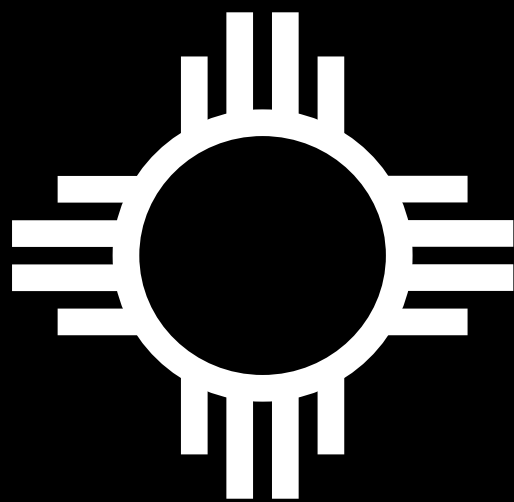


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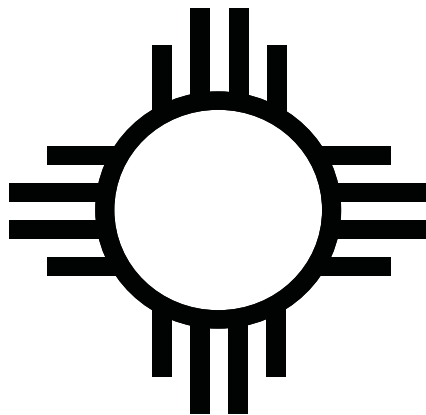


Volume XXIII  
Issue Number 4  
February 29, 2012



# **New Mexico Register**

**Volume XXIII, Issue Number 4  
February 29, 2012**



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

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Administrative Law Division  
Santa Fe, New Mexico  
2012

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# New Mexico Register

Volume XXIII, Number 4

February 29, 2012

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*A=Amended, E=Emergency, N=New, R=Repealed, Rn=Renumbered*

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## Notices of Rulemaking and Proposed Rules

### NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

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

The New Mexico Environmental Improvement Board ("Board") will hold a public hearing on May 7, 2012 at 9:00 am in Room 307 of the New Mexico State Capitol Bldg, 490 Old Santa Fe Trail, Santa Fe 87501. This hearing is a continuation of the hearing commenced on January 3, 2012. The purpose of the hearing is to consider the matter of EIB No. 11-18(R), revisions to the New Mexico Drinking Water Regulations.

The Safe Drinking Water Act section 300(g)(2)(a)(1) requires states with primary enforcement responsibility for public water systems to adopt regulations that are no less stringent than the national primary drinking water regulations. The proposed revision would update New Mexico's incorporation by reference of the National Primary Drinking Water Regulations, 40 CFR Part 141, so that future changes to those regulations will be automatically incorporated into New Mexico law.

The proposed revision would also add new sections as listed below:

20.7.10.8	DOCUMENTATION REQUIRED FOR POPULATION DETERMINATION
20.7.10.202	APPLICATION FOR WATER HAULING OPERATIONS
20.7.10.401	GENERAL OPERATING PROCEDURES FOR WATER HAULERS

In addition, revisions to the existing sections listed below are also proposed.

20.7.10.2	SCOPE
20.7.10.3	STATUTORY AUTHORITY
20.7.10.7	DEFINITIONS
20.7.10.100	ADOPTION OF CFR PART 141
20.7.10.101	ADOPTION OF CFR PART 143
20.7.10.102	GUIDANCE DOCUMENTS
20.7.10.200	PUBLIC WATER SYSTEM PROJECTS
20.7.10.201	APPLICATION FOR PUBLIC WATER SYSTEM APPROVAL
20.7.10.400	GENERAL OPERATING REQUIREMENTS
20.7.10.500	SAMPLING REQUIREMENTS
20.7.10.501	LABORATORIES
20.7.10.503	DEPARTMENT MONITORING AND SAMPLING
20.7.10.504	INSPECTIONS, INVESTIGATIONS AND SANITARY SURVEYS
20.7.10.505	REPORTING

Changes to other sections within 20.7.10 NMAC that are related to the changes in the above listed sections may also be proposed. The proponent of this regulatory revision is the New Mexico Environment Department ("NMED"). At <http://www.nmenv.state.nm.us/dwb/index.htm>, the proposed drinking water regulation revision may be downloaded using the "Laws & Regulations" or the "WHAT'S NEW" links. During regular business hours the proposed drinking water regulation revisions can be reviewed at the NMED Drinking Water Bureau office, 1052 Main Street NE, Los Lunas, New Mexico or by contacting Angela Faye Cross at (505) 841-5376 or [angelafaye.cross@state.nm.us](mailto:angelafaye.cross@state.nm.us).

The hearing will be conducted in accordance with 20.1.1 NMAC - Rulemaking Procedures - Environmental Improvement Board as amended on October 3, 2011; the Environmental Improvement Act, Section 74-1-9 NMSA 1978; and other applicable procedures. Copies of 20.1.1 NMAC as amended October 3, 2011 may be obtained from the Board Administrator at the address below.

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

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

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

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

Notices of intent for the hearing must be received in the Office of the Board not later than 5:00 pm on April 17, 2012, and should reference the docket number, EIB No. 11-18 (R), and the date of the hearing. Notices of intent to present technical testimony should be submitted to:

Carmella Casados, Board Administrator  
Office of the Environmental Improvement Board

Harold Runnels Building

1190 St. Francis Dr., Room N-2150 / 2153  
Santa Fe, NM 87502

Phone: (505) 827-2425, Fax (505) 827-2836

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

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

Persons having a disability and needing help in being a part of this hearing process should contact Connie Joseph by April 17, 2012 at the NMED, Human Resources Bureau, P.O. Drawer 5469, 1190 St. Francis Drive, Santa Fe, New Mexico, 87502, telephone 505-827-9769. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

The Board may make a decision on the proposed drinking water regulation revisions at the conclusion of the hearing, or the Board may convene a meeting after the hearing to consider action on the proposal.

## NEW MEXICO BOARD OF PHARMACY

### NEW MEXICO BOARD OF PHARMACY

#### REGULAR BOARD MEETING

#### NOTICE TO THE PUBLIC

The New Mexico Board of Pharmacy will convene on **April 12<sup>th</sup> & 13th, 2012** at 9:00 a.m. in the **Board of Pharmacy Conference Room located at 5200 Oakland Ave., NE, Albuquerque, NM** for the purpose of conducting a regular Board meeting.

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

Interested persons may contact Debra Wilhite, Administrative Secretary, 5200 Oakland Ave., NE, Suite A, Albuquerque, NM 87113, (505) 222-9830 or fax (505) 222-9845, e-mail [debra.wilhite@state.nm.us](mailto:debra.wilhite@state.nm.us) to receive copies of the agenda and any proposed rule, which will be available April 9, 2012. The Board may go into executive session at any time to discuss licensee and/or personnel matters. Anyone who needs special accommodations for the meeting should contact the Board office at (505) 222-9830 as soon as possible.

The agenda (tentative) will be available starting April 9, 2012 through the Board's website: [www.rld.state.nm.us/pharmacy](http://www.rld.state.nm.us/pharmacy).

The Board will address:

Rule Hearings:

**16.19.23 NMAC Parental  
Responsibility Act Compliance  
16.19.20 NMAC Controlled  
Substances**

Hearings, Board Orders and Surrenders:

**2011-035 Joshua Blevins  
(Smith) - Notice of Hearing**

Approval of Applications:

Other Board Matters:

Committee Reports:

Public Requests:

\*Executive Director's Report:  
Case presentations\*

Published in the New Mexico Register on February 29, 2012.

## NEW MEXICO PUBLIC REGULATION COMMISSION

### BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

Case No. 12-00034-IN

**IN THE MATTER OF ADOPTION OF PROPOSED AMENDMENTS TO THE INSURANCE DIVISION'S GRIEVANCE PROCEDURES RULE REGARDING INTERNAL CLAIMS AND APPEALS AND THE EXTERNAL REVIEW PROCESS.**

### NOTICE OF PROPOSED RULEMAKING

**NOTICE IS HEREBY GIVEN** that the Superintendent of the Insurance Division of the New Mexico Public Regulation Commission (Superintendent) proposes to amend its existing grievance procedures, regarding internal claims and appeals and the external review process, currently codified in the New Mexico Administrative Code (NMAC) at 13.10.17 (the Grievance Procedures). This matter comes before the Superintendent upon his own Motion and, having reviewed the record and being duly advised,

#### **THE SUPERINTENDENT FINDS AND CONCLUDES:**

1. The Superintendent has jurisdiction over the subject matter and the parties in this proceeding pursuant to the New Mexico Insurance Code, 1978 NMSA Section 59A-1-1 *et seq.* (Insurance Code).

2. The Affordable Care Act, reorganized, amended and added to the provisions of part A of Title XXVII of the Public Health Service Act relating to group health plans and health insurance issuers in the group and individual markets pertaining to: 1) internal claims and appeals, and 2) external review processes. On July 23, 2010, the U.S. Departments of Health and Human Services, Labor and the Treasury issued interim final regulations implementing these requirements (IFR).

3. States with regulations pertaining to internal claims and appeals and external review that are not as stringent as the standards established in the IFR and related, subsequent federal publications, must amend their regulations to conform to the federal standards.

4. The Grievance Procedures should be amended to incorporate the new, federal standards set forth in the IFR and related, subsequent federal publications. In order to comply with the standards and requirements of the IFR and subsequent, related federal publications, the Superintendent has prepared a proposed amended rule (Proposed Rule) reflecting the requirements of the IFR and related, subsequent federal publications. The Proposed Rule is attached to and incorporated into this Notice of Proposed (NOPR) by reference as Exhibit A.

5. The Superintendent will accept written comments on the rule contained in Exhibit A and proposed in this NOPR from any interested person. The public is encouraged to file written comments although oral comments will be accepted at the public hearing in this case. Interested persons shall file their written comments on the proposed rules no later than **March 26, 2012**. Any response comments shall be filed no later than **April 2, 2012**. Comments suggesting changes to the proposed rule shall state and discuss the particular reasons for the suggested changes, shall cite to any state or federal law, or other materials, referred to in the comment and shall include all specific language necessary or appropriate to effectuate the changes being suggested. Specific proposed language changes to the proposed rule shall be in legislative format. All pleadings, including comments and suggested changes to the proposed rules, shall bear the caption and docket number contained at the top of this NOPR.

6. Written comments or written response comments shall be sent to:  
Melanie Sandoval  
Records and Docketing Division



New Mexico Public  
Regulation Commission  
Attention: Case No. 12-00034-IN  
1120 Paseo de Peralta  
P.O. Box 1269  
Santa Fe, NM 87504

7. Copies of the proposed rules may be downloaded from the New Mexico Public Regulation's website, [www.nmprc.state.nm.us](http://www.nmprc.state.nm.us).

8. The Superintendent will review all timely submitted written comments and will hold a public comment hearing beginning at **1:00 p.m. on April 11, 2012**, at the Superintendent of Insurance, Public Regulation Commission Hearing Room, 4th Floor, PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.

9. Any person with a disability requiring special assistance in order to participate in a hearing should contact Kacy Aiken at 505-827-3928 at least 48 hours prior to the commencement of the hearing.

10. 1.2.3.7(B) NMAC (Ex Parte Communications) draws a distinction applicable to rulemaking proceedings between communications occurring before the record has been closed and communications occurring after the record has been closed. It defines only the latter as ex parte communications. In order to assure compliance with 1.2.3.7(B) NMAC, the Superintendent should set a date on which it will consider the record to be closed. The Superintendent finds that date shall be the earlier of thirty (30) days following the Public Hearing; that is, May 11, 2012, or the date a Final Order is issued in this case. The setting of that record closure date will permit the Superintendent to conduct follow-up discussions with parties who have submitted initial or response comments to the Superintendent's proposed rules or responses to any bench requests. However, this action should not be interpreted as extending the time during which parties may file comments or response comments, or as allowing the filing of other types of documents in this case.

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

#### IT IS THEREFORE ORDERED:

A. A rulemaking proceeding should be, and hereby is, instituted in this Docket concerning amendments to its existing grievance procedures, regarding internal claims and appeals and the external review process, currently codified in the New Mexico Administrative Code (NMAC) at 13.10.17 (the Grievance Procedures). The proposed rule, attached to this NOPR as Exhibit A, is proposed for adoption as a

permanent rule as provided by this NOPR.

B. This NOPR shall constitute due and lawful notice to all potentially interested parties.

C. Initial, written comments on the proposed rule must be filed by **March 26, 2012** and written response comments must be filed by **April 2, 2012**.

D. A public hearing on the proposed rule amendments shall be held beginning at **1:00 p.m. on April 11, 2012** at the offices of the Superintendent, at the following location:

Superintendent of  
Insurance  
4th Floor - Public  
Regulation Commission  
Hearing Room  
1120 Paseo de Peralta  
Santa Fe, New Mexico  
87501

E. Pursuant to 1.2.3.7(B) NMAC, the record in this case will be closed on the earlier of thirty (30) days following the public hearing; that is, May 11, 2012, or the date a Final Order is issued in this case.

F. Persons providing public comment and/or participating in this public hearing are encouraged to provide specific comment on the proposed rule and cite specifically to any federal or state laws or other materials referenced in a comment. Those wishing to make comments are also encouraged to address any other topic that may be relevant to this rulemaking.

G. Interested persons should contact the Superintendent to confirm the date, time and place of any public hearing, because hearings are occasionally rescheduled. Any person with a disability requiring special assistance in order to participate in the Hearing should contact Kacy Aiken at 505-827-3928 at least 48 hours prior to the commencement of the public hearing in this case.

H. In accordance with NMSA 1978, Section 8-8-15(B), this NOPR, including Exhibit A, shall be mailed at least thirty days prior to the first hearing date to all persons who have made a written request for advance notice.

I. In addition, copies of this NOPR, including Exhibit A, shall be e-mailed to all persons on the attached Certificate of Service if their e-mail addresses are known. If their e-mail addresses are not known, then the same materials shall be mailed to such persons via regular mail.

J. This NOPR, without Exhibit A, pursuant to NMSA 1978, 14.4.7.1.B(1), shall be published in at least two newspapers of regular circulation in the State of New Mexico, and in the New Mexico Register. Affidavits attesting to the publication of this NOPR as described above

shall be filed in this docket.

K. In addition, this NOPR shall be posted on the Superintendent's official Website.

L. This NOPR is effective immediately.

**DONE AND ORDERED this  
14th day of February, 2012.**

**JOHN J. FRANCHINI  
Superintendent of Insurance**

## NEW MEXICO WATER QUALITY CONTROL COMMISSION

### NEW MEXICO WATER QUALITY CONTROL COMMISSION NOTICE OF PUBLIC HEARING TO CONSIDER PETITION TO AMEND USE FOR LOWER DRY CIMMARON RIVER AND TO ESTABLISH WATER QUALITY STANDARDS FOR LAKES, 20.6.4 NMAC, WQCC 11-05 (R)

The New Mexico Water Quality Control Commission (WQCC) will hold a public hearing on April 10, 2012 and continuing on subsequent days as necessary in Room 307 of the State Capitol Building, Santa Fe, NM 87501 to consider proposed amendments to the Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC. The WQCC will begin its regular monthly meeting at 9:00 am, and the public hearing will begin at the conclusion of its regular business.

The proposed amendments to 20.6.4 NMAC, submitted by the New Mexico Environment Department (NMED), propose to amend the aquatic life use for the lower Dry Cimarron River from coldwater to coolwater and to add new segments establishing water quality standards for 62 lakes in the Rio Grande, Pecos, Canadian, Gila, San Juan, and Little Colorado River basins.

NMED's Petition is available at <http://www.nmenv.state.nm.us/swqb/>. The Petition may also be obtained electronically or reviewed in person by contacting:

Carmella Casados  
WQCC Administrator  
1190 S. St. Francis Drive  
PO Box 5469  
Santa Fe, NM 87502  
Tel (505) 827-2425, Fax (505) 827-2836,  
E-mail [Carmella.casados1@state.nm.us](mailto:Carmella.casados1@state.nm.us)

The hearing will be conducted in accordance with Section 74-6-6 of the Water Quality Act, the Guidelines for WQCC Regulation Hearings, and the Procedural Order and Scheduling Order issued by the WQCC Hearing Officer. These documents are

available at: <http://www.nmenv.state.nm.us/WQCC/> or by contacting the WQCC Administrator.

Technical Testimony:

In order to present technical testimony at the hearing, a person must file a notice of intent to present technical testimony in WQCC No. 11-05 (R) with the WQCC Administrator no later than March 19, 2012 at 5:00 pm. The notice shall:

1. Identify the person for whom the witness(es) will testify;
2. Identify each technical witness the person intends to present and state the qualifications of that witness including a description of their educational and work background;
3. Attach the full direct testimony of each technical witness;
4. State the anticipated duration of the direct testimony of each technical witness;
5. Include the text of any recommended modifications to the proposed regulatory change and a statement of basis;
6. Identify and attach all exhibits to be offered by the person at the hearing in their direct case; and
7. Identify whether the person supports or opposes the nomination to be considered by the WQCC and the basis for the position.

The Hearing Officer shall enforce the above requirements through the exclusion of technical testimony, exhibits or recommended modifications, as appropriate.

Participation by the General Public:

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

Post-hearing Procedures

At the conclusion of the hearing, the WQCC may make a final decision or may provide information regarding post-hearing submittals and a timeframe for its final decision.

Assistance

If any person requires assistance, an

interpreter or auxiliary aid to participate in this process, please contact Connie Joseph at least ten days prior to the hearing date at NMED, Personnel Service Bureau, Room N-4071, 1190 S. St. Francis Drive, PO Box 5469, Santa Fe, NM 87502, (505) 827-9769. TDY users may access Ms. Joseph's number through the New Mexico Relay Network at 1-800-659-8331.

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**End of Notices and Proposed Rules Section**

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## Adopted Rules

**NEW MEXICO AGING AND  
LONG-TERM SERVICES  
DEPARTMENT  
ADULT PROTECTIVE SERVICES  
DIVISION**

8.11.4 NMAC, Adult Services (filed 4/14/03) repealed 3/1/2012 and replaced by 8.11.4 NMAC, Adult Services, effective 3/1/2012.

**NEW MEXICO AGING AND  
LONG-TERM SERVICES  
DEPARTMENT  
ADULT PROTECTIVE SERVICES  
DIVISION**

**TITLE 8                    SOCIAL SERVICES  
CHAPTER 11            A D U L T  
PROTECTIVE SERVICES  
PART 4                    ADULT SERVICES**

**8.11.4.1                    ISSUING AGENCY:**  
Aging and Long-Term Services Department – Adult Protective Services Division.  
[8.11.4.1 NMAC - Rp, 8.11.4.1 NMAC, 3/1/2012]

**8.11.4.2                    SCOPE:** Protective services employees and contract providers and the general public.  
[8.11.4.2 NMAC - Rp, 8.11.4.2 NMAC, 3/1/2012]

**8.11.4.3                    S T A T U T O R Y  
AUTHORITY:** Adult Protective Services Act, Section 27-7-15 et seq. NMSA 1978, as amended; Public Health Act, Section 24-1-5L NMSA 1978, as amended; Probate Code, Section 45-5-301 et seq. NMSA 1978, as amended; Resident Abuse and Neglect Act, Section 30-47-1 et seq. NMSA 1978, as amended, and State Agency on Aging, Section 28-4-6 NMSA, as amended.  
[8.11.4.3 NMAC - Rp, 8.11.4.3 NMAC, 3/1/2012]

**8.11.4.4                    D U R A T I O N :**  
Permanent.  
[8.11.4.4 NMAC - Rp, 8.11.4.4 NMAC, 3/1/2012]

**8.11.4.5                    EFFECTIVE DATE:**  
March 1, 2012, unless a later date is cited at the end of a section.  
[8.11.4.5 NMAC - Rp, 8.11.4.5 NMAC, 3/1/2012]

**8.11.4.6                    OBJECTIVE:** To establish guidelines for the provision of adult services by the department that are consistent with statutory authority and legal

mandates.

[8.11.4.6 NMAC - Rp, 8.11.4.6 NMAC, 3/1/2012]

**8.11.4.7                    DEFINITIONS:**

**A.                    “Ability to consent”**  
means an adult’s ability to understand and appreciate the nature and consequences of the proposed protective services or protective placement, including the benefits, risks and alternatives to the proposed services or placement and to make or communicate an informed decision.

**B.                    “Administrative hearing”** is a formal process whereby a client receiving adult services can appeal a decision made by the department to modify or terminate services prior to the service plan’s expiration date.

**C.                    “Administrative review”** is an informal process, which may include an informal conference or may include only a review of the existing file. The administrative review does not create any substantive rights for the client.

**D.                    “Adult day care”** is the provision of contractual day care services for functionally impaired adults who have been abused, neglected or exploited or are at continued risk of being abused, neglected or exploited. Services are delivered in a licensed facility that provides structure and supervision.

**E.                    “Aggrieved person”**  
is someone who has been determined by the department to be abused, neglected or exploited and who has had his or her adult service plan for attendant care, home care or day care denied, modified or terminated.

**F.                    “Assessment”** is a process of completing structured and non structured interviews to acquire an understanding of multiple levels of the adult’s need and developing interventions within available resources, if appropriate.

**G.                    “Attendant care”** is the provision of temporary, non-medical personal care to a functionally impaired adult in his or her own home by a caregiver when no other service options exist.

**H.                    “Eligibility”** means the adult meets necessary criteria for adult services under this part.

**I.                    “Emergency shelter/caregiver”** is the placement of an adult in an appropriate facility or the use of a caregiver in the adult’s home to provide a temporary protected environment.

**J.                    “Functional impairment”** is the inability of an adult to perform independently some or most activities of daily living or instrumental activities of daily living.

**K.                    “Home care services”**

are the provision of direct or contractual non-medical personal care and light housekeeping services for adults who have physical or mental disabilities that cause a functional disability to meet their basic care or home maintenance needs and who otherwise meet the criteria established in these regulations.

**L.                    “Incapacitated person”** means any adult with a mental, physical, or developmental condition that substantially impairs the adult’s ability to provide adequately for the adult’s own care or protection.

**M.                    “Secretary”** is the secretary of the aging and long-term services department or the secretary’s designee within the ALTSD.

**N.                    “Service plan”** a written, individualized plan defining specific services for a client in a specific timeframe.  
[8.11.4.7 NMAC - Rp, 8.11.4.7 NMAC, 3/1/2012]

**8.11.4.8                    PURPOSE OF ADULT SERVICES:** The purpose of adult services is to mitigate adult abuse, neglect and exploitation, to prevent inappropriate or premature institutionalization and to assist clients to remain safely in their home or the least restrictive environment possible.  
[8.11.4.8 NMAC - Rp, 8.11.4.8 NMAC, 3/1/2012]

**8.11.4.9                    TYPES OF ADULT SERVICES:** The department, based upon the adult’s eligibility and the availability of resources, provides or arranges for the following services for adults:

**A.** emergency caregiver/shelter care services;

**B.** home care services;

**C.** attendant care services;

and

**D.** adult day care.

[8.11.4.9 NMAC - Rp, 8.11.4.9 NMAC, 3/1/2012]

**8.11.4.10                    G E N E R A L  
PROVISIONS:**

**A.** Any adult who is not determined to be decisionally incapacitated may refuse services.

**B.** The department determines eligibility for specific services based on client need, client income and the availability of resources and available funding for each type of service under this part.

(1) The department assesses and determines the adult’s need for services.

(2) Adults who have been determined through a department investigation to have been abused, neglected

or exploited and are assessed to continue to be at risk may be eligible to receive services on a short term basis without regard to income, as determined necessary by the department.

(3) Except for emergency shelter/caregiver services, the department utilizes the institutional medicaid income criteria for the determination of financial eligibility for services.

C. The department completes a recertification of income for adult services eligibility on an annual basis.

D. Any denial, modification or termination of adult services may be reviewed by the department pursuant to the administrative review process described in this part.

E. The department coordinates its adult protective services in order to ensure that there is no duplication of like services for the same hours of the same day.

F. Clients receiving APS adult services have the following responsibilities:

(1) assisting with applying for waiver services eligibility, including medicaid and financial eligibility;

(2) reporting on whether he or she needs help; and

(3) appropriately using services paid by state funds.

G. Clients may be terminated from APS services for the following reasons:

(1) moving out of the program service area;

(2) consistently not complying with the service plan and is a person with decision-making capacity;

(3) consistently refusing service or not allowing the agency to enter the home to provide services;

(4) posing a significant risk to self or others;

(5) demonstrating a pattern of verbal or physical abuse of attendants or agency personnel, i.e., use of vulgar or explicit language, verbal or physical sexual harassment, excessive use of force, verbal or physically intimidating threats, and illegal use of narcotics or alcohol abuse;

(6) refusing to provide accurate financial information, providing false information or illegally transferring assets to receive services under this part;

(7) ceasing to meet the financial or non-financial criteria; or

(8) ceasing to meet the level of care criteria.

[8.11.4.10 NMAC - Rp, 8.11.4.10 NMAC, 3/1/2012]

**8.11.4.11 C A S E MANAGEMENT:**

A. The department

provides short term case management of adult services.

B. The department conducts, and documents, at least quarterly, face-to-face visits with adults receiving home and attendant care services.

C. The department utilizes staffings and supervisory conferences to develop and review plans and to determine the need for continuation of services for each adult receiving services.

[8.11.4.11 NMAC - Rp, 8.11.4.11 NMAC, 3/1/2012]

**8.11.4.12 SERVICE PLAN:**

A. The department develops a written individualized service plan for each adult receiving services.

B. The department develops a service plan within 30 days of the dispositional staffing in which an APS supervisor and worker discuss the applicability of adult services to the client.

C. The department reassesses the service plan and the need for ongoing services within a minimum of 90 days after services commence.

[8.11.4.12 NMAC - Rp, 8.11.4.12 NMAC, 3/1/2012]

**8.11.4.13 E M E R G E N C Y SHELTER/CAREGIVER SERVICES:**

A. Any adult who has been or is at continued risk of being abused, neglected or exploited may be eligible to receive emergency shelter/caregiver services if he or she requires a protected environment to maintain health and safety.

(1) Emergency shelter/caregiver services are provided without regard to income.

(2) Emergency shelter/caregiver services are utilized only in emergency situations and are temporary until a permanent safe environment can be located.

B. The adult may select his or her caregiver if the caregiver is a capable adult approved by the department prior to commencement of services.

C. The department may provide emergency shelter/caregiver services not exceeding 30 days unless an exception is approved by the department in writing for a specified longer period of time.

D. Placement is provided in the adult's home or an appropriate licensed facility or safe environment. Placement in a correctional facility is not permitted.

E. When the department enters into a written agreement with the facility or caregiver the agreement will include:

(1) the services to be provided;

(2) the rate of payment for the services; and

(3) the time frame that the service will be provided.

F. The department provides payment for placements based on the rate normally charged by the facility not to exceed the medicaid rate.

G. The department provides payment for caregivers at a predetermined rate.

H. The department places individuals pursuant to the Adult Protective Services Act.

[8.11.4.13 NMAC - Rp, 8.11.4.13 NMAC, 3/1/2012]

**8.11.4.14 HOME CARE SERVICES:**

A. Home care services may be provided or terminated by the department as resources and funding allows.

B. Any incapacitated adult who is substantiated for abuse, neglect or exploitation may be eligible for home care. On occasion, an incapacitated adult, who is not substantiated for abuse, neglect or exploitation, may be considered for home care services if the department determines that the adult remains at imminent risk of abuse, neglect or exploitation. The following criteria apply to adults considered for home care:

(1) the adult must meet institutional care medicaid eligibility; and

(2) the adult must have a documented medical incapacity that limits their activities of daily living and their ability to provide their own care at home.

C. The department, at its discretion, may provide home care by the department staff or through agencies under contract to the department.

D. Adults receiving home care through adult protective services shall apply for long term care services through the appropriate medicaid programs or waiver program and, when approved to receive medicaid or waiver services, the adult must transition to the waiver service and discontinue home care through adult protective services. Adult protective services will discontinue its home care when the client is approved to receive medicaid or waiver home care.

[8.11.4.14 NMAC - Rp, 8.11.4.14 NMAC, 3/1/2012]

**8.11.4.15 ATTENDANT CARE SERVICES:**

A. Attendant care may be provided by the department as resources and funding allows.

B. Attendant care is non-medical personal care provided to a functionally impaired adult in their own home by a caregiver. An adult who is substantiated for or is at imminent risk of abuse, neglect or exploitation may be eligible for attendant care if no other care options exist and if attendant care will reduce the likelihood of

the adult being admitted to a nursing home.

(1) The adult must meet institutional care medicaid eligibility.

(2) The adult must have a documented medical incapacity that significantly limits their activities of daily living and their ability to provide all of their own care at home.

**C.** Attendant care services are considered a temporary intervention and shall be discontinued when long-term services become available.

**D.** Adults receiving attendant care shall apply for long-term care services through the appropriate medicaid or waiver and, when approved to receive those services, the adult must transition to the medicaid or waiver service and discontinue attendant care through adult protective services. Adult protective services can discontinue its attendant care when the client begins receiving medicaid waiver attendant care.

**E.** The department may provide attendant care services based upon its assessment of need. The adult seeking attendant care services provides a medical report to the department documenting the client's medical condition and supporting the need for attendant care services.

**F.** The department approves the number of hours of service based upon the department adult protective service worker's assessment of the needs of the adult, the level of care criteria and the availability of funding.

**G.** Services are provided by individuals chosen and approved by the client and who are not department employees.

(1) The department requires a criminal background check on all attendant care providers as required by law; a review of any substantiations of abuse, neglect or exploitation; and a review of the employee abuse registry.

(2) Individuals selected by the recipient of attendance care services shall meet the following criteria established by the department:

(a) have the physical ability to provide the services;

(b) be age 18 or older;

(c) is not currently listed on the employee abused registry; and

(d) have been determined by APS, after consideration of the facts and circumstances, to be a safe and appropriate caregiver.

**H.** The department enters into a written agreement with the adult and the attendant care provider which specifies the following:

(1) the services provided by the attendant;

(2) the adult's/family's responsibilities;

(3) the time frames for the provision of the service; and

(4) that the failure of the attendant care provider to comply with the agreement will result in the termination of services or replacement of the provider.

**I.** The department makes payment at the established rates following the receipt of documentation of service delivery.

[8.11.4.15 NMAC - Rp, 8.11.4.15 NMAC, 3/1/2012]

#### **8.11.4.16 ADULT DAY CARE:**

**A.** Any incapacitated adult who has been substantiated for or is at risk of abuse, neglect or exploitation may be eligible for adult day care if adult day care will reduce the likelihood of future abuse, neglect or exploitation.

(1) the adult must meet the institutional medicaid income eligibility.

(2) the adult must have a documented medical incapacity that limits their activities of daily living or significantly limits their instrumental activities of daily living.

**B.** Adult day care services can only be delivered in a licensed facility that provides structure and supervision.

[8.11.4.16 NMAC - Rp, 8.11.4.16 NMAC, 3/1/2012]

#### **8.11.4.17 DOCUMENTATION:**

**A.** The department or contract provider documents case work activities and maintains records concerning services provided to all individuals receiving adult services.

**B.** The records created and maintained by the department or by the contract provider on behalf of the department are confidential and are only released as allowed for by law.

[8.11.4.17 NMAC - Rp, 8.11.4.18 NMAC, 3/1/2012]

#### **8.11.4.18 ADMINISTRATIVE**

**REVIEW:** The department will provide an informational administrative review of its decision to deny, modify or terminate the adult's services. The aggrieved party must request a review in writing to the adult protective services division director within 15 days of receiving notice of the department's intent to deny, modify or terminate services. The request for a hearing shall be mailed or hand delivered to the specific office of the adult protective division director or to an alternate address, if set forth in the notice.

**A.** In the written request for review, the aggrieved party shall state the reason(s) why he or she should be eligible to receive the services in question and include any supporting documentation that has not been previously provided or considered by the department.

**B.** Upon receipt of the aggrieved party's request for the review, the department will reconsider its decision and inform the aggrieved party within 15 business days of the decision to affirm or reverse the denial, modification or termination of the services in question. The department's decision will be in writing. Except for a denial of service, the department will inform the aggrieved party of their right to request an administrative hearing before the secretary in accordance with 8.11.4.19 NMAC for such modification or termination. An administrative review of a denial shall be final and is not appealable unless otherwise provided by law. In cases of modification or termination of services, the aggrieved party may file a written request for an administrative hearing within 10 business days after receipt of the department's letter of decision on the administrative review.

[8.11.4.18 NMAC - N, 3/1/2012]

#### **8.11.4.19 ADMINISTRATIVE HEARING:**

**A.** If services are modified or terminated prior to the expiration date of the service plan and an administrative review has not resolved the matter, the aggrieved party may submit a written appeal of the administrative reviewer's decision to the secretary within 15 calendar days after the decision is issued, in accordance with 8.11.4.18 NMAC.

**B.** If the aggrieved party timely appeals the reviewer's administrative decision pursuant to 8.11.4.18 NMAC, the office of the secretary shall docket the appeal on the date received and shall provide notice of the appeal within 15 days of its receipt to the aggrieved party and the adult protective services division director. The secretary may hear the appeal or designate a hearing officer to hear the appeal and make a recommended decision to the secretary.

**C.** The secretary or the secretary's designee shall prepare a notice of hearing setting forth the date, time and place of the hearing. The notice of hearing shall be sent to the parties by regular mail within 15 days of the department sending notice of appeal to them. The hearing shall be held no sooner than 15 days and no later than 30 days of the date the notice of hearing is mailed to the parties. Either party may request a continuance of the hearing for good cause. If a hearing is continued it shall be rescheduled at the earliest date and time available to the parties.

[8.11.4.19 NMAC - N, 3/1/2012]

#### **8.11.4.20 P R E - HEARING:**

**A.** Upon receipt of the request for administrative hearing, the hearing officer shall establish an official record which contains all the filed notices,

pleadings, briefs, recommendations, correspondence, documents and decisions.

**B.** No person may discuss the merits of any pending adjudicatory proceedings with the designated hearing officer or the secretary, unless both parties or their representatives are present.

**C.** The hearing officer may consolidate or join cases if there is commonality of legal issues or parties and if it would expedite final resolution of the cases and would not adversely effect the interests of the parties nor violate the confidentiality provisions of the Adult Protective Services Act. The hearing officer also may join the appeals of an appellant who has two or more appeals pending.

**D.** Upon request of either party or upon the hearing officer's own motion, the hearing officer may require a pre-hearing order or may schedule a pre-hearing conference at a time and place reasonably convenient to all parties to:

- (1) limit and define issues;
- (2) discuss possible pre-hearing dispositions;
- (3) identify and limit the number of witnesses; and
- (4) discuss such other matters as may aid in the simplification of evidence and disposition of the proceedings.

**E.** A pre-hearing conference is an informal proceeding and may occur telephonically. The pre-hearing conference may or may not be recorded, at the discretion of the hearing officer.

**F.** No offer of settlement made in a pre-hearing conference is admissible as evidence at a later hearing. Stipulation and admissions are binding and may be used as evidence at the hearing. Any stipulation, settlement or consent order reached between the parties must be in writing and must be signed by the hearing officer and the parties, and their attorneys if they are represented by counsel.

**G.** The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the secretary, upon a motion to withdraw the appeal by the aggrieved party or their legal representative at any time before the hearing. [8.11.4.20 NMAC - N, 3/1/2012]

#### **8.11.4.21 CONDUCT OF THE HEARING:**

**A.** Failure of a party to appear on the date and time set for the hearing, without good cause shown, constitutes default and the hearing officer shall so notify the parties in writing and enter a default judgment against the party.

**B.** The hearing is open to the public unless the hearing officer directs that the hearing be closed.

**C.** Any party may appear

at the hearing through a licensed attorney, provided the attorney has made a written entry of appearance within a reasonable period of time prior to the hearing date.

**D.** The hearing officer may clear the room of witnesses not under examination if either party so requests and of any person who is disruptive. The department is entitled to have a representative of APS, in addition to its attorney, in the hearing room during the course of the hearing, even if the person will also testify in the hearing.

**E.** Oral evidence is to be taken only under oath or affirmation.

**F.** Generally, except as provided in the following subsection or waived by the party, the order of presentation for the hearing is as follows:

- (1) opening of proceedings and taking of appearances by the hearing officer;
- (2) disposition of preliminary and pending matters;
- (3) opening statement of the department;
- (4) opening statement of the appellant;
- (5) department's case-in-chief;
- (6) appellant's case-in-chief;
- (7) department's rebuttal;
- (8) department's closing argument;
- (9) appellant's closing argument;

and

- (10) closing of the proceeding by the hearing officer.

**G.** The burden of proof in matters arising from denial, reduction or termination of adult services lies with the department, which must prove its case by a preponderance of evidence.

**H.** The hearing officer shall admit only evidence that is relevant to the issue appealed.

**I.** The hearing is to be recorded by a sound-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, is permitted without the approval of the hearing officer.

[8.11.4.21 NMAC - N, 3/1/2012]

#### **8.11.4.22 POST-HEARING:**

**A.** The hearing officer may require or permit written closing post-hearing briefs and proposed findings of facts and conclusions of law.

**B.** The hearing officer shall submit a recommended decision to the secretary as soon as practicable, but no later than 20 working days after the expiration of any time set for the submittal of any last post-hearing proposed findings of facts and conclusions of law, arguments or briefs.

**C.** As a general rule, the secretary will only consider the hearing officer's recommended decision, post-hearing briefs and proposed finding of fact and conclusions of law. Where

circumstances warrant, the secretary may review all or a portion of the record before the hearing officer.

(1) The secretary will not consider any additional evidence or affidavits not in the official record of the hearing or in pleadings not filed in accordance with the hearing officer's scheduling order.

(2) If the secretary disagrees with the findings and conclusions of the hearing officer, the secretary shall issue a separate order which clarifies the findings and conclusions at issue and the reasons a different decision is warranted. An appeal of the final decision by the secretary may be made in accordance with applicable law.

**D.** The secretary shall render a final determination as soon as practicable but no later than 15 working days after submission of the hearing officer's recommended decision. A copy of the final decision shall be mailed or emailed to each party or attorney of record immediately upon entry of the secretary's final decision. The secretary's decision is final and non-appealable except as otherwise provided by law.

[8.11.4.22 NMAC - N, 3/1/2012]

#### **HISTORY OF 8.11.4 NMAC:**

**Pre-NMAC History:** The material in this Part was derived from that previously filed with the State Records Center and Archives under:

- SSD 9.0.0, Domestic Violence - Definition and Goal Statement, filed 8/22/86.
- SSD 9.1.0, Domestic Violence - General Provisions, filed 8/22/86.
- SSD 9.1.0, Domestic Violence - General Provisions, filed 1/29/87.
- SSD 9.1.0, Domestic Violence - General Provisions, filed 6/18/87.
- SSD 9.1.0, Domestic Violence - General Provisions, filed 3/20/90.
- SSD 9.2.0, Domestic Violence - General Guidelines, filed 8/22/86.
- SSD 9.3.0, Domestic Violence - Department Responsibilities, filed 8/22/86.
- SSD 10.0.0, Social Services - Definition and Goal Statement, filed 8/22/86.
- SSD 10.0.0, Social Services - Definition and Goal Statement, filed 6/18/87.
- SSD 10.0.0, Social Services - Definition and Goal Statement, filed 9/18/90.
- SSD 10.1.0, Social Services for Adults - General Provisions, filed 8/22/86.
- SSD 10.1.0, Social Services for Adults - General Provisions, filed 1/29/87.
- SSD 10.1.0, Social Services for Adults - General Provisions, filed 6/18/87.
- SSD 10.1.0, Social Services for Adults - General Provisions, filed 9/18/90.
- SSD 10.2.0, Social Services for Adults - General Guidelines, filed 8/22/86.
- SSD 10.2.0, Social Services for Adults - General Guidelines, filed 9/18/90.
- SSD Rule #409.0000, Protective Services to

Adults, filed 11/10/81.  
 SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 8/22/86.  
 SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 11/18/87.  
 SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 3/28/89.  
 SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 9/18/90.  
 SSD 10.3.0, Social Services for Adults - Department Responsibilities, filed 11/5/91.  
 SSD 10.4.0, Social Services for Adults - Provide Services, filed 9/18/90.  
 SSD 11.0.0, Day Care for Handicapped Adults - Definition and Goal Statement, filed 8/22/86.  
 SSD 11.0.0, Day Care for Handicapped Adults - Definition and Goal Statement, filed 6/18/87.  
 SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 8/22/86.  
 SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 6/18/87.  
 SSD 11.1.0, Day Care for Handicapped Adults - General Provisions, filed 1/13/88.  
 SSD 11.2.0, Day Care for Handicapped Adults - General Guidelines, filed 8/22/86.  
 HSSD 74-12, Social Services Manual, filed 3/11/74.  
 SSD A12.0.0, Home Care Services - Definition and Goal Statement: Home Care, filed 8/22/86.  
 SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 8/22/86.  
 SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 6/18/87.  
 SSD A12.1.0, Home Care Services - General Provisions: Home Care, filed 1/13/88.  
 SSD A12.2.0, Home Care Services - General Guidelines, filed 8/22/86.  
 SSD A12.2.0, Home Care Services - General Guidelines, filed 1/13/87.  
 SSD A12.3.0, Home Care Services - Department Responsibilities, filed 8/22/86.

**History of Repealed Material:**

8.11.4 NMAC, Adult Services, filed 4/14/2003 - Repealed effective, 3/1/2012.

**NEW MEXICO  
 DEPARTMENT OF  
 AGRICULTURE**

The following rules, filed 8/15/2001 by the Organic Commodity Commission are repealed effective 2/29/2012 and are replaced by 21.15.1 NMAC, Organic Agriculture, filed by New Mexico Department of Agriculture, effective 2/29/2012.

21.15.1 NMAC, Organic Agriculture Generally, filed 8/15/2001.  
 21.17.58 NMAC, Organic Methods of Control, filed 8/15/2001.  
 21.18.5 NMAC, Organic Production Methods and Materials, filed 8/15/2001.

21.25.6 NMAC, Organic Labeling and Marketing, Processing/Handling Operations, Application Process and Inspections, filed 8/15/2001.

21.27.3 NMAC, Organic Honey, Propolis and Beeswax Production, filed 8/15/2001.

21.30.1 NMAC, Organic Production Methods and Materials, filed 8/15/2001.

21.34.16 NMAC, Organic Production Methods and Materials, filed 8/15/2001.

**NEW MEXICO  
 DEPARTMENT OF  
 AGRICULTURE**

**TITLE 21 AGRICULTURE AND  
 RANCHING**

**CHAPTER 15 AGRICULTURE  
 GENERAL PROVISIONS**

**PART 1 ORGANIC  
 AGRICULTURE**

**21.15.1.1 ISSUING AGENCY:**

New Mexico State University, New Mexico Department of Agriculture

[21.15.1.1 NMAC - N, 02/29/2012]

[MSC 3189, Box 30005, Las Cruces, New Mexico 88003-8005, Telephone No. (575) 646-3007]

**21.15.1.2 SCOPE:** The rule shall apply to certification of agricultural products.

[21.15.1.2 NMAC - N, 02/29/2012]

**21.15.1.3 STATUTORY**

**AUTHORITY:** The rule is promulgated pursuant to the provisions of the Organic Production Act, 76-21A-1 through 76-21A-5 NMSA 1978.

[21.15.1.3 NMAC - N, 02/29/2012]

**21.15.1.4 DURATION:** Permanent.

[21.15.1.4 NMAC - N, 02/29/2012]

**21.15.1.5 EFFECTIVE DATE:**

February 29, 2012, unless a later date is cited at the end of a section.

[21.15.1.5 NMAC - N, 02/29/2012]

**21.15.1.6 OBJECTIVE:** The rule establishes that the department, as a USDA-accredited certifying agent, follows the requirements of the national organic program's standards to certify agricultural products as organic.

[21.15.1.6 NMAC - N, 02/29/2012]

**21.15.1.7 DEFINITIONS:** The following definitions apply to this part and all other regulations the department adopts.

**A.** "Accreditation" means a determination made by USDA that authorizes a private, foreign, or state entity to conduct certification activities as a certifying agent

under the standards.

**B.** "Agricultural product" means any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock.

**C.** "Certify or certification or certified" means a determination made by a USDA-accredited certifying agent that a production or handling operation is in compliance with the Organic Foods Production Act of 1990 and the standards which is documented by a certificate of organic operation.

**D.** "Certifying agent" means any entity accredited by the national organic program as a certifying agent for the purpose of certifying a production or handling operation as a certified production or handling operation.

**E.** "Department" means the New Mexico department of agriculture.

**F.** "Farm operation" means raising, cultivating, propagating, fattening, grazing, or any other farming or ranching activity.

**G.** "Fees and assessment" means funds collected by the department as provided for under the act.

**H.** "Handler" means any person who engages in the business of handling agricultural products, including producers who handle crops or livestock of their own production, except such term shall not include final retailers of agricultural products that do not process agricultural products. This may include a processor.

**I.** "National organic program" means the USDA program authorized by the federal Organic Foods Production Act of 1990 for the purpose of implementing its provisions.

**J.** "Organic" means a labeling term that refers to an agricultural product produced in accordance with the federal Organic Foods Production Act of 1990.

**K.** "Organic products" means all products certified by the department as "100 percent organic," "organic" or "made with organic (ingredients or food groups)."

**L.** "Processor" means any person who engages in the cooking, baking, curing, heating, drying, mixing, grinding, churning, separating, extracting, slaughtering, cutting, fermenting, distilling, eviscerating, preserving, dehydrating, freezing, chilling, or otherwise manufacturing and includes the packaging, canning, jarring, or otherwise enclosing food in a container.

**M.** "Producer" means a person who engages in the business of growing or producing food, fiber, feed, and other agricultural products.

**N.** "Standards" means the specific federal requirements that must be

verified by the certifying agent accredited by the national organic program of the USDA before products can be labeled organic.

**O.** "USDA" means United States department of agriculture.  
[21.15.1.7 NMAC - N, 02/29/2012]

**21.15.1.8 ADOPTION OF THE STANDARDS:** The standards established by USDA's national organic program and set forth in Title 7 CFR Part 205 are incorporated by reference.  
[21.15.1.8 NMAC - N, 02/29/2012]

**21.15.1.9 FEES AND ASSESSMENTS:**

**A.** Application fee: all new applicants, regardless of category, must remit a \$250 application fee with the completed application. Applications without accompanying fees shall be deemed incomplete, and the applicant shall be notified that the application will not be further processed without the fee. Applicants applying for dual categories (crop and processor and animal and processor, but not crop and animal) must pay two fees, except where total annual gross sales of organic product are less than \$50,000 and all handling/processing is performed by the certified producer; in such cases only one fee will be required. Handling/processing applicants that provide a process or service to organic producers but do not take ownership of the organic product or do not sell an organic product shall remit a \$225 application fee. Annual update applications must be accompanied by a \$200 fee payment. Annual update applications sent in after the announced due date will be subject to a late fee based on the following scale: up to one month late, \$75.00; one to two months, \$100; two to three months, \$200; and three months and later, \$500.

**B.** All operations receiving certification from the department must also remit annually by May 1 an assessment based on gross sales of organic products for the calendar year just ended. The department shall send out a reminder notification of the assessment obligation by March 30.

**(1)** Producers, processors, and handlers whose total annual organic gross sales are less than \$1,000,000 shall be assessed at a rate of three fourths of one percent of total annual gross sales of organically produced agricultural products.

**(2)** Producers, processors, and handlers whose total annual organic gross sales are above \$1,000,000 shall be assessed at a rate of \$7,500 plus seventy-five one thousandths of one percent on any amount over \$1,000,000 of total annual gross sales of organically produced agricultural products.

**C.** All fees and assessments shall be collected directly by the department.

**D.** The department may

charge reasonable fees not to exceed the actual costs of performing additional inspections due to noncompliance or at the request of a producer or handler.  
[21.15.1.9 NMAC - N, 02/29/2012]

**HISTORY of 21.15.1 NMAC:**

History of the Repealed Material:

21 NMAC 15.1, Organic Agriculture Generally, filed 7/2/98 - Repealed effective 8/30/2001

21 NMAC 17.58, Organic Methods of Control, filed 7/2/98 - Repealed effective 8/30/2001

21 NMAC 18.5, Organic Production Methods and Materials, filed 7/2/98 - Repealed effective 8/30/2001

21 NMAC 25.6, Organic Handling Operations, Inspections and Application Process, filed 7/2/98 - Repealed effective 8/30/2001

21 NMAC 27.3, Organic Honey Production, filed 7-2-98 - Repealed effective 8/30/2001

21 NMAC 30.1, Organic Production Methods and Materials, filed 7/2/98 - Repealed effective 8/30/2001

21 NMAC 34.16, Organic Production Methods and Materials, filed 7/2/98 - Repealed effective 8/30/2001

21.15.1 NMAC, Organic Agriculture Generally, filed 8/15/2001 - Repealed effective 02/29/2012

21.17.58 NMAC, Organic Methods of Control, filed 8/15/2001 - Repealed effective 02/29/2012

21.18.5 NMAC, Organic Production Methods and Materials, filed 8/15/2001 - Repealed effective 02/29/2012

21.25.6 NMAC, Organic Labeling and Marketing, Processing/Handling Operations, Application Process and Inspections, filed 8/15/2001 - Repealed effective 02/29/2012

21.27.3 NMAC, Organic Honey, Propolis and Beeswax Production, filed 8/15/2001 - Repealed effective 02/29/2012

21.30.1 NMAC, Organic Production Methods and Materials, filed 8/15/2001 - Repealed effective 02/29/2012

21.34.16 NMAC, Organic Production Methods and Materials, filed 8/15/2001 - Repealed effective 02/29/2012

NMAC History:

21.15.1 NMAC, 21.17.58 NMAC, 21.18.5 NMAC, 21.25.6 NMAC, 21.27.3 NMAC, 21.30.1 NMAC and 21.34.16 NMAC, all replaced by 21.15.1 NMAC, Organic Agriculture, effective 02/29/2012

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

This is an amendment to 8.8.2 NMAC, Sections 7, 8, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21 and 26 effective February 29, 2012.

**8.8.2.7 DEFINITIONS:**

**A. "Administrative hearing"** [means a formal process, where the client has an opportunity to present evidence to an impartial hearing officer] in PSD, administrative hearings are used in the circumstances described herein at Paragraphs (1) – (3) of Subsection B of 8.8.2.13 NMAC.

**B. "Administrative review"** is an informal process, which may include an informal conference or may include only a record review. The administrative review does not create any substantive rights for the client.

~~[C. "Adolescent and adoption resource team (AART)" provides a quality assurance function for the CYFD protective services division (PSD) by reviewing, amending, and approving individual plans for children in custody ensure timely movement toward adoption and permanence and for adolescents to ensure successful transition into adulthood.]~~

~~[D.]~~ **C. "AFCARS"** refers to the federally-required automated foster care and adoptions reporting system. States are required to submit AFCARS data semi-annually. This includes case level information on all children in PSD custody, children who are adopted under the auspices of PSD, and information on foster and adoptive parents.

~~[E.]~~ **D. "Child abuse and neglect check"** [is a review of the family automated client tracking system (FACTS), the PSD information management system, to determine if there have been any referrals of alleged child abuse or neglect to protective services division] is a review of the PSD family automated client tracking system, also known as FACTS, or another state's central abuse or neglect registry to determine if there have been any previous referrals on the family to this state's or any other state's child protective services division.

~~[F.]~~ **E. "Children's Code"** refers to the New Mexico Children's Code, Section 32A-1-1, et. seq., NMSA 1978.

~~[G.]~~ **F. "Client"** means a person who is receiving services from PSD.

~~[H.]~~ **G. "Communicable disease"** means any infectious disease that is both potentially communicable through common social or sexual contact and poses a significant health risk if contracted.



**[F] H.** “**Criminal records check (CRC)**,” as discussed herein, means federal, state or local checks for criminal offenses conducted on PSD employees as well as volunteers and students working in a PSD office. The level of CRC depends on duties performed, as per 8.8.2.22 NMAC herein. Requirements for CRC in reference to foster or adoptive parents are outlined in “Licensing Requirements for Foster and Adoptive Homes,” 8.26.4.10 NMAC.

**[F] L.** “**CYFD**” refers to the children, youth and families department.

**[K] L.** “**FACTS**” refers to the family automated client tracking system (FACTS), the official data management system for CYFD.

**[F] K.** “**NCANDS**” refers to the national child abuse and neglect data system (NCANDS), a voluntary national data collection and analysis system created in response to the requirements of the Child Abuse Prevention and Treatment Act.

**[M] L.** “**Need to know**” is the standard by which individual(s) are identified as required to receive confidential information, based upon risk of transmission of a specific disease.

**M.** “**NYTD**” refers to the national youth in transition (NYTD) database, a national data collection and analysis system created in response to the requirements of the Foster Care Independence Act of 1999.

**N.** “**Policies**” are those regulations that govern CYFD activities and have the force of law.

**O.** “**Procedures**” direct PSD staff in how to implement policies.

**P.** “**Protective services division (PSD)**” refers to the protective services division of the children, youth and families department, and is the state’s designated child welfare agency.

**Q.** “**Provider**” refers to foster care and adoptive families.

**R.** “**RMS**” means random moment sample and is the process used by CYFD to collect information to support claims for reimbursement from the state and federal funding sources.

**[R] S.** “**SACWIS**” means the statewide automated child welfare information systems (SACWIS), a comprehensive automated case management tool that supports foster care and adoptions assistance case management practice. FACTS is the state of New Mexico’s SACWIS system.

**[S] T.** “**Secretary**” means the secretary of CYFD.

**[F] U.** “**Stipend students**” are students in an undergraduate or graduate social work program in New Mexico who have been selected to receive stipends to support their education in return for working for PSD for a specified period of time.

**[U] V.** “**Universal precautions**” are the standardized protocols for the prevention of communicable disease.

**[V] W.** “**Vendor**” refers to individuals or businesses from which PSD purchases goods and services for the needs of our clients.

[8.8.2.7 NMAC - Rp, 8.8.2.7 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.8 PROTECTIVE SERVICES DIVISION:** The protective services division is New Mexico’s officially designated child welfare agency, responsible for providing child protective services to individuals and families.

**A.** PSD shall be responsible for administering and supervising the state of New Mexico’s child welfare services plan pursuant to Section 422(a) of the Social Security Act, 42 U.S.C. 622(a), and the agency responsible for the state plans under Title IV-B and IV-E of the Social Security Act and the social services block grant program pursuant to Title XX.

**B.** The protective services division shall maintain community based offices and maintains a toll free number that is posted in protective services division offices. Access to emergency protective services is available [~~twenty-four (24)~~] 24 hours a day, seven (7) days a week.

[8.8.2.8 NMAC - Rp, 8.8.2.8 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.11 POLICY AND PROCEDURES DEVELOPMENT AND REVIEW:**

**A.** PSD shall hold a public hearing prior to the inclusion, amendment or repeal of any portion of the New Mexico administrative code in accordance with the State Rules Act.

**B.** PSD shall file policies with the New Mexico state records center and archives in accordance with the State Rules Act.

**C.** Emergency rules:

(1) For good cause, PSD may issue rules on an emergency basis without notice or hearing if the secretary determines that the immediate implementation is necessary for public peace, health, safety, or general welfare. An emergency rule is effective for no longer than [~~thirty (30)~~] 30 days unless published in the New Mexico register in accordance with 1.24.20 NMAC. Upon publication in the New Mexico register, emergency rules are converted to regular rules with such duration as stated in the published rule.

(2) Under CYFD’s enabling statute, 9-2A-2(E) NMSA, PSD may also engage in “interim rule making,” if the CYFD secretary certifies to the department of finance and administration that the CYFD has insufficient state funds to operate any

of the programs it administers and that reductions in services or benefit levels are necessary.

**D.** Maintenance of policies: PSD shall regularly review policies and make revisions as necessary to reflect changes in practice to comply with federal and state laws as well as changes in CYFD standards of practice and funding. PSD shall consider requests for revisions to policies by any individual. Revisions to policies shall be made as provided by statute and regulations.

**E.** PSD policies are published in the New Mexico administrative code, which is available at <http://www.nmcp.state.nm.us/NMAC> under Title 8, Social Services. Copies of policies and procedures are available for public inspection in PSD county offices; reasonable copying charges are assessed for duplication.

[8.8.2.11 NMAC - Rp, 8.8.2.11 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.12 PROVISION OF SERVICES:**

**A.** PSD shall make reasonable efforts to protect reported children from abuse and neglect, and when safely possible, to preserve the integrity of the family unit.

**B.** Provision of services is based upon the results of the assessment of the safety of the child, an assessment of the risk to [~~and needs and strengths of the individual and family, and the availability of services~~] the child, the protective capacities of the parent or guardian, and the availability of services.

**C.** Services shall be provided in a setting most consistent with the least restrictive alternatives and the case plan developed.

**D.** Provision of services shall not be dependent upon income certification or recertification for persons receiving the following services:

- (1) child protective services;
- (2) youth services;
- (3) in-home services;
- (4) child protective services childcare;
- (5) permanency planning service for children; or

(6) adoption services for children.

**E.** PSD shall provide services in accordance with the Americans with Disabilities Act (ADA).

**F.** There shall be no residency or citizenship requirements for the provision of protective services.

**G.** Protective services shall be provided when indicated (see Subsection B above) to children who are infected with a communicable disease. PSD staff and providers use universal precautions for the prevention of communicable disease.

[8.8.2.12 NMAC - Rp, 8.8.2.13 NMAC,

03/31/10; A, 02/29/12]

**8.8.2.13 ADMINISTRATIVE REVIEWS AND APPEALS:** PSD shall provide a client with either an administrative review or an administrative hearing to appeal a PSD decision, as [appropriate] outlined below. The outcome of an administrative review or hearing is final except as otherwise provided by law or these policies.

**A. Administrative review:**

(1) An administrative review shall be used in the following instances:

(a) removal of foster children when the children have been in placement with the family for longer than six (6) months;

(b) removal of adoptive children prior to finalization;

(c) denial of [adoption or foster home application] a foster home license application;

(d) denial of the foster family's request to adopt foster children placed in their home, if the children have been placed with the foster family for longer than six months;

(e) denial of transition support services;

(f) the substantiation of an abuse or neglect investigation unless the issue is in litigation in a pending children's court case;

(g) the substantiation of a past abuse or neglect investigation that has been revealed by a present criminal record check where the records fails to show that PSD provided notice or an opportunity for a review, unless the issue was litigated in a children's court case; or

(h) denial of certification as an independent investigator or adoption counselor.

(2) A client seeking an administrative review shall request the review [either orally or] in writing to PSD within ten (10) days of the action or notice of the proposed action.

(3) The decision to initially place children with an adoptive family is not subject to an administrative review, but is made at PSD's sole discretion.

**B. Administrative hearing:**

An administrative hearing shall be used only in the following instances:

(1) the revocation, suspension, or non-renewal of a foster home licensed by PSD (as specified in 8.26.4 NMAC);

(2) the denial, non-renewal, probation, suspension, or revocation of a child placement agency license (as specified in 8.26.5 NMAC); or

(3) the substantiation of an abuse or neglect investigation after it has been upheld in an administrative review, unless the issue is in litigation in a pending children's court case.

**C. PSD shall comply with the administrative appeals process governed by 8.8.4 NMAC, Administrative Appeals.**

**D. A client seeking an administrative hearing shall request the hearing in writing to the PSD director's office within 10 days of the action or notice of proposed action.**

[8.8.2.13 NMAC - Rp, 8.8.2.17 NMAC, 03/31/10; A, 04/29/11; A, 02/29/12]

**8.8.2.15 CONFIDENTIALITY:** All PSD staff and CFYD contractors shall maintain confidentiality of records and information in accordance with the laws and regulations that apply to specific services.

**A. Abuse and neglect records:** Abuse and neglect records are confidential pursuant to the New Mexico Children's Code 32A-4-33(A) NMSA. CYFD may release the identity of a reporting party only with the reporting party's consent or with a court order (See Protective Services Legal Policies, Subsection A of 8.10.7.10 NMAC).

**B. Foster care and adoption records:** Under CYFD's general rulemaking authority Section 9-2A-7 NMSA, the confidentiality provisions of the Children's Code, Sections 32A-3B-22 and 32A-4-33 NMSA, the specific authority related to certification of foster homes, Section 40-7-4 (D) and the Adoption Act, Sections 32A-5-6 and 32A-5-8 NMSA, all client case records and client identifying information including foster and adoptive families, and applicant files are confidential and may not be publicly disclosed. PSD may release such files only upon a valid court order provided that confidential criminal and abuse and neglect information may not be released, unless a court order specifically orders such a release.

**C. Records related to an adoption proceeding:** Records related to an adoption proceeding are confidential pursuant to the Children's Code, Section 32A-5-8 NMSA. Post decree adoption records: Guidance on obtaining access of post decree adoption records by an adult adoptee, biological parent of an adult adoptee, sibling of an adoptee, or adoptive parent of a minor adoptee is outlined in the Adoption Act Regulations, Subsection C of 8.26.3.41 NMAC.

**D. Social security administration electronic records:** Any information obtained through the social security administration (SSA) data system, ISD2, either directly or from another individual with access to the ISD2, is confidential. Improper access, use or disclosure of ISD information is a violation of the Privacy Act of 1974 (5 U.S.C. Section 552a, Public Law No 93-579), and could result in civil and criminal sanctions pursuant to applicable federal statutes. When a PSD

worker becomes aware of a loss or suspected loss of any file containing ISD information (whether a hard copy file, or on a laptop, removable drive, etc.), that worker shall notify CYFD office of the general counsel (OGC) within one hour of the discovery of the loss.

[8.8.2.15 NMAC - Rp, 8.8.2.18 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.16 VENDOR AND PROVIDER PAYMENTS:**

**A.** PSD shall collect social security or tax identification numbers for all vendors and providers.

**B.** PSD seeks recovery of all overpayments made.

**C.** Any demands for payments shall be submitted within [forty-five (45)] 45 days of the service delivery or the date the charges were incurred or else payment is denied.

[8.8.2.16 NMAC - N, 03/31/10; A, 02/29/12]

**8.8.2.17 CRITICAL INCIDENT [REVIEW] REVIEW:**

**A.** [PSD may] CYFD office of the general counsel (OGC) may direct PSD to conduct an internal review of any critical incident which may include, but is not limited to:

(1) a serious injury or death of a child in PSD custody or with a PSD history;

(2) high profile cases with PSD history or involvement;

(3) abuse or neglect allegations involving a foster or adoptive parent; and

(4) allegations involving PSD employees, stipend students, or volunteers.

**B.** Critical incident reviews are confidential, as described herein at Subsections A and B of 8.8.2.15 NMAC, and are not for publication or release.

~~[C. The intent of the critical incident review shall be to evaluate PSD's policies, procedures and practices and the internal decision-making process and to make improvements to protect other clients.]~~

[8.8.2.17 NMAC - Rp, 8.8.2.24 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.18 QUALITY ASSURANCE:**

**A.** PSD's quality assurance unit shall provide regularly scheduled case reviews of a sample of cases in PSD county offices to evaluate the provision of services in the areas of safety, permanency and well-being.

(1) The purpose of the quality assurance unit shall be to provide reliable and valid performance and outcome data that will be used to improve safety, permanency and well-being outcomes for children and families.

(2) The quality assurance unit shall use the federally approved child and

family services (CFSR) instrument.

(3) The quality assurance unit shall review in-home and foster care cases.

(4) The quality assurance unit shall notify the county office manager and deputy director immediately about specific cases that have safety issues identified during the county office quality assurance review.

**B.** The results of the county-based quality assurance review shall be provided in writing to PSD management. The overall results of the county based quality assurance review may be made public upon request. However, information about the specific cases that were the basis of the findings is confidential as described herein at Subsections A and B of 8.8.2.15 NMAC.

**C.** The PSD management at the county office develops and implements a plan to improve outcomes based upon the results of the report.

**D.** The quality assurance unit shall conduct other quality assurance activities upon the direction of PSD management. The results of these quality assurance activities shall be provided in writing to PSD management. The overall results of these quality assurance reviews may be made public upon request. However, specific case information that provided for the basis for any finding shall be confidential as outlined herein at Subsections A and B of 8.8.2.15 NMAC.

[8.8.2.18 NMAC - Rp, 8.8.2.28 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.19 [ ~~ADOLESCENT AND ADOPTION RESOURCE TEAM (AART):~~**

~~**A.** The AART team shall provide an internal real time quality assurance review of specific cases of children in the custody of PSD. The purpose of the AART shall be to provide an independent review of the permanency planning efforts for specific case types for the purpose of promoting good practice and ensuring timely achievement of permanency.~~

~~(1) The AART shall review the designated cases with the assigned PS staff.~~

~~(2) The AART shall provide written reports that are confidential, as described herein at Subsections A and B of 8.8.2.15 NMAC, which include the steps and responsible parties that need to occur, and a finding as to whether or not there has been achievement of activities or goals.~~

~~**B.** PSD shall determine the specific case types to be reviewed based upon statewide performance on achievement of safety, permanency and well-being outcomes for children served by the agency.]~~

**FOSTER CARE GOALS:** No more than 22% of the total number of children in foster care will have been in foster care for over [twenty-four (24)] 24 months at any given

point during the fiscal year.

[8.8.2.19 NMAC - N, 03/31/10; 8.8.2.19 NMAC - Repealed; 02/29/12; 8.8.2.19 NMAC - Rn & A, 8.8.2.26 NMAC, 02/29/12]

**8.8.2.20 FAMILY CENTERED MEETINGS:** ~~[The family-centered meeting (FCM) is a facilitated meeting where PSD workers and supervisors meet with parents, caregivers and others for the purpose of case planning and decision making. Case planning and decisions shall address safety, permanency and well-being of the child.]~~ The family-centered meeting (FCM) is a facilitated meeting where PSD workers and supervisors shall meet with parents, guardians, and other for the purpose of safety planning, case planning and decision making.

[8.8.2.20 NMAC - N, 03/31/10; A, 02/29/12]

**8.8.2.21 QUALIFICATIONS AND TRAINING OF STAFF:** Protective services division staff shall meet minimum qualifications as determined by their positions and job functions, and participate in formal pre-service and annual training as required by CYFD.

**A.** All PSD staff shall be trained in their legal duties to protect the constitutional and statutory rights of children and families from the initial time of contact, during the investigation and throughout the provision of services.

**B.** Protective services supervisors and county office managers shall receive training in supervision [within six (6) months] as soon as possible of commencing supervision or employment as a supervisor or county office manager.

**C.** All PSD field staff child protective services social and community services coordinators shall receive formal pre-service training as soon as possible after employment. Staff shall not be assigned primary case assignment until they have completed all pre-service training requirements, including on the job training.

**D.** All PSD field staff, supervisors, and county office managers shall participate in [annual training] in-service training as required by PSD management.

[8.8.2.21 NMAC - Rp, 8.8.2.26 NMAC, 03/31/10; A, 02/29/12]

**8.8.2.26 RANDOM MOMENT SAMPLING (RMS):** PSD shall participate in RMS consistent with CYFD's federally approved cost allocation plan.

[8.8.2.26 NMAC - N, 03/31/10; 8.8.2.26 NMAC - N, 02/29/12]

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

This is an amendment to 8.10.2 NMAC, Sections 7, 8, 9, 10, 11, 12, 13, 14, and 15 effective February 29, 2012.

**8.10.2.7 DEFINITIONS:**

~~[A. "Abuse and neglect check" is the review of the protective services division management information system to determine if there has been any previous involvement with protective services.]~~

**A. "Child abuse and neglect check"** is a review of the PSD family automated client tracking system, also known as FACTS, or another state's central abuse or neglect registry to determine if there have been any previous referrals on the family to this state's or any other state's child protective services division.

**B. "Children's Code"** refers to the New Mexico Children's Code, Section 32A-1-1, et. seq., NMSA 1978.

~~[C. "Collateral contact" refers to a person who may possess pertinent information concerning the individuals involved in a PSD investigation or who may be able to provide information to the PSD worker concerning the alleged abuse or neglect that would be helpful in assessing safety threats and protective capacities.]~~

**C. "Child vulnerability"** refers to the child's ability to protect him or herself from identified safety threats as well as the child's ability to care for himself or herself when the child's parent or guardian is not able to meet the child's basic needs.

**D. "Collateral contact"** refers to any person who may be able to provide information to the PSD worker during an investigation of alleged abuse or neglect, concerning the alleged abuse or neglect that would be helpful in assessing child vulnerabilities, safety threats and protective capacities.

~~[D.]~~ **E. "CYFD"** is the New Mexico children, youth and families department.

~~[E.]~~ **"Enhanced intake"** is SCI's collection of additional information from collateral contacts in those circumstances where the initial reporter does not give sufficient information to make a decision on how to proceed with respect to the report.]

**F. "FACTS"** refers to the family automated client tracking system (FACTS), the official data management system for CYFD.

**G. "Guardian"** as defined in the Children's Code, Section 32A-1-4(I)

NMSA 1978, means a person appointed as guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.

**H.** **“Impending danger”** is when a child is living in a state of danger or position of continual danger due to a family circumstance or behavior. The threat caused by the circumstance or behavior is not presently occurring, but it can be anticipated to have severe effects on a child at any time.

**[F:] L.** **“Indian child”** refers to an unmarried person who is:

(1) under the age of [eighteen (18)] 18 years old;

(2) a member of an Indian tribe or is eligible for membership in an Indian tribe; and

(3) the biological child of a member of an Indian tribe.

**[G:] J.** **“Initiation”** [is a face-to-face contact by the assigned protective services worker with the alleged victim] of an investigation is the face-to-face contact by a PSD worker with the alleged victim, or documented diligent efforts to establish face-to-face contact with the victim.

**[H:] K.** **“Intake”** [refers to the process by which SCI receives and screens reports of alleged child abuse or neglect] refers to the process by which intake workers receive, screen and prioritize reports of alleged child abuse or neglect.

**L.** **“Parent”** as defined in the Children’s Code, Section 32A-1-4(P) NMSA 1978, includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child.

**[E:] M.** **“Placement”** is an out of home residential arrangement for the care of children in PSD custody, which may include, but is not limited to family foster care, relative foster care and treatment foster care, or a facility such as residential treatment center, group home, or emergency shelter.

**[F:] N.** **“Present danger”** means immediate, significant and observable severe harm or threat of immediate and severe harm that is presently occurring to a child and requires an immediate protective services response.

**[K:] O.** **“Prioritization”** is the assignment of a time frame for PSD to initiate an investigation based upon the reported safety threats to the child, the age of the child and the protective capacities identified in the report (See herein at 8.10.2.13 NMAC).

**[E:] P.** **“Protective capacities”** are those assets possessed by the caregiver that help reduce, control or prevent present or impending danger of serious harm to a child.

**[M:] Q.** **“Protective services division** (PSD refers to the protective

services division of the children, youth and families department, and is the state’s designated child welfare agency.

~~[N:] R.~~ **“Provider”** refers to any person or agency contracted by CYFD to provide placement or child care services.]

~~[O:] R.~~ **“PSD custody”** means custody of children as a result of an action [filed] occurring pursuant to the Children’s Code, Sections 32A-4-1 et seq. and 32A-3B-1 et seq NMSA 1978.

**[P:] S.** **“Report”** is a verbal or written presentation of information [concerning alleged] alleging child abuse or neglect that is received by [SCI] an intake worker.

~~[Q:] T.~~ **“Reporter”** refers to any individual who has contacted [PSD] statewide central intake (SCI) to make a report of alleged child abuse or neglect.

**[R:] U.** **“Safety threats”** are threats of serious harm to a child that may create a present or impending danger.

**[S:] V.** **“Screened in report”** is a report that has met PSD’s criteria for acceptance for investigation.

**[F:] W.** **“Screened out report”** is a report that has not met PSD’s criteria for acceptance for investigation.

**[U:] X.** **“Statewide central intake (SCI)”** [the PSD unit with responsibility that includes, but is not limited to receiving and screening reports of alleged child abuse or neglect and assigning accepted reports to the appropriate county office for investigation] is the unit within PSD whose responsibilities may include, but are not limited to receiving and screening reports of alleged child abuse or neglect and prioritizing and assigning accepted reports to the appropriate county office for investigation.

**Y.** **“Witness”** refers to a person who has a firsthand account of an event that is relevant to a PSD abuse and neglect investigation.

[8.10.2.7 NMAC - Rp, 8.10.2.7 NMAC, 03/31/10; A, 02/29/12]

**8.10.2.8 [PURPOSE OF CHILD PROTECTIVE SERVICES INTAKE] PURPOSE OF INTAKE SERVICES:** The purpose of child protective services intake is to:

**A.** receive reports of alleged child abuse or neglect;

~~[B:]~~ collect sufficient information to determine if the situation reported may constitute abuse or neglect as defined by the Children’s Code, Sections 32A-4-2(B) and 32A-4 (E) NMSA 1978; and

**C.** to determine if the alleged perpetrator is a parent or caregiver in order to determine whether an investigation by PSD and a referral to another agency is warranted]

**B.** determine if the

situation reported may constitute abuse or neglect as defined by the Children’s Code, Sections 32A-4-2(B) and 32A-4 (E) NMSA 1978;

**C.** determine if an investigation by PSD and a referral to another agency is warranted; and

**D.** receive reports of incidents involving children in placements and determine if such reports warrant an investigation.

[8.10.2.8 NMAC - Rp, 8.10.2.8 NMAC, 03/31/10; A, 02/29/12]

#### 8.10.2.9 ELIGIBILITY:

**A.** Any child, birth up to age [eighteen (18)] 18, shall be eligible for protective services intake without regard to income.

**B.** All individuals are required by the Children’s Code, Section 32A-4-3(A) NMSA 1978 to report suspected child abuse or neglect to SCI or law enforcement if he or she knows, or has a reasonable suspicion that a child has been abused or neglected.

[8.10.2.9 NMAC - Rp, 8.10.2.9 NMAC, 03/31/10; A, 02/29/12]

#### 8.10.2.10 PROVISION OF INTAKE SERVICES:

~~[A:]~~ PSD shall receive reports of suspected child abuse or neglect twenty-four (24) hours a day, seven (7) days a week.

~~[B:]~~ Intake services shall be conducted by individuals classified as a social and community services coordinator or caseworker, or higher.

~~[C:]~~ PSD shall accept reports from individuals wishing to remain anonymous:]

**A.** PSD intake workers shall be available to receive reports of suspected child abuse or neglect 24 hours a day, seven days a week, including reports involving suspected abuse or neglect of children in placement.

**B.** PSD intake workers shall accept reports from individuals wishing to remain anonymous.

**C.** Intake services shall be conducted by CYFD employees designated as PSD intake workers.

**D.** PSD intake workers shall collect sufficient information from the reporter in order to make a screening decision.

**E.** PSD intake workers shall assign a priority to screened-in reports as outlined in 8.10.2.13 NMAC.

**F.** PSD intake supervisors shall review all screening and prioritization decisions.

**G.** Once approved by the PSD intake supervisor, the intake worker shall assign screened-in, prioritized

reports to the appropriate county office for investigation within the timelines established by PSD.

**H.** Designated PSD intake workers may complete a national crime information center (NCIC) check on alleged perpetrators of child abuse or neglect. [8.10.2.10 NMAC - Rp, 8.10.2.10 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.2.11 PROTECTION OF THE IDENTITY OF REPORT SOURCES:**

PSD workers shall ask the source if he or she wishes that her identity be kept confidential. If so, the reporter's name will be entered as anonymous and PSD shall protect the identity or identifying information of reporting sources and shall not disclose the reporter's identity, absent the consent of the reporter or a court order. [8.10.2.11 NMAC - Rp, 8.10.2.11 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.2.12 INTAKE SCREENING DECISION:**

**A.** [PSD shall make intake decisions on all reports received.] PSD intake workers make screening decisions on all reports received. Screening decisions will be made on all reports within established time frames.

**B.** PSD intake workers shall use information received from the reporting source, information from collateral contacts as available, and results of the abuse and neglect check to assist in making the intake screening decision.

~~C.~~ PSD shall conduct enhanced intake to collect additional information to make an informed intake decision in appropriate circumstances or as appropriate.

~~D.~~ PSD shall inform the reporting source of the intake decision when the source has provided information that allows PSD to contact him or her for additional contact]

**C.** PSD intake workers shall ask the reporting source for contact information and will inform the reporting source of the intake screening decision, if so requested by reporting source.

[8.10.2.12 NMAC - Rp, 8.10.2.12 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.2.13 PRIORITIZATION:**

[PSD-SCI shall prioritize accepted reports as follows:

**A.** Emergency report: The highest priority report accepted by SCI for which the assigned PSD worker must initiate the investigation within three (3) hours of receipt of the report.

**B.** Priority one report: The second highest priority report accepted by SCI for which the assigned PSD worker must initiate the investigation within twenty-

four (24) hours from receipt of the report.

~~C.~~ Priority two report: The third highest priority report accepted by SCI for which the assigned PSD worker must initiate the investigation within five (5) calendar days from receipt of the report.] Subject to the review and approval of the PSD intake supervisor, the intake workers shall prioritize accepted reports as follows:

**A.** Emergency report (E): A report alleging a serious and immediate safety threat involving a vulnerable child, including but not limited to an abandoned infant or child, any physical injury to an infant, a potentially life threatening situation, recent sexual abuse, a law enforcement request for immediate response, and recent serious trauma, such as a head injury, burns, or broken bones. A report prioritized as an emergency requires that an investigation be initiated within three hours of the report's receipt by the assigned county office.

**B.** Priority one report (P1): A report alleging physical injury involving a vulnerable child who is in a safe environment at the time of the report, or a report alleging a serious impending safety threat involving a vulnerable child but where the alleged perpetrator will not have access to the child for the next 24 hours. A P1 report requires that an investigation be initiated within 24 hours of the report's receipt by the assigned county office.

**C.** Priority two report (P2): A report alleging an impending safety threat involving a vulnerable child with no immediate concern for the child's safety. This may include, but is not limited to, alleged physical abuse with no indication of injury or alleged abuse or neglect where the alleged perpetrator no longer has access to the child or a protective parent or guardian has already intervened. A P2 report requires that an investigation be initiated within five calendar days of the report's receipt by the assigned county office.

[8.10.2.13 NMAC - Rp, 8.10.2.13 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.2.14 PSD REPORTING REQUIREMENTS:**

**A.** When it is the professional opinion of PSD staff that a reasonable suspicion of child abuse or neglect exists, PSD shall make a report [is made] to the appropriate local law enforcement agency [in writing within forty-eight (48) hours of receiving the report].

**B.** PSD intake workers shall refer screened out reports to other agencies as resources exist or as required by law.

**C.** [When the alleged perpetrator of abuse or neglect is not a caregiver or household member, e.g. a coach, schoolteacher, or neighbor, PSD shall receive the information from the reporting source

and shall inform the reporter that it will refer the allegation within forty-eight (48) hours to law enforcement for investigation.] When the alleged perpetrator of abuse or neglect is not a parent or guardian, e.g. a coach, schoolteacher, or neighbor, PSD workers shall receive the information from the reporting source and shall inform the reporter that it will refer the allegation to the appropriate local law enforcement agency.

**D.** When the report received involves an Indian child on the reservation or pueblo, PSD intake workers shall immediately transmit the information to [tribal law enforcement or tribal social services] the appropriate tribal authority, such as tribal law enforcement or tribal social services.

[8.10.2.14 NMAC - Rp, 8.10.2.14 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.2.15 DOCUMENTATION REQUIREMENTS FOR INTAKE:**

**A.** [SCI shall make a record of all reports.] PSD intake workers shall make a record of all reports received regarding alleged child abuse or neglect.

**B.** PSD shall maintain records of all reports as follows:

(1) Screened out reports shall be maintained for one (+) year after date of last activity concerning client, as required by Subsection D of 1.18.690.31 NMAC.

(2) Accepted reports shall be maintained as part of the investigation case record for [eighteen (+18)] 18 years after case closure, as required by Paragraph (2) of Subsection D of 1.18.690.30 NMAC.

[8.10.2.15 NMAC - Rp, 8.10.2.15 NMAC, 03/31/10; A, 02/29/12]

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

This is an amendment to 8.10.3 NMAC, Sections 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, and 22 effective February 29, 2012.

**8.10.3.6 OBJECTIVE:** To establish guidelines for the investigation and disposition of cases of alleged abuse and neglect of children by their parent, guardian, [caregiver,] other household members, or foster care provider.

[8.10.3.6 NMAC - Rp, 8.10.3.6 NMAC, 03/31/10; A, 02/29/12]

#### **8.10.3.7 DEFINITIONS:**

**A. "Abandonment"** as defined in the Children's Code, Section 32A-4-2(A) NMSA 1978, includes instances when the parent, without justifiable cause:

(1) left the child without provision for the child's identification for a period of [fourteen (+14)] 14 days; or

(2) left the child with other,

including the other parent or an agency, without provision for support and without communication for a period of:

(a) three [(3)] months if the child was under six [(6)] years of age at the commencement of the three [(3)] month period; or

(b) six [(6)] months if the child was over six [(6)] years of age at the commencement of the six [(6)] month period.

**B. "Abused child"** as defined in the Children's Code, Section 32A-4-2(B) NMSA 1978, means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;

(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or

(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

**C. "Administrative hearing"** means a formal process in which the client shall have an opportunity to present evidence to an impartial hearing officer in accordance with CYFD's administrative appeals regulations [8.8.2.13 NMAC.] 8.8.4 NMAC.

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

**E. "Accepted report"** is a verbal or written presentation of information concerning the alleged abuse or neglect made to the protective services division (PSD) of child abuse or neglect that falls within PSD's legal authority to investigate.

**F. "Caregiver"** is a person responsible for and is caring for the child, who the legal guardian has placed the child in the care of, or who has assumed responsibility for the care of the child in the absence of the legal guardian.]

**G. E. "Children's Code"** refers to the New Mexico Children's Code, Section 32A-1-1, et. seq., NMSA 1978.

**G. "Child vulnerability"** refers to the child's ability to protect him or herself from identified safety threats as well as the child's ability to care for him or herself when the child's parent or guardian is not able to meet the child's basic needs.

**H. "Collateral contact"** [refers to a person who may possess pertinent information concerning the individuals involved in a PSD investigation or who may be able to provide information to the PSD worker concerning the alleged abuse or neglect that would be helpful in assessing safety threats and protective capacities.] refers to any person who may be able to provide information to the PSD worker during an investigation of alleged abuse or neglect, concerning the alleged abuse or neglect that would be helpful in assessing child vulnerabilities, safety threats and parent or guardian protective capacities.

**I. "Conditionally safe"** means that one or more safety threats have been identified that places the child in [immediate] present or impending danger of serious harm, however one or more protective capacities has been identified to offset, mitigate or control the threat of [immediate] present or impending danger of serious harm.

**J. "CYFD"** refers to the New Mexico children, youth and families department.

**K. "Exigent circumstances"** means when there is credible information that a child is in danger of severe harm and requires immediate protective services.

**L. "Emotional maltreatment"** is an observable behavior, activity, or words to intimidate, threaten, deride or degrade the child that causes substantial impairment of the child's mental or psychological ability to function.

**M. "FACTS"** refers to the family automated client tracking system (FACTS), the official data management system for CYFD.

**N. "Guardian" as defined in the Children's Code, Section 32A-1-4(I) NMSA 1978, means a person appointed as guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.**

**M. O. "Home school"** is the operation of a home study program by a parent as filed with the public education department.

**N. P. "Impending danger"** [means a state of danger in which family behaviors, attitudes, motives, emotions or situations pose a threat which may not be currently active, but can be anticipated to have severe effects on a child at any time] is when a child is living in a state of danger or position of continual danger due to a family circumstance or behavior. The threat caused by the circumstance or behavior is not presently occurring, but it can be anticipated to have severe effects on a child at any time.

**O. Q. "Indian child"** refers to an unmarried person who is [under the age of

eighteen (18) years old and a member of an Indian tribe, or is eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.];

(1) under the age of 18 years old;

(2) a member of an Indian tribe or is eligible for membership in an Indian tribe;

and

(3) the biological child of a member of an Indian tribe.

**P. R. "Initiation"** of an investigation is the face-to-face contact by a PSD worker with the alleged victim, or documented diligent efforts to establish face-to-face contact with the victim.

**Q. S. "Investigative decision"** is a determination of whether each allegation in the report is substantiated or unsubstantiated, as defined herein at [8.10.3.18 NMAC.] 8.10.3.17 NMAC.

**R. T. "Investigation disposition"** is the determination of the level of involvement, if any, of PSD with the family based upon an assessment of safety threats and protective capacities, and considering the ongoing risk to the child and the needs and strengths of the family.

**S. U. "Neglected child"** as defined in the Children's Code, Section 32A-4-2(E) NMSA 1978, means a child:

(1) who has been abandoned by the child's parent, guardian or custodian;

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of faults or habits of the child's parent, guardian or custodian, or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;

(3) who has been physically or sexually abused, the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;

(4) whose parent, guardian or custodian is unable to discharge that person's responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

(5) who has been placed for care of adoption in violation of the law; provided that nothing in the Children's Code (32A-1-1 NMSA 1978) shall be construed to imply that a child who is being provided with treatment by spiritual needs alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner there of is for that reason alone a neglected child within the meaning of the Children's Code; and further provided that no child shall be denied the protection afforded to all children under the Children's Code.

**V. "Parent"** as defined in the Children's Code, Section 32A-1-

4(P) NMSA 1978, includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child.

~~[F:] W.~~ **“Parental notice or notification”** is an in-person or telephone notice to the parent or legal guardian that his or her child will be or has been interviewed as part of an investigation.

~~[U:] X.~~ **“Permission”** is the consent for the child to participate in an investigation.

~~[V:] Y.~~ **“Physical abuse”** as defined in the Children’s Code, Section 32A-4-2(F) NMSA 1978 includes, but is not limited to any case in which the child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling or death and:

(1) there is not a justifiable explanation for the condition or death;

(2) the explanation given for the condition is at variance with the degree or nature of the condition;

(3) the explanation given for death is at variance with the nature of the death; or

(4) circumstances indicate that the condition or death may not be the product of an accidental occurrence.

~~[W:] Z.~~ **“Placement”** [is—an out of home residential arrangement for the care of children in the custody of PSD, including family foster care, relative foster care and treatment foster care, or a facility such as residential treatment center, group home, or emergency shelter.] is an out of home residential arrangement for the care of children in PSD custody, which may include, but is not limited to family foster care, relative foster care and treatment foster care, or a facility such as residential treatment center, group home, or emergency shelter.

~~[X:] AA.~~ **“Present danger”** means immediate, significant and observable severe harm or threat of immediate and severe harm that is presently occurring to a child and requires an immediate protective services response.

~~[Y:] BB.~~ **“Protective capacities”** are those assets possessed by the [caregiver] parent or guardian that help reduce, control or prevent present or impending danger of serious harm to a child.

~~[Z:] CC.~~ **“Protective services division (PSD)”** refers to the protective services division of the children, youth and families department, and is the state’s designated child welfare agency.

~~[AA:] DD.~~ **“Provider”** refers to a person or agency providing services to a PSD client.

~~[BB:] EE.~~ **“Private school”** is a public education department authorized school, including private childcare, other than a home school, that is not under the control, supervision or

management of a local school board.

~~[CC:] FE.~~ **“P S D custody”** means custody of children as a result of an action [filed] occurring pursuant to the Children’s Code, 32A-4-1 et seq. NMSA 1978 or 32A-3B-1 et seq. NMSA 1978.

~~[DD:] GG.~~ **“Public school”** is a school that is under the control, supervision or management of a local school district or the state board of education, including charter schools.

~~[EE:] HH.~~ **“Reasonable efforts”** as used in this policy refers to the provision of services or other interventions to prevent the removal of the child from the home, or if removal is required, to return the child home as soon as possible.

~~[FF:] II.~~ **“Report”** is a verbal or written presentation of information [concerning alleged] alleging child abuse or neglect that is received by [SCH] an intake worker.

~~[GG:] JJ.~~ **“Safe”** as used in this policy means that there are no safety threats placing the child in a present or impending danger of serious harm.

~~[KK.] LL.~~ **“Risk”** is the term used to describe PSD’s assessment, based on established criteria, of the likelihood that child will be abused or neglected by his or her parents or legal guardians.

~~[HH:] LL.~~ **“Safe haven”** refers to the Safe Haven for Infants Act whereby a person may leave an infant with the staff of a hospital without being subject to criminal prosecution for abandonment or abuse if the infant was born within 90 days of being left at the hospital, as determined within a reasonable degree of medical certainty, and if the infant is left in a condition that would not constitute abandonment or abuse pursuant to Section 24-22-1 NMSA 1978.

~~[H:] MM.~~ **“Safety decision”** is based on the presence of safety threats and protective capacities that offset, mitigate or control those threats. A child may be assessed to be safe, conditionally safe or unsafe.

~~[JJ:] NN.~~ **“Safety intervention”** **“Safety plan”** is a document that identifies the strategy or group of strategies implemented to control a safety threat. It is an intrusion into family life in the form of ongoing assessment and specific strategies designed to match the duration and level of the safety threat up to and including removal of the child from home.

~~[KK:] OO.~~ **“Safety threats”** are threats of serious harm to a child that may create a present or impending danger.

~~[LL:] PP.~~ **“Sexual abuse”** as defined in the Children’s Code, Section 32A-4-2(G) NMSA 1978, includes but is not limited to criminal sexual contact, incest or

criminal sexual penetration, as those acts are defined by state law.

~~[MM:] QQ.~~ **“Sexual exploitation”** as defined in the Children’s Code, Section 32A-4-2(H) NMSA 1978 includes, but is not limited to:

(1) allowing, permitting or encouraging a child to engage in prostitution;

(2) allowing, permitting or encouraging a child in obscene or pornographic photographing; or

(3) filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.

~~[RR.] SS.~~ **“Statewide central intake (SCI)”** is the unit within PSD whose responsibilities may include, but is not limited to receiving and screening reports of alleged child abuse or neglect and prioritizing and assigning accepted reports to the appropriate county office for investigation.

~~[NN:] SS.~~ **“Unsafe”** means that one or more safety threats have been identified that place the child in present or impending danger of serious harm and there are not sufficient protective capacities to offset, mitigate or control the threat of present or impending danger of serious harm.

~~[TT.] SS.~~ **“Witness”** refers to a person who has a firsthand account of an event that is relevant to a PSD abuse and neglect investigation.

[8.10.3.7 NMAC - Rp, 8.10.3.7 NMAC, 03/31/10; A, 04/29/11; A, 02/29/12]

**8.10.3.8 PURPOSE OF CHILD PROTECTIVE SERVICES INVESTIGATION:** ~~[The purpose of protective services investigation is to assess safety of children who are the subjects of reports of alleged abuse or neglect. The purpose of the investigation is to collect and assess information to determine whether the incident of child abuse or neglect occurred, whether any child in the home remains at risk for continuing abuse or neglect, and to assess the need for additional protective services. Investigations shall be conducted for children in the custody of their biological parents, adoptive parents, other relatives or guardians, or who are in PSD custody.]~~

~~A.~~ The purpose of protective services investigation is to assess safety of children who are the subjects of reports of alleged abuse or neglect by:

(1) collecting and assessing information to determine whether the alleged child abuse or neglect occurred;

(2) determining whether any child in the home is vulnerable to present or impending danger;

(3) assessing the parent or guardian protective capacities; and

(4) determining the need for

additional services.

**B.** ~~Investigations shall be conducted for children in the custody of their biological parents, adoptive parents or guardians, or for children in PSD custody.~~

**C.** ~~Reports of child abuse or neglect in schools, facilities, and childcare homes or centers shall be investigated by a local law enforcement agency. See herein at Subsection A of 8.10.3.13 NMAC.~~

[8.10.3.8 NMAC - Rp, 8.10.3.8 NMAC, 03/31/10; A, 02/29/12]

### 8.10.3.9 ASSIGNMENT AND INITIATION OF INVESTIGATION:

**A.** Every accepted report concerning alleged child abuse or neglect, shall be assigned for investigation according to the investigation priority as determined by statewide central intake (SCI).

**B.** Investigation priority: The PSD worker shall ~~initiate~~ initiate the investigation within the time frames established by PSD as follows:

(1) Emergency reports shall be initiated within three ~~(3)~~ hours of SCI's decision to accept the report.

(2) Priority one reports shall be initiated within ~~[twenty-four (24)]~~ 24 hours of receipt of SCI's decision to accept the report.

(3) Priority two reports shall be initiated within five ~~(5)~~ calendar days of SCI's decision to accept the report.

**C.** In cases when there has been a child fatality, the PSD worker shall not be required to make face to face contact with the deceased alleged victim for purposes of the initiation of the investigation.

[8.10.3.9 NMAC - Rp, 8.10.3.10 NMAC, 03/31/10; A, 04/29/11; A, 02/29/12]

### 8.10.3.10 INVESTIGATION REQUIREMENTS - GENERAL:

**A.** The safety of the child is the overriding concern throughout the casework relationship with the family. If the safety of the child is ever in conflict with the preservation of a family unit, the child's need for protection always takes precedence. PSD shall request immediate assistance from law enforcement if necessary to assess and secure the safety of the child.

**B.** The PSD worker shall conduct the investigation in a manner that protects the privacy of the child and family.

**C.** The PSD worker shall make efforts to engage the family in the investigation and assessment process to gather the information required to identify the safety threats, [and] child vulnerabilities, protective capacities and ongoing risks of harm to the child.

**D.** The PSD worker shall interview collateral contacts during the investigation.

**E.** The PSD worker shall

visit the home during an investigation. This requirement may be waived in specific circumstances that include but are not limited to:

(1) the parent or guardian refuses the worker entrance;

(2) the home has been determined to be unsafe by law enforcement ~~[and/or]~~ or public health; or

(3) the family is homeless.

**F.** The PSD worker shall complete the ~~[safety assessment, risk assessment and family strengths and needs assessments]~~ safety and risk assessment tools in all investigations. These are FACTS tools used by the PSD worker in determining the investigation ~~[decision and]~~ disposition.

**G.** ~~[The PSD worker shall complete the investigation and documents all investigation requirements, as specified in this section and herein at 8.10.3.12 NMAC and 8.10.3.13 NMAC, within thirty (30) days of SCI accepting the report (see also herein at 8.10.3.17 NMAC and 8.10.3.18 NMAC).]~~ The PSD worker shall make efforts to provide or arrange for services for the child and family during the investigation to enhance the family's capacity to safely care for their child.

[8.10.3.10 NMAC - N, 03/31/10; A, 02/29/12]

### 8.10.3.11 INVESTIGATION REQUIREMENTS - CHILD VICTIM AND OTHER CHILDREN:

**A.** The PSD worker shall interview and ~~[observes]~~ observe the alleged child victim and all other children in the household during the investigation. A parent or guardian may refuse the PSD worker permission to interview or observe the child. If access is denied, the PSD worker shall determine whether it is necessary to contact law enforcement or obtain a court order to ensure the safety of the child. The following applies based on the site at which the interview will take place.

(1) Interviews at home: Children contacted at home ~~[are]~~ shall be interviewed only with the permission of the parent or caretaker.

(2) Interviews at public schools: Public schools are required by the Children's Code, Section 32A-4-5 (C) NMSA 1978, to permit the PSD worker to interview children involved in a PSD investigation without obtaining the permission of the parent of guardian.

~~[(a) public schools are required by the Children's Code, Section 32A-4-5 (C) NMSA 1978, to permit the PSD worker to interview children involved in a PSD investigation; and~~

~~(b) parental permission is not required to interview a child at public school.]~~

(3) Interviews at private schools or

in childcare homes and facilities:

(a) a private school or childcare home or facility may deny permission for the PSD worker to interview the child on the facility grounds, and

(b) if permission is denied by the private school or childcare home and by the parent and exigent circumstances are believed to exist, PSD shall determine whether to contact law enforcement or obtain a court order.

**B.** The PSD worker shall conduct all interactions with alleged child victims and child witnesses in a child sensitive manner that takes into consideration the special needs of the child, the child's ability, age, language and intellectual maturity and protects the child's privacy.

**C.** The PSD worker shall inform all children that their participation in the interview is voluntary. Children ~~[fourteen (14)]~~ 14 years of age and older must agree to participate in the interview even when the PSD worker has obtained parental permission.

**D.** The PSD worker shall ~~[arranges]~~ arrange for any medical, mental health, or other evaluations or examinations as required during the investigation. Parental consent is required for any non-emergency medical, mental health or other evaluations, examinations or assessments. Children 14 years of age or older must also consent to services.

[8.10.3.11 NMAC - N, 03/31/10; A, 02/29/12]

### 8.10.3.12 INVESTIGATION REQUIREMENTS - PARENTS AND [CAREGIVERS] GUARDIANS:

**A.** The PSD worker shall notify the parent guardian of the interview with the child in advance of the interview unless the worker has determined that notification could adversely affect the safety of the child about whom the report has been made or compromise the investigation.

**B.** If the PSD worker ~~[shall determine]~~ determines that notification could adversely affect the safety of the child or compromise the investigation, the worker may interview a child without prior ~~[notification of the parents or guardians]~~ parental or guardian notification. In this situation, the PSD worker shall notify the parents or guardians of the interview within ~~[twenty-four (24)]~~ 24 hours.

**C.** The PSD worker shall identify all legal guardians ~~[and caregivers]~~ of the child.

**D.** The PSD worker shall interview the parents, guardians, ~~[or the caregiver.]~~ collateral contacts or witnesses during the investigation.

**E.** At the time of initial contact with the parents, guardian or alleged perpetrator the PSD worker shall inform him



or her of the reported allegations ~~[made]~~ in a manner consistent with laws protecting the rights of the reporter.

**F.** At the beginning of the investigation, or prior to beginning an interview with the parent or guardian, the PSD worker shall inform the parents or guardians of the following:

(1) that prior to ~~[any legal proceeding,]~~ filing an abuse and neglect petition any PSD interaction with the parents or guardians, ~~[or the caregiver,]~~ is voluntary;

(2) that PSD has received a report alleging child abuse or neglect and ~~[what the allegations are that has led to the investigation]~~ the nature of the allegations;

(3) that PSD is required by law to conduct an investigation of screened-in reports;

~~(3)~~ (4) that only law enforcement can remove a child who is not in PSD custody, if necessary to protect the child's health and safety, unless the district court issues an ex parte order allowing PSD to remove the child;

~~(4)~~(5) that the investigation findings, decision, and disposition are confidential in accordance with the Children's Code, Section 32A-4-33 NMSA 1978;

~~(5)~~ (6) that information concerning the report and investigation has been entered into PSD's data management system;

~~(6)~~ (7) that other people may be interviewed in order to complete the investigation; and

~~(7)~~ (8) children age ~~[fourteen (14)]~~ 14 and older may consent to an interview away from the home even when the parent does not consent.

**G.** The PSD worker shall provide the parent or guardian with information regarding CYFD's complaint process should the parent or guardian have any complaints.

[8.10.3.12 NMAC - N, 03/31/10; A, 02/29/12]

### 8.10.3.15 INVESTIGATIONS INVOLVING INDIAN CHILDREN:

**A.** PSD shall investigate allegations of child abuse or neglect involving Indian children who reside off the reservation or pueblo.

**B.** PSD shall assist in the investigation of allegations of child abuse or neglect involving children who reside on the reservation or pueblo, if requested by the Indian tribal government.

**C.** PSD shall make efforts to determine if the child who is subject of an investigation is an Indian child.

**D.** PSD shall notify the ~~[tribe]~~ appropriate tribal authority of any investigations involving Indian children ~~[as required by the Indian Child Welfare Act].~~

[8.10.3.15 NMAC - Rp, 8.10.3.15 NMAC, 03/31/10; A, 02/29/12]

### 8.10.3.16 SEEKING OR ACCEPTING CUSTODY OF CHILDREN, INCLUDING INDIAN CHILDREN:

**A.** PSD shall make reasonable efforts to maintain the family unit and prevent the removal of a child from his or her home, as long as the child's safety is assured.

**B.** If temporary out-of-home placement is necessary to ensure the immediate safety of the child, PSD shall make reasonable efforts to effect the safe reunification of the child and family.

**C.** PSD shall seek custody of Indian children who are domiciled or residing off-reservation when continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.

**D.** An Indian child who is domiciled on the reservation but temporarily located off the reservation may be removed by law enforcement from his parent or Indian custodian in order to prevent imminent physical harm to the child. PSD shall notify the tribe as soon as possible and facilitates a transfer of the case to the tribe.

**E.** PSD shall notify parents or guardians that their child is in custody within ~~[twenty-four (24)]~~ 24 hours of the child being taken into custody.

**F.** PSD shall make every effort to identify, locate and notify fit and willing relatives for consideration of placement of a child in custody who requires out of home placement.

**G.** When a law enforcement agency seeks to place a child in the custody of PSD, then the PSD worker shall obtain a statement of reasonable grounds for temporary protective services division custody from ~~[that]~~ the law enforcement officer making the request.

[8.10.3.16 NMAC - Rp, 8.10.3.16 NMAC, 03/31/10; A, 04/29/11; A, 02/29/12]

### 8.10.3.17 COMPLETION OF AN INVESTIGATION AND INVESTIGATION DECISION:

**A.** The PSD worker shall complete the investigation and decide whether the report's allegations of abuse or neglect are substantiated or unsubstantiated within ~~[thirty (30)]~~ 45 days of SCI accepting the report for investigation, unless an extension is approved by the supervisor. Extensions are not to exceed an additional ~~[thirty (30)]~~ 30 days after the original ~~[thirty (30)]~~ 45 days have passed. Completion of the investigation includes, but is not limited to making the investigation decision, determining the investigation disposition and completing, sending out the notice of results

of the investigation letter to the parent or guardian and completing all documentation in FACTS.

(1) **Substantiated report:** an allegation of child abuse or neglect in which a ~~[caregiver or provider]~~ parent, guardian, foster parent, pre-adoptive parent or treatment foster care parent has been identified as the perpetrator or as failing to protect the child and credible evidence exists to support the investigation worker's conclusion that the child has been abused or neglected, as defined in the Children's Code. Credible evidence upon which to base a finding of substantiation may include, but is not limited to:

(a) a ~~[caregiver's]~~ parent or guardian's admission;

(b) physical ~~[facts or]~~ evidence;

(c) collateral or witness statements and observations;

(d) a child's disclosure; ~~[and]~~ or

(e) the investigation worker's observation.

(2) **Unsubstantiated report:** an allegation of child abuse or neglect in which the information collected during the investigation does not support a finding that the child was abused or neglected, as defined in the Children's Code by a parent, guardian, foster parent, pre-adoptive parent or treatment foster parent, or that such a person failed to protect the child from abuse or neglect as defined by the Children's Code.

**B.** When there is clear evidence that a child has been an abused child, but there is unclear information about who was the perpetrator, then the PSD worker shall substantiate the investigation as failure to protect the child on the part of the parent or guardian.

~~[B:]~~ **C.** The PSD worker shall document the investigation decision and the supervisory review and approval of the decision in FACTS within 45 days of the date the report was accepted by SCI, or if an extension was granted, by the end of the extension period.

[8.10.3.17 NMAC - Rp, 8.10.3.17 NMAC, 03/31/10; A, 02/29/12]

### 8.10.3.18 INVESTIGATION DISPOSITION:

**A.** The PSD worker shall make an investigation disposition within ~~[thirty (30)]~~ 45 days of SCI accepting the report in every investigation PSD conducts, unless an extension is approved by the supervisor. Extensions are not to exceed an additional ~~[thirty (30)]~~ 30 days after the original ~~[thirty (30)]~~ 45 days have passed.

**B.** The PSD worker shall determine the disposition of the investigation based upon the safety decision (safe, conditionally safe, or unsafe) and ~~[the service delivery matrix that considers the assessment of risk and the needs and~~

strengths of the family] whether a safety plan is required, the family's willingness to participate in services, and the assessment of risk.

C. Disposition options may include, but are not limited to closing the case, referring the family to community providers, providing in-home services (IHS), or providing permanency planning services.

D. PSD shall document the [safety decision and the] investigation disposition in FACTS and include the investigation disposition in the notice of results of investigation letter sent to the parent or guardian.

[8.10.3.18 NMAC - Rp, 8.10.3.18 NMAC, 03/31/10; A, 02/29/12]

### 8.10.3.19 CHILD FATALITY INVESTIGATION WITH NO OTHER CHILDREN IN THE HOME:

PSD shall conduct an investigation of alleged child [maltreatment] abuse or neglect resulting in a child fatality when there are no other remaining children residing in the home.

[8.10.3.19 NMAC - Rp, 8.10.3.19 NMAC, 03/31/10; 8.10.3.19 NMAC - N, 04/29/11; A, 02/29/12]

### 8.10.3.20 DOCUMENTATION:

A. PSD shall document investigation assignments and requirements, as described herein at 8.10.3.9, 8.10.3.10, [and] 8.10.3.11, and 8.10.3.12 NMAC, and shall document the investigation [decisions and dispositions] decision, disposition and notice of results of the investigation letter in FACTS as described herein at 8.10.3.17 and 8.10.3.18 NMAC.

B. PSD shall document reasonable efforts made to enhance the family's capacity to safely provide for the child to avoid removal of the child from the home and efforts to reunify the child if removal was required during the investigation. Documentation shall be included in the case record and in the affidavit for custody.

C. All information obtained by PSD in an abuse and neglect investigation is confidential and [is released only as allowed by law (See Protective Services Legal Policies, Subsection A of 8.10.7.10 NMAC)] may not be publically released. (See Protective Services General Policies, Subsection A of 8.8.2.15 NMAC). [8.10.3.20 NMAC - Rp, 8.10.3.20 NMAC, 03/31/10; 8.10.3.20 NMAC - Rn, 8.10.3.19 NMAC, 04/29/11; A, 02/29/12]

### 8.10.3.21 NOTIFICATION OF THE INVESTIGATIVE DECISION AND RIGHT TO ADMINISTRATIVE REVIEW AND ADMINISTRATIVE HEARING:

A. The PSD worker shall [notify the parents, guardians, or providers

and, if appropriate, law enforcement and regulatory agencies of the investigation decision] provide parents, guardians, foster parents, pre-adoptive parents and treatment foster parents who were the subject of the investigation the notice of results of the investigation letter. The PSD worker shall send the notice of the results of the investigation letter to parents, guardians, foster parents, pre-adoptive parents or treatment foster parents upon closing the investigation within the 45 day time frame, or with a possible 30 day extension. (See above at Subsection A of 8.10.3.17 NMAC).

B. The PSD worker shall notify [the parent, guardian or provider of the] parents, guardians, foster parents, pre-adoptive parents and treatment foster parents who were the subject of a substantiated investigation, which is not the subject of a pending children's court case, in writing that the decision to substantiate the investigation may be reviewed through PSD's administrative review process. A client seeking an administrative review shall request the review in writing to PSD within 10 days of the action or notice of the proposed action.

C. If the investigation decision is upheld after being reviewed through PSD's administrative review process, then [the individual conducting the review shall notify the parent, guardian or provider that the upheld substantiated investigation decision] PSD shall send a formal letter to the parent, guardian, foster parent, pre-adoptive parent or treatment foster parent, who was the subject of the investigation, notifying them of the decision to uphold the substantiation and that the upheld decision may be reviewed through CYFD's administrative hearing process. The parent, guardian, foster parent, pre-adoptive parent or treatment foster parent shall request an administrative hearing in writing to the PSD director's office within 10 days of receipt of the letter.

[8.10.3.21 NMAC - Rn & A, 8.10.3.20 NMAC, 04/29/11; A, 02/29/12]

**8.10.3.22 CHILD D PROTECTIVE SERVICES CHILDCARE DURING THE CPS INVESTIGATION:** The PSD worker may offer child protective services [child-care] childcare during an open investigation as part of an in home safety plan created for the child. Child protective services childcare may be provided [for as long as] during the investigation [remains open.] within the 45 day time frame, or with possibility of an 30 day extension, given to complete the investigation. (See above at Subsection A of 8.10.3.17 NMAC.)

[8.10.3.22 NMAC - N, 04/29/11; A, 02/29/12]

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

This is an amendment to 8.10.6 NMAC, Sections 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 effective February 29, 2012.

**8.10.6.1 ISSUING AGENCY:** Children, Youth and Families Department (CYFD), Protective Services [(PS)] (PSD). [8.10.6.1 NMAC - Rp, 8.10.6.1 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.2 SCOPE:** Protective services division employees and the general public. [8.10.6.2 NMAC - Rp, 8.10.6.2 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.3 STATUTORY AUTHORITY:** Children, Youth and Families Department Act, Section 9-2A-7 D, NMSA 1978; New Mexico Children's Code, Section 32A-1-1, NMSA 1978 [8.10.6.3 NMAC - Rp, 8.10.6.3 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.7 DEFINITIONS:**  
A. "Abused child" as defined in the Children's Code, Section 32A-4-2(B) NMSA 1978, means a child:

(1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;

(2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;

(3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;

(4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health;

or  
(5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

[A-] B. "Case management" is a service provided to the clients that includes, but is not limited to, assessment of needs, reports, monitoring of progress, coordination of services, facilitation of inter-agency collaboration and documentation of efforts to meet the client's needs.

[B-] "Child maltreatment" is neglect, abuse, or perpetration of sexual activity that adversely affects a child or youth.]

**C. “Client”** [is—each individual in a family receiving service from PS as an open and active case in FACTS] means a person who is receiving services from PSD.

**D. “Community resources”** are agencies, contractors, individuals, and community organizers that deliver services or other support for clients during and after PS involvement.

**E. “Conditionally safe”** [is the term used to describe protective services’ assessment based upon available information that when community resources have been put in place to protect the child, factors detrimental to the child have been temporarily mitigated, or the child’s immediate circumstance or environment is not threatening to the child’s safety] means that one or more safety threats have been identified that places the child in present or impending danger of serious harm, however one or more protective capacities has been identified to offset, mitigate or control the threat of present or impending danger of serious harm.

**F. “CYFD”** refers to the New Mexico children, youth and families department.

**G. “Direct service”** is a service provided by [PS] PSD staff to an individual or family that supports one or more goals in the family plan.

**H. “Emergency discretionary funds (EDF)”** are funds used to secure services or items necessary to achieve goals of the family plan.

**I. “Engagement”** refers to the family’s commitment to the [PS] PSD intervention and subsequent involvement of the family with PS and community resources throughout the case.

**J. “FACTS”** [is the family automated client tracking system, CYFD’s management information system] refers to the family automated client tracking system (FACTS), the official data management system for CYFD.

**K. “Family assessment”** [is a collaborative process involving each household member and other relevant persons to identify and document the family’s strengths, needs, and issues to be addressed in the family plan] is a collaborative effort between PSD workers and the family to assess the family’s needs and protective capacities based upon identified safety threats and risk factors.

**L. “Family centered meeting”** is a facilitated meeting where [PS] PSD workers and supervisors meet with [parents or caregivers] parents, guardians and others for the purpose of safety planning, case planning and decision making.

**M. “Family plan”** is a plan developed by [PS] PSD in collaboration with each household member, based on the

information collected through the family assessment, which identifies the specific changes in behaviors and circumstances that are expected as a result of the in-home services intervention.

**N. “Foster care candidate”** is a child who is at serious risk of removal from home where PSD is either pursuing the child’s removal from the home or making reasonable effort to prevent the child’s removal from the home.

**O. “Guardian”** as defined in the Children’s Code, Section 32A-1-4(D) NMSA 1978, means a person appointed as guardian by a court or Indian tribal authority or a person authorized to care for the child by a parental power of attorney as permitted by law.

**P. “Impending danger”** is when a child is living in a state of danger or position of continual danger due to a family circumstance or behavior. The threat caused by the circumstance or behavior is not presently occurring, but it can be anticipated to have severe effects on a child at any time.

**[N:] Q. “In-home services”** are services provided without court intervention that are expected to enhance the family’s ability to function independently of [PS] PSD, improve safety for children, create stability within the home, and develop healthy and supportive on-going community relationships.

**[O.] “New Mexico Children’s Code”** refers to Section 32A-1-1, et. seq., NMSA 1978:.]

**R. “Neglected child”** as defined in the Children’s Code, Section 32A-4-2(E) NMSA 1978, means a child:

(1) who has been abandoned by the child’s parent, guardian or custodian;

(2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child’s well-being because of faults or habits of the child’s parent, guardian or custodian, or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;

(3) who has been physically or sexually abused, the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;

(4) whose parent, guardian or custodian is unable to discharge that person’s responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

(5) who has been placed for care of adoption in violation of the law; provided that nothing in the Children’s Code (32A-1-1 NMSA 1978) shall be construed to imply that a child who is being provided with treatment by spiritual needs alone through prayer, in accordance with the tenets and practices of a recognized church or

religious denomination, by a duly accredited practitioner there of is for that reason alone a neglected child within the meaning of the Children’s Code; and further provided that no child shall be denied the protection afforded to all children under the Children’s Code.

**S. “Parent”** as defined in the Children’s Code, Section 32A-1-4(P) NMSA 1978, includes a biological or adoptive parent if the biological or adoptive parent has a constitutionally protected liberty interest in the care and custody of the child.

**T. “Placement”** is an out of home residential arrangement for the care of children in PSD custody, which may include, but is not limited to family foster care, relative foster care and treatment foster care, or a facility such as residential treatment center, group home, or emergency shelter.

**U. “Present danger”** means immediate, significant and observable severe harm or threat of severe harm that is presently occurring to a child and requiring an immediate protective services response.

**V. “Protective capacities”** are those assets possessed by the parent or guardian that help reduce, control or prevent present or impending danger of serious harm to a child

**[P:] W. [“PS”] Protective services division (PSD)** refers to the protective services division of the children, youth and families department, and is the state’s designated child welfare agency.

**[Q:] X. “Risk”** is the term used to describe [PS’s] PSD’s assessment, based on established criteria, of the likelihood that child will be abused or neglected by his or her parents or legal guardian.

**[R:] Y. “Safe”** [is the term used to describe PS’s assessment based upon pre-determined factors that a child’s immediate circumstances or environment is free from persons and situations that have been identified as possible cause of harm to the child] as used in this policy means that there are no safety threats placing the child in present or impending danger of serious harm.

**[S:] Z. “Safety plan”** [is a written document that outlines the steps a family or individual will take to ensure safety of themselves or others in their care that is mutually agreed upon by the family members and PS and may include community resources] is a document that identifies the strategy or group of strategies implemented to control a safety threat. It is the intrusion into family life in the form of ongoing assessment and specific strategies designed to match the duration and level of the safety threat up to including the removal of the child from the home.

**[T.] “Substitute care”** is the placement of a child outside of the child’s home made by PS pursuant to emergency

custody, custody order, or a voluntary placement agreement.]

~~[F:]~~ **AA. “Structured decision making (SDM) instruments”** [are instruments used to determine the safety and risk of maltreatment of children and the needs and strengths of the family, based upon the application of pre-determined criteria] are standardized assessments located in FACTS that the worker completes to determine the child’s safety and risk of abuse or neglect based upon the application of pre-determined criteria.

**BB. “Unsafe”** means that one or more safety threats have been identified that place the child in present or impending danger of serious harm and there are not sufficient protective capacities to offset, mitigate or control the threat of present or impending danger of serious harm.

~~[V:]~~ **CC. “Voluntary service intake (VSI)”** is the category under which an in-home services case is opened in FACTS.

[8.10.6.7 NMAC - Rp, 8.10.6.7 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.8 PURPOSE OF IN-HOME SERVICES:** [The purpose of in-home services is to promote the safety of children and reduce the risk of the recurrence of maltreatment of children by their caretakers without the intervention of the courts.]

**A.** The purpose of in-home services is to promote the safety of children and reduce the risk of the recurrence of abuse or neglect of children by their parents or guardians without the intervention of the courts.

**B.** A child may not be determined to be safe or conditionally safe solely on the basis of the provision of in-home services.

[8.10.6.8 NMAC - Rp, 8.10.6.8 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.9 ELIGIBILITY:**

**A.** A family is eligible to receive in-home services without regard to income.

~~[B.]~~ A family is eligible to receive in-home services when there is a current substantiated allegation of abuse or neglect with scores of high to moderate on the risk assessment and the family needs and strengths assessment, or there is a current substantiated allegation of abuse or neglect with low risk and needs scores when the family includes a child of three years of age or younger. A family with unsubstantiated abuse or neglect may be eligible for in-home services with county office manager approval. In order to be eligible for in-home services, the child must be determined to be safe or conditionally safe. A child may not be determined to be safe or conditionally

safe solely on the basis of the provision of in-home services.]

**B.** A family may be eligible to receive in-home services when:

**(1)** the child has been determined to be conditionally safe and the risk of child abuse or neglect has been determined to be moderate or high; or

**(2)** the child has been determined to be unsafe and the risk of child abuse or neglect has been determined to be very low, low, moderate, or high.

**C.** A family with an unsubstantiated abuse or neglect report may be eligible for in-home services with county office manager approval.

~~[E:]~~ **D.** A family whose child is in the legal custody of [PS] PSD through a court order or voluntary placement is not eligible to receive in-home services.

[8.10.6.9 NMAC - Rp, 8.10.6.9 NMAC, 10/30/08; A, 02/29/12]

**8.10.6.10 FOSTER CARE CANDIDACY DETERMINATION:**

**A.** The IHS worker shall make a foster care candidacy determination for each child in a family receiving in-home services. A child may be considered a foster care candidate when a child is determined to be conditionally safe and the risk of maltreatment is moderate or high, or when a child is determined to be unsafe.

**B.** A child may determined to be a foster care candidate at any point during the in-home services case when there has been a change in a family’s circumstances that affects the safety of a child.

**C.** Once a child has been initially determined a foster care candidate, then the foster care candidacy is re-determined for the child every six months.

[8.10.6.10 NMAC - Rp, 8.10.6.10 NMAC, 10/30/08; 8.10.6.10 NMAC - N, 02/29/12]

~~[8.10.6.10]~~ **8.10.6.11 C A S E TRANSFER TO IN-HOME SERVICES:**

**A.** In-home services are assigned within five working days of the disposition of the investigation.

**B.** The investigation is closed within five days of case transfer to an in-home services worker.

[8.10.6.11 NMAC - Rp, 8.10.6.10 NMAC, 10/30/08; 8.10.6.11 NMAC - Rn, 8.10.6.10 NMAC, 02/29/12]

~~[8.10.6.11]~~ **8.10.6.12 PROVISION OF SERVICES:**

**A.** No waiting list is established or maintained for in-home services.

**B.** Families participate in in-home services without court intervention.

**C.** Services are provided to the family based on assessment of [safety, risk, and the family’s needs and strengths]

safety of the child and risk of abuse or neglect to the child by the parent or guardian. Services provided to the family utilize family strengths, family resources, community resources, and [PS] PSD resources.

**D.** [PS] PSD favors the use of family and community services over direct services whenever possible and appropriate.

**E.** In-home services are delivered as a collaborative effort between [PS] PSD, the family, and community partners.

[8.10.6.12 NMAC - Rp, 8.10.6.17 NMAC, 10/30/08; 8.10.6.12 NMAC - Rn & A, 8.10.6.11 NMAC, 02/29/12]

~~[8.10.6.12]~~ **8.10.6.13 F A M I L Y CONTACT:**

**A.** The in-home services worker schedules the initial face-to-face contact with the family within [seventy-two] 72 hours from transfer of the case to in-home services.

**B.** The in-home services worker shall meet with the family at least weekly through the duration of the case.

**C.** When determining the meeting frequency and other types of intervention, safety of the child is always the first consideration.

[8.10.6.13 NMAC - Rp, 8.10.6.12 NMAC, 10/30/08; 8.10.6.13 NMAC - R & A, 8.10.6.12 NMAC, 02/29/12]

~~[8.10.6.13]~~ **8.10.6.14 I N - H O M E FAMILY ASSESSMENT AND SERVICE PLANS:**

**A.** The [PS-worker] in-home services worker, in collaboration with the family, completes a family assessment and develops a safety plan and family plan.

**B.** The [PS-worker] in-home services worker, in collaboration with the family, reviews and updates the family’s safety plan, addressing all individuals in the family.

**C.** The [PS-worker] in-home services worker completes a family assessment and family plan for all in-home services cases.

[8.10.6.14 NMAC - Rp, 8.10.6.12 NMAC, 10/30/08; 8.10.6.14 NMAC - Rn & A, 8.10.6.13 NMAC, 02/29/12]

~~[8.10.6.14]~~ **8.10.6.15 C A S E STAFFING AND ON-GOING ASSESSMENT:** [PS-utilizes] In-home services workers utilize staffings and conferences to develop, assess, or review plans and to review services and the safety of a child.

[8.10.6.15 NMAC - Rp, 8.10.6.16 NMAC, 10/30/08; 8.10.6.15 NMAC - Rn & A, 8.10.6.14 NMAC, 02/29/12]

[8.10.6.15] **8.10.6.16 EMERGENCY DISCRETIONARY**

**FUNDS (EDF):** [PS] PSD may use EDF to assist the family with the goals identified in the family plan to reduce safety and risk factors for children in the home. EDF, when related to safety and risk, can be used to purchase products or services such as rent or rent deposits, utilities, clothing, transportation, food, home or car repair, and appliance repair. EDF are dispersed according to the emergency discretionary fund manual.

[8.10.6.16 NMAC - Rp, 8.10.6.19 NMAC, 10/30/08; 8.10.6.16 NMAC - Rn & A, 8.10.6.15 NMAC, 02/29/12]

**[8.10.6.16] 8.10.6.17**

**SUBSEQUENT REPORTS OF ABUSE OR NEGLECT:** If a report is made to statewide central intake when there is reason to believe abuse or neglect has occurred subsequent to the original report that resulted in providing in-home services, then a new investigation will occur. A new investigation does not disqualify a family from receiving in-home services. [PS] PSD may continue to provide in-home services during and after an investigation resulting from additional child abuse or neglect allegations if the safety of a child can be insured.

[8.10.6.17 NMAC - Rp, 8.10.6.20 NMAC, 10/30/08; 8.10.6.17 NMAC - Rn & A, 8.10.6.16 NMAC, 02/29/12]

**[8.10.6.17] 8.10.6.18**

**FAMILY REFUSAL OF IN-HOME SERVICES:** A decision by the family to refuse or withdraw from services does not constitute abuse or neglect.

**A.** When the family refuses in-home services, the in-home services worker, in consultation with the supervisor, reviews the results of the [~~safety assessment, risk assessment, and the family needs and strengths assessment instruments~~] safety and risk assessments as well as other pertinent information to determine if [PS] PSD should pursue involuntary service through a court order.

**B.** When the family withdraws after beginning in-home services, the worker conducts a safety assessment and a risk assessment and reviews the results, along with information from the investigation, as well as other pertinent information, to determine an appropriate course of action. Action may include, but is not limited to:

- (1) revision of the in-home services family plan;
- (2) case closure; or
- (3) pursuit of involuntary services through a court order.

[8.10.6.18 NMAC - Rp, 8.10.6.14 NMAC, 10/30/08; 8.10.6.18 NMAC - Rn & A, 8.10.6.17 NMAC, 02/29/12]

**[8.10.6.18] 8.10.6.19**

**DURATION**

**OF SERVICE DELIVERY:** In-home services case interventions are provided for a maximum of 180 days, unless the in-home services worker requests the county office manager grant a 45 day extension. The in-home services worker documents that an extension of services would assist the family in achievement of goals, reduce the risk of recurrent abuse or neglect, and ensure the child is safe or conditionally safe. No more than three [~~forty-five~~] 45 day extensions will be granted.

[8.10.6.19 NMAC - Rp, 8.10.6.21 NMAC, 10/30/08; 8.10.6.19 NMAC - Rn & A, 8.10.6.18 NMAC, 02/29/12]

**[8.10.6.19] 8.10.6.20**

**CASE CLOSURE:** In-home services cases may be closed with no further intervention from [PS] PSD when the structured decision making instruments are completed and:

- A.** the safety assessment instrument documents that the child is safe or conditionally safe;
- B.** the safety assessment and risk assessment instruments document either no escalation of risk, or a decrease in the risk level;

**C.** the goals of the family plan have been achieved; or

**D.** the family withdraws from services [~~pursuant to PR-8.10.6.17; Family Refusal of In-Home Services~~].

[8.10.6.20 NMAC - Rp, 8.10.6.13 NMAC, 10/30/08; 8.10.6.20 NMAC - Rn & A, 8.10.6.19 NMAC, 02/29/12]

**[8.10.6.20] 8.10.6.21**

**CASE DOCUMENTATION:** Case plans, case contracts, and supervisory consultations are documented in FACTS.

[8.10.6.21 NMAC - Rn, 8.10.6.20 NMAC, 02/29/12]

**NEW MEXICO ENERGY,  
MINERALS AND NATURAL  
RESOURCES DEPARTMENT  
ENERGY CONSERVATION AND  
MANAGEMENT DIVISION**

**TITLE 3 TAXATION  
CHAPTER 3 PERSONAL INCOME  
TAXES  
PART 33 CERTIFICATION  
FOR TAX CREDIT FOR  
AGRICULTURAL BIOMASS**

**3.3.33.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department.  
[3.3.33.1 NMAC - N, 02/29/2012]

**3.3.33.2 SCOPE:** 3.3.33 NMAC applies to the application and certification procedures for administration of the agricultural biomass personal income tax

credit for dairy or feedlot operations.  
[3.3.33.2 NMAC - N, 02/29/2012]

**3.3.33.3 STATUTORY AUTHORITY:** 3.3.33 NMAC is established under the authority of NMSA 1978, Section 7-2-18.26(F) and NMSA 1978, Section 9-1-5.

[3.3.33.3 NMAC - N, 02/29/2012]

**3.3.33.4 DURATION:** Permanent.  
[3.3.33.4 NMAC - N, 02/29/2012]

**3.3.33.5 EFFECTIVE DATE:** 02/29/2012, unless a later date is cited at the end of a section.  
[3.3.33.5 NMAC - N, 02/29/2012]

**3.3.33.6 OBJECTIVE:** 3.3.33 NMAC's objective is to establish procedures to provide certification of transportation of agricultural biomass to a qualified facility that uses agricultural biomass to generate electricity or make biocrude or other liquid or gaseous fuel for commercial use.  
[3.3.33.6 NMAC - N, 02/29/2012]

**3.3.33.7 DEFINITIONS:**  
**A.** "Agricultural biomass" means wet manure from either dairy or feedlot commercial operations that meets specifications established by the energy minerals and natural resources department.

**B.** "Agricultural biomass production facility" means a dairy or feedlot that collects animal waste for the purpose of transporting that material to a facility where it will be used to generate electricity, make biocrude or other liquid or gaseous fuel for commercial use.

**C.** "Applicant" means a taxpayer that transports agricultural biomass to a qualified energy producing facility and who desires to have the department issue a certificate of transportation to be used in applying for an agricultural biomass personal income tax credit from the taxation and revenue department.

**D.** "Application package" means the application documents an applicant submits to the department to receive a certificate of transportation to support an agricultural biomass personal income tax credit application to the taxation and revenue department.

**E.** "Apron scrape" means biomass collected from concrete feeding aprons or bedding areas.

**F.** "Biocrude" means a non-fossil form of energy that can be transported and refined using existing petroleum refining facilities and that is made from biologically derived feedstocks and other agricultural biomass.

**G.** "Certificate of transportation" means a document issued

by the department to the applicant and the taxation and revenue department, enumerated with a unique system certification number and certifying the number of wet tons of agricultural biomass transported to a qualified facility during a specified taxable year. The purpose of this document is to certify the number of wet tons of biomass qualifying for the biomass personal income tax credit.

**H.** "Corral scrape" means biomass collected from soil bedding or feed areas.

**I.** "Dairy" means a facility that raises livestock for milk production.

**J.** "Department" means the energy, minerals and natural resources department.

**K.** "Dry cow" means a fully grown cow that is not currently being milked.

**L.** "Feedlot" means an operation that fattens livestock for market.

**M.** "Greenwater" means milking parlor washwater.

**N.** "Heifer" means a young replacement cow of at least 500 pounds that has not yet been milked.

**O.** "Livestock" means domestic animals that produce usable agricultural biomass.

**P.** "Milking cow" means a dairy cow that is lactating and which is milked on a daily basis.

**Q.** "Qualified facility" or "qualified energy producing facility" means a facility that the department has determined uses agricultural biomass to generate electricity or make biocrude or other liquid or gaseous fuel for commercial use.

**R.** "Transport" means to convey or arrange for conveyance of biomass by vehicle or pipe from dairy or feedlot to a qualified facility.

**S.** "Taxable year" means the annual accounting period for purposes of filing personal income tax returns as defined by the United States internal revenue service.

**T.** "Taxpayer" means a dairy or feedlot operator or lessee who is liable for payment of gross receipts tax or personal income tax.

**U.** "Taxpayer identification number" means an applicant's social security number or 11 digit number issued to the applicant upon registration with the taxation and revenue department to pay gross receipts and individual taxes.

**V.** "Wet ton" means 2000 pounds of agricultural biomass qualifying for a certificate of transportation from the department. The number of wet tons qualifying for the certificate of transportation from a dairy during a specific time period is the amount in tons transported from the agricultural biomass production facility calculated by adding:

(1) the daily population of milking cows times 49 pounds of biomass per milking cow per day of apron scrape plus 70 pounds of biomass per day per milking cow of corral scrape; plus

(2) the daily population of dry cows times 30 pounds of biomass per dry cow per day of apron scrape plus 45 pounds of biomass per day per dry cow of corral scrape; plus

(3) the daily population of heifers times 17 pounds of biomass per heifer per day of apron scrape plus 26 pounds of biomass per day per heifer of corral scrape; plus

(4) 13 pounds of biomass per milking cow per day pumped from the agricultural biomass production facility as greenwater for each day of the time period. In the event that less than 100 percent of the biomass produced at the agricultural biomass production facility is transported to a qualified facility, the amount of calculated transported biomass qualifying for a certificate of transportation will be proportionally reduced by the percentage of each of the three categories (apron scrape, corral scrape and greenwater) of the biomass not transported to a qualifying facility during the time period.

[3.3.33.7 NMAC - N, 02/29/2012]

### **3.3.33.8 G E N E R A L PROVISIONS:**

**A.** The agricultural biomass personal income tax credit is available to taxpayers filing a personal income tax return for taxable years beginning on or after January 1, 2011 and ending prior to January 1, 2020. Certificates of transportation pursuant to 3.3.33 NMAC may be issued by the department for agricultural biomass transported during taxable years beginning on or after January 1, 2011 and ending prior to January 1, 2020.

**B.** The amount of the agricultural biomass income tax credit is calculated at five dollars per wet ton. The maximum amount of the annual combined total of all agricultural biomass income tax credits and all agricultural biomass corporate income tax credits allowed is five million dollars.

[3.3.33.8 NMAC - N, 02/29/2012]

### **3.3.33.9 A P P L I C A T I O N FOR CERTIFICATE OF TRANSPORTATION:**

**A.** To apply for the certificate of transportation, an applicant shall submit a complete application package to the energy conservation and management division of the department within 30 days of the end of the taxable year for which certification is sought. An applicant may obtain the application form from the energy conservation and management division of

the department.

**B.** A complete application package shall include a certificate of transportation application form and all required attachments. An applicant shall submit one application package for each dairy or feedlot operation. All material submitted in the application package shall be provided on 8½-inch x 11-inch paper.

**C.** The completed application form shall include the following information and documents:

(1) the applicant's name, mailing address, telephone number, social security number or taxpayer identification number and the dates of the taxable year for which application is being made;

(2) the address or public land survey system description of the location of the dairy or feedlot operation, including the county;

(3) a description of the dairy or feedlot operation, descriptions and photographs of equipment used to collect and to transport agricultural biomass;

(4) daily data showing the number of milking cows, dry cows and heifers present at the dairy or feedlot during the specified time period;

(5) a description of the qualified facility to which the biomass was transported, including the name and address of the operator;

(6) dated weigh or volume tickets for each truckload of waste leaving the agricultural biomass production facility, the classification of each truckload as either apron scrape, corral scrape or greenwater, and the destination of each load beginning on the first day of the specified period and no later than the last day of the specified time period for which certification is sought;

(7) totalizing flow meter readings showing the amount of pumped waste or greenwater leaving the agricultural biomass production facility and the amount and destination of any waste diverted from delivery to the qualified facility beginning on the first day of the specified time period and no later than the last day of the specified time period for which certification is sought;

(8) a statement, signed and dated by the applicant, which signature may be electronic if approved by the department, stipulating that:

(a) all information provided in the application package is true and correct;

(b) applicant has read the certification requirements contained in 3.3.33 NMAC;

(c) applicant understands that there are annual aggregate limits to the amount of biomass that will qualify for the agricultural biomass income tax credit;

(d) applicant understands that the department must certify the transportation of the biomass before the applicant is eligible

for a tax credit; and

(e) to ensure compliance with 3.3.33 NMAC, applicant agrees that the division or its authorized representative may inspect the dairy or feedlot operation that is described in the application package at any time after the submission of the application package with not less than five business days notice to the applicant; and

(9) a signed statement from the operator of the qualified facility specifying the amount of the biomass received and identifying the dairy or feedlot from which it was received.

**D.** The application package shall meet 3.3.33 NMAC's requirements and be materially complete.

[3.3.33.9 NMAC - N, 02/29/2012]

### **3.3.33.10 APPLICATION REVIEW PROCESS AND CERTIFICATION:**

**A.** The department shall review the application within 30 days of receipt. If the application package complies with 3.3.33 NMAC, the department will determine the number of wet tons of biomass transported, check accuracy of the applicant's documentation and determine whether the department is able to certify that the biomass was transported to a qualified facility.

**B.** If an application package fails to meet a requirement or is not materially complete, the department shall deny the application. The department shall also deny an application from which it is unable to determine from the materials presented in the application package the tonnage transported to or accepted at a qualified facility. The department's disapproval letter shall be issued within 30 days of the receipt of the application and shall state the reasons why the department denied the application.

**C.** If the department finds that the application package meets 3.3.33 NMAC's requirements, the department shall certify that the transportation of the biomass to a qualified facility did occur and so notify the taxpayer and the taxation and revenue department. The certificate shall include the taxpayer's contact information, social security number, taxpayer identification number, system certification number and the net amount of biomass eligible for the tax credit.

**D.** If the department denies the application, the applicant shall have 15 days from the date of denial to petition the department secretary for reconsideration. If no petition is received, the denial shall be considered final on the 15<sup>th</sup> day. If a petition for reconsideration is received, it shall contain a statement of reasons the secretary should reconsider the application and any additional or updated material necessary to

support that petition. The secretary shall have 15 days to reconsider and approve the amended application, set the matter for an examiner hearing or deny the application. If the secretary has not acted within 15 days of receipt of the petition for reconsideration, the denial of the original application shall be considered final.

[3.3.33.10 NMAC - N, 02/29/2012]

### **HISTORY OF 3.3.33 NMAC: [RESERVED]**

## **NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT ENERGY CONSERVATION AND MANAGEMENT DIVISION**

### **TITLE 3 TAXATION CHAPTER 4 CORPORATE INCOME TAXES PART 20 CERTIFICATION FOR TAX CREDIT FOR AGRICULTURAL BIOMASS**

**3.4.20.1 ISSUING AGENCY:** Energy, Minerals and Natural Resources Department.

[3.4.20.1 NMAC - N, 02/29/2012]

**3.4.20.2 SCOPE:** 3.4.20 NMAC applies to the application and certification procedures for administration of the agricultural biomass corporate income tax credit for dairy or feedlot operations.

[3.4.20.2 NMAC - N, 02/29/2012]

**3.4.20.3 STATUTORY AUTHORITY:** 3.4.20 NMAC is established under the authority of NMSA 1978, Section 7-2A-26(D) and NMSA 1978, Section 9-1-5.

[3.4.20.3 NMAC - N, 02/29/2012]

**3.4.20.4 DURATION:** Permanent.

[3.4.20.4 NMAC - N, 02/29/2012]

**3.4.20.5 EFFECTIVE DATE:** 02/29/2012, unless a later date is cited at the end of a section.

[3.4.20.5 NMAC - N, 02/29/2012]

**3.4.20.6 OBJECTIVE:** 3.4.20 NMAC's objective is to establish procedures to provide certification of transportation of agricultural biomass to a qualified facility that uses agricultural biomass to generate electricity or make biocrude or other liquid or gaseous fuel for commercial use.

[3.4.20.6 NMAC - N, 02/29/2012]

### **3.4.20.7 DEFINITIONS:**

**A.** "Agricultural biomass" means wet manure from either dairy or feedlot commercial operations that meets

specifications established by the energy minerals and natural resources department.

**B.** "Agricultural biomass production facility" means a dairy or feedlot that collects animal waste for the purpose of transporting that material to a facility where it will be used to generate electricity, make biocrude or other liquid or gaseous fuel for commercial use.

**C.** "Applicant" means a taxpayer that transports agricultural biomass to a qualified energy producing facility and who desires to have the department issue a certificate of transportation to be used in applying for an agricultural biomass corporate income tax credit from the taxation and revenue department.

**D.** "Application package" means the application documents an applicant submits to the department to receive a certificate of transportation to support an agricultural biomass corporate income tax credit application to the taxation and revenue department.

**E.** "Apron scrape" means biomass collected from concrete feeding aprons or bedding areas.

**F.** "Biocrude" means a non-fossil form of energy that can be transported and refined using existing petroleum refining facilities and that is made from biologically derived feedstocks and other agricultural biomass.

**G.** "Certificate of transportation" means a document issued by the department to the applicant and the taxation and revenue department, enumerated with a unique system certification number and certifying the number of wet tons of agricultural biomass transported to a qualified facility during a specified taxable year. The purpose of this document is to certify the number of wet tons of biomass qualifying for the biomass corporate income tax credit.

**H.** "Corral scrape" means biomass collected from soil bedding or feed areas.

**I.** "Dairy" means a facility that raises livestock for milk production.

**J.** "Department" means the energy, minerals and natural resources department.

**K.** "Dry cow" means a fully grown cow that is not currently being milked.

**L.** "Feedlot" means an operation that fattens livestock for market.

**M.** "Greenwater" means milking parlor washwater.

**N.** "Heifer" means a young replacement cow of at least 500 pounds that has not yet been milked.

**O.** "Livestock" means domestic animals that produce usable agricultural biomass.

**P.** "Milking cow" means

a dairy cow that is lactating and which is milked on a daily basis.

**Q.** "Qualified facility" or "qualified energy producing facility" means a facility that the department has determined uses agricultural biomass to generate electricity or make biocrude or other liquid or gaseous fuel for commercial use.

**R.** "Transport" means to convey or arrange for conveyance of biomass by vehicle or pipe from dairy or feedlot to a qualified facility.

**S.** "Taxable year" means the annual accounting period for purposes of filing corporate income tax returns as defined by the United States internal revenue service.

**T.** "Taxpayer" means a dairy or feedlot operator or lessee who is liable for payment of gross receipts tax or corporate income tax.

**U.** "Taxpayer identification number" means an applicant's 11 digit number issued to the applicant upon registration with the taxation and revenue department to pay gross receipts and corporate taxes.

**V.** "Wet ton" means 2000 pounds of agricultural biomass qualifying for a certificate of transportation from the department. The number of wet tons qualifying for the certificate of transportation from a dairy during a specific time period is the amount in tons transported from the agricultural biomass production facility calculated by adding:

(1) the daily population of milking cows times 49 pounds of biomass per milking cow per day of apron scrape plus 70 pounds of biomass per day per milking cow of corral scrape; plus

(2) the daily population of dry cows times 30 pounds of biomass per dry cow per day of apron scrape plus 45 pounds of biomass per day per dry cow of corral scrape; plus

(3) the daily population of heifers times 17 pounds of biomass per heifer per day of apron scrape plus 26 pounds of biomass per day per heifer of corral scrape; plus

(4) 13 pounds of biomass per milking cow per day pumped from the agricultural biomass production facility as greenwater for each day of the time period. In the event that less than 100 percent of the biomass produced at the agricultural biomass production facility is transported to a qualified facility, the amount of calculated transported biomass qualifying for a certificate of transportation will be proportionally reduced by the percentage of each of the three categories (apron scrape, corral scrape and greenwater) of the biomass not transported to a qualifying facility during the time period.

[3.4.20.7 NMAC - N, 02/29/2012]

### 3.4.20.8 G E N E R A L PROVISIONS:

**A.** The agricultural biomass corporate income tax credit is available to taxpayers filing a corporate income tax return for taxable years beginning on or after January 1, 2011 and ending prior to January 1, 2020. Certificates of transportation pursuant to 3.4.20 NMAC may be issued by the department for agricultural biomass transported during taxable years beginning on or after January 1, 2011 and ending prior to January 1, 2020.

**B.** The amount of the agricultural biomass income tax credit is calculated at five dollars per wet ton. The maximum amount of the annual combined total of all agricultural biomass personal income tax credits and all agricultural biomass corporate income tax credits allowed is five million dollars.

[3.4.20.8 NMAC - N, 02/29/2012]

### 3.4.20.9 A P P L I C A T I O N FOR CERTIFICATE OF TRANSPORTATION:

**A.** To apply for the certificate of transportation, an applicant shall submit a complete application package to the energy conservation and management division of the department within 30 days of the end of the taxable year for which certification is sought. An applicant may obtain the application form from the energy conservation and management division of the department.

**B.** A complete application package shall include a certificate of transportation application form and all required attachments. An applicant shall submit one application package for each dairy or feedlot operation. All material submitted in the application package shall be provided on 8½-inch x 11-inch paper.

**C.** The completed application form shall include the following information and documents:

(1) the applicant's name, mailing address, telephone number, taxpayer identification number and the dates of the taxable year for which application is being made;

(2) the address or public land survey system description of the location of the dairy or feedlot operation, including the county;

(3) a description of the dairy or feedlot operation, descriptions and photographs of equipment used to collect and to transport agricultural biomass;

(4) daily data showing the number of milking cows, dry cows and heifers present at the dairy or feedlot during the specified time period;

(5) a description of the qualified facility to which the biomass was transported, including the name and address

of the operator;

(6) dated weigh or volume tickets for each truckload of waste leaving the agricultural biomass production facility, the classification of each truckload as either apron scrape, corral scrape or greenwater, and the destination of each load beginning on the first day of the specified period and no later than the last day of the specified time period for which certification is sought;

(7) totalizing flow meter readings showing the amount of pumped waste or greenwater leaving the agricultural biomass production facility and the amount and destination of any waste diverted from delivery to the qualified facility beginning on the first day of the specified time period and no later than the last day of the specified time period for which certification is sought;

(8) a statement, signed and dated by the applicant, which signature may be electronic if approved by the department, stipulating that:

(a) all information provided in the application package is true and correct;

(b) applicant has read the certification requirements contained in 3.4.20 NMAC;

(c) applicant understands that there are annual aggregate limits to the amount of biomass that will qualify for the agricultural biomass income tax credit;

(d) applicant understands that the department must certify the transportation of the biomass before the applicant is eligible for a tax credit; and

(e) to ensure compliance with 3.4.20 NMAC, applicant agrees that the division or its authorized representative may inspect the dairy or feedlot operation that is described in the application package at any time after the submission of the application package with not less than five business days notice to the applicant; and

(9) a signed statement from the operator of the qualified facility specifying the amount of the biomass received and identifying the dairy or feedlot from which it was received.

**D.** The application package shall meet 3.4.20 NMAC's requirements and be materially complete.

[3.4.20.9 NMAC - N, 02/29/2012]

### 3.4.20.10 A P P L I C A T I O N REVIEW PROCESS AND CERTIFICATION:

**A.** The department shall review the application within 30 days of receipt. If the application package complies with 3.4.20 NMAC, the department will determine the number of wet tons of biomass transported, check accuracy of the applicant's documentation and determine whether the department is able to certify that the biomass was transported to a qualified facility.



**B.** If an application package fails to meet a requirement or is not materially complete, the department shall deny the application. The department shall also deny an application from which it is unable to determine from the materials presented in the application package the tonnage transported to or accepted at a qualified facility. The department's disapproval letter shall be issued within 30 days of the receipt of the application and shall state the reasons why the department denied the application.

**C.** If the department finds that the application package meets 3.4.20 NMAC's requirements, the department shall certify that the transportation of the biomass to a qualified facility did occur and so notify the taxpayer and the taxation and revenue department. The certificate shall include the taxpayer's contact information, taxpayer identification number, system certification number and the net amount of biomass eligible for the tax credit.

**D.** If the department denies the application, the applicant shall have 15 days from the date of denial to petition the department secretary for reconsideration. If no petition is received, the denial shall be considered final on the 15<sup>th</sup> day. If a petition for reconsideration is received, it shall contain a statement of reasons the secretary should reconsider the application and any additional or updated material necessary to support that petition. The secretary shall have 15 days to reconsider and approve the amended application, set the matter for an examiner hearing or deny the application. If the secretary has not acted within 15 days of receipt of the petition for reconsideration, the denial of the original application shall be considered final.

[3.4.20.10 NMAC - N, 02/29/2012]

**HISTORY OF 3.4.20 NMAC:**  
[RESERVED]

**NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

Notice of Repeal of Rules: 20.2.300 NMAC - Reporting of Greenhouse Gas Emissions, filed 11/29/2010, 20.2.301 NMAC - Greenhouse Gas Reporting - Verification Requirements, filed 11/29/2010 and 20.2.350 NMAC - Greenhouse Gas Cap-and-Trade Provisions, filed 11/15/2010, were repealed by the New Mexico Environmental Improvement Board effective March 14, 2012.

**NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

**TITLE 20 ENVIRONMENTAL PROTECTION  
CHAPTER 5 PETROLEUM STORAGE TANKS  
PART 19 DELIVERY PROHIBITION**

**20.5.19.1 ISSUING AGENCY:** New Mexico Environmental Improvement Board.  
[20.5.19.1 NMAC – N, 3/17/2012]

**20.5.19.2 SCOPE:** This part applies to owners and operators of storage tanks and facilities holding petroleum and to product deliverers, as defined in 20.5.1 NMAC, who deliver petroleum, and to any person subject to the provisions of 20.5 NMAC.  
[20.5.19.2 NMAC – N, 3/17/2012]

**20.5.19.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Groundwater Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through 74-1-17 NMSA 1978.  
[20.5.19.3 NMAC – N, 3/17/2012]

**20.5.19.4 DURATION:** Permanent.  
[20.5.19.4 NMAC – N, 3/17/2012]

**20.5.19.5 EFFECTIVE DATE:** March 17, 2012, unless a later date is indicated in the bracketed history note at the end of a section.  
[20.5.19.5 NMAC – N, 3/17/2012]

**20.5.19.6 OBJECTIVE:** The purpose of this part is to set forth the prohibitions for the delivery, deposit, or

acceptance of product at or to a storage tank or a facility that has been determined by the department to be ineligible for such delivery, deposit or acceptance, in order to protect the public health, safety and welfare and the environment of the state.  
[20.5.19.6 NMAC – N, 3/17/2012]

**20.5.19.7 DEFINITIONS:** The definitions in 20.5.1 NMAC shall apply to this part.  
[20.5.19.7 NMAC – N, 3/17/2012]

**20.5.19.8 GENERAL:** It shall be unlawful for any owner, operator or product deliverer to deliver to, deposit into or accept a regulated substance at or to a storage tank or a facility that has been identified by the department as ineligible for product delivery, deposit or acceptance. It shall also be unlawful for any person to remove, tamper with, destroy or damage a red tag or certificate posted pursuant to this part.  
[20.5.19.8 NMAC – N, 3/17/2012]

**20.5.19.9 DELIVERY PROHIBITIONS:**

**A.** Mandatory ineligibility. The department shall classify a storage tank as ineligible for delivery, deposit or acceptance of product if any of the following conditions exist at the storage tank, or shall classify a facility as ineligible for delivery or acceptance of product if any of the following conditions exist at every storage tank at the facility:

- (1) required spill prevention equipment is not installed;
- (2) required overfill protection equipment is not installed;
- (3) required leak detection equipment is not installed; or
- (4) required corrosion protection equipment is not installed, including required corrosion protection equipment for a buried metal flexible connector.

**B.** Discretionary ineligibility. The department may, in its sole discretion, classify a storage tank as ineligible for delivery, deposit or acceptance of product if any of the following conditions exist at the storage tank, or may classify a facility as ineligible for delivery, deposit or acceptance of product if any of the following conditions exist at every storage tank at the facility:

- (1) improper operation or maintenance of required equipment for:
  - (a) spill prevention;
  - (b) overfill prevention;
  - (c) leak detection; or
  - (d) corrosion protection; or
- (2) operation of the storage tank or facility in a manner that creates an imminent threat to public health and the environment.  
[20.5.19.9 NMAC – N, 3/17/2012]

**20.5.19.10 PROCEDURES FOR CLASSIFYING A STORAGE TANK OR FACILITY AS INELIGIBLE:**

A. Mandatory ineligibility. Notice of intent to red tag: Upon identification of a condition or conditions at one or more storage tanks at a facility under Subsection A of 20.5.19.9 NMAC, the department shall issue the owner and operator a notice of intent to red tag stating the violations and providing the owner or operator 30 days from the date of the notice to correct the violations. The notice of intent to red tag shall inform the owner and operator that the department will prohibit delivery to each storage tank with one or more conditions identified under 20.5.19.9 NMAC at the facility if the violations are not corrected. The notice of intent to red tag shall state if the facility is in a rural and remote area as defined in 20.5.1.7 NMAC, and shall grant a deferral as provided in 20.5.19.15 NMAC.

B. Discretionary ineligibility.

(1) Notice of violation. Upon identification of a condition or conditions at one or more storage tanks at a facility under Subsection B of 20.5.19.9 NMAC, the department shall issue the owner and operator a notice of violation stating the violation and providing the owner or operator 30 days from the date of the notice to correct the violation. The notice of violation shall inform the owner and operator that the violation cited could subject the owner and operator to delivery prohibition at the identified tanks if the violations are not corrected.

(2) Notice of deficiency. If the owner or operator fails to correct the violations within the timeframe provided in the notice of violation, the department shall issue the owner or operator a notice of deficiency re-stating the violations and providing the owner or operator an additional 30 days from the date of the notice to correct the violations. The notice of deficiency shall inform the owner and operator that the violations cited could subject the owner and operator to delivery prohibition at the identified tanks if the violations are not corrected.

(3) Notice of intent to red tag. If the owner or operator fails to correct the violations within the timeframe provided in the notice of deficiency, the department shall issue the owner or operator a notice of intent to red tag re-stating the violations and providing the owner or operator an additional 30 days from the date of the notice to correct the violations. The notice of intent to red tag shall inform the owner and operator that the department will prohibit delivery to the identified tanks at the facility if the violations are not corrected. The notice of intent to red tag shall state if the facility is in a rural and

remote area as defined in 20.5.1.7 NMAC, and shall grant a deferral as provided in 20.5.19.15 NMAC.

C. Red tag. If the owner or operator fails to correct the violations within the timeframe provided in the notice of intent to red tag, the department shall affix a red tag to the fill pipe of every storage tank with one or more conditions identified under 20.5.19.9 NMAC at the facility pursuant to 20.5.19.11 NMAC.

D. Notification of installation, replacement, repair or modification. Owners and operators shall give the department notice of any installation, replacement, repair or modification performed to correct the conditions listed in the notice of violation, notice of deficiency or notice of intent to red tag in accordance with 20.5.4 NMAC and 20.5.5 NMAC. The department may grant a waiver of the time periods required by those parts if warranted by the circumstances.

[20.5.19.10 NMAC – N, 3/17/2012]

**20.5.19.11 IDENTIFICATION OF INELIGIBLE STORAGE TANKS OR FACILITIES:**

A. Red tag. In order to prevent the delivery, deposit or acceptance of product at or to a storage tank or a facility that has been identified by the department as ineligible under 20.5.19.9 and 20.5.19.10 NMAC, the department shall affix a tamper-proof red tag to the fill pipe of every storage tank with one or more conditions identified under 20.5.19.9 NMAC at the facility 48 hours after posting the name and address of the facility on the department's website list of facilities that are ineligible for delivery. The department shall document the level of stored product in each storage tank with one or more conditions identified under 20.5.19.9 NMAC prior to affixing a red tag to the fill pipe(s) of the storage tank.

B. Certificate. In order to prevent the delivery, deposit or acceptance of product at or to a storage tank or a facility that has been classified by the department as ineligible under 20.5.19 NMAC, the department shall post a certificate, conspicuously displayed at the facility, clearly prohibiting the delivery, deposit or acceptance of product at every storage tank at the facility to which the department has affixed a red tag.

C. Red tag tampering prohibited. It shall be unlawful for any person, other than an authorized representative of the department, to remove, tamper with, destroy or damage a red tag affixed to any storage tank or a certificate posted at a storage tank facility by department personnel.

D. Performance standards. Owners and operators shall continue to adhere to all performance standards of 20.5 NMAC after placement of one or more red

tags and a certificate at a facility, including but not limited to leak detection, corrosion protection and monthly inspections.

[20.5.19.11 NMAC – N, 3/17/2012]

**20.5.19.12 REGULATED SUBSTANCE REMOVAL:**

Owners and operators shall empty all regulated substances from storage tanks that have been affixed with a red tag if the violations have not been corrected within 30 days of the placement of the red tag. This section shall not limit or supersede the application of 20.5.7 NMAC in the event of a suspected or confirmed release. If no suspected or confirmed release exists, owners and operators shall:

A. empty all regulated substances from each storage tank at the facility that has been affixed with a red tag in accordance with 20.5.8 NMAC, and shall provide written notice to the inspector who issued the red tag when each tank has been emptied, with the name, address, telephone number and email address of the person who removed the regulated substances from the tank; and

B. continue to meet all requirements for temporary closure in 20.5.8.9 NMAC, including operation of cathodic protection and release detection equipment and payment of the annual fee, or shall permanently close the tank in compliance with 20.5.8.10 NMAC.

[20.5.19.12 NMAC – N, 3/17/2012]

**20.5.19.13 NOTIFICATION PROCESSES FOR STORAGE TANK OWNERS AND OPERATORS AND PRODUCT DELIVERERS:**

A. Owners and operators. Any notice required by 20.5.19.10 NMAC shall be provided to an owner or operator in the following manner:

(1) Owner or operator present. If the owner or operator is present on the site, the department shall provide to the owner or operator the notice of violation, notice of deficiency, or notice of intent to red tag.

(2) Owner and operator not present. If neither the owner nor operator is present on the site, the department shall immediately notify an employee in charge of the facility in the manner provided in Paragraph (1) above and shall send a copy of the written notice to the owner and operator within 24 hours of notifying the employee in charge of the facility or of affixing a red tag and certificate.

B. Product deliverers. The department shall notify all product deliverers 48 hours before the department affixes a red tag to the fill pipes of each storage tank with one or more conditions identified under 20.5.19.9 NMAC by posting the name and address of the facility on the department's website list of facilities that contain storage

tanks which are ineligible for delivery. Product deliverers shall be responsible for checking the website or contacting the department prior to any product delivery.

[20.5.19.13 NMAC – N, 3/17/2012]

[The department provides a list of storage tank facilities containing storage tanks with delivery prohibitions. The list is available on the department's website, www.nmenv.state.nm.us or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.19.14 RECLASSIFYING INELIGIBLE STORAGE TANKS OR FACILITIES AS ELIGIBLE TO RECEIVE PRODUCT:**

A. Statement of compliance from owner or operator. In order for an owner or operator of a storage tank or facility which has been determined by the department as ineligible under this rule to have the storage tank or facility reclassified by the department as eligible to receive delivery of product, the owner or operator shall provide a written statement of compliance to the department and the inspector listed in the notice that the conditions listed in the notice of intent to red tag have been corrected. The written statement shall contain the date, owner or operator's name, how the conditions have been corrected, by whom, and the date of correction.

B. Department confirmation. The department shall, in its sole discretion, determine whether the conditions listed in the notice of intent to red tag have been corrected as soon as practicable but within no more than three business days after receipt of the owner's written statement of compliance. If the conditions have not been corrected, the department shall notify the owner or operator in the manner prescribed by 20.5.19.13 NMAC.

C. Removal of red tag and notice of ineligibility. Upon verification of compliance, department personnel shall:

(1) immediately remove each red tag and certificate at the facility, and document the level of product in each tank; and

(2) as soon as practicable, but in no event longer than three business days, remove the facility from the department's website list of facilities that contain storage tanks which are ineligible for delivery.

[20.5.19.14 NMAC – N, 3/17/2012]

[The department provides an optional form for compliance with Subsection A. The form is available on the department's website, www.nmenv.state.nm.us or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.19.15 DELIVERY**

**PROHIBITION DEFERRAL IN RURAL AND REMOTE AREA AND FOR MATTERS OF NATIONAL SECURITY:**

The department shall defer classifying a storage tank or facility as ineligible for delivery, deposit or acceptance of product if such classification would jeopardize the availability of, or access to, motor fuel in a rural and remote area as defined in 20.5.1.7 NMAC, or where the United States department of defense operates a storage tank and notifies the department that continued operation of the tank is a matter of national security. The department may only defer application of delivery prohibition for up to 180 days after determining a storage tank or facility is ineligible for delivery, deposit, or acceptance of product pursuant to Subsection A of 20.5.19.10 NMAC or Paragraph (3) of Subsection B of 20.5.19.10 NMAC.

[20.5.19.15 NMAC – N, 3/17/2012]

**20.5.19.16 DELIVERY AUTHORIZATION IN EMERGENCY SITUATIONS OR FOR TANK TESTING:**

A. Emergency situations. The department may authorize delivery or deposit of product to an emergency generator tank that is otherwise ineligible for delivery or deposit if the owner or operator can demonstrate to the satisfaction of the department that:

(1) a commercial power failure or other declared state of emergency exists; and

(2) the emergency generator tank:

(a) provides power supply;

(b) stores petroleum; and

(c) is used solely in connection with an emergency system, legally required standby system or optional standby system.

B. Tank testing. The department may authorize delivery or deposit of product to a storage tank that is otherwise ineligible for delivery or deposit if the owner or operator can demonstrate to the satisfaction of the department that delivery or deposit is necessary to test or calibrate a tank.

[20.5.19.16 NMAC – N, 3/17/2012]

**20.5.19.17 ADDITIONAL REQUIREMENTS:**

A. Storage tank equipment tampering prohibited. It shall be unlawful for any person, including product deliverers, to remove, tamper with, destroy, damage or disable storage tank equipment, including but not limited to release detection and other safety mechanisms, in the course of delivery of any product.

B. Compliance with rules. A product deliverer shall be responsible for ensuring that all deliveries are made in compliance with 20.5 NMAC.

[20.5.19.17 NMAC – N, 3/17/2012]

**20.5.19.18 ADMINISTRATIVE APPEALS:** Any owner or operator of a facility that contains storage tanks to which the department has affixed a red tag prohibiting delivery pursuant to this part may appeal to the secretary by submitting a written request for hearing.

A. Timelines. The request must be made in writing to the secretary within five business days after notice of the department's action has been issued or the decision of the department shall be final. If an appeal is received within the five business day time limit, the secretary shall hold a hearing within seven business days after receipt of the request. The secretary shall notify the person who requested the hearing of the date, time and place of the hearing by certified mail.

B. Burden of proof. In the appeal hearing, the burden of proof is on the person who requested the hearing.

C. Procedures.

(1) Appeal hearings shall be held at a place designated by the secretary, unless other mutually agreed upon arrangements are made. The secretary may designate a person to conduct the hearing and make a final decision or make recommendations for a final decision. The secretary's hearing notice shall indicate who will conduct the hearing and make the final decision.

(2) The department shall make an audio recording of the hearing. If either party wants the hearing transcribed, that party shall bear the costs of transcription.

(3) In appeal hearings, the rules governing civil procedure and evidence in district court shall not apply. Hearings shall be conducted so that all relevant views, arguments and testimony are amply and fairly presented without undue repetition. The secretary shall allow department staff and the hearing requestor to call and examine witnesses, to submit written and oral evidence and arguments, to introduce exhibits and to cross-examine persons who testify. All testimony shall be taken under oath. At the end of the hearing, the secretary shall decide and announce if the hearing record will remain open, for how long, and for what reason it will be left open.

D. Secretary's decision. Based upon the evidence presented at the hearing, the secretary shall sustain, modify or reverse the action of the department. The secretary's decision shall be by written order within seven business days following the close of the hearing record. The decision shall state the reasons therefore and shall be sent by certified mail to the hearing requestor and any other affected person who requests notice.

E. No stay of action. The filing of an administrative appeal shall not stay any action, compliance or corrective action required by the red tag issued by the

department.

F. Judicial review. Judicial review of the secretary's final order shall be as provided by law. The filing of a judicial appeal shall not stay any action, compliance or corrective action required by the secretary's decision.

[20.5.19.18 NMAC - N, 3/17/2012]

**HISTORY of 20.5.19 NMAC:  
[RESERVED]**

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

**This is an amendment to 20.5.1 NMAC, Sections 2, 3, 6, 7 and 8, effective March 17, 2012.**

### 20.5.1.2 SCOPE:

A. ~~[20.5.1 through 20.5.16 NMAC apply to owners and operators of storage tanks as defined in 20.5.1.7 NMAC except as otherwise provided in Subsections B and C of this section]~~ This part applies to 20.5.1 through 20.5.19 NMAC.

B. Any UST system holding hazardous wastes that are listed or identified under Subtitle C of the federal Resource Conservation and Recovery Act, or a mixture of such hazardous waste and other hazardous regulated substances, is excluded from these regulations. This subsection does not apply to any UST system containing petroleum.

C. The following types of storage tank systems are excluded from the requirements of 20.5.2 through ~~[20.5.16]~~ 20.5.19 NMAC:

(1) any wastewater treatment tank systems and any wastewater treatment tank system that is part of a wastewater treatment facility regulated under Section 402 or 307(b) of the federal Clean Water Act;

(2) equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;

(3) any UST system with a capacity of 110 gallons or less or any AST system with a capacity of 1,320 gallons or less, or any AST system with a capacity of 55,000 gallons or more;

(4) any UST system that contains a de minimis concentration of regulated substances;

(5) any emergency spill or overflow containment UST system that is expeditiously emptied after use;

(6) any storage tank systems containing radioactive material that are regulated under the Atomic Energy Act of 1954;

(7) any UST system that is part of an emergency generator system at nuclear

power generation facilities regulated by the nuclear regulatory commission under 10 CFR part 50 appendix A;

(8) airport hydrant fuel distribution systems; and

(9) UST systems with field-constructed tanks ~~[-and~~

~~(10) any UST or AST system that stores fuel solely for use by emergency power generators].~~

D. Notwithstanding the foregoing exclusions, no person may install a storage tank system listed in Subsection C of this section for the purpose of storing regulated substances unless such storage tank system (whether of single or double-walled construction):

(1) will prevent releases due to corrosion or structural failure for the operational life of the tank; and

(2) is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material or designed in a manner to prevent the release or threatened release of any stored substance; and

(3) the material used in the construction or lining of the tank is compatible with the substance to be stored.

E. Parts 20.5.4 through 20.5.9 NMAC shall not apply to an existing AST or UST system which has never contained a regulated substance until the system is placed in service.

[20.5.1.2 NMAC - Rp, 20.5.1.2 NMAC, 6/15/2009; A, 3/17/2012]

### 20.5.1.3 STATUTORY

**AUTHORITY:** Parts 20.5.1 through ~~[20.5.16]~~ 20.5.19 NMAC are promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through ~~[74-1-16]~~ 74-1-17 NMSA 1978.

[20.5.1.3 NMAC - Rp, 20.5.1.3 NMAC, 6/15/2009; A, 3/17/2012]

### 20.5.1.6 OBJECTIVE:

The purpose of ~~[20.5.1 through 20.5.16 NMAC is to regulate storage tank systems in order to protect the public health, safety and welfare and the environment of the state]~~ this part is to provide definitions for use in 20.5.1 through 20.5.19 NMAC.

[20.5.1.6 NMAC - Rp, 20.5.1.6 NMAC, 6/15/2009; A, 3/17/2012]

### 20.5.1.7 DEFINITIONS:

A. Terms beginning with numerals or the letter "A", and abbreviations for units.

[A:](1) "Above ground release" means any release to the surface of the land

or to surface water. This includes, but is not limited to, releases from the above ground portion of an underground storage tank system and releases associated with overfills and transfer operations during regulated substance deliveries to or dispensing from an UST system.

[B:](2) "Above ground storage tank" or "AST" means a single tank or combination of manifolded tanks, including pipes connected thereto, that is 1,320 gallons or more, and less than 55,000 gallons, is permanently installed, and is used to contain petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure of 60 degrees fahrenheit and fourteen and seven tenths pounds per square inch absolute, and the volume of which is more than ninety percent above the surface of the ground. Tanks in vaults and special enclosures are ASTs. A compartment tank with combined total capacity greater than 1,320 gallons and less than 55,000 gallons is an AST and for purposes of these regulations is considered to be one tank regardless of the number of compartments and the number of regulated substances contained. Above ground storage tank does not include (regardless of size) any:

[(+)](a) farm, ranch or residential tank used for storing motor fuel ~~[or heating oil]~~ for noncommercial purposes;

[(2)](b) pipeline facility, including gathering lines regulated under the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979, or that is an intrastate pipeline facility regulated under state laws comparable to either act;

[(3)](c) surface impoundment, pit, pond or lagoon;

[(4)](d) storm water or wastewater collection system;

[(5)](e) flow-through process tank;

[(6)](f) liquid trap, tank or associated gathering lines or other storage methods or devices related to oil, gas or mining exploration, production, transportation, refining, processing or storage, or ~~[the]~~ to oil field service industry operations;

[(7)](g) tank ~~[associated with an emergency generator system]~~ used for storing heating oil for consumptive use on the premises where stored;

[(8)](h) tanks, bulk terminals, or related pipelines and facilities owned or used by a refinery, natural gas processing plant or pipeline company in the regular course of their refining, processing or pipeline business; bulk plants are not included in the exemption;

[(9)](i) multiple tanks at a facility, that are individually less than 1,320 gallons, unless tanks that are siphoned together have a cumulative total capacity greater than

1,320 gallons;

~~[(H)](j)~~ pipes connected to any tank exempted by ~~[Paragraphs (1) through (9) of this subsection]~~ Subparagraphs (a) through (i) of this paragraph.

~~[(C-)](3)~~ “Accidental release” means any sudden or non-sudden release neither expected nor intended by the tank owner or operator of petroleum or other regulated substance from a storage tank that results in a need for corrective action or compensation for bodily injury or property damage.

~~[(D-)](4)~~ “Ancillary equipment” means any device including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps associated with a storage tank.

~~[(E-)](5)~~ “Applicable standards” means the most relevant target concentrations that legally apply to a site.

~~[(F-)](6)~~ “AST system” means an above ground storage tank and its associated ancillary equipment and containment system, if any.

B. Terms beginning with the letter “B”.

~~[(G-)](1)~~ “Basin sump” means a liquid-tight collection container with no valves, joints or other penetrations.

~~[(H-)](2)~~ “Below ground release” means any release to the subsurface of the land or to groundwater. This includes, but is not limited to, releases from the below ground portions of a storage tank system and releases associated with overfills and transfer operations as the regulated substance is delivered to or dispensed from a storage tank.

~~[(I-)](3)~~ “Beneath the surface of the ground” means beneath the ground surface or otherwise covered with materials so that physical inspection is precluded.

~~[(J-)](4)~~ “Bodily injury” shall have the meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

~~[(K-)](5)~~ “Bulk plant” means a facility which is not a bulk terminal, and which is used for the temporary storage of petroleum products prior to delivery to gasoline stations, convenience stores, and commercial accounts, which is smaller than a bulk terminal and is not equipped with any processing equipment.

~~[(L-)](6)~~ “Bulk terminal” means a large facility for storing and handling petroleum products that receives and stores bulk deliveries of gasoline and other products from a pipeline, barges, or directly from a nearby refinery. Equipment at the terminal facility is usually capable of further processing the product, including but not limited to: injection of additives or

conversion of gasoline vapors received from transports after making deliveries using stage one vapor recovery back to liquid form.

~~[(M-)](7)~~ “Bureau” means the New Mexico petroleum storage tank bureau.

C. Terms beginning with the letter “C”.

~~[(N-)](1)~~ “Cathodic protection” ~~[is] means~~ a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell ~~[—A tank system can be cathodically protected]~~ through the application of either galvanic anodes or impressed current.

~~[(O-)](2)~~ “Certified installer” refers generally to both AST and UST certified installers.

~~[(P-)](3)~~ “Certified installer-AST” means an individual who has been certified by the department ~~[after August 15, 2003]~~ under 20.5.14 NMAC to install, replace, repair and modify AST systems in this state.

~~[(Q-)](4)~~ “Certified installer-UST” means an individual who has been certified by the department ~~[after August 15, 2003]~~ under 20.5.14 NMAC to install, replace, repair, and modify UST systems in this state.

~~[(R-)](5)~~ “Certified operator” means a class A, B, or C operator trained and certified according to the requirements of 20.5.18 NMAC.

~~[(S-)](6)~~ “Change in service” means removing a regulated substance from a storage tank system and placing something in the system that is not a regulated substance.

~~[(T-)](7)~~ “Chief financial officer,” in the case of local government owners and operators, means the individual with the overall authority and responsibility for the collection, disbursement, and use of funds by the local government.

~~[(U-)](8)~~ “Community water system” means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

~~[(V-)](9)~~ “Compatible” means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for extended periods of time and under varied environmental conditions (i.e., at different temperatures).

~~[(W-)](10)~~ “Connected piping” means all above ground and underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual storage tank system, the piping which joins the two storage tank systems should be allocated equally between them.

~~[(X-)](11)~~ “Consumptive use” with respect to heating oil means the oil is burned on the premises.

~~[(Y-)](12)~~ “Contain” means the stopping of further migration of a regulated substance from a release into or through groundwater, surface water or soil.

~~[(Z-)](13)~~ “Containment” means that contamination from a release has been contained and is not spreading, migrating, spilling, infiltrating or otherwise traveling into uncontaminated areas. Verification of containment requires the performance of physical measurements that provide positive proof that contamination is contained.

~~[(AA-)](14)~~ “Containment sump” means a liquid-tight collection container, which may have valves, joints or penetrations, such as piping penetrations.

~~[(AB-)](15)~~ “Contaminant” means any regulated substance as defined in this section, any constituent of a regulated substance, or any combination of a regulated substance or constituent thereof with any other substance or matter.

~~[(AC-)](16)~~ “Contaminant of concern” means any contaminant which is suspected of being released at the site based on site history for which:

~~[(1)](a)~~ the New Mexico water quality control commission has adopted standards pursuant to the Water Quality Act, Sections 74-6-1- through 74-6-17 NMSA 1978;

~~[(2)](b)~~ the New Mexico environmental improvement board has adopted standards, action levels, risk-based screening levels or site specific target levels pursuant to the Hazardous Waste Act, the Ground Water Protection Act, or the Environmental Improvement Act; or

~~[(3)](c)~~ the New Mexico environment department has established or approved site-specific target levels pursuant to the Hazardous Waste Act, the Ground Water Protection Act, or the Environmental Improvement Act.

~~[(AD-)](17)~~ “Contaminant saturated soil” means soil exclusive of the water table and capillary fringe in which non-aqueous phase liquid is observable in the soil or, if sufficiently liquid, drains from the soil when the soil is suspended on filter paper or its equivalent.

~~[(AE-)](18)~~ “Contaminated soil” means soil containing detectable quantities of contaminants of concern.

~~[(AF-)](19)~~ “Contracting company” means a corporation, partnership, or duly constituted individual proprietorship which contracts to install or repair storage tank systems for third parties.]

(19) “Contractor” means a person who has an agreement to perform corrective action on behalf of the state or owners or operators.

~~[(AG-)](20)~~ “Controlling interest” means direct ownership or other legal control of at least fifty percent of the voting stock of another entity.

[AH:](21) "Corrective action" means an action taken to investigate, minimize, eliminate, or clean up a release to protect the public health, safety, and welfare or the environment.

[AF:](22) "Corrective action fund" or "fund" means the fund created pursuant to the Ground Water Protection Act, Section 74-6B-7 NMSA 1978, to pay or reimburse for corrective action performed pursuant to 20.5 NMAC and the Ground Water Protection Act.

(23) "Corrosion protection" means a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell through the application of either galvanic anodes or impressed current, or by isolating the metal surface from soil, water, or other elements that can cause corrosion, including but not limited to application of a paint or coating material approved for use as corrosion protection.

[AF:](24) "Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the national association of corrosion engineers international (NACE). A corrosion expert shall only perform the specific activities required by these rules for which he is qualified, certified, registered or licensed; for example, a NACE licensed cathodic protection tester shall not design a cathodic protection system unless he is also a NACE licensed cathodic protection technologist, specialist or has another equivalent qualification, certification, registration or license.

[AK:](25) "Corrosion prevention plan" means a plan approved in writing by a corrosion expert for a UST or AST or associated piping, or secondary containment, which plan is designed to maintain the integrity of the tank or piping for its useful life.

[AL:](26) "Critical junctures" means the steps of an installation, replacement, modification, repair or removal of a tank system or any part of a tank system, which are important to the prevention of releases and which are more specifically described in 20.5.5 and 20.5.8 NMAC.

D. Terms beginning with the letter "D".

[AM:](1) "Deductible" means the first ten thousand dollars (\$10,000) of minimum site assessment costs, or any lesser amount determined in accordance with 20.5.17.20 NMAC.

[AN:](2) "Department" means the

New Mexico environment department, also known as the New Mexico department of environment.

[AO:](3) "Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate storage tank systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of storage tank systems, such as tank from piping.

[AP:](4) "Director" means the director of the environmental protection division of the department.

[AQ:](5) "Direct responsible supervisory control" means responsibility for the direction, control, or supervision of investigation and remediation activities to assure that the work is performed in accordance with appropriate industry and regulatory quality standards.

E. Terms beginning with the letter "E".

[AR:](1) "Effectively mitigating" means that the approach taken to corrective action has contained the release and is achieving reductions in contamination levels such that the standards described in 20.5.12 and 20.5.13 NMAC will be met in a manner protective of public health, safety and welfare and the environment, within the period of time specified in the plan for remediation by monitored natural attenuation or otherwise.

[AS:](2) "EIB" means the environmental improvement board.

[AT:](3) "EIB standards" means standards set forth in 20.5.12, 20.5.13 and 20.7.10 NMAC.

[AU:](4) "Electrical equipment" means equipment which contains dielectric fluid which is necessary for the operation of equipment such as transformers and buried electrical cable.

(5) "Emergency generator system" means any UST or AST system that stores any regulated substance solely for use by emergency power generators.

[AV:](6) "Emergency repair" means a repair required by immediate danger of a release, or by an immediate threat to public health, safety and welfare, or to the environment.

[AW:](7) "Environmental improvement board" (EIB) means the board created in the Environmental Improvement Act, Sections 74-1-1 through ~~74-1-16~~ 74-1-17 NMSA 1978.

[AX:](8) "Environmental Improvement Act" means the Environmental Improvement Act, Sections 74-1-1 through ~~74-1-16~~ 74-1-17 NMSA 1978.

[AY:](9) "Excavation zone" means the area containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the UST system is placed at the time of installation.

[AZ:](10) "Existing AST system" means an AST system which is used to contain an accumulation of regulated substances or for which installation commenced on or before June 14, 2002. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction at the site or installation of the tank system, and if either:

[(+)](a) a continuous on-site physical construction or installation program has begun, or

[(2)](b) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.

[BA:](11) "Existing UST system" means a UST system which is used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction of the site or installation of the tank system, and if either:

[(+)](a) a continuous on-site physical construction or installation program has begun, or

[(2)](b) the owner or operator has entered into contractual obligations, which cannot be canceled or modified without substantial loss, for physical construction at the site or installation of the tank system to be completed within a reasonable time.

[BB:](12) "Exposed petroleum products" means petroleum that is present in the non-aqueous phase (i.e. not dissolved in water) on the surface of the ground, on surface water, or in any surface or subsurface structures such as utility corridors, basements and manholes.

[BC:](13) "Exposed hazardous substance" means a regulated substance other than petroleum that is present on the surface of the ground, on surface water, or in any surface or subsurface structures such as utility corridors, basements or manholes.

F. Terms beginning with the letter "F".

[BD:](1) "Facility" means a property location that contains storage tanks.

[BE:](2) "Farm tank" is a tank located on a tract of land devoted to the production of crops, or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, range land and nurseries with growing operations.

[BF:](3) "Financial reporting year" means the latest consecutive twelve-month period for which any of the following reports

used to support a financial test is prepared:

[(+)](a) a 10-K report submitted to the SEC;

[(2)](b) an annual report of tangible net worth submitted to Dun and Bradstreet; or

[(3)](c) annual reports submitted to the energy information administration or the rural electrification administration; "financial reporting year" may thus comprise a fiscal or a calendar year period.

[BG:](4) "Flow-through process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flow-through process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or by-products from the production process.

[BH:](5) "Functionality test" means a test for automatic line leak detectors which determines whether they are operating correctly.

[BF:](6) "Fund" means the corrective action fund which was created pursuant to Section 74-6B-7 NMSA 1978, to pay or reimburse for corrective action required at leaking storage tank sites.

G. Terms beginning with the letter "G".

[BF:](1) "Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

[BK:](2) "Ground Water Protection Act" means the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978.

[BL: "Guidelines for corrective action" means any written guidance developed by the New Mexico petroleum storage tank bureau, approved by the secretary for use and distribution to the public, and pertaining to the technical or financial requirements in 20.5.7, 20.5.12, 20.5.13 and 20.5.15 through 20.5.17 NMAC.]

H. Terms beginning with the letter "H".

[BM:](1) "Hazardous substance UST system" or "hazardous substance UST" means an underground storage tank system that contains an accumulation of hazardous substances defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act (RCRA). Hazardous substance UST includes a tank with a mixture of such substances and petroleum, but which is not a petroleum UST system.

[BN:](2) "Hazardous Waste Act"

means the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978.

[BO:](3) "Heating oil" refers to a type of fuel oil that is one of eight technical grades. These grades are: No. 1; No. 2; No. 4--light; No. 4--heavy; No. 5--light; No. 5--heavy; No. 6; and residual. Heating oil also refers to fuel oil substitutes such as kerosene or diesel when used for heating purposes.

[BP:](4) "Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.

I. Terms beginning with the letter "I".

(1) "Imminent threat to public health and the environment" means a condition that creates a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate the actual or potential damages to public health and the environment.

[BQ:](2) "Incurred" means billed to the owner or operator.

[BR:](3) "Initiation of containment" means the point in time at which a system designed to achieve containment is put into continuous operation.

[BS:](4) "Install" or "installation" means the work involved in placing a storage tank system or any part thereof in, on or above the ground and preparing it to be placed in service.

(5) "Installation of a new or replaced motor fuel dispenser system" means the installation of a new motor fuel dispenser and the equipment necessary to connect the dispenser to the storage tank system, but shall not mean the installation of a motor fuel dispenser installed separately from the equipment needed to connect the dispenser to the storage tank system. The equipment necessary to connect the motor fuel dispenser to the storage tank system may include check valves, shear valves, unburied risers or flexible connectors, or other transitional components that are beneath the dispenser and connect the dispenser to the underground piping.

[BF:](6) "Integrity test" means an evaluation process that has been independently tested and approved by a nationally recognized association or independent testing laboratory to determine, in the case of a UST, the suitability of the tank for continuous containment of a regulated substance, or, in the case of an AST, both the suitability of the tank for continuous containment of a regulated substance and the necessary hydraulic properties of the tank to contain the outward pressure of the regulated substance.

[BU:](7) "Internal inspection" means a formal inspection of an AST by

an inspector authorized by the American petroleum institute or certified by the steel tank institute. The inspection shall determine whether the AST tank bottom or shell is severely corroded and leaking, and shall include an evaluation of the tank bottom and shell thickness to see whether they meet minimum thickness requirements. The inspector shall visually examine all tanks included in the inspection and, if applicable, check for tank bottom settlement.

[BV:](8) "Interstitial monitoring" is a leak detection method which surveys the space between a storage tank system's walls and the secondary containment system for a change in steady state conditions.

[BW:](9) "Inventory controls" are techniques used to identify a loss of product that are based on volumetric measurements in the tank and reconciliation of those measurements with product delivery and withdrawal records.

J. Terms beginning with the letter "J". [RESERVED]

K. Terms beginning with the letter "K". [RESERVED]

L. Terms beginning with the letter "L".

[BX:](1) "Landfarming" is the remediation of petroleum contaminated soils on or at ground surface using natural aeration and volatilization, diking and natural and enhanced bioremediation to reduce the concentrations of petroleum hydrocarbons to regulatory levels; requires a groundwater discharge permit.

[BY:](2) "Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought:

[(+)](a) by EPA or a state to require corrective action or to recover the costs of corrective action;

[(2)](b) by or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

[(3)](c) by any person to enforce the terms of a financial assurance mechanism.

[BZ:](3) "Liquid" means any material that has a fluidity greater than that of 300 penetration asphalt when tested in accordance with ASTM D 5, test for penetration for bituminous materials. When not otherwise identified, the term liquid shall mean both flammable and combustible liquids.

[CA:](4) "Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. Such liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

[CB:](5) "Loading rack" means the area around and including loading arms, pumps, meters, shutoff valves, relief valves, and other equipment used to load and unload fuel cargo tanks, trucks, tank trucks, railroad cars, cars, other distribution containers or other transport vehicles, if the loading rack services or is attached to one or more storage tank(s) regulated in 20.5 NMAC.

[CC:](6) "Local government" shall have the meaning given this term by applicable state law. The term is generally intended to include counties, municipalities, school districts, and special districts, including flood control and conservancy districts.

[CD:](7) "Lower explosive limit" means the lowest percentage of a substance in an airspace that is explosive.

[CE:](8) "LST ranking system" means the leaking storage tank ranking system, the ranking or site prioritization system developed for and modified by the department using the analytical hierarchy process to rank sites where a release from a storage tank has occurred based upon public health, safety and welfare and environmental concerns.

M. Terms beginning with the letter "M".

[CF:](1) "Magnitude of contamination" means the maximum concentrations of contaminants of concern that resulted from a release.

[CG:](2) "Minimum site assessment" or "MSA" means the sum total of all of the following activities:

[(+)](a) reporting, investigating and confirming a release pursuant to 20.5.7 NMAC; and

[(2)](b) determining the on-site extent, magnitude and impact of contamination by conducting investigations and reporting to the department pursuant to 20.5.12.11 NMAC or 20.5.13.10 NMAC (initial abatement), 20.5.12.12 NMAC or 20.5.13.11 NMAC (report on initial abatement), 20.5.12.16 NMAC or 20.5.13.15 NMAC (preliminary investigation), and 20.5.12.18 NMAC or 20.5.13.17 NMAC (report on the preliminary investigation).

[CH:](3) "Mobile AST" means an above ground storage tank that is not field-erected, and which is capable of changes in location.

[CI:](4) "Modification" means any change to any portion of a storage tank system that is not a repair. For purposes of 20.5.14 NMAC, the term does not include the process of relining a tank through the application of such materials as epoxy resins.

[CJ:](5) "Monitored natural attenuation" means a methodology for remediation that relies upon a variety of naturally occurring chemical, physical and biological processes to achieve target concentrations in a manner that is equally

as protective of public health, safety and welfare, and the environment as other methods, and that is accompanied by a program of monitoring to document the progress and results of the above mentioned processes.

[CK:](6) "Monthly" means once per month, not to exceed 35 days.

[CL:](7) "Motor fuel" is a petroleum-based fuel used in the operation of an engine that propels a vehicle for transportation of people or cargo.

[CM:](8) "Motor fuel dispenser system" or "dispenser system" means a motor fuel dispenser and the equipment necessary to connect the dispenser to a storage tank system. The equipment necessary to connect the motor fuel dispenser to the storage tank may include check valves, shear valves, unburied risers of flexible connectors, or other transitional components that are beneath the dispenser and connect the dispenser to the piping.

N. Terms beginning with the letter "N".

[CN:](1) "NAPL" means non-aqueous phase liquid as defined in this section.

[CO:](2) "New AST system" means an AST system for which installation has commenced after June 14, 2002. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals or permits necessary to begin physical construction at the site or installation of the tank, and if either [(+)] (a) a continuous on-site physical construction or installation program has begun, or [(2)] (b) the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss for physical construction at the site or installation of the tank system to be completed within a reasonable time.

[CP:](3) "New storage tank system" means a new AST system or a new UST system.

[CQ:](4) "New UST tank system" means an UST system for which installation has commenced after December 22, 1988. Installation will be considered to have commenced if the owner or operator has obtained all federal, state and local approvals, or permits necessary to begin physical construction at the site or installation of the tank, and if either:

[(+)](a) a continuous on-site physical construction or installation program has begun, or

[(2)](b) the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss for physical construction at the site or installation of the tank system to be completed within a reasonable time.

[CR:](5) "Non-aqueous phase

liquid" (NAPL) means an interstitial body of liquid oil, petroleum product or organic solvent or other organic substance, including an emulsion containing such material; in the case of liquid oil or a petroleum product, the term is synonymous with "phase separated hydrocarbon" and "free product."

[CS:](6) "Non-commercial purposes" with respect to motor fuel means not for resale.

[CT:](7) "Non-community water system" means a public water system that is not a community water system.

[CU:](8) "Normal maintenance" means an activity involving work on a storage tank system that is not a repair, replacement, or installation, which may include but is not limited to: painting, replacing fuses, or touchup. Any time an activity involves disconnecting or affecting the integrity of the piping, tank, spill or overflow systems, or work on line or tank leak detection systems, then the activity is not normal maintenance but is instead a repair.

O. Terms beginning with the letter "O".

[CV:](1) "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from a storage tank. This definition is intended to assist in the understanding of 20.5.9 NMAC and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence."

[CW:](2) "On the premises where stored" with respect to heating oil means storage tank systems located on the same property where the stored heating oil is used.

[CX:](3) "Operational life" is the period beginning from the time when the installation of the tank system is commenced until it is properly closed pursuant to 20.5.8 NMAC.

[CY:](4) "Operator" means any person in control of, or having responsibility for, the daily operation of a storage tank system.

[CZ:](5) "Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.

[DA:](6) "Owner" means, in the case of a storage tank in use on November 8, 1984 or brought into use after that date, any person who owns a storage tank used for storage, use, or dispensing of regulated substances; and in the case of a storage tank in use before November 8, 1984 but no longer in use after that date, any person who owned such tank immediately before the discontinuation of its use. For purposes of the registration requirements of 20.5.2 NMAC only, the term "owner" excludes any person who:



[(+)](a) had a UST taken out of operation on or before January 1, 1974;

[(2)](b) had a UST taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984; or

[(3)](c) had an AST taken out of operation on or before July 1, 2001.

P. Terms beginning with the letter "P".

[DB-](1) "Permanently installed AST" means an AST that is on site for more than 365 consecutive days and dispensing or storing a regulated substance for distribution at any time during that period.

[DC-](2) "Person" means any individual, trust, firm, joint stock company, federal agency, corporation including a government corporation, partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" includes a consortium, a joint venture, a commercial entity, and the United States government.

[DD-](3) "Petroleum" means crude oil, crude oil fractions, and refined petroleum fractions, including gasoline, kerosene, heating oils, and diesel fuels.

[DE-](4) "Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

[DF-](5) "Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with storage tank systems as well as petroleum marketing facilities are considered to be petroleum marketing firms.

[DG-](6) "Petroleum tank system," "petroleum storage tank" or "petroleum UST" means a storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

[DH-](7) "Pipeline facilities, including gathering lines," are new and existing pipe rights-of-way and any equipment, facilities, or buildings regulated under the federal Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the federal Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act.

[DI-](8) "Piping" means the hollow cylinder or the tubular conduit constructed of non-earthen materials that routinely contains and conveys regulated substances within a storage tank system. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey

regulated substances from the storage tank to the dispenser or other end-use equipment.

[DJ-](9) "Positive sampling, testing or monitoring results" refers to the results of sampling, testing or monitoring using a method described in 20.5.6 NMAC that indicate a release from a storage tank system has occurred.

[DK-](10) "Potable drinking water well" means any hole (dug, driven, drilled, or bored) that extends into the earth until it meets groundwater which may supply water for a community water system, a non-community public water system, or otherwise may supply water for human consumption (consisting of drinking, bathing, cooking, or other similar uses). Such wells may provide water to entities such as a single-family residence, group of residences, businesses, schools, parks, campgrounds, and other permanent or seasonal communities.

[DL-](11) "Potentially explosive levels of petroleum hydrocarbon vapors" means vapors which register in excess of [twenty] 10 percent LEL (lower explosive limit) on a combustible gas indicator properly calibrated for pentane.

[DM-](12) "Potentially harmful petroleum hydrocarbon vapors" means vapors which register a reading of five whole units above ambient concentrations total aromatic hydrocarbons in any structure in the vicinity of the release site, on a photoionization detector, flame ionization detector or an equivalent device properly calibrated to detect hydrocarbon vapors at a minimum detection limit of at least one ppm.

(13) "Product" means a regulated substance.

(14) "Product deliverer" means any person who delivers or deposits product into a storage tank system. This term includes, but is not limited to, major oil companies, jobbers, petroleum transportation companies, brokers and other product delivery entities.

[DN-](15) "Professional engineer" is an individual licensed in New Mexico to engage in the practice of engineering under the New Mexico Engineering and Surveying Practices Act, Sections 61-23-1 through 61-23-32 NMSA 1978.

[DO-](16) "Project drawings" means schematic drawings of tanks, piping, and ancillary equipment, which need not be prepared, stamped or signed by a professional engineer.

[DP-](17) "Property damage" shall have the meaning given this term by applicable state law. This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which

are covered by the policy.

[DQ-](18) "Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of a storage tank system through one of the mechanisms listed in 20.5.9.905 through 20.5.9.916 NMAC, including a guarantor, insurer, risk retention group, surety, issuer of a letter of credit, issuer of a state-required mechanism, or a state.

[DR-](19) "Public water system" means a system for the provision to the public of piped water for human consumption (consisting of drinking, bathing, cooking, or other similar uses) if such system has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. Such term includes any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. A public water system is either a "community water system" or a "non-community water system."

Q. Terms beginning with the letter "Q".

[DS-] "Qualified firm" means a person, as defined in this section, qualified by the department under 20.5.16 NMAC to undertake corrective action.

R. Terms beginning with the letter "R".

[DT-](1) "RBSL" means risk-based screening level as used in 20.5.12 NMAC.

[DU-](2) "Receptor" means a person, plant or animal community, structure, utility, surface water, designated wellhead or source water protection area or water supply well that is or may be adversely affected by a release.

(3) "Red tag" means a tamper-resistant tag on a storage tank system's fill pipes that clearly identifies a storage tank system as ineligible for product delivery, deposit or acceptance. The tag shall be easily visible and state that it is unlawful to deliver to, deposit into, or accept product into, the ineligible storage tank system.

[DV-](4) "Regulated substance" means:

[(+)](a) for USTs: any substance defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act, as amended; and

[(2)](b) for ASTs and USTs: petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure of 60

degrees fahrenheit and fourteen and seven tenths pounds per square inch absolute; asphalt is not a regulated substance; the term "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading and finishing, such as motor fuels (including ethanol-based motor fuels), jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

[~~DW~~](5) "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing of a regulated substance from a storage tank system into groundwater, surface water or soil.

[~~DX~~](6) "Release detection" means determining whether a release of a regulated substance has occurred from a storage tank system into the environment or into the interstitial area between a storage tank system and a secondary barrier around it.

[~~DY~~](7) "Remediation" is the process of reducing the concentration of contaminants in air, water or soil to a level that poses an acceptable risk to public health, safety and welfare and the environment.

[~~DZ~~](8) "Repair" means to restore any defective or damaged part of a storage tank system. Repair does not include normal maintenance. For these purposes, normal maintenance shall include but is not limited to: painting, replacing fuses, or touchup. Any time an activity involves disconnecting or affecting the integrity of the piping, tank, spill or overfill systems, or work on line or tank leak detection systems, then the activity is not normal maintenance and is a repair.

[EA](9) "Replace" means:

[(+)(a)] for a storage tank or dispenser system, to remove an existing tank or dispenser system and install a new tank or dispenser; and

[(2)(b)] for piping, to remove and put back in any amount of piping connected to a single tank that is installed after April 4, 2008 or to a single tank that is replaced after April 4, 2008; replacing piping also means removing five or more feet of piping and installing new piping within 30 days.

[EB](10) "Residential tank" is a tank located on property used primarily for dwelling purposes.

[EC](11) "Responsible party-lead site" means a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs, as distinct from a site where the state takes corrective action.

[ED](12) "Return to service" means to bring a storage tank into operation after the tank has been in temporary or permanent closure.

[EE](13) "Risk-based screening level" (RBSL) means an action level or

target level for a contaminant of concern determined using default criteria set by the department and site specific data for thickness of the contaminated zone and depth to groundwater in the tier one evaluation in accordance with 20.5.12 NMAC [~~and the bureau's guidelines for corrective action~~].

[EF](14) "Rural and remote area" means that a storage tank facility is located in an area that is more than 20 miles from another facility that sells fuel to the public and that is open year round.

S. Terms beginning with the letter "S".

[EG](1) "Secondary containment" means a release prevention and release detection system for a storage tank, its piping and associated ancillary equipment that is designed to prevent a release from migrating beyond the secondary containment system outer wall (in the case of a double-walled tank system) or excavation area (in the case of a liner or vault system) before the release can be detected. Such a system may include, but is not limited to, synthetic impervious liners.

[EH](2) "Secretary" means the secretary of the New Mexico environment department also known as the secretary of the environment.

[EI](3) "Septic tank" is a watertight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

[EJ](4) "Site" means a place where there is or was at a previous time one or more storage tanks and may include areas contiguous to the actual location or previous location of the tanks.

[EK](5) "Site conceptual exposure scenario" means a qualitative evaluation of exposure information for a site that identifies the relevant contaminant source, release mechanisms, media of concern, complete and incomplete exposure pathways, and receptors.

[EL](6) "Site-specific target level" (SSTL) means an action level or target level for a contaminant of concern determined using more site-specific data than the tier one evaluation in the tier two or tier three evaluations in 20.5.12 NMAC.

[EM](7) "Source water" means water that could be used for domestic purposes, including but not limited to ground water, natural springs, and surface water, even if such water is not current being used for domestic purposes.

[EN](8) "Special enclosure" means an above or below grade AST installation that surrounds an AST or ASTs, including but not limited to pits, cellars, and

basements.

[EO](9) "Spill" means:

[(+)(a)] any spill or overflow of a regulated substance that exceeds its reportable quantity under CERCLA (40 CFR 302);

[(2)(b)] any spill or overflow of petroleum that exceeds 25 gallons or causes a sheen on surface water or reaches groundwater; or

[(3)(c)] any spill or overflow of petroleum of 25 gallons or less the clean up of which cannot be accomplished within 24 hours.

[EP](10) "SSTL" means site-specific target level as used in 20.5.12 NMAC.

[EQ](11) "State-lead site" means a site where the department takes corrective action using the fund because the owners and operators are unknown, unable or unwilling to take corrective action as described in 20.5.15.10 NMAC or because the department determines that a single entity is necessary to lead the corrective action.

[ER](12) "Storage tank" means any above ground storage tank or underground storage tank.

[ES](13) "Storage tank fee" means fees required by Section 74-4-4.4 NMSA 1978 and Section 74-6B-9 NMSA 1978.

[ET](14) "Storage tank system" means a storage tank and its associated ancillary equipment and containment system, if any.

[EU](15) "Stormwater or wastewater collection system" means piping, pumps, conduits, and any other equipment necessary to collect and transport the flow of surface water run-off resulting from precipitation or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur.

[EV](16) "Substantial business relationship" means the extent of a business relationship necessary under applicable state law to make a guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from and depends on existing economic transactions between the guarantor and the owner or operator.

[EW](17) "Substantial governmental relationship" means the extent of a governmental relationship necessary under applicable state law to make an added guarantee contract issued incident to that relationship valid and enforceable. A guarantee contract is issued "incident to that relationship" if it arises from a clear commonality of interest in the event of a storage tank release such as coterminous boundaries, overlapping constituencies, common ground-water aquifer, or

other relationship other than monetary compensation that provides a motivation for the guarantor to provide a guarantee.

[EX-](18) "Sump" means any pit or reservoir that meets the definition of tank (including troughs or trenches connected to it that serves to temporarily collect regulated substances.

[EY-](19) "Surface impoundment" is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials) that is designed to hold an accumulation of regulated substances and that is not an injection well.

T. Terms beginning with the letter "T".

[EZ-](1) "Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

[FA-](2) "Tank" is a stationary device designed to contain an accumulation of regulated substances which is constructed of non-earthen materials (e.g., concrete, steel, plastic) that provide structural support.

[FB-](3) "Target concentrations" means any concentration of a contaminant to which a medium is required to be remediated under any provision of 20.5 NMAC protective of human health, safety and welfare, and the environment. For purposes of 20.5.13 NMAC, target concentrations as they apply to soil contamination shall be based on standards prescribed by applicable law or, if there are no applicable standards, the standard set forth in 20.6.3.110 NMAC.

[FC-](4) "Termination" under Subsections A and B of 20.5.9.957 NMAC means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

[FD-](5) "Tightness testing" means a procedure for testing the ability of a tank system to prevent an inadvertent release of any stored substance into the environment (or, in the case of an UST system, intrusion of groundwater into a tank system).

U. Terms beginning with the letter "U".

[FE-](1) "Underground area" means an underground room, such as a basement, cellar, shaft or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

[FF-](2) "Underground release" means any below ground release.

[FG-](3) "Underground storage tank" or "UST" means a single tank or combination of tanks, including pipes connected thereto, that are used to contain an accumulation of regulated substances and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground. A compartment tank with combined total capacity greater than 110 gallons is a UST and for purposes of these regulations is considered to be one tank regardless of the number of compartments and the number of regulated substances contained. The term does not include any:

[(+)](a) farm, ranch or residential tank of 1,100 gallons or less capacity used for storing motor fuel ~~[or heating oil]~~ for noncommercial purposes;

[(2)](b) septic tank;

[(3)](c) pipeline facility, including gathering lines which are regulated under the federal Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the federal Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act;

[(4)](d) surface impoundment, pit, pond or lagoon;

[(5)](e) storm water or wastewater collection system;

[(6)](f) flow-through process tank;

[(7)](g) liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

[(8)](h) storage tank situated in an underground area, such as a basement, cellar, mineworking drift, shaft or tunnel, if the storage tank is situated upon or above the surface of the undesignated floor;

[(9)](i) tank ~~[associated with an emergency generator system]~~ used for storing heating oil for consumptive use on the premises where stored;

[(+0)](j) tank exempted by rule of the EIB after finding that the type of tank is adequately regulated under another federal or state law; or

[(+)](k) pipes connected to any tank exempted by ~~[Paragraphs (1) through (10) of this subsection]~~ Subparagraphs (a) through (j) of this paragraph.

[FH-](4) "Un-manned facility" means a storage tank system without a sales office, store or other business establishment associated with it. Examples of un-manned facilities include but are not limited to: a card-lock fueling station with no attendant and a tank serving an emergency generator at a utility transfer station.

[FI-](5) "Unsaturated zone" is the subsurface zone containing water under pressure less than that of the atmosphere, including water held by capillary forces within the soil and containing air or gases

generally under atmospheric pressure. This zone is limited above by the ground surface and below by the upper surface of the zone of saturation (i.e., the water table).

[FJ-](6) "USTR" means the version of the environmental improvement board's underground storage tank regulations in effect prior to adoption of the standard format in the New Mexico Administrative Code in 1995.

[FK-](7) "UST system" means an underground storage tank and its associated ancillary equipment and containment system, if any.

V. Terms beginning with the letter "V".

[FL-] "Vault" means a liquid-tight structure that completely surrounds a tank that is above, below or partially above or below the ground surface.

W. Terms beginning with the letter "W".

[FM-](1) "Wastewater treatment tank" means a tank that is part of a wastewater treatment facility regulated under either Section 402 or 307(b) of the federal Clean Water Act and which receives and treats or stores an influent wastewater which contains regulated substances.

(2) "Workplan" means a written plan for corrective action, including, but not limited to, a scope of work, schedule for implementation, and description of qualifications of persons who will perform the work.

[FN-](3) "WQCC" means the New Mexico water quality control commission.

[FO-](4) "WQCC standards" means standards set forth in 20.6.4 NMAC, standards for interstate and intrastate streams, and 20.6.2 NMAC, ground and surface water protection.

X. Terms beginning with the letter "X". [RESERVED]

Y. Terms beginning with the letter "Y". [RESERVED]

Z. Terms beginning with the letter "Z". [RESERVED]

[20.5.1.7 NMAC - Rp, 20.5.1.7 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.1.8 SAVINGS CLAUSE:**

This rule shall not affect any administrative or judicial enforcement action pending on the effective date of 20.5.1 through ~~[20.5.16]~~ 20.5.19 NMAC.

[20.5.1.8 NMAC - Rp, 20.5.1.8 NMAC, 6/15/2009; A, 3/17/2012]

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

This is an amendment to 20.5.2 NMAC, Sections 3 and 8, effective March 17, 2012.

**20.5.2.3 STATUTORY**

**AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14; and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-16] 74-1-17.

[20.5.2.3 NMAC - Rp, 20.5.2.3 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.2.8 EXISTING TANKS:**

A. The owner of any underground storage tank, as those terms are defined in 20.5.1 NMAC, shall register such tank or tanks with the petroleum storage tank bureau of the department within three months after April 14, 1988, the effective date of this part as first adopted, except that any owner who has filed the form of notice entitled "notification for underground storage tanks," prescribed by the United States environmental protection agency and described in 40 CFR Chapter 1, Section 280.3 (EPA form 7530-1), is not required to register a tank for which a notice has been filed, provided that the information as stated therein is still current.

B. The owner of any above ground storage tank, as those terms are defined in 20.5.1 NMAC, shall register such tank or tanks with the petroleum storage tank bureau of the department within three months after June 14, 2002.

C. The owner of any storage tank associated with an emergency generator system shall register such tank with the petroleum storage tank bureau of the department no later than 90 days after the effective date of this rule.

[C.] D. Registration becomes effective upon receipt of the first year's annual fee described in 20.5.3 NMAC. Registration shall be renewed annually by payment of the annual fee until the permanent closure of the tank pursuant to 20.5.8 NMAC.

[20.5.2.8 NMAC - Rp, 20.5.2.200 NMAC, 04/04/2008; A, 03/17/2012]

**NEW MEXICO  
ENVIRONMENTAL  
IMPROVEMENT BOARD**

This is an amendment to 20.5.4 NMAC, Sections 3, 15, 19, 25, 26, 29, 32, 33, 35 and 38, effective March 17, 2012.

**20.5.4.3 STATUTORY**

**AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-15] 74-1-17.

[20.5.4.3 NMAC - Rp, 20.5.4.3 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.4.15 SECONDARY CONTAINMENT FOR UST SYSTEMS:**

A. After April 4, 2008 owners and operators shall install secondary containment:

(1) for any new or replaced UST system [~~including dispensers and piping~~];

(2) for any new or replaced dispenser system, except for the installation of a motor fuel dispenser installed separately from the equipment needed to connect the dispenser to a storage tank system; and

(3) for any UST [~~dispenser or~~] piping replaced after April 4, 2008.

[H.] B. Owners and operators shall design, provide project drawings for, and construct the entire new UST system with the secondary containment system in compliance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. The secondary containment system shall include all tanks, piping, [~~dispensers~~] dispenser systems, and all containment sumps for any piping and ancillary equipment that routinely contains regulated substances, and shall include interstitial monitoring that meets the requirements of 20.5.6 NMAC.

[E.] C. If owners and operators:

(1) replace a UST, they shall install a double-walled tank with an inner and outer barrier and a release detection system that meets the requirements of 20.5.6 NMAC;

[E.] (2) [~~If owners and operators~~] replace a dispenser system, they shall install, in accordance with manufacturer's recommendations, an under-dispenser containment system that shall be hydrostatically tested and approved by the department prior to use; types of under-dispenser containment systems include, but are not limited to, dispenser liners, containment sumps, dispenser pans and dispenser sump liners; or

[E.] (3) [~~If owners and operators~~]

replace piping, they shall install only double-walled piping with an inner and outer barrier and a release detection system that meets the requirements of 20.5.6 NMAC for the replaced piping.

[E.] D. The following may be used to comply with secondary containment requirements:

[E.] (1) petroleum equipment institute publication RP100, "*recommended practices for installation of underground liquid storage systems*;" or

[E.] (2) American petroleum institute publication RP 1615, "*installation of underground petroleum storage systems*."

[E.] E. The department shall not require owners and operators to install secondary containment required in this section if the owners and operators demonstrate to the department's satisfaction that no part of the UST system is within 1,000 feet of a community water system, potable drinking water well, or source water.

(1) In advance of construction or replacement, owners and operators shall submit in advance of construction or replacement, for approval by the department, a detailed to-scale map of the proposed UST system that demonstrates that no part of the UST system is within 1,000 feet of any existing community water system, any existing potable drinking water well, any potable drinking water well the owner or operator plans to install at the facility, or any source water.

(2) The map shall be accompanied by a certified statement by owners and operators explaining who researched the existence of community water systems, potable drinking water wells, and source water; how the research was conducted; and how the proposed UST system complies with this subsection.

(3) To determine if any part of a UST system is within 1,000 feet of any existing community water systems, potable drinking water well, or source water, at a minimum owners and operators shall measure the distance from the closest part of the new or replaced UST, piping or dispenser system, or other part of a UST system, to the closest part of the nearest community water system, potable drinking water well, or source water, including such components as the location of wellheads for groundwater, depth to groundwater, the location of the intake point for surface water, water lines, processing tanks, water storage tanks, and water distribution or service lines.

[E.] E. [~~In a manifolded UST system, secondary containment is only required for a new or replaced UST; existing USTs in the manifolded system are not required to have secondary containment. Additionally, the~~] The secondary containment requirements of this section shall not apply to:

(1) existing USTs in a manifolded system (as secondary containment is only required for a new or replaced UST in a manifolded system);

~~[(+)]~~ (2) repairs meant to restore a UST, piping or dispenser system to operating condition;

~~[(2)]~~ (3) piping runs that are not new or replaced for USTs with multiple piping runs; ~~[or]~~

~~[(3)]~~ (4) suction piping that meets the requirements of ~~[Subparagraphs (a) through (c) of Paragraph (2) of]~~ Subsection B of ~~[20.5.6.10]~~ 20.5.6.11 NMAC; or

(5) non-pressurized piping that manifolds two or more underground tanks together, such as a siphon piping system.

[20.5.4.15 NMAC - N, 04/04/2008; A, 03/17/2012]

#### 20.5.4.19 INSTALLATION OF AST SYSTEMS:

A. Owners and operators shall properly install all ASTs and piping ~~[:]~~ in accordance with the manufacturer's instructions and

~~[(+)]~~ in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department, ~~[that includes or provides for]~~ or in accordance with 20.5.4.38 NMAC. Installation not in accordance with 20.5.4.38 NMAC shall address the following:

(1) support, if required in the sole discretion of the department, by the use of saddles or longitudinal supports;

~~[(a)]~~(2) ~~[foundation, support and anchorage]~~ a foundation that is of sufficient thickness and reinforcement to support the tank when the tank is filled to maximum capacity with a regulated substance and that is constructed of concrete with a minimum compression strength of 3,000 pounds per square inch at 28 days (or other comparable material approved by the department), and shall be used for:

(a) double-walled or double-bottomed above ground storage tanks;

(b) horizontal tanks with saddles, which shall be placed at a minimum on footings constructed of concrete or other comparable material approved in advance by the department;

(c) horizontal tanks with longitudinal supports, which shall be placed on a concrete slab that extends at least 12 inches beyond the perimeter of the tank and is constructed of concrete or other comparable material approved in advance by the department;

(d) vertical tanks, which shall be placed on a concrete slab that extends at least 12 inches beyond the perimeter of the tank and is constructed of concrete or other comparable material approved in advance by

the department; and

(e) single-walled above ground storage tanks, which shall be installed inside secondary containment that meets the requirements of 20.5.4.29 NMAC:

(3) anchorage;

~~[(b)]~~(4) fills, gauges and vents;

~~[(e)]~~(5) environmental protection;

and

~~[(d)]~~(6) testing and inspection [;

and

(2) in accordance with the manufacturer's instructions].

B. The following may be used to comply with the requirements of this section:

(1) American petroleum institute standard 650, "welded steel tanks for oil storage;"

(2) national fire protection association 30, "flammable and combustible liquids code;"

(3) national fire protection association 30A, "code for motor fuel dispensing facilities and repair garages;"

(4) petroleum institute publication RP200, "recommended practices for installation of above ground storage tank systems for motor vehicle fueling;"

(5) steel tank institute RP R912, "installation instructions for shop fabricated stationary aboveground storage tanks for flammable, combustible liquids;" or

(6) international code council, "international fire code."

C. In addition to other requirements of this section, if owners or operators want to place into service any shop-fabricated AST that has been permanently closed at any location, owners and operators shall:

(1) not use the AST until they have provided to the department:

(a) the age and type of tank;

(b) the tank manufacturer;

(c) a list of regulated and non-regulated substances previously stored in the tank and for what duration;

(d) a description of any unusual circumstances involving the AST; and

(e) any other information requested by the bureau based on the circumstances; and

(2) install the system in compliance with all requirements for new AST systems in this part.

D. Based on the information received in Subsection C of this section, the department may require owners and operators who want to relocate an AST that has been temporarily or permanently closed to have the tank recertified by a certified tank inspector, the tank manufacturer, or a professional engineer prior to use.

[20.5.4.19 NMAC - Rp, 20.5.4.401 NMAC, 04/04/2008; A, 03/17/2012]

#### 20.5.4.25 ADDITIONAL REQUIREMENTS FOR AST SYSTEMS:

A. Above ground tanks located at an elevation so as to produce a gravity head on the dispenser system or piping shall be equipped with an anti-siphon or solenoid valve which meets the requirements of the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. Owners and operators shall install and adjust the anti-siphon or solenoid valve so that fuel cannot flow by gravity from the tank to the dispenser system if the piping fails when the dispenser is not in use.

B. The following may be used to meet the requirements of this section:

(1) national fire protection association 30A, "code for motor fuel dispensing facilities and repair garages;" or

(2) international code council, "international fire code."

[20.5.4.25 NMAC - Rp, 20.5.4.401 NMAC, 04/04/2008; A, 03/17/2012]

#### 20.5.4.26 STORAGE TANKS AT MARINAS:

A. Owners and operators of storage tank systems at marinas shall install an automatic break-away device to shut off flow of fuel from on-shore piping, which shall be located at the connection of the on-shore piping and the piping leading to the dock. Owners and operators shall install another automatic break-away device to shut off flow of fuel located at any connection between flexible piping and hard piping on the dispenser system and dock. The automatic break-away devices shall be easily accessible, and their location shall be clearly marked.

B. Owners and operators of storage tank systems at marinas shall electrically isolate dock piping where excessive stray electrical currents are encountered.

C. Owners and operators of storage tank systems at marinas shall protect piping from stress due to tidal action.

[20.5.4.26 NMAC - Rp, 20.5.4.401 NMAC, 04/04/2008; A, 03/17/2012]

#### 20.5.4.29 AST SECONDARY CONTAINMENT: SINGLE-WALLED TANKS AND PIPING:

Owners and operators shall construct a containment area under and around single-walled ASTs and piping, except for piping that meets the requirements of 20.5.4.23 NMAC. Internal lining of ASTs shall not be used as a method of secondary containment.

A. General requirements:

(1) Owners and operators shall design and construct secondary containment to minimize damage to the surfaces of the

tanks due to corrosion, accumulation of water, and stray electrical current.

(2) Owners and operators shall ensure that any regulated substance stored in an AST system is chemically compatible with the secondary containment material. If owners and operators store more than one type of regulated substance within a single containment area, owners and operators shall ensure that the substances are chemically compatible with each other and with the containment material.

(3) Owners and operators shall construct a containment area which has a capacity of at least one hundred ten percent of the size of the largest AST in the containment area plus the volume displaced by the other AST(s).

(4) Owners and operators shall not use clay for the construction of secondary containment.

(5) Owners and operators may use a vault which complies with the requirements of this section as secondary containment.

B. Concrete secondary containment. Owners and operators may use concrete for construction of the containment area.

(1) If owners and operators use concrete for construction of secondary containment installed on or after (the effective date of this rule), the concrete containment shall be designed and constructed in accordance with [the current edition of] an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory, which shall be approved in advance of construction by the department. [Concrete secondary containment shall be coated or internally lined with a material which, in conjunction with the concrete, has a permeability rate to the regulated substance stored of  $1 \times 10^{-7}$  centimeters per second or less.] New concrete secondary containment shall comply with Subparagraph (a), (b) or (c) below:

(a) be coated or internally lined with a material which, in conjunction with the concrete, has a demonstrated permeability rate to the regulated substance stored of  $1 \times 10^{-7}$  centimeters per second or less;

(b) be installed in accordance with a set of plans that have been stamped by a professional engineer demonstrating that the system is able to contain a release of regulated substances for seven days and properly support the above ground storage tank systems within the secondary containment; or

(c) be installed in accordance with an alternate method for concrete secondary containment design and construction that is approved in advance by the department pursuant to 20.5.4.38 NMAC.

(2) [~~Existing AST systems with~~

~~Secondary containment constructed of concrete existing on (the effective date of this rule) shall meet the requirements of this section on the schedule established in 20.5.4.35 NMAC [if the secondary containment is made impervious in accordance with the standard in Paragraph (1) of this subsection. Owners and operators shall install the coating or internal lining in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory, which shall be approved by the department in advance of installation.] by:~~

~~(a) one of the methods listed in Subsection B of 20.5.4.29 NMAC; or~~

~~(b) coating or internal lining the existing concrete containment in compliance with manufacturer's instructions, or in accordance with an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory, which shall be approved by the department in advance of the coating or lining, or obtain department approval for an alternate method following 20.5.4.38 NMAC.~~

~~[(3) Owners and operators of AST systems shall submit to the department a report on the installation of the coating or internal lining for concrete secondary containment which shall certify that the coating or internal lining has been installed in accordance with the manufacturer's recommendations or an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory. The report shall contain the date of the inspection or installation, the test methods used during the inspection, the data collected during the inspection, and the standard or code of practice according to which the installation was conducted. One of the following shall conduct the inspection and prepare the inspection report:~~

~~(a) a coating inspector who is certified by the national association of corrosion engineers; or~~

~~(b) a protective coatings specialist who is certified by the society for protective coatings.]~~

~~[(4)] (3) The following may be used to comply with the concrete secondary containment requirements:~~

~~(a) American concrete institute 350R, "environmental engineering of concrete structures;"~~

~~(b) American concrete institute 350.2R, "concrete structures for containment of hazardous materials;"~~

~~[(b)] (c) American concrete institute 224R, "control of cracking in concrete structures;"~~

~~[(e)] (d) national association of corrosion engineers international RP0892, "coatings and linings over concrete for~~

~~chemical immersion and containment service;"~~

~~[(d)] (e) society of protective coatings TU2/NACE6G197, "design, installation and maintenance of coating systems for concrete used in secondary containment;"~~

~~[(e)] (f) national association of corrosion engineers international standard number 6/SSPC 13, "surface preparation of concrete;"~~

~~[(f)] (g) national association of corrosion engineers international RP0281, "method for conducting coating (paint) panel evaluation testing in atmospheric exposures; or~~

~~[(g)] (h) American society for testing and materials D4258, "standard practice for cleaning concrete for coating."~~

(4) Owners and operators of AST systems shall have the option of fulfilling Paragraphs (1) through (3) of this subsection by submitting to the department a set of plans for the concrete secondary containment that have been stamped by a professional engineer, or for existing secondary containment a report stamped by a professional engineer demonstrating that the system is able to contain a release of regulated substances for seven days and properly support the above ground storage tank systems within the secondary containment.

C. Liners as secondary containment.

(1) If owners and operators use geo-synthetic membrane for secondary containment, the geo-synthetic membranes or liners shall have a minimum thickness of 60 mils.

(2) Owners and operators shall install liners in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department, or in accordance with the manufacturer's specifications. Owners and operators shall submit to the department a report on the installation of the geo-synthetic membrane which shall certify that the geo-synthetic membrane has been installed in accordance with the manufacturer's recommendations or an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory. The report shall contain the date of the inspection and installation of the geo-synthetic membrane, the test methods used during the inspection, data collected during the inspection, and the standard or code of practice according to which the installation was conducted. An installer or inspector with appropriate certification or experience (which shall be documented in the report) shall prepare the report.

(3) Earthen dike fields shall be

lined with a geo-synthetic membrane to qualify as secondary containment.

D. Steel as secondary containment. If owners and operators use steel for construction of the secondary containment area, and if the steel is routinely in contact with soil, water or concrete, owners and operators shall cathodically protect the containment area in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department.

[20.5.4.29 NMAC - Rp, 20.5.4.401 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.4.32 SECONDARY CONTAINMENT FOR AST DISPENSERS:**

Owners and operators shall install a containment sump underneath each dispenser system associated with an AST, unless the dispenser is located within secondary containment.

A. Owners and operators shall hydrostatically test the sump upon installation, in accordance with manufacturer's recommendations.

B. The following may be used to comply with this containment sump requirement: dispenser liners, under-dispenser containment, dispenser pans, and dispenser sump liners.

[20.5.4.32 NMAC - Rp, 20.5.4.401 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.4.33 SPILL AND OVERFILL PREVENTION:**

A. Except as provided in Subsection B of this section, to prevent spilling and overfilling associated with transfers of regulated substances to storage tank systems, owners and operators shall use the following spill and overfill prevention equipment as of August 15, 2004, for ASTs and as of December 22, 1998, for USTs:

(1) spill prevention equipment that will prevent release of regulated substances to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and

(2) overfill prevention equipment for USTs that will:

(a) automatically shut off flow into the tank when the tank is no more than 95 percent full; or

(b) alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level audible alarm;

(3) overfill prevention equipment for ASTs that will:

(a) automatically shut off flow into the tank when the tank is no more than 95 percent full; or

(b) alert the transfer operator when the tank is no more than 90 percent full by

restricting the flow into the tank or triggering a high-level audible and visual alarm.

B. Owners and operators are not required to use the spill and overfill prevention equipment specified in Subsection A of this section if approved in writing in advance by the department where:

(1) alternative equipment is used that is determined by the department to be no less protective of public health, safety and welfare and the environment than the equipment specified in Paragraphs (1), (2) or (3) of Subsection A of this section; or

(2) the storage tank system is filled by transfers of no more than 25 gallons at one time;

C. Owners and operators are not required to install and operate spill and overfill prevention equipment required in [~~Paragraph (1)~~] Paragraphs (1) and (3) of Subsection A of this section for any AST system where the fill port is located within a secondary containment system meeting the requirements of 20.5.4.27 NMAC and 20.5.4.29 NMAC.

D. Owners and operators shall install any AST for a marina with a system that will allow the level of regulated substance in the AST to be monitored during a delivery of fuel to the AST in addition to spill catchment basins. Unless the AST system is equipped with an audible overfill alarm that will alert the transfer operator at 90 percent of capacity, and overfill protection which will shut off flow of product during a fuel delivery to the tank at 95 percent, owners and operators shall visually monitor the delivery of fuel.

[20.5.4.33 NMAC - Rp, 20.5.4.402 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.4.35 DEADLINES FOR CLOSING OR UPGRADING EXISTING AST SYSTEMS AND EXISTING EMERGENCY GENERATOR SYSTEMS:**

A. Not later than July 1, 2011 all owners and operators shall:

~~—A:] upgrade existing AST systems to meet all performance standards for new AST systems in 20.5.4 NMAC, with the exception that existing AST systems need not submit project drawings; or~~

~~[B:] close any AST system that does not meet the performance standards in 20.5.4 NMAC [and~~

~~C:], except for the following:~~

~~(1) owners and operators may delay compliance with AST system secondary containment requirements of 20.5.4.29 NMAC until July 1, 2013;~~

~~(2) owners and operators must close any UST being used as an AST no later than July 1, 2013; and~~

~~(3) any good faith upgrades to AST system secondary containment made in compliance with this part prior to December~~

3, 2010 shall be deemed in compliance with this section.

B. Not later than July 1, 2013 owners and operators shall:

(1) upgrade AST and UST emergency generator systems existing as of the effective date of this rule to meet all performance standards for AST and UST systems in 20.5.4 NMAC, with the exception that existing systems need not submit project drawings; or

(2) close any AST or UST emergency generator system that does not meet the performance standards in 20.5.4 NMAC.

[20.5.4.35 NMAC - Rp, 20.5.4.405 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.4.38 ALTERNATE METHODS:**

A. If owners and operators want to install tanks, piping, storage tank systems, spill and overfill equipment, secondary containment, or any other requirement of this part [~~by another method~~] with materials or methods that are or are not in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory, owners and operators shall apply in writing to the department, shall provide supporting documentation, and shall not begin the installation unless and until the department approves the request in writing. At a minimum, the request for an alternate method shall contain the following:

(1) date the form is completed;

(2) facility name, number, address (with county) and telephone number;

(3) owner name, number, address and telephone number;

(4) citation to regulation for which alternate method or material (such as type of piping) is requested;

(5) brief description of the proposed alternate method or material; [and]

(6) justification of proposed alternate method or material, including citation to [the] a standard or code supporting its use, [if available]; and

(7) demonstration of its equivalent protection of public health, safety and welfare and the environment.

B. The department shall not grant the request unless owners and operators demonstrate that the request will provide equivalent protection of public health, safety and welfare and the environment.

[20.5.4.38 NMAC - Rp, 20.5.4.404 NMAC, 04/04/2008; A, 03/17/2012]

[The department provides an optional form that may be used to request approval of an alternate method. The form is available on the department's website, www.nmenv.state.nm.us or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or

1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 20.5.5 NMAC, Sections 3, 8, 9, 10, 11, 12 and 23, effective March 17, 2012.

### 20.5.5.3 STATUTORY

**AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-16] 74-1-17.

[20.5.5.3 NMAC - Rp, 20.5.5.3 NMAC, 04/04/2008; A, 03/17/2012]

### 20.5.5.8 OPERATION AND MAINTENANCE OF STORAGE TANK SYSTEMS:

Owners and operators shall properly maintain all tanks, piping, secondary containment and other associated equipment required in 20.5.4 NMAC, and shall ensure that all tanks, piping, secondary containment and other associated equipment for all storage tank systems are fully operational at all times. Owners and operators shall notify the department in accordance with 20.5.7 NMAC if a visual inspection, other inspection or testing conducted in accordance with 20.5.5 or 20.5.6 NMAC indicate that a release may have occurred.

A. Owners and operators shall visually inspect monthly an AST and all its components that are readily accessible to visual inspection.

B. Owners and operators shall maintain the exterior coating of an AST and ancillary equipment not in contact with soil in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. The following may be used to comply with this requirement:

(1) society of protective coatings SSPC-PA 1, "*shop, field, and maintenance painting of steel*;"

(2) society of protective coatings, "*the inspection of coatings and linings: a handbook of basic practice for inspectors, owners and specifiers*;"

(3) society of protective coatings SSPC-PA Guide 4, "*guide to maintenance repainting with oil base or alkyd painting systems*;" or

(4) society of protective coatings SSPC-PA Guide 5, "*guide to maintenance*

*coating of steel structures in atmospheric service.*"

C. Owners and operators shall mark fill port lids of ASTs and USTs in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. The following may be used to comply with this requirement: American petroleum institute RP1637, "*using the API color-symbol system to mark equipment and vehicles for product identification at service stations and distribution terminals.*" Owners and operators shall clearly label the contents of all storage tanks.

D. If any steel piping installed in a trench is used in an AST or UST system, owners and operators shall visually inspect the trench monthly. Owners and operators shall draw off any [water] liquid that has accumulated in the trench within one week of [a-rainfall-event] the accumulation, and shall remove any other debris that has accumulated inside the trench. Owners and operators shall properly treat and dispose of any accumulated [water] liquid with a visible sheen. If a basin sump is located in the trench, owners and operators shall keep the basin sump free of [water] accumulated liquid and debris. Owners and operators shall not install any valves in any basin sump in a piping trench.

E. Owners and operators shall maintain all sumps (including, but not limited to: turbine sumps, STP and submersible pumps), and draw off [water] liquid that has accumulated in the sumps within one week of [a-rainfall-event] the accumulation, and shall remove any other debris that has accumulated inside the containment sumps. Owners and operators shall properly treat and dispose of any accumulated [water] liquid with a visible sheen. If gravity drain valves are used to remove [water] accumulated liquid from the containment sumps, owners and operators shall keep all valves closed except during the process of draining [water] the accumulated liquid.

F. Owners and operators shall check ASTs monthly for the presence of [water] accumulated liquid at the lowest possible point inside the tank, and remove any [water] accumulated liquid found to the extent technically possible. Owners and operators shall properly dispose of any and all [water] accumulated liquid removed from an AST.

[20.5.5.8 NMAC - Rp, 20.5.5.400 NMAC, 04/04/2008; A, 03/17/2012]

### 20.5.5.9 OPERATIONS AND MAINTENANCE PLAN:

Owners and operators of all storage tank systems shall adopt and implement a written operations

and maintenance plan, which they shall keep at the facility for the life of the storage tank system. Owners and operators of unmanned storage tank systems may keep the operations and maintenance plan at an alternate location as long as it is made readily available to the department upon request. The operations and maintenance plan shall be as specific as possible for each facility and shall include the piping and ancillary equipment that routinely contains regulated substances, or controls the flow of regulated substances. Owners and operators may use, by reference, operational and maintenance guidance from the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory. Owners and operators who reference a current edition of an industry standard or code of practice shall maintain a copy of the code or standard they reference. Owners and operators shall not implement the plan until it has been approved by the department.

A. At a minimum the operations and maintenance plan shall include the following:

(1) a detailed plan showing what inspections, operations, testing and maintenance shall be done on a daily, monthly, quarterly and annual basis in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department; the plan shall include a description of how owners and operators properly dispose of regulated substances spilled at the facility, and any water or soil removed from any part of the storage tank system where there is any indication it might be or have been contaminated with a regulated substance; and

(2) responses to emergency situations; this information shall be readily accessible at the facility; responses to emergency situations shall include the following:

(a) the location of equipment to be shut down during an emergency and how to safely perform these tasks;

(b) actions to be taken in the event of a fire, flooding, a spill, or a release of regulated substances;

(c) a site diagram; and

(d) a list of whom to notify or call during or after an emergency situation.

B. The following may be used to comply with the requirements of this section:

(1) American petroleum institute 570, "*pipe inspection code: inspection repair, alteration, and rerating of in-service piping systems*;"

(2) American petroleum institute standard 653, "*tank inspection, repair,*



alteration, and reconstruction;" or

(3) steel tank institute standard SP001, "standard for inspection of in-service shop fabricated aboveground tanks for storage of combustible and flammable liquids."

C. Owners and operators may submit to the department for approval an alternate plan which contains all the information requested in this section.

D. Owners and operators of storage tank systems that have been placed in temporary closure in compliance with 20.5.8.9 NMAC shall not be required to have an operations and maintenance plan, unless one or both of the following conditions is present:

(1) the storage tank contains greater than one inch of regulated substance;  
or

(2) the storage tank system has steel components that are in contact with soil, water or concrete.

E. Owners and operators of emergency generator systems existing as of July 1, 2011 shall meet the requirements of this section no later than July 1, 2012. [20.5.5.9 NMAC - Rp, 20.5.5.400 NMAC, 04/04/2008; A, 03/17/2012]

#### **20.5.5.10 OPERATION, MAINTENANCE, REPAIR AND REPLACEMENT OF SECONDARY CONTAINMENT FOR ASTS:**

A. Owners and operators shall operate, maintain and repair secondary containment in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department.

B. Owners and operators shall not store inside the secondary containment any material which is chemically reactive with the regulated substance stored in the AST system, or with the AST itself. Owners and operators shall not store any material in the secondary containment that reduces the capacity of the secondary containment below the requirements in 20.5.4.29 NMAC.

C. Owners and operators shall draw off ~~[water that has accumulated]~~ any accumulation of liquid in the secondary containment, including all sumps, within one week of ~~[a rainfall event]~~ the accumulation, and shall remove any other debris that has accumulated inside the secondary containment. Owners and operators shall properly treat and dispose of any accumulated ~~[water]~~ liquid with a visible sheen. If gravity drain valves are used to remove ~~[water]~~ the accumulated liquid from the secondary containment, owners and operators shall keep all valves closed except during the process of draining ~~[water]~~ the

accumulated liquid.

D. In order to maintain the highest level of secondary containment in case of a discharge from, or an overflow of, an AST system, owners and operators shall keep the spill containment buckets, catchment basins, containment sumps, basin sumps, and piping trenches free of water, regulated substances and debris.

E. Owners and operators shall ~~[maintain, repair and replace any concrete secondary containment systems]~~, in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department: ~~The following may be used to comply with this requirement]:~~

(1) maintain, repair and replace any concrete secondary containment systems; and

(2) repair all significant cracks in the floors and walls of concrete secondary containment systems.

F. The following may be used to comply with the concrete secondary containment system repair requirement in Subsection E above:

(1) society of protective coating and national association of corrosion experts SSPC-TU2/NACE 6G197, "design, installation and maintenance of coating systems for concrete used in secondary containment;"

(2) American concrete institute 224R, "control of cracking in concrete structures;" or

(3) American concrete institute "concrete repair manual."

~~[F:]~~G. Owners and operators shall maintain, repair and replace any geosynthetic liner according to manufacturer's instructions, which owners and operators shall keep readily available at the facility for the life of the liner.

~~[G:]~~H. Owners and operators shall protect from corrosion any secondary containment constructed of steel, and shall cathodically protect any portion of the steel secondary containment that is in contact with soil or water. Owners and operators shall maintain the exterior of any steel secondary containment in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. The following may be used to comply with this requirement: society of protective coatings SSPC-PA-1, "shop, field, and maintenance painting of steel."

~~[H:]~~I. Owners and operators of above ground storage tanks which are either double-walled or which have an interstitial space that is monitored as a method of release detection shall comply with the

following applicable requirements:

(1) where design and release detection method allow the interstice of a double-walled above ground storage tank to be visually inspected without disturbance of the release detection system, owners and operators shall monthly visually inspect for the presence of water, regulated substances or debris;

~~[(2) owners and operators shall notify the department in accordance with 20.5.7 NMAC if a visual inspection, other inspection or testing conducted in accordance with 20.5.5 or 20.5.6 NMAC indicate that a release may have occurred;]~~

~~[(3)]~~(2) if testing conducted in accordance with 20.5.4, 20.5.5 or 20.5.6 NMAC indicates that the stored regulated substance is leaking into the interstice of the AST, then owners and operators shall have the tank repaired in accordance with the tank manufacturer's instructions or specifications, or with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory;

~~[(4)]~~(3) owners and operators shall monitor all vertical ASTs with an interstitial space between the tank bottom and secondary containment for the presence of water or regulated substances; if gravity drain valves are used for monitoring and removal of water or regulated substances, owners and operators shall keep them closed except during the process of monitoring and draining;

~~[(5)]~~(4) owners and operators shall keep all sumps associated with interstitial monitoring free of water;

~~[(6)]~~(5) owners and operators shall annually inspect and test all sensors used to monitor interstitial spaces ~~[annually]~~, in accordance with manufacturer's ~~[recommendations]~~ testing protocol, or in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department; and

~~[(7)]~~(6) owners and operators shall remove all liquid found in interstitial spaces, and dispose of it properly.

[20.5.5.10 NMAC - Rp, 20.5.5.401 NMAC, 04/04/2008; A, 03/17/2012]

#### **20.5.5.11 OPERATION, REPAIR AND MAINTENANCE OF SECONDARY CONTAINMENT FOR USTS:**

A. Owners and operators of underground storage tank systems shall operate, maintain and repair secondary containment in accordance with the manufacturer's instructions or specifications, or with the current edition of an industry standard or code of practice developed by a nationally recognized association or

independent testing laboratory approved in advance by the department. The following may be used to comply with this requirement:

(1) U.S. environmental protection agency #510-R-05-001, "*ust systems: inspecting and maintaining sumps and spill buckets;*" or

(2) U.S. environmental protection agency #510-B-05-002, "*operating and maintaining underground storage tank systems: practical help and checklists.*"

B. Owners and operators shall draw off [water] liquid that has accumulated in the secondary containment, including all sumps, within one week of [a rainfall event] any accumulation of liquid, and shall remove any other debris that has accumulated inside the secondary containment. Owners and operators shall properly treat and dispose of any accumulated [water] liquid with a visible sheen.

[20.5.5.11 NMAC - N, 04/04/2008; A, 03/17/2012]

#### 20.5.5.12 OPERATION, REPAIR AND MAINTENANCE OF VAULTS:

A. Owners and operators shall operate, maintain and repair the walls and floor of a vault in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. The following may be used to comply with this requirement:

(1) society of protective coating and national association of corrosion experts SSPC-TU2/NACE 6G197, "*design, installation and maintenance of coating systems for concrete used in secondary containment;*"

(2) American concrete institute 224R, "*control of cracking in concrete structures;*" or

(3) American concrete institute "*concrete repair manual.*"

B. Owners and operators shall visually inspect the interior of any vault from the outside monthly, and annually shall enter and inspect the interior of the vault. Owners and operators shall draw off any [water] liquid that has accumulated in a vault within one week of [a rainfall event] any accumulation of liquid if the [water] liquid is in contact with the tank or piping (but need not draw off [water] liquid only in contact with a tank's saddles, skid or other support), and shall remove any other debris that has accumulated inside the vault and which is in contact with the tank, piping or saddle, skid or other support. Owners and operators shall properly treat and dispose of any accumulated [water] liquid with a visible sheen. If a sump is located in the vault, owners and operators shall keep the

liquid trap free of water and debris. Owners and operators shall not install any valves in any sump in a vault.

C. Owners and operators shall not store inside a vault any material which is chemically reactive with the regulated substance stored in the AST system, or with the AST itself.

D. Owners and operators shall ensure that a vault is well vented before any fuel transfer begins, and shall keep open all vents during the transfer.

E. For vaults with roofs, owners and operators shall properly maintain and repair the roof of a vault in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department.

[20.5.5.12 NMAC - Rp, 20.5.5.402 NMAC, 04/04/2008; A, 03/17/2012]

#### 20.5.5.23 ALTERNATE METHODS:

A. If owners and operators want to operate, maintain, replace, repair or modify any part of a storage tank system [by another method, other than that specified in this part;] with materials or methods that are not in accordance with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory, owners and operators shall apply in writing to the department, shall provide supporting documentation, and shall not begin to operate, maintain, replace, repair or modify the system, unless and until the department approves the request in writing. At a minimum, the request for an alternate method shall contain the following:

- (1) date the form is completed;
- (2) facility name, number, address (with county) and telephone number;
- (3) owner name, number, address and telephone number;
- (4) citation to regulation for which alternate method or material (such as type of piping) is requested;
- (5) brief description of the proposed alternate method or material; [and]
- (6) justification of proposed alternate method or material, including citation to [the] a standard or code supporting its use, if available; and
- (7) demonstration of its equivalent protection of public health, safety and welfare and the environment.

B. The department shall not grant the request unless owners and operators demonstrate that the request will provide equivalent protection of public health, safety and welfare and the environment.

[20.5.4.23 NMAC - N, 04/04/2008; A, 03/17/2012]

[The bureau provides an optional form that

may be used for notification of replacement, repair and modification. The form is available on the department's website, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us) or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 20.5.6 NMAC, Sections 2, 3, 9, 11, 20, 23 and 24, effective March 17, 2012.

**20.5.6.2 SCOPE:** This part applies to owners and operators of storage tanks as provided in 20.5.1 NMAC, except that emergency generator systems are exempt from the requirements of this part. If the owner and operator of a storage tank are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of noncompliance.

[20.5.6.2 NMAC - Rp, 20.5.6.2 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.6.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14; and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-16] 74-1-17.

[20.5.6.3 NMAC - Rp, 20.5.6.3 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.6.9 REQUIREMENTS FOR UST SYSTEMS:** Owners and operators of all UST systems shall comply with the release detection requirements of this section.

A. Owners and operators of new and existing UST systems shall provide a method or combination of methods of release detection that:

(1) can detect a release from any portion of the tank, connected piping and ancillary equipment that routinely contains a regulated substance;

(2) is installed, calibrated, operated and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for proper operating condition; and

(3) meets the applicable performance requirements in 20.5.6 NMAC with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer, following the current edition of an industry standard or code of practice developed

by a nationally recognized association or independent testing laboratory approved in advance by the department; in addition, methods for USTs used after December 22, 1990, except for methods permanently installed prior to that date, shall be capable of detecting the leak rate or quantity specified for that method in 20.5.6 NMAC with a probability of detection of 0.95 and a probability of false alarm of 0.05.

B. When a release detection method operated in accordance with the performance standards in 20.5.6 NMAC indicates a release may have occurred, owners and operators shall notify the department in accordance with 20.5.2.12 and 20.5.7 NMAC.

~~C. Owners and operators of all UST systems shall comply with the release detection requirements of this section.~~

~~D. C.~~ Owners and operators of underground storage tank systems shall provide release detection for tanks by monitoring monthly for releases using one of the methods listed in 20.5.6 NMAC with the following exceptions:

(1) UST systems installed prior to April 4, 2008 that meet the performance standards in 20.5.4 NMAC may use the monthly inventory control requirements in 20.5.6 NMAC, in conjunction with tank tightness testing conducted in accordance with this part at least every five years until 10 years after the tank is installed or upgraded under 20.5.4 NMAC;

(2) UST systems that do not meet the performance standards in 20.5.4 NMAC shall upgrade under 20.5.4 NMAC or permanently close under 20.5.8 NMAC; and

(3) USTs ~~[with capacity up to 2,000 gallons]~~ may use manual tank gauging conducted in accordance with ~~[20.5.6 NMAC;]~~ 20.5.6.14 NMAC.

~~(4) D.~~ Owners and operators of UST systems installed or replaced as required by Subsection A of 20.5.4.15 NMAC after April 4, 2008 shall monitor the UST system monthly for releases using interstitial monitoring in accordance with 20.5.6.19 NMAC and Subsection D of 20.5.6.23 NMAC. [20.5.6.9 NMAC - Rp, 20.5.6.601 NMAC, 04/04/2008; A, 03/17/2012]

**20.5.6.11 REQUIREMENTS FOR PIPING:** Owners and operators of petroleum storage tank systems shall provide release detection for piping that routinely contains regulated substances by following the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department, and by monitoring for releases in a manner specified below.

A. Owners and operators

of piping that conveys regulated substances under pressure shall:

(1) equip pressurized piping with an automatic line leak detector in accordance with 20.5.6.23 NMAC; and

(2) conduct annual line tightness testing in accordance with 20.5.6.23 NMAC or conduct monthly monitoring in accordance with 20.5.6.23 NMAC, as applicable.

B. Piping that conveys regulated substances under suction shall either have a line tightness test conducted at least every three years in accordance with 20.5.6.23 NMAC or use a monthly monitoring method conducted in accordance with 20.5.6.23 NMAC. No release detection is required for suction piping that is designed and constructed to meet all of the following standards:

(1) the below-grade piping operates at less than atmospheric pressure;

(2) the below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

(3) only one check valve is included in each suction line;

(4) the check valve is located directly below and as close as practical to the suction pump;

(5) a method is provided that allows compliance with Paragraphs (2) through (4) of Subsection B of this section to be readily determined.

C. Owners and operators of aboveground storage tank systems with underground piping that conveys regulated substances under suction shall either have a line tightness test conducted every 12 months and in accordance with Subsection B of 20.5.6.23 NMAC or conduct monthly monitoring in accordance with ~~[Subsection E of]~~ 20.5.6.23 NMAC.

D. Owners and operators of storage tank systems shall provide the department with a report on all line or piping tightness testing conducted on their petroleum storage tank systems that includes the following:

(1) name of the technician who performed the test;

(2) training and equivalent experience of the technician in the type of testing performed, including certification numbers and national association where certification was obtained or a detailed description of where and when the technician gained experience;

(3) brand name and model number of the testing equipment used during the test, date the testing equipment was last calibrated and by whom;

(4) date of the test;

(5) duration of the test; and

(6) results of the test.

E. Owners and operators shall provide release detection for piping

by monitoring at least monthly for releases using one of the methods in 20.5.6.23 NMAC, except if using automatic line leaks detectors in compliance with Subsection A of 20.5.6.23 NMAC or line tightness testing in compliance with Subsection B of 20.5.6.23 NMAC.

[20.5.6.11 NMAC - Rp, 20.5.6.601 NMAC, 04/04/2008; A, 03/17/2012]

### 20.5.6.20 VISUAL INSPECTION REQUIREMENTS FOR ASTS:

A. Owners and operators of ASTs may use visual inspection as a method of release detection if:

~~[A-]~~(1) all portions of the ASTs, including the AST bottoms, are completely visible, readily accessible, not in contact with the ground or soil and are inspected monthly;

~~[B-]~~(2) owners and operators maintain a written log of the visual inspections for each AST conducted monthly to include the following:

~~[(+)]~~(a) the date and time the inspection was conducted;

~~[(2)]~~(b) name and signature of the person who conducted the inspection;

~~[(3)]~~(c) comments on the condition of each AST;

~~[(4)]~~(d) the results of each inspection; and

~~[(5)]~~(e) the volume of water found in the AST and if the water has been removed from the tank; and

~~[C-]~~(3) owners and operators keep visual inspection logs available at the facility.

B. Owners and operators of double-walled and double-bottomed AST systems shall include inspection of the interstice in the monthly visual inspection which shall be recorded in the log required in Paragraph (2) of Subsection A. Owners and operators of AST systems that use interstitial monitoring with an electronic liquid sensor as their monthly method of release detection in accordance with 20.5.6.21 NMAC do not have to meet the requirements of this subsection. The monthly inspection of the interstice shall use one of the following methods:

(1) manual sticking of the inspection or monitoring ports of the tank by use of a tank gauging stick that is calibrated to the nearest 1/8<sup>th</sup> of an inch;

(2) interstice is equipped with a mechanical float device that will visually signal when a liquid is present in the interstice;

(3) double-bottomed vertical ASTs with drain valves for the interstice are checked for the accumulation of regulated substances or water;

(4) the interstice is inspected per manufacturer's instructions; or

(5) vertical ASTs inside secondary containment that meet the requirements of 20.5.4 NMAC and the secondary containment has been constructed so the space between the tank bottom and the concrete floor can be monitored or visually inspected.

[20.5.6.20 NMAC - N, 04/04/2008; A, 03/17/2012]

#### **20.5.6.23 METHODS OF RELEASE DETECTION FOR PIPING:**

Each method of release detection for piping used to meet the requirements of 20.5.6 NMAC shall comply with the equipment manufacturer's [recommendations] testing protocol, shall be appropriate for the type and length of piping, and shall comply with the current edition of an industry standard or code of practice developed by a nationally recognized association or independent testing laboratory approved in advance by the department. Owners and operators shall conduct release detection in accordance with the following requirements:

A. automatic line leak detectors (including mechanical or electronic detectors); methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping may be used only if they detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour; owners and operators shall conduct an annual test of the operation of the leak detector in accordance with the manufacturer's [requirements] testing protocol; owners and operators shall provide the department with a copy of the report for all leak detector testing, which shall include the following:

(1) name of the facility and facility address;

(2) name of the technician who performed the test;

(3) training and equivalent experience of the technician in the type of testing performed, including certification numbers and national association where certification was obtained or a detailed description of where and when the technician gained experience;

(4) brand name, model number, serial number of the leak detector and on what tank system the leak detector is installed;

(5) date of the test;

(6) leak rate at which the leak detector activated in gallons per hour;

(7) line pressure and functional element holding pressure in pounds per square inch;

(8) results of the test;

(9) type, diameter and length of piping the leak detector is installed upon; and

(10) whether the turbine shuts

down when an alarm is triggered with an electronic line leak detector (if interstitial monitoring with a sensor is used);

B. line tightness testing; a periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure;

C. applicable tank methods; any of the methods in 20.5.6.16 NMAC through 20.5.6.19 NMAC may be used if they are designed to detect a release from any portion of underground piping that routinely contains regulated substances;

D. interstitial monitoring; owners and operators may use interstitial monitoring if they ensure that interstitial monitoring for double-walled piping, whether under pressure or under suction, is approved in advance by the department, and that the interstitial monitoring:

(1) complies with 20.5.6.19 NMAC for USTs or 20.5.6.21 NMAC for ASTs; and

(2) shall automatically shut off the turbine for the AST and UST if the sensors used for interstitial monitoring detect regulated substances or water within the interstice or in the containment sumps associated with the piping;

(3) for ASTs and USTs in operation on April 4, 2008, owners and operator shall have until July 1, 2011 to meet the requirements of Paragraph [(3)] (2) of this subsection; owners and operators that install tank systems after April 4, 2008 shall comply with all requirements of this subsection;

E. for above ground storage tanks, visual inspection may be used for piping if all portions of the piping are completely visible, readily accessible, not in contact with the ground or soil, and are inspected monthly; owners and operators shall keep a log of visual inspection of piping that meets the requirements of Subsections B and C of 20.5.6.20 NMAC;

F. the following may be used to comply with the requirements of this section:

(1) petroleum equipment institute publication RP100, "recommended practices for installation of underground liquid storage systems;"

(2) petroleum equipment institute RP200, "recommended practices for installation of aboveground storage systems for motor vehicle fueling;"

(3) American petroleum institute publication RP 1615, "installation of underground petroleum storage systems;"

(4) American petroleum institute 570, "pipe inspection code: inspection repair, alteration, and rerating of in-service piping systems;" and

(5) American society of mechanical engineering standard B31.3, "process piping."

[20.5.6.23 NMAC - Rp, 20.5.6.604 NMAC, 04/04/2008; A, 03/17/2012]

[The department provides an optional form that may be used for the report required in Subsection A. The form is available on the department's website, www.nmenv.state.nm.us or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.6.24 ALTERNATE METHODS:**

A. If owners and operators want to install [another method] materials or methods of release detection equipment for tanks or piping required in 20.5.6 NMAC that are not in accordance with the current edition of an industry [code or] standard or code of practice developed by a nationally recognized association or independent testing laboratory, owners and operators shall apply in writing to the department, shall provide supporting documentation, and shall not begin the installation unless and until the department approves the request in writing. At a minimum, the request for an alternate method shall contain the following:

(1) date the form is completed;

(2) facility name, number, address (with county) and telephone number;

(3) owner name, number, address and telephone number;

(4) citation to regulation for which alternate method or material (such as type of piping) is requested;

(5) brief description of the proposed alternate method or material; [and]

(6) justification of proposed alternate method or material, including citation to [the] a standard or code supporting its use, if available; and

(7) demonstration of its equivalent protection of public health, safety and welfare and the environment.

B. Another type of release detection method, or combination of methods, may be used if approved pursuant to this section, and if, for either ASTs or USTs, it can detect a 0.2 gallon per hour leak rate monthly or a release of 150 gallons within a month from a tank with a probability of detection of 0.95 and a probability of false alarm of 0.05. Owners and operators may propose inventory control as a method of leak detection for ASTs, which will only be approved on a case-by-case basis by the department in accordance with Subsections B and C of this section.

C. The department may approve another method if owners and operators can demonstrate that the method can detect a release as effectively as any of the applicable methods allowed in 20.5.6 NMAC. In comparing methods, the department shall consider the size of release that the method can detect and the

frequency and reliability with which it can be detected. If the method is approved, the owner and operator shall comply with any conditions imposed by the department on its use to ensure the protection of public health, safety and welfare and the environment. The department shall not grant the request unless owners and operators demonstrate that the request will provide equivalent protection of public health, safety and welfare and the environment as the methods provided in this section.

D. In addition to the requirements in Subsections B and C of this section, any request for an alternate method of release detection for hazardous substance UST systems, shall also include information on effective corrective action technologies, health risks and chemical and physical properties of the stored substance, and the characteristics of the UST site.

[20.5.6.24 NMAC - Rp, 20.5.6.605 NMAC, 04/04/2008; A, 03/17/2012]

[The department provides an optional form that may be used to request approval of an alternate method. The form is available on the department's website, www.nmenv.state.nm.us or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

**This is an amendment to 20.5.7 NMAC, Sections 3 and 10, effective March 17, 2012.**

**20.5.7.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14, NMSA 1978, and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through [†+6] 74-1-17, NMSA 1978.

[20.5.7.3 NMAC - Rp, 20.5.7.3 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.7.10 CONFIRMED RELEASES:**

A. Owners, operators and certified installers of storage tank systems shall report the following conditions to the department within 24 hours, in accordance with 20.5.7.8 NMAC:

(1) visible leaks or seeps from any part of a storage tank system; ~~and~~

(2) evidence of released regulated substances at the storage tank site including, but not limited to, the presence of non-aqueous phase liquid or vapors in soils, basements, sewer and utility lines, groundwater, drinking water or nearby

surface water; ~~and~~

(3) evidence of released regulated substances in soils, including, but not limited to:

(a) any soil analytical results that indicate the presence of total petroleum hydrocarbons at concentrations equal to or exceeding 100 parts per million;

(b) any petroleum hydrocarbon vapor field screening results that exceed 100 whole instrument units; or

(c) significant visible staining or obvious petroleum odors.

B. Owners and operators of storage tank systems shall address confirmed releases in accordance with 20.5.12 and 20.5.13 NMAC, and shall close the system in accordance with 20.5.8 NMAC until the system is repaired or replaced so that the release will not recur.

[20.5.7.10 NMAC - Rp, 20.5.7.702 NMAC, 6/15/2009; A, 3/17/2012]

[To provide notice to the department under this section, telephone the department staff person currently on duty; to obtain this number, check the department's website at [www.nmenv.state.nm.us/ust/leakweek.html](http://www.nmenv.state.nm.us/ust/leakweek.html).]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

**This is an amendment to 20.5.10 NMAC, Sections 2, 3, 6, 7, 8, 9 and 10, effective March 17, 2012.**

**20.5.10.2 SCOPE:** This part applies to [owners and operators of storage tanks as provided in 20.5.1 NMAC] ~~aggravated parties as defined in this part.~~

[20.5.10.2 NMAC - Rp, 20.5.10.2 NMAC, 6/15/09; A, 3/17/12]

**20.5.10.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through [74-1+6] 74-1-17 NMSA 1978.

[20.5.10.3 NMAC - Rp, 20.5.10.3 NMAC, 6/15/09; A, 3/17/12]

**20.5.10.6 OBJECTIVE:** The purpose of this part is to provide [owners and operators] ~~aggravated parties~~ a means of seeking expedited review or reconsideration of decisions made by the department under 20.5 NMAC in regulating storage tank systems in order to protect the public health, safety and welfare and the environment of the state.

[20.5.10.6 NMAC - Rp, 20.5.10.6 NMAC, 6/15/09; A, 3/17/12]

### **20.5.10.7 DEFINITIONS:**

A. The definitions in 20.5.1 NMAC apply to this part.

B. As used in this part, the term "aggravated party" means:

(1) an owner, operator, person designated as a representative under 20.5.17.19 or product deliverer aggravated by a decision by the department pursuant to 20.5 NMAC;

(2) an offeror aggravated by a decision by the department on contractor selection under 20.5.17 NMAC;

(3) a contractor aggravated by a decision by the department under 20.5.17 NMAC;

(4) a person that has been denied designation as a representative under 20.5.17.19 NMAC; or

(5) a person that has been denied qualification or disqualified under 20.5.16 NMAC.

[20.5.10.7 NMAC - Rp, 20.5.10.7 NMAC, 6/15/09; A, 3/17/12]

### **20.5.10.8 INITIATION OF ADMINISTRATIVE REVIEW:**

A. Except for appeals as provided for in 20.5.17 NMAC for compliance determinations, any [owner, operator or contractor aggravated by a decision made by the department pursuant to 20.5.1 through 20.5.17 NMAC, any offeror aggravated by a decision made by the department pursuant to 20.5.17 NMAC and any person denied designation as a representative pursuant to 20.5.17.19 NMAC] ~~aggravated party~~ may obtain review of the decision by either:

(1) submitting to the department a written request for informal review pursuant to 20.5.10.9 NMAC; or

(2) submitting to the secretary or the secretary's designee a written request for review on written submittals pursuant to 20.5.10.10 NMAC.

B. Any request for administrative review initiated pursuant to Subsection A of this section must be postmarked within 15 days of the date of the decision [to be reviewed].

C. [A person entitled to review under Subsection A of this section] ~~An aggravated party~~ may request review on written submittals under 20.5.10.10 NMAC without first requesting informal review under 20.5.10.9 NMAC. If, however, [a person entitled to review] ~~an aggravated party~~ first requests informal review under 20.5.10.9 NMAC, the [person] ~~aggravated party~~ thereafter may request review on written submittals under 20.5.10.10 NMAC of the determination made by the department pursuant to Subsection D of 20.5.10.9

NMAC, provided that the request for review on written submittals under 20.5.10.10 NMAC is postmarked within 15 days of the date of the determination made by the department pursuant to Subsection D of 20.5.10.9 NMAC.

D. Review under this part does not stay the decision being reviewed, unless otherwise ordered by the secretary or secretary's designee, nor does it apply to or affect the secretary's authority to issue compliance orders or otherwise seek enforcement of these regulations, 20.5 NMAC, under the provisions of the Hazardous Waste Act or the Ground Water Protection Act.

[20.5.10.8 NMAC - Rp, 20.5.10.1000 NMAC, 6/15/09; A, 3/17/12]

#### **20.5.10.9 I N F O R M A L REVIEW:**

A. A request for informal review by an ~~owner or operator~~ aggrieved party shall be in writing and shall specify the grounds upon which the ~~owner or operator~~ aggrieved party objects to the decision [~~to be reviewed~~]. Every request for informal review shall be submitted to the department by the deadline set out in [~~Subsections B and C~~] Subsection B of 20.5.10.8 NMAC.

B. The department shall afford prompt opportunity for an informal conference at which the ~~owner or operator~~ aggrieved party may present the ~~owner's or operator's~~ aggrieved party's views on the issues raised in the request for review and offer any supporting documentation or testimony. The department shall notify the ~~owner or operator~~ aggrieved party of the time, date and place of the informal conference.

C. If the decision to be reviewed was based on an inspection or field test performed or witnessed by an employee of the department, the member of department staff conducting the review must be someone other than the employee who conducted or witnessed the inspection or test.

D. After considering all written and oral views presented, the department shall affirm, modify or reverse the original decision and shall furnish the ~~owner or operator~~ aggrieved party with a written notification of its determination.

[20.5.10.9 NMAC - Rp, 20.5.10.1001 NMAC, 6/15/09; A, 3/17/12]

#### **20.5.10.10 REVIEW BY THE SECRETARY OR THE SECRETARY'S DESIGNEE ON WRITTEN SUBMITTALS:**

A. Every request for review by the secretary or the secretary's designee on written submittals shall be in writing and shall specify the grounds upon which the ~~owner or operator~~ aggrieved party objects to the decision [~~to be reviewed~~]. The

request shall be accompanied by any and all written materials and argument which the ~~owner or operator~~ aggrieved party wishes the secretary or the secretary's designee to consider upon review. The request and all written materials and argument shall be submitted to the secretary or the secretary's designee by the deadline set out in Subsections B and C of 20.5.10.8 NMAC.

B. Within 15 days after the filing of the ~~owner or operator's~~ aggrieved party's request for review and submittal of all the ~~owner or operator's~~ aggrieved party's supporting material, department staff shall provide to the secretary or the secretary's designee any and all written materials and argument in support of the position of department staff on the issues raised by the ~~owner or operator~~ aggrieved party.

C. For good cause shown, the secretary or the secretary's designee may permit either party (that is, either department staff or the ~~owner or operator~~ aggrieved party) additional time in which to submit the supporting written materials and argument allowed by Subsections A and B of this section. Any extension of time to submit written submittals shall not include the authority to extend the time to file a request for review under this part.

D. The action of the secretary or the secretary's designee on the request for review shall be based on the written materials and argument submitted pursuant to this section unless the secretary or the secretary's designee schedules a hearing on the request for review as set forth below.

E. The secretary or the secretary's designee may exercise discretion in determining if there is significant public interest for a public hearing and, if so, may provide notice of the time and place of the hearing to the ~~owner and operator~~ aggrieved party, and may provide notice to interested persons other than the ~~owner or operator~~ aggrieved party and provide for public participation in the review process described in this section, as the secretary or the secretary's designee deems appropriate.

F. If the secretary chooses to hold a hearing as described in Subsection E of this section, the secretary shall hold the hearing within 60 days after receiving the written materials and argument described in Subsection A or after receiving the request for a hearing, whichever occurs last. In the event the department holds a hearing, the cost of the court reporter and transcript shall be paid by the party that requested the hearing. The hearing shall be conducted in accordance with 20.1.5 NMAC.

G. The action of the secretary or the secretary's designee on the request for review shall be by written order and shall state the decision and the reason therefore. The secretary or the secretary's

designee shall send a copy of the order to the ~~owner or operator~~ aggrieved party and furnish a copy to department staff promptly after the order is entered. This written order shall be the department's final action on the request for review. Any judicial review of this final order shall be as provided by applicable law.

[20.5.10.10 NMAC - Rp, 20.5.10.1002 NMAC, 6/15/09; A, 3/17/12]

## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

**This is an amendment to 20.5.12 NMAC, Sections 3, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 28, 30, 31, 32, 35, 36 and 38, effective March 17, 2012.**

**20.5.12.3 S T A T U T O R Y AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14, the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14, NMSA 1978; the Water Quality Act, Sections 74-6-1 through 74-6-17, NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through [~~74-1-16~~] 74-1-17, NMSA 1978.

[20.5.12.3 NMAC - Rp, 20.5.12.3 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.8 GENERAL:**

A. Owners and operators of petroleum storage tank systems shall take corrective action to address all releases, including such action as collection and analysis of relevant site-specific data, soil remediation, groundwater and surface water remediation and any other appropriate actions pursuant to this part, in a manner protective of public health, safety and welfare and the environment.

B. Upon confirmation of a release pursuant to 20.5.7 NMAC or identification and reporting of a release in any other manner, owners and operators of petroleum storage tank systems shall comply with the requirements of this part if the release:

(1) is of unknown volume or is greater in volume than 25 gallons; or

(2) is of any size and the owner or operator is directed by the department to comply with this part.

C. Owners and operators shall mail or deliver all written notices and reports required under this part to be submitted to the department to the owner or operator's assigned project manager from the petroleum storage tank bureau, New Mexico environment department.

D. Owners and operators shall comply with any site-specific timeline

or deadline that is [issued or] approved in writing by the department at the time of workplan approval. If no applicable site-specific timeline has been [issued or] approved, the following timeline shall apply to all corrective action requirements under this part. The time deadlines set forth in this part are computed from the date of reporting of a release or of reporting of the confirmation of a suspected release pursuant to 20.5.7 NMAC unless another event is specified in these.

Default Corrective Action Timeline

Deadline, in days from report:	Action or deliverable due date, as defined above:
0	report discovery or confirmation of a release
3	72-hour report
14	14-day report
60	submit NAPL assessment
60	initiate interim removal of contaminated soil
60	preliminary investigation report
120	secondary investigation report
150	tier one evaluation report
180	tier two evaluation report
210	tier three evaluation report
When monitored natural attenuation is used:	
510	monitored natural attenuation (MNA) plan
570	implementation of MNA
935	first annual MNA monitoring report
935	annual evaluation of MNA report
When other remediation is used:	
510	conceptual remediation plan
540	final remediation plan
600	implementation of remediation
690	first quarterly monitoring report
965	annual evaluation of remediation system report

E. All owners and operators are responsible for compliance with all provisions of this part. An owner or operator may designate a representative to facilitate compliance with this part. The designation of such a representative shall not affect the department’s right to seek compliance at any time from any owner or operator and shall not relieve owners or operators of any legal liabilities or responsibilities they may have under this part or otherwise under the law.

F. Except for 20.5.12.10, 20.5.12.11 and 20.5.12.12 NMAC, owners and operators shall submit to the department written workplans for all [required] corrective action, including voluntary corrective action, as required under this part. Owners and operators may submit workplans in stages to reflect the sequence or types of corrective action [required by] described in 20.5.12 NMAC at the site, but the owners and operators shall submit all [required] workplans to and obtain approval by the department in writing for technical adequacy before the corrective action is commenced.

G. Unless otherwise approved, a qualified firm as specified in [20.5.12] 20.5.16 NMAC shall perform all corrective action and, when required by the rules in Title 20, Chapter 5, a professional engineer as defined in 20.5.1.7 NMAC.

(1) All contractors and their subcontractors shall have appropriate licenses and certifications and be in compliance with applicable local, state and federal laws and regulations, including but not limited to the rules in Title 16, Chapter 39 governing engineers, 14.6.3 NMAC governing contractors and 29 CFR part 1910 governing worker health and safety.

(2) Owners and operators shall identify all prime contractors and all subcontractors in all workplans submitted to the department.

H. Where site conditions are amenable, owners and operators may use accelerated site characterization techniques if pre-approved by the department.

I. All monitoring wells shall be permitted in conformance with applicable federal, state and local laws and regulations in effect at the time of installation.

J. Owners and operators shall clearly mark and secure monitoring wells and major remediation equipment to prevent unauthorized access, tampering and damage. Owners and operators shall close or abandon all wells in accordance with the requirements of applicable federal, state and local laws and regulations.

K. The department shall notify [aH] owners and operators [of responsible party-lead sites] taking corrective action and contractors of state-lead sites in writing when it has determined that a deliverable completed under an approved workplan is satisfactory. The written notice shall also inform the owner, operator or contractor that any application for payment from the fund of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received written notice of approval and that [no extensions of this deadline shall be granted] the department shall not grant extensions of the deadline except for good cause as shown pursuant to 20.5.17.26 NMAC.

[20.5.12.8 NMAC - Rp, 20.5.12.1200 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.12.9 CRITERIA FOR TIER ONE, TIER TWO AND TIER THREE EVALUATIONS:**

A. ~~[The department and owners and operators shall use]~~ If the department requires a tier one, tier two or tier three evaluation as described in 20.5.12.21, 20.5.12.23 and 20.5.12.25 NMAC, owners and operators shall perform such evaluations in accordance with the following criteria, [for tier one, tier two and tier three evaluations as described in 20.5.12.21, 20.5.12.23 and 20.5.12.25 NMAC.]

(1) Owners and operators shall develop a conceptual site exposure scenario to identify all current and potential future receptors, direct and indirect pathways, routes of exposure, and complete and incomplete exposure pathways, and to ensure that sufficient data is available to evaluate sites in accordance with this part.

(2) For all complete pathways, owners and operators shall calculate target concentrations for the relevant exposure media (air, soil, surface water, groundwater) using the following components: intake equations, fate and transport models and parameters, target risk goals, physical and chemical property parameters, toxicity parameters and exposure factors, as approved by the department.

(3) Owners and operators shall compare representative site concentrations to tier one levels in accordance with 20.5.12.21 NMAC and determine whether a tier two or a tier three evaluation in accordance with 20.5.12.23 and 20.5.12.25 NMAC is necessary.

(4) The tier two and tier three evaluations shall consider site-specific measurements or estimates for saturated hydraulic conductivity (cm/sec), groundwater gradient, soil bulk density (g/cc), soil gradation, soil moisture content (percent by volume), effective porosity, and fraction organic carbon content (percent), and other parameters if required by the department. Owners and operators shall compare representative site concentrations to the tier two site specific target concentrations (SSTLs) in accordance with 20.5.12.23 NMAC.

(5) In no case will the department make a "no further action" determination for a release if, for the target concentration for any contaminant of concern originating from the release or any route of exposure:

(a) the individual carcinogenic risk exceeds 0.00001; or

(b) the hazard quotient exceeds one.

(6) Owners and operators shall determine RBSLs using residential land use unless the owner or operator can demonstrate that the current and the reasonable future land use is or will likely be commercial or industrial and, therefore, that the assumption of commercial or industrial land use is equally protective of public health, safety and welfare and the environment.

(7) Target surface water concentration criteria shall be as provided in 20.6.2, 20.7.10 and 20.5.12.42 NMAC.

(8) Target groundwater concentration criteria shall be as provided in 20.6.2 and 20.5.12.42 NMAC, and, for domestic water supplies, as provided in 20.7.10 NMAC.

(9) Target concentrations for air, soil and water shall also take into account other factors including vegetation effects, sensitive environmental receptors, and nuisance considerations as required by this part.

B. Owners and operators shall obtain department concurrence with the results of and the procedures used for the tiered evaluations before a remediation plan is approved by the department, or before a "no further action" determination is approved by the department.

[20.5.12.9 NMAC - Rp, 20.5.12.1202 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.11 MINIMUM SITE ASSESSMENT, INITIAL ABATEMENT:**

A. Owners and operators shall undertake the initial abatement and site investigation actions specified in this section within 72 hours of discovery or confirmation of a release pursuant to 20.5.7 NMAC, using the default timeline as set forth in Subsection D of 20.5.12.8 NMAC or as otherwise ~~[directed or]~~ approved by the department.

B. Owners and operators shall identify the location and details of construction of all private water supply wells, using readily accessible public records, within a 1,000 foot radius, and all public water supply wells within a one mile radius of the storage tank system, and shall determine if the identified wells lie within a designated wellhead protection area. Owners and operators shall take appropriate measures to protect these water supplies from contamination.

C. Owners and operators shall contain or remediate releases which present an imminent threat of contamination to or are within 500 feet of a surface water course as soon as practicable to prevent contamination of surface water. If the surface water course is a drinking water supply, within 24 hours owners and operators shall notify the owners or operators of all drinking water supplies likely to be affected by the release.

D. If the release has contaminated a water supply, owners and operators shall immediately provide a temporary replacement drinking water supply, as well as adequate warnings or other mechanisms to prevent persons from drinking or otherwise contacting water contaminated by the release. Within seven days of the discovery or confirmation of a release pursuant to 20.5.7 NMAC that

has contaminated a water supply, owners and operators shall provide a replacement water supply which is of adequate quality and quantity for drinking, bathing, cooking and washing. Owners and operators shall maintain the replacement water supply until an alternate water supply sufficient for all domestic purposes is available.

E. Owners and operators shall identify the depth, location, composition and construction of all underground utilities including water lines, sewer lines, communication cables, electric lines, and natural gas lines within the area of the release to assess the susceptibility of these utilities to permeation by contaminants or deterioration caused by contaminants. Owners and operators shall notify the utility owner that the release has occurred and obtain permission to perform a site check of the utilities or other subsurface structures most likely to be contaminated by the release to determine whether petroleum products or vapors are present.

F. Owners and operators shall complete an investigation to determine whether potentially explosive or harmful vapors are present in any building, utility corridor, basement, or other surface or subsurface structure on or adjacent to the release site.

(1) The investigation shall include testing for vapors using the following:

(a) a combustible gas indicator or equivalent instrument calibrated according to the manufacturer's instructions to test for potentially explosive levels of petroleum hydrocarbon vapors; and

(b) a photoionization detector, flame ionization detector or another method approved by the department calibrated according to the manufacturer's instructions to test for potentially harmful petroleum hydrocarbon vapors.

(2) In the event owners and operators discover ~~[actual or]~~ potentially explosive levels of petroleum hydrocarbon vapors ~~[greater than 20 percent of the lower explosive limit (LEL)]~~ or potentially harmful petroleum hydrocarbon vapors ~~[reading greater than five whole instrument units above ambient concentrations]~~ in any structure in the vicinity of the release site, owners and operators shall ~~[confirm and, if necessary,]~~ take immediate action to mitigate the vapor hazard. Within seven days of the discovery of the vapors, owners and operators shall install and place into operation a vapor mitigation system capable of reducing petroleum hydrocarbon vapors to safe levels within the shortest reasonable time. The vapor mitigation system shall be designed by and constructed under the direct, responsible, supervisory control of a professional engineer, when required by the department.

(a) Once a vapor mitigation



system has been installed, owners and operators shall monitor and report in writing to the department the levels of [~~potentially explosive or harmful~~] petroleum hydrocarbon vapors in the affected structures weekly for the first month and monthly thereafter unless a different monitoring schedule is approved in writing by the department. This monitoring shall be performed in accordance with Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(b) After the vapor mitigation system has been in operation for three months, owners and operators shall have 30 days to submit to the department a written summary report containing the monitoring results. The department may direct the owner and operator to modify the vapor mitigation system as necessary to reduce petroleum hydrocarbon vapors to safe levels. Owners and operators shall submit monitoring results to the department at three-month intervals until operation of the vapor mitigation system is discontinued in accordance with this section.

(3) Owners and operators shall continue to operate the vapor mitigation system until the results of three consecutive monthly monitoring events indicate the following:

(a) levels of [~~potentially explosive~~] petroleum hydrocarbon vapors are less than [~~20~~]10 percent LEL; and

(b) levels of [~~potentially harmful~~] petroleum hydrocarbon vapors are less than or equal to five whole instrument units above ambient levels in any structure in the vicinity of the release site when measured as required in Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(4) When operation of a vapor mitigation system is discontinued, owners and operators shall monitor the vapor levels in the structure weekly for the first month and monthly thereafter until one calendar year has passed, or as otherwise [~~directed or~~] approved by the department. If during this period the levels exceed those set forth in Subparagraphs (a) and (b) of Paragraph (3) of this subsection, owners and operators shall notify the department and take the necessary corrective action, as directed by the department.

G. Owners and operators shall remove any exposed petroleum products related to the release and mitigate any related immediate fire and safety hazards as soon as possible, but in no case no later than 72 hours after the confirmation or other identification of the release.

[20.5.12.11 NMAC - Rp, 20.5.12.1204 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.14 INTERIM REMOVAL OF NON-AQUEOUS PHASE LIQUID:**

A. Owners and operators shall assess the potential for remediation of

non-aqueous phase liquid (NAPL) where there is a thickness of greater than one-eighth inch of NAPL on surface water, in any excavation pit, or in any well. Owners and operators shall submit the assessment to the department in accordance with a timeline approved [~~or issued~~] by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. The department may [~~direct or~~] approve interim removal of NAPL when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment. In this event, owners and operators shall remove NAPL in accordance with a timeline approved [~~or issued~~] by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

C. Owners and operators shall remove NAPL in a manner that minimizes the spread of contamination into uncontaminated media.

D. Owners and operators shall store and dispose of NAPL in accordance with all flammable and combustible liquids codes approved by the state fire marshal or other local authority, state hazardous waste regulations (20.4.1 NMAC), and any other applicable laws or regulations.

E. Owners and operators shall report recovery and disposal of NAPL to the department.

[20.5.12.14 NMAC - Rp, 20.5.12.1207 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.15 INTERIM REMOVAL OF CONTAMINATED SOIL:**

A. Owners and operators shall remediate contaminated soil in accordance with 20.5.12.9, 20.5.12.21, 20.5.12.23, 20.5.12.25, 20.5.12.27, and 20.5.12.35 NMAC, unless [~~directed or~~] approved by the department to remove and treat contaminated soil in accordance with this section.

(1) The department may [~~direct or~~] approve interim removal of contaminated soil when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment.

(2) Under this section, owners and operators shall excavate, treat and dispose of contaminated soil using methods approved by the department, in compliance with local laws and regulations, and under a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

(3) The department shall approve the vertical and horizontal extent of soil to be excavated.

B. When treating or temporarily storing soil on site, owners and operators shall:

(1) for treatment on site, spread soil in a six-inch layer over an impervious liner

or other surface approved by the department to prevent infiltration to groundwater and place the layer of soil on level ground and berm to prevent runoff from contaminating other soil or surface water;

(2) for temporary storage, place the soil in a secure, bermed area on an impervious liner or surface or in a secured and properly labeled container, as approved by the department; and

(3) handle soil in a manner that does not contaminate groundwater, surface water or other uncontaminated soil or does not create or cause a public nuisance or threat to human health, safety and welfare or the environment.

C. When contaminated soil is taken off site, owners and operators shall provide the department with the following information within 14 days of removal of the soil from the site:

(1) written documentation of the type and concentration of contaminants, volume and weight of soil, method of treatment, date transported, and location of the site of disposal or treatment;

(2) a signed, written statement by the owner of the treatment or disposal site describing the location of the site and expressly accepting the contaminated soil; and

(3) if contaminated soil is taken to a permitted solid waste facility, a manifest signed by the generator, transporter and the owner or operator of the solid waste facility.

D. Remediation shall be considered complete when the requirements in 20.5.12.42 NMAC are met.

E. In accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, owners and operators shall submit to the department a report describing the removal and treatment of contaminated soil.

(1) The report shall describe the soil removal action and its effectiveness, including volumes and weight removed.

(2) Owners and operators shall submit the report within 30 days of the soil removal action.

[20.5.12.15 NMAC - Rp, 20.5.12.1208 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.16 MINIMUM SITE ASSESSMENT, PRELIMINARY AND OTHER REQUIRED INVESTIGATIONS:**

A. A preliminary investigation is not required when owners and operators can demonstrate that [~~groundwater has not been contaminated~~] the contamination has not reached groundwater and one of the following two conditions apply:

(1) the release is remediated in accordance with this part within 72 hours of

discovery or confirmation; or

(2) the release is permanently contained within the UST excavation area or the AST containment system.

B. If the contamination extends beyond the boundaries of the property where the release originated, owners and operators shall conduct a secondary investigation in accordance with 20.5.12.19 NMAC.

C. When the horizontal and vertical extent and magnitude of contamination from the release have been characterized, owners and operators, if approved by the department, shall perform a tier one evaluation [~~as outlined~~] in accordance with 20.5.12.9 and 20.5.12.21 NMAC.

[20.5.12.16 NMAC - Rp, 20.5.12.1209 NMAC, 6/15/2009; A, 3/17/2012]

**20.5.12.17 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION - REQUIREMENTS:**

Owners and operators shall conduct a preliminary investigation in accordance with this subsection and under a timeline approved [~~or issued~~] by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The preliminary investigation shall determine the following, unless otherwise [~~directed or~~] approved by the department.

A. If not previously identified and reported under 20.5.12.12 NMAC, the preliminary investigation shall determine the source of contamination, the regulated substance released or suspected of being released at the site, the media of concern, current and potential receptors, current and anticipated use of property, complete and incomplete exposure pathways, and routes of exposure.

B. The preliminary investigation shall also determine the horizontal and vertical extent and magnitude of soil contamination.

(1) Owners and operators shall conduct a soil boring survey by advancing a continuously cored soil boring at each area of release where soil contamination is most likely to be encountered unless otherwise directed by the department. The initial incident report and a soil vapor survey may be used in locating these areas. Owners and operators shall advance at least one of the borings into the groundwater saturated zone or, with approval from the department, to a depth [~~of 50 feet below the depth~~] at which measured levels of contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units.

(2) Owners and operators shall advance at least four additional soil borings to characterize the release within property

boundaries. Borings shall be completed to the depth at which contaminants in soil are no longer detectable by laboratory analysis, and hydrocarbon vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units. If the soil borings indicate that contaminated soil extends beyond the boundary of the property on which the storage tank system is located, owners and operators shall advance soil borings sufficient to characterize the extent and magnitude of contamination within site boundaries.

(3) Owners and operators shall assess at five-foot intervals, field estimates of concentrations of petroleum hydrocarbons in the soil borings and select and prepare samples for laboratory analysis.

(4) Owners and operators shall gather field data for soil classification, determining and recording color, grain size, texture, description of lithification, plasticity and clay content.

(5) The preliminary investigation shall include determinations of derived values for soil bulk density (g/cc), soil moisture content (percent by volume), and effective porosity, and fraction organic carbon content (percent by volume) using samples taken from an uncontaminated area of the vadose zone.

(6) Owners and operators shall delimit the horizontal and vertical extent of contaminant saturated soil as defined in 20.5.1.7 NMAC.

C. Owners and operators shall determine whether groundwater or surface water has been contaminated above applicable standards or whether a potential for groundwater or surface water contamination is present by performing the following:

(1) install at least three groundwater monitoring wells at locations where the results of the soil boring survey conducted pursuant to this section indicate that groundwater may be contaminated; owners and operators shall:

(a) locate monitoring wells so that groundwater gradient can be determined;

(b) install at least one monitoring well on site in the area of highest contamination as determined by the soil borings installed in [~~accordance~~] conformance with the initial incident report and other relevant information;

(c) install one of the monitoring wells in the estimated down-gradient direction from the area of highest contamination;

(d) construct wells in accordance with all applicable federal, state and local laws and regulations; and

(e) survey the wells using a New Mexico licensed professional surveyor, in decimal degrees of latitude and longitude in accordance with NAD 83;

(2) calculate the direction and gradient of groundwater flow;

(3) inspect all monitoring wells for the presence of NAPL using a method approved by the department; if NAPL is present in any well, measure the apparent thickness, delimit its horizontal extent, and initiate recovery procedures in accordance with 20.5.12.14 NMAC; and

(4) sample each monitoring well that does not contain NAPL and analyze the sample for contaminants of concern to determine whether:

(a) immediate mitigation procedures are warranted; and

(b) other hazardous conditions exist as a result of the release if not previously identified in accordance with 20.5.12.11 NMAC by:

(i) identifying the location and depth of underground utilities and other subsurface structures on or adjacent to the site not identified earlier in accordance with Subsection E of 20.5.12.11 NMAC;

(ii) checking for the presence of vapors in accordance with 20.5.12.11 and 20.5.12.16 NMAC; and

(iii) identifying all other hazards and potential threats to public health, safety and welfare and the environment which may exist as a result of the release.

[20.5.12.17 NMAC - Rp, 20.5.12.1209 NMAC, 6/15/2009; A, 3/17/2012]

**20.5.12.18 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the preliminary investigation and other requirements of the minimum site assessment as defined in 20.5.1.7 NMAC in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall include the information gathered under 20.5.12.10, 20.5.12.11, 20.5.12.12 and 20.5.12.16 NMAC and shall conform to the requirements of this section and 20.5.12.17 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report as soon as feasible. Owners and operators shall, in accordance with a timeline [~~issued or~~] approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not conform to the minimum

site assessment, preliminary investigation requirements in this section and 20.5.12.17 NMAC, the department shall reject the report and the owner and operator shall be determined not to have conducted a minimum site assessment for the purposes of section 74-6B-8B(1)(c) NMSA 1978. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

D. Owners and operators shall comply with the requirements of any local government which has designated a wellhead/source water protection area that includes the area of the release.

E. Owners and operators shall provide notice that includes the contaminants identified, as well as the horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination. [20.5.12.18 NMAC - Rp, 20.5.12.1210 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.19 S E C O N D A R Y INVESTIGATION:**

A. Owners and operators shall perform a secondary investigation in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC when the department makes at least one of the following determinations about the site:

(1) the extent and magnitude of contamination in all media has not been delimited by the preliminary investigation; or

(2) the release threatens public health, safety and welfare or the environment.

B. The secondary investigation shall determine the following:

(1) the horizontal and vertical extent and magnitude of soil contamination both on and off site;

(2) the horizontal extent and magnitude of dissolved phase groundwater contamination both on and off site;

(3) the vertical extent and magnitude of dissolved phase groundwater contamination, when site conditions warrant;

(4) characteristics, aerial extent, estimated volume and apparent thickness of NAPL in wells;

(5) the elevation of groundwater and surface water and the gradient, rate and direction of groundwater and surface water flow;

(6) the rate and direction of contaminant migration;

(7) the hydrologic properties of the contaminated portion of the aquifer including hydraulic conductivity, transmissivity and storativity; the department may require field verification of estimates made from literature;

(8) whether the aquifer is perched;  
(9) whether the aquifer is confined or unconfined; and

(10) any other technical information requested by the department which is reasonably necessary to meet the requirements of this part.

[20.5.12.19 NMAC - Rp, 20.5.12.1211 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.20 S E C O N D A R Y INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the secondary investigation to the department in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall include all information gathered under 20.5.12.19 NMAC and shall conform to the requirements of this part.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline [~~issued or~~] approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not meet the requirements of 20.5.12.19 NMAC, the owner and operator will be in violation of this part until the inadequacies are corrected. The department's failure to review or to comment on the secondary investigation report shall not relieve the owner and operator of their responsibilities under this part or the law.

D. Owners and operators shall provide notice that includes the contaminants identified, as well as horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination who were not previously notified in accordance with 20.5.12.18 NMAC.

[20.5.12.20 NMAC - Rp, 20.5.12.1212 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.21 TIER ONE EVALUATION:**

A. The tier one evaluation is intended to determine whether soil contamination poses a threat to groundwater in the future. A tier one evaluation is required when owners and operators can demonstrate that [~~groundwater has not been contaminated~~] the contamination has not reached groundwater and if approved by the department.

B. After the horizontal and vertical extent and magnitude of the soil contamination from the release has been fully characterized, owners and operators shall perform a tier one evaluation as described below. The owners and operators shall:

(1) develop a site conceptual exposure scenario using data collected in accordance with 20.5.12.9, 20.5.12.12, 20.5.12.16 and 20.5.12.19 NMAC; and

(2) for each receptor and each complete pathway identified in the site conceptual exposure scenario determine representative concentrations of contaminants of concern in soil samples from the investigations, and compare these concentrations to risk-based screening levels (RBSLs).

C. When representative concentrations of any contaminant of concern equal or exceed any RBSL for any exposure pathway, owners and operators shall perform a tier two evaluation unless otherwise directed by the department.

[20.5.12.21 NMAC - Rp, 20.5.12.1213 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.22 TIER ONE EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier one evaluation in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, within 14 days of such notice of inadequacy, correct the report and resubmit it to the department for review and written approval. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

[20.5.12.22 NMAC - Rp, 20.5.12.1214 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.12.24 TIER TWO EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier two evaluation to the department in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.12.8. The report shall conform to the requirements of 20.5.12.9 and 20.5.12.23 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators in writing of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, address the inadequacies identified and resubmit the report to the department for review and written approval. The department's failure to review or to comment on this report shall not relieve the owner and operator of their responsibilities under this part or the law.

[20.5.12.24 NMAC - Rp, 20.5.12.1216 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.26 TIER THREE EVALUATION REPORT:**

A. Owners and operators shall submit a written report of the tier three evaluation to the department in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. The report shall conform to the requirements of 20.5.12.9 and 20.5.12.25 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC, correct the report and resubmit it to the department for review and written approval. The department's failure to review or to comment on the report shall not relieve the owner and operator of their responsibilities under this part or the law.

[20.5.12.26 NMAC - Rp, 20.5.12.1218 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.28 MONITORED NATURAL ATTENUATION:**

A. ~~When directed or~~ If approved by the department, owners and operators shall submit a plan for monitored natural attenuation to the department if any of the following conditions have been identified at the site:

(1) concentrations of contaminants of concern exceed site-specific target levels

(SSTLs) in soil or WQCC or EIB standards in groundwater or surface water; or

(2) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. Owners and operators shall submit the monitored natural attenuation plan in accordance with this section and 20.5.12.29 NMAC and in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

C. The intent of the monitored natural attenuation plan is to provide a written description of the methodology proposed and demonstrate how the plan will achieve target concentrations in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. The content of the monitored natural attenuation plan, at a minimum and as appropriate, shall include:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing petroleum storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) cross sections showing the source contaminant mass in relation to the groundwater contamination;

(3) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(5) a schematic drawing depicting the construction details including lithology and screen intervals for the designated monitoring wells;

(6) the justification for selecting the designated monitoring wells;

(7) the recommended approach to monitoring including an implementation and monitoring schedule, the analytical methods, and the justification for the recommendation;

(8) an estimation of the time necessary for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(9) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission

or planned submission of the monitored natural attenuation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the monitored natural attenuation plan to the department; the second publication of this notice shall occur no later than seven days after the date the monitored natural attenuation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the monitored natural attenuation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a monitored natural attenuation plan has been submitted to the department proposing actions to monitor natural attenuation of a release of petroleum products;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of contaminant plume is located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the monitored natural attenuation plan and all data and modeling related to the monitored natural attenuation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a monitored natural attenuation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners; and

(d) owners and operators shall post a notice of the submission of the monitored natural attenuation plan at the release site within seven days of the submission of the monitored natural attenuation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the monitored natural attenuation plan is approved and implemented; public comments must be

received by the department within 21 days of the date of the second publication of the public notice; and

(11) other requirements as directed by the department.

[20.5.12.28 NMAC - Rp, 20.5.12.1220 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

### **20.5.12.30 MONITORED NATURAL ATTENUATION PLAN IMPLEMENTATION:**

A. Owners and operators shall implement the ~~[approved]~~ monitored natural attenuation plan ~~after department approval~~ in accordance with a timeline ~~[issued-or]~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. Owners and operators shall monitor the contamination until the department determines that the natural attenuation is complete pursuant to this part, or unless otherwise approved by the department.

[20.5.12.30 NMAC - Rp, 20.5.12.1222 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.31 REPORTS ON THE MONITORED NATURAL ATTENUATION:**

A. Owners and operators shall submit written reports to the department on the progress of the monitored natural attenuation. Owners and operators shall submit the reports annually unless a different reporting period is ~~[directed-or]~~ approved by the department and shall document all work performed during the preceding interval and shall include at a minimum the following information, as appropriate:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing petroleum storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(3) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(4) tabulation of the current and historical results of all water quality analyses and water elevation data;

(5) graphs of appropriate scale of the current and historical water quality analyses and water elevation data versus

time;

(6) data evaluation and interpretation, and recommendations; and

(7) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.12.31 NMAC - Rp, 20.5.12.1223 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.32 EVALUATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators shall evaluate the effectiveness of the monitored natural attenuation plan at the end of each year of monitoring and submit the evaluation to the department for review unless otherwise approved ~~[or-directed]~~ by the department.

B. When the department determines that the plan is not effectively mitigating contamination according to the identified risks to public health, safety and welfare or the environment, owners and operators shall propose an alternative approach or change in the existing monitored natural attenuation plan within 30 days of the department's determination of ineffectiveness. Within 30 days of the department's approval, owners and operators shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section.

[20.5.12.32 NMAC - Rp, 20.5.12.1224 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.35 CONCEPTUAL REMEDIATION PLAN:**

A. ~~[When—directed—or]~~ If approved by the department, owners and operators shall submit a conceptual remediation plan to the department if any of the following conditions have been identified at the site:

(1) a thickness of greater than one-eighth inch of NAPL is present on the surface of the water, including in any excavation pit, or in any well;

(2) contaminant saturated soil is present;

(3) concentrations of contaminants of concern exceed site-specific target levels (SSTLs) in soil or WQCC or EIB standards in groundwater or surface water;

(4) total petroleum hydrocarbons in soil meet the criteria outlined 20.5.12.27 NMAC; or

(5) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. All remediation plans

shall include but are not limited to methods to mitigate, remove or otherwise remediate the contaminant source areas.

C. Owners and operators shall submit the conceptual remediation plan in accordance with this section and a timeline ~~[issued-or]~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

(1) The conceptual remediation plan shall provide a written description of all of the methodologies proposed and discuss how the plan will achieve target concentrations and other goals of remedial action in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. Owners and operators shall obtain department approval for the conceptual remediation plan before developing the final remediation plan.

(2) The conceptual remediation plan, at a minimum and as appropriate, shall include:

(a) a concise description of site conditions, including hydrogeology, contaminant characteristics and plume dynamics;

(b) the recommended approach to remediation and justification for the recommendation;

(c) a clear description of the goals of remediation and the target concentrations to be met in each medium;

(d) a narrative description of the proposed methodologies including a preliminary cost comparison and time lines for achieving goals of remediation;

(e) a cost estimate of implementation including installation, operation and maintenance, and monitoring;

(f) a schematic diagram of the proposed remediation system or treatment area and a narrative description of its operation;

(g) a plan view, to scale, of the site showing locations of the proposed equipment or excavation boundaries in relation to the site's physical features and contaminant plumes;

(h) a description of how the approach will achieve target concentrations and other goals of remediation; and

(i) a description of additional data required to support the conceptual remediation plan and design of the final plan and how it will be collected.

[20.5.12.35 NMAC - Rp, 20.5.12.1227 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.12.36 FINAL REMEDIATION PLAN:**

A. Following department approval of the conceptual remediation plan, owners and operators shall develop a final remediation plan in accordance with this section and shall submit three copies of

the final remediation plan to the department in accordance with a timeline [issued or] approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC.

B. The design and engineering of any final remediation plan that includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis shall be the responsibility of a professional engineer as defined in 20.5.1.7 NMAC. A professional engineer shall sign and seal all plans and drawings required pursuant to this section, unless otherwise approved by the department.

C. In order to eliminate the potential to emit regulated substances to the environment, all engineered remediation systems shall be designed, constructed and operated such that malfunction or failure of any integral component results in automatic shut down of the entire system. Integral components include but are not limited to pumps, blowers, oil-water separators, oxidizer systems, air strippers, filtration systems and computers.

D. All final remediation plans shall, at a minimum, include all of the following:

(1) goals of remediation and target concentrations to be achieved in each medium;

(2) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(3) a hydrogeologic cross section showing contaminant mass in relation to the remediation system and a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) an implementation schedule;

(5) engineered plans and specifications in accordance with Subsection E of this section;

(6) a schedule for remediation of the source areas, for protection of receptors identified in Paragraph (1) of this subsection, and for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(7) a design and schedule for a system optimization that meets the requirements of 20.5.12.40 NMAC;

(8) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(9) copies of all permits, permit applications, and property access agreements required to initiate remediation,

including, if necessary, permits required by the state engineer, permits for discharge to groundwater or a waste water treatment plant, permits for air emissions or a surface water national pollution discharge elimination system (NPDES) permit;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission or planned submission of the final remediation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the final remediation plan to the department; the second publication of this notice shall occur no later than seven days after the date the remediation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the final remediation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a remediation plan has been submitted to the department proposing actions to remediate a release of petroleum products;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of the remediation system will be located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the remediation plan and all data and modeling related to the remediation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered, within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a remediation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners; and

(d) owners and operators shall post a notice of the submission of the remediation plan at the release site within seven days of the submission of the remediation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and

prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the remediation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice;

(11) for sites where contaminated media are being removed, a description of the ultimate disposal site of contaminated media, location of excavation and trenching, and method of limiting access by pedestrian and vehicular traffic; and

(12) other requirements as directed by the department.

E. In addition to the requirements of Subsection D of this section, all final remediation plans shall include:

(1) for engineered systems:

(a) unless otherwise approved by the department, a complete and definitive engineering design for a mechanical, electrical, or constructed system, including drawings, plans, diagrams and specifications which are signed and sealed by a professional engineer;

(b) process and instrumentation diagrams;

(c) mechanical arrangement plans and elevations, drawn to scale, showing proposed wells, manifolds, piping details, instrumentation and sampling ports;

(d) details of vapor or fluid extraction or injection wells, as appropriate, including screen length and placement in relation to ground surface, normal and low water table elevations and geologic strata, screen slot size, depths and specifications of the filter pack and seal, and drilling method;

(e) equipment and parts list and specifications including a spare parts list, performance requirements, maintenance requirements and schedule;

(f) electric power requirements including a one-line diagram and schematics;

(g) operation and maintenance commitments and schedules for all facets of the remediation system; and

(h) all other plans, diagrams and specifications that are necessary to properly construct and operate the remediation system in accordance with the remediation plan including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and protection of underground utilities;

(2) for excavation and disposal plans:

(a) plan view of proposed excavation relative to contaminant plume;

(b) cross-sections of proposed

excavation depicting overburden, contaminated material to be removed and backfill;

(c) volume calculations and slope stability analysis;

(d) description of excavation and backfill procedure to be performed in conformance with OSHA and ASTM standards and regulations;

(e) traffic control plan;

(f) description of post-excavation of confirmation sampling;

(g) proposed final grade plan;

(h) post-excavation grade survey; and

(i) all other plans, diagrams and specifications that are necessary including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and protection of underground utilities.

[20.5.12.36 NMAC - Rp, 20.5.12.1227 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

### **20.5.12.38 IMPLEMENTATION OF FINAL REMEDIATION PLAN:**

A. Owners and operators shall implement the ~~approved~~ final remediation plan after department approval in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.12.8 NMAC. Owners and operators shall employ a professional engineer to ensure conformance with the final remediation plan including excavation and installation, commissioning and operation of the system.

B. When the remediation plan includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis:

(1) a professional engineer shall supervise conformance with the final remediation plan including installation, commissioning and operation of the system;

(2) owners and operators shall operate the remediation system continuously until the remediation is terminated pursuant to this part unless otherwise approved by the department; and

(3) owners and operators shall report to the department all interruptions of the operation of the remediation system greater than 72 hours.

C. Owners and operators shall obtain written approval from the department prior to implementing any change to the department-approved engineering design.

D. Following implementation of the final remediation plan, owners and operators shall submit an "as-built" report signed and sealed by the project professional engineer including:

(1) any deviations from the drawings and specifications included in the final remediation plan;

(2) a tabulation of pertinent data including but not limited to flow rates, pressures, temperatures, and contaminant concentrations and groundwater elevations at start-up, and boring logs and well completion diagrams; and

(3) information and documentation of purchased major remediation equipment including, but not limited to serial number, model and manufacturer, description, warranty information, operating manuals, maintenance requirements and purchase price.

[20.5.12.38 NMAC - Rp, 20.5.12.1229 NMAC, 6/15/2009; A, 3/17/2012]

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## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

**This is an amendment to 20.5.13 NMAC, Sections 3, 8, 10, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 27, 28, 30 and 35, effective March 17, 2012.**

**20.5.13.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; the Water Quality Act, Sections 74-6-1 through 74-6-17 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through ~~74-1-16~~ 74-1-17 NMSA 1978.

[20.5.13.3 NMAC - Rp, 20.5.13.3 NMAC, 6/15/2009; A, 3/17/2012]

### **20.5.13.8 GENERAL:**

A. Owners and operators of hazardous substance UST systems shall take corrective action to address all releases, including such action as collection and analysis of relevant site-specific data, soil remediation, groundwater and surface water remediation and any other appropriate actions pursuant to this part, in a manner protective of public health, safety and welfare and the environment.

B. Upon confirmation of a release pursuant to 20.5.7.8 NMAC or identification and reporting of a release in any other manner, owners and operators of hazardous substance UST systems shall comply with the requirements of this part if the release:

(1) is of unknown volume or is greater in volume than ~~25 gallons~~ the reportable quantity under 40 C.F.R. part 302; or

(2) is of any size and the owner or operator is directed by the department to comply with this part.

C. Owners and operators shall mail or deliver all written notices and reports required under this part to be submitted to the department to the owner or operator's assigned project manager from the petroleum storage tank bureau, New Mexico environment department.

D. Owners and operators shall comply with any site-specific timeline or deadline that is ~~issued or~~ approved in writing by the department at the time of workplan approval. If no applicable site-specific timeline has been ~~issued or~~ approved, the following timeline shall apply to all corrective action requirements under this part. The time deadlines set forth in this part are computed from the date of reporting of a release or of reporting of the confirmation of a suspected release pursuant to 20.5.7 NMAC unless another event is specified in

these rules.

#### Default Corrective Action Timeline

Deadline, in days from report:	Action or deliverable due date, as defined above:
0	report discovery or confirmation of a release
3	72-hour report
14	14-day report
60	submit NAPL assessment
60	initiate interim removal of contaminated soil
60	preliminary investigation report
120	secondary investigation report
When monitored natural attenuation is used:	
510	monitored natural attenuation (MNA) plan
570	implementation of MNA
935	first annual MNA monitoring report
935	annual evaluation of MNA report
When other remediation is used:	
510	conceptual remediation plan
540	final remediation plan
600	implementation of remediation
690	first quarterly monitoring report
965	annual evaluation of remediation system report

E. All owners and operators are responsible for compliance with all provisions of this part. An owner or operator may designate a representative to facilitate compliance with this part. The designation of such a representative shall not affect the department's right to seek compliance at any time from the owner or the operator or both. The designation of a representative is intended to facilitate compliance with this part and shall not relieve the owner and operator of their legal liabilities or responsibilities under this part.

F. Except for 20.5.13.9, 20.5.13.10 and 20.5.13.11 NMAC, owners and operators shall submit to the department written workplans for all [required] corrective action under this part. Owners and operators may submit workplans in stages to reflect the sequence or types of corrective action [required by] described in 20.5.13 NMAC at the site, but the owners and operators shall submit all [required] workplans to and obtain approval by the department in writing for technical adequacy before the corrective action is commenced.

G. Unless otherwise approved, a qualified firm as specified in 20.5.16 NMAC shall perform all corrective action and, when required by the rules in Title 20, Chapter 5, a professional engineer as defined in 20.5.1.7 NMAC.

(1) All contractors and their subcontractors shall have appropriate licenses and certifications and be in compliance with applicable local, state and federal laws and regulations, including but not limited to the rules in Title 16, Chapter 39 governing engineers, 14.6.3 NMAC governing contractors and, 29 CFR part 1910 governing worker health and safety.

(2) Owners and operators shall identify all prime contractors and all subcontractors in all workplans submitted to the department.

H. Where site conditions are amenable, owners and operators may use accelerated site characterization techniques if pre-approved by the department.

I. All monitoring wells shall be permitted in conformance with all applicable federal, state and local laws, regulations and ordinances in effect at the time of installation.

J. Owners and operators shall clearly mark and secure monitoring wells and major remediation equipment to prevent unauthorized access, tampering. Owners and operators shall close or abandon all wells in accordance with the requirements of applicable federal, state and local laws and regulations in effect at the time the workplan was approved.

K. If a release constitutes a hazardous substance incident under the provisions of the Hazardous Waste Act relating to hazardous substance incidents, those provisions may apply in addition to this part.

L. The department shall notify [all] owners and operators [~~of responsible party-lead sites~~] taking corrective action and contractors of state-lead sites in writing when it has determined that a deliverable completed under an approved workplan is satisfactory. The written notice shall also inform the owner, operator or contractor that any application for payment from the fund of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received written notice of approval and that [no extensions of this deadline shall be granted] the department shall not grant extensions of the deadline except for good cause as shown pursuant to 20.5.17.26 NMAC.

[20.5.13.8 NMAC - Rp, 20.5.13.1300 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### 20.5.13.10 MINIMUM SITE ASSESSMENT, INITIAL ABATEMENT:

A. Owners and operators shall undertake the initial abatement and site investigation actions specified in this section within 72 hours of discovery or confirmation of a release pursuant to 20.5.7 NMAC, using the default timeline as set forth in Subsection D of 20.5.12.8 NMAC or as otherwise [~~directed or~~] approved by the department.

B. Owners and operators shall identify the location and details of construction of all private water supply wells, using readily accessible public records, within a 1,000 foot radius, and all public water supply wells within a one mile radius of the UST system,



and shall determine if the identified wells lie within a designated wellhead protection area. Owners and operators shall take appropriate measures to protect these water supplies from contamination.

C. Owners and operators shall contain or remediate releases which present an imminent threat of contamination to or are within 500 feet of a surface water course as soon as practicable to prevent contamination of surface water. If the surface water course is a drinking water supply, within 24 hours owners and operators shall notify the owners or operators of all drinking water supplies likely to be affected by the release.

D. If the release has contaminated a water supply, owners and operators shall immediately provide a temporary replacement drinking water supply, as well as adequate warnings or other mechanisms to prevent persons from drinking or otherwise contacting water contaminated by the release. Within seven days of discovery or confirmation of a release pursuant to 20.5.7 NMAC that has contaminated a water supply, owners and operators shall provide a replacement water supply which is of adequate quality and quantity for drinking, bathing, cooking and washing. Owners and operators shall maintain the replacement water supply until an alternate water supply sufficient for all domestic purposes is available.

E. Owners and operators shall identify the depth, location, composition and construction of all underground utilities including water lines, sewer lines, communication cables, electric lines, and natural gas lines within the area of the release to assess the susceptibility of these utilities to permeation by contaminants or deterioration caused by contaminants. Owners and operators shall notify the utility owner that the release has occurred and obtain permission to perform a site check of the utilities or other subsurface structures most likely to be contaminated by the release to determine whether NAPL or vapors are present.

F. Owners and operators shall complete an investigation to determine whether potentially explosive or harmful vapors are present in any building, utility corridor, basement, or other surface or subsurface structure on or adjacent to the release site.

(1) The investigation shall include testing for vapors using the following:

(a) a combustible gas indicator or equivalent instrument calibrated according to the manufacturer's instructions to test for potentially explosive levels of vapors; and

(b) a photoionization detector, flame ionization detector or another method approved by the department calibrated according to the manufacturer's instructions

to test for potentially harmful vapors.

(2) In the event owners and operators discover [~~actual~~ ~~or~~] potentially explosive levels of vapors greater than 10 percent of the lower explosive limit (LEL) or potentially harmful vapors [~~greater than 20 percent of the lower explosive limit (LEL)~~] reading greater than five whole units above ambient concentrations in any structure in the vicinity of the release site, owners and operators shall [~~confirm and, if necessary,~~] take immediate action to mitigate the vapor hazard. Within seven days of the discovery of the vapors, owners and operators shall install and place into operation a vapor mitigation system capable of reducing vapors to safe levels within the shortest reasonable time. The vapor mitigation system shall be designed by and constructed under the direct, responsible, supervisory control of a professional engineer, when required by the department.

(a) Once a vapor mitigation system has been installed, owners and operators shall monitor and report in writing to the department the levels of [~~potentially explosive or harmful~~] vapors in the affected structures weekly for the first month and monthly thereafter unless a different monitoring schedule is approved in writing by the department. This monitoring shall be performed in accordance with Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(b) After the vapor mitigation system has been in operation for three months, owners and operators shall have 30 days to submit to the department a written summary report containing the monitoring results. The department may direct owners and operators to modify the vapor mitigation system as necessary to reduce vapors to safe levels. Owners and operators shall submit monitoring results to the department at three-month intervals until operation of the vapor mitigation system is discontinued in accordance with this section.

(3) Owners and operators shall continue to operate the vapor mitigation system until the results of three consecutive monthly monitoring events indicate the following:

(a) levels of [~~potentially explosive~~] vapors are less than [~~20~~] 10 percent-LEL; and

(b) levels of [~~potentially harmful~~] vapors are less than or equal to five whole instrument units above ambient levels in any structure in the vicinity of the release site when measured as required in Subparagraphs (a) and (b) of Paragraph (1) of this subsection.

(4) When operation of a vapor mitigation system is discontinued, owners and operators shall monitor the vapor levels in the structure weekly for the first month and monthly thereafter until one calendar

year has passed, or as otherwise [~~directed or~~] approved by the department. If during this period the levels exceed those set forth in Subparagraphs (a) and (b) of Paragraph (3) of this subsection, owners and operators shall notify the department and take the necessary corrective action, as directed by the department.

G. Owners and operators shall remove any exposed hazardous substances related to the release and mitigate any related immediate fire and safety hazards as soon as possible, but in no case no later than 72 hours after the confirmation or other identification of the release.

[20.5.13.10 NMAC - Rp, 20.5.13.1303 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.13 INTERIM REMOVAL OF NON-AQUEOUS PHASE LIQUID:**

A. Owners and operators shall assess the potential for remediation of non-aqueous phase liquid (NAPL) where there is a thickness of greater than one-eighth inch of NAPL in surface water, in any excavation pit, or in any well. Owners and operators shall submit the assessment to the department in accordance with a timeline approved [~~or issued~~] by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. The department may [~~direct~~ ~~or~~] approve interim removal of NAPL when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment. In this event, owners and operators shall remove NAPL in accordance with a timeline approved [~~or issued~~] by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

C. Owners and operators shall remove NAPL in a manner that minimizes the spread of contamination into uncontaminated media.

D. Owners and operators shall store and dispose of NAPL in accordance with all flammable and combustible liquids codes approved by the state fire marshal or other local authority, state hazardous waste regulations 20.4.1 NMAC, and any other applicable laws or regulations.

E. Owners and operators shall report recovery and disposal of NAPL to the department.

[20.5.13.13 NMAC - Rp, 20.5.13.1306 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.14 INTERIM REMOVAL OF CONTAMINATED SOIL:**

A. Owners and operators shall remediate contaminated soil in accordance with 20.5.13.26 and 20.5.13.34 NMAC, unless [~~directed or~~] approved by the department to remove and treat contaminated soil in accordance with this section.

(1) The department may [~~direct or~~]

approve interim removal of contaminated soil when such action is determined to be practical and necessary to protect public health, safety and welfare or the environment.

(2) Under this section, owners and operators shall excavate, treat and dispose of contaminated soil using methods approved by the department, in compliance with local laws and regulations, and under a timeline ~~issued or~~ approved by the department or the timeline in Subsection D of 20.5.13.8 NMAC.

(3) The department shall approve the vertical and horizontal extent of soil to be excavated.

B. When treating or temporarily storing soil on site, owners and operators shall:

(1) for treatment on site, spread soil in a six-inch layer over an impervious liner or other surface approved by the department to prevent infiltration to groundwater and place the layer of soil on level ground and berm to prevent runoff from contaminating other soil or surface water;

(2) for temporary storage, place the soil in a secure, bermed area on an impervious liner or surface or in a secured and properly labeled container, as approved by the department; and

(3) handle soil in a manner that does not contaminate groundwater, surface water or other uncontaminated soil or does not create or cause a public nuisance or threat to human health, safety and welfare or the environment.

C. When contaminated soil is taken off site, owners and operators shall provide the department with the following information within 14 days of removal of the soil from the site:

(1) written documentation of the type and concentration of contaminants, volume and weight of soil, method of treatment, date transported, and location of the site of disposal or treatment;

(2) a signed, written statement by the owner of the treatment or disposal site describing the location of the site and expressly accepting the contaminated soil; and

(3) if contaminated soil is taken to a permitted solid or hazardous waste facility, a manifest signed by the generator, transporter and the owner or operator of the solid waste facility.

D. Remediation shall be considered complete when the requirements in 20.5.13.34 NMAC are met.

E. In accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC, owners and operators shall submit to the department a report describing the removal and treatment of contaminated soil.

(1) The report shall describe the

soil removal action and its effectiveness, including volumes and weight removed.

(2) Owners and operators shall submit the report within 30 days of the soil removal action.

[20.5.13.14 NMAC - Rp, 20.5.13.1307 NMAC, 6/15/2009; A, 3/17/2012]

**20.5.13.15 MINIMUM SITE ASSESSMENT, PRELIMINARY AND OTHER REQUIRED INVESTIGATIONS:**

A. A preliminary investigation is not required when owners and operators can demonstrate that the contamination has not reached groundwater ~~[has not been contaminated]~~ and one of the following two conditions apply:

(1) the release is remediated in accordance with this part within 72 hours of discovery or confirmation; or

(2) the release is permanently contained within the excavation area.

B. If the contamination extends beyond the boundaries of the property where the release originated, owners and operators shall conduct a secondary investigation in accordance with 20.5.13.18 NMAC.

[20.5.13.15 NMAC - Rp, 20.5.13.1308 NMAC, 6/15/2009; A, 3/17/2012]

**20.5.13.16 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION - REQUIREMENTS:**

Owners and operators shall conduct a preliminary investigation in accordance with this subsection and under a timeline approved ~~or issued~~ by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. The preliminary investigation shall determine the following, unless otherwise ~~directed or~~ approved by the department.

A. If not previously identified and reported under 20.5.13.11 NMAC, the preliminary investigation shall determine the regulated substance released or suspected of being released at the site, the media of concern, current and potential receptors, current and anticipated use of property, complete and incomplete exposure pathways, and routes of exposure.

B. The preliminary investigation shall also determine the horizontal and vertical extent and magnitude of soil contamination.

(1) Owners and operators shall conduct a soil boring survey by advancing a continuously cored soil boring at each area of release where soil contamination is most likely to be encountered unless otherwise directed by the department. The initial incident report and a soil vapor survey may be used in locating these areas. Owners and operators shall advance at least one of the borings into the groundwater saturated zone

or, with approval from the department, to a depth ~~[of 50 feet below the depth]~~ at which measured levels of contaminants in soil are no longer detectable by laboratory analysis, and [hydrocarbon] vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units.

(2) Owners and operators shall advance at least four additional soil borings to characterize the release within property boundaries. Borings shall be completed to the depth at which contaminants in soil are no longer detectable by laboratory analysis, and [hydrocarbon] vapor concentrations, as determined with a field instrument, are less than 100 whole instrument units. If the soil borings indicate that contaminated soil extends beyond the boundary of the property on which the storage tank system is located, owners and operators shall advance soil borings sufficient to characterize the extent and magnitude of contamination within site boundaries.

(3) The preliminary investigation shall assess, at five-foot intervals, field estimates of concentrations of [petroleum hydrocarbons] contaminants of concern in the soil borings and select and prepare samples for laboratory analysis.

(4) Owners and operators shall gather field data for soil classification, determining and recording color, grain size, texture, description of lithification, plasticity and clay content.

(5) The preliminary investigation shall include derived values for soil bulk density (g/cc), soil moisture content (percent by volume), and effective porosity, and fraction organic carbon content (percent by volume) using samples taken from an uncontaminated area of the vadose zone.

(6) The preliminary investigation shall delimit the horizontal and vertical extent of contaminant saturated soil as defined in 20.5.1.7 NMAC.

C. The preliminary investigation shall determine whether groundwater or surface water has been contaminated above applicable standards or whether a potential for groundwater or surface water contamination is present by performing the following:

(1) install at least three groundwater monitoring wells at locations where the results of the soil boring survey conducted pursuant to this section indicate that groundwater may be contaminated; owners and operators shall:

(a) locate monitoring wells so that groundwater gradient can be determined;

(b) install at least one monitoring well on site in the area of highest contamination as determined by the soil borings installed in [accordance] conformance with the initial incident report and other relevant information;

(c) install one of the monitoring

wells in the estimated down-gradient direction from the area of highest contamination;

(d) construct wells in accordance with all applicable federal, state and local laws and regulations; and

(e) survey the wells using a New Mexico licensed professional surveyor, in decimal degrees of latitude and longitude in accordance with NAD 83;

(2) calculate the direction and gradient of groundwater flow;

(3) inspect all monitoring wells for the presence of NAPL using a method approved by the department; if NAPL is present in any well, measure the apparent thickness, delimit its horizontal extent, and initiate recovery procedures in accordance with NMAC; and

(4) sample each monitoring well that does not contain NAPL and analyze the sample for contaminants of concern to determine whether:

(a) immediate mitigation procedures are warranted; and

(b) other hazardous conditions exist as a result of the release if not previously identified in accordance with 20.5.13.10 NMAC by:

(i) identifying the location and depth of underground utilities and other subsurface structures on or adjacent to the site not identified earlier in accordance with Subsection E of 20.5.12.11 NMAC;

(ii) checking for the presence of vapors in accordance with 20.5.12.11 and 20.5.12.16 NMAC; and

(iii) identifying all other hazards and potential threats to public health, safety and welfare and the environment which may exist as a result of the release.

[20.5.13.16 NMAC - Rp, 20.5.13.1308 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.17 MINIMUM SITE ASSESSMENT, PRELIMINARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the preliminary investigation and other requirements of the minimum site assessment as defined in 20.5.1.7 NMAC in accordance with a timeline [~~issued~~ ~~or~~] approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. The report shall include the information gathered under 20.5.13.9, 20.5.13.10, 20.5.13.11 and 20.5.13.15 NMAC and shall conform to the requirements of this section and 20.5.13.16 NMAC.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and

attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline [~~issued~~ ~~or~~] approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not conform to the minimum site assessment, preliminary investigation requirements in this section and 20.5.13.16 NMAC, the department shall reject the report and owners and operators shall be determined not to have conducted a minimum site assessment for the purposes of section 74-6B-8B(1)(c) NMSA 1978. The department's failure to review or to comment on this report shall not relieve owners and operators of their responsibilities under this part or otherwise under the law.

D. Owners and operators shall comply with the requirements of any local government which has designated a wellhead/source water protection area that includes the area of the release.

E. Owners and operators shall provide notice that includes the contaminants identified, as well as the horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination.

[20.5.13.17 NMAC - Rp, 20.5.13.1309 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.18 SECONDARY INVESTIGATION:**

A. Owners and operators shall perform a secondary investigation in accordance with a timeline [~~issued~~ ~~or~~] approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC when the department makes at least one of the following determinations about the site:

(1) the extent and magnitude of contamination in all media has not been delimited by the preliminary investigation; or

(2) the release threatens public health, safety and welfare or the environment.

B. The secondary investigation shall determine the following:

(1) the horizontal and vertical extent and magnitude of soil contamination both on and off site;

(2) the horizontal extent and magnitude of dissolved phase groundwater contamination both on and off site;

(3) the vertical extent and magnitude of dissolved phase groundwater contamination, when site conditions warrant;

(4) characteristics, aerial extent, estimated volume and apparent thickness of NAPL in wells;

(5) the elevation of groundwater and surface water and the gradient, rate and

direction of groundwater and surface water flow;

(6) the rate and direction of contaminant migration;

(7) the hydrologic properties of the contaminated portion of the aquifer including hydraulic conductivity, transmissivity and storativity; the department may require field verification of estimates made from literature;

(8) whether the aquifer is perched;

(9) whether the aquifer is confined or unconfined; and

(10) any other technical information requested by the department which is reasonably necessary to meet the requirements of this part.

[20.5.13.18 NMAC - Rp, 20.5.13.1310 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.19 SECONDARY INVESTIGATION REPORT:**

A. Owners and operators shall submit a written report of the secondary investigation to the department in accordance with a timeline [~~issued~~ ~~or~~] approved by the department or the timeline in Subsection D of 20.5.13.8 NMAC. The report shall include all information gathered under 20.5.13.18 NMAC and shall conform to the requirements of this part.

B. Owners and operators shall attach a statement signed by an authorized representative of the qualified firm preparing the report for the owner or operator attesting to the veracity of the information submitted in the report and attached documents.

C. The department shall review the report and notify owners and operators of any inadequacies in the report within 30 days of receipt. Owners and operators shall, in accordance with a timeline [~~issued~~ ~~or~~] approved by the department, correct the report and resubmit it to the department for review and written approval. If the revised report does not meet the requirements of 20.5.13.18 NMAC, the owner and operator will be in violation of this part until the inadequacies are corrected. The department's failure to review or to comment on the secondary investigation report shall not relieve owners and operators of their responsibilities under this part or otherwise under the law.

D. Owners and operators shall provide notice that includes the contaminants identified, as well as horizontal and vertical extent of those contaminants, to all owners of property located within the extent of contamination who were not previously notified in accordance with 20.5.13.17 NMAC.

[20.5.13.19 NMAC - Rp, 20.5.13.1311 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.20 MONITORED**

**NATURAL ATTENUATION:**

A. ~~[When directed or]~~ If approved by the department, owners and operators shall submit a plan for remediation by monitored natural attenuation to the department if any of the following conditions have been identified at the site:

(1) concentrations of contaminants of concern exceed target concentrations in soil or WQCC or EIB standards in groundwater or surface water; and

(2) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. Owners and operators shall submit the monitored natural attenuation plan in accordance with this section and 20.5.13.21 NMAC and in accordance with a timeline ~~[issued or]~~ approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

C. The intent of the monitored natural attenuation plan is to provide a written description of the methodology proposed and demonstrate how the plan will achieve target concentrations in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. The content of the monitored natural attenuation plan, at a minimum and as appropriate, shall include:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) cross sections showing the source contaminant mass in relation to the groundwater contamination;

(3) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) concentration contour maps depicting the extent and magnitude of the contaminants of concern and the designated monitoring wells in relation to the site;

(5) a schematic drawing depicting the construction details including lithology and screen intervals for the designated monitoring wells;

(6) justification for selecting the designated monitoring wells;

(7) recommended approach to monitoring including an implementation and monitoring schedule, the analytical methods, and the justification for the recommendation;

(8) an estimation of the time necessary for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(9) a contingency plan in case of a change in site conditions that threatens public health, safety and welfare or the environment;

(10) public notice in conformance with the following requirements:

(a) owners and operators shall publish a legal notice of the submission or planned submission of the monitored natural attenuation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the monitored natural attenuation plan to the department; the second publication of this notice shall occur no later than seven days after the date the monitored natural attenuation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the monitored natural attenuation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a monitored natural attenuation plan has been submitted to the department proposing actions to monitor natural attenuation of a release of hazardous substances;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of contaminant plume is located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the monitored natural attenuation plan and all data and modeling related to the monitored natural attenuation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a monitored natural attenuation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners;

(d) owners and operators shall post a notice of the submission of the monitored natural attenuation plan at the release site within seven days of the submission of the monitored natural attenuation plan;

the notice shall contain the information specified in this subsection ~~[and the bureau's guidelines for corrective action]~~ and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the monitored natural attenuation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice; and

(11) other requirements as directed by the department.

[20.5.13.20 NMAC - Rp, 20.5.13.1312 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

**20.5.13.22 MONITORED NATURAL ATTENUATION PLAN IMPLEMENTATION:**

A. Owners and operators shall implement the ~~[approved]~~ monitored natural attenuation plan after department approval in accordance with a timeline ~~[issued or]~~ approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. Owners and operators shall monitor the contamination until the department determines that the natural attenuation is complete pursuant to this part, or unless otherwise approved by the department.

[20.5.13.22 NMAC - Rp, 20.5.13.1314 NMAC, 6/15/2009; A, 3/17/2012]

**20.5.13.23 REPORTS ON THE MONITORED NATURAL ATTENUATION:**

A. Owners and operators shall submit written reports to the department on the progress of the monitored natural attenuation. Owners and operators shall submit the reports annually unless a different reporting period is ~~[directed or]~~ approved by the department and shall document all work performed during the preceding interval and shall include at a minimum the following information, as appropriate:

(1) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing storage tanks and ancillary equipment, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(2) a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(3) concentration contour maps depicting the extent and magnitude of the

contaminants of concern and the designated monitoring wells in relation to the site;

(4) tabulation of the current and historical results of all water quality analyses and water elevation data;

(5) graphs of appropriate scale of the current and historical water quality analyses and water elevation data versus time;

(6) data evaluation and interpretation, and recommendations; and

(7) other information required by the department.

B. Owners and operators shall submit the report within 30 days of the end of the reporting period or as otherwise approved by the department.

[20.5.13.23 NMAC - Rp, 20.5.13.1315 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.24 EVALUATION OF MONITORED NATURAL ATTENUATION PLAN:**

A. Owners and operators shall evaluate the effectiveness of the monitored natural attenuation plan at the end of each year of monitoring and submit the evaluation to the department for review unless otherwise approved [~~or directed~~] by the department.

B. When the department determines that the plan is not effectively mitigating contamination according to the identified risks to public health, safety and welfare or the environment, the owner or operator shall propose a change in the existing monitored natural attenuation plan within 30 days of the department's determination of ineffectiveness, or propose an alternative approach to remediation under 20.5.13.27 NMAC. Within 30 days of the department's approval, the owner or operator shall implement the approved changes.

C. After implementation of any modification, owners and operators shall repeat annually the evaluation process described in this section.

[20.5.13.24 NMAC - Rp, 20.5.13.1316 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.27 CONCEPTUAL REMEDIATION PLAN:**

A. [~~When directed or~~] If approved by the department, owners and operators shall submit a conceptual remediation plan to the department if any of the following conditions have been identified at the site:

(1) a thickness of greater than one-eighth inch of NAPL is present in the water, including in any excavation pit, or in any well;

(2) contaminant saturated soil is present;

(3) concentrations of contaminants of concern exceed target concentrations in soil or WQCC or EIB standards in

groundwater or surface water; or

(4) other conditions exist as a result of the release which threaten public health, safety and welfare or the environment, as determined by the department.

B. All remediation plans shall include but are not limited to methods to mitigate, remove or otherwise remediate the contaminant source areas.

C. Owners and operators shall submit the conceptual remediation plan in accordance with this section and with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

(1) The conceptual remediation plan shall provide a written description of all of the methodologies proposed and discuss how the plan will achieve target concentrations and other goals of remedial action in a manner that is practicable, cost effective, and protective of public health, safety and welfare and the environment. Owners and operators shall obtain department approval for the conceptual remediation plan before developing the final remediation plan.

(2) The conceptual remediation plan, at a minimum and as appropriate, shall include:

(a) a concise description of site conditions, including hydrogeology, contaminant characteristics and plume dynamics;

(b) the recommended approach to remediation and justification for the recommendation;

(c) a clear description of the goals of remediation and the target concentrations to be met in each medium;

(d) a narrative description of the proposed methodologies including a preliminary cost comparison and time lines for achieving goals of remediation;

(e) a cost estimate of implementation including installation, operation and maintenance, and monitoring;

(f) a schematic diagram of the proposed remediation system or treatment area and a narrative description of its operation;

(g) a plan view, to scale, of the site showing locations of the proposed equipment or excavation boundaries in relation to the site's physical features and contaminant plumes;

(h) a description of how the approach will achieve target concentrations and other goals of remediation; and

(i) a description of additional data required to support the conceptual remediation plan and design of the final plan and how it will be collected.

[20.5.13.27 NMAC - Rp, 20.5.13.1319 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.28 FINAL REMEDIATION**

#### **PLAN:**

A. Following department approval of the conceptual remediation plan, owners and operators shall develop a final remediation plan in accordance with this section and shall submit three copies of the final remediation plan to the department in accordance with a timeline [~~issued or~~] approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC.

B. The design and engineering of any final remediation plan that includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis shall be the responsibility of a professional engineer as defined in 20.5.1.7 NMAC. A professional engineer shall sign and seal all plans and drawings required pursuant to this section, unless otherwise approved by the department.

C. In order to eliminate the potential to emit regulated substances to the environment, all engineered remediation systems shall be designed, constructed and operated such that malfunction or failure of any integral component results in automatic shut down of the entire system. Integral components include but are not limited to pumps, blowers, oil-water separators, oxidizer systems, air strippers, filtration systems and computers.

D. All final remediation plans shall, at a minimum, include all of the following:

(1) goals of remediation and target concentrations to be achieved in each medium;

(2) a site plan drawn to scale of no less than one inch equals 40 feet, showing all existing buildings, structures, paved areas, utilities, buried utility trenches, former and existing USTs, other sources of contamination, extent and magnitude of contamination, and existing and proposed monitoring wells;

(3) a hydrogeologic cross section showing contaminant mass in relation to the remediation system and a topographic map of appropriate scale showing the site in relation to existing and reasonably foreseeable future receptors;

(4) an implementation schedule;

(5) engineered plans and specifications in accordance with Subsection E of this section;

(6) a schedule for remediation of the source areas, for protection of receptors identified in Paragraph (1) of this subsection, and for achieving target concentrations, and a demonstration through calculations or other appropriate means which supports this schedule;

(7) a design and schedule for system optimization that meets the requirements of 20.5.13.32 NMAC;

(8) a contingency plan in case of

a change in site conditions that threatens public health, safety and welfare or the environment;

(9) copies of all permits, permit applications, and property access agreements required to initiate remediation, including, if necessary, permits required by the state engineer, permits for discharge to groundwater or a waste water treatment plant, permits for air emissions or a surface water national pollution discharge elimination system (NPDES) permit;

(10) public notice in conformance with the following requirements:

(a) the owner or operator shall publish a legal notice of the submission or planned submission of the final remediation plan at least twice in a paper of general circulation in the county in which soil or water has been contaminated by the release; the first notice shall appear within one week of, but not later than, the day of submission of the final remediation plan to the department; the second publication of this notice shall occur no later than seven days after the date the remediation plan is submitted to the department, and owners and operators shall submit two certified affidavits of publication from the newspaper to the department within 21 days after the date the final remediation plan is submitted;

(b) the notice shall contain the information specified in this section including the following:

(i) a statement that a remediation plan has been submitted to the department proposing actions to remediate a release of hazardous substances;

(ii) the name and physical address of the site at which the release occurred and the names and physical addresses of properties where any part of the remediation system will be located, using adequate identification of the properties, including street addresses if applicable;

(iii) a statement that a copy of the remediation plan and all data and modeling related to the remediation plan, if applicable, can be viewed at the department's main office and at the department's field office for the area in which the release occurred; and

(iv) a statement that public comments on the plan must be delivered, within 21 days of the publication of the second notice, to the owner or operator's assigned project manager at the petroleum storage tank bureau, New Mexico environment department, or a district office if approved by the department, and to the secretary of the environment department;

(c) within seven days of the date a remediation plan is submitted to the department, owners and operators shall also mail by certified mail a copy of the legal notice to adjacent property owners;

(d) owners and operators shall post

a notice of the submission of the remediation plan at the release site within seven days of the submission of the remediation plan; the notice shall contain the information specified in this subsection and shall be at least 8.5 inches by 11 inches in size and prominently displayed in a location where it is likely to be seen by members of the public for a continuous period until the remediation plan is approved and implemented; public comments must be received by the department within 21 days of the date of the second publication of the public notice;

(11) for sites where contaminated media are being removed, a description of the ultimate disposal site of contaminated media, location of excavation and trenching, and method of limiting access by pedestrian and vehicular traffic; and

(12) other requirements as directed by the department.

E. In addition to the requirements of Subsection D of this section, all final remediation plans shall include:

(1) for engineered systems:

(a) unless otherwise approved by the department, a complete and definitive engineering design for a mechanical, electrical, or constructed system, including drawings, plans, diagrams and specifications which are signed and sealed by a professional engineer;

(b) process and instrumentation diagrams;

(c) mechanical arrangement plans and elevations, drawn to scale, showing proposed wells, manifolds, piping details, instrumentation and sampling ports;

(d) details of vapor or fluid extraction or injection wells, as appropriate, including screen length and placement in relation to ground surface, normal and low water table elevations and geologic strata, screen slot size, depths and specifications of the filter pack and seal, and drilling method;

(e) equipment and parts list and specifications including a spare parts list, performance requirements, maintenance requirements and schedule;

(f) electric power requirements including a one-line diagram and schematics;

(g) operation and maintenance commitments and schedules for all facets of the remediation system; and

(h) all other plans, diagrams and specifications that are necessary to properly construct and operate the remediation system in accordance with the remediation plan including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and

protection of underground utilities;

(2) for excavation and disposal plans:

(a) plan view of proposed excavation relative to contaminant plume;

(b) cross-sections of proposed excavation depicting overburden, contaminated material to be removed and backfill;

(c) volume calculations and slope stability analysis;

(d) description of excavation and backfill procedure to be performed in conformance with OSHA and ASTM standards and regulations;

(e) traffic control plan;

(f) description of post-excavation of confirmation sampling;

(g) proposed final grade plan;

(h) post-excavation grade survey;

and

(i) all other plans, diagrams and specifications that are necessary including but not limited to requirements for:

(i) trenching and protection from traffic;

(ii) concrete repair and replacement;

(iii) restoration of property; and

(iv) location and protection of underground utilities.

[20.5.13.28 NMAC - Rp, 20.5.13.1319 NMAC, 6/15/2009; A, 3/17/2012]

[The address of the department's petroleum storage tank bureau, remediation section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

### 20.5.13.30 IMPLEMENTATION OF FINAL REMEDIATION PLAN:

A. Owners and operators shall implement the ~~approved~~ final remediation plan after department approval in accordance with a timeline ~~issued or~~ approved by the department or the timeline set forth in Subsection D of 20.5.13.8 NMAC. Owners and operators shall employ a professional engineer to ensure conformance with the final remediation plan, including excavation, installation, commissioning and operation of the system.

B. When the remediation plan includes mechanical or electrical equipment, engineered fill, pinning, shoring or slope stability analysis:

(1) a professional engineer shall supervise conformance with the final remediation plan including installation, commissioning and operation of the system;

(2) owners and operators shall operate the remediation system continuously until the remediation is terminated pursuant to this part, unless otherwise approved by the department; and

(3) owners and operators shall report to the department all interruptions

of the operation of the remediation system greater than 72 hours.

C. Owners and operators shall obtain written approval from the department prior to implementing any change to the department-approved engineering design.

D. Following implementation of the final remediation plan, the owner or operator shall submit an "as-built" report signed and sealed by the project professional engineer including:

(1) any deviations from the drawings and specifications included in the final remediation plan;

(2) a tabulation of pertinent data including but not limited to flow rates, pressures, temperatures, contaminant concentrations and groundwater elevations at start-up, and boring logs and well completion diagrams; and

(3) information and documentation purchased major remediation equipment including, but not limited to, serial number, model and manufacturer, description, warranty information, operating manuals, maintenance requirements and purchase price.

[20.5.13.30 NMAC - Rp, 20.5.13.1321 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.13.35 PROPERTY REUSE DETERMINATION:**

A. A property reuse determination is a technical determination issued by the department for sites contaminated by releases from storage tank systems to promote their redevelopment and productive use. The property reuse determination shall only apply to sites that have iron and manganese in groundwater above WQCC standards. A property reuse determination is not a clean-closure certification or grounds for a no further action determination, nor does it provide indemnification of an owner or operator from current or future environmental liabilities or obligations. Further action at a property reuse site may be required under the Water Quality Act and WQCC rules.

B. Any owner or operator may request that the department evaluate a site, multiple sites, or a portion of a site for a property reuse determination by submitting a written request to the department. The request shall include the following:

(1) description of the current and proposed future land use(s) of the site;

(2) description of the site including a historical overview and generalized description of businesses, structures, vegetation, other prominent features, and location of the site;

(3) surveyed plat of the site, site map with legal description, or both;

(4) completed current environmental conditions table listing all

areas of environmental concern on the site subject to remediation; the table shall include the following information about each area of environmental concern:

(a) remedial action taken, date, regulatory agency;

(b) residual concentrations of contaminants of concern, including WQCC standards that have not been achieved; and

(c) clean-up standards for contaminants of concern;

(5) chronology of events for each area investigated or remediated;

(6) monitoring plan to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained, if appropriate;

(7) affirmation from the property owner, if different from the requestor, that current or proposed future land uses will be maintained; and

(8) other relevant documents, as requested by the department.

C. Owners and operators shall receive approval of a request for a property reuse determination for the release when the owner or operator has completed remediation pursuant to 20.5.13.34 NMAC, with the exception of iron and manganese in excess of WQCC groundwater standards. A property reuse determination letter shall include a statement that the department shall have the right to conduct audits to ensure that the current and proposed future use(s) upon which the determination is dependent are maintained.

D. A property reuse determination shall not have any effect on any permit, compliance plan, order, or other formal or informal enforcement mechanism applicable to the site, and shall not relieve an owner or operator from the obligations to comply with other applicable federal, state and local laws.

E. Upon completion of an assessment by the department that a site, multiple sites or portion of a site qualifies for a property reuse determination, the department shall issue the following deliverables:

(1) property reuse determination letter; and

(2) property reuse certificate.

F. The department shall have the right to conduct audits to ensure that the risk to human health, safety and welfare and the environment has not significantly changed and that current and proposed future use(s) upon which the determination is dependent are maintained.

G. If new information becomes available or circumstances arise indicating that the environmental or land use conditions upon which the determination [were] was based have changed, the department may reverse the property reuse determination.

[20.5.13.35 NMAC - N, 6/15/2009; A, 3/17/2012]

## **NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD**

**This is an amendment to 20.5.14 NMAC, Sections 3, 8, 9, 10, 11, 13, 15, 17, 19 and 20, effective March 17, 2012.**

**20.5.14.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-16] 74-1-17.

[20.5.14.3 NMAC - Rp, 20.5.14.3 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.8 GENERAL REQUIREMENTS FOR UST SYSTEMS:**

A. Beginning September 16, 1989, no person may install, replace, repair or modify UST systems in this state unless the person is, or employs, an individual who has been certified by the department to perform that work on UST systems. This provision requires certification of the individual who exercises supervisory control over the installation, replacement, repair or modification work, whether as an officer or employee of the UST system owner or operator performing its own installation, replacement, repair or modification, or as an officer or employee of the [contracting company] person agreeing to perform the installation, replacement, repair or modification for the owner or operator. Exceptions to this requirement for a certified installer include:

(1) internal lining of a tank through the application of such materials as epoxy resins;

(2) installation, replacement, repair or modification of cathodic protection systems;

(3) any other installation, replacement, repair or modification specifically approved in writing by the department as an exception to the requirement for a certified [tank] installer;

(4) an applicant for UST installer certification pursuant to Subsection C of 20.5.14.13 NMAC;

(5) normal maintenance; and

(6) work on line or tank leak detection systems performed by technicians trained to work on line or tank leak detection systems by the manufacturer of the systems, or other equivalent training approved by the department; and

(7) persons closing storage tank

systems pursuant to 20.5.8 NMAC.

B. Beginning September 16, 1989, no ~~[contracting company] person~~ may install, replace, repair or modify an UST system in this state unless ~~[it has in its employ]~~ the person is or employs a certified installer who shall control and supervise a given installation, replacement, repair or modification and who shall be physically present on-site at the critical junctures in the installation, replacement, repair or modification.

C. The requirements of this part are not intended to prohibit the employment of apprentices or helpers so long as a certified installer exercises responsible supervisory control and is physically present on-site at the critical junctures in the installation, replacement, repair or modification.

D. The requirements of this part are in addition to and not in lieu of any other licensing and registration requirements imposed by law, including any applicable requirements of the Construction Industries Act, NMSA 1978, Sections 60-13-1 through 60-13-59.

E. The provisions of this part are not intended to relieve owners and operators of UST systems of their obligations and liabilities under applicable state and federal laws and regulations.

F. The department may deny an application or renewal and may suspend or revoke certification pursuant to the Parental Responsibility Act, NMSA 1978, Sections 40-5A-1 through 40-5A-13. [20.5.14.8 NMAC - Rp, 20.5.14.8 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.9 GENERAL REQUIREMENTS FOR AST SYSTEMS:**

A. Beginning August 15, 2004, no person may install, replace, repair or modify AST systems in this state unless the person is, or employs, an individual who has been certified by the department to perform that work on AST systems. This provision requires certification of the individual who exercises supervisory control over the installation, replacement, repair or modification work, whether as an officer or employee of the AST system owner or operator performing its own installation, replacement, repairs or modification, or as an officer or employee of the ~~[contracting company] person~~ agreeing to perform the installation, replacement, repair or modification for the owner or operator. Exceptions to this requirement for a certified installer include:

- (1) internal lining of a tank through the application of such materials as epoxy resins;
- (2) coating or lining of secondary containment for AST systems;
- (3) installation, replacement,

repair or modification of cathodic protection systems;

(4) any other installation, replacement, repair or modification specifically approved in writing by the department as an exception to the requirement for a certified ~~[tank]~~ installer;

(5) an applicant for AST installer certification pursuant to Subsection C of 20.5.14.13 NMAC;

(6) normal maintenance; ~~[and]~~

(7) work on line or tank leak detection systems performed by technicians trained to work on line or tank leak detection systems by the manufacturer of the systems, or other equivalent training approved by the department; ~~and~~

(8) persons closing storage tank systems pursuant to 20.5.8 NMAC.

B. Beginning August 15, 2004, no ~~[contracting company] person~~ may install, replace, repair or modify an AST system in this state unless ~~[it has in its employ]~~ the person is or employs a certified installer who shall control and supervise a given installation, replacement, repair or modification and who shall be physically present on-site at the critical junctures in the installation, replacement, repair or modification.

C. The requirements of this part are not intended to prohibit the employment of apprentices or helpers so long as a certified installer exercises responsible supervisory control and is physically present on-site at the critical junctures in the installation, replacement, repair or modification.

D. The requirements of this part are in addition to and not in lieu of any other licensing and registration requirements imposed by law, including any applicable requirements of the Construction Industries Act, NMSA 1978, Sections 60-13-1 through 60-13-59.

E. The provisions of this part are not intended to relieve owners and operators of AST systems of their obligations and liabilities under applicable state and federal laws and regulations.

F. The department may deny an application or renewal and may suspend or revoke certification pursuant to the Parental Responsibility Act, NMSA 1978, Sections 40-5A-1 through 40-5A-13. [20.5.14.9 NMAC - Rp, 20.5.14.9 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.10 INDIVIDUAL CERTIFICATION FOR UST SYSTEMS:**

A. An applicant for an individual's UST certification shall meet all of the following requirements in order to receive certification from the department.

(1) The applicant shall file an application with the department accompanied by a nonrefundable fee of

\$50.00. At a minimum the application shall contain the following information:

(a) applicant's name, permanent residence address and telephone number;

(b) applicant's business address and any business name used by the applicant, with the business address, telephone number and facsimile transmission number;

(c) applicant's date of birth;

(d) applicant's social security number;

(e) construction industries division license number, type of license, name of license holder under which applicant is working and expiration of license;

(f) whether the construction industries division license in Subparagraph (e) of Paragraph (1) of this subsection has ever been suspended or revoked; if so, an explanation of the circumstances of the suspension or revocation;

(g) the supervisor's name, business name, address and telephone number with whom the applicant apprenticed as a tank installer;

(h) a description of the number of years of experience the applicant has as a tank installer (specify USTs and ASTs);

(i) a description of the types and number of tanks the applicant has installed (specify USTs and ASTs) in the past 4 years;

(j) a description of the types and number of piping systems the applicant has installed, replaced, repaired or modified (specify USTs and ASTs) in the past 4 years; and

(k) whether applicant owes child support in New Mexico.

(2) The applicant shall be an individual and at least 18 years of age.

(3) The applicant need not, for purposes of this part, be a resident of the state.

(4) The applicant shall demonstrate that the applicant is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that the applicant has not had a business or occupational license or certificate suspended or revoked in this or any other state, except as provided in Subsection B of this section.

(5) The applicant shall demonstrate in the application that he has met the experience requirements of 20.5.14.12 NMAC.

(6) The applicant shall pass the on-site examination for which 20.5.14.13 NMAC provides. The installation for an on-site examination shall include the on-site installation of a tank, dispenser system or meter, venting, ancillary equipment and initial testing.

(7) The applicant shall provide the department with evidence in the application that, within the prior three months, the applicant has passed:



(a) a New Mexico laws and rules UST test administered by the department pursuant to 20.5.14.16 NMAC; and

(b) a national technical UST installer's test administered by an approved certification educator and has been certified by that educator. For purposes of this section, the international code council is an approved certification educator.

(8) As an alternative to the tests required in Paragraph (7) of this subsection, applicants may propose alternate tests and approved certification to the department for consideration, including a tank installer certification program sponsored by another state or organization, but these courses shall not be approved for the requirements in Paragraph (7) of this subsection unless approved by the department in writing. Applicants seeking approval of alternate courses and alternate certification shall provide the department with all information about the course and the proposed educator to allow the department to determine whether to approve them, in the department's sole discretion. In determining whether to approve an alternate course and alternate certification, the department shall determine whether the alternate course and alternate certification provide an equivalent demonstration of knowledge of New Mexico petroleum storage tank regulations, 20.5 NMAC, and technical installation requirements.

(9) The applicant shall provide to the department a notarized affidavit from the applicant stating that all information submitted in the application is true and correct.

B. Notwithstanding the provisions of Paragraph (4) of Subsection A of this section, the department may grant certification to an applicant who has had a business or occupational license or certificate suspended or revoked where the suspension or revocation, by reason of its date, nature or other considerations, is not directly relevant to the applicant's competence to install, replace, repair, or modify UST systems. [20.5.14.10 NMAC - Rp, 20.5.14.10 NMAC, 6/15/2009; A, 3/17/2012]

[The department provides an optional form that may be used to apply for certification. The form is available on the department's website, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us) or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Applicants should submit application forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.14.11 INDIVIDUAL CERTIFICATION FOR AST SYSTEMS:**

A. An applicant for an

individual's AST certification shall meet all of the following requirements in order to receive certification from the department.

(1) The applicant shall file an application with the department with the information required in Paragraph (1) of Subsection A of 20.5.14.10 NMAC, accompanied by a nonrefundable fee of \$50.00.

(2) The applicant shall be an individual and at least 18 years of age.

(3) The applicant need not, for purposes of this part, be a resident of the state.

(4) The applicant shall demonstrate that the applicant is in good standing with all licensing authorities by whom licensing is required, given the nature and scope of the applicant's work, and that the applicant has not had a business or occupational license or certificate suspended or revoked in this or any other state, except as provided in Subsection B of this section.

(5) The applicant shall demonstrate in the application that he has met the experience requirements of 20.5.14.12 NMAC.

(6) The applicant shall pass the on-site examination for which 20.5.14.13 NMAC provides. The installation for an on-site examination shall include the on-site installation of a tank and tank foundation, dispenser system or meter, venting, ancillary equipment and initial testing. Installation of a self-contained, concrete-encased or self-contained, skid-mounted AST system is not an AST system installation for purposes of this requirement.

(7) The applicant shall provide the department with evidence in the application that, within the prior three months, the applicant has passed:

(a) a New Mexico laws and rules AST test administered by the department pursuant to 20.5.14.16 NMAC; and

(b) a national technical AST installer's test administered by an approved certification educator and has been certified by that educator. For purposes of this section, the international code council is an approved certification educator.

(8) As an alternative to the tests required in Paragraph (7) of this subsection, applicants may propose alternate tests and approved certification to the department for consideration, including a tank installer certification program sponsored by another state or organization, but these courses shall not be approved for the requirements in Paragraph (7) of this subsection unless approved by the department in writing. Applicants seeking approval of alternate courses and alternate certification shall provide the department with all information about the course and the proposed educator to allow the department to determine whether to approve them, in the

department's sole discretion. In determining whether to approve an alternate course and alternate certification, the department shall determine whether the alternate course and alternate certification provide an equivalent demonstration of knowledge of New Mexico petroleum storage tank regulations, 20.5 NMAC, and technical installation requirements.

(9) The applicant shall provide to the department a notarized affidavit from the applicant stating that all information submitted in the application is true and correct.

B. Notwithstanding the provisions of Paragraph (4) of Subsection A of this section, the department may grant certification to an applicant who has had a business or occupational license or certificate suspended or revoked where the suspension or revocation, by reason of its date, nature or other considerations, is not directly relevant to the applicant's competence to install, replace, repair or modify AST systems.

[20.5.14.11 NMAC - Rp, 20.5.14.11 NMAC, 6/15/2009; A, 3/17/2012]

[The department provides an optional form that may be used to apply for certification. The form is available on the department's website, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us) or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Applicants should submit application forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.14.13 O N - S I T E EXAMINATION:**

A. To qualify for individual certification under 20.5.14.10 or 20.5.14.11 NMAC, an applicant shall pass an on-site examination consisting of a successful installation of the regulated and applicable (AST or UST) type of storage tank system in the presence of a designated employee of the department. The applicant shall complete each aspect of the installation successfully in order to pass the examination, including use of proper materials, proper assembly of materials and proper testing of the tank and piping at the appropriate times during the installation.

B. An applicant may request an on-site examination for UST or AST certification any time within 180 days of the date of submission of the application provided for in Paragraph (1) of Subsection A of 20.5.14.10 NMAC or Paragraph (1) of Subsection A of 20.5.14.11 NMAC and shall accompany the request with a nonrefundable \$300 fee. The applicant shall notify the department of the date and the site of the on-site examination 30 days prior to the examination. For good cause shown, the

department may, in its sole discretion, grant an applicant one 180-day extension of the time period during which the applicant must take the on-site examination. The department shall not grant more than one extension. If the applicant does not schedule an on-site examination within these time periods, the applicant shall file a new application for certification and comply with all the application requirements in 20.5.14.10 or 11 NMAC (as applicable).

C. The applicant shall be responsible, subject to approval by department staff, for identifying a satisfactory site and date(s) for the on-site examination. The applicant is also responsible for ensuring that all necessary equipment and appropriate materials necessary for the installation are on site. Department staff shall fail any applicant who has three significant errors during the on-site examination. For purposes of this section, significant errors include, but are not limited to, use of materials or installation practices that violate these regulations, manufacturer's installation instructions, or other industry standards. As long as a department staff member responsible for assessing the on-site exam is present, the applicant may perform the activities involved in the exam even though the applicant is not a certified installer.

D. The installation shall be assessed by the department employee present at the examination who shall present [his] findings to the department, with a recommendation as to whether or not the applicant passed the on-site examination. The department shall make the determination as to the success of the installation and notify the applicant by mail within 30 days of completion of the installation. If the applicant did not pass the examination, the department shall inform the applicant that the applicant may retake the examination upon payment of a nonrefundable \$300.00 fee and upon such conditions as the department may impose to ensure that the applicant is prepared to perform a more successful installation. If the applicant does not retake the examination within 180 days of being notified that the applicant did not pass the examination or if the applicant fails the on-site examination a second time, the applicant shall file a new application for certification with the department if the applicant desires to become a certified installer.

E. The department employee may stop an on-site examination if the employee determines that the installation being conducted constitutes a threat to public health, safety or welfare or the environment. If the examiner stops the installation, [his] the examiner's findings shall be presented to the department with a "do not pass" recommendation. The department shall notify the applicant of its decision as

provided in Subsection D of this section. [20.5.14.13 NMAC - Rp, 20.5.14.13 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.15 RENEWAL OF CERTIFICATION:**

A. ~~[Certification issued under 20.5.14.10 and 11 NMAC shall be renewed no later than March 16 of the fourth year after the certification was granted, and shall expire March 16 of the fourth calendar year after it was issued. Certification should be renewed prior to expiration but may be renewed up to three months after the date of expiration upon payment of a late fee in addition to the renewal fee and the meeting of the requirements for renewal set forth below: Certification which has not been renewed within this time period shall be considered lapsed and invalid; the department shall not accept applications for renewal after the close of the period.] A certification shall expire March 16 of the fourth calendar year after it was issued. Applications for renewal of certification issued under 20.5.14.10 and 20.5.14.11 NMAC shall be submitted no later than February 16 of the fourth year after the certification was granted to ensure renewal by March 16. Certification for installers who do not submit a timely renewal application shall be considered lapsed and invalid on March 16; the department shall not accept applications for renewal after February 16.~~ Any installer whose certification has lapsed as provided in this subsection shall submit [each] an application for new certification under 20.5.14.10 or 20.5.14.11 NMAC and comply with the requirements thereof.

B. At least ~~[30]~~ 90 days before the expiration date of certification, the department shall mail a renewal application reminder to the installer, at the installer's address of record with the department. It is the duty and responsibility of the installer to timely ~~[renew the]~~ submit the renewal application for certification pursuant to Subsection A whether or not an application reminder has been received from the department.

C. To qualify for renewal, a UST certified individual or installer shall:

(1) file an application with the department with the information required in Paragraphs (1), (4) and (9) of Subsection A of 20.5.14.10 NMAC, accompanied by a nonrefundable \$50.00 fee~~[-together with a \$25.00 late fee if the renewal application is filed after, but within three months of, the date of expiration];~~

(2) demonstrate as required by 20.5.14.12 NMAC that the installer has completed at least two UST system installations, replacements, repairs or modifications during the four-year period preceding the renewal application; and

(3) demonstrate that the installer has passed a New Mexico laws and rules

UST test administered by the department pursuant to 20.5.14.16 NMAC, within the prior three months.

D. To qualify for renewal, an AST certified installer shall:

(1) file an application with the department with the information required in Paragraphs (1), (4) and (9) of Subsection A of 20.5.14.11 NMAC, accompanied by a nonrefundable \$50.00 fee~~[-together with a \$25.00 late fee if the renewal application is filed after, but within three months of, the date of expiration];~~

(2) demonstrate as required by 20.5.14.12 NMAC that the installer has completed at least two AST system installations, replacements, repairs or modifications during the four-year period preceding the renewal application; and

(3) demonstrate that the installer has passed a New Mexico laws and rules AST test administered by the department pursuant to 20.5.14.16 NMAC, within the prior three months.

E. An applicant for renewal shall be afforded opportunity for hearing before the secretary, as provided in 20.5.14.20 NMAC, in the event the department contemplates withholding renewal for any cause other than failure to pay the required renewal fee.

F. For purposes of this section, "demonstrate" means provide copies of registration forms, inspection reports, installation checklists, written statements or other documents verifying the certified installer's on-site, physical, hands-on participation in critical junctures of a particular installation, replacement, repair or modification.

[20.5.14.15 NMAC - Rp, 20.5.14.15 NMAC, 6/15/2009; A, 3/17/2012]

[The department provides an optional form that may be used to apply for renewal of certification. The form is available on the department's website, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us) or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Applicants should submit renewal forms to the Petroleum Storage Tank Bureau, attention: Application for Certified Installer, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.14.17 INSTALLER DUTIES AND OBLIGATIONS:**

~~[A. A contracting company shall not agree to perform installation, replacement, repair or modification services unless it is or has in its employ one or more certified installers competent to perform the particular installation, replacement, repair or modification involved, and who shall:~~

~~(1) exercise responsible supervisory control over any installation, replacement, repair or modification it~~

undertakes;

(2) be physically present on-site at all critical junctures in the installation, replacement, repair or modification; and

(3) give notice as required by these regulations.

B. ~~A certified installer shall exercise responsible, supervisory control over any installation, replacement, repair or modification undertaken and shall, at a minimum, be physically on-site at all critical junctures in the installation, replacement, repair or modification and give notice as required by these regulations, 20.5 NMAC.~~

C. ~~A certified installer shall have adequate knowledge of appropriate materials, technical requirements and installation, replacement, repair or modification procedures for any storage tank system the installer undertakes to install, replace, repair or modify. A certified installer shall not perform any installation, replacement, repair or modification, or affix his signature or certification number to any installation, replacement, repair or modification for which the installer lacks competence.]~~

A. ~~No person shall agree to perform installation, replacement, repair or modification services unless the person is or employs a certified installer competent to perform the particular installation, replacement, repair or modification involved.~~

B. ~~A certified installer shall have adequate knowledge of appropriate materials, technical requirements and installation, replacement, repair or modification procedures for any storage tank system that the installer undertakes to install, replace, repair or modify. A certified installer shall not perform any installation, replacement, repair or modification, or affix an installer signature or certification number to any installation, replacement, repair or modification for which the installer lacks competence.~~

C. ~~A certified installer shall:~~

(1) ~~exercise responsible supervisory control over any installation, replacement, repair or modification undertaken;~~

(2) ~~at a minimum, be physically present on-site at all critical junctures in the installation, replacement, repair or modification; and~~

(3) ~~give notice as required by these regulations, 20.5 NMAC.~~

D. A certified installer shall not certify to an owner or operator of a storage tank system that an installation, replacement, repair or modification is complete unless the installation, replacement, repair, or modification complies with the New Mexico Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14, and the petroleum storage

tank regulations promulgated pursuant to the act, 20.5 NMAC. ~~[Where the installation, replacement, repair or modification is being performed for an owner or operator on a contract basis, both] The certified installer [and the contracting company for whom the individual works are] is responsible for the accuracy of [the] any representations made to the owner or operator.~~

E. Certified installers have a duty to report to the department any and all suspected or confirmed releases, as those terms are used in 20.5.7 NMAC, detected at a site or the surrounding area by the installer or persons working under [his] the installer's supervisory control, as required by 20.5.7 NMAC.

F. Certified installers shall not perform any installation, replacement, repair, modification or removal without providing notice as required by the provisions of 20.5 NMAC, except for emergency repairs as described in 20.5.5 NMAC and defined in 20.5.1 NMAC. Certified installers shall not perform any activity described as a critical juncture in 20.5.5 NMAC, without providing the 24-hour notice required by that part, except for emergency repairs.

G. Certified installers shall comply with all of the provisions of the petroleum storage tank regulations, 20.5 NMAC.

[20.5.14.17 NMAC - Rp, 20.5.14.16 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.19 INVESTIGATIONS, ENFORCEMENT, PENALTIES:**

A. The department may undertake such investigations and take such actions as it deems necessary to ensure compliance with the provisions of this part, including the issuance of compliance orders and the commencement of civil actions under the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14. The department may also initiate proceedings to revoke an installer's certification under NMSA 1978, Subsection C of Section 74-4-4.4[E] and [20.5.14.15] 20.5.14.20 NMAC. The department may revoke certification for an installer upon grounds that the installer:

(1) exercised fraud, misrepresentation or deception in obtaining the certification;

(2) exhibited gross incompetence in the installation, replacement, repair, modification or removal of a storage tank system; or

(3) was derelict in the performance of a duty as a certified [tank] installer required in 20.5.14.17 NMAC (including repeated failure to provide notice of releases or of the installation, replacement, repair, modification or removal of storage tank systems as required in 20.5.14.17 NMAC).

B. Persons violating the

provisions of this part may be subject to the imposition of penalties under the Hazardous Waste Act.

[20.5.14.19 NMAC - Rp, 20.5.14.18 NMAC, 6/15/2009; A, 3/17/2012]

#### **20.5.14.20 DEPARTMENT ACTIONS AGAINST CERTIFIED INSTALLERS:**

A. When the department contemplates denying an application for or revoking certification, it shall serve upon the applicant or certified installer a written notice of contemplated action as required by the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33.

[B. ~~If the applicant or the certified installer does not mail a request for a hearing within the time and in the manner required by the Uniform Licensing Act, NMSA 1978, Section 61-1-4, the department may take the action contemplated in the notice and such action shall be final and not subject to judicial review.~~

C. ~~If a hearing is requested in accordance with the provisions of this section, the secretary shall, within 20 days of receipt of such request, notify the requestor of the time and place of hearing, the name or names of the person or persons who will conduct the hearing for the secretary and the statutes and regulations authorizing the secretary to take the contemplated action, which hearing shall be held not more than 60 nor less than 15 days from the date of service of such notice.]~~

B. [Hearings] Proceedings under this section shall be conducted in accordance with the provisions of the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 through 61-1-33.

[D:] C. If the department revokes certification pursuant to this section, the certified installer may not apply for certification for a minimum of two years for the type of installer certification revoked (either UST installer certification pursuant to 20.5.14.10 NMAC or AST installer certification pursuant to 20.5.14.11 NMAC). However, if the certified installer is certified for another type of installer certification, [it] the certified installer shall not be affected by the revocation of the certification for the other type of installer certification.

[20.5.14.20 NMAC - Rp, 20.5.14.19 NMAC, 6/15/2009; A, 3/17/2012]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 20.5.16 NMAC, Sections 3 and 13 and a repeal of Sections 14 and 15, effective March 17, 2012.

**20.5.16.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978; the Hazardous Waste Act, Sections 74-4-1 through 74-4-14 NMSA 1978; and the general provisions of the Environmental Improvement Act, Sections 74-1-1 through [74-1-16] 74-1-17 NMSA 1978.

[20.5.16.3 NMAC - Rp, 20.5.16.3 NMAC, 6/15/09; A, 3/17/12]

### 20.5.16.13 APPEALING ADVERSE DETERMINATIONS:

[A.] A firm that has been denied qualification or that has been disqualified under this part may obtain review of the decision by [either:] using the procedures set forth in 20.5.10 NMAC, Administrative Review.

[(+) submitting to the department a written request for informal review pursuant to 20.5.16.14 NMAC; or

(2) submitting to the secretary or the secretary's designee a written request for review on written submittals pursuant to 20.5.16.15 NMAC.

B. Any request for administrative review initiated under Subsection A of this section must be postmarked within 15 days of the date of the decision to be reviewed.

C. A firm may request review on written submittals under 20.5.16.15 NMAC without first requesting informal review under 20.5.16.14 NMAC. If, however, the firm first requests informal review under 20.5.16.14 NMAC, the firm thereafter may request review on written submittals under 20.5.16.15 NMAC of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC, provided that the request for review on written submittals under 20.5.16.15 NMAC is postmarked within 15 days of the date of the determination made by the department pursuant to Subsection D of 20.5.16.14 NMAC.

D. Review under this part does not stay the decision being reviewed nor does it apply to or affect the secretary's authority to issue compliance orders or otherwise seek enforcement of any of the provisions of Title 20, Chapter 5 NMAC. [20.5.16.13 NMAC - Rp, 20.5.16.1612 NMAC, 6/15/09; A, 3/17/12]

### 20.5.16.14 [INFORMAL REVIEW]:

A. Every request for informal review by a firm shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. Every request for informal review shall be submitted to the department by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. The department shall afford prompt opportunity for an informal conference at which the firm may present the firm's views on the issues raised in the request for review and offer any supporting documentation or testimony. The department shall notify the firm of the time, date and place of the informal conference.

C. The member of department staff conducting the review must be someone other than the employee who made the original decision not to qualify the firm to perform corrective action under this part.

D. After considering all written and oral views presented, the department shall affirm, modify or reverse the original decision and shall furnish the firm with a written notification of its determination. [RESERVED]

[20.5.16.14 NMAC - Rp, 20.5.16.1613 NMAC, 6/15/09; Repealed, 3/17/12]

### 20.5.16.15 [REVIEW BY THE SECRETARY OR THE SECRETARY'S DESIGNEE ON WRITTEN SUBMITTALS]:

A. Every request for review by the secretary or the secretary's designee on written submittals shall be in writing and shall specify the grounds upon which the firm objects to the decision to be reviewed. The request shall be accompanied by any and all written materials and argument which the firm wishes the secretary or the secretary's designee to consider upon review. The request and all written materials and argument shall be submitted to the secretary or the secretary's designee by the deadline set out in Subsections B and C of 20.5.16.13 NMAC.

B. Within 15 days of the filing of the firm's request for review and submittal of all the firm's supporting material, department staff shall provide to the secretary or the secretary's designee any and all written materials and argument in support of the position of department staff on the issues raised by the firm.

C. For good cause shown, the secretary or the secretary's designee may permit either department staff or the firm additional time in which to submit the supporting written materials and argument allowed by Subsections A and B of this section. Any extension of time to submit written submittals shall not include the

authority to extend the time to file a request for review under this part.

D. The action of the secretary or the secretary's designee on the request for review shall be based on the written materials and argument submitted pursuant to this section unless the secretary or the secretary's designee schedules a hearing on the request for review as set forth below.

E. The secretary or the secretary's designee may exercise discretion in whether to grant a hearing requested by the firm seeking review. If the secretary exercises the discretion to hold a hearing, the secretary shall provide notice of the time and place of the hearing to the firm making the request.

F. If the secretary chooses to hold a hearing as described in Subsection E of this section, the secretary shall hold the hearing within 60 days after receiving the written materials and argument described in Subsection A or after receiving the request for a hearing, whichever occurs last. In the event the department holds a hearing, the cost of the court reporter and transcript shall be paid by the party that requested the hearing. The hearing shall be conducted in accordance with 20.1.5 NMAC.

G. The action of the secretary or the secretary's designee on the request for review shall be by written order and shall state the decision and the reason therefor. The secretary or the secretary's designee shall send a copy of the order to the firm and furnish a copy to department staff promptly after the order is entered. This written order shall be the department's final action on the request for review. Any judicial review of this final order shall be as provided by applicable law. [RESERVED]

[20.5.16.15 NMAC - Rp, 20.5.16.1614 NMAC, 6/15/09; Repealed, 3/17/12]

## NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

This is an amendment to 20.5.18 NMAC, Sections 3, 12, 13, 14, 16 and 18 and a new Section 20, effective March 17, 2012.

**20.5.18.3 STATUTORY AUTHORITY:** This part is promulgated pursuant to the provisions of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 through 74-4-14; the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 through 74-6B-14; and the general provisions of the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 through [74-1-16] 74-1-17.

[20.5.18.3 NMAC - N, 6/15/09; A, 3/17/12]

### 20.5.18.12 TRAINING AND

**CERTIFICATION DEADLINES AND SCHEDULES:**

A. Deadline for designation of operators. Owners and operators of storage tank systems shall post at each facility owned a list of designated and certified class A and B operators, by the following deadlines:

(1) July 1, 2010: all owners of more than 12 facilities;

(2) July 1, 2011: all owners of three to 12 facilities;

(3) July 1, 2012: all owners of one or two facilities; and

(4) July 1, 2012: all owners who own any tanks connected to emergency generators.

B. When requested and at any inspection conducted by the department, owners and operators shall provide to the department a list of designated certified class A and B operators for each facility owned.

C. Owners shall maintain documentation identifying designated and certified class C operators, with proof of training, at each facility.

D. No later than the deadlines established in Subsection A of this section, all designated certified class A, B and C operators shall be trained and possess a current certificate issued by a trainer approved pursuant to this part.

E. After the deadlines established in Subsection A of this section, new operators shall be trained and certified within the following timeframes:

(1) Class A and class B operators shall be trained and certified within 60 days of assuming full operation and maintenance responsibilities at a storage tank system. Owners and operators in rural and remote areas of the state may apply in writing for a 60-day deferral of this requirement. To apply for this deferral, owners and operators must demonstrate to the department that they are located in a rural and remote area, as defined in 20.5.1.7 NMAC.

(2) Class C operators shall be trained before assuming responsibility for responding to emergencies and before dispensing a regulated substance.

[20.5.18.12 NMAC - N, 6/15/09; A, 3/17/12]

**20.5.18.13 OPERATOR PRESENT:** After the applicable deadlines in 20.5.18.12 NMAC, owners and operators shall ensure that every facility has either a class A, class B, or class C operator on-site whenever it is open for business and dispensing ~~fuel~~ any regulated substance, except:

A. pursuant to Paragraph (1) of Subsection E of 20.5.18.12 NMAC; and

B. at un-manned facilities, which shall conspicuously post signage required in Paragraph (1) of Subsection C of

20.5.18.11 NMAC, and shall either:

(1) be visited by a class A or B operator every week; or

(2) have a remote monitoring system that:

(a) meets the requirements of 20.5.6 NMAC;

(b) will automatically shut off the delivery or transfer of regulated substances if a suspected release is detected; and

(c) is visited monthly by a class A or B operator;

C. at emergency generator systems, which shall comply with the requirements of Subsection B above, unless an owner or operator requests an alternate method and such request is approved by the department.

[20.5.18.13 NMAC - N, 6/15/09; A, 3/17/12]

**20.5.18.14 RE-TRAINING AND RE-CERTIFICATION:**

A. Class A and B operators shall be re-trained and re-certified every 5 years, in the same manner as original training and certification required in this part. It is the responsibility of owners, operators and certified operators to track certification dates and expiration, and to ensure that a certified operator as required by this part is designated and on-site for every storage tank system by the deadlines in this part and as required in this part.

B. In addition to the requirements of Subsection A, if the department finds that a storage tank system is out of compliance, the class A and class B operator shall be re-trained and re-certified within 60 days. The class A and B operator may select training specific only to the area of non-compliance (if available) or attend a training program that includes all training elements required by this part. At a minimum, a storage tank system is out of compliance for purposes of this section if the system is in violation of:

(1) storage tank release detection requirements in 20.5 NMAC; or

(2) release prevention requirements (spill, overfill, or corrosion prevention) requirements in 20.5 NMAC.

C. An owner may elect to re-train and re-certify class A and B operators annually for a storage tank system. Class A and B operators that are re-trained and re-certified annually need not re-train and re-certify as required in Subsection B of this section if the department finds the storage tank system is out of compliance.

D. No re-training and re-certification is required for class C operators. Class C operators must be trained and certified each time they are designated for a particular storage tank system.

E. Owners and operators of storage tank systems that have been placed in temporary closure in compliance

with 20.5.8.9 NMAC and have a designated trained class A or class B operator are exempt from re-training requirements unless one or both of the following conditions is present:

(1) the storage tank contains greater than one inch of regulated substance;

or

(2) the storage tank system has steel components that are in contact with soil, water or concrete.

[20.5.18.14 NMAC - N, 6/15/09; A, 3/17/12]

**20.5.18.16 APPROVAL OF TRAINERS AND TRAINING:**

A. Training elements. The following topics shall be covered in approved training courses for class A and class B operators:

(1) general overview of department UST and AST program and administrative requirements, including:

(a) registration forms and certificates, and process for filing and modifying them;

(b) notification process and general technical requirements for new installations, repairs, replacements and modifications;

(c) confirmed and suspected releases (including confirmation steps for suspected releases), monthly monitoring or release detection test failures, and other system failures that may indicate a release of regulated substance has or is occurring;

(d) annual tank fees and invoicing process;

(e) general requirements for maintaining and demonstrating financial responsibility;

(f) department process for inspections and technical assistance resources available, including written checklists required in 20.5.18.17 NMAC; and

(g) enforcement process for violations;

(2) general overview of other regulations pertaining to ASTs and USTs, including but not limited to, fire codes, occupational health and safety, and any related industry practices pertaining to safety;

(3) spill prevention and overfill protection:

(a) rule requirements, including record keeping;

(b) equipment requirements; and

(c) operation and maintenance records;

(4) release detection: for each type of release detection method listed and approved in 20.5.6 NMAC for USTs, ASTs and piping:

(a) rule requirements, including record keeping;

(b) monitoring and equipment requirements, including third party approval requirements; and

(c) operation and maintenance records;

(5) corrosion protection:

(a) rule requirements, including record keeping;

(b) equipment requirements; and

(c) operation and maintenance needs, including periodic inspections and testing;

(6) classes of operators and operator training requirements, including designation and certification;

(7) temporary and permanent closure requirements:

(a) rule requirements, including record keeping;

(b) return to service;

(c) site assessment; and

(d) change in service;

(8) general requirements for tank installer certification:

(a) rule requirements, including record keeping;

(b) when certified installers are required; and

(c) how to find certified installers and verify certified status.

B. Training standards. In determining whether to approve any trainer or training, the department shall consider the following:

(1) whether the trainer is a third-party, in-house, educational institution or other;

(2) whether the trainer will offer training in multiple locations throughout the state, regionally or locally;

(3) how often the trainer will offer training;

(4) what fee (if any) the trainer will charge;

(5) whether the trainer will offer classes only to employee or in-house operators, to the general public, or to independent contract operators.

C. Training options may cover all or a portion of the required elements, and may include:

(1) live training sessions in a classroom setting or at a storage tank system;

(2) internet or computer training program; or

(3) any other equivalent training method approved by the department.

D. Application for approval of trainer and training class. Trainers shall apply to the department for approval of trainers and training classes. An application for approval of trainer and training class shall include at a minimum:

(1) name, address and contact information of the proposed trainer;

(2) detailed description of the proposed trainer's experience, education and qualifications to conduct training;

(3) agenda and materials to be used for the proposed class that shall include

the elements required in this section;

(4) final tests or other proposed methods of evaluating attendee success;

(5) copies of proposed documentation to certify successful attendees as certified operators as required in 20.5.18.17 NMAC and to be used for the monthly and annual inspections required in 20.5.18.17 NMAC;

(6) the proposed fee schedule for the training class; and

(7) the proposed calendar for the proposed training classes that includes location and frequency.

E. The department shall evaluate applications for approval of trainers and training classes and provide a written approval, denial or request for additional information within the following timeframes:

(1) within 30 days of receipt of the original application [-and provide a written approval, denial or request for additional information-];

(2) if the original application is denied and a second application is submitted, within 60 days of receipt of the second application; and

(3) if the second application is denied and a third application is submitted, within 90 days of receipt of the third application.

F. If the department has denied an application three times pursuant to Subsection E above, the applicant shall not re-submit an application for a period of one year from the date of receipt of the third denial.

[F:]G. The department may periodically audit or review any training class, and the trainer shall allow a maximum of two department employees to attend any training class on request without charge and without certification (except a reasonable charge for copying and materials).

H. The department may suspend or revoke a trainer's certificate if it determines that the trainer is not performing adequately or has misrepresented information on the trainer's application. The department shall use the procedures prescribed in the Uniform Licensing Act, Sections 61-1-1 et seq. NMSA 1978, in all suspension and revocation proceedings held pursuant to this rule.

[20.5.18.16 NMAC - N, 6/15/09; A, 3/17/12] [The department provides an optional form for application for approval of trainer and training class, available on the department's webpage, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us), by calling the department at 505-476-4397 or by writing to the Petroleum Storage Tank Bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507. Owners should mail applications for approval of trainer and training to this address.]

## 20.5.18.18 RESPONSIBILITIES OF CERTIFIED OPERATORS:

A. A certified operator shall not represent himself or herself as certified unless [he] the person has a current valid certificate from an approved trainer.

B. Monthly inspections. Each class A or class B operator shall perform a monthly inspection of each storage tank system for which he is designated, and shall record the results of each inspection on a checklist.

(1) At a minimum, monthly inspections shall be conducted and shall include an inspection of the following:

(a) release detection methods, including monitoring systems and all associated sensors, and whether they appropriately responded to all alarms and any conditions that might have indicated a release of regulated substance had occurred;

(b) integrity of spill prevention equipment (for cracks, holes, or bulges), and for the presence of regulated substance, water, or debris in the spill prevention equipment;

(c) dispenser and dispenser sumps for the presence of regulated substances, water, and debris;

(d) containment sumps, such as those which contain the submersible pump on the top of underground tanks, for the presence of regulated substances or any indication a release may have occurred; and

(e) overfill prevention equipment for proper operation and if maintenance is required.

(2) The certified operator(s) shall ensure that all inspections as outlined in the operations and maintenance plan, required in 20.5.5.9 NMAC, are properly performed and conducted by qualified personnel.

(3) Certified operators may use checklists contained in the operations and maintenance plan, required in 20.5.5.9 NMAC, to document monthly inspections only if the checklists meet the requirements of this section.

(4) The certified operator(s) shall provide the owner and operator with a copy of each inspection checklist, and alert the owner or operator of any condition discovered during the monthly inspection that may require follow-up actions.

(5) Owners and operators shall maintain a copy of inspection checklists and all attachments for the previous [twelve] 12 months at all attended facilities or, if approved in writing by the department, off-site at a readily available location.

(6) Owners and operators shall provide monthly inspection reports and all attachments for the previous [twelve] 12 months to the department on request. [20.5.18.18 NMAC - N, 6/15/09; A, 3/17/12] [The department provides an optional checklist for compliance with this section.

The checklist is available on the department's webpage, [www.nmenv.state.nm.us](http://www.nmenv.state.nm.us), or by contacting the Petroleum Storage Tank Bureau at 505-476-4397 or at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

#### **20.5.18.20 ALTERNATE METHODS:**

A. If owners and operators want to propose an alternate method of operator presence at emergency generator systems, other than that specified by this part, owners and operators shall apply in writing to the department, shall provide supporting documentation, and shall not begin the proposed method unless and until the department approves the request in writing. At a minimum, the request for an alternate method shall contain the following:

- (1) date the form is completed;
- (2) facility name, number, address (with county) and telephone number;
- (3) owner name, number, address and telephone number;
- (4) citation to regulation for which alternate method is requested;
- (5) brief description of the proposed alternate method;
- (6) justification of proposed alternate method, including citation to a standard or code supporting its use, if available; and
- (7) demonstration of its equivalent protection of public health, safety and welfare and the environment.

B. The department shall not grant the request unless owners and operators demonstrate that the request will provide equivalent protection of public health, safety and welfare and the environment.  
[20.5.18.20 NMAC – N, 3/17/12]

### **NEW MEXICO DEPARTMENT OF HEALTH EPIDEMIOLOGY AND RESPONSE DIVISION**

This is an amendment to 7.4.3 NMAC, Section 3, 7, 8, 9, 11, 12 and 13, effective February 29, 2012.

**7.4.3.3 STATUTORY AUTHORITY:** These provisions set forth herein are promulgated by the secretary of the department of health by authority of NMSA 1978 Section 9-7-6(E) [NMSA 1978] and in conformity with the Public Health Act, particularly NMSA 1978 Sections 24-1-3C, 24-1-7, and 24-1-15 [NMSA 1978] and pursuant to the Hospital-Acquired Infection Act, NMSA 1978, Sections 24-29-1 through 24-29-6. Administration and enforcement of these rules are the responsibility of the epidemiology and response division of the department of health.

[7.4.3.3 NMAC - Rp, 7.4.3.3 NMAC, 04/30/2009; A, 02/29/2012]

**7.4.3.7 DEFINITIONS:** As used in these provisions, the following terms shall have the meaning given to them, except where the context clearly requires otherwise.

A. “Acute care hospital” means a hospital providing emergency services, in-patient medical and nursing care for acute illness, injury, surgery or obstetrics; ancillary services such as pharmacy, clinical laboratory, radiology, and dietary are required for acute-care hospitals.

[A:] B. “Cancer” means all malignant neoplasms and in situ neoplasms and all intracranial neoplasms, regardless of the tissue of origin.

[B:] C. “Carrier” means an infected person or animal that harbors a specific infectious agent without clinical symptoms and that serves as a potential source of infection for humans.

[C:] D. “Condition of public health significance” means a condition dangerous to public health or safety.

[D:] E. “Designee” means an agency or institution designated by the department of health to receive reports of notifiable conditions on its behalf for the purpose of public health surveillance.

[E:] E. “Disease” means an illness, including those caused by infectious agents or their toxic products which may be transmitted to a susceptible host.

[F:] G. “Division” means the epidemiology and response division of the department of health, P.O. Box 26110, Santa Fe, NM 87502-6110.

[G:] H. “Health care professional” means any licensed doctor of medicine or osteopathy, nurse, physician's assistant, midwife, veterinarian or other licensed health care provider unless the context clearly requires otherwise.

[H:] I. “Isolation, detention or quarantine” means the complete separation or partial restriction of movement and association in such manner and for such period as will prevent the direct and indirect transmission of the infectious agent.

[I:] J. “Laboratory” means the scientific laboratory division of the department of health or any other laboratory which performs diagnostic tests on specimens obtained from New Mexico sources ~~[or from sources having significant epidemiological contact with New Mexico,]~~ for diseases and conditions covered by these rules.

[J:] K. “Notifiable condition” means a disease or condition of public health significance required by statute or these rules to be reported to the division.

[K:] L. “Other person” includes but is not limited to: [a] laboratory staff; an official in charge of any health facility;

hospital records or administrative personnel; the principal or person in charge of any private or public school, or child care center; teachers and school nurses; and a householder or any other person, in the absence of a health care professional having direct knowledge of a disease or condition of public health significance.

[L:] M. “Regional or local public health office” means a public health office designated by the public health division of the department of health.

[M:] N. “Report” means a notification to the division pursuant to these rules.

[N:] O. “Specimen” means any material derived from humans or animals for examination for diagnosis, prevention or treatment of any disease or condition of public health significance.

[7.4.3.7 NMAC - Rp, 7.4.3.7 NMAC, 04/30/2009; A, 02/29/2012]

#### **7.4.3.8 NOTIFIABLE CONDITIONS:**

A. Declaration of notifiable conditions: The division shall periodically issue a list of notifiable conditions according to reporting category designated as ~~[7.4.3-12 NMAC]~~ 7.4.3.13 NMAC. The list shall be reviewed on a regular basis and revised as necessary. Diseases shown in ~~[7.4.3-12 NMAC]~~ 7.4.3.13 NMAC are declared notifiable conditions as of the effective date.

B. Official listing: The list of notifiable conditions shall be issued in a quick reference format and shall show that it is the current official list and shall specify its effective date. The division shall routinely supply the current official list to health care professionals and health facilities and to other persons or entities on request.

C. Reporting of notifiable conditions: Reporting will be by means of the following:

(1) the division's 24-hour telephone number as listed in the report, “*New Mexico epidemiology [report]*,” the division's newsletter or by direct telephone contact with the regional or local public health office;

(2) the division's toll-free telephone receiving and recording system telephone number listed in the report “*New Mexico epidemiology [report]*”;

(3) for specified conditions, reporting to the address/phone number published on the printed form of the “list of notifiable conditions”;

(4) written report to the division;

or  
(5) electronic transmission, which includes facsimile and computer data transfers.

D. Reporting requirements - health care professionals: Every health care professional treating any person or animal

having or suspected of having any notifiable condition shall report the condition within the time and in the manner set out in the list of notifiable conditions.

E. Reporting requirements - laboratories: All laboratories performing diagnostic tests for any notifiable condition shall report all positive findings within the time and in the manner set out in the list. Reports shall include the name of the reporting laboratory, the patient's name, date of birth/age, and address, the date of clinical diagnosis, if known, and the ~~[physician]~~ health care professional or hospital requesting the test.

F. Reporting requirement - other persons: Any other person, including all persons listed in Subsection [J] L of 7.4.3.7 NMAC of these rules, having knowledge of any person having or suspected of having a notifiable condition, shall immediately report the condition to the division.

G. Conditions of public health significance: Any person, including health care professionals and persons listed in Subsection [J] L of 7.4.3.7 NMAC of these rules, having knowledge of a notifiable condition shall immediately report the condition to the division.

[7.4.3.8 NMAC - Rp, 7.4.3.8 NMAC, 04/30/2009; A, 02/29/2012]

#### **7.4.3.9 CONTROL OF DISEASE AND CONDITIONS OF PUBLIC HEALTH SIGNIFICANCE:**

A. Responsibility for protection of public health: The department of health may take such measures ~~[on the advice of its medical officer or officers]~~ as are deemed necessary and proper for the protection of the public health.

B. Coordination among agencies: The department of health shall coordinate the efforts of other concerned or interested federal, state and local agencies and shall cooperate with local health care professionals and health care facilities.

C. Imposition of isolation or quarantine: The department of health may establish or require isolation or quarantine of any animal, person, institution, community or region.

D. Case incidence in schools or health facilities: Where any case of communicable disease occurs or is likely to occur in a public, private, or parochial school, child care facility, or in a health care facility, the department of health may require:

(1) exclusion of infected persons and non-immune persons, whether students, patients, employees or other persons;

(2) closure and discontinuance of operations if there is likelihood of an epidemic.

E. Refusal of voluntary treatment, detention or observation: When

a person who is actively infectious with a threatening communicable disease ~~[and]~~ refuses voluntary treatment, detention or observation, the department of health may seek a court order to detain the person pursuant to Section 24-1-15 NMSA 1978 of the Public Health Act until the person is no longer a contagious threat to the public or the person voluntarily complies with appropriate treatment and contagion precautions.

F. Other public health orders: The department of health may issue orders for the testing of particular populations or groups of persons or animals to identify carriers of disease, including immigrants, travelers, students or preschoolers and others who have been at risk of transmission or exposure. The department of health may require that all tests be done under the control of the scientific laboratory division or by a laboratory approved for that purpose.

G. Enforcement of public health orders: Any order issued by the department of health under the Public Health Act or these rules shall be enforceable as provided by law and violation is punishable in accordance with Section 24-1-21 NMSA 1978.

H. Medical records: To carry out its duties to investigate and control disease and conditions of public health significance, the department of health or designee shall have access to all medical records of persons with, or suspected of having, ~~[notifiable]~~ notifiable diseases or conditions of public health significance. The department of health is a "public health authority" as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Privacy Rule. The department of health is authorized to receive protected health information without patient authorization for purposes of public health surveillance, investigation and interventions and as otherwise required by law. The division or designee may periodically review medical records to ensure the completeness and quality of reporting.

I. Confidentiality of reports: All notifiable condition reports are confidential. Disclosure to any person of report information, except for disclosure for the purpose of prevention, treatment or control, is prohibited unless disclosure is required by law.

J. Research use of notifiable condition data: Researchers authorized by the division or its ~~[agents]~~ designee who certify to the satisfaction of the division that confidentiality of data will be maintained in accordance with applicable state and federal confidentiality requirements, may conduct studies utilizing notifiable condition data, including studies of the sources and causes of conditions of public health significance, evaluations of the cost, quality, efficacy and appropriateness

of screening, diagnostic, therapeutic, rehabilitative and preventive services and programs relating to conditions of public health significance and other clinical or epidemiologic research.

[7.4.3.9 NMAC - Rp, 7.4.3.9 NMAC, 04/30/2009; A, 02/29/2012]

#### **7.4.3.11 HEALTH CARE - ASSOCIATED INFECTION REPORTING:**

Acute care hospitals will submit data to the New Mexico department of health using the centers for disease control and prevention national healthcare safety network (NHSN) and confer rights to access the data to the New Mexico department of health for central line-associated bloodstream infections and clostridium difficile infections.

[7.4.3.11 NMAC - N, 02/29/2012]

~~[7.4.3.11]~~ **7.4.3.12 REPEALER:** These requirements repeal and replace all previous rules, particularly rules governing the control of communicable disease of November 11, 1952, rules governing the reporting of notifiable disease of June 29, 1974 and rules governing the control of disease and conditions of public health significance of 1980.

[7.4.3.12 NMAC - Rp, 7.4.3.12 NMAC, 04/30/2009; 7.4.3.12 NMAC - Rn, 7.4.3.11 NMAC, 02/29/2012]

#### **7.4.3.12] 7.4.3.13 NOTIFIABLE DISEASES OR CONDITIONS IN NEW MEXICO:**

A. All reports including electronic laboratory reports of notifiable conditions, must include:

(1) the disease or condition being reported;

(2) patient's name, date of birth/age, gender, race/ethnicity, address, patient telephone ~~[number]~~ numbers, and occupation;

(3) physician or licensed healthcare professional ~~[(or laboratory)]~~ name and telephone number; and

(4) healthcare facility or laboratory name and telephone number, if applicable.

B. Laboratory or clinical samples for conditions marked with (\*) are required to be sent to the scientific laboratory division.

C. Emergency reporting of diseases or conditions: The following diseases, confirmed or suspected, require **immediate reporting** by telephone to the epidemiology and response division at (505) 827-0006. If no answer, call 1-866-885-6485.

(1) Infectious diseases:

(a) anthrax\*;

(b) avian or novel influenza\*;

(c) bordetella species\*;

[(e)] (d) botulism (any type) \*;



[(~~td~~)] (e) cholera\*;  
 [(~~te~~)] (f) diphtheria\*;  
 [(~~tf~~)] (g) haemophilus influenzae  
 invasive infections\*;  
 [(~~tg~~)] (h) measles;  
 [(~~th~~)] (i) meningococcal infections,  
 invasive\*;  
 [(~~ti~~)] ~~pertussis~~];  
 (j) plague\*;  
 (k) poliomyelitis, paralytic and  
 non-paralytic;  
 (l) rabies;  
 (m) rubella (~~[~~me~~]~~ including  
 congenital);  
 (n) severe acute respiratory  
 syndrome (SARS)\*;  
 (o) smallpox\*;  
 (p) tularemia\*;  
 (q) typhoid fever\*;  
 (r) yellow fever.  
 (2) Other conditions:  
 (a) suspected foodborne illness  
~~[or conditions]~~ in two or more unrelated  
 persons\*;  
 (b) suspected waterborne illness  
 or conditions in two or more unrelated  
 persons\*;  
 (c) illnesses or conditions  
 suspected to be caused by the intentional or  
 accidental release of biologic or chemical  
 agents\*;  
 (d) acute illnesses or conditions of  
 any type involving large numbers of persons  
 in the same geographic area;  
 (e) severe smallpox vaccine  
 reaction;  
 (f) other illnesses or conditions of  
 public health significance.  
 (3) Infectious diseases in animals:  
 (a) anthrax;  
 (b) plague;  
 (c) rabies;  
 (d) tularemia.  
 D. Routine reporting of  
 diseases or conditions:  
 (1) Infectious diseases (report  
 case within 24 hours to epidemiology and  
 response division at [~~1-800-432-4404~~ or]  
 505-827-0006; or contact the local health  
 office).  
 (a) brucellosis;  
 (b) campylobacter infections\*;  
 (c) clostridium difficile\*;  
 [(~~te~~)] (d) coccidioidomycosis;  
 [(~~td~~)] (e) Colorado tick fever;  
 [(~~te~~)] (f) cryptosporidiosis;  
 [(~~tf~~)] (g) cysticercosis;  
 [(~~tg~~)] (h) cyclosporiasis;  
 (i) dengue  
 [(~~th~~)] (j) E. coli 0157:H7  
 infections\*;  
 [(~~ti~~)] (k) E. coli, shiga-toxin  
 producing (STEC) infections\*;  
 [(~~tj~~)] (l) encephalitis, other;  
 [(~~tk~~)] (m) giardiasis;  
 [(~~tl~~)] (n) Group A streptococcal  
 invasive infections\*;

[(~~tm~~)] (o) Group B streptococcal  
 invasive infections\*;  
 [(~~tn~~)] (p) hantavirus pulmonary  
 syndrome;  
 [(~~to~~)] (q) hemolytic uremic  
 syndrome;  
 [(~~tp~~)] (r) hepatitis A, acute;  
 [(~~tq~~)] (s) hepatitis B, acute or  
 chronic;  
 [(~~tr~~)] (t) hepatitis C, acute or  
 chronic;  
 [(~~ts~~)] (u) hepatitis E, acute;  
 (v) influenza-associated pediatric  
death  
 [(~~tt~~)] (w) influenza, laboratory  
 confirmed hospitalization only;  
 [(~~tu~~)] (x) legionnaires' disease;  
 [(~~tv~~)] (y) leptospirosis;  
 [(~~tw~~)] (z) listeriosis\*;  
 [(~~tx~~)] (aa) lyme disease;  
 [(~~ty~~)] (bb) malaria;  
 [(~~tz~~)] (cc) mumps;  
 (dd) necrotizing fasciitis\*;  
 [(~~ta~~)] (ee) psittacosis;  
 [(~~tb~~)] (ff) q fever;  
 [(~~tc~~)] (gg) relapsing fever;  
 [(~~td~~)] (hh) Rocky Mountain  
 spotted fever;  
 [(~~te~~)] (ii) salmonellosis\*;  
 [(~~tf~~)] (jj) shigellosis\*;  
 [(~~tg~~)] (kk) St. Louis encephalitis  
 infections;  
 [(~~th~~)] (ll) streptococcus  
 pneumoniae, invasive infections\*;  
 [(~~ti~~)] (mm) tetanus;  
 [(~~tj~~)] (nn) trichinellosis;  
 [(~~tk~~)] (oo) toxic shock syndrome;  
 [(~~tl~~)] (pp) varicella;  
 [(~~tm~~)] (qq) vibrio infections\*;  
 [(~~tn~~)] (rr) west nile virus  
 infections;  
 [(~~to~~)] (ss) western equine  
 encephalitis infections;  
 [(~~tp~~)] (tt) yersinia infections\*.  
 (2) Infectious diseases in animals  
 (report case within 24 hours to epidemiology  
 and response division at [~~1-800-432-4404~~  
 or] 505-827-0006; or contact the local health  
 office).  
 (a) arboviral, other;  
 (b) brucellosis;  
 (c) psittacosis;  
 (d) west nile virus infections.  
 (3) Tuberculosis\* or other  
 nontuberculous mycobacterial infections  
 (including Mycobacterium avium complex  
 or leprosy). Report suspect or confirmed  
 cases within 24 hours to tuberculosis  
 program, NM Department of Health, P. O.  
 Box 26110, Santa Fe, NM 87502-6110; or  
 call [~~505-827-2474~~] (505-827-2471) or 505-  
 827-2473.  
 (4) Sexually transmitted diseases.  
 Report to infectious disease bureau - STD  
 program, NM Department of Health, P.O.  
 Box 26110, Santa Fe, NM 87502-6110, fax  
 505-476-3638; or call 505-476-3636.

(a) chancroid;  
 (b) chlamydia trachomatis  
 infections;  
 (c) gonorrhoea;  
 (d) syphilis.  
 (5) HIV (human immunodeficiency  
 virus) and AIDS (acquired immunodeficiency  
 syndrome). Report to HIV and hepatitis  
 epidemiology program, 1190 St. Francis Dr.,  
 N1350, Santa Fe, NM 87502, fax 505-476-  
 3544 or call 505-476-3515.  
 (a) [~~HIV:—(t)~~] all confirmed  
 positive HIV antibody [~~test~~] tests (screening  
 test plus confirmatory test); [~~or-(2)~~]  
 (b) [~~any-test~~] all tests for HIV  
 RNA or HIV cDNA ('-viral load tests');  
 (c) [~~or-(3) any-test~~] all tests to  
 detect HIV proteins; [~~or~~]  
 (d) [~~(4) any~~] all positive HIV  
 [culture, or (5) any other test or condition  
 indicative of HIV infection as defined by the  
 United States centers for disease control and  
 prevention:  
 ———(b)———AIDS:———Opportunistic  
 infections,——cancers,——CD4——lymphocyte  
 count (<200 per uL or <14 percent of total  
 lymphocytes), or any condition indicative of  
 AIDS:] cultures;  
 (e) all HIV genotype tests;  
 (f) all CD4 lymphocyte tests  
 (count and percent);  
 (g) opportunistic infections,  
cancers and any other test or condition  
indicative of HIV or AIDS.  
 (6) Occupational illness and  
 injury. Report to epidemiology and response  
 division, NM Department of Health, P.O.  
 Box 26110, Santa Fe, NM 87502-6110; or  
 call [~~1-800-432-4404~~ or] 505-827-0006.  
 (a) asbestosis;  
 [(~~b~~)—chronic beryllium lung  
 disease;]  
 [(~~e~~)] (b) coal worker's  
 pneumoconiosis;  
 [(~~d~~) heavy metal poisoning];  
 [(~~e~~)] (c) hypersensitivity  
 pneumonitis;  
 [(~~f~~)] (d) mesothelioma;  
 [(~~g~~)] (e) noise induced hearing  
 loss;  
 [(~~h~~)] (f) occupational asthma;  
 (g) occupational burn  
hospitalization;  
 (h) occupational injury death;  
 (i) occupational pesticide  
poisoning;  
 (j) occupational traumatic  
amputation;  
 [(~~j~~)] (k) silicosis;  
 [(~~k~~)] (l) other illnesses or injuries  
 related to occupational exposure.  
 (7) Health conditions related to  
 environmental exposures and certain injuries.  
 Report to epidemiology and response  
 division, NM Department of Health, P.O.  
 Box 26110, Santa Fe, NM 87502-6110; or  
 call [~~1-800-432-4404~~ or] 505-827-0006.

(a) Environmental exposures:  
 [(i)] acetylcholinesterase (all blood levels);  
 [(ii)] (i) all pesticide poisoning;  
 [(iii)] (ii) arsenic in urine greater than 50 micrograms/liter;  
(iii) carbon monoxide poisoning;  
 (iv) infant methemoglobinemia;  
 (v) lead (all blood levels);  
 (vi) mercury in urine greater than 3 micrograms/liter and/or or mercury in blood greater than 5 micrograms/liter;  
 (vii) uranium in urine greater than ~~[0.08 ug/L]~~ 0.2 micrograms/liter or 0.2 micrograms/gram creatinine;  
 (viii) other suspected environmentally-induced health conditions.  
 (b) Injuries:  
 (i) drug overdose;  
 (ii) firearm injuries;  
 (iii) traumatic brain injuries.

(8) Adverse vaccine reactions. Report to vaccine adverse events reporting system, <http://www.vaers.hhs.org>. Send copy of report to immunization program vaccine manager, NM Department of Health, P.O. Box 26110, Santa Fe, NM 87502-6110; fax 505-827-1741.

(9) Healthcare-associated infections. Central line-associated bloodstream infections (CLABSI) events.

[(9)] (10) Cancer. Report to designee. Report all malignant and in situ neoplasms and all intracranial neoplasms, regardless of the tissue of origin, using the prevailing standards promulgated by the national cancer institute, the centers for disease control and prevention, the North American association of central cancer registries, and the American college of surgeons.

[(10)] (11) Human papillomavirus (HPV). Laboratories report the following tests to designee

(a) papanicolaou test results (all results);

(b) cervical, vulvar and vaginal pathology results (all results);

(c) HPV test results (all results).

[(11)] (12) Birth defects and congenital hearing loss.

(a) ~~[Report to children's medical services, 2040 S. Pacheco, Santa Fe, NM 87505; or call 505-476-8868.] Report to epidemiology and response division, NM Department of Health, P.O. Box 26110, Santa Fe, NM 87502-6110; or call 505-827-0006.~~

(b) All birth defects diagnosed by age 4 years, including:

(i) defects diagnosed

during pregnancy;  
 (ii) defects diagnosed on fetal deaths;  
 (iii) defects found in chromosome testing on amniotic fluid, chorionic villus sampling and products of conception for Trisomy 13, Trisomy 18 and Trisomy 21.

(13) Genetic and congenital hearing screening. Report to children's medical services, 2040 S. Pacheco, Santa Fe, NM 87505; or call 505-476-8868.

[(e)] (a) ~~[Suspected or confirmed congenital hearing loss in one or both ears]~~ Neonatal screening for congenital hearing loss (all results).

(b) Suspected or confirmed congenital hearing loss in one or both ears.

[(f)] (c) All conditions identified through statewide newborn genetic screening.

[7.4.3.13 NMAC - Rn & A, 7.4.3.12 NMAC, 02/29/2012]

### NEW MEXICO HUMAN SERVICES DEPARTMENT MEDICAL ASSISTANCE DIVISION

The following Human Services Department, Medical Assistance Division rules are being renumbered and reformatted to comply with current NMAC format requirements, effective March 1, 2012.

8 NMAC 4.MAD.000, NMAC Identification, Sections 1 through 6 and the Mission Statement

8 NMAC 4.MAD.712 to 8.310.3 NMAC, Rural Health Clinic Services

8 NMAC 4.MAD.723 to 8.311.5 NMAC, Swing Bed Hospital Services

8 NMAC 4.MAD.737 to 8.315.3 NMAC, Psychosocial Rehabilitation Services

8 NMAC 4.MAD.740 to 8.320.2 NMAC, Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Services

8 NMAC 4.MAD.741 to 8.320.3 NMAC, Tot to Teen Healthcheck

8 NMAC 4.MAD.744 to 8.320.5 NMAC, EPSDT Case Management

8 NMAC 4.MAD.742.2 to 8.321.3 NMAC, Accredited Residential Treatment Centers Services

8 NMAC 4.MAD.742.3 to 8.321.4 NMAC, Non-Accredited Residential Treatment Centers and Group Homes

8 NMAC 4.MAD.745.1 to 8.322.2 NMAC, Treatment Foster Care

8 NMAC 4.MAD.752 to 8.324.3 NMAC, Diagnostic Imaging and Therapeutic Radiology Services

8 NMAC 4.MAD.745.4 to 8.322.5 NMAC, Treatment Foster Care II

8 NMAC 4.MAD.746.3 to 8.323.4 NMAC, EPSDT Private Duty Nursing Services

8 NMAC 4.MAD.751 to 8.324.2 NMAC,

Laboratory Services  
 8 NMAC 4.MAD.758 to 8.324.9 NMAC, Nutrition Services  
 8 NMAC 4.MAD.764 to 8.325.5 NMAC, Transplant Services  
 8 NMAC 4.MAD.767 to 8.325.8 NMAC, Rehabilitation Service Providers  
 8 NMAC 4.MAD.772 to 8.326.3 NMAC, Case Management Services for Pregnant Women and Their Infants  
 8 NMAC 4.MAD.773 to 8.326.4 NMAC, Case Management Services for the Chronically Mentally Ill  
 8 NMAC 4.MAD.774 to 8.326.5 NMAC, Case Management Services for Traumatically Brain Injured Adults  
 8 NMAC 4.MAD.775 to 8.326.6 NMAC, Case Management Services to Children up to Age Three  
 8 NMAC 4.MAD.776 to 8.326.7 NMAC, Adult Protective Services Case Management  
 8 NMAC 4.MAD.778 to 8.326.8 NMAC, Case Management Services for Children Provided by Juvenile Probation and Parole Officers  
 8 NMAC 4.MAD.954 to 8.350.3 NMAC, Abstract Submission for Level of Care Determinations  
 8 NMAC 4.MAD.990 to 8.354.2 NMAC, PASRR and Patient Status Hearings

### NEW MEXICO PUBLIC EDUCATION DEPARTMENT

**Explanatory paragraph: This is an amendment to Sections 7, 9, 11 and 13 of 6.31.2 NMAC (CHILDREN WITH DISABILITIES/GIFTED CHILDREN), effective February 29, 2012. Subsection E of Section 7 (DEFINITIONS) is amended to delete the definition of "summary due process hearing" and to renumber the succeeding paragraph accordingly. Section 9 (PUBLIC AGENCY RESPONSIBILITIES) is amended to add language to Subsection I regarding the creation of new school districts and charter schools. Section 11 (EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES) is amended as follows. Subsection A is amended at paragraph (2) to provide that the child qualifying for special education would transition to the Part B program on his or her third paragraph, with related amendments to paragraph (3) of Subsection A. Subparagraphs (f), (g), and (h) of paragraph (5) of Subsection A are amended. The current subparagraph (g) is deleted and replaced. Subsection E relating to reporting requirements is also amended. Section 13 (ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES) is amended to change the requirements for complaints**

in subparagraph (a) of paragraph (2) of Subsection H to more closely align to federal regulation. A technical correction is made to subparagraph (d) of paragraph (2). Subsection I is amended to delete references to summary due process hearings, to delete subparagraph (d) of paragraph (3), to change the requirements for due process requests in paragraph (5) to more closely align to federal regulation, to delete paragraph (15) regarding summary due process hearings with the following paragraphs renumbered accordingly. Internal cross-references in subsection I are amended to reflect the numbering changes. Subsection M is amended to more closely align with the timelines required by federal regulation.

### 6.31.2.7 DEFINITIONS:

E. The definitions in Subsection E apply only to Section 13, Subsection I (*additional rights of parents, students, and public agencies - due process hearings*).

(1) "Expedited hearing" means a hearing that is available on request by a parent or a public agency under 34 CFR Secs. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

(2) "Gifted services" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

~~[(3) "Summary due process hearing" means a hearing designed to proceed more quickly and incur less expense than a standard due process hearing, as explained under Paragraph (15) of Subsection I of 6.31.2.13 NMAC.]~~

~~[(4)](3) "Transmit" means to mail, send by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:~~

~~[6.31.2.7 NMAC - Rp, 6.31.2.7 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]~~

### 6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:

I. Reallocation of funds. If a new LEA is created, the base payment portion of the IDEA subgrant of the LEA that would have served children with disabilities now being served by the new LEA will be adjusted pursuant to 34 CFR Sec. 300.705(b) (2). IDEA funds to new charter schools that are LEAs will be allocated pursuant to 34 CFR Secs. 76.785-76.799 and 34 CFR Sec. 300.705(b). Pursuant to 34 CFR Sec. 300.705(c) if the department determines that a public agency is adequately providing FAPE to all children with disabilities residing in the area served by that public agency with state and local funds, the department may

reallocate any portion of the funds under this part that are not needed by that public agency to provide FAPE to other LEAs in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs or the department may also retain those funds for use at the state level as provided by 34 CFR Sec. 300.705(c).

[6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]

### 6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:

A. Preschool programs for children aged ~~[2]~~ 3 through 5.

~~[(2) A child who will turn three at any time during the school year who is determined eligible may enroll in a Part B preschool program at the beginning of the school year if the parent so chooses, whether or not the child has previously been receiving Part C services.]~~

(2) Eligibility to enroll in Part B preschool program.

~~(a) If a child turns three at any time during the school year and is determined to be eligible under Part B, the child may enroll in a Part B preschool program when the child turns three if the parent so chooses, whether or not the child has previously been receiving Part C services.~~

(b) Notwithstanding subparagraph (a) of this paragraph, if a child turns three at any time prior to July 1, 2012 and is enrolled in a Part C program, the parent has the option of having the child complete the remainder of the school year in early intervention services or, if the child is determined to be eligible under Part B, enrolling the child in a Part B preschool program.

(3) To ensure effective transitioning from IDEA Part C programs to IDEA Part B programs, each public agency must conduct a full and individual initial comprehensive evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.300, 300.301, 300.302, 300.304 and 300.305 and other department rules and standards before the initial provision of Part B special education and related services to a child with a disability.

(a) The initial comprehensive evaluation process shall be conducted in all areas of suspected disability.

(b) The Part B eligibility determination team shall review current assessments and shall determine the additional data and assessments needed for the comprehensive evaluation. Current assessments are defined as assessments, other than medical assessments, conducted no more than six months prior to the date of the meeting of the Part B eligibility

determination team.

(c) The Part B eligibility determination team must consider educationally relevant medical assessments as part of the review of existing evaluation data. The determination of eligibility may not be made solely on the basis of medical assessments. If the team considers medical assessments conducted more than six months prior to the date of the meeting, the team must document the appropriateness of considering such medical assessments.

(5) In particular:

(f) Each LEA shall designate a team including parents and qualified professionals to review existing evaluation data for each child entering the LEA's preschool program in compliance with 34 CFR Sec. 300.305, and based on that review to identify what additional data, if any, are needed to determine the child's eligibility for Part B services or develop an appropriate program in a manner that is consistent with Paragraph (3) of Subsection A of this section. The notice of procedural safeguards shall be given to the parents as provided in Paragraph (3) of Subsection D of 6.31.2.13 NMAC.

~~[(g) Each LEA shall initiate a meeting to develop an eligible child's IFSP, IEP or IFSP-IEP, in accordance with 34 CFR Sec. 300.323, no later than 15 days prior to the first day of the school year of the LEA where the child is enrolled or no later than 15 days prior to the child's entry into Part B preschool services if the transition process is initiated after the start of the school year, whichever is later, to ensure uninterrupted services. This IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.321 that includes parents and appropriate early intervention providers who are knowledgeable about the child.]~~

(g) Development of IFSP, IEP or IFSP-IEP.

(i) The IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.321 that includes parents. For children transitioning from Part C programs to Part B programs, the team must also include one or more early intervention providers who are knowledgeable about the child. "Early intervention providers" are defined as Part C service coordinators or other representatives of the Part C system.

(ii) For each child transitioning from a Part C program to a Part B preschool program, the LEA shall initiate a meeting to develop the eligible child's IFSP, IEP or IFSP-IEP, in accordance with 34 CFR Sec. 300.124. The IFSP, IEP or IFSP must be developed and implemented no later than the child's third birthday, consistent with 34 CFR Sec. 300.101(b).

(h) In compliance with 34 CFR Sec. 300.101(b)(2), if a child's birthday

occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin. Each public agency must engage in appropriate planning with the Part C lead agency so that the eligible child will be prepared to receive Part B special education and related services when the IEP team determines that the services under the IEP or IFSP will begin.

**E.** Participation in statewide and district-wide assessments. Each local educational agency and other public agencies when applicable shall include all children with disabilities in all statewide and district-wide assessment programs. Each public agency shall collect and report performance results in compliance with the requirements of 34 CFR [Sec.] Secs. 300.157 and 300.160(f) and Sec. 1111(h) of the Elementary and Secondary Education Act, and any additional requirements established by the department. Students with disabilities may participate: [6.31.2.11 NMAC - Rp, 6.31.2.11 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]

### **6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:**

**H.** State complaint procedures.

#### **(2) Requirements for complaints.**

**(a)** The SEB of the department shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint must: (i) be in writing; (ii) be submitted to the SEB (or to the secretary of education, in the case of a complaint against the department); (iii) be signed by the complainant or a designated representative and have the complainant's contact information; (iv) if alleging violations with respect to a specific child, include the name and address of the child and the school the child is attending; [(iv)] (v) include a statement that the department or a public agency has violated a requirement of an applicable state or federal law or regulation; [and (v)] (vi) contain a statement of the facts on which the allegation of violation is based, and a description of any efforts the complainant has made to resolve the complaint issue(s) with the agency (for a complaint against a public agency); and (vii) include a description of a proposed resolution of the problem to the extent known. Any complaint that does not contain each of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

**(d)** Pursuant to 34 CFR Sec. 300.153(c), the complaint must allege a violation that occurred not more than one year before the date the complaint is received

by the SEB in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 [NMSAC] NMAC.

#### **I.** Due process hearings.

**(2) Definitions.** In addition to terms defined in 34 CFR Part 300 and 6.31.2.7 NMAC, the following definitions apply to this Subsection I of 6.31.2.13 NMAC.

~~[(c)]~~ "Summary due process hearing" means a hearing designed to proceed more quickly and incur less expense than a standard due process hearing, as explained under Paragraph (15) of Subsection I of 6.31.2.13 NMAC.

~~[(d)]~~ [(c)] "Transmit" means to mail, send by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

#### **(3) Bases for requesting hearing.**

A parent or public agency may initiate an impartial due process hearing on the following matters:

(c) the public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of, or services to, a child who needs or may need gifted services[;

~~(d) an IDEA due process hearing provides a forum for reviewing the appropriateness of decisions regarding the identification, evaluation, placement or provision of a free appropriate public education for a particular child with a disability by the public agency that is or may be responsible under state law for developing and implementing the child's IEP or ensuring that a FAPE is made available to the child; the IDEA does not authorize due process hearing officers to consider claims asserting that the department should be required to provide direct services to a child with a disability pursuant to 20 USC Sec. 1413(g)(1) and 34 CFR Sec. 300.227 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the department has failed to adequately perform its duty of general supervision over educational programs for children with disabilities in New Mexico; accordingly, a due process hearing is not the proper forum for consideration of such claims and the department will decline to refer such claims against it to a hearing officer; such claims may be presented through the state-level complaint procedure under Subsection H of 6.31.2.13 NMAC above].~~

**(5) Request for hearing.** A parent requesting a due process hearing shall transmit written notice of the request to the public agency whose actions are in question and to the SEB of the department. A public agency requesting a due process hearing shall transmit written notice of the request to the parent(s) and to the SEB of the department. The written request shall state

with specificity the nature of the dispute and shall include:

(e) the name[;] and address [and telephone number(s)] of the party making the request (or available contact information in the case of a homeless party) [and, if the party is represented by an attorney or advocate, the name, address and telephone number(s) of the attorney or advocate];

~~[(g)]~~ a description of efforts the parties have made to resolve their dispute at the local level before filing a request for due process; and]

~~[(h)]~~ [(g)] a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;

~~[(h)]~~ [(h)] a request for an expedited hearing must also include a statement of facts sufficient to show that a requesting parent or public agency is entitled to an expedited hearing under 34 CFR Secs. 300.532(c) or 20 USC Sec. 1415(k)(3);

~~[(j)]~~ [(i)] a request for a hearing must be in writing and signed and dated by the parent or the authorized public agency representative; an oral request made by a parent who is unable to communicate by writing shall be reduced to writing by the public agency and signed by the parent;

~~[(k)]~~ [(j)] a request for hearing filed by or on behalf of a party who is represented by an attorney shall include a sufficient statement authorizing the representation; a written statement on a client's behalf that is signed by an attorney who is subject to discipline by the New Mexico supreme court for a misrepresentation shall constitute a sufficient authorization; and

~~[(h)]~~ [(k)] a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this paragraph.

#### **(10) Duties of the hearing officer.**

The hearing officer shall excuse himself or herself from serving in a hearing in which he or she believes a personal or professional bias or interest exists which conflicts with his or her objectivity. The hearing officer shall:

**(d)** transmit the decision to the parties and to the SEB within 45 days of the commencement of the timeline for the hearing, unless a specific extension of time has been granted by the hearing officer at the request of a party to the hearing, or at the joint request of the parties where the reason for the request is to permit the parties to pursue an ADR option; for an expedited hearing, no extensions or exceptions beyond the timeframe provided in Subparagraph (a) of Paragraph [(20)] (19) of Subsection I of 6.31.2.13 NMAC;

**(f)** the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph [(25)] (24) of

Subsection I of 6.31.2.13 NMAC below.

(12) Prehearing procedures. Unless extended by the hearing officer at the request of a party, within 14 days of the commencement of the timeline for a due process hearing and as soon as is reasonably practicable in an expedited case, the hearing officer shall conduct an initial prehearing conference with the parent and the public agency to:

(d) review the hearing rights of both parties, as set forth in Paragraphs [(16) and (17)] (15) and (16) of Subsection I of 6.31.2.13 NMAC below, including reasonable accommodations to address an individual's need for an interpreter at public expense;

(i) as appropriate, determine the current educational placement of the child pursuant to Paragraph [(27)] (26) of Subsection I of 6.31.2.13 NMAC below;

[(15)] Summary due process hearing. These summary due process hearing procedures are designed to afford parents and public agencies an alternative, voluntary dispute resolution process that requires less time and expense than a traditional due process hearing. The use of summary due process hearing procedures shall not alter the requirement that the public agency convene a resolution session within 15 days of its receipt of the request for the hearing, unless the parties agree to waive that option in writing or choose to use a FIEP meeting or mediation instead.

(a) Any party requesting a due process hearing may request that the dispute be assigned to a summary due process hearing track. A request for a summary due process hearing may be submitted simultaneously with the request for due process hearing, at the prehearing scheduling conference, or at a later time by agreement of all parties.

(b) Any party opposing a request for summary due process shall state its objection within 5 days of the date of receipt of the request for a summary due process hearing. The summary due process hearing option is voluntary. If a party timely states its opposition to this option, the matter will be placed on a traditional due process hearing track.

(c) On or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(d) On or before 5 days before the summary due process hearing, each party shall produce to the opposing party and to the hearing officer a copy of all documents that the party seeks to introduce into evidence at

the hearing and identify all witnesses that the party intends to call to testify at the hearing.

(e) Each party shall have one half (1/2) day to present its case. In the event that extensive cross-examination, arguments or other factors impede a party's ability to complete its case in one half day, the hearing officer shall have discretion to extend the time for the hearing, as needed.

(f) The hearing officer shall issue a decision to the parties within 7 days of the completion of the summary due process hearing.

(g) Except as modified herein, the procedural rules and procedures applicable to due process hearings as stated in Subsection I of 6.31.2.13 NMAC shall also apply to summary due process hearings.

[(16)](15) Any party to a hearing has the right to:

[(17)](16) Parents involved in hearings also have the right to:

[(18)](17) The record of the hearing and the findings of fact and decisions described above must be provided at no cost to the parents.

[(19)](18) Limitations on the hearing.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph [(19)] (18) of Subsection I of 6.31.2.13 NMAC above shall not apply to a parent if the parent was prevented from requesting the hearing due to:

[(20)](19) Rules for expedited hearings. The rules in Paragraphs (4) through [(19)] (18) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph [(20)] (19) of Subsection I of 6.31.2.13 NMAC above, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC, and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph [(20)] (19) of Subsection I of 6.31.2.13 NMAC above. The timeline for resolution sessions provided in 34 CFR Sec. 300.532(c)

(3) shall be observed.

(f) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph [(25)] (24) of Subsection I of 6.31.2.13 NMAC below.

[(21)](20) Decision of the hearing officer.

(a) In general. Subject to Subparagraph (b) of Paragraph [(21)] (20) of Subsection I of 6.31.2.13 NMAC below, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

[(22)](21) Rule of construction. Nothing in this Subsection I shall be construed to affect the right of a parent to file a complaint with the SEB of the department, as described under Subsection H of 6.31.2.13 NMAC.

[(23)](22) Modification of final decision. Clerical mistakes in final decisions, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the hearing officer at any time on the hearing officer's own initiative or on the request of any party and after such notice, if any, as the hearing officer orders. Such mistakes may be corrected after a civil action has been brought pursuant to Paragraph [(25)] (24) of Subsection I of 6.31.2.13 NMAC below only with leave of the state or federal district court presiding over the civil action.

[(24)](23) Expenses of the hearing. The public agency shall be responsible for paying administrative costs associated with a hearing, including the hearing officer's fees and expenses and expenses related to the preparation and copying of the verbatim record, its transmission to the SEB, and any further expenses for preparing the complete record of the proceedings for filing with a reviewing federal or state court in a civil action. Each party to a hearing shall be responsible for its own legal fees or other costs, subject to Paragraph [(26)] (25) of Subsection I of 6.31.2.13 NMAC below.

[(25)](24) Civil action.

[(26)](25) Attorney fees.

[(27)](26) Child's status during proceedings.

(c) If a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the public agency and the parents for purposes of Subparagraph (a) of Paragraph [(27)] (26) of Subsection I of 6.31.2.13 NMAC.

M. Computation of time.

(3) Notwithstanding Paragraph (1) of this subsection, if the due date of a decision referenced in Subsection I of 6.31.2.13 NMAC falls on a Saturday, a Sunday or a legal holiday, the decision must be mailed no later than the actual due date.

A decision is considered "mailed" when addressed, stamped and placed in a United States postal service mailbox. If a parent exercises the option of receiving the decision electronically, the decision is "mailed" when transmitted electronically.

[6.31.2.13 NMAC - Rp, 6.31.2.13 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]

## NEW MEXICO COMMISSIONER OF PUBLIC LANDS

This is an amendment to 19.2.18 NMAC, Section 8, Relating to State Land Trusts Advisory Board, effective 02/29/12

**19.2.18.8 POLICY:** It is the policy of the commissioner of public lands to provide the state land trusts advisory board with all information requested by the board regarding the policies and procedures, rules, and financial information of the New Mexico state land office. The commissioner shall cooperate with the board and obtain its consensus as it seeks to advise and assist the commissioner in protecting and maintaining the assets and resources of the state trust lands and maximizing the income as mandated by the Constitution of New Mexico, the Enabling Act, and by state statute. The commissioner and staff shall meet with the state land trusts advisory board at least ~~four (4)~~ two (2) times per year in addition to the annual joint meeting with the state land trusts advisory board and beneficiaries. Board members may choose to participate in properly noticed meetings by telephone or other similar communications equipment, but only when attendance in person is difficult or impossible. Each board member participating by telephone or other similar equipment must be identified when speaking, all board members must be able to hear each other at the same time and hear any speaker, and members of the public attending the meeting must be able to hear any board member.

[12/31/99; 19.2.18.8 NMAC - Rn, 19 NMAC 2. SLO 18.8, 09/30/02; A, 02/29/12]

## NEW MEXICO TAXATION AND REVENUE DEPARTMENT

This is an amendment to 3.2.1 NMAC, Section 30 effective 2/29/2012.

3.2.1.30 **USE AND USING.** The definition of "use" and "using" pursuant to Subsection N of Section 7-9-3 NMSA 1978 includes three components: use, consumption and storage.

A. **Use:** The first component, "use", means to employ or utilize

property or a service for a particular purpose. Use does not include mere ownership or possession of property. Use does not include the mere treatment, processing or servicing of tangible property to make the property fit for utilization when the ultimate use of the property is outside New Mexico. Use does not include the transfer to the customer of tangible personal property in the course of the treatment, processing or servicing or the return of the property to the owner at the conclusion of the treatment, processing or servicing.

(1) Example 1: The uses of a chair are many and varied. Its designed or intended use is being sat on by human beings. A chair, however, may also be "used" to wedge a door shut, as a step-ladder to reach something, as a receptacle to hold objects, as a display item, as a support to prop up a table or shelf and many other purposes not planned by its designer or maker. In contrast, a chair is not "used" by being assembled, polished, painted, upholstered or recaned.

(2) Example 2: B enters into a contract with C, a firm in New Mexico. Under the contract, B sends a gaseous compound to C for separation. C returns the separated materials to B or delivers them to D for further processing. B has not used the compound or the separated materials in New Mexico.

[A:]B. **Storage:**

(1) The term "using" includes storage in New Mexico except where the storage is for subsequent sale of the property in the ordinary course of the seller's business or for use solely outside New Mexico.

(2) Example 1: D, a resident of Utah, buys pipe in Texas to be used solely in Utah. The pipe is shipped into New Mexico, unloaded, and stored for three days. It is then reloaded and shipped to Utah. There is no use of the pipe in New Mexico within the meaning of Subsection N of Section 7-9-3 NMSA 1978. The transaction which occurred was merely storage for use solely outside New Mexico.

(3) Example 2: X Construction Company purchases a bulldozer in Illinois intending to use it in its construction business. The bulldozer is then delivered to X in New Mexico. X does not have any immediate use for the bulldozer so it is stored in the back lot of the construction company with other equipment. Two months later X changes plans and sells the bulldozer to Y Construction Company who needs it for a job. The bulldozer remained in storage from the day X received it until the day it was sold. Since the storage of the tractor was not for subsequent sale in the ordinary course of X's business, the storage of the tractor is a "use" within the meaning of Subsection N of Section 7-9-3 NMSA 1978. Therefore, X Construction Company will be subject to the compensating tax on the value of the tractor

because it has used the property in New Mexico.

[B. ~~Use - general example:~~

The following example illustrates the application of Subsection N of Section 7-9-3 NMSA 1978. Example: D purchases a juke box in Texas for use in a coin-operated music business in New Mexico. D maintains that the machine is not being used in New Mexico within the meaning of the law. D says that the machine is being held for sale in the ordinary course of business since the machine is paid for by people playing records on it. D is not holding the machine for resale but is merely granting a license to use the machine.]

[9/29/67, 12/5/69, 3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.1.30 NMAC - Rn & A, 3 NMAC 2.1.30, 4/30/01; A, 12/30/03; A, 2/29/12]

## End of Adopted Rules Section

## Submittal Deadlines and Publication Dates 2012

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Issue Number 9	May 1	May 15
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