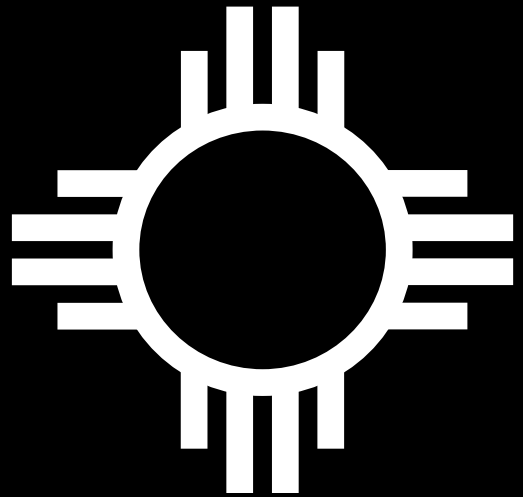


**NEW
MEXICO
REGISTER**

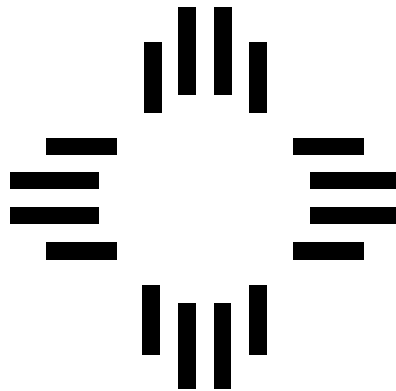


Volume XVI
Issue Number 1
January 14, 2005

New Mexico Register

Volume XVI, Issue Number 1

January 14, 2005



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

The Commission of Public Records
Administrative Law Division
Santa Fe, New Mexico
2005

COPYRIGHT © 2005
BY
THE STATE OF NEW MEXICO

ALL RIGHTS RESERVED

New Mexico Register

Volume XVI, Number 1

January 14, 2005

Table of Contents

Notices of Rulemaking and Proposed Rules

Children, Youth and Families Department

Family Services Division

Notice of Public Hearing: 7.20.12 NMAC 1

Notice of Public Hearing: 8.16.3 NMAC 1

Human Services Department

Income Support Division

Notice of Public Hearing 1

Medical Board

Notice of Public Rule Hearing 1

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A=Amended, E=Emergency, N=New, R=Repealed, Rn=Renumbered

Finance and Administration, Department of

2.40.2 NMAC Rn & A Governing the Approval of Contracts for the Purchase of Professional Services 3

Interstate Stream Commission

19.17.2 NMAC N Weather Control and Precipitation Enhancement 6

Public Regulation Commission

Utility Division

17.9.572 NMAC R Renewable Energy As a Source of Electricity 10

17.9.572 NMAC N Renewable Energy for Electric Utilities 10

Respiratory Care Advisory Board

16.23.12 NMAC A Continuing Education 14

16.23.14 NMAC A Scope of Practice Guidelines for Non-Licensed, Non-Exempted Persons 14

16.23.16 NMAC A Disciplinary Proceedings 15

Transportation, Department of

18.21.3 NMAC Rn & A Requirements for Signs on Gas, Food, Lodging, Camping and Attraction, Traveler Information Signs 15

Workers' Compensation Administration

11.4.7 NMAC A Payments for Health Care Services 20

11.4.8 NMAC Rn & A Individual Self-Insurance 22

11.4.9 NMAC Rn & A Group Self-Insurance 25

11.4.10 NMAC Rn & A Self-Insurance Pooling of Public Entities 27

Other Material Related to Administrative Law

Human Services Department

Income Support Division

Notice of Public Hearing 29

Workers' Compensation Administration

Director's Response to Public Comment: Medical Rules and MAP Order 29

Director's Response to Public Comment: Self-Insurance Rules 30

The New Mexico Register
Published by
The Commission of Public Records
Administrative Law Division
1205 Camino Carlos Rey
Santa Fe, NM 87507

The *New Mexico Register* is published twice each month by the Commission of Public Records, Administrative Law Division. The cost of an annual subscription is \$270.00. Individual copies of any Register issue may be purchased for \$12.00. Subscription inquiries should be directed to: The Commission of Public Records, Administrative Law Division, 1205 Camino Carlos Rey, Santa Fe, NM 87507. Telephone: (505) 476-7907; Fax (505) 476-7910; E-mail rules@rain.state.nm.us.

The *New Mexico Register* is available free at <http://www.nmcpr.state.nm.us/nmregister>

Notices of Rulemaking and Proposed Rules

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT FAMILY SERVICES DIVISION

NOTICE OF PUBLIC HEARING

The New Mexico Children, Youth and Families Department, Family Services Licensing and Certification Authority will hold a formal public hearing on Tuesday, February 15, 2005 from 9 a.m. to 11 a.m., in the conference room at the Family Services Offices at 1920 5th Street; Santa Fe, New Mexico, to receive public comments regarding an amendment of **7.20.12 NMAC** Licensing Requirements for Child and Adolescent Mental Health Facilities. This regulation sets forth the licensing requirements for residential and day treatment facilities. The proposed amendment to 7.20.12 NMAC will eliminate licensing requirements for day treatment facilities.

The proposed amendment may be reviewed, or a copy obtained during the regular business hours of Family Services; 1920 5th Street; Santa Fe, New Mexico 87505. Please address inquiries to the attention of Kurt Johnson.

Interested persons may testify at the hearing or submit written comments at the above address no later than 9:00 a.m. February 15, 2005. Written comments will be given the same consideration as oral testimony given at the hearing.

If you are a person with a disability and you require this information in an alternative format or require special accommodations to participate in the public hearing, please contact Family Services at 505-827-9932. Family Services requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT FAMILY SERVICES DIVISION

NOTICE OF PUBLIC HEARING

The New Mexico Children, Youth and Families Department, Family Services, Child Care Licensing Authority will hold a formal public hearing on Tuesday, February 15, 2005 from 1 p.m. to 3 p.m., in the conference room at the Family Services Offices at 1920 5th Street; Santa Fe, New Mexico, to receive public comments regarding the new regulation implementing the Child

Care Facility Loan Act, at **8.16.3 NMAC**. This regulation sets forth the eligibility and application requirements, and evaluation process, for obtaining a loan from the child care facility revolving loan fund.

The proposed amendment may be reviewed, or a copy obtained during the regular business hours of Family Services; 1920 5th Street; Santa Fe, New Mexico 87505. Please address inquiries to the attention of Kurt Johnson.

Interested persons may testify at the hearing or submit written comments at the above address no later than 3:00 p.m. February 15, 2005. Written comments will be given the same consideration as oral testimony given at the hearing.

If you are a person with a disability and you require this information in an alternative format or require special accommodations to participate in the public hearing, please contact Family Services at 505-476-0465. Family Services requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

NOTICE OF PUBLIC HEARING

The Human Services Department will hold a public hearing to consider adopting revised rules in the New Mexico General Assistance Program. The hearing will be held at 9:00 am on Monday, February 14, 2005. The hearing will be held at the Income Support Division conference room, 2009 S. Pacheco St., Santa Fe, NM. The conference room is located in Room 120 on the lower level.

The Department proposes to revise General Assistance regulations at 8.106 NMAC. The Department has identified a contradiction in the rules at 8.106 NMAC concerning the right to apply. The Department proposes to amend the rules at 8.106.120.9 B, 8.106.420.12 B and 8.106.420.15 E to clarify establishing certification periods, application processing procedures for failure to meet established contingency requirements, and caseworker responsibilities for a disability determination for time-limited disability.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-

432-6217, TDD 1-800-609-4TDD (4833), or through the New Mexico Relay System toll free at 1-800-659-8331. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.

Individuals wishing to testify or requesting a copy of the proposed regulation should contact the Income Support Division, P.O. Box 2348, Pollon Plaza, Santa Fe, NM 87505-2348, or by calling toll free 1-800-432-6217.

Individuals who do not wish to attend the hearing may submit written or recorded comments. Written or recorded comments must be received by 5:00 PM on the date of the hearing. Please send comments to:

Pamela S. Hyde, J.D., Secretary
Human Services Department
P.O. Box 2348 Pollon Plaza
Santa Fe, NM 87504-2348

You may send comments electronically to:
Ted.Roth@state.nm.us

NEW MEXICO MEDICAL BOARD

NEW MEXICO MEDICAL BOARD

Notice

The New Mexico Medical Board will convene a regular Board Meeting on Thursday, February 17, 2005 at 8:00 a.m. and Friday, February 18, 2005 at 8:00 a.m. in the Conference Room, 2055 S. Pacheco, Building 400, Santa Fe, New Mexico. A Public Rule Hearing will be held on Thursday, February 17, 2005 at 1:30 p.m. The Board will reconvene after the Hearing to take action on the proposed rules. The Board may enter into Executive Session during the meeting to discuss licensing or limited personnel issues.

The purpose of the Rule Hearing is to consider amending 16.10.1 NMAC (General Provisions), 16.10.2 NMAC (Physicians: Licensure Requirements), 16.10.4 NMAC (Continuing Medical Education), 16.10.5 NMAC (Disciplinary Power of the Board), 16.10.7 NMAC (License Expiration, Renewal, and Reinstatement), 16.10.9 NMAC (Fees) and 16.10.14 (Management of Chronic Pain with Controlled Substances.) These changes will correct the titles of the board officers, amend the initial licensing process, change license expiration policy, delete the requirement for payment of costs in disciplinary cases, add language related to online

renewals, increase specific fees, establish guidelines for the treatment of physicians in chronic pain, and make other minor editing changes.

A final agenda for the board meeting will be available at the board office on February 16, 2005. Persons desiring to present their views on the proposed amendments may appear in person at said time and place or may submit written comments no later than 5:00 p.m., February 11, 2005, to the board office, 2055 S. Pacheco, Building 400, Santa Fe, NM, 87505. Copies of the proposed rules are available on request from the Board office at the address listed above, by phone (505) 476-7220, or on the Internet at www.nmmb@state.nm.us.

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service in order to attend or participate in the hearing or meeting, please contact Lynnelle Tipton, Administrative Assistant at 2055 S. Pacheco, Building 400, Santa Fe, NM at least one week prior to the meeting. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact the Executive Director if a summary or other type of accessible format is needed.

**End of Notices and
Proposed Rules Section**

Adopted Rules

NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION

This is an amendment to 2.40.2 NMAC, Sections 2, 3, 5, 7, 8, 9, 10, 11, 13, 15 and 16, effective January 14, 2005. This rule was also reformatted and renumbered from 2 NMAC 40.2 to comply with current NMAC requirements.

TITLE 2 PUBLIC FINANCE CHAPTER 40 EXPENDITURE OF PUBLIC FUNDS PART 2 GOVERNING THE APPROVAL OF CONTRACTS FOR THE PURCHASE OF PROFESSIONAL SERVICES

2.40.2.1 ISSUING AGENCY:
Department of Finance and Administration.
[5-15-97; 2.40.2.1 NMAC - Rn, 2 NMAC
40.2.1, 1-14-2005]

2.40.2.2 SCOPE:

A. The contracts review bureau of the department of finance and administration shall review and approve all professional services contracts which result in expenditures equal to or greater than fifteen hundred dollars (\$1500), excluding gross receipts tax, and all amendments to those contracts for all state agencies except as provided in Subsections B and C of Section 2.40.2.2 NMAC of this rule. Contracts expending public funds in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978 as amended are included within the scope of this rule.

B. The following state agencies are currently exempt from submitting professional services contracts and amendments through the contracts review bureau of the department of finance and administration:

(1) state agencies within the judicial branch of government as defined by the New Mexico Constitution, Article VI;

(2) state agencies within the legislative branch of government as defined by the New Mexico Constitution, Article IV;

(3) state educational institutions as defined by the New Mexico Constitution, Article XII, Section 11 and Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978;

(4) the state fair pursuant to Section 16-6-8 NMSA 1978;

(5) the New Mexico public school insurance authority pursuant to Sections ~~[22-2-6.6 (F) and 22-2-6.8]~~ 22-29-6 (F) and 22-29-8 NMSA 1978 for contracts for procuring goods or services and paying for

insurance or insurance-related services;

(6) the New Mexico mortgage finance authority pursuant to Section 58-18-20 NMSA 1978;

~~[(7) the peanut commission pursuant to Section 76-17-8 NMSA 1978;]~~

~~[(8) (7) the livestock board pursuant to Section 77-2-10 NMSA 1978; and~~

~~[(9) (8) other state agencies exempt by statute.~~

C. Pursuant to Section 6-5-9 NMSA 1978, the secretary of the department of finance and administration may exempt a state agency's contracts from contracts review bureau review and approval when the secretary of the department of finance and administration determines that efficiency or economy so requires. A state agency seeking an exemption must:

(1) apply in writing to the secretary of the department of finance and administration; and

(2) meet all of the following requirements:

(a) issue its own warrants;

(b) be exempt from prior submission of vouchers or purchase orders to the financial control division of the department of finance and administration;

(c) receive the majority of its money from non-general fund sources;

(d) maintain pre-audit and post-audit fiscal accounting controls;

(e) maintain and operate its own administrative unit for procurement and controls its own encumbrance of funds available for professional service contracts;

(f) provide administrative control and review of professional services contracts through its own administrative unit; and

(g) employs in-house counsel to prepare, review, and approve professional services contracts for form and legal sufficiency and to advise the state agency with respect to all applicable laws and regulations; provided, however, that the attorney general shall also review and approve all contracts subject to ~~[Subparagraphs (a) or (b) of]~~ Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule prior to approval and execution by the state agency.

[7-1-76, 8-15-77, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97, 7-1-01; 2.40.2.2 NMAC - Rn & A, 2 NMAC 40.2.2, 1-14-2005]

2.40.2.3 STATUTORY AUTHORITY:

A. Sections 13-1-118 and 13-1-125 NMSA 1978 authorize the department of finance and administration to review professional services contracts of state agencies as to form, legal sufficiency,

and budgetary requirements if required by its regulations.

B. Section 6-5-3 NMSA 1978 provides that before any state agency enters into a contract expending public funds, the financial control division of the department of finance and administration shall determine the authority for such proposed expenditure. After the authority for the expenditure is determined, the appropriate fund shall be shown by the financial control division to be encumbered to the extent of the proposed expenditure. The financial control division may request, and the state agency shall provide, such documentation and other information as the financial control division deems necessary to justify the state agency's determination of authority. The financial control division may disapprove the proposed expenditure if it determines that the justification is inadequate or is not substantiated by law.

C. Section 6-5-6 NMSA 1978 requires the financial control division of the department of finance and administration to determine that the proposed expenditure does not exceed the state agency's appropriation, does not exceed the periodic allotment made to the state agency or the unencumbered balance of funds at its disposal ~~[, and is for a purpose included within the appropriation or otherwise authorized by law].~~ The state agency shall determine that a proposed expenditure is for a public benefit and purpose consistent with the related appropriation and is necessary to carry out the statutory mission of the state agency prior to committing the state to the transaction.

D. Sections 9-1-5(E) and 9-6-5(E) NMSA 1978 provide that after notice and hearing, the secretary of the department of finance and administration may make and adopt such reasonable administrative and procedural rules and regulations as necessary to carry out the duties of the department of finance and administration and its divisions.

[7-1-76, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97; 2.40.2.3 NMAC - Rn & A, 2 NMAC 40.2.3, 1-14-2005]

2.40.2.4 DURATION:

Permanent.
[5-15-97; 2.40.2.4 NMAC - Rn, 2 NMAC 40.2.4, 1-14-2005]

2.40.2.5 EFFECTIVE DATE:

May 15, 1997 unless a ~~[different]~~ later date is cited at the end of a section ~~[or paragraph].~~

[7-1-76, 8-15-77, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97, 6-15-98; 2.40.2.5 NMAC - Rn & A, 2 NMAC 40.2.5, 1-14-2005]

2.40.2.6 OBJECTIVE: The purpose of this rule is to establish the procedures state agencies must follow and the requirements state agencies must meet in drafting, entering into, and seeking approval of professional services contracts. These procedures ensure compliance with Sections 6-5-3, 6-5-6, 13-1-118 and 13-1-125 NMSA 1978 as amended. [7-1-87, 5-15-97; 2.40.2.6 NMAC - Rn, 2 NMAC 40.2.6, 1-14-2005]

2.40.2.7 DEFINITIONS:

A. "Bureau" means the contracts review bureau of the administrative services division of the department of finance and administration.

B. "Contract" means any agreement for the provision of professional services.

C. "Contract brief" means the bureau paper form or electronic version which shall accompany all professional services contracts and amendments submitted to the bureau.

D. "Contractor" as defined in Section 13-1-43 NMSA 1978 means any business having a contract with a state agency.

E. "Department or DFA" means the department of finance and administration.

F. "Form" means, at a minimum, that all contracts and amendments contain the provisions required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

G. "Legal sufficiency" means, at a minimum, that all contracts and amendments contain the provisions required by law and that all required signatures have been obtained.

H. "Procurement" as defined by Section 13-1-74 NMSA 1978 means purchasing, renting, leasing, lease purchasing or otherwise acquiring items of personal property, services or construction and includes all procurement functions, including but not limited to, preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of the contract, and contract administration.

I. "Procurement Code" means Sections 13-1-28 to 13-1-199 NMSA 1978, as amended.

J. "Professional services" as defined by Section 13-1-76 NMSA 1978 means the services of architects, archaeologists, engineers, surveyors, landscape archi-

ects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, and persons or businesses providing similar services, except information system resources professional services as defined by Paragraph (2) of Subsection B of GSD Rule 1.4.1.7 NMAC.

K. "Regulation" as defined by Section 13-1-80 NMSA 1978 means any rule, order, statement or policy, as amended, issued by a state agency or a local public body that affects persons not members or employees of the issuer.

L. "Retroactive approval to a contract or a contract amendment" means approval of a contract or contract amendment that was submitted to the bureau and approved by the DFA secretary or his designee pursuant to 2.40.2.13 NMAC of this rule after the contractor has begun work pursuant to a request to perform work from a state agency employee or public officer with authority to make such a request.

M. "DFA secretary" means the secretary of the department of finance and administration.

N. "Sole source contract or amendment to sole source contract" means a contract or amendment which fulfills the requirements of Sections 13-1-118 and 13-1-126 NMSA 1978, as amended, ~~[-and]~~

O. "State agency" means any department, agency, commission, council, board, advisory board, committee, or institution of the state of New Mexico, and does not include local public bodies.

[7-1-76, 8-15-77, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97, 6-15-98; 2.40.2.7 NMAC - Rn & A, 2 NMAC 40.2.7, 1-14-2005]

2.40.2.8 DELEGATION OF APPROVAL AUTHORITY:

A. The bureau shall review all contracts and contract amendments for professional services with state agencies as to form, ~~[legal sufficiency]~~ and budgetary requirements.

B. The bureau shall consult with the department's legal counsel as needed regarding any issues of legal sufficiency of a state agency's contracts and contract amendments for professional services.

~~[B-]~~ C. The DFA secretary shall delegate, in writing to certain members of the bureau, the authority to approve professional services contracts which result in expenditures equal to or greater than fifteen hundred dollars (\$1500), excluding gross receipts tax, and all amendments to those contracts except retroactive approval to contracts and contract amendments and sole source contracts and amendments to sole source contracts as provided herein.

[7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97, 6-15-98, 7-1-01; 2.40.2.8 NMAC - Rn & A, 2 NMAC 40.2.8, 1-14-2005]

2.40.2.9 FORM AND SUBMISSION:

A. All contracts and subsequent amendments shall be in a form and contain such provisions as required by the bureau, including but not limited to, a scope of work consistent with the request for proposals issued by the state agency if the contract was procured by a request for proposals and performance measures as defined by and in accordance with the Accountability in Government Act, Sections 6-3A-1 through 6-3A-9 NMSA 1978 and subsequent amendments.

B. All contracts and amendments shall:

(1) be accompanied by a contract brief being in such form and containing such information as may be required by the bureau;

(2) be accompanied by a document prescribed by the financial control division of the department showing that funds have been encumbered to the extent of the contract, including any amendments to that contract; if the contract term includes more than one fiscal year, the contract must be accompanied by an encumbrance for the current fiscal year amount or, up to the total amount of the current appropriation available for that contract;

(3) be accompanied by a written request for approval from the secretary of the contracting state agency or his designee if the contract is subject to ~~[Subparagraphs (a) or (b) of]~~ Paragraph (1) of Subsection C of 2.40.2.10 NMAC of this rule; and

(4) comply with Procurement Code regulations, GSD Rule 1.4.1 NMAC and subsequent regulations regarding indemnification and insurance.

[7-1-76, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97, 6-15-98; 2.40.2.9 NMAC - Rn & A, 2 NMAC 40.2.9, 1-14-2005]

2.40.2.10 REVIEW PROCEDURES:

A. State agencies must submit to the bureau for review:

(1) sole source contracts;

(2) amendments to sole source contracts;

(3) retroactive approval to contracts; and

(4) retroactive approval to contract amendments.

B. Bureau review:

(1) The bureau shall review all contracts or contract amendments for form, ~~[legal sufficiency]~~ budgetary requirements and compliance with the requirements prescribed on the contract brief.

(2) No contract or contract amendment shall become binding or effective until signed and dated by a member of the bureau with contract approval authority.

C. Other review:

(1) Prior to the bureau's review, the attorney general shall review ~~and approve the following:~~

~~(a) all contracts which may violate conflict of interest provisions of the Governmental Conduct Act, Sections 10-16-1 to 10-16-18 NMSA 1978, [or~~

~~(b) all contracts or contract amendments which, in the aggregate, cause expenditures under the contract to equal or exceed two hundred thousand dollars (\$200,000), excluding gross receipts tax.]~~

(2) The bureau may submit any contract or amendment to the attorney general or other legal counsel for review if the bureau is aware of legal issues concerning the contract or the amendment.

[7-1-76, 8-15-77, 7-1-78, 7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97; 2.40.2.10 NMAC - Rn & A, 2 NMAC 40.2.10, 1-14-2005]

2.40.2.11 SMALL PURCHASES:

A contract for professional services having a value over \$1500 but not exceeding \$20,000 excluding applicable gross receipts taxes, except for the services of architects, landscape architects engineers, or surveyors for state public works projects, may be procured in accordance with the Procurement Code, Sections 13-1-28 to 13-1-199 NMSA 1978 and Procurement Code Regulations, GSD Rule ~~[1 NMAC 5.2]~~ 1.4.1 NMAC or subsequent GSD regulations.

[7-10-85, 7-1-87, 5-15-97, 6-15-98, 7-1-01; 2.40.2.11 NMAC - Rn & A, 2 NMAC 40.2.11, 1-14-2005]

2.40.2.12 SOLE SOURCE CONTRACT OR AMENDMENT TO SOLE SOURCE CONTRACT

A. A contract may be awarded without competitive sealed proposals, regardless of the estimated cost, when a central purchasing office of a contracting state agency makes a written determination, signed by the secretary of the contracting state agency or his designee, which states that a good-faith review of available sources has been conducted and that there is only one source for the required professional services. The written determination and an estimate of the dollar amount of the contract shall be submitted to the bureau for review and approval by the DFA secretary or his designee and shall include the following information:

(1) a detailed, sufficient explanation of the reasons, qualifications, proprietary rights, or unique capabilities that make the prospective contractor a sole

source;

(2) an explanation of the criteria developed and specified by the state agency as necessary to perform the contract and upon which the state agency reviewed available sources;

(3) a description of the procedures used by the state agency in conducting a good faith review of available sources, including without limitation, a narrative description of all steps taken by the state agency as evidence of the good-faith review performance such as:

(a) researching trade publications and industry newsletters;

(b) reviewing telephone books or other advertisements;

(c) reviewing current contract;

(d) contacting similar service providers; and

(e) reviewing the state purchasing agents vendor list; and

(4) a list of all businesses contacted and an explanation of why those businesses could not perform the contract, or, a reasonable explanation of why the state agency has determined that no businesses, besides the prospective contractor, exist.

B. The bureau must obtain written approval of the agency's sole source determination from the DFA secretary or his designee prior to approving a sole source contract or amendment to a sole source contract.

[7-10-85, 7-1-87, 12-20-89, 5-15-97; 2.40.2.12 NMAC - Rn, 2 NMAC 40.2.12, 1-14-2005]

2.40.2.13 RETROACTIVE APPROVAL FOR A CONTRACT OR CONTRACT AMENDMENT:

A. The ~~[New Mexico]~~ Procurement Code, Section 13-1-102, NMSA 1978, as amended, requires that all non exempt procurement (Section 13-1-98, NMSA 1978) by state agencies shall be achieved by competitive sealed bids or competitive sealed proposals except for small purchases, sole source procurements, emergency procurements, existing contracts and procurements from antipoverty program business. For professional services, the proposal and procurement process are not complete until a written contract or contract amendment is signed by the agency and the contractor and is approved by the DFA secretary or his designee and approved by the bureau.

B. For retroactive approval of contracts and contract amendments which fulfill all of the requirements of this rule and the Procurement Code, DFA will approve the date requested in writing by the agency on the brief accompanying the document as long as the requested approval date is within thirty days of ~~[the date the document was received and date~~

~~stamped by the bureau] the first day of each fiscal year.~~

C. For retroactive approval of contracts and contract amendments apart from the approval given pursuant to the provisions ~~[of Subsection B of]~~ 2.40.2.13 NMAC of this rule, DFA may grant additional retroactive approval to a contract or contract amendment, based upon rare and exceptional circumstances, where all of the following conditions are met:

(1) the professional services performed without DFA's prior approval of the contract did not occur as the result of repeated agency mistakes or willful misconduct;

(2) the failure to obtain DFA's retroactive approval will prevent the state agency from fulfilling its statutory obligations;

(3) the state agency provides to DFA a written, factual, detailed explanation of the matters described in Paragraphs (1) and (2) of Subsection C of 2.40.2.13 NMAC, certified to be true by signature of the head of the state agency;

(4) the state agency requested, through a public officer or employee with authority to make such a request, the contractor to perform professional services that were then actually performed by the contractor in good faith reliance that it would be paid for those professional services.

D. The Procurement Code, Section 13 -1-182, NMSA 1978, as amended, governs situations in which DFA has denied a request for retroactive approval of a contract or contract amendment due to the state agency's failure to meet the requirements of Subsections B or C of 2.40.2.13 NMAC of this rule.

[7-10-85, 7-1-87, 12-20-89, 5-15-97, 6-15-98; 2.40.2.13 NMAC - Rn & A, 2 NMAC 40.2.13, 1-14-2005]

2.40.2.14 EMERGENCY PROCUREMENT:

An emergency procurement of professional services may be made under the conditions provided in the Procurement Code and 1.4.1 NMAC or subsequent GSD regulations. Records of any emergency procurement of professional services, including the written determination of the basis for the emergency procurement being relied on by the state agency as justification for the emergency procurement, shall be maintained by the state agency for a minimum of three years and shall be made available by the state agency to the financial control division upon request.

[7-10-85, 7-1-87, 5-15-97, 6-15-98; 2.40.2.14 NMAC - Rn, 2 NMAC 40.2.14, 1-14-2005]

2.40.2.15 COMPLIANCE:

State agencies must comply with federal and state statutes, rules, regulations and

policies and ~~are encouraged to~~ shall have their state agency's legal counsel review all contracts and contract amendments certifying in writing that they are legally sufficient prior to submission to the bureau. Wrongful or mistaken approval by the bureau shall not be a defense to an action brought by or against the state agency on a contract. [7-1-84, 7-10-85, 7-1-87, 12-20-89, 5-15-97; 2.40.2.15 NMAC - Rn & A, 2 NMAC 40.2.15, 1-14-2005]

2.40.2.16 RECORDS:

A. Record inspection, record retention and record destruction relating to contracts shall be conducted in accordance with the Inspection of Public Records Act, Sections 14-2-1 to 14-2-12 NMSA 1978; the Public Records Act, Sections 14-3-1 to 14-3-23 NMSA 1978; and with Section 13-1-128 NMSA pertaining to sole source and emergency procurement; and Section 13-1-116 NMSA 1978 of the Procurement Code.

B. The bureau will retain original contracts, any subsequent amendments, and contract briefs in accordance with provisions of the Inspection of Public Records and Public Records Act. [5-15-97; 2.40.2.16 NMAC - Rn & A, 2 NMAC 40.2.16, 1-14-2005]

2.40.2.17 RULE FILING: This rule shall be filed in accordance with the State Rules Act, Sections 14-3-24, 14-3-25, and 14-4-1 to 14-4-11 NMSA 1978 and shall become effective upon publication in the New Mexico Register. [5-15-97; 2.40.2.17 NMAC - Rn, 2 NMAC 40.2.17, 1-14-2005]

HISTORY OF 2.40.2 NMAC:

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives: DFA 76-3, Technical and Professional Services and State Highway Department Contracts, June 25, 1976, filed 7-13-76. DFA 77-6, Technical and Professional Service Contracts, August 15, 1977, filed 8-22-77. DFA 78-2.1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6-30-78. DFA Rule No. 84-3, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6-28-84. DFA Rule No. 85-1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 7-10-85. DFA 87-1, Governing the Approval of Contracts for the Purchase of Professional Services, filed 6-30-87.

History of Repealed Material: [RESERVED]

NEW MEXICO INTERSTATE STREAM COMMISSION

TITLE 19 N A T U R A L RESOURCES AND WILDLIFE CHAPTER 17 WEATHER MODIFICATION PART 2 WEATHER CONTROL AND PRECIPITATION ENHANCEMENT

19.17.2.1 ISSUING AGENCY: New Mexico Interstate Stream Commission. [19.17.2.1 NMAC - N, 01-15-2005]

19.17.2.2 SCOPE: This rule governs the licensing and application process for weather control operations, research, and development pursuant to the New Mexico Weather Control Act. [19.17.2.2 NMAC - N, 01-15-2005]

19.17.2.3 S T A T U T O R Y AUTHORITY: Section 75-3-1 et seq., NMSA 1978, as amended by House Bill 78, 2003 Legislative Session. [19.17.2.3 NMAC - N, 01-15-2005]

19.17.2.4 D U R A T I O N : Permanent. [19.17.2.4 NMAC - N, 01-15-2005]

19.17.2.5 EFFECTIVE DATE: January 15, 2005, unless a later date is cited at the end of a section. [19.17.2.5 NMAC - N, 01-15-2005]

19.17.2.6 OBJECTIVE: The objective of this rule is to provide a consistent licensing and application process for weather control activities, establish additional rules and procedures that govern proceedings before the commission, and to insure the expeditious and orderly handling of all administrative matters consistent with all requirements of state, tribal and federal law. [19.17.2.6 NMAC - N, 01-15-2005]

19.17.2.7 DEFINITIONS: Unless defined below or in a specific section, all other words used in these regulations shall be given their customary and accepted meanings.

- A. "Applicant" means any individual, firm, partnership, association, company, corporation, business or public trust, federal agency, state agency, the state or any political subdivision thereof, municipalities and any other duly constituted legal entity that applies for a license.
- B. "Application" means an application for a license submitted by an

applicant to the commission.

C. "Apparatus" means any device used with the intention of producing artificial changes in the composition, motions and resulting behavior of the atmosphere.

D. "Commission" means the New Mexico interstate stream commission.

E. "Hearing participant" means an applicant, any person or entity filing a protest of an application or the commission's staff.

F. "License" means a specific written authorization issued by the commission to an operator that has met specified qualifications authorizing such operator to engage in operations pursuant to a specified project scope in the state of New Mexico.

G. "Operation" means the performance of any weather control activity undertaken for the purpose of producing or attempting to produce any form or modifying effect upon the weather in the state. An operation does not include:

- (1) research, development and experimental weather control activities by state or federal agencies or institutions of higher learning, expected to last no longer than six (6) months;
- (2) laboratory research and experiments;
- (3) activities engaged in for purposes other than producing or attempting to produce any form of modifying effect upon the weather;
- (4) emergency activities conducted by public entities for the purposes of fire control; and
- (5) religious or cultural ceremonies, rites or acts that do not utilize artificial methods to alter weather phenomena.

H. "Operations area" means the area in which an operation is conducted to produce or attempt to produce the desired effects within the target area.

I. "Operations director" means the person, identified in a valid license, who has the knowledge, experience and qualifications necessary to design, manage, evaluate and take overall responsibility for an operation.

J. "Operator" means any individual, firm, partnership, association, company, corporation, business or public trust, federal agency, state agency, the state or any political subdivision thereof, municipalities and any other duly constituted legal entity, as identified in a license.

K. "Research and development" means the exploration, field experimentation and extension of investigative findings and theories of a scientific or technical nature for purposes that may lead to practical application for experimental or demonstration purpose, including the exper-

imental production and testing of models, agents, apparatus and processes.

L. "Sponsor" means any person who enters into an agreement with an operator to support weather control activities.

M. "Suspension criteria" means criteria developed for a specific operation to avoid weather control during undesirable periods. Examples include excess snow pack accumulation, excess rainfall forecasts and national weather service forecasts of severe weather.

N. "Target area" means the surface area within which the effects of an operation are expected.

O. "Weather control" means changing or attempting to change by artificial methods, the composition, motions and resulting behavior of the atmosphere.

P. "Weather control committee" means a three-member panel comprised of commission members or commission staff as designated by the commission.

Q. "Weather control hypothesis" means a statement of expectations, which systematically describes certain assumptions and predicts an outcome in terms of operation effects, given specifics such as seeding mode and a project location and duration.

[19.17.2.7 NMAC - N, 01-15-2005]

19.17.2.8 VIOLATIONS AND PENALTIES: As provided by Sections 75-3-15, NMSA 1978, any person violating any of the provisions of the Weather Control Act or this rule shall be guilty of a misdemeanor and a continuing violation shall be punishable as a separate offense for each day during which a violation occurs.

[19.17.2.8 NMAC - N, 01-15-2005]

19.17.2.9 CERTAIN LIABILITIES NOT IMPOSED OR RIGHTS AFFECTED: Nothing in the Weather Control Act or this rule shall be construed to impose or accept any liability or responsibility on the part of New Mexico or any state officials, agents or employees for any weather control activities of any private person or group, or to affect in any way any contractual, tortious or other legal or equitable rights, duties or liabilities between any private persons or groups.

[19.17.2.9 NMAC - N, 01-15-2005]

19.17.2.10 COMMISSION AS OPERATOR: The commission may administer or carry on operations, subject to this rule, by its own officials, agents or employees.

[19.17.2.10 NMAC - N, 01-15-2005]

19.17.2.11 WEATHER CONTROL COMMITTEE: In the perform-

ance of the functions authorized in the Weather Control Act, the commission may establish a weather control committee to advise and make recommendations to the commission concerning licenses and other matters as provided in this rule. Members of the commission or its staff may serve on this committee. The commission shall appoint one member of the committee chairman or chairwoman (chair). In the event that the commission does not establish a weather control committee, all duties of the weather control committee specified in this rule shall be borne by the commission.

[19.17.2.11 NMAC - N, 01-15-2005]

19.17.2.12 OTHER JURISDICTIONS: Operations conducted in the state which are intended to affect the weather in a target area in another state are prohibited except upon full compliance with the laws of that state as well as the provisions of the Weather Control Act and this rule.

[19.17.2.12 NMAC - N, 01-15-2005]

19.17.2.13 LICENSES E REQUIRED: Any person desiring to engage in operations in the state of New Mexico shall be required to make application for and receive a license prior to commencing operations.

[19.17.2.13 NMAC - N, 01-15-2005]

19.17.2.14 LICENSE APPLICATION PROCEDURES AND REQUIREMENTS: In order to apply for a license an applicant must complete the part A application demonstrating professional qualifications for conducting operations and must complete part B of the application presenting a detailed project scope of the operation to be conducted.

A. Part A of the application includes the following requirements:

(1) an application fee of one hundred dollars (\$100.00) with the completed application form;

(2) designation of an operations director having the minimum professional and education requirements of two (2) years of supervisory experience with weather control projects and one of the following four (4) additional requirements:

(a) a masters of science degree in meteorology or related field; or

(b) a bachelor's degree in meteorology, plus two (2) additional years of recent experience in weather control field operations within the last five (5) years; or

(c) a bachelor's degree in engineering, mathematics or applicable physical or natural sciences including at least twenty-five (25) semester hours of meteorological course work plus two (2) additional years of experience in weather control field operations within the last five (5) years; or

(d) a bachelor's degree in meteorology and a manager certification by the weather modification association;

(3) a resume of the operations director and a resume from each individual who will significantly participate in the operation; each resume shall demonstrate sufficient knowledge and competence in the field of meteorology and cloud physics; if the operator is an organization, any individual and individuals who significantly participate in the operation shall meet the requirements of this subparagraph;

(4) proof of financial responsibility (see 19.17.2.15 NMAC).

B. Part B of the application shall include identification of the following:

(1) the name and address of the applicant;

(2) name and address of the operations director;

(3) the sponsor(s) on whose behalf(s) the operation is to be conducted;

(4) the operations area and the target area;

(5) the weather control hypothesis, and a detailed operational plan for implementing the hypothesis;

(6) the intended effect of the operation;

(7) the materials and apparatus to be used in conducting the operation;

(8) suspension criteria;

(9) the period of operation, including starting and ending date (the operation need not be continuous);

(10) a plan, acceptable to the commission, for quantitatively and critically assessing the effects of the proposed operation;

(11) a completed notice of intention for license; a completed notice of intention shall accompany each application and shall be filed on a form furnished by the commission; and

(12) any additional information as the commission or the weather control committee may deem appropriate.

C. Part A and Part B of the application shall be submitted at least one hundred twenty (120) days prior to the proposed commencement date of the operation for which the license is being sought, to allow time to publish the notice of intention, hold a hearing in the event the application is protested or if the applicant requests a hearing after the commission's staff recommends license denial, review the operation information presented, and allow action by the commission prior to the proposed commencement date of the operation. The commission may waive the one hundred twenty (120) day period in part or whole for good cause and at the sole discretion of the commission.

D. A license is neither

assignable nor transferable.

E. Any operation for which a license is granted shall be conducted under the personal direction of the operations director listed on the license.

F. The applicant shall notify the commission's staff in writing within fifteen (15) days of any substantive changes to any of the information submitted in the application.

[19.17.2.14 NMAC - N, 01-15-2005]

19.17.2.15 FINANCIAL RESPONSIBILITY REQUIREMENT UNDER LICENSE:

All applicants shall have on file, prior to license issuance, proof of ability to respond to damages for liability that might reasonably be attached to or result from any operations. This proof shall be in the form of a surety bond in the amount of one million dollars (\$1,000,000) minimum for each license to be issued or such other proof of financial responsibility as the commission or the weather control committee may require.

[19.17.2.15 NMAC - N, 01-15-2005]

19.17.2.16 PRELIMINARY RECOMMENDATION BY COMMISSION STAFF:

Within thirty (30) days of receipt of a completed application, commission staff shall evaluate the application for the purpose of making a recommendation to the weather control committee. The applicant shall be notified in writing of the commission staff's recommendation.

A. Recommendation of approval:

(1) Commission staff may recommend approval of the application only if the operation meets all requirements of this rule, is in conformity with all applicable provisions of New Mexico law and promotes the public welfare.

(2) If the commission staff recommends approval, it shall publish a notice of intention pursuant to 19.17.2.17 NMAC.

B. Recommendation of denial:

(1) The commission's staff shall recommend a denial of the application if the application does not meet the criteria for approval set forth in the Weather Control Act and this rule.

(2) If the commission's staff determines that it will recommend denial of the application to the commission, the staff shall notify the applicant within ten (10) days of such determination by mail. The applicant has fifteen (15) days from the date of mailing to request further consideration by the weather control committee pursuant to 19.17.2.18 NMAC. An applicant's failure to request further consideration under this paragraph shall be deemed as intention to abandon the application.

[19.17.2.16 NMAC - N, 01-15-2005]

19.17.2.17 PUBLICATION OF NOTICE OF INTENTION FOR LICENSE:

The commission staff shall publish the notice of intention once a week for two (2) consecutive weeks in a newspaper or newspapers having general circulation in each county or counties of the proposed operations area and target area. The applicant may either pay publication costs directly to the publisher or may pay such costs to the commission in advance of publication.

[19.17.2.17 NMAC - N, 01-15-2005]

19.17.2.18 FURTHER CONSIDERATION BY THE WEATHER CONTROL COMMITTEE:

A. The weather control committee shall consider the merits of an application and otherwise determine if the requirements of the Weather Control Act and this rule have been met and may hold a hearing on such application at its discretion or in the event of either:

(1) written protest of the application by at least five (5) interested parties received in the offices of the commission (address in Paragraph (2) of Subsection A of 19.17.2.18 NMAC herein) within ten (10) days after last publication of the notice of intention; or

(2) written request by the applicant in accordance with Paragraph (2) of Subsection B of 19.17.2.16 NMAC; commission address for mailing of written protests of any application: Attn: Weather Control Committee, New Mexico Interstate Stream Commission, Post Office Box 25102 Santa Fe, New Mexico 87504-5102.

B. All hearings may be held before the weather control committee, at the commission's sole discretion.

C. Notice of hearing. At least twenty (20) days prior to a hearing by the weather control committee or the commission on an application, the commission's staff shall notify in writing all hearing participants of the hearing date and location. If an applicant requests a hearing after a recommendation of denial by commission staff, the applicant shall first publish the notice of intention in accordance with 19.17.2.17 NMAC of this rule.

D. Hearing is optional. At the discretion of the weather control committee, it may elect to provide a weather control committee recommendation in accordance with Subsection H of 19.17.2.19 NMAC of this rule without a hearing.

[19.17.2.18 NMAC - N, 01-15-2005]

19.17.2.19 HEARING PROCEDURES:

A. Weather control committee chair. The chair of the weather control committee shall preside over hearings on any contested application. The chair,

with advice and consent from the other weather control committee members, shall have the power to regulate the hearing; to perform all acts and take all measures necessary to conduct such hearing, including the authority to administer oaths and affirmations; to explain the events and requirements of the hearing process to all hearing participants; to hear all relevant issues during the hearing; to request and receive a proper administrative record and to otherwise regulate the conduct and course of the hearing. The chair may limit testimony to those matters reasonably noticed by the application or by any letter of protest filed pursuant to Paragraph (1) of Subsection A of 19.17.2.18 NMAC of this rule.

B. Pre-hearing discovery.

No pre-hearing discovery shall be required by or from any hearing participant. At least ten (10) days prior to the hearing, the weather control committee shall make available to any hearing participant any application to be considered at the hearing, and any protest thereof, previously filed with the commission.

C. Location of hearings.

The weather control committee shall hold all hearings in Santa Fe, unless the weather control committee decides in its sole discretion that a hearing should be held elsewhere to facilitate participation.

D. Testimony and evidence.

During a hearing, evidence shall be presented only by (1) the applicant, (2) any person filing a letter of protest filed pursuant to Paragraph (1) of Subsection A of 19.17.2.18 NMAC of this rule, and (3) the commission's staff. No other person or entity may give evidence or argument. Any person or entity giving evidence or argument must provide the commission and all other hearing participants with a copy of any document or exhibit submitted as evidence. The New Mexico rules of evidence are not binding on presentation of evidence. The hearing shall be taped or transcribed.

E. Administrative notice.

The weather control committee may take administrative notice of all judicially cognizable facts (i.e., all facts that may be noticed by a judge), and of generally recognized technical or scientific facts, published reports of governmental and state agencies and studies and conclusions within the commission's specialized knowledge.

F. Continuance/postponement.

At the discretion of the chair, a scheduled hearing may be continued with notice, prior the hearing or may be recessed during the hearing and reconvened at a later date. Any statement of continuance or recess shall be made a part of the record. A hearing participant may request postponement or continuance of a hearing for good cause shown subject to approval by the chair. Grounds for postponement or contin-

uance may include, but are not limited to, the unavailability of witnesses, unfair hardship by a hearing participant or economic use of commission resources.

G. Weather control committee recommendations. Within thirty (30) days after the weather control committee either completes its hearing deliberations or elects not to hold a hearing pursuant to Subsection D of 19.17.2.18 NMAC, it shall deliver to the commission a recommended decision including findings of fact and conclusions of law. The commission's staff shall serve a copy on each hearing participant by U.S. first-class mail, postage prepaid within ten (10) days of issuance thereof.

H. Final decision. At the next regularly scheduled commission meeting occurring at least fifteen (15) days after the weather control committee serves its recommended decision on the hearing participants, the commission shall consider the recommended decision on the hearing participants, the commission shall consider the recommended decision and issue a final decision or remand to the weather control committee for further administrative proceedings.

I. Administrative record. The administrative record shall include or otherwise reflect, at a minimum, all filings with the commission, all staff recommendations, all evidence received or considered, offers of proof and objections and rulings thereon, any recommended decision including findings of fact and conclusions of law submitted by the weather control committee, the transcript or tape of the oral proceedings as well as any decision, opinion or report by the commission. [19.17.2.19 NMAC - N, 01-15-2005]

19.17.2.20 EXPIRATION AND RENEWAL OF LICENSE: Each license shall expire twelve (12) months after the issuance date thereof. Such license may, upon application, be renewed if the operator fulfills all the necessary qualifications and requirements stated in this rule. The application for renewal shall be accompanied by the application fee and by any appropriate modifications to the application. A license shall not be renewed if the applicant no longer qualifies for such license, if the license is no longer in compliance with applicable state, tribal or federal law, if renewal of the license does not promote the public welfare or if the applicant has violated any provisions of the Weather Control Act or this rule. Thirty (30) days after the applicant requests a renewal and submits any changes to the application, the weather control committee shall recommend to the commission whether to renew a license. If there are any significant changes to the application, the weather control committee

shall first give notice and opportunity for hearing as provided in Paragraph (2) of Subsection A of 19.17.2.16 NMAC of this rule before renewing any license. [19.17.2.20 NMAC - N, 01-15-2005]

19.17.2.21 LICENSE SUSPENSION, MODIFICATION OR REVOCATION:

A. The commission may suspend or revoke or refuse to renew a license for any one or any combination of the following causes:

- (1) incompetence;
- (2) dishonest practice;
- (3) false or fraudulent representation in obtaining a license under this rule;
- (4) failure to comply with any of the provisions of the Weather Control Act, this rule or applicable state, tribal or federal law;

B. When it appears to the weather control committee that a threat to life or property exists or is imminent, or the commission or its staff has been notified of a probable impending emergency or the operation fails to maintain compliance with this rule, the weather control committee may summarily order the operator to immediately suspend, terminate or modify all operations within the area affected by such operations.

C. Aiding other persons who fail to comply with any of the provisions of the Weather Control Act, this rule or applicable state, tribal or federal law.

D. When it appears to the weather control committee that a threat to life or property exists or is imminent, or the commission or its staff has been notified of a probable impending emergency or the operation fails to maintain compliance with this rule, the weather control committee may summarily order the operator to immediately suspend, terminate or modify all operations within the area affected by such operations.

(1) Notification of suspension, modification or termination of an operation shall be given in the most expeditious manner under the circumstances.

(2) Regardless of the manner of initial notification, it is to be followed within two (2) business days by facsimile or a certified letter of particulars addressed to the licensed holder stating the time and place for holding a hearing on the question of taking permanent action to modify or cancel the license.

(3) In the event that the weather control committee summarily suspends or modifies a license, it shall issue a report to the commission for its consideration at its next regularly scheduled meeting. The commission may hold an informal hearing on the matter to allow any person who would qualify as a hearing participant a reasonable opportunity to be heard on this issue.

(4) Whether or not the commission reinstates operations, and when such reinstatement may take place, will depend, among other things, upon the conditions that develop within the operations area and target area and if the requirements of the Weather Control Act, this rule, applicable state, tribal and federal law and the commission are met.

(5) The commission or the weather control committee may initiate any necessary actions in a court of competent jurisdiction in the event that the operator fails to adhere to any order under this section.

C. Each license issued will include suspension criteria regarding operations that shall be applied to protect life and property.

D. Failure of the operator to notify the commission's staff of an existing or impending or reasonably foreseeable emergency threat to life or property is grounds for cancellation of the license and immediate termination of the operation. [19.17.2.21 NMAC - N, 01-15-2005]

19.17.2.22 OPERATION RECORDS: The operator shall maintain the following records during an operation and provide them to the commission pursuant to 19.17.2.23 NMAC of this rule:

A. Daily log: Each operator must maintain a daily log of weather control activities for each unit of equipment and apparatus used during an operation. The log shall include at a minimum:

(1) date of weather control activity;

(2) each aircraft flight track and location of each item or apparatus used during each mission; use of maps is required;

(3) local time when weather control activity began and ended; for non-continuous activities, the start and end of a total sequence of activity is acceptable;

(4) amount of time each apparatus is in operational use;

(5) type of weather control agent/material used in each apparatus;

(6) rate of dispersal and dispersal location of each seeding agent/material during actual use of each apparatus; the information is to be provided both in the form of maps and in computer-readable form for possible subsequent analysis;

(7) total amount of seeding agent/material used; if more than one agent/material is used, list totals for each type of agent separately;

(8) local time when any type of monitoring (e.g., radar) was operational and computer readable archives of monitoring date;

(9) type(s), estimated moisture content and size of cloud(s) modified (i.e., stratiform, isolated cumuliform, organized cumuliform, etc.);

(10) narrative indicating such operational problems as equipment failure, personnel problems, weather conditions, etc.; and

(11) monthly totals from the daily logs listing the following:

(a) days during the month in which operation(s) were conducted;

(b) time of operation(s);

- (c) amount of each kind of seeding agent/material used;
- (d) average rate of dispersal of each kind of seeding agent/material used;
- (e) time of operation of any monitoring equipment; and
- (f) days of each type of cloud treated.

B. Weather records.

Each operator must obtain and retain copies of all daily precipitation total records available from the national weather service stations in the operations area and target area and from any other reliable sources.

C. Participants.

Each operator must keep a current listing of names and addresses of all participants in any operation for which the commission issues the operator a license.

[19.17.2.22 NMAC - N, 01-15-2005]

19.17.2.23 OPERATOR REPORTS: At a minimum, the operator shall maintain and provide the following reports to the commission's staff:

A. Tri-monthly report.

Every ninety (90) days after the commencement of an operation, the operator shall submit a report to the commission that shall consist of:

- (1) a summary of the records prepared under 19.2.7.22 NMAC of this rule;
- (2) a copy of the roster of all participants associated with the operation which was prepared according to Section 22 of this rule; and
- (3) a narrative account of the manner and extent in which the operation did or did not conform to the intended effect as described in Subsection B of 19.17.2.14 NMAC of this rule.

B. Summary report.

A summary report on observed results of each operation must be submitted ninety (90) days after conclusion of the operation. These summary reports shall consist of all information required in Subsection A of 19.17.2.23 NMAC, plus a narrative evaluation and quantitative analysis of the operation and its effects on the operations area in form and content acceptable to the commission staff.

C. Reports to sponsors.

The operator shall file with the commission a copy of all reports made by the operator to sponsors.

D. Federal reporting.

The operator is responsible for complying with all applicable federal reporting requirements as set forth in Public Law 92-205, 15 U.S.C. 330b, as amended, including reporting to the national oceanic and atmospheric administration. The commission's staff maintains a copy of the reporting form required by federal law.

[19.17.2.23 NMAC - N, 01-15-2005]

19.17.2.24 RELEASE OF INFORMATION TO PUBLIC: All operational information for an operation shall be filed with the commission before such information is released to the public. Scientific and other information concerning an operation shall also be filed with the commission as it becomes available and before being released to the public.
[19.17.2.24 NMAC - N, 01-15-2005]

19.17.2.25 MONITORING: When an operator conducts an operation in an area where the United States government or its agent is conducting weather control research, then said operator shall submit to monitoring by the United States government or its agent.
[19.17.2.25 NMAC - N, 01-15-2005]

19.17.2.26 LIABILITY: Except as provided in 19.17.2.8 NMAC and 19.17.2.9 NMAC of this rule, nothing in this rule shall present any person adversely affected by an operation or any research and development activity from recovery damages otherwise available under applicable law.
[19.17.2.26 NMAC - N, 01-15-2005]

19.17.2.27 SUITS TO RECOVER FEES: The commission shall have power to commence suit for the recovery of any fees due under the provisions of this rule. All fees collected under the provisions of this rule shall inure to the commission.
[19.17.2.27 NMAC - N, 01-15-2005]

19.17.2.28 LIBERAL CONSTRUCTION: This rule shall be liberally construed to carry out its purpose.
[19.17.2.28 NMAC - N, 01-15-2005]

HISTORY OF 19.17.2 NMAC:
[RESERVED]

NEW MEXICO PUBLIC REGULATION COMMISSION UTILITY DIVISION

Effective January 14, 2005, the Public Regulation Commission repeals 17.9.572 NMAC, Renewable Energy as a Source of Electricity, filed 6-16-03.

NEW MEXICO PUBLIC REGULATION COMMISSION UTILITY DIVISION

TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES

CHAPTER 9 ELECTRIC SERVICES PART 572 R E N E W A B L E ENERGY FOR ELECTRIC UTILITIES

17.9.572.1 ISSUING AGENCY: New Mexico Public Regulation Commission.
[17.9.572.1 NMAC - Rp, 17.9.572.1 NMAC, 1-14-05]

17.9.572.2 SCOPE:
A. All electric public utilities are subject to 17.9.572.1 through 17.9.572.19 NMAC.

B. Rural electric cooperatives are subject to 17.9.572.1 through 17.9.572.6, and 17.9.572.20 NMAC.
[17.9.572.2 NMAC - Rp, 17.9.572.2 NMAC, 1-14-05]

17.9.572.3 STATUTORY AUTHORITY: NMSA 1978 Sections 62-16-7 and 62-16-9.
[17.9.572.3 NMAC - Rp, 17.9.572.3 NMAC, 1-14-05]

17.9.572.4 DURATION: Permanent.
[17.9.572.4 NMAC - Rp, 17.9.572.4 NMAC, 1-14-05]

17.9.572.5 EFFECTIVE DATE: January 14, 2005, unless a later date is cited at the end of a section.
[17.9.572.5 NMAC - Rp, 17.9.572.5 NMAC, 1-14-05]

17.9.572.6 OBJECTIVE: The purpose of this rule is to implement the Renewable Energy Act, NMSA 1978 Section 62-16-1 et seq.
[17.9.572.6 NMAC - Rp, 17.9.572.6 NMAC, 1-14-05]

17.9.572.7 DEFINITIONS: Unless otherwise specified, as used in this rule:

A. procure means to generate or purchase renewable energy and/or renewable energy certificates or to commit to generate or purchase renewable energy and/or renewable energy certificates;

B. public utility means an entity certified by the commission to provide retail electric service in New Mexico pursuant to the Public Utility Act but does not include rural electric cooperatives;

C. reasonable cost threshold means the cost established by the commission above which a public utility shall not be required to add renewable energy to its electric energy supply portfolio pursuant to the renewable portfolio standard;

D. renewable energy

means electrical energy generated by means of a low or zero emissions generation technology with substantial long-term production potential and generated by use of renewable energy resources that may include solar, wind, hydropower, geothermal, fuel cells that are not fossil fueled and biomass resources; biomass resources are fuels, such as agriculture or animal waste, small diameter timber, salt cedar and other phreatophyte or woody vegetation removed from river basins or watersheds in New Mexico, landfill gas and anaerobically digested waste biomass; renewable energy does not include fossil fuel or nuclear energy;

E. renewable energy certificate means a document evidencing that the enumerated renewable energy kilowatt-hours have been generated from a renewable energy generating facility;

F. renewable portfolio standard means the percentage of retail sales by a public utility to electric consumers in New Mexico that is required to be supplied by renewable energy.

[17.9.572.7 NMAC - Rp, 17.9.572.7 NMAC, 1-14-05]

17.9.572.8 LIBERAL CONSTRUCTION: This rule shall be liberally construed to carry out its intended purposes. If any provision of this rule, or the application thereof to any person or circumstance, is held invalid, the remainder of the rule, or the application of such provision to other persons or circumstances, shall not be affected thereby.

[17.9.572.8 NMAC - Rp, 17.9.572.8 NMAC, 1-14-05]

17.9.572.9 RELATIONSHIP TO OTHER COMMISSION RULES: Unless otherwise specified, this rule does not supersede any other rule of the commission but supplements rules applying to public utilities.

[17.9.572.9 NMAC - Rp, 17.9.572.9 NMAC, 1-14-05]

17.9.572.10 RENEWABLE PORTFOLIO STANDARD:

A. Each public utility must develop a reasonable cost renewable energy portfolio. The portfolio shall be diversified as to type of renewable resource, taking into consideration the overall reliability, availability, dispatch flexibility and cost of the various renewable resources made available by providers and generators. Renewable energy resources that are in a public utility's electric energy supply portfolio on July 1, 2004 shall be counted in determining compliance with this rule. However, renewable energy sold to customers through a premium-priced renewable energy tariff shall not be counted in determining compliance with

this rule. Other factors being equal, preference shall be given to renewable energy generated in New Mexico.

B. By January 1, 2006, the renewable portfolio standard shall be no less than five percent (5%) of annual retail jurisdictional energy sales for calendar year 2006, except as modified by Subsection C of this section. Thereafter, the renewable portfolio standard will increase by one percent (1%) per year for each year until the renewable portfolio standard of ten percent (10%) is attained for the calendar year 2011. Upon and after January 1, 2011, the renewable portfolio standard will remain fixed at ten percent (10%) of all retail jurisdictional energy sales.

C. The renewable portfolio standard will be reduced, as necessary, to limit the kilowatt-hours of renewable energy procured by a public utility for non-governmental customers at a single location or facility, regardless of the number of meters, with consumption exceeding ten million kilowatt-hours per year. A public utility shall limit the amount of its renewable portfolio standard so that the additional cost of the standard, inclusive of all interconnection and transmission costs, to each customer on and after January 1, 2006, does not exceed the lower of one percent of that customer's annual electric charges or forty-nine thousand dollars (\$49,000). This procurement limit will increase by one-fifth percent or ten thousand dollars (\$10,000) per year until January 1, 2011, when the procurement limit will remain fixed at the lower of two percent of that customer's annual electric charges or ninety-nine thousand dollars (\$99,000). After January 1, 2012, the commission may adjust the ninety-nine thousand dollar (\$99,000) limit for inflation.

D. In determining the amount of the reduction specified in paragraph C of this section, a public utility shall assume that electric rates in effect on the day of the procurement plan filing will be in effect for the year during which the procurement reduction will apply. A public utility with a fuel and purchased power cost adjustment clause (FPPCAC) shall also assume that FPPCAC charges to the customer during the year immediately preceding its procurement plan filing will be in effect, in identical amounts, during the year for which the procurement reduction will apply.

E. A public utility that, as of July 1, 2004, has an all-requirements contract which would not reasonably permit it to procure renewable energy for purposes of meeting the renewable portfolio standard, may apply to be exempted from the renewable portfolio standard until the earlier of the date of their next contract forward or the first date on which the all-require-

ments contract is amended or renegotiated, at which time such public utility shall be subject to the renewable portfolio standard. A public utility seeking such exemption shall file with the commission a petition for exemption no later than January 31, 2005. The petition shall include a copy of the public utility's all-requirements contract as well as testimony and exhibits demonstrating that the public utility is unable, with due diligence, to procure renewable resources needed to meet the renewable portfolio standard. The public utility shall serve a copy of the petition on staff, the attorney general, and all parties to the public utility's last general rate case.

[17.9.572.10 NMAC - Rp, 17.9.572.10 NMAC, 1-14-05]

17.9.572.11 REASONABLE COST THRESHOLD:

A. A public utility shall not be required to add renewable energy to its electric energy supply portfolio, pursuant to the renewable portfolio standard, above the reasonable cost threshold established by the commission.

B. As changing circumstances warrant, and after notice and hearing, the commission may prospectively modify the reasonable cost threshold applicable to new contracts, but not the threshold applicable to existing contracts which have been previously approved by the commission as part of a procurement plan to meet a public utility's renewable portfolio standard. In establishing and modifying the reasonable cost threshold, the commission will take into account:

(1) the price of renewable energy at the point of sale to the public utility;

(2) transmission and interconnection costs required for the delivery of renewable energy to retail customers;

(3) the impact of the cost for renewable energy on retail customer rates;

(4) overall diversity, reliability, availability, dispatch flexibility, cost per kilowatt-hour and life cycle cost on a net present value basis of renewable energy resources available from suppliers; and

(5) other factors, including public benefits, the commission deems relevant.

C. In any given year, if the cost to procure renewable energy is greater than the reasonable cost threshold, a public utility will not be required to incur that cost or to procure that resource, provided that the condition excusing performance under the renewable portfolio standard in any given year will not operate to delay the annual increases in the renewable portfolio standard in subsequent years. A public utility that believes its procurement will exceed the reasonable cost threshold shall file with the commission a request for waiver of the renewable portfolio standard for the appli-

cable calendar year. The request shall explain in detail why the public utility cannot procure resources at a cost less than the reasonable cost threshold and shall include an explanation and evidence of all efforts the public utility undertook to procure resources at a cost within the reasonable cost threshold. Waiver requests shall be deemed granted if not acted upon within sixty (60) days.

[17.9.572.11 NMAC - N, 1-14-05]

17.9.572.12 COST RECOVERY FOR RENEWABLE ENERGY:

A public utility shall recover the reasonable costs of complying with the renewable portfolio standard through the rate making process. A public utility shall also recover its reasonable interconnection and transmission costs to deliver renewable energy to retail New Mexico customers. Costs that are consistent with commission-approved procurement plans or transitional procurement plans are deemed to be reasonable. A public utility that is permitted to defer the recovery of renewable energy costs pursuant to commission order may, through the ratemaking process, recover from customers that are not subject to the rate impact limitations of Subsection C of 17.9.572.10 NMAC the cumulative sum of those deferred amounts, plus a carrying charge on those amounts. For customers that are subject to the rate impact limitations of Subsection C of 17.9.572.10 NMAC, a public utility may, through the ratemaking process, recover from those customers the cumulative sum of those Subsection C of 17.9.572.10 NMAC limited deferred amounts, plus carrying charges on those amounts.

[17.9.572.12 NMAC - N, 1-14-05]

17.9.572.13 RENEWABLE ENERGY CERTIFICATES:

Each public utility shall annually establish its compliance with the renewable portfolio standard through the filing of renewable energy certificates with the commission, consistent with the kilowatt-hour values established in 17.9.572.14 NMAC.

A. Renewable energy certificates shall contain the following information:

(1) the name and contact information of the renewable energy generating facility owner and/or operator;

(2) the name and contact information of the public utility purchasing the renewable energy certificate;

(3) the type of generator technology and fuel type;

(4) the generating facility's physical location, nameplate capacity in MW, location and ID number of revenue meter, and date of commencement of commercial generation;

(5) the public utility to which the generating facility is interconnected;

(6) the control area operator for the generating facility; and

(7) the quantity in kWh and the date of the renewable energy certificate transaction.

B. Renewable energy certificates:

(1) are owned by the generator of the renewable energy unless:

(a) the renewable energy certificates are transferred to the purchaser of the energy through specific agreement with the generator;

(b) the generator is a qualifying facility, as defined by the federal Public Utility Regulatory Policies Act of 1978, in which case the renewable energy certificates are owned by the public utility purchaser of the renewable energy unless retained by the generator through specific agreement with the public utility purchaser of the energy; or

(c) a contract for the purchase of renewable energy is in effect prior to January 1, 2004, in which case the purchaser of the energy owns the renewable energy certificates for the term of such contract;

(2) may be traded, sold or otherwise transferred by their owner to any other party; such transfers and use of the certificate by a public utility for compliance with the renewable energy portfolio standard do not require physical delivery of the electric energy represented by the certificate to a public utility; the renewable energy shall be contracted for delivery in New Mexico unless the commission determines that there is a regional market for exchanging renewable energy certificates; if the commission has not made a determination that a regional renewable energy market or trading system is generally available for all public utilities in the state, any public utility may seek approval from the commission of individual renewable energy certificates that represent energy generated by a renewable energy resource within a regional renewable energy market or trading system in any region where the public utility is located;

(3) that are used once by a public utility to satisfy the renewable portfolio standard and are retired or that are traded, sold or otherwise transferred by the public utility shall not be further used by the public utility; and

(4) that are not used by a public utility to satisfy the renewable portfolio standard or that are not traded, sold or otherwise transferred by the public utility may be carried forward for up to four (4) years from the date of issuance and, if not used by that time, shall be retired by the public utility.

C. Public utilities are responsible for demonstrating that a renew-

able energy certificate used for compliance with the renewable portfolio standard is derived from eligible renewable energy resources and has not been retired, traded, sold or otherwise transferred to another party. A public utility shall maintain records sufficient to meet the demonstration requirement of this subsection.

[17.9.572.13 NMAC - Rp, 17.9.572.10 NMAC, 1-14-05]

17.9.572.14 RENEWABLE ENERGY VALUATION:

For purposes of complying with the renewable portfolio standard the kilowatt-hour value of renewable energy certificates shall be varied by renewable energy resource or technology as follows:

A. each kilowatt-hour of electricity generated by wind or hydroelectric technologies, plants, or sources represents one (1) kilowatt hour toward compliance with the renewable portfolio standard;

B. each kilowatt hour of electricity generated by biomass, geothermal, landfill gas, or fuel cell technologies, plants, or sources represents two (2) kilowatt hours toward compliance with the renewable portfolio standard; and

C. each kilowatt-hour of electricity generated by solar technologies, plants or sources represents three (3) kilowatt hours toward compliance with the renewable portfolio standard.

[17.9.572.14 NMAC - Rp, 17.9.572.10 NMAC, 1-14-05]

17.9.572.15 VOLUNTARY RENEWABLE TARIFFS:

A. Each public utility shall offer a voluntary renewable energy tariff for those customers who want the option to purchase additional renewable energy.

B. The voluntary renewable tariff may also include provisions to enable consumers to purchase renewable energy within certain energy blocks and by source of renewable energy. Additionally, each public utility must develop an educational program on the benefits and availability of its voluntary renewable energy program. The tariff, along with the details of the consumer education program, shall be on file with the commission.

[17.9.572.15 NMAC - Rp, 17.9.572.10 NMAC, 1-14-05]

17.9.572.16 ANNUAL RENEWABLE ENERGY PORTFOLIO PROCUREMENT PLAN:

A. By September 1 of each year until 2012, and thereafter as determined necessary by the commission, each public utility must file with the commission an annual portfolio procurement plan. The portfolio procurement plan is to include:

(1) the cost of procurement in the

next calendar year for any new renewable energy resource required to comply with the renewable portfolio standard;

(2) the amount of renewable energy the public utility plans to provide in the calendar year commencing sixteen (16) months later, to satisfy the percentages specified in this rule, less any reductions authorized by this rule or by law;

(3) an explanation and exhibits demonstrating how the amount specified in Paragraph (2) was determined;

(4) the reductions, if any, to the renewable portfolio standard for procurements for nongovernmental customers with consumption exceeding ten (10) million kilowatt hours per year and/or due to the reasonable cost threshold, including an explanation and exhibits demonstrating how the reduction was determined;

(5) testimony and exhibits that demonstrate that the proposed procurement is reasonable as to its terms and conditions considering price, costs of interconnection and transmission, availability, dispatchability, any renewable energy certificate values and diversity of the renewable energy resource; or

(6) demonstration that the plan is otherwise in the public interest.

B. A public utility may file a transitional procurement plan requesting that the commission determine that the costs of renewable energy resources that the public utility has committed to or may commit to, prior to the establishment of a reasonable cost threshold, are reasonable and recoverable. A transitional procurement plan is subject to the same filing requirements as an annual portfolio procurement plan.

C. A public utility shall serve notice and a copy of its annual portfolio procurement plan filing by first class mail on renewable resource providers requesting such notice from the commission, the New Mexico attorney general, and the intervenors in the public utility's most recent rate case. A public utility shall also post on its website the most recent and the pending renewable energy portfolio procurement plans.

[17.9.572.16 NMAC - Rp, 17.9.572.11 NMAC, 1-14-05]

17.9.572.17 ANNUAL RENEWABLE ENERGY PORTFOLIO REPORT: By September 1 of each year until 2012, and thereafter as determined necessary by the commission, each public utility must file with the commission a report on its renewable energy generation or purchases of renewable energy during the prior calendar year. This report shall:

A. itemize all renewable energy generation and/or renewable energy certificate purchases and sales;

B. list, and include copies

of, all renewable energy certificates, including acquired, issued or retired certificates;

C. state, for each purchase or sale of a renewable energy certificate, including those to be applied in future years:

(1) the seller's name, address, telephone number, and electronic mail address;

(2) the purchaser's name, address, telephone number, and electronic mail address;

(3) the dates and terms of each transaction involving renewable energy certificates;

(4) the quantity of renewable energy certificates purchased or sold;

(5) the purchase price;

(6) the type of renewable energy resource used to generate the renewable energy and its valuation pursuant to 17.9.572.14 NMAC; and

(7) other data useful to the commission in evaluating the public utility's efforts to acquire renewable energy in accordance with its portfolio procurement plan; if the acquired renewable energy was not acquired in accordance with a public utility's portfolio procurement plan, the public utility must demonstrate that the renewable energy was acquired at the lowest reasonable price consistent with reliability, availability, and portfolio requirements, including renewable resource diversity; and

D. describe and quantify the implementation of the voluntary renewable tariff requirements in 17.9.572.15 NMAC.

[17.9.572.17 NMAC - Rp, 17.9.572.11 NMAC, 1-14-05]

17.9.572.18 REVIEW BY COMMISSION: The commission shall approve or modify annual portfolio procurement plans and transitional procurement plans within sixty (60) days and may approve such plans without a hearing, unless a protest is filed that demonstrates to the commission's reasonable satisfaction that a hearing is necessary. The commission may modify a plan after notice and hearing, and may, for good cause, extend the time to approve a procurement plan for an additional sixty (60) days. If the commission has not acted within the sixty-day period, a procurement plan or transitional plan is deemed approved. The commission may reject a procurement plan or transitional plan if the commission finds that the plan does not contain the required information; upon such rejection the public utility's obligation to procure additional resources will be suspended for the time necessary to file a revised plan. In such instances, the total amount of renewable energy to be procured by the public utility will not change.

[17.9.572.18 NMAC - Rp, 17.9.572.11

NMAC, 1-14-05]

17.9.572.19 EXEMPTION AND VARIANCE: Any interested person may file an application for an exemption or a variance from the requirements of this rule. Such application shall:

A. identify the section of this rule for which the exemption or variance is requested;

B. describe the situation that necessitates the exemption or variance;

C. set out the effect of complying with this rule on the public utility and its customers if the exemption or variance is not granted;

D. define the result the request will have if granted;

E. state how the exemption or variance will be consistent with the purposes of this rule;

F. state why no other reasonable alternative is preferable; and

G. state why the proposed alternative is in the public interest.

[17.9.572.19 NMAC - Rp, 17.9.572.12 NMAC, 1-14-05]

17.9.572.20 RURAL ELECTRIC COOPERATIVES: Rural electric cooperatives must offer a voluntary renewable energy tariff to the extent that their suppliers under their all-requirements contracts make such renewable resources available. Rural electric cooperatives must report to the commission by April 30 of each year concerning the availability to them of renewable energy and the annual demand for renewable energy pursuant to their voluntary tariff.

[17.9.572.20 NMAC - Rp, 17.9.572.14 NMAC, 1-14-05]

HISTORY OF 17.9.572 NMAC:

Pre-NMAC History: None.

History of Repealed Material:

17 NMAC 10.572, Renewable Energy Development Program (filed 11-30-98) repealed 7-1-03.

17.9.572 NMAC, Renewable Energy as a Source of Electricity (filed 6-16-03) repealed 1-14-05.

Other History:

17 NMAC 10.572, Renewable Energy Development Program (filed 11-30-98) replaced by 17.9.572 NMAC, Renewable Energy as a Source of Electricity, effective 7-1-03.

17.9.572 NMAC, Renewable Energy as a Source of Electricity (filed 6-16-03) replaced by 17.9.572, Renewable Energy for Electric Utilities, effective 1-14-05.

NEW MEXICO RESPIRATORY CARE ADVISORY BOARD

This is an amendment to 16.23.12 NMAC effective February 4, 2005. It amends Section 11; adds two reserved Sections, 15 and 16; and adds a new Section, 17 to 16.23.12 NMAC.

16.23.12.11 OTHER EDUCATIONAL OFFERINGS. The department, in consultation with the board, ~~have~~ has an informal arrangement with the New Mexico society for respiratory care (NMSRC) in which NMSRC will review for approval other continuing education offerings, for individual licensees or continuing education sponsors.

A. Any continuing education (CE) activity that is not covered by 16.23.12.8 NMAC through 16.23.12.10 NMAC must be submitted to NMSRC for review and approval.

(1) Approval must be granted by the NMSRC **before** the CE may be considered applicable toward meeting the continuing education renewal requirement for respiratory care practitioners licensed in New Mexico. Any deadlines for submission of these requests to the NMSRC will be established by the NMSRC as needed.

(2) Approval must be granted by NMSRC **before** the continuing education can be submitted to the department and the board to meet the licensee's continuing education renewal requirement.

B. The request for approval of an educational seminar or course must include the following, at a minimum. The NMSRC may require additional information to process the request.

(1) Name of the seminar or course.

(2) Sponsoring party.

(3) Objective of the seminar.

(4) Format and subjects of seminar or course.

(5) Number of clock hours credited for the offering.

(6) Sample "proof of attendance" certificate.

(7) Name and qualifications of the instructor.

(8) Evaluation mechanism to be used.

C. Any processing fee established by the NMSRC for the continuing education review service must be payable to the NMSRC and must accompany the request to the NMSRC for approval of an educational offering.

D. The NMSRC will give written notification to the sponsor or licensee of the approval or denial of the educational program or seminar.

16.23.12.15 [RESERVED]

16.23.12.16 [RESERVED]

16.23.12.17 EXTENUATING CIRCUMSTANCES - DEFERRAL OR WAIVER OF CONTINUING EDUCATION REQUIREMENT

A. Licensees generally have twenty-four (24) months to complete the continuing education requirement for renewal, which is sufficient time to meet the continuing education requirement.

B. In the event a licensee experiences and extenuating circumstance such as a prolonged debilitating personal illness; or a prolonged debilitating illness of an immediate family member; or being mobilized to active duty by the national guard or other branch of service in the United States armed forces, which makes it impossible to meet the continuing education requirement for license renewal, the individual may request an emergency deferral or a waiver of the continuing education requirement by submitting one of the following items to the board before the license expiration date.

(1) A written request for deferral or waiver explaining the circumstances that made it impossible for the licensee to meet the requirement in the twenty-four months prior to the expiration date of the license.

(2) Documentation accompanying the request for deferral or waiver that verifies the extenuating circumstances, such as a signed affidavit from a physician or medical provider, or a copy of the mobilization orders from the branch of government calling the person to active duty; etc.

C. A licensee mobilized for active military duty, but who is still in training when the license renewal comes due, is required to renew his/her license and meet the continuing education requirements, but the license renewal fee will not be assessed.

D. A licensee mobilized into active military duty, and who is in military action at the time the license renewal comes due, is not required to renew his/her license or meet the continuing education requirements. However, upon return to civilian status, the licensee shall renew the license without having to pay the renewal or late penalty fee.

E. The license of a respiratory therapist who does not earn the required continuing education for renewal due to his/her call to active military duty will not lapse for failure to earn continuing education hours provided the licensee submits a copy of the mobilization orders to the board office prior to the expiration of the license.

F. The license renewal

extension authorized by this regulation shall end one month after deployment is concluded.

G. Upon return to civilian status, the licensee shall resume earning continuing education prorated as follows after the deployment ends.

(1) If the deployment ends in October of the odd-numbered year through March of the even-numbered year, the licensee will accrue twenty (20) hours of continuing education for the next renewal cycle.

(2) If the deployment ends in April of the even-numbered year through September of the even-numbered year, the licensee will accrue fifteen (15) hours of continuing education for the next renewal cycle.

(3) If the deployment ends in October of the even-numbered year through March of the odd-numbered year, the licensee will accrue ten (10) hours of continuing education for the next renewal cycle.

(4) If the deployment ends in April of the odd-numbered year through July of the odd-numbered year, the licensee will accrue zero (0) hours of continuing education for the that year's renewal cycle.

NEW MEXICO RESPIRATORY CARE ADVISORY BOARD

This is an amendment to 16.23.14 NMAC effective February 4, 2005. It amends Section 7; adds two reserved Sections, 22 and 23; and adds a new Section, 24.

16.23.14.7 DEFINITIONS:

A. "**Department**" means the New Mexico regulation and licensing department.

~~[A.]~~ **B.** ~~[Reserved]~~ "**DME or DME company**" refers to durable medical equipment or companies that provide durable medical equipment in the health care industry.

C. ~~[Reserved]~~

D. "**Gratuitous**" means to receive no form of payment or remuneration.

E. "**Home care setting**" as it applies to respiratory care, means any facility, including a patient's home that would usually not employ respiratory care practitioners, specifically those facilities visited by a person from outside the facility to provide respiratory care services.

F. ~~[Reserved]~~

G. "**License**" means the legal privilege and authorization to practice within a professional category.

H. ~~[Reserved]~~

I. "Prescription" means an order given individually for the person for whom prescribed, either directly from the prescriber to the person licensed to fill the prescription or indirectly by means of a written order signed by the prescriber

H. "Medical direction" as applied to respiratory care, means a prescription or order by a physician authorized to practice medicine or by any other person authorized to prescribe under the laws of New Mexico.

16.23.14.22 [RESERVED]

16.23.14.23 [RESERVED]

16.23.14.24 UNLICENSED PRACTICE OF RESPIRATORY CARE - DISCIPLINARY GUIDELINES. In accordance with the provisions contained within the Uniform Licensing Act, the department may take disciplinary action as provided in Section 61-1-3.2, NMSA 1978, (2003 Repl. Pamp.) if the department, in consultation with the board, determines that the respondent has violated the Respiratory Care Act or the department's rules and regulations governing respiratory care (16.23 NMAC) by practicing respiratory care in New Mexico without a valid New Mexico license.

A. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a person who, without a license, engages in the practice of respiratory care.

B. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a company or other business entity that requires an unlicensed person to engage in the practice of respiratory care without a license. The penalty shall be imposed in the amount of one thousand dollars (\$1,000) for each individual that the company or business entity employs and who is performing respiratory care scope of practice procedures and/or protocols without benefit of a valid New Mexico respiratory care license or permit.

C. In addition, the department, in consultation with the board may assess the person, company, or other business entity for administrative costs, including investigative costs and the cost of conducting a hearing.

NEW MEXICO RESPIRATORY CARE ADVISORY BOARD

This amendment to 16.23.16 NMAC adds a new Section, 19, effective February 4, 2005.

16.23.16.19 UNLICENSED PRACTICE OF RESPIRATORY CARE - DISCIPLINARY GUIDELINES. In accordance with the provisions contained within the Uniform Licensing Act, the department may take disciplinary action as provided in Section 61-1-3.2, NMSA 1978, (2003 Repl. Pamp.) if the department, in consultation with the board, determines that the respondent has violated the Respiratory Care Act or the department's rules and regulations governing respiratory care (16.23 NMAC) by practicing respiratory care in New Mexico without a valid New Mexico license.

A. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a person who, without a license, engages in the practice of respiratory care.

B. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a company or other business entity that requires an unlicensed person to engage in the practice of respiratory care without a license. The penalty shall be imposed in the amount of one thousand dollars (\$1,000) for each individual that the company or business entity employs and who is performing respiratory care scope of practice procedures and/or protocols without benefit of a valid New Mexico respiratory care license or permit.

C. In addition, the department, in consultation with the board may assess the person, company, or other business entity for administrative costs, including investigative costs and the cost of conducting a hearing.

NEW MEXICO DEPARTMENT OF TRANSPORTATION

This is an amendment to 18.21.3 NMAC, Sections 1, 3, 5, 7, 9, 10, 12, and 15 through 20. This action also renumbers and reformats 18 NMAC 21.3 to 18.21.3 NMAC in conformance with current NMAC requirements, effective 1/14/2005.

18.21.3.1 ISSUING AGENCY: New Mexico [~~State Highway and Transportation Department~~] Department of Transportation Post Office Box 1149 Santa Fe, New Mexico 87504-1149 (505) 827-0714.
[9/30/98; 18.21.3.1 NMAC - Rn & A, 18 NMAC 21.3.1, 1/14/2005]

18.21.3.3 STATUTORY AUTHORITY:

A. Regulations for signs

giving specific information in the interest of the traveling public are authorized under Sections 66-7-101, [~~1988~~] Most current adopted edition of the manual on uniform traffic control devices or latest approved edition; 66-7-102, 67-3-16, 67-12-4, 67-12-5 and 67-14-1 NMSA 1978 et seq.

B. All rules and regulations set forth herein are subject to revision by the New Mexico [~~state highway and transportation department~~] department of transportation with the approval of the New Mexico state [~~highway~~] transportation commission.

[9/30/98; 18.21.3.3 NMAC - Rn & A, 18 NMAC 21.3.3, 1/14/2005]

18.21.3.5 EFFECTIVE DATE: September 30, 1998, unless a later date is cited at the end of a section [~~or paragraph~~].
[9/30/98; 18.21.3.5 NMAC - Rn & A, 18 NMAC 21.3.5, 1/14/2005]

18.21.3.7 DEFINITIONS: As used in these rules unless the context clearly indicates otherwise.

A. "As-built plans" means detailed plans showing the configuration and location of specific information "panels" and trailblazer signs after the initial construction is completed on an interchange by interchange basis.

B. "Business sign" means a separately affixed sign attached to a motorist informational "panel," showing the name, brand or trademark of a qualified motorist service business.

C. "Commission" means the New Mexico state [~~highway~~] transportation commission.

D. "Department" means the New Mexico [~~state highway and transportation department~~] department of transportation.

E. "Department secretary" means the secretary of the New Mexico [~~state highway and transportation department~~] department of transportation or his designated representative.

F. "District" means any one of six sub-districts of the [~~NMSSH&TD~~] NMDOT responsible for construction and maintenance activities in a defined geographical area.

G. "Eligible highway" means those sections of controlled access highways determined by the [~~NMSSH&TD~~] NMDOT to be eligible for the specific information "panel" program.

H. "Eligible interchange" means those interchanges within the eligible sections of highways where the specific information "panel" program may be provided.

I. "Exit gore" means the earliest point at which the exit roadway becomes fully separated from the mainline

roadway.

J. **“Interstate system”** or **“interstate highway”** means every state highway that is a part of a national system of interstate and defense highways established pursuant to Section 103(b), Title 23, United States Code. This definition also includes fully controlled access freeways on the primary highway system.

K. **“Logo”** means a symbol or design used by a qualified traveler service business that may consist of an easily recognizable identification symbol, name brand, trademark, or combination thereof.

L. **“Main traveled way”** means the through traffic lanes of interstate systems or access controlled routes, exclusive of frontage roads, auxiliary lanes and ramps.

M. **“Specific service sign”** means a “specific informational panel” bearing separately affixed individual business signs, indicating the presence of one or more gas, food, lodging, camping or attraction, and erected in advance of exit ramps on interstate systems or access controlled roadways. In appropriate context only, it also means a supplemental direction panel.

N. **“Separate traveler informational sign”** means a traveler information panel which indicates the presence of only one type of tourist service, namely, gas, food, lodging, or camping. The phrase “traveler information sign” when not qualified means “separate traveler informational panel.”

O. **“Combination traveler informational sign”** means a traveler informational panel which indicates the presence of more than one type of tourist service. No traveler informational panel may indicate the presence of more than three types of tourist services in any event.

P. **“ [N M S H & T D] NMDOT program administrator”** means that person assigned by the [NMSH&TD] NMDOT to oversee and coordinate the LOGOS sign program and when applicable the program manager’s activity.

Q. **“Owner”** means the holder of fee title, or holder of leasehold estates from the owner of the real property.

R. **“Permit”** means formal approval by the NMDOT or when applicable the program manager for work performed within the highway right-of-way and processed on forms provided by the NMDOT or when applicable the program manager for that purpose.

S. **“Program manager”** or **“contractor”** means, when applicable, that person, firm, or organization selected by the [NMSH&TD] NMDOT for the purpose of administering, marketing, constructing, refurbishing, and maintaining the existing and future specific service sign pro-

gram in New Mexico.

T. **“Qualified motorist business”** means a business furnishing gas, food, lodging, camping or attraction related tourist services.

U. **“Responsible operator”** means a person or entity other than an owner who operates an independent motorist service business, and who has authority to enter into agreements relevant to matters covered by these requirements.

V. **“Mainline specific information panel”** means a background sign-panel with border and copy upon which one (1) or more separate business signs may be attached and are located adjacent to the mainline and exit ramps of the eligible highway.

W. **“Ramp supplemental directional sign”** means a motorist informational panel located on, opposite or at the terminus of an exit ramp from the interstate system, bearing business signs and directional information for a qualified motorist service business.

X. **“Trailblazer sign”** means a business sign with an appropriate directional arrow sign mounted along the route leading from the interchange to the business for traffic direction purposes.

Y. **“Visible”** means the location of the business can be readily identified by traffic approaching the termini of the highway exit ramp serving the business or approaching an intersection along the route from the exit ramp to the business.

[9/30/98; 18.21.3.7 NMAC - Rn & A, 18 NMAC 21.3.7, 1/14/2005]

18.21.3.9 LOCATION:

A. ~~[Intended for use in rural areas: The specific information panels are designed for application at rural interchanges and are permitted whether a business is or is not visible to the traveling public from the highway. Specific information panels may be installed within suburban or urban areas only where the roadside development does not appear to the traveler to be urban in character.]~~ The use of specific service signs should be limited to areas primarily rural in character or to areas where adequate sign spacing can be maintained.

B. Limitation of specific information panels and individual business signs:

(1) Where there are sufficient qualified applicants, a separate specific information panel shall be erected for each type of traveler service. The GAS, FOOD, LODGING, CAMPING and ATTRACTION specific information panels shall carry no more than six individual business signs each.

(2) Combination motorist information signs may be used at an interchange at the discretion of the department or con-

tractor.

C. Relationship to exit gore and right-of-way line: The specific information panels shall be erected between the previous interchange and 1/2 mile in advance of the exit gore for the approaching interchange. These panels shall be located outside of the clear zone and readable from the main traveled way. The last panel shall be erected no closer than 1/2 mile to the exit gore of the approaching interchange with at least 800 foot spacing between the information panels. In the direction of traffic, the successive panels shall be those of “ATTRACTION”, “CAMPING”, “LODGING”, “FOOD”, “GAS” in that order.

D. Not to be used where re-entry to freeway is Inconvenient: The specific information panel shall not be erected at an interchange at which an exit from the freeway is provided but at which no entrance ramp exists at that interchange or at another reasonably convenient location that would permit a traveler to proceed in the desired direction of travel without undue indirection or use of poor connection roads.

E. Continuity of signing along exit ramp: The traveler services information, shown on the specific information panels, shall be repeated on the panels located along the interchange ramp where distance allows or at the ramp terminal where the service installations are not visible from the ramp terminal. In addition, appropriate trailblazer assemblies or direction information panels may also be provided along the crossroad, as required, to adequately direct travelers to the respective service facilities. These signs shall be the same in shape, color, and message as those shown on the specific information panels, together with a supplemental arrow sign (M6 series) showing the directions for the different services and, where needed, the mileage to the service installation. Normally, this signing will not be necessary at double-exit interchanges. The legends or symbols on these signs shall be smaller (minimum 4-inch letter height, except that any legend on a symbol shall be in proportion to the size of the symbol) than those shown on the specific information panels.

F. General traveler service signs: There is no need for a general traveler service sign to confirm the specific information panels erected for any of the five services. A general traveler service sign carrying any of the legends or symbols not contained on the specific information panels and also the symbols for phone and hospital, when applicable, may be erected. If so used, it shall be erected in conjunction with the ground mounted exit direction signs, or may be a separate sign with appropriate directional information erected a minimum of 800 feet following the last advance guide

sign. Figures 1 through 5 are prepared from the standards and are included for informational purposes.

[9/30/98; 18.21.3.9 NMAC - Rn & A, 18 NMAC 21.3.9, 1/14/2005]

18.21.3.10 CRITERIA TO DETERMINE SPECIFIC INFORMATION PERMITTED:

A. Location of service establishments from interchange: The maximum distance that the "ATTRACTION", "GAS", "FOOD", "LODGING" or "CAMPING" services can be located from the main traveled way to qualify for a business sign shall not exceed 3 miles in either direction. If within that 3-mile limit one or more of the service types considered is not available, continue in 3-mile increments of consideration up to 15-mile maximum, if necessary, to find an available service of the type being considered. Services beyond the 15-mile limit do not qualify for signing.

B. Types of services permitted: ~~[The]~~ Subsequent to the date of this rule, the types of services permitted shall be limited to "gas", "food", "lodging", "camping" and "attraction". Requirements to qualify for display on a specific information panel are as follows:

(1) "gas" and associated services to qualify for erection on a panel shall include:

(a) vehicle services such as fuel, oil and water;

(b) ~~[continuous operation at least 12 hours per day, 6 days a week, which must include Saturday and Sunday]~~ continuous operation at least 16 hours per day, 7 days per week for freeways and expressways, and continuous operation at least 12 hours per day, 7 days per week for conventional roads;

(c) modern sanitary facilities;

(d) public telephone;

(e) drinking water.

(2) "food" to qualify for erection on a panel shall include:

(a) where required, licensing or approval by state or political subdivision;

(b) ~~[continuous operation to serve food and beverages during normal meal times (7:30 a.m. to 7:30 p.m.), 6 days a week, which must include Saturday and Sunday.]~~ continuous operations to serve three meals per day at least 6 days per week;

(c) modern sanitary facilities;

(d) public telephone.

(3) "lodging" to qualify for erection on a panel shall include:

(a) where required, licensing or approval by state or political subdivision;

(b) adequate sleeping accommodations;

(c) public telephone;

(d) modern sanitary facilities.

(4) "camping" to qualify for erection

on a panel shall include:

(a) licensing or approval by appropriate public agency;

(b) adequate parking accommodations;

(c) modern sanitary facilities, drinking water and showers;

(d) continuous operation seven days a week;

(e) public telephone;

(f) provisions for removal or covering of the business signs during off-seasons if operated on a seasonal basis.

(5) "attraction" to qualify for erection on a panel shall include:

(a) regional significance;

(b) adequate parking accommodations.

[9/30/98; 18.21.3.10 NMAC - Rn & A, 18 NMAC 21.3.10, 1/14/2005]

18.21.3.12 SIZE:

A. Business signs:

(1) The business signs displayed on the information panel shall be contained within a 48-inch wide and 36-inch high rectangular background area, including border.

(2) The existing business signs measuring 60-inch by 36-inch on "FOOD," "LODGING" and "CAMPING" specific information panels shall be replaced, at the logo client's expense, with 48-inch wide by 36-inch high business signs. New 48 inch wide by 36 inch high business signs must be provided by the participating business as new specific information panels are being installed or existing specific information panels are being overlaid or refurbished.

B. Information panel - single-exit interchange:

(1) The maximum size of the specific information panel should be 15-foot wide and 10-foot high, including border; the minimum size should be 15-foot wide and 6-foot high, including border.

(2) The size of existing "FOOD," "LODGING" and "CAMPING" specific information panels are 18-foot wide and 10-foot high or 13-foot wide and 6-foot high, including border. These specific information panels should be replaced with 15-foot wide and 10-foot high or 15-foot wide and 6-foot high respectively, as appropriate, during routine re-construction projects or by, when applicable, the program manager/contractor. The department or contractor may choose to refurbish the existing sign and provide spacing between business signs as approved by the department.

C. Information panel - double-exit interchange:

(1) For double-exit interchanges where the same type of motorist services are to be signed for each exit, the specific information panels shall consist of two 15-foot wide and 6-foot high sections, one for each exit.

(a) Existing "FOOD," "LODGING" and "CAMPING", specific information panels, consist of two 13-foot wide and 6-foot high sections, one for each exit. These specific information panels shall be replaced with two 15-foot wide and 6-foot high during routine re-construction projects or as needed by the contractor.

(b) Each section shall be capable of accommodating a maximum of either three gas, FOOD, LODGING, CAMPING or ATTRACTION business signs.

(2) For double-exit interchanges where a type of motorist service is to be signed for only one exit, only one specific information panel may be used.

[9/30/98; 18.21.3.12 NMAC - Rn & A, 18 NMAC 21.3.12, 1/14/2005]

18.21.3.15 PROCEDURES TO BE FOLLOWED BY THE DEPARTMENT:

A. Eligibility of funds: Federal funds may be eligible to participate in the cost and erection of these panels in the same manner that such funds are eligible for other highway signs to the national highway system, except that federal funds are not eligible to participate in the cost of procuring and installing the business signs.

B. Programming, project authorization and other actions: The procedures for obtaining approval for programming, project authorizations and other actions for federal projects including these panels shall follow the same procedures in use for other national highway system projects. If the department desires to erect these panels on the interstate highway system or other controlled access routes on the national highway system without federal fund participation, it shall provide a design consistent with standards in the MUTCD and standards herein. No panels shall be approved which do not conform to the requirements of these standards. Programming of a traveler informational panel project shall be at the discretion of the department and/or, when applicable, the program manager/contractor.

[9/30/98; 18.21.3.15 NMAC - Rn & A, 18 NMAC 21.3.15, 1/14/2005]

18.21.3.16 ELIGIBILITY:

A. Intended primarily for rural interchanges: Traveler information panels shall be erected and maintained at rural interchanges whether a business is or is not visible to the traveling public from the highway and at suburban or urban interchanges where ~~[roadside business developments are not visible to the highway traveler due to the surrounding terrain and topography. If a traveler business is located at or near an urban or suburban interchange where commercial roadside development is visually obvious to a passing traveler the~~

~~owner of that business shall be eligible to apply for a business or logo sign only if other qualified businesses not visible from the highway do not apply] spacing allows.~~

B. Types of services and criteria: Types of services and criteria are set forth in Subsection B of 18.21.3.10 NMAC.

C. Conformity with civil rights laws: The owner or responsible operator of a qualified traveler business must give written assurance of its conformity with all applicable laws concerning the provisions of public accommodations without regard to race, religion, sex, handicap or national origin.

D. Mileage limits - who may apply. (See Subsection A of 18.21.3.10 NMAC)

E. Rules applicable to business signs:

(1) The owner or responsible operator of the business must file an application for placement of its business sign on all traveler informational panels erected at the interchange on which it is eligible for such placement, and if it is not visible from the exit ramp, on any supplemental directional panel on the exit ramp or at its terminus, on a form specified by the department or when applicable, the program manager/contractor.

(2) The applicant must also agree to furnish the necessary number of its business signs to be affixed to the traveler informational panels. ~~[The program manager/contractor may provide these signs under agreement with the business owner.]~~

(3) The applicant must also acknowledge that the permit is revocable for his failure to comply with those requirements of Subsection J of 18.21.3.16 NMAC of this section; that revocation under this paragraph forfeits applicant's paid rental and permit fees, there being no allowance for a pro rata refund for the remainder of the year.

(4) The applicant expressly agrees to waive all claims against the department and when applicable, its contractor, including claims for damage to its business signs by the department's or contractor installation, maintenance removal and replacement as required in Subsection B of 18.21.3.18 NMAC. Applicant further agrees to indemnify the department and when applicable, the contractor and save them harmless from all claims arising out of the erection, maintenance and existence of applicant's business and logo signs within department's right of way. Such claims to be indemnified include, but are not limited to, damages caused as a result of relying upon the representations made by the business and logo signs to the detriment of the traveling public.

F. Conformity with laws:

All signs or advertising on the premises must be in full compliance with all other state and federal laws and regulations.

G. Priority of business sign application: If applications are received for any one interchange from more than the maximum allowable businesses to be placed on any one panel, only six applications for gas, food, lodging, camping and attraction shall be granted. The order of priority shall be the six businesses closest to the interchange that have applied for a permit prior to the closing date set by the department or the contractor for receipt of applications except as stated in Subsection A of 18.21.3.16 NMAC of this requirement.

H. Length of time of permit: Any grant of a new or renewal application shall entitle the applicant to placement of its business sign(s) on traveler information panel(s) for the interchange(s) for the paid rental period.

I. Permit renewed annually: Eligibility of qualified traveler service businesses for continued placement of their business sign on a traveler information panel may be reviewed annually before a grant of renewal permit, on the same basis as for an original permit, but no new application shall be deemed to have higher priority than a renewal application unless it is received at least sixty (60) days before the permit is scheduled to expire under Subsection H of 18.21.3.16 NMAC.

J. Causes for removal of business signs: Notwithstanding Subsection I of 18.21.3.16 NMAC of this section, the business sign of a traveler service business shall be removed from all traveler informational panels and may be replaced by the business sign of another qualified applicant for failure to comply with Subsection B of 18.21.3.10 NMAC, as follows:

(1) If it fails on a sufficient number of occasions or over a sufficient period of time to provide all of the services required by Subsection B of 18.21.3.10 NMAC, so as to justify a finding by the department or when applicable the program manager that the business is not in substantial compliance with that paragraph.

(2) If it fails to open for business for more than seven consecutive days or for more than ten days cumulatively during any one-year period, unless the department or when applicable the program manager finds that closure for such period was beyond the control of the owner or responsible operator, or that the closure was justified by extenuating circumstances.

(3) If it fails to comply with Subsection C of 18.21.3.16 NMAC of this section, except in isolated instances without the knowledge of the owner, responsible operator or manager of the business, or on any occasion unless steps are promptly

taken to insure to the fullest extent reasonably possible that such instances will not recur.

(4) If it willfully fails to comply with Subsection F of 18.21.3.16 NMAC of this section, or if it fails to take immediate steps to comply promptly after it is notified or becomes aware that it is not in compliance.

K. Removal caused by fire or accident: If due to fire, accident or similar causes, a qualified traveler service business becomes inoperable for an extended period of time, exceeding seven days, but not more than ninety days, its business sign shall be temporarily removed from or covered on all motorist informational panels, but the business shall not lose its priority. Further extension may be granted on good cause shown. However, failure of the owner or responsible operator to proceed with necessary repairs within a reasonable time shall cause the loss of right to continued placement of the business sign and require a new application.

L. Waiver: Upon petition by an applicant showing a significant business disadvantage to it which would arise under strict enforcement of these regulations, or showing a substantial benefit to the public if a variance is granted, the department or when applicable the program manager may authorize a waiver of any requirements of Subsection J of 18.21.3.16 NMAC:

(1) that it will not derogate from the purposes of these requirements;

(2) that the applicant will suffer a significant business disadvantage if the waiver is not granted, or that a substantial benefit to the public will be realized if the waiver is granted;

(3) that the waiver will not be contrary to any provisions of state law, or federal law or regulations.

[9/30/98; 18.21.3.16 NMAC - Rn & A, 18 NMAC 21.3.16, 1/14/2005]

18.21.3.17 APPLICATION AND APPEAL PROCEDURES:

A. Application procedures:

(1) Upon selection of a particular interchange, individually or as part of a selected segment of the Interstate or access controlled national highway system, for erection of traveler informational panels for one or more types of qualified traveler service businesses, the department or when applicable the program manager may secure applications from owners or responsible operators of eligible businesses for placement of their business signs on such panels.

(2) The department or when applicable the program manager shall issue permits to each eligible applicant, up to the maximum number permissible.

B. Appeal procedure: Any order of the department or when applicable the program manager denying an application under these rules or for removal of a business sign pursuant to Subsection J of 18.21.3.16 NMAC, may be appealed by the applicant or permittee to the department secretary or when applicable the program manager within fifteen calendar days after knowledge of the facts or occurrences giving rise to the appeal. Any person who has been sent written notice of any fact or occurrence is presumed to have knowledge of the fact or occurrence. Appeals shall be in writing and contain the name and address of the party appealing, a concise statement of the grounds for the appeal, including any supporting evidence to substantiate the appeal, if available, and specify the ruling requested from the secretary or when applicable the program manager. The department or when applicable the program manager shall notify applicants or permittees promptly on any application denial or decision to remove a sign pursuant to Subsection J of 18.21.3.16 NMAC. [9/30/98; 18.21.3.17 NMAC - Rn & A, 18 NMAC 21.3.17, 1/14/2005]

18.21.3.18 ERECTION AND MAINTENANCE:

A. Erect and maintain informational signs: The department or when applicable the program manager shall furnish, erect and maintain traveler informational panels at locations specified by the department or when applicable the program manager, or it may agree or contract with any city, county, or other governmental agency of this state, or with an independent contractor, to erect and maintain such panels at specified locations. In the event the department chooses to use an independent contractor for program management, the department may allow the contractor to fully administer the program, including marketing, issuing permits and collecting fees as well as providing, erecting informational panels, installing business signs and maintaining all logo informational sign panels. Compensation to the contractor may consist of the fees generated by the program. All existing sign panels as well as all sign panels provided and installed by the contractor will remain the property of the department and the state of New Mexico.

B. Erect and maintain business signs: The department or when applicable the program manager shall perform all required installation, maintenance, and removal and replacement of all business signs upon specific information panels within the right-of-way or as stated in Subsection A of 18.21.3.18 NMAC.

C. Business sign damage and new signs: The department or when applicable the program manager shall not be

responsible for damages to business signs caused by acts of vandalism or natural causes requiring repair or replacement of business signs. Permittees in such event shall provide a new or renovated business sign together with payment of the appropriate service charge to the department or when applicable the program manager to replace such damaged business signs. A service fee for each mainline and/or each ramp supplement and/or each trailblazer business sign shall be assessed in accordance with the current, approved LOGO fee schedule.

D. Business sign approval actions: Promptly upon the approval of applications for business signs to be affixed to traveler informational panels, the department or when applicable the program manager shall notify the party with which it has contracted, so that the panels may be erected. The department or when applicable the program manager shall furnish the party with which it has contracted with all necessary information in order to permit the department or when applicable the program manager to erect the panels.

E. Furnishing business signs: The department or when applicable the program manager shall notify businesses to which applications have been approved sufficiently in advance of the date the panels will be erected, or business signs will be affixed to them, to permit such businesses to furnish the necessary number and detail of their business signs to allow when applicable the program manager to fabricate and install the business signs. If the department or when applicable the program manager is notified that a motorist service business has failed to timely furnish detailed information of its business signs, or that the signs furnished are not in compliance with these requirements and, if the department or when applicable the program manager finds that the permittee has not shown due diligence, it may cancel the permit and forfeit the permit fee.

[9/30/98; 18.21.3.18 NMAC - Rn & A, 18 NMAC 21.3.18, 1/14/2005]

18.21.3.19 FEES:

A. Application fees: All application fees are a one-time charge and are payable on application approval. The application fee for each business sign placed on a motorist informational panel shall be in accordance with the current, approved logo fee schedule. A separate fee in accordance with the current, approved logo fee schedule, shall be applicable for each business sign placed on a supplemental ramp directional panel. A separate fee, in accordance with the current, approved logo fee schedule, shall be applicable for each business sign installed as trailblazer at a crossroads between the ramp terminus and the location of the business. If a business is

not visible from the exit ramp terminal, the motorist services information, shown on the specific information panels shall be repeated on the supplemental panels located along the interchange ramp where distance allows or at the ramp terminal.

B. Annual rental fees: In addition to the application fee, an annual rental fee, in accordance with the current, approved logo fee schedule, for each business sign affixed to a traveler informational panel, not including supplemental ramp signs and/or trailblazers shall be paid annually. The advertiser shall be notified when the traveler information panel is erected and the logo installed and the rental fee is then due. Rental fees shall be reviewed periodically to determine their relationship to the cost of operation of this program. Rental fees not received within thirty (30) days of notification to the applicant by the department shall subject applicant's application to revocation and removal of his sign without application fees being refunded.

C. Fee schedule preparation: In the event the department chooses to use an independent contractor, the contractor will prepare a logo sign fee schedule that shall be included as part of his proposal and is, therefore, subject to approval by the department. At the end of four years the logo sign fee schedule should be reviewed by the department and the contractor, at which time any necessary changes can be made. If the department does not choose to use an independent contractor, the department will prepare the logo sign fee schedule.

D. Retention and refunding fees.

(1) If an application for a permit is, for any reason not granted or renewed, all fees tendered with the application shall be refunded. If the permit is revoked under Subsection J of 18.21.3.16 NMAC, or if the rental is not timely tendered under Subsection B of 18.21.3.19 NMAC, the department or when applicable the program manager shall not refund any application fees.

(2) If an application is approved and contract has been awarded for the erection of the sign, no part of the permit fee shall be refunded. If a permit has been renewed, no part of the permit fee shall be refunded. If the business sign is subsequently removed by a taking of eminent domain of the business being advertised, a proportional refund of the permit fee may be made; however, in case of any removal, the rental fee for any months or major portion (16 days or more) of a month remaining to the anniversary date of placement of the business sign may be refunded. There shall be no refund of rental fees for any business sign temporarily removed or covered pursuant to Subsection K of 18.21.3.16

NMAC.

E. Department administered logo sign program: If the department chooses to continue the administration of the logo sign program, the department shall fully administer the program, including marketing, issuing permits and collecting fees as well as providing, erecting informational panels, installing business signs and maintaining all logo informational sign panels. A separate logo signing program account shall be established to receive any and all fees from the program. All funds in this account shall be used to furnish, erect and maintain traveler informational panels as needed as well as to pay costs associated with the administration of the logo sign program.

[9/30/98; 18.21.3.19 NMAC - Rn & A, 18 NMAC 21.3.19, 1/14/2005]

18.21.3.20 MISCELLANEOUS:

A. The department or when applicable the program manager shall adopt all necessary forms, accounting methods and other necessary procedures to carry out the full intent of these regulations.

B. These regulations shall be effective on the day they are filed with the New Mexico records and archives center, and any regulation heretofore affecting the subject matter hereof is hereby superseded.

[9/30/98; 18.21.3.20 NMAC - Rn & A, 18 NMAC 21.3.20, 1/14/2005]

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

Explanatory paragraph: This is an amendment to 11.4.7 NMAC Sections 7, 9, 10, 11, 12 and 14. This rule promulgation amends the existing rules governing payments for health care services. The largest substantive change in the rule is contained in Subsections A through E of Section 9, which set reimbursement to hospitals at 80% of the hospital ratio assigned with two specific areas of service that are reimbursed subject to a different methodology: implants and technical and professional radiology services. The rule also requires hospitals to submit verifying information to the WCA for use in analyzing cost patterns. The rule is temporary in nature and expires on December 31, 2005. Some of the amendments are technical in nature eliminating language that references WCA contractors where contractors are no longer utilized. The rule recognizes certified registered nurse anesthetists and certified nurse specialists as health care providers. The scheduling of treatment is also included under the "services" definition. Prescriptions for medication shall be for no

more than a 30 day supply and shall be generic, if available, unless otherwise prescribed by a physician. There shall continue to be no charge for an initial copy of medical records, but, under the new rule, health care providers may charge for second and subsequent copies pursuant to fees set forth in the rules. Changes to the anesthesia reimbursement schedule were also included in this rule promulgation. The parties potentially affected are employers, insurers and workers covered by the Workers' Compensation Act and healthcare providers who provide services to workers under the Workers' Compensation Act. The full text of the rule can be found at www.state.nm.us/wca and the effective date of the amendment is January 14, 2005.

11.4.7.7 DEFINITIONS: For the purposes of these rules, the following definitions apply to the provision of all services:

A. "ASA Relative Value Guide" means a document published by the American society of anesthesiologists which includes basic relative unit values for each procedure code listed in the edition of the American medical association's *Current Procedural Terminology* adopted in the director's annual order and unit values for anesthesia modifiers and qualifying circumstances. ~~[The edition of the ASA Relative Value Guide adopted by the director in his order, applies to these rules.]~~ The current calendar year edition of the ASA Relative Value Guide applies to these rules.

V. "Health care provider (HCP)" means any person, entity, or facility authorized to furnish health care to an injured or disabled worker pursuant to NMSA 1978, Section 52-4-1, including any provider designated pursuant to NMSA 1978, Section 52-1-49, and may include a provider licensed in another state if approved by the director, as required by the Act. The director has determined that certified registered nurse anesthetists (CRNAs) and certified nurse specialists (CNSs) who are licensed in the state of New Mexico are automatically approved as health care providers pursuant to NMSA 1978, Section 52-4-1(O).

QQ. "Services" means health care services, the scheduling of the date and time of the provision of those services, procedures, drugs, products or items provided to a worker by an HCP, pharmacy, supplier, caregiver, or freestanding ambulatory surgical center which are reasonable and necessary for the evaluation and treatment of a worker with an injury or occupational disease covered under the New Mexico Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

11.4.7.9 PROCEDURES FOR ESTABLISHING THE MAXIMUM AMOUNT OF REIMBURSEMENT DUE

A. All hospital and FASC services, except as provided in Subsection B of this temporary rule, shall be reimbursed at the rate of 80% of the hospital ratios assigned during calendar year 2004 for all services rendered from January 15, 2005 through December 31, 2005. Any new hospital or FASC shall be assigned a ratio pursuant to Subparagraph (b) of Paragraph (4) of Subsection F of 11.4.7.9 NMAC of these rules, and the services provided by that facility will be reimbursed through December 31, 2005 at the rate of 80% of the assigned ratio for that facility.

B. The following services and items will be reimbursed as specified, commencing with services provided on or after 12:01 A.M. January 1, 2005:

(1) Implants and hardware implanted or installed during surgery in the setting of a hospital or FASC shall be reimbursed at invoice cost times 1.25 plus shipping and handling for the implant or hardware and NMGR.

(2) The professional and technical charges for radiology services provided in a hospital or FASC shall be paid at rates equivalent to those set forth in the most current version of the MAP. The hospital or FASC shall provide a detailed billing breakdown of the professional and technical components of the services provided, and shall be paid pursuant to the procedures set forth at Paragraph (7) of Subsection G of 11.4.7.9 NMAC of these rules.

C. All hospitals and FASCs shall provide to the WCA:

(1) the most recent audited financial statement prepared on behalf of the organization, by February 1, 2005 and within 30 days of the date of preparation of any subsequently produced audited financial statement;

(2) the most recent HCFA/CMS 2552 form prepared by or on behalf of the organization by February 1, 2005 and within 30 days of the date of preparation of any subsequently produced form;

(3) the most recent AHA annual survey health form, L.L.C. prepared by or on behalf of the organization, by February 1, 2005 and within 30 days of the date of preparation of any subsequently produced AHA annual survey health form, L.L.C.;

(4) any hospital or FASC may specifically designate pages of the required audit documents and forms as proprietary and confidential; any pages specifically designated as proprietary and confidential in good faith shall be deemed confidential pursuant to NMSA 1978, Section 52-5-21 and the rules promulgated pursuant to that provision.

D. All provisions of 11.4.7 NMAC contrary to the provisions set forth in this temporary rule are deemed void and inoperative during the effective period of this rule.

E. Subsections A-D of 11.4.7.9 NMAC, inclusive, shall be repealed effective 11:59 P.M. December 31, 2005, and shall be of no force or effect with respect to any services provided thereafter.

~~[A-] E.~~ Assigned ratio discount method for hospitals and FASCs

~~[B-] G.~~ Maximum allowable payment method

~~(5) [Special physical medicine (SPM) services] Physical medicine and rehabilitation services~~

~~(a) [All special physical medicine services must be authorized by the claims payer prior to their scheduling and performance.] It shall be the responsibility of the physical medicine/rehabilitation provider to notify the claims payer of a referral prior to commencing treatment.~~

(7) Service component modifiers --radiology and pathology/laboratory

(a) Use of the technical and professional component modifier codes are required for the billing of all radiology and pathology/laboratory procedures. The CPT code followed by "TC" is the appropriate billing code for the technical component.

(b) The dollar value listed as the MAP for a specific radiology or pathology/laboratory procedure represents the combined maximum allowable payment for both the technical and professional components of that procedure:

(i) The entity billing for the technical component shall be paid at no more than 60% of the MAP for the procedure when the service is provided on an inpatient or outpatient basis.

~~(ii) If the procedure is performed on an inpatient basis, the service is reimbursed according to the assigned ratio.~~

~~(iii)~~ (ii) The entity billing for the professional component shall be paid at no more than 40% of the MAP for the billed procedure, whether the service was provided on an inpatient or an outpatient basis.

~~[C-] H.~~ Pharmacy maximum allowable payment (Pharm MAP) is based upon the maximum payment that a pharmacy or authorized HCP is allowed to receive for any prescription drug, not including NMGR.

(1) Basic provisions

(e) No more than a 30-day supply of medication shall be dispensed, unless authorized by the payer. Where possible, a generic equivalent shall be prescribed over brand name medication, unless specifically ordered by an HCP.

~~[D-] L.~~ Qualification of out of state health care providers

11.4.7.10 BILLING PROVISIONS AND PROCEDURES

D. Medical records

(2) No charge shall be made to any party to the claim for the initial copy of required information. Second copies provided shall be charged and paid pursuant to Subsection A of 11.4.7.15 NMAC.

11.4.7.11 PAYMENT PROVISIONS AND PROCEDURES

C. Payer's explanation of benefits (EOB) for contested bills

(3) ~~[A separate EOB]~~ An EOB shall be attached and shall be clearly related to each payment disposition by procedure and date of service.

11.4.7.12 ANESTHESIA

A. The MAP for the CPT code series 00100-01999 (which is specific to the field of anesthesia), shall be determined by including a monetary conversion factor of ~~[\$43.57]~~ \$44.94 which shall be multiplied by the basic unit values, time units, and any physical status and/or qualifying circumstances modifiers to determine the maximum allowable payment. The units need to be separate in this equation.

B. The "basic unit value" assigned to each procedure in the CPT code series 00100-01999 in the ASA Relative Value Guide adopted by the director in his annual order shall be used when billing.

C. "Time units" shall be recorded and billed in 15-minute increments and fractions of units rounded to the nearest fraction (1/15th) of a unit. For example, 19 minutes is billed as follows:

19 minutes = 1 unit (15 minutes) + 4/15 of a unit (4 minutes)

1 unit = ~~[\$43.57]~~ \$44.94

4 minutes = ~~[\$43.57 / 15 = \$2.90]~~

\$44.94 / 15 = \$2.99

~~[\$2.90 x 4 = \$11.60]~~ \$2.99 x 4 = \$11.96

19 minutes = ~~[\$43.57 + \$11.60 = \$55.17]~~ \$44.94 + \$11.96 = \$56.90

D. Physical status modifiers may be used in billing, as appropriate, and shall adhere to the coding and unit value assignments in the ASA Relative Value Guide adopted by the director in his annual order.

E. Qualifying circumstances modifiers may be used in billing, as appropriate, and shall adhere to the coding and unit value assignments in the ASA Relative Value Guide adopted by the director in his annual order.

11.4.7.14 UTILIZATION REVIEW / CASE MANAGEMENT/PEER REVIEW

B. Inpatient admissions

(1) Reporting requirements for planned/elective hospital admissions: Any

practitioner, excluding hospitals, ordering the admission of a worker for evaluation or treatment of their injury or occupational disease disablement shall call the WCA ~~[or its contractor, if any,]~~ at least forty-eight (48) hours prior to the admission. All of the information in Subsection C of 11.4.7.14 NMAC must be reported.

(2) Inter-facility or intra-facility transfers: Any practitioner or hospital discharge planner ordering or arranging a transfer of a worker to another facility shall report to the WCA ~~[or its contractor, if any,]~~ at least twenty four (24) hours prior to any transfer.

(a) All of the information in Subsection C of 11.4.7.14 NMAC must be reported.

(b) The hospital discharge planner has primary responsibility for this.

(3) Review for emergency hospital admissions

(a) Every hospital, as defined in NMSA 1978, 52-4-1(A) shall provide to the WCA ~~[or its contractor, if any,]~~ before the close of business the next business day following any emergency overnight admission of a worker, all the information required by these rules.

(b) The WCA ~~[or its contractor, if any,]~~ shall provide a verbal certification or denial concerning the medical necessity and appropriateness of the emergency admission service and the assigned length of stay to the hospital, practitioner, and the payer.

(c) The WCA ~~[or its contractor, if any,]~~ shall confirm its verbal certification or denial, in writing, within twenty-four (24) hours.

(4) Concurrent review: Throughout the period of time in which inpatient services are being provided, the WCA ~~[or its contractor, if any,]~~ shall monitor the worker's treatment regime, including treatments, procedures, and length of stay.

D. Notification of the WCA's ~~[or its contractor's, if any,]~~ decision

(1) Upon receipt of the information, the WCA ~~[or its contractor, if any,]~~ shall determine if it has been provided with all the necessary information, as cited in Subsection C of 11.4.7.14 NMAC, to render its decision concerning the necessity, appropriateness, and length of stay of the proposed service. The WCA's authorization does not constitute a guarantee of payment or compensability.

(2) If adequate information has been provided, the WCA ~~[or its contractor, if any,]~~ shall:

(a) render a decision concerning the necessity, appropriateness, and length of stay of the proposed admission based upon medically accepted standards and an objective evaluation of the circumstances of the proposed admission;

(b) verbally notify the hospital,

payer, and practitioner ordering the admission of its decision prior to the commencement of the proposed admission;

(c) transmit written notification to the hospital, payer, and practitioner within twenty-four (24) hours of its decision; and,

(d) advise the hospital, practitioner, employer, insurer, and third party administrator that, in the case of a compensable injury or disability, the employer or its insurer retains all financial responsibility for all services that are provided pursuant to the Act.

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.8 NMAC Sections 3, 5, 7 and 8, effective 1/14/05. This rule was also reformatted and renumbered from 11 NMAC 4.8 to comply with current NMAC requirements.

11.4.8.3 STATUTORY AUTHORITY: [~~Chapter 52~~] NMSA 1978, Chapter 52 [~~(Repl. Pamph. 1991)~~]. [8/1/96; 11.4.8.3 NMAC - Rn & A, 11 NMAC 4.8.3, 1/14/05]

11.4.8.5 EFFECTIVE DATE: August 1, 1996, unless a later date is cited at the end of a section. [8/1/96; 11.4.8.5 NMAC - Rn & A, 11 NMAC 4.8.5, 1/14/05]

11.4.8.7 DEFINITIONS:

A. "Allocated loss expenses" means all costs, charges or expenses incurred which are properly chargeable to a claim or loss including, without limitation, court costs, fees and expenses of attorneys, investigators, vocational rehabilitation vendors, experts and witnesses and other related costs.

B. "Brother-sister relationship" means two corporations with a common owner.

C. "Completed application" means that all elements specified in [~~Section 8.2.3 A-H~~] Subparagraphs (a) through (g) of Paragraph (3) of Subsection B of 11.4.8.8 NMAC have been submitted to the self-insurance bureau for evaluation and assessment in support of the request for permission to self-insure. The elements specified in [~~Section 8.2.3 I and J~~] Subparagraphs (h) and (i) of Paragraph (3) of Subsection B of 11.4.8.8 NMAC shall be required before a certificate of insurance is issued by the director.

D. "Director" means the director of the workers' compensation administration.

E. "Financially solvent" means an employer's current and continu-

ing ability to pay, as they become due, all existing and future obligations, including workers' compensation benefits to which it is or becomes obligated under the Act.

~~F.~~ "Financially insolvent" means an employer's current or imminent inability to pay its obligations as they come due as demonstrated by evidence of failure to pay obligations timely or any other indicators suggesting that financial failure is probable or likely.

~~F.] G.~~ "Guarantee fund" means the fund created by NMSA 1978, Section 52-8-7(A) to provide benefits to workers and the families of workers of private individual self-insurers who become insolvent or otherwise unable to meet their financial obligations.

~~G.] H.~~ "Paid losses" means all monies paid to, or on behalf of, an injured worker as a result of the workers on-the-job-injury. For the purposes of assessments to the guarantee fund established by NMSA 1978, Section 52-8-7[~~paid losses are defined in 11 NMAC 4.8.9.7.1.~~]

~~H.] I.~~ "Parent" means ownership of a subsidiary entity of greater than 50 percent.

~~I.] J.~~ "Risk management program" means an entity's safety and loss prevention program, claims management program, and excess insurance.

~~J.] K.~~ "Tangible net worth" means net worth less intangible assets. [8/1/96, 10/1/98; 11.4.8.7 NMAC - Rn & A, 11 NMAC 4.8.7, 1/14/05]

11.4.8.8 INDIVIDUAL SELF-INSURANCE:

A. Eligibility criteria; to be eligible to apply for, and as a continuing obligation to maintain, a certificate of self-insurance, an employer must meet and maintain compliance with the following requirements to the satisfaction of the director:

(1) For all applications filed on or after October 1, 1998, the employer shall provide an audited financial statement demonstrating a tangible net worth of at least two and one half million dollars (\$2,500,000). [~~The audited financial statement shall not be more than six months old, except as approved by the director.~~] For all applications filed or approved on or before September 30, 1998, the employer shall provide an audited financial statement demonstrating a tangible net worth of at least one million dollars (\$1,000,000). [~~The audited financial statement~~] Audited financial statements shall not be more than six months old, except as approved by the director.

(2) The employer shall have been in business for a period of not less than three (3) years. This requirement may be waived by the director under circumstances

where the form of business organization has changed within the three (3) year period while the management of the business entity stays substantially the same.

(3) The employer shall [~~be financially solvent~~] demonstrate a strong trend of financial health and financial solvency.

~~(4) The employer shall demonstrate to the satisfaction of the director compliance with the following requirements:~~

~~(a) a risk management program;~~
~~(b) workers' compensation specific occurrence or aggregate insurance, with retention of \$250,000 and statutory upper limits;~~

~~(c) security, in the form of a surety bond or irrevocable letter of credit, drawn on a New Mexico financial institution in the amount specified by the director and issued in favor of the director. This amount shall include the incurred but not reported (IBNR) workers' compensation benefit estimate. The issuer of the surety bond or letter of credit shall not be in the control of the self-insured. Security shall be used for the payment of claims and related expenses in the event of default by the employer.~~

~~(d) Any other reasonable criteria deemed necessary by the director to guarantee payment of workers' compensation claims to injured employees.]~~

(4) An acceptable risk management program including acceptable claims administration personnel, policies and procedures.

(5) Workers' compensation specific or aggregate insurance from a carrier approved and regulated by the New Mexico department of insurance with a rating that is within the parameters of acceptability set forth in an order published by the director, with retention of \$250,000 or less per occurrence. An acceptable policy of excess insurance shall provide coverage for all provisions of the Act and shall contain no exclusion of such coverage.

(6) An irrevocable letter of credit or a surety bond in the amount and on a form specified by the director and issued in favor of the New Mexico self-insurers' guarantee fund. The issuer of the surety bond or letter of credit shall not be in the control of the self-insured and shall have a rating that is within the parameters of acceptability set forth in an order published by the director. Security shall be used for the payment of claims and related expenses in the event of default by the employer and for reimbursement to the New Mexico self-insurers' guarantee fund for any benefits paid by the fund on behalf of the employer.

~~(5)] (7) A bona fide employment relationship shall exist between the employer and the employees which it proposes to self-insure. Employees under the control of any other entity with respect to the day to day supervision of the work may not come~~

under an individual self-insurance program.

~~[(6) The employer shall provide the director with all records of New Mexico workers' compensation claims for the last three (3) years.]~~

~~[(7)] (8) Every private individual self-insurer must pay assessments as specified in NMSA 1978, Section 52-8-7(B), to the self-insurers' guarantee fund.~~

~~[(8) Two corporations in a brother-sister relationship may self-insure under a single certificate, subject to all other eligibility and application criteria.]~~

(9) A parent company may self-insure its subsidiaries under one certificate in the name of the parent provided the parent meets all eligibility criteria and provides parental guarantees for the subsidiaries and guarantees by each subsidiary for the other(s).

(10) Any other reasonable criteria deemed necessary by the director to guarantee payment of workers' compensation claims to injured workers.

B. Application ~~[criteria]~~ requirements:

(1) An employer seeking to be certified as a self-insurer under the Act shall make application on a form prescribed by the director.

(2) The director may request information regarding the employer's business, financial circumstances, history and any other such information deemed relevant or necessary.

(3) The application shall be accompanied by the following:

(a) a one hundred fifty dollar (\$150) non-refundable filing fee made out to the workers' compensation administration; and

(b) proof of valid workers' compensation insurance in force for the three years preceding the date of application and continuing in force up to the approved date of self-insurance.

(c) a certified copy of the employer's most recent audited financial statement which may not be more than six months old, except as approved by the director; the audited financial statements shall be presented in accordance with generally accepted accounting principles (GAAP) ~~[except as approved by the director]~~; additionally, the employer's previous two years financial statements shall be provided;

(d) if the employer is a corporation, its board of directors must adopt a resolution, as prescribed by the director, authorizing and directing the corporation to undertake to self-insure itself and to comply with the provisions of the Act and the rules of the director; a similar official ratification is required from the governing body of any governmental entity;

(e) if the employer is a subsidiary, a parental guarantee from the subsidiary's

upper-most parent in a form acceptable to the director ~~[or if the employer is a brother-sister corporation applying under one certificate, mutual guarantees from each corporation in a form acceptable to the director];~~

(f) a detailed summary of the employer's workers' compensation loss history for the last three (3) years and experience modifiers for the same period; records shall include all claims covered under a claims "buy-back" program;

~~[(g) resumes of all persons responsible in an administrative or professional capacity for the adjusting and administration of claims under the act, or if a third party administrator or claims administration service is to be used, equivalent information regarding the administrator or service company and its employees;]~~

~~[(h)] (g) an explanation of the safety program, a copy of the safety manual, and resumes of all personnel responsible for the New Mexico safety program;~~

~~[(i)] (h) the employer is required to carry worker's compensation excess insurance coverage, provided by an insurance carrier not controlled by the self-insured; the employer shall submit a copy of the proposed policy or binder, including the declaration page of such policy, and all endorsements providing or limiting coverage; excess insurance shall include statutory limits, specific occurrence retention, and the current New Mexico amendatory endorsement with a retention of \$250,000 or less; the insurance shall be written by a company that has a rating that is within the parameters of acceptability set forth in an order published by the director; the company shall be approved and regulated by the New Mexico department of insurance or be otherwise approved by the director;~~

~~[(j)] (i) a letter of intent from an approved ~~[carrier]~~ surety to issue a surety bond, or a letter of intent from a New Mexico financial institution to issue an irrevocable letter of credit, in an amount and form to be specified by the director, but not less than \$200,000; the surety company shall have a rating that is within the parameters of acceptability set forth in an order published by the director.~~

(4) By signing and submitting the application and, as a condition of the continuing privilege of certification as a self-insurer under the Workers' Compensation Act, the employer agrees:

(a) to promptly discharge all the employer's liabilities to injured employees or their dependents in accordance with the requirements of the Workers' Compensation Act, as amended, and to comply with all rules of the director adopted thereunder;

(b) to notify the director prior to liquidation, sale or transfer of ownership, or any material change in New Mexico operations and to arrange for the payment of all

existing liability, and any disability or liability arising thereafter, by guarantee bond or letter of credit, or as otherwise required by the director;

(c) to obtain the director's approval prior to making any material change in any excess insurance policy or security; evidence of renewal must be provided to the director sixty (60) days prior to the date of expiration;

(d) to notify the director prior to any change in the provider or scope of claims management services;

(e) to promptly notify the director of any material change in the employer's financial condition;

(f) to cooperate fully with administration representatives in any evaluation or audit of the self-insurance program, and to resolve in good faith any issues raised in those evaluations or audits ~~[such evaluation or audit issues may include notice of the inadvertent or mistaken failures to pay benefits which were not paid when due, where no apparent ground existed at the time to contest the payment in good faith; any dispute concerning issues raised shall be referred by the self-insurance bureau chief to the director for determination if not first informally resolved];~~

(g) unless otherwise approved by the director, to have at least one claims representative within New Mexico, licensed as a New Mexico adjuster, to pay workers' compensation claims of claimants resident or located in New Mexico; all claims shall be paid promptly from accounts in financial institutions located within New Mexico; third party administrators must be licensed in New Mexico; all adjusters responsible for New Mexico claims shall be licensed in New Mexico regardless of location;

(h) the self-insured shall be responsible for compliance with the Act and these rules by it and its agents and the self-insured shall be subject to sanctions for any act or omission by it or its agents;

(i) provide loss runs on a semi-annual basis;

(j) provide annual audited financial statements;

(k) to continue to pay claims as required by law, maintain acceptable security, and provide the workers' compensation administration with any information required to assess claim liability and financial ability to pay claims, including access to claim files, after decertification from self-insurance and continuing until the director determines that all self-insurance claims have been fully satisfied;

(l) to provide information required for verification by the workers' compensation administration of compliance with NMSA 1978, Section 52-5-19;

(m) to maintain loss reserves at

the full undiscounted value of each claim, including indemnity and medical only claims.

(5) The director shall notify the chairman of the board of directors (board) of the self- insurers' guarantee fund commission of the identity of any applicant for self-insurance within fifteen (15) days of the receipt of the application. The board shall respond in writing to the director within thirty (30) days of receipt of the notification or be deemed to have expressed no objection to the applicant's membership in the commission. The administration's self-insurance audit staff shall take any written objections into account when making its final recommendation to the director.

C. Evaluation factors: the director may decline to approve an application for self-insurance if not satisfied that the employer will be able to meet all its obligations under the Act and these rules. In determining if an employer can meet these obligations, the factors to be considered by the director shall include, but not be limited to, the following:

~~(1) valuation of assets and liabilities;~~

~~(2) ratio of current assets to current liabilities;~~

~~(3) ratio of debt to tangible net worth;~~

~~(4) profit and loss history;~~

(1) financial condition to include valuation of assets and liabilities, net worth, asset make-up, profitability, solvency, current and projected financial trends for the company and industry, notes to financial statements, reliability of financial statements, contingent liabilities, and ongoing criminal or fraud investigations;

~~(5) (2) organizational structure and management background;~~

~~(6) (3) workers' compensation loss history, experience modifiers, trends, and reliability of information;~~

~~(7) source and reliability of financial information;~~

~~(8) (4) number of employees and the degree of hazard to which employees are exposed;~~

~~(9) (5) proposed excess insurance coverage;~~

~~(10) (6) proposed surety bond or other security;~~

~~(11) (7) claims administration personnel, policies, and procedures;~~

~~(12) (8) safety programs and safety record; and~~

~~(13) (9) recommendations of the self-insurers' guarantee fund commission.~~

D. Financial responsibility:

~~(1) [Every self-insured employer shall record all claim reserves as a liability on the financial statements. For purposes of determining the proper level of security,~~

~~reserves must be set for the full undiscounted value of each claim, including indemnity and medical only claims.] The employer will pay claims for which it becomes obligated under the New Mexico Workers' Compensation Act, in accordance with the Act. The payment of such claims will continue without regard to the self-insurance status of the employer and without regard to any amount of security posted whether or not the security is called. The employer shall report to the WCA, on its periodic loss runs, all claims incurred regardless of type or cost. The employer shall maintain a level of reserves sufficient to pay all claims and associated expenses, and security in an amount and form acceptable to the director. The employer agrees that failure to maintain minimum financial criteria, and an adequate risk management program may result in increased security requirements, termination of self-insurance status or any other measure deemed necessary by the director for the protection of benefits of injured workers and the New Mexico self-insurers' guarantee fund.~~

(2) In addition to any other requirements under the Act or regulations governing self-insurance, upon voluntary or involuntary termination of employer's self-insurance status, the employer must:

(a) provide any information requested by the director for the purpose of establishing claims liability and financial condition;

(b) comply with any requirement by the director to increase security;

(c) make claims files available to the director for the performance of any audit, examination or review, or for administration of claims in the event of a default;

(d) keep the WCA current of changes in address/location, pertinent personnel, claims administration services, location of claims files and related claims personnel, and financial condition; and

(e) compliance with the above will be considered by the director when making a determination on any security reduction or release requested by the employer.

~~(2) (3) All government entities must have a pre-funded system. All past, present, and future liabilities existing at any time shall be fully accounted for by liquid assets or other assets agreeable to the director. No government entity shall be required to post security.~~

E. Certification: After considering the application and all supportive documentation, the director shall act upon a completed application for a certificate of self-insurance within sixty (60) days. If, because of the number of applications pending before him, the director is unable to act upon an application within that period, the director shall have an additional

sixty (60) days to act.

(1) Upon approval, the director shall issue a certificate acknowledging the employer's status as a self-insured under the Act. The certificate shall be effective continuously until terminated at the request of the self-insured or revoked by the director.

(2) If there is a change of ownership whereby the controlling interest of a self-insured changes, the new ownership shall submit a new application to the director for a certificate of self-insurance. A non-refundable filing fee of one hundred fifty dollars (\$150) must accompany the new application.

(3) Upon a merger or other combination by two self-insured employers, the employers may continue to be self-insured under one certificate provided adequate disclosure and guarantees are provided. The director's approval is required for all such certificates.

~~(4)~~ (4) The director may, using his/her sole discretion, issue a provisional certificate, good for not more than one (1) year, to a self-insurer if the director is convinced that any defects are minor in nature and can be corrected within the one (1) year period.

F. ~~[Examinations and reviews.]~~ Audits and examinations: A self-insured employer or applicant is subject to initial or periodic ~~[evaluation]~~ examination or audit by the WCA [administration] to determine initial or continued eligibility for self-insurance. The applicant or self-insured agrees to bear the costs of any reviews or evaluations. Such evaluations may include, but are not limited to:

(1) audits or reviews of the applicant's or self-insured's records regarding any representation made on its financial statement;

(2) audits or reviews of the applicant's or self-insured's records pertaining to its loss history, claims administration, or its loss reserve fund;

(3) audits or reviews of safety programs;

~~(4)~~ (4) interviewing or taking the testimony of the applicant or self-insured, or any of its agents or employees, regarding any matter pertaining to the obligations of the applicant or self-insured under the Act or the director's rules.

G. Denials and decertification:

(1) The director shall deny an application for self-insurance if the employer has failed to demonstrate to the director's satisfaction that the employer meets all requirements of the Act and the director's rules or failed to demonstrate its ability to meet all its obligations under the Act.

(2) A certificate of self-insurance may be revoked if the director, with good cause, ceases to be satisfied that the

employer is able to meet all its obligations under the Act and these rules. The occurrence of any of the following events shall constitute good cause to revoke a certificate of self-insurance:

(a) failure of the employer to comply with any provisions or requirements of the Act or the director's rules or with any lawful order or communication of the director;

(b) failure of the employer's surety or guarantor to remain financially solvent or any other impairment of any aspect of the employer's financial responsibility requirements; ~~or~~

(c) failure to comply with any other statutes, laws, rules, or regulations of the state of New Mexico;

(d) failure to cooperate with the WCA in efforts to mitigate adverse consequences for injured workers caused by the filing, by the employer, for protection under the federal bankruptcy laws;

(e) failure to maintain membership in the New Mexico self-insurers' guarantee fund commission in good standing.

(3) Any self-insured who becomes decertified shall maintain security with the administration in a form and amount acceptable to the director. The employer retains responsibility for payment of all current and future obligations incurred while self-insured, including all obligations to the self-insurers' guarantee fund. The security amount set after decertification shall account for both known claims and associated expenses and claims incurred but not reported (IBNR) and associated expenses. If the employer is still subject to the Act, proof of coverage must be provided. No adjustments to the security will be allowed until the director has determined that an adequate time has passed to reasonably determine the expected long-term liabilities. At that time, the director may, in his discretion, reduce or return some or all of the security.

(4) The denial or revocation of a certificate of self-insurance shall be made by an order signed by the director or by his authority. Every such order shall state its effective date and shall concisely state: what is ordered; the grounds on which the order is based; and the provisions of the Act or rules pursuant to which the action is taken.

H. Recertification:

(1) Any employer formerly certified as a self-insurer who ceases to be certified may not apply for recertification until three (3) years after decertification.

(2) An employer who seeks to reinstate its certificate of self-insurance shall reapply to the director on the form prescribed pursuant to these rules.

(3) A non-refundable filing fee of one hundred fifty dollars (\$150) must

accompany the application for recertification.

I. Hearings: Any person aggrieved by a decision of the director regarding the denial of any application for a certificate of self-insurance, or the certification or decertification of a party as a self-insurer, may request in writing a hearing before the director. The request shall briefly state the respects in which the party is aggrieved, the relief sought and the grounds to be relied upon as the basis of relief. The administration's Rules of Enforcement and Administrative Investigations, Part 5, shall apply.

J. Penalty: In addition to any other sanctions provided herein, failure to comply with any of the provisions of these rules or the Act renders the self-insurer or applicant subject to penalties as provided in NMSA 1978, Section 52-1-61.

K. Waiver: Any requirement contained in these rules may be waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing. [8/1/96, 10/1/98; 11.4.8.8 NMAC - Rn & A, 11 NMAC 4.8.8, 1/14/05]

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.9 NMAC Sections 5 and 8, effective 1/14/05. This rule was also reformatted and renumbered from 11 NMAC 4.9 to comply with current NMAC requirements.

11.4.9.5 EFFECTIVE DATE: August 1, 1996, unless a later date is cited at the end of a section.

[8/1/96; 11.4.9.5 NMAC - Rn & A, 11 NMAC 4.9.5, 1/14/05]

11.4.9.8 GROUP SELF INSURANCE:

A. Application and maintenance:

(1) All the requirements for application and maintenance of a certificate of group self-insurance are contained in NMSA 1978, Section 52-6-5. In addition, the following shall apply:

(a) Submit with the application a non-refundable filing fee of five hundred dollars (\$500.00).

(b) The application shall contain the group's pro forma financial statement, following generally accepted accounting principles, presented in a format acceptable to the director.

(c) Specific excess insurance shall be written with statutory upper limits. The insurance shall be written by an acceptably rated company approved and regulated

by the New Mexico department of insurance to write excess insurance in the state of New Mexico, or a company that is otherwise approved by the director. The policy must include the current New Mexico amendatory endorsement.

(d) The required fidelity bond for the administrator shall be written at a minimum of two hundred fifty thousand dollars (\$250,000).

(e) The required fidelity bond for the service company providing claims service shall be written at a minimum of two hundred fifty thousand dollars (\$250,000).

(f) A performance bond of two hundred fifty thousand dollars (\$250,000) shall be provided for the service company providing claims service, if requested by the director.

(g) A fidelity bond for any member of the board of trustees of the group having signatory authority with respect to the group's funds or investments, or as a condition precedent to any board of trustees action creating or changing such signatory authority, is required and shall be written at a minimum of two hundred fifty thousand dollars (\$250,000).

(h) A statement of the type of business in which employers in the proposed group are engaged and an explanation of how they meet the criteria of "same or similar" contained in NMSA 1978, Section 52-6-2(B).

(i) An actuarial report/study based on at least 3 years loss history of the group's proposed members, including loss projections for the group.

(2) After considering the group's application and all supportive documentation, the director shall act upon a completed application for a certificate of approval within sixty (60) business days. If, because of the number of applications pending, the director is unable to act upon an application within that period, the director shall have an additional sixty (60) days to act.

(3) The definitions in Subsections A and B of 11.4.9.7 NMAC shall be applied prospectively only, commencing with the effective date of this rule. Existing members of a group which would be ineligible for membership under this rule shall not be excluded from membership in the group on the basis of this rule.

~~[(a) Each group shall prepare and deliver to the director a roster identifying each member of the group as of the close of business on the last day before the effective date of the rule.~~

~~(b) In the event that a member's coverage is not reinstated within thirty days of the delivery to the director of the notice of cancellation or termination required in NMSA 1978, Section 52-6-9 (B), the former member will be considered a new applicant for purposes of qualifying as a member of~~

the group.

(4) Each group will screen applicants to their group based upon the definition of "same or similar type of business" contained in this rule. No group shall admit any prospective member that is not in the same or similar type of business.

(a) Each group will designate in writing for the director, a general category from the standard industrial classification manual, designated as a lettered division heading, which most closely fits the type of businesses represented by the sponsoring trade or professional association.

(b) The director will presume that businesses properly included in that division are in the same or similar type of business as are other businesses in the group.

(c) A group may request in writing that additional two digit major group codes, three digit industry group codes or four digit industry codes from the standard industrial classification manual, other than those under the group's designated lettered division heading ~~[are in the same or similar type of business as the other members of the group].~~

~~[(4)]~~ (i) The request for designation of a business as a same or similar type of business for a group shall be accompanied by a written explanation which must satisfy the director that the businesses are significantly related to the sponsoring trade association's industry.

~~[(5)]~~ (ii) The director may consult widely accepted publications which classify types of businesses for the purpose of considering the approval or disapproval of such requested designations.

~~[(6)]~~ (d) Upon prior written approval by the director, a group may add to its roster an individual business which is not otherwise clearly eligible for membership. A request for approval of such individual business shall be accompanied by a written explanation demonstrating to the satisfaction of the director that the business, because of its particular circumstances should be deemed to be in the same or similar type of business as the other members of the group.

~~[(7)]~~ (e) The director shall ~~[make findings on]~~ approve or disapprove such requests in writing.

~~[(8)]~~ (f) The WCA will follow its established protocol to ensure prompt response to requests for such designations.

~~[(9)]~~ (h) A protocol will be developed for insuring quick responses to requests for such designations.]

(5) Each group will certify to the director on each report of roster additions submitted, that any additions to the group's roster are in the same or similar type of business as the other members of the group.

(6) Groups may offer claims "buy back" programs to their members pro-

vided:

(a) a written narrative describing the program shall be provided to the participants and the WCA; and,

(b) details of claims bought back must be provided to the participating member, or its designee, or to the WCA upon request.

B. Evaluation factors: The director shall decline to approve an application for group self-insurance upon a finding that the proposed group does not meet all the requirements of the Group Self-Insurance Act and the rules thereunder. In determining ~~[(#)]~~ whether a group can meet ~~[these]~~ the requirements of the Group Self-Insurance Act (NMSA 1978, Sections 52-6-1 through 52-6-25) and the rules thereunder, the factors to be considered by the director shall include, but not be limited to, the following:

(1) organizational structure and management background;

(2) compliance with NMSA 1978, Section 52-6-2(B);

(3) services provided ~~[(to)]~~ by the group;

(4) statistical reporting and expertise;

(5) workers' compensation loss history and risk;

(6) source and reliability of financial information;

(7) sufficiency of premium;

(8) proposed bylaws, underwriting guidelines, membership application, and membership agreement;

~~[(7)]~~ (9) ~~[an equitable spread]~~ the distribution of group members as to size, premium and loss exposure;

~~[(8)]~~ (10) adequacy of reserve methodology;

~~[(9)]~~ (11) proposed excess insurance coverage;

~~[(10)]~~ ~~[surety bonds and other security]~~

(12) adequacy and form of security;

~~[(11)]~~ (13) claims administration personnel, policies and procedures;

~~[(12)]~~ (14) safety program;

~~[(13)]~~ (15) financial ~~[stability]~~ condition of proposed members;

(16) results of financial evaluation of the group.

C. Financial responsibility:

(1) The group shall submit audited financial statements on an annual basis.

~~[(1)]~~ (2) Every group self-insured shall have actuarially determined financial strength sufficient to meet their obligations.

~~[(2)]~~ (3) The actuarial opinion and report required by NMSA 1978, Section 52-6-12, shall be ~~[supported by the concurrent filing with the director of]~~ filed annually and include the actuarial report from which

the reserves for known claims and associated expenses and claims incurred but not reported and associated expenses were obtained.

~~[(3)]~~ (4) The group shall ~~[use rates comparable to]~~ set rates utilizing the advisory loss costs published by the national council of compensation insurance ~~[rates], and adhere to~~ uniform classification system, uniform experience rating plans, and manual rules filed with the superintendent of insurance, provided, however:

(a) Permission to apply premium discounts shall be requested by the group, subject to approval by the director, and shall be based on the group's expense levels and loss experience.

(b) Permission to make and use its own rates shall be requested by the group, subject to approval by the director and shall be based on at least three years of the group's experience.

(c) All requests for permission regarding rates or discounts shall be accompanied by an actuarial opinion supporting the request.

(d) Retroactive rate decreases and retroactive premium discounts are prohibited.

(e) All requests for rate reductions or premium discounts shall be approved or disapproved by the director within sixty (60) days after the submission of the request ~~[and all supporting data deemed necessary by the director]~~ and any additional data requested by the director.

~~[(4)]~~ (5) Each group shall annually certify to the director the group's continued compliance with Section NMSA 1978, 52-6-5 (B) (1), and, if requested by the director, each group shall provide to the administration a compilation of member assets and liabilities. Such compilation shall be in a form acceptable to the administration. No member's financial statement used for this compilation shall be more than 12 months old.

~~[(5)]~~ (6) In any month where the group's membership roster changes, each group shall submit to the administration an update of additions and deletions to the group's membership roster.

(7) Each group shall provide within 30 days of the end of each calendar quarter a roster of members including the number of employees employed by each member on the last day of the quarter.

~~[(6)]~~ (8) The group shall promptly notify the director of insolvencies or bankruptcies of members.

~~[(7)]~~ (9) The board of trustees shall adopt a policy statement regarding the admission to, or continued membership in, the group of any prospective member or current member with negative net worth. Such statement shall be provided to the

director and to each member and prospective member of the group.

(10) Permission to declare and issue a dividend shall be requested by the group not less than twelve months after the end of the fund year, subject to approval by the director, and shall be based on funds in excess of the amount necessary to fund all obligations for that fund year.

(a) All requests for dividend distributions shall be accompanied by financial information and an actuarial opinion supporting the request.

~~(8)~~ (b) All dividend refunds shall be approved or disapproved by the director within sixty (60) days after the submission of the request, and any additional data requested by the director. [No such submission shall be made until twelve months after the end of the fund year.]

~~(9)~~ (11) The group shall provide proof of renewal of all excess insurance policies, fidelity bonds, or security within 15 days of renewal and copies of all excess insurance policies, fidelity bonds or security within 45 days of renewal.

(12) The group shall provide loss runs on a semi-annual basis.

D. Certification: By signing and submitting an application, and as a condition of the continuing privilege of certification as a group self-insurer under the group self-insurance Act, the group agrees to:

(1) ~~(1)~~ promptly discharge all of the group's liabilities to injured employees or their dependents in accordance with the requirements of the Act and to comply with the Act and any rules of the director adopted thereunder;

(2) ~~(2)~~ obtain the director's approval prior to making any change in any excess insurance policy, fidelity bond, or security which results in diminished coverage;

(3) ~~(3)~~ notify the director of changes in the kind or amount of services provided by any third party claims administrator;

(4) ~~(4)~~ promptly notify the director of any material change in the group's financial condition or group operations;

(5) ~~(5)~~ cooperate fully with administration representatives in any evaluation or audit of the group self-insurance program, and to resolve, in good faith, issues raised in those evaluations or audits; it is specifically contemplated that such evaluation and audit issues may include notice of inadvertent or mistaken failures to pay benefits which were not paid when due, where no apparent ground existed at the time to contest the payment in good faith; failure to correct such inadvertent or mistaken failures to pay, after notice, may constitute a failure to resolve such audit issues in good faith in violation of this rule, and

may result in any sanction appropriate under the group Self-Insurance Act; any dispute concerning issues raised shall be referred by the self-insurance bureau chief to the director for determination if not first informally resolved;

(6) The group shall be responsible for compliance with the Act and the rules and shall be subject to sanction by the administration for acts or omissions in violation of the Act or the rules by itself or by any person or entity acting in an agency relationship with the group; it shall be a defense to any sanction proposed that the group has appropriately fulfilled its duty to monitor, educate and control its agents; nothing in this rule is intended to alter the liability for workers compensation benefits of groups or their agents.

E. Waiver: Any requirement not mandated by statute contained in these rules may be varied or waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing.

[6/22/87, 6/23/87, 8/1/96, 11/15/96; 11.4.9.8 NMAC - Rn & A, 11 NMAC 4.9.8, 1/14/05]

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.10 NMAC Sections 5, 8 and 9, effective 1/14/05. This rule was also reformatted and renumbered from 11 NMAC 4.10 to comply with current NMAC requirements.

11.4.10.5 EFFECTIVE DATE: November 29, 1997 unless a later date is cited at the end of a section.

[11/29/97; 11.4.10.5 NMAC - Rn & A, 11 NMAC 4.10.5, 1/14/05]

11.4.10.8 POOL SELF-INSURANCE:

A. A governmental entity not insured by an insurance company in the voluntary market nor certified as an individually self-insured employer shall be deemed in compliance with NMSA 1978, Section 52-1-4 if the director has issued a certificate of pool self-insurance pursuant to these rules.

B. In order to obtain and maintain a certificate of pool self-insurance a governmental entity shall meet the following requirements:

(1) Within 30 days of the effective date of these rules the governmental entities shall direct the pool's administrator to provide the director with a current membership roster and contact information for each governmental entity insured by the pool. All governmental entities on the roster will be

deemed to have applied for a certificate of pool self-insurance.

(2) A governmental entity that has not applied pursuant to Paragraph (1) of Subsection B of 11.4.10.8 NMAC shall apply to the director at least 30 days prior to the desired effective date of the certificate for pool self-insurance, on forms approved by the director.

(3) A governmental entity insured under a certificate of pool self-insurance shall be responsible for compliance with the provisions of Articles 1-5 of the Workers' Compensation Act, NMSA 1978, Chapter 52 and all rules promulgated thereunder and shall be subject to sanction by the director for violations, acts or omissions by itself or by any person or entity acting in an agency relationship with the governmental entity, including its administrator and service company.

(4) Specific occurrence excess insurance or specific occurrence reinsurance for all governmental entities insured through a pool in a form and in an amount acceptable to the director is required. The insurance shall be written by ~~(a)~~ an acceptably rated company admitted to write insurance in the state of New Mexico or a company that is otherwise ~~[acceptable to]~~ approved by the director. The policy must include the New Mexico amendatory endorsement.

(5) A fidelity bond or commercial crime policy for any officer, agent or member of the board of trustees of the pool having signatory authority with respect to the pool's funds or investments, or as a condition precedent to any board of trustees action creating or changing such signatory authority, is required and shall be written at a minimum of two hundred fifty thousand dollars (\$250,000), unless the director prescribe a higher amount.

C. Certification and termination:

(1) All governmental entities who have applied for a certificate of pool self-insurance pursuant to Paragraph (1) of Subsection B of 11.4.10.8 NMAC shall be deemed to be eligible for a certificate of pool self-insurance.

(2) The certificate of pool self-insurance shall remain in effect until terminated at the request of the governmental entity or revoked by the director. The director shall not grant the request of any governmental entity to terminate its certificate of pool self-insurance unless the governmental entity has insured or reinsured all incurred workers' compensation and occupational disease and disablement obligations or has otherwise secured payment of their obligation in a manner approved in writing by the director. Such obligations shall include both known claims and associated expenses and claims incurred but not

reported and associated expenses.
[11/29/97; 11.4.10.8 NMAC - Rn & A, 11 NMAC 4.10.8, 1/14/05]

11.4.10.9 INFORMATION REQUIREMENTS:

A. As a condition precedent to maintenance of a certificate of pool self-insurance, ~~[a governmental entity]~~ each pool shall compel its administrator and any service company to provide to the director the following information and access to records:

- (1) a copy of ~~[all specific and aggregate]~~ any reinsurance or excess insurance agreements;
- (2) an explanation of reserving methodology and accident year claims data on an annual basis;
- (3) rate change information within thirty days of approval by the board of directors of the pool;
- (4) loss runs in a format acceptable to the director within 60 days of receipt by the administrator of the director's request; and

(5) an annual actuarial opinion.

(a) This opinion shall include actuarially appropriate reserves for (1) known claims and associated expenses; and (2) claims incurred but not reported and associated expenses.

(b) This actuarial opinion shall also include a rate adequacy evaluation.

(c) The actuarial opinion shall be given by a member of the American academy of actuaries.

(6) a copy of any rate adequacy evaluations and reviews of loss and loss adjustment expenses prepared for the pool by an actuary who shall be a member of the American academy of actuaries.

(7) notification to the director of any additions or deletions to the pool's membership roster; additionally, each pool shall provide within 30 days of the end of each calendar quarter a roster of members, including the number of employees employed by each member on the last day of the quarter.

B. Examination and reviews:

(1) The director or his designees may examine the affairs, transactions, accounts, records and assets and liabilities of each governmental entity that has been issued a certificate of pool self-insurance pertaining to the entity's activities under that certificate, whether considered individually or through its pool as often as deemed advisable, whether such information is maintained by a governmental entity, the pools administrator or the pool's service company.

(a) The governmental entity, pool, administrator or pool service company shall cooperate fully with the director's represen-

tatives in any evaluation or audit of the pool self-insurance program, and resolve, in good faith, issues raised in those evaluations or audits.

(b) Failure to resolve such audit issues in good faith will constitute a violation of this rule, and may result in sanctions.

(c) Any dispute concerning issues raised shall be referred by the deputy director for compliance to the director for determination, if not first informally resolved.

(2) In lieu of performing the examination, the director may request:

(a) financial audits conducted by a certified public accountant approved by the state auditor;

(b) audits of claims management by the pool performed by the pool's reinsurer or other outside claims auditing firm;

(c) loss control audits performed by the pool's reinsurer; or

(d) any other independent claims audit of a scope and by an auditing organization deemed acceptable by the director.

(3) Each governmental entity that has been issued a certificate of pool self-insurance, individually, or collectively through its pool, shall be reviewed at least annually by an auditor acceptable to the director to verify proper classifications, experience rating, payroll and rates.

C. A governmental entity that has been issued a certificate of pool self-insurance under these rules shall assist the director in any investigation of specific allegations of unfair claims processing, bad faith or fraud within the scope of NMSA 1978, Section 52-1-28.1, by directing the administrator of the pool to make all records concerning any such claim available to the director upon written request by the director or the records.

[11/29/97; 11.4.10.9 NMAC - Rn & A, 11 NMAC 4.10.9, 1/14/05]

End of Adopted Rules Section

Other Material Related to Administrative Law

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

NOTICE OF PUBLIC HEARING

The Human Services Department will receive public comment for an amendment to the State plan for administration of the Temporary Assistance for Needy Families (TANF) and file the amendment with the Federal Department of Health and Human Services, Administration for Children and Families (ACF). The hearing will be held at 10:00 am on Monday, February 14, 2005. The hearing will be held at the Income Support Division conference room, 2009 S. Pacheco St., Santa Fe, NM. The conference room is located in Room 120 on the lower level.

The Department proposes to amend the TANF State plan to allow for early childhood development programs to serve pre-kindergarten children. The 30-day comment period will begin January 14, 2005 and end at 5:00 P.M. on February 14, 2005. All comments received during the comment period will receive consideration for the proposed amendment of the TANF State plan.

Individuals may submit written or recorded comments to the address below. Individuals may also submit comments electronically to: Ted.Roth@state.nm.us

A copy of the proposed TANF State plan is available as of January 14, 2005 on the Department's web site at: <http://www.state.nm.us/hsd/isd.html>. A copy of the proposed TANF State Plan can be requested by calling the Office of the Director, Income Support Division, in Santa Fe at 1-800-432-6217 or (505) 827-7250; or by writing to:

Human Services Department
Income Support Division
P.O. Box 2348
Pollon Plaza; Room 111
Santa Fe, NM 87504-2348

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-432-6217, TDD 1-800-609-4TDD (4833), or through the New Mexico Relay System toll free at 1-800-659-8331. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

Director's Response to Public Comment Medical Rules and MAP Order

The proposed Rules governing the Payments for Medical Services were opened for public comment on November 30, 2004 for in person comment and through December 7, 2004 for written comment on the rules and through December 15th for written comment on the MAP Order. Several comments were received from the public at the public hearing. Several comments were received from the public in writing.

Several commentators suggested that the proposal concerning the handling of reimbursements for hospital services was not desirable. Some of the commentators offered alternative suggestions, or endorsed the alternatives offered by another commentator. The proposal was modified to reflect the concerns expressed, while retaining some features of the original. The rule is temporary in nature, expiring on December 31st, 2005. It will continue to require that surgical implants be reimbursed at the same rate as durable medical equipment and that radiology services be reimbursed at the rates provided in the MAP. There was evidence that both changes will result in savings that can be recognized within the trial period, and that the administrative burden of those changes was lower than the burden associated with "carve outs" in other service areas. In addition a modifier of .80 will be applied to the hospital ratio applied during calendar year 2004, which represents a compromise from one of the commentator proposals. The provisions concerning the provision of information to the WCA reflecting fuller financial information concerning the hospitals is necessary to the transition to a modern system of hospital cost control as well as to verification of the affects of the current temporary rule. The provisions will be retained despite the objections of one commentator.

Two commentators suggested that the reimbursement rate for anesthesiology be increased from that which is proposed. The assertion that the rates proposed represent the 60th percentile of current billings is not supported and research among other jurisdictions in the region indicated that the proposed rate would be higher than that allowed in the surrounding states of Arizona, Texas, Utah, Kansas and Nebraska. The current proposal for a 3%

increase will maintain comparability with other jurisdictions in the region that have similar reimbursement mechanisms.

One commentator suggested specific language to clarify the intent of 11.4.7.9.B (3) to extend to both inpatient and outpatient services. The suggestion was adopted.

One commentator asked that there be specific mention approving of private contractual relationships between payers and providers for fees at levels less than those provided in the MAP. The suggested change was not considered necessary, because the relations of private parties within the parameters of the MAP have never been regulated by the WCA.

With respect to the MAP Order, two commentators asked for a general increase of the entire fee schedule to the 60th percentile of billed charges. First, it should be noted that such a change would actually reduce a significant number of CPT code reimbursement rates, in many cases to less than the rate of reimbursement allowed by Medicare. The net impact of such a change would still be a shocking upward impulse on premium rates, under circumstances where the current Director has been working on a publicly announced plan to increase reimbursements gradually after years of static rates under a prior administration. Such a precipitous premium increase is not justifiable when payments for medical services currently absorb more than half of every dollar in paid losses and when the Director has fulfilled his pledge to adjust reimbursement rates upon a publicly announced schedule over the course of two years.

The public record of this rulemaking and the issuance of the Director's MAP Order shall incorporate this Response to Public Comment and the formal record of the rule-making proceedings shall close upon execution of this document.

Alan M. Varela
Director
N.M. Workers' Compensation
Administration
December 29, 2004

NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

Director's Response to Public Comment Self-Insurance Rules

The proposed rules governing self-insurance were opened for public comment on November 4, 2004 for in person comment and through November 15, 2004 for written comment. Several comments were received from the public at the public hearing. Several comments were received from the public in writing. One comment that was received after the close of written comment was determined to be duplicative to comments already received at the public hearing, and was considered as an amplification of those comments.

One commentator suggested that the inclusion of the concept of intent, in the definition of solvency, was confusing. The language has been removed.

Several commentators mentioned that excess carriers were not licensed in New Mexico, and were merely approved by the Department of Insurance. Appropriate changes to the language were made at 11.4.8.8.A.5, 11.4.8.8.B.3 (h) and 11.4.9.8.A.1(c)

One commentator suggested that the provisions of 11.4.8.8.A.8 more properly belonged in subsection B of that section. The suggestion was adopted.

One commentator suggested that the provisions of 11.4.8.8.A.10 were too restrictive with regard to PRC regulated entities. No change in the rule will be made. The sole entity that falls within the class of affected self-insurers may request a waiver of the rule if necessary.

Commentators suggested that the language contained in 11.4.8.8.B.3(h) was too restrictive, and that the "New Mexico Amendatory Endorsement" was a "moving target" that was too hard to track and the retention level for excess insurance too low. The language will not be modified. The current version of the New Mexico Amendatory Endorsement is posted on the WCA website and waivers of excess retention limits are possible upon a sufficient showing of cause and financial responsibility.

One commentator pointed out an alleged typographical error in 11.4.8.9.A.2 and another in 11.4.8.9.C.1. The first is actually an intentional difference between "days" and "business days" that is built into the

rule. The second was corrected.

Several Commentators objected to aspects of the proposed language concerning "buy-back" programs contained at 11.4.9.A.6. Upon further research it was determined that very few members of self-insured groups actually participate in such programs, and modified language was substituted.

One commentator objected to the provisions of 11.4.8.9.C.7. The information requested is needed for a wide variety of administrative purposes and the additional administrative burden upon the objecting group, while regrettable, is not avoidable.

One commentator objected that the use of the term "statutory upper limits" with regard to excess policies for individual and group self-insurers was too restrictive with regard to layered retention schemes. The requirement for statutory upper limits is not new, and has never been interpreted as the commentator suggests. The same commentator objected that the same provision was not present with respect to pools of governmental entities. While this is correct, and the failure to include the language is an oversight, it would not be fair to the affected entities to add the language at this time without prior notice and an opportunity to be heard.

One commentator raised a series of concerns affecting a number of rules that were all generally objecting to the amount of discretion left in the hands of the Director with respect to individual self-insurance programs. Each of the comments asked for the rules to set forth greater specificity and further constrain the Director's statutory plenary control over such programs. Attention is drawn to the distinction between the statutory handling of group self-insurance and individual self-insurance. In the former, most of the regulatory requirements are specified by statute and the area of discretion allowed the Director was intentionally small. In the latter the opposite is true, due to the wider range of program size and circumstances and the greater danger to injured workers presented by the possibility of insolvency. In the history of the WCA there have been only a handful of involuntary decertifications of self-insurers, and none have failed to survive court challenges. The Director declines the invitation to unnecessarily constrain his statutory discretion.

The public record of this rulemaking shall incorporate this Response to Public Comment and the formal record of the rule-making proceedings shall close upon execution of this document.

Alan M. Varela
Director
N.M. Workers' Compensation
Administration
December 29, 2004

End of Other Related Material Section

2005

SUBMITTAL DEADLINES AND PUBLICATION DATES

| Volume XVI | Submittal Deadline | Publication Date |
|-------------------|---------------------------|-------------------------|
| Issue Number 1 | January 3 | January 14 |
| Issue Number 2 | January 18 | January 31 |
| Issue Number 3 | February 1 | February 14 |
| Issue Number 4 | February 15 | February 28 |
| Issue Number 5 | March 1 | March 15 |
| Issue Number 6 | March 16 | March 31 |
| Issue Number 7 | April 1 | April 14 |
| Issue Number 8 | April 15 | April 29 |
| Issue Number 9 | May 2 | May 13 |
| Issue Number 10 | May 16 | May 31 |
| Issue Number 11 | June 1 | June 15 |
| Issue Number 12 | June 16 | June 30 |
| Issue Number 13 | July 1 | July 15 |
| Issue Number 14 | July 18 | July 29 |
| Issue Number 15 | August 1 | August 15 |
| Issue Number 16 | August 16 | August 31 |
| Issue Number 17 | September 1 | September 15 |
| Issue Number 18 | September 16 | September 30 |
| Issue Number 19 | October 3 | October 17 |
| Issue Number 20 | October 18 | October 31 |
| Issue Number 21 | November 1 | November 15 |
| Issue Number 22 | November 16 | November 30 |
| Issue Number 23 | December 1 | December 15 |
| Issue Number 24 | December 16 | December 30 |

The *New Mexico Register* is the official publication for all material relating to administrative law, such as notices of rule making, proposed rules, adopted rules, emergency rules, and other similar material. The Commission of Public Records, Administrative Law Division publishes the *New Mexico Register* twice a month pursuant to Section 14-4-7.1 NMSA 1978. For further subscription information, call 505-476-7907.