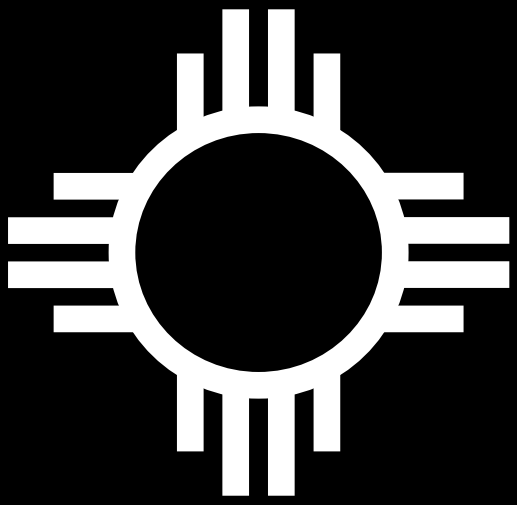
# NEW MEXICO REGISTER



Volume XXI
Issue Number 24
December 30, 2010

# New Mexico Register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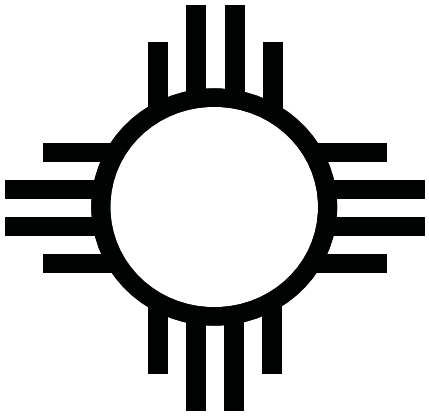

The official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico


The Commission of Public Records
Administrative Law Division
Santa Fe, New Mexico
2010

# New Mexico Register

Volume XXI, Number 24
December 30, 2010

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### Adopted Rules

### Effective Date and Validity of Rule Filings

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

A=***Amended***, E=***Emergency***, N=***New***, R=***Repealed***, Rn=***Renumbered***

## Other Material Related to Administrative Law

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# Notices of Rulemaking and Proposed Rules

## NEW MEXICO AGING AND LONG-TERM SERVICES DEPARTMENT

**NOTICE IS HEREBY GIVEN** that the Secretary of the New Mexico Aging and Long-Term Services Department (ALTSD) is proposing the promulgation of regulations pursuant to his authority under the Aging and Long-Term Services Department Act, Sections 9-23-6.E and NMSA 1978, Section 28-4-6. ALTSD's Adult Protective Services Division (APS) will hold a Public Rule Hearing on January 26, 2011 at 1 p.m. in Hearing Room #1, Toney Anaya Building, 2550 Cerrillos Road, in Santa Fe, New Mexico, for the purpose of amending 8.11.4 NMAC, **ADULT SERVICES.** The proposed amendments to 8.11.4 NMAC, in summary, include, but are not limited to, the following: adding new definitions, clarifying other definitions, more clearly delineating process, eligibility and procedures for adult services and the administrative hearing and review process.

Interested parties may access the proposed amendments on the Division's website at http://www.nmaging.state.nm.us/Adult_Protective_Services_Division.html. Copies may also be obtained by contacting APS at (505) 841-4537. Interested persons may testify at the hearing or submit written comments no later than 5:00 p.m. on January 25, 2011. Written comments regarding the proposed new rule and amendments to rules should be directed to Anthony Louderbough, Deputy Director, New Mexico Adult Protective Services Division, 625 Silver, SW Suite 400, Albuquerque, New Mexico 87102, or faxed to (505) 841-4520.

If you are an individual with a disability and/or require this information in an alternative format or request special accommodations to participate in the public hearing such as a reader, amplifier, qualified language interpreter or any other form of auxiliary aid or service to attend or participate in the upcoming hearing or meeting, please contact Tony Louderbough at the address and phone number listed above, at least one week prior to the hearing or as soon as possible.

## ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

**ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**
**NOTICE OF HEARING AND REGULAR MEETING**

On February 9, 2011, at 5:30 pm, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, 400 Marquette Avenue NW, Albuquerque, NM.

The hearing will address: Proposal to amend 20.11.4 NMAC, *General Conformity*, and to incorporate an amended 20.11.4 NMAC into the New Mexico State Implementation Plan (SIP) for air quality.

On March 24, 2010, the EPA revised their General Conformity Rule, which became effective on July 6, 2010 [FR Vol. 75, No. 64, 17254-79, 4/5/10]. In response, the Air Quality Division (AQD) of the City of Albuquerque's Environmental Health Department, is proposing amendments to the current Air Quality Control Board regulation, 20.11.4 NMAC, *General Conformity* in order to conform to these recent federal rule changes.

General conformity is an important provision of the Clean Air Act Amendments of 1990 (Act). Section 176(c) of the Act clearly illustrates the intent of Congress with respect to this program by explicitly requiring federal actions to conform to the applicable State Implementation Plan (SIP), and defines a conforming state action as one that does not: 1) cause or contribute to a new violation of any health-based air quality standard in any area; 2) increase the severity or frequency of an existing violation of any standard in any area; or 3) delay timely attainment of any standard, required interim emission reduction or other milestone in any area.

The intent of the Act's General Conformity provision is to encourage a process where federal agencies would work with their counterparts at the state and local levels to coordinate review of projects whose air quality impacts are real, but which do not fit neatly into the stationary source "box," where applicable processes and requirements are more well-defined. Examples of covered actions include airport construction or expansion.

Following the hearing, the Air Board will hold its regular monthly meeting during which the Air Board is expected to consider adopting the proposed amendments to 20.11.4 NMAC, *General Conformity*, and incorporating the amended regulation into the SIP.

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

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

Anyone intending to present technical testimony is required by 20.11.82 NMAC, *Rulemaking Procedures - AQCB*, to submit a written Notice Of Intent (NOI) before 5:00 pm on January 25, 2011 to: Attn: February Hearing Record, Ms. Janice Wright, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103, or in person in Room 3023, 400 Marquette Avenue NW. The NOI shall identify the person's name, address and affiliation.

In addition, written comments to be incorporated into the public record should be received at the above P.O. Box, or Environmental Health Department office, before 5:00pm on February 2, 2011. The comments shall include the name and address of the individual or organization submitting the statement. Written comments may also be submitted electronically to jcwright@cabq.gov and shall include the required name and address information.

Interested persons may obtain a copy of the proposed regulation at the Environmental Health Department Office, or by contacting Ms. Janice Wright, Albuquerque

Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103, or by phone 768-2601, or by e-mail at jcwright@cabq.gov , or by downloading a copy from the City of Albuquerque Air Quality Division website.

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

## NEW MEXICO HUMAN SEVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

NOTICE

The New Mexico Human Services Department (HSD) is scheduling a public hearing on February 10, 2011 at 9:00 a.m. in the ASD conference room, Plaza San Miguel, 729 St. Michael's Drive, Santa Fe.

The subject of the hearing is: Developmental Disabilities (DD) Waiver Changes to Respite Service. The proposed change will remove respite from the family living annual resource allocation (ARA) package. Waiver participants who are currently receiving family living services will no longer be able to receive respite services.

Interested persons may submit written comments no later than 5:00 p.m., February 10, 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, Long Term Services and Support Bureau, P.O. Box 2348, Santa Fe, NM. 87504-2348.

## NEW MEXICO BOARD OF NURSING

**Public Rules Hearing**

The New Mexico Board of Nursing will hold a Rules Hearing on Friday, February 11. 2011. The rules hearing will be held at the New Mexico Board of Nursing Conference Room, 6301 Indian School NE, Suite 710, Albuquerque, New Mexico 87110.

The purpose of the rules hearing is to hear public testimony and comments regarding the proposed amendments to the Board's rules and regulations: 16.12 NMAC: Part 1 General Provisions.

Persons desiring to present their views on the proposed amendments to the rules may write to request draft copies of the rules from the Board office at 6301 Indian School Rd NE, Suite 710, Albuquerque, NM, 87110, call (505) 841-8340 or download them from www.bon.state.nm.us .

In order for the Board members to review the comments prior to the hearing, persons wishing to submit written comments regarding the proposed rules should submit them to the Board office in writing no later than January 10, 2011. Persons wishing to present written comments at the hearing are asked to provide (10) copies of any comments or proposed changes for distribution to the Board and staff. In addition, persons may present their comments orally at the hearing.

Notice: Any person presenting testimony, who is representing a client, employer or group, must be registered as a lobbyist through the Secretary of State's Office 9505) 827-3600 or do so within 10 days of the Public Hearing.

If you have questions, or if you are an individual with a disability who wishes to attend the hearing or meeting, please call the Board office at (505) 841-8340 at least two weeks prior to the hearing or as soon as possible.

## NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

**NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS**
**NOTICE OF RULEMAKING AND PUBLIC HEARING**

The New Mexico Department of Workforce (DWS) will hold a public hearing at 10:00 a.m. on January 14, 2011, in the State Purchasing Bid Room, 1st Floor at the Joseph Montoya Building, 1100 St. Francis Dr., Santa Fe, New Mexico to discuss the amendment of 11.3.500.12 NMAC, which will allow issues of timeliness to be decided by the Secretary. Copies of the proposed rule are available online at http://www.dws.state.nm.us/pdf/Timeliness.pdf or upon request to Sherry Crespin at (505) 841-8471.

The hearing will be held before the General Counsel of DWS. All interested parties may attend the hearing and present their views orally or submit written comments prior to the hearing. Written comments must be directed to Elizabeth Garcia, Office of the General Counsel, New Mexico Department of Workforce Solutions, 401 Broadway P.O. Box 1928, Albuquerque, New Mexico 87102.

Anyone requiring special accommodations at the hearing must contact the above mentioned Sherry Crespin no later Than January 4, 2011.

## End of Notices and Proposed Rules Section

# Adopted Rules

## NEW MEXICO AGING AND LONG-TERM SERVICES DEPARTMENT

**This is an amendment to 9.2.19 NMAC Sections 18, 19, 22 and 38, effective 12/30/2010.**

**9.2.19.18 STATE AGENCY ON AGING RESPONSIBILITIES:**

**A** provide for a full-time state long-term care ombudsman;

**B.** provide funding for a statewide long-term care ombudsman program (LTCOP) in accordance with allocation formula and maintenance of effort requirements;

**C.** provide for legal representation for the office of the state long-term care ombudsman (which may be through the office of the New Mexico attorney general);

**D.** provide support to the SLTCO to enable him or her to fulfill all responsibilities consistent with all applicable federal and state laws, regulations, and policies;

**E.** administer the ombudsman service contracts between the SAOA and AAAs [~~and/~~] or provider agencies;

**F**. provide technical assistance for and monitor performance of AAAs; and

[~~**G**. manage and approve all communications with the press, broadcast and other public media, and all other public dissemination or release of information from or concerning the LTCOP.~~]

**[~~H.~~] G.** administer the statewide LTCOP in accordance with all applicable federal and state laws, regulations, and policies.

[9.2.19.18 NMAC - N, 2/1/2001; A, 12/30/2010]

**9.2.19.19 [~~STATE~~] LONG-TERM CARE OMBUDSMAN RESPONSIBILITIES: [Reserved]**

[9.2.19.19 NMAC - N, 2/1/2001; A, 12/30/2010]

**9.2.19.22 STATE LONG-TERM CARE OMBUDSMAN RESPONSIBILITIES:**

**A**. [~~adhering~~] adhere to the rules of confidentiality and propriety set forth in these regulations and in the resource manual for new volunteer training, if applicable;

**B**. [~~protecting~~] protect access to LTCO records, in accordance with [~~Section 2.19.7~~] 9.2.19.36 - 9.2.19.38 NMAC of [~~these regulations~~] this rule;

**C**. [~~carrying~~] carry out other activities that the SLTCO reasonably deems appropriate to the certification of such LTCO, in accordance with the level of certification of such LTCO; [~~and~~]

**D**. [~~performing~~] perform each responsibility in accordance with all applicable federal and state law, rules, regulations, and policies; and

**E.** as soon as practicable, provide and initiate discussion with the director of the SAOA and the SLTCO's immediate supervisor (if the immediate supervisor is someone other than the director) on any written comments regarding laws, regulations, governmental policies or actions relating to the health and well being of residents of long term care facilities and services as determined to be appropriate by the SLTCO; and at any time thereafter provide and facilitate public comment on those laws, regulations, policies and actions to public and private agencies, and to legislators.

[9.2.19.22 NMAC - N, 2/1/2001; A, 12/30/2010]

**9.2.19.38 PROCEDURE FOR RELEASE:**

**A.** Records maintained by the LTCOP may not be released, disclosed, duplicated, or removed to anyone who is not a LTCO without the written permission of the SLTCO. All request made for LTCO records shall be referred to the SLTCO or his/her designee.

**B.** The SLTCO or designee shall determine whether to disclose all or part of the records as follows:

(1) The SLTCO shall require that the request be made in writing and may require a copy of the request before determining the appropriate response. Where the request is made orally by a resident, complainant, or legal representative of the resident or complainant, the request must be documented immediately and filed as an LTCO record by the LTCO to whom consent was communicated in order to meet this requirement.

(2) The SLTCO shall review the request with the relevant Regional Coordinator and/or local Facility Ombudsman to determine whether the release of all or part of the records would be consistent with the wishes or interest of the relevant resident(s).

(3) The SLTCO shall determine whether any part of the records should be redacted (i.e. all identifying information removed). The identities of residents or complainants who have not provided express consent for the release of their names shall not be revealed. Such consent must be in writing or made orally and documented immediately and filed as an LTCO record by the LTCO to whom consent was communicated.

(4) [~~Any request for LTCO records by a public media organization shall be referred to the Director, Deputy Director or designee.~~] SLTCO shall notify the director of the state unit on aging and the immediate supervisor (if the immediate supervisor is someone other than the director of the state unit on aging) of any public media request for records as soon as is practicable.

(5) Any request made by formal legal process, e.g. written interrogatories, subpoena, Court order, etc, shall first be referred to legal counsel. The SLTCO shall be responsible to ensure that a response is timely filed, e.g. motion to quash, request for in camera review, etc, and endeavor to prevent any release that would be inconsistent with the interests of the resident(s).

(6) Any request for information made under the Inspection of Public Records Act, 14-2-1 NMSA 1978 shall be responded to in writing within 15 days by the SLTCO. In most cases the request will be denied as most records of the LTCOP are exempt from the Inspection act, but where the request can be granted without revealing any client identifying information, reasonable effort shall be made to do so. If the request is overly broad but can be addressed with reasonable additional time, the requestor shall be advised of that intention within the initial 15 day time frame.

[9.2.19.38 NMAC - N, 2/1/2001; A, 12/30/2010]

## ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

**This is an amendment to 20.11.1 NMAC, Section 7, effective 1/10/11.**

**20.11.1.7 DEFINITIONS:** The definitions of 20.11.1 NMAC apply unless there is a conflict between definitions in other parts, in which case the definition found in the applicable part shall govern. The definitions include the measurements, abbreviations, and acronyms in Subsection GGGG, of 20.11.1.7 NMAC.

**A. "Abnormal operating conditions"** means the startup or shutdown of air pollution control device(s) or process equipment.

**B. "Administrator"** means the administrator of the United States

environmental protection agency or his or her designee.

**C. "Affected source" or "facility"** means any stationary source, or any other source of air pollutants, that must comply with an applicable requirement.

**D. "Air agency", "department" or "EHD"** means the environmental health department (EHD) of the city of Albuquerque. The EHD, or its successor agency or authority, as represented by the department director or his/her designee, is the lead air quality planning agency for the Albuquerque - Bernalillo county nonattainment/maintenance area. The EHD serves as staff to the Albuquerque - Bernalillo county air quality control board, (A-BC AQCB), and is responsible for the administration and enforcement of the A-BC AQCB regulations.

**E. "Air contaminant" or "air pollutant"** means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant; to the extent the EPA has identified such precursor or precursors for the purpose for which the term "air pollutant" is used. This excludes water vapor, nitrogen ($N_2$), [~~carbon dioxide ($CO_2$),~~] oxygen ($O_2$), [~~methane~~] and ethane.

**F. "Air pollution"** means the emission, except as such emission occurs in nature, into the outdoor atmosphere of one or more air contaminants in such quantities and duration as may with reasonable probability injure human health, animal or plant life, or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

**G. "Air quality control act"** means the State of New Mexico Air Quality Control Act, Chapter 74, Article 2, NMSA 1978 as amended.

**H. "Air quality control board", "board" or "A-BC AQCB"** means the Albuquerque - Bernalillo county air quality control board, which is empowered by federal act, the Air Quality Control Act, and ordinances, to prevent or abate air pollution within the boundaries of Bernalillo county, except for Indian lands over which the board lacks jurisdiction.

**I. "Allowable emissions"** means:

(1) Any department or federally enforceable permit term or condition which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limits the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure continuous reduction that are requested by the applicant and approved by the department or, determined at the time of issuance or renewal of a permit to be an applicable requirement.

(2) Any federally enforceable emissions cap that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject.

**J. "Ambient"** means that portion of the atmosphere, external to buildings, to which the general public has access.

**K. "Applicable requirement"** means any of the following (and includes requirements that have been promulgated or approved by the board or EPA through rulemaking):

(1) any standard or other requirement provided for in the New Mexico state implementation plan approved by EPA, or promulgated by EPA through rulemaking, under Title I, including Parts C or D, of the federal act;

(2) any term or condition of any pre-construction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including parts C or D, of the federal act;

(3) any standard or other requirement:

(a) under Section 111 or 112 of the federal act;

(b) of the acid rain program under Title IV of the federal act or the regulations promulgated thereunder;

(c) governing solid waste incineration under Section 129 of the federal act;

(d) for consumer and commercial products under Section 183(e) of the federal act;

(e) of the regulations promulgated to protect stratospheric ozone under Title VI of the federal act, unless the administrator has determined that such requirements need not be contained in a Title V permit;

(4) any requirements established pursuant to Section 504(b) or Section 114(a)(3) of the federal act;

(5) any national or state ambient air quality standard;

(6) any increment or visibility requirement under Part C of Title I of the federal act applicable to temporary sources permitted pursuant to Section 504(e) of the federal act;

(7) any regulation adopted by the board in accordance with the joint air quality control board ordinances pursuant to the Air Quality Control Act, and the laws and regulations in effect pursuant to the Air Quality Control Act.

**L. "Breakdown or upset"** means any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, or process equipment, which causes a process to not operate in a normal manner. Failures that are caused by process imbalance, poor maintenance or careless operation are not breakdowns.

**M. "Carbon monoxide" or "CO"** means a colorless, odorless, poisonous gas composed of molecules containing a single atom of carbon and a single atom of oxygen with a molecular weight of 28.01 g/mole.

**N. "Chemical process"** means any manufacturing processing operation in which one or more changes in chemical composition or chemical properties are involved.

**O. "Coal burning equipment"** means any device used for the burning of coal for the primary purpose of producing heat or power by indirect heat transfer in which the products of combustion do not come into direct contact with other materials.

**P. "Commenced"** means that an owner or operator has undertaken a continuous program of construction or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

**Q. "Construction"** means fabrication, erection, or installation of an affected facility.

**R. "Crematory"** means any combustion unit designed and used solely for cremating human or animal remains or parts and tissues thereof, and other items normally associated with the cremation process, but not including pathological waste.

**S. "Department"** means the Albuquerque environmental health department, which is the administrative agency of the Albuquerque - Bernalillo county air quality control board.

**T. "Director"** means the administrative head of the Albuquerque environmental health department or a designated representative(s).

**U. "Emission limitation or standard"** means a requirement established by EPA, the state implementation plan (SIP), the Air Quality Control Act, local ordinance, permit, or board regulation, that limits the quantity, rate or concentration, or combination thereof, of emissions of regulated air pollutants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

**V. "EPA"** means the United States environmental protection agency or the EPA's duly authorized representative.

**W. "Excess emissions"** means the emission of an air contaminant,

including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition.

**X. "Excess emissions report"** means a report submitted by a stationary source at the request of the department in order to provide data on the source's compliance with emission limits and operating parameters.

**Y. "Federal act", "act" or "CAA"** means the Federal Clean Air Act, 42 U.S.C. Section 7401 through 7671 et seq., as amended.

**Z. "Federal class I wilderness areas"** means areas designated by the EPA as such. Federal class I wilderness areas within 100 kilometers of Bernalillo county are Bandelier wilderness, Pecos wilderness, and San Pedro Parks wilderness.

**AA. "Fluid"** means either of the two states of matter, liquid or gaseous.

**BB. "Fugitive emissions"** means any emissions which cannot reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening or is not otherwise collected, unless the emission is otherwise regulated by the federal act, the Air Quality Control Act, or the laws and regulation in effect pursuant to the act.

**CC. "Greenhouse gases" or "GHGs"** means the air pollutant defined in § 86.1818–12(a) of Chapter I of Title 40 of the CFR, as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

**[~~CC.~~] DD. "Grain"** means that unit of weight, which is equivalent to 0.0648 grams.

**[~~DD.~~] EE. "Hazardous air pollutant"** means an air contaminant which has been classified pursuant to the federal act, the Air Quality Control Act, or laws and regulations in effect pursuant to the act.

**[~~EE.~~] FF. "Hydrocarbons" or "HC"** means any chemical compound of a class of aliphatic, cyclic, or aromatic chemical compounds containing mostly hydrogen and carbon. Hydrocarbons are highly reactive in the presence of nitrogen oxides and sunlight. All are precursors to more serious air pollutants such as ozone and nitrogen dioxide.

**[~~FF.~~] GG. "Hydrogen sulfide" or "$H_2S$"** means the chemical compound containing two atoms of hydrogen and one of sulfur with a molecular weight of 34.07 g/mole.

**[~~GG.~~] HH. "Incinerator"** means any furnace used in the process of burning solid waste for the purpose of reducing the volume, by removing combustible matter.

**[~~HH.~~] II. "Inedible animal by-product processing"** means operations primarily engaged in rendering, cooking, drying, dehydration, digesting, evaporating or concentrating of animal proteins and fats.

**[~~II.~~] JJ. "Kraft mill"** means any pulping process, which uses an alkaline solution for a cooking liquor.

**[~~JJ.~~] KK. "Lead" or "Pb"** means a heavy metal, with a molecular weight of 207.19 g/mole that is hazardous to health if breathed or swallowed.

**[~~KK.~~] LL. "Malfunction"** means any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction.

**[~~LL.~~] MM. "Modification"** means any physical change in or change in the method of operation of a source that results in an increase in the potential emission rate of any regulated air contaminant emitted by the source or that results in the emission of any regulated air contaminant not previously emitted, but does not include:

(1) a change in ownership of the source;

(2) routine maintenance, repair or replacement;

(3) installation of air pollution control equipment, and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the environmental improvement board or the local board or pursuant to the federal act; or

(4) unless previously limited by enforceable permit conditions:

(a) an increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(b) an increase in the hours of operation; or

(c) use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material, or if use of an alternate fuel or raw material is caused by any natural gas curtailment or emergency allocation or any other lack of supply of natural gas.

**[~~MM.~~] NN. "New source"** means any stationary source, the construction or modification of which is commenced after the filing of a regulation applicable to the stationary source.

**[~~NN.~~] OO. "Nitrogen dioxide" or "$NO_2$"** means a reddish brown, poisonous gas composed of molecules containing a single atom of nitrogen and two of oxygen with a molecular weight of 46.0 g/mole.

**[~~OO.~~] PP. "Nitrogen oxides or $NO_x$"** is a class of chemicals containing varying quantities of nitrogen and oxygen that are created from combustion processes taking place at high temperatures and high pressures (e.g., inside automotive engine cylinders or in high temperature boilers). Examples of nitrogen oxides are NO, $NO_2$, $NO_3$, $N_2O_2$, and $N_2O_5$. Nitrogen oxides are also referred to as oxides of nitrogen.

**[~~PP.~~] QQ. "NMAC"** means New Mexico administrative code, which contains the rules adopted by all rulemaking agencies of the state of New Mexico and the rules adopted by the A-BC AQCB.

**[~~QQ.~~] RR. "Open burning"** means the combustion of any material without the following characteristics:

(1) control of combustion air to maintain adequate temperature for efficient combustion;

(2) containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(3) emission controls for the gaseous combustion products.

**[~~RR.~~] SS. "Operator"** means the person(s) responsible for the overall operation of a source.

**[~~SS.~~] TT. "Owner"** means the person(s) who owns a source or part of a source.

**[~~TT.~~] UU. "Ozone or $O_3$"** means a pungent, colorless gas composed of molecules containing three atoms of oxygen with a molecular weight of 48.0 g/mole.

**[~~UU.~~] VV. "Part"** means the required NMAC designation for the normal division of a chapter. A part consists of a unified body of rule material applying to a specific function or devoted to a specific subject matter. Structurally, a part is the equivalent of a rule.

**[~~VV.~~] WW. "Particulate matter" or "PM"** means any airborne finely divided solid or liquid material such as dust, smoke, mist, fumes or smog found in air or emissions.

**[~~WW.~~] XX. "Particulate matter emissions"** means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by the reference method in 40 CFR 60, Appendix A, Method 5, or an equivalent method approved by the EPA.

**[~~XX.~~] YY. "Pathological waste destructor"** means any equipment, which is used to dispose of pathological waste by combustion or other process, which is approved by EPA.

**[~~YY.~~] ZZ. "Performance test"** means the data, which is the result of a test performed as required by the department to

determine compliance.

**[~~ZZ.~~] AAA. "Permit"** means any permit or group of permits, modifications, renewals or revisions authorizing the construction or operation of a stationary source pursuant to the federal act, the Air Quality Control Act, or laws and regulations in effect pursuant to the act.

**[~~AAA.~~] BBB. "Permittee"** means the owner or operator identified in any permit application or permit.

**[~~BBB.~~] CCC. "Person"** means any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or their legal representatives, agents or assigns.

**[~~CCC.~~]DDD. "Photochemical oxidants"** means an air pollutant, which is formed by the action of sunlight on oxides of nitrogen and hydrocarbons.

**[~~DDD.~~] EEE. "$PM_{10}$", "$PM_{2.5}$" or "$PM_1$"** means particulate matter with an aerodynamic diameter less than or equal to 10, 2.5, or 1 micrometers, respectively.

**[~~EEE.~~] FFF. "$PM_{2.5}$ emissions"** means finely divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers emitted into the ambient air as measured by the reference method in 40 CFR Part 50, Appendix L, approved by the EPA.

**[~~FFF.~~] GGG. "$PM_{10}$ emissions"** means finely divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted into the ambient air as measured by the reference method in 40 CFR Part 50, Appendix J and M, or equivalent method approved by the EPA.

**[~~GGG.~~] HHH. "Pollution control device" or "air pollution control equipment"** means any device, equipment, process or combination thereof, the operation of which may limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state. This includes, but is not limited to, sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection.

**[~~HHH.~~] III. "Portable stationary source" or "temporary stationary source"** means a stationary source capable of changing its location with limited dismantling or reassembly which is associated with a specific construction project or increased production demand.

**[~~III.~~] JJJ. "Potential to emit" or "pre-controlled emission rate"** means the maximum capacity of a stationary source to emit any air contaminant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is federally enforceable or is included in a permit issued by the department. However, the potential to emit for nitrogen dioxide shall be based on total oxides of nitrogen.

**[~~JJJ.~~] KKK. "Process equipment"** means any equipment used for storing, handling, transporting, processing or changing any materials whatsoever but excluding that equipment specifically defined in these regulations as incinerators, crematories, pathological waste destructors, pathological destructors and medical waste destructors.

**[~~KKK.~~] LLL. "Process weight"** means the total weight of all materials introduced into any specific process, which causes any discharge of air contaminants into the atmosphere. Solid fuels introduced into any specific process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not.

**[~~LLL.~~] MMM. "Process weight rate"** means the hourly rate derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, or from the beginning to the completion of a typical portion thereof, excluding any time during which the equipment is idle.

**[~~MMM.~~** [Reserved]]

**NNN. "Regulated air pollutant"** means the following:

(1) any pollutant for which a national, state, or local ambient air quality standard has been promulgated;

(2) any pollutant that is subject to any standard promulgated under Section 111 of the federal act;

(3) any Class I or II substance subject to any standard promulgated under or established by Title VI of the federal act; or

(4) any pollutant subject to a standard promulgated under Section 112 or any other requirements established under Section 112 of the federal act.

**OOO. "Responsible official"** means one of the following:

(1) **for a corporation:** a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for, or subject to a permit and either:

(a) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(b) the delegation of authority to such representatives is approved in advance by the department;

(2) **for a partnership or sole proprietorship:** a general partner or the proprietor, respectively;

(3) **for a municipality, state, federal or other public agency:** either a principal executive officer or ranking elected official; for the purposes of 20.11.1 NMAC, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of EPA); or

(4) **for an acid rain source:**

(a) the designated representative (as defined in Section 402(26) of the federal act) in so far as actions, standards, requirements, or prohibitions under Title IV of the federal act or the regulations promulgated thereunder are concerned; and

(b) the designated representative for any other purposes under 40 CFR Part 70.

**PPP. "Shutdown"** means the cessation of operation of any air pollution control equipment, or process equipment.

**QQQ.** [Reserved]

**RRR.** [Reserved]

**SSS. "Smoke"** means small gas-borne particles resulting from incomplete combustion, consisting predominantly, but not exclusively, of carbon, soot and combustible material.

**TTT. "Solid waste"** means garbage; refuse; yard waste; food wastes; plastics; leather; rubber; sludge; and other discarded combustible or noncombustible waste, including solid, liquid, semisolid; or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community or residential activities, and from waste treatment plants, water supply treatment plants, or air pollution control facilities; but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permit under Section 402 of the Federal Water Pollution Control Act, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act.

**UUU.** [Reserved]

**VVV. "Stack, chimney, vent, or duct"** means any conduit or duct emitting particulate or gaseous emissions into the open air.

**WWW. "Standard conditions"** means the conditions existing at a temperature of 70° F (25° C) and pressure of 14.7 psia (760 mmHg).

**XXX. "Standard cubic foot"** means a measure of the volume of one cubic foot of gas at standard conditions.

**YYY. "Startup"** means setting into operation any air pollution control equipment, or process equipment.

**ZZZ. "Stationary source"** means any building, structure, facility or installation, which is either permanent or temporary, excluding a private residence, that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the federal act, the Air Quality Control Act, or the laws and regulations in effect pursuant to the act. Several buildings, structures, facilities, or installations, or any combinations will be treated as a single stationary source if they belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person, or persons, or are under common control. Pollutant-emitting activities shall be treated as the same industrial grouping if they have the same first two digits of an applicable standard industrial classification (SIC) code as described in the standard industrial classification manual, or if they have the same first three digits of an applicable north american industry classification system (NAICS) code.

**AAAA. "Sulfur dioxide" or "$SO_2$"** means a pungent, colorless, poisonous gas composed of molecules containing a single atom of sulfur and two atoms of oxygen with a molecular weight of 64.07 g/mole.

**BBBB. "Total reduced sulfur"** means any combination of sulfur compounds, except sulfur dioxide and free sulfur, which test as reduced sulfur, including, but not limited to, hydrogen sulfide, methyl mercaptan, and ethyl mercaptan.

**CCCC. "Total suspended particulate" or "TSP"** means particulate matter as measured by the method described in 40 CFR Part 50, Appendix B.

**DDDD. "Vapors"** means the gaseous form of a substance, which exists in the liquid or solid state at standard conditions.

**EEEE. "Visible emission"** means an emission that can be seen because its opacity or optical density is above the threshold of vision.

**FFFF. "Volatile organic compounds" or "VOC"** means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.

(1) VOC includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: methane; ethane; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (HCFC-22); trifluoromethane (HFC-23); 1,2-dichloro 1,1,2,2-tetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC-123); 1,1,1,2-tetrafluoroethane (HFC-134a); 1,1-dichloro 1-fluoroethane (HCFC-141b); 1-chloro 1,1-difluoroethane (HCFC-142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124); pentafluoroethane (HCFC-125); 1,1,2,2-tetrafluoroethane (HFC-134); 1,1,1-trifluoroethane (HFC-143a); 1,1-difluoroethane (HFC-152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene); 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC–225ca); 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC–225cb); 1,1,1,2,3,4,4,5,5,5-decafluoropentane(HFC 43–10mee); difluoromethane(HFC–32); ethylfluoride (HFC–161); 1,1,1,3,3,3-hexafluoropropane(HFC–236fa); 1,1,2,2,3-pentafluoropropane (HFC–245ca); 1,1,2,3,3-pentafluoropropane (HFC–245ea); 1,1,1,2,3-pentafluoropropane (HFC–245eb); 1,1,1,3,3-pentafluoropropane (HFC–245fa); 1,1,1,2,3,3-hexafluoropropane (HFC–236ea); 1,1,1,3,3-pentafluorobutane (HFC–365mfc); chlorofluoromethane (HCFC–31); 1 chloro-1-fluoroethane (HCFC–151a); 1,2-dichloro-1,1,2-trifluoroethane (HCFC–123a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane ($C_4F_9OCH_3$ or HFE-7100); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OCH_3$); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane ($C_4F_9OC_2H_5$ or HFE-7200); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OC_2H_5$); methyl acetate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-$C_3F_7OCH_3$ or HFE-7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (HFE-7500); 1,1,1,2,3,3,3-heptafluoropropane (HFC 227ea); methyl formate ($HCOOCH_3$); 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (HFE-7300); propylene carbonate; dimethyl carbonate; and perfluorocarbon compounds which fall into these classes:

(a) cyclic, branched, or linear, completely fluorinated alkanes;

(b) cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

(c) cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

(d) sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

(2) For purposes of determining compliance with emissions limits, VOC will be measured by the test methods in the approved state implementation plan (SIP) or 40 CFR Part 60, Appendix A, as applicable. Where such a method also measures compounds with negligible photochemical reactivity, these negligibility-reactive compounds may be excluded as VOC if the amount of such compounds is accurately quantified, and such exclusion is approved by the enforcement authority.

(3) As a precondition to excluding these compounds as VOC or at any time thereafter, the enforcement authority may require an owner or operator to provide monitoring or testing methods and results demonstrating, to the satisfaction of the enforcement authority, the amount of negligibly-reactive compounds in the source's emissions.

(4) For purposes of federal enforcement for a specific source, the EPA shall use the test methods specified in the applicable EPA-approved SIP, in a permit issued pursuant to a program approved or promulgated under Title V of the act, or under 40 CFR Part 51, Subpart I or Appendix S, or under 40 CFR Parts 52 or 60. The EPA shall not be bound by any state determination as to appropriate methods for testing or monitoring negligibly-reactive compounds if such determination is not reflected in any of the above provisions.

(5) The following compound(s) are VOC for purposes of all recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements which apply to VOC and shall be uniquely identified in emission reports, but are not VOC for purposes of VOC emissions limitations or VOC content requirements: t-butyl acetate.

(6) For the purposes of determining compliance with California's aerosol coatings reactivity-based regulation, (as described in the California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 3), any organic compound in the volatile portion of an aerosol coating is counted towards that product's reactivity-based limit. Therefore, the compounds identified in Subsection FFFF of 20.11.1.7 NMAC as negligibly reactive and excluded from EPA's definition of VOCs are to be counted towards a product's reactivity limit for the purposes of determining compliance with California's aerosol coatings reactivity-based regulation.

(7) For the purposes of determining compliance with EPA's aerosol coatings

reactivity based regulation (as described in 40 CFR Part 59 - National Volatile Organic Compound Emission Standards for Consumer and Commercial Products) any organic compound in the volatile portion of an aerosol coating is counted towards the product's reactivity-based limit, as provided in 40 CFR Part 59, Subpart E. Therefore, the compounds that are used in aerosol coating products and that are identified in Subsection FFFF of 20.11.1.7 NMAC as negligibly reactive and excluded from EPA's definition of VOC are to be counted towards a product's reactivity limit for the purposes of determining compliance with EPA's aerosol coatings reactivity-based national regulation, as provided in 40 CFR Part 59, Subpart E.

**GGGG. "Measurements, abbreviations. and acronyms"**

**A-BC AQCB**-Albuquerque - Bernalillo county air quality control board
**ABT**-averaging, banking and trading (program)
**AIRS**-aerometric information retrieval system
**AMPA**-Albuquerque metropolitan planning area
**API**-American petroleum institute
**AQIA**-air quality impact assessment
**AQI**-air quality index
**AQS**-air quality services
**ASE**-national institute for automotive service excellence
**ASTM**-American society for testing and materials
**ATS**-allowance tracking system
**BACT**-best available control technology
**Bhp**-brake horsepower
**Btu**-British thermal unit
**C**-Celsius
**CAA(A)**-federal Clean Air Act (Amendments)
**CEM**-continuous emission monitor
**CFC(s)**-chlorofluorocarbon(s)
**cfh**-cubic feet per hour
**cfm**-cubic feet per minute
**CFR**-code of federal regulations
**$CO_2$**-carbon dioxide.
**CO**-carbon monoxide.
**COG**-mid-region council of governments
**CMAQ**-congestion mitigation and air quality
**cu. in**.-cubic inch(es)
**DER**-discrete emission reduction
**DOE**-department of energy
**DOT-U.S.** department of transportation
**DPM**-development process manual
**DRB**-development review board
**EA**-environmental assessment
**EHD**-environmental health department
**EI**-emission inventory
**EIS**-environmental impact statement
**EPA**-U.S. environmental protection agency
**EPC**-environmental planning commission
**ERC**-emission reduction credit
**F**-Fahrenheit
**FHWA**-federal highway administration, DOT
**FMVCP**-federal motor vehicle control program
**FR**-federal register
**ft**.-feet
**FTA**-federal transit administration, DOT
**g**-gram(s)
**g/mole**-grams per mole
**gal**-U.S. gallon(s)
**GVW**-gross vehicle weight
**GVWR**-gross vehicle weight rating
**h**-hour(s)
**HAP**-hazardous air pollutants
**HC**-hydrocarbon(s)
**Hg**-mercury
**hp**.-horsepower
**I/M**-inspection/maintenance
**in**.-inch(es)
**ISTEA**-Intermodal Surface-Transportation Efficiency Act (see SAFETEA-LU)
**K**-Kelvin
**kg**-kilogram(s)
**km**-kilometer(s)
**kPa**-kilopascal(s)
**lb**.-pound(s)
**lb/day**-pounds per day
**lb-ft**-pound-feet
**lb/hr**-pounds per hour
**lb/yr**-pounds per year
**LAER**-lowest achievable emission rate
**LNG**-liquefied natural gas
**LPG**-liquefied petroleum gas
**LRTP**-long range transportation plan
**m**-meter(s)
**MACT**-maximum achievable control technology
**max**.-maximum
**MCO**-manufacturer's certificate of origin
**µg**-microgram
**µg/$m^3$**-microgram per cubic meter
**mg**-milligram(s)
**mg/$m^3$**-milligram per cubic meter
**mi**.-mile(s)
**min**-minute(s)
**ml**-milliliter(s)
**mm**-millimeter(s)
**MMBtu**-million Btu
**mmHg**-millimeters of mercury
**mph**-miles per hour
**MPO**-metropolitan planning organization
**MRCOG**-mid-region council of governments
**MSERC**-mobile source emission reduction credits
**MSMTC**-mobile source modeling technical committee
**MTBE**-methyl tertiary butyl ether
**MVD**-motor vehicle division
**MWe**-megawatt electrical
**$N_2$**-nitrogen
**NAAQS**-national ambient air quality standards
**NAMS**-national air monitoring station
**NCore**-national core multi-pollutant monitoring network
**NDIR**-NonDispersive InfraRed
**NEPA**-National Environmental Policy Act
**NESCAUM/MARAMA**-northeast states for coordinated air use management/mid-atlantic regional air management association
**NESHAP**-national emission standards for hazardous air pollutants
**NIST**-national institute of standards and technology
**NM**-New Mexico
**NMAC**-New Mexico administrative code
**NMSA**-New Mexico statutes annotated
**NO**-nitric oxide
**$NO_2$**-nitrogen dioxide
**NOx**-oxides of nitrogen
**No**-number
**NOV**-notice of violation
**NMHC**-non-methane hydrocarbons
**NSPS**-new source performance standards
**NSR**-new source review
**$O_2$**-oxygen
**$O_3$**-ozone
**OMTR**-open market trading rule
**OTAG**-ozone transport assessment group
**OTC**-ozone transport commission
**Pb**-lead
**PIC**-public involvement committee
**PM**-particulate matter
**$PM_{2.5}$**-particulate matter less than 2.5 microns
**$PM_{10}$**-particulate matter less than 10 microns
**ppm**-parts per million by volume
**ppm C**-parts per million, carbon
**PSD**-prevention of significant deterioration
**psi**-pounds per square inch
**psia**-pounds per square inch absolute
**psig**-pounds per square inch gauge
**PTE**-potential to emit
**PWD**-pathological waste destructor
**QF**-qualifying facility
**R**-Rankin
**RACT**-reasonably available control technology
**R&D**-research & development
**RECLAIM**-regional clean air incentives market
**ROG**-reactive organic gases
**rpm**-revolutions per minute
**RTA**-regional transit authority
**RTC**-RECLAIM trading credit
**RVP**-reid vapor pressure
**s**-second(s)
**SAE**-society of automotive engineers
**SAFETEA-LU**-The Safe, Accountable, Flexible, Efficient Transportation Equity Act - A Legacy for Users
**SBAP**-small business assistance program
**scf**-standard cubic foot
**SI**-international system of units
**SIP**-state implementation plan
**SLAMS**-state and local air monitoring station
**SMOG**-SMoke + fOG
**$SO_2$**-sulfur dioxide
**State DOT**-New Mexico department of transportation
**STIP**-state transportation improvement program

**TCC**-transportation coordinating committee
**TCM**-transportation control measure
**TES**-transportation evaluation study
**TIP**-transportation improvement program
**TMA**-transportation management association
**ton/yr**-tons per year
**TPTG**-transportation program task group
**tpy**-tons per year
**TSP**-total suspended particulate
**UPWP**-unified planning work program
**UTPPB**-urban transportation planning policy board
**U.S.**-United States
**UV**-ultraviolet
**VE**-visible emission(s)
**VIN**-vehicle identification number
**VMT**-vehicle miles traveled
**VOC**-volatile organic compounds
**VPMD**-vehicle pollution management division
**%**-percent
°-degree(s)
[3/21/77. . .11/12/81, 11/21/81, 3/16/89, 6/16/92, 2/26/93, 9/23/94, 12/16/94, 12/1/95, 8/1/96; 20.11.1.7 NMAC - Rn, 20 NMAC 11.01.I.7, 10/1/02; A, 7/1/04; A, 9/14/09; A, 1/10/11]

## ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

**This is an amendment to 20.11.2 NMAC, Sections 1, 2, 3, 6 through 18, and adding new sections 19 through 22, effective 1/10/2011.**

**20.11.2.1 ISSUING AGENCY:** Albuquerque - Bernalillo County Air Quality Control Board, c/o Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) [~~768-2600~~]768-2601.
[20.11.2.1 NMAC - Rp, 20 NMAC.11.02.I.1, 7/1/2001; A, 1/10/11]

**20.11.2.2 SCOPE:**

**A. Applicability:**

[~~(1) any person required to obtain a permit pursuant to 20.11.42 NMAC;~~

~~(2) any person required to obtain a permit pursuant to 20.11.41 NMAC;~~

~~(3) any person with a valid registration or permit issued pursuant to 20.11.40 NMAC, 20.11.41 NMAC, or 20.11.42 NMAC;~~

~~(4) any person required to obtain a fugitive dust control permit pursuant to 20.11.20 NMAC, Fugitive Dust Control;~~

~~(5) any person required to provide notification regarding removing regulated asbestos containing material pursuant to 20.11.64 NMAC, Emission Standards for Hazardous Air Pollutants for Stationary Sources;~~

~~(6) any person requesting professional or administrative services or copies of public records; and~~

~~(7) any person who requests a variance or a hearing before the board.~~]

(1) every person required to submit a source registration application pursuant to 20.11.40 NMAC, *Source Registration* or other board regulation;

(2) except for sources subject to 20.11.42 NMAC, Operating Permits, every person required to submit a permit application pursuant to 20.11.20 NMAC, *Fugitive Dust Control;* 20.11.41 NMAC, *Authority to Construct;* 20.11.60 NMAC, *Permitting in Nonattainment Areas;* 20.11.61 NMAC, *Prevention of Significant Deterioration*; or other board regulation;

(3) every person with a valid source registration or permit issued pursuant to 20.11.20 NMAC; 20.11.40 NMAC; 20.11.41 NMAC; 20.11.42 NMAC; 20.11.60 NMAC; 20.11.61 NMAC; or other board regulation;

(4) every person who submits a permit modification pursuant to 20.11.41 NMAC, *Authority to Construct*; 20.11.60 NMAC, *Permitting in Nonattainment Areas;* or 20.11.61 NMAC, *Prevention of Significant Deterioration;*

(5) every person who submits a technical permit revision pursuant to 20.11.41 NMAC, *Authority to Construct*;

(6) every person who submits an administrative revision to either a source registration issued pursuant to 20.11.40 NMAC, *Source Registration*, or a permit issued pursuant to 20.11.41 NMAC, *Authority to Construct;*

(7) every person required to submit a notification regarding removal of regulated asbestos containing material pursuant to 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*;

(8) every person who submits a request for a variance pursuant to 20.11.7 NMAC, *Variance Procedure*;

(9) every person who submits a request for a hearing before the board unless otherwise exempted; and

(10) every person who submits a request for professional or administrative services or copies of public records.

**B. Exempt:** 20.11.2 NMAC does not apply to:

(1) sources within Bernalillo county that are located on Indian lands over which the Albuquerque - Bernalillo county air quality control board lacks jurisdiction;

(2) requests for rulemaking hearings filed pursuant to 20.11.82 NMAC; and

(3) requests for hearings regarding decisions made by the vehicle pollution management program manager or designee concerning suspension or revocation of air care station certifications or air care inspector certifications.

**C. Variance:** Any person may request a timely variance from the requirements of 20.11.2 NMAC in accordance with [~~*Variance Procedures*~~,] 20.11.7 NMAC, [~~if allowed~~] *Variance Procedures*, unless prohibited by a federal, state or local [~~laws and regulations~~] law or regulation.
[20.11.2.2 NMAC - Rp, 20 NMAC 11.02.I.2 & 20 NMAC 11.02.I.8, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.3 STATUTORY AUTHORITY:** 20.11.2 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5 and 74-2-7; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5, Sections 3, [~~and~~] 4 and 7; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Section 9-5-1-3, [~~and~~] Section 9-5-1-4 and Section 9-5-1-7.
[20.11.2.3 NMAC - Rp, 20 NMAC 11.02.I.3, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.6 OBJECTIVE:**

**[A.** ~~To implement the requirements of 74-2-7 NMSA by establishing:~~] To establish fees sufficient to cover the reasonable costs of implementing and enforcing the requirements of: the federal Clean Air Act (CAA); the New Mexico Air Quality Control Act, Chapter 74, Article 2, NMSA 1978; the city of Albuquerque and Bernalillo county joint air quality control board ordinances; and the Albuquerque-Bernalillo county air quality control board regulations, including:

[~~(1) reasonable fees to cover the cost of reviewing and acting on any permit application received by the Department~~]

**A.** reviewing and acting upon submittals made pursuant to Subsection A of 20.11.2.2 NMAC;

[~~(2) reasonable fees to cover the cost of implementing and enforcing the terms and conditions of any permit issued by the department; and~~]

**B.** ]implementing and enforcing the terms and conditions of source registrations or permits, but not including any court costs or other costs associated with an enforcement action;

[~~(3) a schedule of operating permit fees consistent with Section 502(b)(3) of the Clean Air Act and the joint air quality control board ordinances.~~]

**C.** reviewing air dispersion modeling analysis and demonstrations;

**D.** reviewing emission inventory submittals, conducting electronic filing and maintaining inventories, preparing emission inventories and tracking emissions;

**E.** developing, adopting, promulgating, publishing, amending and repealing regulations;

**F.** conducting emissions monitoring and ambient air monitoring;

**[B.]G.** [~~To establish reasonable fees to partially offset the administrative cost of~~] administering variance procedures; [~~and~~]

**H.** [~~permit-related~~] administering administrative hearings before the board as authorized by 20.11.81 NMAC, *Adjudicatory Procedures – Air Quality Control Board*; and

**[C.]I.** [~~To implement the requirements of Section 507 of the federal Clean Air Act by establishing adequate funding for~~] administering a small business stationary source technical and environmental compliance assistance program pursuant to Section 507 of the federal CAA.

**[D.** ~~To establish reasonable fees to cover the administrative expenses incurred by the department in implementing and enforcing the provisions of the New Mexico Air Quality Control Act, the joint air quality control board ordinances, and the Albuquerque-Bernalillo county air quality control board regulations; and~~

**E.** ~~20.11.2 NMAC is permanent. A financial audit of the division shall be performed for city of Albuquerque fiscal year 2005 (July 1, 2004 through June 30, 2005). The results of the audit shall be reported to the air board during city fiscal year 2006.~~]

[20.11.2.6 NMAC - Rp, 20 NMAC 11.02.I.6, 7/1/2001; A, 3/1/04; A, 12/16/06; A, 1/10/11]

**20.11.2.7 DEFINITIONS:** [~~Throughout 20.11.2 NMAC, the terms defined shall have the following meanings. For the purpose of 20.11.2 NMAC, if there is any apparent conflict between the meaning of a definition in 20.11.2 NMAC and a definition in another part, the definition in 20.11.2 NMAC shall prevail and apply.~~] In addition to the definitions in 20.11.2.7 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.2.7 NMAC shall govern.

**A. "Administrative revision"** means a revision to either:

(1) a source registration issued pursuant to 20.11.40 NMAC, to incorporate a change in the stationary source information that does not result in the source being subject to 20.11.41 NMAC; or

(2) a permit that has been issued pursuant 20.11.41 NMAC in order to:

(a) correct a typographical error not made by the department;

(b) identify a change in ownership, name, address or contact information of any person identified in the permit; or

(c) incorporate a change in the permit to include a source or activity at the facility if the facility is exempted pursuant 20.11.41 NMAC.

**[A.]B. "Allowable emission rate"** means the [~~most stringent~~] fee-pollutant emission [~~limit~~] rate that has been established by a permit issued by the department [~~or the source's potential-to-emit~~].

**C. "Asbestos Unit" or "AU"** is the number derived by dividing the amount of asbestos removed, at or above the levels specified in 40 CFR 61.145, by the corresponding conversion factor and unit of measure in square feet, linear feet, or cubic feet respectively.

**D. "Consumer price index all urban consumers" or "CPI-U"** means a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services as reported by the U.S. Department of Labor, Bureau of Labor Statistics.

**E. "Division"** means the department's air quality division or successor organizational unit.

[**B.]F. "Efficiency control factor"** means a factor used in conjunction with a fugitive dust source classification to determine the annual fee per acre to be paid for a programmatic permit issued pursuant to 20.11.20 NMAC. The four fugitive dust source classifications pertaining to programmatic permits are "no impact source", "low impact source", "moderate impact source" and "high impact source", which are defined in 20.11.2.7 NMAC.

**[C.]G. "Emissions unit"** means any part or activity of a stationary or portable source that emits or has the potential to emit [~~any~~]a fee pollutant.

**[D.]H. "Fee pollutant"** means:

[~~(1) sulfur dioxide (SOx);~~

~~(2) nitrogen dioxide based on total oxides of nitrogen (NOx);~~

~~(3) carbon monoxide (CO);~~

~~(4) particulate matter with an aerodynamic diameter less than or equal to 30 micrometers (TSP);~~

~~(5) any volatile organic compound as defined in 40 CFR 51.100(s), as amended;~~

~~(6) any hazardous air pollutant listed pursuant to 112(b) of the federal Clean Air Act;~~

~~(7) any regulated substance listed pursuant to Section 112(r) of the federal Clean Air Act; and~~

~~(8) any other pollutant determined by the board after public hearing~~] any regulated air pollutant as defined in 20.11.2.7 NMAC, not including any Class I or II substance subject to a standard established in Title VI of the federal Clean Air Act.

**[E.]I. "Fugitive emissions"** means emissions that cannot reasonably pass through a stack, chimney, vent or other functionally equivalent opening.

**[F.]J. "High impact source"** means a fugitive dust source to which a control strategy or combination of strategies has been applied, which strategies, when applied to an entire source or a portion of a source, can reasonably be expected to reduce fugitive dust leaving the source by approximately 10 percent compared to the level of fugitive dust leaving the source that would be expected if no control strategy or strategies were in place. The department shall determine the classification of fugitive dust source as a high impact source based on professional judgment, sound technical information or scientific evidence. The department shall provide a written explanation of the basis for making the determination of the classification if requested by the programmatic permit applicant. The purpose of classifying a fugitive dust source as a high impact source is [~~so the programmatic permit fees can be calculated~~] to calculate the fees for a programmatic permit issued pursuant to 20.11.20 NMAC. For a high impact source, the applicable efficiency control factor for calculating fees [~~shall be~~] is 0.9.

**[G.]K. "Low impact source"** means a fugitive dust source to which a control strategy or combination of strategies has been applied, which strategies, when applied to an entire source or a portion of a source, can reasonably be expected to reduce fugitive dust leaving the source by approximately 90 percent compared to the level of fugitive dust leaving the source that would be expected if no control strategy or strategies were in place. The department shall determine the classification of fugitive dust source as a low impact source based on professional judgment, sound technical information or scientific evidence. The department shall provide a written explanation of the basis for making the determination of the classification if requested by the programmatic permit applicant. The purpose of classifying a fugitive dust source as a low impact source is [~~so the programmatic permit fees can be calculated~~] to calculate the fees for a programmatic permit issued pursuant to 20.11.20 NMAC. For a low impact source, the applicable efficiency control factor for calculating fees [~~shall be~~] is 0.1.

**[H.]L. "Major source"** shall have the meaning defined in 40 CFR [~~71.2~~] 70.2.

**[I.]M. "Moderate impact source"** means a fugitive dust source to which a control strategy or combination of strategies has been applied, which strategies, when applied to an entire source or a portion of a source, can reasonably be expected

to reduce fugitive dust leaving the source by approximately 50 percent compared to the level of fugitive dust leaving the source that would be expected if no control strategy or strategies were in place. The department shall determine the classification of fugitive dust source as a moderate impact source based on professional judgment, sound technical information or scientific evidence. The department shall provide a written explanation of the basis for making the determination of the classification if requested by the programmatic permit applicant. The purpose of classifying a fugitive dust source as a moderate impact source is [~~so the programmatic permit fees can be calculated~~] to calculate the fees for a programmatic permit issued pursuant to 20.11.20 NMAC. For a moderate impact source, the applicable efficiency control factor for calculating fees [~~shall be~~] is 0.5.

[~~J.~~]**N. "No impact source"** means a fugitive dust source to which a control strategy or combination of strategies has been applied, which strategies, when applied to an entire source or a portion of a source, can reasonably be expected to reduce fugitive dust leaving the source by approximately 100 percent compared to the level of fugitive dust leaving the source that would be expected if no control strategy or strategies were in place. The department shall determine the classification of fugitive dust source as a no impact source based on professional judgment, sound technical information or scientific evidence. The department shall provide a written explanation of the basis for making the determination of the classification if requested by the programmatic permit applicant. Land that is classified as a no impact source is not required to obtain a programmatic permit issued under 20.11.20 NMAC and is not required to pay a programmatic permit fee for land classified as a no impact source.

[~~**K. "Potential to emit" or "PTE"** means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of source to emit an air pollutant, including air pollution control equipment, restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if integral to the process or the limitation is federally enforceable through permit or regulation. Any limitation on emissions due to process design must be unchanging and unavoidable physical constraints. The potential-to-emit for nitrogen oxide shall be based on total oxides of nitrogen.~~]

**O. "Proposed allowable emission rate"** means the proposed fee pollutant emission rate that has been requested in a stationary source application submittal.

[~~**L.**~~]**P. "Qualified small business"** means a business that meets all of the following requirements:

(1) a business that has 100 or fewer employees;

(2) a small business concern as defined by the federal Small Business Act;

(3) a source that [~~does not emit more than~~] emits less than 50 tons per year of any individual regulated air pollutant, or less than 75 tons per year of all regulated air pollutants combined; and

(4) a [~~facility~~] source that is not a major source [~~of hazardous air pollutants~~] or major stationary source.

[~~M.~~]**Q. "Regulated air pollutant"** means [~~the following~~]:

(1) nitrogen oxides, total suspended particulate matter, or any volatile organic [~~compounds~~] compound as defined in 40 CFR 51.100(s);

(2) any pollutant for which a national, state or local ambient air quality standard has been promulgated;

(3) any pollutant that is subject to [~~any~~] a standard established in Section 111 of the federal Clean Air Act;

(4) any Class I or II substance subject to [~~any~~] a standard established in Title VI of the federal Clean Air Act; [~~or~~] and

(5) any pollutant subject to [~~a~~] standards or requirements established in Section 112 of the federal Clean Air Act, including:

(a) any pollutant subject to requirements under Section 112(j) of the federal Clean Air Act; and

(b) any pollutant for which the requirements of Section 112(g)(2) of the federal Clean Air Act have been met, but only with respect to the individual source subject to the requirements.

[~~**N. "State air toxic review"** means a case-by-case permit application review of the potential emissions of toxic air pollutants listed in 20.2.72 NMAC, Construction Permits, Section 20.2.72.502 NMAC, Toxic Air Pollutants and Emissions.~~

~~**O. "Stationary source with de minimis emissions"** means a source as defined in 20.11.41 NMAC.~~]

**R. "Technical permit revision" or "technical revision"** means a revision to a permit issued pursuant to 20.11.41 NMAC:

(1) to incorporate a change in the permit if the change only involves a change in monitoring, record keeping or reporting requirements, if the department determines the change does not reduce the enforceability of the permit;

(2) to incorporate a change in the permit if the change only involves incorporating permit conditions, including emissions limitations, but only if the source existed on August 31, 1972, and the source has been in regular operation since that date;

(3) if the permittee wishes to impose a voluntary reduction of an emission limitation or retire an emission unit that was included as a specific permit condition;

(4) to incorporate a change at a facility by replacing an emissions unit for which an allowable emissions rate has been established in the permit, but only if the replacement emissions unit:

(a) is equivalent to the replaced emissions unit, and serves the same function within the facility and process;

(b) has the same or lower capacity and allowable emission rates;

(c) has the same or higher control efficiency, and stack parameters that are at least as effective in dispersing air pollutants;

(d) would not result in an increase of the allowable emission rate of any other equipment at the facility;

(e) is subject to the same or lower allowable emissions limits as the original permit prior to making the replacement and to all other original permit conditions prior to making the technical permit revision request;

(f) will not cause or contribute to a violation of any NAAQS and NMAAQS when operated under applicable permit conditions, and as determined by the department;

(g) will not require additional permit conditions to ensure the enforceability of the permit, such as additional record keeping or reporting in order to establish compliance, as determined by the department; and

(h) does not emit a regulated air contaminant not previously emitted;

(5) in order to reduce the allowable emission rate of a unit or source, by incorporating terms and conditions in the permit, such as a cap on hours of operation, limitations on throughput of a specific product or products, or limitations on equipment capacity; and

(6) to incorporate a change in the permit solely involving the addition of air pollution control equipment or the substitution of a different type of air pollution control equipment to existing equipment if the requested addition or substitution will not result in an increase in the allowable emission rate.

**S. "Submittal"**, when used as a noun, means a document listed in 20.11.2.2 NMAC, and, when used as a verb, means the act of delivering a document listed in 20.11.2.2 NMAC either to the department or filing the document with the board hearing clerk, as required by the applicable procedure.

[20.11.2.7 NMAC - Rp, 20 NMAC 11.02.I.7, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.8 SAVINGS CLAUSE:** Any amendment to 20.11.2 NMAC that is filed with the state records center shall not affect actions pending for violation of a federal or state statute or regulation, a city or county ordinance, or [~~any~~] a board regulation. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part or regulation section in effect at the time the violation was committed.
[20.11.2.8 NMAC - Rp, 20 NMAC 11.02.I.9, 7/1/2001; A, 1/10/11]

**20.11.2.9 SEVERABILITY:** If for any reason any section, paragraph, sentence, clause or word of 20.11.2 NMAC or federal, state or local standard incorporated [~~herein~~] in 20.11.2 NMAC is [~~for any reason held~~] determined to be unconstitutional or otherwise invalid by any court or the United States environmental protection agency, the decision shall not affect the validity of the remaining provisions of 20.11.2 NMAC.
[20.11.2.9 NMAC - Rp, 20 NMAC 11.02.I.10, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.10 DOCUMENTS:** Documents cited and incorporated in 20.11.2 NMAC may be viewed at the Albuquerque Environmental Health Department, One Civic Plaza NW, 3rd Floor, [~~Room~~] Suite 3023, Albuquerque, NM 87102.
[20.11.2.10 NMAC - Rp, 20 NMAC 11.02.I.11, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.11 GENERAL PROVISIONS:**

**A.** [~~At the time of application~~] Any person, including a federal, state or local governmental agency, who [~~files an application pursuant to 20.11.41 NMAC for an initial air quality application review and authority to proceed with construction or any person requesting to modify an existing air quality permit~~] submits a document described in Subsection A of 20.11.2.2 NMAC, shall pay the [~~permit~~] total fee required by 20.11.2 NMAC at the time the document is submitted.

**B.** [~~Any new or existing stationary source that meets the applicability requirements of 20.11.2 NMAC~~] Every person with a valid source registration or a permit issued pursuant to 20.11.20 NMAC, 20.11.40 NMAC, 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC or another board regulation, shall pay an annual emission fee [~~based on the source's potential-to-emit. Sources wishing to reduce their potential-to-emit may do so at any time through the provisions of 20.11.41 NMAC.~~] as required by 20.11.2 NMAC, with the exception of fugitive dust control construction permits, which do not require payment of an annual emission fee.

**[~~C.~~** ~~At the time of submittal, any person filing an application for a fugitive dust control permit with the department pursuant to 20.11.20 NMAC, *Fugitive Dust Control*, shall pay the applicable fee required by 20.11.2 NMAC.~~

**~~D.~~** ~~At the time of notification, any person notifying the department pursuant to 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Source*, of the removal of regulated asbestos containing material shall pay the applicable fee required by 20.11.2 NMAC.~~]

**[~~E.~~]C.** No [~~application~~] notification or submittal will be reviewed or source registration or permit issued unless the owner or operator provides documentary proof satisfactory to the department that either all applicable fees have been paid as required by 20.11.2 NMAC or the owner or operator has been granted a variance [~~in accordance with~~] pursuant to 20.11.7 NMAC, *Variance Procedures*.

**[~~F.~~]D.** All [~~permit~~]fees required to be paid at the time of [~~application~~] notification or submittal shall be paid by check or money order payable to the "City of Albuquerque [~~, permits program~~] fund 242"and either be delivered in person to the Albuquerque Environmental Health Department, [~~finance section,~~] 3rd floor, [~~room~~] Suite 3023 or Suite 3047, Albuquerque - Bernalillo County Government Center ~~(city hall)~~], south building, One Civic Plaza NW, Albuquerque, NM, or mailed to Attn: [~~Finance Section~~] Air Quality Division, Albuquerque Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103. The [~~finance section then~~] department shall [~~send~~] provide a receipt of payment to the applicant. [~~The applicant~~] The person delivering or filing a submittal shall attach a copy of the receipt of payment [~~issued by the finance section~~] to the [~~application~~] submittal as proof of payment. [~~The air quality division cannot accept direct payments.~~]

**[~~G.~~] E.** [~~No person required to pay an annual emission fee pursuant to 20.11.2 NMAC shall be in compliance with their permit unless all applicable fees are paid as required by 20.11.2 NMAC.~~] Failure of the owner or operator of a source to pay an annual emission fee required by 20.11.2 NMAC, is a violation of 20.11.2 NMAC.

**[~~H.~~]F.** No fee or portion of a fee required by 20.11.2 NMAC shall be refunded [~~without~~] unless the written approval of the [~~director. When determining the amount of the refund, the director may deduct a reasonable professional service fee to cover the costs of staff time involved in processing a permit or request.~~] manager is obtained using the procedure required by 20.11.2.16 NMAC.

**G.** As required by 74-2-16 NMSA, all money received by the department pursuant to 20.11.2.13 NMAC, shall be deposited by the city of Albuquerque in the city's air quality permit fund ("fund 242").
[20.11.2.11 NMAC - N, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.12 [~~20.11.41 NMAC,~~] AIR QUALITY SOURCE REGISTRATION AND STATIONARY SOURCE PERMIT APPLICATION FEES; FEE CALCULATIONS AND PROCEDURES:**

**A. Air quality source registration and permits for minor [~~and area~~] sources:** [~~sources applying~~] A person who submits an application for an air quality source registration pursuant to 20.11.40 NMAC or a permit pursuant to 20.11.41 NMAC shall pay the applicable [~~fee found~~] fees provided in Section 20.11.2.18 NMAC.

**B. [~~Case-by-case air quality review prior to the~~] 20.11.41 NMAC, *Authority-to-Construct* permits required to be issued before construction of a stationary source whose applicability is determined by 'pound-per-hour' or 'ton-per-year' emissions:**

(1) [~~Case-by-case air quality~~] Authority-to-construct application review fees shall be calculated based on the proposed source's [~~potential to-emit~~]proposed allowable emission rate for fee pollutants. Federally approved state implementation plan limitations may be used to determine a source's [~~potential to-emit~~] proposed allowable emission rate.

(2) Fugitive emissions shall be included in the application submittal to determine the source's [~~potential to-emit~~] proposed allowable emission rate.

(3) For sources that become subject to 20.11.42 NMAC, emissions from operations [~~determined by the department~~] that the department determines to be insignificant activities shall not be included in the calculation.

(4) For each fee pollutant, calculate the [~~potential to-emit~~] proposed allowable emission rate for each proposed emission unit to the nearest tenth of a ton. Total each of the fee pollutants from each proposed emission unit and express the value in tons per calendar year as a whole number. When rounding, if the number after the decimal point is less than 5, the whole number remains unchanged. If the number after the decimal point is 5 or greater, the whole number shall be rounded up to next whole number.

(5) The applicant shall determine the 20.11.41 NMAC application review fee [~~shall be determined by comparing the~~] by applying the proposed source's calculated [~~potential to-emit~~] proposed allowable emission rate for the single highest fee pollutant in tons per year [~~with the fee schedule found~~] to the applicable 20.11.41

NMAC application review fee provided in [~~Section~~] Subsection C of 20.11.2.18 NMAC.

(6) In addition to paying the application review [~~fees~~] fee, a [~~source proposing~~] person who proposes to construct [~~any~~] an emission unit or units that must comply with the provisions of 20.11.60 NMAC, *Permitting in Nonattainment Areas;* 20.11.61 NMAC, *Prevention of Significant Deterioration*; [~~20.11.62 NMAC, *Acid Rain*,~~] 20.11.63 NMAC, *New Source Performance Standards for Stationary Sources;* or 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*, [~~also~~]shall also pay the applicable federal program review fees listed in [~~Section~~] Subsection D of 20.11.2.18 NMAC.

(7) Example: A [~~company~~] person proposes to build a facility with a NSPS boiler with a [~~potential to emit~~] proposed allowable emission rate of greater than 100 tons per year of NOx. [~~From the fee schedule found in 20.11.2.18 NMAC, the company will be required to pay an initial air quality review fee of $5,000.00 with an addition federal program review fee of $1,000.00 for the NSPS boiler, for a total fee of $6,000.00.~~] The person shall determine and pay an application review fee of $7,500.00, as required by Subsection C of 20.11.2.18 NMAC and a federal program review fee of $1,000.00 for the NSPS boiler, as required by Subsection D of 20.11.2.18 NMAC, for a total fee of $8,500.00. The [~~review~~] total fee shall be submitted [~~at the time of~~] with the application [~~in accordance with the procedures found in~~] as required by Subsections [~~E and F~~] A, C, and D of 20.11.2.11 NMAC.

[~~(8) Sources submitting an application for the removal of regulated asbestos containing material pursuant to 20.11.64 NMAC shall comply with the provisions of 20.11.2.14 NMAC.~~]

**C.** Authority-to-construct permits required to be issued before construction of a stationary source whose applicability is not determined by pound-per-hour or ton-per-year emissions shall pay the applicable application fee provided in Subsection B of 20.11.2.18 NMAC.

[~~**C.**~~]**D. Permit revisions, portable stationary source relocations and permit modifications:**

(1) [~~At the time of application , any source proposing to modify an existing air quality permit shall pay the applicable fee found in Section 20.11.2.18 NMAC~~] The person requesting a permit revision, relocation or modification, as the terms are defined in the applicable board regulation, shall pay the fee required by the applicable provisions of 20.11.2.19 NMAC and 20.11.2.20 NMAC.

(2) [~~Any proposed modifications to an existing air quality permit that must comply with the provisions of 20.11.60 NMAC, *Permitting in Non-Attainment Areas*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, 20.11.62 NMAC, *Acid Rain*, 20.11.63 NMAC, *New Source Performance Standards for Stationary Sources*, or 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*, also requires the applicant to pay the applicable federal program review fee, but only with respect to the individual emission unit subject to the requirement~~] Payment of an applicable federal program review fee, provided in Subsection D of 20.11.2.18 NMAC is required only with respect to the individual emission unit that is subject to relocation or modification.

**[~~D.~~]E.** Qualified small businesses shall pay one-half of the [~~calculated case-by-case air quality review fees prior to adding any federal program review or state toxic review fees~~] Application review fees for 20.11.41 NMAC, or other board regulation, and 100 % of all applicable federal program review fees.

[20.11.2.12 NMAC - Rp, 20 NMAC 11.02. II.1, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.13 ANNUAL EMISSION FEES; FEE CALCULATIONS AND PROCEDURES:**

**A.** [~~By June 1 of each year, the department shall send each owner/operator a letter stating the fee amount owed. The owner/operator has 45 days from receipt of the letter to contact the department to request a correction to the records or submit a complete application within 45 days of receipt of the letter to modify an existing permit reducing the source's allowable emission rate.~~] By June 1 of each year, the department shall send each owner or operator with either a valid source registration pursuant to 20.11.40 NMAC, a fugitive dust control programmatic permit issued pursuant to 20.11.20 NMAC, or a permit issued pursuant to 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC, or other board regulation, a letter stating the annual emission fee amount. If the owner or operator wishes to challenge or request a correction to the letter, then within 30 days after the owner or operator has received the letter from the department, the owner or operator shall deliver a written request to the department challenging the letter or requesting a correction to the letter. An owner or operator who submits a request to challenge or correct an error regarding the annual emission fee shall state in writing the basis upon which the fee was computed and shall follow the procedures set out in 20.11.2.16 NMAC.

**B.** [~~Starting August 1 of each year, each owner/operator shall be sent an official invoice by the city of Albuquerque stating the annual emission fee due, which the owner/operator shall pay consistent with the directions stated in the invoice. If the department does not send the owner/operator an annual letter or invoice stating the annual emission fee that is due, the owner/operator is not authorized to continue operating the source without having first paid the applicable annual emission fee.~~] Beginning August 1 of each year the city of Albuquerque shall send each owner or operator with either a valid source registration pursuant to 20.11.40 NMAC, a fugitive dust control programmatic permit issued pursuant to 20.11.20 NMAC, or a permit issued pursuant to 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC, or other board regulation, an official invoice stating the annual emission fee due. The owner or operator shall pay the invoiced amount in full as directed in the invoice. All incorrect-fee challenges shall follow the appeal procedures set forth in 20.11.2.16 NMAC.

[~~**C.** As required by 74-2-16 NMSA, all monies received pursuant to Section 20.11.2.13 NMAC shall be deposited in the city of Albuquerque, permits program (fund 242).~~]

**[~~D.~~]C. Calculating annual emission fees:**

(1) For a fugitive dust control programmatic permit, the annual fee shall be calculated as required by Subsection J of 20.11.2.15 NMAC.

(2) For a source registration, the annual emission fee shall be the minimum annual emission fee as provided in 20.11.2.21NMAC.

[~~(1)~~](3) [~~For each source, the potential-to-emit~~] For all other permitted sources, the allowable emission rate for each fee pollutant shall be totaled and expressed in tons per calendar year as a whole number. When rounding, if the number after the decimal point is less than five, the whole number remains unchanged. If the number after the decimal point is five or greater, the whole number shall be rounded up to next whole number.

[~~(2)~~] The sum of each fee pollutant expressed in tons, shall be multiplied by the [~~appropriate~~] applicable annual emission fee [~~listed~~] rate provided in [~~Section 20.11.2.18 NMAC~~] Section 20.11.2.21 NMAC, then totaled to determine the annual emission fee due.

[~~(3) The source shall pay either the minimum annual emission fee or the calculated emission fee, whichever is greater~~].

**[~~E.~~]D.** [~~Sources wishing to reduce their potential-to-emit may apply for a permit or modify their existing permit consistent with the provisions of 20.11.41 NMAC.~~] An owner or operator who wishes

to reduce the annual emission fee for a source may apply for a modification to the existing permit and shall comply with the requirements of 20.11.20 NMAC, 20.11.41 NMAC, or 20.11.42 NMAC, as applicable.

**E.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to the annual emission fee rates. The annual emission fee rates pursuant to Subsection A of 20.11.2.21 NMAC shall be adjusted by an amount equal to the increase in the consumer price index for the immediately-preceding year. Annual emission fee adjustment amounts equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Annual emission fee adjustments totaling less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the annual emission fee rates on the city of Albuquerque environmental health department air quality division website.

[20.11.2.13 NMAC - Rp, 20 NMAC 11.02. II.2, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.14 FILING [~~AND INSPECTION~~] FEES FOR [~~THE~~] REMOVAL OF REGULATED ASBESTOS CONTAINING MATERIAL; FEE CALCULATIONS AND PROCEDURES:**

**A. [**~~At the time of notification, a filing and inspection fee shall be paid by the owner/operator removing regulated asbestos containing material pursuant to 20.11.64 NMAC, Emission Standards for Hazardous Air Pollutants for Stationary Sources, and the federal regulations incorporated therein.~~] A filing fee of $21.00 per asbestos unit (AU), adjusted as required by Subsection D of 20.11.2.14 NMAC, shall be paid at the time notification is delivered to the department as required by 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*.

**B.** The filing [~~and inspection~~] fee shall be calculated by multiplying the total number of asbestos units proposed to be removed, by the fee per asbestos unit (AU) [~~by the applicable fee in 20.11.2.18 NMAC~~] provided in Subsection A of 20.11.2.14 NMAC. Equation 1 at Paragraph (1) of Subsection B of 20.11.2.14 NMAC shall be used to calculate the total asbestos units (AU) removed and filing fee amount due at the time the notification is delivered to the department:

(1) [~~Total Due~~] **Equation 1:** Amount due at time of filing = AU x AU fee = [(SF / 160) + (LF / 260) + (CF / 35)] x AU [~~(Equation 1)~~] fee;

[~~(2)~~] where: SF = square feet of asbestos containing material to be removed; LF = linear feet of asbestos containing material to be removed; CF = cubic feet of asbestos containing material to be removed; and AU fee = filing fee per asbestos unit.

[~~(3)~~](2) Example: A contractor proposes to remove 320 square feet (SF), 260 linear feet (LF) and 70 cubic feet (CF) of regulated asbestos containing material.

~~[(4) From the example above: SF=320; LF=260; CF=70; and AU= $21.00 (from Section 20.11.2.18 NMAC).~~

~~(5) From Equation 1:~~] Therefore, [(SF / 160) + (LF / 260) + (CF / 35)] x AU fee = [(320 / 160) + (260 / 260) + (70 / 35)] x $21.00 = [(2) + (1) + (2)] x $21.00 = 5 x $21.00 = $105.00

~~[(6) Result: The contractor must pay $105.00 at the time of notification.~~]

**C.** All fees due pursuant to Section 20.11.2.14 NMAC shall be paid [~~in accordance with the procedures found in~~] as required by Subsections A, C, and D, [~~E and F~~] of 20.11.2.11 NMAC, except that the word "applicant" shall be substituted for the phrase "owner/operator".

**D.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to the asbestos unit fee. The asbestos unit fee established in Subsection A of 20.11.2.14 NMAC shall be adjusted by an amount equal to the increase in the consumer price index for the immediately-preceding year. The applicable consumer price index is the all-urban consumer price index published by the United States department of labor. Asbestos unit fee adjustment amounts equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Asbestos unit fee adjustments totaling less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the asbestos unit fee rate on the city of Albuquerque environmental health department air quality division website.

**E.** If asbestos removal begins before both the notification and filing fee are delivered to the department as required by 20.11.2.14 NMAC, the person removing asbestos shall also pay a $100.00 late fee, to partially offset the additional related costs. In addition to the late fee, penalties may be assessed pursuant to the New Mexico Air Quality Control Act, Chapter 74, Article 2, New Mexico Statutes Annotated 1978.

**F.** An annual fee is not required for sources that are solely subject to 20.11.2.14 NMAC.

[20.11.2.14 NMAC - Rp, 20 NMAC 11.02. II.2, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.15 FEES FOR FUGITIVE DUST CONTROL PERMITS AND INSPECTIONS; FEE CALCULATIONS AND PROCEDURES:**

**A. [**~~Each source required by 20.11.20 NMAC to obtain a fugitive dust control permit~~] Every person required to submit a permit application for a fugitive dust control construction permit as defined in 20.11.20.7 NMAC shall pay the total fee due at the time the permit application is submitted to the department.

**B.** The filing and review fee for a [~~non-programmatic~~] fugitive dust control construction permit for a project that is at least:

(1) [~~for projects that are~~] three-quarters of an acre or more, but less than 2 acres is $250.00;

(2) [~~for projects that are at least~~] 2 acres, but less than 5 acres is $350.00;

(3) [~~for projects that are at least~~] 5 acres, but less than 15 acres is $450.00; and

(4) [~~for projects that are at least~~] 15 acres or more is $550.00.

**C.** To calculate the [~~non-programmatic~~] fugitive dust control construction permit inspection fee, (which is in addition to the [~~above non-programmatic permit~~] filing and review fee required by Subsection B of 20.11.2.15 NMAC), multiply the acreage on which active operations or disturbance will occur by [~~$100.00~~] $115.00 per acre. The number of acres must be expressed as a whole number. When rounding, if the number after the decimal point is less than five, the whole number remains unchanged. If the number after the decimal point is five or greater, the whole number shall be rounded up to the next whole number. Rounding of acres shall occur before the fees are calculated.

**D.** All filing and review fees, and inspection fees required by 20.11.2.15 NMAC for a fugitive dust control construction permit shall be paid as required by Subsections A, C, and D of 20.11.2.11 NMAC.

**E.** If an application to obtain a fugitive dust control construction permit is submitted after active operations have commenced at the project location, a late fee of 50 percent of both the filing and review fee and the inspection fee shall be assessed to partially offset the additional related costs. In addition, penalties may be assessed pursuant to the New Mexico Air Quality Control Act, Chapter 74, Article 2 New Mexico Statutes Annotated 1978.

**F.** An annual fee is not required for sources that are solely subject to a fugitive dust control construction permit.

**[~~D.~~]G.** To calculate the [~~programmatic~~] fugitive dust control programmatic permit annual fee, multiply the acreage upon which routine maintenance or routine ongoing active operations will occur by the applicable emission control factor for a low impact source, moderate impact source, or high impact source as defined in Section 20.11.2.7 NMAC and then multiply by [~~$110.00~~] $127.00. [~~The~~

~~air quality division (division) has~~] A "source classification guidebook" [~~that~~] is available through the department which includes nonbinding examples of how to classify a no impact source, low impact source, a moderate impact source and a high impact source. The number of acres must be expressed as a whole number. When rounding, if the number after the decimal point is less than five, the whole number remains unchanged. If the number after the decimal point is five or greater, the whole number shall be rounded up to the next whole number. Rounding of acres shall occur before the fees are calculated using the applicable emission control factor in Section 20.11.2.7 NMAC. No filing and review fee is required for a programmatic permit. The total annual programmatic permit fee is:

(1) the fee calculated for any low impact source acres; plus

(2) the fee calculated for any moderate impact source acres; plus

(3) the fee calculated for any high impact source acres. However, the maximum combined fee shall not exceed $10,000.00.

**[~~E.~~]**(4) No fee shall be paid for "no impact source" acreage.

**[~~F.~~]H.** Example: The application for a programmatic permit includes a total of 20 acres, of which 2 acres are no impact source acres, 8 acres are low impact source acres, 5 acres are moderate impact source acres, and 5 acres are high impact source acres. To calculate the programmatic permit fee: 2 no impact source acres x 0 = 0 acres. 8 low impact source acres x 0.1 = 0.8 acre. 5 moderate impact acres x 0.5 = 2.5 acres. 5 high impact source acres x 0.9 = 4.5 acres. Therefore, 0 acres, plus 0.8 acre, plus 2.5 acres, plus 4.5 acres = a total of 7.8 acres. 7.8 acres x [~~$110.00~~] $127.00 per acre = a total programmatic permit fee of [~~$858.00~~] $991.00.

**[~~G.~~]I.** [~~The division will begin work on the programmatic permit program immediately after the adoption of 20.11.20 NMAC, Fees. All applicants shall obtain a programmatic permit by July 1, 2004, which is the date upon which all programmatic permits shall become effective during the first annual permit cycle. After June 30, 2005, the term of each programmatic permit will be from July 1 through the following June 30, and annual programmatic permit fees shall be paid for each annual term.~~] When a programmatic permit application is submitted, the applicant may either ask the [~~division~~] department to determine the annual fee to be paid by the applicant, or the applicant may submit a proposed annual fee calculation. No later than [~~eight working~~] 10 business days after the [~~division~~] department has received the programmatic permit application and the proposed fee calculation, the [~~division~~] department shall notify the applicant in writing of the total fees due. The applicant and the department may agree in writing to extend the deadline for the department to issue the programmatic permit in order to attempt to resolve any pending issues, including any dispute over the source classification or fee calculation. [~~The total fees due must be paid to the department before the department will issue a programmatic permit.~~] A permit applicant may challenge the department's determination of source classification or annual programmatic fee calculation for a fugitive dust control permit by following the procedures [~~established by~~] provided in Section 20.11.20.25 NMAC.

**J.** The annual term of each programmatic permit will be from July 1 through the following June 30. Annual programmatic permit fees shall be paid for each additional annual term and shall be calculated in the same manner as the annual fee that is paid for a programmatic permit, as provided in Subsection G of 20.11.2.15 NMAC.

**[~~H.~~]K.** [~~All fees due pursuant to Section 20.11.2.15 NMAC shall be paid in accordance with the procedures found in Subsections C, E, and F of Section 20.11.2.11 NMAC~~] Annual fees required by Subsection J of 20.11.2.15 NMAC for a fugitive dust control programmatic permit shall be paid as required by Subsections B, D and E of Section 20.11.2.11 NMAC and Subsection J of 20.11.2.15 NMAC.

**L.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to each fugitive dust fee. The fugitive dust fee required by Subsections C and G of 20.11.2.15 NMAC shall be increased by an amount equal to the change in the consumer price index for the immediately-preceding year. The applicable consumer price index is the all-urban consumer price index published by the United States department of labor. Fugitive dust fee adjustments equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Fugitive dust fee adjustment amounts less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the fugitive dust fee rates on the city of Albuquerque environmental health department air quality division website.

**M. Demolition activities – fugitive dust control construction permit fee:** Pursuant to 20.11.20.22 NMAC, no person shall demolish any building containing over 75,000 cubic feet of space without first submitting to the department a fugitive dust control construction permit application and fugitive dust control plan, accompanied by a filing and review fee that shall be the same as the filing and review fee required by Paragraph (1) of Subsection B of 20.11.2.15 NMAC, plus the fee charged for a 1-acre site as required by Subsection C of 20.11.2.15 NMAC. The total fugitive dust control construction fee shall be paid as required by Subsections D through F of 20.11.2.15 NMAC.

[20.11.2.15 NMAC - N, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.16 FEE ERRORS, CORRECTIONS AND REFUNDS:**

**A.** [~~For permits other than fugitive dust control permits, within 30 days of receiving an invoice from the city, any person who does not agree with the amount due may request a review by the director to correct any errors or challenge the basis upon which the fee was computed. If the director has not received a written request or challenge within 30 days after the payor receives the invoice, the invoice shall be final.~~] Pursuant to 20.11.20.17 NMAC, *Filing Review and Inspection Fees*, the filing and review fees portion of the total permit application fee due at time of submittal for a fugitive dust control construction permit application are non-refundable.

**B.** [~~If fees are due at the time of application the payor must pay the required fee, and then request a review within 30 days of payment~~] For all review fees that are due at the time of submittal, the person submitting the document (payor) shall pay the required review fee in full. If the payor wishes to request correction of an alleged error or to challenge the basis of a fee calculation, then, within 30 days after the payor delivers the submittal and the fee, the payor shall deliver a written request for review by a manager of the division ("manager"). The written request shall be addressed as required by Subsection D of 20.11.2.16 NMAC. If the manager has not received a written request for review within 30 days of submittal, the fee shall be deemed final.

**C.** An owner or operator (payor) who does not agree with the annual fee amount due may deliver a written request to the manager asking for a correction of an alleged error or challenging the basis upon which the fee was computed. Requests must be delivered to the manager within 30 days of payor's receipt of an invoice from the city requiring payment of an annual fee. If the manager has not received a written request for correction of an alleged error or a challenge to the basis of the fee calculation within 30 days after the payor receives the invoice, the invoice shall be deemed final, and immediately paid by the payor.

**[~~C.~~] D.** All written requests for review of a submittal or an annual fee shall be sent to: [~~Division~~] Manager, Air Quality Division, Albuquerque Environmental Health Department, Air Quality Division, P.O. Box 1293, Albuquerque, NM 87103, or hand-delivered to: Manager, Air Quality

Division, Albuquerque Environmental Health Department, 3rd floor, Suite 3023 or 3047, Albuquerque - Bernalillo County Government Center, south building, One Civic Plaza NW, Albuquerque, NM.

**[D.] E.** The request for review [must] of a submittal or annual fee shall include:

(1) the name [of the owner/operator], address and telephone number of the payor;

(2) the dollar amount of the alleged error or challenged calculation; and

(3) a description of the alleged error or basis of the challenge and any other information the payor believes may support the claim.

**[E.]F.** Within [30]45 days of receiving the request for review of the submittal or annual fee, the [director] manager shall [audit] review the account and either:

(1) amend the invoice [or bill] and refund any money due the payor; [or]

(2) state that the invoice [or bill] is correct; or

(3) require additional fee payment if the manager determines that the payor delivered an insufficient fee to the department.

**[F.]G.** The [director] manager may confer with the payor to obtain additional information during the [audit] review period.

**[G.]H.** Within 10 [working days of the director's decision concerning the] business days after the manager completes the manager's review, the manager's decision shall be sent by certified mail to the address provided by the payor

**[H.]I.** If the manager determines a refund is [due] owed to the payor, the department shall refund [any] all money due consistent with the policies and procedures of the city of Albuquerque. If a refund is owed, the manager may deduct a reasonable professional service fee to cover the costs of staff time involved in processing the review. However, if the manager determines the department or the city made the error, no deduction shall be made from the amount refunded.

**[I.]J.** [The director's decision may be appealed to the board] As authorized by NMSA Section 74-2-9, the manager's decision may be appealed to the board using the procedures described in 20.11.81 NMAC, *Adjudicatory Procedures – Air Quality Control Board*.

[20.11.2.16 NMAC - N, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.17 FAILURE TO PAY; LATE FEE:**

**A.** [It shall be a violation of 20.11.2 NMAC to fail to pay any fee required by 20.11.2 NMAC, a director's decision or a board regulation.] Failure to pay any fee required by 20.11.2 NMAC, a manager's decision made pursuant to 20.11.2.16 NMAC, or a board regulation is a violation of 20.11.2 NMAC.

**B.** All incorrect-fee challenges shall follow the appeal procedures set forth in 20.11.2.16 NMAC. Stating an invoice is in error shall not be a defense to violation of Section 20.11.2.17 NMAC.

**C.** [In addition to paying past due fees, the payor shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with the section of the Internal Revenue Code relating to computation of interest on underpayment of federal taxes.] Every person who is required by 20.11.2 NMAC to pay an annual emission fee but who does not submit payment in full as directed in the invoice shall pay an additional 50 percent of the annual emission fee, plus interest, as a late fee to partially offset related costs. Interest shall be computed in accordance with the section of the internal revenue code relating to computing interest on underpayment of federal taxes.

**D.** In addition to paying a late fee for late delivery of an annual emission fee, the payor may be required to pay a penalty, as authorized by the New Mexico Air Quality Control Act, Chapter 74, Article 2, New Mexico Statutes Annotated 1978.

[20.11.2.17 NMAC - Rp, 20 NMAC 11.02. II.2, 7/1/2001; A, 3/1/04; A, 1/10/11]

**20.11.2.18 [FEE SCHEDULE] REVIEW FEES:**

**A.** [**Annual emission fees:** Sources issued a registration or permit pursuant to 20.11.40 NMAC, 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, or 20.11.61 NMAC shall pay a minimum annual emission fee of $150.00 or the annual emission fee calculated consistent with Section 20.11.2.13 NMAC, which ever is greater. The following fee pollutant rates shall be used in calculating the annual emission fee, unless otherwise listed:

(1) non-hazardous fee pollutants: $31.00 per ton;

(2) hazardous fee pollutants (non-major sources): $31.00 per ton;

(3) hazardous fee pollutants (major sources): $250.00 per ton; and

(4) annual emission fees for specific source categories:

(a) auto body repair and painting: $150.00;

(b) chromium electroplating: $150.00;

(c) degreasers using organic solvents:

(i) non-halogenated solvents using less than 2,200 gallons of any one solvent-containing material or 5,400 gallons or more of any combination of solvent-containing materials: $150.00; and

(ii) halogenated solvents using less than 1,200 gallons of any one solvent-containing material or 2,900 gallons or more of any combination of solvent-containing materials: $150.00;

(d) dry cleaners (non-major): $150.00;

(e) emergency generators: $150.00 or $31.00 per ton, whichever is greater;

(f) gasoline service and fleet stations: $250 or $31.00 per ton, which ever is greater;

(g) stand alone natural gas or distillate fueled fired boilers less than 10 million BTU used exclusively for residential, commercial or institutional heating and hot water: no charge;

(h) printing, publishing and packaging operations:

(i) sheetfed (nonheatset) offset lithography using less than 7,125 gallons of clean solvent and fountain solution additives per year: $150.00;

(ii) nonheatset web offset lithography using less than 7,125 gallons of solvent and fountain solution additive per year: $150.00;

(iii) heatset web offset lithography using less than 50,000 pounds of ink, cleaning solvent, and fountain solution additives: $150.00;

(iv) screen printing using less than 7,125 gallons of total solvent used including solvent-based inks, cleaning solvents, adhesives and coatings: $150.00;

(v) flexography (water-based or UV-cured inks, coating and adhesives) using less than 200,000 pounds total of inks, coatings and adhesives: $150.00;

(i) soil and/or water remediation operations: $150.00; and

(j) stationary sources with de minimis emissions: no charge.] **Source registration review fees:** A person with a stationary source that is required by 20.11.40 NMAC to submit a source registration shall pay a registration review fee of $500.00 when the registration application is delivered to the department.

**B.** [**Air quality application review fees for sources requiring permits pursuant to 20.11.40 NMAC or 20.11.41 NMAC:**

(1) auto body repair and painting: $500.00;

(2) dry cleaners: $500.00;

(3) emergency generators: $500.00;

(4) generic coating and abrasive operations: $500.00;

(5) other fueling facilities receiving fuel by truck or rail (non-NSPS): $1000.00;

~~(6) non-NSPS boilers (greater than 10 million BTU): $500.00;~~

~~(7) printing and packaging operations: $500.00;~~

~~(8) retail and fleet gasoline service stations: $500.00; and~~

~~(9) soil/water remediation systems: $1000.00.~~] **Permit application review fees for stationary sources that require permits pursuant to 20.11.41 NMAC or other board regulation, and that are not subject to Subsection C of 20.11.2.18 NMAC:** $1,000.00.

**C.** [**~~Case-by-case air quality application review fees for sources requiring permits pursuant to 20.11.40 NMAC or 20.11.41 NMAC (based on a source's potential-to-emit for the single highest pollutant):~~**] **Ton-per-year application review fees for stationary sources that require permits pursuant to 20.11.41 NMAC or other board regulation, and whose applicability is based on the source's pound per hour or ton per year emissions**: A person with a stationary source that is required by Subsection C of 20.11.2.18 NMAC to obtain a permit and whose applicability is determined by pound per hour or ton per year emissions shall pay the following application review fee, based on the source's ton per year proposed allowable emission rate for the single highest fee pollutant:

(1) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than one ton per year and less than five tons per year: [~~$500.00~~] $750.00;

(2) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than 5 tons per year and less than 25 tons per year: [~~$1,000.00~~] $1,500.00;

(3) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than 25 tons per year and less than 50 tons per year: [~~$2,000.00~~] $3,000.00;

(4) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than 50 tons per year and less than 75 tons per year: [~~$3,000.00~~] $4,500.00;

(5) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than 75 tons per year and less than 100 tons per year: [~~$4,000.00~~] $6,000.00; and

(6) proposed sources with a [~~potential to-emit~~] proposed allowable emission rate equal to or greater than 100 tons per year: [~~$5,000.00~~] $7,500.00.

**D. Federal program [~~and state toxic air pollutant application~~] review fees due in addition to the [~~air quality~~]stationary source permit application review fees:** A person with a stationary source that is required by 20.11.41 to apply for a permit and pay a review fee pursuant to Subsection B or Subsection C of 20.11.2.18 NMAC shall also pay the federal program review fee for each applicable federal program standard or review listed in Paragraphs (1) through (5) of Subsection D of 20.11.2.18 NMAC:

(1) for review of each 40 CFR 60 [~~standards~~] standard: $1,000.00;

(2) for review of each 40 CFR 61 [~~standards~~] standard: $1,000.00;

(3) for review of each 40 CFR 63 [~~standards~~] promulgated standard: $1000.00;

[~~(a) promulgated standards: $2,000.00;~~]

[~~(b)~~](4) for each case-by-case 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*, maximum achievable control technology (MACT) review: $10,000.00; and

[~~(4)~~](5) [~~PSD/non-attainment~~] for each 20.11.61 NMAC, *Prevention of Significant Deterioration*, and 20.11.60 NMAC, *Permitting in Nonattainment Areas*, review: $5,000.00.

[~~(5) acid rain review: $5,000.00; and~~

~~(6) state toxic air pollutant review: $500.00~~

~~**E. Permit modifications:**~~

~~(1) P2 modifications: no charge;~~

~~(2) minor/flexible permit modifications: $1,000.00; and~~

~~(3) major modifications: $5,000.00;~~]

**E.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to the application review fees. The application review fees established in Subsection A through D of 20.11.2.18 NMAC shall be adjusted by an amount equal to the increase in the consumer price index for the immediately-preceding year. Application review fees adjustments equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Application review fees adjustments totaling less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the application review fees on the city of Albuquerque environmental health department air quality division website.

~~**F. Portable source relocation fee:** $250.00;~~

~~**G. Administrative modifications to existing permit:** $100.00;~~

~~**H. Asbestos unit (AU):** $21.00;~~

~~**I. Administrative fees:**~~

~~(1) Professional services fee: $75.00 per staff hour;~~

~~(2) Photocopying and other copies of public records: as provided by the New Mexico Inspection of Public Records Act and by the applicable city of Albuquerque ordinance and administrative instruction number 1-7.~~

~~(3) Regulation compilation: $20.00; and~~

~~(4) Public records research fee: $50.00 per staff hour. However, the charge for copying public records shall not include a separate charge for staff time for locating and copying the documents.~~

~~**J. Variance request fees:** any person who petitions for a variance shall pay a fee of $1,500.00, unless the fee is determined by the board at a hearing to impose an undue economic burden on the petitioner.~~

~~**K. Board hearing filing fees:** Any person who requests a hearing before the board to challenge the issuance of a permit, the terms of a permit or permit modification, the department's refusal to issue a permit, or the department's determination of a source classification or fee calculation for a fugitive dust control permit shall be charged a filing fee of $125.00.~~]

[20.11.2.18 NMAC - Rp, 20 NMAC 11.02.II.2, 7/1/2001; A, 3/1/04; A, 12/16/06; A, 1/10/11]

**20.11.2.19 APPLICATION REVIEW FEES FOR MODIFICATION OF EXISTING PERMITS:**

**A. Modifications:** A person who submits an application for a proposed modification to an existing stationary source permit shall pay either $1000.00 if subject to Subsection B of 20.11.2.18 NMAC, or the applicable fee listed in Paragraphs (1)-(6) of Subsection A of 20.11.2.19 NMAC based on the source's ton-per-year proposed allowable emission rate for the single highest fee pollutant: The applicant shall round the calculations as described in Paragraph 4 of Subsection B of 20.11.2.12 NMAC:

(1) proposed sources with a proposed allowable emission rate equal to or greater than one ton per year and less than five tons per year: $750.00;

(2) proposed sources with a proposed allowable emission rate equal to or greater than 5 tons per year and less than 25 tons per year: $1,500.00;

(3) proposed sources with a proposed allowable emission rate equal to or greater than 25 tons per year and less than 50 tons per year: $3,000.00;

(4) proposed sources with a proposed allowable emission rate equal to or greater than 50 tons per year and less than 75 tons per year: $4,500.00;

(5) proposed sources with a proposed allowable emission rate equal to or greater than 75 tons per year and less than 100 tons per year: $6,000.00; and

(6) proposed sources with a

proposed allowable emission rate equal to or greater than 100 tons per year: $7,500.00.

**B. Major modifications:** A person, who submits an application for a proposed modification to an existing stationary source permit, shall pay the following fee as applicable in addition to the application review fee required by Subsection A of 20.11.2.19 NMAC. The applicant shall round the calculations as described in Paragraph 4 of Subsection B of 20.11.2.12 NMAC.

(1) 20.11.60 NMAC, *Permitting in Non-Attainment Areas*, major modification: $5,000.00; and

(2) 20.11.61 NMAC, *Prevention of Significant Deterioration*, major modification: $5,000.00.

**C. Federal program review fees for modification of an existing permit:** A person proposing a modification to an existing stationary source permit shall pay a review fee pursuant to Subsection A or Subsection B of 20.11.2.19 NMAC, and shall also pay the federal program review fee for each applicable federal program standard or review listed in Paragraphs (1) through (5) of Subsection C of 20.11.2.19 NMAC, if the federal program review is triggered by the modification:

(1) for review of each 40 CFR 60 standard: $1,000.00;

(2) for review of each 40 CFR 61 standard: $1,000.00;

(3) for review of each 40 CFR 63 standards promulgated standard: $1000.00;

(4) for each case-by-case 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*, maximum achievable control technology (MACT) review: $10,000.00; and

(5) for each 20.11.61 NMAC, *Prevention of Significant Deterioration*, and 20.11.60 NMAC, *Permitting in Nonattainment Areas*, review: $5,000.00.

**D.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to the application review fees required by 20.11.2.19 NMAC. The application review fees established by Subsections A, B and C of 20.11.2.19 NMAC shall be adjusted by an amount equal to the increase in the consumer price index for the immediately-preceding year. Application review fee adjustments equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Application review fee adjustments totaling less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the application review fee rates on the city of Albuquerque environmental health department air quality division website.

[20.11.2.19 NMAC - N, 1/10/11]

**20.11.2.20 ADMINISTRATIVE AND TECHNICAL REVISION APPLICATION FEES; PORTABLE STATIONARY SOURCE RELOCATION FEES:**

**A. Revision fees:**

(1) administrative revisions to permits issued pursuant to 20.11.41 NMAC: $250.00;

(2) technical revisions to permits issued pursuant to 20.11.41 NMAC: $500.00.

**B. Portable stationary source relocation fees:**

(1) no new air dispersion modeling required: $500.00;

(2) new air dispersion modeling required: $750.00.

[20.11.2.20 NMAC - N, 1/10/11]

**20.11.2.21 ANNUAL EMISSIONS FEES AND RATES FOR STATIONARY SOURCES:**

**A.** Source registration: $185.00.

**B.** Permitted source: Sources issued a permit pursuant to 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC or other board regulation, shall pay a minimum annual emission fee of $185.00 or $44.00 per ton, whichever is greater. The annual emission fee shall be calculated as required by Subsection C of 20.11.2.13 NMAC.

**C.** Hazardous fee pollutants (major sources): $308.00 per ton.

**D**. Stationary sources that require permits pursuant to 20.11.41 NMAC or other board regulation, and that are not subject to Subsection C of 20.11.2.18 NMAC shall pay an annual emission fee of $185.00.

**E.** The following sources shall pay a minimum annual emission fee of $308.00 or a fee of $44.00 per ton whichever is greater, with the annual emission fee calculated as required by Subsection C of 20.11.2.13 NMAC:

(1) emergency generators; and

(2) gasoline service and fleet stations.

**F.** Beginning January 1, 2011, and every January 1 thereafter, an increase based on the consumer price index shall be added to the annual emission fee and rates required by 20.11.2.21 NMAC. The annual emission fees and rates pursuant to 20.11.2.21 NMAC shall be adjusted by an amount equal to the increase in the consumer price index for the immediately-preceding year. Annual emission fee and rate adjustments equal to or greater than fifty cents ($0.50) shall be rounded up to the next highest whole dollar. Annual emission fee and rate adjustments totaling less than fifty cents ($0.50) shall be rounded down to the next lowest whole dollar. The department shall post the annual emission fees and rates on the city of Albuquerque environmental health department air quality division website.

[20.11.2.21 NMAC - N, 1/10/11]

**20.11.2.22 MISCELLANEOUS FEES -- ADMINISTRATIVE FEES; VARIANCE REQUEST FEES; BOARD HEARING FILING FEES.**

**A. Administrative fees:**

(1) Professional services fee: $92.00 per staff hour.

(2) Photocopying and other copies of public records: as provided by the New Mexico Inspection of Public Records Act and by the applicable city of Albuquerque ordinance and city administrative instruction number 1-7. The charge for copying public records shall not include a separate charge for staff time for locating and copying documents or for determining whether documents are exempt from inspection and copying.

**B. Variance request fees:** Every person who petitions for a variance shall pay a fee of $1500.00, unless the board determines at a hearing that the variance fee imposes an undue economic burden on the petitioner.

**C. Board hearing filing fees:** Every person who requests a hearing before the board shall pay a filing fee of $125.00, which shall be delivered to the board hearing clerk with the petition or other document that requests a hearing before the board. However, the hearing filing fee does not apply to requests for rulemaking hearings or to board hearings regarding decisions made by the Albuquerque-Bernalillo County vehicle pollution management program manager or designee regarding the proposed suspension or revocation of an air car station certification or air car inspector certification.

[20.11.2.22 NMAC - N, 1/10/11]

## ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

**This is an amendment to 20.11.42 NMAC, Sections 7 & 12, effective 1/10/11.**

**20.11.42.7 DEFINITIONS:** In addition to the definitions in 20.11.42.7 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.42 NMAC shall govern.

**A. "Acid rain source"** has the meaning given to "affected source" in the regulations promulgated under Title IV of the federal act, and includes all sources subject to Title IV.

**B. "Affected programs"**

means the state of New Mexico and Indian tribes and pueblos that are within 50 miles of the source.

**C. "Air pollutant"** means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter, which is emitted into or otherwise, enters the ambient air. Such term includes any precursors to the formation of any air pollutant; to the extent the administrator has identified such precursor or precursors for the purpose for which the term "air pollutant" is used. This excludes water vapor, nitrogen ($N_2$), [~~carbon dioxide ($CO_2$),~~] oxygen ($O_2$)[~~, methane~~] and ethane.

**D. "Air pollution control equipment"** means any device, equipment, process or combination thereof, the operation of which would limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state. This includes, but is not limited to, sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection.

**E. "Applicable requirement"** means all of the following, as they apply to emissions units at a 20.11.42 NMAC source (including requirements that have been promulgated or approved by the board or EPA through rulemaking at the time of permit issuance but have future-effective compliance dates):

(1) any standard or other requirement provided for in the New Mexico state implementation plan approved by EPA, or promulgated by EPA through rulemaking, under Title I of the federal act to implement the relevant requirements of the federal act, including any revisions to that plan promulgated in 40 CFR, Part 52;

(2) any term or condition of any pre-construction permit issued pursuant to regulations approved or promulgated through rulemaking under Title I, including Parts C or D, of the federal act, unless that term or condition is determined by the department to be no longer pertinent;

(3) any standard or other requirement under Section 111 of the federal act, including Section 111(d);

(4) any standard or other requirement under Section 112 of the federal act, including any requirement concerning accident prevention under Section 112(r)(7) of the federal act;

(5) any standard or other requirement of the acid rain program under Title IV of the federal act or the regulations promulgated thereunder;

(6) any requirements established pursuant to Section 504(b) or Section 114(a)(3) of the federal act;

(7) any standard or other requirement under Section 126(a)(1) and (c) of the federal act;

(8) any standard or other requirement governing solid waste incineration under Section 129 of the federal act;

(9) any standard or other requirement for consumer and commercial products, under Section 183(e) of the federal act;

(10) any standard or other requirement for tank vessels under Section 183(f) of the federal act;

(11) any standard or other requirement of the program to control air pollution from outer continental shelf sources, under Section 328 of the federal act;

(12) any standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the federal act, unless the administrator has determined that such requirements need not be contained in a Title V permit;

(13) any national ambient air quality standard, or any increment or visibility requirement under Part C of Title I of the federal act, but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the federal act; and

(14) any regulation adopted by the board in accordance with the joint air quality control board ordinances pursuant to the New Mexico Air Quality Control Act, 74-2-5.B NMSA 1978.

**F. "Department"** means the Albuquerque environmental health department or its successor agency or authority, as represented by the department director or his or her designee.

**G. "Draft permit"** means a version of a permit, for which the department offers for public participation under Subsection B of 20.11.42.13 NMAC or affected program review under Subsection C of 20.11.42.13 NMAC.

**H. "Emission limitation"** means a requirement established by EPA, the board, or the department, that limits the quantity, rate or concentration, or combination thereof, of emissions of regulated air pollutants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

**I. "Emissions allowable under the permit"** means:

(1) any federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emission limit (including a work practice standard); or

(2) any federally enforceable emissions cap that the permittee has assumed to avoid an applicable requirement to which the source would otherwise be subject.

**J. "Emissions unit"** means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any air pollutant listed pursuant to Section 112(b) of the federal act. This term is not meant to alter or affect the definition of the term "unit" for purposes of Title IV of the federal act.

**K. "Federal act"** means the federal Clean Air Act, as amended, 42 U.S.C. Section 7401, et seq.

**L. "Federally enforceable"** means all limitations and conditions which are enforceable by the administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within the New Mexico state implementation plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including 40 CFR 51.165 and 40 CFR 51.166.

**M. "Final permit"** means the version of an operating permit issued by the department that has met all review requirements of Section 20.11.42.13 NMAC.

**N. "Fugitive emissions"** are those emissions, which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

**O. "General permit"** means an operating permit that meets the requirements of Subsection D of 20.11.42.12 NMAC.

**P. "Greenhouse gases" or "GHGs"** means the air pollutant defined in § 86.1818–12(a) of Chapter I of Title 40 of the CFR, as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

**[~~P.~~] Q. "Hazardous air pollutant"** means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act.

**[~~Q.~~] R. "Insignificant activities"** means those activities listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate.

**[~~R.~~] S. "Major source"** means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person(s)) in which all of the pollutant emitting activities at such source belong to the same major group (i.e., all have the same two-digit code), as described in the *standard industrial classification manual*, *1987*, and that is described in paragraphs (1), (2), or (3) below.

(1) A major source under Section 112 of the federal act, which is defined as:

(a) for pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year or more of any hazardous air pollutant which has been listed pursuant to Section 112 (b) of the federal act, 25 tons per year or more of any combination of such hazardous air pollutants, or such lesser quantity as the administrator may establish by rule; notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(b) for radionuclides, "major source" shall have the meaning specified by the administrator by rule.

(2) A major stationary source of air pollutants, as defined in Section 302 of the act, that directly emits or has the potential to emit, 100 tons per year or more of any air pollutant subject to regulation (including any major source of fugitive emissions of any such pollutant, as determined by rule by the administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of Section 302(j) of the act, unless the source belongs to one of the following categories of stationary sources:

(a) coal cleaning plants (with thermal dryers);

(b) kraft pulp mills;

(c) portland cement plants;

(d) primary zinc smelters;

(e) iron and steel mills;

(f) primary aluminum ore reduction plants;

(g) primary copper smelters;

(h) municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) hydrofluoric, sulfuric, or nitric acid plants;

(j) petroleum refineries;

(k) lime plants;

(l) phosphate rock processing plants;

(m) coke oven batteries;

(n) sulfur recovery plants;

(o) carbon black plants (furnace process);

(p) primary lead smelters;

(q) fuel conversion plant;

(r) sintering plants;

(s) secondary metal production plants;

(t) chemical process plants - the term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(u) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) taconite ore processing plants;

(x) glass fiber processing plants;

(y) charcoal production plants;

(z) fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(aa) any other stationary source category, which as of August 7, 1980, is being regulated under Section 111 or 112 of the federal act.

(3) A major stationary source as defined in Part D of Title I of the federal act, including:

(a) for ozone non-attainment areas, sources with the potential to emit 100 tons per year or more of volatile organic compounds or nitrogen oxides in areas classified as "marginal" or "moderate", 50 tons per year or more in areas classified as "serious", 25 tons per year or more in areas classified as "severe", and 10 tons per year or more in areas classified as "extreme"; except that the references in Paragraph (3) of Subsection [~~R~~] S of 20.11.42.7 NMAC to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply to any source for which the administrator has made a finding, under Section 182(f)(1) or (2) of the federal act, that requirements under Section 182(f) of the act do not apply;

(b) for ozone transport regions established pursuant to Section 184 of the federal act, sources with the potential to emit 50 tons per year or more of volatile organic compounds;

(c) for carbon monoxide non-attainment areas:

(i) that are classified as "serious"; and

(ii) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the administrator, sources with the potential to emit 50 tons per year or more of carbon monoxide; and

(d) for particulate matter ($PM_{10}$) non-attainment areas classified as "serious", sources with the potential to emit 70 tons per year or more of $PM_{10}$.

**[~~S.~~] T. "Operating permit" or "permit"** means any permit or group of permits covering a source that is issued, renewed, modified or revised pursuant to 20.11.42 NMAC.

**[~~T.~~] U. "Operator"** means the person(s) responsible for the overall operation of a facility.

**[~~U.~~] V. "Owner"** means the person(s) who owns a facility or part of a facility.

[~~**V.** Reserved.~~]

**W. "Permit modification"** means a revision to an operating permit that meets the requirements of significant permit modifications, minor permit modifications, or administrative permit amendments, as defined in Subsection E of 20.11.42.13 NMAC.

**X. "Permittee"** means the owner, operator or responsible official at a permitted 20.11.42 NMAC source, as identified in any permit application or modification.

**Y. "Person"** includes any individual, partnership, corporation, association, state or political subdivision of a state, and any agency, department or instrumentality of the United States, and any of their officers, agents or employees.

**Z. "Potential to emit"** means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is federally enforceable. The potential to emit for nitrogen dioxide shall be based on total oxides of nitrogen.

**AA. "Proposed permit"** means the version of a permit that the department proposes to issue and forwards to the administrator for review in compliance with Subsection C of 20.11.42.13 NMAC.

**BB. "Regulated air pollutant"** means the following:

(1) nitrogen oxides, total suspended particulate matter, or any volatile organic compounds;

(2) any pollutant for which a national ambient air quality standard has been promulgated;

(3) any pollutant that is subject to any standard promulgated under Section 111 of the federal act;

(4) any class I or II substance subject to any standard promulgated under or established by Title VI of the federal act; [~~or~~]

(5) any pollutant subject to a standard promulgated under Section 112 or any other requirements established under Section 112 of the federal act, including:

(a) any pollutant subject to requirements under Section 112(j) of the federal act; if the administrator fails to promulgate a standard by the date established pursuant to Section 112(e) of the federal act, any pollutant for which a subject source would be a major source shall be considered

to be regulated on the date 18 months after the applicable date established pursuant to Section 112(e) of the federal act; and

(b) any pollutant for which the requirements of Section 112(g)(2) of the federal act have been met, but only with respect to the individual source subject to a Section 112(g)(2) requirement; or

(6) any other pollutant "subject to regulation" as defined in Subsection II of 20.11.42.7 NMAC.

**CC. "Renewal"** means the process by which a permit is reissued at the end of its term.

**DD. "Responsible official"** means one of the following:

(1) For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(a) the facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(b) the delegation of authority to such representatives is approved in advance by the department.

(2) For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

(3) For a municipality, state, federal or other public agency: either a principal executive officer or ranking elected official. For the purposes of 20.11.42 NMAC, a principal executive officer of a federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a regional administrator of EPA).

(4) For an acid rain source:

(a) the designated representative (as defined in Section 402(26) of the federal act) in so far as actions, standards, requirements, or prohibitions under Title IV of the federal act or the regulations promulgated thereunder are concerned; and

(b) the designated representative for any other purposes under 40 CFR, Part 70.

**EE. "Section 502(b)(10) changes"** are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene permit terms and conditions that are monitoring (including test methods), record keeping, reporting, or compliance certification requirements.

**FF. "Shutdown"** means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose.

**GG. "Startup"** means the setting into operation of any air pollution control equipment, process equipment or process for any purpose.

**HH. "Stationary source" or "source"** means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under Section 112(b) of the federal act.

**II. "Subject to regulation"** means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the administrator in Subchapter C of 40 CFR Chapter I, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) "Greenhouse gases" (GHGs), shall not be subject to regulation unless, as of July 1, 2011, the GHG emissions are at a stationary source emitting or having the potential to emit 100,000 tpy $CO_2$ equivalent emissions.

(2) The term "tpy $CO_2$ equivalent emissions" ($CO_2$e) shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to Subpart A of 40 CFR Part 98, *Global Warming Potentials*, and summing the resultant value for each to compute a tpy $CO_2$e.

[~~II~~] **JJ. "Subsidiary"** means a business concern which is owned or controlled by, or is a partner of, the applicant or permittee.

[~~JJ~~] **KK. "Title I modification"** means any modification under Sections 111 or 112 of the federal act and any physical change or change in method of operations that is subject to the pre-construction regulations promulgated under Parts C and D of the federal act.

[3/1/94. . .12/1/95; 20.11.42.7 NMAC - Rn, 20 NMAC 11.42.I.7, 10/1/02; A, 2/1/03; A, 8/10/09; A, 1/10/11]

**20.11.42.12 PERMIT REQUIREMENTS:**

**A. Permit applications:**

(1) **Duty to apply.** For each 20.11.42 NMAC source, the owner or operator shall submit a timely and complete permit application in accordance with 20.11.42 NMAC.

(2) **Timely application.**

(a) **A timely application is:**

(i) for first time applications, one that is submitted within 12 months after the source commences operation as a 20.11.42 NMAC source, [~~or as established in the transition schedule outlined in Subparagraph (b), of Paragraph (2), of Subsection A of 20.11.42.12 NMAC below~~];

(ii) for purposes of permit renewal, one that is submitted at least 12 months prior to the date of permit expiration;

(iii) for the acid rain portion of permit applications for initial phase II acid rain sources under Title IV of the federal act, by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

(b) [~~**Transition schedule.** A timely application for a 20.11.42 NMAC source which is in operation on or before the effective date of 20.11.42 NMAC is one that is submitted:~~

~~(i) within six months after the effective date for storage of gasoline in stationary containers having greater than 40,000 gallons capacity and loading of gasoline from loading racks having a 30-day throughput greater than 600,000 gallons;~~

~~(ii) within 12 months after the effective date for other sources.~~] Reserved.

(3) **Completeness of application.**

(a) To be deemed complete, an application must provide all information required pursuant to Paragraph (4), of Subsection A of 20.11.42.12 NMAC, except that applications for permit modifications need supply such information only if it is related to the proposed change.

(b) If, while processing an application, regardless of whether it has been determined or deemed to be complete, the department determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response.

(c) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application or in a supplemental submittal shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide further information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(d) The applicant's ability to operate without a permit, as set forth in Subparagraph (b), of Paragraph (1), of Subsection B of 20.11.42.2 NMAC, shall be in effect from the date a timely application is submitted until the final permit is issued or disapproved, provided that the applicant adequately submits any requested additional

information by the deadline specified by the department.

(4) **Content of application.** Any person seeking a permit under 20.11.42 NMAC shall do so by filing a written application with the department. The applicant shall submit three copies of the permit application, or more, as requested by the department. An applicant may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under 20.11.2 NMAC, *Fees*. Fugitive emissions shall be included in the permit application in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. All applications shall:

(a) be made on forms furnished by the department, which for the acid rain portions of permit applications and compliance plans shall be on nationally-standardized forms to the extent required by regulations promulgated under Title IV of the federal act;

(b) state the company's name and address (and, if different, plant name and address), together with the names and addresses of the owner(s), responsible official and the operator of the source, any subsidiaries or parent companies, the company's state of incorporation or principal registration to do business and corporate or partnership relationship to other permittee's subject to 20.11.42 NMAC, and the telephone numbers and names of the owners' agent(s) and the site contact(s) familiar with plant operations;

(c) state the date of the application;

(d) include a description of the source's processes and products (by standard industrial classification code) including any associated with alternative scenarios identified by the applicant, and a map, such as the 7.5 minute topographic quadrangle map published by the United States geological survey or the most detailed map available showing the exact location of the source; the location shall be identified by latitude and longitude or by UTM coordinates;

(e) for all emissions of all air pollutants for which the source is major and all emissions of regulated air pollutants, provide all emissions information, calculations and computations for the source and for each emissions unit, except for insignificant activities (as defined in Subsection [~~Q~~] R of 20.11.42.7 NMAC); this shall include:

(i) a process flow sheet of all components of the facility which would be involved in routine operations and emissions;

(ii) identification and description of all emission points in sufficient detail to establish the basis for fees and applicability of requirements of the state and federal acts;

(iii) emissions rates in tons per year, pounds per hour and other terms necessary to establish compliance consistent with the applicable standard reference test method;

(iv) specific information such as that regarding fuels, fuel use, raw materials, or production rates, to the extent it is needed to determine or regulate emissions;

(v) identification and full description, including all calculations and the basis for all control efficiencies presented, of air pollution control equipment and compliance monitoring devices or activities;

(vi) the maximum and standard operating schedules of the source, as well as any work practice standards or limitations on source operation which affect emissions of regulated pollutants;

(vii) an operational plan defining the measures to be taken to mitigate source emissions during startups, shutdowns and emergencies;

(viii) other relevant information as the department may reasonably require or which are required by any applicable requirements (including information related to stack height limitations developed pursuant to Section 123 of the federal act); and

(ix) for each alternative operating scenario identified by the applicant, all of the information required in Items (i) through (viii) above, as well as additional information determined to be necessary by the department to define such alternative operating scenarios;

(f) provide a list of insignificant activities (as defined in Subsection [~~Q~~] R of 20.11.42.7 NMAC) at the source, their emissions, to the extent required by the department, and any information necessary to determine applicable requirements;

(g) provide a citation and description of all applicable air pollution control requirements, including:

(i) sufficient information related to the emissions of regulated air pollutants to verify the requirements that are applicable to the source; and

(ii) a description of or reference to any applicable test method for determining compliance with each applicable requirement;

(h) provide an explanation of any proposed exemptions from otherwise applicable requirements;

(i) provide other specific information that may be necessary to implement and enforce other requirements of the state or federal acts or to determine the applicability of such requirements, including information necessary to collect any fees owed under 20.11.2 NMAC, *Fees*;

(j) for applications which:

(i) are required pursuant to the transition schedule in Subparagraph (b), of Paragraph (2), of Subsection A of 20.11.42.12 NMAC; or

(ii) for subsequent applications or modifications, where emissions or anticipated emissions have increased since modeling for a modification or new source construction was reviewed under 20.11.41 NMAC or 20.11.42 NMAC: submit a dispersion modeling analysis, using EPA approved models and procedures, showing whether emissions from the source would cause air pollutant concentrations in excess of any New Mexico ambient air quality standard for nitrogen oxides, sulfur oxides, total suspended particulates or non-methane hydrocarbons, or any national ambient air quality standard; air pollutants that are not emitted in significant amounts (as defined in 40 CFR 52.21(b)(23)(i)) during routine operations need not be modeled; the department may waive modeling with respect to ozone if the department determines that emissions from the source are not likely to cause ozone concentrations in excess of the national ambient air quality standard;

(k) provide certification of compliance, including:

(i) a certification, by a responsible official consistent with Paragraph (5), of Subsection A of 20.11.42.12 NMAC of the source's compliance status for each applicable requirement;

(ii) a statement of methods used for determining compliance, including a description of monitoring, record keeping, and reporting requirements and test methods;

(iii) a statement that the source will continue to be in compliance with applicable requirements for which it is in compliance, and will, in a timely manner or at such schedule expressly required by the applicable requirement, meet additional applicable requirements that become effective during the permit term;

(iv) a schedule for submission of compliance certifications during the permit term, to be submitted no less frequently than annually, or more frequently if specified by the underlying applicable requirement or by the department; and

(v) a statement indicating the source's compliance status with any enhanced monitoring and compliance certification requirements of the federal act;

(l) for sources that are not in compliance with all applicable requirements at the time of permit application, provide a compliance plan that contains:

(i) a description of the compliance status of the source with respect to all applicable requirements;

(ii) a narrative description of how the source will achieve compliance with such requirements for which it is not in compliance;

(iii) a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with such applicable requirements; the schedule of compliance shall be at least as stringent as that contained in any consent decree or administrative order to which the source is subject, and the obligations of any consent decree or administrative order shall not be in any way diminished by the schedule of compliance; any such schedule of compliance shall be supplemental to, and shall not prohibit the department from taking any enforcement action for noncompliance with, the applicable requirements on which it is based;

(iv) a schedule for submission of certified progress reports no less frequently than every six months; and

(v) for the portion of each acid rain source subject to the acid rain provisions of Title IV of the federal act, the compliance plan content requirements specified in this paragraph, except as specifically superseded by regulations promulgated under Title IV of the federal act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

(5) **Certification.** Any document, including any application form, report, or compliance certification, submitted pursuant to 20.11.42 NMAC shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this regulation shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

**B. Confidential information protection:**

(1) All confidentiality claims made regarding material submitted to the department under 20.11.42 NMAC shall be reviewed in accordance with the provisions of the joint air quality control board ordinances pursuant to the New Mexico Air Quality Control Act Section 74-2-11 NMSA 1978 and the New Mexico Inspection of Public Records Act, Section 14-2-1, et seq. NMSA 1978.

(2) In the case where an applicant or permittee has submitted information to the department under a claim of confidentiality, the department may also require the applicant or permittee to submit a copy of such information directly to the administrator.

(3) An operating permit is a public record, and not entitled to protection under Section 114(c) of the federal act.

**C. Permit content:**

(1) **Permit conditions.**

(a) The department shall specify conditions upon a permit, including emission limitations and sufficient operational requirements and limitations, to assure compliance with all applicable requirements at the time of permit issuance or as specified in the approved schedule of compliance. The permit shall:

(i) for major sources, include all applicable requirements for all relevant emissions units in the major source;

(ii) for any non-major source subject to Section 20.11.42.2 NMAC, include all applicable requirements which apply to emissions units that cause the source to be subject to 20.11.42 NMAC;

(iii) specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based;

(iv) include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit; and

(v) include a provision to ensure that the permittee pays fees to the department consistent with the fee schedule in 20.11.2 NMAC, *Fees*;

(vi) for purposes of the permit shield, identify any requirement specifically identified in the application or significant permit modification that the department has determined is not applicable to the source, and state the basis for any such determination.

(b) Each permit issued shall, additionally, include provisions stating that:

(i) the permittee shall comply with all terms and conditions of the permit; any permit noncompliance is grounds for enforcement action; in addition, noncompliance with federally enforceable permit conditions constitutes a violation of the federal act;

(ii) it shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit;

(iii) the permit may be modified, reopened and revised, revoked and reissued, or terminated for cause in accordance with Subsection F of 20.11.42.13 NMAC;

(iv) the filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance shall not stay any permit condition;

(v) the permit does not convey any property rights of any sort, or any exclusive privilege;

(vi) within the period specified by the department, the permittee shall furnish any information that the department may request in writing to determine whether cause exists for reopening and revising, revoking and reissuing, or termination of the permit or to determine compliance with the permit; upon request, the permittee shall also furnish to the department copies of records required by the permit to be maintained.

(c) The terms and conditions for all alternative operating scenarios identified in the application and approved by the department:

(i) shall require that the permittee maintain a log at the permitted facility which documents, contemporaneously with any change from one operating scenario to another, the scenario under which the facility is operating; and

(ii) shall, for each such alternative scenario, meet all applicable requirements and the requirements of 20.11.42 NMAC.

(d) The department may impose conditions regulating emissions during startup and shutdown.

(e) All permit terms and conditions which are required under the federal act or under any of its applicable requirements, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator and citizens under the federal act. The permit shall specifically designate as not being federally enforceable under the federal act any terms or conditions included in the permit that are not required under the federal act or under any of its applicable requirements.

(f) The issuance of a permit, or the filing or approval of a compliance plan, does not relieve any person from civil or criminal liability for failure to comply with the provisions of the Air Quality Control Act, the federal act, federal regulations thereunder, any applicable regulations of the board, and any other applicable law or regulation.

(g) The department may include part or all of the contents of the application as terms and conditions of the permit or permit modification. The department shall not apply permit terms and conditions upon emissions of regulated pollutants for which there are no applicable requirements, unless the source is major for that pollutant.

(h) Fugitive emissions from a source shall be included in the operating permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source.

(i) The acid rain portion of

operating permits for acid rain sources shall:

(i) state that, where an applicable requirement of the federal act is more stringent than an applicable requirement of regulations promulgated under Title IV of the federal act, both provisions shall be incorporated into the permit and shall be enforceable by the administrator;

(ii) contain a permit condition prohibiting emissions exceeding any allowances that the acid rain source lawfully holds under Title IV of the federal act or the regulations promulgated thereunder; no permit modification under this regulation shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit modification under any other applicable requirement; no limit shall be placed on the number of allowances held by the acid rain source; the permittee may not use allowances as a defense to noncompliance with any other applicable requirement; any such allowance shall be accounted for according to the procedures established in regulations promulgated under Title IV of the federal act.

(2) **Permit duration.** The department shall issue operating permits for a fixed term not to exceed five years.

(3) **Monitoring.**

(a) Each permit shall contain all emissions monitoring requirements, and analysis procedures or test methods, required to assure and verify compliance with the terms and conditions of the permit and applicable requirements, including any procedures and methods promulgated by the administrator.

(b) Where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of record keeping designed to serve as monitoring), the permit shall require periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to Paragraph (5), of Subsection C of 20.11.42.12 NMAC. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.

(c) The permit shall also contain specific requirements concerning the use, maintenance, and, when appropriate, installation of monitoring equipment or methods.

(4) **Record keeping.**

(a) The permit shall require record keeping sufficient to assure and verify compliance with the terms and conditions of the permit, including:

(i) the date, place as defined in the permit, and time of sampling or measurements;

(ii) the date(s) analyses were performed;

(iii) the company or entity that performed the analyses;

(iv) the analytical techniques or methods used;

(v) the results of such analyses; and

(vi) the operating conditions existing at the time of sampling or measurement.

(b) Records of all monitoring data and support information shall be retained for a period of at least five years from the date of the monitoring sample, measurement, report, or application. Supporting information includes all calibration and maintenance records and all original strip-chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(5) **Reporting.** The permit shall require reporting sufficient to assure and verify compliance with the terms and conditions of the permit and all applicable requirements, including:

(a) submittal of reports of any required monitoring at least every six months; the reports shall be due to the department within 45 days of the end of the permittee's reporting period; all instances of deviations from permit requirements, including emergencies, must be clearly identified in such reports; all required reports must be certified by a responsible official consistent with Paragraph (5), of Subsection A of 20.11.42.12 NMAC;

(b) prompt reporting of all deviations (including emergencies) from permit requirements, including the date, time, duration and probable cause of such deviations, the quantity and pollutant type of excess emissions resulting from the deviation, and any corrective actions or preventive measures taken; such reports shall include telephone, verbal, e-mail or facsimile communication within 24 hours of the start of the next business day and written notification within 10 days;

(c) submittal of compliance certification reports at least every 12 months (or more frequently if so specified by an applicable requirement) certifying the source's compliance status with all permit terms and conditions and all applicable requirements relevant to the source, including those related to emission limitations or work practices; the reports shall be due to the department within 30 days of the end of the permittee's reporting period; such compliance certifications shall be submitted to the administrator as well as to the department and shall include:

(i) the identification of each term or condition of the permit that is the basis of the certification;

(ii) the compliance status of the source;

(iii) whether compliance was continuous or intermittent;

(iv) the method(s) used for determining the compliance status of the source, currently and during the reporting period identified in the permit; and

(v) such other facts as the department may require to determine the compliance status of the source;

(d) such additional provisions as may be specified by the administrator to determine the compliance status of the source.

(6) **Compliance.** To assure and verify compliance with the terms and conditions of the permit and with 20.11.42 NMAC, permits shall also:

(a) require that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow authorized representatives of the department to perform the following:

(i) enter upon the permittee's premises where a source is located or emission related activity is conducted, or where records must be kept under the conditions of the permit;

(ii) have access to and copy any records that must be kept under the conditions of the permit;

(iii) inspect any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) sample or monitor any substances or parameters for the purpose of assuring compliance with the permit or applicable requirements or as otherwise authorized by the federal act;

(b) require that sources required under Subparagraph (k), of Paragraph (4), of Subsection A of 20.11.42.12 NMAC to have a schedule of compliance submit progress reports to the department at least semiannually, or more frequently if specified in the applicable requirement or by the department; such progress reports shall be consistent with the schedule of compliance and requirements of Subparagraph (k), of Paragraph (4), of Subsection A of 20.11.42.12 NMAC, and shall contain:

(i) dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted;

(c) include such other provisions as the department may require.

(7) **Operational flexibility.**

(a) **Section 502(b)(10) changes.**

(i) The permittee may make Section 502(b)(10) changes, as defined in Section 20.11.42.7 NMAC, without applying for a permit modification, if those changes are not Title I modifications and the changes do not cause the facility to exceed the emissions allowable under the permit (whether expressed as a rate of emissions or in terms of total emissions).

(ii) For each such change, the permittee shall provide written notification to the department and the administrator at least seven days in advance of the proposed changes. Such notification shall include a brief description of the change within the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(iii) The permittee and department shall attach each such notice to their copy of the relevant permit.

(iv) If the written notification and the change qualify under this provision, the permittee is not required to comply with the permit terms and conditions it has identified that restrict the change. If the change does not qualify under this provision, the original terms of the permit remain fully enforceable.

(b) **Emissions trading within a facility.**

(i) The department shall, if an applicant requests it, issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit in addition to any applicable requirements. Such terms and conditions shall include all terms and conditions required under Subsection C of 20.11.42.12 NMAC to determine compliance. If applicable requirements apply to the requested emissions trading, permit conditions shall be issued only to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval.

(ii) The applicant shall include in the application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The department shall not include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall require compliance with all applicable requirements.

(iii) For each such change, the permittee shall provide written notification to the department and the administrator at least seven days in advance of the proposed changes. Such notification shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(iv) The permittee and department shall attach each such notice to their copy of the relevant permit.

(8) **Off-permit changes.**

(a) Permittees are allowed to make, without a permit modification, changes that are not addressed or prohibited by the operating permit, if:

(i) each such change meets all applicable requirements and shall not violate any existing permit term or condition;

(ii) such changes are not subject to any requirements under Title IV of the federal act and are not Title I modifications;

(iii) such changes are not subject to permit modification procedures under Subsection E of 20.11.42.13 NMAC; and

(iv) the permittee provides contemporaneous written notice to the department and EPA of each such change, except for changes that qualify as insignificant activities; such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted and any applicable requirement that would apply as a result of the change.

(b) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

(9) **Permit shield.**

(a) Except as provided in 20.11.42 NMAC, the department shall expressly include in a 20.11.42 NMAC permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) such applicable requirements are included and are specifically identified in the permit; or

(ii) the department, in acting on the permit application or significant permit modification, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

(b) A 20.11.42 NMAC permit that does not expressly state that a permit shield exists for a specific provision shall be presumed not to provide a shield for that provision.

(c) Nothing in 20.11.42.12 NMAC or in any 20.11.42 NMAC permit shall alter or affect the following:

(i) the provisions of Section 303 of the federal act - *Emergency Powers*, including the authority of the administrator under Section 303, or the provisions of the joint air quality control board ordinances pursuant to the New Mexico Air Quality Control Act, 74-2-10 NMSA 1978;

(ii) the liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance;

(iii) the applicable requirements of the acid rain program, consistent with Section 408(a) of the federal act;

(iv) the ability of EPA to obtain information from a source pursuant to Section 114 of the federal act, or the department to obtain information in accordance with the joint air quality control board ordinances pursuant to the New Mexico Air Quality Control Act 74-2-13 NMSA 1978.

(d) The permit shield shall remain in effect if the permit terms and conditions are extended past the expiration date of the permit pursuant to Paragraph (4), of Subsection A of 20.11.42.13 NMAC.

(e) The permit shield may extend to terms and conditions that allow emission increases and decreases as part of emissions trading within a facility pursuant to Subparagraph (b), of Paragraph (7), of Subsection C of 20.11.42.12 NMAC, and to all terms and conditions under each operating scenario included pursuant to Subparagraph (e), of Paragraph (1), of Subsection C of 20.11.42.12 NMAC.

(f) The permit shield shall not extend to *administrative permit amendments* under Paragraph (1), of Subsection E of 20.11.42.13 NMAC, to m*inor permit modifications* under Paragraph (2), of Subsection E of 20.11.42.12 NMAC, to *section 502(b)(10) changes* under Subparagraph (a), of Paragraph (7) of Subsection C of 20.11.42.12 NMAC, or to permit terms or conditions for which notice has been given to reopen or revoke all or part under Subsection F of 20.11.42.13 NMAC.

**D. General permits:**

(1) **Issuance of general permits.**

(a) The department may, after notice and opportunity for public participation and EPA and affected program review, issue a general permit covering numerous similar sources. Such sources shall be generally homogenous in terms of operations, processes and emissions, subject to the same or substantially similar requirements, and not subject to case-by-case standards or requirements.

(b) Any general permit shall comply with all requirements applicable to other operating permits and shall identify

criteria by which sources may qualify for the general permit.

(2) **Authorization to operate under a general permit.**

(a) The owner or operator of a 20.11.42 NMAC source which qualifies for a general permit must:

(i) apply to the department for coverage under the terms of the general permit;

(ii) apply for an operating permit consistent with Subsection A of 20.11.42.12 NMAC.

(b) The department may, in the general permit, provide for applications which deviate from the requirements of Paragraph (4), of Subsection A of 20.11.42.12 NMAC, provided that such applications meet the requirements of the federal act and include all information necessary to determine qualification for, and to assure compliance with, the general permit. The department shall review the application for authorization to operate under a general permit for completeness within 30 days after its receipt of the application.

(c) The department shall authorize qualifying sources which apply for coverage under the general permit to operate under the terms and conditions of the general permit. The department shall take final action on a general permit authorization request within 90 days of deeming the application complete.

(d) The department may grant a request for authorization to operate under a general permit without repeating the public participation procedures required under Subsection B of 20.11.42.13 NMAC. Such an authorization shall not be a permitting action for purposes of administrative review under the joint air quality control board ordinances pursuant to the New Mexico Air Quality Control Act Section 74-2-7.H NMSA 1978.

(e) Authorization to operate under a general permit shall not be granted for acid rain sources unless provided for in regulations promulgated under Title IV of the federal act.

(f) The permittee shall be subject to enforcement action for operation without an operating permit if the source is later determined not to qualify for the conditions and terms of the general permit.

**E. Emergency provision:**

(1) An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.

(2) An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the permittee has demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(a) an emergency occurred and that the permittee can identify the cause(s) of the emergency;

(b) the permitted facility was at the time being properly operated;

(c) during the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards or other requirements in the permit; and

(d) the permittee fulfilled notification requirements under Subparagraph (b), of Paragraph (5), of Subsection C of 20.11.42.12 NMAC; this notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(3) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(4) This provision is in addition to any emergency or upset provision contained in any applicable requirement, except that 20.11.42 NMAC sources shall not be subject to the provisions of 20.11.90.12 NMAC for permit terms and conditions issued under 20.11.42 NMAC.

[3/1/94. . .12/1/95; 20.11.42.12 NMAC - Rn, 20 NMAC 11.42.I.12 & Repealed, 10/1/02; Rn, 20 NMAC 11.42.II.1, 10/1/02; A, 8/10/09; A, 1/10/11]

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## ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

**This is an amendment to 20.11.61 NMAC, Sections 6, 7, 11, 12, 20 and 27, effective 1/10/11.**

**20.11.61.6 OBJECTIVE:** [~~The objective of 20.11.61 NMAC is~~] To minimize air pollutant emissions from new major stationary sources or major modifications in areas classified as in attainment of the national ambient air quality standards or determined to be unclassifiable pursuant to Section 107(d) of the act.

[20.11.61.6 NMAC - Rp, 20.11.61.6 NMAC, 1/23/06; A, 1/10/11]

**20.11.61.7 DEFINITIONS:** In addition to the definitions in 20.11.61 NMAC, the definitions in 20.11.1 NMAC, *General Provisions*, shall apply unless there is a conflict between definitions, in which case the definition in 20.11.61 NMAC shall govern.

**A. "Act"** means the federal Clean Air Act, as amended, 42 U. S. C. Sections 7401 et seq.

**B. "Actual emissions"** means the actual rate of emissions of a regulated new source review pollutant from an emissions unit, as determined in accordance with Paragraphs (2) through (4) of Subsection B of 20.11.61.7 NMAC.

(1) This definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a PAL under 20.11.61.20 NMAC. Instead, Subsections I and [~~UU~~] VV of 20.11.61.7 NMAC shall apply for those purposes.

(2) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation. The department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(3) The department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(4) For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

**C. "Administrator"** means the administrator of the U.S. environmental protection agency (EPA) or an authorized representative.

**D. "Adverse impact on visibility"** means visibility impairment which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the federal class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency, and time of the visibility impairments and how these factors correlate with the following:

(1) times of visitor use of the federal class I area; and

(2) the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas as defined in 40 CFR 51.301 *Definitions*.

**E. "Air quality related**

**values (AQRV)"** means visibility and other scenic, cultural, physical, biological, ecological, or recreational resources which may be affected by a change in air quality resulting from the emissions of a proposed major stationary source or major modification that interferes with the management, protection, preservation, or enjoyment of the air quality related values of a federal class I area.

**F. "Allowable emissions"** means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(1) the applicable standards as set forth in 40 CFR Parts 60 and 61;

(2) the applicable state implementation plan emissions limitation, including those with a future compliance date; or

(3) the emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

**G. "Associated emission sources"** means secondary emissions and all reasonably foreseeable emissions of regulated pollutants from the growth of general residential, commercial, industrial, governmental emission sources and other mobile and non-mobile emission sources which are associated with and/or support the proposed new major stationary source or major modification. Other mobile and non-mobile emission sources shall include, but not be limited to, new highways and roads or improvements to existing highways and roads to increase capacity, new parking facilities or improvements to existing parking facilities to increase capacity, service enhancements to ground and air public transportation to include the building of new public transportation facilities or improvements to existing public transportation facilities to increase capacity; and the building of new public or private educational facilities or improving existing public or private educational facilities to increase enrollment.

**H. "Attainment area"** means, for any air pollutant, an area which is shown by monitored data or which is calculated by air quality modeling not to exceed any national ambient air quality standard for such pollutant, and is so designated under Section 107(d)(1)(D) or (E) of the act.

**I. "Baseline actual emissions"** means the rate of emissions, in tons per year, of a regulated new source review pollutant, as determined in accordance with Paragraphs (1)-(4) of Subsection I of 20.11.61.7 NMAC.

(1) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five year period immediately preceding when the owner or operator begins actual construction of the project. The department shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(a) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(b) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(c) For a regulated new source review pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant.

(d) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparagraph (b) of Paragraph (1) of Subsection I of 20.11.61.7 NMAC.

(2) For an existing emissions unit (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 10 year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received by the department for a permit required either under 20.11.61 NMAC or under a plan approved by the administrator, whichever is earlier, except that the 10 year period shall not include any period earlier than November 15, 1990.

(a) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

(b) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above an emission limitation that was legally enforceable during the consecutive 24-month period.

(c) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period. However, if an emission limitation is part of a maximum achievable control technology standard that the administrator proposed or promulgated under 40 CFR Part 63, the baseline actual emissions need only be adjusted if the state has taken credit for such emissions reductions in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G).

(d) For a regulated new source review pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for the emissions units being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant.

(e) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparagraphs (b) and (c) of Paragraph (2) of Subsection I of 20.11.61.7 NMAC.

(3) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(4) For a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in Paragraph (1) of Subsection I of 20.11.61.7 NMAC, for other existing emissions units in accordance with the procedures contained in Paragraph (2) of Subsection I of 20.11.61.7 NMAC, and for a new emissions unit in accordance with the procedures contained in Paragraph (3) of Subsection I of 20.11.61.7 NMAC.

**J. "Baseline area"**

(1) Means any intrastate area (and every part thereof) designated as attainment or unclassifiable under Section 107(d)(1) (D) or (E) of the act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than one microgram per cubic meter (1 $\mu g/m^3$) (annual average) of the pollutant for which the minor source baseline date is established.

(2) Area redesignations under Section 107(d)(1) (D) or (E) of the act cannot intersect or be smaller than the area

of impact of any major stationary source or major modification which:

(a) establishes a minor source baseline date; or

(b) is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166, and would be constructed in the same state as the state proposing the redesignation;

(3) Any baseline area established originally for total suspended particulates (TSP) increments shall remain in effect and shall apply for purposes of determining the amount of available $PM_{10}$ increments, except that such baseline area shall not remain in effect if the department rescinds the corresponding minor source baseline date in accordance with Paragraph (3) of Subsection [~~LL~~]MM of 20.11.61.7 NMAC.

**K. "Baseline concentration"** means that ambient concentration level that exists in the baseline area at the time of the applicable minor source baseline date.

(1) A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

(a) the actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in Paragraph (2) of Subsection K of 20.11.61.7 NMAC;

(b) the allowable emissions of major stationary sources that commenced construction before the major source baseline date, but were not in operation by the applicable minor source baseline date.

(2) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(a) actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(b) actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

**L. "Begin actual construction"** means, in general, the initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities, other than preparatory activities which mark the initiation of the change.

**M. "Best available control technology (BACT)"** means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each regulated new source review pollutant which would be emitted from any proposed major stationary source or major modification, which the director on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice, or operation, and shall provide for compliance by means which achieve equivalent results.

**N. "Building, structure, facility, or installation"** means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "major group" (i.e., which have the same first two-digit code) as described in the standard industrial classification (SIC) manual, 1972, as amended by the 1977 supplement (U. S. government printing office stock numbers 4101-0066 and 003-005-00176-0, respectively) or any superseding SIC manual.

**O. "Class I area"** means any federal land that is classified or reclassified as "class I" as listed in 20.11.61.25 NMAC.

**P. "Commence"** as applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(1) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(2) entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

**Q. "Complete"** means, in reference to an application for a permit, that the department has determined the application contains all of the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the department from requesting or accepting any additional information.

**R. "Construction"** means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

**S. "Continuous emissions monitoring system (CEMS)"** means all of the equipment that may be required to meet the data acquisition and availability requirements of 20.11.61 NMAC, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.

**T. "Continuous emissions rate monitoring system (CERMS)"** means the total equipment required for the determination and recording of the pollutant mass emissions rate (in terms of mass per unit of time).

**U. "Continuous parameter monitoring system (CPMS)"** means all of the equipment necessary to meet the data acquisition and availability requirements of 20.11.61 NMAC, to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, $O_2$ or $CO_2$ concentrations), and to record average operational parameter value(s) on a continuous basis.

**V. "Department"** means the city of Albuquerque, environmental health department or its successor agency.

**W. "Director"** means the director of the city of Albuquerque, environmental health department or the director of its successor agency.

**X. "Electric utility steam generating unit"** means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

**Y. "Emissions unit"**

means any part of a stationary source that emits or would have the potential to emit any regulated new source review pollutant and includes an electric utility steam generating unit as defined in 20.11.61.7 NMAC. For purposes of 20.11.61 NMAC, there are two types of emissions units as follows:

(1) a new emissions unit is any emissions unit that is (or will be) newly constructed and that has existed for less than two years from the date such emissions unit first operated;

(2) an existing emissions unit is any emissions unit that does not meet the requirements in Paragraph (1) of Subsection Y of 20.11.61.7 NMAC. A replacement unit is an existing unit.

**Z. "Federal land manager"** means, with respect to any lands in the United States, a federal level cabinet secretary of a federal level department (e.g. interior department) with authority over such lands.

**AA. "Federally enforceable"** means all limitations and conditions which are enforceable by the administrator, including:

(1) those requirements developed pursuant to 40 CFR Parts 60 and 61;

(2) requirements within any applicable state implementation plan (SIP);

(3) any permit requirements established pursuant to 40 CFR 52.21; or

(4) under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that expressly requires adherence to any permit issued under such program.

**BB. "Fugitive emissions"** means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

**CC. "Greenhouse gases" or "GHGs"** means the air pollutant defined in § 86.1818–12(a) of Chapter I of Title 40 of the CFR, as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

**[~~CC.~~] DD. "High terrain"** means any area having an elevation 900 feet or more above the base of a source's stack.

**[~~DD.~~] EE. "Indian governing body"** means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

**[~~EE.~~] FF. "Innovative control technology"** means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or achieving at least comparable reductions at lower cost in terms of energy, economics, or non-air quality environmental impacts.

**[~~FF.~~] GG. "Low terrain"** means any area other than high terrain.

**[~~GG.~~] HH. "Lowest achievable emission rate (LAER)"** means, for any source, the more stringent rate of emissions based on the following:

(1) the most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(2) the most stringent emissions limitation which is achieved in practice by such class or category of stationary source; this limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source; in no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

**[~~HH.~~] II. "Major modification"**

(1) Means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase of a regulated new source review pollutant; and a significant net emissions increase of that pollutant from the major stationary source.

(2) Any significant emissions increase from any emissions units or net emissions increase at a major stationary source that is significant for volatile organic compounds or oxides of nitrogen shall be considered significant for ozone.

(3) A physical change or change in the method of operation shall not include:

(a) routine maintenance, repair, and replacement;

(b) use of an alternative fuel or raw material by reason of an order under Section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) use of an alternative fuel by reason of an order or rule under Section 125 of the act;

(d) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) use of an alternative fuel or raw material by a stationary source which:

(i) the source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166; or

(ii) the source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) an increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166;

(g) any change in ownership at a stationary source;

(h) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(i) the state implementation plan for the state in which the project is located; and

(ii) other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated;

(i) the installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated new source review pollutant emitted by the unit; this exemption shall apply on a pollutant-by-pollutant basis; or

(j) the reactivation of a very clean coal-fired electric utility steam generating unit.

(4) This definition shall not apply with respect to a particular regulated new source review pollutant when the major stationary source is complying with the requirements under 20.11.61.20 NMAC for a PAL for that pollutant. Instead, the definition at Paragraph (8) of Subsection B of 20.11.61.20 NMAC shall apply.

**[~~II.~~] JJ. "Major source baseline date"** means:

(1) in the case of particulate matter and sulfur dioxide, January 6, 1975; and

(2) in the case of nitrogen dioxide, February 8, 1988.

**[~~JJ.~~] KK. "Major stationary source"**

(1) means:

(a) any stationary source listed in Table 1 of 20.11.61.26 NMAC which emits, or has the potential to emit, 100 tons per year or more of any regulated new source review pollutant;

(b) notwithstanding the stationary source categories specified in Subparagraph (a) of Paragraph (1) of Subsection [~~JJ~~] KK of 20.11.61.7 NMAC, any stationary source

which emits, or has the potential to emit, 250 tons per year or more of any regulated new source review pollutant; or

(c) any physical change that would occur at a stationary source not otherwise qualifying under Subsection [~~JJ~~] KK of 20.11.61.7 NMAC, as a major stationary source if the change would constitute a major stationary source by itself.

(2) A major source that is major for volatile organic compounds or oxides of nitrogen shall be considered major for ozone.

(3) The fugitive emissions of a stationary source shall not be included in determining whether it is a major stationary source, unless the source belongs to one of the stationary source categories found in Table 1 of 20.11.61.26 NMAC or any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the act.

**[~~KK.~~] LL. "Mandatory federal class I area"** means any area identified in 40 CFR Part 81, Subpart D.

**[~~LL.~~] MM. "Minor source baseline date"** means the earliest date after the trigger date on which a major stationary source or major modification subject to 40 CFR 52.21, or 20.11.61 NMAC, submits a complete application.

(1) The trigger dates are:

(a) August 7, 1977, for particulate matter and sulfur dioxide; and

(b) February 8, 1988 for nitrogen dioxide.

(2) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(a) the area in which the proposed major stationary source or major modification would construct is designated as attainment or unclassifiable under Section 107(d)(i)(D) or (E) of the federal act for the pollutant on the date of its complete application under 40 CFR 52.21 or 20.11.61 NMAC; and

(b) in the case of a major stationary source, the pollutant would be emitted in significant amounts, or in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(3) Any minor source baseline date established originally for the TSP increments shall remain in effect and shall apply for purposes of determining the amount of available $PM_{10}$ increments, except that the department may rescind any such minor source baseline date where it can be shown, to the director's satisfaction that, either the emissions increase from the major stationary source, or the net emissions increase from the major modification, responsible for triggering that date did not result in a significant amount of $PM_{10}$ emissions.

**[~~MM.~~] NN. "Natural conditions"** includes naturally occurring phenomena that reduce visibility as measured in terms of visual range, contrast or coloration.

**[~~NN.~~] OO. "Necessary preconstruction approvals or permits"** mean those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the New Mexico state implementation plan.

**[~~OO.~~] PP. "Net emissions increase"**

(1) Means, that with respect to any regulated new source review pollutant emitted by a major stationary source, the amount by which the sum of the following exceeds zero:

(a) the increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to Subsection D of 20.11.61.11 NMAC; and

(b) any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable; baseline actual emissions for calculating increases and decreases shall be determined as provided in Subsection I of 20.11.61.7 NMAC, except that Subparagraph (c) of Paragraph (1) and Subparagraph (d) of Paragraph (2) of Subsection I of 20.11.61.7 NMAC shall not apply.

(2) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(a) the date five years prior to the commencement of construction on the particular change; and

(b) the date that the increase from the particular change occurs.

(3) An increase or decrease in actual emissions is creditable only if:

(a) it occurs between:

(i) the date five years prior to the commencement of construction on the particular change; and

(ii) the date that the increase from the particular change occurs; and

(b) the department has not relied on it in issuing a permit for the source under regulations approved pursuant to 20.11.61 NMAC, which permit is in effect when the increase in actual emissions from the particular change occurs.

(4) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or oxides of nitrogen that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(5) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(6) A decrease in actual emissions is creditable only to the extent that:

(a) the old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) it is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and

(c) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(7) an increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant; any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(8) Paragraph (2) of Subsection B of 20.11.61.7 NMAC shall not apply for determining creditable increases and decreases.

**[~~PP.~~]QQ. "Nonattainment area"** means an area which has been designated under Section 107 of the act as nonattainment for one or more of the national ambient air quality standards by EPA.

**[~~QQ.~~] RR. "Portable stationary source"** means a source which can be relocated to another operating site with limited dismantling and reassembly.

**[~~RR.~~] SS. "Potential to emit"** means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollutant control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitations or the effect the limitation would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

**[~~SS.~~] TT. "Predictive emissions monitoring system (PEMS)"** means all of the equipment necessary to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, $O_2$ or $CO_2$ concentrations), and calculate and record the mass emissions rate (for example, lb/hr) on a continuous basis.

**[~~TT.~~] UU. "Project"** means a physical change in, or change in method of operation of, an existing major stationary source.

**[~~UU.~~] VV. "Projected**

**actual emissions"**

(1) Means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated new source review pollutant in any one of the five years (12-month period) following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated new source review pollutant, and full utilization of the unit would result in a significant emissions increase, or a significant net emissions increase at the major stationary source.

(2) In determining the projected actual emissions (before beginning actual construction), the owner or operator of the major stationary source:

(a) shall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under an approved SIP; and

(b) shall include fugitive emissions to the extent quantifiable and emissions associated with startups, shutdowns, and malfunctions; and

(c) shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under Subsection I of 20.11.61.7 NMAC and that are also unrelated to the particular project, including any increased utilization due to product demand growth; or

(3) may elect to use the emissions unit's potential to emit in tons per year in lieu of using the method set out in Subparagraphs (a)-(c) of Paragraph (2) of Subsection [~~UU~~] VV of 20.11.61.7 NMAC.

**[~~VV.~~] WW. "Regulated new source review pollutant"** means the following:

(1) any pollutant for which a national ambient air quality standard has been promulgated and any pollutant identified under Paragraph (1) of Subsection [~~VV~~] WW of [~~20.11.61~~] 20.11.61.7 NMAC as a constituent or precursor to such pollutant; precursors identified by the administrator for purposes of new source review are the following:

(a) volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas;

(b) sulfur dioxide is a precursor to $PM_{2.5}$ in all attainment and unclassifiable areas;

(c) nitrogen oxides are presumed to be precursors to $PM_{2.5}$ in all attainment and unclassifiable areas, unless the state demonstrates to the administrator's satisfaction or EPA demonstrates that emissions of nitrogen oxides from sources in a specific area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations;

(d) volatile organic compounds are presumed not to be precursors to $PM_{2.5}$ in any attainment or unclassifiable area, unless the state demonstrates to the administrator's satisfaction or EPA demonstrates that emissions of volatile organic compounds from sources in a specific area are a significant contributor to that area's ambient $PM_{2.5}$ concentrations;

(2) any pollutant that is subject to any standard promulgated under Section 111 of the act;

(3) any class I or II substance subject to a standard promulgated under or established by Title VI of the act;

(4) any pollutant that otherwise is "subject to regulation" under the act as defined in Subsection CCC of 20.11.61.7 NMAC; [~~except that any or all hazardous air pollutants either listed in Section 112 of the act or added to the list pursuant to Section 112(b)(2) of the act, which have not been delisted pursuant to Section 112(b)(3) of the act, are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the act.~~]

(5) [~~Reserved~~] notwithstanding Paragraphs (1) through (4) of Subsection WW of 20.11.61.7 NMAC, the term "regulated NSR pollutant" shall not include any or all hazardous air pollutants either listed in Section 112 of the act, or added to the list pursuant to Section 112(b)(2) of the act, and which have not been delisted pursuant to Section 112(b)(3) of the act, unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the act.

(6) particulate matter (PM) emissions, $PM_{2.5}$ emissions, and $PM_{10}$ emissions shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures; on or after January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods), such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, $PM_{2.5}$ and $PM_{10}$ in PSD permits; compliance with emissions limitations for PM, $PM_{2.5}$ and $PM_{10}$ issued prior to this date shall not be based on condensable particulate matter unless required by the terms and conditions of the permit or the applicable implementation plan; applicability determinations made prior to this date without accounting for condensable particulate matter shall not be considered in violation of 20.11.61 NMAC unless the applicable implementation plan required condensable particulate matter to be included.

**[~~WW.~~]XX. "Replacement unit"** means an emission unit for which all of the following criteria are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced.

(1) The emissions unit is a reconstructed unit within the meaning of 40 CFR 60.15(b)(1), or the emissions unit completely takes the place of an existing emissions unit.

(2) The emissions unit is identical to or functionally equivalent to the replaced emissions unit.

(3) The replacement unit does not change the basic design parameter(s) of the process unit.

(4) The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

**[~~XX.~~] YY. "Secondary emissions"** means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of 20.11.61 NMAC, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

**[~~YY.~~] ZZ. "Significant"** means:

(1) in reference to a net emissions increase or the potential of a source to emit any of the pollutants listed in Table 2 of 20.11.61.27 NMAC, a rate of emissions that would equal or exceed any of the corresponding emission rates listed in Table 2 of 20.11.61.27 NMAC;

(2) in reference to a net emissions increase or the potential of a source to emit a regulated new source review pollutant

that Paragraph (1) of Subsection [~~YY~~] ZZ of 20.11.61.7 NMAC, does not list, any emissions rate; and

(3) notwithstanding Paragraph (1) of Subsection [~~YY~~] ZZ of 20.11.61.7 NMAC, any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

**[~~ZZ.~~] AAA. "Significant emissions increase"** means, for a regulated new source review pollutant, an increase in emissions that is significant for that pollutant.

**[~~AAA.~~] BBB. "Stationary source"** means any building, structure, facility, or installation which emits, or may emit, any regulated new source review pollutant.

**CCC. "Subject to regulation"** means, for any air pollutant, that the pollutant is subject to either a provision in the Clean Air Act, or a nationally-applicable regulation codified by the administrator in Subchapter C of Chapter I of Title 40 of the CFR, that requires actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity. Except that:

(1) **Greenhouse gases (GHGs)** shall not be subject to regulation except as provided in Paragraphs (4) and (5) of Subsection CCC of 20.11.61.7 NMAC.

(2) For purposes of Paragraphs (3) through (5) of Subsection CCC of 20.11.61.7 NMAC, the term "tpy $CO_2$ equivalent emissions ($CO_2e$)" shall represent an amount of GHGs emitted, and shall be computed as follows:

(a) multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of Part 98 of Chapter I of Title 40 of the CFR — *Global Warming Potentials*;

(b) sum the resultant value from Subparagraph (a) of Paragraph (2) of Subsection CCC of 20.11.61.7 NMAC for each gas to compute a tpy $CO_2e$.

(3) The term "emissions increase" as used in Paragraphs (4) and (5) of Subsection CCC of 20.11.61.7 NMAC, shall mean that both a significant emissions increase (as calculated using the procedures in Subsection D of 20.11.61.11 NMAC) and a significant net emissions increase (as defined in Subsection PP of 20.11.61.7 NMAC and Subsection ZZ of 20.11.61.7 NMAC) occur. For the pollutant GHGs, an emissions increase shall be based on tpy $CO_2e$, and shall be calculated assuming the pollutant GHGs is a regulated NSR pollutant, and "significant" is defined as 75,000 tpy $CO_2e$ instead of applying the value in Table 2 of 20.11.61.27 NMAC.

(4) Beginning January 2, 2011, the pollutant GHGs is subject to regulation if:

(a) the stationary source is a new major stationary source for a regulated NSR pollutant that is not GHGs, and also will emit or will have the potential to emit 75,000 tpy $CO_2e$ or more; or

(b) the stationary source is an existing major stationary source for a regulated NSR pollutant that is not GHGs, and also will have an emissions increase of a regulated NSR pollutant, and an emissions increase of 75,000 tpy $CO_2e$ or more; and,

(5) beginning July 1, 2011, in addition to the provisions in Paragraph (4) of Subsection CCC of 20.11.61.7 NMAC, the pollutant GHGs shall also be subject to regulation:

(a) at a new stationary source that will emit or have the potential to emit 100,000 tpy $CO_2e$; or

(b) at an existing stationary source that emits or has the potential to emit 100,000 tpy $CO_2e$, when such stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase of 75,000 tpy $CO_2e$ or more.

**[~~BBB~~] DDD. "Temporary source"** means a stationary source which changes its location or ceases to exist within two years from the date of initial start of operations.

**[~~CCC~~] EEE. "Visibility impairment"** means any humanly perceptible change in visibility (visual range, contrast, coloration) from that which would have existed under natural conditions.

**[~~DDD~~] FFF. "Volatile organic compound (VOC)"** means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions; this includes any such organic compound other than those which the administrator designates as having negligible photochemical reactivity under 40 CFR 51.100(s).

[20.11.61.7 NMAC - Rp, 20.11.61.7 NMAC, 1/23/06; A, 5/15/06; A, 8/30/10; A, 1/10/11]

**20.11.61.11 APPLICABILITY:**

**A.** The requirements of 20.11.61 NMAC apply to the construction of any new major stationary source or any project at an existing major stationary source in an area designated as attainment or unclassifiable.

**B.** The requirements of Sections 20.11.61.12 NMAC through 20.11.61.18 NMAC, 20.11.61.21 NMAC and 20.11.61.24 NMAC apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as 20.11.61 NMAC otherwise provides.

**C.** No new major stationary source or major modification to which the requirements of Subsections A, B, C and D of 20.11.61.12 NMAC, Sections 20.11.61.13 NMAC through 20.11.61.18 NMAC, 20.11.61.21 NMAC and 20.11.61.24 NMAC apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

**D. Applicability procedures.**

(1) Except as otherwise provided in [~~Subsections E and F~~] Subsection E of 20.11.61.11 NMAC, and consistent with the definition of major modification, a project is a major modification for a regulated new source review pollutant if it causes a significant emissions increase and a significant net emissions increase. The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(2) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to Paragraphs (3) through (4) of Subsection D of 20.11.61.11 NMAC. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in Subsection [~~OO~~] PP of 20.11.61.7 NMAC. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(3) **Actual-to-projected-actual applicability test for projects that only involve existing emissions units.** A significant emissions increase of a regulated new source review pollutant is projected to occur if the sum of the difference between the projected actual emissions and the baseline actual emissions for each existing emissions unit equals or exceeds the significant amount for that pollutant.

(4) **Actual-to-potential test for projects that only involve construction of a new emissions unit(s).** A significant emissions increase of a regulated new source review pollutant is projected to occur if the sum of the difference between the potential to emit from each new emissions unit following completion of the project and

the baseline actual emissions of these units before the project equals or exceeds the significant amount for that pollutant.

(5) **Hybrid test for projects that involve multiple types of emissions units.** A significant emissions increase of a regulated new source review pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in Paragraphs (3) and (4) of Subsection D of 20.11.61.11 NMAC as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant.

**E.** For any major stationary source for a PAL for a regulated new source review pollutant, the major stationary source shall comply with requirements under 20.11.61.20 NMAC.

[20.11.61.11 NMAC - N, 1/23/06; A, 8/30/10; A, 1/10/11]

**20.11.61.12 OBLIGATIONS OF OWNERS OR OPERATORS OF SOURCES:**

**A.** Any owner or operator who begins actual construction or operates a source or modification without, or not in accordance with, a permit issued under the requirements of 20.11.61 NMAC shall be subject to enforcement action.

**B.** Approval to construct shall not relieve any person from the responsibility to comply fully with the provisions of the Air Quality Control Act, Sections 74-2-1 to 74-2-17, NMSA 1978; any applicable regulations of the board; and any other requirements under local, state, or federal law.

**C.** Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time; the administrator may extend the 18-month period upon a satisfactory showing that an extension is justified; this provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

**D.** At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then 20.11.61 NMAC shall apply to the source or modification as though construction had not yet commenced on the source or modification.

**E.** Except as otherwise provided in Subparagraph (b) of Paragraph (6) of Subsection E of 20.11.61.12 NMAC the following specific provisions apply with respect to any regulated new source review pollutant emitted from projects at existing emissions units at a major stationary source (other than projects at a source with a PAL) in circumstances where there is a reasonable possibility within the meaning of Paragraph (6) of Subsection E of 20.11.61.12 NMAC that a project that is not a part of a major modification may result in a significant emissions increase of such pollutant and the owner or operator elects to use the method specified in Paragraphs (1) through (3) of Subsection [~~UU~~] VV of 20.11.61.7 NMAC for calculating projected actual emissions.

(1) Before beginning actual construction of the project, the owner or operator shall document and maintain a record of the following information:

(a) a description of the project;

(b) identification of the emissions unit(s) whose emissions of a regulated new source review pollutant could be affected by the project; and

(c) a description of the applicability test used to determine that the project is not a major modification for any regulated new source review pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under Paragraph (3) of Subsection [~~UU~~] VV of 20.11.61.7 NMAC and an explanation for why such amount was excluded, and any netting calculations, if applicable.

(2) If the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator shall provide a copy of the information set out in Paragraph (1) of Subsection E of 20.11.61.12 NMAC to the department. Nothing in Paragraph (2) of Subsection E of 20.11.61.12 NMAC shall be construed to require the owner or operator of such a unit to obtain any determination from the department before beginning actual construction; however, necessary preconstruction approvals and/or permits must be obtained before beginning actual construction.

(3) The owner or operator shall monitor the emissions of any regulated new source review pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in Subparagraph (b) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of five years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated new source review pollutant at such emissions unit. For purposes of Paragraph (3) of Subsection E of 20.11.61.12 NMAC, fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in Table 1 of 20.11.61.26 NMAC or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

(4) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the department within 60 days after the end of each year during which records must be generated under Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC setting out the unit's annual emissions during the calendar year that preceded submission of the report.

(5) If the unit is an existing unit other than an electric utility steam generating unit, the owner or operator shall submit a report to the department if the annual emissions, in tons per year, from the project identified in Paragraph (1) of Subsection E of 20.11.61.12 NMAC, exceed the baseline actual emissions (as documented and maintained pursuant to Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC) by a significant amount for that regulated new source review pollutant, and if such emissions differ from the preconstruction projection as documented and maintained pursuant to Subparagraph (c) of Paragraph (1) of Subsection E of 20.11.61.12 NMAC. Such report shall be submitted to the department within 60 days after the end of such year. The report shall contain the following:

(a) the name, address and telephone number of the major stationary source;

(b) the annual emissions as calculated pursuant to Paragraph (3) of Subsection E of 20.11.61.12 NMAC; and

(c) any other information that the owner or operator wishes to include in the report (e.g., an explanation as to why the emissions differ from the preconstruction projection).

(6) A ''reasonable possibility'' under Subsection E of 20.11.61.12 NMAC occurs when the owner or operator calculates the project to result in either:

(a) a projected actual emissions increase of at least 50 percent of the amount that is a ''significant emissions increase,'' as defined under Subsection [~~ZZ~~] AAA of 20.11.61.7 NMAC (without reference to the amount that is a significant net emissions increase), for the regulated new source review pollutant; or

(b) a projected actual emissions increase that, added to the amount of emissions excluded under Paragraph (3) of

Subsection [~~UU~~] VV of 20.11.61.7 NMAC, sums to at least 50 percent of the amount that is a "significant emissions increase," as defined under Subsection [~~ZZ~~] AAA of 20.11.61.7 NMAC (without reference to the amount that is a significant net emissions increase), for the regulated new source review pollutant; for a project for which a reasonable possibility occurs only within the meaning of Subparagraph (b) of Paragraph (6) of Subsection E of 20.11.61.12 NMAC, and not also within the meaning of Subparagraph (a) of Paragraph (6) of Subsection E of 20.11.61.12 NMAC, then provisions of Paragraphs (2) through (5) of Subsection E of 20.11.61.12 NMAC do not apply to the project.

**F.** The owner or operator of the source shall make the information required to be documented and maintained pursuant to Subsection E of 20.11.61.12 NMAC available for review upon request for inspection by the department or the general public pursuant to the requirements contained in 40 CFR 70.4(b)(3)(viii).

[20.11.61.12 NMAC - Rp, 20.11.61.12 NMAC, 1/23/06; A, 8/30/10; A, 1/10/11]

**20.11.61.20 ACTUALS PLANTWIDE APPLICABILITY LIMITS (PALs)**

**A. Applicability.**

(1) The department may approve the use of an actuals PAL for any existing major stationary source if the PAL meets the requirements of 20.11.61.20 NMAC. The term "PAL" shall mean "actuals PAL" throughout 20.11.61.20 NMAC.

(2) Any physical change in or change in the method of operation of a major stationary source that maintains its total source-wide emissions below the PAL level, meets the requirements of 20.11.61.20 NMAC, and complies with the PAL permit:

(a) is not a major modification for the PAL pollutant;

(b) does not have to be approved through the plan's major NSR program; and

(c) is not subject to the provisions in Subsection D of 20.11.61.12 NMAC (restrictions on relaxing enforceable emission limitations that the major stationary source used to avoid applicability of the major new source review program).

(3) Except as provided under Subparagraph (c) of Paragraph (2) of Subsection A of 20.11.61.20 NMAC, a major stationary source shall continue to comply with all applicable federal or state requirements, emission limitations, and work practice requirements that were established prior to the effective date of the PAL.

**B. Definitions applicable to 20.11.61.20 NMAC.**

(1) **Actuals PAL for a major stationary source** means a PAL based on the baseline actual emissions of all emissions units at the source that emit or have the potential to emit the PAL pollutant.

(2) **Allowable emissions** means "allowable emissions" as defined in Subsection F of 20.11.61.7 NMAC, except as this definition is modified in accordance with the following.

(a) The allowable emissions for any emissions unit shall be calculated considering any emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit.

(b) An emissions unit's potential to emit shall be determined using the definition in Subsection [~~RR~~] SS of 20.11.61.7 NMAC, except that the words "or enforceable as a practical matter" should be added after "federally enforceable".

(3) **Small emissions unit** means an emissions unit that emits or has the potential to emit the PAL pollutant in an amount less than the significant level for that PAL pollutant, as defined in Subsection [~~YY~~] ZZ of 20.11.61.7 NMAC or in the act, whichever is lower.

(4) **Major emissions unit means:**

(a) Any emissions unit that emits or has the potential to emit 100 tons per year or more of the PAL pollutant in an attainment area; or

(b) any emissions unit that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant as defined by the act for nonattainment areas. For example, in accordance with the definition of major stationary source in Section 182(c) of the act, an emissions unit would be a major emissions unit for VOC if the emissions unit is located in a serious ozone nonattainment area and it emits or has the potential to emit 50 or more tons of VOC per year.

(5) **Plantwide applicability limitation (PAL)** means an emission limitation expressed in tons-per-year, for a pollutant at a major stationary source that is enforceable as a practical matter and established source-wide in accordance with 20.11.61.20 NMAC.

(6) **PAL effective date** generally means the date of issuance of the PAL permit. However, the PAL effective date for an increased PAL is the date any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(7) **PAL effective period** means the period beginning with the PAL effective date and ending 10 years later.

(8) **PAL major modification** means, notwithstanding the definitions for major modification and net emissions increase in 20.11.61.7 NMAC, any physical change in or change in the method of operation of the PAL source that causes it to emit the PAL pollutant at a level equal to or greater than the PAL.

(9) **PAL permit** means the major new source review permit, the minor new source review permit, or the state operating permit under a program that is approved into the SIP, or the title V permit issued by the department that establishes a PAL for a major stationary source.

(10) **PAL pollutant** means the pollutant for which a PAL is established at a major stationary source.

(11) **Significant emissions unit** means an emissions unit that emits or has the potential to emit a PAL pollutant in an amount that is equal to or greater than the significant level as defined in Subsection [~~YY~~] ZZ of 20.11.61.7 NMAC or in the act, whichever is lower for that PAL pollutant, but less than the amount that would qualify the unit as a major emissions unit as defined in Paragraph (4) of Subsection B of 20.11.61.20 NMAC.

**C. Permit application requirements.** As part of a permit application requesting a PAL, the owner or operator of a major stationary source shall submit the following information to the department for approval.

(1) A list of all emissions units at the source designated as small, significant or major based on their potential to emit. In addition, the owner or operator of the source shall indicate which, if any, federal or state applicable requirements, emission limitations, or work practices apply to each unit.

(2) Calculations of the baseline actual emissions with supporting documentation. Baseline actual emissions are to include emissions associated not only with operation of the unit, but also emissions associated with startup, shutdown, and malfunction.

(3) The calculation procedures that the major stationary source owner or operator proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by Subsection M of 20.11.61.20 NMAC.

**D. General requirements for establishing PALs.**

(1) The department may establish a PAL at a major stationary source, provided that at a minimum, the following requirements are met.

(a) The PAL shall impose an annual emission limitation in tons per year that is enforceable as a practical matter for the entire major stationary source. For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall show that the sum of the monthly emissions from each emissions unit under the PAL for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly). For each month

during the first 11 months from the PAL effective date, the major stationary source owner or operator shall show that the sum of the preceding monthly emissions from the PAL effective date for each emissions unit under the PAL is less than the PAL.

(b) The PAL shall be established in a PAL permit that meets the public participation requirements in Subsection E of 20.11.61.20 NMAC.

(c) The PAL permit shall contain all the requirements of Subsection G of 20.11.61.20 NMAC.

(d) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source.

(e) Each PAL shall regulate emissions of only one pollutant.

(f) Each PAL shall have a PAL effective period of 10 years.

(g) The owner or operator of the major stationary source with a PAL shall comply with the monitoring, recordkeeping, and reporting requirements provided in Subsections L through N of 20.11.61.20 NMAC for each emissions unit under the PAL through the PAL effective period.

(2) At no time during or after the PAL effective period are emissions reductions of a PAL pollutant that occur during the PAL effective period creditable as decreases for purposes of offsets under 40 CFR 51.165(a)(3)(ii) unless the level of the PAL is reduced by the amount of such emissions reductions and such reductions would be creditable in the absence of the PAL.

**E. Public participation requirements for PALs.** PALs for existing major stationary sources shall be established, renewed, or increased, through a procedure that is consistent with 40 CFR 51.160 and 161. This includes the requirement that the department provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment. The department must address all material comments before taking final action on the permit.

**F. Setting the 10-year actuals PAL level.**

(1) Except as provided in Paragraph (2) of Subsection F of 20.11.61.20 NMAC, the actuals PAL level for a major stationary source shall be established as the sum of the baseline actual emissions of the PAL pollutant for each emissions unit at the source; plus an amount equal to the applicable significant level for the PAL pollutant under Subsection [~~YY~~] ZZ of 20.11.61.7 NMAC or under the act, whichever is lower. When establishing the actuals PAL level, for a PAL pollutant, only one consecutive 24-month period must be used to determine the baseline actual emissions for all existing emissions units. However, a different consecutive 24-month period may be used for each different PAL pollutant. Emissions associated with units that were permanently shutdown after this 24-month period must be subtracted from the PAL level. The department shall specify a reduced PAL level(s) (in tons/yr) in the PAL permit to become effective on the future compliance date(s) of any applicable federal or state regulatory requirement(s) that the department is aware of prior to issuance of the PAL permit. For instance, if the source owner or operator will be required to reduce emissions from industrial boilers in half from baseline emissions of 60 ppm $NO_X$ to a new rule limit of 30 ppm, then the permit shall contain a future effective PAL level that is equal to the current PAL level reduced by half of the original baseline emissions of such unit(s).

(2) For newly constructed units (which do not include modifications to existing units) on which actual construction began after the 24-month period, in lieu of adding the baseline actual emissions as specified in Paragraph (1) of Subsection F of 20.11.61.20 NMAC, the emissions must be added to the PAL level in an amount equal to the potential to emit of the units.

**G. Contents of the PAL permit.** The PAL permit shall contain, at a minimum, the following information.

(1) The PAL pollutant and the applicable source-wide emission limitation in tons per year.

(2) The PAL permit effective date and the expiration date of the PAL (PAL effective period).

(3) Specification in the PAL permit that if a major stationary source owner or operator applies to renew a PAL in accordance with Subsection J of 20.11.61.20 NMAC before the end of the PAL effective period, then the PAL shall not expire at the end of the PAL effective period. It shall remain in effect until a revised PAL permit is issued by the department.

(4) A requirement that emission calculations for compliance purposes include emissions from startups, shutdowns and malfunctions.

(5) A requirement that, once the PAL expires, the major stationary source is subject to the requirements of Subsection I of 20.11.61.20 NMAC.

(6) The calculation procedures that the major stationary source owner or operator shall use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by Paragraph (1) of Subsection C of 20.11.61.20 NMAC.

(7) A requirement that the major stationary source owner or operator monitor all emissions units in accordance with the provisions under Subsection M of 20.11.61.20 NMAC.

(8) A requirement to retain the records required under Subsection M of 20.11.61.20 NMAC on site. Such records may be retained in an electronic format.

(9) A requirement to submit the reports required under Subsection N of 20.11.61.20 NMAC by the required deadlines.

(10) Any other requirements that the department deems necessary to implement and enforce the PAL.

**H. PAL effective period and reopening of the PAL permit.**

(1) **PAL effective period.** The PAL effective period shall be 10 years.

(2) **Reopening of the PAL permit.**

(a) During the PAL effective period, the department shall reopen the PAL permit to: correct typographical/calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL; reduce the PAL if the owner or operator of the major stationary source creates creditable emissions reductions for use as offsets under 40 CFR 51.165(a)(3)(ii); and revise the PAL to reflect an increase in the PAL as provided under Paragraph Subsection K of 20.11.61.20 NMAC.

(b) The department may reopen the PAL permit for the following: to reduce the PAL to reflect newly applicable federal requirements (for example, NSPS) with compliance dates after the PAL effective date; to reduce the PAL consistent with any other requirement, that is enforceable as a practical matter, and that the department may impose on the major stationary source under the plan; and to reduce the PAL if the department determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or to an adverse impact on an air quality related values (AQRV) that has been identified for a federal class I area by a federal land manager and for which information is available to the general public.

(c) Except for the permit reopening in Subparagraph (a) of Paragraph (2) of Subsection H of 20.11.61.20 NMAC for the correction of typographical/calculation errors that do not increase the PAL level, all reopenings shall be carried out in accordance with the public participation requirements of Subsection E of 20.11.61.20 NMAC.

**I. Expiration of a PAL.** Any PAL that is not renewed in accordance with the procedures in Subsection J of 20.11.61.20 NMAC shall expire at the end of the PAL effective period, and the requirements in Subsection I of 20.11.61.20 NMAC shall apply.

(1) Each emissions unit, or each group of emissions units, that existed under the PAL shall comply with an allowable emission limitation under a revised permit

established according to the procedures in Paragraph (1) of Subsection I of 20.11.61.20 NMAC.

(a) Within the time frame specified for PAL renewals in Paragraph (2) of Subsection J of 20.11.61.20 NMAC, the major stationary source shall submit a proposed allowable emission limitation for each emissions unit, or each group of emissions units, if such a distribution is more appropriate as decided by the department, by distributing the PAL allowable emissions for the major stationary source among each of the emissions units that existed under the PAL. If the PAL had not yet been adjusted for an applicable requirement that became effective during the PAL effective period, as required under Paragraph (5) of Subsection J of 20.11.61.20 NMAC, such distribution shall be made as if the PAL had been adjusted.

(b) The department shall decide whether and how the PAL allowable emissions will be distributed and issue a revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as the department determines is appropriate.

(2) Each emissions unit(s) shall comply with the allowable emission limitation on a 12-month rolling basis. The department may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS or CPMS to demonstrate compliance with the allowable emission limitation.

(3) Until the department issues the revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as required under Subparagraph (b) of Paragraph (1) of Subsection I of 20.11.61.20 NMAC, the source shall continue to comply with a source-wide, multi-unit emissions cap equivalent to the level of the PAL emission limitation.

(4) Any physical change or change in the method of operation at the major stationary source will be subject to major new source review requirements if such change meets the definition of major modification in Subsection [~~HH~~] II of 20.11.61.7 NMAC.

(5) The major stationary source owner or operator shall continue to comply with any state or federal applicable requirements (BACT, RACT, NSPS, etc.) that may have applied either during the PAL effective period or prior to the PAL effective period except for those emission limitations that had been established pursuant to Subsection D of 20.11.61.12 NMAC, but were eliminated by the PAL in accordance with the provisions in Subparagraph (c) of Paragraph (2) of Subsection A of 20.11.61.20 NMAC.

**J. Renewal of a PAL.**

(1) The department shall follow the procedures specified in Subsection E of 20.11.61.20 NMAC in approving any request to renew a PAL for a major stationary source, and shall provide both the proposed PAL level and a written rationale for the proposed PAL level to the public for review and comment. During such public review, any person may propose a PAL level for the source for consideration by the department.

(2) **Application deadline.** A major stationary source owner or operator shall submit a timely application to the department to request renewal of a PAL. A timely application is one that is submitted at least six months prior to, but not earlier than 18 months from, the date of permit expiration. This deadline for application submittal is to ensure that the permit will not expire before the permit is renewed. If the owner or operator of a major stationary source submits a complete application to renew the PAL within this time period, then the PAL shall continue to be effective until the revised permit with the renewed PAL is issued.

(3) **Application requirements.** The application to renew a PAL permit shall contain the following information.

(a) The information required in Subsection C of 20.11.61.20 NMAC.

(b) A proposed PAL level.

(c) The sum of the potential to emit of all emissions units under the PAL, with supporting documentation.

(d) Any other information the owner or operator wishes the department to consider in determining the appropriate level for renewing the PAL.

(4) **PAL adjustment.** In determining whether and how to adjust the PAL, the department shall consider the options outlined in Subparagraphs (a) and (b) of Paragraph (4) Subsection J of 20.11.61.20 NMAC. However, in no case may any such adjustment fail to comply with Subparagraph (c) of Paragraph 4 of Subsection J of 20.11.61.20 NMAC.

(a) If the emissions level calculated in accordance with Subsection F of 20.11.61.20 NMAC is equal to or greater than 80 percent of the PAL level, the department may renew the PAL at the same level without considering the factors set forth in Subparagraph (b) of Paragraph (4) of Subsection J of 20.11.61.20 NMAC; or

(b) the department may set the PAL at a level that it determines to be more representative of the source's baseline actual emissions, or that it determines to be appropriate considering air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the source's voluntary emissions reductions, or other factors as specifically identified by the department in its written rationale.

(c) Notwithstanding Subparagraphs (a) and (b) of Paragraph (4) of Subsection J of 20.11.61.20 NMAC: if the potential to emit of the major stationary source is less than the PAL, the department shall adjust the PAL to a level no greater than the potential to emit of the source; and the department shall not approve a renewed PAL level higher than the current PAL, unless the major stationary source has complied with the provisions of Subsection K of 20.11.61.20 NMAC.

(5) If the compliance date for a state or federal requirement that applies to the PAL source occurs during the PAL effective period, and if the department has not already adjusted for such requirement, the PAL shall be adjusted at the time of PAL permit renewal or Title V permit renewal, whichever occurs first.

**K. Increasing a PAL during the PAL effective period.**

(1) The department may increase a PAL emission limitation only if the major stationary source complies with the following provisions.

(a) The owner or operator of the major stationary source shall submit a complete application to request an increase in the PAL limit for a PAL major modification. Such application shall identify the emissions unit(s) contributing to the increase in emissions so as to cause the major stationary source's emissions to equal or exceed its PAL.

(b) As part of this application, the major stationary source owner or operator shall demonstrate that the sum of the baseline actual emissions of the small emissions units, plus the sum of the baseline actual emissions of the significant and major emissions units assuming application of BACT equivalent controls, plus the sum of the allowable emissions of the new or modified emissions unit(s), exceeds the PAL. The level of control that would result from BACT equivalent controls on each significant or major emissions unit shall be determined by conducting a new BACT analysis at the time the application is submitted, unless the emissions unit is currently required to comply with a BACT or LAER requirement that was established within the preceding 10 years. In such a case, the assumed control level for that emissions unit shall be equal to the level of BACT or LAER with which that emissions unit must currently comply.

(c) The owner or operator obtains a major new source review permit for all emissions unit(s) identified in Subparagraph (a) of Paragraph (1) of Subsection B of 20.11.61.20 NMAC, regardless of the magnitude of the emissions increase resulting from them, that is, no significant levels apply. These emissions unit(s) shall comply with any emissions requirements resulting from the major new source review process, for example, BACT, even though

they have also become subject to the PAL or continue to be subject to the PAL.

(d) The PAL permit shall require that the increased PAL level shall be effective on the day any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(2) The department shall calculate the new PAL as the sum of the allowable emissions for each modified or new emissions unit, plus the sum of the baseline actual emissions of the significant and major emissions units (assuming application of BACT equivalent controls as determined in accordance with Subparagraph (b) of Paragraph (1) of Subsection K of 20.11.61.20 NMAC), plus the sum of the baseline actual emissions of the small emissions units.

(3) The PAL permit shall be revised to reflect the increased PAL level pursuant to the public notice requirements of Subsection E of 20.11.61.20 NMAC.

**L. Monitoring requirements for PALs.**

(1) **General requirements.**

(a) Each PAL permit must contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant in terms of mass per unit of time. Any monitoring system authorized for use in the PAL permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. Additionally, the information generated by such system must meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.

(b) The PAL monitoring system must employ one or more of the four general monitoring approaches meeting the minimum requirements set forth in Paragraph (2) of Subsection L of 20.11.61.20 NMAC and must be approved by the department.

(c) Notwithstanding Subparagraph (b) of Paragraph (1) of Subsection L of 20.11.61.20 NMAC, you may also employ an alternative monitoring approach that meets Subparagraph (a) of Paragraph (1) of Subsection L of 20.11.61.20 NMAC if approved by the department.

(d) Failure to use a monitoring system that meets the requirements of 20.11.61.20 NMAC renders the PAL invalid.

(2) **Minimum performance requirements for approved monitoring approaches.** The following are acceptable general monitoring approaches when conducted in accordance with the minimum requirements in Paragraphs (3) through (9) of Subsection L of 20.11.61.20 NMAC:

(a) mass balance calculations for activities using coatings or solvents;

(b) CEMS;

(c) CPMS or PEMS; and

(d) emission factors.

(3) **Mass balance calculations.** An owner or operator using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(a) provide a demonstrated means of validating the published content of the PAL pollutant that is contained in or created by all materials used in or at the emissions unit;

(b) assume that the emissions unit emits all of the PAL pollutant that is contained in or created by any raw material or fuel used in or at the emissions unit, if it cannot otherwise be accounted for in the process; and

(c) where the vendor of a material or fuel, which is used in or at the emissions unit, publishes a range of pollutant content from such material, the owner or operator must use the highest value of the range to calculate the PAL pollutant emissions unless the department determines there is site-specific data or a site-specific monitoring program to support another content within the range.

(4) **CEMS.** An owner or operator using CEMS to monitor PAL pollutant emissions shall meet the following requirements:

(a) CEMS must comply with applicable performance specifications found in 40 CFR part 60, Appendix B; and

(b) CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(5) **CPMS or PEMS.** An owner or operator using CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements:

(a) the CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the PAL pollutant emissions across the range of operation of the emissions unit; and

(b) each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes, or at another less frequent interval approved by the department, while the emissions unit is operating.

(6) **Emission factors.** An owner or operator using emission factors to monitor PAL pollutant emissions shall meet the following requirements:

(a) all emission factors shall be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(b) the emissions unit shall operate within the designated range of use for the emission factor, if applicable; and

(c) if technically practicable, the owner or operator of a significant emissions unit that relies on an emission factor to calculate PAL pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of PAL permit issuance, unless the department determines that testing is not required.

(7) A source owner or operator must record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for an emissions unit during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the PAL permit.

(8) Notwithstanding the requirements in Paragraphs (3) through (7) of Subsection L of 20.11.61.20 NMAC, where an owner or operator of an emissions unit cannot demonstrate a correlation between the monitored parameter(s) and the PAL pollutant emissions rate at all operating points of the emissions unit, the department shall, at the time of permit issuance:

(a) establish default value(s) for determining compliance with the PAL based on the highest potential emissions reasonably estimated at such operating point(s); or

(b) determine that operation of the emissions unit during operating conditions when there is no correlation between monitored parameter(s) and the PAL pollutant emissions is a violation of the PAL.

(9) **Revalidation.** All data used to establish the PAL pollutant must be revalidated through performance testing or other scientifically valid means approved by the department. Such testing must occur at least once every five years after issuance of the PAL.

**M. Recordkeeping requirements.**

(1) The PAL permit shall require an owner or operator to retain a copy of all records necessary to determine compliance with any requirement of 20.11.61.20 NMAC and of the PAL, including a determination of each emissions unit's 12-month rolling total emissions, for five years from the date of such record.

(2) The PAL permit shall require an owner or operator to retain a copy of the following records, for the duration of the PAL effective period plus five years:

(a) a copy of the PAL permit application and any applications for revisions to the PAL; and

(b) each annual certification of compliance pursuant to 20.11.42 NMAC, Operating Permits, and the data relied on in certifying the compliance.

**N. Reporting and notification requirements.** The owner or operator shall submit semi-annual monitoring reports and prompt deviation reports to the department in accordance with 20.11.42 NMAC, *Operating Permits*. The reports shall meet the following

requirements.

(1) **Semi-annual report.** The semi-annual report shall be submitted to the department within 30 days of the end of each reporting period. This report shall contain the following information.

(a) The identification of owner and operator and the permit number.

(b) Total annual emissions (tons/year) based on a 12-month rolling total for each month in the reporting period recorded pursuant to Paragraph (1) of Subsection M of 20.11.61.20 NMAC.

(c) All data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions.

(d) A list of any emissions units modified or added to the major stationary source during the preceding six-month period.

(e) The number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken.

(f) A notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, and whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit, as provided by Paragraph (7) of Subsection L of 20.11.61.20 NMAC.

(g) A signed statement by the responsible official as defined by 20.11.42.7 NMAC certifying the truth, accuracy, and completeness of the information provided in the report.

(2) **Deviation report.** The major stationary source owner or operator shall promptly submit reports of any deviations or exceedance of the PAL requirements, including periods where no monitoring is available. A report submitted pursuant to 40 CFR 70.6(a)(3)(iii)(B) shall satisfy this reporting requirement. The deviation reports shall be submitted within the time limits prescribed by the applicable program implementing 40 CFR 70.6(a)(3)(iii)(B). The reports shall contain the following information:

(a) the identification of owner and operator and the permit number;

(b) the PAL requirement that experienced the deviation or that was exceeded;

(c) emissions resulting from the deviation or the exceedance; and

(d) a signed statement by the responsible official as defined by 20.11.42.7 NMAC certifying the truth, accuracy, and completeness of the information provided in the report.

(3) **Revalidation results.** The owner or operator shall submit to the department the results of any revalidation test or method within three months after completion of such test or method.

**O. Transition requirements.**

(1) The department may not issue a PAL that does not comply with the requirements of Subsections A through O of 20.11.61.20 NMAC after the administrator has approved regulations incorporating these requirements into the SIP.

(2) The department may supersede any PAL which was established prior to the date of approval of the SIP by the administrator with a PAL that complies with the requirements of 20.11.61.20 NMAC.

[20.11.61.20 NMAC - N, 1/23/06; A, 8/30/10; A, 1/10/11]

**20.11.61.27 TABLE 2 - SIGNIFICANT EMISSION RATES:**

| POLLUTANT | | EMISSION RATE (TONS/YR) |
|---|---|---|
| Carbon monoxide | | 100 |
| Fluorides | | 3 |
| Lead | | 0.6 |
| Municipal waste combustor: | | |
| | Acid gases (measured as sulfur dioxide and hydrogen chloride) | 40 (36 megagrams/year) |
| | Metals (measured as particulate matter) | 15 (14 megagrams/year) |
| | Organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans) | 0.0000035 (0.0000032 megagrams/yr) |
| Municipal solid waste landfill emissions (measured as NMOC) | | 50 (45 megagrams/year) |
| Nitrogen oxides | | 40 |
| Ozone | | 40 VOC or NOx |
| Particulate Matter: | | |
| | Particulate matter emissions | 25 |
| | $PM_{10}$ emissions | 15 |
| | $PM_{2.5}$ emissions | 10 tpy of direct $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions unless demonstrated not to be a $PM_{2.5}$ precursor under Subsection [~~VV~~] WW of 20.11.61.7 NMAC |
| Sulfur compounds | | |
| | Hydrogen sulfide ($H_2S$) | 10 |
| | Reduced sulfur compounds (incl. $H_2S$) | 10 |
| | Sulfur dioxide | 40 |

| | | |
|---|---|---|
| | Sulfuric acid mist | 7 |
| | Total reduced sulfur (incl. $H_2S$) | 10 |
| Any other regulated new source review pollutant that is not listed in this table | | Any emission rate |
| Each regulated pollutant | | Emission rate or net emissions increase associated with a major stationary source or major modification that causes an air quality impact of one microgram per cubic meter or greater (24-hr average) in any Class I Federal area located within 10 km of the source. |

[20.11.61.27 NMAC - Rp, 20.11.61.24 NMAC, 1/23/06; A, 8/30/10; A, 1/10/11]

## NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT
EARLY CHILDHOOD SERVICES DIVISION

This is a repromulgation to make permanent the amendment to 8.15.2 NMAC, Section 17, effective 12/30/10.

**8.15.2.17 PAYMENT FOR SERVICES:** The department pays child care providers on a monthly basis, according to standard practice for the child care industry. Payment is based upon the child's enrollment with the provider as reflected in the child care placement agreement, rather than daily attendance. As a result, most placements reflect a month of service provision and are paid on this basis. However, placements may be closed at any time during the month. The following describes circumstances when placements may be closed and payment discontinued at a time other than the end of the month:

A. When the eligibility period as indicated by the child care placement agreement expires during the month, including the end of a school semester; or when the provider requests that the client change providers or the provider discontinues services; payment will be made through the last day that care is provided.

B. When the client requests a change of provider, regardless of the reason, payment will be made through the final day of the expiration of the 14 calendar day notice issued to the provider. Payment to the new provider begins on the day care begins.

C. The amount of the payment is based upon the average number of hours per week needed per child during the certification period. The number of hours of care needed is determined with the parent at the time of certification and is reflected in the provider agreement. Providers are paid according to the units of service needed which are reflected in the child care agreement covering the certification period.

D. The department pays for care based upon the following units of service:

| Full time | Part time 1 | Part time 2 | Part time 3 |
|---|---|---|---|
| Care provided for an average of 30 or more hours per week per month | Care provided for an average of 20-29 hours per week per month | Care provided for an average of 6 -19 hours per week per month | Care provider for an average of 5 or less hours per week per month |
| Pay at 100% of full time rate | Pay at 75 % of full time rate | Pay at 50 % of full time rate | Pay at 25% of full time rate |

E. Out of school time care provided by licensed child care providers who provide care for 6-19 hours per week are paid at the 75% rate (part time 1).

F. Out of school time care provided by licensed child care providers who provide care for 20 or more hours per week are paid at the 100% rate (full time).

G. Out of school time care provided for 5 hours or less per week are paid at the 25% rate (part time 3) regardless of provider type.

H. Monthly reimbursement rates: The table below reflects a decrease in monthly provider reimbursement rates in response to a significant budget shortfall in FY 2011. The department will reevaluate its financial situation prior to June 30, 2011, which is the end of the state fiscal year 2011, and determine whether it will be possible to increase reimbursement rates for the following fiscal year.

| | Licensed child care centers | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Full time | | Part time 1 | | Part time 2 | | Part time 3 | |
| | Metro | Rural | Metro | Rural | Metro | Rural | Metro | Rural |
| Infant | [~~$476.37~~] $457.32 | [~~$418.75~~] $402.00 | [~~$357.28~~] $342.99 | [~~$314.06~~] $301.50 | [~~$238.19~~] $228.66 | [~~$209.38~~] $201.00 | [~~$119.09~~] $114.33 | [~~$104.69~~] $100.50 |
| Toddler | [~~$425.72~~] $408.69 | [~~$389.63~~] $374.04 | [~~$319.29~~] $306.52 | [~~$292.22~~] $280.53 | [~~$212.86~~] $204.35 | [~~$194.81~~] $187.02 | [~~$106.43~~] $102.17 | [~~$97.41~~] $93.51 |
| Pre-school | [~~$395.01~~] $379.21 | [~~$363.02~~] $348.50 | [~~$296.26~~] $284.41 | [~~$272.27~~] $261.37 | [~~$197.51~~] $189.60 | [~~$181.51~~] $174.25 | [~~$98.75~~] $94.80 | [~~$90.76~~] $87.12 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| School age | [~~$345.64~~] $331.81 | [~~$332.96~~] $319.64 | [~~$259.23~~] $248.86 | [~~$249.72~~] $239.73 | [~~$172.82~~] $165.91 | [~~$166.48~~] $159.82 | [~~$86.41~~] $82.95 | [~~$83.24~~] $79.91 |
| | Licensed group homes (capacity: 7-12) | | | | | | | |
| | Full time | | Part time 1 | | Part time 2 | | Part time 3 | |
| | Metro | Rural | Metro | Rural | Metro | Rural | Metro | Rural |
| Infant | [~~$379.01~~] $363.85 | [~~$355.96~~] $341.72 | [~~$284.26~~] $272.89 | [~~$266.97~~] $256.29 | [~~$189.51~~] $181.92 | [~~$177.98~~] $170.86 | [~~$94.75~~] $90.96 | [~~$88.99~~] $85.43 |
| Toddler | [~~$343.93~~] $330.17 | [~~$336.23~~] $322.78 | [~~$257.95~~] $247.63 | [~~$252.17~~] $242.09 | [~~$171.97~~] $165.09 | [~~$168.12~~] $161.39 | [~~$85.98~~] $82.54 | [~~$84.06~~] $80.70 |
| Pre-school | [~~$338.08~~] $324.56 | [~~$330.81~~] $317.57 | [~~$253.56~~] $243.42 | [~~$248.10~~] $238.18 | [~~$169.04~~] $162.28 | [~~$165.40~~] $158.79 | [~~$84.52~~] $81.14 | [~~$82.70~~] $79.39 |
| School age | [~~$333.53~~] $320.19 | [~~$323.53~~] $310.59 | [~~$250.15~~] $240.14 | [~~$242.65~~] $232.94 | [~~$166.77~~] $160.09 | [~~$161.77~~] $155.29 | [~~$83.38~~] $80.05 | [~~$80.88~~] $77.65 |
| | Licensed family homes (capacity: 6 or less) | | | | | | | |
| | Full time | | Part time 1 | | Part time 2 | | Part time 3 | |
| | Metro | Rural | Metro | Rural | Metro | Rural | Metro | Rural |
| Infant | [~~$365.20~~] $350.59 | [~~$342.60~~] $328.90 | [~~$273.90~~] $262.94 | [~~$256.95~~] $246.67 | [~~$182.60~~] $175.30 | [~~$171.30~~] $164.45 | [~~$91.30~~] $87.65 | [~~$85.65~~] $82.22 |
| Toddler | [~~$325.08~~] $312.08 | [~~$320.04~~] $307.24 | [~~$243.81~~] $234.06 | [~~$240.03~~] $230.43 | [~~$162.54~~] $156.04 | [~~$160.02~~] $153.62 | [~~$81.27~~] $78.02 | [~~$80.01~~] $76.81 |
| Pre-school | [~~$324.17~~] $311.20 | [~~$317.09~~] $304.40 | [~~$243.13~~] $233.40 | [~~$237.81~~] $228.30 | [~~$162.09~~] $155.60 | [~~$158.54~~] $152.20 | [~~$81.04~~] $77.80 | [~~$79.27~~] $76.10 |
| School age | [~~$319.28~~] $306.51 | [~~$309.64~~] $297.25 | [~~$239.46~~] $229.88 | [~~$232.23~~] $222.94 | [~~$159.64~~] $153.25 | [~~$154.82~~] $148.63 | [~~$79.82~~] $76.63 | [~~$77.41~~] $74.31 |
| | Registered homes and in-home child care | | | | | | | |
| | Full time | | Part time 1 | | Part time 2 | | Part time 3 | |
| | Metro | Rural | Metro | Rural | Metro | Rural | Metro | Rural |
| Infant | [~~$278.74~~] $267.59 | [~~$258.00~~] $247.68 | [~~$209.06~~] $200.69 | [~~$193.50~~] $185.76 | [~~$139.37~~] $133.80 | [~~$129.00~~] $123.84 | [~~$69.69~~] $66.90 | [~~$64.50~~] $61.92 |
| Toddler | [~~$264.00~~] $253.44 | [~~$217.69~~] $208.98 | [~~$198.00~~] $190.08 | [~~$163.27~~] $156.74 | [~~$132.00~~] $126.72 | [~~$108.85~~] $104.49 | [~~$66.00~~] $63.36 | [~~$54.42~~] $52.25 |
| Pre-school | [~~$242.00~~] $232.32 | [~~$220.00~~] $211.20 | [~~$181.50~~] $174.24 | [~~$165.00~~] $158.40 | [~~$121.00~~] $116.16 | [~~$110.00~~] $105.60 | [~~$60.50~~] $58.08 | [~~$55.00~~] $52.80 |
| School age | [~~$242.00~~] $232.32 | [~~$198.00~~] $190.08 | [~~$181.50~~] $174.24 | [~~$148.50~~] $142.56 | [~~$121.00~~] $116.16 | [~~$99.00~~] $95.04 | [~~$60.50~~] $58.08 | [~~$49.50~~] $47.52 |

I. The department pays a differential rate according to the location of the provider, license or registration status of the provider, national accreditation status of the provider if applicable, Star level status of the provider if applicable, and in accordance with the rate established for metro or rural location of the provider. Providers located in the metropolitan statistical areas of the state as determined by the U.S. census bureau receive the metropolitan rate. These include Bernalillo, Sandoval, Valencia, Santa Fe, Los Alamos, Dona Ana, and San Juan counties. All other providers receive the rural rate.

J. Providers holding national accreditation status receive an additional [~~$132.00~~] $126.72 per child per month for full time care above the metro rate for type of child care (licensed center, group home or family home) and age of child. All licensed nationally accredited providers will be paid at the metro rates for the appropriate age group and type of care. In order to continue at this accredited reimbursement rate, a provider holding national accreditation status must meet and maintain licensing standards and maintain national accreditation status without a lapse. If a provider holding national accreditation status fails to maintain these requirements, this will result in the provider reimbursement reverting to a lower level of reimbursement. The provider is required to notify the department immediately when a change in accreditation status occurs.

K. The department pays a differential rate to providers achieving higher Star levels as follows: 2-Star at [~~$45.00~~] $43.20 per month per child for full time care above the base reimbursement rate; 3-Star at [~~$70.00~~] $67.20 per month per child for full time care above the base reimbursement rate; 4-Star at [~~$104.50~~] $100.32 per month per child for full time care above the base reimbursement rate, and 5-Star at [~~$132.00~~] $126.72 per child per month for full time care above the base reimbursement rate. In order to continue at these reimbursement rates, a provider must maintain and meet most recent star criteria and basic licensing requirements. If the provider fails to meet the requirements, this will result in the provider reimbursement reverting to the level demonstrated.

L. The department pays a differential rate equivalent to 5, 10, or 15% of the applicable full-time/part-time rate to providers who provide care during non-traditional hours. Non-traditional care will be paid according to the following charts:

| | 1-10 hrs/wk | 11-20 hrs/wk | 21 or more hrs/wk |
|---|---|---|---|

| | | | |
|---|---|---|---|
| After hours | 5% | 10% | 15% |

| | 1-10 hrs/wk | 11-20 hrs/wk | 21 or more hrs/wk |
|---|---|---|---|
| Weekend hours | 5% | 10% | 15% |

M. If a significant change occurs in the client's circumstances, (see Subsection G of 8.15.2.13 NMAC) the child care placement agreement is modified and the rate of payment is adjusted. The department monitors attendance and reviews the placement at the end of the certification period when the child is re-certified.

N. The department may conduct provider or parent audits to assess that the approved service units are consistent with usage. Providers found to be defrauding the department are sanctioned. Providers must provide all relevant information requested by the department during an audit.

O. Payments are made to the provider for the period covered in the placement agreement or based on the availability of funds, which may be shorter than the usual six to 12 month certification period. The client's certification period may be established for a period less than six months, if applicable to their need for care.

[8.15.2.17 NMAC - Rp, 8.15.2.17 NMAC, 02/14/05; A, 08/31/06; A/E, 8/15/07; A, 06/30/10; A/E, 11/1/10; Re-pr, 12/30/10]

# NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT AND TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.13.20 NMAC, Sections 7, 9, 10, 11, 12, 14, and 15, effective 12/30/2010.

**3.13.20.7 DEFINITIONS:**

**A.** "Applicant" means a taxpayer who on or after January 1, 2004, donates or partially donates (or for purposes of 3.13.20.8 NMAC plans to donate or partially donate) through a bargain sale for a conservation or preservation purpose, a perpetual less-than-fee interest in land that appears to qualify as a charitable contribution under 26 U.S.C. section 170(h) and its implementing regulations or a fee interest in land, which is subject to a perpetual conservation easement, to a public or private conservation agency. If more than one taxpayer owns an interest in the land or interest in land that is the donated or partially donated, they shall be considered one applicant, but the application shall include the names and addresses of all taxpayers that own an interest in the donated land or interest in land.

**B.** "Appraisal bureau" means the taxation and revenue department, property tax division, appraisal bureau.

[~~B.~~]**C.** "Bargain sale" means a sale where the taxpayer is paid less than the fair market value of the land or interest in land.

[~~C.~~]**D.** "Building envelope" means a designated area within a conservation easement that is identified in the deed of conservation easement that contains existing structures and activities or will contain future structures and activities that are for the grantor's continued use of the property but that are prohibited elsewhere within the conservation easement.

**E.** "Committee" means the committee established pursuant to the Natural Lands Protection Act, NMSA 1978, Sections 75-5-1 *et seq.*

[~~D.~~]**F.** "Conservation or preservation purpose" means open space, natural area preservation, land conservation or preservation, natural resource or biodiversity conservation including habitat conservation, forest land preservation, agricultural preservation, watershed preservation or historic or cultural property preservation, or similar uses or purposes such as protection of land for outdoor recreation purposes. The resources or areas contained in the donation must be significant or important.

[~~E.~~]**G.** "Cultural property" means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance.

[~~F.~~]**H.** "Development approach" means a method of appraising undeveloped land having a highest and best use for subdivision into lots. This approach consists of estimating a final sale price for the total number of lots into which the property could best be divided and then deducting all development costs, including the developer's anticipated profit. The remaining sum, the residual, represents the raw land's market value.

[~~G.~~]**I.** "Governmental body" means the state of New Mexico or any of its political subdivisions.

[~~H.~~]**J.** "Interest in land" means a right in real property, including access, improvement, water right, fee simple interest, easement, land use easement, mineral right, remainder interest or other interest in or right in real property that complies with the requirements of 26 U.S.C. section 170(h)(2) and its implementing regulations, or any pertinent successor of 26 U.S.C. section 170(h)(2).

[~~I.~~]**K.** "Land" means real property, including rights of way, easements, privileges, water rights and all other rights or interests connected with real property.

[~~J.~~]**L.** "Less-than-fee interest" means an interest in land that is less than the entire property or all of the rights in the property or a non-possessory interest in land that imposes a limitation or affirmative obligation such as a conservation, land use or preservation restriction or easement.

[~~K.~~]**M.** "National register of historic places" means the register that the United States secretary of the interior maintains of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering or culture.

[~~L.~~]**N.** "Pass-through entity" means a business association other than a sole proprietorship; an estate or trust; a corporation, limited liability company, partnership or other entity not a sole proprietorship taxed as a corporation for federal income tax purposes for the taxable year; or a partnership that is organized as an investment partnership in which the partners' income is derived solely from interest, dividends and sales of securities.

[~~M.~~]**O.** "Public or private conservation agency" means a governmental body or a private non-profit charitable corporation or trust authorized to do business in New Mexico that is organized and operated for natural resources, land or historic conservation purposes and that has tax-exempt status as a public charity under 26 U.S.C. section 501(c)(3) and meets the requirements of 26 U.S.C. section 170(h)(3) and its implementing regulations, and has the power to acquire, hold or maintain land or interests in land.

[~~N.~~]**P.** "Qualified appraisal" means a qualified appraisal as defined in 26 C.F.R. section 1.170A-13(c)(3) or subsequent amendments and does not use the development approach as the sole means of determining fair market value. The appraisal for a conservation easement or restriction shall state whether the donation increases the value of other property the donor or a related person owns. In accordance with 26 C.F.R. section 1.170A-14(h)(3)(i), if the donation increases the value of other property the donor or a related person owns the appraisal shall reflect the increase by reducing the value of the conservation contribution by the

amount of the increase in value to the other property, whether or not the other property is contiguous with the donated property.

[~~O.~~]**Q.** "Qualified appraiser" means a qualified appraiser as defined in 26 C.F.R. section 1.170A-13(c)(5) or subsequent amendments and who is a certified general real estate appraiser.

[~~P.~~]**R.** "Qualified intermediary" means any person who has not been previously convicted of a felony, who has not had a professional license revoked, who is not engaged in the practice of public accountancy as defined in NMSA 1978, Section 61-28B-3 or who is not identified in the NMSA 1978, Section 61-29-2, which governs real estate brokers and salespersons, or who is not an entity owned wholly or in part by or employing a person who has been previously convicted of a felony, who has had a professional license revoked, who is engaged in the practice of public accountancy as defined in NMSA 1978, Section 61-28B-3 or who is identified in NMSA 1978, Section 61-29-2.

[~~Q.~~]**S.** "Taxpayer" means a United States citizen or resident, a United States domestic partnership, a limited liability company, a United States domestic corporation, an estate, including a foreign estate, or a trust. A non-profit may be a taxpayer if organized as a United States domestic partnership, a limited liability company, a United States domestic corporation or a trust. A governmental body or other governmental entity is not a taxpayer.

[~~R.~~]**T.** "Tax filer" means a New Mexico taxpayer who files a New Mexico tax return claiming a tax credit pursuant to the Land Conservation Incentives Act together with valid numbered documentation from the taxation and revenue department or valid sub-numbered documentation from a qualified intermediary.

[~~S.~~]**U.** "Secretary" means the secretary of energy, minerals and natural resources department or his or her designee.

[3.13.20.7 NMAC - Rp, 3.13.20.7 NMAC, 6-16-2008; A, 12-30-2010]

**3.13.20.9 ASSESSMENT APPLICATION:**

**A.** An applicant who plans to apply for a land conservation incentives tax credit shall apply for an assessment by the energy, minerals and natural resources department of the donation the applicant made or proposes to make for a conservation or preservation purpose of a fee interest in land or a less-than-fee interest in land. An applicant may submit the assessment application to the energy, minerals and natural resources department either prior to conveying the fee interest in land or less-than-fee interest in land or after conveying the fee interest in land or less-than-fee interest in land. The applicant does not need to submit an appraisal with the assessment application package.

**B.** An applicant may obtain an assessment application form from the energy, minerals and natural resources department.

**C.** An applicant shall submit the assessment application package, which shall include [~~an~~] one signed, completed paper original and either eight paper copies or eight electronic copies, to the energy, minerals and natural resources department. If submitting electronic copies, the applicant may submit the eight copies of the assessment application package [~~in electronic format~~] on a compact or digital video disc or other electronic medium such as a USB flash drive [~~, instead of a paper original and copies, but shall provide nine copies of the compact or digital video disc or nine of the other electronic medium~~]. Any photographs submitted shall be in color.

**D.** The assessment application package shall consist of an assessment application form that contains the applicant's name, address, telephone number, e-mail address if available and signature, with the following required attachments:

**(1)** a donation assessment report that includes:

**(a)** a detailed description of the donation or proposed donation including:

**(i)** whether the donation or proposed donation is a fee interest in land or a less-than-fee interest in land;

**(ii)** if the donation or proposed donation is a fee interest in land, in order to ensure that the conservation or preservation purpose is protected in perpetuity, a description of who holds or will hold a conservation easement that the applicant has placed or will place on the land and assurance that the conservation easement will contain a provision that the conservation restrictions run with the land in perpetuity and that any reserved use shall be consistent with the conservation or preservation purpose and that separate donees will hold the fee interest and conservation easement;

**(iii)** the donation or proposed donation's conservation or preservation purpose and how the donation or proposed donation protects that purpose in perpetuity;

**(iv)** significant natural or cultural resources present on the property; and

[~~(iv)~~]**(v)** a description of any water rights associated with the property and whether the conservation easement or deed requires or will require any water rights associated with the property to remain with the property;

**(b)** the current property characteristics and condition with clear maps of appropriate scale to illustrate relevant details, and showing the property's location and boundaries including a survey plat if available, directions to the property, topography, relation to other properties applicant owns that are within a 10 mile radius of the property, and relation to adjacent land uses and ownership (*i.e.* federal, tribal, state, private, etc.) and other properties whose conservation or preservation purposes are protected in perpetuity that are adjacent to the property or within a five mile radius of the property;

**(c)** the size of the property in acres;

**(d)** a description of all structures existing on the property;

**(e)** if a donation or proposed donation is a less-than-fee interest, a description of any building envelopes including their size and exact location and the size of the buildings allowed within each building envelope;

**(f)** if a donation or proposed donation is a less-than-fee interest, a description of the reserved rights and permitted activities that the applicant has or plans to retain or a copy of the completed or draft conservation easement;

**(g)** if a conservation or preservation purpose is for the preservation of a historically important land area, documentation that the donation meets the requirements of 26 C.F.R. section 1.170A-14(d)(5); historically important land areas include an independently significant land area that meets the national register criteria for evaluation in 36 C.F.R section 60.4, a land area (including related historic resources) within a registered historic district including a building on the land area that can reasonably be considered as contributing to the district's significance and a land area adjacent to a property listed individually in the national register of historic places where the land area's physical or environmental features contribute to the property's historic or cultural integrity;

**(h)** if a conservation or preservation purpose is for the preservation of a certified historic structure, which means buildings, structures or land areas, documentation that the structure is listed in the national register of historic places or is located in a registered historic district and is certified by the secretary of the interior to the secretary of treasury as being of historic significance to the district and that the donation meets the requirements of 26 C.F.R. section 1.170A-14(d)(5);

**(i)** if a conservation or preservation purpose is for the preservation of land areas for outdoor recreation by or for the education of the general public, a detailed description of how the conservation easement or deed will provide for the general public's substantial and regular use;

**(j)** if a conservation or preservation purpose is for the protection of a relatively natural area, a detailed description of the vegetative cover, wildlife use, how the property contributes to the functioning of the larger regional ecosystem and watershed and how the conservation easement will protect the soil, native plant cover and wildlife use of the property;

**(k)** if a conservation or preservation purpose is for the preservation of open space pursuant to a clearly delineated federal, state or local government policy, documentation of such policy and a detailed description identifying the significant public benefit;

**(l)** if a conservation or preservation purpose is for the preservation of open space that is not pursuant to a clearly delineated federal, state or local government policy, a detailed description of how the conservation easement or deed will provide for the general public's scenic enjoyment and identifying the significant public benefit;

**(m)** if a conservation or preservation purpose is for the protection of agricultural land, a detailed description of the property's crop or animal production potential, documentation that the portion of the property claimed as agricultural land is currently subject to the special method of valuation of land used primarily for agricultural purposes as described in NMSA 1978, Section 7-36-20 (*i.e.*, classified as either irrigated agricultural land, dryland agricultural land or grazing land under Paragraph (2) of Subsection F of 3.6.5.27 NMAC as shown on the statement of value issued by the county in which the land is located) and a description of how the conservation easement or deed will provide for agricultural use and the continued use of any water rights;

**(n)** the results of and a description of the physical inspection of the property the donee or proposed donee conducted for any indications of potentially hazardous materials or activities that have or may result in environmental contamination such as landfills, leaking petroleum storage tanks, hazardous material containers or spills, polychlorinated biphenyl containing equipment, asbestos insulation and abandoned mineral mining or milling facilities or other past activities using hazardous materials and the results of and a description of the interview the donee or proposed donee conducted with the landowner concerning the landowner's knowledge of such potentially hazardous materials or activities;

**(2)** if the donee or proposed donee or landowner identified the potential for potentially hazardous materials or activities in the donation assessment report, a phase I environmental site assessment of the property and a phase II environmental site assessment if recommended by the phase I environmental assessment;

**(3)** a copy of any formal donor or donee plan for management or stewardship of the property's conservation or preservation values;

**(4)** signed authorization from the applicant that allows personnel from the energy, minerals and natural resources department or members of the committee [~~established pursuant to the Natural Lands Protection Act~~] to enter upon the land or interest in land to view the conservation or preservation values conveyed or to be conveyed by the applicant for the purposes of reviewing the assessment application, upon the personnel or committee members providing the applicant with 48 hours prior notice; and

**(5)** a report from the public or private land conservation agency that has accepted or plans to accept the donation that provides the following:

**(a)** the number of fee lands held for conservation or preservation purposes or conservation easements that the agency holds in New Mexico;

**(b)** the number of acres of each fee land held for conservation or preservation purposes or conservation easement that the agency holds in New Mexico;

**(c)** the names of board members if the agency is a private nonprofit organization or the names of elected or appointed officials if the organization is a public entity; and

**(d)** a signed statement from the public or private conservation agency describing its commitment to protect the donation's conservation or preservation purposes, its resources to provide stewardship of and management for fee lands or to enforce conservation easement restrictions and, if a conservation easement, its resources and policies to annually monitor the conservation easement.

**E.** The secretary reviews the assessment applications in consultation with the committee [~~established pursuant to the Natural Lands Protection Act~~]. The secretary initiates consultation by sending the assessment application package to the committee members for review and comment or by calling a meeting of the committee. The secretary shall accept assessment application packages on a rolling basis or not fewer than three times per year spaced throughout the year, the deadlines for which shall be published in advance on the energy, minerals and natural resources department's website. The committee shall meet not fewer than three times per year (within approximately 45 days after a set deadline for assessment application package submittals or otherwise spaced throughout the year) to consider timely and complete assessment applications unless no assessment applications are currently pending or the limited volume of the assessment application enables the secretary to consult with the committee without the need for a formal meeting. The secretary, in consultation with the committee, shall assess the donation or proposed donation, using the factors in 3.13.20.13 NMAC, to determine if the donation or proposed donation is for a conservation or preservation purpose and will protect the conservation or preservation purpose in perpetuity and that the resources or areas contained in the donation or proposed donation are significant or important.

**F.** If the secretary finds [~~, contingent upon the applicant meeting the requirements in 3.13.20.10 NMAC, the completed conservation easement or deed accurately reflecting the donation or proposed donation described in the donation assessment report and the taxation and revenue department, property tax division, appraisal bureau not issuing an unfavorable recommendation of the appraisal pursuant to 3.13.20.12 NMAC,~~] that the donation as conveyed or proposed is for a conservation or preservation purpose and will protect the conservation or preservation purpose in perpetuity and that the resources or areas contained in the donation or proposed donation are significant or important, the secretary shall notify the applicant by letter that the applicant may file an application for certification of eligibility as provided in 3.13.20.10 NMAC. Approval of the application for certification of eligibility is contingent upon the applicant meeting the requirements in 3.13.20.10 NMAC, the completed conservation easement or deed accurately reflecting the donation or proposed donation described in the donation assessment report and the appraisal bureau issuing a favorable recommendation of the appraisal. In order to apply for certification of eligibility, the applicant may not change a proposed donation, donation assessment report or, if a proposed donation, the public or private conservation agency to which [~~it~~] the applicant is making the donation after [~~it~~] the applicant submits the assessment application. If the applicant makes such changes, the applicant shall submit a new assessment application and must receive a favorable finding from the secretary before applying for certification of eligibility.

**G.** The secretary shall reject an assessment application that is not complete or correct. If the secretary rejects the assessment application because [~~it~~] the assessment application is incomplete or incorrect or finds that the donation or proposed donation is not for a conservation or preservation purpose, the donation or proposed donation may not or will not protect the conservation or preservation purpose in perpetuity or that the resources or areas contained in the donation or proposed donation are not significant or important, the applicant may not submit an

application for certification of eligibility for the land conservation incentives tax credit. The secretary's letter shall state the specific reasons why the secretary found the assessment application incomplete or incorrect, that the donation or proposed donation is not for a conservation or preservation purpose, that the donation or proposed donation may not or will not protect the conservation or preservation purpose in perpetuity or that the resources or areas contained in the donation or proposed donation are not significant or important.

**H.** If the secretary rejects the assessment application because [~~it~~] the assessment application is incomplete or incorrect; or although [~~it~~] the assessment application is complete and correct and the donation or proposed donation is for a conservation or preservation purpose the resources or areas contained in the donation or proposed donation are not significant or important; or the donation or proposed donation may not or will not protect the conservation or preservation purpose in perpetuity, the applicant may resubmit the application package with the complete or correct information or additional information that addresses the requirement that the resources or areas contained in the donation or proposed donation be significant or important or that the donation or proposed donation protect the conservation or preservation purpose in perpetuity. The secretary shall place the resubmitted assessment application in the review schedule as if it were a new assessment application.

[3.13.20.9 NMAC - N, 6-16-2008; A, 12-30-2010]

**3.13.20.10 APPLICATION FOR CERTIFICATION OF ELIGIBILITY:**

**A.** An applicant who submitted an assessment application to the energy, minerals and natural resources department and received a finding from the secretary that the donation or proposed donation is for a conservation or preservation purpose and will protect that conservation or preservation purpose in perpetuity and that the resources or areas contained in the donation or proposed donation are significant or important may apply for certification of eligibility for a land conservation incentives tax credit. An applicant may not apply for certification of eligibility for a land conservation incentives tax credit without first submitting an assessment application pursuant to 3.13.20.9 NMAC and receiving a favorable finding from the secretary. The applicant shall certify in writing that the applicant has not changed the donation or proposed donation, donation assessment report or the public or private conservation agency to which [~~it~~] the applicant conveyed or planned to convey the donation since [~~it~~] the applicant submitted the assessment application. If the applicant has made such changes the applicant shall submit a new assessment application pursuant to 3.13.20.9 NMAC and receive a favorable finding from the secretary before applying for certification of eligibility.

**B.** The applicant may obtain a land conservation incentives tax credit certification of eligibility application form from the energy, minerals and natural resources department.

**C.** An applicant shall submit the certification of eligibility application package, which shall include [~~an~~] one signed, completed paper original and [~~eight~~] two paper copies of the application package, to the energy, minerals and natural resources department. Any photographs shall be provided in color. [~~If submitting electronic copies, the applicant may submit the certification of eligibility application package in electronic format on a compact or digital video disc or other electronic medium such as a USB flash drive, instead of a paper original and copies, but shall provide nine copies of the compact or digital video disc or of the other electronic medium~~]. The applicant shall certify that the information and documents included in the application for certification of eligibility are true and correct.

**D.** The completed application for certification of eligibility shall contain the applicant's name, address, telephone number, e-mail address if available, signature, federal employer identification number or social security number, and, if available, the New Mexico combined reporting system (CRS) identification number as well as the certifications, information and attachments required by Subsections E through I of 3.13.20.10 NMAC, as applicable. If more than one taxpayer owns the donated land or interest in land, the application shall include each taxpayer's federal employer identification number or social security number and, if available, New Mexico CRS identification number. The applicant shall indicate on the application whether the applicant is a United States citizen or resident, a United States domestic partnership, a limited liability company, a United States domestic corporation, an estate or a trust. If more than one taxpayer owns the donated land or interest in land, the application shall include each taxpayer's status.

**E.** The application shall state whether the applicant made the donation as part of a bargain sale. If the applicant made the donation as part of a bargain sale, the application shall include the amount the applicant received from the sale of the land or interest in land.

**F.** The applicant shall certify on the certification of eligibility application that none of the taxpayers listed on the certification of eligibility application is or was a subsidiary, partner, manager, member, shareholder or beneficiary of a domestic partnership, limited liability company, domestic corporation or pass-through entity that owns or has owned the land or interest in land in the five years preceding the date that the applicant conveyed the land or interest in land. If an individual and a domestic partnership, limited liability company, domestic corporation or pass-through entity are listed as owners on the deed conveying the land or interest in land, the applicant shall certify on the certification of eligibility application that the individual is not a partner, manager, member, shareholder or beneficiary of the domestic partnership, limited liability company, domestic corporation or pass-through-entity. If more than one domestic partnership, limited liability company, domestic corporation or pass-through entity are listed as an owner on the deed conveying the land or interest in land, the applicant shall certify on the certification of eligibility application that none of the named entities is a subsidiary, partner, manager, member, shareholder or beneficiary of any of the other entities listed on the deed.

**G.** The certification of eligibility application package shall consist of a land conservation incentives tax credit application form, with the following required attachments as well as any attachments required in Subsection H of 3.13.20.10 NMAC for fee donations or Subsection I of 3.13.20.10 NMAC for less-than-fee donations:

**(1)** a copy of the letter from the secretary stating that after reviewing the applicant's assessment application that the donation or proposed donation is for a conservation or preservation purpose and will protect the conservation or preservation purpose in perpetuity and that the resources or areas contained in the donation or proposed donation are significant or important;

**(2)** written certification signed by the applicant that the applicant has not changed the donation or proposed donation, donation assessment report or the public or private conservation agency to which [~~it~~] the applicant conveyed or planned to convey the donation since [~~it~~] the applicant submitted the assessment application;

**(3)** a copy of the conservation easement or deed recorded with the county clerk of the county or counties where the land is located, which reflects the ownership interest of each individual or entity conveying the land or interest in land;

**(4)** a qualified appraisal of the land or interest in land donated that a qualified appraiser prepared showing the fair market value of the land or interest in land with a statement from the appraiser that prepared

the appraisal certifying that the appraisal is a qualified appraisal and that the appraiser is a qualified appraiser; the appraisal shall not be made more than 60 days prior to the date of the donation; the appraisal shall either be a self-contained appraisal or, if a summary appraisal, shall include a copy of the appraiser's work file;

**(5)** if the donation is to a private conservation agency, a copy of that agency's 501(c)(3) certification from the United States internal revenue service;

**(6)** a signed statement from the applicant certifying that the applicant did not donate the land or interest in land for open space for the purpose of fulfilling density requirements to obtain subdivision or building permits;

**(7)** if the applicant owns other properties within a 10 mile radius of the donated land or interest in land, a legal description of those properties;

**(8)** signed authorization from the applicant that authorizes personnel from the [~~taxation and revenue department, property tax division,~~] appraisal bureau to contact the appraiser that prepared the appraisal for the donation;

**(9)** a title opinion certifying that the applicant owned the donated land or interest in land as of the date of the donation or a title insurance policy for the land or interest in land showing that the applicant owned the donated land or interest in land as of the date of the donation;

[~~**(9)**~~]**(10)** if the applicant owns the mineral interest under the land or the interest in land, a title opinion certifying such ownership, other documentation establishing such ownership, or a report from a professional geologist that the probability of surface mining occurring on such property is so remote as to be negligible, and a provision in the conservation easement or deed that prohibits any extraction or removal of minerals by any surface mining method; methods of mining that have limited, localized negative effects on the land and that are not irremediably destructive of significant conservation interests may be allowed if the secretary finds that the methods will have limited, localized negative effects and are not irremediably destructive of significant conservation interests; and

[~~**(10)**~~]**(11)** if the ownership of the surface estate and mineral interest has been separate and remains separate, a report, satisfactory to the secretary, from a professional geologist that the probability of surface mining occurring on such property is so remote as to be negligible; the secretary may have a geologist that the state employs review the report; if the secretary finds the report unsatisfactory the secretary's letter denying certification of eligibility shall state the reasons that the report is unsatisfactory.

**H.** If the applicant donated the land in fee, the applicant shall also include the following attachments with the application package:

**(1)** a statement from the public or private conservation agency to which the applicant donated the land, that the applicant donated the land for conservation or preservation purposes and the public or private conservation agency will hold the land for such purposes;

**(2)** a copy of United States internal revenue service form 8283 for the donation signed by the public or private conservation agency and the appraiser who prepared the appraisal for the donation; and

**(3)** to ensure the land will be used in perpetuity for the purposes of the donation, documentation in the form of a conservation easement that complies with 26 U.S.C. section 170(h) and its implementing regulations placed on the land that contains a provision in the conservation easement that the conservation restrictions run with the land in perpetuity and that any reserved use shall be consistent with the conservation or preservation purpose (separate donees must hold the fee and conservation easement).

**I.** If the applicant donated a less-than-fee interest in land, the applicant shall also include the following attachments with the application package:

**(1)** a copy of United States internal revenue service form 8283 for that donation signed by the public or private conservation agency and the appraiser who prepared the appraisal for the donation;

**(2)** a provision in the conservation easement that identifies the donation's conservation or preservation purpose or purposes;

**(3)** a provision in the conservation easement that provides that the conveyance of the less-than-fee interest does not and will not adversely affect contiguous landowners' existing property rights;

**(4)** if a conservation or preservation purpose is for the conservation or preservation of land areas for outdoor recreation by or for the education of the general public, a provision in the conservation easement that provides for the general public's substantial and regular use;

**(5)** if a conservation or preservation purpose is for the protection of a relatively natural habitat, a provision in the conservation easement that describes the habitat;

**(6)** if a conservation or preservation purpose is for the preservation of open space pursuant to a clearly delineated federal, state or local government policy, a provision in the conservation easement identifying such policy and identifying the significant public benefit;

**(7)** if a conservation or preservation purpose is for the preservation of open space that is not pursuant to a clearly delineated federal, state or local government policy, a provision in the conservation easement stating how the easement or restriction provides for the general public's scenic enjoyment and identifies the significant public benefit;

**(8)** if a conservation or preservation purpose is for the property's continued use for irrigated agriculture, a provision that provides that sufficient water rights will remain with the property;

**(9)** a provision in the conservation easement that the conservation restrictions run with the land in perpetuity;

**(10)** a provision in the conservation easement that any reserved use shall be consistent with the conservation or preservation purpose;

**(11)** a provision in the conservation easement that prohibits the donee from subsequently transferring the interest in land unless the transfer is to another public or private conservation agency and the donee, as a condition of the transfer, requires that the conservation or preservation purposes for which the donation was originally intended continue to be carried out;

**(12)** a provision in the conservation easement that provides that the donation of the less-than-fee interest is a property right, immediately vested in the donee, and provides that the less-than-fee interest has a fair market value that is at least equal to the proportionate value that the conservation restriction at the time of the donation bears to the property as a whole at that time; the provision shall further provide that if subsequent unexpected changes in the conditions surrounding the property make impossible or impractical the property's continued use for conservation or preservation purposes and judicial proceedings extinguish the easement or restrictions then the donee is entitled to a portion of the proceeds from the property's subsequent sale, exchange or involuntary conversion at least equal to the perpetual conservation restriction's proportionate value;

**(13)** if the applicant reserves rights that if exercised may impair the conservation interests associated with the property, documentation sufficient to establish the property's condition at the time of the donation and a provision in the conservation easement whereby the applicant agrees to notify the public or private conservation agency receiving the donation before exercising any reserved right that may adversely impact the conservation or preservation purposes; and

**(14)** if the interest in land is subject to a mortgage, a subordination agreement, recorded with the county clerk of the county or counties where the land that is located, from the mortgage holder that [~~it~~] the mortgage holder subordinates

[~~its~~] the mortgage holder's rights in the interest in land to the right of the public or private conservation agency to enforce the conservation or preservation purposes of the donation in perpetuity.

[3.13.20.10 NMAC - Rp, 3.13.20.9 NMAC, 6-16-2008; A, 12-30-2010]

**3.13.20.11 CERTIFICATION OF ELIGIBILITY APPLICATION REVIEW PROCESS AND CERTIFICATION OF ELIGIBLE DONATION:**

**A.** Authority to Review. The secretary reviews certification of eligibility applications.

**B.** Appraisal Review. Upon receiving the certification of eligibility application, the secretary requests that the taxation and revenue department review the appraisal and forwards the appraisal to the appraisal bureau for review. The appraisal bureau shall review the appraisal and advise the secretary whether the appraisal meets the requirements of 3.13.20 NMAC including whether the appraisal complies with the uniform standards of professional appraisal practice and whether the appraiser used proper methodology and reached a reasonable conclusion concerning value.

**(1)** If the appraisal bureau determines that the appraisal meets the requirements of 3.13.20 NMAC including whether the appraisal complies with the uniform standards of professional appraisal practice and that the appraiser used proper methodology and reached a reasonable conclusion concerning value the appraisal bureau shall issue a final review of the appraisal to the energy, minerals and natural resources department.

**(2)** If the appraisal bureau determines that that the appraisal does not meet the requirements of 3.13.20 NMAC, the uniform standards of professional appraisal practice or that the appraiser did not use proper methodology or reach a reasonable conclusion concerning value the appraisal bureau shall send a preliminary review of the appraisal to the energy, minerals and natural resources department identifying the reasons for the appraisal bureau's determination.

**(3)** The appraisal bureau's review does not preclude further audit by the taxation and revenue department or the United States internal revenue service.

[~~B.~~]**C.** Rejection of Certification of Eligibility Applications. The secretary shall reject a certification of eligibility application if

**(1)** [~~it~~] the certification of eligibility application is incomplete or incorrect;

**(2)** the applicant changed the donation or proposed donation, donation assessment report or the public or private conservation agency to which [~~it~~] the applicant conveyed or planned to convey the donation since [~~it~~] the applicant submitted the assessment application;

**(3)** the donation does not meet the requirements of 3.13.20.8 NMAC or 3.13.20.10 NMAC;

**(4)** the completed conservation easement or deed does not accurately reflect the donation the applicant described in [~~its~~] the applicant's assessment application; or

**(5)** the [~~taxation and revenue department, property tax division,~~] appraisal bureau provides [~~an~~] a final unfavorable recommendation of the appraisal.

**D.** Notice of Cause to Reject. If the secretary determines that there is cause to reject the certification of eligibility application, the secretary shall issue notice to the applicant pursuant to 3.13.20.12 NMAC.

[~~C.~~]**E.** Resubmittal of Rejected Certification of Eligibility Applications.

**(1)** If the secretary rejects the certification of eligibility application because [~~it~~] the certification of eligibility application was incomplete or incorrect; does not meet the requirements of 3.13.20.8 NMAC or 3.13.20.10 NMAC; the filed conservation easement or deed does not accurately reflect the donation the applicant described in [~~its~~] the applicant's assessment application; or the [~~taxation and revenue department, property tax division,~~] appraisal bureau provides [~~an~~] a final unfavorable recommendation of the appraisal, the applicant may resubmit the application package for the rejected certification of eligibility application with the complete or correct information or additional information that addresses the requirements the donation does not meet. The secretary shall place the resubmitted certification of eligibility application in the review schedule as if it were a new certification of eligibility application.

**(2)** If the secretary rejects the certification of eligibility application because the applicant changed the donation or proposed donation, donation assessment report or the public or private conservation agency to which [~~it~~]the applicant conveyed or planned to convey the donation since [~~it~~] the applicant submitted the assessment application, the applicant shall submit a new assessment application pursuant to 3.13.20.8 NMAC.

[~~E.~~] **F.** Approval of Certification of Eligibility Applications.

**(1)** The secretary approves the certification of eligibility application if the secretary finds

**(a)** the donation of land or interest in land meets the requirements of 3.13.20.8 NMAC or 3.13.20.10 NMAC;

**(b)** the secretary issued a favorable finding on the applicant's assessment application and the applicant has not changed the donation or proposed donation, donation assessment report or the public or private conservation agency to which [~~it~~] the applicant conveyed or planned to convey the donation since [~~it~~] the applicant submitted the assessment application;

**(c)** the completed conservation easement or deed accurately reflects the donation the applicant described in [~~its~~] the applicant's assessment application; the donation does not adversely affect contiguous landowners' property rights; and

**(d)** [~~the taxation and revenue department, property tax division, appraisal bureau does not issue an unfavorable recommendation of the appraisal~~] the appraisal meets the requirements of 3.13.20 NMAC including compliance with the uniform standards of professional appraisal practice and that the appraiser used proper methodology and reached a reasonable conclusion concerning value.

**(2)** The secretary's approval is given by the issuance of a letter to the applicant [~~and the taxation and revenue department~~]. This letter shall certify that the donation of land or interest in land includes the conveyance in perpetuity, on or after January 1, 2004, for a conservation or preservation purpose of a fee interest in land or a less-than-fee interest in land that meets the requirements of the Land Conservation Incentives Act; NMSA 1978, Sections 7-2-18.10 or 7-2A-8.9; and 3.13.20 NMAC, and include a calculation of the maximum amount of the land conservation incentives tax credit for which each taxpayer is eligible.

[3.13.20.11 NMAC - Rp, 3.13.20.10 NMAC, 6-16-2008; A, 12-30-2010]

**3.13.20.12** [~~**APPRAISALS:**~~

~~**A.** Upon receiving the certification of eligibility application, the energy, minerals and natural resources department forwards the appraisal to the taxation and revenue department, property tax division, appraisal bureau for review.~~

~~**B.** The taxation and revenue department, property tax division, appraisal bureau shall review the appraisal and advise the secretary whether the appraisal meets the requirements of 3.13.20 NMAC including whether the appraisal complies with the uniform standards of professional appraisal practice and whether the appraiser used proper methodology and reached a reasonable conclusion concerning value. The secretary may approve certification of eligibility without an appraisal review if the secretary determines that the taxation and revenue department , property tax division, appraisal bureau is unable to provide a timely review.~~

~~**C.** The taxation and revenue department, property tax division, appraisal bureau's review does not preclude further audit by the taxation and revenue department or the United States internal revenue service.~~] **NOTICE**

**TO APPLICANT OF PROPOSED REJECTION OF CERTIFICATION OF ELIGIBILITY APPLICATION; APPLICANT RESPONSE; FINAL ACTION:**

**A.** If after review of a certification of eligibility application, the secretary determines that there is cause to reject the certification of eligibility application, the secretary shall issue a letter advising the applicant that the secretary is proposing to reject the certification of eligibility application and stating the specific reasons for the proposed rejection.

**B.** The applicant shall have 45 days after the issuance of the letter to respond in writing to the reasons for the proposed rejection and offer information or documents that demonstrates that the application meets the requirements.

**C.** If the secretary's proposed rejection involves an unfavorable preliminary review of the appraisal from the appraisal bureau and the applicant responds to the preliminary review of the appraisal within 45 days of the issuance of the letter, the energy, minerals and natural resources department shall forward the applicant's response to the appraisal bureau for review of the response and issuance of the appraisal bureau's final review of the appraisal. If the applicant does not respond to the preliminary review of the appraisal within 45 days of the issuance of the letter, the energy, minerals and natural resources department shall notify the appraisal bureau that the energy, minerals and natural resources department did not receive a response to the preliminary review of the appraisal from the applicant. After reviewing the applicant's response, if any, the appraisal bureau shall issue a final review of the appraisal and advise the secretary whether the appraisal meets the requirements of 3.13.20 NMAC including whether the appraisal complies with the uniform standards of professional appraisal practice and whether the appraiser used proper methodology and reached a reasonable conclusion concerning value.

**D.** After reviewing the applicant's response, if any, and the appraisal bureau's final review of the appraisal the secretary shall determine whether the information or documents the applicant has supplied satisfactorily address and resolve the specific reasons for the proposed rejection and issue a letter either rejecting the certification of eligibility application or approving the certification of eligibility application. If the secretary determines that the applicant's response does not satisfactorily resolve the reasons for the rejection or if the appraisal bureau has issued a final unfavorable recommendation of the appraisal, the secretary shall issue a letter denying the certification of eligibility application. The secretary's letter shall state the specific reasons why the secretary rejected the certification of eligibility application.

[3.13.20.12 NMAC - N, 6-16-2008; A, 12-30-2010]

**3.13.20.14 FILING REQUIREMENTS:**

**A.** After obtaining a certificate of eligibility from the energy, minerals and natural resources department, the applicant shall apply for the land conservation incentives tax credit with the taxation and revenue department on a form the taxation and revenue department develops. The applicant shall attach the certificate of eligibility received from the secretary.

**B.** If the applicant complies with all the requirements in NMSA 1978, Section 7-2-18.10 or Section 7-2-8.9 and has received the certificate of eligibility from the secretary, the taxation and revenue department shall issue a document granting the land conservation incentives tax credit, which is numbered for identification and includes its date of issuance and the amount of the land conservation incentives tax credit allowed.

**C.** A tax filer shall use a claim form the taxation and revenue department develops to apply the land conservation incentives tax credit to the tax filer's income taxes. A tax filer shall submit the claim form with its income tax return.

**D.** A tax filer who has both a carryover credit and a new credit derived from a qualified donation in the taxable year for which the tax filer is filing the return shall first apply the amount of carryover credit against the income tax liability. A tax filer may apply one or more tax credits against the liability in a given year; provided however, that the tax credits applied shall not exceed the liability for that year. If the amount of liability exceeds the carryover credit, then the tax filer may apply the current year credit against the liability.

**E.** If an applicant claims a charitable deduction on the applicant's federal income tax for a contribution for which the applicant also claims a tax credit pursuant to the Land Conservation Incentives Act, the applicant's itemized deduction for New Mexico income tax shall be reduced by the deduction amount for the contribution to determine the applicant's New Mexico taxable income.

[3.13.20.14 NMAC - Rp, 3.13.20.11 NMAC, 6-16-2008; A, 12-30-2010]

**3.13.20.15 TRANSFER OF THE LAND CONSERVATION INCENTIVES TAX CREDIT:**

**A.** An applicant may sell, exchange or otherwise transfer an approved land conservation incentives tax credit, represented by the document that the taxation and revenue department issues, for a conveyance made on or after January 1, 2008. A land conservation incentives tax credit or increment of a land conservation incentives tax credit may only be transferred once. An applicant may transfer [~~its~~] the applicant's land conservation incentives tax credit to any tax filer.

**B.** A tax filer to whom an applicant has transferred a land conservation incentives tax credit may use the land conservation incentives tax credit in the year that the transfer occurred and carry forward unused amounts to succeeding taxable years, but may not use the land conservation incentives tax credit for more than 20 years after the taxation and revenue department originally issued [~~it~~] the land conservation incentives tax credit. In order to use the land conservation incentives tax credit for that taxable year, the transfer of the land conservation incentives tax credit must occur on or before December 31 of that taxable year, if the individual or entity who will use the land conservation incentives tax credit has a taxable year of January 1 to December 31, or on or before the end of the taxable year if the individual or entity has a taxable year that is not January 1 to December 31.

**C.** An applicant may only transfer a land conservation incentives tax credit in increments of $10,000 or more.

**D.** An applicant shall use a qualified intermediary to transfer a land conservation incentives tax credit. The qualified intermediary shall notify the taxation and revenue department of the transfer and the date of the transfer on a taxation and revenue department-developed form within 10 days following the transfer. The qualified intermediary shall keep an account of the land conservation incentives tax credit transferred.

**E.** A qualified intermediary may issue sub-numbers registered with and obtained from the taxation and revenue department.

**F.** If an individual who owns an interest in the donated property dies prior to selling, exchanging or otherwise transferring the land conservation incentives tax credit, the donor's estate may sell, exchange or otherwise transfer the land conservation incentives tax credit.

[3.13.20.15 NMAC - N, 6-16-2008; A, 12-30-2010]

# NEW MEXICO OFFICE OF THE STATE ENGINEER

This is an amendment to 19.25.12 NMAC, Sections 7 - 14 and 17 - 21, effective 12/31/2010.

**19.25.12.7 DEFINITIONS:** Unless defined below or in a specific section of these regulations, all other words used herein shall be given their customary and accepted meaning.

**A. Terms starting with the letter 'A' are defined as follows:**

**[~~A.~~] (1) Abutment:** That part of the valley side against which the dam is constructed. The left and right abutments of dams are defined with the observer viewing the dam looking in the downstream direction.

**(2) Aesthetic fill:** Cosmetic fill added to the downstream slope of a dam that is not required to address the safe design. Aesthetic fill shall not be considered when determining the properties of the dam for the purposes of evaluating the jurisdictional status and shall not be used to support the safe design.

**[~~B.~~] (3) Alteration, modification, repair, rehabilitation or enlargement of an existing dam:** To change from the state engineer accepted construction drawings and specifications or current condition.

**[~~C.~~] (4) Appurtenant structure:** Auxiliary features of a dam such as outlets, spillways, access structures, tunnels and related housing at a dam.

**[~~D.~~] (5) [~~American society for testing and materials (ASTM):~~** ~~An accepted standard for testing the properties of materials.~~] **ASTM:** Standards promulgated by ASTM international for testing the properties of materials. Methods cited in these regulations include laboratory compaction characteristics of soils.

**B. Terms starting with the letter 'B' are defined as follows: [~~E.~~] Breach:** An opening through a dam or spillway that is capable of draining a portion of the reservoir or the entire reservoir. A controlled breach is a constructed opening. An uncontrolled breach is an unintentional discharge from the reservoir.

**C. Terms starting with the letter 'C' are defined as follows:**

**[~~F.~~] (1) Consequences of failure:** Potential loss of life or property damage downstream of a dam caused by waters released at the dam or by waters released by partial or complete failure of dam; includes effects of landslides upstream of the dam on property located around the reservoir.

**[~~G.~~] (2) Crest width:** The thickness or width of a dam at the crest level (excluding corbels or parapets). In general, the term thickness is used for gravity and arch dams and width is used for other dams.

**D. Terms starting with the letter 'D' are defined as follows:**

**[~~H.~~] (1) Dam:** A man-made barrier constructed across a watercourse or off-channel for the purpose of storage, control or diversion of water.

**[~~(1)~~] (a) Jurisdictional dam:** [~~A dam that is more than 10 feet in height measured from the lowest point on the downstream toe to the dam crest or impounds more than 10 acre-feet of water as measured from the lowest point on the downstream toe to the spillway crest. Dams constructed under the supervision of the U.S. army corps of engineers before May 19, 2004, become jurisdictional when such supervision by the U.S. army corps of engineers is terminated.~~] A dam 25 feet or greater in height, which impounds more than 15 acre-feet of water or a dam that impounds 50 acre-feet or more of water and is 6 feet or greater in height. For purposes of these regulations, reference to a dam means a jurisdictional dam unless otherwise noted.

See figure of jurisdictional dam size.


**[~~(2)~~] (b) Non-jurisdictional dam:** [~~Any dam less than or equal to 10 feet in height and having storage less than or equal to 10 acre-feet of water.~~] Any dam not meeting the height and storage requirements of a jurisdictional dam. The state engineer does not regulate the design, construction and operation of a non-jurisdictional dam unless the dam is unsafe and there is a threat to life or property, as determined by the state engineer. Waters impounded by a non-jurisdictional dam may not be exempt from water right permit requirements; therefore a separate state engineer water right permit for the water impounded in the reservoir created by a non-jurisdictional dam may be required. Non-jurisdictional dams shall meet the requirements of 19.26.2.15 NMAC unless otherwise exempt. The structures listed below are considered non-jurisdictional dams:

~~[(a) Stock dam: A stock dam constructed prior to May 19, 2004 with a storage capacity of 10 acre-feet or less regardless of the height of the dam.~~

~~(b) Erosion control dam: A dam for the sole purpose of erosion control constructed on a naturally dry watercourse as determined by the state engineer, with a storage capacity of 10 acre-feet or less as measured from the lowest point on the downstream toe to the spillway crest and the reservoir drains in 96 hours unless a quicker drain time is required by court decree.~~]

**[~~(c)~~] (i) Levee or diversion dike:** A structure where water flows parallel to the length of the levee or diversion dike as determined by the state engineer.

**[~~(d)~~] (ii) Roadway embankment:** A structure across a watercourse designed for the sole purpose of supporting a roadbed or other means of conveyance for transportation as determined by the state engineer; where the area upstream has not been enlarged to increase flood storage; and where the embankment is provided with an uncontrolled conduit of sufficient capacity to satisfy requirements of the appropriate state or local transportation authority. If no transportation authority has jurisdiction over the structure, the current drainage design criteria of the New Mexico department of transportation shall apply.

**[~~I.~~] (2) Dam crest:** The [~~lowest elevation of the~~] uppermost surface of a dam, usually a road or walkway excluding any parapet wall, railing, etc.

**[~~J.~~] (3) Dam failure:** The breakdown of a dam, characterized by the uncontrolled release of impounded water. [~~There are varying degrees of failure.~~]

**[~~K.~~] (4) Dam height:** The vertical distance from the lowest point on the downstream toe to the lowest point on the dam crest.

**[~~L.~~] (5) Dam incident:** An event at a dam that interrupts normal procedures and performance, affects the safety of the dam or results in a potential loss of life or damage to property.

**E. Terms starting with the letter 'E' are defined as follows:**

**(1) Earthquake:** A sudden motion or trembling of the earth caused by the abrupt release of accumulated stress along a fault.

**(a) Operating basis earthquake:** The earthquake that can reasonably be expected to occur within the service life of the dam or appurtenant structures.

**(b) Maximum credible earthquake:** The greatest earthquake that can reasonably be expected to be generated by a specific source on the basis of seismological and geological evidence.

**(2) Evacuation map:** A map prepared in collaboration with local emergency managers defining the area to be evacuated from a dam failure.

**F. Terms starting with the letter 'F' are defined as follows:**

**[~~M.~~] (1) Fetch:** The straight-line distance [~~across a body of water~~] between the dam and farthest reservoir shore subject to wind forces. The fetch is one of the factors used to calculate wave heights in a reservoir.

**[~~N.~~] (2) Freeboard:** The vertical distance between the spillway crest and the lowest point of the dam crest not including camber.

**[~~O.~~] (3) Functional exercise:** A meeting in a conference room environment involving the dam owner and state and local emergency personnel with responsibilities in the emergency action plan. The exercise takes place in a stress-induced environment with time constraints and involves simulation of a dam failure and other specific events. The exercise is designed to evaluate both the internal capabilities and responses of the dam owner and the workability of the information in the emergency action plan used by emergency management officials.

**G. Terms starting with the letter 'G' are defined as follows: Geotextile:** Any fabric or textile (natural or synthetic) used as an engineering material in conjunction with soil, foundations or rock. Geotextiles provide the following uses: drainage, filtration, separation of materials, reinforcement, moisture barriers and erosion protection.

**H. Terms starting with the letter 'H' are defined as follows: [~~P.~~] High water line:** The highest water level elevation in the reservoir as determined from routing the spillway design flood or inflow design flood.

**I. Terms starting with the letter 'I' are defined as follows:**

**(1) Incremental impacts:** Under a given flood, earthquake or other conditions, the difference in impacts that would occur due to failure or misoperation of the dam and appurtenant structures compared to those that would have occurred without failure or misoperation of the dam and appurtenant structures.

[~~**Q. Inflow design flood:** The flood flow above which the incremental increase in downstream water surface elevation due to failure of a dam is no longer considered to present an unacceptable additional downstream threat. The upper limit of the inflow design flood is the flood resulting from the probable maximum precipitation and the lower limit is the flood resulting from the 100-year precipitation.~~]

**[~~R.~~] (2) Inundation map:** A map delineating the area that would be flooded by a particular flood event.

**J. Terms starting with the letter 'J' [Reserved]**

**K. Terms starting with the letter 'K' [Reserved]**

**L. Terms starting with the letter 'L' are defined as follows:**

**[~~S.~~] (1) Length of dam:** The length measured along the dam axis at the dam crest. This also includes the spillway, powerplant, navigation lock, fish pass, etc., where these form part of the length of the dam. If detached from the dam these structures [~~should~~] shall not be included.

**[~~T.~~] (2) Loss of life:** The likely number of human fatalities that would result from a dam failure flood event. No allowances for evacuation or other emergency actions by the population [~~should~~] shall be considered.

**M. Terms starting with the letter 'M' [Reserved]**

**N. Terms starting with the letter 'N' are defined as follows:**

**[~~U.~~] (1) Naturally dry watercourse:** A watercourse or portion thereof, which under normal conditions is dry, which flows only in direct response to precipitation and whose channel is at all times above the groundwater table.

**[~~V.~~] (2) Normal operating level:** The water level elevation corresponding to the maximum storage level that excludes any flood control or surcharge storage.

**[~~W.~~] (3) North American vertical datum 1988 (NAVD 88):** The current vertical control datum in use in North America established from nine space geodetic stations. This basis of establishing elevation provides a precise surface, [~~whereas the North American vertical datum 1927 (NAVD27)~~] whereas the national geodetic vertical datum 1929 (NGVD 29) is elevation established from mean sea level.

**O. Terms starting with the letter 'O' are defined as follows:**

**[~~X.~~] (1) One-hundred year flood:** A flood that has 1 chance in 100 of being equaled or exceeded during any year.

**[~~Y.~~] (2) Owner:** The individual, association or corporation, public or private, the state or the United States, owning the land upon which a dam is constructed; having a contractual right to construct, operate or maintain a dam; or the beneficiary of an easement to construct, operate or maintain a dam.

**P. Terms starting with the letter 'P' are defined as follows:**

**(1) Probable:** Likely to occur, reasonably expected, realistic.

**[~~Z.~~] (2) Probable maximum precipitation:** Theoretically, the greatest depth of precipitation for a given duration that is physically possible over a given size storm area at a particular location during a certain time of year.

**Q. Terms starting with the letter 'Q' [Reserved]**

**R. Terms starting with the letter 'R' are defined as follows: Residual**

**freeboard:** The vertical distance between the high water line and the lowest point on the dam crest.

**S. Terms starting with the letter 'S' are defined as follows:**

**[AA.] (1) Spillway:** A structure over or through which excess flow is discharged from a reservoir. If the rate of flow is controlled by mechanical means such as gates, it is considered a controlled spillway. If the geometry of the spillway is the only control, it is considered an uncontrolled spillway. For purposes of these regulations, an uncontrolled outlet conduit that is used to drain the reservoir is not considered a spillway.

**[BB.] (2) Spillway crest:** The lowest level at which water can flow over or through the spillway.

**[CC.] (3) Spillway design flood:** The required flood that a spillway must pass without failure of the dam.

**[DD.] (4) Storage:** For purposes of determining whether a dam is jurisdictional, the storage is the volume of water impounded by the dam above the lowest elevation of the downstream toe to the elevation of the spillway crest. For dams with no spillway, storage is measured to the dam crest. Definitions of specific types of storage in reservoirs are:

**[(1)] (a)** Dead storage is the storage volume of a reservoir that lies below the invert of the lowest outlet and therefore, cannot readily be withdrawn from the reservoir.

**[(2)] (b)** Flood surcharge storage is the storage volume between the maximum operating level and the maximum water level during the spillway design flood.

**[(3)] (c)** Live storage is the storage volume of a reservoir that is available for use and lies above the invert of the lowest outlet.

**[(4)] (d)** Reservoir storage capacity is the sum of the dead and live storage of the reservoir.

**[(5)] (e)** Maximum storage is the sum of the reservoir storage capacity and flood surcharge storage.

**(5) Sunny day failure:** Dam failure with the reservoir at the normal operating level.

**T. Terms starting with the letter 'T' are defined as follows:**

**[EE.] (1) Tabletop exercise:** A meeting in a conference room environment involving the dam owner and state and local emergency personnel with responsibilities in the emergency action plan. The format is a discussion of an emergency event, response procedures to resolve concerns regarding coordination and responsibilities.

**[FF.] (2) Toe:** The contact line between the outer shell of the dam and the natural ground surface.

**U. Terms starting with the letter 'U' [Reserved]**

**V. Terms starting with the letter 'V' [Reserved]**

**W. Terms starting with the letter 'W' are defined as follows: [GG.] Wave runup:** Vertical height above the water level to which water from a specific wave will run up the face of a structure or embankment.

**X. Terms starting with the letter 'X' [Reserved]**

**Y. Terms starting with the letter 'Y' [Reserved]**

**Z. Terms starting with the letter 'Z' [Reserved]**

[19.25.12.7 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.8 FEE SCHEDULE:** The state engineer assesses fees for filing forms, reviewing plans and specifications for dams and appurtenant structures and construction inspections.

**A.** For filing an application for permit to construct and operate a dam the fees shall be $25.

**B.** For filing an application to alter, repair or rehabilitate a dam the fee shall be $25.

[**B.**] **C.** For each review of design plans, construction drawings and specifications for a dam the fee shall be $2 per $1000 or fraction thereof of the estimated construction cost. For determination of fees, inclusion of contingencies, taxes and other permit fees is not required. Assessment of multiple review fees for the same application is at the sole discretion of the state engineer.

**[C.] D.** For issuing an extension of time for construction of a dam the fee shall be $50.

**[D.] E.** For inspecting construction of a dam the fee shall be $100/8-hour day and actual and necessary traveling expenses.

**[E.] F.** For filing a proof of completion of works for a dam the fee shall be $25.

**[F.] G.** For filing a change of ownership for a dam the fee shall be $5.

**[G.] H.** [For copies of dam safety records up to 11 inches by 17 inches the fee shall be $0.20 per copy.] The state engineer shall charge reasonable fees for copy and reproduction to offset the cost of the service, consistent with the state engineer's current policy adopted pursuant to the New Mexico Inspection of Public Records Act, NMSA 1978 Section 14-2 et seq.

[**H.** For copies of dam safety records greater than 11 inches by 17 inches the fee shall be $3.00 per copy.]

[19.25.12.8 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.9 SIZE CLASSIFICATION:** A dam shall be less than or equal to the maximum height and storage to qualify for the size classification.

**A. Small:** [A small dam is greater than 10 feet but less than or equal to 40 feet in height, or greater than 10 acre-feet but less than or equal to 1000 acre-feet of storage.] A small dam is 25 feet or greater but less than or equal to 40 feet in height, or 50 acre-feet or greater but less than or equal to 1000 acre-feet of storage.

**B. Intermediate:** An intermediate dam is greater than 40 feet but less than or equal to 100 feet in height, or greater than 1000 acre-feet but less than or equal to 50,000 acre-feet of storage.

**C. Large:** A large dam is greater than 100 feet in height[;] or greater than 50,000 acre-feet of storage.

[19.25.12.9 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.10 HAZARD POTENTIAL CLASSIFICATION:** The hazard potential classification is a rating for a dam based on the potential consequences of failure. The rating is based on loss of life, damage to property and environmental damage that is likely to occur in the event of dam failure. No allowances for evacuation or other emergency actions by the population [should] shall be considered. The hazard potential classification is not a reflection of the condition of the dam.

**A. Low hazard potential:** Dams assigned the low hazard potential classification are those dams where failure or misoperation results in no probable loss of life and low economic [and/or] or environmental losses. Losses are principally limited to the dam owner's property.

**B. Significant hazard potential:** Dams assigned the significant hazard potential classification are those dams where failure or misoperation results in no probable loss of human life but can cause economic loss, environmental damage, disruption of lifeline facilities, or can impact other concerns. Significant hazard potential classification dams are often located in predominantly rural or agricultural areas but could be located in populated areas with significant infrastructure.

**C. High hazard potential:** Dams assigned the high hazard potential classification are those dams where failure or misoperation will probably cause loss of human life.

[19.25.12.10 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.11 DESIGN OF A DAM:** Any person, association or corporation, public or private, the state, or the United States that is intending to construct a dam shall submit an application to construct and operate a dam and supporting documentation acceptable to the state engineer. This

section primarily addresses the design and construction of embankment dams. Other types of dams shall conform to sound engineering principles and current state of the practice. Because each site, design and operating practice is unique, waivers of specific requirements in this section will be considered on a case-by-case basis. Request for waiver shall be in writing accompanied with documentation justifying the request. If the request is not justified to the satisfaction of the state engineer the request will be denied. If the supporting documentation for the design of a dam does not meet acceptable engineering standards and does not conform to these regulations, as determined by the state engineer, a quality management plan or third party review may be required by the state engineer. Construction shall not begin until the state engineer has accepted the supporting documentation and approved the application with [~~construction and operation~~] permit conditions. The application and supporting documentation shall include[~~:~~] the information described below.

**A. Application:** An application form shall be completed with original signature of the dam owner and accompanied with a filing fee in accordance with Subsection A of 19.25.12.8 NMAC. The form will be the only information available to the public before the project is approved for construction. All other supporting documentation is considered draft until accepted by the state engineer. A plan review fee in accordance with Subsection [~~B~~] C of 19.25.12.8 NMAC shall accompany the submittal of the design report, construction drawings and specifications. A detailed estimate of the construction cost for the proposed dam and appurtenant structures shall be submitted in support of the plan review fee.

**B. Water right:** A water right is required for water impounded by the dam. If the dam owner has a permit for the diversion of water, documentation addressing the necessity for storage, diversion periods and release conditions for the reservoir may be required. This requirement is waived for flood control dams that do not detain water longer than 96 hours in accordance with Subparagraph (b) of Paragraph (7) of Subsection C of 19.25.12.11 NMAC or provide documentation that a waiver by the state engineer has been granted. Flood control dams that do not drain within 96 hours require a water right for water permanently stored beyond the 96-hour drain time requirement and for associated losses due to evaporation and other potential depletions to the system unless a waiver in accordance with 19.25.12.11 NMAC is obtained.

**C. Design report:** A design report, which includes information to evaluate the safe design of the dam and appurtenant structures, shall be submitted in a form acceptable to the state engineer. [~~The design report shall contain the information described below and any other additional information determined necessary by the state engineer.~~] The final design report shall also be submitted in an electronic format acceptable to the state engineer. The design report may be submitted as a single report or as individual reports documenting the information described below. A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare or supervise the preparation of the design report. [~~The front cover shall show the name of the dam (identical to the application), the county in which the dam is located and type of report. The first page behind the front cover shall show the name of the dam (identical to the dam name on the application), the county in which the dam is located and the signed certifications for the engineer and state engineer in accordance with Subsections B and E of 19.25.12.12 NMAC. The design report shall include:~~] The front cover shall show the name of the dam, the county in which the dam is located, the dam owner and the type of report. The first page behind the front cover shall show the name of the dam, the county in which the dam is located, a signed certification from the engineer and a certification for the state engineer in accordance with Subsections B and E of 19.25.12.12 NMAC. The design report shall contain the information described below and any other additional information determined necessary by the state engineer to evaluate if the design is safe.

**(1)** Hazard potential classification. A hazard potential classification shall be based on the dam failure condition that results in the greatest potential for loss of life and property damage. If the state engineer concurs, the classification may be based on the judgment and recommendation of the professional engineer. For all other cases, a low or significant hazard potential classification shall be supported by a dam breach and flood routing analysis, which includes calculations and data that supports the predicted dam failure flood. This analysis shall also address the potential for foreseeable future development. Evaluation of the effects of flooding from dam failure shall extend at least to the location downstream where the classification can be properly identified. The dam breach and flood routing analysis shall include, but not be limited to:

**(a)** [~~dam failure inundation maps;~~] description of the dam breach and flood routing methodology;

**[~~(b)~~]** ~~map of the water surface profiles;~~

**[~~(c)~~]** ~~cross-sections drawn to scale showing water surface elevation at critical sections where structures are impacted and showing discharge in cubic feet per second, average velocity in feet per second, flood wave travel times, rate of rise and structures located in the flooded sections;~~]

**[~~(d)~~] (b)** a tabulation and justification of [~~assumed~~] parameters used in the analysis;

**[~~(e)~~] (c)** a sensitivity analysis of the [~~assumed~~] parameters used in the analysis;

**[~~(f)~~] (d)** references to all computer models, data and supporting justification used in the analysis; [~~and~~]

**[~~(g)~~] (e)** [~~appropriate data sheets and computer program output computations from computerized analysis shall be provided.~~] appropriate data sheets, computer program input and output computations and electronic files from computerized analysis;

**(f)** table of results for the flood routing for the sunny day failure and the failure and no failure scenarios for multiple flood events up to and including the spillway design flood as defined in Subparagraph (a) through (d) of Paragraph (3) of Subsection C of 19.25.12.11 NMAC; the table of results for all critical locations downstream shall include the depth of flow in feet, velocity of flow in feet per second, rate of flow in cubic feet per second and the incremental impacts; and

**(g)** dam failure inundation maps downstream of the dam for the sunny day failure and failure during the spillway design flood event showing the depth of flow in feet, average velocity in feet per second and rate of flow in cubic feet per second at critical locations downstream.

**(2)** Hydrologic analysis. The hydrologic analysis shall include a discussion of methodology used to calculate the spillway design flood for determining the available flood storage and spillway capacity. Consideration of how the dam will perform under these hypothetical flood conditions shall be evaluated. The hydrologic analysis shall include, but not be limited to:

**(a)** a topographic map of the drainage area above the dam with the drainage area and sub-basins delineated and presented on a map of appropriate scale and size;

**(b)** a description of the topography, soils and vegetative cover and land treatment of the drainage area;

**(c)** a discussion of the depth, duration and distribution of the spillway design storm;

**(d)** a tabulation, discussion and justification of all hydrologic parameters and methodology used to calculate runoff from rainfall;

**(e)** a discussion of the peak inflow, volume of runoff and maximum reservoir water level elevation for the inflow hydrograph;

**(f)** a plot of the reservoir inflow and outflow hydrographs extended until flow is negligible and plotted on the same figure of appropriate size and scale;

**(g)** a table showing the reservoir area (in acres) and storage capacity (in acre-feet) for each foot of elevation above the bottom of the reservoir to the dam crest; the table shall be determined from the reservoir topography map; indicate the amount of dead storage, elevation of the invert of the outlet and elevation of the crest of each spillway; all elevations shall be based on North American vertical datum 1988 or more recent adjustment; and

**(h)** appropriate data sheets and computer program output computations from computerized analysis [~~shall be provided~~].

**(3)** Spillway design flood. The spillway design flood is the flood that a spillway must be capable of conveying without dam failure. For perimeter embankment dams with no spillway and no external drainage area, the dam must be capable of impounding the spillway design flood without dam failure. A spillway design flood less than these requirements is acceptable to the state engineer if an incremental damage analysis is presented to justify the inflow design flood in accordance with Paragraph (4) of Subsection C of 19.25.12.11 NMAC. The spillway design flood is based on size classification and hazard potential classification of the dam as [~~follows~~] described below.

**(a)** Dams classified as low hazard potential, regardless of size, shall have spillways designed to pass a flood resulting from a 100-year precipitation event expressed as a percentage of the probable maximum precipitation.

**(b)** Dams classified as small and intermediate, with a significant hazard potential rating shall have spillways designed to pass a flood resulting from 50 percent of the probable maximum precipitation.

**(c)** Dams classified as large, with a significant hazard potential rating shall have spillways designed to pass a flood resulting from 75 percent of the probable maximum precipitation.

**(d)** Dams classified as high hazard potential, regardless of size, shall have spillways designed to pass a flood resulting from the probable maximum precipitation.

**(4)** Incremental damage assessment. Where spillways are not in compliance with Paragraph (3) of Subsection C of 19.25.12.11 NMAC an incremental damage assessment shall justify the inflow design flood used to size the spillway. [~~The assessment shall evaluate the consequences of dam failure. The assessment shall compare the impact of with-failure and without-failure conditions on downstream water levels and existing and known future development.~~] The spillway design flood from an incremental damage assessment is the flood above which the incremental increase in downstream water surface elevation due to failure of a dam is no longer considered to present an unacceptable additional downstream threat when compared to the same flood without dam failure. The lower limit is the flood resulting from the 100-year precipitation. The assessment shall compare the incremental impacts on downstream areas including existing and foreseeable future development. The assessment shall include a dam breach and flood routing analysis in accordance with Subparagraphs (a) through (g) of Paragraph (1) of Subsection C of 19.25.12.11 NMAC for the failure and non-failure conditions. Methods for assessing the damage between failure and non-failure conditions shall be fully documented.

**(5)** Spillway capacity. The spillway capacity shall be adequate to pass the spillway design flood in accordance with Paragraph (3) of Subsection C of 19.25.12.11 NMAC or accepted inflow design flood in accordance with Paragraph (4) of Subsection C of 19.25.12.11 NMAC without failure of the dam. [~~If design calculations show that overtopping will occur, an erosion study of the embankment documenting that the dam will not breach is required.~~] If the outlet works are gated, the design discharge of the outlet works shall not be considered when routing the spillway design flood through the reservoir and spillway. The water level shall be at the normal operating level at the beginning of the spillway design storm. A spillway rating curve and table showing elevation in one-foot increments versus maximum discharge capacity shall be prepared. The rating curve and table shall include data from the crest of the spillway to the dam crest. The parameters used to calculate the spillway capacity shall be justified and appropriate data sheets and computer program output computations from computerized analysis shall be provided. Elevations shall be based on North American vertical datum 1988 or more recent adjustment.

**(6)** Spillway design. Spillways shall be evaluated for erosion potential during normal operation and the design flood event. Damage to a spillway during the design flood event is acceptable; however, a breach of the spillway is unacceptable. The spillway design shall address the [~~following~~] minimum requirements[~~:~~] described below.

**(a)** The material required for spillway lining depends on the spillway location, frequency of discharge and velocity of discharge to adequately address erosion and breach potential. The design shall provide adequate justification for the material selected.

**(b)** The design shall provide aeration of the nappe for cavitation control where control weirs are used at the spillway crest.

**(c)** The spillway must discharge away from the toe of the dam and abutment slopes.

**(d)** The design shall address the potential for the accumulation of debris that may block the spillway [~~shall be addressed~~].

**(e)** [~~Energy dissipation to control erosion of the natural channel due to spillway discharge shall be addressed.~~] The design shall address energy dissipation to adequately control erosion of the natural channel due to spillway discharge reasonably expected to occur during the life of the dam.

**(f)** Channel lining shall be placed on a suitably prepared, stable subgrade. All edges and joints in channel lining material must be designed to prevent undermining and erosion. Concrete channel lining must be provided with adequate jointing to permit thermal expansion and contraction and adequate reinforcing to control thermal cracking. Adequate water stops are required at joints in the spillway lining. Concrete lining shall be adequately anchored against displacement and uplift and shall be provided with adequate subdrainage to relieve hydrostatic pressure and prevent frost heave.

**(g)** Where training dikes are used to divert the water away from the dam, the dike shall be designed with a compaction to at least 95% of the maximum standard Proctor density, ASTM D 698, or at least 90% of the maximum modified Proctor density, ASTM D 1557[~~, or at least 70% relative density if Proctor testing is not appropriate~~]. Erosion protection for the dike shall be addressed in accordance with Paragraph (16) of Subsection C of 19.25.12.11 NMAC.

**(7)** Outlet works capacity. Dams shall be designed with a low level outlet to drain the entire contents above the elevation of the downstream toe of the dam. If environmental consequences prevent draining of the reservoir, the state engineer will grant a waiver if written justification is provided to the satisfaction of the state engineer. The outlet shall be sized to provide adequate capacity to satisfy water rights of downstream priority users. A stage discharge curve and table showing elevation in one-foot increments versus discharge capacity shall be prepared. The rating curve and table shall be from the invert of the outlet to the dam crest. The parameters used to calculate the outlet works capacity shall be justified and appropriate data sheets and computer program output computations from computerized analysis shall be provided. Elevations shall be based on North American vertical datum 1988 or more recent adjustment. The outlet works capacity shall meet the [~~following~~] minimum requirements [~~:~~] described below.

**(a)** Outlets for water storage

[~~reservoirs~~] dams shall drain the reservoir in 45 days with supporting calculations provided.

**(b)** Outlets for flood control dams shall drain the reservoir in 96 hours unless a waiver is granted by the state engineer. The 96-hour time frame begins once the reservoir storage drops to the emergency spillway crest or reaches its peak during the 100-year, 24-hour event. Documentation supporting the waiver shall include the time to drain more frequent events.

**(8)** Outlet works design. The outlet works design includes the intake structure, conduit and terminal structure. The outlet works design shall meet the [~~following~~] minimum requirements [~~:~~] described below.

**(a)** Minimum conduit diameter is 18 inches unless a waiver is granted by the state engineer. Documentation supporting a waiver shall include identification of methods to inspect the interior of the conduit.

**(b)** Metal conduits used in dams that are classified as significant hazard potential where the sole purpose of the dam is flood control, or in dams classified as low hazard potential, shall have adequate strength after corrosion for a minimum of 200 years, based on corrosivity testing of onsite soils. Cathodic or other protection of metal conduits is permissible and may be considered in this analysis. Metal conduits are not acceptable for dams classified as high hazard potential or dams classified as significant hazard potential with permanent water storage except as interior forms for cast-in-place concrete conduits.

**(c)** Outlet conduits for storage reservoirs shall be gated at the upstream end unless a waiver is granted by the state engineer. Where gates are located other than at the upstream end of the conduit, a guard gate or bulkhead shall be provided at the upstream end to allow draining of the conduit for inspection, maintenance and repair.

**(d)** Outlet conduits shall be adequately vented and shall include all supporting calculations. Where the outlet conduit ties directly to a downstream pipe, a by-pass valve shall be provided. An exception to the by-pass valve will be granted when the conduit discharges to an ungated downstream storm drain with adequate access for inspection and maintenance.

**(e)** Outlet controls and equipment shall be properly designed to be secure from damage due to vandalism, weather, ice, floating debris, wave action, embankment settlement and other reasonably foreseeable causes. The outlet control operators shall remain accessible during outlet works and spillway releases.

**(f)** Outlets for flood control structures shall be ungated. Where a gate is required to satisfy downstream release restrictions, a waiver from the state engineer is required. The written request for waiver shall include a plan for timely release of the floodwater.

**(g)** Outlet works intake structures shall be provided with trash racks or grates to prevent clogging with debris. Grate opening [~~size~~] area or bar spacing shall be adequate to satisfy applicable public safety requirements, if appropriate. Total [~~size~~] area of grate openings must be at least three times the cross-sectional area of the outlet conduit.

**(h)** The design of the outlet works terminal structure shall address energy dissipation to prevent erosion and shall include supporting calculations.

**(i)** Outlet conduits shall be designed for full embankment loading and for hydrostatic pressure equal to the maximum reservoir head, acting separately and in combination, with an adequate factor of safety for the conduit material. If future increases in embankment height [~~and/or~~] or reservoir head are foreseeable, allowance shall be made in the design.

**(j)** The conduit together with all joints and fittings shall be watertight at the design pressure and shall be pressure tested prior to backfilling. Conduits shall be designed for all reasonably foreseeable adverse conditions including corrosion, abrasion, cavitation, embankment settlement and spreading, thermal effects and seismic loading. The ability of the conduit to withstand deflection and separation at the joints shall be addressed in the design of the outlet conduit.

**(k)** Outlet works shall be supported by stable, well-consolidated foundation materials. Where the conduit is placed in embankment fill or native overburden materials, settlement analysis shall be performed.

**(l)** Minimizing seepage along conduits shall be addressed including the methods for ensuring compaction of backfill around and beneath the conduit. Seepage collars are not an acceptable design standard for controlling seepage.

**(m)** All supporting documentation and calculations for the outlet works design shall be provided. The outlet works design shall include all foreseeable loading conditions, including but not limited to ice loading, debris buildup, wave action and embankment settlement. Structural design calculations for the intake structure, conduit and outlet structure shall be submitted.

**(9)** Geological assessment. A geological assessment of the dam and reservoir site is required for all dams classified as high or significant hazard potential. The geological assessment may be included in the geotechnical investigation or seismic study, or may be submitted as a separate document. The geological assessment shall address regional geologic setting; local and site geology; geologic suitability of the dam foundation; slide potential of the reservoir rim and abutment areas; and seismic history and potential.

**(10)** Geotechnical investigation. A geotechnical investigation shall assess site conditions and support the design. A professional engineer licensed in the state of New Mexico qualified to provide geotechnical expertise in the design and construction of dams shall prepare, stamp and sign the geotechnical investigation, which may be submitted as a separate report. The scope of the geotechnical investigation is dependent on the size classification, hazard potential classification, anticipated materials and construction methods, site geology and seismicity, anticipated soil strata and other site-specific conditions. The geotechnical investigation shall include a field investigation and laboratory testing. Results of field and laboratory testing shall be presented in a report, including recommended parameters to be used in design and construction of the dam and appurtenant structures. The field investigation and laboratory testing shall include but not be limited to the following:

**(a)** test borings in the footprint of the embankment, spillway excavations and appurtenant structures extending to bedrock or to a depth equal to at least the height of the dam; where appropriate, borings may include coring of bedrock materials to determine the quality and character of the rock;

**(b)** standard penetration tests or other field-testing to assess soil character and consistency;

**(c)** "undisturbed" sampling for further tests such as insitu density, shear strength and compressibility;

**(d)** supplemental test pits, if deemed necessary, to obtain bulk and undisturbed samples, assess soil layering and measure bedrock orientation;

**(e)** measurement of water level in drill holes;

**(f)** field permeability testing, if feasible;

**(g)** logs of test borings and test pits, location map and profile along dam axis with soil information shown;

**(h)** testing to determine the relevant properties of the material to be used in construction, including but not limited to shear strength, permeability, compressibility and filter characteristics; the testing method shall conform to accepted industry standards and be appropriate for the material being tested;

**(i)** evaluation of liquefaction potential and dynamic shear strength testing if deformation analysis is required; and

**(j)** identification of the location of the borrow material to be used during construction.

**(11)** Seepage and internal drainage.

The effects of seepage and potential for internal erosion shall be evaluated. For dams with aesthetic fill on the downstream slope, the effects of seepage shall be evaluated with and without the aesthetic fill. A seepage analysis shall be performed to address the performance of the embankment under steady-state conditions for dams classified as high or significant hazard potential. All parameters and assumptions used in the analysis shall be summarized in a table and justified in the seepage analysis. A waiver may be requested in writing for flood control dams [~~or reservoirs with synthetic liners~~] that drain in 96 hours. The seepage analysis and internal drainage design shall include [~~but not be limited to the following:~~] the minimum requirements described below.

**(a)** Flow nets of appropriate size and scale shall be prepared. The effects of anisotropy with respect to permeability shall be addressed. Ratios of horizontal to vertical permeability of less than 4 for constructed embankments and less than 9 for native deposits shall be supported by field and laboratory permeability tests. Appropriate data sheets and computer program output computations from computerized analysis shall be provided.

**(b)** The design shall address the effects of anticipated seepage beneath, around and through the dam. Seepage shall not exit on the dam face and excessive exit seepage gradients are unacceptable. All filter, transition and drainage zones within earth dams shall have a thickness adequate to address constructability and enhance seismic stability with a minimum thickness of 3 feet for each zone.

**(c)** Collector pipes and conduits for internal drains shall be made of non-corrodible material capable of withstanding the anticipated loads. If possible, pipes shall be located where they can be exposed for repair or replacement without threatening the stability of the dam. Collector pipes for drains shall be enveloped in a free-draining medium meeting filter criteria for adjacent embankment or foundation zones. Where surging or hydraulic gradient reversal is likely, perforation size must be less than the diameter at which 15 percent of the surrounding medium is finer. Where surging or hydraulic gradient reversal are unlikely, the perforation size must be less than the diameter at which 85 percent of the surrounding medium is finer.

**(d)** Drain pipes shall be sized to provide a flow depth no more than ¼ of the pipe diameter when carrying the anticipated discharge. Drain pipes shall be at least 6 inches in diameter unless the availability of technology for inspection and maintenance can be demonstrated. Individual pipes shall discharge to a gallery, well, manhole, or to daylight such that the flow of each pipe can be monitored and measured. Manifold connections, tees and wyes are not permitted. [~~If the anticipated flow from a drain line exceeds 10 gpm, a measuring flume or weir shall be provided for that line. If the anticipated flow from a drain line is less than 10 gpm, the outfall shall be designed to allow a 5 gallon bucket to be used to collect and measure discharge.~~] A seepage measuring device must be appropriate for the rate of anticipated flow. The measuring device must include an upstream catchment to detect any sediment in the seepage. Where pipes from internal drains are discharged to daylight, a rodent screen shall be provided.

**(12)** Stability analysis. Cross-sectional design for dams shall be supported by slope stability analysis. For dams with aesthetic fill on the downstream slope, the stability of the downstream slope shall be evaluated with and without the aesthetic fill. Dams classified as low hazard potential with upstream slopes no steeper than 3 horizontal to 1 vertical, downstream slopes no steeper than 2 horizontal to 1 vertical and which are 25 feet or less in height will not require slope stability analysis. Stability analysis of the reservoir rim is required where slopes are steeper than 3 horizontal to 1 vertical. The analysis model shall adequately represent the geometry and zoning, shear strength parameters, material unit weights, pore pressure and seepage conditions, external loading and other relevant factors of the critical cross section or sections. Manual computations in the analysis will be accepted if judged to be sufficiently rigorous. Where appropriate, the analysis shall consider noncircular or block and wedge type failure surfaces as well as circular failures. All parameters and assumptions used in the analysis shall be summarized in a table and justified in the geotechnical investigation. A scale drawing, utilizing the same scale for vertical and horizontal dimensions, shall be provided for each cross-sectional model used in the analysis, with the critical failure surface(s) identified. Appropriate data sheets and computer program output computations from computerized analysis shall be provided. Dams shall be designed to provide the following minimum factors of safety from the stability analysis:

**(a)** 1.5 for steady state long-term stability;

**(b)** 1.5 for operational drawdown conditions;

**(c)** [~~1.2~~] 1.3 for rapid drawdown conditions; and

**(d)** [~~1.2~~] 1.3 for end of construction.

**(13)** Seismic design and analysis. Dams and appurtenant structures classified as high or significant hazard potential shall be analyzed for seismic stability. Seismic analysis for water storage dams shall be based on full reservoir under steady state seepage conditions. Flood control dams with ungated outlets that satisfy Subparagraph (b) of Paragraph (7) of Subsection C of 19.25.12.11 NMAC without waiver shall be designed for earthquake loads under empty reservoir conditions and need not consider steady-state seepage. Dams sited on active faults shall obtain a waiver from the state engineer. To obtain a waiver the analysis shall show that the location of the dam is unavoidable and the dam must be designed to withstand anticipated fault movement without compromising its integrity. Appropriate data sheets and computer program output computations from computerized analysis shall be provided. The seismic analysis shall meet the [~~following~~] minimum requirements [~~:~~] described below.

**(a)** A seismological investigation for the dam area and reservoir area shall be performed. This study may be part of the geological or geotechnical report for the structure, or may be a separate effort. The study shall determine and justify the appropriate seismic parameters to be used for design. The dam and appurtenant structures shall be capable of withstanding the operating basis earthquake with little to no damage and without interruption of function. The operating basis earthquake has a 50% probability of exceedance during the service life of the dam or appurtenant structures. In no case shall the service life be less than 100 years. The dam and appurtenant structures critical to the safety of the dam shall be capable of withstanding the design earthquake without failure. The seismic parameters shall be based on the [~~following~~] design earthquake [~~:~~] requirements described below.

**(i)** Dams classified as high hazard potential other than flood control structures shall be designed for the maximum credible earthquake or for [~~an earthquake with a 5000-year return frequency~~] a 1% probability of exceedance in 50 years (approximately 5000-year return frequency).

**(ii)** Dams classified as significant hazard potential or high hazard potential dams whose sole purpose is for flood control shall be designed for a 2% [~~chance of occurrence~~] probability of exceedance in 50 years (approximately 2500-year return frequency).

**(b)** An analysis of materials in the foundation, reservoir area and proposed embankment shall be completed to determine the potential for liquefaction, earthquake-induced sliding, or other seismic sensitivity, which may be accomplished as part of the geotechnical investigation.

**(c)** Pseudostatic analysis will be acceptable for the following cases:

**(i)** the embankment is to be mechanically compacted to at least 95% of the maximum standard Proctor density, ASTM D 698, or at least 90% of the

maximum modified Proctor density, ASTM D 1557 [~~or at least 70% relative density if Proctor testing is not appropriate~~]; no materials prone to liquefaction are present in the foundation and peak [~~bedrock~~] ground acceleration is 0.20g or less; or

**(ii)** the embankment is to be mechanically compacted to at least 95% of the maximum standard Proctor density, ASTM D 698, or at least 90% of the maximum modified Proctor density, ASTM D 1557; potentially submerged portions of the embankment except for internal drain elements are constructed of clayey material; the dam is constructed on clayey soil or bedrock foundation and peak [~~bedrock~~] ground acceleration is 0.35g or less; and

**(iii)** all safety factor requirements in accordance with Subparagraphs (a) through (d) of Paragraph (12) of Subsection C of 19.25.12.11 NMAC are met;

**(iv)** minimum freeboard requirements in accordance with Subparagraphs (a) through (e) of Paragraph (15) of Subsection C of 19.25.12.11 NMAC are met; and

**(v)** the pseudostatic coefficient selected for analysis must be at least 50% of the predicted peak [~~bedrock~~] ground acceleration, but not less than 0.05g and the factor of safety under pseudostatic analysis shall be 1.1 or greater. In determining the factor of safety for pseudostatic analysis, a search for the critical failure surface shall be made.

**(d)** For dams not satisfying the requirements for pseudostatic analysis, a deformation analysis is required. The resulting embankment must be capable of withstanding the design earthquake without breaching and with at least 3 feet of freeboard remaining after deformation. The analysis shall also assess the potential for internal erosion as a result of cracking during deformation.

[~~**(e)** The seismic assessment shall also address the stability of appurtenant structures to the dam during the design earthquake as appropriate, unless failure of an appurtenance due to earthquake does not represent an immediate threat to the dam, in which case the operating basis earthquake may be used.~~]

**(14)** Dam geometry. The dam geometry shall be supported by the stability and seismic analysis and [~~meeting the following minimum requirements:~~] shall meet the minimum requirements described below.

**(a)** The crest width shall be at least equal to the dam height in feet divided by 5 plus 8 feet, with the minimum permissible crest width being 10 feet and the maximum required crest width being 24 feet.

**(b)** Roads located on the crest shall have appropriate surfacing to provide a stable base that resists rutting and provides adequate friction for safety in wet conditions.

**(c)** The crest design shall provide a minimum of 2 feet of cover or the depth of frost penetration; whichever is greater, above clay cores to prevent cracking of the core due to desiccation or frost penetration.

**(d)** Turnarounds [~~should~~] shall be provided on dead-end service roads on dam crests, located in such a manner that backing maneuvers longer than 300 feet are eliminated.

**(e)** The crest shall be provided with adequate cross slope to prevent ponding.

**(f)** The slope or slopes to which crest drainage is directed must be provided with adequate erosion protection to accept the crest drainage.

**(g)** The crest longitudinal profile shall be provided with adequate camber to maintain the profile after embankment settlement. Camber [~~should~~] shall be based on a settlement analysis and shall be at least 2 percent of the total embankment height, with a minimum of 1 foot at the highest point of the dam. The tops of internal core zones shall also be provided with camber in a similar manner to the crest of the dam.

**(h)** In the event that safety berms, street curbs, or other longitudinal features which block, control, or concentrate drainage are required on the dam crest, the design shall provide for collection and conveyance of accumulated water to discharge away from the embankment without erosion.

**(15)** Freeboard. Dams shall be provided with adequate freeboard. Wave runup shall be determined taking into consideration wind speed, reservoir fetch, embankment slope and roughness of the slope surface. Freeboard shall satisfy the [~~following conditions:~~] minimum requirements described below.

**(a)** Anticipated wave runup resulting from a 100 mph wind with reservoir level at the spillway crest will not overtop the dam.

**(b)** Anticipated wave runup resulting from a 50 mph wind with maximum reservoir level from routed spillway design flood will not overtop the dam.

**(c)** Clay core cover and capillary rise requirements in accordance with Subparagraph (c) of Paragraph (14) of Subsection C of 19.25.12.11 NMAC are satisfied.

**(d)** A minimum of 3 feet of freeboard remains after seismic deformation.

**(e)** In any case, at least 4 feet of freeboard shall be provided. The minimum of 4 feet of freeboard may be waived for perimeter [~~embankments~~] embankment dams with no spillway and no external drainage area, provided a written request is made to the state engineer accompanied with supporting justification.

**(16)** Erosion protection. Erosion protection shall be addressed to protect the dam and appurtenant structures from erosion that can threaten the safety of the structure. [~~At a minimum, the following areas of erosion shall be addressed:~~] Erosion protection shall address the minimum requirements described below.

**(a)** Wave erosion. The upstream slope shall be protected from wave erosion. The material selected and area of coverage shall be appropriate for the protection required with justification provided. Flood control dams in compliance with Subparagraph (b) of Paragraph (7) of Subsection C of 19.25.12.11 NMAC without waiver are exempt from wave protection.

**(b)** Surface erosion. The slope, crest, abutment and groins, toe areas and any other constructed areas associated with the dam and appurtenant structures shall be protected from [~~surface~~] wind erosion and erosion from concentrated and sheet flows. The material selected and area of coverage shall be appropriate for the protection required with justification provided.

**(17)** Geotextile design. Geotextiles are an acceptable material for use in dam design only if the geotextile is placed so that it does not jeopardize the dam or appurtenant structures during repair or failure of the geotextile. The geotextile [~~material~~] shall be used in accordance with the manufacturer's recommendations and intended use for the product. [~~Installation shall be by certified personnel and the completed installation certified by installer or manufacturer, if required by the manufacturer.~~] Geotextile design computations shall be provided. Where a geotextile is used for fluid containment the installation shall be performed by certified personnel and the completed installation shall be certified by a qualified independent entity.

**(18)** Structural design. The structural design information for all appurtenant structures, addressing water, earth, ice and any other applicable load shall be provided. Reinforced concrete design including assumptions for loads and limiting stresses and sample calculations shall be provided. Appropriate data sheets and computer program output computations from computerized analysis shall be provided.

**(19)** Utilities design. Utility placement or relocation shall be addressed as applicable. Utilities located in the vicinity of the proposed embankment, spillway and seepage footprint should be relocated and trenches backfilled and compacted with suitable material to the satisfaction of the state engineer. If utilities are allowed to remain, they will be required to satisfy applicable provisions for outlet conduits in accordance with Paragraph (8) of Subsection C of 19.25.12.11 NMAC.

**(20)** Miscellaneous design. Because each design is unique, all design

elements not specifically addressed in these regulations shall be documented and justified with sample calculations and appropriate data sheets and computer program output computations from computerized analysis shall be included in the design report.

**D. Construction drawings:** Construction drawings shall be submitted in a form acceptable to the state engineer. The final construction drawings shall also be submitted in an electronic format acceptable to the state engineer. A professional engineer licensed in the state of New Mexico qualified in dam design and construction shall prepare the construction drawings. Illegible, mutilated, careless or otherwise poorly prepared drawings are not acceptable for filing with the state engineer. [~~Plan drawings and maps prepared with the aid of a computer require the submittal of the digital data files in tagged image file format or other format acceptable to the state engineer. The preparation of construction drawings is described below and shall include the following items:~~] The construction drawings shall contain the information described below and any other additional information determined necessary by the state engineer to evaluate if the construction drawings are consistent with the design.

**(1)** Quality. Construction drawings and maps shall be made from actual field or photogrammetric surveys of an accuracy acceptable to the state engineer. Construction drawings and maps shall be prepared with permanent black ink on mylar. All original signatures, dates and acknowledgments appearing on the sheet(s) shall be in permanent ink. [~~Plan~~] Construction drawings and maps shall always be rolled, never folded, for transmittal.

**(2)** Scale and size. Sheets shall [~~be~~] range in size from twenty-two (22) to twenty-four (24) inches by thirty-four (34) to thirty-six (36) inches with one (1) inch margins on all sides. The scale(s) used on the drawings may vary according to requirements and space available to show all necessary data in detail clearly in feet and decimals and to be clearly legible when the drawings are reduced to eleven (11) inches by seventeen (17) inches. Detailed dimensions of appurtenant structures shall be given in feet and inches. All sheets shall have bar scales in order to allow scaling of reduced drawings.

**(3)** Sheet numbers. Each sheet shall be numbered sequentially with the first sheet being sheet number one in conjunction with the total numbered sheets (example Sheet 1 of 5). The sheet number on the last sheet shall equal the total number of sheets.

**(4)** Engineer's seal and signature. Each sheet shall have the responsible engineer's seal and signature.
Seals and signatures shall be presented in accordance with 16.39.3 NMAC.

**(5)** Orientation and date. The direction of north and the basis of bearings shall be shown on all maps. The date that field surveys are made or the date of the aerial photography used shall be shown on the maps.

**(6)** Title sheet. The first sheet of a set of [~~plans~~] construction drawings is the title sheet. The title sheet shall only contain sufficient information to summarize the scope of the project, [~~the title of the project and signed certifications for the dam owner, engineer and state engineer in accordance with Subsections A, B and E of 19.25.12.12 NMAC.~~] the title of the project, signed certifications from the dam owner, engineer and a certification for the state engineer in accordance with Subsections A, B and E of 19.25.12.12 NMAC. The title sheet shall summarize the properties of the dam and shall include the following information, as appropriate:

**(a)** name of the dam (same as shown on the application);

**(b)** type of dam (material);

**(c)** hazard potential classification;

**(d)** maximum height above the downstream toe in feet;

**(e)** maximum length in feet;

**(f)** crest width in feet;

**(g)** slope of the upstream face (horizontal to 1 vertical);

**(h)** slope of the downstream face (horizontal to 1 vertical);

**(i)** elevation of the dam crest in feet;

**(j)** elevation of spillway crest in feet;

**(k)** [~~elevation of outlet conduit flow line;~~] length of the conduit in feet;

**(l)** invert elevation of the upstream end of the conduit in feet;

**(m)** invert elevation of the downstream end of the conduit in feet;

**[~~(l)~~] (n)** freeboard in feet;

**(o)** residual freeboard in feet;

**[~~(m)~~] (p)** maximum spillway discharge capacity in cubic feet per second;

**[~~(n)~~] (q)** type of outlet conduit (give size and material);

**[~~(o)~~] (r)** maximum outlet conduit discharge capacity in cubic feet per second; and

[~~**(p)**~~] **(s)** location of the outlet works intake structure (using latitude and longitude [~~or to the New Mexico state plane coordinate system~~] in decimal degrees at least to the fifth place after the decimal).

**(7)** Vicinity map. A vicinity map of sufficient scale and size to locate the pertinent area shall be shown on the title sheet or second sheet of the drawings.

**(8)** Site topography. A detailed topography of the dam site including sufficient area upstream and downstream and at the abutments shall be provided. Elevations shall be based on North American vertical datum 1988 or more recent adjustment.

**(9)** Design details. Detailed information of the various construction features including plan view, elevations, cross-sections at the maximum section and along the outlet works, profile along and section through the centerline of the dam showing the foundation materials, construction features and cross-sections and a profile of the emergency spillway with dimensions and construction details shall be provided. Any other information necessary for the state engineer to determine the feasibility and safety of the dam shall be [~~required~~] provided.

**(10)** Reservoir area, capacity and high water line traverse. The topography of any proposed reservoir site shall be determined to industry standards and a contour map with a contour interval of 1 foot shall be prepared. Elevations of the contours shall be tied to the North American vertical datum of 1988 or more recent adjustment. [~~The high water line at the elevation of the dam crest will be highlighted on the contour map.~~] The elevation of the high water line will be highlighted on the contour map. A curve [~~or~~] and table of elevation versus area and storage capacity for the reservoir shall be prepared from the contour map. The curve [~~or~~] and table shall be from the bottom of the reservoir to the dam crest. Area shall be provided in acres and storage capacity in acre-feet.

[~~**(11)** Point of outlet. A location of the outlet works shall be referenced using latitude and longitude or to the New Mexico state plane coordinate system.~~]

[~~**(12)**~~] **(11)** Permanent bench mark. A permanent bench mark shall be established above the high water line at a location unlikely to settle or be disturbed. The North American vertical datum of 1988 or more recent adjustment [~~and latitude and longitude or the New Mexico state plane coordinate system~~] for the bench mark elevation and the latitude and longitude in decimal degrees at least to the fifth place after the decimal for the bench mark location shall be provided. A detail of construction of the permanent bench mark shall be provided.

**E. Specifications:** [~~Specifications~~] A specification package shall be prepared for each project describing work to be done and materials to be used to supplement construction drawings. [~~Specifications must be clear and concise and include detailed methods of construction, qualities and sizes of materials, unit amounts to be used and methods of testing and quality control, construction supervision and inspection.~~] Specifications shall be submitted in a form acceptable to the state engineer. The specifications shall also be submitted in an electronic format acceptable to the state

engineer. Reference to standard technical specifications is not acceptable. Inclusion of appropriate specification sections derived from model specifications is acceptable. Specifications must be clear and concise. Specifications shall include detailed methods of construction, qualities and sizes of materials, unit amounts to be used, methods and frequency of testing and quality control, construction supervision and frequency of inspection. Specifications shall be prepared by a professional engineer licensed in the state of New Mexico qualified in the design and construction of dams. The specifications shall [~~meet the following requirements:~~] contain the information described below and any other additional information determined necessary by the state engineer to evaluate if the construction methods are consistent with the design and construction drawings.

**(1)** The front cover of the specifications shall show the name of the dam (identical to the application) and the county in which the dam is located. The first page behind the front cover shall show the name of the dam (identical to the dam name on the application), the county in which the dam is located, [~~signed certifications for the engineer and state engineer in accordance with Subsections B and E of 19.25.12.12 NMAC and a statement recognizing the authority of the state engineer. An approved model statement recognizing the authority of the state engineer is provided below. Changes to the model statement require prior approval of the state engineer.~~

~~"All construction shall be performed in strict accordance with the accepted plans and specifications. Representatives of the state engineer shall have full authority to perform inspections during construction and shall have full power to act pursuant to the law and in accordance with Title 19, Chapter 25, Part 12, Dam Design, Construction and Dam Safety of the New Mexico Administrative Code if plans and specifications are not followed.".~~] a signed certification from the engineer and a certification for the state engineer in accordance with Subsections B and E of 19.25.12.12 NMAC.

**(2)** The specifications shall [~~be indexed~~] include a table of contents.

**(3)** The specifications shall be bound and submitted on [~~a good grade of white~~] 8 1/2-inch by 11-inch white paper.

**(4)** [~~The general conditions shall include statements that the construction drawings and specifications cannot be significantly changed without the prior written approval of the state engineer.~~] The general conditions shall include a statement that the construction drawings and specifications cannot be changed without the prior written approval of the state engineer and must recognize the authority of the state engineer to perform inspections during construction. An approved model statement is provided below. Changes to the model statement require prior approval of the state engineer. "All construction shall be performed in strict accordance with the accepted construction drawings and specifications. Changes to the accepted construction drawings or specifications require prior written approval of the state engineer. Representatives of the state engineer shall have full authority to perform inspections during construction and shall have full power to act pursuant to the law and in accordance with Title 19, Chapter 25, Part 12, Dam Design, Construction and Dam Safety of the New Mexico Administrative Code if construction drawings and specifications are not followed."

**F. Boundary, easement or right of way plat of survey:** A plat of survey shall be submitted in a form acceptable to the state engineer. A professional surveyor licensed in the state of New Mexico shall prepare a plat of survey showing the dam owner's property boundaries or easement [~~and/or~~] or right of way granted by the land owner. The plat of survey shall be prepared in conformance with the requirements as set forth in the Minimum Standards for Surveying in New Mexico, 12.8.2 NMAC. The plat of survey shall clearly state to whom an easement is granted and what rights are conveyed with the easement. The plat of survey shall show the footprint of the dam and appurtenant structures and the high water line in the reservoir. The plat of survey shall be [~~submitted with the construction drawings and~~] recorded with the county clerk of the county or counties in which the survey is located. A certificate signed by the surveyor in accordance with Subsection C of 19.25.12.12 NMAC shall appear on the plat of survey. A certified copy of the recorded plat of survey bearing the recorded page and endorsement of the county clerk shall be submitted to the state engineer for filing [~~upon completion of construction~~]. Adequate property ownership, easement or right of way shall be required for the following conditions:

**(1)** to access the dam and outlet controls during normal and flood events;

**(2)** to prevent development encroachment into the reservoir area defined by normal operation and the spillway design flood that adversely affects the performance of the dam;

**(3)** to prevent development in the approach, control and discharge section of the spillway that may restrict flow through the spillway;

**(4)** to return outlet works and spillway discharge to the natural drainage and allow the outlet works to discharge freely; and

**(5)** to perform maintenance on the dam, appurtenant structures and surrounding areas to ensure the safe performance of the dam.

**G. Dam site security:** Dams classified as high or significant hazard potential shall address security at dams to prevent unauthorized operation or access. If in the opinion of the state engineer, the failure of the dam will result in catastrophic consequences, a security and risk management program for the dam will be required. Elements of a security and risk management program are:

**(1)** threat, vulnerability and risk assessments;

**(2)** physical security plans; and

**(3)** integration of security operational procedures.

**H. Instrumentation plan:** An instrumentation plan shall be submitted in a form acceptable to the state engineer. An instrumentation plan providing the ability to monitor and evaluate the performance of a dam is required for dams classified as high or significant hazard potential. Instrumentation details must be included on construction drawings and specifications must be consistent with the instrumentation plan. The instrumentation plan may be submitted as a separate report or as part of the [~~operation and maintenance manual~~] design report. Minimum requirements of the instrumentation plan shall include:

[~~**(1)** general description of instrumentation;~~

~~**(2)** reading schedule;~~

~~**(3)** identification of critical readings;~~

~~**(4)** specifics for each installation including;~~

~~**(a)** detailed description of installations;~~

~~**(b)** purpose of the instrumentation;~~

~~**(c)** reading and maintenance schedule instructions; and~~

~~**(5)** special instrumentation or monitoring requirements.~~]

**(1)** description and purpose;

**(2)** detailed description of installations;

**(3)** calibration and maintenance schedule and instructions;

**(4)** reading schedule and instructions;

**(5)** data reduction and interpretation instructions; and

**(6)** identification of critical readings.

**I. Operation and maintenance manual:** An operation and maintenance manual is required for dams classified as high or significant hazard potential. The operation and maintenance manual identifies activity necessary to address the continued safe operation, maintenance and overall performance of the dam. Any restrictions imposed by the design shall be addressed in the operation and maintenance manual. The operation

and maintenance manual shall conform to the requirements set forth in 19.25.12.17 NMAC.

**J. Emergency action plan:** An emergency action plan is required for dams classified as high or significant hazard potential. The emergency action plan identifies potential emergency conditions at a dam and specifies preplanned actions to be followed to minimize property damage and loss of life. The emergency action plan shall conform to the requirements set forth in 19.25.12.18 NMAC.

[19.25.12.11 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.12 CERTIFICATIONS:** Signed certifications by the dam owner, engineer, surveyor, [~~state office of emergency management~~] local and state emergency management officials and the state engineer are required by these regulations on specific documents. Approved model certifications for the dam owner, engineer, surveyor, [~~state office of emergency management~~] local and state emergency management officials and state engineer are provided below. Changes to the model certifications require prior approval of the state engineer.

**A. DAM OWNER'S CERTIFICATE:** A certificate followed by the dated signature of the dam owner and notary public acknowledgment is required on the title sheet of the construction drawings and first page behind the front cover of the operation and maintenance manual and emergency action plan. The following model certification is considered to be an example of the minimum that the dam owner shall certify. If the dam owner is a corporation, political subdivision or other governmental entity a model certificate is also provided.

[~~state of _____) _____) ss. county of _____)~~]

I, (dam owner's name) _____, being first duly sworn, upon my oath, state that I have read and examined the accompanying _____ (construction drawings consisting of ____ sheets, operation and maintenance manual, or emergency action plan) and know the contents and representations therein for _____ dam and all that is shown herein is done with my free consent and in accordance with my wishes and state that the same are true and correct to the best of my knowledge and belief.

_____
Dam owner signature Date

Subscribed and sworn to before me this _____ day of _____ , 20__.

_____
Notary public

My commission expires _____
(SEAL)

If a claimant is a corporation, political subdivision or other governmental entity the following shall be used:

[~~state of _____) _____) ss. county of _____)~~]

I, (representative's name) , being first duly sworn, upon my oath, state [~~than~~] that I am the _____ (officer) of the _____, a [~~corporation~~] (corporation or political subdivision) duly organized under the laws of the state of _____, that the accompanying _____ (construction drawings consisting of ____ sheets, operation and maintenance manual, or emergency action plan) for _____ dam were made under authority of the board of directors of said [~~corporation~~] (corporation or political subdivision) and that, in their behalf, I have read and examined the statements and representations and all that is shown herein is done with their free consent and in accordance with their wishes and state that the same are true and correct to the best of my knowledge and belief.

_____
Representative signature, title Date

Subscribed and sworn to before me this _____ day of _____ , 20__.

_____
Notary public

My commission expires _____
(SEAL)

**B. ENGINEER'S CERTIFICATE:** A certificate followed by the dated signature, license number and seal of the engineer responsible for preparing the [~~design~~] report, construction drawings, specifications, operation and maintenance manual and engineering elements of the emergency action plan is required. The certificate shall be placed on the title sheet of the construction drawings and first page behind the front cover of the [~~design~~] report, specifications, operation and maintenance manual and emergency action plan. The following model certification is considered to be an example of the minimum that the engineer [~~should~~] must certify to:

[~~state of _____) _____) ss. county of _____)~~]

I, (engineer's name) , hereby certify that I am a professional engineer licensed in the state of New Mexico, qualified in _____ (civil, geotechnical, etc.) engineering; that the accompanying _____ ([~~design~~] report, construction drawings consisting of ____ sheets, specifications, ____ elements of the operation and maintenance manual, or _____ elements of the emergency action plan) for _____ dam was prepared by me or under my supervision; that the accompanying _____ ([~~design~~] report, construction drawings consisting of ____ sheets, specifications, ____ elements of the operation and maintenance manual, or _____ elements of the emergency action plan) is in compliance with the Dam Design, Construction and Dam Safety Regulations (19.25.12 NMAC) and that the same are true and correct to the best of my knowledge and belief.

(Engineer's signature) _____, License number __ _____[~~,~~] (SEAL)
Engineer's name

Date [~~submitted~~]: _____

**C. SURVEYOR'S CERTIFICATE:** The professional surveyor licensed in the state of New Mexico preparing the plat of survey showing property boundaries, acquired easements or rights-of-way shall include a certificate on the plat of survey as modeled in Paragraph (2) of Subsection J of 12.8.2.9 NMAC, the Minimum Standards for Surveying in New Mexico. The following model certificate is considered to be an example of the minimum that the surveyor [~~should~~] must certify to:

I, (surveyor's name) , New Mexico professional surveyor no. (surveyor's license number), do hereby certify that this (boundary, easement, or right of way) plat of survey and the actual survey on the ground upon which it is based were performed by me or under my direct supervision; that I am responsible for this survey; that this survey meets the Minimum Standards for Surveying in New Mexico; and that it is true and correct to the best of my knowledge and belief. I further certify that this survey is not a land division or subdivision as defined in the New Mexico Subdivision Act and that this instrument is a (boundary, easement, or right of way) plat of survey of _____ dam.

(Surveyor's signature) _____, License number [~~,~~] (SEAL)
Surveyor's name

Date [~~submitted~~]: _____

**D.** [~~**STATE OFFICE OF EMERGENCY MANAGEMENT:** A certificate form for the state office of emergency management acceptance shall be placed on the first page behind the front cover of the emergency action plan. This certificate is to be signed by state office of emergency management after all necessary corrections or additions, if any, have been made.~~

~~state of _____ )~~
~~_____ ) ss.~~
~~county of _____ )~~]

**LOCAL AND STATE EMERGENCY MANAGEMENT OFFICIAL'S CERTIFICATE:** Certificate forms for the local and state officials responsible for emergency management shall be placed at the front of the emergency action plan and immediately after the engineer's certificate. The local official's certificate shall be placed in front of the state official's certificate.

I hereby certify that the accompanying emergency action plan for _____ dam has been duly examined by me and accepted for filing on the _____ day of _____, 20__.

[~~_____~~
~~State office of emergency management~~]
(Official's signature) _____

(Print official's name)
(Print name of local or state emergency management entity)

**E. STATE ENGINEER'S CERTIFICATE:** A certificate form for the state engineer acceptance shall be placed on the title sheet of the construction drawings and first page behind the front cover of the [~~design~~] report, specifications, operation and maintenance manual and immediately after the state official responsible for emergency management in the emergency action plan. This certificate is to be signed by the state engineer or his representative after all necessary corrections or additions, if any, have been made.

[~~state of _____ )~~
~~_____ ) ss.~~
~~county of _____ )~~]

I hereby certify that the accompanying _____ ([~~design~~] report, construction drawings, specifications, operation and maintenance manual or emergency action plan) for _____ dam and appurtenant structures has been duly examined by me and accepted for filing on the _____ day of _____, 20__.

_____
State engineer

[19.25.12.12 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.13 [~~CONSTRUCTION AND OPERATION~~] PERMIT CONDITIONS:** After reviewing the required documentation, the state engineer will notify the dam owner if any deficiencies are found with the submittal to construct and operate a dam. The dam owner will be given an opportunity to correct any deficiencies noted in the review process. Once all deficiencies have been addressed the state engineer will approve the application for permit to construct and operate a dam with conditions under which construction and operation shall occur. Failure to comply with conditions of the approved permit may result in the state engineer issuing an order to redesign, reconstruct or restrict operation of the dam and reservoir until conditions are met. Construction must be completed within two years of approving the application unless an extension of time for the construction is requested and approved by the state engineer. [~~The conditions of construction and operation shall include, but not be limited to the following:~~] The permit conditions are described below and may include additional conditions determined necessary by the state engineer to ensure the dam is constructed and operated in a safe condition.

**A. Engineer supervising construction:** Prior to initiation of construction, the dam owner shall designate a professional engineer licensed in the state of New Mexico qualified in the design and construction of dams to supervise construction. If the state engineer finds the engineer acceptable, an order is issued approving the engineer and setting forth conditions under which the engineer will supervise construction. [~~Conditions shall include, but shall not be limited to:~~] Construction supervision conditions are described below.

**(1)** The engineer supervising construction shall submit monthly progress reports [~~including summary of test results, problems encountered and their solutions.~~] that are signed and sealed. The report shall include:

**(a)** summary of construction activities;

**(b)** summary of test results;

**(c)** captioned and dated construction photographs; and

**(d)** a discussion of problems encountered and their solutions.

**(2)** Construction shall be in accordance with accepted drawings and specifications. State engineer approval of any modifications to the accepted drawings or specifications is required prior to undertaking the modifications. Requests for changes or modifications by the engineer supervising construction shall be submitted in writing, supported with appropriate documentation.

**(3)** The engineer supervising construction shall provide the state engineer a minimum of 72 hours notice to perform inspections as specified in the conditions of construction.

[~~**(4)** Upon completion of construction, the engineer supervising construction shall submit to the state engineer the following items:~~

~~**(a)** a completion report, which shall include descriptions of problems and their solutions;~~

~~**(b)** a summary of materials test data and labeled and dated construction photographs;~~

~~**(c)** record mylar construction drawings including signed certifications on the title sheet; and~~

~~**(d)** a certificate that the dam was constructed in accordance with the accepted drawings and specifications and is in satisfactory condition. An approved model certificate for the engineer supervising construction is shown below. Changes to the language in the certification require prior approval by the state engineer.~~]

**(4)** Upon completion of construction, the engineer supervising construction shall submit to the state engineer the items described below.

**(a)** A construction completion report, which shall include a signed certification from the engineer supervising construction and a certification for the state engineer in accordance with Subsections B and E of 19.25.12.12 NMAC. The construction completion report shall also include:

**(i)** description of construction activities including problems and their solutions;

**(ii)** a summary of materials test data; and

**(iii)** captioned and dated construction photographs.

**(b)** Record mylar construction drawings including a signed certification on the title sheet from the dam owner and a certification for the state engineer in accordance with Subsections A and E of 19.25.12.12 NMAC. The record mylar drawings shall also contain a signed certificate from the engineer supervising construction that the dam was constructed in accordance with the record drawings and specifications and is in satisfactory condition. If design changes are made during construction, the design engineer may also be required to sign a certification in accordance with Subsection B of 19.25.12.12 NMAC. An approved model certificate for the engineer supervising construction is

shown below. Changes to the language in the certification require prior approval by the state engineer.

[~~state of _____)~~
~~_____) ss.~~
~~county of _____)~~

~~I, _____,~~
~~(engineer's name) state that I am a qualified professional engineer licensed in the state of New Mexico, that I have inspected the _____ dam and appurtenant structures and find them to be completed in accordance with the record construction drawings and specifications and are now in a satisfactory condition for acceptance.~~]

I, (engineer's name) , state that I am a qualified professional engineer licensed in the state of New Mexico, that I have supervised the (construction, repair, rehabilitation) of _____dam and appurtenant structures and find them to be completed in accordance with the record construction drawings and specifications and are now in a satisfactory condition for acceptance.

(Engineer's signature)_____, License number _____[~~,~~] (SEAL)
Engineer's name

Date [~~submitted~~]: _____

**B. State engineer's authority during construction:** The state engineer may perform inspections at any time during construction of the dam and appurtenant structures. Inspections will vary with each project, based on the complexity of the design. Inspection of specific construction items are standard construction conditions in the permit and require the engineer supervising construction to provide the state engineer with a minimum of 72 hours advanced notice. If the state engineer receives a minimum of 72 hours advanced notice, a delay of construction to schedule a state engineer inspection is not required. State engineer inspection fees are charged in accordance with Subsection [~~D~~] E of 19.25.12.8 NMAC. Fees for inspection of construction by the state engineer not paid on demand shall become a lien on any land or other property of the dam owner and may be recovered by the state engineer.

**C. Completion of construction:** Upon completion of construction, a proof of completion of works form for the dam shall be submitted in accordance with 19.25.12.14 NMAC. Owners of dams classified as high or significant hazard potential shall submit to the [~~state engineer an updated operation and maintenance manual in accordance with 19.25.12.17 NMAC and an updated emergency action plan~~] state engineer any required updates to the operation and maintenance manual in accordance with 19.25.12.17 NMAC and any required updates to the emergency action plan in accordance with 19.25.12.18 NMAC incorporating any modifications made during construction. Upon the satisfactory completion of all conditions in the permit, pending the issuance of a certificate of construction and license to operate a dam, use of the reservoir shall require written permission from the state engineer. Use of the dam and reservoir are restricted until the state engineer accepts the updated operation and maintenance manual and emergency action plan, if required.

**D. Extension of time for construction:** The state engineer will grant an extension of time for completing construction upon proper showing by the dam owner of due diligence or reasonable cause for delay and accompanied with a fee in accordance with Subsection [~~C~~] D of 19.25.12.8 NMAC. An affidavit by a professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall be filed with the state engineer providing evidence that the design of the dam meets or exceeds the design requirements in accordance with 19.25.12.11 NMAC. An extension of time may be granted for a period not to exceed five (5) years. No extension of time shall be granted which in combination extend the time allowed by the permit beyond ten (10) years from the initial date of approval of the application, unless the state engineer in his discretion expressly waives this limitation pursuant to NMSA 1978, Section 72-5-14. Failure to request an extension of time shall result in cancellation of the permit by the state engineer.

**E. Operation conditions:** Operation conditions will be identified in the permit to construct and operate a dam. Operation conditions are described below:

**(1)** The owner shall comply with the office of the state engineer rules and regulations for dams.

**(2)** Changes to the easements, that adversely affects the conditions outlined in paragraphs (1) through (5) of Subsection F of 19.25.12.11 NMAC require prior approval from the state engineer.

**(3)** Changes, alterations, or modifications to the dam or sediment removal or dredging not outlined in the operation and maintenance manual requires state engineer approval prior to making the change.

**(4)** The dam owner shall provide access to the state engineer for periodic dam safety inspections.

**(5)** The dam owner must comply with all state engineer safety orders issued for the dam.

**(6)** Owners of dams classified as low and significant hazard potential shall have the hazard classification periodically evaluated by a professional engineer licensed in New Mexico if downstream development occurs to ensure the dam design is not deficient.

**(7)** Operation of the dam must be in compliance with the approved operation and maintenance manual and emergency action plan.

**(8)** The dam owner shall operate the dam in compliance with any specific condition, requirement, or limitation established by the design engineer or otherwise applicable to the dam.

**(9)** Failure by the dam owner to comply with operation conditions may result in revocation of the permit or license to operate and an order to breach the dam in accordance with Subsection B or C of 19.25.12.19 NMAC.

[19.25.12.13 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.14 PROOF OF COMPLETION OF WORKS:** Upon completion of [~~all~~] the construction conditions a proof of completion of works for the dam shall be filed on a form provided by the state engineer with appropriate fees in accordance with Subsection [~~E~~] F of 19.25.12.8 NMAC. The proof of completion of works for the dam shall be filed with original signature of the dam owner and engineer supervising construction. The proof of completion of works form shall be provided to the state engineer as a separate submittal.

[19.25.12.14 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.17 OPERATION AND MAINTENANCE MANUAL:** Owners of dams classified as high or significant hazard potential shall prepare, maintain and adhere to an operation and maintenance manual that addresses the continued safe operation, maintenance and performance of the dam. Because each site, design and operating practice is unique, waivers of specific requirements in this section will be considered on a case-by-case basis. Request for waiver shall be in writing accompanied with documentation justifying the request. If the request is not justified to the satisfaction of the state engineer the request will be denied. [~~A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare the operation and maintenance manual. The front cover shall show the name of the dam (identical to the application), the county in which the dam is located and type of report. The first page behind the front cover shall show the name of the dam (identical to the dam name on the application), the county~~

~~in which the dam is located and signed certifications for the dam owner, engineer and state engineer in accordance with Subsections A, B and E of 19.25.12.12 NMAC.~~] If deemed appropriate, the state engineer may require the owner to obtain the services of a professional engineer licensed in the state of New Mexico qualified in the design and construction of dams to prepare complex technical aspects of the operation and maintenance manual. The operation and maintenance manual shall be submitted in a form acceptable to the state engineer. The operation and maintenance manual shall also be submitted in an electronic format acceptable to the state engineer. The front cover shall identify the document as an operation and maintenance manual and shall show the name of the dam, the county in which the dam is located and the dam owner. The first page behind the front cover shall show the name of the dam, the county in which the dam is located, signed certifications from the dam owner, engineer if required and a certification for the state engineer in accordance with Subsections A, B and E of 19.25.12.12 NMAC. Operation or maintenance of the dam in violation of the procedures presented in the accepted operation and maintenance manual that affect the safety of the dam will result in an order being issued requiring the dam owner to address the problem. The state engineer may also issue an order restricting storage in order to improve the unsafe condition. Failure to comply with orders issued by the state engineer may result in the license to operate the dam being revoked and the dam being ordered breached in accordance with Subsection B or C of 19.25.12.19 NMAC. [~~Generally, the~~] The operation and maintenance manual shall [~~address the following, with modification depending on the specific dam application:~~] contain the information described below, if relevant to the project, and any other additional information determined necessary by the state engineer to evaluate if the dam will be operated and maintained in a safe condition.

[~~**A. Project Information:** General information on the project including the purpose, location, history, responsibilities and description and properties of the dam and appurtenant structures shall be required.~~]

**A. General information:** Information on the project shall include but not be limited to the following:

**(1)** location and access;

**(2)** purpose and description;

**(3)** table of properties; and

**(4)** history of construction, repairs and performance.

**B. Operation:** Operation instructions, frequency of operation and operator safety for the project shall include but not be limited to the following:

**(1)** Reservoir:

**(a)** water right storage allocations;

**(b)** [~~spillway design flood water level~~] elevation, area and storage curve and table to the dam crest;

**(c)** [~~emergency reservoir evacuation procedures and maximum discharge rate; and~~] elevation of the high water line;

**(d)** discharge rating table for the outlet conduit;

**(e)** discharge rating table for the spillway;

**(f)** emergency reservoir evacuation procedures; and

**[~~(d)~~] (g)** first filling criteria and monitoring requirements.

**(2)** Outlet works:

**(a)** first operation;

**(b)** seasonal startup;

**(c)** seasonal shutdown;

**(d)** installation and removal of bulkhead;

**(e)** operation procedures for specific equipment; and

**(f)** electrical systems and controls.

**(3)** Operator safety:

**(a)** confined space entry and permits;

**(b)** fall protection;

**(c)** lockout/tag out; and

**(d)** other applicable safety requirements.

**C. Instrumentation:** [~~The following elements for monitoring instrumentation shall be addressed~~

[~~**(1)** general description~~

~~**(2)** purpose~~

~~**(3)** critical readings~~

~~**(4)** reading and maintenance procedures; and~~

~~**(5)** reading schedule.~~] Instrumentation for the project shall include but not be limited to the following:

**(1)** description and purpose;

**(2)** detailed description of installation;

**(3)** calibration and maintenance schedule and instructions;

**(4)** reading schedule and instructions;

**(5)** data reduction and interpretation;

**(6)** identification of critical readings and notification procedures; and

**(7)** schedule for reporting data with interpretations to the state engineer.

**D.** Security: Projects that include security measures shall describe the security measures along with instructions for monitoring, maintaining and inspection.

[~~**D.**~~] **E.** Maintenance: Maintenance requirements and [~~schedule~~] frequency shall be included.

[~~**E.**~~] **F.** Inspection: Inspection requirements, [~~schedule~~] frequency and recommended checklist shall be included.

[~~**F.**~~] **G.** Updates and revisions: An update and revision procedure shall be included.

[~~**G.**~~] **H.** Appendices: [~~Appendices to include any design consideration and the instrumentation plan to ensure any restrictions imposed by the design are incorporated into the operation and maintenance manual shall be included. Copies of inspections forms and any other information that supports and supplements the material used in the development and maintenance of the operation and maintenance manual.~~] Appendices shall include documentation that supports and supplements the manual. The appendices shall include but not be limited to the following:

**(1)** captioned and dated photographs;

**(2)** key sheets from the record construction drawing set;

**(3)** instrumentation construction drawings;

**(4)** instrumentation rating tables and calibration details;

**(5)** monitoring and inspection forms;

**(6)** instrumentation plan to ensure any restrictions imposed by the design are incorporated into the operation and maintenance manual; and

**(7)** copies of any relevant procedures.

[19.25.12.17 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.18 EMERGENCY ACTION PLAN:** Owners of dams classified as high or significant hazard potential shall prepare, maintain and exercise an emergency action plan for immediate action in the event of a potential dam failure. [~~The emergency action plan shall follow the format provided by the state engineer or a format that has prior approval of the state engineer.~~] Because each site and operating practice is unique, waivers of specific requirements in this section will be considered on a case-by-case basis. Request for waiver shall be in writing accompanied with documentation justifying the request. If the request is not justified to the satisfaction of the state engineer the request will be denied. The emergency action plan shall follow the format provided by the state engineer or a format that has prior approval of the state engineer. The emergency action plan shall also be submitted in an electronic format acceptable to the state engineer. The front cover shall identify the document as an emergency action plan and shall show the name of the dam [~~(identical to the application)~~], the county in which the dam is located and [~~type of report~~] the dam owner. [~~The pages immediately behind the front cover shall show the name of the dam (identical to the dam name on the application), the county~~

~~in which the dam is located and signed certifications for the dam owner, engineer, state office of emergency management and state engineer in accordance with Subsections A, B, D and E of 19.25.12.12 NMAC.~~] The pages immediately behind the front cover shall show the name of the dam, the county in which the dam is located, signed certifications from the dam owner, engineer, local and state officials responsible for emergency management and a certification for the state engineer in accordance with Subsections A, B, D and E of 19.25.12.12 NMAC. The dam owner shall coordinate with the local emergency management office in preparing the emergency action plan. The coordination is required to ensure that there is an agreement on the evacuation limits and responsibilities. The dam owner shall submit a copy to the local and state [~~office of~~] officials responsible for emergency management for acceptance prior to submittal to the state engineer. The dam owner shall review the emergency action plan annually, update as necessary and furnish a copy of updates to [~~the state engineer, state office of emergency management and~~] all official copyholders. The dam owner shall exercise the emergency action plan to verify those involved in its implementation know their roles and responsibilities. It is recommended the dam owner conduct a functional exercise of the emergency action plan every 5 years with a table top exercise conducted 2 to 3 years before the functional exercise. The exercise may result in updates to ensure the emergency action plan maintains operational readiness, timeliness and responsiveness. Failure to act in accordance with the accepted emergency action plan that affects [~~the safety of the dam~~] public safety will result in an order being issued requiring the dam owner to address the problem. Failure to comply with orders issued by the state engineer may result in the license to operate the dam being revoked and the dam being ordered breached in accordance with Subsection B or C of 19.25.12.19 NMAC. A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare engineering [~~elements of~~] information for the emergency action plan as specified below. An emergency action plan shall [~~contain the following minimum elements:~~] contain the information described below and any other additional information determined necessary by the state engineer or emergency management official to evaluate the planned response to an emergency situation by the dam owner.

**A. Notification flowchart:** A notification flowchart showing who is to be notified, by whom and in what priority.

**B. Emergency detection, evaluation and classification:** Procedures for reliably and timely identifying an emergency situation to ensure that an appropriate course of action is implemented. A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare this element.

**C. Responsibilities:** A list designating responsibilities for the emergency action plan related tasks including, but not limited to developing, maintaining, exercising, implementing, warning, evacuation and termination of the emergency.

**D. Preparedness:** A list of materials, equipment and manpower available to moderate or alleviate the effects of a dam failure or spillway release. [~~A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare this element.~~]

**E. Evacuation map:** An evacuation map delineating the areas that will be evacuated as a result of dam failure. The evacuation map shall extend to a point where the consequences of dam failure does not pose a threat to life and evacuation or restricting access is not required. If available, shape files from geographic information system software of the evacuation map shall be submitted. Evacuation maps shall include the following information at critical locations downstream when required by the local official responsible for emergency management:

**(1)** distance downstream from the dam;

**(2)** arrival time of the leading edge of the flood wave;

**(3)** peak flow depth, incremental rise or water surface elevation in feet; and

**(4)** peak velocity in feet per second.

**[~~E.~~] F. Inundation map:** An inundation map delineating the areas that will be flooded as a result of dam failure. [~~The dam breach analysis shall be prepared in accordance with Subparagraphs (a) through (g) of Paragraph (1) of Subsection C of 19.25.12.11 NMAC for the failure with the water level at the reservoir storage capacity and at the maximum water level during the spillway design flood event. If a dam is located upstream, failure scenarios with the upstream dam shall also be evaluated. Flood control dams that have not experienced a fill to the spillway crest shall prepare a failure scenario with the water level at the spillway crest. Flood inundation maps shall also be prepared for the maximum release without failure of the dam. Evaluation of the effects of flooding from dam failure shall extend at least to the location downstream where the flood no longer poses a threat to life or property.~~] The inundation map shall be supported by a dam breach and flood routing analysis report. The dam breach and flood routing analysis shall evaluate the sunny day failure, failure at the high water line and any additional event deemed appropriate by the dam owner. If appropriate considering the consequences of dam failure, a simplified dam breach and flood routing analysis may be used with approval from the state engineer. If a dam is located downstream, failure scenarios with the downstream dam shall also be evaluated. Evaluation of the effects of flooding from dam failure shall extend at least to the location downstream where the consequences of dam failure does not pose a threat to life and evacuation or restricting access is not required. A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare this element. If available, shape files from geographic information system software of the inundation map shall be submitted. Inundation maps shall include the following information at critical locations downstream:

**(1)** distance downstream from the dam;

**(2)** arrival time of the leading edge of the flood wave;

**(3)** peak flow depth, incremental rise and water surface elevation in feet; and

**(4)** peak velocity in feet per second.

**[~~F.~~] G. Appendices:** All information that supports and supplements the material used in the development and maintenance of the emergency action plan. The dam breach and flood routing analysis report shall be submitted as a separate document.

[19.25.12.18 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.19 CHANGES TO AN EXISTING DAM:** A dam owner proposing to reconstruct, enlarge, modify, restore reservoir capacity, repair, remove or breach an existing dam must make application to and receive approval from the state engineer prior to undertaking any such action. The current condition of the dam, the type of repair or modification and the proposed means to achieve the repair or modification shall dictate the detail of the information provided to the state engineer in order to obtain approval. Because each site, design change and operating practice is unique, waivers of specific requirements in this section will be considered on a case-by-case basis. Request for waiver shall be in writing accompanied with documentation justifying the request. If the request is not justified to the satisfaction of the state engineer the request will be denied. Existing dams present the same hazards to life and property downstream as new dams. Therefore, owners of dams classified as high or significant hazard potential shall evaluate the current condition of the dam and address in the submittal to the state engineer whether the dam is in

compliance with the design requirements in Subsection C of 19.25.12.11 NMAC. If the state engineer determines compliance with requirements in Subsection C of 19.25.12.11 NMAC are critical to the safety of the dam, the state engineer shall issue an order requiring the deficiency be addressed as part of the proposed change. Owners of dams classified as low hazard potential shall comply with the design requirements in Subsection C of 19.25.12.11 NMAC for the proposed change only. Maintenance activity performed in accordance with 19.25.12.17 NMAC does not require prior state engineer approval. Dam owners shall not abandon a dam without breaching or removing the dam to ensure the dam no longer poses a risk to life, property, the environment surrounding the dam or downstream of the dam. In the event of any changes of ownership affecting the title to a dam, the new owner shall file a change of ownership form for a dam with the state engineer. Recognition of the responsibility and liability associated with dam ownership is required along with fees for filing the change in ownership form for a dam in accordance with Subsection [~~F~~] G of 19.25.12.8 NMAC. This section exempts federal dams if no change to the water storage permit is required. [~~In general, the following minimum submittal is required to make changes to an existing dam:~~] A proposed change to an existing dam shall require the submittal of the information described below and any other additional information determined necessary by the state engineer to evaluate if the change to the dam is safe.

**A. Proposed changes to an existing dam:** For dam owners proposing to reconstruct, enlarge, modify, restore reservoir capacity, [~~or~~] repair or add aesthetic fill to an existing dam, the [~~following supporting documentation~~] information described below is required prior to undertaking any such action[~~:~~].

**(1)** An [~~amended~~] application [~~if properties of~~] to alter, repair or rehabilitate the dam and appurtenant structures [~~change~~]. Fees for filing the [~~amended~~] application and for reviewing drawings and specifications shall be in accordance with Subsections [~~A~~] B and [~~B~~] C of 19.25.12.8 NMAC. [~~Fees~~] Review fees identified in Subsection C of 19.25.12.8 NMAC are waived for the first review if the state engineer requires the change to address a dam safety deficiency.

**(2)** Documentation of sufficient water rights if changes in storage or release requirements are proposed in accordance with the requirements of Subsection B of 19.25.12.11 NMAC.

**(3)** A design report addressing the proposed change in accordance with the requirements of Subsection C of 19.25.12.11 NMAC. Owners of dams classified as high or significant hazard potential shall submit a design report addressing whether the existing condition of the dam is in compliance with the design requirements listed in Subsection C of 19.25.12.11 NMAC. Where the existing condition of the dam is not in compliance with the design requirements of Subsection C of 19.25.12.11 NMAC, the design report shall propose changes to address compliance with the design requirements of Subsection C of 19.25.12.11 NMAC or request a waiver that the deficiency is not critical to the safety of the dam and provide adequate justification for the waiver.

**(4)** Construction drawings and specifications addressing the proposed change in accordance with the requirements of Subsections D and E of 19.25.12.11 NMAC.

**(5)** A plat of survey showing the dam owner's property boundaries, easement, or right of way. The plat of survey shall be in accordance with the requirements of Subsection F of 19.25.12.11 NMAC.

**(6)** For dams classified as high or significant hazard potential, a dam site security assessment in accordance with the requirements of Subsection G of 19.25.12.11 NMAC.

**(7)** For dams classified as high or significant hazard potential, an instrumentation plan in accordance with the requirements of Subsection H of 19.25.12.11 NMAC.

**(8)** For dams classified as high or significant hazard potential, an updated operation and maintenance manual and emergency action plan in accordance with the requirements of Sections 17 and 18 of 19.25.12 NMAC.

**B. Removal or breach of dams classified as high or significant hazard potential:** Dam owners intending to breach or remove a dam classified as high or significant hazard potential shall submit a plan to the state engineer for approval prior to breaching or removing the dam. The plan shall evaluate the potential effects of the dam removal or breach on life, property and the environment downstream. A professional engineer licensed in the state of New Mexico qualified in the design and construction of dams shall prepare the plan. The state engineer will revoke the license to operate a dam upon completion of all construction conditions. The plan shall meet the [~~following~~] conditions[~~:~~] described below.

**(1)** The reservoir shall be emptied in a controlled manner, which will not endanger lives or damage property downstream.

**(2)** The dam or breach area shall be excavated down to the level of natural ground and the breach shall be of sufficient width to safely pass the 100-year, 24-hour flood peak discharge without attenuation of the flood through the reservoir.

**(3)** The side slopes of the breach shall be excavated to a stable angle.

**(4)** The breach shall be armored as necessary to prevent erosion of the breach area.

**(5)** The plan shall address the control of sediment previously deposited in the reservoir.

**(6)** Drawings and specifications shall be prepared in accordance with the appropriate requirements listed in Subsections D and E of 19.25.12.11 NMAC and shall include a title sheet with required certifications and signatures, the location, dimensions and lowest elevation of the breach and any other detail to sufficiently describe the proposal.

**(7)** Designation of the professional engineer licensed in the state of New Mexico qualified in the design and construction of dams that will supervise construction of the breach or dam removal. Submittal of the professional engineer's qualifications for state engineer approval is required.

**C. Removal or breach of dams classified as low hazard potential:** Owners of dams classified as low hazard potential shall submit a written notice to the state engineer of intent to breach the dam. The state engineer will revoke the license to operate a dam upon completion of all construction conditions. The breach notice shall meet the [~~following~~] minimum requirements[~~:~~] described below.

**(1)** The bottom width elevation of the breach shall be to original ground.

**(2)** The bottom width of the breach shall be a minimum of one-half the height of the dam but not less than 10 feet.

**(3)** The side slopes shall not be steeper than one horizontal to one vertical.

**(4)** The excavated material shall not be placed in the streambed.

**D. Closure of a tailings facility:** A closure plan [~~is~~] must be prepared to address the closure of a tailings facility. State engineer approval is required before any modification occurs to a jurisdictional tailings dam. A professional engineer licensed in the state of New Mexico qualified in the design and construction of tailings dams shall prepare the closure plan, which shall include a design report, drawings and specifications prepared in accordance with the appropriate requirements listed in Subsections C, D and E of 19.25.12.11 NMAC. The state engineer will revoke the license to operate a dam upon completion of all construction conditions. The plan shall address the following issues:

**(1)** long-term stability under static and dynamic conditions;

**(2)** control of surface runoff to avoid erosion;

**(3)** plan for long term monitoring, if appropriate; and

**(4)** identification of an engineer licensed in the state of New Mexico qualified

in tailings dam design and construction to supervise implementation of the closure plan; submittal of the engineer's qualifications for state engineer approval is required.

**E. Construction and operating conditions:** After reviewing the required documentation, the state engineer will notify the dam owner if any deficiencies are found with the submittal. The dam owner will be given an opportunity to correct any deficiencies noted in the review process. Once all deficiencies have been addressed the state engineer will approve the amended application or proposed change with conditions under which construction and operation shall occur. Action by the state engineer will be in accordance with 19.25.12.13 NMAC, appropriately modified to address the proposed changes.

**F. Proof of completion of works, certificate of construction and license to operate:** [~~Requirement~~] The requirement for a proof of completion of works form for the dam, certificate of construction and license to operate a dam for changes to a dam will be made on a case by case basis by the state engineer. The proof of completion of works form for the dam, certificate of construction and license to operate a dam, if required, shall be in accordance with the Sections 14, 15 and 16 of 19.25.12 NMAC, appropriately modified to address the proposed changes. If the dam is breached, the state engineer will cancel the permit and revoke the license to operate a dam.

[19.25.12.19 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.20 CHANGES TO AN EXISTING NON-JURISDICTIONAL DAM:** A dam owner proposing to reconstruct, enlarge, or modify a non-jurisdictional dam, resulting in a jurisdictional dam after construction is completed, shall comply with 19.25.12.11 NMAC before construction begins. If the [~~purpose~~] ownership of a non-jurisdictional dam changes, resulting in a jurisdictional dam, [~~or if ownership changes, resulting in a jurisdictional dam,~~] the owner shall comply with 19.25.12.11 NMAC. The state engineer will give the owner a reasonable amount of time to comply with 19.25.12.11 NMAC. If the owner fails to comply with 19.25.12.11 NMAC, the dam will be ordered breached in accordance with Subsection B or C of 19.25.12.19 NMAC.

[19.25.12.20 NMAC - N, 3/31/2005; A, 12/31/2010]

**19.25.12.21 EXISTING DAMS:** The state engineer [~~inspects~~] may inspect existing dams to verify dams are operated and maintained in a safe manner. Access to the dam site shall be made available to the state engineer upon request. If a critical dam safety problem is observed by the state engineer or reported to the state engineer, an order [~~will~~] may be issued requiring the dam owner to address the problem. If a dam incident occurs at a dam, the dam owners shall report the incident to the state engineer within 72 hours. If a major repair is required at an existing dam, the plan to repair the dam shall be in accordance with 19.25.12.19 NMAC. Minor repairs not identified as maintenance activity in accordance with 19.25.12.17 NMAC require state engineer approval. Failure to comply with state engineer directives or these regulations may result in an order to reduce storage or to take corrective action. Failure to comply with orders issued by the state engineer may result in the license to operate a dam being revoked and the dam ordered breached in accordance with Subsection B or C of 19.25.12.19 NMAC. Owners of existing dams shall comply with the [~~following:~~] requirements described below.

**A.** Owners acquiring property with a dam shall promptly notify the state engineer on a form provided by the state engineer of the change in ownership. Recognition of the responsibility and liability associated with dam ownership is required along with fees for filing the change in ownership form for a dam in accordance with Subsection [~~F~~] G of 19.25.12.8 NMAC.

**B.** Owners of dams classified as low or significant hazard potential shall evaluate the hazard classification if downstream development occurs. The dam owner shall submit the results of the hazard potential evaluation prepared in accordance with Paragraph (1) of Subsection C of 19.25.12.11 NMAC to the state engineer for approval [~~and a plan for addressing design deficiencies~~]. If the hazard potential classification changes due to downstream development, the state engineer shall give the dam owner a time limit to address deficiencies. Deficiencies shall be addressed in accordance with [~~Paragraphs (3), (12) and (13) of~~] Subsection C of 19.25.12.11 NMAC and Sections 17 and 18 of 19.25.12 NMAC. [~~If the dam owner fails to address a deficiency, the state engineer may revoke the license to operate the dam and order the dam breached in accordance with Subsection B or C of 19.25.12.19 NMAC.~~]

**C.** Dams classified as high or significant hazard potential shall be inspected on an interval no greater than 5 years by a professional engineer licensed in the state of New Mexico qualified in the design and construction of dams. The owner is responsible for securing the services of the professional engineer. The professional engineer shall provide a signed and sealed report to the state engineer describing the findings of the inspection and recommendations for corrective action or changes to the operating procedures. Routine inspection by the state engineer as described in 19.25.12.21 NMAC satisfies this requirement.

**D.** Owners of dams classified as high or significant hazard potential in an unsafe condition may receive an order from the state engineer to address the deficiency pursuant to NMSA 1978, Section 72-5-11 (1979). The state engineer may also issue an order to an owner of a non-jurisdictional dam if the dam is unsafe and a threat to life or property, as determined by the state engineer. Owners shall comply with orders issued by the state engineer pursuant to NMSA 1978, Section 72-5-12 (1979).

**E.** Owners of dams classified as high or significant hazard potential shall comply with 19.25.12.17 NMAC requiring an operation and maintenance manual. Upon compliance with 19.25.12.17 NMAC the state engineer will issue a license to operate the dam. [~~Dams classified as high hazard potential shall comply by December 31, 2008. Dams classified as significant hazard potential shall comply by December 31, 2010.~~]

**F.** Owners of dams classified as high or significant hazard potential shall comply with 19.25.12.18 NMAC requiring an emergency action plan. [~~Dams classified as high hazard potential shall comply by December 31, 2008 unless the dam is for flood control purposes with no permanent storage, then compliance by December 31, 2010 is required. Dams classified as significant hazard potential shall comply by December 31, 2010 unless the dam is for flood control purposes with no permanent storage, then compliance by December 31, 2012 is required.~~] Dams classified as significant hazard potential for flood control purposes with no permanent storage shall comply by December 31, 2012. Owners of 5 or more dams classified as high or significant hazard potential may propose a schedule for compliance with the emergency action plan requirement. [~~The schedule must be submitted by the owner to the state engineer by December 31, 2005 and is subject to review and approval or modification by the state engineer. The schedule must propose compliance dates for each dam. The first dam must be in compliance by December 31, 2008 and at least an additional dam must be in compliance each year thereafter. All dams must be in compliance by December 31, 2015. Upon failure to meet an approved compliance schedule all dams will revert to compliance dates shown above.~~] The schedule must propose compliance dates for each dam and all dams must be in compliance by December 31, 2015. The compliance schedule is subject to review and approval or modification by the state engineer.

**G.** Dam owners that transfer the entire water right out of the

reservoir shall have their license to operate a dam revoked and [~~may~~] will receive from the state engineer an order to breach the dam in accordance with Subsection B or C of 19.25.12.19 NMAC.

**H.** Dam owners that fail to obtain state engineer approval prior to construction of a dam shall comply with all conditions imposed by the state engineer within a time limit established by the state engineer or the state engineer may order the dam breached in accordance with Subsection B or C of 19.25.12.19 NMAC.

[19.25.12.21 NMAC - N, 3/31/2005; A, 12/31/2010]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 20.2.88 NMAC by the addition of Section 14 effective on 1/31/11.

**20.2.88.14 WAIVER OF PART REQUIREMENTS.** All requirements of this part are waived from January 31, 2011 through January 1, 2016.

[20.2.88.14 NMAC - N, 01/31/11]

**[~~20.2.88.14~~] 20.2.88.15 to 20.2.88.99 [RESERVED]**

## NEW MEXICO DEPARTMENT OF GAME AND FISH

This is an amendment to 19.30.9 NMAC, Section 9, effective 12-30-2010.

**19.30.9.9 ESTABLISHING CERTAIN LICENSES, PERMITS, CERTIFICATES AND FEES:**

Licenses, permit, or certificate Fee

**A.** Airborne hunting $10.00

**B.** Call pen 15.00

**C.** Class A lake 101.00

**D.** Additional Class A lake 26.00

**E.** Class A park 501.00

**F.** Field trial/importation 15.00

**G.** Falconry 25.00

**H.** Game bird propagation 10.00

**I.** Importation

**(1)** protected ungulate:

**(a)** initial $500.00/source & up to 2 animals (valid 6 months)

**(b)** for additional animals, not to exceed 30 ungulates from the same source property/owner $50.00 per animal (if no acquisitions to source herd during 6 month period of validity)

**(c)** for greater than 30 ungulates from the same source property/owner $5.00 per animal (if no acquisitions to source herd during 6 months period of validity).

**(2)** fish

**(a)** annual application processing fee 25.00

**(b)** additional stocking and shipment fee 6.00

**(3)** non-domesticated animals per calendar year (1/1 to 12/31) except protected ungulates, game birds, fish or other:

**(a)** class 1: importation of 1 to 5 animals 25.00

**(b)** class 2: importation of 6 to 99 animals 75.00

**(c)** class 3: importation of greater than 100 animals 300.00

**(4)** other (i.e., temporary importation, exhibition, game birds, restoration/recovery, etc.) 20.00

**J.** Protected mammal 10.00

**K.** Shooting preserve 200.00

**L.** Zoo 15.00

**M.** Scientific collecting/ bird banding 15.00

**N.** Bait dealers 21.00

**O.** Transportation 0.00

**P.** Retention 1.25

**Q.** Triploid grass carp 25.00

**R.** Commercial fishing 25.00

**S.** Certificate of application:

[~~**(1)** NM resident *(2009-2010)* 9.00~~

~~**(2)** NM resident *(2010-2011 and subsequent license years)* 10.00~~

~~**(3)** Non-resident *(2009-2010)* 12.00~~

~~**(4)** Non-resident *(2010-2011 and subsequent license years)* 27.00~~]

**(1)** NM resident 8.00

**(2)** Non-resident 20.00

**T.** Wildlife conservation stamp 10.00

**U.** Duplicate license 6.00

**V.** Landowner authorization certificate 9.00

**W.** Additional antelope permit tag 25.00

**X.** Migratory bird permit 0.00

**Y.** Big game depredation damage stamp resident 3.00

**Z.** Big game depredation damage stamp non-resident 10.00

**AA.** Public land user stamp 5.00

**BB.** Commercial collecting permit 50.00

[12-20-94, 3-31-98; 19.30.9.9 NMAC - Rn, 19 NMAC 30.1.9 & A, 7-16-01; A, 10-31-01, A, 12-28-01; A, 08-01-03; A, 3-16-09; A, 6-15-09; A/E, 7-9-10; A, 12-30-10]

## NEW MEXICO DEPARTMENT OF HEALTH

7.34.2 NMAC, Advisory Board Responsibilities and Duties (filed 3/19/2008) repealed 12/30/2010 and replaced by 7.34.2 NMAC, Advisory Board Responsibilities and Duties, effective 12/30/2010.

7.34.3 NMAC, Registry Identification Cards (filed 12/01/2008) repealed 12/30/2010 and replaced by 7.34.3 NMAC, Registry Identification Cards, effective 12/30/2010.

7.34.4 NMAC, Licensing Requirements for Producers, Production Facilities and Distribution (filed 12/01/2008) repealed 12/30/2010 and replaced by 7.34.4 NMAC, Licensing Requirements for Producers, Production Facilities and Distribution, effective 12/30/2010.

## NEW MEXICO DEPARTMENT OF HEALTH

**TITLE 7 HEALTH**
**CHAPTER 34 MEDICAL USE OF CANNABIS**
**PART 2 ADVISORY BOARD RESPONSIBILITIES AND DUTIES**

**7.34.2.1 ISSUING AGENCY**: New Mexico Department of Health, Public Health Division.

[7.34.2.1 NMAC - Rp, 7.34.2.1 NMAC, 12/30/2010]

**7.34.2.2 STATUTORY AUTHORITY**: These requirements set forth herein are promulgated by the secretary of the department of health, pursuant to the authority granted under the Department of Health Act, Section 9-7-6E and the Lynn and Erin Compassionate Use Act, Sections 26-2B-1 through 26-2B-7, (NMSA 2007).

[7.34.2.2 NMAC - Rp, 7.34.2.2 NMAC, 12/30/2010]

**7.34.2.3 SCOPE**: This part governs the membership, duties, responsibilities and public hearing proceedings of the medical cannabis advisory board.

[7.34.2.3 NMAC - Rp, 7.34.2.3 NMAC, 12/30/2010]

**7.34.2.4 DURATION**: Permanent.
[7.34.2.4 NMAC - Rp, 7.34.2.4 NMAC, 12/30/2010]

**7.34.2.5 EFFECTIVE DATE**: December 30, 2010, unless a later date is cited at the end of a section.
[7.34.2.5 NMAC - Rp, 7.34.2.5 NMAC, 12/30/2010]

**7.34.2.6 OBJECTIVE**: The objective of this part is to establish membership, duties, responsibilities, and public hearing procedures that govern the medical cannabis advisory board proceedings.
[7.34.2.6 NMAC - Rp, 7.34.2.6 NMAC, 12/30/2010]

**7.34.2.7 DEFINITIONS:**

**A. "Act"** means the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-7.

**B. "Administrative review committee**" means an intra-department committee that reviews qualified patient or primary caregiver application denials, licensed producer denials, or the imposition of a summary suspension. The administrative review committee shall consist of the medical director for the department's public health division (or that person's designee); the director of the public health division (or that's person's designee); and the chief of the infectious disease bureau of the department's public health division (or that person's designee).

**C. "Administrative withdrawal"** means the procedure for the voluntary withdrawal of a qualified patient or primary caregiver from the medical cannabis program.

**D. "Adequate supply"** means an amount of cannabis, derived solely from an intrastate source and
in a form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver, that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three (3) months. An adequate supply shall not exceed six (6) ounces of useable cannabis, and with a personal production license only, four (4) mature plants and twelve (12) seedlings, or a three (3) month supply of topical treatment. An amount greater than six (6) ounces of useable cannabis may be allowed, at the department's discretion, upon proof of special need as evidenced by a practitioner letter explaining why a larger dose is indicated. Any such allowance shall be reviewed for approval by a medical director designated by the department, who shall consider standards for exceptions to the adequate supply requirements that are approved by the advisory board. A qualified patient and primary caregiver may also possess cannabis seeds.

**E. "Adverse action"** includes the denial of any application, immediate revocation of the qualified patient or primary caregiver's registry identification card, licensed producer revocation, referral to state or local law enforcement and loss of all lawful privileges under the act.

**F. "Advisory board"** means the medical cannabis advisory board consisting of eight (8) practitioners representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology.

**G. "Applicant"** means any person applying to participate in the medical use of cannabis program as a qualified patient, primary caregiver or licensed producer.

**H. "Cannabis"** means all parts of the plant cannabis sativa and cannabis indica, whether growing or not, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin.

**I. "Consent to release of medical information form"** means a signed qualified patient or primary caregiver authorization form to release specific medical information relating to the use of cannabis.

**J. "Debilitating medical condition"** means:

**(1)** cancer;

**(2)** glaucoma;

**(3)** multiple sclerosis;

**(4)** damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity;

**(5)** epilepsy;

**(6)** positive status for human immunodeficiency virus or acquired immune deficiency syndrome;

**(7)** admission into hospice care in accordance with rules promulgated by the department; or

**(8)** any other medical condition, medical treatment or disease as approved by the department which results in pain, suffering or debility for which there is credible evidence that medical use cannabis could be of benefit.

**K. "Deficiency"** means a violation of or failure to comply with a provision of these requirements.

**L. "Department"** means the department of health or its agent.

**M. "Division"** means the public health division of the department of health.

**N. "Facility"** means any building or grounds licensed for the production, possession and distribution of cannabis in any form.

**O. "Intrastate"** means existing or occurring within the state boundaries of New Mexico.

**P. "License"** means the document issued by the department granting the legal right to produce and distribute medical cannabis for a specified period of time.

**Q. "Licensed producer"** means a person or entity licensed to produce medical cannabis.

**R. "Licensure"** means the process by which the department grants permission to an applicant to produce or possess cannabis.

**S. "Mature plant"** means a harvestable female cannabis plant that is flowering.

**T. "Medical cannabis program"** means the administrative body of the New Mexico public health division charged with the management of the medical cannabis program, to include issuance of registry identification cards, licensing of producers and distribution systems, administration of public hearings and administration of informal administrative reviews.

**U. "Medical cannabis program manager"** means the administrator of the New Mexico department of health, public health division medical cannabis program who holds that title.

**V. "Medical director"** means a medical practitioner designated by the department to determine whether the medical condition of an applicant qualifies as a debilitating medical condition eligible for enrollment in the program.

**W. "Medical provider certification for patient eligibility form"** means a written certification form provided by the medical cannabis program signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition as defined by the act or this part and would be anticipated to benefit from the use of cannabis.

**X. "Minor"** means an individual less than eighteen (18) years of age.

**Y. "Paraphernalia"** means any equipment, product, or material of any kind that is primarily intended or designed for use in compounding, converting, processing, preparing, inhaling, or otherwise introducing into the human body.

**Z. "Participant enrollment form"** means the registry identification card application form for adult qualified patient applicants provided by the

medical cannabis program.

**AA. "Personal production license"** means a license issued to a qualified patient participating in the medical cannabis program, or to a qualified patient's primary caregiver, to permit the qualified patient or primary caregiver to produce medical cannabis for the qualified patient's personal use, consistent with the requirements of this rule.

**BB. "Petitioner"** means any New Mexico resident or association of New Mexico residents petitioning the advisory board for the inclusion of a new medical condition, medical treatment or disease to be added to the list of debilitating medical conditions that qualify for the use of cannabis.

**CC. "Plant"** means any cannabis plant, cutting, trimming or clone that has roots or that is cultivated with the intention of growing roots.

**DD. "Policy"** means a written statement of principles that guides and determines present and future decisions and actions of the licensed producer.

**EE. "Practitioner"** means a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act, Sections 30-31-1 *et seq.*, NMSA (1978).

**FF. "Primary caregiver"** means a resident of New Mexico who is at least eighteen (18) years of age and who has been designated by the qualified patient or patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the provisions of the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq*.

**GG. "Primary caregiver application form"** means the registry identification card application form provided by the medical cannabis program.

**HH. "Private entity"** means a private, non-profit organization that applies to become or is licensed as a producer and distributor of cannabis.

**II. "Qualified patient"** means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received a registry identification card issued pursuant to the requirements of the act or department rules.

**JJ. "Registry identification card"** means a document issued by the department which identifies a qualified patient authorized to engage in the use of cannabis for a debilitating medical condition or a document issued by the department which identifies a primary caregiver authorized to engage in the intrastate possession and administration of cannabis for the sole use of the qualified patient.

**KK. "Representative"** means an individual designated as the petitioner's agent, guardian, surrogate, or other legally appointed or authorized health care decision maker pursuant to the Uniform Health Care Decisions Act, Sections 24-7A-1 *et seq*. (NMSA 2007).

**LL. "Secretary"** means the secretary of the New Mexico department of health.

**MM. "Secure grounds"** means a facility that provides a safe environment to avoid loss or theft.

**NN. "Security alarm system"** means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to detect an unauthorized intrusion.

**OO. "Security policy"** means the instruction manual or pamphlet adopted or developed by the licensed producer containing security policies, safety and security procedures, personal safety and crime prevention techniques.

**PP. "Seedling"** means a cannabis plant that has no flowers.

**QQ. "Submission date"** means the date of submission of the last item in an application, petition or proposal.

**RR. "Technical evidence"** means scientific, clinical, medical or other specialized testimony, or evidence, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

**SS. "Topical treatment"** means a transcutaneous therapeutic cannabis extract formulation.

**TT. "Usable cannabis"** means the dried leaves and flowers of the female cananbis plant and any mixture or preparation thereof, including ointments, but does not include the seedlings, seeds, stalks, or roots of the plant.

[7.34.2.7 NMAC - Rp, 7.34.2.7 NMAC, 12/30/2010]

**7.34.2.8 ADVISORY BOARD MEMBERSHIP REQUIREMENTS AND RESPONSIBILITIES:**

**A. Advisory board membership**. The advisory board shall consist of eight (8) practitioners representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology. The practitioners shall be nationally board-certified in their area of specialty and knowledgeable about the medical use of cannabis. The members shall be chosen for appointment by the secretary from a list proposed by the New Mexico medical society.

**B. Duties and responsibilities**. The advisory board shall convene at least twice per year to:

**(1)** review and recommend to the department for approval additional debilitating medical conditions that would benefit from the medical use of cannabis;

**(2)** recommended quantities of cannabis that are necessary to constitute an adequate supply for qualified patients and primary caregivers;

**(3)** accept and review petitions to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis and all lawful privileges under the act and implementing rules;

**(4)** issue recommendations concerning rules to be promulgated for the issuance of registry identification cards; and

**(5)** review conditions previously reviewed by the board and approved by the secretary for the purpose of determining whether to recommend the revision of eligibility criteria for persons applying under those conditions or to review new medical and scientific evidence pertaining to currently approved conditions.

**C. Advisory board membership term**. Each member of the advisory board shall serve a term of two (2) years from the date of appointment by the secretary. No member may be removed prior to the expiration of his or her term without a showing of good cause by the secretary.

**D. Chairperson elect**. The advisory board shall elect by majority vote cast of the eight (8) member board a chairperson and an alternate. The chairperson or alternate shall exercise all powers and duties prescribed or delegated under the act or this rule.

**(1)** Public hearing responsibilities. The chairperson shall conduct a fair and impartial proceeding, assure that the facts are fully elicited and avoid delay. The chairperson shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial resolution of issues arising during the public hearing proceedings or in any public meeting in which a quorum of the advisory board are present.

**(2)** Delegation of chair. The chairperson may delegate their responsibility to an alternate. The alternate shall exercise all powers and duties prescribed or delegated under the act or this part.

**E. Per diem and mileage**. All advisory board members appointed under the authority of the act or this part will receive as their sole remuneration for services as a member those amounts authorized under the Per Diem and Mileage Act, Sections 10-8-1 *et seq.*, (NMSA 1978).

[7.34.2.8 NMAC - Rp, 7.34.2.8 NMAC,

12/30/2010]

**7.34.2.9 PETITION REQUIREMENTS:**

**A. Petition requirements**. The advisory board may accept and review petitions from any individual or association of individuals requesting the addition of a new medical condition, medical treatment or disease for the purpose of participating in the medical cannabis program and all lawful privileges under the act. Except as otherwise provided, a petitioner filing a petition shall file the petition and a copy with the medical cannabis program staff by either personal delivery or certified mail. In order for a petition to be processed and forwarded to the advisory board the following information shall be submitted to the medical cannabis program staff.

**(1)** Petition format. Unless otherwise provided by this part or by order of the hearing officer, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed double-sided, if possible, and where appropriate, the first page of every document shall contain a heading and caption. The petitioner shall include in the petition documents a narrative address to the advisory board, which includes:

**(a)** petition caption stating the name, address and telephone number of the petitioner and the medical condition, medical treatment or disease sought to be added to the existing debilitating medical conditions;

**(b)** an index of the contents of the petition, an introductory narrative of the individual or association of individuals requesting the inclusion of a new medical condition, medical treatment or disease to include the individual or association of individuals' relationship or interest for the request whether that interest is professional or as a concerned citizen;

**(c)** the proposed benefits from the medical use of cannabis specific to the medical condition, medical treatment or disease sought to be added to the existing debilitating medical conditions listed under the act; and

**(d)** any additional supporting medical, testimonial, or scientific documentation.

**(2)** Statement of intent to present technical evidence. If the petitioner wishes to present technical evidence at the hearing, the petition shall include a statement of intent. The statement of intent to present technical evidence shall include:

**(a)** the name of the person filing the statement;

**(b)** the name of each witness;

**(c)** an estimate of the length of the direct testimony of each witness;

**(d)** a list of exhibits, if any, to be offered into evidence at the hearing; and;

**(e)** a summary or outline of the anticipated direct testimony of each witness.

**B. Qualified patient applicant petitioner**. If the petitioner is submitting their requests as a potential qualified patient applicant the petitioner shall attach an original medical practitioner's certification for patient eligibility form provided by the medical cannabis program manager or designee which includes the following information.

**(1)** The name, address, telephone number and clinical licensure of the petitioner's practitioner.

**(2)** The petitioner's name, date of birth.

**(3)** The medical justification for practitioner's certification of the petitioner's debilitating medical condition.

**(4)** The practitioner's signature and date of signature.

**(5)** The name, address and date of birth of the petitioner.

**(6)** The name, address and telephone number of the petitioner's practitioner.

**(7)** A reasonable xerographic copy of the petitioner's New Mexico driver's license or comparable New Mexico state or federal issued photo identification card verifying New Mexico residence.

**(8)** Documented parental consent if applicable to the petitioner.

**(9)** If applicable the petitioner's potential debilitating medical condition.

**(10)** The length of time the petitioner has been under the care of the practitioner providing the medical provider certification for patient eligibility.

**(11)** The petitioner's signature and date.

**(12)** A signed consent for release of medical information form provided by the medical cannabis program.

**C. Petitioner confidentiality**. The department shall maintain a confidential file containing the names and addresses of the persons who have either applied for or received a public hearing petition request. Individual names on the list shall be confidential and not subject to disclosure, except:

**(1)** to authorized employees or agents of the department as necessary to perform the duties of the department pursuant to the provisions of the act or this part;

**(2)** as provided in the federal Health Insurance Portability and Accountability Act of 1996.

**D. Department notification**. The medical cannabis program manager or designee shall review each petition request and within reasonable time after receipt issue notice of docketing upon the petitioner, each advisory board member, and the advisory board legal counsel. The notice of docketing shall contain the petition caption and docket number, the date upon which the petition was received and scheduling date of the advisory board public hearing. A copy of this rule shall be included with a notice of docketing sent to the petitioner.

**E. Examination allowed**. Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any public hearing proceeding. Inspection shall be permitted in accordance with the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 *et seq.*, (NMSA 1978), but may be limited by the Health Insurance Portability and Accountability Act of 1996. Documents subject to inspection shall be made available by the medical cannabis program manager, or designee as appropriate. Unless waived by the department, the cost of duplicating documents or tapes filed in any public hearing proceeding shall be borne by the person seeking the copies.

**F. Notice of withdrawal**. A petitioner may withdraw a petition at any time prior to a decision by the advisory board by filing a notice of withdrawal with the medical cannabis program manager or designee.

[7.34.2.9 NMAC - Rp, 7.34.2.9 NMAC, 12/30/2010]

**7.34.2.10 ADVISORY BOARD PUBLIC HEARING PROCEDURES:**

**A. Public hearing requirement**. The advisory board shall convene by public hearing at least twice (2) per year to accept and review petitions requesting the inclusion of medical conditions, medical treatments or diseases to the list of debilitating medical conditions. Any meeting consisting of a quorum of the advisory board members held for the purpose of evaluating, discussing or otherwise formulating specific opinions concerning the recommendation of a petition filed pursuant to this rule, shall be declared a public hearing open to the public at all times, unless a portion of the hearing is closed to protect information made confidential by applicable state or federal laws. A petitioner or his or her representative may request to close a portion of the hearing to protect the disclosure of confidential information by submitting their request in writing and having that request delivered to medical cannabis program staff at least forty-eight (48) hours prior to the hearing.

**B. Location of the public hearing**. Unless otherwise ordered by the advisory board, the public hearing shall be in held in New Mexico at a location sufficient to accommodate the anticipated audience.

**C. Public hearing notice**. The medical cannabis program manager

or designee shall, upon direction from the advisory board chairperson, prepare a notice of public hearing setting forth the date, time and location of the hearing, a brief description of the petitions received, and information on the requirements for public comment or statement of intent to present technical evidence, and no later than thirty (30) days prior to the hearing date, send copies, with requests for publication, to at least one newspaper of general circulation. The program manager or designee may further issue notice of the hearing by any other means the department determines to be acceptable to provide notice to the public.

**D. Public hearing agenda**. The department shall make available an agenda containing a list of specific items to be discussed or information on how the public may obtain a copy of such agenda.

**E. Postponement of hearing**. Request for postponement of a public hearing will be granted, by the advisory board for good cause shown.

**F. Statement of intent to present technical evidence**. Any individual or association of individuals who wish to present technical evidence at the hearing shall, no later than fifteen (15) days prior to the date of the hearing, file a statement of intent. The statement of intent to present technical evidence shall include:

**(1)** the name of the person filing the statement;

**(2)** indication of whether the person filing the statement supports or opposes the petition at issue;

**(3)** the name of each witness;

**(4)** an estimate of the length of the direct testimony of each witness;

**(5)** a list of exhibits, if any, to be offered into evidence at the hearing; and

**(6)** a summary or outline of the anticipated direct testimony of each witness.

**G. Ex parte discussions**. At no time after the initiation and before the conclusion of the petition process under this part, shall the department, or any other party, interested participant or their representatives discuss ex parte the merits of the petitions with any advisory board member.

**H. Public hearing process**. The advisory board chairperson shall conduct the public hearing so as to provide a reasonable opportunity for all interested persons to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition.

**(1)** A quorum of the advisory board shall consist of three (3) voting members.

**(2)** The advisory board chairperson or alternate shall convene each public hearing by:

**(a)** introduction of the advisory board members;

**(b)** statutory authority of the board;

**(c)** statement of the public hearing agenda; and

**(d)** recognition of the petitioner.

**(3)** Petitioner comment period. The petitioner or by representative may present evidence to the advisory board. The advisory board shall only consider findings of fact or scientific conclusions of medical evidence presented by the petitioner or by representative to the advisory board prior to or contemporaneously with the public hearing.

**(4)** Public comment period. The advisory board may provide for a public comment period. Public comment may be by written comment, verbal or both.

**(a)** Written comment. Any individual or association of individuals may submit written comment to the advisory board either in opposition or support of the inclusion of a medical conditions, medical treatments or diseases to the existing list of debilitating medical conditions contained under the act. All written comment shall adhere to the requirements of Subsection F of this section.

**(b)** Public comment. Any member of the general public may testify at the public hearing. No prior notification is required to present general non-technical statements in support of or in opposition to the petition. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is non-technical in nature and not unduly repetitious of the testimony.

**I. Recorded minutes**. Unless the advisory board orders otherwise, the hearing will be tape recorded. Any person, other than the advisory board, desiring a copy of hearing tapes must arrange copying with the medical cannabis program program or designee at their own expense.

[7.34.2.10 NMAC - Rp, 7.34.2.10 NMAC, 12/30/2010]

**7.34.2.11 ADVISORY BOARD RECOMMENDATION TO THE DEPARTMENT:**

**A. Advisory board recommendation**. Upon final determination the advisory board shall provide to the secretary a written report of finding, which recommends either the approval or denial of the petitioner's request. The written report of findings shall include a medical justification for the recommendation based upon the individual or collective expertise of the advisory board membership. The medical justification shall delineate between the findings of fact made by the advisory board and scientific conclusions of credible medical evidence.

**B. Department final determination**. The department shall notify the petitioner within ten (10) days of the secretary's determination. A denial by the secretary regarding the inclusion of a medical conditions, medical treatments or diseases to the existing list of debilitating medical conditions contained under the act shall not represent a permanent denial by the department. Any individual or association of individuals may upon good cause re-petition the advisory board. All requests shall present new supporting findings of fact, or scientific conclusions of credible medical evidence not previously examined by the advisory board.

[7.34.2.11 NMAC - Rp, 7.34.2.11 NMAC, 12/30/2010]

**7.34.2.12 SEVERABILITY**: If any part or application of these rules is held to be invalid, the remainder or its application to other situations or persons shall not be affected. Failure to promulgate rules or implement any provision of these rules shall not interfere with the remaining protections provided by these rules and the act.

[7.34.2.12 NMAC - Rp, 7.34.2.12 NMAC, 12/30/2010]

**HISTORY OF 7.34.2 NMAC:**
**Pre NMAC History:** none.

**History of Repealed Material:**
7.34.2 NMAC, Advisory Board Responsibilities and Duties (filed 03/19/2008) repealed 12/30/2010.

**NMAC History:**
7.34.2 NMAC, Advisory Board Responsibilities and Duties (filed 03/19/2008) was replaced by 7.34.2 NMAC, Advisory Board Responsibilities and Duties, effective 12/30/2010.

## NEW MEXICO DEPARTMENT OF HEALTH

**TITLE 7 HEALTH**
**CHAPTER 34 MEDICAL USE OF CANNABIS**
**PART 3 REGISTRY IDENTIFICATION CARDS**

**7.34.3.1 ISSUING AGENCY:** New Mexico Department of Health, Public Health Division.

[7.34.3.1 NMAC - Rp, 7.34.3.1 NMAC, 12/30/2010]

**7.34.3.2 SCOPE:** This rule governs the issuance of registry identification cards to qualified patients and primary caregivers as defined by the Lynn and Erin Compassionate Use Act, 26-2B-3(F) and (G) NMSA 1978. All requirements contained herein are necessary prerequisites to the state's ability to distinguish between authorized use under the act and unauthorized use under the state's criminal laws.

[7.34.3.2 NMAC - Rp, 7.34.3.2 NMAC,

12/30/2010]

**7.34.3.3 STATUTORY AUTHORITY:** The requirements set forth herein are promulgated by the secretary of the department of health, pursuant to the general authority granted under Section 9-7-6 (E) NMSA 1978, as amended; Section 53-8-1 et seq. NMSA 1978; and the Lynn and Erin Compassionate Use Act, Section 26-2B-1 et seq. NMSA 1978 Although federal law currently prohibits any use of cannabis, the laws of Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, Oregon, Rhode Island, Vermont and Washington permit the medical use and cultivation of cannabis. New Mexico joins this effort to provide for the health and welfare of its citizens. New Mexico adopts these regulations to accomplish the purpose of the Lynn and Erin Compassionate Use Act as stated in Section 26-2B-2 NMSA 1978, "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments," while at the same time ensuring proper enforcement of any criminal laws for behavior that has been deemed illicit by the state.
[7.34.3.3 NMAC - Rp, 7.34.3.3 NMAC, 12/30/2010]

**7.34.3.4 DURATION:** Permanent.
[7.34.3.4 NMAC - Rp, 7.34.3.4 NMAC, 12/30/2010]

**7.34.3.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[7.34.3.5 NMAC - Rp, 7.34.3.5 NMAC, 12/30/2010]

**7.34.3.6 OBJECTIVE:** The objective of this rule is to ensure the safe use and possession of cannabis for individuals living with debilitating medical conditions, and the safe possession and administration of cannabis for medical use to those individuals by primary caregivers, as mandated under the Lynn & Erin Compassionate Use Act Sections 26-2B-1 et seq., (NMSA 2007).
[7.34.3.6 NMAC - Rp, 7.34.3.6 NMAC, 12/30/2010]

**7.34.3.7 DEFINITIONS:**

**A. "Act"** means the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-7.

**B. "Administrative review committee**" means an intra-department committee that reviews qualified patient or primary caregiver application denials, licensed producer denials, or the imposition of a summary suspension. The administrative review committee shall consist of the medical director for the department's public health division (or that person's designee); the director of the public health division (or that's person's designee); and the chief of the infectious disease bureau of the department's public health division (or that person's designee).

**C. "Administrative withdrawal"** means the procedure for the voluntary withdrawal of a qualified patient or primary caregiver from the medical cannabis program.

**D. "Adequate supply"** means an amount of cannabis, derived solely from an intrastate source and in a form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver, that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three (3) months. An adequate supply shall not exceed six (6) ounces of useable cannabis, and with a personal production license only, four (4) mature plants and twelve (12) seedlings, or a three (3) month supply of topical treatment. A qualified patient and primary caregiver may also possess cannabis seeds.

**E. "Adverse action"** includes the denial of any application, immediate revocation of the qualified patient or primary caregiver's registry identification card, licensed producer revocation, referral to state or local law enforcement and loss of all lawful privileges under the act.

**F. "Advisory board"** means the medical cannabis advisory board consisting of eight (8) practitioners representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology.

**G. "Applicant"** means any person applying to participate in the medical use of cannabis program as a qualified patient, primary caregiver or licensed producer.

**H. "Cannabis"** means all parts of the plant cannabis sativa and cannabis indica, whether growing or not, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin.

**I. "Consent to release of medical information form"** means a signed qualified patient or primary caregiver authorization form to release specific medical information relating to the use of cannabis.

**J. "Debilitating medical condition"** means:

**(1)** cancer;

**(2)** glaucoma;

**(3)** multiple sclerosis;

**(4)** damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity;

**(5)** epilepsy;

**(6)** positive status for human immunodeficiency virus or acquired immune deficiency syndrome;

**(7)** admission into hospice care in accordance with rules promulgated by the department; or

**(8)** any other medical condition, medical treatment or disease as approved by the department which results in pain, suffering or debility for which there is credible evidence that medical use cannabis could be of benefit.

**K. "Deficiency"** means a violation of or failure to comply with a provision of these requirements.

**L. "Department"** means the department of health or its agent.

**M. "Division"** means the public health division of the department of health.

**N. "Facility"** means any building or grounds licensed for the production, possession and distribution of cannabis in any form.

**O. "Intrastate"** means existing or occurring within the state boundaries of New Mexico.

**P. "License"** means the document issued by the department granting the legal right to produce and distribute medical cannabis for a specified period of time.

**Q. "Licensed producer"** means a person or entity licensed to produce medical cannabis.

**R. "Licensure"** means the process by which the department grants permission to an applicant to produce or possess cannabis.

**S. "Mature plant"** means a harvestable female cannabis plant that is flowering.

**T. "Medical cannabis program"** means the administrative body of the New Mexico public health division charged with the management of the medical cannabis program, to include issuance of registry identification cards, licensing of producers and distribution systems, administration of public hearings and administration of informal administrative reviews.

**U. "Medical cannabis program manager"** means the administrator of the New Mexico department of health, public health division medical cannabis program who holds that title.

**V. "Medical director"** means a medical practitioner designated by the department to determine whether the medical condition of an applicant qualifies as a debilitating medical condition eligible

for enrollment in the program.

**W. "Medical provider certification for patient eligibility form"** means a written certification form provided by the medical cannabis program signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition as defined by the act or this part and would be anticipated to benefit from the use of cannabis.

**X. "Minor"** means an individual less than eighteen (18) years of age.

**Y. "Paraphernalia"** means any equipment, product, or material of any kind that is primarily intended or designed for use in compounding, converting, processing, preparing, inhaling, or otherwise introducing into the human body.

**Z. "Participant enrollment form"** means the registry identification card application form for adult qualified patient applicants provided by the medical cannabis program.

**AA. "Personal production license"** means a license issued to a qualified patient participating in the medical cannabis program, or to a qualified patient's primary caregiver, to permit the qualified patient or primary caregiver to produce medical cannabis for the qualified patient's personal use, consistent with the requirements of this rule.

**BB. "Petitioner"** means any New Mexico resident or association of New Mexico residents petitioning the advisory board for the inclusion of a new medical condition, medical treatment or disease to be added to the list of debilitating medical conditions that qualify for the use of cannabis.

**CC. "Plant"** means any cannabis plant, cutting, trimming or clone that has roots or that is cultivated with the intention of growing roots.

**DD. "Policy"** means a written statement of principles that guides and determines present and future decisions and actions of the licensed producer.

**EE. "Practitioner"** means a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act, Sections 30-31-1 *et seq.*, NMSA (1978).

**FF. "Primary caregiver"** means a resident of New Mexico who is at least eighteen (18) years of age and who has been designated by the qualified patient or patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the provisions of the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq*.

**GG. "Primary caregiver application form"** means the registry identification card application form provided by the medical cannabis program.

**HH. "Private entity"** means a private, non-profit organization that applies to become or is licensed as a producer and distributor of cannabis.

**II. "Qualified patient"** means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received a registry identification card issued pursuant to the requirements of the act or department rules.

**JJ. "Registry identification card"** means a document issued by the department which identifies a qualified patient authorized to engage in the use of cannabis for a debilitating medical condition or a document issued by the department which identifies a primary caregiver authorized to engage in the intrastate possession and administration of cannabis for the sole use of the qualified patient.

**KK. "Representative"** means an individual designated as the petitioner's agent, guardian, surrogate, or other legally appointed or authorized health care decision maker pursuant to the Uniform Health Care Decisions Act, Sections 24-7A-1 *et seq*. (NMSA 2007).

**LL. "Secretary"** means the secretary of the New Mexico department of health.

**MM. "Secure grounds"** means a facility that provides a safe environment to avoid loss or theft.

**NN. "Security alarm system"** means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to detect an unauthorized intrusion.

**OO. "Security policy"** means the instruction manual or pamphlet adopted or developed by the licensed producer containing security policies, safety and security procedures, personal safety and crime prevention techniques.

**PP. "Seedling"** means a cannabis plant that has no flowers.

**QQ. "Submission date"** means the date of submission of the last item in an application, petition or proposal.

**RR. "Technical evidence"** means scientific, clinical, medical or other specialized testimony, or evidence, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

**SS. "Topical treatment"** means a transcutaneous therapeutic cannabis extract formulation.

**TT. "Usable cannabis"** means the dried leaves and flowers of the female cananbis plant and any mixture or preparation thereof, including ointments, but does not include the seedlings, seeds, stalks, or roots of the plant.

[7.34.3.7 NMAC - Rp, 7.34.3.7 NMAC, 12/30/2010]

**7.34.3.8 QUALIFYING DEBILITATING MEDICAL CONDITIONS:**

**A. Statutorily-approved conditions:** As of the date of promulgation of this rule, specific qualifying debilitating medical conditions, diseases and treatments ("qualifying conditions") identified in the Lynn and Erin Compassionate Use Act [NMSA 1978, Section 26-2B-3(B)] include:

**(1)** cancer;

**(2)** glaucoma;

**(3)** multiple sclerosis;

**(4)** damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spacticity;

**(5)** epilepsy;

**(6)** positive status for human immunodeficiency virus or acquired immune deficiency syndrome; and

**(7)** admission into hospice care in accordance with rules promulgated by the department.

**B. Department-approved conditions:** The department finds that the following additional qualifying conditions result in pain, suffering or debility for which there is credible evidence that the medical use of cannabis could be of benefit, through the alleviation of symptoms, and the department accordingly approves these conditions as qualifying debilitating medical conditions for the participation of a qualified patient or primary caregiver in the medical cannabis program. Pursuant to this rule, a patient applying on the basis of having any qualifying condition must submit written certification from the patient's practitioner which must attest (1) to the diagnosis of the medical condition; (2) that the condition is debilitating; (3) that standard treatments have failed to bring adequate relief; and (4) that potential risks and benefits of the use of medical cannabis for the condition have been discussed with the patient (7.34.3.9 NMAC). A patient who applies on the basis of having a department-approved condition may further be required to satisfy additional eligibility criteria, as specified after each of the following department-approved conditions. The department-approved conditions include:

**(1) severe chronic pain:**

**(a)** objective proof of the etiology of the severe chronic pain shall be included in the application; and

**(b)** two practitioners familiar

with the patient's chronic pain shall provide written certification that the patient has an unremitting severe chronic pain condition; one certification shall be from a primary care provider; the second certification shall be from a specialist with expertise in pain management or a specialist with expertise in the disease process that is causing the pain;

**(2) painful peripheral neuropathy:** application to the medical cannabis program shall be accompanied by medical records that confirm the objective presence of painful peripheral neuropathy that has been refractory to other treatments;

**(3) intractable nausea/vomiting**;

**(4) severe anorexia/cachexia**;

**(5) hepatitis C infection currently receiving antiviral treatment:** the written certification shall attest:

**(a)** that the hepatitis C infection is currently being treated with antiviral drugs;

**(b)** to the anticipated duration of the hepatitis C antiviral treatment; and

**(c)** that standard treatments for the management of side effects associated with hepatitis C treatment have failed to bring adequate relief;

**(6) Crohn's disease**;

**(7) post-traumatic stress disorder (PTSD):** each individual applying to the program for enrollment shall submit medical records that confirm the diagnosis of PTSD based upon the evaluation of a psychiatrist or psychiatric nurse practitioner and meeting the diagnostic criteria of the current *diagnostic and statistical manual of mental disorders*;

**(8) inflammatory autoimmune-mediate arthritis:** the written certification shall come from a rheumatologist who is board-certified in rheumatology by the American board of internal medicine;

**(9) amyotrophic lateral sclerosis (Lou Gehrig's disease);** and

**(10) such other conditions as the secretary may approve.**

**C. Modification or removal of department-approved conditions:** The secretary may remove or modify a department-approved condition only if the secretary determines, on the basis of substantial credible medical and scientific evidence, and after an opportunity for review of the proposed removal or modification by the medical advisory board, that the use of cannabis by patients who have the approved condition would more likely than not result in substantial harm to the patients' health.

[7.34.3.8 NMAC - N, 12/30/2010]

**7.34.3.9 QUALIFIED PATIENT AND PRIMARY CAREGIVER REGISTRY IDENTIFICATION CARD APPLICATION REQUIREMENTS:**

**A.** The department shall issue a registry identification card to an applicant for the purpose of participating in the medical cannabis program upon the written certification of the applicant's practitioner and supporting application documents. The following information shall be provided in (or as an attachment to) the participant enrollment form submitted to the department in order for a registry identification card to be obtained and processed.

**(1)** An attached original medical provider certification for patient eligibility form shall contain:

**(a)** the name, address and telephone number of the practitioner;

**(b)** the practitioner's clinical licensure;

**(c)** the patient applicant's name and date of birth;

**(d)** the medical justification for the practitioner's certification of the patient's debilitating medical condition, which shall include but not be limited to a statement that, in the practitioner's professional opinion, the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh health risks for the patient;

**(e)** an attestation that the practitioner's primary place of practice is located within the state of New Mexico;

**(f)** the practitioner's signature and the date;

**(g)** the name, address and date of birth of the applicant;

**(h)** the name, address and telephone number of the applicant's practitioner;

**(i)** a reasonable photocopy of the applicant's New Mexico driver's license or comparable state of New Mexico or federal issued photo identification card verifying New Mexico residence;

**(j)** documented parental consent, if applicable, to the applicant;

**(k)** the applicant's debilitating medical condition;

**(l)** the length of time the applicant has been under the care of the practitioner providing the medical provider certification for patient eligibility;

**(m)** the applicant's signature and date; and

**(n)** a signed consent for release of medical information related to the patient's debilitating medical condition, on a form provided by the medical cannabis program.

**B. Qualified minor:** The department shall issue a registry identification card to an applicant under the age of eighteen (18) for the purpose of participating in the medical cannabis program upon the medical provider certification for patient eligibility from the applicant's practitioner and supporting application documents required under this rule. The qualified minor parental consent form shall require the following information to be provided:

**(1)** written documentation that the applicant's practitioner has explained the potential risks and benefits of the use of cannabis to both the applicant and parent or representative of the applicant; and

**(2)** the applicant's parent or representative consents to:

**(a)** allow the applicant's use of cannabis;

**(b)** serve as the applicant's primary caregiver; and

**(c)** control the acquisition of the cannabis, dosage and the frequency of the use of cannabis by the applicant.

**C. Primary caregiver:** The department shall issue a registry identification card to a primary caregiver applicant for the purpose of managing the well-being of up to four (4) qualified patients pursuant to the requirements of this rule upon the completion and approval of the primary caregiver application form available from the medical cannabis program. In order for a registry identification card to be obtained and processed, the following information shall be submitted to the medical cannabis program:

**(1)** New Mexico driver's license or comparable state of New Mexico or federal issued photo identification card verifying that the applicant is at least eighteen (18) years of age and is a resident of New Mexico;

**(2)** written approval by each qualified patient, and written approval by at least one certifying practitioner for each qualified patient, authorizing the primary caregiver's responsibility for managing the well-being of the patient(s) with respect to the medical use of cannabis;

**(3)** the name(s), address(es), telephone number(s) and date of birth of the qualified patient(s);

**(4)** the name, address and telephone number of each qualified patient's practitioner;

**(5)** the name, address,and telephone number of the applicant primary caregiver;

**(6)** an attestation from the primary caregiver applicant that he or she is a resident of the state of New Mexico;

**(7)** the applicant primary caregiver's signature and the date; and

**(8)** documentation of completed nationwide and statewide background checks conducted within six months of the application submission date.

**D. Primary caregiver application requirements:** Criminal history screening requirements.

**(1)** All primary caregiver applicants are required to consent to a nationwide and statewide criminal history screening background check. All applicable application fees associated with the nationwide and statewide criminal history screening background check shall be paid by

the primary caregiver applicant.

**(2)** Individuals convicted of a felony violation of Section 30-31-20, 30-31-21, or 30-31-22 NMSA 1978, or a violation of any equivalent out-of-state statute in any jurisdiction, are prohibited from serving as a primary caregiver. If an applicant has been convicted of a felony violation of Section 30-31-1 et seq. NMSA 1978, other than Sections 30-31-20 through 30-31-22, and the final completion of the entirety of the associated sentence of such felony conviction has been less than three (3) years from the date of the applicant's application as a primary caregiver, then the applicant is prohibited from being a primary caregiver. The applicant and qualified patient shall be notified of his or her disqualification from being a primary caregiver. If the applicant has been convicted of more than one (1) felony violation of Section 30-31-1 et seq. NMSA 1978 or a violation of an equivalent out-of-state statute in any jurisdiction, the applicant and qualified patient shall be notified that the applicant is permanently prohibited from being a primary caregiver and cannot be issued a medical use cannabis registry identification card.

**E. Primary caregiver requirements:**

**(1)** A primary caregiver applicant shall be a resident of New Mexico.

**(2)** A qualified patient's primary caregiver shall be permitted to obtain and transport medical cannabis from a licensed non-profit to the qualified patient.

**(3)** The primary caregiver of a qualified patient who holds a personal production license may assist the qualified patient to produce medical cannabis at the designated licensed location, identified on the personal production license; the primary caregiver may not independently produce medical cannabis.

**(4)** A qualified patient shall only reimburse their primary caregiver for the cost of travel, supplies or utilities associated with the possession of medical cannabis by the primary caregiver for the qualified patient. No other cost associated with the possession of medical use cannabis by the primary caregiver for the qualified patient, including the cost of labor, shall be reimbursed or paid. All medical cannabis possessed by a primary caregiver for a qualified patient is the property of the qualified patient.

**F. Certifying practitioner requirements:**

**(1)** Patient may not be certified by a practitioner who is related to the patient within the second degree of consanguinity or the first degree of affinity, including a spouse, child, stepchild, parent, step-parent, sibling, grandparent, mother-in-law, father-in-law, son-in law, or daughter-in-law of the patient.

(**2)** A practitioner's primary place of practice must be located within the state of New Mexico in order for the practitioner to a certify a patient's eligibility.

**(3)** A practitioner may be prohibited from certifying a patient's application for:

**(a)** failure to comply with any provision of this rule;

**(b)** falsification of any material or information submitted to the department;

**(c)** threatening or harming an employee of a producer, a medical practitioner, a patient, or an employee of the department; or

**(d)** any determination by the practitioner's licensing body that practitioner has engaged in unprofessional or dishonorable conduct.

[7.34.3.9 NMAC - Rp, 7.34.3.8 NMAC, 12/30/2010]

**7.34.3.10 REGISTRY IDENTIFICATION CARDS:**

**A. Department inquiry:**

**(1)** The department may verify information on each application and accompanying documentation by the following methods:

**(a)** contacting each applicant by telephone or mail, or if proof of identity is uncertain, the department by requiring a face-to-face meeting and the production of additional identification materials;

**(b)** when applicable, contacting a minor's parent or legal representative;

**(c)** contacting the New Mexico medical board, the New Mexico board of pharmacy, or other licensing agencies to verify that the practitioner is licensed to practice and prescribe controlled substances in New Mexico and is in good standing; and

**(d)** contacting the practitioner to obtain further documentation to verify that the applicant's medical diagnosis and medical condition qualify the applicant for enrollment in the medical use cannabis program.

**(2)** The department shall approve or deny an application within thirty (30) calendar days of receipt of the completed application. A request by the department for additional information shall toll this period until such time as the requested information is received.

**B. Department registry identification card:** The department shall issue a registry identification card within five (5) business days of approving an application. A registry identification card shall contain the name, address and date of birth of the qualified patient and primary caregiver (if any), the date of issuance and expiration date of the registry identification card, and a code maintained by the division which identifies the qualified patient or primary caregiver. Unless renewed at an earlier date, suspended or revoked, a registry identification card shall be valid for a period of one (1) year from the date of issuance and shall expire at midnight on the day indicated on the registry identification card as the expiration date.

**C. Supplemental information requirement:** A qualified patient or primary caregiver who possesses a registry identification card shall notify the department of any change in the person's name, address, qualified patient's primary caregiver, or change in status of the qualified patient's debilitating medical condition, within ten (10) calendar days of the change. An extension shall be granted by the medical cannabis program manager or designee upon the showing of good cause. Failure to provide notification of any change shall result in the immediate revocation of the registry identification card and all lawful privileges provided under the act.

**D. Registry identification card application denial:** The medical director or designee shall deny an application if the application fails to satisfy any requirement of this rule, if the applicant fails to provide the information required, if the department determines that the information provided is false, if the patient does not have a debilitating medical condition eligible for enrollment in the program as determined by the medical director, or if the applicant's certifying provider(s) determine(s) that the use of cannabis by the patient would more likely than not be detrimental to the patient's health. The medical director or designee may also deny an application if the applicant has threatened or harmed an employee of a producer, a medical practitioner, a patient, or an employee of the department. A person whose application has been denied shall not reapply for six (6) months from the date of the denial, unless otherwise authorized by the department, and is prohibited from all lawful privileges provided by this rule and act. A person whose application as a qualified patient or primary caregiver has been denied may request a record review.

**E. Registry identification card renewal application:** Each registry identification card issued by the department is valid for one (1) year from the date of issuance. A qualified patient or primary caregiver shall apply for a registry identification card renewal no less than thirty (30) calendar days prior to the expiration date of the existing registry identification card in order to prevent interruption of possession of a valid (unexpired) registry identification card. Certifications from certifying providers must be obtained within ninety (90) calendar days prior to the expiration of the patient's registry identification card.

**F. Non-transferable registration of registry identification card:** A registry identification card shall not be transferred by assignment or otherwise

to other persons. Any attempt shall result in the immediate revocation of the registry identification card and all lawful privileges provided by this rule and act.

**G. Automatic expiration of registry identification card by administrative withdrawal:** Upon request of the qualified patient or primary caregiver, the qualified patient or primary caregiver may discontinue the medical cannabis program by an administrative withdrawal. A qualified patient or primary caregiver that intends to seek an administrative withdrawal shall notify the licensing authority no later than thirty (30) calendar days prior to withdrawal.

**H. Lost or stolen registry identification card:** The qualified patient or primary caregiver shall report a lost or stolen registry identification card to the medical cannabis program within five (5) business days after discovery. An extension shall be granted by the medical cannabis program manager upon the showing of good cause. Upon notification, the medical cannabis program manager or designee shall issue a new registry identification card. The patient or primary caregiver shall verify the accuracy of all documentation in the most recent application. Unless documentation in the most recent application has changed, the qualified patient or primary caregiver shall not be required to submit a new application.
[7.34.3.10 NMAC - Rp, 7.34.3.9 NMAC, 12/30/2010]

**7.34.3.11 DENIAL OF AN INITIAL PATIENT OR PRIMARY CAREGIVER APPLICATION:**

**A. Administrative review:** All patient applicants or primary caregivers whose initial application for a registry identification card has been denied may request a record review from the department.

**B. Procedure for requesting informal administrative review:**

**(1)** An applicant given notice of an application denial may submit a written request for an administrative review. To be effective, the written request shall:

**(a)** be made within thirty (30) calendar days, as determined by the postmark, from the date of the denial notice issued by the department;

**(b)** be properly addressed to the medical cannabis program;

**(c)** state the applicant's name, address, and telephone numbers;

**(d)** state the applicant's proposed status as a qualified patient or primary caregiver;

**(e)** if the applicant is a potential primary caregiver, state the anticipated date of which service shall commence;

**(f)** provide a brief narrative rebutting the circumstances of the application denial, and

**(g)** if applicable, provide supplemental documentation from the applicant's practitioner supporting the debilitating medical condition as eligible for the program.

**(2)** If the applicant wishes to submit additional documentation for consideration, such additional documentation must be included with the request for an administrative review.

**C. Administrative review proceeding:** The administrative review proceeding shall be a closed proceeding that is limited to an administrative review of written application materials and documents offered to verify eligibility. The administrative review proceeding is not an adjudicatory hearing, and an individual whose initial application for a registry identification card has been denied shall not be entitled to an adjudicatory hearing to contest the denial. The administrative review shall be conducted by the administrative review committee. In cases where the administrative review committee finds the need for additional or clarifying information, the review committee shall request that the applicant supply such additional information within the time set forth in the committees' request.

**D. Final determination:**

**(1)** Content. The administrative review committee shall render a written decision setting forth the reasons for the decision and the evidence upon which the decision is based.

**(2)** Effect. The decision of the administrative review committee is the final decision of the informal administrative review proceeding.

**(3)** Notice. A copy of the decision shall be mailed to the applicant.

**E. Judicial review:** Except as otherwise provided by law, there shall be no right to judicial review of a decision by the administrative review committee.
[7.34.3.11 NMAC - Rp, 7.34.3.10 NMAC, 12/30/2010]

**7.34.3.12 MONITORING AND CORRECTIVE ACTIONS:**

**A. Monitoring:**

**(1)** The department or its designee may perform on-site assessments of a qualified patient or primary caregiver to determine compliance with these rules. The department may enter the premises of a qualified patient or primary caregiver during business hours for purposes of monitoring and compliance. Twenty-four (24) hours' notice will be provided to the qualified patient or primary caregiver prior to an on-site assessment except when the department has a reasonable suspicion to believe that providing notice will result in the destruction of evidence or that providing such notice will impede the department's ability to enforce these regulations.

**(2)** All qualified patients or primary caregivers shall provide the department or the department's designee immediate access to any material and information necessary for determining compliance with these requirements.

**(3)** Failure by the qualified patient or primary caregiver to provide the department access to the premises or information may result in the revocation of the qualified patient or primary caregiver enrollment and referral to state law enforcement.

**(4)** Any failure by a qualified patient or primary caregiver to adhere to these rules may result in sanction(s), including suspension, revocation, non-renewal or denial of licensure and referral to state or local law enforcement.

**B. Corrective action:**

**(1)** If violations of these requirements are cited, the qualified patient or primary caregiver shall be provided with an official written report of the findings within seven (7) business days following the monitoring visit.

**(2)** Unless otherwise specified by the department, the qualified patient or primary caregiver shall correct the violation within five (5) calendar days of receipt of the official written report citing the violation(s).

**(3)** The violation shall not be deemed corrected until the department verifies in writing within seven (7) calendar days of receiving notice of the corrective action that the corrective action is satisfactory.

**(4)** If the violation has not been corrected, the program manager or designee may issue a notice of contemplated action to revoke the enrollment of the qualified patient.

**C. Suspension of enrollment without prior hearing:** If immediate action is required to protect the health and safety of the general public, the qualified patient or primary caregivers, the medical cannabis program manager or designee may suspend the qualified patient or primary caregiver's enrollment in the medical cannabis program without notice.

**(1)** A qualified patient or primary caregiver whose enrollment has been summarily suspended is entitled to an administrative review not later than thirty (30) calendar days after the enrollment is summarily suspended.

**(2)** An administrative review requested subsequent to a summary suspension shall be conducted by the administrative review committee.

**(3)** The administrative review committee shall conduct the administrative review on the summary suspension by reviewing all documents submitted by both

the participant and the department.

**(4)** The administrative review is not an adjudicatory hearing; rather, the sole issue in an administrative review of a summary suspension is whether the individual's enrollment shall remain suspended pending a final administrative adjudicatory hearing and decision.

**(5)** An enrollee given notice of summary suspension by the medical cannabis program may submit a written request for an administrative review. To be effective, the written request shall:

**(a)** be made within thirty (30) calendar days, as determined by the postmark, from the date of the notice issued by the department;

(**b)** be properly addressed to the medical cannabis program;

**(c)** state the requestor's name, address, and telephone numbers;

**(d)** provide a brief narrative rebutting the circumstances of the suspension; and

**(e)** be accompanied by any additional documentation offered in support of the request.

[7.34.3.12 NMAC - Rp, 7.34.3.11 NMAC, 12/30/2010]

**7.34.3.13 PROHIBITIONS, RESTRICTIONS AND LIMITATIONS ON THE USE OF CANNABIS BY QUALIFIED PATIENTS:** Participation in the medical cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from:

**A**. criminal prosecution or civil penalties for activities not authorized in this rule and act;

**B**. liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis; or

**C**. criminal prosecution or civil penalty for possession, distribution or transfers of cannabis or use of cannabis:

**(1)** in a school bus or public vehicle;

**(2)** on school grounds or property;

**(3)** in the workplace of the qualified patient's or primary caregiver's employment

**(4)** at a public park, recreation center, youth center or other public place;

**(5)** to a person not approved by the department pursuant to this rule;

**(6)** outside New Mexico or attempts to obtain or transport cannabis from outside New Mexico; or

**(7)** that exceeds the allotted amount of useable medical use cannabis.

[7.34.3.13 NMAC - N, 12/30/2010]

**7.34.3.14 SUMMARY SUSPENSION, REVOCATION, AND APPEAL PROCESS:**

**A. Suspension or revocation of registry identification card:** Violation of any provision of this rule may result in either the summary suspension of a qualified patient's or primary caregiver's registry identification card or issuance of a notice of contemplated action by the medical cannabis program manager or designee to suspend or revoke the qualified patient's or primary caregiver's registry identification card, and the revocation of all lawful privileges under the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq*.

**B. Grounds for revocation or suspension of enrollment or denial of renewal application:** A patient or primary caregiver's registry identification card may be revoked or suspended and a renewal application may be denied, for:

**(1)** failure to comply with any provision of this rule;

**(2)** falsification of any material or information submitted to the department;

**(3)** failure to allow inspection and monitoring by an authorized representative of the department;

**(4)** any instance of diversion of cannabis, as determined by the department;

**(5)** threatening or harming an employee of a producer, a medical practitioner, a patient, or an employee of the department;

**(6)** for primary caregivers: any determination by the primary caregiver's licensing body that the primary caregiver has engaged in unprofessional or dishonorable conduct;

**(7)** for primary caregivers: conviction of the primary caregiver of any of the disqualifying convictions identified by department rule;

**(8)** for patients: failure of the patient to satisfy any criterion identified as a prerequisite to eligibility for a condition approved by the department; or

**(9)** for patients: if a certifying provider of the patient determines that the use of cannabis by the patient would more likely than not be detrimental to the patient's health.

**C. Request for hearing:** A qualified patient or primary caregiver whose enrollment has been summarily suspended, or who has received a notice of contemplated action to suspend or revoke their enrollment, may request a hearing in writing, in addition to a request for a record review, for the purpose of review of such action. The appellant shall file the request for hearing within thirty (30) calendar days of the date the action is taken or the notice of contemplated action is received. The request shall:

**(1)** be properly addressed to the medical cannabis program;

**(2)** state the requestor's name, address, and telephone numbers; include a statement of the facts relevant to the review of the action;

**(3)** include a statement of the provision of the act and the rules promulgated under the act that are relevant to the review of the action;

**(4)** include a statement of the arguments that the appellant considers relevant to the review of the action; and

**(5)** include any other relevant evidence.

**D. Hearing process:**

**(1)** All formal adjudicatory hearings held pursuant to this regulation shall be conducted by a hearing examiner appointed by the secretary.

**(2)** Hearings shall be conducted in Santa Fe, New Mexico, or, with the consent of the parties, at another location.

**(3)** Due to federal and state laws regarding the confidentiality of protected health information, all hearings held pursuant to this section shall be closed to the public.

**(4)** The hearing shall be recorded on audiotape or other means of sound reproduction.

**(5)** Any hearing provided for in this rule may be held telephonically.

**E. Scheduling:** The department shall schedule and hold the hearing no later than sixty (60) calendar days from the date the department receives the appellant's request for hearing. The hearing examiner may extend the sixty (60) day time period for good cause shown, or the parties may extend that period by mutual agreement. The department shall issue notice of the hearing, which shall include:

**(1)** a statement of the time, place and nature of the hearing;

**(2)** a statement of the legal authority and jurisdiction under which the hearing is to be held;

**(3)** a short and plain statement of the matters of fact and law asserted; and

**(4)** all necessary telephone numbers if a telephonic hearing shall be conducted.

**F. Presentation of evidence:** All parties shall be given the opportunity to respond and present evidence and argument on all relevant issues.

**G. Record of proceeding:** The record of the proceeding shall include the following:

**(1)** all pleadings, motions and intermediate rulings;

**(2)** evidence and briefs received or considered;

**(3)** a statement of matters officially noticed;

**(4)** offers of proof, objections and rulings thereon;

**(5)** proposed findings and

conclusions; and

**(6)** any action recommended by the hearing examiner.

**H. Transcription of the proceedings:** A party requesting a transcript shall bear the cost of transcription, to include any duplication costs.

**I. Procedures and evidence:**

**(1)** Any party may be represented by a person licensed to practice law in New Mexico, or may represent himself or herself.

**(2)** The rules of evidence as applied in courts of law shall not apply in these proceedings. Any relevant evidence may be admitted. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

**(3)** Documentary and other physical evidence shall be authenticated or identified by any reasonable means that shows that the matter in question is what the proponent claims it to be.

**(4)** The experience, technical competence and specialized knowledge of the hearing examiner, the department or the department's staff may be used in the evaluation of evidence.

**(5)** An appellant's failure to appear at the hearing at the date and time noticed for the hearing shall constitute a default.

**J. Conduct of proceeding:** Unless the hearing examiner determines a different procedure to be appropriate, the hearing shall be conducted as follows:

**(1)** the appellant may present an opening statement on the merits and the appellee may make a statement of the defense or reserve the statement until presentation of that party's case;

**(2)** upon conclusion of any opening statements,the appellant shall present his or her case in chief;

**(3)** upon the conclusion of the appellant's case in chief, the department shall present its case in defense;

**(4)** upon conclusion of the department's case in chief, the appellant may present rebuttal argument;

**(5)** upon conclusion of the parties' cases in chief and rebuttal arguments (if any), the parties may present closing arguments; and

**(6)** thereafter, the matter shall be considered submitted for recommendation by the hearing examiner.

**K. Burden of proof:** The appellant bears the burden of establishing by a preponderance of the evidence that the decision made or proposed by the department should be reversed or modified.

**L. Continuances:** The hearing examiner may grant a continuance for good cause shown. A motion to continue a hearing shall be made at least ten (10) calendar days before the hearing date.

**M. Telephonic hearings:**

**(1)** Any party requesting a telephonic hearing shall do so within ten (10) business days of the date of the notice of the hearing. Notice of the telephonic hearing shall be made to all parties and shall include all necessary telephone numbers.

**(2)** Failure of an appellant to provide their correct telephone number or failure to be available at the commencement of the hearing shall be treated as a failure to appear and shall constitute a default.

**(3)** The in-person presence of some parties or witnesses at the hearing shall not prevent the participation of other parties or witnesses by telephone with prior approval of the hearing examiner.

**N. Recommended action and final decision:**

**(1)** The parties may submit briefs including findings of fact and conclusions of law for consideration by the hearing examiner.

**(2)** No more than thirty (30) calendar days after the last submission by a party, the hearing examiner shall submit to the secretary a written decision containing a recommendation of action to taken by the secretary. The recommendation shall propose sustaining, reversing, or modifying the proposed action of the department.

**(3)** The secretary shall accept, reject or modify the hearing examiner's recommendation no later than thirty (30) calendar days after receipt of the hearing examiner's recommendation. The final decision or order shall be issued in writing and shall include a statement of findings and conclusions, and shall identify the final action to be taken. Service of the secretary's final decision shall be made upon the appellant by registered or certified mail.

**(4)** The final decision or order shall be made a part of the patient or primary caregiver's file with the medical cannabis program.

[7.34.3.14 NMAC - Rp, 7.34.3.12 NMAC, 12/30/2010]

**7.34.3.15 EXEMPTION FROM STATE CRIMINAL AND CIVIL PENALTIES FOR THE MEDICAL USE OF CANNABIS:** Possession of, or application for, a registry identification card shall not constitute probable cause or give rise to reasonable suspicion for any governmental agency to search the person or property of the person possessing or applying for the card.

**A.** A qualified patient shall not be subject to arrest, prosecution or penalty in any manner by the state of New Mexico or a political subdivision thereof for the possession of or the use of medical cannabis if the quantity of cannabis does not exceed an adequate supply.

**B.** A primary caregiver shall not be subject to arrest, prosecution or penalty in any manner for the possession of cannabis by the state of New Mexico, or a political subdivision thereof, for the medical use by the qualified patient if the quantity of cannabis does not exceed an adequate supply.

**C.** A qualified patient or a primary caregiver shall be granted the full legal protections provided under the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq.*, by the state of New Mexico if the qualified patient or primary caregiver is in possession of a valid registry identification card. If the qualified patient or primary caregiver is not in possession of a valid registry identification card, the qualified patient or primary caregiver shall be given an opportunity to produce the registry identification card before any arrest or criminal charges or other penalties are initiated.

**D.** A practitioner shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege by the state of New Mexico, or political subdivision thereof, for recommending the medical use of cannabis or providing written certification for the medical use of cannabis pursuant to this rule and the act.

**E.** Any property interest that is possessed, owned or used in connection with the medical use of cannabis, or acts incidental to such use, shall not be harmed, neglected, injured or destroyed while in the possession of New Mexico state or local law enforcement officials. Any such property interest shall not be forfeited under any New Mexico state or local law providing for the forfeiture of property except as provided in the Forfeiture Act. Cannabis, paraphernalia or other property seized from a qualified patient or primary caregiver in connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient or primary caregiver is entitled to the protections of the provisions of this rule and the act, as may be evidenced by a failure to actively investigate the case, a decision not to prosecute, the dismissal of charges or acquittal.

**F.** A person shall not be subject to arrest or prosecution by the state of New Mexico, or political subdivision thereof, for a cannabis-related offense for being in the presence of the medical use of cannabis as permitted under the provisions of this rule and the act.

[7.34.3.15 NMAC - Rp, 7.34.3.13 NMAC, 12/30/2010]

**7.34.3.16 QUALIFIED PATIENT, PRIMARY CAREGIVER, AND CERTIFYING PROVIDER CONFIDENTIALITY:** The department shall maintain a confidential file containing the names and contact information of the

persons who have either applied for or received a registry identification card, as well as the names and contact information of certifying and diagnosing providers.

**A. Patient applicants and qualified patients:** Names and contact information regarding a qualified patient or patient-applicant shall be confidential and shall not be subject to disclosure, except:

**(1)** to employees or agents of the department as necessary to perform the duties of the department pursuant to the provisions of this rule and the act;

**(2)** to employees of New Mexico state or local law enforcement agencies, for the purpose of verifying that a person is lawfully enrolled in the medical cannabis program, or in the event that the medical cannabis program manager or designee has reason to believe that a qualified patient or patient-applicant may have violated an applicable law; and

**(3)** as provided in the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 and applicable state and federal regulations.

**B. Primary caregivers and certifying providers:** Names and contact information regarding a primary caregiver or certifying provider shall be confidential and shall not be subject to disclosure, except:

**(1)** to applicable licensing bodies, for the purpose of verifying the practitioner's licensure status, or in the event that the medical cannabis program manager or designee has reason to believe that a practitioner may have violated licensing requirements or an applicable law;

**(2)** to employees of New Mexico state or local law enforcement agencies, in the event that the medical cannabis program manager or designee has reason to believe that a primary caregiver or certifying provider may have violated an applicable law;

**(3)** as provided in the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996 and applicable state and federal regulations.

[7.34.3.16 NMAC - Rp, 7.34.3.14 NMAC, 12/30/2010]

**7.34.3.17 DISPOSAL OF UNUSED CANNABIS:** Unused cannabis in the possession of the qualified patient or caregiver that is no longer needed for the patient's needs may be disposed of by transporting the unused portion to a state or local law enforcement office, or by destroying the unused cannabis.

[7.34.3.17 NMAC - Rp, 7.34.3.15 NMAC, 12/30/2010]

**7.34.3.18 ASSESSMENT REPORT:** The department shall evaluate the implementation of the Lynn and Erin Compassionate Use Act and regulations issued pursuant to that act and provide a report to the secretary of the department within one year of the effective date of these regulations. In performing its evaluation, the department shall focus on whether the needs of qualified patients are being met by the department's administration of the act and whether there is a demonstrable need for a state run production and distribution facility. The department's assessment report shall be issued every two years, shall be a public document, and shall contain de-identified data upon which the assessment is based.

[7.34.3.18 NMAC - Rp, 7.34.3.16 NMAC, 12/30/2010]

**7.34.3.19 SEVERABILITY:** If any part or application of these rules is held to be invalid, the remainder or its application to other situations or persons shall not be affected. Failure to promulgate rules or implement any provision of these rules shall not interfere with the remaining protections provided by these rules and the act.

[7.34.3.19 NMAC - Rp, 7.34.3.17 NMAC, 12/30/2010]

**HISTORY OF 7.34.3 NMAC:**

**History of Repealed Material:**
7.34.3 NMAC, Registry Identification Cards (filed 12/01/2008) repealed 12/30/2010.

**NMAC History:**
7.34.3 NMAC, Registry Identification Cards (filed 12/01/2008) was and replaced by 7.34.3 NMAC, Registry Identification Cards, effective 12/30/2010.

# NEW MEXICO DEPARTMENT OF HEALTH

**TITLE 7 HEALTH**
**CHAPTER 34 MEDICAL USE OF CANNABIS**
**PART 4 LICENSING REQUIREMENTS FOR PRODUCERS, PRODUCTION FACILITIES AND DISTRIBUTION**

**7.34.4.1 ISSUING AGENCY:** New Mexico Department of Health, Public Health Division.

[7.34.4.1 NMAC - Rp, 7.34.4.1 NMAC, 12/30/2010]

**7.34.4.2 SCOPE:** This rule applies to all licensed producers of medical use cannabis, defined in Section 26-2B-3 (D) NMSA 1978 as "any person or association of persons within New Mexico that the department determines to be qualified to produce, possess, distribute and dispense cannabis pursuant to the Lynn and Erin Compassionate Use Act and that is licensed by the department." All requirements contained herein are necessary prerequisites to the state's ability to distinguish between authorized use under this act and unauthorized use under the state's criminal laws.

[7.34.4.2 NMAC - Rp, 7.34.4.2 NMAC, 12/30/2010]

**7.34.4.3 STATUTORY AUTHORITY:** The requirements set forth herein are promulgated by the secretary of the department of health, pursuant to the general authority granted under Section 9-7-6 (E) NMSA 1978, as amended, and the authority granted under Sections 24-1-2(D), 24-1-3(I) and 24-1-5, NMSA 1978, of the Public Health Act, as amended, Section 53-8-1 et seq. NMSA 1978, and the Lynn and Erin Compassionate Use Act. Although federal law currently prohibits any use of cannabis, the laws of Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, Oregon, Rhode Island, Vermont, and Washington permit the medical use and cultivation of cannabis. New Mexico joins this effort to provide for the health and welfare of its citizens. New Mexico adopts these regulations to accomplish the purpose of the Lynn and Erin Compassionate Use Act as stated in Section 26-2B-2, NMSA 1978, "to allow for the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments," while at the same time ensuring proper enforcement of any criminal laws for behavior that has been deemed illicit by the state.

[7.34.4.3 NMAC - Rp, 7.34.4.3 NMAC, 12/30/2010]

**7.34.4.4 DURATION:** Permanent.

[7.34.4.4 NMAC - Rp, 7.34.4.4 NMAC, 12/30/2010]

**7.34.4.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.

[7.34.4.5 NMAC - Rp, 7.34.4.5 NMAC, 12/30/2010]

**7.34.4.6 OBJECTIVE:** Ensuring the safe production, distribution and dispensing of cannabis for the sole purpose of medical use for alleviating symptoms caused by debilitating medical conditions in a regulated system.

[7.34.4.6 NMAC - Rp, 7.34.4.6 NMAC, 12/30/2010]

**7.34.4.7 DEFINITIONS:**

**A. "Act"** means the Lynn and Erin Compassionate Use Act, NMSA 1978, Sections 26-2B-1 through 26-2B-7.

**B. "Administrative review committee"** means an intra-department committee that reviews qualified patient or primary caregiver application denials, licensed producer denials, or the imposition of a summary suspension. The administrative review committee shall consist of the medical director for the department's public health division (or that person's designee); the director of the public health division (or that's person's designee); and the chief of the infectious disease bureau of the department's public health division (or that person's designee).

**C. "Administrative withdrawal"** means the procedure for the voluntary withdrawal of a qualified patient or primary caregiver from the medical cannabis program.

**D. "Adequate supply"** means an amount of cannabis, derived solely from an intrastate source and
in a form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver, that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three (3) months. An adequate supply shall not exceed six (6) ounces of useable cannabis, and with a personal production license only, four (4) mature plants and twelve (12) seedlings, or a three (3) month supply of topical treatment. A qualified patient and primary caregiver may also possess cannabis seeds.

**E. "Adverse action"** includes the denial of any application, immediate revocation of the qualified patient or primary caregiver's registry identification card, licensed producer revocation, referral to state or local law enforcement and loss of all lawful privileges under the act.

**F. "Advisory board"** means the medical cannabis advisory board consisting of eight (8) practitioners representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology.

**G. "Applicant"** means any person applying to participate in the medical use of cannabis program as a qualified patient, primary caregiver or licensed producer.

**H. "Cannabis"** means all parts of the plant cannabis sativa and cannabis indica, whether growing or not, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin.

**I. "Consent to release of medical information form"** means a signed qualified patient or primary caregiver authorization form to release specific medical information relating to the use of cannabis.

**J. "Debilitating medical condition"** means:

**(1)** cancer;

**(2)** glaucoma;

**(3)** multiple sclerosis;

**(4)** damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity;

**(5)** epilepsy;

**(6)** positive status for human immunodeficiency virus or acquired immune deficiency syndrome;

**(7)** admission into hospice care in accordance with rules promulgated by the department; or

**(8)** any other medical condition, medical treatment or disease as approved by the department which results in pain, suffering or debility for which there is credible evidence that medical use cannabis could be of benefit.

**K. "Deficiency"** means a violation of or failure to comply with a provision of these requirements.

**L. "Department"** means the department of health or its agent.

**M. "Division"** means the public health division of the department of health.

**N. "Facility"** means any building or grounds licensed for the production, possession and distribution of cannabis in any form.

**O. "Intrastate"** means existing or occurring within the state boundaries of New Mexico.

**P. "License"** means the document issued by the department granting the legal right to produce and distribute medical cannabis for a specified period of time.

**Q. "Licensed producer"** means a person or entity licensed to produce medical cannabis.

**R. "Licensure"** means the process by which the department grants permission to an applicant to produce or possess cannabis.

**S. "Mature plant"** means a harvestable female cannabis plant that is flowering.

**T. "Medical cannabis program"** means the administrative body of the New Mexico public health division charged with the management of the medical cannabis program, to include issuance of registry identification cards, licensing of producers and distribution systems, administration of public hearings and administration of informal administrative reviews.

**U. "Medical cannabis program manager"** means the administrator of the New Mexico department of health, public health division medical cannabis program who holds that title.

**V. "Medical director"** means a medical practitioner designated by the department to determine whether the medical condition of an applicant qualifies as a debilitating medical condition eligible for enrollment in the program.

**W. "Medical provider certification for patient eligibility form"** means a written certification form provided by the medical cannabis program signed by a patient's practitioner that, in the practitioner's professional opinion, the patient has a debilitating medical condition as defined by the act or this part and would be anticipated to benefit from the use of cannabis.

**X. "Minor"** means an individual less than eighteen (18) years of age.

**Y. "Paraphernalia"** means any equipment, product, or material of any kind that is primarily intended or designed for use in compounding, converting, processing, preparing, inhaling, or otherwise introducing into the human body.

**Z. "Participant enrollment form"** means the registry identification card application form for adult qualified patient applicants provided by the medical cannabis program.

**AA. "Personal production license"** means a license issued to a qualified patient participating in the medical cannabis program, or to a qualified patient's primary caregiver, to permit the qualified patient or primary caregiver to produce medical cannabis for the qualified patient's personal use, consistent with the requirements of this rule.

**BB. "Petitioner"** means any New Mexico resident or association of New Mexico residents petitioning the advisory board for the inclusion of a new medical condition, medical treatment or disease to be added to the list of debilitating medical conditions that qualify for the use of cannabis.

**CC. "Plant"** means any cannabis plant, cutting, trimming or clone that has roots or that is cultivated with the intention of growing roots.

**DD. "Policy"** means a written statement of principles that guides and determines present and future decisions and actions of the licensed producer.

**EE. "Practitioner"** means a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act, Sections 30-31-1 *et seq.*, NMSA (1978).

**FF. "Primary caregiver"** means a resident of New Mexico who is at least eighteen (18) years of age and who has been designated by the qualified patient or patient's practitioner as being necessary to

take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the provisions of the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq*.

**GG. "Primary caregiver application form"** means the registry identification card application form provided by the medical cannabis program.

**HH. "Private entity"** means a private, non-profit organization that applies to become or is licensed as a producer and distributor of cannabis.

**II. "Qualified patient"** means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received a registry identification card issued pursuant to the requirements of the act or department rules.

**JJ. "Registry identification card"** means a document issued by the department which identifies a qualified patient authorized to engage in the use of cannabis for a debilitating medical condition or a document issued by the department which identifies a primary caregiver authorized to engage in the intrastate possession and administration of cannabis for the sole use of the qualified patient.

**KK. "Representative"** means an individual designated as the petitioner's agent, guardian, surrogate, or other legally appointed or authorized health care decision maker pursuant to the Uniform Health Care Decisions Act, Sections 24-7A-1 *et seq*. (NMSA 2007).

**LL. "Secretary"** means the secretary of the New Mexico department of health.

**MM. "Secure grounds"** means a facility that provides a safe environment to avoid loss or theft.

**NN. "Security alarm system"** means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to detect an unauthorized intrusion.

**OO. "Security policy"** means the instruction manual or pamphlet adopted or developed by the licensed producer containing security policies, safety and security procedures, personal safety and crime prevention techniques.

**PP. "Seedling"** means a cannabis plant that has no flowers.

**QQ. "Submission date"** means the date of submission of the last item in an application, petition or proposal.

**RR. "Technical evidence"** means scientific, clinical, medical or other specialized testimony, or evidence, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

**SS. "Topical treatment"** means a transcutaneous therapeutic cannabis extract formulation.

**TT. "Usable cannabis"** means the dried leaves and flowers of the female cananbis plant and any mixture or preparation thereof, including ointments, but does not include the seedlings, seeds, stalks, or roots of the plant.

[7.34.4.7 NMAC - Rp, 7.34.4.7 NMAC, 12/30/2010]

**7.34.4.8 PRODUCER LICENSING; GENERAL PROVISIONS:**

**A. The department may license two classes of producers**.

**(1)** A qualified patient who shall produce no more than an adequate supply of cannabis for the qualified patient's personal use only; and who may obtain useable cannabis, seeds or plants from licensed non-profit producers.

**(2)** A non-profit private entity that operates a facility and, at any one time, is limited to a total of one-hundred and fifty (150) mature plants and seedlings and an inventory of usable cannabis and seeds that reflects current patient needs, and that shall sell cannabis with a consistent unit price, without volume discounts. A licensed non-profit producer may obtain plants, seeds and useable cannabis from other licensed non-profit producers.

**B. Processing of production applications**.

**(1)** The issuance of an application form is in no way a guarantee that the completed application will be accepted or that a license will be granted. Information provided by the applicant and used by the licensing authority for the licensing process shall be accurate and truthful. Any applicant that fails to participate in good faith or that falsifies information presented in the licensing process shall have its application denied by the department.

**(2)** The number of licenses issued by the department to non-profit private entities, and the determination of which non-profit entities shall be licensed, shall be determined at the discretion of the secretary, which determination shall constitute the final administrative decision of the department.

**(3)** A non-profit private entity whose application for licensure is not approved by the secretary shall not be entitled to further administrative review.

**C. Factors considered**. The secretary shall consider the overall health needs of qualified patients and the safety of the public in determining the number of licenses to be issued to non-profit private entities and shall further consider:

**(1)** the sufficiency of the overall supply available to qualified patients statewide;

**(2)** the service location of the applicant;

**(3)** the applicant's plan to ensure purity, consistency of dose, and the various forms of applications to be provided; i.e., topical, oral, tinctures, etc.;

**(4)** the applicant's skill and knowledge of organic growing methods to ensure a safe product;

**(5)** the quality of the security plan proposed, including location, security devices employed and staffing;

**(6)** the quality assurance plans in place, including provision for periodic testing;

**(7)** the experience and expertise of the non-profit board members; and

**(8)** other relevant factors.

**D. Production and distribution of medical cannabis by a licensed non-profit private entity**. Production and distribution of medical cannabis by a non-profit private entity to a qualified patient or primary caregiver shall take place at locations described in the non-profit entity's production and distribution plan approved by the department, and shall not take place at locations that are within three hundred (300) feet of any school, church or daycare center.

**E. Verification of application information**. The department may verify information contained in each application and accompanying documentation by:

**(1)** contacting the applicant by telephone, mail, or electronic mail;

**(2)** conducting an on-site visit;

**(3)** requiring a face-to-face meeting and the production of additional identification materials if proof of identity is uncertain; and

**(4)** requiring additional relevant information as the department deems necessary.

**F. Cooperation with the department**. Upon submitting an application, an applicant shall fully cooperate with the department and shall timely respond to requests for information or documentation; failure to cooperate with a request of the department may result in the application being denied or otherwise declared incomplete.

**G. Non-profit private entity criminal history screening requirements**. All persons associated with a non-profit private entity production facility shall consent to and undergo a nationwide and statewide criminal history screening background check. This includes board members, persons having direct or indirect authority over management or policies, and employees.

**(1) Criminal history screening fees**. All applicable fees associated with the nationwide and statewide criminal history screening background checks shall be paid by the individual or the non-profit private entity.

**(2) Disqualifying convictions**. Individuals convicted of a felony violation of Section 30-31-20, 30-31-21, or 30-31-22 NMSA 1978, or a violation of any equivalent federal statute or equivalent statute from any other jurisdiction, shall be prohibited from participating or being associated with a production facility licensed under this rule. If an individual has been convicted of a felony violation of Section 30-31-1 *et seq*. NMSA 1978 other than Sections 30-31-20 through 30-31-22, or has been convicted of any equivalent federal statute or equivalent statute from any other jurisdiction, and the final completion of the entirety of the associated sentence of such conviction has been less than five (5) years from the date of the individual's anticipated association with the production facility, then the individual shall be prohibited from serving on the board or working for the entity. An individual who is disqualified shall be notified of his or her disqualification. If the individual has been convicted of more than one (1) felony violation of Section 30-31-1 et seq. NMSA 1978 or an equivalent federal statute or equivalent statute from any other jurisdiction, the individual shall be notified that he or she is permanently prohibited from participating or being associated with a production facility licensed under this rule. Any violation of this subsection shall result in the immediate revocation of any privilege granted under this rule and the act.

**H. Board membership requirements for private entities**. The board of directors for a private non-profit applicant or licensee shall include at a minimum five (5) voting members, including one (1) medical provider limited to a physician (MD or DO), a registered nurse, nurse practitioner, licensed practical nurse or physician assistant, and three (3) patients currently qualified under the Lynn and Erin Compassionate Use Act.

**(1)** For purposes of board membership, a single individual may not qualify as both the patient and as the medical provider.

**(2)** Members of the board of directors for a non-profit private entity shall be residents of New Mexico.

**(3)** Beginning July 1, 2011 and continuing thereafter, no member of the non-profit producer's board of directors may serve on more than one single board of directors for licensed non-profit producers.

**I. Private entity policies and procedures**: The private non-profit entity shall develop, implement and maintain on the premises policies and procedures relating to the medical cannabis program, which shall at a minimum include the following:

**(1)** distribution criteria for qualified patients or primary caregivers appropriate for cannabis services, to include clear identifiable photocopies of the registry identification card of every qualified patient or primary caregiver served by the private entity;

**(2)** alcohol and drug-free work place policies and procedures;

**(3)** employee policies and procedures to address the following requirements:

**(a)** job descriptions or employment contracts developed for every employee that identify duties, authority, responsibilities, qualifications and supervision; and

**(b)** training materials concerning adherence to state confidentiality laws;

**(4)** personnel records for each employee that include an application for employment and a record of any disciplinary action taken;

**(5)** on-site training curricula, or contracts with outside resources capable of meeting employee training needs, to include, at a minimum, the following topics:

**(a)** professional conduct, ethics and patient confidentiality; and

**(b)** informational developments in the field of medical use of cannabis;

**(6)** employee safety and security training materials provided to each employee at the time of his or her initial appointment, to include:

**(a)** training in the proper use of security measures and controls that have been adopted; and

**(b)** specific procedural instructions regarding how to respond to an emergency, including robbery or a violent accident;

**(7)** a general written security policy, to address at a minimum:

**(a)** safety and security procedures;

**(b)** personal safety; and

**(c)** crime prevention techniques;

**(8)** training documentation prepared for each employee and statements signed by employees indicating the topics discussed (to include names and titles of presenters) and the date, time and place the employee received said training; and

**(9)** a written policy regarding the right of the private entity to refuse service.

**J. Retention of training documentation**: A private non-profit entity shall maintain documentation of an employee's training for a period of at least six (6) months after termination of an employee's employment. Employee training documentation shall be made available within twenty-four (24) hours of a department representative's request; the twenty-four (24) hour period shall exclude holidays and weekends.

**K. Licensure periods**:

**(1) Licensure period for private entities**. The licensure period of a private entity shall be from January 1st (or the date of approval of the licensure application, if later) through December 31st of a given year. A license that was issued prior to the promulgation of this provision that is scheduled to expire before December 31, 2011 shall be extended to that date.

**(2) Licensure period for qualified patient producers**. A qualified patient's personal production license shall expire annually at the end of their enrollment in the NM medical cannabis program.

**L. Amended license**. A licensed producer shall submit to the department an application form for an amended license, and shall obtain approval from the department, at least thirty (30) business days prior to implementing any:

**(1)** change of location of a qualified patient who also holds a personal production license;

**(2)** change of location of the private non-profit entity, change of ownership, private entity name, capacity or any physical modification or addition to the facility; and

**(3)** substantial change to a private entity's production and distribution plan, including any change to the type(s) of products produced, the private entity's method(s) of distribution, and security plan.

**M. Application for renewal of an annual production license**.

**(1) Deadline for private entities**. Each licensed producer shall apply for renewal of its annual license no later than December 1st of each year by submitting a renewal application to the department. The department shall provide the renewal application requirements no later than October 1st of each year.

**(2) Deadline for qualified patients**. Each patient licensed for a personal production license shall apply for renewal of their annual license no later than 30 days prior to the expiration of the license by submitting a renewal application to the department.

**(3) General submission requirements for qualified patients**. Qualified patients shall submit:

**(a)** an application for renewal of license; and

**(b)** a non-refundable thirty-dollar ($30) application fee, except the fee may be waived upon a showing that the income of the qualified patient is equal to or lesser than two-hundred percent (200%) of the federal poverty guidelines established by the U.S. department of health and human services.

**(4) General submission requirements for private entities**. Private entities shall submit:

**(a)** an application for renewal of

license; and

**(b)** applicable non-refundable licensure renewal fees.

**N. Non-transferable registration of license**.

**(1)** A license shall not be transferred by assignment or otherwise to other persons or locations. Unless the licensed producer applies for and receives an amended license, the license shall be void and returned to the licensing authority when any one of the following situations occurs:

**(a)** ownership of the facility changes;

**(b)** location change;

**(c)** change in licensed producer;

**(d)** the discontinuance of operation; or

**(e)** the removal of all medical cannabis from the facility by lawful state authority.

**(2)** Transactions, which do not constitute a change of ownership, include the following:

**(a)** when applicable, changes in the membership of a corporate board of directors or board of trustees; and

**(b)** two (2) or more corporations merge and the originally licensed corporation survives.

**(3)** Management agreements are generally not considered a change in ownership if the licensed producer continues to retain ultimate authority for the operation of the facility. However, if the ultimate authority is surrendered and transferred from the licensed producer to a new manager, then a change of ownership has occurred.

**O. Automatic expiration of license**.

**(1)** A license shall expire at 11:59 p.m. on the day indicated on the license as the expiration date, unless the license was renewed at an earlier date, suspended or revoked.

**(2**) A private entity that intends to voluntarily close shall notify the licensing authority no later than thirty (30) calendar days prior to closure. All private non-profit entities shall notify all qualified patients or the primary caregivers prior to expiration of the license. Any unused medical cannabis must be turned over to local law enforcement, destroyed by the producer, or donated to patients or provided to another non-profit producer to be donated to patients. A producer that destroys medical cannabis shall submit documentation of that destruction to the department.

**P. Display of license**. The licensed producer shall maintain the license safely at the production location and be able to produce the license immediately upon request by the department or law enforcement.

**Q. Fees applicable to applicants and licensees**:

**(1) Private non-profit application fee**: A non-profit producer shall submit with its initial application a non-refundable application fee of one thousand dollars ($1,000).

**(2) Private non-profit renewal fee**: A non-profit private entity that has been licensed for more than six months shall additionally submit to the medical cannabis program a non-refundable renewal fee no later than December 1st of each year of:

**(a)** five-thousand dollars ($5,000) if the producer has been licensed for less than one year but more than six months;

**(b)** ten-thousand dollars ($10,000) if the producer has been licensed for more than one year;

**(c)** twenty-thousand dollars ($20,000) if the producer has been licensed for more than two years;

**(d)** thirty-thousand dollars ($30,000) if the producer has been licensed for more than three years.

**(3) Qualified patient producer fees**: A qualified patient shall submit with each initial application and renewal application for personal production licensure a fee of thirty dollars ($30), unless the fee is waived on a showing that the income of the qualified patient is equal to or lesser than two-hundred percent (200%) of the federal poverty guidelines established by the U.S. department of health and human services.

**(4) Payment**: Fees shall be paid by check, money order, or any other form of payment approved by the medical cannabis program manager or designee, and shall be made payable to the harm reduction program of the department.

**R. Department testing**: If the department or its designee receives a complaint regarding the presence of mold, bacteria or another contaminant in cannabis produced by a licensed non-profit or patient who holds a personal production license, or if the department or its designee has reason to believe that the presence of mold, bacteria or another contaminant may jeopardize the health of a patient, the department or its designee may conduct an unannounced visit to the producer and may require the producer to provide samples of medical cannabis for testing. Producers shall bear the cost of any testing required by the department. Medical cannabis program employees or their designees may possess those medical cannabis samples for the sole purposes of testing or transport to a testing facility. The department or its designee shall comply with the following testing requirements:

**(1)** the department or its designee shall maintain chain of custody documentation for any medical cannabis samples taken;

**(2)** a written receipt shall be given to the producer for all testing samples;

**(3)** all testing samples shall be placed into a sealed container and clearly labeled;

**(4)** all testing samples shall be tested by DOH or a designated testing facility;

**(5)** no more than eight (8) grams of medical cannabis shall be gathered for testing purposes from a non-profit medical cannabis producer on any single occasion;

**(6)** no more than one (1) gram of medical cannabis shall be gathered for testing purposes from a patient who holds a personal production license on any single occasion.

[7.34.4.8 NMAC - Rp, 7.34.4.8 NMAC, 12/30/2010]

**7.34.4.9 QUALIFIED PERSONAL PRODUCTION APPLICATION REQUIREMENTS:**

**A.** A qualified patient may apply for a personal production license to produce medical cannabis solely for the qualified patient's own use.

**B.** A qualified patient may obtain no more than one personal production license, which license may be issued for production to occur in no more than one single location, which shall be either the patient's primary residence, or other property owned by the patient.

**C.** Only one personal production license may be issued for a given location, absent proof that more than one registered patient currently resides at the location. Multiple personal production licenses may not be issued for non-residential locations.

**D.** Qualified patients shall provide the following in order to be considered for a personal production license to produce medical cannabis:

**(1)** appropriate non-refundable fee Paragraph (3) of Subsection Q of 7.34.4.8 NMAC;

**(2)** a description of the single location that shall be used in the production of cannabis;

**(3)** a written plan that ensures that the cannabis production shall not be visible from the street or other public areas;

**(4)** a description of any device or series of devices that shall be used to provide security and proof of the secure grounds; and

**(5)** a written acknowledgement of the limitations of the right to use and possess cannabis for medical purposes in New Mexico.

[7.34.4.9 NMAC - N, 12/30/2010]

**7.34.4.10 NON-PROFIT PRIVATE ENTITY PRODUCTION APPLICATION REQUIREMENTS:** A private non-profit entity shall provide the following in order to be considered for a license to produce medical cannabis.

**A. Organizational**

**information and materials**: A private non-profit entity shall submit to the department:

**(1)** proof that the private entity is a non-profit corporation pursuant to Section 53-8-1 *et seq*. NMSA 1978;

**(2)** copies of the entity's articles of incorporation;

**(3)** copies of the entity's by-laws;

**(4)** verification that the board of directors of the non-profit includes, at a minimum, five (5) voting members, including one (1) medical provider limited to a physician (MD or OD), a registered nurse, nurse practitioner, licensed practical nurse or physician assistant, and three (3) patients currently qualified under the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq.*;

**(5)** a list of all persons or business entities having direct or indirect authority over the management or policies of the facility;

**(6)** a list of all persons or business entities having five percent or more ownership in the facility, whether direct or indirect and whether the interest is in land, building, or other material, including owners of any business entity which owns all or part of the land or building;

**(7)** the identities of all creditors holding a security interest in the premises of the private entity, if any; and

**(8)** a brief business plan showing how the private entity will fund operations during the first two years of licensing, including funding sources.

**B. Production and distribution information and materials**: A private non-profit entity shall submit to the department:

**(1)** an acknowledgement that production, at any time, shall not exceed a total of one-hundred and fifty (150) mature plants, seedlings, cuttings, and clones, as well as an inventory of usable cannabis that reflects current patient needs;

**(2)** a written set of distribution criteria for qualified patients or primary caregivers appropriate for cannabis services that describes the method by which and locations at which distribution will occur, and that includes a clear identifiable photocopy of all qualified patient's or the primary caregiver's registry identification card served by the private entity;

**(3)** a complete written description of the means that the private non-profit shall employ to safely dispense the cannabis to qualified patients or the qualified patient's primary caregivers;

**(4)** a description and sample of the packaging of the useable cannabis that the private non-profit entity shall utilize, including a label that shall contain the name of the strain, batch, quantity and a statement that the product is for medical use and not for resale; and

**(5)** a description of the testing procedures the private entity shall use to determine the quality of medical cannabis produced or distributed.

**C. Facility information**: A private non-profit entity shall submit to the department:

**(1)** a description of the facility that shall be used in the production of cannabis;

**(2)** proof that the facility is not within three hundred (300) feet of any school, church or daycare center; and

**(3)** a description of the device or series of devices that shall be used to provide security.

**D. Educational methods and materials**: A private non-profit entity shall submit to the department:

**(1)** a description of the private entity's means for educating the qualified patient and the primary caregiver on the limitation of the right to possess and use cannabis;

**(2)** a description of the means the private entity shall employ to make qualified patients or the primary caregiver aware of the quality of the product;

**(3)** a description of ingestion options of useable cannabis provided by the private entity;

**(4)** a description of safe smoking techniques that shall be provided to qualified patients; and

**(5)** a description of potential side effects and how the private entity will educate qualified patients and the qualified patient's primary caregivers regarding potential side effects.

**E. Sales records**: A private non-profit entity shall submit to the department a sample of the private entity's sales record form(s), which shall identify (among other items) the name of the purchaser, the date of the sale, and the quantity and price of medical cannabis sold.

**F. Policies and procedures**: A private non-profit entity shall submit to the department copies of policies and procedures developed, implemented and maintained on the premises of the private entity's facility.

**G. Personnel records**: A private non-profit entity shall submit to the department:

**(1)** nationwide and statewide criminal history screening documentation for all individuals associated with the private entity's production facility, to include board members, persons having direct or indirect authority over management or policies, employees, and volunteers;

**(2)** samples of the personnel records retained by the private entity for each employee as required by this rule, including:

**(a)** a sample application for employment;

**(b)** sample record of any disciplinary action taken;

**(c)** a sample written job descriptions or employment contracts developed for all employee positions, to include duties, authority, responsibilities, qualifications and supervision;

**(3)** an on-site training curriculum (unless the private entity intends to enter into contractual relationships with outside resources capable of meeting employee training needs) that addresses, at a minimum, the following topics:

**(a)** state and federal confidentiality laws, including HIPAA;

**(b)** professional conduct and ethics;

**(c)** informational developments in the field of medical use of cannabis; and

**(d)** employee safety and security training addressing, at a minimum, the proper use of the security measures and controls that have been adopted, and specific procedural instructions on how to respond to an emergency, including a robbery or violent accident; and

**(4)** proof of HIPAA certification for all individuals associated with a private entity production facility, including all board members, persons having direct or indirect authority over management or policies, employees, and volunteers.

**H. Other materials**: A private non-profit entity shall submit to the department such other information as the private entity wishes to provide or such information as the department may reasonably request.

[7.34.4.10 NMAC - N, 12/30/2010]

**7.34.4.11 SECURITY REQUIREMENTS FOR LICENSED PRODUCERS:** Private entities licensed to produce medical cannabis shall comply with the following requirements to ensure that production facilities are located on secure grounds.

**A.** The licensed private non-profit entity shall provide and maintain in each facility a fully operational security alarm system.

**B.** The licensed private non-profit entity shall conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the alarm system and, in the event of an extended mechanical malfunction that exceeds an eight (8) hour period, provide alternative security that shall include closure of the premises.

**C.** The licensed private non-profit entity shall maintain documentation for a period of at least twenty-four (24) months of all inspections, servicing, alterations and upgrades performed on the security alarm system; all documentation shall be made available within twenty-four (24) hours of a department representative's request;

failure to provide equipment maintenance documentation within the twenty-four (24) hour period shall subject the licensed producer to the sanctions and penalties provided for in this rule; the twenty-four (24) hour period shall not include holidays and weekends.

[7.34.4.11 NMAC - Rp, 7.34.4.9 NMAC, 12/30/2010]

**7.34.4.12 DENIAL OF AN INITIAL PRODUCER LICENSE:**

**A. Administrative review of license application denials**: An applicant whose initial application for a producer license is denied by the medical cannabis program manager or designee may request an administrative review by the administrative review committee. The written notice of denial shall include a statement of the right to request such a review.

**B. No administrative review of determinations made by the secretary**: An applicant whose initial application for a producer license was for any reason not approved by the secretary (rather than the program manager or designee) shall not be entitled to further review by the department, but may reapply at a later date.

**C. Procedure for requesting informal administrative review**:

**(1)** An applicant given notice of an application denial by the medical cannabis program manager or designee may submit a written request for a record review. To be effective, the written request shall:

**(a)** be made within thirty (30) calendar days, as determined by the postmark, from the date of the denial notice issued by the department;

**(b)** be properly addressed to the medical cannabis program;

**(c)** state the applicant's name, address, and telephone numbers;

**(d)** state the applicant's proposed status as a licensed producer; and

**(e)** provide a brief narrative rebutting the circumstances of the application denial.

**(2)** If the applicant wishes to submit additional documentation for consideration, the applicant shall include such additional documentation when submitting the request for administrative review.

**D. Administrative review proceeding**: The administrative review proceeding shall be a closed proceeding that is limited to an administrative review of written application materials and documents offered to verify eligibility. The administrative review is not an adjudicatory hearing. The administrative review shall be conducted by the administrative review committee. In cases where the administrative review committee finds the need for additional or clarifying information, the review committee shall request that the applicant supply such additional information within the time set forth in the committees' request.

**E. Final determination**:

**(1)** Content. The administrative review committee shall render a written decision setting forth the reasons for the decision.

**(2)** Effect. The decision of the administrative review committee is the final decision of the informal administrative review proceeding.

**(3)** Notice. A copy of the decision shall be mailed to the applicant.

**F. Judicial review**: Except as otherwise provided by law, there shall be no right to judicial review of a decision by the program manager or designee, the administrative review committee, or the secretary.

[7.34.4.12 NMAC - Rp, 7.34.4.10 NMAC, 12/30/2010]

**7.34.4.13 PARENTAL RESPONSIBILITY ACT:** The failure to comply with a judgment or order for child support, or subpoena or warrants relating to paternity or child support proceedings, is grounds for the denial, suspension or revocation of a private entity's license to produce medical cannabis in accordance with Section 40-5A-6, NMSA 1978, of the Parental Responsibility Act.

[7.34.4.13 NMAC - Rp, 7.34.4.11 NMAC, 12/30/2010]

**7.34.4.14 PROHIBITIONS, RESTRICTIONS AND LIMITATIONS ON THE PRODUCTION AND DISTRIBUTION OF MEDICAL CANNABIS AND CRIMINAL PENALTIES:**

**A.** Participation in the medical cannabis licensing program by a licensed producer, or the employees of a licensed producer, does not relieve the producer or employee from criminal prosecution or civil penalties for activities not authorized in this rule and the act.

**B. Locations of production and distribution**: Production of medical cannabis and distribution of medical cannabis to qualified patients or their primary caregivers shall take place at locations (or, with respect to distribution, categories of locations) described in the non-profit entity's production and distribution plan approved by the department, and shall not take place at locations that are within three hundred feet of any school, church or daycare center.

**C. Fraudulent misrepresentation**: Any person who makes a fraudulent representation to a law enforcement officer about the person's participation in the medical cannabis program to avoid arrest or prosecution for a cannabis-related offense is guilty of a petty misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 *et seq.*, NMSA 1978.

**D. Unlawful distribution**: If a licensed producer or employee of a licensed producer sells, distributes, dispenses or transfers cannabis to a person not approved by the department pursuant to this rule and the act, or obtains or transports cannabis outside New Mexico in violation of federal law, the licensed producer or employee of the licensed producer shall be subject to arrest, prosecution and civil or criminal penalties pursuant to state law.

**E. Revocation of registry identification card, licensed primary caregiver card, license to produce or distribute**: Violation of any provision of this rule may result in the immediate revocation of any privilege granted under this rule and the act.

[7.34.4.14 NMAC - Rp, 7.34.4.12 NMAC, 12/30/2010]

**7.34.4.15 MONITORING AND CORRECTIVE ACTIONS:**

**A. Monitoring**:

**(1)** The department or its designee may perform on-site assessments of a licensed producer to determine compliance with these rules. The department may enter a facility at any time to assess or monitor.

**(2)** Twenty-four (24) hours' notice shall be provided to licensed producers who are qualified patients prior to an on-site assessment, except when the department has reasonable suspicion to believe that providing notice will result in the destruction of evidence or that providing such notice will impede the department's ability to enforce these regulations.

**(3)** The department may review any and all employee, qualified patient or primary caregiver records or conduct interviews with employees, qualified patients, primary caregivers or private licensed producers for the purpose of determining compliance with these requirements.

**(4)** All licensed producers shall provide the department or the department's designee immediate access to any material and information necessary for determining compliance with these requirements.

**(5)** Failure by the licensed producer to provide the department access to the premises or information may result in the revocation of the licensed producer's license and referral to state law enforcement.

**(6)** Any failure to adhere to these rules documented by the department during monitoring may result in sanction(s), including suspension, revocation, non-renewal or denial of licensure and referral to state or local law enforcement.

**(7)** The department shall refer

non-frivolous complaints involving alleged criminal activity made against a licensed producer to the appropriate New Mexico state or local authorities.

**B. Financial records**: A licensed non-profit private entity shall maintain detailed confidential sales records in a manner and format approved by the department, and shall inform the department of the location where such records are kept, and promptly update that information if the records are removed.

**(1) Access:** The department or its agents shall have reasonable access to the sales and other financial records of a private entity licensee, and shall be granted immediate access to those records upon request. A patient shall be granted reasonable access to sales records of that patient upon request.

**(2) Audit**: A non-profit private entity shall submit the results of an annual financial audit to the department no later than January 31st of each year. The annual audit shall be conducted by an independent certified public accountant; the costs of any such audit shall be borne by the private entity. Results of the annual audit shall be forwarded to the medical cannabis program manager or designee. The department may also periodically require, within its discretion, the audit of a non-profit private entity's financial records by the department.

**(3) Quarterly reports:** A non-profit producer shall submit reports on at least a quarterly basis, or as otherwise requested, and in the format specified by the department.

**C. Corrective action:**

**(1)** If violations of requirements of this rule are cited as a result of monitoring or review of financial records, the licensed producer shall be provided with an official written report of the findings within seven (7) business days following the monitoring visit or the review of financial records.

**(2)** Unless otherwise specified by the department, the licensed producer shall correct the violation within five (5) calendar days of receipt of the official written report citing the violation(s).

**(3)** The violation shall not be deemed corrected until the department verifies in writing within seven (7) calendar days of receiving notice of the corrective action that the corrective action is satisfactory.

**(4)** If the violation has not been corrected, the department may issue a notice of contemplated action to suspend, revoke, or take other disciplinary action against the producer's license.

**D. Suspension of license without prior hearing**: In accordance with the Public Health Act, Section 24-1-5 (H) NMSA 1978, if immediate action is required to protect the health and safety of the general public, the qualified patient or primary caregivers, the program manager or designee may suspend the qualified patient, primary caregiver or licensed producer's license without notice.

**(1)** A licensee whose license has been summarily suspended is entitled to a record review not later than thirty (30) calendar days after the license was summarily suspended.

**(2)** The record review requested subsequent to a summary suspension shall be conducted by the administrative review committee.

**(3)** The administrative review committee shall conduct the record review on the summary suspension by reviewing all documents submitted by both licensee and the department.

**(4)** The sole issue at a record review on a summary suspension is whether the licensee's license shall remain suspended pending a final adjudicatory hearing and subsequent ruling by the secretary.

**(5)** A licensee given notice of summary suspension by the division may submit a written request for a record review. To be effective, the written request shall:

**(a)** be made within thirty (30) calendar days, from the date of the notice issued by the department, as determined by the postmark;

**(b)** be properly addressed to the medical cannabis program;

**(c)** state the applicant's name, address, and telephone numbers;

**(d)** provide a brief narrative rebutting the circumstances of the suspension, and

**(e)** include attachments of any additional documentation that the individual wishes to be considered in the record review. [7.34.4.15 NMAC - Rp, 7.34.4.13 NMAC, 12/30/2010]

**7.34.4.16 DISCIPLINARY ACTIONS AND APPEAL PROCESS:**

**A. Revocation of producer license**: Violation of any provision of this rule may result in either the summary suspension of a producer's license by the medical cannabis program manager or designee, or issuance of a notice of contemplated action by the program manager or designee to suspend, revoke or take other disciplinary action against the producer's license and revoke (or otherwise affect) lawful privileges under the Lynn and Erin Compassionate Use Act, NMSA 1978, Section 26-2B-1 *et seq*.

**B. Grounds for disciplinary action**. A license may be revoked or suspended, or have other disciplinary action taken against it, and a renewal application may be denied, for:

**(1)** failure to comply with or satisfy any provision of this rule;

**(2)** failure to allow a monitoring visit by authorized representatives of the department;

**(3)** falsification of any material or information submitted to the department;

**(4)** diversion of cannabis, as determined by the department; and

**(5)** threatening or harming a patient, a medical practitioner, or an employee of the department.

**C. Request for hearing**: A producer whose license has been summarily suspended or who has received a notice of contemplated action to suspend, revoke or take other disciplinary action may request a hearing, in addition to a request for an administrative review of written materials (as applicable), for the purpose of review of such action. The appellant shall file the request for hearing within thirty (30) calendar days of the date the action is taken or the notice of contemplated action is received. The request shall:

**(1)** be properly addressed to the medical cannabis program; a statement of the facts relevant to the review of the action;

**(2)** state the requestor's name, address and telephone numbers;

**(3)** include a statement of the provision of the act and the rules promulgated under the act that are relevant to the review of the action;

**(4)** include a statement of the arguments that the appellant considers relevant to the review of the action; and

**(5)** include any other relevant evidence.

**D. Hearing process**:

**(1)** All formal adjudicatory hearings held pursuant to this regulation shall be conducted by a hearing examiner appointed by the secretary.

**(2)** Hearings shall be conducted in Santa Fe, NM or, with the consent of the parties, in another location.

**(3)** Due to federal and state confidentiality laws, hearings held pursuant to this section shall be closed to the public.

**(4)** The hearing shall be recorded on audiotape or other means of sound reproduction.

**(5)** Any hearing provided for in this rule may be held telephonically.

**E. Scheduling**: The department shall schedule and hold the hearing as soon as practicable, however; in any event no later than sixty (60) calendar days from the date the department receives the appellant's request for hearing. The hearing examiner shall extend the sixty (60) day time period upon motion for good cause shown or the parties shall extend the sixty (60) day time period by mutual agreement. The department shall issue notice of hearing, which shall include:

**(1)** a statement of the time, place and nature of the hearing;

**(2)** a statement of the legal authority and jurisdiction under which the hearing is to be held;

**(3)** a short and plain statement of the matters of fact and law asserted;

**(4)** notice to any other parties to give prompt notice of issues controverted in fact or law; and

**(5)** all necessary telephone numbers if a telephonic hearing shall be conducted.

**F. Presentation of evidence**: All parties shall be given the opportunity to respond and present evidence and argument on all relevant issues.

**G. Record of proceeding**: The record of the proceeding shall include the following:

**(1)** all pleadings, motions and intermediate rulings;

**(2)** evidence and briefs received or considered;

**(3)** a statement of matters officially noticed;

**(4)** questions and offers of proof, objections and rulings thereon;

**(5)** proposed findings and conclusions; and

**(6)** any action recommended by the hearing examiner.

**H. A party may request a transcription of the proceedings**: The party requesting the transcript shall endure the cost of transcription.

**I. Procedures and evidence**:

**(1)** A party may be represented by a person licensed to practice law in New Mexico, a non-lawyer representative, or an individual appellant may represent him or herself.

**(2)** The rules of evidence as applied in the courts do not apply in these proceedings. Any relevant evidence shall be admitted. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

**(3)** Documentary and other physical evidence shall be authenticated or identified by any reasonable means that shows that the matter in question is what the proponent claims it to be.

**(4)** The experience, technical competence and specialized knowledge of the hearing examiner, the department or the department's staff may be used in the evaluation of evidence.

**J. Conduct of proceeding**: Unless the hearing examiner determines that a different procedure is appropriate, the hearing shall be conducted in accordance with the procedures set forth in this rule. The following procedures shall apply:

**(1)** the appellant shall present an opening statement on the merits and the appellee shall make a statement of the defense or reserve the statement until presentation of that party's case;

**(2)** after the opening statements, if made, the appellant shall present its case in chief in support of the appellant's petition;

**(3)** upon the conclusion of the appellant's case, the appellee shall present its case in defense;

**(4)** upon conclusion of the appellee's case, the appellant shall present rebuttal evidence;

**(5)** after presentation of the evidence by the parties, the appellant shall present a closing argument; the appellee then shall present his or her closing argument and the appellant shall present a rebuttal argument; and

**(6)** thereafter, the matter shall be submitted for recommendation by the hearing examiner.

**K. Burden of proof**: The appellant shall bear the burden of establishing by a preponderance of the evidence that the decision made or proposed by the department should be reversed or modified.

**L. Continuances**: The hearing examiner shall not grant a continuance except for good cause shown. A motion to continue a hearing shall be made at least ten (10) calendar days before the hearing date.

**M. Telephonic hearings**:

**(1)** Any party requesting a telephonic hearing shall do so within ten (10) business days of the date of the notice. Notice of the telephonic hearing shall be made to all parties and shall include all necessary telephone numbers.

**(2)** The appellee shall initiate the telephone call. The appellant is responsible for ensuring the telephone number to the appellant's location for the telephonic hearing is accurate and the appellant is available at said telephone number at the time the hearing is to commence. Failure to provide the correct telephone number or failure to be available at the commencement of the hearing shall be treated as a failure to appear and shall subject the petitioner to a default judgment.

**(3)** The in-person presence of some parties or witnesses at the hearing does not prevent the participation of other parties or witnesses by telephone with prior approval of the hearing examiner.

**N. Recommended action and final decision**:

**(1)** At the request of the hearing examiner or upon motion by either party granted by the hearing examiner and before the hearing examiner recommends action by the secretary, the parties shall submit briefs including findings of fact and conclusions of law for consideration by the hearing examiner. The hearing examiner holds the discretion to request briefs or grant a motion to submit briefs on any point of law deemed appropriate by the hearing examiner. Briefs submitted shall include supporting reasons for any findings or legal conclusions and citations to the record and to relevant law.

**(2)** No more than thirty (30) calendar days after after the last submission by a party, the hearing examiner shall prepare a written decision containing his or her recommendation of action to taken by the secretary. The recommendation shall propose to sustain, modify or reverse the initial decision of the department.

**(3)** The secretary shall accept, reject or modify the hearing examiner's recommendation no later than ten (10) calendar days after receipt of the hearing examiner's recommendation. The final decision or order shall be issued in writing and shall include a statement of findings and conclusions and the reasons thereof, on all material issues of fact, law or discretion involved, together with a statement of the specific action taken to sustain, modify or reverse the initial decision of the hearing examiner. Service shall be made by mail.

**(4)** The final decision or order shall be made a part of the non-profit private entity's file with the medical cannabis program.

[7.34.4.16 NMAC - Rp, 7.34.4.14 NMAC, 12/30/2010]

**7.34.4.17 EXEMPTION FROM STATE CRIMINAL AND CIVIL PENALTIES FOR THE MEDICAL USE OF CANNABIS:**

**A.** No licensed producer or employee of the licensed producer, qualified patient licensed as a producer or licensed primary caregiver shall be subject to arrest, prosecution or penalty, in a manner for the production, possession, distribution or dispensation of cannabis in accordance with this rule and the act.

**B.** Any property interest that is possessed, owned or used in connection with the production of cannabis or acts incidental to such production shall not be harmed, neglected, injured or destroyed while in the possession of state or local law enforcement officials. Any such property interest shall not be forfeited under any state or local law providing for the forfeiture of property except as provided in the Forfeiture Act. Cannabis, paraphernalia or other property seized from a qualified patient or primary caregiver in connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient or primary caregiver is entitled to the protections of the provisions of this rule and act as shall be evidenced by a failure to actively investigate the case, a decision not to prosecute, the dismissal of charges or acquittal.

[7.34.4.17 NMAC - Rp, 7.34.4.15 NMAC, 12/30/2010]

**7.34.4.18 LICENSED PRODUCER CONFIDENTIALITY:** The department shall maintain a confidential file containing the names, addresses and telephone numbers of the persons or entities who have either applied for or received a license for the purpose of producing cannabis for medical use. Any financial records of any such person or entity that are held by the department shall remain confidential and not subject to public disclosure, with the exception of reports created by the department, or reports collected by the department from non-profit producers. Individual names of producers and patients shall be confidential and not subject to disclosure, except:

**A.** to authorized employees or agents of the department as necessary to perform the duties of the department pursuant to the provisions of this rule and the act;

**B.** to authorized employees of state or local law enforcement agencies, but only for the purpose of verifying that a person is lawfully in possession of the license to produce, or as otherwise expressly permitted in this rule; or

**C.** as provided in the federal Health Insurance Portability and Accountability Act of 1996.

[7.34.4.18 NMAC - Rp, 7.34.4.16 NMAC, 12/30/2010]

**7.34.4.19 DISPOSAL OF UNUSED CANNABIS BY QUALIFIED PATIENTS:** Unused cannabis in the possession of a patient who holds a personal production license may be disposed of by transporting the unused portion to a state or local law enforcement office, or by destroying the unused cannabis.

[7.34.4.19 NMAC - Rp, 7.34.4.17 NMAC, 12/30/2010]

**7.34.4.20 ASSESSMENT REPORT:** The department shall evaluate the implementation of the Lynn and Erin Compassionate Use Act and regulations issued pursuant to that act and provide a report to the secretary of the department within one year of the effective date of these regulations. In performing its evaluation, the department shall focus on whether the needs of qualified patients are being met by the department's administration of the act and whether there is a demonstrable need for a state run production and distribution facility. The department's assessment report shall be issued every two years, shall be a public document, and must contain de-identified data upon which the assessment is based.

[7.34.4.20 NMAC - Rp, 7.34.4.18 NMAC, 12/30/2010]

**7.34.4.21 SEVERABILITY:** If any part or application of these rules is held to be invalid, the remainder or its application to other situations or persons shall not be affected. Any section of these rules legally severed shall not interfere with the remaining protections provided by these rules and the act.

[7.34.4.21 NMAC - Rp, 7.34.4.19 NMAC, 12/30/2010]

**HISTORY OF 7.34.4 NMAC:**

**History of Repealed Material:**
7.34.4 NMAC, Licensing Requirements for Producers, Production Facilities and Distribution (filed 12/01/2008) repealed 12/30/2010.

**NMAC History:**
7.34.4 NMAC, Licensing Requirements for Producers, Production Facilities and Distribution (filed 12/01/2008) was replaced by 7.34.4 NMAC, Licensing Requirements for Producers, Production Facilities and Distribution, effective 12/30/2010.

## NEW MEXICO DEPARTMENT OF HEALTH
EPIDEMIOLOGY AND RESPONSE DIVISION

7 NMAC 2.2, Vital Records and Statistics (filed 10/18/96) repealed 12/30/2010 and replaced by 7.2.2 NMAC, Vital Records and Statistics, effective 12/30/2010.

## NEW MEXICO DEPARTMENT OF HEALTH
EPIDEMIOLOGY AND RESPONSE DIVISION

**TITLE 7 HEALTH**
**CHAPTER 2 VITAL STATISTICS**
**PART 2 VITAL RECORDS AND STATISTICS**

**7.2.2.1 ISSUING AGENCY:** Department of Health, Epidemiology and Response Division, Bureau of Vital Records and Health Statistics.

[7.2.2.1 NMAC - Rp, 7 NMAC 2.2.1, 12/30/2010]

**7.2.2.2 SCOPE:** These regulations govern the creation and maintenance of a system of vital records and health statistics in New Mexico and insure the integrity of all vital records and health statistics issued or maintained by the department of health.

[7.2.2.2 NMAC - Rp, 7 NMAC 2.2.2, 12/30/2010]

**7.2.2.3 STATUTORY AUTHORITY:** The regulations set forth herein are promulgated by the secretary of the department of health by the authority of Section 9-7-6(F) NMSA 1978 and implement the Vital Statistics Act, Sections 24-14-1 to 24-14-31 NMSA 1978, as amended. These regulations also implement certain sections of the Uniform Parentage Act, 40-11-1 et seq. , at Sections 40-11-5 and 40-11-6 NMSA 1978.

[7.2.2.3 NMAC - Rp, 7 NMAC 2.2.3, 12/30/2010]

**7.2.2.4 DURATION:** Permanent.

[7.2.2.4 NMAC - Rp, 7 NMAC 2.2.4, 12/30/2010]

**7.2.2.5 EFFECTIVE DATE:** 12-30-10, unless a later date is cited at the end of a section.

[7.2.2.5 NMAC - Rp, 7 NMAC 2.2.5, 12/30/2010]

**7.2.2.6 OBJECTIVE:** These regulations are promulgated pursuant to statute for the purpose of installing, maintaining and operating a system of vital statistics throughout this state.

[7.2.2.6 NMAC - Rp, 7 NMAC 2.2.6, 12/30/2010]

**7.2.2.7 DEFINITIONS:** As used in these regulations.

A. "Act" means the Vital Statistics Act, Sections 24-14-1 to 24-14-31, NMSA 1978 as amended.

B. "Bureau" means the vital records and health statistics bureau, epidemiology and response division) within the department of health, which was formerly and in the statute referred to as the vital statistics bureau. Vital Statistics Act 24-14-1, et sequens, NMSA 1978.

C. "Certificate of still birth" means a certificate created by the BVRHS at the request of a parent named on a report of spontaneous fetal death which captures data from a report of a spontaneous fetal death reported in accordance with New Mexico law. The certificate is intended to memorialize a stillbirth event, but cannot be used as proof of a live birth, for identification or other legal purposes.

D. "Certifier", for purposes of death records means a person authorized to certify cause of death pursuant to the laws of New Mexico.

E. Dead body" means a human body or such parts thereof other than skeletal remains which cannot be classified as artifacts; dead within the meaning of Section 12-2-4 NMSA 1978.

F. "Department" means the department of health.

G. "Fetal death" means death prior to complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy; the death is indicated by the fact that after such expulsion or

extraction the fetus does not breathe or show any evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

(1) "Induced termination of pregnancy" means the purposeful interruption of pregnancy with the intention other than to produce a live-born infant or to remove a dead fetus, and which does not result in a live birth; induced abortion.

(2) "Spontaneous fetal death" means the expulsion or extraction of a product of human conception resulting in other than a live birth and which is not an induced termination of pregnancy; still birth.

H. "File" means to present a vital record for registration by the state registrar.

I. "Final disposition" means the burial, interment, cremation, removal from the state or other authorized disposition of a dead body or fetus.

J. "Forms" means all certificates, forms, electronic media, reports, and records, and any safety paper used in their production, which are vital records.

K. "Fraud manager" means an employee or representative of the bureau whose responsibilities include liaison with law enforcement, immigration, passport, embassy and consular officials, or other agencies, and who investigates and/or coordinates the investigation of any incidence or suspected incidence of fraud, or violation of statute or regulation, and who reports on these investigations to the state registrar.

L. "Immediate family" means any of the following: mother, father, grandmother, grandfather, grandchild, sibling, child or current spouse.

M. "Institution" means any establishment, public or private, which provides in-patient or out-patient medical or surgical, or diagnostic care or treatment or nursing, custodial, or domiciliary care, or to which persons are committed by law.

N. "Live birth" means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes, or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

O. "OMI" means the office of the medical investigator.

P. "Physician" means a person authorized or licensed to practice medicine or osteopathy pursuant to the laws of New Mexico.

Q. "Registration" means the acceptance by the state registrar and the incorporation into his or her official records of vital records provided for in the act.

R. "State" means the state of New Mexico.

S. "State registrar" means the person appointed under the Vital Statistics Act, section 24-14-14, et seq. NMSA 1978, and whose duties are described in the act at section 24-14-4 NMSA 1978.

T. "System of vital statistics" means the registration, collection, preservation, amendment and certification of vital records; the collection of other reports required by this act; and activities related thereto, including the tabulation, analysis and publication of vital statistics.

U. "Vital records" means certificates, records, reports, or registration forms of birth and death, and supporting documentation.

V. "Vital statistics" means the data derived from certificates and reports of birth, death, spontaneous fetal death, induced termination of pregnancy and related reports.

[7.2.2.7 NMAC - Rp, 7 NMAC 2.2.7, 12/30/2010]

**7.2.2.8 BUREAU OF VITAL RECORDS FORMS:** All forms used in the system of vital statistics are the property of the department, and shall be returned to the state registrar upon demand. Only those forms prescribed, distributed and approved by the state registrar shall be used in the reporting of vital records and statistics or in making copies thereof. Such forms shall be used for official purposes only.

A. Requirements for the preparation of forms.

(1) All certificates, registration forms, reports and records relating to vital statistics must either be prepared in approved electronic form or on a typewriter or printer which prints in unfading ink. All signatures required shall be entered in unfading ink, unless otherwise instructed in these or related regulations.

(2) Unless otherwise directed by the state registrar, no certificate, registration form, record or report shall be complete and acceptable for registration that:

(a) does not have the certifier's name typed or printed legibly with his or her signature;

(b) does not supply all items of information called for thereon or satisfactorily account for their omission;

(3) does not contain handwritten or approved electronic signatures, as required;

(4) includes alterations, including all manner of erasures, the use of correction fluids, and other correction devices;

(5) is marked "copy" or that is a carbon or photo or other copy;

(6) is prepared on an improper form;

(7) contains improper or inconsistent data;

(8) contains an indefinite cause of death which denotes only symptoms of disease or conditions resulting from disease;

(9) is not prepared in conformity with regulations or instructions issued by the state registrar.

B. **Missing or unknown information:** The state registrar shall request and be provided information from applicants, informants , or other interested parties if the registrar finds that information is missing, inconsistent, or listed as "unknown".

[7.2.2.8 NMAC - Rp, 7 NMAC 2.2.8, 12/30/2010]

**7.2.2.9 REGISTRATION OF BIRTH:** A certificate of birth registration form for each live birth which occurs in this state shall be filed with the bureau within ten (10) days after the birth and shall be registered if it has been completed and filed in accordance with the Vital Records Act and related regulations. Exceptions shall be only those noted in the Vital Records Act or related regulations, or upon written authorization of the state registrar.

A. **Infants of unknown parentage**: Foundling registration. The report for an infant of unknown parentage shall be registered on a foundling report, and:

(1) show the required facts as determined by approximation and show parentage information as "unknown";

(2) show the signature and title of the custodian in lieu of the attendant.

B. **Safe haven registration**: If parentage information is known for a safe haven baby (NMSA, 1978 section 24-22-1 et seq.) it shall be entered on the certificate of birth registration form for filing with the state registrar. If no parentage information is known, the certificate of birth registration form shall be completed as a foundling registration.

C. **Birth registration - eleven days to one year**: Birth registrations forms filed after ten (10) days, but within one year from the date of birth, shall be filed on the certificate of birth registration form in the manner prescribed in NMSA, 1978 section 24-14-13 as amended. Certificates issued pursuant to the section shall not be marked "delayed."

(1) In any case where the certificate of birth registration form is signed by someone other than the licensed attendant or person in charge of the institution where the birth occurred, a notarized statement setting forth the reason therefore must be attached to the certificate. The state registrar may require additional evidence in support of facts of birth and/or an explanation why the certificate of birth registration form was not filed within the required ten days.

(2) Out-of-hospital births not

attended by a licensed medical attendant (physician, licensed certified nurse midwife, licensed midwife, emergency medical technician) must be signed by the mother as certifier, and sworn by any other person in attendance (if any other person was in attendance), and must be accompanied by notarized documents which prove both that a birth occurred and the New Mexico county in which the birth occurred. The state registrar will issue instructions containing a list of documents which will be acceptable as proof of birth, and as proof of residency.
[7.2.2.9 NMAC - Rp, 7 NMAC 2.2.9, 12/30/2010]

**7.2.2.10 DELAYED CERTIFICATE OF BIRTH:** All births presented for registration one year or more after the date of birth are to be filed on an application for delayed certificate of birth form or other format prescribed by the state registrar. No application for a delayed birth certificate shall be approved except by the state registrar or the deputy state registrar. No delayed certificate of birth shall be prepared for a person who is deceased.

A. **Who may request the registration of and sign an application for a delayed birth certificate**. Any person whose birth is not registered in this state, or his/her parent, or legal guardian, may request the registration of a delayed certificate of birth, subject to these regulations, evidentiary requirements and instructions issued by the state registrar. The application for each delayed certificate of birth shall be signed and sworn to before an official authorized to administer oaths, by the person whose birth is to be registered if such person is eighteen (18) years of age or over and is competent to sign and swear to the accuracy of facts stated therein; otherwise, the application shall be sign and sworn to by one of the following:

(1) one of the parents of the applicant for registration; or

(2) the legal guardian of the applicant for registration.

B. **Facts to be established for a delayed registration of birth**. The minimum facts which must be established by documentary evidence shall be the following:

(1) the full name of the person at the time of birth;

(2) the date of birth;

(3) the place of birth;

(4) the full maiden name of the mother; and

(5) the full name of the father, if paternity has been established pursuant to the Vital Records Act and related regulations or the Uniform Parentage Act.

C. **Delayed registration following a legal change of status**. When evidence is presented and accepted reflecting a legal change of status by adoption, legitimation, paternity determination, denial of paternity, or acknowledgment of paternity; an amended, delayed certificate may be established to reflect such change. The existing certificate and the evidence upon which the amended, delayed certificate was based shall be placed in a special file. Such file shall not be subject to inspection except upon order of a court or by the state registrar for purposes of properly administering the vital statistics program.

D. **Documentary evidence requirements for delayed birth registration**: To be acceptable for filing the following is needed to support a delayed registration of birth:

(1) to establish the name of the registrant; at least two pieces of documentary evidence;

(2) to establish the date of birth; at least two pieces of documentary evidence;

(3) to establish the place of birth; at least two pieces of documentary evidence.

(4) to establish facts of parentage; at least one piece of documentary evidence.

E. **Documentary evidence - acceptability**: The state registrar may establish a priority of the best evidence, and will determine the acceptability of any document submitted as evidence.

(1) Documents presented such as census, hospital, church and school records must be from independent sources and shall be in the form of the original record or a duly certified copy thereof.

(2) All documents submitted in evidence must have been established at least five years prior to the date of the first application for a delayed birth certificate, or have been established prior to the applicant's tenth birthday, and may not have been established for the purpose of obtaining a certificate.

(3) Affidavits of personal knowledge are not acceptable as evidence to establish a delayed certificate of birth.

(4) All documents submitted to support a delayed certificate of birth are subject to verification.

(5) If any fraudulent document is submitted in evidence, no delayed birth certificate shall be prepared, and the fraud manager shall be notified of the attempt.

(6) Examples of acceptable documentary evidence include but are not limited to the following:

(a) enrollment of service records;

(b) tribal records from tribal authorities;

(c) social security proof of application (NUMIDENT);

(d) first application for marriage;

(e) first application for voter registration; and

(f) documents mentioned in Paragraph (1) of Subsection E of this section.

F. **Documentary evidence - retention of copies, abstracts**: The state registrar, or his or her designated representative, shall attach to the application for a delayed birth certificate, photo copies or an abstract and description of each document submitted to support the facts shown on the delayed birth certificate. All documents submitted in support of the delayed birth registration shall be returned to the applicant after review and use by the state registrar. The application and a copy of the documents submitted and accepted to support the delayed birth certificate shall be maintained in a permanent, confidential file. If an abstract is used in lieu of photo copies it shall include the following information:

(1) the title or description of the document;

(2) the name and address of the custodian, if the document is an original or certified copy of a record;

(3) the date of the original filing of the document being abstracted;

(4) the information regarding the birth facts contained in the document.

G. **Certification by the state registrar**: The state registrar shall, by signature, certify that:

(1) no prior birth certificate is on file for the person whose birth is to be recorded;

(2) he or she has reviewed and accepted the evidence submitted to establish the facts of birth;

(3) the list of documents accepted as evidence which is entered on the delayed certificate of birth accurately reflects the documents accepted as evidence.

H. **Rejection of applications for a delayed birth registration**: If an applicant for a delayed registration of birth fails to submit the minimum documentary evidence required for a delayed registration of birth or if the state registrar finds reason to question the validity or adequacy of the certificate or the documentary evidence, the state registrar shall not register the delayed certificate and shall advise the applicant of the reason for such by final rejection letter, signed by the state registrar. The final rejection letter with notice of such will be deemed the rejection of the application and related certificate for purposes of NMSA, 1978 section 24-14-16. Applicants initially submitting evidence for a delayed certificate of birth may receive preliminary letters from the *bureau of vital records and health statistics* requesting additional documentary evidence; such letters however shall not be considered the final rejection letter.

I. **Court order for delayed certificates of birth**. If an order from a court of competent jurisdiction to establish a delayed certificate of birth pursuant to NMSA, 1978 Sections 24-14-15 and 24-14-16 is entered the state registrar

shall require the applicant for the delayed certificate of birth to provide a duly certified copy of the court order and the related petition and supporting documents presented to the court to obtain such order, if the documents have not been previously received by the department. If the department was not given notice as required by statute of a hearing on a delayed birth certificate, the department and state registrar may seek legal redress.

J. **Dismissal in six months**: Applications for delayed certificates which have not been completed within six months from the date of initial application may be dismissed at the discretion of the state registrar. Upon dismissal, the state registrar shall so advise the applicant.

[7.2.2.10 NMAC - Rp, 7 NMAC 2.2.10, 12/30/2010]

**7.2.2.11 THE CREATION OF AMENDED CERTIFICATES OF BIRTH FOLLOWING ADOPTION, LEGITIMATION, DENIALS OF PATERNITY AND ACKNOWLEDGEMENTS OF PATERNITY AND OTHER LEGALLY RECOGNIZED DETERMINATIONS OF PARENTAGE:**

A. **Paternity**: Upon receipt of a sworn acknowledgement of paternity signed by both parents, if no other man is shown as the father on the original certificate, an amended certificate shall be prepared. A written request by both parents, if made within the first year of the child's birth, (unless acceptable proof is submitted that the mother is deceased, then by the father) that the minor child's surname be changed, and if no other man is shown as the father on the original certificate, a revised certificate shall be prepared.

B. **Court orders**: If a person claims a change in paternity but cannot provide acknowledgement and/or denial of paternity as prescribed in the Uniform Parentage Act Section 40-11A-3, the person will be advised to seek a court adjudication of paternity.

C. An amended certificate of birth shall be prepared by the state registrar for a child born in this state upon receipt of a certified copy of a court determination of parentage or other acceptable evidence of parentage as required by the state registrar pursuant to the provisions of the Vital Records Act and related regulations and the Uniform Parentage Act.

D. Creation of amended certificate:

(1) The amended certificate of birth prepared after adoption, a denial of paternity, legitimation, a determination of parentage, or an acknowledgement of paternity shall be prepared on the form in use at the time of its presentation, and shall include the following items and such other information necessary to complete the certificate:

(a) the name of the child;

(b) the date and place of birth as transcribed from the original certificate;

(c) the names and required personal information about the adoptive parent(s), the natural parent(s) or other legally recognized parents, whichever is applicable; and

(d) the original filing date.

(2) The information necessary to locate the existing certificate and to complete the amended certificate shall be submitted to the state registrar on a form prescribed by him or her.

E. **Existing certificate - special filing of**: Upon preparation of the amended certificate, the existing certificate and the evidence upon which the amended certificate was based shall be placed in a special file. Such file shall not be subject to inspection except upon order of a court of competent jurisdiction or by the state registrar for purposes of properly administering the vital statistics program.

[7.2.2.11 NMAC - Rp, 7 NMAC 2.2.11, 12/30/2010]

**7.2.2.12 ADOPTION OF FOREIGN BORN:**

A. **Final Decree Requirements**. On proof of adoption, a certificate of foreign birth shall be established by the state registrar for a person born in a foreign country who was not a citizen of the United States at the time of birth, provided the following conditions exist:

(1) the adopting parents are legal residents of New Mexico or members of the United States armed forces on active duty within the state of New Mexico;

(2) the child is adopted in New Mexico;

(3) a New Mexico court has issued an order recognizing the foreign adoption;

(4) the department is provided a certified copy of the report of adoption and related court order;

(5) the final decree of adoption includes or is amended to include the following court findings:

(a) the probable country of birth;

(b) the year (and if known), the date and place of birth;

(c) a provision directing the state registrar to establish a certificate of birth.

B. **Citizenship - limitations**. The birth certificate form used by the state registrar in cases of foreign birth shall state on its face "this certificate is not evidence of United States citizenship."

C. **Confidentiality**. The evidence of adoption shall be sealed by the state registrar and shall not be subject to public inspection. The information shall be opened for inspection only upon court order, or upon the authorization of the state registrar in accordance with the Adoption Act.

D. **Applicability**. This section applies only to individuals born in foreign countries and who were neither born to U.S. citizens residing abroad nor naturalized as citizens prior to the adoption.

[7.2.2.12 NMAC - Rp, 7 NMAC 2.2.12, 12/30/2010]

**7.2.2.13 DEATH REGISTRATION:**

A. **Filing Deadlines.** A certificate of death for each death which occurs in this state shall be filed within five days after the death and prior to final disposition. Exceptions to this period shall be only those afforded by statute or regulation.

(1) An extension of the required filing time for a certificate of death may be granted at the discretion of the state registrar to prevent undue hardship in accordance with NMSA, 1978 section 24-14-24.

(2) In all cases the medical certification must be signed by the person responsible for such certification. If the cause of death is unknown or undetermined, the cause and or manner of death shall be shown as such on the certificate.

B. **Incomplete certificate of death**. If all the information necessary to complete the certificate of death is not available within the time prescribed for filing of the certificate, the funeral service practitioner shall file the certificate completed with all information that is available, and attach a note explaining why the incomplete items cannot be completed at the time of submission.

(1) The affidavit providing the information missing from the original certificate shall be filed with the state registrar as soon as possible, but in all cases within 30 days of the date of the death occurred unless otherwise specifically approved by the state registrar.

(2) When the affidavit results in changes to the existing certificate of death, such affidavit shall be considered an amendment; the certificate of death shall be marked "amended," and the affidavit shall be attached to the original certificate which is retained by the bureau.

C. **Amendment of a certificate of death**. Unless otherwise provided for in these regulations, the certificate of death may be amended only in the following manner:

(1) Statistical items: non-medical statistical items, including but not limited to: ethnicity, education, race and occupation may be amended when new facts become available. The affidavit/change procedure described in Paragraphs (1) and (2) of Subsection B of 7.2.2.13 NMAC shall be used. Additional evidence may be required by the state registrar.

(2) Date of death, place of death, time of death, date pronounced, time pronounced, manner of death, and any portion of the cause of death may not be changed through the use of an amended certificate. These items shall only be changed by the preparation and filing of a medical affidavit signed by the certifier.

(3) The amendment of medically related items and items related to injury may only be submitted by the office of the medical investigator or equivalent military or tribal authorities and only on the form prescribed by the state registrar. Should the certificate of death be revised, resulting in changes of referenced material, the state registrar shall advise customary users of the certificate of the changes.

(4) An amendment of the marital status at time of death shall be made only if it is:

(a) requested by the person listed as informant on the certificate of death (who signs a notarized affidavit indicating that they previously gave incorrect info.); or

(b) accompanied by a notarized affidavit from the informant agreeing to the amendment; or

(c) requested by the funeral practitioner who provides an affidavit that the information as filed with the bureau was inconsistent with the information provided to such practitioner by the informant; or

(d) accompanied by a certified copy of a district court order directing the change in marital status, along with a copy of the petition for such order and evidence submitted to the court in support of the requested amendment, if such information was not previously supplied to the bureau.

D. **Certificate of death occurring in a hospital or other institution and not under the jurisdiction of OMI**. When a death occurs in a hospital or other institution, and the death is not under the jurisdiction of the office of the medical investigator, the person in charge of such institution, or his or her designated representative, may initiate the preparation of the certificate of death as follows.

(1) Place the full name of the decedent and the date and place of death on the certificate of death, and obtain information on the method and place of disposition and enter on the disposition part of the certificate, and obtain from the certifier the medical certification of cause of death and the certifier's signature;

(2) Present the partially completed certificate of death to the funeral service practitioner or person acting as such and advise them that they need to complete the missing items on the certificate and file it with the bureau of vital records and health statistics.

(3) For all deaths in which OMI assumes jurisdiction, including but not limited to a death without medical attendance and presumptive death, see OMI administrative rules at OMI 86-1.

[7.2.2.13 NMAC - Rp, 7 NMAC 2.2.13, 12/30/2010]

**7.2.2.14 DELAYED REGISTRATION OF DEATH:** Any certificate issued for a death registered after the time prescribed by statute and regulation shall be marked "delayed." The delayed registration of a death shall be registered in the manner prescribed below.

A. If the certifier, at the time of death and the attending funeral services practitioner or person who acted as such are available to complete and sign the certificate of death, it may be completed without additional evidence and filed with the state registrar. For those certificates of death filed one year or more after the date of death, the certifier or office of the medical investigator and the funeral service practitioner or person who acted as such must state in accompanying affidavits that the information on the certificate of death is based on records kept in their files.

B. In the absence of the certifier or office of the medical investigator and the funeral service practitioner or person who acted as such, the prescribed delayed certificate of death form may be filed by the immediate family of the decedent and shall be accompanied by:

(1) an affidavit of the person filing the certificate swearing to the accuracy of the information on the certificate;

(2) two documents which identify the decedent and his or her date and place of death, a summary of which shall be placed on the certificate.

C. The state registrar may reject a certificate of death or require additional documentary evidence to prove the facts of death, or in his or her discretion refer the case to the office of the medical investigator.

[7.2.2.14 NMAC - Rp, 7 NMAC 2.2.14, 12/30/2010]

**7.2.2.15 DISPOSITION OF REPORTS OF INDUCED TERMINATION OF PREGNANCY:** Reports of induced termination of pregnancy are statistical reports only and are not to be incorporated into the official records of the vital records and health statistics bureau, nor to be issued in any manner. The state registrar is authorized to dispose of the reports when all statistical processing of the records has been accomplished. However, the state registrar may establish a file of the records so they will be available for future statistical and research projects provided the file is not made a part of the official records and the reports are not made available for the issuance of certified copies. The file shall be retained for as long as the state registrar deems necessary, but in no case shall any report of induced termination of pregnancy be retained for longer than 18 months, and it shall then be destroyed. The file may be maintained by photographic, electronic, or other means as determined by the state registrar, in which case the original report from which the photographic, electronic or other file was made shall be destroyed. The provisions of Section 15 shall also apply to all records of induced termination of pregnancy filed prior to the adoption of this part.

[7.2.2.15 NMAC - Rp, 7 NMAC 2.2.15, 12/30/2010]

**7.2.2.16 AUTHORIZATION FOR FINAL DISPOSITION:**

A. **Disposition of Body**. Before final disposition of a dead body or a fetus, the funeral service practitioner or person acting as such shall.

(1) Obtain assurance from the certifier that death is from natural causes and that the certifier will assume responsibility for certifying the cause of death or fetal death.

(2) For any case which comes under the jurisdiction of the office of the medical investigator, notify the office of the medical investigator and obtain authorization for removal and final disposition of a dead body or fetus.

B. **Disposition of a dead body not under the supervision of a licensed New Mexico funeral service practitioner, direct disposer**. When a death occurs in a hospital or other institution, and the disposition is not under the supervision of a licensed New Mexico funeral service practitioner, or direct disposer, the person in charge of such an institution or his or her designated representative shall:

(1) initiate the certificate of death or burial as follows:

(a) place the full name of the decedent and the date of death on the certificate of death registration form;

(b) obtain the information from the person to whom the body is being released and complete on the disposition section of the form the method and place of disposition; and

(c) obtain the medical certification of the cause of death from the certifier and the certifier's signature;

(2) obtain and verify through identification the full name and address of the person to whom the dead body is being released for disposition, and the place of disposition; and

(3) advise the person taking charge of the dead body of the statutory requirements to file the certificate of death registration form within 5 days, and prior to final disposition;

(4) send a photocopy of the partially completed certificate of death along with the name and address of the person who is not a funeral service practitioner, but who is acting as such, to the bureau of vital records and health statistics within five (5) days;

(5) the original, partially completed copy of the registration form shall be completed by the person who is not a funeral service practitioner, but who is acting as such, to file within 5 days with the bureau of vital records and health statistics.

C. **Filing of fetal death report**. For any fetal death of 500 grams or more occurring in the state, a fetal death report shall be filed by the hospital, institution, physician, or, in the event the fetal death was unattended by any of the former, by the office of the medical investigator within 5 days and prior to final disposition. If a fetal death occurs with a midwife in attendance, the office of the medical investigator must be notified since New Mexico law limits pronouncement of death to a physician, certified nurse practitioner, or the office of the medical investigator. If a funeral service practitioner is aware that a fetal death occurred without medical attention, he shall initiate a fetal death report and notify the office of the medical investigator. In all circumstances, a fetal death report must be initiated before the fetus is released for disposition.

D. **Authorization for disinterment and reinterment**. An authorization for disinterment and reinterment of a dead body shall be issued by the state registrar or state medical investigator on the form prescribed, upon receipt of a written request from the immediate family and the person who is in charge of the disinterment or upon receipt of an order of a court of competent jurisdiction directing the disinterment. A disinterment/reinterment permit can only be issued to a licensed funeral service practitioner or direct disposer.

(1) Upon receipt of a court order or signed permission of the owner of the cemetery or burial ground, the state registrar or state medical investigator may issue one authorization to permit disinterment and reinterment of all remains in a mass disinterment. Insofar as possible, the remains of each body should be identified. The place of disinterment and reinterment shall be specified, including the cemetery name, the city, county and state of burial. The authorization shall be permission for disinterment, transportation and reinterment.

(2) Authorization shall be obtained from the state archaeologist for disinterment subject to the provisions of Section 18-6-11 NMSA 1978.

(3) A dead body properly prepared by an embalmer and deposited in a receiving vault shall not be considered a disinterment when removed from the vault for final disposition.

(4) No permit shall be issued for disinterment/reinterment of a dead body within the boundaries of a single cemetery, but notice of such should be provided to the immediate family of the decedent.

[7.2.2.16 NMAC - Rp, 7 NMAC 2.2.16, 12/30/2010]

**7.2.2.17 AMENDMENT OF LIVE BIRTH AND DEATH CERTIFICATES:** This section is intended to supplement previous sections regarding the amendment of live birth and death records.

A. **Who may apply to amend a certificate - birth and death**.

(1) To amend a birth certificate, application may be made by both parents, the legal guardian, the registrant if 18 years of age or over, or the individual responsible for filing the certificate. On any request not made by the registrant him or herself for a child age fourteen years of age or older, the child must sign the application or give notarized consent to the change, and Section 17.D [now Subsection D of 7.2.2.17 NMAC] of these regulations applies.

(2) To amend a certificate of death, application may be made by the immediate family or the funeral service practitioner or person acting as such who signed the certificate of death. Applications to amend the medical certification of cause of death shall be made only by the certifier who signed the medical certification or the office of the medical investigator. Other requested amendments shall be in conformance with these regulations and the Vital Records Act.

B. **Minor Errors**.

(1) Correction of minor errors by the state registrar during the first year of birth: Correction of obvious minor errors, transposition of letters in words of common knowledge, or omissions may be made by the state registrar either upon his or her own observation or query.

(2) Correction of minor errors may be made upon request of the immediate family of the registrant during the first year after birth. The certified certificate shall not be marked "amended."

C. **Amendments of first or middle name**. Unless otherwise provided for in these regulations or in statute, all applications for amendment to change the first and/or middle name on a vital record shall be supported by.

(1) An affidavit setting forth information to identify the certificate; the incorrect data as it is listed on the certificate; the correct data as it should appear, together with two or more items of acceptable documentary evidence which support the alleged facts and which were established at least five years prior to the date of the first application for amendment and within seven years of the date of the event.

(2) When minor corrections are made by the state registrar, a notation as to the source of the information, together with the date the change was made and the initials of the authorized agent making the change shall be made on the computer file, but shall not become a part of any certificate issued.

(3) The state registrar shall evaluate the evidence submitted in support of any amendment, and when he or she finds reason to doubt its validity or adequacy the amendment may be rejected and the applicant advised of the reasons for this action.

(4) The bureau may also amend a record upon receipt of a court order for a name change made pursuant to the provisions of NMSA, 1978 Section 40-8-1.

D. **Other Amendments**.

(1) Any application for amendment to change a last name on a vital record, except as otherwise provided in these regulations, shall be accompanied by an order from a court of competent jurisdiction.

(2) Any amendment to a vital record not addressed in these regulations shall be at the discretion of and in the manner prescribed by the state registrar.

E. **Amendment of given name - birth certificates**. If acceptable evidence specified by the state registrar is presented which demonstrates a registrant has commonly used a given name other than that shown on a certificate of birth, given names may be amended upon written request of the registrant or:

(1) both parents; or

(2) the mother in the case of a child with no legally recognized father; or

(3) the father in the case of the death or incapacity of the mother; or

(4) the mother in the case of the death or incapacity of the father; or

(5) the guardian or agency having evidence of legal custody of the registrant; or

(6) any other legally recognized parent or legal custodian of a minor.

F. **Addition of given names - birth certificates**. Given names, for a child whose birth was recorded without given names, may be added to the certificate upon written request of the registrant; or

(1) both parents; or

(2) the mother in the case of a child with no legally recognized father; or

(3) the father in the case of the death or incapacity of the mother; or

(4) the mother in the case of the death or incapacity of the father; or

(5) the guardian or agency having evidence of legal custody of the registrant; or

(6) any other legally recognized

parent or legal custodian of a minor, or

(7) upon the receipt of an order by a court of competent jurisdiction

G. **Amendment of the same item more than once**. Once an amendment of an item is made on a vital record, that item shall not be amended again except upon receipt of a court order.

H. When an applicant or informant does not submit the minimum documentation required in the regulations for issuing or amending a vital record, or when the state registrar has reasonable cause to question the validity or adequacy of the applicant's sworn statements or the documentary evidence submitted, the state registrar shall not issue or amend the vital record and shall advise the applicant of the reason for the action.

[7.2.2.17 NMAC - Rp, 7 NMAC 2.2.17, 12/30/2010]

**7.2.2.18 CERTIFICATES OF STILL BIRTH:**

A. **Form of Fetal Death Report**. The state registrar shall prescribe the form and content of a spontaneous fetal death report.

B. **Application**. The state registrar shall prescribe the form and content of an application for a certificate of still birth which shall specify the information necessary to prepare the certificate.

C. **Form of Certificate of Still Birth**. The state registrar shall prescribe the form of a certificate of still birth and such form shall be distinct from the form for a certificate of live birth.

(1) A certificate of still birth shall include the state file number of the corresponding spontaneous fetal death report.

(2) The certificate of still birth shall contain the phrase "not evidence of live birth, or intended for identification or other legal purposes."

D. **Information on Certificate of Still Birth**. If requested, the state registrar shall create a certificate of still birth based on the information contained in a report of spontaneous fetal death filed with the bureau in accordance with New Mexico law.

E. **Who may request a certificate of Still Birth**. Only a person designated as a parent on a report of spontaneous fetal death may request and receive a certificate of still birth pertaining to that spontaneous fetal death.

F. **Cost**. Certificates of still birth will be issued at no cost to the requesting parent.

G. **Amendments**. The bureau will not accept or process requests for substantive amendments to a certificate of still birth. Minor or clerical errors may be remedied if information on the application for a certificate of still birth differs from the report of spontaneous fetal death filed with the bureau.

H. **Retroactivity**. The bureau shall create certificates of still birth for still birth events that occurred from January 1980 forward if a report of spontaneous fetal death was filed with the bureau. The bureau does not have information to create certificates of still birth for still birth events prior to January 1980. If data held by the bureau for the creation of retroactive certificates of still birth is incomplete, supplemental information may be provided by the mother at the time of application for a retroactive certificate and such information will be accepted at the discretion of the state registrar.

I. **Retention of Fetal Death Reports**: Spontaneous fetal death reports filed after the finalization of this rule section (7.7.2.18 NMAC) shall be maintained as permanent records of the bureau. Spontaneous fetal death reports filed prior to the finalization of this rule, 7.2.2.18 NMAC, but maintained by the bureau pursuant to 7.2.2.15 NMAC (prior to amendment) shall be permanently maintained by the bureau to support the creation of retroactive certificates of still birth.

[7.2.2.18 NMAC - N, 12/30/2010]

**7.2.2.19 RECORD PRESERVATION AND DESTRUCTION:** When an authorized reproduction of a vital record has been properly prepared by the state registrar and when all steps have been taken to ensure the continued preservation of the information, the record from which the authorized reproduction was made may be disposed of by the state registrar. The record may not be disposed of, however, until the quality of the authorized reproduction has been tested to ensure that acceptable certified copies can be issued and until a security copy of the document has been placed in a secure location removed from the building where the authorized reproduction is housed. When no longer required for administrative use, the state registrar shall offer the original documents from which the authorized reproductions are made to the state records center and archives which shall be allowed to permanently retain the records pursuant to the restrictions in the vital statistics law and regulations related to access to such records. If the state records center and archives does not wish to place the records in its files the state registrar shall be authorized to destroy the documents upon receipt of written permission from state records and archives. The destruction shall be by approved methods for disposition of confidential or sensitive documents.

[7.2.2.19 NMAC - Rp, 7 NMAC 2.2.18, 12/30/2010]

**7.2.2.20 DISCLOSURE OF RECORDS:**

A. To protect the integrity of vital records the state registrar or other authorized custodian of vital records shall not permit inspection of, nor disclose information contained in vital statistics records, or copy or issue a copy of all or part of any vital record unless he or she is satisfied that the applicant has a direct and tangible interest in the record.

(1) The registrant, a member of the registrant's immediate family, the registrant's legal guardian, or any of their respective legal representatives shall be considered to have a direct and tangible interest. Others may demonstrate a direct and tangible interest when information is needed for determination or protection of a personal or property right of the registrant.

(2) The term "legal representative" shall include an attorney, executor of the estate, physician, funeral service practitioner, trust officer or other corporate fiduciary or other authorized agent acting on behalf of the registrant or his or her family.

(3) The natural parents of adopted children, when neither has custody, and business firms or other agencies requesting listings of names and addresses shall not be considered to have a direct and tangible interest.

B. The state registrar may permit the use of data from vital statistics records for statistical or research purposes, subject to those conditions the state registrar may impose. No data shall be furnished from records for research purposes until the state registrar has prepared or accepted, in writing, the conditions under which the records or data will be used, and the estimated or actual charges therefore and has received an agreement signed by a responsible agent of the agency or research organization agreeing to meet with and conform to the conditions.

C. The state registrar in his or her discretion may disclose copies or data from vital statistics records in accordance with the Vital Records Act and to federal, state, county, or tribal governments, or municipal agencies of government which the request data in the conduct of their official duties, except that any costs incurred by the bureau shall be the responsibility of the receiving agency.

D. Information from vital statistics records indicating a birth occurred to an unmarried woman may be disclosed only if it can be shown that disclosure of the information will be of benefit to the registrant.

E. The state registrar or authorized local custodian shall not issue a certified copy of a record until a signed application has been received from the applicant. Whenever the state registrar shall deem it necessary to establish an applicant's

right to information from a vital record, the state registrar or local custodian may also require acceptable identification of the applicant and/or a sworn statement.

F. Nothing in this part shall be construed to permit disclosure of information contained in the "information for medical and health use only" section of the birth certificate unless specifically authorized by the state registrar for statistical or research purposes.

G. When 100 years have elapsed after the date of birth, provided the registrant is deceased, or 50 years have elapsed after date of death, the records in the custody of the state registrar shall become public records and any person may obtain copies of the record upon submission of an application containing sufficient information to locate the record and the payment of the proper fee.

H. No person except the parent or parents designated on a report of spontaneous fetal death shall be considered to have direct and tangible interest concerning that record of spontaneous fetal death and any resulting certificate of still birth.

[7.2.2.20 NMAC - Rp, 7 NMAC 2.2.19, 12/30/2010]

**7.2.2.21 VITAL RECORDS: FORM AND REPRODUCTION OF RECORDS, VERIFICATION AND FRAUD:**

A. **Reproduction of Records**. Copies of vital records may be made by mechanical, electronic, or other reproductive process, except that the information contained in the "information for medical and health use only" section of the birth certificate shall not be included, except as provided by statute or regulation.

B. **Form of Records**. The format of all certificates shall be at the discretion of the state registrar. Each non-memorial certificate to be authentic shall contain the seal of the state of New Mexico, the signature of the state registrar or authorized delegate, and a certification as prescribed.

C. **Verification**. Confidential verification of the facts contained in a vital record may be furnished by the state registrar to any federal, state, county or municipal government agency, or to any other agency representing the interest of the registrant, subject to and any limitations as provided for in these regulations. Verifications shall be on forms prescribed and furnished by the state registrar, or on forms furnished by the requesting agency and acceptable to the state registrar; or, the state registrar may authorize the verification in other ways when it shall prove in the best interests of his or her office. Costs incurred in the provision of the verification shall be the responsibility of the receiving agency.

D. **Fraud**. When the state registrar finds evidence that a certificate was registered through misrepresentation or fraud, he or she shall have authority to withhold the issuance of the certificate. If any certificate has already been issued and cannot be recalled, the state registrar shall tag the record for non-issuance, and notify all concerned agencies of the presumption of fraud.

[7.2.2.21 NMAC - Rp, 7 NMAC 2.2.20, 12/30/2010]

**7.2.2.22 MISSING CHILD REPORTING:** Upon notification of the state registrar by a law enforcement agency that a child born in this state is missing, the record shall be flagged "M.C., do not issue."

A. Upon notification by a law enforcement agency that a child born outside this state is missing, the state registrar shall notify the corresponding officer in the state where the child was born that the child has been reported missing.

B. In response to any inquiry or request for a certificate, the state registrar or any appointed local registrar appointed by him or her shall not provide a copy of a birth certificate or information concerning the birth record of any missing child whose record is flagged, except following the notification of the law enforcement agency having jurisdiction over the investigation of the missing child.

C. Upon notification by a law enforcement agency that a missing child has been recovered, the state registrar shall remove the flag from the child's birth record.

[7.2.2.22 NMAC - Rp, 7 NMAC 2.2.21, 12/30/2010]

**7.2.2.23 FEES FOR COPIES, SEARCHES AND OTHER SERVICES:** No copy of a birth certificate or certificate of death shall be issued until the fee for the copy is received unless specific approval has been obtained from the state registrar or otherwise provided for by statute or regulation.

A. Each search for a birth certificate shall be $10 and each search for a death certificate shall be $5.00. The fee shall include one certified copy of the record, if available, and if no record is found the fee shall be non-refundable.

B. **Delayed birth or death registration**. The fee for the establishment of a delayed record shall be $10.00 and shall include one certified copy of the delayed record.

C. Amendments.

(1) **Minor corrections**. For the amendment of a record due to obvious errors, omissions on birth records (other than the name of the father), or transposition of letters in words of common knowledge, there shall be no charge.

(2) **Major corrections**. For the amendment of a record requiring the creation of an affidavit of correction or the submission of documentary evidence to support a change or correction to a record, the fee shall be ten dollars ($10.00) for the revision, and $10.00 for one certified copy of the amended record.

D. **Multiple Copies**. The fee for additional copies, after those provided for in Subsections A. and B., and Paragraph (2) of Subsection C, of this section shall be $10.00 for each copy of a birth certificate and $5.00 for each copy of a death certificate.

E. **Other**. For any statistical research, other agency verification, data provision service or permit not specified in statute, the state registrar shall determine the fee for service on the basis of the costs of providing such services and determine the manner in which such costs must be paid.

[7.2.2.23 NMAC - Rp, 7 NMAC 2.2.22, 12/30/2010]

**7.2.2.24 PENALTIES:**

A. Except for violations of Section 24-14-18 NMSA 1978, any person is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978, who willfully and knowingly:

(1) make any false statement or supplies any false information in a report, record or certificate required to be filed;

(2) with the intent to deceive, alters, amends or mutilates any report, record or certificate;

(3) uses or attempts to use, or furnishes to another for use for any purpose of deception any certificate, record, report or certified copy that has been altered, amended, or mutilated or contains false information; or

(4) neglects or violates any of the provisions of the Vital Statistics Act 24-14-1 to 24-14-31 NMSA 1978 as amended, or refuses to perform any of the duties imposed upon him or her by that act.

B. Any person who willfully and knowingly permits inspection of or discloses information contained in vital statistics records of adoptions or induced abortions, or copies or issues a copy of all or part of any record of an adoption or induced abortion, except as authorized by law, is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act 31- 18-12 to 31-18-21 NMSA 1978 as amended.

[7.2.2.24 NMAC - Rp, 7 NMAC 2.2.23, 12/30/2010]

**7.2.2.25 COURT ORDERS:**

A. Court orders received by the bureau which order the amendment or creation of a vital records which are inconsistent with information known or maintained by the bureau may require the formal or other challenge of such if the

bureau was not given notice of the related hearing or otherwise made aware of the proceeding prior to receiving the court order or was not provided with supporting documentary evidence relied on by the court to support its findings. Such action is necessary to protect the integrity and accuracy of the vital records held by the state registrar pursuant to state law.

B. The bureau will work cooperatively with tribal courts and authorities to meet the requirements of state law and the needs of the tribes.

[7.2.2.25 NMAC - 7 NMAC 2.2, 12/30/2010]

**HISTORY OF 7.2.2 NMAC:**

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

HSSD 70-3, Amendment of Regulations Governing Preservation, Disposition, Transportation, Interment and Disinterment of Dead Human Bodies, filed 2/17/70.

HSSD 77-7, Regulations Governing the Reporting, Transporting, Storing, Preserving and Disposing of Dead Human Bodies and Fetal Remains (Stillborns), filed 10/12/77.

HED 79-HSD-3, Regulations Governing the Disposition of Human and Fetal Remains, filed 10/11/79.

HSSD 77-5, Regulations Governing the New Mexico Vital Statistics Act, filed 7/26/77.

HSSD 77-6, Regulations Governing the Reporting, Filing and Use of Reports of Induced Abortion, filed 8/9/77.

HED-82-5 (HSD), Vital Statistics Regulations, filed 7/28/82.

HED 89-7 (PHD), Regulations Governing New Mexico Vital Records and Statistics, filed 8/21/89.

**History of Repealed Material:**

7 NMAC 2.2, Vital Records and Statistics (filed 10/18/96) repealed 12/30/2010

**Other History:**

HED 89-7 (PHD), Regulations Governing New Mexico Vital Records and Statistics (filed 8/21/89) was renumbered, reformatted, amended and replaced by 7 NMAC 2.2, Vital Records and Statistics, effective 10/31/1996.

7 NMAC 2.2, Vital Records and Statistics (filed 10/18/1996) was renumbered, reformatted and replaced by 7.2.2 NMAC, Vital Records and Statistics, effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

**Notice of Repeal**

8.50.100 NMAC, Child Support Enforcement Program: General Provisions, filed 5-14-2001 is hereby repealed and replaced by 8.50.100 NMAC, Child Support Enforcement Program: General Provisions, effective 12-30-2010.

8.50.105 NMAC, Intake, filed 5-14-2001 is hereby repealed and replaced by 8.50.105 NMAC, Intake, effective 12-30-2010.

8.50.106 NMAC, Location, filed 5-14-2001 is hereby repealed and replaced by 8.50.106 NMAC, Location, effective 12-30-2010.

8.50.110 NMAC, Income Withholding, filed 5-14-2001 is hereby repealed and replaced by 8.50.110 NMAC, Income Withholding, effective 12-30-2010.

8.50.111 NMAC, General Enforcement of Support Obligations, filed 5-14-2001 is hereby repealed and replaced by 8.50.111 NMAC, General Enforcement of Support Obligations, effective 12-30-2010.

8.50.112 NMAC, Administrative Enforcement of Support Obligations, filed 11-2-2009 is hereby repealed and replaced by 8.50.112 NMAC, Administrative Enforcement of Support Obligations, effective 12-30-2010.

8.50.113 NMAC, Enforcement of Support Obligations from Federal Employees Including Members of the Armed Services, filed 5-14-2001 is hereby repealed and replaced by 8.50.113 NMAC, Enforcement of Support Obligations from Federal Employees Including Members of the Armed Services, effective 12-30-2010.

8.50.114 NMAC, Financial Institution Data Match (FIDM), filed 5-14-2001 is hereby repealed and replaced by 8.50.114 NMAC, Financial Institution Data Match (FIDM), effective 12-30-2010.

8.50.115 NMAC, Expedited Processes and Administrative Expedited Process, filed 5-14-2001 is hereby repealed and replaced by 8.50.115 NMAC, Expedited Processes and Administrative Expedited Process, effective 12-30-2010.

8.50.117 NMAC, International Child Support Enforcement, filed 5-14-2001 is hereby repealed and replaced by 8.50.117 NMAC, International Child Support Enforcement, effective 12-30-2010.

8.50.124 NMAC, Interstate Cases, filed 5-14-2001 is hereby repealed and replaced by 8.50.124 NMAC, Interstate Cases, effective 12-30-2010.

8.50.125 NMAC, Fees, Payments, and Distributions, filed 5-14-2001 is hereby repealed and replaced by 8.50.125 NMAC, Fees, Payments, and Distributions, effective 12-30-2010.

8.50.129 NMAC, Case Management, filed 5-14-2001 is hereby repealed and replaced by 8.50.129 NMAC, Case Management, effective 12-30-2010.

8.50.130 NMAC, Administrative Hearings, filed 5-14-2001 is hereby repealed and replaced by 8.50.130 NMAC, Administrative Management, effective 12-30-2010.

8.50.131 NMAC, Penalties, filed 5-14-2001 is hereby repealed and replaced by 8.50.131 NMAC, Penalties, effective 12-30-2010.

8.50.132 NMAC, Unclaimed Child, Spousal or Medical Support, filed 5-3-2004 is hereby repealed and replaced by 8.50.132 NMAC, Unclaimed Child, Spousal or Medical Support, effective 12-30-2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 100 GENERAL PROVISIONS**

**8.50.100.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.100.1 NMAC - Rp, 8.50.100.1 NMAC, 12/30/10]

**8.50.100.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.

[8.50.100.2 NMAC - Rp, 8.50.100.2 NMAC, 12/30/10]

**8.50.100.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).

[8.50.100.3 NMAC - Rp, 8.50.100.3 NMAC, 12/30/10]

**8.50.100.4 DURATION:** Permanent.
[8.50.100.4 NMAC - Rp, 8.50.100.4 NMAC, 12/30/10]

**8.50.100.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.100.5 NMAC - Rp, 8.50.100.5 NMAC, 12/30/10]

**8.50.100.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.100.6 NMAC - Rp, 8.50.100.6 NMAC, 12/30/10]

**8.50.100.7 DEFINITIONS:** Unless otherwise apparent from the context, the following definitions shall apply throughout these regulations.

A. **"Account"** means a demand deposit account checking or negotiable withdrawal order account, savings account, time deposit account, or money-market mutual fund account.

B. **"Arrearage"** means the amount of support owed that was unpaid and has been consolidated into a judgment. Also referred to as arrears or past-due support.

C. **"AFDC"** means aid to families with dependent children. AFDC is now replaced by the TANF/ NM works program. Where TANF/ NM works is referenced in these regulations, the provisions apply to AFDC cases.

D. **"Authorized representative"** means a person acting under the authority of a valid power of attorney (with a general or specific designation regarding a child support case), a guardian ad litem, an attorney representing a person, or the parent of a minor having a child support case. The person will be required to produce documentation of his or her authorized status.

E. **"Business day"** means a day on which state offices are open for regular business.

F. **"CP"** means custodial party or custodial parent.

G. **"CSED"** means the child support enforcement division of the human services department that is the New Mexico IV-D agency, designated by NMSA 1978, Section 27-2-27, as the single state agency for the enforcement of child, medical, and spousal support obligations pursuant to Title IV-D of the Social Security Act.

H. **"CSES"** means the child support enforcement system (the computer system for CSED).

I. **"Delinquency"** means any payment under an order for support that has become due and is unpaid and has not been consolidated into a judgment. This may also be known as overdue support.

J. **"Department"** means the New Mexico human services department.

K. **"Department's records"** means all physical and automated records maintained by the department on any person, as well as access to automated and physical records maintained by other persons.

L. **"Dependant"** means a minor who has not emancipated by age or by court order. This is the same as a "minor child."

M. **"DMSH"** means data match specification handbook.

N. **"Distribution"** means the act of collecting child support payments and disbursing those payments to the proper individual or agency.

O. **"District court"** means the judicial district courts, family courts, and child support hearing officers having jurisdiction over child support matters in the state of New Mexico.

P. **"Employer"** means the same as the term in Section 3401(d) of the Internal Revenue Code of 1986 and includes any governmental entity and any labor organization.

Q. **"FIDM"** means financial institution data match.

R. **"Financial institution"** is defined in NMSA 1978, Section 27-1-13.

S. **"Family violence"** means the family violence indicator or non-disclosure indicator on the child support computer system.

T. **"Genetic testing"** means any testing methodology used to determine parent and child relationship as described in NMSA 1978, Section 40-11A-503.

U. **"Hearings bureau"** means the Title IV-D hearings bureau.

V. **"Hearing officer"** means the Title IV-D administrative hearings officer or administrative law judge.

W. **"HSD"** means the human services department.

X. **"Location"** means information concerning the physical whereabouts of a person or the person's employer(s), other sources of income, or assets as appropriate, which is sufficient and necessary to take the next appropriate action in a case.

Y. **"NCP"** means non-custodial party or non-custodial parent.

Z. **"Obligee"** means any person who is entitled to receive support under an order for support or that person's legal representative or assignee pursuant to NMSA 1978, Section 27-2-28 (F).

AA. **"Obligor"** means the person who owes a duty to make payments under an order for support.

BB. **"Order for support"** means any order that has been issued by any judicial, quasi-judicial or administrative entity of competent jurisdiction of any state, territory, or nation that has entered into a reciprocal agreement for the establishment and enforcement of orders for support with the United States and which order provides for:

(1) periodic payment of funds for the support of a child or a spouse;

(2) modification or resumption of payment of support;

(3) payment of delinquency; or

(4) reimbursement of support.

CC. **"Payor"** means any person or entity who provides income to an obligor.

DD. **"Person"** means an individual, corporation, partnership, governmental agency, public office or other entity.

EE. **"Physical or emotional harm"** means being subjected to: physical acts that resulted in, or threatened to result in, physical injury; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in non-consensual sexual acts or activities; threats of, or attempts at, physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

FF. **"Proof of service"** means the completed document demonstrating that service has been completed in accordance with the New Mexico rules of civil procedure at Rule 1-004 NMRA. The documents include, but are not limited to: an affidavit of mailing, acceptance of service, certificate of service, or return of service.

GG. **"Secretary"** means the secretary of the human services department.

HH. **"SDU"** means the state disbursement unit that collects and disburses payments in all IV-D cases.

II. **"Service of process"** means:

(1) service has been accepted by the person signing an acceptance of service; or

(2) service performed pursuant to Rule 1-004 NMRA.

JJ. **"Support order"** means a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child or children, including a child who has attained the age of majority under the law of the issuing state, or a child and the parent with whom the child is living, which provides for monetary support, medical support, or arrearages.

KK. **"TANF/NM works"** means federally funded temporary assistance to needy families / New Mexico works (see

AFDC).

LL. **"Title IV"** programs mean the various programs operated under the Social Security Act (42 USC Chapter 7, Title IV). IV-A refers to TANF and IV-B or IV-E refers to foster care. See definition below for "IV-D".

MM. **"Title IV-D"** or **"Title IV-D agency"** or **"IV-D agency"** means the single and separate state agency authorized by Title IV, Subsection D of the Social Security Act (42 USC 651 et seq.) to operate a child support program. Both states and tribes may administer a Title IV-D program. The New Mexico "Title IV-D" agency is authorized by NMSA 1978, Section 27-2-27.

NN. **"Title IV-D agency director"** or **"division director"** means the director of the child support enforcement division of the New Mexico human services department.

OO. **"Title IV-D staff"** or **"IV-D staff"** means employees of the state of New Mexico assigned to operate a child support program to also include any contractors with the IV-D agency.

PP. **"Title XIX"** means medicaid programs that are operated under Title XIX of the Social Security Act.

QQ. **"UIFSA"** means Uniform Interstate Family Support Act (replaces the former Uniform Reciprocal Enforcement of Support Act). A case from another jurisdiction that has not yet adopted UIFSA shall be treated as a New Mexico UIFSA case. (See NMSA 1978, Section 40-6A-101 et. seq.).

[8.50.100.7 NMAC - Rp, 8.50.100.7 NMAC, 12/30/10]

**8.50.100.8 GENERAL PROGRAM DESCRIPTION:** Child support enforcement services include establishing paternity, obtaining enforceable orders of support, collection and distribution of on-going support and arrears, and medical support, as appropriate. Any case with an enforceable order is an enforcement case, although some intake functions, such as non-custodial party locate may be required in order to enforce the order.

[8.50.100.8 NMAC - Rp, 8.50.100.8 NMAC, 12/30/10]

**8.50.100.9 PROGRAM SERVICES:**

A. There are six major program services in child support enforcement, of which one or more may be appropriate for a particular case:

(1) non-custodial parent location;

(2) establishment of paternity;

(3) establishment of a support obligation (including medical support);

(4) collection and distribution of support payments (including spousal and medical support);

(5) enforcement of support obligation, (including medical and spousal support); and

(6) review and adjustment of support obligation.

B. A non -IV-A applicant may, upon payment of a fee, request the non-custodial parent be located so he/she can pursue support individually. Requests for parent locate only are processed by the state parent locate unit and the applicant is informed of the results.

C. Spousal support: The IV-D agency does not take any action to establish an order for spousal support. It remains the obligee's responsibility to establish such an order. The responsibility of the IV-D agency is limited to enforcing existing spousal support orders. The IV-D agency may enforce spousal support when:

(1) the payee has a previously established order for spousal support or the payee subsequently obtains an order for spousal support, and

(2) the minor child and the payee are living in the same household, and

(3) the child support obligation established will be enforced by the IV-D agency; existing spousal support orders must be enforced even if the spousal support and child support are in separate orders.

D. Parental kidnapping and child custody cases: Federal and state parent locate services may be used to locate parents involved in parental kidnapping and custody cases pursuant to 42 USC 663 and 45 CFR 303.15. Any information obtained through the state or federal parent locate service shall be treated as confidential and shall be used solely for the purpose for which it was obtained and shall be safeguarded. A fee may be charged to cover the costs of processing requests for information. A separate fee may be charged to cover costs of searching for a social security number before processing a request for location information.

E. Mandatory and optional services: As a condition of eligibility, IV-A and IV-E applicants are mandated to receive full services, including medical support, and do not have the option to refuse any IV-D services. Medicaid only referrals that include an assignment of rights, including SSI referrals, are mandated to receive medical support services, but have the option of receiving full service. The custodial party must cooperate in establishing paternity and medical support. Non-IV-A, non-medicaid applicants may receive child support services, subject to service and the actual cost of fees.

[8.50.100.9 NMAC - Rp, 8.50.100.9 NMAC, 12/30/10]

**8.50.100.10 RESPONSIBILITY AND DELEGATION OF AUTHORITY:** Pursuant to NMSA 1978, Section 27-2-27, the New Mexico human services department's child support enforcement division (CSED) is the single and separate organizational unit designated to administer Title IV-D of the Social Security Act. It is responsible and accountable for the operation of the child support enforcement program insuring that its functions are being carried out in accordance with the relevant federal and state laws and regulations.

[8.50.100.10 NMAC - Rp, 8.50.100.10 NMAC, 12/30/10]

**8.50.100.11 ATTORNEY REPRESENTATION:** Per NMSA 1978, Section 27-2-27(E), the Title IV-D attorneys only represent the human services department. There is no express or implied attorney-client relationship between IV-D attorneys and applicants or recipients of IV-D services. Although applicants and recipients of IV-D services may interact with IV-D attorneys regarding their cases, the interaction with the IV-D attorneys does not indicate any confidential relationship that the person would have with a private attorney. All IV-D applicants and recipients are on notice that information provided to the IV-D agency (either to IV-D staff or attorneys) will not be disclosed to the general public, but may be used to collect support from either parent. The IV-D agency reserves the right to invoke the attorney work product privilege as it pertains to its attorneys and their work for the IV-D agency.

[8.50.100.11 NMAC - Rp, 8.50.100.11 NMAC, 12/30/10]

**8.50.100.12 PRIVATE COUNSEL:** Applicants for Title IV-D child support services may hire private legal counsel to represent their interests. The IV-D agency will cooperate with private attorneys, to the extent that such cooperation does not compromise the interests of the state. Applicants and their attorneys shall keep the IV-D agency fully informed of any private proceedings. If applicants or their legal representatives engage in conduct that is deemed to be non-cooperative, the case shall be eligible for closure. The IV-D agency is under no obligation to litigate any matters filed pro se by the custodial party or filed by a private attorney.

[8.50.100.12 NMAC - Rp, 8.50.100.13 NMAC, 12/30/10]

**8.50.100.13 CONFIDENTIALITY:**

A. The IV-D agency has access to the entire IV-A case file and to material in the medicaid case file. Information contained in the IV-A and IV-D records is subject to federal and state confidentiality requirements. Federal and state law restrict the use or disclosure of information concerning applicants or recipients of program services to purposes

directly connected with the administration of the IV-D program. No unauthorized use, dissemination or disclosure of information in the possession of the IV-D agency will be made or permitted. (See 42 USC 654 (a) (26) and 45 CFR 303.21). Department records are confidential and may not be released to third parties without a court order or as otherwise provided by federal or state law. Department records include, but are not limited to: address/locate information, audits, correspondence with other state agencies, payment records, distribution records, and employer information.

B. Unless authorized by federal law, no release of information concerning the whereabouts of persons subject to a protective order or about whom the state has reasonable evidence of domestic violence or child abuse shall be made.

C. A non-disclosure indicator will be entered on the child support enforcement system (CSES) and on the physical case file if a protective order or family violence affidavit is submitted. A court order for unsupervised visitation is not generally compatible with a non-disclosure indicator. A non-disclosure indicator will not be entered if a support order or divorce decree provides for unsupervised visitation, unless there is a specific court protective order.

D. The federal government may disclose confidential information on a New Mexico Title IV-D case in accordance with 42 USC 653.

E. All state and local staff and contractors who may have access to or be required to use confidential program data in the computerized support system will:

(1) be informed of applicable requirements and penalties, including those in section 6103 of the Internal Revenue Service Code (26 USC 6103);

(2) be adequately trained in security procedures; and

(3) be subject to have administrative penalties, including dismissal from employment, for unauthorized access to, disclosure, or use of confidential information.

F. The Title IV-D agency will redact personal identifying information to include social security numbers and dates of birth when releasing documents pursuant to a request for information, unless that information is being released pursuant to a specific program operation (i.e. court required information or administrative enforcement).

[8.50.100.13 NMAC - Rp, 8.50.100.14 NMAC, 12/30/10]

**8.50.100.14 AUTHORIZED RELEASE OF INFORMATION:** Some information must be released to persons outside the agency. IV-D staff will exercise caution in releasing information on a IV-D case. Information should be released only after the identity of the requestor and the right to receive the information is clearly established. The burden of proving the legitimacy of a request is on the requestor.

A. Information may be released to the following parties:

(1) Applicants or recipients of IV-D services: Custodial and non-custodial parties of IV-D cases, their respective attorney of record, guardian, or power of attorney may obtain information concerning the receipt and distribution of payments, copies of legal documents filed in court on their case, public assistance benefits history, payment records, official notifications for a fee established by HSD, and correspondence from either the custodial or non-custodial party. They are not entitled to receive information that relates to the state's legal strategy or is otherwise protected by federal and state laws.

(2) Information may be released per the operational requirements of the program, subject to federal and state laws on confidentiality. Other agencies/requesters include, but are not limited to: district courts, credit reporting agencies, tax intercept programs, financial institutions, other Title IV agencies, medicaid agencies, authorized government agents (both federal and state authorized government agents must present adequate identification and permission from the individual concerned unless otherwise authorized to receive information), the federal office of child support enforcement and other state governmental bodies that are responsible for issuing licenses or holding money that is collectible by the IV-D agency.

(3) Congressional, executive or legislative inquiries - Congressional, executive and legislative inquiries are subject to all regulations governing confidentiality.

(4) Other individuals - Other individuals may obtain information through legal discovery procedures or from the custodial or non-custodial party.

B. Requests for information:

(1) Phone inquiries - IV-D staff will not release information on the telephone to anyone other than the custodial party, the non-custodial party, or his or her authorized representative. Requests by a third party for information must be submitted in writing.

(2) Written requests - Written requests for case information shall be screened by the Title IV-D agency to determine what information, if any, will be released.

(3) Walk-in requests - The same precautions applying to phone inquiries shall be used in dealing with walk-in requests for information. If uncertainty exists as to the identity of the requestor, the worker will ask to see identification before providing case information.

(4) Third party requests - The Title IV-D agency will not honor a request for information from a third party without a notarized release from either the custodial party or non-custodial party that specifies the information to be released. A third party may not obtain information pursuant to an authorized release unless the party consenting to the release is entitled to receive the information. The information provided will be in accordance with authorized releases according to federal and state law. The Title IV-D agency reserves the right to provide the requested information directly to either the custodial party or non-custodial party rather than the third party requestor or to redact personal or confidential information, as appropriate. An attorney of record for a custodial or non-custodial party is not considered a third party requestor.

[8.50.100.14 NMAC - Rp, 8.50.100.15 NMAC, 12/30/10]

**8.50.100.15 WRITTEN STATEMENTS OF COLLECTION PROVIDED TO RECIPIENTS OF IV-D SERVICES:**

A. General written communication regarding collections: Upon a request from a recipient of IV-D services, the IV-D agency will make available a written statement, no more than twice a year, of payments made to the obligee by the obligor through the IV-D agency pursuant to an order for support, and the amount of any delinquency still owed to the obligee by the obligor.

B. Notice of collection of assigned support: The IV-D agency provides notice to recipients of benefits under Title IV-A of the Social Security Act of the amount of support payments collected for each quarter. No notice will be sent if:

(1) no collection is made in the quarter;

(2) the assignment is no longer in effect; and

(3) there are no assigned arrearages.

[8.50.100.15 NMAC - Rp, 8.50.100.16 NMAC, 12/30/10]

**8.50.100.16 CONTROLS AND REPORTING:** The IV-D agency maintains records necessary for the proper and efficient operation of the state plan and for the reporting accountability required by the federal office of child support enforcement including records regarding the following:

A. application for support services available under the state plan;

B. location of non-custodial parties, action to establish paternity, and obtain and enforce support and the costs incurred in such action;

C. amount and sources of

support collections and the distribution of these collections;

D. any fees charged or paid for support enforcement services;

E. administrative costs; and

F. statistical, fiscal, and other records necessary to the reporting required.

[8.50.100.16 NMAC - Rp, 8.50.100.18 NMAC, 12/30/10]

**8.50.100.17 CHANGE OF ADDRESS:** All requests for address and phone number changes must be made in writing or made in person with proper identification. If a person changing his or her address on file with the Title IV-D agency is receiving distributions by warrant (check), the request to update an address must be in writing and notarized or made in person with proper identification. The failure of a custodial party or non-custodial party to maintain a valid address on file with the Title IV-D agency may result in one of the following, as appropriate for that party: further enforcement actions, closure of the Title IV-D case, or the surrender of support that has been determined to be unclaimed property pursuant to 8.50.132 NMAC.

[8.50.100.17 NMAC - N, 12/30/10]

**History of 8.50.100 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:

ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

ISD SCEB 512.0000, Conditions Under Which Confidential Information May Be Released, 6-23-80.

NMAC History:

8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:

8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.

8.50.100 NMAC, General Provisions, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 105 INTAKE**

**8.50.105.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.105.1 NMAC - Rp, 8.50.105.1 NMAC, 12/30/10]

**8.50.105.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.

[8.50.105.2 NMAC - Rp, 8.50.105.2 NMAC, 12/30/10]

**8.50.105.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).

[8.50.105.3 NMAC - Rp, 8.50.105.3 NMAC, 12/30/10]

**8.50.105.4 DURATION:** Permanent.

[8.50.105.4 NMAC - Rp, 8.50.105.4 NMAC, 12/30/10]

**8.50.105.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.

[8.50.105.5 NMAC - Rp, 8.50.105.5 NMAC, 12/30/10]

**8.50.105.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.

[8.50.105.6 NMAC - Rp, 8.50.105.6 NMAC, 12/30/10]

**8.50.105.7 DEFINITIONS: [RESERVED]**

[See 8.50.100.7 NMAC]

**8.50.105.8 PROVISION OF SERVICES:** The IV-D agency shall provide services to anyone who has filed a proper application for services.

A. Services to residents and non-residents: Services will be made available to residents of other states on the same terms as to residents of the state of New Mexico. The IV-D agency shall not be required to provide services when neither party resides in the state of New Mexico and the state is not actively seeking reimbursement of public assistance paid. There is no citizenship requirement as a pre-condition for Title IV-D services.

B. Provision of services for recipients of other benefit programs: Federal regulations also require the IV-D agency to provide services equally to intrastate and interstate cases, including IV-D, IV-E, medicaid only, and non-IV-A cases. Information detailing the services offered by the IV-D agency, the responsibilities of the custodial party, the IV-D agency's fee schedule, and requirements to cooperate must be provided to all recipients of IV-A and medicaid benefits within five (5) days of referral to the IV-D agency. The IV-A agency provides this information to all applicants/recipients of IV-A and medicaid benefits when the IV-A case is opened.

C. Provision of services when all dependants are emancipated:

(1) Intrastate cases: The IV-D agency will not accept an application or re-open a closed case for the establishment or enforcement of a support order when all dependants are emancipated. The existence of a public assistance benefit history does not obligate the IV-D agency to pursue or re-open a case when the dependants are emancipated.

(2) Interstate cases: The IV-D agency will not establish paternity or an order of support after all dependants are emancipated. The IV-D agency will, however, enforce an existing order of support when all dependants are emancipated in accordance with NMSA 1978, Section 40-6A-101 et seq.

[8.50.105.8 NMAC - Rp, 8.50.105.8 NMAC, 12/30/10]

**8.50.105.9 NON-PUBLIC ASSISTANCE APPLICATIONS:** The IV-D agency shall make applications for child support services readily accessible to the public. When an individual requests an application for IV-D services, the application shall be provided on the day the individual makes the request in person. The application shall be sent within no more than five (5) working days of a written or telephone request. An application is considered to be filed on the day it is received by the IV-D agency. The IV-D agency shall not accept applications from individuals seeking to pursue claims of parentage or support against their biological or adoptive parents.

[8.50.105.9 NMAC - Rp, 8.50.105.9 NMAC, 12/30/10]

**8.50.105.10 PROCESSING REFERRALS AND APPLICATIONS:** For all cases appropriately referred and for all applications, federal regulations mandate that within twenty (20) calendar days of receipt of an appropriate referral or application submitted to the IV-D agency, the IV-D staff opens a case by establishing a case record. Based on an assessment of the case to determine necessary action, within the same twenty (20) calendar days the IV-D agency must:

A. solicit necessary and relevant information from the custodial party and other relevant sources;

B. initiate verification of information, which may include interviewing the custodial party to determine the next action on the case; and

C. if there is inadequate information to proceed, a request for

additional information must be made or the case referred for parent location services.
[8.50.105.10 NMAC - Rp, 8.50.105.10 NMAC, 12/30/10]

**8.50.105.11 GENERAL REQUIREMENTS FOR APPLICANTS AND RECIPIENTS OF IV-D BENEFITS:**

A. Title IV-D applicants and recipients: The state IV-D agency will provide services relating to the establishment of paternity or the establishment, modification, or enforcement of support obligations for a child, as appropriate, under the plan with respect to each child for whom:

(1) assistance is provided under the state program funded under Title IV-A of the Social Security Act;

(2) benefits or services for foster care maintenance are provided under the state program funded under Title IV-E of the Social Security Act;

(3) medical assistance is provided under the state plan approved under Title XIX of the Social Security Act and an assignment of support rights is indicated;

(4) any other child, if an individual, who is either a biological parent, adoptive parent, or a legal custodian of the child, applies for such services with respect to the child.

B. Title IV-A, IV-E foster care, and medicaid only recipients: Appropriate recipients of Title IV-A, IV-E foster care, and medicaid only (where an assignment of rights is indicated and cooperation is required) are referred to the IV-D program and are eligible for all IV-D services. When a family needs support from a non-custodial parent and is approved for IV-A, IV-E foster care, non-IV-E medicaid, or medicaid benefits, a referral is made to the IV-D regional office. The medicaid only recipient, who has assigned support rights and whose cooperation is required, must receive medical support services but can decline receipt of all other IV-D services. In addition, post-IV-A recipients will continue to receive IV-D services until they inform the division that they no longer desire these services.

C. Non-IV-A applicants: Non-IV-A families can apply for program services through the completion of a non-IV-A application for services.

D. Non-resident applicant: A non-resident applicant who applies for services through the IV-D agency in his/her state of residence is eligible for assistance from the New Mexico IV-D program under applicable laws, so long as the other party resides in the state of New Mexico.

E. Non-custodial parent applicant: The non-custodial parent can apply for program services for the purpose of establishing paternity, child support, medical support, making support payments, or to request a review of an existing child support court order. Any other person or entity who has standing to request an adjustment to the child support order may apply for services.
[8.50.105.11 NMAC - Rp, 8.50.105.11 NMAC, 12/30/10]

**8.50.105.12 SUPPORT ASSIGNMENT AND COOPERATION REQUIREMENTS:**

A. Cooperation with the IV-D agency is required of all recipients of IV-D services regardless of public assistance benefit status. The IV-D agency pursues sanction and disqualification of recipients of services, as appropriate, and may close any IV-D case for a failure to cooperate. Cooperation includes, but is not limited to:

(1) providing all information regarding the identity and location of the absent parent (including the names of other persons who may have information regarding the identity or location of the absent parent);

(2) appearing for scheduled appointments;

(3) reviewing and signing forms and court documents;

(4) providing documentation relevant to the claim for an award of support;

(5) appearing at court or administrative hearings, as required;

(6) immediately notifying the IV-D agency if the dependant(s) is no longer in the care or custody of the custodial party;

(7) reporting all direct payments made to the custodial party prior to and during the provision of services by the IV-D agency;

(8) immediately notifying the IV-D agency if the dependant(s) is involved in adoption proceedings;

(9) keeping the IV-D agency informed of changes in contact information; and

(10) providing all requested information to the IV-D agency in a timely manner.

B. If there is an assignment of support rights pursuant to NMSA 1978, Section 27-2-28, the IV-D agency will request a sanction or disqualification of a member of a public assistance benefit group for noncompliance with IV-D agency cooperation requirements. The IV-D agency will notify the appropriate agency of compliance if the custodial party resolves the issue of noncompliance with the IV-D agency.

(1) IV-A public assistance benefits - referrals for sanctions or disqualifications are sent to and handled by the IV-A agency.

(2) Title XIX medicaid - if there is an assignment of support rights and cooperation is mandated, the IV-D agency will request disqualification of the member that is not cooperating with the IV-D agency. The disqualification status continues until the member cooperates with the IV-D agency.
[8.50.105.12 NMAC - Rp, 8.50.105.12 NMAC, 12/30/10]

**8.50.105.13 BENEFITS OF COOPERATION:** The establishment of a child's paternity may give the child rights to future social security, veteran's or other government benefits as well as inheritance rights should the non-custodial parent become disabled or deceased. The amount established for child support (with medical support) under child support award guidelines can help provide financially for the child. Medical support in the form of private health insurance can help provide for the medical needs of the child. Pursuant to federal law, the State IV-D agency is required to make determinations related to custodial party cooperation in locating absent and alleged parents, establishing parentage, and establishing and enforcing support obligations in Title IV-A cases.
[8.50.105.13 NMAC - Rp, 8.50.105.13 NMAC, 12/30/10]

**8.50.105.14 GOOD CAUSE FOR REFUSAL TO COOPERATE:** In some cases it may be determined by the IV-D agency that the IV-A or medicaid applicant recipient's refusal to cooperate is with good cause.

A. Good cause may be claimed when the applicant's/recipient's cooperation in establishing paternity, securing child or medical support or pursuing liability for medical services is reasonably anticipated to result in the following:

(1) physical or emotional harm to the child for whom support is to be sought;

(2) physical or emotional harm to the caretaker/parent with whom the child is living that reduces the capacity to care for the child adequately.

B. Good cause may also be claimed when at least one of the following circumstances exist and the IV-D worker believes that proceeding to establish paternity, secure child or medical support or pursuing liability for medical services would be detrimental to the child for whom assistance is sought:

(1) the child was conceived as a result of incest or rape; or

(2) legal proceedings for the adoption of the child are pending before a court of competent jurisdiction; or

(3) the applicant/recipient is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish the child for adoption, and the discussions have not gone on for more than three (3) months.

C. Any person requesting a good cause exemption to a public assistance benefit requirement to cooperate, must fill

out a request for a good cause exemption on a form provided by the IV-D agency and provide any documentation requested by the IV-D agency. The request for a good cause exemption will be reviewed by the IV-D agency and the requestor will be informed of the decision in writing. The requestor's failure to complete the form or provide the requested documentation will result in an automatic denial of the request.
[8.50.105.14 NMAC - Rp, 8.50.105.14 NMAC, 12/30/10]

**8.50.105.15 DOMESTIC VIOLENCE AND CHILD ABUSE:** The IV-D agency ensures that no information is released that may result in harm to any person related to a case. Reasonable evidence of domestic violence or child abuse is defined as the existence of a protective order or an affidavit completed by the requesting person that indicates there is reasonable evidence that physical or emotional harm will occur if personal and locate information is released in the administration of the case. If there is an order for unsupervised visitation, the requestor must also demonstrate through documentation that to limit the release of information by presenting a copy of a protective order to the Title IV-D agency. The IV-D agency, however, cannot protect the name of a person(s). A custodial party or a non-custodial party using a substitute address pursuant to NMSA 1978, Section 40-13-11 must inform the Title IV-D agency of his or her current address when he or she is no longer participating in or has been denied the use of the substitute address through the New Mexico secretary of state's office.
[8.50.105.15 NMAC - N, 12/30/10]

**History of 8.50.105 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 518.0000, Establishing The CSEB Case Record, 6-23-80.
ISD CSEB 522.0000, Non-AFDC Forms, 6-23-80.
ISD CSEB 522.0000, Non-AFDC Forms, 1-20-81.
ISD CSEB 519.0000, Cooperation In Obtaining Support, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.
History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.105 NMAC, Intake, filed 5/14/2001 - Repealed effective 12/30/2010.

# NEW MEXICO HUMAN SERVICES DEPARTMENT
## CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 106 LOCATION**

**8.50.106.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.106.1 NMAC - Rp, 8.50.106.1 NMAC, 12/30/10]

**8.50.106.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.
[8.50.106.2 NMAC - Rp, 8.50.106.2 NMAC, 12/30/10]

**8.50.106.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.106.3 NMAC - Rp, 8.50.106.3 NMAC, 12/30/10]

**8.50.106.4 DURATION:** Permanent.
[8.50.106.4 NMAC - Rp, 8.50.106.4 NMAC, 12/30/10]

**8.50.106.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.106.5 NMAC - Rp, 8.50.106.5 NMAC, 12/30/10]

**8.50.106.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.106.6 NMAC - Rp, 8.50.106.6 NMAC, 12/30/10]

**8.50.106.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.106.8 LOCATION OF NON-CUSTODIAL PARENTS:** The state is required to use appropriate federal, interstate, and local location sources and to use appropriate state agencies and departments as authorized by state law in locating the non-custodial parent, his or her employer, and all sources of income and assets.
[8.50.106.8 NMAC - Rp, 8.50.106.8 NMAC, 12/30/10]

**8.50.106.9 TIME FRAMES FOR PARENT LOCATE:** Federal regulations require that within seventy-five (75) calendar days of determining that location is necessary, the IV-D agency will access all appropriate location sources.
[8.50.106.9 NMAC - Rp, 8.50.106.9 NMAC, 12/30/10]

**8.50.106.10 VERIFICATION OF LOCATION:** Location information must be verified prior to service of process. Federal regulations require that the IV-D case record contain documentation of the date, time, and name of each location source, even when the source failed to provide helpful information.
[8.50.106.10 NMAC - Rp, 8.50.106.12 NMAC, 12/30/10]

**8.50.106.11 THE STATE PARENT LOCATOR SERVICE:** The New Mexico IV-D agency established a state parent locator service (SPLS) that operates out of the agency's central office. The state parent locator service is authorized to submit location information requests to the federal parent locator service. If all attempts to locate a non-custodial parent fail at the local office level, these cases may be referred to the state parent locator service provided that at least the non-custodial parent's full name and either an approximate date of birth or social security number are known.
[8.50.106.11 NMAC - Rp, 8.50.106.10 NMAC, 12/30/10]

**8.50.106.12 FEDERAL PARENT LOCATOR SERVICE (FPLS):** The IV-D agency may utilize the FPLS in accordance with 42 USC 653 and 45 CFR 303.70. All information obtained is subject to federal and state laws regarding confidentiality of information. Neither parties nor their respective private legal representative may apply directly to the SPLS for FPLS information in parental kidnapping and child custody cases. Parties or their respective legal representative may, however, petition a state district court to request location information from the FPLS concerning the absconding parent and missing child. A party can request appropriate state officials who are authorized persons to make a locate request. A state district court may request FPLS information in connection with a child custody determination in adoption and parental rights determination cases.
[8.50.106.12 NMAC - Rp, 8.50.106.13 NMAC, 12/30/10]

**8.50.106.13 DECEASED PARTIES:** If a party or dependant is reported as deceased, the death must be verified. Verification may consist of written verification from the vital statistics bureau, office of the medical investigator or from

any other accepted official source. If the deceased is a non-custodial parent, after receipt of verification, a determination as to the existence of an estate is to be made and the possibility of a levy against the estate. If it is determined that no further action can be taken and no levy against the non-custodial parent's estate can occur, the case qualifies for closure.
[8.50.106.13 NMAC - Rp, 8.50.106.14 NMAC, 12/30/10]

**8.50.106.14 STATE CASE REGISTRY:** The IV-D agency established a state case registry that contains records with respect to:

A. each case in which services are being provided on or after October 1, 1998 by the state Title IV-D agency; and

B. each support order established or modified in the state on or after October 1, 1998, whether or not the order was obtained by the Title IV-D agency. (NMSA 1978, Section 27-1-8).
[8.50.106.14 NMAC - Rp, 8.50.106.15 NMAC, 12/30/10]

**8.50.106.15 LOCATOR INFORMATION FROM INTERSTATE NETWORKS:** The state IV-D agency is authorized to have access to any system used by the state to locate an individual for purposes relating to motor vehicle or law enforcement.
[8.50.106.15 NMAC - Rp, 8.50.106.16 NMAC, 12/30/10]

**8.50.106.16 STATE DIRECTORY OF NEW HIRES:** The department established a state directory of new hires pursuant to the State Directory of New Hires Act ("Act"), NMSA 1978, Section 50-13-1 et seq. The department may, at its discretion, contract this service, as appropriate. All information required by the act may be provided to a contractor designated by the department.
[8.50.106.16 NMAC - Rp, 8.50.106.18 NMAC, 12/30/10]

**History of 8.50.106 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 531.0000, Location Efforts at the Local Level, 6-23-80.
ISD CSEB 539.0000, Use of the Federal Parent Locator Service (FPLS) in Parental Kidnapping and Child Custody Cases, 2-15-83.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.
History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.106 NMAC, Location, filed 5/14/2001 - Repealed effective 12/30/2010

## NEW MEXICO HUMAN SERVICES DEPARTMENT
### CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 110 INCOME WITHHOLDING**

**8.50.110.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.110.1 NMAC - Rp, 8.50.110.1 NMAC, 12/30/10]

**8.50.110.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.
[8.50.110.2 NMAC - Rp, 8.50.110.2 NMAC, 12/30/10]

**8.50.110.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.110.3 NMAC - Rp, 8.50.110.3 NMAC, 12/30/10]

**8.50.110.4 DURATION:** Permanent.
[8.50.110.4 NMAC - Rp, 8.50.110.4 NMAC, 12/30/10]

**8.50.110.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.110.5 NMAC - Rp, 8.50.110.5 NMAC, 12/30/10]

**8.50.110.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.110.6 NMAC - Rp, 8.50.110.6 NMAC, 12/30/10]

**8.50.110.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.110.8 INCOME WITHHOLDING:** State and federal laws require the IV-D agency to seek to obtain an immediate income withholding in all Title IV-D cases.

A. The IV-D agency complies with the Support Enforcement Act, NMSA 1978, Section 40-4A-1 et seq. when it requests or initiates wage withholding.

B. Although the Support Enforcement Act provides for a good cause exemption to immediate wage withholding and a procedure to avoid immediate income withholding, the IV-D agency will not stipulate or agree to such provisions. The party requesting to avoid wage withholding bears the burden or proof on this issue with the court.

(1) The IV-D agency will comply with any valid court or administrative order that prohibits wage withholding.

(2) If an obligor receives an exemption to wage withholding and later accrues a delinquency, the IV-D agency, in its discretion, may pursue wage withholding from the appropriate judicial or administrative authority.

C. The department will take all actions necessary to institute income withholding upon the request of an obligor.
[8.50.110.8 NMAC - Rp, 8.50.110.8 NMAC, 12/30/10]

**8.50.110.9 TERMINATION OF INCOME WITHHOLDING:** The IV-D agency will not terminate an income withholding once instituted, unless:

A. the support obligation ends and all arrears are paid off; or

B. the court orders that income withholding cease; or

C. the IV-D agency closes its case pursuant to 8.50.129 NMAC.
[8.50.110.9 NMAC - Rp, 8.50.110.15 NMAC, 12/30/10]

**8.50.110.10 WITHHOLDING OF UNEMPLOYMENT COMPENSATION:** A cooperative endeavor exists between the IV-D agency and the New Mexico department of workforce solutions for the withholding of unemployment compensation and workman's compensation in those cases with an income withholding order pursuant to federal and state laws.
[8.50.110.10 NMAC - Rp, 8.50.110.16 NMAC, 12/30/10]

**History of 8.50.110 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 561.0000, Procedures for Enforcement, 6-23-80.
ISD CSEB 564.0000, Collection by IRS, 6-23-80.
ISD CSEB 564.0000, Collection by IRS, 3-7-84.
ISD CSEB 565.0000, U.S. District Court

Enforcement, 6-23-80.
ISD CSEB 566.0000, Voluntary Wage Allotments of Federal Employees and Processing of Garnishment Orders for Child Support and/or Alimony, 11-3-81.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.110 NMAC, Income Withholding, filed 5/14/2001 - Repealed effective 12/30/2010

## NEW MEXICO HUMAN SERVICES DEPARTMENT
CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 111 GENERAL ENFORCEMENT OF SUPPORT OBLIGATIONS**

**8.50.111.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.111.1 NMAC - Rp, 8.50.111.1 NMAC, 12/30/10]

**8.50.111.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.
[8.50.111.2 NMAC - Rp, 8.50.111.2 NMAC, 12/30/10]

**8.50.111.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.111.3 NMAC - Rp, 8.50.111.3 NMAC, 12/30/10]

**8.50.111.4 DURATION:** Permanent.
[8.50.111.4 NMAC - Rp, 8.50.111.4 NMAC, 12/30/10]

**8.50.111.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.111.5 NMAC - Rp, 8.50.111.5 NMAC, 12/30/10]

**8.50.111.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.111.6 NMAC - Rp, 8.50.111.6 NMAC, 12/30/10]

**8.50.111.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.111.8 GENERAL ENFORCEMENT OF SUPPORT OBLIGATIONS:** The IV-D agency uses a variety of processes, both administrative and judicial, to enforce support obligations.
[8.50.111.8 NMAC - Rp, 8.50.111.8 NMAC, 12/30/10]

**8.50.111.9 PERSONS OWING OVERDUE SUPPORT:** Pursuant to state and federal law, the IV-D agency may seek to obtain an order that requires the obligor to adhere to the support obligations or, if the person is not incapacitated, to participate in work activities. The IV-D agency does not charge a late fee for overdue support.
[8.50.111.9 NMAC - Rp, 8.50.111.9 NMAC, 12/30/10]

**8.50.111.10 INTEREST CALCULATIONS:** The IV-D agency calculates interest in accordance with:

A. New Mexico law regarding the accrual of interest on support obligations is applied to New Mexico support orders; and

B. the interest rules of the issuing state (state that issued the order) apply when New Mexico registers a foreign support order; the initiating state (state requesting registration of a foreign support order) is responsible for providing an accurate audit to include interest, as appropriate.
[8.50.111.10 NMAC - Rp, 8.50.111.12 NMAC, 12/30/10]

**8.50.111.11 NON-DISCHARGEABILITY IN BANKRUPTCY:** A debt of support is not released by a discharge in bankruptcy. (11 USC 523 (a)).
[8.50.111.11 NMAC - Rp, 8.50.111.15 NMAC, 12/30/10]

**8.50.111.12 CONTEMPT PROCEEDINGS:** Contempt proceedings are used to enforce an existing order when the non-custodial parent has failed to make support payments as ordered. The IV-D agency will pursue contempt provisions, as appropriate. If an obligor is found by a court to be in contempt of court, the IV-D agency may request the court issue a bench warrant for the arrest of the obligor. Any bond requested by the IV-D agency in a bench warrant shall be a cash only bond to be paid to the IV-D agency and distributed in accordance with federal and state laws regarding distribution of support payments.
[8.50.111.12 NMAC - Rp, 8.50.111.16 NMAC, 12/30/10]

**8.50.111.13 GARNISHMENT:** The IV-D agency may pursue garnishment of an obligor's wages to reduce his or her arrearage balance. A garnishment will not be pursued if there is currently a wage withholding in effect.
[8.50.111.13 NMAC - Rp, 8.50.111.17 NMAC, 12/30/10]

**8.50.111.14 LIENS:** The Title IV-D agency has in effect and uses procedures for the imposition of liens against the real or personal property of an obligor who owes overdue support and who resides or owns property in New Mexico. Once a lien is secured, a release of lien will not be issued until there is a complete or partial satisfaction of the arrears, or upon agreement of the parties.
[8.50.111.14 NMAC - Rp, 8.50.111.18 NMAC, 12/30/10]

**8.50.111.15 POSTING OF BOND, GUARANTEE, OR OTHER SECURITY:** The IV-D agency may request the court to order an obligor to secure the support payment by bond, guarantee, surety or other security deemed appropriate by the court.
[8.50.111.15 NMAC - Rp, 8.50.111.19 NMAC, 12/30/10]

**8.50.111.16 STATE OR FEDERAL CRIMINAL PROSECUTIONS:** The IV-D agency will refer support obligors for state or federal criminal prosecution pursuant to state and federal law (See 18 USC 228 and NMSA 1978, Section 30-6-2). During the time a referral is being considered by or accepted by a state or federal agency for prosecution, the IV-D agency will suspend civil enforcement (court proceedings) unless otherwise instructed by the appropriate prosecutor's office. The IV-D agency will continue to administratively enforce the obligation.
[8.50.111.16 NMAC - Rp, 8.50.111.20 NMAC, 12/30/10]

**HISTORY OF 8.50.111 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 561.0000, Procedures for Enforcement, 6-23-80.
ISD CSEB 564.0000, Collection by IRS, 6-23-80.
ISD CSEB 564.0000, Collection by IRS, 3-7-84.
ISD CSEB 565.0000, U.S. District Court Enforcement, 6-23-80.

ISD CSEB 566.0000, Voluntary Wage Allotments of Federal Employees and Processing of Garnishment Orders for Child Support and/or Alimony, 11-3-81.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.111 NMAC, General Enforcement of Support Obligations, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 112 ADMINISTRATIVE ENFORCEMENT OF SUPPORT OBLIGATIONS**

**8.50.112.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division
[8.50.112.1 NMAC - Rp, 8.50.112.1 NMAC, 12/30/10]

**8.50.112.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.112.2 NMAC - Rp, 8.50.112.2 NMAC, 12/30/10]

**8.50.112.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.112.3 NMAC - Rp, 8.50.112.3 NMAC, 12/30/10]

**8.50.112.4 DURATION:** Permanent.
[8.50.112.4 NMAC - Rp, 8.50.112.4 NMAC, 12/30/10]

**8.50.112.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.112.5 NMAC - Rp, 8.50.112.5 NMAC, 12/30/10]

**8.50.112.6 OBJECTIVE:** To provide regulations in accordance with federal and state law and regulations.
[8.50.112.6 NMAC - Rp, 8.50.112.6 NMAC, 12/30/10]

**8.50.112.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.112.8 PARENTAL RESPONSIBILITY ACT (LICENSE SUSPENSION):** The IV-D agency submits a certified list of support obligors who are thirty (30) days or more delinquent on their monthly support obligation. The certified list is submitted to the appropriate boards, commissions, courts, or agencies responsible for issuing drivers, professional, occupational, and recreational licenses as detailed in the Parental Responsibility Act NMSA 1978, Sect. 40-5A-1 et seq.

A. Automated referral process: The IV-D agency provides a certified list of all obligors who meet referral criteria to various licensing boards. The licensing boards report back to the IV-D agency the action the board has taken in connection with the Parental Responsibility Act. The IV-D automated system will refer cases that meet the following criteria:

(1) the obligor is delinquent thirty (30) days or more in payment of court ordered support;

(2) a notice of potential submittal has been sent to the obligor's last address of record with the IV-D agency;

(3) there is no court order prohibiting the referral; and

(4) thirty (30) calendar days have elapsed since the transmittal of the notice.

B. Administrative hearing by the licensing boards: If requested in writing by the hearing officer of the licensing board, the IV-D agency will make available a witness to testify on the IV-D agency's behalf at an administrative hearing that may be held in connection with the Parental Responsibility Act.

C. Settlement:

(1) In all cases, the IV-D agency must make every effort to obtain lump sum payments to satisfy all arrearages, including prior judgments, current delinquency, and accrued interest.

(2) If an obligor has had his or her license suspended in multiple cases, the issuance of a certificate of compliance for one case will not release the license suspension(s) for obligor's other case(s). The obligor will have to make satisfactory arrangements for each case in order to be eligible for license reinstatement.

D. Arrears only cases: In an arrears only case, the monthly payment must be calculated using the current child support guidelines at NMSA 1978, Section 40-4-11.1, or a schedule that will fully pay the arrearages plus accumulated interest in seventy two (72) months or less.

E. Withdrawal of referral: If the obligor does not meet the minimum criteria for referral at the time of the referral, the referral will be withdrawn, and a certificate of compliance will be issued with a request to waive the reinstatement of fees.

F. Responsibilities of the obligor: The obligor has the following responsibilities.

(1) The obligor must supply a valid mailing address for the certificate of compliance to be mailed when complete. The obligor may elect to have the certificate of compliance sent to his/her attorney of record, but must also provide the IV-D agency with a current, valid mailing address and physical address for the obligor.

(2) The obligor is entirely responsible for submitting the certificate(s) of compliance to all licensing agencies for the reinstatement of any and all licenses within thirty (30) days of date of the certificate of compliance is issued. Failure to comply with the licensing agency's requirements for license application approval or license reinstatement may result in the obligor's license(s) continued denial or suspension. The IV-D agency will not re-issue a certificate of compliance if the obligor fails to maintain compliance with all court orders for support.
[8.50.112.8 NMAC - Rp, 8.50.112.8 NMAC, 12/30/10]

**8.50.112.9 CONSUMER REPORTING AGENCIES (CREDIT BUREAUS):**

A. The Title IV-D agency is required by federal and state law to report periodically to consumer reporting agencies the name of any obligor who is delinquent in the payment of support and the amount of the overdue support. The IV-D agency has procedures in place that ensure that overdue support is reported only:

(1) after the obligor has been afforded due process required under state law, including notice and a reasonable opportunity to contest the accuracy of such information; and

(2) to an entity that has furnished evidence satisfactory to the state that the entity is a legitimate consumer reporting agency.

B. At the request of a consumer reporting agency, and upon thirty (30) day's advance notice to the obligor at the obligor's last known address of record with the IV-D agency, the department may release information regarding the delinquency of an obligor. The department may charge a reasonable fee to the consumer reporting agency, pursuant to NMSA 1978, Sec. 40-4A-15.
[8.50.112.9 NMAC - Rp, 8.50.112.9 NMAC, 12/30/10]

**8.50.112.10 COLLECTION OF**

**PAST DUE SUPPORT BY FEDERAL TAX REFUND OFFSET:** Federal tax refund offset is utilized to pay support arrearages, including child support, medical support, and spousal support. Cases meeting specific criteria are referred to the U.S. department of treasury's financial management service. A non-TANF custodial party who has applied for IV-D services is assessed fees for the federal income tax refund offset remedy. The fees are deducted from the tax refund when it is intercepted but are credited to the obligor's support payment. Custodial party consent is not required before submitting the case for offset in any IV-D case. In addition, cases may be submitted where there is past due support on behalf of a disabled adult who was determined to be disabled under Title II or XVI while he or she was still a minor and for whom a support order is still in effect.

A. Criteria for federal income tax offset: A IV-D case may be referred for federal income tax offset, regardless of whether the child(ren) are emancipated, so long as there is a delinquency or arrearage owed. IV-D cases having spousal support delinquencies or arrearages will not be referred for federal income tax offset if there is not also an ongoing child support obligation, delinquency, or arrearage. IV-D cases that are solely for processing payments will not be referred. Only IV-D cases that meet at least one of the criteria in 45 CFR 303.72(a) are to be referred for federal income tax offset.

B. Periodic updates on referred obligors are sent by the IV-D agency to the treasury department. Those updates may result in modifications up or down on the balance due or deletions from the referral.

C. Joint return: The U. S. internal revenue service (IRS) will offset a refund from a joint income tax return to pay a past due support obligation if either tax filer is certified as being legally responsible for providing support. Complaints, questions, and forms (i.e., injured spouse claim and allocation) concerning joint refund cases can only be addressed by the IRS. If the obligor's spouse is not liable for the support debt, the IRS will issue a pro rata refund to the spouse (upon the filing of an IRS injured spouse claim and allocation form by the obligor's spouse) and the IV-D agency will be required to reimburse the IRS in the amount of the pro rata refund. The federal government will advise the IV-D agency of any adjustments to IV-D collections. The injured spouse may also voluntarily release the claim to his or her portion of the joint refund. This will result in an immediate distribution of the refund amount to the IV-D case. An injured spouse may request the release form from the IV-D agency, or may provide a notarized letter authorizing the release. The notarized letter shall set forth the injured spouse's name, the name of the obligor, and the obligor's CSED case number(s).

D. Bankruptcy cases: The IV-D agency will review the non-custodial party's bankruptcy case to determine what action, if any, the Title IV-D agency may take in regard to the non-custodial party's obligation to pay support. When the automatic stay, issued pursuant to Section 362 of the bankruptcy code, has been lifted or is no longer in effect with respect to the individual owing the obligation, and the obligation was not discharged by the bankruptcy proceeding, the case may be submitted for offset.

E. Notification of federal income tax offset:

(1) Written advance notice is sent to inform an obligor that the amount of his or her past due support will be referred to the secretary of the U.S. treasury for collection by federal tax refund offset. The notice shall be sent to the obligor's last address of record with the IV-D agency and shall inform the obligor:

(a) of the right to contest the department's determination that past due support is owed;

(b) of the right to contest the amount of past due support;

(c) of the right to an administrative review;

(d) of the procedures and time frame for requesting an administrative review; and

(e) that the U.S. treasury will notify the obligor's spouse at the time of offset regarding steps to take to protect the share of the refund that may be payable to that spouse.

(2) At the time the offset occurs, the secretary of the U.S. treasury will notify the obligor that the offset has been made. In addition, notice will be provided to any individual who filed a joint return with the obligor, advising him or her of the steps to be taken in order to secure a proper share of the refund.

F. Contesting referral for federal offset: The obligor has thirty (30) days from the date of mailing of the notification of a referral for federal tax intercept to notify the IV-D agency that he or she contests the referral. The notification issued by the IV-D agency provides the address and telephone number to be contacted in order for the obligor to request a hearing to contest the referral.

(1) Upon receipt of an appeal request from the obligor, a notice is generated by the administrative law judge and sent to the obligor and the IV-D agency.

(2) The notice shall set forth the time and place of the administrative hearing. The hearing is conducted in accordance with 8.50.130 NMAC.

(3) If the appeal request concerns a joint tax refund that has not yet been intercepted, the obligor is informed that the secretary of the U.S. treasury will notify the obligor's spouse at the time of offset regarding steps to take to secure his or her proper share of the refund.

(4) If the appeal concerns a joint tax refund which has already been offset, the obligor will be referred to the secretary of the U.S. treasury to address the refund due to the obligor's spouse.

(5) If the hearing decision results in a deletion or decrease in the amount referred for offset, the federal office of child support enforcement will be notified.

(6) If an amount which has already been offset is found to have exceeded the amount of past due support owed, steps to refund the excess amount to the obligor will be promptly taken.

G. Interstate cases: The following applies to the New Mexico IV-D agency when it is the state that submits a case for federal income tax offset. The obligor shall request an administrative review be conducted by the New Mexico IV-D agency. If the underlying order upon which the referral for federal income tax offset is based has not been issued by a New Mexico district court, within ten (10) days of the receipt of the obligor's request for administrative review, the New Mexico IV-D agency must notify the IV-D agency in the state that referred the case to New Mexico of the obligor's request for administrative review. Within forty-five (45) days of receipt of the request for administrative review from the New Mexico IV-D agency, the IV-D agency in the state that referred the case to New Mexico should: (1) send notice to all appropriate parties setting forth the time and place of the administrative review; and (2) conduct the review and render a decision. If the administrative review conducted by the IV-D agency in the other state results in a reduction or elimination of the amount referred for offset, the IV-D agency that conducted the administrative review should inform the New Mexico IV-D agency and the OCSE of the decision. The New Mexico IV-D agency shall be bound by the determination of the IV-D agency in the state that conducted the review.

H. Distribution of collections from federal income tax offset: Past-due support amounts collected as a result of the federal income tax refund offset shall be distributed pursuant to 8.50.125.12 NMAC. The obligor shall receive full credit for the entire amount of tax intercept that is applied to his or her case(s). Distribution of tax intercept money for obligors with multiple IV-D cases shall be in accordance with federal and state laws. If an offset is

made to satisfy non-TANF past due support from a refund based upon a joint return, the IV-D agency may delay distribution until notified that the injured spouse's proper share of the refund has been paid or for a period not to exceed six months from notification of offset, whichever is shorter.

[8.50.112.10 NMAC - Rp, 8.50.112.10 NMAC, 12/30/10]

**8.50.112.11 COLLECTION OF PAST DUE SUPPORT BY NEW MEXICO TAXATION AND REVENUE DEPARTMENT BY STATE TAX REFUND OFFSET:** New Mexico law allows for the interception (offset) of an obligor's tax refund to pay child support.

A. Criteria for state income tax offset: Cases submitted for tax refund offset to the New Mexico taxation and revenue department (TRD) must meet federal tax refund offset criteria. In interstate cases, if New Mexico is the responding state, obligors are referred to TRD only, not to IRS.

B. Pre-offset notices/final notices: Within ten (10) days after receiving notification of an offset from TRD, the Title IV-D agency will send a notice to the obligor at his or her last known address of record with the IV-D agency. The notice will include:

(1) a statement that an offset will be made and that the IV-D agency intends to apply the amount of the offset against a claimed debt;

(2) the amount of the debt asserted;

(3) the name, address, and telephone number of the IV-D agency;

(4) the amount of refund to be offset against the debt asserted;

(5) a statement that the obligor has thirty (30) days from the date indicated on the notice to contest the offset by applying to the IV-D agency for a hearing with respect to the validity of the debt asserted by the IV-D agency; and

(6) a statement that failure of the obligor to apply for a hearing within thirty (30) days will be deemed a waiver of the opportunity to contest the offset and to a hearing.

C. If the refund against which a debt is intended to be offset results from a joint return, within ten (10) days after receiving the notification from TRD, the IV-D agency will send a notice to the obligor's last known address of record with the IV-D agency for the injured spouse named on the return. The notice to the injured spouse will contain the following information:

(1) a statement that an offset will be made and the IV-D agency intends to apply the amount of the offset against a claimed debt;

(2) the total amount of the refund and the amount of each claimed debt;

(3) the name, address, and telephone number of the IV-D agency;

(4) a statement that no debt is claimed against the injured spouse and that the he or she may be entitled to receive all or part of the refund, regardless of the claimed debt against the obligor;

(5) a statement that to assert a claim to all or part of the refund, the injured spouse must notify the IV-D agency within thirty (30) days from the date indicated on the notice of the injured spouse's intention to seek his or her portion of the refund; and

(6) a statement that failure of the injured spouse to notify the IV-D agency regarding his or her claim to all or part of the refund within thirty (30) days may be deemed a waiver of any claim of the injured spouse with respect to the refund.

D. Upon the transfer of money from TRD to the IV-D account, the IV-D agency will notify the obligor of the final determination of the offset. The notice includes:

(1) the amount of the TRD refund to which the obligor was entitled prior to intercept;

(2) the offset amount and balance, if any, of the debt still due; and

(3) the amount of refund in excess of the debt due and owed to the obligor, if any.

E. Contesting referral for state tax offset: The appeal procedures are the same as for federal tax refund offset with some exceptions.

(1) When the injured spouse who has filed jointly contacts the Title IV-D agency within the time required, no tax intercept hearing is held. Upon verification, the injured spouse's portion will be refunded as soon as the TRD money is posted to the case, and the obligor will not be given credit for the injured spouse's portion of the payment that is refunded.

(2) If the obligor's spouse files "married, but separated" the state taxation and revenue department does not honor this filing status for offset purposes and will offset the obligor's spouse's refund. In this instance, the injured spouse may contact the IV-D agency. Upon notification, the IV-D tax intercept unit will contact TRD to obtain verification and, upon obtaining verification, the IV-D agency will refund the spouse's portion of the offset to the injured spouse.

(3) If the injured spouse determines that he or she is entitled to more than one-half of the offset, he or she must notify the IV-D agency within thirty (30) days of the date of mailing of the notice of offset that he or she wants an administrative hearing regarding the claim to a larger portion of the offset.

F. Distribution of collections from state income tax offset: State income tax offset collections will be placed on hold for thirty (30) days. After the thirty (30) day hold, the state income tax offset monies will be applied as a regular payment and distributed as outlined in 8.50.125.11 NMAC. The obligor shall receive full credit for the entire amount of tax intercept that is applied to his or her case(s). Distribution of tax intercept money for obligors with multiple IV-D cases shall be in accordance with federal and state laws. If an offset is made to satisfy non-TANF past due support from a refund based upon a joint return, the IV-D agency may delay distribution until notified that the injured spouse's proper share of the refund has been paid or for a period not to exceed six (6) months from notification of offset, whichever is shorter.

[8.50.112.11 NMAC - Rp, 8.50.112.11 NMAC, 12/30/10]

**8.50.112.12 FULL COLLECTION SERVICES BY THE SECRETARY OF THE TREASURY:** Cases may be referred for full collection services after reasonable efforts have been made to collect the support through available mechanisms and these efforts have failed. When referring a case for full collection services by the secretary of the treasury, the IV-D agency shall comply with the provision of 45 CFR 303.71.

[8.50.112.12 NMAC - Rp, 8.50.112.12 NMAC, 12/30/10]

**8.50.112.13 DENIAL OF PASSPORTS FOR NONPAYMENT OF CHILD SUPPORT:**

A. Referral for passport denial: The IV-D agency certifies obligors who owe support arrears in excess of $2,500. The U. S. department of state denies passports to individuals whose name appears on the certified database of the OSCE as owing more than $2,500. Once the department of state identifies a passport applicant as owing money for child support, the applicant will be notified by letter that the issuance or renewal of the passport has been denied, pending satisfactory payment of money owed to the IV-D agency. After the applicant makes satisfactory payment arrangements with the IV-D agency, the IV-D agency shall request that OCSE remove the applicant's name from its database. The IV-D agency makes every effort in its negotiations to obtain a lump sum payment sufficient to satisfy the entire delinquency and arrears balances, including accrued interest.

B. Contesting referral for passport denial: The obligor has thirty (30) days from the date of the notification of a referral for passport denial to notify the IV-D agency that he or she contests the referral. The notification sent to the obligor provides the address and telephone number for the obligor to contact the IV-D agency to request

a hearing to appeal the referral.

(1) Upon receipt of an appeal request from the obligor, a notice is generated by the administrative law judge and sent to the obligor and the IV-D agency.

(2) The notice shall set forth the time and place of the administrative hearing. The hearing is conducted in accordance with 8.50.130 NMAC.

(3) If the case is a non-IV-A case, the IV-D agency shall send a copy of the notice to the custodial party.

[8.50.112.13 NMAC - Rp, 8.50.112.13 NMAC, 12/30/10]

**8.50.112.14 LOTTERY:** The IV-D agency and the lottery commission work cooperatively to intercept lottery winnings for debts collected by the IV-D agency.

A. State law authorizes the IV- D agency to place a lien on lottery winnings owed to delinquent obligors. Lists of delinquent obligors are provided by the IV-D agency to the lottery commission who then compares the list with lottery winners claiming prizes of more than $600. The lottery commission then notifies the IV-D agency of any matches. The lottery commission must be notified by the IV-D agency within five (5) business days with verification of the support lien. The verification of the support lien will include a notice of administrative lien requesting the lottery commission to retain the funds for ninety (90) days or until such time the administrative process is completed, so long as the process is completed within ninety (90) days. If no delinquency exists, the notification will be a release of lien.

B. If the lottery winner is verified by the IV-D agency as owing a debt collected by the agency, the IV-D agency has ninety (90) days to initiate an administrative action against the winner. The IV-D agency will notify the winner by mailing a copy of the notice of administrative lien to the obligor at their last known address of record with the IV-D agency via registered mail. The notice of administrative lien will notify the obligor that he or she has fifteen (15) days from the date of the notice to contest or appeal the administrative lien. The notification sent to the obligor provides the address and telephone number for the obligor to contact the IV-D agency to request a hearing to appeal the referral. If the obligor does not contest the notice of administrative lien within the required timeframe, a notice for release of funds to the IV-D agency is mailed to the lottery commission instructing it to forward the lottery winnings to the IV-D agency. If the obligor contests the notice of administrative lien and timely requests a hearing, an administrative hearing will be conducted in accordance with 8.50.130 NMAC.

[8.50.112.14 NMAC - Rp, 8.50.112.14 NMAC, 12/30/10]

**8.50.112.15 GAMING:** The IV-D agency and the gaming board work cooperatively to intercept racetrack gaming machine payouts for debts collected by the IV-D agency.

A. State law authorizes the IV-D agency to place a lien on gaming machine payouts owed to delinquent obligors. Lists of delinquent obligors are provided by the IV-D agency to the gaming control board on a monthly basis. The racetrack licensees research the names of winners of $1,200 or more per payout against the list provided to the gaming control board by the IV-D agency. The racetrack licensee then notifies the IV-D agency of any matches. The racetrack licensee must be notified by the IV-D agency within seven (7) business days (excluding weekends and state holidays) with verification of the support lien. If no delinquency exists, the IV-D agency will notify the racetrack licensee with a release of lien. If a delinquency exits, the verification of the support lien shall include a notice of administrative lien requesting the racetrack licensee to retain the gaming machine payout for ninety days (90) or until such time as the administrative process is completed, so long as the process is completed within ninety (90) days. If no delinquency exists, the notification will be a release of lien.

B. If the gaming machine winner is an obligor verified by the IV-D agency as owing a debt to or collected by the IV-D agency, the IV-D agency has ninety (90) days to complete an administrative action against the winner, unless the winner agrees to an extension of the time limitations or the administrative law judge extends the time. The IV-D agency shall notify the winner by mailing a copy of the notice of administrative lien to the obligor at his or her last known address of record with the IV-D agency via registered mail. The notice of administrative lien shall notify the obligor that he or she has fifteen (15) days from the date of the receipt of the notice to contest or appeal the administrative lien. The notification sent to the obligor provides the address and telephone number of the obligor to contact the IV-D agency to request a hearing to appeal the referral. If the obligor does not contest the notice of administrative lien within the required timeframe, a notice for release of funds to the IV-D agency is mailed to the racetrack licensee within five (5) working days after the expiration of the obligor's deadline to request a timely hearing, instructing the racetrack licensee to forward the gaming machine payout to the IV-D agency. If the obligor contests the notice of administrative lien and timely requests a hearing, an administrative hearing will be conducted in accordance with 8.50.130 NMAC. The IV-D agency shall notify the racetrack licensee within five (5) working days of the ruling of any hearing held in accordance with this section.

[8.50.112.15 NMAC - Rp, 8.50.112.15 NMAC, 12/30/10]

**History of 8.50.112 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:

ISD CSEB 501.1100, State and Local Requirements, 6/23/80.

ISD CSEB 501.1100, State and Local Requirements, 6/23/80.

ISD CSEB 561.0000, Procedures for Enforcement, 6/23/80.

ISD CSEB 564.0000, Collection by IRS, 6/23/80.

ISD CSEB 564.0000, Collection by IRS, 3/7/84.

ISD CSEB 565.0000, U.S. District Court Enforcement, 6/23/80.

ISD CSEB 566.0000, Voluntary Wage Allotments of Federal Employees and Processing of Garnishment Orders for Child Support and/or Alimony, 11/3/81.

NMAC History:

8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12/30/94.

History of Repealed Material:

8 NMAC 5.CSE, Child Support Enforcement - Repealed 5/31/2001.

8.50.112 NMAC, Administrative Enforcement of Support Obligations, filed 5/14/2001 - Repealed effective 11/13/2009.

8.50.112 NMAC, Administrative Enforcement of Support Obligations, filed 11/2/2009 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 113 ENFORCEMENT OF SUPPORT OBLIGATIONS FROM FEDERAL EMPLOYEES INCLUDING MEMBERS OF THE ARMED SERVICES**

**8.50.113.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.113.1 NMAC - Rp, 8.50.113.1 NMAC, 12/30/10]

**8.50.113.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.

[8.50.113.2 NMAC - Rp, 8.50.113.2 NMAC, 12/30/10]

**8.50.113.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.113. 3 NMAC - Rp, 8.50.113.3 NMAC, 12/30/10]

**8.50.113.4 DURATION:** Permanent.
[8.50.113.4 NMAC - Rp, 8.50.113.4 NMAC, 12/30/10]

**8.50.113.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.113.5 NMAC - Rp, 8.50.113.5 NMAC, 12/30/10]

**8.50.113.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.113.6 NMAC - Rp, 8.50.113.6 NMAC, 12/30/10]

**8.50.113.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.113.8 AUTHORITY TO COLLECT SUPPORT FROM FEDERAL EMPLOYEES INCLUDING MEMBERS OF THE ARMED SERVICES:** In accordance with federal regulations, the IV-D agency may secure and enforce support obligations from federal employees and members of the armed forces through income withholding, garnishment, and similar proceedings. Monetary amounts due from, or payable by, the United States or the District of Columbia for employment (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed forces of the United States, will be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with state law, and to any other legal process brought by the IV-D agency to enforce the legal obligation of the individual to provide child support, medical support, or spousal support. (42 USC 659).

A. Requirements applicable to private person: With respect to notices to withhold income or any other order or process to enforce support obligations against an individual, (if the order or process contains or is accompanied by sufficient data to permit prompt identification of the individual and the amounts involved), each governmental entity specified above will be subject to the same requirements as would apply if the entity were a private person.

B. Notice of process: The IV-D agency shall send or serve notice to withhold income for an individual's child support, medical support, or spousal support payment obligation to the duly designated federal agent.

C. Priority of claims: If a governmental entity specified above receives notice or is served with process, as provided in this section, concerning amounts owed by an individual to more than one person, then federal law shall control the determination of the priority of competing claims.

D. No requirement to vary pay cycles: A governmental entity that is affected by legal process served for the enforcement of an individual's child support or spousal support payment obligations is not required to vary its normal pay and disbursement cycle in order to comply with the legal process.

E. Federal payments subject to process: Monetary amounts paid or payable to an individual that are considered to be based upon remuneration for employment consist of:

(1) compensation payable for personal services of the individual, whether the compensation is denominated as wages, salary, commission, bonus, pay, allowances, or otherwise (including severance pay, sick pay, and incentive pay);

(2) periodic benefits or other payments:

(a) under the insurance system established by Chapter 7, Subchapter II of the United States Code - (federal old-age, survivors, and disability insurance benefits);

(b) under any other system or fund established by the United States that provides for the payment of pensions, retirement or retired pay, annuities, dependants' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual;

(c) as compensation for death under any federal program;

(d) under any federal program established to provide ''black lung'' benefits; or

(e) by the secretary of veterans affairs as compensation for a service-connected disability paid by the secretary to a former member of the armed forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation;

(3) worker's compensation benefits paid or payable under federal or state law; and

(4) benefits paid or payable under the railroad retirement system.

F. Federal payments not subject to process: Monetary amounts that are not considered to be based upon remuneration for employment consist of:

(1) payments by way of reimbursement or otherwise, to defray expenses incurred by the individual in carrying out duties associated with the employment of the individual; or

(2) payments made as allowances for members of the uniformed services as necessary for the efficient performance of duty.
[8.50.113.8 NMAC - Rp, 8.50.113.8 NMAC, 12/30/10]

**8.50.113.9 ENFORCEMENT OF CHILD SUPPORT OBLIGATIONS OF MEMBERS OF THE ARMED FORCES THROUGH INVOLUNTARY ALLOTMENTS:**

A. In any case in which support payments are owed by a member of one of the uniformed services on active duty, such member may elect to satisfy the obligation by making allotments from his or her pay and allowances as payment of such support. In addition, in the event a member of the uniformed services who owes a duty of support accrues a delinquency equal to two (2) months' obligation or more, a notice of said delinquency may be issued by the IV-D agency to the designated official in the appropriate uniformed service. A copy of the notice of delinquency shall also be provided to the service member. The issuance of said notice will compel the creation of an allotment to satisfy the service member's obligation. The amount of the allotment will be the amount necessary to comply with the order which, if the order so provides, may include arrearages as well as amounts for current support; however, the amount of the allotment, together with any other amounts withheld for support from the wages of the member, as a percentage of his or her pay from the uniformed service, will not exceed the limits prescribed in sections 1673(b) and (c) of Title 15, Chapter 41, Subchapter II of the United States Code. An allotment under this subsection will be adjusted or discontinued upon notice from the authorized person. Payments made by allotment will be sent to the IV-D agency for disbursement.

B. Regulations: The secretary of defense has issued regulations applicable to allotments to be made under this section, designating the officials to whom notice of failure to make support payments, or notice to discontinue or adjust an allotment, should be given, prescribing the form and content of the notice and specifying any other rules necessary for such secretary to implement this section.

C. Availability of locator information: The IV-D agency uses the United State's secretary of defense's centralized personnel locator service that includes the address of each member of the

armed forces. Except as provided below, the address for a member of the armed forces shown in the locator service will be the residential address of that member. The address for a member of the armed forces shown in the locator service will be the duty address of that member in the case of a member:

(1) who is permanently assigned overseas, to a vessel, or to a routinely deployable unit; or

(2) with respect to whom the secretary concerned makes a determination that the member's residential address should not be disclosed due to national security or safety concerns.

[8.50.113.9 NMAC - Rp, 8 50.113.9 NMAC, 12/30/10]

**8.50.113.10 PAYMENT OF MILITARY RETIRED PAY IN COMPLIANCE WITH SUPPORT ORDERS:**

A. Payments consistent with assignments of rights to states: In the case of a spouse or former spouse who assigns to the IV-D agency the rights of the spouse or former spouse to receive support, the secretary concerned may make the support payments to the IV-D agency in amounts consistent with that assignment of rights.

B. Arrearages owed by members of the uniformed services: In the case of a court order that is effectively served on the secretary of defense and that provides for payments from the disposable retired pay of a member to satisfy the amount of support set forth in the order, the authority to make payments from the disposable retired pay of a member to satisfy the amount of support set forth in a court order will apply to payment of any amount of support arrearages set forth in that order, as well as to amounts of support that currently become due.

[8.50.113.10 NMAC - Rp, 8.50.113.10 NMAC, 12/30/10]

**History of 8.50.113 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:

8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:

8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.

8.50.113 NMAC, Enforcement of Support Obligations From Federal Employees Including Members of the Armed Services, filed 5/14/2001 - Repealed effective 12/30/2010

# NEW MEXICO HUMAN SERVICES DEPARTMENT

## CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 114 FINANCIAL INSTITUTION DATA MATCH (FIDM)**

**8.50.114.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.114.1 NMAC - Rp, 8.50.114.1 NMAC, 12/30/10]

**8.50.114.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.

[8.50.114.2 NMAC - Rp, 8.50.114.2 NMAC, 12/30/10]

**8.50.114.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).

[8.50.114.3 NMAC - Rp, 8.50.114.3 NMAC, 12/30/10]

**8.50.114.4 DURATION:** Permanent.

[8.50.114.4 NMAC - Rp, 8.50.114.4 NMAC, 12/30/10]

**8.50.114.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.

[8.50.114.5 NMAC - Rp, 8.50.114.5 NMAC, 12/30/10]

**8.50.114.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.

[8.50.114.6 NMAC - Rp, 8.50.114.6 NMAC, 12/30/10]

**8.50.114.7 DEFINITIONS: [RESERVED]**

[See 8.50.100.7 NMAC]

**8.50.114.8 AGREEMENTS WITH FINANCIAL INSTITUTIONS:** The department, through the IV-D agency, has developed procedures and forms by which it enters into agreements with financial institutions doing business in the state to develop and operate, in coordination with such financial institutions, a data match system for the purpose of identifying and seizing assets to satisfy past-due support. All references to the IV-D agency below are on behalf of the department.

A. Data match agreements: The IV-D agency has agreements with financial institutions for data match using a standard IV-D agency form. The institutions may elect to report through an agent.

B. Election of reporting methods: Financial institutions shall elect their method of reporting using forms provided by the IV-D agency and return reporting agreements to the IV-D agency within thirty (30) days of notification of required reporting. Acceptable methods of reporting are contained in the federal office of child support enforcement's data match specification handbook (DMSH). The financial institution may elect to report through an agent authorized and identified to the IV-D agency by the financial institution.

C. Quarterly matches: Financial institutions shall quarterly conduct matches of their accounts against the names and social security numbers provided by IV-D agency and report all accounts matched, or may elect to provide a quarterly list of all accounts in a format acceptable to the IV-D agency. Each calendar year, information matches shall be furnished no later than:

(1) March 31 (first quarter);

(2) June 30 (second quarter);

(3) September 30 (third quarter); and

(4) December 31 (fourth quarter).

D. Failure to report: Financial institutions failing to perform a quarterly match, return the reporting election forms, or furnish account information are subject to the penalties in 8.50.131 NMAC. If the financial institution is unable to perform a quarterly match due to circumstances outside of its control, it should immediately notify the IV-D agency to request an extension of time. If the IV-D agency grants an extension, a penalty shall not be assessed against the financial institution.

E. False statements: If false statements are used to obtain a release, penalties will be assessed as set forth in 8.50.131 NMAC.

[8.50.114.8 NMAC - Rp, 8.50.114.8 NMAC, 12/30/10]

**8.50.114.9 FREEZE ORDER:**

A. Issuance and effect: When a match occurs showing the existence of assets held by a support obligor, the IV-D agency may issue a freeze order to the financial institution. Account funds shall not be released by the financial institution during the pendency of proceedings involving a freeze order. The institution shall mail a copy of the administrative freeze order to all persons listed on the account. The IV-D agency will mail a copy of the administrative order to the obligor's most current address on file with the IV-D agency. The institution

shall reply within ten (10) days on the form provided by the IV-D agency.

B. Right to appeal: The administrative freeze order will inform the aggrieved party of the right to appeal the administrative order by mailing the appeal by certified mail to the address indicated on the form provided by the IV-D agency within fifteen (15) calendar days.

[8.50.114.9 NMAC - Rp, 8.50.114.9 NMAC, 12/30/10]

**8.50.114.10 SEIZE ORDER:**

A. Seizure: If no written appeal is received within the time frame for appeal, or if an appeal is not upheld, a seize order will be issued by the IV-D agency. The financial institution must transfer the assets to the IV-D agency within three (3) working days of the receipt of the seize order.

B. Appeals: If an appeal is received, it will be processed in accordance with the appeals process set forth in 8.50.130 NMAC.

[8.50.114.10 NMAC - Rp, 8.50.114.10 NMAC, 12/30/10]

**8.50.114.11 INTERSTATE FIDM ORDERS:** A freeze or seize order issued by another state's Title IV-D agency will be treated as if it were issued by New Mexico's Title IV-D agency. Any institution failing to honor the order will be subject to all fines and penalties as if the institution had failed to honor an order of New Mexico's Title IV-D agency.

[8.50.114.11 NMAC - Rp, 8.50.114.11 NMAC, 12/30/10]

**8.50.114.12 SEIZED ASSETS:** Assets seized from accounts will be distributed according to the IV-D agency distribution rules.

[8.50.114.12 NMAC - Rp, 8.50.114.12 NMAC, 12/30/10]

**8.50.114.13 DISTRIBUTION OF FIDM COLLECTIONS IN MULTIPLE CASES:** FIDM collections will always be prorated to all open IV-D cases for an obligor based on the arrearage owed in each case. By operation of law, arrearages include all adjudicated arrears and delinquency on current support, plus accrued interest. FIDM collections are not distributed to payment processing-only cases unless there is a TANF/AFDC arrearage owed to the state.

[8.50.114.13 NMAC - Rp, 8.50.114.13 NMAC, 12/30/10]

**History of 8.50.114 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:

8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:

8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.

8.50.114 NMAC, Financial Institution Data Match (FIDM), filed 5/14/2001 - Repealed effective 12/30/2010.

# NEW MEXICO HUMAN SERVICES DEPARTMENT

## CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 115 EXPEDITED PROCESSES AND ADMINISTRATIVE EXPEDITED PROCESS**

**8.50.115.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.115.1 NMAC - Rp, 8.50.115.1 NMAC, 12/30/10]

**8.50.115.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.

[8.50.115.2 NMAC - Rp, 8.50.115.2 NMAC, 12/30/10]

**8.50.115.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).

[8.50.115.3 NMAC - Rp, 8.50.115.3 NMAC, 12/30/10]

**8.50.115.4 DURATION:** Permanent.

[8.50.115.4 NMAC - Rp, 8.50.115.4 NMAC, 12/30/10]

**8.50.115.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.

[8.50.115.5 NMAC - Rp, 8.50.115.5 NMAC, 12/30/10]

**8.50.115.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.

[8.50.115.6 NMAC - Rp, 8.50.115.6 NMAC, 12/30/10]

**8.50.115.7 DEFINITIONS: [RESERVED]**

[See 8.50.100.7 NMAC]

**8.50.115.8 EXPEDITED PROCESSES:** Expedited processes are the administrative and judicial processes that increase program effectiveness and meet the processing time specified. The following timeframes apply to the IV-D agency.

A. In IV-D cases needing support order establishment, regardless of whether paternity has been established, action to establish support orders must be completed from the date of service of process to the time of disposition within the following time frames:

(1) seventy-five percent (75%) of cases within six (6) months; and

(2) ninety percent (90%) of cases within twelve (12) months.

B. In IV-D cases where a support order has been established, the IV-D agency must:

(1) monitor compliance with the support obligation;

(2) identify a delinquency on the date the obligor fails to make payments in an amount equal to the support payable for one (1) month, or on an earlier date in accordance with state law; and

(3) enforce the obligation by:

(a) initiating income withholding;

(b) taking any appropriate enforcement action (except income withholding and federal and state tax intercepts):

(i) unless service of process is necessary, within no more than thirty (30) calendar days of either identifying a delinquency or other support related non-compliance with the order, or the location of the delinquent parent, whichever occurs later; or

(ii) if service of process is necessary prior to taking an enforcement action, service must be completed (or unsuccessful attempts, despite diligent efforts to serve process, must be documented) and enforcement action taken if process is served, within sixty (60) calendar days of identifying a delinquency or other support related non-compliance with the order, or the location of the delinquent parent, whichever occurs later; diligent efforts consist of a minimum of two separate attempts to complete service; the attempts must be made at different locations, or if at the same location, on different days;

(iii) submitting once a year all cases that meet the certification requirements for federal and state tax offset; and

(iv) in cases in which enforcement attempts have been unsuccessful, at the time an attempt to enforce fails, examining the reason the enforcement attempt failed and determining when it would be appropriate to take an enforcement action in the future, and taking an enforcement action in accordance with

the requirements of this section at that time.

C. In cases where the IV-D agency uses long-arm jurisdiction and disposition occurs within twelve (12) months of service of process on non-custodial parent, the case may be counted as a success within the six (6) month tier of the time frame.

[8.50.115.8 NMAC - Rp, 8.50.115.8 NMAC, 12/30/10]

**8.50.115.9 HEARING OFFICERS AND EXPEDITED PROCESSES:** Child support hearing officers contribute to expedited processes by handling child support cases that would otherwise be heard by a state district court judge. Cases assigned to a child support hearing officer are expedited for hearings, as necessary. The child support hearing officer program is operated by the courts in accordance with NMSA 1978, Section 40-4B-1 et seq.

[8.50.115.9 NMAC - Rp, 8.50.115.9 NMAC, 12/30/10]

**8.50.115.10 SERVICE OF PROCESS:** Service of process may be required, depending upon the type of action the IV-D agency is pursuing. Any action initiated by the IV-D agency involving a court proceeding will include service of process on all appropriate parties in accordance with New Mexico law regarding service of process. Any administrative action taken by IV-D agency that requires notice or service of process will be in accordance with New Mexico law including the New Mexico administrative code, as appropriate.

[8.50.115.10 NMAC - Rp, 8.50.115.10 NMAC, 12/30/10]

**8.50.115.11 ADMINISTRATIVE EXPEDITED PROCESS:** The IV-D agency is authorized to take administrative action without the need to seek a judicial order. Those actions include:

A. issuing administrative subpoenas that carry a possible penalty under 8.50.131 NMAC in addition to any court imposed sanctions;

B. accessing information regarding employment compensation from any entity in the state; and

C. obtaining records from:

(1) automated databases of certain governmental agencies;

(2) private entities to include last known address; and

(3) financial institutions.

[8.50.115.11 NMAC - Rp, 8.50.115.11 NMAC, 12/30/10]

**8.50.115.12 ADMINISTRATIVE ORDERS:** In accordance with state and federal laws, the IV-D agency may issue administrative orders for the following:

A. genetic testing for the purposes of establishing paternity;

B. changing the payee to the IV-D agency, when there has been an assignment from a IV-A or Title XIX program, or payment is to be made to the state disbursement unit;

C. requiring income withholding for any IV-D case in which there is not an automatic wage withholding already in effect and there is no judicial or administrative order to the contrary;

D. securing assets to satisfy an obligor's arrearage; and

E. increasing payments toward arrearages, as appropriate.

[8.50.115.12 NMAC - Rp 8.50.115.12 NMAC, 12/30/10]

**8.50.115.13 FAILURE TO COMPLY WITH ADMINISTRATIVE SUBPOENA OR ORDER:**

A. Upon failure to comply with an order or subpoena issued hereunder, the IV-D agency may pursue one or more of the following:

(1) administer the penalties pursuant to 8.50.131 NMAC;

(2) commence appropriate enforcement action with the court;

(3) seek sanctions against a person who is required to cooperate pursuant to an assignment of rights pursuant to NMSA 1978, Section 27-2-28; or

(4) close the case for non-cooperation.

B. Stay: Upon receipt of an appeal, written notice, or a request from a person or entity that the IV-D agency's administrative order be stayed, the IV-D agency may, for good cause, stay the order, revoke the order, or seek appropriate enforcement. The IV-D agency will notify the parties regarding any stay of an administrative order via written notification sent by first class US mail to the last address of record with the IV-D agency. Appeals shall be scheduled for hearing in accordance with 8.50.130 NMAC.

[8.50.115.13 NMAC - Rp, 8.50.115.19 NMAC, 12/30/10]

**8.50.115.14 PROVIDE UPDATED INFORMATION:** Any party to a paternity or child support proceeding shall provide, and update as needed, the following information: social security number; residential and mailing addresses; telephone number; driver's license number; name, address, and telephone number of all employers. All court orders obtained or modified by the IV-D agency will contain language requiring that both the obligor and the obligee provide the IV-D agency, in writing, with any and all changes to this information.

[8.50.115.14 NMAC - Rp, 8.50.115.21 NMAC, 12/30/10]

**8.50.115.15 DUE PROCESS SAFEGUARDS:** The IV-D agency has due process safeguards related to the issuance and enforcement of administrative orders and subpoenas. In all instances where the IV-D agency issues an administrative order or administrative subpoena, the administrative order or administrative subpoena will not be considered properly served unless the service requirements for each type of administrative order or administrative subpoena are met pursuant to New Mexico law, to include New Mexico administrative law. The IV-D agency will maintain a copy of the proof of service for each service of process in the IV-D agency's records, and will produce the proof of service at the request of the judicial or administrative tribunal. Each administrative order or administrative subpoena, as described in these regulations, will provide instructions on the procedure to be followed to contest the action of the IV-D agency. These instructions will specify that the proper tribunal for appeal of the IV-D agency's administrative orders and administrative subpoenas is the state district court of New Mexico.

[8.50.115.15 NMAC - Rp, 8.50.115.23 NMAC, 12/30/10]

**History of 8.50.115 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:

8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:

8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.

8.50.115 NMAC, Expedited Processes and Administrative Expedited Process, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 117 INTERNATIONAL CHILD SUPPORT ENFORCEMENT**

**8.50.117.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.

[8.50.117.1 NMAC - Rp, 8.50.117.1 NMAC, 12/30/10]

**8.50.117.2 SCOPE:** To the general

public. For use by the IV-D agency and recipients of IV-D services.
[8.50.117.2 NMAC - Rp, 8.50.117.2 NMAC, 12/30/10]

**8.50.117.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.117.3 NMAC - Rp, 8.50.117.3 NMAC, 12/30/10]

**8.50.117.4 DURATION:** Permanent.
[8.50.117.4 NMAC - Rp, 8.50.117.4 NMAC, 12/30/10]

**8.50.117.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.117.5 NMAC - Rp, 8.50.117.5 NMAC, 12/30/10]

**8.50.117.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.117.6 NMAC - Rp, 8.50.117.6 NMAC, 12/30/10]

**8.50.117.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.117.8 INTERNATIONAL SUPPORT ENFORCEMENT:** Special enabling legislation allows the state of New Mexico, and all other states, to directly enter into agreements for child support enforcement services with foreign nations. (42 USC 659 (A)). With Mexico and Canada, these agreements are arranged on a state-by-state or province-by-province basis.
[8.50.117.8 NMAC -Rp, 8.50.117.8 NMAC, 12/30/10]

**8.50.117.9 FOREIGN CURRENCY CONVERSION:** Some interstate cases handled by the IV-D agency are received from foreign nations or are initiated to foreign nations.

A. Responding international cases:

(1) Establishment of an obligation for support: If the IV-D agency is asked to establish an order for support by the child support agency of a foreign nation, the IV-D agency shall:

(a) file the action in the appropriate state district court;

(b) convert the custodial party's income into United States dollars, provided that it is appropriate to utilize the custodial party's income in a calculation of support under the laws of New Mexico;

(c) utilize the non-custodial parent's actual or imputed income, in United States dollars;

(d) obtain a support order to be paid in United States dollars; and

(e) all payments collected by the IV-D agency's SDU shall be remitted to the child support agency in the foreign nation in United States dollars.

(2) Enforcement of a foreign nation's order for support: If the IV-D agency is asked to enforce an existing order for support from a foreign nation, the IV-D agency shall:

(a) register the order for support in the appropriate state district court;

(b) at the time of registration of the foreign support order, the amount of the obligation registered for enforcement shall be in United States dollars; if the initiating jurisdiction has not already converted the monetary amount into United States dollars, the IV-D agency shall convert the obligation from the currency of the foreign nation into United States dollars; the currency exchange rate used for the conversion of the foreign currency into United States dollars shall be obtained by the IV-D agency from the internet websites of respected financial journals or news organizations; the IV-D agency shall, at the time of the conversion, print out and retain in its file a copy of the dated exchange rate information relied upon by the IV-D agency in calculating the correct amount of the obligation to be enforced in United States dollars.

B. Initiating international cases: In all cases initiated by the IV-D agency to the child support agency of a foreign nation, regardless of whether for the establishment or the enforcement of an obligation of support, the IV-D agency shall ensure all financial records or information sent by the IV-D agency reflect United States dollars.
[8.50.117.9 NMAC - N, 12/30/10]

**History of 8.50.117 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/15/2001.
8.50.117 NMAC, International Child Support Enforcement, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
### CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 124 INTERSTATE CASES**

**8.50.124.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.124.1 NMAC - Rp, 8.50.124.1 NMAC, 12/30/10]

**8.50.124.2 SCOPE:** To the general public. For use by the IV-D agency and recipients of IV-D services.
[8.50.124.2 NMAC - Rp, 8.50.124.2 NMAC, 12/30/10]

**8.50.124.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.124.3 NMAC - Rp, 8.50.124.3 NMAC, 12/30/10]

**8.50.124.4 DURATION:** Permanent.
[8.50.124.4 NMAC - Rp, 8.50.124.4 NMAC, 12/30/10]

**8.50.124.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.124.5 NMAC - Rp, 8.50.124.5 NMAC, 12/30/10]

**8.50.124.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.124.6 NMAC - Rp, 8.50.124.6 NMAC, 12/30/10]

**8.50.124.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.124.8 INTERSTATE CASES:** The IV-D agency extends the full range of services available under its program to other states or territories. In addition, services are extended to nations that have entered into reciprocal agreements for the establishment and enforcement of orders for support with the United States. These cases shall be handled by the IV-D agency in accordance with the requirements of 45 CFR 303.7 and NMSA 1978, Section 40-6A-101, et seq., Uniform Interstate Family Support

Act (UIFSA).
[8.50.124.8 NMAC - Rp, 8.50.124.8 NMAC, 12/30/10]

**8.50.124.9 HIGH VOLUME, AUTOMATED ADMINISTRATIVE ENFORCEMENT IN INTERSTATE CASES:** The Title IV-D agency may, by electronic or other means, transmit to another state a request for assistance in enforcing support orders through high-volume, automated administrative enforcement. The request must include such information as will enable the responding state to compare the case information sent by the IV-D agency to the information in the data bases of the responding state.
[8.50.124.9 NMAC - Rp, 8.50.124.13 NMAC, 12/30/10]

**8.50.124.10 INTERSTATE WITHHOLDING:** The Uniform Interstate Family Support Act authorizes direct interstate wage withholding without a requirement of registration. A Title IV-D worker in New Mexico can send a wage withholding directly to an employer in any other state, and any other state can send a wage withholding directly to a New Mexico employer.
[8.50.124.10 NMAC - Rp, 8.50.124.14 NMAC, 12/30/10]

**8.50.124.11 FEES FOR GENETIC TESTING:** In accordance with 45 CFR 303.7(d)(2) and (3), the Title IV-D agency in the initiating state must pay for the cost of genetic testing in actions to establish paternity. If paternity is established in New Mexico by the Title IV-D agency, the Title IV-D agency must attempt to obtain a judgment for the costs of genetic testing from the party who denied paternity and must reimburse the initiating state with any sums so collected.
[8.50.124.11 NMAC - Rp, 8.50.124.16 NMAC, 12/30/10]

**8.50.124.12 COOPERATION DEFINED IN INTERSTATE CASES:** In interstate cases, the Title IV-D agency works closely with the child support agency in another jurisdiction. It is important that the Title IV-D agency be made aware of all communication in interstate cases in order to stay fully aware of the status of the cases. Accordingly, a party to an interstate action must not communicate directly with a child support agency in another jurisdiction. If an individual communicates directly with a child support agency in another jurisdiction without utilizing the Title IV-D agency, this conduct may be deemed to be "non-cooperation" by the Title IV-D agency and may subject the party to sanction and case closure, as appropriate. Parties in interstate cases must also follow the cooperation guidelines set forth in 8.50.105.12 NMAC or be deemed to be "non-cooperative" and be subjected to sanction and case closure, as appropriate.
[8.50.124.12 NMAC - N, 12/30/10]

**8.50.124.13 DOMESTIC VIOLENCE SAFEGUARDS:**

A. Responding interstate cases: In all responding interstate cases (cases sent to the Title IV-D agency by another jurisdiction for the establishment or enforcement of a support obligation), the Title IV-D agency should review the documents received from the child support agency in the other jurisdiction to determine if the case has been noted as a non-disclosure case. If the case is a non-disclosure case, then the Title IV-D agency, in accordance with NMSA 1978, Section 40-6A-312 shall:

(1) prepare appropriate documents requesting the temporary sealing of the court file;

(2) upon issuance by the state district court of the temporary order sealing court file and notice of hearing, as appropriate, serve the non-custodial parent with redacted copies of all pleadings and attachments; the Title IV-D agency shall redact all addresses, telephone numbers, and social security numbers for the custodial party and the child(ren) in the initiating jurisdiction;

(3) at the hearing on sealing of the court file, inform the custodial party that he or she shall testify as to why the court's file should be permanently sealed to prevent the disclosure of contact information for the custodial party and the child(ren);

(4) if the court enters an order permanently sealing the court file, only forward to the non-custodial party documents that have all contact information for the custodial party and the child(ren) redacted.

B. Initiating interstate cases: In all initiating interstate cases (cases sent by the Title IV-D agency to the child support agency of another jurisdiction), if the initiating individual (custodial party or non-custodial parent) requests non-disclosure status, then the IV-D agency shall require the party to complete documents relating to the non-disclosure request and forward the request to the other state or territory.
[8.50.124.13 NMAC - N, 12/30/10]

**8.50.124.14 FOREIGN CURRENCY CONVERSION:** If there is a need to convert the support or judgment amounts into foreign currency, refer to 8.50.117.9 NMAC for the Title IV-D agency's process.
[8.50.124.14 NMAC - N, 12/30/10]

**History of 8.50.124 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 570.0000, Interjurisdictional Cases, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.124 NMAC, Interstate Cases, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
### CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 125 FEES, PAYMENTS, AND DISTRIBUTIONS**

**8.50.125.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.125.1 NMAC - Rp, 8.50.125.1 NMAC, 12/30/10]

**8.50.125.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.125.2 NMAC - Rp, 8.50.125.2 NMAC, 12/30/10]

**8.50.125.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.125.3 NMAC - Rp, 8.50.125.3 NMAC, 12/30/10]

**8.50.125.4 DURATION:** Permanent.
[8.50.125.4 NMAC - Rp, 8.50.125.4 NMAC, 12/30/10]

**8.50.125.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.125.5 NMAC - Rp, 8.50.125.5 NMAC, 12/30/10]

**8.50.125.6 OBJECTIVE:** To provide regulations in accordance with federal and state law and regulations.
[8.50.125.6 NMAC - Rp, 8.50.125.6 NMAC, 12/30/10]

**8.50.125.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.125.8 CHILD SUPPORT PAYMENTS:**

A. The IV-D agency has in effect procedures for the payment of support through the IV-D agency upon the request of either the non-custodial party or the custodial party, regardless of whether arrearages exist or withholding procedures have been instituted. The IV-D agency is designated to administer the state's withholding system. The IV-D agency monitors all amounts paid and the dates of payments and records them on an individual payment record. As a condition of receiving IV-D services and cooperating with the IV-D agency, recipients must submit to the IV-D agency child support received directly from the non-custodial party. If the recipient of title XIX (medicaid) services elects to receive medical support services only, the recipient of title XIX (medicaid) services may keep child support payments received directly from the payor.

B. All support payments disbursed by the IV-D agency shall be through electronic funds transfer (EFT). The custodial party must elect to receive the payments via direct deposit or a pre-paid debit card authorized by the IV-D agency. If a custodial party receiving support payments fails to choose either option at the time of application or when requested by the IV-D agency, he or she will automatically be enrolled in the IV-D authorized pre-paid debit card program. Exceptions to disbursements via EFT may be granted for exceptional circumstances. Those wishing to request an exemption should request an "EFT exemption form" from the IV-D agency. The form must be fully completed to include an explanation of the exceptional circumstances requiring an exemption from EFT. The IV-D agency will respond in writing either granting or denying the request for an exemption.
[8.50.125.8 NMAC - Rp, 8.50.125.8 NMAC, 12/30/10]

**8.50.125.9 STATE DISBURSEMENT UNIT:** The state IV-D agency has established and operates a state disbursement unit (SDU) for the collection and disbursement of payments in all IV-D cases pursuant to 42 USC 654(a).
[8.50.125.9 NMAC - Rp, 8.50.125.9 NMAC, 12/30/10]

**8.50.125.10 COLLECTION OF FEES/RECOUPMENTS:** New Mexico is a cost recovery state, and other states' IV-D agencies have been notified of this fact. All fees charged to the custodial party are deducted from payments the IV-D agency distributes to the custodial party. The amount the IV-D agency deducts from each payment will not exceed ten percent of the total amount of the distribution. Once the percentage for the fee is deducted, the balance of the distribution is sent to the custodial party. Title IV-A, Title IV-E and medicaid-only (Title XIX) recipients are not charged any fees; federal regulations will not allow cost recovery on these cases.

A. Fee types and amounts:

(1) non-IV-D wage withholding payment processing only: $25 (annually)

(2) non-IV-a full service IRS collection: applicable federal fee

(3) paternity genetic testing: as charged by lab

(4) non-IV-A/IV-E case processing: actual cost

(5) parent locate only: $60

(6) filing fee: actual cost

(7) witness fee: actual cost

(8) service of process: actual cost

(9) expert witness fee: actual cost

(10) court costs: as assessed

(11) establishment of support obligation and paternity (if necessary): $250

(12) modification: $150

(13) enforcement: $250

(14) tax intercept related: as determined by federal regulations

(15) IRS tax intercept service: $25

(16) TRD tax intercept service: $20

B. Refund of fees: Fees are to be refunded only under the following conditions:

(1) fees have been charged in error or overcharged;

(2) the court orders a refund.

C. Fees are assessed to the custodial or non-custodial party requesting an action or service (i.e. establishment of paternity, modification or enforcement of support obligation) in a IV-D case in accordance with the fee schedule above.

D. Genetic testing fees: See 8.50.107.12 NMAC in addition to the fee schedule listed above.

E. Recoupment: The IV-D agency will recoup from the custodial party for any over-distribution of funds and for any funds collected from the non-custodial party that are returned for insufficient funds. If the recoupment is pursuant to an over-distribution of funds, the recoupment amount shall not exceed twenty-five percent of any future distribution to the custodial party until paid in full. If the recoupment is pursuant to insufficient funds received from the non-custodial party's payment, the recoupment amount shall be one hundred percent (100%) of any future distribution to the custodial party until paid in full.
[8.50.125.10 NMAC - Rp, 8.50.125.10 NMAC, 12/30/10]

**8.50.125.11 DISTRIBUTION OF COLLECTIONS (EXCEPT FOR FEDERAL INCOME TAX REFUND OFFSETS):** Specific terms used in this section are derived from 42 USC 657 and 45 CFR 300 through 303.

A. In accordance with federal regulations, for purposes of distribution in a IV-D case, amounts collected, except for amounts collected through federal income tax refund offset, must be distributed as follows:

(1) current support (monthly payment ordered for current support);

(2) past due support (monthly payment on judgment);

(3) current support arrears;

(4) past due support arrears;

(5) in each of the categories above, the payment is prioritized in the following order: child support, medical support, spousal support; any payment that is insufficient to meet the entire obligation will be applied in the order stated above.

B. The requirement to apply collections first to satisfy the current support obligation is critical in all IV-D cases to ensure that payment records are consistent in interstate cases, regardless of whether the amount applied to current support is paid to the family (as in a former assistance case) or retained by the state to recover unreimbursed assistance in a current assistance case.

C. Current assistance cases: The state will (not exceeding the cumulative amount of unreimbursed assistance paid to the family):

(1) pay to the federal government the federal share of the entire amount collected;

(2) retain the state share of the amount collected; and

(3) reduce the cumulative amount of unreimbursed assistance by the total amount collected and disbursed under (1) and (2), and distribute collections exceeding the cumulative amount of unreimbursed assistance to the family.

D. Federal statute does not specify the order in which collections are applied to satisfy assigned arrearages in current assistance cases. The state of New Mexico has selected the following option:

(1) collections will be first applied to temporarily assigned arrearages; and

(2) additional collections will be applied to permanently assigned arrearages.

E. Pass through payment: At the discretion of the New Mexico legislature, the IV-D agency may disburse a maximum amount determined on a monthly basis (refer to disregard for child support payments in 8.102.520.9 NMAC for maximum amount), to the IV-A service recipient from collections on current support. Under no circumstances is a current or former IV-A recipient entitled to receive

said amount as part of the arrearages owed to him or her. The disbursement to the custodial party, up to the maximum amount, shall only be made if the recipient is currently receiving TANF and the IV-D agency collects a payment from the non-custodial party. If the non-custodial party pays less than the maximum amount allowed to pass through, the custodial party shall only receive the amount of the payment collected. Neither the IV-D agency nor the IV-A agency will pay the difference to the custodial party between the maximum pass through amount and the amount paid by the non-custodial party. If the custodial party has more than one IV-D case, he or she will only receive the lower of the amount of the maximum disregard or the current monthly collection received on all cases. A pass through payment is in addition to, not in lieu of, the monthly TANF payment.

F. Former assistance cases: For collections made prior to October 1, 1998 (other than through federal income tax refund offset), the state shall:

(1) first, distribute the amount collected to satisfy the current monthly support obligation and pay that amount to the family;

(2) second, distribute any amount above the current monthly support obligation to arrearages owed to the family or assigned to the state; the federal statute does not specify the order in which collections are applied to satisfy arrearages; the state must have procedures that specify the order in which assigned arrearages will be satisfied; if the state distributes any amount to assigned arrearages, the state must pay to the federal government the federal share of the amount so collected; the state must retain the state share of the amount so collected, with one exception; the state may retain or pay to the family the state share of collections applied to arrearages that accrued while the family was receiving assistance after October 1, 1996.

G. For collections made on or after October 1, 1998, or earlier at state option (other than collections through federal income tax refund offset), the state shall:

(1) distribute the amount collected to satisfy the current monthly support obligation and pay that amount to the family;

(2) distribute any amount above the current monthly support obligation to satisfy never-assigned arrearages and pay that amount to the family;

(3) distribute any amount above amounts distributed in (1) and (2) to satisfy unassigned pre-assistance arrearages and conditionally-assigned arrearages and pay that amount to the family;

(4) distribute any amount above amounts distributed in (1), (2) and (3) to satisfy permanently-assigned arrearages; the state must pay the federal government the federal share of the amount so collected; the state must retain the state share of the amount so collected with one exception; the state may retain or pay to the family the state share of collections applied to arrearages that accrued while the family was receiving assistance after October 1, 1996;

(5) reduce the cumulative amount of unreimbursed assistance by the total amount distributed under (4), distribute collections exceeding the cumulative amount of unreimbursed assistance to satisfy unassigned during-assistance arrearages and pay those amounts to the family.

H. Never-assistance cases: All support collections in never-assistance cases must be paid (less any applicable fees) to the family.

I. No collections of funds will be sent to third parties, attorneys, or agents, except in cases where there is a court order directing the support payment(s) to a person or entity other than the custodial party.

J. When the non-custodial parent has multiple cases with the IV-D agency, payments received from the non-custodial parent through wage withholding shall be distributed among all active cases on a pro-rata basis determined by the total amount of all monthly support obligations. Payments received through administrative enforcement mechanisms shall be distributed among multiple cases on a pro-rata split based on the total amount of arrearages owed at the time of the referral for administrative enforcement, except for reinstatement of license(s). Payments received for the reinstatement of licenses will be applied to the specific case(s) rather than split among multiple cases. Any other direct payments made by the non-custodial parent will be divided among all active cases involving the non-custodial parent.

[8.50.125.11 NMAC - Rp, 8.50.125.11 NMAC, 12/30/10]

**8.50.125.12 DISTRIBUTION OF COLLECTIONS THROUGH FEDERAL INCOME TAX REFUND OFFSET:** Any amount of support collected through federal income tax refund offset will be retained by the state to the extent past-due support has been assigned to the state up to the amount necessary to reimburse the state for cumulative amounts paid to the family as assistance by the state. The state will pay to the federal government the federal share of the amounts so retained. To the extent the amount collected exceeds the amount required to be retained, the state will pay the excess to the family.

A. Current assistance cases: Support collections through federal income tax refund offsets in current assistance cases are retained by the state up to the cumulative amount of unreimbursed assistance paid to the family. Collections over and above the cumulative amount of unreimbursed assistance are paid to the family.

B. Former assistance cases: Support collections made through federal income tax refund offsets in former assistance cases shall first be applied to assigned arrearages. This includes any conditionally-assigned arrearages. These collections shall be retained by the state up to the cumulative amount of unreimbursed assistance paid to the family. Collections over and above the cumulative amount of unreimbursed assistance are paid to the family.

C. Never-assistance cases: Support collections through federal income tax refund offsets in non-assistance cases are paid to the family.

[8.50.125.12 NMAC - Rp, 8.50.125.12 NMAC, 12/30/10]

**8.50.125.13 DISTRIBUTION OF COLLECTIONS IN TITLE IV-E FOSTER CARE CASES:** Amounts collected as support in Title IV-E foster care cases will be distributed in accordance with 45 CFR 302.52.

[8.50.125.13 NMAC - Rp, 8.50.125.13 NMAC, 12/30/10]

**8.50.125.14 ASSIGNED MEDICAL SUPPORT COLLECTIONS:** Any amounts collected by the IV-D agency that represent specific dollar amounts designated in the support order for medical purposes that have been assigned to the state will be forwarded to the medicaid agency for distribution. When a family ceases receiving assistance under the state's Title XIX (medicaid) plan, the assignment of medical support rights under section 1912 of the act terminates, except for the amount of any unpaid medical support obligation that has accrued under such assignment. The IV-D agency will attempt to collect any unpaid specific dollar amounts designated in the support order for medical support purposes. Under this requirement, any medical support collection made by the IV-D agency will be forwarded to the medicaid agency for distribution.

[8.50.125.14 NMAC - Rp, 8.50.125.14 NMAC, 12/30/10]

**8.50.125.15 CHILD LEVEL ACCOUNTING:** An application for public assistance by any person constitutes an assignment by operation of law of any support rights the person is entitled to from any other person, whether the support rights are owed to the applicant or to any family member for whom the applicant is applying for or receiving assistance. Therefore, in current or former assistance cases, the IV-D agency may not use child-level accounting

by splitting or pro-rating the family grant amount on a per-child basis when the child is (or was) included in the family unit and must continue to apply collections to the cumulative amount of unreimbursed assistance balances based on the total monthly family grant amount.
[8.50.125.15 NMAC - Rp, 8.50.125.15 NMAC, 12/30/10]

**8.50.125.16 CHILD SUPPORT RECEIVED DIRECTLY FROM PAYORS:** As a condition of receiving IV-D services, all recipients must submit to the IV-D agency all court ordered, voluntary agreement and voluntary contribution child support directly received from the non-custodial party. Failure to cooperate with this requirement may constitute cause for closing the IV-D case for non-cooperation. If the recipient of IV-D services elects to receive medical support services only, the recipient of IV-D services may keep child support payments received directly from the payor.
[8.50.125.16 NMAC - Rp, 8.50.125.16 NMAC, 12/30/10]

**8.50.125.17 CHILD SUPPORT COLLECTED FOR MEDICAID REFERRALS:** A medicaid only recipient, for whom an assignment of support rights is in effect, must receive medical support services but may choose to receive full services. If the recipient elects to receive full services, the recipient is required to turn over all child support received, to be distributed in accordance with federal and state regulations. If the recipient elects to receive only medical support services, the recipient may keep child support payments received directly from the payor.
[8.50.125.17 NMAC - Rp, 8.50.125.17 NMAC, 12/30/10]

**8.50.125.18 CHILD SUPPORT CASE SERVICES:** The IV-D agency provides two types of case services: full service and payment processing only.

A. Full services cases: Recipients of IV-A services are automatically enrolled for full services and recipients of title XIX may elect to receive full services for all support or solely for medical support. Full services cases include all services listed below as specific services may not be selected. Applicants not receiving any type of public assistance may also request full services that include:

(1) establishment of paternity;

(2) establishment of a child support, medical support order, or both;

(3) enforcement of a child support orders, spousal support orders (so long as there is a current order for child support), and medical support orders;

(4) administrative enforcement of orders, including referrals for tax intercepts, passport denial, license revocation, and financial institution data match;

(5) issuance of wage withholding against a non-custodial party's earnings/ wages for support obligations; and

(6) modification of child support orders, if appropriate.

B. Payment processing only cases: A custodial party currently receiving full services from the IV-D agency or opening a new case with the IV-D agency may elect to receive payment processing only services so long as he/she is not currently receiving public assistance (Title IV-A or Title XIX) and does not have an outstanding balance of arrears owed to the state for prior public assistance. Payment processing only services are charged an annual fee as stated in section 10, above. In order to receive payment processing only services, the custodial party must produce a valid court order (either issued by or registered by a court in New Mexico) for a support obligation that contains an income withholding provision or a copy of an income withholding order indicating that payments are to be sent to the IV-D agency.

(1) The IV-D agency is not responsible for:

(a) establishing, modifying, or enforcing the support obligation;

(b) establishing, modifying, enforcing, sending, or terminating the income withholding order;

(c) calculating or determining the appropriate amount of support, payment toward arrears, delinquencies, and arrearages;

(d) appearing in court for any issues involving the establishment, modification, enforcement or termination of the support obligations.

(2) The IV-D agency will provide either the custodial party or the non-custodial party a printout of the payments received by the IV-D agency after receiving a written request.

(3) The IV-D agency may terminate the payment processing only services if no payments are received for a period of two (2) months.
[8.50.125.18 NMAC - Rp, 8.50.125.18 NMAC, 12/30/10]

**8.50.125.19 ISSUANCE OF REPLACEMENT WARRANTS:** If a custodial party or non-custodial parent claims that a warrant issued to him or her has not been received, a replacement warrant shall be issued only if the original warrant has not been redeemed or at the discretion of the IV-D agency. If the IV-D agency determines that a replacement warrant will be issued, any warrants that were fraudulently redeemed shall be reported by the intended recipient to the proper authorities as a pre-condition for the issuance of a replacement warrant. An unredeemed warrant is subject to the undistributed collections process, see 8.50.132 NMAC. The IV-D agency will replace a warrant that it can confirm was not redeemed and has not escheated to the IV-D agency through the undistributed collections process. If the IV-D agency is unable to confirm that a warrant has been redeemed due to the length of time that has passed since the warrant was issued, the IV-D agency will deny the request for a replacement warrant.
[8.50.125.19 NMAC - N, 12/30/10]

**History of 8.50.125 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives:
ISD CSEB 501.1100, State and Local Requirements, 6-23-80.
ISD CSEB 521.0000, Non-AFDC Fees and Costs, 6-23-80.
ISD CSEB 521.0000, Non-AFDC Fees and Costs, 1-20-81.
ISD CSEB 592.0000, Collection, 6-23-80.
ISD CSEB 593.0000, Distribution, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.125 NMAC, Fees, Payments, and Distributions, filed 5/14/2001 - Repealed effective 12/30/2010

## NEW MEXICO HUMAN SERVICES DEPARTMENT
### CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 129 C A S E MANAGEMENT**

**8.50.129.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.129.1 NMAC - Rp, 8.50.129.1 NMAC, 12/30/10]

**8.50.129.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.129.2 NMAC - Rp, 8.50.129.2 NMAC, 12/30/10]

**8.50.129.3 S T A T U T O R Y AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement

of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.129.3 NMAC - Rp, 8.50.129.3 NMAC, 12/30/10]

**8.50.129.4 DURATION:** Permanent.
[8.50.129.4 NMAC - Rp, 8.50.129.4 NMAC, 12/30/10]

**8.50.129.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.129.5 NMAC - Rp, 8.50.129.5 NMAC, 12/30/10]

**8.50.129.6 OBJECTIVE:** To provide regulations in accordance with federal and state laws and regulations.
[8.50.129.6 NMAC - Rp, 8.50.129.6 NMAC, 12/30/10]

**8.50.129.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.129.8 CASE RECORDS:** The IV-D agency maintains electronic and physical records necessary for the proper and efficient operation of the program.
[8.50.129.8 NMAC - Rp, 8.50.129.8 NMAC, 12/30/10]

**8.50.129.9 RETENTION OF RECORDS:** Records will be retained in accordance with the state's retention schedule for the human services department at 1.18.630 NMAC.
[8.50.129.9 NMAC - Rp, 8.50.129.9 NMAC, 12/30/10]

**8.50.129.10 SUSPENSION OF CASES:** New Mexico IV-D cases may be suspended when it is not possible to proceed with the case and the case does not meet federal closure criteria.
[8.50.129.10 NMAC - Rp, 8.50.129.11 NMAC, 12/30/10]

**8.50.129.11 CLOSURE OF CASES:** IV-D cases may be closed if they meet the federal case closure criteria in 45 CFR 303.11 or they were opened in error.
[8.50.129.11 NMAC - Rp, 8.50.129.12 NMAC, 12/30/10]

**History of 8.50.129 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.129 NMAC, Case Management, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 130 ADMINISTRATIVE HEARINGS**

**8.50.130.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division
[8.50.130.1 NMAC - Rp, 8.50.130.1 NMAC, 12/30/10]

**8.50.130.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.130.2 NMAC - Rp, 8.50.130.2 NMAC, 12/30/10]

**8.50.130.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.130.3 NMAC - Rp, 8.50.130.3 NMAC, 12/30/10]

**8.50.130.4 DURATION:** Permanent.
[8.50.130.4 NMAC - Rp, 8.50.130.4 NMAC, 12/30/10]

**8.50.130.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.130.5 NMAC - Rp, 8.50.130.5 NMAC, 12/30/10]

**8.50.130.6 OBJECTIVE:** To provide regulations in accordance with federal and state law and regulations.
[8.50.130.6 NMAC - Rp, 8.50.130.6 NMAC, 12/30/10]

**8.50.130.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.130.8 ADMINISTRATIVE HEARINGS:** The Title IV-D agency will provide for administrative hearings for:

A. an obligor requesting a review pertaining to an adverse administrative order, or referral for federal tax intercept, state tax intercept, referral for passport denial, lien on lottery winnings, lien on gaming winnings, or the FIDM program;

B. any IV-A recipient or former IV-A recipient who believes he or she is entitled to receive part or all of a support payment that was received by the Title IV-D agency but not disbursed to the recipient;

C. an obligor's spouse who requests the refund of more that one-half of a state tax intercept; and

D. an owner as defined in 8.50.132.7 NMAC who is claiming an interest in undistributed collections.
[8.50.130.8 NMAC - Rp, 8.50.130.8 NMAC, 12/30/10]

**8.50.130.9 IN GENERAL:**

A. The hearing process provides the appellant notice and an opportunity to assert his or her claim.

B. Hearing appellant: A hearing "appellant" for the purpose of these regulations is any obligor, obligor's spouse (only in cases involving a state tax intercept), or obligee requesting and entitled to a review.

C. Appellant's rights: the right to a hearing includes the right:

(1) to be advised of the nature and availability of a hearing;

(2) to safeguards of the appellant's opportunity to present a case;

(3) to have prompt notice and implementation of the decision based upon the hearing; and

(4) to be advised that judicial review may be invoked to the extent such review is available under state law.
[8.50.130.9 NMAC - Rp, 8.50.130.8 NMAC, 12/30/10]

**8.50.130.10 NOTICE OF ADMINISTRATIVE ENFORCEMENT ACTION:**

A. Notices to obligor of referral to tax-offset program: The IV-D agency sends written notice to inform an obligor that the amount of his or her past-due support will be referred for a tax refund offset. One or more of the following notices is sent:

(1) FMS pre-offset notice (obligor);

(2) taxation and revenue department pre-offset notice (obligor);

(3) taxation and revenue department pre-offset notice (injured spouse);

(4) IRS notice of offset; and

(5) taxation and revenue department final distribution notice.

B. Notice to obligor of FIDM freeze order: The Title IV-D agency will mail a copy of the freeze order to the

obligor at the last known address on file with the IV-D agency. The freeze order will inform the aggrieved party of the right to appeal the order by mailing a request for appeal within fifteen (15) calendar days by certified mail to the address indicated on the form provided by the IV-D agency.

C. Notice to obligor of administrative lien on lottery and gaming winnings: The Title IV-D agency will mail a copy of the notice of administrative lien to the obligor at the last known address on file with the IV-D agency.

D. Notice to obligor for passport referral: Notice regarding the referral for passport denial is included in the FMS offset notice and is sent to the obligor at the last known address on file with the IV-D agency.

E. Notice to owner of an undistributed collection: The Title IV-D agency will mail a copy of the notice of undistributed collection to the owner at the last known address on file with the IV-D agency.

[8.50.130.10 NMAC - Rp, 8.50.130.8 NMAC, 12/30/10]

**8.50.130.11 TIME FRAMES FOR REQUESTING AN ADMINISTRATIVE HEARING:** In all cases where a time frame is not specifically provided, the appellant has fifteen (15) calendar days following the date of mailing of notice by the IV-D agency to submit a written request for an administrative hearing. The appellant has thirty (30) days from the date on the pre-offset notice to request a hearing. In order to be considered timely, the request for a hearing on a pre-offset notice must be received by the Title IV-D agency no later than the close of business on the thirtieth (30th) day, or the next business day if the thirtieth (30th) day is a Sunday or federally recognized holiday.

[8.50.130.11 NMAC - Rp, 8.50.130.8 NMAC, 12/30/10]

**8.50.130.12 CONTESTING TAX REFUND INTERCEPT IN INTERSTATE CASES:**

A. If an appellant requests an administrative hearing in writing, a tax hearing request form is completed by the appellant or the IV-D staff and is submitted within ten (10) days to the administrative law judge. The administrative law judge sends a notice of acknowledgment to the appellant and to the respective Title IV-D agency worker. The notice and acknowledgement shall include a statement regarding the timeliness of the request for hearing. In non-Title IV-A cases, the Title IV-D agency notifies the custodial party of the time and place of the administrative hearing. The Title IV-D agency worker should be available to testify at the administrative hearing.

B. If the appeal concerns an IRS joint tax refund that has not yet been intercepted, the appellant is informed that the IRS will notify the injured spouse at the time of intercept regarding the steps to take to secure his or her proper share of the refund. If the appeal concerns a joint tax refund that has already been intercepted, the injured spouse is referred to the IRS to seek resolution.

[8.50.130.12 NMAC - Rp, 8.50.130.9 NMAC, 12/30/10]

**8.50.130.13 CONTESTING TAX REFUND INTERCEPT IN RESPONDING INTERSTATE CASES:** Administrative hearing requests are referred to the central registry in the responding state if the obligor requests a hearing in that state.

A. When the obligor, after receiving the FMS offset notice from the other state, contacts the Title IV-D agency worker, the worker may refer the obligor to the state that issued the notice. However, if the obligor contacts the Title IV-D agency as the last resort because he or she cannot get assistance from the other state, the worker may contact the other state, or refer the obligor to central registry and central registry staff will contact the other state.

B. If a request from the obligor for an administrative hearing in New Mexico is received and the case was submitted based on another state's order, a review of the arrearage computation submitted for tax intercept and the underlying documentation, and any new evidence provided by the appellant is completed, and an attempt is made to resolve the complaint. If the complaint cannot be resolved by the Title IV-D agency worker and the obligor requests an administrative hearing in the initiating state, the other state is notified by the New Mexico Title IV-D agency of the request and all necessary information is provided within ten (10) days of the obligor's request for an administrative hearing. At the same time, the central registry sends the OCSE an update to report that the matter is being transferred to the initiating state for the purpose of conducting an administrative hearing.

C. The initiating state is responsible for all procedures required for conducting a hearing within that state.

[8.50.130.13 NMAC - Rp, 8.50.130.10 NMAC, 12/30/10]

**8.50.130.14 CONTESTING THE DENIAL OF PAYMENT OF AN UNDISTRIBUTED COLLECTION:** If an appellant requests an administrative hearing, an undistributed collections hearing request form is completed by the appellant or the IV-D staff and is submitted within ten (10) days to the administrative law judge. The administrative law judge sends a notice of acknowledgement to the appellant and to the respective Title IV-D agency worker to include a statement regarding the timeliness of the request for hearing.

[8.50.130.14 NMAC - N, 12/30/10]

**8.50.130.15 INITIATION OF HEARING PROCESS:**

A. A request for hearing must be made in writing.

B. Receipt of a written hearing request shall be acknowledged in writing to the appellant by the administrative law judge.

C. Upon the request of the appellant, the IV-D staff shall assist in the preparation of a notice of hearing. The notice of hearing will be signed by the appellant.

[8.50.130.15 NMAC - N, 12/30/10]

**8.50.130.16 DENIAL/DISMISSAL OF REQUEST FOR HEARING:**

A. The administrative law judge may deny or dismiss a request for hearing when:

(1) the request is not received within the specified time period;

(2) the situation has been resolved;

(3) the request is not made in writing; or

(4) a written withdrawal of request for hearing is received from the appellant, or a written agreement settling all issues is approved by all parties and is submitted to the administrative law judge.

B. A request for a hearing is considered abandoned and therefore dismissed if neither the appellant nor his or her representative appears at the time and place of the hearing, and if, within ten (10) days after a notice of abandonment is mailed by the administrative law judge, the appellant has not presented good cause for failing to appear. Good cause includes verification of a death in the family, doctor's note verifying a disabling personal illness, or other significant emergencies. At the discretion of the administrative law judge, a showing of exceptional circumstances is considered good cause.

[8.50.130.16 NMAC - Rp, 8.50.130.13 NMAC, 12/30/10]

**8.50.130.17 NOTICE OF HEARING:** As early as possible and not less than ten (10) days prior to the hearing, written notice is sent by the administrative law judge to all parties involved in the hearing. The notice shall set forth the time, date and place of the hearing. Arrangements will be made to ensure that the hearing process is accessible to and accommodates the appellant, as long as the appellant provides at least ten (10) days advance notice to the administrative law judge of the need for reasonable accommodations. The notice of hearing includes an explanation of the hearing process and limitation of the

scope of the hearing, the procedures to be followed during the hearing, and notification that the appellant should be ready to produce any required witnesses at the hearing and secure legal counsel prior to the hearing. The appellant is told that neither the department nor the IV-D agency will pay for any representation or legal counsel for appellant or for any hearing costs. The issuance of a notice of hearing by the administrative law judge shall act to stay the administrative action, pending the issuance of a ruling on the, merits of the hearing.
[8.50.130.17 NMAC - Rp, 8.50.130.12 NMAC, 12/30/10]

**8.50.130.18 APPELLANT'S RIGHTS:** The appellant is given adequate opportunity to review and present evidence that is within the scope of the hearing.

A. The appellant may examine all documents to be used at the hearing prior to the date of the hearing, as well as during the hearing. If requested, the IV-D staff will provide copies of the portions of the case file that are relevant to the hearing. Confidential information that is protected from release and other documents or records that the appellant will not otherwise have an opportunity to challenge will not be introduced at the hearing or affect the administrative law judge's decision.

B. The appellant may present his or her case or have it presented by a representative.

C. The appellant may bring witnesses he or she wants to present information that he or she believes is important to his or her case.

D. The appellant may advance arguments without undue interference.

E. The appellant may question or overcome any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses.

F. The appellant may submit relevant evidence to support pertinent facts and defenses in the case.
[8.50.130.18 NMAC - Rp, 8.50.130.14 NMAC, 12/30/10]

**8.50.130.19 TITLE IV-D AGENCY RESPONSIBILITY:** To ensure an appellant's rights during the hearing process, the IV-D agency shall:

A. make available, in a timely manner, without charge, the case documents (excluding any privileged, safeguarded or confidential information) necessary for an appellant or representative to determine whether a hearing should be requested or to prepare for a hearing;

B. provide a translator if the appellant is not proficient in English; and

C. prepare a summary of evidence to include all documents to be presented by the Title IV-D agency at the hearing and all documents should be provided to the appellant, or his or her representative, by the Title IV-D agency at least ten (10) days prior to the hearing.
[8.50.130.19 NMAC - Rp. 8.50.130.15 NMAC, 12/30/10]

**8.50.130.20 PRE-HEARING ACTIVITY:**

A. Preliminary conference: A preliminary conference may be scheduled prior to the hearing to discuss the issues concerning the hearing. The preliminary conference is held between the IV-D agency worker, the appellant, and the appellant's representative, as applicable. The administrative law judge is not involved and will not participate in the preliminary conference. This conference may provide an opportunity to resolve the dispute. A preliminary conference may lead to an informal resolution of the dispute. However, a hearing shall still be held unless the appellant makes a written withdrawal of his or her request for a hearing. If a written withdrawal is received by the IV-D agency worker, it must be forwarded to the administrative law judge. Appellants are advised that the preliminary conference is optional and that it will not delay or replace the hearing process.

B. The purposes of the pre-hearing conference include, but are not limited to:

(1) clarification, formulation and simplification of issues;

(2) resolution of some or all issues;

(3) exchange of documents and information;

(4) review of any audit findings; and

(5) discussion of other matters that might help dispose of any of the pending issues.

C. Matters left unresolved: If all matters in controversy are not resolved at the preliminary conference, a hearing is held.

D. Tax hearing request form: If the dispute cannot be resolved, within ten (10) days of the receipt of the request for administrative hearing, a tax hearing request form is sent to the child support enforcement division, administrative support bureau.
[8.50.130.20 NMAC - Rp, 8.50.130.16 NMAC, 12/30/10]

**8.50.130.21 CONDUCT OF HEARING:**

A. Conduct of a hearing is as follows:

(1) all hearings are conducted telephonically;

(2) the hearing is not open to the public;

(3) the administrative law judge identifies for the record all persons present at the hearing; and

(4) the administrative law judge takes administrative notice of those matters the same as state courts take judicial notice of, including the IV-D agency's policies and procedures.

B. Record: A hearing is electronically recorded. The recording is placed on file at the hearings unit and is available for examination by the appellant or representative for thirty (30) days following the hearing. If a decision is appealed, an index log of the tape is prepared by the Title IV-D agency and a copy of the index log is supplied to the appellant free of charge.

C. Admission of evidence: Formal rules of evidence and civil procedure do not apply. The administrative law judge may allow hearsay testimony if it is deemed relevant to the decision. The rules of privilege will be effective to the extent that they are recognized in civil actions in the New Mexico district courts.

D. Case records: An appellant or representative is allowed to examine the entire hearing case record before, during and after the proceedings. The appellant or representative must request the hearing record and the Title IV-D agency will provide the record within a reasonable period of time.
[8.50.130.21 NMAC - Rp, 8.50.130.17 NMAC, 12/30/10]

**8.50.130.22 DECISION MAKING:**

A. Authority: The hearing decision is based only on the evidence introduced and admitted by the administrative law judge during the hearing. This includes the record of the testimony, all reports, documents, forms, etc., made available at the hearing, provided that the appellant was given an opportunity to examine them as part of the hearing process.

B. Written decision: The administrative law judge will issue a written hearing decision notice within twenty (20) business days after the hearing. The decision will clearly state whether the administrative law judge is finding in favor of the appellant of the Title IV-D agency and shall include reference to the admitted evidence that supports the decision.
[8.50.130.22 NMAC - Rp, 8.50.130.18 NMAC, 12/30/10]

**8.50.130.23 IMPLEMENTATION OF DECISIONS:** The administrative law judge's decision is final and binding on all issues within the scope of a hearing and that have been the subject of a hearing, unless stayed by an appeal or a district court order.

A. Decision favorable to appellant regarding offsets:

(1) If the administrative hearing results in a deletion of, or decrease in, the amount referred for tax intercept, the tax intercept unit notifies the OCSE within ten (10) business days of the administrative hearing.

(2) If, as a result of the administrative hearing, an amount which has already been offset is found to have exceeded the amount of past-due support owed, the IV-D agency refunds the excess amount to the obligor promptly, and reports the refund to the OCSE. In joint return cases, the refund check is made payable to both parties.

B. Decisions regarding liens on lottery, gaming, or FIDM: The Title IV-D agency will take appropriate action in accordance with the decision of the administrative law judge. If the administrative law judge rules in favor of the appellant, the Title IV-D agency will take action to fully or partially release a freeze order or administrative lien, as appropriate. If the administrative law judge rules in the agency's favor, the Title IV-D agency will proceed to have the funds routed to the Title IV-D agency for distribution to the obligor's case(s) or held with the Title IV-D agency until all appeals relevant to the action have been exhausted or foreclosed due to deadlines.

[8.50.130.23 NMAC - Rp, 8.50.130.19 NMAC, 12/30/10]

**8.50.130.24 RIGHT OF APPEAL:** Either party has the right to judicial review of the hearing decision or a denial of a hearing issued pursuant to 8.50.130.15 NMAC other than for a written withdrawal of request for hearing signed by the appellant. If a hearing decision is in favor of the Title IV-D agency, appellant is notified of the right to pursue judicial review of the decision at the time of the decision.

A. Timeframes for appealing decision: Within thirty (30) days after the date on the hearing decision notice, an appellant or the Title IV-D agency may appeal a decision by filing an appropriate action for judicial review with the clerk of the appropriate district court, and filing a copy with the Title IV-D administrative law judge.

B. Record sent to district court: All appeals to the district court are on the record made at the hearing. The administrative law judge files one (1) copy of the hearing record with the clerk of the appropriate district court and furnishes one copy to the appellant within twenty (20) days after receipt of the notice of appeal.

C. Stay pending appeal: An appeal to the state district court shall act as a stay of the underlying administrative action, pending the court's ruling.

[8.50.130.24 NMAC - Rp, 8.50.130.20 NMAC, 12/30/10]

**8.50.130.25 STATE DIRECTORY OF NEW HIRES PENALTY ASSESSMENT HEARINGS:** The human services department, Title IV-D agency, has established a hearing process that provides for impartial review of New Mexico state directory of new hires claims against non-complying employers. (45 USC 653(d)). For purposes of these regulations, an employer requesting a hearing is referred to as an appellant.

A. Appellant eligibility: The IV-D agency established a hearing process for any individual who meets the following criteria:

(1) any employer who believes he or she has been erroneously assessed penalties; and

(2) who has been unable to resolve this issue with the New Mexico state directory of new hires representative at a preliminary conference.

B. Hearing appellant: A hearing appellant for the purposes of these regulations is any employer requesting review. The right to file a request for a hearing is not to be limited or interfered with in any way by the IV-D agency as long as the request is made in a timely manner.

C. Appellant's rights: The right to a hearing includes the right:

(1) to be advised of the nature and availability of a hearing;

(2) to be represented by counsel or other person of the appellant's choice;

(3) to have a hearing that safeguards the appellant's opportunity to present a case;

(4) to have prompt notice and implementation of the decision on the hearing, and

(5) to be advised that judicial review may be invoked to the extent such review is available under state law, and that the IV-D agency does not pay for the cost of such proceedings; the requirements of due process apply to hearing proceedings.

D. Penalty assessment notice: The New Mexico state directory of new hires sends written notice to inform an employer that penalties have been assessed. Each penalty assessment notice will:

(1) cite the statutory authority (NMSA 1978, Section 50-13-4) for the assessment of the penalty;

(2) include the name and last four digits of the social security number for each party not reported;

(3) list the total amount of penalties assessed;

(4) inform the employer that failure to report is the basis for penalty and does not require a knowing or deliberate act on the part of the employer;

(5) inform the employer that conspiracy can be established by circumstantial evidence;

(6) list requirements for employers to request a hearing if they disagree with the assessment;

(7) provide the name and business telephone number of a Title IV-D agency contact to provide additional information or answer questions relating to the assessment of penalties.

E. Time frames for requesting hearing: The appellant has thirty (30) days from the date on the penalties assessment notice to submit a written request for a hearing. In order to be considered timely, the request must be received by the administrative law judge no later than the close of business on the thirtieth ($30^{th}$) day. When a timely request for hearing is received by the administrative law judge, the administrative law judge notifies the new hires directory, state project manager immediately so that a preliminary conference can be scheduled.

F. Notice of hearing: Upon receipt of a timely request for hearing, written notice is sent by the administrative law judge to all parties involved in the hearing regarding the time, date and place of the hearing. Arrangements will be made to ensure that the hearing process is accessible to and accommodates the appellant. In the hearing notice, appellants are also given an explanation of the hearing process, the procedures to be followed for the hearing, and enough time to secure witnesses or legal counsel. The appellant shall be informed that neither the department nor the IV-D agency pays for representation or legal counsel for appellant or for any hearings costs, and are provided the name and business telephone number of a contact who can provide additional information relating to the assessment of penalties. A hearing may be continued or rescheduled with the consent of all parties.

G. State directory of new hires responsibility: To ensure an appellant's rights during the hearing process, the state directory of new hires staff will:

(1) upon request, make available in a timely manner the documents necessary for an appellant or representative to determine whether to request a hearing or to prepare for a hearing;

(2) upon request, help appellant submit a written hearing request.

H. Effect of issuance of notice of hearing: All provisions contained in sections 8.50.130.15, 8.50.130.17, 8.50.130.19, 8.50.130.20 and 8.50.130.22 NMAC apply when a notice of hearing is issued pursuant to subsection F above.

[8.50.130.25 NMAC - Rp, 8.50.130.21 NMAC, 12/30/10]

**History of 8.50.130 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.130 NMAC, Administrative Hearings, filed 5/14/2001 - Repealed effective 12/30/2010

## NEW MEXICO HUMAN SERVICES DEPARTMENT
CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 131 PENALTIES**

**8.50.131.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.131.1 NMAC - Rp, 8.50.131.1 NMAC, 12/30/10]

**8.50.131.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.131.2 NMAC - Rp, 8.50.131.2 NMAC, 12/30/10]

**8.50.131.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27. The human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.131.3 NMAC - Rp, 8.50.131.3 NMAC, 12/30/10]

**8.50.131.4 DURATION:** Permanent.
[8.50.131.4 NMAC - Rp, 8.50.131.4 NMAC, 12/30/10]

**8.50.131.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.50.131.5 NMAC - Rp, 8.50.131.5 NMAC, 12/30/10]

**8.50.131.6 OBJECTIVE:** To provide regulations in accordance with federal and state law and regulations.
[8.50.131.6 NMAC - Rp, 8.50.131.6 NMAC, 12/30/10]

**8.50.131.7 DEFINITIONS: [RESERVED]**
[See 8.50.100.7 NMAC]

**8.50.131.8 PENALTIES:** In cases of non-compliance with an administrative subpoena or order, the IV-D agency may levy penalties as provided by these rules. If no response is made to a mailed subpoena or administrative order, it may be personally served and the charges for the service may be awarded against the person or entity failing to respond. Monetary penalty amounts shall include the following.

A. For financial institutions' failure to execute and return a FIDM reporting election form: One hundred dollars ($100) per day commencing on the date the response was due until the required information is furnished to the IV-D agency.

B. For failure to file quarterly match or for failure to file in proper form: One thousand dollars ($1,000) per day commencing on the day the response was due, except in circumstances outside the control of the financial institution and approved by the IV-D agency.

C. For failure to comply with a freeze order: The amount of any assets released up to the amount of the subpoena or freeze order, plus ten percent.

D. For failure to comply with a seize order: The amount of any assets released up to the amount of the subpoena or seize order, plus ten percent.

E. For failure to comply with an administrative subpoena: The value of any assets released up to the amount to satisfy judgment, plus ten percent.

F. For failure to comply with an increase in the amount of withholding: One hundred dollars ($100) per day, plus the amount(s) which was or were not withheld.

G. For failure to comply with an order for withholding: One hundred dollars per ($100) day, plus the amount(s) that were not withheld.

H. For failure to comply with an order for genetic testing: One hundred dollars ($100) per day.

I. For failure to comply with an order to provide information: One hundred dollars ($100) per day.

J. For failure to comply with any other administrative order issued by the IV-D agency: One hundred dollars ($100) per day.

K. For obtaining release of assets through false statements: One thousand dollars ($1,000) per occurrence, plus the value of any assets released. Persons submitting fraudulent material may also be referred for criminal prosecution.

L. For deliberate falsification of a financial institution data match form: One thousand dollars ($1,000) per account plus the value of any assets released. Persons submitting fraudulent material may also be referred for criminal prosecution.

M. A reasonable cost may also be levied for the expense of an enforcement action under these regulations.

N. The IV-D agency will impose a civil penalty of twenty dollars ($20) on employers for each instance of failure to comply with the provisions of 8.50.106.18 NMAC, unless the failure is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report, in which case the penalty will be five hundred dollars ($500) on the employer for each instance. An employer may appeal a penalty as provided in 8.50.130 NMAC.
[8.50.131.8 NMAC - Rp, 8.50.131.8 NMAC, 12/30/10]

**History of 8.50.131 NMAC:**
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: ISD CSEB 501.1100, State and Local Requirements, 6-23-80.

NMAC History:
8 NMAC 5.CSE.000 through 8 NMAC 5.CSE.970, 12-30-94.

History of Repealed Material:
8 NMAC 5.CSE, Child Support Enforcement - Repealed effective 5/31/2001.
8.50.131 NMAC, Penalties, filed 5/14/2001 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
CHILD SUPPORT ENFORCEMENT DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 50 CHILD SUPPORT ENFORCEMENT PROGRAM**
**PART 132 UNCLAIMED CHILD, SPOUSAL OR MEDICAL SUPPORT**

**8.50.132.1 ISSUING AGENCY:** New Mexico Human Services Department - Child Support Enforcement Division.
[8.50.132.1 NMAC - Rp, 8.50.132.1 NMAC, 12/30/10]

**8.50.132.2 SCOPE:** To the general public. For use by the Title IV-D agency and recipients of IV-D services.
[8.50.132.2 NMAC - Rp, 8.50.132.2 NMAC, 12/30/10]

**8.50.132.3 STATUTORY AUTHORITY:** Public Assistance Act, NMSA 1978, Section 27-2-27 (A)(5). The

human services department is designated as the single state agency for the enforcement of child and spousal support obligations pursuant to Title IV-D of the Social Security Act (42 USC 651 et. seq.).
[8.50.132.3 NMAC - Rp, 8.50.132.3 NMAC, 12/30/10]

**8.50.132.4 DURATION:** Permanent.
[8.50.132.4 NMAC - Rp, 8.50.132.4 NMAC, 12/30/10]

**8.50.132.5 EFFECTIVE DATE**: December 30, 2010, unless a later date is cited at the end of a section.
[8.50.132.5 NMAC - Rp, 8.50.132.5 NMAC, 12/30/10]

**8.50.132.6 OBJECTIVE:** To provide regulations in accordance with federal and state law and regulations.
[8.50.132.6 NMAC - Rp, 8.50.132.6 NMAC, 12/30/10]

**8.50.132.7 DEFINITIONS:** For purposes relating to unclaimed child, spousal or medical support payments the following definitions will apply.

A. "Department" is the New Mexico human services department, child support enforcement division (also known as the Title IV-D agency or IV-D agency).

B. "Owner" means a person who has a legal interest in property. In cases where support is due and owing, the owner is the custodial party. In cases where support is fully satisfied and the IV-D agency has excess funds on hold, the owner is the obligor. If support is received from an employer, and there is no information regarding the custodial or non-custodial party, the owner is the employer until such time that a custodial or non-custodial party can be identified.

C. "Support" means money (including a check, draft, deposit, interest, overpayment, refund or credit), real or personal property, or other assets held, received, or seized pursuant to an order to pay child support, spousal support (alimony) or medical support.

D. "Unclaimed" means that no person to whom to deliver the support received or seized by the department can be located or identified. "Unclaimed" also includes situations when the custodial party, non-custodial party, or child(ren) are deceased and no claimant comes forward after notice is sent to the last known address or last known employer of the custodial party and non-custodial party. Money distributed to a custodial party via electronic funds transfer is not subject to being unclaimed property in possession of the IV-D agency once it is distributed to an account.
[8.50.132.7 NMAC - Rp, 8.50.132.7 NMAC, 12/30/10]

**8.50.132.8 EFFORTS TO LOCATE:** Before support may be declared unclaimed by the department, the department shall make reasonable attempts to locate the owner. These attempts shall include the following:

A. If there is no case or payee identified in the support transmittal, the department shall attempt to ascertain the case to which property should be applied through any documents accompanying the payment.

B. If unable to ascertain the case to which the support should be applied, the department shall attempt to contact the person, if any, named in the return address on the mailing envelope by mailing a notice of intent to declare property unclaimed to the return address.

C. If the owner has moved or support cannot be delivered to the owner's last known address on file with the IV-D agency, the IV-D agency will utilize standard locate resources (per 8.50.106 NMAC) to determine if a current address or employer can be obtained for the owner. If use of standard locate resources is unsuccessful, the department shall mail notice of intent to declare support unclaimed to the owner's last known home and employer's address, if the address is on file with the department.
[8.50.132.8 NMAC - Rp, 8.50.132.8 NMAC, 12/30/10]

**8.50.132.9 NOTICE OF ABANDONMENT OF UNCLAIMED SUPPORT:**

A. If, after thirty six (36) months from the date the support is paid to the department, the department is unable to disburse a payment to the owner because of failure to locate, the department shall send a notice indicating that the unclaimed support shall revert to the department unless the owner files a claim within thirty (30) days from the date of the notice.

B. Support not claimed within the timeframe described in subsection A above will be deemed as "unclaimed" support and will be distributed to the department. In cases where the custodial party is owed the support and fails to claim the support, the non-custodial party will receive credit for the amount of support paid.
[8.50.132.9 NMAC - Rp, 8.50.132.9 NMAC, 12/30/10]

**8.50.132.10 RECOVERY BY PERSON TO WHOM SUPPORT IS OWED:** The department may make payment or return support to a person reasonably appearing to be entitled to payment, if the support has not already been disbursed to the department as unclaimed property. The owner should immediately contact the department as indicated below in 8.50.132.11 NMAC to establish a claim for the undistributed support. When the owner's identity is verified, the department will distribute the support to the owner so long as the owner made his or her claim within the appropriate timeframes.
[8.50.132.10 NMAC - Rp, 8.50.132.10 NMAC, 12/30/10]

**8.50.132.11 FILING CLAIM WITH DEPARTMENT; HANDLING OF CLAIMS BY DEPARTMENT:** A person, claiming they are owed money or property from the department under this rule, may file a claim on a form prescribed by the department and verified under oath or affirmation by the claimant.

A. Within thirty (30) days after a claim is filed, the department shall allow or deny the claim and give written notice of the decision to the claimant.

B. A person whose claim has not been acted upon within thirty (30) days after its filing may immediately file an administrative appeal to establish the claim.

C. A person adversely affected by a decision of the department may, within thirty (30) days after notice of the decision, file an administrative appeal in accordance with 8.50.130 NMAC.
[8.50.132.11 NMAC - Rp, 8.50.132.12 NMAC, 12/30/10]

**History of 8.50.132 NMAC:**
History of Repealed Material:
8.50.132 NMAC, Unclaimed Child, Spousal, or Medical Support, filed 5/3/2004 - Repealed effective 12/30/2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
### CHILD SUPPORT ENFORCEMENT DIVISION

This is an amendment to 8.50.107 NMAC, Sections 2, 8, 9, 11 and 12, effective December 30, 2010.

**8.50.107.2 SCOPE:** To the general public. For use by the [~~department's employees~~] IV-D agency and recipients of IV-D services.
[8.50.107.2 NMAC - Rp/E, 8.50.107.2 NMAC, 1/1/10; A, 12/30/10]

**8.50.107.8 DETERMINATION OF PARENTAGE:** A determination of parentage is necessary for the establishment of child support. The IV-D agency extends full faith and credit to a determination of parentage made by another [~~state~~] jurisdiction, whether established through voluntary acknowledgment or through administrative or judicial process. Alleged

fathers may initiate parentage actions through the IV-D agency. The IV-D agency may petition a court of competent jurisdiction to establish parentage so long as the dependant child is still under the age of majority.

A. Federal time-frames and requirements for establishment of parentage. The IV-D agency shall establish an order for support or complete service of process necessary to commence proceedings to establish a support order and, if necessary, parentage (or document unsuccessful attempts to serve process) within ninety (90) calendar days of locating the alleged father or non-custodial parent. (45 CFR Section 303.4(d)).

B. The IV-D agency is not required to establish parentage or pursue genetic testing in any case involving incest or rape, or in any case in which legal proceedings for adoption are pending, or if, in the opinion of the IV-D agency, it would not be in the best interests of the child.

C. The IV-D agency may identify and use laboratories [~~which~~] that perform, at reasonable cost, legally and medically acceptable genetic tests that tend to identify the biological parent or exclude the alleged biological parent. The IV-D agency may make available a list of such laboratories to appropriate courts and law enforcement officials, and to the public upon request.

D. The IV-D agency may seek entry of a default order by the court or administrative authority in a parentage case according to state law and rules of procedure regarding default orders.

E. The IV-D agency may seek to establish maternity in compliance with the New Mexico Uniform Parentage Act, as appropriate.

F. The IV-D agency will not initiate an action to rescind or disestablish parentage.

G. If a child in a IV-D case has an acknowledged, presumed, or an adjudicated father as defined within the New Mexico Uniform Parentage Act, then parentage has been determined and the IV-D agency will pursue the establishment of support on behalf of or against the parent, as appropriate.

[8.50.107.8 NMAC - Rp/E, 8.50.107.8 NMAC, 1/1/10; A, 12/30/10]

**8.50.107.9 PARENTAGE INVOLVING MINOR FATHERS AND MOTHERS:** If the biological parent is under the age of emancipation, and is not otherwise emancipated by law, the IV-D agency will take measures to establish parentage and support, as appropriate. If a biological parent is a minor, his or her parent, legal guardian, or attorney who has entered an appearance on behalf of the minor biological parent may be present at all meetings or discussions between the minor biological parent and the representatives of the IV-D agency. The IV-D agency will seek to establish parentage. If the alleged minor non-custodial parent is employed, the IV-D agency will pursue guideline support. Any order or stipulation will include a requirement that the minor non-custodial parent will notify the IV-D agency of his or her employment and educational status on a regular basis. In uncontested cases, the IV-D agency may seek the concurrence of [~~either~~] the minor biological parent's parent(s), legal guardian, or attorney. In contested cases, the minor biological parent(s) may request the court to appoint a guardian ad litem. Any legal notices or pleading prepared following the appointment of the guardian ad litem will be sent in accordance with the rules of civil procedure.

[8.50.107.9 NMAC - Rp/E, 8.50.107.9 NMAC, 1/1/10; A, 12/30/10]

**8.50.107.11 LONG ARM STATUTE CASES:**

A. The IV-D agency will use the long arm statute as appropriate to exercise jurisdiction over a non-custodial parent residing in another state pursuant to NMSA 1978, Section 40-6A-201.

B. Genetic testing may be used in long arm statute cases in the establishment of parentage. New Mexico shall advance the costs associated with the testing in [~~which~~] cases wherein the state initiated long arm statute actions. The IV-D agency shall seek reimbursement for the advancement of the costs pursuant to the genetic testing section below.

[8.50.107.11 NMAC - Rp/E, 8.50.107.11 NMAC, 1/1/10; A, 12/30/10]

**8.50.107.12 GENETIC TESTING:**

A. The IV-D agency provides genetic testing services, as appropriate. The IV-D agency will not provide genetic testing services when parentage has already been adjudicated unless ordered by a court of competent jurisdiction to do so. The IV-D agency will seek the admission into evidence, for purposes of establishing parentage, the results of a genetic test that are performed by a laboratory contracted with the IV-D agency to provide this specific service, unless the results are otherwise stipulated to by the parties. Any party to a IV-D case may seek genetic testing outside of the IV-D agency, at his or her own expense and obtain a genetic test and report in compliance with NMSA 1978, Sections 40-11A-503 to 504. The IV-D agency will not present or introduce into evidence the results of a genetic test report obtained through a laboratory not contracted with the IV-D agency.

B. The IV-D agency may charge any individual who is not a recipient of state aid for the cost of genetic testing in accordance with the fee schedule in 8.50.125 NMAC[~~; however, if parentage is established and genetic tests were performed, the IV-D agency must attempt to obtain a judgment for the costs of the genetic tests from the party who denied parentage or, at the state option, from each party in accordance with the fee schedule in 8.50.125 NMAC~~]. The IV-D agency may advance the cost of the fee if the IV-D agency is a party in a pending court case and is providing full services. If the IV-D agency is not a party in a pending court case and is not providing full services, the IV-D agency may require payment of the fee from any or all parties prior to scheduling the genetic testing. If a party paying any or all of the genetic testing fee wants reimbursement from the other party, he or she must seek a court order against that party.

[8.50.107.12 NMAC - Rp/E, 8.50.107.12 NMAC, 1/1/10; A, 12/30/10]

## NEW MEXICO HUMAN SERVICES DEPARTMENT

### CHILD SUPPORT ENFORCEMENT DIVISION

This is an amendment to 8.50.108 NMAC, Sections 2, 6, 8, 9, 11, 12, 13 and 14, effective December 30, 2010.

**8.50.108.2 SCOPE:** To the general public. For use by the [~~department's employees~~] Title IV-D agency and recipients of IV-D services.

[8.50.108.2 NMAC - Rp/E, 8.50.108.2 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.6 OBJECTIVE:** To provide regulations [~~for the establishment of support in title IV-D cases~~] in accordance with federal and state law and regulations.

[8.50.108.6 NMAC - Rp/E, 8.50.108.6 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.8 ESTABLISHMENT OF SUPPORT ORDER:** If parentage has been determined, and there is no support order in existence, the IV-D agency will pursue the establishment of a support order, as appropriate. All support orders obtained by the IV-D agency shall include a provision requiring the parties to keep the IV-D agency informed of their current addresses and, if the party is a parent, to also provide the name and address of his or her current employer, whether the parent has access to medical insurance coverage at reasonable cost and, if so, the medical insurance policy information.

A. Immediate income withholding: The IV-D agency will request an income withholding provision in accordance with the Support Enforcement Act, NMSA 1978, Section 40-4A1 et

seq. The IV-D agency will not agree to an exception to wage withholding, but will honor any court or [~~administration~~] administrative order that waives or excepts wage withholding. All payments on Title IV-D cases, whether paid through income withholding, direct withdrawal, or direct payment by the non-custodial parent [~~should~~] shall be paid through the IV-D agency. If the custodial party obtains an order on a IV-D case for direct payments to him or her, the IV-D agency will begin non-cooperation procedures in active IV-A cases and close cases with no public assistance history.

B. Persons and agencies the IV-D agency will assist to establish a support order:

(1) parent;

(2) legal guardian by court or administrative order;

(3) legal custodian by court or administrative order;

(4) IV-B or IV-E agency;

(5) another IV-D agency, state, U.S. territory or [~~county~~] country pursuant to the Uniform Interstate Family Support Act, NMSA 1978, Section 40-6A-101 et seq., or reciprocal international agreements.

C. Public assistance: If a dependant child receives public assistance, the IV-D agency will pursue a support order against the non-custodial parent, unless the IV-D agency determines that the case involves rape, incest, or it would not be in the best interest of the child(ren). If neither parent has custody of the child, the IV-D agency will pursue a support order against both parents. If the custodian of the child receiving public assistance does not have legal standing to pursue support, the IV-D agency will seek to establish a support order solely in favor of the [~~IV-D agency~~] state as reimbursement for public assistance benefits expended on behalf of the child(ren).

[8.50.108.8 NMAC - Rp/E, 8.50.108.8 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.9 CHILD SUPPORT AWARD GUIDELINES:** The IV-D agency uses income information provided to the agency by the parties or other sources to apply the child support guidelines in NMSA 1978, Section 40-4-11.1. If exact income information is unavailable, or if a party's earnings history is below minimum wage, the IV-D agency will seek to impute income to a party, as appropriate. A request for retroactive support by the IV-D agency will [~~be either to the date of birth of the child, or twelve years, whichever is the shorter period~~] only be for the minimal period in accordance with New Mexico law. The custodial party may [~~request~~] seek a longer retroactive period in accordance with the law and is solely responsible for providing all documentation, presenting all evidence, and making all arguments at any hearing or during negotiations in support for the additional time period. The amount of retroactive support requested by the IV-D agency on [~~its own~~] behalf of the state or for a custodial party will be in accordance with the child support guidelines or as otherwise stipulated to by the parties. Any deviations from the guidelines will be in accordance with NMSA 1978, Section 40-4-11.2.

[8.50.108.9 NMAC - Rp/E, 8.50.108.9 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.11 FURNISHING CONSUMER REPORTS FOR CERTAIN PURPOSES RELATING TO CHILD SUPPORT:** Section 604 of the Fair Credit Reporting Act (15 U.S.C. 1681b) authorizes the release of information contained in a non-custodial parent's credit report to the New Mexico IV-D agency. The information obtained from the consumer reporting agency is to be used solely for the purpose of [~~setting an initial or modified child support award~~] establishing or modifying an order of support.

[8.50.108.11 NMAC - Rp/E, 8.50.108.11 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.12 MODIFICATION OF CHILD SUPPORT ORDERS:** Either party may request the IV-D agency to provide the service of [~~requesting~~] seeking the modification of a support order. Applicable fees will be charged to the requesting party in compliance with 8.50.125.10 NMAC. The IV-D agency will not review a spousal support order for [~~order for~~] modification unless the custodial parent is currently receiving public assistance. In accordance with federal and state laws, a modification of a support order is retroactive only to the time period that a petition or motion was filed with a court and was pending a decision.

[8.50.108.12 NMAC - Rp/E, 8.50.108.14 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.13 REVIEW AND ADJUSTMENT OF SUPPORT ORDERS:** The IV-D agency conducts a review for modification of support orders in the IV-D caseload three years from the effective date of the last support order. At the time of review, if the case is actively receiving public assistance, the IV-D agency must pursue a modification either upward or downward if its review indicates that there will be at least a twenty percent (20%) change from the current obligation of support. The review is conducted based on information provided by the parties and other sources that report income. Both parties are sent notice at the time of review to request current information from them regarding income, child care costs, medical expenses to include insurance, and any other appropriate expenses that are considered by the child support guidelines. Both parties are notified of the result of the review conducted by the IV-D agency. If the IV-D agency chooses not to pursue a modification, any party may independently pursue his or her own request for a modification of a support order.

[8.50.108.13 NMAC - Rp/E, 8.50.108.15 NMAC, 1/1/10; A, 12/30/10]

**8.50.108.14 PROVISION OF SERVICES TO IV-B AND IV-E PROGRAMS:** Upon request for services from the state IV-B or IV-E program, the IV-D agency will review its caseload to determine if there is an active IV-D case. The IV-D agency will send a letter to both the custodial party and non-custodial parent(s) notifying them that the IV-B or IV-E agency has requested services due to the minor child(ren) being in state custody. If there is a current order of support in place, all money collected on the case or cases by the Title IV-D agency will be placed on hold pending an order by a district court regarding the distribution of the money or a withdrawal of the claim by the IV-B or IV-E agency for re-directed payments. If there is not a current support order in place, the IV-D agency will work with the IV-B or IV-E agency to obtain a support order in favor of the IV-B or IV-E agency.

[8.50.108.14 NMAC - N, 12/30/10]

## NEW MEXICO HUMAN SERVICES DEPARTMENT

CHILD SUPPORT ENFORCEMENT DIVISION

This is an amendment to 8.50.116 NMAC, Sections 2, 5, 6 and 8, effective December 30, 2010.

**8.50.116.2 SCOPE:** To the general public. For [~~usability by the enforcement officer and recipient~~] use by the Title IV-D agency and recipients of IV-D services.

[8.50.116.2 NMAC - Rp 8 NMAC 5.CSE.000.2, 5/31/01; A, 12/30/10]

**8.50.116.5 EFFECTIVE DATE:** May 31, 2001, unless a later date is cited at the end of a section.

[8.50.116.5 NMAC - Rp 8 NMAC 5.CSE.000.5, 5/31/01; A, 12/30/10]

**8.50.116.6 OBJECTIVE:** [~~To repeal all existing regulations for the child support enforcement division filed at state records as 8 NMAC 5 CSE - 000.000 through 979.000 and to replace the existing regulations with new regulations and conform the regulations with changes made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The regulations here codify present practices in accordance with federal~~

~~and state law and regulations.~~ ]To provide regulations in accordance with federal and state laws and regulations.
[8.50.116.6 NMAC - Rp 8 NMAC 5.CSE.000.6, 5/31/01; A, 12/30/10]

**8.50.116.8 CHILD SUPPORT ENFORCEMENT FOR INDIAN TRIBES:** The [~~state of New Mexico~~] IV-D agency may enter into cooperative agreements with any or all of the nineteen pueblos [~~or~~] and three tribes that comprise the twenty-two separate Indian nations having lands located within the borders of New Mexico and with tribal IV-D agencies within the state of New Mexico. (42 USC 654 and 45 CFR Section 309). There is a specialized Native American initiative within the Title IV-D agency to deal with these matters.
[8.50.116.8 NMAC - N, 5/31/01; A, 12/30/10]

## 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 [~~$79~~] $91 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, 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, 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; A, 01/01/2011]

## NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

8.315.4 NMAC, Personal Care Option Services, filed August 20, 2010, is repealed and replaced by 8.315.4 NMAC, Personal Care Option Services, effective December 30, 2010.

## NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

**TITLE 8 SOCIAL SERVICES**
**CHAPTER 315 OTHER LONG TERM CARE SERVICES**
**PART 4 PERSONAL CARE OPTION SERVICES**

**8.315.4.1 ISSUING AGENCY:** New Mexico Human Services Department (HSD).
[8.315.4.1 NMAC - Rp, 8.315.4.1 NMAC, 12-30-10]

**8.315.4.2 SCOPE:** The rule applies to the general public.

[8.315.4.2 NMAC - Rp, 8.315.4.2 NMAC, 12-30-10]

**8.315.4.3 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 NMSA 1978, Section 27-2-12 et seq.
[8.315.4.3 NMAC - Rp, 8.315.4.3 NMAC, 12-30-10]

**8.315.4.4 DURATION:** Permanent
[8.315.4.4 NMAC - Rp, 8.315.4.4 NMAC, 12-30-10]

**8.315.4.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[8.315.4.5 NMAC - Rp, 8.315.4.5 NMAC, 12-30-10]

**8.315.4.6 OBJECTIVE:** The objective of this regulation is to provide rules for the service portion of the New Mexico medicaid program. These rules describe service delivery models, eligible providers and consumer and attendant responsibilities, covered and non-covered services, medical eligibility, assessments for services, individual plan of care (IPoC), utilization review, transfer process, consumer discharge, provider reimbursement, provider voluntary disenrollment, solicitation/advertising and sanction and remedies.
[8.315.4.6 NMAC - Rp, 8.315.4.6 NMAC, 12-30-10]

**8.315.4.7 DEFINITIONS:** [RESERVED]

**8.315.4.8 MISSION STATEMENT:** 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.
[8.315.4.8 NMAC - Rp, 8.315.4.8 NMAC, 12-30-10]

**8.315.4.9 PERSONAL CARE OPTION SERVICES:** Personal care option (PCO) services have been established by the New Mexico human services department (HSD), medical assistance division (MAD or medicaid) to assist individuals 21 years of age or older who are eligible for full medicaid coverage and meet the nursing facility (NF) level of care (LOC) criteria, see, *long term care services utilization review instructions for nursing facilities* which is attached to this part of the NMAC as attachment II. These regulations describe PCO services for consumers who are unable to perform at least two activities of daily living (ADLs) because of disability or functional limitation and need assistance with certain ADLs and instrumental activities of daily living (IADLs) as described in attachment I to this part of the NMAC.

A. A third-party assessor (TPA) determines medical LOC for PCO eligibility upon initial application and at least annually thereafter. Medicaid-eligible individuals may contact the TPA or the managed care organization (MCO) for coordinated long-term care services (CoLTS) (if applicable) to apply for PCO services.

B. The goals of PCO services are to avoid institutionalization and to maintain the individual's functional level and independence. PCO services are not provided 24-hours a day.

C. PCO is a medicaid service, not a medicaid category of assistance, and services under this option are delivered pursuant to an IPoC. PCO services include a range of ADL and IADL services to consumers who are unable to perform at least two ADLs because of a disability or a functional limitation(s). Consumers will be assessed for services at least annually, or more frequently, as appropriate. PCO services will not include those services for tasks the individual is already receiving from other sources including tasks provided by natural supports. Natural supports are friends, family, and the community (through individuals, clubs and organizations) that are able and consistently available to provide supports and services to the consumer. The assessment for services is performed by the TPA for fee-for-service (FFS) or the MCO for CoLTS. The PCO service assessment will determine the amount and type of services needed to supplement the services a consumer is already receiving including those services provided by natural supports. PCO services must be related to the individual's impairment rating as indicated in the personal care options service guide, MAD 055, which is attached to this part of the NMAC as attachment I.
[8.315.4.9 NMAC - Rp, 8.315.4.9 NMAC, 12-30-10]

**8.315.4.10 SERVICE DELIVERY MODELS:**

A. Individuals eligible for PCO services have the option of choosing the consumer-delegated or the consumer-directed personal care model. Under both models, the consumer may select a family member (except a spouse), friend, neighbor, or other individual as the attendant. Under the consumer-delegated model, the consumer chooses the PCO agency to perform all employer-related tasks and the agency is responsible for ensuring all service delivery to the consumer. The consumer-directed model allows the consumer to oversee his/her own service care delivery, and requires the consumer to work with a PCO agency that acts as a fiscal intermediary agency to process all financial paperwork to medicaid for FFS or the MCO for consumers enrolled in CoLTS. The TPA for FFS or MCO for CoLTS, or other medicaid designee is responsible for explaining both models to each individual initially and annually thereafter.

B. Consumers who are unable to make a decision regarding the service delivery model or are unable to communicate decisions must have a legal representative to select and participate in the consumer-directed model. A legal representative is a person who has documentation that he or she is legally authorized to make decisions on behalf of the consumer. Examples include a properly executed Power of Attorney, legal guardian or conservator. A person's status as a legal representative must be properly documented with the PCO agency. If a consumer or the consumer's legal representative chooses consumer-directed personal care, the consumer or the consumer's legal representative retains responsibility for performing certain employer-related tasks. Alternatively, PCO services consumers may select an agency to provide services and perform employer related tasks, known as consumer-delegated personal care. The selected agency must be certified by medicaid or medicaid's designee to perform these tasks.

C. Regardless of which service delivery model is selected by the consumer or the consumer's legal representative, the consumer may hire family members (excluding spouses); however, a family member shall not be reimbursed for a service that he/she would have otherwise provided. A personal care attendant that resides with the consumer, regardless of any family relation, may not be paid to deliver household services, support services (shopping and errands), or meal preparation that are routinely provided as part of the household division of chores, unless those services are specific to the consumer (i.e., cleaning consumer's room, linens, clothing, and special diets).
[8.315.4.10 NMAC - Rp, 8.315.4.10 NMAC, 12-30-10]

**8.315.4.11 CONSUMER'S RESPONSIBILITIES:** Consumers receiving PCO services have certain responsibilities depending on the service delivery model they choose.

A. The consumer's or consumer's legal representative's responsibilities under the **consumer-delegated model** include:

(1) verifying that services have

been rendered by signing accurate time sheets/logs being submitted to the PCO agency for payroll;

(2) taking the medical assessment form (ISD 379) once a year to his/her physician (a physician's assistant, nurse practitioner or clinical nurse specialist may also sign the ISD 379 in the place of a physician for PCO services only) for completion and submitting the completed form to the TPA for FFS or the MCO for CoLTS for review by the TPA; this must be done as required prior to his/her LOC expiring to ensure that there will be no break in services; a consumer who does not submit a timely ISD 379 to the TPA for FFS or the MCO for CoLTS to forward to the TPA, may experience a break in services; in addition, the consumer must allow the TPA and the MCO for CoLTS, as applicable, to complete assessment visits and other contacts necessary to avoid a break in services;

(3) participating in the development and review of the IPoC;

(4) maintain proof of current vehicle insurance (as mandated by the laws of the state of New Mexico) if the attendant will transport the consumer in the consumer's vehicle for support services that have been allocated to the consumer; and

(5) complying with all medicaid rules, regulations, and PCO service requirements; failure to comply could result in discontinuation of PCO services.

B. The consumer's or the consumer's legal representative's responsibilities under the **consumer-directed model** include:

(1) interviewing, hiring, training, terminating and scheduling personal care attendants; this includes, but is not limited to:

(a) verifying that the attendant possesses a current and valid state driver's license if there are any driving-related activities listed on the IPoC; a copy of the current driver's license must be maintained in the attendant's personnel file at all times; if no driving-related activities are listed on the IPoC, a copy of a valid state ID is kept in the attendant's personnel file at all times;

(b) verifying that the attendant has proof of current liability vehicle insurance if the consumer is to be transported in the attendant's vehicle at any time; a copy of the current proof of insurance must be maintained in the attendant's personnel file at all times; and

(c) identifying training needs; this includes training his/her own attendant(s) or arranging for training for the attendant(s);

(2) developing a list of attendants who can be contacted when an unforeseen event occurs that prevents the consumer's regularly scheduled attendant from providing services; making arrangements with attendants to ensure coverage and notifying the agency when arrangements are changed;

(3) verifying that services have been rendered by completing, dating, signing and submitting documentation to the agency for payroll; a consumer or his/her legal representative is responsible for ensuring the submission of accurate timesheets/ logs; payment shall not be issued without appropriate documentation;

(4) notifying the agency, within one working day, of the date of hire or the date of termination of his/her attendant and ensure that all relevant employment paperwork and other applicable paperwork is completed and submitted; this may include, but is not limited to: employment application, verification from the employee abuse registry, criminal history screening, doctor's release to work (when applicable), photo identification, proof of eligibility to work in the United States (when applicable), copy of a state driver's license and proof of insurance (as appropriate);

(5) notifying and submitting a report of an incident (as described in Paragraph (14), Subsection B of 8.315.4.12 NMAC) to the PCO agency within 24 hours of such incident, so that the PCO agency can submit an incident report on behalf of the consumer; the consumer or his/her legal representative is responsible for completing the incident report;

(6) ensuring that the individual selected for hire has submitted to a request for a nationwide caregiver criminal history screening, pursuant to 7.1.9 NMAC and in accordance with NMSA 1978, Section 29-17-2 et seq. of the Caregivers Criminal History Screening Act, within 20-calendar days of the individual beginning employment; the consumer must work with the selected agency to complete all paperwork required for submitting the nationwide caregiver criminal history screening; the consumer may conditionally (temporarily) employ the individual contingent upon the receipt of written notice that the individual has submitted to a nationwide caregiver criminal history screening; a consumer may not continue employing an attendant who does not successfully pass a nationwide criminal history screening;

(7) obtaining from the attendant a signed agreement, in which the attendant agrees that he/she will not provide PCO services while under the influence of drugs or alcohol and, therefore, acknowledges that if he/she is under the influence of drugs or alcohol while providing PCO services he/she will be immediately terminated and a copy of the signed agreement must be given to the PCO agency;

(8) ensuring that if the attendant is the consumer's legal representative and is the individual selected for hire, prior approval has been obtained from medicaid or its designee; any PCO services provided by the consumer's legal representative *MUST* be justified, in writing, by the PCO agency and consumer and submitted for approval to medicaid or its designee prior to employment; the justification must demonstrate the lack of other qualified attendants in the applicable area and indicate how timesheets will be verified to ensure services were provided; documentation of written approval by medicaid or its designee must be maintained in the consumer's file; the consumer is responsible for immediately informing the agency if the consumer has appointed or obtained a legal representative any time during the plan year;

(9) signing an agreement accepting responsibility for all aspects of care and training including mandatory training in cardiopulmonary resuscitation (CPR) and first aid for all attendants, competency testing, tuberculosis (TB) testing, hepatitis B immunizations or waiving the provision of such training and accepting the consequences of such a waiver;

(10) verifying initially prior to employment, and annually thereafter, that attendants are not on the employee abuse registry by researching the Consolidated Online Registry (COR) pursuant to 8.11.6 NMAC and in accordance with the Employee Abuse Registry Act, NMSA, Section 27-7A-1 et seq.;

(11) taking the medical assessment form (ISD 379) or successor document once a year to his/her physician (physician's assistant, nurse practitioner or clinical nurse specialist) for completion and submitting the completed form to the TPA or MCO for CoLTS, as applicable, for review; this must be done at least 60 days prior to his/her LOC expiring to ensure that there will be no break in services; a consumer who does not submit a timely ISD 379 may experience a break in service; in addition, the consumer must allow the TPA and the MCO for CoLTS, as applicable, to complete assessment visits and other contacts necessary to avoid a break in services;

(12) participating in the development and review of the IPoC;

(13) maintain proof of current vehicle insurance (as mandated by the laws of the state of New Mexico) if the attendant will transport the consumer in the consumer's vehicle for support services that have been allocated to the consumer;

(14) a consumer that authorizes services when he/she does not have a currently approved LOC or IPoC is liable for payment of those services, that are not eligible for medicaid reimbursement; and

(15) complying with all medicaid rules, regulations, and PCO service requirements; failure to comply could result in discontinuation of PCO services.

C. Consumers may have a

personal representative assist him/her giving instruction to the personal care attendant or provide information to the TPA or MCO during assessments of the consumer's natural supports and service needs. A personal representative is not the same as a legal representative, but may be the same person, as appropriate. A personal care representative must have the following qualifications: be at least 18 years of age, have a personal relationship with the consumer and understand the consumer's natural supports and service support needs, and know the consumer's daily schedule and routine (to include medications, medical and functional status, likes and dislikes, strengths and weaknesses). A personal representative does not make decisions for the consumer unless he/she is also a legal representative, but may assist the consumer in communicating, as appropriate. A personal representative may not be a personal care attendant, unless he/she is also the legal representative and has obtained written approval from MAD or its designee pursuant to these PCO regulations. A person's status as a personal representative must be properly documented with the PCO agency.

[8.315.4.11 NMAC - Rp, 8.315.4.11 NMAC, 12-30-10]

**8.315.4.12 ELIGIBLE PCO AGENCIES:** PCO agencies electing to participate in providing PCO services must obtain certification and have various responsibilities for complying with the requirements for provision of PCO services.

A. **PCO agency certification:** A PCO agency providing either the consumer-directed, the consumer-delegated or both models, must adhere to the requirements of this section. PCO agencies must be certified by medicaid or its designee. An agency listing, by county, is maintained by medicaid or its designee. All certified PCO agencies are required to select a county in which to establish and maintain an official office for conducting of business with published phone number and hours of operation; the PCO agency must provide services in all areas of the county in which the main office is located. The PCO agency may elect to serve any county within 100 miles of the main office. The PCO agency may elect to establish branch office(s) within 100 miles of the main office. The PCO agency must provide PCO services to all areas of any county(ies) selected to provide services. To be certified by medicaid or its designee, agencies must meet the following conditions and submit a packet (contents of paragraphs one through six described below) for approval to medicaid's fiscal agent or its designee containing the following:

(1) a completed medicaid provider participation agreement (PPA also known as the MAD 335);

(2) copies of successfully passed nationwide caregivers criminal history screenings on employees who meet the definition of "caregiver" and "care provider" pursuant to 7.1.9 NMAC and in accordance with NMSA 1978, Section 29-17-2 et seq., of the Caregivers Criminal History Screening Act;

(3) a copy of a current and valid business license or documentation of non-profit status; if certified, a copy of the business license or documentation of non-profit status must be kept current and submitted annually;

(4) proof of liability and workers' compensation insurance; if certified, proof of liability and workers' compensation insurance must be submitted annually;

(5) a copy of written policies and procedures that address:

(a) medicaid's PCO provider rules and regulations;

(b) personnel policies; and

(c) office requirements that include but are not limited to:

(i) contact information, mailing address, physical location if different from mailing address, and hours of operation for the main office and branch offices if any; selected counties for the area(s) of service;

(ii) meeting all Americans with Disabilities Act (ADA) requirements; and

(iii) if PCO agencies have branch offices, the branch office must have a qualified on-site administrator to handle day-to-day operations who receives direction and supervision from the main/central office;

(d) quality improvement to ensure adequate and effective operation, including documentation of quarterly activity that addresses, but is not limited to:

(i) service delivery;

(ii) operational activities;

(iii) quality improvement action plan; and

(iv) documentation of quality improvement activities;

(e) agency operations to furnish services either as a consumer-directed or as a consumer-delegated, or both;

(6) a copy of a current and valid home health license, issued by the department of health, division of health improvement, licensing and certification (pursuant to 7.28.2 NMAC) may be submitted in lieu of requirements Paragraph (3) and Subparagraph (b) and (d) of Paragraph (5) above; if certified, a copy of a current and valid home health license must be submitted annually along with proof of liability and workers' compensation insurance;

(7) if the agency requests approval to provide the consumer-delegated model of service, a copy of the agency's written competency test for attendants approved by medicaid or its designee; an agency may select to purchase a competency test or it may develop its own test; the test must address at least the following:

(a) communication skills;

(b) patient/client rights, including respect for cultural diversity;

(c) recording of information for patient/client records;

(d) nutrition and meal preparation;

(e) housekeeping skills;

(f) care of the ill and disabled, including the special needs populations;

(g) emergency response (including CPR and first aid);

(h) universal precautions and basic infection control;

(i) home safety including oxygen and fire safety;

(j) incident management and reporting; and

(k) confidentiality;

(8) after the packet is received, reviewed, and approved in writing by medicaid or its designee, the agency will be contacted to complete the rest of the certification process; this will require the agency to:

(a) attend a mandatory medicaid or its designee's provider training session prior to the delivery of PCO services; and

(b) possess a letter from medicaid or its designee changing provider status from "pending" to "active";

(9) an agency will not be certified as a personal care agency if:

(a) it is owned in full or in part by a professional authorized to complete the medical assessment form (ISD 379) or other similar assessment tool subsequently approved by medicaid under PCO or the agency would have any other actual or potential conflict of interest; or

(b) the agency is authorized to carry out PCO TPA responsibilities, such as in-home assessments, or the agency would have any other actual or potential conflict of interest; and

(c) a conflict of interest is presumed between people who are related within the third degree of blood or consanguinity or when there is a financial relationship between:

(i) persons who are related within the third degree of consanguinity (by blood) or affinity (by marriage) including a person's spouse, children, parents (first degree by blood); siblings, half-siblings, grandchildren or grandparents (second degree by blood and uncles, aunts, nephews, nieces, great grandparents, and great grandchildren (third degree by blood); stepmother, stepfather, mother-in-law, father-in-law (first degree by marriage); stepbrother, stepsister, brothers-in-law, sisters-in-law, step grandchildren,

grandparents (second degree by marriage); step uncles, step aunts, step nephews, step nieces, step great grandparents, step great grandchildren (third degree by marriage);

(ii) persons or entities with an ongoing financial relationship with each other including a personal care provider whose principals have a financial interest in an entity or financial relationship with a person who is authorized to complete an ISD 379 or other similar assessment tool or authorized to carry out any of the TPA's responsibilities; a financial relationship is presumed between spouses.

B. **Approved PCO agency responsibilities:** A personal care agency electing to provide PCO services under either the consumer-directed model or the consumer-delegated model, or both, is responsible for:

(1) furnishing services to medicaid consumers that comply with all specified medicaid participation requirements outlined in 8.302.1 NMAC, *General Provider Policies*;

(2) verifying every month that all consumers are eligible for full medicaid coverage and PCO services prior to furnishing services pursuant to Subsection A of 8.302.1.11 NMAC, *provider responsibilities and requirements*; PCO agencies must document the date and method of eligibility verification; possession of a medicaid card does not guarantee a consumer's financial eligibility because the card itself does not include financial eligibility, dates or other limitations on the consumer's financial eligibility; PCO agencies must notify consumers who are not financially eligible that he/she cannot authorize employment for his/her attendant(s) until financial eligibility is resumed; PCO agencies and consumers cannot bill medicaid or its designee for PCO services rendered to the consumer if he/she is not eligible for PCO services;

(3) maintaining appropriate recordkeeping of services provided and fiscal accountability as required by the PPA;

(4) maintaining records, as required by the PPA and as outlined in 8.302.1 NMAC, *General Provider Policies*, that are sufficient to fully disclose the extent and nature of the services furnished to the consumers;

(5) passing random and targeted audits, conducted by medicaid or its designee, that ensure agencies are billing appropriately for services rendered; medicaid or its designee will seek recoupment of funds from agencies when audits show inappropriate billing or inappropriate documentation for services;

(6) providing either the consumer-directed or the consumer-delegated models, or both models;

(7) furnishing their consumers, upon request, with information regarding each model; if the consumer chooses a model that an agency does not offer, the agency must refer the consumer to medicaid or medicaid's designee for a list of agencies that offer that model; the TPA for FFS or the MCO for CoLTS is responsible for explaining each model in detail to consumers on an annual basis;

(8) ensuring that each consumer receiving PCO services has a current, approved IPoC on file;

(9) performing the necessary nationwide caregiver criminal history screening, pursuant to 7.1.9 NMAC and in accordance with NMSA 1978, Section 29-17-2 et seq. of the Caregivers Criminal History Screening Act, on all potential personal care attendants; nationwide caregiver criminal history screenings must be performed by an agency certified to conduct such checks; the agency, along with the consumer, as applicable ensures the paperwork is submitted within the first 20-calendar days of hire; consumers under the consumer-directed model or agencies under the consumer-delegated model may conditionally (temporarily) employ an attendant until such check has been returned from the certified agency; if the attendant does not successfully pass the nationwide caregiver criminal history screening, the agency under consumer-delegated or the consumer under consumer-directed may not continue to employ the attendant;

(10) producing reports or documentation as required by medicaid or its designee;

(11) verifying that consumers will not be receiving services through the following programs while they are receiving PCO services: medicaid home and community-based services (HCBS) waivers with the exception of the CoLTS (c) HCBS waiver, also known as the disabled and elderly (D&E) HCBS waiver, medicaid certified NF, intermediate care facility/ mentally retarded (ICF/MR), program of all-inclusive care for the elderly (PACE), or adult protective services (APS) attendant care program; an individual residing in a NF or ICF/MR or receiving a non-qualifying HCBS waiver is eligible to apply for PCO services; recipients of community transition goods or services may also receive PCO services; all individuals must meet the medicaid and LOC eligibility requirements to receive PCO services; the TPA, medicaid, or its designee must conduct an assessment or evaluation to determine if the transfer is appropriate and if PCO services would be able to meet the needs of that individual;

(12) processing all claims for PCO services in accordance with the billing specifications from medicaid for FFS or the MCO for CoLTS, as appropriate; payment shall not be issued without appropriate documentation;

(13) making a referral to an appropriate social service, legal, or state agency, or the MCO for CoLTS for assistance, if the agency questions whether the consumer is able to direct his/her own care or is non-compliant with medicaid rules and regulations;

(14) immediately reporting abuse, neglect or exploitation pursuant to NMSA 1978, Section 27-7-30 and in accordance with the Adult Protective Services Act, by fax, within 24 hours of the incident being reported to the agency; reportable incidents may include but are not limited to abuse, neglect and exploitation as defined below:

(a) abuse is defined as the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish to a consumer;

(b) neglect is defined as the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness to a consumer;

(c) exploitation is defined as the deliberate misplacement or wrongful, temporary or permanent use of a consumer's belongings or money without the voluntary and informed consent of the consumer;

(15) submitting written incident reports to medicaid or its designee, and the MCO for CoLTs consumers, on behalf of the consumer, within 24 hours of the incident being reported to the PCO agency; the PCO agency must provide the consumer with an appropriate form for completion; reportable incidents may include, but are not limited to:

(a) death of the consumer:

(i) unexpected death is defined as any death of an individual caused by an accident, or an unknown or unanticipated cause;

(ii) natural/expected death is defined as any death of an individual caused by a long-term illness, a diagnosed chronic medical condition, or other natural/ expected conditions resulting in death;

(b) other reportable incidents:

(i) environmental hazard is defined as an unsafe condition that creates an immediate threat to life or health of a consumer;

(ii) law enforcement intervention is defined as the arrest or detention of a person by a law enforcement agency, involvement of law enforcement in an incident or event, or placement of a person in a correctional facility;

(iii) emergency services refers to admission to a hospital or psychiatric facility or the provision of emergency services that results in medical care that is not anticipated for this consumer and that would not routinely be provided by a primary care provider;

(iv) any reports made to APS;

(16) informing the consumer and his/her attendant of the responsibilities of the agency;

(17) develop an IPoC based on the assessment, services authorization, task list, and consideration of natural supports provided by the TPA for FFS or MCO for CoLTS;

(18) provide an informed consent form to consumers if the agency chooses not to provide transportation services as part of support services;

(19) identifying a consumer with an improved or declining health condition or whose needs have changed (i.e. more or less natural supports) and believe the consumer is in need of more or fewer services should send written notification to the TPA for an LOC determination and the TPA for FFS or MCO for CoLTS for additional assessment of need of services;

(20) except for the CoLTS (c) HCBS waiver, agencies who are providing PCO services to a consumer who becomes eligible for a non-CoLTS (c) HCBS waiver must coordinate with the consumer's service coordinator to ensure that the consumer does not experience a break in service or that services do not overlap; coordination must include the effective date PCO services are to stop and non-CoLTS (c) HCBS waiver services are to begin;

(21) maintaining documentation in the consumer's file regarding legal and personal representatives, as applicable; and

(22) cooperating with the TPA or MCO in locating and assisting the consumer with submitting the necessary paperwork for an LOC determination.

C. **For agencies providing PCO services under the consumer-directed model**, the responsibilities include:

(1) providing services through an agency with choice model or as a fiscal employer agent, and complying with all applicable state and federal employment laws as applicable to the provision of such services;

(a) agency with choice, in which the agency is the legal employer of the personal care attendant and the consumer is the managing employer and the agency maintains at least quarterly in-person contact with the consumer, or

(b) fiscal employer agent (FEA) in which the consumer is the legal employer of record and the managing employer; and the agency maintains at least quarterly in person contact with the consumer;

(2) obtaining from the consumer or his/her legal representative a signed agreement with the attendant in which the attendant agrees that he/she will not provide PCO services while under the influence of drugs or alcohol and acknowledges that if he/she is under the influence of drugs or alcohol while providing PCO services he/she will be immediately terminated; the agency must maintain a copy of the signed agreement in the attendant's personnel file, for the consumer;

(3) obtaining a signed agreement from each consumer accepting responsibility for all aspects of care and training including mandatory training in CPR and first aid for all attendants, competency testing, TB testing, hepatitis B immunizations or a waiver of providing such training and accepting the consequences thereof, and supervisory visits are not included in the consumer-directed option; a copy of the signed agreement must be maintained in the consumer's file;

(4) verifying that if the consumer has selected the consumer's legal representative as the attendant, the consumer has obtained prior approval from medicaid or its designee; any personal care services provided by the consumer's legal representative *MUST* be justified, in writing, by the agency and consumer and submitted for approval to medicaid or its designee prior to employment; the justification must demonstrate the lack of other qualified attendants in the applicable area and indicate how timesheets will be verified to ensure that services were provided; documentation of written approval by medicaid or its designee must be maintained in the consumer's file; the agency must inform the consumer that if the consumer is appointed or selects a legal representative any time during the plan year, the consumer must notify the agency immediately and the agency must ensure appropriate documentation is maintained in the consumer's file;

(5) establishing and explaining to the consumer the necessary payroll documentation needed for reimbursement of PCO services, such as time sheets/logs and tax forms;

(6) performing payroll activities for the attendants, such as, but not limited to, state and federal income tax, social security withholdings and make payroll liability payments as required;

(7) arranging for state of New Mexico unemployment coverage and workers' compensation insurance for all attendants;

(8) informing the consumer of available resources for necessary training, if requested by the consumer, in the following areas: hiring, recruiting, training, supervision of attendants, advertising, and interviewing techniques;

(9) making a referral to an appropriate social service agency, legal agency(s) or medicaid designee for assistance, if the agency questions whether the consumer is able to direct his/her own care; and

(10) maintaining a consumer file and an attendant personnel file for the consumer for a minimum of six years.

D. **For agencies providing PCO services under the consumer-delegated model,** the responsibilities include, but are not limited to the following:

(1) employing, terminating and scheduling qualified attendants;

(2) conducting or arranging for training of all attendants for a minimum of 12-hours per year; initial training must be completed within the first three months of employment and must encompass:

(a) an overview of PCO services;

(b) living with a disability or chronic illness in the community;

(c) CPR and first aid training; and

(d) a written competency test with a minimum passing score of 80 percent or better; expenses for all trainings are to be incurred by the agency; other trainings may take place throughout the year as determined by the agency; the agency must maintain in the attendant's file: copies of all trainings, certifications, and specialty training the attendant completed; CPR and first aid certifications must be kept current;

(e) documentation of all training must include at least the following information: name of individual taking training, title of the training, source of instruction, number of hours of instruction, and date instruction was given;

(f) documentation of competency testing must include at least the following: name of individual being evaluated for competency, date and method used to determine competency, and copy of the attendant's graded and passed competency test in the attendant's personnel file; special accommodations must be made for attendants who are not able to read or write or who speak/read/write a language other than English;

(3) developing and maintaining a procedure to ensure trained and qualified attendants are available as backup for regularly scheduled attendants and emergency situations; complete instructions regarding the consumer's care and a list of attendant duties and responsibilities must be available in each consumer's home;

(4) informing the attendant of the risks of hepatitis B infection per current department of health (DOH) recommendation or the center for disease control and prevention (CDC), as appropriate, and offering hepatitis B immunization at the time of employment at no cost to the attendant; attendants are not considered to be at risk for hepatitis B since only non-medical services are performed; therefore, attendants may refuse the vaccine; documentation of the immunization, prior immunization, or refusal of immunization by the attendant must be in the attendant's personnel file;

(5) obtaining a copy of the attendant's current and valid state driver's

license or other current and valid state photo id, if the consumer is to be transported by the attendant, obtaining a copy of the attendant's current and valid driver's license and current motor vehicle insurance policy; maintaining copies of these documents in the attendant's personnel file at all times;

(6) complying with federal and state regulations and labor laws;

(7) preparing all documentation necessary for payroll;

(8) complying with all specified medicaid participation requirements outlined in 8.302.1 NMAC, *General Provider Policies*;

(9) maintaining records that are sufficient to fully disclose the extent and nature of the services furnished to the consumers as outlined in 8.302.1 NMAC, *General Provider Policies*;

(a) the PCO agency may elect to keep a log/check-off list, in addition to the timesheet, in the consumer's home, describing services provided on a daily basis; if a log/check-off list is maintained, the log must be compared with the weekly timesheet and copies of both the timesheet and the log/check-off list must be kept in the consumer's file;

(b) the PCO agency may elect to use an electronic system that attendants may use to check in and check out at the end of each period of service delivery; the system must produce records that can be audited to determine the time of services provided, the type of services provided, and a verification by the consumer or the consumer's legal representative, as appropriate; failure by a PCO agency to maintain a proper record for audit under this system will subject the PCO agency to recovery by medicaid of any undocumented or insufficiently documented claims;

(10) obtaining from the attendant a signed agreement, in which the attendant agrees that he/she will not provide PCO services while under the influence of drugs or alcohol and acknowledges that if he/she is under the influence of drugs alcohol while providing PCO services he/she will be immediately terminated;

(11) ensuring that if the consumer has elected the consumer's legal representative as his/her attendant, the agency has obtained prior approval from medicaid or its designee; all PCO services provided by the consumer's legal representative *MUST* be justified in writing by the agency and consumer and submitted for approval to medicaid or its designee prior to employment; the justification must demonstrate the lack of other qualified attendants in the applicable area and include a plan for oversight by the agency to assure service delivery; documentation of approval by medicaid or its designee must be maintained in the consumer's file; the agency must inform the consumer that if the consumer is appointed or selects a legal representative any time during the plan year, they must notify the agency immediately;

(12) establishing and explaining to all their consumers and all attendants the necessary documentation needed for reimbursement of PCO services;

(13) performing payroll activities for the attendants;

(14) providing state of New Mexico workers' compensation insurance for all attendants;

(15) conducting face-to-face supervisory visits in the consumer's residence at least once a month (12 per service plan year); each visit must be sufficiently documented in the consumer's file by indicating:

(a) date of visit;

(b) time visiting to include length of visit;

(c) name and title of person conducting supervisory visit;

(d) individuals present during visit;

(e) review of IPoC;

(f) identification of health and safety issues and quality of care provided by attendant, and

(g) signature of consumer or consumer's legal representative;

(16) maintaining an accessible and responsive 24-hour communication system for consumers to use in emergency situations to contact the agency;

(17) following current recommendations of DOH and CDC, as appropriate, for preventing the transmission of TB for attendants upon initial employment and as needed; and

(18) verifying initially prior to employment, and annually thereafter, that attendants are not on the employee abuse registry by researching COR pursuant to 8.11.6 NMAC and in accordance with the Employee Abuse Registry Act, NMSA 1978, Section 27-7A-1 et seq.

[8.315.4.12 NMAC - Rp, 8.315.4.11 & 12 NMAC, 12-30-10]

**8.315.4.13 PERSONAL CARE ATTENDANT RESPONSIBLITIES:** Personal care attendants providing PCO services for consumers electing either **consumer-directed or consumer delegated** must comply with the following responsibilities and requirements. They include:

A. being hired by the consumer (consumer-directed model) or the PCO agency (consumer-delegated model);

B. not being the spouse of a consumer pursuant to 42 CFR Section 440.167 and CMS state medicaid manual section 4480-D;

C. providing the consumer (consumer-directed ) or the PCO agency (consumer-delegated) with proof of and copies of current/valid state driver's license or current/valid state photo ID and if the attendant will be transporting the consumer, current/valid driver's license and current motor vehicle insurance policy;

D. being 18 years of age or older;

E. ensuring that if the attendant is the consumer's legal representative and is the selected individual for hire, prior approval has been obtained from medicaid or its designee; any personal care services provided by the consumer's legal representative *MUST* be justified, in writing, by the PCO agency and consumer and submitted for written approval to medicaid or its designee prior to employment; the justification must demonstrate the lack of other qualified attendants in the applicable area and indicate how timesheets will be verified to ensure that services were provided; documentation of approval by medicaid or its designee must be maintained in the consumer's file and submit appropriate documentation of time worked and services performed ensuring that he/she has signed his/her time sheet/log/check-off list verifying the services provided to the consumer;

F. successfully passing a nationwide caregiver criminal history screening, pursuant to 7.1.9 NMAC and in accordance with NMSA 1978, Section 29-17-2 et seq., of the Caregivers Criminal History Screening Act, performed by an agency certified to conduct such checks; attendants are required to submit to a criminal history screening within the first 20-days of hire; an attendant may be conditionally hired by the agency contingent upon the receipt of written notice from the certified agency of the results of the nationwide criminal history screening; attendants who do not successfully pass a nationwide criminal history screening are not eligible for further PCO service employment;

G. ensuring while employed as an attendant he/she will not be under the influence of drugs or alcohol while performing PCO services; the attendant must complete and sign an agreement with the agency or consumer in which the attendant acknowledges that if he/she is under the influence of drugs or alcohol while providing PCO services he/she will be immediately terminated;

H. may not be the consumer's personal representative, unless he/she is also the legal representative;

I. if the attendant is a member of the consumer's family, he/she may not be paid for services that would have otherwise been provided to the consumer; if the attendant is a member of the consumer's household, he/she may not be

paid for household services, support services (shopping and errands), or meal preparation that are routinely provided as part of the household division of chores, unless those services are specific to the consumer (i.e., cleaning consumer's room, linens, clothing, and special diets);

J. an attendant may not act as the consumer's legal representative, in matters regarding medical treatment, financial or budgetary decision making, unless the attendant has documentation authorizing the attendant to act in a legal capacity on behalf of the consumer;

K. following current recommendations of DOH and CDC, as appropriate for preventing the transmission of TB, and

L. for **consumer-delegated care only**, completing 12-hours of training yearly; the attendant must obtain certification of CPR and first aid training within the first three months of employment, and the attendant must maintain certification throughout the entire duration of providing PCO services; additional training will be based on the consumer's needs as listed in the IPoC; attendants are not required to be reimbursed for training time and must successfully pass a written personal care attendant competency test with 80 percent or better within the first three months of employment.

[8.315.4.13 NMAC - N, 12-30-10]

**8.315.4.14 ELIGIBLE POPULATION:** To be eligible for PCO services, consumers must meet all of the following criteria:

A. be a recipient of a full benefit medicaid category of assistance and, except for CoLTS (c) HCBS waiver, not be receiving other medicaid HCBS waiver benefits, medicaid NF, intermediate care facility/mentally retarded (ICF/MR) medicaid, PACE, or APS attendant care program , at the time PCO services are furnished; an individual residing in a NF or ICF/MR medicaid or receiving medicaid under a non-CoLTS (c) HCBS waiver is eligible to apply for PCO services to facilitate NF discharge; recipients of community transition goods or services may also receive PCO services; all individuals must meet the medicaid eligibility requirements to receive PCO services; the TPA, medicaid or its alternative designee must conduct an assessment or evaluation to determine if the transfer to PCO is appropriate and if the PCO services would be able to meet the needs of that individual;

B. be age 21 or older;

C. be determined to have met NF LOC by the TPA; and

D. comply with all medicaid and PCO regulations and procedures.

[8.315.4.14 NMAC - N, 12-30-10]

**8.315.4.15 COVERAGE CRITERIA:** PCO services have been established to assist individuals 21 years of age or older who are eligible for full medicaid benefits and meet the NF LOC criteria, see, *long term care services utilization review instructions for nursing facilities* which is attached to this part of the NMAC as attachment II. PCO services are defined as those tasks necessary to avoid institutionalization and maintain the consumer's functional level and independence. PCO services are for consumers who are unable to perform at least two ADLs because of disability or functional limitation and need assistance with certain ADLs and IADLs as described in Attachment II to this part of the NMAC. PCO services are allocated for a reasonable accommodation of tasks to be performed by a personal care attendant, but do not provide 24-hours per day services. A PCO service assessment determines the amount and type of services needed to supplement the services a consumer is already receiving including those services provided by natural supports. PCO services must be closely aligned with the individual's impairment rating as indicated in the PCO Service Guide, MAD 055 which is attached to this part of the NMAC as attachment I.

A. PCO services are usually furnished in the consumer's place of residence, except as otherwise indicated, and during the hours specified in the consumer's IPoC. Services may be furnished outside the residence only when appropriate and necessary and when not available through other existing benefits and programs, such as home health or other state plan or long-term care services. If a consumer is receiving hospice care, is a resident in an assisted living facility, shelter home, or room and board facility, the TPA for FFS or the MCO for CoLTS, will perform an assessment and ensure that the PCO services do not duplicate the services that are already being provided. If ADL or IADL services are part of the hospice or assisted living facility, shelter home, or room and board facility, as indicated by the contract or admission agreement signed by the consumer, PCO services cannot duplicate those services. Regulations for assisted living facilities may be found at 7.8.2 NMAC, *Assisted Living Facilities for Adults.*

B. PCO services are not furnished to an individual who is an inpatient or resident of a hospital, NF, ICF/MR, mental health facility, correctional facility, other institutional settings (except for recipients of community transition goods or services).

C. All consumers, regardless of living arrangements, will be assessed for natural supports. PCO services are not intended to replace natural supports. Service hours will be allocated, as appropriate, to supplement the natural supports available to a consumer. Consumers that reside with other adult household members, that are not receiving PCO services or are not disabled, will be presumed to have household services in the common/shared areas provided by the other adult residents, whether or not the adult residents are the selected personal care attendant. Personal care attendants that live with the consumer will not be paid to deliver household services, support services (shopping and errands), or meal preparation that are routinely provided as part of the household division of chores, unless those services are specific to the consumer (i.e., cleaning consumer's room, linens, clothing, and special diets). If a consumer's living situation changes:

(1) such that there is no longer a shared living space with another consumer, he/she will be re-assessed for services that were allocated between multiple consumers in a shared household; or

(2) such that he/she begins sharing a living space with another consumer(s), all consumers in the new shared living space will be re-assessed to determine the allocation of services shared by all consumers residing in the household.

[8.315.4.15 NMAC - Rp, 8.315.4.13 NMAC, 12-30-10]

**8.315.4.16 COVERED SERVICES:** PCO services are provided as described in Subsections A through J. Consumers will be assessed both individually and jointly if sharing a living space with another PCO applicant/recipient (Subsection K), in each of the following listed service categories. PCO services will not include those services for tasks the individual does not need or is already receiving from other sources including tasks provided by natural supports. PCO services must be related to the individual's impairment rating as indicated in the PCO Service Guide, MAD 055 which is attached to this part of the NMAC as attachment I.

A. **Individualized bowel and bladder services:** These services include bowel care, bladder care, perineal care and toileting.

(1) Pursuant to NMSA 1978, Section 61-3-29(J) of the Nursing Practice Act, bowel and bladder care may be provided to a consumer that is medically stable and able to communicate and assess his/her own needs to include:

(a) bowel care - evacuation and ostomy care, changing and cleaning of bags and ostomy site skin care; an individual requiring assistance with bowel care who does not have a statement by his/her physician determining he/she is medically

stable and able to communicate his/her bladder care needs is not eligible for PCO services in this category; digital stimulation is not a covered service; and

(b) bladder care - cueing the consumer to empty his/her bladder at timed intervals to prevent incontinence; elimination; catheter care, including the changing and cleaning of the catheter bag; the requirements and limitations from Subparagraph (a) bowel care above regarding medically determined stability and ability to communicate apply here; insertion/extraction of a catheter is not a covered service.

(2) Services that do not require the consumer to be medically stable and able to communicate and assess his/her own needs include:

(a) perineal care - cleansing of the perineal area and changing of sanitary napkins; and

(b) toileting - assisting with bedside commode or bedpan; cleaning perineal area, changing adult briefs/pads, readjusting clothing; cleaning changing of wet or soiled clothing after incontinence episodes or assisting with adjustment of clothing before and after toileting.

B. **Meal preparation and assistance:** At the direction of the consumer or his/her personal representative, prepare meal(s) including cutting ingredients to be cooked, cooking of meals, and placing/presenting meal in front of consumer to eat, and cutting up food into bite-sized portions for the consumer or assist the consumer pursuant to the IPoC. This includes provision of snacks and fluids and may include cueing and prompting the consumer to prepare meals. This does not include assistance with eating. Services requiring assistance with eating are covered under eating in Subsection G below. Personal care attendants who reside in the same household as the consumer may not be paid for meal preparation routinely provided as part of the household division of chores, unless those services are specific to the consumer (i.e., special diets, processing of meals into edible portions, pureeing).

C. **Support services:** These are services that provide additional assistance to the consumer. Personal care attendants who reside in the household may not be paid for shopping or errands routinely provided as part of the household division of chores, unless those services are specific to the consumer. These services are limited to:

(1) shopping or completing errands specific to the consumer (with or without the consumer);

(2) transportation of the consumer - transportation shall only be for non-medically necessary events and may include assistance with transfers in/out of vehicles; PCO agencies are not required to provide this service; consumers that need this service and are with a PCO agency that does not provide this service may transfer to a different PCO agency in accordance with 8.315.4.22 NMAC, *transfer process for PCO services;* medically necessary transportation services may be a covered PCO service when the TPA for FFS or the MCO for CoLTS has assessed and determined that other medically necessary transportation services are not available through other state plan services; and

(3) assistance with feeding and hydrating or cueing consumer to feed and hydrate a personal assistance animal for the consumer is a covered service; a consumer must provide documentation that his/her animal is a personal assistance animal; feeding and hydrating non-assistance animals is not a covered service.

D. **Hygiene/grooming:** The IPoC may include the following tasks to be performed by the attendant or cueing and prompting by the attendant for the consumer to perform the tasks. These services include:

(1) bathing - giving a sponge bath/bed bath/tub bath/shower, including transfer in/out, turning bath/shower water off/on, and setting temperature of bath/shower water; bringing in water from outside or heating water for consumer;

(2) dressing - putting on, fastening, removing clothing, and shoes;

(3) grooming - combing or brushing hair, applying make-up, trimming beard or mustache, braiding hair, shaving under arms, legs or face;

(4) oral care with intact swallowing reflex - brushing teeth, cleaning dentures/partials (includes use of floss, swabs, or mouthwash);

(5) nail care - cleaning, filing to trim, or cuticle care, except for consumers with a medical condition such as venous insufficiency, diabetes, peripheral neuropathy, or consumers that are documented as medically at risk, which then would be considered a skilled task and not a covered PCO service;

(6) applying lotion to intact skin for routine skin care; and

(7) cueing to ensure appropriate bathing, dressing, grooming, oral care, nail care and application of lotion for routine skin care.

E. **Minor maintenance of assistive device(s):** Battery replacement and minor, routine wheelchair and durable medical equipment (DME) maintenance or cleaning is a covered service. A consumer must have an assistive device(s) that requires regular cleaning or maintenance (that is not already provided by the supplier of the assistive device) that the consumer cannot clean and maintain to be eligible to receive services under this category.

F. **Mobility assistance:** Either physical assistance or verbal prompting and cueing provided by the attendant is a covered service. These include assistance with:

(1) ambulation - moving around inside or outside the residence or consumer's living area with or without assistive device(s) such as walkers, canes and wheelchairs;

(2) transferring - moving to/from one location/position to another with or without assistive devices(s) including in and out of vehicles;

(3) toileting - transferring on/off toilet; and

(4) repositioning - turning or moving an individual to another position who is bed bound to prevent skin breakdown.

G. **Eating:** Feeding the consumer or assisting the consumer with eating a prepared meal with a utensil or with specialized utensils is a covered service. Eating is the ability to physically put food into mouth, chew and swallow food safely. The attendant shall assist the consumer as determined by the IPoC. Eating assistance may include cueing a consumer to ensure appropriate nutritional intake or monitor for choking. This does not include preparation of food/meals. Services requiring preparation of food/meals is covered under meal preparation and assistance in Subsection B. If the consumer has special needs in this area, the attendant should receive specific instruction to meet that need. Gastrostomy feeding and tube feeding are not covered services.

H. **Assisting with self-administered medication:** This service is limited to *prompting and reminding only* for self-administering physician ordered (prescription) medications. The use of over the counter medications does not qualify for this service. The ability to self-administer is defined as the ability to identify and communicate medication name, dosage, frequency and reason for the medication. A consumer who does not meet this definition of ability to self-administer is not eligible for this service. This assistance does not include administration of injections, which is a skilled/nursing task. Splitting or crushing medication or filling of medication boxes is not a covered service. Assistance includes:

(1) getting a glass of water or other liquid as requested by the consumer for the purpose of taking medications;

(2) at the direction of the consumer handing the consumer his/her daily medication box or medication bottle;

(3) at the direction of the consumer, helping a consumer with placement of oxygen tubes for consumers who can communicate to the caregiver the dosage/route of oxygen;

(4) splitting or crushing medication or filling of medication boxes is not a covered service.

I. **Skin care:** The consumer must have a skin disorder documented by a physician, physician assistant, nurse practitioner or a clinical nurse specialist to be eligible to receive skin care services. This service is limited to the attendant's application of over-the counter or prescription skin cream for a diagnosed chronic skin condition that is not related to burns, pressure sores or ulceration of skin. A consumer must meet the definition of "ability to self-administer" defined in Subsection H of this section, to be eligible to receive time for application of a prescription over the counter medication for skin care. Wound care/open sores and debriding/dressing open wounds are not covered services.

J. **Household services:** This service is for performing interior household activities as needed. Such activities are limited to the maintenance of the consumer's personal living area (i.e., kitchen, living room, bedroom, and bathroom). To maintain a clean and safe environment for the consumer, particularly a consumer living alone who may not have adequate support in his/her residence. Personal care attendants who reside in the same household as the consumer may not be paid for this service routinely provided as part of the household division of chores, unless those services are specific to the consumer (i.e., changing the consumer's linens, cleaning the consumer's personal living areas). Services include:

(1) sweeping, mopping or vacuuming the consumer's carpets, hardwood floors, tile or linoleum;

(2) dusting the consumer's furniture;

(3) changing the consumer's linens;

(4) washing the consumer's laundry;

(5) cleaning the consumer's bathroom (tub or shower area, sink, and toilet);

(6) cleaning the consumer's kitchen and dining area (i.e., washing the consumer's dishes, putting the consumer's dishes away; cleaning counter tops, cleaning the area where the consumer eats, etc.); household services do not include cleaning up after other household members or pets.

K. **Shared households/ living space:** Two or more consumers living in the same residence, (including assisted living facilities, shelter homes, and other similar living arrangements), who are receiving PCO services will be assessed both individually and jointly to determine services that are shared. Consumers sharing living space will be assessed as follows for services identified in Subsections B, C and J of 8.315.4.16 NMAC:

(1) individually to determine if the consumer requires unique assistance with the service; and

(2) jointly with other household members to determine shared living space and common needs of the household; services will be allocated based on common needs, not based on individual needs, unless it has been assessed by the TPA for FFS or the MCO for CoLTS, there is an individual need for provision of the service(s); (common needs may include meals that can be prepared for several individuals; shopping/errands that can be completed at the same time; laundry that can be completed for more than one individual at the same time; dusting and vacuuming of shared living spaces), these PCO services are based on the assessment of combined needs in the household without replacing natural and unpaid supports identified during the assessment.

[8.315.4.16 NMAC - Rp, 8.315.4.14 NMAC, 12-30-10]

**8.315.4.17 NON-COVERED SERVICES:** The following services are not covered as New Mexico medicaid PCO services:

A. services to an inpatient or resident of a hospital, NF, ICF/MR, mental health facility, correctional facility or other institutional setting, except for recipients of community transition goods or services;

B. services that are already being provided by other sources including natural supports;

C. household services, support services (shopping and errands), or meal preparation that are routinely provided as part of the household division of chores;

D. services that must be provided by a person with professional licensure or technical training;

E. services not approved in the consumer's approved IPoC;

F. childcare, pet care or personal care for other household members not receiving PCO services;

G. retroactive services;

H. services provided to a consumer who does not have medicaid eligibility;

I. assistance with finances and budgeting;

J. scheduling of appointments for a consumer;

K. range of motion exercises;

L. wound care/open sores and debriding/dressing open wounds;

M. filling of medication boxes, cutting/grinding pills, administration of injections, assistance with over-the-counter medication or medication that the consumer cannot self-administer;

N. skilled nail care for consumers with a medical condition such as venous insufficiency, diabetes, peripheral neuropathy, or consumers that are documented as medically at risk;

O. medically necessary transportation available through other state plan services;

P. bowel and bladder services that include insertion/extraction of a catheter or digital stimulation; and

Q. gastrostomy feeding and tube feeding.

[8.315.4.17 NMAC - Rp, 8.315.4.15 NMAC, 12-30-10]

**8.315.4.18 MEDICAL ELIGIBILITY:** To be eligible for PCO services, a consumer must meet the LOC required in a NF.

A. The TPA is responsible for making LOC determinations based on criteria developed by medicaid or medicaid's designee according to national standards. See attachment II to this part titled *long term care services utilization review instructions for nursing facilities*.

(1) **Determine level of care (LOC):** The TPA makes initial LOC determinations and subsequent determinations at least annually thereafter.

(a) An LOC packet is developed by the TPA for FFS and the MCO for CoLTS and reviewed by the TPA to determine approval for medical eligibility.

(b) The LOC packet must include:

(i) a current (within the last six months) approved medical assessment form (ISD 379) signed by a physician or physician's designee (physician assistant, nurse practitioner or, clinical nurse specialist);

(ii) any other information or medical justification documenting the consumer's functional abilities; and

(iii) an assessment of the consumer's functional needs, performed by the TPA initially through the in-home assessment (MAD 057), or for subsequent approval, subsequent assessments performed by the TPA for FFS or MCO for CoLTS.

(2) The TPA will use the LOC packet to:

(a) make all LOC determinations for all consumers requesting/receiving PCO services;

(b) approve the consumer's LOC for a maximum of one year (12 consecutive months); and a new LOC determination must be made at least annually to ensure the consumer continues to meet medical eligibility criteria for PCO services; each LOC determination must be based on the consumer's current medical condition and need of service(s) and may not be based on prior year LOC determinations; and

(c) contact the consumer for FFS or the MCO within a minimum of 120 days, prior to the expiration of the approved LOC, to begin the annual LOC review process for

PCO services to prevent a break in service; the TPA for FFS or the MCO for CoLTS shall also provide a notification to the PCO agency, at the same time the consumer is notified, that the LOC is due to expire within 120 days.

B. **Initial in-home assessment:** The TPA must perform an initial in-home assessment (MAD 057) of the consumer's functional needs in the consumer's place of residence. The initial in-home assessment is only done one time by the TPA when the consumer is first evaluated for eligibility for PCO services and not upon annual renewal.

C. The TPA must initially explain both service delivery models, consumer-directed and consumer-delegated to the consumer or his/her legal representative and provide the consumer or his/her legal representative with informational material, allowing the consumer to make the best educated decision possible regarding which model he/she will select. A copy of the consumer's or legal representative's responsibilities in 8.315.4.10 NMAC, *service delivery models,* must be provided to each consumer or legal representative. If the consumer is FFS, the TPA must explain both service delivery models and provide a copy of the consumer's responsibilities in 8.315.4.10 NMAC, *service delivery models*, at every annual assessment, based on the service delivery model he/she has selected.

D. A PCO agency that does not agree with the LOC determination made by the TPA or medicaid's designee may work with the consumer's physician or physician designee that submitted the ISD 379 form or, for CoLTS consumers, with the MCO to request a re-review or reconsideration from the TPA pursuant to medicaid oversight policies, 8.350.2 NMAC, *Reconsideration of Utilization Review Decisions* [MAD-953].

E. A consumer that does not agree with the LOC determination made by the TPA may file a grievance with the TPA, request a fair hearing pursuant to 8.352.2 NMAC, *Recipient Hearings,* or request both.

F. Conflict of Interest: The TPA is not authorized to contract with any medicaid approved PCO agency to carry out TPA responsibilities or any person, agency, or entity that would have any other actual or potential conflict of interest as a TPA subcontractor due to its financial or corporate relationship or relationship by blood (consanguinity) or by affinity (by marriage) to the third degree with a PCO personal care provider agency or its principals. A conflict of interest includes the situation in which a principal or a relative of the principal of the prospective TPA contracting entity has a financial interest in a PCO provider agency.

G. Temporary authorization: If the consumer is determined to meet the medical eligibility criteria to receive PCO services, but is not yet enrolled in CoLTS, the TPA automatically gives these consumers a temporary prior-authorization of 10 hours per week for up to 75 days. This temporary prior-authorization is automatic for all CoLTS consumers that are medically eligible and is not a determination of a CoLTS consumer's actual need. The consumer's actual need may be higher or lower as determined by the assessment for services performed by the MCO for CoLTS. There is no right to a fair hearing with respect to this temporary prior authorization. The approval for 10 hours is not a guarantee of a minimum amount of services when the consumer is assessed by the MCO for CoLTS for need of services. Temporary prior authorization of services does not guarantee that an individual is eligible for medicaid. PCO agencies must verify monthly all individuals' financial eligibility for medicaid prior to providing services. FFS consumers do not receive a temporary authorization as their assessment of services is conducted at the same time as the LOC assessment.

H. The TPA shall review the LOC upon a referral from the PCO agency, the consumer the consumer's legal representative, or the MCO for CoLTS regarding an improvement or decline in the consumer's health condition and make a new determination regarding eligibility, as appropriate.

I. The ISD 379 form is used solely to determine the LOC and is not used to determine the type or the amount of services for a consumer. The MAD 057 is used solely to obtain initial LOC assessment information on a consumer who is FFS or not yet enrolled in CoLTS.

[8.315.4.18 NMAC - N, 12-30-10]

**8.315.4.19 ASSESSMENTS FOR SERVICES:** After the consumer is determined to be medically eligible for PCO services, the TPA for FFS or the MCO for CoLTS performs an assessment to include the personal care options service guide (MAD 055) of the consumer's natural supports and need of covered services.

A. The assessment performed by the TPA for FFS or the MCO for CoLTS determines the type of covered services needed by the consumer (assessment form approved by the state) and the amount of time allocated to each type of covered service (recorded on the MAD 055). PCO services are allocated for a reasonable accommodation of tasks to be performed by a personal care attendant, but do not provide 24-hour per day services. A PCO service assessment determines the amount and type of services needed to supplement the services a consumer is already receiving including those services provided by natural supports. The PCO service guide, the MAD 055, which is attached to this part of the NMAC as attachment I is used as a tool to record service assessment responses that determine the type of PCO services that are needed and the time allotted for each PCO service as it relates to the individual's impairment ratings. In the rare event that the consumer's functional needs exceed the average allocation of time allotted to perform a particular service task per the recommendation of a medical professional, the TPA for FFS or the MCO for CoLTS may consider authorizing additional time based on the consumer's medical and clinical need(s).

B. The assessment is conducted in the consumer's place of residence by the TPA for FFS or the MCO for CoLTS and shall be based on the current health condition and functional needs of the consumer, to include no duplication of services a consumer is already receiving including those services provided by natural supports, and shall not be based on a prior assessment of the consumer's health condition, functional needs, or existing services.

C. The completed assessment is sent to the PCO agency by the TPA for FFS or the MCO for CoLTS for the PCO agency to develop the IPoC.

D. The assessment must be performed by the TPA for FFS or the MCO for CoLTS upon a consumer's initial approval for medical eligibility to receive PCO services and at least annually thereafter. The TPA for FFS or the MCO for CoLTS must complete an assessment within 75 days from the date of the temporary prior authorization. The assessment may be performed more often than annually, if:

(1) there is a change in the consumer's condition (either improved or declined);

(2) there is a change in the consumer's natural supports or living conditions;

(3) upon the consumer's request;

(4) the full amount of services has not been utilized within the last two months; or

(5) upon a referral from a PCO agency regarding the consumer's need for an assessment.

E. The MCO must explain each service delivery model at least annually to consumers enrolled in CoLTS.

F. Consumers enrolled in a CoLTS MCO who disagree with authorized number of hours may utilize the CoLTS MCO grievance and appeal process, request a fair hearing, or both.

[8.315.4.19 NMAC - N, 12-30-10]

**8.315.4.20 INDIVIDUAL PLAN OF CARE (IPOC):** An IPoC is developed and PCO services are identified along with

the appropriate assessment for allocating PCO services. The PCO agency develops an IPoC using an authorization, task list and the MAD 055 provided by the TPA for FFS or the MCO for CoLTS. The finalized IPoC contains approved daily tasks, for a period of seven days at a time, to be performed by the attendant based on the consumer's daily needs. Only those services identified as IADLs (household services, certain support services (shopping and errands) or meal preparation) may be moved to another day within a seven-day IPoC. Any tasks not performed by the attendant for any reason cannot be banked or saved for a later date.

A. The PCO agency must:

(1) develop the IPoC with a specific description of the attendant's responsibilities, including tasks to be performed by the attendant and any special instructions related to maintaining the health and safety of the consumer;

(2) ensure the consumer has participated in the development of the plan and that the IPoC is reviewed and signed by the consumer or the consumer's legal representative; a signature on the IPoC indicates that the consumer or the consumer's legal representative understands what services have been identified and that services will be provided on a weekly basis for a maximum of one year; if a consumer is unable to sign the IPoC and the consumer does not have a legal representative, a thumbprint or personal mark (i.e., an "X") will suffice; if signed by a legal representative, medicaid or its designee and the agency must have documentation in the consumer's file verifying the individual is the consumer's legal representative;

(3) maintain an approved IPoC for PCO services for a maximum of one year (12 consecutive months), a new IPoC must be developed at least annually, to ensure the consumer's current needs are being met; a consumer's previous year IPoC is not used or considered in developing a new IPoC and allocating services; a new IPoC must be developed independently at least every year based on the consumer's current medical condition and need of services; the tasks and number of hours in the IPoC must match the authorized tasks and number of hours on the authorization;

(4) provide the consumer and the TPA for FFS or MCO for CoLTS with a copy of their approved IPoC;

(5) obtain an approved task list and MAD 055 from the TPA for FFS or MCO for CoLTS;

(6) obtain written verification that the consumer or the consumer's legal representative understands that if the consumer does not utilize services (for two months) or the full amount of allocated services (within a two-month period) on the IPoC that these circumstances will be documented in the consumer's file for need of services; and

(7) submit a personal care transfer/closure form (MAD 062 or other approved transfer/closure form) to the TPA for FFS or MCO for CoLTS for a consumer who has passed away or who has not received services for 90-consecutive days.

B. PCO services are to be delivered in the state of New Mexico only. Consumers who require PCO services out of the state, for medically necessary reasons only, must obtain medicaid or medicaid's designee for FFS or the MCO for CoLTS written approval prior to leaving the state. The following must be submitted for consideration when requesting medically necessary out-of-state services:

(1) a letter from the consumer or the consumer's legal representative requesting an out-of-state exception and reason for request; the letter must include:

(a) the consumer's name and social security number;

(b) how time sheets/logs/check-off list will be transmitted and payroll checks issued to the attendant;

(c) date the consumer will be leaving the state, including the date of the medical procedure or other medical event, and anticipated date of return; and

(d) where the consumer will be housed after the medical procedure.

(2) a letter or documentation from the physician, surgeon, physician assistant, nurse practitioner, or clinical nurse specialist verifying the date of the medical procedure; and

(3) a copy of the consumer's approved IPoC and a proposed adjusted revision of services to be provided during the time the consumer is out-of-state; support services and household services will not be approved unless justified; if the consumer has been approved for services under self-administered medications, a statement from the physician, physician assistant, nurse practitioner, or clinical nurse specialist must be included indicating the consumer will continue to have the ability to self-administer for the duration he/she is out-of-state.

[8.315.4.20 NMAC - Rp, 8.315.4.17 NMAC, 12-30-10]

**8.315.4.21 UTILIZATION REVIEW (UR):** All PCO services are subject to utilization review for medical necessity and program compliance. See 8.302.5 NMAC, *Prior Authorization and Utilization Review*. All PCO services require prior LOC approval by the TPA; therefore, retroactive services are not authorized. The TPA for FFS or the MCO for CoLTS will perform utilization review for medical necessity. The TPA for FFS or the MCO for CoLTS makes final authorization of PCO services using:

A. the TPA-approved LOC determination; and

B. an assessment conducted by the TPA for FFS or the MCO for CoLTS to include the MAD 055.

[8.315.4.21 NMAC - Rp, 8.315.4.18 NMAC, 12-30-10]

**8.315.4.22 TRANSFER PROCESS FOR PCO SERVICES:** A consumer wishing to transfer services to another medicaid approved PCO agency may request to do so. Transfers within the plan year may be requested by the consumer, but must be approved by medicaid or medicaid's designee prior to the agency providing PCO services to the consumer. All requests for change of service model (from directed/delegated) must be approved by the TPA for FFS or MCO for CoLTS prior to the receiving agency providing services to the consumer. Transfers may only be initiated by the consumer or his/her legal representative and may not be requested by the attendant as a result of an employment issue. For consumers enrolled in a CoLTS MCO, the transfer process is determined by medicaid or medicaid's designee and should be initiated by the consumer through the consumer's assigned service coordinator. The consumer must give the reason for the requested transfer.

A. A transfer requested by a consumer may be denied by medicaid or its designee for the following reasons:

(1) the consumer is requesting more hours/services;

(2) the consumer's attendant or family member is requesting the transfer;

(3) the consumer has requested three or more transfers within a six-month period;

(4) the consumer wants his/her legal guardian, spouse or attorney-in-fact to be his/her attendant;

(5) the consumer wants an individual to be his/her attendant who has not successfully passed a nationwide criminal history screening;

(6) the consumer wants an attendant who has been terminated from another agency for fraudulent activities or other misconduct;

(7) the attendant does not want to complete the mandated trainings under the consumer-delegated model;

(8) the consumer does not wish to comply with the medicaid or PCO regulations and procedures; and

(9) there is reason to believe that solicitation has occurred as defined in 8.315.4.24 NMAC, *reimbursement.*

B. The TPA for FFS or MCO for CoLTS will notify the consumer and both the originating agency and the receiving agency of its decision and has 15-working days after receiving the request

from the TPA to make a decision. The consumer must work with the TPA for FFS or the MCO for CoLTS to verify his/her request.

C. A consumer who does not agree with the decision may request a fair hearing pursuant to 8.352.2 NMAC, *Recipient Hearings*. The originating agency is responsible for the continuance of PCO services throughout the fair hearing process.

D. The following is the process for submitting a transfer request.

(1) The consumer must inform the TPA for FFS or the MCO for CoLTS of the desire to transfer PCO agencies; the TPA for FFS or the MCO for CoLTS approves or denies the transfer request; if approved, the TPA for FFS or the MCO for CoLTS works with both the agency he/she is currently receiving services from (originating agency) and the agency he/she would like to transfer to (receiving agency) to effectively complete the transfer.

(2) Originating agencies are responsible for continuing service provision until the transfer is complete.

(3) Both the originating and receiving PCO agencies are responsible for following approved transfer procedures (either TPA for FFS or MCO for CoLTS transfer procedures).

(4) After the TPA for FFS or the MCO for CoLTS verifies the consumer's request, the TPA for FFS or the MCO for CoLTS will process the transfer request within 15 working days of receiving the transfer request.

(5) The TPA for FFS or the MCO for CoLTS will issue a new prior authorization number and task information to the receiving agency and make the transfer date effective 10 business days from the date of processing the transfer request with new dates of service and units remaining for the remainder of the IPoC year; the TPA for FFS or the MCO for CoLTS will notify the consumer and the originating and receiving PCO agencies.

[8.315.4.22 NMAC - Rp, 8.315.4.19 NMAC, 12-30-10]

**8.315.4.23 CONSUMER DISCHARGE:** A consumer may be discharged from a PCO agency or may be discharged by the state from receiving any PCO services.

A. **PCO agency discharge:** The PCO agency may discharge a consumer for a justifiable reason. Prior to initiating discharge, the PCO agency must send a notice to medicaid or its designee for approval. Once approved by medicaid or its designee, the PCO agency may initiate the discharge process by means of a 30-day written notice to the consumer. The notice must include the consumer's right to request a fair hearing and must include the justifiable reason for the agency's decision to discharge.

(1) A PCO agency may discharge a consumer for a justifiable reason. A justifiable reason for discharge may include:

(a) staffing problems (i.e., excessive request for change in attendants (three or more in a 30-day period);

(b) a consumer demonstrates a pattern of verbal or physical abuse toward attendants or agency personnel, including the use of vulgar or explicit (i.e. sexually) language, sexual harassment, excessive use of force, use of verbal threats or physical threats, demonstrates intimidating behavior; the agency or attendant must have documentation demonstrating the pattern of abuse; the agency may also discharge a consumer if the life of an attendant or agency's staff member is believed to be in immediate danger;

(c) a consumer or family member demonstrates a pattern of uncooperative behavior including not complying with agency or medicaid regulations; not allowing the PCO agency to enter the home to provide services; and continued requests to provide services not approved on the IPoC;

(d) illegal use of narcotics or alcohol abuse; and

(e) fraudulent submission of timesheets; or

(f) living conditions or environment that may pose a health or safety risk or cause harm to the personal care attendant, employee of an agency, TPA, MCO, or other medicaid designee.

(2) The PCO agency must provide the consumer with a current list of medicaid-approved personal care agencies that service the county in which the consumer resides. The PCO agency must assist the consumer in the transfer process and must continue services throughout the transfer process. If the consumer does not select another PCO agency within the 30-day time frame, the current PCO agency must inform the consumer that a break in services will occur until the consumer selects an agency. The discharging agency may not ask the medicaid's designee to terminate the consumer's PCO services.

(3) A consumer has a right to appeal the agency's decision to suspend services as outlined in 8.352.2 NMAC, *Recipient Hearings*. A recipient has 90 days from the date of the suspension notice to request a fair hearing.

B. **Discharge by the state:** Medicaid or its designee reserves the right to exercise its authority to discontinue the consumer's receipt of PCO services due to the consumer's non-compliance with medicaid regulations and PCO service requirements. The consumer's discontinuation of PCO services does not affect his/her medicaid eligibility. The consumer may be discharged for a justifiable reason by means of a 30-day written notice to the consumer. The notice will include duration of discharge, which may be permanent, the consumer's right to request a fair hearing, and the justifiable reason for the decision to discharge. A justifiable reason for discharge may include:

(1) staffing problems (i.e., unjustified excessive requests for change in attendants three or more in a 30-day period), excessive requests for transfers to other agencies or excessive agency discharges;

(2) a consumer who demonstrates a pattern of verbal or physical abuse toward attendants, agency personnel, or state staff or contractors, including use of vulgar or explicit (i.e. sexually) language, verbal or sexual harassment, excessive use of force, demonstrates intimidating behavior, verbal or physical threats toward attendants, agency personnel, or state staff or contractors;

(3) a consumer or family member who demonstrates a pattern of uncooperative behavior including, not complying with agency, medicaid program requirements or regulations or procedures;

(4) illegal use of narcotics or alcohol abuse; and

(5) fraudulent submission of timesheets; or

(6) unsafe or unhealthy living conditions or environment.

C. PCO agencies, the TPA, and the MCO for CoLTS are all responsible for properly documenting and reporting any incidents involving a consumer that is described in section B one through six above to medicaid or its designee.

[8.315.4.23 NMAC - Rp, 8.315.4.20 & 21 NMAC, 12-30-10]

**8.315.4.24 REIMBURSEMENT:** A medicaid-approved PCO agency will process billings in accordance with the following.

A. Agencies must submit claims for reimbursement on the HCFA-1500 claim form or its successor. See 8.302.2 NMAC, *Billing for Medicaid Services*. Once enrolled, agencies receive instructions on documentation, billing, and claims processing. Claims must be filed per the billing instructions in the medicaid manual for FFS or instructions from the CoLTS MCO. PCO agencies must use ICD-9-CM diagnosis codes when billing for medicaid services.

B. Reimbursement for PCO services is made at the lesser of the following:

(1) the provider's billed charge;

(2) the medicaid fee schedule for the specific service or procedure; or

(3) the agency's billed charge must be its usual and customary charge for services.

(4) "usual and customary charge" refers to the amount an individual provider

charges the general public in the majority of cases for a specific service and level of service.
[8.315.4.22 NMAC - Rp, 8.315.4.22 NMAC, 12-30-10]

**8.315.4.25 PCO PROVIDER VOLUNTARY DISENROLLMENT:** A medicaid approved PCO agency may choose to discontinue provision of services. Once approved by medicaid or its designee, the PCO agency may initiate the disenrollment process to assist consumers to transfer to another medicaid approved PCO agency. The PCO agency must continue to provide services until consumers have completed the transfer process and the agency has received approval from medicaid or its designee to discontinue services. Prior to disenrollment, the PCO agency must send a notice to medicaid or its designee for approval. The notice must include:

A. consumer notification letter;

B. list of all the medicaid approved personal care agencies serving the county in which the consumer resides; and

C. list of all consumers currently being served by the agency and the MCO in which they are enrolled.
[8.315.4.25 NMAC - Rp, 8.315.4.23 NMAC, 12-30-10]

**8.315.4.26 SOLICITATION/ ADVERTISING:** For the purposes of this section, solicitation shall be defined as any communication regarding PCO services from an agency's employees, affiliated providers, agents or contractors to a medicaid recipient who is not a current client that can reasonably be interpreted as intended to influence the recipient to become a client of that entity. Individualized personal solicitation of existing or potential consumers by an agency for their business is strictly prohibited.

A. Prohibited solicitation includes, but is not limited to, the following:

(1) contacting a consumer who is receiving services through another PCO service or any another medicaid program;

(2) contacting a potential consumer to discuss the benefits of its agency, including door to door, telephone and email solicitation;

(3) offering a consumer/attendant a finder fee, kick back, or bribe consisting of anything of value to the consumer to obtain transfers to its agency; see 8.351.2 NMAC, *Sanctions and Remedies;*

(4) directly or indirectly engaging in door-to-door, telephone, or other cold-call marketing activities by the entity's employees, affiliated providers, agents or contractors;

(5) making false promises;

(6) misinterpretation or misrepresentation of medicaid rules, regulations or eligibility;

(7) misrepresenting itself as having affiliation with another entity; and

(8) distributing PCO related marketing materials.

B. Penalties for engaging in solicitation prohibitions: Agencies found to be conducting such activity will be subject to sanctions and remedies as provided in 8.351.2 NMAC and applicable provisions of the PPA.

C. An agency wishing to advertise for PCO service provision, or its agency must first get prior written approval from medicaid or its designee before conducting any such activity. Advertising and community outreach materials means materials that are produced in any medium, on behalf of a PCO agency and can reasonably be interpreted as advertising to potential clients. Only approved advertising materials may be used to conduct any type of community outreach. Advertising or community outreach materials must not misrepresent the agency as having affiliation with another entity or use proprietary titles, such as "medicaid PCO". Any PCO agency conducting any such activity without prior written approval from medicaid or its designee will be subject to sanctions and remedies as provided in 8.351.2 NMAC and applicable provisions of the PPA.
[8.315.4.26 NMAC - Rp, 8.315.4.24 NMAC, 12-30-10]

**8.315.4.27 SANCTIONS AND REMEDIES:** Any agency or contractor that is not compliant with the applicable medicaid regulations is subject to sanctions and remedies as provided in 8.351.2 NMAC.
[8.315.4.27 NMAC - N, 12-30-10]

**HISTORY OF 8.315.4 NMAC:**

History of Repealed Material:
8 .NMAC 4.MAD 738, Personal Care Services, filed 8-18-99 - Repealed effective 7-1-2004.
8.315.4 NMAC, Personal Care Option Services, filed 6-16-2004 - Repealed effective 9-15-2010.
8.315.4 NMAC, Personal Care Option Services, filed 8-20-2010 - Repealed effective 12-30-10

## NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.200.510 NMAC Sections 11, 13, 14 and 15, effective January 1, 2011.

**8.200.510.11 COMMUNITY SPOUSE RESOURCE ALLOWANCE (CSRA):** The CSRA standard varies based on when the applicant/recipient become institutionalized for a continuous period. The CSRA remains constant even if it was calculated prior to submission of a formal medicaid application. If institutionalization began:

(A) Between September 30, 1989 and December 31, 1989, the state maximum CSRA is $30,000 and the federal maximum CRSA is $60,000.

(B) On or after January 1, 1990, the state minimum is $31,290 and the federal maximum CSRA is $62,580.

(C) On or after January 1, 1991, the state minimum is $31,290 and the federal maximum CSRA is $66,480.

(D) On or before January 1, 1992, the state minimum is $31,290 and the federal maximum CSRA is $68,700.

(E) On or after January 1, 1993, the state minimum is $31,290 and the federal maximum CSRA is $70,740.

(F) On or after January 1, 1994, the state minimum is $31,290 and the federal maximum CSRA is $72,660.

(G) On or after January 1, 1995, the state minimum is $31,290 and the federal maximum CSRA is $74,820.

(H) On or after January 1, 1996, the state minimum is $31,290 and the federal maximum CSRA is $76,740.

(I) On or after January 1, 1997, the state minimum is $31,290 and the federal maximum CSRA is $79,020.

(J) On or after January 1, 1998, the state minimum is $31,290 and the federal maximum CSRA is $80,760.

(K) On or after January 1, 1999, the state minimum is $31,290 and the federal maximum CSRA is $81,960.

(L) On or after January 1, 2000, the state minimum is $31,290 and the federal maximum CSRA is $84,120.

(M) On or after January 1, 2001, the state minimum is $31,290 and the federal maximum CSRA is $87,000.

(N) On or after January 1, 2002, the state minimum is $31,290 and the federal maximum CSRA is $89,280.

(O) On or after January 1, 2003, the state minimum is $31,290 and the federal maximum CSRA is $90,660.

(P) On or after January 1, 2004, the state minimum is $31,290 and the federal maximum CSRA is $92,760.

(Q) On or after January 1, 2005, the state minimum is $31, 290 and the federal maximum CSRA is $95,100.

(R) On or after January 1, 2006, the state minimum is $31,290 and the federal maximum CSRA is $99,540.

(S) On or after January 1, 2007, the state minimum is $31,290 and the federal maximum CSRA is $101,640.

(T) On or after January 1, 2008, the state minimum is $31,290 and the federal maximum CSRA is $104,400.

(U) On or after January 1, 2009, the state minimum is $31,290 and the federal maximum CSRA is $109,560.

(V) On or after January 1, 2010, the state minimum is $31,290 and the federal maximum CSRA remains $109,560.

(W) On or after January 1, 2011, the state minimum is $31,290 and the federal maximum CSRA remains $109,560.

[*Continued on page 1403*]

[1-1-95, 7-1-95, 3-30-96, 8-31-96, 4-1-97, 6-30-97, 4-30-98, 6-30-98, 1-1-99, 7-1-99, 7-1-00; 8.200.510.11 NMAC - Rn, 8 NMAC 4.MAD.510.1 & A, 1-1-01; A, 1-1-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08; A, 1-1-09; A, 1-15-10; A, 1-1-11]

**8.200.510.13 AVERAGE MONTHLY COST OF NURSING FACILITIES FOR PRIVATE PATIENTS USED IN TRANSFER OF ASSET PROVISIONS:** Costs of care are based on the date of application registration.

| DATE | AVERAGE COST PER MONTH |
|---|---|
| A. July 1, 1988 - Dec. 31, 1989 | $ 1,726 per month |
| B. Jan. 1, 1990 - Dec. 31, 1991 | $ 2,004 per month |
| C. Jan. 1, 1992 - Dec. 31, 1992 | $ 2,217 per month |
| D. Effective July 1, 1993, for application register on or after Jan. 1, 1993 | $ 2,377 per month |
| E. Jan. 1, 1994 - Dec. 31, 1994 | $2,513 per month |
| F. Jan. 1, 1995 - Dec. 31, 1995 | $2,592 per month |
| G. Jan. 1, 1996 - Dec. 31, 1996 | $2,738 per month |
| H. Jan. 1, 1997 - Dec. 31, 1997 | $2,889 per month |
| I. Jan. 1, 1998 - Dec 31, 1998 | $3,119 per month |
| J. Jan. 1, 1999 - Dec. 31, 1999 | $3,429 per month |
| K. Jan. 1, 2000 - Dec. 31, 2000 | $3,494 per month |
| L. Jan. 1, 2001 - Dec. 31, 2001 | $3,550 per month |
| M. Jan. 1, 2002 - Dec. 31, 2002 | $3,643 per month |
| N. Jan. 1, 2003 - Dec. 31, 2003 | $4,188 per month |
| O. Jan. 1, 2004 - Dec. 31, 2004 | $3,899 per month |
| P. Jan. 1, 2005 - Dec. 31, 2005 | $4,277 per month |
| Q. Jan. 1, 2006 - Dec. 31, 2006 | $4,541 per month |
| R. Jan. 1, 2007 - Dec. 31, 2007 | $4,551 per month |
| S. Jan. 1, 2008 - Dec. 31, 2008 | $4,821 per month |
| T. Jan. 1, 2009 - Dec. 31, 2009 | $5,037 per month |
| U. Jan. 1, 2010 - Dec. 31, 2010 | $5,269 per month |
| V. Jan. 1, 2011 | $5,774 per month |

Any fraction of a month remaining when this calculation is completed is dropped.

[1-1-95, 3-30-96, 4-1-97, 4-30-98, 1-1-99, 7-1-00; 8.200.510.13 NMAC - Rn, 8 NMAC 4.MAD.510.3 & A, 1-1-01; A, 1-1-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06 ; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-15-10; A, 1-1-11]

**8.200.510.14 RESOURCE AMOUNTS FOR SUPPLEMENTAL SECURITY INCOME (SSI) RELATED MEDICARE SAVINGS PROGRAMS (QMB, SLIMB/QI1 AND QD):** The following resource standards are inclusive of the $1,500 per person burial exclusion:

A. individual [~~$8,100~~] $8,180 and

B. couple [~~$12,910~~] $13,020.

[8.200.510.14 NMAC - N, 1-1-01; A, 1-1-02; 8.200.510.14 NMAC - N, 7-15-10; A, 1-1-11]

**8.200.510.15 EXCESS HOME EQUITY AMOUNT FOR LONG-TERM CARE SERVICES:**

A. Jan. 2011 $758,000

B. Jan. 2010 $750,000

[8.200.510.15 NMAC - N, 1-11-11]

# NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.200.520 NMAC, Sections 12, 13, 16 and 20, effective January 1, 2011.

**8.200.520.12 COLA DISREGARD COMPUTATION**

| Current amt/cost of living | Benefit period |
|---|---|
| Current Title II amount= 0 | Benefit before [~~1/10~~] 1/11 |
| Benefit before 1/11= 1.058 | Benefit before 1/10 |
| Benefit before 1/10= 1.058 | Benefit before 1/09 |
| Benefit before 1/09= 1.023 | Benefit before 1/08 |
| Benefit before 1/08 = 1.033 | Benefit before 1/07 |
| Benefit before 1/07 = 1.041 | Benefit before 1/06 |
| Benefit before 1/06 = 1.027 | Benefit before 1/05 |
| Benefit before 1/05 = 1.021 | Benefit before 1/04 |
| Benefit before 1/04 = 1.014 | Benefit before 1/03 |
| Benefit before 1/03 = 1.026 | Benefit before 1/02 |
| Benefit before 1/02 = 1.035 | Benefit before 1/01 |
| Benefit before 1/01 = 1.025 | Benefit before 1/00 |
| Benefit before 1/00 = 1.013 | Benefit before 1/99 |
| Benefit before 1/99 = 1.021 | Benefit before 1/98 |
| Benefit before 1/98 = 1.029 | Benefit before 1/97 |
| Benefit before 1/97 = 1.026 | Benefit before 1/96 |
| Benefit before 1/96 = 1.028 | Benefit before 1/95 |
| Benefit before 1/95 = 1.026 | Benefit before 1/94 |
| Benefit before 1/94 = 1.030 | Benefit before 1/93 |
| Benefit before 1/93 = 1.037 | Benefit before 1/92 |
| Benefit before 1/92 = 1.054 | Benefit before 1/91 |
| Benefit before 1/91 = 1.047 | Benefit before 1/90 |
| Benefit before 1/90 = 1.040 | Benefit before 1/89 |
| Benefit before 1/89 = 1.042 | Benefit before 1/88 |
| Benefit before 1/88 = 1.013 | Benefit before 1/87 |
| Benefit before 1/87 = 1.031 | Benefit before 1/86 |
| Benefit before 1/86 = 1.035 | Benefit before 1/85 |
| Benefit before 1/85 = 1.035 | Benefit before 1/84 |
| Benefit before 1/84 = 1.074 | Benefit before 7/82 |
| Benefit before 7/82 = | Benefit before 7/81 |

1.112
Benefit before 7/81 = Benefit before 7/80
1.143
Benefit before 7/80 = Benefit before 7/79
1.099
Benefit before 7/79 = Benefit before 7/78
1.065
Benefit before 7/78 = Benefit before 7/77
1.059

[1-1-95, 4-1-95, 3-30-96, 4-1-97, 4-30-98, 1-1-99; 8.200.520.12 NMAC - Rn, 8 NMAC 4.MAD.520.6 & A, 1-1-01; A, 1-1-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-15-10; A, 1-1-11]

**8.200.520.13 FEDERAL BENEFIT RATES**

| YEAR | Individual | Inst. | Indiv. | Couple | Inst. | Couple |
|---|---|---|---|---|---|---|
| | FBR | FBR | VTR | FBR | FBR | VTR |
| 1/89 to 1/90 | $368 | $30 | $122.66 | $553 | $60 | $184.33 |
| 1/90 to 1/91 | $386 | $30 | $128.66 | $579 | $60 | $193.00 |
| 1/91 to 1/92 | $407 | $30 | $135.66 | $610 | $60 | $203.33 |
| 1/92 to 1/93 | $422 | $30 | $140.66 | $633 | $60 | $211.00 |
| 1/93 to 1/94 | $434 | $30 | $144.66 | $652 | $60 | $217.33 |
| 1/94 to 1/95 | $446 | $30 | $148.66 | $669 | $60 | $223.00 |
| 1/95 to 1/96 | $458 | $30 | $152.66 | $687 | $60 | $229.00 |
| 1/96 to 1/97 | $470 | $30 | $156.66 | $705 | $60 | $235.00 |
| 1/97 to 1/98 | $484 | $30 | $161.33 | $726 | $60 | $242.00 |
| 1/98 to 1/99 | $494 | $30 | $164.66 | $741 | $60 | $247.00 |
| 1/99 to 1/00 | $500 | $30 | $166.66 | $751 | $60 | $250.33 |
| 1/00 to 1/01 | $512 | $30 | $170.66 | $769 | $60 | $256.33 |
| 1/01 to 1/02 | $530 | $30 | $176.66 | $796 | $60 | $265.33 |
| 1/02 to 1/03 | $545 | $30 | $181.66 | $817 | $60 | $272.33 |
| 1/03 to 1/04 | $552 | $30 | $184.00 | $829 | $60 | $276.33 |
| 1/04 to 1/05 | $564 | $30 | $188 | $846 | $60 | $282.00 |
| 1/05 to 1/06 | $579 | $30 | $193 | $869 | $60 | $289.66 |
| 1/06 to 1/07 | $603 | $30 | $201 | $904 | $60 | $301.33 |
| 1/07 to 1/08 | $623 | $30 | $207.66 | $934 | $60 | $311.33 |
| 1/08 to 1/09 | $637 | $30 | $212.33 | $956 | $60 | $318.66 |
| 1/09 to 1/10 | $674 | $30 | $224.66 | $1,011 | $60 | $337 |
| 1/10 to 1/11 | $674 | $30 | $224.66 | $1,011 | $60 | $337 |
| 1/11 to 1/12 | $674 | $30 | $224.66 | $1,011 | $60 | $337 |

Ineligible child deeming allocation: $319.00

Part B premium is $96.40 per month.

VTR (value of one third reduction) is used when an individual or couple lives in the household of another and receives food and shelter from the household or when the individual or couple is living in their own household but receiving support and maintenance from others.

The SSI resource standard is $2000 for an individual and $3000 for a couple.

[1-1-95, 4-1-95, 3-30-96, 4-1-97, 4-30-98, 1-1-99; 8.200.520.13 NMAC - Rn, 8 NMAC 4.MAD.520.7 & A, 1-1-01; A, 1-01-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-15-10; A, 1-1-11]

**8.200.520.16 MAXIMUM COUNTABLE INCOME FOR INSTITUTIONAL CARE MEDICAID AND HOME AND COMMUNITY BASED WAIVER CATEGORIES:** Effective [~~January 1, 2009~~] January 1, 2011, the maximum countable monthly income standard for institutional care medicaid and the home and community based waiver categories is $2,022.

[4-1-95, 3-30-96, 4-1-97, 4-30-98, 1-1-99, 4-1-99; 8.200.520.16 NMAC - Rn, 8 NMAC 4.MAD.520.10 & A, 1-1-01; A, 1-1-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-1-11]

**8.200.520.20 COVERED QUARTER INCOME STANDARD:**

| DATE | CALENDAR QUARTER AMOUNT |
|---|---|
| Jan. 2011 - Dec. 2011 | $1,120 per calendar quarter |
| Jan. 2010 - Dec. 2010 | $1,120 per calendar quarter |
| Jan. 2009 - Dec. 2009 | $1,090 per calendar quarter |
| Jan. 2008 - Dec. 2008 | $1,050 per calendar quarter |

| | |
|---|---|
| Jan. 2007 - Dec. 2007 | $1,000 per calendar quarter |
| Jan. 2006 - Dec. 2006 | $970 per calendar quarter |
| Jan. 2005 - Dec. 2005 | $920 per calendar quarter |
| Jan. 2004 - Dec. 2004 | $900 per calendar quarter |
| Jan. 2003 - Dec. 2003 | $890 per calendar quarter |
| Jan. 2002 - Dec. 2002 | $870 per calendar quarter |

[8.200.520.20 NMAC - Rn, 8.200.510.14 NMAC & A, 1-1-02; A, 4-1-02; A, 1-1-03; A, 1-1-04; A, 1-1-05; A, 1-1-06; A, 1-1-07; A, 1-1-08, A, 1-1-09; A, 1-15-10; A, 2-26-10; A, 1-1-11]

## NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

Explanatory paragraph: This is an amendment to 8.281.500.13 NMAC, which will be effective January 1, 2011. The Medical Assistance Division is amending Subsection E, removing the specific home equity dollar amounts and placing the specific dollar amounts more appropriately in 8.200.510.15 NMAC.

**8.281.500.13 RESOURCE EXCLUSIONS:** Some types of resources can be excluded from the calculation of countable resources if they meet the specific criteria listed below.

E. **Exclusions for real property and home:** A home is any shelter used by an applicant/recipient or his/her spouse as the principal place of residence. To be excluded, a home must have an equity value of $750,000 or less. An applicant/recipient with home equity of more than [~~$750,000~~] (see 8.200.510.15 NMAC, *excess home equity amount for long-term care services*) shall be placed on restricted coverage for as long as he/she owns the home. The home includes any buildings and contiguous land used in the operation of the home. A home is not considered a countable resource while in use by the applicant/recipient as his/her principal place of residence. The home with an equity value of [~~$750,000~~] (see 8.200.510.15 NMAC, *excess home equity amount for long-term care services*) or less continues to be excluded during periods when the applicant/recipient resides in an acute care or long term care medical facility if the applicant/recipient or his/her representative states that the applicant/recipient intends to return to the home. **Exclusion of home:** If the applicant/recipient or his/her representative states the applicant/recipient does not intend to return to the home, but the home is the residence of the applicant/recipient's spouse or dependent minor child or adult disabled child, the home is an excluded resource.

[2-1-95; 7-31-97; 8.281.500.13 NMAC - Rn, 8 NMAC 4.ICM.513, 3-1-01; A, 5-1-01; A, 1-1-06; A, 4-1-09; A, 1-1-11]

## NEW MEXICO HUMAN SERVICES DEPARTMENT
MEDICAL ASSISTANCE DIVISION

This is an amendment to 8.312.3 NMAC, Sections 3, 5, 6, 8, 10 - 12 and 15, effective December 31, 2010.

**8.312.3.3 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, Section 27-2-12 et seq. [~~(Repl. Pamp. 1991)~~].

[1/1/95; 8.312.3.3 NMAC - Rn, 8 NMAC 4.MAD.000.3, 7-1-02; A, 12/31/10]

**8.312.3.5 EFFECTIVE DATE:** February 1, 1995, unless a later date is cited at the end of a section.

[1/1/95, 2/1/95; 8.312.3.5 NMAC - Rn, 8 NMAC 4.MAD.000.5, 7-1-02; A, 12/31/10]

**8.312.3.6 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; 8.312.3.6 NMAC - Rn, 8 NMAC 4.MAD.000.6, 7-1-02; A, 12/31/10]

**8.312.3.8 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; 8.312.3.8 NMAC - Rn, 8 NMAC 4.MAD.002, 7-1-02; A, 12/31/10]

**8.312.3.10 GENERAL REIMBURSEMENT POLICY:** The human services department will reimburse nursing facilities (effective October 1, 1990, the skilled nursing facility/intermediate care facility SNF/ICF distinction is eliminated; see [~~Section~~] 8.312.3.16 NMAC) the lower of the following, effective July 1, 1984:

A. billed charges; and

B. the prospective rate as constrained by the ceilings ([~~Section~~] 8.312.3.16 NMAC) established by the department as described in this plan.

[2/1/95; 8.312.3.10 NMAC - Rn, 8 NMAC 4 MAD.731-D.I, 7-1-02; A, 12/31/10]

**8.312.3.11 DETERMINATION OF ACTUAL, ALLOWABLE AND REASONABLE COSTS AND SETTING OF PROSPECTIVE RATES:**

A. **Adequate cost data:**

(1) Providers receiving payment on the basis of reimbursable cost must provide adequate cost data based on financial and statistical records which can be verified by qualified auditors. The cost data must be based on an approved method of cost finding and on the accrual basis of accounting. However, where governmental institutions operate on a cash basis of accounting, cost data on this basis will be acceptable, subject to appropriate treatment of capital expenditures.

(2) **Cost finding:** The cost finding method to be used by NF providers will be the step-down method. This method recognizes that services rendered by certain non-revenue-producing departments or centers are utilized by certain other non-revenue-producing centers. All costs of non-revenue-producing centers are allocated to all centers which they serve, regardless of whether or not these centers produce revenue. The cost of the non-revenue-producing center serving the greatest number of other centers, while receiving benefits from the least number of centers, is apportioned first. Following the apportionment of the cost of the non-revenue-producing center, that center will be considered "closed" and no further costs will be apportioned to it. This applies even though it may have received some service from a center whose cost is apportioned later. Generally when two centers render services to an equal number, that center which has the greater amount of expense will be allocated first.

B. **Reporting year:** For the purpose of determining a prospective per diem rate related to cost for NF services, the reporting year is the provider's fiscal year. The provider will submit a cost report each year.

C. **Cost reporting:** At the end of each fiscal year the provider will provide to the state agency or its audit agent an itemized list of allowable cost (financial and statistical report) on the N.M. Title XIX cost reporting form. This itemized list must be submitted within [~~90~~] 150 days after the close of the provider's cost reporting year. Failure to file a report within the [~~90~~] 150-day limit[~~, unless an extension is granted prior to the due date,~~] will result in termination of Title XIX payments. [~~Extensions must be requested in writing from the medical assistance division prior to the due date of the cost report.~~] In the case of a change of ownership the previous provider must file a final cost report as of the date of the change of ownership in accordance with reporting requirements specified in this plan. The department will withhold the last month's payment to the previous provider as security against any outstanding obligations to the department. The provider must notify the department 60 days prior to any change in ownership.

D. **Retention of records:**

(1) Each NF provider shall maintain financial and statistical records of the period covered by such cost report for a period of not less than four years following the date of submittal of the New Mexico Title XIX cost report to the state agency. These records must be accurate and in sufficient detail to substantiate the cost data reported. The provider shall make such records available upon demand to representatives of the state agency, the state audit agent, or the department of health and human services.

(2) The state agency or its audit agent will retain all cost reports submitted by providers for a period of not less than three years following the date of final settlement of such reports.

E. **Audits:** Audits will be performed in accordance with 42 CFR 447.202.

(1) **Desk audit:** Each cost report submitted will be subjected to a comprehensive desk audit by the state audit agent. This desk audit is for the purpose of analyzing the cost report. After each desk audit is performed, the audit agent will submit a complete report of the desk review to the state agency.

(2) **Field audit:** Field audits will be performed on all providers at least once every three years. The purpose of the field audit of the provider's financial and statistical records is to verify that the data submitted on the cost report are in fact accurate, complete and reasonable. The field audits are conducted in accordance with generally accepted auditing standards and of sufficient scope to determine that only proper items of cost applicable to the service furnished were included in the provider's calculation of its cost and to determine whether the expenses attributable to such proper items of cost were accurately determined and reasonable. After each field audit is performed, the audit agent will submit a complete report of the audit to the state agency. This report will meet generally accepted auditing standards and shall declare the auditor's opinion as to whether, in all material respects, the costs reported by the provider are allowable, accurate and reasonable in accordance with the state plan. These audit reports will be retained by the state agency for a period of not less than three years from the date of final settlement of such reports.

F. **Overpayments:** All overpayments found in audits will be accounted for on the HCFA-64 report to [~~HHS~~] health and human services (HHS) no later than the second quarter following the quarter in which found.

G. **Allowable costs:** The following identifies costs that are allowable in the determination of a provider's actual, allowable and reasonable costs. All costs are subject to all other terms stated in HIM-15 that are not modified by these regulations.

(1) **Cost of meeting certification standards:** These will include all items of expense that the provider must incur under:

(a) 42 CFR 442;

(b) Sections 1861(j) and 1902(a)(28) of the Social Security Act;

(c) standards included in 42 CFR 431.610; and

(d) cost incurred to meet requirements for licensing under state law which are necessary for providing NF service.

(2) **Costs of routine services:** Allowable costs shall include all items of expense that providers incur to provide routine services, known as operating costs. Operating costs include such things as:

(a) regular room;

(b) dietary and nursing services;

(c) medical and surgical supplies (including syringes, catheters; ileostomy, and colostomy supplies);

(d) use of equipment and facilities;

(e) general services, including administration of oxygen and related medications, hand feeding, incontinency care, tray service and enemas;

(f) items furnished routinely and relatively uniform to all patients, such as patient gowns, water pitchers, basins and bed pans;

(g) items stocked at nursing stations or on the floor in gross supply and distributed or used individually in small quantities, such as alcohol and body rubs, applicators, cotton balls, bandaids, laxatives and fecal softeners, aspirin, antacids, [~~OTC~~] over-the-counter (OTC) ointments, and tongue depressors;

(h) items which are used by individual patients but which are reusable and expected to be available, such as ice bags, bed rails, canes, crutches, walkers, wheelchairs, traction equipment, and other durable equipment;

(i) special dietary supplements used for tube feeding or oral feeding even if prescribed by a physician;

(j) laundry services including basic personal laundry;

(k) the department will make payment directly to the medical equipment provider in accordance with procedures outlined in 8.324.5 NMAC, *Durable Medical Equipment and Medical Supplies*, and subject to the limitations on rental payments contained in that section; and

(l) managerial, administrative, professional, and other services related to the providers operation and rendered in connection with patient care.

(3) **Facility costs**, for purpose of specific limitations included in this plan, include only depreciation, lease costs, and long-term interest.

(a) Depreciation is the systematic distribution of the cost or other basis of tangible assets, less salvage value, over the estimated useful life of the assets.

(i) The basis for depreciation is the historical cost of purchased assets or the fair market value at the time of donation for donated assets.

(ii) Historical cost is the actual cost incurred in acquiring and preparing an asset for use.

(iii) Fair market value is the price for which an asset would have been purchased on the date of acquisition in an arms-length transaction between an informed buyer and seller, neither being under any compulsion to buy or sell. Fair market value shall be determined by a qualified appraiser who is a registered member of the American institute of real estate appraisers (MAI) and who is acceptable to the department.

(iv) In determining the historical cost of assets where an on-going facility is purchased, the provisions of medicare provider reimbursement manual (HIM-15), Section 104.14 will apply.

(v) Depreciation will be calculated using the straight-line method and estimated useful lives approximating the guidelines published in American hospital association chart of accounts for hospitals.

(b) Long-term interest is the cost incurred for the use of borrowed funds for capital purposes, such as the acquisition of facility, equipment, improvements, etc., where the original term of the loan is more than one year.

(c) Lease term will be considered a minimum of five years for purposes of determining allowable lease costs.

(4) **Gains and losses on disposition:** Gains or losses on the disposition of depreciable assets used in the program are calculated in accordance with Section 130 and 132 of HIM-15. Disposition of a provider's depreciable assets which effectively terminates its participation in the program shall include the sale, lease or other disposition of a facility to another entity whether or not that entity becomes a participant in the program. The amount of gain on the disposition of depreciable assets will be subject to recapture as allowed by HIM-15.

(5) Depreciation, interest, lease costs, or other costs are subject to the limitations stated in Section 2422 of HIM-15 regarding approval of capital expenditures in accordance with Section 1122 of the Social Security Act.

(6) Facility costs are subject to all other terms stated in HIM-15 that are not modified by these regulations.

H. **Non-allowable costs:**

(1) bad debts, charity, and courtesy allowances: bad debts on non-Title XIX program patients and charity and courtesy allowances shall not be included in allowable costs;

(2) purchases from related organizations: cost applicable to services, facilities, and supplies furnished to a provider by organizations related to the provider by common ownership or control shall not exceed the lower of the cost to the related organization or the price of comparable services, facilities or supplies purchased elsewhere; providers shall identify such related organizations and costs in the state's cost reports;

(3) return on equity capital;

(4) other cost and expense items identified as unallowable in HIM-15;

(5) interest paid on overpayments as per 8.302.2 NMAC, *Billing for Medicaid Services*; and

(6) any civil monetary penalties levied in connection to intermediate sanctions, licensure, certification, or fraud regulations.

[2/1/95; 8.312.3.11 NMAC - Rn, 8 NMAC 4 MAD.731-D.III, 7-1-02; A, 12-01-04; A, 12/31/10]

**8.312.3.12 ESTABLISHMENT OF PROSPECTIVE PER-DIEM RATES:** Prospective per diem rates will be established as follows and will be the lower of the amount calculated using the following formulas, or the ceiling:

A. **Base year:** Rebasing of the prospective per diem rate will take place every three years. Therefore, the operating years under this plan will be known as year [~~1, year 2, and year 3~~] one, year two and year three. Because rebasing is done every three years, operating year [~~4~~] four will again become year [~~1~~] one, etc. Cost incurred, reported, audited [~~and/or~~] or desk reviewed for the provider's last fiscal year which falls in the calendar year prior to year [~~1~~] one will be used to rebase the prospective per-diem rate. Rebasing of costs in excess of 110[~~%~~] percent of the previous year's audited cost per diem times the index (as described further on in these regulations) will not be recognized for calculation of the base year costs. For implementation year [~~1~~] one (effective July 1, 1984) the base year is the provider's last available audited cost report prior to January 1, 1984. Rebasing will occur out of cycle for rates effective January 1, 1996, using the provider's FYE 1994 audited cost reports. The rate period January 1, 1996, through June 30, 1996, will be considered year [~~1~~] one. The rate period July 1, 1996, through June 30, 1997, will be considered year [~~2~~] two, and the rate period July 1, 1997, through June 30, 1998, will be considered year [~~3~~] three. The rebasing cycle will resume for rates effective July 1, 1998, and continue as described in the first paragraph of this section. Pursuant to budget availability, any changes to reimbursement, including the decision to rebase rates will be at the department's discretion.

B. **Inflation factor** to recognize economic conditions and trends during the time period covered by the provider's prospective per diem rate:

(1) Pursuant to budget availability and at the department's discretion, an inflation factor may be used to recognize economic conditions and trends. A notice will be sent out every July informing each provider that a:

(a) MBI will or will not be authorized; and

(b) the percentage increase if the MBI is authorized.

(2) If utilized, the index used to determine the inflation factor will be the center for medicare and medicaid services (CMS) market basket index (MBI) or a percentage up to the MBI.

(3) Each provider's operating costs will be indexed up to a common point of 12/31 for the base year, and then indexed to a mid-year point of 12/31 for operating year [~~1~~] one, if applicable. For out-of-cycle rebasing occurring for rates effective January 1, 1996, through June 30, 1996, the mid-year point for indexing in operating year [~~1~~] one will be 3/31.

(4) The inflation factor for the period July 1, 1996, through June 30, 1997, will be the percentage change in the (MBI) for the previous year plus [~~2~~] two percentage points.

C. **Incentives to reduce increases in costs:** As an incentive to reduce the increases in the costs of operation, the department will share with the provider in accordance with the following formula, the savings below the operating cost ceiling in effect during the state's fiscal year.

$I = [1/2(M - N)] \leq \$2.00$

where

M = current operating cost ceiling per diem

N - allowable operating per diem rate based on the base year's cost report

I = allowable incentive per diem

D. **Calculation of the prospective per-diem rate:** The following formulas are used to determine the prospective per diem rate:

**YEAR [~~1~~] ONE**

$PR = BYOC \times (1 + \Delta MBI) + I + FC$

where

PR = prospective per diem rate

BYOC = allowable base year operating costs as described in A above, and indexed as described in B above.

NHI = the change in the MBI as described in B above

I = allowable incentive per diem

FC = allowable facility costs per diem

**YEARS [~~2 and 3~~] TWO and**

THREE

PR = (OP+ I) x (1 + Δ MBI) + FC
where

PR = prospective per-diem rate

OP= allowable operating costs per diem

I = allowable incentive per diem

NHI = the change in the MBI as described in B above

FC = allowable facility costs per diem

E. **Effective dates of prospective rates:** Rates are effective July 1 of each year for each facility.

F. **Calculation of rates for existing providers** that do not have 1983 actuals, and for newly constructed facilities entering the program after July 1, 1984.

(1) For existing and for newly constructed facilities entering the program that do not have 1983 actuals, the provider's interim prospective per-diem rate will become the sum of:

(a) the applicable facility cost ceiling; and

(b) the operating cost ceiling.

(2) After six months of operation or at the provider's fiscal year end, whichever comes later, the provider will submit a completed cost report. This will be audited to determine the actual operating and facility cost, and retroactive settlement will take place. The provider's prospective per-diem rate will then become the sum of:

(a) the lower of allowable facility costs or the applicable facility cost ceiling; and

(b) the lower of allowable operating costs or the operating cost ceiling.

(3) Such providers will not be eligible for incentive payments until the next operating year [+] one, after rebasing.

G. **Changes of provider by sale of an existing facility:**

(1) When a change of ownership occurs, the provider's prospective per-diem rate will become the sum of:

(a) the lower of allowable facility costs determined by using the medicare principles of reimbursement, or the facility cost ceiling; and

(b) the operating cost established for the previous owner/operator, or the median of operating costs for its category, whichever is higher.

(2) Such providers will not be eligible for incentive payments until the next operating year [+] one, after rebasing.

H. **Changes of provider by lease of an existing facility:**

(1) When a change of ownership occurs, the provider's prospective per-diem rate will become the sum of:

(a) the lower of allowable facility costs or the facility cost ceiling, as defined by this plan; and

(b) the operating cost established for the previous owner/operator, or the median of operating costs for its category, whichever is higher.

(2) Such providers will not be eligible for incentive payments until the next operating year [+] one, after rebasing.

I. **Sale/leaseback of an existing facility:** When a sale/leaseback of an existing facility occurs, the provider's prospective rate will remain the same as before the transaction.

J. **Replacement of an existing facility:** When an existing facility is replaced, the provider's prospective rate will become the sum of:

(1) the lower of allowable facility costs or the facility cost ceiling as defined by this plan; and

(2) the operating cost plus incentive payment paid to the provider prior to the construction of the replacement facility.

K. **Replaced facility re-entering the medicaid program:**

(1) When a facility is replaced by a replacement facility and the replaced facility re-enters the medicaid program either under the same ownership or under different ownership, the provider's prospective rate will become the sum of:

(a) the median operating cost for its category; and

(b) the lower of allowable facility costs or the applicable facility cost ceiling.

(2) Such providers will not be eligible for incentive payments until the next operating year [+] one, after rebasing.

L. **Closed facility re-entering the medicaid program:**

(1) When a facility has been closed and re-enters the medicaid program under new ownership, it shall be considered a change of ownership and either Subsection G or Subsection H, whichever is applicable, will apply.

(2) When a facility has been closed and re-enters the medicaid program under the same ownership within 12 months of closure, the provider's prospective rate will be the same as prior to the closing.

(3) When a facility has been closed and re-enters the medicaid program under the same ownership more than 12 months after closure, the provider's prospective rate will be the sum of:

(a) the median operating cost for its category; and

(b) the lower of allowable facility costs or the applicable facility cost ceiling.

(4) Providers of such facilities will not be eligible for incentive payments until the next operating year [+] one, after rebasing.

[2/1/95, 12/30/95; 8.312.3.12 NMAC - Rn, 8 NMAC 4 MAD.731-D.IV & A, 7-1-02; A, 12/31/10]

**8.312.3.15 ADJUSTMENTS TO BASE YEAR COSTS:**

A. Since rebasing of the prospective per diem rate will take place every three years, the department recognizes that certain circumstances may warrant an adjustment to the base rate. Therefore, the provider may request such an adjustment for the following reasons:

(1) additional costs incurred to meet new requirements imposed by government regulatory agencies, taxation authorities, or applicable law (e.g. minimum staffing requirements, social security taxation of 501 (c)(3) corporations, minimum wage change, property tax increases, etc.);

(2) additional costs incurred as a result of uninsurable losses from catastrophic occurrences; and

(3) additional costs of approved expansion, remodeling or purchase of equipment;

B. Such additional costs must reach a minimum of $10,000 incurred cost per year for rebasing to be considered. The provider may request consideration of such rebasing no more than twice in its fiscal year. The provider is encouraged to submit such rebasing requests before the cost is actually incurred if possible. The department will approve or disapprove the rebasing request in a timely manner. If the rebasing is approved, the resulting increase in the prospective per diem rate will go into effect:

(1) beginning with the month the cost was actually incurred if prior approval was obtained; or

(2) no later than 30 days from the date of the approval if retroactive approval was obtained.

C. At no time will rebasing in excess of the applicable operating or facility cost ceilings be allowed, unless the department determines that a change in law or regulation has equal impact on all providers regardless of the ceiling limitation. An example of this would be the minimum wage law.

D. Pursuant to budget availability, the decision to approve any adjustments to base year costs will be at the department's discretion.

[2/1/95, 12/30/95; 8.312.3.15 NMAC - Rn, 8 NMAC 4 MAD.731-D.VII, 7-1-02; A, 12/31/10]

# NEW MEXICO PUBLIC EDUCATION DEPARTMENT

Explanatory paragraph. This is an amendment to 6.40.2 NMAC, Section 7, Subsections A and F, Section 9, Subsections D, J, R, V and BB, and Section 10, Subsections F, M, Q, W, X, Z, BB, EE, KK, LL, RR, AAA, HHH, III and JJJ, effective December 30, 2010. Under the authority of section 22-16-1 NMSA 1978, this rule was promulgated to govern the design and operation of all school buses, used for the transportation of school children, when owned and operated by any school district or privately owned and operated under contract with any school district in this state, and the regulations shall by reference be made a part of any such contract with a school district. Every school district, its officers and employees and every person employed under contract by a school district shall be subject to the regulations. This amendment refines technical and mechanical specifications for school buses under the rule.

**6.40.2.7 DEFINITIONS:**

**A. Type A** - A Type "A" school bus is a van conversion or bus constructed utilizing a cutaway front-section vehicle with a left side driver's door. The entrance door is behind the front wheels. This definition includes two classifications: Type A-I, with a gross vehicle weight rating (GVWR) less than equal to 10,000 pounds; and Type A-II with a GVWR greater than 10,000 pounds. Type "A-I" school buses are not approved for use in New Mexico.

**B. Type B** - A Type "B" school bus is constructed utilizing a stripped chassis. The entrance door is behind the front wheels. This definition includes two classifications: Type B1, with GVWR less than or equal to 10,000 pounds; and Type B2, with a GVWR greater than 10,000 pounds. **Type "B" school buses are not approved for use in New Mexico.**

**C. Type C** - A Type "C" school bus is constructed utilizing a chassis with a hood and front fender assembly. The entrance door is behind the front wheels.

**D. Type D** - A Type "D" school bus is constructed utilizing a stripped chassis. The entrance door is ahead of the front wheels.

**E. Commercial advertiser** - A person who advertises a product or services for profit or not for profit and has a permitted advertisement.

**F. School bus private owner** - A person who owns a school bus other than a local school district, the state [~~department of~~] public education department, the state or any other political subdivision of the state.

[7-01-96, 7-31-97; 6.40.2.7 NMAC - Rn, 6 NMAC 9.2.7 & A, 7-31-2000; A, 12-30-2010]

**6.40.2.9 BUS CHASSIS STANDARDS**

**D. BRAKES**

**(1)** The braking system shall include the service brake and a parking emergency brake.

**(2)** Buses using air [~~or vacuum~~] in the operation of the brake system shall be equipped with warning signals, readily audible and visible to the driver, that will give a continuous warning when the air pressure available in the system for braking is 60 psi (pounds per square inch) or less [~~or the vacuum in the system available for braking is eight (8) inches of mercury or less~~]. An illuminated gauge shall be provided that will indicate to the driver the air pressure in pounds per square inch [~~or the inches of mercury vacuum available~~] for the operation of the brakes.

[~~**(3)** Vacuum-assist brake systems shall have a reservoir used exclusively for brakes that shall adequately ensure a full stroke application that loss in vacuum shall not exceed 30 percent with the engine off. Brake systems on gas-powered engines shall include suitable and convenient connections for the installation of a separate vacuum reservoir.~~]

[~~**(4)**~~] **(3)** Any brake system with a dry reservoir shall be equipped with a check-valve or equivalent device to ensure that in the event of failure or leakage in its connection to the source of compressed air [~~or vacuum~~], the stored dry air [~~or vacuum~~] shall not be depleted by the leakage or failure.

[~~**(5)**~~] **(4)** Buses using a hydraulic-assist brake shall be equipped with warning signals, readily audible and visible to the driver, that will provide continuous warning in the event of a loss of fluid flow from primary source and in the event of discontinuity in that portion of the vehicle electrical system that supplies power to the backup system.

[~~**(6)**~~] **(5)** The brake lines and booster-assist lines shall be protected from excessive heat and vibration and installed in a manner, which prevents chafing.

[~~**(7)**~~] **(6)** All brake systems shall be designed to permit visual inspection of brake lining wear without removal of any chassis components.

[~~**(8)**~~] **(7)** All type C and type D school buses shall be equipped with air brakes.

**J. ELECTRICAL SYSTEM**

**(2) Alternator**

**(b)** Types A-II buses over 15,000 lbs. GVWR and all types C and D buses shall be equipped with a heavy-duty truck or bus-type alternator [~~meeting society of automotive engineers (SAE) J 180~~], having a minimum output rating of 130 amperes. Alternators of 130 through 145-ampere design shall produce a minimum of 50 percent amperes output at engine idle speed.

**R. INSTRUMENTS AND INSTRUMENT PANEL**

**(1)** Chassis shall be equipped with the following instruments and gauges. (lights in lieu of gauges are not acceptable, except as noted):

**(h)** brake indicator gauge [~~(vacuum or air);~~] light indicator in lieu of gauge is permitted on vehicle equipped with hydraulic-over-hydraulic brake system;

**V. POWER AND GRADE ABILITY:** Shall not exceed the manufacturer's recommended standards for the vehicle size. A maximum speed limiter shall be set at 75 miles per hour. A lower setting is permissible at the request of the school bus owner. A cruise control mechanism may be installed on school activity buses only.

**BB. TIRES AND RIMS**

**(2)** Dual rear tires shall be provided on type A-II, type C, and type D school buses. [~~type A-I may be single or dual rear tires.~~]

[7-01-96; 6.40.2.9 NMAC - Rn, 6 NMAC 9.2.10 & A, 7-31-2000; A, 07-15-2003; A, 11-15-2005; A, 12-30-2010]

**6.40.2.10 BUS BODY STANDARDS**

**F. BUMPER (REAR)**

**(1)** Bumper shall be pressed steel channel or equivalent material, at least 3/16-inches thick, and shall be a minimum of [~~8-inches wide (high)) on type A-I and a minimum of~~] 9 1/2-inches wide (high) on types A-II, C and D buses and of sufficient strength to permit being pushed by another vehicle without permanent distortion.

**M. DOORS**

**(1)** Service door

**(c)** Service door shall have a minimum horizontal opening of 24-inches and a minimum vertical opening of 68-inches. [~~Type A-I vehicles shall have a minimum opening area of 1200 square inches.~~]

**(f)** Vertical closing edges on split-type or folding-type entrance doors shall be equipped with flexible material to protect children's fingers. [~~Type A-I vehicles may be equipped with chassis manufacturer's standard entrance door.~~]

**Q. FLOORS**

**(4)** On types [~~A-II~~], C and D buses a flush-mounted screw-down plate that is secured and insulated shall be provided to access the fuel tank sending unit or fuel pump.

**W. INSIDE HEIGHT:** Inside body height shall be 72-inches or more, measured metal to metal, at any point

on longitudinal center line from front vertical bow to rear vertical bow. [~~Inside body height of type A-I buses shall be 62-inches or more.~~]

**X. INSULATION**

**(2)** Floor insulation is required and shall be either 5 ply nominal 5/8-inch thick plywood, or a material of equal or greater strength and insulation R value, and it shall equal or exceed properties of the exterior-type softwood plywood, C-D grade as specified in standard issued by U.S. department of commerce. When plywood is used, all exposed edges shall be sealed. [~~type A-I buses may be equipped with nominal 1/2-inch thick plywood or equivalent material meeting above requirements.~~]

**Z. LAMPS AND SIGNALS**

**(3)** School bus alternately flashing signal lamps:

**(d)** Red lamps shall flash at any time the stop signal arm is extended. An optional headlight wig-wag warning system may be installed to operate only when the red lamps are flashing.

**(e)** All flashers for alternately flashing red and amber signal lamps shall be enclosed in the body in a readily accessible location.

**(4)** Turn signal and stop/tail lamps:

**(a)** Bus body shall be equipped with amber rear turn signal LED lamps that are at least 7-inches in diameter or if a shape other than round, a minimum 38 square inches of illuminated area and meet SAE specifications. These signal lamps must be connected to the chassis hazard warning switch to cause simultaneous flashing of turn signal lamps when needed as vehicular traffic hazard warning. Turn signal lamps are to be placed as wide apart as practical and their centerline shall be approximately 8 inches below the rear window. [~~Type A-I conversion vehicle lamps must be at least 21 square inches in lens area and be in manufacturer's standard color.~~]

**BB. MIRRORS**

**(2)** Each school bus shall be equipped with exterior mirrors meeting the requirements of 49 CFR 571.111 (FMVSS). Exterior rearview mirrors shall be mounted to the school bus body. Mirrors shall be electrical remote, but shall be [~~rigidly~~] braced with up to one (1") inch mounting brace so as to reduce vibration. The mirror system shall be an independent system consisting of one (1) flat glass mirror assembly and one (1) convex mirror assembly separated by a minimum of two inches per side of the vehicle.

**(3)** The cross view mirror, reflective surface shall be of a type for maximum, low light, visibility. The lens shall present the driver with a flat, horizontal top surface, which limits the upward view of the sky and solar glare and shall provide for lateral adjustment only.

[~~**(3)**~~] **(4)** Heated external mirrors may be used.

**EE. OVERALL WIDTH:** Overall width of bus shall be a minimum of 95 inches and shall not exceed 102-inches excluding accessories.

**KK. RESTRAINING DEVICES**

**(5)** (Optional equipment). Integrated child restraint seats may be provided which are rated for children 20 - 85 lbs and must contain; two separate shoulder belt adjustment slots to allow shoulder belt to be adjusted higher for taller children and lower for shorter children; a two piece fold under insert pad for "booster seat" style cushion; a seat back maximum width of 3.5 inches; and an insert and complete three or four point belt assembly that is easily removable for maintenance or replacement by removing a maximum of 4 anchors in the front of the insert without having to unfasten or remove the cover or foam.

**LL. RUB RAILS**

**(4)** Both rub rails shall be 4-inches or more in width in their finished form, shall be of 16-gauge steel or suitable material of equivalent strength [~~, and shall be constructed in corrugated or ribbed fashion~~].

**(5)** Both rub rails shall be applied outside body or outside body posts. Pressed-in or snap-on rub rails do not satisfy this requirement. For [~~type A-I vehicles using chassis manufacturer's body, or for~~] types A-II, C and D buses using rear luggage or rear engine compartment, rub rails need not extend around rear corners.

**RR. SPECIAL SERVICE ENTRANCE DOORS**

**(1)** A single door [~~or double doors may~~] shall be used for the special service entrance.

**(2)** A single door shall be hinged to the forward side of the entrance unless doing so would obstruct the regular service entrance. If, due to the above condition, the door is hinged to the rearward side of the doorway, the door shall utilize a safety mechanism which will prevent the door from swinging open should the primary door latch fail. [~~If double doors are used the system shall be designed to prevent the door(s) from being blown open by the wind resistance created by the forward motion of the bus, and/or incorporate a safety mechanism to provide secondary protection should be primary latching mechanism(s) fail.~~]

**(3)** All doors shall have positive fastening devices to hold doors in the open position.

**(4)** All doors shall be weather sealed.

[~~**(5)** When manually-operated dual doors are provided, the rear door shall have at least one-point fastening device to the header. The forward-mounted door shall have at least three-point fastening devices. One shall be to the header, one to the floor line of the body, and the other shall be into the rear door. The door and hinge mechanism shall be a strength that is greater than or equivalent to the emergency exit door.~~]

[~~**(6)**~~] **(5)** Door materials, panels and structural strength shall be equivalent to the conventional service and emergency doors. Color, rub rail extensions, lettering, and other exterior features shall match adjacent sections of the body.

[~~**(7)**~~] **(6)** Each door shall have windows set in rubber which are visually similar in size an location to adjacent non-door windows. Glazing shall be of same type and tinting (if applicable) as standard fixed glass in other body locations.

[~~**(8)**~~] **(7)** Door(s) shall be equipped with a device that will actuate an audible or flashing signal located in the driver's compartment when door(s) is not securely closed and ignition is in "on" position.

~~**(9)**~~] **(8)** A switch shall be installed so that the lifting mechanism will not operate when the lift platform door(s) is closed.

[~~**(10)**~~] **(9)** Special service entrance doors shall be equipped with padding at the top edge of the door opening. Pad shall be at least three inches wide and one inch thick and extend the full width of the door opening.

**AAA. TECHNOLOGY AND NEW EQUIPMENT:** It is the intent of these standards to accommodate new technologies and equipment, which will better facilitate the transportation of students. When a new technology, piece of equipment, or component is desired to be applied to the school bus, and it meets the following criteria, it may be acceptable.

**(6)** The inspection technology sensory equipment including the GPS and emergency notification systems shall be provided which meets the standard established by previous state procurement.

**(7)** An electronic child check system shall be provided which will provide for notification when a school bus is not inspected for any students being left unattended inside the school bus at the end of the school bus route.

**(8)** All doors shall be equipped when manufacturing technology becomes available with a keyless remote locking device, to include primarily the emergency and service doors.

**HHH. WINDOWS**

**(3)** The driver's side windows shall consists of transition glass when manufacturing technology becomes available that darkens in daylight conditions and clears in dark conditions consistent with the glazing standard.

**III. [ ~~WINDSHIELD WASHERS:~~** ~~A windshield washer system shall be provided.~~] **WINDSHIELD:** Option

- A multi-piece windshield shall be provided.

**JJJ. WINDSHIELD WIPERS**

**(1)** A windshield wiping system, two-speed or variable speed, with an intermittent feature, shall be provided. A windshield washer system shall be provided.

[7-01-96; 6.40.2.10 NMAC - Rn, 6 NMAC 9.2.11 & A, 7-31-2000; A, 07-15-2003; A, 11-15-2005; A, 12-30-2010]

# NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.13.5 NMAC, Sections 6, 10, 11, 13, 14 and 17, effective 12/30/2010.

**1.13.5.6 OBJECTIVE:** The New Mexico historical records advisory board (NMHRAB) [~~has received funds~~] receives funds from the New Mexico legislature [~~and~~] or the national historic publications and records commission (NHPRC) to fund its historical records grant programs for improving preservation of and access to New Mexico's historical records. To address funding issues that underlie many other problems identified during its strategic planning process, the NMHRAB created its grant program. Subject to funding availability, grants shall be awarded annually to applicants who demonstrate need, financially and programmatically, and show commitment to solving their historical records problems. Projects shall address the funding priorities of the NMHRAB as published.

[1.13.5.6 NMAC - N, 11/30/00; A, 06/30/04; A, 06/30/05; A, 12/30/10]

**1.13.5.10 FUNDING PRIORITIES:** Grant funds shall be ranked according to funding priorities adopted by the NMHRAB.

**A.** The [~~three~~] highest priorities [~~of the NMHRAB~~] ranked in order are:

**(1)** preservation;

**(2)** access; and training.

[~~**(3)** regional or statewide training.~~]

**B.** The secondary priorities of the NMHRAB are:

**(1)** documentary research; [~~and~~]

**(2)** programs that promote New Mexico history, such as exhibits, conferences, papers and documentaries; and

**(3)** development of records and archival management programs.

[1.13.5.10 NMAC - N, 11/30/00; 07/15/03; A, 06/30/04; A, 06/30/05; A, 12/31/08; A, 12/30/10]

**1.13.5.11 TYPES OF PROJECTS FUNDED:** Projects shall directly address the funding priorities published in the NMHRAB strategic plan. Funding priorities are published in order of importance. [~~Funding priorities are published in order of importance.~~] Following are examples of projects that could be funded.

**A. Preservation** projects that mitigate unstable or deteriorating conditions of historical records through the identification, organization and description, conservation treatment or reformatting of the records - for example, copying to another medium, such as microform.

**B. Access** projects that promote the availability of historical records by developing finding aids. Examples include: indexing significant collections; creating electronic catalog records or distributing collection guides; providing on-line access to finding aids; digitizing historical records; and placing copies in other repositories that have agreed to accept them.

**C. Regional or statewide training** programs that focus on developing best practices that can be used to train staff in more than one repository or in a repository experiencing high-turnover.

**D. Research** projects that provide original scholarly exposition or interpretation of documentary evidence of New Mexico history based on original records, and documentary edition projects that publish original records for general usage. Since these projects are a lower funding priority, proposals shall be very well developed if funding is to be obtained.

**E. Program development** projects that establish or elevate standards of archival or records management practice in the applicant repository.

[1.13.5.11 NMAC - N, 11/30/00; A, 09/30/02; A, 06/30/04; A, 12/31/08; A, 12/30/10]

**1.13.5.13 FUNDING:** [~~The NMHRAB has funding annually to divide among successful applicants. Minimum awards of $500 and maximum~~] Maximum awards of $8,500 per applicant are possible, depending on available funds. Applicants shall provide a minimum match valued at 25 percent of the total cost of their projects in either cash or in-kind services or materials. [~~Preference shall be given to proposals that match the grants with 50 percent cash or in-kind.~~] The in-kind match shall be rendered during the project period.

[1.13.5.13 NMAC - N, 11/30/00; A, 09/30/02; A, 07/15/03; A, 06/30/04; A, 12/30/10]

**1.13.5.14 APPLICATION FOR HISTORICAL RECORDS GRANTS:**

**A.** An applicant shall answer all questions on the application form. An applicant may submit pertinent attachments to support its application, but the number of pages shall be limited to the essential minimum. An applicant shall submit one completed application with original signatures and supporting documents, and [~~eight~~] ten copies. Incomplete applications shall not be considered.

**B.** The following information shall be included in the application.

**(1)** Applicant information - legal name, address, contact name, phone number and e-mail address (if available).

**(2)** Signature by an individual authorized to obligate the applicant.

**(3)** Project title, period and amount of both the grant request and the proposed match.

**(4)** Applicant's status: An organization shall be an eligible entity as defined in Subsection A of 1.13.5.8 NMAC.

**(5)** A summary statement that briefly summarizes the nature and purpose of the project proposed for funding no more than one-quarter page in length.

**(6)** A project description narrative limited to three pages in length. The narrative shall discuss content and significance of the historical records to be affected by this project, the scope of the work to be performed, key personnel and the work plan for the project.

**(7)** The budget for the project submitted on the form prescribed by the NMHRAB.

**C.** Application deadline: Completed applications (original and [~~eight~~] ten copies) shall be received by the deadline set forth in the call for proposals.

**D.** Rejection: Applications that do not comply with these criteria shall be rejected.

[1.13.5.14 NMAC - N, 11/30/00; A, 09/30/02; A, 07/15/03; A, 06/30/04; A, 06/30/05; A, 12/31/08; A, 12/30/10]

**1.13.5.17 POST-AWARD REQUIREMENTS:** Successful historical record grant applicants shall comply with the following post award requirements.

**A.** Submit [~~progress reports by end of~~] interim reports by the end of the seventh month for work completed in the first six months of the grant period or as required in the agreement or contract. Progress reported shall be substantially in line with the project timeline included in the grant application. Any appreciable deviation from the timeline shall be justified in the progress report.

**(1)** If work has not been initiated [~~by the due date of the progress report,~~] as stipulated in the timeline included in the grant application, the entire grant award [~~shall~~] may be nullified.

**(2)** If progress reported lags substantially behind that described in the

project timeline, the grant administrator shall review the project, consult with the grantee to determine whether timely completion of the project is feasible and make a recommendation to the chair of the NMHRAB on continuation of the project. Based on the recommendation, the chair reserves the right to terminate the grant or require an amended scope of work and reduced award.

**(3)** Failure to submit the [~~progress~~] interim report by the established deadline [~~shall~~] may result in suspension of further reimbursements or payments until the report is submitted and accepted. If the report is not submitted within 30 days of the due date of the [~~progress~~] interim report, no further requests for reimbursements or payments shall be honored and any balance remaining in the grant award shall revert to the state records center and archives.

**B.** Submit final reports within 30 days of project completion or no later than June 15 of the fiscal year for which the grant award is made, whichever is earlier.

**C.** Request funds for reimbursement or payment based on amount of work completed.

**D.** Submit proof of completion of training before project start date, if required.

**E.** Adhere to the state Procurement Code for purchase of goods and services.

**F.** Maintain grant records for at least two years after completion of the project.

**G.** Complete the project within the grant period specified in the grant award. No extensions of the grant period shall be made.

[1.13.5.16 NMAC Rn to 1.13.5.17 NMAC & A, 09/30/02; A, 06/30/04; A, 06/30/05; A, 06/01/06; A, 06/29/07; A, 12/31/08; A, 12/30/10]

## NEW MEXICO PUBLIC REGULATION COMMISSION

NMPSC Rule 550, Fuel and Purchased Power Cost Adjustment Clauses for Electric Utilities (promulgated by former NM Public Service Commission and filed 8/25/92), repealed 12/30/2010.

## NEW MEXICO PUBLIC REGULATION COMMISSION

**TITLE 17 PUBLIC UTILITIES AND UTILITY SERVICES**
**CHAPTER 9 ELECTRIC SERVICES**
**PART 550 FUEL AND PURCHASED POWER COST ADJUSTMENT CLAUSES FOR ELECTRIC UTILITIES**

**17.9.550.1 ISSUING AGENCY:** New Mexico Public Regulation Commission.
[17.9.550.1 NMAC - Rp, NMPSC Rule 550, 12-30-10]

**17.9.550.2 SCOPE:** NMPSC Rule 550, 17.9.550 NMAC shall apply to every electric utility and generation and transmission cooperative operating within the state of New Mexico and which is subject to the jurisdiction of the commission as provided by law.
[17.9.550.2 NMAC - Rp, NMPSC Rule 550.1, 12-30-10]

**17.9.550.3 STATUTORY AUTHORITY:** Sections 62-3-1, 62-3-2, 62-6-4, 62-8-1, 62-8-3 and 62-8-7(E) and (F), NMSA 1978.
[17.9.550.3 NMAC - N, 12-30-10]

**17.9.550.4 DURATION:** Permanent.
[17.9.550.4 NMAC - N, 12-30-10]

**17.9.550.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[17.9.550.5 NMAC - N, 12-30-10]

**17.9.550.6 OBJECTIVE:** The objective of this rule is to:

A. provide for adequate regulatory review of a utility's operations under a fuel and purchased power cost adjustment clause ("FPPCAC");

B. provide for the stability of utility earnings when electric fuel costs and purchased power costs are rising and permit prompt credits to customers when electric fuel costs and purchased power costs are declining; and

C. assure that utilities collect through the FPPCAC the amount actually expended for fuel and purchased power costs;

D. the objective of a FPPCAC is to flow through to the users of electricity the increases or decreases in applicable fuel and purchased power expense per kilowatt-hour of delivered energy above or below a base fuel and purchased power expense.

[17.9.550.6 NMAC - Rp, NMPSC Rule 550.2, 12-30-10]

**17.9.550.7 DEFINITIONS:** Unless otherwise specified, the following definitions will apply:

A. **account (number)** means such account as defined and in current use by the federal energy regulatory commission;

B. **annual report** means the report filed annually that summarizes and verifies all actual fuel and purchased power revenues and expenses during the twelve (12) months ended December 31 of each year; the annual report shall be verified under oath by an officer of the utility;

C. **applicable fuel and purchased power expense** means the fuel and/or purchased power expense that is to be collected through the FPPCAC in accordance with a utility's commission-approved methodology and forms;

D. **applicable kWh sales** means the kilowatt-hour ("kWh") sales associated with the applicable fuel and purchased power expense;

E. **balancing account** means the difference between the increased or decreased fuel and purchased power expenses in the second month preceding the current month and the actual fuel and purchased power cost adjustment revenue billed in the current month; the balancing account may also include other components granted by a 17.9.550 NMAC variance;

F. **base fuel and purchased power expense** means the cost of fuel and purchased power upon which the applicable rate schedule was based stated on a dollars per kWh basis;

G. **billing month** or **effective month** means the month during which the FPPCAC factor is applied to customers' bills;

H. **current month** means the most recent month for which actual fuel and purchased power volumes and costs and kWh sales data are available;

I. **fuel and purchased power cost adjustment clause** or **FPPCAC** means that clause in a rate schedule that contains the parameters under which the fuel and purchased power cost adjustment factor is determined for customer monthly billing;

J. **fuel and purchased power cost adjustment factor** or **factor** means the monthly dollars per kWh charge to be applied to customers' bills, and which represents the amount of increase or decrease in dollars per kWh to be added to or deducted from each bill; for monthly adjustable factors, the factor is the increased or decreased fuel and purchased power expense stated on a dollars per kWh basis by dividing the current month's increased or decreased fuel and purchased power expenses by the applicable kWh sales as set forth under 17.9.550.12 NMAC;

K. **increased or decreased fuel and purchased power expense** means

the difference between the applicable fuel and purchased power expense and the base fuel and purchased power expense during the current month.
[17.9.550.7 NMAC - Rp, NMPSC Rule 550.7, 12-30-10]

**17.9.550.8 VARIANCES:** Applications for a variance shall:

A. describe with particularity the reasons which prompted the filing of the variance application;

B. set out the effect of complying with 17.9.550 NMAC on the utility and its customers as a result of the condition;

C. identify the section(s) of 17.9.550 NMAC from which the variance is requested;

D. describe the result which the request will have if granted;

E. state how the variance will achieve the purposes of 17.9.550 NMAC as stated in 17.9.550.6 NMAC;

F. state why the proposed variance is a reasonable alternative to the requirements of this rule.
[17.9.550.8 NMAC - Rp, NMPSC Rule 550.3, 12-30-10]

**17.9.550.9 SERVICE OF APPLICATIONS:** A utility filing an application for an initial or continued FPPCAC, or a variance, shall, contemporaneously with such filing, mail copies of such application by first class mail to the attorney general and the intervenors in the utility's most recent rate case.
[17.9.550.9 NMAC - Rp, NMPSC Rule 550.4, 12-30-10]

**17.9.550.10 HEARINGS:**

A. Unless otherwise ordered by the commission, formal hearings will not be held prior to the effective date of any factor adjustment made in accordance with the provisions of 17.9.550 NMAC. The commission may, upon its own motion or upon the filing of a complaint, and after notice to the utility, public, attorney general, and intervenors of record in the utility's last filed rate case, suspend any adjustment pending hearing. However, the commission may allow the factor in effect immediately preceding the period in which the suspended adjustment otherwise would have become effective, to remain in effect, subject to refund or surcharge, during the interim time period in which an adjustment is suspended pending hearing. In the event that a suspended adjustment ultimately is approved, in whole or in part, following a hearing, interest charges computed at the statutory rate established under NMSA 1978, Section 62-13-13, or any amendment to it, and computed for the period commencing with the date the suspended adjustment actually becomes effective, shall, as provided by the commission, be added to the calculation resulting from the approved adjustment.

B. The matters which the commission might notice for hearing may include but are not limited to:

(1) any unusual or substantial increases in the cost for fuel and purchased power;

(2) the development of any dispute over the interpretation of contracts or laws concerning the pricing of any significant amount of power supply;

(3) any new or amended contractual arrangements for provision of services related to power supply; and

(4) any other matter that the commission determines requires a hearing.
[17.9.550.10 NMAC - Rp, NMPSC Rule 550.5, 12-30-10]

**17.9.550.11 EFFECT OF RULE:** This rule shall in no way relieve any electric utility subject to the jurisdiction of the commission of any of its duties prescribed under the laws of New Mexico or the tariff regulations, orders and rules of the commission.
[17.9.550.11 NMAC - Rp, NMPSC Rule 550.6, 12-30-10]

**17.9.550.12 CALCULATION OF FUEL AND PURCHASED POWER COST ADJUSTMENT FACTOR; PURPOSE OF BALANCING ACCOUNT:**

A. Calculation of a factor shall be made using the methodology, required format and data calculations approved for the utility by the commission, and shall be submitted on commission-approved forms. A sample format is provided in 17.9.550.20 NMAC of this rule. A utility's methodology for calculation of its factor shall be proposed in its initial tariff filing or continuation filing pursuant to 17.9.550.16 and 17 NMAC of this rule. A methodology approved by the commission may be based on monthly, rolling average, or fixed period calculations. Where applicable, a utility's methodology shall take into consideration the utility's multi-state and jurisdictional operations and shall identify any allocation factors applied by the utility. Costs associated with an investor-owned utility's long term purchase power contracts with a term of two or more years may be recovered through the utility's FPPCAC if consistent with all commission orders or rules regarding such contracts or with commission approval.

B. Unless otherwise ordered by the commission the methodology for calculating a monthly-adjustable factor shall employ the use of a balancing account. The purpose of the balancing account is to insure that only the appropriate revenue is recovered through the application of the factor. The balancing account shall compensate for under-collections and over-collections of revenue by increasing or decreasing the factor for the next following billing month. A utility may make additional adjustments to the factor to mitigate the effect on customers of monthly changes in the balancing account, and the adjusted factor shall go into effect unless suspended by the commission. Additional amounts may be applied to the balancing account as the commission may authorize or direct. These additional items may include such amounts as refunds received by the utility or extraordinary payments by the utility, provided that these payments have received written approval of the commission prior to inclusion in the balancing account.
[17.9.550.12 NMAC - Rp, NMPSC Rule 550.8, 12-30-10]

**17.9.550.13 INFORMATION TO BE FILED:**

A. Each electric utility that has a FPPCAC as a part of a filed rate schedule shall file each month all the data and calculations called for in 17.9.550.12 NMAC. The monthly data shall be submitted in electronic format to the director of the utility division or his designee on the earliest possible date after the end of each month, but in no event less than five (5) days before the factor becomes effective for customer billing. The utility shall also file its monthly data with the commission's records bureau prior to the effective date of the factor. Where a utility has more than one base fuel and purchased power expense in various rate schedules, a separate calculation shall be filed for each base fuel and purchased power expense and a separate balancing account shall be maintained for each base fuel and purchased power expense.

B. An investor-owned utility shall provide the total charges that were incurred under purchased power contracts with a term of not less than fifteen days and entered into by the utility to replace normally available or scheduled power and energy from the utility's generating resources that operate at annual capacity factors of 40 percent or more and that were unavailable due to an unplanned outage and included in each month's FPPAC report. The utility shall make available each underlying purchased power contract to utility division staff upon request, in a manner consistent with any applicable confidentiality provisions in such contract. This reporting requirement shall not apply to economy energy transactions and transactions entered into for solely economic dispatch purposes.

C. Upon the utility division's receipt of the factor, a review of the calculations will be conducted by utility division staff to ensure compliance with this rule. In the event a utility fails to timely file

the calculations of its factor in accordance with this section, or if the data filed by the utility is incomplete or inaccurate, utility division staff may immediately petition the commission for the appropriate relief provided by law and these rules, including the suspension, or collection subject to refund, of the factor.

D. Whenever the utility or the commission has good reason to believe on the basis of factual data that the adjustment factor would result in a substantial under-collection or over-collection of revenue in the following billing month with the further result that adjustment factors for future billing months would fluctuate excessively, the utility may apply to the commission for permission to place into effect or the commission may direct the utility to place into effect a specified increase or decrease in the amount of the adjustment factor which is to remain in effect for such period of time as the commission may direct.

E. Each utility that has a FPPCAC shall file by April 30 of each year the annual report defined in Subsection B of 17.9.550.7 NMAC.

[17.9.550.13 NMAC - Rp, NMPSC Rule 550.9, 12-30-10]

**17.9.550.14 ELIMINATION OR IMPOSITION OF CONDITIONS:** The commission may eliminate or impose conditions on a particular FPPCAC if it finds such action is consistent with the purposes of the Public Utility Act, including serving the goal of providing reasonable and proper service at fair, just and reasonable rates to all customer classes; provided however that no such elimination or imposition of conditions shall be ordered if to do so would place the affected utility at a competitive disadvantage. The commission may provide for separate examination of a utility's FPPCAC based upon that utility's particular operating characteristics.

[17.9.550.14 NMAC - Rp, NMPSC Rule 550.10, 12-30-10]

**17.9.550.15 RENDITION AND STATEMENT OF FUEL AND PURCHASED POWER COST ADJUSTMENT FACTOR:** The factor shall be expressed in dollars per kWh, and the resultant monthly charge or credit shall be shown on each customer's monthly bill.

[17.9.550.15 NMAC - Rp, NMPSC Rule 550.11, 12-30-10]

**17.9.550.16 INITIAL TARIFF FILING:**

A. No utility shall have a FPPCAC included in its tariff unless it complies with the requirements of 17.9.550 NMAC in the design of its FPPCAC and tariff and files an application with the commission requesting approval of its use of a FPPCAC. The utility shall submit testimony along with its initial tariff filing and application under 17.9.550 NMAC showing that all of the objectives stated in 17.9.550.6 NMAC are met by its tariff and that:

(1) the costs of fuel and purchased power are a significant percentage of the total cost of service;

(2) the costs of fuel and purchased power periodically fluctuate and cannot be precisely determined in a rate case;

(3) the utility's fuel and purchased power policies and practices are designed to assure that electric power is generated and purchased at the lowest reasonable cost.

B. Sufficient financial and other necessary information and data shall be submitted to demonstrate that no amounts to be recovered under the operation of the FPPCAC are included in the base rates for service. The commission may approve all or part of the tariff filing and format with or without a formal hearing. All tariffs shall be deemed approved thirty (30) days after filing unless otherwise suspended by the commission.

[17.9.550.16 NMAC - Rp, NMPSC Rule 550.12, 12-30-10]

**17.9.550.17 CONTINUATION FILINGS:**

A. Each utility operating with a FPPCAC as part of its tariff shall file an application for continued use of its FPPCAC at intervals of no more than four (4) years from the date the FPPCAC is approved or continued by the commission. The application must address the considerations described in Paragraphs (1) through (4) of Subsection E of 62-8-7 NMSA 1978. A utility may elect to satisfy this requirement by submitting its continuation filing as part of a general rate proceeding that is subject to hearing by the commission or in a separate filing. Failure to file the application required in this paragraph by the prescribed time may, after notice and hearing, result in appropriate orders or sanction under the Public Utility Act, including termination of the utility's FPPCAC.

B. All applications required by this section shall be accompanied by a revenue and expense statement that shall contain, at minimum, an analysis of costs and revenues included in or affected by the operation of the utility's FPPCAC. In addition, the utility shall make the same showings required of an initial tariff filing set out in 17.9.550.16 NMAC.

C. A continuation filing shall be deemed approved thirty (30) days after filing unless suspended by the commission. Unless otherwise ordered by the commission, an existing FPPCAC shall remain in effect pending the outcome of a proceeding in which a request for continued use of an FPPCAC has been suspended.

[17.9.550.17 NMAC - Rp, NMPSC Rule 550.13, 12-30-10]

**17.9.550.18 REFUNDS RIGHT:** The commission in its discretion may order refunds of charges collected under the provisions of 17.9.550 NMAC to the customers of an electric utility where the commission determines, after notice and hearing, that the utility's collection of such amounts is contrary to the provisions of 17.9.550 NMAC, the previously approved adjustment factor, or otherwise is unfair, unjust or unreasonable.

[17.9.550.18 NMAC - Rp, NMPSC Rule 550.14, 12-30-10]

**17.9.550.19 PRUDENCE REVIEW:** The commission in its discretion may order that a prudence review be conducted to assure that fuel and purchased power costs collected by a utility through its FPPCAC are prudently incurred. Any prudence review shall be conducted under such procedures as the commission may direct. Unless otherwise ordered by the commission for good cause shown, the costs of the prudence review shall be paid by the utility and the costs treated as a regulatory asset, which shall accrue carrying costs at a rate to be set by the commission in its order authorizing the prudence review, until included in base rates and recovered in the utility's next general rate proceeding.

[17.9.550.19 NMAC - N, 12-30-10]

**17.9.550.20 NMPRC RULE 550 FPPCAC SAMPLE FORM:** A utility shall submit a monthly report and calculation of its factor to the commission, using a standard format that is not inconsistent with the format and data requirements of this section. Supporting workpapers shall accompany the monthly report. **FPPCAC Factor Sample Report Form:**

**NEW MEXICO PUBLIC REGULATION COMMISSION**
**NEW MEXICO JURISDICTION**
**RETAIL FUEL AND PURCHASED POWER DATA**

**17.9.550 NMAC FPPCAC REPORT FORM**

*[Continued on page 1415]*

UTILITY NAME _____
BILLING MONTH _____
CURRENT MONTH _____

**I. SUMMARY FPPCAC FACTOR INFORMATION**

1. Type of Factor (fixed, rolling average, monthly): _____
2. Effective Date of Factor: _____
3. Billing Month's System Factor: _____ /kWh
4. Per kWh Base Rate Cost of Fuel and Purchased Power (if applicable): _____ /kWh
5. Number of Months Factor is Applicable: _____
6. Time Period of Data Used to Calculate Factor: _____
7. Cumulative Over/Under Collection at end of Current Month: _____
8. Applicable Case No(s). for FPPCAC Approvals: _____
9. Supporting Workpapers (attached)

**II. CURRENT MONTH (OR OTHER APPLICABLE PERIOD) JURISDICTIONAL FUEL AND PURCHASED POWER EXPENSES**

**FUEL EXPENSE (Investor-Owned Utilities)**
(Attach supporting workpapers)

**ACCOUNT 501 -FUEL EXPENSE**

| | | | |
|---|---|---|---|
| a) | Coal | $_____ | |
| b) | Natural Gas | $_____ | |
| c) | Oil | $_____ | |
| | **TOTAL ACCOUNT 501** | | $_____ |

**ACCOUNT 518 - NUCLEAR FUEL EXPENSE (Investor-Owned Utilities)**
$_____

**2.A. PURCHASED POWER EXPENSE (Investor-Owned Utilities)**
(Attach supporting workpapers)

ACCOUNT 555-PURCHASES

| | | | |
|---|---|---|---|
| a) Firm/Capacity | | | $_____ |
| | Capacity | $_____ | |
| | Firm | $_____ | |
| | Bank (Net) | $_____ | |
| | Spinning Reserves | $_____ | |
| b) Contingent/Unit Commitment | | | $_____ |
| c) Economy | | | $_____ |
| | TOTAL PURCHASED POWER EXPENSE | | $_____ |

LESS ACCOUNT 447-SALES FOR RESALE

| | | | |
|---|---|---|---|
| a) Firm/Capacity | | | $_____ |
| | Capacity | $_____ | |
| | Firm | $_____ | |
| | Bank (Net) | $_____ | |
| | Spinning Reserves | $_____ | |
| b) Contingent/Unit Commitment | | | $_____ |
| c) Economy | | | $_____ |
| d) Firm Surplus | | | $_____ |
| | System Sales | $_____ | |
| | Block Sales | $_____ | |
| | Other Firm Sales | $_____ | |
| e). Other Adjustments | | | |

(Renewable Energy, Margin Sharing, Etc.) $_____
TOTAL SALES FOR RESALE $_____

NET PURCHASED POWER EXPENSE $_____

**2.B PURCHASED POWER EXPENSE (Distribution Cooperatives)**
(Attach supporting workpapers, with purchased power billing invoice to be provided as available)
a) Demand $_____
b) Energy $_____
c) Transmission $_____
d) Misc Adjustments $_____
e) Supplier Adjustments $_____
f) Other Charges $_____
TOTAL PURCHASED POWER EXPENSE $_____

**3. BALANCING ACCOUNT OR CUMULATIVE OVER/UNDER COLLECTION (If Applicable)**
(Investor-Owned Utilities and Distribution Cooperatives)
(Attach supporting workpapers)
**$_____**

**4. APPLICABLE TOTAL FUEL AND PURCHASED POWER EXPENSE**
(Investor-Owned Utilities and Distribution Cooperatives)
$_____

**III. CURRENT MONTH (OR OTHER APPLICABLE PERIOD) FUEL AND PURCHASED POWER REVENUES**
(Investor-Owned Utilities and Distribution Cooperatives)

**1. APPLICABLE KWH SALES _____ kWh**

**2. FUEL AND PURCHASED POWER REVENUES**
a) Base Rate Revenues: $_____/kWh times kWh Sales $_____
b) FPPCAC Revenues: $_____/kWh times kWh Sales $_____
c) Revenue Adjustments $_____

TOTAL FUEL AND PURCHASED POWER REVENUES $_____

[17.9.550.20 NMAC - Rp, NMPSC Rule 550 Forms I & II, 12-30-10]

**HISTORY OF 17.9.550 NMAC:**
**Pre-NMAC History:** The material in this part was derived from that previously filed with the commission of public records-state records center and archives.
PSC-GO 28, (Case No. 1083) General Order No. 28, Rules Governing Fuel And Purchased Power Cost Adjustment Clause For Electric Utilities, filed 4/17/74.
NMPSC Rule 550, Fuel and Purchased Power Cost Adjustment Clauses for Electric Utilities, filed 6/30/88.
NMPSC Rule 550, Fuel and Purchased Power Cost Adjustment Clauses for Electric Utilities, filed 8/17/92.
NMPSC Rule 550, Fuel and Purchased Power Cost Adjustment Clauses for Electric Utilities, filed 8/25/92.

**History of Repealed Material:**
NMPSC Rule 550, Fuel and Purchased Power Cost Adjustment Clauses for Electric Utilities (promulgated by former NM Public Service Commission and filed 8/25/92), repealed 12/30/2010.

**Other History:**
NMPSC Rule 550, Fuel And Purchased Power Cost Adjustment Clauses For Electric Utilities (filed 8/25/92) was renumbered, reformatted and replaced by 17.9.550 NMAC, Fuel and Purchased Power Cost Adjustment Clauses For Electric Utilities, effective 12/30/2010.

# NEW MEXICO PUBLIC REGULATION COMMISSION

INSURANCE DIVISION

**TITLE 13 INSURANCE**
**CHAPTER 14 TITLE INSURANCE**
**PART 19 TITLE INSURER RATE FILINGS**

**13.14.19.1 ISSUING AGENCY**: Public Regulation Commission, Insurance Division, Title Insurance Bureau.
[13.14.19.1 NMAC - N, 12-30-10]

**13.14.19.2 SCOPE:** This rule applies to all title insurers and title insurance agents conducting title insurance business in New Mexico.
[13.14.19.2 NMAC - N, 12-30-10]

**13.14.19.3 STATUTORY AUTHORITY**: NMSA 1978 Sections 59A-30-4 and 59A-30-6.
[13.14.19.3 NMAC - N, 12-30-10]

**13.14.19.4 DURATION:** Permanent.
[13.14.19.4 NMAC - N, 12-30-10]

**13.14.19.5 EFFECTIVE DATE:** December 30, 2010, unless a later date is cited at the end of a section.
[13.14.19.5 NMAC - N, 12-30-10]

**13.14.19.6 OBJECTIVE:** The purpose of this rule is to establish standards and procedures by which a title insurance rate lower than the promulgated rate shall be filed and may be approved.
[13.14.19.6 NMAC - N, 12-30-10]

**13.14.19.7 DEFINITIONS:** [RESERVED]
[See 13.14.7 NMAC for definitions.]

**13.14.19.8 STANDARDS FOR RATES THAT ARE LOWER THAN THE PROMULGATED RATES:** Rates that are lower than the promulgated rates must meet the standards set forth in Section 59A-30-6(C) NMSA 1978 and the superintendent shall also consider the interests and protection of consumers and independent title insurance agents and the potential impact on competition within the title insurance industry.
[13.14.19.8 NMAC - N, 12-30-10]

**13.14.19.9 FILING OF RATES THAT ARE LOWER THAN THE PROMULGATED RATE:** A title insurer that proposes to charge rates that are lower than the promulgated rates shall file with the superintendent its proposed rates, supplementary rate information and supporting information at least ninety days before the proposed effective date. Such filing shall specify the county or counties in which these proposed rates would apply and shall be submitted electronically via the national association of insurance commissioners' system for electronic rate and form filing ("SERFF").
[13.14.19.9 NMAC - N, 12-30-10]

**13.14.19.10 NOTICE OF RATE FILING:** Within ten days of receipt of a filing submitted under 13.14.19.9 NMAC, the superintendent shall provide notice of the filed title insurance rates to the attorney general and to all title insurance agents and title insurers doing business in the county or counties in which the filed rates would apply. The superintendent shall promptly provide a complete copy of the filing, including supplementary rate information and supporting information, to any party that, upon receiving the superintendent's notification of the filing, requests such information.
[13.14.19.10 NMAC - N, 12-30-10]

**13.14.19.11 OPPORTUNITY TO OPINE ON RATE FILING**: Within thirty days after the superintendent's issuance of notification of the filed rates under 13.14.19.10 NMAC, a party receiving such notification may submit to the superintendent in writing its comments on the propriety of the proposed rates or may request a hearing pursuant to Section 59A-30-8 NMSA 1978 to argue the propriety of the proposed rates.
[13.14.19.11 NMAC - N, 12-30-10]

**13.14.19.12 APPROVAL OF FILED RATES:** In determining whether to approve a filing submitted under 13.14.19.9 NMAC, the superintendent shall consider the provisions of 13.14.19.8 NMAC as well as any comments or testimony provided under 13.14.19.11 NMAC The superintendent shall issue a final order approving or disapproving a filing submitted under 13.14.19.9 NMAC within 60 days after receipt of the filing or, if a hearing regarding the filing is held pursuant to 13.14.19.11 NMAC, within 60 days after the conclusion of such a hearing.
[13.14.19.12 NMAC - N, 12-30-10]

**13.14.19.13 MAINTENANCE OF DOUBLE-RATING RECORD SYSTEM:** A title insurer that uses filed and approved rates that are lower than the promulgated rates shall maintain a record of both the charged rate and the promulgated rate for each policy and endorsement issued.
[13.14.19.13 NMAC - N, 12-30-10]

**13.14.19.14 EFFECT OF RATE PROMULGATIONS UPON FILED AND APPROVED RATES:** If a rate promulgation by the superintendent produces rates that are lower than those contained in a previously approved rate filing, those rates in the previously approved rate filing that are in excess of the promulgated rates shall expire upon the effective date of the rate promulgation.
[13.14.19.14 NMAC - N, 12-30-10]

**13.14.19.15 CANCELLATION OF FILED AND APPROVED RATES:** A title insurer using filed and approved rates that wishes to revert to the use of promulgated rates shall file with the superintendent the effective date of cancellation of its filed and approved rates. Such filing shall be submitted at least 30 days prior to the insurer's reversion to promulgated rates, shall specify the county or counties in which the reversion will apply and shall be submitted electronically via the national association of insurance commissioners' system for electronic rate and form filing ("SERFF"). Such filing shall not be subject to the prior approval of the superintendent. The title insurer shall provide notice of the reversion, at least 30 days prior to the effective date of the reversion, to its appointed agents in the county or counties where the reversion will apply.
[13.14.19.15 NMAC - N, 12-30-10]

**13.14.19.16 REVIEW OF THE SUPERINTENDENT'S ACTIONS:** Any person aggrieved by the superintendent's refusal to hold a hearing requested under 13.14.19.11 NMAC or by a final order issued by the superintendent under 13.14.19.12 NMAC shall have the rights to review and appeal provided in Section 59A-30-9 NMSA 1978.
[13.14.19.16 NMAC - N, 12-30-10]

**HISTORY OF 13.14.19 NMAC:** [RESERVED]

## NEW MEXICO PUBLIC REGULATION COMMISSION
INSURANCE DIVISION

This is an amendment to 13.14.1 NMAC Section 25, effective 12-30-10:

**13.14.1.25 DEFINITIONS "S":** As used in 13 NMAC Chapter 14, and also in interpreting the New Mexico Title Insurance Act, the following terms shall have the following meanings:

**A. Schedule of basic premium rates.** See basic premium rates (schedule).

**B. Simultaneous (issue).** Issuing two or more policies bearing the same effective date and insuring the same land.

**C. Superintendent.** The superintendent of insurance, acting on behalf of the state insurance board, state corporation commission, department of insurance or the state of New Mexico, or anyone acting in an official capacity on his behalf.

**D. Supplementary rate information.** Rate schedules and manuals, rating rules, and all other information needed to determine the applicable rate in effect or to be in effect.

**E. Supporting information.** The experience and judgment of the filer and its appointed New Mexico agents, if any, and the experience or data of other insurers and agents relied upon by the filer; the interpretation of any other data relied upon by the filer; descriptions of methods used in making the rates; and any other information required by the superintendent to be filed.

**[D.] F. Survey (recent).** "Recent survey" as used in 13.14.6.14 NMAC and 13.14.7.13 NMAC is a survey not more than six (6) months old which otherwise meets the requirements of the insurer; provided that:

**(1)** for condominium units, the term also includes the most recently filed as-built or as-modified survey, confirmed by such site inspections, review of documents including condominium by-laws and regulations, and affidavits, if any, as the underwriter may require;

**(2)** for existing-owner refinances, the term also includes the most recent survey made after the existing owner purchased the property, or within six (6) months prior to that date, supplemented with the existing owner's affidavit that there have been no known changes since the date of the survey, that the survey is believed to be accurate and complete, and such additional statements as the underwriter may require, confirmed by such site inspections, if any, as the underwriter may require.

**(3)** for improved land, the term also includes the most recent survey made which shows the improvements on the land. [6-16-86...4-1-94; 13.14.1.25 NMAC - Rn & A, 13 NMAC 14.1.25, 5-15-00; A, 12/30/10]

## NEW MEXICO REGULATION AND LICENSING DEPARTMENT
FINANCIAL INSTITUTIONS DIVISION

**This is an amendment to 12.15.3 NMAC Sections 12, effective 12/31/10.**

**12.15.3.12 RATE THRESHOLD:** The phrase "comparable periods of maturity", as used in Section 58-21A-3 (N) NMSA 1978, refers to the "treasury constant maturities" published in the federal reserve "selected interest rates" (statistical release H-15).

**A**. Creditors must use the yield corresponding to the constant maturity that is closest to the loan's maturity or the lower yield if the loan's maturity is midway between constant maturities published in the statistical release. [~~For example:~~

~~(1) if a mortgage loan has a term of at least 20 but less than 30 years, the rate threshold test uses the yield of securities having a constant maturity of 20 years;~~

~~(2) if a mortgage loan has a term of 30 years or more, and if the federal reserve statistical release does not provide a term equal to that same exact term of years, then the rate threshold test uses the yield of securities having a constant maturity of the next shortest fixed term listed in the statistical release;~~

~~(3) if the statistical release H-15 contains a yield for treasury securities with constant maturities of 7 years and 10 years and no maturity in between, the rate threshold test of an 8 year mortgage loan uses the yield of securities having a 7 year constant maturity, and the rate threshold test of a 9 year mortgage loan uses the yield of securities having a 10 year constant maturity;~~

~~(4) if the loan's maturity is exactly halfway between security maturities, the rate threshold test on the loan should be compared with the yield for treasury securities having the lower yield; if a mortgage loan has a term of 15 years, and the statistical release H-15 contains a yield of 5.21 percent for constant maturities of 10 years, and also contains a yield of 6.33 percent for constant maturities of 20 years, then the creditor compares the rate for a 15 year mortgage loan with the lower yield for constant maturities of 10 years.~~]

**B.** If the 15th day of the month immediately preceding the month in which the loan is made is not a business day, the creditor must use the yield calculated as of the business day immediately preceding the 15th.

**C.** A loan is considered "made," within the meaning of Section 58-21A-3 (N), NMSA 1978, when the consumer becomes contractually obligated on a credit transaction.

**D.** When calculating the interest rate for adjustable rate loans, the creditor shall not use any introductory rate. The interest rate will be based on the loan's disclosed index plus the margin, which is the fully indexed rate, at the time the loan is made. As an example, if the index is 2% and the margin is 3% for a first lien mortgage, the interest rate is 5% (fully indexed rate).
[12.15.3.12 NMAC - N, 01/23/2004; Repealed, 06/01/10; 12.15.3.12 NMAC - Rn, 12.15.3.13 NMAC & A, 06/01/10; A, 12/31/10]

## NEW MEXICO REGULATION AND LICENSING DEPARTMENT
FINANCIAL INSTITUTIONS DIVISION

**This is an amendment to 12.19.2 NMAC Sections 7, 10, 16 and the addition of a new Section 18, effective 12/31/10.**

**12.19.2.7 DEFINITIONS:**

**A. "Days"** means a period of time expressed in calendar days, [~~excluding~~] except when disclosures are required to be given to borrowers, then "days" shall exclude Saturdays, Sundays and legal holidays.

**B. "Independent contractor"** means any person who processes or underwrites residential mortgage loans and is not a W-2 employee of a licensed mortgage loan company.

**C. "Scheduled long-term monthly debt payments"** means the monthly payments of all installment debts, revolving charge accounts, open accounts and lines of credit that would be used to determine a borrower's ability to repay per the current underwriting guidelines of the federal housing administration (FHA), the federal national mortgage association (FNMA), the federal home loan mortgage corporation (FHLMC) or the department of veteran's affairs (VA).

**D. "Takes a residential mortgage loan application",** with respect to Section 58-21B-3(K) NMSA 1978, means:

(1) any communication, regardless of form, from a mortgage loan originator to a borrower soliciting a loan application or requesting information typically required in an application for the purpose of deciding whether or not to extend the requested offer of a loan to a borrower; or

(2) any communication,

regardless of form, from a borrower to a mortgage loan originator, for an offer or responding to a solicitation for an offer of residential mortgage loan terms or providing information typically required in an application for the purpose of deciding whether or not to extend the requested offer of a loan to a borrower
[12.19.2.7 NMAC - N, 08/31/09; A, 06/01/10; A, 12/31/10]

**12.19.2.10 HEARING PROCEDURES AND CHALLENGE PROCESS:**

**A.** [~~A mortgage loan originator may challenge information entered by the director into the nationwide mortgage licensing system and registry and by requesting a hearing.~~] In reference to Section 58-21B-14 NMSA 1978, hearings requested shall be conducted under the following procedures.

**[~~A~~]** (1) The mortgage loan originator shall request a hearing in writing by certified return receipt letter addressed to the director. The director shall, within 30 days of receipt of the request, notify the mortgage loan
originator of the date, time and place of the hearing.

**[~~B~~]** (2) Hearings shall be conducted pursuant to the Administrative Procedures Act, Sections 12-8-10 and 12-8-11 NMSA 1978.

**[~~C~~]** (3) Hearings shall be conducted in Santa Fe county or another county if agreed to by the director and the mortgage loan originator.

**[~~D~~]** (4) All hearings shall be conducted by the director or by a hearing officer designated by the director. A hearing officer shall, within 30 days following the hearing, submit to the director a report setting forth the hearing officer's findings of fact and conclusions of law.

**[~~E~~]** (5) All hearings shall be open to the public. In cases in which the reputation of an applicant or licensee may be damaged or, for good cause shown, the director or hearing officer may hold a closed hearing and must state the reasons for this decision in the record.

**[~~F~~]** (6) A complete record shall be made of all evidence and testimony received during the course of any hearing.

**[~~G~~]** (7) Within sixty (60) days after the hearing, the director shall serve upon the applicant or licensee a copy of the final written order.

**B.** In reference to Section 58-21B-12 NMSA 1978, the challenge process shall be conducted under the following procedures.

(1) Any person aggrieved by a final order of the director may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

(2) The commencement of the proceedings under Paragraph (1) of Subsection B of this section does not, unless specifically ordered by the court, operate as a stay of the director's order.
[12.19.2.10 NMAC - N, 08/31/09; A, 12/31/10]

**12.19.2.16 CHANGE IN EMPLOYMENT:** A licensed mortgage loan originator whose employment with a mortgage loan [~~originator~~] company is terminated shall not originate new mortgage loans for that mortgage loan company but may receive compensation for those mortgage loans originated by him or her while employed by that mortgage loan company.
[12.19.2.16 NMAC - N, 06/01/10; A, 12/31/10]

**12.19.2.18 NINETY (90) DAY TEMPORARY LICENSE:** In reference to 58-21B-4(D), a mortgage loan originator may obtain a ninety day temporary license to originate residential mortgage loans in New Mexico while they complete the licensing requirements for a New Mexico mortgage loan originator license. A temporary license shall be issued if the mortgage loan originator meets the following requirements:

**A.** contact the division in writing via mail or email requesting a 90 day temporary license;

**B.** a license status of "Approved" in another state or jurisdiction; if the mortgage loan originator's license status changes during the ninety (90) day period to anything other than "Approved", their temporary license may be rescinded;

**C.** apply and pay for the New Mexico mortgage loan originator license, and

**D.** be sponsored by a mortgage loan company licensed in New Mexico.
[12.19.2.18 NMAC - N, 12/31/10]

# NEW MEXICO REGULATION AND LICENSING DEPARTMENT

## FINANCIAL INSTITUTIONS DIVISION

**This is an amendment to 12.19.8 NMAC Sections 7, 8, effective 12/31/10.**

**12.19.8.7 DEFINITIONS:**

**A. "Applicant"** means a person who has applied for a license pursuant to the provisions of the Mortgage Loan Company Act, and includes all directors, officers, employees, trustees and owners of such person.

**B. "Days"** means a period of time expressed in calendar days, [~~excluding~~] except when disclosures are required to be given to borrowers, then "days" shall exclude Saturdays, Sundays and legal holidays.

**C. "Independent contractor"** means any person who originates, processes or underwrites mortgage loans and is not a W-2 employee of a licensed mortgage loan company.

**D. "Licensee"** means a person who is licensed pursuant to the provisions of the act, and includes all directors, officers, employees, trustees and owners of such person.

**E. "Person who controls or is controlled"**, with respect to Section 58-21-2(A) NMSA 1978, means a person who is a director or executive officer of a business or organization, who directly or indirectly, or acting in concert with one or more other persons or entities, owns, controls or holds power to vote, or holds proxies representing ten percent (10%) or more of the voting shares or rights of any entity, or the spouse of such person.

**F. "Reasonably reliable documentation"** means any documentation that is required by a mortgage loan company to satisfy the requirements of a loan product that meets the borrower's requested terms and qualifications, documents the source of repayment and includes verifiable written documentation obtained from the borrower or a third party. Reasonably reliable documentation may include but may not be limited to verbal verifications.

**G. "Scheduled long-term monthly debt payments"** means the monthly payments of all installment debts, revolving charge accounts, open accounts and lines of credit that would be used to determine a borrower's ability to repay per the current underwriting guidelines of the federal housing administration (FHA), the federal national mortgage association (FNMA), the federal home loan mortgage corporation (FHLMC) or the department of veteran's affairs (VA).
[12.19.8.7 NMAC - Rp, 12 NMAC 19.2.8.7, 12/15/08; A, 08/31/09; A, 06/01/10; A, 12/31/10]

**12.19.8.8 APPLICANT AND LICENSEE REQUIREMENTS:**

**A.** Application for licensure: In addition to the information required by Section 58-21-4 NMSA 1978 of the act, each applicant for issuance or renewal of a license shall be subject to the following requirements:

**(1)** applications for license or renewal of a license shall be made using the nationwide mortgage licensing system and registry;

**(2)** a mortgage loan company shall obtain and maintain a unique identifier

number issued by the nationwide mortgage licensing system and registry for each principal office, divisional office or branch office;

**(3)** an independent contractor who intends to originate mortgage loans and is not sponsored by a licensed New Mexico mortgage loan company shall, prior to originating mortgage loans, [~~shall file an application with the director and~~] obtain a license under the Mortgage Loan Company Act, Section 58-21-1 NMSA 1978 et.seq.

**B.** The unique identifier number of any person originating a residential mortgage loan shall be clearly shown on all residential mortgage loan applications, solicitations, advertisements, including business cards and web sites.

**C.** Licensees shall keep the following records and make them available upon examination or investigation:

**(1)** documents related to the withdrawal, denial or settlement of a residential mortgage loan which includes, but are not limited to:

**(a)** mortgage loan transaction documents: all loan applications, written or electronic, mortgage loan settlement statement, loan transmittal summary, credit report, appraisal, all verifications (mortgage, rent, deposits, employment, income), lender loan approval, clear to close and interest rate lock-in confirmation, title commitment, survey and sales contract (if loan is a purchase);

**(b)** rate sheet(s) used in the determination of the information used on the initial good faith estimate and loan application and any subsequent good faith estimate and loan application done prior to interest rate lock-in;

**(c)** rate sheet(s) used for the determination of the interest rate that was locked-in with the lender for the purpose of settlement and funding the loan;

**(d)** all disclosures required by the Real Estate Settlement Procedures Act, Truth in Lending Act (Regulation Z), the Equal Credit Opportunity Act, the Patriot Act and the Mortgage Loan Company Act;

**(e)** disclosures that include: borrower's signature, certification and authorization, fair credit reporting, affidavit of occupancy, insurance anti-coercion statement, mortgage loan agreement, privacy policy, loan comparison for adjustable rate mortgages, credit score information;

**(f)** title documents: note, mortgage or deed of trust (including all riders for the note and mortgage or deed of trust), final signed truth-in-lending disclosure, lender's closing instructions to the title company, closing disbursement sheet and copies of issued checks or direct deposits, initial escrow account statement and right of rescission;

**(2)** all evidence of payment of commissions, brokers' fees or other forms of compensation for services rendered in connection with a mortgage loan transaction;

**(3)** all books, records, canceled checks pertaining to, but are not limited to, the mortgage loan transactions and payment of fees; books and records shall include cash receipts and disbursements journals, to be posted daily, and a general ledger, to be posted monthly;

**(4)** the books of account shall include a funded residential mortgage loan journal showing an entry for each mortgage loan transaction completed;

**(5)** records covered by 12.19.8 NMAC include electronic records.

**D.** Licensees' accounts.

**(1)** Trust accounts: All funds belonging to third party settlement service providers (e.g., appraisal services, credit reporting agencies), borrowers or sellers, shall, upon receipt thereof, be deposited into the licensee's trust account that is set up exclusively for the deposit and disbursement of third party settlement service fees and the borrowers or sellers funds. The trust account shall be established with a depository institution the accounts of which are insured by the federal deposit insurance corporation or the national credit union administration. Deposited funds shall remain in the trust account until disbursed to the third party settlement service providers, used at settlement for the borrowers benefit or returned to the rightful borrowers or sellers. If the trust account is interest-bearing, all interest shall be distributed to the appropriate parties, on a pro rata basis, at the time trust funds are disbursed or returned. All funds received by the licensee must be disbursed within 30 days of the settlement of the residential mortgage loan.

**(2)** If a licensee requires a deposit in connection with an application for a mortgage loan, there must be an agreement in writing between consumer and licensee, setting forth the disposition of the deposit, whether the loan is finally consummated or not.

**(3)** Deposit accounts: All deposit accounts maintained by a licensee shall be reconciled within ten (10) business days after receipt of statements; "deposit accounts" includes all accounts maintained with depository institutions.

[12.19.8.8 NMAC - Rp, 12 NMAC 19.2.8.8.1, 5 & 6, 12/15/08; A, 08/31/09; A, 06/01/10; A, 12/31/10]

# NEW MEXICO SOIL AND WATER CONSERVATION COMMISSION

This is an amendment to 21.9.2 NMAC, Section 9, effective December 30, 2010. This amendment will correct a conflict with the election code (1-4-10, NMSA 1978) by moving elections of soil and water conservation district supervisors to odd-numbered years.

**21.9.2.9 DUTIES OF COMMISSION OR BOARD OF SUPERVISORS:**

A. Conduct a supervisor election on the first Tuesday in May of [~~even-numbered~~] odd-numbered years to fill positions designated by the soil and water conservation commission as being eligible for election.

B. Notify the county clerks of all counties located within the district boundaries of the election by January 1, preceding the election. Each county clerk must be provided the following:

(1) district boundary description;

(2) district boundary map;

(3) date of the election;

(4) the official election timeline;

(5) a copy of the supervisor election rules.

C. Provide for "due notice" of the election. There must be two notices: the first notice between 51 and 65 days before the election and the second notice between 23 and 37 days before the election. The notice shall include but is not limited to:

(1) geographical area affected, including zone within the district if applicable;

(2) declare which terms expire by name of incumbent and position number, and zone represented if the district is zoned. [Supervisors serving positions #1, #2, #3 and #4, or candidates for those positions, must be resident owners of land within the district, and within the zone if the district is zoned. Position #5 is the supervisor-at-large who does not have to be an owner of land but must be resident within the district.]

(3) instructions on how to file a declaration of candidacy, including:

(a) dates, times and address where declarations of candidacy and declarations of intent to be a write-in candidate may be obtained,

(b) the date on which declarations of candidacy must be filed, and

(c) the date on which declarations of intent to be a write-in candidate must be filed;

(4) date, time and place ballots may be cast;

(5) instructions for absentee

balloting, including the hours and days of the week that absentee ballot applications will be available;

(6) documentation required by the election officials to confirm eligibility to vote (voter registration card, utility bill or other proof of residency within the district);

(7) questions to be submitted to voters on the same ballot, if any; and

(8) name and telephone number of a person to contact in case of questions about the election.

D. Prepare and make available declaration of candidacy forms to persons who request them. Declarations of candidacy must be delivered in person by the candidate to the designated place 49 days before the election, and shall take substantially the following form:

"Declaration of Candidacy

Name of candidate (as it should appear on the ballot): _____

Candidate's residence physical address: _____

Candidate's mailing address: _____

Candidate's phone number: _____

Description of land owned within the _____ soil and water conservation district, if different from physical address above: _____

I desire to become a candidate for the office of supervisor, position number ___, at the election of supervisors to be held on the date set by law. I will be eligible to hold this office at the beginning of its term. I make the foregoing affidavit under oath, knowing that any false statement herein constitutes a felony punishable under the criminal laws of New Mexico.

Declarant's signature: _____

Witness signature: _____

Received by (signature, date, time): _____"

E. Prepare ballots for the election. The names of persons for whom a declaration of candidacy was successfully completed shall appear on the ballot. The ballot must provide for write-in votes if any persons have declared their intent to be a write-in candidate on the appropriate declaration form filed 42 days prior to the election. Such persons shall not be entitled to have their name printed on the ballot.

F. In the event that no more than one candidate has filed a declaration of candidacy for each position to be filled, the board of supervisors shall certify such facts to the canvassing board. If there are no other questions on the ballot the canvassing board shall cancel the election as provided by these rules. The election superintendent shall notify applicants for absentee ballots of the cancellation. Unopposed candidates will assume the office of supervisor according to the Soil and Water Conservation District Act. In the case that there are no candidates for a position, incumbent supervisors continue in office until their successors are elected or appointed as in the case of any other vacancy.

G. At least 60 days prior to the election, appoint an election superintendent who must take the following oath of office before performing the required duties: "I, (name of person), do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the state of New Mexico, and I will faithfully discharge the duties of the office of election superintendent for the (name of district) soil and water conservation district."

H. Assure that candidates for office do not serve as election superintendent or on the canvassing board.

I. Assure that all polling places are staffed with at least two polling officials during the entire voting period. At least one of the officials must not be a district supervisor, district employee, candidate, or immediate family member of any of the aforementioned. Arrange for substitutes if necessary. Polling officials and substitutes must take an oath of office similar to that of the election superintendent before assuming their duties.

J. Maintain a file of all records pertaining to the election in compliance with the applicable records retention schedule. [See 1.19.11 NMAC]

[21.9.2.9 NMAC - Rp, 21.9.2.9 NMAC, 9-30-05; A, 12-30-10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.1.6 NMAC, Section 9 effective 12/30/2010.

3.1.6.9 [~~**TAXES LESS THAN $10.00:** The secretary or secretary's delegate shall not assess taxpayers for taxes due aggregating less than $10.00, except that assessments shall be issued for the minimum $5.00 penalty for late-filed reports under Section 7-1-69 NMSA 1978.~~] [RESERVED]

[11/5/85, 8/15/90, 10/31/96; 3.1.6.1 NMAC - Rn & A, 3 NMAC 1.6.1, 1/15/01; Repealed, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.20 NMAC, Sections 13, 19 and 32 effective 12/30/2010.

3.2.20.13 **REPORTING, FILING OR REGISTRATION FEES**

A. Whenever a person is required by law to report to or register with a governmental agency or to register possession or use of tangible personal property, receipts of an agency, institution, instrumentality or political subdivision of the state of New Mexico from such registrations are not governmental gross receipts, regardless of whether tangible personal property is given to the person registering as evidence of the registration.

B. Example 1: The owner or operator of a facility in which a hazardous chemical is present in certain quantities is required to file an inventory report on such chemicals. A fee is charged for each inventory form filed. Receipts from such fees are not governmental gross receipts.

C. Example 2: The New Mexico owner of a motor vehicle which is to be driven upon the public highways is obliged to register the vehicle with the taxation and revenue department. A metal plate, to be affixed to the motor vehicle, is given to the owner upon registration as evidence of the registration. The transaction is not primarily the sale of tangible personal property but the registration of the motor vehicle. Receipts from such registrations are not governmental gross receipts.

D. Fees charged by any agency, institution, instrumentality or political subdivision of the state of New Mexico as a pre-condition for official action by that entity are not receipts from a taxable activity.

E. Example 1: Docketing fees are charged by New Mexico courts to

defray the administrative costs of accepting a case. Cases will not be accepted in absence of payment of the fee. Such fees are not governmental gross receipts.

F. Example 2: The state public regulation commission charges fees for incorporating a corporation and will not recognize the corporation unless the fees are paid. Such fees are not governmental gross receipts.

[~~G. Example 3: The taxation and revenue department charges a fee of $100 for granting permission to a taxpayer to apply for nontaxable transaction certificates. Such fees are not governmental gross receipts.~~]

[6/28/91, 10/2/92, 11/15/96; 3.2.20.13 NMAC - Rn, 3 NMAC 2.100.13 & A, 4/30/01; A, 12/30/10]

3.2.20.19 **RECEIPTS FROM SERVICES - RECREATIONAL, ENTERTAINMENT AND ATHLETIC SERVICES**

A. Receipts of any agency, institution, instrumentality or political subdivision of the state of New Mexico from performing services which are entirely or predominantly recreational, entertainment or athletic services in facilities which are open to the general public are governmental gross receipts and are subject to the governmental gross receipts tax.

B. Example: A public university sells season tickets to the games of its basketball team. The price of the season ticket includes use of a parking space in a parking lot near the place where the games are played. All receipts from the sale of the season tickets, including any receipts that might otherwise be attributable to the value of right to use the parking space, are governmental gross receipts.

C. Admissions fees to a recreational, entertainment or athletic facility open to the general public or to a recreational, entertainment or athletic event in a facility open to the general public are governmental gross receipts.

D. Example 1: Municipality X maintains a museum. An admissions fee of $2 is charged for admission to the museum, except that no fee is charged to school classes or accompanying adults. Receipts from the admissions fees collected are governmental gross receipts.

E. Example 2: A state agency maintains parks. It charges campers an admissions fee which also permits the use of a camping spot (whether designated or not). Receipts from the admissions fees collected are governmental gross receipts.

F. Student activity fees received by a state university, college or school are governmental gross receipts to the extent that the fees permit attendance at recreational, entertainment or athletic events in facilities open to the general public. When the portion of the student activity fees permitting attendance at recreational, entertainment or athletic events in facilities open to the general public is not readily determinable, reasonable methods may be used to estimate that portion, including the following.

(1) Reserved seats method. If a specific number of seats or places are reserved for students at the event, governmental gross receipts is estimated by multiplying the number of reserved seats or places times the amount of the lowest price ticket available to the general public.

(2) Face value method. When the student activity fee permits attendance of a student at an event at a reduced price (but not free), the governmental gross receipts from the sale of a discounted ticket is the cash received plus the amount of the discount, i.e., the face value of the ticket.

(3) Budget method. When the student activity fees are commingled with other revenue sources and the total is used to carry on several activities, including at least one taxable activity such as a program of athletic contests in facilities open to the general public, the portion of the student activity fees which are governmental gross receipts is estimated by multiplying the total amount of student activity fees by a fraction, the numerator of which is the amount budgeted for taxable activities and events and the denominator of which is the total amount of commingled funds budgeted for all activities and events.

(4) Any other method agreed to by the secretary or the secretary's delegate.

G. Fees received by a municipality for providing a swimming instruction program are not governmental gross receipts. Teaching someone to swim is an educational service and not a recreational, athletic or entertainment service. Fees for permitting individuals to use pool facilities or to swim are receipts from admissions to a recreational, athletic or entertainment event and are governmental gross receipts. See Paragraph (2) of Subsection A of 3.2.20.7 NMAC regarding admissions.

[6/28/91, 11/15/96; 3.2.20.19 NMAC - Rn, 3 NMAC 2.100.19, 4/30/01; A, 12/30/10]

3.2.20.32 **FINES**

A. Receipts from the imposition of criminal or civil fines or forfeitures are not receipts from a taxable activity and are not governmental gross receipts.

B. Example 1: The taxation and revenue department charges penalty (at 2% per month, or portion thereof, up to a maximum of [~~10%~~] 20%) for late payment of taxes. A $5 minimum penalty applies even when no tax is due if a report due is late. The penalties collected are not governmental gross receipts.

C. Example 2: A governmentally-operated library charges a fine for late return of borrowed materials. Such fines are not governmental gross receipts.

D. Example 3: Police agencies under some laws are entitled to seize certain tangible personal property if the property is connected with certain unlawful behavior. The value of such property when seized is "receipts" but is not reportable as governmental gross receipts. If the agency sells the property from a facility open to the general public or to another part of the state, however, receipts from that sale are governmental gross receipts. [9/17/91, 10/2/92, 11/15/96; 3.2.20.32 NMAC - Rn, 3 NMAC 2.100.32, 4/30/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.100 NMAC, Section 9 effective 12/30/2010.

3.2.100.9 **EXEMPTIONS FROM GROSS RECEIPTS**: The exemptions provided [~~by Sections 7-9-13 through 7-9-42 NMSA 1978~~] in the Gross Receipts and Compensating Tax Act apply only to those receipts which are included in and defined as gross receipts pursuant to Section [~~7-9-3~~] 7-9-3.5 NMSA 1978.

[10/21/86, 11/26/90, 11/15/96; 3.2.100.9 NMAC - Rn, 3 NMAC 2.12.9 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.101 NMAC, Sections 9 and 10 effective 12/30/2010.

3.2.101.9 **RECEIPTS OF GOVERNMENTAL ENTITIES**:

A. Except for the receipts from the sale of gas or electricity by a utility owned or operated by a political subdivision of the state and receipts of a municipality from the ownership or operation of a cable television station owned by the municipality, the receipts of the United States or any agency or instrumentality of the United States, the state of New Mexico or any political subdivision of the state or any Indian nation, tribe or pueblo from activities or transactions occurring on its sovereign territory are exempt from the gross receipts tax. This exemption applies to the receipts of such governmental entity from the sale, [~~or lease~~] leasing or licensing of property,

granting a franchise or from the sale of a service by that governmental entity. This exemption, however, does not apply to the imposition of the governmental gross receipts tax under the provisions of Section [~~7-9-4.1~~] 7-9-4.3 NMSA 1978.

B. Example 1: A New Mexico municipality publishes and sells to the public a compilation of all its municipal ordinances. The receipts from these sales are not subject to the gross receipts tax but the receipts will be subject to the governmental gross receipts tax.

C. Example 2: X Sporting Goods Store sells a hunting license for $7.50. Of this $7.50, X remits $7.25 to the state of New Mexico and $0.25 is retained by X as a commission. The $7.25 that is remitted to the state is exempt from the gross receipts tax. However, the $0.25 retained by X is subject to the gross receipts tax. This amount is not deductible under Section 7-9-66 NMSA 1978 because a license is not tangible personal property under Section 7-9-3 NMSA 1978. The $0.25 is a receipt derived from services performed in New Mexico.

D. Example 3: M Utility Company obtains a franchise from a New Mexico municipality to operate an electric utility. The receipts the municipality obtains from M for granting of this franchise are exempt from the gross receipts tax.

E. Example 4: The university of New Mexico sells copies of transcripts to students. These receipts are not subject to the gross receipts tax because the university of New Mexico is the state of New Mexico. Provided that the conditions set forth in [~~Section~~] 3.2.20.21 NMAC are met, the receipts from selling the transcript copies are not governmental gross receipts.

F. Example 5: The receipts of a public housing authority which is an agency either of the state of New Mexico or any political subdivision thereof or of the United States or any agency or instrumentality thereof are exempted from the gross receipts tax to the extent provided in Section 7-9-13 NMSA 1978. The receipts of the public housing authority from the sale of tangible personal property from a facility open to the general public or providing refuse collection, [~~refusal~~] refuse disposal or [~~sewerage~~] sewage services are governmental gross receipts subject to the governmental gross receipts tax; its receipts in the form of rentals are not governmental gross receipts.

G. Example 6: The receipts of concessionaires who are not agencies or instrumentalities of the federal government or the state of New Mexico or any political subdivision of the state from carrying on activities within a federal area are subject to the gross receipts tax.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/17/91, 3/19/92, 10/28/94, 11/15/96, 1/15/98; 3.2.101.9 NMAC - Rn, 3 NMAC 2.13.9 & A, 5/15/01; A, 12/30/10]

3.2.101.10 **AMERICAN NATIONAL RED CROSS**: The American national red cross chartered pursuant to [~~36 U.S.C. 1~~] 36 U.S.C. 300101 et seq. is immune from state taxation as an instrumentality of the federal government. As such, its receipts are exempt from gross receipts tax under Section 7-9-13 NMSA 1978.

[5/31/97; 3.2.101.10 NMAC - Rn, 3 NMAC 2.13.10 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.102 NMAC, Sections 8 and 11 effective 12/30/2010.

3.2.102.8 **USE OF PROPERTY BY GOVERNMENTAL ENTITIES**:

A. For purposes of Section 7-9-14 NMSA 1978, the phrase "United States [~~or any agency or instrumentality thereof~~]" does not include individual states or any agency, department, instrumentality or political subdivision of an individual state. The phrase "the state of New Mexico" includes any agency, institution of higher education, board, commission or department which has been created by statute, executive order or action of the legislature and which has been charged with the administration or enforcement of certain provisions of New Mexico statutes. The phrase "or any political subdivision thereof" includes incorporated municipalities, counties, school districts, conservation districts or other entities authorized by statute and which are governed by representatives elected by the public. The use of property in New Mexico by the United States or any of its agencies, departments or instrumentalities is exempt from compensating tax. Except for tangible personal property incorporated into a metropolitan redevelopment project or into a construction project, the use of property in New Mexico by [~~the United States or any agency or instrumentality of the United States or by~~] the state of New Mexico or any of its agencies, departments, instrumentalities or political subdivisions is exempt from compensating tax.

B The following examples illustrate the application of Section 7-9-14 NMSA 1978:

(1) Example 1: The air force purchases [~~an F-111~~] a fighter jet for use at an air force base in New Mexico. The use of this plane in New Mexico by the United States is exempt from the compensating tax.

(2) Example 2: Z, a soil and water conservation district created pursuant to the Soil and Water Conservation District Act, buys equipment and trees for its use in controlling erosion. Because Z is a political subdivision of New Mexico, its use of the equipment and trees are not subject to the compensating tax.

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 3/16/95, 11/15/96; 3.2.102.8 NMAC - Rn, 3 NMAC 2.14.8 & A, 5/15/01; A, 12/30/10]

3.2.102.11 **AMERICAN NATIONAL RED CROSS**: The American national red cross chartered pursuant to [~~36 U.S.C. 1~~] 36 U.S.C. 300101 et seq. is immune from state taxation as an instrumentality of the federal government. As such, its use of property in New Mexico is exempt from compensating tax under Section 7-9-14 NMSA 1978.

[5/31/97; 3.2.102.11 NMAC - Rn, 3 NMAC 2.14.11 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.105 NMAC, Section 8 effective 12/30/2010.

3.2.105.8 **BLIND OPERATORS OF VENDING STANDS**:

A. Except as provided in Subsection B of this section, receipts of blind operators of vending stands established in business pursuant to the Vending Stands for Blind in Federal Buildings Act, 20 U.S.C. Sections 107-107(f), [~~(1964), 49 Stat. 1559 (1936) Amend., 68 Stat. 663 (1954)~~] or Sections 22-14-24 to 22-14-29 NMSA 1978 are subject to the gross receipts tax.

[~~B.~~] Such operators are not employees within the indicia outlined in [~~Section~~] 3.2.105.7 NMAC.

B. The receipts of a blind "disabled street vendor" are exempt under Section 7-9-41.3 NMSA 1978.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.8 NMAC - Rn, 3 NMAC 2.17.8 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.107 NMAC, Section 8 effective 12/30/2010.

3.2.107.8 **RECEIPTS FROM FEEDING ANIMALS**:

A. Only the receipts from feeding, pasturing, penning or handling livestock are exempt under Section 7-9-19 NMSA 1978. The receipts from feeding, pasturing, penning or handling any animals which are not livestock are subject to the gross receipts tax.

B. [~~Receipts from the training of livestock are exempt under Section 7-9-19 NMSA 1978 except for the period July 1, 1991 through June 30, 1992. During the period July 1, 1991 through June 30, 1992 only, receipts from training of any animals, whether or not those animals are livestock, are not exempt from the gross receipts tax under the provisions of Section 7-9-19 NMSA 1978.~~

~~C.~~] The following examples illustrate the application of Section 7-9-19 NMSA 1978.

(1) Example 1: A owns 1,000 sheep. A pastures them with B, who owns a ranch, for fifteen cents ($0.15) per head per month. The receipts which B receives are exempt from the gross receipts tax.

(2) Example 2: V, a veterinarian, maintains facilities for boarding animals. V boards cats and dogs that are under veterinary care. V's receipts from these services are not exempt under Section 7-9-19 NMSA 1978 because the cats and dogs are not livestock.

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96, 4/30/99; 3.2.107.8 NMAC - Rn, 3 NMAC 2.19.8 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.109 NMAC, Section 11 effective 12/30/2010.

3.2.109.11 **MANUFACTURED HOMES**: Receipts from selling manufactured homes are subject to the gross receipts tax. [~~A manufactured home is a house trailer which exceeds either a width of eight feet or a length of forty feet when equipped for the road.~~] Manufactured homes are exempted from the motor vehicle excise tax by Section 7-14-3 NMSA 1978.

[7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.109.11 NMAC - Rn, 3 NMAC 2.22.1.11, 3/14/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.113 NMAC, Section 9 effective 12/30/2010.

3.2.113.9 **PAWNBROKERS**: Receipts of a [~~corporation engaged in pawnbroking~~] person from engaging in pawn transactions, as that term is defined in Section 56-12-2 NMSA 1978, which are received as interest upon money loaned are exempt from the gross receipts tax pursuant to Section 7-9-25 NMSA 1978.

[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.113.9 NMAC - Rn, 3 NMAC 2.25.9 & A, 5/15/01; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.114 NMAC, Section 8 effective 12/30/2010.

3.2.114.8 **REFUND OF TAX**: When a refund of tax imposed by Sections 7-13-3 and [~~7-16A-2.~~1] 7-16A-3 NMSA 1978 is given the purchaser under Sections 7-13-17 or 7-16A-13.1 NMSA 1978, the compensating tax will be deducted from such refund and no gross receipts tax will be charged at the time of sale of the product. The reasonable value of gasoline or special fuel for compensating tax purposes will be the price paid for the fuel, including any applicable excise taxes whether separately stated or included in the price. This version of [~~Section~~] 3.2.114.8 NMAC applies to transactions on or after July 1, 1998.

[12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.114.8 NMAC - Rn, 3 NMAC 2.26.8 & A, 10/31/00; A, 10/15/02; A, 12/30/10]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.3.12 NMAC, Section 14 effective 12/30/2010.

3.3.12.14 [ ~~**COMPOSITE RETURNS FOR OWNERS OF PASS-THROUGH ENTITIES**~~

~~A. For the purposes of 3.3.12.14 NMAC:~~

~~(1) "authorized representative" means any of the qualifying owners, the entity the qualified owner is an owner of or the entity's or the qualifying owners' contractor or agent authorized to file composite returns for the qualified owners;~~

~~(2) "entity" means a partnership which has not elected to be taxed for federal income tax purposes as a corporation, a limited liability company which is not taxed as a corporation for federal income tax purposes or an S corporation;~~

~~(3) "owner" means an individual who is a partner in a partnership which has not elected to be taxed for federal income tax purposes as a corporation, a shareholder in an S corporation or a member of a limited liability company which is not taxed as a corporation for federal income tax purposes; and~~

~~(4) "qualifying owner" means an owner who is a not a resident of New Mexico and who has no income from New Mexico sources (including spouse's income on a joint return) other than the owner's share of the entity's income from New Mexico or the owner's share of income from New Mexico of other entities, the income from which is reported on composite returns.~~

~~B. Qualifying owners of a qualifying entity may elect to have the entity file a composite income tax return on behalf of certain individual owners with prior approval of the department on a form prescribed by the secretary. The filing of a composite return by the entity is in lieu of the filing of individual personal income tax returns by each owner included in the return and if properly completed the filing of the composite return shall fulfill the filing requirement for each owner qualified to be included in, and included in, the return.~~

~~C. An entity may file a composite return on behalf of its qualified owners if the following conditions are met:~~

~~(1) the entity assumes responsibility for payment of any liability of each qualified owner included in the composite return for income tax due to New Mexico for the taxable year for which the return is filed.~~

~~(2) all qualified owners included in the composite return report, for federal income tax purposes, on the same fiscal~~

~~year basis as the fiscal year for which the composite return is being reported.~~

~~D. The entity shall exclude from the composite filing any owner who is a resident of New Mexico or who is a nonresident of New Mexico having income from other sources within New Mexico, including any income of a spouse.~~

~~E. Corporations shall always be excluded from composite returns filed by any entity. Corporations which are partners in a partnership or members of a limited liability company which partnership or company derives income from New Mexico sources must file, in accordance with the Corporate Income and Franchise Tax Act, a New Mexico corporate income and franchise tax return and must include all sources of income, including income from the partnership or limited liability company, in that return.~~

~~(1) A partnership which has elected to report for federal income tax purposes as a corporation may not file composite returns. Each partner of such a partnership shall file separate individual or corporate income tax returns for New Mexico.~~

~~(2) A limited liability company which is taxed as a corporation for federal income tax purposes may not file composite returns. Each member of such a company shall file separate individual or corporate income tax returns for New Mexico.~~

~~F. The following requirements must be met for an authorized representative to file a composite return on behalf of qualifying owners of an entity:~~

~~(1) All qualifying owners included in the composite return must authorize in writing the authorized representative to file the New Mexico income tax return on their behalf.~~

~~(2) No qualifying owner may be included in a composite return if that owner files an individual New Mexico income tax return for the same taxable year for which the composite return is filed. A qualifying owner may be included in more than one composite return if the qualifying owner has income from more than one entity and does not file an individual New Mexico income tax return for that same year.~~

~~(3) The composite return must be accompanied by the following information for each owner of the entity, whether included or excluded from the composite return:~~

~~(a) the name of each owner;~~

~~(b) the owner's address;~~

~~(c) the owner's social security number;~~

~~(d) the income distributed to the owner;~~

~~(e) the owner's percentage of ownership in the entity; and~~

~~(f) a statement of whether the owner is included or excluded from the composite return.~~

~~(4) The composite return shall be filed under the name of the entity and shall not be filed under the name of any individual owner.~~

~~(5) The entity shall allocate and apportion to New Mexico the income of each owner included in the composite return in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act and the regulations and instructions of the department under the Income Tax Act and under the Uniform Division of Income for Tax Purposes Act. The sum of the income allocable to New Mexico plus the income apportionable to New Mexico shall be divided by the entity's total income. The result, carried to four places in decimal form, will be referred to hereinafter as the "New Mexico ratio".~~

~~(6) With respect to taxable years beginning on or after January 1, 1998, to determine the amount due for an owner included in the composite return, apply a rate equal to the maximum bracket rate set by Section 7-2-7 NMSA 1978 to the distribution of entity income to the owner without allowance for exemptions, deductions or rebates of any kind other than the deduction for interest from investments in obligations of New Mexico, the United States or other jurisdictions which states are prohibited from taxing by the laws of the United States. The resulting tax shall be multiplied by the New Mexico ratio. The amount due on the composite return shall be the aggregate amount due for all of the owners included on the return.~~

~~G. If it is determined that an individual owner who was previously included in one or more composite returns had income from sources in New Mexico other than that reported in the composite return or returns, that owner shall file an amended individual income tax return for each year in which the owner was included in a composite return and had income from sources in New Mexico other than that included in the composite return or returns. The individual owner shall receive credit against the tax due on the filing of the owner's amended individual income return for the owner's share of any income tax actually paid to this state with the composite return.~~

~~H. The filing of a composite income tax return does not relieve any owner included in the return from any liability for income tax due this state unless the tax due from the individual has actually been paid with the filing of the composite return.~~]

[RESERVED]

[8/30/95, 1/15/97, 12/15/98, 7/30/99; 3.3.12.14 NMAC - Rn & A, 3 NMAC 3.12.14, 12/14/00, A, 10/31/05; Repealed, 12/30/10]

# NEW MEXICO WATER QUALITY CONTROL COMMISSION

**This is an amendment to 20.6.4 NMAC Sections 7, 8 and 9, effective 01/14/2011.**

**20.6.4.7 DEFINITIONS:** Terms defined in the New Mexico Water Quality Act, but not defined in this part will have the meaning given in the Water Quality Act.

**A. Terms beginning with numerals or the letter "A," and abbreviations for units.**

**(1) "4T3 temperature"** means the temperature not to be exceeded for four or more consecutive hours in a 24-hour period on more than three consecutive days.

**(2) "6T3 temperature"** means the temperature not to be exceeded for six or more consecutive hours in a 24-hour period on more than three consecutive days.

**(3) Abbreviations** used to indicate units are defined as follows:

**(a) "cfu/100 mL"** means colony-forming units per 100 milliliters;

**(b) "cfs"** means cubic feet per second;

**(c) "µg/L"** means micrograms per liter, equivalent to parts per billion when the specific gravity of the solution equals 1.0;

**(d) "µS/cm"** means microsiemens per centimeter; one µS/cm is equal to one µmho/cm;

**(e) "mg/kg"** means milligrams per kilogram, equivalent to parts per million;

**(f) "mg/L"** means milligrams per liter, equivalent to parts per million when the specific gravity of the solution equals 1.0;

**(g) "NTU"** means nephelometric turbidity unit;

**(h) "pCi/L"** means picocuries per liter.

**(4) "Acute toxicity"** means toxicity involving a stimulus severe enough to induce a response in 96 hours of exposure or less. Acute toxicity is not always measured in terms of lethality, but may include other toxic effects that occur within a short time period.

**(5)** "**Adjusted gross alpha**" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample, including radium-226, but excluding radon-222 and uranium. Also excluded are source, special nuclear and by-product material as defined by the Atomic Energy Act of 1954.

**(6) "Aquatic life"** means any plant or animal life that uses surface water as primary habitat for at least a portion of its life cycle, but does not include avian or mammalian species.

**(7)** "**Attainable"** means achievable

by the imposition of effluent limits required under sections 301(b) and 306 of the Clean Water Act and implementation of cost-effective and reasonable best management practices for nonpoint source control.

**B. Terms beginning with the letter "B".**

**(1) "Best management practices" or "BMPs":**

**(a)** for national pollutant discharge elimination system (NPDES) permitting purposes means schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of "waters of the United States;" BMPs also include treatment requirements, operating procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal or drainage from raw material storage; or

**(b)** for nonpoint source pollution control purposes means methods, measures or practices selected by an agency to meet its nonpoint source control needs; BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures; BMPS can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters; BMPs for nonpoint source pollution control purposes shall not be mandatory except as required by state or federal law.

**(2) "Bioaccumulation"** refers to the uptake and retention of a substance by an organism from its surrounding medium and food.

**(3) "Bioaccumulation factor"** is the ratio of a substance's concentration in tissue versus its concentration in ambient water, in situations where the organism and the food chain are exposed.

**(4) "Biomonitoring"** means the use of living organisms to test the suitability of effluents for discharge into receiving waters or to test the quality of surface waters of the state.

**C. Terms beginning with the letter "C".**

**(1)** "**CAS number**" means an assigned number by chemical abstract service (CAS) to identify a substance. CAS numbers index information published in chemical abstracts by the American chemical society.

**(2) "Chronic toxicity"** means toxicity involving a stimulus that lingers or continues for a relatively long period relative to the life span of an organism. Chronic effects include, but are not limited to, lethality, growth impairment, behavioral modifications, disease and reduced reproduction.

**(3) "Classified water of the state"** means a surface water of the state, or reach of a surface water of the state, for which the commission has adopted a segment description and has designated a use or uses and applicable water quality criteria in 20.6.4.101 through 20.6.4.899 NMAC.

**(4) "Coldwater"** in reference to an aquatic life use means a surface water of the state where the water temperature and other characteristics are suitable for the support or propagation or both of coldwater aquatic life.

**(5) "Coolwater"** in reference to an aquatic life use means the water temperature and other characteristics are suitable for the support or propagation of aquatic life whose physiological tolerances are intermediate between and may overlap those of warm and coldwater aquatic life.

**(6) "Commission"** means the New Mexico water quality control commission.

**(7) "Criteria"** are elements of state water quality standards, expressed as constituent concentrations, levels or narrative statements, representing a quality of water that supports a use. When criteria are met, water quality will protect the designated use.

**D. Terms beginning with the letter "D".**

**(1)** "**DDT and derivatives**" means 4,4'-DDT (CAS number 50293), 4,4'-DDE (CAS number 72559) and 4,4'-DDD (CAS number 72548).

**(2) "Department"** means the New Mexico environment department.

**(3) [~~"Designated management agency"~~** ~~means an agency as defined by 40 CFR Section 130.9(d).~~

~~**(4)]**~~ **"Designated use"** means a use specified in 20.6.4.97 through 20.6.4.899 NMAC for a surface water of the state whether or not it is being attained.

[~~**(5)**~~]**(4) "Dissolved"** refers to the fraction of a constituent of a water sample that passes through a 0.45-micrometer pore-size filter. The "dissolved" fraction is also termed "filterable residue."

[~~**(6)**~~]**(5) "Domestic water supply"** means a surface water of the state that could be used for drinking or culinary purposes after disinfection.

**E. Terms beginning with the letter "E".**

**(1) "E. coli"** means the bacteria Escherichia coli.

**(2) "Ephemeral"** when used to describe a surface water of the state means the water body contains water briefly only in direct response to precipitation; its bed is always above the water table of the adjacent region.

**(3) "Existing use"** means a use actually attained in a surface water of the state on or after November 28, 1975, whether or not it is a designated use.

**F. Terms beginning with the letter "F".**

**(1) "Fish culture"** means production of coldwater or warmwater fishes in a hatchery or rearing station.

**(2)** "**Fish early life stages**" means the egg and larval stages of development of fish ending when the fish has its full complement of fin rays and loses larval characteristics.

**G. Terms beginning with the letter "G". [RESERVED]**

**H. Terms beginning with the letter "H".**

**(1) "High quality coldwater"** in reference to an aquatic life use means a perennial surface water of the state in a minimally disturbed condition with considerable aesthetic value and superior coldwater aquatic life habitat. A surface water of the state to be so categorized must have water quality, stream bed characteristics and other attributes of habitat sufficient to protect and maintain a propagating coldwater aquatic life population.

**(2) "Human health-organism only"** means the health of humans who ingest fish or other aquatic organisms from waters that contain pollutants.

**I. Terms beginning with the letter "I".**

**(1) "Industrial water supply"** means the use or storage of water by a facility for process operations unless the water is supplied by a public water system. Industrial water supply does not include irrigation or other agricultural uses.

**(2) "Intermittent"** when used to describe a surface water of the state means the water body contains water for extended periods only at certain times of the year, such as when it receives seasonal flow from springs or melting snow.

**(3) "Interstate waters"** means all surface waters of the state that cross or form a part of the border between states.

**(4) "Intrastate waters"** means all surface waters of the state that are not interstate waters.

**(5) "Irrigation"** means application of water to land areas to supply the water needs of beneficial plants.

**J. Terms beginning with the letter "J". [RESERVED]**

**K. Terms beginning with the letter "K". [RESERVED]**

**L. Terms beginning with the letter "L".**

**(1) "LC-50"** means the concentration of a substance that is lethal to 50 percent of the test organisms within a defined time period. The length of the time period, which may vary from 24 hours to one week or more, depends on the test method selected to yield the information desired.

**(2)** "**Limited aquatic life**" as a designated use, means the surface water is capable of supporting only a limited community of aquatic life. This subcategory includes surface waters that support aquatic

species selectively adapted to take advantage of naturally occurring rapid environmental changes, ephemeral or intermittent water, high turbidity, fluctuating temperature, low dissolved oxygen content or unique chemical characteristics.

**(3) "Livestock watering"** means the use of a surface water of the state as a supply of water for consumption by livestock.

**M. Terms beginning with the letter "M".**

**(1) "Marginal coldwater"** in reference to an aquatic life use means that natural intermittent or low flows, or other natural habitat conditions severely limit maintenance of a coldwater aquatic life population or historical data indicate that the temperature in the surface water of the state may exceed 25°C (77°F).

**(2) "Marginal warmwater"** in reference to an aquatic life use means natural intermittent or low flow or other natural habitat conditions severely limit the ability of the surface water of the state to sustain a natural aquatic life population on a continuous annual basis; or historical data indicate that natural water temperature routinely exceeds 32.2°C (90°F).

**(3) "Maximum temperature"** means the instantaneous temperature not to be exceeded at any time.

**(4) "Minimum quantification level"** means the minimum quantification level for a constituent determined by official published documents of the United States environmental protection agency.

**N. Terms beginning with the letter "N".**

**(1) "Natural background"** means that portion of a pollutant load in a surface water resulting only from non-anthropogenic sources. Natural background does not include impacts resulting from historic or existing human activities.

**(2) "Natural causes"** means those causal agents that would affect water quality and the effect is not caused by human activity but is due to naturally occurring conditions.

**(3) "Nonpoint source"** means any source of pollutants not regulated as a point source that degrades the quality or adversely affects the biological, chemical or physical integrity of surface waters of the state.

**O. Terms beginning with the letter "O".**

**(1)** "**Organoleptic**" means the capability to produce a detectable sensory stimulus such as odor or taste.

**(2) "Oversight agency"** means a state or federal agency, such as the United States department of agriculture forest service, that is responsible for land use or water quality management decisions affecting nonpoint source discharges where an outstanding national resource water is located.

**P. Terms beginning with the letter "P".**

**(1)** "**Playa**" means a shallow closed basin lake typically found in the high plains and deserts.

**(2) "Perennial"** when used to describe a surface water of the state means the water body typically contains water throughout the year and rarely experiences dry periods.

**(3) "Point source"** means any discernible, confined and discrete conveyance from which pollutants are or may be discharged into a surface water of the state, but does not include return flows from irrigated agriculture.

**(4)** "**Practicable**" means that which may be done, practiced or accomplished; that which is performable, feasible, possible.

**(5) "Primary contact"** means any recreational or other water use in which there is prolonged and intimate human contact with the water, such as swimming and water skiing, involving considerable risk of ingesting water in quantities sufficient to pose a significant health hazard. Primary contact also means any use of surface waters of the state for cultural, religious or ceremonial purposes in which there is intimate human contact with the water, including but not limited to ingestion or immersion, that could pose a significant health hazard.

**(6) "Public water supply"** means the use or storage of water to supply a public water system as defined by New Mexico's Drinking Water Regulations, 20.7.10 NMAC. Water provided by a public water system may need to undergo treatment to achieve drinking water quality.

**Q. Terms beginning with the letter "Q". [RESERVED]**

**R. Terms beginning with the letter "R". [RESERVED]**

**S. Terms beginning with the letter "S".**

**(1) "Secondary contact"** means any recreational or other water use in which human contact with the water may occur and in which the probability of ingesting appreciable quantities of water is minimal, such as fishing, wading, commercial and recreational boating and any limited seasonal contact.

**(2) "Segment"** means a classified water of the state described in 20.6.4.101 through 20.6.4.899 NMAC. The water within a segment should have the same uses, similar hydrologic characteristics or flow regimes, and natural physical, chemical and biological characteristics and exhibit similar reactions to external stresses, such as the discharge of pollutants.

**(3)** "**Specific conductance**" is a measure of the ability of a water solution to conduct an electrical current.

**(4) "State"** means the state of New Mexico.

**(5) "Surface water(s) of the state"** means all surface waters situated wholly or partly within or bordering upon the state, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, reservoirs or natural ponds. Surface waters of the state also means all tributaries of such waters, including adjacent wetlands, any manmade bodies of water that were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state, and any "waters of the United States" as defined under the Clean Water Act that are not included in the preceding description. Surface waters of the state does not include private waters that do not combine with other surface or subsurface water or any water under tribal regulatory jurisdiction pursuant to Section 518 of the Clean Water Act. Waste treatment systems, including treatment ponds or lagoons designed and actively used to meet requirements of the Clean Water Act (other than cooling ponds as defined in 40 CFR Part 423.11(m) that also meet the criteria of this definition), are not surface waters of the state, unless they were originally created in surface waters of the state or resulted in the impoundment of surface waters of the state.

**T. Terms beginning with the letter "T".**

**(1) "TDS"** means total dissolved solids, also termed "total filterable residue."

**(2) "Toxic pollutant"** means those pollutants, or combination of pollutants, including disease-causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring.

**(3)** "**Tributary**" means a perennial, intermittent or ephemeral waterbody that flows into a larger waterbody, and includes a tributary of a tributary.

**(4) "Turbidity"** is an expression of the optical property in water that causes incident light to be scattered or absorbed rather than transmitted in straight lines.

**U. Terms beginning with the letter "U". [RESERVED]**

**V. Terms beginning with the letter "V". [RESERVED]**

**W. Terms beginning with the letter "W".**

**(1) "Warmwater"** with reference to an aquatic life use means that water temperature and other characteristics are suitable for the support or propagation or both of warmwater aquatic life.

**(2) "Water contaminant"** means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, but may include all other radioactive materials, including but not limited to radium and accelerator-produced isotopes.

**(3) "Water pollutant"** means a water contaminant in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property.

**(4) "Wetlands"** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions in New Mexico. Wetlands that are constructed outside of a surface water of the state for the purpose of providing wastewater treatment and that do not impound a surface water of the state are not included in this definition.

**(5) "Wildlife habitat"** means a surface water of the state used by plants and animals not considered as pathogens, vectors for pathogens or intermediate hosts for pathogens for humans or domesticated livestock and plants.

**X. Terms beginning with the letters "X" through "Z". [RESERVED]**

[20.6.4.7 NMAC - Rp 20 NMAC 6.1.1007, 10-12-00; A, 7-19-01; A, 05-23-05; A, 07-17-05; A, 08-01-07; A, 12-01-10; A, 01-14-11]

**20.6.4.8 ANTIDEGRADATION POLICY AND IMPLEMENTATION PLAN:**

**A. Antidegradation Policy**: This antidegradation policy applies to all surface waters of the state.

**(1)** Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected in all surface waters of the state.

**(2)** Where the quality of a surface water of the state exceeds levels necessary to support the propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected unless the commission finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state's continuing planning process, that allowing lower water quality is necessary to accommodate important economic and social development in the area in which the water is located. In allowing such degradation or lower water quality, the state shall assure water quality adequate to protect existing uses fully. Further, the state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable BMPs for nonpoint source control. Additionally, the state shall encourage the use of watershed planning as a further means to protect surface waters of the state.

**(3)** No degradation shall be allowed in waters designated by the commission as outstanding national resource waters (ONRWs), except as provided in Subparagraphs (a) through (e) of this paragraph and in Paragraph (4) of this Subsection A.

**(a)** [~~Temporary and short-term degradation of water quality shall be allowed only when such degradation can be shown to result in restoration or maintenance of the chemical, physical or biological integrity of the ONRW and is consistent with the objectives in 20.6.4.6 NMAC and with the purposes for which the commission designated the ONRW.~~] After providing a minimum 30-day public review and comment period, the commission determines that allowing temporary and short-term degradation of water quality is necessary to accommodate public health or safety activities in the area in which the ONRW is located. Examples of public health or safety activities include but are not limited to replacement or repair of a water or sewer pipeline or a roadway bridge. In making its decision, the commission shall consider whether the activity will interfere with activities implemented to restore or maintain the chemical, physical or biological integrity of the water. In approving the activity, the commission shall require that:

**(i)** the degradation shall be limited to the shortest possible time and shall not exceed six months;

**(ii)** the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate; all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

**(iii)** the degradation shall not result in water quality lower than necessary to protect any existing use in the ONRW; and

**(iv)** the degradation shall not alter the essential character or special use that makes the water an ORNW.

**(b)** [~~Temporary and short-term degradation of water quality that complies with Subparagraph (a) of this paragraph shall be limited to the shortest possible time and last no longer than 12 months, unless approved by the commission.~~] Prior to the commission making a determination, the department or appropriate oversight agency shall provide a written recommendation to the commission. If the commission approves the activity, the department or appropriate oversight agency shall oversee implementation of the activity.

**(c)** [~~Temporary and short-term degradation shall only be approved on a case-by-case basis by the commission, the department or a designated management agency as appropriate. Temporary and short-term degradation resulting from applications under 20.6.4.16 NMAC shall be considered and may be approved by the commission. All other temporary and short-term degradation shall be considered and may be approved by the department or by a designated management agency pursuant to a commission-approved memorandum of agreement between the department and the designated management agency. In approving temporary and short-term degradation, the commission, the department or the designated management agency shall consider and minimize the frequency and cumulative effects of such degradation. The approval of temporary and short-term degradation shall not result in permanent degradation of water quality in the ONRW or in water quality lower than necessary to protect existing uses in the ONRW and shall not alter the essential character or special use that makes the water an ONRW.~~] Where an emergency response action that may result in temporary and short-term degradation to an ONRW is necessary to mitigate an immediate threat to public health or safety, the emergency response action may proceed prior to providing notification required by Subparagraph (a) of this paragraph in accordance with the following:

**(i)** only actions that mitigate an immediate threat to public health or safety may be undertaken pursuant to this provision; non-emergency portions of the action shall comply with the requirements of Subparagraph (a) of this paragraph;

**(ii)** the discharger shall make best efforts to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph;

**(iii)** the discharger shall notify the department of the emergency response action in writing within seven days of initiation of the action;

**(iv)** within 30 days of initiation of the emergency response action, the discharger shall provide a summary of the action taken, including all actions taken to comply with requirements (i) through (iv) of Subparagraph (a) of this paragraph.

**(d)** [~~In implementing activities that may result in temporary and short-term degradation of water quality, all practical means of minimizing such temporary and short-term degradation shall be utilized.~~

**(e)** ]Preexisting land-use activities,

including grazing, allowed by federal or state law prior to designation as an ONRW, and controlled by best management practices (BMPs), shall be allowed to continue so long as there are no new or increased discharges resulting from the activity after designation of the ONRW.

**(e)** Acequia operation, maintenance, and repairs are not subject to new requirements because of ONRW designation. However, the use of BMPs to minimize or eliminate the introduction of pollutants into receiving waters is strongly encouraged.

**(4)** This antidegradation policy does not prohibit activities that may result in degradation in surface waters of the state when such activities will result in restoration or maintenance of the chemical, physical or biological integrity of the water.

**(a)** For ONRWs, the department or appropriate oversight agency shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

**(i)** the degradation shall be limited to the shortest possible time;

**(ii)** the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized;

**(iii)** the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water; and

**(iv)** the degradation shall not alter the essential character or special use that makes the water an ORNW.

**(b)** For surface waters of the state other than ONRWs, the department shall review on a case-by-case basis discharges that may result in degradation from restoration or maintenance activities, and may approve such activities in accordance with the following:

**(i)** the degradation shall be limited to the shortest possible time;

**(ii)** the degradation shall be minimized and controlled by best management practices or in accordance with permit requirements as appropriate, and all practical means of minimizing the duration, magnitude, frequency and cumulative effects of such degradation shall be utilized; and

**(iii)** the degradation shall not result in water quality lower than necessary to protect any existing use of the surface water.

[~~(4)~~]**(5)** In those cases where potential water quality impairment associated with a thermal discharge is involved, this antidegradation policy and implementing method shall be consistent with Section 316 of the federal Clean Water Act.

[~~(5)~~]**(6)** In implementing this section, the commission through the appropriate regional offices of the United States environmental protection agency will keep the administrator advised and provided with such information concerning the surface waters of the state as he or she will need to discharge his or her responsibilities under the federal Clean Water Act.

**B. Implementation Plan**: The department, acting under authority delegated by the commission, implements the water quality standards, including the antidegradation policy, by describing specific methods and procedures in the continuing planning process and by establishing and maintaining controls on the discharge of pollutants to surface waters of the state. The steps summarized in the following paragraphs, which may not all be applicable in every water pollution control action, list the implementation activities of the department. These implementation activities are supplemented by detailed antidegradation review procedures developed under the state's continuing planning process. The department:

**(1)** obtains information pertinent to the impact of the effluent on the receiving water and advises the prospective discharger of requirements for obtaining a permit to discharge;

**(2)** reviews the adequacy of existing data and conducts a water quality survey of the receiving water in accordance with an annually reviewed, ranked priority list of surface waters of the state requiring total maximum daily loads pursuant to Section 303(d) of the federal Clean Water Act;

**(3)** assesses the probable impact of the effluent on the receiving water relative to its attainable or designated uses and numeric and narrative criteria;

**(4)** requires the highest and best degree of wastewater treatment practicable and commensurate with protecting and maintaining the designated uses and existing water quality of surface waters of the state;

**(5)** develops water quality based effluent limitations and comments on technology based effluent limitations, as appropriate, for inclusion in any federal permit issued to a discharger pursuant to Section 402 of the federal Clean Water Act;

**(6)** requires that these effluent limitations be included in any such permit as a condition for state certification pursuant to Section 401 of the federal Clean Water Act;

**(7)** coordinates its water pollution control activities with other constituent agencies of the commission, and with local, state and federal agencies, as appropriate;

**(8)** develops and pursues inspection and enforcement programs to ensure that dischargers comply with state regulations and standards, and complements EPA's enforcement of federal permits;

**(9)** ensures that the provisions for public participation required by the New Mexico Water Quality Act and the federal Clean Water Act are followed;

**(10)** provides continuing technical training for wastewater treatment facility operators through the utility operators training and certification programs;

**(11)** provides funds to assist the construction of publicly owned wastewater treatment facilities through the wastewater construction program authorized by Section 601 of the federal Clean Water Act, and through funds appropriated by the New Mexico legislature;

**(12)** conducts water quality surveillance of the surface waters of the state to assess the effectiveness of water pollution controls, determines whether water quality standards are being attained, and proposes amendments to improve water quality standards;

**(13)** encourages, in conjunction with other state agencies, implementation of the best management practices set forth in the New Mexico statewide water quality management plan and the nonpoint source management program, such implementation shall not be mandatory except as provided by federal or state law;

**(14)** evaluates the effectiveness of BMPs selected to prevent, reduce or abate sources of water pollutants;

**(15)** develops procedures for assessing use attainment as required by 20.6.4.15 NMAC and establishing site-specific standards; and

(**16)** develops list of surface waters of the state not attaining designated uses, pursuant to Sections 305(b) and 303(d) of the federal Clean Water Act.

[20.6.4.8 NMAC - Rp 20 NMAC 6.1.1101, 10-12-00; A, 05-23-05; A, 08-01-07; A, 01-14-11]

**20.6.4.9 OUTSTANDING NATIONAL RESOURCE WATERS:**

**A. Procedures for nominating an ONRW**: Any person may nominate a surface water of the state for designation as an ONRW by filing a petition with the commission pursuant to the guidelines for water quality control commission regulation hearings. A petition to designate a surface water of the state as an ONRW shall include:

**(1)** a map of the surface water of the state, including the location and proposed upstream and downstream boundaries;

**(2)** a written statement and evidence based on scientific principles in support of the nomination, including specific reference to one or more of the applicable ONRW criteria listed in Subsection B of this

section;

**(3)** water quality data including chemical, physical or biological parameters, if available, to establish a baseline condition for the proposed ONRW;

**(4)** a discussion of activities that might contribute to the reduction of water quality in the proposed ONRW;

**(5)** any additional evidence to substantiate such a designation, including a discussion of the economic impact of the designation on the local and regional economy within the state of New Mexico and the benefit to the state; and

**(6)** affidavit of publication of notice of the petition in a newspaper of general circulation in the affected counties and in a newspaper of general statewide circulation.

**B. Criteria for ONRWs:** A surface water of the state, or a portion of a surface water of the state, may be designated as an ONRW where the commission determines that the designation is beneficial to the state of New Mexico, and:

**(1)** the water is a significant attribute of a state special trout water, national or state park, national or state monument, national or state wildlife refuge or designated wilderness area, or is part of a designated wild river under the federal Wild and Scenic Rivers Act; or

**(2)** the water has exceptional recreational or ecological significance; or

**(3)** the existing water quality is equal to or better than the numeric criteria for protection of aquatic life and contact uses and the human health-organism only criteria, and the water has not been significantly modified by human activities in a manner that substantially detracts from its value as a natural resource.

**C.** Pursuant to a petition filed under Subsection A of this section, the commission may classify a surface water of the state or a portion of a surface water of the state as an ONRW if the criteria set out in Subsection B of this section are met.

**D. Waters classified as ONRWs:** The following waters are classified as ONRWs:

**(1)** Rio Santa Barbara, including the west, middle and east forks from their headwaters downstream to the boundary of the Pecos Wilderness; and

**(2)** the waters within the United States forest service Valle Vidal special management unit including:

**(a)** Rio Costilla, including Comanche, La Cueva, Fernandez, Chuckwagon, Little Costilla, Powderhouse, Holman, Gold, Grassy, LaBelle and Vidal creeks, from their headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit;

**(b)** Middle Ponil creek, including the waters of Greenwood Canyon, from their headwaters downstream to the boundary of the Elliott S. Barker wildlife management area;

**(c)** Shuree lakes;

**(d)** North Ponil creek, including McCrystal and Seally Canyon creeks, from their headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit; and

**(e)** Leandro creek from its headwaters downstream to the boundary of the United States forest service Valle Vidal special management unit.

**(3)** the named perennial surface waters of the state, identified in Subparagraph (a) below, located within United States department of agriculture forest service wilderness. Wilderness are those lands designated by the United States congress as wilderness pursuant to the Wilderness Act. Wilderness areas included in this designation are the Aldo Leopold wilderness, Apache Kid wilderness, Blue Range wilderness, Chama River Canyon wilderness, Cruces Basin wilderness, Dome wilderness, Gila wilderness, Latir Peak wilderness, Pecos wilderness, San Pedro Parks wilderness, Wheeler Peak wilderness, and White Mountain wilderness.

**(a)** The following waters are designated in the Rio Grande basin:

**(i)** in the Aldo Leopold wilderness: Byers Run, Circle Seven creek, Flower canyon, Holden Prong, Indian canyon, Las Animas creek, Mud Spring canyon, North Fork Palomas creek, North Seco creek, Pretty canyon, Sids Prong, South Animas canyon, Victorio Park canyon, Water canyon;

**(ii)** in the Apache Kid wilderness Indian creek and Smith canyon;

**(iii)** in the Chama River Canyon wilderness: Chavez canyon, Ojitos canyon, Rio Chama;

**(iv)** in the Cruces Basin wilderness: Beaver creek, Cruces creek, Diablo creek, Escondido creek, Lobo creek, Osha creek;

**(v)** in the Dome wilderness: Capulin creek, Medio creek, Sanchez canyon/creek;

**(vi)** in the Latir Peak wilderness: Bull creek, Bull Creek lake, Heart lake, Lagunitas Fork, Lake Fork creek, Rito del Medio, Rito Primero, West Latir creek;

**(vii)** in the Pecos wilderness: Agua Sarca, Hidden lake, Horseshoe lake (Alamitos), Jose Vigil lake, Nambe lake, Nat lake IV, No Fish lake, North Fork Rio Quemado, Rinconada, Rio Capulin, Rio de las Trampas (Trampas creek), Rio de Truchas, Rio Frijoles, Rio Medio, Rio Molino, Rio Nambe, Rio San Leonardo, Rito con Agua, Rito Gallina, Rito Jaroso, Rito Quemado, San Leonardo lake, Santa Fe lake, Santa Fe river, Serpent lake, South Fork Rio Quemado, Trampas lake (East), Trampas lake (West);

**(viii)** in the San Pedro Parks wilderness: Agua Sarca, Cañon Madera, Cave creek, Cecilia Canyon creek, Clear creek (North SPP), Clear creek (South SPP), Corralitos creek, Dove creek, Jose Miguel creek, La Jara creek, Oso creek, Rio Capulin, Rio de las Vacas, Rio Gallina, Rio Puerco de Chama, Rito Anastacio East, Rito Anastacio West, Rito de las Palomas, Rito de las Perchas, Rito de los Pinos, Rito de los Utes, Rito Leche, Rito Redondo, Rito Resumidero, San Gregorio lake;

**(ix)** in the Wheeler Peak wilderness: Black Copper canyon, East Fork Red river, Elk lake, Horseshoe lake, Lost lake, Sawmill creek, South Fork lake, South Fork Rio Hondo, Williams lake.

**(b)** The following waters are designated in the Pecos River basin:

**(i)** in the Pecos wilderness: Albright creek, Bear creek, Beatty creek, Beaver creek, Carpenter creek, Cascade canyon, Cave creek, El Porvenir creek, Hollinger creek, Holy Ghost creek, Horsethief creek, Jack's creek, Jarosa canyon/creek, Johnson lake, Lake Katherine, Lost Bear lake, Noisy brook, Panchuela creek, Pecos Baldy lake, Pecos river, Rio Mora, Rio Valdez, Rito Azul, Rito de los Chimayosos, Rito de los Esteros, Rito del Oso, Rito del Padre, Rito las Trampas, Rito Maestas, Rito Oscuro, Rito Perro, Rito Sebadilloses, South Fork Bear creek, South Fork Rito Azul, Spirit lake, Stewart lake, Truchas lake (North), Truchas lake (South), Winsor creek;

**(ii)** in the White Mountain wilderness: Argentina creek, Aspen creek, Bonito creek, Little Bonito creek, Mills canyon/creek, Rodamaker creek, South Fork Rio Bonito, Turkey canyon/creek.

**(c)** The following waters are designated in the Gila River basin:

**(i)** in the Aldo Leopold wilderness: Aspen canyon, Black Canyon creek, Bonner canyon, Burnt canyon, Diamond creek, Falls canyon, Fisherman canyon, Running Water canyon, South Diamond creek;

**(ii)** in the Gila wilderness: Apache creek, Black Canyon creek, Brush canyon, Canyon creek, Chicken Coop canyon, Clear creek, Cooper canyon, Cow creek, Cub creek, Diamond creek, East Fork Gila river, Gila river, Gilita creek, Indian creek, Iron creek, Langstroth canyon, Lilley canyon, Little creek, Little Turkey creek, Lookout canyon, McKenna creek, Middle Fork Gila river, Miller Spring canyon, Mogollon creek, Panther canyon, Prior creek, Rain creek, Raw Meat creek, Rocky canyon, Sacaton creek, Sapillo creek, Sheep Corral canyon, Skeleton canyon, Squaw creek, Sycamore canyon, Trail

canyon, Trail creek, Trout creek, Turkey creek, Turkey Feather creek, Turnbo canyon, West Fork Gila river, West Fork Mogollon creek, White creek, Willow creek, Woodrow canyon.

**(d)** The following waters are designated in the Canadian River basin: in the Pecos wilderness Daily creek, Johns canyon, Middle Fork Lake of Rio de la Casa, Middle Fork Rio de la Casa, North Fork Lake of Rio de la Casa, Rito de Gascon, Rito San Jose, Sapello river, South Fork Rio de la Casa, Sparks creek (Manuelitas creek).

**(e)** The following waters are designated in the San Francisco River basin:

**(i)** in the Blue Range wilderness: Pueblo creek;

**(ii)** in the Gila wilderness: Big Dry creek, Lipsey canyon, Little Dry creek, Little Whitewater creek, South Fork Whitewater creek, Spider creek, Spruce creek, Whitewater creek.

**(f)** The following waters are designated in the Mimbres Closed basin: in the Aldo Leopold wilderness Corral canyon, Mimbres river, North Fork Mimbres river, South Fork Mimbres river.

**(g)** The following waters are designated in the Tularosa Closed basin: in the White Mountain wilderness Indian creek, Nogal Arroyo, Three Rivers.

**(h)** The wetlands designated are identified on the *maps and list of wetlands within United States forest service wilderness areas designated as outstanding national resource waters* published at the New Mexico state library and available on the department's website.

[20.6.4.9 NMAC - Rn, Subsections B, C and D of 20.6.4.8 NMAC, 05-23-05; A, 05-23-05; A, 07-17-05; A, 02-16-06; A, 12-01-10; A, 01-14-11]

## NEW MEXICO WATER QUALITY CONTROL COMMISSION

This is an amendment to 20.7.4 NMAC Sections 13 and 14, effective 1/15/2011. Section 20.7.4.13(C) is amended to change the criteria for determining the certification level required for municipal wastewater laboratory technicians. Section 20.7.4.14 is amended to provide that a wastewater operator, level 2 (WW2) certification includes wastewater laboratory tech I certification; and that wastewater operator, levels 3 and 4 (WW3 and WW4) certifications include wastewater laboratory tech II certification.

**20.7.4.13 PUBLIC WASTEWATER FACILITIES:**

A. In order to operate the various types of treatment processes at public wastewater facilities, the indicated level of certification shall be required:

| Type of Treatment Process | Population Served | | | | |
|---|---|---|---|---|---|
| | 25 to 500 | 501 to 5,000 | 5,001 to 10,000 | 10,001 to 20,000 | 20,000+ |
| Raw wastewater lagoons | SWW | WW1 | WW1 | WW1 | WW1 |
| Aerated lagoons | SWW | WW2 | WW2 | WW2 | WW2 |
| Primary treatment | SWW | WW2 | WW2 | WW2 | WW2 |
| Primary treatment and oxidation ponds | SWW | WW2 | WW2 | WW2 | WW2 |
| Secondary treatment, trickling filter | SWW | WW2 | WW3 | WW3 | WW4 |
| Secondary treatment, aeration | SWWA | WW3 | WW3 | WW4 | WW4 |
| Physical-chemical treatment processes | SWWA | WW3 | WW3 | WW3 | WW4 |
| Advanced waste treatment process | SWWA | WW3 | WW4 | WW4 | WW4 |
| Phosphorous and nitrogen removal | SWWA | WW3 | WW3 | WW4 | WW4 |

B. In order to operate collection systems at the various sizes of public wastewater facilities, the indicated level of certification shall be required:

| Population Served | 25 to 500 | 501 to 5,000 | 5,001 to 10,000 | 10,001 to 20,000 | 20,000+ |
|---|---|---|---|---|---|
| Level of Certification | SWW | CS1 | CS1 | CS2 | CS2 |

C. In order to perform wastewater analysis for regulatory compliance at [~~the various sizes of~~] public wastewater facilities after January 1, [~~2008~~] 2011, the indicated level of certification shall be required:

| [~~Population Served~~] | [~~25 to 500~~] | [~~501 to 5,000~~] | [~~5,001 to 10,000~~] | [~~10,001 to 20,000~~] | [~~20,000+~~] |
|---|---|---|---|---|---|
| [~~Level of Certification~~] | [~~WWLT1~~] | [~~WWLT2~~] | [~~WWLT2~~] | [~~WWLT3~~] | [~~WWLT3~~] |

| Level of Certification Needed | Type of Methodology Performed |
|---|---|

| | |
|---|---|
| WWLT1 | Analyses involving colorimetry and commercially prepared reagents, including but not limited to Dissolved Oxygen (DO) and pH by probe, and commercially available test kits. |
| WWLT2 | WWLT1 plus analyses involving other specific ion electrodes, titration, gravimetry, microbiology, media and standards preparation, including but not limited to Biochemical Oxygen Demand (BOD), fecal coliform, E.coli, residuals (Total Suspended Solids (TSS), Total Volatile Solids (TVS), Volatile Suspended Solids (VSS), etc.), Total Residual Chlorine (TRC) by titration, and Dissolved Oxygen by the Winkler method. |
| WWLT3 | WWLT1 and WWLT2 plus analyses involving digestion, distillation, spectrophotometry, chromatography, reagents and standards preparation, live organisms, including but not limited to nitrogen (Nitrate ($NO_3$), Ammonium ($NH_4$), Total Kjeldahl Nitrogen (TKN)), trace metals, anions, and whole effluent toxicity. |
| SWW, SWWA, WW1, WW2, WW3, WW4, WWLT1, WWLT2 or WWLT3 | TRC by the N-diethyl-p-phenylene-diamine (DPD) method, pH, Temperature and DO by probe. |

[20.7.4.13 NMAC - Rp, 20 NMAC 7.4.113, 1-26-01; A, 11-15-06; A, 1-15-11]

**20.7.4.14 LESSER INCLUDED CERTIFICATIONS:**

A. An operator holding a SWA certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SW certification.

B. An operator holding a SWWA certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SWW certification.

C. An operator holding a WS1 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SW, WST1 and DS1 certification.

D. An operator holding a WS2 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SW, WS1, WST1, WST2, DS1 and DS2 certification.

E. An operator holding a WS3 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SW, SWA, WS1, WS2, WST1, WST2, DS1, DS2 and DS3 certification.

F. An operator holding a WS4 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SW, SWA, WS1, WS2, WS3, WST1, WST2, DS1, DS2 and DS3 certification.

G. An operator holding a WW1 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SWW and CS1certification.

H. An operator holding a WW2 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SWW, WW1, WWLT1, CS1 and CS2 certification.

I. An operator holding a WW3 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SWW, SWWA, WW1, WW2, WWLT2, CS1 and CS2 certification.

J. An operator holding a WW4 certification is certified to perform any activity or function or make any process control or system integrity decision which requires a SWW, SWWA, WW1, WW2, WW3, WWLT2, CS1 and CS2 certification.

[20.7.4.14 NMAC - N, 11-15-06; A, 1-15-11]

## NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

**Explanatory paragraph:** This is an amendment to 11.4.7 NMAC, Sections 7 through 9, effective 12-31-10. The amendment to Section 7, Subsection M of 11.4.7 updates the copyrighting information for the newest edition of the Current Procedural Terminology ("CPT") of the American Medical Association. The dates contained in Section 9 have been changed to allow the current rule to stay in place for another year.

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

**M.** "*Current procedural terminology* ("CPT")" means a systematic listing and coding of procedures and services performed by HCPs of the American medical association, adopted in the director's annual order. Each procedure or service is identified with a numeric or alphanumeric code (CPT code). This was developed and copyrighted by the American medical association. The five character codes included in the rules governing the healthcare provider fee schedule are obtained from current procedural terminology (CPT®), copyright [~~2008~~] 2009 by the American medical association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of the rules governing the healthcare provider fee schedule is with WCA and no endorsement by the AMA is intended or

should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in rules governing the healthcare provider fee schedule. Fee schedules, relative value units, conversion factors or related components are not assigned by the AMA, are not part of CPT, and AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of rules governing the healthcare provider fee schedule should refer to the most recent current procedural terminology which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DRARS apply. CPT is a registered trademark of the American medical association.

[4-1-91, 12-30-91, 12-31-91, 2-24-92, 10-30-92, 1-15-93, 3-18-94, 1-31-95, 8-1-96, 8-15-97, 10-01-98; 11.4.7.7 NMAC - Rn, 11 NMAC 4.7.7, 8-30-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 1-1-07; A, 12-31-07; A, 12-31-08; A, 12-31-09; A, 12-31-10]



**11.4.7.8 GENERAL PROVISIONS**

**A.** These rules apply to all charges and payments for medical, other health care treatment, and related non-clinical services covered by the New Mexico Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law.

**B.** These rules shall be interpreted to the greatest extent possible in a manner consistent with all other rules promulgated by the workers' compensation administration (WCA). In the event of an irreconcilable conflict between these rules and any other rules, the more specific set of rules shall control.

**C.** Nothing in these rules shall preclude the separate negotiation of fees between a practitioner and a payer within the healthcare provider fee schedule for any health care service as set forth in these rules.

**D.** These rules and the director's annual order adopting the healthcare provider fee schedule utilize the edition of the *current procedural terminology* referenced in the director's annual order, issued pursuant to Subparagraph (c) of Paragraph (1) of Subsection B, 11.4.7.9 NMAC. All references to specific CPT code provisions in these rules shall be modified to the extent required for consistency with the director's annual order.

**E.** A carrier who subcontracts the bill review services remains fully responsible for compliance with these rules.

**F.** Employers are responsible for timely good faith payment as defined in Subsection A of 11.4.7.11 NMAC for all reasonable and necessary health care services for work-related injuries and diseases.

**G.** Employers are required to inform a worker of the identity and source of their coverage for the injury or disablement.

**H.** The provision of services gives rise to an obligation of the employer to pay for those services. Accordingly, all services are controlled by the rules in effect on the date the services were provided.

**I.** Fees and payments for all physician professional services, regardless of where those services are provided, are reimbursed within the healthcare provider fee schedule.

**J.** Diagnostic coding shall be consistent with the *international classification of diseases, 9th edition, clinical modification* (ICD-9-CM) or *diagnostic and statistical manual of mental disorders* guidelines as appropriate.

**K. AUTHORIZATION FOR TREATMENT AND SERVICES**

**(1) Outpatient services**

**(a)** All requests for authorization of referrals and procedures shall be approved or denied by the insurer within three (3) business days.

**(b)** If, after three (3) business days, an authorization or denial is not received by the practitioner, the requested service or treatment will be deemed authorized.

**(c)** The practitioner shall document all attempts to obtain authorization from the date of the initial request.

**(d)** The three (3) business days shall not include weekends or holidays.

**(e)** Any dispute about payment for the treatment or service can be raised to the medical cost containment bureau chief as a reasonable and necessary dispute.

**(2) Inpatient services**

**(a)** All requests for authorization of referrals and procedures shall be approved or denied by the insurer within twenty-four (24) hours.

**(b)** If, after twenty-four (24) hours, an authorization or denial is not received by the practitioner, the requested service or treatment will be deemed authorized.

**(c)** The practitioner shall document all attempts to obtain authorization from the date of the initial request.

**(d)** Any dispute about payment for the treatment or service can be raised to the medical cost containment bureau chief as a reasonable and necessary dispute.

[12-31-91, 1-15-93, 10-28-93, 3-14-94, 12-2-94, 8-1-96, 8-15-97, 10-01-98; 11.4.7.8 NMAC - Rn & A, 11 NMAC 4.7.8, 8-07-02; A, 10-25-02; A, 1-14-04; A, 12-31-07; A, 12-31-09; A, 12-31-10]



**11.4.7.9 PROCEDURES FOR ESTABLISHING THE MAXIMUM AMOUNT OF REIMBURSEMENT DUE**

**A.** All hospitals shall be reimbursed at the hospital ratio itemized in the official WCA listing that becomes effective on[~~ December 31, 2009~~] December 31, 2010, for all services rendered from [~~December 31, 2009 to~~] December 31, 2010 to December 31, 2011, except as provided in Subsection B of this temporary rule. Any new hospital shall be assigned a ratio of 67%.

**C.** All hospitals shall provide to the WCA:

**(1)** the most recent full year filing of their HCFA/CMS 2552 G-2 worksheet prepared on behalf of the organization, by February 1,[~~2010~~] 2011;

**E.** Method of payment for FASCs:

**(1)** All FASCs will provide global billing by CPT code on a CMS-1500 and shall be paid by the assigned centers for medicare and medicaid services (CMS) ambulatory payment classification (APC) base payment rate times 1.3 effective for services from [~~December 31, 2009, to~~] December 31, 2010 to December 31, 2011. See [~~http://www.cms.hhs.gov/HospitalOutpatientPPS/AU~~], http://www.cms.gov/HospitalOutpatientPPS/AU under Addendum B, [~~October 2009~~] October 2010. No adjusted conversion factors or index values are to be applied. Payment will be made in accordance with the APC base payment rate assigned for that service in Addendum B dated [~~October 2009~~] October 2010. Absent an assigned APC base payment rate, services shall be paid BR.

**F.** Subsections A-E of 11.4.7.9 NMAC, inclusive, shall be repealed effective 11:59 P.M. [~~December 31, 2010~~] December 31, 2011, and shall be of no force or effect with respect to any services provided thereafter.

**(14)** Durable medical equipment (DME) shall be pre-authorized by the payer within 72 hours unless the worker is hospitalized at the time of the request. In the event the worker is hospitalized, authorization shall be granted or denied within 24 hours. Authorization will be presumed if the adjuster or claims manager does not respond to the request. Any dispute about payment for the treatment or service can be raised to the medical cost containment bureau chief as a reasonable and necessary dispute. However, reasonable and necessary prosthetic/orthotics training or adjusting is excluded from the cost of the DME and may be billed separately.

[01-24-91, 4-1-91, 12-30-91, 12-31-91,

1-18-92, 10-30-92, 1-15-93, 10-28-93, 2-23-94, 3-14-94, 12-2-94, 1-31-95, 8-1-96, 9-1-96, 8-15-97, 4-30-98, 10-01-98, 6-30-99; 11.4.7.9 NMAC - Rn & A, 11.4.7.9 NMAC, 8-07-02; A, 10-25-02; A, 1-14-04; A, 1-14-05; A, 12-30-05; A, 12-31-06; A, 1-1-07; A, 12-31-07; A, 12-31-08; A, 12-31-09; A, 12-31-10]



## End of Adopted Rules Section

# Other Material Related to Administrative Law

## NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION

**Director's Response to Public Comment**

The proposed changes to the WCA Healthcare Provider Fee Schedule and Part 7 of the WCA Rules were released for public comment on September 23, 2010. Public comment was accepted through October 28, 2010.

The WCA received one comment during the comment period regarding the amendment to Part 7 initiating time lines for authorization of treatment. The commentator asserted that timelines should be altered to recognize a distinction between palliative, emergent and life saving care. The rule will be implemented as proposed.

The changes to the fee schedule would represent an approximate increase of 1.6% (one point six percent) in total medical costs in workers' compensation. Prior to issuing a final fee schedule, the WCA Director followed the processes established by NMSA 1978, 52-4-5 by soliciting comments from the Medical Advisory Committee and at a public hearing. The fee schedule changes will be implemented as proposed.

The public record of this rulemaking shall incorporate this Response to Public Comment and the formal record of the rulemaking proceedings shall close upon execution of this document.

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Glenn R. Smith
Director
N.M. Workers' Compensation Administration
December 15, 2010

## End of Other Related Material Section

# Submittal Deadlines and Publication Dates
# 2011

| Volume XXII | Submittal Deadline | Publication Date |
|---|---|---|
| Issue Number 1 | January 4 | January 14 |
| Issue Number 2 | January 18 | January 31 |
| Issue Number 3 | February 1 | February 14 |
| Issue Number 4 | February 15 | February 28 |
| Issue Number 5 | March 1 | March 15 |
| Issue Number 6 | March 16 | March 31 |
| Issue Number 7 | April 1 | April 15 |
| Issue Number 8 | April 18 | April 29 |
| Issue Number 9 | May 2 | May 16 |
| Issue Number 10 | May 17 | May 31 |
| Issue Number 11 | June 1 | June 15 |
| Issue Number 12 | June 16 | June 30 |
| Issue Number 13 | July 1 | July 15 |
| Issue Number 14 | July 18 | July 29 |
| Issue Number 15 | August 1 | August 15 |
| Issue Number 16 | August 16 | August 31 |
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| Issue Number 19 | October 3 | October 17 |
| Issue Number 20 | October 18 | October 31 |
| Issue Number 21 | November 1 | November 15 |
| Issue Number 22 | November 16 | November 30 |
| Issue Number 23 | December 1 | December 15 |
| Issue Number 24 | December 16 | December 30 |