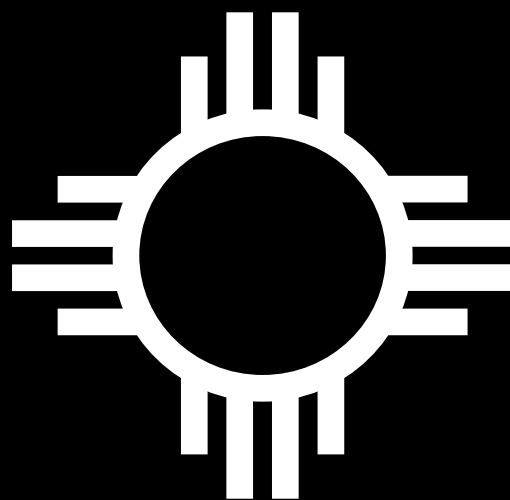


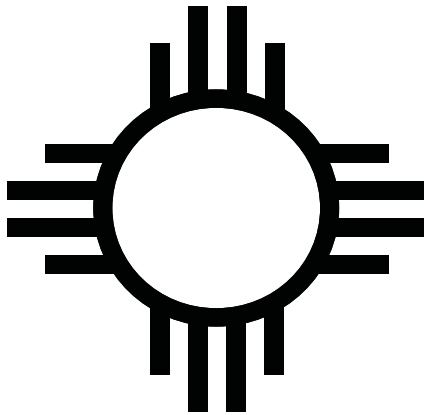
NEW MEXICO REGISTER



Volume XXI
Issue Number 22
December 1, 2010

New Mexico Register

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December 1, 2010**



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

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New Mexico Register

Volume XXI, Number 22

December 1, 2010

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Notices of Rulemaking and Proposed Rules

NEW MEXICO GAME COMMISSION

STATE GAME COMMISSION PUBLIC MEETING AND RULE MAKING NOTICE

On Thursday, December 9, 2010, beginning at 9:00 a.m., at the **Clovis Community College - Town Hall, Rm. 154, 417 Schepps Blvd., Clovis, NM 88101**, the State Game Commission will meet in Public Session to hear and consider action as appropriate on the following: Updates and Miscellaneous; Williams Oil Company/NM-Sportsmen for Fish & Wildlife - Habitat Protection Donation and Appreciation Recognition; Revocations; Lesser Prairie Chicken Management Update; New Mexico/Colorado Decision Support System Pilot Project; Appointment of Citizen Advisors to the Habitat Stamp Program; Update on Future Habitat Stamp Program Procedures; Discussion Regarding Modified Fish Bag Limits on Properties Subject to an Open Gate Agreement; Closed Executive Session pursuant to Section 10-15-1, NMSA, 1978; Notice of Commission Contemplated Action; Proposed Conservation Easement; and General Public Comments (comments limited to 3 minutes).

The following rules are available for public comment and discussion by the Commission:

- * Adoption of a Proposed Private Land Antelope License Allocation Rule (19.30.12, NMAC);
- * Adoption of Proposed Amendments to the Pronghorn Antelope Rule (19.31.15, NMAC);
- * Opening the Trapping and Furbearers Rule (19.32.2, NMAC); and
- * Falconry Rule Update (19.35.8, NMAC);.

A copy of the agenda or any of the affected rules can be obtained from the Office of the Director, New Mexico Department of Game and Fish, P.O. Box 25112, Santa Fe, New Mexico 87504 or on the Department's website. This agenda is subject to change up to 24 hours prior to the meeting. Please contact the Director's Office at (505) 476-8008, or the Department's website at www.wildlife.state.nm.us for updated information.

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 or meeting, please contact Sonya Quintana at (505) 476-8029. Please contact Ms. Quintana at least

3 working days before the set meeting date. Public documents, including the Agenda and Minutes can be provided in various accessible forms. Please also contact Ms. Quintana if a summary or other type of accessible form is needed.

NEW MEXICO HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) is scheduling a public hearing on Tuesday, January 4, 2011, at 9:00 a.m. in the ASD conference room of Plaza San Miguel, 729 St. Michael's Drive, Santa Fe.

The subject of the hearing is Mi Via Home and Community-Based Services Waiver. The Human Services Department, Medical Assistance Division (HSD/MAD) is proposing to repeal and replace the Mi Via Waiver Program regulations to conform to the program as approved by the Centers for Medicare and Medicaid Services (CMS).

Definitions are being added to clarify program terms. Service categories are being changed. Language is being added to clarify the individual budget allotment and service and support plan and budget approval and modification processes.

Interested persons may submit written comments no later than 5:00 p.m., January 4, 2011, to Kathryn Falls, Secretary, Human Services Department, P.O. Box 2348, Santa Fe, New Mexico 87504-2348. All written and oral testimony will be considered prior to issuance of the final regulation.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in any HSD public hearing, program or services, please contact the NM Human Services Department toll-free at 1-888-997-2583, in Santa Fe at 827-3156, or through the department TDD system, 1-800-609-4833, in Santa Fe call 827-3184. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

Copies of all comments will be made available by the Medical Assistance Division upon request by providing copies directly to a requestor or by making them available on the MAD website or at a location within the county of the requestor.

Copies of the Human Services Register

and their proposed rules are available for review on our Website at www.hsd.state.nm.us/mad/registers/2010 or by sending a self-addressed stamped envelope to Medical Assistance Division, Program Oversight & Support Bureau, P.O. Box 2348, Santa Fe, NM. 87504-2348.

NEW MEXICO BOARD OF PHARMACY

NEW MEXICO BOARD OF PHARMACY

REGULAR BOARD MEETING

NOTICE TO THE PUBLIC

The New Mexico Board of Pharmacy will convene on **January 12th & 13th, 2011 at 9:00 a.m. in the Board of Pharmacy Conference Room located at 5200 Oakland Ave., NE, Albuquerque, NM** for the purpose of conducting a regular Board meeting.

Interested persons wishing to comment and or present proposed language regarding rule hearings must submit documentation via fax, mail or email to William Harvey, William.Harvey@state.nm.us or Debra Wilhite, debra.wilhite@state.nm.us no later than 72 hours prior to board meeting, if in attendance please provide 15 copies for distribution to board members.

Interested persons may contact Debra Wilhite, Administrative Secretary, 5200 Oakland Ave., NE, Suite A, Albuquerque, NM 87113, (505) 222-9830 or fax (505) 222-9845, e-mail debra.wilhite@state.nm.us to receive copies of the agenda and any proposed rule, which will be available January 2, 2011. The Board may go into executive session at any time to discuss licensee and/or personnel matters. Anyone who needs special accommodations for the meeting should contact the Board office at (505) 222-9830 as soon as possible.

The agenda (tentative) will be available starting January 2, 2011 through the Board's website: www.rld.state.nm.us/pharmacy.

The Board will address:

Rule Hearings:

16.19.20.68 NMAC Controlled Substances (Tramadol)

Hearings, Board Orders and Surrenders:

Notice of Hearing Cases:
2010-031

Approval of Applications:

Other Board Matters:

Committee Reports:

Public Requests:

*Executive Director's Report:

Case presentations*

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

NOTICE OF PUBLIC HEARING

The Public Education Department (PED) hereby give notice that the PED will conduct a public hearing at Mabry Hall, Jerry Apodaca Building, at 300 Don Gaspar, Santa Fe, New Mexico, 87501-2786, on Tuesday, January 11, 2011, from 2:00 PM to 4:00 PM.

The purpose of the public hearing will be to obtain input on the following Professional Licensure Rules:

6.60.3 NMAC	ALTERNATIVE LICENSURE
6.62.2 NMAC	LICENSURE FOR EDUCATIONAL ADMINISTRATION, GRADES PRE-K-12
6.63.3 NMAC	LICENSURE FOR INSTRUCTIONAL SUPPORT PROVIDERS PRE K-12 NOT COVERED IN OTHER RULES.
6.64.4 NMAC.	COMPETENCIES FOR ENTRY-LEVEL MATHEMATICS TEACHERS
6.68.2 NMAC	DENIAL OF APPLICATIONS FOR LICENSES FOR SCHOOL PERSONNEL
6.69.3 NMAC	PERFORMANCE EVALUATION REQUIREMENTS FOR ADMINISTRATORS
6.69.4 NMAC	PERFORMANCE EVALUATION SYSTEM REQUIREMENTS FOR TEACHERS

■ [New Mexico Administrative Code: Chapter 6 \(All Official PED Rules\)](#)

The proposed rules may be accessed on the PED website (<http://ped.state.nm.us>) or, obtained from Ms. Montano as indicated in the following paragraph, by providing a self-addressed stamped envelope to Ms. Montano.

The proposed rules will be made available at least thirty days prior to the hearings.

Interested individuals may testify at the public hearing or submit written comments to Ms. Montano, Executive Assistant, Educator Quality Division, Public Education Department, 444 Galisteo, Suite A., Santa Fe, NM 87501, by email; Elizabeth.Montano@state.nm.us or by fax: 505-827-3525. Written comments must be received no later than 5:00 PM on January 11, 2011. However, the submission of written comments as soon as possible is encouraged.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in the meeting are asked to contact Ms. Montano by 5:00 PM on December 31, 2010. The PED requests at least ten (10) days advance notice to provide requested special accommodations.

NEW MEXICO PUBLIC REGULATION COMMISSION

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

CASE NO. 10-00316-UT

IN THE MATTER OF A PROPOSED RULEMAKING TO REPEAL AND REPLACE 17.5.410 NMAC

NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the New Mexico Public Regulation Commission ("Commission") is commencing a rulemaking proceeding for the purpose of repealing and replacing rule 17.5.410 NMAC governing residential services by gas, electric and rural electric cooperatives. The proposed replacement rule would be promulgated under authority granted to the Commission by the New Mexico Constitution, Article XI, Section 2 (1996), and by the Legislature pursuant to NMSA 1978 Sections 8-8-4, 8-8-5, 27-6-17 and 27-

6-18.1. A copy of the proposed replacement rule is attached hereto as Attachment A.

On October 22, 2010, the Commission's Utility Division Staff ("Staff"); New Mexico Gas Company, Inc.; Prosperity Works and Raton Natural Gas Company filed a Joint Motion to Initiate Rulemaking ("Joint Motion") in Case No. 08-00011-UT. As explained in the Joint Motion, the proposed replacement rule is the result of a number of workshops that were held on a proposed rule issued in Case No. 08-00011-UT. As the result of those workshops and other proceedings in that case, the parties resolved all but three issues raised by the proposed rule. However, because the Commission was not able to issue a final rule within the 18-month period set forth in NMSA 1978, Section 8-8-15.D, the proposed rule in that case is deemed to have been withdrawn.

The Movants request the Commission to commence a rulemaking by issuing the proposed rule agreed to by the parties in Case No. 08-00011-UT with the three issues that are still unresolved. That proposed rule, which is attached as Attachment A, would repeal and replace rule 17.5.410 NMAC governing residential services by gas, electric and rural electric cooperatives (the "Utilities"). The proposed replacement rule contains revisions resulting from numerous workshops among the Utilities, Staff and other interested parties. The proposed changes to rule 17.5.410 NMAC contained in the proposed replacement rule 17.5.410 NMAC include (1) new language and required forms of notice relating to the prohibition on discontinuance of utility service during the winter heating season set forth in NMSA 1978, Section 27-6-18.1; (2) revisions of several sections relating to discontinuance of services for nonpayment; (3) revisions to the section regarding methods of establishing acceptable credit rating; (4) revisions to the Medical Certification Form and the Financial Certification Form; and (5) other revisions made for the general purpose of updating, reorganizing and clarifying the current rule.

Because the proposed rule in Case No. 08-00011-UT is now deemed withdrawn, the Commission finds it appropriate to issue the Joint Movants' proposed replacement in this new docket, rather than in Case No. 08-00011-UT. Accordingly, and for the sake of administrative efficiency, the Joint Motion and the comments and public hearing transcripts should be transferred to this docket. Thus, parties that wish to rely on their previously filed comments in Case No. 08-00011-UT need not re-file those comments in this proceeding.

Any person wishing to comment on the proposed replacement rule may do so by submitting written comments no later than December 2, 2010. Any person wishing to respond to comments may do so by submitting written response comments no later than December 17, 2010. Comments suggesting changes to the rule amendments as proposed 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 draft rule shall be provided in legislative format.

All pleadings, including comments, shall bear the caption and case number contained at the top of this notice. Additional copies of the proposed replacement rule 17.5.410 NMAC can be obtained from, and comments on the proposed rule, shall be sent to:

Ronald X. Montoya
New Mexico Public Regulation
Commission PERA Building
1120 Paseo de Peralta
Santa Fe, New Mexico 87501
Telephone: (505) 827-6968

A public hearing will begin at 1:00 p.m. on January 6, 2011 at the offices of the NMPRC, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico to receive oral comment and to clarify or supplement the written comments. No testimony or other evidence will be taken at the hearing as this is a rulemaking proceeding.

Pursuant to NMSA 1978, Section 8-8-15.B, this notice, including Attachment A, shall be mailed at least sixty days prior to the hearing date to all persons who have made a written request for advance notice. Also, pursuant to Section 8-8-15B, this notice shall be published, without Attachment A, in at least two newspapers of general circulation in the state and in the New Mexico Register.

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 record date for this rulemaking as the earlier of February 4, 2010, or the date a Final Order is issued in this proceeding. The setting of a record closing date will permit Commissioners and Commission counsel to conduct follow-up discussions with parties who have submitted

initial or responsive comments to the Commission's proposed rule 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 responsive comments, or as allowing the filing of other documents in this case.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 2nd day of November, 2010.

NEW MEXICO PUBLIC REGULATION COMMISSION

DAVID W. KING, CHAIRMAN

JEROME D. BLOCK, VICE CHAIRMAN

JASON A. MARKS, COMMISSIONER

THERESA BECENTI-AGUILAR, COMMISSIONER

SANDY JONES, COMMISSIONER

NEW MEXICO WATER QUALITY CONTROL COMMISSION

NEW MEXICO WATER QUALITY CONTROL COMMISSION

NOTICE OF PUBLIC HEARING TO CONSIDER PROPOSED AMENDMENTS

TO 20.6.2 NMAC - GROUND AND SURFACE WATER PROTECTION REGULATIONS - CERTIFICATION OF FEDERAL CLEAN WATER ACT (CWA) PERMITS

The New Mexico Water Quality Control Commission (WQCC) will hold a public hearing beginning at 9:00 a.m. on January 11, 2011 and continuing on subsequent days as necessary in the Auditorium on the 1st Floor of the Harold Runnels Building, 1190 St. Francis Drive, Santa Fe, to consider proposed amendments to 20.6.2 NMAC - Ground and Surface Water Protection Regulations. At the hearing, the WQCC will consider rulemaking to establish procedures governing State certification of federal permits under section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. Both the Clean Water Act and the New Mexico Water Quality Act require the adoption of procedures for certification of federal permits. Section 401(a)(1) of the Clean Water Act provides that the appropriate state agency "shall establish procedures for public notice in the case of all applications for

certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications.” 33 U.S.C. § 1341(a)(1). The Water Quality Act similarly provides that “[t]he [C]ommission shall adopt regulations establishing procedures for certifying federal water quality permits.” NMSA 1978, § 74-6-5(B).

The Department has drafted, and is petitioning the WQCC to adopt, regulations that would establish procedures for certification or denial of federal permits. The proposed regulations would govern State certification of National Pollutant Discharge Elimination System (NPDES) permits issued by the U.S. Environmental Protection Agency (USEPA), permits for discharge of dredged or fill material issued by the Army Corps of Engineers, and other federal permits that may effect waters of the United States. The Rulemaking Petition and proposed regulations will be considered at the hearing. A copy of the Rulemaking Petition, the proposed regulations, and other documents related to the rulemaking, are available at: <http://www.nmenv.state.nm.us/swqb/wqa/>. A copy of the proposed regulations is attached to the Rulemaking Petition.

The proposed state certification rules would add clarity and lend certainty to the certification process, provide for public notice that it is reviewing a draft permit for purpose of certification or denial of certification, provide a minimum of thirty days for public comment on a draft permit, provide that all pertinent public comments must be considered, and provide for appeal of the permit certification or denial to the Secretary of the New Mexico Environment Department.

The hearing will be conducted in accordance with NMSA 1978, Section 74-6-6 of the Water Quality Act; and the Guidelines for WQCC Regulation Hearings. The Guidelines are available at: <http://www.nmenv.state.nm.us/wqcc/WQCC1993Guidlines.pdf>

The Rulemaking Petition and the Guidelines for WQCC Regulation Hearings may also be obtained electronically or reviewed in person by contacting:

Joyce Medina, WQCC Administrator
1190 St. Francis Dr., PO Box 5469
Santa Fe, NM 87502
Tel: (505) 827-2425
Fax: (505) 827-2836
E-mail: joyce.medina@state.nm.us

Technical Testimony:

In order to present technical testimony at the hearing, a person must file a notice of intent to present technical testimony with

the WQCC Administrator no later than ten working days prior to the hearing. The notice shall:

1. identify the person for whom the witness(es) 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. state the anticipated duration of the direct testimony of each technical witness;
 5. include the text of any recommended modifications to the proposed regulatory change; and
 6. identify and attach all exhibits to be offered by the person at the hearing.
- The Hearing Officer may exclude technical testimony and exhibits not timely filed.

Participation by the General Public:

Any member of the general public may present non-technical testimony and exhibits at the hearing. No prior notification is required. Persons desiring to present non-technical testimony may be heard at the end of the technical case. A member of the general public may submit a written non-technical statement for the record in lieu of oral testimony at the hearing at any time prior to the close of the hearing.

If any person requires assistance, an interpreter or auxiliary aid to participate in this process, please contact Judy Bentley at least ten days prior to the hearing date at NMED, Personnel Service Bureau, Room N-4071, 1190 St. Francis Drive, P.O. Box 5469, Santa Fe, New Mexico, 87502. Ms. Bentley's telephone number is (505) 827-9872. TDY users please access Ms. Bentley's number through the New Mexico Relay Network at 1-800-659-8331.

End of Notices and Proposed Rules Section

Adopted Rules

NEW MEXICO PUBLIC ACCOUNTANCY BOARD

This is an amendment to 16.60.5 NMAC Section 11, effective 1-01-2011

16.60.5.11 RULES OF CONDUCT:

In addition to abiding by the AICPA code of professional conduct, New Mexico CPA/RPA certificate/license holders shall abide by the following board rules:

A. Rule 901 - Responses to board communications. An individual certificate/license or firm permit holder shall, when requested, substantively respond in writing to any communications from the board requesting a response within 30 days of the mailing of such communications by registered or certified mail to the last address furnished the board by the applicant, certificate or registration holder.

(1) Failure to respond substantively to written board communications or failure to furnish requested documentation and/or working papers constitutes conduct indicating lack of fitness to serve the public as a professional accountant.

(2) Each applicant, certificate or firm permit holder and each person required to be registered with the board under the act shall notify the board, in writing, of any and all changes in such person's mailing address and the effective date thereof within 30 days before or after such effective date.

B. Rule 902 - Reportable events.

(1) A licensee shall report in writing to the board the occurrence of any of the following events within 30 days of the date the licensee had knowledge of these events:

(a) conviction or imposition of deferred adjudication of the licensee of any of the following: felony or any crime of which fraud or dishonesty is an element; and any crime related to the qualifications, functions, or duties of a RPA or CPA or to acts or activities in the course and scope of the practice of public accountancy or as a fiduciary;

(b) the cancellation, revocation, or suspension of a certificate; other authority to practice or refusal to renew a certificate or other authority to practice as a RPA or CPA by any state, foreign country or other jurisdiction; or

(c) the cancellation, revocation or suspension of the right to practice as a CPA or RPA before any governmental body, agency or other licensing agency.

(2) The required report shall be signed by the licensee and shall set forth the facts which constitute the reportable event. If the reportable event involves the action of

an administrative agency or court, then the report shall set forth the title of the matter, court or agency name, docket number, and dates of occurrence of the reportable event. As used in this rule, a conviction includes the initial plea, verdict, or finding of guilt, plea of no contest, or pronouncement of sentence by a trial court even though that conviction may not be final or sentence may not actually imposed until all appeals are exhausted. Nothing in this rule imposes a duty upon any licensee to report to the board the occurrence of any events set forth either by or against any other licensee.

C. Rule 903 - Frivolous complaints. An individual certificate/license or firm permit holder who, in writing to the board, accuses another certificate/license or firm permit holder of violating the act or board rules shall assist the board in any investigation and/or prosecution resulting from the written accusation. Failure to do so, such as not appearing to testify at a hearing or to produce requested documents necessary to the investigation or prosecution, without good cause, is a violation of this rule.

D. Rule 904 - Compliance with the Parental Responsibility Act. If an applicant for a certificate/license or a CPA or RPA certificate/license or firm permit holder is identified by the state of New Mexico human services department (HSD) as not in compliance with a judgment and order for support, the board or its legally authorized designee shall: deny an application for a license; deny the renewal of a license; have grounds for suspension or revocation of a license; and shall initiate a notice of contemplated action under provisions of the Uniform Licensing Act.

(1) If an applicant or licensee disagrees with the determination of non-compliance, or wishes to come into compliance, the applicant or licensee should contact the HSD child support enforcement division. An applicant or licensee can provide the board with a subsequent statement of compliance, which shall preclude the board from taking any action based solely on the prior statement of non-compliance from HSD.

(2) When a disciplinary action is taken under this section solely because the applicant or licensee is not in compliance with a judgment and order for support, the order shall state that the application or license shall be reinstated upon presentation of a subsequent statement of compliance. The board may also include any other conditions necessary to comply with board requirements for reapplications or reinstatement of lapsed licenses.

E. Rule 905 - Specialty

designations. A CPA/RPA certificate/license holder may only represent a claim of special expertise through the use of "specialty designations" in conjunction with the CPA/RPA designation if the specialty designation is:

(1) consistent with designations prescribed by national or regional accreditation bodies offering the designations pursuant to a prescribed course of study, experience, or examination, and

(2) cannot be construed by the public or clients of the CPA/RPA practitioner to be a false fraudulent, misleading, or deceptive claim unsubstantiated by fact.

[16.60.5.11 - Rp 16 NMAC 60.7, 16 NMAC 60.9, and 16 NMAC 60.10, 02-14-2002; A, 06-30-2008; A, 01-01-2011]

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

**TITLE 20 ENVIRONMENTAL
PROTECTION
CHAPTER 2 AIR QUALITY
(STATEWIDE)
PART 350 GREENHOUSE GAS
CAP-AND-TRADE PROVISIONS**

20.2.350.1 ISSUING AGENCY: Environmental Improvement Board.
[20.2.350.1 NMAC - N, 01/01/11]

20.2.350.2 SCOPE: All persons who:

A. own or operate a cap facility, as defined in 20.2.350.7 NMAC, in the geographic area within the jurisdiction of the environmental improvement board; or

B. are authorized account representatives pursuant to this part.
[20.2.350.2 NMAC - N, 01/01/11]

20.2.350.3 STATUTORY AUTHORITY: Environmental Improvement Act, NMSA 1978, Section 74-1-8(A)(4), and Air Quality Control Act, NMSA 1978, Sections 74-2-1 et seq., including specifically Section 74-2-5(B)(1).
[20.2.350.3 NMAC - N, 01/01/11]

20.2.350.4 DURATION: Permanent.
[20.2.350.4 NMAC - N, 01/01/11]

20.2.350.5 EFFECTIVE DATE: January 1, 2011 except where a later date is cited at the end of a section.
[20.2.350.5 NMAC - N, 01/01/11]

20.2.350.6 OBJECTIVE: The objective of this part is to establish requirements for participation in a

greenhouse gas emissions cap-and-trade market.

[20.2.350.6 NMAC - N, 01/01/11]

20.2.350.7 DEFINITIONS: The following definitions apply to this part. The definitions included in 20.2.2 NMAC and 20.2.300 NMAC shall apply to the terms used in this part, unless such term is defined in this part.

A. Allocation year of an allowance means the calendar year in which the allocation of that allowance is made.

B. An allowance under this part is a limited authorization by the department or a jurisdiction approved pursuant to this part to emit one metric ton of CO₂e in accordance with this part.

C. Authorized account representative means a person designated and certified as such pursuant to 20.2.350.400 NMAC.

D. Cap emission means any emission, in units of CO₂e, that is defined as a cap emission in 20.2.300 NMAC. [Cap emissions include most but not all of the emissions required to be reported by emitting facilities under the Federal greenhouse gas mandatory reporting rule, 40 CFR 98, as well as carbon dioxide removed from natural gas and emitted by natural gas treatment plants. Some of the emissions that are not cap emissions are those resulting from motor vehicles, mobile equipment (graders, forklifts, etc.), manure management and livestock, and fugitive methane emissions from landfills, emergency generators, irrigation pumps at agricultural operations, and bench-scale research and development activities.]

E. A cap facility is any facility subject to the obligation to surrender compliance instruments pursuant to 20.2.350.300 NMAC.

F. Cap threshold means twenty-five thousand (25,000) metric tons of cap emissions, in units of CO₂e.

G. CO₂e or carbon dioxide equivalent has the meaning established in 40 CFR 98.

H. Compliance instruments include allowances, early reduction allowances and offset credits.

I. Compliance instrument surrender deadline means midnight at the end of the June 30th occurring after the end of the relevant compliance period or, if that June 30th is not a business day, midnight of the first business day thereafter, and is the deadline by which compliance instruments shall be surrendered for the compliance period immediately preceding the deadline.

J. Compliance period means a three-calendar-year time period. The first compliance period is from January 1, 2012 through December 31, 2014. Each subsequent sequential three-calendar-year

period is a separate compliance period.

K. Emissions year means the calendar year in which the emissions that are subject to the obligation to surrender compliance instruments under 20.2.350.301 NMAC occur.

L. Existing cap facility means a cap facility that meets the criteria for an existing cap facility under Subsection A of 20.2.350.200 NMAC.

M. An external trading program is a greenhouse gas cap-and-trade program consisting of multiple jurisdictions that:

(1) do not include any jurisdiction in New Mexico; and

(2) have entered into mutually binding agreements between those jurisdictions to establish consistent program and trading mechanisms for purposes of capping greenhouse gases and trading greenhouse gas compliance instruments.

N. Facility means any physical property, plant, building, structure, source, or stationary equipment located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or other public right-of-way and under common ownership or common control, that emits or may emit any greenhouse gas. Operators of military installations may classify such installations as more than a single facility based on distinct and independent functional groupings within contiguous military properties. This definition does not aggregate facilities.

O. Initial cap year means the first year for which cap emissions that occur during that year will be subject to an obligation to surrender compliance instruments under this part. The initial cap year refers to the cap-and-trade program rather than to any individual facility. The initial cap year shall be the later of:

(1) 2012;

(2) the year in which this part becomes effective; or

(3) the year in which the provisions of Subsection D of 20.2.350.300 NMAC are met.

P. Offset credit means a type of compliance instrument that:

(1) is issued by a jurisdiction:

(a) approved by the department under 20.2.350.206 NMAC or 20.2.350.209 NMAC; and

(b) for which the program authority has certified that the program meets the criteria of Subsection B of 20.2.350.208 NMAC;

(2) meets the criteria of Subsection A of 20.2.350.208 NMAC; and

(3) is subject to a limitation under Paragraph (3) of Subsection B of 20.2.350.301 NMAC for use in meeting the obligation to surrender compliance instruments.

Q. Vintage year of an allowance means the first calendar year in which the allowance becomes valid for use in meeting a compliance obligation, and is established by the issuing jurisdiction at the time of issuance. The vintage year of each allowance is reflected in the unique identification number given to the allowance. [20.2.350.7 NMAC - N, 01/01/11]

20.2.350.8 SEVERABILITY: If any provision of this part, or the application of such provision to any person or circumstance, is held invalid, the remainder of this part, or the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.

[20.2.350.8 NMAC - N, 01/01/11]

20.2.350.9 CONSTRUCTION: This part shall be liberally construed to carry out its purpose.

[20.2.350.9 NMAC - N, 01/01/11]

20.2.350.10 COMPLIANCE WITH OTHER REGULATIONS: Compliance with this part does not relieve a person from the responsibility to comply with any other applicable federal, state, or local regulation.

[20.2.350.10 NMAC - N, 01/01/11]

20.2.350.11 NEW MEXICO GREENHOUSE GAS EMISSIONS CAP:

The initial greenhouse gas emissions cap shall be the sum of the representative annual cap emissions for existing cap facilities, determined pursuant to 20.2.350.200 NMAC. The effective annual cap reduction is one and a half percent (1.5%) for the year after the initial cap year, and two percent (2%) per year for the following seven years, based on a two percent (2%) per year reduction in allocations to existing cap facilities under Subsection A of 20.2.350.201 NMAC, and an annual allocation under Paragraph (2) of Subsection B of 20.2.350.201 NMAC of the number of allowances equal to one half percent (0.5%) of the cap into the new annual allocation account. In the event that the sum of the representative annual cap emissions (baselines) for existing facilities is reduced pursuant to Subsection E of 20.2.350.200 NMAC or increased due to an existing facility later becoming a cap facility, the initial New Mexico greenhouse gas emissions cap shall be adjusted accordingly. [20.2.350.11 NMAC - N, 01/01/11]

20.2.350.12 APPLICABILITY TO OWNERS AND OPERATORS: Any provision of this part that applies to a cap facility (including those requirements applicable to the authorized account representative of a compliance account) shall also apply to the owners and operators

of such cap facility.

[20.2.350.12 NMAC - N, 01/01/11]

20.2.350.13 [RESERVED]

20.2.350.14 SUSPENSION OF 20.2.100 NMAC: This regulation suspends 20.2.100 NMAC when the sum of initial cap year capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC represent at least 100 million metric tons CO₂e, and for so long as this regulation is in full force and effect and is not stayed.

[20.2.350.14 NMAC - N, 01/01/11]

20.2.350.15 SUNSET CLAUSE: This part and 20.2.100 NMAC shall sunset if a greenhouse gas cap-and-trade program that is at least as effective as this part in reducing cap emissions and established by the federal government becomes effective.

[20.2.350.15 NMAC - N, 01/01/11]

20.2.350.16 PROPERTY RIGHTS: An allowance issued under this part is a limited authority to emit, and shall not constitute a property right.

[20.2.350.16 NMAC - N, 01/01/11]

20.2.350.17 REASSESSMENT: Prior to January 1, 2016, the department shall evaluate and advise the board regarding amendments to the cap-and-trade program regarding the following:

A. additional cap reductions;

B. the allowance allocation provisions for existing cap facilities and new cap facilities;

C. emissions leakage to areas outside of the cap-and-trade program;

D. an allowance retirement process for emissions avoided as a result of the voluntary renewable electricity market;

E. provisions to issue offset credits by the department;

F. provisions to further assure effective functioning of the cap-and-trade market, which may include holdings limits;

G. provisions to allow any person that is not the owner, operator or authorized account representative of a cap facility to establish an account for compliance instruments under this part;

H. additional cost containment provisions, and if for a period of six (6) continuous months the average price per metric ton of CO₂e for offsets and allowances exceeds forty-five (45) dollars in 2010 dollars as adjusted annually by the consumer price index the department shall automatically return to the board with a cost containment proposal; and

I. evaluation of the need to adjust any facility's individual baseline

due to underestimation under 20.2.350.200 NMAC, and provisions for how such adjustments will be determined.

[20.2.350.17 NMAC - N, 01/01/11]

20.2.350.18 to 20.2.350.99 [RESERVED]

20.2.350.100 TRACKING SYSTEM FOR COMPLIANCE INSTRUMENTS: The department shall maintain, or participate in, a system for tracking compliance instruments that is capable of:

A. maintaining records of compliance accounts, including information regarding authorized account representatives;

B. serving as a permanent repository of information on all transactions involving compliance instruments from the time they are created or approved to the time they are retired, including transfers, prices, counter-parties, and other documentation;

C. maintaining and transferring between jurisdictions information as necessary regarding compliance instruments and registrants;

D. assuring that any compliance instruments issued in units other than metric tons CO₂e are converted in an appropriate manner; and

E. providing for public access and confidentiality of information, as appropriate.

[20.2.350.100 NMAC - N, 01/01/11]

20.2.350.101 COMPLIANCE ACCOUNTS:

A. General accounts. [Reserved]

B. Compliance accounts. (1) Nature and function of compliance accounts. Allocations of allowances, and deductions or transfers of compliance instruments pursuant to this part, shall be recorded in the compliance accounts in accordance with this part. The department shall establish one compliance account for each cap facility.

(2) A complete and accurate application for a compliance account shall be submitted to the department:

(a) by October 1, 2012 for each cap facility for which reported cap emissions for emissions year 2011 meet or exceed the cap threshold; and

(b) within ninety (90) days after the first submittal for any facility of an emissions report under 20.2.300 NMAC for which cap emissions meet or exceed the cap threshold.

(3) A complete application for a compliance account shall include:

(a) an account certificate of representation for an authorized account representative, and if applicable an alternate authorized account representative, that meets the requirements under Subsection D

of 20.2.350.400 NMAC; and

(b) identification of the cap facility, including plant name and the identification number associated with the emissions reports submitted pursuant to 20.2.300 NMAC, to which the compliance account shall apply.

(4) Upon receipt of a complete application for a compliance account under Paragraph (2) of Subsection B of this section, the department shall establish a compliance account for the cap facility for which the application was submitted.

(5) The department may place restrictions on a compliance account for any violation of this part.

(6) Closing of compliance accounts. The department may close a compliance account if it determines that:

(a) no cap facility is registered in the compliance account;

(b) no outstanding compliance obligations are associated with the authorized account representative or the account; and

(c) no remaining compliance instruments are in the account.

C. Accounts under the control of the department. The department shall create and maintain the following accounts:

(1) an account containing the allowances to be distributed by the department;

(2) an account into which compliance instruments shall be surrendered, or transferred for retirement or cancellation by the department; and

(3) a new annual allocation account.

D. [RESERVED]

E. Account identification. The department shall assign a unique identifying number to each compliance account established under this part.

F. All submissions to the department pertaining to the account, including submissions concerning the deduction or transfer of compliance instruments in the account and modifications to the account, shall be made only by the authorized account representative for the account.

G. Banking. Each compliance instrument that is held in a compliance account shall remain in such account unless and until the compliance instrument is deducted or transferred under this part.

H. Account error. The department may, at its sole discretion, correct any error in any compliance account under this part. Within ten (10) business days of making such correction, the department shall notify the authorized account representative for the account.

[20.2.350.101 NMAC - N, 01/01/11]

20.2.350.102 COMPLIANCE INSTRUMENT TRANSFERS:

A. Submission of compliance instrument transfers. Each authorized account representative seeking to record a compliance instrument transfer to or from an account established under this part shall submit the transfer to the department by means of the tracking system established under 20.2.350.100 NMAC. To be considered correctly submitted, the compliance instrument transfer shall include the following elements in a format specified by the department:

- (1) the numbers identifying both the transferor and transferee accounts;
- (2) the serial number of each compliance instrument to be transferred, indicating;
- (a) the jurisdiction that originally issued the compliance instrument;
- (b) the vintage year of the compliance instrument; and
- (c) whether the compliance instrument is an allowance or offset credit;
- (3) certification that the transfer is being conducted by the authorized account representative of the transferor account;
- (4) the date of the transaction; and
- (5) the purchase or sale price of the compliance instrument that is the subject of a sale or purchase transaction.

B. [Reserved]

C. Recording transfers of compliance instruments. Each completed compliance instrument transfer shall be recorded by means of the tracking system established under 20.2.350.100 NMAC in the transferor account and the transferee account. The transfer shall not be completed unless:

- (1) the transferor has correctly submitted the transfer; and
- (2) the transferor account includes each compliance instrument identified by serial number in the transfer.

D. Notification.

(1) Notification of recording. As soon as practicable after the recording of a compliance instrument transfer under Subsection C of this section, the department shall electronically notify each party to the transfer. Notice shall be given to the authorized account representatives for both the transferor and transferee accounts.

(2) Notification of non-recording. As soon as practicable after receipt of a compliance instrument transfer that fails to meet the requirements of this part, the department shall electronically notify the authorized account representatives for both accounts subject to the transfer of:

- (a) a decision not to record the transfer; and
- (b) the reasons for such non-recording.

E. Nothing in this

section shall preclude the submission of a compliance instrument transfer for recording following notification of non-recording.

[20.2.350.102 NMAC - N, 01/01/11]

20.2.350.103 RECORDKEEPING:

Unless otherwise provided, the application for each compliance account, the account certificate of representation for the authorized account representative, and all documents that demonstrate the truth of the statements in the account certificate of representation, shall be maintained for seven (7) years after the document was created, or until such documents are superseded because of the submission of a new account certificate of representation changing the authorized account representative, whichever is later. The authorized account representatives, owners of each account, and owners and operators of each cap facility shall keep copies of such documents and make them available to the department upon request.

[20.2.350.103 NMAC - N, 01/01/11]

20.2.350.104 to 20.2.350.199 [RESERVED]**20.2.350.200 BASELINE QUANTITIES FOR EXISTING CAP FACILITIES:**

A. For the purposes of this part, an existing cap facility is a cap facility that:

- (1) began operating prior to January 1, 2011; and
- (2) has been subject to the obligation to surrender compliance instruments pursuant to 20.2.350.300 NMAC for emissions that occurred in every year from the year in which it first qualified as an existing cap facility to and including the emissions year for which allowances are being allocated under this part.

B. By April 2, 2012, the owner, operator or authorized account representative of each facility for which baseline quantities will be determined for purposes of existing cap facility allocations for the initial cap year under this part shall provide to the department all relevant and necessary information to as accurately as possible determine such quantities. Each facility that is not subject to a compliance obligation under 20.2.350.300 NMAC for emissions that occur during the initial cap year shall provide such information by April 1 following the first year for which emissions from the facility are subject to a compliance obligation. Additional information as requested by the department shall be provided by the deadlines established in the request.

C. Baseline quantities. For the purposes of this part, representative annual cap emissions means the cap emissions which occur during normal operation in a typical year contemporaneous

with the effective date of this part.

(1) Representative annual cap emissions for purposes of allocating allowances to existing cap facilities. Representative annual cap emissions of each existing cap facility shall be based on the best available estimate of emissions.

(a) The best available estimate of emissions shall be based, where possible, on:

(i) any greenhouse gas emissions reports submitted to the department for calendar years 2009, 2010, and 2011, with greater weight given to verified data; and

(ii) any other emissions reports which have been verified by a third party.

(b) Where emissions reports as specified in Subparagraph (a) of this paragraph are not available for all years, emissions shall be estimated by best available methods, which may include the following methods. The department shall take into account the potential margin of error associated with the emissions estimates used.

(i) Methods in 20.2.300 NMAC.

(ii) Methods in 40 CFR 98.

(iii) The department reporting procedures issued in any year for reporting under 20.2.73 NMAC or 20.2.87 NMAC.

(iv) Reporting protocols of any voluntary greenhouse gas registry.

(v) Industry standard protocols for estimating greenhouse gas emissions.

(vi) Simple correlations with production.

(2) In establishing representative annual cap emissions for purposes of allocating allowances to an existing cap facility, the department shall consider:

(a) a previous emissions intensity, if the intensity of greenhouse gas emissions per unit of production decreased between January 1, 2005 and December 31, 2009, and the supporting information is complete and verified; and

(b) other information and quantifications provided and certified by the owner, operator or authorized account representative of the facility indicating that the years 2009 through 2011 are not representative of annual cap emissions during normal operation in a typical year contemporaneous with the effective date of this part, which may include the effects of an economy-wide downturn that results in unrepresentatively low levels of production.

(3) The department shall:

(a) evaluate each sector to assure that the representative cap emissions for cap facilities in that sector are determined in a consistent and equitable manner; and

(b) take into account the potential margin of error associated with the data and emissions estimates used in developing representative annual cap emissions.

D. Comment and review.

(1) By October 1, 2012, the department shall notify the authorized account representative of each existing facility anticipated to be subject to a compliance obligation for emissions during the initial cap year and release for public comment:

(a) the department's preliminary determination of its representative annual cap emissions; and

(b) the department's evaluation under Subparagraph (a) of Paragraph (3) of Subsection C of this section describing the means by which the representative cap emissions for cap facilities in each sector have been determined in a consistent and equitable manner.

(2) The deadline for providing public comments shall be November 16, 2012. The department shall release its final determination by December 31, 2012. The department's final determination may be appealed pursuant to the Air Quality Control Act, Section 74-2-9.A.

E. The department may revise the representative annual cap emissions for the existing cap facility if new information indicates that the values for representative annual cap emissions overestimated that of normal operation in a typical year contemporaneous with the effective date of this part.

[20.2.350.200 NMAC - N, 01/01/11]

20.2.350.201 ALLOCATION OF EXISTING FACILITY ALLOWANCES:

A. Existing facility allocation. Except as provided in Subsection B of this section, the department shall allocate without charge into the compliance account of each existing cap facility those allowances as calculated by Equation 201-1. Allocation shall occur by May 1 of the year following each emissions year in which the facility qualifies for an existing facility allocation as an existing cap facility. If the number of allowances as calculated by Equation 201-1 is not a whole number, the allocation shall be that number rounded to the nearest whole number.

$$A_i = E_R \times [1 - [(Y_i - Y_{IN}) \times 0.02]] \quad \text{Equation 201-1}$$

Where:

A_i = allowances allocated for emissions year i
 E_R = representative annual cap emissions, in metric tons CO₂e.
 Y_i = emissions year i or $(Y_{IN} + 8)$, whichever is less
 Y_{IN} = initial cap year, as defined in Section 20.2.350.7 NMAC
 0.02 = annual cap reduction.

B. Each existing cap facility in the phase-out period under Subsection B of 20.2.350.300 NMAC shall be allocated the lesser of the following:

(1) the number of allowances equal to the number of metric tons CO₂e reported under 20.2.300 NMAC for the emissions year for which the allocation is being made; or

(2) the number of allowances as calculated under Subsection A of this section.

C. On May 1 of each year after the initial cap year, the department shall record in the new annual allocation account:

(1) each allowance that is not allocated as a result of a facility no longer qualifying as an existing cap facility under 20.2.350.300 NMAC; and

(2) the number of allowances equal to one half of one percent (0.5%) of the allowances under the cap for the emissions year.

[20.2.350.201 NMAC - N, 01/01/11]

20.2.350.202 NEW ANNUAL ALLOCATIONS:

A. The authorized account representative of cap facility may choose to apply for new annual allocations for:

(1) cap emissions from a new cap facility that commences operation after January 1, 2011;

(2) for an existing facility that becomes a cap facility after the initial cap year, the new cap emissions that do not qualify for existing cap facility allocations; and

(3) new cap emissions that are directly attributable to changes in equipment or activities necessary to meet new federal air quality requirements for the production of clean fuels.

B. Authorization date for the request for new annual allocations. The authorization date for the request for new annual allocations shall be the later of the following dates.

(1) The date on which the department establishes the maximum new annual allocations pursuant to 20.2.350.203 NMAC.

(2) The date on which the department receives a request under this section that new annual allocations be established for a facility.

(3) The date on which the department receives notification that the new cap facility or equipment and activities associated with qualifying emissions have commenced operation.

(4) If after a cap facility has received new annual allocations it ceases to be a cap facility, the date the department receives notification that the facility has commenced operations at a level at which it becomes a cap facility again.

C. Distribution from the new annual allocation account. The department shall, until the account is exhausted or the sum of the maximum new annual allocations established under 20.2.350.203 NMAC for the authorized requests have been satisfied, allot the allowances in the new annual allocation account in order of authorization date with the earlier dates first.

D. In order to assure that the provisions of this part for new allocations are implemented in a consistent and equitable manner, the department shall develop detailed procedures for establishing maximum new annual allocation values under 20.2.350.203 NMAC and the allocation of allowances in the new annual allocation account under this section.

(1) By October 31, 2011 the department shall release the draft detailed procedures for public comment. The deadline for providing public comments shall be November 30, 2011.

(2) By December 31, 2011, the department shall, after consideration of public comments, release final detailed procedures.

[20.2.350.202 NMAC - N, 01/01/11]

20.2.350.203 MAXIMUM NEW ANNUAL ALLOCATIONS:

A. No allocation of allowances under 20.2.350.202 NMAC may occur unless:

(1) the authorized account representative has submitted a request that the department establish the maximum new annual allocation for the request; and

(2) the department has determined pursuant to this section the maximum new annual allocation that may occur for the request.

B. The request that the department establish a maximum new annual allocation for a facility shall contain the following information:

(1) the cap facility for which the new allocations are being requested;

(2) the equipment and activities associated with the new cap emissions and date on which they commenced or are anticipated to commence production;

(3) for new cap emissions that are directly attributable to changes in equipment or activities necessary to meet new federal air quality requirements:

(a) a description of the new federal air quality requirements for which the increased cap emissions are directly attributable to meet;

(b) a quantification of the increase in cap emissions, including supporting data and calculations; and

(c) an explanation of why the increase of cap emissions cannot be avoided to meet the new federal air quality requirements; and

(4) a quantification, including supporting information, of the new cap emissions resulting from combustion.

C. Maximum new annual allocations for a facility shall be determined by the department as the cap emissions that would occur during normal operation from the combustion of an equivalent number of British thermal units of natural gas for all combustion at the facility. The limit to the maximum new annual allocations for purposes of allocating allowances to a facility under this part does not limit the type of fuel that is used at the facility or the actual emissions that may occur at that facility.

D. The department may revise the maximum annual new allocation under this section if new information indicates that it was overestimated as a result of information provided in the request.

E. No facility shall receive new annual allocation allowances for any emissions level used in determining baseline

quantities, under 20.2.350.200 NMAC, which are the basis for any allocation of existing facility allowances under 20.2.350.201.

[20.2.350.203 NMAC - N, 01/01/11]

20.2.350.204 RECORDING OF ALLOWANCE ALLOCATIONS:

A. Allocation shall occur when the department records in the compliance account of the cap facility the allowances allocated under 20.2.350.201 NMAC.

B. Serial numbers for allocated allowances. Prior to allocating allowances to and recording them in an account, the department shall assign each allowance a unique identification number that shall include digits identifying the vintage year for that allowance.

[20.2.350.204 NMAC - N, 01/01/11]

20.2.350.205 [RESERVED]

20.2.350.206 COMPLIANCE INSTRUMENTS THAT ORIGINATE IN OTHER JURISDICTIONS: A compliance instrument issued by another jurisdiction may be used to meet a compliance obligation under 20.2.350.301 NMAC if the compliance instrument meets the requirements of this section.

A. The compliance instrument shall be:

(1) recorded in the compliance account of the cap facility;

(2) valid, not retired, and not used to meet a compliance obligation in any other jurisdiction;

(3) of a vintage year that occurs during or prior to the compliance period for which it is being used; and

(4) issued by a jurisdiction approved under Subsection B of this section.

B. The department may approve another jurisdiction for purposes of accepting a compliance instrument that originates from that jurisdiction if:

(1) the department has evaluated the jurisdiction based on the qualifications described in 20.2.350.207 NMAC;

(2) the department has provided public notice and an opportunity for public comment regarding the proposed approval of the jurisdiction; and

(3) the department and the program authority have mutually acknowledged that their programs are compatible so as to:

(a) allow the mutual acceptance of compliance instruments issued by the department and the other jurisdiction to meet compliance obligations; and

(b) provide that after any compliance instrument is retired or used to meet an obligation to surrender compliance instruments under a cap-and-trade program, it shall be disqualified for subsequent use

under any system, whether such use is a sale, exchange, or submission to meet an obligation to surrender compliance instruments under a cap-and-trade program; and

(4) the program authority for the other jurisdiction has provided assurances that it will continue to meet the qualifications in 20.2.350.207 NMAC.

[20.2.350.206 NMAC - N, 01/01/11]

20.2.350.207 QUALIFICATIONS FOR APPROVAL UNDER 20.2.350.206 NMAC OF A JURISDICTION FOR PURPOSES OF ACCEPTING COMPLIANCE INSTRUMENTS THAT ORIGINATE FROM THAT JURISDICTION: In evaluating a jurisdiction, the department shall consider whether the jurisdiction:

A. has committed to a binding and annually declining aggregate total greenhouse gas emissions cap that covers one or more economic sectors in that jurisdiction;

B. includes the following:

(1) a comprehensive registration requirement for all market participants;

(2) the capability to transfer relevant and necessary information on all registrants between the jurisdiction and the department using an emissions tracking system that meets the criteria in 20.2.350.100 NMAC;

(3) provisions to ensure that the integrity of offset credits accepted into the system is equal to or greater than that required by 20.2.350.208 NMAC;

(4) restrictions to the use of offset credits comparable to the quantitative usage limit established in Paragraph (3) of Subsection B of 20.2.350.301 NMAC;

(5) provisions for comparable monitoring, reporting, verification, compliance, and enforcement of its greenhouse gas emissions and emission reductions to those set forth in this part and 20.2.300 NMAC; and

(6) provisions that compliance instruments that are voluntarily retired or used to meet an obligation to surrender compliance instruments are disqualified from further use in any system;

C. includes enforcement mechanisms that:

(1) provide general market surveillance, identify suspect transactions, and provide for investigations and enforcement actions;

(2) ensure consequences for noncompliance are comparable between the other jurisdiction and this part;

(3) respond in a timely manner to requests by enforcement agencies in the jurisdiction and all jurisdictions approved by the department under this part for information on market participants under

investigation by those agencies; and

(4) transfer between systems in a timely manner relevant and necessary information of all relevant enforcement actions undertaken by the system's jurisdictional enforcement authority;

D. is capable of transferring between the jurisdiction and all jurisdictions approved by the department under this part information necessary to monitor market trends on a regional basis, including:

(1) prices, aggregate emissions, positions of major market participants and expected issuance of offset credits; and

(2) information that can be released to the public in a coordinated and consistent manner; and

E. provides an equal degree of protection for confidential business information.

[20.2.350.207 NMAC - N, 01/01/11]

20.2.350.208 OFFSET CREDITS:

A. No offset credit shall be used to meet a compliance obligation unless the offset credit:

(1) represents a greenhouse gas emission reduction, avoidance or sequestration that is real, additional, quantifiable, permanent, verifiable and enforceable;

(2) has been authenticated through review, approval, and issuance by a jurisdiction or external trading program approved by the department under:

(a) 20.2.350.206 NMAC or 20.2.350.209 NMAC; and

(b) Subsection B of this section;

(3) has been developed using an offset protocol that has been reviewed and approved by the department to assure that the offset credit meets the requirements of this part;

(4) has been issued for an offset project located in North America with a commencement date after January 1, 2007; and

(5) is not the result of an offset project that reduced emissions that:

(a) are covered by this part; or

(b) would be covered by this part if they occurred within its jurisdiction.

B. The department shall not approve an offset from a jurisdiction or external trading program unless the program authority can certify that the program will assure that the offset credits that it issues are for emissions reductions that are real, additional, quantifiable, permanent, verifiable and enforceable by:

(1) performing audits of offset project sites;

(2) requiring adequate reporting, recordkeeping and verification of the offset projects that produce offset credits;

(3) notifying the department in the event that an offset credit recorded in an

account under this part:

(a) has been discovered to not meet the criteria of this section;

(b) has been determined to be invalid; or

(c) has been used to meet a compliance obligation not under this part; and

(4) retiring such offset credit from that jurisdiction or program at such time that the department notifies the program authority that the offset credit has been used to meet a compliance obligation under this part.

C. If the department determines that an offset credit recorded in a compliance account pursuant to this part is or has become invalid:

(1) the department shall:

(a) notify the authorized account representative and program authority for the issuing jurisdiction or external trading program of such determination and the basis for it; and

(b) if an invalid offset credit remains in the compliance account, remove it the from the account; and

(2) if the offset credit has been used to meet a surrender obligation under this part, the authorized account representative shall within thirty (30) days surrender a valid compliance instrument to replace each invalid offset credit.

[20.2.350.208 NMAC - N, 01/01/11]

20.2.350.209 COMPLIANCE INSTRUMENTS THAT ORIGINATE IN AN EXTERNAL TRADING PROGRAM:

A compliance instrument that originates in an external trading program may be used to meet a compliance obligation under 20.2.350.301 NMAC if:

A. the department has approved the external trading program after considering whether the program:

(1) is run by a sub-national, national or regional government;

(2) provides for emissions measurement, monitoring, reporting and verification that are comparable to the provisions of this part;

(3) includes a binding aggregate greenhouse gas emissions cap covering one or more economic sectors; and

(4) contains offset credit provisions that:

(a) ensure a level of integrity commensurate with the offset requirements in 20.2.350.208 NMAC; and

(b) limit the use of offsets so as to ensure that emissions reductions will also occur at the facilities covered by the external trading program;

B. the department and external trading program have established provisions to ensure that after any compliance instrument issued by the external trading

program is used to meet an obligation to surrender compliance instruments under this part, it shall be disqualified for subsequent use under any system, whether such use is a sale, exchange, or submission to meet an obligation to surrender compliance instruments under a cap-and-trade program; and

C. the compliance instrument is:

(1) recorded in the compliance account of the cap facility in units of metric tons CO₂e (see Subsection D of 20.2.350.100 NMAC);

(2) valid and has not been used to meet compliance obligations in any other jurisdiction; and

(3) of a vintage year that has occurred during or prior to the compliance period for which it is being used.

[20.2.350.209 NMAC - N, 01/01/11]

20.2.350.210 to 20.2.350.299 [Reserved]

20.2.350.300 APPLICABILITY OF THE OBLIGATION TO SURRENDER COMPLIANCE INSTRUMENTS:

A. Except as provided in Subsections B and D of this section, the obligation to surrender compliance instruments under 20.2.350.301 NMAC applies to the owner or operator of a cap facility, which includes each facility for which emissions that meet or exceed the cap threshold are reported under 20.2.300 NMAC to have occurred in the initial cap year or any calendar year thereafter.

B. Phase-out of the obligation to surrender compliance instruments. If at any time after a facility becomes a cap facility the reported cap emissions at the facility are less than the cap threshold for three (3) consecutive years, then the facility is no longer a cap facility, until such future time that the facility again becomes a cap facility under Subsection A of this section.

C. For each emissions year in which a facility is not a cap facility:

(1) the facility shall not be subject to the obligation to surrender compliance instruments under 20.2.350.301 NMAC for cap emissions that occur during that year; and

(2) the facility shall not be allocated existing facility allowances or new annual allocation allowances under this part.

D. No facility shall be subject to an obligation to surrender a compliance instrument under this part for emissions that occur during a year prior to when the sum of initial cap year capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC represent at least one hundred million metric tons CO₂e.

E. No later than sixty (60)

days from the date on which the sum of capped emissions of jurisdictions located in the United States and approved under 20.2.350.206 NMAC no longer represents one hundred million metric tons CO₂e, the department shall request that the board reevaluate this part.

[20.2.350.300 NMAC - N, 01/01/11]

20.2.350.301 SURRENDER OF COMPLIANCE INSTRUMENTS:

A. The authorized account representative of each compliance account shall, as of the compliance instrument surrender deadline, surrender qualifying compliance instruments in an amount not less than the sum of the total cap emissions reported under 20.2.300 NMAC for each year for which the cap facility was subject to an obligation to surrender compliance instruments during the compliance period. If the total cap emissions for the compliance period in units of metric tons CO₂e is not a whole number, it shall be rounded up to the nearest whole number.

B. Qualifying compliance instruments. Compliance instruments that meet the following criteria may be used to comply with the obligation to surrender compliance instruments under this part.

(1) The compliance instrument is valid.

(2) The vintage year for each compliance instrument has occurred during or prior to the compliance period for which it is being used.

(3) The sum of offset credits and external trading program compliance instruments that are used to comply with an obligation to surrender compliance instruments under this part for a compliance period may not exceed four percent of the total compliance obligation that applies for that compliance period to the cap facility.

C. For each allowance that originated under this part and was surrendered to meet compliance obligations under this part or in any other jurisdiction, the department shall retire the compliance instrument and assure that it is disqualified for subsequent use in any program.

D. For each compliance instrument that originated in another jurisdiction or program and surrendered to meet compliance obligations under this part, the department shall notify that jurisdiction or program that the compliance instrument shall be disqualified for subsequent use in any program.

[20.2.350.301 NMAC - N, 01/01/11]

20.2.350.302 ENFORCEMENT AND PENALTIES FOR NON-COMPLIANCE:

A. Each of the following events shall constitute a separate violation of this part on each day of the applicable

compliance period:

(1) Each metric ton of cap emissions or portion thereof emitted during the compliance period in excess of the number of compliance instruments surrendered on the compliance instrument surrender deadline for that compliance period.

(2) Each day or portion thereof that any report required by this part is not timely submitted or contains incomplete or inaccurate information.

B. In the event that the authorized account representative of a cap facility does not surrender sufficient compliance instruments to meet the obligation Subsection A of 20.2.350.301 NMAC, the following shall apply.

(1) The compliance account of the cap facility shall be assessed an additional surrender obligation of compliance instruments equal to three times the number of insufficient compliance instruments. This assessment shall be in addition to any fine, penalty, assessment, corrective action, injunctive relief, or obligation otherwise applicable to the cap facility.

(2) The authorized account representative shall within thirty days surrender sufficient compliance instruments to cover the additional assessment. Offset credits and external trading program compliance instruments may be used to meet this obligation, provided that their sum shall adhere to the limit in Paragraph (3) of Subsection B of 20.2.350.301 NMAC.

[20.2.350.302 NMAC - N, 01/01/11]

20.2.350.303 to 20.2.350.399 [Reserved]

20.2.350.400 AUTHORIZED ACCOUNT REPRESENTATIVES FOR CAP FACILITIES:

A. Authorization and responsibilities of authorized account representative.

(1) Except as provided under Subsection B of this section, each cap facility shall have one authorized account representative, with regard to all matters under this part concerning the cap facility.

(2) The authorized account representative of the cap facility shall be selected by an agreement binding on the owners and operators of the cap facility.

(3) Upon receipt by the department of a complete account certificate of representation under Subsection D of this section, the authorized account representative of the capped facility shall represent and, by his or her representations, actions, inactions, or submissions, legally bind each owner and operator of the cap facility represented in all matters pertaining to this part, notwithstanding any agreement between the authorized account representative and such owners and operators. The owners and

operators shall be bound by any decision or order issued to the authorized account representative by the department or a court regarding the facility.

(4) No compliance account shall be established for a cap facility until the department has received a complete account certificate of representation under Subsection D of this section for an authorized account representative of the cap facility.

(5) Each submission under this part shall be submitted, signed, and certified by the authorized account representative for each cap facility on behalf of which the submission is made. Each such submission shall include the following certification statement by the authorized account representative: "I am authorized to make this submission on behalf of the owners and operators of the cap facility for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

(6) The department shall accept or act on a submission made on behalf of owners or operators of a cap facility only if the submission has been made, signed, and certified in accordance with Paragraph (5) of this subsection.

B. Alternate authorized account representative.

(1) An account certificate of representation may designate one and only one alternate authorized account representative who may act on behalf of the authorized account representative. The agreement by which the alternate authorized account representative is selected shall include a procedure for authorizing the alternate authorized account representative to act in lieu of the authorized account representative.

(2) Upon receipt by the department of a complete account certificate of representation under Subsection D of this section, any representation, action, inaction, or submission by the alternate authorized account representative shall be deemed to be a representation, action, inaction, or submission by the authorized account representative.

(3) Except in this section, whenever the term "authorized account representative" is used in this part, the term shall be construed to include the alternate authorized account representative.

C. Changing the authorized account representatives and the alternate authorized account representative; changes in the owner and operators.

(1) Changing the authorized account representative. The authorized account representative may be changed at any time upon receipt by the department of a superseding complete account certificate of representation under Subsection D of this section. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous authorized account representative or alternate authorized account representative prior to the time and date when the department receives the superseding account certificate of representation shall be binding on the new authorized account representative and the owners and operators of the cap facility.

(2) Changing the alternate authorized account representative. The alternate authorized account representative may be changed at any time upon receipt by the department of a superseding complete account certificate of representation under Subsection D of this section. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous or alternate authorized account representative or alternate authorized account representative prior to the time and date when the department receives the superseding account certificate of representation shall be binding on the new alternate authorized account representative and the owners and operators of the cap facility.

(3) Changes in the owners and operators.

(a) In the event a new owner or operator of a cap facility is not included in the list of owners and operators submitted in the account certificate of representation, such new owner or operator shall be deemed to be subject to and bound by the account certificate of representation, the representations, actions, inactions, and submissions of the authorized account representative and any alternate authorized account representative of the source or unit, and the decisions, orders, actions, and inactions of the department, as if the new owner or operator were included in such list.

(b) Within thirty (30) days following any change in the owners and operators of a cap facility, including the addition of a new owner or operator, the authorized account representative or alternate authorized account representative shall submit a revision to the account certificate of representation amending the list of owners and operators to include the change.

D. Account certificate of representation.

(1) A complete account certificate

of representation for an authorized account representative or an alternate authorized account representative shall include the following elements in a format prescribed by the department:

(a) identification of the cap facility or cap facilities for which the account certificate of representation is submitted;

(b) contact information requested by the department, such as the name, address, e-mail address, telephone number, and facsimile transmission number, of the authorized account representative and any alternate authorized account representative;

(c) a list of the owners and operators of the cap facility;

(d) the following certification statement by the authorized account representative and any alternate authorized account representative: "I certify that I was selected as the authorized account representative or alternate authorized account representative, as applicable, by an agreement binding on the owners and operators of the cap facility. I certify that I have all the necessary authority to carry out my duties and responsibilities under 20.2.350 NMAC on behalf of the owners and operators of the cap facility and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions and by any decision or order issued to me by the department or a court regarding the source or unit."; and

(e) the signature of the authorized account representative and any alternate authorized account representative and the dates signed.

(2) Unless otherwise required by the department, documents of agreement referred to in the account certificate of representation shall not be submitted to the department. Neither the department nor its agent shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

E. Objections concerning the authorized account representative.

(1) Once a complete account certificate of representation under Subsection D of this section has been submitted and received, the department shall rely on the account certificate of representation unless and until the department receives a superseding complete account certificate of representation under Subsection D of this section.

(2) Except as provided in this part, no objection or other communication submitted to the department concerning the authorization, or any representation, action, inaction, or submission of the authorized account representative shall affect any representation, action, inaction, or submission of the authorized account representative or the finality of any decision or order by the department under this part.

(3) The department shall not adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of any authorized account representative, including private legal disputes concerning the proceeds of compliance instrument transfers.

F. Delegation by authorized account representative and alternate authorized account representative.

(1) An authorized account representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the department under this part.

(2) An alternate authorized account representative may delegate, to one or more natural persons, his or her authority to make an electronic submission to the department under this part.

(3) In order to delegate authority to make an electronic submission to the department in accordance with this part, the authorized account representative or alternate authorized account representative, as appropriate, shall submit to the department a notice of delegation, in a format prescribed by the department that includes the following elements:

(a) contact information requested by the department, such as the name, address, e-mail address, telephone number, and facsimile transmission number, of such authorized account representative or alternate authorized account representative;

(b) contact information requested by the department, such as the name, address, e-mail address, telephone number and facsimile transmission number, of each such natural person, herein referred to as the "electronic submission agent";

(c) for each such natural person, a list of the type of electronic submissions under this part for which authority is delegated to him or her; and

(d) the following certification statements by such authorized account representative or alternate authorized account representative:

(i) "I agree that any electronic submission to the department that is by a natural person identified in this notice of delegation and of a type listed for such electronic submission agent in this notice of delegation and that is made when I am a authorized account representative or alternate authorized account representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under 20.2.350 NMAC shall be deemed to be an electronic submission by me."; and

(ii) "Until this notice of delegation is superseded by another notice of delegation under 20.2.350 NMAC, I agree to maintain an e-mail account and to notify

the department immediately of any change in my e-mail address unless all delegation authority by me under 20.2.350 NMAC is terminated."

(4) A notice of delegation submitted under this section shall be effective, with regard to the authorized account representative or alternate authorized account representative identified in such notice, upon receipt of such notice by the department and until receipt by the department of a superseding notice of delegation by such authorized account representative or alternate authorized account representative as appropriate. The superseding notice of delegation may replace any previously identified electronic submission agent, add a new electronic submission agent, or eliminate entirely any delegation of authority.

(5) Any electronic submission covered by the certification in this section and made in accordance with a notice of delegation effective under this part shall be deemed to be an electronic submission by the authorized account representative or alternate authorized account representative submitting such notice of delegation. [20.2.350.400 NMAC - N, 01/01/11]

HISTORY OF 20.2.350 NMAC: [RESERVED]

NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION LOCAL GOVERNMENT DIVISION

This is an amendment to 2.110.2 NMAC, Sections 11, 15, 16 and 17, effective 12-1-2010.

2.110.2.11 ELIGIBLE ACTIVITIES/CATEGORIES

A. Applicants may apply for funding assistance under the following categories:

- (1) community infrastructure;
- (2) housing;
- (3) public facility capital outlay;
- (4) economic development;
- (5) emergency;
- (6) colonies;
- (7) planning.

B. Eligible activities under each of the categories are listed below.

C. Community infrastructure: Eligible activities may include, but are not limited to, the following:

- (1) real property acquisition
- (2) construction or rehabilitation

of the following:

- (a) water systems;
- (b) sewer systems;

- (c) municipal utilities;
- (d) roads;
- (e) streets;
- (f) highways;
- (g) curbs;
- (h) gutters;
- (i) sidewalks;
- (j) storm sewers;
- (k) street lighting;
- (l) traffic control devices;
- (m) parking facilities;
- (n) solid waste disposal facilities.

D. Housing: Eligible activities may include, but are not limited to, the following:

- (1) real property acquisition;
- (2) rehabilitation;
- (3) clearance;
- (4) demolition and removal of privately-owned or acquired property for use or resale in the provision of assisted housing;
- (5) provision of public facilities to increase housing opportunities;
- (6) financing the repair, rehabilitation and in some cases reconstruction of privately-owned residential or other properties through either loan or grant programs;
- (7) certain types of housing modernization;
- (8) temporary relocation assistance;
- (9) code enforcement;
- (10) historic preservation activities;
- (11) not to exceed ~~[fifty thousand dollars (\$50,000)]~~ sixty five thousand dollars (\$65,000) in CDBG funds per home can be used on home rehabilitation/repair activities.

E. Public facility capital outlay: Eligible activities may include, but are not limited to, such items as:

- (1) real property acquisition;
- (2) construction or improvement of community centers;
- (3) senior citizen centers;
- (4) nonresidential centers for the handicapped such as sheltered workshops;
- (5) other community facilities designed to provide health, social, recreational or similar community services for residents.

F. Economic development: The economic development category is established to assist communities in the promotion of economic development and is described in detail in Section 26.

G. Emergency: The emergency fund provides funding for emergency projects which address life threatening situations resulting from disasters or imminent threats to health and safety.

- (1) Applications under this category will be accepted throughout the year.
- (2) Application shall include

written verification and adequate documentation by a state agency and with the applicant's assessment of the life threatening situation and shall be submitted no later than 18 months from the certification by the applicant and documentation of the need for the emergency project.

(3) An applicant for emergency funding must verify that it does not have sufficient local resources to address the life threatening condition; and that other federal or state resources have been explored and are unavailable to alleviate the emergency.

H. Planning: In addition to municipalities and counties, water associations, including water and sanitation districts, and land grants as defined in Section 2.110.2.7, Subsection M; are eligible to apply directly for planning grants only. Planning grant assistance from the CDBG program, which is available only to a municipality or county, must be used for a comprehensive plan if the applicant does not have a current comprehensive plan (not older than five years from the date of application). A comprehensive plan must be adopted by ordinance, and it must include as a minimum the following elements;

(1) elements:

(a) land use; including (i) an analysis and mapping of existing land patterns and an inventory of the amount, type and intensity of uses by land category, as well as an analysis of effects of various land use patterns on greenhouse gas emissions; (ii) an analysis of trends in the supply and demand of land by land use category, including a projection of the distribution, location and extent of future land uses by land use category over a twenty-year period; (iii) goals, objectives and policies that address maintaining a broad variety of land uses, including the range of uses existing when the plan is adopted or amended; and (iv) specific actions and incentives that the contracting agency may use to promote planned development, reduction in greenhouse gas emissions, or otherwise encourage certain identified development patterns and the locations where such development patterns should be encouraged;

(b) housing; including (i) an analysis of existing housing supply and demand, analysis of greenhouse gas emissions from the housing sector, and forecasted housing needs; (ii) goals, objectives and policies for the improvement of housing quality, variety and affordability, for reduction of greenhouse gas emissions, and for provision of adequate sites for housing and housing opportunities for all segments of the community; and (iii) a description of the actions that will be taken to implement housing goals, objectives and policies; and (iv) must comply with the affordable housing act.

(c) transportation; including (i)

description and assessment of the location, type, capacity and condition of existing transportation facilities, such as freeways, arterial and collector streets, mass transit or other modes of transportation as may be appropriate, and analysis of greenhouse gas emissions from the transportation sector; (ii) goals, objectives and policies for encouraging safe, convenient, efficient and economical transportation, including mass transit and facilities for bicyclists and pedestrians, for reduction of greenhouse gas emissions, and a description of proposed levels of service and funding mechanisms; and (iii) a description and assessment of proposed location, type and capacity of proposed transportation facilities designed to implement transportation goals, objectives and policies and a description of funding mechanisms that will be used to fund proposed transportation improvements;

(d) infrastructure; including (i) a description and assessment of the location, type, capacity and condition of existing infrastructure, including emergency services, sewage, drainage, local utilities and other types of facilities; (ii) goals, objectives and policies for promoting the efficient provision of infrastructure, including a description of proposed levels of service; and (iii) a description and assessment of proposed facility expansion and improvements designed to support planned uses and implement infrastructure goals, objectives and policies;

(e) economic development; including (i) a description of existing job composition and trends by industry and location characteristics, such as access to transportation or proximity to natural or human resources, that influence the economic development potential of the contracting agency, and analysis of greenhouse gas emissions from the commercial and industrial sectors; (ii) goals, objectives and policies for promoting economic development, and for reduction of greenhouse gas emissions; and (iii) a description of the actions that the contracting agency will take to implement economic development goals, objectives and policies;

(f) water; including (i) description and assessment of the sources of water supply; (ii) the demand for water by residential, commercial, institutional, industrial and recreational sectors; (iii) assessment of the water unaccounted for water losses due to leaks, theft or other reasons; (iv) goals, objectives and policies for promoting the efficient use of water and for managing periods of drought; and (v) an analysis of the demand for water that will result from future growth projected in the plan, when added to existing uses, and how the demand for water that will result from future projected growth will be served by current water supplies, water conservation, water reuse or a plan to

obtain additional water supplies or increase water use efficiencies;

(g) hazards; , including (i) an analysis of the risks of hazards such as wildfire, floods, extreme weather conditions, accidents, and terrorism; (ii) goals, objectives and policies for hazard mitigation; and (iii) a description of the actions that will be taken to mitigate hazards;

(h) implementation; a compilation of the plan's goals, objectives, policies, standards or guidelines, along with specific actions to be completed in a stated sequence, which start with adoption of the comprehensive plan by ordinance;

(2) development of additional elements of a comprehensive plan may include, but are not limited to:

(a) drainage;

(b) parks, recreation and open space;

(c) tourism;

(d) growth management;

(e) fiscal impact analysis;

(f) intergovernmental cooperation;

(g) social services;

(h) historic preservation;

(i) asset management plan;

(3) if the entity has a current comprehensive plan (not older than five years from the date of application), it may apply for funding assistance for any of the following:

(a) data gathering analysis and special studies;

(b) base mapping, aerial photography, geographic information systems, or global positioning satellite studies;

(c) improvement of infrastructure capital improvement plans and individual project plans;

(d) development of codes and ordinances, that further refine the implementation of the comprehensive plan;

(e) climate change mitigation and adaptation plan;

(f) preliminary engineering report (according to USDA/RUS guidelines);

(g) related citizen participation or strategic planning process; or

(h) other functional or comprehensive planning activities;

(i) asset management plan;

(j) regionalization of infrastructure and service delivery.

(4) applicants may apply for funding assistance throughout the year as long as funds are available.

I. Colonias:

(1) The colonias category is established in the amount of 10% of the annual CDBG allocation for specific activities including water, sewer and housing improvements, which are the three conditions which qualify communities for designation to be carried out in areas along

the U.S. - Mexican border.

(2) Eligible applicants for the colonias set aside are municipalities and counties located within 150 miles of the U.S. - Mexico border.

(3) Colonias must be designated by the municipality or county in which it is located. The designation must be on the basis of objective criteria, including:

(a) lack of potable water supply; or

(b) lack of adequate sewage systems; or

(c) lack of decent, safe and sanitary housing; and

(d) must have been in existence as a colonia prior to November, 1990.

(4) Appropriate documentation to substantiate these conditions must be provided along with the application for funding.

[2.110.2.11 NMAC - Rp 2 NMAC 110.2.11, 08-30-01; A, 08-13-04; A, 08-15-05; A, 12-14-06; A, 09-28-07; A, 10-15-09; A, 12-1-10]

2.110.2.15 P R O G R A M REQUIREMENTS SECTION A:

Public participation requirements - Applicants must provide opportunities for public participation in the development of community development goals, objectives, and applications for funding assistance by undertaking the following activities:

A. provide for and encourage citizen participation within their areas of jurisdiction with particular emphasis on participation by persons of low and moderate income;

B. provide citizens with reasonable and timely access to local meetings, information, and records relating to proposed and actual use of funds;

C. provide for technical assistance to groups and representatives of low and moderate income persons that request assistance in developing proposals;

D. {special note}: the level and type of assistance is to be determined by the applicant; and

E. provide for public hearings to obtain citizen participation and respond to proposals and questions at all stages;

F. prior to selecting a project and submitting an application for CDBG funding assistance, eligible applicants must conduct at least one public hearing for the following purposes:

(1) to advise citizens of the amount of CDBG funds expected to be made available for the current fiscal year;

(2) to advise citizens of the range of activities that may be undertaken with the CDBG funds;

(3) to advise citizens of the estimated amount of CDBG funds proposed

to be used for activities that will meet the national objective to benefit to low and moderate income persons;

(4) to advise citizens of the proposed CDBG activities likely to result in displacement, and the unit of general local government's anti-displacement and relocation plans;

(5) to obtain recommendations from citizens regarding the community development and housing needs of the community;

(a) After considering all recommendations and input provided at the public hearing(s), the county commission or city/town/village council must select one project for which to submit an application for funding assistance at an official public meeting.

(b) The applicant must conduct a second public hearing to review program performance, past use of funds and make available to the public its community development and housing needs including the needs of low and moderate income families and the activities to be undertaken to meet such needs.

(c) This public hearing may occur subsequent to the submission of the application for funding assistance.

(d) Public hearing notices must be published in the non-legal section of newspapers ~~[and in other local media]~~, or posted in a minimum of three prominent public places within the project area, with reasonable time and public access. All applicants must be in compliance with the Open Meetings Act (NMSA 1978, Section 10-15-1(D)).

(e) Evidence of compliance with these regulations must be provided with each application, i.e., hearing notice, minutes of public meetings, list of needs and activities to be undertaken, etc.

(f) Amendments to goals, objectives, and applications are also subject to public participation.

(6) provide for timely written answers to written complaints and grievances within 15 working days where practicable;

(7) identify how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of residents can be reasonably expected to participate.

[2.110.2.15 NMAC - Rp 2 NMAC 110.2.15, 08-30-01; A, 12-1-10]

2.110.2.16 PROGRAM REQUIREMENTS Section B:

Each CDBG application must meet at least one of the three national objectives, low and moderate income benefit, prevention or elimination of slums or blight or urgent need, which are herein described.

A. Low and moderate income benefit - An activity identified as

principally benefiting (51%) persons of low and moderate income will be considered eligible only if it meets one of the criteria below:

(1) the activity must be carried out in a neighborhood or area consisting predominantly of persons of low and moderate income and provide services to such persons;

(2) the activity must involve facilities designed for use by a specific group of people or clientele predominantly of low and moderate income; or

(3) the activity must add or improve permanent residential structures which will be occupied by low and moderate income households upon completion; or

(4) the activity must involve creating or retaining jobs, the majority of which must be for persons of low and moderate income;

(5) the above can be substantiated with data from:

(a) the most recent low and moderate income data from the U.S. census (see attachment A);

(b) a special survey conducted using HUD approved methodology;

(c) income eligibility requirements consistent with HUD approved income limits.

B. Prevention or elimination of slums or blight - An activity identified as aiding in the prevention or elimination of a slum or blighted area must meet all of the following five criteria.

(1) The area must be designated by the applicant and must meet a definition of a slum, blighted, deteriorated or deteriorating area under state or local law (see definitions section of 2.110.2 NMAC).

(2) The area must exhibit at least one of the following physical signs of blight or decay.

(a) The area shall possess a substantial number of deteriorated or deteriorating buildings throughout; meaning at least one quarter of all the buildings in the area must be in a state of deterioration.

(b) The area shall possess public improvements throughout the area which must be in a general state of deterioration. For example, it would be insufficient for only one type of public improvement, such as the sewer system, to be in a state of deterioration; rather, the public improvements taken as a whole must clearly exhibit signs of deterioration.

(3) Documentation must be maintained by the applicant on the boundaries of the area and the condition which qualified the area at the time of its designation.

(4) The activity must address one or more of the conditions which contributed to the deterioration of the area.

(5) To comply with this objective on a spot basis outside of a slum or blighted

area the proposed activity must be designated to eliminate, specific conditions of blight or physical decay.

(a) acquisition and clearance of blighted properties;

(b) renovation and reuse of abandoned, historic properties;

(c) commercial revitalization through façade improvements;

(d) removal of environmental contamination on property to enable it to be redeveloped.

C. Urgent need - An activity identified as meeting community development needs having a particular urgency will be considered only if the applicant certifies the following:

(1) that the activity is designed to alleviate existing conditions which pose a serious and immediate threat to the health and welfare of the community;

(2) that the condition(s) to be alleviated is of recent origin, i.e., it developed or became critical within 18 months preceding the certification by the applicant;

(3) that the applicant is unable to finance the activity on its own and other sources of funding are not available;

(4) in addition, verification of the urgency of the need must be provided with written documentation by the appropriate state agency;

(5) planning grants are not allowed under urgent need.

[2.110.2.16 NMAC - Rp 2 NMAC 110.2.16, 08-30-01; A, 10-15-09; A, 12-1-10]

2.110.2.17 APPLICATION REQUIREMENTS

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

(1) Planning applicants may submit at anytime an additional application for funding and shall not exceed fifty thousand dollars (\$50,000).

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

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

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

B. Single purpose application -An application for CDBG funding must be limited to a project specific activity or set of activities which address a particular need in a designated target area of

a unit of local government. The target area may not be the entire municipality or county.

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

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

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

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

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

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

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

(2) projects shall be completed within twenty-four months of an [award of funding] executed grant agreement signed by both parties;

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

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

(5) application must be complete, with all documentation provided as listed on the submission and attachment checklist included in the application, otherwise application will be deemed ineligible; application will be returned to the applicant and will not be considered for funding.

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

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

(2) All [audit and] CDBG program's monitoring findings and concerns,

for CDBG projects, must be resolved. The applicants shall submit a letter attaching a copy of the monitoring findings/concerns and demonstration of clearance of the monitoring findings/concerns by the CDBG program.

(3) The current fiscal operating budget for any local public body as defined in Section 6-6-1 NMSA 1978 (as amended) applying for CDBG funds must be approved.

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

(5) The local government division, budget and finance bureau, shall report the applicant's most current audit filing with the state auditor office for all applicants that are counties and municipalities. They determine compliance with the budget certification rule, 2.2.3 NMAC. The CDC will take into consideration whether the counties or municipalities are in compliance with the budget certification rule.

(6) The set aside categories are exempt from threshold requirements set forth in Subsection E of 2.110.2.17 NMAC: planning, economic development, and emergency categories.

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

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

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

(3) Consistent with 2.110.2 NMAC, all applications in the economic development category must provide at least one private dollar for each dollar of CDBG funds requested.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) distribution system leak repair;

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

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

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

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

I. Asset management - In

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

(1) In order to ensure water and wastewater infrastructure is managed within a strategic framework driven by program and service delivery needs, communities that implement an asset management program and use that approach as the basis for their rate analysis will be credited in the application process for their achievement. The model for the asset management program is the international infrastructure asset management model, adopted by EPA. This approach includes five core components, which are as follows:

(a) current state of the assets: an asset inventory that includes the following at a minimum: asset name, asset location, asset condition, useful life, and an estimate of replacement value;

(b) level of service: a description of what the utility wishes to provide its customers;

(c) criticality: an evaluation of which assets are critical to the sustained operation of the utility;

(d) life cycle costing: at a minimum, a capital improvement plan that describes the replacement of assets and some consideration of operation and maintenance of the assets;

(e) financing plan: a description of the funding sources that will be used to pay for the capital and operational needs of the utility.

(2) For community infrastructure and public facilities, or other eligible activities an asset management plan will be required to be submitted at the time of application. The approach will follow the same five components described in Subparagraphs (a) - (e) of Paragraph (1) of Subsection I of 2.110.2.17 NMAC above. [2.110.2.17 NMAC - Rp 2 NMAC 110.2.17, 08-30-01; A, 08-13-04; A, 08-15-05; A, 12-14-06; A, 09-28-07; A, 09-30-08; A, 10-15-09; A, 12-1-10]

NEW MEXICO GENERAL SERVICES DEPARTMENT PROPERTY CONTROL DIVISION

TITLE 1 G E N E R A L GOVERNMENT ADMINISTRATION CHAPTER 5 PUBLIC PROPERTY MANAGEMENT PART 25 STATE AGENCIES LEASE-PURCHASING OF REAL PROPERTY

1.5.25.1 ISSUING AGENCY:
General Services Department, Property
Control Division.
[1.5.25.1 NMAC - N, 01/01/11]

1.5.25.2 SCOPE: This rule applies to all lease-purchases by executive branch agencies except the state land office.
[1.5.25.2 NMAC - N, 01/01/11]

**1.5.25.3 S T A T U T O R Y
AUTHORITY:** Section 9-17-5 NMSA 1978, 15-3B-4 NMSA 1978. Sections 15-10-1 and 15-10-2 NMSA enable state agencies to enter into lease-purchases.
[1.5.25.3 NMAC - N, 01/01/11]

1.5.25.4 D U R A T I O N :
Permanent.
[1.5.25.4 NMAC - N, 01/01/11]

1.5.25.5 EFFECTIVE DATE:
January 1, 2011, unless a later date is cited at the end of a section.
[1.5.25.5 NMAC - N, 01/01/11]

1.5.25.6 OBJECTIVE: The objective of this rule is to establish a fair, uniform, clear and effective process to regulate the lease-purchasing of real property constructed by public or private entities as office, warehouse or special use facilities for state executive agencies under jurisdiction of the property control division.
[1.5.25.6 NMAC - N, 01/01/11]

1.5.25.7 DEFINITIONS:

A. "Agency" means a state executive agency other than the state land office seeking to lease-purchase space.

B. "Agency representative" means a person who serves on the selection committee and who has been designated, in writing, by the agency head at the beginning of each lease-purchase process to act on behalf of the agency as the sole contact for information from and about the agency during the process.

C. "Bid bond" means a negotiable security instrument required when proposals are submitted to ensure a proposal for space can be delivered by the top-ranked offeror. Bid bonds are returned to all unsuccessful offerors when the top-ranked offeror selection is approved.

D. "BOMA method" means the current, industry standard methodology for calculating usable square footage (by the building owners and managers association).

E. "Desirable" means the terms "may", "can", "should", "preferably", or "prefers" identify a desirable or discretionary item or factor (as opposed to "mandatory").

F. "Determination" means the written documentation of a decision of a procurement officer, including findings of fact required to support a decision. A determination becomes part of the procurement file to which it pertains.

G. "Evaluation committee" means a body appointed by the property control division director to evaluate proposals and make selection recommendation and or selection. The evaluation committee consists of at least three members. The committee should collectively possess expertise in the technical requirements of the project, design, construction, leasing, and contracting. The committee may use independent consultants or agents to support the committee, provided appropriate precautions are taken to avoid potential conflicts of interest. The PCD staff architect or designee serves as staff to the evaluation committee.

H. "Facilities" means buildings and the appurtenances and improvements associated with them, including the real property upon which a building is constructed; suitable parking for use of the building; utilities, access roads and other infrastructure; and related real estate. "Facilities" can also mean undeveloped real estate that is transferred or leased with the intent that a new building or improvement be constructed thereon.

I. "General services department (GSD)" means the cabinet agency established in Chapter 9, Article 17 NMSA 1978.

J. "Leasable square feet (LSF)" means usable area, plus interior office circulation, plus prorated common space, if applicable, which is what the overall lease-purchase payments are based on and which defines the purchase boundaries.

K. "Lease-purchase document" means the standard New Mexico lease-purchase of real property form provided by PCD.

L. "Lease-purchase agreement" means a financing agreement for the leasing of facilities by the state or a state agency from a public or private entity with a option to purchase the leasehold property for a price that is reduced according to the payments made pursuant to the financing agreement.

M. "Leasehold property" means facilities that are subject to a lease-purchase agreement.

N. "Lease revenues" means the amounts payable pursuant to a lease-purchase agreement.

O. "Mandatory" means the terms "must", "shall", "will", "is required", "are required", "requires", identify a mandatory item or factor (as opposed to "desirable"). Failure to meet a mandatory item or factor will result in the rejection of the offeror's proposal.

P. "Performance bond" means a bond required of the successful offeror to ensure conformation of space required by the lease-purchase agreement is successfully completed. The performance

bond is returned when the lease-purchase space is approved and accepted for occupancy.

Q. “Principal individual owners” means all majority stockholders, members of board of directors, officers and partners.

R. “Property control division (PCD)” means the division of the general services department established in Chapter 15, Article 3 NMSA 1978 which is statutorily responsible for controlling the lease-purchase of space in buildings by state executive agencies other than the state land office.

S. “Request for Proposal” (RFP) means all documents, including those attached or incorporated by reference, used for soliciting proposals.

T. “Usable square feet (USF)” means the amount of specific floor area needed to provide an employee or function of an agency with adequate space to perform effectively. Usable square footage is calculated using the BOMA method. Usable square footage can be described as the area within the four walls which defines a work space.

[1.5.25.7 NMAC - N, 01/01/11]

1.5.25.8 PROPERTY CONTROL DIVISION RESPONSIBILITIES:

A. Adequacy of existing state facilities: the PCD director shall determine whether existing state facilities are adequate for an agency’s needs before an agency is allowed to initiate the lease-purchase process from any other public or private entity.

B. Lease-purchase agreements: the PCD director shall have final signatory of all lease-purchases, lease-purchase amendments, lease-purchase extensions, and all other agreements subject to this rule. No such agreement shall be valid or binding on the state of New Mexico or any of its agencies unless it is in writing, (on a PCD approved lease-purchase form) signed by the appropriate parties and approved in writing by the PCD director. The PCD director’s signature shall not signify that PCD is a party to an agreement, but only that PCD has authorized, approved, and validated the agreement in compliance with statute and this rule.

C. Director’s designee: the PCD director may assign a designee to act on his or her behalf in carrying out his or her duties under this rule. Any such designation shall be in writing.

[1.5.25.8 NMAC - N, 01/01/11]

1.5.25.9 COMMENCEMENT OF LEASE-PURCHASE PROCESS:

A. Sufficient resources to evaluate and implement project: a lease-

purchase contract can be very complex and involve multiple professional disciplines.

(1) The agency/department seeking to implement a lease-purchase project shall collaborate with the property control division in seeking sufficient resources and expertise to at the minimum analyze, evaluate and negotiate the following to be consistent with the guidance document approved by the CBPC:

- (a) baseline costs;
- (b) market/feasibility studies;
- (c) architectural and engineering specifications;
- (d) construction/development budgets;
- (e) developer qualifications;
- (f) legal aspects of developer agreements;
- (g) comprehensive financial modeling including alternative finance scenarios.

(2) To the extent these resources do not exist within the agency/department, the agency/department in consultation with the property control division shall engage those third party resources deemed necessary to implement said transaction. The costs of these third party resources may be paid directly by the agency/department or factored into and become a part of the total project cost funded through the lease-purchase project.

B. Develop baseline cost model: the user agency/department in concert with PCD shall develop a baseline cost model by which to compare the lease-purchase scenario. The baseline cost model should be forecast for the anticipated useful life of the new facility. Costs should include but not be limited to:

- (1) all third party leasing costs as escalated over the proposed term including pass-through of operating expenses;
- (2) debt service/capital costs for owned facilities that are to be vacated or replaced;
- (3) anticipated deferred maintenance expenses for owned facilities; and
- (4) ancillary costs that will be eliminated by acquisition of new facility for example, third party parking expenses, special meeting spaces, external storage facilities, etc;
- (5) for comparison purposes, the total baseline cost as well as the cost of the lease-purchase scenario shall be discounted to a net present value using the state’s then applicable cost of tax exempt borrowing.

C. Comprehensive space needs assessment: the agency/department shall have prepared and submitted to the property control division for approval a comprehensive space needs assessment. The space needs assessment will reflect the current space standards for all state

employees as well as take into consideration the special space needs of the agency/department including but not limited to meeting rooms, hearing rooms, storage and technology requirements.

[1.5.25.9 NMAC - N, 01/01/11]

1.5.25.10 LEGISLATIVE APPROVAL: Review by capitol planning building commission (CPBC).

In accordance with Sections 15-10-1 and 15-10-2 NMSA 1978 the CBPC will review state agency lease-purchase agreements for facilities or other real property prior to the lease-purchase agreements being submitted to the legislature for approval pursuant to Section 15-3-35 NMSA 1978.

[1.5.25.10 NMAC - N, 01/01/11]

1.5.25.11 SOLICITATION OF LEASE-PURCHASE PROCUREMENT:

A. General: the provisions of 1.5.25 NMAC set forth specific procedures that shall apply to all procurements of real property made by lease-purchase.

B. Regulation to use sealed proposal: the regulations applicable to the use of competitive sealed proposals pursuant to 1.4.1.29 NMAC through 1.4.1.47 NMAC, as well as other existing rules applicable to competitive sealed proposals and procurement generally, e.g., 1.4.1.64 NMAC through 1.4.1.92 NMAC, shall apply to procurements made by lease-purchase for real property to the extent that they do not conflict with the provisions of 1.5.25 NMAC.

C. Fair and open process: to promote a fair and open process and to foster maximum participation and competition from the development community the property control division shall acquire lease-purchase facilities through a three phased procedure. During phase one, and prior to solicitation, the following shall occur:

(1) a procurement plan shall be prepared describing the conduct of the lease-purchase procurement;

(2) the procurement plan shall be approved by the PCD director and shall include rationale for the procurement, key personnel involved in the procurement, procurement schedule, key evaluation factors, and criteria for providing a stipend to cover some expenses, if offered;

(3) documents shall be prepared for a “request for proposals”(RFP);

(a) the documents shall include minimum qualifications, scope of work statement and schedule, evaluation criteria and a description of the selection process, the composition of the selection committee, and a description of the subsequent phases’ requirements, program statements for the facility that describe space needs, design goals and specific objectives so that all

respondents can be comparably evaluated;

(b) the phase two RFP documents shall include program statements for the facility that describe space needs, design goals and specific objectives, building specifications, proposed transaction structures, schedule and other important project and contract terms; building performance specifications shall be prepared to describe the quality of building sought by the state; the narrative description shall include but not be limited to expected base building materials and standards (roof, windows, cladding, etc), interior finishes and quantities, HVAC specifications, vertical conveyances, parking, sustainability standards, etc.

D. Evaluation of proposals: PCD shall evaluate proposals and select a lease-purchase team in three phases:

(1) In phase one, the evaluation committee shall evaluate statements of qualifications and performance data submitted by all responsive businesses in regard to the particular project, and select, ranked in the order of their qualifications, up to three firms deemed to be the most highly qualified to perform the required services. The selection criteria should include but are not limited to:

(a) experience, organization and reputation of the respondent's team on similar projects, based on relevant factors such as:

- (i) history of on-time and on budget projects;
- (ii) design excellence of completed projects;
- (iii) clear lines of authority and responsibilities;
- (iv) team and key personnel qualifications;
- (v) availability of key team members;
- (vi) ability to work with the state of New Mexico;
- (vii) litigation and compliance record;
- (viii) health and safety record.

(b) financial capacity of the respondent based on relevant factors such as:

- (i) ability to raise and commit funds for the project and continuing operations and maintenance;
- (ii) reasonableness of the cash flow analysis.

(2) In phase two, PCD shall invite the short listed firms to submit their response to the phase two RFP documents including detailed specific technical concepts of solutions, costs and scheduling, as well as their financial proposal.

(a) A mandatory pre proposal conference will be conducted to allow short-listed firms the opportunity to submit

questions of clarification.

(b) Unsuccessful phase two offerors submitting a responsive proposal may be paid a stipend to cover proposal expenses.

(c) The evaluation committee may conduct interviews with, and may require public presentation by, all offerors responding to the RFP regarding their qualifications, their approach to the project, and their ability to furnish the required services. The evaluation committee may also choose to visit examples of one or more of the responding offeror's completed projects.

(d) The evaluation committee shall evaluate the short listed offerors with selection criteria stated in the phase two RFP documents including the weight given to each criterion. The selection criteria should include but are not limited to:

- (i) phase one qualifications;
- (ii) quality of proposed design, including response to RFP objectives, and clarity in sustainability proposals;
- (iii) strength of financial proposal, including detailed description of project costs, and detailed description of the rent calculation methodology;
- (iv) financial analysis will be discounted for similar lengths of term back to a net present value at the state's then existing cost of tax exempt capital.

(e) Presentation requirements to properly judge the offers should be stated in the RFP and should include but are not limited to:

- (i) the maximum number and size of drawings or technical submittals allowed;
- (ii) types of media that can be used in the presentation;
- (iii) the format allowed for the financial proposals.

(f) Upon completion of the evaluation process, the selection will be made and the highest ranked offeror will be invited to negotiations.

(3) During phase three, PCD will conduct negotiations with the selected offeror.

(a) PCD should consider the offeror's overall project plan, schedule, financial proposal, benefits and risks to the state.

(b) The lease-purchase agreement and related documents for the lease-purchase agreement in a final form approved by name's office will be negotiated incorporating specific terms, including the state's and offeror's respective responsibilities, the economic parameters, development standards and requirements, and a performance schedule. The agreement shall not become effective until it has been ratified and approved by the legislature.

(c) The offeror, with PCD cooperation, will complete the project approval processes and any required environmental or historic board review.

E. Ownership disclosure: any proposal that is submitted in response to an RFP shall indicate the ownership of the facility offered for lease-purchase. If the facility is owned by a corporation or other legal entity, the proposal shall also indicate the principal individual owners and percentages of their ownership.

F. Proposal modifications: after a proposal is submitted, an offeror shall not withdraw a building that has been offered or attempt to substitute buildings or building sites on non-contiguous properties.

[1.5.25.11 NMAC - N, 01/01/11]

1.5.25.12 PROPERTY CONTROL DIVISION FEE SCHEDULE:

PCD charges by the page for copies of GSD Rules, documents, forms, drawings, lease-purchase inventory, and other printed material associated with this rule. The charge shall be based on a fee schedule issued by PCD and based on costs to PCD. Some or all documents may be made available electronically.

[1.5.25.12 NMAC - N, 01/01/11]

HISTORY OF 1.5.25 NMAC: [RESERVED]

NEW MEXICO DEPARTMENT OF HEALTH DIVISION OF HEALTH IMPROVEMENT

7.1.7 NMAC, Health Facility Licensure Fees and Procedures (filed 2/15/2006) repealed 12/01/2010 and replaced by 7.1.7 NMAC, Health Facility Licensure Fees and Procedures, effective 12/01/2010.

NEW MEXICO DEPARTMENT OF HEALTH DIVISION OF HEALTH IMPROVEMENT

TITLE 7 HEALTH CHAPTER 1 HEALTH GENERAL PROVISIONS PART 7 HEALTH FACILITY LICENSURE FEES AND PROCEDURES

7.1.7.1 ISSUING AGENCY: New Mexico Department of Health, Division of Health Improvement, Health Facility Licensing and Certification Bureau.
[7.1.7.1 NMAC - Rp, 7.1.7.1 NMAC, 12/01/2010]

7.1.7.2 SCOPE: These regulations apply to any health facility as defined by 24-1-2(D) NMSA 1978, as amended, which is licensed or is required to be licensed, or any health facility which by federal regulations must be licensed to obtain or maintain federal funding.

[7.1.7.2 NMAC - Rp, 7.1.7.2 NMAC, 12/01/2010]

7.1.7.3 STATUTORY AUTHORITY: The regulations set forth herein have been promulgated by the secretary of the New Mexico department of health by authority of Sections 24-1-2, 24-1-3, and 24-1-5 of the Public Health Act and Section 9-7-6 (E) of the Department of Health Act.

[7.1.7.3 NMAC - Rp, 7.1.7.3 NMAC, 12/01/2010]

7.1.7.4 DURATION: Permanent.

[7.1.7.4 NMAC - Rp, 7.1.7.4 NMAC, 12/01/2010]

7.1.7.5 EFFECTIVE DATE: 12/01/2010, unless a later date is cited at the end of a section.

[7.1.7.5 NMAC - Rp, 7.1.7.5 NMAC, 12/01/2010]

7.1.7.6 OBJECTIVE: The purpose of these regulations is to set licensing fees for health facilities. Fees are charged in order to partially defray the cost to the state of New Mexico of the licensing process, including the cost of on-site facility surveys by the licensing authority.

[7.1.7.6 NMAC - Rp, 7.1.7.6 NMAC, 12/01/2010]

7.1.7.7 DEFINITIONS: For purposes of these regulations the following shall apply:

A. “amended license” means a license issued by the licensing authority to reflect a non-substantive change which does not result in the voiding of the original license, for example, a change in the name of the facility or a change in the operator or administrator;

B. “annual license” is a license granting permission to operate a facility for the one-year period stated on the face of the document; the annual license is issued on an initial and renewal basis following submission of an acceptable application for license and survey of the facility;

C. “application for license” means the forms, attachments and other writings and drawings required by the licensing authority, under the authority of the regulations listed in 7.1.7.14 NMAC, of these regulations to be submitted for review by the licensing authority as part of the process of granting or denying an annual license;

D. “bed” means an assembly for sleeping, whether or not the bed is in actual use and for which “bed capacity” the facility is licensed;

E. “capacity” means the total number of persons or beds for which the facility is licensed;

F. “change of ownership” licenses are **non-transferable**; a change of ownership licensure will follow the initial application and licensure fee schedule process;

G. “denial of the license” means action by the licensing authority refusing to grant an annual license on the basis of non-compliance with applicable laws and regulations, and specifically under these regulations, nonpayment of the prescribed fee;

H. “facility and health facility” means any health facility required to be licensed by the licensing authority by authority of the Public Health Act, Sections 24-1-1 et. seq. NMSA 1978, as amended, and the regulations listed in 7.1.7.14 NMAC of these regulations;

I. “facility inspections or survey and inspection survey” means an entry into a facility and examination of the facility premises, inspection of records and interview of staff and clientele;

J. “license” means the document issued by the licensing authority which authorizes the operation of a facility. The term license may mean an annual license or a time-limited temporary license;

K. “licensing authority” means the division of health improvement of the New Mexico department of health;

L. “temporary license” means a provisional license granting permission to operate a facility for any period of time not to exceed one hundred twenty (120) days; not more than two (2) consecutive temporary licenses may be granted by the licensing authority.

[7.1.7.7 NMAC - Rp, 7.1.7.7 NMAC, 12/01/2010]

7.1.7.8 STANDARD OF COMPLIANCE: Strict compliance is required of health facilities subject to these regulations. Payment of the licensing fee is a condition precedent to licensure of the health facility by the licensing authority.

[7.1.7.8 NMAC - Rp, 7.1.7.8 NMAC, 12/01/2010]

7.1.7.9 BASIS: Licensing fees for inpatient health facilities providing professional medical or nursing services on a twenty-four (24) hour basis are based upon a maximum fee per bed set by statute. Licensing fees are based upon the maximum fee for health facilities as set by statute.

[7.1.7.9 NMAC - Rp, 7.1.7.9 NMAC, 12/01/2010]

7.1.7.10 LICENSURE FEE SCHEDULE: Rates shall be charged, as indicated in the fee schedule shown in this section, upon initial and renewal application for an annual license and prior to issuance of a second temporary license. The fee for the first temporary license is included in the initial application fee.

A. Category I: Fees for facilities providing professional medical or nursing services on a twenty-four (24) hour basis shall be based on the number of beds in each facility.

Type of Facility	Rate Per Bed
General hospitals	\$12.00
Limited hospitals	\$12.00

Special hospitals	\$12.00
orthopedic hospitals	\$12.00
children's hospitals	\$12.00
psychiatric hospitals	\$12.00
alcohol and drug abuse treatment hospitals	\$12.00
rehabilitation hospitals	\$12.00
other special hospitals as identified	\$12.00
Children's Psychiatric Hospital	\$12.00
Rural primary care hospitals	\$12.00
Long-term care facilities	\$12.00
skilled nursing facilities	\$12.00
intermediate care facilities	\$12.00
intermediate care facilities for mentally retarded	\$12.00

B. Category II: Fee for facilities providing professional medical or nursing services in the home or on an outpatient basis shall be based per license for each facility:

Type of Facility	Rate Per License
Health facilities providing outpatient medical services	\$300.00
community mental health	\$300.00
free standing hospice	\$300.00
home health agency	\$300.00
diagnostic and treatment center	\$300.00
limited diagnostic and treatment center	\$300.00
rural health clinic	\$300.00
infirmary	\$300.00
new or innovative clinic	\$300.00
ambulatory surgical center	\$300.00
Facilities providing services for end stage renal disease	\$300.00
services for end state renal disease	\$300.00
renal transplantation center	\$300.00
renal dialysis center	\$300.00
renal dialysis facility	\$300.00
self dialysis unit	\$300.00
special purpose renal dialysis facility	\$300.00
In home and inpatient hospice care	\$300.00
Home health agencies	\$300.00

C. Category III: Fees for facilities providing assisted living on a twenty-four (24) hour basis in accordance with 7 8.2 NMAC.

Type of Facility	Rate Per License
Assisted Living Facilities	\$300.00

D. Category IV: Facilities providing adult day care and services for less than twenty-four (24) hours a day for 3 or more clients in accordance with 7 NMAC 13.2 [recompiled as 7.13.2 NMAC].

Type of Facility	Rate Per License
Adult Day Care Facilities	\$300.00

[7.1.7.10 NMAC - Rp, 7.1.7.11 NMAC, 12/01/2010]

7.1.7.11 FEES FOR AMENDED LICENSES: The licensing fee for each amended license issued shall be \$300.00 as follows.

Amendment Types	Amended License Fee
Change of administrator or director	\$300.00
Change of capacity (additional \$12.00 per bed if fee is rate per bed)	\$300.00
Change of facility name	\$300.00
Change of physical address	\$300.00

[7.1.7.11 NMAC - Rp, 7.1.7.12 NMAC, 12/01/2010]

7.1.7.12 METHOD OF PAYMENT FOR LICENSE FEES: All applications for license and requests for amended license shall be accompanied by the prescribed fee in the form of a check or money order payable to the state of New Mexico.

[7.1.12 NMAC - Rp, 7.1.13 NMAC, 12/01/2010]

7.1.7.13 NON-REFUNDABLE PRE-PAYMENT OF FEES: All fees are prepaid and are not refundable.
[7.1.7.13 NMAC - Rp, 7.1.7.14 NMAC, 12/01/2010]

7.1.7.14 RELATED REGULATIONS: The following is a list of regulations regarding licensure of health facilities within the jurisdiction of the licensing authority.

A. Requirements for Acute Care, Limited Services and Special Hospitals, New Mexico department of health, 7.7.2 NMAC.

B. Requirements for Long Term Care Facilities, New Mexico department of health, 7.9.2 NMAC.

C. Requirements for Facilities Providing Outpatient Medical Services and Infirmaries, New Mexico department of health, 7.11.2 NMAC.

D. Requirements for In-home and Inpatient Hospice Care, New Mexico department of health, 7.12.2 NMAC.

E. Requirements for Adult Day Care Facilities, New Mexico department of health, 7.13.2 NMAC.

F. Requirements for Intermediate Care Facilities for the Mentally Retarded, New Mexico department of health, 7.26.2 NMAC.

G. Requirements for End Stage Renal Disease Facilities, New Mexico department of health, 7.36.2 NMAC.

H. Requirements for Assisted Living Facilities for Adults, New Mexico department of health, 7.8.2 NMAC.

I. Requirements for Home Health Agencies, New Mexico department of health, 7.28.2 NMAC.
[7.1.7.14 NMAC - Rp, 7.1.7.15 NMAC, 12/01/2010]

HISTORY OF 7.1.7 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the state records center:

HED-85-7 (HSD), Regulations Governing Licensing Fees for Health Facilities, filed 11/20/85.

DOH 91-3 (PHD), New Mexico Regulations Governing Licensing Fees for Health Facilities, filed 10/18/91.

DOH 93-3 (PHD), Regulations Governing Licensing Fees for Health Facilities in New Mexico, filed 4/30/93.

History of Repealed Material:

7.1.7 NMAC, Health Facility Licensure Fees and Procedures (filed 2/15/2006) repealed 12/01/2010.

Other History:

DOH 93-3 (PHD), Regulations Governing Licensing Fees for Health Facilities in New

Mexico (filed 4/30/93) was renumbered, reformatted, amended and replaced by 7 NMAC 1.7, Health Facility Licensure Fees and Procedures, effective 10/31/96.

7 NMAC 1.7, Health Facility Licensure Fees and Procedures (filed 10/18/96) was renumbered, reformatted, amended and replaced by 7.1.7 NMAC, Health Facility Licensure Fees and Procedures, effective 2/28/06.

7.1.7 NMAC, Health Facility Licensure Fees and Procedures (filed 2/15/2006) was replaced by 7.1.7 NMAC, Health Facility Licensure Fees and Procedures, effective 12/01/2010.

NEW MEXICO HEALTH POLICY COMMISSION

This is an amendment to 7.1.4 NMAC Sections 7, 10 and 11, effective 12/01/2010.

7.1.4.7 DEFINITIONS: In addition to the definitions in the Health Information System Act, Section 24-14A-1 et seq. NMSA 1978, the following terms have the following meaning for purposes of this rule.

A. Admission hour coded in military time (e.g., 2:45 p.m. is represented as 1445).

B. Attending physician
NPI the national provider identifier (NPI), a unique, government-issued, standard identification 10-digit number for individual health care providers and provider organizations like clinics, hospitals, schools and group practices.

C. Birth weight coded in grams.

D. Data provider means a data source that has provided data to the health information system on a regular basis.

E. Data source has the meaning given in Section 24-14A-2 of the Health Information System Act, Section 24-14A-1 et seq. NMSA 1978, and includes those categories of persons or entities that possess health information, including any public or private sector licensed hospital, health care practitioner, primary care clinic, ambulatory surgery center, ambulatory urgent care center, ambulatory dialysis unit, home health agency, long-term care facility, pharmacy, third-party payer and any public entity that has health information

F. Discharge hour coded in military time (e.g., 2:45 p.m. is represented as 1445).

G. 1st E-code means the first code for external causes of injury, poisoning, or adverse effect. If a patient has an injury diagnosis in a range of ICD-9-CM 800-999, e-codes are required.

H. 2nd E-code means the second code for external causes of injury,

poisoning, or adverse effect. If a patient has an injury diagnosis in a range of ICD-9-CM 800-999, e-codes are required.

I. 3rd E-code means the third code for external causes of injury, poisoning, or adverse effect. If a patient has an injury diagnosis in a range of ICD-9-CM 800-999, e-codes are required.

J. Health care means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition.

K. Health information system or HIS means the health information system established by the Health Information System Act, Section 24-14A-1 et seq. NMSA 1978.

L. Inpatient health care facility means a hospital or other health facility which admits patients for overnight or longer (and therefore is responsible for patients' room and board) for the purpose of providing diagnostic treatment or other health services.

M. Medicare provider number means the six digit number assigned by medicare to the data source providing the reported service(s).

N. National provider identifier (NPI) means the ten digit NPI from the national plan and provider enumeration system (NPPES).

O. New Mexico state license number means the four to eight digit license number issued by the New Mexico health department for the data source providing the reported service(s).

P. Operating physician
NPI the national provider identifier (NPI), a unique, government-issued, standard identification 10-digit number for individual health care providers and provider organizations like clinics, hospitals, schools and group practices.

Q. Outpatient health care facility means a hospital or other health facility that provides ambulatory care to a patient without admitting the patient to the facility or providing lodging services.

R. Patient means a person who has received or is receiving health care.

S. Patient admission date means the date the patient was admitted by the provider for inpatient care. Format as "MMDDYYYY". For example, if the admission date was July 1, 1983, "07011983" would be coded.

T. Patient street address means the mailing address of the patient at the time of discharge including street name and number or post office box number or rural route number.

U. Patient city means the city of the patient's residence at the time of discharge.

V. Patient county means the county of the patient's residence at the

time of discharge.

W. **Patient state** means the state of the patient's residence at the time of discharge.

X. **Patient zip code** means the zip code of the patient's residence at the time of discharge. Use either five or nine digits, e.g. 87501 or 875010968.

Y. **Patient control number** means the patient's unique alphanumeric number assigned by the provider.

Z. **Patient date of birth** means the date of birth of the patient. Required format is "MMDDYYYY". Note that all four digits of year are required, e.g., "08191898" is for August 19, 1898.

AA. **Patient discharge date** means the date the patient was discharged by the provider from the inpatient health care facility. Formatted as "MMDDYYYY".

BB. **Patient diagnosis related group (DRG) code** means the diagnostic related group code.

CC. **Patient EMS ambulance run number** means the emergency medical services ambulance run number.

~~[DD. **Patient ethnicity/race** means the gross classification of patient's stated ethnicity, coded as follows:~~

- ~~(1) A - Asian/Pacific Islander;~~
- ~~(2) B - black;~~
- ~~(3) H - Hispanic;~~
- ~~(4) I - Native American Indian;~~
- ~~(5) O - other;~~
- ~~(6) U - unknown;~~
- ~~(7) W - white.]~~

DD. **Patient race** means the classification(s) of a patient's stated race to include one or multiple reported classifications, coded as shown below. When reporting multiple classifications do not use spaces or delimiters. For example, if a patient states that he or she is both Asian and other the race field would be R1R5.

(1) R1 - American Indian.

(2) R2 - Asian (including Asian Indian, Chinese, Filipino, Japanese, Korean and Vietnamese).

(3) R3 - Black or African American.

(4) R4 - Native Hawaiian or Pacific Islander (including Chamorro and Samoan).

(5) R5 - White.

(6) R6 - patient refused.

(7) R7 - unknown.

(8) R9 - other race.

EE. **Patient ethnicity** means the gross classification of a patient's stated ethnicity, coded as follows:

(1) Y - Hispanic or Latino;

(2) N - not Hispanic or Latino.

FF. **Patient tribal affiliation** means the classification(s) of patient's stated New Mexico tribal affiliation. Up to five reported affiliations can be reported, coded

as shown below. When reporting multiple affiliations do not use spaces or delimiters. For example, if a patient states that he or she has affiliations with both Acoma pueblo and the Navajo nation the tribal affiliation field would be T1T22:

(1) T1 - Acoma pueblo;

(2) T2 - Cochiti pueblo;

(3) T3 - Isleta pueblo;

(4) T4 - Jemez pueblo;

(5) T5 - Jicarilla Apache nation;

(6) T6 - Kewa/Santo Domingo pueblo;

(7) T7 - Laguna pueblo;

(8) T8 - Mescalero Apache nation;

(9) T9 - Nambe pueblo;

(10) T10 - Ohkay Owingeh pueblo;

(11) T11 - Picuris pueblo;

(12) T12 - Pojoaque pueblo;

(13) T13 - San Felipe pueblo;

(14) T14 - San Ildefonso pueblo;

(15) T15 - Sandia pueblo;

(16) T16 - Santa Ana pueblo;

(17) T17 - Santa Clara pueblo;

(18) T18 - Taos pueblo;

(19) T19 - Tesuque pueblo;

(20) T20 - Zia pueblo;

(21) T21 - Zuni pueblo;

(22) T22 - New Mexico Navajo nation;

(23) T100 - other tribal affiliation;

(24) T200 - patient refused;

(25) T300 - unknown.

[EE] GG. **Patient first name** means the first name of the patient.

[FF] HH. **Patient last name** means the last name of patient. Last name should not have a space between a prefix and a name (as in MacBeth), but hyphenated names retain the hyphen (as in Smith-Jones). Titles should not be recorded. If the last name has a suffix, put the last name, a space, and then the suffix (as in "Snyder III"). Last name does not include abbreviations of academic achievement or profession, such as "M.D.", "Ph.D." etc.

[GG] II. **Patient middle initial** means the middle initial of the patient.

[HH] JJ. **Patient medicaid number** means the patient's unique identification number assigned by medicaid.

[H] KK. **Patient medical record number** means the medical record number used by the provider to identify the patient.

[H] LL. **Patient principle diagnosis code, patient 2nd diagnosis code, patient 3rd diagnosis code, patient 4th diagnosis code, patient 5th diagnosis code, patient 6th diagnosis code, patient 7th diagnosis code, patient 8th diagnosis code, patient 9th diagnosis code, patient 10th diagnosis code, patient 11th diagnosis code, patient 12th diagnosis code, patient 13th diagnosis code, patient 14th diagnosis code, patient 15th diagnosis code, patient 16th diagnosis code, patient 17th**

diagnosis code, patient 18th diagnosis code means the ICD-9-CM diagnosis codes corresponding to additional conditions that co-exist at the time of admission, or develop subsequently, and which have an effect on the treatment received or the length of stay.

[KK] MM.

P a t i e n t principle diagnosis code, present on admission; patient 2nd diagnosis code; present on admission; patient 3rd diagnosis code, present on admission; patient 4th diagnosis code, present on admission; patient 5th diagnosis code, present on admission; patient 6th diagnosis code, present on admission; patient 7th diagnosis code, present on admission; patient 8th diagnosis code, present on admission; patient 9th diagnosis code, present on admission; patient 10th diagnosis code, present on admission; patient 11th diagnosis code, present on admission; patient 12th diagnosis code, present on admission; patient 13th diagnosis code, present on admission; patient 14th diagnosis code, present on admission; patient 15th diagnosis code, present on admission; patient 16th diagnosis code, present on admission; patient 17th diagnosis code, present on admission; patient 18th diagnosis code, present on admission means diagnosis was present at the time the order for inpatient admission occurs - conditions that develop during an outpatient encounter, including emergency room, observation, or outpatient surgery are considered as present on admission.

(1) Y - yes

(2) N - no

(3) U - no information on the record

(4) W - clinically undetermined

(5) I - exempt

[LL] NN. **Patient principal procedure code, patient 2nd procedure code, patient 3rd procedure code, patient 4th procedure code, patient 5th procedure code, patient 6th procedure code** means the codes identifying the significant procedures, performed during the patient stay.

[MM] OO.

Procedure date for patient principal procedure code, procedure date for 2nd procedure code, procedure date for 3rd procedure code, procedure date for 4th procedure code, procedure date for 5th procedure code, procedure date for 6th procedure code means the date of the procedure that is reported as it coincides with the procedure code that was performed (mmddyyyy).

[NN] PP. **Patient social security number** means the nine digit social security number provided by the patient, without section separating characters like dashes, hyphens or slashes, for example, "585940323".

[OO] QQ.

Patient status

means the code indicating patient disposition at time of discharge. The codes are:

(1) 01 - discharged to home or self care (routine discharge);

(2) 02 - discharged/transferred to another general hospital;

(3) 03 - discharged/transferred to skilled nursing facility;

(4) 04 - discharged/transferred to intermediate care facility (ICF);

(5) 05 - discharged/transferred to another type of institution;

(6) 06 - discharged/transferred to home under care of organized home health service organization;

(7) 07 - left against medical advice;

(8) 08 - reserved for national assignment;

(9) 09 - admitted as an inpatient to this hospital;

(10) 10 - 19 reserved for national assignment;

(11) 20 - expired;

~~[(12)] 21 - 29 - reserved for national assignment;~~

[(12)] 21 - discharged/transferred to court/law enforcement (covers patients sent to jail, prison or other detention facilities);

[(13)] 22 - 29 - reserved for national assignment;

~~[(14)]~~ [(14)] 30 - still patient or expected to return for outpatient services;

~~[(14)]~~ [(15)] 31 - 39 - reserved for national assignment;

~~[(15)]~~ [(16)] 40 - expired at home (hospice claims only);

~~[(16)]~~ [(17)] 41 - expired in a medical facility, such as a hospital, SNF, ICF or freestanding hospice (hospice claims only);

~~[(17)]~~ [(18)] 42 - expired - place unknown (hospice claims only);

~~[(18)]~~ [(19)] 43 - discharged/transferred to a federal health care facility; (effective 03/31/2008) (usage note: discharges and transfers to a government operated health care facility such as a department of defense hospital, a veteran's administration (VA) hospital or VA hospital or a VA nursing facility; to be used whenever the destination at discharge is a federal health care facility, whether the patient lives there or not);

~~[(19)]~~ [(20)] 44 - 49 - reserved for national assignment;

~~[(20)]~~ [(21)] 50 - discharged/transferred to hospice - home;

~~[(21)]~~ [(22)] 51 - discharged/transferred to hospice - medical facility;

~~[(22)]~~ [(23)] 52 - 60 - reserved for national assignment;

~~[(23)]~~ [(24)] 61 - discharged/transferred within this institution to a hospital based medicare approved swing bed;

~~[(24)]~~ [(25)] 62 - Discharged/

transferred to an inpatient rehabilitation facility including distinct part units of a hospital;

~~[(25)]~~ [(26)] 63 - discharged/transferred to long term care hospitals;

~~[(26)]~~ [(27)] 64 - discharged/transferred to a nursing facility certified under medicaid but not certified under medicare;

~~[(27)]~~ [(28)] 65 - discharged/transferred to a psychiatric hospital or psychiatric distinct part unit of a hospital;

~~[(28)]~~ [(29)] 66 - discharged/transferred to a critical access hospital (CAH) (effective 03/31/2008);

~~[(29)]~~ [(30)] 67 - 69 reserved for national assignment;

~~[(30)]~~ [(31)] 70 - discharge/transfer to another type of health care institution not defined elsewhere in the code list (effective 03/31/2008);

~~[(31)]~~ [(32)] 71-99 - reserved for national assignment.

[PP] RR. Primary payer category means one of the following broad categories assigned by the data provider to the payment source identified in the primary payer identification name field.

(1) 1 **Medicare** is the primary payer from which the provider might expect some payment.

(2) 2 **Medicaid** is the primary payer from which the provider might expect some payment.

(3) 3 **CHAMPUS/military/VA** is the primary payer from which the provider might expect some payment.

(4) 4 **IHS/PHS** (Indian health service/public health service) is the primary payer from which the provider might expect some payment.

(5) 5 **Other government** (including corrections/research) is a government entity other than those specifically listed as the primary payer from which the provider might expect some payment.

(6) 6 **Private insurance** is the primary payer from which the provider might expect some payment.

(7) 7 **Workers compensation** is the primary payer from which the provider might expect some payment.

(8) 8 **Self pay/no insurance** means the patient (or the patient's family) is the primary payer from which the provider might expect some payment.

(9) 9 **County indigent funds** are the primary payer source from which the provider might expect some payment.

(10) 10 **Charity care** means the provider does not anticipate any payment from any source, including the patient.

(11) 88 **Unknown.**

[QQ] SS. Primary payer identification name means the name identifying the primary payer from which

the provider might expect some payment for the reported service(s).

[RR] TT. Primary payer type means the type of primary payer as defined below from which the provider might expect some payment for the reported services(s):

(1) 1 **HMO** - health maintenance organization;

(2) 2 **other managed care** - includes provider service networks;

(3) 3 **indemnity plan;**

(4) 88 **unknown.**

[SS] UU. Provider zip code means the zip code whose boundaries physically contain the facility where the reported service(s) were provided. Use either five or nine digits, e.g. 87501 or 875010968.

[TT] VV. Secondary payer category means one of the following broad categories assigned by the data provider to the payment source identified in the secondary payer identification name field.

(1) 1 - **Medicare** is the secondary payer from which the provider might expect some payment.

(2) 2 - **Medicaid** is the secondary payer from which the provider might expect some payment.

(3) 3 - **CHAMPUS/military/VA** is the secondary payer from which the provider might expect some payment.

(4) 4 - **IHS/PHS** (Indian health service/public health service) is the secondary payer from which the provider might expect some payment.

(5) 5 - **Other government** (including corrections/research) is a government entity other than those specifically listed as the secondary payer from which the provider might expect some payment.

(6) 6 - **Private insurance** is the secondary payer from which the provider might expect some payment.

(7) 7 - **Workers compensation** is the secondary payer from which the provider might expect some.

(8) 8 - **Self pay/no insurance** means the patient (or the patient's family) is the secondary payer from which the provider might expect some payment.

(9) 9 - **County indigent funds** are the secondary payer source from which the provider might expect some payment.

(10) 10 - **Charity care** means the provider does not anticipate any payment from any source, including the patient.

(11) 88 - **Unknown.**

[UU] WW. Secondary payer identification name means the name identifying a secondary payer from which the provider might expect some payment for the reported service(s).

[VV] XX. Secondary payer type means the type of secondary payer as defined below from which the

provider might expect some payment for the reported service(s):

(1) 1 - **HMO** - health maintenance organization;

(2) 2 - **other managed care** - includes provider service networks;

(3) 3 - **indemnity plan**;

(4) 88 - **unknown**.

[WW] YY.

Sex of patient

means the sex of the patient as recorded at discharge. Enter the sex of the patient, coded as follows:

(1) female - F;

(2) male - M;

(3) unknown - U.

[XX].

Source of admission

means an inpatient only code indicating the source of this admission:

(1) **Adults and pediatrics**: source of admission codes for adults and pediatrics are:

(a) 1--physician referral - the patient was admitted to this facility upon the recommendation of his or her personal physician if other than a clinic physician or a HMO physician;

(b) 2--clinic referral - the patient was admitted to this facility upon recommendation of this facility's clinic physician;

(c) 3--HMO referral - the patient was admitted to this facility upon the recommendation of a health maintenance organization physician;

(d) 4--transfer from hospital - the patient was admitted to this facility as a transfer from an acute care facility where he or she was an inpatient;

(e) 5--transfer from skilled nursing facility - the patient was admitted to this facility as a transfer from a skilled nursing facility where he or she was an inpatient;

(f) 6--transfer from another health care facility - the patient was admitted to this facility as a transfer from a health care facility other than an acute care facility or skilled nursing facility;

(g) 7--emergency room - the patient was admitted to this facility upon the recommendation of this facility's emergency room physician;

(h) 8--court/law enforcement - the patient was admitted to this facility upon the direction of a court of law, or upon a request of a law enforcement agency representative;

(i) 9--information not available - the source of admission is unknown.

(2) **Newborns**: Newborn codes must be used when the **type of admission** is code 4. The codes are:

(a) 1--normal birth - a baby delivered without complications;

(b) 2--premature birth - a baby delivered with time or weight factors qualifying it for premature status;

(c) 3--sick baby - a baby delivered with medical complications, other than those

relating to premature status;

(d) 4--extramural - A newborn birth in a non-sterile birth environment.]

ZZ. Point of origin for admission or visit means the source of referral for this admission.

(1) **Adults and pediatrics**: source of admission codes for adults and pediatrics are:

(a) 1 - non-health care facility point of origin - the patient was admitted to this facility upon the recommendation of his or her personal physician if other than a clinic physician or a HMO physician (this includes patients coming from home, a physician's office or workplace;

(b) 2 - clinic referral - the patient was admitted to this facility as a transfer from a freestanding or non-freestanding clinic;

(c) 4 - transfer from a hospital - the patient was admitted to this facility as a transfer from an acute care facility where he or she was an inpatient or outpatient (excludes transfers from hospital inpatient in the same facility);

(d) 5 - transfer from SNF or ICF - the patient was admitted to this facility as a transfer from a skilled nursing facility (SNF) or intermediate care facility (ICF) where he or she was a resident;

(e) 6 - transfer from another health care facility - the patient was admitted to this facility as a transfer from a health care facility not defined elsewhere in this code list (i.e. other than an acute care facility or skilled nursing facility);

(f) 8 - court/law enforcement - the patient was admitted to this facility upon the direction of a court of law, or upon a request of a law enforcement agency representative (includes transfers from incarceration facilities);

(g) 9 - information not available - the means by which the patient was referred to this facility is not known;

(h) A - reserved for national assignment;

(i) D - transfer from hospital inpatient in the same facility resulting in a separate claim to the payer - the patient was admitted to this facility as a transfer from hospital inpatient within this facility resulting in a separate claim to the payer;

(j) E - transfer from ambulatory surgery center - the patient was admitted to this facility from an ambulatory or same-day surgery center (does not include patients admitted from the same facilities' outpatient surgery department);

(k) F - transfer from hospice and is under a hospice plan of care or enrolled in a hospice program - the patient was admitted to this facility as acute inpatient status and was receiving hospice care;

(l) G-Z - reserved for national assignment.

(2) **Newborns**: Newborn codes must be used when the **type of admission** is code 4. The codes are:

(a) 5 - born inside this facility - a baby born inside this facility;

(b) 6 - born outside of this facility - a baby born outside of this facility;

[YY] AAA. **Total charges** means an 11 digit number rounded to the whole dollar for the total charges for all inpatient services reported.

[ZZ] BBB. **Traffic crash report number** means the six digit number of the traffic crash/accident report form.

[AAA] CCC. **Type of admission** means an Inpatient code indicating the priority of the admission. Type of admission codes are:

(1) 1--emergency - the patient requires immediate medical intervention as a result of severe, life threatening or potentially disabling conditions; generally, the patient is admitted through the emergency room;

(2) 2--urgent - the patient requires immediate medical attention for the care and treatment of a physical or mental disorder; generally, the patient is admitted to the first available and suitable accommodation;

(3) 3--elective - the patient's condition permits adequate time to schedule the availability of a suitable accommodation;

(4) 4--newborn - a baby born within this facility; use of this code necessitates the use of special source of admission codes - see source of admission;

(5) 9--information not available.

[7.1.4.7 NMAC - Rp, 7.1.4.7 NMAC, 11/14/2008; A, 12/01/2010]

7.1.4.10 DATA REPORTING BY LICENSED NONFEDERAL GENERAL AND SPECIALTY INPATIENT HEALTH CARE FACILITIES:

[A. **Schedule for reporting**: licensed facilities shall submit to the commission on a yearly basis the data required by this rule in accordance with the following schedule:

(1) **reporting period**: January 1 to December 31;

(2) **report original data to commission**: no later than March 31 of the following year;

(3) **HPC will return integrity and validation errors to facilities for a 30-day review**: no later than April 30;

(4) **facilities will report corrected data back to commission**: no later than May 31;

(5) facilities reporting to their clearinghouse will continue to report quarterly for the NMHA comparative data program; however, those reporting for core measures submission will continue to report monthly.]

A. **Schedule for reporting**:

Beginning with the first quarter of 2011 (January 1-March 31), all licensed nonfederal general and specialty inpatient health care facilities in New Mexico shall submit to the commission on a quarterly basis the data required by this rule, in accordance with the following schedule:

<u>Reporting period</u>	<u>Report due to the commission</u>	<u>Commission returns integrity and validation errors</u>	<u>Final corrected report due to the commission</u>
<u>January 1 - March 31</u>	<u>June 30</u>	<u>July 31</u>	<u>August 30</u>
<u>April 1 - June 30</u>	<u>September 30</u>	<u>October 30</u>	<u>November 30</u>
<u>July 1 - September 30</u>	<u>December 31</u>	<u>January 30 of the following year</u>	<u>February 28 of the following year</u>
<u>October 1 - December 31</u>	<u>March 31 of the following year</u>	<u>April 30 of the following year</u>	<u>May 31 of the following year</u>

B. **Pursuant to the electronic reporting requirements in 7.1.4.11 NMAC, submit the data as a ~~[vertical bar (pipe) delimited]~~ fixed-width ASCII text (flat) file. Follow the record layout specifications, provided by the commission, for field placement and lengths (field lengths are maximum values).**

C. **Data required to be reported:** All licensed nonfederal general and specialty inpatient health care facilities in New Mexico shall report to the commission the following data elements, in the record layout provided by the commission:

- (1) admission hour;
- (2) attending physician NPI;
- (3) birth weight;
- (4) discharge hour;
- (5) 1st E-code, left justified;
- (6) 2nd E-code, left justified;
- (7) 3rd E-code, left justified;
- (8) medicare provider number, left justified;
- (9) New Mexico state license number left justified;
- (10) operating physician NPI;
- (11) patient principal diagnosis code (ICD-9-CM) left justified;
- (12) patient 2nd diagnosis code (ICD-9-CM) left justified;
- (13) patient 3rd diagnosis code (ICD-9-CM) left justified;
- (14) patient 4th diagnosis code (ICD-9-CM) left justified;
- (15) patient 5th diagnosis code (ICD-9-CM) left justified;
- (16) patient 6th diagnosis code (ICD-9-CM) left justified;
- (17) patient 7th diagnosis code (ICD-9-CM) left justified;
- (18) patient 8th diagnosis code (ICD-9-CM) left justified;
- (19) patient 9th diagnosis code (ICD-9-CM) left justified;
- (20) patient 10th diagnosis code (ICD-9-CM) left justified;
- (21) patient 11th diagnosis code (ICD-9-CM) left justified;
- (22) patient 12th diagnosis code (ICD-9-CM) left justified;
- (23) patient 13th diagnosis code (ICD-9-CM) left justified;
- (24) patient 14th diagnosis code (ICD-9-CM) left justified;
- (25) patient 15th diagnosis code (ICD-9-CM) left justified;
- (26) patient 16th diagnosis code (ICD-9-CM) left justified;
- (27) patient 17th diagnosis code (ICD-9-CM) left justified;
- (28) patient 18th diagnosis code (ICD-9-CM) left justified;
- (29) patient principal diagnosis code, present on admission, left justified;
- (30) patient 2nd diagnosis code, present on admission, left justified;
- (31) patient 3rd diagnosis code, present on admission, left justified;
- (32) patient 4th diagnosis code, present on admission, left justified;
- (33) patient 5th diagnosis code, present on admission, left justified;
- (34) patient 6th diagnosis code, present on admission, left justified;
- (35) patient 7th diagnosis code, present on admission, left justified;
- (36) patient 8th diagnosis code, present on admission, left justified;
- (37) patient 9th diagnosis code, present on admission, left justified;
- (38) patient 10th diagnosis code, present on admission, left justified;
- (39) patient 11th diagnosis code, present on admission, left justified;
- (40) patient 12th diagnosis code, present on admission, left justified;
- (41) patient 13th diagnosis code, present on admission, left justified;
- (42) patient 14th diagnosis code, present on admission, left justified;
- (43) patient 15th diagnosis code, present on admission, left justified;
- (44) patient 16th diagnosis code, present on admission, left justified;
- (45) patient 17th diagnosis code, present on admission, left justified;
- (46) patient 18th diagnosis code, present on admission, left justified;
- (47) patient principal procedure code, left justified;

(48) patient 2nd procedure code, left justified;
 (49) patient 3rd procedure code, left justified;
 (50) patient 4th procedure code, left justified;
 (51) patient 5th procedure code, left justified;
 (52) patient 6th procedure code, left justified;
 (53) procedure date for patient principal procedure code (mmddyyyy);
 (54) procedure date for patient 2nd procedure code (mmddyyyy);
 (55) procedure date for patient 3rd procedure code (mmddyyyy);
 (56) procedure date for patient 4th procedure code (mmddyyyy);
 (57) procedure date for patient 5th procedure code (mmddyyyy);
 (58) procedure date for patient 6th procedure code (mmddyyyy);
 (59) patient admission date (mmddyyyy);
 (60) patient street address, left justified;
 (61) patient city, left justified;
 (62) patient county, left justified;
 (63) patient state, left justified;
 (64) patient zip code, left justified;
 (65) patient control number, left justified;
 (66) patient date of birth (mmddyyyy);
 (67) patient diagnosis related group (DRG) code;
 (68) patient discharge date (mmddyyyy);
 (69) patient EMS ambulance run number, left justified;
~~[(70) patient ethnicity/race;]~~
~~(70) patient race;~~
~~(71) patient ethnicity;~~
~~(72) patient tribal affiliation;~~
~~[(71)] (73) patient first name, left justified;~~
~~[(72)] (74) patient last name, left justified;~~
~~[(73)] (75) patient middle initial;~~
~~[(74)] (76) patient medicaid I.D. number;~~
~~[(75)] (77) patient medical record number, left justified;~~
~~[(76)] (78) patient social security number;~~
~~[(77)] (79) patient status;~~
~~[(78)] (80) primary payer category, right justified;~~
~~[(79)] (81) primary payer identification name, left justified;~~
~~[(80)] (82) primary payer type, right justified;~~
~~[(81)] (83) provider zip code, left justified;~~
~~[(82)] (84) secondary payer category, right justified;~~
~~[(83)] (85) secondary payer~~

identification name, left justified;
~~[(84)] (86) secondary payer type;~~
~~[(85)] (87) sex of patient;~~
~~[(86)] (88) source of admission;~~
~~[(87)] (89) total charges, right justified;~~
~~[(88)] (90) traffic crash report number, left justified;~~
~~[(89)] (91) type of admission.~~

D. **Data reporting requirements for New Mexico human services department's medicaid system:** The New Mexico human service department's medicaid system shall provide all data listed by cooperative agreement between the commission and the human services department, pursuant to the reporting schedule contained in Subsection A of 7.1.4.10 NMAC.

E. **Data reporting requirements for the medicare (part A) fiscal intermediary:** The medicare (part A) fiscal intermediary shall provide all data mutually agreed upon in accordance with law between the commission and the fiscal intermediary, pursuant to the reporting schedule contained in Subsection A of 7.1.4.10 NMAC.

F. **Annual financial statements:** All licensed nonfederal general and specialty inpatient health care facilities shall submit annual audited financial statements to the commission. If the owners of such facilities obtain one audit covering more than one facility, combined annual audited financial statements may be submitted in compliance with this section. Facilities reporting in combined annual audited financial statements must also submit annual unaudited, individual facility financial statements to the commission. These reports shall be submitted no later than the end of the calendar year following the statement year.

[7.1.4.10 NMAC - Rp, 7.1.4.10 NMAC, 11/14/2008; A, 12/01/2010]

7.1.4.11 ELECTRONIC REPORTING REQUIREMENTS:

Starting with ~~[2009]~~ 2011 data, all data providers shall submit the required ~~[yearly discharge data no later than March 31 of the following year]~~ quarterly discharge data pursuant to the reporting schedule contained in Subsection A of 7.1.4.10 NMAC and all final corrected reports, for the full year's worth of data, are due no later than May 31 of the following year. Submit data by electronic media, which includes CD or DVD or by direct electronic transmission, ~~[preferably in an xml (extensible markup language) or in an ASCII file [layout] format,~~ per the record layout and instruction provided by the commission. Label all data with the following information: type of data, hospital name and license number, year, file name, point of contact and telephone

number. Please mail data to New Mexico Health Policy Commission, ATTN: [FF Manager, 2055 South Pacheco Street, Suite 200, Santa Fe, NM 87505] State Reporting Data Steward, 1190 St. Francis Drive, Suite N3060, Santa Fe, NM 87505.

[7.1.4.11 NMAC - Rp, 7.1.4.11 NMAC, 11/14/2008; A, 12/01/2010]

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

This is an amendment to 8.102.500 NMAC, section 8; effective 01/01/2011.

8.102.500.8 GENERAL REQUIREMENTS:

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

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

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

(3) the countable resources owned by and available to the benefit group do not exceed the \$1,500 liquid and \$2,000 non-liquid resource limits;

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

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

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

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

- | | |
|---|---------|
| (a) one person | \$ 768 |
| (b) two persons | \$1,033 |
| (c) three persons | \$1,297 |
| (d) four persons | \$1,562 |
| (e) five persons | \$1,828 |
| (f) six persons | \$2,092 |
| (g) seven persons | \$2,357 |
| (h) eight persons | \$2,622 |
| (i) add \$265 for each additional person. | |

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

may be eligible to receive services. The gross income guidelines for the size of the benefit group are as follows:

- (1) one person \$ 903
- (2) two persons \$1,215
- (3) three persons \$1,526
- (4) four persons \$1,838
- (5) five persons \$2,150
- (6) six persons \$2,461
- (7) seven persons \$2,773
- (8) eight persons \$3,085
- (9) add \$312 for each additional

person.

D. Standard of need:

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

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

(3) The financial standard includes approximately ~~[\$94]~~ \$79 per month for each participant in the benefit group.

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

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

person.

E. Special needs:

(1) Special clothing allowance:

In order to assist in preparing a child for school, a special clothing allowance is made each year in the amount of \$100 ~~[for the months of August and January]~~, subject to the availability of state or federal funds.

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

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

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

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

(3) Special circumstance:

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

F. Non-inclusion of legal guardian in benefit group:

Based on the availability of state and federal funds, the department may limit the eligibility of a benefit group due to the fact that a legal guardian is not included in the benefit group. [8.102.500.8 NMAC - Rp 8.102.500.8 NMAC, 07/01/2001; A, 10/01/2001; A, 10/01/2002; A, 10/01/2003; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 11/15/2007; A, 01/01/2008; A/E, 10/01/2008; A, 08/01/2009; A, 08/14/2009; A/E, 10/01/2009; A, 10/30/2009; A, 01/01/2011]

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

This is an amendment to 8.102.620 NMAC, section 9; effective 01/01/2011.

8.102.620.9 G R A N T DETERMINATION:

A. Determining the payment standard: The payment standard shall be determined based on the eligibility standards and requirements forth in 8.102.500.8 NMAC. The payment standard also includes the special clothing allowance.

B. Determining benefit group income: The benefit group's net countable income considered in the payment determination shall be the sum of:

- (1) gross alien sponsor income;
- (2) countable earnings after allowable deductions and disregards of benefit group members; and
- (3) gross unearned income of benefit group members.

C. Determining the grant:

~~[The grant amount shall be determined by subtracting the benefit group's net countable income from the standard of need applicable to the benefit group.]~~ A benefit [groups] group whose countable income after allowed deductions and disregards equals or exceeds the standard of need applicable to the benefit group shall not be eligible for payment. The grant shall be a monthly benefit amount determined using the following methodology:

- (1) subtract the benefit group's net countable income from the payment standard applicable to the benefit group; and

(2) further subtract the following budgetary adjustment amounts to establish the monthly benefit amount:

- (a) one person \$ 39
- (b) two persons \$ 53
- (c) three persons \$ 67
- (d) four persons \$ 80
- (e) five persons \$ 94
- (f) six persons \$108
- (g) seven persons \$121
- (h) eight persons \$138
- (i) for households with nine or more benefit group members, subtract an additional \$14 for each member.

[8.102.620.9 NMAC - Rp 8.102.620.9 NMAC, 07/01/2001; A, 11/15/2007; A, 01/01/2011]

NEW MEXICO HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

This is an amendment to 8.106.500 NMAC, section 8; effective 01/01/2011.

8.106.500.8 GA - GENERAL REQUIREMENTS:

A. Limited state funds may result in a suspension or reduction in general assistance benefits without eligibility and need considered.

B. Need determination process: Eligibility for the GA program based on need requires a finding that the:

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

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

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

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

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

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

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

- (a) one person \$ 768
- (b) two persons \$1,033
- (c) three persons \$1,297
- (d) four persons \$1,562

- (e) five persons \$1,828
- (f) six persons \$2,092
- (g) seven persons \$2,357
- (h) eight persons \$2,622
- (i) add \$265 for each additional

person.

E. Standard of need:

(1) As published monthly by the department, the standard of need is an amount provided to each GA cash assistance benefit group on a monthly basis and is based on availability of state funds, the number of individuals included in the benefit group, number of cases, number of applications processed and approved, application approval rate, number of case closures, IAR caseload number and expenditures, and number of pending applications.

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

(3) **Notice:** The department shall issue prior public notice identifying any change(s) to the standard of need amounts for the next quarter, as discussed at 8.106.630.11 NMAC.

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

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

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

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

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

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

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

(2) To be eligible to receive the one time supplement, a GA application must

be active and determined eligible no later than the last day of the month in the month the one time supplement is issued.

[8.106.500.8 NMAC - N, 07/01/2004; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 01/01/2008; A, 06/16/2008; A/E, 10/01/2008; A, 07/01/2009; A/E, 10/01/2009; A, 10/30/2009; A, 12/01/2009; A, 01/01/2011]

NEW MEXICO HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.314.3 NMAC, Sections 3, 6, 8 - 10 and 12 - 17, effective December 1, 2010.

8.314.3.3 STATUTORY

AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See NMSA 1978, Sections 27-2-12 et seq. [(Repl. Pamp. 1991)].

[1/1/95; 8.314.3.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 5/1/02; A, 12/1/10]

8.314.3.6 OBJECTIVE: The objective of [these regulations] this rule is to provide policies for the service portion of the New Mexico medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement.

[1/1/95, 2/1/95; 8.314.3.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 5/1/02; A, 12/1/10]

8.314.3.8 MISSION STATEMENT: ~~[The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.]~~ To reduce the impact of poverty on people living in New Mexico and to assure low income and individuals with disabilities in New Mexico equal participation in the life of their communities.

[2/1/95; 8.314.3.8 NMAC - Rn, 8 NMAC 4.MAD.002, 5/1/02; A, 12/1/10]

8.314.3.9 MEDICALLY FRAGILE HOME AND COMMUNITY-BASED SERVICES WAIVER: The New Mexico medicaid program (medicaid) pays for medically necessary services furnished to eligible recipients. The term "recipient"

hereinafter refers to waiver recipients or

their representatives. Where the recipient is a minor or has a cognitive disability, the recipient may be represented by a parent, legal guardian, or other recognized legal representative. To help New Mexico recipients receive services in a cost-effective manner, the New Mexico medical assistance division (MAD) has obtained a waiver of certain federal regulations to provide home and community-based services waiver (HCBSW) programs to recipients as an alternative to institutionalization. [See Section 2176 of the Omnibus Budget Reconciliation Act of 1981, codified at 42 CFR 441.300 Subpart G.] See 42 CFR 441.300. This section describes the [home and community-based services waiver] HCBSW for the medically fragile, eligible providers, covered waiver services, service limitations, and general reimbursement methodology.

[2/1/95, 4/15/96; 8.314.3.9 NMAC - Rn, 8 NMAC 4.MAD.734, 5/1/02; A, 12/1/10]

8.314.3.10 ELIGIBLE PROVIDERS:

A. Upon approval of New Mexico medical assistance program provider participation agreements by MAD, providers who meet the following requirements are eligible to be reimbursed for furnishing waiver services to recipients:

(1) standards established by the HCBSW program; and

(2) provide services to recipients in the same scope, quality and manner as provided to the general public; [see 8.302.1 NMAC, Provider Agreements] see 8.302.1.14 NMAC, nondiscrimination.

B. Once enrolled, providers receive a packet of information, including medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD and the [department of health (DOH)] New Mexico department of health (NMDOH). Providers are responsible for ensuring that they have received these materials and for updating them as new materials are received from MAD.

C. **Qualifications of case management agency providers:** Agencies must meet the standards developed for this HCBSW program by the applicable division of the [New Mexico department of health] NMDOH. Case management agencies are required to have national accreditation. These accrediting organizations are the commission on accreditation of rehabilitation facilities (CARF), the joint commission or another nationally recognized accrediting authority. Case management assessment activities necessary to establish eligibility are considered administrative costs.

D. **Qualifications of case managers:** Case managers employed by case management agencies must have the

skills and abilities necessary to perform case management services for recipients who are medically fragile, as defined by the HCBSW standards for this waiver program. Case managers must be registered nurses, as defined by the New Mexico state board of nursing and have a minimum of two [(2)] years of supervised experience with the target population in one or more areas of pediatrics, critical care or public health.

E. Qualifications of home health aide service providers:

(1) Home health aide services must be provided by a licensed home health agency, a licensed rural health clinic or a licensed or certified federally qualified health center using only home health aides who have successfully completed a home health aide training program as described in 42 CFR 484.36(a) (1) and (2); or who have successfully completed a home health aide training program described in the New Mexico regulations governing home health agencies, [DOH 91-2 (PHD), Part IV 406.(A) through (D)] 7.28.2.30 NMAC. Additionally, home health aides providing services must be deemed competent through a written examination and meet competency evaluation requirements specified in the 42 CFR 484.36(b) (1), (2) and (3); or meet the requirement for documentation of training or competency evaluation specified in the New Mexico regulations governing home health agencies, [DOH 91-2 (PHD), Part IV 406.(E) and (F)] 7.28.2.30 NMAC.

(2) Supervision: Supervision must be performed by a registered nurse and shall be in accordance with the New Mexico [Nurse] Nursing Practice Act, NMSA 1978, Section 61-3-1 et seq. [Supervision must occur at least once every sixty (60) days in the client's home and be specific to the individualized service plan.] Supervision must occur at least once every 60 days in the recipient's home and be specific to the individual service plan (ISP). All supervisory visits must be documented in the [client's] recipient's file.

(3) The supervision of home health aides is an administrative expense to the provider and is not billable as a direct service.

F. Qualifications of private duty nursing providers:

(1) Private duty nursing services must be provided by a licensed home health agency, a licensed rural health clinic, or a licensed or certified federally qualified health center, using only registered nurses or licensed practical nurses holding a current New Mexico board of nursing license and having a minimum of one year of supervised nursing experience; nursing experience preferably with individuals with developmental disabilities or who are medically fragile.

(2) **Supervision:** Supervision

must be performed by a registered nurse and shall be in accordance with the New Mexico Nursing Practice Act. Supervision must be specific to the [Individualized Service Plan] ISP.

(3) The supervision of nurses is an administrative expense to the provider and not billable as a direct service.

G. Qualifications of skilled therapy providers: Skilled therapy services may be provided by a licensed group practice/home health agency that employs licensed occupational therapists, physical therapists, or speech therapists and certified occupational therapy assistants and certified physical therapy assistants in accordance with the New Mexico regulation and licensing department. Physical therapy services must be provided by a physical therapist currently licensed by the state of New Mexico. Occupational therapy services must be provided by an occupational therapist currently licensed by the state of New Mexico, and registered with the American occupational therapy association or be a graduate of a program in occupational therapy approved by the council on medical education of the American occupational therapist association. Speech therapy services must be provided by a speech therapist currently licensed by the state of New Mexico and certified by the national association for speech and hearing. A physical therapy assistant working only under the direction and supervision of a licensed physical therapist, 16.20.6 NMAC, may provide physical therapy services. An occupational therapy assistant working only under the direction and supervision of a licensed occupational therapist, 16.15.3 NMAC, may provide occupational therapy services.

H. Qualifications of [psycho-social—counseling] behavior support consultation providers: [Psycho-social counseling services must be provided by a psychiatrist, psychologist/ psychoanalyst, or social worker licensed in New Mexico or a counselor with a master's degree in family or guidance and counseling.]

(1) Behavior support consultation services must be provided by a psychiatrist; psychologist/psychoanalyst, licensed psychologist associate, licensed psychiatric nurse, social worker or counselor licensed in New Mexico.

(2) Behavior support consultation may be provided through a corporation, partnership or sole proprietor.

(3) Providers of behavior support consultation must have a minimum of one year of experience working with individuals with developmental disabilities or who are medically fragile. All behavior support consultants must maintain current New Mexico licensure with their professional

field licensing body.

I. Qualifications of institutional and in-home respite care service providers: [Institutional providers must be an approved New Mexico medicaid provider of institutional care services and must hold a valid New Mexico institutional license issued by the department of health. Federal regulations prohibit payment for room and board services under the waiver. Respite care services are the exception to this statutory prohibition. Under 42 CFR 440.180(g), use of medicaid waiver funds to reimburse room and board as a part of respite care services will be permitted when such services are provided in an institution. When respite care services are provided to an eligible individual by an institution, that individual will not be considered a resident of the institution for purposes of waiver eligibility. In-home respite services are provided by a licensed home health care agency, a licensed or certified federally qualified health center, or a licensed rural health clinic.]

(1) Institutional respite services may be provided by an institution that is an approved medicaid provider of institutional care services, and:

(a) must hold a valid New Mexico institutional license issued by the DOH, to include a licensed hospital, skilled nursing facility, or intermediate care facility for the mentally retarded (ICF/MR), or

(b) be a certified specialized foster care provider, certified by the New Mexico children, youth and families department.

(2) In-home respite services are provided by a licensed home health care agency, a licensed or certified federally qualified health center, or a licensed rural health clinic. The registered nurses (RNs) and licensed practical nurses (LPNs) who work for the home health agency and provide respite services must be licensed by the New Mexico state board of nursing as an RN or LPN. See the New Mexico Nursing Practice Act, NMSA 1978, Section 61-3-1 et seq. and 16.12.2 NMAC. The home health aides who work for the home health agency and provide respite services, must have successfully completed a home health aide training program, as described in 42 CFR 484.36(a) (1) and (2); or have successfully completed a home health aide training program described in the New Mexico regulations governing home health agencies, 7.28.2 NMAC.

J. Qualifications of nutritional counseling providers: Nutritional counseling must be furnished by a licensed dietitian registered by the commission on dietetic registration of the American dietetic association, Nutrition and Dietetics Practice Act NMSA 1978, Section 61-7A-1 et seq.

K. Qualifications of specialized medical equipment and

supplies providers: Specialized medical equipment and supplies providers must have a business license for the locale they are in, a tax identification (ID) number for state and federal government, proof of fiscal solvency, proof of use of approved accounting principles, meet bonding required by the NMDOH, and comply with timeliness standards for this service.

[2/1/95, 4/15/96; 8.314.3.10 NMAC - Rn, 8 NMAC 4.MAD.734.1& A, 5/1/02; A, 12/1/10]

8.314.3.12 ELIGIBLE RECIPIENTS:

A. Medicaid recipients who have been diagnosed with a medically fragile condition before reaching [twenty-two(22)] 22 years of age and who require an [intermediate care facility for the mentally retarded (ICF/MR)] ICF/MR level of care (LOC) can be eligible to participate in the medically fragile HCBSW program.

B. Eligibility is limited to individuals who in addition to a developmental disability, developmental delay, or are at risk of developmental delay, have a medically fragile condition defined as a chronic physical condition, which results in a prolonged dependency on medical care for which daily skilled (nursing) intervention is medically necessary and is characterized by one or more of the following:

(1) [There is] a life threatening condition characterized by reasonably frequent periods of acute exacerbation which require frequent medical supervision, [and/or] or physician consultation and which in the absence of such supervision or consultation, would require hospitalization;

(2) [The individual requires] a condition requiring frequent, time consuming administration of specialized treatments which are medically necessary; or

(3) [The individual is dependent] dependence on medical technology such that without the technology a reasonable level of health could not be maintained; examples include but are not limited to ventilators, dialysis machines, enteral or parenteral nutrition support and continuous oxygen.

[2/1/95, 4/15/96; 8.314.3.12 NMAC - Rn, 8 NMAC 4.MAD.734.3, 5/1/02; A, 12/1/10]

8.314.3.13 COVERED WAIVER SERVICES:

This Medicaid waiver covers the following services for a specified number of medically fragile recipients as an alternative to institutionalization. The program is limited by the number of federally authorized unduplicated recipient (UDR) positions and program funding.

A. **Case management services:** Case managers provide a link between recipients and care providers and coordinate the use of community resources needed for that care. At least every other

month, the case manager conducts a face-to-face contact with the recipient, and on a monthly basis conducts a telephonic or electronic contact with the recipient. The scope of the case manager's duties includes the following:

(1) Assess the recipient's medical and social needs and functional limitations, using a needs assessment instrument, in cooperation with recipients, primary care givers and families;

(2) Develop and implement an Individualized Service Plan (ISP);

(3) Coordinate and monitor the delivery of services;

(4) Evaluate the effectiveness of services provided under the ISP and revise the plan as necessary;

(5) Reassess the recipient's need for and use of HCBSW services and arrange for financial eligibility redetermination and level of medical care determination annually or at more frequent intervals as the recipient's condition warrants;

(6) Mobilize the use of "natural helping" networks, such as family members, church members and friends; and

(7) Provide the documentation required by the HCBSW program and regular Medicaid for accountability for services and expenditures.]

(1) identifying medical, social, educational, family and community support resources;

(2) scheduling and coordinating timely interdisciplinary team (IDT) meetings to develop and modify the ISP annually and as needed by any team member;

(3) documenting contacts with the recipient and providers responsible for delivery of services to the recipient;

(4) verifying eligibility on an annual basis;

(5) ensuring the medically fragile long-term care assessment abstract (LTCAA) is completed and signed by the physician, physician assistant or clinical nurse practitioner (CNP);

(6) submitting the LOC packet including the LTCAA to the third-party assessor (TPA) contractor for prior authorization on a timely basis;

(7) ensuring the waiver review form (MAD 046) is submitted timely, both annually and as needed;

(8) initiating an ongoing monitoring process that provides for evaluation of delivery, effectiveness, appropriateness of services and support provided to the recipient as identified in the ISP;

(9) performing an annual recipient satisfaction survey; and

(10) coordinating services provided through the medically fragile (MF) waiver and other sources (state plan, family infant toddler (FIT), commercial insurance,

educational and community).

B. **Home health aide:** Home health aide services provide total care or assist a recipient in all activities of daily living. Total care is defined as: the provision of bathing (bed, sponge, tub, or shower), shampooing (sink, tub, or bed), care of nails and skin, oral hygiene, toileting and elimination, safe transfer techniques and ambulation, normal range of motion and positioning, adequate oral nutrition and fluid intake. The home health aide services assist the recipient in a manner that promotes an improved quality of life and a safe environment for the recipient. Home health aide services can be provided outside the recipient's home. Home health aides perform simple procedures such as an extension of therapy services, bowel and bladder care, ostomy site care, personal care, ambulation and exercise, household services essential to health care at home, assistance with medications that are normally self-administered, reporting changes in patient conditions and needs, and completing appropriate records. Home health aides may provide basic non-invasive nursing assistant skills within the scope of their practice.

C. **Private duty nursing:** Private duty nursing services are covered under the state plan as expanded early and periodic screening, diagnosis and treatment (EPSDT) benefits for waiver recipients under the age of 21. Private duty nursing services are provided to a recipient at home and in the community and include activities, procedures and treatment for a physical condition, physical illness, or chronic disability. Services may include medication management; administration and teaching; aspiration precautions; feeding management such as gastrostomy and jejunostomy; skin care; weight management; urinary catheter management; bowel and bladder care; wound care; health education; health screening; infection control; environmental management for safety; nutrition management; oxygen management; seizure management and precautions; anxiety reduction; staff supervision; and behavior and self-care assistance. DOH requires certain standards to be maintained by the private duty nursing care provider with which it contracts. In carrying out their role for DOH, private duty nursing care agencies must:

(1) employ only RNs and LPNs licensed in the state of New Mexico;

(2) assure that all nurses delivering services are culturally sensitive to the needs and preferences of the [individuals] recipients and their families. Based upon the [client's] recipient's individual language needs or preferences, nurses may be requested to communicate in a language other than English;

(3) inform the case manager

immediately of the agency's inability to staff according to the ISP;

(4) develop and implement an individual nursing plan in conjunction with the [client's] recipient's physician and case manager in a manner that identifies and fulfills the [client's] recipient's specific needs;

~~[(5) Immediately inform the case manager of physician-ordered changes regarding the client's needs;~~

(6) (5) document all assessments, observations, treatments and nursing interventions;

(7) (6) document and report to the case manager any non-compliance with the ISP; and

(8) (7) document any incidence of [client] recipient harm, medication error, [etc.] or other adverse event in accordance with the New Mexico Nursing Practice Act.

D. ~~[Physical, occupational and speech therapy services]~~ **Skilled therapy services for adults:** This medicaid waiver covers medically necessary skilled therapy services under the state plan as expanded EPSDT benefits for waiver participants under the age of 21. Waiver services for adults are provided when the limits of EPSDT skilled therapy services are exhausted. Adults access therapy services under the state plan for acute and temporary conditions that are expected to improve significantly in a reasonable and generally predictable period of time. The amount, duration, and goals of skilled therapy services must be included in an ISP. A therapy treatment plan must be developed with the initiation of therapy services and updated at least every six (6) months. The therapy treatment plan includes the following: [(+)] developmental status of the [recipients] recipient in areas relevant to the service provided; [(2)] treatment provided, including the frequency and duration; and [(3)] recommendation for continuing services and documentation [or] of results. Skilled maintenance therapy services specifically include the following:

(1) Physical therapy: Physical therapy services promote gross/fine motor skills, facilitate independent functioning or prevent progressive disabilities. Specific services may include: professional assessment(s), evaluation(s) and monitoring for therapeutic purposes; physical therapy treatments and interventions; training regarding physical therapy activities, use of equipment and technologies or any other aspect of the individual's physical therapy services; designing, modifying or monitoring use of related environmental modifications; designing, modifying, and monitoring use of related activities supportive to the ISP goals and objectives; and consulting or collaborating with other service providers or family members, as directed by the recipient.

(2) Occupational therapy: Occupational therapy services promote fine motor skills, coordination, sensory integration, or facilitate the use of adaptive equipment or other assistive technology. Specific services may include: teaching of daily living skills; development of perceptual motor skills and sensory integrative functioning; design, fabrication, or modification of assistive technology or adaptive devices; provision of assistive technology services; design, fabrication, or applying selected orthotic or prosthetic devices or selecting adaptive equipment; use of specifically designed crafts and exercise to enhance function; training regarding occupational therapy activities; and consulting or collaborating with other service providers or family members, as directed by the recipient.

(3) Speech language therapy: Speech language therapy services preserve abilities for independent function in communication; facilitate oral motor and swallowing function; facilitate use of assistive technology, or prevent progressive disabilities. Specific services may include: identification of communicative or oropharyngeal disorders and delays in the development of communication skills; prevention of communicative or oropharyngeal disorders and delays in the development of communication skills; development of eating or swallowing plans and monitoring their effectiveness; use of specifically designed equipment, tools, and exercises to enhance function; design, fabrication, or modification of assistive technology or adaptive devices; provision of assistive technology services; adaptation of the recipient's environment to meet his/her needs; training regarding speech language therapy activities; and consulting or collaborating with other service providers or family members, as directed by the recipient.

E. ~~[Psycho-Social Services Counseling]~~ **Behavior support consultation services:** This medicaid waiver provides services to the medically fragile client, their parents, family members or primary care givers. Psycho-social counseling includes assessment, treatment, evaluation and follow-up services to assist the client parents, family members or primary care givers with the development of coping skills related to preserving the family's efforts to maintain the client at home. **Behavior support consultation services:** This medicaid waiver provides services to assist the medically fragile recipient, his/her parents, family members or primary care givers. Behavior support consultation includes assessment, treatment, evaluation and follow-up services to assist the recipient, parents, family members or primary care givers with the development of coping skills related to preserving the family's efforts to maintain the recipient at

home. Behavior support consultation: (1) informs and guides the recipient's providers with the services and supports as they relate to the recipient's behavior and his/her medically fragile condition; (2) identifies support strategies to ameliorate contributing factors with the intention of enhancing functional capacities, adding to the provider's competency to predict, prevent and respond to interfering behavior and potentially reducing interfering behavior(s); (3) supports effective implementation based on a functional assessment; (4) collaborates with medical and ancillary therapies to promote coherent and coordinated services addressing behavioral issues and to limit the need for psychotherapeutic medications; and (5) monitors and adapts support strategies based on the response of the recipient and his/her service and support providers. Based on the recipient's ISP, services are delivered in an integrated/natural setting or in a clinical setting.

F. **Institutional and in-home respite care services:** This medicaid waiver covers respite care as outlined in the [individual service plan (ISP)] ISP. [The interdisciplinary team (IDT)] The IDT is responsible for determining the need for respite care. Respite services are provided to recipients unable to care for themselves that are furnished on a short-term basis to allow the primary caregiver a limited leave of absence in order to reduce stress, accommodate caregiver illness, or meet a sudden family crisis or emergency. Respite care is furnished at [home or] home, in a private residence of a respite care provider, in a specialized foster care home, in a hospital or nursing facility (NF) [low-NF level of care,] or an ICF/MR meeting the qualifications for provider certification. When respite care services are provided to an eligible individual by an institution, that individual will not be considered a resident of the institution for purposes of waiver eligibility. Respite services include: medical and non-medical health care; personal care bathing; showering; skin care; grooming; oral hygiene; bowel and bladder care; catheter and supra-pubic catheter care; preparing or assisting in preparation of meals and eating; as appropriate, administering enteral feedings; providing home management skills; changing linens; making beds; washing dishes; shopping; errands; calls for maintenance; assisting with enhancing self-help skills; promoting use of appropriate interpersonal communication skills and language; working independently without constant supervision/observation; providing body positioning, ambulation and transfer skills; arranging for transportation to medical or therapy services; assisting in arranging health care needs and follow-up as directed by the primary care giver, physician, and case manager; ensuring the health and

safety of the recipient at all times.

G. **Nutritional counseling:** Nutritional counseling is designed to meet the unique food and nutrition requirements of [individuals] recipients with medical fragility and developmental disabilities. Examples of [individuals] recipients who may require nutritional counseling are children or adults with specific illnesses such as failure to thrive, gastroesophageal reflux, dysmotility of the esophagus and stomach etc., or who require specialized formulas, or receive tube feedings or parenteral nutrition. This does not include oral-motor skill development such as that provided by a speech language pathologist. Nutritional counseling services include assessment of the recipient's nutritional needs, regimen development, or revisions of the recipient's nutritional plan, counseling and nutritional intervention and observation and technical assistance related to implementation of the nutritional plan. These services advise and help recipients obtain appropriate nutritional intake by integrating information from the nutritional assessment with information on food, other sources of nutrients, and meal preparation consistent with cultural backgrounds and socioeconomic status. These services can be delivered in the home.

H. **Specialized medical equipment and supplies:** This Medicaid waiver provides specialized medical equipment and supplies which include: (1) devices, controls or appliances specified in the plan of care that enable recipients to increase their ability to perform activities of daily living; (2) devices, controls, or appliances that enable the recipient to perceive, control, or communicate with the environment in which they live; (3) items necessary for life support or to address physical conditions along with ancillary supplies and equipment necessary to the proper functioning of such items; (4) such other durable and non-durable medical equipment not available under the state plan that is necessary to address recipient functional limitations; and (5) necessary medical supplies not available under the state plan. Items reimbursed with waiver funds are in addition to any medical equipment and supplies furnished under the state plan and exclude those items that are not of direct medical or remedial benefit to the recipient. The costs of maintenance and upkeep of equipment are included in the cost of equipment and supplies. This service does not include nutritional or dietary supplements, disposable diapers, bed pads, or disposable wipes.

[2/1/95, 4/15/96; 8.314.3.13 NMAC - Rn, 8 NMAC 4.MAD.734.4 & A, 5-1-02; A, 12/1/10]

8.314.3.14 NON - COVERED SERVICES: Only services listed as covered waiver services are covered under

the waiver program. Ancillary services can be available to waiver recipients through the regular Medicaid program. These ancillary services are subject to the limitations and coverage restrictions which exist for other Medicaid services. See 8.301.3 NMAC, [Program Limitations] *General Noncovered Services*, for an overview of non-covered services.

[2/1/95, 4/15/96; 8.314.3.14 NMAC - Rn, 8 NMAC 4.MAD.734.5, 5/1/02; A, 12/1/10]

8.314.3.15 INDIVIDUALIZED SERVICE PLAN: An initial ISP must be developed by a team of professionals in consultation with [recipients] the recipient and others involved in the recipient's care within 90 days of being determined eligible for the MF waiver.

[A. The interdisciplinary team must review the treatment plan at least every twelve (12) months or more often if indicated:

B. The plan of care must contain the following information:

(1) Statement of the nature of the specific problem and the specific needs of the recipient;

(2) Description of the functional level of the recipient, including an assessment and evaluation of the following:

(a) Mental status examination;

(b) Intellectual function assessment;

(c) Psychological assessment;

(d) Educational assessment;

(e) Vocational assessment;

(f) Social assessment;

(g) Medication assessment; and

(h) Physical assessment.

(3) Statement of the least restrictive conditions necessary to achieve the purposes of treatment;

(4) Description of intermediate and long-range goals, with a projected timetable for their attainment and the duration and scope of therapy services;

(5) Statement and rationale of the treatment plan for achieving these intermediate and long-range goals, including provision for review and modification of the plan; and

(6) Specification of responsibilities for areas of care, description of needs, and orders for medication(s), treatments, restorative and rehabilitative services, activities, therapies, social services, diet, and special procedures recommended for the health and safety of the recipient.]

A. The case manager assists the recipient in identifying his/her dreams, goals, preferences and outcomes for service. The case manager obtains information about the recipient's strengths, capacities, needs, preferences, desired outcomes, health status, and risk factors. This information is gained through a review of the LOC assessment;

interviews between the case manager and recipient; and the person-centered planning process that takes place between the case manager and recipient to develop the ISP.

B. The ISP addresses: activities of daily living assistance needs, health care needs, equipment needs, relationships in the home and community, personal safety and provider responsibilities.

C. During the pre-planning process, the case manager provides the recipient with information about the MF waiver. The case manager provides information about the range and scope of service choices and options, as well as the rights, risks, and responsibilities associated with the MF waiver. The case manager is responsible for completing the CIA and obtaining other medical assessments needed for the ISP; completing the annual LOC redetermination process; and referring the recipient to HSD for financial eligibility determination annually and as needed.

D. The case manager works with the recipient to identify service providers to participate in the IDT meeting. State approved providers are selected from a list provided by the case manager. The recipient sets the date and time of the IDT meeting. The case manager works with the recipient to plan the IDT meeting and encourages him/her to lead the IDT meeting to the extent possible.

E. The case manager assists the recipient in ensuring that the ISP addresses the recipient's goals, health, safety and risks along with addressing the information or concerns identified through the assessment process. The case manager writes up the ISP as identified in the IDT meeting. Each provider develops care activities and strategies for each outcome, goal, and objective identified at the IDT meeting. The case manager assures the ISP budget is within the capped dollar amount (CDA). Implementation of the ISP begins when provider service plans have been received by the case manager and recipient, and the plan and budget have been approved by the TPA contractor.

F. The case manager ensures for each recipient that:

(1) the plan addresses the recipient's needs and personal goals in medical supports needed at home for health and wellness;

(2) services selected address the recipient's needs as identified during the assessment process; needs not addressed in the ISP are addressed through resources outside the MF waiver program;

(3) the outcomes of the assessment process for assuring health and safety are considered in the plan;

(4) services do not duplicate or supplant those available to the recipient through the Medicaid state plan or other

public programs;

(5) services are not duplicated in more than one service code;

(6) the parties responsible for implementing the plan are identified and listed within the document;

(7) the back-up plans are complete; and

(8) the ISP is submitted to and reviewed by the TPA contractor in compliance with the MF waiver service standards.

G. The ISP is updated if personal goals, needs or life circumstances change that may or may not result in a change of the LOC. Revisions may be requested by the recipient. Each member of the IDT may request an IDT meeting to address changes or challenges. The case manager contacts the recipient to initiate revisions to the budget. The case manager initiates the scheduling of IDT meetings and assures the IDT meeting is in compliance with the MF waiver service standards.

H. The case manager is responsible for monitoring the ISP pre-planning and development process. The case management agency conducts internal quality improvement monitoring of service plans. The ISP is monitored monthly via phone, electronically, and face-to-face by the case manager.

I. After the initial ISP, the IDT reviews the ISP at least annually or more often as needed, in order to assess progress toward goal achievement and determine any needed revisions in care.

[2/1/95, 4/15/96; 8.314.3.15 NMAC - Rn, 8 NMAC 4.MAD.734.6, 5/1/01; A, 12/1/10]

8.314.3.16 UTILIZATION REVIEW: All medicaid services, including services covered under this medicaid waiver, are subject to utilization review for medical necessity and program compliance. Reviews can be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See 8.302.5 NMAC, *Prior Approval Authorization and Utilization Review*. Once enrolled, providers receive instructions and documentation forms necessary for prior approval and claims processing.

A. **Prior approval:** To be eligible for HCBSW program services, medicaid recipients must require an [intermediate care facility for the mentally retarded] ICF/MR LOC and meet the definition of NM medical fragility as defined in Subsection B of 8.314.3.12 NMAC, *eligible recipients*. LOC determinations are made by MAD or its designee. The ISP must specify the type, amount and duration of services. Certain procedures or services specified in the ISP can require prior approval from MAD or its designee. Services for which prior approval was obtained remain

subject to utilization review at any point in the payment process.

B. **Eligibility determination:** Prior approval of services does not guarantee that individuals are eligible for medicaid. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance.

C. **Reconsideration:** Providers who disagree with prior approval request denials or other review decisions can request a re-review and reconsideration. See Section 953 [8.350.2 NMAC], *Reconsideration of Utilization Review Decisions*.

[2/1/95, 4/15/96; 8.314.3.16 NMAC - Rn, 8 NMAC 4.MAD.734.7, 5/1/02; A, 12/1/10]

8.314.3.17 REIMBURSEMENT: Waiver service providers must submit claims for reimbursement [through the administrative services division of the department of health for payment by the MAD claims processing contractor] to the MAD medicaid management information system (MMIS) contractor for processing. Claims must be filed per the billing instructions in the medicaid policy manual. Providers must follow all medicaid billing instructions. See 8.302.2 NMAC, *Billing for Medicaid Services*. Once enrolled, providers receive instructions on documentation, billing, and claims processing. Reimbursement to providers of medicaid waiver services is made at a predetermined reimbursement rate.

[2/1/95, 8.314.3.17 NMAC - Rn, 8 NMAC 4. MAD 734.8, 5/1/02; A, 12/1/10]

NEW MEXICO HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.314.4 NMAC, Sections 3, 5, 6 and 8 - 17, effective December 1, 2010. This rule was also renumbered and reformatted from 8 NMAC 4.MAD.753 and 8 NMAC 4.MAD.000 to comply with NMAC requirements.

8.314.4.3 STATUTORY AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. [See Section 27-2-12 et seq. NMSA 1978 (Repl. Pamph. 1991)] See NMSA 1978, Section 27-2-12 et seq.

[2/1/95; 8.314.4.3 NMAC - Rn, 8 NMAC 4.MAD.000.3 & A, 12/1/10]

8.314.4.5 EFFECTIVE DATE: February 1, 1995, unless a later date is cited at the end of the section.

[2/1/95; 8.314.4.5 NMAC - Rn, 8 NMAC 4.MAD.000.5 & A, 12/1/10]

8.314.4.6 OBJECTIVE: The objective of [these regulations] this rule is to provide policies for the service portion of the New Mexico medicaid program. These policies describe eligible providers, covered services, noncovered services, utilization review, and provider reimbursement.

[2/1/95; 8.314.4.6 NMAC - Rn, 8 NMAC 4.MAD.000.6 & A, 12/1/10]

8.314.4.8 MISSION STATEMENT: [The mission of the New Mexico medical assistance division (MAD) is to maximize the health status of medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.] To reduce the impact of poverty on people living in New Mexico and to assure low income and individuals with disabilities in New Mexico equal participation in the life of their communities.

[2/1/95; 8.314.4.8 NMAC - Rn, 8 NMAC 4.MAD.002 & A, 12/1/10]

8.314.4.9 A C Q U I R E D IMMUNODEFICIENCY SYNDROME (AIDS) OR AIDS-RELATED CONDITION HOME AND COMMUNITY-BASED SERVICES WAIVER: The New Mexico medicaid program (medicaid) pays for medically necessary services furnished to eligible recipients. To help New Mexico recipients receive necessary [service] services, the New Mexico medical assistance division (MAD) has obtained a waiver of certain federal regulations to provide home and community-based services waiver (HCBSW) programs to recipients as an alternative to institutionalization. [See Section 2176 of the Omnibus Budget Reconciliation Act of 1981, codified at 42 CFR 441.300 Subpart G.] See 42 CFR 441.300. This section describes the HCBSW services for recipients who are diagnosed as having acquired immunodeficiency syndrome (AIDS) or AIDS-related conditions (ARC), eligible providers, covered waiver services, service limitations, and general reimbursement methodology.

[2/1/95; 8.314.4.9 NMAC - Rn, 8 NMAC 4.MAD.735 & A, 12/1/10]

8.314.4.10 ELIGIBLE PROVIDERS:

A. Upon approval of New Mexico medical assistance program provider

participation agreements by MAD, providers who meet the following requirements are eligible to be reimbursed for furnishing waiver services to recipients:

(1) meet standards established by the HCBSW program; and

(2) provide services to recipients in the same scope, quality and manner as provided to the general public; see 8.302.1 NMAC, *General Provider Policies*.

B. Once enrolled, providers receive a packet of information, including medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD and the department of health (DOH). Providers are responsible for ensuring that they have received these materials and for updating them as new materials are received from MAD.

C. **Qualifications of case management agency providers:** [Agencies must meet the standards developed for the HCBSW programs by the New Mexico department of health. Case management assessment activities necessary to establish eligibility for the waiver program are administrative costs.] Agencies must meet the standards developed for this HCBSW program by the applicable division of the New Mexico DOH. Case management agencies are required to have national accreditation. These accrediting organizations are the commission on accreditation of rehabilitation facilities (CARF), the joint commission or another nationally recognized accrediting authority. Case management assessment activities necessary to establish eligibility are considered administrative costs.

D. **Qualifications of case managers:** Case managers employed by case management agencies must have the skills and abilities necessary to perform case management services for recipients who are diagnosed with AIDS or ARC, as defined by the [HCBWS] HCBSW standards for this waiver program. Case managers must have one of the following credentials:

(1) bachelor's degree in social work, counseling, [gerontology;] psychology, rehabilitation counseling, nursing, or a closely related field; or

(2) licensed as a registered nurse, as defined by the New Mexico state board of nursing; or

(3) licensed as a social worker, as defined by the New Mexico board of social work examiners.

E. **Qualification of home health agency:** Agencies providing home health services must be licensed as a home health agency by the New Mexico DOH and meet the standards developed for the HCBSW programs by the New Mexico department of health.

F. **Qualifications of homemaker/personal care [and in-home**

respite care service] services providers: [Homemaker/personal care and in-home respite care service providers must have the specific knowledge, skills and abilities to furnish services, as specified in the standards developed by the applicable HCBSW program of the department of health. For medicaid reimbursement, homemaker/personal care services providers and in-home respite care service providers must be physically and mentally able to perform tasks specified in the plan of care (POC).]

(1) homemaker/personal care services must be provided by a licensed home health agency, a licensed rural health clinic or a licensed or certified federally qualified health center; and

(2) homemaker/personal care services providers must have the specific knowledge, skills and abilities to furnish services, as specified in the standards developed by the applicable HCBSW program of the New Mexico DOH; for medicaid reimbursement, homemaker/personal care services providers must be physically and mentally able to perform tasks as specified in the plan of care (POC).

G. **Qualifications of private duty nursing providers:** [Private duty nursing services must be provided by licensed home health agencies or certified rural health clinics. Direct nursing services are provided by individuals who are currently licensed as registered or licensed practical nurses by the New Mexico state board of nursing.] Private duty nursing services must be provided by a licensed home health agency, a licensed rural health clinic, or a licensed or certified federally qualified health center, using only registered nurses or licensed practical nurses holding a current New Mexico board of nursing license and having a minimum of one year of supervised nursing experience; nursing experience preferably with individuals who have been diagnosed with AIDS or ARC.

[2/1/95; 8.314.4.10 NMAC - Rn, 8 NMAC 4.MAD.735.1 & A, 12/1/10]

8.314.4.11 PROVIDER RESPONSIBILITIES:

A. Providers who furnish services to medicaid recipients must comply with all specified medicaid participation requirements. See [Section MAD-701] 8.302.1 NMAC, *General Provider Policies*.

B. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance.

C. Providers must maintain records which are sufficient to fully disclose the extent and nature of the services provided to recipients. See [Section MAD-701] 8.302.1 NMAC, *General Provider Policies*. [2/1/95; 8.314.4.11 NMAC - Rn, 8 NMAC

4.MAD.735.2 & A, 12/1/10]

8.314.4.12 ELIGIBLE

RECIPIENTS: Medicaid recipients diagnosed as having AIDS or ARC and who require [hospital or a high or low level] a nursing facility level of care (LOC) may be eligible to participate in the acquired immunodeficiency syndrome or AIDS-related conditions HCBSW program.

[2/1/95; 8.314.4.12 NMAC - Rn, 8 NMAC 4.MAD.735.3 & A, A, 12/1/10]

8.314.4.13 COVERED WAIVER

SERVICES: This medicaid waiver covers the following services for a specified number of recipients diagnosed as having AIDS or ARC, as an alternative to institutionalization [in a hospital], based on availability of unduplicated recipient (UDR) positions and program funding.

A. **Case management services:** Case managers provide a link between recipients and care providers and coordinate the use of community resources needed for that care. At least every month, the case manager is required to conduct a face-to-face contact with the recipient. The scope of the case manager's duties includes the following:

[(1) assess the recipient's medical and social needs and functional limitations; using a standardized needs assessment instrument, in cooperation with recipients, primary care givers and families;

(2) develop and implement the plan of care (POC);

(3) coordinate and monitor the delivery of services;

(4) evaluate the effectiveness of services provided under the POC and revise the plan as necessary;

(5) reassess the recipient's need for and use of HCBSW services and arrange for financial eligibility redeterminations and level of medical care determinations annually, or more frequently if necessary;

(6) mobilize the use of "natural helping" networks, such as family members, church members and friends; and

(7) provide the documentation required by the HCBSW and regular medicaid program for maintenance of accountability for services and expenditures.]

(1) identifying medical, social, educational, family and community support resources;

(2) scheduling and coordinating timely interdisciplinary team (IDT) meetings to develop and modify the POC annually and as needed by any team member;

(3) documenting contacts with the recipient and providers responsible for delivery of services to the recipient;

(4) verifying eligibility on an annual basis;

(5) ensuring the long-term care

assessment abstract (LTCAA- ISD 379) is completed and signed by the physician, physician assistant or clinical nurse practitioner (CNP);

(6) ensuring that the comprehensive individual assessment (CIA) is completed;

(7) ensuring the timely submission of the LOC packet including the LTCAA and CIA to the third-party assessor (TPA) contractor for prior authorization;

(8) ensuring the waiver review form (MAD 046) is submitted timely, both annually and as needed;

(9) initiating an ongoing monitoring process that provides for evaluation of delivery, effectiveness, appropriateness of services and support provided to the participant as identified in the POC;

(10) performing an annual participant satisfaction survey; and

(11) coordinating services provided through the AIDS waiver and other sources (state plan, commercial insurance, educational and community).

B. Homemaker/personal care services: This medicaid waiver covers home/personal care services which are medically necessary and included in the recipient's POC. Homemaker/personal care services include the following duties:

(1) home management and maintenance which includes promotion of self-care, house cleaning, minor home repairs;

(2) preparation of meals, including shopping, menu planning and helping the recipient eat;

(3) non-medical personal care services, including assistance with mobility, personal comfort and grooming;

(4) shopping and errands which are necessary for maintenance of the recipient at home;

(5) transportation arrangements, as indicated in the POC;

(6) emotional support;

(7) identification and reporting problems to case managers and nursing staff;

(8) health needs as specified in the POC and follow-up on health care needs; and

(9) assisting recipients with direct contact with case managers;]

(1) providing home management and maintenance, including budget preparation, promotion of self-care, house cleaning, dusting, mopping and vacuuming, minor home repairs, minor clothing repairs, making beds, changing linens, washing dishes, doing laundry and routine maintenance;

(2) providing meal preparation, including shopping, menu planning and assisting the recipient in eating;

(3) providing non-medical

personal care services, such as assistance with mobility; personal comfort; and grooming of the recipient, including bathing, shampooing, dressing, preventive skin care and assistance with elimination;

(4) shopping and performing errands necessary for maintenance of the recipient at home;

(5) arranging for transportation or accompanying the recipient so that he/she may receive services as indicated in the POC;

(6) assisting with arrangements for health care services within the POC and following-up on health care services;

(7) teaching household members, family members or other appropriate individuals to assist with the care of the recipient;

(8) identifying and reporting problems to case managers and nursing staff; and

(9) facilitating and assisting the recipient with direct contact with the case manager.

C. Private duty nursing:

This medicaid waiver covers medically necessary skilled private duty nursing services needed to avoid institutionalization which are provided to recipients in their own home. [Private duty nurses must accomplish the following:] Private duty nursing services are provided to a recipient at home and include activities, procedures, and treatment for a physical condition, physical illness, or chronic disability. Services may include medication management; administration and teaching; aspiration precautions; feeding tube management such as gastrostomy and jejunostomy; skin care; weight management; urinary catheter management; bowel and bladder care; wound care; health education; health screening; infection control; environmental management for safety; nutrition management; oxygen management; seizure management and precautions; anxiety reduction; staff supervision; and behavior and self-care assistance. The scope of the private duty nurse's duties includes:

(1) [initiate] initiating the development and implementation of the nursing treatment plan under the direction of the recipient's physician and in conjunction with the case manager in a manner that fulfills the recipient's specific needs;

(2) [inform] informing the case manager of physician-ordered changes regarding the recipient's health status;

(3) [ensure] ensuring that recipient complaints and concerns about services are reported to the case manager in a timely fashion and in a manner which directs the complaint or concern to a satisfactory conclusion;

(4) [report] reporting any situation which is or may be harmful to recipients [and/or] or others to the case management

agency; and

(5) [abide] abiding by the scope of practice for licensing, as defined by the New Mexico board of nursing.

[2/1/95; 8.314.4.13 NMAC - Rn, 8 NMAC 4.MAD.735.4 & A, 12/1/10]

8.314.4.14 NON-COVERED SERVICES:

Only services listed as covered waiver services are covered under the HCBSW program. Ancillary services may be available to waiver recipients through the regular medicaid program. Ancillary services are subject to the limitations and coverage restrictions which exist for other medicaid services. See [Section MAD-602] 8.301.3 NMAC, *General Noncovered Services*, for general services not covered by the medicaid program.

[2/1/95; 8.314.4.14 NMAC - Rn, 8 NMAC 4.MAD.735.5 & A, 12/1/10]

8.314.4.15 PLAN OF CARE:

An initial individualized plan of care (POC) must be developed by a team of professionals in consultation with [recipients] the recipient and others involved in the recipient's care within 90 days of being determined eligible for the AIDS waiver.

[A. The interdisciplinary team must review the treatment plan at least every six (6) months or more often if indicated:

B. The following must be contained in the plan of care or documents used in the development of the plan of care. The plan of care and all supporting documents must be available for review in the recipient's file:

(1) statement of the nature of the specific problem and the specific needs of the recipient;

(2) description of the functional level of the recipient, including an assessment and evaluation of the following:

(a) mental status assessment;

(b) intellectual function assessment;

(c) psychological assessment;

(d) educational assessment;

(e) vocational assessment;

(f) social assessment;

(g) medication assessment; and

(h) physical assessment;

(3) statement of the least restrictive conditions necessary to achieve the purposes of treatment;

(4) description of intermediate and long-range goals, with a projected timetable for their attainment and the duration and scope of therapy services;

(5) statement and rationale of the treatment plan for achieving these intermediate and long-range goals, including provision for review and modification of the plan; and

(6) specification of responsibilities

for areas of care, description of needs, and orders for medication(s), treatments, restorative and rehabilitative services, activities, therapies, social services, diet and special procedures recommended for the health and safety of the recipient.]

A. The case manager assists the recipient in identifying his/her dreams, goals, preferences and outcomes for service. The case manager obtains information about the recipient's strengths, capacities, needs, preferences, desired outcomes, health status, and risk factors. This information is gained through a review of the LOC assessment; interviews between the case manager and recipient; and the person-centered planning process that takes place between the case manager and recipient to develop the POC.

B. The POC addresses: activities of daily living assistance needs, health care needs, equipment needs, relationships in the home and community, personal safety and provider responsibilities.

C. During the pre-planning process, the case manager provides the recipient with information about the AIDS waiver. The case manager provides information about the range and scope of service choices and options, as well as the rights, risks, and responsibilities associated with the AIDS waiver. The case manager then gives the recipient information about the AIDS waiver, community resources, and ways to interface with providers, physicians and support groups. The case manager is responsible for completing the CIA and obtaining other medical assessments needed for the POC; completing the annual LOC redetermination process; and referring the recipient to HSD for financial eligibility determination annually and as needed.

D. The case manager works with the recipient to identify service providers to participate in the IDT meeting. State approved providers are selected from a list provided by the case manager. The case manager encourages the recipient to meet with the provider agencies and specific providers before making a choice of agency or specific provider. The recipient sets the date and time of the IDT meeting. The case manager works with the recipient to plan the IDT meeting and encourages him/her to lead the IDT meeting to the extent possible.

E. During the IDT meeting, the case manager assists the recipient in ensuring that the POC addresses the recipient's goals, health, safety and risks along with addressing the information or concerns identified through the assessment process. The case manager writes up the POC as identified in the IDT meeting. Each provider develops care activities and strategies for each outcome, goal, and objective identified at the IDT meeting. Implementation of the POC begins when provider service plans have been received by

the case manager and recipient, and the plan and budget have been approved by the TPA contractor.

F. The case manager ensures for each recipient that:

(1) the planning process addresses the recipient's needs and personal goals in medical supports needed at home for health and wellness;

(2) services selected address the recipient's needs as identified during the assessment process; needs not addressed in the POC are addressed through resources outside the AIDS waiver program;

(3) the outcomes of the assessment process for assuring health and safety are considered in the plan;

(4) services do not duplicate or supplant those available to the recipient through the medicaid state plan or other public programs;

(5) services are not duplicated in more than one service code;

(6) the parties responsible for implementing the plan are identified and listed within the document;

(7) the back-up plans are complete; and

(8) the POC is submitted to the TPA contractor in compliance with the AIDS waiver policies and procedures.

G. The POC is updated if personal goals, needs or life circumstances change that may or may not result in a change of the LOC. Revisions may be requested by the recipient. Each member of the IDT may request an IDT meeting to address changes or challenges. The case manager contacts the recipient to initiate revisions to the budget. The case manager initiates the scheduling of IDT meetings and assures the IDT meeting is in compliance with the AIDS waiver policies and procedures.

H. The case manager monitors the effectiveness of services through written reports, phone contacts, and a monthly face-to-face contact with the recipient.

I. After the initial POC, the IDT reviews the POC every six months or more often as needed, in order to assess progress toward goal achievement and determine any needed revisions in care.

[2/1/95; 8.314.4.15 NMAC - Rn, 8 NMAC 4.MAD.735.6 & A, 12/1/10]

8.314.4.16 PRIOR APPROVAL AND UTILIZATION REVIEW: All medicaid services, including services covered [by the] under this medicaid waiver, are subject to utilization review for medical necessity and program compliance. Reviews may be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See [Section MAD-705] 8.302.5 NMAC, Prior [Approval]

Authorization and Utilization Review. Once enrolled, providers receive instructions and documentation forms necessary for prior approval and claims processing.

A. **Prior approval:** To be eligible for HCBSW program services, medicaid recipients must require a [hospital or] nursing facility level of care (LOC). [~~Level of care (LOC)~~] LOC determinations are made by MAD or its designee. The plan of care (POC) developed by the case manager must specify the type, amount and duration of services. Certain procedures [and] or services specified in the POC can require prior approval from MAD or its designee. Services for which prior approval was obtained remain subject to utilization review at any point in the payment process.

B. **Eligibility determination:** Prior approval of services does not guarantee that individuals are eligible for medicaid. Providers must verify that individuals are eligible for medicaid at the time services are furnished and determine if medicaid recipients have other health insurance.

C. **Reconsideration:** Providers who disagree with prior approval request denials or other review decisions can request a re-review and [a] reconsideration. See Section MAD-953, Reconsideration of Utilization Review Decisions.

[2/1/95; 8.314.4.16 NMAC - Rn, 8 NMAC 4.MAD.735.7 & A, 12/1/10]

8.314.4.17 REIMBURSEMENT:

[~~Waiver service providers must submit claims for reimbursement to the administrative services division of the department of health for processing by the MAD claims processing contractor. See Section MAD-702, Billing for Medicaid Services. Once enrolled, providers receive instructions on documentation, billing, and claims processing. Reimbursement to providers of waiver services is made at a predetermined reimbursement rate.~~] Waiver service providers must submit claims for reimbursement to the MAD medicaid management information system (MMIS) contractor for processing. Claims must be filed per the billing instructions in the medicaid policy manual. Providers must follow all medicaid billing instructions. See 8.302.2 NMAC, *Billing for Medicaid Services*. Once enrolled, providers receive instructions on documentation, billing, and claims processing. Reimbursement to providers of waiver services is made at a predetermined reimbursement rate.

[2/1/95; 8.314.4.17 NMAC - Rn, 8 NMAC 4.MAD.735.8 & A, 12/1/10]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.1 NMAC Section 15, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.1.15 TRAINING AND DEVELOPMENT: The director shall establish, pursuant to direction from the board, and maintain a training and development [guidelines and will ensure that a copy of the guidelines is provided to each agency:] work plan. The board will review the training and development [guidelines] work plan on an annual basis.
[1.7.1.15 NMAC - N, 07/07/01; A, 11/14/02; A, 7/15/05; A, 12/1/10]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.4 NMAC Sections 13 and 14, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.4.13 P A Y DIFFERENTIALS:

A. Temporary recruitment/Retention differential: The director may authorize, in writing, a pay differential of up to fifteen percent (15%) of an employee's base pay to an employee who fills a position which has been documented as critical to the effective operation of the agency and has been demonstrated and documented to be a severe recruitment problem for the agency.

(1) A temporary recruitment differential authorized under this provision shall be tied to the position and may not transfer with the employee should the employee leave that position. Payment of this differential shall be separate from the employee's base salary. Agencies shall demonstrate to the office, at least biennially, the circumstances which justified the differential to determine the necessity for its continuance.

(2) A temporary recruitment differential of more than fifteen percent (15%) of an employee's base pay or a total salary (base pay plus differential amount) that exceeds the maximum of the pay band may be authorized if approved by the director.

B. Temporary retention differential: The director may authorize, in writing, a pay differential of up to fifteen percent (15%) of an employee's base pay to an employee in a position which the agency has documented and has been designated

as critical to the effective operation of the agency and the employee's departure would disrupt the agency's ability to fulfill its mission.

(1) A temporary retention differential authorized under this provision may be approved up to one year. The agency shall demonstrate to the office, at least annually, the circumstances which justify the continuance of the differential. The agency must provide a detailed plan that outlines how they intend to resolve the problems associated with the retention difficulties. Payment of this differential shall be separate from the employee's base salary and may not transfer with the employee should the employee leave that position.

(2) A temporary retention differential of more than fifteen percent (15%) of an employee's base pay or a total salary (base pay plus differential amount) that exceeds the maximum of the pay band may be authorized if approved by the director.

C. The temporary recruitment differential and the temporary retention differential are separate and distinct pay differentials that are administered separately.

[B:] D. Out - o f - s t a t e differential: The director may authorize an out-of-state differential to an employee up to the maximum of the pay band if the agency is able to substantiate that the employee's current salary is insufficient to adequately pay an employee while working or residing out of state. Payment of this differential should be separate from the employee's base salary. A total salary (base pay plus differential amount) that exceeds the maximum of the pay band may be authorized if approved by the director.

[1.7.4.13 NMAC - Rp, 1.7.4.11 NMAC, 11/14/02; A, 10/30/03; A, 7-15-05; 1.7.4.13 NMAC - Rn, 1.7.4.14 NMAC & A, 12-30-05; A, 6-30-06; A, 12/1/10]

1.7.4.14 OVERTIME:

A. Agencies are responsible for the evaluation of each employee's position and duties in order to determine their overtime status as set forth under the *Fair Labor Standards Act*.

B. Agencies shall provide documentation to employees as to the determination of their overtime status.

C. Employees have the right to appeal the determination of their overtime status according to the provisions of *1.7.6.13 NMAC*. Agencies shall notify employees in writing of their appeal decision within 30 calendar days. The employee may file an appeal of the agency's decision to the director within 30 calendar days of the agency's decision. Agencies shall notify employees that their appeal to the director must be in writing and must include the

reason(s) why the employee believes he or she is improperly identified for overtime coverage. The appeal must include documentation describing the work currently being performed by the employee and any other relevant information. All information contained in the appeal shall be verified by the employing agency.

D. Agencies shall maintain a record on each employee containing information required by the provisions of the *Fair Labor Standards Act*.

E. Workweek is a period of time which begins at 12:01 a.m. Saturday, and ends at 12:00 midnight, the following Friday. The director may approve an alternative workweek.

F. Time worked in excess of 40 hours during the designated workweek shall be compensated in accordance with the provision of the *Fair Labor Standards Act* [29 U.S.C. Sections 201 to 262] for *Fair Labor Standards Act* covered, non-exempt employees.

G. Agencies shall not change the workweek to avoid payment of overtime. A change to the scheduled work hours within the workweek shall not be considered a change to the workweek.

H. Agencies shall determine the need for employees to work overtime, and be responsible for authorizing overtime work.

I. Paid holiday leave in accordance with the provisions of Subsection A of 1.7.4.17 NMAC, annual leave taken in accordance with the provisions of Subsection F of 1.7.7.8 NMAC, and administrative leave for voting taken in accordance with the provisions of *Subsection C of 1.7.7.14 NMAC* shall also count as time worked in the consideration of overtime for *Fair Labor Standards Act* covered, non-exempt employees.

J. Agencies shall pay *Fair Labor Standards Act* covered, non-exempt employees for overtime worked unless the employee, in advance, agrees in writing to compensatory time off. Employees may accrue a maximum of 240 hours of compensatory time, unless otherwise authorized by statute and shall be paid for accrued compensatory time upon separation.

K. Employees not covered or exempt from the overtime provisions of the *Fair Labor Standards Act* may be compensated for overtime if an agency's policy permits.

L. Any additional regular hours worked shall not be substituted for approved paid leave time during the same week additional regular hours were worked.
[1.7.4.14 NMAC - Rp, 1.7.4.12 NMAC, 11/14/02; A, 7-15-05; 1.7.4.14 NMAC - Rn, 1.7.4.15 NMAC & A, 12-30-05; A, 12/1/10]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.7 NMAC adding Section 19, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.7.19 DONATING AN ORGAN OR BONE MARROW:

A. In accordance with the provisions of NMSA 1978, Section 24-28-3, an agency head may authorize a leave of absence, not to exceed twenty workdays, to an employee for the purpose of donating an organ or bone marrow.

B. In accordance with the provisions of 1.7.7.9 NMAC, an employee may request and use donated annual or sick leave for the purpose of donating an organ or bone marrow.

C. If an employee requests donations of annual leave or sick leave but does not receive the full amount of leave needed for the donation of an organ or bone marrow, the agency head may grant paid administrative leave for the remainder of the needed leave up to the maximum total of twenty workdays.

D. An agency head may require verification by a physician regarding the purpose of the leave requested and information from the physician regarding the length of the leave requested.

E. Any paid leave of absence granted pursuant to this provision shall not result in a loss of compensation, seniority, annual leave, sick leave or accrued overtime for which the employee is otherwise eligible.

[1.7.7.19 NMAC - N, 12/1/10]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.8 NMAC Sections 11, 13 and 19, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.8.11 AUTHORIZED DRUG AND ALCOHOL TESTING:

A. All candidates for safety-sensitive positions are required to submit to drug testing after an offer of employment is made and prior to final selection.

B. Agencies that require employees in safety-sensitive positions to undergo regular physical examinations shall require such employees to undergo drug testing as part of those physical examinations.

C. Agencies shall require employees to undergo drug, alcohol testing or both if the agency has a reasonable

suspicion that the employee has committed drug or alcohol abuse based on, but not limited to:

(1) direct observation of the physical symptoms or manifestations of being under the influence of a drug or alcohol while on duty; such symptoms may include, but are not limited to liquor on breath, slurred speech, unsteady walk, or impaired coordination; or

(2) direct observation of the use or possession of drugs or drug paraphernalia, or the use of alcohol while on duty.

D. An employee shall submit to a reasonable suspicion drug or alcohol test provided the requesting supervisor has secured the next level supervisor's approval, unless the requesting supervisor is the agency head. The requesting supervisor shall prepare a contemporaneous memorandum outlining the details leading up to the reasonable suspicion drug or alcohol test. The memorandum shall be submitted to the substance abuse coordinator within 24 hours of the request for testing.

E. At least ten percent (10%) of employees in safety-sensitive positions in each agency shall be required to undergo drug testing on a yearly basis.

(1) The director shall identify the [employees] safety-sensitive positions on a random selection basis.

(2) At the discretion of the agency head or substance abuse coordinator, employees may be excused from random drug testing if:

(a) they have previously requested referral in accordance with the provisions of Subsection B of 1.7.8.19 NMAC;

(b) the selection for random drug testing is made during the first 30 calendar days following the request for referral; or

(c) they are on an authorized absence for 30 calendar days or more.

(3) The agency head or substance abuse coordinator shall inform the director of any employee excused from random drug testing within 10 working days of receipt of the notice of safety sensitive testing.

F. The director may authorize an agency to conduct more than 10% random drug testing on employees in safety sensitive positions upon receipt of an agency's written request that would include justification of how the additional testing is related to the conditions of employment and the use of equipment that could pose a risk to public health or safety.

[1.7.8.11 NMAC - Rp, 1.7.8.11 NMAC, 02/12/2010; A, 12/1/2010]

1.7.8.13 DRUG TESTS:

A. The initial and confirmatory drug tests shall be performed by a state licensed laboratory in accordance with the substance abuse and mental health services administration or the college

of American pathologists in forensic urine drug testing. The laboratory shall have the capability of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

B. The following initial cutoff [levels] concentrations shall be used when screening specimens on the initial drug tests to determine whether they are negative for these [five] seven drugs or classes of drugs.

(1) Marijuana metabolites 5 0 (ng/ml)

(2) Cocaine metabolites [300] 150 (ng/ml)

(3) Opiate metabolites 2,000 (ng/ml)

(4) 6-Acetylmorphine 1 0 (ng/ml)

[4] (5) Phencyclidine (PCP) 25 (ng/ml)

[5] (6) Amphetamines [1,000] 500 (ng/ml)

(7) MDMA 500 (ng/ml)

C. All specimens identified as positive on the initial drug test, shall be confirmed by the laboratory at the cutoff [values] concentration listed below for each drug. All confirmations shall be by quantitative analysis:

(1) Marijuana [metabolites⁺] metabolite - Delta - 9-tetrahydrocannabinol - 9-carboxylic acid (THCA) 15 (ng/ml)

(2) Cocaine [metabolites²] metabolite - Benzoylcegonine [+50] 100 (ng/ml)

(3) Opiates:
(a) Morphine 2,000 (ng/ml)
(b) Codeine 2,000 (ng/ml)
(4) 6-Acetylmorphine 1 0 (ng/ml)

[4] (5) Phencyclidine (PCP) 25 (ng/ml)

[5] (6) Amphetamines:
(a) Amphetamine [500] 250 (ng/ml)

(b) Methamphetamine¹ [500] 250 (ng/ml)

[6] Delta-9-tetrahydrocannabinol - 9-carboxylic acid
[7] Benzoylcegonine

(7) MDMA (Methylenedioxymethamphetamine) 250 (ng/ml)

(a) MDA (Methylenedioxyamphetamine) 250 (ng/ml)

(b) MDEA (Methylenedioxyethylamphetamine) 250 (ng/ml)

(8) ¹To be reported as positive for methamphetamine, a specimen must also contain amphetamine at a concentration equal to or greater than 100 ng/ml.

D. The laboratory shall report as negative all specimens that are negative on the initial test or negative on the

confirmatory test. Only specimens reported as positive on the confirmatory test shall be reported positive for a specific drug.

E. The laboratory shall retain and place those specimens confirmed positive in properly secured long-term frozen storage for at least 365 calendar days. An agency may request the laboratory to retain the specimen for an additional period of time. If the laboratory does not receive a request to retain the specimen during the initial 365 calendar day period, the specimen may be discarded.

[1.7.8.13 NMAC - Rp, 1.7.8.13 NMAC, 02/12/2010; A/E, 10/01/2010; Re-pr, 12/1/2010]

1.7.8.19 REHABILITATION AND SANCTIONS:

A. Candidates for employment:

(1) A candidate for employment in a safety-sensitive position shall be rejected for selection when he tests positive for drugs and does not seek review by the medical review officer or cannot satisfactorily explain the positive test results.

(2) An employee for transfer or promotion to a safety-sensitive position who tests positive for drugs and is unable to satisfactorily explain the positive test results shall be subject to disciplinary action including dismissal if the employee occupies a safety-sensitive position. If the employee is not in a safety-sensitive position, the employee shall be treated in accordance with the provisions of *Subsection D of 1.7.8.19 NMAC*.

B. Voluntary self-identification by employees:

(1) Any employee who requests referral to an EAP, counseling or a drug or alcohol rehabilitation program, prior to selection for drug and alcohol testing shall be referred by the substance abuse counselor. Any costs for counseling or rehabilitation shall be borne by the employee.

(2) The agency may grant administrative leave to an employee to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial voluntary self-identification only.

(3) Employees in safety-sensitive positions, who have requested referral shall be assigned to non safety-sensitive duties until successful completion of the approved substance abuse program or treatment plan and release by the substance abuse program provider.

(4) Employees are subject to drug, alcohol testing or both at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of requesting referral.

(a) Employees in safety-sensitive

positions who test positive during this time period or fail to successfully complete such program are subject to disciplinary action including dismissal.

(b) Employees in non safety-sensitive positions who test positive during this time period or fail to successfully complete such program may be subject to disciplinary action including dismissal. The agency may allow the employee to use annual leave, sick leave, or leave without pay for additional counseling or rehabilitation by the agency after considering all factors relevant to the employee's condition and job performance history.

(5) For employees who have been required to undergo an alcohol rehabilitation program, any indication of alcohol at any level during the 30 to 180 calendar day period following the [request-for] referral shall be considered a positive test result.

C. Safety-sensitive positions: Employees in safety-sensitive positions who have not requested referral to an employee assistance program, counseling, or a drug or alcohol rehabilitation program and test positive on a required drug, alcohol test or both shall be subject to disciplinary action including dismissal if they do not have a satisfactory explanation for the positive test results.

D. Non safety-sensitive positions:

(1) Employees in non safety-sensitive positions who test positive on a reasonable suspicion drug or alcohol test or both required by *Subsection D of 1.7.8.11 NMAC* and do not have a satisfactory explanation for the positive test results shall be referred to an employee assistance program, counseling, or a drug or alcohol rehabilitation program. Employees are subject to drug or alcohol testing at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of the first positive test. Any such employee who tests positive for drugs, alcohol or both between 30 and 180 calendar days of the first positive test without a satisfactory explanation or who fails to enter and successfully complete a program shall be subject to disciplinary action including dismissal.

(2) The agency may grant an employee administrative leave to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial reasonable suspicion referral only.

E. Refusal to cooperate in testing procedure: Any employee who refuses or fails without good cause to cooperate in the drug or alcohol testing or both procedure by refusing or failing to complete the specified forms, by refusing or failing to submit a urine or breath specimen, or otherwise refuses or fails to cooperate

shall be subject to disciplinary action including dismissal.

F. Possession of drugs or alcohol:

(1) Employees who illegally sell, purchase, or convey from one person or one place to another drugs or any substance in *Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pam. 1994)*, while on duty shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency.

(2) When employees, while on duty [at the worksite,] consume or have in their possession drugs, open containers of alcohol or any substance in *Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pam. 1994)* without a valid prescription or as otherwise authorized by law, they shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency.

[1.7.8.19 NMAC - Rp, 1.7.8.19 NMAC, 02/12/2010; A, 12/1/2010]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.10 NMAC Sections 13 and 14, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.10.13 SEPARATION WITHOUT PREJUDICE:

A. Employees who have suffered an injury or illness which is compensable under the workers' compensation act and are physically or mentally unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, shall be separated from the service without prejudice provided:

(1) the employee has been afforded modified duty in accordance with *1.7.10.12 NMAC*;

(2) the employee has reached maximum medical improvement prior to the completion of up to 12 months of modified duty; or, the employee has not reached maximum medical improvement upon the expiration of up to 12 months of modified duty;

(3) all efforts to accommodate the medical restrictions of the employee have been made and documented; and

(4) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:

(a) the employee meets the established requirements and can perform

the essential functions of the job, either with or without reasonable accommodation, or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

B. Employees who have suffered an illness or injury that is not compensable under the workers' compensation act and are unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, as a result of the physical or mental disability created by the non job-related injury or illness shall be separated from the service without prejudice provided:

(1) all efforts to reasonably accommodate the medical restrictions of the employee have been made and documented; and

(2) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation; or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

C. Agencies may provide modified duty to employees for a period of up to 4 months during the separation process if required to meet the provisions of this rule.

D. Notice of contemplated separation without prejudice:

(1) to initiate the separation without prejudice of an employee who has completed the probationary period, the agency shall serve a notice of contemplated separation without prejudice on the employee which: describes the circumstances which form the basis for the contemplated separation without prejudice; gives a general explanation of the evidence the agency has; advises the employee of his or her right to inspect and obtain copies of any documentary evidence relied upon; specifies what the contemplated action is; and states that the employee has 11 calendar days from service of the notice to respond in writing to the notice or to request an opportunity for an oral response;

(2) when the notice of contemplated separation without prejudice is served by mail, the employee receiving service shall have 3 additional calendar days in which to file a response;

(3) at the time the notice of contemplated separation without prejudice is served on the employee, the agency shall

notify the director and the risk management division of the general services department of the proposed separation without prejudice and submit a copy of the separation notice along with documentation to support efforts to provide modified duty and to support efforts to find other suitable vacant positions.

E. Response to notice of contemplated separation without prejudice:

(1) a representative of the employee's choosing may respond in writing to the notice of contemplated separation without prejudice on behalf of the employee;

(2) if there is a request for an oral response to the notice of contemplated separation without prejudice, the agency shall meet with the employee within 11 calendar days of a request for an oral response, unless the employee and the agency agree in writing to an extension of time; a representative of the employee's choosing may represent the employee.

(3) the purpose of the oral response is not to provide an evidentiary hearing but is an opportunity for the employee to present his or her side of the story; it is an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to support the proposed involuntary separation without prejudice.

F. Notice of final separation without prejudice:

(1) if the employee does not respond to the notice of contemplated separation without prejudice the agency shall issue a notice of final separation within 11 calendar days following the response period;

(2) if the employee has filed a written response or has been provided an opportunity for oral response, the agency shall issue a notice of final separation without prejudice no later than 11 calendar days from the date of receipt of the response;

(3) the notice of final separation without prejudice shall:

(a) specify the action to be taken;

(b) describe the circumstances which form the basis for the separation without prejudice, which may not include allegations not included in the notice of contemplated separation without prejudice;

(c) give a general explanation of the evidence the agency has;

(d) specify when the final separation without prejudice will be effective, which must be at least 24 hours from the time of service of the notice of final separation without prejudice;

(e) inform the employee that the final separation without prejudice may be appealed to the board with a written statement of the grounds for the appeal delivered to the state personnel office in Santa Fe, New Mexico, and received by the director within 30 calendar days of the effective date of the separation without prejudice; and

(f) the adjudication process is outlined in [1-17-12 NMAC] **1.7.12 NMAC**. [1.7.10.13 NMAC - Rp, 1 NMAC 7.10.13, 07/07/01; A, 11/14/02; A, 06/08/04; A, 10/29/04; A, 7/15/05; A, 5/15/07; A, 12/1/10]

1.7.10.14 REEMPLOYMENT OF JOB-RELATED INJURED OR ILL FORMER EMPLOYEES:

A. A former employee who has separated from the service due to job-related injury or illness and who has received or is due to receive benefits under the Workers' Compensation Act shall have reemployment rights in accordance with the provisions of *NMSA 1978, Section [52-7-25-1] 52-1-50.1 and NMSA 1978 Section 52-3-49*, under the following provisions:

(1) Reemployment rights under **1.7.10.14 NMAC** are extended only by the agency employing the former employee at the time of the job related injury or illness and are provided only for positions which contain the same or lower midpoint as that held at the time of separation.

(2) To initiate reemployment rights under this rule, the former employee must notify the agency in writing, with a copy to the office, of their desire to be reemployed. The notification shall include the positions and locations, which the former employee is willing to accept, and an appropriate application for employment.

(3) The agency must receive certification in writing from the treating health care provider that the former employee is fit to carry out the essential functions of the position with or without reasonable accommodation without significant risk of re-injury or relapse to illness.

(4) When the agency is to fill a vacant position which is a position and location indicated by the former employee, the agency shall offer the job to the former employee provided:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

(5) Former employees reemployed in accordance with the provisions of **Subsection A of 1.7.10.14 NMAC** will hold the status of the position in accordance with **1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC** and do not have to serve a probationary period if they were in career status at the time of separation.

B. The risk management division of the general services department and the office shall be notified immediately of any injured or ill former employee who

applies for a position and subsequently declines a job offer.

[1.7.10.14 NMAC - Rp, 1 NMAC 7.10.14, 07/07/01; A, 11/14/02; A, 12/1/10]

NEW MEXICO STATE PERSONNEL BOARD

This is an amendment to 1.7.12 NMAC Sections 18 and 23, effective 12-1-10, adopted by the State Personnel Board at a meeting on 11-12-10.

1.7.12.18 HEARINGS:

A. The hearing shall be open to the public unless the parties agree that it shall be closed.

B. ~~[A party may appear at the hearing through a representative, provided such representative has made a written entry of appearance prior to the hearing date.] A party may appear through a representative at any and all times during the adjudication process, provided such representative has filed a written entry of appearance.~~

C. The hearing officer may clear the room of witnesses not under examination, if either party so requests, and of any person who is disruptive. The agency is entitled to have a person, in addition to its representative, in the hearing room during the course of the hearing, even if the person will testify in the hearing.

D. The agency shall present its evidence first.

E. Oral evidence shall be taken only under oath or affirmation.

F. Each party shall have the right to:

(1) make opening and closing statements;

(2) call and examine witnesses and introduce exhibits;

(3) cross-examine witnesses;

(4) impeach any witness;

(5) rebut any relevant evidence; and

(6) introduce evidence relevant to the choice of discipline if it was raised as an issue in the pre-hearing order.

G. The hearing shall be conducted in an orderly and informal manner without strict adherence to the rules of evidence that govern proceedings in the courts of the state of New Mexico. However, in order to support the board's decisions, there must be a residuum of legally competent evidence to support a verdict in a court of law.

H. The hearing officer shall admit all evidence, including affidavits, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs. The hearing officer shall exclude immaterial, irrelevant, or unduly cumulative testimony.

I. If scientific, technical, or other specialized knowledge will assist the hearing officer to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. In the case of evidence relating to polygraph examinations, the proponent must have followed all the provisions of rule *11-707 NMR*.

J. The hearing officer may take administrative notice of those matters in which courts of this state may take judicial notice.

K. The rules of privilege shall be effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.

L. The hearing officer shall admit evidence relevant only to those allegations against the appellant included in both the notice of contemplated action and the notice of final action or which are contested issues as set forth in the pre-hearing order.

M. The hearing shall be recorded by a video and/or audio-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, shall be permitted without the approval of the hearing officer.

N. The board shall provide ~~[an interpreter to appellants whose hearing is so impaired that they can not understand voice communications. Appellants must provide proof of disability:]~~ for and require that the hearing officer:

(1) appoint a signed language interpreter pursuant to the Signed Language Interpreting Practices Act [NMSA 1978, Section 61-34-1 to 61-34-17] to appellants whose hearing is so impaired that they cannot understand voice communication; appellant must provide proof of disability; and

(2) appoint a language interpreter pursuant to the Court Interpreter Act [NMSA 1978, Section 38-10-1 to 38-10-8] for hearing participants who do not understand English well enough to understand the proceedings.

~~[**O.**—The hearing officer shall appoint an interpreter to appellants who do not understand English well enough to understand the proceedings:]~~

[1.7.12.18 NMAC - Rp, 1 NMAC 7.12.18, 07/07/01; 1.7.12.18 NMAC - Rn, 1.7.12.17 NMAC, 7-15-05; A, 5/15/07; A, 12/1/10]

1.7.12.23 REINSTATEMENT:

A. The board may order agencies to reinstate appellants with back pay and benefits. Such appellants shall be reinstated to their former position, or to a position of like status and pay, that they occupied at the time of the disciplinary

actions.

B. In the event the board's order includes any back pay, the appellant shall provide the agency with a sworn statement of gross earnings, [and] unemployment compensation, and any other earnings, including but not limited to disability benefits received by the appellant since the effective date of the disciplinary action. The agency shall be entitled to offset earnings, [and] unemployment compensation and any other earnings received during the period covered by the back pay award against the back pay due. The hearing officer shall retain jurisdiction of the case for the purpose of resolving any disputes regarding back pay.

[1.7.12.23 NMAC - Rp, 1 NMAC 7.12.23, 07/07/01; 1.7.12.23 NMAC - Rn, 1.7.12.22 NMAC, 7/15/05; A, 10/15/08; A, 12/1/10]

NEW MEXICO BOARD OF PHARMACY

This is an amendment to 16.19.6 NMAC, Section 13, effective 12-05-10.

16.19.6.13 CONSPICUOUS DISPLAY REQUIREMENTS NOTICE OF PERMANENT CLOSURE OF PHARMACIES:

A. Every person shall have his or her license or registration and the license for the operation of the business conspicuously displayed in the pharmacy or place of business to which it applies or in which he or she is employed. All articles, including the following shall be in the vicinity of all prescription departments in full view of patrons:

(1) the pharmacy license

(2) the prohibition of the return of drugs sign

(3) the current board of pharmacy inspection report

(4) the current controlled substance registration

(5) the "patient's bill of right's" as approved by the board.

B. Name tags, including job title and the designation R.Ph., shall be required of all pharmacists while on duty.

C. Pharmacies permanently closing shall notify the public and the board of pharmacy of the closure at least 30 days prior to the final day of service. The notice shall include the last date of service and the name, address, and phone number of the location where patient records will be transferred and/or stored. Notice must also occur by one of the following; newspaper notice, radio broadcast, or other method as approved by the executive director of the board.

[16.19.6.13 NMAC - Rp, 16 NMAC 19.6.13, 03-30-02; A, 03-01-08; A, 12-05-10]

NEW MEXICO RACING COMMISSION

Explanatory paragraph: This is an amendment to 15.2.1 NMAC Sections 7 and 9. In Subsection A of 15.2.1.7 NMAC the statutes are updated and in Subsection O of 15.2.1.7 Out of Competition Testing has been added. Subsections B through N and Subsections P through Z were not published as there were no changes made. In Subsection C of 15.2.1.9 NMAC, amendments were made to include a time deadline for an entry of appearance by counsel, to include a time deadline to object to a presiding officer, disqualification of a hearing officer has been eliminated, and the agency director has been given the authority to issue subpoenas. Subsection B of 15.2.1.9 NMAC Paragraphs 1 through 9 were not published as there were no changes made and Subsection C of 15.2.1.9 NMAC, Paragraphs 2 through 6 and Paragraphs 10 through 22 were not published as there were no changes made. These amendments are effective 12/1/10.

15.2.1.7 DEFINITIONS:

A. DEFINITIONS BEGINNING WITH THE LETTER "A":

(1) "**Act**" means the New Mexico Horseracing Act, New Mexico Statutes Annotated, 1978 Compilation, and Sections [60-1-1] 60-1A-1 through [60-1-26]60-1A-30 including any amendments to that statute.

(2) "**Added money**" is the amount added into the purses for a stakes race by the association, or by sponsors, state-bred programs or other funds added to those monies gathered by nomination, entry, sustaining and other fees coming from owners of horses participating in the race.

(3) "**Age**" of a horse foaled in North America shall be reckoned from the first day of January of the year of foaling.

(4) "**Also eligible**" pertains to: a number of eligible horses, properly entered, which were not drawn for inclusion in a race, but which become eligible according to preference or lot if an entry is scratched prior to the scratch time deadline; in a trial race, the next preferred contestant that is eligible to participate when an entry is scratched, pursuant to the written conditions of the race.

(5) "**Allowance race**" is an overnight race for which eligibility and weight to be carried are determined according to specified conditions which include age, sex, earnings and number of wins.

(6) "**Appeal**" is a request for the commission or its designee to investigate, consider and review any decisions or rulings of stewards of a meeting.

(7) "**Arrears**" are all monies

owed by a licensee, including subscriptions, jockey fees, forfeitures, and any default incident to these rules and are past due.

(8) "**Association**" is an individual or business entity holding a license from the commission to conduct racing with pari-mutuel wagering.

(9) "**Association grounds**" are all real property utilized by the association in the conduct of its race meeting, including the racetrack, grandstand, concession stands offices, barns, stable area, employee housing facilities and parking lots.

(10) "**Authorized agent**" is a person licensed by the commission and appointed by a written instrument, signed and acknowledged before a notary public by the owner in whose behalf the agent will act.

...

O. DEFINITIONS BEGINNING WITH THE LETTER "O":

(1) "**Objection**" is a written complaint made to the stewards concerning a horse entered in a race and filed in a timely manner prior to the scheduled post time of the first race on the day in which the questioned horse is entered; or a verbal claim of foul in a race lodged by the horse's jockey, trainer, owner or the owner's authorized agent before the race is declared official.

(2) "**Official or racing official**" means assistant racing secretary, chief of security, director of racing or similar position, clerk of scales, clocker, general manager, handicapper, horse identifier, horsemen's bookkeeper, jockey room custodian, official veterinarian, paddock judge, pari-mutuel manager, patrol judge, placing judges, racing secretary, racing veterinarian, stable superintendent, starter, steward, timer, and track superintendent.

(3) "**Official order of finish**" is the order of finish of the contestants in a contest as declared official by the stewards.

(4) "**Official starter**" is the official responsible for dispatching the horses for a race.

(5) "**Official time**" is the elapsed time from the moment the first horse crosses the starting point until a horse crosses the finish line.

(6) "**Off time**" is the moment, at which, on the signal of the official starter, the doors of the starting gate are opened, officially dispatching the horses in each contest.

(7) "**Optional claiming race**" is a contest restricted to horses entered to be claimed for a stated claiming price and to those which have started previously for that claiming price or less.

(8) "**Out of competition**" is defined as not participating in a race.

(9) "**Out of competition testing**" test(s) that may be conducted on any

horse that is on the grounds of a racetrack or training center under the jurisdiction of the commission; or under the care or control of a trainer or owner licensed by the commission; or whose papers are filed in the racing office; or has been nominated to a stakes race.

(10) "**Outstanding ticket**" is a winning or refundable pari-mutuel ticket, which was not cashed during the performance for which it was issued; also known as "outs".

(11) "**Overnight race**" is a race for which entries close at a time set by the racing secretary and for which the owners of the horses do not contribute to the purse.

(12) "**Owner**" is defined as a person who holds any title, right or interest, whole or partial in a horse, including the lessee and lessor of a horse.

...

[15.2.1.7 NMAC - Rp, 15 NMAC 2.1.7, 03/15/2001; A, 02/14/2002; A, 08/30/2007; A, 12/1/2010]

15.2.1.9 DUE PROCESS AND DISCIPLINARY ACTION:

...

B. PROCEEDINGS BEFORE THE STEWARDS:

...

(10) Stay.

(a) A person who has been disciplined by a ruling of the stewards may apply to the agency director for a stay of the ruling within 20 days from the date of the ruling.

(b) An application for a stay must be filed with the agency director not later than the deadline for filing an appeal.

(c) An application for a stay must be in writing and include the name, address and telephone number and signature of the person requesting the stay; a statement of the justification for the stay.

(d) On a finding of good cause, the agency director may grant the stay. The agency director shall notify the person in writing of the agency director's decision on the stay application. On a finding of changed circumstances or upon appellant's request for a continuance, the agency director may rescind a stay granted under this subsection. No such stay shall be rescinded with less than a 72 hours notice.

(e) The fact that a stay is granted is not a presumption that the ruling by the stewards is invalid.

C. PROCEEDINGS BY THE COMMISSION:

(1) Party designations.

(a) A person who is the subject of a disciplinary hearing, who filed an appeal from a stewards' ruling or who otherwise

seeks relief from the commission is a party to that proceeding.

(b) A party to a proceeding has the right to present a direct case, cross-examine each witness, submit legal arguments and otherwise participate fully in the proceeding.

(c) A party summoned to appear at a hearing must appear unless he/she is excused by the commission presiding officer. Parties may appear with counsel or other representatives of their choice. Counsel must be an attorney licensed to practice law in this state or with the permission of the commission is associated with an attorney licensed to practice law in this state and must submit an entry of appearance no later than ten (10) days prior to the hearing date.

(d) A non-party to a proceeding who wishes to appear in a contested case pending before the commission must prove that he/she has an effected interest sufficient to create standing in the case. The burden of proof is on the party asserting standing in such a contested case.

...

(7) Presiding officers.

(a) One or more members of the commission, an administrative law judge, or a duly designated hearing officer may serve as the presiding officer for a commission proceeding. ~~[At the written request of the charged party a non-commission member will be appointed as the presiding officer.]~~ Objections to the presiding officer must be made in writing to the agency director at least twenty (20) days prior to the hearing.

(b) The presiding officer may: authorize the taking of depositions; issue subpoenas to compel the attendance of witnesses and the production of papers and documents; administer oaths; receive evidence; rule on the admissibility of evidence and amendments to pleadings; examine witnesses; set reasonable times within which a party may present evidence and within which a witness may testify; permit and limit oral argument; issue interim orders; recess a hearing from day to day and place to place; request briefs before or after the presiding officer files a report or proposal for decision; propose findings of fact and conclusions of law; propose orders and decisions; perform other duties necessary to a fair and proper hearing.

(c) An administrative law judge designated as the presiding officer must be an attorney licensed to practice in this state.

(d) A person may not serve as the presiding officer of a proceeding in which the person has an economic interest. A person is considered to have an economic interest in a proceeding if the person, a member of the person's immediate family, or a dependent, business partner, or client of the person has an economic interest in the

proceeding. ~~[Each party may disqualify one hearing officer from serving not later than five days before the hearing.]~~

(8) Conferences.

(a) On written notice, the presiding officer may, on the officer's own motion or on the motion of a party, direct each party to appear at a specified time and place for a prehearing conference to formulate issues and consider any of the following: simplifying issues; amending the pleadings; making admissions of fact or stipulations to avoid the unnecessary introduction of proof; designating setting the order of procedure at a hearing; identifying and limiting the number of witnesses; resolving other matters that may expedite or simplify the disposition of the controversy, including settling issues in dispute.

(b) The presiding officer shall record the action taken at the prehearing conference unless the parties enter into a written agreement as to the action. The presiding officer may enter appropriate order concerning prehearing discovery, stipulations of uncontested matters, presentation of evidence and scope of inquiry.

(c) During a hearing, on written notice or notice stated into the record, the presiding officer may direct each party or the representative of each party to appear for a conference to consider any matter that may expedite the hearing and serve the interests of justice. The presiding officer shall prepare a written statement regarding the action taken at the conference and the statement must be signed by each party and made a part of the record.

(9) Discovery.

(a) On written request by a party, the presiding officer or the agency director may issue a subpoena to require the attendance of witnesses and the production of books, records, papers, or other objects as may be necessary and proper for the purposes of a proceeding.

(b) A motion for a subpoena to compel the production of books, records, papers, or other objects shall be addressed to the appropriate person, shall be sworn to and shall specify the books, records, papers, or other objects desired and the relevant and material facts to be proved by them.

(c) Discovery on behalf of commission shall only be provided to the licensee or to counsel who has submitted an entry of appearance.

...

[15.2.1.9 NMAC - Rp, 15 NMAC 2.1.9, 03/15/2001; A, 03/31/2003; A, 05/30/2003; A, 06/15/2004; A, 06/30/2009; A, 09/15/2009; A, 12/1/2010]

NEW MEXICO RACING COMMISSION

This is an amendment to 15.2.2 NMAC, Sections 3 and 10, effective 12/1/10.

15.2.2.3 STATUTORY AUTHORITY: Section 60-1A-4, NMSA 1978 empowers the state racing commission to make rules and regulations for the holding, conducting and operating of all race meets and races. Section ~~[60-1-6]~~60-1A-20, NMSA 1978 empowers the racing commission to establish such qualifications for licenses to conduct horse race meets as it deems to be in the public interest.

[15.2.2.3 NMAC - Rp, 15 NMAC 2.2.3, 03/15/2001; A, 09/15/2009; A, 12/01/2010]

15.2.2.10 CAPITAL IMPROVEMENTS

A. GENERAL AUTHORITY:

(1) Capital improvements made on licensed racing premises with state funds offset from the amount of taxes due pursuant to Section ~~[60-1-15]~~ 60-1A-20, NMSA 1978, shall be utilized only for the improvement of horse racing facilities for the benefit of the public, breeders and horse owners and shall be intended to increase the revenue to the state from the increases in pari mutuel wagering and tourism which result from the improvements.

(2) No capital improvement for which an offset from state taxes is requested shall be made unless it is a capital investment subject to depreciation under the United States Internal Revenue Code and is approved in advance by the commission.

(3) It is the responsibility of the licensee requesting the offset of state taxes to establish that the proposed capital improvement qualifies as a capital investment subject to depreciation under the United States Internal Revenue Code.

B. COMMISSION REQUIREMENTS:

(1) Each commission member and the agency director shall inspect all facilities, grounds and areas of each licensed racetrack in New Mexico annually for the purpose of identifying the need for capital improvements for those areas.

(2) The commission shall annually adopt or revise a schedule of priorities of areas in need of immediate capital improvements for each licensed racetrack. Licensees and any other individuals or organizations may submit to the commission recommendations for the schedule of priorities. The commission chairman may appoint committees as are necessary to prepare the schedule of priorities. All committee meetings shall be open meetings.

(3) In adoption of the schedule

of priorities, the commission shall give due consideration to the needs of the public, breeders and horse owners and shall balance those needs in the allocation of priorities.

(4) The commission shall adhere to the schedule of priorities in the approval of capital improvement projects applied for by the licensees.

C. PROCEDURES:

(1) A licensee shall submit to the commission, on application forms provided by the commission, proposals for capital improvement projects for which an offset of state taxes will be requested. Applications shall contain, but are not limited to, the following information:

(a) Licensed racetrack at which project is proposed.

(b) Person(s) supervising the proposal and project.

(c) Total cost of project.

(d) Amount of total cost to be offset by state tax revenues.

(e) Amount of total cost to be paid by other funds and sources of those funds.

(f) Complete description of project and timetable for construction.

(g) Estimated timetable of requests for offsets by state tax revenues.

(h) Proof of compliance with Section ~~[60-1-15(B)]~~ 60-1A-20, NMSA 1978 that the project qualifies under the Internal Revenue Code as a capital investment subject to depreciation.

(2) For any capital improvement project in which the requested offset from state taxes equals or exceeds 50 percent of the total purchase or construction price, the licensee shall obtain and submit to the commission at least three written bids from suppliers or licensed contractors, where applicable.

(3) At the next regularly scheduled commission meeting, the commission shall review, reject, modify or condition each proposal, or return the application for additional information. Then, at the subsequent scheduled commission meeting, the commission shall approve each capital improvement proposal reviewed.

(4) The commission shall approve only the bid of the lowest bidder, unless the licensee requests in writing that a particular bid be accepted, in which case the commission may approve the licensee's recommended bidder if it finds extraordinary circumstances which call for the acceptance of that bidder and additionally finds that acceptance of that bidder would be in the best interests of racing in New Mexico. The commission shall give preference to New Mexico contractors and suppliers, as defined in Section 13-4-2, NMSA 1978, in selecting bids, provided that the bid for a project of the New Mexico contractor or supplier does not exceed ten (10) percent over the amount of the lowest bid.

(5) When special circumstances warrant, or when unexpected cost overruns are incurred, the commission may consider a capital improvement retroactively.

(6) When the licensee's in-house maintenance work force is accepted as the low bidder in a capital improvement project, any cost overrun beyond the highest bid price may not be allowed as an offset and must be paid by the licensee. A cost overrun performed by in-house maintenance above the original bid price and below the highest bidder price must be approved by the commission before the work is accomplished.

(7) Following the completion of any capital improvement project for which an offset of state taxes was requested and approved, the commission, or designee, shall inspect the project and any recommended future projects.

D. TAX LIABILITIES:

All taxes assessed pursuant to the provisions of Section ~~[60-1-15]~~ 60-1A-20, NMSA 1978, shall be paid to the racing commission at the time set by law, unless a capital expenditure project or the financing of term investment in capital improvements has been previously approved by the commission and the licensee is entitled by such previous approval to offset the amount of the taxes then due. If no previous approval for a project or financing has been made, the full amount of taxes due shall be paid. If previous approval for a project or financing has been made and the licensee is entitled to offset the amount of the taxes then due, the licensee may offset such taxes due and shall account to the commission for such offset from taxes due.

[15.2.2.10 NMAC; N, 08/30/2001; A, 12/01/2010]

NEW MEXICO RACING COMMISSION

This is an amendment to Subsection C of 15.2.3.8 NMAC, Subsections A, B and D through P were not published as there were no changes made to those subsections; effective 12/01/10.

15.2.3.8 FLAT RACING OFFICIALS GENERAL PROVISIONS:

...

C. Racing secretary.

(1) **General authority.** The racing secretary shall be responsible for the programming of races during the race meeting, compiling and publishing condition books, assigning weights for handicap races, and shall receive all entries, subscriptions, declarations and scratches.

(2) **Foal, health and other eligibility certificates.** The racing secretary shall be responsible for receiving, inspecting and safeguarding the foal and

health certificates and other documents of eligibility for all horses competing at the track or stabled on the grounds.

(3) Allocation of stalls.

(a) The racing secretary shall assign stall applicants such stabling as is deemed proper and maintain a record of arrivals and departures of all horses stabled on association grounds.

(b) Stall approvals shall be determined by: each track's screening rule as approved by the New Mexico racing commission; consideration given to stables with a balanced application; and, New Mexico bred on each application shall have preference over horses of comparable quality.

(4) Conditions.

(a) The racing secretary shall establish the conditions and eligibility for entering races and cause them to be published to owners, trainers and the commission and be posted in the racing secretary's office.

(b) For the purpose of establishing conditions, winnings shall be considered to include all monies won up to the time of the start of a race.

(c) Winnings during the year shall be calculated by the racing secretary from the preceding January 1.

(d) A minimum of two (2) races, one for quarter horses and one for thoroughbreds restricted to registered New Mexico bred horses, shall be offered daily in the condition book excluding trials.

(5) **Listing of horses.** The racing secretary shall: examine all entry blanks and declarations to verify information as set forth therein; select the horses to start and the also eligible horses from the declarations in accordance with these rules.

(6) **Posting of entries.** Upon completion of the draw each day, the racing secretary shall post a list of entries in a conspicuous location in his/her office and make the list available to the media. If the racing secretary declares a race off, the names of entrants in that race shall be posted on the official bulletin board that day, identifying the race by number as it appears in the condition book.

(7) **Daily program.** The racing secretary shall publish the official daily program, ensuring the accuracy therein of the following information: ~~[sequence of races to be run and post time for the first race; purse, conditions and distance for each race, and current track record for such distance; the name of licensed owners of each horse, indicated as leased, if applicable; and description of racing colors to be carried; the name of the trainer and the name of the jockey named for each horse together with the weight to be carried; the post position and saddle cloth number or designation for each horse if there is a variance with the saddle cloth designation; identification of each~~

horse by name, color, sex, age, sire and dam; such other information as may be requested by the association or the commission.]

(a) sequence of races to be run and post time for the first race;

(b) purse, conditions and distance for each race, and current track record for such distance;

(c) the name of the licensed owners of each horse, indicated as leased, if applicable, and description of racing colors to be carried;

(d) the name of the trainer and the name of the jockey named for each horse together with the weight to be carried;

(e) the post position and saddle cloth number or designation for each horse if there is a variance with the saddle cloth designation;

(f) identification of each horse by name, color, sex, age, sire and dam;

(g) a notice shall be included in the daily program stating that all jockeys may carry approximately three (3) pounds more than the published and announced weights to account for inclement weather clothing and equipment when weighing in; and

(h) such other information as may be requested by the association or the commission.

(8) Nominations and declarations. The racing secretary shall examine nominations and declarations and early closing events, late closing events and stakes events to verify the eligibility of all declarations and nominations and compile lists thereof for publication.

(9) Stakes and entrance money records: The racing secretary shall be caretaker of the permanent records of all stakes and shall verify that all entrance monies due are paid prior to entry for races conducted at the meeting.

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[15.2.3.8 NMAC - Rp, 15 NMAC 2.3.8, 04/13/2001; A, 11/15/2001; A, 08/30/2007; A, 06/15/2009; A, 06/30/2009; A, 12/01/2010]

NEW MEXICO RACING COMMISSION

This is an amendment to 15.2.6 NMAC, Sections 9 and 12, effective 12/01/2010. In 15.2.6.9 NMAC, Subsections A through H were not published as there were no changes made.

15.2.6.9 MEDICATIONS AND PROHIBITED SUBSTANCES: The “uniform classification guidelines for foreign substances and recommended penalties and model rule”, revised [February 2009] January 2010, as issued by the association of racing commissioners international, is

incorporated by reference. Upon a finding of a violation of these medication and prohibited substances rules, the stewards shall consider the classification level of the violation as listed at the time of the violation by the uniform classification guidelines of foreign substances as promulgated by the association of racing commissioners international and impose penalties and disciplinary measures as determined by the New Mexico racing commission. The commission only adopts the recommended penalties listed in this reference material should a violation occur in a thoroughbred graded stake race. The guidelines and recommended penalties shall be provided to all license holders by attachment to this section. Provided, however, that in the event a majority of the stewards determine that mitigating circumstances require imposition of a lesser penalty they may impose the lesser penalty.

...

[15.2.6.9 NMAC - Rp, 15 NMAC 2.6.9, 04/13/2001; A, 08/30/2001; A, 07/15/2002; A, 08/15/2002; A, 09/29/2006; A, 10/31/2006; A, 08/30/2007; A, 01/31/2008; A, 03/01/2009; A, 06/15/2009; A, 06/30/2009; A, 09/15/2009; A, 12/15/2009; A, 03/16/2010; A, 07/05/2010; A, 09/01/2010; A, 12/01/2010]

15.2.6.12 P H Y S I C A L INSPECTION OF HORSES:

A. ASSESSMENT OF RACING CONDITION:

(1) Every horse entered to participate in an official race may be subjected to a veterinary inspection prior to starting in a race for which it is entered.

(2) The inspection shall be conducted by the official veterinarian or the racing veterinarian.

(3) The agency or the association employing the examining veterinarian(s) should provide a staffing level of not less than two (2) veterinarians.

~~(3)~~(4) The trainer of each horse or a representative of the trainer must present the horse for inspection as required by the examining veterinarian. Horses presented for examination must have bandages removed and the legs must be clean. Prior to examination horses may not be placed in ice nor shall any device or substance be applied that impedes veterinary clinical assessment.

~~(4)~~(5) The assessment of a horse's racing condition shall be based on the recommendations of the American association of equine practitioners and shall include: proper identification of each horse inspected; observation of each horse in motion; manual palpation ~~[when indicated close]~~ and passive flexion of both forelimbs; clinical observation in the paddock and saddling area, during the parade to

post and at the starting gate; any other inspection deemed necessary by the official veterinarian and/or the racing veterinarian or the stewards.

~~(5)~~(6) Every horse shall be observed by the racing veterinarian during and after the race.

~~(6)~~(7) The official veterinarian and/or the racing veterinarian shall maintain a permanent continuing health and racing soundness record of each horse inspected.

(8) The official veterinarian and/or the racing veterinarian are authorized access to any and all horses housed on association grounds regardless of entry status.

(9) If, prior to starting, a horse is determined to be unfit for competition, or if the veterinarian is unable to make a determination of racing soundness, the veterinarian will recommend to the stewards the horse be scratched.

(10) Horses scratched upon the recommendation of the official veterinarian or the racing veterinarian, are to be placed on the veterinarian's list.

(11) All pre-race examination reports and the veterinarian reports, reference in Subsection C of 15.2.6.8 NMAC, on each horse selected for a pre-race examination will be submitted to the commission on a monthly basis. In addition, these reports will be made available to the commission upon request within a 48-hour period. Any such report is confidential and its content shall not be disclosed except in the course of an investigation of a possible violation of these rules or in a proceeding before the stewards or the commission, or to the trainer or owner of record at the time of report.

B. VETERINARIAN'S LIST:

(1) The racing veterinarian shall maintain a list of all horses which are determined to be unfit to compete in a race due to physical distress, unsoundness, infirmity or medical condition.

(2) A horse may be removed from the veterinarian's list when, in the opinion of the racing veterinarian, the horse has satisfactorily recovered the capability of competing in a race.

C. POST MORTEM EXAMINATION:

(1) The commission may require a postmortem examination of any horse that dies or is euthanized on association grounds.

(2) The commission may require a postmortem examination of any horse that dies or is euthanized at recognized training facilities within this jurisdiction.

(3) If a postmortem examination is to be conducted, the commission shall take possession of the horse upon death for a postmortem examination. All shoes and equipment on the horse's legs shall be left on the horse.

(4) If a postmortem examination

is to be conducted, the commission or its representative shall collect blood, urine, bodily fluids, or other biologic specimens immediately, if possible before euthanization. The commission may submit blood, urine, bodily fluid, or other biologic specimens collected during a postmortem examination for testing analysis. The presence of a prohibited substance in a specimen collected during the postmortem examination may constitute a violation.

(5) Requests for each postmortem examination shall be filed with the official veterinarian by the owner's or trainer's veterinarian within one hour of the death and shall be submitted on a necropsy submission form entitled New Mexico racing commission necropsy submission form, hereby incorporated by reference and which is available at all official veterinarian offices and all stable gates. The trainer or their designee is responsible to supply all information to complete this form.

(6) All licensees shall be required to comply with postmortem examination requirements as a condition of licensure. In proceeding with a postmortem examination the commission or its designee shall coordinate with the owner or the owner's authorized agent to determine and address any insurance requirements.

(7) Postmortem examinations shall be conducted according to the most recent edition of the American association of equine practitioners' guidelines for the necropsy of racehorses.

(8) Upon completion of the postmortem examination the diagnostic laboratory shall file a written report with the racing commission's agency director and official veterinarian.

[15.2.6.12 NMAC - Rp, 15 NMAC 2.6.12, 04/13/2001; A, 09/01/2010; A, 12/01/2010]

NEW MEXICO RACING COMMISSION

Explanatory paragraph: This is an amendment to 15.2.7 NMAC Section 12; adding new material to Subsection H and I which details the procedures for two new wagers. The subsequent subsections were renumbered only to accommodate the new rule material being placed into Subsection H and I.

15.2.7.12 CALCULATION OF PAYOUTS AND DISTRIBUTION OF POOLS:

...

H. PLACE PICK (n) POOLS:

(1) The place pick (n) is a separate pari-mutuel pool established by the association on a designated number of races.

The pool consists of amounts wagered on a horse to finish first or second in each of the races. It is not a parlay and has no connection with or relation to other pools conducted by the association, except for the provisions in Paragraph (5) of Subsection H of 15.2.7.12 NMAC, or to rules governing the distribution of other pools.

(2) A valid place pick (n) ticket shall be evidence of a binding contract between the holder of the ticket and the association and shall constitute an acceptance of place pick (n) provisions and rules contained herein.

(3) A place pick (n) may be given a distinctive name by the association conducting the meeting, subject to commission approval.

(4) A wager on a coupled entry or mutuel field is considered a wager on the remaining part of the coupled entry or mutuel field if any part of such entry starts for pari-mutuel purposes in accordance with Subsection L of 15.2.7.8 NMAC.

(5) If a ticket in any place pick (n) race designates a selection that is scratched, excused or determined by the stewards to be a nonstarter in the race, the association may designate the actual favorite, which is determined by the amounts wagered in the win pool at the time of the start of the race. The actual favorite will be substituted for the nonstarting selection for all purposes.

(6) Except as provided in Subparagraph (a) of Paragraph (6) of Subsection H of 15.2.7.12 NMAC, in a dead heat for win between two or more horses, only the horses in such dead heat shall be considered winning horses.

(a) In a dead heat for win between two or more coupled horses, all such horses together with the horse(s) which finishes next in order shall be considered winning horses.

(b) Except as provided in Paragraph (6) of Subsection H 15.2.7.12 NMAC, a dead heat for second between two or more horses, all such horses together with the horse which finished first shall be considered winning horses.

(7) The association shall distribute the net pool to holders of valid tickets that correctly selected the most first or second place finishers.

(8) All tickets shall be refunded if all races comprising the place pick (n) are cancelled or declared as no contest. The entire pool shall be refunded if less than four races are completed and if four or more races are completed the net pool shall be distributed pursuant to Paragraph (7) of Subsection H of 15.2.7.12 NMAC.

(9) After wagering closes on the first race comprising of the place pick (n) no ticket shall be sold, exchanged or cancelled.

(10) If the racing surface changes from turf to dirt or dirt to turf in any race

of a place pick (n), and such change is not announced to the public before the close of wagering on the place pick (n) pool, all wagers on such race shall be considered winning wagers for the purposes of the place pick (n).

I. GRAND SLAM POOLS:

(1) The grand slam requires selection of the official first, second or third place finisher in each of the first three races in a series of four designated grand slam races. A completed winning grand slam wager requires the selection of the official first place finisher in the fourth and final event in this same series of races. The association must obtain written approval from the commission for the initial scheduling or specific performances of grand slam races or any other name used to characterize this bet type and identify the pari-mutuel pool and any required distribution percentages. Changes to the approved grand slam format, or suspension of previously approved grand slam wagering, require prior approval from the commission.

(2) The grand slam pool shall be apportioned under the following method:

(a) Grand slam wager with no carryover; the net grand slam pool shall be distributed from a single betting pool to participants who selected the first, second or third place finisher in the first three races of a series of four grand slam races completing a winning wager with the selection of the first place finisher in the fourth and final grand slam event in this same series, based upon the official order of finish.

(b) Grand slam wager with no carryover; if there are no winning wagers taking into account all four segments of the grand slam wager, the pool shall be distributed as a single price pool to those who selected the first place finisher in the fourth and final grand slam event in this series of races along with the greatest number of first, second or third place finishers each of which had an accompanying show pari-mutuel payout, in accordance with Subsection M of 15.2.7.8 NMAC in each of the first three races in the series of four designated grand slam races. All results are based upon the official order of finish for each race.

(3) If there is a dead heat for the first in any of the grand slam segments involving:

(a) Official program numbered horses representing the same betting interest, the grand slam pool shall be distributed as if no dead heat occurred.

(b) Official program numbered horses representing two or more betting interests, the grand slam pool shall be distributed from a single betting pool with a winning wager including each betting interest participating in the dead heat provided each entrant has a pari-mutuel

show payout within its race.

(4) If there is a dead heat for second and/or third in any of the first three races in a series of four designated grand slam contests involving:

(a) Horses representing the same betting interest, the grand slam pool shall be distributed as if no dead heat occurred.

(b) Horses representing two or more betting interests, the grand slam pool shall be distributed from a single betting pool with a winning wager including the betting interest which finished first or any betting interest involved in the dead heat for second or third providing the horse has a show pari-mutuel payout.

(5) Should a betting interest in any of the grand slam contests be scratched:

(a) The actual favorite, as evidenced by total amounts wagered in the win pool at the association for the contest at the close of wagering on that contest, shall be substituted for the scratched betting interest for all purposes, including pool calculation. In the event that the win pool total for two or more favorites is identical, the substitute selection shall be the betting interest with the greatest amount of money in the place pool. The totalisator shall produce reports showing each of the wagering combinations with substituted betting interests which became winners as a result of the substitution, in addition to the normal winning combination.

(b) Should a scratch or scratches occur in any of the first three races in a series of four designated grand slam contests and subsequently show wagering is cancelled due to an insufficient number of remaining betting interests, this race for winning grand slam wagering purposes would include the win and place horse only.

(6) The grand slam pool shall be canceled and all grand slam wagers for the individual performance shall be refunded if at least two contests included as part of a grand slam wager are cancelled or declared "no contest".

(7) If at least one race included as part of a grand slam wager is canceled or declared "no contest", but not more than the number specified in Paragraph (6) of Subsection I of 15.2.7.12 NMAC, the net pool shall be distributed from a single betting pool to those bettors whose selections finished first, second or third in the greatest number of grand slam contests in the first three races in a series of four designated grand slam contests. In determining a pari-mutuel distribution under this section, a finish of first in the final and fourth designated grand slam contest race for the performance in question shall have the same weight as a finish of first, second or third in the greatest number of grand slam contests in the first three races in a series of four designated grand slam contests.

(8) When the condition of the turf

course warrants a change of racing surface in any of the legs of the grand slam races, and such change has not been made known to the betting public prior to the close of wagering for the grand slam pool, the stewards shall declare the changed leg(s) a "no contest" for grand slam wagering purposes and the pool shall be distributed in accord with Paragraph (7) of Subsection I of 15.2.7.12 NMAC.

(9) Providing information to any person regarding covered combinations, amounts wagered on specific combinations, number of tickets sold, or number of live tickets remaining prior to the third segment of the wager being made official is strictly prohibited. This shall not prohibit necessary communication between totalisator and pari-mutuel department employees for processing of pool data.

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[15.2.7.12 NMAC - Rp, 15 NMAC 2.7.12, 03/15/2001; A, 03/31/2003; A, 09/15/2003; A, 04/14/2005; A, 07/15/2005; A, 11/30/2005; A, 03/30/2007; A, 06/15/2009; A, 12/01/2010]

NEW MEXICO REGULATION AND LICENSING DEPARTMENT SECURITIES DIVISION

This is an amendment to 12.11.14 NMAC Section 9, effective 12-1-2010.

12.11.14.9 NOTICE FILING PROCEDURES FOR RULE 506 OFFERINGS:

Pursuant to Section 58-13C-302C, an issuer offering a security that is a covered security under Section 18(b)(4)(D) of the Securities Act of 1933 shall file with the director no later than 15 days after the first sale of such federal covered security in this state the following: a notice on SEC form D[-form U-2, consent to service of process;] and a fee of \$350. If the notice filing is late but within 10 days after the due date, the fee accompanying the late filing shall be \$700. If the notice filing is more than 10 days after the due date, the fee accompanying the late filing shall be \$1050. For purposes of this rule, the securities and exchange commission "form D" is defined as the document, as adopted by the securities and exchange commission and in effect on September 1, 1996, as may be amended by the securities and exchange commission from time to time, entitled "form D: notice of sale of securities pursuant to Regulation D, Section 4(6), and/or uniform limited offering exemption," including part E and the appendix. A notice filing shall be considered filed with the New Mexico securities division as of the date on which it is received by the New Mexico securities

division.

[12.11.14.9 NMAC - Rp, 12 NMAC 11.4.11.2, 1-1-2010; A, 7-1-2010; A, 12-1-2010]

NEW MEXICO DEPARTMENT OF TRANSPORTATION

TITLE 18 TRANSPORTATION AND HIGHWAYS CHAPTER 14 RAILROADS PART 4 GRADE CROSSINGS ON LAND AND RAILROAD TRACKS CONTROLLED BY THE DEPARTMENT OF TRANSPORTATION

18.14.4.1 ISSUING AGENCY:
New Mexico Department of Transportation.
[18.14.4.1 NMAC - N, 12/1/2010]

18.14.4.2 SCOPE: All
government, private and public entities.
[18.14.4.2 NMAC - N, 12/1/2010]

**18.14.4.3 STATUTORY
AUTHORITY:** Section 67-3-11, 67-3-12,
63-3-35, 63-3-36, 63-3-37, 63-3-38, and 67-
3-67 through 67-3-70 NMSA 1978.
[18.14.4.3 NMAC - N, 12/1/2010]

18.14.4.4 DURATION:
Permanent.
[18.14.4.4 NMAC - N, 12/1/2010]

18.14.4.5 EFFECTIVE DATE:
December 1, 2010, unless a later date is cited
at the end of a section.
[18.14.4.5 NMAC - N, 12/1/2010]

18.14.4.6 OBJECTIVE: To
create procedures and standards for any new
and all existing grade crossings on land and
railroad tracks controlled by the department
of transportation.
[18.14.4.6 NMAC - N, 12/1/2010]

18.14.4.7 DEFINITIONS:
**A. "Active traffic control
device"** means those traffic control devices
activated by the approach or presence
of a train, such as flashing light signals,
automatic gates and similar devices, all of
which display to motorists positive warning
of the approach or presence of a train.

B. "Agreement" means
a contract between the department as the
owner of the railroad and the party or
parties who own, use, or have responsibility
for a road that cross the rail line that
describes responsibility for the grade
crossing construction, repair, maintenance,
inspection, and liability for the crossing and
other items as may be appropriate at the
grade crossing and adjacent traffic control
signs. An agreement shall be negotiated

between the department and the party or parties when approval for the construction or modification to the crossing has been given by the department secretary. A template agreement will be made available to any party requesting such document, but the final terms of the agreement will be subject to negotiation by the parties thereto.

C. "Applicant" means an individual or company or local government or any other entity that submits a request in writing to the department rail manager for a new crossing, modification to an existing crossing, a change in designation from a private crossing to a public crossing, the closing of a crossing or the grade separation of a crossing, and who or which must be an adjacent property owner, the property owner's authorized representative or a governmental agency that maintains the road approaches to a crossing.

D. "Crossing" means a general area where a highway and the department's railroad right-of-way cross at the same level, within which are included the railroad tracks, highway or other roadway either publicly or privately owned or pedestrian crossing and any traffic control devices for highway traffic traversing that area. The crossing shall include the area of department owned railroad property from the property boundary on one side of the track to the property boundary on the other side.

E. "Department" means the New Mexico department of transportation.

F. "Diagnostic study" means a study of a highway railroad grade crossing and any adjacent factors that will have an impact upon the operation at the grade crossing. This study shall be initiated by the department rail manager and shall be conducted by a diagnostic team constituted by the rail manager. Any reports submitted shall be stamped and signed by a registered engineer licensed in the state of New Mexico. A diagnostic study of a crossing shall be based on criteria and standards identified in the reference documents in subsection B of 18.14.4.8 NMAC.

G. "Diagnostic team" means a group of knowledgeable representatives of the parties of interest in a railroad highway crossing or a group of crossings. A diagnostic team composition will be determined by the department rail manager and shall have the following members:

- (1) a railroad engineering professional (preferably an experienced professional engineer);
- (2) a railroad signal professional (or consultant);
- (3) a highway engineer from the department as designated by the district engineer for the department district where

the highway-railroad grade crossing is located;

(4) a person from an appropriate local government who deals with roadways at the crossing if a local government does maintenance of the road that crosses the department owned tracks;

(5) the rail manager or their designated staff member;

(6) an appropriate regulatory or law enforcement professional from the local government where the crossing is located;

(7) an individual or individuals from any railroad or railroads that operate trains on the department owned track that is being examined;

(8) any additional personnel that may be needed depending on the individual circumstances at a crossing location as determined by the department rail manager.

H. "FHWA" means the United States department of transportation federal highway administration.

I. "FRA" means the United States department of transportation federal railroad administration.

J. "Highway, road or roadway" means a general term denoting a public or private way for purpose of vehicular and other modes of travel. The names usually apply to the entire area within the right of way limits.

K. "License" means permission to a revocable non-possessory interest in land which the department grants for specific purposes without being subject to an action and trespass.

L. "Local government" means a municipality or county or agency or local authority that has jurisdiction for or control of the road or roadway that crosses or is proposed to cross land and railroad tracks controlled by the department. Local governments shall include Indian tribes or tribal governments as defined in federal law at 25 USC 450b(e) and other sections.

M. "MUTCD" means the most current version of the federal highway administration manual on uniform traffic control devices.

N. "NMDOT" means the New Mexico department of transportation.

O. "NMDOT grade crossings" means crossings of railroad tracks that are owned by the department or the state transportation commission.

P. "Passive warning traffic control device" means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train.

Q. "Permit" means a temporary short or long term document approved by an applicant and the department

with terms and conditions (i.e. contract, license or agreements), giving permission to enter department railroad property for a specific purpose and limited period of time to construct or maintain a crossing and for the crossing itself.

R. "Private crossing" means a crossing that is not on a public road and was opened by a private railroad or the department under the terms and conditions of an agreement with the department or a private railroad. At private crossings, the roadway is privately owned, as might be found on a farm or within an industrial complex, where the road is not intended for public use and is not maintained by a public entity.

S. "Public crossing" means a crossing where a public entity maintains the approach roads to the railroad grade crossing on both sides of the railroad track within the department owned railroad property.

T. "Rail manager" means the department rail section manager.

U. "Second party" means an individual or company or local government or any other entity that enters into an agreement with the department for a highway-railroad grade crossing of department owned railroad track.

V. "Secretary" means the New Mexico department of transportation secretary.

[18.14.4.7 NMAC - N, 12/1/2010]

18.14.4.8 REFERENCES:

A. The reference documents listed in Subsection B of 18.14.4.8 NMAC are supplementary and will be used by the department to evaluate requests for a new crossing or modification to an existing crossing or a request for a change in designation from a private crossing to a public crossing or the closing of a crossing or the grade separation of a crossing or in any diagnostic study of a crossing that is conducted. The most recent edition of each technical reference shall be used.

B. Technical reference documents.

(1) FHWA, railroad-highway grade crossing handbook.

(2) FHWA, MUTCD.

(3) Institute of transportation engineers, *geometric design criteria for highway-rail intersections (grade crossings)*.

(4) Institute of transportation engineers, *traffic engineering handbook*.

(5) The department railroads and utilities manual, most current version.

(6) Any applicable department engineering standards.

[18.14.4.8 NMAC - N, 12/1/2010]

18.14.4.9 CROSSING REQUEST PROCESS:

A. Crossing request general requirements.

(1) Requests for a new crossing, modification to an existing crossing, a change in designation from a private crossing to a public crossing, the closing of a crossing or the grade separation of a crossing shall be made by any adjacent property owner, the property owner's authorized representative or a local government representative that maintains the road approaches to a crossing.

(2) All requests for a new crossing, modification to an existing crossing, a change in designation from a private crossing to a public crossing, the closing of a crossing or the grade separation of a crossing shall be submitted in writing to the rail manager with proof of ownership of the adjacent property that the crossing will serve. The request shall also contain a description of the crossing that includes a to-scale engineering drawing of the location where the crossing will be constructed or modified at the railroad tracks and the approach roads to the crossing and any other features in the area and will acknowledge that the requestor accepts all liability for the crossing and will pay all maintenance costs for the crossing.

(3) Any request by an applicant for a new crossing, modification to and existing crossing, a change in designation from a private crossing to a public crossing, the closing of a crossing or the grade separation of a crossing may be refused by the department if necessary and relevant information is missing. If the request is refused, the department shall notify the applicant within ten (10) working days of receipt of the request and shall indicate the reason or reasons for refusal.

(4) Each applicant understands and agrees as a condition of issuance of any agreement, that if the department determines that any violation of the agreement has or may result in the creation of any safety or traffic hazard, the department may immediately take such action as the department deems necessary to correct, prevent, eliminate or mitigate such hazard, without the need for the completion of any review process.

(5) The review process shall begin with the acceptance of a request by the department rail manager.

(6) From the date of acceptance of a written request for modifications to an existing crossing or construction of a new crossing or the grade separation or elimination of a crossing by the rail manager the process time for any request will normally take ninety (90) days. The process may be extended by the department when further action is required by the department. Transmittal of a completed agreement, approved by the department secretary or transmittal of a denied request constitutes action on the request.

(7) Upon receipt and review

of a written request for a new crossing, modification to an existing crossing, a change in designation from a private crossing to a public crossing, the closing of a crossing or the grade separation of a crossing the rail manager shall form a diagnostic team who will then conduct a diagnostic study of the proposed action. A report of the diagnostic study will then be prepared and submitted to the secretary with a recommendation by the rail manager as to whether the request should be approved or denied.

(8) The secretary shall approve or deny any and all crossing requests or proposals regarding crossings on any department owned railroad property.

(9) If the secretary approves a request from an applicant, an agreement shall be prepared by the rail manager and transmitted to the applicant who will become the second party to the agreement. If the applicant does not agree to all terms and conditions of the agreement, the agreement shall not be executed.

(10) In accepting the agreement, the applicant agrees to all terms and conditions of the agreement. Should the applicant choose to appeal a denied request, or the terms and conditions of an agreement, the appeal shall be filed with the rail manager within sixty (60) days of the date the denial notice or the approved agreement is transmitted.

(11) The issue date of the agreement is the date the department secretary signs the agreement.

(12) The granting of an agreement for a crossing conveys no rights, title or interest in department property to the applicant. An agreement for a crossing does not entitle the applicant to control or have any rights or interests in any portion of the design, specifications or operation of the rail line, including those portions of the rail line built pursuant to the terms and conditions of the agreement.

(13) If the department denies a request, the department rail manager shall provide the applicant a copy of the written request marked "denied" along with any attachments and a written explanation for the decision.

(14) Denial of a request for modification to an existing lawful crossing does not constitute a revocation of the existing crossing.

B. Fees: The secretary may establish a reasonable schedule of fees for crossing agreements issued pursuant to 18.14.4.12 NMAC.

C. Appeals of denied requests for crossings.

(1) If the requestor objects to the denial of a crossing request by the department or objects to any of the terms or conditions of the agreement placed therein by the department, a written appeal may be

filed with the rail manager within sixty (60) days of the transmittal of notice of denial or transmittal of the approved agreement. The request shall include reasons for the appeal and may include recommendations by the requestor.

(2) The rail manager will review the appeal and provide a recommendation to the secretary regarding the appeal.

(3) Upon review the secretary will approve or deny the appeal recommendation. [18.14.4.9 NMAC - N, 12/1/2010]

18.14.4.10 STANDARDS TO BE USED FOR ALL CROSSINGS OF DEPARTMENT OWNED RAILROAD PROPERTY:

A. All crossings shall be subject to an agreement between the department and a second party.

B. An agreement between the department and the second party at the crossing shall address the party that is responsible for the maintenance, repair and replacement of the crossing and installation and maintenance, repair and replacement of any traffic control signage at the crossing.

C. The department shall require the second party at the crossing to pay the department for the installation and maintenance, repair and replacement as needed of the traffic controls and signage determined to be necessary based upon a diagnostic study of the crossing and as approved by the secretary. If payment is not provided the department may close the crossing after providing written notice to the second party.

D. The following passive warning traffic control devices will be installed and maintained at all crossings unless the secretary determines that additional passive warning traffic control devices or active traffic control devices are required at a crossing. All passive warning traffic control devices shall be installed as specified in section 8B.04 of the MUTCD and shall include:

(1) a yield sign (an R1-2 sign as shown in figure 8B-1 and sized as shown in table 8B-1 of the MUTCD) shall be the default traffic control device, unless the secretary or a diagnostic study determines that a stop sign (an R1-1 sign as shown in figure 8B-1 and sized as shown in table 8B-1 of the MUTCD) is appropriate and shall be installed in compliance with the provisions of Part 2 of section 2B.10 of the MUTCD and figures 8B-2 and 8B-3 of the MUTCD;

(2) a railroad cross buck sign (an R15-1 sign as shown in figure 8B-1 and sized as of Table 8B-1 of the MUTCD) that complies with the provisions of section 8B.03 of the MUTCD;

(3) a sign indicating the number of tracks at the crossing at the location if two or more tracks are present that complies with

the provisions of section 8B.03 of the MUTCD;

(4) reflective striping on the front and back of the signpost but may be omitted from the back sides of crossbuck sign supports installed on one-way streets;

(5) an emergency notification sign as shown in figure 1 below with a telephone number for the railroad dispatcher who dispatches trains using the tracks at the crossing;



DOT Crossing Number is specific to the location of the crossing
The Mile Post (MP) is specific to the locations of the crossing

Figure 1

(6) roadway striping where appropriate;

(7) advance highway-railroad grade crossing warning signs for each direction of traffic.

E. It shall be the responsibility of the department to ensure that all federal and state laws and regulations, department procedures and industry standards are followed.

F. The rail manager shall conduct inspections of all department-owned crossings on a regular basis at least every two years to evaluate the sufficiency of traffic control devices and signage. The rail manager shall utilize the references in section b of 18.14.4.8 NMAC in conducting the inspection. The rail manager shall make a recommendation regarding any modifications to a crossing to the department secretary. The department secretary shall decide whether modifications to a crossing shall be made.

[18.14.4.10 NMAC - N, 12/1/2010]

18.14.4.11 ADDITIONAL REQUIREMENTS FOR PRIVATE CROSSINGS OF DEPARTMENT OWNED RAILROAD PROPERTY:

A. All liability at a private crossing will lie with the second party named in any existing or future crossing agreement. The department will bear no liability for these crossings.

B. The liability for the use and the responsibility for funding the inspection, maintenance and improvement of a private crossing shall be the responsibility of the second party, as the owner of the road that crosses the department owned railroad property.

C. If the department can not locate or acquire a valid agreement that has been issued to allow a private crossing of the department owned railroad property, and the department is unable to execute an agreement with an applicant for the crossing, the department shall initiate a process to consider closing the crossing utilizing the procedures included in 18.14.4.13 NMAC.

D. The department shall have the right to terminate an agreement in the event that the department determines any of the following:

- (1) the crossing is being used for a purpose or in a manner not set forth in the agreement; or
- (2) there is a significant change in the volume or nature of road traffic at the crossing; or
- (3) the second party has in any way breached the terms or conditions of any applicable agreement.

[18.14.4.11 NMAC - N, 12/1/2010]

18.14.4.12 FOR REQUESTS THAT A DESIGNATION OF A PRIVATE CROSSING BE CHANGED TO A PUBLIC CROSSING:

A. A local government or regional transit district may request that a private crossing be changed to a public crossing by submitting a written request to the rail manager. The request shall include the reasons for such redesignation, the supporting documents referenced in Paragraph (2) of Subsection (A) of 18.14.4.9 NMAC, and a resolution from the governing body of the local government or regional transit district committing to maintain the approach roads to the grade crossing. The process referenced in 18.14.4.9 NMAC shall be used by the department in considering the redesignation request.

B. The rail manager shall make a recommendation to the secretary regarding the request to redesignate a private crossing to a public crossing. The secretary shall decide whether such redesignation shall be made. Upon approval by the secretary of the redesignation, an agreement between the department and the second party that will assume responsibility for the redesignated crossing shall be executed regarding the responsibilities of the second party.

C. The rail manager shall submit all changes in crossing designation to the FRA to update the FRA crossing inventory.

[18.14.4.12 NMAC - N, 12/1/2010]

18.14.4.13 CONSIDERATION OF CLOSING AN EXISTING CROSSING: CONSIDERATION OF CLOSING AN EXISTING CROSSING:

A. If the department seeks the closure of an existing crossing or if the rail manager receives a proposal to close an existing crossing that is determined to merit consideration based on the rail manager's review of the proposal, the department shall provide public notice of the proposed closure:

(1) the department shall inform the local government in which the crossing is located of the proposed closure;

(2) the department shall post signs at the crossing notifying the public that the crossing is under consideration for closure and requesting public comment;

(3) the department shall publish a notice in a newspaper of general circulation in the community in which the crossing is located inviting public comment.

B. The rail manager shall evaluate the impacts of closing the crossing and the options to closure. In preparing a recommendation to the secretary regarding a proposed closing of an existing crossing, the rail manager shall utilize the criteria contained in the references cited in 18.14.4.8 NMAC, the results of the diagnostic study and consider any public comments received. The rail manager shall provide a recommendation and a summary of any public comments received to the secretary.

C. The approval of the secretary or their designee is required in order to close an existing crossing.
[18.14.4.13 NMAC - N, 12/1/2010]

18.14.4.14 CONSIDERATION OF OPENING A NEW CROSSING:

A. If the department seeks the opening of a new crossing or if the rail manager receives a proposal to open a new crossing that is determined to have merit based on the rail manager's review of the proposal, the department shall provide public notice of the proposed new crossing.

(1) The department shall inform

the local government in which the crossing is located of the proposed new crossing.

(2) The department shall post signs at the site of the proposed crossing notifying the public that a new crossing is under consideration at this site and requesting public comment.

(3) The department shall publish a notice in a newspaper of general circulation in the community in which the crossing is located inviting public comment.

B. The rail manager shall evaluate the impacts of opening the new crossing in preparing a recommendation to the secretary regarding a proposed new crossing, the rail manager shall utilize the criteria contained in the references cited in 18.14.4.8 NMAC, the results of the diagnostic study and consider any public comments received. The rail manager shall provide a recommendation and a summary of any public comments received to the secretary.

C. The approval of the secretary or their designee is required in order to open a new crossing.

[18.14.4.14 NMAC - N, 12/1/2010]

18.14.4.15 CONSIDERATION OF REQUESTS FOR GRADE SEPARATION OF A CROSSING:

A. The rail manager in preparing their recommendation to the secretary regarding a request for grade separation of a crossing shall utilize:

(1) the criteria contained in the references cited in 18.14.4.8 NMAC;

(2) the results of the diagnostic study of the grade crossing;

(3) the cost of the project;

(4) the availability of funding for the project;

(5) the impact on the community in which the crossing is located.

B. The approval of the secretary or their designee is required in order to grade separate an existing crossing.

[18.14.4.15 NMAC - N, 12/1/2010]

HISTORY OF 18.14.4 NMAC: [RESERVED]

End of Adopted Rules Section

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Issue Number 23	December 2	December 15
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