

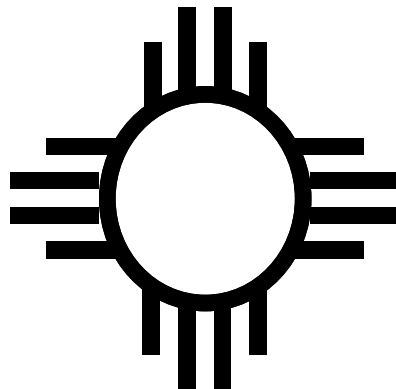
**NEW
MEXICO
REGISTER**



**Volume XIX
Issue Number 18
September 30, 2008**

New Mexico Register

**Volume XIX, Issue Number 18
September 30, 2008**



The official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico

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New Mexico Register

Volume XIX, Number 18

September 30, 2008

Table of Contents

Notices of Rulemaking and Proposed Rules

| | |
|--|-----|
| Albuquerque-Bernalillo County Air Quality Control Board | |
| Notice of Hearing and Regular Meeting | 875 |
| Environment Department | |
| Notice of Public Meeting and Rulemaking Hearing | 876 |
| Environmental Improvement Board | |
| Notice of Public Meeting and Rule Making Hearing (regarding 11.5.2 NMAC, 11.5.3 NMAC and 11.5.4 NMAC) | 876 |
| Notice of Public Meeting and Rulemaking Hearing (regarding 20.2.71 NMAC) | 877 |
| Health, Department of | |
| Notice of Public Hearing | 878 |
| Water Quality Control Commission | |
| Notice of Public Hearing to Consider Proposed Amendments to 20.7.4 NMAC - Utility Operator Certification. | 878 |
| Workers' Compensation Administration | |
| Notice of Public Hearing | 879 |

Adopted Rules

Effective Date and Validity of Rule Filings

Rules published in this issue of the New Mexico Register are effective on the publication date of this issue unless otherwise specified. "No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act. Unless a later date is otherwise provided by law, the effective date of a rule shall be the date of publication in the New Mexico register." Section 14-4-5 NMSA 1978.

A=Amended, E=Emergency, N=New, R=Repealed, Rn=Renumbered

| | | | |
|--|--------|--|-----|
| Environmental Improvement Board | | | |
| 11.5.6 NMAC | A | Convenience Stores. | 881 |
| 11.5.1 NMAC | Rn & A | Occupational Health and Safety: Occupational Health and Safety - General Provisions | 883 |
| 11.5.2 NMAC | Rn & A | Occupational Health and Safety - General Industry. | 890 |
| 11.5.3 NMAC | Rn & A | Occupational Health and Safety - Construction Industry. | 897 |
| 11.5.4 NMAC | Rn & A | Occupational Health and Safety - Agriculture | 898 |
| Finance and Administration, Department of | | | |
| Local Government Division | | | |
| 2.110.2 NMAC | A | Small Cities Community Development Block Grant. | 899 |
| Human Services Department | | | |
| Income Support Division | | | |
| 8.102.500 NMAC | A/E | Cash Assistance Programs: Eligibility Policy - General Information | 901 |
| 8.106.500 NMAC | A/E | State Funded Assistance Programs: Eligibility Policy - General Information | 902 |
| 8.139.500 NMAC | A/E | Food Stamp Program: Financial Eligibility - Need Determination | 903 |
| Medical Assistance Division | | | |
| 8.325.10 NMAC | A | Emergency Services for Undocumented Aliens | 904 |
| Public Education Department | | | |
| 6.30.8 NMAC | R | Distance Learning | 906 |
| 6.30.8 NMAC | N | Distance Learning | 906 |

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Notices of Rulemaking and Proposed Rules

ALBUQUERQUE- BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD NOTICE OF HEARING AND REGU- LAR MEETING

On November 12, 2008, at 5:30 pm, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, 400 Marquette Avenue NW, Albuquerque, NM.

The hearing will address: Proposal to amend 20.11.3 NMAC, *Transportation Conformity*, and to incorporate the complete and amended 20.11.3 NMAC into the New Mexico State Implementation Plan for air quality (SIP). The City of Albuquerque, Air Quality Division (AQD) is proposing these amendments in response to the promulgation by the U.S. Environmental Protection Agency (EPA) of an amended federal transportation conformity rule.

On January 24, 2008, EPA finalized changes to the transportation conformity rule to make the rule consistent with the Clean Air Act as amended by the most recent transportation funding legislation known as the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* or "SAFETEA-LU".

Transportation conformity is a Clean Air Act requirement that ensures that federally supported highway and transit projects are consistent with ("conform to") the purpose of a State Implementation Plan (SIP). Conformity ensures that public health is protected by early consideration of the air-quality impacts of transportation decisions in places where air quality does not currently meet national standards or has not met them in the past. Enacted in August 2005, SAFETEA-LU primarily authorized funding of the nation's transportation infrastructure. This legislation also made several changes to the conformity portion of the Clean Air Act, which is addressed by the final rule.

The final rule updates the conformity regulation as follows: changes the required frequency of conformity determinations for transportation plans (i.e. the Metropolitan

Transportation Plan) and transportation improvement programs (TIP) from at least every three years to at least every four years; gives areas two years (increased from 18 months) to make a conformity determination in response to a new "motor vehicle emissions budget" in a SIP; provides a one-year grace period before the consequences of a conformity lapse apply when an area misses certain conformity deadlines; during the lapse grace period, an area can make conformity determinations for certain projects; gives areas the flexibility to shorten the timeframe covered by a conformity determination, if the local transportation planning agency elects to do so; streamlines the requirements for state conformity procedures ("conformity SIPs"); and, addresses the statute's provision that allows areas to substitute or add transportation control measures (TCMs) without a SIP revision.

In addition, this final rule includes other changes not related to SAFETEA-LU. It allows the U.S. Department of Transportation, in consultation with EPA, to make categorical hot-spot findings for projects in areas that are in nonattainment or maintenance for carbon monoxide (such as Bernalillo County). Such findings could streamline hot-spot analyses for certain projects. It also removes the provision that allowed 8-hour ozone areas to use other tests for conformity instead of their 1-hour ozone SIP budgets where the other tests were more appropriate. This provision no longer applies because it was vacated by the U.S. Court of Appeals for the District of Columbia Circuit on Oct. 20, 2006. Additionally, it updates terms and makes other minor changes for clarification or to ensure the rule is consistent with other EPA and DOT regulations.

Following the combined hearing, the Air Board will hold its regular monthly meeting during which the Air Board is expected to consider adopting the proposed amendments to 20.11.3 NMAC, *Transportation Conformity*, and incorporating the complete and amended regulation into the SIP.

The Air Quality Control Board is the federally delegated air quality authority for Albuquerque and Bernalillo County. Local delegation authorizes the Board to administer and enforce the Clean Air Act and the New Mexico Air Quality Control Act, and to require local air pollution sources to comply with air quality standards and regulations.

Hearings and meetings of the Air Board are

open to the public and all interested persons are encouraged to participate. All persons who wish to testify regarding the subject of the hearing may do so at the hearing and will be given a reasonable opportunity to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits and to examine witnesses in accordance with the Joint Air Quality Control Board Ordinances, Section 9-5-1-6 ROA 1994 and Bernalillo County Ordinance 94-5, Section 6.

Anyone intending to present technical testimony is required by 20.11.82 NMAC to submit a written Notice Of Intent (NOI) before 5:00 pm on Tuesday, October 28, 2008 to: Attn: October Hearing Record, Ms. Janice Amend, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103, or in person in Room 3023, 400 Marquette Avenue NW. The NOI shall identify the person's name, address and affiliation.

In addition, written comments to be incorporated into the public record should be received at the above P.O. Box, or Environmental Health Department office, before 5:00pm on Wednesday, November 5, 2008. The comments shall include the name and address of the individual or organization submitting the statement. Written comments may also be submitted electronically to Jamend@cabq.gov and shall include the required name and address information.

Interested persons may obtain a copy of the proposed regulation at the Environmental Health Department Office, or by contacting Ms. Janice Amend, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103 or electronically at Jamend@cabq.gov or by phone, 768-2601.

NOTICE FOR PERSON WITH DISABILITIES: If you have a disability and/or require special assistance please call (505) 768-2600 [Voice] and special assistance will be made available to you to review any public meeting documents, including agendas and minutes. TTY users call the New Mexico Relay at 1-800-659-8331 and special assistance will be made available to you to review any public meeting documents, including agendas and minutes

NEW MEXICO ENVIRONMENT DEPARTMENT

NEW MEXICO ENVIRONMENT DEPARTMENT NOTICE OF PUBLIC MEETING AND RULEMAKING HEARING

The New Mexico Environment Department ("NMED") will hold a public hearing on November 6, 2008 at 1:30 p.m. at the Air Quality Bureau, Room 240, 1301 Siler Road, Building B, Santa Fe, NM 87507. The purpose of the hearing is to consider the matter of adopting 20.2.89 NMAC - Qualified Generating Facility Certification.

The proponent of this regulatory adoption and revision is the New Mexico Air Quality Bureau ("AQB").

NMED is proposing to adopt this new regulation to implement Senate Bill 994 from the 2007 legislative session (NMSA 1978 Section 7-9G-2). Senate Bill 994 requires that the Environment Department issue rules with procedures for determining whether a solar generating facility, recycled energy facility, or coal electric generating facility that meets the definition in statute is a qualified generating facility as defined in the statute. The proposed regulation allows NMED to evaluate solar thermal and recycled energy projects to determine whether they meet the requirements of a qualified energy facility in order to qualify for tax credits. NMED would then issue a certification for projects that qualify, and would deny certifications to projects that do not meet the requirements.

The proposed regulation may be reviewed during regular business hours at the NMED Air Quality Bureau office, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. A full text of NMED's amended regulation is available on NMED's web site at www.nmenv.state.nm.us/aqb, or by contacting Rita Bates at (505) 476-4304 or via e-mail to rita.bates@state.nm.us.

The hearing will be conducted in accordance with 20.1.9 NMAC (Rulemaking Procedures - Environment Department), the Department of Environment Act, Section 9-7A-6(D) NMSA 1978, the Air Quality Control Act Section, 74-2-6 NMSA 1978, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to comment on the proposed rule, orally or in writing.

If any person requires assistance, an interpreter or auxiliary aid to participate in this

process, please contact Judy Bentley by October 20, 2008, at NMED, Personnel Service Bureau, Room N-4071, 1190 St. Francis Drive, P.O. Box 26110, Santa Fe, New Mexico, 87502. Ms. Bentley's telephone number is (505) 827-9872. TDY users please access Ms. Bentley's number through the New Mexico Relay Network at 1-800-659-8331.

The hearing officer may allow the record to remain open for a reasonable period of time following conclusion of the hearing for written submission of additional comments, documents, arguments and proposed statements of reasons. The hearing officer's determination shall be announced at the conclusion of the hearing. In considering whether to keep the record open, the hearing officer may consider the reasons why the material was not presented during the hearing, the significance of material to be submitted and the necessity for a prompt decision. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals. The secretary shall render his final decision on the proposed regulatory changes within 60 days following close of the record.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF PUBLIC MEETING AND RULE MAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public rule making hearing on December 1, 2008 at 10:00 a.m. at the State Capitol Building, Room 317, 490 Old Santa Fe Trail, Santa Fe, New Mexico, to consider amendments to 11.5.2, 11.5.3 and 11.5.4 NMAC (Occupational Health and Safety). The hearing will begin after other business conducted by the Board. If necessary, the hearing will continue to December 2, 2008 at the same location, at a time to be announced.

The proponent of the amendments is the New Mexico Environment Department ("NMED").

NMED proposes to add the following language to 11.5.2 NMAC, which governs general industry employers; 11.5.3 NMAC, which governs construction industry employers; and 11.5.4 NMAC, which governs agriculture employers:

"PROHIBITION AGAINST UNLAWFUL DRUG USE AND ALCOHOLIC BEVERAGE USE IN THE WORKPLACE; PENALTY

A. Employers shall provide a place of employment that is free of unlawful drug use and free of alcoholic beverage use by employees.

B. Employers shall develop and implement a written policy prohibiting unlawful drug use and alcoholic beverage use by employees in the workplace.

C. Employers who violate this section may be penalized in accordance with the maximum statutory civil penalty."

The proposed amendments make it clear that the illegal use of drugs and the use of alcoholic beverages in the workplace is prohibited, and can result in imposition of the maximum statutorily authorized penalties. The proposed amendments establish a new requirement for employers to have in place a written policy regarding the illegal use of drug and alcohol in the workplace.

The proposed changes may be reviewed during regular business hours at the NMED Occupational Health and Safety Bureau office, 525 Camino de los Marquez, Suite 3, Santa Fe, New Mexico. A full text of NMED's proposed changes are available on NMED's web site at http://www.nmenv.state.nm.us/Common/regs_idx.html, or by contacting Harry Buysse at (505) 476-8712 or at harry.buysse@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures) Environmental Improvement Board; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; the Occupational Health and Safety Act, Section 50-9-12 NMSA 1978; and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

- (1) Identify the person for whom the witness(es) will testify;
- (2) Identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) Summarize or include a copy of the

direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;

(4) List and describe, or attach, each exhibit anticipated to be offered by that person at the hearing; and

(5) Attach the text of any recommended modifications to the proposed changes.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on November 14, 2008, and should reference the rules to be amended, 11.5.2, 11.5.3 and 11.5.4 NMAC, and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Joyce Medina, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room N-2150/2153
Santa Fe, NM 87502
Telephone: (505) 827-2425
Facsimile (505) 827-2836

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Judy Bentley by November 14, 2008 at the NMED, Human Resources Bureau, P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-9872. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

The Board may deliberate and rule on the proposed amendments at the close of the hearing or the Board may convene a meeting after the hearing to consider action on the proposal.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD NOTICE OF PUBLIC MEETING AND RULEMAKING HEARING

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on December 1, 2008 at 10:00 a.m. at the State Capitol Building, Room 317, 490 Old Santa Fe Trail, Santa Fe, NM 87501. The purpose of the hearing is to consider the matter of **EIB 08-06 (R)**, an amendment to Air Quality Control Regulation 20.2.71 NMAC - Operating Permit Emissions Fees.

The proponent of this regulatory adoption and revision is the New Mexico Environment Department ("NMED").

NMED is proposing an amendment to 20.2.71 NMAC - Operating Permit Emissions Fees. The amendment will increase the emissions fees incrementally over a three year time period. This increase will enable the NMED to comply with federal requirements to collect emissions fees sufficient to cover the costs of the Title V permitting program.

The proposed amended regulation may be reviewed during regular business hours at the NMED Air Quality Bureau office, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. A full text of NMED's amended regulation is available on NMED's web site at www.nmenv.state.nm.us/aqb, or by contacting Rita Bates at (505) 476-4304 or via e-mail to rita.bates@state.nm.us.

The hearing will be conducted in accordance with 20.1.1 NMAC (Rulemaking Procedures - Environmental Improvement Board), the Environmental Improvement Act, Section 74-1-9 NMSA 1978, the Air Quality Control Act Section, 74-2-6 NMSA 1978, and other applicable procedures.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written notice of intent to do so. The notice of intent shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the

person intends to present and state the qualifications of the witness, including a description of their education and work background;

(3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;

(4) attach each exhibit anticipated to be offered by that person at the hearing; and

(5) attach the text of any recommended modifications to the proposed new and revised regulations.

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on **October 31, 2008**, and should reference the docket number, **EIB 08-06 (R)**, and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Joyce Medina, Board Administrator
Office of the Environmental Improvement Board
Harold Runnels Building
1190 St. Francis Dr., Room N-2150 / 2153
Santa Fe, NM 87502
Phone: (505) 827-2425, Fax (505) 827-2836

Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer exhibits in connection with the testimony, so long as the exhibit is not unduly repetitious of the testimony.

A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

Persons having a disability and needing help in being a part of this hearing process should contact Judy Bentley by November 14, 2008 at the NMED, Personnel Services Bureau, P.O. Box 26110, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-9872. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed new and revised regulations at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

NEW MEXICO DEPARTMENT OF HEALTH

NOTICE OF PUBLIC HEARING

The New Mexico Department of Health will hold a public hearing on 7.30.9 NMAC "Birthing Workforce Fund". The Hearing will be held on Monday, November 10, 2008 at 9:00 a.m. in the Harold Runnels Building Auditorium, located at 1190 St. Francis Drive, Santa Fe, New Mexico.

The public hearing will be conducted to certified nurse-midwives and physicians licensed in New Mexico who provide birthing services and apply for funds from the birthing workforce retention fund.

A copy of the proposed rules can be obtained from:

Roberta Moore
2040 S. Pacheco St.
Santa Fe, NM 87505
(505) 476-8908

Please submit any written comments regarding the proposed rules to:

Roberta Moore
2040 S. Pacheco St.
Santa Fe, NM 87505
(505) 476-8908

The Department will accept public comment through the close of the hearing.

If you are an individual with a disability who is in need of special services to attend or participate in the hearing, please contact Roberta Moore by telephone at (505) 476-8908. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

NEW MEXICO WATER QUALITY CONTROL COMMISSION

NEW MEXICO WATER QUALITY CONTROL COMMISSION NOTICE OF PUBLIC HEARING TO CONSIDER PROPOSED AMENDMENTS TO 20.7.4 NMAC - UTILITY OPERATOR CERTIFICA- TION

The New Mexico Water Quality Control Commission ("Commission" or "WQCC") will hold a public hearing on November 12, 2008 at 9:00 a.m., and continuing thereafter as necessary, in the New Mexico State Capital Building, Room 317, Santa Fe, New Mexico. The hearing location may change

prior to November 12, 2008 and those interested in attending should check the WQCC website: www.nmenv.state.nm.us/wqcc prior to the hearing. The purpose of the hearing is to consider proposed amendments to the New Mexico Utility Operator Certification Regulations (20.7.4 NMAC). The New Mexico Utility Operator Certification Advisory Board is the proponent of these regulations.

The proposed amendments to 20.7.4 NMAC would add a new section, 20.7.4.15, and are necessary to conform to the requirements in the Utility Operators Certification Act and the Utility Operator Certification Regulations for providing criteria for identifying the minimum number of certified operators of public water supply systems or public wastewater facilities.

Please note formatting and minor technical changes in the regulations may occur. In addition, the Commission may make other amendments as necessary to accomplish the purpose of providing public health and safety in response to public comments submitted to the Commission and evidence presented at the hearing.

All proposed amendments and other documents related to the hearing may be reviewed during regular business hours in the office of the Commission:

Joyce Medina, WQCC Administrator
Harold Runnels Building, 1190 St. Francis Drive, N2150
Santa Fe, New Mexico, 87502
(505) 827-2425, Fax (505) 827-2836

The proposed amendments have been posted to the New Mexico Environment Department/Facility Operations Section webpage at <http://www.nmenv.state.nm.us/swqb/FOT/index.html>. Parties interested in receiving a printed copy should contact Mike Coffman by email at: mike.coffman@state.nm.us or by phone at (505) 222-9575. Written comments regarding the new regulations may be addressed to Ms. Medina at the above address, and should reference docket number WQCC 07-09 (R).

The hearing will be conducted in accordance with NMSA 1978, Section 74-6-6 of the Water Quality Act; the Guidelines for Water Quality Control Commission Regulation Hearings; and other applicable procedures. A copy of the Guidelines for Water Quality Control Commission Regulation Hearings and the Hearing Guidelines may be obtained from Ms. Medina; they are also available on the Commission's website at www.nmenv.state.nm.us/wqcc.

All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Any person who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file such statement prior to the close of the hearing.

Persons wishing to present technical testimony during the hearing must file with the Commission a written notice of intent to do so. Notices must be filed with Joyce Medina at the address above by 5:00 p.m. on October 28, 2008 and should reference the date of the hearing and docket number WQCC 07-09(R).

The Notice shall include:

- identify the person for whom the witness(es) will testify;
- identify each technical witness the person intends to present and state the qualifications of that witness including a description of their educational and work background;
- if the hearing will be conducted at multiple locations, indicate the location or locations at which the witness(es) will be present;
- summarize, or include a copy of, the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- include the text of any recommended modifications to the proposed regulatory change; and
- list and describe, or attach, all exhibits anticipated to be offered by the person at the hearing.

If you are an individual with a disability and you require assistance or an auxiliary aid, e.g. sign language interpreter, to participate in any aspect of this process, please contact Judy Bentley at the Personnel Services Bureau by October 28, 2008. The Personnel Services Bureau can be reached at the New Mexico Environment Department, 1190 St. Francis Drive, P.O. Box 26110, Santa Fe, NM 87502, (505) 827-2844. TDD or TDY users may access this number via the New Mexico Relay Network (Albuquerque TDD users: (505) 275-7333; outside of Albuquerque: 1-800-659-1779.)

The Commission may make a decision on the proposed regulatory change at the conclusion of the hearing, or the Commission may convene a meeting after the hearing to consider action on the proposal.

**NEW MEXICO WORKERS'
COMPENSATION
ADMINISTRATION**

NOTICE OF PUBLIC HEARING

Notice is hereby given that on Thursday, October 9, 2008, commencing at 1:30 p.m., the New Mexico Workers' Compensation Administration (WCA) will conduct a public hearing on the changes to the Statutory Physicians' Fee Schedule and amendments to Part 7 of the WCA Rules entitled Payment for Health Care Services. The hearing will be conducted at the Workers' Compensation Administration, 2410 Centre Avenue S.E., Albuquerque, New Mexico. Changes to the Fee Schedule will be available on Monday, September 8, 2008, at the WCA and online at <http://www.worker-comp.state.nm.us/>.

Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business on Friday, October 10, 2008. Comments should be addressed to the WCA Director, Glenn R. Smith, c/o Sharon L. Gentry, General Counsel, Post Office Box 27198, Albuquerque, New Mexico 87125-7198.

For further information call (505) 841-6000. Please inquire at the WCA Clerk's Office, 2410 Centre Avenue S.E., Albuquerque, NM, 87106, (505) 841-6000, for copies of the proposed rules. If you intend to request a copy by mail, please inquire at the WCA about the postage cost and envelope size needed to accommodate your request and plan on including a post-paid, self-addressed envelope with your request.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aide or service to attend or participate in the hearing or meetings, please contact Renee Blechner at (505) 841-6083. Or you may inquire about assistance through the New Mexico relay network at 1-800-659-8331.

**End of Notices and
Proposed Rules Section**

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Adopted Rules

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 11.5.6 NMAC Sections 7, 8, and 22, effective 10/30/08.

11.5.6.7 DEFINITIONS:

General: Unless otherwise specified, the following definitions, in addition to those contained in ~~[11.5.1.12 NMAC]~~ 11.5.1.7 NMAC and the state act, are applicable to this part.

A. "American society for testing materials standard D3935-02" means the American society for testing materials classification standards for transparent polycarbonate bullet-resistant materials.

B. "B rated" means a safe box industry standard, which, at a minimum, conforms to the specifics of a one-fourth inch body and a one-half inch door constructed of steel or an equivalent material.

C. "Controlled access area" means an enclosure of the service counter area with transparent polycarbonate or other bullet-resistant material that meets American society for testing materials or underwriters laboratory standards.

D. "Convenience store" means any business that is primarily engaged in the retail sale of convenience goods, or both convenience goods and gasoline, and employs one or more employees during the normal operating hours of the establishment. This term excludes businesses that operate as hotels, taverns, lodging facilities, restaurants, stores that sell prescription drugs, gasoline service stations, grocery stores, supermarkets, businesses that have more than 10,000 square feet of retail floor space, farmer's markets, roadside stands, on-site farm markets, and other agricultural activities or operations.

E. "Convenience goods" means articles that are purchased frequently for immediate use in readily accessible stores and with a minimum of effort. This term includes consumable items that are generally limited in quantity and variety, and sold in their original containers. This definition is not intended to exclude convenience stores that sell a small quantity of fresh food or unpackaged products in addition to other convenience goods.

F. "Depository or time lock safe" means a B or higher rated safe box equipped with an electronic or manually programmed time lock, or drop slot, that prevents unauthorized access.

G. "Environmental engi-

neering controls" means an established store floor plan adopted or developed by the employer to reduce theft or robbery by measures, which include, but are not limited to, cash register placement in plain view of customers, properly functioning indoor and outdoor lighting, and proper placement of security cameras.

H. "Pass-through window" means a manually operated mechanical pass-through trough, front-loading deposit door, or other similar device that is encased in a transparent polycarbonate window or other bullet-resistant material that meets American society for testing materials standard D3935-02, or underwriters laboratory standard 752.

I. "Security surveillance system" means a VHS or digital camera surveillance system that is capable of recording and retrieving a clear video or digital recorded image.

J. "Security alarm system" means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to notify law enforcement or a private security agency of an unlawful act in progress.

K. "Underwriters laboratories standard 752 [~~rated~~]" means the underwriters laboratory standards for transparent polycarbonate bullet-resistant materials.

L. "Service counter" means, at a minimum, the counter space designated by the employer to include the service transaction area of the money register(s) and the surrounding perimeter.

M. "Signage" means posters, placards, neon lights, or logos, positioned in the convenience store windows and doors.

N. "Training curriculum" means the instruction manual or pamphlet adopted or developed by the employer containing security policies, safety and security procedures, and personal safety and crime prevention techniques.

[11.5.6.7 NMAC - N, 6/1/04; A, 12/01/04; A, 10/30/08]

11.5.6.8 SECURITY REQUIREMENTS: All convenience stores shall be equipped with the following security devices and standards:

A. Exterior lighting: The employer shall provide and maintain exterior lighting during all evening and nighttime operating hours that ensures clear visibility of the parking areas, walkways, building entrances and exits, and gasoline pump areas.

B. Employee training:

(1) The employer shall provide each employee, at the time of his or her initial appointment, and by periodic review not to exceed four-month intervals, crime prevention and safety training in accordance with a written training curriculum. The training curriculum may include computer-based training. Periodic reviews shall include, at a minimum, review of the written training curriculum and site-specific issues. Training shall be conducted in a language that is understood by the employee. The employer shall conduct training, or designate a knowledgeable representative to conduct training, in accordance with the written training curriculum that includes but is not limited to:

(a) an overview of the potential risk of assault;

(b) operational procedures, such as cash handling rules, that are designed to reduce risk;

(c) proper use of security measures and engineering controls that have been adopted in the workplace;

(d) behavioral strategies to defuse tense situations and reduce the likelihood of violence, such as techniques of conflict resolution and aggression management;

(e) specific instructions on how to respond to a robbery and how to respond to attempted shoplifting; and

(f) emergency action procedures to be followed in the event of a robbery or violent incident.

(2) Store specific training shall be conducted by the employee's immediate supervisor.

(3) Current employees shall receive training within ninety days of the effective date of this regulation.

(4) All employers shall prepare training documentation for each employee and have employees sign a statement indicating the date, time, and place they received their safety training. Employers shall maintain documentation of an employee's training for a period of at least twelve months, or six months after termination of an employee's employment. Employee training documentation shall be made available within forty-eight hours of a department representative's request. The forty-eight hour period shall exclude holidays and weekends. Failure to provide employee training documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). Training curricula shall be kept on the convenience store premises and made available on request by the department.

C. Late night security

measures:

(1) In addition to the other security requirements of this part, convenience stores operating between the hours of 11:00 p.m. and 5:00 a.m. shall employ at least one of the following security measures:

(a) two employee shift: the employer shall employ a minimum of two employees during the operating hours of 11:00 p.m. to 5:00 a.m.; or, shall substitute the second employee requirement by employing security personnel on the premises;

(b) controlled access area: the employer shall provide a controlled access area by means of a secured safety enclosure of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935-02 or underwriters laboratory standard 752;

(c) pass-through window(s): the employer shall provide a pass-through window of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935-02 or underwriters laboratory standard 752 that restricts access to and encompasses the service counter area, providing an enclosure that extends not less than five feet above the service counter; or

(d) alternative operation: between the hours of 11:00 p.m. and 5:00 a.m., the employer shall close the store and prohibit all sales transactions but allow employees to perform duties such as store stocking, maintenance, cleaning and other non-sales transaction duties. Signs shall be conspicuously posted on all entryways stating the store is closed.

D. [Limits on Store Window Signage] Unobstructed view of the service counter: The employer shall maintain door and window signage, product displays, shelving, equipment, and other similar items so that a clear and unobstructed view of the service counter and cash register exists from outside the building.

E. Security surveillance system:

(1) The employer shall provide each convenience store with a fully operational VHS or digital security surveillance system that, at a minimum, shall:

(a) record a continuous unobstructed view of the service counter area and all entryways and exits during all operating hours; and

(b) include a high resolution black and white or color screen monitor with on screen date and time capabilities.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the security surveillance system, and, in the event of an extended mechanical malfunction that exceeds an eight hour period, pro-

vide alternative security that may include closure of the premises;

(b) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the security surveillance system. All documentation shall be made available within forty-eight hours of a department representative's request; and

(c) maintain a VHS or digital library of all in-store transactions recorded by the security surveillance system during normal operating hours of the convenience store for a period of no less than twenty business days;

(d) failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

F. Security alarm system:

(1) The employer shall provide and maintain in each convenience store a fully operational security alarm system with a working personal panic alarm for each employee that, when activated, notifies law enforcement or a private security agency when an unlawful act is in progress.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the alarm system, and, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(b) maintain documentation for a period of at least twenty-four months of all inspections, servicing, alterations, and upgrades performed on the security alarm system; all documentation shall be made available within forty-eight hours of a department representative's request. Failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(3) The security alarm activators shall be located in a location accessible to the employees and be available to the employees as a portable device that can be carried on their person.

G. Depository or time lock safe:

(1) The employer shall:

(a) provide at least one B or higher rated depository or time lock safe in each store;

(b) utilize each depository or time lock safe to ensure controlled access to

cash;

(c) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the depository or time lock safe system, or, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(d) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the depository or time lock safe; all documentation shall be made available within forty-eight hours of a department representative's request; failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(2) The location of the depository time lock safe may be determined by the employer but shall be located within the service counter area, or in an office adjacent to the service counter area.

H. Cash management:

The employer shall not have more than ~~[fifty]~~ seventy-five dollars in any cash register at any time between the hours of 11:00 p.m. and 5:00 a.m. To protect employee safety, the employer shall maintain ~~[small]~~ minimal amounts of cash in the cash registers at all other times.

I. Required signs:

(1) The employer shall conspicuously post a notice in English and in Spanish in the convenience store that contains, at a minimum, the following information:

(a) there is a safe in the store;

(b) employees do not have access to the safe;

(c) there is an active security alarm system;

(d) there is an active surveillance system; and

(e) there is a limited amount of cash in the cash register.

(2) Employers will not be cited by the department for providing employees access to a time lock or other safe.

J. Pay phones:

The owner shall provide adequate lighting to the pay phone area.

K. Unobstructed view of sales area: The employer shall ensure an unobstructed view throughout the store from the service counter area. This may be accomplished by different means, including mirrors and video monitors.

[11.5.6.8 NMAC - N, 6/1/04; A, 12/01/04; A, 10/30/08]

11.5.6.22 CONSTRUCTION: This regulation shall be liberally construed

to carry out the purposes of the ~~[Occupational Health and Safety regulations and Act]~~ occupational health and safety regulations and the state act.

[11.5.6.22 NMAC - N, 6/1/04; A, 10/30/08]

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 11.5.1 NMAC Sections 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25 and the addition of new Section 26, effective 10/30/08. This action also formally renumbers and reformats 11 NMAC 5.1, Occupational Health and Safety - General Provisions (filed 10/27/95) in accordance with the current NMAC requirements, effective 10/30/08.

11.5.1.5 EFFECTIVE DATE: May 1, 1995, except where a later effective date is indicated in the history note at the end of a section ~~[or paragraph]~~.

A. Initial promulgation: sections 1 through 14 of this part were effective May 1, 1995.

B. Amendments and additions: the amendments to sections 5 and 7 through 13 of this part and sections 15 through 24 of this part are effective January 1, 1996.

[5/1/95, 1/1/96, 9/15/97; 11.5.1.5 NMAC - Rn & A, 11 NMAC 5.1.5, 10/30/08]

11.5.1.7 DEFINITIONS:

A. General: Unless otherwise specified, the terms used in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed in accordance with definitions contained in the state act. In addition, the following terms have the indicated meanings.

(1) **"Bureau"** means the occupational health and safety bureau of the department, or any other bureau of the department to which responsibility for enforcement of the state act may be assigned.

(2) **"Chief"** means the chief of the bureau or his or her designee.

(3) **"Commission"** means the occupational health and safety review commission.

~~(3)~~ (4) **"Compliance officer"** means a department employee who is carrying out the provisions of the state act.

(5) **"Compliance program manager"** means the person in the bureau who is primarily responsible for managing the compliance program.

(6) **"Counsel"** means an attorney licensed to practice law.

(4) (7) **"Department"** means

the New Mexico environment department.

(8) **"Employee representative"** means a representative of the employee's recognized or certified bargaining agent.

(9) **"Imminent danger situations"** means those situations in a place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement provisions otherwise provided by the state act.

(10) **"Interviewee"** means the individual being questioned by the department's representative.

(11) **"On-site consultation"** means an inspection conducted by the bureau pursuant to Subsection B of 50-9-6 NMSA 1978.

(12) **"Personal counsel"** means counsel for an employee who requests representation for an employee interview, but does not want to use employer counsel. The employer may, if the employee requests such counsel prior to the interview, or the employer must, if employee uses company counsel during the interview and a conflict of interest arises during the interview in violation of the New Mexico rules of professional conduct, retain and pay for a counsel for the employee: (i) who is not currently representing the employer; (ii) does not have a retainer agreement with the employer; (iii) is not in-house counsel with the employer; (iv) will have a duty to represent employee in the context of the OSHA investigation; (v) will abide by the relevant New Mexico rules of professional conduct and (vi) and is a comparable attorney to the employer's counsel.

(13) **"Private"** means:

(a) for employee interviews, to the exclusion of an employer or employer representative, except if employee requests employee's representative, or requests employer counsel abides by the relevant New Mexico rules of professional conduct; and

(b) for employer interviews, to the exclusion of an employee or employee representative.

~~(5)~~ (14) **"Secretary"** means the secretary of the environment department.

~~(6)~~ (15) **"State act"** means the Occupational Health and Safety Act, NMSA 1978, Sections 50-9-1 to 50-9-25, as it may be amended from time to time.

(16) **"Trade secret"** means the whole or any portion of a phase of any scientific or technical information, design, process, procedure, formula or improvement that is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other

than those selected by the owner to have access thereto for limited purposes.

~~(7)~~ (17) **"USDOL"** means the United States department of labor.

B. Terms in incorporated federal standards: Terms in the federal occupational safety and health standards incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed to be references to the corresponding entities in the state occupational health and safety program. ~~[Specifically:]~~

(1) "Act" shall be construed to mean the corresponding section of the state act.

(2) "Assistant secretary of labor" shall be construed to mean the secretary.

(3) "OSHA area director or area office" shall be construed to mean the ~~[chief]~~ compliance program manager.

(4) "OSHA area office" shall be construed to mean the bureau.

[8/30/73, 9/3/78, 3/21/79, 5/10/81, 1/19/94, 5/1/95, 1/1/96; 11.5.1.7 NMAC - Rn & A, 11 NMAC 5.1.12, 10/30/08]

11.5.1.8 AMENDMENT AND SUPERSESION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

~~[A. Amendment and super-session: This part shall be construed as amending and superseding the following regulations:~~

~~(1) EIB/OHSR 100, definitions; application, filed January 19, 1994;~~

~~(2) EIB/OHSR 100.1, limitations; filed January 19, 1994;~~

~~(3) EIB/OHSR 101, recordkeeping and reporting occupational injuries and illnesses, filed April 10, 1981, as amended;~~

~~(4) EIB/OHSR 102, posting of occupational health and safety information poster, filed January 19, 1994;~~

~~(5) EIB/OHSR 103, petitions for variance from job safety and health regulations, filed March 27, 1981;~~

~~(6) EIB/OHSR 104, on site consultative inspections, filed November 9, 1984;~~

~~(7) EIB/OHSR 106, inspections; authority; objection, filed January 19, 1994;~~

~~(8) EIB/OHSR 106.1, private questioning, filed November 1, 1983;~~

~~(9) EIB/OHSR 106.6, advance notice of inspections, filed March 27, 1981;~~

~~(10) EIB/OHSR 106.7, conduct of inspections, consultation with employees, filed October 17, 1983;~~

~~(11) EIB/OHSR 106.8, representatives of employers and employees; accompaniment during inspection, filed March 27, 1981;~~

~~(12) EIB/OHSR 106.9, trade secrets, filed April 10, 1981;~~

~~(13) EIB/OHSR 106.11, complaints by employees; review procedures, filed March 27, 1981;~~

~~(14) EIB/OHSR 106.13, imminent danger, filed April 10, 1981;~~

~~(15) EIB/OHSR 106.14, citations; notices of de minimus violations, filed March 27, 1981;~~

~~(16) EIB/OHSR 106.15, proposed penalties, filed December 21, 1979;~~

~~(17) EIB/OHSR 106.16, posting of citations, filed December 21, 1979; and~~

~~(18) EIB/OHSR 106.18, failure to correct a violation for which a citation has been issued, filed February 7, 1983.~~

B. References in other regulations: Any reference in any other rule to any regulation listed in 7.4.1 now Subsection A of 11.5.1.8 NMAC of this part shall be construed as a reference to the corresponding provision of this part. This part shall be construed as amending and superseding all prior regulations. See history of 11.5.1 NMAC at the end of this part.

[1/19/94, 5/1/95, 1/1/96; 11.5.1.8 NMAC - Rn & A, 11 NMAC 5.1.7, 10/30/08]

11.5.1.9 SEVERABILITY: If any provision or application of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[5/1/95, 1/1/96; 11.5.1.9 NMAC -Rn & A, 11 NMAC 5.1.8, 10/30/08]

11.5.1.10 SAVING CLAUSE:

~~A. General: Supersession of any regulation listed in 7.A.1 [now Subsection A of 11.5.1.8 NMAC] of this Part shall not affect any administrative or judicial enforcement action pending on the effective date of such supersession.~~

~~B.] Future amendments: No future amendment to 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC shall affect any administrative or judicial enforcement action pending on the effective date of the amendment.~~

[5/1/95, 1/1/96; 11.5.1.10 NMAC - Rn & A, 11 NMAC 5.1.9, 10/30/08]

11.5.1.11 CONSTRUCTION: The provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be liberally construed to effectuate the purpose of the state act.

[5/1/95, 1/1/96, 11.5.1.11 NMAC - Rn & A, 11 NMAC 5.1.10, 10/30/08]

11.5.1.12 COMPLIANCE WITH OTHER REGULATIONS: Compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC does not relieve a person from the obligation to comply with other applicable state and federal regulations.

[5/1/95, 1/1/96; 11.5.1.12 NMAC - Rn & A, 11 NMAC 5.1.11, 10/30/08]

11.5.1.13 COMPLIANCE WITH INCORPORATED STANDARDS; EFFECT:

An employer who is in compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC, including any incorporated federal standards, shall be deemed in compliance with the requirement of ~~Section 50-9-5(A)NMSA 1978]~~ Subsection A of Section 50-9-5 NMSA 1978, but only to the extent of the condition, practice, means, methods, operation or process covered by the provision.

[5/10/81, 5/1/95, 1/1/96; 11.5.1.13 NMAC - Rn & A, 11 NMAC 5.1.13, 10/30/08]

11.5.1.14 STAY OR INVALIDATION OF INCORPORATED FEDERAL STANDARDS; EFFECT:

If a federal court stays, invalidates, or otherwise renders unenforceable by USDOL, in whole or in part, any federal standard incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, such incorporated federal standard shall be enforceable by the department only to the extent it is enforceable by USDOL.

[5/1/95; 11.5.1.14 NMAC - Rn & A, 11 NMAC 5.1.14, 10/30/08]

11.5.1.15 LIMITATIONS:

The exemptions and limitations contained in the appropriation for the USDOL, including those applicable to the proposal or assessment of penalties, shall be construed as limitations on the department's use of any federal grant funds for enforcement of the state act and the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC; but nothing in such exemptions and limitations shall be construed to prohibit the department from enforcing any otherwise applicable provisions with the use of state funds only.

[1/20/80, 7/19/94, 1/1/96, 11.5.1.15 NMAC - Rn & A, 11 NMAC 5.1.15, 10/30/08]

11.5.1.16 RECORDKEEPING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1904, Recording and Reporting Occupational Injuries and Illnesses (internet: www.osha.gov), are hereby incorporated into this section.

B. Exception: Fatalities and multiple hospitalization accidents shall be reported, by telephone, ~~telegraph,~~ or facsimile machine, to the bureau in lieu of the location specified in 29 CFR ~~[1904.8] Part 1904.39~~. The bureau's address and telephone/facsimile numbers are: occupa-

tional health and safety bureau, New Mexico environment department, P.O. Box 26110, Santa Fe, NM 87502, Tel: (505) ~~[827-4230] 476-8700~~, Fax: (505) ~~[827-4422] 476-8734~~.

[10/9/75, 9/3/78, 3/21/79, 5/10/81, 11/17/83, 7/19/94, 1/1/96, 8/15/98; 11.5.1.16 NMAC - Rn & A, 11 NMAC 5.1.16, 10/30/08]

11.5.1.17 POSTING OF OCCUPATIONAL HEALTH AND SAFETY INFORMATION POSTER:

Posting of the occupational health and safety information poster is required by ~~[Section 50-9-5(C)NMSA 1978]~~ Subsection C of Section 50-9-5 NMSA 1978. Each employer shall post and keep posted one or more notices, to be furnished by the bureau, informing employees of the ~~[projections]~~ protections and obligations provided for in the state act, and that for assistance and information, employees should contact the department. The notices shall be posted where employees report each day or from which the employees operate to carry out their activities. Each employer shall take steps to insure that the notices are not altered, defaced, removed, or covered by other material.

[10-9-75, 9-3-78, 3-21-79, 4-26-81, 7-19-94, 1-1-96; 11.5.1.17 NMAC - Rn & A, 11 NMAC 5.1.17, 10/30/08]

11.5.1.18 PETITIONS FOR VARIANCES FROM JOB SAFETY AND HEALTH REGULATIONS:

A. Permanent variances:

(1) The department may grant an individual variance from any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, whenever it is found that the proponent of the variance has demonstrated by a preponderance of the evidence, that the conditions, practices, means, methods, operations and processes used by an employer, although not conforming to a regulation, will, in fact, provide protection to the health and safety of the employees to a degree which is equal to or greater than that which is provided by the regulations.

(2) Any employer seeking a variance under this section shall do so by filing a written petition with the ~~[department]~~ bureau. Petition forms may be obtained from the ~~[department]~~ bureau. Petitions shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility or activity for which the variance is sought;

(d) state the address or description of the property upon which the facility or activity is located;

(e) identify the provision, includ-

ing incorporated federal standard, if applicable, from which the variance is sought;

(f) state in detail the extent to which the petitioner wishes to vary from the provision;

(g) state why the petitioner believes the requested variance will provide protection to the health and safety of the petitioner's employees to a degree that is equal to or greater than that which is provided by the provision from which variance is sought;

(h) certify that the petitioner's employees have been informed of the petition, by giving a copy thereof to their authorized representatives; posting a statement giving a summary of the application and specifying where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(i) describe how employees have been informed of the application and of their right to request a hearing before the [department] bureau;

(j) state the name and mailing address of the representatives of the petitioner's employees, if known; and

(k) be signed by the petitioner, or the petitioner's attorney or other authorized representative.

(3) The petitioner may submit with the petition any relevant documents or material which the petitioner believes would support the petition and may request a hearing, as provided in this section.

B. Temporary variance:

(1) The [department] secretary may grant a temporary variance from any provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, if it is found that the proponent of the variance has demonstrated by a preponderance of the evidence that:

(a) the petitioner is unable to comply with the provision by its effective date because of unavailability of professional or technical personnel or because necessary construction or alteration of facilities cannot be completed by the effective date;

(b) the petitioner is taking all available steps to safeguard the petitioner's employees against the hazards covered by the provision; and

(c) the petitioner has an effective program for coming into compliance with the provision as quickly as practicable.

(2) The petition for a temporary variance shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility and activ-

ity for which the temporary variance is sought;

(d) identify the provision from which the variance is sought;

(e) describe the extent of current deviation from the provision, including numbers of employees affected;

(f) state the period of time for which the variance is desired;

(g) describe why the petitioner is unable to comply with the provision from which the variance is sought by its effective date;

(h) describe the methods taken to safeguard employees;

(i) show that the petitioner has an effective program for coming into compliance with the provision from which variance is sought;

(j) certify that the petitioner's employees have been informed of the petition by giving a copy thereof to their authorized representatives, posting a statement giving a summary of the application and specifying where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(k) describe how employees have been informed of the application and of their right to request a hearing before the department; and

(l) contain any request for hearing, as provided in this section.

(3) After an opportunity for a hearing, the [department] secretary may issue an order granting a temporary variance. A temporary variance may be effective for one year or for the period needed by the petitioner to come into compliance, whichever is shorter. A temporary variance may be renewed no more than twice provided that:

(a) the application for a renewal must be submitted 90 days before expiration of the temporary variance; and

(b) no renewal may be for more than 180 days.

C. Modification, revocation and renewal of variances:

(1) Modification or revocation: The secretary may at any time on his own motion, or upon application by an employer or affected employee after six months have elapsed from the date of issuance of the order granting a temporary or permanent variance, after hearing, modify or revoke such order.

(a) An employer or affected employee (including employee representative) may petition the [department] secretary for a modification or revocation of any variance issued under this section. The petition shall[+]

(+) state the petitioner's

name and mailing address;

(+) describe the relief sought;

(+) state with particularity the grounds for relief;

(+) if the petitioner is an employer, certify that the petitioner has informed the affected employees of the petition in the manner described for the original variance request;

(+) if the petitioner is an affected employee, certify that a copy of the petition has been furnished to the employer; and

(+) request a hearing, as provided in this section.

(b) If the secretary, on his own motion, proceeds to modify or revoke the variance, he shall so notify the affected employer by certified mail and shall take such action as necessary to give actual notice to affected employees. The secretary shall promptly schedule a hearing on the matter and notify the employer and affected employees of the time, date and place of said hearing.

(2) Renewal: Any final order for a variance may be renewed or extended as permitted by this section and in the manner prescribed for its issuance.

D. Interim order during variance consideration:

(1) An application may be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The secretary may rule ex parte upon the application.

(2) If an application filed for an interim order is denied, the applicant shall be given prompt notice of the denial which shall include, or be accompanied by, a brief statement of the grounds therefore.

(3) If an interim order is granted, a copy of the order including the terms of the order shall be served upon the applicant for the order and other parties. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

E. Action on petition:

(1) Defective petitions: If a petition does not conform with the requirements of this section, the [department] secretary may deny the petition. Prompt notice of denial of a petition shall be given to the petitioner. A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial. Such denial shall be without prejudice to the filing of another or amended petition.

(2) Adequate petitions:

(a) If a petition conforms with the requirements of this section, the department shall promptly notify the petitioner and employee representative that the petition has been accepted for review. The notice shall be posted by the employer in the same place and manner as the petition. In addition, the department shall publish notice of the filing of the petition in a newspaper of general circulation in the state. Such notice shall describe the relief requested and shall state the manner in which interested persons may submit data, views or arguments concerning the petition.

(b) The petitioner, any of the petitioner's employees, or an employee representative may request a hearing on the petition before the department. The request must be made in writing to the secretary within 15 days after the petition has been accepted by the department as being adequate.

(c) Where no timely request for a hearing has been made and the ~~[department]~~ secretary determines that no substantial public interest is involved, the ~~[department]~~ secretary shall promptly investigate the petition and make a decision thereon. The ~~[department]~~ secretary shall notify the employer and the employees or the employee representative of the decision and reasons therefor. The decision shall be posted in the same place and manner as the petition. If the ~~[department]~~ secretary is opposed to the granting of the variance, the petitioner may, within 15 days from receipt of the decision, request a hearing before the secretary. Unless a timely request for hearing is made, the decision of the ~~[department]~~ secretary shall be final.

(3) Decisions:

(a) Decisions or orders of the department or secretary shall [:

(i) state the petitioner's name and mailing address;

(ii) state the date the order was made;

(iii) describe the facility or activity for which the variance was sought;

(iv) state the address or description of the property upon which the facility or activity is located;

(v) identify the provision from which the variance was sought;

(vi) state the nature of the variance requested;

(vii) state the decision of the department or secretary;

(viii) describe the conditions the employer must maintain, and the practices, means, methods, operations, and procedures which the employer must adopt and utilize to the extent they differ from the provision from which the variance was sought;

(ix) state the reasons for the decision; and

(x) be signed by the secretary or his authorized representative.

(b) The decision shall be posted by the employer in the same place and manner as the petition.

(c) No variance shall be granted until the department or the secretary has considered the relative interests of the petitioner, his employees, and the general public.

(d) The ~~[department]~~ bureau shall maintain a file of all variance orders. The file shall be open for public inspection subject to the limitations contained in ~~[44 NMAC 5.1.22.F]~~ Subsection F of 11.5.1.21 NMAC.

F. Hearings:

(1) If a timely request for hearing is made, the department shall, within 30 days after receipt of the request, notify the petitioner and his employees or employee representative by certified mail of the date, time and place of the hearing.

(2) The hearing shall be held not less than 10 nor more than 30 days from the date the notice of the hearing is mailed. Where a hearing is being held subsequent to an initial determination by the ~~[department]~~ secretary without hearing, as authorized by ~~[41 NMAC 5.1.19.E.2.e]~~ Subparagraph (c) of Paragraph (2) of Subsection E of 11.5.1.18 NMAC, the hearing shall be conducted by a department employee who did not participate in the original decision on the petition.

(3) A record shall be made at each hearing, the cost of which shall be borne by the department. Transcript cost shall be paid by those persons requesting transcripts. In the hearings, the technical rules of evidence and rules of civil procedure shall not apply, but the hearing shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The hearing officer may require reasonable substantiation of statements or records rendered and may require any view to be stated in writing when the circumstances justify. The hearing officer shall allow all parties to the hearing a reasonable opportunity to submit written and oral evidence and arguments, to examine witnesses and to introduce exhibits. All witnesses shall be subject to questioning by the hearing officer.

(4) Based upon the evidence presented at the hearing and the recommendation of the hearing officer, the secretary shall grant the variance, grant the variance subject to conditions, or deny the variance. All actions taken by the secretary shall be by written order within 10 days after the closing of the hearing. The ~~[department]~~ secretary shall send the order to the petitioner by certified mail with a statement of the reasons for ~~[its]~~ his order. A copy of the

order shall be mailed to all persons testifying at the hearing, or who request a copy.

G. Multi-state variances:

Where action has been taken by the USDOL, pursuant to the federal Occupational Safety and Health Act of 1970, on any temporary or permanent variance request to a federal standard that is identical to a provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC such action shall be an authoritative interpretation of an employer's compliance obligation with regard to the provision, or portion thereof, identical to the federal standard, or portion thereof, affected by the action in the employment or places of employment covered by the variance application.

[8/30/73, 10/9/75, 9/3/78, 4/26/81, 1/1/96; 11.5.1.18 NMAC - Rn & A, 11 NMAC 5.1.18, 10/30/08]

11.5.1.19 ON-SITE CONSULTATIVE INSPECTIONS:

A. Upon an employer's request, the department shall provide an on-site consultation inspection of conditions and practices of the employer's work place.

B. Requests by employers for on-site consultation, pursuant to ~~[Section 50-9-6(B) NMSA 1978]~~ Subsection B of Section 50-9-6 NMSA 1978 shall be in writing and filed with the ~~[department]~~ bureau.

C. On-site consultations shall be provided as ~~[department]~~ bureau consultants are available. No compliance inspection will be delayed by a request for an on-site consultation. No regularly scheduled compliance inspection shall be made during any on-site consultation. An on-site consultation shall be deemed to exist for purposes of this regulation from the date that the ~~[department's]~~ bureau's consultant enters the workplace until the violations noted during the inspection are corrected or until the ~~[department]~~ bureau determines that no such corrective action will be taken.

D. ~~[Department]~~ Bureau consultants shall upon arrival at the workplace, announce the nature, purpose, and scope of their visit. At the conclusion of the consultation, the consultant shall confer with the employer or his representative and advise him of any apparent violations of the state act or the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC disclosed by the consultation. If the employer fails to take necessary action to correct a serious violation within the duly established time frame for correction, or any extension therefore, the matter shall immediately be forwarded to appropriate ~~[department]~~ bureau personnel for necessary compliance action.

E. ~~[Department]~~ Bureau consultants shall not issue citations or pro-

pose penalties for violations noted, provided imminent danger situations found during the on-site consultative visit must be pointed out to the employer. In the event imminent danger situations are pointed out but immediate steps are not taken by the employer to eliminate such danger, the emergency procedures provided in Section 50-9-14 NMSA 1978 shall be pursued by the department to assure timely abatement of the imminent danger situation.

[F. For purposes of this section:

(1) "on site consultation" means an inspection conducted by the department pursuant to Section 50-9-6(B) NMSA 1978, and

(2) "imminent danger situations" means those situations in a place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement provisions otherwise provided by the state act.]

[10/9/75, 9/3/78, 4/26/81, 11/16/83, 1/1/96; 11.5.1.19 NMAC - Rn & A, 11 NMAC 5.1.19, 10/30/08]

11.5.1.20 COMPLAINTS BY EMPLOYEES; REVIEW PROCEDURES:

A. Any employee or representative of employees may file a written complaint with the [department] bureau concerning any alleged violation of a regulation or any hazardous condition in any workplace where such employee is employed. Any such [complaint] complaint shall set forth with reasonable particularity the grounds therefore, and shall be signed by the employee or representative of employees. A copy of the complaints shall be provided to the employer or his agent by the compliance officer at the time of the inspection. However, upon the request of the complainant, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released or made available by the [department] bureau.

B. If upon receipt of such complaint the [department] bureau determines that the complaint meets the requirements set forth in Subsection A of this section, it shall cause an investigation of the complaint to be made as soon as practicable. Investigations under this section are not limited to the matters referred to in the complaint.

C. If the [department] bureau determines that the requirements of Subsection A of this section have not been met, it shall notify the complainant in writing of such determination. Such determina-

tion shall be without prejudice to the filing of a new complaint meeting the requirements of Subsection A of this section.

D. Prior to or during an inspection of a workplace, any employee or representative of employees employed in such workplace may notify the [department] bureau or the compliance officer, in writing, of any violation of the state act which they have reason to believe exists in the workplace. Any such notice shall comply with the requirements of Subsection A of this section.

E. The [department] bureau shall promptly notify the complainant and employer in writing of the results of the investigation and any action to be taken. If no action is contemplated, the [department] bureau shall notify the complainant and include in the notice the reasons therefor.

F. If the [department] bureau determines that no compliance action will be taken, the complainant may obtain review of such determination by submitting a written request [with] to the secretary within 15 days of receipt of the notice specified in Subsection E of this section. Within five days after receiving the request, the secretary shall notify the employer by certified mail of the request and shall include a copy thereof. However, upon the request of the complainant, his name shall not appear on such copy.

G. Within 30 days after notice to the employer, the secretary shall hold such informal conferences as may be necessary for the complainant and the employer to present their views. After considering all written and oral views presented, the secretary shall affirm, modify, or reverse the determination of the [department] bureau and furnish the complainant and the employer a written notification of his decision and the reasons therefore.

H. The secretary may designate an employee of the department to conduct the review, but such employee may not be the person who investigated the complaint. The decision of the secretary shall be final and not subject to further review. [9/3/78, 4/26/81, 1/1/96; 11.5.1.20 NMAC - Rn & A, 11 NMAC 5.1.20, 10/30/08]

11.5.1.21 COMPLIANCE INSPECTIONS:

A. Authority; objection:

(1) The department's authorized representatives are authorized, in accordance with Section 50-9-10 NMSA 1978, to enter and inspect any place of employment at reasonable times and without delay; to question privately the employer and any employees of the employer; to inspect and investigate the place of employment and all pertinent conditions, structures, machines,

apparatus, devices, equipment and materials therein, and other records which are directly related to the purpose of the inspection during regular working hours and at other reasonable times and in a reasonable manner.

(2) Upon a refusal to permit a compliance officer, in the exercise of official duties, to enter without delay and at reasonable times, any place of employment or portion thereof, to inspect, to review records, or to question privately any employer, owner, operator, agent or employee, in accordance with Section 50-9-10 NMSA 1978, and [paragraph 1 of this Subsection] Paragraph (1) of Subsection A of this section, or to permit a representative of employees to accompany the compliance officer during the physical inspection of any workplace, the compliance officer shall either terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records or interviews concerning which no objection is raised. Nothing in this paragraph shall be construed to preclude the department from obtaining an administrative inspection order and returning to the place of employment to conduct an inspection, interview(s), or to review records as authorized by such order.

(3) Any permission to enter, inspect, review records or question any person shall not imply or be conditioned upon a waiver of any cause of action, citation or penalty under the state act. Compliance officers are not authorized to grant any such waiver.

B. Advance notice of inspections:

(1) Section 50-9-10 NMSA 1978, declares it unlawful for any person to give advance notice of any inspection to be conducted under the state act without the written approval of the secretary or his authorized representative.

(2) Advance notice of inspections may be given only:

(a) in cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible;

(b) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for the inspection;

(c) where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; or

(d) in other circumstances where the secretary determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(3) Advance notice in any of the situations described shall not be given more

than 24 hours before the inspection is scheduled to be conducted, except in unusual circumstances.

(4) In the situations described in this section, advance notice of inspections may be given only if authorized by the secretary, except that in cases of apparent imminent danger, advance notice may be given by the compliance officer without such authorization if the secretary is not immediately available. When advance notice is given, it shall be the employer's responsibility promptly to notify the authorized representative of employees of the inspection, if the identity of such representatives is known to the employer.

C. Conduct of inspections; consultation with employees:

(1) At the beginning of an inspection, compliance officers shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in Subsection A of this section which they wish to review. However, such designation of records shall not preclude access to additional records specified in Subsection A of this section.

(2) Compliance officers shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent or employee of an establishment. As used in this paragraph, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other similar devices to employees in order to measure their exposures.

(3) In taking photographs and samples, compliance ~~offers~~ officers shall take reasonable precautions to insure that such actions with flash, spark-producing or other equipment would not be hazardous. Compliance officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and shall wear and use appropriate protective clothing and equipment.

(4) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment.

(5) In addition to compliance officers' private questioning of any employee, compliance officers may consult with employees concerning matters of occupational health and safety to the extent they deem necessary for the conduct of an effective and thorough inspection. Separately, employees may request a private interview

with the compliance officers to inform the compliance officers of any information relevant to the investigation and to bring any violation of the state act that the employee has reason to believe exists in the workplace to the attention of the compliance officers.

D. Representative of employers and employees; accompaniment during physical site inspection:

(1) Compliance officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the compliance officer during the physical inspection of any workplace for the purpose of aiding such inspection as required by Section 50-9-10 NMSA 1978. A different employer and employee representative may accompany the compliance officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(2) Compliance officers shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees, for purposes of this section. If there is no authorized representative of employees or if the compliance officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(3) The representative authorized by employees shall be an employee of the employer. However, if in the judgement of the compliance officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the compliance officer during the inspection.

(4) Compliance officers are authorized to deny the right of accompaniment under this regulation to any person whose conduct interferes with a fair and orderly inspection.

E. Private questioning:

(1) Purpose: ~~[Section 50-9-10(A)(2) NMSA 1978.]~~ Paragraph (2) of Subsection A of Section 50-9-10 NMSA 1978 provides that the department's ~~representative is~~ representatives, including but not limited to compliance officers, are authorized to, and may, question privately the employer or any employee, subject to regulation of the environmental improvement board. The purpose of [such questioning] privately questioning employees is to obtain useful information [in the course of a department inspection or investigation] regarding the health and safety of the workplace being inspected or investigated.

Information being sought includes but is not limited to uncovering any violation of the state act, providing an opportunity to an employee to bring any potential violation of the state act to the bureau's attention in confidence, and to protect the [rights of the individual] employee being questioned from employer intimidation, retaliation, and discrimination. The purpose of questioning the employer is to, among other things, obtain useful information regarding the employer's health and safety policies, practices, and procedures and the employer's implementation thereof.

(2) General requirements:

(a) an ~~[individual] employee~~ being questioned by the department shall have the right to have personal counsel or other representative of his or her choosing present during the department's questioning, except that counsel employed by the employer shall be excluded from personally representing an employee because of the inherent conflict of interest at issue;

(b) if the ~~[individual requests,]~~ compliance officer has not already chosen to conduct the interview in private, the employee may request that the questioning [shall] be conducted in private; and

(c) the results of questioning not conducted in private shall be disclosable in accordance with ~~[Section 50-9-21(B) NMSA 1978]~~ Subsection B of Section 50-9-21 NMSA 1978.

(3) ~~[Private questioning]~~ Interview process:

(a) ~~[at the time the compliance officer questions the employer or any employee, he shall advise the individual being questioned of his right to a private interview and to counsel and shall ask if he desires the interview to be conducted in private] in the event the compliance officer has not already determined that an interview will be conducted in private, prior to commencing an interview the compliance officer shall advise the individual to be interviewed of his or her right to a private interview; whenever the individual being interviewed expresses a preference for a private interview, the compliance officer shall honor the request; if the employee requests to have personal counsel present, the employee shall be given seven business days to secure personal counsel for the interview to be rescheduled as soon as possible;~~

(b) at the conclusion of the department's private questioning or a reasonable time thereafter, the department shall provide the interviewee the opportunity to read or be read, the statement given to the compliance officer; any changes in form or substance which the interviewee desires to make shall be ~~[entered upon the statement by the compliance officer]~~ made; the statement shall then be signed by the interviewee

unless the interviewee cannot be found or refuses to sign; if the statement is not signed within seven days of its submission to the interviewee, the compliance officer shall sign it and indicate on the statement that the interviewee was absent or refused to sign the statement, together with the reason, if any, given therefor; the interviewee shall be provided with a copy of the completed statement; any statement given in private shall be treated by the department as confidential to the extent allowed by law.

(4) Refusal to be privately interviewed: In the event the employer or any employee refuses to consent to a private interview, the department may compel by subpoena the individual to be interviewed privately pursuant to Subsection D of Section 50-9-8, NMSA 1978 and Section 50-9-18, NMSA 1989 (1993).

(5) Obstruction of investigation: Employers or their representatives, agents or counsel, that obstruct or hamper an investigation violate the state act and may also be in violation of the Sarbanes-Oxley Act (18 U.S.C.A. 1514A, 1543(c)2002). Obstruction may include, but is not limited to, instructing employees to not cooperate with the department during an investigation; instructing employees to refuse to be interviewed by the department; directing employees to insist on counsel that represents the employer be present during a private interview; preventing employees directly or indirectly from being interviewed by the department; encouraging employees to lie; or suggesting to employees to withhold information or potential violations from the department.

(4) Definitions: As used in this section:

(a) ~~“counsel” means an attorney licensed to practice law;~~

(b) ~~“employee representative” means a representative of the employee’s recognized or certified bargaining agent;~~

(c) ~~“in private” means:~~
(i) ~~for employee interviews, to the exclusion of an employer or employer representative not an employee representative, unless the employee expresses a desire to be interviewed out of the hearing of both the employer and the employee representatives; and~~

(ii) ~~for employer interviews, to the exclusion of an employee or employee representative;~~

(d) ~~“interviewee” means the individual being questioned by the department’s representative.]~~

F. Trade secrets:

(1) At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the compliance officer has no clear reason to question

such identification, information obtained in such areas, including all negative and prints of photographs, and environmental samples, shall be labeled “confidential - trade secret” and shall not be disclosed except in accordance with the provisions of Section 50-9-2 NMSA 1978.

(2) Upon the request of an employer, any representative of employees accompanying the compliance officer during the inspection of an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. When there is no such representative or employee, the compliance officer shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

~~[(3) As used in this section, “trade secret” means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement that is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.]~~
[10/9/75, 9/3/78, 4/26/81, 5/10/81, 10/1/83, 1/19/94, 1/1/96; 11.5.1.21 NMAC - Rn & A, 11 NMAC 5.1.21, 10/30/08]

11.5.1.23 ISSUANCE OF CITATIONS AND PROPOSED PENALTIES; FAILURE TO CORRECT VIOLATIONS:

A. Citations; notices of *de minimis* violations:

(1) The secretary or the secretary’s authorized representative shall review the compliance officer’s inspection report. If, on the basis of the report, the secretary or authorized representative believes that the employer has violated a requirement of Section 50-9-5 NMSA 1978, or any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, he shall issue to the employer, by certified mail, either a citation or, for violations that have no direct or immediate relationship to health or safety, a notice of *de minimis* violations. An appropriate citation or notice of *de minimis* violations shall be issued even though after being informed of an alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate, such alleged violation. Any citation or notice of *de minimis* violations shall be issued with reasonable promptness after termination of the inspection. No citation may be issued under this subsection after the expiration of six months following the occurrence of any alleged violation.

(2) Any citation shall describe with particularity the nature of the alleged

violation, including a reference to the provision(s) of the state act or of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC (including incorporated federal standard) alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(3) If a citation or notice of *de minimis* violations is issued for a violation alleged in a request for inspection under ~~[11 NMAC 5.1.21.A]~~ Subsection A of 11.5.1.20 NMAC, or a notification of violation under ~~[11 NMAC 5.1.21.D]~~ Subsection D of 11.5.1.20 NMAC, a copy of the citation or notice of *de minimis* violations shall be sent to the employee or representative of employees who made such request or notification.

(4) After an inspection, if the secretary or authorized representative determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under ~~[11 NMAC 5.1.21.A]~~ Subsection A of 11.5.1.20 NMAC, or a notification of violation under ~~[11 NMAC 5.1.21.D]~~ Subsection D of 11.5.1.20 NMAC, the informal review procedures prescribed in ~~[11 NMAC 5.1.21.F to H]~~ Subsections F through H of 11.5.1.20 NMAC shall be applicable.

(5) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the state act has occurred unless there is a failure to contest as provided for in the state act, or if contested, unless the citation is affirmed by the commission.

B. Proposed penalties:

(1) After, or concurrent with, the issuance of a citation and within a reasonable time after the termination of the inspection, the department shall notify the employer by certified mail of the penalty, if any, proposed to be assessed under the state act, or that no penalty is being proposed. Any notice of proposed penalty shall state that the proposed penalty shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notice, the employer notifies the department in writing that he intends to contest the citation or the notification of proposed penalty before the commission.

(2) The department shall determine the amount of any proposed penalty, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(3) Appropriate penalties may be proposed with respect to an alleged violation even though after being informed of

such alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate such alleged violation. Penalties shall not be proposed for *de minimis* violations.

C. Failure to correct a violation for which a citation has been issued:

(1) If an inspection discloses that an employer has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, the department shall notify the employer by certified mail of such failure and of the additional penalty proposed under the act by reason of such failure. The period for correction of a violation for which a citation has been issued shall not begin to run until the entry of a final order of the commission in the case of any review proceedings initiated by the employer in good faith and not solely for delay or avoidance of penalties.

(2) Any employer receiving a notification of failure to correct a violation and of proposed additional penalty may notify the department in writing that he intends to ~~correct~~ contest such notification or proposed additional penalty before the commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notification of failure to correct a violation and of proposed additional penalty. The department shall immediately transmit such notice to the commission in accordance with the rules of procedure prescribed by the commission.

(3) Each notification of failure to correct a violation and of proposed additional penalty shall state that it shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notification, the employer notifies the department in writing that he intends to contest the notification or the proposed additional penalty before the commission.

[9/3/78, 3/21/79, 1/20/80, 4/26/81, 3/9/83, 1/1/96; 11.5.1.23 NMAC - Rn & A, 11 NMAC 5.1.23, 10/30/08]

11.5.1.25 ABATEMENT VERIFICATION: The provisions of 29 CFR Part 1903.19, Abatement Verification (internet: www.osha.gov), are hereby incorporated into this section.

[9-15-97, 8-15-98; 11.5.1.25 NMAC - Rn & A, 11 NMAC 5.1.25, 10/30/08]

11.5.1.26 INFORMAL CONFERENCE: At the request of an employer, affected employee, or representative of employees, the chief or the chief's designee, may hold an informal conference for the purpose of discussing any issues raised by

an inspection, citation, proposed penalty, proposed petition for modification of abatement date or proposed petition for variance. When the conference is requested by the employer, an affected employee or representative shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee. When the conference is requested by an employee or representative of employees, the employer shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee.

A. The request for an informal conference and the informal conference meeting shall not extend or modify in any manner:

(1) an abatement date established in the citation;

(2) the filing deadline for an employer to file a notice of contest;

(3) any other filing deadline related to the citation; or

(4) any matter that is pending before the bureau.

B. Once an employer files a notice of contest, a petition for modification of the abatement date, a request for a commission hearing, a petition for variance, or other filing with the commission or department, the informal conference opportunity ends.

C. The settlement of any issue at the informal conference shall be subject to the commission's settlement procedural rules set forth in 11.5.5.503 NMAC. [11.5.1.26 NMAC - N, 10/30/2008]

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 11.5.2 NMAC, Sections 2, 5, 7, 9, and 10. This action also rennumbers and reformats 11 NMAC 5.2, Occupational Health and Safety - General Industry (filed 10/27/95) into current NMAC requirements, effective 10/30/08.

11.5.2.2 SCOPE: All employment and places of employment subject to the Occupational Health and Safety Act, except as otherwise covered by 11.5.3 NMAC, Occupational Health and Safety - Construction Industry, or 11.5.4 NMAC, Occupational Health and Safety - Agriculture. In addition to this part, convenience stores are specifically covered in 11.5.6 NMAC.

[5/1/95; 11.5.2.2 NMAC - Rn & A, 11 NMAC 5.2.1, 10/30/08]

11.5.2.5 EFFECTIVE DATE: May 1, 1995, unless a later effective date is indicated in the history note at the end of a section ~~[or paragraph]~~.

[5/1/95, 7/15/96, 3/16/97; 11.5.2.5 NMAC - Rn & A, 11 NMAC 5.2.5, 10/30/08]

11.5.2.7 DEFINITIONS:

A. The provisions of ~~[[~~ ~~NMAC 5.1.12]~~ 11.5.1.7 NMAC are applicable to this part.

B. Additional definitions: The following definitions, in addition to those contained in ~~[[~~ ~~NMAC 5.1.12]~~ 11.5.1.7 NMAC and the state act, are applicable to this section:

(1) "ANSI" means American national standards institute;

(2) "approved" means tested and listed as satisfactory by the bureau of mines of the United States department of interior, or jointly by the MSHA and NIOSH;

(3) "confined space" means an enclosure, usually having limited means of access or egress, or both, and poor natural ventilation, which may contain hazardous contaminants or be oxygen deficient, including but not limited to a storage tank, process tank, tank car, boiler, duct, sewer, tunnel, pipeline, pit or tube;

(4) "contaminant" means a harmful, irritating or nuisance material that is foreign to the normal atmosphere;

(5) "controlled breathing" means the ability of the wearer of an SCBA to maintain a breathing rate that is near normal for the activities being performed;

(6) "corrective lens" means a lens ground to the wearer's individual corrective prescription;

(7) "dB" means decibel(s), a unit for measuring the relative loudness of sounds equal approximately to the smallest degree of difference of loudness ordinarily detectable by the human ear;

(8) "education" means the process of imparting knowledge or skill through systematic instruction, whether or not through formal classroom instruction;

(9) "exhalation valve" means a device that allows exhaled air to leave a facepiece and prevents outside air from entering through the valve;

(10) "eyepiece" means a gas-tight, transparent window or lens in a full facepiece through which the wearer can see;

(11) "face shield" means a heat and flame resistant device worn in front of the eyes and face, the predominant function of which is protection of the wearer's eyes and face;

(12) "firefighter" means an individual who is assigned to firefighting activity, and is required to respond to alarms and performs emergency action at the location of a fire or fire danger;

(13) "firefighting activity" means physical action taken in the direct act of fire suppression, and rescue or hazardous duties performed at the location of a fire emergency and supportive activities related to

firefighting;

(14) "fire department" means a paid or volunteer service group organized and trained for the prevention and control of loss of life and property from any fire or disaster;

(15) "full facepiece" means the portion of an SCBA covering the wearer's nose, mouth, and eyes and designed to make a gas-tight fit with the face, including the head harness, exhalation valves, and connections for a source of respirable gas;

(16) "gas" means an aeriform fluid that is in the gaseous state at standard temperature and pressure;

(17) "hazardous atmosphere" means any atmosphere, whether or not immediately dangerous to life or health, that is oxygen deficient or that contains a toxic or disease-producing contaminant;

(18) "hazardous substance" means a substance which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritant or otherwise harmful, is likely to cause injury;

(19) "Hg" means the element mercury;

(20) "head harness" means a device for holding the facepiece securely in place on the wearer's head;

(21) "health professional" means a licensed physician, registered nurse, practical nurse, or certified emergency medical technician;

(22) "helmet" means a head protective device consisting of a shell, energy absorption system, and chin strap intended to be worn to provide protection for the head or portions thereof, against impact, flying or falling objects, electric shock, penetrations, heat and flame;

(23) "Hz" means hertz, a unit of frequency equal to one cycle per second;

(24) "immediately dangerous to life or health" means posing an immediate hazard to life or producing immediate irreversible effects on health that may be debilitating;

(25) "inhalation valve" means a device that allows respirable air or oxygen to enter the facepiece and prevents exhaled air or oxygen from leaving the facepiece through the intake opening;

(26) "MSHA" means the mine safety and health administration of the United States department of labor;

(27) "negative-pressure type apparatus" means an open or closed-circuit apparatus in which the pressure inside the facepiece, in relation to the immediate environment, is positive during exhalation and negative during inhalation;

(28) "NIOSH" means the national institute for occupational safety and health of the United States department of health and human services;

(29) "NFPA" means national fire protection association;

(30) "overhaul" means:

(a) the final stages of fire control, following suppression of the main body of fire, during which smoke conditions and visibility gradually improve and pockets of fire are sought out to complete extinguishment, searching for victims continues, and salvage operations may be carried out; or

(b) in a situation other than fire, the cleanup stage following the elimination of the emergency phase of the incident;

(31) "oxygen-deficient atmosphere" means an atmosphere that causes an oxygen partial pressure of 100 millimeters of mercury or less in the freshly inspired air saturated with water vapor in the upper portion of the lungs;

(32) "positive-pressure apparatus" means an open- or closed-circuit apparatus in which the pressure inside the facepiece in relation to the immediate environment is positive during both inhalation and exhalation;

(33) "provide" means to furnish, supply or to make arrangements for monetary reimbursement;

(34) "qualitative SCBA fitting test" means a fitting test in which the person wearing an SCBA is exposed to an irritant smoke, an odorous vapor, or another suitable test agent;

(35) "quantitative SCBA fitting test" means a fitting test in which a person wears an SCBA in a test atmosphere containing a test agent in the form of an aerosol, vapor, or gas, and instrumentation that samples the test atmosphere and the air inside the facepiece of the SCBA is used to measure quantitatively the penetration of the test agent into the facepiece;

(36) "sanitization" means the removal of dirt and the inhibiting of the action of agents that cause infection or disease;

(37) "SCBA" means self-contained breathing apparatus, which is a portable device that includes the supply of respirable breathing gas for the firefighter, but does not include a rebreather;

(38) "smoke" means the products of incomplete combustion or organic substances in the form of solid and liquid particles and gaseous products in air;

(39) "speaking diaphragm" means a device integral with the facepiece, designed to improve direct voice communication;

(40) "structural firefighting" means physical activity of fire suppression, rescue or both, of buildings or structures that are involved in a fire situation beyond the incipient stage; and

(41) "training" means the process of making proficient through instruction

and hands-on practice in the operation of equipment, including respiratory protection equipment, that is expected to be used [and] in the performance of assigned duties.

[9/12/84; 2/21/86; 5/1/95; 11.5.2.7 NMAC - Rn & A, 11 NMAC 5.2.7, 10/30/08]

11.5.2.9 INCORPORATED FEDERAL STANDARDS:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards (internet: www.osha.gov), are hereby incorporated into this section.

B. Modifications, exceptions and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1910 incorporated by Subsection A of this section:

(1) omit 1910.1;

(2) omit 1910.2(c), (d) and (e);

(3) omit 1910.4;

(4) omit 1910.5(a) and (f); and

~~[(5) references in 1910.20 to 29 CFR 1913 shall be construed as to the appropriate department policy; and~~

~~[(6) (5) amend 1910.1200 Hazard Communication, as follows:~~

(a) 1910.1200(g)(9) is amended to read: Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. The information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(b) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training: (1) employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g. flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[1/20/80, 5/1/95, 7/15/96; 3/16/97, 9/15/97, 8/15/98; 11.5.2.9 NMAC - Rn & A, 11

NMAC 5.2.9, 10/30/08]

11.5.2.10 FIREFIGHTING:

A. Scope and application:

(1) **Scope and purpose:** This standard establishes minimum requirements for personal protective clothing and equipment, training, respiratory protection, and medical surveillance for firefighters when exposed to the hazards of firefighting activity. This standard is not intended to supersede any more stringent requirements in effect at any fire department in the state. Fire departments are encouraged to provide protection that exceeds the minimum requirements specified in the standard. This standard is not intended to cover catastrophic situations where private citizens not trained in firefighting are pressed into service.

(2) **Application:** The requirements of this standard apply to public fire departments, including those composed of private or contractual type fire departments primarily performing duties normally performed by public fire departments, and forest firefighting operations. For the requirements applicable to fire brigades, industrial fire departments, and private or contractual type fire departments generally, see 29 CFR Part 1910.156, Fire Brigades.

B. Firefighting equipment:

(1) General requirements:

(a) All firefighting equipment acquired after July 1, 1989 shall meet or exceed the requirements of the appropriate NFPA standard as published in the national fire codes as specified in ~~[Section 10.L]~~ Subsection K of this section.

(b) The employer shall inspect firefighting equipment at least annually and maintain records of such inspections. Firefighting equipment that is damaged or in an unserviceable condition shall be repaired or removed from service.

(c) A visual inspection of all equipment which has been utilized for firefighting shall be performed after each fire run or daily, whichever is less frequent.

(d) Personal protective clothing and equipment specified in this regulation shall be provided at no cost to the employee, or the employee shall be reimbursed for the purchase of such clothing and equipment. The protective clothing and equipment shall be used whenever such employees are required to work in a hazardous environment that may be encountered during firefighting activities or under similar conditions during training activities.

(e) The employer shall assure that protective clothing protects the head, body, and extremities, and consists of at least the following components: foot and leg protection; hand protection; eye, face and head

protection.

(f) The employer shall assure proper maintenance and use of all protective clothing and equipment.

(g) Employees shall be instructed to wear or utilize appropriate personal protective clothing and equipment when directed to work in a hazardous environment until such time as the officer in charge determines that such protection is no longer required.

(h) Personal protective clothing and equipment that has become damaged or otherwise defective to the point of voiding its intended protection shall be repaired or ~~[removal]~~ removed from service.

(2) Foot and leg protection:

(a) Foot and leg protection for structural firefighting ~~[shall meet the requirements of Sections 10.B.2.b and 9.B.2.c., and]~~ may be achieved by either of the following methods:

(i) fully extended boots which provide protection for the entire leg; or

(ii) protective shoes or boots worn in combination with protective trousers that meet the requirements of ~~[Section 10.F]~~ Subsection E of this section.

(b) Protective footwear for structural firefighting or turnout boots shall meet the requirements of ~~[ANSI Z41.1 (1967 (R-1972))]~~ ASTM F2412-05 "test methods for foot protection" and ASTM F2413-05 "specification for performance requirements for foot protection" for class 75 footwear and shall have sole penetration resistance of 300 pounds (1330N) when tested in accordance with MIL-B-2885D (1973) and amendment dated 1975, "Military Specification for Firemen's Boots". In addition, protective footwear shall be water resistant for at least [5] five inches (12.7 cm) above the bottom of the heel and shall be equipped with slip resistant outer soles.

(c) Foot and leg protection provided for other than structural fires shall be appropriate for the potential hazards.

(3) Body protection:

(a) ~~[As required in Section 10.C, body]~~ Body protection shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Body protection shall consist of turnout clothing or an appropriate combination of a turnout coat and protective clothing meeting the requirements of this section.

(b) Performance, construction, testing and certification of firefighter turnout clothing and protective clothing shall be at least equivalent to the requirements of NFPA standard no. 1971 "protective [Clothing] ensemble for structural fire fighting" (~~[1984]~~ 2007 edition).

(c) Turnout coats in combination with turnout trousers, or turnout coats and

protective clothing meeting these requirements shall be worn on all structural fires until such time as the officer in charge determines that such protection is no longer required. Body protection provided for other than structural fires shall be appropriate for the potential hazards.

(4) Hand protection:

(a) Protective gloves shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Such protective gloves shall be properly sized and suitable to the hazards encountered in fires and fire related emergencies.

(b) Protective gloves for firefighting shall be made of durable material designed to withstand the effects of flame, heat, vapor, liquids, sharp objects and other hazards encountered in fires and firefighting or shall be appropriate for the hazards encountered.

(c) Protective gloves shall meet the requirements of ~~[National Fire Protection Association (NFPA) Standard No. 1973, "Gloves for Structural Fire Fighters" (1983 Edition)]~~ NFPA standard no. 1971, "protective ensemble for structural firefighting" (2007 edition), or a similar nationally approved standard.

(5) Head protection:

(a) Head protection shall be provided for each firefighter, and shall be maintained in a location of readiness for immediate response to fires and like emergencies. Head protection shall be worn by firefighters whenever they are exposed to head injury hazard. Head protection is normally provided for firefighters through the use of helmets.

(b) Helmets provided for use in structural firefighting shall meet the performance, construction, and testing requirements of ~~[National Fire Protection Association (NFPA) Standard No. 1972, "Structural Firefighters Helmets" (1979 Edition)]~~ NFPA standard no. 1971, "protective ensemble for structural firefighting" (2007 edition).

(6) Eye and face protection:

employees exposed to eye or facial hazards shall be protected in accordance with the following provisions.

(a) Face shields of plastic or glass shall meet the optical qualities, impact resistance, and light transmission standards specified in ~~[ANSI Z87.1-1968]~~ ANSI Z87.1-2003, "practice for occupational and educational eye and face protection".

(b) Whenever eye and face protection is not provided by the breathing apparatus facepiece, the face of the firefighter engaged in structural firefighting shall be protected by a face shield attached to the helmet or goggles and either [:

(+) heat and flame resistant hood[;] or

(++) high collar and

throat strap.

(c) Eye and face protection provided for other than structural fires shall be appropriate for the potential hazards.

C. Medical review:

(1) Firefighting activity requires that a firefighter be able to work with extreme exertion and with agility and endurance in a wide variety of hazardous situations in order to assure the safety of the firefighter and others. The exposures include ranges of heat and cold, smoke, possible allergens and toxins, and noise. The settings include those with poor lighting, slippery surfaces, confined spaces, and heights. The firefighter must be able to work using a self-contained breathing apparatus. The firefighter's life and safety as well as the lives and safety of others depend upon the firefighter's being physically and emotionally fit to work effectively in such situations.

(2) The employer shall assure that firefighters are physically and emotionally capable of performing the specific duties which may be assigned to them by instituting a program of medical review.

(3) Medical review is not intended to eliminate those volunteer firefighters from performing firefighting activities consistent with their medical limitations.

(4) Initial requirements:

(a) At the time of initial assignment the employer shall ensure that each firefighter completes the following forms or equivalents [~~which contain the minimum information specified in the following:~~

(i) the "Medical History for Firefighters" (Section 10.M);

(ii) the "Performance Criteria for Firefighters" (Section 10.N);

(iii) a medical screening examination, performed in conformance with the "Medical Screening Form for Firefighters" (Section 10.O): "*medical history for firefighters*" Subsection L of this section; "*performance criteria for firefighters*" Subsection M of this section; and a medical screening examination, performed in conformance with the "*medical screening form for firefighters*" Subsection N of this section.

(b) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the "*medical history for firefighters*" [~~(Section 10.M)~~] Subsection L of this section shall be certified for firefighting activities by a physician in accordance with the "*physician's certification criteria for firefighters*" [~~(Section 10.P)~~] Subsection O of this section with the following exceptions:

(~~⊕~~) if a firefighter answers "yes" to item 21 or 22 of the "*medical history for firefighters*" (Section

~~10.M)~~ Subsection L of this section, a certification from a specialist (e.g. optometrist, ophthalmologist, or audiologist) that the individual can function as a firefighter will suffice in lieu of a complete physician's certification;

(~~⊕~~) and if a firefighter answers "no" to item 27 of the "*medical history for firefighters*" [~~(Section 10.M)~~] Subsection L of this section, the employer is required to make a tetanus immunization available to the firefighter.

(c) A physician certifying a firefighter shall be provided with a copy of the medical requirements of this section.

(d) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the "*performance criteria for firefighters*" [~~(Section 10.N)~~] Subsection M of this section may be allowed to perform only those duties for which the employer determines they are fit.

(e) Candidates for firefighting activities who have been screened in accordance with the "*medical screening for firefighters*" [~~(Section 10.O)~~] Subsection N of this section and the health professional has designated an answer as "yes", the candidate shall be certified by a physician in accordance with the "*physician's certification criteria for firefighters*" [~~(Section 10.P)~~] Subsection O of this section with the following exception.

(f) If the response to item 4, 5, 6 or 7 is "yes", a certification from an optometrist or ophthalmologist that the individual can function as a firefighter in accordance with item 2 of the "*physician's certification criteria for firefighters*" [~~(Section 10.P)~~] Subsection O of this section will suffice in lieu of a complete physician's certification.

(5) **Periodic requirements:** The employer shall ensure that the medical surveillance required by this standard be performed every five [~~(5)~~] years for firefighters below age 35, every [~~(2)~~] two years from ages 35 to 45, and annually after age 45.

(6) **Removal:** A firefighter may be removed from firefighting activities when the employer becomes aware of a physical or mental condition as specified in [~~(Sections 10.L through 10.S)~~] Subsections K through R of this section which would affect the safe performance of specifically assigned duties. A firefighter shall be removed from those firefighting duties when it is certified that a firefighter has a physical or mental condition as specified in [~~(Sections 10.L through 10.S)~~] Subsections K through R of this section which would affect the safe performance of specifically assigned duties. The firefighter may return to such activities only after the changed capability is restored or the firefighter has

been approved for those duties by a physician.

(7) Records:

(a) The employer shall maintain the medical records required in this standard for the length of employment of each firefighter plus five [~~(5)~~] years.

(b) The employer shall make available upon request all records required to be maintained by this standard to the bureau for examination and copying.

D. Training:

(1) The employer shall provide training and education for all firefighters commensurate with those duties and functions that firefighters are expected to perform. Such training and education shall be provided to firefighters before they perform emergency activities.

(2) Formal training or education shall be provided at least annually, and at least quarterly for those expected to perform interior structural firefighting.

(3) Suggested training sources are included in [~~Section 10.Q~~] Subsection P of this section.

E. Respiratory protection equipment: Employers shall comply with the provisions of 29 CFR Part 1910.134, Respiratory Protection (internet: www.osha.gov).

F. Confined spaces: All confined spaces shall be considered to be immediately dangerous to life or health unless proven otherwise. No firefighter shall be permitted to enter a confined space for firefighting operations, including emergency rescue operations, without wearing a SCBA. Confined spaces include, but are not limited to, wells, cisterns, tunnels, pits and other such spaces where oxygen deficiency or hazardous airborne materials, or both, may be present.

G. Vision: Corrective lenses, if required, shall be fitted in the facepiece in way that provides good vision and shall be worn in such a manner as not to interfere with the seal of the face of the facepiece. [~~The wearing of contact lenses by personnel while fighting fires shall not be permitted.~~]

H. Absorption through or irritation of the skin: If toxic materials which irritate or can be absorbed through the skin are encountered or suspected and protective clothing worn by firefighters as specified in [~~Section 10.F~~] Subsection E of this section does not provide adequate protection, an effective fully body covering suit of impermeable materials shall be worn with the SCBA, as specified in hazardous chemical data, [~~NFPA 49-1978~~] NFPA "*fire protection guide to hazardous materials 2001 edition*".

I. Effects of ionizing radiation on the skin and whole body:

The SCBA will not protect the skin or whole body against ionizing radiation from airborne concentrations of certain radioactive materials. All users of SCBA in such contaminated atmospheres shall be made aware of the fact that special protection is necessary in addition to the SCBA.

J. Notification requirements: Employers shall comply with the provisions of 11.5.1.16 NMAC, Recordkeeping and Reporting Occupational Injuries and Illnesses.

K. References:

(1) The following references are published by the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269:

- (a) NFPA standard no. 1500, "fire department occupational safety and health program" (2007 edition);
- ~~(a)~~ (b) NFPA standard no. 1901, "automotive fire apparatus" (~~[1979]~~ 2003 edition);
- ~~(b)~~ NFPA Standard No. 1904, "Aerial Ladders and Elevated Platforms" (1980 Edition);
- (c) NFPA standard no. 1961, "fire hose" (~~[1979]~~ 2007 edition);
- ~~(d)~~ [NFPA standard no. 1962, "care, use, and maintenance of fire hose including connections and nozzles" (1979 edition)] NFPA standard no. 1962, "inspection, care, and use of firehose, couplings, and nozzles and the service testing of fire hose" (2003 edition);
- (e) NFPA standard no. 1971, "protective ~~[Clothing]~~ ensemble for structural fire fighting" (~~[1981]~~2007 edition);
- ~~(f)~~ NFPA Standard No. 1972, "Structural Fire Fighter's Helmets" (1979 Edition);
- ~~(g)~~ (f) NFPA standard no. 1981, [~~"self-contained breathing apparatus for firefighter"~~ (1981 edition)] "open-circuit self-contained breathing apparatus (SCBA) for emergency services" (2007 version); and
- ~~(h)~~ NFPA Standard No. 1973, "Gloves for Structural Firefighters" (1983 Edition); and
- ~~(i)~~ (g) [NFPA 49-1978, "hazardous chemical data"] NFPA "fire protection guide to hazardous materials" (2001 edition).

(2) The following references are published by the American National Safety Institute Inc. (ANSI), 1430 Broadway, New York, 10018:

- (a) [ANSI standard no. Z41.1-1967 (R 1972), "mens safety toe footwear"] ASTM F2412-05 "test methods for foot protection" and ASTM F2413-05 "specification for performance requirements for foot protection,";
- (b) standard no. Z89.1-~~[1969]~~ 2003, "~~[safety requirements]~~ American national standard for industrial head protection";
- (c) ANSI standard no. Z87.1-~~[1968]~~ 2003, "practice for occupational and educational eye and face protection";
- ~~(d)~~ ANSI standard no. Z88.5-1981, "~~practices for respiratory protection for the fire service~~";
- ~~(e)~~ (d) ANSI/CGA G-7.1-~~[1973]~~ 2004, "American national standard commodity specification for air";
- ~~(f)~~ (e) ANSI Z88.2-1980, "standard practices for respiratory protection"; and
- ~~(g)~~ (f) ANSI S3.6-~~[1969]~~ 2004 [~~(R1973)~~] "specification[s] for audiometers".

(3) Copies of the references listed in ~~[Section 10.L.1 and 2]~~ Paragraphs (1) and (2) of this subsection are available for review in the ~~[offices]~~ Santa Fe office of the bureau.

L. Medical history form: The following form shall be used to record each firefighter's medical history:

MEDICAL HISTORY FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question.

Do you have or have you ever had:

| | NO | YES |
|---|-----------|------------|
| 1. Emphysema | () | () |
| 2. Chronic bronchitis | () | () |
| 3. Asthma | () | () |
| 4. Daily cough persistent for more than eight (8) weeks | () | () |
| 5. Coronary heart disease (heart attack or angina pectoris) | () | () |
| 6. History of heart murmur, congenital heart problem or rheumatic fever. | () | () |
| 7. Shortness of breath, difficulty staying up with healthy adults, or walking briskly 1/4 mile. | () | () |
| 8. Irregular heart beat or palpitations of heart | () | () |
| 9. Chest pain with exertion | () | () |
| 10. Other heart problem | () | () |
| 11. High blood pressure | () | () |
| 12. Diabetes | () | () |
| 13. Epilepsy or seizures | () | () |
| 14. Emotional illness | () | () |
| 15. Arthritis | () | () |
| 16. Back disease or injury | () | () |
| 17. Neurologic disorder (nerve or brain disease) | () | () |
| 18. Disease of muscle or bone | () | () |
| 19. Recurrent fainting or dizziness | () | () |
| Do you now have: | | |
| 20. Other respiratory problem (severe or persistent) | () | () |

- 21. Impaired hearing () ()
- 22. Impaired vision (unless corrected with glasses) () ()
- 23. Hernia () ()
- 24. Allergies to substances in the environment or to smoke () ()
- 25. Other chronic serious disorders or disease requiring medication or medical care () ()
- 26. Alcohol or drug abuse problems () ()
- 27. Tetanus immunization within 10 years is important. For prevention of Tetanus. Have you had a Tetanus immunization within 10 years? () ()

I certify that the answers to the above questions are true to the best of my knowledge.

DATE

SIGNATURE

M. Performance criteria form. The following form shall be used to record each firefighter's performance criteria:

PERFORMANCE CRITERIA FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes". You need only answer the questions which apply to your work.

Do you have any physical or mental condition that would hamper your ability to do any of the following:

- | | NO | YES |
|--|-----------|------------|
| 1. Use self-contained breathing apparatus (SCBA) | () | () |
| 2. Run | () | () |
| 3. Stand continuously for three (3) hours | () | () |
| 4. Keep balance | () | () |
| 5. Crawl | () | () |
| 6. Kneel | () | () |
| 7. Climb/work at heights greater than 10 feet | () | () |
| 8. Work in tight or enclosed places | () | () |
| 9. Reach above shoulder height with both arms | () | () |
| 10. Fully use both hands | () | () |
| 11. Use heavy exertion suddenly and continuously | () | () |

Is there any reason that you cannot work under any of the following environmental conditions?

- | | NO | YES |
|-------------------------|-----------|------------|
| 1. Very dry air | () | () |
| 2. Very humid air | () | () |
| 3. On slippery surfaces | () | () |
| 4. Heat | () | () |
| 5. Cold | () | () |
| 6. Very bright light | () | () |
| 7. Very dim light | () | () |
| 8. Noise | () | () |
| 9. Dust | () | () |
| 10. Smoke | () | () |

I certify that my answers to the above questions are true to the best of my knowledge.

DATE

SIGNATURE

N. Medical screening form. The following form shall be used for medical screening of each firefighter:

MEDICAL SCREENING FORM FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes".

NO / YES

- 1. Systolic blood pressure (sitting) above 150 mm Hg () ()
- 2. Diastolic blood pressure (sitting) above 100 mm Hg () ()
- 3. Pulse (sitting) above 95 beats/min. () ()
Snellen test (contact lens not allowed)
- 4. Left eye (corrected) worse than 20/30 () ()
- 5. Right eye (corrected) worse than 20/30 () ()
- 6. Left eye (uncorrected) worse than 20/200 () ()
- 7. Right eye (uncorrected) worse than 20/200 () ()

I certify that the findings are accurate.

DATE

SIGNATURE

PRINT NAME

PRINT PROFESSIONAL TITLE

O. Physician's certification criteria. The following criteria shall be used by any physician in the examination of any firefighter for certification:

PHYSICIAN'S CERTIFICATION CRITERIA FOR FIREFIGHTERS

- 1. Hearing threshold level (corrected) in both ears not over 30 dB average at 500, 1000 and 2000 Hz, with no single frequency over 35 dB and not over 55 dB at 4,000 Hz based on the zero reference level as specified in the American National Standards Institute (ANSI) S3.6-1969 (R1973) "Specifications for Audiometers".
- 2. Vision acuity worse than 20/30 (corrected) or 20/200 (uncorrected) in either eye. (Contact lenses are not permitted.)
- 3. Cardiovascular disease including (a) either history or electrocardiographic evidence of myocardial infraction or angina pectoris, (b) abnormal electrocardiogram with dysrhythmia, conduction block, or chamber hypertrophy, unless specifically waived as being at risk for firefighting duties by a physician, and (c) systemic arterial hypertension uncontrolled down to levels below 150 mm Hg systolic and 100 mm Hg diastolic blood pressure.
- 4. Seizure disorder of any type unless free of seizures and not taking anti-seizure medication throughout previous five (5) years.
- 5. Chronic obstructive or chronic restrictive lung disease with vital capacity or forced expiratory volume in one second (FEV1) less than 75% predicted, or bronchial asthma requiring chronic or intermittent medication.
- 6. Other physical or mental conditions that preclude (a) strenuous effort (b) mobility, agility or alertness in dangerous situations, or (c) the carrying out of the duties of a firefighter without excess risk of harm to the firefighter's health or safety.
- 7. Incomplete tetanus immunization.

P. Suggested training sources:

- (1) International Fire Service Training Association, Oklahoma State University, Fire Protection Publication, Stillwater, Oklahoma 74078-0118.
- (2) National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.
- (3) New Mexico State Fire Marshal's office, P.O. Box 1269, Santa Fe, NM 87504.
- (4) National Inter-agency Qualification System, Publication Management System, 3833 S. Development Way, Boise, Idaho 83705.

Q. Inspection and maintenance check list for self-contained breathing apparatus:

| REGULATOR CHECK | CYLINDER CHECK | AUDI-LARM CHECK | APPARTUS CHECK | FACEPIECE CHECK | GASKET & AIRLEAK TEST | REMARKS | INSPECTED BY & DATE |
|-----------------|----------------|-----------------|----------------|-----------------|-----------------------|---------|---------------------|
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- 1. Regulator Check: The functions of the reducing value and of the emergency by-pass valve shall be checked for proper operation.
- 2. Cylinder Check: Cylinder pressure shall be at least 80% of the full operating pressure. Observation of cylinder pressure gauge and regulator guage for corresponding pressure.
- 3. Audi-Larm Check: Check for Audi-Larm function when system is activated and again when system is deactivated and pressure

falls below 400-600 psi.

4. **Apparatus Check:** Inspect conditions of straps on harness, tightness of screws and fasteners, and locking devices.

5. **Facepiece Check:** Inspect facepiece components for damage and the condition of headband straps, exhalation valve, speaking diaphragm, breathing tube and facepiece lens.

6. **Gasket & Airleak Test:** Inspect condition of breathing tube, "O" rings, and speaking diaphragm. If a leak is suspected, apply soapy water to the threaded connection between the valve body and the cylinder, to the pressure gage and its connection between the valve body, to the safety plug, and to the regulator. Open the cylinder valve and apply soapy water to the valve stem and packing gland nut. Expanding bubbles indicate leaks.

7. **Remarks:** Use this column to list and describe any replacement parts used or any repairs made to the SCBA.

R. Qualitative fit test protocols (QLFT):

(1) Irritant smoke test: The irritant smoke is produced by air flowing through a commercially available stannic tetrachloride or titanium tetrachloride smoke tube normally used to check the performance of ventilation systems. Ventilation should be provided in the test room to prevent contamination of the room with smoke. If the respirator wearer detects penetration of smoke in the respirator during the test, the wearer should be permitted to readjust the seal of the SCBA. The test operator operates the smoke tube to direct smoke over the SCBA while the wearer is inhaling, keeping the smoke tube about one foot from the facepiece, and watches the reactions of the wearer. If the wearer does not detect penetration of smoke into the facepiece, the test operator moves the smoke tube closer to the facepiece and observes the reactions of the wearer. When the smoke tube has moved to within six inches of the facepiece and the wearer still has not detected penetration of smoke, the smoke may be directed at potential sources of leakage (for example, beneath the chin and around the cheeks, temples and forehead) in the seal of the facepiece to the wearer. If the wearer still does not detect penetration of smoke, the wearer should carry out a series of exercises such as deep breathing, turning the head from side to side, nodding the head up and down, frowning, and talking while smoke is directed at the respirator. If the wearer is unable to detect penetration of smoke, a satisfactory fit has been achieved.

(2) Odorous vapor test:

(a) A material commonly used in the odorous vapor test is isoamyl acetate. The simplest means of carrying out the test

is to saturate a piece of fabric or sponge or fill a stencil brush with liquid isoamyl acetate and then move the fabric, sponge or stencil brush around the facepiece of a respirator worn by a person. The fabric, sponge, or stencil brush should be passed close to the potential sources of leakage in the seal of the facepiece while the wearer is inhaling and performing the recommended exercises. If the wearer detects the odor of isoamyl acetate vapor during the test, the wearer should be permitted to readjust the seal of the facepiece. If the wearer is unable to detect the odor of isoamyl acetate vapor when inhaling, a satisfactory fit has been achieved.

(b) A major drawback of a test using isoamyl acetate vapor as the test agent is that the odor threshold varies widely among people. Most can detect by odor a concentration of isoamyl acetate vapor in air as low as 0.1 parts per million by volume. After a person has smelled the odor for a long period of time, olfactory fatigue may cause a failure to detect the odor of low concentration of isoamyl acetate vapor in the air. Several hours before a facepiece fitting test is performed, all those who are to undergo the test should first be tested to determine their ability to detect the odor of isoamyl acetate vapor in air. It should also be noted that people being tested can fake the test by indicating that they do not detect the odor when they actually do, or vice versa.

S. Availability of forms:

The forms illustrated in [~~Sections 10.M through 10.R~~] Subsections L through Q of this section are available from the bureau. [9/12/84, 2/21/86, 6/16/88, 7/11/89, 2/13/90, 4/13/90, 5/1/95, 9/15/98; 11.5.2.10 NMAC - Rn & A, 11 NMAC 5.2.10, 10/30/08]

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 11.5.3 NMAC, Sections 2, 5, 6, and 9. This action also renumbers and reformats 11 NMAC 5.3, Occupational Health and Safety - Construction Industry (filed 10/27/95) into current NMAC requirements, effective 10/30/08.

11.5.3.2 SCOPE: All employment and places of employment of every employee engaged in work for construction, alteration, [~~and/or~~] or repair, including painting and decorating. [5/1/95; 11.5.3.2 NMAC - Rn & A, 11 NMAC 5.3.2, 10/30/08]

11.5.3.5

EFFECTIVE DATE:

May 1, 1995, unless a later effective date is indicated in the history note at the end of a section [~~or paragraph~~].

[5/1/95, 7/15/96, 3/16/97; 11.5.3.5 NMAC - Rn & A, 11 NMAC 5.3.5, 10/30/08]

11.5.3.6 OBJECTIVE: To establish standards related to employee occupational health and safety in the construction industry.

[5/1/95; 11.5.3.6 NMAC - Rn & A, 11 NMAC 5.3.6, 10/30/08]

11.5.3.9 INCORPORATED FEDERAL STANDARDS:

A. General. Except as otherwise provided in Subsection C of this section, the provisions of 29 CFR Part 1926, Safety and Health Regulations for Construction (internet: www.osha.gov), are hereby incorporated into this section.

B. Incorporation of applicable general standards: Additionally, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards, identified by the United States department of labor as applicable to the construction industry and incorporated by 11.5.2 NMAC, Occupational Health and Safety-General Standards, are hereby made applicable to construction.

C. Modifications, exceptions, and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1926, incorporated by Subsection A of this section:

~~(1) omit 1926.1;~~

~~(2) amend 1926.2(a) by adding "(a) for multi state employers only....";~~

~~(3) omit 1926.3;~~

~~(4) omit 1926.4] omit Subpart A-general 1926.1 through 5;~~

~~(5) (2) omit Subpart B-general interpretations (1926.10 through 1926.16); and~~

~~(6) (3) amend 1926.59, hazard communication, as follows:~~

~~(a) [1926.59(g)(9)] 1910.1200(g)(9) is amended to read: Where employees must travel between work places during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. This information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.~~

~~(b) The introductory paragraph to [1926.59(h)] 1910.1200(h) is amended to read: Employee information and training: (1) employers shall provide employees with~~

effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[3/21/79, 1/20/80, 5/21/88, 5/1/95, 7/15/96, 3/16/97, 9/15/97, 8/15/98; 11.5.3.9 NMAC - Rn & A, 11 NMAC 5.3.9, 10/30/08]

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 11.5.4 NMAC, Sections 5, 7, 11, and the addition of new Section 12. This action also renumbers and reformats 11 NMAC 5.4, Occupational Health and Safety - Agriculture (filed 10/27/95) into current NMAC requirements, effective 10/30/08.

11.5.4.5 EFFECTIVE DATE:

May 1, 1995, unless a later effective date is indicated in the history note at the end of a section ~~or paragraph~~.

[5/1/95, 8/15/98; 11.5.4.5 NMAC - Rn & A, 11 NMAC 5.4.5, 10/30/08]

11.5.4.7 DEFINITIONS:

A. General: The provisions of 11.5.1.7 NMAC are applicable to this part.

B. Additional definitions: The following definitions, in addition to those contained in ~~[11.5.1.12]~~ 11.5.1.7 NMAC and the state act, are applicable to this part.

(1) "Agricultural employer" means any person who owns or operates an agricultural establishment or on whose premises or in whose interest an agricultural establishment is operated and any person who is responsible for the management and condition of an agricultural establishment or who acts directly or indirectly in the interest of an employer in relation to any employee.

(2) "Agricultural establishment" means a business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants, or parts of plants.

(3) "Hand-labor operations"

means agricultural activities or operations performed by hand or with hand tools, including but not limited to the hand harvest of vegetables, nuts, and fruit, hand weeding of crops and hand planting of seedlings, but not including such activities as logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures such as canning facilities or packing houses.

(4) "Handwashing facility" means a facility providing a basin, container, or outlet with an adequate supply of potable water, soap and single-use towels.

(5) "Potable water" means:

(a) water that meets the standards for drinking purposes by the state or local authority having jurisdiction; or

(b) water that meets the quality standards prescribed by the United States environmental protection agency's National Interim Primary Drinking Water Regulations, published in 40 CFR Part 141~~[-and]~~.

(6) "Toilet facility" means a fixed or portable facility designed for defecation and urination, including a biological or chemical toilet, ~~[a combustion toilet, or a sanitary privy]~~, which is supplied with toilet paper adequate to employee needs.

[7/23/86, 5/1/95; 11.5.4.7 NMAC - Rn & A, 11 NMAC 5.4.8, 10/30/08]

11.5.4.10 TOOLS FOR WEEDING AND THINNING CROPS:

A. Scope: This section applies to any agricultural establishment where employees are engaged on any given day in hand-labor operations in the field.

B. Requirements: The use of a hoe, knife, or fork less than four ~~[(4)]~~ feet in length for weeding and thinning crops is prohibited.

[7/23/86, 5/1/95; 11.5.4.10 NMAC - Rn & A, 11 NMAC 5.4.10, 10/30/08]

11.5.4.11 FIELD SANITATION:

A. Scope: This section applies to any agricultural establishment where ~~[eleven (11) or more employees are engaged]~~ on any given day ~~there are employees engaged~~ in hand-labor operations in the field.

B. Requirements: Agricultural employers shall provide the following for employees engaged in hand-labor operations in the field, without cost to the employee, and employees shall be allowed reasonable opportunities during the workday to use the toilet facilities.

(1) **Potable drinking water:**

(a) Potable water shall be provided and shall be placed in locations readily accessible to all employees.

(b) The water shall be suitably cool and in sufficient amounts, taking into

account the air temperature, humidity and the nature of the work performed to meet employees' needs.

(c) The water shall be dispensed in single use drinking cups or by fountains. The use of common drinking cups or dip-pers is prohibited.

(2) Toilet and handwashing facilities:

(a) One toilet facility and one handwashing facility shall be provided for each ~~[twenty]~~ 20 employees or fraction thereof, except as stated in Subparagraph (d) of ~~[Paragraph 2 of Subsection B of 11.5.4.11 NMAC]~~ this paragraph.

(b) Toilet facilities shall have doors that can be closed and latched from the inside and shall be constructed to insure privacy.

(c) Toilet and handwashing facilities shall be accessibly located, in close proximity to each other, and within one-quarter (1/4) mile (0.4 kilometers) of each employee's place of work in the field. Where it is not feasible to locate facilities accessibly and within the required distance due to the terrain, they shall be located at the point of closest vehicular access.

(d) Toilet and handwashing facilities are not required for employees who perform field work for a period of three ~~[(3)]~~ hours or less (including transportation time to and from the field) during the day.

(3) **Maintenance:** Potable drinking water and toilet and handwashing facilities shall be maintained in accordance with appropriate public health sanitation practices, including the following:

(a) drinking water containers shall be covered, cleaned and refilled daily;

(b) toilet facilities shall be operational and maintained in clean and sanitary condition;

(c) handwashing facilities shall be maintained in clean and sanitary condition; and

(d) disposal of wastes from facilities shall not cause unsanitary conditions.

~~[(4) Reasonable use. Employees shall be allowed reasonable opportunities during the workday to use the toilet facilities.]~~

[7/23/86, 5/1/95; 11.5.4.11 NMAC - Rn & A, 11 NMAC 5.4.11, 10/30/08]

11.5.4.12 EMERGENCY MEDICAL CARE:

A. In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available. Appendix A to 29 CFR Part 1910.151 - first aid kits (non-mandatory) may be used as guidance in determining the adequacy of first aid sup-

plies.

B. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.
[11.5.4.12 NMAC - N, 10/30/08]

**NEW MEXICO
DEPARTMENT OF
FINANCE AND
ADMINISTRATION
LOCAL GOVERNMENT DIVISION**

This is an amendment to 2.110.2 NMAC, Sections 10, 17, 18 and 19, effective September 30, 2008.

2.110.2.10 ELIGIBLE APPLICANTS

A. All counties, incorporated municipalities, and New Mexico mortgage finance authority (MFA) are eligible to apply except: the city of Albuquerque, the city of Farmington, the city of Las Cruces, the city of Santa Fe and the city of Rio Rancho who cannot apply since they receive funding directly from the department of housing and urban development (Title I, Section 106) as entitlement cities.

B. Other entities such as water associations, sanitation districts, land grants, public nonprofit groups, etc., cannot apply directly for assistance, other than planning grants.

C. However, these entities may be involved in the execution of an approved CDBG project if the eligible applicant chooses to operate the program through such an entity under a contractual agreement.

D. Indian pueblos and tribes receive funding directly from the department of housing and urban development (Title I, Section 107). Native American tribes are encouraged to submit applications to the Albuquerque HUD Office of Native American Programs, 201 3rd St., N.W., Suite 1830, Albuquerque, New Mexico 87102-3368, (505) 346-6923. [2.110.2.10 NMAC - Rp 2 NMAC 110.2.10, 08-30-01; A, 08-13-04 A, 09-28-07; A, 09-30-08]

2.110.2.17 APPLICATION REQUIREMENTS

A. Number of applications - All eligible applicants may submit one application for CDBG funding assistance in the infrastructure, housing, public facility capital outlay, or colonias categories.

(1) Planning applicants may sub-

mit at anytime an additional application for funding and shall not exceed fifty thousand dollars (\$50,000).

(2) Applicants in the economic development, emergency may be submitted at any time and shall not exceed five hundred thousand dollars (\$500,000), subject to funding availability.

(3) Counties may submit multiple applications for planning grants for water associations.

(4) Planning, economic development and emergency applications may be submitted, at anytime, even if the applicant has not completed other CDBG projects.

~~[(5) Counties may submit multiple applications for planning grants for water associations.]~~

B. Single purpose application -An application for CDBG funding must be limited to a project specific activity or set of activities which address a particular need in a designated target area of a unit of local government. The target area may not be the entire municipality or county.

C. Joint applications - Joint applications will be allowed when two or more eligible applicants within reasonable proximity of each other wish to address a common problem.

(1) One community will be designated to serve as the lead applicant and will be subject to administrative requirements and to the application limit requirements.

(2) However, other parties to the joint application may submit another application.

(3) Joint applications must satisfy certain federal criteria and must receive division approval prior to submitting an application for funding assistance.

(4) It should be noted that satisfying the required criteria, which is available from the division upon request, may take a significant period of time.

D. Application requirements for the following minimum requirements apply to all applications for CDBG funding:

(1) applications must involve a project that will be fully functional on a stand-alone basis once awarded CDBG and other committed funds have been expended and;

(2) projects shall be completed within twenty-four months of an award of funding;

(3) applications may not exceed \$500,000;

(4) if the applicant, after conducting the required public hearing, determines that the previous year's CDBG unfunded application is still a priority, the applicant must submit the original along with a current year's resolution, updated project budget and schedule and any other informa-

tion required by division staff.

E. Threshold requirements - To encourage timely completion of projects and to maximize participation the following threshold requirements shall be met prior to the application deadline.

(1) All projects for the eligible activities in the categories listed in Subsections C, D, E, and I of 2.110.2.11 NMAC must be completed at the time of application. (certificate of occupancy or certification of operation must be in place).

(2) All audit and monitoring findings, for CDBG projects, must be resolved.

(3) The current fiscal operating budget for any local public body applying for CDBG funds must be approved.

(4) The local government division financial management bureau will verify that financial quarterly/ monthly reports are current before CDBG applications deadline.

(5) The following set aside categories are exempt from threshold requirement: planning, economic development, and emergency.

F. Matching requirements - In order to assist the council in making funding resources go further and to ensure there is a local investment in applications submitted to the council for funding consideration, the following will be required.

(1) Rural applicants must provide, at a minimum, a 5% cash match during the project period from local, state, federal or other resources, this cannot include local work force or local equipment.

(2) Non-rural applicants must provide, at a minimum, a 10% cash match during the project period from local, state, federal or other resources, this cannot include local work force or local equipment.

(3) Consistent with ~~[Section 26 of these regulations]~~ 2.110.2 NMAC, all applications in the economic development category must provide at least ~~[two private dollars]~~ one private dollar for each dollar of CDBG funds requested.

(4) Local funds expended by eligible applicants for engineering, architectural design or environmental reviews prior to project approval can be applied towards the required match.

(5) Applicants may request a waiver of the matching requirement from the council if documentation can be provided which demonstrates the absence of local resources to meet the required match. Criteria used to recommend approval/disapproval will be as follows:

(a) the required match must exceed 5% of the applicant's general fund budget;

(b) the required match must equal or exceed the non-earmarked balance of funds in the applicant's budget.

G. Other funding commit-

ments - If other funding is necessary to make a proposed project feasible, funding commitments or commitments subject to CDBG approval, must be in place and letters of commitments from the funding agency must be submitted with the application.

H. Water conservation and drought commitments - In order to make the state's water supplies go further and to ensure proper levels of preparations are taken locally for periodic droughts, the following is encouraged:

(1) Applicants develop, adopt and submit to the state engineer a comprehensive water conservation ordinance.

(2) Applicants develop, adopt and submit to the state engineer a drought management plan.

(3) The ordinance and plan shall be accompanied by a program for its implementation.

(a) in developing a water conservation ordinance pursuant to this section: applicants shall adopt ordinances and codes to encourage water conservation measures; they shall identify and implement best management practices in their operations to improve conservation of the resources; and

(b) applicants shall consider and incorporate into its plan if appropriate, at least the following:

(i) water-efficient fixtures and appliances, including toilets, urinals, showerheads and faucets;

(ii) low-water-use landscaping and efficient irrigation;

(iii) water-efficient commercial and industrial water-use processes;

(iv) water reuse systems for both potable and non-potable water;

(v) distribution system leak repair;

(vi) dissemination of information regarding water-use efficiency measures, including public education programs and demonstrations of water-saving techniques;

(vii) water rate structures establishing rates or revenues that support the long term operation, maintenance, repair, and replacement of the system or facility and are designed to encourage water-use efficiency and reuse in a fiscally responsible manner and

(viii) incentives to implement water-use efficiency techniques, including rebates to customers or others, to encourage the installation of water-use efficiency and reuse measures.

(c) the council shall encourage the applicant to submit a copy of its water conservation plan with applications for construction of any facility.

I. Asset management - In

order to support the long term operation, maintenance, repair and replacement of system facilities, infrastructure, public facilities, or other eligible activities the following will be required.

(1) In order to ensure water and wastewater infrastructure is managed within a strategic framework driven by program and service deliver needs, communities that implement a rate analysis based upon an asset management program will be credited in the application process for their achievement. The model for the asset management program is the EPA publication "Asset Management: A Handbook for Small Water Systems (EPA 816-R-03-0160 September 2003).

(2) For community infrastructure and public facilities, or other eligible activities an asset management plan will be required to be submitted at the time of application (EPA 816-R-03-0160 September 2003).

[2.110.2.17 NMAC - Rp 2 NMAC 110.2.17, 08-30-01; A, 08-13-04; A, 08-15-05; A, 12-14-06; A, 09-28-07; A, 09-30-08]

2.110.2.18 APPLICATION PROCEDURES AND CONTENT:

The application packet provided by local government division will be used for infrastructure, housing, public facility, capital outlay, colonias, emergency categories, economic development and planning.

A. An applicant must submit an original and ~~three~~ two copies of each application to the Department of Finance and Administration, Local Government Division, Bataan Memorial Building, Suite 201, Santa Fe, New Mexico 87501, and one copy to the appropriate council of governments.

B. Applications must be received at the local government division by 5 p.m. of the designated application deadline. Applications received after that time will be returned to the applicant unprocessed.

[2.110.2.18 NMAC - Rp 2 NMAC 110.2.18, 08-30-01; A, 08-13-04; A, 12-14-06; A, 09-28-07; A, 09-30-08]

2.110.2.19 APPLICATION REVIEW AND EVALUATION PROCESS

A. Upon receipt of applications, division staff will review them for eligibility, completeness, feasibility, and compliance and to ensure that all other funding necessary to make the project functional is in place. Applications that are found to be incomplete, ineligible, not feasible or do not have other funding necessary to make the project functional, will be returned to the applicant and will not be considered for funding.

B. Applications will be

forwarded to appropriate state agencies for technical review and comment. Review agencies may include, but are not limited to, the environment department, department of transportation,, department of health, state engineer's office, state agency on aging, economic development department, state fire marshal and governor's commission on disability

C. Applicants will be allowed to make presentations to the council and division staff at an official council hearing. Testimony related to the application will be presented by an official or designee of the applying entity who may be assisted by technical staff.

D. Division staff will receive comments from state agencies regarding specific projects.

E. The council and division have developed the following rating criteria for evaluation of CDBG applications submitted for funding ~~[consideration]~~ in the following categories: infrastructure, housing, public facility, capital outlay and colonias [applications] application categories. For infrastructure, housing, public facility, capital outlay and colonia application categories, the following nine (9) criteria are used to score the application. In addition, for colonias applications, the applicant needs to fulfill the four conditions in Subsection G of 2.110.2.19 NMAC.

(1) **Description and need** - (5 points) extent to which the project is needed. The more severe the need as documented in the application, the higher the score. ~~[Colonias applicants must provide documentation to substantiate that a majority of the following conditions exist in the project area:~~

~~(a) lack of potable water;~~
~~(b) lack of an adequate sewage system;~~

~~(c) lack of safe, sanitary housing;~~
~~(d) source documentation must also be provided.]~~

It is only necessary to answer the questions on the application that pertain to the appropriate application category and do not answer questions on the application that pertain to other categories.

(2) **Benefit to low and moderate and appropriateness** - (20 points) extent to which the CDBG application:

(a) documents the number and percentage of low and moderate income beneficiaries, also include race and gender; or

(b) addresses the prevention or removal of slum or blighting conditions; or

(c) addresses conditions which pose a serious and immediate threat to the health and welfare of the community (for emergency applications only).

(3) **Leveraging** - (15 points) extent to which federal, state, and local resources, in addition to the required match,

are being used by the applicant for the proposed project. The greater the leveraging, in addition to the required match, the higher the score.

(4) Citizen participation - (10 points) extent to which the applicant:

(a) has provided opportunities for public participation in the identification of community development needs;

(b) pledges opportunities for active citizen participation during the project, where applicable; and;

(c) pledges opportunities for active citizen participation in the implementation of the project, where applicable.

(5) Planning - (10 points) extent to which the applicant:

(a) (3) points: Applicant has adopted a local (ICIP), which has qualified for publication in the most recent local (ICIP) published prior to the CDBG application deadline.

(b) (3) points: The proposed project has qualified for publication in the most recent ICIP prior to the CDBG application deadline and applicant has selected CDBG as one of its possible funding sources.

(c) 1 point: Degree to which applicant's proposed project shows consistency with applicant's comprehensive plan.

(d) 1 point: Adopting a drought contingency plan, setting in place various drought management stages and accompanying restrictions on water use.

(e) 1 point: Adopting a water conservation ordinance, setting in place various methods for conserving potable water.

(f) 1 point: Implementing a water conservation ordinance, accompanied by evidence of exercising at least two various methods for conserving potable water.

(6) Feasibility/readiness - (20 points) extent to which the project is technically and economically feasible and ready to be implemented. Examples of actions that can be taken prior to submission of the application to receive maximum points are:

(a) ~~[acquire necessary property]~~ necessary real property or easements acquired; (5)

(b) ~~[secure professional services]~~ professional services contract executed; (5)

(c) ~~[complete plans, specifications, or preliminary engineering report, etc.]~~ completed plans, specifications, bid documents, or preliminary engineering reports; (5)

(d) complete the environmental review process (5).

(7) Cost benefit - (10 points) number of direct beneficiaries of the project compared to the amount of funds requested. The higher the number of beneficiaries compared to the amount of funds requested, the higher the score.

(8) User fees and revenues - (10

points) What best demonstrates the rates or revenues that support the long term operation, maintenance, repair, and replacement of the system or facility?

(a) Rates developed by asset management as presented by the New Mexico Tech, environmental finance center (EFC). (10 points)

(b) rates developed by a rate analysis, excluding asset management or allowance for replacement of reserve funds. (5 points)

(c) rates developed by other. (1 point)

(9) Non-funded applicants - (10 points) - Applicants that were not funded in the prior year.

F. Planning criteria category

(1) Consistency (25 points): Document the degree to which the proposed planning project is consistent with the applicants current version of its comprehensive plan, its infrastructure capital improvement plan, and its planning region's consolidated plan, or its planning documents or studies.

(2) Appropriateness (25 points): Describe the impact the proposed project will have on at least one of the three national objectives of the CDBG program, i.e.,

(a) documents the number and percentage of low and moderate income beneficiaries, also include race and gender; or

(b) addresses the prevention or removal of slum or blighting conditions; or

(c) addresses conditions which pose a serious and immediate threat to the health and welfare of the community (for emergency applications only).

(3) Public involvement (25 points): Describe how the planning process will involve citizens in the preliminary identification of community needs, in the development and active participation in the planning process, and in the implementation of the plan, including a minimum of one public hearing with proper notice in accordance with law.

(4) Implementation strategy (25 points): Describe the local commitment of resources to the planning process; commitment to adopt the plan, either by resolution, rule, policy or ordinance; and commitment to use the results of the planning process in the decision making process.

G. Colonias criteria category - When submitting a colonias category application, the applicant shall provide documentation to substantiate that a majority of the following conditions exist in the project area:

(1) lack of potable water;

(2) lack of an adequate sewage system;

(3) lack of safe, sanitary housing;

(4) source documentation must also be provided of colonias designation.

[G.] H. Economic development rating criteria is included in Section 2.110.2.26.

[H.] I. Site visits will be conducted as needed during the ~~[application review process]~~ life time of the project to verify [the] or review information presented [in an application].

[I.] J. Division staff will present its recommendations in high, medium and low groupings to the council at least seven days prior to the allocation meeting.

[J.] K. Because emergency, economic development, and rural planning projects are received throughout the year, formal staff rating may not be necessary if all other federal and state requirements are met and other applications are not competing for funding assistance.

[2.110.2.19 NMAC - Rp 2 NMAC 110.2.19, 08-30-01; A, 08-13-04; A, 12-14-06; A, 09-28-07; A, 09-30-08]

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

This is an emergency amendment to Section 8 of 8.102.500 NMAC, effective October 1, 2008.

8.102.500.8 GENERAL REQUIREMENTS:

A. Need determination process: Eligibility for NMW and EWP cash assistance based on need requires a finding that:

(1) the benefit group's countable gross monthly income does not exceed the gross income limit for the size of the benefit group;

(2) the benefit group's countable net income after all allowable deductions does not equal or exceed the standard of need for the size of the benefit group;

(3) the countable resources owned by and available to the benefit group do not exceed the \$1500 liquid and \$2000 non-liquid resource limits;

(4) the benefit group is eligible for a cash assistance payment after subtracting from the standard of need the benefit group's countable income, and any payment sanctions or recoupments.

B. Gross income limits: The total countable gross earned and unearned income of the benefit group cannot exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group.

(1) Income eligibility limits are revised and adjusted each year in October.

(2) The gross income limit for the size of the benefit group is as follows:

- (a) one person [~~\$ 723~~] \$ 737
 (b) two persons [~~\$ 970~~] \$ 992
 (c) three persons [~~\$1,216~~] \$1,247
 (d) four persons [~~\$1,463~~] \$1,502
 (e) five persons [~~\$1,709~~] \$1,757
 (f) six persons [~~\$1,956~~] \$2,012
 (g) seven persons [~~\$2,202~~] \$2,267
 (h) eight persons [~~\$2,449~~] \$2,522
 (i) add [~~\$247~~] \$255 for each additional person.

C. Eligibility for support services only: Subject to the availability of state and federal funds, a benefit group that is not receiving cash assistance but has countable gross income that is less than 100% of the federal poverty guidelines applicable to the size of the benefit group may be eligible to receive services. The gross income guidelines for the size of the benefit group are as follows:

- (1) one person [~~\$ 851~~] \$ 867
 (2) two persons [~~\$1,141~~] \$1,167
 (3) three persons [~~\$1,431~~] \$1,467
 (4) four persons [~~\$1,721~~] \$1,767
 (5) five persons [~~\$2,011~~] \$2,067
 (6) six persons [~~\$2,301~~] \$2,367
 (7) seven persons [~~\$2,591~~] \$2,667
 (8) eight persons [~~\$2,881~~] \$2,967
 (9) add [~~\$290~~] \$300 for each additional person.

D. Standard of need:

(1) The standard of need is based on the number of participants included in the benefit group and allows for a financial standard and basic needs.

(2) Basic needs include food, clothing, shelter, utilities, personal requirements and the participant's share of benefit group supplies.

(3) The financial standard includes approximately \$91 per month for each participant in the benefit group.

(4) The standard of need for the NMW, and EWP cash assistance benefit group is:

- (a) one person \$ 266
 (b) two persons \$ 357
 (c) three persons \$ 447
 (d) four persons \$ 539
 (e) five persons \$ 630
 (f) six persons \$ 721
 (g) seven persons \$ 812
 (h) eight persons \$ 922
 (i) add \$91 for each additional person.

E. Special needs:

(1) **Special clothing allowance:** In order to assist in preparing a child for school, a special clothing allowance is made each year in the amount of \$100 for the months of August and January subject to the availability of state or federal funds.

(a) For purposes of determining eligibility for the clothing allowance, a child is considered to be of school age if the child is six years of age or older and less than age 19 by the end of August.

(b) The clothing allowance shall be allowed for each school-age child who is included in the NMW, or EWP cash assistance benefit group for the months of August and January subject to the availability of state or federal funds.

(c) The clothing allowance is not allowed in determining eligibility for NMW, or EWP cash assistance.

(2) **Layette:** A one-time layette allowance of \$25 is allowed upon the birth of a child who is included in the benefit group. The allowance shall be authorized by no later than the end of the month following the month in which the child is born.

(3) **Special circumstance:** Dependent upon the availability of funds and in accordance with the federal act, the HSD secretary, may establish a separate, non-recurring, cash assistance program that may waive certain New Mexico Works Act requirements due to a specific situation. This cash assistance program shall not exceed a four month time period, and is not intended to meet recurrent or ongoing needs.

[8.102.500.8 NMAC - Rp 8.102.500.8 NMAC, 07/01/2001; A, 10/01/2001; A, 10/01/2002; A, 10/01/2003; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 11/15/2007; A, 01/01/2008; A/E, 10/01/2008]

**NEW MEXICO HUMAN
 SERVICES DEPARTMENT
 INCOME SUPPORT DIVISION**

This is an emergency amendment to Section 8 of 8.106.500 NMAC, effective October 1, 2008.

8.106.500.8 GA - GENERAL REQUIREMENTS:

A. Need determination

process: Eligibility for the GA program based on need requires a finding that the:

(1) countable resources owned by and available to the benefit group do not exceed either the \$1500 liquid or \$2000 non-liquid resource limit;

(2) benefit group's countable gross earned and unearned income does not equal or exceed eighty-five percent (85%) of the federal poverty guideline for the size of the benefit group; and

(3) benefit group's countable net income does not equal or exceed the standard of need for the size of the benefit group.

B. GA payment determination:

The benefit group's cash assistance payment is determined after subtracting from the standard of need the benefit group's countable income and any payment sanctions or recoupments.

C. Gross income test:

The total countable gross earned and unearned income of the benefit group cannot exceed eighty-five percent (85%) of the federal poverty guidelines for the size of the benefit group.

(1) Income eligibility limits are revised and adjusted each year in October.

(2) The gross income limit for the size of the benefit group is as follows:

- (a) one person [~~\$ 723~~] \$ 737
 (b) two persons [~~\$ 970~~] \$ 992
 (c) three persons [~~\$ 1,216~~]

\$1,247

- (d) four persons [~~\$ 1,463~~]

\$1,502

- (e) five persons [~~\$ 1,709~~]

\$1,757

- (f) six persons [~~\$ 1,956~~]

\$2,012

- (g) seven persons [~~\$ 2,202~~]

\$2,267

- (h) eight persons [~~\$ 2,449~~]

\$2,522

- (i) add [~~\$247~~] \$255 for each additional person.

D. Standard of need:

(1) The standard of need is based on the number of individuals included in the benefit group and allows for a financial standard and basic needs.

(2) Basic needs include food, clothing, shelter, utilities, personal require-

ments and an individual benefit group member's share of supplies.

(3) The financial standard includes approximately \$91 per month for each individual in the benefit group.

(4) The standard of need for the GA cash assistance benefit group is:

- (a) one person \$ 266
- (b) two persons \$ 357
- (c) three persons \$ 447
- (d) four persons \$ 539
- (e) five persons \$ 630
- (f) six persons \$ 721
- (g) seven persons \$ 812
- (h) eight persons \$ 922
- (i) add \$91 for each additional person.

E. Net income test: The total countable earned and unearned income of the benefit group after all allowable deductions cannot equal or exceed the standard of need for the size of the GA benefit group.

F. Special clothing allowance for school-age dependent children: In order to assist in preparing a child for school, a special clothing allowance is made each year in the amount of \$100 for the months of August and January subject to the availability of state or federal funds.

(1) For purposes of determining eligibility for the clothing allowance, a child is considered to be of school age if the child is six years of age or older and less than age nineteen (19) by the end of August.

(2) The clothing allowance shall be allowed for each school-age child who is included in the GA cash assistance benefit group for the months of August and January subject to the availability of state or federal funds.

(3) The clothing allowance is not counted in determining eligibility for GA cash assistance.

G. Supplemental issuance: A one time supplemental issuance may be distributed to recipients of GA for disabled adults based on the sole discretion of the secretary of the human services department and the availability of state funds.

(1) The one time supplemental issuance may be no more than the standard GA payment made during the month the GA payment was issued.

(2) To be eligible to receive the one time supplement, a GA application must be active and determined eligible no later than the last day of the month in the month the one time supplement is issued.

[8.106.500.8 NMAC - N, 07/01/2004; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 01/01/2008; A, 06/16/2008; A/E, 10/01/2008]

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

This is an emergency amendment to section 8 of 8.139.500 NMAC effective October 1, 2008

8.139.500.8 BASIS OF ISSUANCE

A. Income standards: Determination of need in the food stamp program is based on federal guidelines. Participation in the program is limited to households whose income is determined to be a substantial limiting factor in permitting them to obtain a nutritious diet. The net and gross income eligibility standards are based on the federal income poverty levels established in the Community Services Block Grant Act [42 USC 9902(2)].

B. Gross income standards: The gross income eligibility standards for the 48 contiguous states, District of Columbia, Guam and the Virgin Islands is 130 percent (130%) of the federal income poverty levels for the 48 states and the District of Columbia. One hundred thirty percent (130%) of the annual income poverty guidelines is divided by 12 to determine monthly gross income standards, rounding the results upward as necessary. For households larger than eight, the increment in the federal income poverty guidelines is multiplied by 130%, divided by 12, and the results rounded upward if necessary.

C. Net income standards: The net income eligibility standards for the 48 contiguous states, District of Columbia, Guam and the Virgin Islands are the federal income poverty levels for the 48 contiguous states and the District of Columbia. The annual income poverty guidelines are divided by 12 to determine monthly net income eligibility standards, (results rounded upward if necessary). For households larger than eight, the increment in the federal income poverty guidelines is divided by 12, and the results rounded upward if necessary.

D. Yearly adjustment: Income eligibility limits are revised each October 1st to reflect the annual adjustment to the federal income poverty guidelines for the 48 states and the District of Columbia.

E. Issuance table: The issuance table lists applicable income guidelines used to determine food stamp (FS) eligibility based on household size. Some amounts are increased to meet the needs of certain categorically eligible households. Some of the net income amounts listed are higher than the income limits for some household sizes. Households not categorically eligible for FS benefits must have income below the appropriate gross income limit for household size.

| Household Size | Maximum Gross Monthly Income Elderly/Disabled Separate Status at 165% of Poverty | Maximum Gross Monthly Income At 130% of Poverty | Maximum Net Monthly Income At 100% of Poverty | Maximum Allotment (benefit amount) |
|--------------------------|--|---|---|------------------------------------|
| | [\$1,404] \$1,430 | [\$1,107] \$1,127 | [\$ 851] \$ 867 | [\$162] \$176 |
| 2 | [\$1,883] \$1,925 | [\$1,484] \$1,517 | [\$1,141] \$1,167 | [\$298] \$323 |
| 3 | [\$2,361] \$2,420 | [\$1,861] \$1,907 | [\$1,431] \$1,467 | [\$426] \$463 |
| 4 | [\$2,840] \$2,915 | [\$2,238] \$2,297 | [\$1,721] \$1,767 | [\$542] \$588 |
| 5 | [\$3,318] \$3,410 | [\$2,615] \$2,687 | [\$2,011] \$2,067 | [\$643] \$698 |
| 6 | [\$3,797] \$3,905 | [\$2,992] \$3,077 | [\$2,301] \$2,367 | [\$772] \$838 |
| 7 | [\$4,275] \$4,400 | [\$3,369] \$3,467 | [\$2,591] \$2,667 | [\$853] \$926 |
| 8 | [\$4,754] \$4,895 | [\$3,746] \$3,857 | [\$2,881] \$2,967 | [\$975] \$1,058 |
| \$Each Additional Member | [\$479] \$495 | [\$377] \$390 | [\$290] \$300 | [\$122] \$132 |

F. Deductions and standards:

(1) **Determination:** Expense and standard deduction amounts are determined by federal guidelines and may be adjusted each year. Households eligible based on income and resource guidelines, and other relevant eligibility factors, are allowed certain deductions to determine countable income.

(2) **Yearly adjustment:** The expense and standard deductions may change each year. If federal guidelines mandate a change, it is effective each October 1st.

(3) **Expense deductions and standards table:**

| | |
|---|--|
| Standard Deduction for Household Size of 1 through 3 | [\$134.00] \$144.00 |
| Standard Deduction for Household of 4 | [\$143.00] \$147.00 |
| Standard Deduction for Household Size of 5 | [\$167.00] \$172.00 |
| Standard Deduction for Household Size of 6 or more | [\$191.00] \$197.00 |
| Earned Income Deduction (EID) | 20% |
| Dependent Care Deduction [Limit (per dependent)- Under age 2- All others including elderly dependent-] | <u>Actual Amount</u> [\$200.00] [\$175.00] |
| Heating/Cooling Standard Utility Allowance (HCSUA) | [\$234.00] \$278.00 |
| Limited Utility Allowance (LUA) | [\$100.00] \$101.00 |
| Telephone Standard (TS) | \$32.00 |
| Excess Shelter Cost Deduction Limit for Non -Elderly/Disabled Households | [\$431.00] \$446.00 |
| Homeless Household Shelter Standard | \$ 143.00 |
| Minimum Allotment for Eligible One -and Two-Person Households | [\$10.00] \$14.00 |

[02/1/95, 10/01/95, 02/29/96, 10/01/96, 3/15/97, 01/15/98,11/15/98, 12/15/99, 01/01/01, 03/01/01; 8.139.500.8 NMAC - Rn, 8 NMAC 3.FSP.501, 05/15/2001; A, 10/01/2001; A, 10/01/2002, A, 09/01/2003; A, 10/01/2003; A/E, 10/01/2004; A/E, 10/01/2005; A/E, 10/01/2006; A/E, 10/01/2007; A/E, 10/01/2008]

**NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION**

This is an amendment to 8.325.10 NMAC, Sections 1, 3, 5, 6, 8 through 17, effective October 15, 2008.

8.325.10.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).
[2/1/95; 8.325.10.1 NMAC - Rn, 8 NMAC 4.MAD.000.1, 12/1/03, A, 10/15/08]

8.325.10.3 STATUTORY AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal

department of health and human services under Title XIX of the Social Security Act, [as amended and by the state human services department pursuant to state statute] as amended or state statute. See Section 27-2-12 et seq. NMSA 1978 (Repl. Pamp. 1991).
[2/1/95; 8.325.10.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 12/1/03; A, 10/15/08]

8.325.10.5 EFFECTIVE DATE: February 1, 1995, unless a later date is cited at the end of a section.
[2/1/95; 8.325.10.5 NMAC - Rn, 8 NMAC 4.MAD.000.5, 12/1/03; A, 10/15/08]

8.325.10.6 OBJECTIVE: The objective of these [regulations] rules is to provide [policies] instructions for the service portion of the New Mexico [medicaid

program] medical assistance programs. [These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement].
[2/1/95; 8.325.10.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 12/1/03; A, 10/15/08]

8.325.10.8 MISSION STATEMENT: The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of [medicaid eligible individuals] eligible recipients by furnishing payment for quality health services at levels comparable to private health plans.
[2/1/95; 8.325.10.8 NMAC - Rn, 8 NMAC 4.MAD.002, 12/1/03; A, 10/15/08]

8.325.10.9 EMERGENCY SER-

VICES FOR UNDOCUMENTED

ALIENS: The New Mexico [medicaid program (medicaid)] MAD is required to pay for necessary emergency services furnished to individuals who are undocumented aliens, reside in New Mexico and meet the requirements for [medicaid] MAD eligibility [42 CFR 440.255(c)]. [This section gives the definition of an emergency situation, eligible recipients, covered services, service limitations and general reimbursement methodology.]

[2/1/95; 8.325.10.9 NMAC - Rn, 8 NMAC 4.MAD.769, 12/1/03; A, 10/15/08]

8.325.10.10 ELIGIBLE PROVIDERS:

[Upon approval of New Mexico medical assistance program provider participation agreements by the New Mexico medical assistance division (MAD), all providers who furnish emergency services for conditions that meet the definition of an emergency for certain eligible individuals who are undocumented aliens are eligible to be reimbursed for furnishing those services.] Upon approval of a New Mexico MAD provider participation agreement by MAD or its designee, licensed practitioners of facilities that meet applicable requirements are eligible to be reimbursed for furnishing covered services to eligible recipients. A provider must be enrolled before submitting a claim for payment to the MAD claims processing contractors. MAD makes available on the HSD/MAD website, on other program-specific websites, or in hard copy format, information necessary to participate in health care programs administered by HSD or its authorized agents, including program rules, billing instructions, utilization review instructions, and other pertinent materials. When enrolled, providers receive instruction on how to access these documents. It is the provider's responsibility to access these instructions or ask for paper copies to be provided, to understand the information provided and to comply with the requirements. The provider must contact HSD or its authorized agents to request hard copies of any program policy manuals, billing and utilization review instructions and other pertinent material, and to obtain answers to questions found in the material or not covered by the material. To be eligible for reimbursement, a provider must adhere to the provisions of the MAD provider participation agreement and all applicable statutes, regulations, and executive orders. [2/1/95; 8.325.10.10 NMAC - Rn, 8 NMAC 4.MAD.769.1, 12/1/03; A, 10/15/08]

8.325.10.11 PROVIDER RESPONSIBILITIES: [Providers who furnish services to medicaid recipients must comply with all specified medicaid partici-

pation requirements. See 8.302.1 NMAC, *General Provider Policies*. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance. Providers must maintain records that are sufficient to fully disclose the extent and nature of the services furnished to recipients. See 8.302.1 NMAC, *General Provider Policies*.] A provider who furnishes services to medicaid and other health care eligible recipients must comply with all federal and state laws, regulations, and executive orders relevant to the provision of medical services as specified in the MAD provider participation agreement. A provider must adhere to the MAD program rules and instructions as specified in this manual and its appendices, and program directions and billing instructions, as updated. A provider is also responsible for following coding manual guidelines and CMS correct coding initiatives, including not improperly unbundling or up-coding services. See 8.302.1 NMAC, *General Provider Policies*.

[2/1/95; 8.325.10.11 NMAC - Rn, 8 NMAC 4.MAD.769.2 & A, 12/1/03; A, 10/15/08]

8.325.10.12 ELIGIBLE INDIVIDUALS:

A. Individuals who are undocumented, illegal, and non-immigrant aliens and who meet all the eligibility criteria [for JUL Medicaid (category 072), children meeting applicable age requirements (category 032), medicaid] for MAD pregnant women (category 030 or 035), or supplemental security income (SSI), except for citizenship or legal alien status, are eligible to receive emergency services.

B. Eligibility determinations are made by local county income support division (ISD) offices after the receipt of emergency services. The individual is responsible for completing an application at the local county ISD office and for providing all necessary documentation to prove that he or she meets the applicable eligibility criteria.

(1) Individuals must apply for [medicaid] coverage at the ISD office no later than the last day of the third month following the month in which the alleged emergency services were received.

(2) Individuals are responsible for notifying providers of the approval or denial of [a medicaid] an application.

(3) If an application is denied or an application for [medicaid] coverage is not filed by the last day of the third month following the month in which the alleged emergency services were received, the individual is responsible for payment of the provider bill.

(4) If reimbursement for services

is denied by [medicaid] MAD, the individual is responsible for payment and can be billed directly for payment by the provider. [2/1/95; 8.325.10.12 NMAC - Rn, 8 NMAC 4.MAD.769.3 & A, 12/1/03; A, 10/15/08]

8.325.10.13 COVERAGE CRITERIA:

A. "Emergency" [is defined as a medical condition, including all emergency labor and delivery, which including all emergency inductions and unscheduled cesarean sections] as defined for EMSA includes labor and delivery including inductions and cesarean sections, as well as any other medical condition, manifesting itself with acute symptoms of sufficient severity such that the absence of immediate emergency medical attention could reasonably be expected to result in one of the following:

- (1) the individual's death;
- (2) placement of the individual's health in serious jeopardy;
- (3) serious impairment of bodily functions; or
- (4) serious dysfunction of any bodily organ or part.

B. [Only medical services that are] Services are covered only when necessary to treat [and/or] or evaluate a condition meeting the definition of emergency and are covered only for the duration of that emergency.

C. After delivery, a child can have legally documented or citizenship status because of its birth in the United States and, therefore, is not eligible for emergency services for undocumented aliens. The child may be eligible for another [medicaid] MAD category of eligibility on [his/her] his or her own.

D. Determination of coverage is made by MAD or its designee. [2/1/95; 8.325.10.13 NMAC - Rn, 8 NMAC 4.MAD.769.4 & A, 12/1/03; A, 10/15/08]

8.325.10.14 SERVICE LIMITATIONS:

[Medicaid] MAD covers only those emergency medical services furnished in the state of New Mexico. To meet the categorical eligibility requirements, [individuals] recipients who are undocumented aliens must be residents of the state of New Mexico. Proof of residence must be furnished by the undocumented alien to the local county ISD office. Individuals traveling through New Mexico, entering the United States through New Mexico en route to another destination, visiting in New Mexico or touring New Mexico with a tourist visa do not meet the residence requirement.

[2/1/95; 8.325.10.14 NMAC - Rn, 8 NMAC 4.MAD.769.5, 12/1/03; A, 10/15/08]

8.325.10.15 NON COVERED SERVICES: ~~Medicaid~~ MAD does not cover any medical service that is not necessary to treat ~~and/or~~ or evaluate a condition for an individual who is an undocumented alien that does not meet the definition of emergency. ~~Medicaid~~ Additionally, MAD does not cover the following specific services:

- A. long term care;
 - B. organ transplants;
 - C. rehabilitation services;
 - D. ~~[surgical procedures; including scheduled cesarean sections, other than unscheduled emergency procedures]~~ elective surgical procedures;
 - E. psychiatric or psychological services;
 - F. durable medical equipment or supplies;
 - G. eyeglasses;
 - H. hearing aids;
 - I. outpatient prescriptions;
 - J. podiatry services;
 - K. prenatal and postpartum care;
 - L. well child care;
 - M. routine dental care;
 - N. routine dialysis services,
 - O. any medical service furnished by ~~a border or~~ an out-of-state provider;
 - P. non-emergency transportation; and
 - Q. preventive care.
- [2/1/95; 8.325.10.15 NMAC - Rn, 8 NMAC 4.MAD.769.6 & A, 12/1/03; A, 10/15/08]

8.325.10.16 UTILIZATION REVIEW: All claims for services furnished to individuals who are undocumented aliens are reviewed by MAD or its designee before payment to determine if the circumstances warrant coverage. If the MAD medical director or another physician appointed by MAD to perform this specific task determined that the services were furnished in a non-emergency situation, a claim for services is denied and payment for services becomes the responsibility of the individual.

- A. **Eligibility determination:** Undocumented aliens who request ~~medicaid~~ MAD coverage for services must meet specific categorical eligibility requirements. Eligibility determinations by local county ISD offices must be made before the review for medical necessity.
- B. **Reconsideration:** Providers and undocumented aliens are given notice of the denial of ~~medicaid~~ MAD payment. Providers ~~[or aliens]~~ can request a re-review and reconsideration of denied medical claims. See 8.350.2 NMAC, *Reconsideration of Utilization*

Review Decisions. Aliens can also request a hearing. See 8.352.2 NMAC, Recipient Hearings.
[2/1/95; 8.325.10.16 NMAC - Rn, 8 NMAC 4.MAD.769.7 & A, 12/1/03; A, 10/15/08]

8.325.10.17 REIMBURSEMENT:
~~[A. Providers furnishing services to undocumented aliens must submit claims for reimbursement on the HCFA-1500 or UB-92 claim form or its successor, depending on the provider type. See 8.302.2 NMAC, Billing for Medicaid Services. Once enrolled, providers receive instructions on documentation, billing and claims processing. Reimbursement to professional service providers for covered emergency services is made at the lesser of the following:~~
(1) the provider's billed charge;
~~or~~
(2) the MAD fee schedule for the specific service or procedure.
B. The provider's billed charge must be their usual and customary charge for services.
C. "Usual and customary" charge refers to the amount which an individual provider charges the general public in the majority of cases for a specific procedure or service.
D. ~~Reimbursement for institutional service providers is made at the rate specified in the specific service sections of this manual.]~~ Reimbursement is made according to the rules applicable to the provider rendering the service.
[2/1/95; 8.325.10.17 NMAC - Rn, 8 NMAC 4.MAD.769.8, 12/1/03; A, 10/15/08]

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

6.30.8 NMAC, Distance Learning, filed December, 28, 2006 is repealed and replaced by 6.30.8 NMAC, Distance Learning, effective September 30, 2008.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

TITLE 6 PRIMARY AND SECONDARY EDUCATION CHAPTER 30 EDUCATIONAL STANDARDS - GENERAL REQUIREMENTS PART 8 DISTANCE LEARNING

6.30.8.1 ISSUING AGENCY: Public Education Department (PED)

[6.30.8.1 NMAC - Rp, 6.30.8.1 NMAC, 9-30-08]

6.30.8.2 SCOPE: All public schools, charter schools, nonpublic schools, home schools and schools or institutions that serve delinquent children and youth who are detained temporarily or who are committed for long-term care and rehabilitation. This rule does not apply to the use of technologies or methods used in distance learning programs when such technology or methods are used within a regular classroom setting solely to supplement or aid classroom instruction.
[6.30.8.2 NMAC - Rp, 6.30.8.2 NMAC, 9-30-08]

6.30.8.3 STATUTORY AUTHORITY: Sections 22-2-1, 22-2-2, 22-13-1.1, and 22-30-1et seq. NMSA 1978.
[6.30.8.3 NMAC - Rp, 6.30.8.3 NMAC, 9-30-08]

6.30.8.4 DURATION: Permanent
[6.30.8.4 NMAC - Rp, 6.30.8.4 NMAC, 9-30-08]

6.30.8.5 EFFECTIVE DATE: September 30, 2008, unless a later date is cited at the end of a section.
[6.30.8.5 NMAC - Rp, 6.30.8.5 NMAC, 9-30-08]

6.30.8.6 OBJECTIVE: This rule establishes requirements for statewide and locally administered distance learning courses taken for credit or for a grade by distance learning students enrolled in public school districts, charter schools, state-supported schools, nonpublic schools, and home schools, and for children and youth detained or committed to juvenile detention facilities or other facilities for the long-term care and rehabilitation of delinquent children and youth, as well as for professional development opportunities for teachers, instructional support providers and administrators.
[6.30.8.6 NMAC - Rp, 6.30.8.6 NMAC, 9-30-08]

6.30.8.7 DEFINITIONS:
A. "Asynchronous instruction" means the course provider and the distance-learning student do not interact at the same time and can, but need not, utilize the internet.
B. "Council on technology in education" means the council established pursuant to the Technology for Education Act [22-15A-5 NMSA 1978], which advises the department on implementing educational technology, promotes the collaborative development and implementation of educational technologies, develops and rec-

ommends a statewide plan to the department related to educational standards, and provides assistance to the department in reviewing school district technology plans to support on-site and distance learning.

C. "Course provider" means a person, institution, or organization that supplies educational course content for distance learning courses.

D. "Department" means the public education department.

E. "Distance learning" means the technology and educational process used to provide instruction for credit or grade when the course provider and the distance-learning student are not necessarily physically present at the same time or place. Distance learning does not include educational software that utilizes only on-site teaching.

F. "Distance learning course" means an educational course that is taught where the student and primary instructor are separated by time or space and linked by technology.

G. "Distance learning irregularities" means any circumstances within or beyond the control of a local distance learning site that in the opinion of the department or a local distance learning site raises doubts about the propriety of procedures followed, preparation or validity of materials, testing administration, testing security, online security, or teacher or student conduct.

H. "Distance learning student" means a qualified student as defined in 22-8-2 NMSA 1978 who is enrolled in one or more distance learning courses for credit.

I. "District coordinator" means the superintendent or designee who administers and monitors the distance learning program in a public school district or charter school.

J. "Dual credit course" means a program of studies that allows high school students to enroll in college-level courses offered by public post-secondary educational institutions that may be academic or career-technical in nature, but may not be remedial or developmental, and through which students can simultaneously earn credit toward high school graduation and a post-secondary degree or certificate.

K. "Enrolling district" means the school district or charter school in which a distance-learning student is enrolled for the purposes of compulsory attendance. Students shall have only one enrolling district for purposes of membership.

L. "HED" means the higher education department.

M. "Innovative digital education and learning-New Mexico" or

IDEAL-NM means the operating program for the administration and management of the statewide cyber academy.

N. "Local board" means the policy-setting body of a school district or the governing structure of a charter school as set forth in the school's charter.

O. "Local distance learning site" means a public school district or charter school that offers and grants credit for distance learning courses to distance learning students enrolled in public school districts, charter schools or contracted non-public schools.

P. "Membership" means the total number of qualified students as defined in 22-8-2 NMSA 1978.

Q. "Online" or "web based" means utilizing the internet.

R. "Public school" means that part of a school district that is a single attendance center in which instruction is offered by one or more teachers and is discernible as a building or group of buildings generally recognized as either an elementary, middle, junior high or high school or any combination of those and includes charter schools.

S. "Qualified distance learning student" means a qualified student as defined in 22-8-2 NMSA 1978, who is also participating in distance learning courses for credit or a grade.

T. "REC" means regional education cooperative.

U. "Regional host" means an educational institution, school district or other entity selected by IDEAL-NM to coordinate the delivery of distance learning courses within a broad geographic region of the state.

V. "Site coordinator" means a licensed school employee with the responsibility to facilitate student completion of online courses, including services related to student registration, monitoring student progress, communicating with online providers, and ensuring that grades are recorded on transcripts. Site coordinators shall not include substitute teachers.

W. "Statewide cyber academy" means the collaborative program among the department, HED, telecommunications networks and representatives of other state agencies engaged in providing distance education. The statewide cyber academy operates as IDEAL-NM.

X. "Student" means a qualified student as defined in 22-8-2 NMSA 1978.

Y. "Synchronous instruction" means the instructor and students interact at the same time, even though they might not be in the same physical location. Synchronous instruction includes:

(1) web-based instruction, includ-

ing web conferencing, that requires real time interaction between instructor and student;

(2) two way interactive video;

(3) traditional face-to-face classroom instruction; and

(4) telephone based instruction.

[6.30.8.7 NMAC - Rp, 6.30.8.7 NMAC, 9-30-08]

6.30.8.8 GENERAL PARAMETERS:

A. Distance learning courses provide an opportunity for schools within the state to expand their course offerings and expand access to learning resources. While distance learning technologies may occasionally be used as full-time educational programming for students in unusual circumstances, asynchronous distance learning shall not be used as a substitute for all direct, face-to-face student and teacher interactions unless approved by the local board of education.

B. Local distance learning sites shall provide onsite access to the necessary technology for participation in distance learning courses involving internet-based instruction.

C. Local distance learning sites shall provide accompanying electronic formats that are usable by a person with a disability using assistive technology, and those formats shall be based on the American standard code for information interchange, hypertext markup language, and extensible markup language.

D. Districts and charter schools shall inform students about the distance-learning courses available to them.

E. Qualified distance-learning students must receive grades or academic credits for taking a distance learning course unless not taken for credit. Public school districts and charter schools entering into written agreements with each other for distance learning courses shall determine through such agreements which entity or institution shall be responsible for granting students' grades and credits. Should a district or charter school determine that a student fails to comply with any provision of this rule or the local distance learning site's policies, in addition to any other disciplinary actions, the student may be denied credit for the distance-learning course or program in which the student was participating.

F. Should a local distance learning site fail to comply with this rule, the department may disapprove membership based on student enrollment in the distance learning courses or programs.

[6.30.8.8 NMAC - Rp, 6.30.8.8 NMAC, 9-30-08]

6.30.8.9 PARTICIPATION AND MONITORING:

A. In order to participate in distance-learning courses, a public school student must be enrolled in a public school district, charter school, state institution or educational program conducted in a state institution and must have the written permission of the student's enrolling district, charter school, state institution or educational program conducted in a state institution.

B. School districts and charter schools providing distance-learning courses to students statewide shall enter into written agreements with students' enrolling districts or charter schools prior to providing distance-learning courses to students. The agreements shall, at a minimum, include:

- (1) the courses to be delivered;
- (2) the delivery period;
- (3) the financial arrangements;
- (4) support mechanisms needed in behalf of students;
- (5) state assessment responsibilities on behalf of students;
- (6) identification of the responsible entity and timelines for granting grades and credit; and
- (7) a statement of assurance that all distance learning courses meet or exceed state content standards with benchmarks and performance standards and are taught by highly-qualified teachers.

C. If a student participates in a distance learning course offered by a district or charter school other than the student's enrolling district, the student shall be counted only once as a qualified student for state equalization guarantee funding purposes as defined in 22-8-2 NMSA 1978, and for determining membership in the student's enrolling district. Any reimbursement for cross-district participation for distance learning courses shall be arranged between the districts or charter schools through signed written agreements.

D. Qualified distance learning students participating in asynchronous distance learning courses must log on to their distance learning courses at least the same number of days per week as the traditional face-to-face classes occur at the schools in which they are enrolled, and certify that they are the enrolled students. Students participating in synchronous distance learning courses shall log on to their computers at the scheduled class times and certify that they are the enrolled students.

E. Each qualified distance learning student participating in a distance learning course or program shall be evaluated, tested and monitored and shall be subject to the statewide assessments as required in the Assessment and Accountability Act. No student shall be allowed to participate in

the statewide assessments at a place other than a department authorized site.

F. A qualified distance learning student may participate in and receive credit or a grade for a distance learning course that is at a different grade level than the student's current grade level. If allowed by district policy, a student may retake a course to earn a higher grade. However, credit cannot be earned twice for the same course.

G. Students enrolled in nonpublic schools and home school students may participate in distance learning courses as provided in section 11 of 6.30.8 NMAC.

[6.30.8.9 NMAC - Rp, 6.30.8.9 NMAC, 9-30-08]

6.30.8.10 STATE DISTANCE EDUCATION SERVICES:

A. The department and HED shall create and maintain a single central facility for statewide distance education services in New Mexico known as IDEAL-NM in cooperation with RECs, public school districts, charter schools, and post-secondary institutions to facilitate the delivery of distance learning courses statewide for students, training courses for state agency employees, and professional development courses for teachers, instructional support providers and school administrators. IDEAL-NM shall, at a minimum, provide distance learning courses for grades 6-12. Training courses for state agency employees and professional development courses for teachers, instructional support providers and school administrators shall be provided as resources permit.

B. IDEAL-NM shall define and coordinate the roles and responsibilities of the collaborating agencies to establish a distance learning governance and accountability framework.

(1) The department and HED shall administer IDEAL-NM operations.

(2) The department and HED may establish an advisory council to recommend policies and procedures relative to the vision, goals, and implementation of distance learning course offerings by IDEAL-NM.

(3) The department shall ensure that each distance learning course taught by IDEAL-NM meets state content standards with benchmark and performance standards. IDEAL-NM courses may be provided to schools and students pending department review, and during the time needed to make any revisions required by the department.

C. IDEAL-NM shall develop and maintain a distance education services plan that is statewide in scope and that contains short- and long-term goals that supports the work of the council on technol-

ogy in education.

D. IDEAL-NM shall provide technology and program support to regional hosts and local distance learning sites via help desk, academic service, student service, and outreach training.

E. IDEAL-NM shall only use teachers who meet the highly qualified teacher requirements of the Elementary and Secondary Education Act of 1965 [20 U.S. Code 6301], or who are public post-secondary faculty members.

F. Cost allocation:

(1) IDEAL-NM shall annually establish per-semester course fees, subject to department approval, which shall be paid on behalf of students taking distance-learning courses through IDEAL-NM.

(2) The course fees shall be collected and used for teacher compensation and other per-course costs.

(3) Post-secondary educational institutions may charge tuition for distance learning courses in accordance with their fee structures except for high school students enrolled in credit courses as provided in 21-1-1.2 NMSA 1978.

(4) IDEAL-NM may charge districts or teachers for the per-course costs associated with the delivery of professional development distance learning opportunities for teachers.

(5) IDEAL-NM may charge state agencies or employees for the per-course costs associated with the delivery of agency training courses for employees.

(6) IDEAL-NM may enter into agreements with districts, charter schools and state agencies to waive course fees in exchange for online teaching or other provided services.

(7) The department shall create an intergovernmental agreement for districts and charter schools desiring to enroll students in IDEAL-NM courses. Participation in IDEAL-NM courses is contingent upon the district or charter school signing the intergovernmental agreement.

G. IDEAL-NM shall comply with all federal and state statutes pertaining to student privacy, the posting of images on the internet, copyright, or duplication of materials, and rules pertaining to the public broadcasting of audio and video technology.

H. IDEAL-NM shall report online coursework completed by students to the enrolling districts, which, in turn shall award grades and credits according to local standards.

I. Schools shall release student demographic and course completion information to IDEAL-NM for statistical purposes.

J. IDEAL-NM shall facilitate the delivery of online dual credit courses in accordance with the provisions of dual

credit rules as per 5.55.4 NMAC and 6.30.7 NMAC.

K. IDEAL-NM shall provide an annual report to the secretaries of the department and HED, the legislative education study committee and legislative finance committee.

[6.30.8.10 NMAC - N, 9-30-08]

6.30.8.11 PARTICIPATION IN IDEAL-NM:

A. Students enrolled in nonpublic schools may participate in the distance learning courses offered by IDEAL-NM if the school in which the student is enrolled enters into a contract with the school district in which the nonpublic school is located. Nonpublic schools participating in distance learning shall pay the same per-semester course fee that school districts must pay to IDEAL-NM.

B. Home school students may participate in the distance learning courses offered by IDEAL-NM by enrolling for one-half or more of the minimum course requirements approved by the department for public school students in the school district in which the student resides; or, if the student is enrolled for less than one-half of the minimum course requirements, the student may participate in distance learning courses offered by IDEAL-NM by paying to the public school district where the student is located, or directly to the department, not more than thirty-five percent of the current unit value per curricular unit.

C. A student who is detained in or committed to a juvenile detention facility or a facility for the long-term care and rehabilitation of delinquent children may participate in the distance learning courses offered by IDEAL-NM if the facility in which the student is enrolled enters into a written agreement with the school district in which the facility is located, or directly with the department.

[6.30.8.11 NMAC - N, 9-30-08]

6.30.8.12 LOCAL POLICIES REGARDING DISTANCE LEARNING COURSES:

A. All local school boards and charter school governing authorities shall adopt written policies providing for student access to distance learning courses. The policies shall, at a minimum, include procedures for:

(1) designating a district coordinator and a school site coordinator; charter schools may designate school site coordinators only;

(2) designating a school official to approve or disapprove students' requests to participate in any distance learning courses or programs for credit or a grade pursuant to criteria established by local school board or

charter school governing authority policy;

(3) assigning scheduled class periods during the school day that correspond to the number of distance learning courses students are taking while making it possible for students to maintain a class schedule which incorporates both distance learning courses and locally scheduled classes without conflict;

(4) monitoring student progress;

(5) ensuring compliance with all federal and state statutes pertaining to student privacy, the posting of images on the internet, copyright or duplication of materials, and rules pertaining to the public broadcasting of audio and video technology;

(6) ensuring the security of individual student data and records under the Family Educational Rights and Privacy Act [20 U.S. Code 1232g];

(7) ensuring that all teachers of distance learning courses meet the highly qualified teacher requirements of the current authorization of the Elementary and Secondary Education Act of 1965 [20 U.S. Code 6301];

(8) establishing the written criteria and approval process for determining the appropriateness of particular distance learning courses for each individual student prior to student enrollment in distance learning courses; including that all core curriculum delivered by distance learning courses must meet or exceed the state content standards with benchmarks and performance standards; and

(9) determining the process for the prompt removal or non-use of a distance learning course provider should irregularities or deficiencies in the provider's services become apparent.

B. Districts and charter schools which utilize a distance learning option not provided by IDEAL-NM must provide documentation to the local school board that the distance learning course meets the state content standards with benchmarks and performance standards.

[6.30.8.12 NMAC - N, 9-30-08]

6.30.8.13 SEVERABILITY: If any part or application of this rule is held invalid by a court of competent jurisdiction, the remainder or its application to other situations shall not be affected.

[6.30.8.13 NMAC - N, 9-30-08]

HISTORY OF 6.30.8 NMAC:

History of Repealed Material:
6.30.8 NMAC, Distance Learning, filed 12-28-2006 - Repealed effective 9-30-08.

End of Adopted Rules Section

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| Issue Number 13 | July 1 | July 16 |
| Issue Number 14 | July 17 | July 31 |
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| Issue Number 16 | August 15 | August 29 |
| Issue Number 17 | September 2 | September 15 |
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