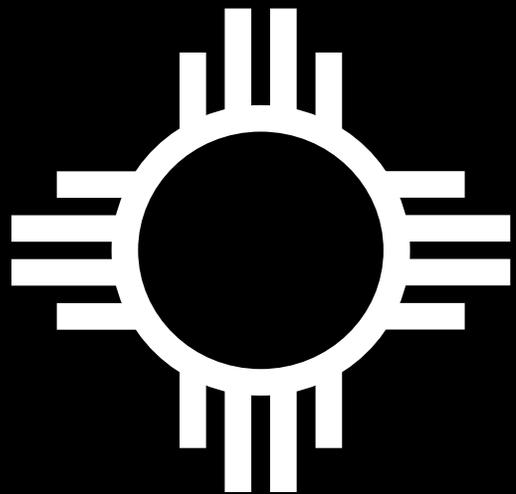


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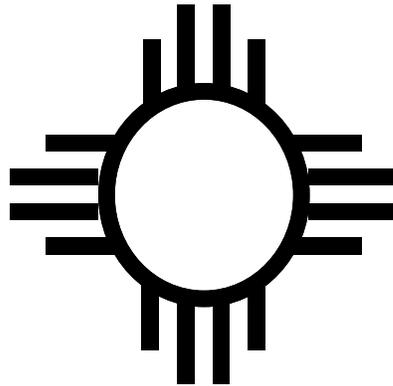
Volume XX  
Issue Number 10  
May 29, 2009



# **New Mexico Register**

**Volume XX, Issue Number 10**

**May 29, 2009**



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

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Administrative Law Division  
Santa Fe, New Mexico  
2009

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# New Mexico Register

Volume XX, Number 10

May 29, 2009

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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.

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

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 [staterules@state.nm.us](mailto:staterules@state.nm.us).

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

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## Notices of Rulemaking and Proposed Rules

### ALBUQUERQUE- BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

#### ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD NOTICE OF HEARING

On July 8, 2009, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, 400 Marquette Avenue NW, Albuquerque, NM. The hearing will address:

Proposal to amend 20.11.42 NMAC, *Operating Permits*; and to submit proposed amendments to the U.S. Environmental Protection Agency (EPA) as an update to the Albuquerque Air Quality Division (AQD) Title V program.

The AQD is proposing to amend 20.11.42 NMAC, *Operating Permits*, for the following reasons:

1. Currently, source categories subject to Section 111 of the Clean Air Act (Act), entitled *New Source Performance Standards* (NSPS), or subject to Section 112 of the Act, entitled *National Emission Standards for Hazardous Air Pollutants* (NESHAPs), are required to include their fugitive emissions in addition to their direct emissions when calculating their total emissions. If/when their total emissions reach a limit of 100 Tons per Year (TPY) of a pollutant, the source is then deemed a "Major Source", which would require an operating permit. The proposed amendment changes the definition of "Major Source", thereby limiting the number of sources which would be required to include fugitive emissions as part of their total emissions, to only those source categories subject to NSPS and NESHAPs promulgated on or before August 7, 1980;

2. The language under Paragraphs (1) and (2) of Subsection D of 20.11.42.2 NMAC, "*Existing major sources, which are not required to have a permit under 20.11.41 NMAC*" is proposed to be deleted. This language was originally developed when the AQD Title V program first began, and was designed to capture "grandfathered" major sources. However, currently all major sources have been permitted, and so this provision is no longer needed. In addition, this language is not codified within 40 CFR

Part 70.

3. To align language in 20.11.42 NMAC with language in 40 CFR Part 70, *State Operating Permit Programs*; and
4. To correct style and formatting.

Following the hearing, the Air Board will hold its regular monthly meeting during which the Air Board is expected to consider adopting the proposed revisions to 20.11.42 NMAC, *Operating Permits*.

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

Hearings and meetings of the Air Board are open to the public and all interested persons are encouraged to participate. All persons who wish to testify regarding the subject of the hearing may do so at the hearing and will be given a reasonable opportunity to submit relevant evidence, data, views, and arguments, orally or in writing, to introduce exhibits and to examine witnesses in accordance with the Joint Air Quality Control Board Ordinances, Section 9-5-1-6 ROA 1994 and Bernalillo County Ordinance 94-5, Section 6, and 20.11.82 NMAC, *Rulemaking Procedures — Air Quality Control Board*.

Anyone intending to present technical testimony at this hearing is required by 20.11.82.20 NMAC to submit a written Notice Of Intent to testify (NOI) before 5:00pm on June 23, 2009, to: Attn: Hearing Clerk, Ms. Janice Amend, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103, or, you may deliver your NOI to the Environmental Health Department, Room 3023, 400 Marquette Avenue NW. The NOI shall: 1. identify the person for whom the witness or witnesses will testify; 2. identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background; 3. summarize or include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; 4. include the text of any recommended modifications to the proposed regulatory change; and 5. list and describe, or attach, all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

In addition, written comments to be incorporated into the public record for this hearing should be received at the above P.O. Box, or Environmental Health Department office, before 5:00 pm on July 1, 2009. Comments shall include the name and address of the individual or organization submitting the statement. Written comments may also be submitted electronically to [jamend@cabq.gov](mailto:jamend@cabq.gov) and shall include the required name and address information. Interested persons may obtain a copy of the proposed regulation at the Environmental Health Department Office, or by contacting Ms. Janice Amend electronically at [jamend@cabq.gov](mailto:jamend@cabq.gov) or by phone (505) 768-2601.

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

### NEW MEXICO OFFICE OF THE ATTORNEY GENERAL CONSUMER PROTECTION DIVISION

#### OFFICE OF THE NEW MEXICO ATTORNEY GENERAL NOTICE OF PROPOSED NEW RULE AND PUBLIC HEARING

Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
(505) 827-6000  
[www.nmag.gov](http://www.nmag.gov)

The Attorney General is proposing a new rule addressing requirements for Motor Vehicle sales involving spot delivery. This rule is being promulgated by the authority vested in the Attorney General pursuant to the New Mexico Unfair Practices Act, NMSA 1978, Section 57- 12-13 (1967).

The proposed rule is available at the Office of the Attorney General located in the Paul Bardacke Attorney General Complex in Santa Fe located at 408 Galisteo Street, Consumer Protection Division, at the Attorney General's Office located in Albuquerque at 111 Lomas Blvd. NW, Suite 120 or in Las Cruces at 201 North Church

Street, Suite 315. The proposed rule is also posted on the Office of the Attorney General's website and may be accessed, free of charge, from the following website:

<http://www.nmag.gov/office/Divisions/CP/RuleProposals/Default.aspx>

To request that a copy of the proposed rule be mailed to you, please submit your request in writing to:

**Office of the Attorney General  
Consumer Protection Division  
Attention: Rebecca Branch  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508**

You may also request a copy of a proposed rule by calling the following telephone number:

**1 (800) 678-1508**

There is a \$.25 copying charge per page for written and telephone requests for copies of the rules.

Any person who is or may be affected by this proposed rule and regulation may appear, testify and/or submit written comments.

Written comments concerning the proposed rule may be submitted by mail to:

Office of the Attorney General  
Consumer Protection Division  
Attention: Rebecca Branch  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508

Testimony and written comments may also be submitted in person at hearings set for the proposed rule. The hearing will be held as follows:

**Location:**

New Mexico State Bar Center  
Bigbee Auditorium  
5121 Masthead NE  
Albuquerque, NM 87109

**Date and Time: Tuesday, June 23, 2009  
9:30 a.m.**

The Office of the New Mexico Attorney General will accept written comments for consideration as provided above no later than July 15, 2009.

If you are an individual with a disability, who is in need of a reasonable accommodation or participate at the hearing, please contact **Rebecca Branch** at (800) 678-1508. The Office of the Attorney General

requests ten (10) business days advanced notice to provide any reasonable accommodations.

**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT  
ADMINISTRATIVE SERVICES  
DIVISION**

**NOTICE OF PUBLIC HEARING**

The Children, Youth and Families Department, Administrative Services, will hold a formal public hearing on Tuesday, June 30, 2009, at 3:00 p.m. in Room 565 of the PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico to receive public comment regarding proposed amendments to 8.8.3 NMAC Governing Background Checks and Employment History Verification. The proposed amendments may be obtained by contacting Mary J. Gutierrez at 505-827-7326.

Interested persons may testify at the hearing or submit written comments no later than 5:00 p.m. on June 30, 2009. Written comments will be given the same consideration as oral testimony given at the hearing. Written comments should be addressed to: Mary J. Gutierrez, Administrative Services Background Checks Unit, Children, Youth and Families Department, P.O. Drawer 5160, Santa Fe, New Mexico 87502-5160, Fax Number: 505-827-7422, Electronic Mail: Mary.Gutierrez1@state.nm.us.

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 Mary J. Gutierrez at 505-827-7326. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT  
JUVENILE JUSTICE DIVISION**

**Notice of Public Hearing**

The Children, Youth and Families Department, Juvenile Justice Services, will hold a formal public hearing on June 25 from 9:00 to 11:00 a.m. in Room 565 on the 5<sup>th</sup> floor of the PERA building located at 1120 Paseo de Peralta, Santa Fe, New Mexico to receive public comments regarding proposed new regulations 8.14.7 NMAC, governing Supervised Release of juveniles from CYFD JJS Facilities.

The proposed changes to the regulations may be obtained by contacting Patricia Ruiz at 505-827-7632. Interested persons may testify at the hearing or submit written comments no later than 11:00 a.m. on June 25, 2009. Written comments will be given the same consideration as oral testimony given at the hearing. Written comments should be addressed to Patricia Ruiz, Juvenile Justice Services, P.O. Drawer 5160, Santa Fe, New Mexico 87502-5160, Fax Number 505-827-8408.

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 Patricia Ruiz at 505-827-7632. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT  
YOUTH AND FAMILY SERVICES  
DIVISION**

**Notice of Public Hearing**

The Children, Youth and Families Department, Youth and Family Services, will hold a formal public hearing on June 25 from 9:00 to 11:00 a.m. in Room 565 on the 5<sup>th</sup> floor of the PERA building located at 1120 Paseo de Peralta, Santa Fe, New Mexico to receive public comments regarding proposed updated/revised regulations 8.14.2 NMAC, governing Probation and Aftercare Services from CYFD, Youth and Family Services.

The proposed changes to the regulations may be obtained by contacting Ted Lovato at 505-827-9916. Interested persons may testify at the hearing or submit written comments no later than 11:00 a.m. on June 25, 2009. Written comments will be given the same consideration as oral testimony given at the hearing. Written comments should be addressed to Ted Lovato, Youth and Family Services, P.O. Drawer 5160, Santa Fe, New Mexico 87502-5160, Fax Number 505-476-2225.

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 Patricia Ruiz at 505-827-7632. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

**NEW MEXICO BOARD OF  
CHIROPRACTIC  
EXAMINERS**

**RULE HEARING AND REGULAR  
BOARD MEETING**

The New Mexico Board of Chiropractic Examiners will hold a Rule Hearing on July 11, 2009. Following the Rule Hearing the New Mexico Board of Chiropractic Examiners Board will convene a regular meeting to adopt the rules and take care of regular business. The New Mexico Board of Chiropractic Examiners Rule Hearing will begin at 9:00 a.m. and the Regular Meeting will convene following the rule hearing. Portions of the regular meeting may be closed to the public while the Board is in Executive Session. The meetings will be held at the Toney Anaya Building, Hearing room 1, 2nd Floor, and 2550 Cerrillos Road, Santa Fe, New Mexico.

The purpose of the rule hearing is to consider adoption of proposed amendments, replacements, repeals and or additions to the following Board Rules in NMAC 16.4 Chiropractic Practitioners -

**16.4.15 Chiropractic Advanced Practice Certification Registry**

Persons desiring to present their views on the proposed rules may write to request draft copies from the Board office at the Toney Anaya Building located at the West Capital Complex, 2550 Cerrillos Road in Santa Fe, New Mexico 87505, or call (505) 476-4605 after April 15,2008. In order for the Board members to review the comments in their meeting packets prior to the meeting, persons wishing to make comment regarding the proposed rules must present them to the Board office in writing no later than June 10, 2009. Persons wishing to present their comments at the hearing will need (10) copies of any comments or proposed changes for distribution to the Board and staff.

If you have questions, or if you are an individual with a disability who wishes to attend the hearing or meeting, but you need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to participate, please call the Board office at (505) 476-4613 at least two weeks prior to the meeting or as soon as possible.

**NEW MEXICO ENERGY, MINERALS  
AND NATURAL RESOURCES  
DEPARTMENT**

ENERGY CONSERVATION AND MANAGEMENT DIVISION

**NOTICE OF PUBLIC MEETING AND HEARING  
OF THE NEW MEXICO**

**ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
Solar Market Development Tax Credit**

The New Mexico Energy, Minerals and Natural Resources Department will hold a meeting and hearing at 9:00 A.M. Tuesday, June 16, 2009 in Porter Hall, Wendell Chino Building, 1220 S. St. Francis Drive, Santa Fe, New Mexico.

During the meeting, the New Mexico Energy, Minerals and Natural Resources Department will conduct a public hearing on amended rule 3.3.28 NMAC for administration of the Solar Market Development Tax Credit.

Copies of the rule and the proposed changes are available from the New Mexico Energy, Minerals and Natural Resources Department, Energy Conservation and Management Division, 1220 South Saint Francis Drive, Santa Fe, NM 87505, on our website, <http://www.cleanenergynm.org>, or by contacting Ryan Helton at 505-476-3318 or [ryan.helton@state.nm.us](mailto:ryan.helton@state.nm.us).

All interested persons may participate in the hearing, and will be given an opportunity to submit relevant evidence, data, views, and arguments, orally or in writing.

A person who wishes to submit a written statement, in lieu of providing oral testimony at the hearing, shall submit the written statement prior to the hearing, or submit it at the hearing. No statements will be accepted after the conclusion of the hearing.

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 to attend or participate in the hearing, please contact Ryan Helton at least one week prior to the hearing or as soon as possible. Public documents can be provided in various accessible formats. Please contact Ryan Helton at 476-3318, through Relay New Mexico at 1-800-489-8536 Voice/ TTY, if a summary or other type of accessible format is needed.

**NEW MEXICO PUBLIC REGULATION COMMISSION  
UTILITY DIVISION**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF THE NOTICE OF )  
PROPOSED RULEMAKING TO AMEND )  
UTILITY DIVISION PROCEDURAL ) Case No. 09-00141-UT  
RULE 17.9.570.10 NMAC PERTAINING )  
TO NET METERING )  
)**

**NOTICE OF PROPOSED RULEMAKING AND ORDER CLOSING DOCKET**

**THIS MATTER** comes before the New Mexico Public Regulation Commission (“Commission”) upon the Commission’s own motion. Being advised in the premises,

**THE COMMISSION FINDS AND CONCLUDES:**

1. The Commission’s current rules for net-metering provide for monthly “true-ups” of net energy delivered from a qualifying facility to a utility. 17.9.570.10(C)(2). Any net energy delivered from the qualifying facility to the utility is to be purchased at an avoided cost rate, as specified in 17.9.570.11 NMAC, with a cash payment to be made prior to the end of the following monthly billing cycle (or, if the amount is less than \$50, carried forward until it reaches \$50).

2. The question of whether the Commission should require annual, instead

of monthly, true-ups for net-metered energy arose in the course of the cases involving the 2008 renewable energy procurement plans submitted by the state's investor-owned utilities. See Case 08-00388-UT, Notice of Inquiry, at ¶ 5(a) and (b).

3. The Commission accepted written comments and held a workshop on this topic on January 28, 2009, pursuant to the Notice of Inquiry (NOI) in Case 08-00388-UT, which was attended by renewable energy developers and advocates, utilities, and other interested persons. (The NOI and workshop also addressed other renewable energy related issues.)

4. Renewable energy advocates supported annual true-ups, asserting that monthly true-ups discouraged qualifying facilities from sizing their generation to meet all of their annual needs, and further that monthly true-ups place additional and unnecessary financial risks upon qualifying facilities in the event that a business interruption causes on-site use to be abnormally low for a particular month. See e.g., Marks Westbrook, Response to NOI, Case 08-00388-UT. El Paso Electric, joined by other utilities, expressed the concern that annual true-ups provide a subsidy from the utility and its other ratepayers to the qualifying facility by allowing the qualifying facility to net a greater amount of energy against consumption at retail, rather than avoided cost, rates. See, e.g., El Paso Electric Company's Response to NOI Attachment 1, Case 08-00388-UT. PNM, in written comments indicated that energy rates vary month-to-month, and that an annual true-up could be inappropriate if it used the rate for the pay-out month to compensate for energy generated throughout the year. Comments of Public Service Company of New Mexico, Case 08-00388-UT. In addition, in comments made during the December 16, 2008 Commission Open Meeting, a PNM representative expressed the concern that overly generous net-metering terms would encourage entities to oversize their facilities and effectively become wholesale power providers under the guise of net-metered qualifying facilities, when those entities should instead be required to participate in competitive bidding processes for power suppliers. Utility Division Staff filed written comments in Case 08-00388-UT favorable to annual true-ups.

5. The Commission proposes to amend Rule 570 to eliminate monthly true-ups in order to further the State's renewable energy goals by removing unnecessary barriers to the deployment of customer-owned renewable generation intended to meet the customer's own electricity needs. In order to address the rea-

sonable concern that the rule not encourage would-be independent power producers to sign up as net-metered qualifying facilities, the proposed rule eliminates cash payouts during the lifetime of the service agreement between the utility and the qualifying facility. This could also address the concern that about an annual pay-out at a rate that is not representative of rates in effect at the time of generation.

6. The Commission should issue as proposed rules the amendments shown in Exhibit A to this Notice of Proposed Rulemaking.

7. The Commission will accept written comments on the rule contained in Exhibit A and proposed in this Notice of Proposed Rulemaking from any interested person.

8. Interested persons shall file their written comments on the proposed rules no later than June 23, 2009. Any response comments shall be filed no later than July 7, 2009. Comments suggesting changes to the proposed rules shall state and discuss the particular reasons for the suggested changes and shall include all specific language necessary or appropriate to effectuate the changes being suggested. Specific proposed language changes to the proposed rules shall be in legislative format. Any proposed changes to the proposed rules shall be submitted in hard copy. All pleadings, including comments and suggested changes to the proposed rules, shall bear the caption and docket number contained at the top of this Notice.

9. Written comments or written response comments should be sent to:

New Mexico Public  
Regulation Commission  
Attention: Case No.  
09-00141-UT  
224 East Palace  
Avenue, Marian Hall  
Santa Fe, NM 87501  
Telephone: (505) 827-  
6968

10. Copies of the proposed rule may be downloaded from the Commission's web site, [www.nmprc.state.nm.us](http://www.nmprc.state.nm.us).

11. The Commission will review all timely submitted written comments and will hold a public comment hearing on the following date and at the following time and place:

Wednesday, July 15, 2009, 9:30 a.m.  
Fourth Floor Hearing Room, PERA Bldg.

1120 Paseo de Peralta, Santa Fe, NM

12. Interested persons should contact the Commission to confirm the date, time and place of any public hearing because hearings are occasionally rescheduled.

13. Any person with a disability requiring special assistance in order to participate in a hearing should contact Cecilia Rios at 827-4501 at least 48 hours prior to the commencement of the hearing.

14. 1.2.3.7(B) NMAC ("Ex Parte Communications") draws a distinction applicable to rulemaking proceedings between communications occurring before the record has been closed and communications occurring after the record has been closed. It defines only the latter as "ex parte communications". In order to assure compliance with 1.2.3.7(B) NMAC, the Commission should set a date on which it will consider the record to be closed. The Commission finds such date should be August 17, 2009, or the date a Final Order is issued in this case, whichever is earlier. The setting of that record closure date will permit Commissioners and Commission counsel to conduct follow-up discussions with parties who have submitted initial or response comments to the Commission's proposed rules or responses to any bench request orders. However, this action should not be interpreted as extending the time during which parties may file comments or response comments, or as allowing the filing of other types of documents in this case.

15. The Commission should close Docket 08-00388-UT as a housekeeping matter. Issues other than the net-metering true-up that were raised and discussed in response to that NOI may be further addressed through separate proceedings at the Commission's discretion.

16. Copies of this Notice should be sent to all persons on the attached Certificate of Service.

#### IT IS THEREFORE ORDERED:

A. The proposed rule, attached to this Notice of Proposed Rulemaking as Exhibit A, is proposed for adoption as a permanent rule as provided by this Notice.

B. Initial comments on the proposed rule must be filed by June 23, 2009, and response comments must be filed by July 7, 2009.

C. A public comment hearing shall be held as provided in this

Notice of Proposed Rulemaking.

D. A copy of this Notice, including Exhibit A, shall be mailed to all persons listed on the attached Certificate of Service. This Notice, excluding Exhibit A, shall be published in two newspapers of general circulation in the State and in the New Mexico Register. The Commission shall provide the Notice by e-mail or facsimile transmission to any persons who so request, and shall post a copy of the proposed rules on the Commission's web site.

E. The record in this case, for the purposes of 1.2.3.7(B) NMAC shall be closed at 5:00 p.m. on August 17, 2009, or the date a Final Order is issued in this case, whichever is earlier.

F. Docket number 08-00388-UT is closed.

G. This Notice is effective immediately.

**ISSUED under the Seal of the Commission at Santa Fe, New Mexico, on this 12 day of May 2009.**

**NEW MEXICO PUBLIC REGULATION COMMISSION**

\_\_\_\_\_  
SANDY JONES, CHAIRMAN

\_\_\_\_\_  
DAVID KING, VICE CHAIRMAN

\_\_\_\_\_  
JASON MARKS, COMMISSIONER

\_\_\_\_\_  
JEROME BLOCK, COMMISSIONER

\_\_\_\_\_  
CAROL K. SLOAN, COMMISSIONER

**NEW MEXICO  
REGULATION AND  
LICENSING DEPARTMENT  
CONSTRUCTION INDUSTRIES  
DIVISION**

**STATE OF NEW MEXICO  
CONSTRUCTION INDUSTRIES  
DIVISION**

**of the  
Regulation and Licensing Department**

**NOTICE OF PUBLIC HEARING**

A Public Hearing on proposed amendments to 14.5.2 NMAC, Section 19 and 14.6.4, Section 8D will be held **FROM 9:00**

**A.M. TO 12:00 NOON**, at the following locations:

- \* **JUNE 29 ALBUQUERQUE, NM** - CID Conference Room: 5200 Oakland Avenue, NE
- \* **JUNE 30 SANTA FE, NM** - CID Conference Room, 2550 Cerrillos Road, 3<sup>rd</sup> Floor,
- \* **JULY 01 LAS CRUCES, NM** - CID Conference Room, 505 S. Main St., Suite 150,

Copies of the draft rule will be available at the Construction Industries Division offices beginning June 15, 2009.

You are invited to attend and express your opinion on these proposed rules changes. If you cannot attend the meeting, you may send your written comments to the Construction Industries Division, 2550 Cerrillos Road, P.O. Box 25101, Santa Fe, New Mexico 87504, Attention: Public Comments. FAX (505) 476-4685. All comments must be received no later than 5:00 p.m., June 29, 2009.

**If you require special accommodations to attend the hearing, please notify the Division by phone, email or fax, of such needs no later than June 15, 2009. Telephone: 505-476-4686. Email: [www.rld@state.nm.us/cid](mailto:www.rld@state.nm.us/cid) Fax No. 505-476-4685.**

**NEW MEXICO STATE RECORDS CENTER AND ARCHIVES**

**Notice of Public Hearing**

The State Records Administrator, New Mexico State Records Center and Archives will hold a public hearing at 9:00 a.m., on Thursday, June 11, 2009 at the State Records Center and Archives building, Commission Room, 1209 Camino Carlos Rey, Santa Fe, New Mexico 87507. The public hearing will be held to solicit comments on the following:

**Amendments**

- 1.13.1 NMAC General Provisions
- 1.13.2 NMAC Fees
- 1.13.7 NMAC Office of the State Historian Scholars Program
- 1.13.10 NMAC Records Custody, Access, Storage and Disposition
- 1.13.11 NMAC Access to Public Records, Research in the New Mexico Archives
- 1.14.2 NMAC Microphotography Systems, Microphotography Standards
- 1.24.15 NMAC New Mexico Register

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the hearing, please contact Antoinette Solano at 476-7902 by June 4, 2007. Proposed rules can be viewed at <http://www.nmcpr.state.nm.us> and can also be provided in various accessible formats. For additional assistance please contact Antoinette. L. Solano at 505 476-7902 or by e-mail at [antoinettel.solano@state.nm.us](mailto:antoinettel.solano@state.nm.us)

**End of Notices and  
Proposed Rules Section**

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## Adopted Rules

### NEW MEXICO PUBLIC ACCOUNTANCY BOARD

This is an amendment to 16.60.1 NMAC Section 10, effective 05-29-2009.

**16.60.1.10 FEES AND OBLIGATIONS:** Fees charged by the board shall be as follows.

**A.** Fees set by the board for CPA examination applicants shall not unreasonably exceed the amount required for the board to operate CPA examination administration on a break even basis, but in no case shall the fee be less than the state's cost of procuring and administering the exam.

**B.** Initial examination qualification review under Section 27F of the act shall be \$75.

**C.** Delinquency fee for incomplete or delinquent continuing education reports, certificate/license or firm permit renewals under Section 27D of the act shall be \$50.

**D.** Certificate application under Section 27B of the act shall be: initial certificate, ~~[\$150]~~ \$175; certificate renewal, ~~[\$100]~~ \$125.

**E.** No annual renewal fee shall be assessed for an individual who holds an inactive certificate and who has reached the age of 70.

**F.** Firm permit application or renewal fee under Section 27C of the act shall be ~~[\$45]~~ \$75 for each firm, regardless of form of entity.

**G.** Firm permit renewal delinquency fee under Section 27C of the act shall be \$50 and includes all practitioners whose renewal applications are delinquent.

**H.** Certificate/license reinstatement fee under Section 27G of the act shall be \$175 plus the current year's renewal fee. No delinquency fee shall be assessed.

**I.** No fee shall be charged for firm permit reinstatement, and no delinquency fee shall be assessed; only the current year's renewal fee shall be assessed.

**J.** Continuing professional education waiver and reentry into active certificate status and to comply with continuing professional education under Sections 27H and 27I of the act shall not exceed \$75 each occurrence.

**K.** Administrative fees for services under Section 27F shall be:

(1) list of certificate or permit holders, \$250;

(2) duplicate or replacement certificate card or permit card, \$10 each;

(3) duplicate or replacement wall

certificate, \$25 each;

(4) board evaluation of coursework for continuing professional education credit, \$50 per hour of board staff research and study;

(5) certificate application package for reciprocity and grade transfer candidates and replacement packages for by-examination candidates, \$20 each;

(6) copies of combined Accountancy Act and board rules, \$10 each;

(7) copies of records and documents, \$.25 per page;

(8) the board may, at its discretion, charge for other administrative costs as it deems appropriate.

**L.** Fee for the transfer of licensure or examination information to a third party under Section 27E of the act shall be \$20.

**M.** Fee for criminal history background check under Section 8.1 of the act shall be \$29.25.

**N.** The board may waive charges as it deems appropriate.

[16.60.1.10 NMAC - Rp 16 NMAC 60.2.8, 02-14-2002; A, 01-15-2004; A, 04-29-2005; A, 11-30-2007; A, 06-30-2008; A, 05-29-2009]

### NEW MEXICO DEPARTMENT OF AGRICULTURE

December 29, 2008

I. Miley Gonzalez, Ph.D  
New Mexico Department of Agriculture  
MSC 3189, Box 30005  
Las Cruces, New Mexico 88003-8005

Dr. Gonzalez:

You recently requested to publish a synopsis in lieu of publishing the amendments to Section 1, Issuing Agency of the following Department of Agriculture rules:

19 NMAC 15.103; SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR COMMERCIAL WEIGHING AND MEASURING DEVICES

19 NMAC 15.104; STANDARD SPECIFICATIONS/MODIFICATIONS FOR PETROLEUM PRODUCTS

19 NMAC 15.105; LABELING REQUIREMENTS FOR PETROLEUM PRODUCTS

19 NMAC 15.106; OCTANE POSTING REQUIREMENTS

19 NMAC 15.107; APPLYING ADMINISTRATIVE PENALTIES

19 NMAC 15.109; NOT SEALED NOT LEGAL FOR TRADE

21 NMAC 1.1; NMDA RULE MAKING PROCEDURES

21 NMAC 1.2; FEES FOR LISTS, DOCUMENTS AND SERVICES

21 NMAC 16.2; SPECIFICATIONS, TOLERANCES AND OTHER TECHNICAL REQUIREMENTS FOR COMMERCIAL WEIGHING AND MEASURING DEVICES

21 NMAC 16.3; NOT SEALED NOT LEGAL FOR TRADE

21 NMAC 16.4; METHOD OF SALE OF COMMODITIES

21 NMAC 16.6; PRICE REPRESENTATIONS

21 NMAC 16.9; WEIGHMASTER BONDING REQUIREMENTS

21 NMAC 16.10; CHECKING THE NET CONTENTS OF PACKAGED GOODS

21 NMAC 17.28; PECAN WEEVIL EXTERIOR QUARANTINE

21 NMAC 17.29; PEPPER WEEVIL INTERIOR QUARANTINE AND PLOW-DOWN

21 NMAC 17.31; PINK BOLLWORM PERMANENT PLOWDOWN

21 NMAC 17.33; RED IMPORTED FIRE ANT INTERIOR QUARANTINE

21 NMAC 17.51; CONTROL OF WOOD DESTROYING PESTS

21 NMAC 17.53; CONTINUING EDUCATION UNITS FOR PESTICIDE APPLICATORS

21 NMAC 17.57; M-44 CAPSULES AND THE LIVESTOCK PROTECTION COLLAR

21 NMAC 18.2; FERTILIZER PRODUCTS

21 NMAC 18.3; COMMERCIAL FEEDS

21 NMAC 18.4; SEED STANDARDS AND CLASSIFICATIONS

21 NMAC 25.5; LICENSE FEES AND BONDS FOR PRODUCE BROKERS, DEALERS, AND PACKERS

21 NMAC 27.2; COMMERCIAL APIARIES

21 NMAC 34.2; RETAIL SALE OF RAW MILK

21 NMAC 34.3; PASTEURIZED MILK ORDINANCE

21 NMAC 34.4; ANIMAL DRUG RESIDUE ENFORCEMENT PROCEDURES

21 NMAC 34.5; OPEN DATE LABELING FOR DAIRY PRODUCTS

21 NMAC 34.6; STANDARDS OF IDENTITY FOR FROZEN DAIRY DESSERTS

21 NMAC 34.7; EGG INSPECTION FEES

21 NMAC 34.8; GRADES, STANDARDS AND REPORTS FOR SHELL EGGS

19.15.108 NMAC; BONDING AND REGISTRATION OF SERVICE TECHNICAL

CIANS AND SERVICE ESTABLISHMENTS FOR COMMERCIAL WEIGHING OR MEASURING DEVICES  
21.16.5 NMAC; BONDING AND REGISTRATION OF SERVICE TECHNICIANS AND SERVICE ESTABLISHMENTS FOR COMMERCIAL WEIGHING OR MEASURING DEVICES

21.16.11 NMAC; APPLYING ADMINISTRATIVE PENALTIES: WEIGHTS AND MEASURES LAW

21.16.12 NMAC; APPLYING ADMINISTRATIVE PENALTIES: WEIGHMASTER ACT

21.17.32 NMAC; COTTON PEST EMERGENCY ACTION

21.17.50 NMAC; PESTICIDES

21.17.56 NMAC; RESTRICTED-USE PESTICIDES

21.34.13 NMAC; APPLYING ADMINISTRATIVE PENALTIES: EGG GRADING ACT

21.34.14 NMAC. APPLYING ADMINISTRATIVE PENALTIES: DAIRY ACT

A review of the rules shows that their impact is "unduly cumbersome, expensive or otherwise inexpedient" to publish. Therefore, your request to publish a synopsis is approved.

Sincerely,

Sandra Jaramillo  
State Records Administrator

SJ/ab

## NEW MEXICO DEPARTMENT OF AGRICULTURE

### SYNOPSIS

#### Subject Matter Disclosure

New Mexico Department of Agriculture (NMDA) proposes to make the changes to rules under its authority. First, it is proposed that the addresses and phone numbers be removed from the "Issuing Agency" section of each rule and placed in an annotation. In addition, it is proposed that 33 of NMDA's rules be reformatted and renumbered to comply with current New Mexico Administrative Code (NMAC) requirements.

The rules to be changed in the "Issuing Agency" section include:

19 NMAC 15.103; 19 NMAC 15.104; 19 NMAC 15.105; 19 NMAC 15.106; 19 NMAC 15.107; 19 NMAC 15.109; 21

NMAC 1.1; 21 NMAC 1.2; 21 NMAC 16.2; 21 NMAC 16.3; 21 NMAC 16.4; 21 NMAC 16.6; 21 NMAC 16.9; 21 NMAC 16.10; 21 NMAC 17.28; 21 NMAC 17.29; 21 NMAC 17.31; 21 NMAC 17.33; 21 NMAC 17.51; 21 NMAC 17.53; 21 NMAC 17.57; 21 NMAC 18.2; 21 NMAC 18.3; 21 NMAC 18.4; 21 NMAC 25.5; 21 NMAC 27.2; 21 NMAC 34.2; 21 NMAC 34.3; 21 NMAC 34.4; 21 NMAC 34.5; 21 NMAC 34.6; 21 NMAC 34.7; 21 NMAC 34.8; 19.15.108 NMAC; 21.16.5 NMAC; 21.16.11 NMAC; 21.16.12 NMAC; 21.17.32 NMAC; 21.17.50 NMAC; 21.17.56 NMAC; 21.34.13 NMAC and 21.34.14 NMAC.

The rules be reformatted and renumbered to comply with current NMAC requirements include:

19 NMAC 15.103; 19 NMAC 15.104; 19 NMAC 15.105; 19 NMAC 15.106; 19 NMAC 15.107; 19 NMAC 15.109; 21 NMAC 1.1; 21 NMAC 1.2; 21 NMAC 16.2; 21 NMAC 16.3; 21 NMAC 16.4; 21 NMAC 16.6; 21 NMAC 16.9; 21 NMAC 16.10; 21 NMAC 17.28; 21 NMAC 17.29; 21 NMAC 17.31; 21 NMAC 17.33; 21 NMAC 17.51; 21 NMAC 17.53; 21 NMAC 17.57; 21 NMAC 18.2; 21 NMAC 18.3; 21 NMAC 18.4; 21 NMAC 25.5; 21 NMAC 27.2; 21 NMAC 34.2; 21 NMAC 34.3; 21 NMAC 34.4; 21 NMAC 34.5; 21 NMAC 34.6; 21 NMAC 34.7; 21 NMAC 34.8.

The proposed rules changes were approved by the Director/Secretary of NMDA and the New Mexico State University Board of Regents.

#### Disclosure to Persons Affected

Persons and entities normally subject to the rules and regulations of NMDA may be directly or indirectly affected by these rules changes.

#### Description of the Interests of Persons Affected

Any person affected by rules under NMDA.

#### Geographically Applicability

Geographical applicability is limited to areas within the State of New Mexico covered by the New Mexico Department of Agriculture.

#### Identification of Incorporated Commercially Published Material

There will be no change to incorporated

commercially published material because there are no substantive changes to incorporated commercially published material.

#### Information for Obtaining the Full Text of the Rule

Interested persons may obtain the full text of the Rule at:

NMDA

C/O Ricardo Gonzales

P O Box 30005, MSC 3189

Las Cruces, NM 88003-8005

575-646-3702

#### Effective Date

May 29, 2009

#### Certification

As counsel for the New Mexico Department of Agriculture, I certify that this synopsis gives adequate notice of the contents of the rules described above

This 8<sup>th</sup> day of

May 2009

BY: Bruce Kite

## NEW MEXICO ANIMAL SHELTERING BOARD

### TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING CHAPTER 24 ANIMAL SHELTERING PROVIDERS PART 1 GENERAL PROVISIONS

**16.24.1.1 ISSUING AGENCY:** Regulation and Licensing Department, Animal Sheltering Board.  
[16.24.1.1 NMAC - N, 07/01/09]

**16.24.1.2 SCOPE:** This part applies to applicants, licensees, certificate holders and persons or agencies within the jurisdiction of the board.  
[16.24.1.2 NMAC - N, 07/01/09]

**16.24.1.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Animal Sheltering Act, Sections 77-1B-2, 77-1B-3, 77-1B-4, 77-1B-5, 77-1B-6, 77-1B-7, 77-1B-8, 77-1B-9, 77-1B-10 and 77-1B-11 NMSA 1978.  
[16.24.1.3 NMAC - N, 07/01/09]

**16.24.1.4 DURATION:** Until July 1, 2012

[16.24.1.4 NMAC - N, 07/01/09]

**16.24.1.5 EFFECTIVE DATE:** July 1, 2009 unless a later date is cited in the history note at the end of a section.

[16.24.1.5 NMAC - N, 07/01/09]

**16.24.1.6 OBJECTIVE:** To define terms relevant to animal sheltering, euthanasia, circumstances under which a license is required, persons exempted from licensing, custody and alteration of a license, transferability, display of license, notification of changes, local regulations, and professional ethical standards, and to set forth standards for the operation, meeting and record keeping requirements of the board.

[16.24.1.6 NMAC - N, 07/01/09]

**16.24.1.7 DEFINITIONS:**

**A. "Act"** means the Animal Sheltering Act, Sections 77-1B-1 through 77-1B-12 NMSA 1978.

**B. "Animal"** means any animal, except humans, not defined as "livestock" in Subsection T of this section.

**C. "Animal shelter"** means:

(1) a county or municipal facility that provides shelter to animals on a regular basis, including a dog pound; and

(2) a private humane society or a private animal shelter that temporarily houses stray, unwanted or injured animals through administrative or contractual arrangements with a local government agency; and

(3) does not include a municipal zoological park.

**D. "Board"** means the animal sheltering board.

**E. "Companion animal"** means any vertebrate commonly kept as domestic pets, excluding man, and those under the jurisdiction of the New Mexico department of game and fish and those under the jurisdiction of the New Mexico livestock board.

**F. "Consulting pharmacist"** means a pharmacist whose services are engaged on a routine basis by a euthanasia agency and who is responsible for the distribution, receipt and storage of drugs according to the state and federal regulations.

**G. "Dangerous drug"** means a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe, except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot

be prepared. 'Adequate directions for use' means directions under which the layperson can use a drug or device safely and for the purposes for which it is intended.

**H. "DEA"** means United States drug enforcement administration.

**I. "Department"** means the regulation and licensing department.

**J. "Disposition"** means the adoption of an animal; return of an animal to the owner; release of an animal to a rescue organization; release of an animal to another animal shelter or to a rehabilitator licensed by the department of game and fish or the United States fish and wildlife service; or euthanasia of an animal.

**K. "Emergency field euthanasia"** means the process defined by rule of the board to cause the death of an animal in an emergency situation when the safe and humane transport of the animal is not possible.

**L. "Euthanasia"** means to produce the humane death of an animal by standards deemed acceptable to the board as set forth in its rules.

**M. "Euthanasia agency"** means a facility licensed by the board that provides shelter to animals on a regular basis, including a dog pound, a humane society or a public or private shelter facility that temporarily houses stray, unwanted or injured animals, and that performs euthanasia.

**N. "Euthanasia drugs"** means non-narcotic schedule II or schedule III substances and chemicals as set forth in the Controlled Substances Act, Section 30-31-1 et. seq. NMSA 1978, that are used for the purposes of euthanasia and pre-euthanasia of animals.

**O. "Euthanasia instructor"** means a euthanasia technician or a veterinarian certified by the board to instruct other individuals in euthanasia techniques.

**P. "Euthanasia technician"** means a person licensed by the board to euthanize animals for a euthanasia agency.

**Q. "Exotic"** means any vertebrate animal, excluding man, wild animals, livestock and companion animals.

**R. "FDA"** means United States food and drug administration.

**S. "Humanely"** means actions marked by compassion, sympathy or consideration, especially for the prevention of the suffering of the animal.

**T. "Livestock"** means all domestic or domesticated animals that are used or raised on a farm or ranch and exotic animals in captivity and includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rheas, camelids and farmed cervidae but does not include canine or feline animals.

**U. "Non-livestock"** means any animal not covered under the definition of livestock in Subsection L of Section 77-1B-2 NMSA 1978.

**V. "Rescue organization"** means an organization that rescues animals and is not involved in the breeding of animals.

**W. "Sharps"** means any discarded article that may cause punctures or cuts. Such wastes may include, but are not limited to needles, scalpel blades, glass slides, glassware, suture needles and trocars.

**X. "Supervising veterinarian"** means a person who is a veterinarian, who holds both a valid New Mexico controlled substance license and a valid federal drug enforcement agency license and who approves the drug protocols and the procurement and administration of all pharmaceuticals at a euthanasia agency.

**Y. "Veterinarian"** means a person who is licensed as a doctor of veterinary medicine by the board of veterinary medicine pursuant to the Veterinary Practice Act, Section 61-14-1 et. seq. NMSA 1978.

**Z. "Veterinary facility"** means any building, mobile unit, vehicle or other location where services included within the practice of veterinary medicine are provided.

**AA. "Wild animal"** means any vertebrate animals under the jurisdiction of the New Mexico game and fish department.

[16.24.1.7 NMAC - N, 07/01/09]

**16.24.1.8 BOARD OPERATIONS:**

**A. Quorum.** The board shall transact official business only at a legally constituted meeting with a quorum present. A simple majority of the appointed board members constitutes a quorum. The board is in no way bound by any opinion, statement, or action of any board member, the board administrator, or other staff except when such action is pursuant to a lawful instruction or direction of the board.

**B. Addressing the board.** Except for proceedings to adopt, amend, or repeal rules in accordance with the Uniform Licensing Act, Section 61-1-29 NMSA 1978, the board, at its sole discretion, may provide a reasonable opportunity for persons attending an open meeting to address the board on an agenda item. The request to speak shall be timely made and shall not delay or disrupt the board's meeting. No person shall be permitted to address the board on any pending or concluded application, complaint, investigation, adjudicatory proceeding, or matter in litigation, except to confer for the purpose of settlement or simplification of the issues. Any public com-

ment to the board shall be brief, concise, and relevant to the agenda item. The board may limit the total time allotted for comments and the time allotted to any person.

**C. Conflict of interest, recusal.** Any board member who cannot be impartial in the determination of a matter before the board and who cannot judge a particular matter or controversy fairly on the basis of its own merits, including because the board member had prior knowledge of the controversy, shall not participate in the any board deliberation or vote on the matter. A board member with a personal, social, family, financial, business, or pecuniary interest in a matter shall recuse himself or herself and shall not participate in a hearing, consideration, deliberation, or vote on the matter, except as provided by law.

**D. Confidentiality.** Board members shall not disclose to any non-member the content of any executive session discussion or deliberation, or any other confidential matters that may be the subject of an executive session or attorney-client privileged communications except as ordered by a court of competent jurisdiction or where the board knowingly and intentionally permits disclosure. Nothing herein shall preclude the board from including in executive session discussions or confidential committee meetings the board administrator or other persons the board deems necessary to assist the board in carrying out its operations. Such other persons shall be bound by the same rules of executive session as board members.

[16.24.1.8 NMAC - N, 07/01/09]

#### **16.24.1.9 BOARD MEETING TELEPHONIC ATTENDANCE:**

**A.** Pursuant to the provisions of the Open Meetings Act, Subsection C of Section 10-15-1, NMSA 1978, board members may participate in a meeting of the board by means of a conference telephone or similar communications equipment.

(1) Board members' participation in meetings telephonically shall constitute presence in person at the meeting.

(2) Telephonic participation may occur only when it is difficult or impossible for the board member to be physically present, that is, when there are circumstances which make attendance in person extremely burdensome.

**B.** Each board member participating telephonically shall be identified when speaking and all participants shall be able to hear all other participants.

**C.** Members of the public attending the meeting shall be able to hear all members of the board and members of the public who speak during the meeting.

[16.24.1.9 NMAC - N, 07/01/09]

#### **16.24.1.10 INSPECTION OF PUBLIC RECORDS:**

**A. Public Records.** The board operates in compliance with the Inspection of Public Records Act, Section 14-2-1 et. seq. NMSA 1978. The board administrator is the custodian of the board's records.

**B. Copying charges.** The custodian shall charge the standard copying charge established by the department.

**C. Creating records.** The board shall not be required to create any document or compile data for an individual or private entity.

**D. Reasonable access.** Consistent with the Inspection of Public Records Act and taking into account the available staff, space, and the needs of other legitimate public business, the custodian may determine the reasonable time, place, and conditions for access to public records.

**E. Removal.** Public records shall not be removed from the board office.

[16.24.1.10 NMAC - N, 07/01/09]

**16.24.1.11 NON-PUBLIC RECORDS:** The following records are considered confidential and are not subject to public inspection:

**A.** letters of reference;

**B.** medical reports or records of chemical dependency, physical or mental examinations or treatment;

**C.** the contents of any examination used to test for an individual's knowledge or competence;

**D.** investigative files if disclosure would impede the investigation;

**E.** written communication relating to actual or potential disciplinary action, including complaints, until the board acts or declines to act; and

**F.** matters of opinion in personnel files.

[16.24.1.11 NMAC - N, 07/01/09]

#### **16.24.1.12 SAVINGS CLAUSE:**

If any provision of these rules or the application thereof to any person or circumstances shall be held to be invalid or unconstitutional, the remainder of these rules and the application of such provisions to other persons or circumstances shall not be affected thereby.

[16.24.1.12 NMAC - N, 07/01/09]

**HISTORY of 16.24.1 NMAC:**  
[RESERVED]

## **NEW MEXICO ANIMAL SHELTERING BOARD**

### **TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING CHAPTER 24 ANIMAL SHELTERING PROVIDERS PART 2 LICENSURE AND CERTIFICATION**

**16.24.2.1 ISSUING AGENCY:** Regulation & Licensing Department, Animal Sheltering Board.

[16.24.2.1 NMAC - N, 07/01/09]

**16.24.2.2 SCOPE:** This part applies to applicants, licensees, certificate holders and persons or agencies within the jurisdiction of the board.

[16.24.2.2 NMAC - N, 07/01/09]

**16.24.2.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Animal Sheltering Act, Sections 77-1B-5, 77-1B-6, 77-1B-7, NMSA 1978.

[16.24.2.3 NMAC - N, 07/01/09]

**16.24.2.4 DURATION:** Until July 1, 2012

[16.24.2.4 NMAC - N, 07/01/09]

**16.24.2.5 EFFECTIVE DATE:** July 1, 2009 unless a later date is cited in the history note at the end of the section.

[16.24.2.5 NMAC - N, 07/01/09]

**16.24.2.6 OBJECTIVE:** To provide for the most humane restraint, in-facility capture, and death possible for animals when euthanasia is required.

[16.24.2.6 NMAC - N, 07/01/09]

**16.24.2.7 DEFINITIONS:**  
[Reserved]

#### **16.24.2.8 PRACTICING WITHOUT A LICENSE OR CERTIFICATE:**

**A.** It is a violation of the act for a person, other than a veterinarian licensed to practice in New Mexico, to perform euthanasia for a euthanasia agency in this state unless the individual is licensed by the board pursuant to the Act, Section 77-1B-6 NMSA 1978.

**B.** It is a violation of the act for an entity other than a veterinary facility to perform euthanasia unless the agency is licensed by the board pursuant to the Act, Section 77-1B-8 NMSA 1978.

[16.24.2.8 NMAC - N, 07/01/09]

#### **16.24.2.9 LICENSURE OR CERTIFICATION EXEMPTIONS:**

**A.** The act does not apply to veterinarians licensed in New Mexico.

**B.** The act does not apply to wildlife rehabilitators working under the auspices of the department of game and fish.

**C.** A for profit veterinary facility serving as a euthanasia agency pursuant to a contract with a local government is exempt from the provisions of the act; provided that the veterinary facility is subject to licensure and rules adopted pursuant to the Veterinary Practice Act, Section 61-14-1 et. seq. NMSA 1978.

**D.** A municipal facility that is a zoological park is exempt from the provisions of the act.

**E.** A commissioned law enforcement officer is exempt from the act when conducting emergency field euthanasia or in situations where the public's health or safety is at risk or the animal is irremediably suffering.

**F.** The board may exempt a euthanasia instructor from the required euthanasia technician testing based upon review of the applicant's credentials and practical experience in shelter euthanasia. The applicant shall be required to obtain a euthanasia instructor certificate and is subject to the required certified euthanasia instructor duties.

[16.24.2.9 NMAC - N, 07/01/09]

#### **16.24.2.10 CUSTODY AND ALTERATION OF LICENSE OR CERTIFICATE:**

**A.** Licenses and certificates issued by the board are at all times the property of the board, and may remain in the custody of the licensee or certificate holder only as long as the licensee or certificate holder complies with the act and board rules.

**B.** Licenses and certificates shall not be altered in any way.

**C.** Inspectors or board designees shall retrieve any license or certificate that is suspended, revoked, expired, or left by a licensee or certificate holder who is no longer employed at an establishment.

[16.24.2.10 NMAC - N, 07/01/09]

**16.24.2.11 LICENSE OR CERTIFICATE NOT TRANSFERABLE:** A license or certificate issued by the board pursuant to the act shall not be transferred or assigned.

[16.24.2.11 NMAC - N, 07/01/09]

#### **16.24.2.12 DISPLAY OF LICENSE OR CERTIFICATE AND NOTIFICATION OF CHANGES:**

**A.** A euthanasia technician license or a euthanasia agency license shall at all times be posted in the euthanasia room of the euthanasia agency, unless the

euthanasia technician is working at a location other than the euthanasia agency. If the euthanasia technician is performing euthanasia offsite, the licensee shall have the license in his or her possession. Euthanasia instructor certificate holders shall have the certificate in his or her possession when teaching any board approved euthanasia technician training course.

**B.** Licensees and certificate holders shall notify the board of any change of address, phone or other contact information within 30 days. If a euthanasia agency has a change of address, its current license will be invalidated on the date the change in address is effective and the agency shall reapply to the board for a valid license in order to perform euthanasia.

[16.24.2.12 NMAC - N, 07/01/09]

#### **16.24.2.13 APPLICATION FOR LICENSURE AS A EUTHANASIA TECHNICIAN:**

**A.** All persons who will provide euthanasia services on or after January 1, 2010, with the exception of licensed New Mexico veterinarians or state or federally licensed wildlife rehabilitators, shall be licensed by the board by January 1, 2010, or before they begin performing euthanasia services after January 1, 2010. Any person not licensed in that time frame may be in violation of the act for practicing euthanasia without a license.

**B.** In order to obtain a license as a licensed euthanasia technician, the applicant shall submit the following documentation and a completed application on a form provided by the board which may be available online, accompanied by the required fees:

(1) proof of age indicating the applicant is at least 18 years of age, such as a copy of a driver's license or a copy of a state issued identification card (do not submit a copy of a birth certificate);

(2) two 2" x 2" original photographs taken within the past six months;

(3) two completed fingerprint cards, a completed verification of fingerprints form, a notarized authorization for release of information form, and the prescribed fee for a state and federal criminal history background check as specified in 16.24.2.17 NMAC;

(4) verification that the applicant holds a high school diploma or its equivalent;

(5) verification that the applicant holds a certificate of completion, or similar document, of a board approved euthanasia technician training course within three years preceding the date the application for licensure is submitted, which course shall be approved as described in 16.24.2.18 NMAC.

(6) verification of passing a board approved examination administered by a certified euthanasia instructor at a board approved euthanasia training course with a grade of at least 80%.

(7) passing a board approved jurisprudence examination, administered by the board, with a grade of at least 80%.

(8) any other information or verifications the board may request.

**C.** 60-day temporary euthanasia technician license.

(1) A temporary license may be issued at the discretion of the board. The temporary license is intended to assist a licensed euthanasia agency to hire trained personnel in the event the agency's only licensed euthanasia technician leaves the agency or is no longer able to perform euthanasia for any reason. The temporary license is valid for a period of no more than 60 calendar days. The temporary license cannot be renewed by the euthanasia technician. No more than one temporary license may be granted to an individual unless approved by the board in consideration of extenuating circumstances.

(2) To qualify for a temporary license, an applicant shall submit all items required in Paragraphs (1) through (4) of Subsection B of 16.24.2.13 NMAC, submit proof of completion of a euthanasia technician training course within three years preceding the date of the application, successfully complete the jurisprudence exam, and submit three references regarding euthanasia by injection proficiency from licensed veterinarians or New Mexico licensed euthanasia technicians who have witnessed the applicant perform these procedures.

[16.24.2.13 NMAC - N, 07/01/09]

#### **16.24.2.14 APPLICATION FOR CERTIFICATION AS A EUTHANASIA INSTRUCTOR:**

**A.** In order to obtain a certificate as a certified euthanasia instructor the applicant shall submit the following documentation and a completed application on a form provided by the board, which may be available online, accompanied by the required fees:

(1) proof of age indicating the applicant is at least 21 years of age such as a copy of a driver's license or a copy of a state issued identification card (do not submit a copy of a birth certificate);

(2) two 2" x 2" original photographs taken within the past six months;

(3) two completed fingerprint cards, a completed verification of fingerprints form, a notarized authorization for release of information form and the prescribed fee for a state and federal criminal history background check as specified in 16.24.2.17 NMAC;

(4) verification that the applicant holds a high school diploma or its equivalent;

(5) verification that the applicant holds a certificate of completion of a board approved euthanasia technician training course, completed within one year preceding the date the application for certification is submitted;

(6) verification of passing a board approved examination for a board approved euthanasia technician training course with a grade of at least 90%;

(7) verification of at least one year of practical experience in the euthanasia of shelter animals preceding the date of application;

(8) any other information or verifications the board may request.

**B.** The board may exempt a euthanasia instructor from taking a required board approved euthanasia technician training course and test based upon review of the applicant's credentials and practical experience in shelter euthanasia. The applicant shall be required to obtain a euthanasia instructor certificate and is subject to the required certified instructor duties.

[16.24.2.14 NMAC - N, 07/01/09]

#### **16.24.2.15 APPLICATION FOR LICENSURE AS A EUTHANASIA AGENCY:**

All agencies that will provide euthanasia services on or after January 1, 2010, shall be licensed by the board by January 1, 2010, or before performing euthanasia services if the agency does not begin performing euthanasia services until a later date. In order to obtain a license as a euthanasia agency, the applicant shall submit the following documentation and a completed application on a form provided by the board, which may be online, accompanied by the required fee:

**A.** the agency shall have at least one licensed euthanasia technician on staff who shall at all times be assisted by a trained assistant as specified in Subsection I of 16.24.3.11 NMAC for each method of humane euthanasia;

**B.** the agency shall provide the names of their current licensed euthanasia technicians at the time of application or renewal for licensure and shall notify the board when there is a change in licensed euthanasia technicians at the agency within 30 days;

**C.** the agency shall have a written contingency plan for providing euthanasia in the event the agency is without a licensed euthanasia technician;

**D.** the agency shall notify the board in the event it no longer has a licensed euthanasia technician on staff within 72 hours;

**E.** the agency shall keep

accurate controlled substance and dangerous drug logs, in compliance with applicable state controlled substances laws, which shall be inspected quarterly according to the guidelines of the New Mexico pharmacy board and shall be made available to the board approved euthanasia agency inspector;

**F.** the agency shall identify and describe any contracts with a supervising veterinarian, a consulting pharmacist and any holder of DEA licenses;

**G.** the agency shall comply with board requests for inspections;

**H.** the agency shall pay the license fee established by the board; and

**I.** the agency shall provide any other information or verifications the board may request.

[16.24.2.15 NMAC - N, 07/01/09]

#### **16.24.2.16 APPLICATION FOR LICENSE OR CERTIFICATE RENEWALS:**

**A.** Licenses and certificates shall be valid for three years from the date the license or certificate is issued. Each licensee or certificate holder shall, on or before the expiration date of the license or certificate submit a renewal form provided by the board, which may be online, and pay a renewal fee as established by the board. Holders of a license or certificate who fail to renew on or before the expiration date may not practice past the expiration date and may be considered to be practicing without a license. Any person may reinstate an expired license or certificate within three years of its expiration by making application to the board for renewal and paying the current renewal fee along with all delinquent renewal fees and late fees. After three years have elapsed since the date of expiration, a license or certificate may not be renewed and the holder shall apply for a new license or certificate and take the required examination. The board may assess a late fee on the applicant as established by the board. License or certificate holders shall also comply with Subsections B through D to renew a license or certificate, as applicable.

**B.** For each renewal, a euthanasia technician shall also:

(1) provide proof of having taken 12 hours of board approved continuing education courses or in-service training during the prior three years, which may include, but are not limited to, animal handling, euthanasia, recording and handling of controlled substances and dangerous drugs, shelter operations and teacher training courses;

(2) complete any continuing education course specifically required by the board within the preceding three years;

(3) be responsible for proving the

validity of the reported continuing education hours by submitting photocopies of seminar registrations or completion certificates, or similar documentation;

(4) submit a request for course approval including a course description with course outline, the number of course hours, and agency teaching the course, in writing to the board if there is a question about whether a particular course, class, or seminar will be approved for credit;

(5) pass a board approved jurisprudence examination, administered by the board, with a grade of at least 80%.

**C.** For each renewal, a euthanasia instructor shall also:

(1) provide proof of having taken 24 hours of board approved continuing education courses during the prior three years, which may include, but are not limited to, animal handling, euthanasia, recording and handling of controlled substances and dangerous drugs, shelter operations and teacher training courses;

(2) complete any continuing education course specifically required by the board within the preceding three years;

(3) be responsible for proving the validity of the reported continuing education hours by submitting photocopies of seminar registrations or completion certificates, or similar documentation;

(4) submit a request for course approval including a course description with course outline, the number of course hours, and agency teaching the course, in writing to the board if there is a question about whether a particular course, class, or seminar will be approved for credit;

(5) pass a board approved jurisprudence examination, administered by the board, with a grade of at least 80%.

**D.** For each renewal, a euthanasia agency shall also:

(1) submit to an annual inspection and correct any deficiencies found during its inspection;

(2) submit a current list of its licensed euthanasia technicians.

[16.24.2.16 NMAC - N, 07/01/09]

#### **16.24.2.17 APPLICANT BACKGROUND CHECK PROCEDURE:**

Pursuant to Section 77-1B-5(N) NMSA 1978 all applicants for initial issuance, reinstatement or renewal of a license or certificate in New Mexico shall be required to be fingerprinted to establish positive identification for a state and federal criminal history background check, except commissioned law enforcement officers.

**A.** Blank fingerprint cards shall be obtained from the department.

**B.** Fingerprints shall be taken:

(1) under the supervision of and certified by a New Mexico state police offi-

cer, a county sheriff, or a municipal chief of police;

(2) by comparable officers in the applicant's state of residence if the applicant is not a resident of New Mexico; or

(3) at the discretion of the department, by a private agency or individual qualified to take and certify fingerprints, provided the agency submits to the department written authorization or proof of training from any of the agencies referenced in Paragraphs (1) and (2) above.

C. Completed fingerprint cards shall be submitted to the board with a check, money order, cashiers check made out to the board, or credit card for the prescribed.

[16.24.2.17 NMAC - N, 07/01/09]

**16.24.2.18 CURRICULUM FOR BOARD APPROVED EUTHANASIA TECHNICIAN TRAINING COURSES:**

A. In order to receive board approval for a euthanasia technician training course that will be taught on or after July 1, 2009, the euthanasia instructor shall submit a written request for approval to the board along with 12 copies of the instructor's manual, the course curriculum and a description of the test administered by the instructor. Courses will be approved until such time as the board revokes the approval. Approved courses will subject to annual review. The curriculum shall include the following.

(1) Animal anatomy and physiology as related to euthanasia.

(2) Euthanasia: the history, current standards, stages of euthanasia, best practices.

(3) Euthanasia by injection: acceptable sites (advantages, disadvantages, criteria for selecting which site), restraint for each type of injection, injection techniques and mechanics of each technique, acceptable euthanasia drugs, best practices.

(4) Pre-euthanasia anesthesia: uses, stages of anesthesia, criteria for judging depth of anesthesia, drugs for this use, administration sites and methods, best practices.

(5) Verification of death: proper and accurate methods of verification of death.

(6) Pharmaceuticals: controlled and non-controlled substances (types, method of actions, uses), dosage calculations, security and storage of both types of drugs, record keeping, drug logs, controlled substance logs, labeling of drug mixtures, material safety data sheets (MSDS sheets), inventory management.

(7) Proper disposal techniques: euthanized animals, drug waste, expired drugs, sharps, biohazardous or infectious waste.

(8) Euthanasia by non-injection method: criteria for choosing case for non-injection method.

(9) Emergency field euthanasia: methods and best practices for emergency field euthanasia.

(10) Animal handling: humane handling techniques, techniques to reduce animal stress, restraint of wild or unsocialized animals, humane capture techniques for in-facility escapes.

(11) Species other than dogs and cats: restraint techniques, acceptable and best euthanasia techniques for each species, public health concerns, rabies (description of disease, signs, submission procedures).

(12) Euthanasia room: equipment and supplies (use and location), backup equipment, setup, lighting, safety measures.

(13) Staff health and safety concerns: zoonotic disease, emergency equipment (use, location), sharps handling and disposal, work place safety, safety equipment and apparel, eye wash station; compassion fatigue and euthanasia-related stress (recognition, reduction techniques, professional services).

B. The board may approve euthanasia technician training courses that were taught between July 1, 2006 and June 30, 2009, in its discretion.

[16.24.2.18 NMAC - N, 07/01/09]

**HISTORY of 16.24.2 NMAC: [RESERVED]**

**NEW MEXICO ANIMAL SHELTERING BOARD**

**TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING CHAPTER 24 ANIMAL SHELTERING PROVIDERS**

**PART 3 DUTIES OF LICENSEES AND CERTIFICATE HOLDERS**

**16.24.3.1 ISSUING AGENCY:** Regulation & Licensing Department, Animal Sheltering Board. [16.24.3.1 NMAC - N, 07/01/09]

**16.24.3.2 SCOPE:** This part applies to applicants, licensees, certificate holders and persons or agencies within the jurisdiction of the board. [16.24.3.2 NMAC - N, 07/01/09]

**16.24.3.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Animal Sheltering Act, Sections 77-1B-5, 77-1B-6, 77-1B-7, NMSA 1978. [16.24.3.3 NMAC - N, 07/01/09]

**16.24.3.4 DURATION:** Until

July 12, 2012 [16.24.3.4 NMAC - N, 07/01/09]

**16.24.3.5 EFFECTIVE DATE:** July 1, 2009 unless a later date is cited in the history note at the end of the section. [16.24.3.5 NMAC - N, 07/01/09]

**16.24.3.6 OBJECTIVE:** To establish board approved procedures for humane euthanasia of common shelter animals in New Mexico that include duties of euthanasia agencies, euthanasia technicians, and euthanasia instructors in order to ensure approved humane restraint and euthanasia techniques are consistently practiced. [16.24.3.6 NMAC - N, 07/01/09]

**16.24.3.7 DEFINITIONS:** [Reserved]

**16.24.3.8 GENERAL REQUIREMENTS FOR LICENSED EUTHANASIA TECHNICIANS AND AGENCIES:**

A. Euthanasia shall be performed by a licensed euthanasia technician employed or under contract with a licensed euthanasia agency, by a licensed veterinarian, or in the case of emergency field euthanasia, may be performed by a commissioned law enforcement officer by means of gunshot.

B. Euthanasia technicians shall scan all companion animals for a microchip and look for a license or other identification tag directly prior to performing euthanasia. Every microchip, license or identification tag located shall be recorded. If a microchip, license or identification tag is found at the time of euthanasia, the licensed euthanasia technician shall verify that all reasonable attempts to contact the owner have been made and only after verification may the euthanasia proceed. If the verification is not possible, then the euthanasia shall be postponed until verification is completed, except in situations in which the animal is in severe, acute distress or is irremediably suffering.

C. Euthanasia technicians shall euthanize dogs and cats only by the use of an FDA approved sodium pentobarbital euthanasia solution, or any other board approved euthanasia solutions, with the exception of emergency field euthanasia as provided for in 16.24.3.15 NMAC.

D. Euthanasia agencies using controlled substances shall have under contract a consulting pharmacist as defined in the New Mexico Pharmacy Act.

E. Euthanasia agencies shall be inspected at least once annually.

F. Euthanasia technicians shall euthanize all other non-livestock animals in accordance with Section 61-11-1 et.

seq. NMSA 1978 and the applicable methods, recommendations and procedures set forth in 16.24.3.9 NMAC and 16.24.3.12 through 16.24.3.15 NMAC.

**G.** Euthanasia technicians and euthanasia agencies shall maintain storage, security, recordkeeping and disposal methods of controlled substances used for euthanasia as set forth in the board approved euthanasia technician training courses in accordance with the New Mexico pharmacy board and DEA regulations. Euthanasia technicians and euthanasia agencies shall adhere to all existing state and federal laws and protocols.

**H.** Euthanasia agencies shall display material safety data sheets for all drugs used in the euthanasia process in the euthanasia area or shall make such material available and accessible to all employees on the premises.

**I.** Euthanasia technicians may use pre-euthanasia drugs as set forth in the board approved euthanasia technician training courses.

**J.** Euthanasia technicians and their assistants shall handle animals humanely as detailed in board approved euthanasia instruction from the commencement of and throughout the euthanasia process. Remains shall be disposed of in a respectful manner.

**K.** A euthanasia agency shall handle, treat and dispose of infectious waste, including but not limited to remains, anatomical body parts, excretions, blood soiled articles and bedding, that are generated from an animal that the agency knows or has reason to suspect has a disease that is capable of being transmitted to humans as follows.

(1) All infectious waste will be sterilized or disinfected by heat, steam, chemical disinfection, radiation, or desiccation.

(2) Infectious waste held for disposal shall be collected in sanitary leak resistant bags clearly labeled for biohazard disposal. The bag shall contain the gloves worn while collecting the waste and those used in treatment and post mortem examinations of suspect animals.

(3) All sharps shall be disposed of in labeled sharps containers. Such containers shall be rigid-sided, solidly sealed containers that are highly resistant to puncture. These containers shall be incinerated or disposed of in an environmentally safe manner by a duly licensed disposer or an approved medical sharps incineration facility or shall be disposed of in such a way as to render the sharps harmless. This disposal shall not apply to infectious waste sharps, which, contained in a puncture resistant container, should be disposed of as described in infectious waste disposal. Due to the small volume of sharps generated in a euthanasia

agency, transportation of the filled, sealed containers shall not be mandated by nor limited to commercial haulers.

**L.** A euthanasia agency shall dispose of drugs as follows.

(1) The removal and disposal of outdated or unwanted dangerous drugs shall be pursuant to the rules of the board of pharmacy and be the responsibility of the consultant pharmacist.

(2) Outdated or unwanted controlled substances shall be disposed of through a DEA-registered reverse distributor or pursuant to the requirements of Title 21, Code of Federal Regulations, Part 1307.

(3) The transfer of any dangerous drug inventory to another registrant shall be pursuant to the rules of the board of pharmacy and be the responsibility of the consultant pharmacist in compliance with state and federal laws and regulations for the transfer of such drugs.

**M.** A euthanasia agency shall handle waste materials that are generated from an animal that does not have a disease transmissible to humans and is not suspected of being contaminated with an agent capable of infecting humans as provided under this section.

(1) Animal remains.

(a) A euthanasia technician shall dispose of an animal's remains promptly by release to owner, burial, cremation, incineration, commercial rendering or, if permitted by local ordinance, placement in a public landfill.

(b) If prompt disposal of an animal's remains is not possible, the euthanasia technician shall contain the animal's remains in a freezer or store them in a sanitary, non-offensive manner until such time as they can be disposed of as provided above.

(2) A euthanasia technician shall dispose of tissues, specimens, bedding, animal waste and extraneous materials, not suspected of harboring pathogens infectious to humans, by approved municipality or county disposal methods.

**N.** In the event of the occurrence of a suspect foreign animal disease or disease of potential concern to state or national security, the euthanasia agency will immediately contact the state department of agriculture, the U. S. department of agriculture, and other applicable departments. The euthanasia technician and euthanasia agency shall handle all tissues, laboratory samples, and biomedical waste associated with such cases in accordance with the recommendations made by the department of agriculture, and other departments and agencies, which are deemed necessary and appropriate in such cases.

**O.** It shall be a violation of the act for euthanasia technicians and euthanasia agencies to end an animal's life

using the following methods:

- (1) decompression;
- (2) nitrous oxide;
- (3) drowning;
- (4) decapitation;
- (5) cervical dislocation;
- (6) pithing;
- (7) exsanguination;
- (8) electrocution;
- (9) gunshot, excluding properly

performed field euthanasia in an emergency situation as defined in 16.24.3.13 NMAC below;

- (10) air embolism;
- (11) nitrogen flushing;
- (12) strychnine;
- (13) acetone or any other industrial solvent;
- (14) any other chemical agent;
- (15) intrahepatic injection (IH);

and

- (16) any method not specifically approved by the board.

[16.24.3.8 NMAC - N, 07/01/09]

### **16.24.3.9 DUTIES OF A LICENSED EUTHANASIA TECHNICIAN:**

The duties of a euthanasia technician shall include but are not limited to:

**A.** performing euthanasia on a sufficient number and variety of animals under the direct supervision of a veterinarian or an experienced, licensed euthanasia technician to demonstrate proficiency in the performance of humane euthanasia before performing euthanasia without supervision, and, verifying in writing to the board (for example, by a letter written by the supervising veterinarian or euthanasia technician) within 60 days that the technician has demonstrated proficiency and maintains that documentation at the euthanasia agency, provided that this requirement does not apply to euthanasia technicians who have performed euthanasia for a period of at least six months;

**B.** preparing animals for euthanasia, including scanning for the presence of a microchip in companion animals;

**C.** carefully and accurately recording the dosage and drug waste for every euthanasia performed pursuant to the rules of the New Mexico board of pharmacy;

**D.** maintaining the security of all controlled substances and dangerous drugs, including records relating to controlled substances and dangerous drugs, at the euthanasia agency in accordance with applicable state and federal laws;

**E.** reporting to the board, the regulation and licensing department or the department of health any infraction of the act or rules adopted pursuant to the act, or any misuse of drugs;

**F.** humanely capturing, restraining, and euthanizing animals as

taught in board approved euthanasia technician training courses;

**G.** disposing of remains in accordance with law;

**H.** maintaining one's license in an active status;

**I.** reporting any change of address, telephone or other contact information to the board within 30 days;

**J.** providing to the board or authorized board representative a reply to a request for information allowed under the act or these rules within ten working days;

**K.** a euthanasia technician shall prepare a report of any euthanasia performed that deviates from board approved rules, and the euthanasia agency shall keep these records on file for three years.  
[16.24.3.9 NMAC - N, 07/01/09]

**16.24.3.10 DUTIES OF A CERTIFIED EUTHANASIA INSTRUCTOR:**  
The duties of a certified euthanasia instructor shall include but are not limited to:

**A.** reporting any change of address, phone or other contact information to the board within 30 days;

**B.** maintaining current knowledge of New Mexico board of pharmacy rules, the New Mexico board of veterinary medicine rules and these rules, as they apply to euthanasia and controlled substances used in the practice of euthanasia;

**C.** providing reports on a form provided to the board within 30 days of the completion of the courses;

**D.** complying with continuing education requirements as set by the board;

**E.** providing to the board or authorized board representative, a reply to a request for additional information allowed under the act or these rules within ten working days.  
[16.24.3.10 NMAC - N, 07/01/09]

**16.24.3.11 DUTIES OF A LICENSED EUTHANASIA AGENCY:**  
The duties of a licensed euthanasia agency shall include, but are not limited to:

**A.** keeping records for a period of 3 years showing:

(1) those individuals who are authorized in writing, in accordance with these rules, by the euthanasia agency to administer an FDA approved sodium pentobarbital euthanasia solution or other board approved euthanasia solution;

(2) logs with respect to controlled substances used to carry out humane euthanasia in accordance with the New Mexico pharmacy board rules;

**B.** having at least one licensed euthanasia technician on staff or having a contract with a veterinary facility for the purposes of performing euthanasia;

in the event the agency falls below this minimum requirement, the agency shall immediately apply to the board to license additional individual(s) or forfeit its license;

**C.** accurately reporting quarterly on board provided forms, which may be online, regarding the impound, disposition and reason for euthanasia of all animals;

**D.** expediting the euthanasia procedure for any animal accepted by a euthanasia agency that is critically ill or severely injured and that in the determination of the euthanasia agency requires euthanasia; in these cases, the euthanasia agency shall place the animal in a quiet environment and give the animal treatment to reduce pain and suffering until a euthanasia technician or veterinarian is able to euthanize the animal;

**E.** having a current euthanasia policy and procedures manual; the manual shall include but is not limited to the following:

(1) a copy of the act, Section 77-1B-1 et. seq. NMSA 1978, and the animal sheltering rules, Title 16 Chapter 24 Parts 1 - 5 NMAC;

(2) a copy of the euthanasia training manuals provided by the board approved euthanasia technician training courses attended by the euthanasia technicians working at the euthanasia agency;

(3) a list of methods of euthanasia allowed at the euthanasia agency and the policy and procedures for each method;

(4) a list of licensed euthanasia technicians, the methods they have been trained in, the date of training and the date of expiration of their license;

(5) the name, address and contact information for the veterinarian or euthanasia technician responsible for the euthanasia agency facility license;

(6) the name, address and contact information for the veterinarian responsible for veterinary medical care of the animals; the contact information shall include telephone numbers for working hours, weekends, nights and holidays;

(7) a protocol for euthanasia procedures to use in emergencies, after hours, holidays and weekends;

(8) procedures to follow if no licensed euthanasia technician is present and euthanasia of an animal is necessary;

(9) a list of methods of verifying death of an animal after a euthanasia process is performed;

(10) the name and contact information of the manufacturer and supplier of all materials used in euthanasia procedures at the euthanasia agency, including such materials as:

(a) bottled gas (if applicable);

(b) the chamber used to euthanize

animals by inhalant gas (if applicable);

(c) injectable FDA approved sodium pentobarbital euthanasia solution or other board approved euthanasia solution; and,

(d) tranquilizer or anesthetic solution;

(11) a copy of the original DEA certification permitting the use of controlled substances;

(12) a material safety data sheet for any chemical or gas used for euthanasia in that agency;

(13) a material safety data sheet for any anesthetic or tranquilizer used in that agency;

(14) notice of the signs and symptoms associated with human exposure to the agents used for euthanasia at that agency;

**F.** providing for the observation or inspection of the euthanasia process and euthanasia agency as requested by the board; observations or inspections may be done by any means including through a board approved instructor, inspector, or appointed designee;

**G.** a euthanasia technician shall prepare a report of any euthanasia performed that deviates from board approved rules, and the euthanasia agency shall keep these records on file for three years;

**H.** the agency shall ensure that any assistants to the euthanasia technician have received, at a minimum, documented in-service training as to the proper handling and restraint of animals for the purposes of euthanasia; this training can be provided by the agency's own licensed euthanasia technician.  
[16.24.3.11 NMAC - N, 07/01/09]

**16.24.3.12 EUTHANASIA BY INJECTION OF FDA APPROVED SODIUM PENTOBARBITAL EUTHANASIA SOLUTION OR BOARD APPROVED EUTHANASIA SOLUTIONS:**

**A.** The approved routes of injections of an FDA approved sodium pentobarbital euthanasia solution or board approved euthanasia solutions, listed in order of preference, are:

(1) intravenous injection as taught in board approved euthanasia technician training courses;

(2) intraperitoneal injection, but only if used as taught in a board approved euthanasia technician training course and as set forth below; or

(3) intracardiac injection, but only if used in accordance with Section 30-18-15 NMSA 1978 and as set forth below; it is unlawful for a euthanasia technician to use intracardiac injections to administer euthanasia on a conscious animal if the animal could first be rendered unconscious in a

humane manner.

**B.** Intracardiac injection shall be acceptable only when performed on anesthetized or comatose animals. If a euthanasia technician uses intracardiac injection, the euthanasia technician shall administer the appropriate pre-euthanasia drugs as set forth in the board approved euthanasia technician training courses and shall ascertain that the animal is not conscious before administering the intracardiac injection.

**C.** Euthanasia technicians shall place animals who received an intraperitoneal injection in small cages in a quiet area to minimize excitement and trauma except that newborns and infants may be held.

**D.** Only veterinarians or euthanasia technicians shall administer the injections set forth in the board approved euthanasia technician training.

**E.** The euthanasia agency shall equip the designated area used for injection to ensure accuracy in the procedure and safety for the euthanasia technician, which should include but is not limited to sufficient lighting, useable animal restraint devices, and an eye wash station.

**F.** Euthanasia technicians shall administer injectable euthanasia agents to animals with at least the minimum dosage, as set forth in the board approved euthanasia technician training courses.

**G.** Euthanasia technicians shall place animals given an FDA approved sodium pentobarbital euthanasia solution or board approved euthanasia solutions by intraperitoneal injection in a quiet area, separated from physical contact with other animals during the dying process except that newborns and infants may be held.

**H.** Euthanasia technicians shall monitor the animals from the time euthanasia is performed until verification of the death of each animal.

**I.** Euthanasia technicians shall verify death by a combination of ascertaining the absence of ocular reflexes as well as the cessation of heartbeat or by observing the onset of rigor mortis, or other methods established by the board approved euthanasia technician training courses prior to remains storage and disposal.

[16.24.3.12 NMAC - N, 07/01/09]

#### **16.24.3.13 EUTHANASIA BY CARBON MONOXIDE GAS:**

**A.** Carbon monoxide is illegal for the euthanasia of dogs and cats.

**B.** Carbon monoxide may be used for the euthanasia of animals (excluding dogs or cats) that may present a zoonotic hazard.

**C.** Operations shall be in compliance with all applicable state and federal regulations under the occupational

safety and health administration (OSHA) and an annual inspection of such equipment and operations shall be required. The following guidelines shall be observed:

(1) a euthanasia agency shall not operate a carbon monoxide chamber unless a euthanasia technician or New Mexico licensed veterinarian and one other adult are present at the time of operation;

(2) acceptable gas is limited to commercially compressed carbon monoxide gas and never gas piped from a motor;

(3) the ambient temperature inside the chamber shall not exceed 85 degrees fahrenheit (29.4 degrees celsius) when it contains live animals;

(4) if the chamber is commercially manufactured to euthanize only one animal at a time, no more than one animal at a time may be euthanized;

(5) if the chamber is commercially designed to euthanize more than one animal at a time, there shall be independent sections or cages to separate individual animals; if separation partitions are not used under specific circumstances, the specific circumstances shall be noted on the animal's disposition card; only animals of the same species shall be placed in the chamber simultaneously, with no more than the maximum number recommended by the manufacturer placed in the chamber;

(6) no live animal shall be placed in the chamber with a dead animal;

(7) prior to storage and disposal of remains, the euthanasia technician shall verify death by a combination of ascertaining the absence of ocular reflexes as well as the cessation of heartbeat or by observing the onset of rigor mortis or other methods established by the board approved euthanasia technician training courses prior to remains storage and disposal;

(8) euthanasia of this type shall be performed in a commercially manufactured carbon monoxide chamber and the manufacturer's operating and servicing instructions shall be strictly followed;

(9) the chamber shall be located outdoors or in a properly ventilated room, though if it is located indoors it shall not be located in the same room as kennels housing other animals;

(10) to avoid risk of death or injury to personnel operating the chamber, as well as personnel working in the vicinity of the chamber, the chamber shall be airtight and equipped with the following in working order:

(a) an exhaust fan that is capable of evacuating all gas from the chamber prior to the chamber being opened, is connected by a gas-type duct to the outdoors, and the chamber shall be thoroughly vented prior to removing any remains to avoid risk of death to the euthanasia technician or other personnel in the vicinity of the chamber;

(b) a gas flow regulator and flow meter for the canister;

(c) a gas concentration gauge to indicate that gas concentrations are at proper levels and that the gas concentration process shall achieve at least a 6.0% carbon monoxide gas concentration, but not to exceed 10%, within 5 minutes after the introduction of carbon monoxide into the chamber is initiated;

(d) an accurate temperature gauge for monitoring the interior of the chamber;

(e) a carbon monoxide monitor, which if located on the exterior of the chamber shall be connected to an audible alarm system that will sound in the room containing the chamber;

(f) explosion-proof electrical equipment, if equipment is exposed to carbon monoxide; and

(g) a view-port with either internal lighting or external lighting sufficient to allow visual surveillance of all animals within the chamber;

(11) all chamber equipment shall be in proper working order and used according to manufacturer's specifications during the operation of the chamber;

(12) the chamber shall be thoroughly cleaned after the completion of each cycle; chamber surfaces shall be constructed and maintained so they are impervious to moisture and can be readily sanitized; and,

(13) the euthanasia agency shall prominently display the operation, maintenance, and safety instructions in the area containing the chamber.

[16.24.3.13 NMAC - N, 07/01/09]

#### **16.24.3.14 EUTHANASIA BY CARBON DIOXIDE GAS:**

**A.** Euthanasia by carbon dioxide gas is illegal for use on dogs and cats.

**B.** Carbon dioxide may be used for the euthanasia of animals, excluding dogs and cats, that may present a zoonotic hazard.

**C.** Operations and equipment shall be in compliance with any applicable state and federal regulations and may be inspected annually or as required by the board. Inspections must be performed by board trained inspectors.

**D.** Acceptable gas is limited to commercially compressed carbon dioxide gas.

**E.** If the chamber is manufactured to euthanize only one animal at a time, no more than one animal at a time may be euthanized in that chamber.

**F.** If the chamber is designed to euthanize more than one animal at a time there shall be independent sections or cages to separate individual animals. If separation partitions are not used under specific circumstances approved by the board,

the specific circumstances shall be noted on the animal's disposition card. Only animals of the same species shall be placed in the chamber simultaneously with no more than the maximum recommended by the manufacturer.

**G.** Carbon dioxide should enter the chamber at a rate that displaces 20% of the oxygen each minute.

**H.** The optimal carbon dioxide flow for the chamber must be calculated.

**I.** No live animal shall be placed in the chamber with a dead animal.

**J.** Euthanasia of this type shall be performed in a commercially manufactured carbon dioxide chamber or one manufactured to commercial standards and the manufacturer's operating and services instructions shall be strictly followed.

**K.** The chamber shall be located outdoors or in a well-ventilated room to minimize exposure to the carbon dioxide.

**L.** The chamber must not be airtight. Air must be able to escape to leave room for the carbon dioxide. A vent hole near the top of the chamber or a loosely-fitted lid will let out the air but not the carbon dioxide. The vent hole will also prevent pressure buildup.

**M.** The carbon dioxide chamber shall have a view-port to allow visual surveillance of the animals within the chamber.

**N.** All chamber equipment shall be in proper working order and used according to the manufacturer's specifications during the operation of the chamber.

**O.** The chamber shall be thoroughly cleaned and aired out between uses. Chamber surfaces shall be constructed and maintained so they are impervious to moisture and can be readily sanitized.

**P.** The euthanasia agency shall prominently display the operation, maintenance, and safety instructions for the carbon dioxide chamber in the area containing the chamber.

**Q.** Euthanasia technicians shall verify death by a combination of ascertaining the absence of ocular reflexes as well as the cessation of heartbeat or by observing the onset of rigor mortis or other methods established by the board approved euthanasia technician training courses, prior to remains storage and disposal.

[16.24.3.14 NMAC - N, 07/01/09]

**16.24.3.15 EMERGENCY FIELD EUTHANASIA:**

**A.** From time to time, there will be cases when emergency field euthanasia will be required. Cases shall be limited to:

- (1) situations in which the animal

is in severe, acute distress or is irremediably suffering in which delay or movement of the animal will cause severe pain and suffering;

(2) situations in which movement of the animal poses immediate and significant risk to the animal, human, or public health or safety.

**B.** If possible or practical, euthanasia by injection is the preferred method of field euthanasia. If practical, pre-euthanasia drugs shall be given to the animal prior to the euthanasia drugs.

**C.** If gunshot is used, it shall be performed by a euthanasia technician only if the euthanasia technician is properly certified in the use of firearms permitted by the employing agency of the euthanasia technician, or by a commissioned law enforcement officer. The gunshot shall be placed according to species as taught in board approved euthanasia technician training courses, whenever possible.

**D.** All instances of emergency field euthanasia shall be documented and shall include the following:

(1) a description of the incident that resulted in the need to conduct emergency field euthanasia;

(2) the date of the incident;

(3) the time of the incident;

(4) a description of the animal including species, gender, estimated age;

(5) the name and contact information of the euthanasia technician or law enforcement officer;

(6) the technique used; and,

(7) the reason why the animal could not be transported to a shelter or euthanasia agency.

**E.** Emergency field euthanasia incidents shall be reported to the board within 30 days. All documentation and records relating to the incident shall be kept on file by the euthanasia agency for three years and be available for review by the board.

**F.** The euthanasia technician or commissioned law enforcement officer shall verify death by pupil dilation and cessation of respiration or other methods established by the board approved euthanasia technician training courses prior to remains storage and disposal.

[16.24.3.15 NMAC - N, 07/01/09]

**HISTORY of 16.24.3 NMAC:**  
[RESERVED]

**NEW MEXICO ANIMAL SHELTERING BOARD**

**TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING CHAPTER 24 ANIMAL SHELTERING PROVIDERS**

**PART 4 COMPLAINTS, ENFORCEMENT AND DISCIPLINARY ACTION**

**16.24.4.1 ISSUING AGENCY:** Regulation and Licensing Department, Animal Sheltering Board.

[16.24.4.1 NMAC - N, 07/01/09]

**16.24.4.2 SCOPE:** This part applies to applicants, licensees, certificate holders and persons or agencies within the jurisdiction of the board.

[16.24.4.2 NMAC - N, 07/01/09]

**16.24.4.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Animal Sheltering Act, Sections 77-1B-3, 77-1B-5, 77-1B-9, 77-1B-10, 77-1B-11, NMSA 1978.

[16.24.4.3 NMAC - N, 07/01/09]

**16.24.4.4 DURATION:** Until July 1, 2012

[16.24.4.4 NMAC - N, 07/01/09]

**16.24.4.5 EFFECTIVE DATE:** July 1, 2009 unless a later date is cited in the history note at the end of a section.

[16.24.4.5 NMAC - N, 07/01/09]

**16.24.4.6 OBJECTIVE:** To inform licensees, certificate holders, applicants, animal shelters, euthanasia agencies and the public of the board's complaint, enforcement and disciplinary procedures.

[16.24.4.6 NMAC - N, 07/01/09]

**16.24.4.7 DEFINITIONS:** [Reserved]

**16.24.4.8 COMPLAINT PROCEDURES:**

**A. Inquiries regarding filing of complaints.**

(1) Inquiries made to the board or to a board member regarding a potential complaint will be referred to the board administrator.

(2) Upon receipt of an inquiry, the board administrator shall forward to the potential complainant a statement regarding the board's jurisdiction, the conduct or grounds for possible action by the board against a licensee, certificate holder, applicant, or person or agency within the jurisdiction of the board, and a complaint form with instructions on how to file the com-

plaint. The complainant shall submit the complaint in writing on a form provided by the board that is signed, notarized and submitted to the board administrator.

(3) Anonymous complaints may be investigated in the sole discretion of the board.

**B. Procedures for processing complaints.** The board administrator shall:

(1) log in the date the complaint is received;

(2) determine whether the subject of the complaint is a licensed euthanasia technician, certified euthanasia instructor, licensed euthanasia agency, or an applicant or person otherwise within the jurisdiction of the board;

(3) assign an individual file with a complaint number, which numbering sequence shall begin each new calendar year;

(4) send a letter to the complainant confirming receipt of the complaint within 5 days of receipt; and

(5) forward the complaint file to the chair of the complaint committee and the complaint manager or designee, if any.

**C. Review by the complaint committee.**

(1) The complaint committee is appointed by the board chair and shall consist of at least one board member and may include liaisons from the compliance section of the regulation and licensing department.

(2) The complaint committee shall review the complaint and meet with the administrative prosecutor as needed.

(3) Unless the complaint committee determines that it will impede an investigation or interfere with the acquisition of documents or relevant papers or the development of the case, the complaint committee shall inform the licensee, certificate holder, applicant, or person or agency within the jurisdiction of the board of the complaint and request a response to the allegations.

(4) The complaint committee or its designee may employ experts, consultants, or private investigators to assist in investigations of complaints.

(5) Upon completion of an investigation and review, the complaint committee shall submit a case summary containing alleged violations of the code, board regulations or the act and recommendations for legal disposition, to the full board. Throughout this process, the confidentiality of interested parties will be maintained.

**D. Review by the full board.**

(1) Any board member or any member of the complaint committee who is not capable of judging a particular controversy fairly, including because the board member had prior personal knowledge of

the controversy, shall not participate in the decision of whether to issue a notice of contemplated action and shall not participate in the hearing, deliberation, or decision of the board.

(2) The board shall review the case summary presented by the complaint committee, relevant documents, witness statements, and other pertinent information regarding the complaint. If the board has sufficient evidence, when substantiated, that constitutes grounds for disciplinary action, the board may forward the evidence to the administrative prosecutor for issuance of a notice of contemplated action in accordance with the Uniform Licensing Act, Sections 61-1-1 et. seq. NMSA 1978.

(3) Following the issuance of a notice of contemplated action, the board may at its option authorize a board member, the hearing officer, or the administrative prosecutor to confer with the applicant or the licensee for the purpose of settlement of the complaint. Such settlement shall be approved by the board, shall be with the consent of the applicant or licensee, and shall include a knowing and intentional waiver by the applicant or the licensee of the right of the applicant or licensee to a hearing under the Uniform Licensing Act.

(4) Pursuant to Section 77-1B-10 NMSA 1978 the board may issue a cease and desist order or refer a complaint to the attorney general for a temporary restraining order or injunctive proceedings. [16.24.4.8 NMAC - N, 07/01/09]

#### **16.24.4.9 ADJUDICATORY PROCEEDINGS:**

##### **A. General provisions and pre-hearing and preliminary matters.**

(1) All hearings shall be conducted either by the board or, at the election of the board, by a hearing officer.

(2) If the board appoints a hearing officer, the hearing officer shall have the authority to decide pre-hearing matters, preside over the hearing, and direct post-hearing matters in accordance with the requirements of the case in a manner that ensures an efficient and orderly hearing and expedites the final resolution of the case. Except as otherwise limited in this part, the hearing officer shall have the authority to rule on all non-dispositive motions. If the board does not appoint a hearing officer or if the hearing officer is unavailable or unable to proceed, the board chair or other board member designated by the board shall have the authority to decide pre-hearing or preliminary matters on behalf of the board. This authority shall be in accordance with the requirements of the case in a manner that ensures an efficient and orderly hearing and expedites the final resolution of the case, including:

(a) unopposed or stipulated motions to change venue;

(b) motions for continuance of a hearing date; a motion to vacate the hearing shall contain an affirmative statement that the licensee or applicant waives the right of the licensee or applicant to a hearing held not more than 60 days from the date of service of the notice hearing;

(c) the granting of one notice of peremptory excusal to each party if the notice is timely and if the peremptory excusal does not result in a loss of a quorum of the board; and,

(d) motions regarding discovery.

(3) The original of any papers and pleadings shall be filed with the board. Copies shall be sent to the hearing officer and attorneys or parties of record.

(4) The hearing officer or designated board member shall issue appropriate orders to control the course of the proceedings.

(5) Consistent with provisions of the Uniform Licensing Act and to the extent practicable, the rules of civil procedure for the district courts shall apply unless the hearing officer or designated board member orders otherwise.

(6) A request for an order shall be made by a motion filed with the board. Except for motions made during the course of the hearing, a motion shall be in writing. A motion shall state with particularity the grounds for the motion and shall set forth the relief and order sought.

(7) A motion shall be accompanied by a memorandum brief in support of the motion. The brief shall state with particularity the grounds for the motion and shall contain citations to authorities, statutes, and references to the pleadings on file. If matters outside of the pleadings are considered, a copy of the referenced material shall be attached to the brief. Responsive briefs shall be permitted in accordance with the rules of civil procedure for the district courts to the extent practicable unless the hearing officer or designated board member orders otherwise.

(8) The hearing officer or the designated board member may order the filing of briefs or other documents and may set oral argument on any matter.

(9) No more than 2 continuances of the hearing date will be granted without the approval of the board for good cause shown.

(10) All dispositive motions shall be decided by the board.

(11) No proposed settlement, consent agreement, voluntary surrender of a license in lieu of prosecution, or other proposal for the resolution of a pending disciplinary case shall be effective unless approved by the board and executed by the board and the licensee or applicant. The

board or hearing officer may seek information from the administrative prosecutor and the licensee or applicant concerning circumstances of the case relevant to a consideration of the proposed settlement or clarification of the proposed terms and conditions. No board member is presumed to be biased and shall not be excused based solely on the reason that the member considered a proposed settlement, consent agreement, or other proposal for the resolution of a pending disciplinary case. The board may submit a counterproposal for the settlement or resolution of the case.

(12) Any proposed settlement, consent agreement, voluntary surrender of a license in lieu of prosecution, or other proposal for the resolution of a pending disciplinary case shall contain at least the following:

(a) an admission of all jurisdictional facts; an acknowledgment of the rights contained in the Uniform Licensing Act and an express waiver of those rights and of all rights to hearing and judicial review or any other opportunity to contest the validity of the board order in any other proceeding or forum;

(b) a statement that the proposal resolves only the violations alleged in the notice of contemplated action and a statement that the board reserves the right to initiate other proceedings for any other violations of the act or board regulations;

(c) a description of the general nature of the evidence underlying each alleged violation;

(d) if appropriate, a list of provisions of the acts or practices from which the licensee or applicant will refrain in the future;

(e) a statement of the type, terms, and conditions of the proposed disciplinary action of the board;

(f) a statement that the licensee will be responsible for all costs of disciplinary proceedings or a statement setting forth the reason why the licensee should be excused from paying costs; the affidavit of the board administrator concerning the costs incurred to date shall accompany the proposal;

(g) a statement that the decision and order of the board shall be a public record and reported, as required by law; and

(h) other provisions necessary to ensure the complete and final resolution of the proceedings.

(13) A proposal to settle a matter shall not stay the proceedings or vacate the hearing date unless otherwise ordered by the hearing officer or presiding officer upon the filing of a timely motion.

**B. Duties of the board administrator.** The board administrator shall:

(1) after consultation with the board or hearing officer, issue a notice of hearing stating the date, time, and place of the hearing;

(2) on behalf of the hearing officer or board, execute notices, scheduling orders, subpoenas, and subpoenas duces tecum, and other routine procedural documents that facilitate the efficient conduct of adjudicatory proceedings;

(3) maintain the official record of all papers and pleadings filed with the board in any matter;

(4) prepare an affidavit as to costs of any disciplinary proceeding at the conclusion of any hearing or upon request by a party submitting a proposed settlement, consent agreement, or voluntary surrender of a license in lieu of prosecution;

(5) prepare, certify, and file with the district court the record of the case on appeal or review;

(6) unless the board orders otherwise, have the authority to sign the decision of the board to grant or refuse a request to reopen the case.

**C. Conduct of hearings.**

(1) The hearing officer, or presiding officer if the case is heard by the board, shall ensure the fair, efficient, and orderly conduct of the hearing in accordance with the Uniform Licensing Act.

(2) Unless the board orders otherwise, a board member hearing officer, the board chair, or presiding officer shall have the authority to sign the written decision of the board.

(3) The board administrator shall serve the decision of the board on the licensee or applicant in accordance with law.

(4) A motion for an order staying the operation of a board decision shall be decided by the board.

[16.24.4.9 NMAC - N, 07/01/09]

**16.24.4.10 SURRENDER OF LICENSE OR CERTIFICATE:**

**A.** If a license or certificate is restricted, suspended, or revoked by the board for any reason specified in the rules and regulations of the board or in the act, the licensee or certificate holder shall immediately surrender the license or certificate of the licensee or the certificate holder in person or by registered mail to the board.

**B.** If the scope of practice of the licensee or certificate holder is restricted or limited or otherwise subject to conditions, the license or certificate may reflect the restriction, limitations, or condition.

[16.24.4.10 NMAC - N, 07/01/09]

**16.24.4.11 PUBLIC RECORDS:** Except as provided herein and except as

otherwise provided by law, all applications, pleadings, petitions and motions are matters of public record at the time of filing with the board. The notice of contemplated action, or the pre-notice of contemplated action settlement agreed upon prior to the issuance of a notice of contemplated action and the information contained in the complaint file becomes a public record and subject to disclosure.

[16.24.4.11 NMAC - N, 07/01/09]

**HISTORY of 16.24.4 NMAC:**  
[RESERVED]

**NEW MEXICO ANIMAL SHELTERING BOARD**

**TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING  
CHAPTER 24 ANIMAL SHELTERING PROVIDERS  
PART 5 FEES**

**16.24.5.1 ISSUING AGENCY:** Regulation and Licensing Department, Animal Sheltering Board.

[16.24.5.1 NMAC - N, 07/01/09]

**16.24.5.2 SCOPE:** This part applies to applicants, licensees, certificate holders and persons or agencies within the jurisdiction of the board.

[16.24.5.2 NMAC - N, 07/01/09]

**16.24.5.3 STATUTORY AUTHORITY:** These rules are promulgated pursuant to the Animal Sheltering Act, Sections 77-1B-5, 77-1B-6, 77-1B-7, NMSA 1978.

[16.24.5.3 NMAC - N, 07/01/09]

**16.24.5.4 DURATION:** Until July 1, 2012

[16.24.5.4 NMAC - N, 07/01/09]

**16.24.5.5 EFFECTIVE DATE:** July 1, 2009 unless a later date is cited in the history note at the end of a section.

[16.24.5.5 NMAC - N, 07/01/09]

**16.24.5.6 OBJECTIVE:** To establish fees for application, licensure, certification, renewal and board provided services.

[16.24.5.6 NMAC - N, 07/01/09]

**16.24.5.7 DEFINITIONS:** [Reserved]

**16.24.5.8 FEES:** All fees are payable to the board and are non-refundable. No individual fee shall exceed \$150.00 annually. Fees are as follows.

**A.** Application for

- euthanasia technician license \$ 25.00
- B.** Renewal for euthanasia technician license \$ 15.00
- C.** Application for 60-day temporary license \$ 25.00
- D.** Application for euthanasia instructor certification \$ 75.00
- E.** Renewal for euthanasia instructor certification \$ 75.00
- F.** Application for euthanasia agency license \$100.00
- G.** Renewal for euthanasia agency license \$100.00
- H.** Late renewal fee (includes technician, instructor and agency) \$ 20.00
- I.** Verification of license or certification \$ 25.00
- J.** Listing of licensees (paper or electronic) \$ 50.00
- K.** Charge for insufficient funds \$ 25.00
- L.** Duplicate licenses \$ 15.00

[16.24.5.8 NMAC - N, 07/01/09]

**HISTORY of 16.24.5 NMAC:**  
[RESERVED]

**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT**  
PROTECTIVE SERVICES DIVISION

8 NMAC 27.3, Licensing Standards for Foster Care, filed 1-13-1997 is repealed effective 5-29-2009.  
8.26.2 NMAC, Adoption Services, filed 2-1-2001 is repealed effective 5-29-2009.  
8.27.2 NMAC, Foster Parenting, filed 11-1-2005 is repealed effective 5-29-2009.  
These three rules have been replaced by 8.26.2 NMAC, Placement Services and 8.26.4 NMAC, Licensing Requirements for Foster and Adoptive Homes, effective 5-29-2009.  
8.27.6 NMAC, Child Placement Agency Licensing Standards, filed 10-15-2002 is repealed effective 5-29-2009 and replaced by 8.26.5 NMAC, Child Placement Agency Licensing Standards, effective 5-29-2009.

**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT**  
PROTECTIVE SERVICES DIVISION

**TITLE 8 SOCIAL SERVICES  
CHAPTER 26 FOSTER CARE AND  
ADOPTION**

**PART 2 PLACEMENT SERVICES**

**8.26.2.1 ISSUING AGENCY:** Children, Youth and Families Department (CYFD), Protective Services Division (PSD).

[8.26.2.1 NMAC - Rp, 8.26.2.1 NMAC, 5/29/09]

**8.26.2.2 SCOPE:** Protective services division employees, CYFD licensed foster and adoptive families, and the general public.

[8.26.2.2 NMAC - Rp, 8.26.2.2 NMAC, 5/29/09]

**8.26.2.3 STATUTORY AUTHORITY:** Children, Youth and Families Department Act, 9-2A-7 D, NMSA 1978; New Mexico Children's Code Adoption Act, 32A-5-6-A, NMSA 1978.

[8.26.2.3 NMAC - Rp, 8.26.2.3 NMAC, 5/29/09]

**8.26.2.4 DURATION:** Permanent.

[8.26.2.4 NMAC - Rp, 8.26.2.4 NMAC, 5/29/09]

**8.26.2.5 EFFECTIVE DATE:** May 29, 2009, unless a later date is cited at the end of a section.

[8.26.2.5 NMAC - Rp, 8.26.2.5 NMAC, 5/29/09]

**8.26.2.6 OBJECTIVE:** To establish standards for the provision of foster care adoption services for children in PSD custody and for families who are seeking to foster and adopt, or current foster parents who want to adopt those children.

[8.26.2.6 NMAC - Rp, 8.26.2.6 NMAC, 5/29/09]

**8.26.2.7 DEFINITIONS:**

**A. "Administrative appeal"** is a formal hearing for families whose license has been revoked, suspended, or not renewed. The family has the opportunity to present evidence to an impartial hearing officer in accordance with CYFD's Administrative Appeals regulations 8.8.4 NMAC.

**B. "Administrative review"** is an informal process that may include an informal conference or record review, and does not create any substantive rights for the family.

**C. "Adoptee"** refers to any person who is the subject of an adoption petition.

**D. "Adoption"** is the establishment of a court sanctioned legal parental relationship between an adult and a child.

**E. "Adoption subsidy"** is

a third party payment program that may include reimbursement for adoption related expenses, monthly maintenance payments, medical provisions, or payments for pre-approved expenses for pre-existing conditions.

**F. "Adoption tax credit"** is a federal or state tax credit program that may be available to families who adopt children from foster care.

**G. "Adoptive home"** refers to:

(1) a foster home licensed by PSD or a licensed child placement agency who chooses to adopt a foster child; or

(2) a family approved by a private agency or a licensed individual to adopt a child.

**H. "Assessment"** is the process of collecting information and conducting interviews with applicants by the licensing agent, and evaluating that information to determine the suitability of an applicant for a foster parent license.

**I. "Best interest adoptive placement"** is the adoption placement considered by PSD staff to be the most appropriate placement to meet the child's needs and best interest.

**J. "Case management team"** means the group of individuals with responsibility for implementing the case plan which may include PSD staff, parents or relatives, and the child if age appropriate.

**K. "Community service providers"** refers to organizations or individuals that provide support services to families, and may include CYFD contractors or any public or private agency or individual.

**L. "Concurrent plan"** refers to case planning and legal practices providing reunification services while simultaneously implementing an alternative case plan should the reunification efforts be unsuccessful.

**M. "Consent to adoption"** is a document signed by the adoptee if the child is fourteen (14) years of age or older consenting to the adoption.

**N. "CYFD"** means the New Mexico children, youth and families department.

**O. "Disruption"** means the removal of a child by CYFD from a pre-adoptive home after an adoptive agreement has been signed, but prior to the finalization of the adoption.

**P. "Dissolution"** means the legal termination of an adoption.

**Q. "Fictive kin"** is a person not related by birth or marriage who has a significant relationship with the child.

**R. "Foster care maintenance payment"** is the monthly reimbursement to foster care providers for costs associated with the child's room and board, and

other expenses. Payments are determined by the child's age and level of care.

**S. "Foster parent"** refers to a person or persons licensed by CYFD or a licensed child placement agency to provide emergency, respite, stranger, relative or fictive kin, or treatment foster care services. The parent(s) may also be concurrently licensed to adopt. The term foster parent also refers to an adoptive parent whose adoption has not yet finalized.

**T. "Foster parent bill of rights"** is a statement of PSD's responsibilities to foster parents.

**U. "Freed for adoption"** means all parental rights are terminated and all time for appeal is exhausted.

**V. "Home study"** is the final written document that results from the assessment process to determine the suitability of an applicant for a foster parent license.

**W. "Individualized adoption plan (IAP)"** is an individualized and specific recruitment plan developed by PSD staff for children who have a plan of adoption.

**X. "Initial relative or fictive kin assessment"** is an in-home assessment of relative or fictive kin completed by the child's caseworker to determine suitability for provisional licensure.

**Y. "Level 1 foster care"** is the basic level of foster care services. Every child, except for those with documented serious medical or behavioral conditions, enters foster care as a level 1.

**Z. "Level 2 foster care"** is for children requiring a higher level of care, structure, or supervision than would be required for a child of similar age development. Level 2 requires a PSD assessment and PSD supervisory approval.

**AA. "Level 3 foster care"** is for children requiring a significantly high level of care and is generally an alternative to institutional care. Level 3 requires a medical or psychological clinical assessment and PSD deputy director approval.

**BB. "Life book"** is a combination of documents that remains with the child that may include photos, letters, correspondence, development milestones, memorabilia and other items related to the child's life.

**CC. "Non-recurring adoption expenses (NRAE)"** are reasonable and necessary adoption fees that may include transportation, food and lodging for the child and adoptive parent, court costs, attorney fees and other expenses which are directly related to the legal adoption of a child with special needs and which have not been reimbursed from other sources or funds.

**DD. "Post adoption contact agreement (PACA)"** is an agreement

between the birth and adoptive families regarding contact between them after the adoption has been finalized.

**EE. "Post placement support services"** are services intended to strengthen families and support adoptive placement provided by PSD staff, or community service providers to children in custody and their pre-adoptive families to enhance the family's capacity to care for the child, assure the stability of the placement, and help the family meet the requirements to finalize the adoption.

**FF. "Post decree support services"** are services provided by PSD staff or community service providers to children and families who have finalized an adoption to enhance the family's capacity to care for the child and support family functioning.

**GG. "Pre-adoptive home"** refers to a family who has signed the adoption agreement to adopt a foster child, but the adoption has yet to finalize.

**HH. "Protective services division (PSD)"** refers to the protective services division of the children, youth and families department, and is the state's designated child welfare agency.

**II. "PSD custody"** means custody of children as a result of an action filed under the New Mexico Children's Code 32A-4-1 et seq., NMSA 1978 or 32A-3B-1 et seq., NMSA 1978.

**JJ. "Relative"** refers to mothers, fathers, brothers, sisters, grandparents, aunts, uncles, nieces, nephews, first cousins, mother-in-laws, father-in-laws, sister-in-laws and brother-in-laws, as well as fictive kin.

**KK. "Surrogate parent":**  
(1) a person, other than the child's case worker, appointed by the New Mexico department of health family, infant and toddler program director to represent the special needs of a child in all matters related to the early intervention and evaluation assessment and treatment for the child in the event the parent is unable or unwilling to act in that capacity; or

(2) a person, other than the child's case worker, appointed by the court who stands in for the parent of a student who qualifies for special education to protect the student's educational rights, and act as the student's advocate in the education decision making process in the event the parent is unable or unwilling to act in the capacity.

**LL. "Traveling file"** includes copies of the medical and educational records related to the foster child. The traveling file shall remain with the child.  
[8.26.2.7 NMAC - Rp, 8.26.2.7 NMAC, 5/29/09]

**8.26.2.8 PURPOSE OF PLACEMENT SERVICES:** The purpose

of placement services is to recruit, support and retain safe and stable families willing to make life long commitments to foster children and their families, to create permanent families for children requiring adoption, and to ensure a child's safety, permanency, and well-being.

[8.26.2.8 NMAC - Rp, 8.26.2.8 NMAC, 5/29/09]

#### **8.26.2.9 CHILD ELIGIBILITY CRITERIA AND WAITING LIST:**

**A.** A child is eligible for foster care and adoption services when in PSD custody under a court's jurisdiction or through a voluntary placement agreement.

**B.** There are no waiting lists for eligible children.

[8.26.2.9 NMAC - Rp, 8.26.2.10 & 13 NMAC, 5/29/09]

#### **8.26.2.10 RECRUITMENT AND INQUIRIES FOR PSD FAMILIES:**

**A.** PSD recruits foster and adoptive families and responds to inquiries from individuals interested in becoming foster or adoptive parents. PSD provides general information regarding the special needs of children requiring foster care and adoption, and makes attempt to identify and locate relatives for consideration of placement.

**B.** PSD completes an annual recruitment plan to recruit foster and adoptive families. The recruitment plan, at a minimum, addresses the following:

(1) information about the characteristics and needs of available children;

(2) information about the nature of the foster care and adoption process; and

(3) information about the cultural, racial, and ethnic identity of children in the population.

**C.** PSD may coordinate adoption events in order to create permanent families for children in PSD custody with a plan of adoption. Only licensed adoptive families may attend these events. Children who are freed for adoption or who have a plan of legal risk adoption may attend these events.

[8.26.2.10 NMAC - Rp, 8.26.2.14 NMAC, 5/29/09]

#### **8.26.2.11 RIGHTS OF FOSTER PARENTS:**

**A.** PSD shall share records or information about the social, medical, psychological or educational needs of a child in PSD custody to a foster parent who is considering a child for placement to make an informed decision regarding the placement.

**B.** PSD staff shall provide updated information regarding the status of a child's case to the foster parent, upon

request of any confidential records or information concerning the child's social, medical, psychological or educational needs pursuant to the New Mexico Children's

**C.** Foster parents shall maintain confidentiality of all information regarding the foster child and the child's family as described herein at 8.26.2.12 N, NMAC.

**D.** PSD shall inform foster parents of their right to receive notice of and be heard at any court proceeding held with respect to the child placed in the home.

**E.** PSD shall provide each foster parent with a copy of the foster parent bill of rights.  
[8.26.2.11 NMAC - Rp, 8 NMAC 27.3.24, 5/29/09]

#### **8.26.2.12 ROLES AND RESPONSIBILITIES OF FOSTER PARENTS:**

**A.** Foster parents are considered integral members of a professional team dedicated to the critical responsibility of providing safety, permanency and well-being for children who have been abused or neglected. As such, foster parents shall be active participants in case planning for foster children. The foster parent shall work closely with PSD staff to implement the service plan for each foster child including visitation for each foster child.

**B.** Foster families support the preservation of connections for foster children in their care. Preserving connections may include the development of a long-term supportive relationship with foster children and their foster families even after the child has been discharged from care.

**C.** Foster care providers shall adhere to applicable PSD policy and procedure.

**D.** Foster parents shall not use words, language, gestures, either directed at the foster child or made within a foster child's sight or hearing, which disparage the foster children's parents, relatives or the child's cultural heritage. Foster parents shall encourage the child to recognize and accept such strengths and achievements of their family as honestly identified.

**E.** Prohibited forms of discipline shall include, but are not limited to the following: corporal punishment such as shaking, spanking, hitting, whipping, or hair or ear pulling; isolation; forced to exercised; denial of food, sleep or approved visits or contact with parent; verbal assaults which subject the child to ridicule or which belittle the child or the child's family, gender, race, religious preference, sexual orientation or cultural identity. The child shall not be excluded from the foster family and shall not be threatened with exclusion from the foster home as punishment. The child

shall not be locked in a room or closet.

**F.** The foster parent may serve as a surrogate parent to protect the foster child's educational rights and act as the student's advocate in the educational decision making process.

**G.** When appointed by the New Mexico department of health family, infant and toddler program director, the foster parent may serve as a surrogate parent to represent the special needs of a child in all matters related to the early intervention and evaluation assessment and treatment for the child in the event the parent is unable or unwilling to act in that capacity.

**H.** Foster parents return all of a child's belongings when he or she moves to another placement, including the return home.

**I.** Foster parents shall not release a foster child to the custody of any person, including the child's biological parent or any relative, without the authorization of PSD. The only exception to this rule is that foster children may be surrendered to the custody of a law enforcement officer.

**J.** Foster parents shall adhere to all statutes and regulations applicable to the provision of foster care, including but not limited to child labor laws, public health laws, mandatory school attendance, and motor vehicle laws.

**K.** Foster parents shall provide PSD with any documents they obtain with respect to the foster child's legal status, health needs or care, service planning, school progress or other relevant documents.

**L.** Foster parents shall maintain copies of all educational and medical documents related to the foster child in a traveling medical and educational file that shall remain with the child if the child is moved.

**M.** Foster parents, in cooperation with PSD staff, shall create or maintain a life book for each child in their care that shall remain with the child if the child is moved.

**N.** The foster parent shall maintain the confidentiality of all information regarding the foster child and the child's family pursuant to the New Mexico Children's Code 32A-4-33 NMSA 1978. The provision requires that, among other things, all records or information regarding a part to a neglect or abuse proceeding, including but not limited to medical, social, and psychological records regarding the child's educational needs, be kept confidential, and that the unlawful public disclosure of such confidential information is a misdemeanor under New Mexico criminal law.

**O.** Foster parents shall immediately report any signs, symptoms indications or risk of abuse or neglect to any child to PSD statewide central intake (SCI)

or law enforcement.

**P.** With PSD approval, foster parents may consent to the use of their own personal vehicle by a foster child, and shall assume all civil and financial liabilities applicable to the foster child's operation of a motor vehicle. Foster parents shall provide to PSD written documentation that all requirements have been met, including insurance coverage for any vehicle driven by the foster child. Liability may extend to the foster parents even after the foster child has left the home.

**Q.** Foster parents may not permit foster children to work without approval from PSD.

**R.** Foster parents shall complete the foster parent report form provided by PSD regarding the child's well-being and progress and submit it to their PSD worker monthly.

[8.26.2.12 NMAC - Rp, 8 NMAC 27.3.25 & 8.27.2.29 NMAC, 5/29/09]

#### **8.26.2.13 HEALTH SERVICES FOR FOSTER CHILDREN:**

**A.** The foster parent shall observe daily the foster child's behavior and signs of emotional or physical health problems. Any concerns shall be reported to PSD immediately.

**B.** There shall be a designated license physician and dentist for each child so that a coordinated plan of care is assured. Foster parents shall obtain medical attention for any sick or injured child. Foster parents, in their role as an adjunct representative of state government, shall not rely solely on spiritual or religious healing for foster children.

[8.26.2.13 NMAC - N, 5/29/09]

#### **8.26.2.14 EDUCATIONAL SERVICES FOR FOSTER CHILDREN:**

**A.** Parents shall assist PSD in meeting the child's educational requirements, and in transporting the child to school he or she attended at the time of placement when necessary and reasonable. Foster parents shall ensure that the foster child attend school. Foster children may not be home schooled.

**B.** Foster parents shall actively advocate for the foster child's interest in the school setting, including seeking evaluations of the child's abilities and placement in any special education programs appropriate to the child's needs. Foster parents shall attend school conferences and activities when appropriate. Foster parents shall report significant educational information to PSD.

[8.26.2.14 NMAC - N, 5/29/09]

#### **8.26.2.15 FOSTER CARE MAINTENANCE PAYMENTS:**

**A.** Reimbursement: Foster

care providers shall receive reimbursement for the care and support of a child in PSD custody placed in their home. Rates are established through legislative appropriation based on the age and needs of the child.

**B.** Foster parents receiving CYFD foster care and support maintenance payments shall use these funds for the care and support of the identified child in their care, and shall not be considered a source of income and is not recognized as income when filing taxes.

**C.** PSD shall advise foster parents that they should consult a tax advisor to determine if foster children in their home may be considered eligible for a federal tax credit under the Internal Revenue Code.

[8.26.2.15 NMAC - N, 5/29/09]

#### **8.26.2.16 MONITORING AND SUPPORT:**

**A.** PSD monitors foster and adoptive homes licensed by PSD.

**B.** At a minimum, when a child is placed in the home, PSD placement staff shall:

(1) visit the foster or adoptive parent in the home within five (5) days of each new placement;

(2) conduct a home visit to the foster or adoptive parent once a month for the first three (3) months following placement;

(3) conduct a home visit to the foster or adoptive parent at least every three (3) months, and make phone contact at least every thirty (30) days thereafter.

**C.** At a minimum, when a child is not placed in the home, PSD placement staff shall conduct a home visit to the foster parent every three (3) months and have monthly phone contact.

**D.** PSD receives documents and investigates all reported licensing violations and reports of maltreatment in foster care.

**E.** PSD placement staff may continue to have contact with a foster family it license that is under investigation for allegations of child abuse or neglect, but is prohibited from action in such a manner that may interfere with any ongoing civil or criminal investigation.

**F.** PSD may develop and implement a professional development plan to include training and professional development opportunities to address parenting needs, or licensing and policy infractions. At no time is the safety of a foster child compromised to allow for a foster parent to participate in a professional development plan.

**G.** Relative foster homes receive the same monitoring and support afforded to non-relative foster homes.

**H.** Additional support

services may be available from community service providers or PSD staff.

[8.26.2.16 NMAC - Rp, 8.27.2.28 NMAC, 5/29/09]

#### **8.26.2.17 INVESTIGATIONS OF ABUSE AND NEGLECT REFERRALS AND POLICY VIOLATIONS:**

**A.** Any CYFD employee suspecting child abuse or neglect in a foster parent home makes a report as set forth in Protective Services Intake policy, 8.10.2.14 NMAC. PSD staff who suspects, has knowledge of, or receives an allegation about a foster parent violating CYFD policy or licensing regulations shall immediately notify the placement supervisor.

**B.** Investigations of abuse and neglect referrals in foster homes:

(1) PSD shall investigate all screened-in reports of allegations of abuse or neglect regarding children in accordance with protective services investigation policy and procedure.

(2) If a screened-out report involves a child in PSD custody, the child's worker shall conduct a safety assessment of the placement.

(3) No new placement may be made in the home during a pending investigation. Existing placements in the home shall be evaluated for safety. The decision as to whether to maintain placement shall depend on the continued safety of any child.

(4) Based upon the results of the investigation of the abuse or neglect referral, PSD may take one or more of the following actions:

(a) continue the placement, implementing a professional development and safety plan, if appropriate;

(b) terminate the placement; or

(c) determine if the family shall continue to be licensed as a PSD foster family.

**C.** Investigations of CYFD policy violations:

(1) The placement worker shall assess any allegations that the family has violated CYFD policy or licensing regulations.

(2) Based upon the results of the investigation of the alleged policy violation, PSD may take one or more of the following actions:

(a) continue the placement, implementing a professional development and safety plan, if appropriate;

(b) terminate the placement; or

(c) determine if the family shall continue to be licensed as a PSD foster family.

**D.** PSD shall notify the foster parent in writing, by return of receipt mail, of the results and PSD actions of any substantiated abuse and neglect investigation or policy violations.

**E.** The results of any substantiated abuse and neglect investigation or policy violation, which is not the subject of court action, may be reviewed through CYFD's administrative review process. The foster family may request an administrative review within ten (10) days of receiving the written notice.

[8.26.2.17 NMAC - Rp, 8.26.2.21 NMAC, 5/29/09]

#### **8.26.2.18 CRISIS INTERVENTION:**

**A.** PSD staff may develop and implement a crisis intervention plan to prevent the disruption of a foster or adoptive placement and strengthen the family's capacity to care for the child.

**B.** If disruption is unavoidable, PSD staff focuses on minimizing the trauma to the child. After a disruption, PSD staff re-assesses the permanency plan for the child and child's placement and services needs.

[8.26.2.18 NMAC - Rp, 8.26.2.22 NMAC, 5/29/09]

#### **8.26.2.19 POST ADOPTION CONTACT AGREEMENT (PACA):**

PSD facilitates the negotiation of post adoption contact agreements.

[8.26.2.19 NMAC - N, 5/29/09]

#### **8.26.2.20 BEST INTEREST ADOPTION PLACEMENT:**

**A.** When a child's permanency plan becomes adoption, the child is referred to a PSD adoption consultant for the purposes of identifying a potential adoptive family. If an adoptive family is not identified, an individualized adoption plan is developed for the child.

**B.** The best interest of a child is paramount in identifying an adoptive family for a child. PSD makes reasonable efforts to place siblings together in the same adoptive home, unless PSD documents that such a joint placement would be contrary to the safety and well-being of any of the children in the sibling group. PSD will not separate siblings solely because an adoptive placement is available for one or more children, but not the entire group.

**C.** When a family is identified, placement staff will schedule a best interest placement staffing.

**D.** Children aged fourteen (14) years or older must consent to the adoption.

**E.** The placement of a child shall not be delayed or denied based on the race, color, sex, gender identity, sexual orientation, mental or physical handicap, ancestry, or national origin of the adoptive parent or child involved.

**F.** For Native American

children, the Indian Child Welfare Act (ICWA) adoption preferences shall be followed pursuant to the Adoption Act, 32A-5-5 NMSA 1978.

[8.26.2.20 NMAC - Rp, 8.26.2.17 NMAC, 5/29/09]

#### **8.26.2.21 PRE-PLACEMENT ACTIVITIES FOR ADOPTION:**

**A.** PSD placement staff in coordination with the child's worker shall develop a calendar for the transition of the child to the adoptive home, except in the event a foster parent decide to adopt the child.

**B.** PSD staff and the adoptive family shall review and sign a placement agreement when the child is placed in the home.

**C.** Placement staff becomes responsible for the case form placement until finalization of the adoption. [8.26.2.21 NMAC - Rp, 8.26.2.16 NMAC, 5/29/09]

#### **8.26.2.22 FOSTER HOME ADOPTIONS:**

**A.** PSD shall attempt to place foster children with concurrent plans of adoption in foster homes which have been identified as concurrent families.

**B.** PSD completes the pre-placement home study for foster parents and treatment foster parents who have been selected as adoptive parent for children in PSD custody.

[8.26.2.22 NMAC - Rp, 8.26.2.18 NMAC, 5/29/09]

#### **8.26.2.23 FULL DISCLOSURE:**

**A.** Prior to placement, PSD staff shall provide full disclosure about the child to the foster or adoptive family, and continue to provide full disclosure throughout the case and after finalization of the adoption, provided the information does not reveal information that would identify the biological family. Pursuant to the Adoption Act, 32A-5-3 (N) NMSA 1978, full disclosure information includes:

- (1) health history;
- (2) psychological history;
- (3) mental history;
- (4) hospital history;
- (5) medication history;
- (6) genetic history;
- (7) physical description;
- (8) social history;
- (9) placement history; and
- (10) education.

**B.** All records, whether on file with the court, an agency, PSD, an attorney or other provider or professional services in connection with an adoption are confidential pursuant to the Adoption Act, 32A-

5-8 NMSA 1978. A person who intentionally and unlawfully release any information or records closed to the public pursuant to the Adoption Act or releases or make other unlawful use of records in violation of that act is guilty of a petty misdemeanor.

**C.** Documentation provided for the purpose of full disclosure shall remain the property of the person making the full disclosure when a prospective adoptive parent decides not to accept a placement. Immediately upon refusal of the placement, the prospective adoptive parent shall return all full disclosure documentation to the person providing the full disclosure. A prospective adoptive parent shall not make public any confidential information received during the full disclosure process, but may disclose such information only as necessary to make an informed placement decision, or to the child's guardian ad litem or youth attorney.

[8.26.2.23 NMAC - N, 5/29/09]

#### **8.26.2.24 ADOPTION ASSISTANCE:**

**A.** Adoption assistance is available to any family who adopts an eligible child through CYFD.

**B.** PSD determines if a child is eligible to receive state or federal adoption assistance based upon federal of state established criteria. PSD informs the adoptive family of the adoptee's eligibility for adoption assistance.

**C.** Initial adoption agreement:

(1) PSD shall negotiate adoption assistance based on the family's circumstances and any special needs of the child. The monthly adoption maintenance payment may not exceed the maximum monthly amount that was paid for the child in foster care. Where a private agent has licensed a foster family and the foster family has determined to adopt, the adoption subsidy shall be negotiated in the same manner as any other subsidy.

(2) Types of assistance available:

(a) Maintenance: Monthly adoption assistance maintenance payments for the eligible child shall be utilized to meet the child's existing day to day needs and is not considered income. Monthly adoption assistance maintenance payments are terminated on the child's eighteenth birthday. Adoption assistance may be extended until the child is twenty-one (21) years of age, if the child is certified medically fragile by the New Mexico department of health.

(b) Medical: Medical adoption assistance may be made on behalf of a child and shall cover only those pre-approved, pre-existing conditions that are not covered by the family's private or group medical insurance or medicaid, and does not include

co-payments or deductible for which the patient is responsible.

(3) Interstate placement: When the adoption of the child involves interstate placement, the state that enters into the adoption assistance agreement shall be responsible for paying the non-recurring adoption expenses of the child. In cases in which there is interstate placement, but no agreement for adoption assistance, the state in which the final adoption decree is issued shall be responsible for paying the non-recurring expenses if the child meets the requirements.

(4) With placement worker approval, the adoptive family may be reimbursed for non-recurring adoption expenses (NRAE) up to \$2000.00 per child in PSD custody. NRAE may include transportation and other reasonable expenses such as lodging and food for the child and adoptive parents that are not otherwise reimbursed. NRAE are not reimbursable in the event the adoption does not finalize. There is no income eligibility requirement for adoptive parents in determining whether payments for non-recurring expenses of adoption shall be made. However, parents cannot be reimbursed for out-of-pocket expenses for which they have otherwise been reimbursed.

(5) An adoptive family may receive a one-time only subsidy for legal services leading to the finalization of an adoption based on the adoption case regardless of number of siblings.

**D.** Prior to adoption finalization, the placement worker and the adoptive family shall sign the adoption assistance agreement that specifies adoption assistance and NRAE. Each Title IV-E subsidy agreement shall be completed and signed prior to the adoption finalization to be valid.

**E.** By signing the adoption assistance agreement, the adoptive parent agrees to immediately notify PSD of any of the changes listed below:

(1) the adoptive parent is no longer legally responsible for the child;

(2) the adoptive parent is no longer financially responsible for the child;

(3) change of address, phone numbers, or email addresses;

(4) change in the child's name and social security number;

(5) change in the family's needs or circumstances;

(6) change in electronic funds deposit information;

(7) the adoptive child no longer lives with the adoptive parents; or

(8) the death of an adoptive child.

**F.** Annual contact: On an annual basis PSD shall provide the adoptive family a form to complete and return to

PSD attesting to the following:

(1) the family continues to have financial and legal responsibility for the child; or

(2) that the adopted child is a full time elementary or secondary student (or has completed secondary school). If the child is incapable of attending school on a full time basis due to medical condition, the adoptive parent must submit to PSD regularly updated medical information to support such incapability. The parent must certify one of the following:

(a) that the child is enrolled (or is in a timely process of enrolling) in an institution that provides elementary or secondary education and meets school attendance requirements in accordance with state law;

(b) that the child is being home schooled in an elementary or secondary school program that complies with state law; or

(c) that the child is in an independent study elementary or secondary school program that complies with state law and is administered by the local school or school district.

(3) the child is or is not covered by private medical insurance.

**G.** Adoption assistance shall be terminated based upon any of the following events:

(1) the child reaches eighteen (18) years of age, except in the event of medical fragile certification;

(2) PSD determines that the adoptive family is no longer legally responsible for the child; or

(3) PSD determines that the adoptive family is no longer providing any support to the child.

**H.** PSD shall notify the adoptive family in writing, by return of receipt mail, of any decision to reduce, change, suspend or terminate an adoption subsidy. The adoptive parent may request an administrative appeal within ten (10) days of receiving notification of the decision to reduce, change, suspend or terminate adoption subsidy.

[8.26.2.24 NMAC - Rp, 8.26.2.15 NMAC, 5/29/09]

#### **8.26.2.25 POST PLACEMENT ADOPTION SUPPORT SERVICES:**

**A.** PSD shall provide support services to the child and adoptive family. Support services are intended to assist the family in adjusting, enhance the family's capacity to care for the child, and strengthen the family.

**B.** PSD shall develop a case plan with all families adopting children in PSD custody.

**C.** During this period PSD shall provide information to the adoptive

family regarding requirements for legal finalization of the adoption including the family's selection of an attorney, name change of the child, and required consent of the child, if the child is over fourteen (14) years of age.

**D.** PSD shall assess and document the status of placement until finalization of the adoption.

**E.** If the adoptive family and child, with PSD approval, move out of state prior to the finalization, PSD shall initiate a referral through the interstate compact on the placement of children to request appropriate post placement services and written reports from the receiving state. PSD shall retain jurisdiction and responsibility for all case activities until finalization. [8.26.2.25 NMAC - Rp, 8.26.2.20 NMAC, 5/29/09]

#### **8.26.2.26 ADOPTION FINALIZATION:**

**A.** PSD establishes time frames for finalization based on the age and needs of the child pursuant to the Adoption Act, 32A-5-25 A and the time frames for court approval of finalization pursuant to 32A-5-36 F(6) NMSA 1978.

**B.** The family may file the adoption petition according to their state of residence or in New Mexico.

**C.** Placement staff compile and submits post placement reports to the court for all PSD children and children placed for adoption in New Mexico through the interstate compact for the placement of children.

[8.26.2.26 NMAC - Rp, 8.26.2.23 NMAC, 5/29/09]

#### **8.26.2.27 POST DECREE SUPPORT SERVICES:**

**A.** Upon finalization, PSD shall provide information regarding resources to support the family in their community. Placement staff may provide direct support services or make referrals to community service providers in order to support, strengthen, and enhance the family's capacity to care for the child to prevent disruption or dissolution.

**B.** PSD shall respond to adult adoptee requests for information pursuant to the Adoption Act, 32A-5-40 E NMSA 1978.

[8.26.2.27 NMAC - Rp, 8.26.2.24 NMAC, 5/29/09]

#### **HISTORY OF 8.26.2 NMAC: Pre-NMAC History:**

The material in this part was derived from that previously filed with the State Records Center and Archives:

HSSD 75-7, Minimum Requirements for Licensing of Child Placement Agencies, 9/15/75.

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 8/22/86;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 1/29/87;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 11/18/87;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 6/14/88;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 8/22/88;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 9/18/90;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 3/15/91;

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 8/22/86.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 1/29/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 6/18/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 11/18/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 8/22/88.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/28/89.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/20/90.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 9/18/90.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/15/91.

SSD 5.5.0, Foster Care Child Placement Agency Licensing Regulations, 12/7/89.

SSD 7.0.0, Adoption - Definition and Goal Statement, filed 8/22/86;

SSD 7.0.0, Adoption - Definition and Goal Statement, filed 6/14/88;

SSD 7.0.0, Adoption - Purpose and Goal Statement, filed 10/18/95;

SSD 7.1.0, Adoption - General Provisions: Adoption, filed 8/22/86;

SSD 7.1.0, Adoption - General Provisions: Adoption, filed 6/18/87;

SSD 7.1.0, Adoption - General Provisions: Adoption, filed 1/13/88;

SSD 7.1.0, Adoption - General Provisions: Adoption, filed 3/28/89;

SSD 7.2.0, Adoption - General Guidelines, filed 8/22/86;

SSD 7.2.0, Adoption - General Guidelines,

filed 6/18/87;  
SSD 7.2.0, Adoption - General Guidelines, filed 6/14/88;  
SSD 7.2.0, Adoption - General Guidelines, filed 3/15/91;  
SSD 7.3.0, Adoption - Department Responsibilities, filed 8/22/86;  
SSD 7.3.0, Adoption - Department Responsibilities, filed 6/14/88;  
SSD 7.3.0, Adoption - Department Responsibilities, filed 3/15/91;  
SSD 7.3.0, Adoption - Department Responsibilities, filed 10/18/95.

#### History of Repealed Material:

8 NMAC 26.2, Adoption Services, filed 6/16/1997 - Repealed effective 2/14/2001.  
8.26.2 NMAC, Adoption Services, filed 2/1/2001 - Repealed effective 7/30/2004.  
8.26.2 NMAC, Adoption Services, filed 7/16/2004 - Repealed effective 11/15/2005.  
8.26.2 NMAC, Adoption Services, filed 11/1/2005 - Repealed effective 5/29/2009.

## NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT

### PROTECTIVE SERVICES DIVISION

#### TITLE 8 SOCIAL SERVICES CHAPTER 26 FOSTER CARE AND ADOPTION PART 4 LICENSING REQUIREMENTS FOR FOSTER AND ADOPTIVE HOMES

**8.26.4.1 ISSUING AGENCY:**  
Children, Youth and Families Department (CYFD), Protective Services Division (PSD).  
[8.26.4.1 NMAC - Rp, 8 NMAC 27.3.1, 5/29/09]

**8.26.4.2 SCOPE:** All agencies in New Mexico providing foster care and adoption licensing, protective services staff, children placed in PSD custody, individuals applying for or licensed as a foster or adoptive parent in New Mexico, and parents or guardians whose child is placed in PSD custody.  
[8.26.4.2 NMAC - Rp, 8 NMAC 27.3.2, 5/29/09]

**8.26.4.3 STATUTORY AUTHORITY:** Children, Youth and Families Department Act, 9-2A-7 D, NMSA 1978; New Mexico Children's Code Adoption Act, 32A-5-6 A, NMSA 1978; Child Placement Licensing Act, 40-7A-4 D, NMSA 1978.  
[8.26.4.3 NMAC - Rp, 8 NMAC 27.3.3, 5/29/09]

**8.26.4.4 DURATION:**  
Permanent.

[8.26.4.4 NMAC - Rp, 8 NMAC 27.3.4, 5/29/09]

**8.26.4.5 EFFECTIVE DATE:**  
May 29, 2009 unless a later date is cited at the end of a section.

[8.26.4.5 NMAC - Rp, 8 NMAC 27.3.5, 5/29/09]

**8.26.4.6 OBJECTIVE:** To create uniform standards for licensing of foster care and adoptive homes in New Mexico which are consistent with the best interest, safety, permanency, and well-being of children by:

**A.** enabling protective services division or licensed child placement agencies to license and monitor foster and adoptive homes;

**B.** enabling protective services division to set standards for the application and operation of foster and adoptive homes to protect the best interest of children in foster or adoptive placement; and

**C.** complying with the New Mexico Children's Code, the New Mexico Adoption Act and regulations, the Indian Child Welfare Act, the Adoption and Safe Families Act, the Interstate Compact on Placement of Children, the Interstate Compact on Adoption and Medical Assistance, the Multi-Ethnic Placement Act, as amended by the Inter-Ethnic Adoption Provisions of 1996, the Safe and Timely Interstate Placement of Foster Children Act, the Adam Walsh Act and the Fostering Connections for Success and Increasing Adoptions Act.

[8.26.4.6 NMAC - Rp, 8 NMAC 27.3.6, 5/29/09]

#### 8.26.4.7 DEFINITIONS:

**A. "Administrative appeal"** is a formal hearing for families whose license has been revoked, suspended, or not renewed. The family has the opportunity to present evidence to an impartial hearing officer in accordance with CYFD's Administrative Appeals regulations 8.8.4 NMAC.

**B. "Administrative review"** is an informal process in which may include an informal conference or a record review, and does not create any substantive rights for the family.

**C. "Adoptee"** refers to any person who is the subject of an adoption petition.

**D. "Adoption"** is the establishment of a court sanctioned legal parental relationship between an adult and a child.

**E. "Adoptive home"** refers to:

(1) a foster family licensed by PSD or by a licensed child placement

agency who chooses to adopt a foster child; or

(2) a family approved by a private agency or a licensed individual to adopt a child.

**F. "Agency"** means any PSD licensed individual, partnership, association or corporation, for profit or non-profit, undertaking to place a child in a home in this or any other state for the purpose of providing foster care or adoption services. An agency may be licensed as an adoption agency, a foster care agency or both.

(1) "Adoption agency" means an agency licensed by PSD to facilitate the adoption of a child or perform a function within the adoption process.

(2) "Foster care agency" means an agency licensed by PSD for the purpose of supervising foster care homes, treatment foster care homes, or other levels of foster care as developed by PSD.

**G. "Applicant"** is any person who applies to be considered as a potential foster care provider, treatment foster care provider, or an adoptive family.

**H. "Application"** is the document by which persons who wish to become foster or adoptive parents request an assessment of their home and family, and the issuance of a license. The document also authorizes the department or licensed child placement agency to obtain relevant information from the applicant and other authorized persons in order to conduct an assessment of the applicant's qualifications. The applicant shall certify that there are no willful misrepresentations in the application.

**I. "Assessment"** is the process of collecting information and conducting interviews with applicants by the licensing agent, and evaluating that information to determine the suitability of an applicant for a foster parent license.

**J. "Child abuse and neglect check"** is a review of the PSD information management system (also known as FACTS) to determine if there have been any previous referrals to protective services division.

**K. "Client"** means a foster care or adoptive parent applicant, foster care or adoptive family, a foster or adoptive child, or the child's biological family who receives services from a child placement agency or protective services.

**L. "Concurrent planning"** refers to case planning and legal practices providing reunification services while simultaneously implementing an alternative case plan.

**M. "Criminal records check (CRC)"** means federal, state or local checks for criminal offenses conducted by CYFD on potential and current foster and adoptive parents, and of all adults living in

the foster or adoptive home.

**N. "CYFD"** means the New Mexico children, youth and families department.

**O. "FACTS"** means the PSD management information system.

**P. "Fictive kin"** is a person not related by birth or marriage who has an emotionally significant relationship with the child.

**Q. "Foster child"** is a child who is placed in the care and custody of children, youth and families department protective services division either under the legal authorization of the Children's Code or through a voluntary placement agreement signed by the parent or legal guardian, or a child who is placed with a licensed child placement agency under the authority of the Child Placement Agency Licensing Act. If the court orders legal custody to a relative, person, facility, or agency other than the children, youth and families department protective services division, the child is not a foster child of protective services division.

**R. "Foster home"** refers to a person or persons licensed by PSD, or a licensed child placement agency to provide services including emergency, respite, relative, or treatment foster care. The persons may also be concurrently licensed to adopt.

**S. "Foster home license"** is the document which bears the name or names and address or addresses of those who are foster parents for the protective services division or licensed child placement agency. The license displays the gender, ages and number of foster children the licensee is authorized to care for and the date such authorization begins and ends. The license shall bear the signature of the authorized person who issued the license.

**T. "Foster parent"** is the person named on the license issued by protective services division or a licensed child placement agency who is authorized to care for foster children. Throughout this policy, the term foster parent also refers to an adoptive parent whose adoption has not yet finalized.

**U. "Home study"** is the final written document that results from the assessment process to determine the suitability of an applicant for a foster parent license.

**V. "Licensing agent"** means the individual with the proper credential and qualifications conducting a home study.

**W. "Protective Services Division (PSD)"** refers to the protective services division of the children, youth and families department, and is the state's designated child welfare agency.

**X. "PSD custody"** means

custody of children as a result of an action filed pursuant to the New Mexico Children's Code, 32A-4-1 et seq. NMSA 1978 or 32A-3B-1 et seq. NMSA 1978.

**Y. "Relative"** refers to mothers, fathers, brothers, sisters, grandparents, aunts, uncles, nieces, nephews, first cousins, mother-in-laws, father-in-laws, sister-in-laws, and brother-in-laws, as well as fictive kin.

**Z. "Respite care"** means a licensed foster parent(s) who are able to care for foster children for short periods of time when the child's original foster parents are unable to provide care.

**AA. "SAFE"** means the structured analysis family evaluation© home study format, which is the only home study format approved for use in New Mexico.

**BB. "Specialized foster home"** means a family foster home licensed by PSD in which at least one adult has the required education, training or experience necessary to care for a child who has been certified as special needs.

**CC. "Treatment foster care home"** is a foster home licensed by a child placement agency to provide intensive therapeutic support, intervention and treatment for a child who would otherwise require a more restrictive placement.

[8.26.4.7 NMAC - Rp, 8 NMAC 27.3.7 & 8.27.2.7 NMAC, 5/29/09]

#### **8.26.4.8 ELIGIBILITY TO FOSTER OR ADOPT:**

**A.** Any adult age eighteen (18) or older who is a legal resident of the United States and who is a resident of New Mexico can apply to become a licensed foster parent.

**B.** A petition for adoption may be filed in New Mexico by any adult, age eighteen (18) or older, who:

(1) is a New Mexico resident as defined in the Adoption Act, 32A-5-3(Y) NMSA 1978, and pursuant to the Adoption Act, 32A-5-11(B) NMSA 1978; or

(2) is a non-resident, who meets the requirements pursuant to the Adoption Act, 32A-5-11(C) NMSA 1978, and the child was placed by the department or a New Mexico licensed child placement agency and the adoptee is a resident of New Mexico or was born in New Mexico, but is less than six months of age.

**C.** Any adult seeking to adopt a child in PSD custody must be approved as an adoptive parent and licensed as a foster parent.

**D.** CYFD employees who meet all licensing requirements may serve as foster or adoptive parents. A CYFD employee is not allowed to foster or adopt any child with whom he or she is working

with in an official capacity.

**E.** A foster or adoptive family may be a single parent, a married couple or an unmarried couple.

**F.** No persons shall be licensed as foster parents whose own children are currently in foster care. Persons whose children have been formerly in foster placement may be licensed if the assessment of their application determines that the problems leading to the placement have been resolved.

**G.** To be considered for a PSD foster parent license issued by PSD, applicants shall have sufficient income, apart from the reimbursement, to support themselves and their families.

**H.** PSD recruits foster and adoptive families who demonstrate the ability to care for children in PSD custody and may deny applicants who are not willing to accept children in PSD custody.

[8.26.4.8 NMAC - N, 5/29/09]

#### **8.26.4.9 APPLICATION FOR INITIAL LICENSURE:**

**A.** All persons wishing to become licensed foster parents or an eligible adoptive home for PSD or for a child placement agency must:

(1) complete an application form;

(2) consent to a home study;

(3) consent to a criminal records check and child abuse and neglect check; and

(4) complete the required pre-service training.

**B.** Applicants shall complete and sign the foster home licensing application provided by PSD or licensed child placement agency. The application shall include but not be limited to the following:

(1) demographic data such as name, address, telephone number; date of birth of all persons living in or frequently residing in the home;

(2) previous addresses for the past five years, including the dates;

(3) at least three (3) year employment history preceding the date of application, if applicable;

(4) a statement from the applicant asserting that, if approved for license, the applicant shall adhere to the applicable statutes and regulations applying to foster or adoptive homes and their responsibilities which shall include:

(a) working with children and families on reunification or alternate case plan;

(b) working with PSD or an agency to ensure placement stability, such as accepting only children who can remain in the placement until adopted or discharged from care;

(c) ensuring that the safety of children is paramount;

(d) adherence to foster parent responsibilities as set forth in Placement Services, 8.26.2.12 NMAC.

(5) each applicant shall submit the names, addresses and telephone numbers of three (3) non-related persons who have knowledge of the applicant character and suitability to be foster or adoptive parents; in addition to the names, addresses and telephone numbers of all adult children out of the home shall be provided for references;

(6) a statement of monthly income and expenditures;

(7) information regarding past or present medical conditions and hospitalizations, including any institutionalization or treatment for behavioral disorders for all adults and children living in the home;

(8) a summary of current and past marriages and significant adult interpersonal relationships;

(9) a history of any application or licensure for adoptive home or foster care in this or any other state; if such history exists the application shall also include a PSD approved notification form signed by the applicant that will serve the purpose of notifying the previous agency of the applicant's application to the new agency and allow the release of assessment information and the home study to any agency considering the foster or adoptive family;

(10) a history of arrests or referrals to PSD; and

(11) signature and date: the applicant's signature shall certify the information provided in the application form is true and complete and the application contains no willful misrepresentation.

[8.26.4.9 NMAC - Rp, 8 NMAC 27.3.10 & 8.27.2.14 NMAC, 5/29/09]

#### **8.26.4.10 CRIMINAL RECORDS CHECKS (CRC):**

**A.** CRCs are required for all applicants and adults living in the foster or adoptive home.

**B.** CYFD CRC unit conducts federal and state criminal records checks for all applicants and adults living in the home. PSD placement staff or agency staff shall submit to the CYFD CRC unit two completed finger print cards for each applicant and adult living in the applicant's home. Agency staff shall also submit a certified check or money order payable to CYFD protective services division for the required fingerprinting fee for each applicant and adult living in the applicant's home. (Finger print packets including cards and instructions may be obtained from the CRC unit.)

**C.** PSD and agency staff shall conduct an additional criminal record

check of the applicant and all adults living in the applicant's home through a search of nmcourts.com.

**D.** Licensure shall not be approved in any case in which the CRC results for the applicant or any adult living in the applicant's home reveal any of the following federally mandated automatic disqualifiers:

(1) a felony conviction for child abuse or neglect;

(2) a felony conviction for spousal abuse;

(3) a felony conviction for a crime against children, including child pornography;

(4) a conviction for any crime involving violence such as rape, sexual assault, or homicide, but does not include other physical assault or battery; or

(5) a felony conviction within the past five years for physical assault, battery, or a drug related offense.

**E.** Applicants who have a conviction for crimes other than those noted above are not automatically disqualified; however this information shall be used to determine suitability for licensure. All police or court records relating to the applicant or other adult living in the home shall be considered in determining suitability for licensure.

**F.** The home study process for any applicant or adult living in the home with a pending criminal charge and no disposition shall be closed. The applicant may reapply after disposition of the charge.

[8.26.4.10 NMAC - Rp, 8.27.2.16 NMAC, 5/29/09]

#### **8.26.4.11 CHILD ABUSE AND NEGLECT CHECK:**

**A.** For families applying to be licensed by PSD, staff shall conduct a FACTS review for abuse and neglect referrals on the applicant and all adults living in the applicant's home. If the applicant or any other adult living in the home resided in any state(s) other than New Mexico in the five years prior to the date of the application, PSD shall request that each such state review its abuse and neglect information system or registry for information on the applicant or other adults living in the home and submit the results of that review to PSD.

**B.** For families seeking to become foster or adoptive homes through agencies other than PSD, the agency shall submit, at the time they submit finger print cards, a signed PSD approved "abuse and neglect check for prospective foster or adoptive parents" form to request that the CRC unit conduct a FACTS review for abuse and neglect referrals on the applicant and each adult living in the applicant's

home. If the applicant or any other adult living in the home resided in any state(s) other than New Mexico in the five years prior to the date of the application, the agency shall request that each such state review its abuse and neglect information system or registry for information on the applicant or other adults living in the home and submit the results of that review to PSD.

**C.** If the applicant or any adult living in the applicant's home has been the subject of a substantiated allegation of sexual exploitation or sexual abuse of a child, the applicant shall not be licensed.

**D.** In the event of a substantiated report of child abuse or neglect, other than substantiated sexual exploitation or sexual abuse as listed above, involving the applicant or any adult living in the home, the application is assessed on a case-by-case basis to determine if the safety of any child in the home can be assured. This information shall be used to determine suitability for licensure.

**E.** Persons who have been referred to PSD for investigation of allegations of child abuse or neglect or exploitation may be considered for licensure. The best interest of children is paramount. Licensure may be denied based on the professional judgment of the licensing agent.

**F.** The home study process for any applicant or adult living in the applicant's home with a pending child abuse or neglect investigation and no disposition shall be closed. The applicant may reapply when the investigation is complete. [8.26.4.11 NMAC - Rp, 8.27.2.17 NMAC, 5/29/09]

#### **8.26.4.12 ASSESSMENT PROCESS FOR FOSTER OR ADOPTIVE HOME LICENSE:**

**A.** Only qualified persons employed by PSD, qualified staff of licensed child placement agencies or individuals certified by PSD, as licensing agents shall conduct home studies. (See process for certification as a licensing agent as set forth in the Adoption Act Regulations, 8.26.3.17 NMAC)

**B.** Upon receipt of the application to become a foster or adoptive family, the licensing agent has five (5) days to contact the family.

**C.** Home study forms and requirements are determined by PSD. The SAFE home study is the approved format to be used in New Mexico.

**D.** All foster or adoptive applicants are assessed for their suitability to care for children who might be placed in their home. Although any previous foster care assessments and home studies that are obtainable shall be considered, the licensing agent shall conduct an independent assess-

ment and home study.

**E.** PSD gives priority to applicants that meet the needs of children in PSD custody.

**F.** In addition to the CRC and abuse and neglect checks, as described herein at 8.26.4.10 and 8.26.4.11 NMAC, the minimum documentation required for the assessment process includes:

(1) a physical exam report, paid for by the applicant, which certifies that all adult household members are in good mental and physical health with a statement from the physician as to whether any medical conditions may affect the applicant's ability to care for a foster child; the medical report shall be dated within twelve (12) months of the application date and include a list of any prescribed medications and the reasons for which they are prescribed;

(2) immunization records or waiver issued by the department of health for any child residing in the home;

(3) a copy of the applicant's driver's license and proof of motor vehicle insurance for any vehicle used to transport a foster child;

(4) a copy of the applicant's current marriage license and all previous divorce decrees, if applicable;

(5) proof of school enrollment or home schooling for all school aged children residing in the home;

(6) proof of the applicant's U.S. citizenship such as a social security card, or proof of permanent residency, such as a green card;

(7) a signed PSD approved release of information form;

(8) a signed copy of the CYFD HIPAA notice of privacy practices;

(9) a signed foster parent agreement, if applicable.

**G.** The licensing agent shall contact the three (3) references provided by the applicant and shall contact any adult children living out of the parental home. The purpose of the contact is to assist in determining the applicant's suitability to become a foster or adoptive parent.

**H.** The licensing agent shall conduct at least (1) one individual interview with each adult living in the applicant's home. This includes children, and any relatives or other adults living in the home. If any person(s) who lives in the home declines to be interviewed, the foster or adoptive home shall not be licensed or certified.

**I.** A minimum of two (2) home visits shall be made to the proposed foster or adoptive home.

**J.** The results of a foster home or relative foster home study are documented in PSD's approved home study format and filed in the foster parent record

maintained by the licensing agent.

**K.** Once the home study process has been initiated, the licensing agent shall complete the home study within one hundred twenty (120) days for non-relative foster or adoptive homes, and ninety (90) days for relative foster or adoptive home.

[8.26.4.12 NMAC - Rp, 8 NMAC 27.3.14 & 15, 5/29/09]

#### **8.26.4.13 SAFETY CHECK-LIST FOR FOSTER AND ADOPTIVE HOMES:**

**A.** Heating, cooling, and ventilation:

(1) A foster home shall be adequately ventilated. There shall be an effective means of providing fresh air to children's sleeping rooms, including at least one window.

(2) Fuel-burning equipment, including natural gas or liquid propane gas cooking ranges shall be vented appropriately and meet applicable safety code requirements.

(3) Heating equipment shall be adequate to maintain interior temperature of 65 degrees Fahrenheit in all rooms. Gas furnaces shall have a cut-off valve.

(4) The heating systems and associated equipment shall meet all requirements of state and local safety codes.

**B.** Water:

(1) A foster home shall have an adequate supply of sanitary water.

(2) If water is not obtained from a public supply, a well water certificate from the New Mexico environment department shall be provided for initial licensure, and at five year intervals. Well water testing instructions and an application form are available on the environment department website. Bottled water may be used for cooking and drinking if the water source is assessed to be unsuitable.

(3) Water supply piping and associated equipment shall be installed and maintained in compliance with state and local safety codes. There shall be a pop-off valve on the hot water heater.

**C.** Sewage, waste and sanitation:

(1) A foster home shall be kept clean and free of accumulation of dirt, waste, and infestations of insects and rodents.

(2) Toilet and bathing facilities shall be provided and maintained in a sanitary manner.

(3) There shall be sanitary methods of household waste disposal which meet applicable safety codes.

(4) Foster homes shall be free of clutter that may cause tripping or falling hazards.

**D.** Electrical wiring and communication:

(1) Electrical wiring shall comply with state and local safety codes. If the licensing agent has doubt of the adequacy of electrical wiring, the licensing agent shall request the applicant arrange and pay for a local electrical inspector to inspect the wiring and submit a report to the licensing agent.

(2) Electrical extension cords shall not be used for general wiring.

(3) A readily available telephone in case of emergencies.

**E.** Kitchen and food storage:

(1) A foster home shall have a kitchen with sufficient storage space. Food shall be stored separately from cleaning supplies and other household chemicals.

(2) The kitchen shall be equipped with a refrigerator sufficient to maintain cold food storage in a temperature range between 33 degrees and 45 degrees Fahrenheit.

(3) The kitchen and food preparation equipment and storage shall be maintained in a sanitary condition.

**F.** First aid and medical supplies:

(1) Foster parents shall maintain a stock of first aid supplies in the foster home. The minimum acceptable stock includes:

(a) one (1) box of non-medicated adhesive bandages;

(b) one (1) pair of blunt scissors;

(c) one (1) roll of two (2) inch or three (3) inch adhesive roller bandage;

(d) one (1) roll of one-half (1/2) inch adhesive tape;

(e) one (1) box of sterile first aid dressings in sealed envelopes;

(f) first aid cream and/or ointment.

(2) These shall be stored in a single cabinet or kit, separate from food storage or household cleaning supplies or other chemicals/poisons.

(3) Prescription medicines shall be supplied and administered only as prescribed. They shall be properly labeled, and stored separately from food, cleaning agents or other household chemicals and poisons. After the prescribed course of treatment has been completed, leftover medicine shall be disposed of in an appropriate manner.

**G.** Personal items:

(1) Each foster child shall be provided an individual comb, toothbrush, night clothes, and under garments which shall not be interchanged between children.

(2) Linens and bedding shall be stored and maintained in a manner assuring that they will be clean. All linens and bedding shall be laundered before use by another child.

**H.** Any animal, birds, and pets shall be in good health with documentation of current vaccinations, and have a temperament such that they will not be frightening or hazardous to foster children.

**I.** Foster home space, furnishing and sleeping arrangement:

(1) A foster home shall have a separate bedroom for the foster parents and for any other adults living in or frequently residing in the home. This shall not preclude a foster child under the age of eighteen (18) months from sleeping in the same room with his or her foster parents provided that the bedroom space is available for the foster child when he or she reaches the age of eighteen (18) months.

(2) There shall be a separate bed provided for each foster child, except that two (2) children of the same gender may sleep in the same double bed.

(3) A foster child over the age of five (5) years shall not share a bedroom with another non-related child of the opposite gender.

(4) The licensing agent may allow exceptions to the sleeping arrangement requirements to permit placement of siblings together in the same foster home.

(5) Sleeping quarters for foster children shall be a contiguous part of the main family residential building or apartment. Exceptions can be made for those children over sixteen (16) years of age who are preparing for independent living.

(6) There shall be sufficient closet space or furniture storage space to permit the sanitary storage of children's clothes, linens and bedding.

(7) Furnishings shall be clean and maintained in a sanitary condition at all times.

**J.** Doors and locks:

(1) A foster home shall have at least two (2) designated exits that meet fire code standards.

(2) There shall be no interior door hardware which makes it possible for a child to be locked inside. All privacy locks shall be provided with emergency unlocking mechanisms.

**K.** Yard and play space:

(1) A foster home shall have access to a safe indoor and outdoor designated play area.

(2) In areas which have a high density of traffic or other hazards to children, the yard or play space shall be adequately fenced for the children's protection.

(3) All outdoor play space and toys, swings and other outdoor equipment shall be maintained in a sound state of repair and free of projecting sharp edges, splinters or other hazards to children.

**L.** Other safety issues:

(1) If the applicant operates an

automobile, he or she shall have automobile insurance as required by law and a valid driver's license. Motor vehicles shall have safety restraints as required by law and shall have properly installed car seats for age appropriate children.

(2) For age appropriate children, a foster home shall have safety gates and locking mechanisms for cabinets that contain cleaning agents or chemicals.

(3) A foster home shall have at least one fire extinguisher.

(4) A foster home shall have smoke detectors appropriate for the square footage.

(5) A foster family shall develop a fire evacuation plan.

(6) A foster family shall provide to PSD or the agency contact information for at least two (2) locations (including one (1) out of town location) where the foster family would go in the event that a community evacuation is necessary.

(7) All weapons owned or acquired by a foster family shall be stored and locked with ammunition stored separately as per the PSD approved weapons safety agreement. The foster family shall provide a signed copy of the PSD approved weapons safety agreement to the licensing agent.

(8) All pool areas, including hot tubs, shall be adequately fenced or secured in order to prevent the access of children when not accompanied by an adult. Spas or hot tubs shall be securely covered to prevent the access of children when not in use. Outdoor ponds shall not be within the immediate play area of children.

(9) Farm and ranch equipment shall not be easily accessible to foster children as a safety precaution. Farm animals shall be properly housed and secured as a safety precaution.

(10) At initial licensure, homes built prior to 1980 must be tested for lead contamination. Homes that have been previously licensed and were built prior to 1980 will be tested for lead contamination at re-licensure. Once a home has been determined lead free, the home will not have to be tested again.

(11) At initial licensure the licensing agent will check the statewide methamphetamine contamination registry at the New Mexico environment department to verify the home has not been registered. This verification shall be documented in the home study. Homes which appear in the registry shall not be licensed. For homes that have been previously licensed, the licensing agent shall check the statewide methamphetamine contamination registry at the time of re-licensure. If a home is not on the registry, the licensing agent need not check the home again in further re-licen-

sure.

(12) Smoking shall be prohibited in the house and in any vehicle used for transporting foster children.

[8.26.4.13 NMAC - Rp, 8 NMAC 27.3.11, 5/29/09]

#### **8.26.4.14 FOSTER AND ADOPTIVE PARENT TRAINING:**

**A.** All foster and adoptive parent applicants licensed by PSD and all foster care applicants licensed by child placement agencies shall successfully complete the required pre-service training prior to being licensed in New Mexico.

**B.** All foster and adoptive parents licensed by PSD and all foster parents licensed by child placement agencies shall participate in at least twelve hours of PSD or agency approved training each year. The specific content of six of the twelve required training hours shall be mandated by PSD foster care and adoption bureau. The remaining hours are determined by the foster family and approved by their PSD worker. The foster parent shall obtain and the PSD worker or agency worker shall document training hours in FACTS or in the agency record prior to annual re-licensure. [8.26.4.14 NMAC - Rp, 8 NMAC 27.3.12 & 8.27.2.15 NMAC, 5/29/09]

#### **8.26.4.15 INITIAL FOSTER HOME LICENSE:**

**A.** A foster home license shall be granted or denied based upon the assessment and participation in the licensing process. The issuance of a foster parent license is not an entitlement.

**B.** The applicant and adults living in the home shall complete all licensing requirements before the home can be licensed.

**C.** A license is only valid for the physical location reviewed during the assessment of the application. Licensed foster parents shall notify the licensing agent prior to moving to a new address. If the new residence meets licensing standards, the licensing agent shall issue a new license within thirty (30) days for the remainder of the licensing period. A foster home license is not transferable.

**D.** A foster home license shall be valid for a period of two (2) years from the date of issuance.

**E.** An initial foster parent agreement outlining the stipulations of licensure shall be reviewed by the licensing agent and the foster parent. Signing of the agreement is an acknowledgement that the stipulations are understood and accepted by all concerned. The initial agreement shall be signed prior to placing children in the home.

**F.** The maximum number of children in a foster home shall be deter-

mined by space limitations and the ability of the foster parent(s) to provide for adequate physical and emotional care. For homes licensed by PSD, a maximum number of six (6) is recommended, and any more than six (6) children including children already living in the home must be approved the PSD regional managers.

**G.** No foster home shall be concurrently licensed or certified by more than one licensing entity, unless necessary for the purpose of adoption with approval from the PSD director.  
[8.26.4.15 NMAC - Rp, 8 NMAC 27.3.17 & 8.27.2.23 NMAC, 5/29/09]

#### **8.26.4.16 RELATIVE FOSTER CARE:**

**A.** Relatives who provide foster care to children in PSD custody must be licensed.

**B.** A child in PSD custody may be placed on a provisional basis with a relative provided that the PSD worker:

(1) completes the initial relative assessment by collecting and assessing the following information:

(a) the child's attitude toward the prospective caregiver;

(b) the prospective caregiver's attitude toward the child and parents;

(c) the prospective caregiver's motivation to foster the child;

(d) the prospective caregiver's ability to safely parent the child;

(e) local background records check that does not contain a disqualifying conviction;

(f) a check of nmcourts.com for a disqualifying conviction;

(g) check of CYFD management information system for a referral history with PSD; and

(h) completion of the physical standards checklist;

(2) obtains supervisory approval.

**C.** The safety of the child is the primary consideration. If this is ever in conflict with the placement of the child with a relative, PSD makes the placement decision in favor of the child's safety.

**D.** A provisional license is limited to sixty (60) days with one possible thirty (30) day extension at the discretion of the PSD deputy director. When a child is placed in the home under a provisional license, the relative foster parents are expected to complete all requirements of foster home licensing within sixty (60) days of placement. Failure to meet these requirements within the sixty (60) day time frame shall result in the removal of the child.  
[8.26.4.16 NMAC - Rp, 8.27.2.24 NMAC, 5/29/09]

#### **8.26.4.17 TYPE OF LICENS-**

**ES:**

**A.** Provisional license: A provisional license is a license issued by PSD to a relative upon satisfactory completion of the relative initial assessment. A provisional license may be issued to facilitate or expedite placement of a child with a relative. A provisional license is valid for sixty (60) days, with the possibility of one thirty (30) day extension as described herein at Subsection D of 8.26.4.16 NMAC.

**B.** Family foster home license: A two (2) year license issued by PSD only after all licensing requirements have been completed.

**C.** Specialized foster home license: A license issued by PSD to a family foster home in which at least one adult has the PSD specified education or training necessary to care for a child needing specialized care. Such homes are limited to no more than three (3) special needs certified children who need specialized care. When there are three (3) special needs children in placement, no other children shall be placed.

**D.** Treatment foster care license: A license issued by a child placement agency to a family foster home to accept a child requiring intensive services when the agency has met both the child placement agency licensing regulations, and the treatment foster care standards contained in Treatment Foster Care Services, Certification Requirements for Child and Adolescent Mental Health Services, 7.20.11.29 NMAC. PSD does not license treatment foster care homes.  
[8.26.4.17 NMAC - Rp, 8 NMAC 27.3.16, 5/29/09]

#### **8.26.4.18 UPDATES AND RENEWAL OF FOSTER HOME LICENSE:**

**A.** The licensing agent shall conduct an annual review of each foster home to include:

(1) documentation of completion of the training requirements as described herein at Subsection B of 8.26.4.14 NMAC;

(2) a check of FACTS is conducted on all adults living in the home;

(3) a check of nmcourts.com shall be conducted on all adults living in the home;

(4) a review of the agreement between the foster parent, licensing agency, and PSD or child placement agency; the agreement shall be signed again to cover the remainder of the licensing period or the new licensing period;

(5) a review of placements made during the year, identification of strengths and training needs, and a review of current policies affecting foster care; and

(6) a review with the foster parent

their duty to disclose any arrests or abuse and neglect referrals.

**B.** Foster families must meet the following re-licensure requirements every two (2) years. The SAFE home study update shall be used for re-assessment for re-licensure. The reassessment shall include all requirements listed above in Paragraphs (1) - (5) of Subsection A of 8.26.4.18 NMAC.

**C.** Before the end of the licensure period, both foster parents and PSD or licensed child placement agency shall ensure that all requirements are met to qualify the family for a renewed license.

**D.** PSD or child placement agency foster home licenses shall be issued every two (2) years, if they continue to meet requirements

[8.26.4.17 NMAC - Rp, 8 NMAC 27.3.18, 5/29/09]

#### **8.26.4.19 DENIAL, REVOCATION, SUSPENSION, OR NON-RENEWAL OF A LICENSE:**

**A. Denial of a license:**

(1) PSD or agency staff may deny an applicant's request for licensure based on a documented professional assessment that the applicant cannot adequately provide safety, permanency, and well-being for children or when in the professional opinion of the licensing agent, conditions in the prospective foster home are not conducive to the fostering of children.

(2) Applicant's may be denied licensure at any point in the licensing process. The applicant shall be notified in writing of the denial within ten (10) days of the decision.

(3) Applicants who have been denied an initial foster parent license may request an administrative review of the decision. This is an informal process completed by the licensing agent, which may include an informal conference or record review. The administrative review does not create any substantive rights for the family.

**B. Revocation or non-renewal of a license:** A foster home license may be revoked or not renewed by PSD or a licensed child placement agency at any time for reasons which may include but are not limited to:

(1) disqualifying criminal records check results as described herein at Subsection D, E and F of 8.26.4.10 NMAC;

(2) disqualifying abuse and neglect check results as described herein at Subsection C, D, E and F of 8.26.4.11 NMAC;

(3) failure to comply with 8.26.2, 8.26.4, 8.26.5 NMAC and agency policies;

(4) failure to comply with safety measures, including those requirements described herein at 8.26.4.13 NMAC;

(5) returning a child to an agency without seeking support services provided by the agency or community service providers in order to preserve the placement;

(6) refusal to comply with case plan;

(7) inability to adequately meet the needs the child;

(8) failure to include children in family activities;

(9) overuse or inappropriate use of respite care;

(10) failure to actively preserve connections with foster children and their birth families and community of origin such as:

(a) siblings or other birth relatives;

(b) church community; and

(c) fictive kin, or the child's friends;

(11) failure to demonstrate the ability to provide emotional support during important developmental points in the course of a child's life;

(12) repeated refusals by the family to accept children who have been matched for placements;

(13) failure to participate in required training;

(14) failure to comply with PSD decisions regarding the child's safety, permanency, and well-being;

(15) abuse of substances including but not limited to:

(a) alcohol;

(b) illegal drugs; or

(c) prescription drugs or controlled substances;

(16) exposure of the child to cigarette smoking and tobacco products; and

(17) a documented professional assessment that continued licensure would be contrary to the safety, permanency, and well-being of the child, or in the opinion of the licensing agent that conditions in the foster home are not conducive to the fostering of children.

**C. Suspension of a license:** Suspension of a license can be voluntary or involuntary and last not more than six (6) months.

(1) Voluntary reasons for suspension must be approved by the licensing agency and may include, but not limited to:

(a) medical conditions;

(b) adoption; or

(c) life changes within the household.

(2) Involuntary reasons for suspension may include all the reasons described herein at Paragraphs (1) - (17) of Subsection B of 8.26.4.19 NMAC, as well as:

(a) screened-in abuse or neglect referrals; or

(b) during the period of a professional development plan.

**D. Notification:** The foster or adoptive family shall be notified in writing, by return of receipt mail, of the proposed action and the reason for revocation, involuntary suspension or non-renewal of the license. The licensing agency will provide for a hearing before a hearing officer appointed by the secretary no earlier than twenty (20) days from receipt of the notice unless time limitation are waived. This is a formal process where the family has the opportunity to present evidence to an impartial hearing officer described herein at Subsection A of 8.26.4.7 NMAC.

[8.26.4.19 NMAC - Rp, 8.27.2.25 & 26 NMAC, 5/29/09]

#### **8.26.4.20 CHANGES IN HOUSEHOLD EFFECTING LICENSURE STATUS:**

**A.** Licensed foster parents must notify their licensing agent immediately of any circumstance that may impact their license. Such circumstances may include but are not limited to:

(1) birth or death of household member;

(2) serious illness of household member;

(3) criminal arrest or conviction of any household member;

(4) child abuse or neglect referrals involving a household member;

(5) new person living in the home or a person leaving the home; or

(6) change in address.

**B.** The licensing agent shall assess changes within the foster home that may affect licensing status and take appropriate action based upon the assessment.

**C.** Any adult intending to move into the foster or adoptive home shall meet all licensing requirements prior to residing in the home.

[8.26.4.20 NMAC - Rp, 8.27.2.27 NMAC, 5/29/09]

#### **8.26.4.21 DOCUMENTATION AND RECORDS:**

**A. Maintenance of records:** The licensing agent shall maintain records related to the application and licensing of foster and adoptive parents.

(1) Foster home parent files: The agency or PSD shall maintain records concerning the evaluation of a foster home, including but not limited to the application, assessment information, recertification of information, releases of information, criminal records and background checks, medical examination records, a copy of the foster home license and correspondence. For families licensed by PSD, PSD maintains the

records for ten (10) years after the case is closed and then transfers them to archives as set forth in 1.18.690.30 NMAC. For families licensed by agencies, records shall be transferred to a subsequent agency or to CYFD upon closure.

(2) Adoption files: The agency, attorney, independent agent or PSD shall maintain records concerning adoptive families, including the foster care application records as described above at Paragraph (1) of Subsection A of 8.26.4.21 NMAC, as well as adoption case information including but not limited to the adoption decree, annual contact reports, and adoption assistance agreements.

(a) Approved cases: PSD transfers adoption records to archives one hundred (100) years after the date of birth of the youngest adopted child as set forth in 1.18.690.30 NMAC. Agencies, attorneys, and independent agents shall transfer adoption records to PSD upon closure of business.

(b) Denied cases: PSD, agencies, attorneys and independent agents shall retain cases for five (5) years after the case is closed.

**B. Confidentiality:** Under CYFD's general rulemaking authority Section 9-2A-7 NMSA, the confidentiality provisions of the New Mexico Children's Code, 32A-3B-22 and 32A-4-33, the specific authority related to certification of foster homes, Section 40-7-4 (D) and the Adoption Act, 32A-5-6 and 32A-5-8 NMSA, all client case records and client identifying information including foster and adoptive families, and applicant files are confidential and may not be publicly disclosed.

(1) Release in response to court order: PSD and agencies may release such files only upon a valid court order provided that confidential criminal and abuse and neglect information may not be released, unless a court order specifically orders such a release.

(2) Release to another agency that is considering a previously licensed family for licensure: An agency that has licensed a foster or adoptive family may release assessment information and the home study to any agency that is considering the foster or adoptive family for licensure, upon receipt of the signed notification by the foster family of its licensure history with previous agencies as described herein at Paragraph (9) of Subsection B of 8.26.4.9 NMAC.

**C.** Foster or adoptive parents files:

(1) Upon request foster or adoptive parents shall be allowed to review their own file with the exception of letters of reference and the identity of any abuse or neg-

lect report source regarding the foster or adoptive parents. Copying the file is not permitted.

(2) PSD shall provide an unofficial copy of the home study to the foster or adoptive family upon written request to PSD.

(3) Foster or adoptive parents may purchase an official copy of their home study for reasonable fee to be determined by the PSD director.

[8.26.4.21 NMAC - Rp, 8.27.2.30 NMAC, 5/29/09]

#### **HISTORY OF 8.26.4 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with State Records Center and Archives under:

HSSD 75-7, Minimum Requirements for Licensing of Child Placement Agencies, 9/15/75.

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 8/22/86;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 1/29/87; SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 11/18/87;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 6/14/88;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 8/22/88;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 9/18/90;

SSD 5.3.0, Substitute Care for Children - Department Responsibilities, filed 3/15/91;

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 8/22/86.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 1/29/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 6/18/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 11/18/87.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 8/22/88.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/28/89.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/20/90.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 9/18/90.

SSD 5.4.0, Substitute Care for Children - Licensing Standards for Foster Homes, 3/15/91.

SSD 5.5.0, Foster Care Child Placement Agency Licensing Regulations, 12/7/89.

#### **History of Repealed Material:**

8 NMAC 27.2, Foster Parenting, filed 6/16/1997 - Repealed 2/14/2001.

8.27.2 NMAC, Foster Parenting, filed 2/1/2001 - Repealed 7/15/2004.

8.27.2 NMAC, Foster Parenting, 7/2/2004 - Repealed effective 11/15/2005.

8.27.2 NMAC, Foster Parenting, filed 11/1/2005 - Repealed effective 5/29/2009.

8 NMAC 27.3, Licensing Standards for Foster Care, filed January 13, 1997 - Repealed effective May 29, 2009.

## **NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT**

### **PROTECTIVE SERVICES DIVISION**

#### **TITLE 8 SOCIAL SERVICES CHAPTER 26 FOSTER CARE AND ADOPTION**

#### **PART 5 CHILD PLACE- MENT AGENCY LICENSING STANDARDS**

#### **8.26.5.1 ISSUING AGENCY:** Children, Youth and Families Department (CYFD) Protective Services Division (PSD)

[8.26.5.1 NMAC - Rp, 8.27.6.1 NMAC, 5/29/09]

**8.26.5.2 SCOPE:** Any individual, partnership, association or corporation, doing business in New Mexico, undertaking to place a child in a home in this or any other state for the purpose of foster care or adoption of the child, including treatment foster homes also governed by 7.20.11 NMAC, Certification Requirements for Child and Adolescent Mental Health Services.

[8.26.5.2 NMAC - Rp, 8.27.6.2 NMAC, 5/29/09]

**8.26.5.3 STATUTORY AUTHORITY:** Children, Youth and Families Department Act, 9-2A-7 D, NMSA 1978; New Mexico Children's Code Adoption Act, 32A-5-6 A, NMSA 1978; Child Placement Licensing Act, 40-7A-4 D, NMSA 1978.

[8.26.5.3 NMAC - Rp, 8.27.6.3 NMAC, 5/29/09]

**8.26.5.4 DURATION:** Permanent

[8.26.5.4 NMAC - Rp, 8.27.6.4 NMAC, 5/29/09]

**8.26.5.5 EFFECTIVE DATE:** May 29, 2009, unless a later date is cited at the end of a section.

[8.26.5.5 NMAC - Rp, 8.27.6.5 NMAC, 5/29/09]

**8.26.5.6 OBJECTIVE:** These standards supplement and are used in conjunction with the Child Placement Licensing Act. The standards:

**A.** authorize CYFD protective services division to license and monitor agencies that place children in adoptive homes or in foster care so that the safety, permanency, and well being interests of the child are served; and

**B.** authorize CYFD protective services division to require the agency to protect the rights of children in foster or adoptive placement and to monitor agency compliance with the New Mexico Children's Code, the New Mexico Adoption Act and regulations, the Indian Child Welfare Act, the Adoption and Safe Families Act, the Interstate Compact on Placement of Children, the Interstate Compact on Adoption and Medical Assistance, the Multi-Ethnic Placement Act, as amended by the Inter-Ethnic Adoption Provisions of 1996, the Uniform Child Custody Jurisdiction and Safety Act, The Safe and Timely Interstate Placement of Foster Children Act, the Adam Walsh Act and the Fostering Connections for Success and Increasing Adoptions Act.

[8.26.5.6 NMAC - Rp, 8.27.6.6 NMAC, 5/29/09]

**8.26.5.7 DEFINITIONS:**  
**A.** "Act" means the Child Placement Agency Licensing Act, pursuant to 40-7A-1 et. seq. NMSA 1978.

**B.** "Acknowledged father" means a father who:

(1) acknowledges paternity of the adoptee pursuant to the putative father registry, pursuant to the Adoption Act, 32A-5-20, NMSA 1978;

(2) is named, with his consent, as the adoptee's father on the adoptee's birth certificate; is obligated to support the adoptee under a written voluntary promise or pursuant to a court order; or

(3) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as pursuant to the Adoption Act, 32A-5-3F (4)(a) and (b) NMSA 1978.

**C.** "Agency" or "child placement agency" means any PSD licensed individual, partnership, association or corporation, for profit or non-profit, undertaking to place a child in a home in this or any other state for the purpose of providing foster care or adoption services. An agency may be licensed as an adoption agency, a foster care agency or both.

(1) "Adoption agency" means an

agency licensed by PSD to facilitate the adoption of a child or perform a function within the adoption process.

(2) **“Foster care agency”** means an agency licensed by PSD for the purpose of supervising foster care homes, treatment foster care homes, or other levels of foster care as developed by protective services division.

**D. “Alleged father”** means an individual whom the biological mother has identified as the biological father, but the individual has not acknowledged paternity or registered with the putative father registry as pursuant to the Adoption Act, 32A-5-20 NMSA 1978.

**E. “Applicant”** means an individual, partnership, unincorporated association or corporation who makes written application to become a licensed child placement agency in the state of New Mexico.

**F. “Audit”** means the review of an agency, as prescribed in these standards, for the purpose of determining if the standards outlined in these regulations are met.

**G. “Best interest adoptive placement”** is the adoption placement considered by PSD staff to be the most appropriate placement to meet the child’s needs and best interest.

**H. “Child abuse and neglect check”** is a review of the PSD information management system (also known as FACTS) to determine if there have been any previous referrals to protective services division.

**I. “Child placement agency”** (see “agency”).

**J. “Client”** means a foster care or adoptive parent applicant, foster care or adoptive family, a foster or adoptive child, or the child’s biological family who receives services from an agency.

**K. “Corrective action”** means action taken by the agency in order to correct deficiencies or non-compliance with these standards or the Child Placement Agency Licensing Act.

**L. “Corrective action plan”** means the written plan developed by the agency identifying the actions that will be taken to correct deficiencies or non-compliance with these standards or the Child Placement Agency Licensing Act; the plan shall be approved PSD licensing staff.

**M. “Criminal records check (CRC)”** means federal, state or local checks for criminal offenses conducted on employees of an agency who are direct service staff as defined herein at Subsection P of 8.26.5.7 NMAC, potential and current foster and adoptive parents, and adult members of a foster or adoptive parent household.

**N. “CYFD”** means the children, youth and families department of the state of New Mexico.

**O. “Deficiency”** means non-compliance with these standards, and other laws, compacts and regulations referenced herein.

(1) **“Minor deficiencies”** means those deficiencies that do not impair the safety, permanency or well being of a child in the agency’s care.

(2) **“Substantial deficiencies”** means those deficiencies that impair the safety, permanency or well being of a child in the agency’s care.

**P. “Direct service staff”** means supervisors, physicians, nurses, therapists, client care workers, coordinators or other agency personnel who work in immediate direct unsupervised contact with children.

**Q. “Direct unsupervised contact”** means physical proximity to clients, such that physical contact or abuse could occur, without being observed or noticed by another staff member who has been cleared by PSD.

**R. “Full disclosure”** means prior to placement, the agency shall provide full disclosure about the child to the foster or adoptive family and the child’s PSD worker, and continue to provide full disclosure throughout the case and after finalization of the adoption, provided the information does not disclose information regarding the biological family in pursuant to the Adoption Act, 32A-5-3 (N) NMSA 1978. (See 8.26.5.17 NMAC herein)

**S. “Governing board”** means the organizational entity of an agency that has the ultimate responsibility for all planning, direction, control, and management of the activities and functions of a program licensed pursuant to these standards.

**T. “Home study”** is the final written document that results from the assessment process to determine the suitability of an applicant for a foster parent license.

**U. “Interstate compact on adoption and medical assistance (ICAMA)”** is an agreement between member states that governs the interstate delivery of medical services for adopted special needs children.

**V. “Legal risk”** means an adoptive placement where birth parents or other individuals may have legal rights that have not been fully terminated at the time of placement. The prospective adoptive parents are fully informed of the legal risks prior to the placement.

**W. “Permanency plan”** means a plan of intervention for the permanent placement of a child, as defined under

the Adoption and Safe Families Act.

**X. “Placement”** means the point in time when the child is placed in the foster or adoptive home by a legal custodian or guardian.

**Y. “Post placement”** means the period of time between the placement of a child in an adoptive home and the issuance of a decree signed by a judge ordering the adoption.

**Z. “Post-adoption”** means any time following the entry of an adoption decree by the court.

**AA. “Presumed father”** means, pursuant to the Adoption Act, 32A-5-3 (V) NMSA 1978, the husband of the biological mother at the time the adoptee was born; and individual who was married to the mother and either the adoptee was born during the term of the marriage or the adoptee was born within three hundred (300) days after the marriage was terminated by death, annulment, declaration of invalidity or divorce; or before the adoptee’s birth, an individual who attempted to marry the adoptee’s biological mother by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid and if the attempted marriage:

(1) could be declared invalid only by a court, the adoptee was born during the attempted marriage or within three hundred days after its termination by death, annulment, declaration or invalidity or divorce; or

(2) is invalid without a court order, the adoptee was born within three hundred (300) days after the termination of cohabitation.

**BB. “Protective services division (PSD)”** refers to the protective services division of the children, youth and families department, and is the state’s designated child welfare agency.

**CC. “Service provider”** means anyone, agency or individual, providing a service to an individual or client.

**DD. “Substantial compliance”** means all licensing standards have been complied with and that only minor deficiencies exist which do not impair the safety, permanency or well being of a child in the agency’s care and that the agency is in compliance with New Mexico Children’s Code, the New Mexico Adoption Act and regulations, the Indian Child Welfare Act, the Adoption and Safe Families Act, the Interstate Compact on Placement of Children, the Interstate Compact on Adoption and Medical Assistance, the Multi-Ethnic Placement Act, the Interstate Ethnic Placement Act, the Uniform Child Custody Act, the Health Information Portability and Accountability Act, the Adam Walsh Child Protection and Safety Act, the Safe and Timely Interstate

Placement of Foster Children Act, and the Fostering Connections for Success and Increased Adoptions Act.

**EE. "Variance"** means to refrain from enforcing compliance with a portion of these regulations for an unlimited period of time provided the health and safety of children, families, or staff is not compromised. Variances are issued, in writing, at the sole discretion of PSD.

**FF. "Waiver"** means to refrain from enforcing compliance with a portion or these regulations for a limited period of time provided the health and safety of children, families, or staff is not compromised. Waivers are issued in writing at the sole discretion of PSD.

**GG. "Wide scale emergency"** means a natural disaster (*e.g.*, floods, wild fires, pandemic diseases) or human-caused disaster, whether intentional or accidental (*e.g.*, acts of terrorism, transportation accidents, explosions). A wide scale emergency affects the entire community, with consequences that surpass the community's resources to respond, and typically, although not necessarily, results in a local, state, or national declaration of emergency.

[8.26.5.7 NMAC - Rp, 8.27.6.7 NMAC, 5/29/09]

**8.26.5.8 RULES OF CONSTRUCTION:** The Adoption Act Regulations, 8.26.3 NMAC and the Licensing Requirements for Foster and Adoptive Homes, 8.26.4 NMAC are applicable and are cross referenced, unless otherwise noted. The Child Placement Agency Licensing Standards control should a conflict occur between these regulations. [8.26.5.8 NMAC - Rp, 8.27.6.8 NMAC, 5/29/09]

**8.26.5.9 ELIGIBLE AGENCY:**

**A.** The agency must be licensed to do business in the state of New Mexico.

**B.** PSD does not issue a license unless the applicant or agency maintains an office and sufficient staff in the state of New Mexico, as described herein at Subsection A of 8.26.5.21 NMAC. Both the state program director and placement supervisor must work in the New Mexico office. An agency must operate from a street address in New Mexico and have sufficient office space to protect and maintain client case records, client identifying information and agency operation. The agency must have established and posted hours of operation.

[8.26.5.9 NMAC - N, 5/29/09]

**8.26.5.10 APPLICATION:** Any

individual, group or organization requesting consideration for a license as a child placement agency shall submit a packet of information, as described in Subsections A-H below, to PSD. An applicant may be licensed as an adoption agency, a foster care agency, or both. As a condition of receiving a license, the applicant's proposed policies and procedures and proposed manner of operation shall be in writing and shall comply with the laws, regulations, and standards referenced herein. The application packet shall include:

**A. Agency description and organization:**

(1) the name or proposed name and location of the agency;

(2) profit or non-profit status;

(3) names and addresses of the members of the governing board;

(4) rules of the governing board and all sub-committees; and

(5) a signed statement from the governing board acknowledging responsibility for placement and monitoring of children in homes approved by the agency for such placement and acknowledging responsibility for:

(a) monitoring risks that may expose the organization to liability; and

(b) monitoring risks that may reveal unsatisfactory service;

(6) the geographic area of operation.

**B. Statement of purpose, including:**

(1) a brief history of the existing organization;

(2) philosophy of the agency;

(3) the type of child placements the applicant agency proposed to provide;

(4) the type of services to be provided pertinent to the placement process;

(5) the type of services to be offered outside of the placement process;

(6) any applicable and current accreditations or affiliations.

**C. Personnel:**

(1) The application shall include a list of staff positions, which must include the following minimum personnel requirements:

(a) state program director, meeting the requirements as described herein at Paragraph (1) of Subsection A of 8.26.5.21 NMAC; the program director may also fulfill the role of placement supervisor and placement worker;

(b) placement supervisor, meeting the requirements as described herein at Paragraph (2) of Subsection A of 8.26.5.21 NMAC; and

(c) placement worker, meeting the requirement as described herein at Paragraph (3) of subsection A of 8.26.5.21 NMAC.

(2) The applicant agency shall include a copy of its personnel policy and procedures manual with its application, which shall include, but not be limited to, conflicts of interest, conflict resolution between staff and families, and gifts to staff. (See personnel policies and procedures requirements as described herein at 8.26.5.20 NMAC).

(3) The applicant agency shall in its application the following information regarding staff and contract providers:

(a) names, addresses, and telephone numbers of all staff and contract providers;

(b) resumes;

(c) documentation of the results of criminal records checks, and abuse and neglect checks, if required (see personnel policies and procedures requirements as described herein at Paragraph (6) of Subsection C of 8.26.5.20 NMAC; and

(d) documentation of employee and contractor reference checks.

**D. Policies and procedures:** A copy of adopted and proposed policies and procedures addressing agency operations, client rights, client safety, and others as described herein at 8.26.5.18 NMAC.

**E. Financial operations:** The application shall include documentation of financial operations, including:

(1) a statement of financial responsibility from a certified or registered public accountant which demonstrates that the applicant has access to sufficient funds to provide services for a minimum of six months;

(2) a letter from a certified or registered public accountant stating that a bookkeeping system is in place and a process of financial review or audit is completed at the end of each fiscal year;

(3) a complete list of fees for services; and

(4) a projected six (6) month operating budget.

**F. Disclosures:** Applicants shall disclose affiliations and parent holding companies, to include financial, religious, professional and political affiliations.

**G. Other documents and information:** The application shall include copies of any legal documents, such as constitution, by laws and articles of incorporation and any other relevant information requested by PSD.

**H. Changes, additions or revisions:** Contemplated changes, additions or revisions to the information contained in the original application shall be submitted to PSD for approval before implementation. PSD may request, in writing and by certified mail, additional information to support

the application. The requested information shall be submitted within thirty (30) calendar days of PSD's request. An agency's failure to respond to PSD's request for information within thirty (30) calendar days shall be construed as voluntary withdrawal of an application.

[8.26.5.10 NMAC - Rp, 8.27.6.10 NMAC, 5/29/09]

#### **8.26.5.11 TYPES OF LICENSES:**

**A. Initial license:** An initial license is granted to any agency when PSD verifies that the applicant is in substantial compliance with the licensing requirements. If the applicant is in substantial compliance but there are minor deficiencies, the applicant is directed to correct the minor deficiencies. An applicant's initial license shall be issued for a maximum of one (1) year.

**B. Standard license:** If the agency continues to meet all licensing requirements, PSD may elect to license the agency for a standard license. A standard license may be issued for one (1) year or two (2) years. If all regulations have been met during the current audit, a license may be issued for up to two (2) years.

**C. Six month license:** A six (6) month license may be issued when PSD determines the agency has documented substantial deficiencies or chronic minor deficiencies, and:

(1) the agency submits a written corrective action plan as approved by PSD to correct the deficiencies; and

(2) the applicant can meet the licensing requirements within six (6) months from the date of issuance of the six (6) month license; PSD makes at least one site visit at least two (2) months prior to the expirations of the six (6) month license, or more frequent visits, to determine that the agency has taken sufficient steps to correct the deficiencies.

**D. License extension:** If an agency requests to be re-licensed, and holds a current standard license, and an audit is not conducted prior to the or on the date of expiration of the present license, the most recent license may remain in effect for a period of up to ninety (90) calendar days beyond the current expiration date. The extension allows for completion of the audit and determination if a new license is issued, or, in the case of an agency closure, to allow for the timely transfer of families or children. Upon the request of the agency, PSD issues a letter extending the license for the determined amount of time, not to exceed ninety (90) days.

[8.26.5.11 NMAC - N., 5/29/09]

#### **8.26.5.12 APPROVAL OR**

**DENIAL OF A LICENSE:** A license is granted or denied based upon the application and upon PSD review, assessment and determination that the applicant is, or is not, in compliance with these standards and the standards outlined in the act.

**A. Approval:** PSD notifies the applicant, in writing, of approval of the application for a license. Notice is by registered mail sent to the address shown on the application within ninety (90) calendar days after receipt of the completed application.

**B. Denial:** PSD notifies the applicant, in writing, of denial of the license. The applicant may be denied a license when the requirements for licensing are not met or the applicant has a history of license revocation, suspension, denial, penalties or other corrective action based upon complaints substantiated by any state agency responsible for regulation and licensing of child placement agencies or by a court of competent jurisdiction in any state where the agency has operated. Notice of denial is sent by registered mail to the address shown on the application within ninety (90) calendar days after the receipt of the completed application packet. A notice denying the license states the reason for the denial and informs the applicant of the appeal process. (See 8.26.5.14 NMAC, appeal rights, as described below).

[8.26.5.12 NMAC - N, 5/29/09]

#### **8.26.5.13 LICENSE RENEWAL:**

**A.** The agency shall request a renewal of its license, on a renewal form provided by PSD, by certified mail, no later than ninety (90) calendar days before the expiration of the current license.

**B.** A license is renewed or terminated based on the agency's written request for renewal and PSD's review and assessment of agency operations. Failure to submit a renewal form at least ninety (90) days prior to expiration of a license with the required documents attached, shall be interpreted as voluntary closure.

**C.** Upon request for license renewal, the agency shall submit to PSD its financial review or audit, agency governing board minutes, and agency statistics for the current licensing period. If changes have occurred with respect to personnel or other operations, the agency shall submit documentation reflecting such changes with the renewal request. All required attachments, as indicated on the checklist on the PSD renewal form, shall be included with the request or the request is not considered valid and PSD shall advise the agency of such.

**D.** If an agency fails to file a renew request within ninety (90) calendar days of expiration of the license, the license

may, at PSD's sole discretion, automatically be terminated thirty (30) days from the expiration date shown on the face of the existing license. The agency shall assist in the smooth transfer of the children and families to other agencies, so that there is no disruption in the care of the children.

**E.** Before renewing an agency's license, PSD shall determine that the agency is in compliance with all applicable requirements by conducting an on site visit which shall include interviews, case record reviews and visits to the facilities maintained by the agency. PSD is not responsible for locating documents when files are not kept organized and up to date.

**F.** PSD shall notify the agency in writing of its licensing decision before the expiration date of the current license. If CYFD does not renew the license prior to its expiration date, a license extension, at PSD's sole discretion, may be issued to the agency for a maximum of ninety (90) calendar days. If PSD decides to not renew and agency's license, notice of denial is sent by registered mail to the address shown on the application prior to the expiration date of the current license. The notice states the reasons for the denial and informs the applicant of the appeal process. (See 8.26.5.14 NMAC, appeal rights, as described below)

[8.26.5.13 NMAC - Rp, 8.27.6.19 NMAC, 5/29/09]

#### **8.26.5.14 APPEAL RIGHTS:**

**A.** In accordance with the act, PSD may deny, revoke, suspend, place on probation or refuse to renew the license of any child placement agency when the requirements for licensing are not met or the applicant has a history of license revocation, suspension, denial, penalties or other corrective action based upon complaints substantiated by a state agency responsible for regulation and licensing or by a court of competent jurisdiction in any state where the agency has operated.

**B.** The holder of the child placement agency license that is denied, revoked, suspended, placed on probation or that is not renewed shall be given written notice by return receipt mail of the proposed action and the reason therefore and shall, at a date and place to be specified in the notice, be given a hearing before a hearing officer appointed by the CYFD secretary with an opportunity to produce testimony in the holder's behalf and to be assisted by counsel. The hearing shall be held no earlier than twenty (20) days after receipt of notice thereof unless the time limitations are waived. An agency license that has been denied, revoked, suspended, placed on probation or not renewed may, on application to PSD, have the license issued, reinstated or reissued upon proof that the noncompli-

ance with the rules have ceased.

**C.** An agency adversely affected by a PSD decision denying, revoking, suspending, placing on probation or refusing to renew a license may obtain a review by appealing to the district court pursuant to the provisions of 39-3-1.1 NMSA 1978.

[8.26.5.14 NMAC - Rp, 8.27.6.20 NMAC, 5/29/09]

### **8.26.5.15 AGENCY OPERATIONS:**

**A. Agency protocol:** It is the responsibility of each agency to be aware of and conform to the following:

(1) New Mexico Children's Code, Chapter 32A, NMSA 1978;

(2) New Mexico Adoption Act, 32A-5-1, NMSA 1978;

(3) Adoption Act Regulations, 8.26.3 NMAC;

(4) Certification Requirements for Child and Adolescent Mental Health Services, 7.20.11 NMAC (for treatment foster care agencies);

(5) Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C 1901 et seq.);

(6) Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89;

(7) Interstate Compact on the Placement of Children (ICPC);

(8) Interstate Compact on Adoption and Medical Assistance (ICAMA);

(9) Multi-Ethnic Placement Act of 1994 (MEPA), as amended by the Interethnic Adoption Provisions of 1996;

(10) Health Information Portability and Accountability Act (HIPAA);

(11) Adam Walsh Child Protection and Safety Act of 2006;

(12) Safe and Timely Interstate Placement of Foster Children Act of 2006; and

(13) Fostering Connection for Success and Increasing Adoptions Act of 2008.

**B. Ethical operations:** The agency operates in an ethical manner and according to any standards a relevant licensing board promulgates, including, but not limited to the following:

(1) Favoritism: The licensed child placement agency determines if the governing board, staff and consultants are favored when applying for or receiving the services of the agency. If placement is made with a staff member or board member or consultant, the pre-placement study is conducted by an unrelated licensed placement agency or private person meeting the qualifications set forth in the Adoption Act Regulations, Subsection D and E of 8.26.3.17 NMAC.

(2) Referral compensation: An

agency neither receives nor provides referral fees or other forms of consideration from or to another provider of services.

(3) Conflict of interest: An agency prohibits its staff, consultants and governing board members to provide private practice services to its applicants, clients or their families. PSD may review restrictions and suspend the applicability of this restriction if the services were in place sixty (60) days prior to the date of application or intake and the record reflects a finding that it is in the best interest of the individual and why it is in their best interest to maintain the professional relationship. No one may provide foster care services or adopt a child for whom he or she has any case management responsibility.

(4) Gifts: Gifts may not be given or received between or among clients, staff and agencies that exceed fifty (50) dollars.

(5) Discrimination: Agencies shall not discriminate against applicants, clients, or employees based on race, religion, color, national origin, ancestry, sex, age, spousal affiliation, sexual orientation or gender identity.

[8.26.5.15 NMAC - Rp, 8.27.6.12 NMAC, 5/29/09]

### **8.26.5.16 GOVERNING BOARD:**

The agency's governing board is responsible for adopting bylaws and policies and defining the scope of the agency's services.

[8.26.5.16 NMAC - N, 5/29/09]

### **8.26.5.17 FULL DISCLOSURE:**

**A.** Prior to placement, the agency shall provide full disclosure about the child to the foster family, adoptive family and the child's PSD worker, and continue to provide full disclosure throughout the case and after finalization of the adoption, provided the information does not reveal information that would identify the biological family. Pursuant to the Adoption Act, 32A-5-3 (N) NMSA 1978, full disclosure includes:

- (1) health history;
- (2) psychological history;
- (3) mental history;
- (4) hospital history;
- (5) medication history;
- (6) genetic history;
- (7) physical descriptions;
- (8) social history;
- (9) placement history; and
- (10) education.

**B.** All records, whether on file with the court, an agency, PSD, an attorney or other provider of professional services in connection with an adoption are confidential pursuant to the Adoption Act, 32A-5-8 NMSA 1978. A person who intentional-

ly and unlawfully releases any information or records closed to the public pursuant to the Adoption Act or releases or makes other unlawful use of records in violation that act is guilty of a petty misdemeanor.

**C.** Documentation provided for the purpose of full disclosure shall remain the property of the person making the full disclosure when a prospective adoptive parent decides not to accept a placement. Immediately upon refusal of the placement, the prospective adoptive parent shall return all full disclosure documentation to the person providing the full disclosure. A prospective adoptive parent shall not make public any confidential information received during the full disclosure process, but may disclose such information only as necessary to make an informed placement decision, or to the child's guardian ad litem or youth attorney.

[8.26.5.17 NMAC - N, 5/29/09]

### **8.26.5.18 AGENCY POLICIES AND PROCEDURES:**

The agency shall develop and maintain written policies and procedures concerning the licensing of foster and adoptive families and shall provide PSD with a copy of these policies and procedures and with any changes to these policies and procedures within ten (10) days of the change. Agency policies and procedures shall not conflict with any part of these licensing standards. Violations of this subsection may result in the suspension or revocation of the agency's license. Policies and procedures shall address, but are not limited to:

**A. Protection of children:** Agency policies and procedures shall acknowledge the agency's responsibility to protect the safety of children. Specifically, policies and procedures shall:

(1) require that agency staff (pursuant to the New Mexico Children's Code, 32A-4-1 et. seq. NMSA 1978) and all licensed families report all suspected incidents of abuse and neglect involving children in the agency's care and advise the child's legal guardian when such a report is made;

(2) address the safety of children who may be harmed while in the care and control of the agency or its providers and include a plan stating the course of action followed in the event a child is harmed, without regard to how the incident occurred, and indentifying the line of authority and the decision-making process to assist in the reporting and investigation of these matters.

**B. Confidentiality:** Agency policies and procedures shall acknowledge the agency's responsibility to maintain the confidentiality of client case records and client identifying information

including all foster and adoptive families, and applicant files.

**C. Certification and licensing of families:** Agency policies and procedures shall include criteria for initial certification and licensing and re-certification and re-licensing of families.

(1) Agencies are required to provide procedures for administrative reviews for families who are not licensed initially. This is an informal process completed by the agency director or designee, which may include an informal conference or a record review. The administrative review does not create any substantive rights for the family. (See Licensing Requirements for Foster and Adoptive Homes, Subsection A of 8.26.4.19 NMAC)

(2) Agencies are required to have policies and procedures for providing administrative appeals for families whose license has been denied, revoked, suspended, place on probation or not renewed. (See Licensing Requirements for Foster and Adoptive Homes, Subsection B, C and D of 8.26.4.19 NMAC)

**D. Acknowledgement of rights and notification forms:**

(1) Agency policy and procedure shall require that foster or adoptive parents sign an acknowledgement of rights form that explains the foster or adoptive parent's rights. The agency maintains the original signed acknowledgement of rights in the foster or adoptive parent file.

(2) Agency policy and procedure shall also require that the foster or adoptive parents disclose their history of application to and licensing by any other agency, and sign a PSD approved notification form that will serve the purpose of notifying any previous agency of the foster or adoptive parent's application to the current agency. (See Licensing Requirements for Foster and Adoptive Homes, Paragraph (9) of Subsection B of 8.26.4.9 NMAC) The previous agency may release assessment information and the home study to the current agency regarding such foster or adoptive family or applicant upon receipt of signed notification that the family is being considered for licensure or approval by the current agency.

**E. Training:** Agency policies and procedures shall include a statement of training requirements for staff and foster and adoptive parents, and agency procedures shall outline the method of tracking that the training is complete. PSD may, at its own discretion, require the agency to provide specific training for their licensed families, and will notify agencies when that training is available.

**F. Detailed services:** Agency policies and procedures shall include a description of agency services.

**G. Fee schedule:** Agency

policies and procedures shall set forth fees charged for adoption or treatment foster care related services, including, but not limited to the purchase of approved home studies.

**H. Review process:**

Agency policies and procedures shall include the process by which grievances and incident reports are reviewed for correction.

[8.26.5.18 NMAC - N, 5/29/09]

**8.26.5.19 FISCAL ACCOUNTABILITY:**

**A. Financial statement availability:** An agency shall maintain complete financial records. A copy of an agency's financial statements, which demonstrates the financial condition of the agency, shall be submitted to PSD with the agency's license renewal request.

**B. Donations and charitable contributions:** An agency shall maintain complete records of any donations of money or property received by the agency. The records shall include representations made by the agency or donor regarding how the funds will be used and document how the funds will be spent according to the stated purposes. The agency also shall document unsolicited donations and how the donations are utilized or spent.

**C. Independent accountability:** The agency shall have an annual financial audit conducted by an independent certified public accountant. Such records are submitted to PSD with the agency's license renewal request.

**D. Audit:** PSD may conduct an unannounced audit of any agency, as deemed necessary. Such an audit may be conducted or contracted by PSD. The agency fully cooperates with PSD.

**E. Liability insurance:** The agency shall provide proof of professional liability insurance acceptable to PSD. [8.26.5.19 NMAC - N, 5/29/09]

**8.26.5.20 PERSONNEL POLICIES AND PROCEDURES:**

**A.** The agency shall develop and maintain written personnel policy and procedures governing employees and volunteer contractors.

**B.** A copy of the agency's personnel policy shall be provided to each employee at the time of employment.

**C.** The personnel policy and procedure, at a minimum, shall contain the following information:

- (1) job descriptions which outline the duties and responsibilities of all staff;
- (2) job qualifications for all positions;
- (3) job benefits, work hours, and leave policies for each position;
- (4) policy regarding conflicts of

interest;

(5) policy regarding the confidentiality of case records and client identifying information, including the requirement for a signed acknowledgement of confidentiality by each employee, contractor, or volunteer, as described herein at Paragraph (10) of Subsection A and Paragraph (9) of Subsection B of 8.26.5.22 NMAC;

(6) requirements for FACTS abuse and neglect checks and criminal records checks for all direct service staff (i.e., agency personnel who work in direct, unsupervised contact with clients or have physical proximity to clients such that physical contact could occur, see definitions herein at Subsections H and M of 8.26.5.7 NMAC); when a criminal records check is not required for a specific employee, policy shall require that the reason for not requiring the criminal records check be documented in writing;

(7) the organizational structure, demonstrating sufficient ratios of personnel, consultants, providers or contracted personnel, with the appropriate qualifications and availability, to enable it to provide all elements of the required service, including clerical services necessary to maintain correspondence, records, bookkeeping, and files current and in an organized order; and

(8) the ratio of full time placement supervisors to placement workers supervised shall be a maximum of 1:7.

[8.26.5.20 NMAC - N, 5/29/09]

**8.26.5.21 PERSONNEL QUALIFICATIONS AND REQUIREMENTS:**

Treatment foster care agencies shall comply with Treatment Foster Care Services, Certification Requirements for Child and Adolescent Mental Health Services, 7.20.11.29 NMAC. In addition, child placement agencies must ensure compliance with the following requirements.

**A. Minimum staff:** The staff of an agency shall include, at a minimum, a program director and a placement supervisor, and may include placement workers. The program director may also fulfill the role of placement supervisor and placement worker, provided the person meets the minimum qualifications for the higher position.

(1) State program director: The program director of an agency shall work in its New Mexico office and shall be able to demonstrate through documentation, knowledge of child welfare services and the circumstances which children and families experience in the substitute care or adoptive process. The minimum acceptable requirements of the program director of an agency are:

- (a) a graduate degree from an accredited college or university program in one of the following fields: social work,

clinical psychology, family studies, marriage and family therapy, guidance and counseling or another human services related field; and

(b) a minimum of two years experience providing social services in a licensed child placement agency or a state child placement agency with at least one (1) year of supervisory experience.

(2) Placement supervisor: The placement supervisor is required to possess a bachelor's degree from an accredited college or university program in the following fields: social work, clinical psychology, family studies, marriage and family therapy, guidance and counseling or another human-services related field. A placement supervisor has at least one (1) year of experience providing social services in a licensed child placement agency or a state child welfare agency. The placement supervisor works in New Mexico.

(3) Placement worker: The placement worker is required to possess a bachelor's degree from an accredited college or university program in the following fields: social work, clinical psychology, family studies, marriage and family therapy, guidance and counseling or another human services related field. The placement worker works in New Mexico.

**B. Employment history:** An agency shall obtain a relevant employment history on each potential employee prior to employment and verify requisite experience or document attempts to accomplish such in the personnel file.

**C. Not retroactive:** The educational and experience requirements contained herein do not apply to individuals continuously employed by an agency on or before the effective date of these regulations.

**D. References:** At least three (3) professional and character references shall be obtained by an agency for each potential professional employee prior to his or her employment. One of these references shall be from the previous employer or a professional colleague who has direct knowledge of the qualifications of the potential employee. Each letter of reference shall be followed up by a phone call by the agency. Documentation of references, with date and type of contact, including all telephone or in person contacts, shall be included in the employee's personnel file.

**E. Background checks:** Abuse and neglect checks and criminal records checks are required for direct service staff as a condition of employment. This includes agency personnel who work in direct, unsupervised contact with clients or have physical proximity to clients such that physical contact could occur, as defined herein at Subsections H and M of 8.26.5.7

NMAC.

(1) If a criminal records check is not required for any staff member, the reason it is not required must be documented in the employee's record.

(2) Direct service staff shall report all arrests or abuse and neglect referrals to the agency within twenty-four (24) hours of the alleged offense or referral to PSD. Failure to report could result in termination or suspension. The agency shall investigate any reported or discovered arrests and referrals and take appropriate action to protect the safety of its clients.

(3) Any corrective actions in response to a referral or arrest will depend on the outcome of such referral or arrest and may include a written reprimand, a corrective action plan, and restriction of unsupervised contact with clients, suspension or termination, depending on the nature of the offense and whether or not children were involved. The agency shall document any corrective action in the employee's employment file.

**F. Personnel policy:** A copy of the agency's personnel policy shall be given to each employee at the time of employment. Documentation of receipt of the policy shall be maintained in the personnel file.

**G. Staff training:** An agency shall document a minimum of fifteen (15) hours of training relevant to the position, per year, for each agency's full-time professional employees, and ten (10) hours of training relevant to the position, per year, for each of the agency's part-time (20 hours or less) professional employees. All applicable licensing requirements apply which may lead to more hours than the requirements of PSD, but shall not be less. PSD may at its discretion, require the agency to provide topic specific training for agency personnel.

[8.26.5.21 NMAC - Rp, 8.27.6.17 NMAC, 5/29/09]

#### **8.26.5.22 PERSONNEL, CONTRACTOR AND VOLUNTEER FILES:**

**A. Employee personnel file:** The agency shall maintain a personnel file for all employees of the agency which shall be available to PSD for inspection. Each file shall include, at a minimum:

(1) application: the employee's employment application showing qualifications and experience;

(2) academic transcripts: the official academic transcripts;

(3) disciplinary actions: documentation of any disciplinary action taken with respect to any employee;

(4) evaluations: any evaluations of work performance;

(5) background check results: the

results of the abuse and neglect and criminal records check, if required; if a background check is not required, the file shall include written documentation as to why it is not required;

(6) training: documentation of training received, content and hours;

(7) license: a copy of an employee's professional license when applicable;

(8) abuse and neglect reporting: a signed statement of understanding by the employee of the requirements to report suspected abuse and neglect to PSD;

(9) child placement agency licensing standards: a signed statement by the employee acknowledging the receipt of these regulations; and

(10) confidentiality statement: any individual who is employed by an agency shall sign a statement acknowledging the confidentiality rights of the children and families that are or may become clients of the agency, specifically that case records and client identifying information shall not be publically released.

**B. Volunteer and contractor file:** The agency shall maintain a separate file on each individual or entity not employed by the agency, conducting business on the agency's behalf, which shall include, but is not limited to:

(1) contract: the contract, which outlines the specific requirements, qualifications and experience, and limitations of the contract;

(2) academic transcripts: the official academic transcripts of individuals working under the contract, if required under the contract;

(3) disciplinary actions: documentation of any disciplinary action taken with respect to the volunteer or contracted agency or individual;

(4) evaluations: any evaluation of work performance;

(5) background check results: the results of the abuse and neglect and criminal records check, if required. If a background check is not required, the files shall include a statement as to why it is not required;

(6) license: a copy of the current professional license, if required under contract;

(7) abuse and neglect reporting: a signed statement of understanding by the contractor or volunteer of the requirements to report suspected abuse and neglect to PSD;

(8) child placement agency licensing standards: a signed statement by the contractor or volunteer acknowledging the receipt of these regulations; and

(9) confidentiality statement: any individual who volunteers for or is contracted by an agency shall sign a statement acknowledging the confidentiality rights of

the children and families that are or may become clients of the agency, specifically that case records and client identifying information shall not be publicly released. [8.26.5.22 NMAC - N, 5/29/09]

### **8.26.5.23 AGENCY SERVICES:**

#### **A. Adoption services:**

The agency shall maintain a detailed description of the agency's adoption services and procedures applicable to those services. The description shall include, but is not limited to, adoptive home assessments, relinquishment procedures, procedure to assure best interest adoption placement, provision for medical services for the birth mother and the child, post-relinquishment medical services for the child until adoptive placement occurs, services for adoption applicants and biological parents, placement and post-placement services, management of adoption disruptions and dissolutions, finalization procedures and post decree adoption support services. All agencies shall follow the requirements for the assessment process for foster or adoptive homes licenses set forth in the Adoption Act Regulations, 8.26.3.18 NMAC, and Licensing Requirements for Foster and Adoptive Homes, 8.26.4.12 NMAC.

#### **B. Foster care services:**

The agency shall maintain a detailed description of the services provided to the children and families who are served by the agency, as well as the agency's foster care services. The description shall include, but is not limited to, recruitment, foster home assessments, training of foster parents, the placement process, documentation of contacts between child and biological family, the interaction of the agency with the child's family of origin and with the foster home, documentation of efforts made to reunite the child with the family, when appropriate, and the permanent plan. All agencies shall follow the requirements for home studies, including background checks, or pre-placement studies set forth in the Adoption Act Regulations, 8.26.3.18 NMAC and the Licensing Requirements for Foster and Adoptive Homes, 8.26.4.14 NMAC. Therapeutic foster homes must meet the requirements listed in Treatment Foster Care Services, Certification Requirements for Child and Adolescent Mental Health Services, 7.20.11.29 NMAC, in order to receive medicaid reimbursement.

(1) All services to be rendered shall comply with the court order, if the child is not in the custody of the parent.

(2) For children in department custody, agency case planning shall be reflective of the case plan developed by PSD and shall never be in conflict with the PSD case plan or current court orders. The treatment foster care coordinator shall be

invited to staffing meetings with department staff to determine that the case plans are consistent.

#### **C. Relinquishment of parental rights:**

(1) If an individual contacts an agency to relinquish his or her parental rights, pursuant to the Adoption Act, 32A-5-17(4) and (5) and 32A-5-19 (E) NMSA 1978, the agency shall make diligent efforts to locate, obtain and document consent from the acknowledged or presumed father defined herein at Subsections B and D of 8.26.5.7 NMAC. Consent from the alleged father, defined herein at Subsection AA of 8.26.5.7 NMAC, shall not be required. Diligent efforts shall include attempts to locate any court records pertaining to a divorce, separation, paternity or custody action, a search of the putative father registry and a search of PSD's record and all other efforts that may be reasonable under the circumstances. The agency shall also obtain and maintain documentation establishing the parental rights of the presenting parent. A signed release of information allowing the agency to conduct searches shall be obtained to allow the agency to determine that an outstanding custody order which prohibits the parent from acting independently is not in effect. Such a search shall be diligent and encompassing of all jurisdictions in which the child has resided since birth. The agency shall not take any action to place the child for adoption until such time as the agency has determined that parental rights have been relinquished, terminated, or that legal proceedings relating to custody of the a child are not pending. This does not preclude the agency from placing the child in a legal risk adoption home. Should there be concern for the welfare of the child due to the parents' inability to care for and protect the child, the agency shall notify CYFD's statewide central intake (SCI).

(2) An agency shall not use coercion or deception to obtain a relinquishment of parental rights from a parent. A relinquishment is freely and voluntarily given by the biological parent.

(3) A relinquishment of parental rights shall be taken before a court of competent jurisdiction pursuant to the Adoption Act, 32A-5-17 through 32A-5-24 NMSA 1978.

(4) An agency's payment to, or on behalf of, a relinquishing parent shall be limited to the actual costs associated with the adoption and conforms to all provisions of New Mexico law. If any agency becomes aware of an illegal payment by any agency or individual, the agency shall notify the court presiding over the adoption proceedings or PSD.

**D. Placement:** Placement does not occur until after a comprehensive

assessment of how the prospective foster family can meet the child's needs and preferences, and a documented determination by the agency that the prospective placement is in the best interest of the child.

#### **E. Change in placement:**

When a change in a child's placement is contemplated, the agency shall work with the legal guardian or parents to determine if the placement change is in the best interests of the child.

(1) Except in cases of an emergency, an agency shall not make a change in placement of the child without the concurrence of the legal guardian, and the guardian ad litem or youth attorney, if applicable. When a placement change is agreed upon, including a return to the child's home for a trial home visit, the agency shall arrange for:

(a) the transfer of all of the child's belongings, including clothing, personal belongings, the child's medical and educational records, and the child's life book;

(b) notifying the PSD case worker, the child's CASA, the guardian ad litem or youth attorney, if applicable, of the placement change at least ten (10) days prior to the change of placement if the child in question is in state custody; and

(c) documentation of the change in placement in the child's agency record.

(2) The agency shall notify the child of the placement change. The legal guardian may choose to be a part of the disclosure to the child. The placement worker shall be responsible to provide medical, education, and psychological information to any subsequent placement provider.

(3) An emergency change in placement may occur only when the caretaker requests the immediate removal of the child or for the safety of the child. If the emergency change is due to a mental health hold, it must be in compliance with the provisions of the Mental Health Placement Act. The agency shall notify the legal guardian of the change in placement, unless circumstances preclude such and are documented in the child's record. For children in state custody, if the removal occurs after regular working hours, the agency notifies statewide central intake (SCI).

**F. PSD registration:** In accordance with national child abuse and neglect data system (NCANDS) requirements for the reporting and tracking of abuse and neglect in foster homes, all foster homes shall be registered with PSD.

(1) The agency shall register a family with PSD upon the licensing of the home and prior to the agency placing a child in the home.

(2) The agency shall notify PSD within five (5) working days if a family's license is revoked or not renewed.

[8.26.5.23 NMAC - Rp, 8.27.6.13 NMAC,

5/29/09]

**8.26.5.24 CONTINUITY OF SERVICE:** An agency shall provide continuity of services for children in their care in the event that a family transfers from one agency to another.

**A. Transfers:**

(1) **Foster family:** The transfer of a foster family from one agency to another when a child is placed in the home is discouraged, unless all members of the child's treatment team and the agencies involved agree that the transfer is in the best interest of the child. If the transfer is in the best interest of the child, the sending agency and receiving agency shall ensure that services being received by the child follow that child to the new agency in order to ensure consistency in the course of that child's treatment. If the home is a therapeutic foster home, both agencies must comply with the Treatment Foster Care Services, Certification Requirements for Child and Adolescent Mental Health Services, 7.20.11.29 NMAC. Both agencies shall provide written documentation, to PSD in the case of children in custody of PSD, or to the legal guardian when the child is not in custody of PSD that the transfer is in the best interest of the children currently in the home. A reasonable fee may be charged by the sending agency to the receiving agency for:

- (a) document copying;
- (b) time and effort spent conducting the home study; and
- (c) training hours provided to parents.

(2) **Adoptive family:** Transfer of an adoptive family from one agency to another shall not occur after the agency had identified the family and agreed to the placement. In permissible transfers, the family's request to transfer from one agency to another shall be made in writing to the agency that initially certified the family. When the adoptive parents have paid the applicable fees and after written notice of the transfer has been filed with the previous agency, the previous agency shall send documentation leading to certification to the current agency. A reasonable fee may be charged by the sending agency to the receiving agency for:

- (a) document copying;
- (b) time and effort spent conducting the home study; and
- (c) training hours provided to parents.

(3) **Fees:** Foster and adoptive parents are not responsible for these fees. Agencies may file a complaint with PSD if they believe charges to be unreasonable.

**B. New license:** No foster care home or adoptive home may be

licensed for placement by more than one agency or PSD.

(1) If a foster home license has been revoked by an agency due to a substantiated abuse or neglect investigation they may not be licensed by another agency unless the applicant can demonstrate that the dynamics that resulted in the abuse or neglect have been resolved and that no safety issues exist. In all such cases, the agency reviewing the application shall consult with PSD prior to approving the license.

(2) If a foster home license has been revoked by an agency due to any of the federally mandated automatic disqualifiers listed in Licensing Requirement for Foster and Adoptive Homes, Subsection D of 8.26.4.10 NMAC, then that family may not be licensed by another agency. Applicants who have a conviction for crimes other than those included in Subsection D of 8.26.4.10 NMAC are not disqualified from licensure; however this information shall be used to determine suitability for licensure. In all such cases, the agency reviewing the application shall consult with PSD prior to approving the license.

(3) If a family transfers from one agency to another, the current agency shall request assessment information and the home study from the previous agency by presenting the to the previous agency the family's signed PSD approved notification of the family's history with any previous agency as described herein at Paragraph (2) of Subsection D of 8.26.5.18 NMAC. The license issued by the new agency is considered a new license and shall conform to these standards. It is the responsibility of the current agency to review the information provided by the previous agency. This review shall be documented by the current agency.

(4) All foster care and adoption agencies shall follow the requirements for background checks, home studies or pre-placement studies as set forth in the Adoption Act Regulations, 8.26.3.18 NMAC, and the requirements for background checks and assessments as set forth in Licensing Requirements for Foster and Adoptive Homes, Subsections 10, 11, and 12 of 8.26.4 NMAC.

**C. Respite care:** Any agency seeking to use a family licensed by another agency for respite care must receive advance approval from the child's legal guardian and the agency licensing the respite family.

[8.26.5.24 NMAC - N, 5/29/09]

**8.26.5.25 RECORDS:**

**A. Types of records:** Separate records shall be kept for foster parents, adoptive parents, and the child. The agency shall also keep separate its adminis-

trative records as described herein at Subsection E of 8.26.5.25 NMAC. The child's record includes information regarding the family of origin. Case records shall be continuously updated and easily accessible to the agency staff and PSD.

**B. Foster parent records:**

The agency shall maintain records concerning the evaluation of a foster home which may include, but are not limited to:

(1) the application documents as set forth in Licensing Requirements for Foster and Adoptive Homes, 8.26.4.9 NMAC;

(2) the original home study and all subsequent updates or addenda and are filed in sequence; in addition, the foster parent record shall contain a separate documentation section which lists each placement in the home including but not limited to the name of the child, dates of placement, and the reason for a child's removal from the biological home; if a disruption occurs, the reason for the disruption of placement shall be documented;

(3) criminal records checks results of the foster parents and any adults living in the home, as well as abuse and neglect checks; the agency shall arrange for abuse and neglect checks, criminal records checks, and renewals of these checks as set forth in Licensing Requirements for Foster and Adoptive Homes, Subsections 10 and 11 of 8.26.4 NMAC.

(4) medical exam records and signed releases of information;

(5) the home safety checklist as set forth in Licensing Requirements for Foster and Adoptive Home 8.26.4.13, NMAC; the home safety checklist shall be updated annually at recertification; CYFD will provide the form to all applicants; the agency shall provide information regarding each listed category;

(6) the annual clean well water certification if the home uses well water as a water source;

(7) a copy of the foster home license; and

(8) any and all correspondence between the agency and the foster parents.

**C. Adoptive parent record:** The agency shall maintain records concerning the evaluation of an adoptive home which may include, but are not limited to:

(1) the application documents as set forth in Licensing Requirements for Foster and Adoptive Homes, 8.26.4.9 NMAC;

(2) the original home study or pre-placement study and all subsequent updates or addenda and are filed in sequence; in addition, the adoptive parent record shall contain a separate documentation section which lists each placement in

the home including but not limited to the name of the child, dates of placement, and the reason for a child's removal from the biological home; if a disruption occurs, the reason for the disruption of placement shall be documented; this will be used during the best interest placement process; the agency shall maintain in each file the annual clean well water certification if the home uses well water as a water source;

(3) criminal records checks results of the adoptive parents and any adults living in the home, as well as abuse and neglect checks; the agency shall arrange for abuse and neglect checks, criminal records checks, and renewals of these checks as set forth in Licensing Requirements for Foster and Adoptive Homes, Subsections 10 and 11 of 8.26.4.10 NMAC;

(4) medical exam records and signed releases of information; the agency shall maintain in each file the home safety checklist; the home safety checklist shall be updated annually at recertification; this form may be requested from CYFD, and shall, at a minimum, address each safety category as developed by CYFD;

(5) the home safety checklist as set forth in Licensing Requirements for Foster and Adoptive Home 8.26.4.13, NMAC. The home safety checklist shall be updated annually at recertification; PSD will provide the form to all applicants; the agency shall provide information regarding each listed category;

(6) the annual clean well water certification if the home uses well water as a water source;

(7) a copy of the foster home license, if applicable;

(8) any and all correspondence between the agency and the adoptive parents; and

(9) the adoption decree and all adoption assistance agreements.

**D. Child's record:** These requirements apply to all children in the care of a licensed child placement agency and are not restricted to children in the custody of PSD. The record of the adoptive or foster child shall contain:

(1) placement history section: the placement history section shall contain a chronological summary of the child's placements, including the name, and address of the foster home of all the child's placements, the dates of each placement and the child's adjustment to each placement, including progress, problems and their resolution, and reasons for removal, disruption, or replacement; the placement history shall record all formal and informal placements since birth;

(a) for children placed in foster homes, this section shall record in detail the reason a child is moved from one home to

another, i.e., enumerating the child's behavior or family problems;

(b) for children placed in adoptive homes, this section shall contain the name and address of the adoptive parents and a description of the child's adjustment in the home up to the time of filing the post-placement report;

(c) for foster and adoptive children, this section shall include all documented efforts to secure the placement information, such as letters and telephone calls to the worker or parents;

(2) progress notes for foster children: progress notes for foster children shall reflect the child's activities, behaviors, school issues, medical issues and emotional state, and the foster parent's observations of the child. Progress notes shall be developed, at a minimum, on a weekly basis;

(3) education records: the agency shall maintain documentation of the child's educations status, needs, and history; the documentation shall include information provided by the school to the agency and is updated, at a minimum, each semester;

(4) medical records: the agency shall maintain documentation of the child's medical needs, medications, and history;

(5) best interest placement: the agency shall document in the child's file the process used to determine that the child was placed appropriately, including the care givers' abilities to address the child's needs;

(6) full disclosure documentation: the agency shall document in the child's file all information that the agency has disclosed to the foster or adoptive parent and the child's PSD worker as described herein at Subsection A of 8.26.5.17 NMAC.

(7) permanency plan: the child's permanency plan shall be clearly documented as set forth in Permanency Planning, 8.10.8.8 NMAC; the permanency plan for children in the custody of PSD is designated by the court; it is the agency's responsibility to know the plan and document accordingly; for children not in PSD custody, the agency shall staff and designate the plan;

(8) monthly treatment plan report: the child's record shall contain a monthly treatment plan report of services provided by the agency;

(a) the report shall summarize the services provided, such as home and office visits, treatment needs, issues, prognosis, relationship with foster parents, current medical and educational information, and the child's progress toward discharge; if the child is dually diagnosed, the plan to address both diagnoses and the permanency plan shall be included; the reports shall be subdivided into the identified sections by service;

(b) for children in PSD custody, the report shall be provided to the PSD

worker and shall include dates and locations of all professional staff visits with the child;

(c) for children not in PSD custody, the report shall be provided to the child's legal guardian.

**E. Administrative records:** Administrative records include but are not limited to:

(1) personnel records or files as described herein at 8.26.5.21 NMAC;

(2) agency policy and procedure as described herein at 8.26.5.18 NMAC;

(3) personnel policy and procedure as described herein at 8.26.5.20 NMAC;

(4) fiscal records as described herein at 8.26.5.19 NMAC; and

(5) a copy of the agency's license. [8.26.5.25 NMAC - Rp, 8.27.6.16 NMAC, 5/29/09]

#### **8.26.5.26 MAINTENANCE OF RECORDS:**

**A. Foster parent records:** Foster parent care records shall be retained by the agency in locked files for at least ten (10) years from the date of case closure. In the event a foster care agency is closed or goes out of business, the agency shall forward the records of clients transferring to another agency, to the foster care agency with whom the child is placed.

**B. Adoptive parent records:**

(1) Approved cases: Adoption records shall be retained by the agency in locked files for one hundred (100) years from the date of case closure. The agency may preserve records through microfilming or other electronic measures. In the event an agency is closed or goes out of business, the agency shall forward records to PSD for permanent storage.

(2) Denied cases: Agencies shall retain cases for five (5) years after the case is closed.

#### **C. The child's record:**

(1) If the child is adopted the child's record shall be retained by the agency as described above herein at Paragraph (1) of Subsection B of 8.26.5.26 NMAC.

(2) If the child remains in foster care the child's record shall be retained by the agency as described above herein at Subsection A of 8.26.5.25 NMAC.

**D. Administrative records:** An agency shall retain its administrative records for a minimum of seven (7) years from the date the records were created unless an applicable law requires retention for a longer period of time. Upon expiration or revocation of the agency's license or if the agency closes, it shall forward its administrative records to CYFD.

**E. Confidentiality:** Under CYFD's general rulemaking authority

Section 9-2A-7 NMSA, the confidentiality provisions of the New Mexico Children's Code, 32A-3B-22 and 32A-4-33, the specific authority related to certification of foster homes, Section 40-7-4 (D) and the Adoption Act, 32A-5-6 and 32A-5-8 NMSA, all client case records and client identifying information including foster and adoptive families, and applicant files are confidential and may not be publicly disclosed.

(1) Release in response to court order: PSD and agencies may release such files only upon a valid court order provided that confidential criminal and abuse and neglect information may not be released, unless a court order specifically orders such a release.

(2) Release to another agency that is considering a previously licensed family for licensure: An agency that has licensed a foster or adoptive family may release assessment information and the home study to any agency that is considering the foster or adoptive family for licensure, upon receipt of the signed notification by the foster family of its licensure history with previous agencies as set forth in Licensing Requirements for Foster and Adoptive Homes, Paragraph (9) of Subsection B of 8.26.4.9 NMAC.

[8.26.5.26 NMAC - N, 5/29/09]

### 8.26.5.27 REPORTS:

#### A. Semi-annual reports:

An agency shall submit to PSD a semi-annual statistical report of the services provided by the agency.

#### B. Report format:

Semi-annual reports shall be prepared on forms provided by PSD and include all the information required therein, including, but not limited to:

(1) foster home statistics:

(a) number of applications received;

(b) number and types of foster home applicants licensed by type;

(c) number of applicants denied;

(d) number of licenses revoked;

(e) number of applications pending at the end of the reporting period;

(f) number of applications withdrawn;

(g) names of all family members of all homes transferring to other agencies and the receiving agency and the reason for the transfer, should foster children reside in the home, the report shall also document how continuity of care was maintained;

(h) number of foster homes operating under the agency's supervision at the end of the reporting period;

(i) all complaints, incidents, and abuse and neglect reports with complaint's identifying information made regarding

specific homes or the agency, and information regarding resolution of such; and

(j) any other specific data requested by PSD;

(2) foster children statistics:

(a) number of children placed in foster care during the reporting period;

(b) number of foster children discharged from placement during the reporting period;

(c) number of foster children remaining in foster care placement at the end of the reporting period;

(d) number of children removed from one foster home and placed in a different foster home licensed by the agency;

(e) number of children removed from one foster home and placed with another agency's foster home;

(f) number of children removed from one foster home and placed in a hospital, RTC, group home, or shelter during the reporting period;

(g) identity (first name and last initial) and date of placement of those children who have been in foster care for more than six (6) months;

(h) legal custodian of those who have been in foster care for more than six (6) months; and

(i) any other child-specific data requested by PSD;

(3) adoptive home statistics:

(a) number of applications received from prospective adoptive parents during the reporting period;

(b) number of applications denied;

(c) number of applications withdrawn;

(d) number of adoptive studies pending;

(e) number of agency adoptive studies approved and waiting;

(f) number of agency studies not approved;

(g) number of agency adoptive studies withdrawn;

(h) all complaints, with complaint's identifying information, made regarding the agency;

(i) number of pre-placement training held;

(j) number of families receiving post placement services;

(k) number of families receiving post-decree services;

(l) names of homes transferring to other agencies and the reasons given; and

(m) any other specific data requested by PSD.

(4) adoptive children statistics:

(a) number of children freed for adoption;

(b) number of children physically placed with adoptive parents;

(c) number of adoption disruptions;

(d) number of adoptions finalized; and

(e) any other child-specific data requested by PSD;

(5) a list of clients and their status and a separate list of foster parents or adoptive parents who maintain a license of certificate for adoption.

**C. Confidentiality of reports:** Semi-annual reports are not confidential, except that client identifying information and criminal records checks and abuse and neglect checks information, shall not be publically released except as required by a court order

[8.26.5.27 NMAC - Rp, 8.27.6.16 NMAC, 5/29/09]

### 8.26.5.28 E M E R G E N C Y

**RESPONSE PLAN:** As required by the federal Child and Family Services Improvement Act of 2006 and included in CYFD's federal child and family services plan, each agency shall develop and maintain a written emergency response plan. The plan shall be developed within three (3) months of the promulgation of these regulations, or within three (3) months of initial licensure.

#### A. Essential functions:

The agency's plan must assure the agency, in the event of a wide-scale emergency, is capable of performing the following essential functions:

(1) locating and ensuring the safety of children placed with families licensed by the agency and of those families;

(2) locating and ensuring the safety of agency staff;

(3) cooperating with, sharing information, and assisting PSD in providing emergency response as requested; and

(4) ensuring continuity of operations, including maintaining records, continuing payments to providers, communicating with staff and foster care providers, and documenting costs of response efforts.

**B. Content of plan:** The details of each agency's emergency response plan shall be developed by the agency based on its specific characteristics and needs, including the size of staff, the number of families and children served, the geographic location, office facilities and resources, and other factors. Although the details of each plan may vary, the plan shall include:

(1) a safety plan for the office, including evacuation of staff and identification of an alternate location if the office is unavailable;

(2) development of a staff registry, including emergency contact numbers and the identification of and contact infor-

mation for at least two (2) locations (including one out-of-town location) where staff would go in the event a community evacuation is necessary;

(3) a call-back process to notify staff to report for work after hours;

(4) identification of a lead person (incident commander) for emergency response and a liaison to coordinate with other response agencies in the community, including the PS county office;

(5) development of a foster and adoptive parent registry, including emergency contact numbers and the identification of and contact information for at least two (2) locations (including one out-of-town location) where the foster or adoptive family would go in the event a community evacuation is necessary;

(6) a call-in process for foster and adoptive families to report their location and condition and request assistance if necessary;

(7) assistance to foster and adoptive families in developing their own family emergency plans;

(8) a continuity of operations plan addressing how records will be safeguarded, communication will be maintained, activities and costs will be documented, payments will be made, and other business functions continued during and immediately after the emergency;

(9) a plan to assist families and children to recover from the emergency, including reuniting families and children, providing psychosocial support, linking with resources, and other services as needed; and

(10) a recovery plan to reestablish business as usual.

**C. Coordination of plans:** The agency's plan shall be coordinated with the local county emergency operations plan. Assistance in the development of the plan may be available from the county government's emergency management personnel; if not it may be requested from PSD staff.

**D. Training and drills:** All agency staff shall be trained in the emergency response plan and shall participate in regular drills and exercises. Staff shall also participate in county-wide, inter-agency drills and exercises as requested by local emergency management personnel. [8.26.5.28 NMAC - N, 5/29/09]

#### 8.26.5.29 PSD ROLE:

**A. Meetings and training:** PSD retains the right to call meetings or training for licensed adoption and foster care agencies. Agencies shall be responsible for obtaining all information distributed at each meeting regardless of whether or not they attend the meeting.

#### **B. Access to agency**

**information:** Information regarding the operations of PSD licensed agencies shall be available to other state departments and divisions upon receipt of a written request to the extent permitted by New Mexico law.

**C. Oversight and investigation authority:** PSD may conduct inspections and interviews related to referrals of abuse and neglect, licensing violations, or complaints received by PSD related to the operation of the agency. Such inspections and interviews may be conducted at any time, with or without prior notice. In order to evaluate the safety and continuity of care for children placed with the agency, PSD may:

(1) enter and inspect the agency's or applicant's offices and physical facilities;

(2) inspect and copy all agency financial records, files, papers, and correspondence which pertain directly or indirectly to the issuance and maintenance of the license and the issuance and maintenance of foster home licenses or adoption certificates; and

(3) interview, as PSD deems appropriate, agency staff, consultants, contractors, foster parents, adoptive parents, governing body, and any other agency personnel, volunteers and clients.

**D. Investigations of abuse and neglect referrals in foster homes:**

(1) PSD shall investigate all screened-in reports of allegations of abuse or neglect regarding children in accordance with CYFD protective services investigation policy and procedure. If a screened-out report involves a child in PSD custody, the child's worker shall conduct a safety assessment of the placement.

(2) No new placement may be made in the home during a pending investigation. Existing placements in the home shall be evaluated for safety, with a decision for maintaining the placement depending on the continued safety of a child.

(3) The agency shall notify PSD's foster care and adoption bureau of any abuse and neglect report regarding a foster home, therapeutic foster home, or pre-adoptive home licensed by a child placement agency, regardless of the screening decision. The agency shall also notify CYFD's licensing and certification unit of any abuse and neglect report regarding a therapeutic foster home licensed by an agency, regardless of the screening decision.

**E. Investigations of complaints and alleged policy violations:** PSD investigates complaints and alleged violations of agency policy or procedures or CYFD licensing regulations. Allegations of abuse and neglect regarding agency staff are considered alleged policy violations.

(1) Absent an emergency, PSD shall provide an agency notice of a com-

plaint of an alleged agency policy or procedure, or CYFD licensing regulation violation within ten (10) working days from receipt of the complaint or allegation.

(2) Depending on the type and severity of the allegations, PSD may investigate the agency. The investigation may result in no action being taken, the imposition of sanctions, the suspension of an agency's license, or closure of the agency.

(3) PSD shall maintain a listing of the complaints, notification to the agency, and the findings of PSD's investigation in each agency's file. PSD and the agency shall maintain confidentiality regarding the identity of specific individuals who make complaints and any children and foster or adoptive families involved.

**F. Disclosure of complaint information:**

(1) Third parties considering obtaining services through a licensed agency may, upon written request, obtain from PSD the number of and calendar year of the complaints and substantiated allegations regarding the agency.

(2) The identity of the complainant shall not be publically released and shall be protected from disclosure to the extent permitted by law.

(3) Client identifying information is confidential and shall be protected as described herein at Subsection E of 8.26.5.26 NMAC.

**G. Sanctions:** PSD may impose sanctions if it determines that an agency has violated its policies or procedures or any applicable CYFD licensing regulations where an investigation substantiates a complaint against the agency. At PSD's discretion, depending upon the severity of an agency's non-compliance, any of the following actions may be taken.

(1) When there are no safety issues involving children:

(a) Letter of correction: PSD licensing staff may send a letter notifying the agency of the identified deficiencies and instructing the agency to correct the deficiencies by a specific date. The letter of correction shall advise the agency of potential PSD actions should the deficiencies not be corrected, including probation, suspension or revocation of license, or denial of license renewal. If appropriate, the agency shall submit a written corrective action plan, which addresses the deficiencies and follows the time frame provided by PSD. At its discretion, PSD staff may work with the program in the development or revision of the corrective action plan.

(b) Probation with restricted admissions: In addition to requiring a corrective action plan, PSD may restrict the program from accepting any new clients or expanding into additional services until the identified deficiencies are corrected. PSD

shall notify a licensee, in writing, when it intends to sanction the agency by placing the agency on probation with restricted admissions. Notice of probation is sent by registered mail to the address on file. The notice states the deficiencies and reasons for the probation and informs the applicant of the appeal process as described herein at 8.26.5.14.

(2) When safety issues for children exist:

(a) Denial of license renewal or revocation of agency license: PSD may revoke a license or deny renewal of a license based upon deficiencies related to one or all of the following:

(i) abuse, neglect or sexual exploitation of a child pursuant to the New Mexico Children's Code, 32A-4-2(B), (E) (G) and (H), NMSA 1978;

(ii) presence or history of health and safety deficiencies as documented by CYFD in current or previous on-site visits;

(iii) presence or history of license revocation, suspension or denial, penalties or other similar corrective actions taken by a regulatory body or court of competent jurisdiction in New Mexico or other state;

(iv) noncompliance with state, county and municipality health and safety regulations;

(v) records which are out of compliance with the prescribed record content or deficiencies that were present in the last review and have not been corrected.

(3) Suspension, denial of renewal or revocation of license: PSD may suspend or revoke an agency's license as detailed above and if, at any time during the license period, a licensee fails to meet or maintain the licensing requirements or fails to provide information requested by PSD. PSD shall notify a licensee, in writing, of its intent to suspend or revoke a license. Notice shall be served by certified mail, delivered to the address on file, or by personal delivery to the person authorized to accept service on behalf of the agency, at least ten (10) working days prior to suspension or revocation. The notice shall state the reasons for the action, its effective date, and inform the licensee of the appeal process as described herein at 8.26.5.14 NMAC.

(4) Agency responsibility: When PSD suspends or revokes an agency's license for any reason; the agency shall assist PSD in arranging for care, custody and control of any children currently being served, and for the preservation and transfer of records. The agency shall assist in the transfer of a licensed home in good standing to another agency when such would be in the best interests of the children to be placed

in a different home.

[8.26.5.29 NMAC - Rp, 8.27.6.18 NMAC, 5/29/09]

**8.26.5.30 VOLUNTARY AGENCY CLOSURE:** When a licensee closes its agency, the licensee shall notify PSD in writing at least ninety (90) calendar days prior to the agency beginning to move staff, families or children to another agency. The licensee shall provide PSD a written plan summarizing the preparation and arrangements for the care, custody and control of any children being served and the financial plan to ensure timely payments to families. The licensee shall make arrangements for the transfer of records to PSD. [8.26.5.30 NMAC - Rp, 8.27.6.21 NMAC, 5/29/09]

#### **HISTORY OF 8.26.5 NMAC:**

##### **Pre-NMAC History:**

HSSD 75-7, Minimum Requirements for Licensing of Child Placement Agencies, 9/15/75.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 8/22/86.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 1/29/87.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 6/18/87.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 11/18/87.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 8/22/88.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 3/28/89.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 3/20/90.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 9/18/90.

SSD 5.4.0, Substitute Care for Children, Licensing Standards for Foster Homes, 3/15/91.

SSD 7.5.0, Adoption - Child Placement Agency Regulations, 8/22/86.

SSD 7.5.0, Adoption - Child Placement Agency Regulations, 6/18/87.

SSD 7.5.0, Adoption - Child Placement Agency Regulations, 8/22/88.

SSD 5.5.0, Foster Care Child Placement Agency Licensing Regulations, 12/7/89.

##### **History of Repealed Material:**

8 NMAC 27.2, Foster Parenting, filed 6/16/97 - Repealed effective 2/14/2001.

8 NMAC 27.3, Licensing Standards for Foster Care, filed 1/13/97 - Repealed effective

5/29/2009.

8.27.6 NMAC, Child Placement Agency Licensing Standards, filed October 15, 2002 - Repealed effective 5/29/2009.

## **NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT**

### **YOUTH AND FAMILY SERVICES DIVISION**

8.8.7 NMAC, Court Ordered Domestic Violence Offender Treatment Programs, filed July 18, 2007 is repealed effective May 29, 2009 and replaced with 8.8.7 NMAC, Court Ordered Domestic Violence Offender Treatment or Intervention Programs, effective May 29, 2009.

## **NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT**

### **YOUTH AND FAMILY SERVICES DIVISION**

#### **TITLE 8 SOCIAL SERVICES CHAPTER 8 CHILDREN, YOUTH AND FAMILIES GENERAL PROVI- SIONS**

#### **PART 7 COURT ORDERED DOMESTIC VIOLENCE OFFENDER TREATMENT OR INTERVENTION PROGRAMS**

**8.8.7.1 ISSUING AGENCY:**  
New Mexico Children, Youth and Families Department.

[8.8.7.1 NMAC - Rp, 8.8.7.1 NMAC, 05/29/09]

**8.8.7.2 SCOPE:** General public, providers of domestic violence offender treatment or intervention programs, persons convicted of domestic violence, courts, and attorneys.

[8.8.7.2 NMAC - Rp, 8.8.7.2 NMAC, 05/29/09]

**8.8.7.3 STATUTORY AUTHORITY:** NMSA 1978 Sections 30-3-15 and 30-3-16 (2007).

[8.8.7.3 NMAC - Rp, 8.8.7.3 NMAC, 05/29/09]

**8.8.7.4 DURATION:**  
Permanent.

[8.8.7.4 NMAC - Rp, 8.8.7.4 NMAC, 05/29/09]

**8.8.7.5 EFFECTIVE DATE:**  
May 29, 2009, unless a later date is cited at the end of a section.

[8.8.7.5 NMAC - Rp, 8.8.7.5 NMAC, 05/29/09]

**8.8.7.6 OBJECTIVE:** The objective of Chapter 8, Part 7 is to establish the manner in which the department will approve programs to provide court-ordered domestic violence offender treatment or intervention, and will identify approved programs to court personnel. [8.8.7.6 NMAC - Rp, 8.8.7.6 NMAC, 05/29/09]

**8.8.7.7 DEFINITIONS:**

A. "Approved DVOTI program list" means the list compiled by the department consisting of approved DVOTI programs for use by New Mexico courts in ordering domestic violence offenders to complete domestic violence offender treatment or intervention pursuant to NMSA 1978 Sections 30-3-15 and 30-3-16 (2008).

B. "Approved DVOTI program" means a domestic violence offender treatment or intervention program that has been approved by the department to provide domestic violence offender treatment or intervention pursuant to the NMSA 1978 Sections 30-3-15 and 30-3-16 (2008).

C. "Court-ordered domestic violence offender treatment or intervention" means domestic violence offender treatment or intervention ordered by a court pursuant to NMSA 1978 Sections 30-3-15 or 30-3-16 (2007).

D. "Department" means the children, youth and families department.

E. "Domestic violence offender" means a person convicted under NMSA 1978 Section 30-3-15 or 30-3-16 (2008) regardless of whether or not the person received a suspended sentence, a deferred sentence, or a conditional discharge.

F. "Domestic violence offender treatment or intervention (DVOTI)" means services, approved by the department, that address and seek to ameliorate domestic violence perpetration. Such services may, but need not, be provided by licensed therapists.

[8.8.7.7 NMAC - Rp, 8.8.7.7 NMAC, 05/29/09]

**8.8.7.8 APPROVAL OF DVOTI PROGRAMS TO PROVIDE DVOTI SERVICES**

A. Approval is based upon the provider's submission of a formal application to the department, demonstrating the operation of a functioning program that uses evidence-based techniques and effectively serve the target population.

B. In granting approval for the list, the department may rely in part upon its knowledge of services the provider has supplied whether pursuant to contract with the department, or otherwise.

C. The department shall distribute the approved DVOTI program list

to New Mexico tribunals. The department shall notify courts of any additions or deletions to the approved DVOTI program list. [8.8.7.8 NMAC - Rp, 8.8.7.8 NMAC, 05/29/09]

**8.8.7.9 LIST OF APPROVED DVOTI PROGRAMS TO BE COMPILED ANNUALLY**

A. The department shall compile a list of approved DVOTI programs to be distributed to sentencing tribunals annually on or about January 1.

B. DVOTI providers that wish to be included in the approved DVOTI program list must comply with the application and renewal procedures set forth in this regulation.

[8.8.7.9 NMAC - Rp, 8.8.7.9 NMAC, 05/29/09]

**8.8.7.10 CRITERIA FOR APPROVED DVOTI PROGRAMS:**

The department shall approve DVOTI programs that include the following criteria and features:

A. an initial assessment to determine if the domestic violence offender will benefit from participation in the program and a policy in place for notification to the court if a determination is made that an offender will not benefit from the program; the program will provide recommendations for alternative offender treatment to the court pursuant to section 15;

B. a written contract, which must be signed by the domestic violence offender, that sets forth:

(1) attendance and participation requirements;

(2) consequences for failure to attend or participate in the program;

(3) consequences of reoffending while enrolled in the program;

(4) a requirement that a domestic violence offender not be under the influence of alcohol or drugs during a session;

C. strategies to hold domestic violence offenders accountable for their violent behavior;

D. a requirement for group discussions that the participants be limited to members of the same gender;

E. a requirement that offenders under the age of 18 may be enrolled in intervention groups so long as they are separate from adult groups;

F. goals that focus on the cessation of abuse or violence, whether physical or non-physical, and that is mindful of the safety of the victim, current partner and children;

G. ongoing process of assessing for danger during the time the offender is enrolled in the program;

H. a written policy requiring a duty to warn potential victims of

threats of imminent harm and other mandatory reporting requirements designed to protect victim, potential victims and children;

I. an education component for treatment that:

(1) defines physical, emotional, sexual, economic and verbal abuse and techniques for stopping those forms of abuse; and

(2) examines gender roles, socialization, the nature of violence, the dynamics of power and control and the effects of domestic violence on children;

(3) facilitates the offender acknowledging responsibility for abusive actions and consequences of actions;

(a) identifies and offers alternatives to the offender's belief system that facilitate abusive behaviors;

(b) increases the offender's empathic skills to enhance ability to empathize with the survivor/victim;

(c) assures that the offender history of trauma never takes precedence over his/her responsibility to be accountable for violent behavior and potential offense, or be used as an excuse, rationalization, or distraction from being held accountable;

(d) educates the offender on the potential for re-offending and signs of abuse escalation;

(e) assists the offender in developing a written re-offense prevention plan;

(f) increases the offender's understanding of the impact violence on adult intimate victims and children;

(g) educates the offender on the legal ramifications of his/her violence; and

(h) teaches the offender self-management techniques to avoid abusive behavior.

J. a requirement that the program provide monthly written reports to the presiding judge or the domestic violence offender's probation or parole officer regarding:

(1) proof of the domestic violence offender's enrollment in the program;

(2) progress reports that address the domestic violence offender's attendance, fee payments and compliance with other program requirements; and

(3) evaluations of progress made by the domestic violence offender and recommendations as to whether or not to require the offender's further participation in the program;

K. a requirement that all approved domestic violence offender treatment or intervention programs must consist of at least 52 weeks of group sessions lasting no less than ninety minutes each; individual sessions to address crisis management or case management issues will not replace group sessions; and

L. a requirement that all

approved domestic violence offender treatment or intervention programs must maintain a staff to client ratio of 1:12 with the group size limited to no more than 20; and

M. Marriage counseling, family therapy and counseling for couples shall not be a component of an approved domestic violence offender treatment or intervention program.

N. a requirement that DVOTI staff working with offenders receive the following training:

(1) a requirement that prior to facilitating, all group facilitators demonstrate that they have received at least 40 hours of training which includes the dynamics of domestic violence, tactics of abuse, the effects of domestic violence on victims and their children, the relationship between domestic violence and substance abuse, best practices in performing ongoing danger assessments, state and federal laws against domestic violence, cultural diversity, group facilitation skills, and best practices for working with offenders;

(2) a requirement that prior to facilitating, facilitators observe a group by a seasoned facilitator with five or more years of experience.

(3) a requirement that all group facilitators receive a minimum of 8 hours of CYFD approved annual retraining on advanced issues related to offender treatment;

(4) a requirement that the DVOTI maintain documentation that personnel have received the required training.

O. the DVOTI shall make a good faith effort to establish a cooperative working relationship with a local domestic violence victim services provider and that the DVOTI participate to the extent possible in the local coordinated community response team working to reduce domestic violence.

P. a requirement that the group be strictly limited to domestic violence offenders and cannot include other classes of offenders.

[8.8.7.10 NMAC - Rp, 8.8.7.10 NMAC, 05/29/09]

#### **8.8.7.11 APPLICATION PROCEDURES FOR INCLUSION IN THE APPROVED DVOTI PROGRAM LIST**

A. Application packets for inclusion in the annual approved DVOTI program list will be available from the department. Providers must submit a completed application packet for inclusion in the approved DVOTI program list.

B. The application process for inclusion in the annual approved DVOTI list shall be separate from, and shall not be influenced by, any requests for pro-

posals or contractual awards issued by the department.

[8.8.7.11 NMAC - Rp, 8.8.7.11 NMAC, 05/29/09]

#### **8.8.7.12 EVALUATION OF APPLICATIONS FOR INCLUSION IN THE APPROVED DVOTI PROGRAM LIST**

A. Applications shall be evaluated for approval by the department.

B. The evaluation process may include a component based upon prior years' performance, and whether or not concerns from prior years have been satisfactorily addressed and corrected.

C. The evaluation process may include a component based upon feedback from local courts and DVOTI program participants.

D. Geographic coverage areas. The department shall seek to identify providers who can provide approved DVOTI treatment at locations within a reasonable commute for all geographic areas within the state. However all approved DVOTI programs must satisfy the minimum criteria.

E. The evaluation shall not include any preference based on the provider's current or prior contractual agreements with the department, nor absence thereof.

[8.8.7.12 NMAC - Rp, 8.8.7.12 NMAC, 05/29/09]

#### **8.8.7.13 NOTIFICATION TO PROGRAMS OF EVALUATION RESULTS**

A. DVOTI program applicants shall be notified by the department whether they have been selected for inclusion on the annual approved DVOTI program list. If the provider is not selected, the notification shall state the reasons for non-selection.

B. A DVOTI program whose application was not selected for inclusion on the annual approved DVOTI program list may re-apply for inclusion after correcting the deficiencies identified by the department. The program must establish that the reasons for non-selection have been satisfactorily corrected.

C. The department will evaluate re-submitted applications as promptly as possible; however, staffing priority will be given to the evaluation and maintenance of programs already identified on the current approved DVOTI provider list.

[8.8.7.13 NMAC - Rp, 8.8.7.13 NMAC, 05/29/09]

#### **8.8.7.14 DISTRIBUTION OF APPROVED DVOTI PROVIDER LIST**

A. The department shall distribute the approved DVOTI program list annually on or about January 1, to sentencing courts, public defenders, district attorneys, DVOTI providers, and other interested parties.

B. The department shall promptly update the approved DVOTI program list to identify newly-approved providers and providers who have been removed from the list.

C. The approved DVOTI provider list, as updated, shall be available on the department's website: [www.cyfd.org](http://www.cyfd.org).

[8.8.7.14 NMAC - Rp, 8.8.7.14 NMAC, 05/29/09]

#### **8.8.7.15 SERVICES PURSUANT TO COURT ORDER**

A. Approved DVOTI programs are to provide domestic violence offender treatment or intervention in accordance with the rule. Court orders should specify that the domestic violence offender complete the approved DVOTI program.

B. If the approved DVOTI program assesses that alternative services are appropriate for an offender, the program shall notify the court so that the court order may be amended. The recommended alternative services shall be deemed to constitute the approved DVOTI program for that offender.

C. In the event a program is de-listed, domestic violence offenders should be re-directed to complete treatment or intervention with another approved DVOTI program.

[8.8.7.15 NMAC - Rp, 8.8.7.15 NMAC, 05/29/09]

#### **8.8.7.16 MONITORING OF APPROVED DVOTI PROGRAMS**

A. The department shall conduct ongoing monitoring of approved DVOTI programs.

B. Approved DVOTI programs must allow the department to conduct site visits during regular business hours, to determine compliance with approved criteria.

C. The department shall establish a schedule by which it will conduct site visits. In no event shall site visits be conducted less than one time during any two-year period.

D. Approved providers will be required to report and verify recommendations for alternative offender treatment or intervention.

E. Approved DVOTI providers must maintain data and records as required by the department.

F. Judges, district attorneys, public defenders, other court person-

nel, domestic violence offenders, their attorneys and families, victim advocates and domestic violence service providers will be encouraged to provide feedback regarding the efficacy of approved DVOTI programs, to the programs and to the department.

G. The department will investigate complaints as promptly as possible.

H. The department may require approved DVOTI providers to take corrective action in response to the department's ongoing monitoring and evaluation of feedback and complaints. Failure to implement corrective action may result in de-listing of the DVOTI program.

[8.8.7.16 NMAC - Rp, 8.8.7.16 NMAC, 05/29/09]

#### **8.8.7.17 DE-LISTING OF PROGRAMS; APPEAL RIGHTS**

A. Programs may be removed from the approved DVOTI provider list upon a determination by the department that:

(1) the program is not providing the services substantially as described in its approved application for inclusion in the annual approved DVOTI provider list;

(2) the program has requested to be removed from the list;

(3) failure to update information;

or  
(4) failure to implement corrective action required by the department.

B. A program that is involuntarily removed from the annually-approved DVOTI provider list, and which wishes to appeal its removal, must request an administrative hearing within 10 business days of receipt of the notice of removal. An appeal hearing shall be conducted by an administrative hearing officer appointed by the department secretary in the manner prescribed by, 8.8.4 NMAC.

[8.8.7.17 NMAC - Rp, 8.8.7.17 NMAC, 05/29/09]

#### **8.8.7.18 ANNUAL RENEWAL:**

Renewal shall not be automatic from year to year. Each approved DVOTI program must submit an annual application packet and data report, which may be obtained from the department.

[8.8.7.18 NMAC - Rp, 8.8.7.18 NMAC, 05/29/09]

#### **HISTORY OF 8.8.7 NMAC:**

History of Repealed Material:

8.8.7 NMAC, Court Ordered Domestic Violence Offender Treatment Programs, filed 7/18/2007 - Repealed effective 05/29/09.

### **NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS LIBRARY DIVISION**

4.5.2 NMAC, State Grants in Aid for Public Libraries (filed 06/19/2000) is repealed effective 07/01/2009 and replaced by 4.5.2 NMAC, State Grants in Aid for Public Libraries, effective 07/01/2009.

### **NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS LIBRARY DIVISION**

#### **TITLE 4 C U L T U R A L RESOURCES CHAPTER 5 STATE LIBRARY PART 2 STATE GRANTS IN AID TO PUBLIC LIBRARIES**

#### **4.5.2.1 ISSUING AGENCY:**

Department of Cultural Affairs, New Mexico State Library Division.

[4.5.2.1 NMAC - Rp, 4.5.2.1 NMAC, 7/1/2009]

#### **4.5.2.2 SCOPE:** Public

libraries and developing public libraries.

[4.5.2.2 NMAC - Rp, 4.5.2.2 NMAC, 7/1/2009]

#### **4.5.2.3 S T A T U T O R Y**

**AUTHORITY:** Section 18-2-4 I NMSA 1978 directs the state librarian to make rules and regulations necessary to administer the division and as provided by law. Section 18-2-4 B NMSA 1978 directs the state librarian to administer grants-in-aid and encourage local library services and generally promote an effective statewide library system.

[4.5.2.3 NMAC - Rp, 4.5.2.3 NMAC, 7/1/2009]

#### **4.5.2.4 D U R A T I O N :**

Permanent.

[4.5.2.4 NMAC - Rp, 4.5.2.4 NMAC, 7/1/2009]

#### **4.5.2.5 EFFECTIVE DATE:**

July 1, 2009 unless a later date is cited at the end of a section.

[4.5.2.5 NMAC - Rp, 4.5.2.5 NMAC, 7/1/2009]

#### **4.5.2.6 OBJECTIVE:**

The objective of this rule is to describe the state grants in aid to public libraries program (hereinafter "the library grants program") and to establish criteria for reviewing and awarding the grants. The purpose of the library grants program is to provide financial assistance that encourages and supports

public library service by public libraries and developing public libraries. The library grants program is intended to supplement and encourage local effort in providing local library service. The library grants program consists of developing library grants and public library grants that may be used for: library collections; library staff salaries; library staff training; library equipment; or other operational expenditures associated with delivery of library services. [4.5.2.6 NMAC - Rp, 4.5.2.6 NMAC, 7/1/2009]

#### **4.5.2.7 DEFINITIONS:**

##### **A. "Annual report"**

means a report sent once a year from a public library to the state library. An annual report shall:

(1) provide information in the time, manner and form prescribed by the state library;

(2) cover one fiscal year's activities including income, expenditures, statistics on collections and services, and compliance with library grants program criteria;

(3) be certified by the library as to the accuracy, completeness, and truthfulness of the information provided;

(4) be approved by and on file at the state library.

**B. "Basic developing library services"** means free services provided by a developing library to its legal service area that include circulating collections; basic reference collection and services; educational programs and interlibrary loan services.

**C. "Basic public library services"** means free services provided by a public library to its legal service area that include circulating collections; basic reference collection and services; educational programs; interlibrary loan services; and public access computers connected to the internet.

**D. "Basic reference collection"** means materials listed in the basic reference list published periodically by the state library.

**E. "Branch/bookmobile"** means an auxiliary service administered by a public or developing library that provides the following:

(1) separate quarters from the main library;

(2) a permanent circulating and basic reference collection;

(3) staff dedicated to the branch or bookmobile;

(4) open 20 hours per week on an annual basis.

**F. "Collection development policy"** means guidelines used by library staff for making decisions about budget, selection, management and preservation of library collections.

**G. "Community analysis and needs assessment"** means an evaluation of the library's legal service area; its current and future needs; and the library's role in meeting those needs.

**H. "Developing library"** means a New Mexico organization that offers basic developing library services within its legal service area.

(1) A developing library is established either:

(a) through an ordinance or legal resolution of a subdivision of state government;

(b) by a contract between a private entity and a subdivision of state government;

(c) by an Indian nation; or

(d) as a non-profit corporation.

(2) A developing library is:

(a) open a minimum of fifteen hours per week on an annual basis;

(b) open a minimum of two days each week on an annual basis; and

(c) clearly posts the hours of operation on or near the library.

**I. "Fiscal year"** means July 1 through June 30.

**J. "Legal service area"** means the geographic area for which a library has been established to offer services and from which, or on behalf of which, the library derives income. The legal service area may also include any areas served under written agreement or contract for which the library is the primary service provider. The legal service area includes the entire service area of the library or library system and not merely the general service area of any one branch. The most recent United States census determines the population of the legal service area if the population figures are given separately for that area. If the census does not have a discreet population figure for the legal service area, then the state library and the library whose population is at issue shall work together to arrive at a mutually acceptable population figure using the most recent census data. If this is not possible, the state library in its sole discretion shall determine the population for the library's legal service area.

**K. "Library board"** means a planning and advisory group for the library comprised of representative members of the community.

**L. "Library collections"** means library holdings for public use. Collections can include books, videos, sound recordings, and electronic media.

**M. "Library equipment"** means equipment associated with the delivery of library services.

**N. "Library staff"** means employees or volunteers whose time is dedicated to delivery of library services.

**O. "Local acquisitions expenditures"** means an amount expended for library collections from any source other than state funding such as library grants program funds or general obligation bond funds. The source of the money may include municipal funds, county funds, tribal funds, or money acquired through donations, fund-raising or grants. This amount shall not include in-kind contributions.

**P. "Long range plan"** means a detailed program to ensure that library services meet the current and future needs of the legal service area. The plan shall include a vision and mission statement as well as goals and objectives.

**Q. "Public library"** means a New Mexico organization that offers basic public library services within its legal service area.

(1) A public library is established either:

(a) through an ordinance or legal resolution of a subdivision of state government;

(b) by a contract between a private entity and a subdivision of state government;

(c) by Indian nation; or

(d) as a non-profit corporation.

(2) A public library is:

(a) open a minimum of 25 hours per week on an annual basis; and

(b) clearly posts the hours of operation on or near the library.

[4.5.2.7 NMAC - Rp, 4.5.2.7 NMAC, 7/1/2009]

#### **4.5.2.8 DEVELOPING LIBRARY GRANT:**

**A. Purpose:** To supplement an eligible developing library's budget for up to five years until it meets the minimum requirements for a public library grant.

**B. Description:** The grant awards a minimum of \$1,500 to each eligible developing library. The grant funds shall be used for library collections; library staff salaries; library staff training; library equipment; or other operational expenditures associated with delivery of library services.

**C. Criteria for reviewing and awarding developing library grants:** The staff of the state library shall award developing library grants to developing libraries that have met the following criteria.

(1) Library shall be a developing library.

(2) Library shall have filed an annual report with the state library.

(3) Library shall have received no more than five developing library grants.

(4) Library shall demonstrate financial support from sources other than

state funding. A library shall have minimum annual local acquisitions expenditures based upon a per capita amount expended per legal service area population. The schedule of local acquisitions expenditures for a developing library is: \$0.25 per capita in its first year of participation; \$0.50 per capita in its second year; \$0.75 per capita in its third year; \$1.00 per capita in its fourth year; and \$1.25 per capita in its fifth year.

(5) Library shall keep adequate financial and other records to support its eligibility for receiving library grants. At the sole discretion of the state library, such records may be audited annually, or as needed, by the state library or its designated representative.

(6) Library shall be in compliance with all relevant state statutes affecting public libraries.

(7) Library shall have met all requirements for developing library grants in the required timeframes.

(8) A developing library shall have a designated director.

(9) A developing library shall have a library board that meets at least two times a year. The meetings shall be held in accordance with the state open meetings law.

[4.5.2.8 NMAC - Rp, 4.5.2.14 NMAC, 7/1/2009]

#### **4.5.2.9 PUBLIC LIBRARY GRANT:**

**A. Purpose:** To supplement an eligible public library's budget.

**B. Description:** The grants are awarded to all eligible public libraries, branches, and bookmobiles according to the formula detailed in this section after distribution to developing libraries. Each public library shall receive one (1) share in the allocation of funds; each branch or bookmobile shall receive one-half (.5) share in the allocation of funds. The grant funds shall be used for library collections; library staff salaries; library staff training; library equipment; or other operational expenditures associated with delivery of library services.

**C. Criteria for reviewing and awarding public library grants:** The staff of the state library shall review and award public library grants to public libraries that have met the following criteria:

(1) Library shall be a public library.

(2) Library shall have filed an annual report with the state library.

(3) Library shall have been in continuous existence and operation for at least one year.

(4) Library shall demonstrate financial support from sources other than state funding. Library shall have a mini-

num annual local acquisitions expenditure of \$1.50 per capita of the legal service area population.

(5) Library shall keep adequate financial and other records to support its eligibility for receiving library grants. At the sole discretion of the state library, such records may be audited annually, or as needed, by the state library or its designated representative.

(6) Library shall be in compliance with all relevant state statutes affecting public libraries.

(7) Library shall have met all requirements for public library grants in the required timeframes.

(8) Library shall have a community analysis and assessment, a long-range plan and a collection development policy that are reviewed and updated on a regular basis as determined by the library.

(9) A public library shall have a library board that meets at least two times a year. The meetings shall be held in accordance with the state open meetings law. [4.5.2.9 NMAC - Rp, 4.5.2.8 NMAC, 7/1/2009]

#### 4.5.2.10 SOURCE OF FUNDS:

The state legislature is the sole source for the state grants-in-aid to public libraries money. The state library, in its appropriation request to the New Mexico state legislature each year, shall request an amount of money for distribution through the fund known as the state grants-in-aid to public libraries.

[4.5.2.10 NMAC - Rp, 4.5.2.15 NMAC, 7/1/2009]

#### 4.5.2.11 DISTRIBUTION OF FUNDS:

Money from the library grants program shall be distributed in the following manner:

**A. Notification:** When the state library's budget is finalized by the department of cultural affairs, the state library shall calculate the grant award for each library. The state library shall send a letter of notification to all eligible public libraries informing them of their grant.

**B. Invoice:** Each library shall submit an invoice to the state library requesting payment within 120 days of the letter of notification. Upon receipt of the invoice, the state library shall process the invoice for payment. If a library does not submit the invoice within the required time period, it shall relinquish the grant award and the funds shall revert back to the state library's budget.

**C. Allocation:** Eligible developing libraries shall receive a minimum grant of \$1,500. The remaining funds shall be divided equally among all eligible public libraries, branches and bookmobiles

according to the following formula: each public library shall receive one (1) share in the allocation of funds; each branch or bookmobile shall receive one-half (.5) share in the allocation of funds.

#### D. Maintenance of effort:

Library's local budget shall not be reduced by its governing body as a result of eligibility for the library grants program. Upon demonstrated evidence that such a reduction has occurred, the library shall be ineligible to receive funds from the library grants award for one year after the reduction has occurred.

[4.5.2.11 NMAC - Rp, 4.5.2.16 NMAC, 7/1/2009]

#### 4.5.2.12 LIMITATION ON FUNDS:

**A.** The amount received and distributed may vary each year depending on the allocation of the state legislature.

**B.** The state library, in its sole discretion, may alter the amount of the library grants if the state legislature allocates an amount that is different than the state library request for the library grants program.

**C.** Funds shall be expended in the fiscal year in which they are awarded.

[4.5.2.12 NMAC - Rp, 4.5.2.17 NMAC, 7/1/2009]

#### 4.5.2.13 ADMINISTRATION OF FUNDS:

**A.** The state library shall administer the library grants program.

**B.** Awards to Indian nations and non-profit entities shall be made by contract or agreement between the entity and the state library.

[4.5.2.13 NMAC - Rp, 4.5.2.18 NMAC, 7/1/2009]

#### 4.5.2.14 APPEALS:

**A.** In the event that any library is denied a library grant by the state library, that library may appeal the decision of the state library.

**B.** Such appeal shall be made in writing to the state librarian within thirty (30) days of notification of denial of funds. The appeal should state all facts and conditions relating to the appeal.

**C.** The appeal shall be considered and ruled upon by the state librarian and a response shall be made within ninety (90) days in writing to the appealing party.

[4.5.2.14 NMAC - N, 7/1/2009]

#### HISTORY OF 4.5.2 NMAC:

##### Pre-NMAC History:

NMSL 67-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, Revised

April 19, 1967, filed 5/3/67.

NMSL 67-2, State Grants-In-Aid To Public Libraries, Rules and Regulations, Amended August 28, 1967, filed 8/30/67.

NMSL 68-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, Amended August 28, 1967, filed 12/19/68.

NMSL 69-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, Revised May 26, 1969, filed 6/20/69.

NMSL 69-2, State Grants-In-Aid To Public Libraries, Rules and Regulations; Revised September 16, 1969, filed 10/9/69.

NMSL 70-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, Revised February 26, 1970, filed 4/27/70.

NMSL 73-4, State Grants-In-Aid To Public Libraries, Rules and Regulations, June 1973, filed 7/10/73.

NMSL 74-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, July 19, 1974, filed 8/16/74.

NMSL 75-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, 1975, filed 6/9/75.

NMSL 76-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, March 31, 1976, filed 4/27/76.

NMSL 77-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, January 21, 1977, filed 2/4/77.

NMSL Rule 79-1B, State Grants-In-Aid To Public Libraries, Rules and Regulations, June 11, 1979, filed 6/25/79.

NMSL 79-3, State Grants-In-Aid To Public Libraries, Rules and Regulations, July 1, 1979, filed 7/27/79.

NMSL 81-2, State Grants-In-Aid To Public Libraries, Rules and Regulations, May 11, 1981, filed 5/12/81.

NMSL 89-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, filed 10/23/89.

NMSL 93-1, State Grants-In-Aid To Public Libraries, Rules and Regulations, filed 1/28/93.

#### History of Repealed Material:

NMSL 93-1, State Grants-In-Aid To Public Libraries, Rules and Regulations (filed 1/28/93), repealed 7/1/2000.

4.5.2 NMAC, State Grants-In-Aid To Public Libraries (filed 6/19/2000), repealed 7/1/2009.

#### Other History:

NMSL 93-1, State Grants-In-Aid To Public Libraries, Rules and Regulations (filed 1/28/93) was replaced by 4.5.2 NMAC, State Grants In Aid To Public Libraries, effective 7/1/2000.

4.5.2 NMAC, State Grants In Aid To Public Libraries (filed 6/19/2000) was replaced by 4.5.2 NMAC, State Grants In Aid To Public Libraries, effective 7/1/2009.

**NEW MEXICO BOARD OF DENTAL HEALTH CARE**

This is an amendment to 16.5.5 NMAC Section 8, effective 06/10/09.

**16.5.5.8 FEES:**

- A. All fees are non-refundable.
- B. Application for licensure by examination fee is [~~\$500~~] \$600, which includes the initial licensing period.
- C. Application for licensure by credential fee is [~~\$750~~] \$850, which includes the initial licensing period.
- D. An applicant who does not obtain a passing score on the jurisprudence exam must submit an additional fee of \$100 to re-take the exam.
- E. Triennial renewal fee for all dental licensees is [~~\$450~~] \$550.
  - (1) Impaired fee is \$30 per triennial renewal period plus renewal fee.
  - (2) Late renewal fee of \$100 after July 1 through September 1 plus renewal and impaired fees.
  - (3) Cumulative late fee of \$10 per day from August 1 to the date of the post-mark or hand-delivery to the board office plus renewal, late and impaired fees.
- F. Triennial renewal fee for inactive license is \$90.
- G. Temporary license fees:
  - (1) forty-eight hour license, application fee of \$50, license fee of \$50;
  - (2) six month license, application fee of \$100, license fee of \$200;
  - (3) twelve month license, application fee of \$100, license fee of \$300.
- H. Anesthesia permit fees:
  - (1) nitrous oxide permit fee is \$25;
  - (2) conscious sedation I permit fee is \$25;
  - (3) conscious sedation II permit fee is \$300;
  - (4) deep sedation and general anesthesia permit fee is \$300.
- I. Reinstatement fee is \$400.
- J. Application for licensure for inactive status is \$50.
- K. Non-dentist owner fees.
  - (1) Application for licensure fee is \$300, which includes the initial licensing period.
  - (2) Triennial renewal fee of \$150.
  - (3) Late renewal fee of \$100 after July 1 through September 1 plus renewal fee.
  - (4) Cumulative late fee of \$10 per day from August 1 to the date of the post-mark or hand-delivery to the board office plus renewal and late fee.
- L. Administrative and duplication fees:

- (1) duplicate license fee is \$25;
- (2) multiple copies of the statute or rules are \$10 each;
- (3) copy fees are \$0.25 per page;
- (4) list of current dental licensees is [~~\$250~~] \$300; an annual list of current licensees is available to the professional association upon request at no cost; and
- (5) mailing labels of current dental licensees is \$300.
  - [10-21-70, 3-14-73, 4-11-81, 3-7-88, 4-12-92, 3-16-94, 5-31-95, 9-30-96, 12-15-97, 5-28-99, 8-16-99; 16.5.5.8 NMAC - Rn & A, 16 NMAC 5.5.8, 06-14-01; A, 5-31-02, A, 03-06-05; A, 04-17-06 A, 07-16-07; A, 07-17-08; A, 06-10-09]

**NEW MEXICO BOARD OF DENTAL HEALTH CARE**

This is an amendment to 16.5.18 NMAC Section 8, effective 06/10/09.

**16.5.18.8 FEES:**

- A. All fees are non-refundable.
- B. Application fee for licensure by examination is [~~\$250~~] \$350, which includes the initial licensing period.
- C. Application fee for licensure by credentials is [~~\$300~~] \$400, which includes the initial licensing period.
- D. An applicant who does not obtain a passing score on the jurisprudence exam must submit an additional fee of \$50 to re-take the exam.
- E. Triennial renewal fee for all dental hygienist licensee is [~~\$225~~] \$325:
  - (1) impaired fee is \$15 per triennial renewal period plus renewal fee;
  - (2) late renewal fee of \$100 after July 1 through September 1, plus renewal and impaired fees;
  - (3) cumulative late fee of \$5 per day from August 1 to the date of the post-mark or hand-delivery to the board office plus renewal, late and impaired fees.
- F. Fees for collaborative practice:
  - (1) application for certification for collaborative practice fee is \$150;
  - (2) renewal of certification for collaborative practice fee is \$50 at the time of each triennial license renewal; the initial fee will be prorated at \$20 per full year of certification.
- G. Fees for temporary licenses and application:
  - (1) forty-eight hour license, application fee of \$50, license fee of \$50;
  - (2) six month license, application fee of \$100, license fee of \$100;
  - (3) twelve month license, application fee of \$100, license fee of \$150.
- H. Application for certifi-

cation in local anesthesia fee:
 

- (1) by examination - \$40;
- (2) by credentials - \$100 for application and credential review.

- I. Reinstatement fee is \$200.
- J. Application for licensure for inactive status is \$50.
- K. Administrative fees:
  - (1) duplicate license fee is \$25;
  - (2) multiple copies of the statute or rules are \$10 each;
  - (3) copies cost \$0.25 per page;
  - (4) list of current dental hygiene licensees is [~~\$250~~] \$300; an annual list of current licensees is available to the professional association upon request at no cost; and
  - (5) mailing labels of current dental hygiene licensees is \$300.
    - [3-14-73, 4-11-81, 3-7-88, 3-28-91, 5-31-95, 12-15-97, 8-16-99; 16.5.18.8 NMAC - Rn & A, 16 NMAC 5.18.8, 06-14-01; A, 9-30-02; A, 12-30-02; A, 03-06-05; A, 04-17-06; A, 04-16-08; A, 07-17-08; A, 06-10-09]

**NEW MEXICO BOARD OF DENTAL HEALTH CARE**

This is an amendment to 16.5.32 NMAC Section 8, effective 06/10/09.

**16.5.32.8 FEES:**

- A. all fees are non-refundable;
- B. application fee: [~~\$25.00~~] \$50;
- C. examination fee not to exceed \$100 per exam;
- D. triennial renewal fee: [~~\$45.00~~] \$50;
- E. late penalty fee: \$25.00;
- F. duplicate certificate fee: \$10.00;
- G. list of current certificate holders: [~~\$250~~] \$300; an annual list of current certificate holders is available to the professional association upon request at no cost;
- H. labels of current certificate holders: \$300;
- I. reinstatement fee: \$15.00;
- J. DXTR rental fee, per day: \$15.00;
- K. copies cost \$0.25 per page.
  - [9/7/84, 3/7/88, 4/12/92, 5/31/95, 9/30/96; 16.5.32.8 NMAC - Rn, 16 NMAC 5.32.8, 04/17/06; A, 07-16-07; A, 07-17-08; A 06-10-09]

**NEW MEXICO  
ENVIRONMENT  
DEPARTMENT**

The following has been repealed by the Secretary of the New Mexico Environment Department:

20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration (filed 10/27/03), repealed 6/15/09.

**NEW MEXICO  
ENVIRONMENT  
DEPARTMENT**

**TITLE 20 ENVIRONMENTAL  
PROTECTION  
CHAPTER 5 P E T R O L E U M  
STORAGE TANKS  
PART 17 C O R R E C T I V E  
ACTION FUND ADMINISTRATION**

**20.5.17.1 ISSUING AGENCY:**  
New Mexico Environment Department.  
[20.5.17.1 NMAC - Rp, 20.5.17.1 NMAC,  
6/15/09]

**20.5.17.2 SCOPE:** This part applies to owners and operators of storage tanks as provided in 20.5.1 through 20.5.16 NMAC and as provided in 20.5.1 NMAC, contractors, offerors, and designated representatives, and to all payments made by the department to or on behalf of storage tank owners and operators under the Ground Water Protection Act. If the owner and operator are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of noncompliance.  
[20.5.17.2 NMAC - Rp, 20.5.17.2 NMAC,  
6/15/09]

**20.5.17.3 S T A T U T O R Y  
AUTHORITY:** 20.5.17 NMAC is adopted by the Secretary of Environment pursuant to the provisions of the Department of Environment Act, Sections 9-7A-1 through 9-7A-15 NMSA 1978 and the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978.  
[20.5.17.3 NMAC - Rp, 20.5.17.3 NMAC,  
6/15/09]

**20.5.17.4 D U R A T I O N :**  
Permanent.  
[20.5.17.4 NMAC - Rp, 20.5.17.4 NMAC,  
6/15/09]

**20.5.17.5 EFFECTIVE DATE:**  
June 15, 2009, unless a later date is indicat-

ed in the rule history note at the end of a section.

[20.5.17.5 NMAC - Rp, 20.5.17.5 NMAC,  
6/15/09]

**20.5.17.6 OBJECTIVE:** The purpose of 20.5.17 NMAC is to establish the procedures for administering and making payments from the corrective action fund (fund) created by the Ground Water Protection Act (act), Sections 74-6B-1 through 74-6B-14 NMSA 1978, including procedures for:

- A. payment of the costs of a minimum site assessment in excess of ten thousand dollars (\$10,000), or in excess of lesser amounts as permitted by the act;
  - B. payment of the costs of corrective action other than the minimum site assessment;
  - C. determinations of compliance with the act;
  - D. determinations of eligibility of costs for payment;
  - E. competitive bidding for corrective action work; and
  - F. disposition of remediation equipment acquired through the fund.
- [20.5.17.6 NMAC - Rp, 20.5.17.6 NMAC,  
6/15/09]

**20.5.17.7 DEFINITIONS:**  
A. Terms used in this part shall have the meanings given to them in the Ground Water Protection Act and 20.5.1 NMAC except as provided in Subsection B of this section.

B. As used in 20.5.17 NMAC:

- (1) "cost-effectiveness" means completing tasks in a manner that is economical in terms of goods or services received for the money spent;
- (2) "major remediation equipment" means any transportable unit or system which has been acquired specifically for remediation using the corrective action fund and which the department must inventory pursuant to Section 12-6-10 NMSA 1978;
- (3) "pay for performance" means payment of a previously approved amount based on completion or achievement of previously determined criteria including but not limited to a given task or set of tasks, specified reductions in contaminant levels, or achievement of other measurable milestones, as approved by the department;
- (4) "payment" means payment from the fund to a person that the owner or operator has assigned the right of reimbursement or reimbursement from the fund to an owner or operator for the costs of corrective action;
- (5) "phase of corrective action" means any one of the following activities, required by 20.5.12 or 20.5.13 NMAC:

(a) minimum site assessment (MSA), as defined in 20.5.1.7 NMAC and tier 1 evaluation and report;

(b) secondary investigation and report, tier two evaluation and report, or tier three evaluation and report, which are known as phase 1;

(c) interim removal of non-aqueous phase liquid or contaminated soil, which is known as phase 2;

(d) development of a conceptual and final remediation plan or a monitored natural attenuation plan, which are known as phase 3;

(e) implementation of the remediation plan, which is known as phase 4; or

(f) operating, monitoring, maintaining and reporting under the implemented remediation plan or monitoring and reporting under the approved monitored natural attenuation plan, which are known as phase 5;

(6) "proposal" means an offer to complete work submitted in response to given specifications issued for a responsible party-lead site or for a state-lead site;

(7) "resident business" means:

(a) a business enterprise which is authorized to do and is doing business under the laws of New Mexico and which maintains its principal place of business in New Mexico, or has staffed an office and has paid applicable New Mexico taxes for two years prior to the awarding of the proposal and has five or more employees who are residents of New Mexico, or is an affiliate of a business which meets either of these two requirements; as used in this paragraph, "affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the qualifying business through ownership of voting securities representing a majority of the total voting power of the entity; or

(b) a business enterprise, including a sole proprietorship, partnership or corporation, that offers for sale or lease or other form of exchange, goods, commodities or services that are substantially manufactured, produced or assembled in New York state, or, in the case of construction services, has its principal place of business in New York state;

(8) "responsible party-lead site" means a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs, as distinct from a site where the state takes corrective action;

(9) "specifications" means a detailed written statement of particulars prescribing corrective action to be taken, conditions to be met, materials to be used, or standards of workmanship to which something is to be built, installed, or operated, which is provided to prospective contrac-

tors on responsible party-lead sites and state-lead sites;

(10) "state-lead site" means a site where the department takes corrective action using the fund because the owner and operator are unknown, unable or unwilling to take corrective action as described in 20.5.15.9 NMAC or because the department determines that a single entity is necessary to lead the corrective action;

(11) "technical merit" means those characteristics of a proposal including but not limited to strategies, expertise, methods, materials and procedures meeting the specifications included in a request for proposals.

[20.5.17.7 NMAC - Rp, 20.5.17.7 NMAC, 6/15/09]

**20.5.17.8 CONSTRUCTION:**

This part shall be liberally construed to effectuate the purposes of the Ground Water Protection Act and shall be construed, to the extent possible, so as not to conflict with the Hazardous Waste Act or 20.5.1 through 20.5.16 NMAC.

[20.5.17.8 NMAC - Rp, 20.5.17.107 NMAC, 6/15/09]

**20.5.17.9 SEVERABILITY:**

If any section or application of this part (20.5.17 NMAC) is held invalid, the remainder of this part (20.5.17 NMAC) or its application to other persons or situations shall not be affected.

[20.5.17.9 NMAC - Rp, 20.5.17.108 NMAC, 6/15/09]

**20.5.17.10 EFFECT ON OTHER REGULATIONS:**

This part does not relieve any owner or operator of the obligation to comply with any federal or state laws or regulations, including 20.5 NMAC.

[20.5.17.10 NMAC - Rp, 20.5.17.109 NMAC, 6/15/09]

**20.5.17.11 COMPLIANCE DETERMINATIONS:**

A. The department shall make compliance determinations in the following circumstances.

(1) Corrective action by owner or operator. Pursuant to Section 74-6B-13 NMSA 1978, in order to be eligible for payment of corrective action costs other than those costs associated with a minimum site assessment, the owner or operator shall be in compliance with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, as outlined in 20.5.17.12 NMAC, during the owner or operator's term of ownership or operation for all storage tanks owned or operated at the site where the corrective action was or is being taken. Compliance for underground storage tanks (USTs) shall be determined for the period

from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for above-ground storage tanks (ASTs) shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

(2) Corrective action by the department. Before bringing an action in district court against an owner or operator to recover expenditures from the fund incurred by the department to take corrective action at a site, the department shall determine, in accordance with 20.5.17.12 NMAC, whether the owner or operator has complied with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, during his term of ownership or operation for all storage tanks owned or operated at the site. Compliance for USTs shall be determined for the period from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for ASTs shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

B. The owner or operator shall request a compliance determination before submitting the initial request for payment of the costs of corrective action, other than the costs of an MSA. Once the department has completed an initial compliance determination at the owner or operator's request, it may initiate and make separate compliance determinations at one or more phases of corrective action, other than an MSA, for which payment is requested. If the department determines that a tank owner or operator is not in compliance with 20.5.17.12 NMAC, the tank owner or operator will be ineligible for payment of corrective action costs, other than an MSA.

C. No compliance determination is necessary when, pursuant to Section 74-6B-13 NMSA 1978, an owner or operator applies to the department for payment of MSA costs exceeding the deductible. However, the department shall determine prior to payment that the work performed meets the definition of an MSA provided in 20.5.1.7 NMAC.

[20.5.17.11 NMAC - Rp, 20.5.17.200 NMAC, 6/15/09]

**20.5.17.12 DETERMINATION OF COMPLIANCE UNDER SECTION 74-6B-8 NMSA 1978:**

A. For sites where all USTs were removed or properly abandoned prior to March 7, 1990, and for sites where all ASTs were removed or properly abandoned prior to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.17.11 NMAC shall include findings as to whether the owner or operator

has:

(1) paid all storage tank fees required by Section 74-4-4.4 NMSA 1978, and, for all storage tanks removed or properly abandoned prior to March 7, 1990, a two hundred (\$200) fee per site;

(2) conducted a minimum site assessment as defined in 20.5.1.7 NMAC; and

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring.

B. For sites where USTs were not removed or properly abandoned prior to March 7, 1990, or where ASTs were not removed or properly abandoned prior to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.17.11 NMAC shall include findings as to whether the owner or operator has:

(1) paid all storage tank fees required by Sections 74-4-4.4 and 74-6B-9 NMSA 1978;

(2) conducted a minimum site assessment as defined in 20.5.1.7 NMAC and, if contamination is found, taken action to prevent continuing contamination;

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring; and

(4) substantially complied with all of the requirements and provisions of regulations adopted by the EIB under Subsection C of Section 74-4-4 NMSA 1978 for storage tanks at the site for which payment is sought (including installation, upgrade, operation and maintenance of storage tanks in accordance with 20.5.4 NMAC and 20.5.5 NMAC; release detection in accordance with 20.5.6 NMAC; for any storage tanks which have been abandoned or closed at the site, proper closure in accordance with 20.5.8 NMAC; reporting, investigating, confirming and remediating the release in accordance with 20.5.7 NMAC, 20.5.12 NMAC and 20.5.13 NMAC; proof of financial responsibility in accordance with 20.5.9 NMAC; and record keeping in accordance with the record keeping provisions of 20.5.1 through 20.5.13 NMAC).

C. In determining whether the owner or operator has substantially complied with the regulations referenced in Paragraph (4) of Subsection B of this section, the department may consider, among other things, the severity of the non-compliance, the period of non-compliance, the actions taken by the owner or operator to come into compliance, and the timeliness of the owner or operator's actions in coming into compliance.

[20.5.17.12 NMAC - Rp, 20.5.17.201 NMAC, 6/15/09]

**20.5.17.13 PROCEDURES FOR DETERMINING COMPLIANCE:**

A. When the owner or operator submits a written request for a compliance determination to the department, the request shall provide the following information for all storage tanks located at the site where the owner or operator is performing corrective action:

(1) the applicant's name, address, telephone number and federal tax identification number;

(2) a description of the applicant's interest in the site (for example, landowner, tank owner, lending institution, operator);

(3) the name, address and telephone number of the tank facility at the release site;

(4) the facility and owner numbers for the tank facility at the release site;

(5) information on all systems that exist or that have existed at the release site during the owner or operator's term of ownership or operation, including:

(a) tank type (UST or AST), tank number, installation dates, tank capacity, product contained and removal date, if applicable;

(b) information on installation, upgrade, operation and maintenance standards, including type of tank construction, piping system, corrosion protection, spill and overflow protection, release detection for tanks and piping, operation and maintenance plans, and secondary containment, if applicable; and

(c) dates of permanent closure, if applicable;

(6) proof of financial responsibility that includes:

(a) name and address of the facility that is the subject of the compliance determination;

(b) type of financial responsibility;

(c) name of insurance provider, policy number, and period of coverage; and

(d) information about insurance coverage, including: type or types of coverage for corrective action or third-party liability, amount of coverage per occurrence, and amount of annual aggregate coverage for sudden accidental releases, non-sudden accidental releases, and accidental releases;

(7) corrective action information for each release that includes:

(a) date the release was reported to the department;

(b) methods of preventing further release; and

(c) completion of the MSA report;

(8) certification on oath or affirmation of the truthfulness of all matters and facts contained in the request.

B. When the department initiates a compliance determination pursuant to Subsection B of 20.5.17.11 NMAC:

(1) the department shall, in writing, notify the owner or operator of the reason for the compliance determination and explain that if the department determines that the owner or operator is not in compliance with 20.5.17.12 NMAC, the owner or operator will be ineligible for payment of corrective action costs other than an MSA; and

(2) the owner or operator shall submit in writing all information requested by the department by a date specified by the department; the department may request any of the information required for an MSA pursuant to Subsection A of this section and shall establish a deadline for submission of this information that is reasonable under the circumstances.

C. The department shall review all written submissions in the order received and shall, within 30 days of receipt, notify the owner or operator in writing of any inadequacies in the submittal. The owner or operator may then correct any inadequacies and resubmit the application. Submissions shall be determined "complete" by the department when the submissions are adequately documented or inadequacies identified by the department have been corrected.

D. The owner or operator has the burden of establishing each point of fact relevant to such a determination. For such purpose, the submissions shall state specific facts which demonstrate compliance with Subsection B of 20.5.17.12 NMAC.

E. The department shall make a compliance determination within 45 days following the department's determination that a submission is complete and shall promptly notify the owner or operator of its determination. If the department finds an owner or operator to be out of compliance, the department shall also notify the owner or operator in writing of the manner in which the owner or operator has failed to comply with 20.5.17.12 NMAC and inform the owner or operator that he or she is ineligible for payment of corrective action costs, other than the costs of an MSA.

[20.5.17.13 NMAC - Rp, 20.5.17.202 NMAC, 6/15/09]

[The department provides a form that may be used to request a compliance determination that may be obtained from the petroleum storage tank bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507 address or on the department's webpage: [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us).]

**20.5.17.14 COMPETITIVE CONTRACTOR SELECTION FOR REMEDIATION AT RESPONSIBLE PARTY-LEAD SITES:**

A. Payments made from the fund shall be made in accordance with

20.5.17.17 NMAC and only for work performed by contractors that were selected using a competitive procedure based upon technical merit and cost-effectiveness, as defined in this part except as provided in Subsections C and D of this section. The solicitation and evaluation of proposals are required prior to workplan approval.

B. At a minimum, the department shall obtain proposals and select contractors competitively for remediation activities under 20.5.12.35 through 20.5.12.41 NMAC and under 20.5.13.27 through 20.5.13.33 NMAC, including conceptual and final remediation plans, design, construction, installation, operation and maintenance, and monitoring.

C. Competitive contractor selection is not required for the following activities:

(1) initial abatement or emergency response under 20.5.12.11 or 20.5.13.10 NMAC;

(2) 72 hour and 14 day reports under 20.5.12.12 or 20.5.13.11 NMAC;

(3) interim removal of non-aqueous phase liquid (NAPL), directed or approved by the department under 20.5.12.14 or 12.5.13.13 NMAC;

(4) interim removal of contaminated soil, directed or approved by the department under 20.5.12.15 or 12.5.13.14 NMAC;

(5) investigation activities under 20.5.7.9 NMAC and 20.5.12.16 through 20.5.12.26 NMAC or 20.5.13.15 through 20.5.13.19 NMAC;

(6) development of and monitoring and reporting under a monitored natural attenuation plan under 20.5.12.28 through 20.5.12.34 NMAC or 20.5.13.20 through 20.5.13.26 NMAC;

(7) work at sites for which the owner or operator is not seeking payment, including but not limited to federal facilities and sites determined to be out of compliance pursuant to 20.5.17.12 NMAC; or

(8) work at sites under contract as described in Subsection D of this section.

D. Work at sites with releases from USTs where the owner or operator and a contractor entered into a contract approved by the department and initiated remediation prior to October 1, 1995, shall be exempt from competitive contractor selection requirements. Work at sites with releases from ASTs at which the owner or operator and a contractor entered into a contract for and initiated remediation prior to June 14, 2002, shall be exempt from competitive contractor selection requirements. The owner or operator shall obtain a contractor for any subsequent site through the competitive contractor selection process in accordance with the requirements of 20.5.17.14 through 20.5.17.17 NMAC.

[20.5.17.14 NMAC - Rp, 20.5.17.300

NMAC, 6/15/09]

**20.5.17.15 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION CONTRACTORS AT RESPONSIBLE PARTY-LEAD SITES:**

A. Within two weeks of written notification from the department that remediation is required, the owner or operator shall provide to the department either a written list with a minimum of five names of consultants from which the department shall solicit proposals for remediation or a written request that the department solicit proposals for remediation on its website. The department shall follow the procedures outlined in Subsections B through E of this section.

B. Specifications.

(1) The department shall develop specifications for remediation, which shall state which sections of 20.5.12 or 20.5.13 NMAC the work is intended to fulfill.

(2) The department may require that specifications including primary responsibility for operation or maintenance of remediation systems with electrical or mechanical components contain the requirement that winning proposals shall include pay-for-performance criteria as defined in this part.

(3) Proposals shall meet all requirements outlined in the specifications.

(4) Costs for all tasks outlined in the specifications shall be submitted by short-listed firms only and shall be submitted under separate, sealed cover from the technical portion of the proposal.

C. Solicitation of proposals.

(1) If the owner or operator provides a list of contractors, the department shall mail the specifications to those contractors. However, if the owner or operator fails to provide the department with the names of five contractors, fails to respond to the department's notice that remediation is required, or chooses to allow the department to solicit proposals, the department may solicit proposals from and make specifications available to any interested contractor using the department's webpage.

(2) Any questions concerning the solicitation, including any requests for clarification of the specifications, shall be submitted in writing to the department, within two weeks prior to the deadline for submission of proposals. Any response from the department shall be provided promptly to all contractors through a posting on the department's webpage.

(3) Each proposal shall contain a notarized affidavit signed by the contractor certifying under oath that the contractor has participated and will continue to participate

in the competitive contractor selection process as described in this section and Section 74-6B-7C NMSA 1978 without misrepresentation and without collusion with other contractors during the entire solicitation, evaluation and selection process.

D. Evaluation of proposals and contractor selection.

(1) Once the department and the owner or operator have received a proposal, they shall not discuss the solicitation or any proposal received in response to the solicitation with anyone other than department staff or the owner or operator.

(2) If fewer than three responsive proposals are obtained by the deadline in the solicitation, the department shall consult with the owner or operator and solicit additional proposals pursuant to Subsection A of this section or Paragraph (1) of Subsection C of this section.

(3) If fewer than three responsive proposals are obtained after two attempts, the department may select a proposal following the procedures in this section, provided the technical merit is acceptable for the proposed work.

(4) The department shall, and the owner or operator may, evaluate proposals based on technical merit as defined in this part. The technical merit score shall be based on an understanding of site-specific conditions and the appropriateness of proposed remediation technology.

(a) A team approved by the department shall evaluate the proposals in a timely manner. The owner or operator or their representative is encouraged to participate as a part of the evaluation team. Each team member shall independently evaluate each proposal for technical merit. After discussion, the team shall determine the preliminary technical merit score for each proposal.

(b) The team shall prepare a short list of proposals for further consideration. The short list shall consist of the names of the firms that have submitted proposals with the highest preliminary technical merit scores.

(c) The team shall present the short list of firms to a department task force for a discussion of proposals to ensure consistency among team evaluation and scoring. The task force shall consist of senior department technical staff. After discussion with the task force, the team shall assign the technical merit scores.

(5) Within two (2) weeks of being notified that they are on the short list, short-listed firms shall provide the department's project manager with proposed costs for all tasks outlined in the specifications.

(6) The department may request all firms selected for the short list to con-

duct an oral presentation outlining their proposals for the task force, the team and the owner or operator. The owner or operator's attendance during the oral presentations is encouraged, but not required. During the oral presentations, members of the task force, the team and the owner or operator may ask questions. Only the team shall assign the scores to each proposal on the short list.

(a) Any firm that is requested by the department to conduct an oral presentation and chooses not to do so, shall be eliminated from the short list.

(b) All short-listed firms shall submit a sealed cost proposal to the department no later than two (2) days prior to the oral presentations. The team shall open and review the sealed cost information submitted for each proposal on the short list.

(c) Prior to or during the oral presentations, contractors on the short list may withdraw the original cost submission and substitute a best and final offer for the cost portion of the proposal.

(7) Following the oral presentations, the team may adjust the technical merit score, based on demonstrated general expertise, site-specific knowledge and application, or information clarified or provided.

(8) At any point in the evaluation process, when, in the team's opinion, a proposal does not substantially meet the technical merit or cost effectiveness standards set forth in the solicitation, the team may reject the proposal.

(9) The team shall assign a final score for each proposal on the short list, which shall be the cost effectiveness score plus the technical merit score.

(a) The technical merit score, with a maximum of 700 points, shall be assigned pursuant to the procedure described in this subsection.

(b) The cost effectiveness score is the technical weight factor times the cost weight factor times 300, where the technical weight factor is the proposal's technical merit score divided by the highest technical merit score of proposals on the short list; the cost weight factor is the lowest cost of proposals on the short list divided by the proposal's cost; and 300 is the maximum cost effectiveness score.

(10) The department shall notify the owner or operator and all submitting firms of the highest scoring proposal. The owner or operator shall enter into a contract with the selected firm within 30 days of this notification. If, for any reason, the selected firm cannot complete the project, the department shall either select the firm with the second highest scoring proposal, provided the technical merit is acceptable for the proposed work, or repeat the contractor

selection process in accordance with this section. In order for the work to qualify for payment from the fund, the owner or operator shall use the firm selected in accordance with this part.

(11) After the department has been notified that the owner or operator has entered into a contract with the selected firm, the department shall make available to the owner, operator, contractors and the public all proposals submitted and the evaluation team's scores.

(12) An owner, operator or offeror aggrieved by the department's selection may request administrative review pursuant to 20.5.17.28 NMAC within 15 days of the post mark on the notification.

(13) For purposes of owner and operator participation in the process set forth in this subsection, the owner or operator may appoint a representative who is not affiliated with anyone who submitted a proposal. Any owner or operator representative may not later work for the contractor, the owner, or the operator on any work generated by the proposal.

E. When proposals are received from nonresident businesses and resident businesses, and the proposal with the highest evaluation is from a nonresident business, the contract shall be awarded to the resident business whose technical merit is comparable and whose cost is nearest to the cost of the high scoring nonresident business proposal if the cost of the resident proposal is made lower than the cost of the nonresident business when multiplied by a factor of 0.95.

[20.5.17.15 NMAC - Rp, 20.5.17.301 NMAC, 6/15/09]

#### **20.5.17.16 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION CONTRACTORS AT STATE-LEAD SITES:**

When selecting remediation contractors for state-lead sites, the department shall comply with the Procurement Code, Sections 13-1-21 through 13-1-199 NMSA 1978, 1.4.1 NMAC and the request for proposals procurement guide, which is incorporated by reference.

[20.5.17.16 NMAC - N, 6/15/09]

#### **20.5.17.17 WORK PLAN APPROVAL, CHANGE ORDERS FOR CORRECTIVE ACTION AND APPROVAL OF DELIVERABLES:**

A. Except as provided in Subsection C of 20.5.17.18 NMAC, a written workplan and budget to complete any phase of corrective action shall be approved in writing by the department prior to any corrective action work being done in order for that work to be eligible for payment under this part.

B. For responsible party-

lead sites, the owner or operator shall submit the corrective action workplan and cost in a fixed-fee format unless the department determines that a time-and-materials format is appropriate. If the department approves a time-and-materials format, any increase in approved amounts for specific tasks, categories or subcategories or any reallocation of an amount from one task to another task, one category to another category or within categories must be approved in advance by the department in writing.

C. If required by Paragraph (2) of Subsection B of 20.5.17.15 NMAC, a workplan including the operation and maintenance of a remediation system that includes mechanical or electrical installations shall list the performance criteria required for payment and amount of payment.

D. If a workplan is rejected after two attempts to receive approval by the department, the department may select the contractor who received the second highest evaluation, repeat the contractor selection process in accordance with Subsection B of 20.5.17.15 NMAC, or, in the case of activities which do not require competitive contractor selection under Subsection D of 20.5.17.14 NMAC, require the owner or operator to submit a workplan from a different contractor.

E. Changes to the technical approach or increases in costs beyond the approved workplan shall not be eligible for payment unless approved in writing by the department prior to implementation.

F. The department may increase or reduce payments for work based on pay-for-performance criteria because of *force majeure* or unforeseen changes in site conditions.

G. After receiving a deliverable, the department shall assess whether the deliverable is satisfactory. If the department finds that the deliverable is satisfactory, it shall issue a written or electronic notice of approval to the owner, operator or contractor. The notice of approval shall explain that any application for payment of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received the certification of approval and that no extensions of this deadline shall be granted except extensions for good cause pursuant to 20.5.17.26 NMAC. If the department finds the deliverable to be unsatisfactory, it shall, within 30 days of receiving a deliverable, provide to the owner, operator or contractor a written or electronic notice of exception explaining the defect in the deliverable and any steps the owner, operator or contractor may take to remedy the defect.

[20.5.17.17 NMAC - Rp, 20.5.17.302 NMAC, 6/15/09]

#### **20.5.17.18 CORRECTIVE ACTION ELIGIBLE AND INELIGIBLE COSTS AND EXPENDITURES FOR STATE-LEAD AND RESPONSIBLE PARTY-LEAD SITES:**

A. Payments shall be made only for corrective action conducted by firms qualified under 20.5.16 NMAC or in accordance with Subsection G of 20.5.12.8 NMAC.

B. No expenditures from the fund shall be paid to or on behalf of owners or operators for corrective action, other than the minimum site assessment or any sampling done for purposes of Paragraph (3) of Subsection A of 20.5.12.34 or 20.5.12.42 NMAC or Paragraph (2) of Subsection A of 20.5.13.26 or 20.5.13.34 NMAC, where the corrective action was conducted by firms or entities that are subsidiaries, parents or otherwise affiliate firms or entities of the owner or operator.

C. Payments shall be made for only those deliverables that the department has approved as satisfactory in writing, as required by 20.5.17.17 NMAC.

D. For USTs, payment shall not be made for corrective action performed on or after September 22, 1992, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.12.10 or 20.5.12.11 NMAC or 20.5.13.9 or 20.5.13.10 NMAC. For ASTs, payment shall not be made for corrective action performed on or after June 14, 2002, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.12.10 or 20.5.12.11 NMAC.

E. Costs eligible for payment from the fund are all costs except those excluded by Subsections H and I of this section, and that are reasonable and necessary to confirm releases in accordance with 20.5.7 NMAC, to complete the minimum site assessment in excess of the deductible, and to complete corrective action beyond the minimum site assessment, in accordance with 20.5.12 NMAC or 20.5.13 NMAC, the department's fee schedule, and any workplan required by 20.5.17.17 NMAC and approved by the department.

F. Before making payments, the department shall determine that the owner or operator has reimbursed the department for all federal LUST trust funds expended for contractual services at the site.

G. Unpaid invoices are eligible for payment on an assignment basis from the applicant to the party who ren-

dered the invoiced services or goods, or the party who actually made payment. Invoices resulting from assignments as described in this subsection are not contractual between the department and the party who rendered the service or the party who actually made payment. Payments of such invoices are made pursuant to provisions of Section 74-6B-13 NMSA 1978, including being subject to the availability of funds in the corrective action fund.

H. For USTs, costs ineligible for payment include, but are not limited to, the following:

- (1) costs incurred prior to March 7, 1990;
- (2) costs incurred on or after September 22, 1992, that exceed those in the department fee schedule in effect at the time the work was performed;
- (3) costs paid or reimbursed by insurance companies or any other third party as described in 20.5.17.27 NMAC;
- (4) unpaid invoices, unless allowed under Subsection F of this section;
- (5) costs of removing, repairing, retrofitting or replacing any USTs;
- (6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;
- (7) costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;
- (8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;
- (9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;
- (10) attorneys' fees or other legal costs;
- (11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;
- (12) costs associated with real estate transactions;
- (13) rush charges for laboratory or other services, unless required by the department;
- (14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;
- (15) economic losses and liability to third parties; and
- (16) costs associated with corrective action that fails to conform with the

preapproved workplan or with the requirements of 20.5.12 NMAC or 20.5.13 NMAC.

I. For ASTs, costs ineligible for payment include but are not limited to the following:

- (1) costs incurred prior to July 1, 2001;
  - (2) costs incurred that exceed those in the department fee schedule in effect at the time the work was performed;
  - (3) costs paid or reimbursed by insurance companies or any other third party described in 20.5.17.27 NMAC;
  - (4) unpaid invoices, unless allowed under Subsection F of this section;
  - (5) costs of removing, repairing, retrofitting or replacing any ASTs;
  - (6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;
  - (7) costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;
  - (8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;
  - (9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;
  - (10) attorneys' fees or other legal costs;
  - (11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;
  - (12) costs associated with real estate transactions;
  - (13) rush charges for laboratory or other services, unless required by the department;
  - (14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;
  - (15) economic losses and liability to third parties; and
  - (16) costs associated with corrective action that fails to conform with the preapproved workplan or with the requirements of 20.5.12 NMAC or 20.5.13 NMAC.
- [20.5.17.18 NMAC - Rp, 20.5.17.400 NMAC, 6/15/09]
- 20.5.17.19 DESIGNATED REPRESENTATIVES:**
- A. Subject to approval by

the department, an owner or operator may designate a representative to facilitate compliance with Parts 7, 12 or 13, 15, 16 and 17 of Chapter 5, Title 20 NMAC. Designation of a representative shall include assignment to the designated representative of any rights the owner or operator may have to payment from the corrective action fund.

B. In the event that an owner or operator is incapable of both directing required corrective action and assigning rights to a designated representative, a person may request in writing to be designated as a representative by the department and to be assigned any rights the owner or operator may have had to payment from the corrective action fund.

C. Anyone requesting to designate or be designated as a representative pursuant to this section shall submit a written request to the department that includes the:

- (1) owner identification number;
- (2) facility identification number;
- (3) release identification number;
- (4) reason for the requested designation (for example sale of property or owner, out-of-state move or operator illness, age or death); and
- (5) proposed representative's name, address, e-mail address, telephone number and federal tax identification number.

D. When determining whether to approve or designate a person as a representative pursuant to Subsection A or B of this section, the department shall consider: the reason or reasons a designated representative may be necessary; the nature of the proposed representative's relationship to the owner or operator, if any; the proposed representative's interest in the facility or real property where corrective action is being or shall be performed; and the proposed representative's ability to direct corrective action activities. The department shall approve or deny the request for designation of a representative in a writing to the requesting party and the owner or operator that explains the department's decision.

E. Requests for payment from the fund resulting from assignments described in Subsection A or B of this section are not contractual between the department and the designated representative. Payments of such requests are made pursuant to the provisions of Section 74-6B-13 NMSA 1978, and are subject to the availability of funds in the corrective action fund.

F. Designation of a representative does not waive owner or operator responsibility or liability. Regardless of appointment of a designated representative, or assignment to the designated representa-

tive of rights to the corrective action fund, owners and operators remain responsible for compliance with the provisions of this chapter. The designation of a representative shall not affect the department's right to seek compliance at any time from the owner or operator or both. The designation of a representative is intended to facilitate compliance with corrective action requirements only and shall not relieve the owner and operator of their legal responsibilities or liabilities under this chapter.

[20.5.17.19 NMAC - N, 6/15/09]

[The department provides an optional form on its website, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us), that may be used to designate a representative pursuant to this section. The form may also be obtained from the bureau at or by writing to 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.17.20 MEANS TEST TO DETERMINE DEDUCTIBLE:**

A. An owner or operator otherwise responsible for paying the first ten thousand dollars (\$10,000) of minimum site assessment costs under Section 74-6B-13 NMSA 1978 may request that the first ten thousand dollars (\$10,000) be paid from the fund (a "zero deductible") if the owner or operator proves to the department an inability to pay the deductible.

B. An owner or operator otherwise responsible for a ten thousand dollar (\$10,000) deductible is allowed a five thousand dollar (\$5,000) deductible if the owner or operator proves to the department an inability to pay the full deductible.

C. The owner or operator shall submit an application for a zero or reduced deductible before or with submission of the MSA workplan, pursuant to 20.5.12 or 20.5.13 NMAC. The application shall include the following:

(1) a letter explaining why the owner or operator is unable to afford to pay all or a portion of the initial ten thousand dollar (\$10,000) cost of an MSA;

(2) copies of the owner's or operator's federal tax returns for the immediately preceding two years; and

(3) any additional financial documentation that will assist the department in determining whether the owner or operator is unable to pay (for example, copies of bankruptcy filings or medical bills).

D. The department shall determine inability or reduced ability to pay by using one of the environmental protection agency's published computer analysis programs, and by considering the owner's or operator's ability to maintain basic business operations if required to pay the full or reduced deductible, including consideration of the overall financial condition of the owner or operator and demonstrable constraints on the ability of the owner or oper-

ator to raise revenues.

E. Notwithstanding the provisions of Subsections A and B of this section, an owner or operator otherwise responsible for paying a deductible shall be allowed a zero deductible if the owner or operator has proven to the department that the owner or operator is a municipality or county.

[20.5.17.20 NMAC - Rp, 20.5.17.401 NMAC, 6/15/09]

#### **20.5.17.21 OWNERSHIP AND DISPOSITION OF MAJOR REMEDIATION EQUIPMENT:**

A. The department shall be the owner of all major remediation equipment paid for by the fund, unless the equipment is leased as a more cost-effective approach, and shall be responsible for disposition of all major remediation equipment. No owner or operator shall dispose of any major remediation equipment without the written permission of the department. Disposition by the department shall be in accordance with all applicable laws and regulations, and by any of the following means:

(1) relocation to another fund remediation site, as provided in Subsections C through E of this section;

(2) interim rental to a non-fund remediation site, subject to Subsection F of this section;

(3) sale or salvage, subject to Subsection G of this section; or

(4) when options in Paragraphs (1) through (3) of this subsection are not available, any other form of disposal consistent with federal and state law.

B. Any major remediation equipment shall be installed, maintained and disposed of in accordance with Subsections A through G of this section.

C. An owner or operator requiring the use of major remediation equipment for corrective action paid for with fund money shall use equipment on the department's reuse list, if available and provided such equipment can be refurbished to the manufacturer's operating specifications for a cost not to exceed one-half of the replacement cost of the equipment.

D. For all major remediation equipment, new or used, the owner or operator shall enter into a written installation and maintenance agreement with a company qualified to install and maintain the equipment and shall furnish a copy of the agreement, executed by the company, to the department. Installation and maintenance shall be performed by factory authorized personnel or a contractor specified by the manufacturer, or as otherwise approved by the department. Complete and proper installation must be verified by both the manufacturer, or its designated representa-

tive, and the installation personnel or company. Installation and maintenance contract costs shall be stated together with the purchase price of the equipment quoted to the department in proposals, workplans and applications for payment from the fund.

E. For all new major remediation equipment and for all used major remediation equipment under warranty when acquired, the owner or operator shall also furnish a copy of the manufacturer's warranty to the department.

F. If major remediation equipment is rented to a non-fund remediation site, a reasonable rental fee shall be paid into the fund. The department shall determine the reasonable rental fee based on the lowest price quote from three equipment renters.

G. Major remediation equipment shall be depreciated over its useful life and have a salvage value, method and schedule as approved by the department. If the equipment is sold or salvaged, the proceeds from the sale or salvage value shall be paid into the fund. Gain or loss shall be calculated based on the net book value or salvage value in accordance with generally accepted accounting principles.

H. The department shall remove all major remediation equipment from a site within 90 days after issuing a "no further action" letter for that site.

[20.5.17.21 NMAC - Rp, 20.5.17.402 NMAC, 6/15/09]

#### **20.5.17.22 FUND APPLICATION, PAYMENT AND SUBROGATION:**

A. Nothing in 20.5.17 NMAC establishes or creates any liability or responsibility on the part of the department or the state to pay corrective action costs from any source other than the fund, nor shall the department or the state have any liability or responsibility to make any payments of corrective action costs if the balance in the fund is insufficient to cover those costs.

B. Payment shall be made only for work that has been performed in accordance with 20.5.7, 20.5.12 or 20.5.13 and 20.5.17 NMAC, subject to the provisions of 20.5.15.1504 NMAC.

[20.5.17.22 NMAC - Rp, 20.5.17.500 NMAC, 6/15/09]

#### **20.5.17.23 OBTAINING FACILITY AND OWNER IDENTIFICATION NUMBERS FOR PURPOSES OF CORRECTIVE ACTION:**

A. An owner or operator who is exempt from registration and tank fee requirements pursuant to 20.5.1.7 NMAC (because the owner had a UST taken out of operation on or before January 1, 1974, had a UST taken out of operation

after January 1, 1974 and removed from the ground prior to November 8, 1984, or had an AST taken out of operation on or before July 1, 2001) remains responsible for all corrective action requirements otherwise imposed on all owners and operators.

B. To access the fund, an owner or operator shall apply for and receive from the department a facility identification number and owner identification number upon submitting the following information:

(1) the owner's or operator's name, address, e-mail address, and telephone number; and

(2) the address of the UST, AST or site that requires corrective action but that is exempt from registration and tank fee requirements pursuant to 20.5.1.7 NMAC. [20.5.17.23 NMAC - N, 6/15/09]

#### **20.5.17.24 CONTENTS OF APPLICATION FOR PAYMENT AT RESPONSIBLE PARTY-LEAD SITES:**

A. When a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the owner or operator shall submit one original and one copy of the application for payment to the department. The application shall include:

(1) information about the applicant, including: the owner's or operator's name, address, e-mail address, telephone number, federal tax identification number, owner identification number and the name of an individual to contact about the claim;

(2) the name of the owner at the time of the release;

(3) the name of the operator at the time of the release;

(4) the name of the responsible party at the time of the release;

(5) information about the facility, including: the name, address, site number, and facility number for which payment is sought; the phase of corrective action being claimed; the type of tank (UST or AST); the workplan approval date and workplan identification number; the amount approved for the deliverable and the amount of the claim; the invoice number; the deliverable identification; and the exact name and date of the deliverable;

(6) references to all work products or deliverables for which payment is sought;

(7) the date or dates of the department's compliance determination or determinations under 20.5.17.11 NMAC;

(8) information about the payee if the owner or operator has assigned payment to another person, including: name, mailing address, telephone number, e-mail address, federal tax identification number and the

nature of the payee's interest in the site;

(9) a copy of any claim or claims the owner or operator has filed against any third party who caused or contributed to the release;

(10) copies of invoices showing the work performed for the minimum site assessment or other required corrective action for which payment is sought;

(11) a copy of the letter from the department determining the owner's or operator's eligibility for a zero or reduced deductible, if applicable, as determined in accordance with 20.5.17.20 NMAC;

(12) a statement that requirements to use a qualified firm in accordance with 20.5.16 NMAC have been met;

(13) a signed and notarized statement of an officer or agent of the qualified firm performing the corrective action:

(a) consenting to an audit of time sheets, payroll and bank records, tax records, purchase orders, manifests and bills of lading, internal expense records and any other documents required to verify the costs claimed in the application; and

(b) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts;

(14) copies of the workplan approval letter and any subsequent amendments to the workplan covering work for which payment is requested;

(15) a copy of any and all notices from the department approving as satisfactory the deliverable for which payment is requested;

(16) information about the contractor, including: the contractor's name, address and telephone number; and the name of the contractor's project manager for the site; and

(17) if payment has been assigned by the owner or operator to a contractor, proof that the contractor has paid all subcontractor invoices.

B. When work is performed on a fixed fee basis, the owner or operator shall also submit the following as part of the application:

(1) a description of the deliverable and the date delivered;

(2) verification that any performance criteria required for payment were achieved; and

(3) any other requirements of the workplan approval.

C. When work is performed on a time-and-materials basis, the owner or operator shall also submit the following as part of the application:

(1) detailed billings of labor and equipment for each task performed; con-

tractor staff must be identified by name and hourly rate; equipment must be identified as owned or rented, with the hourly or daily rate; laboratory and subcontractor charges must be clearly explained;

(2) timesheets, invoices, or statements with staff name, labor category, and description and date of work performed;

(3) copies of receipts for all equipment and supplies;

(4) travel and expense logs;

(5) if work is billed on an hourly basis, timesheets, invoices or statements which include the hourly rate and number of hours billed to the nearest one-quarter hour; and

(6) any other requirements of the workplan approval.

D. Upon the department's request, the owner or operator shall submit copies of all subcontractor invoices and an accounting of the amount paid and any remaining balance on each invoice.

E. In the first application for payment of corrective action costs for each workplan, the owner or operator shall submit one original and one copy of:

(1) an original, signed oath or affirmation in accordance with Sections 14-13-1 and 14-13-2 NMSA 1978:

(a) certifying that the owner or operator has read the approved workplan and understands that the corrective action described in the workplan shall be completed at the identified facility;

(b) certifying that all matters and facts contained in that application, and in any subsequent applications for payment for the same workplan, are and will be truthful and that all invoices reflect actual costs paid or otherwise incurred;

(c) consenting to an audit of financial records pertaining to the current and any future claims for the same workplan; and

(d) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts in this or any future application for payment for the same workplan;

(2) a signed, dated, and notarized disclosure statement indicating the site name and number where the release occurred; the type of tank (UST or AST); the facility number; the name, address, and telephone number of the entity that performed the work for which payment is claimed; the full name of all owners and operators of the tank for which payment is claimed; the name of each individual and business entity that owns or controls the entity that performed the work for which payment is claimed; and the name of every business concern that is a partner or sub-

subsidiary of the entity that performed the work for which payment is claimed;

(3) a completed internal revenue service W-9 form (request for taxpayer identification number and certification form);

(4) information about insurance coverage, including: whether the owner or operator has insurance for releases of regulated substances at the site of the release for which a claim is being made; the name, address, and telephone number of the insurance company; the name, address, and telephone number of a contact person within the insurance company; the amount of coverage; whether the applicant has filed an insurance claim for this release, and if so, the amount sought; and the amount the insurance company has paid; and

(5) copies of any insurance policies in effect on the date of the report or at the time of the release that may insure the owner or operator against all or part of the costs of corrective action.

F. After the first application for payment of corrective action costs for each workplan, an owner or operator who has properly submitted the documents required by Subsection E of this section and received a payment need not submit these documents with future applications for payment unless any information provided in the first application has changed or the department has modified the scope of the work or the budget of the workplan.

G. The owner or operator shall not submit costs of any portion of a minimum site assessment in the same application for payment of costs of other required corrective action.

H. Documents submitted as part of an application for payment of corrective action costs shall not contain alterations, corrections, or erasures.

[20.5.17.24 NMAC - Rp, 20.5.17.501 NMAC, 6/15/09]

[The department provides forms that may be used to comply with this section. The address of the department's petroleum storage tank bureau, reimbursement section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.17.25 CONTENTS OF APPLICATION FOR PAYMENT AT STATE-LEAD SITES:**

When a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the contractor shall submit one original and one copy of the application for payment to the department. All applications shall include:

A. the payee's name, address, e-mail address and telephone number;

B. the contractor's name, address, e-mail address and telephone num-

ber;

C. information about the workplan, including: the date the workplan was approved, the workplan identification number, the deliverable identification numbers and the date or dates each deliverable was delivered;

D. information about the facility, including: the name, address, site number, and facility number of the facility for which payment is sought; the phase of corrective action being claimed; the contract number; and the expiration date of the contract;

E. the invoice number or numbers and the amount of each invoice for which payment is sought;

F. copies of each invoice for which payment is sought; and

G. copies of the workplan approval letter and any subsequent amendments to the workplan.

[20.5.17.25 NMAC - N, 6/15/09]

[The department provides a form that may be used to comply with this section. The address of the department's petroleum storage tank bureau, reimbursement section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.17.26 APPLICATION AND PAYMENT PROCESS:**

A. All applications for payment shall be received by the department within 90 days of the date upon which the owner, operator or contractor received a notice of approval of the deliverable from the department, pursuant to 20.5.17.17 NMAC. The department shall not grant extensions of the deadline for applications for payment except for good cause shown, in which case the department shall grant a 30-day extension. For purposes of this section, "good cause" means unavoidable circumstances beyond the owner's, operator's, or contractor's control. All requests for an extension shall describe the reason or reasons an extension is necessary and shall be submitted to the department in writing within the 90-day period for submitting an application for payment.

B. Applications for payment shall be sent to the New Mexico environment department, petroleum storage tank bureau, reimbursement section.

C. The department shall review all applications for payment in the order received and shall, within 60 days of receipt, either:

(1) pay the owner, operator or contractor for all eligible costs or as required by 20.5.15.14 NMAC; or

(2) reject the application and notify the owner, operator or contractor in writing of the inadequacies in the application that caused the rejection.

D. The department may

reject an application for payment:

(1) of the cost of any deliverable if:

(a) the application is received after the deadlines imposed by this section;

(b) the application does not contain all of the information or documents required by 20.5.17.24 or 20.5.17.25 NMAC (including but not limited to, all required disclosures, affirmations, timesheets, receipts, logs, and invoices);

(c) the application itself or the attached documents are incomplete, inaccurate or unclear;

(d) the application contains information that is intentionally misleading or false;

(e) the application seeks payment for work that was not pre-approved by the department; or

(f) the application seeks payment for work that was not approved by the department as satisfactory;

(g) the application seeks payment of costs that exceed the amount approved in the workplan; and

(2) of the cost of any deliverable other than an MSA if:

(a) the department has not made a compliance determination; or

(b) tank fees are past due.

E. The owner, operator or contractor may correct any inadequacies in the application and resubmit one completed original application and one copy within 30 days of the date of the notice of inadequacies.

F. Upon receiving a resubmitted application, the department shall follow the procedures in Subsections C, D and H of this section for reviewing and accepting or rejecting applications for payment.

G. The owner, operator or contractor may submit a total of three applications (an initial application and two resubmitted applications) for any deliverable. After the owner, operator or contractor submits a total of three inadequate applications, the department may decline to review additional applications for the same deliverable.

H. Payment for eligible costs shall occur not later than 60 days, or in accordance with 20.5.15.14 NMAC, after the department determines the application is complete and approves the technical adequacy of the application. The department shall mail the check for payment to the person designated as payee in the application.

I. Payment under this section shall not foreclose the department's right to recover excessive or illegal payments.

[20.5.17.26 NMAC - Rp, 20.5.17.501 NMAC, 6/15/09]

[The address of the department's petroleum storage tank bureau, reimbursement section

is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.17.27 SUBROGATION:**

A. The department has a right of subrogation to any insurance policies in existence at the time of the release to the extent of any rights the owner or operator of a site may have had under that policy, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. The department's subrogation rights are limited to the extent of the department's expenditures from the corrective action fund or other sources. The owner or operator shall include in the first application for payment a copy of any insurance policies which were in effect on the date of the report, as well as any policies which were in existence at the time the release may have occurred and which may insure the owner or operator against all or part of the costs of taking corrective action. The owner or operator shall also report to the department any claims filed against any policy identified in accordance with this section or Subsection G of 20.5.17.18 NMAC.

B. The department has a right of subrogation against any third party who caused or also contributed to the release, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. This right of subrogation shall apply regardless of any applications for payment the owner or operator may have made or intends to make for payment from the fund. The owner or operator shall report to the department the identity of any third party against whom a claim is filed and provide a copy of any claim filed against that party.  
[20.5.17.27 NMAC - Rp, 20.5.17.502 NMAC, 6/15/09]

**20.5.17.28 ADMINISTRATIVE REVIEW:**

A. With the exception of compliance determinations under 20.5.17.11 through 20.5.17.13 NMAC, an owner, operator or contractor aggrieved by a decision made by the department under Title 20, Chapter 5 NMAC may obtain review of the decision using the procedures and subject to the limitations set forth in 20.5.10 NMAC.

B. An offeror aggrieved by a selection decision made by the department pursuant to 20.5.17.14 through 20.5.17.16 NMAC may obtain review of the decision using the procedures and subject to the limitations set forth in 20.5.10 NMAC.

C. A person denied designation by the department as a representative pursuant to 20.5.17.19 NMAC may obtain review of the department's decision using the procedures and subject to the limitations set forth in 20.5.10 NMAC.

D. Compliance determina-

tions shall be appealed as provided in 20.5.17.29 and 20.5.17.30 NMAC.  
[20.5.17.28 NMAC - Rp, 20.5.17.600 NMAC, 6/15/09]

**20.5.17.29 REVIEW OF DETERMINATIONS OF COMPLIANCE:**

A. Any owner or operator aggrieved by a decision made by the department regarding determinations of compliance 20.5.17.11 through 20.5.17.13 NMAC, may appeal the decision by submitting a request for reconsideration of the decision to the director. Any owner or operator aggrieved by a decision made under these regulations by the director may appeal the decision by submitting a request for reconsideration to the director. The reconsideration will be based on written submittals. Any such request for reconsideration must be in writing and must specify the grounds upon which the petitioner objects to the decision being appealed. The request shall be accompanied by any and all written material and argument which the owner or operator wishes the director to consider upon reconsideration. The request for reconsideration shall be postmarked within 15 days of the date of the determination.

B. Department staff shall respond to the request for reconsideration within 15 days of receipt of the complete submittal of the owner or operator's request for reconsideration. The response of the department staff shall be sent to both the director and the owner or operator and shall be accompanied by any and all written materials and argument in support of the position of the staff on the issues raised by the owner or operator.

C. For good cause shown, the director may permit either party additional time in which to submit the supporting written materials or argument for which Subsections A and B of this section provide. Any request for additional time and all evidence for good cause shall be submitted in writing prior to the end of the 15-day period described in Subsection A of this section. The department shall act on the request for additional time within a reasonable period of time.

D. The director's action on the request for reconsideration shall be based on the written materials and argument submitted pursuant to this section unless the director, in the director's discretion, schedules a conference on the request for reconsideration.

E. The director's action on the request for reconsideration shall be by written decision and shall state the reason therefor. The director shall send a copy of the decision to the owner or operator and furnish a copy to department staff promptly

after the decision is rendered.

F. The owner or operator may appeal the decision of the director made under Subsection E of this section by requesting a hearing in accordance with 20.5.17.30 NMAC.

[20.5.17.29 NMAC - Rp, 20.5.17.601 NMAC, 6/15/09]

**20.5.17.30 REQUEST FOR HEARING ON DETERMINATIONS OF COMPLIANCE:**

A. An owner or operator may obtain review by the secretary of a decision by the director made pursuant to Subsection E of 20.5.17.29 NMAC by filing a written request for a hearing as provided in the environment department adjudicatory procedures, 20.1.5 NMAC, within 30 days after the date the owner or operator receives the director's decision pursuant to Subsection E of 20.5.17.29 NMAC. The procedures set forth in the environment department adjudicatory procedures, 20.1.5 NMAC, shall govern the proceeding.

B. The complainant shall attach to the request for hearing a copy of the determination for which review is sought.

C. With the request for hearing, the complainant shall file a reply to the determination. The reply shall address each of the findings in the determination, including any facts which support the complainant's position that the complainant has complied with the requirements of Subsection B of Section 74-6B-8 NMSA 1978.

D. The secretary shall schedule the hearing for no later than 90 days after service of the notice of docketing.  
[20.5.17.30 NMAC - Rp, 20.5.17.602 NMAC, 6/15/09]

**20.5.17.31 EFFECT OF APPEAL ON PAYMENT, ENFORCEMENT:**

A request for hearing or other administrative review shall not delay payment for any phase of corrective action, other than that which is being contested. A request for hearing shall not affect the secretary's authority to issue compliance orders or otherwise seek enforcement of Title 20, Chapter 5 NMAC under the provisions of the Hazardous Waste Act or relieve an owner or operator of any responsibility under Title 20, Chapter 5 NMAC.

[20.5.17.31 NMAC - Rp, 20.5.17.603 NMAC, 6/15/09]

**20.5.17.32 CONTRACTOR FEE SCHEDULE:**

A.	
Professional services	Hourly rate
Principal scientist	\$150.00
Senior scientist	\$125.00

Project scientist/engineer-manager	\$100.00
Staff scientist/engineer	\$80.00
Field technician	\$74.00
Draftsperson	\$65.00
Administrator	\$68.00
Secretary	\$44.00
Clerk	\$37.00

B.

Field equipment	Cost per day
Carbon monoxide, sulphur dioxide oxide and oxygen meters	\$50.00
Water quality meter	\$50.00
Dissolved oxygen meter (water)	\$37.50
Electroconductivity meter	\$47.50
Explosimeter	\$42.50
Fluid field detector	\$30.00
Interface probe	\$65.00
Organic vapor meter	\$70.00
Photionization detector	\$70.00
Flame ionization detector	\$75.00
pH Meter	\$22.50

Other. Costs shall be pre-approved by the department. The department may require justification.

C. Per diem will be paid in accordance with the current state allowance.

D. Earth-moving equipment. Costs shall be pre-approved by the department. The department may require justification.

- (1) Backhoe, light duty (12 feet-19 feet).
- (2) Backhoe, medium duty (14 feet-19 feet).
- (3) Trackhoe, light duty.
- (4) Trackhoe, medium duty.
- (5) Trackhoe, heavy duty.

(6) Other. Costs shall be pre-approved by the department. The department may require justification.

E. Well Supplies. Costs shall be pre-approved by the department. The department may require justification.

- (1) Two-inch blank.
- (2) Four-inch blank.
- (3) Two- inch screen PVC 10 feet.
- (4) Four-inch screen PVC 10 feet.
- (5) Filter pack, per 100 pounds.
- (6) Bentonite pellets, per 50 pounds.
- (7) Bentonite chips, per 50 pounds.
- (8) Bentonite gel, per 100 pounds.
- (9) Grout, per 50 pounds.
- (10) Eight-inch manhole.
- (11) 12-inch manhole.
- (12) Other. Costs shall be pre-approved by the department. The department may require justification.

F. Drilling. Costs shall be pre-approved by the department. The department may require justification.

- (1) Mobilization/demobilization.
- (2) Hollow stem auger.
- (3) Air rotary.
- (4) Sonic drilling.
- (5) Other drilling methods.
- (6) Plug and abandon.
- (7) Other. Costs shall be pre-approved by the department. The department may require justification.

G. Lab services. Costs shall be pre-approved by the department. The department may require justification.

- (1) EPA methods.
  - (a) 8310.
  - (b) 601/8010, 602/8020.
  - (c) Modified 8015.
  - (d) 418.1.
  - (e) 610/8100.
  - (f) 624/8240.
  - (g) 625/8270.

- (h) 8260.
- (i) RCRA 8 metals.
- (2) Benzene, toluene, ethyl benzene, and xylenes; methyl tertiary-butyl ether.

- (3) pH.
- (4) Total organic carbon.
- (5) Geotechnical soil analyses.
  - (a) Sieve analysis.
  - (b) Soil moisture.
  - (c) Density.
  - (d) Porosity.
  - (e) Fraction organic carbon.

(6) Other. Costs shall be pre-approved by the department. The department may require justification.

[20.5.17.32 NMAC - Rp, 20.5.17.604 NMAC, 6/15/09]

**HISTORY OF 20.5.17 NMAC:**

**Pre-NMAC History:**

The material in this part was derived from that previously filed with the commission of public records - state records and archives: NMED 92-1, Ground Water Protection Act Corrective Action Fund Regulations, filed 9/24/92; NMED 94-1, Corrective Action Fund Payment And Reimbursement Regulations, filed 2/4/94.

**History of Repealed Material:**

20 NMAC 5.17 Underground Storage Tanks, Corrective Action Fund Payment and Reimbursement (filed 10/6/95) repealed, 1/31/00.  
 20 NMAC 5.17 Underground Storage Tanks, Corrective Action Fund Administration (filed 1/18/00) repealed 6/14/02.  
 20.5.17 NMAC Petroleum Storage Tanks, Corrective Action Fund Administration (filed 5/29/02) repealed 11/13/03.  
 20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration (filed 10/27/03) repealed 6/15/09.

**Other History:**

NMED 94-1, Corrective Action Fund Payment And Reimbursement Regulations, filed 2/4/94 was renumbered, reformatted and replaced by 20 NMAC 5.17, Underground Storage Tanks, Corrective Action Fund Administration, effective 1/31/00.  
 20 NMAC 5.17, Underground Storage Tanks, Corrective Action Fund Administration, (filed 1/18/00), was replaced by 20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration, effective 6/14/02.  
 20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration, (filed 5/29/02), was replaced by 20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration, effective 11/13/03.

20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration (filed 10/27/03), was replaced by 20.5.17 NMAC, Petroleum Storage Tanks, Corrective Action Fund Administration, effective 6/15/09.

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

The following have been repealed by the Environmental Improvement Board:

20.5.1 NMAC, Petroleum Storage Tanks, General Provisions (filed 3/5/08), repealed 6/15/09.

20.5.7 NMAC, Petroleum Storage Tanks, Reporting and Investigation of Suspected and Confirmed Releases (filed 7/16/03), repealed 6/15/09.

20.5.10 NMAC, Petroleum Storage Tanks, Administrative Review (filed 7/16/03), repealed 6/15/09.

20.5.12 NMAC, Petroleum Storage Tanks, Corrective Action for Storage Tank Systems Containing Petroleum Products (filed 7/16/03), repealed 6/15/09.

20.5.13 NMAC, Petroleum Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances (filed 7/16/03), repealed 6/15/09.

20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers (filed 3/5/08), repealed 6/15/09.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 7/16/03), repealed 6/15/09.

20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action (filed 7/16/03), repealed 6/15/09.

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

### TITLE 20 ENVIRONMENTAL PROTECTION CHAPTER 5 PETROLEUM STORAGE TANKS PART 1 GENERAL PROVI- SIONS

**20.5.1.1 ISSUING AGENCY:**  
New Mexico Environmental Improvement Board.  
[20.5.1.1 NMAC - Rp, 20.5.1.1 NMAC, 6/15/2009]

**20.5.1.2 SCOPE:**  
A. 20.5.1 through 20.5.16 NMAC apply to owners and operators of storage tanks as defined in 20.5.1.7 NMAC

except as otherwise provided in Subsections B and C of this section.

B. Any UST system holding hazardous wastes that are listed or identified under Subtitle C of the federal Resource Conservation and Recovery Act, or a mixture of such hazardous waste and other hazardous regulated substances, is excluded from these regulations. This subsection does not apply to any UST system containing petroleum.

C. The following types of storage tank systems are excluded from the requirements of 20.5.2 through 20.5.16 NMAC:

(1) any wastewater treatment tank systems and any wastewater treatment tank system that is part of a wastewater treatment facility regulated under Section 402 or 307(b) of the federal Clean Water Act;

(2) equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;

(3) any UST system with a capacity of 110 gallons or less or any AST system with a capacity of 1,320 gallons or less, or any AST system with a capacity of 55,000 gallons or more;

(4) any UST system that contains a de minimis concentration of regulated substances;

(5) any emergency spill or overflow containment UST system that is expeditiously emptied after use;

(6) any storage tank systems containing radioactive material that are regulated under the Atomic Energy Act of 1954;

(7) any UST system that is part of an emergency generator system at nuclear power generation facilities regulated by the nuclear regulatory commission under 10 CFR part 50 appendix A;

(8) airport hydrant fuel distribution systems;

(9) UST systems with field-constructed tanks; and

(10) any UST or AST system that stores fuel solely for use by emergency power generators.

D. Notwithstanding the foregoing exclusions, no person may install a storage tank system listed in Subsection C of this section for the purpose of storing regulated substances unless such storage tank system (whether of single or double-walled construction):

(1) will prevent releases due to corrosion or structural failure for the operational life of the tank; and

(2) is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material or designed in a manner to prevent the release or threatened release of any stored substance; and

(3) the material used in the con-

struction or lining of the tank is compatible with the substance to be stored.

E. Parts 20.5.4 through 20.5.9 NMAC shall not apply to an existing AST or UST system which has never contained a regulated substance until the system is placed in service.

[20.5.1.2 NMAC - Rp, 20.5.1.2 NMAC, 6/15/2009]

**20.5.1.3 STATUTORY AUTHORITY:** Parts 20.5.1 through 20.5.16 NMAC are promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.

[20.5.1.3 NMAC - Rp, 20.5.1.3 NMAC, 6/15/2009]

**20.5.1.4 DURATION:** Permanent.

[20.5.1.4 NMAC - Rp, 20.5.1.4 NMAC, 6/15/2009]

**20.5.1.5 EFFECTIVE DATE:** June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.

[20.5.1.5 NMAC - Rp, 20.5.1.5 NMAC, 6/15/2009]

**20.5.1.6 OBJECTIVE:** The purpose of 20.5.1 through 20.5.16 NMAC is to regulate storage tank systems in order to protect the public health, safety and welfare and the environment of the state.

[20.5.1.6 NMAC - Rp, 20.5.1.6 NMAC, 6/15/2009]

**20.5.1.7 DEFINITIONS:**  
A. "Above ground release" means any release to the surface of the land or to surface water. This includes, but is not limited to, releases from the above ground portion of an underground storage tank system and releases associated with overfills and transfer operations during regulated substance deliveries to or dispensing from an UST system.

B. "Above ground storage tank" or "AST" means a single tank or combination of manifolded tanks, including pipes connected thereto, that is 1,320 gallons or more, and less than 55,000 gallons, is permanently installed, and is used to contain petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure of 60 degrees fahrenheit and fourteen and seven tenths pounds per square inch absolute, and the volume of which is more

than ninety percent above the surface of the ground. Tanks in vaults and special enclosures are ASTs. A compartment tank with combined total capacity greater than 1,320 gallons and less than 55,000 gallons is an AST and for purposes of these regulations is considered to be one tank regardless of the number of compartments and the number of regulated substances contained. Above ground storage tank does not include (regardless of size) any:

(1) farm, ranch or residential tank used for storing motor fuel or heating oil for noncommercial purposes;

(2) pipeline facility, including gathering lines regulated under the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979, or that is an intrastate pipeline facility regulated under state laws comparable to either act;

(3) surface impoundment, pit, pond or lagoon;

(4) storm water or wastewater collection system;

(5) flow-through process tank;

(6) liquid trap, tank or associated gathering lines or other storage methods or devices related to oil, gas or mining exploration, production, transportation, refining, processing or storage, or the oil field service industry operations;

(7) tank associated with an emergency generator system;

(8) tanks, bulk terminals, or related pipelines and facilities owned or used by a refinery, natural gas processing plant or pipeline company in the regular course of their refining, processing or pipeline business; bulk plants are not included in the exemption;

(9) multiple tanks at a facility, that are individually less than 1,320 gallons, unless tanks that are siphoned together have a cumulative total capacity greater than 1,320 gallons;

(10) pipes connected to any tank exempted by Paragraphs (1) through (9) of this subsection.

C. "Accidental release" means any sudden or non-sudden release neither expected nor intended by the tank owner or operator of petroleum or other regulated substance from a storage tank that results in a need for corrective action or compensation for bodily injury or property damage.

D. "Ancillary equipment" means any device including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps associated with a storage tank.

E. "Applicable standards" means the most relevant target concentrations that legally apply to a site.

F. "AST system" means an above ground storage tank and its associ-

ated ancillary equipment and containment system, if any.

G. "Basin sump" means a liquid-tight collection container with no valves, joints or other penetrations.

H. "Below ground release" means any release to the subsurface of the land or to groundwater. This includes, but is not limited to, releases from the below ground portions of a storage tank system and releases associated with overfills and transfer operations as the regulated substance is delivered to or dispensed from a storage tank.

I. "Beneath the surface of the ground" means beneath the ground surface or otherwise covered with materials so that physical inspection is precluded.

J. "Bodily injury" shall have the meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

K. "Bulk plant" means a facility which is not a bulk terminal, and which is used for the temporary storage of petroleum products prior to delivery to gasoline stations, convenience stores, and commercial accounts, which is smaller than a bulk terminal and is not equipped with any processing equipment.

L. "Bulk terminal" means a large facility for storing and handling petroleum products that receives and stores bulk deliveries of gasoline and other products from a pipeline, barges, or directly from a nearby refinery. Equipment at the terminal facility is usually capable of further processing the product, including but not limited to: injection of additives or conversion of gasoline vapors received from transports after making deliveries using stage one vapor recovery back to liquid form.

M. "Bureau" means the New Mexico petroleum storage tank bureau.

N. "Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. A tank system can be cathodically protected through the application of either galvanic anodes or impressed current.

O. "Certified installer" refers generally to both AST and UST certified installers.

P. "Certified installer-AST" means an individual who has been certified by the department after August 15, 2003 under 20.5.14 NMAC to install, replace, repair and modify AST systems in this state.

Q. "Certified installer-UST" means an individual who has been

certified by the department after August 15, 2003 under 20.5.14 NMAC to install, replace, repair, and modify UST systems in this state.

R. "Certified operator" means a class A, B, or C operator trained and certified according to the requirements of 20.5.18 NMAC.

S. "Change in service" means removing a regulated substance from a storage tank system and placing something in the system that is not a regulated substance.

T. "Chief financial officer," in the case of local government owners and operators, means the individual with the overall authority and responsibility for the collection, disbursement, and use of funds by the local government.

U. "Community water system" means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

V. "Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for extended periods of time and under varied environmental conditions (i.e., at different temperatures).

W. "Connected piping" means all above ground and underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual storage tank system, the piping which joins the two storage tank systems should be allocated equally between them.

X. "Consumptive use" with respect to heating oil means the oil is burned on the premises.

Y. "Contain" means the stopping of further migration of a regulated substance from a release into or through groundwater, surface water or soil.

Z. "Containment" means that contamination from a release has been contained and is not spreading, migrating, spilling, infiltrating or otherwise traveling into uncontaminated areas. Verification of containment requires the performance of physical measurements that provide positive proof that contamination is contained.

AA. "Containment sump" means a liquid-tight collection container, which may have valves, joints or penetrations, such as piping penetrations.

AB. "Contaminant" means any regulated substance as defined in this section, any constituent of a regulated substance, or any combination of a regulated substance or constituent thereof with any other substance or matter.

AC. "Contaminant of con-

cern” means any contaminant which is suspected of being released at the site based on site history for which:

(1) the New Mexico water quality control commission has adopted standards pursuant to the Water Quality Act, Sections 74-6-1- through 74-6-17 NMSA 1978;

(2) the New Mexico environmental improvement board has adopted standards, action levels, risk-based screening levels or site specific target levels pursuant to the Hazardous Waste Act, the Ground Water Protection Act, or the Environmental Improvement Act; or

(3) the New Mexico environment department has established or approved site-specific target levels pursuant to the Hazardous Waste Act, the Ground Water Protection Act, or the Environmental Improvement Act.

AD. “Contaminant saturated soil” means soil exclusive of the water table and capillary fringe in which non-aqueous phase liquid is observable in the soil or, if sufficiently liquid, drains from the soil when the soil is suspended on filter paper or its equivalent.

AE. “Contaminated soil” means soil containing detectable quantities of contaminants of concern.

AF. “Contracting company” means a corporation, partnership, or duly constituted individual proprietorship which contracts to install or repair storage tank systems for third parties.

AG. “Controlling interest” means direct ownership or other legal control of at least fifty percent of the voting stock of another entity.

AH. “Corrective action” means an action taken to investigate, minimize, eliminate, or clean up a release to protect the public health, safety, and welfare or the environment.

AI. “Corrective action fund” or “fund” means the fund created pursuant to the Ground Water Protection Act, Section 74-6B-7 NMSA 1978, to pay or reimburse for corrective action performed pursuant to 20.5 NMAC and the Ground Water Protection Act.

AJ. “Corrosion expert” means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the national association of corrosion engineers international (NACE). A corrosion expert shall only perform the specific activities required by these rules for which he is qualified, certified, registered or

licensed; for example, a NACE licensed cathodic protection tester shall not design a cathodic protection system unless he is also a NACE licensed cathodic protection technologist, specialist or has another equivalent qualification, certification, registration or license.

AK. “Corrosion prevention plan” means a plan approved in writing by a corrosion expert for a UST or AST or associated piping, or secondary containment, which plan is designed to maintain the integrity of the tank or piping for its useful life.

AL. “Critical junctures” means the steps of an installation, replacement, modification, repair or removal of a tank system or any part of a tank system, which are important to the prevention of releases and which are more specifically described in 20.5.5 and 20.5.8 NMAC.

AM. “Deductible” means the first ten thousand dollars (\$10,000) of minimum site assessment costs, or any lesser amount determined in accordance with 20.5.17.20 NMAC.

AN. “Department” means the New Mexico environment department, also known as the New Mexico department of environment.

AO. “Dielectric material” means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate storage tank systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of storage tank systems, such as tank from piping.

AP. “Director” means the director of the environmental protection division of the department.

AQ. “Direct responsible supervisory control” means responsibility for the direction, control, or supervision of investigation and remediation activities to assure that the work is performed in accordance with appropriate industry and regulatory quality standards.

AR. “Effectively mitigating” means that the approach taken to corrective action has contained the release and is achieving reductions in contamination levels such that the standards described in 20.5.12 and 20.5.13 NMAC will be met in a manner protective of public health, safety and welfare and the environment, within the period of time specified in the plan for remediation by monitored natural attenuation or otherwise.

AS. “EIB” means the environmental improvement board.

AT. “EIB standards” means standards set forth in 20.5.12, 20.5.13 and 20.7.10 NMAC.

AU. “Electrical equipment” means equipment which contains dielectric

fluid which is necessary for the operation of equipment such as transformers and buried electrical cable.

AV. “Emergency repair” means a repair required by immediate danger of a release, or by an immediate threat to public health, safety and welfare, or to the environment.

AW. “Environmental improvement board” (EIB) means the board created in the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.

AX. “Environmental Improvement Act” means the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.

AY. “Excavation zone” means the area containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the UST system is placed at the time of installation.

AZ. “Existing AST system” means an AST system which is used to contain an accumulation of regulated substances or for which installation commenced on or before June 14, 2002. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction at the site or installation of the tank system, and if either:

(1) a continuous on-site physical construction or installation program has begun, or

(2) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.

BA. “Existing UST system” means a UST system which is used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction of the site or installation of the tank system, and if either:

(1) a continuous on-site physical construction or installation program has begun, or

(2) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.

BB. “Exposed petroleum products” means petroleum that is present in the non-aqueous phase (i.e. not dissolved

in water) on the surface of the ground, on surface water, or in any surface or subsurface structures such as utility corridors, basements and manholes.

BC. "Exposed hazardous substance" means a regulated substance other than petroleum that is present on the surface of the ground, on surface water, or in any surface or subsurface structures such as utility corridors, basements or manholes.

BD. "Facility" means a property location that contains storage tanks.

BE. "Farm tank" is a tank located on a tract of land devoted to the production of crops, or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, range land and nurseries with growing operations.

BF. "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

(1) a 10-K report submitted to the SEC;

(2) an annual report of tangible net worth submitted to Dun and Bradstreet; or

(3) annual reports submitted to the energy information administration or the rural electrification administration; "financial reporting year" may thus comprise a fiscal or a calendar year period.

BG. "Flow-through process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flow-through process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or by-products from the production process.

BH. "Functionality test" means a test for automatic line leak detectors which determines whether they are operating correctly.

BI. "Fund" means the corrective action fund which was created pursuant to Section 74-6B-7 NMSA 1978, to pay or reimburse for corrective action required at leaking storage tank sites.

BJ. "Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

BK. "Ground Water Protection Act" means the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978.

BL. "Guidelines for corrective action" means any written guidance

developed by the New Mexico petroleum storage tank bureau, approved by the secretary for use and distribution to the public, and pertaining to the technical or financial requirements in 20.5.7, 20.5.12, 20.5.13 and 20.5.15 through 20.5.17 NMAC.

BM. "Hazardous substance UST system" or "hazardous substance UST" means an underground storage tank system that contains an accumulation of hazardous substances defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act (RCRA). Hazardous substance UST includes a tank with a mixture of such substances and petroleum, but which is not a petroleum UST system.

BN. "Hazardous Waste Act" means the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978.

BO. "Heating oil" refers to a type of fuel oil that is one of eight technical grades. These grades are: No. 1; No. 2; No. 4—light; No. 4—heavy; No. 5—light; No. 5—heavy; No. 6; and residual. Heating oil also refers to fuel oil substitutes such as kerosene or diesel when used for heating purposes.

BP. "Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.

BQ. "Incurred" means billed to the owner or operator.

BR. "Initiation of containment" means the point in time at which a system designed to achieve containment is put into continuous operation.

BS. "Install" or "installation" means the work involved in placing a storage tank system or any part thereof in, on or above the ground and preparing it to be placed in service.

BT. "Integrity test" means an evaluation process that has been independently tested and approved by a nationally recognized association or independent testing laboratory to determine, in the case of a UST, the suitability of the tank for continuous containment of a regulated substance, or, in the case of an AST, both the suitability of the tank for continuous containment of a regulated substance and the necessary hydraulic properties of the tank to contain the outward pressure of the regulated substance.

BU. "Internal inspection" means a formal inspection of an AST by an inspector authorized by the American petroleum institute or certified by the steel tank institute. The inspection shall determine whether the AST tank bottom or shell is

severely corroded and leaking, and shall include an evaluation of the tank bottom and shell thickness to see whether they meet minimum thickness requirements. The inspector shall visually examine all tanks included in the inspection and, if applicable, check for tank bottom settlement.

BV. "Interstitial monitoring" is a leak detection method which surveys the space between a storage tank system's walls and the secondary containment system for a change in steady state conditions.

BW. "Inventory controls" are techniques used to identify a loss of product that are based on volumetric measurements in the tank and reconciliation of those measurements with product delivery and withdrawal records.

BX. "Landfarming" is the remediation of petroleum contaminated soils on or at ground surface using natural aeration and volatilization, disking and natural and enhanced bioremediation to reduce the concentrations of petroleum hydrocarbons to regulatory levels; requires a groundwater discharge permit.

BY. "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:

(1) by EPA or a state to require corrective action or to recover the costs of corrective action;

(2) by or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

(3) by any person to enforce the terms of a financial assurance mechanism.

BZ. "Liquid" means any material that has a fluidity greater than that of 300 penetration asphalt when tested in accordance with ASTM D 5, test for penetration for bituminous materials. When not otherwise identified, the term liquid shall mean both flammable and combustible liquids.

CA. "Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. Such liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

CB. "Loading rack" means the area around and including loading arms, pumps, meters, shutoff valves, relief valves, and other equipment used to load and unload fuel cargo tanks, trucks, tank trucks, railroad cars, cars, other distribution containers or other transport vehicles, if the loading rack services or is attached to one or

more storage tank(s) regulated in 20.5 NMAC.

CC. "Local government" shall have the meaning given this term by applicable state law. The term is generally intended to include counties, municipalities, school districts, and special districts, including flood control and conservancy districts.

CD. "Lower explosive limit" means the lowest percentage of a substance in an airspace that is explosive.

CE. "LST ranking system" means the leaking storage tank ranking system, the ranking or site prioritization system developed for and modified by the department using the analytical hierarchy process to rank sites where a release from a storage tank has occurred based upon public health, safety and welfare and environmental concerns.

CF. "Magnitude of contamination" means the maximum concentrations of contaminants of concern that result from a release.

CG. "Minimum site assessment" or "MSA" means the sum total of all of the following activities:

(1) reporting, investigating and confirming a release pursuant to 20.5.7 NMAC; and

(2) determining the on-site extent, magnitude and impact of contamination by conducting investigations and reporting to the department pursuant to 20.5.12.11 NMAC or 20.5.13.10 NMAC (initial abatement), 20.5.12.12 NMAC or 20.5.13.11 NMAC (report on initial abatement), 20.5.12.16 NMAC or 20.5.13.15 NMAC (preliminary investigation), and 20.5.12.18 NMAC or 20.5.13.17 NMAC (report on the preliminary investigation).

CH. "Mobile AST" means an above ground storage tank that is not field-erected, and which is capable of changes in location.

CI. "Modification" means any change to any portion of a storage tank system that is not a repair. For purposes of 20.5.14 NMAC, the term does not include the process of relining a tank through the application of such materials as epoxy resins.

CJ. "Monitored natural attenuation" means a methodology for remediation that relies upon a variety of naturally occurring chemical, physical and biological processes to achieve target concentrations in a manner that is equally as protective of public health, safety and welfare, and the environment as other methods, and that is accompanied by a program of monitoring to document the progress and results of the above mentioned processes.

CK. "Monthly" means once per month, not to exceed 35 days.

CL. "Motor fuel" is a petroleum-based fuel used in the operation of an engine that propels a vehicle for transportation of people or cargo.

CM. "Motor fuel dispenser system" means a motor fuel dispenser and the equipment necessary to connect the dispenser to a storage tank system. The equipment necessary to connect the motor fuel dispenser to the storage tank may include check valves, shear valves, unburied risers of flexible connectors, or other transitional components that are beneath the dispenser and connect the dispenser to the piping.

CN. "NAPL" means non-aqueous phase liquid as defined in this section.

CO. "New AST system" means an AST system for which installation has commenced after June 14, 2002. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction at the site or installation of the tank, and if either (1) a continuous on-site physical construction or installation program has begun, or (2) the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss for physical construction at the site or installation of the tank system to be completed within a reasonable time.

CP. "New storage tank system" means a new AST system or a new UST system.

CQ. "New UST tank system" means an UST system for which installation has commenced after December 22, 1988. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals, or permits necessary to begin physical construction at the site or installation of the tank, and if either:

(1) a continuous on-site physical construction or installation program has begun, or

(2) the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss for physical construction at the site or installation of the tank system to be completed within a reasonable time.

CR. "Non-aqueous phase liquid" (NAPL) means an interstitial body of liquid oil, petroleum product or organic solvent or other organic substance, including an emulsion containing such material; in the case of liquid oil or a petroleum product, the term is synonymous with "phase separated hydrocarbon" and "free product."

CS. "Non-commercial purposes" with respect to motor fuel means not for resale.

CT. "Non-community water system" means a public water system that is not a community water system.

CU. "Normal maintenance" means an activity involving work on a storage tank system that is not a repair, replacement, or installation, which may include but is not limited to: painting, replacing fuses, or touchup. Any time an activity involves disconnecting or affecting the integrity of the piping, tank, spill or overfill systems, or work on line or tank leak detection systems, then the activity is not normal maintenance but is instead a repair.

CV. "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from a storage tank. This definition is intended to assist in the understanding of 20.5.9 NMAC and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

CW. "On the premises where stored" with respect to heating oil means storage tank systems located on the same property where the stored heating oil is used.

CX. "Operational life" is the period beginning from the time when the installation of the tank system is commenced until it is properly closed pursuant to 20.5.8 NMAC.

CY. "Operator" means any person in control of, or having responsibility for, the daily operation of a storage tank system.

CZ. "Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.

DA. "Owner" means, in the case of a storage tank in use on November 8, 1984 or brought into use after that date, any person who owns a storage tank used for storage, use, or dispensing of regulated substances; and in the case of a storage tank in use before November 8, 1984 but no longer in use after that date, any person who owned such tank immediately before the discontinuation of its use. For purposes of the registration requirements of 20.5.2 NMAC only, the term "owner" excludes any person who:

(1) had a UST taken out of operation on or before January 1, 1974;

(2) had a UST taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984; or

(3) had an AST taken out of operation on or before July 1, 2001.

DB. "Permanently installed AST" means an AST that is on site for more

than 365 consecutive days and dispensing or storing a regulated substance for distribution at any time during that period.

DC. "Person" means any individual, trust, firm, joint stock company, federal agency, corporation including a government corporation, partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" includes a consortium, a joint venture, a commercial entity, and the United States Government.

DD. "Petroleum" means crude oil, crude oil fractions, and refined petroleum fractions, including gasoline, kerosene, heating oils, and diesel fuels.

DE. "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

DF. "Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with storage tank systems as well as petroleum marketing facilities are considered to be petroleum marketing firms.

DG. "Petroleum tank system," "petroleum storage tank" or "petroleum UST" means a storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

DH. "Pipeline facilities, including gathering lines," are new and existing pipe rights-of-way and any equipment, facilities, or buildings regulated under the federal Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the federal Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act.

DI. "Piping" means the hollow cylinder or the tubular conduit constructed of non-earthen materials that routinely contains and conveys regulated substances within a storage tank system. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the storage tank to the dispenser or other end-use equipment.

DJ. "Positive sampling, testing or monitoring results" refers to the results of sampling, testing or monitoring using a method described in 20.5.6 NMAC that indicate a release from a storage tank system has occurred.

DK. "Potable drinking water well" means any hole (dug, driven, drilled,

or bored) that extends into the earth until it meets groundwater which may supply water for a community water system, a non-community public water system, or otherwise may supply water for human consumption (consisting of drinking, bathing, cooking, or other similar uses). Such wells may provide water to entities such as a single-family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.

DL. "Potentially explosive levels of petroleum hydrocarbon vapors" means vapors which register in excess of twenty percent LEL (lower explosive limit) on a combustible gas indicator properly calibrated for pentane.

DM. "Potentially harmful petroleum hydrocarbon vapors" means vapors which register a reading of five whole units above ambient concentrations total aromatic hydrocarbons in any structure in the vicinity of the release site, on a photoionization detector, flame ionization detector or an equivalent device properly calibrated to detect hydrocarbon vapors at a minimum detection limit of at least one ppm.

DN. "Professional engineer" is an individual licensed in New Mexico to engage in the practice of engineering under the New Mexico Engineering and Surveying Practices Act, Sections 61-23-1 through 61-23-32 NMSA 1978.

DO. "Project drawings" means schematic drawings of tanks, piping, and ancillary equipment, which need not be prepared, stamped or signed by a professional engineer.

DP. "Property damage" shall have the meaning given this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

DQ. "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of a storage tank system through one of the mechanisms listed in 20.5.9.905 through 20.5.9.916 NMAC, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

DR. "Public water system" means a system for the provision to the public of piped water for human consumption (consisting of drinking, bathing, cooking, or other similar uses) if such system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. Such

term includes any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. A public water system is either a "community water system" or a "non-community water system."

DS. "Qualified firm" means a person, as defined in this section, qualified by the department under 20.5.16 NMAC to undertake corrective action.

DT. "RBSL" means risk-based screening level as used in 20.5.12 NMAC.

DU. "Receptor" means a person, plant or animal community, structure, utility, surface water, designated well-head or source water protection area or water supply well that is or may be adversely affected by a release.

DV. "Regulated substance" means:

(1) for USTs: any substance defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act, as amended; and

(2) for ASTs and USTs: petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure of 60 degrees fahrenheit and fourteen and seven tenths pounds per square inch absolute; asphalt is not a regulated substance; the term "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading and finishing, such as motor fuels (including ethanol-based motor fuels), jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

DW. "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing of a regulated substance from a storage tank system into groundwater, surface water or soil.

DX. "Release detection" means determining whether a release of a regulated substance has occurred from a storage tank system into the environment or into the interstitial area between a storage tank system and a secondary barrier around it.

DY. "Remediation" is the process of reducing the concentration of contaminants in air, water or soil to a level that poses an acceptable risk to public health, safety and welfare and the environ-

ment.

DZ. "Repair" means to restore any defective or damaged part of a storage tank system. Repair does not include normal maintenance. For these purposes, normal maintenance shall include but is not limited to: painting, replacing fuses, or touchup. Any time an activity involves disconnecting or affecting the integrity of the piping, tank, spill or overflow systems, or work on line or tank leak detection systems, then the activity is not normal maintenance and is a repair.

EA. "Replace" means:

(1) for a storage tank or dispenser, to remove an existing tank or dispenser and install a new tank or dispenser; and

(2) for piping, to remove and put back in any amount of piping connected to a single tank that is installed after April 4, 2008 or to a single tank that is replaced after April 4, 2008; replacing piping also means removing five or more feet of piping and installing new piping within 30 days.

EB. "Residential tank" is a tank located on property used primarily for dwelling purposes.

EC. "Responsible party-lead site" means a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs, as distinct from a site where the state takes corrective action.

ED. "Return to service" means to bring a storage tank into operation after the tank has been in temporary or permanent closure.

EE. "Risk-based screening level" (RBSL) means an action level or target level for a contaminant of concern determined using default criteria set by the department and site specific data for thickness of the contaminated zone and depth to groundwater in the tier one evaluation in accordance with 20.5.12 NMAC and the bureau's guidelines for corrective action.

EF. "Rural and remote area" means that a storage tank facility is located in an area that is more than 20 miles from another facility that sells fuel to the public and that is open year round.

EG. "Secondary containment" means a release prevention and release detection system for a storage tank its piping and associated ancillary equipment that is designed to prevent a release from migrating beyond the secondary containment system outer wall (in the case of a double-walled tank system) or excavation area (in the case of a liner or vault system) before the release can be detected. Such a system may include, but is not limited to, synthetic impervious liners.

EH. "Secretary" means the secretary of the New Mexico environment department also known as the secretary of

the environment.

EI. "Septic tank" is a water-tight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

EJ. "Site" means a place where there is or was at a previous time one or more storage tanks and may include areas contiguous to the actual location or previous location of the tanks.

EK. "Site conceptual exposure scenario" means a qualitative evaluation of exposure information for a site that identifies the relevant contaminant source, release mechanisms, media of concern, complete and incomplete exposure pathways, and receptors.

EL. "Site-specific target level" (SSTL) means an action level or target level for a contaminant of concern determined using more site-specific data than the tier one evaluation in the tier two or tier three evaluations in 20.5.12 NMAC.

EM. "Source water" means water that could be used for domestic purposes, including but not limited to ground water, natural springs, and surface water, even if such water is not current being used for domestic purposes.

EN. "Special enclosure" means an above or below grade AST installation that surrounds an AST or ASTs, including but not limited to pits, cellars, and basements.

EO. "Spill" means:

(1) any spill or overflow of a regulated substance that exceeds its reportable quantity under CERCLA (40 CFR 302);

(2) any spill or overflow of petroleum that exceeds 25 gallons or causes a sheen on surface water or reaches groundwater; or

(3) any spill or overflow of petroleum of 25 gallons or less the clean up of which cannot be accomplished within 24 hours.

EP. "SSTL" means site-specific target level as used in 20.5.12 NMAC.

EQ. "State-lead site" means a site where the department takes corrective action using the fund because the owners and operators are unknown, unable or unwilling to take corrective action as described in 20.5.15.10 NMAC or because the department determines that a single entity is necessary to lead the corrective action.

ER. "Storage tank" means any above ground storage tank or underground storage tank.

ES. "Storage tank fee"

means fees required by Section 74-4-4.4 NMSA 1978 and Section 74-6B-9 NMSA 1978.

ET. "Storage tank system" means a storage tank and its associated ancillary equipment and containment system, if any.

EU. "Stormwater or wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water run-off resulting from precipitation or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur.

EV. "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

EW. "Substantial governmental relationship" means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from a clear commonality of interest in the event of a storage tank release such as coterminous boundaries, overlapping constituencies, common ground-water aquifer, or other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

EX. "Sump" means any pit or reservoir that meets the definition of tank (including troughs or trenches connected to it that serves to temporarily collect regulated substances.

EY. "Surface impoundment" is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials) that is designed to hold an accumulation of regulated substances and that is not an injection well.

EZ. "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

FA. "Tank" is a stationary device designed to contain an accumulation of regulated substances which is construct-

ed of non-earthen materials (e.g., concrete, steel, plastic) that provide structural support.

FB. "Target concentrations" means any concentration of a contaminant to which a medium is required to be remediated under any provision of 20.5 NMAC protective of human health, safety and welfare, and the environment. For purposes of 20.5.13 NMAC, target concentrations as they apply to soil contamination shall be based on standards prescribed by applicable law or, if there are no applicable standards, the standard set forth in 20.6.3.110 NMAC.

FC. "Termination" under Subsections A and B of 20.5.9.957 NMAC means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

FD. "Tightness testing" means a procedure for testing the ability of a tank system to prevent an inadvertent release of any stored substance into the environment (or, in the case of an UST system, intrusion of groundwater into a tank system).

FE. "Underground area" means an underground room, such as a basement, cellar, shaft or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

FF. "Underground release" means any below ground release.

FG. "Underground storage tank" or "UST" means a single tank or combination of tanks, including pipes connected thereto, that are used to contain an accumulation of regulated substances and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground. A compartment tank with combined total capacity greater than 110 gallons is a UST and for purposes of these regulations is considered to be one tank regardless of the number of compartments and the number of regulated substances contained. The term does not include any:

(1) farm, ranch or residential tank of 1,100 gallons or less capacity used for storing motor fuel or heating oil for non-commercial purposes;

(2) septic tank;

(3) pipeline facility, including gathering lines which are regulated under the federal Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the federal Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act;

(4) surface impoundment, pit,

pond or lagoon;

(5) storm water or wastewater collection system;

(6) flow-through process tank;

(7) liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

(8) storage tank situated in an underground area, such as a basement, cellar, mineworking drift, shaft or tunnel, if the storage tank is situated upon or above the surface of the undesignated floor;

(9) tank associated with an emergency generator system;

(10) tank exempted by rule of the EIB after finding that the type of tank is adequately regulated under another federal or state law; or

(11) pipes connected to any tank exempted by Paragraphs (1) through (10) of this subsection.

FH. "Un-manned facility" means a storage tank system without a sales office, store or other business establishment associated with it. Examples of un-manned facilities include but are not limited to: a card-lock fueling station with no attendant and a tank serving an emergency generator at a utility transfer station.

FI. "Unsaturated zone" is the subsurface zone containing water under pressure less than that of the atmosphere, including water held by capillary forces within the soil and containing air or gases generally under atmospheric pressure. This zone is limited above by the ground surface and below by the upper surface of the zone of saturation (i.e., the water table).

FJ. "USTR" means the version of the environmental improvement board's underground storage tank regulations in effect prior to adoption of the standard format in the New Mexico Administrative Code in 1995.

FK. "UST system" means an underground storage tank and its associated ancillary equipment and containment system, if any.

FL. "Vault" means a liquid-tight structure that completely surrounds a tank, that is above, below or partially above or below the ground surface.

FM. "Wastewater treatment tank" means a tank that is part of a wastewater treatment facility regulated under either Section 402 or 307(b) of the federal Clean Water Act and which receives and treats or stores an influent wastewater which contains regulated substances.

FN. "WQCC" means the New Mexico water quality control commission.

FO. "WQCC standards" means standards set forth in 20.6.4 NMAC, standards for interstate and intrastate streams, and 20.6.2 NMAC, ground and surface water protection.

[20.5.1.7 NMAC - Rp, 20.5.1.7 NMAC, 6/15/2009]

**20.5.1.8 SAVINGS CLAUSE:** This rule shall not affect any administrative or judicial enforcement action pending on the effective date of 20.5.1 through 20.5.16 NMAC.

[20.5.1.8 NMAC - Rp, 20.5.1.8 NMAC, 6/15/2009]

**20.5.1.9 COMPLIANCE WITH OTHER REGULATIONS:** Compliance with 20.5 NMAC does not relieve a person of the obligation to comply with other applicable state and federal regulations.

[20.5.1.9 NMAC - Rp, 20.5.1.9 NMAC, 6/15/2009]

**20.5.1.10 CONSTRUCTION:** The petroleum storage tank regulations, 20.5 NMAC, shall be liberally construed to effectuate the purposes of the Hazardous Waste Act and the Ground Water Protection Act.

[20.5.1.10 NMAC - Rp, 20.5.1.10 NMAC, 6/15/2009]

**20.5.1.11 SEVERABILITY:** If any part, section or application of 20.5 NMAC is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[20.5.1.11 NMAC - Rp, 20.5.1.11 NMAC, 6/15/2009]

#### **HISTORY OF 20.5.1 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records - state records center and archives:

EIB/USTR-1, Underground Storage Tank Regulations - Part I - General Provisions, filed 3/15/88;

EIB/USTR-1, Underground Storage Tank Regulations - Part I - General Provisions, filed 9/12/88;

EIB/USTR-1, Underground Storage Tank Regulations - Part I - General Provisions, filed 2/14/89;

EIB/USTR-1, Underground Storage Tank Regulations - Part I - General Provisions, filed 8/4/89;

EIB/USTR 11, Underground Storage Tank Regulations - Part XI - Miscellaneous, filed 9/12/88.

#### **History of Repealed Material:**

20 NMAC 5.1, Underground Storage Tanks - General Provisions (filed 10/6/95), repealed 2/2/00;

20.5.1 NMAC, Petroleum Storage Tank Regulations - General Provisions (filed 12/30/99), repealed 6/14/02;

20.5.1 NMAC, Petroleum Storage Tank Regulations - General Provisions, (filed

4/30/02), repealed 8/15/03.

20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, (filed 7/16/03), repealed 4/4/08.

20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, (filed 3/5/08), repealed 6/15/09.

**Other History:**

EIB/USTR-1, Underground Storage Tank Regulations - Part I - General Provisions, filed 8/4/89 and EIB/USTR 11, Underground Storage Tank Regulations - Part XI - Miscellaneous (filed 9/12/88) both renumbered, reformatted and replaced by 20 NMAC 5.1, Underground Storage Tanks - General Provisions, effective 11/5/95;

20 NMAC 5.1, Underground Storage Tanks - General Provisions (filed 10/6/95), was replaced by 20 NMAC 5.1, Underground Storage Tanks - General Provisions, effective 2/2/00;

20 NMAC 5.1, Underground Storage Tanks - General Provisions (filed 12/30/99), was replaced by 20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, effective 6/14/02

20.5.1 NMAC, Petroleum Storage Tanks - General Provisions (filed 4/30/02), was replaced by 20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, effective 8/15/03.

20.5.1 NMAC, Petroleum Storage Tanks - General Provisions (filed 7/16/03), replaced by 20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, effective 4/4/08.

20.5.1 NMAC, Petroleum Storage Tanks - General Provisions (filed 3/5/08), replaced by 20.5.1 NMAC, Petroleum Storage Tanks - General Provisions, effective 6/15/09.

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

**TITLE 20 ENVIRONMENTAL  
PROTECTION**

**CHAPTER 5 P E T R O L E U M  
STORAGE TANKS**

**PART 7 REPORTING AND  
INVESTIGATION OF SUSPECTED  
AND CONFIRMED RELEASES**

**20.5.7.1 ISSUING AGENCY:**  
New Mexico Environmental Improvement Board.

[20.5.7.1 NMAC - Rp, 20.5.7.1 NMAC, 6/15/2009]

**20.5.7.2 SCOPE:** This part applies to owners and operators of storage tanks as defined in 20.5.1 NMAC. If the owner and operator of a storage tank are separate persons, only one person is required to comply with the requirements of

this part, including any notice and reporting requirements; however, both parties are liable in the event of noncompliance.

[20.5.7.2 NMAC - Rp, 20.5.7.2 NMAC, 6/15/2009]

**20.5.7.3 S T A T U T O R Y**

**AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14, NMSA 1978, and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 1-16, NMSA 1978. [20.5.7.3 NMAC - Rp, 20.5.7.3 NMAC, 6/15/2009]

**20.5.7.4 D U R A T I O N :**

Permanent. [20.5.7.4 NMAC - Rp, 20.5.7.4 NMAC, 6/15/2009]

**20.5.7.5 EFFECTIVE DATE:**

June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.

[20.5.7.5 NMAC - Rp, 20.5.7.5 NMAC, 6/15/2009]

**20.5.7.6 OBJECTIVE:**

The purpose of 20.5.7 NMAC is to regulate storage tank systems in order to protect the public health, safety and welfare and the environment of the state, and to ensure that suspected and confirmed releases from storage tank systems are promptly reported and investigated and that corrective action is promptly initiated.

[20.5.7.6 NMAC - Rp, 20.5.7.6 NMAC, 6/15/2009]

**20.5.7.7 DEFINITIONS:**

The definitions in 20.5.1 NMAC apply to this part.

[20.5.7.7 NMAC - Rp, 20.5.7.7 NMAC, 6/15/2009]

**20.5.7.8 REPORTING OF  
SPILL OR RELEASE:**

A. Owners, operators and certified installers shall give notice of any suspected or confirmed release from a storage tank system pursuant to 20.5.7.9 or 20.5.7.10 NMAC, or any spill or any other relevant emergency situation to the department by telephone within 24 hours. The owner, operator or certified installer giving the notice shall provide the following items of information to the best of the owner's, operator's or certified installer's knowledge:

(1) the name, address, and telephone number of the agent in charge of the site at which the storage tank system is located, as well as the name, address and telephone number of the owner and the operator of the system;

(2) the name and address of the site at which the storage tank system is located and the location of the storage tank system on that site;

(3) the date, time, location and duration of the spill, release or suspected release;

(4) the source and cause of the spill, release or suspected release;

(5) the tank system description;

(6) a description of the spill, release or suspected release, including its chemical composition;

(7) the estimated volume of the spill, release or suspected release; and

(8) any actions taken to mitigate immediate damage from the spill, release or suspected release.

B. Owners and operators shall provide a written report describing the spill, release or suspected release and any investigation or follow-up action to the department within 14 days of the incident. The written report shall verify the prior oral notification as to each of the items of information listed in Subsection A of this section and provide any appropriate amendments to the information contained in the prior oral notification.

C. The department shall determine whether a release is a confirmed release based on the 24-hour and 14-day reports prepared in accordance with 20.5.7.8, 20.5.7.9 and 20.5.7.10 NMAC, monitoring results, system checks, the investigation performed in accordance with 20.5.7.9 NMAC, and any other information available to the department. The department shall provide a written determination that a release is a confirmed release to all affected owners and operators, and shall state the basis for the determination.

[20.5.7.8 NMAC - Rp, 20.5.7.700 NMAC, 6/15/2009]

[To provide notice to the department under Subsection A of this section, telephone the department staff person currently on duty; to obtain this number, check the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html). The department provides an optional incident reporting form on the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html) that may be used for Subsection B of this section.]

**20.5.7.9 S U S P E C T E D  
RELEASES:**

A. Owners, operators and certified installers of storage tank systems shall report the following conditions, which are considered suspected releases, to the department within 24 hours, in accordance with 20.5.7.8 NMAC, and follow the procedures in Subsection B of this section:

(1) evidence of released regulated substances in the vicinity of the storage tank site, including but not limited to, the presence of non-aqueous phase liquid or vapors in soils, basements, sewer and utility lines, groundwater, drinking water or nearby surface water;

(2) unusual operating conditions such as, but not limited to, the erratic function of product dispensing equipment, the sudden loss of a regulated substance from the storage tank system, an unexplained presence of water in the tank, the presence of a regulated substance in the annular or interstitial space of double-walled tanks or piping, and anything other than a "pass" result from any release detection method in 20.5.6 NMAC, unless system equipment is found to be defective but not leaking and is immediately repaired or replaced; or

(3) monitoring results from a release detection method described in 20.5.6 NMAC that are anything other than a "pass" result from any release detection method in 20.5.6 NMAC, or that indicate a release may have occurred.

B. Owners and operators shall investigate all suspected releases of regulated substances within 14 days of discovery of the suspected release. Owners and operators shall conduct a system test, site check or another procedure, with prior approval by the department of the procedure.

(1) System test. Owners and operators shall conduct appropriate system tests approved by the department according to the requirements for tightness testing in Subsection C of 20.5.6.14 NMAC and Subsection B of 20.5.6.23 NMAC to determine whether a leak exists in the storage tank system. Further investigation is not required if test results for the storage tank system do not show a leak exists and if environmental contamination is not the basis for the suspected release report. If test results show that a storage tank system leak exists, owners and operators shall follow the procedures set forth in this chapter.

(2) Site check. When there is evidence of a release of a regulated substance in the vicinity of a storage tank system, owners and operators shall conduct a site check as directed by the department.

(a) Owners and operators shall investigate a release in the locations where contamination is most likely to be present at the storage tank site.

(b) In selecting sample types, sample locations, and measurement methods, owners and operators shall consider the nature of the stored regulated substance, the basis for the suspected release report, the type of backfill, depth to groundwater, and other appropriate site-specific conditions.

(c) The department shall approve sample types, locations and methods of

measurement.

C. Owners and operators shall report all results of the system test, site check or other procedure approved by the department in accordance with this part.

[20.5.7.9 NMAC - Rp, 20.5.7.701 NMAC & 20.5.7.703 NMAC, 6/15/2009]

[To provide notice to the department under this section, telephone the department staff person currently on duty; to obtain this number, check the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html).]

#### 20.5.7.10 CONFIRMED RELEASES:

A. Owners, operators and certified installers of storage tank systems shall report the following conditions to the department within 24 hours, in accordance with 20.5.7.8 NMAC:

(1) visible leaks or seeps from any part of a storage tank system; and

(2) evidence of released regulated substances at the storage tank site including, but not limited to, the presence of non-aqueous phase liquid or vapors in soils, basements, sewer and utility lines, groundwater, drinking water or nearby surface water.

B. Owners and operators of storage tank systems shall address confirmed releases in accordance with 20.5.12 and 20.5.13 NMAC, and shall close the system in accordance with 20.5.8 NMAC until the system is repaired or replaced so that the release will not recur.

[20.5.7.10 NMAC - Rp, 20.5.7.702 NMAC, 6/15/2009]

[To provide notice to the department under this section, telephone the department staff person currently on duty; to obtain this number, check the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html).]

#### 20.5.7.11 SPILLS AND OVERFILLS:

A. Owners and operators of storage tank systems shall contain and immediately clean up a spill or overflow, and report the spill or overflow to the department within 24 hours in accordance with 20.5.7.8 NMAC except as provided in Subsection C of this section, and begin corrective action in accordance with 20.5.12 and 20.5.13 NMAC in the following cases:

(1) any spill or overflow of petroleum that results in a release to the environment that exceeds 25 gallons, that causes a sheen on nearby surface water, or that creates a vapor hazard pursuant to 20.5.12.11 NMAC; and

(2) any spill or overflow of a hazardous substance that results in a release to the environment that equals or exceeds its reportable quantity under the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 (CERCLA), and 40 CFR part 302.

B. Owners and operators of storage tank systems shall contain and immediately clean up a spill or overflow of petroleum that is less than 25 gallons, and a spill or overflow of a hazardous substance that is less than the reportable quantity. Owners and operators shall notify the department if cleanup cannot be accomplished within 24 hours, or within another reasonable time period which has been established by the department.

C. Pursuant to 40 CFR parts 302.7 and 355.40, owners and operators shall also immediately report a release of a hazardous substance equal to or in excess of its reportable quantity to the National Response Center under sections 102 and 103 of CERCLA and to appropriate state and local authorities under Title III of the Superfund Amendments and Reauthorization Act of 1986.

[20.5.7.11 NMAC - Rp, 20.5.7.704 NMAC, 6/15/2009]

[To provide notice to the department under this section, telephone the department staff person currently on duty; to obtain this number, check the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html).]

#### HISTORY OF 20.5.7 NMAC:

**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

EIB/USTR-7, Underground Storage Tank Regulations - Part VII - Release Reporting and Investigation, filed 9/12/88.

EIB/USTR-7, Underground Storage Tank Regulations - Part VII - Release Reporting, Investigation and Confirmation, filed 6/12/90.

**History of Repealed Material:** 20 NMAC 5.7, Underground Storage Tank Regulations - Release Reporting, Investigations, and Confirmation (filed 10/6/95), repealed 8/15/03.

20.5.7 NMAC, Petroleum Storage Tanks - Reporting and Investigation of Suspected and Confirmed Releases (filed 7/16/03), repealed 6/15/09.

#### Other History:

EIB/USTR-7, Underground Storage Tank Regulations - Part VII - Release Reporting, Investigation and Confirmation (filed 6/12/90) was renumbered, reformatted and replaced by 20 NMAC 5.7, Underground Storage Tanks - Release Reporting, Investigations and Confirmation, effective 11/5/95.

20 NMAC 5.7, Underground Storage Tanks - Release Reporting, Investigations and Confirmation (filed 10/6/95) was renum-

bered, reformatted and replaced by 20.5.7 NMAC, Petroleum Storage Tanks - Reporting and Investigation of Suspected and Confirmed Releases, effective 8/15/03. 20.5.7 NMAC, Petroleum Storage Tanks - Reporting and Investigation of Suspected and Confirmed Releases (filed 7/16/03) was replaced by 20.5.7 NMAC, Petroleum Storage Tanks - Reporting and Investigation of Suspected and Confirmed Releases, effective 6/15/09.

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

### TITLE 20 ENVIRONMENTAL PROTECTION CHAPTER 5 P E T R O L E U M STORAGE TANKS PART 10 ADMINISTRATIVE REVIEW

**20.5.10.1 ISSUING AGENCY:**  
New Mexico Environmental Improvement Board.  
[20.5.10.1 NMAC - Rp, 20.5.10.1 NMAC, 6/15/09]

**20.5.10.2 SCOPE:** This part applies to owners and operators of storage tanks as provided in 20.5.1 NMAC.  
[20.5.10.2 NMAC - Rp, 20.5.10.2 NMAC, 6/15/09]

**20.5.10.3 S T A T U T O R Y  
AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, 74-6B-1 through 74-6B-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, 74-1-1 through 74-1-16 NMSA 1978.  
[20.5.10.3 NMAC - Rp, 20.5.10.3 NMAC, 6/15/09]

**20.5.10.4 D U R A T I O N :**  
Permanent.  
[20.5.10.4 NMAC - Rp, 20.5.10.4 NMAC, 6/15/09]

**20.5.10.5 EFFECTIVE DATE:**  
June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.  
[20.5.10.5 NMAC - Rp, 20.5.10.5 NMAC, 6/15/09]

**20.5.10.6 OBJECTIVE:** The purpose of this part is to provide owners and operators a means of seeking review or reconsideration of decisions made by the department under 20.5 NMAC in regulating storage tank systems in order to protect the

public health, safety and welfare and the environment of the state.

[20.5.10.6 NMAC - Rp, 20.5.10.6 NMAC, 6/15/09]

**20.5.10.7 DEFINITIONS:** The definitions in 20.5.1 NMAC apply to this part.

[20.5.10.7 NMAC - Rp, 20.5.10.7 NMAC, 6/15/09]

### **20.5.10.8 INITIATION OF ADMINISTRATIVE REVIEW:**

A. Except for appeals as provided for in 20.5.17 NMAC for compliance determinations, any owner, operator or contractor aggrieved by a decision made by the department pursuant to 20.5.1 through 20.5.17 NMAC, any offeror aggrieved by a decision made by the department pursuant to 20.5.17 NMAC and any person denied designation as a representative pursuant to 20.5.17.19 NMAC may obtain review of the decision by either:

(1) submitting to the department a written request for informal review pursuant to 20.5.10.9 NMAC; or

(2) submitting to the secretary or the secretary's designee a written request for review on written submittals pursuant to 20.5.10.10 NMAC.

B. Any request for administrative review initiated pursuant to Subsection A of this section must be post-marked within 15 days of the date of the decision to be reviewed.

C. A person entitled to review under Subsection A of this section may request review on written submittals under 20.5.10.10 NMAC without first requesting informal review under 20.5.10.9 NMAC. If, however, a person entitled to review first requests informal review under 20.5.10.9 NMAC, the person thereafter may request review on written submittals under 20.5.10.10 NMAC of the determination made by the department pursuant to Subsection D of 20.5.10.9 NMAC, provided that the request for review on written submittals under 20.5.10.10 NMAC is post-marked within 15 days of the date of the determination made by the department pursuant to Subsection D of 20.5.10.9 NMAC.

D. Review under this part does not stay the decision being reviewed, unless otherwise ordered by the secretary or secretary's designee, nor does it apply to or affect the secretary's authority to issue compliance orders or otherwise seek enforcement of these regulations, 20.5 NMAC, under the provisions of the Hazardous Waste Act or the Ground Water Protection Act.

[20.5.10.8 NMAC - Rp, 20.5.10.1000 NMAC, 6/15/09]

### **20.5.10.9 I N F O R M A L REVIEW:**

A. A request for informal review by an owner or operator shall be in writing and shall specify the grounds upon which the owner or operator objects to the decision to be reviewed. Every request for informal review shall be submitted to the department by the deadline set out in Subsections B and C of 20.5.10.8 NMAC.

B. The department shall afford prompt opportunity for an informal conference at which the owner or operator may present the owner's or operator's views on the issues raised in the request for review and offer any supporting documentation or testimony. The department shall notify the owner or operator of the time, date and place of the informal conference.

C. If the decision to be reviewed was based on an inspection or field test performed or witnessed by an employee of the department, the member of department staff conducting the review must be someone other than the employee who conducted or witnessed the inspection or test.

D. After considering all written and oral views presented, the department shall affirm, modify or reverse the original decision and shall furnish the owner or operator with a written notification of its determination.

[20.5.10.9 NMAC - Rp, 20.5.10.1001 NMAC, 6/15/09]

### **20.5.10.10 REVIEW BY THE SECRETARY OR THE SECRETARY'S DESIGNEE ON WRITTEN SUBMIT- TALS:**

A. Every request for review by the secretary or the secretary's designee on written submittals shall be in writing and shall specify the grounds upon which the owner or operator objects to the decision to be reviewed. The request shall be accompanied by any and all written materials and argument which the owner or operator wishes the secretary or the secretary's designee to consider upon review. The request and all written materials and argument shall be submitted to the secretary or the secretary's designee by the deadline set out in Subsections B and C of 20.5.10.8 NMAC.

B. Within 15 days after the filing of the owner or operator's request for review and submittal of all the owner or operator's supporting material, department staff shall provide to the secretary or the secretary's designee any and all written materials and argument in support of the position of department staff on the issues raised by the owner or operator.

C. For good cause shown, the secretary or the secretary's designee

may permit either party (that is, either department staff or the owner or operator) additional time in which to submit the supporting written materials and argument allowed by Subsections A and B of this section. Any extension of time to submit written submittals shall not include the authority to extend the time to file a request for review under this part.

D. The action of the secretary or the secretary's designee on the request for review shall be based on the written materials and argument submitted pursuant to this section unless the secretary or the secretary's designee schedules a hearing on the request for review as set forth below.

E. The secretary or the secretary's designee may exercise discretion in determining if there is significant public interest for a public hearing and, if so, may provide notice of the time and place of the hearing to the owner and operator, and may provide notice to interested persons other than the owner or operator and provide for public participation in the review process described in this section, as the secretary or the secretary's designee deems appropriate.

F. If the secretary chooses to hold a hearing as described in Subsection E of this section, the secretary shall hold the hearing within 60 days after receiving the written materials and argument described in Subsection A or after receiving the request for a hearing, whichever occurs last. In the event the department holds a hearing, the cost of the court reporter and transcript shall be paid by the party that requested the hearing. The hearing shall be conducted in accordance with 20.1.5 NMAC.

G. The action of the secretary or the secretary's designee on the request for review shall be by written order and shall state the decision and the reason therefor. The secretary or the secretary's designee shall send a copy of the order to the owner or operator and furnish a copy to department staff promptly after the order is entered. This written order shall be the department's final action on the request for review. Any judicial review of this final order shall be as provided by applicable law. [20.5.10.10 NMAC - Rp, 20.5.10.1002 NMAC, 6/15/09]

#### **History of 20.5.10 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

EIB/USTR-10, Underground Storage Tank Regulations - Part X - Administrative Review, filed 9/12/88.

EIB/USTR-10, Underground Storage Tank Regulations - Part X - Administrative

Review, filed 8/4/89.

#### **History of Repealed Material:**

20 NMAC 5.10, Underground Storage Tanks, Administrative Review (filed 2/27/97), repealed 8/15/03.

20.5.10 NMAC, Petroleum Storage Tanks, Administrative Review (filed 7/16/03), repealed 6/15/09.

#### **Other History:**

EIB/USTR-10, Underground Storage Tank Regulations - Part X - Administrative Review, (filed 8/4/89) renumbered, reformatted and replaced by 20 NMAC 5.10, effective 11/5/95.

20 NMAC 5.10, Underground Storage Tanks, Administrative Review, (filed 10/6/95) was replaced by 20 NMAC 5.10, Underground Storage Tanks, Administrative Review, effective 4/1/97.

20 NMAC 5.10, Underground Storage Tanks, Administrative Review, (filed 2/27/97) was renumbered, reformatted and replaced by 20.5.10, NMAC, Petroleum Storage Tanks, Administrative Review, effective 8/15/03.

20.5.10 NMAC, Petroleum Storage Tanks, Administrative Review, (filed 7/16/03) was replaced by 20.5.10 NMAC, Petroleum Storage Tanks, Administrative Review, effective 6/15/09.

## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

### **TITLE 20 ENVIRONMENTAL PROTECTION CHAPTER 5 PETROLEUM STORAGE TANKS PART 12 CORRECTIVE ACTION FOR STORAGE TANK SYSTEMS CONTAINING PETROLEUM PRODUCTS**

**20.5.12.1 ISSUING AGENCY:** New Mexico Environmental Improvement Board.  
[20.5.12.1 NMAC - Rp, 20.5.12.1 NMAC, 6/15/2009]

**20.5.12.2 SCOPE:** This part applies to owners and operators of petroleum storage tanks as defined in 20.5.1 NMAC. If the owner and operator of a petroleum storage tank are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of non-compliance.  
[20.5.12.2 NMAC - Rp, 20.5.12.2 NMAC, 6/15/2009]

**20.5.12.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14, the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14, NMSA 1978; the Water Quality Act, Sections 74-6-1 through 74-6-17, NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-16, NMSA 1978.  
[20.5.12.3 NMAC - Rp, 20.5.12.3 NMAC, 6/15/2009]

**20.5.12.4 DURATION:** Permanent.  
[20.5.12.4 NMAC - Rp, 20.5.12.4 NMAC, 6/15/2009]

**20.5.12.5 EFFECTIVE DATE:** June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.  
[20.5.12.5 NMAC - Rp, 20.5.12.5 NMAC, 6/15/2009]

**20.5.12.6 OBJECTIVE:** The purpose of this part is to provide for corrective action at sites contaminated by releases from petroleum storage tank systems and to protect the public health, safety and welfare and the environment of the state.  
[20.5.12.6 NMAC - Rp, 20.5.12.6 NMAC, 6/15/2009]

**20.5.12.7 DEFINITIONS:** The definitions in 20.5.1 NMAC apply to this part.  
[20.5.12.7 NMAC - Rp, 20.5.12.7 NMAC, 6/15/2009]

#### **20.5.12.8 GENERAL:**

A. Owners and operators of petroleum storage tank systems shall take corrective action to address all releases, including such action as collection and analysis of relevant site-specific data, soil remediation, groundwater and surface water remediation and any other appropriate actions pursuant to this part, in a manner protective of public health, safety and welfare and the environment.

B. Upon confirmation of a release pursuant to 20.5.7 NMAC or identification and reporting of a release in any other manner, owners and operators of petroleum storage tank systems shall comply with the requirements of this part if the release:

- (1) is of unknown volume or is greater in volume than 25 gallons; or
- (2) is of any size and the owner or operator is directed by the department to comply with this part.

C. Owners and operators shall mail or deliver all written notices and reports required under this part to be submitted to the department to the owner or operator’s assigned project manager from the petroleum storage tank bureau, New Mexico environment department.

D. Owners and operators shall comply with any site-specific timeline or deadline that is issued or approved in writing by the department at the time of workplan approval. If no applicable site-specific timeline has been issued or approved, the following timeline shall apply to all corrective action requirements under this part. The time deadlines set forth in this part are computed from the date of reporting of a release or of reporting of the confirmation of a suspected release pursuant to 20.5.7 NMAC unless another event is specified in these.

Default Corrective Action Timeline

Deadline, in days from report:	Action or deliverable due date, as defined above:
0	report discovery or confirmation of a release
3	72-hour report
14	14-day report
60	submit NAPL assessment
60	initiate interim removal of contaminated soil
60	preliminary investigation report
120	secondary investigation report
150	tier one evaluation report
180	tier two evaluation report
210	tier three evaluation report
When monitored natural attenuation is used:	
510	monitored natural attenuation (MNA) plan
570	implementation of MNA
935	first annual MNA monitoring report
935	annual evaluation of MNA report
When other remediation is used:	
510	conceptual remediation plan
540	final remediation plan
600	implementation of remediation
690	first quarterly monitoring report
965	annual evaluation of remediation system report

E. All owners and operators are responsible for compliance with all provisions of this part. An owner or operator may designate a representative to facilitate compliance with this part. The designation of such a representative shall not affect the department’s right to seek compliance at any time from any owner or operator and shall not relieve owners or operators of any legal liabilities or responsibilities they may have under this part or otherwise under the law.

F. Except for 20.5.12.10, 20.5.12.11 and 20.5.12.12 NMAC, owners and operators shall submit to the department written workplans for all required corrective action under this part. Owners and operators may submit workplans in stages to reflect the sequence or types of corrective action required by 20.5.12 NMAC at the site, but the owners and operators shall submit all required workplans to and obtain approval by the department in writing for technical adequacy before the corrective action is commenced.

G. Unless otherwise approved, a qualified firm as specified in 20.5.12 NMAC shall perform all corrective action and, when required by the rules in Title 20, Chapter 5, a professional engineer as defined in 20.5.1.7 NMAC.

(1) All contractors and their subcontractors shall have appropriate licenses and certifications and be in compliance with applicable local, state and federal laws and regulations, including but not limited to the rules in Title 16, Chapter 39 governing engineers, 14.6.3 NMAC governing contractors and 29 CFR part 1910 governing worker health and safety.

(2) Owners and operators shall identify all prime contractors and all subcontractors in all workplans submitted to the department.

H. Where site conditions are amenable, owners and operators may use accelerated site characterization techniques if pre-approved by the department.

I. All monitoring wells shall be permitted in conformance with applicable federal, state and local laws and regulations in effect at the time of installation.

J. Owners and operators shall clearly mark and secure monitoring wells and major remediation equipment to prevent unauthorized access, tampering and damage. Owners and operators shall close or abandon all wells in accordance with the requirements of applicable federal, state and local laws and regulations.

K. The department shall notify all owners and operators of responsible party-lead sites and contractors of state-lead sites in writing when it has determined that a deliverable completed under an approved workplan is satisfactory. The written notice shall also inform the owner, operator or contractor that any application for payment from the fund of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received written notice of approval and that no extensions of this deadline shall be granted.

[20.5.12.8 NMAC - Rp, 20.5.12.1200 NMAC, 6/15/2009].

[The address of the petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.12.9 CRITERIA FOR TIER ONE, TIER TWO AND TIER THREE EVALUATIONS:**

A. The department and owners and operators shall use the following criteria for tier one, tier two and tier three evaluations as described in 20.5.12.21, 20.5.12.23 and 20.5.12.25 NMAC.

(1) Owners and operators shall develop a conceptual site exposure scenario to identify all current and potential future receptors, direct and indirect pathways, routes of exposure, and complete and incomplete exposure pathways, and to ensure that sufficient data is available to evaluate sites in accordance with this part.

(2) For all complete pathways, owners and operators shall calculate target concentrations for the relevant exposure media (air, soil, surface water, groundwater) using the following components: intake equations, fate and transport models and parameters, target risk goals, physical and chemical property parameters, toxicity parameters and exposure factors, as approved by the department.

(3) Owners and operators shall compare representative site concentrations to tier one levels in accordance with 20.5.12.21 NMAC and determine whether a tier two or a tier three evaluation in accordance with 20.5.12.23 and 20.5.12.25 NMAC is necessary.

(4) The tier two and tier three evaluations shall consider site-specific measurements or estimates for saturated hydraulic conductivity (cm/sec), groundwater gradient, soil bulk density (g/cc), soil gradation, soil moisture content (percent by volume), effective porosity, and fraction organic carbon content (percent), and other parameters if required by the department. Owners and operators shall compare representative site concentrations to the tier two site specific target concentrations (SSTLs) in accordance with 20.5.12.23 NMAC.

(5) In no case will the department make a "no further action" determination for a release if, for the target concentration for any contaminant of concern originating from the release or any route of exposure:

(a) the individual carcinogenic risk exceeds 0.00001; or

(b) the hazard quotient exceeds one.

(6) Owners and operators shall determine RBSLs using residential land use unless the owner or operator can demonstrate that the current and the reasonable future land use is or will likely be commercial or industrial and, therefore, that the assumption of commercial or industrial land use is equally protective of public health, safety and welfare and the environment.

(7) Target surface water concen-

tration criteria shall be as provided in 20.6.2, 20.7.10 and 20.5.12.42 NMAC.

(8) Target groundwater concentration criteria shall be as provided in 20.6.2 and 20.5.12.42 NMAC, and, for domestic water supplies, as provided in 20.7.10 NMAC.

(9) Target concentrations for air, soil and water shall also take into account other factors including vegetation effects, sensitive environmental receptors, and nuisance considerations as required by this part.

B. Owners and operators shall obtain department concurrence with the results of and the procedures used for the tiered evaluations before a remediation plan is approved by the department, or before a "no further action" determination is approved by the department.

[20.5.12.9 NMAC - Rp, 20.5.12.1202 NMAC, 6/15/2009]

**20.5.12.10 MINIMUM SITE ASSESSMENT, INITIAL RESPONSE:**

A. Upon discovery or confirmation of a release, owners and operators of the storage tank system shall immediately prevent any further release from the storage tank system by whatever means necessary, including removing product from the storage tank system or any part of the storage tank system that is known to leak or is suspected of leaking. If necessary, owners and operators shall remove the storage tank system from service in accordance with 20.5.8 NMAC.

B. Owners and operators shall inform the department in accordance with 20.5.7.8 NMAC of any release and action taken to mitigate immediate damage from the release.

[20.5.12.10 NMAC - Rp, 20.5.12.1203 NMAC, 6/15/2009]

**20.5.12.11 MINIMUM SITE ASSESSMENT, INITIAL ABATEMENT:**

A. Owners and operators shall undertake the initial abatement and site investigation actions specified in this section within 72 hours of discovery or confirmation of a release pursuant to 20.5.7 NMAC, using the default timeline as set forth in Subsection D of 20.5.12.8 NMAC or as otherwise directed or approved by the department.

B. Owners and operators shall identify the location and details of construction of all private water supply wells, using readily accessible public records, within a 1,000 foot radius, and all public water supply wells within a one mile radius of the storage tank system, and shall determine if the identified wells lie within a designated wellhead protection area. Owners and operators shall take appropriate

measures to protect these water supplies from contamination.

C. Owners and operators shall contain or remediate releases which present an imminent threat of contamination to or are within 500 feet of a surface water course as soon as practicable to prevent contamination of surface water. If the surface water course is a drinking water supply, within 24 hours owners and operators shall notify the owners or operators of all drinking water supplies likely to be affected by the release.

D. If the release has contaminated a water supply, owners and operators shall immediately provide a temporary replacement drinking water supply, as well as adequate warnings or other mechanisms to prevent persons from drinking or otherwise contacting water contaminated by the release. Within seven days of the discovery or confirmation of a release pursuant to 20.5.7 NMAC that has contaminated a water supply, owners and operators shall provide a replacement water supply which is of adequate quality and quantity for drinking, bathing, cooking and washing. Owners and operators shall maintain the replacement water supply until an alternate water supply sufficient for all domestic purposes is available.

E. Owners and operators shall identify the depth, location, composition and construction of all underground utilities including water lines, sewer lines, communication cables, electric lines, and natural gas lines within the area of the release to assess the susceptibility of these utilities to permeation by contaminants or deterioration caused by contaminants. Owners and operators shall notify the utility owner that the release has occurred and obtain permission to perform a site check of the utilities or other subsurface structures most likely to be contaminated by the release to determine whether petroleum products or vapors are present.

F. Owners and operators shall complete an investigation to determine whether potentially explosive or harmful vapors are present in any building, utility corridor, basement, or other surface or subsurface structure on or adjacent to the release site.

(1) The investigation shall include testing for vapors using the following:

(a) a combustible gas indicator or equivalent instrument calibrated according to the manufacturer's instructions to test for potentially explosive levels of petroleum hydrocarbon vapors; and

(b) a photoionization detector, flame ionization detector or another method approved by the department calibrated according to the manufacturer's instructions to test for potentially harmful petroleum hydrocarbon vapors.

(2) In the event owners and operators discover actual or potentially explosive levels of petroleum hydrocarbon vapors greater than 20 percent of the lower explosive limit (LEL) or potentially harmful petroleum hydrocarbon vapors reading greater than five whole instrument units above ambient concentrations in any structure in the vicinity of the release site, owners and operators shall confirm and, if necessary, take immediate action to mitigate the vapor hazard. Within seven days of the discovery of the vapors, owners and operators shall install and place into operation a vapor mitigation system capable of reducing petroleum hydrocarbon vapors to safe levels within the shortest reasonable time. The vapor mitigation system shall be designed by and constructed under the direct, responsible, supervisory control of a professional engineer, when required by the department.

(a) Once a vapor mitigation system has been installed, owners and operators shall monitor and report in writing to the department the levels of potentially explosive or harmful petroleum hydrocarbon vapors in the affected structures weekly for the first month and monthly thereafter unless a different monitoring schedule is approved in writing by the department. This monitoring shall be performed in accordance with Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(b) After the vapor mitigation system has been in operation for three months, owners and operators shall have 30 days to submit to the department a written summary report containing the monitoring results. The department may direct the owner and operator to modify the vapor mitigation system as necessary to reduce petroleum hydrocarbon vapors to safe levels. Owners and operators shall submit monitoring results to the department at three-month intervals until operation of the vapor mitigation system is discontinued in accordance with this section.

(3) Owners and operators shall continue to operate the vapor mitigation system until the results of three consecutive monthly monitoring events indicate the following:

(a) levels of potentially explosive petroleum hydrocarbon vapors are less than 20 percent LEL; and

(b) levels of potentially harmful petroleum hydrocarbon vapors are less than or equal to five whole instrument units above ambient levels in any structure in the vicinity of the release site when measured as required in Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(4) When operation of a vapor mitigation system is discontinued, owners and operators shall monitor the vapor levels

in the structure weekly for the first month and monthly thereafter until one calendar year has passed, or as otherwise directed or approved by the department. If during this period the levels exceed those set forth in Subparagraphs (a) and (b) of Paragraph (3) of this subsection, owners and operators shall notify the department and take the necessary corrective action, as directed by the department.

G. Owners and operators shall remove any exposed petroleum products related to the release and mitigate any related immediate fire and safety hazards as soon as possible, but in no case no later than 72 hours after the confirmation or other identification of the release.

[20.5.12.11 NMAC - Rp, 20.5.12.1204 NMAC, 6/15/2009]

**20.5.12.12 MINIMUM SITE ASSESSMENT, 72-HOUR AND 14-DAY REPORTS:**

A. Owners and operators shall make an oral report to the department summarizing the abatement procedures undertaken and the results of action taken under 20.5.12.10 and 20.5.12.11 NMAC within 72 hours of the discovery or confirmation of a release pursuant to 20.5.7 NMAC.

B. Owners and operators shall submit a written report to the department within 14 days of the discovery or confirmation of a release pursuant to 20.5.7 NMAC, in addition to the written notice required under 20.5.7 NMAC. This report shall summarize all the work performed pursuant to 20.5.12.10 and 20.5.12.11 NMAC and shall include the following information, as appropriate:

(1) a map based on a United States geologic survey topographic map showing locations of actual and potential receptors, including, but not limited to, private and public water supplies identified pursuant to Subsection A of 20.5.12.11 NMAC; owners and operators shall draw two concentric circles, at 1,000 feet and at one mile radii from the center of the release, and shall also show on the map all surface water courses within a one mile radius of the site;

(2) information about any water supplies known or suspected to have been contaminated by the release;

(3) most likely direction of groundwater flow;

(4) a site plan map showing locations of utilities, surface structures and storage tank systems;

(5) information about underground utilities gathered in accordance with Subsection E of 20.5.12.11 NMAC;

(6) soil borings, logs, and details of construction of all wells, if available;

(7) description of any actions taken to abate adverse effects;

(8) data from vapor monitoring performed in the vicinity of the site;

(9) description of any actions taken to abate potentially explosive or harmful vapors and any plans for further action;

(10) description of fire and safety hazards resulting from the release and actions taken to abate such hazards;

(11) description of current and past ownership of the property, storage tank systems, the substance stored in the system, age of tank and history of any tank removals;

(12) present land use, within 1,000 feet of the site; and

(13) records of tightness tests, repairs to the storage tank system, release detection and monitoring results.

[20.5.12.12 NMAC - Rp, 20.5.12.1205 NMAC, 6/15/2009]

**20.5.12.13 NOTICE, SPLIT SAMPLES AND SAMPLING PROCEDURES:**

A. Except for the 72-hour vapor check, owners and operators shall notify the department at least four days prior to the collection of any samples which are required pursuant to this part and upon which laboratory analyses are to be performed to allow the department an opportunity to be present at the collection of samples or to split samples.

B. Owners and operators shall notify the department at least four days prior to the decommissioning, destruction or abandonment of any wells.

C. Owners and operators shall collect, store and transport all samples necessary to comply with the requirements of this part in a manner consistent with the nature of the known or suspected contaminants and in conformance with applicable federal, state and local laws and regulations. [20.5.12.13 NMAC - Rp, 20.5.12.1206 NMAC, 6/15/2009]

**20.5.12.14 INTERIM REMOVAL OF NON-AQUEOUS PHASE LIQUID:**

A. Owners and operators shall assess the potential for remediation of non-aqueous phase liquid (NAPL) where there is a thickness of greater than one-eighth inch of NAPL on surface water, in any excavation pit, or in any well. Owners and operators shall submit the assessment to the department in accordance with a timeline approved or issued by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. The department may direct or approve interim removal of NAPL

when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment. In this event, owners and operators shall remove NAPL in accordance with a timeline approved or issued by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

C. Owners and operators shall remove NAPL in a manner that minimizes the spread of contamination into uncontaminated media.

D. Owners and operators shall store and dispose of NAPL in accordance with all flammable and combustible liquids codes approved by the state fire marshal or other local authority, state hazardous waste regulations (20.4.1 NMAC), and any other applicable laws or regulations.

E. Owners and operators shall report recovery and disposal of NAPL to the department.

[20.5.12.14 NMAC - Rp, 20.5.12.1207 NMAC, 6/15/2009]

#### **20.5.12.15 INTERIM REMOVAL OF CONTAMINATED SOIL:**

A. Owners and operators shall remediate contaminated soil in accordance with 20.5.12.9, 20.5.12.21, 20.5.12.23, 20.5.12.25, 20.5.12.27, and 20.5.12.35 NMAC, unless directed or approved by the department to remove and treat contaminated soil in accordance with this section.

(1) The department may direct or approve interim removal of contaminated soil when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment.

(2) Under this section, owners and operators shall excavate, treat and dispose of contaminated soil using methods approved by the department, in compliance with local laws and regulations, and under a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

(3) The department shall approve the vertical and horizontal extent of soil to be excavated.

B. When treating or temporarily storing soil on site, owners and operators shall:

(1) for treatment on site, spread soil in a six-inch layer over an impervious liner or other surface approved by the department to prevent infiltration to groundwater and place the layer of soil on level ground and berm to prevent runoff from contaminating other soil or surface water;

(2) for temporary storage, place the soil in a secure, bermed area on an impervious liner or surface or in a secured

and properly labeled container, as approved by the department; and

(3) handle soil in a manner that does not contaminate groundwater, surface water or other uncontaminated soil or does not create or cause a public nuisance or threat to human health, safety and welfare or the environment.

C. When contaminated soil is taken off site, owners and operators shall provide the department with the following information within 14 days of removal of the soil from the site:

(1) written documentation of the type and concentration of contaminants, volume and weight of soil, method of treatment, date transported, and location of the site of disposal or treatment;

(2) a signed, written statement by the owner of the treatment or disposal site describing the location of the site and expressly accepting the contaminated soil; and

(3) if contaminated soil is taken to a permitted solid waste facility, a manifest signed by the generator, transporter and the owner or operator of the solid waste facility.

D. Remediation shall be considered complete when the requirements in 20.5.12.42 NMAC are met.

E. In accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, owners and operators shall submit to the department a report describing the removal and treatment of contaminated soil.

(1) The report shall describe the soil removal action and its effectiveness, including volumes and weight removed.

(2) Owners and operators shall submit the report within 30 days of the soil removal action.

[20.5.12.15 NMAC - Rp, 20.5.12.1208 NMAC, 6/15/2009]

#### **20.5.12.16 MINIMUM SITE ASSESSMENT, PRELIMINARY AND OTHER REQUIRED INVESTIGATIONS:**

A. A preliminary investigation is not required when owners and operators can demonstrate that groundwater has not been contaminated and one of the following two conditions apply:

(1) the release is remediated in accordance with this part within 72 hours of discovery or confirmation; or

(2) the release is permanently contained within the UST excavation area or the AST containment system.

B. If the contamination extends beyond the boundaries of the property where the release originated, owners and operators shall conduct a secondary investigation in accordance with 20.5.12.19

NMAC.

C. When the horizontal and vertical extent and magnitude of contamination from the release have been characterized, owners and operators shall perform a tier one evaluation as outlined in 20.5.12.9 and 20.5.12.21 NMAC.

[20.5.12.16 NMAC - Rp, 20.5.12.1209 NMAC, 6/15/2009]

#### **20.5.12.17 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION - REQUIREMENTS:**

Owners and operators shall conduct a preliminary investigation in accordance with this subsection and under a timeline approved or issued by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The preliminary investigation shall determine the following, unless otherwise directed or approved by the department.

A. If not previously identified and reported under 20.5.12.12 NMAC, the preliminary investigation shall determine the source of contamination, the regulated substance released or suspected of being released at the site, the media of concern, current and potential receptors, current and anticipated use of property, complete and incomplete exposure pathways, and routes of exposure.

B. The preliminary investigation shall also determine the horizontal and vertical extent and magnitude of soil contamination.

(1) Owners and operators shall conduct a soil boring survey by advancing a continuously cored soil boring at each area of release where soil contamination is most likely to be encountered unless otherwise directed by the department. The initial incident report and a soil vapor survey may be used in locating these areas. Owners and operators shall advance at least one of the borings into the saturated zone or, with approval from the department, to a depth of 50 feet below the depth at which measured levels of contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units.

(2) Owners and operators shall advance at least four additional soil borings to characterize the release within property boundaries. Borings shall be completed to the depth at which contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units. If the soil borings indicate that contaminated soil extends beyond the boundary of the property on which the storage tank system is located, owners and operators shall advance soil borings sufficient to characterize the extent

and magnitude of contamination within site boundaries.

(3) Owners and operators shall assess at five-foot intervals, field estimates of concentrations of petroleum hydrocarbons in the soil borings and select and prepare samples for laboratory analysis.

(4) Owners and operators shall gather field data for soil classification, determining and recording color, grain size, texture, description of lithification, plasticity and clay content.

(5) The preliminary investigation shall include determinations of derived values for soil bulk density (g/cc), soil moisture content (percent by volume), and effective porosity, and fraction organic carbon content (percent by volume) using samples taken from an uncontaminated area of the vadose zone.

(6) Owners and operators shall delimit the horizontal and vertical extent of contaminant saturated soil as defined in 20.5.1.7 NMAC.

C. Owners and operators shall determine whether groundwater or surface water has been contaminated above applicable standards or whether a potential for groundwater or surface water contamination is present by performing the following:

(1) install at least three groundwater monitoring wells at locations where the results of the soil boring survey conducted pursuant to this section indicate that groundwater may be contaminated, owners and operators shall:

(a) locate monitoring wells so that groundwater gradient can be determined;

(b) install at least one monitoring well on site in the area of highest contamination as determined by the soil borings installed in accordance with the initial incident report and other relevant information;

(c) install one of the monitoring wells in the estimated down-gradient direction from the area of highest contamination;

(d) construct wells in accordance with all applicable federal, state and local laws and regulations; and

(e) survey the wells using a New Mexico licensed professional surveyor, in decimal degrees of latitude and longitude in accordance with NAD 83;

(2) calculate the direction and gradient of groundwater flow;

(3) inspect all monitoring wells for the presence of NAPL using a method approved by the department; if NAPL is present in any well, measure the apparent thickness, delimit its horizontal extent, and initiate recovery procedures in accordance with 20.5.12.14 NMAC; and

(4) sample each monitoring well that does not contain NAPL and analyze the sample for contaminants of concern to

determine whether:

(a) immediate mitigation procedures are warranted; and

(b) other hazardous conditions exist as a result of the release if not previously identified in accordance with 20.5.12.11 NMAC by:

(i) identifying the location and depth of underground utilities and other subsurface structures on or adjacent to the site not identified earlier in accordance with Subsection E of 20.5.12.11 NMAC;

(ii) checking for the presence of vapors in accordance with 20.5.12.11 and 20.5.12.16 NMAC; and

(iii) identifying all other hazards and potential threats to public health, safety and welfare and the environment which may exist as a result of the release.

[20.5.12.17 NMAC - Rp, 20.5.12.1209 NMAC, 6/15/2009]

#### **20.5.12.18 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the preliminary investigation and other requirements of the minimum site assessment as defined in 20.5.1.7 NMAC in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall include the information gathered under 20.5.12.10, 20.5.12.11, 20.5.12.12 and 20.5.12.16 NMAC and shall conform to the requirements of this section and 20.5.12.17 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report as soon as feasible. Owners and operators shall, in accordance with a timeline issued or approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not conform to the minimum site assessment, preliminary investigation requirements in this section and 20.5.12.17 NMAC, the department shall reject the report and the owner and operator shall be determined not to have conducted a minimum site assessment for the purposes of section 74-6B-8B(1)(c) NMSA 1978. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

D. Owners and operators shall comply with the requirements of any local government which has designated a wellhead/source water protection area that includes the area of the release.

E. Owners and operators shall provide notice that includes the contaminants identified, as well as the horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination.

[20.5.12.18 NMAC - Rp, 20.5.12.1210 NMAC, 6/15/2009]

#### **20.5.12.19 S E C O N D A R Y INVESTIGATION:**

A. Owners and operators shall perform a secondary investigation in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC when the department makes at least one of the following determinations about the site:

(1) the extent and magnitude of contamination in all media has not been delimited by the preliminary investigation; or

(2) the release threatens public health, safety and welfare or the environment.

B. The secondary investigation shall determine the following:

(1) the horizontal and vertical extent and magnitude of soil contamination both on and off site;

(2) the horizontal extent and magnitude of dissolved phase groundwater contamination both on and off site;

(3) the vertical extent and magnitude of dissolved phase groundwater contamination, when site conditions warrant;

(4) characteristics, aerial extent, estimated volume and apparent thickness of NAPL in wells;

(5) the elevation of groundwater and surface water and the gradient, rate and direction of groundwater and surface water flow;

(6) the rate and direction of contaminant migration;

(7) the hydrologic properties of the contaminated portion of the aquifer including hydraulic conductivity, transmissivity and storativity; the department may require field verification of estimates made from literature;

(8) whether the aquifer is perched;

(9) whether the aquifer is confined or unconfined; and

(10) any other technical information requested by the department which is reasonably necessary to meet the requirements of this part.

[20.5.12.19 NMAC - Rp, 20.5.12.1211 NMAC, 6/15/2009]

**20.5.12.20 SECONDARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the secondary investigation to the department in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall include all information gathered under 20.5.12.19 NMAC and shall conform to the requirements of this part.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline issued or approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not meet the requirements of 20.5.12.19 NMAC, the owner and operator will be in violation of this part until the inadequacies are corrected. The department's failure to review or to comment on the secondary investigation report shall not relieve the owner and operator of their responsibilities under this part or the law.

D. Owners and operators shall provide notice that includes the contaminants identified, as well as horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination who were not previously notified in accordance with 20.5.12.18 NMAC.

[20.5.12.20 NMAC - Rp, 20.5.12.1212 NMAC, 6/15/2009]

**20.5.12.21 TIER ONE EVALUATION:**

A. The tier one evaluation is intended to determine whether soil contamination poses a threat to groundwater in the future. A tier one evaluation is required when owners and operators can demonstrate that groundwater has not been contaminated.

B. After the horizontal and vertical extent and magnitude of the soil contamination from the release has been fully characterized, owners and operators shall perform a tier one evaluation as described below. The owners and operators shall:

(1) develop a site conceptual exposure scenario using data collected in accordance with 20.5.12.9, 20.5.12.12, 20.5.12.16 and 20.5.12.19 NMAC; and

(2) for each receptor and each complete pathway identified in the site conceptual exposure scenario determine representative concentrations of contaminants of concern in soil samples from the investigations, and compare these concentrations to risk-based screening levels (RBSLs).

C. When representative concentrations of any contaminant of concern equal or exceed any RBSL for any exposure pathway, owners and operators shall perform a tier two evaluation unless otherwise directed by the department.

[20.5.12.21 NMAC - Rp, 20.5.12.1213 NMAC, 6/15/2009]

**20.5.12.22 TIER ONE EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier one evaluation in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, within 14 days of such notice of inadequacy, correct the report and resubmit it to the department for review and written approval. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

[20.5.12.22 NMAC - Rp, 20.5.12.1214 NMAC, 6/15/2009]

**20.5.12.23 TIER TWO EVALUATION:**

A. Owners and operators shall perform a tier two evaluation to determine site specific target levels (SSTLs) for soil for any complete exposure pathway where contaminants of concern exceed any RBSL, as described below. Owners and operators shall:

(1) modify the site conceptual exposure scenario as appropriate, using information obtained in the investigations; and

(2) compare representative concentration of contaminants of concern in soil samples from the investigations to SSTLs in soil for each receptor and complete pathway identified in the site conceptual exposure scenario.

B. When representative concentrations of contaminants of concern equal or exceed any SSTL in soil for any

complete exposure pathway, owners and operators shall remediate soil to the SSTLs in accordance with 20.5.12.34 or 20.5.12.42 NMAC or, if directed by the department, perform a tier three evaluation.

[20.5.12.23 NMAC - Rp, 20.5.12.1215 NMAC, 6/15/2009]

**20.5.12.24 TIER TWO EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier two evaluation to the department in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8. The report shall conform to the requirements of 20.5.12.9 and 20.5.12.23 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators in writing of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, address the inadequacies identified and resubmit the report to the department for review and written approval. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

[20.5.12.24 NMAC - Rp, 20.5.12.1216 NMAC, 6/15/2009]

**20.5.12.25 TIER THREE EVALUATION:**

A. In certain cases, including but not limited to complex hydrogeology or sensitive ecological receptors, the department may require a tier three evaluation, in place of or in addition to a tier two evaluation. Owners and operators shall perform the tier three evaluation in accordance with 20.5.12.9 NMAC.

B. When representative concentrations exceed any SSTL determined in accordance with this section or exceed any WQCC or EIB standard for any contaminant of concern, owners and operators shall remediate the site to the SSTLs in soil and WQCC and EIB standards in groundwater and surface water.

[20.5.12.25 NMAC - Rp, 20.5.12.1217 NMAC, 6/15/2009]

**20.5.12.26 TIER THREE EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier three

evaluation to the department in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall conform to the requirements of 20.5.12.9 and 20.5.12.25 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, correct the report and resubmit it to the department for review and written approval. The department's failure to review or to comment on the report shall not relieve the owner and operator of their responsibilities under this part or the law. [20.5.12.26 NMAC - Rp, 20.5.12.1218 NMAC, 6/15/2009]

**20.5.12.27 CORRECTIVE ACTION REQUIREMENTS FOR TOTAL PETROLEUM HYDROCARBONS (TPH):** In addition to comparing representative soil concentrations for all contaminants of concern to risk-based screening levels (RBSLs) and site-specific target levels (SSTLs) and concentrations in groundwater and surface water to applicable WQCC and EIB standards, in accordance with 20.5.12.9, 20.5.12.21, 20.5.12.23 and 20.5.12.25 NMAC, owners and operators shall mitigate, remediate, or remove TPH contamination in soil and groundwater, when directed by the department based upon a determination by the department that the TPH contamination adversely affects public health, safety and welfare or the environment. [20.5.12.27 NMAC - Rp, 20.5.12.1219 NMAC, 6/15/2009]

**20.5.12.28 MONITORED NATURAL ATTENUATION:**

A. When directed or approved by the department, owners and operators shall submit a plan for monitored natural attenuation to the department if any of the following conditions have been identified at the site:

(1) concentrations of contaminants of concern exceed site-specific target levels (SSTLs) in soil or WQCC or EIB standards in groundwater or surface water; or

(2) other conditions exist as a result of the release which threaten public

health, safety and welfare or the environment, as determined by the department.

B. Owners and operators shall submit the monitored natural attenuation plan in accordance with this section and 20.5.12.29 NMAC and in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

C. The intent of the monitored natural attenuation plan is to provide a written description of the methodology proposed and demonstrate how the plan will achieve target concentrations in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. The content of the monitored natural attenuation plan, at a minimum and as appropriate, shall include:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing petroleum storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) cross sections showing the source contaminant mass in relation to the groundwater contamination;

(3) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(5) a schematic drawing depicting the construction details including lithology and screen intervals for the designated monitoring wells;

(6) the justification for selecting the designated monitoring wells;

(7) the recommended approach to monitoring including an implementation and monitoring schedule, the analytical methods, and the justification for the recommendation;

(8) an estimation of the time necessary for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(9) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission or planned submission of the monitored natural attenuation plan at least twice in a paper of general circulation in the county in which

soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the monitored natural attenuation plan to the department; the second publication of this notice shall occur no later than seven days after the date the monitored natural attenuation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the monitored natural attenuation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a monitored natural attenuation plan has been submitted to the department proposing actions to monitor natural attenuation of a release of petroleum products;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of contaminant plume is located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the monitored natural attenuation plan and all data and modeling related to the monitored natural attenuation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a monitored natural attenuation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners; and

(d) owners and operators shall post a notice of the submission of the monitored natural attenuation plan at the release site within seven days of the submission of the monitored natural attenuation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the monitored natural attenuation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the

public notice; and

(11) other requirements as directed by the department.  
[20.5.12.28 NMAC - Rp, 20.5.12.1220 NMAC, 6/15/2009]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.12.29 REVIEW AND APPROVAL OF MONITORED NATURAL ATTENUATION PLAN:**

A. After the public comment period has ended, the department shall review the plan and shall either approve the plan or notify the owner and operator in writing of the deficiencies of the plan. If the secretary determines that a decision on the monitored natural attenuation plan must be postponed due to significant comments from the public, the department shall notify the owner and operator within 30 days of such a postponement, and may extend its review period for a period not to exceed 60 days unless otherwise provided in Subsection D of this section. All deadlines calculated from the end of the review period will be adjusted to reflect any extension.

B. The department may approve a monitored natural attenuation plan and impose reasonable conditions.

C. If the department determines that the monitored natural attenuation plan is inadequate, owners and operators shall modify the plan to correct the deficiencies specified by the department and re-submit it within the time period specified by the department.

D. The department may provide notice of the submission of the monitored natural attenuation plan to persons other than the owner and operator and provide for public participation in the review process as the department deems appropriate or when there is significant public interest. In the event that an informal public meeting, public hearing or other form of public participation is conducted, the department may postpone its decision on the monitored natural attenuation plan until after a public hearing or meeting is held and a determination is made. Any public hearing or meeting that is held due to significant public interest shall be held within 60 days of determining that there is significant public interest.

[20.5.12.29 NMAC - Rp, 20.5.12.1221 NMAC, 6/15/2009]

**20.5.12.30 MONITORED NATURAL ATTENUATION PLAN IMPLEMENTATION:**

A. Owners and operators shall implement the approved monitored natural attenuation plan in accordance with a timeline issued or approved by the depart-

ment or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. Owners and operators shall monitor the contamination until the department determines that the natural attenuation is complete pursuant to this part, or unless otherwise approved by the department.

[20.5.12.30 NMAC - Rp, 20.5.12.1222 NMAC, 6/15/2009]

**20.5.12.31 REPORTS ON THE MONITORED NATURAL ATTENUATION:**

A. Owners and operators shall submit written reports to the department on the progress of the monitored natural attenuation. Owners and operators shall submit the reports annually unless a different reporting period is directed or approved by the department and shall document all work performed during the preceding interval and shall include at a minimum the following information, as appropriate:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing petroleum storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(3) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(4) tabulation of the current and historical results of all water quality analyses and water elevation data;

(5) graphs of appropriate scale of the current and historical water quality analyses and water elevation data versus time;

(6) data evaluation and interpretation, and recommendations; and

(7) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.12.31 NMAC - Rp, 20.5.12.1223 NMAC, 6/15/2009]

**20.5.12.32 EVALUATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators shall evaluate the effectiveness of the monitored natural attenuation plan at the end of each year of monitoring and submit the evaluation to the department for review

unless otherwise approved or directed by the department.

B. When the department determines that the plan is not effectively mitigating contamination according to the identified risks to public health, safety and welfare or the environment, owners and operators shall propose an alternative approach or change in the existing monitored natural attenuation plan within 30 days of the department's determination of ineffectiveness. Within 30 days of the department's approval, owners and operators shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section.

[20.5.12.32 NMAC - Rp, 20.5.12.1224 NMAC, 6/15/2009]

**20.5.12.33 MODIFICATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators may petition the department to approve a modification of the monitored natural attenuation plan for good cause.

B. The department may approve a modification of the monitored natural attenuation plan only if such modification provides adequate protection of public health, safety and welfare and the environment and the owner or operator complies with the public notice requirements of 20.5.12.28 NMAC.

[20.5.12.33 NMAC - Rp, 20.5.12.1225 NMAC, 6/15/2009]

**20.5.12.34 COMPLETION OF MONITORED NATURAL ATTENUATION:**

A. Natural attenuation shall be considered complete when all of the following criteria are met:

(1) no layer of NAPL greater than one-eighth inch in thickness is present on the water table or in any of the wells;

(2) the EIB standard of 0.1 mg/L for methyl tertiary butyl ether (MTBE) has been met in groundwater and surface water;

(3) all applicable site-specific target levels or risk-based screening levels in soil and WQCC and EIB standards in groundwater have been achieved:

(a) the applicable standards shall be achieved concurrently at all compliance wells as approved by the department;

(b) for verification that soil has reached target concentrations, owners and operators shall install at least four soil borings, at least three of which are distributed throughout the previously most contaminated portion of the vadose zone, unless otherwise approved by the department;

(4) corrective action requirements for total petroleum hydrocarbons deter-

mined in accordance with 20.5.12.27 NMAC have been met; and

(5) any other conditions which threatened public health, safety and welfare or the environment have been abated.

B. If any of the conditions of Paragraphs (1) through (5) of Subsection A of this section are not met, the department may require owners and operators to perform additional remediation.

C. Termination of monitored natural attenuation in accordance with this section does not relieve the owner and operator of any other liability or responsibility they may have under this part or any other federal, state or local law or regulation.

D. Following department approval, and with 30 days notice unless otherwise approved by the department, owners and operators shall properly abandon wells that are no longer needed for monitoring, in accordance with federal, state and local laws and regulations.

[20.5.12.34 NMAC - Rp, 20.5.12.1226 NMAC, 6/15/2009]

### **20.5.12.35 CONCEPTUAL REMEDIATION PLAN:**

A. When directed or approved by the department, owners and operators shall submit a conceptual remediation plan to the department if any of the following conditions have been identified at the site:

(1) a thickness of greater than one-eighth inch of NAPL is present on the surface of the water, including in any excavation pit, or in any well;

(2) contaminant saturated soil is present;

(3) concentrations of contaminants of concern exceed site-specific target levels (SSTLs) in soil or WQCC or EIB standards in groundwater or surface water;

(4) total petroleum hydrocarbons in soil meet the criteria outlined 20.5.12.27 NMAC; or

(5) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. All remediation plans shall include but are not limited to methods to mitigate, remove or otherwise remediate the contaminant source areas.

C. Owners and operators shall submit the conceptual remediation plan in accordance with this section and a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

(1) The conceptual remediation plan shall provide a written description of all of the methodologies proposed and discuss how the plan will achieve target con-

centrations and other goals of remedial action in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. Owners and operators shall obtain department approval for the conceptual remediation plan before developing the final remediation plan.

(2) The conceptual remediation plan, at a minimum and as appropriate, shall include:

(a) a concise description of site conditions, including hydrogeology, contaminant characteristics and plume dynamics;

(b) the recommended approach to remediation and justification for the recommendation;

(c) a clear description of the goals of remediation and the target concentrations to be met in each medium;

(d) a narrative description of the proposed methodologies including a preliminary cost comparison and time lines for achieving goals of remediation;

(e) a cost estimate of implementation including installation, operation and maintenance, and monitoring;

(f) a schematic diagram of the proposed remediation system or treatment area and a narrative description of its operation;

(g) a plan view, to scale, of the site showing locations of the proposed equipment or excavation boundaries in relation to the site's physical features and contaminant plumes;

(h) a description of how the approach will achieve target concentrations and other goals of remediation; and

(i) a description of additional data required to support the conceptual remediation plan and design of the final plan and how it will be collected.

[20.5.12.35 NMAC - Rp, 20.5.12.1227 NMAC, 6/15/2009]

### **20.5.12.36 FINAL REMEDIATION PLAN:**

A. Following department approval of the conceptual remediation plan, owners and operators shall develop a final remediation plan in accordance with this section and shall submit three copies of the final remediation plan to the department in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. The design and engineering of any final remediation plan that includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis shall be the responsibility of a professional engineer as defined in 20.5.1.7 NMAC. A professional engineer

shall sign and seal all plans and drawings required pursuant to this section, unless otherwise approved by the department.

C. In order to eliminate the potential to emit regulated substances to the environment, all engineered remediation systems shall be designed, constructed and operated such that malfunction or failure of any integral component results in automatic shut down of the entire system. Integral components include but are not limited to pumps, blowers, oil-water separators, oxidizer systems, air strippers, filtration systems and computers.

D. All final remediation plans shall, at a minimum, include all of the following:

(1) goals of remediation and target concentrations to be achieved in each medium;

(2) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(3) a hydrogeologic cross section showing contaminant mass in relation to the remediation system and a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) an implementation schedule;

(5) engineered plans and specifications in accordance with Subsection E of this section;

(6) a schedule for remediation of the source areas, for protection of receptors identified in Paragraph (1) of this subsection, and for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(7) a design and schedule for a system optimization that meets the requirements of 20.5.12.40 NMAC;

(8) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(9) copies of all permits, permit applications, and property access agreements required to initiate remediation, including, if necessary, permits required by the state engineer, permits for discharge to groundwater or a waste water treatment plant, permits for air emissions or a surface water national pollution discharge elimination system (NPDES) permit;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission or planned submission of the final remediation

plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the final remediation plan to the department; the second publication of this notice shall occur no later than seven days after the date the remediation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the final remediation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a remediation plan has been submitted to the department proposing actions to remediate a release of petroleum products;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of the remediation system will be located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the remediation plan and all data and modeling related to the remediation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered, within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a remediation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners; and

(d) owners and operators shall post a notice of the submission of the remediation plan at the release site within seven days of the submission of the remediation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the remediation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice;

(11) for sites where contaminated media are being removed, a description of the ultimate disposal site of contaminated media, location of excavation and trench-

ing, and method of limiting access by pedestrian and vehicular traffic; and

(12) other requirements as directed by the department.

E. In addition to the requirements of Subsection D of this section, all final remediation plans shall include:

(1) for engineered systems:

(a) unless otherwise approved by the department, a complete and definitive engineering design for a mechanical, electrical, or constructed system, including drawings, plans, diagrams and specifications which are signed and sealed by a professional engineer;

(b) process and instrumentation diagrams;

(c) mechanical arrangement plans and elevations, drawn to scale, showing proposed wells, manifolds, piping details, instrumentation and sampling ports;

(d) details of vapor or fluid extraction or injection wells, as appropriate, including screen length and placement in relation to ground surface, normal and low water table elevations and geologic strata, screen slot size, depths and specifications of the filter pack and seal, and drilling method;

(e) equipment and parts list and specifications including a spare parts list, performance requirements, maintenance requirements and schedule;

(f) electric power requirements including a one-line diagram and schematics;

(g) operation and maintenance commitments and schedules for all facets of the remediation system; and

(h) all other plans, diagrams and specifications that are necessary to properly construct and operate the remediation system in accordance with the remediation plan including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and protection of underground utilities;

(2) for excavation and disposal plans:

(a) plan view of proposed excavation relative to contaminant plume;

(b) cross-sections of proposed excavation depicting overburden, contaminated material to be removed and backfill;

(c) volume calculations and slope stability analysis;

(d) description of excavation and backfill procedure to be performed in conformance with OSHA and ASTM standards and regulations;

(e) traffic control plan;

(f) description of post-excitation of confirmation sampling;

(g) proposed final grade plan;

(h) post-excitation grade survey;

and

(i) all other plans, diagrams and specifications that are necessary including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and protection of underground utilities.

[20.5.12.36 NMAC - Rp, 20.5.12.1227 NMAC, 6/15/2009]

[The address of the petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.12.37 REVIEW AND APPROVAL OF FINAL REMEDIATION PLAN:**

A. Within 30 days of receipt of the final remediation plan and after the public comment period has ended, the department shall review the plan and shall either approve the plan or notify the owner and operator in writing of the deficiencies of the plan. If the secretary determines that a decision on the remediation plan must be postponed due to significant comments from the public, the department must notify the owner and operator within 30 days of such a postponement, and may extend its review period for a period not to exceed 60 days unless otherwise provided in Subsection D of this section. All deadlines calculated from the end of the review period will be adjusted to reflect any extension.

B. The department may approve a final remediation plan and impose reasonable conditions.

C. If the department determines that the final remediation plan is inadequate, owners and operators shall modify the plan to correct the deficiencies specified by the department and re-submit it within the time period specified by the department.

D. The department may provide notice of the submission of the remediation plan to persons other than the owner and operator and provide for public participation in the review process as the department deems appropriate or when there is significant public interest. In the event that an informal public meeting, public hearing or other form of public participation is conducted, the department may postpone its decision on the final remediation plan until after a public hearing or meeting is held and a determination is

made. Any public hearing or meeting that is held due to significant public interest shall be held within 60 days of determining that there is significant public interest.

[20.5.12.37 NMAC - Rp, 20.5.12.1228 NMAC, 6/15/2009]

#### **20.5.12.38 IMPLEMENTATION OF FINAL REMEDIATION PLAN:**

A. Owners and operators shall implement the approved, final remediation plan in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. Owners and operators shall employ a professional engineer to ensure conformance with the final remediation plan including excavation and installation, commissioning and operation of the system.

B. When the remediation plan includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis:

(1) a professional engineer shall supervise conformance with the final remediation plan including installation, commissioning and operation of the system;

(2) owners and operators shall operate the remediation system continuously until the remediation is terminated pursuant to this part unless otherwise approved by the department; and

(3) owners and operators shall report to the department all interruptions of the operation of the remediation system greater than 72 hours.

C. Owners and operators shall obtain written approval from the department prior to implementing any change to the department-approved engineering design.

D. Following implementation of the final remediation plan, owners and operators shall submit an "as-built" report signed and sealed by the project professional engineer including:

(1) any deviations from the drawings and specifications included in the final remediation plan;

(2) a tabulation of pertinent data including but not limited to flow rates, pressures, temperatures, and contaminant concentrations and groundwater elevations at start-up, and boring logs and well completion diagrams; and

(3) information and documentation of purchased major remediation equipment including, but not limited to serial number, model and manufacturer, description, warranty information, operating manuals, maintenance requirements and purchase price.

[20.5.12.38 NMAC - Rp, 20.5.12.1229 NMAC, 6/15/2009]

#### **20.5.12.39 QUARTERLY REPORTS ON THE REMEDIATION:**

A. Owners and operators shall submit written reports to the department on the operation of the remediation system. Owners and operators shall submit the reports quarterly unless a different reporting period is approved by the department, shall document all work performed during the preceding interval, and shall include the following information, as appropriate:

(1) tabulation of the current and historical results of all water quality analyses and water elevation data;

(2) evaluation of the performance and efficiency of each aspect of the remediation:

(a) the evaluation and all adjustments to system operation shall be performed, as appropriate, under the direct, responsible, supervisory control of an authorized representative of the qualified firm and a professional engineer; and

(b) owners and operators shall submit evidence that the performance of the remediation system meets the operating standards outlined in the final remediation plan;

(3) verification based on calculations that the schedule is being met for source removal, protection of actual and potential receptors, achievement of target concentrations, quarterly and cumulative contaminant mass reduction totals to date in pounds and gallons of contaminants;

(4) records of system operation, including but not limited to, periods of shutdown and equipment malfunctions; the maintenance procedures performed on the remediation system during the preceding quarter, including the names of the individuals performing the maintenance; and an operation and maintenance schedule for the next quarter;

(5) NAPL recovery, both cumulative and quarterly, and details of its disposal;

(6) effluent vapor concentrations over time;

(7) evaluation and recommendations for improving the performance of the system to achieve the goals of remediation; and

(8) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.12.39 NMAC - Rp, 20.5.12.1230 NMAC, 6/15/2009]

#### **20.5.12.40 ANNUAL EVALUATION OF REMEDIATION:**

A. Owners and operators

shall evaluate the effectiveness of the approach to remediation at the end of each year of operation and submit the evaluation to the department for review.

B. When the department determines that the approach to remediation is not effectively remediating contamination according to the identified risks to public health, safety and welfare and the environment, owners and operators shall propose an alternative approach or change in the existing remediation plan within 30 days of the department's determination of ineffectiveness. Within 30 days of the department's approval, owners and operators shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section until monitoring to verify completion of remediation in accordance with 20.5.12.42 NMAC commences. [20.5.12.40 NMAC - Rp, 20.5.12.1231 NMAC, 6/15/2009]

#### **20.5.12.41 MODIFICATION OF FINAL REMEDIATION PLAN:**

A. Owners and operators may petition the department to approve a modification of the final remediation plan for good cause.

B. The department may modify a final remediation plan only if it complies with applicable regulations, provides adequate protection of public health, safety and welfare and the environment, and the owner and operator comply with the public notice requirements of 20.5.12.34 NMAC.

[20.5.12.41 NMAC - Rp, 20.5.12.1232 NMAC, 6/15/2009]

#### **20.5.12.42 COMPLETION OF REMEDIATION:**

A. The department shall consider remediation complete when all of the following criteria are met:

(1) no layer of NAPL greater than one-eighth inch in thickness is present on the water table or in any of the wells;

(2) the EIB standard of 0.1 mg/L for methyl tertiary butyl ether (MTBE) has been met in groundwater and surface water;

(3) all applicable site-specific target levels or risk-based screening levels in soil and WQCC and EIB standards in groundwater have been achieved;

(a) all electrical and mechanical components of the remediation system shall remain shut down during the monitoring period described in this subsection;

(b) the department shall approve the designation of certain monitoring wells as compliance wells; the applicable standards shall be achieved concurrently at all compliance wells for at least eight consecu-

tive quarters unless otherwise as approved by the department; and

(c) for verification of remediation of soil to target concentrations, owners and operators shall install at least four soil borings, at least three of which are distributed throughout the previously most contaminated portion of the vadose zone, as approved by the department;

(4) corrective action requirements for total petroleum hydrocarbons determined in accordance with 20.5.12.27 NMAC have been met; and

(5) any other conditions which threatened public health, safety and welfare or the environment have been abated or remediated.

B. If any of the conditions of Paragraphs (1) through (5) of Subsection A of this section are not met, the department may require owners and operators to perform additional remediation.

C. Notwithstanding the conditions in Subsection A of this section, owners and operators may continue to operate the mechanical and electrical components of the remediation system when it is effectively reducing contaminant concentrations, as determined and approved by the department.

D. Termination of remediation in accordance with this section does not relieve the owner and operator of any other liability or responsibility they may have under this part or any other federal, state or local law or regulation.

E. Following department approval, owners and operators shall decommission the electrical and mechanical components of the remediation system and properly abandon wells that are no longer needed for remediation or monitoring, in accordance with federal, state and local laws and regulations.

[20.5.12.42 NMAC - Rp, 20.5.12.1233 NMAC, 6/15/2009]

#### **20.5.12.43 PROPERTY REUSE DETERMINATION:**

A. A property reuse determination is a technical determination issued by the department for sites contaminated by releases from petroleum storage tank systems to promote their redevelopment and productive use. The property reuse determination shall only apply to sites that have iron and manganese in groundwater above WQCC standards. A property reuse determination is not a clean-closure certification or grounds for a no further action determination, nor does it provide indemnification of an owner or operator from current or future environmental liabilities or obligations. Further action at a property reuse site may be required under the Water Quality Act and WQCC rules.

B. Any owner or operator

may request that the department evaluate a site, multiple sites, or a portion of a site for a property reuse determination by submitting a written request to the department. The request shall include the following:

(1) description of the current and proposed future land use(s) of the site;

(2) description of the site including a historical overview and generalized description of businesses, structures, vegetation, other prominent features, and location of the site;

(3) surveyed plat of the site, site map with legal description, or both;

(4) completed current environmental conditions table listing all areas of environmental concern on the site subject to remediation; the table shall include the following information about each area of environmental concern:

(a) remedial action taken, date, regulatory agency;

(b) residual concentrations of contaminants of concern, including WQCC standards that have not been achieved; and

(c) clean-up standards for contaminants of concern;

(5) chronology of events for each area investigated or remediated;

(6) monitoring plan to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained, if appropriate;

(7) affirmation from the property owner, if different from the requestor, that current or proposed future land uses will be maintained; and

(8) other relevant documents, as requested by the department.

C. Owners and operators shall receive approval of a request for a property reuse determination for the release when the owner or operator has completed remediation pursuant to 20.5.12.42 NMAC, with the exception of iron and manganese in excess of WQCC groundwater standards. A property reuse determination letter shall include a statement that the department shall have the right to conduct audits to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained.

D. A property reuse determination shall not have any effect on any permit, compliance plan, order, or other formal or informal enforcement mechanism applicable to the site, and shall not relieve an owner or operator from the obligations to comply with other applicable federal, state and local laws.

E. Upon completion of an assessment by the department that a site, multiple sites or portion of a site qualifies for a property reuse determination, the department shall issue the following deliverables:

(1) property reuse determination

letter; and

(2) property reuse certificate.

F. The department shall have the right to conduct audits to ensure that the risk to human health, safety and welfare and the environment has not significantly changed and that current and proposed future use(s) upon which the determination is dependent are maintained.

G. If new information becomes available or circumstances arise indicating that the environmental or land use conditions upon which the determination were based have changed, the department may reverse the property reuse determination.

[20.5.12.43 NMAC - N, 6/15/2009]

#### **20.5.12.44 NO FURTHER ACTION DETERMINATION:**

A. A no further action determination is a technical determination issued by the department that documents that the owner or operator of a site has met all applicable WQCC and EIB remediation standards and that no contaminant will present a significant risk of harm to public health, safety and welfare and the environment.

B. Any owner or operator may request that the department evaluate a site for a no further action determination by submitting a written request to the department. The request shall include the following, if requested by the department:

(1) description of the site including a historical overview and generalized description of businesses, structures, vegetation, other prominent features, and location of the site;

(2) surveyed plat of the site, site map with legal description, or both;

(3) completed current environmental conditions table listing all areas of environmental concern on the site subject to remediation; the table shall include the following information about each area of environmental concern:

(a) remedial action taken, date, regulatory agency;

(b) residual contaminants of concern;

(c) clean-up status; and

(d) clean-up standards for contaminants of concern;

(4) chronology of events for each area investigated or remediated; and

(5) other relevant documents, as requested by the department.

C. Owners and operators shall receive approval of a request for a no further action determination for the release when all of the following conditions are met:

(1) groundwater and surface water contamination related to the release is less than or equal to WQCC and EIB stan-

dards, and where there had been groundwater contamination related to the release, the applicable standards have been achieved concurrently at all compliance wells for at least eight consecutive quarters unless otherwise approved by the department;

(2) soil contamination is less than or equal to applicable RBSLs or SSTLs, unless otherwise approved by the department under Subparagraph (c) of Paragraph (3) of Subsection A of 20.5.12.41 NMAC; and

(3) any other conditions which did threaten public health, safety and welfare or the environment have been adequately mitigated.

D. Owners and operators shall receive approval of a request for no further action determination for the release when subsurface water does not meet the definition of "subsurface water" in 20.6.2.7 NMAC or is unprotected pursuant to Subsection A of 20.6.2.3101 NMAC, if NAPL and contaminant saturated soil have been adequately remediated in accordance with this part and any other conditions which threatened public health, safety and welfare or the environment have been adequately mitigated.

E. Upon completion of an assessment by the department that a site qualifies for a no further action determination, the department shall issue a no further action determination letter.

F. Any of the following may result in a reversal of a no further action determination:

(1) new information becomes available or circumstances arise indicating that an unacceptable risk to public health, safety and welfare or the environment exists; or

(2) a change in use or reasonable foreseeable future use of land or resources, including a change from less sensitive land use to more sensitive land use, such as from commercial or industrial to residential, and including the drilling of water supply wells in the vicinity of remaining contamination. [20.5.12.44 NMAC - Rp, 20.5.12.1234 NMAC, 6/15/2009]

#### **20.5.12.45 REQUEST FOR EXTENSION OF TIME:**

A. For good cause shown, the department may extend the time for complying with any deadline set forth in this part. The request shall specify the reason for the request, all actions taken to comply with the deadline and the period of time for which the extension is requested.

B. The department shall not grant an extension for more than 30 days at a time unless the department determines additional time is warranted. The department may place conditions on the

extension.

C. Lack of diligence or failure of owners and operators to comply with these regulations shall be grounds for denying a request for an extension of time. [20.5.12.45 NMAC - Rp, 20.5.12.1236 NMAC, 6/15/2009]

#### **HISTORY OF 20.5.12 NMAC:**

##### **Pre-NMAC History:**

The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

EIB/USTR 12, Underground Storage Tank Regulations - Part XII - Corrective Action for Petroleum UST Systems, filed 6/13/90.

##### **History of Repealed Materials:**

20 NMAC 5.12, Environmental Protection, Underground Storage Tanks, Corrective Action for UST Systems Containing Petroleum Products (filed 10/6/95), repealed 2/2/00.

20 NMAC 5.12, Corrective Action for UST Systems Containing Petroleum Products (filed 12/30/99), repealed 8/15/03.

20.5.12 NMAC, Corrective Action for Storage Tank Systems Containing Petroleum Products (filed 7/16/03), repealed 6/15/09.

##### **Other History:**

EIB/USTR 12, Underground Storage Tank Regulations - Part XII - Corrective Action for Petroleum UST Systems, (filed 6/13/90) was renumbered, reformatted and replaced by 20 NMAC 5.12, Underground Storage Tanks, Corrective Action for UST Systems Containing Petroleum, effective 11/05/95.

20 NMAC 5.12, Underground Storage Tanks, Corrective Action for UST Systems Containing Petroleum, (filed 10/06/95) was replaced by 20 NMAC 5.12, Corrective Action for UST Systems Containing Petroleum Products, effective 2/2/00.

20 NMAC 5.12, Corrective Action for UST Systems Containing Petroleum Products, (filed 12/30/99) was renumbered, reformatted and replaced by 20.5.12 NMAC, Corrective Action for Storage Tank Systems Containing Petroleum Products, effective 8/15/03.

20.5.12 NMAC, Corrective Action for Storage Tank Systems Containing Petroleum Products (filed 7/16/03) was replaced by 20.5.12 NMAC, Corrective Action for Storage Tank Systems Containing Petroleum Products, effective 6/15/09.

## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

### **TITLE 20 ENVIRONMENTAL PROTECTION CHAPTER 5 PETROLEUM STORAGE TANKS PART 13 CORRECTIVE ACTION FOR UST SYSTEMS CONTAINING OTHER REGULATED SUBSTANCES**

**20.5.13.1 ISSUING AGENCY:** New Mexico Environmental Improvement Board.

[20.5.13.1 NMAC - Rp, 20.5.13.1 NMAC, 6/15/2009]

**20.5.13.2 SCOPE:** This part applies to owners and operators of hazardous substance UST systems as defined in 20.5.1 NMAC. If the owner and operator of an UST system are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of non-compliance.

[20.5.13.2 NMAC - Rp, 20.5.13.2 NMAC, 6/15/2009]

**20.5.13.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; the Water Quality Act, Sections 74-6-1 through 74-6-17 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.

[20.5.13.3 NMAC - Rp, 20.5.13.3 NMAC, 6/15/2009]

**20.5.13.4 DURATION:** Permanent.

[20.5.13.4 NMAC - Rp, 20.5.13.4 NMAC, 6/15/2009]

**20.5.13.5 EFFECTIVE DATE:** June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.

[20.5.13.5 NMAC - Rp, 20.5.13.5 NMAC, 6/15/2009]

**20.5.13.6 OBJECTIVE:** The purpose of this part is to provide for corrective action at sites contaminated by releases from hazardous substance UST systems and to protect the public health, safety and welfare and the environment of the state.

[20.5.13.6 NMAC - Rp, 20.5.13.6 NMAC,

6/15/2009]

**20.5.13.7 DEFINITIONS:** The definitions in 20.5.1 apply to this part.  
[20.5.13.7 NMAC - Rp, 20.5.13.7 NMAC, 6/15/2009]

**20.5.13.8 GENERAL:**

A. Owners and operators of hazardous substance UST systems shall take corrective action to address all releases, including such action as collection and analysis of relevant site-specific data, soil remediation, groundwater and surface water remediation and any other appropriate actions pursuant to this part, in a manner protective of public health, safety and welfare and the environment.

B. Upon confirmation of a release pursuant to 20.5.7.8 NMAC or identification and reporting of a release in any other manner, owners and operators of hazardous substance UST systems shall comply with the requirements of this part if the release:

- (1) is of unknown volume or is greater in volume than 25 gallons; or
- (2) is of any size and the owner or operator is directed by the department to comply with this part.

C. Owners and operators shall mail or deliver all written notices and reports required under this part to be submitted to the department to the owner or operator’s assigned project manager from the petroleum storage tank bureau, New Mexico environment department.

D. Owners and operators shall comply with any site-specific timeline or deadline that is issued or approved in writing by the department at the time of workplan approval. If no applicable site-specific timeline has been issued or approved, the following timeline shall apply to all corrective action requirements under this part. The time deadlines set forth in this part are computed from the date of reporting of a release or of reporting of the confirmation of a suspected release pursuant to 20.5.7 NMAC unless another event is specified in these rules.

Default Corrective Action Timeline

Deadline, in days from report:	Action or deliverable due date, as defined above:
0	report discovery or confirmation of a release
3	72-hour report
14	14-day report
60	submit NAPL assessment
60	initiate interim removal of contaminated soil
60	preliminary investigation report
120	secondary investigation report
When monitored natural attenuation is used:	
510	monitored natural attenuation (MNA) plan
570	implementation of MNA
935	first annual MNA monitoring report
935	annual evaluation of MNA report
When other remediation is used:	
510	conceptual remediation plan
540	final remediation plan
600	implementation of remediation
690	first quarterly monitoring report
965	annual evaluation of remediation system report

E. All owners and operators are responsible for compliance with all provisions of this part. An owner or operator may designate a representative to facilitate compliance with this part. The designation of such a representative shall not affect the department’s right to seek compliance at any time from the owner or the operator or both. The designation of a representative is intended to facilitate compliance with this part and shall not relieve the owner and operator of their legal liabilities or responsibilities under this part.

F. Except for 20.5.13.9, 20.5.13.10 and 20.5.13.11 NMAC, owners and operators shall submit to the department written workplans for all required corrective action under this part. Owners and operators may submit workplans in stages to reflect the sequence or types of corrective action required by 20.5.13 NMAC at the site, but the owners and operators shall submit all required workplans to and obtain approval by the department in writing for technical adequacy before the corrective action is commenced.

G. Unless otherwise approved, a qualified firm as specified in 20.5.16 NMAC shall perform all corrective action and, when required by the rules in Title 20, Chapter 5, a professional engineer as defined in 20.5.1.7 NMAC.

(1) All contractors and their subcontractors shall have appropriate licenses and certifications and be in compliance with applicable local, state and federal laws and regulations, including but not limited to the rules in Title 16, Chapter 39 governing engineers, 14.6.3 NMAC governing contractors and, 29 CFR part 1910 governing worker health and safety.

(2) Owners and operators shall identify all prime contractors and all subcontractors in all workplans submitted to the department.

H. Where site conditions are amenable, owners and operators may use accelerated site characterization techniques if pre-approved by the department.

I. All monitoring wells shall be permitted in conformance with all applicable federal, state and local laws, regulations and ordinances in effect at the time of installation.

J. Owners and operators shall clearly mark and secure monitoring wells and major remediation equipment to prevent unauthorized access, tampering. Owners and operators shall close or abandon all wells in accordance with the requirements of applicable federal, state and local laws and regulations in effect at the time the workplan was approved.

K. If a release constitutes a hazardous substance incident under the provisions of the Hazardous Waste Act relating to hazardous substance incidents, those provisions may apply in addition to this part.

L. The department shall notify all owners and operators of responsible party-lead sites and contractors of state-lead sites in writing when it has determined that a deliverable completed under an approved workplan is satisfactory. The written notice shall also inform the owner, operator or contractor that any application for payment from the fund of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received written notice of approval and that no extensions of this deadline shall be granted.

[20.5.13.8 NMAC - Rp, 20.5.13.1300 NMAC, 6/15/2009]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.13.9 MINIMUM SITE ASSESSMENT, INITIAL RESPONSE:**

A. Upon discovery or confirmation of a release, owners and operators of the UST system shall immediately prevent any further release from the UST system by whatever means necessary, including removing product from the UST system or any part of the UST system that is known to leak or is suspected of leaking. If necessary, owners and operators shall remove the UST system from service in accordance with 20.5.8 NMAC.

B. Owners and operators shall inform the department in accordance with 20.5.7.8 NMAC of any release and action taken to mitigate immediate damage from the release.

[20.5.13.9 NMAC - Rp, 20.5.13.1302 NMAC, 6/15/2009]

#### **20.5.13.10 MINIMUM SITE ASSESSMENT, INITIAL ABATEMENT:**

A. Owners and operators shall undertake the initial abatement and site investigation actions specified in this section within 72 hours of discovery or confirmation of a release pursuant to 20.5.7 NMAC, using the default timeline as set forth in Subsection D of 20.5.12.8 NMAC or as otherwise directed or approved by the department.

B. Owners and operators shall identify the location and details of construction of all private water supply wells, using readily accessible public records, within a 1,000 foot radius, and all public water supply wells within a one mile

radius of the UST system, and shall determine if the identified wells lie within a designated wellhead protection area. Owners and operators shall take appropriate measures to protect these water supplies from contamination.

C. Owners and operators shall contain or remediate releases which present an imminent threat of contamination to or are within 500 feet of a surface water course as soon as practicable to prevent contamination of surface water. If the surface water course is a drinking water supply, within 24 hours owners and operators shall notify the owners or operators of all drinking water supplies likely to be affected by the release.

D. If the release has contaminated a water supply, owners and operators shall immediately provide a temporary replacement drinking water supply, as well as adequate warnings or other mechanisms to prevent persons from drinking or otherwise contacting water contaminated by the release. Within seven days of discovery or confirmation of a release pursuant to 20.5.7 NMAC that has contaminated a water supply, owners and operators shall provide a replacement water supply which is of adequate quality and quantity for drinking, bathing, cooking and washing. Owners and operators shall maintain the replacement water supply until an alternate water supply sufficient for all domestic purposes is available.

E. Owners and operators shall identify the depth, location, composition and construction of all underground utilities including water lines, sewer lines, communication cables, electric lines, and natural gas lines within the area of the release to assess the susceptibility of these utilities to permeation by contaminants or deterioration caused by contaminants. Owners and operators shall notify the utility owner that the release has occurred and obtain permission to perform a site check of the utilities or other subsurface structures most likely to be contaminated by the release to determine whether NAPL or vapors are present.

F. Owners and operators shall complete an investigation to determine whether potentially explosive or harmful vapors are present in any building, utility corridor, basement, or other surface or subsurface structure on or adjacent to the release site.

(1) The investigation shall include testing for vapors using the following:

(a) a combustible gas indicator or equivalent instrument calibrated according to the manufacturer's instructions to test for potentially explosive levels of vapors; and

(b) a photoionization detector, flame ionization detector or another method

approved by the department calibrated according to the manufacturer's instructions to test for potentially harmful vapors.

(2) In the event owners and operators discover actual or potentially explosive levels of vapors or potentially harmful vapors greater than 20 percent of the lower explosive limit (LEL) reading greater than five whole units above ambient concentrations any structure in the vicinity of the release site, owners and operators shall confirm and, if necessary, take immediate action to mitigate the vapor hazard. Within seven days of the discovery of the vapors, owners and operators shall install and place into operation a vapor mitigation system capable of reducing vapors to safe levels within the shortest reasonable time. The vapor mitigation system shall be designed by and constructed under the direct, responsible, supervisory control of a professional engineer, when required by the department.

(a) Once a vapor mitigation system has been installed, owners and operators shall monitor and report in writing to the department the levels of potentially explosive or harmful vapors in the affected structures weekly for the first month and monthly thereafter unless a different monitoring schedule is approved in writing by the department. This monitoring shall be performed in accordance with Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(b) After the vapor mitigation system has been in operation for three months, owners and operators shall have 30 days to submit to the department a written summary report containing the monitoring results. The department may direct owners and operators to modify the vapor mitigation system as necessary to reduce vapors to safe levels. Owners and operators shall submit monitoring results to the department at three-month intervals until operation of the vapor mitigation system is discontinued in accordance with this section.

(3) Owners and operators shall continue to operate the vapor mitigation system until the results of three consecutive monthly monitoring events indicate the following:

(a) levels of potentially explosive vapors are less than 20 percent LEL; and

(b) levels of potentially harmful vapors are less than or equal to five whole instrument units above ambient levels in any structure in the vicinity of the release site when measured as required in Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(4) When operation of a vapor mitigation system is discontinued, owners and operators shall monitor the vapor levels in the structure weekly for the first month and monthly thereafter until one calendar

year has passed, or as otherwise directed or approved by the department. If during this period the levels exceed those set forth in Subparagraphs (a) and (b) of Paragraph (3) of this subsection, owners and operators shall notify the department and take the necessary corrective action, as directed by the department.

G. Owners and operators shall remove any exposed hazardous substances related to the release and mitigate any related immediate fire and safety hazards as soon as possible, but in no case no later than 72 hours after the confirmation or other identification of the release.

[20.5.13.10 NMAC - Rp, 20.5.13.1303 NMAC, 6/15/2009]

#### **20.5.13.11 MINIMUM SITE ASSESSMENT, 72-HOUR AND 14-DAY REPORTS:**

A. Owners and operators shall make an oral report summarizing the abatement procedures undertaken and the results of action taken under 20.5.13.9 and 20.5.13.10 within 72 hours of the discovery or confirmation of a release pursuant to 20.5.7 NMAC.

B. Owners and operators shall submit a written report to the department within 14 days of the discovery or confirmation of a release pursuant to 20.5.7 NMAC in addition to the written notice required under 20.5.7 NMAC. This report shall summarize all the work performed pursuant to 20.5.13.9 and 20.5.13.10 NMAC and shall include the following information, as appropriate:

(1) a map based on a United States geologic survey topographic map showing locations of actual and potential receptors, including, but not limited to, private and public water supplies identified pursuant to Subsection B of 20.5.13.10 NMAC; owners and operators shall draw two concentric circles, at 1,000 feet and at one mile radii from the center of the release, and shall also show on the map all surface water courses within a one mile radius of the site;

(2) information about any water supplies known or suspected to have been contaminated by the release;

(3) most likely direction of groundwater flow;

(4) a site plan map showing locations of utilities, surface structures and storage tank systems;

(5) information about underground utilities gathered in accordance with Subsection E of 20.5.13.10 NMAC;

(6) soil borings, logs, and details of construction of all wells, if available;

(7) description of any actions taken to abate adverse effects;

(8) data from vapor monitoring performed in the vicinity of the site;

(9) description of any actions taken to abate potentially explosive or harmful vapors and any plans for further action;

(10) description of fire and safety hazards resulting from the release and actions taken to abate such hazards;

(11) description of current and past ownership of the property, UST systems, the substance stored in the system, age of tank and history of any tank removals;

(12) present land use, within 1,000 feet of the site; and

(13) records of tightness tests, repairs to the UST system, release detection and monitoring results.

[20.5.13.11 NMAC - Rp, 20.5.13.1304, 6/15/2009]

#### **20.5.13.12 NOTICE, SPLIT SAMPLES AND SAMPLING PROCEDURES:**

A. Except for the 72-hour vapor check, owners and operators shall notify the department at least four days prior to the collection of any samples which are required pursuant to this part and upon which laboratory analyses are to be performed to allow the department an opportunity to be present at the collection of samples or to split samples.

B. Owners and operators shall notify the department at least four days prior to the decommissioning, destruction or abandonment of any wells.

C. Owners and operators shall collect, store and transport all samples necessary to comply with the requirements of this part in a manner consistent with the nature of the known or suspected and in conformance with applicable federal, state and local laws and regulations.

[20.5.13.12 NMAC - Rp, 20.5.13.1305 NMAC, 6/15/2009]

#### **20.5.13.13 INTERIM REMOVAL OF NON-AQUEOUS PHASE LIQUID:**

A. Owners and operators shall assess the potential for remediation of non-aqueous phase liquid (NAPL) where there is a thickness of greater than one-eighth inch of NAPL in surface water, in any excavation pit, or in any well. Owners and operators shall submit the assessment to the department in accordance with a timeline approved or issued by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. The department may direct or approve interim removal of NAPL when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment. In this event, owners and operators shall remove NAPL in accordance with a time-

line approved or issued by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

C. Owners and operators shall remove NAPL in a manner that minimizes the spread of contamination into uncontaminated media.

D. Owners and operators shall store and dispose of NAPL in accordance with all flammable and combustible liquids codes approved by the state fire marshal or other local authority, state hazardous waste regulations 20.4.1 NMAC, and any other applicable laws or regulations.

E. Owners and operators shall report recovery and disposal of NAPL to the department.

[20.5.13.13 NMAC - Rp, 20.5.13.1306 NMAC, 6/15/2009]

#### **20.5.13.14 INTERIM REMOVAL OF CONTAMINATED SOIL:**

A. Owners and operators shall remediate contaminated soil in accordance with 20.5.13.26 and 20.5.13.34 NMAC, unless directed or approved by the department to remove and treat contaminated soil in accordance with this section.

(1) The department may direct or approve interim removal of contaminated soil when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment.

(2) Under this section, owners and operators shall excavate, treat and dispose of contaminated soil using methods approved by the department, in compliance with local laws and regulations, and under a timeline issued or approved by the department or the timeline in Subsection D of 20.5.13.8 NMAC.

(3) The department shall approve the vertical and horizontal extent of soil to be excavated.

B. When treating or temporarily storing soil on site, owners and operators shall:

(1) for treatment on site, spread soil in a six-inch layer over an impervious liner or other surface approved by the department to prevent infiltration to groundwater and place the layer of soil on level ground and berm to prevent runoff from contaminating other soil or surface water;

(2) for temporary storage, place the soil in a secure, bermed area on an impervious liner or surface or in a secured and properly labeled container, as approved by the department; and

(3) handle soil in a manner that does not contaminate groundwater, surface water or other uncontaminated soil or does not create or cause a public nuisance or threat to human health, safety and welfare

or the environment.

C. When contaminated soil is taken off site, owners and operators shall provide the department with the following information within 14 days of removal of the soil from the site:

(1) written documentation of the type and concentration of contaminants, volume and weight of soil, method of treatment, date transported, and location of the site of disposal or treatment;

(2) a signed, written statement by the owner of the treatment or disposal site describing the location of the site and expressly accepting the contaminated soil; and

(3) if contaminated soil is taken to a permitted solid or hazardous waste facility, a manifest signed by the generator, transporter and the owner or operator of the solid waste facility.

D. Remediation shall be considered complete when the requirements in 20.5.13.34 NMAC are met.

E. In accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC, owners and operators shall submit to the department a report describing the removal and treatment of contaminated soil.

(1) The report shall describe the soil removal action and its effectiveness, including volumes and weight removed.

(2) Owners and operators shall submit the report within 30 days of the soil removal action.  
[20.5.13.14 NMAC - Rp, 20.5.13.1307 NMAC, 6/15/2009]

**20.5.13.15 MINIMUM SITE ASSESSMENT, PRELIMINARY AND OTHER REQUIRED INVESTIGATIONS:**

A. A preliminary investigation is not required when owners and operators can demonstrate that groundwater has not been contaminated and one of the following two conditions apply:

(1) the release is remediated in accordance with this part within 72 hours of discovery or confirmation; or

(2) the release is permanently contained within the excavation area.

B. If the contamination extends beyond the boundaries of the property where the release originated, owners and operators shall conduct a secondary investigation in accordance with 20.5.13.18 NMAC.

[20.5.13.15 NMAC - Rp, 20.5.13.1308 NMAC, 6/15/2009]

**20.5.13.16 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION - REQUIREMENTS:**

Owners and operators shall conduct a preliminary investigation in accordance with this subsection and under a timeline approved or issued by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. The preliminary investigation shall determine the following, unless otherwise directed or approved by the department.

A. If not previously identified and reported under 20.5.13.11 NMAC, the preliminary investigation shall determine the regulated substance released or suspected of being released at the site, the media of concern, current and potential receptors, current and anticipated use of property, complete and incomplete exposure pathways, and routes of exposure.

B. The preliminary investigation shall also determine the horizontal and vertical extent and magnitude of soil contamination.

(1) Owners and operators shall conduct a soil boring survey by advancing a continuously cored soil boring at each area of release where soil contamination is most likely to be encountered unless otherwise directed by the department. The initial incident report and a soil vapor survey may be used in locating these areas. Owners and operators shall advance at least one of the borings into the saturated zone or, with approval from the department, to a depth of 50 feet below the depth at which measured levels of contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units.

(2) Owners and operators shall advance at least four additional soil borings to characterize the release within property boundaries. Borings shall be completed to the depth at which contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units. If the soil borings indicate that contaminated soil extends beyond the boundary of the property on which the storage tank system is located, owners and operators shall advance soil borings sufficient to characterize the extent and magnitude of contamination within site boundaries.

(3) The preliminary investigation shall assess, at five-foot intervals, field estimates of concentrations of petroleum hydrocarbons in the soil borings and select and prepare samples for laboratory analysis.

(4) Owners and operators shall gather field data for soil classification, determining and recording color, grain size, texture, description of lithification, plasticity and clay content.

(5) The preliminary investigation

shall include derived values for soil bulk density (g/cc), soil moisture content (percent by volume), and effective porosity, and fraction organic carbon content (percent by volume) using samples taken from an uncontaminated area of the vadose zone.

(6) The preliminary investigation shall delimit the horizontal and vertical extent of contaminant saturated soil as defined in 20.5.1.7 NMAC.

C. The preliminary investigation shall determine whether groundwater or surface water has been contaminated above applicable standards or whether a potential for groundwater or surface water contamination is present by performing the following:

(1) install at least three groundwater monitoring wells at locations where the results of the soil boring survey conducted pursuant to this section indicate that groundwater may be contaminated; owners and operators shall:

(a) locate monitoring wells so that groundwater gradient can be determined;

(b) install at least one monitoring well on site in the area of highest contamination as determined by the soil borings installed in accordance with the initial incident report and other relevant information;

(c) install one of the monitoring wells in the estimated down-gradient direction from the area of highest contamination;

(d) construct wells in accordance with all applicable federal, state and local laws and regulations; and

(e) survey the wells using a New Mexico licensed professional surveyor, in decimal degrees of latitude and longitude in accordance with NAD 83;

(2) calculate the direction and gradient of groundwater flow;

(3) inspect all monitoring wells for the presence of NAPL using a method approved by the department; if NAPL is present in any well, measure the apparent thickness, delimit its horizontal extent, and initiate recovery procedures in accordance with NMAC; and

(4) sample each monitoring well that does not contain NAPL and analyze the sample for contaminants of concern to determine whether:

(a) immediate mitigation procedures are warranted; and

(b) other hazardous conditions exist as a result of the release if not previously identified in accordance with 20.5.13.10 NMAC by:

(i) identifying the location and depth of underground utilities and other subsurface structures on or adjacent to the site not identified earlier in accordance with Subsection E of 20.5.12.11 NMAC;

(ii) checking for the presence of vapors in accordance with

20.5.12.11 and 20.5.12.16 NMAC; and  
(iii) identifying all other hazards and potential threats to public health, safety and welfare and the environment which may exist as a result of the release.

[20.5.13.16 NMAC - Rp, 20.5.13.1308 NMAC, 6/15/2009]

**20.5.13.17 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the preliminary investigation and other requirements of the minimum site assessment as defined in 20.5.1.7 NMAC in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. The report shall include the information gathered under 20.5.13.9, 20.5.13.10, 20.5.13.11 and 20.5.13.15 NMAC and shall conform to the requirements of this section and 20.5.13.16 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline issued or approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not conform to the minimum site assessment, preliminary investigation requirements in this section and 20.5.13.16 NMAC, the department shall reject the report and owners and operators shall be determined not to have conducted a minimum site assessment for the purposes of section 74-6B-8B(1)(c) NMSA 1978. The department's failure to review or to comment on this report shall not relieve owners and operators of their responsibilities under this part or otherwise under the law.

D. Owners and operators shall comply with the requirements of any local government which has designated a wellhead/source water protection area that includes the area of the release.

E. Owners and operators shall provide notice that includes the contaminants identified, as well as the horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination.

[20.5.13.17 NMAC - Rp, 20.5.13.1309 NMAC, 6/15/2009]

**20.5.13.18 SECONDARY INVESTIGATION:**

A. Owners and operators shall perform a secondary investigation in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC when the department makes at least one of the following determinations about the site:

(1) the extent and magnitude of contamination in all media has not been delimited by the preliminary investigation; or

(2) the release threatens public health, safety and welfare or the environment.

B. The secondary investigation shall determine the following:

(1) the horizontal and vertical extent and magnitude of soil contamination both on and off site;

(2) the horizontal extent and magnitude of dissolved phase groundwater contamination both on and off site;

(3) the vertical extent and magnitude of dissolved phase groundwater contamination, when site conditions warrant;

(4) characteristics, aerial extent, estimated volume and apparent thickness of NAPL in wells;

(5) the elevation of groundwater and surface water and the gradient, rate and direction of groundwater and surface water flow;

(6) the rate and direction of contaminant migration;

(7) the hydrologic properties of the contaminated portion of the aquifer including hydraulic conductivity, transmissivity and storativity; the department may require field verification of estimates made from literature;

(8) whether the aquifer is perched;

(9) whether the aquifer is confined or unconfined; and

(10) any other technical information requested by the department which is reasonably necessary to meet the requirements of this part.

[20.5.13.18 NMAC - Rp, 20.5.13.1310 NMAC, 6/15/2009]

**20.5.13.19 SECONDARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the secondary investigation to the department in accordance with a timeline issued or approved by the department or the timeline in Subsection D of 20.5.13.8 NMAC. The report shall include all information gathered under 20.5.13.18 NMAC and shall conform to the requirements of this part.

B. Owners and operators shall attach a statement signed by an author-

ized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline issued or approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not meet the requirements of 20.5.13.18 NMAC, the owner and operator will be in violation of this part until the inadequacies are corrected. The department's failure to review or to comment on the secondary investigation report shall not relieve owners and operators of their responsibilities under this part or otherwise under the law.

D. Owners and operators shall provide notice that includes the contaminants identified, as well as horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination who were not previously notified in accordance with 20.5.13.17 NMAC.

[20.5.13.19 NMAC - Rp, 20.5.13.1311 NMAC, 6/15/2009]

**20.5.13.20 MONITORED NATURAL ATTENUATION:**

A. When directed or approved by the department, owners and operators shall submit a plan for remediation by monitored natural attenuation to the department if any of the following conditions have been identified at the site:

(1) concentrations of contaminants of concern exceed target concentrations in soil or WQCC or EIB standards in groundwater or surface water; and

(2) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. Owners and operators shall submit the monitored natural attenuation plan in accordance with this section and 20.5.13.21 NMAC and in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

C. The intent of the monitored natural attenuation plan is to provide a written description of the methodology proposed and demonstrate how the plan will achieve target concentrations in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. The content of the monitored natural attenuation plan, at a minimum and as appropriate, shall include:

(1) a site plan drawn to scale of no

less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) cross sections showing the source contaminant mass in relation to the groundwater contamination;

(3) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(5) a schematic drawing depicting the construction details including lithology and screen intervals for the designated monitoring wells;

(6) justification for selecting the designated monitoring wells;

(7) recommended approach to monitoring including an implementation and monitoring schedule, the analytical methods, and the justification for the recommendation;

(8) an estimation of the time necessary for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(9) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission or planned submission of the monitored natural attenuation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the monitored natural attenuation plan to the department; the second publication of this notice shall occur no later than seven days after the date the monitored natural attenuation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the monitored natural attenuation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a monitored natural attenuation plan has been submitted to the department proposing actions to monitor natural attenuation of a release of hazardous substances;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of contaminant plume is located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the monitored natural attenuation plan and all data and modeling related to the monitored natural attenuation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a monitored natural attenuation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners;

(d) owners and operators shall post a notice of the submission of the monitored natural attenuation plan at the release site within seven days of the submission of the monitored natural attenuation plan; the notice shall contain the information specified in this subsection and the bureau's guidelines for corrective action and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the monitored natural attenuation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice; and

(11) other requirements as directed by the department.

[20.5.13.20 NMAC - Rp, 20.5.13.1312 NMAC, 6/15/2009]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.13.21 REVIEW AND APPROVAL OF MONITORED NATURAL ATTENUATION PLAN:**

A. After the public comment period has ended, the department shall review the plan and shall approve the plan or notify the owner and operator in writing of the deficiencies of the plan. If the secretary determines that a decision on the monitored natural attenuation plan must be post-

poned due to significant comments from the public, the department must notify owners and operators of such a postponement, and may extend its review period for a period not to exceed 60 days unless otherwise provided in Subsection D of this section. All deadlines calculated from the end of the review period will be adjusted to reflect any extension.

B. The department may approve a monitored natural attenuation plan and impose reasonable conditions.

C. If the department determines that the monitored natural attenuation plan is inadequate, owners and operators shall modify the plan to correct the deficiencies specified by the department and re-submit it within the time period specified by the department.

D. The department may provide notice of the submission of the monitored natural attenuation plan to persons other than the owner and operator and provide for public participation in the review process as the department deems appropriate or when there is significant public interest. In the event an informal public meeting, public hearing or other form of public participation is conducted, the department may postpone its decision on the monitored natural attenuation plan until after a public hearing or meeting is held and a determination is made. Any public hearing or meeting that is held due to significant public interest shall be held within 60 days of determining there is significant public interest.

[20.5.13.21 NMAC - Rp, 20.5.13.1313 NMAC, 6/15/2009]

#### **20.5.13.22 MONITORED NATURAL ATTENUATION PLAN IMPLEMENTATION:**

A. Owners and operators shall implement the approved monitored natural attenuation plan in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. Owners and operators shall monitor the contamination until the department determines that the natural attenuation is complete pursuant to this part, or unless otherwise approved by the department.

[20.5.13.22 NMAC - Rp, 20.5.13.1314 NMAC, 6/15/2009]

#### **20.5.13.23 REPORTS ON THE MONITORED NATURAL ATTENUATION:**

A. Owners and operators shall submit written reports to the department on the progress of the monitored natural attenuation. Owners and operators shall submit the reports annually unless a differ-

ent reporting period is directed or approved by the department and shall document all work performed during the preceding interval and shall include at a minimum the following information, as appropriate:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(3) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(4) tabulation of the current and historical results of all water quality analyses and water elevation data;

(5) graphs of appropriate scale of the current and historical water quality analyses and water elevation data versus time;

(6) data evaluation and interpretation, and recommendations; and

(7) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.13.23 NMAC - Rp, 20.5.13.1315 NMAC, 6/15/2009]

#### **20.5.13.24 EVALUATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators shall evaluate the effectiveness of the monitored natural attenuation plan at the end of each year of monitoring and submit the evaluation to the department for review unless otherwise approved or directed by the department.

B. When the department determines that the plan is not effectively mitigating contamination according to the identified risks to public health, safety and welfare or the environment, the owner or operator shall propose a change in the existing monitored natural attenuation plan within 30 days of the department's determination of ineffectiveness, or propose an alternative approach to remediation under 20.5.13.27 NMAC. Within 30 days of the department's approval, the owner or operator shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section.

[20.5.13.24 NMAC - Rp, 20.5.13.1316

NMAC, 6/15/2009]

#### **20.5.13.25 MODIFICATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators may petition the department to approve a modification of the monitored natural attenuation plan for good cause.

B. The department may approve a modification of the monitored natural attenuation plan only if such modification provides adequate protection of public health, safety and welfare and the environment and the owner or operator complies with the public notice requirements of 20.5.13.20 NMAC.

[20.5.13.25 NMAC - Rp, 20.5.13.1317 NMAC, 6/15/2009]

#### **20.5.13.26 COMPLETION OF MONITORED NATURAL ATTENUATION:**

A. Natural attenuation shall be considered complete when all of the following criteria are met:

(1) no layer of NAPL greater than one-eighth inch in thickness is present on the water table or in any of the wells;

(2) all applicable standards for soil and in groundwater and surface water have been achieved; the applicable standards shall be achieved concurrently at all compliance wells as approved by the department; and

(3) any other conditions which threatened public health, safety and welfare or the environment have been abated.

B. If any of the conditions of Paragraphs (1) through (3) of Subsection A of this section are not met, the department may require the owner or operator to perform additional remediation.

C. Termination of monitored natural attenuation in accordance with this section does not relieve the owner and operator of any other liability or responsibility they may have under this part or any other federal, state or local law or regulation.

D. Following department approval, and with 30 days notice unless otherwise approved by the department, owners and operators shall properly abandon wells that are no longer needed for monitoring, in accordance with federal, state and local laws and regulations.

[20.5.13.26 NMAC - Rp, 20.5.13.1318 NMAC, 6/15/2009]

#### **20.5.13.27 CONCEPTUAL REMEDIATION PLAN:**

A. When directed or approved by the department, owners and operators shall submit a conceptual remediation plan to the department if any of the following conditions have been identified at

the site:

(1) a thickness of greater than one-eighth inch of NAPL is present in the water, including in any excavation pit, or in any well;

(2) contaminant saturated soil is present;

(3) concentrations of contaminants of concern exceed target concentrations in soil or WQCC or EIB standards in groundwater or surface water; or

(4) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. All remediation plans shall include but are not limited to methods to mitigate, remove or otherwise remediate the contaminant source areas.

C. Owners and operators shall submit the conceptual remediation plan in accordance with this section and with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

(1) The conceptual remediation plan shall provide a written description of all of the methodologies proposed and discuss how the plan will achieve target concentrations and other goals of remedial action in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. Owners and operators shall obtain department approval for the conceptual remediation plan before developing the final remediation plan.

(2) The conceptual remediation plan, at a minimum and as appropriate, shall include:

(a) a concise description of site conditions, including hydrogeology, contaminant characteristics and plume dynamics;

(b) the recommended approach to remediation and justification for the recommendation;

(c) a clear description of the goals of remediation and the target concentrations to be met in each medium;

(d) a narrative description of the proposed methodologies including a preliminary cost comparison and time lines for achieving goals of remediation;

(e) a cost estimate of implementation including installation, operation and maintenance, and monitoring;

(f) a schematic diagram of the proposed remediation system or treatment area and a narrative description of its operation;

(g) a plan view, to scale, of the site showing locations of the proposed equipment or excavation boundaries in relation to the site's physical features and contaminant plumes;

(h) a description of how the

approach will achieve target concentrations and other goals of remediation; and

(i) a description of additional data required to support the conceptual remediation plan and design of the final plan and how it will be collected.

[20.5.13.27 NMAC - Rp, 20.5.13.1319 NMAC, 6/15/2009]

### **20.5.13.28 FINAL REMEDIATION PLAN:**

A. Following department approval of the conceptual remediation plan, owners and operators shall develop a final remediation plan in accordance with this section and shall submit three copies of the final remediation plan to the department in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. The design and engineering of any final remediation plan that includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis shall be the responsibility of a professional engineer as defined in 20.5.1.7 NMAC. A professional engineer shall sign and seal all plans and drawings required pursuant to this section, unless otherwise approved by the department.

C. In order to eliminate the potential to emit regulated substances to the environment, all engineered remediation systems shall be designed, constructed and operated such that malfunction or failure of any integral component results in automatic shut down of the entire system. Integral components include but are not limited to pumps, blowers, oil-water separators, oxidizer systems, air strippers, filtration systems and computers.

D. All final remediation plans shall, at a minimum, include all of the following:

(1) goals of remediation and target concentrations to be achieved in each medium;

(2) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing USTs, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(3) a hydrogeologic cross section showing contaminant mass in relation to the remediation system and a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) an implementation schedule;

(5) engineered plans and specifications in accordance with Subsection E of this section;

(6) a schedule for remediation of the source areas, for protection of receptors identified in Paragraph (1) of this subsection, and for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(7) a design and schedule for system optimization that meets the requirements of 20.5.13.32 NMAC;

(8) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(9) copies of all permits, permit applications, and property access agreements required to initiate remediation, including, if necessary, permits required by the state engineer, permits for discharge to groundwater or a waste water treatment plant, permits for air emissions or a surface water national pollution discharge elimination system (NPDES) permit;

(10) public notice in conformance with the following requirements:

(a) the owner or operator shall publish a legal notice of the submission or planned submission of the final remediation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the final remediation plan to the department; the second publication of this notice shall occur no later than seven days after the date the remediation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the final remediation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a remediation plan has been submitted to the department proposing actions to remediate a release of hazardous substances;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of the remediation system will be located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the remediation plan and all data and modeling related to the remediation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered, within 21 days of the publication of

the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a remediation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners;

(d) owners and operators shall post a notice of the submission of the remediation plan at the release site within seven days of the submission of the remediation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the remediation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice;

(11) for sites where contaminated media are being removed, a description of the ultimate disposal site of contaminated media, location of excavation and trenching, and method of limiting access by pedestrian and vehicular traffic; and

(12) other requirements as directed by the department.

E. In addition to the requirements of Subsection D of this section, all final remediation plans shall include:

(1) for engineered systems:

(a) unless otherwise approved by the department, a complete and definitive engineering design for a mechanical, electrical, or constructed system, including drawings, plans, diagrams and specifications which are signed and sealed by a professional engineer;

(b) process and instrumentation diagrams;

(c) mechanical arrangement plans and elevations, drawn to scale, showing proposed wells, manifolds, piping details, instrumentation and sampling ports;

(d) details of vapor or fluid extraction or injection wells, as appropriate, including screen length and placement in relation to ground surface, normal and low water table elevations and geologic strata, screen slot size, depths and specifications of the filter pack and seal, and drilling method;

(e) equipment and parts list and specifications including a spare parts list, performance requirements, maintenance requirements and schedule;

(f) electric power requirements including a one-line diagram and schematics;

(g) operation and maintenance

commitments and schedules for all facets of the remediation system; and

(h) all other plans, diagrams and specifications that are necessary to properly construct and operate the remediation system in accordance with the remediation plan including but not limited to requirements for:

- (i) trenching and protection from traffic;
- (ii) concrete repair and replacement;
- (iii) restoration of property; and
- (iv) location and protection of underground utilities;

(2) for excavation and disposal plans:

- (a) plan view of proposed excavation relative to contaminant plume;
- (b) cross-sections of proposed excavation depicting overburden, contaminated material to be removed and backfill;
- (c) volume calculations and slope stability analysis;
- (d) description of excavation and backfill procedure to be performed in conformance with OSHA and ASTM standards and regulations;
- (e) traffic control plan;
- (f) description of post-excavation of confirmation sampling;
- (g) proposed final grade plan;
- (h) post-excavation grade survey;

and

(i) all other plans, diagrams and specifications that are necessary including but not limited to requirements for:

- (i) trenching and protection from traffic;
- (ii) concrete repair and replacement;
- (iii) restoration of property; and
- (iv) location and protection of underground utilities.

[20.5.13.28 NMAC - Rp, 20.5.13.1319 NMAC, 6/15/2009]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.13.29 REVIEW AND APPROVAL OF FINAL REMEDIATION PLAN:**

A. Within 30 days of receipt of the final remediation plan and after the public comment period has ended, the department shall review the plan and shall either approve the plan or notify the owner and operator in writing of the deficiencies of the plan. If the secretary determines that a decision on the remediation plan must be postponed due to significant comments from the public, the department must notify the owner and operator of such

a postponement within 30 days, and may extend its review period for a period not to exceed 60 days unless otherwise provided in Subsection D of this section. All deadlines calculated from the end of the review period will be adjusted to reflect any extension.

B. The department may approve a final remediation plan and impose reasonable conditions.

C. If the department determines that the final remediation plan is inadequate, the owner or operator shall modify the plan to correct the deficiencies specified by the department and re-submit it within the time period specified by the department.

D. The department may provide notice of the submission of the remediation plan to persons other than the owner and operator and provide for public participation in the review process as the department deems appropriate or when there is significant public interest. In the event an informal public meeting, public hearing or other form of public participation is conducted, the department may postpone its decision on the final remediation plan until after a public hearing or meeting is held. Any public hearing or meeting that is held due to significant public interest shall be held within 60 days of determining that there is significant public interest.

[20.5.13.29 NMAC - Rp, 20.5.13.1320 NMAC, 6/15/2009]

#### **20.5.13.30 IMPLEMENTATION OF FINAL REMEDIATION PLAN:**

A. Owners and operators shall implement the approved, final remediation plan in accordance with a timeline issued or approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. Owners and operators shall employ a professional engineer to ensure conformance with the final remediation plan, including excavation, installation, commissioning and operation of the system.

B. When the remediation plan includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis:

(1) a professional engineer shall supervise conformance with the final remediation plan including installation, commissioning and operation of the system;

(2) owners and operators shall operate the remediation system continuously until the remediation is terminated pursuant to this part, unless otherwise approved by the department; and

(3) owners and operators shall report to the department all interruptions of the operation of the remediation system greater than 72 hours.

C. Owners and operators shall obtain written approval from the

department prior to implementing any change to the department-approved engineering design.

D. Following implementation of the final remediation plan, the owner or operator shall submit an "as-built" report signed and sealed by the project professional engineer including:

(1) any deviations from the drawings and specifications included in the final remediation plan;

(2) a tabulation of pertinent data including but not limited to flow rates, pressures, temperatures, contaminant concentrations and groundwater elevations at start-up, and boring logs and well completion diagrams; and

(3) information and documentation purchased major remediation equipment including, but not limited to, serial number, model and manufacturer, description, warranty information, operating manuals, maintenance requirements and purchase price.

[20.5.13.30 NMAC - Rp, 20.5.13.1321 NMAC, 6/15/2009]

#### **20.5.13.31 QUARTERLY REPORTS ON THE REMEDIATION:**

A. Owners and operators shall submit written reports to the department on the operation of the remediation system. Owners and operators shall submit the reports quarterly unless a different reporting period is approved by the department, shall document all work performed during the preceding interval, and shall include the following information, as appropriate:

(1) tabulation of the current and historical results of all water quality analyses and water elevation data;

(2) evaluation of the performance and efficiency of each aspect of the remediation:

(a) the evaluation and all adjustments to system operation shall be performed, as appropriate, under the direct, responsible, supervisory control of an authorized representative of the qualified and a professional engineer; and

(b) owners and operators shall submit evidence that the performance of the remediation system meets the operating standards outlined in the final remediation plan;

(3) verification based on calculations that the schedule is being met for source removal, protection of actual and potential receptors, achievement of target concentrations, quarterly and cumulative contaminant mass reduction totals to date in pounds and gallons of contaminants;

(4) records of system operation, including but not limited to, periods of shutdown and equipment malfunctions; the maintenance procedures performed on the

remediation system during the preceding quarter, including the names of the individuals performing the maintenance; and an operation and maintenance schedule for the next quarter;

(5) NAPL recovery, both cumulative and quarterly, and details of its disposal;

(6) effluent vapor concentrations over time;

(7) evaluation and recommendations for improving the performance of the system to achieve the goals of remediation; and

(8) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.13.31 NMAC - Rp, 20.5.13.1322 NMAC, 6/15/2009]

#### **20.5.13.32 ANNUAL EVALUATION OF REMEDIATION:**

A. Owners and operators shall evaluate the effectiveness of the approach to remediation at the end of each year of operation and submit the evaluation to the department for review.

B. When the department determines that the approach to remediation is not effectively remediating contamination according to the identified risks to public health, safety and welfare or the environment, owners and operators shall propose an alternative approach or change in the existing remediation plan within 30 days of the department's determination of ineffectiveness. Within 30 days of the department's approval, owners and operators shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section until monitoring to verify completion of remediation in accordance with 20.5.13.34 NMAC commences. [20.5.13.32 NMAC - Rp, 20.5.13.1323 NMAC, 6/15/2009]

#### **20.5.13.33 MODIFICATION OF FINAL REMEDIATION PLAN:**

A. Owners and operators may petition the department to approve a modification of the final remediation plan for good cause.

B. The department may modify a final remediation plan only if it complies with applicable regulations, provides adequate protection of public health, safety and welfare and the environment, and the owners and operators comply with the public notice requirements of 20.5.13.27 NMAC.

[20.5.13.33 NMAC - Rp, 20.5.13.1324

NMAC, 6/15/2009]

#### **20.5.13.34 COMPLETION OF REMEDIATION:**

A. The department shall consider remediation complete when all of the following criteria are met:

(1) no layer of NAPL greater than one-eighth inch in thickness is present on the water table or in any of the wells;

(2) all applicable standards for soil, groundwater and surface water have been achieved;

(a) all electrical and mechanical components of the remediation system shall remain shut down during the monitoring period described in this subsection;

(b) the department shall approve the designation of certain monitoring wells as compliance wells; the applicable standards shall be achieved concurrently at all compliance wells for at least eight consecutive quarters unless otherwise as approved by the department; and

(c) for verification of remediation of soil to target concentrations, owners and operators shall install at least four soil borings, at least three of which are distributed throughout the previously most contaminated portion of the vadose zone, as approved by the department; and

(3) any other conditions which threatened public health, safety and welfare or the environment have been remediated.

B. If any of the conditions of Paragraphs (1) through (3) of Subsection A of this section are not met, the department may require the owner or operator to perform additional remediation.

C. Notwithstanding the conditions in Subsection A of this section, owners and operators may continue to operate the mechanical and electrical components of the remediation system when it is effectively reducing contaminant concentrations, as determined and approved by the department.

D. Termination of remediation in accordance with this section does not relieve owners and operators of any other liability or responsibility they may have under this part or any other federal, state or local law or regulation.

E. Following department approval, owners and operators shall decommission the electrical and mechanical components of the remediation system and properly abandon wells that are no longer needed for remediation or monitoring, in accordance with federal, state and local laws and regulations.

[20.5.13.34 NMAC - Rp, 20.5.13.1325 NMAC, 6/15/2009]

#### **20.5.13.35 PROPERTY REUSE DETERMINATION:**

A. A property reuse determination is a technical determination issued by the department for sites contaminated by releases from storage tank systems to promote their redevelopment and productive use. The property reuse determination shall only apply to sites that have iron and manganese in groundwater above WQCC standards. A property reuse determination is not a clean-closure certification or grounds for a no further action determination, nor does it provide indemnification of an owner or operator from current or future environmental liabilities or obligations. Further action at a property reuse site may be required under the Water Quality Act and WQCC rules.

B. Any owner or operator may request that the department evaluate a site, multiple sites, or a portion of a site for a property reuse determination by submitting a written request to the department. The request shall include the following:

(1) description of the current and proposed future land use(s) of the site;

(2) description of the site including a historical overview and generalized description of businesses, structures, vegetation, other prominent features, and location of the site;

(3) surveyed plat of the site, site map with legal description, or both;

(4) completed current environmental conditions table listing all areas of environmental concern on the site subject to remediation; the table shall include the following information about each area of environmental concern:

(a) remedial action taken, date, regulatory agency;

(b) residual concentrations of contaminants of concern, including WQCC standards that have not been achieved; and

(c) clean-up standards for contaminants of concern;

(5) chronology of events for each area investigated or remediated;

(6) monitoring plan to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained, if appropriate;

(7) affirmation from the property owner, if different from the requestor, that current or proposed future land uses will be maintained; and

(8) other relevant documents, as requested by the department.

C. Owners and operators shall receive approval of a request for a property reuse determination for the release when the owner or operator has completed remediation pursuant to 20.5.13.34 NMAC, with the exception of iron and manganese in excess of WQCC groundwater standards. A property reuse determination letter shall include a statement that the department

shall have the right to conduct audits to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained.

D. A property reuse determination shall not have any effect on any permit, compliance plan, order, or other formal or informal enforcement mechanism applicable to the site, and shall not relieve an owner or operator from the obligations to comply with other applicable federal, state and local laws.

E. Upon completion of an assessment by the department that a site, multiple sites or portion of a site qualifies for a property reuse determination, the department shall issue the following deliverables:

(1) property reuse determination letter; and

(2) property reuse certificate.

F. The department shall have the right to conduct audits to ensure that the risk to human health, safety and welfare and the environment has not significantly changed and that current and proposed future use(s) upon which the determination is dependent are maintained.

G. If new information becomes available or circumstances arise indicating that the environmental or land use conditions upon which the determination were based have changed, the department may reverse the property reuse determination.

[20.5.13.35 NMAC - N, 6/15/2009]

#### **20.5.13.36 NO FURTHER ACTION DETERMINATION:**

A. A no further action determination is a technical determination issued by the department that documents that the owner or operator of a site has met all applicable remediation standards and that no contaminant will present a significant risk of harm to public health, safety and welfare and the environment.

B. Any owner or operator may request that the department evaluate a site for a no further action determination by submitting a written request to the department. The request shall include the following, if requested by the department:

(1) description of the site including a historical overview and generalized description of businesses, structures, vegetation, other prominent features, and location of the site;

(2) surveyed plat of the site, site map with legal description, or both;

(3) completed current environmental conditions table listing all areas of environmental concern on the site subject to remediation; the table shall include the following information about each area of environmental concern:

(a) remedial action taken, date,

regulatory agency;

(b) residual contaminants of concern;

(c) clean-up status; and

(d) clean-up standards for contaminants of concern;

(4) chronology of events for each area investigated or remediated; and

(5) other relevant documents, as requested by the department.

C. Owners and operators shall receive approval of a determination for no further action status for the release when all of the following conditions are met:

(1) groundwater and surface water contamination related to the release is less than or equal to WQCC and EIB standards, and where there had been groundwater contamination related to the release, the applicable standards have been achieved concurrently at all compliance wells for at least eight consecutive quarters unless otherwise approved by the department;

(2) soil contamination is less than or equal to applicable standards; and

(3) any other conditions which did threaten public health, safety and welfare or the environment have been adequately mitigated.

D. Owners and operators shall receive approval of a request for no further action determination for the release when subsurface water does not meet the definition of "subsurface water" in 20.6.2.7 NMAC or is unprotected pursuant to Subsection A of 20.6.2.3101 NMAC, if NAPL and contaminant saturated soil have been adequately remediated in accordance with this part and any other conditions which threatened public health, safety and welfare or the environment have been adequately mitigated.

E. Upon completion of an assessment by the department that a site qualifies for a no further action determination, the department shall issue a no further action determination letter.

F. Any of the following may result in a reversal of a no further action determination:

(1) new information becomes available or circumstances arise indicating that an unacceptable risk to public health, safety and welfare or the environment exists; or

(2) change in use or reasonable foreseeable future use of land or resources, including a change from less sensitive land use to more sensitive land use, such as from commercial or industrial to residential, and including the drilling of water supply wells in the vicinity of remaining contamination. [20.5.13.36 NMAC - Rp, 20.5.13.1326 NMAC, 6/15/2009]

#### **20.5.13.37 REQUEST FOR EXTENSION OF TIME:**

A. For good cause shown, the department may extend the time for complying with any deadline set forth in this part. The request for an extension of time shall specify the reason for the request, the actions taken to comply with the deadline and the period of time for which the extension is requested.

B. The department shall not grant an extension for more than 30 days at a time unless the department determines additional time is warranted. The department may place conditions on the extension.

C. Lack of diligence or failure of owners and operators to comply with this part shall be grounds for denying a request for an extension of time.

[20.5.13.37 NMAC - Rp, 20.5.13.1328 NMAC, 6/15/2009]

#### **HISTORY OF 20.5.13 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

EIB/USTR-13, Underground Storage Tank Regulations - Part XIII - Corrective Action For Hazardous Substance UST Systems, filed 6/13/90.

**History of Repealed Material:** 20 NMAC 5.13, Environmental Protection, Underground Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances (filed 12/30/99), repealed 8/15/03.

20.5.13 NMAC, Petroleum Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances (filed 7/16/03), repealed 6/15/09.

#### **Other History:**

EIB/USTR-13, Underground Storage Tank Regulations - Part XIII - Corrective Action For Hazardous Substance UST Systems, (filed 6/13/90) reformatted, renumbered and replaced by 20 NMAC 5.13, Underground Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances, effective 11/05/95.

20 NMAC 5.13, Underground Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances, (filed 12/30/99) replaced by 20.5.13 NMAC, Petroleum Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances, effective 8/15/03.

20.5.13 NMAC, Petroleum Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances, (filed 7/16/03) was replaced by 20.5.13 NMAC, Petroleum Storage Tanks, Corrective Action for UST Systems Containing Other Regulated Substances, effective 6/15/09.

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

**TITLE 20 ENVIRONMENTAL  
PROTECTION  
CHAPTER 5 PETROLEUM  
STORAGE TANKS  
PART 14 CERTIFICATION  
OF TANK INSTALLERS**

**20.5.14.1 ISSUING AGENCY:** New Mexico Environmental Improvement Board.  
[20.5.14.1 NMAC - Rp, 20.5.14.1 NMAC, 6/15/2009]

**20.5.14.2 SCOPE:** This part applies to persons installing, replacing, repairing, modifying or removing storage tank systems.  
[20.5.14.2 NMAC - Rp, 20.5.14.2 NMAC, 6/15/2009]

**20.5.14.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through 74-1-16.  
[20.5.14.3 NMAC - Rp, 20.5.14.3 NMAC, 6/15/2009]

**20.5.14.4 DURATION:** Permanent.  
[20.5.14.4 NMAC - Rp, 20.5.14.4 NMAC, 6/15/2009]

**20.5.14.5 EFFECTIVE DATE:** June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.  
[20.5.14.5 NMAC - Rp, 20.5.14.5 NMAC, 6/15/2009]

**20.5.14.6 OBJECTIVE:** The purpose of this part is to provide for the regulation of persons installing, replacing, repairing, modifying and removing storage tank systems that contain regulated substances in order to assure that storage tank systems are being installed, replaced, repaired, modified and removed in a manner which shall not encourage or facilitate leaking, and which shall protect the public health, safety and welfare and the environment of the state.  
[20.5.14.6 NMAC - Rp, 20.5.14.6 NMAC, 6/15/2009]

**20.5.14.7 DEFINITIONS:** The definitions in 20.5.1 NMAC apply to this part.

[20.5.14.7 NMAC - Rp, 20.5.14.7 NMAC, 6/15/2009]

**20.5.14.8 GENERAL REQUIREMENTS FOR UST SYSTEMS:**

A. Beginning September 16, 1989, no person may install, replace, repair or modify UST systems in this state unless the person is, or employs, an individual who has been certified by the department to perform that work on UST systems. This provision requires certification of the individual who exercises supervisory control over the installation, replacement, repair or modification work, whether as an officer or employee of the UST system owner or operator performing its own installation, replacement, repair or modification, or as an officer or employee of the contracting company agreeing to perform the installation, replacement, repair or modification for the owner or operator. Exceptions to this requirement for a certified installer include:

(1) internal lining of a tank through the application of such materials as epoxy resins;

(2) installation, replacement, repair or modification of cathodic protection systems;

(3) any other installation, replacement, repair or modification specifically approved in writing by the department as an exception to the requirement for a certified tank installer;

(4) an applicant for UST installer certification pursuant to Subsection C of 20.5.14.13 NMAC;

(5) normal maintenance; and

(6) work on line or tank leak detection systems performed by technicians trained to work on line or tank leak detection systems by the manufacturer of the systems, or other equivalent training approved by the department.

B. Beginning September 16, 1989, no contracting company may install, replace, repair or modify an UST system in this state unless it has in its employ a certified installer who shall control and supervise a given installation, replacement, repair or modification and who shall be physically present on-site at the critical junctures in the installation, replacement, repair or modification.

C. The requirements of this part are not intended to prohibit the employment of apprentices or helpers so long as a certified installer exercises responsible supervisory control and is physically present on-site at the critical junctures in the installation, replacement, repair or modification.

D. The requirements of this part are in addition to and not in lieu of

any other licensing and registration requirements imposed by law, including any applicable requirements of the Construction Industries Act, NMSA 1978, Sections 60-13-1 through 60-13-59.

E. The provisions of this part are not intended to relieve owners and operators of UST systems of their obligations and liabilities under applicable state and federal laws and regulations.

F. The department may deny an application or renewal and may suspend or revoke certification pursuant to the Parental Responsibility Act, NMSA 1978, Sections 40-5A-1 through 40-5A-13.  
[20.5.14.8 NMAC - Rp, 20.5.14.8 NMAC, 6/15/2009]

**20.5.14.9 GENERAL REQUIREMENTS FOR AST SYSTEMS:**

A. Beginning August 15, 2004, no person may install, replace, repair or modify AST systems in this state unless the person is, or employs, an individual who has been certified by the department to perform that work on AST systems. This provision requires certification of the individual who exercises supervisory control over the installation, replacement, repair or modification work, whether as an officer or employee of the AST system owner or operator performing its own installation, replacement, repairs or modification, or as an officer or employee of the contracting company agreeing to perform the installation, replacement, repair or modification for the owner or operator. Exceptions to this requirement for a certified installer include:

(1) internal lining of a tank through the application of such materials as epoxy resins;

(2) coating or lining of secondary containment for AST systems;

(3) installation, replacement, repair or modification of cathodic protection systems;

(4) any other installation, replacement, repair or modification specifically approved in writing by the department as an exception to the requirement for a certified tank installer;

(5) an applicant for AST installer certification pursuant to Subsection C of 20.5.14.13 NMAC;

(6) normal maintenance; and

(7) work on line or tank leak detection systems performed by technicians trained to work on line or tank leak detection systems by the manufacturer of the systems, or other equivalent training approved by the department.

B. Beginning August 15, 2004, no contracting company may install, replace, repair or modify an AST system in this state unless it has in its employ a certi-

fied installer who shall control and supervise a given installation, replacement, repair or modification and who shall be physically present on-site at the critical junctures in the installation, replacement, repair or modification.

C. The requirements of this part are not intended to prohibit the employment of apprentices or helpers so long as a certified installer exercises responsible supervisory control and is physically present on-site at the critical junctures in the installation, replacement, repair or modification.

D. The requirements of this part are in addition to and not in lieu of any other licensing and registration requirements imposed by law, including any applicable requirements of the Construction Industries Act, NMSA 1978, Sections 60-13-1 through 60-13-59.

E. The provisions of this part are not intended to relieve owners and operators of AST systems of their obligations and liabilities under applicable state and federal laws and regulations.

F. The department may deny an application or renewal and may suspend or revoke certification pursuant to the Parental Responsibility Act, NMSA 1978, Sections 40-5A-1 through 40-5A-13. [20.5.14.9 NMAC - Rp, 20.5.14.9 NMAC, 6/15/2009]

#### **20.5.14.10 INDIVIDUAL CERTIFICATION FOR UST SYSTEMS:**

A. An applicant for an individual's UST certification shall meet all of the following requirements in order to receive certification from the department.

(1) The applicant shall file an application with the department accompanied by a nonrefundable fee of \$50.00. At a minimum the application shall contain the following information:

(a) applicant's name, permanent residence address and telephone number;

(b) applicant's business address and any business name used by the applicant, with the business address, telephone number and facsimile transmission number;

(c) applicant's date of birth;

(d) applicant's social security number;

(e) construction industries division license number, type of license, name of license holder under which applicant is working and expiration of license;

(f) whether the construction industries division license in Subparagraph (e) of Paragraph (1) of this subsection has ever been suspended or revoked; if so, an explanation of the circumstances of the suspension or revocation;

(g) the supervisor's name, busi-

ness name, address and telephone number with whom the applicant apprenticed as a tank installer;

(h) a description of the number of years of experience the applicant has as a tank installer (specify USTs and ASTs);

(i) a description of the types and number of tanks the applicant has installed (specify USTs and ASTs) in the past 4 years;

(j) a description of the types and number of piping systems the applicant has installed, replaced, repaired or modified (specify USTs and ASTs) in the past 4 years; and

(k) whether applicant owes child support in New Mexico.

(2) The applicant shall be an individual and at least 18 years of age.

(3) The applicant need not, for purposes of this part, be a resident of the state.

(4) The applicant shall demonstrate that the applicant is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that the applicant has not had a business or occupational license or certificate suspended or revoked in this or any other state, except as provided in Subsection B of this section.

(5) The applicant shall demonstrate in the application that he has met the experience requirements of 20.5.14.12 NMAC.

(6) The applicant shall pass the on-site examination for which 20.5.14.13 NMAC provides. The installation for an on-site examination shall include the on-site installation of a tank, dispenser or meter, venting, ancillary equipment and initial testing.

(7) The applicant shall provide the department with evidence in the application that, within the prior three months, the applicant has passed:

(a) a New Mexico laws and rules UST test administered by the department pursuant to 20.5.14.16 NMAC; and

(b) a national technical UST installer's test administered by an approved certification educator and has been certified by that educator. For purposes of this section, the international code council is an approved certification educator.

(8) As an alternative to the tests required in Paragraph (7) of this subsection, applicants may propose alternate tests and approved certification to the department for consideration, including a tank installer certification program sponsored by another state or organization, but these courses shall not be approved for the requirements in Paragraph (7) of this subsection unless approved by the department in writing. Applicants seeking approval of alternate

courses and alternate certification shall provide the department with all information about the course and the proposed educator to allow the department to determine whether to approve them, in the department's sole discretion. In determining whether to approve an alternate course and alternate certification, the department shall determine whether the alternate course and alternate certification provide an equivalent demonstration of knowledge of New Mexico petroleum storage tank regulations, 20.5 NMAC, and technical installation requirements.

(9) The applicant shall provide to the department a notarized affidavit from the applicant stating that all information submitted in the application is true and correct.

B. Notwithstanding the provisions of Paragraph (4) of Subsection A of this section, the department may grant certification to an applicant who has had a business or occupational license or certificate suspended or revoked where the suspension or revocation, by reason of its date, nature or other considerations, is not directly relevant to the applicant's competence to install, replace, repair, or modify UST systems.

[20.5.14.10 NMAC - Rp, 20.5.14.10 NMAC, 6/15/2009]

[The department provides an optional form that may be used to apply for certification. Applicants should submit application forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.14.11 INDIVIDUAL CERTIFICATION FOR AST SYSTEMS:**

A. An applicant for an individual's AST certification shall meet all of the following requirements in order to receive certification from the department.

(1) The applicant shall file an application with the department with the information required in Paragraph (1) of Subsection A of 20.5.14.10 NMAC, accompanied by a nonrefundable fee of \$50.00.

(2) The applicant shall be an individual and at least 18 years of age.

(3) The applicant need not, for purposes of this part, be a resident of the state.

(4) The applicant shall demonstrate that the applicant is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that the applicant has not had a business or occupational license or certificate suspended or revoked in this or any other state, except as provided in Subsection B of this section.

(5) The applicant shall demon-

strate in the application that he has met the experience requirements of 20.5.14.12 NMAC.

(6) The applicant shall pass the on-site examination for which 20.5.14.13 NMAC provides. The installation for an on-site examination shall include the on-site installation of a tank and tank foundation, dispenser or meter, venting, ancillary equipment and initial testing. Installation of a self-contained, concrete-encased or self-contained, skid-mounted AST system is not an AST system installation for purposes of this requirement.

(7) The applicant shall provide the department with evidence in the application that, within the prior three months, the applicant has passed:

(a) a New Mexico laws and rules AST test administered by the department pursuant to 20.5.14.16 NMAC; and

(b) a national technical AST installer's test administered by an approved certification educator and has been certified by that educator. For purposes of this section, the international code council is an approved certification educator.

(8) As an alternative to the tests required in Paragraph (7) of this subsection, applicants may propose alternate tests and approved certification to the department for consideration, including a tank installer certification program sponsored by another state or organization, but these courses shall not be approved for the requirements in Paragraph (7) of this subsection unless approved by the department in writing. Applicants seeking approval of alternate courses and alternate certification shall provide the department with all information about the course and the proposed educator to allow the department to determine whether to approve them, in the department's sole discretion. In determining whether to approve an alternate course and alternate certification, the department shall determine whether the alternate course and alternate certification provide an equivalent demonstration of knowledge of New Mexico petroleum storage tank regulations, 20.5 NMAC, and technical installation requirements.

(9) The applicant shall provide to the department a notarized affidavit from the applicant stating that all information submitted in the application is true and correct.

B. Notwithstanding the provisions of Paragraph (4) of Subsection A of this section, the department may grant certification to an applicant who has had a business or occupational license or certificate suspended or revoked where the suspension or revocation, by reason of its date, nature or other considerations, is not directly relevant to the applicant's competence to install, replace, repair or modify AST sys-

tems.

[20.5.14.11 NMAC - Rp, 20.5.14.11 NMAC, 6/15/2009]

[The department provides an optional form that may be used to apply for certification. Applicants should submit application forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.14.12 EXPERIENCE REQUIREMENTS:**

A. To qualify for individual certification under 20.5.14.10 or 20.5.14.11 NMAC, an applicant shall demonstrate that the applicant has had one year, within the three years immediately prior to making the application, of field experience in the installation, replacement, repair or modification of the type of storage tank systems for which the applicant is applying for certification or, with the approval of the department, closely related work. The applicant's demonstration shall include copies of inspection reports (or other similar documents) for the work performed, which shall include the name, phone number and email contact of the supervising inspector. For purposes of this part, the applicant's field experience may be demonstrated in New Mexico or other states.

B. An engineering degree or a license to practice engineering may substitute for six months of the experience required by Subsection A of this section. [20.5.14.12 NMAC - Rp, 20.5.14.12 NMAC, 6/15/2009]

#### **20.5.14.13 ON-SITE EXAMINATION:**

A. To qualify for individual certification under 20.5.14.10 or 20.5.14.11 NMAC, an applicant shall pass an on-site examination consisting of a successful installation of the applicable type of storage tank system in the presence of a designated employee of the department. The applicant shall complete each aspect of the installation successfully in order to pass the examination, including use of proper materials, proper assembly of materials and proper testing of the tank and piping at the appropriate times during the installation.

B. An applicant may request an on-site examination for UST or AST certification any time within 180 days of the date of submission of the application provided for in Paragraph (1) of Subsection A of 20.5.14.10 NMAC or Paragraph (1) of Subsection A of 20.5.14.11 NMAC and accompany the request with a nonrefundable \$300 fee. The applicant shall notify the department of the date and the site of the on-site examination 30 days prior to the examination. For good cause shown, the

department may, in its sole discretion, grant an applicant one 180-day extension of the time period during which the applicant must take the on-site examination. The department shall not grant more than one extension. If the applicant does not schedule an on-site examination within these time periods, the applicant shall file a new application for certification and comply with all the application requirements in 20.5.14.10 or 11 NMAC (as applicable).

C. The applicant shall be responsible, subject to approval by department staff, for identifying a satisfactory site and date(s) for the on-site examination. The applicant is also responsible for ensuring that all necessary equipment and appropriate materials necessary for the installation are on site. Department staff shall fail any applicant who has three significant errors during the on-site examination. For purposes of this section, significant errors include, but are not limited to, use of materials or installation practices that violate these regulations, manufacturer's installation instructions, or other industry standards. As long as a department staff member responsible for assessing the on-site exam is present, the applicant may perform the activities involved in the exam even though the applicant is not a certified installer.

D. The installation shall be assessed by the department employee present at the examination who shall present his findings to the department, with a recommendation as to whether or not the applicant passed the on-site examination. The department shall make the determination as to the success of the installation and notify the applicant by mail within 30 days of completion of the installation. If the applicant did not pass the examination, the department shall inform the applicant that the applicant may retake the examination upon payment of a nonrefundable \$300.00 fee and upon such conditions as the department may impose to ensure that the applicant is prepared to perform a more successful installation. If the applicant does not retake the examination within 180 days of being notified that the applicant did not pass the examination or if the applicant fails the on-site examination a second time, the applicant shall file a new application for certification with the department if the applicant desires to become a certified installer.

E. The department employee may stop an on-site examination if the employee determines that the installation being conducted constitutes a threat to public health, safety or welfare or the environment. If the examiner stops the installation, his findings shall be presented to the department with a "do not pass" recommendation. The department shall notify the applicant of its decision as provided in

Subsection D of this section.

[20.5.14.13 NMAC - Rp, 20.5.14.13 NMAC, 6/15/2009]

**20.5.14.14 DENIAL OF CERTIFICATION:**

An applicant shall be afforded an opportunity for a hearing before the secretary under 20.5.14. 20 NMAC, in any instance afforded pursuant to these regulations and to the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33.

[20.5.14.14 NMAC - Rp, 20.5.14.14 NMAC, 6/15/2009]

**20.5.14.15 RENEWAL OF CERTIFICATION:**

A. Certification issued under 20.5.14.10 and 11 NMAC shall be renewed no later than March 16 of the fourth year after the certification was granted, and shall expire March 16 of the fourth calendar year after it was issued. Certification should be renewed prior to expiration but may be renewed up to three months after the date of expiration upon payment of a late fee in addition to the renewal fee and the meeting of the requirements for renewal set forth below. Certification which has not been renewed within this time period shall be considered lapsed and invalid; the department shall not accept applications for renewal after the close of the period. Any installer whose certification has lapsed as provided in this subsection shall submit each application for new certification under 20.5.14.10 or 20.5.14.11 NMAC and comply with the requirements thereof.

B. At least 30 days before the expiration date of certification, the department shall mail a renewal application reminder to the installer, at the installer's address of record with the department. It is the duty and responsibility of the installer to timely renew the certification whether or not an application reminder has been received from the department.

C. To qualify for renewal, a UST certified individual or installer shall:

(1) file an application with the department with the information required in Paragraphs (1), (4) and (9) of Subsection A of 20.5.14.10 NMAC, accompanied by a nonrefundable \$50.00 fee, together with a \$25.00 late fee if the renewal application is filed after, but within three months of, the date of expiration;

(2) demonstrate as required by 20.5.14.12 NMAC that the installer has completed at least two UST system installations, replacements, repairs or modifications during the four-year period preceding the renewal application; and

(3) demonstrate that the installer has passed a New Mexico laws and

rules UST test administered by the department pursuant to 20.5.14.16 NMAC, within the prior three months.

D. To qualify for renewal, an AST certified installer shall:

(1) file an application with the department with the information required in Paragraphs (1), (4) and (9) of Subsection A of 20.5.14.11 NMAC, accompanied by a nonrefundable \$50.00 fee, together with a \$25.00 late fee if the renewal application is filed after, but within three months of, the date of expiration;

(2) demonstrate as required by 20.5.14.12 NMAC that the installer has completed at least two AST system installations, replacements, repairs or modifications during the four-year period preceding the renewal application; and

(3) demonstrate that the installer has passed a New Mexico laws and rules AST test administered by the department pursuant to 20.5.14.16 NMAC, within the prior three months.

E. An applicant for renewal shall be afforded opportunity for hearing before the secretary, as provided in 20.5.14.20 NMAC, in the event the department contemplates withholding renewal for any cause other than failure to pay the required renewal fee.

F. For purposes of this section, "demonstrate" means provide copies of registration forms, inspection reports, installation checklists, written statements or other documents verifying the certified installer's on-site, physical, hands-on participation in critical junctures of a particular installation, replacement, repair or modification.

[20.5.14.15 NMAC - Rp, 20.5.14.15 NMAC, 6/15/2009]

[The department provides an optional form that may be used to apply for renewal of certification. Applicants should submit renewals forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.14.16 NEW MEXICO LAWS AND RULES TEST:**

A. The department shall create and administer written tests on the rules contained in 20.5 NMAC, Petroleum Storage Tanks. Tests for UST installer applicants and AST installer applicants may be different tests. The department shall offer tests at least monthly at a charge of \$45 per installer applicant per test, paid to the storage tank fund.

B. Installer applicants may apply to take the New Mexico laws and rules test at any office of the bureau, at least 15 days before a test is given. The department shall post on its webpage dates, times

and locations that tests will be offered. The department shall not administer any test until payment is received.

C. An installer must pass a test by a grade of seventy percent or higher. The department will notify an installer applicant in writing of a passing or failing grade, no later than 15 working days after the installer took a test.

D. Any installer may re-take the New Mexico laws and rules test for each type of test once within 30 days of receipt of notice of a failing grade. If the installer does not pass a test the second time, the installer must re-apply for certification complying with the requirements for initial certification in 20.5.14.10 NMAC or 20.5.14.11 NMAC.

[20.5.14.16 NMAC - N, 6/15/2009]

**20.5.14.17 INSTALLER DUTIES AND OBLIGATIONS:**

A. A contracting company shall not agree to perform installation, replacement, repair or modification services unless it is or has in its employ one or more certified installers competent to perform the particular installation, replacement, repair or modification involved, and who shall:

(1) exercise responsible supervisory control over any installation, replacement, repair or modification it undertakes;

(2) be physically present on-site at all critical junctures in the installation, replacement, repair or modification; and

(3) give notice as required by these regulations.

B. A certified installer shall exercise responsible, supervisory control over any installation, replacement, repair or modification undertaken and shall, at a minimum, be physically on-site at all critical junctures in the installation, replacement, repair or modification and give notice as required by these regulations, 20.5 NMAC.

C. A certified installer shall have adequate knowledge of appropriate materials, technical requirements and installation, replacement, repair or modification procedures for any storage tank system the installer undertakes to install, replace, repair or modify. A certified installer shall not perform any installation, replacement, repair or modification, or affix his signature or certification number to any installation, replacement, repair or modification for which the installer lacks competence.

D. A certified installer shall not certify to an owner or operator of a storage tank system that an installation, replacement, repair or modification is complete unless the installation, replacement, repair, or modification complies with the

New Mexico Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the petroleum storage tank regulations promulgated pursuant to the act, 20.5 NMAC. Where the installation, replacement, repair or modification is being performed for an owner or operator on a contract basis, both the certified installer and the contracting company for whom the individual works are responsible for the accuracy of the representations made.

E. Certified installers have a duty to report to the department any and all suspected or confirmed releases, as those terms are used in 20.5.7 NMAC, detected at a site or the surrounding area by the installer or persons working under his supervisory control, as required by 20.5.7 NMAC.

F. Certified installers shall not perform any installation, replacement, repair, modification or removal without providing notice as required by the provisions of 20.5 NMAC, except for emergency repairs as described in 20.5.5 NMAC and defined in 20.5.1 NMAC. Certified installers shall not perform any activity described as a critical juncture in 20.5.5 NMAC, without providing the 24-hour notice required by that part, except for emergency repairs.

G. Certified installers shall comply with all of the provisions of the petroleum storage tank regulations, 20.5 NMAC.

[20.5.14.17 NMAC - Rp, 20.5.14.16 NMAC, 6/15/2009]

#### **20.5.14.18 COMPLAINTS:**

A. When the department receives a signed written complaint from any person which indicates an apparent violation of applicable law by a certified installer, the department shall provide a copy of the complaint to the certified installer along with a letter from the department specifying the statute, regulation, order or license alleged to be violated. The letter shall include a reasonable description of the acts or practices alleged to be in violation of applicable law. The department shall provide a copy of the letter to the complainant.

B. The installer may, but need not, file a response to the complaint with the department. After reviewing the complaint together with any other matter in the certified installer's record, the department shall determine whether further action is to be taken.

[20.5.14.18 NMAC - Rp, 20.5.14.17 NMAC, 6/15/2009]

#### **20.5.14.19 INVESTIGATIONS, ENFORCEMENT, PENALTIES:**

A. The department may undertake such investigations and take such actions as it deems necessary to ensure

compliance with the provisions of this part, including the issuance of compliance orders and the commencement of civil actions under the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14. The department may also initiate proceedings to revoke an installer's certification under NMSA 1978, Section 74-4-4.4C and 20.5.14.15 NMAC. The department may revoke certification for an installer upon grounds that the installer:

(1) exercised fraud, misrepresentation or deception in obtaining the certification;

(2) exhibited gross incompetence in the installation, replacement, repair, modification or removal of a storage tank system; or

(3) was derelict in the performance of a duty as a certified tank installer (including repeated failure to provide notice, as required in 20.5.14.17 NMAC).

B. Persons violating the provisions of this part may be subject to the imposition of penalties under the Hazardous Waste Act.

[20.5.14.19 NMAC - Rp, 20.5.14.18 NMAC, 6/15/2009]

#### **20.5.14.20 DEPARTMENT ACTIONS AGAINST CERTIFIED INSTALLERS:**

A. When the department contemplates denying an application for or revoking certification, it shall serve upon the applicant or certified installer a written notice of contemplated action as required by the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33.

B. If the applicant or the certified installer does not mail a request for a hearing within the time and in the manner required by the Uniform Licensing Act, NMSA 1978, Section 61-1-4, the department may take the action contemplated in the notice and such action shall be final and not subject to judicial review.

C. If a hearing is requested in accordance with the provisions of this section, the secretary shall, within 20 days of receipt of such request, notify the requestor of the time and place of hearing, the name or names of the person or persons who will conduct the hearing for the secretary and the statutes and regulations authorizing the secretary to take the contemplated action, which hearing shall be held not more than 60 nor less than 15 days from the date of service of such notice. Hearings under this section shall be conducted in accordance with the provisions of the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33.

D. If the department revokes certification pursuant to this section, the certified installer may not apply for

certification for a minimum of two years for the type of installer certification revoked (either UST installer certification pursuant to 20.5.14.10 NMAC or AST installer certification pursuant to 20.5.14.11 NMAC). However, if the certified installer is certified for another type of installer certification, it shall not be affected by the revocation of the certification for the other type of installer certification.

[20.5.14.20 NMAC - Rp, 20.5.14.19 NMAC, 6/15/2009]

#### **HISTORY OF 20.5.14 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

EIB/USTR-14, Underground Storage Tank Regulations - Part XIV - Certification of Tank Installers, filed 2/14/89.

EIB/USTR-14, Underground Storage Tank Regulations - Part XIV - Certification of Tank Installers, filed 8/4/89.

#### **History of Repealed Material:**

20 NMAC 5.14, Environmental Protection, Underground Storage Tanks, Certification of Tank Installers (filed 2/27/97), repealed 8/15/03.

20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers (filed 7/16/03) repealed 4/4/08.

20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers (filed 3/5/08) repealed 6/15/09.

#### **Other History:**

EIB/USTR-14, Underground Storage Tank Regulations - Part XIV - Certification of Tank Installers, (filed 8/14/89) renumbered, reformatted and replaced by 20 NMAC 5.14, Underground Storage Tanks, Certification of Tank Installers, effective 11/5/95.

20 NMAC 5.14, Underground Storage Tanks, Certification of Tank Installers, (filed 10/6/95) replaced by 20 NMAC 5.14, Underground Storage Tanks, Certification of Tank Installers, effective 4/1/97.

20 NMAC 5.14, Underground Storage Tanks, Certification of Tank Installers, (filed 2/27/97) renumbered, reformatted and replaced by 20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers, effective 8/15/03.

20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers (filed 7/16/03) replaced by 20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers, effective 4/4/08.

20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers (filed 3/5/08) replaced by 20.5.14 NMAC, Petroleum Storage Tanks, Certification of Tank Installers, effective 6/15/09.

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

**TITLE 20 ENVIRONMENTAL  
PROTECTION  
CHAPTER 5 PETROLEUM  
STORAGE TANKS  
PART 15 CORRECTIVE  
ACTION FUND USE AND EXPENDI-  
TURES**

**20.5.15.1 ISSUING AGENCY:**  
New Mexico Environmental Improvement  
Board.  
[20.5.15.1 NMAC - Rp, 20.5.15.1 NMAC,  
6/15/2009]

**20.5.15.2 SCOPE:** This part  
applies to owners and operators of storage  
tanks as provided in 20.5.1 NMAC and to  
the use of the corrective action fund. If  
the owner and the operator of a storage tank  
are separate persons, only one person is  
required to comply with the requirements of  
this part; however, both parties are liable in  
the event of noncompliance.  
[20.5.15.2 NMAC - Rp, 20.5.15.2 NMAC,  
6/15/2009]

**20.5.15.3 STATUTORY  
AUTHORITY:** This part is promulgated  
pursuant to the provisions of the Ground  
Water Protection Act, sections 74-6B-1  
through 74-6B-14 NMSA 1978, and the  
general provisions of the Environmental  
Improvement Act, sections 74-1-1 through  
74-1-16 NMSA 1978.  
[20.5.15.3 NMAC - Rp, 20.5.15.3 NMAC,  
6/15/2009]

**20.5.15.4 DURATION :**  
Permanent.  
[20.5.15.4 NMAC - Rp, 20.5.15.4 NMAC,  
6/15/2009]

**20.5.15.5 EFFECTIVE DATE:**  
June 15, 2009, unless a later date is indicat-  
ed in the bracketed history note at the end of  
a section.  
[20.5.15.5 NMAC - Rp, 20.5.15.5 NMAC,  
6/15/2009]

**20.5.15.6 OBJECTIVE:** The  
purposes of this part are (1) to establish pri-  
orities for the use of the corrective action  
fund at sites contaminated by releases of  
regulated substances from storage tanks and  
(2) to specify procedures for administering  
the fund in conjunction with the procedures  
set forth in 20.5.17 NMAC, adopted by the  
New Mexico environment department.  
[20.5.15.6 NMAC - Rp, 20.5.15.6 NMAC,  
6/15/2009]

**20.5.15.7 DEFINITIONS:** The

definitions in 20.5.1 NMAC and the Ground  
Water Protection Act apply to this part. In  
the case of conflict, the definitions in the  
Ground Water Protection Act shall apply to  
this part.

[20.5.15.7 NMAC - Rp, 20.5.15.7 NMAC,  
6/15/2009]

**20.5.15.8 PERMISSIBLE  
FUND EXPENDITURES:** The depart-  
ment shall make expenditures from the fund  
that are necessary to take emergency cor-  
rective action, to investigate releases and  
undertake other corrective action in accor-  
dance with the priorities established in this  
part, to make payments to or on behalf of  
owners and operators as provided in 20.5.17  
NMAC, to pay for the department's reason-  
able costs of administering the fund, to pay  
for the department's costs associated with  
the recovery of expenditures from the fund  
pursuant to section 74-6B-8 NMSA 1978,  
including related legal costs, and to pay the  
state's share of federal leaking underground  
storage tank trust fund cleanup costs as  
required by the federal Resource  
Conservation and Recovery Act. The  
department shall keep records of the expen-  
ditures made from the fund and shall make  
those records available to the interim leg-  
islative finance committee upon request.

[20.5.15.8 NMAC - Rp, 20.5.15.1500  
NMAC, 6/15/2009]

**20.5.15.9 CORRECTIVE  
ACTION BY OWNERS AND OPERA-  
TORS:** Owners and operators shall take  
corrective action in accordance with 20.5.7  
NMAC and 20.5.12 or 20.5.13 NMAC, and  
the department shall make payments to or  
on behalf of owners and operators in accor-  
dance with section 74-6B-13 NMSA 1978  
and the provisions of 20.5.17 NMAC. The  
department shall designate a site where the  
owner or operator takes corrective action  
and applies to the fund for payment of cor-  
rective action costs as a responsible party-  
lead site.

[20.5.15.9 NMAC - Rp, 20.5.15.1501  
NMAC, 6/15/2009]

**20.5.15.10 CORRECTIVE  
ACTION BY THE DEPARTMENT -  
INFORMATION REQUIRED:**

A. When the department  
determines that the owners and operators  
are unknown, unable or unwilling to take  
corrective action as described in 20.5.15.9  
NMAC, or when the department determines  
that a single entity is necessary to lead the  
corrective action, the department may des-  
ignate the site as a state-lead site and take  
corrective action using the fund.

B. To make a determina-  
tion that the owner and operator are  
unknown, the department shall, as appropri-  
ate:

(1) investigate site specifics;  
(2) ascertain the current status  
and past history of the tanks at the site and  
determine the compliance status of the  
tanks; and

(3) review and document search  
results of all additional reasonably available  
records.

C. To make a determina-  
tion that the owner and operator are unable  
to take corrective action, the department  
shall, as appropriate:

(1) investigate site specifics;  
(2) ascertain the current status  
and past history of the tanks at the site and  
determine the compliance status of the  
tanks;

(3) request and review the  
owner's and operator's documentation of  
mental or physical inability, including but  
not limited to physician statements and  
court orders;

(4) request and review the  
owner's and operator's financial records for  
the past two years, including but not limited  
to federal tax returns, and evaluate the  
owner's and operator's ability to pay, based  
on anticipated costs of remediation; and

(5) review and document search  
results of all additional reasonably available  
records.

D. To make a determina-  
tion that the owner and operator are unwill-  
ing to take corrective action, the department  
shall, as appropriate:

(1) investigate site specifics;  
(2) ascertain the liable owner  
and operator and identify any other owner  
and operator that may be liable;

(3) review and document search  
results of all additional reasonably available  
records; and

(4) send a notice of violation,  
return receipt requested, to the appropriate  
owner and operator.

E. To make a determina-  
tion that a single entity is necessary to lead  
the corrective action, the department shall,  
as appropriate:

(1) investigate site specifics;  
(2) ascertain the current status  
and past history of the tanks at the site and  
determine the compliance status of the  
tanks; and

(3) review and document search  
results of all additional reasonably available  
records.

[20.5.15.10 NMAC - Rp, 20.5.15.1502  
NMAC, 6/15/2009]

**20.5.15.11 CORRECTIVE  
ACTION BY THE DEPARTMENT -  
OWNER AND OPERATOR NOTIFICA-  
TION:**

A. Upon a determina-  
tion that a site be designated a state-lead site, the  
department shall send a notice to the owner

and operator, if known, with the division director's signature notifying the owner and operator that the site is being designated a state-lead site and that the department may initiate an action for recovery of its costs of corrective action from the owner and operator pursuant to Subsection C of this section.

B. When the department takes corrective action at sites as described in 20.5.15.10 NMAC, it shall do so in accordance with the provisions of 20.5.15.12 NMAC.

C. The department may recover the costs of corrective action taken under 20.5.15.10 NMAC from the owner or operator, unless the owner or operator demonstrates compliance as required by section 74-6B-8 NMSA 1978 and the provisions of 20.5.17 NMAC.

D. Owners and operators at sites where the department has taken corrective action under this section shall assume responsibility for and control of the corrective action when required or permitted by the department. Any request by the owner and operator to change the designation of a site from a state-lead site to a responsible-party lead site shall be in writing, shall state the reasons why corrective action by the department is no longer necessary, and shall include appropriate documentation to support the request. The department may request additional documentation from the owner and operator, shall respond to the request in writing and shall state the reasons for its decision. [20.5.15.11 NMAC - Rp, 20.5.15.1502 NMAC, 6/15/2009]

#### **20.5.15.12 SITE PRIORITIZATION:**

A. The department shall assign a rank to all sites contaminated by releases from storage tanks using the leaking storage tank (LST) ranking system, as defined in 20.5.1.7 NMAC, and shall classify sites as being first, second or third priority sites. A site's priority shall be based on a minimum site assessment, as defined in 20.5.1.7 NMAC, or other available information that documents an effect or potential effect of the release on public health, safety and welfare or the environment. The department may re-rank and reclassify as warranted, based on facts affecting public health, safety and welfare and the environment.

(1) A first priority site is a site where the release of a regulated substance from a storage tank system has created an actual or imminent hazard to public health, safety and welfare or the environment such that the following corrective action is required:

(a) water supply protection or replacement pursuant to Subsection C or D of 20.5.12.11 and 20.5.13.10 NMAC;

(b) mitigation of toxic or explo-

sive or potentially toxic or explosive vapors pursuant to Subsection F of 20.5.12.11 and 20.5.13.10 NMAC; or

(c) other corrective action as required to protect public health, safety and welfare or the environment from hazards caused by the release pursuant to Subsection G of 20.5.12.11 and 20.5.13.10 NMAC.

(2) A second priority site is a site where the release of a regulated substance from a storage tank system has created a source of environmental contamination such that the following corrective action is required:

(a) containment and removal of non-aqueous phase liquid pursuant to 20.5.12.14 and 20.5.13.13 NMAC; or

(b) treatment of contaminant saturated soils pursuant to 20.5.12.15 and 20.5.13.14 NMAC.

(3) A third priority site is a site which is not first or second priority, containing contaminants that were released from the storage tank system and where corrective action is required by 20.5.12 or 20.5.13 NMAC.

(4) A fourth priority site is a site which is not first, second or third priority where corrective action is required by 20.5.12 or 20.5.13 NMAC.

B. When the department approves corrective action other than minimum site assessments, it shall approve corrective action at sites in order of rank and shall approve priority one sites first, priority two sites after priority one sites, priority three sites after priority one and priority two sites, and priority four sites after priority one, priority two and priority three sites, except that the department may approve emergency corrective action at any time. [20.5.15.12 NMAC - Rp, 20.5.15.1503 NMAC, 6/15/2009]

#### **20.5.15.13 ORDER OF PAYMENTS IN CASE OF INSUFFICIENT FUNDS:**

A. If, after the department has determined that the owner or operator is in substantial compliance, the department determines that the fund budget or the fund balance is insufficient to cover the amount requested for payment, the department shall promptly notify the owner or operator. Payment for eligible costs shall occur when sufficient amounts are available in the fund budget or the fund, subject to the provisions of this section.

B. If the fund budget or the fund balance is insufficient to pay all applications for payment under 20.5.17.23 NMAC but the fund remains an approved financial responsibility mechanism under 20.5.9.911 NMAC, the department shall pay applications for payment for approved corrective action in order of priority as

established in accordance with this part from the funds available, so long as funds are available.

C. Applications for sites of equal score based on the priorities established in this part shall be paid in order of date of receipt of complete applications for payment. For applications for sites of equal score with the same date of receipt, the earliest date on which a corrective action was taken as evidenced by the date of the earliest invoice included in the application shall determine the order of payment.

D. When the fund budget or the fund balance is insufficient to pay all applications for payment under 20.5.17.23 NMAC and the fund is no longer an approved financial responsibility mechanism, the department shall make payments according to priority rank as established in this part and in the following percentages, so long as funds are available:

(1) 100 percent of all reasonable and necessary eligible costs incurred to complete a minimum site assessment in excess of the deductible;

(2) 100 percent of all reasonable and necessary eligible costs incurred to conduct a secondary investigation in accordance with 20.5.12.18 or 20.5.13.17 NMAC;

(3) in the case of reasonable and necessary costs incurred to complete corrective action other than the minimum site assessment and secondary investigation, according to the following formulae:

(a) for owners or operators of two or fewer facilities used for retail gasoline sales and whose facilities have less than 40,000 gallons combined total of product dispensed monthly, averaged over the last two years of operation: first priority leaking storage tank (LST) ranked sites: 100 percent; second priority LST ranked sites: 95 percent; third priority LST ranked sites: 90 percent; or

(b) for sites owned or operated by other owners or operators: 100 percent for first priority LST ranked sites. The percentage of payment for second and third priority LST ranked sites shall be based on the ending quarterly unobligated balance of the fund proportional to the amount of each application for payment received in that quarter for these sites. The quarters end on June 30, September 30, December 31 and March 31. The percentage of payment equals the unobligated fund balance on the last day of the quarter divided by the dollar amount of reasonable and necessary eligible costs of applications for payment received in the quarter, not to exceed 100 percent. For purposes of this subparagraph, "unobligated balance" or "unobligated fund balance" means corrective action fund equity less all known or anticipated liabilities against the fund; and

(4) payment for remaining eligible costs shall be made pursuant to Subsection E of this section.

E. When the fund is reestablished as an approved financial responsibility mechanism, payment shall be made for the balance of the eligible costs previously submitted but not paid under provisions of this section. These payments shall be made in the order in which sites were ranked by the department, in accordance with this part, as funds become available.

F. The department's determinations under this section concerning the availability of funds shall be final and not subject to appeal.

[20.5.15.13 NMAC - Rp, 20.5.15.1504 NMAC, 6/15/2009]

#### **20.5.15.14 RESERVE MONEY:**

A. The department shall establish a reserve of \$1,000,000 in the fund for the costs of taking emergency corrective action. The department may make expenditures from this reserve during the fiscal year and replenish the reserve at the beginning of the next fiscal year.

B. Money that is reserved pursuant to Subsection A of this section may be expended by the department only for corrective action necessary when an emergency threat to public health, safety and welfare or the environment is determined by the department to exist.

[20.5.15.14 NMAC - Rp, 20.5.15.1505 NMAC, 6/15/2009]

#### **HISTORY OF 20.5.15 NMAC:**

##### **Pre-NMAC History:**

The material in this part was derived from that previously filed with the commission of public records - state records center and archives:

EIB/USTR-15, Underground Storage Tank Regulations - Part XV - Ground Water Protection Act Regulations, filed 6/18/91.

##### **History of Repealed Material:**

20 NMAC 5.15 Underground Storage Tanks, Corrective Action Fund Allocation for State-Lead Sites (filed 10/6/95), repealed 2/2/00.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 12/30/99), repealed 8/15/03.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 7/16/03), repealed 6/15/09.

##### **Other History:**

EIB/USTR-15, Underground Storage Tank Regulations - Part XV - Ground Water Protection Act Regulations (filed 6/18/91),

renumbered, reformatted and replaced by 20 NMAC 5.15, effective 11/5/95.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 10/6/95), was replaced by 20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures, effective 2/2/00.

20 NMAC 5.15, Underground Storage Tanks, Corrective Action Fund Use and Expenditures (filed 12/30/99), renumbered, reformatted and replaced by 20.5.15, NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures, effective 8/15/03.

20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures (filed 7/16/03), was replaced by 20.5.15 NMAC, Petroleum Storage Tanks, Corrective Action Fund Use and Expenditures, effective 6/15/09.

## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

### **TITLE 20 ENVIRONMENTAL PROTECTION**

#### **CHAPTER 5 PETROLEUM STORAGE TANKS**

#### **PART 16 QUALIFICATION OF PERSONS PERFORMING CORRECTIVE ACTION**

**20.5.16.1 ISSUING AGENCY:** New Mexico Environmental Improvement Board.

[20.5.16.1 NMAC - Rp, 20.5.16.1 NMAC, 6/15/09]

**20.5.16.2 SCOPE:** This part applies to all persons performing corrective action on behalf of storage tank owners, operators or the state under Title 20, Chapter 5 NMAC.

[20.5.16.2 NMAC - Rp, 20.5.16.2 NMAC, 6/15/09]

**20.5.16.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-16 NMSA 1978.

[20.5.16.3 NMAC - Rp, 20.5.16.3 NMAC, 6/15/09]

**20.5.16.4 DURATION:** Permanent.

[20.5.16.4 NMAC - Rp, 20.5.16.4 NMAC, 6/15/09]

**20.5.16.5 EFFECTIVE DATE:** June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.

[20.5.16.5 NMAC - Rp, 20.5.16.5 NMAC, 6/15/09]

**20.5.16.6 OBJECTIVE:** The objective of this part is to establish rules for the qualification of firms for and disqualification of firms from conducting corrective action on sites where releases from storage tanks have caused contamination.

[20.5.16.6 NMAC - Rp, 20.5.16.6 NMAC, 6/15/09]

#### **20.5.16.7 DEFINITIONS:**

A. The definitions in 20.5.1 NMAC and the Ground Water Protection Act apply to this part. In the case of conflict, the definitions in the Ground Water Protection Act control.

B. For purposes of this part, the term "firm" shall be synonymous with the term "person," as defined in 20.5.1 NMAC.

C. For purposes of this part, the term "proposal" means an offer to complete work submitted in response to given specifications issued for a responsible party-lead site or for a state-lead site.

[20.5.16.7 NMAC - Rp, 20.5.16.7 NMAC, 6/15/09]

**20.5.16.8 PAYMENTS:** Payments from the corrective action fund may be made only for corrective action conducted by firms qualified by the department to perform such work pursuant to this part.

[20.5.16.8 NMAC - Rp, 20.5.16.1607 NMAC, 6/15/09]

#### **20.5.16.9 QUALIFICATION OF FIRMS:**

A. Except as provided in Subsections C and D of this section, firms shall be evaluated for qualification by the department to conduct corrective action for each workplan submitted. Except as provided in Subsection B of this section, firms shall be qualified upon approval of the following:

(1) the subject workplan;  
(2) a current statement of qualifications of the firm's authorized representative, the individual with direct, responsible, supervisory control of the approved workplan unless previously submitted under the current active phase of corrective action; and

(3) if the involvement of a professional engineer is required for the work to be undertaken under the workplan, a current statement of qualifications of the professional engineer that complies with 20.5.16.11 NMAC.

B. In addition to the

requirements of Subsection A of this section, if the department reasonably believes that a firm already qualified to perform corrective action under an approved workplan is not timely paying its subcontractors, suppliers, laboratories, and other entities included in any invoice connected with an approved workplan, the firm shall not be qualified unless it provides proof to satisfy the department that within the preceding two years it has paid those entities according to the firm's contractual agreements.

C. When initial response or initial abatement is required at a site, firms may be qualified prior to commencement of work by submitting for verbal approval a statement of qualifications for the authorized representative and, if a professional engineer is required by 20.5.12 or 20.5.13 NMAC, for the professional engineer. Written statements of qualifications shall be submitted to the department with the report on initial abatement required by Subsection B of 20.5.12.12 or 20.5.13.11 NMAC.

D. When remediation is required at a site, selection of a remediation proposal in accordance with the competitive selection process described in 20.5.17.14 and 20.5.17.15 NMAC qualifies the successful firm to conduct corrective action within the scope of work defined by the proposal, except as provided in 20.5.16.12 NMAC. A firm may be tentatively qualified prior to submitting a proposal under 20.5.17.14 by submitting for verbal approval a statement of qualifications for the authorized representative and, if a professional engineer is required by 20.5.12 or 20.5.13 NMAC, for the professional engineer. Firms tentatively qualified under this subsection will be deemed qualified firms for purposes of 20.5.17 NMAC until such time as 20.5.17 NMAC is amended to permit the evaluation of proposals from firms not yet qualified under this part.

E. Statements of qualifications shall include:

- (1) the authorized representative's name and status as sole proprietor, officer, partner, employee or subcontractor of the firm;
- (2) education relevant to the nature of the work to be performed;
- (3) experience relevant to the nature of the work to be performed; and
- (4) licenses and certifications required for the work to be performed.

F. While the required education and experience for the authorized representative may vary with the work to be performed, the following shall be considered minimums: a baccalaureate degree in science or engineering and at least two years applicable experience in the investigation and remediation of unsaturated and sat-

urated zone contamination, or five years supervised experience in investigation or remediation of unsaturated and saturated zone contamination.

G. Firms performing corrective action must maintain their qualification at all stages of work in order for the costs of that work to be eligible for payment.

H. This part is in addition to and not in lieu of any other licensing and registration requirements of the Construction Industries Licensing Act, Sections 60-13-1 through 60-13-59 NMSA 1978.

I. This part does not relieve contractors or owners or operators of their obligations and liabilities under applicable local, state, and federal laws and regulations.

[20.5.16.9 NMAC - Rp, 20 5.16.1609 NMAC, 6/15/09]

#### **20.5.16.10 DISQUALIFICATION OF FIRMS:**

A. The department may disqualify a qualified firm if the department determines that the firm has:

- (1) knowingly misrepresented a material fact in its request to become qualified or in any subsequent report or communication with the department;
- (2) failed to comply with any of the requirements of 20.5.12, 20.5.13, 20.5.16 or 20.5.17 NMAC;
- (3) failed to complete to the department's satisfaction the work described in one or more approved workplans; or
- (4) when required to do so by 20.5.16.9 NMAC, failed to prove to the department's satisfaction that it has timely paid its subcontractors, suppliers, laboratories and other entities.

B. A firm that has been disqualified under this section may become eligible to perform corrective action upon satisfactory proof that the firm has remedied, to the department's satisfaction, the problem that led to disqualification. For purposes of Paragraph (4) of Subsection A of this section, a firm that has timely paid its subcontractors, suppliers, laboratories and other entities for at least six months, and which meets all applicable requirements of 20.5.16.9 NMAC, shall become eligible to perform corrective action.  
[20.5.16.10 NMAC - N, 6/15/09]

**20.5.16.11 REQUIREMENTS FOR PROFESSIONAL ENGINEERS:** If the involvement of a professional engineer is required for the corrective action being conducted, the firm's qualification requirements shall include licensure by the New Mexico state board of licensure for profes-

sional engineers and surveyors in the discipline of engineering appropriate to the corrective action. This requirement may be met by demonstrating that the firm has on staff or available by contract a professional engineer licensed in the appropriate discipline.  
[20.5.16.11 NMAC - Rp, 20.5.16.1610 NMAC, 6/15/09]

#### **20.5.16.12 ADVERSE DETERMINATIONS ON REQUESTS TO QUALIFY FIRMS:**

A. In reviewing a firm's qualifications to perform corrective action, the department shall consider the nature of the work to be performed under the submitted workplan. Except as provided in Subsections B and C of this section, the department's determination on a request to qualify a firm for a workplan involving remediation shall be consistent with the department's selection of the firm's proposal for remediation under 20.5.17 NMAC, if applicable.

B. Failure of a qualified firm to complete work described in one or more approved workplans to the satisfaction of the department may be taken into consideration when the firm's qualifications are reviewed by the department for purposes of future workplans.

C. The failure of a qualified firm to complete work described in an approved workplan to the satisfaction of the department may result in a determination by the department that further work by the firm is not eligible for payment or that a new remediation proposal or workplan, or both, is required.

D. Nothing in this part is intended to affect the rights or obligations of the department or its contractors in any suspension or debarment proceedings undertaken by the department under the Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978. Suspension or debarment under the Procurement Code will be considered, however, in the department's determination on a firm's qualifications under this part.  
[20.5.16.12 NMAC - Rp, 20.5.16.1611 NMAC, 6/15/09]

#### **20.5.16.13 APPEALING ADVERSE DETERMINATIONS:**

A. A firm that has been denied qualification or that has been disqualified under this part may obtain review of the decision by either:

- (1) submitting to the department a written request for informal review pursuant to 20.5.16.14 NMAC; or
- (2) submitting to the secretary or the secretary's designee a written request for review on written submittals pursuant to 20.5.16.15 NMAC.

B. Any request for administrative review initiated under Subsection A of this section must be postmarked within 15 days of the date of the decision to be reviewed.

C. A firm may request review on written submittals under 20.5.16.15 NMAC without first requesting informal review under 20.5.16.14 NMAC. If, however, the firm first requests informal review under 20.5.16.14 NMAC, the firm thereafter may request review on written submittals under 20.5.16.15 NMAC of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC, provided that the request for review on written submittals under 20.5.16.15 NMAC is postmarked within 15 days of the date of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC.

D. Review under this part does not stay the decision being reviewed nor does it apply to or affect the secretary's authority to issue compliance orders or otherwise seek enforcement of any of the provisions of Title 20, Chapter 5 NMAC.

[20.5.16.13 NMAC - Rp, 20.5.16.1612 NMAC, 6/15/09]

#### **20.5.16.14 I N F O R M A L REVIEW:**

A. Every request for informal review by a firm shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. Every request for informal review shall be submitted to the department by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. The department shall afford prompt opportunity for an informal conference at which the firm may present the firm's views on the issues raised in the request for review and offer any supporting documentation or testimony. The department shall notify the firm of the time, date and place of the informal conference.

C. The member of department staff conducting the review must be someone other than the employee who made the original decision not to qualify the firm to perform corrective action under this part.

D. After considering all written and oral views presented, the department shall affirm, modify or reverse the original decision and shall furnish the firm with a written notification of its determination.

[20.5.16.14 NMAC - Rp, 20.5.16.1613 NMAC, 6/15/09]

#### **20.5.16.15 REVIEW BY THE SECRETARY OR THE SECRETARY'S DESIGNEE ON WRITTEN SUBMITTALS:**

A. Every request for review by the secretary or the secretary's designee on written submittals shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. The request shall be accompanied by any and all written materials and argument which the firm wishes the secretary or the secretary's designee to consider upon review. The request and all written materials and argument shall be submitted to the secretary or the secretary's designee by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. Within 15 days of the filing of the firm's request for review and submittal of all the firm's supporting material, department staff shall provide to the secretary or the secretary's designee any and all written materials and argument in support of the position of department staff on the issues raised by the firm.

C. For good cause shown, the secretary or the secretary's designee may permit either department staff or the firm additional time in which to submit the supporting written materials and argument allowed by Subsections A and B of this section. Any extension of time to submit written submittals shall not include the authority to extend the time to file a request for review under this part.

D. The action of the secretary or the secretary's designee on the request for review shall be based on the written materials and argument submitted pursuant to this section unless the secretary or the secretary's designee schedules a hearing on the request for review as set forth below.

E. The secretary or the secretary's designee may exercise discretion in whether to grant a hearing requested by the firm seeking review. If the secretary exercises the discretion to hold a hearing, the secretary shall provide notice of the time and place of the hearing to the firm making the request.

F. If the secretary chooses to hold a hearing as described in Subsection E of this section, the secretary shall hold the hearing within 60 days after receiving the written materials and argument described in Subsection A or after receiving the request for a hearing, whichever occurs last. In the event the department holds a hearing, the cost of the court reporter and transcript shall be paid by the party that requested the hearing. The hearing shall be conducted in accordance with 20.1.5 NMAC.

G. The action of the secretary or the secretary's designee on the request for review shall be by written order and shall state the decision and the reason therefor. The secretary or the secretary's designee shall send a copy of the order to the firm and furnish a copy to department

staff promptly after the order is entered. This written order shall be the department's final action on the request for review. Any judicial review of this final order shall be as provided by applicable law.

[20.5.16.15 NMAC - Rp, 20.5.16.1614 NMAC, 6/15/09]

#### **HISTORY OF 20.5.16 NMAC:**

**Pre-NMAC History:** None.

#### **History of Repealed Material:**

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors (filed 2/27/97), repealed 2/2/00.

20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors (filed 12/30/99), repealed 8/15/03.

20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action (filed 7/16/03), repealed 6/15/09.

#### **Other History:**

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, (filed 10/06/95) replaced by 20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, effective 4/1/97.

20 NMAC 5.16, Underground Storage Tanks, Certification of Contractors, (filed 02/27/97) replaced by 20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors, effective 2/2/00.

20 NMAC 5.16, Underground Storage Tanks, Qualification of Contractors, (filed 12/30/99) replaced by 20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action, effective 8/15/03.

20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action (filed 7/16/03) replaced by 20.5.16 NMAC, Petroleum Storage Tanks, Qualification of Persons Performing Corrective Action, effective 6/15/09.

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

**TITLE 20 ENVIRONMENTAL  
PROTECTION  
CHAPTER 5 P E T R O L E U M  
STORAGE TANKS  
PART 18 OPERATOR TRAINING**

**20.5.18.1 ISSUING AGENCY:**  
New Mexico Environmental Improvement Board.  
[20.5.18.1 NMAC - N, 6/15/09]

**20.5.18.2 SCOPE:** This part applies to owners and operators of storage tanks as provided in 20.5.1 NMAC. If the owner and operator of a storage tank are separate persons, only one person is required to comply with the requirement of this part, including any notice, reporting, designation of certified operators, and payment requirements; however, both parties are liable in the event of noncompliance.  
[20.5.18.2 NMAC - N, 6/15/09]

**20.5.18.3 S T A T U T O R Y AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, 74-4-1 through 74-4-14; the Ground Water Protection Act, NMSA 1978, 74-6B-1 through 74-6B-14; and the general provisions of the Environmental Improvement Act, NMSA 1978, 74-1-1 through 74-1-16.  
[20.5.18.3 NMAC - N, 6/15/09]

**20.5.18.4 D U R A T I O N :**  
Permanent.  
[20.5.18.4 NMAC - N, 6/15/09]

**20.5.18.5 EFFECTIVE DATE:**  
June 15, 2009, unless a later date is indicated in the bracketed history note at the end of a section.  
[20.5.18.5 NMAC - N, 6/15/09]

**20.5.18.6 OBJECTIVE:** The purpose of this part is to ensure that operators of regulated storage tanks are effectively trained to manage and prevent environmental and public health emergencies and other situations requiring on-site response, in order to protect public health, safety and welfare and the environment of the state.  
[20.5.18.6 NMAC - N, 6/15/09]

**20.5.18.7 DEFINITIONS:** The definitions in 20.5.1 NMAC apply to this part. The terms operator and certified operator as used in this part are different terms, as defined in 20.5.1.7 NMAC.  
[20.5.18.7 NMAC - N, 6/15/09]

**20.5.18.8 CLASSES OF OPERATORS:** There shall be three classes of operators identified as class A, class B, and class C.

A. Designation. Owners and operators shall identify and designate for each storage tank system or group of storage tank systems at a facility, at least one named individual for each class of operator.

(1) Owners and operators may designate different individuals for each class of operator, or one individual for more than one of the operator classes.

(2) Any individual designated for more than one operator class shall be trained and certified for each class of operator.

B. Training. All individuals designated as a class A, B or C operator shall, at a minimum, be trained and certified according to these regulations by the applicable deadlines in this part.

[20.5.18.8 NMAC - N, 6/15/09]

**20.5.18.9 CLASS A OPERATOR:** A class A operator has primary responsibility to operate and maintain the storage tank system. The class A operator's responsibilities include managing resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements.

A. General requirements. The class A operator focuses on the broader aspects of the statutory and regulatory requirements and standards necessary to operate and maintain the storage tank system (20.5 NMAC). For example, the class A operator typically ensures that appropriate individuals:

(1) properly operate and maintain the storage tank system;

(2) maintain appropriate records;

(3) are trained to operate and maintain the storage tank system and keep records;

(4) properly respond to emergencies caused by releases or spills from storage tank systems at the facility;

(5) make financial responsibility documents available to the department as required.

B. Minimum training requirements. At a minimum, the class A operator shall be trained in:

(1) a general knowledge of storage tank system requirements so he can make informed decisions regarding compliance and ensure appropriate individuals are fulfilling operation, maintenance, and recordkeeping requirements and standards of 20.5 NMAC regarding:

(a) spill prevention;

(b) overfill protection;

(c) release detection;

(d) corrosion protection;

(e) emergency response; and  
(f) product compatibility;  
(2) financial responsibility documentation requirements;  
(3) notification requirements;  
(4) release and suspected release reporting requirements;  
(5) temporary and permanent closure requirements; and  
(6) operator training requirements.

[20.5.18.9 NMAC - N, 6/15/09]

**20.5.18.10 CLASS B OPERATOR:** A class B operator implements applicable storage tank regulatory requirements and standards (20.5 NMAC) in the field. This individual implements the day-to-day aspects of operating, maintaining, and recordkeeping for storage tanks at one or more facilities.

A. General requirements. The class B operator typically monitors, maintains and ensures:

(1) release detection method, recordkeeping and reporting requirements are met;

(2) release prevention equipment, recordkeeping and reporting requirements are met;

(3) all relevant equipment complies with performance standards; and

(4) appropriate individuals are trained to properly respond to emergencies caused by releases or spills from storage tank systems at the facility.

B. Minimum training requirements. Compared with training for the class A operator, training for the class B operator shall provide a more in-depth understanding of operation and maintenance aspects, but may cover a more narrow breadth of applicable regulatory requirements. At a minimum, class B operator training shall include:

(1) components of storage tank systems;

(2) materials of storage tank system components;

(3) methods of release detection and release prevention applied to storage tank system components;

(4) operation and maintenance requirements of 20.5 NMAC that apply to storage tank systems and include:

(a) spill prevention;

(b) overfill protection;

(c) release detection;

(d) corrosion protection;

(e) emergency response; and

(f) product compatibility;

(5) reporting and recordkeeping requirements; and

(6) class C operator training requirements.

[20.5.18.10 NMAC - N, 6/15/09]

**20.5.18.11 CLASS C OPERATOR:**

A class C operator is an employee and is, generally, the first line of response to events indicating emergency conditions. This individual is responsible for responding to alarms or other indications of emergencies caused by spills or releases from storage tank systems. This individual notifies the class B or class A operator and appropriate emergency responders when necessary. Not all employees of a facility are necessarily class C operators.

**A. General requirements.**

The class C operator typically:

- (1) controls or monitors the dispensing or sale of regulated substances; and
- (2) is responsible for initial response to alarms or releases.

**B. Minimum training requirements.** At a minimum, the class C operator shall be trained to take action in response to emergencies (such as situations posing an immediate danger or threat to the public or to the environment and that require immediate action) and alarms potentially caused by spills or releases from a storage tank system.

**C. Training elements for class C.**

(1) Trained class A or class B operators shall:

(a) provide training to class C operators on emergency response procedures and on contacts for alarms potentially caused by spills or releases;

(b) provide simple written instructions on these procedures and contacts; and

(c) post signage with these procedures and contacts in prominent areas of the storage tank facility that are easily visible to any person dispensing a regulated substance.

(2) For purposes of this subsection, emergency response procedures shall include but are not limited to:

(a) procedures for overfill protection during delivery of regulated substances;

(b) operation of the emergency shut off system and alarm response;

(c) release reporting; and

(d) any site specific emergency procedures.

[20.5.18.11 NMAC - N, 6/15/09]

**20.5.18.12 TRAINING AND CERTIFICATION DEADLINES AND SCHEDULES:**

**A.** Deadline for designation of operators. Owners and operators of storage tank systems shall post at each facility owned a list of designated and certified class A and B operators, by the following deadlines:

- (1) July 1, 2010: all owners of

more than 12 facilities;

(2) July 1, 2011: all owners of three to 12 facilities;

(3) July 1, 2012: all owners of one or two facilities.

**B.** When requested and at any inspection conducted by the department, owners and operators shall provide to the department a list of designated certified class A and B operators for each facility owned.

**C.** Owners shall maintain documentation identifying designated and certified class C operators, with proof of training, at each facility.

**D.** No later than the deadlines established in Subsection A of this section, all designated certified class A, B and C operators shall be trained and possess a current certificate issued by a trainer approved pursuant to this part.

**E.** After the deadlines established in Subsection A of this section, new operators shall be trained and certified within the following timeframes:

(1) Class A and class B operators shall be trained and certified within 60 days of assuming full operation and maintenance responsibilities at a storage tank system. Owners and operators in rural and remote areas of the state may apply in writing for a 60-day deferral of this requirement. To apply for this deferral, owners and operators must demonstrate to the department that they are located in a rural and remote area, as defined in 20.5.1.7 NMAC.

(2) Class C operators shall be trained before assuming responsibility for responding to emergencies and before dispensing a regulated substance.

[20.5.18.12 NMAC - N, 6/15/09]

**20.5.18.13 OPERATOR PRESENT:**

After the applicable deadlines in 20.5.18.12 NMAC, owners and operators shall ensure that every facility has either a class A, class B, or class C operator on-site whenever it is open for business and dispensing fuel, except:

**A.** pursuant to Paragraph (1) of Subsection E of 20.5.18.12 NMAC; and

**B.** at un-manned facilities, which shall conspicuously post signage required in Paragraph (1) of Subsection C of 20.5.18.11 NMAC, and shall either:

(1) be visited by a class A or B operator every week; or

(2) have a remote monitoring system that:

(a) meets the requirements of 20.5.6 NMAC;

(b) will automatically shut off the delivery or transfer of regulated substances if a suspected release is detected; and

(c) is visited monthly by a class A or B operator.

[20.5.18.13 NMAC - N, 6/15/09]

**20.5.18.14 RE-TRAINING AND RE-CERTIFICATION:**

**A.** Class A and B operators shall be re-trained and re-certified every 5 years, in the same manner as original training and certification required in this part. It is the responsibility of owners, operators and certified operators to track certification dates and expiration, and to ensure that a certified operator as required by this part is designated and on-site for every storage tank system by the deadlines in this part and as required in this part.

**B.** In addition to the requirements of Subsection A, if the department finds that a storage tank system is out of compliance, the class A and class B operator shall be re-trained and re-certified within 60 days. The class A and B operator may select training specific only to the area of non-compliance (if available) or attend a training program that includes all training elements required by this part. At a minimum, a storage tank system is out of compliance for purposes of this section if the system is in violation of:

(1) storage tank release detection requirements in 20.5 NMAC; or

(2) release prevention requirements (spill, overfill, or corrosion prevention) requirements in 20.5 NMAC.

**C.** An owner may elect to re-train and re-certify class A and B operators annually for a storage tank system. Class A and B operators that are re-trained and re-certified annually need not re-train and re-certify as required in Subsection B of this section if the department finds the storage tank system is out of compliance.

**D.** No re-training and re-certification is required for class C operators. Class C operators must be trained and certified each time they are designated for a particular storage tank system.

[20.5.18.14 NMAC - N, 6/15/09]

**20.5.18.15 DEFERRAL OF RE-TRAINING:**

**A.** An owner or operator that is a certified operator may apply in writing to the department for a one-time five-year deferral of re-training required in 20.5.18.14 NMAC if he can demonstrate the following:

(1) he owns no more than two facilities;

(2) no significant changes, modifications or upgrades to either of the facilities have been made during the five-year period immediately preceding the deferral application, including changes to spill prevention equipment, overfill protection equipment, leak detection equipment or corrosion protection equipment;

(3) the average monthly through-

put at each facility is less than 20,000 gallons over the last 12 months; and

(4) the facility has not been out of compliance as defined in 20.5.18.14 NMAC during the five-year period immediately preceding the deferral application.

B. The department shall promptly evaluate applications for deferral of re-training, and shall respond in writing within 30 days of receipt whether the application is granted, denied, or whether more information is needed. The department shall not unreasonably withhold approval if the applicant meets all requirements of Subsection A of this section. It is the responsibility of owners and operators to timely apply for deferrals of re-training so that they may be processed and evaluated well before the expiration of operator certification.

C. The department shall place facilities where the owner or operator has received a deferral of re-training on a priority list for technical assistance and inspection.

D. Owners and operators that receive a deferral of re-training shall complete re-training as required in 20.5.18.14 NMAC within five years after the deferral is granted. In other words, if approved, these owners and operator shall re-certify class A and B operators after 10 years.

[20.5.18.15 NMAC - N, 6/15/09]

[The department provides an optional form for application for deferral of re-training, available on the department's webpage, www.nmenv.state.nm.us, by calling the department at 505-476-4397 or by writing to the Petroleum Storage Tank Bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Owners should mail applications for deferral to this address.]

#### **20.5.18.16 APPROVAL OF TRAINERS AND TRAINING:**

A. Training elements. The following topics shall be covered in approved training courses for class A and class B operators:

(1) general overview of department UST and AST program and administrative requirements, including:

(a) registration forms and certificates, and process for filing and modifying them;

(b) notification process and general technical requirements for new installations, repairs, replacements and modifications;

(c) confirmed and suspected releases (including confirmation steps for suspected releases), monthly monitoring or release detection test failures, and other system failures that may indicate a release of regulated substance has or is occurring;

(d) annual tank fees and invoicing process;

(e) general requirements for maintaining and demonstrating financial responsibility;

(f) department process for inspections and technical assistance resources available, including written checklists required in 20.5.18.17 NMAC; and

(g) enforcement process for violations;

(2) general overview of other regulations pertaining to ASTs and USTs, including but not limited to, fire codes, occupational health and safety, and any related industry practices pertaining to safety;

(3) spill prevention and overflow protection:

(a) rule requirements, including record keeping;

(b) equipment requirements; and

(c) operation and maintenance records;

(4) release detection: for each type of release detection method listed and approved in 20.5.6 NMAC for USTs, ASTs and piping:

(a) rule requirements, including record keeping;

(b) monitoring and equipment requirements, including third party approval requirements; and

(c) operation and maintenance records;

(5) corrosion protection:

(a) rule requirements, including record keeping;

(b) equipment requirements; and

(c) operation and maintenance needs, including periodic inspections and testing;

(6) classes of operators and operator training requirements, including designation and certification;

(7) temporary and permanent closure requirements:

(a) rule requirements, including record keeping;

(b) return to service;

(c) site assessment; and

(d) change in service;

(8) general requirements for tank installer certification:

(a) rule requirements, including record keeping;

(b) when certified installers are required; and

(c) how to find certified installers and verify certified status.

B. Training standards. In determining whether to approve any trainer or training, the department shall consider the following:

(1) whether the trainer is a third-party, in-house, educational institution or

other;

(2) whether the trainer will offer training in multiple locations throughout the state, regionally or locally;

(3) how often the trainer will offer training;

(4) what fee (if any) the trainer will charge;

(5) whether the trainer will offer classes only to employee or in-house operators, to the general public, or to independent contract operators.

C. Training options may cover all or a portion of the required elements, and may include:

(1) live training sessions in a classroom setting or at a storage tank system;

(2) internet or computer training program; or

(3) any other equivalent training method approved by the department.

D. Application for approval of trainer and training class. Trainers shall apply to the department for approval of trainers and training classes. An application for approval of trainer and training class shall include at a minimum:

(1) name, address and contact information of the proposed trainer;

(2) detailed description of the proposed trainer's experience, education and qualifications to conduct training;

(3) agenda and materials to be used for the proposed class that shall include the elements required in this section;

(4) final tests or other proposed methods of evaluating attendee success;

(5) copies of proposed documentation to certify successful attendees as certified operators as required in 20.5.18.17 NMAC and to be used for the monthly and annual inspections required in 20.5.18.17 NMAC;

(6) the proposed fee schedule for the training class; and

(7) the proposed calendar for the proposed training classes that includes location and frequency.

E. The department shall evaluate applications for approval of trainers and training classes within 30 days of receipt of the application, and provide a written approval, denial or request for additional information.

F. The department may periodically audit or review any training class, and the trainer shall allow a maximum of two department employees to attend any training class on request without charge and without certification (except a reasonable charge for copying and materials).

[20.5.18.16 NMAC - N, 6/15/09]

[The department provides an optional form

for application for approval of trainer and training class, available on the department's webpage, www.nmenv.state.nm.us, by calling the department at 505-476-4397 or by writing to the Petroleum Storage Tank Bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Owners should mail applications for approval of trainer and training to this address.]

**20.5.18.17 DOCUMENTATION AND RECORDKEEPING:**

A. Approved trainers shall provide written verification of training completion for class A, B and C operators that shall include:

- (1) the operator's name;
- (2) the date and location where training was completed;
- (3) the facility name, address and department facility identification number for each facility for which the operator is trained; and
- (4) the name, address and phone number of the approved trainer that conducted the training.

B. Written verification of training shall include a certificate of training and wallet card.

C. Owners and operators shall maintain written verification of training for class A, B, and C operators at every storage tank system for all designated certified operators, and make the written verification available for review when requested by the department.

D. Approved trainers shall maintain records of successful completion of training, including examination results, for at least 10 years, and shall make the records available to the department on request.

[20.5.18.17 NMAC - N, 6/15/09]

**20.5.18.18 RESPONSIBILITIES OF CERTIFIED OPERATORS:**

A. A certified operator shall not represent himself as certified unless he has a current valid certificate from an approved trainer.

B. Monthly inspections. Each class A or class B operator shall perform a monthly inspection of each storage tank system for which he is designated, and shall record the results of each inspection on a checklist.

(1) At a minimum, monthly inspections shall be conducted and shall include an inspection of the following:

- (a) release detection methods, including monitoring systems and all associated sensors, and whether they appropriately responded to all alarms and any conditions that might have indicated a release of regulated substance had occurred;

(b) integrity of spill prevention equipment (for cracks, holes, or bulges), and for the presence of regulated substance, water, or debris in the spill prevention equipment;

(c) dispenser sumps for the presence of regulated substances, water, and debris;

(d) containment sumps, such as those which contain the submersible pump on the top of underground tanks, for the presence of regulated substances or any indication a release may have occurred; and

(e) overflow prevention equipment for proper operation and if maintenance is required.

(2) The certified operator(s) shall ensure that all inspections as outlined in the operations and maintenance plan, required in 20.5.5.9 NMAC, are properly performed and conducted by qualified personnel.

(3) Certified operators may use checklists contained in the operations and maintenance plan, required in 20.5.5.9 NMAC, to document monthly inspections only if the checklists meet the requirements of this section.

(4) The certified operator(s) shall provide the owner and operator with a copy of each inspection checklist, and alert the owner or operator of any condition discovered during the monthly inspection that may require follow-up actions.

(5) Owners and operators shall maintain a copy of inspection checklists and all attachments for the previous twelve months at all attended facilities or, if approved in writing by the department, off-site at a readily available location.

(6) Owners and operators shall provide monthly inspection reports and all attachments for the previous twelve months to the department on request.

[20.5.18.18 NMAC - N, 6/15/09]

[The department provides an optional checklist for compliance with this section that is available on the department's webpage, www.nmenv.state.nm.us, by calling the department at 505-476-4397 or by writing to the Petroleum Storage Tank Bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.18.19 RECIPROCITY:** No reciprocity, training or certification from any other state or territory shall qualify an operator to be certified pursuant to this part. [20.5.18.19 NMAC - N, 6/15/09]

**HISTORY OF 20.5.18 NMAC:**  
[RESERVED]

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

**TITLE 8 SOCIAL SERVICES  
CHAPTER 139 FOOD STAMP PROGRAM**

**PART 503 NEW MEXICO  
MODIFIED COMBINED APPLICATION PROJECT**

**8.139.503.1 ISSUING AGENCY:**  
New Mexico Human Services Department  
[8.139.503.1 NMAC - N, 06/01/2009]

**8.139.503.2 SCOPE:** General public  
[8.139.503.2 NMAC - N, 06/01/2009]

**8.139.503.3 STATUTORY AUTHORITY:** The food stamp program is authorized by the Food Stamp Act of 1977 as amended (7 U.S.C. 2011 et. seq.). Regulations issued pursuant to the act are contained in 7 CFR Parts 270-282. State authority for administering the food stamp program is contained in Chapter 27 NMSA, 1978. Administration of the human services department (HSD), including its authority to promulgate regulations, is governed by Chapter 9, Article 8, NMSA 1978 (Repl. 1983).  
[8.139.503.3 NMAC - N, 06/01/2009]

**8.139.503.4 DURATION:**  
Permanent  
[8.139.503.4 NMAC - N, 06/01/2009]

**8.139.503.5 EFFECTIVE DATE:**  
June 1, 2009, unless a later date is cited at the end of a section.  
[8.139.503.5 NMAC - N, 06/01/2009]

**8.139.503.6 OBJECTIVE:** The objective of the New Mexico Modified Combined Application Project (NMCAP) is to increase access to the nutrition benefits offered by the food stamp program among elderly and disabled populations receiving supplemental security income (SSI). The combined application project will increase the ability to purchase food and meet dietary needs. The combined application project for food stamp benefit assistance is authorized by a state demonstration project via a joint partnership with food and nutrition services (FNS) and social security administration (SSA).  
[8.139.503.6 NMAC - N, 06/01/2009]

**8.139.503.7 DEFINITIONS:**  
[RESERVED]

**8.139.503.8 PROGRAM ELIGIBILITY:** Benefits shall be processed, allot-

ment determined and certification periods assigned based on the waiver guidelines as approved by FNS.

[8.139.503.8 NMAC - N, 06/01/2009]

### 8.139.503.9 BASIS FOR DEFINING GROUP (HOUSEHOLD COMPOSITION)

**A. Household:** An applicant can opt to receive NMCAP benefits if the applicant:

- (1) receives federal SSI benefits;
- (2) is twenty-two years of age or older;
- (3) is eligible for separate household status; or
- (4) lives with a spouse who also receives SSI benefits; or
- (5) living with others but buys and cooks food separately from others; and
- (6) at the time application for NMCAP the household has no earned income.

**B. Verification of information:** All information received by the department from the SSA data interface will be deemed as true and accurate for purposes of initial verification.

[8.139.503.9 NMAC - N, 06/01/2009]

### 8.139.503.10 APPLICATION PROCESS

**A. Opt in/out:** An applicant can choose to receive benefits through the regular food stamp program if:

- (1) combined shelter and utility expenses, as defined at 8.139.520.11 NMAC, are greater than \$315.00; or
- (2) out-of-pocket medical expenses, as defined at 8.139.520.11 NMAC, are at least \$35.00 a month.

**B. Application requirements:** The application at minimum will contain:

- (1) the applicants name, and address;
- (2) receipt of income and amount;
- (3) amount of applicable deductions, such as shelter and medical; and
- (4) must be signed by the applicant or authorized representative.

**C. Application filing:** Potential NMCAP recipients will receive applications from the department based on interface data supplied by SSA. NMCAP applicants also have the right to apply at:

- (1) a social security (SSA) office;
- or
- (2) a local ISD county office.

**D. Processing standards:** Applications are processed by the department and notice of disposition is sent to the applicant.

- (1) **Standard processing:** An application shall be processed as soon as possible and the applicant afforded an opportunity to participate no later than 30

days from the date of application.

**(2) Expedited processing:** In the month of application NMCAP applicants shall be considered as standard food stamp program applicants and may qualify for expedited service.

**E. Authorized representatives:** The head of the household or the spouse or any other responsible member of the household may designate an individual who is a non-household member to act on its behalf in applying, obtaining or using food stamp benefits.

(1) The caseworker shall obtain a copy of the household's written authorization for the authorized representative and maintain it in the household's case record. No limit shall be placed on the number of households an authorized representative may represent.

(2) Even if the household member is able to make an application and obtain benefits, the household should be encouraged to name an authorized representative to use the food stamp benefits in case illness or other circumstances prevent household members from using the benefits themselves.

(3) The authorized representative's identity shall be verified and a copy of the document maintained in the household's case file.

[8.139.503.10 NMAC - N, 06/01/2009]

### 8.139.503.11 CASE MANAGEMENT

**A. Interviews:** NMCAP applicants are not required to see an ISD caseworker or be otherwise subjected to an interview, although additional information or verification may be requested.

**B. Certification periods:** Eligible households shall be assigned to a 36-month certification period, and with no interim contact.

**C. Reporting requirements:** All information received by the department from the SSA data interface will be deemed as true and accurate for reported changes.

**D. Actions on reported changes:** NMCAP recipients are subject only to the reporting standards of SSA and all data sent to the department monthly. Within ten days of receipt the department shall act on the following changes:

- (1) death of a household member;
- (2) loss of SSI eligibility;
- (3) changes in state residency; or
- (4) a member of the household's institutional status has changed.

**E. Recertification:** NMCAP recipients shall not be subject to an interview to review eligibility at the end of the 36-month certification period. Recipients shall receive notice of expiration and recertification prior to closure.

Continued eligibility will be evaluated based on the submission of a completed application and information received from SSA. Participants that do not reapply by the end of certification period will be subject to case closure.

[8.139.503.11 NMAC - N, 06/01/2009]

### 8.139.503.12 BENEFIT DELIVERY

**A. Effective date:** Benefits for the initial month of certification shall be prorated from the date of application according to the standard food stamp program tables at 8.139.500 NMAC.

**B. Benefit issuance:** NMCAP are issued through a direct deposit into a household's electronic benefit transfer (EBT) food stamp account. EBT cards are issued and EBT accounts maintained as defined at 8.139.610 NMAC. A participating household has a definite issuance date so that food stamp benefits are received on or about the same time each month. The issuance date is based on the last two digits of the social security number of the individual to whom the food stamps are issued.

**C. Benefit calculation:** Benefits are issued based on allowable and out-of-pocket medical deductions. Benefit amounts shall be subject to review and adjustment in coordination with the regular food stamp program and cost neutrality and may be adjusted each January. Monthly NMCAP benefit amounts are based on the following for:

(1) monthly shelter costs equal to or less than \$315.00, the maximum benefit amount is \$70.00; and

(2) monthly shelter costs greater than \$315.00, the maximum benefit amount is \$93.00.

**D. Benefit correction:** Benefit corrections shall be determined and adjusted as defined at 8.139.640 NMAC.

[8.139.503.12 NMAC - N, 06/01/2009]

### HISTORY OF 8.139.503 NMAC: [RESERVED]

## NEW MEXICO PUBLIC REGULATION COMMISSION INSURANCE DIVISION

### NOTICE:

The Public Regulation Commission, Division of Insurance is repealing 13.10.13 NMAC, *Managed Health Care*, effective September 1, 2009. It will be replaced with 13.10.13 NMAC, *Managed Health Care - Benefits*, which will become effective September 1, 2009.

**NEW MEXICO PUBLIC  
REGULATION  
COMMISSION  
INSURANCE DIVISION**

**TITLE 13 INSURANCE  
CHAPTER 10 HEALTH INSURANCE  
PART 13 MANAGED  
HEALTH CARE - BENEFITS**

**13.10.13.1 ISSUING AGENCY:**  
New Mexico Public Regulation  
Commission, Division of Insurance, Post  
Office Box 1269, Santa Fe, New Mexico  
87504-1269.  
[13.10.13.1 NMAC - Rp, 13.10.13.1  
NMAC, 09/01/2009]

**13.10.13.2 SCOPE:**

**A. Applicability.** This rule applies to health care insurers that are required to obtain a certificate of authority or licensure in this state and which provide, offer, or administer managed health care plans.

**B. Exemptions.** This rule does not apply to policies or certificates that provide coverage for:

(1) traditional fee-for-service indemnity plans;

(2) only short-term travel, accident-only, student health, specified disease, or other limited benefits; or

(3) credit, disability income, hospital indemnity, long-term care insurance, vision care or any other limited supplemental benefit, including a stand-alone dental benefit plan, whether indemnity, PPO, or non-profit plan.

**C. Conflicts.** This rule relates to and should be read in conjunction with 13.10.16 NMAC, 13.10.17 NMAC, 13.10.21 NMAC, 13.10.22 NMAC, and 13.10.23 NMAC. If any provision in this rule conflicts with any provision of 13.10.17 NMAC, Grievance Procedures, or 13.10.16 NMAC, Provider Grievance, promulgated prior to the effective date of this rule, the provision in this rule shall apply.

[13.10.13.2 NMAC - Rp, 13.10.13.2 NMAC, 09/01/2009]

**13.10.13.3 STATUTORY AUTHORITY:** Sections 59A-1-18, 59A-2-8, 59A-2-9, 59A-4-4, 59A-4-5, 59A-15-16, 59A-18-21, 59A-19-5, 59A-19-6, 59A-22-19, 59A-22-20, 59A-22-21, 59A-22-42, 59A-22-43, 59A-22A-4, 59A-22A-5, 59A-22A-6, 59A-22A-7, 59A-23E-15, 59A-44-41, 59A-46-23, 59A-46-25, 59A-46-30, 59A-47-24, 59A-47-25, 59A-47-27, 59A-47-33, 59A-57-2, 59A-57-4, 59A-57-5, 59A-57-6, 59A-57-8, and 59A-57-11 NMSA 1978.

[13.10.13.3 NMAC - Rp, 13.10.13.3

NMAC, 09/01/2009]

**13.10.13.4 DURATION:**  
Permanent.  
[13.10.13.4 NMAC - Rp, 13.10.13.4  
NMAC, 09/01/2009]

**13.10.13.5 EFFECTIVE DATE:**  
September 1, 2009, unless a later date is cited at the end of a section.  
[13.10.13.5 NMAC - Rp, 13.10.13.5  
NMAC, 09/01/2009]

**13.10.13.6 OBJECTIVE:** The purpose of this rule is to ensure the availability, accessibility, and quality of health care services provided by health care insurers through managed health care plans. The rule provides uniform definitions; standards regarding patient rights and responsibilities; requirements regarding supplemental services and prescription drug coverage, when offered; and requirements for consumer assistance offices and consumer advisory boards within managed health care plans.  
[13.10.13.6 NMAC - Rp, 13.10.13.6  
NMAC, 09/01/2009]

**13.10.13.7 DEFINITIONS.** In addition to the following, this rule is subject to the definitions found in the Grievance Procedures Rule, 13.10.17 NMAC.

**A. "Certified nurse-midwife"** means any person who is licensed by the board of nursing as a registered nurse and who is licensed by the New Mexico department of health as a certified nurse-midwife.

**B. "Certified nurse practitioner"** means a registered nurse whose qualifications are endorsed by the board of nursing for expanded practice as a certified nurse practitioner and whose name and pertinent information is entered on the list of certified nurse practitioners maintained by the board of nursing.

**C. "Continuous quality improvement"** means an ongoing and systematic effort to measure, evaluate, and improve a managed health care plan's process in order to continually improve the quality of health care services provided to its covered persons.

**D. "Covered person"** means an individual entitled to receive health care benefits provided by a health benefits plan, and includes individuals whose health insurance coverage is provided by an entity that purchases or is authorized to purchase health care benefits pursuant to the New Mexico Health Care Purchasing Act.

**E. "Cytologic screening"** means a papanicolaou test or liquid based cervical cytopathology, a human papillomavirus test and a pelvic exam for symptomatic as well as asymptomatic female

patients.

**F. "Division"** means the New Mexico division of insurance.

**G. "Emergency care"** means health care procedures, treatments, or services delivered to a covered person after the sudden onset of what reasonably appears to be a medical condition that manifests itself by symptoms of sufficient severity, including severe pain, that the absence of immediate medical attention could reasonably be expected by a reasonable layperson, to result in:

(1) jeopardy to the person's health;

(2) serious impairment of bodily functions;

(3) serious dysfunction of any bodily organ or part; or

(4) disfigurement to the person.

**H. "Evidence of coverage"** means a clear and conspicuous written statement of the essential features and medical services covered by the managed health care plan (MHCP), which may include a separate summary of benefits, as more particularly described at 13.10.23.8 NMAC, and which is provided to the covered person by the MHCP.

**I. "FDA"** means the United States food and drug administration.

**J. "Grievance"** means a complaint, and other documentation, as more particularly defined at 13.10.17.7 NMAC, submitted by or on behalf of a covered person.

**K. "Health care facility"** means an institution providing health care services, including a hospital or other licensed inpatient center; an ambulatory surgical or treatment center; a skilled nursing center; a residential treatment center; a home health agency; a diagnostic, laboratory or imaging center; and a rehabilitation or other therapeutic health setting.

**L. "Health care insurer"** means a person that has a valid certificate of authority in good standing under the Insurance Code to act as an insurer, health maintenance organization, nonprofit health care plan, prepaid dental plan, a multiple employer welfare arrangement or any other person providing a plan of health insurance or a managed health care plan subject to state insurance law and regulation.

**M. "Health care professional"** means a physician or other health care professional, including a pharmacist, who is licensed, certified or otherwise authorized by the state to provide health care services consistent with state law.

**N. "Health care services"** means services, supplies, and procedures for the diagnosis, prevention, treatment, cure or relief of a health condition, illness, injury, or disease, and includes, to the extent offered by the health benefits plan, physical

and mental health services, including community-based mental health services, and services for developmental disability or developmental delay.

**O. "Health maintenance organization (HMO)"** means any person who undertakes to provide or arrange for the delivery of basic health care services to covered persons on a prepaid basis, except for covered person responsibility for copayments or deductibles.

**P. "Independent quality review organization (IQRO)"** means an organization independent of the health care insurer or managed health care plan that performs external quality audits of managed health care plans and submits reports of its findings to both the managed health care plan and to the division.

**Q. "Managed care"** means a system or technique(s) generally used by third party payors or their agents to affect access to and control payment for health care services. Managed care techniques most often include one or more of the following:

(1) prior, concurrent, and retrospective review of the medical necessity and appropriateness of services or site of services;

(2) contracts with selected health care providers;

(3) financial incentives or disincentives for covered persons to use specific providers, services, prescription drugs, or service sites;

(4) controlled access to and coordination of services by a case manager; and

(5) payor efforts to identify treatment alternatives and modify benefit restrictions for high cost patient care.

**R. "Managed health care plan (MHCP or plan)"** means a policy, contract, certificate or agreement offered or issued by a health care insurer, provider service network, or plan administrator to provide, deliver, arrange for, pay for, or reimburse the costs of health care services, except as otherwise provided in this subsection. A MHCP either requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by the health care insurer, provider service network, or plan administrator. Effective immediately, a MHCP does not include a traditional fee-for-service indemnity health benefit plan or a health benefit plan that covers only short-term travel, accident-only, limited benefit, an indemnity, PPO dental or non-profit dental benefit plan, student health plan, or specified disease policies. For purposes of this section, "plan administrator" shall include and apply to an HMO or other health care insurer not

required to be licensed under Section 59A-12A-2 NMSA 1978, but which is acting as a "plan administrator" as defined under the act." A MHCP includes a health benefits plan as defined under NMSA 1978 Section 59A-22A-3(D) as "the health insurance policy or subscriber agreement between the covered person or the policyholder and the health care insurer which defines the covered services and benefit levels available."

**S. "Obstetrician-gynecologist"** means a physician who is board eligible or board certified by the American board of obstetricians and gynecologists or by the American college of osteopathic obstetricians and gynecologists.

**T. "Participating provider"** means a provider who, under a contract (or through other arrangement) with the health care insurer offering a managed health care plan, or with its contractor or subcontractor, has agreed to provide health care services to covered persons with an expectation of receiving payment, other than copayments or deductibles, directly or indirectly from the managed health care plan or health care insurer.

**U. "Physician assistant"** means a skilled person who is a graduate of a physician assistant or surgeon assistant program approved by a nationally recognized accreditation body or who is currently certified by the national commission on certification of physician assistants, and who is licensed in the state of New Mexico to practice medicine under the supervision of a licensed physician.

**V. "Primary care practitioner (PCP)"** means a health care professional who, within the scope of his or her license, supervises, coordinates, and provides initial and basic care to covered persons, who initiates their referral for specialist care, and who maintains continuity of patient care. Primary care practitioners shall include but not be limited to general practitioners, family practice physicians, internists, pediatricians, and obstetricians-gynecologists, physician assistants and nurse practitioners. Pursuant to 13.10.21.7 NMAC, other health care professionals may also provide primary care.

**W. "Prospective enrollee"** means:

(1) in the case of an individual who is a member of a group, an individual eligible for enrollment in a MHCP through that individual's group; or

(2) in the case of an individual who is not a member of a group or whose group has not purchased or does not intend to buy a MHCP, an individual who has expressed an interest in purchasing individual plan coverage and is eligible for coverage by the plan.

**X. "Provider"** means a

duly licensed hospital or other licensed facility, physician, or other health care professional authorized to furnish health care services within the scope of their license.

**Y. "Registered lay midwife"** means any person who practices lay midwifery and is registered as a lay midwife by the New Mexico department of health.

**Z. "Screening mammography"** means a radiologic examination utilized to detect unsuspected breast cancer at an early stage in asymptomatic persons and includes the x-ray examination of the breast using equipment that is specifically for mammography, including the x-ray tube, filter, compression device, screens, film, and cassettes, and that has an average radiation exposure delivery of less than one rad mid-breast. Screening mammography includes two views for each breast. Screening mammography includes the professional interpretation of the film, but does not include diagnostic mammography.

**AA. "Subscriber"** means an individual whose employment or other status, except family dependency, is the basis for eligibility for enrollment in the managed health care plan, or in the case of an individual contract, the person in whose name the contract is issued.

**BB. "Summary of benefits"** means a summary of the benefits and exclusions, required to be given prior to or at the time of enrollment to a prospective subscriber by the health care insurer or group contract holder.

**CC. "Tertiary care facility"** means a hospital unit which provides complete perinatal care and intensive care of intrapartum and perinatal high-risk patients with responsibilities for coordination of transport, communication, education and data analysis systems for the geographic area served.

**DD. "Traditional fee-for-service indemnity benefit"** means a fee-for-service indemnity benefit as defined at 13.10.17.7 NMAC, as a fee-for-service indemnity benefit, not associated with any financial incentives that encourage covered persons to utilize preferred providers, to follow pre-authorization rules, to utilize prescription drug formularies or other cost-saving procedures to obtain prescription drugs, or to otherwise comply with a plan's incentive program to lower cost and improve quality, regardless of whether the benefit is based on an indemnity form of reimbursement for services.

**EE. "Urgent care"** means medically necessary health care services provided in emergencies or after a primary care physician's normal business hours for unforeseen conditions due to illness or injury that are not life-threatening but require prompt medical attention.

**FF. "Utilization review"**

means a system for reviewing the appropriate and efficient allocation of medical services and hospital resources given or proposed to be given to a patient or group of patients.

[13.10.13.7 NMAC - Rp, 13.10.13.7 NMAC, 09/01/2009]

**13.10.13.8 PATIENT RIGHTS AND RESPONSIBILITIES:**

**A.** Each health care insurer through its managed health care plan (MHCP) shall implement written policies and procedures regarding the rights of covered persons and implementation of such rights.

**B.** At the time of enrollment, each health care insurer through its MHCP shall provide each subscriber, and upon request, a covered person, or a covered person's representative, in compliance with state or federal law, with a summary of benefits and exclusions, premium information and provider listing, along with information on how to access or obtain the evidence of coverage. Basic consumer information, including the phone number of the managed health care bureau, shall be included on a newly issued covered person's health insurance card, or on a separate wallet-sized card, to include the phone number and website of the managed health care bureau, issued simultaneously with the newly issued health insurance card.

**C.** The evidence of coverage shall include a complete statement that a covered person shall have the right, at a minimum:

(1) to available and accessible services when medically necessary, and in an HMO, as determined by the primary care or treating physician in consultation with the MHCP, 24 hours per day, 7 days per week for urgent or emergency care services, and for other health care services as defined by the contract or the evidence of coverage;

(2) to be treated with courtesy and consideration, and with respect for the covered person's dignity and need for privacy;

(3) to be provided with information concerning the health care insurer's policies and procedures regarding products, services, providers, appeals procedures and other information about the MHCP and the benefits provided;

(4) in an HMO, to choose a primary care practitioner within the limits of the covered benefits, plan network, and as provided by this rule, including the right to refuse care of specific health care professionals;

(5) to receive from the covered person's physician(s) or provider, in terms that the covered person understands, an explanation of his or her complete medical condition, recommended treatment, risk(s)

of the treatment, expected results and reasonable medical alternatives, irrespective of the health care insurers or MHCP's position on treatment options; if the covered person is not capable of understanding the information, the explanation shall be provided to his or her next of kin, guardian, agent or surrogate, if available, and documented in the covered person's medical record;

(6) to all the rights afforded by law, rule, or regulation as a patient in a licensed health care facility, including the right to refuse medication and treatment after possible consequences of this decision have been explained in language the covered person understands;

(7) to prompt notification, as required in this rule, of termination or changes in benefits, services or provider network;

(8) to file a complaint or appeal with the health care insurer or the superintendent and to receive an answer to those complaints in accordance with existing law;

(9) to privacy of medical and financial records maintained by the health care insurer and its health care providers, in accordance with existing law;

(10) to know upon request of any financial arrangements or provisions between the health care insurer and its providers which may restrict referral or treatment options or limit the services offered to covered persons;

(11) to adequate access to qualified health professionals for the treatment of covered benefits near where the covered person lives or works within the service area of the MHCP;

(12) in an HMO, and to the extent available and applicable to the MHCP, to affordable health care, with limits on out-of-pocket expenses, including the right to seek care from a non-participating provider, and an explanation of a covered person's financial responsibility when services are provided by a non-participating provider, or provided without required preauthorization;

(13) in a MHCP that provides benefits for out-of-network coverage, to an approved example of the financial responsibility incurred by a covered person when going out-of-network; inclusion of the entire "billing examples" provided by the superintendent available on the division's website at the time of the filing of the plan will be deemed satisfaction of this requirement; any substitution for, or changes to, the division's "billing examples" requires written approval by the superintendent;

(14) to detailed information about coverage, maximum benefits, and exclusions of specific conditions, ailments or disorders, including restricted prescription benefits, and all requirements that a covered person must follow for prior authorization and utilization review;

(15) to a complete explanation of why care is denied, an opportunity to appeal the decision to the health care insurer's internal review, the right to a secondary appeal, and the right to request the superintendent's assistance.

**D.** The health care insurer shall establish and implement written policies and procedures regarding the responsibilities of covered persons. A complete statement of these responsibilities shall be included in the evidence of coverage.

[13.10.13.8 NMAC - Rp, 13.10.13.8 NMAC, 09/01/2009]

**13.10.13.9 SUPPLEMENTAL HEALTH CARE SERVICES:**

**A.** A health care insurer, through its MHCP, may provide to its covered persons supplemental health care services that are not basic health care services. For HMOs, basic health care services are defined and described at 13.10.21.8 NMAC. These supplemental health care services may be limited as to time and cost.

**B. Additional fees:** A health care insurer may determine the level and scope of any supplemental health care service provided to its covered persons in a MHCP, whether or not the service is listed in this section, and may charge additional fees for those services.

**C.** The following are not required as basic health care services, but may be provided as supplemental health care services:

(1) consultation with and referral to physicians and other health care professionals such as dentists, nurses, podiatrists, optometrists, chiropractic physicians, physician assistants, clinical psychologists, social workers, pharmacists, nutritionists, occupational therapists, physical therapists, certified nurse midwives and other professionals engaged in the delivery of health services who are licensed to practice, are certified, and are practicing under authority of the MHCP, a medical group, an independent practice association or other authority authorized by applicable New Mexico law when treatment exceeds that included in basic health care services;

(2) corrective appliances, prosthetics, and artificial aids, including hearing aids, except as required in Section 13-7-10 NMSA 1978;

(3) mental health services, including, but not limited to, outpatient evaluative, crisis intervention and short term therapeutic mental health services and inpatient psychiatric care, except as required in Section 59A-23E 18 NMSA 1978;

(4) cosmetic surgery;

(5) pharmaceuticals and other medicines prescribed on an outpatient basis by licensed physicians nurse practitioners, physician assistants or certified nurse-mid-

wives to treat or prevent illness;

(6) ambulance services, other than for emergencies or otherwise deemed medically necessary;

(7) care for military service-connected disabilities for which a covered person is legally entitled to services and for which facilities are reasonably available to the covered person;

(8) care for conditions that state or local law requires be treated in a public facility;

(9) dental services not required as a basic health care service;

(10) vision care;

(11) personal or comfort items;

(12) long-term physical therapy and rehabilitation;

(13) durable medical equipment for home use, such as wheel chairs, surgical beds, respirators, and dialysis machines;

(14) diagnosis, medical treatment and referral services for the abuse of or addiction to alcohol or drugs, including inpatient substance abuse care in a facility licensed to provide residential alcohol and drug abuse services, except as required by Section 59A-23-6 NMSA 1978;

(15) home health care services which, if offered, at a minimum shall comply with Section 59A-22-36 and Section 59A-46-40 NMSA 1978;

(16) skilled or intermediate nursing care;

(17) custodial or domiciliary care;

(18) hearing care, except as required for children by Section 59A-22-34.5 NMSA 1978;

(19) experimental or investigational medical, surgical, other health care procedures or treatments, including drugs, unless approved as a basic health care service treatment or procedure by the health care insurer. As used in this section, "experimental" or "investigational" as related to drugs, devices, medical treatments or procedures means:

(a) the drug or device cannot be lawfully marketed without approval of the FDA and approval for marketing has not been given at the time the drug or device is furnished;

(b) reliable evidence shows that the drug, device or medical treatment or procedure is the subject of on-going phase I, II, or III clinical trials or under study to determine its maximum tolerated dose, its toxicity, its safety, its efficacy, or its efficacy as compared with the standard means of treatment or diagnosis;

(c) reliable evidence shows that the consensus among experts regarding the drug, device, or medical treatment or procedure is that further studies or clinical trials are necessary to determine its maximum tolerated dose, toxicity, safety, or efficacy as

compared with the standard means of treatment or diagnosis; or

(d) except as required by 13.10.13.10 NMAC, the drug or device is used for a purpose that is not approved by the FDA;

(e) for the purposes of this section, "reliable evidence" shall mean only published reports and articles in the authoritative medical and scientific literature listed in Subsection A of 13.10.13.10 NMAC; the written protocol or protocols used by the treating facility or the protocol(s) of another facility studying substantially the same drug, device or medical treatment or procedure; or the written informed consent used by the treating facility or by another facility studying substantially the same drug, device or medical treatment or procedure;

(f) as used in this section, "experimental" or "investigational" does not mean cancer chemotherapy or other types of therapy that are the subjects of on-going phase IV clinical trials.

[13.10.13.9 NMAC - Rp, 13.10.13.10 NMAC, 09/01/2009]

### **13.10.13.10 PRESCRIPTION DRUGS:**

**A.** No MHCP that provides coverage for prescription drugs as a basic or supplemental health care service or pursuant to inpatient, urgent, or emergency medical services shall limit or exclude coverage for any drug approved by the FDA on the basis that the drug has not been approved by the FDA for the treatment of the particular indication for which the drug has been prescribed, provided that:

(1) the drug has been recognized as safe and effective for the treatment of that indication in one or more of the standard medical reference compendia, including the "AMA drug evaluations," the "American hospital formulary service drug information," and "drug information for the healthcare provider;" or

(2) as provided for cancer clinical trials, pursuant to Section 59A-22-43 NMSA.

**B.** Coverage of a drug includes medically necessary services associated with the administration of the drug provided that such services would not be otherwise excluded from coverage.

**C.** Coverage of a drug includes coverage for prescription contraceptive drugs or devices, pursuant to Sections 59A-22-42 and 59A-46-44 NMSA 1978.

**D.** Nothing in this section requires:

(1) coverage for any drug if the FDA has determined its use to be contraindicated for the treatment of the particular indication for which the drug has been

prescribed;

(2) coverage for experimental or investigational drugs not approved for any indication by the FDA; and

(3) reimbursement or coverage for any drug not included on the drug formulary or list of covered drugs specified in a managed health care plan, contract, or policy, subject to the exceptions listed in Subsection D of 13.10.13.10 NMAC.

**E.** Every MHCP must allow covered persons to obtain drugs not on the formulary as though the drug were included in the formulary, based on the type of drug, how the drug is administered, and the medically necessary services, when the treatment for which the drug is prescribed is a covered benefit, and when the participating provider in consultation with the MHCP determines that:

(1) the formulary drug has been or is reasonably expected to be less effective for the covered person; or

(2) the formulary drug has caused or is reasonably expected to cause adverse reactions in the covered person.

[13.10.13.10 NMAC - Rp, 13.10.13.12 NMAC, 09/01/2009]

### **13.10.13.11 COORDINATION OF BENEFITS:**

**A.** A health care insurer may or may not coordinate benefits in some or all of its group and individual managed health care plan contracts. However, a health care insurer which does coordinate benefits may do so only pursuant to the provisions in its plan contracts, all of which shall be fair, reasonable, and consistent with the objectives of this rule and shall comply with all applicable rules and regulations governing coordination of benefits.

**B.** A provision regarding coordination of benefits shall be presumed to be unfair and unreasonable if it:

(1) may relieve the health care insurer of a duty otherwise arising from a contract to deliver any health care service to any covered person in need of such service because the covered person may be or is entitled to coverage of the service by another health carrier; or

(2) results in any covered person who cooperates with such provision having greater personal liability for any particular health care service furnished by or through the health care insurer or received in reliance on the health care insurer than such person would have had in the absence of any other health carrier.

[13.10.13.11 NMAC - Rp, 13.10.13.24 NMAC, 09/01/2009]

### **13.10.13.12 COPAYMENTS:**

**A.** All copayments required of covered persons by the health

care insurer or managed health care plan for the provision of health care services shall be reasonable and shall include any applicable state and federal taxes.

**B.** Copayment requirements, including any variations in contribution requirements based on the type of health care service rendered or provider used, shall be disclosed to covered persons in MHCP contracts, enrollment materials, and in the evidence of coverage.

**C.** No female covered person shall be assessed a higher copayment, over and above the copayment required of all covered persons to be seen by a primary care physician, for choosing a women's health care provider as her primary care physician.

[13.10.13.12 NMAC - Rp, 13.10.13.27 NMAC, 09/01/2009]

### **13.10.13.13 CONSUMER ASSISTANCE:**

**A.** Consumer assistance office: Each MHCP shall establish and adequately staff a consumer assistance office. Those MHCPs currently doing business in New Mexico shall submit to the superintendent for approval a plan of how the MHCP's consumer assistance office will be organized and established. At a minimum, the plan shall address:

(1) the staffing of the consumer assistance office, including whether the planned hours and level of staffing are sufficient for the numbers and types of covered persons served by the MHCP;

(2) the MHCP's arrangements to meet the needs of covered persons with special needs;

(3) how the consumer assistance staff will be trained;

(4) how the independence of staff assigned to assist consumers is assured; and

(5) whether staff will have the authority to assist consumers in filing and pursuing a grievance or appeal.

**B.** A MHCP new to this state shall submit a plan for establishing a consumer assistance office to the superintendent as part of its application for licensure.

**C.** The superintendent shall approve or reject a plan submitted by a MHCP within 45 days after the plan is submitted to the superintendent. If the superintendent rejects a plan submitted by a MHCP, the superintendent shall state in writing in a letter addressed to the MHCP the specific grounds for rejection.

**D.** Consumer advisory board: Each MHCP shall establish and maintain a consumer advisory board.

(1) The consumer advisory board shall meet at least quarterly and shall advise the MHCP about the MHCP's general operations from the perspective of the enrollee

as a consumer of health care.

(2) The consumer advisory board shall review the operations of and be advisory to the MHCP's consumer assistance office.

(3) All members of the consumer advisory board shall be current enrollees of the MHCP, employees of groups which subscribe to the MHCP, or be representatives of consumer organizations which represent the interests of health care consumers. No member of the consumer advisory board shall be an employee of the MHCP, nor shall the board members' immediate family be employees of the MHCP.

(4) The MHCP shall implement procedures whereby, when specific recommendations are made by the advisory board, representatives of the MHCP with responsibility for the substantive areas addressed in the recommendation will consider the matters raised in the recommendation and timely respond to the advisory board.

(5) The MHCP shall inform enrollees of the advisory board's existence and role in the operation of the MHCP in the evidence of coverage.

[13.10.13.13 NMAC - Rp, 13.10.13.30 NMAC, 09/01/2009]

**13.10.13.14 PENALTIES:** In addition to any applicable suspension, revocation or refusal to continue any certificate of authority or license under the Insurance Code, a penalty for any material violation of this rule may be imposed against a health care insurer by the superintendent in accordance with Sections 59A-1-18, 59A-46-25, 59A-57-11 NMSA 1978.

[13.10.13.14 NMAC - Rp, 13.10.13.32 NMAC, 09/01/2009]

**13.10.13.15 SEVERABILITY:** If any section of this rule, or the applicability of any section to any person or circumstance, is for any reason held invalid by a court of competent jurisdiction, the remainder of the rule, or the applicability of such provisions to other persons or circumstances, shall not be affected.

[13.10.13.15 NMAC - Rp, 13.10.13.33 NMAC, 09/01/2009]

### **HISTORY OF 13.10.13 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records-state records center and archives:

SCC-85-10, Insurance Department Regulation 46, Health Maintenance Organizations, filed 10/10/1985.

### **History of Repealed Material:**

13.10.13 NMAC, Managed Health Care (filed 4/13/2007) repealed 09/01/2009.

### **Other History:**

Those applicable portions of SCC-85-10, Insurance Department Regulation 46, Health Maintenance Organizations (filed 10/10/1985) were replaced by 13 NMAC 10.13, Managed Health Care, effective 3/16/1997.

13 NMAC 10.13, Managed Health Care (filed 2/14/1997) was renumbered, reformatted, amended and replaced by 13.10.13 NMAC, Managed Health Care, effective 4/30/2007.

13.10.13 NMAC, Managed Health Care (filed 4/13/2007) was replaced by 13.10.13 NMAC, Managed Health Care - Benefits, effective 09/01/2009.

## **NEW MEXICO PUBLIC REGULATION COMMISSION INSURANCE DIVISION**

### **TITLE 13 INSURANCE CHAPTER 10 HEALTH INSURANCE**

### **PART 21 HEALTH CARE SERVICES AND PROVIDER CREDENTIALING REQUIRED FOR HMOs**

**13.10.21.1 ISSUING AGENCY:** Public Regulation Commission, Insurance Division.

[13.10.21.1 NMAC - N, 09/01/2009]

### **13.10.21.2 SCOPE:**

**A.** Applicability. This rule applies to all health care insurers that provide, offer, or administer health care coverage pursuant to the health maintenance organization (HMO) laws of the state of New Mexico:

**B.** Exemptions. This rule does not apply to policies or certificates that provide coverage for:

(1) only short-term travel, accident-only, student health, specified disease, or other limited benefits; or

(2) credit, disability income, hospital indemnity, long-term care insurance, vision care or any other limited supplemental benefit, including a stand-alone dental benefit plan, whether indemnity, PPO, or non-profit plan.

**C.** Conflicts. For purposes of this rule, if any provision in this rule conflicts with any provision in 13.10.13 NMAC, Managed Health Care, 13.10.16 NMAC, Provider Grievances, or 13.10.17 NMAC Grievance Procedures Rule, the provisions in this rule shall apply.

[13.10.21.2 NMAC - N, 09/01/2009]

**13.10.21.3 STATUTORY AUTHORITY:** Sections 59A-2-8, 59A-2-9, 59A-4-4, 59A-4-5, 59A-15-16, 59A-16-13.1, 59A-22-41.1, 59A-22-43, 59A-46-2,

59A-46-4, 59A-46-7, 59A-46-23, 59A-46-30, 59A-46-35, 59A-46-36, 59A-46-38.2, 59A-46-38.4, 59A-46-38.5, 59A-46-39, 59A-46-41, 59A-46-41.1, 59A-46-42, 59A-46-42.2, 59A-46-43, 59A-46-43.2, 59A-46-44, 59A-46-45, 59A-46-46, 59A-46-48, 59A-46-49, 59A-57-4, and 59A-57-6 NMSA 1978.

[13.10.21.3 NMAC - N, 09/01/2009]

**13.10.21.4 D U R A T I O N :** Permanent.

[13.10.21.4 NMAC - N, 09/01/2009]

**13.10.21.5 EFFECTIVE DATE:** September 1, 2009, unless a later date is cited at the end of a section.

[13.10.21.5 NMAC - N, 09/01/2009]

**13.10.21.6 OBJECTIVE:** The purpose of this rule is to clarify what is meant by a basic health care plan, for the purposes of certification of a health care plan as a health maintenance organization (HMO), pursuant to the requirements of Section 59A-46-2 NMSA 1978.

[13.10.21.6 NMAC - N, 09/01/2009]

**13.10.21.7 DEFINITIONS:** In addition to the following, this rule is subject to the definitions found in 13.10.17 NMAC and to the definitions in 59A-46-2 NMSA 1978 and 59A-46-7 NMSA 1978.

**A. "Credentialing"** means the process of obtaining and verifying information about a health professional and evaluating that health professional when that health professional applies to become a participating provider with an HMO.

**B. "Credentialing intermediary"** means a person to whom an HMO has delegated credentialing or re-credentialing authority and responsibility.

**C. "Health maintenance organization (HMO)"** means any person who undertakes to provide or arrange for the delivery of basic health care services to covered persons on a prepaid basis, except for covered person responsibility for copayments or deductibles.

**D. "Health care professional"** means physicians, dentists, registered nurses, licensed practical nurses, podiatrists, optometrists, chiropractic physicians, physician assistants, nurse anesthetists, certified nurse practitioners, certified nurse-midwives, registered lay midwives, clinical psychologists, social workers, pharmacists, nutritionists, occupational therapists, physical therapists, doctors of oriental medicine, and other professionals engaged in the delivery of health care services who are licensed to practice in New Mexico, are certified, and are practicing under the authority of an HMO.

**E. "Primary care practitioner"** means physicians, other health care professionals such as doctors of oriental medicine, chiropractic physicians, nurse practitioners, physician assistants, or certified nurse midwives who may provide primary care, provided that the health care practitioner: 1) is acting within his or her scope of practice as defined under the relevant state licensing law; 2) meets the HMO eligibility criteria for health care practitioners who provide primary care; and 3) agrees to participate and to comply with the health care insurers or HMO care coordination and referral policies.

**F. "Quality assurance plan"** means the internal ongoing quality assurance program of an HMO to monitor and evaluate the HMO's health care services, including its system for credentialing health professionals applying to become a participating provider with an HMO or otherwise providing services to the HMO's covered persons.

**G. "Uniform credentialing forms"** means the version current at the time of the application or re-application process of forms used either by the hospital services corporation (HSC) or council for affordable quality healthcare universal credentialing datasource (CAQH), including any revisions thereto and as developed and updated from time to time, and including electronic versions of such forms.

**H. "Women's health care practitioner"** means obstetricians-gynecologists, family practitioners, general practitioners, certified nurse midwives, other physicians specializing in women's health, and physician assistants or nurse practitioners specializing in women's health. An HMO may also make registered lay midwives available to female covered persons for prenatal care and delivery. The HMO may assure that those providers who seek to provide self-referral women's services who are not obstetricians-gynecologists or who are not practicing under the supervision of obstetricians-gynecologists have the requisite background, training, and experience to properly examine and treat self-referred female covered persons.

**I. "Written notification"** as between the MHCP and providers means a writing delivered through standard U.S. postal service, or through other written means if agreed upon by the parties as effective alternative methods of communication for the intended purpose, including but not limited to personal delivery service, facsimile delivery, or electronic mail.

[13.10.21.7 NMAC - N, 09/01/2009]

**13.10.21.8 HMO BASIC HEALTH CARE SERVICES:** A health care insurer offering basic health care serv-

ices through an HMO shall provide or shall arrange for the following medically necessary basic health care services for its covered persons.

**A.** An HMO may not provide or arrange to provide basic health care services if such services:

(1) do not include all the basic health services set forth in this section; or

(2) are limited as to time or cost except as prescribed in this section, subject to lifetime policy maximums.

**B. Outpatient medical services:** Outpatient medical services shall include those hospital services that can reasonably be provided on an ambulatory basis, and those preventive, medically necessary, and diagnostic and treatment procedures that are prescribed by a covered person's primary care or attending health care professional. Such services may be provided at a hospital, a physician's office, any other appropriate licensed facility, or at any other appropriate facility if the health care professional delivering the services is licensed to practice, is certified, and is practicing under authority of the health care insurer or HMO, a medical group, an independent practice association or other authority authorized by applicable New Mexico law.

**C. Inpatient hospital services:** Inpatient hospital services shall include, but not be limited to, semi-private room accommodations, general nursing care, meals and special diets or parenteral nutrition when medically necessary, physician and surgeon services, use of all hospital facilities when use of such facilities is determined to be medically necessary by the covered person's primary care practitioner or treating health care professional, pharmaceuticals and other medications, anesthesia and oxygen services, special duty nursing when medically necessary, radiation therapy, inhalation therapy, and administration of whole blood and blood components when medically necessary.

**D. Emergency and urgent care services:** Emergency and urgent care services shall include:

(1) acute medical care that is available twenty-four hours per day, seven days per week, so as not to jeopardize a covered person's health status if such services were not received immediately; such medical care shall include ambulance or other emergency transportation; in addition, acute medical care shall include, where appropriate, transportation and indemnity payments or service agreements for out-of-service area or out-of-network coverage in cases where the covered person cannot reasonably access in-network services or facilities; and

(2) coverage for trauma services

at any designated level I, level II, or other appropriately designated trauma center according to established emergency medical services triage and transportation protocols; coverage for trauma services and all other emergency services shall continue at least until the covered person is medically stable, does not require critical care, and can be safely transferred to another facility based on the judgment of the attending physician or health care professional in consultation with the HMO; if the health care insurer or HMO requests transfer to a hospital participating in its provider network, the patient must be stabilized and the transfer effected in accordance with federal law. See 42 CFR 489.20 and 42 CFR 489.24;

(3) reimbursement for emergency care and emergency transportation shall not be denied by the health care insurer or HMO when the covered person, who in good faith and who possesses average knowledge of health and medicine, seeks medical care for what reasonably appears to the covered person to be an acute condition that requires immediate medical attention, even if the patient's condition is subsequently determined to be non-emergent;

(4) in determining whether care is reimbursable as emergency care, the MHCP shall take the following factors into consideration:

(a) a reasonable person's belief that the circumstances required immediate medical care that could not wait until the next working day or next available appointment;

(b) the time of day the care was provided;

(c) the presenting symptoms; and

(d) any circumstances which precluded use of the HMO's established procedures for obtaining emergency care;

(5) reimbursement for emergency care shall not be denied in those instances when the covered person is referred to emergency care by the covered person's primary care practitioner or by the HMO;

(6) no prior authorization shall be required for emergency care. In addition, appropriate out-of-network emergency care shall be provided to a covered person without additional cost; whether out-of-network emergency care is appropriate shall be determined by the standards of Paragraph (4) of Subsection D of 13.10.21.8 NMAC.

**E. Short-term rehabilitation services and physical therapy:** Short-term rehabilitation services and physical therapy shall be provided in those instances where the covered person's primary care practitioner or other appropriate treating health care professional determines that such services and therapy can be expected to result in the significant improvement of a covered person's physical condition within a period of two months. Such services may

be extended beyond the two month period upon recommendation by the primary care practitioner in consultation with the HMO.

**F. Diagnostic services:** Diagnostic services shall include diagnostic laboratory services, diagnostic and therapeutic radiological services, and other services in support of comprehensive basic health care services.

**G. Other mandated benefits:** Any and all mandated benefits pursuant to federal or state law that apply to HMOs which become effective following promulgation of this rule, and the following:

(1) dental services:

(a) when determined to be medically necessary by a participating provider in connection with the following: accidental injury to sound natural teeth, the jaw bones, or surrounding tissues; the correction of a non-dental physiological condition which has resulted in a severe functional impairment; or the treatment for tumors and cysts requiring pathological examination of the jaws, cheeks, lips, tongue, roof and floor of the mouth;

(b) general anesthesia and hospitalization, pursuant to Section 59A-46-48 NMSA 1978;

(2) reconstructive surgery: surgery from which an improvement in physiologic function could reasonably be expected, when ordered by a covered person's primary care practitioner or treating health care professional and performed for the correction of functional disorders resulting from accidental injury or from congenital defects or disease;

(3) diabetes care: for insulin-using individuals, non-insulin-using individuals and those with elevated blood glucose levels induced by pregnancy, coverage pursuant to Section 59A-46-43 NMSA 1978;

(4) medical diets: for genetic inborn errors of metabolism, medical diets pursuant to Section 59A-46-43.2 NMSA 1978;

(5) craniomandibular and temporomandibular joint disorders: for surgical and nonsurgical treatment of temporomandibular joint disorders and craniomandibular disorders, subject to the same conditions, limitations, prior review and referral procedures as are applicable to treatment of any other joint in the body, pursuant to Section 59A-16-13.1 NMSA 1978;

(6) cancer clinical trials: routine patient care costs incurred as a result of the patient's participation in a phase II, III or IV cancer clinical trial, pursuant to Section 59A-22-43 NMSA.

**H. Children's health care:** Children's health care shall include, but not be limited to:

(1) childhood immunizations,

pursuant to Section 59A-46-38.2 NMSA 1978;

(2) vision and hearing testing for persons through age 17 to determine the need for vision and hearing corrections;

(3) well-child care from birth in accordance with recommendations of the American academy of pediatrics;

(4) prenatal care, including medically necessary nutritional supplements prescribed by the expectant mother's obstetrician-gynecologist, or other health care professional from whom the expectant mother is receiving prenatal care, if maternity coverage is provided by the HMO;

(5) availability of educational materials or consultation from providers to discuss lifestyle behaviors that promote health and well-being including, but not limited to, the consequences of tobacco use, nutrition and diet recommendations, exercise plans, and, as deemed appropriate by the primary care practitioner or as requested by the parents or legal guardian, educational information on alcohol and substance abuse, sexually-transmitted diseases, and contraception;

(6) hearing aid coverage, pursuant to Section 59A-46-38.5 NMSA 1978; and

(7) circumcision for newborn males, pursuant to Section 59A-46-38.4 NMSA 1978.

**I. Women's health care:** Women's health care coverage shall be included in all HMOs, and shall include, at a minimum, the following:

(1) mammograms, pursuant to Section 59A-46-41 NMSA 1978;

(2) cytologic and human papillomavirus screening, pursuant to Section 59A-46-42 NMSA 1978;

(3) osteoporosis services, defined as diagnosis, treatment, and appropriate management of osteoporosis when such services are determined to be medically necessary by a covered person's primary care practitioner in consultation with the HMO;

(4) alpha-fetoprotein IV screening, pursuant to Section 59A-46-46 NMSA 1978;

(5) limitation on visits: an HMO may limit the number of visits to designated women's health care providers by female covered persons, provided that it allows:

(a) at least one routine annual well-visit per female covered person; and

(b) follow-up treatment within sixty days following a well-visit for treatment of a condition diagnosed during a well-visit.

**J. HMOs providing maternity coverage:** If an HMO provides maternity benefits, the coverage shall include:

(1) medically necessary prenatal, intrapartum, and perinatal care;

(2) smoking cessation treatment, pursuant to Section 59A-46-45 NMSA 1978; and 13.10.18.8 NMAC;

(3) maternity transport, pursuant to Section 59A-46-39 NMSA 1978; and

(4) minimum hospital stays and postpartum care, pursuant to federal law and 13.10.2 NMAC.

**K. HMOs providing mastectomy coverage:** Each HMO which provides mastectomy coverage shall also cover mammography for screening and diagnostic purposes, prosthetic devices, and reconstructive surgery, as mandated by federal or state laws.

**L. Direct access to women's health care practitioners:** A female covered person whose primary care practitioner is not a women's health care practitioner shall have direct and timely access to an in-network, participating women's health care practitioner for women's health care coverage, as defined at Subsection I of 13.10.21.7 NMAC. Direct access shall also be offered by an HMO that offers additional obstetric and gynecological services beyond those required under this rule, or that offers maternity coverage.

(1) **Disclosure.** Each managed health care plan shall disclose to covered persons in clear, accurate language, the right of female covered persons age 13 and over of direct access to an in-network, participating women's health care practitioner of her choice. The information shall include, at a minimum, any specific women's health care services excluded from coverage, and shall include reference to the HMO's right to limit coverage to medically necessary and appropriate women's health care services.

(2) **Co-payments.** No HMO shall impose additional copayments, co-insurance, or deductibles for female covered persons' direct access to in-network, participating women's health care providers when acting as a PCP.

(3) **Choice to become a PCP.** Nothing in this section requires any women's health care provider to enter into a contract with an HMO whereby he or she must act as a primary care practitioner (PCP) rather than as a referral specialist.

(4) **Criteria for PCP acceptance.** An HMO's criteria for accepting women's health care providers as PCPs must be the same as the criteria utilized by the HMO for other specialists seeking to act as PCPs.

(5) **Procedure for direct access.** Any female covered person age 13 or older shall have direct access to women's health care by:

(a) including qualified women's health care providers as primary care practitioners (PCPs), which means that the women's health care provider has met the

HMO's general eligibility criteria for a specialist seeking PCP status, and agrees with the HMO to comply with its coordination and referral policies;

(b) allowing female covered persons to select a qualified women's health care practitioner as their PCP; and

(c) allowing female covered persons who have not chosen a women's health care provider as their PCP to self-refer, without requiring prior authorization or pre-approval from the plan or their PCP, to an in-network, participating women's health care practitioner for women's health care and, if offered as a covered benefit under the plan, for maternity care and additional obstetric and gynecological services, subject to the following:

(i) self-referrals shall be limited to those services defined by the published recommendations of the American college of obstetrics and gynecology;

(ii) the HMO may require the women's health care practitioner to discuss with the female covered person's PCP any services or treatment the women's health care practitioner recommends for the covered person.

(iii) the women's health care practitioner must comply with the HMO's coordination and referral policies.

**M. Health promotion program:** Each HMO that provides coverage for comprehensive basic health care services in this state shall provide a preventative health services program and shall make the following services available to a covered person only in those instances where the covered person's primary care practitioner determines that such services are medically necessary:

(1) periodic tests to determine blood hemoglobin, blood pressure, blood glucose level, and blood cholesterol level or, alternatively, a fractionated cholesterol level including a low-density lipoprotein (LDL) level and a high-density lipoprotein (HDL) level, in accordance with recommendations of the U.S. preventive services task force;

(2) periodic glaucoma eye tests for all persons 35 years of age or older, in accordance with recommendations of the U.S. preventive services task force;

(3) periodic stool examinations for the presence of blood for all persons 50 years of age or older, in accordance with recommendations of the U.S. preventive services task force;

(4) colorectal cancer screening, in accordance with the recommendations of the U.S. preventive services task force, pursuant to Section 59A-46-48 NMSA 1978;

(5) immunizations for all adults, as recommended by the CDC advisory committee for immunization practice;

(6) for all persons 20 years of age or older and as deemed medically necessary by a primary care practitioner, an annual consultation with a health professional to discuss lifestyle behaviors that promote health and well-being including, but not limited to, smoking control, nutrition and diet recommendations, exercise plans, lower back protection, immunization practices, breast self-examination, testicular self-examination, use of seat-belts in motor vehicles, and other preventative health care practices;

(7) other preventative health services shall include, under a covered person's primary care practitioner's supervision:

(a) reasonable physical and behavioral health appraisal examinations and laboratory and radiological tests on a periodic basis when medically necessary;

(b) voluntary family planning services; and

(c) diagnosis and medically indicated treatments for physical conditions causing infertility except as required to reverse prior voluntary sterilization surgery. [13.10.21.8 NMAC - Rp, 13.10.13.9 NMAC, 09/01/2009]

### 13.10.21.9 UNIFORM PROVIDER CREDENTIALING FOR HEALTH MAINTENANCE ORGANIZATIONS (HMOs):

**A. Delegation of credential verification activities:** Whenever an HMO delegates credential verification activities to a contracting entity, whether a credentialing intermediary or subcontractor, the HMO shall review and approve the contracting entity's credential verification program before contracting and shall require that the entity comply with all applicable requirements of this regulation. The HMO shall monitor the contracting entity's credential certification activities. The HMO shall implement oversight mechanisms, including (a) reviewing the contracting entity's credential verification plans, policies, procedures, forms, and adherence to verification procedures, (b) requiring the contract entity to submit an updated list of health professionals no less frequently than quarterly, and (c) conducting an evaluation of the contracting entity's credential verification program at least every two years. The HMO's monitoring activities should at least meet the verification procedures and standards as defined by the national committee for quality assurance (NCQA).

**B. Credential verification program:** In order to assure accessibility and availability of services, each HMO shall establish a program in accordance with this regulation that verifies that its network providers are credentialed before the HMO lists those providers in the

HMO's provider directory, handbooks, or other marketing or member materials. The credential verification program established by each HMO shall provide for an identifiable person or persons to be responsible for all credential verification activities, which person or persons shall be capable of carrying out that responsibility.

**C. Written credential verification plan:** Each HMO shall develop and adopt a written credentialing plan that contains policies and procedures to support the credentialing verification program. The plan shall include the purpose, goals and objectives of the credential verification program; and the roles of those persons responsible for the credential verification program.

**D. Use of uniform credentialing forms required:** Beginning September 1, 2009, an HMO shall not use any health professional credentialing application form other than uniform HSC or CAQH credentialing or re-credentialing forms. Should the superintendent determine that these forms no longer represent industry standards, the superintendent will issue a bulletin advising of alternative forms to be used to satisfy this requirement. The uniform credentialing or re-credentialing forms may be used in electronic or paper format, as determined by the HMO. An HMO shall not require an applicant to submit information not required by the uniform credentialing or re-credentialing forms. An exception is made for health professionals who: (a) are subject to credentialing under the HMO's internal policy; (b) practice outside of New Mexico; and (c) prefer to use the credentialing forms required by their respective states. In such circumstances, the HMO and its delegated entity, if any, may accept those forms.

**E. Verification of credentials:** Each HMO shall maintain a process to assess and verify the qualifications of health professionals applying to become participating providers with the HMO within 45 calendar days of receipt of a completed uniform credentialing form. Each HMO's process for verifying credentials shall take into account and make allowance for the time required to request and obtain primary source verifications and other information that must be obtained from third parties in order to authenticate the applicant's credentials, and shall make allowance for the scheduling of a final decision by a credentialing committee, if the HMO's credentialing program requires such review.

(1) Within 45 calendar days after receipt of a completed application and all supporting documents, the HMO shall assess and verify the applicant's qualifications and notify the applicant of its decision. If, by the 45th calendar day after receipt of

the application, the HMO has not received all of the information or verifications it requires from third parties, or date-sensitive information has expired, the HMO shall issue a written notification, through standard mail, fax, electronic mail or other agreed-upon writing, to the applicant either closing the application and detailing the HMO's attempts to obtain the information or verification, or pending the application and detailing the HMO's attempts to obtain the information and verifications. If the application is held, the HMO shall inform the applicant of the length of time the application will be pending. The notification shall include the name, address and telephone number of a credentialing staff person who will serve as a contact person for the applicant.

(2) Within 10 working days after receipt of an incomplete application, the HMO shall notify the applicant in writing of all missing or incomplete information or supporting documents.

(a) The notice to the applicant shall include a complete and detailed description of all of the missing or incomplete information or documents that must be submitted in order for review of the application to continue. The notification shall include the name, address, and telephone number of a credentialing staff person who will serve as the contact person for the applicant.

(b) Within 45 calendar days after receipt of all of the missing or incomplete information or documents, the HMO shall assess and verify the applicant's qualifications and notify the applicant of its decision, in accordance with Subsection E of this section.

(c) If the missing information or documents have not been received within 45 calendar days after initial receipt of the application or if date-sensitive information has expired, the HMO shall close the application or delay final review, pending receipt of the necessary information. The HMO shall provide written notification to the applicant of the closed or pending status of the application and, where applicable, the length of time the application will be pending. The notification shall include the name, address, and telephone number of a credentialing staff person who will serve as the contact person for the applicant.

(3) If an HMO elects not to include an applicant in its network, for reasons that do not require review of the application, the HMO shall provide written notice to the applicant of that determination within 10 working days after receipt of the application.

(4) Nothing in this regulation shall require an HMO to include a health professional in its network or prevent an HMO from conducting a complete review

and verification of an applicant's credentials, including an assessment of the applicant's office, before agreeing to include the applicant in its network.

(5) Nothing in this regulation shall be deemed to supersede any provision of a contract between an HMO and a health professional participating as a provider in the HMO's network.

(6) HMOs must notify a provider at least 120 days in advance of all items necessary to complete recredentialing. The HMO must complete the recredentialing process within 45 days of receipt of the provider's complete recredentialing application and all supporting documents.

**F. Health professional files:** Each HMO shall maintain centralized files, either paper or electronic, on each health professional making application to be a participating provider in the HMO's network. Each file shall include documentation of compliance with this regulation.

**G. Records and examinations:** Each HMO shall maintain all records related to credential verification in a manner that the HMO deems to be adequate for a period of six years and shall make such records available to the superintendent on request.

**H. Accreditation by nationally recognized accrediting entity:** Nothing in this section shall prohibit an HMO from submitting accreditation by a nationally recognized accrediting entity as evidence of compliance with the requirements of this section. In those instances where an HMO seeks to meet the requirements of this section through accreditation by a private accrediting entity, the HMO shall submit to the division the following information: 1) current standards of the private accrediting entity in order to demonstrate that the entity's standards meet or exceed the requirements of this rule; 2) documentation from the private accrediting entity showing that the HMO has been accredited by the entity; and 3) a summary of the data and information that was presented to the private accrediting entity by the HMO and upon which accreditation of the HMO was based. An HMO accredited by the private accrediting entity that has submitted all of the requisite information to the division may then be deemed by the superintendent to have met the requirements of the relevant provisions of this section where comparable standards exist, provided that the private accrediting entity from which the HMO obtained accreditation is recognized and approved by the superintendent.

[13.10.21.9 NMAC - N, 09/01/2009]

**13.10.21.10 PENALTIES:** In addition to any applicable suspension, revocation or refusal to continue any certificate of

authority or license under the Insurance Code, a penalty for any material violation of this rule may be imposed against a health care insurer by the superintendent in accordance with Sections 59A-1-18, 59A-46-25, and 59A-57-11 NMSA 1978.  
[13.10.21.10 NMAC - Rp, 13.10.13.32 NMAC, 09/01/2009]

**13.10.21.11 SEVERABILITY:** If any section of this rule, or the applicability of any section to any person or circumstance, is for any reason held invalid by a court of competent jurisdiction, the remainder of the rule, or the applicability of such provisions to other persons or circumstances, shall not be affected.  
[13.10.21.11 NMAC - Rp, 13.10.13.33 NMAC, 09/01/2009]

**HISTORY OF 13.10.21 NMAC:**  
**Pre-NMAC History:** none.

**History of Repealed Material:**  
[RESERVED]

**NMAC History:**  
Only those applicable portions of 13.10.13 NMAC, Managed Health Care (filed 4/13/2007) were renumbered, amended, and replaced by 13.10.21 NMAC, Health Care Services and Provider Credentialing Required for HMOs, effective 09/01/2009.

**NEW MEXICO PUBLIC  
REGULATION  
COMMISSION  
INSURANCE DIVISION**

**TITLE 13 INSURANCE  
CHAPTER 10 HEALTH INSURANCE  
PART 22 MANAGED  
HEALTH CARE PLAN COMPLIANCE**

**13.10.22.1 ISSUING AGENCY:**  
New Mexico Public Regulation Commission, Division of Insurance, Post Office Box 1269, Santa Fe, New Mexico 87504-1269.  
[13.10.22.1 NMAC - Rp, 13.10.13.1 NMAC, 09/01/2009]

**13.10.22.2 SCOPE:** This rule applies to health care insurers that are required to obtain a certificate of authority or licensure in this state and which provide, offer, or administer managed health care plans. This rule relates to and should be read in conjunction with 13.10.13, 13.10.16, 13.10.17, 13.10.21 and 13.10.23 NMAC.  
[13.10.22.2 NMAC - Rp, 13.10.13.2 NMAC, 09/01/2009]

**13.10.22.3 STATUTORY**

**AUTHORITY:** Sections 59A-1-18, 59A-2-8, 59A-2-9, 59A-4-4, 59A-4-5, 59A-15-16, 59A-16-12, 59A-16-12.1, 59A-16-13, 59A-16-22, 59A-18-17, 59A-18-27.1, 59A-22-32, 59A-22-32.1, 59A-22A-4, 59A-22A-5, 59A-23-4, 59A-44-34, 59A-44-41, 59A-46-7, 59A-46-9, 59A-46-10, 59A-46-11, 59A-46-23, 59A-46-25, 59A-46-27, 59A-46-30, 59A-46-35, 59A-46-36, 59A-47-27, 59A-47-29, 59A-47-33, 59A-57-2, 59A-57-4, 59A-57-5, 59A-57-6, 59A-57-8, and 59A-57-11 NMSA 1978.  
[13.10.22.3 NMAC - Rp, 13.10.13.3 NMAC, 09/01/2009]

**13.10.22.4 DURATION:**  
Permanent.  
[13.10.22.4 NMAC - Rp, 13.10.13.4 NMAC, 09/01/2009]

**13.10.22.5 EFFECTIVE DATE:**  
September 1, 2009, unless a later date is cited at the end of a section.  
[13.10.22.5 NMAC - Rp, 13.10.13.5 NMAC, 09/01/2009]

**13.10.22.6 OBJECTIVE:** The purpose of this rule is to ensure the availability, accessibility, and quality of health care services provided by health care insurers through managed health care plans, and to regulate trade practices in the insurance business and related businesses by prohibiting unfair or deceptive acts or practices.  
[13.10.22.6 NMAC - Rp, 13.10.13.6 NMAC, 09/01/2009]

**13.10.22.7 DEFINITIONS:** In addition to the following, this rule is subject to the definitions found in the Grievance Procedures Rule, 13.10.17 NMAC.

**A. "Claim"** means:

- (1) any request by an insured for indemnification by a MHCP; and
- (2) any direct services provided to an individual.

**B. "Direct services"** means:

- (1) services rendered to an individual by a health insurer or a health care professional, facility or other provider;
- (2) case management, disease management, health education and promotion, preventive services, quality incentive payments to providers or individuals; and
- (3) any portion of an assessment that covers services rather than administration and for which an insurer does not receive a tax credit pursuant to the Medical Insurance Pool Act or the Health Insurance Alliance Act.

**C. "Earned premium"** means paid premiums for the year plus uncollected premiums minus premiums paid in advance.

**D. "Health care facility"**

means an institution providing health care services, including a hospital or other licensed inpatient center; an ambulatory surgical or treatment center; a skilled nursing center; a residential treatment center; a home health agency; a diagnostic, laboratory or imaging center; and a rehabilitation or other therapeutic health setting.

**E. "Health care insurer"** means a person that has a valid certificate of authority in good standing under the Insurance Code to act as an insurer, health maintenance organization, nonprofit health care plan, prepaid dental plan, a multiple employer welfare arrangement or any other person providing a plan of health insurance or a managed health care plan subject to state insurance law and regulation.

**F. "Health care professional"** means a physician or other health care professional, including a pharmacist, who is licensed, certified or otherwise authorized by the state to provide health care services consistent with state law.

**G. "Health care services"** means services, supplies, and procedures for the diagnosis, prevention, treatment, cure or relief of a health condition, illness, injury, or disease, and includes, to the extent offered by the health benefits plan, physical and mental health services, including community-based mental health services, and services for developmental disability or developmental delay.

**H. "Incurred claims"** means paid-on-incurred claims for the year, plus a reserve for claims incurred but not yet paid, plus the change in any other reserve held, plus expenses incurred during the year.

**I. "Incurred health care expenses"** means health care coverage that is provided by a health maintenance organization, as defined in Article 46 of the New Mexico Insurance Code, on a service rather than reimbursement basis.

**J. "Loss Ratio"** means incurred claims or incurred health care expenses to earned premiums.

**K. "Managed health care plan (MHCP or plan)"** means a policy, contract, certificate or agreement offered or issued by a health care insurer, provider service network, or plan administrator to provide, deliver, arrange for, pay for, or reimburse the costs of health care services, except as otherwise provided in this subsection. A MHCP either requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by the health care insurer, provider service network, or plan administrator. Effective immediately, a MHCP does not include a traditional fee-for-service indemnity health

benefit plan or a health benefit plan that covers only short-term travel, accident-only, limited benefit, an indemnity, PPO dental or non-profit dental benefit plan, student health plan, or specified disease policies. For purposes of this section, "plan administrator" shall include and apply to an HMO or other health care insurer not required to be licensed under Section 59A-12A-2 NMSA 1978, but which is acting as a "plan administrator" as defined under the act." A MHCP includes a health benefits plan as defined under NMSA 1978 Section 59A-22A-3(D) as "the health insurance policy or subscriber agreement between the covered person or the policyholder and the health care insurer which defines the covered services and benefit levels available."

**L. "Premium"** means all income received from individuals and private and public payers or sources for the procurement of health coverage, including capitation payments, recoveries from third parties or other insurers, interest and administrative fees received and claim payments made by:

(1) an administrator or third party administrator pursuant to Chapter 59A, Article 12A NMSA 1978;

(2) a health maintenance organization;

(3) a nonprofit health care plan; or

(4) an insurer.

**M. "Small group health insurance market"** means plans offered to small employers pursuant to Article 23C of the New Mexico Insurance Code.

**N. "Usual, customary and reasonable rate"** means health care services, medical supplies and payment rates for health care services provided by a health care practitioner at or near the median rate paid for similar health care services within a surrounding geographic area where the charges were incurred. Surrounding geographic area may be determined by the type of service and access to that service in the geographic area.

[13.10.22.6 NMAC - Rp, 13.10.13.6 NMAC, 09/01/2009]

### 13.10.22.8 ACCESS TO HEALTH CARE SERVICES:

**A. Provider network adequacy:** Each health care insurer through its MHCP shall maintain and have available an adequate network of licensed primary care practitioners (PCPs) to provide comprehensive basic health care services to its enrolled population at all times. Those MHCPs currently doing business in New Mexico shall submit to the superintendent for approval an access plan addressing all of the criteria of this section. A MHCP new to this state shall submit a preliminary access plan to the division as part of its application for licensure. A MHCP new to this state shall file a fol-

low-up access plan with the superintendent within six months after it obtains a certificate of authority. The superintendent shall approve or reject an access plan submitted by a MHCP within 45 days after the access plan is submitted to the division. In considering whether to approve or reject an access plan, the superintendent shall determine whether the MHCP meets all of the following criteria; however, the superintendent may make reasonable exceptions to the criteria on a case by case basis when the MHCP demonstrates the need for such exceptions.

(1) Whether, in population areas of 50,000 or more residents, two PCPs are available within no more than 20 miles or 20 minutes average driving time for 90 percent of the enrolled population, or, in population areas of less than 50,000, whether two PCPs are available in any county or service area within no more than 60 miles or 60 minutes average driving time for 90 percent of the enrolled population. For remote rural areas, the superintendent shall consider on a case by case basis whether the MHCP has made sufficient PCPs available given the number of residents in the county or service area and given the community's standard of care.

(2) Whether the MHCP has a sufficient number of PCPs to meet the primary care needs of the enrolled population, using, as guidelines for calculation, the following criteria: 1) that each covered person will have four primary care visits annually, averaging a total of one hour; 2) that each PCP will see an average of four patients per hour; and 3) that one full-time equivalent PCP will be available for every 1,500 covered persons.

(3) Whether the MHCP demonstrates that the projected PCP network is sufficient to meet the primary care needs of adult, pediatric, and obstetric-gynecological patients. Each MHCP should show the adequacy of PCP availability by verifying that the PCPs committed to provide sufficient time for new patients so that projected clinic hour needs of the projected enrollment by service area are met.

(4) Whether the MHCP provides reasonable and reliable access for its covered persons to qualified health care professionals in those specialties that are covered by the MHCP. In developing its access plan, the MHCP should: 1) demonstrate that a sufficient number of licensed medical specialists are available to covered persons for specialty care when referral to such care is determined to be medically necessary by the PCP or other treating health care professional in consultation with the MHCP; and 2) attempt to provide at least one licensed medical specialist in those specialties that are generally available in the geographic area served, taking into consideration the

urban or rural nature of the service area, the geographic location of each covered person, and the type of specialty care needed by the covered person population. A MHCP shall not restrict PCPs, in consultation with the MHCP, from referring covered persons to providers outside the network, even when geographically distant from the covered person's residence, when access to such treatment by such provider is medically necessary and no other provider can provide comparable treatment in-network or on a more cost-effective basis.

(5) Whether the MHCP has contracts, or other arrangements acceptable to the superintendent, with institutional providers - so that: 1) the need for services covered by the MHCP is satisfied; 2) the medical needs of covered persons are met 24 hours per day, seven days per week; and 3) the institutional services are geographically accessible to covered persons. In its access plan, the MHCP should demonstrate that in population areas of 50,000 or more residents, at least one licensed acute care hospital providing, at a minimum, licensed medical-surgical, emergency medical, pediatric, obstetrical, and critical care services is available no greater than 30 miles or 30 minutes average driving time for 90 percent of the enrolled population within the service area, and, in population areas of less than 50,000, that the acute care hospital is available no greater than 60 miles or 60 minutes average driving time for 90 percent of the enrolled population within the service area. For remote rural areas, the superintendent shall consider on a case by case basis whether the MHCP has made at least one licensed acute care hospital available given the number of residents in the county or service area and given the community's standard of care.

(6) Whether a sufficient number of health care professionals, such as registered and licensed practical nurses, are available to covered persons to ensure the delivery of covered health care services.

(7) Whether the MHCP has made surgical facilities including acute care hospitals for major surgery, hospitals for minor surgical procedures, licensed ambulatory surgical facilities, and medicare eligible surgical practices reasonably available, given the population of the service area and the institutional facilities available in or around the service area.

(8) Whether the MHCP has a policy assuring access to tertiary and specialized services as evidenced by contract or other agreement acceptable to the superintendent. In its access plan, the MHCP should describe the geographic location of and covered persons' accessibility to the following such services:

(a) at least one hospital providing regional perinatal services, if maternity cov-

erage is offered as a health care service;

(b) a hospital offering tertiary pediatric services;

(c) a hospital offering diagnostic cardiac catheterization services;

(d) inpatient psychiatric services for adults and children, if provided as a covered health care service; and

(e) a residential substance abuse treatment center, if provided as a covered health care service.

(9) Whether the MHCP has a policy assuring access to the specialized services listed below, as evidenced by contract or other agreement acceptable to the superintendent. The MHCP should demonstrate in its access plan the geographic location of and covered persons' accessibility to the following such services:

(a) a therapeutic radiation provider;

(b) magnetic resonance imaging center;

(c) diagnostic radiology provider, including x-ray, ultrasound, and CAT scan; and

(d) a licensed renal dialysis center.

(10) Whether the MHCP has at least one licensed home health care professional available to serve each service area where 3,000 or more covered persons reside, if home health care is provided as a covered health care service.

**B. Appointment waiting times:** Each MHCP shall demonstrate that the network will meet the following criteria:

(1) emergencies shall be triaged through the PCP or by a hospital emergency room through medical screening or evaluation;

(2) urgent care shall be available within 48 hours of notification to the PCP or MHCP, or sooner as required by the medical exigencies of the case;

(3) for both emergent and urgent care, the MHCP shall ensure 7 day, 24 hour access to triage services, and that each PCP will have back-up coverage by another provider;

(4) the MHCP shall have an adequate number of PCPs with admitting privileges at one or more participating hospitals within the MHCP's service area so that necessary hospital admissions are made on a timely basis consistent with generally accepted practice parameters;

(5) routine appointments shall be scheduled as soon as is practicable given the medical needs of the covered person and the nature of the health care professional's medical practice;

(6) routine physical exams shall be scheduled within 4 months;

(7) in all instances of scheduling, the MHCP or its participating health care

professionals shall have guidelines to assess when an appointment should be scheduled based on the type of health care service to be provided; upon request, the MHCP shall make such guidelines available to covered persons;

(8) all appointments shall be scheduled either during normal business hours or after hours (if applicable), depending upon the individual patient's needs and in accordance with the individual physician's scheduling practice.

**C. Referrals:** The MHCP shall implement a system that ensures routine referrals are made to other participating health care professionals.

(1) A covered person shall not be held liable for payment of services if the MHCP health care professional mistakenly makes a referral to a non-participating health care professional, unless the MHCP has notified the covered person in writing concerning the use of non-participating health care professionals and informed the covered person that the MHCP will not be responsible for future payment to the non-participating health care professionals.

(2) The MHCP shall bear the burden of showing that the covered person has been adequately informed by specific written notice of the MHCP's future refusal to pay for future care provided by the identified non-participating health care professional.

(3) The MHCP shall ensure that a covered person is not precluded from obtaining a referral from the covered person's PCP to a specialist or other health care professional that is within the MHCP's network, if the referral is reasonable.

**D. Provider lists:** A MHCP must provide a list of all providers to subscribers, enrollees, covered persons or prospective enrollees upon request.

(1) The list shall include specialty health care professionals and other health care professionals providing health care services, and shall specify the locations, including addresses, of such providers.

(2) The list shall identify those health care professionals who are not currently accepting new patients.

(3) The information shall be made available and upon request be provided to enrollees in the evidence of coverage.

(4) Information should be provided through toll-free phones and electronic means, as specified in 13.10.23.7 NMAC.

(5) MHCPs are encouraged to facilitate a covered person's ability to obtain a second opinion from a participating health care professional regarding the covered person's request for a second opinion from, or referral to, a non-participating health care professional.

**E. Out-of-network serv-**

**ices:** In the event medically necessary covered services are not reasonably available through participating health care professionals, the MHCP shall provide in the contract terms that the MHCP and the PCP or other participating health care professional shall refer a covered person to a non-participating health care professional and shall fully reimburse the non-participating health care professional at the usual, customary, and reasonable rate or at an agreed upon rate. The contract must further state that before a MHCP may deny such a referral to a non-participating physician or health care professional, the request must be reviewed by a specialist similar to the type of specialist to whom a referral is requested.

**F. Specialty care:** Referrals to participating or non-participating specialty health care professionals must be accessible to covered persons on a timely and appropriate basis in accordance with generally accepted medical guidelines.

(1) If the MHCP requires covered persons to obtain prior authorization before referral to specialty care, the MHCP must provide covered persons the following information in the evidence of coverage:

(a) procedures a covered person must follow to obtain prior authorization for specialty referrals, including whether a covered person's PCP, the MHCP's medical director, or a committee must first authorize the specialty referral;

(b) the necessity, if any, of repeating prior authorization if the specialist care is to be ongoing; and

(c) procedures to obtain a second medical opinion.

(d) if a PCP referral is required under the MHCP, the MHCP must inform PCPs of their responsibility to provide written referrals; of any specific procedures that must be followed in providing such referrals; and that the PCP must refer patients to those participating health care professionals who are qualified to address the covered person's health care needs as determined by the PCP in consultation with the MHCP.

(2) The MHCP shall make determinations on requests for referrals in accordance with Subsection D of 13.10.13.19 NMAC.

(3) Covered persons denied referral to specialty care may initiate a grievance through the MHCP's grievance procedures pursuant to 13.10.17 NMAC.

**G. Ongoing specialty care:** If, in the best medical judgment of the covered person's PCP, the covered person's health condition requires ongoing specialty care, such as for chronic illnesses requiring medical supervision beyond the capability or training of the PCP, the PCP may, after consultation with the specialist and the MHCP, refer the covered person to

the appropriate specialist for ongoing care as the severity of the condition warrants.

(1) The ultimate determination, however, of whether the covered person should have ongoing care from the specialist shall remain with the PCP.

(2) In such cases, neither the PCP nor the covered person will be required to obtain a prior authorization from the MHCP for subsequent specialist visits.

(3) The MHCP may review such referrals to specialist care on an annual basis to determine whether ongoing specialist care continues to be medically necessary. In conducting such a review, the MHCP shall consult with the covered person's primary care physician and the specialist to whom the covered person has been referred.

(4) Nothing in Subsection G of 13.10.22.8 NMAC prohibits a MHCP from requiring that covered persons receive ongoing specialist care from those specialists who are considered "participating health care professionals" by the MHCP, unless there are no participating specialists of the type required to manage the patient's condition. In such instances, the MHCP shall make indemnity or other payment arrangements for the patient's care, and covered persons will not be assessed higher or additional co-payments as a result of such arrangements.

(5) A MHCP must allow qualified health care professionals who are specialists to act as PCPs for patients with chronic medical conditions of sufficient severity to require primary coordination of care by a specialist as determined by the covered person, the covered person's current treating health care professional, the covered person's PCP if different than the treating health care professional, and the MHCP, provided that:

(a) the specialist offers all basic health care services that are required of them by the MHCP; and

(b) the specialist meets the MHCP's eligibility criteria for health care professionals who provide primary care.

#### H. Out of state providers:

A MHCP is encouraged to enter into contracts or other arrangements with out of state providers in order to meet the access requirements of this rule.

#### I. Access to non-allopathic health care services:

In order to maximize covered persons' access to all types of health care services, the division affirmatively encourages each health care insurer or MHCP to enter into appropriate contracts with qualified health care professionals, including but not limited to, doctors of oriental medicine, chiropractic physicians, nurse practitioners, physician assistants, or certified nurse midwives to provide both allopathic and non-allopathic health care services.

#### J. Reliance on nationally recognized accreditation standards to meet access standards:

If the MHCP utilizes an open network pursuant to NMSA 1978, Section 59A-22A-5, then in lieu of the provisions of 13.10.22.8 NMAC, Subsections A-I, the MHCP shall present to the superintendent written verification either that the National Committee for Quality Assurance (NCQA) or American Accreditation Healthcare Commission/URAC (URAC) determined that the MHCP has achieved one of the two highest ratings for all factors regarding availability of health care professionals and accessibility of services, under contemporaneous NCQA or URAC standards.

(1) In lieu of the above, the plan shall present evidence to the superintendent that it would achieve these ratings if evaluated by the NCQA or URAC, in addition to member survey results.

(2) Plans shall also take into account that the division will utilize the standards described in Subsections D, H and I of 13.10.22.8 NMAC, and the "medical necessity" and "usual, customary, and reasonable rate" standards found in Subsection E of 13.10.22.8 NMAC.

[13.10.22.8 NMAC - Rp, 13.10.13.11 NMAC, 09/01/2009]

#### 13.10.22.9 UTILIZATION MANAGEMENT:

A. Utilization management program: The health care insurer through its MHCP shall establish and implement a comprehensive utilization management program to monitor access to and appropriate utilization of health care services. The program shall be under the direction of a medical director responsible for the medical services provided by the MHCP in New Mexico and who is a licensed physician in New Mexico, and shall be based on a written plan that is reviewed at least annually. At a minimum, the plan shall identify the following:

(1) scope of utilization management activities;

(2) procedures to evaluate clinical necessity, access, appropriateness, and efficiency of services;

(3) mechanisms to detect underutilization and overutilization;

(4) clinical review criteria and protocols used in decision-making;

(5) mechanisms to ensure consistent application of review criteria and uniform decisions;

(6) development of outcome and process measures for evaluating the utilization management program; and

(7) a mechanism to evaluate member and provider satisfaction with the complaint and appeals systems set forth at 13.10.17 NMAC; such evaluation shall be

coordinated with the performance monitoring activities conducted pursuant to the continuous quality improvement program to include care coordination between utilization management, case management and disease management services as set forth in 13.10.22.10 NMAC.

B. Utilization management determinations shall be based on written clinical criteria and protocols developed with involvement from practicing physicians and other health professionals and providers within the MHCP's net network. These criteria and protocols shall be periodically reviewed and updated, and shall, with the exception of internal or proprietary quantitative thresholds for utilization management, be readily available, upon request, to affected providers and covered persons. The MHCP shall have the burden of showing that information requested by affected providers or covered persons is in fact proprietary. Nothing in this section shall be construed to prevent a MHCP from incorporating into its clinical protocols criteria from outside sources.

#### C. Utilization management staff availability:

(1) A registered professional nurse or physician shall be immediately available by telephone seven days a week, 24 hours a day, to render utilization management determinations for providers.

(2) The MHCP shall provide all covered persons and providers with a toll-free telephone number by which to contact utilization management staff on at least a five-day, 40 hours a week basis. The MHCP may provide a separate telephone number for covered persons and for providers.

(3) All covered persons must have immediate telephone access seven days a week, 24 hours a day, to their primary care physician or the physician's authorized on-call back-up provider. When these providers are unavailable, a registered nurse or physician on the utilization management staff must be available to respond to inquiries concerning emergency or urgent care.

#### D. Utilization management determinations:

(1) All determinations to authorize an admission, service, procedure or extension of stay shall be rendered by either a physician, registered professional nurse, or other qualified health professional.

(2) All determinations to deny or limit an admission, service, procedure or extension of stay shall be rendered by a physician, either after application of uniform criteria established by the plan in consultation with specialists acting within the scope of their license or after consultation with specialists acting within the scope of their license. The physician shall be under the clinical direction of the medical director responsible for medical services provided to

the MHCP's New Mexico covered persons. Such determinations shall be made in accordance with clinical and medically necessary criteria developed pursuant to Subsection A of 13.10.22.9 NMAC and the evidence of coverage.

(3) All determinations shall be made on a timely basis as required by the exigencies of the situation and in accordance with sound medical principles, which, in any event, shall not exceed 24 hours for emergency care and seven days for all other determinations. If the MHCP is unable to complete a referral within ten days due to unforeseen circumstances, the MHCP shall inform the covered person in writing about the reasons for the delay and when a decision may be expected.

(4) A MHCP may not retroactively deny reimbursement for a covered service provided to a covered person by a provider who relied upon the verbal or written authorization of the MHCP or its agents prior to providing the service to the covered person, except in those cases where there was material misrepresentation or fraud. Retroactive reimbursement for a covered service shall not be denied when the covered person provides authorization information, such as a MHCP referral number, directly to the provider, except in those cases where there was material misrepresentation or fraud.

(5) An enrollee must receive a written notice of all determinations to deny coverage or authorization for health care services, which shall contain the reasons why coverage or authorization was denied, and which shall be subject to review in accordance with the specific grievance procedures outlined in 13.10.17 NMAC. The written notice shall advise the covered person that review of the MHCP's denial of coverage or authorization is available. In addition, the notice shall describe the procedures necessary for commencing an internal review as outlined in 13.10.17 NMAC.

**E. Accreditation by nationally recognized accrediting entity.** Nothing in this section shall prohibit a MHCP from submitting accreditation by a nationally recognized accrediting entity as evidence of compliance with the requirements of this section. In those instances where a MHCP seeks to meet the requirements of this section through accreditation by a private accrediting entity, the MHCP shall submit to the division the following information: 1) current standards of the private accrediting entity in order to demonstrate that the entity's standards meet or exceed the requirements of this rule; 2) documentation from the private accrediting entity showing that the MHCP has been accredited by the entity; and 3) a summary of the data and information that was pre-

sent to the private accrediting entity by the MHCP and upon which accreditation of the MHCP was based. A MHCP accredited by the private accrediting entity that has submitted all of the requisite information to the division may then be deemed by the superintendent to have met the requirements of the relevant provisions of this section where comparable standards exist, provided that the private accrediting entity from which the MHCP obtained accreditation is recognized and approved by the superintendent.

[13.10.22.9 NMAC - Rp, 13.10.13.19 NMAC, 09/01/2009]

### **13.10.22.10 CONTINUOUS QUALITY IMPROVEMENT**

**A.** Under the direction of a medical director or his or her designated physician, the MHCP shall have a system-wide continuous quality improvement program to monitor the quality and appropriateness of care and services provided to covered persons. This program shall be based on a written plan which is reviewed at least annually and revised as necessary. The plan shall describe at least:

- (1) the scope and purpose of the program;
- (2) the organizational structure of quality improvement activities;
- (3) duties and responsibilities of the medical director and/or designated physician responsible for continuous quality improvement activities;
- (4) contractual arrangements, where appropriate, for delegation of quality improvement activities;
- (5) confidentiality policies and procedures;
- (6) specification of standards of care, criteria and procedures for the assessment of the quality of services provided and the adequacy and appropriateness of health care resources utilized;
- (7) a system of ongoing evaluation activities, including individual case reviews as well as pattern analysis;
- (8) a system of focused evaluation activities, particularly for frequently performed and/or highly specialized procedures;
- (9) a system for monitoring random covered person satisfaction and network provider's response and feedback on MHCP operations;
- (10) a system for verification of providers' credentials, recertification, performance reviews and for obtaining information about any disciplinary action against a provider available from any state licensing board applicable to the provider;
- (11) the procedures for conducting peer review activities, which shall include providers within the same discipline

and area of clinical practice;

(12) a system for evaluation of the effectiveness of the continuous quality improvement program to include care coordination between utilization management, case management and disease management services.

**B.** The board of directors or other management body of the MHCP shall be kept apprised of continuous quality improvement activities and be provided at least annually with regular written reports from the program delineating quality improvements, performance measures used and their results, and demonstrated improvements in clinical and service quality.

**C.** There shall be a multi-disciplinary continuous quality improvement committee responsible for the implementation and operations of the program. The structure of the committee shall include representation from the medical, nursing and administrative staff, with substantial involvement of the medical director of the MHCP.

**D.** The program shall monitor the availability, accessibility, continuity and quality of care on an ongoing basis. Indicators for evaluating the quality of health care services provided by all participating providers shall be identified and established and may include:

- (1) a mechanism for monitoring patient appointment and triage procedures, discharge planning services, linkage between all modes and levels of care and appropriateness of specific diagnostic and therapeutic procedures, as selected by the continuous quality improvement program;
- (2) a mechanism for evaluating all providers of care that is supplemental to each provider's quality improvement system;
- (3) a system to monitor provider and covered person access to utilization management services, including, at a minimum, waiting times to respond to phone requests for service authorization, covered person urgent care inquiries, and other services required by this rule.

**E.** The MHCP shall follow up on findings from the program to assure that effective corrective actions have been taken, including, at a minimum, policy revisions, procedural changes and implementation of educational activities for covered persons and providers.

**F.** Continuous quality improvement activities shall be coordinated with other performance monitoring activities including utilization management, risk management, and monitoring of covered person and provider complaints.

**G.** The MHCP shall maintain documentation of the quality improve-

ment program in a confidential manner. This documentation shall be available to the superintendent, shall be submitted as part of the health care insurer's annual report to the superintendent, and shall include:

- (1) minutes of quality improvement committee meetings;
- (2) records of evaluation activities, performance measures, quality indicators and corrective plans and their results or outcomes.

#### **H. External quality audit:**

(1) Upon request by the superintendent, each MHCP shall have an external quality audit conducted by an IQRO approved by the division, and shall submit proof to the superintendent that such an audit and report has been completed.

(2) The report must describe in detail the MHCP's conformance to performance standards established by the IQRO, other national standard-setting bodies for MHCPs, and the standards set out in this rule. The report shall also describe in detail any corrective actions proposed and/or undertaken and approved by the IQRO. The report shall be submitted to the division within 60 days of its receipt in final form by the MHCP.

(3) The superintendent may grant a MHCP a deferral of the above requirement for an external quality audit for a 12-month period if it is in the initial three years of start-up operations.

#### **I. Performance and outcome measures.**

(1) The division may develop a performance and outcome measurement system for monitoring the quality of care provided to MHCP covered persons. The data collected through this system may be used by the division to:

- (a) assist MHCPs and their providers in quality improvement efforts;
- (b) provide the division with information on the performance of MHCPs for regulatory oversight;
- (c) support efforts to inform consumers about MHCP performance;
- (d) promote the standardization of data reporting by MHCPs and providers; and for
- (e) any other purpose consistent with the policies and provisions of this rule and the Insurance Code.

(2) The performance and outcome measures may include population-based and patient-centered indicators of quality of care, appropriateness, access, utilization, and satisfaction. To minimize costs to health care insurers, MHCPs, providers, and the division, performance measures will incorporate, when possible, data routinely collected or available to the division from other sources. Data for these performance measures may include but not be limited to the

following:

(a) indicator data collected by MHCPs from chart reviews and administrative data bases;

(b) satisfaction surveys of covered persons;

(c) provider surveys;

(d) all reports submitted by MHCPs to the superintendent as required by this rule;

(e) data collected by the division for administrative, epidemiological and other purposes, such as the state cancer registry, vital records, and hospital records.

(3) MHCPs shall submit such performance and outcome data as the division may request from time to time.

(4) The division shall provide each MHCP an opportunity to comment on the compilation and interpretation of the data before its release to consumers.

(5) The division may conduct or arrange for periodic satisfaction surveys of covered persons. Upon request by the superintendent, the MHCP shall provide the division with the mailing list of covered persons to be used to select samples of the MHCP's membership for the surveys. Upon request by the superintendent, the MHCP shall also provide the division with a mailing list of former covered persons who are no longer covered by the MHCP, which the division may use to select samples of the MHCP's former covered persons for surveys.

(6) The division shall ensure the confidentiality of patient specific information.

(7) The division shall take all necessary measures to reduce duplicative reporting of information to state agencies. Any performance and outcome measurement system developed by the division shall not be duplicative of the health information system created by the Health Information System Act, Chapter 24, Article 14A NMSA 1978, and implemented by the New Mexico health policy commission.

(8) In developing a performance and outcome measurement system, the division shall take into consideration data reporting standards of nationally recognized accrediting entities, such as, for example, the health plan employer data and information set (HEDIS), and shall attempt to avoid duplication of such reporting standards, so that a MHCP may, where possible, submit the same data to the division that the MHCP submits to a private accrediting entity.

#### **J. Accreditation by nationally recognized accrediting entity:**

Nothing in this section shall prohibit a MHCP from submitting accreditation by a nationally recognized accrediting entity as evidence of compliance with the requirements of this section. In those instances where a MHCP seeks to meet the require-

ments of this section through accreditation by a private accrediting entity, the MHCP shall submit to the division the following information: 1) current standards of the private accrediting entity in order to demonstrate that the entity's standards meet or exceed the requirements of this rule; 2) documentation from the private accrediting entity showing that the MHCP has been accredited by the entity; and 3) a summary of the data and information that was presented to the private accrediting entity by the MHCP and upon which accreditation of the MHCP was based. A MHCP accredited by the private accrediting entity that has submitted all of the requisite information to the division may then be deemed by the superintendent to have met the requirements of the relevant provisions of this section where comparable standards exist, provided that the private accrediting entity from which the MHCP obtained accreditation is recognized and approved by the superintendent.

[13.10.22.10 NMAC - Rp, 13.10.13.20 NMAC, 09/01/2009]

#### **13.10.22.11 CULTURAL AND LINGUISTIC DIVERSITY:**

The MHCP must ensure that information and services are available in languages other than English, that services are provided in a manner that takes into account cultural aspects of the covered person population, and that accommodations are provided for covered persons with disabilities. Each MHCP shall develop, implement, and maintain a plan that reasonably addresses the cultural and linguistic diversity of its covered person population.

**A.** MHCPs that have not already done so and are currently doing business in New Mexico shall submit to the superintendent for approval a plan of how the MHCP will address the cultural and linguistic diversity of its covered person population. At a minimum, the plan shall address:

(1) how the MHCP will identify the language needs of covered persons;

(2) measures to be taken to ensure access for limited-English-proficient (LEP) covered persons in both administrative and health care encounters with the plan and its providers;

(3) steps the MHCP will take to ensure availability of adequate interpretation services within its network, which shall include a description of specific contracts or other arrangements for interpretation and identification of interpreters for the deaf;

(4) whether interpreting services are available to covered persons on a 24-hour basis for emergency care;

(5) whether linguistic and cultural needs are explicitly addressed in the MHCP's continuous quality improvement

program;

(6) how the MHCP will conduct outreach to ensure that covered persons with particular cultural and linguistic needs are identified by the MHCP and made aware of the services available to them to address their needs;

(7) any guidelines or training regarding cultural and linguistic needs of covered persons that the MHCP will utilize with its own staff and providers within its network;

(8) the extent to which the MHCP contracts with community clinics and other local providers that offer linguistic and culturally appropriate services to covered persons in their areas; and

(9) physical accessibility to persons with disabilities of MHCP information and administrative services as well as the provider network.

**B.** A MHCP new to this state shall submit a plan for addressing cultural and linguistic diversity to the superintendent as part of its application for licensure. The plan shall address all of the factors listed Subsection A of 13.10.22.11 NMAC.

**C.** The superintendent shall approve or reject a plan submitted by a MHCP within 45 days after the plan is submitted to the superintendent. If the superintendent rejects a plan submitted by a MHCP, the superintendent shall state in writing in a letter addressed to the MHCP the specific grounds for rejection.

[13.10.22.11 NMAC - Rp, 13.10.13.29 NMAC, 09/01/2009]

**13.10.22.12 CONTRACTS WITH PROVIDERS IN THE STATE OF NEW MEXICO:** This section shall apply only to health care professionals practicing in and health care facilities located in the state of New Mexico.

**A.** A health care insurer shall, either directly or indirectly, enter into contracts with participating professionals and health care facilities through which health care services are provided on a recurring basis to its covered persons. The health care insurer shall file an annual certificate with the superintendent certifying that all health care professional contracts and contracts with health care facilities located in the state of New Mexico through which health care services are being provided on a recurring basis meet the criteria of this section.

**B.** Each contract shall contain a description of the specific health care services for which the health care professional or health care facility will be responsible, including any limitations or conditions on such services.

**C.** Each contract shall contain the specific hold harmless provision

specifying protection of covered persons set forth as follows: "Health care professional/health care facility agrees that in no event, including but not limited to nonpayment by the health insuring corporation, insolvency of the health insuring corporation, or breach of this agreement, shall health care professional/health care facility bill, charge, collect a deposit from, seek remuneration or reimbursement from, or have any recourse against, a subscriber, enrollee, covered person, or person acting on behalf of the covered person, for health care services provided pursuant to this agreement. This does not prohibit health care professional/health care facility from collecting co-insurance, deductibles, or copayments as specifically provided in the evidence of coverage, or fees for uncovered health care services delivered on a fee-for-service basis to persons referenced above, nor from any recourse against the health insuring corporation or its successor."

**D.** Each contract shall contain a provision clearly stating the rights and responsibilities of the MHCP, and of the contracted health care professionals and health care facilities, with respect to administrative policies and programs, including, but not limited to, payment systems, utilization review, quality assessment and improvement programs, credentialing, confidentiality requirements, and any applicable federal or state programs.

**E.** Each contract shall contain a provision regarding the availability and confidentiality of those health records maintained by health care professionals and health care facilities to monitor and evaluate the quality of care, to conduct evaluations and audits, and to determine on a concurrent or retrospective basis the medical necessity and appropriateness of health care services provided to covered persons. The provision shall include terms requiring the health care professional or health care facility to make these health records available to appropriate state and federal authorities involved in assessing the quality of care or in investigating the grievances or complaints of covered persons, and requiring the health care professional or health care facility to comply with applicable state and federal laws related to the confidentiality of medical or health records.

**F.** Each contract shall provide that contractual rights and responsibilities may not be assigned or delegated by the provider without the prior written consent of the contracting MHCP.

**G.** Each contract shall contain a provision requiring the health care professional or health care facility to maintain adequate professional liability and malpractice insurance. The provision shall also require the health care professional or

health care facility to notify the health care insurer or MHCP not more than ten days after the provider's receipt of notice of any reduction or cancellation of such coverage.

**H.** Each contract shall require the health care professional or health care facility to observe, protect, and promote the rights of covered persons as patients.

**I.** Each contract shall require the health care professional or health care facility to provide health care services without discrimination on the basis of a patient's participation in the health care plan, age, gender, ethnicity, religion, sexual orientation, health status, or disability, and without regard to the source of payments made for health care services rendered to a patient. This requirement shall not apply to circumstances when the health care professional or health care facility appropriately does not render services due to limitations arising from the health care professional's or health care facility's lack of training, experience, or skill, or due to licensing restrictions. Each contract shall require the health care insurer or MHCP to provide interpreters for limited English proficient (LEP) individuals and interpretative services for patients who qualify under the Americans with Disabilities Act (ADA). Such interpretive services will be made available to provider's office at no cost to the provider.

**J.** Each contract shall contain a provision detailing the specifics of any obligation on the health care professional or health care facility to provide, or to arrange for the provision of, covered health care services twenty-four hours per day, seven days per week.

**K.** Each contract shall set forth procedures for the resolution of disputes arising out of the contract.

**L.** Each contract shall state that the hold harmless provision required by Subsection C of 13.10.22.12 NMAC shall survive the termination of the contract regardless of the reason for the termination, including the insolvency of the health care insurer or MHCP.

**M.** Each contract shall provide that those terms used in the contract and that are defined by New Mexico statutes and division regulations will be used in the contract in a manner consistent with any definitions contained in said laws or regulations.

**N.** A health care insurer or MHCP is prohibited from including the following provisions in any of its contracts with health care professionals or health care facilities:

(1) offer an inducement, financial or otherwise, to provide less than medically necessary services to a covered person;

(2) penalize a health care professional or health care facility that assists a covered person to seek a reconsideration of the health care insurer's or MHCP's decision to deny or limit benefits to the covered person;

(3) prohibit a participating health care professional from discussing treatment options with covered persons irrespective of the health care insurer's or MHCP's position on treatment options, or from advocating on behalf of a patient or patients within the utilization review or grievance processes established by the MHCP or a person contracting with the health care insurer or MHCP;

(4) prohibit a participating health care professional from using disparaging language or making disparaging comments when referring to the health care insurer or MHCP; or

**O.** Each contract shall provide that a MHCP failing to pay a health care professional or failing to pay a covered person for out of pocket covered expenses within forty-five days after a clean claim has been received by the MHCP shall be liable for the amount due and unpaid with interest on that amount at the rate of one and one half times the rate established by a bulletin entered by the superintendent in January of each calendar year. For the purposes of this section, "clean claim" means a manually or electronically submitted claim that contains all the required data elements necessary for accurate adjudication without the need for additional information from outside of the MHCP's system and contains no deficiency or impropriety, including lack of substantiating documentation currently required by the MHCP, or particular circumstances requiring special treatment that prevents timely payment from being made by the MHCP.

**P.** Except for the access requirements contained in 13.10.22.8 NMAC, nothing contained in this rule should be construed to either prohibit or limit a health care insurer from entering into contracts with qualified health care professionals other than allopathic physicians to provide primary care to covered persons, provided that the health care professional is acting within his or her scope of practice as defined under the relevant state licensing law.

**Q.** A health care insurer shall not, based upon a national policy of the insurer, uniformly reject contract terms that may be requested by New Mexico providers.

**R.** Retroactive adjustments by a health care insurer or MHCP for overpayment must be made within 18 months absent health care professional mis-coding, claim submission error, suspected fraud and abuse; or retroactive adjustments

required by other federal or state agencies. [13.10.22.12 NMAC - Rp, 13.10.13.25 NMAC, 09/01/2009]

### **13.10.22.13 ADMINISTRATIVE COSTS AND BENEFIT DISCLOSURES:**

**A. Yearly reporting required:** On a yearly basis, on or before April 15, each MHCP shall provide the superintendent with a loss ratio for individual contracts and a separate calculation for plans offered in the small group health insurance market by the MHCP. The superintendent may require that the information be prepared on a form supplied by the division.

**B. Calculation of the ratio:** Calculation of the loss ratio shall be based on the average of a plan's previous three years' experience. The superintendent shall apply or alter this calculation in a manner consistent with New Mexico law.

(1) If the plan has been in existence for less than three years, than the ratio shall be based on a two year past plan experience, with a statement as to the length of plan experience.

(2) If the plan has been in existence for less than two years, than the ratio shall be based on a one year past plan experience, with a statement as to the length of plan experience.

(3) If the plan is new or has been in existence less than one year, then the MHCP shall report to the superintendent a loss ratio for a similar plan with an explanation as to why that plan can be used as an estimated loss ratio for the new plan.

(4) The superintendent shall state on any materials distributed to the public the bases for the loss ratios.

(5) The superintendent shall provide notice to brokers, agents, and solicitors engaged in the sale of managed health care plans regarding the availability and use of the loss ratios for MHCPs.

(6) The superintendent may in the future require in addition to the ratio calculations, that each MHCP provide the division with sample premium costs for various plan designs, to be used by the superintendent as a guide to purchasing managed health care products in the state.

[13.10.22.13 NMAC - N, 09/01/2009]

**13.10.22.14 PENALTIES:** In addition to any applicable suspension, revocation or refusal to continue any certificate of authority or license under the Insurance Code, a penalty for any material violation of this rule may be imposed against a health care insurer by the superintendent in accordance with Sections 59A-1-18 and 59A-46-25 NMSA 1978.

[13.10.22.14 NMAC - Rp, 13.10.13.32 NMAC, 09/01/2009]

**13.10.22.15 SEVERABILITY:** If any section of this rule, or the applicability of any section to any person or circumstance, is for any reason held invalid by a court of competent jurisdiction, the remainder of the rule, or the applicability of such provisions to other persons or circumstances, shall not be affected.

[13.10.22.15 NMAC - Rp, 13.10.13.33 NMAC, 09/01/2009]

### **HISTORY OF 13.10.22 NMAC:**

**Pre-NMAC History:** none.

**History of Repealed Material:** [RESERVED]

### **NMAC History:**

Only those applicable portions of 13.10.13 NMAC, Managed Health Care (filed 4/13/2007) were renumbered, amended, and replaced by 13.10.22 NMAC, Managed Health Care Plan Compliance, effective 09/01/2009.

## **NEW MEXICO PUBLIC REGULATION COMMISSION INSURANCE DIVISION**

### **TITLE 13 INSURANCE CHAPTER 10 HEALTH INSURANCE PART 23 M A N A G E D HEALTH CARE PLAN CONTRACTING**

**13.10.23.1 ISSUING AGENCY:** Public Regulation Commission, Insurance Division.

[13.10.23.1 NMAC - N, 09/01/2009]

### **13.10.23.2 SCOPE:**

**A. Applicability.** This rule applies to all health care insurers that provide, offer, or administer managed health care plans subject to the Insurance Code of the state of New Mexico:

**B. Exemptions.** This rule does not apply to policies or certificates that provide coverage for:

(1) only short-term travel, accident-only, student health, specified disease, or other limited benefits; or

(2) credit, disability income, hospital indemnity, long-term care insurance, vision care or any other limited supplemental benefit.

**C. Conflicts.** This rule relates to and should be read in conjunction with 13.10.13, 13.10.16, 13.10.17, 13.10.21 and 13.10.23 NMAC. If any provision in this rule conflicts with any provision in 13.10.13 NMAC, Managed Health Care-Benefits, 13.10.16 NMAC, Provider

Grievances, or 13.10.17. NMAC Grievance Procedures Rule, the provisions in this rule shall apply.

[13.10.23.2 NMAC - N, 09/01/2009]

**13.10.23.3 STATUTORY**

**AUTHORITY:** Sections 59A-1-18, 59A-2-8, 59A-2-9, 59A-4-4, 59A-4-5, 59A-59A-15-16, 59A-16-4, 59A-16-5, 59A-16-11, 59A-16-12, 59A-16-12.1, 59A-16-13, 59A-16-15, 59A-16-16, 59A-16-17, 59A-18-16, 59A-19-4, 59A-19-5, 59A-19-6, 59A-23E-15, 59A-44-34, 59A-44-41, 59A-46-7, 59A-46-8, 59A-46-23, 59A-46-25, 59A-46-27, 59A-46-30, 59A-46-32, 59A-46-34, 59A-47-33, 59A-47-34, 59A-57-2, 59A-57-4, 59A-57-6, and 59A-57-11, NMSA 1978.

[13.10.23.3 NMAC - N, 09/01/2009]

**13.10.23.4 DURATION:**

Permanent.

[13.10.23.4 NMAC - N, 09/01/2009]

**13.10.23.5 EFFECTIVE DATE:**

September 1, 2009, unless a later date is cited at the end of a section.

[13.10.23.5 NMAC - N, 09/01/2009]

**13.10.23.6 OBJECTIVE:**

The purpose of this rule is to clarify contracting between both the health care insurer and enrollees and health care providers under managed health care plans.

[13.10.23.6 NMAC - N, 09/01/2009]

**13.10.23.7 DEFINITIONS:**

**A.** In addition to the following, this rule is subject to the definitions found in Managed Health Care - Benefits, 13.10.13 NMAC.

**B. "Medical record"** means all information maintained by a health care provider relating to the past, present or future physical or mental health of a patient, and for other provision of health care to a patient. This information includes, but is not limited to, the health care provider's notes, reports and summaries, and x-rays and laboratory and other diagnostic test results. A patient's complete medical record includes information generated and maintained by the health care provider, as well as information provided to the health care provider by the patient, by any another health care provider who has consulted with or treated the patient, and other information acquired by the health care provider about the patient in connection with the provision of health care to the patient. A medical record does not include medical billing, insurance forms or correspondence and communication related thereto.

[13.10.23.7 NMAC - N, 09/01/2009]

**13.10.23.8 INFORMATION**

**PROVIDED TO COVERED PERSONS AND READABILITY OF MANAGED HEALTH CARE PLAN CONTRACTS:**

**A. Evidence of coverage:**

At the time of enrollment, each managed health care plan (MHCP) shall provide each covered person with information on how to access and obtain an evidence of coverage. Upon request at any time after enrollment, the covered person shall be provided with the evidence of coverage. Each evidence of coverage offered to covered persons, and prospective covered persons shall state in clear, accurate, and conspicuous language, in not less than 10 point font, written such that it can be easily understood by the average covered person, and so that it comports with the requirements of the "Policy Language Simplification Law," Chapter 59A, Article 19 NMSA 1978, the following information:

(1) the name of the health care insurer and managed health care plan and its principal place of business, including its address and telephone number;

(2) definitions for words that have meanings other than common general usage;

(3) for an HMO, a description of the HMO's service area;

(4) a complete list or description of the comprehensive basic health care services, urgent health care services, emergency health care services, and, if applicable, supplemental health care services available within the MHCP's service or geographical area, and any other benefits to which the covered person is entitled under the particular plan;

(5) an explanation of how participation in the managed health care plan may affect the potential covered person's choice of physician, hospital, or other health care provider;

(6) eligibility requirements for coverage, including a statement of conditions on eligibility for benefits;

(7) conditions of cancellation, which shall include a statement that if a covered person believes coverage was canceled due to health status or health care requirements, race, gender, age, or sexual orientation, he may appeal termination to the superintendent;

(8) the name, address, and toll-free telephone number of the superintendent;

(9) a statement that a copy of the evidence of coverage will be provided upon request if the covered person is unable to obtain a copy of the contract from the covered person's employer or other contract holder;

(10) conditions for renewal and reinstatement;

(11) any procedures for filing

claims;

(12) in bold typeface, or through an equally or more effective means, highlight any and all exclusions or limitations on the health care services, type of health care services, benefits, or type of benefits to be provided, including deductibles or copayments, or co-insurance; when presented on the plan's website or through other internet means, this information may be highlighted with movement, color, pop-up material, and other devices;

(13) any other requirements or procedures necessary for covered persons to obtain particular health care services, such as additional copayments, prior authorizations, second opinions, and consultations with or referrals to specialists, physicians, or other providers other than the primary care physician;

(14) the covered person's personal financial obligation for non-covered health care services;

(15) a clear and complete summary of where, and in what manner, information is available regarding how a covered person obtains services, including emergency and out-of-area services;

(16) a toll-free telephone number and a web-based or other electronic methods through which the covered person may contact the MHCP for additional information on obtaining health care services or for other inquiries regarding the plan, including benefit information and plan requirements;

(17) for all contracts, a list of relevant copayments and all other out of pocket expenses paid by the covered person;

(18) for individual and conversion contracts, the contractual periodic prepayment or premium, which may be contained in a separate insert and the total of payment for health services and the indemnity or services benefits, if any, which the covered person is obligated to pay;

(19) a description of the MHCP's grievance procedures and method for resolving covered person complaints, including a description of the appeals process available if the MHCP limits or excludes coverage of a treatment or procedure, the address and telephone number to which grievances are to be directed, and a statement identifying the superintendent as an external source with whom grievances may be filed, including the division of insurance contact information, as provided at Paragraph (2) of Subsection A of 13.10.17.24 NMAC, so that the covered person may submit the complaint;

(20) if the MHCP provides prescription drug coverage, the evidence of coverage must convey in clear and concise language:

(a) whether participating providers are restricted to prescribing drugs

from a drug formulary;

(b) whether or not brand-name products or specialty drugs require a higher copayment;

(c) the extent, if at all, to which an enrollee will be reimbursed for costs of a drug that is not on the plan's formulary;

(d) how covered persons may obtain, upon request, a complete list of drugs covered by the plan or listed on the MHCP's drug formulary; and

(e) any exclusions or limitations for coverage of "experimental," "investigational," or "specialty" drugs and definitions of "experimental," "investigational," and "specialty" as those terms are used by the MHCP, and in accordance with this chapter;

(21) a list of providers which contains all of the information listed in Subsection D of 13.10.22.8 NMAC, and shall include a statement, if applicable, that providers may be deleted or added within the coverage year;

(22) a statement regarding whether or not participating providers must comply with any specified numbers, targeted averages, or maximum durations of patient visits; and if so, a description of the specific requirements;

(23) a statement reflecting that a covered person will not be liable to a provider for any sums owed to the provider by the MHCP;

(24) language reflecting that the enrollee may be liable for sums owed to a non-contracting provider, except when an enrollee or covered person is mistakenly referred to a non-participating provider by a MHCP provider as discussed in Subsection C of 13.10.22.8 NMAC; and

(25) a statement explaining the covered person's rights and responsibilities as required by 13.10.13.8 NMAC.

**B. Toll-free number:** The toll-free telephone number referred to in Paragraph (16) of Subsection A of this section shall:

(1) be answered twenty-four (24) hours a day, seven days a week, so that covered persons who need assistance may obtain answers to their questions;

(2) be equipped so that covered persons with non-medical benefit information questions may leave a voice-mail message for the MHCP that the administrative office of the MHCP will answer before 5:00 p.m. on the next business day;

(3) be included on a covered person membership card issued by the MHCP.

**C. Electronic communications:** MHCPs shall provide web-based or other electronic methods to inform interested covered persons with benefit information and other health care information in accordance with state and federal privacy regulations.

**D. Bi-annual updates of**

**provider lists:** For MHCPs that require covered persons to select a primary care physician, the MHCP shall provide covered persons with written bi-annual notices of any deletions or additions to the list of primary care physicians in their area, and shall make more recent updated lists available to enrollees or covered persons upon request. The bi-annual notices may be included in other written materials that are sent to covered persons.

**E. Current provider lists:** The MHCP shall use a current list of providers, including health professionals and facilities, when soliciting individuals or groups for enrollment in the MHCP.

**F. Provider information:** Upon request of a covered person or prospective covered person, the MHCP shall provide information on participating providers, including their education, training, applicable certification, and any subspecialty.

**G. Termination of provider status:**

(1) When an HMO terminates or suspends any contract with a participating provider, the HMO shall notify, in writing, affected covered persons who are current patients of or, where applicable, assigned to the provider, within 30 days. The notice to covered persons shall advise them of their right to continue receiving care from the provider as set forth in 13.10.23.13 NMAC. Current patients are covered persons who have a claim with the HMO related to the provider's services within the past year, or who have received a pre-authorization prior to termination to use the provider's services at a future time.

(2) The HMO shall assist such affected covered persons in locating and transferring to another similarly qualified provider.

(3) A covered person may not be held financially liable for services received from the provider in good faith between the effective date of the suspension or termination and the receipt of notice provided to the covered person, if the covered person has not received comparable notice during this time from the provider.

**H. Notice of plan changes:** Before issuing any increase in premiums in an individual contract, a MHCP shall provide a 60 day written notice to affected subscribers in the manner the MHCP customarily provides such notice. The MHCP shall also provide in the same manner a 60 day written notice for plan design or plan benefit changes, other than enhanced benefits, in an individual contract. All notices pursuant to this section shall state the reasons for the changes.

**I. Disclosure of utilization review procedures:** Each MHCP currently doing business in this state shall dis-

close to the superintendent and to its contracting providers the process by which the MHCP authorizes or denies health care services rendered by its providers pursuant to the benefits covered by the plan. Any MHCP claiming that such information is proprietary has the burden of showing to the superintendent that the information requested is in fact proprietary. Health care insurers planning to offer a new MHCP in this state must disclose such information to the superintendent prior to when the health care insurer solicits individuals or groups for enrollment in the MHCP. In addition, each MHCP shall make available such information to covered persons and prospective covered persons upon request.

**J.** Upon request of covered persons and prospective covered persons, the MHCP shall provide copies of its quality assurance plans and patterns of its utilization of services that the MHCP routinely tracks. A MHCP may provide such information through such nationally recognized reporting data bases, such as, for example, the health plan employer data and information set (HEDIS).

[13.10.23.8 NMAC - Rp, 13.10.13.14 NMAC, 09/01/2009]

### **13.10.23.9 TERMINATION OF COVERAGE:**

**A.** A MHCP shall not cancel the coverage of an enrollee except for "good cause," which, for the purposes of this section means:

(1) failure of the enrollee or subscriber to pay the premiums and other applicable charges for coverage;

(2) material failure to abide by the rules, and/or policies and procedures of the MHCP;

(3) fraud or material misrepresentation affecting coverage;

(4) a reason for cancellation or failure to renew which the superintendent determines is not objectionable.

**B. Notwithstanding** Subsection A of 13.10.23.8 NMAC, a MHCP shall not cancel an enrollee's coverage for non-payment of copayments if such a cancellation would constitute abandonment of a covered person who is hospitalized and is receiving treatment for a life threatening condition. In addition, a MHCP shall not cancel an enrollee's coverage due to a covered person's refusal to follow a prescribed course of treatment.

**C.** Before an enrollee's coverage may be terminated by the MHCP, the MHCP must provide written notice of at least 30 calendar days to the enrollee. Notification of cancellation of enrollment must:

(1) be in writing and dated;

(2) state the reason(s) for cancellation, with specific reference to the clause

of the MHCP contract giving rise to the right of cancellation;

(3) state that an enrollee cannot be canceled because of health status, need for health care services, race, gender, age, or sexual orientation of covered persons under enrollee's contract;

(4) state that an enrollee who alleges that an enrollment has been canceled or not renewed because of the enrollee's or covered person's health status, need for health care services, race, gender, age, or sexual orientation may request review of the cancellation by the superintendent as set forth in 13.10.17 NMAC;

(5) state that in the event of cancellation by either the enrollee or MHCP, except in the case of fraud or deception in the use of services or facilities of the MHCP or knowingly permitting such fraud or deception by another, the MHCP shall, within 30 calendar days, return to the enrollee or subscriber the pro rata portion of the money paid to the MHCP which corresponds to any unexpired period for which payment had been received together with amounts due on claims, if any, less any amounts due the MHCP; provided, however, that the superintendent may approve other reasonable reimbursement practices;

(6) state the date on which the cancellation becomes effective;

(7) state that receipt by the MHCP of the proper prepaid or periodic payment, including all past due amounts, after cancellation of the contract for nonpayment shall reinstate the contract as though it had never been canceled if such payment is received on or before the due date of the succeeding prepaid or periodic payment; provided, however, that the contract may specify one or more of the following methods by which the MHCP may avoid such reinstatement:

(a) in the notice of cancellation, the MHCP notifies the enrollee that if payment is not received within 15 days of issuance of the notice of cancellation, a new application is required and the conditions under which a new contract will be issued or whether the original contract will be reinstated;

(b) if such payment is received more than 15 calendar days after issuance of the notice of cancellation, the MHCP refunds the payment within 20 business days; or

(c) if such payment is received more than 15 calendar days after issuance of the notice of cancellation, the MHCP issues to the enrollee, within 20 business days of receipt of such payment, a new contract accompanied by a written notice clearly stating the ways in which the new contract differs from the canceled contract, including any difference in benefits or coverage;

(8) state that the MHCP is prohib-

ited from increasing the amount paid by the enrollee, except after a period of at least 30 calendar days from either: 1) the postage paid mailing to the enrollee at the enrollee's address of record with the MHCP; or 2) actual hand delivery to the enrollee of written notice of such proposed increase; and

(9) state that the MHCP is prohibited from decreasing the benefits stated in the contract in any manner, except after a period of at least 30 calendar days from either: 1) the postage paid mailing to the enrollee at the enrollee's address of record with the MHCP; or 2) actual hand delivery to the enrollee of written notice of such proposed change(s).

**D.** In the event that the MHCP cancels or refuses to renew a managed health care plan contract, or enrollment under the contract, the MHCP shall mail a notice of the cancellation to the enrollee at the enrollee's address of record with the MHCP. However, in the event that the MHCP cancels or refuses to renew a group contract, the MHCP need not mail a notice of cancellation to each enrollee covered by the group plan if:

(1) the plan contract requires the group contract holder to mail promptly any such notice to each enrollee;

(2) the MHCP mails or hand delivers a notice of cancellation to the group contract holder designated in the plan contract, and the MHCP gives a written reminder to the group contract holder of its obligation under the contract; and

(3) the MHCP demonstrates that the group contract holder promptly provided proof to the MHCP of the mailing of a legible true copy of the notice of cancellation to each enrollee at the enrollee's current address and the date the mailing occurred.

**E.** Each MHCP contract shall provide a notice of cancellation, pursuant to Paragraph (3) of Subsection C of 13.10.23.8 NMAC and will not be effective any sooner than 30 calendar days after the notice is mailed to the enrollee.

**F.** The terms "cancellation" and "failure to renew," for the purposes of this section do not include a voluntary termination by an enrollee or the termination of a plan or contract which does not contain a renewal provision.

[13.10.23.9 NMAC - Rp, 13.10.13.17 NMAC, 09/01/2009]

### **13.10.23.10 M E D I C A L RECORDS:**

**A. Transfer of medical records.** Each health care insurer shall develop and implement a policy for the transfer of medical records of a covered person whenever the following occur:

(1) change of physician or other health care professional;

(2) disenrollment of enrollee from the managed health care plan; or

(3) other circumstances where requests by covered persons or former covered persons is reasonable.

### **B. Confidentiality of medical records.**

(1) Any data or information pertaining to the diagnosis, treatment, or health of any covered person obtained from the covered person, from any provider, or from any other source, shall be held in confidence as otherwise required or permitted by New Mexico or federal law.

(2) The data or information shall not be disclosed to any person except: 1) to the extent that it may be necessary to carry out the purposes of this rule; 2) upon the express consent of the covered person; 3) pursuant to state or court order for the production of evidence or the discovery thereof; 4) in the event of claim or litigation between a covered person and the health care insurer wherein such data or information is pertinent; or 5) where otherwise required or permitted by New Mexico or federal law.

(3) A health care insurer shall be entitled to claim any statutory privileges against such disclosure which the provider who furnished such information to the health care insurer is entitled to claim.

### **C. Maintenance of medical records.**

(1) Any medical records directly maintained by the health care insurer shall be organized in a uniform format applicable to all medical records.

(2) The health care insurer shall have policies governing the contents of medical records including maintenance of records by electronic means.

### **D. Copies of medical records.**

(1) Covered persons or their legally authorized representatives shall have a right to inspect and obtain a copy of their medical records maintained by the health care insurer.

(2) Charges for copies of medical records must be based upon actual costs not to exceed the prevailing community market rates. For photocopying, the cost shall be twenty-five cents (\$.25) per page or less.

**E. Protection of medical records.** Medical records maintained by health care insurers shall be protected by health care insurers against loss, destruction, or unauthorized use, and shall be retained for at least 10 years or until the covered person reaches age 21 years, whichever is longer.

**F. Destruction of medical records.** Destruction of medical records must be such that confidentiality is maintained. Records must be destroyed by

shredding, incinerating (where permitted) or by other method of permanent destruction, including purging of medical records from a computer hard disk, server hard disk or other media or disk in accordance with current practices for data deletion. A log must be kept of all charts destroyed, including the patient's name and date of record destruction.

[13.10.23.10 NMAC - Rp, 13.10.13.21 NMAC, 09/01/2009]

### **13.10.23.11 NONDISCRIMINATION BY HEALTH CARE INSURERS:**

#### **A. Guaranteed renewability:**

(1) In addition to the guaranteed renewability provisions pertaining to individuals, pursuant to NMSA 1978, Section 59A-23E-19, and under group health plans, pursuant to NMSA 1978, Section 59A-23E-14, health care insurers through managed health care plans are prohibited from establishing rules for continued eligibility of any individual to continue to participate in a health plan based on any of the following:

- (a) gender, race, color, national origin, ancestry, religion or marital status;
- (b) sexual orientation;
- (c) age or the age of any contracting party, or person reasonably expected to benefit from any such contract as a covered person;
- (d) health status related factors, and
- (e) filing of a grievance or utilization management appeal as permitted by this rule.

(2) Health status related factors include:

- (a) medical condition, including both physical and mental illnesses and disability;
- (b) claims experience and frequency of use of health care services;
- (c) medical history;
- (d) genetic information;
- (e) evidence of insurability, including conditions arising out of acts of domestic violence.

#### **B. Contract terms and premiums:**

(1) A health care insurer issuing a managed health care plan shall comply with the adjusted community rating requirements as to individuals, pursuant to NMSA 1978, Section 59A-18-13.1, and as to small group employers, pursuant to NMSA 1978, Section 59A-23C-5.1.

(2) A health care insurer issuing a managed health care plan is allowed to apply premium, price or charge differentials based on a wellness program to promote health or prevent disease in a managed health care plan, in compliance with 26 CFR Part 54, 29 CFR Part 2590 and 45 CFR Part 146.

**C. Providers nondiscrimination:** In addition to the provisions of NMSA 1978, Section 59A-57-6, a health care insurer issuing a managed health care plan shall not discriminate against providers on the basis of religion, race, color, national origin, age, sex, marital status, disability, or sexual orientation. Selection of participating providers shall be primarily based on, but not limited to, cost and availability of covered services and the quality of services performed by the providers.

#### **D. Genetic information and testing prohibition:**

(1) In determining insurability and in processing an application for coverage for health care services under a managed health care plan, health care insurers are prohibited from: 1) requiring an individual seeking coverage to submit to genetic screening or testing; 2) taking into consideration, other than in accordance with this section, the results of genetic screening or testing; 3) making any inquiry to determine the results of genetic screening or testing; or 4) making a decision adverse to the applicant based on entries in medical records or other reports of genetic screening or testing.

(2) In developing and asking questions regarding medical histories of applicants for coverage under an individual or group managed health care plan, contract, policy, or agreement, no health care insurer shall ask for the results of any genetic screening or testing or ask questions designed to ascertain the results of any genetic screening or testing.

(3) No health care insurer shall cancel or refuse to issue or renew coverage for health care services based on the result of genetic screening or testing or the use of genetic services.

(4) No health care insurer shall deliver, issue for delivery, or renew an individual or group managed health care plan, contract, policy, or agreement in this state that limits benefits based on the results of genetic screening or testing.

(5) A health care insurer may consider the results of genetic screening or testing if the results are voluntarily submitted by an applicant for coverage or renewal of coverage and the results are favorable to the applicant.

[13.10.23.11 NMAC - Rp, 13.10.13.22 NMAC, 09/01/2009]

### **13.10.23.12 DECEPTIVE HEALTH CARE INSURER OR MANAGED HEALTH CARE PLAN NAME:**

**A.** A health care insurer or managed health care plan shall not use a deceptive name.

**B.** A name will be considered deceptive if it unreasonably suggests:

(1) the quality of care provided by the health care insurer or managed health

care plan;

(2) that full benefits are provided for health care or a specialized area of health care;

(3) that the cost of benefits to enrollees of the MHCP is lower than the cost of similar benefits purchased elsewhere; and

(4) in any such case where the express or implied representation contained in the name is demonstrably untrue or is not supported by substantial evidence at all times while such name is used by the health care insurer or MHCP.

**C.** Nothing in this section limits or restricts the superintendent from determining that a health care insurer or MHCP or solicitor firm name is deceptive for reasons other than those stated herein.

**D.** A change of a health maintenance organization plan name is a "substantial modification" of the HMO for purposes of Section 59A-46-3D NMSA 1978.

[13.10.23.12 NMAC - Rp, 13.10.13.23 NMAC, 09/01/2009]

### **13.10.23.13 ADVERTISING AND SOLICITATION:**

**A. Deceptive advertising prohibited.** No health care insurer may cause or knowingly permit the use of advertising or solicitation that is untrue or misleading, or may cause or knowingly permit any form of summary of benefits or evidence of coverage which is deceptive.

**B. Approval required.** All materials, including, but not limited to, solicitation documents and texts of media advertising to be employed by the health care insurer for the purpose of personally soliciting individual or group enrollees shall be submitted, in a form as prescribed by Section 59A-46-5 NMSA 1978 and 13.10.4.18 NMAC, to the superintendent prior to the health care insurer's use of such materials. If such material has not been disapproved by the superintendent within 30 days of its receipt, it shall be deemed approved until such time the superintendent issues a specific disapproval in writing.

**C. Information to be included in solicitation.** Any solicitation document employed by the health care insurer for the purpose of soliciting individual or group enrollees shall provide a link, contact or other information which would allow the consumer to find the following:

(1) all information necessary to enable a consumer of reasonable understanding, not possessing special knowledge regarding health care coverage, to make an informed choice as to whether or not to enroll with the health care insurer or in the MHCP;

(2) a specific description of the health care services available;

(3) a current list of providers, including health care professionals and facilities; and

(4) the obligations, including financial obligations, required of enrollees who join the MHCP.

**D. Deceptive description of benefits.** A summary of benefits or evidence of coverage is deceptive if the document taken as a whole, and with consideration given to typography and format, would cause a reasonable person, not possessing special knowledge regarding health care coverage, to expect benefits, services, charges, or other advantages which the MHCP does not provide to covered persons.

**E. Inducements prohibited.**

(1) No health care insurer shall use monetary or other valuable consideration, engage in misleading or deceptive practices, or make untrue, misleading, or deceptive representations to applicants in order to induce enrollment.

(2) A statement shall be deemed untrue if it does not conform to fact in any respect and would be considered significant to a person contemplating enrollment with a MHCP.

(3) Inducements do not include incentives specified or provided for in the MHCP contract given to covered persons and to promote the delivery of preventive care or other health improvement activities, which include "value added services" described in 8.305.17.9 NMAC.

**F. Filing of public advertising.** Texts of all media promotional advertising used by the health care insurer solely for the purpose of public advertising shall be filed with the superintendent no later than fifteen (15) days prior to when it first appears in the print, television, electronic, radio, or other medium.

**G. Retraction.** Any health care insurer that makes untrue or misleading statements may be required by the superintendent to publish a correction or retraction of the untrue or misleading statements in the same medium and with the same prominence in which the original untrue or misleading statements were published or broadcasted.

**H. Language used in contracts and advertisements.**

(1) All MHCP contracts or forms shall be in English.

(2) If the negotiation by a health care insurer with a subscriber, enrollee or covered person leading up to the effectuation of a MHCP contract is conducted in a language other than English, the health care insurer shall supply to the subscriber, enrollee or covered person a written translation of the contract in the negotiated language, with a verification which certifies

that the translation is true, accurate and complete, and accurately reflects the substance of the contract, pursuant to Section 59A-19-6 NMSA 1978. The written translation and verification shall be affixed to and shall become a part of the contract or form. Any such translation and verification shall be provided to the superintendent as part of the filing of the MHCP contract or form. No translation of a MHCP contract form shall be approved by the superintendent unless the translation accurately reflects the substance of the MHCP contract form.

(3) The text of all advertisements by a health care insurer, if printed or broadcast in a language other than English, shall also be available in English and shall be provided to the superintendent upon request.

[13.10.23.13 NMAC - Rp, 13.10.13.26 NMAC, 09/01/2009]

**13.10.23.14 CONTINUATION AND TRANSITION OF TREATMENT:**

Each health care insurer shall offer continuation and transition of treatment to covered persons in compliance with the Insurance Code and applicable rules.

**A.** If a covered person's health care provider leaves the MHCP's network of providers, the MHCP shall permit the covered person to continue an ongoing course of treatment with the provider for a transitional period.

**B.** For all covered persons except those addressed Subsection C of 13.10.23.14 NMAC, the transitional period shall continue for a time that is sufficient to permit coordinated transition planning consistent with the patient's condition and needs relating to continuity of case, and, in any event, shall not be not less than thirty days.

**C.** If a covered person has entered the third trimester of pregnancy at the time of the provider's disaffiliation, and the MHCP offers maternity coverage, the transitional period shall include the provision of post-partum care directly related to the delivery.

**D.** The MHCP will not be required to permit the covered person to continue treatment with the current provider if the provider's disaffiliation with the MHCP was for reasons related to medical competence or professional behavior.

**E.** For transitional periods exceeding thirty days, the MHCP shall authorize continued care as provided in this section only if the health care provider agrees:

(1) to accept reimbursement from the MHCP at the rates applicable prior to the start of the transitional period as payment in full;

(2) to adhere to the MHCP's qual-

ity assurance requirements and to provide to the MHCP necessary medical information related to such care; and

(3) to otherwise adhere to the MHCP's policies and procedures, including but not limited to procedures regarding referrals, pre-authorization and treatment planning approved by the MHCP.

**F.** If upon the effective date of enrollment a new covered person's health care provider is not a member of the MHCP's provider network, the MHCP shall permit the covered person to continue an ongoing course of treatment with the covered person's current health care provider for a transitional period of time.

**G.** For covered persons in an ongoing course of treatment, the transitional period shall be sufficient to permit coordinated transition planning consistent with the patient's condition and needs relating to continuity of care, and, in any event, shall not be less than thirty days.

**H.** If a covered person has entered the third trimester of pregnancy at the effective date of enrollment, and the MHCP offers maternity coverage, the transitional period shall include the provision of post-partum care directly related to the delivery.

**I.** While a covered person is under the care of a provider outside the MHCP's network pursuant to this section, the covered person may receive care from other providers outside the network as ordered by the treating health care professional in consultation with the MHCP. The MHCP shall be obligated to authorize such care and to pay for such services only if the provider furnishing the care to the covered person agrees to accept the conditions described in this section.

[13.10.23.14 NMAC - Rp, 13.10.13.28 NMAC, 09/01/2009]

**13.10.23.15 PENALTIES:** In addition to any applicable suspension, revocation or refusal to continue any certificate of authority or license under the Insurance Code, a penalty for any material violation of this rule may be imposed against a health care insurer by the superintendent in accordance with Sections 59A-1-18 and 59A-46-25 NMSA 1978.

[13.10.23.15 NMAC - Rp, 13.10.13.32 NMAC, 09/01/2009]

**13.10.23.16 SEVERABILITY:** If any section of this rule, or the applicability of any section to any person or circumstance, is for any reason held invalid by a court of competent jurisdiction, the remainder of the rule, or the applicability of such provisions to other persons or circumstances, shall not be affected.

[13.10.23.16 NMAC - Rp, 13.10.13.33 NMAC, 09/01/2009]

**HISTORY OF 13.10.23 NMAC:**

**Pre-NMAC History:** none.

**History of Repealed Material:**  
[RESERVED]

**NMAC History:**

Only those applicable portions of 13.10.13 NMAC, Managed Health Care (filed 4/13/2007) were renumbered, amended, and replaced by 13.10.23 NMAC, Managed Health Care Plan Contracting, effective 09/01/2009.

**NEW MEXICO  
REGULATION AND  
LICENSING DEPARTMENT  
CONSTRUCTION INDUSTRIES  
DIVISION**

**TITLE 14 HOUSING AND  
CONSTRUCTION  
CHAPTER 6 CONSTRUCTION  
INDUSTRIES LICENSING  
PART 7 CONSUMER PRO-  
TECTION**

**14.6.7.1 ISSUING AGENCY:**  
Construction Industries Division (CID) of the Regulation and Licensing Department.  
[14.6.7.1 NMAC - N, 07-01-09]

**14.6.7.2 SCOPE:** This rule applies to consumer protection remedies available to consumers of construction which are administered by CID.  
[14.6.7.2 NMAC - N, 07-01-09]

**14.6.7.3 STATUTORY AUTHORITY:** NMSA 1978 Section 60-13-9.  
[14.6.7.3 NMAC - N, 07-01-09]

**14.6.7.4 DURATION:**  
Permanent.  
[14.6.7.4 NMAC - N, 07-01-09]

**14.6.7.5 EFFECTIVE DATE:**  
July 1, 2009, unless a later date is cited at the end of a section.  
[14.6.7.5 NMAC - N, 07-01-09]

**14.6.7.6 OBJECTIVE:** The purpose of this rule is to establish the procedure for processing claims against any bond issued pursuant to NMSA 1978, Section 60-13-49.  
[14.6.7.6 NMAC - N, 07-01-09]

**14.6.7.7 DEFINITIONS:**  
[Reserved]  
[14.6.7.7 NMAC - N, 07-01-09]

**14.6.7.8 CONSUMER PROTECTION BOND CLAIM PROCESS.**

**A. Certification of uncorrected code violation.**

(1) No uncorrected code violation shall be the basis for a claim against a bond issued pursuant to NMSA 1978, Section 60-13-49 unless certified by CID.

(2) In order to qualify for certification an uncorrected code violation must meet the following criteria:

(a) the code violation must have been investigated and confirmed by CID;

(b) CID will mail a notification of the code violation to the licensee responsible for the violation to the licensee's address of record; the notice shall identify the code violation and inform the licensee that the violation must be corrected no later than 60 days from the date of the notice and inform the licensee that failure to correct the violation, unless excused, shall subject the licensee's bond to a claim for the cost of correcting the violation;

(c) if the licensee fails to correct the code violation within the period provided in the notice, CID shall issue a written certification of uncorrected code violation; a copy of the certificate shall be sent to the licensee, the licensee's bonding company and, upon request, to the owner of the construction on which the violation occurred along with the contact information of the surety holding the bond of the licensee responsible for the violation, and instructions for filing a bond claim.

**B. Claims on bond.**

(1) The owner of construction on which a certified uncorrected code violation exists or has occurred may apply to the surety company holding the bond of the licensee responsible for the violation to claim against the bond for the cost of correcting the violation.

(2) The person claiming against the bond must submit the following to the surety company:

(a) a copy of the CID certification of uncorrected code violation;

(b) three estimates of the cost to correct the code violation; each estimate must be in writing, must have been made within thirty days prior to submission, must be made by a licensee in good standing with CID who is not related to the claimant, and must be limited to the work that is necessary to correct the code violation; and

(c) a copy of the certificate of occupancy for the construction in which the certified uncorrected code violation occurred, or documentation of the final inspection performed on the construction by the governmental entity which performed the inspection; if the governmental entity having jurisdiction is not CID and if no documentation of final inspection is available from that entity, the owner may submit documentation of CID's complaint inspection.

(3) The person claiming against

the bond must provide written notice to CID of the claim within 10 days after submitting the claim to the surety company.

**C. Payment of claim.** A surety company shall not make a payment on a claim against a bond:

(1) to a person who is not the owner of the construction on which a code violation has occurred;

(2) for costs of correcting an uncorrected code violation unless CID has issued a certification of uncorrected code violation and the surety company has a copy of the certification;

(3) in an amount that is greater than the cost to correct the code violation as provided in the lowest of three estimates that meets the criteria in Subsection B of this section, above;

(4) if the date on which the certificate of occupancy or the final inspection of the construction in which the verified uncorrected code violation occurred is more than two years prior to the date on which CID issues the certification of uncorrected code violation.

**D. Effect of payment of a claim.**

(1) A surety company who makes payment of a claim against a bond shall notify CID in writing concurrently with making such payment to the claimant.

(2) Upon receipt of payment of a claim against a bond, CID shall notify the licensee of the payment and the licensee shall have 30 days to provide CID with proof of financial responsibility pursuant to Section 60-13-49 of the act. If CID does not receive proof of compliance with this section of the act, it shall request approval from the CIC to issue a notice of contemplated disciplinary action against the licensee for failure to comply with the act.

(3) Any payment by a surety company pursuant to this rule shall deduct from the amount of an order directing payment of a claim on the consumer recovery fund when the claim on the bond and the claim on the fund involve the same licensee, homeowner and construction.

**F. Disciplinary action.**

Nothing contained in this rule shall be construed to limit the authority of CID to take administrative disciplinary action against a licensee.

[14.6.7.8 NMAC - N, 07-01-09]

**14.6.7.9 CONSUMER RECOVERY FUND CLAIM PROCESS.**  
[Reserved]

**HISTORY OF 14.6.7 NMAC:**  
[RESERVED]

**NEW MEXICO  
REGULATION AND  
LICENSING DEPARTMENT  
CONSTRUCTION INDUSTRIES  
DIVISION**

This is an amendment to 19.15.40 NMAC, Section 24, effective 7-1-09.

**19.15.40.24 STANDARDS.** This rule adopts by reference the following standards, as amended herein:

A. 2006 national fuel gas code, referred to as NFPA54;

B. ~~2004~~ 2008 liquefied petroleum gas code, referred to as NFPA 58;

C. 2008 guide for fire and explosion investigations, referred to as NFPA 921;

D. 1999 standard on recreational vehicles, referred to as NFPA 1192;

E. 1999 liquefied natural gas vehicular fuel systems code, referred to as NFPA 57; and

F. 1998 compressed natural gas vehicular fuel systems code, referred to as NFPA 52.

[19.15.40.24 NMAC - N, 11/25/08; A, 7-1-09]

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**End of Adopted Rules Section**

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**Other Material Related to Administrative Law**

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**NEW MEXICO CHILDREN,  
YOUTH AND FAMILIES  
DEPARTMENT**

**NMAC Chapter Name Changes**

By request of the Children, Youth and Families Department, the State Records Administrator considered and approved to change the names of Chapters 26 and 27 of Title 8. Chapter 26 is changed from "ADOPTION" to "ADOPTION AND FOSTER CARE." Chapter 27, formerly "FOSTER CARE" is now RESERVED. The name changes will take effect on May 29, 2009.

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**End of Other Material Section**

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## SUBMITTAL DEADLINES AND PUBLICATION DATES

### 2009

<b>Volume XX</b>	<b>Submittal Deadline</b>	<b>Publication Date</b>
Issue Number 1	January 2	January 15
Issue Number 2	January 16	January 30
Issue Number 3	February 2	February 13
Issue Number 4	February 16	February 27
Issue Number 5	March 2	March 16
Issue Number 6	March 17	March 31
Issue Number 7	April 1	April 15
Issue Number 8	April 16	April 30
Issue Number 9	May 1	May 14
Issue Number 10	May 15	May 29
Issue Number 11	June 1	June 15
Issue Number 12	June 16	June 30
Issue Number 13	July 1	July 16
Issue Number 14	July 17	July 31
Issue Number 15	August 3	August 14
Issue Number 16	August 17	August 31
Issue Number 17	September 1	September 15
Issue Number 18	September 16	September 30
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Issue Number 20	October 16	October 30
Issue Number 21	November 2	November 13
Issue Number 22	November 16	December 1
Issue Number 23	December 2	December 15
Issue Number 24	December 16	December 31

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