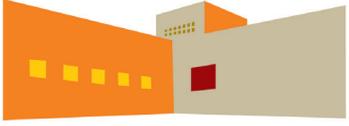


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New Mexico Register

The official publication for all official notices of rulemaking
and filing of proposed, adopted and emergency rules.

Volume XXIX - Issue 23 - December 11, 2018

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The New Mexico Register

Published by the Commission of Public Records,
Administrative Law Division

1205 Camino Carlos Rey, Santa Fe, NM 87507

The *New Mexico Register* is published twice each month by the Commission of Public Records, Administrative Law Division. The cost of an annual subscription is \$270.00. Individual copies of any Register issue may be purchased for \$12.00. Subscription inquiries should be directed to: The Commission of Public Records, Administrative Law Division, 1205 Camino Carlos Rey, Santa Fe, NM 87507.

Telephone: (505) 476-7942; Fax: (505) 476-7910; E-mail: staterules@state.nm.us.

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

New Mexico Register

Volume XXIX, Issue 23

December 11, 2018

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Notices of Rulemaking and Proposed Rules

**HUMAN SERVICES
DEPARTMENT
INCOME SUPPORT DIVISION

NOTICE OF PUBLIC HEARING**

The New Mexico Human Services Department (HSD) adopted emergency rules for the Federal Poverty Level (FPL), effective October 1, 2018. The Department is holding a public hearing to adopt the rules to make them permanent pursuant to Section 14-4-5.6 NMSA 1978. Regulations issued pursuant to the act are contained in 45 CFR Parts 200-299. Administration of the HSD, including its authority to promulgate regulations, is governed by Chapter 9, Article 8, NMSA 1978 (Repl. 1983). The rules were implemented to comply with the Federal mandate; failure to implement the emergency rules would have placed the Department in violation of Federal law.

The HSD is required to make changes to 8.102.500 of the New Mexico Administrative Code (NMAC) and 8.106.500 NMAC. The Standard Utility Allowances and the Federal Poverty Guidelines are determined by the United States Department of Agriculture (USDA) and Food and Nutrition Services (FNS) each federal fiscal year. These amounts are used to determine the maximum Supplemental Nutrition Assistance Program, Cash Assistance and Low Income Heating and Energy Assistance Programs benefit issuance amounts.

HSD will hold a public hearing to allow public comment on the amendment of the rules for the FPL regulations that were published November 27, 2018. The hearing will be held on Thursday, January 10, 2019 from 2:00 p.m. to 3:00 p.m., at the HSD Administrative Services Division (ASD) conference room, 1474 Rodeo Road, Santa Fe, NM 87505. The conference room is at the ASD Rodeo Building, first floor.

The Human Services Register Vol. 41 No. 32 outlining the regulations is available on the HSD's website at: <http://www.hsd.state.nm.us/LookingForInformation/income-support-division-registers.aspx>. Individuals wishing to testify or to request a copy of the final regulations should contact the Income Support Division, P.O. Box 2348, Santa Fe, NM 87504-2348, or by calling 505-827-7244.

If you are a person with a disability and you require this information in an alternative format, or you require a special accommodation to participate in any HSD public hearing, program, or service, please contact the Assistant General Counsel/American Disabilities Act Coordinator, at 505-827-6201 or through the New Mexico Relay system, at 711 or toll free at 1-800-659-1779. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.

Individuals who do not wish to attend the hearing may submit written comments which must be received by 5:00 p.m. on the date of the hearing, Thursday, January 10, 2019. All comments received will be posted to the HSD website within three days of receipt. Comments can be found at: <http://www.hsd.state.nm.us/LookingForInformation/income-support-division-registers.aspx>.

Please send comments to:

Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

You may also send comments electronically to: HSD-isdrules@state.nm.us.

**REGULATION AND
LICENSING DEPARTMENT
PHYSICAL THERAPY, BOARD
OF**

**PUBLIC RULE HEARING AND
REGULAR BOARD MEETING**

The New Mexico Physical Therapy Board will hold a rule hearing on Friday, January 11, 2019, at 12:00 p.m. Following the rule hearing, the Board will convene a board meeting to adopt the rules and take care of regular business. The rule hearing and board meeting will be held at the Regulation and Licensing Department, 2550 Cerrillos, Road 2nd Floor, Santa Fe, NM, in the Rio Grande Conference Room.

The purpose of the rule hearing is to consider proposed amendments to the following rules:

- 16.20.2 NMAC- Examinations
- 16.20.3 NMAC- Issuance of Licenses
- 16.20.4 NMAC- Temporary License
- 16.20.6 NMAC - Physical Therapist Assistance
- 16.20.7 NMAC - Physical Therapist Supervision
- 16.20.13 NMAC – (New Part) Dry Needling Provision

To obtain and review copies of the proposed changes you may go to the Board's website at: http://www.rld.state.nm.us/boards/Physical_Therapy_Rules_and_Laws.aspx, or contact the Boards and Commissions Division at 505.476.4622.

The Board is currently accepting public comments on the proposed amendments. Please submit written comments on the proposed changes to Cynthia Lyons, Board Administrator, via electronic mail at: Physicaltherapy@state.nm.us, or by regular mail at P.O. Box 25101, Santa Fe, NM 87504 no later than Thursday, January 10, 2019. Comments will be posted to the RLD website at: <http://www.rld.state.nm.us/boards/>

Physical Therapy Rules and Laws.aspx. Persons will also be given the opportunity to present their comments at the rule hearing.

An individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or other form of auxiliary aid or service to attend or participate in the hearing, please contact Cynthia Lyons, Board Administrator 505.476.4622.

Statutory Authority: Legal authority for this rulemaking can be found in the Physical Therapy Act, NMSA 1978 Sections 61-12D-1 through -12D19 which, among other provisions, specifically authorizes the Board to “adopt rules necessary to implement the provisions of the Physical Therapy Act.” Section 61-12D-5, NMSA 1978.

Summary of Proposed Changes:

16.20.2 NMAC - Physical Therapists

Add language to clarify how many times an applicant may sit for the NPTE in a 12-month period based on the requirements of the testing agency. Add new “Subsection 11” which will provide applicants with an alternate method to apply for the FSBPT national licensure exam. With this method, the applicant does not need to apply with the State of New Mexico until they have passed the national exam.

16.20.3 NMAC - Issuance of Licenses

Language change is to correct a grammatical error and adds new subsections to Section 8 which will be added to include criminal background checks per the requirements necessary to set up a Compact for licensure through the Federation of State Boards of Physical Therapy (FSBPT).

16.20.4 NMAC – Temporary Licenses

Correction of grammatical errors.

16.20.6 NMAC – Physical Therapist Assistants

Correction of grammatical errors.

16.20.7 NMAC Supervision

Clarify the use of both the physical therapist and physical therapist assistant, providing supervision of unlicensed aides.

16.20.13 NMAC – Dry Needling Provision (New Part)

This new part is added to clarify the practice of “dry needling” in the State of New Mexico. The procedure is allowed within the scope of practice for a physical therapist and is supported by the American Physical Therapy Association (APTA) and the Federation of State Boards for Physical Therapy (FSBPT). This new part will clarify the procedure to obtain certification required when providing dry needling services in the State of New Mexico.

End of Notices of Rulemaking and Proposed Rules

Adopted Rules

Effective Date and Validity of Rule Filings

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

AGRICULTURE DEPARTMENT		
<p>TITLE 21 AGRICULTURE AND RANCHING CHAPTER 20 HEMP CULTIVATION RULE PART 2 HEMP CULTIVATION RULE</p> <p>21.20.2.1 ISSUING AGENCY: New Mexico State University, New Mexico Department of Agriculture, MSC 3189, Box 30005, Las Cruces, New Mexico 88003, Telephone No. (575) 646-3007. [21.20.2.1 NMAC - N, 12/11/2018]</p> <p>21.20.2.2 SCOPE: All individuals, businesses, agencies, institutions, or other entities engaged in the production of hemp in New Mexico. [21.20.2.2 NMAC - N, 12/11/2018]</p> <p>21.20.2.3 STATUTORY AUTHORITY: Granted to the Board of Regents of New Mexico State University under the Industrial Hemp Research and Development Program Act, Chapter 76, Article 24, Section 2, NMSA 1978 Compilation. [21.20.2.3 NMAC - N, 12/11/2018]</p> <p>21.20.2.4 EFFECTIVE DATE: December 11, 2018, unless a later date is cited at the end of the section. [21.20.2.4 NMAC - N, 12/11/2018]</p> <p>21.20.2.5 DURATION: Permanent. [21.20.2.5 NMAC - N, 12/11/2018]</p> <p>21.20.2.6 OBJECTIVE: Establishes rules regulating the licensing of growers producing hemp in New Mexico and the establishment of testing processes to ensure</p>	<p>uniformity to the definition of hemp. [21.20.2.6 NMAC - N, 12/11/2018]</p> <p>21.20.2.7 DEFINITIONS:</p> <p>A. "Annual Production License" means license issued for the production of a single crop that is destroyed within 240 days of planting.</p> <p>B. "Applicant" means individuals, businesses, agencies, institutions, or other entities that have submitted an application to the department.</p> <p>C. "Application" means documents submitted to the department by an applicant as part of the process for obtaining a hemp production license for a single location.</p> <p>D. "Business Day" means normal business hours and days as defined by New Mexico State University policy.</p> <p>E. "Cannabis" means a plant of the genus cannabis.</p> <p>F. "Continuous Production License" means license issued for the production of hemp as part of a plant nursery, greenhouse or similar operation in which viable hemp plant(s) are produced or present throughout the year in a location.</p> <p>G. "Crop" means planting of one or more hemp varieties within a two week (2 week) contiguous period within a location. Cannabis varieties, not planted within a two week period within a location, shall be subject to a separate license and license fee.</p> <p>H. "Department" means the New Mexico Department of Agriculture.</p> <p>I. "Destroy(ed)" meaning method approved by the department to ensure non-viability of a cannabis plant. Methods may include shredding, disking, burning, or other methods as prescribed by the director.</p>	<p>J. "Director" means the director/secretary of New Mexico Department of Agriculture or designee.</p> <p>K. "Hemp" means the plant Cannabis sativa L. and any part of the plant, whether growing or not, containing a delta-9-tetrahydrocannabinol concentration of no more than three-tenths percent (.3 %) on a dry weight basis.</p> <p>L. "License" means document issued to an applicant by the department authorizing a licensee to produce hemp at a location.</p> <p>M. "Licensee" means individuals, businesses, agencies, institutions, or other entities that possess a valid hemp production license.</p> <p>N. "Location" means one contiguous growing area of any size, or multiple non-contiguous growing areas, totaling no more than 10 acres, within a 2.5 mile radius. Non-contiguous growing areas must be owned or leased by a single licensee.</p> <p>O. "THC" means delta-9 tetrahydrocannabinol.</p> <p>P. "Variety" means cannabis cultivar or strain with known or unknown THC levels. [21.20.2.7 NMAC - N, 12/11/2018]</p> <p>21.20.2.8 APPLICATION/ LICENSE:</p> <p>A. Annual Production License: Applicants cultivating hemp for annual production shall apply for an annual hemp production license no less than 25 business days prior to planting of each crop at each location. The effective date of an application received by the department shall be the date postmarked on a properly completed application received by mail. The effective date of</p>

application for documents submitted in person shall be the actual calendar date the applicant presents a properly completed application. Incomplete or improperly completed applications will be identified as invalid by the department and returned to the applicant for completion or correction. A separate application and application fee are required prior to planting of each new crop at each location. An annual hemp production license is valid for 240 days after date of issuance, or until crop destruction, whichever occurs first, for specified cannabis varieties grown annually at the specified location identified in the application.

B. Continuous Production License:

Applicants cultivating hemp for continuous production and propagation purposes shall apply for a continuous production license no less 25 business days prior to planting or prior to other propagative activities. Applicants producing hemp in continuous production shall apply for a renewal of their continuous production license prior to February 1 of each year as defined by department policy. A separate application and application fee are required for each licensed location. Incomplete or improperly completed renewal applications will be identified as invalid by the department and returned to the applicant for completion or correction. The effective date of a renewal application received by the department shall be the date postmarked on a properly completed application received by mail. The effective date of application for renewal application, submitted in person, shall be the actual calendar date the applicant presents a properly completed application. A continuous production license expires January 31 of each year.
[21.20.2.8 NMAC - N, 12/11/2018]

21.20.2.9 LICENSEE REQUIREMENTS: Licensee shall:

A. submit all required documents by due dates specified by the department;

B. not reassign or transfer to another business, location, individual, or other entity a license;

C. destroy cannabis varieties covered under this rule and found not to be in compliance with requirements set forth in this rule or department policy;

D. not sell, transport, process, or utilize a cannabis variety in any manner without a valid document issued by the department demonstrating compliance with requirements set forth in regulations or department policies;

E. remit payment to the department for fees associated with enforcement of this rule within 20 calendar days of receipt of notice; and

F. follow all state and federal requirements relevant to hemp production.
[21.20.2.9 NMAC - N, 12/11/2018]

21.20.2.10 FEES:

A. Fees associated with the application for a license shall include but not exceed the following stated amounts for each license:

(1) Annual production license: \$800 per location.

(2) Continuous production license: \$900 per location.

(3) Additional \$100 late fee for continuous production license renewal application received after February 1.

(4) Annual inspection fees for continuous and annual licenses per location:

(a) Outdoor production: \$6.00 per acre; minimum \$6.00.

(b) Indoor production: \$0.75 per 1,000 square feet; minimum \$5.00.

(c) Additional varietal fee: \$25 per variety in excess of one variety.

B. Annual inspection fees include only the cost of routine inspections and sampling visits as defined by department policy. Licensee shall be financially responsible for additional staff time and or fees directed at noncompliance

issues, or additional sampling requirements, or other expenditures as required by the department and related to compliance requirements found in this rule and department policy. Reimbursable staff time or fees may be associated with mileage, per diem, and staff hours, as allowed by department rule or policy.
[21.20.2.10 NMAC - N, 12/11/2018]

21.20.2.11 INSPECTION/SAMPLING/TESTING:

A. All locations are subject to inspections by department staff or its authorized agents, without prior notification, to verify application information and compliance with rule requirements.

B. Unless directed otherwise by the department, all cannabis variety samples collected in support of obtaining a THC determination, shall be collected by the licensee at the direction and supervision of department staff. Licensee shall be responsible for delivery of cannabis variety samples to a department-approved laboratory, within five calendar days of sampling, to determine THC content using quantification methods approved by the department. It is the responsibility of each licensee to ensure the department receives THC quantification results for each sample prior to harvest, processing, or utilization of a cannabis variety in any manner. Licensee shall be financially responsible for costs associated with delivery and testing of samples. Sampling methodology shall be defined in department in policy.
[21.20.2.11 NMAC - N, 12/11/2018]

21.20.2.12 NONCOMPLIANT VARIETIES:

A sample test result containing a delta-9- tetrahydrocannabinol concentration of more than three-tenths percent (.3 percent) on a dry weight basis (post decarboxylation) shall constitute evidence that at least one cannabis variety, plant or part of a plant in a location does not meet the THC requirements for hemp. Cannabis varieties, within a location, exhibiting THC levels greater than

three-tenths of one percent (0.3 percent) shall be destroyed by a date determined by the department. The licensee is responsible for all costs related to crop destruction. Licensee may be provided the opportunity to resample and retest, pursuant to department policy.

[21.20.2.12 NMAC - N, 12/11/2018]

21.20.2.13 VIOLATIONS/PENALTIES: It is a violation of state and federal law to produce hemp without a valid hemp production license. Individuals, businesses, agencies, institutions, or other entities responsible for locations producing hemp, without a valid license will be provided five business days, after receipt of notification by the department, to submit a valid application or destroy the crop/plant. In accordance with state or federal law, the department may suspend or deny a license.

[21.20.2.13 NMAC - N, 12/11/2018]

21.20.2.14 EXEMPTIONS: The director shall have authority to review and grant exceptions to rule requirements and rule violations.

[21.20.2.14 NMAC - N, 12/11/2018]

21.20.2..15 RECORD RETENTION: The department shall retain applicant records including legal descriptions of hemp production locations for a period of no less than three years and in compliance with state records retention schedules.

[21.20.2.15 NMAC - N, 12/11/2018]

HISTORY OF 21.20.2 NMAC:
[RESERVED]

ENVIRONMENT DEPARTMENT

The Secretary of the New Mexico Environment Department approved by Order on November 19, 2018 hearing, to repeal rule 20.1.9 NMAC, Rulemaking Procedures – Environment Department (adopted 12/01/2007) and replace it with 20.1.9 NMAC, Rulemaking Procedures – Environment Department, (adopted on 11/19/2018), and effective 12/11/2018.

ENVIRONMENT DEPARTMENT

TITLE
20 ENVIRONMENTAL PROTECTION CHAPTER
1 ENVIRONMENTAL PROTECTION GENERAL PART 9 RULEMAKING PROCEDURES - ENVIRONMENT DEPARTMENT

20.1.9.1 ISSUING

AGENCY: New Mexico Environment Department.
[20.1.9.1 NMAC - Rp 20.1.9.1 NMAC, 12/11/18]

20.1.9.2 STATUTORY

AUTHORITY: This part is adopted pursuant to Section 3-29-9, Subsection D of Section 9-7A-6, and Sections 14-4-1 through 14-4-11 NMSA 1978.
[20.1.9.2 NMAC - Rp 20.1.9.2 NMAC, 12/11/2018]

20.1.9.3 SCOPE: This part governs the procedures in all regulatory change hearings before the department pursuant to the Department of Environment Act, Subsection D of Section 9-7A-6 NMSA 1978; the Sanitary Projects Act, Sections 3-29-1 through 3-29-20 NMSA 1978; and the State Rules Act Sections 14-4-1 through 14-4-11 NMSA 1978.

[20.1.9.3 NMAC - Rp 20.1.9.3 NMAC, 12/11/2018]

20.1.9.4 DURATION:

Permanent.
[20.1.9.4 NMAC - Rp 20.1.9.4 NMAC, 12/11/2018]

20.1.9.5 EFFECTIVE

DATE: December 11, 2018, unless a later date is cited at the end of a section.
[20.1.9.5 NMAC - Rp 20.1.9.5 NMAC, 12/11/2018]

20.1.9.6 OBJECTIVE: The purposes of this part are:

A. to standardize the procedures used in rulemaking proceedings before the department pursuant to the Department of Environment Act, the Sanitary Projects Act, and the State Rules Act;

B. to encourage public participation in the regulatory change hearings conducted by the department pursuant to the Department of Environment Act and Sanitary Projects Act;

C. to make possible the effective presentation of the evidence and points of view of parties and members of the general public;

D. to allow all interested persons a reasonable opportunity to submit data, views, or arguments orally or in writing; and

E. to assure that rulemaking proceedings pursuant to the Department of Environment Act, the Sanitary Projects Act, and the State Rules Act are conducted by the department in a fair and equitable manner.

[20.1.9.6 NMAC - Rp 20.1.9.6 NMAC, 12/11/2018]

20.1.9.7 DEFINITIONS:

As used in this part:

A. “department” means the New Mexico environment department;

B. “document” means any paper, exhibit, pleading, motion, response, memorandum, decision, order, or other written or tangible item that is filed in a proceeding under this part, or is brought to or before the secretary for consideration, but does not include a cover letter accompanying a document transmitted for filing;

C. “exhibit” means any document or tangible item submitted for inclusion in the hearing record;

D. “general public” includes any person attending a hearing who has not submitted a notice of intent to present technical testimony;

E. “governing law” means the statute, including any applicable case law, which authorizes and governs the decision on the proposed regulatory change;

F. “hearing clerk”
means the department employee designated by the secretary as the hearing clerk for the department;

G. “hearing officer”
means the person designated by the secretary of the department to conduct a hearing under this part; the hearing officer may be an employee of the department;

H. “hearing record”
means:

- (1) the transcript of proceedings; and
- (2) the record proper;

I. “participant”
means any person who participates in a rulemaking proceeding before the secretary;

J. “party” means the petitioner, any person filing a notice of intent to present technical testimony, and any person filing an entry of appearance;

K. “person” means an individual or entity, including federal, state, local, and tribal governmental entities, however organized;

L. “petitioner”
means the person who petitioned the secretary for the regulatory change that is the subject of the rulemaking hearing;

M. “provide to the public” means for the secretary to distribute rulemaking information by:

- (1) posting it on the department website;
- (2) posting it on the New Mexico sunshine portal;
- (3) making it available at the department’s district, field, and regional offices;
- (4) sending it by email to persons who have made a written request for notice of announcements addressing the subject of the rulemaking proceeding and who have provided an email address to the secretary’s hearing office administrator;
- (5) sending it by email to persons who have participated in the rulemaking and who have provided an email address to the secretary’s hearing office administrator;

- (6) sending written notice that includes, at a minimum, an internet and street address where the information may be found to persons who provided a postal address; and
- (7) providing it to the New Mexico legislative council service for distribution to appropriate interim and standing legislative committees.

N. “record proper”
means all documents related to the hearing and received or generated by the secretary prior to the beginning, or after the conclusions, of the hearing, including but not limited to:

- (1) the petition for hearing, including the proposed regulatory change and any response thereto;
- (2) the notice of hearing;
- (3) affidavits of publication;
- (4) a copy of all publications in the New Mexico register relating to the proposed rule;
- (5) notices of intent to present technical testimony;
- (6) all written pleadings, including motions and responsive pleadings and orders;
- (7) a copy of any technical information that was relied upon in formulating the final rule;
- (8) statements for the public record or other relevant materials received by the department during the public comment period;
- (9) the hearing officer’s report, if any;
- (10) a copy of the full text of the initial proposed rule, the full text of the final adopted rule, and the concise explanatory statement filed with the state records administrator;
- (11) post-hearing submissions, if allowed; and
- (12) the secretary’s decision and the reasons therefore; and
- (13) any correction made by the state records administrator pursuant to Section 14-4-3 NMSA 1978.

O. “regulation” means any regulation, rule, or standard promulgated by the secretary and affecting one or more persons, besides the secretary and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts;

P. “regulatory change” means the adoption, amendment or repeal of a regulation;

Q. “secretary”
means the secretary of the New Mexico environment department, the secretary’s designee, or any person who properly assumes the role of the secretary in the event of the secretary’s recusal or disqualification.

R. “service” means personally delivering a copy of the document, exhibit, or pleading to the person required by this part to be served; mailing it to that person; or if that person has agreed, sending it by facsimile or electronic transmission; if a person is represented by an attorney, service of the document shall be made on the attorney; service by mail is complete upon mailing the document; service by facsimile or electronic transmission is complete upon transmission of the document.

S. “technical testimony” means scientific, engineering, economic, or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing; and

T. “transcript of proceedings” means the verbatim record (audio recording or stenographic) of the proceedings, testimony, and argument in the matter, together with all exhibits proffered at the hearing, whether or not admitted into evidence, including the recording of any motion hearings or prehearing conferences.
[20.1.9.7 NMAC - Rp 20.1.9.7 NMAC, 12/11/18]

20.1.9.8 POWERS AND DUTIES OF THE DEPARTMENT AND HEARING OFFICER:

A. Department: The secretary of the department shall exercise all powers and duties prescribed by Subsection D of Section 9-7A-6 or Section 3-29-9 NMSA 1978, and by this part, and not otherwise delegated to the hearing officer. The secretary shall have the authority to take all measures necessary and appropriate to maintain an orderly, efficient and fair proceeding.

B. Hearing officer: The secretary shall designate a hearing officer for each hearing who shall exercise all powers and duties prescribed or delegated under this part. The hearing officer shall conduct a fair and equitable proceeding, assure that the facts are fully elicited, and avoid delay. The hearing officer shall have authority to take all measures necessary for the maintenance of order and or the efficient, fair, and impartial consideration of issues arising in proceedings governed by this part, including, but not limited to:

- (1) conducting hearings under this part;
- (2) ruling on motions and procedural requests that do not seek final resolution of the proceeding, and issuing all necessary orders;
- (3) administering oaths and affirmations, admitting or excluding evidence, examining witnesses, and allowing post-hearing submissions;
- (4) making such orders as may be necessary to preserve decorum and to protect the orderly hearing process;
- (5) if requested by the secretary, preparing and filing a report of the hearing, with recommendations for the secretary's action;
- (6) requesting parties to file original documents with the secretary's hearing office administrator; and
- (7) requesting a party to submit a proposed statement of reasons in support of the secretary's decision.

C. Qualifications: The

hearing officer may be an independent contractor, shall be knowledgeable of the laws of the state and of administrative hearing procedures, and shall not be:

- (1) an employee of the department, except for the secretary, or unless employed by the department as a hearing officer;
- (2) a person who has a personal bias or prejudice concerning a party, a party's lawyer, or consultant; has personal knowledge of disputed facts concerning the proceeding; is related to a party within the third degree of relationship; or has a financial interest in the proceeding.

D. Notice of hearing officer assignment: If a hearing officer other than the secretary is assigned, the secretary's hearing office administrator shall notify the parties of the name and address of the hearing officer. The secretary's hearing office administrator shall also, at that time, forward to the hearing officer copies of all documents filed to date.

[20.1.9.8 NMAC - Rp 20.1.9.8 NMAC, 12/11/2018]

20.1.9.9 GENERAL PROVISIONS:

A. Liberal construction: This part shall be liberally construed to carry out its purpose.

B. Severability: If any part or application of this part is held invalid, the remainder of this part or its application to other persons or situations shall not be affected.

C. Computation of time: In computing any period of time prescribed or allowed by this part, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal state holiday, in which event the time is extended until the end of the next day, which is not a Saturday, Sunday, or legal state holiday. Whenever a party must act within a prescribed period after service upon them, and service is

by mail, three days is added to the prescribed period.

D. Extension of time: The secretary or hearing officer may grant an extension of time for the filing of any document upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.
[20.1.9.9 NMAC - Rp 20.1.9.9 NMAC, 12/11/2018]

20.1.9.10 DOCUMENT REQUIREMENTS – FILING, SERVICE, AND EXAMINATION:

A. The filing of any document as required by this part shall be accomplished by delivering the document to the secretary's hearing office administrator.

B. Any person filing any document shall:

- (1) provide the secretary's administrator with the original document;
- (2) if the document is a notice of intent to present technical testimony filed by any person other than the petitioner, serve a copy thereof on the petitioner.

C. The petitioner and any person who has filed a timely notice of intent to present technical testimony under this part may inspect all documents that have been filed in a proceeding in which they are involved as participants. Such inspection shall be permitted in accordance with the Inspection of Public Records Act, Sections 14-2-1 through 14-2-12 NMSA 1978. The secretary's hearing office administrator shall notify the petitioner and all persons who have filed a timely notice of intent to present technical testimony by email whenever any document is filed in a proceeding under this part. Any such person who does not provide an email address shall instead be notified by mail.

D. All documents filed under this part shall be made available to any person for inspection upon request and shall, to the extent required by law, be made available on the department's website and the New Mexico sunshine portal.

E. Examination
 allowed: Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any rulemaking proceeding before the secretary. Such documents shall be made available by the secretary’s hearing office administrator, as appropriate, and shall also be made available on the New Mexico sunshine portal. If the secretary’s hearing office administrator determines that any part of the rulemaking record cannot be practicably displayed or is inappropriate for public display on the New Mexico sunshine portal, the secretary’s hearing office administrator shall describe that part of the record, shall note on the New Mexico sunshine portal that the part of the record is not displayed, and shall provide instructions for accessing or inspecting that part of the record.

F. Cost of duplication:
 The cost of duplicating documents shall be borne by the person seeking copies of such documents, but the secretary’s hearing office administrator shall not charge a fee for providing the notice of proposed rulemaking in electronic form. [20.1.9.10 NMAC – Rp 20.1.9.10 NMAC, 12/11/2018]

20.1.9.11 EX PARTE DISCUSSIONS: At no time after the filing of a petition under this part shall any petitioner or member of the public discuss ex parte the merits of the proceeding with the secretary or hearing officer. This prohibition does not preclude department staff who are not and have not been involved in the petition from conferring with the secretary or hearing officer. [20.1.9.11 NMAC - Rp 20.1.9.11 NMAC, 12/11/2018]

20.1.9.12 PREHEARING PROCEDURES:
A. Petition for regulatory changes.
(1) Any person, including the department, may

file a petition with the secretary to adopt, amend or repeal any regulation within the jurisdiction of the secretary.
(2) If the department is the petitioner and intends to file a petition under the Sanitary Projects Act, the department shall prepare the proposed regulatory change in consultation with representatives of the associations as defined in Section 3-29-2 NMSA 1978.

(3) The petition shall be in writing and shall include a statement of reasons for the regulatory change. The proposed regulatory change, indicating any language to be added or deleted, shall be attached to the petition.

(4) The secretary shall determine no later than 60 days after receipt of the petition whether or not to hold a public hearing on the petition.

(5) If the secretary determines to hold a public hearing on the petition, the secretary may issue such orders specifying procedures for the conduct of the hearing, in addition to those provided by this part, as may be necessary and appropriate.

B. Notice of hearings.
(1) The secretary shall provide to the public notice of the proposed rulemaking at least 30 days prior to the hearing. Notice of the proposed rulemaking shall include publication in at least one newspaper of general circulation in the state, publication in the New Mexico register, the department’s website, and such other means as the secretary may direct or are required by law.

(2) The notice of proposed rulemaking shall state:
(a) the subject of the proposed rule, including a summary of the full text of the proposed rule and a short explanation of the purpose of the proposed rule;

(b) a citation to the specific legal authority authorizing the proposed rule and a short explanation of the purpose of the proposed rule;

(c) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained;

(d) the statutes, regulations, and procedural rules governing the conduct of the hearing;

(e) the manner in which persons may present their views or evidence to the secretary, including the time, place, and information on participating in the public hearing;

(f) the location where persons may secure copies of the full text of the proposed regulatory change;

(g) an internet link providing free access to the full text of the proposed rule; and

(h) if applicable, that the secretary may make a decision on the proposed regulatory change at the conclusion of the hearing.

C. Participation by public.

(1) 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 non-technical exhibits in connection with his or her testimony, so long as the exhibit is not unduly repetitious of the testimony.

(2) Any member of the general public who wishes to submit a written statement for the record, in lieu of giving oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing. Written comment must be mailed or delivered to the secretary’s administrator.

D. Location of hearing: Unless otherwise permitted by governing law, the secretary shall hold hearings on proposed regulatory changes in Santa Fe and at other places the secretary may prescribe.

E. If the secretary changes the date of the hearing or the deadline for submitting comments

as stated in the notice of proposed rulemaking, the secretary shall provide notice to the public of the change.

[20.1.9.12 NMAC - Rp 20.1.9.12 NMAC, 12/11/2018]

20.1.9.13 TECHNICAL TESTIMONY:

A. Any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 15 days prior to the hearing, file a notice of intent to present technical testimony with the secretary’s hearing office administrator. 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 education and work background;
- (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present;
- (4) include a copy of the direct testimony of each technical witness in narrative form;
- (5) include the text of any recommended modifications to the proposed regulatory change; and
- (6) list and attach all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

B. The hearing officer may enforce the provisions of this section through such action as the hearing officer deems appropriate, including, but not limited to, exclusion of the technical testimony of any witness for whom a notice of intent was not timely filed. If such testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to such testimony. The hearing officer may also require that written rebuttal testimony be submitted prior to the hearing.

[20.1.9.13 NMAC - Rp 20.1.9.13 NMAC, 12/11/2018]

20.1.9.14 ENTRY OF APPEARANCE:

Any person may file an entry of appearance as a party. The entry of appearance shall be filed with the secretary’s hearing office administrator no later than 20 days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid waste of resources.

[20.1.9.14 NMAC - Rp 20.1.9.14 NMAC, 12/11/2018]

20.1.9.15 PARTICIPATION BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE:

A witness may participate in a rulemaking hearing before the secretary by means of a telephone conference or other similar communications equipment when an emergency or circumstances make it impossible for the witness to attend the hearing in person. A witness who wishes to participate in a rulemaking hearing in this manner must receive permission from the hearing officer or the secretary sufficiently in advance of the rulemaking hearing. No witness may participate in a rulemaking hearing by telephone conference unless the witness makes a request sufficiently in advance of the rulemaking hearing so as to permit the secretary’s hearing office administrator to arrange for an adequate telephone hookup. Each witness participating by telephone must be identified when speaking, all participants must be able to hear each other at the same time, and members of the public attending the hearing must be able to hear any witness who speaks during the hearing.

[20.1.9.15 NMAC – N, 12/11/2018]

20.1.9.16 MOTIONS:

A. General: All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion and state the relief sought. Each

motion shall be accompanied by an affidavit, certificate, or other evidence relied upon and shall be served as provided by 20.1.9.10 NMAC.

B. Unopposed motions: An unopposed motion shall state that the concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by all parties for the hearing officer’s review.

C. Opposed motions: Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

D. Response to motions: Any party upon whom an opposed motion is served shall have 15 days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.

E. Reply to response: The moving party may, but is not required to, submit a reply to any response within 10 days after service of the response.

F. Decision: All motions shall be decided by the hearing officer without a hearing, unless otherwise ordered by the hearing officer *sua sponte* or upon written request of any party. The hearing officer shall refer any motion that would effectively dispose of the matter, and may refer any other motion, to the secretary for a decision. A procedural motion may be ruled upon prior to the expiration of the time for response; any response received thereafter shall be treated as a request for reconsideration of the ruling. The hearing officer shall file all original documents with the secretary’s hearing office administrator.

[20.1.9.16 NMAC – N, 12/11/2018]

20.1.9.17 HEARING PROCEDURES – CONDUCT OF HEARINGS:

A. The rules of civil procedure and the rules of evidence shall not apply.

B. The hearing officer shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition. The hearing shall proceed as follows:

(1) The hearing shall begin with an opening statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.

(2) The hearing officer may allow a brief opening statement by any party who wishes to make one.

(3) Unless otherwise ordered, the petitioner shall present its case first.

(4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon notices of intent to present technical testimony, sign-in sheets, and the availability of witnesses who cannot be present for the entire hearing.

(5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from the members of the general public. Members of the general public who wish to present testimony should indicate their intent on a sign-in sheet.

(6) The hearing officer may allow a brief closing argument by any person who wishes to make one.

(7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance with 20.1.9.21 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.

C. If the hearing is conducted at multiple locations, the hearing officer may require the petitioner's witnesses to summarize their testimony or be available for

cross-examination at each location. Other participants are not required to testify at more than one location, and the hearing officer may prohibit a witness from testifying at more than one location.
[20.1.9.17 NMAC - N, 12/11/2018]

20.1.9.18 TESTIMONY AND CROSS-EXAMINATION:

A. All testimony will be taken under oath or affirmation which may be accomplished en masse or individually.

B. The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is incompetent or unduly repetitious. The hearing officer shall require all oral testimony be limited to the position of the witness in favor or against the proposed rule.

C. Any person who testifies at the hearing is subject to cross-examination on the subject matter of his or her direct testimony and matters affecting his or her credibility. Any person attending the hearing is entitled to conduct such cross-examination as may be required for a full and true disclosure of matters at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time, or undue repetition.
[20.1.9.18 NMAC - N, 12/11/2018]

20.1.9.19 EXHIBITS:

A. Any person offering an exhibit at hearing, other than a document filed and served before the hearing, shall provide an original for the secretary and a sufficient number of copies for every other party.

B. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, he or she shall identify each exhibit with an index tab or by other appropriate means.

C. Large charts and diagrams, models, and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be

submitted for inclusion in the record.
[20.1.9.19 NMAC - N, 12/11/2018]

20.1.9.20 TRANSCRIPT OF PROCEEDINGS:

A. Unless specified by the secretary or hearing officer, a verbatim transcript shall be made of the hearing. The cost of the original transcript of the proceeding and of providing a copy for each member shall be borne by the petitioner.

B. Any person may obtain a copy of the transcript of a proceeding. It shall be obtained directly from the court reporter, and the cost of the transcript shall be paid directly to the source.
[20.1.9.20 NMAC - N, 12/11/2018]

20.1.9.21 POST-HEARING SUBMISSIONS:

The hearing officer may allow the record to remain open for a reasonable period of time following conclusion of the hearing for written submission of additional evidence, comments arguments, and proposed statements of reasons. The hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of material to be submitted, and the necessity for a prompt decision. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.
[20.1.9.21 NMAC - N, 12/11/2018]

20.1.9.22 HEARING OFFICER'S REPORT:

If the secretary directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final proposals, and the evidence supporting those proposals, including discussion or recommendations as requested by the secretary, and shall be filed with the secretary's administrator within

the time specified by the secretary. The secretary's hearing office administrator shall promptly notify each party that the hearing officer's report has been filed and shall provide a copy of the report along with a notice of any deadline set for comments on that report. [20.1.9.22 NMAC - N, 12/11/2018]

20.1.9.23 DELIBERATION AND DECISION:

A. If the hearing notice indicated that a decision might be made at the conclusion of the hearing, the secretary may immediately make a decision on the proposed regulatory change.

B. The secretary shall reach a decision on the proposed regulatory change within 60 days following close of the record or the date the hearing officer's report is filed, whichever is later.

C. If the secretary determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed regulatory change, the secretary may, consistent with the requirements of due process, reopen the hearing for such additional evidence only.

D. The secretary shall issue a decision on the proposed regulatory change in a suitable format which shall include the secretary's reasons for the action taken.

E. The secretary's written decision is the official version of the secretary's action, and the reasons for that action. Other written or oral statements by the secretary are not recognized as part of the secretary's official decision.

F. If the secretary fails to act on a proposed regulatory change within two years after the notice of proposed rulemaking is published in the New Mexico register, the rulemaking is automatically terminated unless the secretary acts to extend the period for an additional two years by filing a statement of good cause for the extension in the rulemaking record. If the secretary extends the rulemaking period, the secretary shall provide for additional public participation, comments, and

hearing(s) prior to adopting the rule.
G. The secretary may terminate a rulemaking at any time by publishing a notice of termination in the New Mexico register. If the secretary terminates a rulemaking in this manner, the secretary shall provide to the public notice of the action. [20.1.9.23 NMAC - N, 12/11/2018]

20.1.9.24 NOTICE OF SECRETARY ACTION:

A. The secretary's administrator shall provide to the public notice of the secretary's action and a concise explanatory statement.

B. The adopted rule shall not take effect unless within 15 days of adoption of the rule, the secretary delivers the final rule to the state records administrator, accompanied by a concise explanatory statement that contains:

- (1) the date that the secretary adopted the rule;
- (2) the effective date of the rule;
- (3) a reference to the specific statutory or other authority authorizing the rule;
- (4) any findings required by law for adoption of the rule;
- (5) reasons for any change between the published proposed rule and the final rule; and
- (6) reasons for not accepting substantive argument made through public comment.

C. Adoption of the final rule occurs upon signature of the written decision.

D. If the state records administrator notifies the secretary of having made any minor, non-substantive corrections in spelling, grammar, or format in the filed rule, the secretary's hearing office administrator shall provide to the public notice of the correction within 30 days of receiving the state records administrator's record of correction. [20.1.9.24 NMAC - N, 12/11/2018]

20.1.9.25 STAYS AND APPEALS OF SECRETARY REGULATIONS:

A. Any person who is or may be affected by a rule adopted by the secretary may file a motion with the secretary's hearing administrator seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the legal authority supporting, the granting of a stay. The movant that serve the motion for a say as provided by this part and shall further serve all parties in the rulemaking proceeding. The secretary will decide when the motion will be heard. Unless otherwise ordered by the secretary or otherwise provided by law, the filing of an appeal shall not act as a stay on the regulatory change being appealed.

B. Unless otherwise provided by governing law, the secretary may grant a stay pending appeal of any regulatory change promulgated by the secretary. The secretary may only grant a stay if good cause is shown after a motion is filed and a hearing is held.

C. In determining whether good cause is present for the granting of a stay, the secretary shall consider:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- (3) whether substantial harm will result to other interested persons; and
- (4) whether harm will ensue to the public interest.

D. If no action is taken within 60 days after filing the motion, the secretary shall be deemed to have denied the motion for stay.

E. Appeal of any final decision of the secretary shall be taken in accordance with the governing law.

F. The appellant shall service a copy of the appeal on the secretary and the petitioner.

G. The appellant shall be responsible for preparation of a sufficient number of copies of the hearing record at the appellant's expense. [20.1.9.25 NMAC - N, 12/11/2018]

HISTORY OF 20.1.9 NMAC:

History of Repealed Material:

20.1.9 NMAC, Rulemaking Procedures - Environmental Improvement Board, filed 10/27/07, repealed 12/11/2018.

**ENVIRONMENT
DEPARTMENT
WATER QUALITY CONTROL
COMMISSION**

This is an amendment to Sections 7, 10, 1203, 1210, 3102, 3105 through 3109, 3112, 3114, 4101, 4103 through 4106, 4108, 4109, 4114, 5002 through 5006, 5101, 5102, 5202, 5206, and 5209 of 20.6.2 NMAC, effective December 21, 2018.

Throughout this part, the word “groundwater” was replaced with the words “ground water” and spelling errors were corrected.

20.6.2.7 DEFINITIONS:

[Terms] The following terms, as used in this part shall have the following meanings; terms defined in the Water Quality Act, but not defined in this part, will have the meaning given in the act. [As used in this part:]

A. Definitions that begin with the letter “A.”

(1)

“abandoned well” means a well whose use has been permanently discontinued or which is in a state of disrepair such that it cannot be rehabilitated for its intended purpose or other purposes including monitoring and observation;

[B:] (2) “abate”

or “abatement” means the investigation, containment, removal or other mitigation of water pollution;

[C:] (3)

“abatement plan” means a description of any operational, monitoring, contingency and closure requirements and conditions for the prevention, investigation and abatement of water pollution, and includes Stage 1, Stage 2, or Stage

1 and 2 of the abatement plan, as approved by the secretary;
[D:] (4) “adjacent properties” means properties that are contiguous to the discharge site or property that would be contiguous to the discharge site but for being separated by a public or private right of way, including roads and highways.

[E:] B. Definitions

that begin with the letter “B.”

“background” means, for purposes of ground water abatement plans only and for no other purposes in this part or any other regulations including but not limited to surface water standards, the amount of ground water contaminants naturally occurring from undisturbed geologic sources or water contaminants which the responsible person establishes are occurring from a source other than the responsible person’s facility; this definition shall not prevent the secretary from requiring abatement of commingled plumes of pollution, shall not prevent responsible persons from seeking contribution or other legal or equitable relief from other persons, and shall not preclude the secretary from exercising enforcement authority under any applicable statute, regulation or common law;

[F:] C. Definitions that begin with the letter “C.”

(1) “casing”

means pipe or tubing of appropriate material, diameter and weight used to support the sides of a well hole and thus prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent fluid from entering or leaving the well other than to or from the injection zone;

[G:] (2)

“cementing” means the operation whereby a cementing slurry is pumped into a drilled hole and/or forced behind the casing;

[H:] (3) “cesspool”

means a “drywell” that receives untreated domestic liquid waste containing human excreta, and which sometimes has an open bottom and/or perforated sides; a large capacity cesspool means a cesspool that receives liquid waste greater than that regulated by 20.7.3 NMAC;

[I:] (4) “collapse”

means the structural failure of overlying materials caused by removal of underlying materials;

[J:] (5)

“commission” means:

[(+) (a)

the New Mexico water quality control commission or

[(2) (b)

the department, when used in connection with any administrative and enforcement activity;

[K:] (6) “confining

zone” means a geological formation, group of formations, or part of a formation that is capable of limiting fluid movement from an injection zone;

[L:] (7)

“conventional mining” means the production of minerals from an open pit or underground excavation; underground excavations include mine shafts, workings and air vents, but does not include excavations primarily caused by in situ extraction activities;

[M:] D. Definitions that begin with the letter “D.”

(1) “daily

composite sample” means a sample collected over any twenty-four hour period at intervals not to exceed one hour and obtained by combining equal volumes of the effluent collected, or means a sample collected in accordance with federal permit conditions where a permit has been issued under the national pollutant discharge elimination system or for those facilities which include a waste stabilization pond in the treatment process where the retention time is greater than twenty (20) days, means a sample obtained by compositing equal volumes of at least two grab samples collected within a period of not more than twenty-four (24) hours;

[N:] (2)

“department”, “agency”, or “division” means the New Mexico environment department or a constituent agency designated by the commission;

[O:] (3) “discharge

permit” means a discharge plan approved by the department;

~~[P:]~~ (4) “**discharge permit modification**” means a change to the requirements of a discharge permit that result from a change in the location of the discharge, a significant increase in the quantity of the discharge, a significant change in the quality of the discharge; or as required by the secretary;

~~[Q:]~~ (5) “**discharge permit renewal**” means the re-issuance of a discharge permit for the same, previously permitted discharge;

~~[R:]~~ (6) “**discharge plan**” means a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water;

~~[S:]~~ (7) “**discharge site**” means the entire site where the discharge and associated activities will take place;

~~[T:]~~ (8) “**disposal**” means to abandon, deposit, inter or otherwise discard a fluid as a final action after its use has been achieved;

~~[U:]~~ (9) “**domestic liquid waste**” means human excreta and water-carried waste from typical residential plumbing fixtures and activities, including but not limited to waste from toilets, sinks, bath fixtures, clothes or dishwashing machines and floor drains;

~~[V:]~~ (10) “**domestic liquid waste treatment unit**” means a watertight unit designed, constructed and installed to stabilize only domestic liquid waste and to retain solids contained in such domestic liquid waste, including but not limited to aerobic treatment units and septic tanks;

~~[W:]~~ (11) “**drywell**” means a well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids;

~~[X:]~~ E. **Definitions that begin with the letter “E.”**
 “**experimental technology**” means a technology which has not been proven feasible under the conditions in which it is being tested;

~~[Y:]~~ E. **Definitions that begin with the letter “F.”** “**fluid**” means material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state;

~~[Z:]~~ G. **Definitions that begin with the letter “G.”** “**ground water**” means interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply;

~~[AA:]~~ H. **Definitions that begin with the letter “H.”** “**hazard to public health**” exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the ~~[numerical]~~ standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher~~[- or if any toxic pollutant affecting human health is present in the water;]~~ in determining whether a discharge would cause a hazard to public health to exist, the secretary shall investigate and consider the purification and dilution reasonably expected to occur from the time and place of discharge to the time and place of withdrawal for use as human drinking water;

~~[BB:]~~ I. **Definitions that begin with the letter “I.”**
(1) “**improved sinkhole**” means a naturally occurring karst depression or other natural crevice found in volcanic terrain and other geologic settings which have been modified by man for the purpose of directing and emplacing fluids into the subsurface;

~~[CC:]~~ (2) “**injection**” means the subsurface emplacement of fluids through a well;

~~[DD:]~~ (3) “**injection zone**” means a geological formation, group of formations, or part of a formation receiving fluids through a well;

~~[EE:]~~ J. **Definitions that begin with the letter “J.”**
[RESERVED]

K. **Definitions that begin with the letter “K.”**
[RESERVED]

L. **Definitions**

that begin with the letter “L.”
[RESERVED]

M. **Definitions that begin with the letter “M.”** “**motor vehicle waste disposal well**” means a well which receives or has received fluids from vehicular repair or maintenance activities;

~~[FF:]~~ N. **Definitions that begin with the letter “N.”** “**non-aqueous phase liquid**” means an interstitial body of liquid oil, petroleum product, petrochemical, or organic solvent, including an emulsion containing such material;

~~[GG:]~~ O. **Definitions that begin with the letter “O.”**
(1) “**operational area**” means a geographic area defined in a project discharge permit where a group of wells or well fields in close proximity comprise a single class III well operation;

~~[HH:]~~ (2) “**owner of record**” means an owner of property according to the property records of the tax assessor in the county in which the discharge site is located at the time the application was deemed administratively complete;

~~[H:]~~ P. **Definitions that begin with the letter “P.”**
(1) “**packer**” means a device lowered into a well to produce a fluid-tight seal within the casing;

~~[JJ:]~~ (2) “**person**” means an individual or any other entity including partnerships, corporation, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees;

~~[KK:]~~ (3) “**petitioner**” means a person seeking a variance from a regulation of the commission pursuant to Section 74-6-4~~[(G)]~~~~(H)~~ NMSA 1978;

~~[LL:]~~ (4) “**plugging**” means the act or process of stopping the flow of water, oil or gas into or out of a geological formation, group of formations or part of a formation through a borehole or well penetrating these geologic units;

[MM:] (5) “project discharge permit” means a discharge permit which describes the operation of similar class III wells or well fields within one or more individual operational areas;

[NN:] Q. Definitions that begin with the letter “O.”
[RESERVED]

R. Definitions that begin with the letter “R.”

(1) “refuse” includes food, swill, carrion, slops and all substances from the preparation, cooking and consumption of food and from the handling, storage and sale of food products, the carcasses of animals, junked parts of automobiles and other machinery, paper, paper cartons, tree branches, yard trimmings, discarded furniture, cans, oil, ashes, bottles, and all unwholesome material;

[OO:] (2) “responsible person” means a person who is required to submit an abatement plan or who submits an abatement plan pursuant to this part;

[PP:] S. Definitions that begin with the letter “S.”

(1) “secretary” or “director” means the secretary of the New Mexico department of environment or the director of a constituent agency designated by the commission;

[QQ:] (2) “sewer system” means pipelines, conduits, pumping stations, force mains, or other structures, devices, appurtenances or facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal;

[RR:] (3) “sewerage system” means a system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems;

[SS:] (4) “significant modification of Stage 2 of the abatement plan” means a change in the abatement technology used excluding design and operational parameters, or re-location of 25 percent or more of the compliance sampling stations, for any single

medium, as designated pursuant to Paragraph (4) of Subsection E of 20.6.2.4106 NMAC;

[TT:] (5) “subsurface fluid distribution system” means an assemblage of perforated pipes, drain tiles, or other mechanisms intended to distribute fluids below the surface of the ground;

[UU:] (6) “subsurface water” means ground water and water in the vadose zone that may become ground water or surface water in the reasonably foreseeable future or may be utilized by vegetation;

[VV:] T. Definitions that begin with the letter “T.”

(1) “TDS” means total dissolved solids as determined by the “calculation method” (sum of constituents), by the “residue on evaporation method at 180 degrees” of the “U.S. geological survey techniques of water resource investigations,” or by conductivity, as the secretary may determine;

[WW:] (2) “toxic pollutant” means [a water-contaminant or combination of water-contaminants in concentration(s) which, upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; in order to be considered a toxic pollutant a contaminant must be one or a combination of the potential toxic pollutants listed below and be at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above;] any water contaminant or combination of the

water contaminants in the list below [creating a lifetime risk of more than one cancer per 100,000 exposed persons is a toxic pollutant:

- _____ **(1)** acrolein
- _____ **(2)** acrylonitrile
- _____ **(3)** aldrin
- _____ **(4)** benzene
- _____ **(5)** benzidine
- _____ **(6)** carbon-tetrachloride
- _____ **(7)** chlordane
- _____ **(8)** chlorinated benzenes
- _____ **(a)** monochlorobenzene
- _____ **(b)** hexachlorobenzene
- _____ **(c)** pentachlorobenzene
- _____ **(9)** 1,2,4,5-tetrachlorobenzene
- _____ **(10)** chlorinated ethanes
- _____ **(a)** 1,2-dichloroethane
- _____ **(b)** hexachloroethane
- _____ **(c)** 1,1,2,2-tetrachloroethane
- _____ **(d)** 1,1,1-trichloroethane
- _____ **(e)** 1,1,2-trichloroethane
- _____ **(11)** chlorinated phenols
- _____ **(a)** 2,4-dichlorophenol
- _____ **(b)** 2,4,5-trichlorophenol
- _____ **(c)** 2,4,6-trichlorophenol
- _____ **(12)** chloroalkyl ethers
- _____ **(a)** bis (2-chloroethyl) ether
- _____ **(b)** bis (2-chloroisopropyl) ether
- _____ **(c)** bis (chloromethyl) ether
- _____ **(13)** chloroform
- _____ **(14)** DDT
- _____ **(15)** dichlorobenzene
- _____ **(16)** dichlorobenzidine
- _____ **(17)**

1,1-dichloroethylene (18)	(32)	(45)	vinyl chloride
dichloropropenes (19) dieldrin (20)	(33)	(46)	xylenes (a)
diphenylhydrazine (21) endosulfan (22) endrin (23)	(a)		o-xylene (b)
ethylbenzene (24)	(b)		m-xylene (c)
halomethanes (a)	(34)		p-xylene (47)
bromodichloromethane (b)	N-nitrosodiethylamine (b)		1,1-dichloroethane (48) ethylene dibromide (EDB)
bromomethane (c)	N-nitrosodimethylamine (c)		(49) cis-1,2-dichloroethylene
chloromethane (d)	N-nitrosodibutylamine (d)		(50) trans-1,2-dichloroethylene
dichlorodifluoromethane (e)	N-nitrosodiphenylamine (c)		(51) naphthalene (52)
dichloromethane (f)	N-nitrosopyrrolidine (35)		1-methylnaphthalene (53)
tribromomethane (g)	pentachlorophenol (36) perchlorate (37) phenol (38) phthalate- esters (a)		2-methylnaphthalene (54) benzo-a-pyrene] (a)
trichlorofluoromethane (25) heptachlor (26)	dibutyl phthalate (b)		acrolein (CAS 107-02-8) (b)
hexachlorobutadiene (27)	di-2-ethylhexyl phthalate (c)		acrylonitrile (CAS 107-13-1) (c)
hexachlorocyclohexane (HCH) (a)	diethyl phthalate (d)		benzene and alkylbenzenes (i)
alpha-HCH (b)	dimethyl phthalate (39)		benzene (CAS 71-43-2) (ii)
beta-HCH (c)	polychlorinated biphenyls (PCB's) (40)		toluene (methylbenzene) (CAS 108-88-3) (iii)
gamma-HCH (d)	polynuclear aromatic hydrocarbons (PAH) (a)		ethylbenzene (CAS 100-41-4) (iv)
technical HCH (28)	anthracene (b)		xylenes (dimethyl benzene isomers): o-xylene (CAS 95-47-6); m-xylene (CAS 108-38-3); and p-xylene (CAS 106-42-3) (v)
hexachlorocyclopentadiene (29) high- explosives (HE) (a)	3,4-benzofluoranthene (c)		styrene (ethenylbenzene) (CAS 100-42-5) (d)
2,4-dinitrotoluene (2,4,DNT) (b)	benzo (k) fluoranthene (d)		chlorinated benzenes (i)
2,6-dinitrotoluene (2,6,DNT) (c)	fluoranthene (c)		monochlorobenzene (CAS 108-90-7) (ii)
octahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine (HMX) (d)	fluorene (f)		1,2-dichlorobenzene (ortho-dichlorobenzene) (CAS 95-50-1) (iii)
hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX) (e)	phenanthrene (g)		1,4-dichlorobenzene (para-dichlorobenzene) (CAS 106-46-7) (iv)
2,4,6-trinitrotoluene (TNT) (30) isophorone (31) methyl- tertiary butyl ether	pyrene (41)		1,2,4-trichlorobenzene (CAS 120-82-1) (v)
	tetrachloroethylene (42) toluene (43) toxaphene (44)		
	trichloroethylene		

<u>1,2,4,5-tetrachlorobenzene (CAS 95-94-3)</u>	<u>halogenated ethenes</u>	<u>2,4-dinitrotoluene (2,4-DNT) (CAS 121-14-2)</u>
<u>pentachlorobenzene (CAS 608-93-5)</u>	<u>chloroethene (vinyl chloride) (CAS 75-01-4)</u>	<u>2,6-dinitrotoluene (2,6-DNT) (CAS 606-20-2)</u>
<u>hexachlorobenzene (CAS 118-74-1)</u>	<u>1,1-dichloroethene (1,1-DCE) (CAS 75-35-4)</u>	<u>octrahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine(HMX)(CAS 2691-41-0)</u>
<u>chlorinated phenols</u>	<u>cis-1,2-dichloroethene (cis-1,2-DCE) (CAS 156-59-2)</u>	<u>hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX) (CAS 121-82-4)</u>
<u>2,4-dichlorophenol (CAS 120-83-2)</u>	<u>trans-1,2-dichloroethene (trans-1,2-DCE) (CAS 156-60-5)</u>	<u>2,4,6-trinitrotoluene (TNT) (CAS 118-96-7)</u>
<u>2,4,5-trichlorophenol (CAS 95-95-4)</u>	<u>trichloroethene (trichloroethylene, TCE) (CAS 79-01-6)</u>	<u>2,4-dinitro-o-cresol (CAS 534-52-1)</u>
<u>2,4,6-trichlorophenol (CAS 88-06-2)</u>	<u>tetrachloroethene (perchloroethylene, PCE) (CAS 127-18-4)</u>	<u>dinitrophenols (CAS 51-28-5)</u>
<u>pentachlorophenol (PCP) (CAS 87-86-5)</u>	<u>halogenated methanes</u>	<u>nitrosamines</u>
<u>chloroalkyl ethers</u>	<u>bromodichloromethane (CAS 75-27-4)</u>	<u>N-nitrosodiethylamine (CAS 55-18-5)</u>
<u>bis (2-chloroethyl) ether (CAS 111-44-4)</u>	<u>bromomethane (CAS 74-83-9)</u>	<u>N-nitrosodimethylamine (CAS 62-75-9)</u>
<u>bis (2-chloroisopropyl) ether (CAS 108-60-1)</u>	<u>chloromethane (CAS 74-87-3)</u>	<u>N-nitrosodibutylamine (CAS 924-16-3)</u>
<u>bis (chloromethyl) ether (CAS 542-88-1)</u>	<u>dichlorodifluoromethane (fluorocarbon-12) (CAS 75-71-8)</u>	<u>N-nitrosodiphenylamine (CAS 86-30-6)</u>
<u>1,2-dichloropropane (propylene dichloride, PDC) (CAS 78-87-5)</u>	<u>dichloromethane (methylene chloride) (CAS 75-09-2)</u>	<u>N-nitrosopyrrolidine (CAS 930-55-2)</u>
<u>dichloropropenes (CAS 542-75-6)</u>	<u>tribromomethane (bromoform) (CAS 75-25-2)</u>	<u>perchlorate (CAS 14797-73-0)</u>
<u>1,4-dioxane (CAS 123-91-1)</u>	<u>trichloromethane (chloroform) (CAS 67-66-3)</u>	<u>perfluorinated-chemicals (PFCs)</u>
<u>halogenated ethanes</u>	<u>tetrachloromethane (carbon tetrachloride) (CAS 56-23-5)</u>	<u>perfluorohexane sulfonic acid (PHHxS) (CAS 355-46-4)</u>
<u>1,2-dibromoethane (ethylene dibromide, EDB) (CAS 106-93-4)</u>	<u>trichlorofluoromethane (fluorocarbon-11) (CAS 75-69-4)</u>	<u>perfluorooctane sulfonate (PFOS) (CAS 1763-23-1)</u>
<u>1,1-dichloroethane (1,1DCA) (CAS 75-34-3)</u>	<u>hexachlorobutadiene (CAS 87-68-3)</u>	<u>perfluorooctanoic acid (PFOA) (CAS 335-67-1)</u>
<u>1,2-dichloroethane (ethylene dichloride, EDC) (CAS 107-06-2)</u>	<u>isophorone (CAS 78-59-1)</u>	<u>pesticides</u>
<u>1,1,1-trichloroethane (TCA) (CAS 71-55-6)</u>	<u>methyl tertiary-butyl-ether (MTBE) (CAS 1634-04-4)</u>	<u>Aldrin (CAS 309-00-2)</u>
<u>1,1,2-trichloroethane (1,1,2-TCA) (CAS 79-00-5)</u>	<u>nitroaromatics and high explosives (HE)</u>	<u>atrazine (CAS 1912-24-9)</u>
<u>1,1,2,2-tetrachloroethane (CAS 79-34-5)</u>	<u>nitrobenzene (CAS 98-95-3)</u>	<u>chlordane (CAS 57-74-9)</u>
<u>hexachloroethane (CAS 67-72-1)</u>		<u>DDT (CAS 50-29-3)</u>
		<u>dieldrin (CAS 60-57-1)</u>

(vi) endosulfan (CAS 115-29-7)

(vii) endrin (CAS 72-20-8)

(viii) heptachlor (CAS 76-44-8)

(ix) hexachlorocyclohexane (HCH, lindane): alpha-HCH (CAS 319-84-6); beta-HCH (CAS 319-85-7); gamma-HCH (CAS 58-89-9); and, technical-HCH (CAS 608-73-1)

(x) hexachlorocyclopentadiene (CAS 77-47-4)

(xi) prometon (CAS 1610-18-0)

(xii) toxaphene (CAS 8001-35-2)

(u) phenol (CAS 108-95-2)

(v) phthalate esters

(i) dibutyl phthalate (CAS 84-74-2)

(ii) di-2-ethylhexyl phthalate (DEHP) (CAS 117-81-7)

(iii) diethyl phthalate (DEP) (CAS 84-66-2)

(iv) dimethyl phthalate (DMP) (CAS 131-11-3)

(w) polycyclic compounds

(i) benzidine (CAS 92-87-5)

(ii) dichlorobenzidine (CAS 91-94-1)

(iii) diphenylhydrazine (CAS 122-66-7)

(iv) polychlorinated biphenyls (PCBs) (CAS 1336-36-3)

(x) polynuclear aromatic hydrocarbons (PAHs)

(i) anthracene (CAS 120-12-7)

(ii) benzo(a)pyrene (CAS 50-32-8)

(iii) 3,4-benzofluoranthene (CAS 205-99-2)

(iv) benzo(k)fluoranthene (CAS 207-08-9)

(v) fluoranthene (CAS 206-44-0)

(vi) fluorene (CAS 86-73-7)

(vii) naphthalene (CAS 91-20-3)

(viii) 1-methylnaphthalene (CAS 90-12-0)

(ix) 2-methylnaphthalene (CAS 91-57-6)

(x) phenanthrene (CAS 85-01-8)

(xi) pyrene (CAS 129-00-0)

(v) thiolane 1,1 dioxide (sulfolane) (CAS 126-33-0)

U. Definitions

that begin with the letter “U.”

[RESERVED]

[XX:] V. Definitions

that begin with the letter “V.”

“**vadose zone**” means earth material below the land surface and above ground water, or in between bodies of ground water

[YY:] W. Definitions that

begin with the letter “W.”

(1) “wastes”

means sewage, industrial wastes, or any other liquid, gaseous or solid substance which will pollute any waters of the state;

[ZZ:] (2) “water”

means all water including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water;

[AAA:] (3) “water

contaminant” means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water; “water contaminant” does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954;

[BBB:] (4)

“**watercourse**” means any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and beds with visible evidence of the occasional flow of water;

[CCC:] (5) “water

pollution” means introducing or permitting the introduction into water, either directly or indirectly, of one

or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property;

[DDD:] (6) “well”

means: (1) A bored, drilled, or driven shaft; (2) A dug hole whose depth is greater than the largest surface dimension; (3) An improved sinkhole; or (4) A subsurface fluid distribution system;

[EEE:] (7) “well

stimulation” means a process used to clean the well, enlarge channels, and increase pore space in the interval to be injected, thus making it possible for fluids to move more readily into the injection zone; well stimulation includes, but is not limited to, (1) surging, (2) jetting, (3) blasting, (4) acidizing, (5) hydraulic fracturing.

X. Definitions

that begin with the letter “X.”

[RESERVED]

Y. Definitions

that begin with the letter “Y.”

[RESERVED]

Z. Definitions

that begin with the letter “Z.”

[RESERVED]

[1-4-68, 4-20-68, 11-27-70, 9-3-72, 4-11-74, 8-13-76, 2-18-77, 6-26-80, 7-2-81, 1-29-82, 9-20-82, 11-17-84, 3-3-86, 8-17-91, 8-19-93, 12-1-95; 20.6.2.7 NMAC - Rn, 20 NMAC 6.2.I.1101, 1-15-01; A, 1-15-01; A, 12-1-01; A, 9-15-02; A, 9-26-04; A, 7-16-06; A, 8-1-14; A, 12-21-18]

20.6.2.10 LIMITATIONS:

These regulations do not apply to the following:

A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 to -14, the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 to -14, or the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -25, except to abate water pollution or to control the disposal or use of septage and sludge; or

B. Any activity or condition subject to the authority

of the oil conservation commission pursuant to the provisions of the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution. [N, 12-21-18]

20.6.2.1201 NOTICE OF INTENT TO DISCHARGE:

A. ~~[Any] Except for the notices specified in paragraphs (1) and (2) of this subsection, any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water. [However, notice regarding discharges from facilities for the production, refinement, pipeline transmission of oil and gas or products thereof, the oil field service industry, oil field brine production wells, geothermal installations and carbon dioxide facilities shall be filed instead with the oil conservation division.]~~

(1) Notices regarding discharges from facilities for the production, refinement, pipeline transmission of oil and gas or products thereof, the oil field service industry as related to oil and gas production activities, oil field brine production wells, and carbon dioxide facilities shall be filed with the oil conservation division of the energy, minerals and natural resources department.

(2) Notices regarding discharges related to geothermal resources, as defined in Section 71-9-3 of the Geothermal Resources Development Act,

NMSA 1978, Sections 71-9-1 to -11 (2016) shall be filed with the energy conservation and management division of the energy, minerals and natural resources department.

B. ~~[A]Except for the notices specified in paragraphs (1) and (2) of this subsection any person intending to inject fluids into a well, including a subsurface distribution system, unless the injection is being made subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department. [However, notice regarding injection to wells associated with oil and gas facilities as described in Subsection A of Section 20.6.2.1201 NMAC shall be filed instead with the oil conservation division.]~~

(1) Notices regarding injections to wells associated with oil and gas facilities as described in Paragraph (1) of Subsection A of 20.6.2.1201 NMAC shall be filed with the oil conservation division.

(2) Notices regarding injections to wells associated with exploration, development or production of geothermal resources, as described in Paragraph (2) of Subsection A of 20.6.2.1201 NMAC, shall be filed with the energy conservation and management division of the energy, minerals and natural resources department pursuant to the Geothermal Resources Development Act, Sections 71-9-1 to -11, NMSA 1978 (2016).

C. Notices shall state:
(1) the name of the person making the discharge;
(2) the address of the person making the discharge;
(3) the location of the discharge;
(4) an estimate of the concentration of water contaminants in the discharge; and
(5) the quantity of the discharge.

D. Based on information provided in the notice of

intent, the department will notify the person proposing the discharge as to which of the following apply:

- (1)** a discharge permit is required;
- (2)** a discharge permit is not required;
- (3)** the proposed injection well will be added to the department's underground injection well inventory;
- (4)** the proposed injection activity or injection well is prohibited pursuant to 20.6.2.5004 NMAC.

[1-4-68, 9-5-69, 9-3-72, 2-17-74, 2-20-81, 12-1-95; 20.6.2.1201 NMAC - Rn, 20 NMAC 6.2.I.1201, 1-15-01; A, 12-1-01; A, 12-21-18]

20.6.2.1203 NOTIFICATION OF DISCHARGE-REMOVAL:

A. With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, the following notifications and corrective actions are required:

(1) As soon as possible after learning of such a discharge, but in no event more than twenty-four (24) hours thereafter, any person in charge of the facility shall orally notify the chief of the ground water quality bureau of the department, or [his]the appropriate counterpart in any constituent agency delegated responsibility for enforcement of these rules as to any facility subject to such delegation. To the best of that person's knowledge, the following items of information shall be provided:

- (a)** the name, address, and telephone number of the person or persons in charge of the facility, as well as of the owner and/or operator of the facility;
- (b)** the name and address of the facility;
- (c)** the date, time, location, and duration of the discharge;

(d) the source and cause of discharge;

(e) a description of the discharge, including its chemical composition;

(f) the estimated volume of the discharge; and

(g) any actions taken to mitigate immediate damage from the discharge.

(2) When in doubt as to which agency to notify, the person in charge of the facility shall notify the chief of the ground water quality bureau of the department. If that department does not have authority pursuant to commission delegation, the department shall notify the appropriate constituent agency.

(3) Within one week after the discharger has learned of the discharge, the facility owner and/or operator shall send written notification to the same department official, verifying the prior oral notification as to each of the foregoing items and providing any appropriate additions or corrections to the information contained in the prior oral notification.

(4) The oral and written notification and reporting requirements contained in this Subsection A are not intended to be duplicative of discharge notification and reporting requirements promulgated by the oil conservation commission (OCC) or by the oil conservation division (OCD); therefore, any facility which is subject to OCC or OCD discharge notification and reporting requirements need not additionally comply with the notification and reporting requirements herein.

(5) As soon as possible after learning of such a discharge, the owner/operator of the facility shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by the discharge.

(6) If it is possible to do so without unduly delaying needed corrective actions,

the facility owner/operator shall endeavor to contact and consult with the chief of the ground water quality bureau of the department or appropriate counterpart in a delegated agency, in an effort to determine the department's views as to what further corrective actions may be necessary or appropriate to the discharge in question. In any event, no later than fifteen (15) days after the discharger learns of the discharge, the facility owner/operator shall send to said Bureau Chief a written report describing any corrective actions taken and/or to be taken relative to the discharge. Upon a written request and for good cause shown, the bureau chief may extend the time limit beyond fifteen (15) days.

(7) The bureau chief shall approve or disapprove in writing the foregoing corrective action report within thirty (30) days of its receipt by the department. In the event that the report is not satisfactory to the department, the bureau chief shall specify in writing to the facility owner/operator any shortcomings in the report or in the corrective actions already taken or proposed to be taken relative to the discharge, and shall give the facility owner/operator a reasonable and clearly specified time within which to submit a modified corrective action report. The bureau chief shall approve or disapprove in writing the modified corrective action report within fifteen (15) days of its receipt by the department.

(8) In the event that the modified corrective action report also is unsatisfactory to the department, the facility owner/operator has five (5) days from the notification by the bureau chief that it is unsatisfactory to appeal to the department secretary. The department secretary shall approve or disapprove the modified corrective action report within five (5) days of receipt of the appeal from the bureau chief's decision. In the absence of either corrective action consistent with the approved corrective action report or with the decision of the secretary concerning the shortcomings of the modified corrective action report,

the department may take whatever enforcement or legal action it deems necessary or appropriate.

(9) If the secretary determines that the discharge causes or may with reasonable probability cause water pollution in excess of the standards and requirements of Section 20.6.2.4103 NMAC, and the water pollution will not be abated within one hundred and eighty (180) days after notice is required to be given pursuant to Paragraph (1) of Subsection A of Section 20.6.2.1203 NMAC, the secretary may notify the facility owner/operator that he is a responsible person and that an abatement plan may be required pursuant to Section 20.6.2.4104 and Subsection A of Section 20.6.2.4106 NMAC.

B. Exempt from the requirements of this section are continuous or periodic discharges which are made:

(1) in conformance with regulations of the commission and rules, regulations or orders of other state or federal agencies; or

(2) in violation of regulations of the commission, but pursuant to an assurance of discontinuance or schedule of compliance approved by the commission or one of its duly authorized constituent agencies.

C. As used in this section and in Sections 20.6.2.4100 through 20.6.2.4115 NMAC, but not in other sections of this part:

(1) "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping into water or in a location and manner where there is a reasonable probability that the discharged substance will reach surface or subsurface water;

(2) "facility" means any structure, installation, operation, storage tank, transmission line, motor vehicle, rolling stock, or activity of any kind, whether stationary or mobile;

(3) "oil" means oil of any kind or in any form

including petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes;
 (4) "operator"

means the person or persons responsible for the overall operations of a facility; and

(5) "owner"
 means the person or persons who own a facility, or part of a facility.

D. Notification of discharge received pursuant to this part or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except for perjury or for giving a false statement.

E. Any person who has any information relating to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property, is urged to notify the chief of the ground water quality bureau of the department. Upon such notification, the secretary may require an owner/operator or a responsible person to perform corrective actions pursuant to Paragraphs (5) and (9) of Subsection A of Section 20.6.2.1203 NMAC.

[2-17-74, 2-20-81, 12-24-87, 12-1-95; 20.6.2.1203 NMAC - Rn, 20 NMAC 6.2.I.1203, 1-15-01; A, 12-1-01; A, 12-21-18]

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to Subsection H of Section 74-6-4[+(G)] NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

- (1) state the petitioner's name and address;
- (2) state the date of the petition;
- (3) describe the facility or activity for which the variance is sought;
- (4) state the

address or description of the property upon which the facility is located;

(5) describe the water body or watercourse affected by the discharge for which the variance is sought and provide information on uses of water that may be affected;

(6) identify the regulation of the commission from which the variance is sought;

(7) state in detail the extent to which the petitioner wishes to vary from the regulation;

(8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and

(9) [state the period of time for which the variance is desired:] state in detail how any water pollution above standards will be abated; and

(10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. ~~[The]~~If the variance is granted in whole or in part, or subject to conditions, the commission shall [not grant a] specify the length of time that the variance [for a period of time in excess of five years:] shall be in place.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a variance compliance report at five

year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts that are material to the variance. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions that were unknown at the time the variance was initially granted, any person, including the department, may request a hearing before the commission to revoke, modify, or otherwise reconsider the variance within 90 days of the issuance of the notice of availability of the report.

F. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, among other things, the development of new information and techniques to be sufficient justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing on the basis of the petition. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

[7-19-68, 11-27-70, 9-3-72, 2-20-81, 11-15-96; 20.6.2.1210 NMAC - Rn, 20 NMAC 6.2.I.1210, 1-15-01; A, 12-21-18]

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION

OR LESS: The following standards are the allowable pH range and the maximum allowable concentration

in ground water for the contaminants specified unless the existing condition exceeds the standard or unless otherwise provided in Subsection [D] E of Section 20.6.2.3109 NMAC. Regardless of whether there is one contaminant or more than one contaminant present in ground water, when an existing pH or concentration of any water contaminant exceeds the standard specified in Subsection A, B, or C of this section, the existing pH or concentration shall be the allowable limit, provided that the discharge at such concentrations will not result in concentrations at any place of withdrawal for present or reasonably foreseeable future use in excess of the standards of this section. These standards shall apply to the dissolved portion of the contaminants specified with a definition of dissolved being that given in the publication “*methods for chemical analysis of water and waste of the U.S. environmental protection agency*,” with the exception that standards for mercury, organic compounds and non-aqueous phase liquids shall apply to the total [unfiltered] nonfiltered concentrations of the contaminants. If the secretary determines that there is a reasonable probability of facilitated contaminant transport by colloids or organic macromolecules, or that proper filtration procedures are not being followed, the discharger may be required to test for both filtered and nonfiltered portions of inorganic contaminants to develop appropriate protocol for monitoring contaminants that have the potential to migrate through the aquifer.

A. Human Health Standards [Ground water shall meet the standards of Subsection A and B of this section unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria as set forth in the definition of toxic pollutant in Section 20.6.2.1101-NMAC for the combination of contaminants, or the Human Health Standard of Subsection A of Section 20.6.2.3103 NMAC for each contaminant shall apply, whichever is more stringent. Non-aqueous

phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.]

(1)	Numerical
Standards	
	(a)
Antimony (Sb) (CAS 7440-36-0).....	0.006 mg/l
	(b)
Arsenic (As) (CAS 7440-38-2).....	[0-1]0.01 mg/l
	(c)
Barium (Ba) (CAS 7440-39-3).....	[1-0]2 mg/l
	(d)
Beryllium (be) (CAS 7440-41-7).....	0.004 mg/l
	(e)
Cadmium (Cd) (CAS 7440-43-9).....	[0-0+]0.005 mg/l
	(f)
Chromium (Cr) (CAS 7440-47-3)....	0.05 mg/l
	(g)
Cyanide (CN) (CAS 57-12-5).....	0.2 mg/l
	(h)
Fluoride (F) (CAS 16984-48-8).....	1.6 mg/l
	(i)
Lead (Pb) (CAS 7439-92-1).....	[0-05]0.015 mg/l
	(j)
Total Mercury (Hg) (CAS 7439-97-6).....	0.002 mg/l
	(k)
Nitrate (NO ₃ as N) (CAS 14797-55-8).....	10.0 mg/l
	(l)
Nitrite (NO ₂ as N) (CAS 10102-44-0).....	1.0 mg/l
	(m)
Selenium (Se) (CAS 7782-49-2).....	0.05 mg/l
	(n)
Silver (Ag) (CAS 7440-224).....	0.05 mg/l
	(o)
Thallium (Tl) (CAS 7440-28-0).....	0.002 mg/l
	(p)
Uranium (U) (CAS 7440-61-1).....	0.03 mg/l
	(q)
Radioactivity: Combined Radium-226 (CAS 13982-63-3) and	

Radium-228 (CAS 15262-20-1).....	[30]5 pCi/l
	(r)
Benzene (CAS 71-43-2).....	[0-0+]0.005 mg/l
	(s)
Polychlorinated biphenyls (PCB's) (CAS 1336-36-3).[0-00+]0.0005 mg/l	
	(t)
Toluene (CAS 108-88-3).....	[0-75]1 mg/l
	(u)
Carbon Tetrachloride (CAS 56-23-5).....	[0-0+]0.005 mg/l
	(v)
1,2-dichloroethane (EDC) (CAS 107-06-2).....	[0-0+]0.005 mg/l
	(w)
1,1-dichloroethylene (1,1-DCE) (CAS 75-35-4).....	[0-005]0.007 mg/l
	(x)
[1,1,2,2]tetrachloroethylene (PCE) (CAS 127-18-4).....	[0-02]0.005 mg/l
	(y)
[1,1,2]trichloroethylene (TCE) (CAS 79-01-6).....	[0-1]0.005 mg/l
	(z)
ethylbenzene (CAS 100-41-4).....	[0-75]0.7 mg/l
	(aa)
total xylenes (CAS 1330-20-7).....	0.62 mg/l
	(bb)
methylene chloride (CAS 75-09-2)....	[0-1]0.005 mg/l
	(cc)
chloroform (CAS 67-66-3).....	0.1 mg/l
	(dd)
1,1-dichloroethane (CAS 75-34-3)...	0.025 mg/l
	(ee)
ethylene dibromide (EDB) (CAS 106-93-4).....	[0-000+]0.00005 mg/l
	(ff)
1,1,1-trichloroethane (CAS 71-55-6).....	[0-06]0.2 mg/l
	(gg)
1,1,2-trichloroethane (CAS 79-	

00-5).....	
[0.0+]0.005 mg/l	
	(30) (hh)
1,1,2,2-tetrachloroethane (CAS 79-34-5).....	0.01 mg/l
	(31) (ii)
vinyl chloride (CAS 75-01-4).....	[0.0+]0.002 mg/l
	(32) (jj)
PAHs: total naphthalene (CAS 91-20-3) plus monomethylnaphthalenes ...	0.03 mg/l
	(33) (kk)
benzo-a-pyrene (CAS 50-32-8).....	[0.0007]0.0002 mg/l
	(ll)
cis-1,2-dichloroethene (CAS 156-59-2).....	0.07 mg/l
	(mm)
trans-1,2-dichloroethene (CAS 156-60-5).....	0.1 mg/l
	(nn)
1,2-dichloropropane (PDC) (CAS 78-87-5).....	0.005 mg/l
	(oo)
styrene (CAS 100-42-5).....	0.1 mg/l
	(pp)
1,2-dichlorobenzene (CAS 95-50-1).....	0.6 mg/l
	(qq)
1,4-dichlorobenzene (CAS 106-46-7).....	0.075 mg/l
	(rr)
1,2,4-trichlorobenzene (CAS 120-82-1).....	0.07 mg/l
	(ss)
pentachlorophenol (CAS 87-86-5).....	0.001 mg/l
	(tt)
atrazine (CAS 1912-24-9).....	0.003 mg/l

(2) Standards for Toxic Pollutants. A toxic pollutant shall not be present at a concentration shown by credible

scientific data and other evidence appropriate under the Water Quality Act, currently available to the public, to have potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons.

(3) Standards for Non-Aqueous Phase Liquids. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.

B. Other Standards for Domestic Water Supply

(1) Chloride (Cl) (CAS 16887-00-6)...	250.0 mg/l
(2) Copper (Cu) (CAS 7440-50-8).....	1.0 mg/l
(3) Iron (Fe) (CAS 7439-89-6).....	1.0 mg/l
(4) Manganese (Mn) (CAS 7439-96-5).....	0.2 mg/l
(6)(5) Phenols ...	0.005 mg/l
(7)(6) Sulfate (SO ₄) (CAS 14808-79-8).....	600.0 mg/l
(8)(7) Total Dissolved Solids (TDS) TDS.....	1000.0 mg/l
(9)(8) Zinc (Zn) (CAS 7440-66-6).....	0.0 mg/l
(10)(9) pH.....	between 6 and 9
(10) Methyl tertiary-butyl ether (MTBE) (CAS 1634-04-4).....	0.1 mg/l

C. Standards for Irrigation Use - Ground water shall meet the standards of Subsection

A, B, and C of this section unless otherwise provided.

(1) Aluminum (Al) (CAS 7429-90-5).....	5.0 mg/l
(2) Boron (B) (CAS 7440-42-8).....	0.75 mg/l
(3) Cobalt (Co) (CAS 7440-48-4).....	0.05 mg/l
(4) Molybdenum (Mo) (CAS 7439-98-7).....	1.0 mg/l
(5) Nickel (Ni) (CAS 7440-02-0).....	0.2 mg/l

D. For purposes of application of the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, ethylbenzene, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene, to past and current water discharges (as of July 1, 2017), the new standards will not become effective until July 1, 2020. With regard to sites for which the secretary has approved an abatement completion report as of the effective date of this rule pursuant to 20.6.2.4112 NMAC, the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, ethylbenzene, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene shall not apply unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water that pose a hazard to public health.

[2-18-77, 1-29-82, 11-17-83, 3-3-86, 12-1-95; 20.6.2.3103 NMAC - Rn, 20 NMAC 6.2.III.3103, 1-15-01; A, 9-26-04; A 12-21-18]

[Note: For purposes of application of the amended numeric uranium standard to past and current water discharges (as of 9-26-04), the new standard will not become effective until June 1, 2007.]

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

A. Effluent or leachate which conforms to all the [~~listed numerical~~] standards in Subsections A, B, and C of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less [~~and does not contain any toxic pollutant~~]. To determine conformance, samples may be taken by the agency before the effluent or leachate is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

B. Effluent which is regulated pursuant to 20.7.3 NMAC, "Liquid Waste Disposal and Treatment" regulations;

C. Water used for irrigated agriculture, for watering of lawns, trees, gardens or shrubs, or for irrigation for a period not to exceed five years for the revegetation of any disturbed land area, unless that water is received directly from any sewerage system;

D. Discharges resulting from the transport or storage of water diverted, provided that the water diverted has not had added to it after the point of diversion any effluent received from a sewerage system, that the source of the water diverted was not mine workings, and that the secretary has not determined that a hazard to public health may result;

E. Effluent which is discharged to a watercourse which is naturally perennial; discharges to dry arroyos and ephemeral streams are not exempt from the discharge permit requirement, except as otherwise provided in this section;

F. Those constituents which are subject to effective and enforceable effluent limitations in a National Pollutant Discharge Elimination System (NPDES) permit, where discharge onto or below the surface of the ground so that water contaminants may move directly or indirectly into ground water

occurs downstream from the outfall where NPDES effluent limitations are imposed, unless the secretary determines that a hazard to public health may result. For purposes of this subsection, monitoring requirements alone do not constitute effluent limitations;

G. Discharges resulting from flood control systems;

H. Leachate which results from the direct natural infiltration of precipitation through disturbed materials, unless the secretary determines that a hazard to public health may result;

I. Leachate which results entirely from the direct natural infiltration of precipitation through undisturbed materials;

~~[J.]~~ Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board;

~~[K.]~~ **J.** Natural ground water seeping or flowing into conventional mine workings which re-enters the ground by natural gravity flow prior to pumping or transporting out of the mine and without being used in any mining process; this exemption does not apply to solution mining;

~~[L.]~~ **K.** Effluent or leachate discharges resulting from activities regulated by ~~[a mining plan approved and]~~ permit issued by the ~~[New Mexico Coal]~~ mining and minerals division of the energy, minerals and natural resources department pursuant to the Surface Mining [Commission,] Act, NMSA 1978, Sections 69-25A-1 to 36, provided that this exemption shall not be construed as limiting the application of appropriate ground water protection requirements by the mining and minerals division and the New Mexico Coal Surface Mining Commission; or

~~[M.]~~ **L.** [Effluent or leachate discharges which are regulated by under the Oil Conservation Commission and Gas Act and the regulation of which by the Water Quality Control Commission would interfere with the exclusive

~~authority granted under Section 70-2-12 NMSA 1978, or under other laws, to the Oil Conservation Commission and the oil conservation division.]~~ Discharges resulting from activities regulated by the energy conservation and management division of the energy, minerals and natural resources department under the authority of the Geothermal Resources Development Act, NMSA 1978, Sections 71-9-1 to -11 (2016).

[2-18-77, 6-26-80, 7-2-81, 12-24-87, 12-1-95; 20.6.2.3105 NMAC - Rn, 20 NMAC 6.2.III.3105, 1-15-01; A, 12-1-01; A, 8-1-14; A, 12-21-18]

20.6.2.3106 APPLICATION FOR DISCHARGE PERMITS, RENEWALS, AND MODIFICATIONS:

A. Any person who, before or on June 18, 1977, is discharging any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant so that they may move directly or indirectly into ground water shall, within 120 days of receipt of written notice from the secretary that a discharge permit is required, or such longer time as the secretary shall for good cause allow, submit a discharge plan to the secretary for approval; such person may discharge without a discharge permit until 240 days after written notification by the secretary that a discharge permit is required or such longer time as the secretary shall for good cause allow.

B. Any person who intends to begin, after June 18, 1977, discharging any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant so that they may move directly or indirectly into ground water shall notify the secretary giving the information enumerated in Subsection B of 20.6.2.1201 NMAC; the secretary shall, within 60 days, notify such person if a discharge permit is required; upon submission of a discharge plan, the secretary shall review the discharge plan pursuant to 20.6.2.3108 and 20.6.2.3109 NMAC. For good cause shown the secretary may allow such person to discharge

without a discharge permit for a period not to exceed 120 days.

C. Any person who intends to modify the discharge of any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant in a manner that is a discharge permit modification as defined in this part shall submit a discharge plan for modification that contains the information required in Subsection D of 20.6.2.3106 NMAC; upon submission of a discharge plan for modification, the secretary shall review the discharge plan for modification pursuant to 20.6.2.3108 and 20.6.2.3109 NMAC.

~~C.~~D. A proposed discharge plan shall set forth in detail the methods or techniques the discharger proposes to use or processes expected to naturally occur which will ensure compliance with this part. At least the following information shall be included in the plan:

- (1) quantity, quality and flow characteristics of the discharge;
 - (2) location of the discharge and of any bodies of water, watercourses and ground water discharge sites within one mile of the outside perimeter of the discharge site, and existing or proposed wells to be used for monitoring;
 - (3) depth to and TDS concentration of the ground water most likely to be affected by the discharge;
 - (4) flooding potential of the site;
 - (5) location and design of site(s) and method(s) to be available for sampling, and for measurement or calculation of flow;
 - (6) depth to and lithological description of rock at base of alluvium below the discharge site if such information is available;
 - (7) any additional information that may be necessary to demonstrate that the discharge permit will not result in concentrations in excess of the standards of 20.6.2.3103 NMAC [~~or the presence of any toxic pollutant~~]
- at any place of withdrawal of water

for present or reasonably foreseeable future use; detailed information on site geologic and hydrologic conditions may be required for a technical evaluation of the applicant's proposed discharge plan; and

(8) additional detailed information required for a technical evaluation of underground injection control wells as provided in 20.6.2.5000 through 20.6.2.5399 NMAC.

~~D.~~E. An applicant for a discharge permit shall pay fees as specified in 20.6.2.3114 and 20.6.2.5302 NMAC.

~~E.~~E. An applicant for a permit to dispose of or use septage or sludge, or within a source category designated by the commission, may be required by the secretary to file a disclosure statement as specified in Section 74-6-5.1 of the Water Quality Act.

~~F.~~G. If the holder of a discharge permit submits an application for discharge permit renewal at least 120 days before the discharge permit expires, and the discharger is not in violation of the discharge permit on the date of its expiration, then the existing discharge permit for the same activity shall not expire until the application for renewal has been approved or disapproved. A discharge permit continued under this provision remains fully effective and enforceable. An application for discharge permit renewal must include and adequately address all of the information necessary for evaluation of a new discharge permit. Previously submitted materials may be included by reference provided they are current, readily available to the secretary and sufficiently identified to be retrieved.

[2-18-77, 6-26-80, 7-2-81, 9-20-82, 8-17-91, 12-1-95; 20.6.2.3106 NMAC - Rn, 20 NMAC 6.2.III.3106, 1-15-01; A, 12-1-01; A, 9-15-02; A, 8-31-15; A, 12-21-18]

20.6.2.3107 MONITORING, REPORTING, AND OTHER REQUIREMENTS:

A. Each discharge plan shall provide for the following as the secretary may require:

- (1) the installation, use, and maintenance of effluent monitoring devices;
- (2) the installation, use, and maintenance of monitoring devices for the ground water most likely to be affected by the discharge;
- (3) monitoring in the vadose zone;
- (4) continuation of monitoring after cessation of operations;
- (5) periodic submission to the secretary of results obtained pursuant to any monitoring requirements in the discharge permit and the methods used to obtain these results;
- (6) periodic reporting to the secretary of any other information that may be required as set forth in the discharge permit;
- (7) the discharger to retain for a period of at least five years any monitoring data required in the discharge permit;
- (8) a system of monitoring and reporting to verify that the permit is achieving the expected results;
- (9) procedures for detecting failure of the discharge system;
- (10) contingency plans to cope with failure of the discharge permit or system;
- (11) a closure plan to prevent the exceedance of standards of 20.6.2.3103 NMAC [~~or the presence of a toxic pollutant~~] in ground water after the cessation of operation which includes: a description of closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans, financial assurance, and other measures necessary to prevent or abate such contamination; the obligation to implement the closure plan as well as the requirements of the closure plan, if any is required, survives the termination or expiration of the permit; a closure plan for any underground injection control well must also incorporate the applicable requirements of 20.6.2.5005, 20.6.2.5209, and 20.6.2.5361 NMAC.

B. Sampling and analytical techniques shall conform with the following references unless otherwise specified by the secretary:

- (1) standard methods for the examination of water and wastewater, latest edition, American public health association; or
- (2) methods for chemical analysis of water and waste, and other publications of the analytical quality laboratory, EPA; or
- (3) techniques of water resource investigations of the U.S. geological survey; or
- (4) annual book of ASTM standards; Part 31; water, latest edition, American society for testing and materials; or
- (5) federal register, latest methods published for monitoring pursuant to Resource Conservation and Recovery Act regulations; or
- (6) national handbook of recommended methods for water-data acquisition, latest edition, prepared cooperatively by agencies of the United States government under the sponsorship of the U.S. geological survey.

C. The discharger shall notify the secretary of any facility expansion, production increase or process modification that would result in any significant modification in the discharge of water contaminants.

D. Any discharger of effluent or leachate shall allow any authorized representative of the secretary to:

- (1) inspect and copy records required by a discharge permit;
- (2) inspect any treatment works, monitoring and analytical equipment;
- (3) sample any effluent before or after discharge;
- (4) use monitoring systems and wells installed pursuant to a discharge permit requirement in order to collect samples from ground water or the vadose zone.

E. Each discharge permit for an underground injection

control well shall incorporate the applicable requirements of 20.6.2.5000 through 20.6.2.5399 NMAC.

[2-18-77, 9-20-82, 11-17-83, 12-1-95; 20.6.2.3107 NMAC - Rn, 20 NMAC 6.2.III.3107, 1-15-01; A, 12-1-01; A, 8-31-15; A, 12-21-18]

20.6.2.3108 PUBLIC NOTICE AND PARTICIPATION:

A. Within 15 days of receipt of an application for a discharge permit, modification or renewal, the department shall review the application for administrative completeness. To be deemed administratively complete, an application shall provide all of the information required by Paragraphs (1) through (5) of Subsection F of 20.6.2.3108 NMAC and shall indicate, for department approval, the proposed locations and newspaper for providing notice required by Paragraphs (1) and (4) of Subsection B or Paragraph (2) of Subsection C of 20.6.2.3108 NMAC. The department shall notify the applicant in writing when the application is deemed administratively complete. If the department determines that the application is not administratively complete, the department shall notify the applicant of the deficiencies in writing within [15]30 days of receipt of the application and state what additional information is necessary.

B. Within 30 days of the department deeming an application for discharge permit or discharge permit modification administratively complete, the applicant shall provide notice, in accordance with the requirements of Subsection F of 20.6.2.3108 NMAC, to the general public in the locale of the proposed discharge in a form provided by the department by each of the methods listed below:

- (1) for each 640 contiguous acres or less of a discharge site, prominently posting a synopsis of the public notice at least 2 feet by 3 feet in size, in English and in Spanish, at a place conspicuous to the public, approved by the department, at or near the proposed facility for 30

days; one additional notice, in a form approved by and may be provided by the department, shall be posted at a place located off the discharge site, at a place conspicuous to the public and approved by the department; the department may require a second posting location for more than 640 contiguous acres or when the discharge site is not located on contiguous properties;

(2) providing written notice of the discharge by mail or electronic mail, to owners of record of all properties within a 1/3 mile distance from the boundary of the property where the discharge site is located; if there are no properties other than properties owned by the discharger within a 1/3 mile distance from the boundary of property where the discharge site is located, the applicant shall provide notice to owners of record of the next nearest adjacent properties not owned by the discharger;

(3) providing notice by certified mail, return receipt requested, to the owner of the discharge site if the applicant is not the owner; and

(4) publishing a synopsis of the notice in English and in Spanish, in a display ad at least three inches by four inches not in the classified or legal advertisements section, in a newspaper of general circulation in the location of the proposed discharge.

C. Within 30 days of the department deeming an application for discharge permit renewal administratively complete, the applicant shall provide notice, in accordance with the requirements of Subsection F of 20.6.2.3108 NMAC, to the general public in the locale of the proposed discharge in a form provided by the department by each of the methods listed below:

- (1) providing notice by certified mail to the owner of the discharge site if the applicant is not the owner; and
- (2) publishing a synopsis of the notice, in English and in Spanish, in a display ad at least two inches by three inches, not in

the classified or legal advertisements section, in a newspaper of general circulation in the location of the discharge.

D. Within 15 days of completion of the public notice requirements in Subsections B or C of 20.6.2.3108 NMAC, the applicant shall submit to the department proof of notice, including an affidavit of mailing(s) and the list of property owner(s), proof of publication, and an affidavit of posting, as appropriate.

E. Within 30 days of determining an application for a discharge permit, modification or renewal is administratively complete, the department shall post a notice on its website and shall mail notice to any affected local, state, federal, tribal or pueblo governmental agency, political subdivisions, ditch associations and land grants, as identified by the department. The department shall also mail or e-mail notice to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications. The notice shall include the information listed in Subsection F of 20.6.2.3108 NMAC.

F. The notice provided under Subsection B, C and E of 20.6.2.3108 NMAC shall include:

- (1) the name and address of the proposed discharger;
- (2) the location of the discharge, including a street address, if available, and sufficient information to locate the facility with respect to surrounding landmarks;
- (3) a brief description of the activities that produce the discharge described in the application;
- (4) a brief description of the expected quality and volume of the discharge;
- (5) the depth to and total dissolved solids concentration of the ground water most likely to be affected by the discharge;
- (6) the address and phone number within

the department by which interested persons may obtain information, submit comments, and request to be placed on a facility-specific mailing list for future notices; and

(7) a statement that the department will accept comments and statements of interest regarding the application and will create a facility-specific mailing list for persons who wish to receive future notices.

G. All persons who submit comments or statements of interest to the department or previously participated in a public hearing and who provide a mail or e-mail address shall be placed on a facility-specific mailing list and the department shall send those persons the public notice issued pursuant to Subsection [H] J of 20.6.2.3108 NMAC, and notice of any public meeting or hearing scheduled on the application. All persons who contact the department to inquire about a specific facility shall be informed of the opportunity to be placed on the facility-specific mailing list.

H. Within 60 days after the department makes its administrative completeness determination and all required technical information is available, the department shall make available a [~~proposed approval or disapproval of the~~] draft permit or a notice of intent to deny an application for a discharge permit, modification or renewal [~~; including conditions for approval proposed by the department or the reasons for disapproval~~]. The draft permit shall include all proposed effluent limitations or other conditions on proposed discharge, and all proposed monitoring, recordkeeping, and reporting requirements. A draft permit for a permit modification shall only include those permit conditions proposed to be modified.

I. The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for discharges comprised solely of domestic liquid waste, and for other draft permits as determined by the Secretary. The fact sheet shall include:

(1) the information in Paragraphs 1 - 4 of Subsection F of 20.6.2.3108 NMAC;

(2) the information in Subsection J of 20.6.2.3108 NMAC; and

(3) a brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record.

~~[(H)]~~ **J.** The department shall mail by certified mail a copy of the [~~proposed approval or notice of proposed disapproval~~] draft permit and fact sheet or notice of intent to deny to the applicant and shall provide notice of the [~~proposed approval or disapproval of the application for a discharge permit, modification or renewal~~] draft permit or the notice of intent to deny by:

- (1) posting on the department's website;
- (2) publishing notice in a newspaper of general circulation in this state and a newspaper of general circulation in the location of the facility;
- (3) mailing or e-mailing to those persons on a facility-specific mailing list;
- (4) mailing to any affected local, state, or federal governmental agency, ditch associations and land grants, as identified by the department; and
- (5) mailing to the governor, chairperson, or president of each Indian tribe, pueblo or nation within the state of New Mexico, as identified by the department.

~~[(H)]~~ **K.** The public notice issued under Subsection H shall include the information in Subsection F of 20.6.2.3108 NMAC and the following information:

- (1) a brief description of the procedures to be followed by the secretary in making a final determination;
- (2) a statement of the comment period and description of the procedures for a person to request a hearing on the application; and

(3) the address, ~~[and]~~ telephone number, ~~and email address~~ at which interested persons may obtain a copy of the ~~[proposed approval or disapproval of an application for a discharge permit, modification or renewal]~~ draft permit and fact sheet or the notice of intent to deny.

~~[J:]~~ L. In the event that the ~~[proposed approval or disapproval of an application for a discharge permit, modification or renewal]~~ draft permit or notice of intent to deny is available for review within 30 days of deeming the application administratively complete, the department may combine the public notice procedures of Subsections E and H of 20.6.2.3108 NMAC.

~~[K:]~~ M. Following the public notice of the ~~[proposed approval or disapproval of an application for a discharge permit, modification or renewal]~~ draft permit or notice of intent to deny, and prior to a final decision by the secretary, there shall be a period of at least 30 days during which written comments may be submitted to the department and/or a public hearing may be requested in writing. The 30-day comment period shall begin on the date of publication of notice in the newspaper. All comments will be considered by the department. Requests for a hearing shall be in writing and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the secretary determines there is substantial public interest. The department shall notify the applicant and any person requesting a hearing of the decision whether to hold a hearing and the reasons therefore in writing.

~~[L:]~~ N. If a hearing is held, pursuant to Subsection ~~[K:]~~ M of 20.6.2.3108 NMAC, notice of the hearing shall be given by the department at least 30 days prior to the hearing in accordance with Subsection H of 20.6.2.3108 NMAC. The notice shall include the information identified in Subsection F of 20.6.2.3108 NMAC in addition to the time and place of the hearing and a brief description of the hearing

procedures. The hearing shall be held pursuant to 20.6.2.3110 NMAC. [2-18-77, 12-24-87, 12-1-95, 11-15-96; 20.6.2.3108 NMAC - Rn, 20 NMAC 6.2.III.3108, 1-15-01; A, 12-1-01; A, 9-15-02; A, 7-16-06; A, 12-21-18]

20.6.2.3109 SECRETARY APPROVAL, DISAPPROVAL, MODIFICATION OR TERMINATION OF DISCHARGE PERMITS, AND REQUIREMENT FOR ABATEMENT PLANS:

A. The department shall evaluate the application for a discharge permit, modification or renewal based on information contained in the department's administrative record. The department may request from the discharger, either before or after the issuance of any public notice, additional information necessary for the evaluation of the application. The administrative record shall consist of the application, any additional information required by the department, any information submitted by the discharger or the general public, other information considered by the department, the proposed approval or disapproval of an application for a discharge permit, modification or renewal prepared pursuant to Subsection H of 20.6.2.3108 NMAC, and, if a public hearing is held, all of the documents filed with the hearing clerk, all exhibits offered into evidence at the hearing, the written transcript or tape recording of the hearing, any hearing officer report, and any post hearing submissions.

B. The secretary shall, within 30 days after the administrative record is complete and all required information is available, approve, approve with conditions or disapprove the proposed discharge permit, modification or renewal based on the administrative record. The Secretary shall issue a response to comments which shall specify which provisions, if any, in the draft permit were changed and the reasons for the change, and shall briefly describe and respond to all significant comments

on the draft permit raised during the public comment period or at any hearing. The secretary shall ~~[give written notice of the action taken to]~~ notify the applicant or permittee ~~[and any other person]~~ by certified mail of the action taken and the reasons for such action and shall include a copy of the response to comments. Notice shall also be given by mail or email to persons who participated in the permitting action ~~[who requests a copy in writing].~~

C. Provided that the other requirements of this part are met and the proposed discharge plan, modification or renewal demonstrates that neither a hazard to public health nor undue risk to property will result, the secretary shall approve the proposed discharge plan, modification or renewal if the following requirements are met:

(1) ground water that has a TDS concentration of 10,000 mg/l or less will not be affected by the discharge; or

(2) the person proposing to discharge demonstrates that approval of the proposed discharge plan, modification or renewal will not result in either concentrations in excess of the standards of 20.6.2.3103 NMAC ~~[or the presence of any toxic pollutant]~~ at any place of withdrawal of water for present or reasonably foreseeable future use, except for contaminants in the water diverted as provided in Subsection ~~[D:]~~ E of 20.6.2.3109 NMAC; or

(3) the proposed discharge plan conforms to either Subparagraph (a) or (b) below and Subparagraph (c) below:

(a) municipal, other domestic discharges, and discharges from sewerage systems handling only animal wastes: the effluent is entirely domestic, is entirely from a sewerage system handling only animal wastes or is from a municipality and conforms to the following:

(i) the discharge is from an impoundment or a leach field existing on February 18, 1977 which receives less than

10,000 gallons per day and the secretary has not found that the discharge may cause a hazard to public health; or

(ii) the discharger has demonstrated that the total nitrogen in effluent that enters the subsurface from a leach field or surface impoundment will not exceed 200 pounds per acre per year and that the effluent will meet the standards of 20.6.2.3103 NMAC except for nitrates and except for contaminants in the water diverted as provided in Subsection [D]E of 20.6.2.3109 NMAC; or

(iii) the total nitrogen in effluent that is applied to a crop which is harvested shall not exceed by more than 25 percent the maximum amount of nitrogen reasonably expected to be taken up by the crop and the effluent shall meet the standards of 20.6.2.3103 NMAC except for nitrates and except for contaminants in the water diverted as provided in Subsection [D] E of 20.6.2.3109 NMAC;

(b) discharges from industrial, mining or manufacturing operations:

(i) the discharger has demonstrated that the amount of effluent that enters the subsurface from a surface impoundment will not exceed 0.5 acre-feet per acre per year; or

(ii) the discharger has demonstrated that the total nitrogen in effluent that enters the subsurface from a leach field or surface impoundment shall not exceed 200 pounds per acre per year and the effluent shall meet the standards of 20.6.2.3103 NMAC except for nitrate and contaminants in the water diverted as provided in Subsection [D]E of 20.6.2.3109 NMAC; or

(iii) the total nitrogen in effluent that is applied to a crop that is harvested shall not exceed by more than 25 percent the maximum amount of nitrogen reasonably expected to be taken up by the crop and the effluent shall meet the standards

of 20.6.2.3103 NMAC except for nitrate and contaminants in the water diverted as provided in Subsection D of 20.6.2.3109 NMAC;

(c) all discharges: (i) the monitoring system proposed in the discharge plan includes adequate provision for sampling of effluent and adequate flow monitoring so that the amount being discharged onto or below the surface of the ground can be determined;

(ii) the monitoring data is reported to the secretary at a frequency determined by the secretary.

D. The secretary shall allow the following unless he determines that a hazard to public health may result:

(1) the weight of water contaminants in water diverted from any source may be discharged provided that the discharge is to the aquifer from which the water was diverted or to an aquifer containing a greater concentration of the contaminants than contained in the water diverted; and provided further that contaminants added as a result of the means of diversion shall not be considered to be part of the weight of water contaminants in the water diverted;

(2) the water contaminants leached from undisturbed natural materials may be discharged provided that:

(a) the contaminants were not leached as a product or incidentally pursuant to a solution mining operation; and

(b) the contaminants were not leached as a result of direct discharge into the vadose zone from municipal or industrial facilities used for the storage, disposal, or treatment of effluent;

(3) the water contaminants leached from undisturbed natural materials as a result of discharge into ground water from lakes used as a source of cooling water.

E. If data submitted

pursuant to any monitoring requirements specified in the discharge permit or other information available to the secretary indicates that this part is being or may be violated or that the standards of 20.6.2.3103 NMAC are being or will be exceeded[; or a toxic pollutant as defined in 20.6.2.7 NMAC is present;] in ground water at any place of withdrawal for present or reasonably foreseeable future use, or that the water quality standards for interstate and intrastate streams in New Mexico are being or may be violated in surface water, due to the discharge, except as provided in Subsection D of 20.6.2.3109 NMAC.

(1) The secretary may require a discharge permit modification within the shortest reasonable time so as to achieve compliance with this part and to provide that any exceeding of standards in ground water at any place of withdrawal for present or reasonably foreseeable future use, or in surface water, due to the discharge except as provided in Subsection [D]E of 20.6.2.3109 NMAC will be abated or prevented. If the secretary requires a discharge permit modification to abate water pollution:

(a) the abatement shall be consistent with the requirements and provisions of 20.6.2.4101, 20.6.2.4103, Subsections C and E of 20.6.2.4106, 20.6.2.4107, 20.6.2.4108 and 20.6.2.4112 NMAC; and

(b) the discharger may request of the secretary approval to carry out the abatement under 20.6.2.4000 through 20.6.2.4115 NMAC, in lieu of modifying the discharge permit; the discharger shall make the request in writing and shall include the reasons for the request.

(2) The secretary may terminate a discharge permit when a discharger fails to modify the permit in accordance with Paragraph (1) of Subsection E of 20.6.2.3109 NMAC.

(3) The secretary may require modification, or may terminate a discharge permit for

a Class I well, a Class III well or other type of well specified in Subsection A of 20.6.2.5101 NMAC, pursuant to the requirements of Subsection I of 20.6.2.5101 NMAC.

(4) If a discharge permit is terminated, the secretary shall notify the permittee by certified mail of the action taken and the reasons for that action. Notice of the termination shall also be given by mail or electronic mail to persons who participated in the permitting action and to those persons on the facility-specific list maintained by the department.

F. If a discharge permit expires or is terminated for any reason and the standards of 20.6.2.3103 NMAC are being or will be exceeded~~[-or a toxic pollutant as defined in 20.6.2.7 NMAC is present]~~ in ground water, or that the water quality standards for interstate and intrastate streams in New Mexico are being or may be violated, the secretary may require the discharger to submit an abatement plan pursuant to 20.6.2.4104 and Subsection A of 20.6.2.4106 NMAC.

G. At the request of the discharger, a discharge permit may be modified in accordance with 20.6.2.3000 through 20.6.2.3114 NMAC.

H. The secretary shall not approve a proposed discharge plan, modification, or renewal for:

(1) any discharge for which the discharger has not provided a site and method for flow measurement and sampling;

(2) any discharge that will cause any stream standard to be violated;

(3) the discharge of any water contaminant which may result in a hazard to public health; or

(4) a period longer than five years, except that for new discharges, the term of the discharge permit approval shall commence on the date the discharge begins, but in no event shall the term of the approval exceed seven years from the date the permit was issued; for those permits expiring more than

five years from the date of issuance, the discharger shall give prior written notification to the department of the date the discharge is to commence; the term of the permit shall not exceed five years from that date.

[2-18-77, 6-26-80, 9-20-82, 7-2-81, 3-3-86, 12-1-95, 11-15-96; 20.6.2.3109 NMAC - Rn, 20 NMAC 6.2.III.3109, 1-15-01; A, 12-1-01; A, 9-15-02; A, 7-16-06; A, 8-31-15; A, 12-21-18]

20.6.2.3112 APPEALS OF SECRETARY'S DECISIONS:

A. If the secretary approves, approves subject to conditions, or disapproves a proposed discharge plan, renewal or modification, or modifies or terminates a discharge permit, appeal therefrom shall be in accordance with the provisions of Subsections N, O and P of Sections 74-6-5 NMSA 1978. The filing of an appeal does not act as a stay of any provision of the Act, the regulations, or any permit issued pursuant to the Act, unless otherwise ordered by the secretary or the commission.

B. If the secretary determines that a discharger is not exempt from obtaining a discharge permit, or that the material to be discharged contains any toxic pollutant [as defined] listed in 20.6.2.7 NMAC, which is not included in the numerical standards of Paragraph (1) of Subsection A of 20.6.2.3103 NMAC, then the discharger may appeal such determination by filing with the commission's secretary a notice of appeal to the commission within thirty days after receiving the secretary's written determination, and the appeal therefrom and any action of the commission thereon shall be in accordance with the provisions of Subsections (O) through (S) of Section 74-6-5, NMSA 1978.

C. Proceedings before the commission shall be conducted in accordance with the commission's adjudicatory procedures, 20 NMAC 1.3.

[2-18-77, 7-2-81, 12-1-95, 11-15-96; 20.6.2.3112 NMAC - Rn, 20 NMAC 6.2.III.3112, 1-15-01; A, 12-1-01; A, 7-16-06; A, 12-21-18]

20.6.2.3114 FEES:

A. FEE AMOUNT AND SCHEDULE OF PAYMENT - Every facility submitting a discharge permit application for approval or renewal shall pay the permit fees specified in Table 1 of this section and shall pay a filing fee as specified in Table 2 of this section to the Water Quality Management Fund. Every facility submitting a request for temporary permission to discharge pursuant to Subsection B of Section 20.6.2.3106 NMAC, or financial assurance pursuant to Paragraph (11) of Subsection A of Section 20.6.2.3107 NMAC shall pay the fees specified in Table 2 of this section to the Water Quality Management Fund.

B. Facilities applying for discharge permits which are subsequently withdrawn or denied shall pay one-half of the permit fee at the time of denial or withdrawal.

C. Every facility submitting an application for discharge permit modification will be assessed a filing fee plus one-half of the permit fee. Applications for both renewal and modification will pay the filing fee plus the permit fee.

D. If the secretary requires a discharge permit modification as a component of an enforcement action, the facility shall pay the applicable discharge permit modification fee. If the secretary requires a discharge permit modification outside the context of an enforcement action, the facility shall not be assessed a fee.

E. The secretary may waive or reduce fees for discharge permit modifications or renewals which require little or no cost for investigation or issuance.

F. Facilities shall pay the filing fee at the time of discharge permit application. The filing fee is nonrefundable. The required permit fees may be paid in a single payment at the time of discharge permit approval or in equal installments over the term of the discharge permit. Installment payments shall be remitted yearly, with the first installment due on the date of discharge permit approval.

Subsequent installment payments shall be remitted yearly thereafter. The discharge permit or discharge permit application review of any facility shall be suspended or terminated if the facility fails to submit an installment payment by its due date.

G. Every three years beginning in 2004, the department shall review the fees specified in Table 1 and 2 of this section and shall provide a report to the commission. The department shall revise the fees as necessary in accordance with Subsection J of Section 74-6-5 NMSA 1978.

20.6.2.3114 TABLE 1 (gpd=gallons per day)

	Permit Fee
Agriculture <10,000 gpd	\$ 1,150
Agriculture 10,000 to 49,999 gpd	\$ 2,300
Agriculture 50,000 to 99,999 gpd	\$ 3,450
Agriculture 100,000 gpd or greater	\$ 4,600
Domestic Waste <10,000 gpd	\$ 1,150
Domestic Waste 10,000 to 49,999 gpd	\$ 2,300
Domestic Waste 50,000 to 99,999 gpd	\$ 3,450
Domestic Waste 100,000 to 999,999 gpd	\$ 4,600
Domestic Waste 1,000,000 to 9,999,999 gpd	\$ 7,000
Domestic Waste 10,000,000 gpd or greater	\$ 9,200
Food Processing <10,000 gpd	\$ 1,150
Food Processing 10,000 to 49,999 gpd	\$ 2,300
Food Processing 50,000 to 99,999 gpd	\$ 3,450
Food Processing 100,000 to 999,999 gpd	\$ 4,600
Food Processing 1,000,000 or greater	\$ 7,000
Grease/Septage surface disposal <10,000 gpd	\$ 1,725
Grease/Septage surface disposal 10,000 gpd or greater	\$ 3,450
Industrial <10,000 gpd; or <10,000 yd ³ of contaminated solids	\$ 1,725
Industrial 10,000 to 99,999 gpd; or 10,000 to 99,999 yd ³ of contaminated solids	\$ 3,450
Industrial 100,000 to 999,999 gpd; or 100,000 to 999,999 yd ³ of contaminated solids	\$ 6,900
Industrial 1,000,000 gpd or greater; or 1,000,000 yd ³ of contaminated solids or greater	\$10,350
Discharge of remediation system effluent - remediation plan approved under separate regulatory authority	\$ 1,600
Mining dewatering	\$ 3,250
Mining leach dump	\$13,000
Mining tailings	\$13,000
Mining waste rock	\$13,000
Mining in-situ leach (except salt) and old stope leaching	\$13,000
Mining other (mines with minimal environmental impact, post closure operation and maintenance, evaporation lagoons and land application at uranium mines)	\$ 4,750
Gas Compressor Stations 0 to 1000 Horsepower	\$ 400
Gas Compressor Stations >1001 Horsepower	\$ 1,700
Gas Processing Plants	\$ 4,000
Injection Wells: Class I (non-hazardous)	\$ 4,500
Injection Wells: Class III and Geothermal	\$ 1,700
Oil and Gas Service Companies	\$ 1,700
Refineries	\$ 8,400
Crude Pump Station	\$ 1,200
Underground Gas Storage	\$ 1,700
Abatement of ground water and vadose zone contamination [at oil and gas Sites]	\$ 2,600
General permit	\$ 600

20.6.2.3114 Table 2

	Fee Amount
Filing fee	\$100
Temporary permission	\$50
Financial assurance: approval of instrument	greater of \$250 or .01%
Financial assurance: annual review	greater of \$ 100 or .001%

[8-17-91, 12-1-95; 20.6.2.3114, Rn & A, 20 NMAC 6.2.III.3114, 01-01-01; A, 12-21-18]

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

A. The vadose zone shall be abated as follows:

~~(1) [so that] water~~ contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B and C below, through leaching, percolation or as the water table elevation fluctuates; and

(2) any constituent listed in 20.6.2.3103 NMAC or any toxic pollutant in the vadose zone shall be abated so that it is not capable of endangering human health due to inhalation of vapors that may accumulate in structures, utility infrastructure, or construction excavations.

B. Ground water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to ~~[conform to the following standards:~~

~~(1) toxic pollutant(s) as defined in Section 20.6.2.1101 NMAC shall not be present; and~~

~~(2) the standards of Section 20.6.2.3103 NMAC shall be met.]~~ meet the standards of Subsections A, B, and C of Section 20.6.2.3103 NMAC:

C. Surface water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC).

D. Subsurface water and surface water abatement shall not be considered complete until a minimum of eight (8) consecutive ~~[quarterly samples]~~ sampling events collected from all compliance sampling stations approved by the secretary, with a minimum of ninety (90) days between sampling events spanning a time period no greater than four (4) years, meet the abatement standards of Subsections A, B, and C of this section. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after

one-time sampling from compliance stations approved by the secretary.

E. ~~[Technical Infeasibility:~~

~~(1) If any responsible person is unable to fully meet the abatement standards set forth in Subsections A and B of this section using commercially accepted abatement technology pursuant to an approved abatement plan, he may propose that abatement standards compliance is technically infeasible. Technical infeasibility proposals involving the use of experimental abatement technology shall be considered at the discretion of the secretary. Technical infeasibility may be demonstrated by a statistically valid extrapolation of the decrease in concentration(s) of any water contaminant(s) over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration(s) at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive quarters. The technical infeasibility proposal shall include a substitute abatement standard(s) for those contaminants that is/are technically feasible. Abatement standards for all other water contaminants not demonstrated to be technically infeasible shall be met.~~

~~(2) In no event shall a proposed technical infeasibility demonstration be approved by the secretary for any water contaminant if its concentration is greater than 200 percent of the abatement standard for that contaminant.~~

~~(3) If the secretary cannot approve any or all portions of a proposed technical infeasibility demonstration because the water contaminant concentration(s) is/are greater than 200 percent of the abatement standard(s) for each contaminant, the responsible person may further pursue the issue of technical infeasibility by filing a petition with the commission seeking:~~

~~(a) approval of alternate abatement standard(s) pursuant to Subsection F~~

of this section; or

~~(b) granting of a variance pursuant to Section 20.6.2.1210 NMAC.~~

F. ~~Alternative Abatement Standards:~~

~~(1) At any time during or after the submission of a Stage 2 abatement plan, the responsible person may file a petition seeking approval of alternative abatement standard(s) for the standards set forth in Subsections A and B of this section. The commission may approve alternative abatement standard(s) if the petitioner demonstrates that:~~

~~(a) compliance with the abatement standard(s) is/are not feasible, by the maximum use of technology within the economic capability of the responsible person; OR there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standard(s) set forth in Section 20.6.2.4103 NMAC) to be obtained;~~

~~(b) the proposed alternative abatement standard(s) is/are technically achievable and cost-benefit justifiable; and~~

~~(c) compliance with the proposed alternative abatement standard(s) will not create a present or future hazard to public health or undue damage to property.~~

~~(2) The petition shall be in writing, filed with the secretary. The petition shall specify, in addition to the information required by Subsection A of Section 20.6.2.1210 NMAC, the water contaminant(s) for which alternative standard(s) is/are proposed, the alternative standard(s) proposed, the three-dimensional body of water pollution for which approval is sought, and the extent to which the abatement standard(s) set forth in Section 20.6.2.4103 NMAC is/ are now, and will in the future be, violated. The petition may include a transport, fate and risk assessment in accordance with accepted methods, and other information as the petitioner deems necessary to support the petition.~~

(3) The commission shall review a petition for alternative abatement standards in accordance with the procedures for review of a variance petition provided in the commission's adjudicatory procedures, 20.1.3 NMAC.]

Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to the exemptions of 20.6.2.4105 NMAC, is unable to fully meet an abatement standard set forth in Subsections A and C of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

(1) A petition for an alternative abatement standard shall demonstrate at least one of the following criteria:

(a) compliance with the standard set forth in Subsections A and B of this section would not be feasible by the maximum use of commercially accepted abatement technology;

(b) compliance with the standard set forth in Subsections A and B of this section would not be feasible by the maximum use of technology within the economic capability of the person;

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A and B of this section; or

(d) compliance with the standard set forth in Subsections A and B of this section is technically infeasible following the maximum use of commercially accepted abatement technology, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. Technical infeasibility proposals that involved the use of experimental abatement technology shall be considered at the discretion of the commission. A

statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events and shall not span a time period greater than four (4) years.

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(e) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection E of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by Subsection H of Section 74-6-4 NMSA 1978 of the Water Quality Act.

(5) The commission shall review petitions

for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

F. For a site where abatement activities include post-completion monitoring, maintenance of engineering controls, remediation systems, affirmation of non-residential use, or port-closure care, institutional controls such as well drilling restrictions under 19.27.5 NMAC, deed restrictions, easements or other legal restrictions binding on successors in interest to the site may be required by the secretary. [12-1-95, 11-15-96; 20.6.2.4103 NMAC - Rn, 20 NMAC 6.2.IV.4103, 1-15-01; A, 12-21-18]

20.6.2.4104 ABATEMENT PLAN REQUIRED:

A. Unless otherwise provided by this Part, all responsible persons who are abating, or who are required to abate, water pollution in excess of the standards and requirements set forth in Section 20.6.2.4103 NMAC of this Part shall do so pursuant to an abatement plan approved by the secretary. When an abatement plan has been approved, all actions leading to and including abatement shall be consistent with the terms and conditions of the abatement plan.

B. In the event of a transfer of the ownership, control or possession of a facility for which an abatement plan is required or approved, where the transferor is a responsible person, the transferee also shall be considered a responsible person for the duration of the abatement plan, and may jointly share the responsibility to conduct the actions required by this Part with other responsible persons. The transferor shall notify the transferee in writing, at least thirty (30) days prior to the transfer, that an abatement plan has been required or approved for the facility, and shall deliver or send by certified mail to the secretary a copy of such notification together with a certificate or other proof that such notification has in fact been received

by the transferee. The transferor and transferee may agree to a designated responsible person who shall assume the responsibility to conduct the actions required by this Part. The responsible persons shall notify the secretary in writing if a designated responsible person is agreed upon. If the secretary determines that the designated responsible person has failed to conduct the actions required by this Part, the secretary shall notify all responsible persons of this failure in writing and allow them thirty (30) days, or longer for good cause shown, to conduct the required actions before issuing a compliance order pursuant to Section 20.6.2.1220 NMAC.

C. ~~[If the source of the water pollution to be abated is a facility that operated under a discharge plan, the]~~ The secretary may require the responsible person(s) to submit a financial assurance plan which covers the estimated costs to conduct the actions required by the abatement plan. Such a financial assurance plan shall be consistent with any financial assurance requirements adopted by the commission.

D. The Secretary may require an oversight funding agreement with the responsible person for abatement plans which compensates the department for reasonable costs associated with the oversight of activities.

[12-1-95; 20.6.2.4104 NMAC - Rn, 20 NMAC 6.2.IV.4104, 1-15-01; A, 12-21-18]

20.6.2.4105 EXEMPTIONS FROM ABATEMENT PLAN REQUIREMENTS:

A. Except as provided in Subsection B of this Section, Sections 20.6.2.4104 and 20.6.2.4106 NMAC do not apply to a person who is abating water pollution:

(1) from a storage tank, under the authority of the Petroleum Storage Tank Regulations (20.5 NMAC) adopted by the New Mexico Environmental Improvement Board, or in accordance with the New Mexico Ground Water Protection Act;

(2) under the authority of the U.S. Environmental Protection Agency pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act, and amendments, or the Resource Conservation and Recovery Act;

(3) under the authority of the secretary pursuant to the Hazardous Waste Management Regulations (20.4.1 NMAC) adopted by the New Mexico Environmental Improvement Board;

(4) under the authority of the U.S. Nuclear Regulatory Commission or the U.S. Department of Energy pursuant to the Atomic Energy Act;

(5) from a solid waste landfill, under the authority of the secretary pursuant to the Solid Waste Management Regulations (20.9.1 NMAC) adopted by the N.M. Environmental Improvement Board;

(6) under the authority of a ground water discharge plan approved by the secretary, provided that such abatement is consistent with the requirements and provisions of Sections 20.6.2.4101, 20.6.2.4103, Subsections C and E of Section 20.6.2.4106, Sections 20.6.2.4107 and 20.6.2.4112 NMAC;

(7) under the authority of a Letter of Understanding, Settlement Agreement or Administrative Order on Consent signed by the secretary prior to December 1, 1995, provided that abatement is being performed in full compliance with the terms of the Letter of Understanding, Settlement Agreement or Administrative Order on Consent; and

(8) on an emergency basis, or while abatement plan approval is pending, or in a manner that will result in compliance with the standards and requirements set forth in Section 20.6.2.4103 NMAC within one hundred and eighty (180) days after notice is required to be given pursuant to Paragraph (1) of Subsection A of Section 20.6.2.1203 NMAC, provided that the delegated agency does

not object to the abatement action pursuant to Paragraphs (6) and (7) of Subsection A of Section 20.6.2.1203 NMAC.

B. If the secretary determines that abatement of water pollution subject to Subsection A of this section will not meet the standards of Subsections A, B, and C of Section 20.6.2.4103 NMAC, or that additional action is necessary to protect health, welfare, environment or property, the secretary may notify a responsible person, by certified mail, to submit an abatement plan pursuant to Section 20.6.2.4104 and Subsection A of Section 20.6.2.4106 NMAC. The notification shall state the reasons for the secretary's determination. In any appeal of the secretary's determination under this Section, the secretary shall have the burden of proof.

C. Sections 20.6.2.4104 and 20.6.2.4106 NMAC do not apply to the following activities:

(1) Discharges subject to an effective and enforceable National Pollutant Discharge Elimination System (NPDES) permit;

(2) Land application of ground water contaminated with nitrogen originating from human or animal waste and not otherwise exceeding the standards of Subsection A of Section 20.6.2.3103 NMAC ~~[and not containing a toxic pollutant as defined in Section 20.6.2.1101 NMAC]~~, provided that it is done in compliance with a discharge plan approved by the secretary;

(3) Abatement of water pollution resulting from the withdrawal and decontamination or blending of polluted water for use as a public or private drinking-water supply, by any person other than a responsible person, unless the secretary determines that a hazard to public health may result; and

(4) Reasonable operation and maintenance of irrigation and flood control facilities. [12-1-95; 20.6.2.4105 NMAC - Rn, 20 NMAC 6.2.IV.4105, 1-15-01; A, 10/15/03; A, 12-21-18]

20.6.2.4106 ABATEMENT

PLAN PROPOSAL:

A. Except as provided for in Section 20.6.2.4105 NMAC, a responsible person shall, within sixty (60) days of receipt of written notice from the secretary that an abatement plan is required, submit an abatement plan proposal to the secretary for approval. For good cause shown, the secretary may allow for a total of one hundred and twenty (120) days to prepare and submit the abatement plan proposal.

B. Voluntary

Abatement:

(1) Any person wishing to abate water pollution in excess of the standards and requirements set forth in Section 20.6.2.4103 NMAC may submit a Stage 1 abatement plan proposal to the secretary for approval. Following approval by the secretary of a final site investigation report prepared pursuant to Stage 1 of an abatement plan, any person may submit a Stage 2 abatement plan proposal to the secretary for approval.

(2) Following approval of a Stage 1 or Stage 2 abatement plan proposal under Paragraph (1) of Subsection B of this Section, the person submitting the approved plan shall be a responsible person under Sections 20.6.2.4000 through 20.6.2.4115 NMAC for the purpose of performing the approved Stage 1 or Stage 2 abatement plan. Nothing in this Section shall preclude the secretary from applying Paragraph (9) of Subsection A of Section 20.6.2.1203 NMAC to a responsible person if applicable.

C. Stage 1 Abatement

Plan: The purpose of Stage 1 of the abatement plan shall be to design and conduct a site investigation that will adequately define site conditions, and provide the data necessary to select and design an effective abatement option. Stage 1 of the abatement plan may include, but not necessarily be limited to, the following information depending on the media affected, and as reasonably needed to select and implement an expeditious abatement option:

(1)

Descriptions of the site, including a site map, and of site history including the nature of the discharge that caused the water pollution, and a summary of previous investigations;

(2) Site

investigation workplan to define:

(a)

site geology and hydrogeology, the vertical and horizontal extent and magnitude of vadose-zone and ground water contamination, subsurface hydraulic parameters including hydraulic conductivity, transmissivity, storativity, and rate and direction of contaminant migration, inventory of water wells inside and within one (1) mile from the perimeter of the three-dimensional body where the standards set forth in Subsection B of Section 20.6.2.4103 NMAC are exceeded, and location and number of such wells actually or potentially affected by the pollution; and

(b)

surface water hydrology, seasonal stream flow characteristics, ground water/surface water relationships, the vertical and horizontal extent and magnitude of contamination and impacts to surface water and stream sediments. The magnitude of contamination and impacts on surface water may be, in part, defined by conducting a biological assessment of fish, benthic macroinvertebrates and other wildlife populations. Seasonal variations should be accounted for when conducting these assessments.

(3) Monitoring

program, including sampling stations and frequencies, for the duration of the abatement plan that may be modified, after approval by the secretary, as additional sampling stations are created;

(4) Quality

assurance plan, consistent with the sampling and analytical techniques listed in Subsection B of Section 20.6.2.3107 NMAC and with Section 20.6.4.10 NMAC of the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC), for all work to be conducted pursuant to the abatement plan;

(5) Site health

and safety plan for all work to be performed pursuant to the abatement plan;

(6) A schedule

for all Stage 1 abatement plan activities, including the submission of summary quarterly progress reports, and the submission, for approval by the secretary, of a detailed final site investigation report; and

(7) Any

additional information that may reasonably be required to design and perform an adequate site investigation.

D. Stage 2 Abatement

Plan: Any responsible person shall submit a Stage 2 abatement plan proposal to the secretary for approval within sixty (60) days [~~or up to one hundred and twenty (120) days for good cause shown;~~] after approval by the secretary of the final site investigation report prepared pursuant to Stage 1 of the abatement plan. The secretary may grant approval for an extension of time to submit a State 2 abatement plan for good cause shown.

E. The purpose of

Stage 2 of the abatement plan shall be to select and design, if necessary, an abatement option that, when implemented, will result in attainment of the abatement standards and requirements set forth in Section 20.6.2.4103 NMAC, including post-closure maintenance activities. Stage 2 of the abatement plan should include, at a minimum, the following information:

(1) Brief

description of the current situation at the site;

(2)

Development and assessment of abatement options;

(3)

Description, justification and design, if necessary, of preferred abatement option;

(4)

Modification, if necessary, of the monitoring program approved pursuant to Stage 1 of the abatement plan, including the designation of pre and post abatement-completion sampling stations and sampling frequencies to be used to demonstrate

compliance with the standards and requirements set forth in Section 20.6.2.4103 NMAC;

(5) Site maintenance activities, if needed, proposed to be performed after termination of abatement activities;

(6) A schedule for the duration of abatement activities, including the submission of summary quarterly progress reports;

(7) A public notification proposal designed to satisfy the requirements of Subsections B and C of Sections 20.6.2.4108 and 20.6.2.4108 NMAC; and

(8) Any additional information that may be reasonably required to select, describe, justify and design an effective abatement option. [12-1-95; 20.6.2.4106 NMAC - Rn, 20 NMAC 6.2.IV.4106, 1-15-01; A, 12-21-18]

20.6.2.4108 PUBLIC NOTICE AND PARTICIPATION:

A. Within thirty (30) days of filing of a Stage 1 abatement plan proposal, the secretary shall issue a news release summarizing:

(1) the source, extent, magnitude and significance of water pollution, as known at that time;

(2) the proposed Stage 1 abatement plan investigation; and

(3) the name and telephone number of an agency contact who can provide additional information.

B. ~~[Within thirty (30) days of filing of]~~ Any person proposing a Stage 2 abatement plan, [proposal, or proposed] a significant modification [of] to a Stage 2 abatement plan, or an alternative abatement standard [any responsible person] shall provide ~~[to the secretary proof of public-]~~ notice of the ~~[abatement plan-]~~ proposal to the following persons:

(1) the public, who shall be notified through publication of a notice in newspapers of general circulation in this state and in the county where the abatement

will occur or where the water body that would be affected by a proposed alternative abatement standard is located, and, in areas with large percentages of non-English speaking people, through the mailing of the public notice in English to a bilingual radio station serving the area where the abatement will occur with a request that it be aired as a public service announcement in the predominant non-English language of the area;

(2) those persons, as identified by the secretary, who have requested notification, who shall be notified by mail or email;

(3) the New Mexico Trustee for Natural Resources, and any other local, state or federal governmental agency affected, as identified by the secretary, which shall be notified by certified mail;

(4) owners and residents of surface property located inside, and within one (1) mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary; and

(5) the Governor or President of each Indian Tribe, Pueblo or Nation within the state of New Mexico, as identified by the secretary, who shall be notified by mail or email.

C. The public notice proposal for a Stage 2 abatement plan proposal or significant modification of a Stage 2 abatement plan shall [include, as approved in advance by-] be submitted to the secretary for approval with a proposed Stage 2 abatement plan, or significant modification of a Stage 2 abatement plan, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed abatement;

(3) brief description of the nature of the water pollution and of the proposed abatement action;

(4) brief description of the procedures

followed by the secretary in making a final determination;

(5) statement on the comment period;

(6) statement that a copy of the abatement plan can be viewed by the public at the department's main office or at the department field office for the area in which the discharge occurred;

(7) statement that written comments on the abatement plan, and requests for a public meeting or hearing that include the reasons why a meeting or hearing should be held, will be accepted for consideration if sent to the secretary within sixty (60) days after the ~~[determination of administrative-completeness; and]~~ date of public notice; and

(8) address and phone number at which interested persons may obtain further information.

D. The public notice proposal for a proposed alternative abatement standard shall be submitted to the secretary for approval thirty (30) days prior to the filing of a petition for alternative abatement standards, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed alternative abatement standards;

(3) brief description of the nature of the water pollution and of the proposed alternative abatement standards;

(4) brief description of the procedures followed by the commission in making a final determination on a petition for alternate abatement standards;

(5) statement that a copy of the petition for alternate abatement standards petition can be viewed by the public at the department's main office or at the department field office for the area in which the affected water body is occurring;

(6) statement on how the public can request to be placed on a facility-specific mailing list for notification of any hearing

conducted on the petition for alternate abatement standards pursuant to 20.1.3 NMAC; and

(7) address and phone number at which interested persons may obtain further information.

E. Within thirty (30) days of the secretary's approval of a Stage 2 abatement plan public notice proposal, any responsible person shall provide to the secretary proof of public notice to the persons listed in Subsection B of 20.6.2.4108 NMAC.

~~[D]~~ E. [A] For a proposed Stage 2 abatement plan or significant modification of a Stage 2 abatement plan a public meeting or hearing may be held if the secretary determines there is significant public interest. Notice of the time and place of the meeting or hearing shall be given at least thirty (30) days prior to the meeting or hearing pursuant to Subsections A and B above. The secretary may appoint a meeting facilitator or hearing officer. The secretary may require the responsible person to prepare for approval by the secretary a fact sheet, to be distributed at the public meeting or hearing and afterwards upon request, written in English and Spanish, describing site history, the nature and extent of water pollution, and the proposed abatement. The record of the meeting or hearing, requested under this Section, consists of a tape recorded or transcribed session, provided that the cost of a court recorder shall be paid by the person requesting the transcript. If requested by the secretary, the responsible person will provide a translator approved by the secretary at a public meeting or hearing conducted in a locale where testimony from non-English speaking people can reasonably be expected. At the meeting or hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing, and to ask questions of the secretary or the secretary's designee and of the responsible person, or their authorized representatives.

G. An alternative abatement standard shall only be

granted after a public hearing before the commission, as required by Subsection H of Section 74-6-4 NMSA 1978 of the Water Quality Act. The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

[12-1-95; 20.6.2.4108 NMAC - Rn, 20 NMAC 6.2.IV.4108, 1-15-01; A, 12-21-18]

20.6.2.4109 SECRETARY APPROVAL OR NOTICE OF DEFICIENCY OF SUBMITTALS:

A. The secretary shall, within sixty (60) days of receiving a Stage 1 abatement plan proposal, a site investigation report, [~~a technical infeasibility demonstration,~~] or an abatement completion report, approve the document, or notify the responsible person of the document's deficiency, based upon the information available.

B. The secretary shall, within thirty (30) days of receiving a fact sheet, or Stage 2 abatement plan public notice proposal, approve or notify the responsible person of the document's deficiency, based upon the information available.

C. If no public meeting or hearing is held pursuant to Subsection ~~[D]~~ E of Section 20.6.2.4108 NMAC, then the secretary shall, within ~~[ninety (90)]~~ 120 days of receiving a Stage 2 abatement plan proposal, approve the plan, or notify the responsible person of the plan's deficiency, based upon the information available.

D. If a public meeting or hearing is held pursuant to Subsection ~~[D]~~ E of Section 20.6.2.4108, then the secretary shall, within sixty (60) days of receipt of all required information, approve Stage 2 of the abatement plan proposal, or notify the responsible person of the plan's deficiency, based upon the information contained in the plan and information submitted at the meeting or hearing.

E. If the secretary notifies a responsible person of any

deficiencies in a site investigation report, or in a Stage 1 or Stage 2 abatement plan proposal, the responsible person shall submit a modified document to cure the deficiencies specified by the secretary within thirty (30) days of receipt of the notice of deficiency. The responsible person shall be in violation of Sections 20.6.2.4000 through 20.6.2.4115 NMAC if he fails to submit a modified document within the required time, or if the modified document does not make a good faith effort to cure the deficiencies specified by the secretary.

F. Provided that the other requirements of this Part are met and provided further that Stage 2 of the abatement plan, if implemented, will result in the standards and requirements set forth in Section 20.6.2.4103 NMAC being met within a schedule that is reasonable given the particular circumstances of the site, the secretary shall approve the plan. [12-1-95; 20.6.2.4109 NMAC - Rn, 20 NMAC 6.2.IV.4109, 1-15-01; A, 12-21-18]

20.6.2.4114 APPEALS FROM SECRETARY'S DECISIONS:

A. If the secretary determines that an abatement plan is required pursuant to Paragraph (9) of Subsection A of 20.6.2.1203, [~~Paragraph (4) of~~] Subsection E of 20.6.2.3109, or Subsection B of 20.6.2.4105 NMAC, approves or provides notice of deficiency of a proposed abatement plan, [~~technical infeasibility demonstration~~] or abatement completion report, or modifies or terminates an approved abatement plan, he shall provide written notice of such action by certified mail to the responsible person and any person who participated in the action.

B. Any person who participated in the action before the secretary and who is adversely affected by the action listed in Subsection A of 20.6.2.4114 NMAC may file a petition requesting a review before the commission.

C. The petition shall be made in writing to the

commission and shall be filed with the commission's secretary within thirty (30) days after receiving notice of the secretary's action. The petition shall specify the portions of the action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered to the secretary, and to the applicant or permittee if the petitioner is not the applicant or permittee, and attach a copy of the action for which review is sought. Unless a timely petition for hearing is made, the secretary's action is final.

D. The proceedings before the commission shall be conducted as provided in the commission's adjudicatory procedures, 20 NMAC 1.3.

E. The cost of the court reporter for the hearing shall be paid by the petitioner.

F. The appeal provisions do not relieve the owner, operator or responsible person of their obligations to comply with any federal or state laws or regulations. [12-1-95, 11-15-96; 20.6.2.4114 NMAC - Rn, 20 NMAC 6.2.IV.4114, 1-15-01; A, 7-16-06; A, 12-21-18]

20.6.2.5002 UNDERGROUND INJECTION CONTROL WELL CLASSIFICATIONS:

A. Underground injection control wells include the following.

(1) Any dug hole or well that is deeper than its largest surface dimension, where the principal function of the hole is emplacement of fluids.

(2) Any septic tank or cesspool used by generators of hazardous waste, or by owners or operators of hazardous waste management facilities, to dispose of fluids containing hazardous waste.

(3) Any subsurface distribution system, cesspool or other well which is used for the injection of wastes.

B. Underground injection control wells are classified as follows:

(1) Class I wells inject fluids beneath the

lowermost formation that contains 10,000 milligrams per liter or less TDS. Class I hazardous or radioactive waste injection wells inject fluids containing any hazardous or radioactive waste as defined in 74-4-3 and 74-4A-4 NMSA 1978 or 20.4.1.200 NMAC (incorporating 40 C.F.R. Section 261.3), including any combination of these wastes. Class I non-hazardous waste injection wells inject non-hazardous and non-radioactive fluids, and they inject naturally-occurring radioactive material (NORM) as provided by 20.3.1.1407 NMAC.

(2) Class II wells inject fluids associated with oil and gas recovery;

(3) Class III wells inject fluids for extraction of minerals or other natural resources, including sulfur, uranium, metals, salts or potash by in situ extraction. This classification includes only in situ production from ore bodies that have not been conventionally mined. Solution mining of conventional mines such as stopes leaching is included in Class V.

(4) Class IV wells inject fluids containing any radioactive or hazardous waste as defined in 74-4-3 and 74-4A-4 NMSA 1978, including any combination of these wastes, above or into a formation that contains 10,000 mg/l or less TDS.

(5) Class V wells inject a variety of fluids and are those wells not included in Class I, II, III or IV. Types of Class V wells include, but are not limited to, the following:

(a) domestic liquid waste injection wells: (i)

domestic liquid waste disposal wells used to inject liquid waste volumes greater than that regulated by 20.7.3 NMAC through subsurface fluid distribution systems or vertical wells; (ii)

septic system wells used to emplace liquid waste volumes greater than that regulated by 20.7.3 NMAC into the subsurface, which are comprised of a septic tank and subsurface fluid

distribution system; (iii) large capacity cesspools used to inject liquid waste volumes greater than that regulated by 20.7.3 NMAC, including drywells that sometimes have an open bottom or perforated sides;

(b) industrial waste injection wells: (i)

air conditioning return flow wells used to return to the supply aquifer the water used for heating or cooling; (ii)

dry wells used for the injection of wastes into a subsurface formation; (iii)

~~geothermal energy~~] injection wells associated with the recovery of geothermal energy for heating, aquaculture and production of electrical power; (iv)

stormwater drainage wells used to inject storm runoff from the surface into the subsurface; (v)

motor vehicle waste disposal wells that receive or have received fluids from vehicular repair or maintenance activities; (vi)

car wash waste disposal wells used to inject fluids from motor vehicle washing activities; (c)

mining injection wells: (i) stopes leaching wells used for solution mining of conventional mines; (ii)

brine injection wells used to inject spent brine into the same formation from which it was withdrawn after extraction of halogens or their salts; (iii)

backfill wells used to inject a mixture of water and sand, mill tailings or other solids into mined out portions of subsurface mines whether water injected is a radioactive waste or not; (iv)

injection wells used for in situ recovery of lignite, coal, tar sands, and oil shale; (d)

ground water management injection wells:

(i) ground water remediation injection wells used to inject contaminated ground water that has been treated to ground water quality standards;

(ii) in situ ground water remediation wells used to inject a fluid that facilitates vadose zone or ground water remediation.

(iii) recharge wells used to replenish the water in an aquifer, including use to reclaim or improve the quality of existing ground water;

(iv) barrier wells used to inject fluids into ground water to prevent the intrusion of saline or contaminated water into ground water of better quality;

(v) subsidence control wells (not used for purposes of oil or natural gas production) used to inject fluids into a non-oil or gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water;

(vi) wells used in experimental technologies;

(e) agricultural injection wells - drainage wells used to inject fluids into ground water to prevent the intrusion of saline or contaminated water into ground water of better quality. [20.6.2.5002 NMAC - N, 12-1-01; A, 8-1-14; A, 8-31-15; A, 12-21-18]

20.6.2.5003 NOTIFICATION AND GENERAL OPERATION REQUIREMENTS FOR ALL UNDERGROUND INJECTION CONTROL WELLS: All operators of underground injection control wells, except those wells regulated under the Oil and Gas Act, the Geothermal Resources [~~Conservation~~] Development Act, and the Surface Mining Act, shall:

A. for existing underground injection control wells, submit to the secretary the information enumerated in Subsection C of 20.6.2.1201 NMAC of this part; provided, however, that if the information in Subsection C

of 20.6.2.1201 NMAC has been previously submitted to the secretary and acknowledged by him, the information need not be resubmitted; and

B. operate and continue to operate in conformance with 20.6.2.1 through 20.6.2.5399 NMAC;

C. for new underground injection control wells, submit to the secretary the information enumerated in Subsection C of 20.6.2.1201 NMAC of this part at least 120 days prior to well construction.

[9-20-82, 12-1-95; 20.6.2.5300 NMAC - Rn, 20 NMAC 6.2.V.5300, 1-15-01; 20.6.2.5003 NMAC - Rn, 20.6.2.5300 NMAC, 12-1-01; A, 12-1-01; A, 9-15-02; A, 8-31-15; A, 12-21-18]

20.6.2.5004 PROHIBITED UNDERGROUND INJECTION CONTROL ACTIVITIES AND WELLS:

A. No person shall perform the following underground injection activities nor operate the following underground injection control wells.

(1) The injection of fluids into a motor vehicle waste disposal well is prohibited. Motor vehicle waste disposal wells are prohibited. Any person operating a new motor vehicle waste disposal well (for which construction began after April 5, 2000) must close the well immediately. Any person operating an existing motor vehicle waste disposal well must cease injection immediately and must close the well by December 31, 2002, except as provided in this subsection.

(2) The injection of fluids into a large capacity cesspool is prohibited. Large capacity cesspools are prohibited. Any person operating a new large capacity cesspool (for which construction began after April 5, 2000) must close the cesspool immediately. Any person operating an existing large capacity cesspool must cease injection immediately and must close the cesspool by December 31, 2002.

(3) The injection of any hazardous or radioactive waste into a well is prohibited, except as provided in 20.6.2.5300 through 20.6.2.5399 NMAC or this subsection.

(a) Class I radioactive waste injection wells are prohibited, except naturally-occurring radioactive material (NORM) regulated under 20.3.1.1407 NMAC is allowed as a Class I non-hazardous waste injection well pursuant to Paragraph (1) of Subsection B of 20.6.2.5002 NMAC.

(b) Class IV wells are prohibited, except for wells re-injecting treated ground water into the same formation from which it was drawn as part of a removal or remedial action if the injection has prior approval from the environmental protection agency (EPA) or the department under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA).

(4) Barrier wells, drainage wells, recharge wells, return flow wells, and motor vehicle waste disposal wells are prohibited, except when the discharger can demonstrate that the discharge will not adversely affect the health of persons, and

(a) the injection fluid does not contain a [contaminant] constituent or exhibit a physical parameter (which could include pH, redox condition or temperature) which may cause an exceedance at any place of present or reasonable foreseeable future use of any primary state drinking water maximum contaminant level as specified in the water supply regulations, "Drinking Water" (20.7.10 NMAC), adopted by the environmental improvement board under the Environmental Improvement Act or the standard of 20.6.2.3103 NMAC, whichever is more stringent;

(b) the discharger can demonstrate that the injection will result in an overall

or net improvement in water quality as determined by the secretary.

B. Closure of prohibited underground injection control wells shall be in accordance with 20.6.2.5005 and 20.6.2.5209 NMAC. [20.6.2.5004 NMAC - N, 12-1-01; A, 8-31-15; A, 12-21-18]

20.6.2.5005 PRE-CLOSURE NOTIFICATION AND CLOSURE REQUIREMENTS:

A. Any person proposing to close a Class I, III, IV or V underground injection control well must submit pre-closure notification to the department at least 30 days prior to closure. Pre-closure notification must include the following information:

- (1) Name of facility.
- (2) Address of facility.
- (3) Name of Owner/Operator.
- (4) Address of Owner/Operator.
- (5) Contact Person.
- (6) Phone Number.
- (7) Type of Well(s).
- (8) Number of Well(s).
- (9) Well Construction (e.g. drywell, improved sinkhole, septic tank, leachfield, cesspool, other...).
- (10) Type of Discharge.
- (11) Average Flow (gallons per day).
- (12) Year of Well Construction.
- (13) Proposed Well Closure Activities (e.g. sample fluids/sediment, appropriate disposal of remaining fluids/sediments, remove well and any contaminated soil, clean out well, install permanent plug, conversion to other type well, ground water and vadose zone investigation, other).
- (14) Proposed Date of Well Closure.

(15) Name of Preparer.
 (16) Date.
 (17) Well
plugging plan as submitted to the Office of the State Engineer pursuant to 19.27.4 NMAC.

B. Proposed well closure activities must be approved by the department prior to implementation. [20.6.2.5005 NMAC - N, 12-1-01; A, 12-21-18]

20.6.2.5006 DISCHARGE PERMIT REQUIREMENTS FOR CLASS V INJECTION WELLS: Class V injection wells must meet the requirements of Sections 20.6.2.3000 through 20.6.2.3999 NMAC and Sections 20.6.2.5000 through 20.6.2.5006 NMAC. Class V injection wells or surface impoundments constructed as recharge basins used to replenish the water in an aquifer, including use to reclaim or improve the quality of existing water must additionally provide documentation of compliance with 19.25.8 NMAC (Underground Storage and Recovery) and shall not be subject to the exemptions of 20.6.2.3105 NMAC.

[20.6.2.5006 NMAC - N, 12-1-01; A, 12-21-18]

20.6.2.5101 DISCHARGE PERMIT AND OTHER REQUIREMENTS FOR CLASS I WELLS AND CLASS III WELLS:

A. Class I wells and Class III wells must meet the requirements of 20.6.2.5000 through 20.6.2.5399 NMAC in addition to other applicable requirements of the commission regulations. The secretary may also require that some Class IV and Class V wells comply with the requirements for Class I wells in 20.6.2.5000 through 20.6.2.5399 NMAC if the secretary determines that the additional requirements are necessary to prevent the movement of water contaminants from a specified injection zone into ground water having 10,000 mg/l or less TDS. No Class I well or Class III well may be approved which allows

for movement of fluids into ground water having 10,000 mg/l or less TDS except for fluid movement approved pursuant to 20.6.2.5103 NMAC, or pursuant to a temporary designation as provided in Paragraph (2) of Subsection C of 20.6.2.5101 NMAC.

B. Operation of a Class I well or Class III well must be pursuant to a discharge permit meeting the requirements of 20.6.2.3000 through 20.6.2.3999 NMAC and 20.6.2.5000 through 20.6.2.5399 NMAC.

C. Discharge permits for Class I wells, or Class III wells affecting ground water of 10,000 mg/l or less TDS submitted for secretary approval shall:

- (1) receive an aquifer designation if required in 20.6.2.5103 NMAC prior to discharge permit issuance; or
- (2) for Class III wells only, address the methods or techniques to be used to restore ground water so that upon final termination of operations including restoration efforts, ground water at any place of withdrawal for present or reasonably foreseeable future use will not contain either concentrations in excess of the standards of 20.6.2.3103 NMAC or any toxic pollutant; issuance of a discharge permit or project discharge permit for Class III wells that provides for restoration of ground water in accordance with the requirements of this subsection shall substitute for the aquifer designation provisions of 20.6.2.5103 NMAC; the approval shall constitute a temporary aquifer designation for a mineral bearing or producing aquifer, or portion thereof, to allow injection as provided for in the discharge permit; such temporary designation shall expire upon final termination of operations including restoration efforts.

D. The exemptions from the discharge permit requirement listed in 20.6.2.3105 NMAC do not apply to underground injection control wells except as provided below:

~~(4) wells regulated by the oil conservation division of the energy, minerals and~~

natural resources department under the exclusive authority granted under Section 70-2-12 NMSA 1978 or under other sections of the "Oil and Gas Act";

~~(2)~~(1) wells regulated by the [~~oil conservation division~~] energy conservation management division of the energy, minerals and natural resources department under the "Geothermal Resources Development Act";

~~(3)~~(2) wells regulated by the [~~New Mexico coal surface mining bureau~~] mining and minerals division of the energy, minerals and natural resources department under the "Surface Mining Act";

~~(4)~~(3) wells for the disposal of effluent from systems which are regulated under the "Liquid Waste Disposal and Treatment" regulations (20.7.3 NMAC) adopted by the environmental improvement board under the "Environmental Improvement Act".

E. Project permits for Class III wells.

(1) The secretary may consider a project discharge permit for Class III wells, if the wells are:

(a) within the same well field, facility site or similar unit;

(b) within the same aquifer and ore deposit;

(c) of similar construction;

(d) of the same purpose; and

(e) operated by a single owner or operator.

(2) A project discharge permit does not allow the discharger to commence injection in any individual operational area until the secretary approves an application for injection in that operational area (operational area approval).

(3) A project discharge permit shall:

(a) specify the approximate locations and number of wells for which operational

area approvals are or will be sought with approximate time frames for operation and restoration (if restoration is required) of each area; and

(b) provide the information required under the following sections of this part, except for such additional site-specific information as needed to evaluate applications for individual operational area approvals:

Subsection C of 20.6.2.3106, 20.6.2.3107, 20.6.2.5204 through 20.6.2.5209, and Subsection B of 20.6.2.5210 NMAC.

(4) Applications for individual operational area approval shall include the following:

(a) site-specific information demonstrating that the requirements of this part are met; and

(b) information required under 20.6.2.5202 through 20.6.2.5210 NMAC and not previously provided pursuant to Subparagraph (b) of Paragraph (3) of Subsection E of this section.

(5) Applications for project discharge permits and for operational area approval shall be processed in accordance with the same procedures provided for discharge permits under 20.6.2.3000 through 20.6.2.3114 NMAC, allowing for public notice on the project discharge permit and on each application for operational area approval pursuant to 20.6.2.3108 NMAC with opportunity for public hearing prior to approval or disapproval.

(6) The discharger shall comply with additional requirements that may be imposed by the secretary pursuant to this part on wells in each new operational area.

F. If the holder of a discharge permit for a Class I well, or Class III well submits an application for discharge permit renewal at least 120 days before discharge permit expiration, and the discharger is in compliance with his discharge

permit on the date of its expiration, then the existing discharge permit for the same activity shall not expire until the application for renewal has been approved or disapproved. An application for discharge permit renewal must include and adequately address all of the information necessary for evaluation of a new discharge permit. Previously submitted materials may be included by reference provided they are current, readily available to the secretary and sufficiently identified to be retrieved.

G. Discharge permit signatory requirements: No discharge permit for a Class I well or Class III well may be issued unless:

(1) the application for a discharge permit has been signed as follows:

(a) for a corporation: by a principal executive officer of at least the level of vice-president, or a representative who performs similar policy-making functions for the corporation who has authority to sign for the corporation; or

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

(c) for a municipality, state, federal, or other public agency: by either a principal executive officer who has authority to sign for the agency, or a ranking elected official; and

(2) all reports required by Class I hazardous waste injection well permits and other information requested by the director pursuant to a Class I hazardous waste injection well permit shall be signed by a person described in Paragraph (1) of this subsection, or by a duly authorized representative of that person; a person is a duly authorized representative only if:

(a) the authorization is made in writing by a person described in Paragraph (1) of this subsection;

(b) the authorization specifies either an individual or a position having

responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility; (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and

(c) the written authorization is submitted to the director.

(3) *Changes to authorization.* If an authorization under Paragraph (2) of this subsection is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Paragraph (2) of this subsection must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(4) The signature on an application, report or other information requested by the director must be directly preceded by the following certification: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment."

H. Transfer of Class I non-hazardous waste injection well and Class III well discharge permits.

(1) The transfer provisions of 20.6.2.3111 NMAC do not apply to a discharge permit for a Class I non-hazardous waste injection well or Class III well.

(2) A Class I non-hazardous waste injection well or Class III well discharge permit may be transferred if:

(a) the secretary receives written notice 30 days prior to the transfer date; and

(b) the secretary does not object prior to the proposed transfer date; the secretary may require modification of the discharge permit as a condition of transfer, and may require demonstration of adequate financial responsibility.

(3) The written notice required by Subparagraph (a) of Paragraph (2) of Subsection H above shall:

(a) have been signed by the discharger and the succeeding discharger, including an acknowledgement that the succeeding discharger shall be responsible for compliance with the discharge permit upon taking possession of the facility; and

(b) set a specific date for transfer of discharge permit responsibility, coverage and liability; and

(c) include information relating to the succeeding discharger's financial responsibility required by Paragraph (17) of Subsection B of 20.6.2.5210 NMAC.

I. Modification or termination of a discharge permit for a Class I well or Class III well: If data submitted pursuant to any monitoring requirements specified in the discharge permit or other information available to the secretary indicate that this part are being or may be violated, the secretary may require modification or, if it is determined by the secretary that the modification may not be adequate, may terminate a discharge permit for a Class I well, or Class III well or well field, that was approved pursuant to the requirements of this under 20.6.2.5000 through 20.6.2.5399 NMAC for the following causes:

(1) noncompliance by the discharger with any condition of the discharge permit; or

(2) the discharger's failure in the discharge permit application or during the

discharge permit review process to disclose fully all relevant facts, or the discharger's misrepresentation of any relevant facts at any time; or

(3) a determination that the permitted activity may cause a hazard to public health or undue risk to property and can only be regulated to acceptable levels by discharge permit modification or termination.

[9-20-82, 12-1-95, 11-15-96; 20.6.2.5101 NMAC - Rn, 20 NMAC 6.2.V.5101, 1-15-01; A, 12-1-01; A, 9-15-02; A, 8-1-14; A, 8-31-15; A, 12-21-18]

20.6.2.5102 PRE-CONSTRUCTION REQUIREMENTS FOR CLASS I WELLS AND CLASS III WELLS:

A. Discharge permit requirement for Class I wells.

(1) Prior to construction of a Class I well or conversion of an existing well to a Class I well, an approved discharge permit is required that incorporates the requirements of 20.6.2.5000 through 20.6.2.5399 NMAC, except Subsection C of 20.6.2.5210 NMAC. As a condition of discharge permit issuance, the operation of the Class I well under the discharge permit will not be authorized until the secretary has:

(a) reviewed the information submitted for his consideration pursuant to Subsection C of 20.6.2.5210 NMAC; and

(b) determined that the information submitted demonstrates that the operation will be in compliance with this part and the discharge permit.

(2) If conditions encountered during construction represent a substantial change which could adversely impact ground water quality from those anticipated in the discharge permit, the secretary shall require a discharge permit modification or may terminate the discharge permit pursuant to Subsection I of 20.6.2.5101 NMAC, and the secretary shall publish public notice and allow for comments

and hearing in accordance with 20.6.2.3108 NMAC.

B. Notification requirement for Class III wells.

(1) The discharger shall notify the secretary in writing prior to the commencement of drilling or construction of wells which are expected to be used for in situ extraction, unless the discharger has previously received a discharge permit or project discharge permit for the Class III well operation.

(a) Any person proposing to drill or construct a new Class III well or well field, or convert an existing well to a Class III well, shall file plans, specifications and pertinent documents regarding such construction or conversion, with the ground water quality bureau of the environment department.

(b) Plans, specifications, and pertinent documents required by this section, if pertaining to ~~[geothermal installations,]~~ carbon dioxide facilities, or facilities for the exploration, production, refinement or pipeline transmission of oil and natural gas, shall be filed instead with the oil conservation division of the energy, minerals and natural resources department.

(c) Plans, specifications and pertinent documents required to be filed under this section must be filed 90 days prior to the planned commencement of construction or conversion.

(d) The following plans, specifications and pertinent documents shall be provided with the notification:

(i) information required in Subsection C of 20.6.2.3106 NMAC;

(ii) a map showing the Class III wells which are to be constructed; the map must also show, in so far as is known or is reasonably available from the public records, the number, name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells

and other pertinent surface features, including residences and roads, that are within the expected area of review (20.6.2.5202 NMAC) of the Class III well or well field perimeter;

(iii) maps and cross-sections indicating the general vertical and lateral limits of all ground water having 10,000 mg/l or less TDS within one mile of the site, the position of such ground water within this area relative to the injection formation, and the direction of water movement, where known, in each zone of ground water which may be affected by the proposed injection operation;

(iv) maps and cross-sections detailing the geology and geologic structure of the local area, including faults, if known or suspected;

(v) the proposed formation testing program to obtain an analysis or description, whichever the secretary requires, of the chemical, physical, and radiological characteristics of, and other information on, the receiving formation;

(vi) the proposed stimulation program;

(vii) the proposed injection procedure;

(viii) schematic or other appropriate drawings of the surface and subsurface construction details of the well;

(ix) proposed construction procedures, including a cementing and casing program, logging procedures, deviation checks, and a drilling, testing, and coring program;

(x) information, as described in Paragraph (17) of Subsection B of 20.6.2.5210 NMAC, showing the ability of the discharger to undertake measures necessary to prevent ground water contamination; and

(xi) a plugging and abandonment plan showing that the requirements of Subsections B, C and D of 20.6.2.5209 NMAC will be met.

(2) Prior to

construction, the discharger shall have received written notice from the secretary that the information submitted under item 10 of Subparagraph (d) of Paragraph (1) of Subsection B of 20.6.2.5102 NMAC is acceptable. Within 30 days of submission of the above information the secretary shall notify the discharger that the information submitted is acceptable or unacceptable.

(3) Prior to construction, the secretary shall review said plans, specifications and pertinent documents and shall comment upon their adequacy of design for the intended purpose and their compliance with pertinent sections of this part. Review of plans, specifications and pertinent documents shall be based on the criteria contained in 20.6.2.5205, Subsection E of 20.6.2.5209, and Subparagraph (d) of Paragraph (1) of Subsection B of 20.6.2.5102 NMAC.

(4) Within 30 days of receipt, the secretary shall issue public notice, consistent with Subsection B of 20.6.2.3108 NMAC, that notification was submitted pursuant to Subsection B of 20.6.2.5102 NMAC. The secretary shall allow a period of at least 30 days during which comments may be submitted. The public notice shall include:

(a) name and address of the proposed discharger;

(b) location of the discharge;

(c) brief description of the proposed activities;

(d) statement of the public comment period; and

(e) address and telephone number at which interested persons may obtain further information.

(5) The secretary shall comment in writing upon the plans and specifications within 60 days of their receipt by the secretary.

(6) Within 30

days after completion, the discharger shall submit written notice to the secretary that the construction or conversion was completed in accordance with submitted plans and specifications, or shall submit as-built plans detailing changes from the originally submitted plans and specifications.

(7) In the event a discharge permit application is not submitted or approved, all wells which may cause ground water contamination shall be plugged and abandoned by the applicant pursuant to the plugging and abandonment plan submitted in the notification; these measures shall be consistent with any comments made by the secretary in his review. If the wells are not to be permanently abandoned and the discharger demonstrates that plugging at this time is unnecessary to prevent ground water contamination, plugging pursuant to the notification is not required. Financial responsibility established pursuant to 20.6.2.5000 through 20.6.2.5299 NMAC will remain in effect until the discharger permanently abandons and plugs the wells in accordance with the plugging and abandonment plan. [9-20-82, 12-24-87, 12-1-95; 20.6.2.5102 NMAC - Rn, 20 NMAC 6.2.V.5102, 1-15-01; A, 12-1-01; A, 8-31-15; A, 12-21-18]

20.6.2.5202 AREA OF REVIEW:

A. The area of review is the area surrounding a Class I non-hazardous waste injection well or Class III well or the area within and surrounding a well field that is to be examined to identify possible fluid conduits, including the location of all known wells and fractures which may penetrate the injection zone.

B. The area of review for each Class I non-hazardous waste injection well, or each Class III well or well field shall be an area which extends:

- (1) two and one half (2 1/2) miles from the well, or well field; or
- (2) one-quarter (1/4) mile from a well or well field

where the area of review is calculated to be zero pursuant to Paragraph (3) of Subsection B below, or where the well field production at all times exceeds injection to produce a net withdrawal; or

(3) a suitable distance, not less than one-quarter (1/4) mile, proposed by the discharger and approved by the secretary, based upon a mathematical calculation to determine the area of review; computations to determine the area of review may be based upon the parameters listed below and should be calculated for an injection time period equal to the expected life of the Class I non-hazardous waste injection well, or Class III well or well field; the following modified This equation illustrates one form which the mathematical model may take to compute the area of review; the discharger must demonstrate that any equation or simulation used to compute the area of review applies to the hydrogeologic conditions in the area of review.

$$r = \left(\frac{2.25 K H t}{S \phi} \right)^{1/2}$$

Where:

$$\left[\frac{4BKH (H_w - H_{bo}) \times S_p G_b}{x} \right] = 2.3 Q$$

- r = Radius of the area of review for a Class I non-hazardous waste injection well or Class III well (length)
- K = Hydraulic conductivity of the injection zone (length/time)
- H = Thickness of the injection zone (length)
- t = Time of injection (time)
- S = Storage coefficient (dimensionless)
- Q = Injection rate (volume/time)
- H_{bo} = Observed original hydrostatic head of injection zone (length) measured from the base of the lowest aquifer containing ground water of 10,000 mg/l or less TDS
- H_w = Hydrostatic head of underground source of drinking water (length) measured from the base of the lowest aquifer containing ground water of 10,000 mg/l or less TDS
- S_p G_b = Specific gravity of fluid in the injection zone (dimensionless)
- B = 3.142 (dimensionless)

(4) The above equation is based on the following assumptions:

- (a) the injection zone is homogenous and isotropic;
- (b) the injection zone has infinite areal extent;
- (c) the Class I non-hazardous waste injection well or Class III well penetrates the entire thickness of the injection zone;
- (d) the well diameter is infinitesimal compared

to “r” when injection time is longer than a few minutes; and

(e) the emplacement of fluid into the injection zone creates an instantaneous increase in pressure.

C. The secretary shall require submittal by the discharger of information regarding the area of review including the information to be considered by the secretary in Subsection B of Section 20.6.2.5210 NMAC.

[9-20-82, 12-1-95; 20.6.2.5202 NMAC - Rn, 20 NMAC 6.2.V.5202, 1-15-01; A, 12-1-01; A, 12-21-18]

20.6.2.5206 OPERATING REQUIREMENTS FOR CLASS I NON-HAZARDOUS WASTE INJECTION WELLS AND CLASS III WELLS:

A. General operating requirements applicable to Class I non-hazardous waste injection wells and Class III wells.

(1) The maximum injection pressure at the wellhead shall not initiate new fractures or propagate existing fractures in the confining zone, or cause the movement of injection or formation fluids into ground water having 10,000 mg/l or less TDS except for fluid movement approved pursuant to Section 20.6.2.5103 NMAC.

(2) Injection between the outermost casing and the well bore is prohibited in a zone other than the authorized injection zone.

B. Additional operating requirements for Class I non-hazardous waste injection wells.

(1) Except during well stimulation, the maximum injection pressure shall not initiate new fractures or propagate existing fractures in the injection zone.

(2) Unless an alternative to a packer has been approved under Subparagraph (c) of Paragraph (3) of Subsection B of Section 20.6.2.5205 NMAC, the annulus between the tubing and the long string of casing shall be filled with a fluid approved by the secretary and a pressure, also approved by the

secretary shall be maintained on the annulus.

C. Additional operating requirements for Class III wells: Initiation of new fractures or propagation of existing fractures in the injection zone will not be approved by the secretary as part of a discharge permit unless it is done during well stimulation and the discharger demonstrates:

(1) that such fracturing will not cause movement of fluids out of the injection zone into ground water having 10,000 mg/l or less TDS except for fluid movement approved pursuant to Section 20.6.2.5103 NMAC; and

(2) that the provisions of Subsection [E] D of Section 20.6.2.3109 and Subsection C of Section 20.6.2.5101 NMAC for protection of ground water are met. [9-20-82, 12-1-95; 20.6.2.5206 NMAC - Rn, 20 NMAC 6.2.V.5206, 1-15-01; A, 12-1-01; A, 12-21-18]

20.6.2.5209 PLUGGING AND ABANDONMENT FOR CLASS I WELLS AND CLASS III WELLS:

A. The discharger shall submit as part of the discharge permit application, a plan for plugging and abandonment of a Class I well or a Class III well that meets the requirements of Subsection [E] D of 20.6.2.3109, Subsection C of 20.6.2.5101, and 20.6.2.5005 NMAC for protection of ground water. If requested, a revised or updated abandonment plan shall be submitted for approval prior to closure. The obligation to implement the plugging and abandonment plan as well as the requirements of the plan survives the termination or expiration of the permit.

B. Prior to abandonment of a well used in a Class I well or Class III well operation, the well shall be plugged in a manner which will not allow the movement of fluids through the well bore out of the injection zone or between other zones of ground water. Cement plugs shall be used unless a comparable method has been approved by the secretary for the plugging of Class III wells at that site.

C. Prior to placement of the plugs, the well to be abandoned shall be in a state of static equilibrium with the mud weight equalized top to bottom, either by circulating the mud in the well at least once or by a comparable method approved by the secretary.

D. Placement of the plugs shall be accomplished by one of the following:

- (1) the balance method; or
- (2) the dump bailer method; or
- (3) the two-plug method; or
- (4) an equivalent method with the approval of the secretary.

E. The following shall be considered by the secretary in determining the adequacy of a plugging and abandonment plan:

- (1) the type and number of plugs to be used;
- (2) the placement of each plug, including the elevation of the top and bottom;
- (3) the type, grade and quantity of cementing slurry to be used;
- (4) the method of placement of the plugs;
- (5) the procedure to be used to plug and abandon the well; and
- (6) such other factors that may affect the adequacy of the plan.

F. The discharger shall retain all records concerning the nature and composition of injected fluids until five years after completion of any plugging and abandonment procedures.

[9-20-82, 12-1-95; 20.6.2.5209 NMAC - Rn, 20 NMAC 6.2.V.5209, 1-15-01; A, 12-1-01; A, 8-31-15; A, 12-21-18]

**GENERAL SERVICES
DEPARTMENT**

The New Mexico General Services Department approved and adopted, at its 9/26/2018 hearing, to repeal its rule 1.6.3 NMAC - Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies (filed 9/1/2004) and replace it with 1.6.3 NMAC - Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, adopted on 9/26/2018 and effective 12/11/2018.

The New Mexico General Services Department approved and adopted, at its 9/26/2018 hearing, to repeal its rule 1.6.4 NMAC, State Loss Control Program (filed 5/15/2007) and replace it with 1.6.4 NMAC, State Loss Control Program (filed 5/15/2007), adopted on 9/26/2018 and effective 12/11/2018.

**GENERAL SERVICES
DEPARTMENT**

**TITLE 1 GENERAL
GOVERNMENT
ADMINISTRATION
CHAPTER 6 RISK
MANAGEMENT
PART 3 BUDGETING
AND PAYMENT OF
ASSESSMENTS FOR
UNEMPLOYMENT
COMPENSATION BENEFITS BY
STATE AGENCIES AND LOCAL
PUBLIC BODIES**

**1.6.3.1 ISSUING
AGENCY:** General Services Department (GSD) - Risk Management Division.
[1.6.3.1 NMAC - Rp, 1.6.3.1 NMAC, 12/11/2018]

1.6.3.2 SCOPE: Unless otherwise provided by law, this rule applies to all state agencies, including elected officials and institutions of higher learning, and all local public

bodies. This rule supersedes and replaces all prior conflicting rules and directives.
[1.6.3.2 NMAC - Rp, 1.6.3.2 NMAC, 12/11/2018]

**1.6.3.3 STATUTORY
AUTHORITY:** This rule is adopted pursuant to the authority of Section 9-17-5, 15-7-3, 51-1-17 and 51-1-46 NMSA 1978.
[1.6.3.3 NMAC - Rp, 1.6.3.3 NMAC, 12/11/2018]

1.6.3.4 DURATION:
Permanent.
[1.6.3.4 NMAC - Rp, 1.6.3.4 NMAC, 12/11/2018]

**1.6.3.5 EFFECTIVE
DATE:** December 11, 2018, unless a later date is cited at the end of a section or paragraph.
[1.6.3.5 NMAC - Rp, 1.6.3.5 NMAC, 12/11/2018]

1.6.3.6 OBJECTIVE:
To provide a uniform system for assessing the cost of unemployment compensation benefits to state agencies and local public bodies, based on each covered entity's claims experience that will be sufficient to insure solvency of the fund(s). Further, to prescribe the methods for which local public bodies may enter and leave the local public body unemployment compensation reserve fund.
[1.6.3.6 NMAC - Rp, 1.6.3.6 NMAC, 12/11/2018]

1.6.3.7 DEFINITIONS:
A. "Fund" or "funds" means the state government unemployment compensation reserve fund or the local public body unemployment compensation reserve fund, or both, as the contract requires.
B. "Governmental entity" means the state or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions (Section 51-1-44B NMSA 1978).

C. "Local public body" means all political

subdivisions of the state or any of their agencies, instrumentalities and institutions or any county hospitals, or outpatient clinics thereof, leased to, or operated under an agreement with, a state educational institution named in Article 12, Section 11 of the constitution of New Mexico. The term "local public body" shall not be construed to mean school districts.

D. "RMD" means the risk management division of the general services department.

E. "State" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all school districts of this state.
[1.6.3.7 NMAC - Rp, 1.6.3.7 NMAC, 12/11/2018]

**1.6.3.8 GOVERNMENTAL ENTITY
BUDGETS, RATES FOR
UNEMPLOYMENT
COMPENSATION BENEFITS
AND ADMINISTRATIVE
EXPENSES:**

A. RMD shall prescribe annually before April 15, a schedule of minimum rates per employee to be budgeted by governmental entities for the succeeding year. Rates shall include administrative expenses. Rates shall be determined as follows.

(1) A schedule of initial rates shall be developed by RMD to be used until governmental entities are experience rated. One initial rate shall apply to the state agencies in the state fund and another initial rate shall apply to local public bodies in the local public body fund.

(2) Rate schedules to be used for those that are to be experience rated shall take into account the prior experience of the governmental entity, the amount of reserves the governmental entity has on deposit in the fund, and the balance in the fund. Separate schedules shall be developed for the state fund and the local public body fund.

(3) RMD shall notify each participating entity of the rates to be used the next fiscal

year by April 15; or as an alternative RMD may notify the state budget organization serving each entity of the rate for the entities they service. [1.6.3.8 NMAC - Rp, 1.6.3.8 NMAC, 12/11/2018]

1.6.3.9 PAYMENT OF BILLINGS; INTEREST CHARGE FOR LATE PAYMENT; CANCELLATION OF LOCAL PUBLIC BODIES:

A. The rate schedules will outline the percentage interest charge for late payments for participants in the state fund and local public body fund.

B. The rate schedule will outline how many days participants in the state account will have before payment is delinquent after the date assessment. Participants in the state fund are responsible for paying assessments and interest charges.

C. In accordance with 51-1-46 C NMSA 1978, the director of RMD shall terminate the participation of any local public body if the local public body fails to pay any assessment by RMD within 30 days of the assessment. A local public body may be reinstated without loss of coverage if the local public body pays all assessments and interest charges within 90 days of the billing of the assessment charge that were not paid. [1.6.3.9 NMAC - Rp, 1.6.3.9 NMAC, 12/11/2018]

1.6.3.10 PENALTY FOR LATE REPORTING OF PAYROLL: RMD may, at RMD's option, bill any participant entity for the penalty imposed by RMD by the department of labor for an entities first late report in a fiscal year (Section 51-1-112A NMSA 1978). If the next quarter report is also late, RMD shall bill the entity for both late reports plus any additional late reports for the next quarters. [1.6.3.10 NMAC - Rp, 1.6.3.10 NMAC, 12/11/2018]

1.6.3.11 EXPERIENCE HISTORY TRANSFER:

A. In the case of a total experience history transfer of a governmental entity, the experience history of the transferred entity will be transferred from the predecessor entity to the successor entity in total. The reserve account and the assessment rate will also be transferred in total.

B. When a governmental agency is taken over in total by two or more successor entities, the experience history of the predecessor shall be transferred to the two or more successors as in Subsection A above.

(1) The two or more successor entities shall determine the percentage of employees each received from the predecessor.

(2) This percentage shall be applied to the assessable wage, assessments charged, benefits paid and the reserve account. This formula shall be applied to all the successors and an assessment rate shall be arrived at in accordance with experience and rating requirements.

C. The applicable experience may be transferred to the partial successor in the case of partial transfer of the entity. Both the predecessor and the successor must continue in business with employees. The partial experience history shall be transferred to the successor using the same formula outlined in Paragraphs (1) and (2) of Subsection B of 1.6.3.11 NMAC above.

D. Benefits (total) charged to the predecessor's account by ESD shall be transferred as follows:

(1) In a total experience history transfer, all of the benefits charged shall be assumed by the successor.

(2) In the event the successor is made of two or more entities, they will assume all of the benefits charged to the predecessor. The successor entities shall divide the benefits charges of the predecessor by the percentage figures arrived at in Paragraph (1) of Subsection B of 1.6.3.11 NMAC above.

(3) When there is a partial history transfer and only one successor is involved, the percentage factor arrived at in 1.6.3.8 NMAC shall apply. Benefits charged to the predecessor's account shall be charged to the successor as follows:

(a) in the quarter in which the transfer occurred and in the first successive quarter, the percentage factor of the successor times the benefits charged the predecessor's account;

(b) in the second successive quarter, the percentage factor times seventy-five percent of the benefits charged the predecessor's account;

(c) in the third successive quarter, the percentage factor times fifty percent of the benefits charged the predecessor's account;

(d) in the fourth successive quarter, the percentage factor times twenty-five percent of the benefits charged the predecessor's account;

(e) the fifth and all other quarters will not have benefit charges relating to the predecessor except in unusual cases and such charges shall be transferred to the successor's account;

(f) the predecessor and all successors, when applicable, shall continue to be experienced-rated.

[1.6.3.11 NMAC - Rp, 1.6.3.11 NMAC, 12/11/2018]

1.6.3.12 ELIGIBILITY FOR LOCAL PUBLIC BODY UNEMPLOYMENT COMPENSATION RESERVE FUND: To be eligible to participate in the local public body unemployment compensation reserve fund noted in accordance with Section 51-1-46 NMSA 1978, an entity must:

- A.** Be a local public body as defined in 1.6.3.7 NMAC,
- B.** Not have voluntarily left or have been removed from the local public body unemployment compensation fund, within the past five years.
- C.** The local public

body does not owe an outstanding financial obligation to RMD.

D. Apply for participation at least 90 days prior to the new fiscal year and have this application approved by the risk management division.

[1.6.3.12 NMAC - Rp, 1.6.3.12 NMAC, 12/11/2018]

1.6.3.13 APPLICATION TO ENTER LOCAL PUBLIC BODY UNEMPLOYMENT COMPENSATION RESERVE FUND:

A. The effective date of coverage for any local public body that enters the local public body unemployment compensation reserve fund shall be January 1.

B. A local public body must submit an application to RMD to participate in the fund no later than September 30 of the year prior to entering the fund.

C. Local public bodies shall submit the following information to RMD as part of the application:

- (1) an application form available on the RMD website;
- (2) acceptable proof that the entity is an eligible local public body as defined in 1.6.3.7 NMAC;
- (3) the local public body's unemployment claims data for the previous five years;
- (4) a written agreement that the local public body will stay in the local public body unemployment compensation reserve fund for the next five consecutive years;

(5) information on current employment statistics, employee salaries, and other similar information requested by the risk management division; and

(6) a written agreement to follow the obligations of local public body unemployment compensation reserve fund membership shown in 1.6.3.14 NMAC.

D. RMD shall inform applicants of acceptance or rejection

by December 1 of the year prior to entering the fund.

1.6.3.13 NMAC N, 12/11/2018

1.6.3.14 OBLIGATIONS OF LOCAL PUBLIC BODIES UPON ADMITTANCE TO THE LOCAL PUBLIC BODY UNEMPLOYMENT COMPENSATION RESERVE FUND:

A. A local public body participating in the fund must meet all obligations to remain in good standing and continue participation.

B. Obligations include:

- (1) timely payment of premiums, administrative fees, assessments, fines, remittances, and similar obligations to the risk management division;
- (2) complying with any loss control policies or administrative directives issued by RMD or by any permitted third-party;
- (3) complying with rules, guidance, and administrative directions from the department of workforce solutions;
- (4) preparing for, attending, and participating in training seminars, program meetings, hearings, and other similar events as directed by RMD or the department of workforce solutions; and

(5) agree to comply with RMD and department of workforce solutions determinations regarding a claimant's employment status, employment dates, salaries, separation circumstances, and other similar factors or to appeal determinations to the proper agency following established protocols.

[1.6.3.14 NMAC N, 12/11/2018]

1.6.3.15 NONCOMPLIANCE BY LOCAL PUBLIC BODIES AND TERMINATION OF PARTICIPATION:

A. The director of RMD has sole discretion to determine if a local public body is noncompliant and to terminate the participation of any local public body in accordance with this rule.

B. Upon a determination that a local public body is noncompliant, RMD shall inform the local public body in writing of the determination and the reasons for the finding.

C. Upon a determination that a local public body's participation will be terminated, RMD shall inform the local public body in writing that, effective December 31, it may no longer participate in the fund.

D. Any local public body that has been terminated from the local public body shall remain in the local public body unemployment compensation reserve fund until December 31 and shall comply with all participation obligations and directives from RMD through that date.

E. Upon termination, the local public body remains obligated to pay RMD for any unemployment claims with a date of loss prior to their effective date of removal.

F. On January 1 of the calendar year following termination, a local public body shall resume its sole responsibility to pay its unemployment claims to the department of workforce solutions. [1.6.3.15 NMAC N, 12/11/2018]

1.6.3.16 VOLUNTARY DEPARTURE OF THE LOCAL PUBLIC BODY UNEMPLOYMENT COMPENSATION RESERVE FUND:

A. A local public body that participates in the local public body fund may voluntarily depart the fund if:

(1) the local public body has participated in the fund for at least the five consecutive years immediately preceding departure;

(2) the local public body applies for departure in writing before September 1 of the year it intends to depart, and

(3) the local public body has secured written approval to depart from RMD.

B. The last effective date of coverage for a local public body departing the fund in a given year shall be December 31 of the year of departure.

C. The local public body shall remain obligated to pay RMD for any claims with a date of loss prior to its departure from the fund on December 31.

D. Following departure, a local public body shall resume its sole responsibility to pay its unemployment claims to the department of workforce solutions on January 1.
[1.6.3.16 NMAC N, 12/11/2018]

History of 1.6.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the state records center and archives under: DFA Rule 78-7, department of finance and administration rule Relating to the Budgeting and Payment of Assessments for Unemployment Compensation Benefits By State Agencies and Local Public Bodies, filed 6/30/1978; DFA Rule 78-7 amendment No. 1, filed 12/18/1978; DFA Rule 79-7, department of finance and administration rule Relating to the Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, filed 5/18/1979; DFA Rule 80-1, department of finance and administration rule Relating to the Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, filed 3/26/1980; GSD Rule 84-701, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, filed 4/4/1984; GSD Rule 86-701, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, filed 6/30/1986; and GSD Rule 94-701, Budgeting and Payment of Assessments for

Unemployment Compensation Benefits by State Agencies and Local Public Bodies, filed 5/5/1994.

History of Repealed Material: 1.6.3 NMAC - Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies (filed 9/1/2004) repealed 12/11/2018.

Other History:

GSD Rule 94-701, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies (filed 5/5/1994) was reformatted, renumbered, and replaced by 1 NMAC 6.3, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, effective 6/14/1997. 1 NMAC 6.3, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies (filed 6/2/1997) was renumbered and reformatted to 1.6.3 NMAC, Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, to comply with the current NMAC requirements, effective 9/15/2004. 1.6.3 NMAC - Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies (filed 9/1/2004) was replaced by 1.6.3 NMAC - Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies, effective 12/11/2018.

GENERAL SERVICES DEPARTMENT

**TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 6 RISK MANAGEMENT
PART 4 STATE LOSS PREVENTION AND CONTROL PROGRAM**

1.6.4.1 ISSUING

AGENCY: General Services Department (GSD) Risk Management Division.
[1.6.4.1 NMAC - Rp, 1.6.4.1 NMAC, 12/11/2018]

1.6.4.2 SCOPE: Unless otherwise provided by law, this rule applies to all state agencies, including elected officials and institutions of higher learning. This rule supersedes and replaces all rules and directives for conflicting loss prevention and control programs. State agencies must comply with this rule; no exemptions will be granted.

[1.6.4.2 NMAC - Rp, 1.6.4.2 NMAC, 12/11/2018]

1.6.4.3 STATUTORY AUTHORITY:

This rule is adopted pursuant to Paragraph (9) of Subsection A of Section 15-7-3 NMSA 1978 which empowers the risk management division to initiate safety program establishment and to adopt regulations for effective implementation of safety programs and Subsection E of Section 9-17-5 NMSA 1978 which empowers the secretary of the general services department to adopt regulations to accomplish the duties of the department and its divisions.
[1.6.4.3 NMAC - Rp, 1.6.4.3 NMAC, 12/11/2018]

1.6.4.4 DURATION:

Permanent.
[1.6.4.4 NMAC - Rp, 1.6.4.4 NMAC, 12/11/2018]

1.6.4.5 EFFECTIVE DATE:

December 11, 2018 unless a later date is cited at the end of a section

or paragraph.
[1.6.4.5 NMAC - Rp, 1.6.4.5 NMAC, 12/11/2018]

1.6.4.6 OBJECTIVE: The objectives of this rule 1.6.4 NMAC are to:

- A. prevent and control insurable losses in state government;
- B. integrate loss prevention and control activities into state agency operations and culture;
- C. establish systematic safety and loss prevention and control mechanisms within state agencies;
- D. develop uniform loss control reporting procedures for state agencies; and
- E. assure compliance with this rule by reporting non-compliant agencies to the appropriate oversight bodies and by adjusting risk premium rates of non-compliant agencies.

[1.6.4.6 NMAC - Rp, 1.6.4.6 NMAC, 12/11/2018]

1.6.4.7 DEFINITIONS:

The following definitions apply in this rule:

- A. **Agency or state agency:** Any department, agency, branch, board, instrumentality, or institution of New Mexico state government.
- B. **Committee:** An agency loss prevention and control committee.
- C. **Loss prevention and control:** Any managerial system or systems intended to identify potential or actual loss situations and the implementation of a strategy or strategies to prevent or manage losses.
- D. **Loss prevention and control coordinator:** The agency loss prevention and control coordinator.
- E. **RMD:** The risk management division of the general services department.
- F. **State loss control manager:** The state loss control manager at RMD (*see* Paragraph (10) of Subsection A of Section 15-7-3 NMSA 1978).

[1.6.4.7 NMAC - Rp, 1.6.4.7 NMAC, 12/11/2018]

1.6.4.8 LOSS PREVENTION AND CONTROL PROGRAM:

- A. The state loss prevention and control program is created. The program includes coordination of all agency loss prevention and control activities and any loss prevention and control services administered by RMD.
- B. Each agency shall develop an annual loss prevention and control plan using a method approved by RMD, submit a copy of its loss prevention and control plan to the state loss control manager within 60 days of adoption of the state loss prevention and control plan, and must inform the state loss control manager of any program change.
- C. The state loss control manager shall report any agency that fails to adopt an agency loss prevention and control plan to the agency head, to the secretary of the general services department, and to the director of the risk management division.
- D. If the RMD director determines that an agency has failed to substantially comply with this rule, the director shall notify the agency head. The Agency shall have 30 days to cure any deficiencies. If after such 30 day period, the director determines that the agency has still failed to substantially comply with this provision, the director may, after consultation with the secretary of the general services department, adjust the coverage premiums paid by non-compliant entities for the following plan year to reflect the increased risk profile of the entity. Non-compliant entities may appeal any rate adjustment to the risk management advisory board.

[1.6.4.8 NMAC - Rp, 1.6.4.8 NMAC, 12/11/2018]

[1.6.4.8 NMAC - Rp, 1.6.4.8 NMAC, 12/11/2018]

1.6.4.9 LOSS PREVENTION AND CONTROL COORDINATOR:

- A. Each agency shall appoint a loss prevention and control coordinator no later than 60 days after the effective date of this

rule. Each agency shall submit this individual's name to RMD and inform the state loss control manager of any appointment changes.

B. Each agency head shall appoint one of the following persons as loss prevention and control coordinator:

- (1) the deputy agency head;
- (2) the agency chief financial officer;
- (3) the agency general counsel;
- (4) a division director; or
- (5) a senior supervisory employee approved by RMD.

C. The loss prevention and control coordinator shall:

- (1) report to the agency head on matters pertaining to the loss prevention and control program, safety, employment-related civil rights issues, and other potential or actual exposures;
- (2) liaise with the state loss control manager and RMD;
- (3) establish, interpret, and apply loss prevention and control procedures;
- (4) monitor loss prevention and control training, incident investigations, and program progress;
- (5) chair the agency safety committee; and
- (6) chair the agency loss prevention and control committee.

[1.6.4.9 NMAC - Rp, 1.6.4.9 NMAC, 12/11/2018]

1.6.4.10 LOSS PREVENTION AND CONTROL COMMITTEE:

- A. Each state agency shall establish a loss prevention and control committee.
- B. Committee members may be appointed by the agency head or by the loss prevention and control coordinator. The appointing authority shall appoint division directors, bureau chiefs, section or unit heads, and other

senior supervisory employees. All major components of an agency's organizational structure shall be represented on the agency committee.

C. Each committee should hold meetings at least quarterly. The agency head or chairperson may convene special meetings. Committee meetings may be incorporated into regular agency staff meetings and should address issues at all operational levels within the agency.

D. The loss prevention and control committee shall:

- (1) define an annual agency loss prevention and control plan;
- (2) meet quarterly to assess the implementation of the loss prevention and control plan;
- (3) report the status of the annual loss prevention and control program; and
- (4) perform any other functions the chairperson considers useful and appropriate.

[1.6.4.10 NMAC - Rp, 1.6.4.10 NMAC, 12/11/2018]

1.6.4.11 INCIDENT AND LOSS INVESTIGATION:

A. Each state agency shall establish and implement procedures for investigation, analysis, and evaluation of incidents and losses. The procedures shall provide that incidents and losses be thoroughly investigated by the supervisory person most immediately responsible for the operation in which the loss occurred, by an individual who has been trained to perform this type of work, or both.

B. Investigations pertinent to an alleged job-related injury or illness and all necessary and supplemental documentation generated during an investigation will become a part of the injury or illness claim record.

C. Any investigations and reports prepared pursuant to this section are supplementary to and do not replace reports required to comply with state and federal laws, insurance and other reporting requirements.

[1.6.4.11 NMAC - Rp, 1.6.4.11 NMAC, 12/11/2018]

1.6.4.12 LOSS PREVENTION AND CONTROL TRAINING:

A. Each agency shall provide position-appropriate safety training, loss prevention and control training, worker's compensation training, and employment-related civil rights training to all employees.

B. Supervisors shall discuss loss prevention and control policies, procedures, and strategies with employees, individually and at group training sessions.

C. All employees shall be trained in the safe and correct way to perform their job functions as needed.

D. Agencies shall provide training on occupational health and safety laws and regulations to all employees as appropriate to job function.

E. Agencies shall provide training on employment-related civil right to supervisors and managers.

F. Training on Federal and state civil rights laws, including Title VII of the Civil Rights Act and the New Mexico Human Rights Act (Sections 28-1-1 and following NMSA 1978), shall occur on a continuing basis.

[1.6.4.12 NMAC - Rp, 1.6.4.13 NMAC, 12/11/2018]

1.6.4.13 JOB-RELATED INJURY OR ILLNESS CLAIMS MANAGEMENT:

A. Each agency shall adopt a workers' compensation claims management procedure approved by RMD that complies with all relevant laws, regulations, policies, directives, guidance, and other requirements.

B. Each agency shall have written procedures for:

- (1) workers' compensation claims management;
- (2) early return to work for workers with job-related injuries or illnesses; and
- (3) new employee orientation programs that include job safety and workers' compensation training.

C. Each agency shall have written policies providing for the following items, as they apply to job-related injury or illness claims:

(1) training, appropriate to each supervisor, on the supervisor's and responsibilities regarding job-related injuries and workers' compensation claims;

(2) methods for record keeping and filing job-related injury and illness claims;

D. Claims records retained by agencies and submitted to the RMD shall contain the following:

(1) Mandatory documents:

(a) notice of accident (WCA form NOA-1, as may be amended);

(b) employer's first report of injury or illness (WCA form E1.2, as may be amended);

(c) Authorization to release medical information (WCA mandatory form, per Subparagraph (c) of Paragraph (2) of Subsection R of 11.4.4.9 NMAC, as may be amended);

(2) Other records, documents, statements, and evidence appropriate to the claim.

E. The policies required by this rule shall address:

(1) injured employee responsibilities - At a minimum, injury reporting procedures, administration and documentation details, and compliance with the medical treatment plan;

(2) employer responsibilities - At minimum, job-related injury or illness reactive procedures, contact protocol, employer involvement in all phases of job-related injury or illness claim management, and accountability measures;

(3) identifying job roles and modifying job functions to accommodate a worker placed on restricted or modified work status and procedures and authorities to implement this program;

(4) implementing controls to reduce the

likelihood of job-related injuries or illnesses reoccurring.

F. Every effort shall be made to implement an early return to work program that includes, at a minimum, the requirements of Section 52-1-25.1 NMSA 1978. No state employee shall be terminated from employment because of a job-related injury or illness or because of physical circumstances resulting from a job-related injury or illness unless the state agency has provided advance notice to RMD.

G. Vacant positions resulting from job related injuries or illnesses shall not be filled, except by temporary employment, unless provided for elsewhere by law.

(1) A position may be permanently filled if there is documented medical diagnosis or evidence that an employee with a job-related injury or illness has reached maximum medical improvement or that the employee’s impairment or condition is permanent and that the employee cannot perform the essential functions of the particular job.

(2) A position may be permanently filled if there is a critical need and that need cannot be satisfied with temporary employment, and the agency has made a “good faith” effort to do so, and the other provisions of this rule have been satisfied.

[1.6.4.13 NMAC - Rp, 1.6.4.14 NMAC, 12/11/2018]

**1.6.4.15 and 1.6.4.16
[RESERVED]**

HISTORY OF 1.6.4 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

- GSD 84-703 State Loss Control Program, 4/4/1984;
- GSD 86-703 State Loss Control Program, 6/30/1986; and
- GSD 91-703 State Loss Control Program, 11/14/1991.

History of Repealed Material: 1.6.4 NMAC, State Loss Control Program (filed 9/01/2004) repealed 7/1/2007.
1.6.4 NMAC, State Loss Prevention and Control Program (filed 5/15/2007) repealed 12/11/2018.

Other History:

GSD 91-703 State Loss Control Program (filed 11/14/1991) was reformatted and renumbered to 1.6.4 NMAC, State Loss Control Program, to comply with the current NMAC requirements, effective 9/15/2004.
1.6.4 NMAC, State Loss Control Program (filed 9/1/2004) was replaced by 1.6.4 NMAC, State Loss Prevention and Control Program, effective 7/1/2007.
1.6.4 NMAC, State Loss Control Program (filed 5/15/2007) was replaced by 1.6.4 NMAC, State Loss Prevention and Control Program, effective 12/11/2018.

**HIGHER EDUCATION
DEPARTMENT**

The New Mexico Higher Education Department approved on 11/16/2018, to repeal 5.5.5 NMAC - Closure of Public Institutions, filed 7/15/2015 and replace it with 5.5.5 NMAC - Closure and Student Complaint Procedures for Public Institutions, adopted 11/29/2018 and effective 12/11/2018.

The New Mexico Higher Education Department approved on 11/16/18, to repeal 5.99.1 NMAC - Public and Private Post-Secondary Institutions Operating under the Interstate Distance Education Act, filed 12/16/2017 and replace it with 5.99.1 NMAC - Public and Private Post-Secondary Institutions Operating under the Interstate Distance Education Act, adopted 11/29/2018 and effective 12/11/2018.

**HIGHER EDUCATION
DEPARTMENT**

**TITLE 5 POST-
SECONDARY EDUCATION
CHAPTER 3 POST-
SECONDARY EDUCATION
INSTITUTION FINANCES
PART 11 FISCAL
OVERSIGHT**

**5.3.11.1 ISSUING
AGENCY:** State of New Mexico
Higher Education Department
[5.3.11.1 NMAC - N, 12/11/2018]

5.3.11.2 SCOPE:
Provisions of 5.3.11 NMAC apply to all public higher education institutions operating within and receiving financial support from the state of New Mexico.
[5.3.11.2 NMAC - N, 12/11/2018]

**5.3.11.3 STATUTORY
AUTHORITY:** Section 9-25-8
NMSA 1978, Section 21-1-26 NMSA 1978, Section 21-1-26.3 NMSA 1978, Section 21-1-26.12 NMSA 1978, and Section 21-1-33 NMSA 1978.
[5.3.11.3 NMAC - N, 12/11/2018]

5.3.11.4 DURATION:
Permanent.
[5.3.11.4 NMAC - N, 12/11/2018]

**5.3.11.5 EFFECTIVE
DATE:** December 11, 2018, unless a later date is cited at the end of a section.
[5.3.11.5 NMAC - N, 12/11/2018]

5.3.11.6 OBJECTIVE: The objective of 5.3.11 NMAC is to:

A. establish regulations and procedures for the fiscal oversight of institutions designated in Article 12, Section 11 of the Constitution of New Mexico and any other public higher education institutions operating within and receiving financial support from the state of New Mexico;

B. develop a system that measures, monitors, and verifies the fiscal health of institutions and ensures governing boards continually monitor the overall fiscal health of their institutions;

C. provide fiscal oversight of institutions through accountability reporting; and

D. establish procedures to redress problems of finance or poor fiscal health of institutions through use of the enhanced fiscal oversight program (EFOP).
[5.3.11.6 NMAC - N, 12/11/2018]

5.3.11.7 DEFINITIONS:

A. **“Accrediting agency”** means an accrediting agency recognized by the United States department of education that has issued an accreditation status to the institution.

B. **“Attorney general”** means the New Mexico office of the attorney general.

C. **“Board”** or **“Governing Board”** means the board of an institution, charged by law with determining financial policy and providing the management and control to implement the financial policies at the institution. In the case of branch community colleges, means both the board of regents and the advisory board of the institution.

D. **“Department”** means the New Mexico higher education department.

E. **“EFOP”** means the enhanced fiscal oversight program.

F. **“Higher education institution”** or **“Institution”** means a public post-secondary higher education institution operating within and receiving financial support from the state of New Mexico.

G. **“IPA”** means an independent public accountant.

H. **“OSA”** means the New Mexico office of the state auditor.

I. **“Risk factor”** or **“risk factors”** means the factors outlined in Paragraphs 1 through 24 of Subsection A of 5.3.11.9 NMAC, to be utilized by the department to detect potential problems of finance and to evaluate fiscal health of institutions, pursuant to 5.3.11.9 NMAC.

J. **“Substantial mitigation”** or **“substantially mitigate”** or **“substantially mitigated”** means significant

remedial action to address any risk factor(s) and demonstrable evidence that the risk factor(s) will be eliminated within 90 days.
[5.3.11.7 NMAC - N, 12/11/2018]

5.3.11.8 STANDARD REPORTING REQUIREMENTS:

A. Institutions shall file financial reports in accordance with deadlines set by the department, pursuant to a schedule published by the department. The department shall make the published reporting schedule available on its website.

B. Institutions shall submit all requested documentation to the department in the manner requested by the department, utilizing any applicable forms.

C. The department may request any additional supporting documentation to verify an institution’s required submission.

D. Institutions designated by the department to participate in the EFOP shall continue to comply with standard reporting requirements as well as EFOP reporting requirements.
[5.3.11.8 NMAC - N, 12/11/2018]

5.3.11.9 EVALUATION OF FISCAL HEALTH:

The department shall evaluate the reports submitted pursuant to 5.3.11.8 NMAC, in order to ensure accountability, detect potential problems of finance, and to evaluate fiscal health of institutions. In its evaluation, the department will assess potential risk factors exhibited by institutions that have predictive value to identify problems of finance related to fiscal solvency or fiscal control concerns of the institution. The department shall make careful consideration of the severity, frequency, and the potential impact to the institution’s financial stability when evaluating the risk factors. The department shall also consider whether the institution has already remedied the risk factor(s) or the likelihood that the institution can quickly redress the risk factor(s) to mitigate financial impact to the institution.

A. The department may determine that potential problems of finance exist within an institution, if the institution exhibits one or more of the following risk factors:

- (1) financial ratios analysis which may highlight liquidity or solvency issues (examples include, but are not limited to unrestricted instruction and general fund balance as a percentage of total expenditures or financial responsibility composite scores);
- (2) weak unrestricted cash position;
- (3) negative year-end fund balance;
- (4) inability to pay vendor invoices promptly;
- (5) delays in making pension retirement contributions;
- (6) failure to make scheduled payroll payments;
- (7) non-payment of debt principal or interest payment;
- (8) requests for advanced state funding or emergency loans;
- (9) failure to complete an annual financial audit;
- (10) late submission of annual financial audit as determined by OSA;
- (11) annual financial audit with a disclaimer, adverse, or modified audit opinion, as determined by an IPA;
- (12) repeat audit findings classified as material weaknesses or significant deficiencies, as determined by an IPA;
- (13) a finding of fraud, waste, or abuse by OSA in a special audit or investigation;
- (14) an allegation of fraud or other crimes that relate to financial control of the institution, made by a law enforcement agency;
- (15) designation by accrediting agency of “show cause” or “probation” status;
- (16) determinations by the accrediting agency or IPA that indicate concerns with board fiscal governance and control;

(17) lack of financial systems or resources to support strong internal control (examples include, but are not limited to inadequate staffing resources or lack of accounting infrastructure);

(18) significant negative variance between budget and actual spending, as determined by an IPA;

(19) material control weaknesses, material legal non-compliance or discussion and analysis comments by institutional management in the annual financial audit, which could indicate a significant effect to the financial condition of the institution in the current and future years, as determined by an IPA;

(20) failure to obtain proper capital projects approval required by law or regulation from the department or the state board of finance, as determined by the department;

(21) failure to comply with any law or regulation related to capital projects, as determined by the department;

(22) failure to comply with any law, regulation, or restriction related to bonds or tax levies, as determined by the department;

(23) failure to comply with the department's standard reporting requirements; or

(24) any other occurrence that indicates a lack of financial stability or lack of strong internal control.

B. If in its evaluation of the institution's fiscal health, the department determines that an institution exhibits one or more of the risk factors specified in Paragraphs (1) through (24) of Subsection A of 5.3.11.9 NMAC, the department may assign the institution to participate in the enhanced fiscal oversight program.

[5.3.11.9 NMAC - N, 12/11/2018]

5.3.11.10 ENHANCED FISCAL OVERSIGHT PROGRAM

OVERVIEW: The EFOP is administered by the department for

institutions found to exhibit risk factors indicating potential problems of finance. An institution assigned by the department to participate in the EFOP will be considered by the department to be on EFOP status until the institution satisfactorily completes all conditions of EFOP, as determined by the department. The program will establish reporting requirements for the institution, increased monitoring and verification by the department, and establish a systematic approach to substantially mitigate or eliminate institutional risk factors.

[5.3.11.10 NMAC - N, 12/11/2018]

5.3.11.11 NOTICE OF CONTEMPLATED EFOP STATUS:

If in its evaluation of fiscal health the department determines that potential problems of finance exist within the institution, the department shall issue notice of contemplated EFOP status to the institution. The notice shall indicate the risk factor(s) identified by the department that provide the basis of the contemplated EFOP status. Notice of contemplated EFOP status shall be sent via certified mail to the president of the institution, the chair of the governing board, and the chief financial officer of the institution.

[5.3.11.11 NMAC - N, 12/11/2018]

5.3.11.12 INITIAL MEETING:

The institution shall schedule an initial meeting with the department within 30 days of issuance of notice of contemplated EFOP status. Representatives from the institution in attendance at the initial meeting shall include the president of the institution, the chair of the governing board, and the chief financial officer of the institution. Representatives from the department in attendance at the initial meeting shall include the department cabinet secretary and designated department staff. During the initial meeting, the department shall make available the reports or documents utilized in identifying the risk factor(s) that served as the basis of the contemplated EFOP status. The institution may provide

additional documentation or information during the initial meeting, to be considered by the department. Any documentation or information provided by the institution shall be considered when determining whether the institution shall be placed on EFOP status. The department shall consider information provided by the institution that demonstrates the risk factor or risk factors have already been remedied or the likelihood that the institution can quickly redress the risk factor(s) to mitigate financial impact to the institution.

[5.3.11.12 NMAC - N, 12/11/2018]

5.3.11.13 NOTICE OF EFOP STATUS:

Within 15 days of the initial meeting, the department shall issue notice regarding its decision of whether the institution will be placed on EFOP status to the president of the institution, the chair of the governing board, and the chief financial officer of the institution via certified mail.

A. If the department determines that the institution demonstrated the substantial mitigation or elimination of the risk factor(s) that led to the notice of contemplated EFOP status at the initial meeting, the department shall send notice to the institution stating as such and withdraw the notice of contemplated EFOP status.

B. If the department determines that the risk factor(s) which led to the notice of contemplated EFOP status have not been substantially mitigated or eliminated and potential problems of finance continue to exist within the institution, the department shall issue notice of EFOP status to the institution. If notice of EFOP status is issued, the department shall also issue notice of the EFOP status to:

- (1) the legislative finance committee;
- (2) any accrediting agency of the institution;
- (3) the department of finance and administration; and
- (4) other entities, as determined by the

department, that may be concerned with any identified risk factor(s). [5.3.11.13 NMAC - N, 12/11/2018]

5.3.11.14 CORRECTIVE ACTION PLAN:

A. The institution shall submit to the department a corrective action plan to redress the risk factor(s) identified in the notice of EFOP status, within 30 days of the department's issuance of notice of EFOP status.

B. The institution may consult with the department in developing its corrective action plan. The institution is strongly encouraged to engage in discussions with the department during the development of a corrective action plan designed to substantially mitigate or eliminate the risk factor(s).

C. After receipt of the corrective action plan, the department may either accept the plan as proposed, request additional information to accompany the plan, or reject the plan as proposed. If the department rejects the plan as proposed, the department shall issue its reasoning in writing to the institution. If the initial plan is rejected, the institution shall submit a new or revised plan within 15 days of issuance of the rejection. The corrective action plan proposed by the institution shall focus on actions which will rapidly address and substantially mitigate or eliminate the risk factor(s) and must:

- (1) identify responsible representatives of the institution that will regularly communicate with the department while the institution is on EFOP status;
- (2) establish a clear timeline and deadlines to complete proposed action steps to resolve the risk factor(s) that prompted EFOP status;
- (3) provide a description of the efforts or initiatives proposed to address the risk factor(s) that prompted EFOP status; and
- (4) provide analysis of how the proposed efforts or initiatives will resolve the risk

factor(s) that prompted EFOP status. [5.3.11.14 NMAC - N, 12/11/2018]

5.3.11.15 EFOP REPORTING:

A. An institution placed on EFOP status shall provide periodic financial reports, as determined by the department, in accordance with deadlines set by the department.

B. The department shall establish additional financial reporting requirements for an institution placed on EFOP status. The department shall establish a timeline and deadlines for institutional reporting. In establishing the reporting requirements for an institution on EFOP status, the department shall consider the risk factor(s) exhibited by the institution and request reports that will help the department monitor institutional progress to complete its corrective action plan.

C. All reports requested by the department shall be prepared pursuant to generally accepted accounting principles. The department may require the institution to submit one or more of the following reports, on dates set by the department:

- (1) year-to-date revenue and expenditure results;
- (2) monthly revenue and expenditure results;
- (3) budget comparisons;
- (4) cash position;
- (5) associated bank reconciliations;
- (6) projected monthly cash flows for the remainder of the fiscal year;
- (7) projected monthly cash flows for the following twelve-month period;
- (8) monthly financial reports; or
- (9) control gap closure report to include:
 - (a) listing of each control concern;
 - (b) action plan to correct concerns;

(c) expected gap closure date; and
(d) responsible party to ensure closure.

D. EFOP reports shall be issued to other entities, in accordance with the department's determination. The department shall determine the frequency in which other entities receive ongoing reports and which of the ongoing reports shall be sent. Other entities that may receive ongoing EFOP reports, based on the determination of the department, include, but are not limited to:

- (1) the legislative finance committee;
- (2) the department of finance and administration;
- (3) any accrediting agency of the institution;
- (4) the United States department of education;
- (5) OSA;
- (6) the attorney general; or
- (7) other entities, as determined by the department, that may be concerned with any identified risk factor(s). [5.3.11.15 NMAC - N, 12/11/2018]

5.3.11.16 CAMPUS VERIFICATION VISITS:

A. An on-site verification visit may be scheduled at any campus location of an institution on EFOP status. During its on-site verification visit, the department may:

- (1) seek to verify any information reported by the institution;
- (2) determine the institution's compliance with EFOP reporting requirements;
- (3) verify the institution's compliance with its corrective action plan; and
- (4) verify progress toward completion of the corrective action plan and substantial mitigation or elimination of risk factor(s).

B. Prior to an on-site verification visit, the department shall issue notice to the institution of its

intent to conduct a verification visit no less than 10 days prior to the visit. The department shall coordinate the verification visit with the institution and provide information to be used by the department during the verification process.

C. The department shall conduct meetings with institutional representatives at the beginning and end of the verification visit to discuss objectives, procedures, time frame and post-visit follow-up. A preliminary and final report of the visit shall be shared with the institution for review and comment. In its report, the department may offer suggested remedies to cure any deficiencies discovered through the verification process.
[5.3.11.16 NMAC - N, 12/11/2018]

5.3.11.17 ONGOING COMMUNICATION:

A. An institution on EFOP status shall keep the department informed of any new risk factor or risk factors that develop at the institution. The institution shall report any new risk factor(s) immediately upon gaining actual knowledge of the new risk factor(s), but no more than 10 days after gaining actual knowledge. The institution's failure to report any new risk factor(s) while on EFOP status may result in the department extending the length of the EFOP status or additional reporting requirements. The institution may be required to submit an updated corrective action plan addressing the new risk factor(s). Action taken to extend EFOP, modify EFOP reporting requirements, or amend the corrective action plan will be based on the type of new risk factor(s), at the discretion of the department. The department shall make careful consideration of the severity, frequency, and the potential impact of the newly identified risk factor(s) to the institution's financial stability and the institution's demonstrated diligence in reporting the risk factor(s). If the institution is required to submit an amended corrective action plan, the department may either accept the

amended plan as proposed, request additional information to accompany the amended plan, or reject the amended plan as proposed. If the department rejects the amended plan as proposed, the department shall issue its reasoning in writing to the institution and the institution shall submit a new or revised amended plan within 15 days of issuance of the rejection.

B. An institution on EFOP status and the department may engage in periodic meetings. Meetings may be convened to identify reporting problems, clarify reporting requirements and procedures, solicit information or assistance, ensure ongoing progress toward completion of the corrective action plan, discuss current operating results, discuss pending or proposed budget adjustment requests, or any other potential issues related to EFOP.

C. If during the course of implementing the corrective action plan, the institution determines that all or part of the plan cannot be implemented as originally approved, the institution must work with the department to submit an amended corrective action plan. The department may either accept the amended plan as proposed, request additional information to accompany the amended plan, or reject the amended plan as proposed. If the department rejects the amended plan as proposed, the department shall issue its reasoning in writing to the institution and the institution shall submit a new or revised amended plan within 15 days of issuance of the rejection.

D. Representatives from the department may request to address the governing board at scheduled governing board meetings.
[5.3.11.17 NMAC - N, 12/11/2018]

5.3.11.18 REMOVAL OF EFOP STATUS:

A. The EFOP status of an institution shall remain in effect until the department determines the risk factor(s) that led to the status have been substantially mitigated or eliminated. Once the department

determines EFOP status may be removed, a letter issuing notice of removal from EFOP status will be sent from the department cabinet secretary to the president of the institution, the chair of the governing board, the chief financial officer of the institution, and any other entity that was previously notified when the EFOP status was initiated. The notice of removal from EFOP status will include the specific criteria utilized by the department in its determination to remove EFOP status. Examples of conditions supporting removal of the EFOP status may include, but are not limited to the following:

- (1) material improvement in the fiscal stability of the institution as documented in financial reports; or
- (2) demonstration that fiscal controls have been implemented and are functioning adequately as shown by:
 - (a) the institution's ability to produce materially accurate and complete financial statements and reports of account balances and transactions; and
 - (b) audit opinions which are no longer modified, qualified, adverse, or disclaimed.

B. The EFOP seeks to ensure that potential problems of finance are substantially mitigated or eliminated in a timely manner as demonstrated by fiscal liquidity, strong internal controls and substantial mitigation or elimination of any risk factor(s) that led to the EFOP status. In making its determination to remove an institution from EFOP status the department will consider progress made toward substantially mitigating or eliminating the risk factor(s), ability of the institution to implement its corrective action plan, measures taken by the institution to sustain efforts made through the corrective action plan, and the fiscal outlook for the institution.
[5.3.11.18 NMAC - N, 12/11/2018]

5.3.11.19 FAILURE TO COMPLY WITH EFOP REQUIREMENTS:

- A.** The following conditions shall constitute institutional non-compliance with EFOP:
- (1) failure to schedule or attend the initial meeting pursuant to 5.3.11.12 NMAC;
 - (2) failure to submit a corrective action plan pursuant to 5.3.11.14 NMAC;
 - (3) failure to obtain department approval of the proposed corrective action plan or any amendments to the corrective action plan;
 - (4) failure to take steps to implement the corrective action plan or any amendments to the corrective action plan;
 - (5) non-compliance with provisions of the corrective action plan or any amendments to the corrective action plan;
 - (6) failure to submit EFOP reports in accordance with deadlines set by the department;
 - (7) failure to report any new risk factor(s) while the institution is on EFOP status pursuant to Subsection A of 5.3.11.17 NMAC; or
 - (8) failure to comply with any other aspect of the EFOP established by the department within 5.3.11 NMAC.

B. If the department finds that the institution has met one or more conditions of institutional non-compliance with EFOP, the department shall issue notice stating the basis of the non-compliance to:

- (1) the president of the institution, the chair of the governing board of the institution, and the chief financial officer of the institution;
- (2) the legislative finance committee;
- (3) the department of finance and administration; and
- (4) any accrediting agency of the institution.

C. The department shall provide a report regarding the risk factor(s) identified that led to the institution's EFOP status, the conditions that constitute institutional non-compliance, and any relevant facts or circumstances surrounding the non-compliance to the legislative finance committee during funding evaluations.

D. In its discretion, the department may send notice of institutional non-compliance with EFOP to:

- (1) the United States department of education;
- (2) OSA;
- (3) the attorney general; or
- (4) other entities, as determined by the department, that may be concerned with any identified risk factor(s). [5.3.11.19 NMAC - N, 12/11/2018]

HISTORY OF 5.3.11 NMAC:
[RESERVED]

HIGHER EDUCATION DEPARTMENT

**TITLE 5 POST-SECONDARY EDUCATION
CHAPTER 5 POST-SECONDARY EDUCATIONAL PROGRAMS
PART 5 CLOSURE AND STUDENT COMPLAINT PROCEDURES FOR PUBLIC INSTITUTIONS**

5.5.5.1 ISSUING AGENCY: State of New Mexico Higher Education Department [5.5.5.1 NMAC - Rp, 5.5.5.1 NMAC, 12/11/2018]

5.5.5.2 SCOPE: Provisions of 5.5.5 NMAC apply to all public higher education institutions operating within and receiving financial support from the state of New Mexico. [5.5.5.2 NMAC - Rp, 5.5.5.2 NMAC, 12/11/2018]

5.5.5.3 STATUTORY AUTHORITY: Section 9-25-8 NMSA 1978, Section 21-1-26 NMSA 1978, Section 21-2-5 NMSA 1978, and Section 21-1B-5.1 NMSA 1978. [5.5.5.3 NMAC - Rp, 5.5.5.3 NMAC, 12/11/2018]

5.5.5.4 DURATION: Permanent [5.5.5.4 NMAC - Rp, 5.5.5.4 NMAC, 12/11/2018]

5.5.5.5 EFFECTIVE DATE: December 11, 2018, unless a later date is cited at the end of a section. [5.5.5.5 NMAC - Rp, 5.5.5.5 NMAC, 12/11/2018]

5.5.5.6 OBJECTIVE:
A. The purpose of 5.5.5 NMAC is to create a process for administration of student complaint resolution for public post-secondary institutions and to establish procedures for student program completion and student record maintenance and retention in the event an institution closes, ceases program offerings that contain enrolled students, or substantially relocates.

B. No public post-secondary institution located in New Mexico operating within and receiving financial support from the state shall close, cease program offerings that contain enrolled students, or substantially relocate without proper notice and complying with the provisions set out in 5.5.5 NMAC. A public post-secondary institution that closes shall provide for the perpetual care and maintenance of student records and ensure students have access to transcripts in perpetuity.

C. Pursuant to Federal regulation Section 600.9 of 34 C.F.R. (as amended in 2010), for a public post-secondary institution (established by name as an educational institution by a state through a charter, statute, constitutional provision, or other action) to be eligible for state authorization, the institution must be

legally authorized by a state that has a process to review and appropriately act on complaints concerning the institution including enforcing applicable state laws.

D. Institutions concurrently offering distance education pursuant to 5.99.1 NMAC as a SARA institution, through distance education authorization, or through any other method detailed in Section 5.99.1.10 NMAC:

(1) shall be subject to complaint procedures detailed in 5.99.1 NMAC, as related only to students enrolled exclusively as distance education students; and

(2) shall be subject to 5.99.2 NMAC, if the institution seeks to close, cease program offerings that contain enrolled students, or substantially relocate as defined in 5.99.2 NMAC, as related only to students enrolled exclusively as distance education students.

[5.5.5.6 NMAC - Rp, 5.5.5.6 NMAC, 12/11/2018]

5.5.5.7 DEFINITIONS:

A. “Accrediting body” means an accreditor or accrediting agency that has issued an accreditation status to the institution.

B. “Custodian of records” means an entity with which the institution has arranged for the perpetual care, maintenance and accessibility of all records and transcripts for all students receiving credit from the institution during the period of its existence. The entity must be in compliance with the Family Educational Rights and Privacy Act (FERPA) and be capable of servicing student record requests. Documentation evidencing such compliance shall be submitted to the department

C. “Department” means the New Mexico higher education department.

D. “Manager” means the chief executive officer, chief operations officer, chief financial officer, senior business or finance officer, senior financial aid administrator, and senior or chief

academic officer of an institution.

E. “Post-Secondary Institution” or “Institution” means a public post-secondary higher education institution operating within and receiving financial support from the state of New Mexico.

F. “Program” means any certificate or degree program or for purposes of closure, a college, school or department within an institution.

G. “Substantially relocating” or “substantially relocates” or “substantial relocation” means a relocation of the institution’s physical site that is beyond the proximity a student is normally required to travel for educational offerings.

[5.5.5.7 NMAC - Rp, 5.5.5.7 NMAC, 12/11/2018]

5.5.5.8 NOTICE:

A. An institution shall provide formal written notice of closure to the department, enrolled students, and the legislature immediately upon gaining actual knowledge of the institution’s intent to close, but no less than 90 days prior to closure.

B. An institution shall provide formal written notice of intent to substantially relocate to the department, enrolled students, and the legislature immediately upon gaining actual knowledge of the institution’s intent to substantially relocate, but no less than 90 days prior to moving operations.

C. An institution that seeks to close any other campuses (branch, satellite, or main) associated with the institution’s accreditation shall provide formal written notice to the department, enrolled students and the legislature immediately upon gaining actual knowledge of the institution’s intent to close, but no less than 90 days prior to closure.

D. An institution shall provide formal written notice of intent to cease program offerings that contain enrolled students, to the enrolled students and the department immediately upon gaining actual knowledge of the institution’s intent

to cease the program offerings, but no less than 90 days prior to ceasing offerings. If an institution is unable to comply with the 90 day notice period to cease program offerings that contain enrolled students, the institution must notify the department. The department may grant approval for a deviation from the required 90 day notice period if the institution presents evidence and articulable facts and circumstances that demonstrate the institution’s inability to comply with the 90 day notice period.

[5.5.5.8 NMAC - Rp, 5.5.5.8 NMAC, 12/11/2018]

5.5.5.9 PLAN:

A. An institution that intends to close, cease program offerings that contain enrolled students, or substantially relocate shall present a plan to the department.

B. An institution that is required to seek approval from an accrediting body of a plan to close, cease program offerings that contain enrolled students, or substantially relocate, must submit a copy of the approved plan to the department within seven days of receiving approval by the accrediting body.

C. An institution that is not required to seek approval of a plan by an accrediting body must submit a plan to the department as soon as practical, but no less than 90 days prior to closure, ceasing a program offering that contains enrolled students, or making substantial change to location.

D. The plan must include provisions for teach-out agreements, completion of programs by enrolled students, perpetual care and maintenance of student records, and identification and location of a responsible agent for the institution for a period of at least one year following closure.

[5.5.5.9 NMAC - N, 12/11/2018]

5.5.5.10 TEACH-OUT AGREEMENT OR PLAN:

A. An institution that seeks to close, cease program offerings that contain enrolled students, or substantially relocate,

shall enter into a teach-out agreement with another institution offering similar programs for provision of the remaining program requirements of enrolled students or provide a teach-out plan that allows students to complete their program of study at the closing institution.

B. An institution that has served notice to close, cease program offerings that contain enrolled students, or substantially relocate, shall provide to the department a copy of the approved teach-out agreement or plan. If an institution enters into a teach-out plan that allows students to complete their program of study at the closing institution, the timeframe to complete the plan must be accepted by the department.

C. Enrolled students impacted by teach-out agreements or plans must be notified of the agreement or plan when it is finalized. Teach-out agreements or plans shall be made available and arranged at no additional cost to the student beyond that originally agreed to by the student.

D. The department may determine that a teach-out agreement or plan is not feasible after consideration of evidence submitted to the department. The department may find that teach-out arrangements are not feasible for students in one or more programs offered by the institution, in which case the institution shall refund all tuition and fees paid by the students in question for the current period of enrollment and shall provide appropriate transcripts and evaluations to assist students in transferring their work to another institution.

E. An institution that seeks to relocate may be exempt from entering into a teach-out agreement or plan if the institution can demonstrate to the department that students will not be substantially burdened by the change in location. The institution will be required to complete a form published by the department demonstrating possible impact to students.

[5.5.5.10 NMAC - N, 12/11/2018]

5.5.5.11 RECORDS MAINTENANCE:

A. Prior to closure, an institution must ensure that records are in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, regulations of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory, whichever is longest in time. If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail.

B. If an institution discontinues its operation, the manager shall file with the designated custodian of records, the original or legible true copies of all educational records required to be maintained pursuant to law, the United States department of education, the accrediting body of the institution, and at a minimum, the student's enrollment agreement, student transcript, record indicating program completion (either certificate, diploma, degree, or other like proof of completion) and student financial aid records. A written detailed description for how records will be maintained following the closure shall be provided to the department in a plan for the perpetual care and maintenance of records. The written plan must include, but is not limited to the following:

(1) certification that the post-secondary institution is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, records retention requirements of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory related to records retention, whichever is longest in time;

(2) designation of a custodian of records;

(3) physical address of hard copy files;

(4) physical address of digital files; and

(5) process for obtaining transcripts or other records from the custodian of record.

C. The department must be notified of any update related to the custodian of records or upon any change to the custodian of records.

D. The department must be provided a copy of any contractual arrangements made for the perpetual care, maintenance and accessibility of all records. The department may request any additional records or information to help students gain access to transcripts in perpetuity.

E. In the event that the institution does not comply with the records maintenance provisions within 5.5.5 NMAC, the department may seek a court order to protect and if necessary take possession of the records.

F. Students must be made aware of the process to request student records from the custodian of records. The process must be provided in writing to the student and made available on the institution's website. [5.5.5.11 NMAC - N, 12/11/2018]

5.5.5.12 FINAL EXECUTION REPORT: Before any post-secondary institution closes it shall submit to the department a summary of all actions taken pursuant to the requirements set forth in all applicable Sections of 5.5.5 NMAC. The institution must also submit certification that it has met all rules of the department pertaining to the termination of operations by institutions. [5.5.5.12 NMAC - N, 12/11/2018]

5.5.5.13 STUDENT COMPLAINTS:
A. An institution shall adopt student complaint procedures which allow students to seek resolution to complaints or grievances. Institutions shall retain records that make available the student complaint received and record of its processing the complaint

(that comports with the institution’s policies and procedures for handling grievances or complaints) for a minimum of three years. The institution shall have and make available to all students, the adopted complaint procedure that describes in detail, how students may register a complaint or grievance, how the institution will investigate the complaint, and how the institution will attempt to resolve the complaint. Such policies shall at a minimum include the following components:

- (1) requirement that students with complaints or grievances against an institution first seek to resolve their complaint or grievance directly with the institution;
- (2) a timeframe within which the institution will investigate and respond to the complainant;
- (3) assurance that the representative of the institution investigating or addressing the complaint will serve as an impartial representative and is not directly involved in the subject matter to which the complaint is related;
- (4) assurance that no adverse action will be taken against the complainant for registering the complaint; and
- (5) identification of the department as the agency to be contacted in cases where a complaint cannot be resolved and include the mailing address, website, and phone number for the department.

B. The initial responsibility for the investigation and resolution of complaints resides with the institution. A student not satisfied with the outcome of a complaint or the institution’s handling of the complaint process may submit the complaint to the department. The department shall not engage in any complaint resolution procedures unless a student has exhausted all complaint procedures set by the institution or can demonstrate the institution’s refusal to utilize its complaint resolution procedures. If the student can demonstrate all complaint procedures of the

institution have been exhausted and the student is not satisfied with the outcome, the department may help facilitate resolution where possible, if the complaint contains a question of fact or potentially involves a violation of or a deviation from policy, regulation, or law.

C. Complaints regarding student grades or student conduct violations shall be governed entirely by institutional policy and shall not be reviewed by the department. Complaints containing allegations of fraud, abuse, or consumer protection violations, rising to the level of violation of state or federal law, as demonstrated through substantial evidence (evidence of such weight and quality that it is sufficient to persuade a reasonable person to support the allegation asserted), shall be reported to law enforcement, the United States department of education, and the institution’s accreditor, or any other applicable oversight entities.

D. Upon receipt of a student complaint, the department shall determine whether the complaint meets initial criteria to permit use of the department’s complaint procedure. The following initial complaint criteria must be satisfied:

- (1) A student must file a complaint with the department within two years of their last date of enrollment or incident about which the complaint is made, whichever is latest in time.
- (2) The complaint must be made to the department in writing utilizing the designated complaint form published by the department. The student may include supporting documentation or evidence related to the complaint. The department may request additional documentation from the student, as needed, to conduct an initial assessment.
- (3) The complaint must detail and provide evidence that the student has exhausted all complaint procedures at the institution.
- (4) The complaint must contain a question of

fact or question regarding potential violation of or deviation from policy, regulation, or law.

E. If the department determines the complaint meets the initial complaint criteria, it shall serve as an intermediary in attempting to facilitate a resolution or to obtain information from the institution to eliminate questions of fact or possible violations or deviations from policy, regulation or law raised by the complaint. Satisfaction of initial complaint criteria, in no way means the department has assigned greater weight to the student’s allegations. If the department finds that the subject matter of the complaint falls within the investigatory purview of another entity, it may forward the complaint and cease further review (for example the office for civil rights).

(1) Acting as an intermediary, the department shall request a response from the institution addressing the student’s complaint. The complaint and any documentation provided by the student shall be sent to the institution with a request for a written response. The institution shall have 10 days to forward its response to the department. The institution may request additional response time, if inquiry into the complaint requires greater than 10 days. The institution may provide any supporting documentation or evidence to address questions or concerns raised by the complaint with its response.

(2) After considering the institution’s response and any documentation or evidence supplied by the institution, the department may conduct further inquiry of the parties or may continue to serve as an intermediary for possible compromise between the parties. The department may seek additional clarifying information or supporting documentation from either party and may request additional response from either party.

(3) If the institution accepts the desired outcome proposed by the student in the complaint, the department shall inform the student. If the institution proposes an alternate

desired outcome, the department shall convey such information to the student and the student shall indicate acceptance or denial of the alternate proposed outcome, or create a different proposed outcome, to allow for compromise. If at any point, the student and the institution reach an agreed upon outcome, the department may help facilitate fulfillment of the outcome, as necessary.

(4) If the parties are unable to reach a mutually agreeable outcome, the department may, but is not obligated to, convene a meeting between the parties. Such meetings, if held, shall be informal and for the purpose of clarifying the facts surrounding the complaint and to facilitate the parties reaching a resolution or compromise, if possible. If a meeting is convened, the department shall give written notice to the institution and to the student, regarding the time, date, and place of the meeting.

F. The department may help facilitate a compromised resolution between the parties. However, the department shall not impose an outcome and shall not act as an adjudicatory entity. If the department has received evidence to support potential violation of or a deviation from policy, regulation, or law through its inquiry, the department may refer the complaint to either law enforcement, the United States department of education, the institution's accreditor, or any other applicable oversight entities for further investigation, as applicable to the type of potential violation or deviation. If the department determines, at any time, that questions raised by the complaint are alleviated or the complaint relates to grades or student conduct violations, it shall cease further inquiry into the complaint and inform the student that the complaint will be closed with no further action by the department. [5.5.5.13 NMAC - N, 12/11/2018]

History of 5.5.5 NMAC:

5.5.5 NMAC - Closure of Public Institutions, filed 7/15/2015 was repealed and replaced by 5.5.5

NMAC - Closure and Student Complaint Procedures for Public Institutions, effective 21/11/2018.

HIGHER EDUCATION DEPARTMENT

TITLE 5 POST-SECONDARY EDUCATION CHAPTER 99 DISTANCE EDUCATION PART 1 PUBLIC AND PRIVATE POST-SECONDARY INSTITUTIONS OPERATING UNDER THE INTERSTATE DISTANCE EDUCATION ACT

5.99.1.1 ISSUING AGENCY: New Mexico Higher Education Department. [5.99.1.1 NMAC - Rp. 5.99.1.1 NMAC, 12/11/2018]

5.99.1.2 SCOPE: Provisions of 5.99.1 NMAC apply to public post-secondary institutions and private post-secondary institutions offering distance education to any student within New Mexico and the provision of distance education by participating New Mexico post-secondary educational institutions to students in other states. [5.99.1.2 NMAC - Rp. 5.99.1.2 NMAC, 12/11/2018]

5.99.1.3 STATUTORY AUTHORITY: Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23B-1 et seq. NMSA 1978. The Interstate Distance Education Act ("the act"), Sections 21-23B-1 through 21-23B-6 NMSA 1978 authorizes the New Mexico higher education department to adopt rules and regulations for the receipt of distance education by students in New Mexico and the provision of distance education by New Mexico participating post-secondary educational institutions to students located outside New Mexico. [5.99.1.3 NMAC - Rp. 5.99.1.3 NMAC, 12/11/2018]

5.99.1.4 DURATION: Permanent. [5.99.1.4 NMAC - Rp. 5.99.1.4 NMAC, 12/11/2018]

5.99.1.5 EFFECTIVE DATE: December 11, 2018, unless a later date is cited at the end of a section. [5.99.1.5 NMAC - Rp. 5.99.1.5 NMAC, 12/11/2018]

5.99.1.6 OBJECTIVE:
A. Unless expressly exempt pursuant to 5.99.1.10 NMAC, an institution shall obtain distance education authorization from the department if the institution either:

(1) has a physical presence in New Mexico and engages in distance education with students located outside New Mexico; or

(2) engages in distance education from a location originating outside New Mexico with a student located in New Mexico.

B. Institutions with a physical presence in New Mexico engaging in distance education may be subject to:

(1) distance education authorization pursuant to the Interstate Distance Education Act and 5.99.1 NMAC, unless exempted pursuant to 5.99.1.10 NMAC;

(2) state authorization for private institutions pursuant to the Post-secondary Educational Institution Act and 5.100.6 NMAC or 5.100.7 NMAC, unless expressly exempted by law and 5.100.5 NMAC; and

(3) authorization required by laws and regulations of any other state or territory in which a student is located and engaging in distance education with the institution.

C. Post-secondary educational institutions must be accredited in order to apply for distance education authorization under the act.

D. Distance education authorization does not serve as an endorsement of a particular institution, but certifies that an

institution has met the minimum criteria set by the department to operate in New Mexico under the Interstate Distance Education Act. An institution authorized by the department may not use terms such as “accredited,” “endorsed,” or “recommended” when referring to authorization by the department.

E. Post-secondary educational institutions that do not have distance education authorization or do not meet the criteria for exemption, and are offering distance education from New Mexico or to students in New Mexico, shall be notified by certified mail that they shall cease immediately to offer such education until obtaining distance education authorization or are found to be exempted by the department; the department shall initiate appropriate legal action if institutions fail to comply; whoever violates any provision of the act may be assessed a civil penalty not to exceed five hundred dollars (\$500) per day per violation.

[5.99.1.6 NMAC - Rp. 5.99.1.6 NMAC, 12/11/2018]

5.99.1.7 DEFINITIONS:

A. “Accreditation” means a verified accreditation status with an accrediting agency recognized by the United States department of education.

B. “Department” means the New Mexico higher education department.

C. “Distance education” means instruction offered online or through correspondence or interactive video or other means enabling a student to receive instruction from a higher education provider. Instruction may be either synchronous (instruction in which a group of students engage in learning at the same time), asynchronous (instruction that does not occur in the same place or at the same time), or experiential learning activity.

D. “Distance education authorization” or “**DEA**” means a post-secondary institution that has been deemed by the department to satisfactorily meet

criteria, as set by the department, to provide distance education, under the Interstate Distance Education Act.

E. “Educational activity” means distance education which is synchronous (instruction in which a group of students engage in learning at the same time) or asynchronous (instruction that does not occur in the same place or at the same time).

F. “Exempt” or “**exemption**” means an institution that meets criteria in 5.99.1.10 NMAC to be exempt from obtaining distance education authorization and has completed all documentation required by the department.

G. “Experiential learning activity” means application of previously studied skills through practica, student teaching, clinical placements, research, internships, or other similar placements by a student receiving supervised field experience at an experiential learning site.

H. “Experiential learning site” means a clinical, practicum, internship, student teaching or other similar site location where a student participates in a supervised field experience.

I. “Higher education” means education or training beyond secondary education.

J. “Home state” means a state or territory where the institution holds its legal domicile and accreditation. To operate under the act an institution must have a single home state.

K. “Non-New Mexico home state SARA institutions” means an institution which holds its legal domicile and accreditation in a state or territory in the United States and outside of New Mexico and is an approved member institution of SARA.

L. “Physical presence” means the ongoing occupation of a physical location in the state, the ongoing maintenance of an administrative office to support the provision of higher education instruction, or engaging in one or more of the activities detailed in 5.99.1.8 NMAC.

M. “Post-secondary educational institution” or “**institution**” means public post-secondary educational institutions and private post-secondary educational institutions.

N. “Portal entity” means the state agency or other state body designated by each SARA member state to serve as the interstate point of contact for SARA questions, complaints and other communications. In New Mexico, the portal entity is the department.

O. “Private post-secondary educational institution” means a post-secondary educational institution not primarily funded by public funds.

P. “Public post-secondary educational institution” means a post-secondary educational institution primarily funded by public funds.

Q. “SARA Manual” means a manual which codifies existing SARA policy and includes procedures for use by states and institutions to regulate SARA. A current version of the manual will be maintained on the NC-SARA website.

R. “State authorization reciprocity agreement” or “**SARA**” means an agreement, developed by the national council for state authorization reciprocity agreements (NC-SARA) that provides uniform standards and parameters for the interstate provision of post-secondary distance education courses and programs.

S. “Student location” or “**students located**” means the physical location in which the student engages in distance education. The student’s legal state of residence will not be a criterion for determining the student’s physical location for purposes of the act.

T. “Supervised field experience” means a form of distance education which enables instruction from an experiential learning site, through an agreement with an institution pursuant to 5.99.1.11 NMAC. To be considered supervised field experience, the student location

must be in a different state or territory than that of the institution.
[5.99.1.7 NMAC - Rp. 5.99.1.7 NMAC, 12/11/2018]

5.99.1.8 PHYSICAL PRESENCE IN NEW MEXICO:

Engaging in one or more of the following activities constitutes a physical presence in New Mexico:

- A. ongoing occupation of a physical location in the state;
- B. maintenance of an administrative office to support the provision of higher education instruction;
- C. establishing a physical location for students to engage in educational activity;
- D. requiring students to physically meet in a location for instructional purposes more than twice per full-term (quarter or semester) course for a total of more than six hours;
- E. establishing an administrative office;
- F. providing student support services to enrolled students, from a physical site operated by or on behalf of the institution in the state;
- G. obtaining office space for instructional or non-instructional staff;
- H. maintaining a mailing address or phone exchange in New Mexico;
- I. holding proctored exams on behalf of the institution in New Mexico more than twice per full-term (quarter or semester); or
- J. facilitating student participation in off-campus field trips in New Mexico for academic purposes in excess of 20 classroom hours in one six-month period or in which the institution establishes a residential or instructional facility in New Mexico.

[5.99.1.8 NMAC - Rp. 5.99.1.8 NMAC, 12/11/2018]

5.99.1.9 ACTIVITY THAT DOES NOT ESTABLISH A PHYSICAL PRESENCE:

The following is a non-exhaustive list of activities, which if conducted by the institution, will not trigger a physical presence in New Mexico:

- A. advertising to students whether through print, billboard, direct mail, internet, radio, television or other medium;
- B. maintaining a server, router or similar electronic service device housed in a facility that otherwise would not constitute physical presence (the presence of a server or similar pass-through switching device does not by itself constitute the offering of a course or program in the state);
- C. having faculty, adjunct faculty, mentors, tutors, recruiters or other academic personnel residing in New Mexico and working from their homes or another private, non-institutional site, provided that such staff is not engaged in activities that would otherwise constitute physical presence;
- D. using recruiters in New Mexico if the recruiter has registered as an agent pursuant to Section 21-24-1 through Section 21-21-9 NMSA 1978;
- E. independent off-campus study or research by students including, independent fieldwork for a thesis or dissertation, by individual students not engaged in a supervised field experience as defined in 5.99.1.11 NMAC and with no supervision or control by the student's institution; or
- F. facilitating student participation in off-campus field trips in New Mexico for academic purposes, so long as the field trip does not exceed more than 20 classroom hours in one six-month period, or the establishment of a residential or instructional facility by the institution in New Mexico.

[5.99.1.9 NMAC - Rp. 5.99.1.9 NMAC, 12/11/2018]

5.99.1.10 INSTITUTIONS EXEMPT FROM DISTANCE EDUCATION AUTHORIZATION:

An institution may be granted an exemption from obtaining distance education authorization, if the institution meets the criteria for exemption, set by the department. An institution seeking an exemption shall complete a DEA exemption form, published by the department. An

institution shall meet one or more of the following criteria to be eligible for DEA exemption:

- A. the institution is authorized to operate as a member institution under SARA;
- B. the institution has a physical presence in New Mexico exclusively offering distance education to students located only in New Mexico;
- C. the department has entered into a reciprocal agreement pursuant to Subsection B of Section 21-23B-3 NMSA 1978.
- D. the institution offers distance education courses on a military base or vessel, if enrollment in such courses is limited to active and reserve military personnel and their spouse or dependents;
- E. the institution has contractual arrangements in New Mexico for course offerings through consortium agreements (for example an agreement between two or more institutions to partner and provide program offerings) and has previously notified the department of the agreement;
- F. the institution is only offering distance education courses as a means of continuing education units and the units meet the criteria set out by the professional organization or authority requiring the continuing education; or
- G. the institution is offering supervised field experience pursuant to the parameters established in 5.99.1.11 NMAC.

[5.99.1.10 NMAC - Rp. 5.99.1.10 NMAC, 12/11/2018]

5.99.1.11 SUPERVISED FIELD EXPERIENCE:

Supervised field experience is a form of distance education which enables instruction from an experiential learning site. The experiential learning site will facilitate student participation in experiential learning activity which requires application of previously studied skills through practica, student teaching, clinical placements, research, internships, or other similar placements. The institution and the experiential learning site must

enter into an agreement to facilitate experiential learning activity for students through use of supervisors, mentors, faculty members or other qualified professionals employed by the experiential learning site.

A. A student may participate in a supervised field experience, without the institution obtaining DEA if the institution certifies the following:

(1) the supervised field experience is part of a program of study offered by the enrolling institution;

(2) the experiential learning site has entered into an agreement with the institution which specifies:

(a) the student will receive oversight by a supervisor, mentor, faculty member or other qualified professional, located at the experiential learning site; and

(b) the supervisor, mentor, faculty member or other qualified professional has a direct or indirect reporting responsibility to the institution where the student is enrolled;

(3) no greater than 10 students from an individual academic program will be placed simultaneously at an experiential learning site during a full-term (quarter or semester);

(4) approval requirements have been satisfied by the applicable professional licensing agency or board, if the supervised field experience requires licensure or certification for practice; and

(5) support services and complaint resolution procedures will be made available to the student, while the student participates in the supervised field experience.

B. The department may allow an institution to maintain an exemption from DEA and increase maximum student placements beyond those in Paragraph (3) of Subsection A of 5.99.1.11 NMAC if the experiential learning site contains more than one division, department, or unit, and the institution seeks to place

students within different divisions, departments, or units. If an institution seeks to place more than 10 students at an experiential learning site that contains more than one division, department, or unit, and maintain eligibility for DEA exemption, the institution shall file a request with the department detailing the basis of the increase in maximum student placements. For the department to consider an increase in maximum student placements beyond those in Paragraph (3) of Subsection A of 5.99.1.11 NMAC, it will evaluate the demonstrated ability of the institution and the experiential learning site to provide adequate learning opportunity and resources to the student. In making its determination, factors considered by the department shall include, but are not limited to, the following:

(1) the size of the facility or location of the experiential learning site;

(2) the number of distinct divisions, departments, or units to which students will be placed within the experiential learning site;

(3) whether the divisions, departments, or units engage in distinct specializations or disciplines;

(4) whether the number of supervisors, mentors, faculty member or other qualified professionals available is adequate to provide oversight and fulfill the terms of the agreement between the institution and the experiential learning site, entered into pursuant to Paragraph (2) of Subsection A of 5.99.1.11 NMAC; and

(5) overall demand for student placements by all institutions seeking to establish agreements with the experiential learning site.

C. An institution that seeks to place more students at an experiential learning site than permitted pursuant to Paragraph (3) of Subsection A of 5.99.1.11 NMAC and does not obtain express approval by the department pursuant to Section B of 5.99.1.11 NMAC must obtain DEA pursuant to 5.99.1.12 NMAC.

[5.99.1.11 NMAC - Rp. 5.99.1.11 NMAC, 12/11/2018]

5.99.1.12 DISTANCE EDUCATION AUTHORIZATION APPLICATION REQUIREMENTS:

Institutions operating under the act shall apply for distance education authorization unless exempt pursuant to 5.99.1.10 NMAC. The department shall promulgate forms and require the institution to meet criteria as applicable to each of the following sectors:

A. Public post-secondary educational institutions must submit to department:

(1) a complete distance education authorization application set out by the department;

(2) certification of compliance with the interregional guidelines for the evaluation of distance education programs adopted by the council of regional accrediting commission;

(3) certification of compliance with the western interstate commission for higher education principles outlined in 5.99.1.20 NMAC;

(4) a surety bond or alternate form of surety in the amount of twenty percent of the gross New Mexico distance education tuition and fees revenue;

(5) current accreditation;

(6) proof that the public post-secondary educational institution has adopted a complaint procedure that complies with the department's requirements in 5.99.1.15 NMAC;

(7) certification that the public post-secondary educational institution has adopted a plan for records maintenance and retention that complies with the department's requirements in 5.99.1.21 NMAC; and

(8) a fully executed participation agreement with the department.

B. Private post-secondary educational institutions must submit to the department:

(1) a complete distance education authorization application set out by the department;

(2) certification of compliance with the interregional guidelines for the evaluation of distance education programs adopted by the council of regional accrediting commission;

(3) certification of compliance with the western interstate commission for higher education principles outlined in 5.99.1.20 NMAC;

(4) a surety bond or alternate form of surety in the amount of twenty percent of the gross New Mexico distance education tuition and fees revenue;

(5) current accreditation;

(6) financial responsibility composite score of 1.5 or above as assigned by the United States department of education in the private post-secondary educational institution's most recent fiscal report;

(7) proof that the private post-secondary educational institution has adopted a complaint procedure that complies with the department's requirements in 5.99.1.15 NMAC;

(8) certification that the private post-secondary educational institution has adopted a plan for records maintenance and retention that complies with the department's requirements in 5.99.1.21 NMAC; and

(9) a fully executed participation agreement with the department.

[5.99.1.12 NMAC - Rp. 5.99.1.12 NMAC, 12/11/2018]

5.99.1.13 REPORTING FOR DISTANCE EDUCATION AUTHORIZED INSTITUTIONS:

A. Institutions granted DEA shall comply with department reporting procedures and submit institutional information and data on an annual basis using standard forms. Institutions granted DEA must comply with all reporting deadlines to be eligible for renewal or to remain in good standing.

B. The department shall promulgate a standard form

for annual reporting to include curriculum, enrollment, demographic, or other institutional information and data.

[5.99.1.13 NMAC - Rp. 5.99.1.13 NMAC, 12/11/2018]

5.99.1.14 APPLICABLE DISTANCE EDUCATION AUTHORIZATION FEES AND SURETY BOND:

A. The department may assess application, administrative, or reporting fees and publish a fee schedule.

B. The department shall assess fees for providing services associated with application review and making determinations of eligibility for DEA.

C. The department shall assess a fee upon determination that the institution has satisfactorily met all conditions for DEA.

D. The department shall assess an administrative fee for filing annual reporting; any costs associated with specialized review, program changes, and institution or administrative changes shall be assessed to the institution.

E. Each institution holding DEA shall maintain in force a surety bond or alternate form of surety accepted by the department.

(1) The surety bond shall:

(a) be payable to the department;

(b) be in an amount set at twenty percent of the institution's projected or actual gross annual New Mexico distance education tuition and fee revenue;

(c) include the name, office address and phone number of the issuing company representative; and

(d) allow for the department to draw in order to indemnify any student damaged as a result of fraud or misrepresentation, as a result of the institution ceasing operation prior to its students having completed the programs for which they have contracted, or to pay costs associated with preservation of student records.

(2) Alternate forms of surety: An institution may request a waiver from the bond requirement by providing a request to utilize an alternate form of surety. The request must detail the reasons the institution is seeking approval to utilize an alternate form of surety and provide detail regarding the type of surety. The department may accept or reject a request for alternate surety. The alternate form of surety shall:

(a) be payable to the department;

(b) be in an amount set at twenty percent of the institution's projected or actual gross annual New Mexico distance education tuition and fee revenue;

(c) be in the form of a cash deposit escrow account, irrevocable letter or credit, or similar alternate form of surety;

(d) include the name, office address and phone number of the issuing surety representative; and

(e) allow for the department to draw in order to indemnify any student damaged as a result of fraud or misrepresentation, as a result of the institution ceasing operation prior to its students having completed the programs for which they have contracted, or to pay costs associated with preservation of student records.

F. If an institution seeks to cancel a surety bond or an alternate form of surety, written notice must be delivered to the department. The institution may not cancel the surety bond or alternate form of surety until it has been provided with written release from the department. If the institution seeks to maintain or renew DEA, it shall provide the department with a like surety or acceptable alternative.

[5.99.1.14 NMAC - Rp. 5.99.1.14 NMAC, 12/11/2018]

5.99.1.15 COMPLAINTS UNDER DEA:

A. An institution shall adopt student complaint procedures which allow students to seek resolution to complaints

or grievances. Institutions shall retain records that make available the student complaint received and record of processing the complaint (that comports with the institution's policies and procedures for handling grievances or complaints) for a minimum of three years. The institution shall have and make available to all students, the adopted complaint procedure that describes in detail, how students may register a complaint or grievance, how the institution will investigate the complaint, and how the institution will attempt to resolve the complaint. Such policies shall at a minimum include the following components:

- (1) requirement that students with complaints or grievances against an institution first seek to resolve their complaint or grievance directly with the institution;
- (2) a timeframe within which the institution will investigate and respond to the complainant;
- (3) assurance that the representative of the institution investigating or addressing the complaint will serve as an impartial representative and is not directly involved in the subject matter to which the complaint is related;
- (4) assurance that no adverse action will be taken against the complainant for registering the complaint; and
- (5) identification of the higher education department as the agency to be contacted in cases where a complaint cannot be resolved and include the mailing address, website, and phone number for the department.

B. The initial responsibility for the investigation and resolution of complaints resides with the institution. A student not satisfied with the outcome of a complaint or the institution's handling of the complaint process, may submit the complaint to the department. The department shall not engage in any complaint resolution procedures unless a student has exhausted all complaint procedures set by the

institution or can demonstrate the institution's refusal to utilize its complaint resolution procedures.

If the student can demonstrate all complaint procedures of the institution have been exhausted and the student is not satisfied with the outcome, the department may help facilitate resolution where possible, if the complaint contains a question of fact or potentially involves a violation of or a deviation from policy, regulation, or law.

C. Complaints regarding student grades or student conduct violations shall be governed entirely by institutional policy and shall not be reviewed by the department. Complaints containing allegations of fraud, abuse, or consumer protection violations, rising to the level of violation of state or federal law, as demonstrated through substantial evidence (evidence of such weight and quality that it is sufficient to persuade a reasonable person to support the allegation asserted), shall be reported to law enforcement, the United States department of education, the institution's accreditor, or any other applicable oversight entities.

D. Upon receipt of a student complaint, the department, shall determine whether the complaint meets initial criteria, to permit use of the department's complaint procedure. The following initial complaint criteria must be satisfied:

- (1) A student must file a complaint with the department within two years of their last date of enrollment or incident about which the complaint is made, whichever is latest in time.
- (2) The complaint must be made to the department in writing utilizing the designated complaint form published by the department. The student may include supporting documentation or evidence related to the complaint. The department may request additional documentation from the student, as needed, to conduct an initial assessment.
- (3) The complaint must detail and provide

evidence that the student has exhausted all complaint procedures at the institution.

(4) The complaint must contain a question of fact or question regarding potential violation of or deviation from policy, regulation, or law.

E. If the department determines the complaint meets the initial complaint criteria, it shall serve as an intermediary in attempting to facilitate a resolution or to obtain information from the institution to eliminate questions of fact or possible violations or deviations from policy, regulation or law raised by the complaint. Satisfaction of initial complaint criteria, in no way means the department has assigned greater weight to the student's allegations. If the department finds that the subject matter of the complaint falls within the investigatory purview of another entity, it may forward the complaint and cease further review (for example the office for civil rights).

(1) Acting as an intermediary, the department shall request a response from the institution addressing the student's complaint. The complaint and any documentation provided by the student shall be sent to the institution with a request for a written response. The institution shall have 10 days to forward its response to the department. The institution may request additional response time, if inquiry into the complaint requires greater than 10 days. The institution may provide any supporting documentation or evidence to address questions or concerns raised by the complaint with its response.

(2) After considering the institution's response and any documentation or evidence supplied by the institution, the department may conduct further inquiry of the parties or may continue to serve as an intermediary for possible compromise between the parties. The department may seek additional clarifying information or supporting documentation from either party and may request additional response from either party.

(3) If the institution accepts the desired outcome proposed by the student in the complaint, the department shall inform the student. If the institution proposes an alternate desired outcome, the department shall convey such information to the student and the student shall indicate acceptance or denial of the alternate proposed outcome, or create a different proposed outcome, to allow for compromise. If at any point, the student and the institution reach an agreed upon outcome, the department may help facilitate fulfillment of the outcome, as necessary.

(4) If the parties are unable to reach a mutually agreeable outcome, the department may, but is not obligated to, convene a meeting between the parties. Such meetings, if held, shall be informal and for the purpose of clarifying the facts surrounding the complaint and to facilitate the parties reaching a resolution or compromise, if possible. If a meeting is convened, the department shall give written notice to the institution and to the student, regarding the time, date, and place of the meeting.

F. The department may help facilitate a compromised resolution between the parties. However, if the parties cannot reach a compromised agreement, the department shall impose an outcome by weighing the assertions of the parties after careful consideration of all documents and evidence. The department may sanction a DEA institution pursuant to 5.99.1.22 NMAC if the department determines the institution:

(1) failed to resolve a complaint or comply with the department's efforts to facilitate resolution or conduct inquiry; or

(2) violated provisions of the DEA participation agreement.

G. If the department, through its inquiry, has received evidence to support potential violation of or a deviation from policy, regulation, or law the department may refer the complaint to either

law enforcement, the United States department of education, the institution's accreditor, or any other applicable oversight entities for further investigation, as applicable to the type of potential violation or deviation. If the department determines, at any time, that questions raised by the complaint are alleviated or the complaint relates to grades or student conduct violations, it shall cease further inquiry into the complaint and inform the student that the complaint will be closed with no further action by the department.

[5.99.1.15 NMAC - Rp. 5.99.1.15 NMAC, 12/11/2018]

5.99.1.16 SARA INSTITUTIONS:

A. Non-New Mexico SARA member institutions providing distance education to students located in New Mexico shall be governed by rules set forth by the national council for state authorization reciprocity agreements, the SARA manual, and the applicable regional compact.

B. If a non-New Mexico SARA member institution seeks to place students at experiential learning sites in New Mexico to complete supervised learning experience, the institution must comply with SARA manual regarding maximum placements for an individual academic program at one clinical or practicum site. If the institution seeks to exceed placement limitations in the SARA manual for an individual academic program at one clinical or practicum site, the institution must notify and seek permission from the department.

Non-New Mexico SARA member institutions that place students in supervised learning experiences within New Mexico and exceed the maximum number of placements without department approval or do not adhere to rules for placements set out pursuant to the SARA manual, placements may be subject to objection by the department. The department will follow procedures for objection pursuant to the SARA manual. If a non-New Mexico SARA member institution seeks to

place students from an individual academic program simultaneously at one clinical or practicum site within New Mexico in excess of the amount permitted pursuant to the SARA rules, the department will consider the demonstrated ability of the non-New Mexico SARA member institutions and the clinical or practicum site to provide adequate learning opportunity and resources to the student. In making its determination, factors the department may consider include, but are not limited to:

(a) the size of the facility or location of the experiential learning site;

(b) the number of distinct divisions, departments, or units to which students will be placed within the experiential leaning site;

(c) whether the divisions, departments, or units engage in distinct specializations or disciplines;

(d) whether the number of supervisors, mentors, faculty member or other qualified professionals available to provide oversight to fulfill the terms of any agreement between the institution and the clinical or practicum site;

(e) overall demand for student placements by all institutions seeking to establish agreements with the clinical or practicum site.

C. New Mexico home state SARA member institutions providing distance education from New Mexico shall be governed by rules set forth by the national council for state authorization reciprocity agreements, the SARA manual, and the western interstate commission on higher education compact. Application fees for New Mexico home state SARA member institutions shall be assessed by the department pursuant to Section 5.99.1.18 NMAC. [5.99.1.16 NMAC - Rp. 5.99.1.16 NMAC, 12/11/2018]

5.99.1.17 REPORTING FOR SARA INSTITUTIONS:

SARA member institutions shall comply with the reporting requirements set out by the national

council for state authorization reciprocity agreement.
[5.99.1.17 NMAC - Rp. 5.99.1.17 NMAC, 12/11/2018]

5.99.1.18 APPLICABLE SARA FEES AND SURETY

BOND: Acting in the capacity of the state portal entity, the department will assess a non-refundable application fee for SARA home state applicants and publish a fee schedule. New Mexico home state institutions shall pay the state application fee prior to application or renewal application review by the portal entity. If an institution is approved by the portal entity to become a SARA member institution, the institution shall pay fees set out by the national council for state authorization reciprocity agreements. The department may require institutions to obtain a surety bond in the amount of twenty percent of the gross or projected distance education tuition and fees revenue from students enrolled pursuant to SARA as a condition of SARA membership approval.
[5.99.1.18 NMAC - Rp. 5.99.1.18 NMAC, 12/11/2018]

5.99.1.19 COMPLAINTS UNDER SARA:

A. SARA member institutions offering distance education to a student enrolled under SARA, shall be subject to the complaint procedures set out in 5.99.1.19 NMAC and the SARA manual. New Mexico home state SARA member institutions shall adopt complaint procedures for SARA students to allow SARA students to seek resolution to complaints or grievances. The SARA member institution shall have and make available to all enrolled SARA students, the adopted complaint procedure that describes in detail, how SARA students may register a complaint or grievance, how the SARA member institution will investigate the complaint, and how the SARA member institution will attempt to resolve the complaint. Such policies shall at a minimum include the following components:

- (1) requirement that students with complaints or grievances against an institution first seek to resolve their complaint or grievance directly with the institution;
 - (2) a timeframe within which the institution will investigate and respond to the complainant, pursuant to the SARA manual;
 - (3) assurance that the representative of the institution investigating or addressing the complaint will serve as an impartial representative and is not directly involved in the subject matter to which the complaint is related;
 - (4) assurance that no adverse action will be taken against the complainant for registering the complaint; and
 - (5) identification of department as the New Mexico portal entity to be contacted in cases related to complaints resulting from distance education courses or activities offered by New Mexico home state SARA member institutions to students in other SARA states or territories and include the mailing address, website, and phone number for the department and the same contact information for other SARA portal entities.
- B.** New Mexico home state SARA member institutions shall retain records that make available the student complaint received and record of processing the complaint (that comports with the institution's policies and procedures for handling grievances or complaints) for a minimum of three years.
- C.** The initial responsibility for the investigation and resolution of complaints resides with the SARA member institution. A student not satisfied with the outcome of a complaint or the institution's handling of the complaint process, may submit the complaint to the department for review. The department shall not engage in any complaint resolution procedures unless a student has exhausted all complaint procedures set by the SARA member institution or can

demonstrate the SARA member institution's refusal to utilize its complaint resolution procedures. If the student can demonstrate all complaint procedures of the SARA member institution have been exhausted and the student is not satisfied with the outcome, the department shall administer complaint procedures set out in the SARA manual.

D. Complaints regarding student grades or student conduct violations shall be governed entirely by institutional policy and shall not be reviewed by the department. Complaints containing allegations of fraud, abuse, or consumer protection violations, rising to the level of violation of state or federal law, as demonstrated through substantial evidence (evidence of such weight and quality that it is sufficient to persuade a reasonable person to support the allegation asserted), shall be reported to law enforcement, the United States department of education, the institution's accreditor, or any other applicable oversight entities.

E. Upon receipt of a student complaint, the department shall determine whether the complaint meets initial criteria to permit use of the department's and SARA's complaint procedures. The following initial complaint criteria must be satisfied:

- (1) A student must file a complaint with the department within the timeframe set in the SARA manual.
- (2) The complaint must be made to the department in writing utilizing the designated complaint form published by the department. The student may include supporting documentation or evidence related to the complaint. The department may request additional documentation from the student, as needed, to conduct an initial assessment.
- (3) The complaint must detail and provide evidence that the student has exhausted all complaint procedures at the institution.

(4) The complaint must raise an issue that can be addressed pursuant to the SARA manual.

(5) The department is the appropriate portal entity to handle the complaint pursuant to SARA guidelines.

F. If the department determines the complaint meets the initial complaint criteria, it shall administer the SARA complaint procedures set out in 5.99.1.19 NMAC and the SARA manual. Satisfaction of initial complaint criteria, in no way means the department has assigned greater weight to the student's allegations. If the department finds that the subject matter of the complaint falls within the investigatory purview of another entity, it may forward the complaint and cease further review (for example the office for civil rights).

G. In conducting investigation of the complaint, the department may request a response from the SARA member institution addressing the student's complaint. The complaint and any documentation provided by the student shall be sent to the SARA member institution with a request for a written response. The SARA member institution shall respond to any inquiry issued by the department. The SARA member institution may provide any supporting documentation or evidence to address questions or concerns raised by the complaint with its response. After considering the SARA member institution's response and any documentation or evidence supplied by the institution, the department may conduct further inquiry or may continue to serve as an intermediary for possible compromise between the parties. The department may seek additional clarifying information or supporting documentation from either party and may request additional responses from either party. If at any point, the student and the institution reach an agreed upon outcome, the department may help facilitate fulfillment of the outcome, as necessary.

H. If the department has received evidence to support potential violation of or a deviation from policy, regulation, or law through its inquiry, the department may refer the complaint to law enforcement, the United States department of education, the institution's accreditor, or any other applicable oversight entities for further investigation, as applicable to the type of potential violation or deviation. If the department determines, at any time, that questions raised by the complaint are alleviated or the complaint relates to grades or student conduct violations, it shall cease further inquiry into the complaint and inform the student that the complaint will be closed with no further action by the department. [5.99.1.19 NMAC - Rp. 5.99.1.19 NMAC, 12/11/2018]

5.99.1.20 WESTERN INTERSTATE COMMISSION FOR HIGHER EDUCATION PRINCIPLES: Principles of good practice for quality distance education is an essential component of the department's agenda for higher education in New Mexico. The department endorses the principles of good practice established by the western interstate commission for higher education (WICHE). It is expected that all distance education courses and programs meet the following principles:

- A. each program of study results in learning outcomes appropriate to the rigor and breadth of the degree or certificate awarded;
- B. an electronically offered degree or certificate program is coherent and complete;
- C. the program provides for appropriate real-time or delayed interaction between faculty and students and among students;
- D. qualified faculty provide appropriate oversight of the program electronically offered;
- E. the program is consistent with the institution's role and mission;
- F. review and approval processes ensure the appropriateness

of the technology being used to meet the program's objectives;

G. the program provides faculty support services specifically related to teaching via an electronic system;

H. the program provides training for faculty who teach via the use of technology;

I. the program ensures that appropriate learning resources are available to students;

J. the program provides students with clear, complete, and timely information on the curriculum, course and degree requirements, nature of faculty/student interaction, assumptions about technological competence and skills, technical equipment requirements, availability of academic support services and financial aid resources, and costs and payment policies;

K. enrolled students have reasonable and adequate access to the range of student services appropriate to support their learning;

L. accepted students have the background, knowledge and technical skills needed to undertake the program;

M. advertising, recruiting, and admissions materials clearly and accurately represent the program and the services available;

N. policies for faculty evaluation include appropriate consideration of teaching and scholarly activities related to electronically offered programs;

O. the institution demonstrates a commitment to ongoing support, both financial and technical, and to continuation of the program for a period sufficient to enable students to complete a degree or certificate;

P. the institution evaluates the program's educational effectiveness, including assessments of student learning outcomes, student retention, and student and faculty satisfaction; students have access to such program evaluation data; and

Q. the institution provides for assessment and documentation of student achievement in each course and at

completion of the program.
[5.99.1.20 NMAC - Rp. 5.99.1.20 NMAC, 12/11/2018]

5.99.1.21 STUDENT RECORDS:

A. An institution providing distance education under DEA or that is offering distance education pursuant to 5.99.1.10 NMAC shall maintain a plan for records maintenance and retention which may be inspected by the department. The plan shall consist of a records maintenance and disposal schedule that is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, regulations of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory, whichever is longest in time. If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail. The plan must include a description of how records will be maintained in the event of closure, including, but is not limited to, designation of a custodian of records, digitization, and a process for obtaining transcripts from the custodian of records.

B. The institution must maintain at a minimum, the student's enrollment agreement, student transcript, or record indicating program completion (either certificate, diploma, degree, or other like proof of completion), and student financial aid records.
[5.99.1.21 NMAC - N, 12/11/2018]

5.99.1.22 MONITORING, SANCTIONS, AND CLOSURE:

A. Any institution operating pursuant to the act shall be subject to Section 21-23B-5 NMSA 1978.

B. An institution found in violation of the act may be assessed a civil penalty not to exceed five hundred dollars (\$500) per day per violation.

C. An institution that does not submit an application for renewal within deadlines set by the department may have a lapse in DEA.

D. The department shall provide notification for public viewing on the department's website if a distance education authorized institution has been sanctioned or penalized by their accreditor or the U.S. department of education or has a lapse in DEA.

E. An institution engaging in distance education with students located in New Mexico or post-secondary educational institution located in New Mexico engaging in distance education with a student located outside of New Mexico, shall not cease provision of distance education, close, or make a substantial change to location (a relocation of the institution's physical site which impacts the institution's ability to offer distance education or affects the institution's ability to continue to meet the criteria for distance education authorization) without providing notice to the department and complying with the provisions set out in 5.99.2 NMAC.
[5.99.1.22 NMAC - N, 12/11/2018]

History of 5.99.1 NMAC:
5.99.1 NMAC - Public And Private Post-Secondary Institutions Operating Under The Interstate Distance Education Act, filed 12/16/2017, was repealed and replaced by 5.99.1 NMAC - Public And Private Post-Secondary Institutions Operating Under The Interstate Distance Education Act, effective 12/11/2018.

HIGHER EDUCATION DEPARTMENT

TITLE 5 POST-SECONDARY EDUCATION CHAPTER 99 DISTANCE EDUCATION PART 2 CLOSURE OF A DISTANCE EDUCATION INSTITUTION

5.99.2.1 ISSUING AGENCY: New Mexico Higher Education Department.
[5.99.2.1 NMAC - N, 12/11/2018]

5.99.2.2 SCOPE:
Provisions of 5.99.2 NMAC apply to public and private post-secondary institutions offering distance education to any student within New Mexico and the provision of distance education by New Mexico post-secondary educational institutions to students in other states.
[5.99.2.2 NMAC - N, 12/11/2018]

5.99.2.3 STATUTORY AUTHORITY: Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23B-1 et seq. NMSA 1978. The Interstate Distance Education Act, Sections 21-23B-1 through 21-23B-6 NMSA 1978 authorizes the New Mexico higher education department to adopt rules and regulations for the receipt of distance education by students in New Mexico and the provision of distance education by New Mexico participating post-secondary educational institutions to students located outside New Mexico.
[5.99.2.3 NMAC - N, 12/11/2018]

5.99.2.4 DURATION:
Permanent
[5.99.2.4 NMAC - N, 12/11/2018]

5.99.2.5 EFFECTIVE DATE: December 11, 2018 unless a later date is cited at the end of a section.
[5.99.2.5 NMAC - N, 12/11/2018]

5.99.2.6 OBJECTIVE: No post-secondary educational institution engaging in distance education with

students located in New Mexico or post-secondary educational institutions located in New Mexico engaging in distance education with a student located outside of New Mexico operating pursuant to 5.99.1 NMAC, shall cease provision of distance education, close, or make a substantial change to location without providing notice to the department and complying with the provisions set out in 5.99.2 NMAC.
[5.99.2.6 NMAC - N, 12/11/2018]

5.99.2.7 DEFINITIONS:

A. “Accrediting body” means an accreditor or accrediting agency that has issued an accreditation status to the institution.

B. “Custodian of records” means an entity with which the institution has arranged for the perpetual care, maintenance and accessibility of all records and transcripts for all students receiving credit from the institution during the period of its existence. The entity must be in compliance with the Family Educational Rights and Privacy Act (FERPA) and be capable of servicing student record requests. Documentation evidencing such compliance shall be submitted to the department.

C. “Department” means the New Mexico higher education department or its designated employee.

D. “Distance education” means instruction offered online or through correspondence or interactive video or other means enabling a student to receive instruction from a higher education provider. Instruction may be either synchronous (instruction in which a group of students engage in learning at the same time), asynchronous (instruction that does not occur in the same place or at the same time), or experiential learning activity, as defined in 5.99.1 NMAC.

E. “Manager” means the chief executive officer, chief operations officer, chief financial officer, senior business or finance officer, senior financial aid administrator, and senior or chief academic officer of an institution.

F. “Post-secondary educational institution” or “institution” means public post-secondary educational institutions and private post-secondary educational institutions operating pursuant to 5.99.1 NMAC.

G. “Program” means any certificate or degree program or for purposes of closure, a college, school or department within an institution.

H. “Substantial change to location” means a relocation of the institution’s physical site which impacts the institution’s ability to offer distance education or affects the institution’s ability to continue to meet the criteria for distance education authorization.
[5.99.2.7 NMAC - N, 12/11/2018]

5.99.2.8 NOTICE:

A. An institution shall provide formal written notice of closure to the department immediately upon gaining actual knowledge of the institution’s intent to close, but no less than 90 days prior to closure.

B. An institution shall provide formal written notice of substantial change to location to the department immediately upon gaining actual knowledge of the institution’s intent to change location, but no less than 90 days prior to moving operations.

C. An institution operating pursuant to 5.99.1 NMAC has a mandatory obligation to report a closure of any other branch, satellite, main campus or parent company or organization associated with the institution’s accreditation immediately upon gaining actual knowledge of the institution’s intent to close, but no less than 90 days prior to closure.

D. An institution shall provide formal written notice of intent to cease distance education program offerings that contain enrolled students, to the enrolled students and the department immediately upon gaining actual knowledge of the institution’s intent to cease the program offerings, but no less than 90 days prior to ceasing offerings.
[5.99.2.8 NMAC - N, 12/11/2018]

5.99.2.9 PLAN:

A. An institution operating pursuant to 5.99.1 NMAC that intends to cease provision of distance education, close, or make a substantial change to location must present a plan to the department.

B. An institution that is required to seek approval of such a plan by an accrediting body, must submit a copy of the approved plan to the department within seven days of receiving approval by the accrediting body.

C. An institution that is not required to seek approval of a plan by an accrediting body must submit a plan to the department as soon as practical, but no less than 90 days prior to closure, cessation of distance education program offerings, or substantial change to location.

D. The plan must include provisions for teach-out agreements, completion of programs by enrolled students, perpetual care and maintenance of student records, and identification and location of a responsible agent for the institution for a period of at least one year following closure.
[5.99.2.9 NMAC - N, 12/11/2018]

5.99.2.10 TEACH-OUT AGREEMENT OR PLAN:

A. An institution operating pursuant to 5.99.1 NMAC that has served notice of closure, substantial change to location, or intent to cease program offerings that contain enrolled students shall provide to the department a teach-out agreement or plan.

B. An institution that is closing, has a substantial change to location, or intends to cease program offerings that contain enrolled students shall enter into a teach-out agreement with another institution offering similar programs, for provision of the remaining program requirements of enrolled students, or provide a teach-out plan that allows students to complete their program of study at the closing institution within a timeframe accepted by the department.

C. Enrolled students impacted by teach-out agreements or plans must be notified of the agreement or plan when it is finalized. Teach-out agreements or plans shall be made available and arranged at no additional cost to the students beyond that originally agreed to by the student.

D. The department may determine that a teach-out agreement or plan is not feasible after consideration of evidence submitted to the department. The department may find that teach-out arrangements are not feasible for students in one or more programs offered by the institution, in which case the institution shall refund all tuition and fees paid by the students in question for the current period of enrollment and shall provide appropriate transcripts and evaluations to assist students in transferring their work to another institution.

E. An institution that seeks to relocate may be exempt from entering into a teach-out agreement or plan if the institution can demonstrate to the department that students will not be substantially burdened by the change in location. The institution will be required to complete a form published by the department demonstrating possible impact to students.

[5.99.2.10 NMAC - N, 12/11/2018]

5.99.2.11 RECORDS MAINTENANCE:

A. Prior to closure, an institution must ensure that records are in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, regulations of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory, whichever is longest in time. If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail.

B. If an institution discontinues its operation, the

manager shall file with the designated custodian of records, the original or legible true copies of all educational records required to be maintained pursuant to 5.99.1 NMAC. For institutions authorized pursuant to or exempt from 5.99.1 NMAC the manager must file to the designated custodian of records the original or legible true copies of student records to include, at a minimum, the student's enrollment agreement, student transcript, record indicating program completion (either certificate, diploma, degree, or other like proof of completion) and student financial aid records. Any institution that closes and has not operated lawfully pursuant to 5.99.1 NMAC, must file to a designated custodian of records, the original or legible true copies of student records to include, at a minimum, the student's enrollment agreement, student transcript, record indicating program completion (either certificate, diploma, degree, or other like proof of completion), and student financial aid records and may be subject to penalty for operating without state authorization or exemption. A written detailed description for how records will be maintained following the closure shall be provided to the department in a plan for the perpetual care and maintenance of records. The written plan must include, but is not limited to the following:

- (1) certification that the post-secondary institution is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, records retention requirements of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory related to records retention, whichever is longest in time;
- (2) designation of a custodian of records;
- (3) physical address of hard copy files;
- (4) physical address of digital files; and
- (5) process for

obtaining transcripts or other records from the custodian of record.

C. The department must be notified of any update related to the custodian of records or upon any change to the custodian of records.

D. The department must be provided a copy of any contractual arrangements made for the perpetual care, maintenance and accessibility of all records. The department may request any additional records or information to help students gain access to transcripts in perpetuity.

E. In the event that the post-secondary institution does not comply with the records maintenance provisions cited above, the department may seek a court order to protect and if necessary take possession of the records. The institution's surety bond may be drawn on to cover costs associated with the department's efforts in securing records.

F. Students must be made aware of the process to request student records from the custodian of records. The process must be provided in writing to the student and made available on the institution's website. [5.99.2.11 NMAC - N, 12/11/2018]

5.99.2.12 FINAL EXECUTION REPORT: Before any post-secondary institution terminates its services or sells, transfers or disposes of substantially all of its assets, it shall submit to the department a summary of all actions taken pursuant to the requirements set forth in all applicable Sections of 5.99.2 NMAC. The institution must also submit certification that it has met all rules of the department pertaining to the termination of operations by post-secondary educational institutions. [5.99.2.12 NMAC - N, 12/11/2018]

History of 5.99.2 NMAC - [RESERVED]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.7.2 NMAC, Sections 6 and 7 effective 12/11/2018. Non-substantive grammar corrections to ‘and/or’ and ‘he/she’ were made throughout the part to conform to correct legislative styles.

5.7.2.6 OBJECTIVE [AND PURPOSE]: The objective and purpose of the New Mexico Health Professions Student Loan-for-Service Acts are to increase the number of health professionals in areas of the state which have experienced shortages of health practitioners, by making educational loans to students seeking certification/licensure in an eligible health profession. The acts require, as a condition of each loan, that the student declare their intent to practice as a health professional within one of the areas of the state designated by the health profession advisory committee, of the New Mexico higher education department, as a health professional shortage area.
[7/15/1998, 5.7.2.6 NMAC - Rn, 5 NMAC 7.2.6, 6/29/2001; A, 5/30/2008; A, 12/11/2018]

5.7.2.7 DEFINITIONS:

- A. “Department”** means the New Mexico higher education department.
- B. “Committee”** means the health professions advisory committee of the department.
- C. “Designated shortage area”** means an area in New Mexico determined by the committee as not being adequately served by eligible health professionals.
- D. “Eligible health profession”** means:
 - (1)** for the Allied Health Student Loan-for-Service Act, dental hygienist, physical therapy, occupational therapy, speech-language pathology, audiology, pharmacy, nutrition, respiratory care, laboratory technology, radiologic technology, mental health services, emergency medical services, or a

licensed or certified health profession as defined by the department;

(2) for the Medical Student Loan-for-Service Act: physicians and physician assistants, including osteopathic physicians and osteopathic physician assistants.

(3) for the Nursing Student Loan-for-Service Act: nurses; and,

(4) for the Osteopathic Medical Student Loan-for-Service Act: osteopathic [~~medical doctors~~] physicians and osteopathic physician assistants.

E. “Eligible institution” means:

(1) for the Allied Health Student Loan-for-Service Act: an accredited public postsecondary educational institution which provides an eligible allied health program; preference in awarding Allied Health Student Loan-for-Service Act funds shall be to students accepted for enrollment at a New Mexico public postsecondary educational institution;

(2) for the Medical Student Loan-for-Service Act: an accredited [~~public~~] school of medicine in the United States; preference in awarding Medical Student Loan-for-Service Act funds shall be to students accepted for enrollment at [~~the UNM school of medicine~~] an accredited New Mexico medical school;

(3) for the Nursing Student Loan-for-Service Act: an accredited New Mexico public post-secondary educational institution which provides a program of nursing; and,

(4) for the Osteopathic Medical Student Loan-for-Service Act: an accredited [~~public~~] program of osteopathic education in the United States.

F. “Extenuating circumstances” means circumstances not within the control of the recipient.

G. “Loan” means a grant of funds to defray the costs incidental to an eligible health profession education, under a contract between the department and a student,

requiring repayment with services or repayment of principal and interest and any fees.

H. “Student” means a student who is a resident of New Mexico and is enrolled at least half-time in, or has been accepted by an accredited program for one of the eligible health professions, and will be enrolled at least half-time.

I. “Service” means full-time, on-site practice in an eligible health profession; unless otherwise provided for by the committee;
[7/15/1998, 5.7.2.7 NMAC - Rn, 5 NMAC 7.2.7, 6/29/2001; A, 5/30/2008; A, 12/11/2018]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.7.3 NMAC, Sections 10 and 11, effective 12/11/2018. Non-substantive grammar corrections to ‘and/or’ and ‘he/she’ were made throughout the part to conform to correct legislative styles.

5.7.3.10 SELECTION OF LOAN REPAYMENT PARTICIPANTS:

A. Upon receipt of application forms and supporting documentation from eligible participants, a committee will be convened by the commission staff person charged with the administration of this program to make award recommendations. Applicants will be notified within 30 days of the results of this review.

B. Preference in awarding funds will be to individuals that have graduated from a New Mexico [~~public~~] post-secondary institution.

C. Recruitment awards will be made to eligible participants who agree to relocate to an approved practice site.

D. Retention awards will be made to eligible participants who agree to remain in an approved practice.

E. Award amounts will be dependent upon the location of the practice, the applicant's total health professional educational indebtedness, and certain characteristics of the practice; the committee may modify the amount of the awards based upon available funding or other special circumstances.

(1) No award amount may exceed the total medical educational indebtedness of any participant.

(2) Highest priority will be given to those participants in practices which are hard to fill (vacancies in excess of 12 months), practices which require after-hours call at least every other night, and those which have heavy obstetrical responsibilities.

F. Payments will be made on a quarterly basis upon receipt of a certified quarter (three months) of service which verifies that the participant is satisfactorily providing primary health care services in an approved area.

G. Payments will not be made until participants are actually providing services in their approved practice sites, and no payments will be made prior to the date of application and execution of a participation agreement.

H. Participants with consolidated loans will be asked to detail the consolidation in writing at the time of application, segregating those loan amounts which qualify under this program for repayment.

I. The program will not pay fines, penalties or other financial damages assessed as a result of delinquent payments on eligible loans, other loans or as a result of other legal action taken against participants.

[7/15/1998; 5.7.3.10 NMAC - Rn, 5 NMAC 7.3.10, 7/31/2005; A, 12/11/2018]

5.7.3.11 PARTICIPATION

AGREEMENT: Upon approval, a participation agreement shall be drawn between each eligible participant receiving loan repayment and the department on behalf of the

state of New Mexico. The agreement shall state both the participant's obligation under the program as well as the department's responsibility. No payment will be made until a duly signed document is on file at the department offices. The participation agreement shall include, but not be limited to, the following stipulations:

A. provide for the repayment of a specified sum as determined in Section 10; the commission will pay the amount due for each quarter of completed service by the program participant, directly to the participant or their lender(s) for payment of their health professional education loans; any amounts allocated to repay loans will be divided equally by the number of quarters in the service period covered by the award; quarters comprise an average of thirteen weeks including paid leave or any combination of hours and weeks thereof for the entire service period;

B. state that the department will complete annual reports to all tax authorities delineating award payments made to the program participant;

C. state that payment of the award is conditioned upon the program participant submitting timely reports and requests for reimbursement to the department or its designee, as required by the commission;

D. state the participant's obligations including a minimum two year period of service in a practice providing continuous clinical services in the field of their profession in an area designated by the committee as eligible;

E. state that the program participant is responsible for payment(s) of their eligible health professional education loans until such time that actual loan repayment is performed by the department.

Repayment by the department will begin following the first certified quarter of completed clinical service in an area designated by the committee;

F. state that the recipient will charge for professional

services at the usual and customary rate prevailing in the area where the services are provided, except that if a person is unable to pay such charge, such person shall be charged at a reduced rate or not charged any fee;

G. in providing health services, the participant shall not discriminate against any person on the basis of such person's ability to pay for such services or because payment for the health services provided to such person will be made under the insurance program established under Part A or B of Title XVIII of the Social Security Act or under a state plan for medical assistance approved under Title XIX of such act;

H. the participant will accept assignment under Sections 1842(b)(3)(B)(ii) of the Social Security Act for all services for which payment may be under Part B of Title XVIII of such act and enter into an appropriate agreement with the state agency which administers the state plan for medical assistance under Title XIX of such act to provide services to individuals entitled to medical assistance under the plan;

I. the award will be terminated if any of the following should occur:

(1) the participant fails to perform continuous clinical service at the approved facility, unless a change of facility or an interruption in service is approved in advance and in writing by the department; no interruption in service exceeding six months will be approved;

(2) the employment of the participant at an approved location is terminated;

(3) the participant loses their professional license, board certification [~~or~~ ~~medicaid and/or medicare billing~~ ~~privileges~~] or billing privileges for medicaid or medicare; or

(4) the department deems termination is warranted for any other reasonable cause.

J. in the event this agreement is terminated by the commission, the commission shall have no obligation to make any

further payments to or on behalf of the participant;

K. penalties as outlined in Section 12; and

L. shall state that the participant further promises:

(1) to use the allocated award solely for the purposes of repaying health professional education loans, including principal, interest and related expenses or, where approved by the commission;

(2) to be responsible for all tax liabilities incurred in the acceptance of the award; and

(3) to complete all necessary reports and requests for loan repayment required by commission and submit them to the commission or its designee on a timely basis.

[7/15/1998; 5.7.3.11 NMAC - Rn & A, 5 NMAC 7.3.11, 7/31/2005; A, 12/11/2018]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.100.5 NMAC Sections 3, 6, 7 & 8, effective 12/11/2018.

5.100.5.3 STATUTORY AUTHORITY: Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23-1 et seq. NMSA 1978. The Post-Secondary Educational Institution Act, Section 21-23-1 et seq. NMSA 1978 authorizes the New Mexico higher education department (“department”) to establish standards to exempt post-secondary educational institutions from the act while operating in New Mexico. [5.100.5.3 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.5.6 [OBJECTIVES- AND GENERAL PRINCIPLES] OBJECTIVE:

A. Each private post-secondary institution with a physical presence in New Mexico shall be classified by the department as either

subject to or exempt from provisions of the Post-Secondary Educational Institution Act (“the act”).

(1) Engaging in one or more of the following activities constitutes a physical presence in New Mexico:

(a) ongoing occupation of a physical location in the state;

(b) maintenance of an administrative office to support the provision of higher education instruction;

(c) establishing a physical location for instruction which is synchronous (instruction in which a group of students engage in learning at the same time) or asynchronous (instruction that does not occur in the same place or at the same time);

(d) requiring students to physically meet in a location for instructional purposes more than twice per full-term (quarter or semester) course for a total of more than six hours;

(e) establishing an administrative office;

(f) providing student support services to enrolled students, from a physical site operated by or on behalf of the institution in the state;

(g) obtaining office space for instructional or non-instructional staff;

(h) maintaining a mailing address or phone exchange in New Mexico;

(i) holding proctored exams on behalf of the institution in New Mexico more than twice per full-term (quarter or semester); or

(j) facilitating student participation in off-campus field trips in New Mexico for academic purposes in excess of 20 classroom hours in one six-month period or in which the institution establishes a residential or instructional facility in New Mexico.

(2) The following is a non-exhaustive list of activities, which if conducted by the institution, will not trigger a physical

presence in New Mexico:

(a) advertising to students whether through print, billboard, direct mail, internet, radio, television or other medium;

(b) maintaining a server, router or similar electronic service device housed in a facility that otherwise would not constitute physical presence (the presence of a server or similar pass-through switching device does not by itself constitute the offering of a course or program in the state);

(c) having faculty, adjunct faculty, mentors, tutors, recruiters or other academic personnel residing in New Mexico and working from their homes or another private, non-institutional site, provided that such staff is not engaged in activities that would otherwise constitute physical presence;

(d) using recruiters in New Mexico if the recruiter has registered as an agent pursuant to Section 21-24-1 through Section 21-21-9 NMSA 1978;

(e) independent off-campus study or research by students including independent fieldwork for a thesis or dissertation, by individual students not engaged in a supervised field experience under 5.99.1 NMAC and with no supervision or control by the student’s institution; or

(f) facilitating student participation in off-campus field trips in New Mexico for academic purposes, so long as the field trip does not exceed more than 20 classroom hours in one six-month period, or the establishment of a residential or instructional facility by the institution in New Mexico.

B. A post-secondary educational institution is subject to the act unless expressly exempted by the department. Post-secondary educational institutions or programs shall apply to the department to receive formal exemption status. [Such] Exempt institutions may use the term “exempt” but may not refer to their status with the department

using terms such as “authorized,” “accredited,” “licensed,” “approved,” or “endorsed.”

C. Post-secondary educational institutions that do not have state authorization or have not been granted express exemption by the department, and meet the definition of physical presence in New Mexico, shall be notified by certified mail that they shall cease immediately to offer instruction until they obtain a state authorization or exemption from the department; the department shall initiate appropriate legal action if post-secondary educational institutions fail to comply; whoever violates any provision of Sections 21-23-1 et seq. NMSA 1978 of the Post-Secondary Educational Institution Act may be assessed a civil penalty not to exceed five hundred dollars (\$500) per day per violation.

D. An exemption status shall in no way constitute state authorization. Therefore, references to the department shall not be used in any advertisements, brochures, etc. without written consent of the department.

E. Non-accredited private post-secondary educational institutions that offer a degree program shall not be granted exemption. [5.100.5.6 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.5.7 DEFINITIONS:

A. “Accreditation” means a verified accreditation status with an accrediting agency recognized by the United States department of education that accredits institutions, as a means of assuring quality instruction.

B. “Avocation or recreation” means an activity taken up in addition to one’s regular work or profession, usually for enjoyment; a hobby.

C. “Career school” means a private post-secondary educational institution offering a formal educational curriculum in New Mexico for a fee to members of the general public beyond compulsory school age, terminating

in a certificate, diploma, associate degree, or comparable confirmation of completion of the curriculum.

D. “Charter” means a formal document by which a sovereign authority or a government grants rights, powers, and privileges to a person, business, or the people.

E. “College” or “University” means a private post-secondary educational institution offering a formal educational curriculum in New Mexico for a fee to members of the general public beyond compulsory school age, terminating in a baccalaureate degree, master’s degree, or doctoral degree or comparable confirmation of completion of the curriculum.

F. “Continuing education” means only brief courses of instruction designed to teach specific skills that may be applicable in a work setting but are not sufficient in themselves to be considered a program of training for employment. Typically, a student only enrolls for one course rather than a sequence of courses. The continuing education units must meet the criteria set out by the professional organization or authority requiring the continuing education.

G. “Department” means the New Mexico higher education department or its designated employee.

H. “Degree” means any title, designation, mark, abbreviation, appellation, or series of letters or words, including “associate”, “bachelor’s”, “master’s”, “doctor’s” and their equivalents, which are generally taken to signify satisfactory completion of the requirements of a program of study designed to be comparable to those provided by institutions accredited by agencies recognized by the United States department of education.

I. “Degree-granting” means a post-secondary educational institution that offers instruction resulting in a credential as defined by “degree.”

J. “Exemption” or “exempt” means a written acknowledgment by the department

that an institution, organization, or other entity, has met requirements and filed pertinent information as required by the department to provide educational services in New Mexico, and is not subject to the post-secondary educational institution act.

K. “Instruction provided by employer” means only a brief course of instruction designed to teach specific skills that may be applicable in a work setting or as professional development but are not sufficient in themselves to result in a credential.

L. “License”, “Licensed” or “Licensure” means a written acknowledgment by the department that a career school or nonregionally accredited college or university has met the requirements of the department [~~for offering~~] to offer a formal educational curriculum within New Mexico;

M. “Physical presence” means the ongoing occupation of a physical location in the state [~~for~~], [~~or~~] the ongoing maintenance of an administrative office to support, the provision of higher education instruction, or engaging in one or more of the activities detailed in Paragraph 1 of Subsection A of 5.100.5.6 NMAC.

N. “Post-secondary educational institution” or “Institution” or “post-secondary institution” means an academic, vocational, technical, business, professional, or other school, college, or university or other organization or person offering or purporting to offer courses, instruction, training, or education.

O. “Registration” or “Registered” means a written acknowledgment by the department that a regionally accredited college or university has filed pertinent curriculum and enrollment information, as required by the department, and is authorized to operate [~~a private post-secondary educational institution~~] and offer a formal educational curriculum within New Mexico.

P. “State Authorization” means a private

post-secondary educational institution has been deemed by the department to satisfactorily meet [satisfactory] criteria, as determined by the department, for registration or licensure under the [post-secondary educational institution act] Post-Secondary Educational Institution Act. All degree-granting institutions seeking state authorization shall be accredited or be seeking appropriate external accreditation. State authorization [is not an endorsement of the institution by the department] does not serve as an endorsement of a particular institution, but confirms that an institution has met the minimum criteria set by the department to operate in New Mexico. [5.100.5.7 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.5.8 GENERAL STANDARD FOR OBTAINING EXEMPTION STATUS BY THE DEPARTMENT:

A. The department shall provide an application form and assess an administrative fee to provide a formal exemption status. The department has the sole discretion to determine whether an institution meets the criteria for exemption status pursuant to Section 21-23-4 NMSA 1978 and 5.100.5 NMAC. If the department determines that an institution does not meet the criteria for exemption, the department may require the institution to apply for state authorization.

B. The exemption status will be valid for a term of five years from the date that the department makes the final determination.

C. As a condition of exemption, all post-secondary educational institutions shall agree to comply with Section 21-23-15 NMSA 1978 and 5.100.8 NMAC in the event of institutional closure.

D. An exempt institution shall provide the department with immediate written notification of any changes or events that may trigger the whole or part of the claim for exemption application to be untrue. In no case shall a change

be made without an acknowledgement from the department. An institution shall provide the department with notification in no less than 90 days prior to the proposed changes going in effect.

[5.100.5.8 NMAC - N, 12/26/2017; A, 12/11/2018]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.100.6 NMAC Sections 3, 6, 7, 16 and 19, effective 12/11/2018.

5.100.6.3 STATUTORY AUTHORITY:

Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23-1 et seq. NMSA 1978. The Post-Secondary Educational Institution Act, Sections 21-23-1 et seq. NMSA 1978 authorizes the New Mexico higher education department (“department”) to establish standards and oversight for registered private post-secondary institutions under the act while operating in New Mexico. [5.100.6.3 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.6.6 [OBJECTIVES AND GENERAL PRINCIPLES] OBJECTIVE:

A. Each private post-secondary institution operating with a physical presence in New Mexico shall be subject to provisions of the Post-Secondary Educational Institution Act (“the act”) unless expressly exempt by the department.

(1) Engaging
in one or more of the following activities constitutes a physical presence in New Mexico:

(a)
ongoing occupation of a physical location in the state;

(b)
maintenance of an administrative office to support the provision of higher education instruction;

(c)
establishing a physical location for instruction which is synchronous (instruction in which a group of

students engage in learning at the same time) or asynchronous (instruction that does not occur in the same place or at the same time);

(d)
requiring students to physically meet in a location for instructional purposes more than twice per full-term (quarter or semester) course for a total of more than six hours;

(e)
establishing an administrative office;

(f)
providing student support services to enrolled students, from a physical site operated by or on behalf of the institution in the state;

(g)
obtaining office space for instructional or non-instructional staff;

(h)
maintaining a mailing address or phone exchange in New Mexico;

(i)
holding proctored exams on behalf of the institution in New Mexico more than twice per full-term (quarter or semester); or

(j)
facilitating student participation in off-campus field trips in New Mexico for academic purposes in excess of 20 classroom hours in one six-month period or in which the institution establishes a residential or instructional facility in New Mexico.

(2) The
following is a non-exhaustive list of activities, which if conducted by the institution, will not trigger a physical presence in New Mexico:

(a)
advertising to students whether through print, billboard, direct mail, internet, radio, television or other medium;

(b)
maintaining a server, router or similar electronic service device housed in a facility that otherwise would not constitute physical presence (the presence of a server or similar pass-through switching device does not by itself constitute the offering of a course or program in the state);

(c)
having faculty, adjunct faculty, mentors, tutors, recruiters or other

academic personnel residing in New Mexico and working from their homes or another private, non-institutional site, provided that such staff is not engaged in activities that would otherwise constitute physical presence;

(d)

using recruiters in New Mexico if the recruiter has registered as an agent pursuant to Section 21-24-1 through Section 21-21-9 NMSA 1978;

(e)

independent off-campus study or research by students including independent fieldwork for a thesis or dissertation, by individual students not engaged in a supervised field experience under 5.99.1 NMAC and with no supervision or control by the student's institution; or

(f)

facilitating student participation in off-campus field trips in New Mexico for academic purposes, so long as the field trip does not exceed more than 20 classroom hours in one six-month period, or the establishment of a residential or instructional facility by the institution in New Mexico.

B. Every private college or university operating with a physical presence in New Mexico that is regionally accredited or seeking regional accreditation by an accrediting agency shall register with the department.

C. A private college or university that is regionally accredited or seeking regional accreditation with a physical presence in the state, deemed by the department to satisfactorily meet [satisfactory] criteria, as determined by the department, will be registered with the state. A college or university that has successfully registered with the [state] department shall be considered to hold state authorization.

D. An institution shall provide the department with immediate written notification of any changes or events that may trigger the whole or part of the application or the certifications to be untrue. In no case shall a change be made without an acknowledgement from the department. An institution

shall provide the department with notification in no less than 90 days prior to the proposed changes going in effect.

E. The department is statutorily charged with evaluating each individual institution in order to determine the institution's compliance with the standards outlined in this regulation. This evaluation may take the form of a physical visit to the institution or administrative office or may be a desk audit if a physical visit is not feasible. It is the responsibility of the institution to maintain full compliance with the Post-Secondary Educational Institution Act, Sections 21-23-1 through 21-23-15 NMSA 1978 and all applicable rules at all times. The following three types of site visits may be conducted by the department as means to determine the institution's compliance with the standards outlined in the regulation:

(1) Regular

site visit: The department shall determine an appropriate schedule on which to re-evaluate each individual registered institution and the specific programs offered by that institution in order to determine continued compliance with this rule. Department staff will give prior notification of at least two weeks of the date and time of the visit. A short exit interview will be held at the conclusion of the visit. This exit interview may include a discussion of findings and a final written site visit report will be sent to the institution for review and comment. The outcome of the regular site visit may be continued registration.

(2) Required

special site visit: The department may request a required special site visit as a requirement for initial registration, or for registration renewal. At the conclusion of a required special site visit, the exit interview may include a discussion of any findings.

(3) Triggered

site visit: any occurrence listed below trigger a site visit to the institution in order to evaluate compliance with standard within this regulation. The exit interview may include a discussion of any findings. The

outcome of a triggered site visit may include a recommendation for a penalty, as outlined in 5.100.6.21 NMAC:

(a)

an institution involuntarily loses its accreditation status;

(b)

the department is notified of an institution's non-compliance with federal financial aid program regulations or the outcome of an audit from another state agency;

(c)

the institution fails to renew its surety bond, or appropriate alternative in a timely manner;

(d)

an institution is experiencing financial difficulties sufficient to threaten program quality;

(e)

an institution has significant staff turnover;

(f)

an institution fails to immediately notify the department of a change in ownership/management; or

(g)

the department becomes aware of any other factor that could alter basis for registration.

F. [~~Post-secondary educational institutions~~] Regionally accredited private colleges or universities that do not have state authorization or have not been granted express exemption by the department, and meet the definition of physical presence in New Mexico, shall be notified by certified mail that they shall cease immediately to offer instruction until they obtain state authorization or exemption from the department; the department shall initiate appropriate legal action if [~~post-secondary educational institutions fail~~] an institution fails to comply; whoever violates any provision of Sections 21-23-1 et seq. NMSA 1978 of the Post-Secondary Educational Institution Act may be assessed a civil penalty not to exceed five hundred dollars (\$500) per day per violation.

G. As a condition

of registration, all [~~private post-secondary~~] institutions shall agree to

comply with Section 21-23-15 NMSA 1978 and 5.100.8 NMAC in the event of institutional closure.

H. Registered institutions concurrently offering distance education pursuant to 5.99.1 NMAC as a SARA institution, through distance education authorization, or through any other method detailed in Section 5.99.1.10 NMAC:

(1) shall be subject to complaint procedures detailed in 5.99.1 NMAC, as related only to students enrolled exclusively as distance education students; and **(2)** shall be subject to 5.99.2 NMAC, if the institution seeks to close, cease program offerings that contain enrolled students, or substantially relocate as defined in 5.99.2 NMAC, as related only to students enrolled exclusively as distance education students. [5.100.6.6 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.6.7 DEFINITIONS:

A. "Accreditation" means a verified accreditation status with an accrediting agency recognized by the United States department of education that accredits degree granting institutions, as a means of assuring quality instruction.

B. "College" or "university" means a private post-secondary educational institution offering a formal educational curriculum in New Mexico for a fee to members of the general public beyond compulsory school age, terminating in a baccalaureate degree, master's degree, or doctoral degree or comparable confirmation of completion of the curriculum.

C. "Department" means the New Mexico higher education department or its designated employee.

D. ["Exception";] "Exemption", or "Exempt" means a written acknowledgment by the department that an institution, organization, or other entity, has met requirements and filed pertinent information as required by the

department to provide educational services in New Mexico, and is not subject to the ~~[post-secondary educational institution act]~~ Post-Secondary Educational Institution Act.

E. "Institution" means a regionally accredited college or university.

[E] F. "License", "Licensed", or "Licensure" means a written acknowledgment by the department that a career school or nonregionally accredited college or university has met the requirements of the department ~~[for offering]~~ to offer a formal educational curriculum within New Mexico.

[F] G. "Manager" or "Managers" means the chief executive officer, chief operations officer, chief financial officer, senior business or finance officer, senior financial aid administrator, and senior or chief academic officer of a New Mexico private post-secondary educational institution.

[G] H. "Management plan of action" means a plan that has been developed, reviewed and implemented by managers of the institution which details specific steps the institution will commit to taking in order to remediate an identified weakness, shortcoming or insufficiency.

[H] I. "Physical presence" means the ongoing occupation of a physical location in the state ~~[for]~~, ~~[or]~~ the ongoing maintenance of an administrative office to support the provision of higher education instruction, or engaging in one or more of the activities detailed in Paragraph 1 of Subsection A of 5.100.6.6 NMAC.

[I] J. "Post-secondary educational institution" or "post-secondary institution" includes an academic, vocational, technical, business, professional, or other school, college, or university or other organization or person offering or purporting to offer courses, instruction, training, or education.

[J] K. "Regional accreditation" means a verified accreditation status with an

accrediting agency recognized by the United States department of education that accredits degree granting institutions operating in a designated geographic region.

[K] L. "Registration" or "Registered" means a written acknowledgment by the department that a regionally accredited college or university has filed pertinent curriculum and enrollment information, as required by the department, and is authorized to operate ~~[a private post-secondary educational institution]~~ and offer a formal educational curriculum within New Mexico.

[E] M. "State Authorization" means a private post-secondary educational institution has been deemed by the department to satisfactorily meet ~~[satisfactory]~~ criteria, as determined by the department, for registration or licensure under the ~~[post-secondary educational institution act]~~ Post-Secondary Educational Institution Act. All degree-granting institutions seeking state authorization through application for registration or licensure shall be accredited or be seeking appropriate external accreditation. State authorization ~~[is not an endorsement of the institution by the department]~~ does not serve as an endorsement of a particular institution, but confirms that an institution has met the minimum criteria set by the department to operate in New Mexico. [5.100.6.7 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.6.16 RECORD MAINTENANCE AND RETENTION POLICY:

A. Each regionally accredited college or university registered by the department shall provide a records maintenance and retention plan. The plan shall consist of a records maintenance and disposal schedule that ~~[follows the minimum retention schedule set out and published by the department]~~ is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the

records retention schedule set by the department, regulations of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory, whichever is longest in time. If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail. The plan must include a description of how records will be maintained in the event of closure, which includes, but is not limited to, designation of a custodian of records, digitization, and a process for obtaining transcripts from the custodian of record.

B. Each institution must submit a certification of compliance with all applicable laws, rules and regulations that govern records management for closed institution.
[5.100.6.16 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.6.19 APPLICABLE FEES:

A. The department shall assess application and administrative fees for registration, pursuant to Section 21-23-6.3 NMSA 1978, and publish a fee schedule.

B. The department shall assess an administrative fee for providing the services associated with application review and determination of eligibility for registration.

C. The department shall assess an application fee upon determination that the institution has satisfactorily met all [satisfactory] conditions for registration.

D. The department shall assess an administrative fee for annual reporting.
[5.100.6.19 NMAC - N, 12/26/2017; A, 12/11/2018]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.100.7 NMAC, Sections 3, 6, 7, 8, 10, 13 and 15 effective 12/11/2018.

5.100.7.3 STATUTORY AUTHORITY:

Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23-1 et seq. NMSA 1978. The Post-Secondary Educational Institution Act, Sections 21-23-1 et seq. NMSA 1978 authorizes the New Mexico higher education department (“Department”) to establish standards and oversight for licensed private post-secondary institutions under the act while operating in New Mexico.
[5.100.7.3 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.6 [OBJECTIVES AND GENERAL PRINCIPLES] OBJECTIVE:

A. Each private post-secondary institution operating with a physical presence in New Mexico shall be subject to provisions of the (“the act”) unless expressly exempted by the department.

(1) Engaging in one or more of the following activities constitutes a physical presence in New Mexico:

(a) ongoing occupation of a physical location in the state;

(b) maintenance of an administrative office to support the provision of higher education instruction;

(c) establishing a physical location for instruction which is synchronous (instruction in which a group of students engage in learning at the same time) or asynchronous (instruction that does not occur in the same place or at the same time);

(d) requiring students to physically meet in a location for instructional purposes more than twice per full-term (quarter or semester) course for a total of more than six hours;

(e) establishing an administrative office;

(f) providing student support services to enrolled students, from a physical site operated by or on behalf of the institution in the state;

(g) obtaining office space for instructional or non-instructional staff;

(h) maintaining a mailing address or phone exchange in New Mexico;

(i) holding proctored exams on behalf of the institution in New Mexico more than twice per full-term (quarter or semester); or

(j) facilitating student participation in off-campus field trips in New Mexico for academic purposes in excess of 20 classroom hours in one six-month period or in which the institution establishes a residential or instructional facility in New Mexico.

(2) The following is a non-exhaustive list of activities, which if conducted by the institution, will not trigger a physical presence in New Mexico:

(a) advertising to students whether through print, billboard, direct mail, internet, radio, television or other medium;

(b) maintaining a server, router or similar electronic service device housed in a facility that otherwise would not constitute physical presence (the presence of a server or similar pass-through switching device does not by itself constitute the offering of a course or program in that state);

(c) having faculty, adjunct faculty, mentors, tutors, recruiters or other academic personnel residing in New Mexico and working from their homes or another private, non-institutional site, provided that such staff is not engaged in activities that would otherwise constitute physical presence;

(d)
using recruiters in New Mexico if the recruiter has registered as an agent pursuant to Section 21-24-1 through Section 21-21-9 NMSA 1978;

(e)
independent off-campus study or research by students including independent fieldwork for a thesis or dissertation, by individual students not engaged in a supervised field experience under 5.99.1 NMAC and with no supervision or control by the student's institution; or

(f)
facilitating student participation in off-campus field trips in New Mexico for academic purposes, so long as the field trip does not exceed more than 20 classroom hours in one six-month period, or the establishment of a residential or instructional facility by the institution in New Mexico.

B. Every private career school or nonregionally accredited college or university operating with a physical presence in New Mexico shall annually license with the department.

C. A private career school or nonregionally accredited college or university with a physical presence in the state deemed by the department to satisfactorily meet [satisfactory] criteria, as determined by the department, will be licensed with the state. A career school or nonregionally accredited college or university that has successfully licensed with the [state] department shall be considered to hold state authorization.

D. An institution shall provide the department with immediate written notification of any changes or events that may trigger the whole or part of the application or the certifications to be untrue. In no case shall a change be made without an acknowledgement from the department. An institution shall provide the department with notification in no less than 90 days prior to the proposed changes going in effect.

E. The department is statutorily charged with evaluating each individual institution in order to

determine the institution's compliance with the standards outlined in this regulation. This evaluation may take the form of a physical visit to the institution or administrative office or may be a desk audit if a physical visit is not feasible. It is the responsibility of the institution to maintain full compliance with the Post-Secondary Educational Institution Act, Sections 21-23-1 through 21-23-15 NMSA 1978 and all applicable rules at all times. The following four types of site visits may be conducted by the department as means to determine the institution's compliance with the standards outlined in the regulation:

(1) Initial site visit: In making a determination regarding issuance of a new license, a site review may be conducted during the initial start-up phase to determine the adequacy of items included on the application for licensure. This visit is for information gathering purposes only.

(2) Regular site visit: The department shall determine an appropriate schedule (typically on a bi-annual basis) on which to re-evaluate each individual licensed institution and the specific programs offered by that institution in order to determine continued compliance with this rule. Department staff will give prior notification of at least two weeks of the date and time of the visit. A short exit interview will be held at the conclusion of the visit. This exit interview may include a discussion of findings and a final written site visit report will be sent to the school for review and comment. The outcome of the regular site visit may be continued licensure.

(3) Required special site visit: The department may request a required special site visit as a requirement for initial licensure, probation, or for licensure renewal. At the conclusion of a required special site visit, the exit interview may include a discussion of any findings.

(4) Triggered site visit: any occurrence listed below trigger a site visit to the institution

in order to evaluate compliance with standard within this regulation. The exit interview may include a discussion of any findings. The outcome of a triggered site visit may be a recommendation for a provisional license or revocation of a license:

(a)
an institution involuntarily loses its accreditation status;

(b)
the department is notified of an institution's non-compliance with federal financial aid program regulations or the outcome of an audit from another state agency;

(c)
the institution fails to renew its surety bond, or appropriate alternative in a timely manner;

(d)
an institution is experiencing financial difficulties sufficient to threaten program quality;

(e)
an institution has significant staff turnover;

(f)
an institution fails to immediately notify the department of a change in ownership/management; or

(g)
the department becomes aware of any other factor that could alter basis for licensure.

F. A career school or nonregionally accredited college or university that does not have state authorization or has not been granted express exemption by the department, and meets the definition of physical presence in New Mexico, shall be notified by certified mail that it shall cease immediately offering instruction or enrolling new students until it obtains state authorization or exemption from the department; the department shall initiate appropriate legal action if an institution fails to comply; whoever violates any provision of Section 21-23-1 et seq. NMSA 1978 of the Post-Secondary Educational Institution Act may be assessed a civil penalty not to exceed five hundred dollars (\$500) per day per violation.

G. No person other than an employee of an institution licensed pursuant to this rule shall, for a salary or fee, solicit attendance at that institution.

H. Licensed institutions concurrently offering distance education pursuant to 5.99.1 NMAC as a SARA institution, through distance education authorization, or through any other method detailed in Section 5.99.1.10 NMAC:

(1) shall be subject to complaint procedures detailed in 5.99.1 NMAC, as related only to students enrolled exclusively as distance education students; and

(2) shall be subject to 5.99.2 NMAC, if the institution seeks to close, cease program offerings that contain enrolled students, or substantially relocate as defined in 5.99.2 NMAC, as related only to students enrolled exclusively as distance education students.

[5.100.7.6 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.7 DEFINITIONS:

A. “Accreditation” means a verified accreditation status with an accrediting agency recognized by the United States department of education that accredits institutions, as a means of assuring quality instruction.

B. “Career school” means a private post-secondary educational institution offering a formal educational curriculum in New Mexico for a fee to members of the general public beyond compulsory school age, terminating in a certificate, diploma, associate degree, or comparable confirmation of completion of the curriculum.

C. “College” or “university” means a private post-secondary educational institution offering a formal educational curriculum in New Mexico for a fee to members of the general public beyond compulsory school age, terminating in a baccalaureate degree, master’s degree, or doctoral degree or comparable confirmation of

completion of the curriculum.

D. “Continuing education” means only brief courses of instruction designed to teach specific skills that may be applicable in a work setting but are not sufficient in themselves to be considered a program of training for employment. Typically, a student only enrolls for one course rather than a sequence of courses. The continuing education units must meet the criteria set out by the professional organization or authority requiring the continuing education.

E. “Cooling off period” means at least three work days from the date of agreement or payment or from the date that the student first visits the institution, whichever is later.

F. “Credit hour” means an institution’s count of the amount of work represented in the intended learning outcomes and verified by evidence of student achievement, proof of commonly-accepted industry practices or consistent with the federal definition of the credit hour.

G. “Degree” means any title, designation, mark, abbreviation, appellation, or series of letters or words, including “associate”, “bachelor’s”, “master’s”, “doctor’s” and their equivalents, which are generally taken to signify satisfactory completion of the requirements of a program of study designed to be comparable to those provided by institutions accredited by agencies recognized by the United States department of education.

H. “Department” means the New Mexico higher education department or its designated employee.

I. “Enrollment Agreement” means any agreement, instrument or note executed before a student begins course work which creates a binding obligation between the student and the institution.

J. [“Exception”, “Exemption”, or “Exempt” means a written acknowledgment by the department that an institution, organization, or other entity, has

met requirements and filed pertinent information as required by the department to provide educational services in New Mexico, and is not subject to the ~~[post-secondary educational institution act]~~ Post-Secondary Educational Institution Act.

K. “Institution” means a career school or nonregionally accredited college or university.

L. “License”, “Licensed”, or “Licensure” means a written acknowledgment by the department that a career school or nonregionally accredited college or university has met the requirements of the department ~~[for offering]~~ to offer a formal educational curriculum within New Mexico.

M. “Manager” or “Managers” means the chief executive officer, chief operations officer, chief financial officer, senior business or finance officer, senior financial aid administrator, and senior or chief academic officer of a New Mexico private post-secondary educational institution.

N. “Management plan of action” means a plan that has been developed, reviewed and implemented by managers of the institution which details specific steps the institution will commit to taking in order to remediate an identified weakness, shortcoming or insufficiency.

O. “Owner” or “Ownership” means all individuals or entities that have any ownership interest in the institution.

P. “Physical presence” means the ongoing occupation of a physical location in the state ~~[for], [or]~~ the ongoing maintenance of an administrative office to support the provision of higher education instruction, or engaging in one or more of the activities detailed in Paragraph 1 of Subsection A of 5.100.7.6 NMAC.

Q. “Post-secondary educational institution” or “post-secondary institution” means an academic, vocational, technical, business, professional, or other

school, college, or university or other organization or person offering or purporting to offer courses, instruction, training, or education.

R. “Regional accreditation” means a verified accreditation status with an accrediting agency recognized by the United States department of education that accredits degree granting institutions operating in a designated geographic region.

S. “Registration” or “Registered” means a written acknowledgment by the department that a regionally accredited college or university has filed pertinent curriculum and enrollment information, as required by the department, and is authorized to operate ~~[a private post-secondary educational institution]~~ and offer a formal educational curriculum within New Mexico.

T. “Review Committee” means a committee established by the department pursuant to 5.100.7.11 NMAC.

U. “State Authorization” means a private post-secondary educational institution has been deemed by the department to satisfactorily meet [satisfactory] criteria, as determined by the department, for registration or licensure under the [post-secondary educational institution act] Post-Secondary Educational Institution Act. All degree-granting institutions seeking state authorization shall be accredited or be seeking appropriate external accreditation. State authorization ~~[is not an endorsement of the institution by the department]~~ does not serve as an endorsement of a particular institution, but confirms that an institution has met the minimum criteria set by the department to operate in New Mexico.

V. “Work day” means a week day, Monday through Friday that is not recognized as a federal holiday. [5.100.7.7 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.8 GENERAL STANDARDS FOR LICENSURE:

A. An institution seeking state authorization through licensure must submit a complete application and all supporting documentation as described in 5.100.7.10 NMAC. The department shall create application forms for institutions to apply for licensure.

B. A branch campus that operates under the accreditation of a primary New Mexico campus is not considered a separate institution for purposes of state authorization. To be considered a branch campus the institution shall meet the following criteria:

- (1) it has the same ownership, financial management or control as that of the primary New Mexico campus;
- (2) it operates under the accreditation of the primary New Mexico campus;
- (3) it is not considered a separate institution for the purpose of accreditation;
- (4) the primary New Mexico campus has previously operated as a state authorized and accredited institution in New Mexico; and
- (5) it is a secondary physical presence by the same institution in New Mexico.

C. An institution licensed by the department shall adopt the student complaint procedure, as defined in Subsection Q of 5.100.7.10 NMAC, for the resolution of student complaints.

D. As a condition of licensure, all institutions shall agree to comply with surety bond requirements as defined in Subsection O of 5.100.7.10 NMAC.

E. As a condition of licensure, all institutions shall agree to comply with Section 21-23-15 NMSA 1978 and 5.100.8 NMAC and applicable rules and regulations in the event of institutional closure.

F. An institution that has been granted state authorization through licensure must submit an annual report, as requested by the department. The department may require separate annual reporting submissions for each

branch or location of an institution authorized under a single license.

The department shall promulgate a standard reporting form for licensure to include: enrollment, program completion by students, and employment and other educational placements of students. [5.100.7.8 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.10 APPLICATION REQUIREMENTS: The institution must provide complete and accurate information to the department. The department may request additional supporting documentation. Upon request of the department, the applicant must supply any missing or requested information to the department. An applicant must respond to the department within deadlines set by the department. The department application will require institutions to supply information described in Subsections A through W of 5.100.7.10 NMAC:

A. Evaluation plan: The plan shall include measures of institutional success. The institution shall provide a plan for evaluation of the following:

- (1) the satisfaction of its graduates and shall make available to the department all reports of these satisfaction assessments prepared during the past five years;
- (2) a written plan for keeping courses current;
- (3) a written plan for faculty improvement in terms of content knowledge and relevant instructional techniques and the use of new and applicable technologies to support instruction; and
- (4) if the institution is subject to the Student-Right-to-Know Act, it shall provide the department with copies of all reports submitted to the federal agency.

B. Tuition policy: Tuition and fee charges shall be the same for all students admitted to a given program for a given term of instruction. An institution may not discount its tuition and fees charged

to individual students as an incentive for quick enrollment or early payment. An institution may negotiate special rates with business, industrial, governmental, or similar groups for group training programs and may establish special rates for students who transfer between programs. An institution may charge a reasonable carrying fee associated with deferred payments or payment plans. All tuition and fees must be comprehensively listed in the institution’s catalog as required in Subsection G of 5.100.7.10 NMAC.

C. Tuition refund policy: An institution licensed by the department shall adhere to the following tuition refund policy:

(1) An institution accredited by agencies recognized by the United States department of education shall adhere to the tuition refund schedule established by the institution’s accrediting body or the United States department of education. If an institution is required to adopt such refund schedule, it is required to provide proof of adoption and a copy of the refund schedule policy from either the accreditor or the United States department of education.

(2) If an institution is not required to adopt a refund schedule policy by an accreditor or the United States department of education, the following refund schedule policy set out by the department shall be adopted:

Date of student withdrawal as a % of the enrollment period for which the student was obligated	Portion of tuition and fees obligated and paid that are eligible to be retained by the institution
On 1st class day	0%
After 1st day; within 10%	10%
After 10%; within 25%	50%
After 25%; within 50%	75%
50% or thereafter	100%

(3) Any student signing an enrollment agreement or making an initial deposit or payment toward tuition and fees of the institution shall be entitled to a cooling off period as defined in 5.100.7.7 NMAC. During the cooling off period the agreement can be withdrawn and all payments shall be refunded. Evidence of personal appearance at the institution or deposit of a written statement of withdrawal for delivery by mail or other means shall be deemed as meeting the terms of the cooling off period.

(4) Following the cooling off period, but prior to the beginning of instruction, a student may withdraw from enrollment, effective upon personal appearance at the institution or deposit of a written statement of withdrawal for delivery by mail or other means, and the institution shall be entitled to retain no more than \$100 or five percent in tuition or fees, whichever is less, as the institution’s registration charges.

(5) In the case of students enrolling for non-traditional instruction, a student may withdraw from enrollment following the cooling off period, prior to submission by the student of any lesson materials and effective upon deposit of a written statement of withdrawal for delivery by mail or other means, and the institution shall be entitled to retain no more than \$100 or five percent in tuition or fees, whichever is less, as the institution’s registration charges or an alternative amount that the institution can demonstrate to have been expended in preparation for that particular student’s enrollment.

(6) Upon request by a student or by the department, the institution shall provide an accounting for such amounts retained under this standard within five work days.

D. Record maintenance and retention policy: Each private career school or non-regionally accredited college or university licensed by the department shall provide a records maintenance and retention plan. The plan shall consist of a records maintenance and disposal schedule that ~~[follows the minimum retention schedule set out and published by the department]~~ is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, regulations of any other authorizing agency, or laws, regulations, and rules of any other authorizing jurisdiction or territory, whichever is longest in time. If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail. The plan must include a description of how records will be maintained in the event of closure, which includes, but is not limited to, designation of a custodian of records, digitization, and a process for obtaining transcripts from the custodian of record.

E. Materials and information: The department shall regulate the use of deceptive and misleading materials and information. An institution shall not disseminate material or information that is deceptive, misleading or untrue. The institution shall certify compliance with all laws and regulations related to materials and information. The department may request copies of publications, advertisements, agreements, marketing collateral, or contracts in order to regulate the use of deceptive and misleading information. All materials and information shall comply with the following requirements:

(1) Representation of accreditation and state authorization status:

(a) An institution may not make claims to or advertise an accreditation status if the accrediting agency is not recognized by the United States department of education.

(b) An institution not accredited by a United States department of education recognized accreditor shall clearly state that the institution is not accredited.

(c) An institution licensed by the department may not use terms such as “accredited,” “endorsed,” or “recommended” in reference to its approval by the department.

(2) Enrollment agreement: Before a student begins coursework at an institution, the institution shall execute an enrollment agreement with the student. An enrollment agreement will be binding only when it has been fully completed, signed, and dated by the student and authorized institution representative prior to the beginning of instruction. The institution shall retain the original enrollment agreement and a copy shall be delivered to the student at the time of execution or by mail when the enrollment is solicited by mail. A copy of the blank agreement or contract shall be submitted to the department. Each enrollment contract or agreement shall include at least the following:

(a) information that will clearly and completely define the terms of the agreement between the student and the school;

(b) names and addresses of the school and the student;

(c) the program or course title in which the student is enrolling and the applicable catalog date or version reference;

(d) the program start date and estimated end date;

(e) the number of hours or units of instruction;

(f) the school’s cancellation and refund policies;

(g) an itemization of all charges, fees and required purchases being incurred by the student or their sponsor in order to complete the training, e.g., tuition, books, supplies and all other items of expense required by the school;

(h) the method of payment and payment schedule being established; and

(i) when applicable, a statement detailing the institution’s academic placement policy.

(3) Advertising, marketing, promotional materials and recruitment: All advertisements and promotional literature must be truthful regarding the content of an institution’s educational program(s), the duration of the program(s), student attributes and skills needed for successful completion of the program(s), and costs of the program(s). An institution shall use no advertisements or promotional materials that are false, deceptive, inaccurate, or misleading. Materials must comply with all of the following requirements:

(a) Advertisements and promotional literature shall not contain promises of job placement or employment, either explicitly or implicitly, but may refer to an institution’s services to assist students in obtaining employment.

(b) Advertisements shall clearly indicate by their content and location in media that the institution is offering education or training and may not either explicitly or implicitly suggest that the institution is offering employment.

(c) An institution advertising salary ranges or averages for its graduates must have on file and available to inspection by students, the department, or their representatives

current and accurate data that includes New Mexico employers and that validates such claims.

(d) An institution shall not advertise the transferability of its courses or programs to another institution unless it has signed transfer or articulation agreements with that institution.

(e) An institution shall not include in its advertising or promotional materials any photograph or other illustration of facilities unless those facilities serve predominantly as sites of instruction or related activities provided by the institution, either in New Mexico or in other states. Photographs or other illustrations must accurately depict the size and condition of any facilities or equipment illustrated.

(f) No person shall for a fee solicit enrollment at an institution who is not employed by and under supervision of the institution. The institution shall be responsible for the representations of its employees.

(g) Prospective students shall not be solicited by any representative of an institution on the sites of any government agency such as motor vehicle division offices, unemployment offices, or public assistance offices. However, leaflets or other promotional material may be made available at such sites.

(h) Prospective students shall not be solicited by any representative of an institution on the site of any public school, except at the invitation of school personnel. No institution shall offer or provide financial inducement to any public school in return for permission to solicit students.

(i) No institution shall solicit the enrollment of any student who is currently attending another institution in New Mexico by using any inducement of greater financial assistance in meeting the costs of education.

(j) On all materials, an institution shall use the full name in which it is

licensed and list any other names in which the institution holds other government approvals. Permutations of its name, e.g., initials, or shortened name or nicknames, cannot be employed without prior written permission of the department.

(k)

On all materials, the name of an institution shall not be misleading.

F. Name of the institution:

The department reserves the right to deny licensure to an institution proposing to operate under a name that the department determines to be misleading or so similar to that of another institution operating within the state that it may result in substantial confusion. Institution names must comply with each of the following regulations:

(1) institutions

including the term “college” in their name must offer at least an associate degree and enroll a substantial portion of their students in such degree programs; and

(2) institutions

including the term “university” in their name must offer graduate degree programs and must enroll a preponderance of their students in baccalaureate and graduate degree programs.

G. Information

provided to students: Information shall be provided to students prior to their signing an enrollment agreement and the institution shall make reasonable effort to assure and verify that each student understands their academic and financial obligations prior to enrolling in the institution. An institution shall publish and make available to all students a catalog or other materials that clearly describe:

(1) accurate

representation of accreditation and state authorization status as described in Paragraph 1 of Subsection E of 5.100.7.10 NMAC;

(2) admission

policies and procedures that provide criteria and methods used to assess and admit or deny admission;

(3) admission

methods and criteria used to assess student ability to complete program

requirement;

(4) programs

offered, the program completion requirements of each program offered, and descriptions of all courses offered;

(5)

requirements for those occupations that require professional or trade licensure and for which the institution is offering preparation;

(6) tuition and

fees and refund policies, consistent with the requirements in 5.100.7 NMAC;

(7) types of

financial aid available to students and the procedure for applying for such aid;

(8) the

institution’s policy regarding program or course cancellations;

(9) rules and

regulations pertaining to academic progress;

(10) rules and

regulations pertaining to student conduct;

(11) the

procedure to be followed in the instance that a student decides to withdraw from the institution prior to completing a program;

(12) the

institution’s policy regarding student complaints and the resources available to students for resolving differences with the institution. The institution must adopt the student complaint process established by the department and published by the department; and

(13) the

institution’s policy regarding release of transcripts.

H. Financial aid:

Prior to a student signing a financial aid agreement, each student must be informed in writing regarding his or her obligations associated with receipt of financial aid and the institution must take reasonable steps to assure that the student understands that obligation. The institution shall provide financial aid resources to students.

I. Proof of teach-out

agreement: Each institution shall submit a teach-out plan or agreement.

(1) An

institution must submit ~~proof~~ proof of a teach-out agreement with at least one other private or public institution operating in the state or provide a teach-out plan that allows students to complete their program of study at the institution within a timeframe accepted by the department. Proof of such teach-out agreement(s) with another institution must be submitted to the department. The teach-out plan or agreement must address the ability of students to complete programs within a reasonable proximity to the physical location of the institution and shall be arranged at no additional cost to the students beyond that originally agreed to by the students.

(2) The

department may determine that a teach-out plan or agreement is not feasible after consideration of evidence submitted to the department. The department may find that teach-out arrangements are not feasible for students in one or more programs offered by the institution, in which case the institution shall plan to refund all tuition and fees paid by the students in question for the current period of enrollment and shall plan to provide appropriate transcripts and evaluations to assist students in transferring their work to another institution.

(3) A

teach-out plan or agreement shall be evaluated and updated by the institution annually upon submitting a license renewal application. If an institution closes or has a substantial change in location, the institution is subject to 5.100.8 NMAC. If the teach-out plan or agreement presented to the department during application for licensure becomes impossible or is no longer feasible due to institutional changes, the plan must be updated and submitted to the department within 90 days of the change.

J. Adoption of degree

standards: Institutions accredited by a recognized United States department of education accreditor shall adopt degree standards governed by their accrediting body. Any non-accredited degree granting institution shall adopt

the following degree standards for each credential as listed below:

(1) Associate degree program:

(a) associate degree programs must include both technical or vocational and general education instruction. Associate degree programs shall consist of 60 credit hours of study or the equivalent;

(b) associate of applied science degrees, associate of occupational studies degrees or comparable appellations must be based upon the institution's certification that the recipient is prepared for immediate employment in a specified career field and must be comprised primarily of technical or vocational study; and

(c) associate of arts or associate of science degrees must be based upon the institution's certification that the recipient is prepared both for immediate employment in a specified career field and transfer to another institution for more advanced study; associate of arts and associate of science degree programs will normally consist of approximately equal numbers of technical or vocational and general education courses.

(2) Baccalaureate degree programs:

(a) baccalaureate degree programs must be comparable in quality to those offered by institutions operating in New Mexico that are accredited by agencies recognized by the United States department of education as authorities regarding the quality of such degree programs; award of degrees must be based upon the institution's certification that the recipient has met standards of performance and competency comparable to the standards of institutions so accredited; and

(b) at a minimum, issuance of a baccalaureate degree shall require 120 credit ~~hour~~ hours or the equivalent; the degree program must include 30 credit hours of general education core requirements.

(3) Master's degree programs:

(a) master's degree programs must be comparable in quality to those offered by institutions operating in New Mexico that are accredited by agencies recognized by the United States department of education as authorities regarding the quality of such degree programs; award of degrees must be based upon the institution's certification that the recipient has met standards of performance and competency comparable to the standards of institutions so accredited; and

(b) at a minimum, issuance of a master's degree shall require 30 credit hours of academic credit or the equivalent beyond a baccalaureate degree.

(4) Doctoral degree programs:

(a) at a minimum, issuance of a doctoral degree shall require 90 credit hours of academic credit or the equivalent beyond a baccalaureate degree or 60 credit hours or the equivalent beyond the master's degree and shall require successful completion and defense of a major independent project, involving original research or application of knowledge. The research component shall provide no more than thirty percent of the degree credit requirement;

(b) research or project committees composed of no fewer than three qualified readers shall review the project at various stages of development; documentation shall be provided to support this requirement. The final version of the research or project shall be accompanied by the original signature of each committee member; and

(c) the institution shall maintain a copy of the final report of the research or project and make it available upon request.

(5) Honorary degree or certificate: Licensed, private degree-granting institutions may issue honorary degrees or

certificates. An honorary degree or certificate shall identify in its title or name that it is an honorary degree or certificate and shall bear such on its face.

(6) Credit for life experience: If an institution offers academic credit for life experience or employment related experience, the institution must have and adhere to the following requirements:

(a) applicable life experience shall be limited to work experience, military experience or a combination of the two;

(b) no more than 30 percent of the credit in a student's degree program may be awarded for life or work experience;

(c) the institution shall utilize the methodologies outlined by the council for adult and experimental learning (CAEL) for evaluating life experience or shall have in place a comparable plan which describes procedures and requirements for the assessment of experiential learning;

(d) the institution shall maintain documentation for at least three years of all materials used to assess and award credit for experiential learning;

(e) the institution shall clearly indicate on the student degree plan the course(s) for which the experiential learning is being substituted;

(f) the institution shall evaluate extra-institutional learning only in subject areas in which it has or can arrange for faculty expertise or where it can rely on nationally validated examinations or other procedures for establishing credit equivalencies; and

(g) no life experience credit shall be awarded toward the doctorate degree beyond master's level study.

K. Accreditation:

(1) Accredited institutions shall be governed by their accrediting agencies in establishing degree and program standards. Accredited institutions shall submit:

(a) formal documentation from the accreditor listing all approved campuses, degrees and programs; and

(b) written notification of any changes related to accreditation.

(2) Institutions proposing to change or add programs must formally notify the department. If the change or addition of the program requires the accreditor's approval, the institution must provide written proof of the approval. If the change or addition does not require approval by the accreditor, the institution shall provide proof that the accreditor was notified of the change or addition. The department shall review proposed changes. The department may review proposed changes on a set schedule defined by the department and charge an administrative fee for the processing of such requests. Upon final review, the department will provide a formal acknowledgment of the approved new degrees and programs. The institution may begin to advertise the program based on the department's letter of acknowledgement. The complete list of programs offered by an institution will be listed on the license issued to the institution.

L. Accreditation for new degree-granting institutions or degree-granting institution seeking accreditation: New degree-granting institutions making application with the department will be required to obtain accreditation with an accrediting agency recognized by the United States department of education within two years of submitting the initial application. Non-accredited degree-granting institutions must submit a written accreditation plan, which shall include:

(1) the United States department of education recognized accrediting agency with which the applicant intends to apply for institutional accreditation;

(2) the planned timeline for application with and approval by the United States department of education recognized accrediting agency;

(3) any contracts already made with the United States department of education recognized accrediting agency, including supporting documents;

(4) certification that the institution will complete the accreditation process within the planned timeline provided to the department;

(5) submit all documents as required for non-accredited non-degree granting institutions; and

(6) any additional information which the department may request.

M. Non-accredited non-degree granting institutions: Applications for non-accredited non-degree granting institutions shall be evaluated by a department review committee described in 5.100.7.11 NMAC. A new non-accredited non-degree granting institution applying for licensure will be approved to offer no more than six degree programs during the first two years of operation. Non-accredited non-degree granting institutions shall submit the following for review:

(1) Institution curriculum requirements: For each program and course of instruction offered by an institution, the institution shall submit:

(a) program outline, syllabus and curriculum materials that accurately describe the objectives, content, and methods of the program or course;

(b) objectives, content, and methods of each program and course of instruction which demonstrate curriculum quality;

(c) details of equipment and facilities utilized by a program which shall be sufficient for the number of students using them, and shall be applicable to the objectives set for the program; and

(d) a report that demonstrates that each program is designed to provide training for an occupation that is recognized in New Mexico and that the training provided is sufficient in

length and quality to prepare students for immediate employment in the occupation(s) or prepare students to complete licensing assessments.

(2) Faculty qualifications: The institution must demonstrate the following:

(a) each member of the teaching faculty has an educational background, including licensure or occupational or credential, and experience applicable to teaching assignments;

(b) faculty degrees, licensure, certification, and credentials are in the applicable field of instruction unless the institution demonstrates to the satisfaction of the department and review committee, on an individual basis, that alternative qualifications are sufficient;

(c) for degree-granting institutions faculty must hold degrees in the field of instruction from an accredited institution at a minimum of one degree level higher than the level of instruction, and in no case less than a baccalaureate unless the institution demonstrates to the satisfaction of the department that alternative qualifications are sufficient;

(d) for degree-granting institutions no more than twenty percent of the faculty of an institution may be employed under alternative qualifications;

(e) for each proposed credential offering, the institution employs at least one faculty member with the applicable training who shall have the responsibility for providing oversight of the instructional program; and

(f) faculty are sufficient in number to provide instruction and attention to the work of students of the institution.

(3) Student outcomes: New institutions submitting first time application shall provide a plan for tracking program completion rates, withdrawal rates and satisfaction of students, and employers. Institutions renewing application with the department

must submit required reporting for program completion rates, withdrawal rates, and satisfaction of students and employers.

(4) Non-accredited non-degree institutions proposing to change existing programs or add new degree programs to their curriculum shall submit application on a form acceptable to the department, for review committee approval prior to marketing the program and enrolling students in the proposed program.

N. Maintenance of records certification: Each institution must submit a certification of compliance with all applicable laws, rules and regulations that govern records management for closed [institution] institutions.

O. Surety bond: Each institution licensed by the department shall maintain in force a surety bond or alternative surety accepted by the department, in an amount set by the department, and payable to the department. The institution must have and adhere to the following requirements:

(1) the amount of the bond or alternative surety shall be sufficient to indemnify any student damaged as a result of fraud or misrepresentation by a licensed institution or as a result of the institution ceasing operation prior to its students having completed the programs for which they have contracted. If a licensed institution closes, the department may draw upon the bond to pay costs associated with preservation of student records. The bond must also meet the following criteria:

(a) the bond required for each institution shall be twenty percent of the institution's projected or actual gross annual tuition and fee revenue in New Mexico, which takes into consideration the size, number of students and total income and assets of an institution. In no case shall the bond be less than \$5,000; and

(b) bonds provided by institutions must be accompanied by the name, office

address and phone number of the issuing company representative.

(2) If an institution seeks to cancel a surety bond, written notice must be delivered to the department. The institution may not cancel the surety bond until provided with written release by the department. The institution shall provide the department with a like surety or acceptable alternative in order to maintain licensure.

(3) Alternative forms of surety: An institution may request a waiver from the bond requirement and provide to the department an explanation of the alternative form for which they are seeking approval. The department has the authority to accept or reject any request. Such alternative may be a cash deposit escrow account, irrevocable letter or credit, or similar alternative payable to the department in the amount equal to the bond requirement.

P. Proof of financial stability: Standards for reviewing and analyzing financial stability are a critical component of the institution's overall assessment. The institution's financial stability will be reviewed by the department to assess the institution's ability to meet financial obligations including, but not limited to, obligations to enrolled students. In determining financial stability of the institution the department shall review the following requirements:

(1) Insurance: Institutions licensed by the department shall maintain valid standard, commercial liability insurance, worker's compensation insurance, and property insurance sufficient to protect students, employees, and other citizens from hazards in the institution's facilities. Where applicable, institutions shall have liability insurance covering students involved in internships at sites and locations other than the institution.

(2) Financial statement analysis: The department shall consider an institution's financial history when reviewing an application for licensure. In the case where an

institution submits an audit report and management letter provided by a certified public accountant, the department shall normally accept the report as accurate and rely on the auditor's professional responsibility to evaluate and to make known their professional opinion.

(3) New institutions not previously operating in any capacity in any state or jurisdiction shall demonstrate liquid assets sufficient to operate the institution for a period of one year exclusive of anticipated revenue from tuition and fees. These assets shall be sufficient to pay all projected salary and benefits of employees and the rent, utilities, insurance and other costs of operating the institution's facilities for a period of one year. If an institution has audited financials available for the year prior to that of the application, such audited financials shall be submitted for review. Any new institution shall submit the following:

(a) bank statements, investor agreements, any other financial donations or gifts used to develop the institution;

(b) the institution's projected income statement certified as accurate by the institution. The income statement must include details of projected salaries and benefits of employees, rent, utilities, insurance, any financial obligations made by the institution, and any other operating costs; and

(c) any additional information which the department may request.

(4) Existing institutions: If an institution has previously operated in any capacity in any jurisdiction, it must submit documents based on the following thresholds:

(a) An institution with seven hundred fifty thousand dollars (\$750,000) or more in gross annual tuition revenue and all federal Title IV financial aid institutions shall submit, on a schedule set by the department, an audit report and management letter prepared by a certified public

accountant in accordance with the New Mexico Public Accountancy Act, Section 61-28B-1 et seq. NMSA 1978 as amended. If the institution has been required to obtain a financial responsibility composite score as computed using the latest version of the United States department of education index score formula it shall provide the score to the department. The financial responsibility composite score must be 1.5 or above as computed using the latest version of the United States department of education index score formula. The composite score must be calculated by the United States department of education, a recognized accreditor, or a certified public accountant contracted at the expense of the institution.

(b)

An institution with gross annual tuition revenue of two hundred fifty thousand dollars (\$250,000) or more but less than seven hundred forty nine thousand nine hundred ninety-nine dollars (\$749,999) shall submit, on a schedule set by the department, either an audit report and management letter prepared by a certified public accountant in accordance with the New Mexico Public Accountancy Act, Section 61-28B-1 et seq. NMSA 1978 as amended or a review of financial statements prepared by a certified public accountant in accordance with the New Mexico Public Accountancy Act. If the institution has been required to obtain a financial responsibility composite score as computed using the latest version of the United States department of education index score formula it shall provide the score to the department. The financial responsibility composite score must be 1.5 or above as computed using the latest version of the United States department of education index score formula. The composite score must be calculated by the United States department of education, a recognized accreditor, or a certified public accountant contracted at the expense of the institution.

(c)

An institution with gross annual tuition revenue of less than two hundred forty nine thousand nine hundred ninety-nine dollars (\$249,999) shall submit on a schedule set by the department either an audit report and management letter prepared by a certified public accountant in accordance with the New Mexico Public Accountancy Act, 61-28B-1 et seq. NMSA 1978 as amended, a review of financial statements prepared by a certified public accountant in accordance with the New Mexico Public Accountancy Act, or an income statement and balance sheet certified as accurate by the institution. In addition to the audit report and management letter, the review of financial statements, or the income statement and balance sheet as described in this paragraph, the institution shall submit copies of business tax returns and bank statements for the most current year. If the institution has been required to obtain a financial responsibility composite score as computed using the latest version of the United States department of education index score formula it shall provide the score to the department. The financial responsibility composite score must be 1.5 or above as computed using the latest version of the United States department of education index score formula. The composite score must be calculated by the United States department of education, a recognized accreditor, or a certified public accountant contracted at the expense of the institution.

(5) Failure

to satisfactorily meet financial requirements: If considerable concern is established as to the institution's ability to maintain its operation, department staff may contact the school to request additional information regarding the institution's financial picture. If concerns are not addressed through the additional information provided to the department, a department financial analyst may conduct a second financial review. If after the second review, substantial doubt remains

about the institution's ability to continue, the department may contract for further independent review of the records. All costs associated with contracting a third party independent reviewer will be charged to the institution. Following review and based on the determination of the department

(a)

the institution may be authorized for operation; or

(b)

the institution may be placed on probationary status and required to submit a management plan of action; and

(c)

the department may report the failure to satisfactorily meet financial requirements to the United States department of education and the institution's accreditor. If the issue is not resolved, the department may take action to forward the file to the attorney general's office for issuance of a notice of contemplated action to deny licensure.

Q. Procedure for

resolution of student complaints: An institution shall provide proof of an adopted complaint procedure that complies with the minimum requirements set by the department. The institution shall have and make available to all students, the adopted complaint procedure that describes, in detail, how students or other parties may register a complaint or grievance, how the institution will investigate the complaint, and how the institution will attempt to resolve the complaint. Such policies shall at a minimum include the following components:

(1)

requirement that students or other parties with complaints or grievances against an institution first seek to resolve their complaint or grievance directly with the institution;

(2) a time

frame within which the institution will investigate the complaint and respond to the complainant;

(3) assurance

of the involvement of a person who will serve as an impartial representative of the institution but

not be directly involved in the area of the complaint;

(4) assurance that no adverse action will be taken against the complainant for registering the complaint; and

(5) identification of the higher education department as the agency to be contacted in cases where a complaint cannot be resolved.

R. Student Services:

The institution shall certify that it will provide the following:

(1) Financial aid counseling: Institutions offering financial aid to students shall provide adequate personnel qualified to administer the financial aid programs according to the regulations of all applicable agencies;

(2) Academic counseling and progress: Institutions shall provide adequate counseling for students regarding their academic progress. An institution shall have a clear policy and procedure for assessing the progress of students toward their program objectives and to inform student of progress. Students shall receive warning when their academic status is at risk and shall be given clear information about their academic status and whatever actions are needed to maintain satisfactory progress. The institution shall have a policy for terminating enrollment in manner that minimizes the financial cost to the student, when the student fails to meet the standards for academic progress. Records of the institution, including individual student records, shall reflect consistent application of such policy and procedure. The institution's catalog and other publications shall clearly inform students about the institution's standards for academic progress and any academic counseling and support services available to students.

(3) Employment counseling and placement: Institutions shall provide services that assist students in locating and qualifying for employment opportunities. Employment counseling and placement services

must be provided at no additional charge to students. No institution shall be expected to provide employment counseling and placement services beyond providing academic and financial aid transcripts for more than one year following a student's receipt of a diploma, certificate, or degree, except by such policy of the institution. An institution offering placement services for its students and graduates shall maintain records listing, for each student who has been assisted, each placement conference held with the student and each placement contact made in behalf of the student.

S. Records standards and access:

(1) Transcript standards: An institution shall prepare for students a transcript of record. A sample transcript shall be submitted and include at minimum the following:

(a) designation of the program(s) of study for which the student has been enrolled;

(b) each course completed by the student and the grade or other indication of performance assigned; and

(c) a dated statement of completion of the program and award of any certificate, diploma, or degree earned by the student.

(2) The method by which students and graduates may obtain transcripts and financial aid documents and applicable fees shall be described clearly in the institution's catalog or in other documents provided to students. All documents with reference to the method for obtaining transcripts and financial aid documents and fees must be submitted to the department for review.

(3) The institution shall certify that an official student file will be kept for each student and include at a minimum the following:

(a) admission application and enrollment agreement;

(b) official transcripts indicating qualification for admission;

(c) when applicable actual test and scores from an ability-to-benefit assessment;

(d) grades received (up-dated transcript);

(e) all obligations incurred and all funds paid by the student to the institution;

(f) student attendance information;

(g) academic counseling and employment counseling records; and

(h) financial aid records.

T. Academic support resources: The institution shall provide or otherwise assist students in gaining access to learning resources needed for completion of their programs, including library materials, laboratories, facilities, equipment and materials, and relevant experiences needed to meet program requirements. No institution shall absolve itself from this requirement solely by referring students to the resources of other private or public institutions or facilities, except by written agreement with such institutions or facilities. The institution will certify that:

(1) students have access to learning resources;

(2) [that] resources are adequate to support the programs;

(3) students are adequately informed about learning resources available to them and how to access such resources and services;

(4) training is made available for accessing learning resources;

(5) resources are delivered within a reasonable period of time;

(6) the facilities have satisfactorily met all applicable health and fire inspections; and

(7) compliance with regulations pursuant to the American with Disabilities Act (ADA).

U. Admission policy:
Each institution shall adopt an admission policy that includes the following standards:

(1) No student shall begin a certificate or diploma program who has not received a high school diploma or the equivalent or who has not demonstrated ability to benefit from the program through a process of assessment that meets standards of the United States department of education or the department or who is participating in a concurrent enrollment program with a secondary school.

(2) Institutions enrolling students who are of compulsory school age or who are concurrently attending an elementary or secondary school shall have in their possession a signature or other written acknowledgement by elementary or secondary officials and by the student's parent or guardian.

(3) Institutions using an ability-to-benefit admission option shall provide the department with a clear and detailed statement describing their ability-to-benefit assessment programs (including cut off scores and validity data for any test used) and shall be able to demonstrate that ability-to-benefit assessment is performed in a consistent and valid manner.

(4) No student shall be admitted to an associate degree or baccalaureate degree program who has not received a high school diploma or the equivalent.

(5) No student shall be admitted to a graduate degree program who has not received a baccalaureate degree from an institution accredited by an agency recognized by the United States department of education, or received a baccalaureate degree from a non-accredited institution licensed by the department or by the cognizant state agency in another state, or qualified in an alternative manner approved by the department.

V. Cooperation: The institution shall provide copies of valid certificates from other federal, state and municipal agencies, and any

other higher education authorities as proof of compliance with applicable bodies. At minimum the application submission must include:

(1) a copy of the notification of good standing and ability to do business in New Mexico issued by the New Mexico secretary of state's office;

(2) a copy of the New Mexico taxation and revenue department registration;

(3) as applicable, a copy of the national council of state authorization reciprocity agreements (NC-SARA) welcome letter;

(4) as applicable, a list and copy of authorizations granted by other jurisdictions;

(5) as applicable, a list and copy of authorizations granted by other New Mexico boards, commission or agencies.

W. Ownership and administration: The institution shall provide the department with information about ownership, owners, and managers. An institution shall notify the department in writing within 10 working days whenever the institution changes ownership, whenever there is a change in control of the institution, or whenever changes are made to managers. No institution will be licensed in the state of New Mexico without completion certifications required by the department. Any changes or events that may trigger any certification to be untrue, must be immediately reported to the department, and shall be reported in no less than 10 working days.

(1) The institution shall provide a list of principal owners and provide a list of managers.

(2) The institution shall certify that no owner of the institution has:

(a) been convicted of or has pled no contest or guilty to a crime involving abuse of public funds;

(b) been convicted of or has pled no contest or guilty to a crime of dishonesty or felony within the last five years;

(c) controlled or managed an institution that has ceased operation during the past five years without providing for the completion of programs by its students; [~~and~~] or

(d) filed bankruptcy associated with the operation of an educational institution during the past five years.

(3) The institution shall certify that no manager of the institution has:

(a) been convicted of or has pled no contest or guilty to a crime involving abuse of public funds;

(b) been convicted of or has pled no contest or guilty to a crime of dishonesty or felony within the last five years;

(c) controlled or managed an institution that has ceased operation during the past five years without providing for the completion of programs by its students; [~~and~~] or

(d) filed bankruptcy associated with the operation of an educational institution during the past five years.

(4) The institution shall certify it:

(a) has not filed bankruptcy during the past five years;

(b) is not under the ownership of any person who has filed bankruptcy associated with the operation of an educational institution during the past five years;

(c) is not managed by any person who has filed bankruptcy associated with the operation of an educational institution during the past five years;

(d) has not been found to be operating illegally in another state for a least five years.

[5.100.7.10 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.13 APPLICABLE FEES:

A. The department shall assess application, administrative, and licensing fees, pursuant to Section 21-23-6.3 NMSA 1978, and publish a fee schedule.

B. The department shall assess an administrative fee for providing the services associated with application review and determination of eligibility for licensure.

C. The department shall assess a licensing fee upon determination that the institution has satisfactorily met all [satisfactory] conditions for licensure.

D. The department shall assess an administrative fee for filing annual reporting; any costs associated with review committee evaluation and determination; any costs associated with specialized review, program changes, and institution or administrative changes. [5.100.7.13 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.7.15 SITE VISITS AND RECORDS INSPECTION: The department may conduct a site visit at any time to evaluate institutional compliance with all applicable laws and regulations. The department may request documents or access to files to evaluate compliance. The department may request inspection of the institution’s records, which must follow the records management plan set out by the institution as required in Subsection D of 5.100.7.10 NMAC [~~and comply with the retention schedule set by the department~~]. Records that must be maintained and available for inspection are as follows:

A. official student transcripts;

B. records related to development of courses including, but not limited to, outlines and syllabi; and

C. records related to student enrollment, original version of enrollment agreements, student class registration and withdrawals,

D. list of current students;

E. list of dropped or withdrawn students;

F. list of students that have graduated;

G. catalogs of the institution plus any additional documentation that defines student policies. The institution shall maintain an archive of catalog versions for the period of time applicable to enrollment agreements for current students;

H. records related to marketing and recruitment, including but not limited to, samples of advertising including online pages;

I. records related to examination and testing including, but not limited to, grade results;

J. records related to academic programs, including, but not limited to, analyses of academic program completion rates, student transfer rates, or employment rates for graduates of the institution and membership and minutes for academic committees;

K. records related to higher education programs;

L. documentation of accrediting reports and self-study reports submitted to accrediting bodies for institutions accredited or seeking accreditation;

M. records related to faculty and staff qualifications, including, but not limited to, the results of periodic student and peer or supervisor assessment of teaching, original official transcripts of record sent directly to the hiring institution from institutions issuing the faculty member a degree and applicable license or certification demonstrating the educational qualifications of the faculty member, documentation of applicable experience for faculty members with alternative qualifications, and a separate file available for review containing documentation regarding all complaints lodged against the faculty member;

N. records related to student evaluations, discipline, assessments and attendance;

O. student complaint files;

P. evidence of the institution’s valid insurance policies and surety bond or alternative surety;

Q. records related to scholarships, loans, grants and other financial aid; and

R. records related to financial stability.
[5.100.7.15 NMAC - N, 12/26/2017; A, 12/11/2018]

HIGHER EDUCATION DEPARTMENT

This is an amendment to 5.100.8 NMAC, Sections 2, 3, 6, 7, 9, 10, and 11 effective 12/11/2018.

5.100.8.2 SCOPE:
Provisions of 5.100.8 NMAC apply to all private post-secondary institutions operating within the state of New Mexico.
[5.100.8.2 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.3 STATUTORY AUTHORITY: Section 9-25-1 et seq. NMSA 1978, Section 21-1-26 NMSA 1978 and Section 21-23-1 et seq. NMSA 1978. The Post-Secondary Educational Institution Act, Sections 21-23-1 et seq. NMSA 1978 authorizes the New Mexico higher education department (“department”) to establish standards for closures of private post-secondary educational institutions operating in New Mexico.
[5.100.8.3 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.6 [OBJECTIVES AND GENERAL PRINCIPLES] OBJECTIVE: No private post-secondary institution shall cease operation within New Mexico or make a substantial change to location without providing notice to the department and complying with the provisions set out in this rule. Institutions operating with a physical presence in New Mexico and concurrently offering distance education pursuant to 5.99.1 NMAC as a SARA institution, through distance education authorization, or

through any other method detailed in Section 5.99.1.10 NMAC, shall be subject to 5.99.2 NMAC, if the institution seeks to close, cease program offerings that contain enrolled students, or substantially relocate as defined in 5.99.2 NMAC, as related only to students enrolled exclusively as distance education students.

[5.100.8.6 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.7 DEFINITIONS:

A. “Accrediting body” means an accreditor or accrediting agency that has issued an accreditation status to the institution.

[A] B. “Custodian of Records” [is] means an entity with which the institution has arranged for the perpetual care, maintenance and accessibility of all records and transcripts [reports and evaluations of] for all students receiving credit from the institution during the period of its existence. The entity must be in compliance with the Family Educational Rights and Privacy Act (FERPA) and be capable of servicing student record requests. [documentation] Documentation evidencing [of] such compliance shall be submitted to the department.

[B] C. “Department” means the New Mexico higher education department or its designated employee.

[C] D. “Manager” means the chief executive officer, chief operations officer, chief financial officer, senior business or finance officer, senior financial aid administrator, and senior or chief academic officer of an institution’s New Mexico facility.

[D] E. “Physical presence” means the ongoing occupation of a physical location in the state [for], [or] the ongoing maintenance of an administrative office to support the provision of higher education instruction, or engaging in one or more of the activities detailed in Paragraph (1) of Subsection A of 5.100.5.6 NMAC, Paragraph (1) of Subsection A of 5.100.6.6 NMAC, or Paragraph (1) of Subsection A of 5.100.7.6 NMAC.

[E] F. “Post-secondary educational institution” or “institution” or “post-secondary institution” means an a private academic, vocational, technical, business, professional, or other school, college, or university or other organization or person offering or purporting to offer courses, instruction, training, or education.

G. “Program” means any certificate or degree program or for purposes of closure, a college, school or department within an institution.

[F] H. “Substantial change to location” means a relocation of the institution’s physical site that is beyond the proximity a student is normally required to travel for educational offerings.

[5.100.8.7 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.9 PLAN [FOR CLOSURE OR SUBSTANTIAL CHANGE TO LOCATION]:

A. A post-secondary institution operating with a physical presence in New Mexico that intends to cease operations, cease program offerings that contain enrolled students, or [makes] make a substantial change to location must present a plan to the department.

B. Post-secondary institutions that are required to seek approval of such a plan by an accrediting body must submit the plan to the department within seven days of receiving approval by the accrediting body.

C. Post-secondary institutions that are not required to seek approval of a plan by an accrediting body must submit a plan to the department as soon as practical but in no case less than 90 days prior to closure, ceasing a program offering that contains enrolled students, or making substantial change to location.

D. The plan must include provisions for teach-out agreements, completion of programs by enrolled students, [records-maintenance] perpetual care and maintenance of student records, and identification and location of a

responsible agent for the [school] institution for a period of at least one year following closure [as detailed in this rule].

[5.100.8.9 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.10 TEACH-OUT [AGREEMENTS] AGREEMENT OR PLAN:

A. A post-secondary institution operating with a physical presence in the state of New Mexico that has served notice of closure, intent to cease program offerings that contain enrolled students or intent to make a substantial change to location [to the department] shall provide to the department a teach-out plan or agreement.

B. A post-secondary institution that is closing, ceasing a program offering that contains enrolled students, or has a substantial change to location shall enter into a teach-out agreement with at least one other [private or public institution operating in the state] provider of post-secondary education offering similar programs, for provision of the remaining program requirements of enrolled students, or provide a teach-out plan that allows students to complete their program of study at the closing institution within a timeframe accepted by the department.

C. A post-secondary institution that has a substantial change to location may be required to present evidence that the institution has made efforts to enter into a teach-out agreement with an institution within a reasonable proximity.

D. Enrolled students impacted by teach-out agreements or plans must be notified of the agreement or plan when it is finalized. Teach-out plans or agreements shall be arranged at no additional cost to the students beyond that originally agreed to by the student.

E. Licensed post-secondary institution operating under 5.100.7 NMAC must comply with the teach-out plan or agreement provided to the department in its application for licensure unless a [substantial] change in the teach-out plan or agreement

has occurred. If [~~a substantial change in~~] the teach-out agreement submitted to the department in the licensure application has [~~occurred~~] changed, the institution shall seek additional teach-out agreements with at least one institution operating in the state of New Mexico or provide a teach-out plan that allows students to complete their program of study at the institution within a timeframe accepted by the department.

F. The department may determine that a teach-out plan or agreement is not feasible after consideration of evidence submitted to the department. The department may find that teach-out arrangements are not feasible for students in one or more programs offered by the institution, in which case the institution shall refund all tuition and fees paid by the students in question for the current period of enrollment and shall provide appropriate transcripts and evaluations to assist students in transferring their work to another institution.

G. An institution that seeks to relocate may be exempt from entering into a teach-out agreement or plan if the institution can demonstrate to the department that students will not be substantially burdened by the change in location. The institution will be required to complete a form published by the department demonstrating possible impact to students.

[5.100.8.10 NMAC - N, 12/26/2017; A, 12/11/2018]

5.100.8.11 RECORDS MAINTENANCE:

A. A post-secondary institution operating with a physical presence in the state of New Mexico upon submitting intent to close must ensure that records are in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set by the department, [~~and~~] regulations of any other authorizing [~~agencies~~] agency, or laws, regulations and rules of any other authorizing jurisdiction or territory, whichever is longest in time.

If another authorizing agency of the institution requires a longer period of retention than that of 1.21.2 NMAC, the longest retention period shall prevail.

B. If a post-secondary institution discontinues its operation, the manager shall file with the [~~appropriate~~] designated custodian of records, the original or legible true copies of all educational records required [~~by the agency~~] to be maintained as a condition of state authorization pursuant to 5.100.6 NMAC or 5.100.7 NMAC. For institutions granted express exemption by the department pursuant to Section 21-23-4 NMSA 1978 and 5.100.5 NMAC, the manager must file to the designated custodian of records the original or legible true copies of student records. The institution must maintain at a minimum, the student's enrollment agreement, student transcript, record indicating program completion (either certificate, diploma, degree, or other like proof of completion) and student financial aid records. Any institution that closes and has not operated lawfully pursuant to the Post-Secondary Educational Institution Act, must file to a designated custodian of records, the original or legible true copies of student records to include, the institution must maintain at a minimum, the student's enrollment agreement, student transcript, record indicating program completion (either certificate, diploma, degree, or other like proof of completion), and student financial aid records. A written detailed description for how records will be maintained following the closure shall be provided to the department in a plan for the perpetual care and maintenance of records [~~and a copy of all digital files as a backup to any other records provided to the custodian of records~~]. The written [~~document~~] plan must include, but is not limited to the following:

(1) certification that the post-secondary institution is in compliance with the functional records retention and disposition schedule in 1.21.2 NMAC, the records retention schedule set

by the department, and any other authorizing agencies laws, regulations and rules, whichever is longest in time;

- (2)** designation of a custodian of records;
- (3)** physical address of hard copy files;
- (4)** physical address of digital files; and
- (5)** process for obtaining transcripts or other records from the custodian of record.

C. The department must be notified [~~on an annual basis~~] of any update related to the custodian of records or upon any change to the custodian of record.

D. The department must be provided a copy of any contractual arrangements made for the perpetual care, maintenance and accessibility of all records. The department may request any additional records or information to help students gain access to transcripts in perpetuity.

E. In the event that the post-secondary institution does not comply with the records maintenance provisions cited above, the department may seek a court order to protect and if necessary take possession of the records. The institution's surety bond may be drawn on to cover costs associated with the department's efforts in securing records.

F. Students must be made aware of the process to request student records from the custodian of records. The process must be provided in writing to the student and made available on the institution's website.

[5.100.8.11 NMAC - N, 12/26/2017; A, 12/11/2018]

**HUMAN SERVICES
DEPARTMENT
MEDICAL SERVICES DIVISION**

This is an amendment to 8.200.510 NMAC, Sections 11-15, effective 12/11/2018.

8.200.510.11 COMMUNITY SPOUSE RESOURCE ALLOWANCE (CSRA):

The CSRA standard varies based on when the applicant or recipient become institutionalized for a continuous period. The CSRA remains constant even if it was calculated prior to submission of a formal MAP application. If institutionalization began:

- A.** Between September 30, 1989 and December 31, 1989, the state maximum CSRA is \$30,000 and the federal maximum CSRA is \$60,000.
- B.** On or after January 1, 1990, the state minimum is \$31,290 and the federal maximum CSRA is \$62,580.
- C.** On or after January 1, 1991, the state minimum is \$31,290 and the federal maximum CSRA is \$66,480.
- D.** On or before January 1, 1992, the state minimum is \$31,290 and the federal maximum CSRA is \$68,700.
- E.** On or after January 1, 1993, the state minimum is \$31,290 and the federal maximum CSRA is \$70,740.
- F.** On or after January 1, 1994, the state minimum is \$31,290 and the federal maximum CSRA is \$72,660.
- G.** On or after January 1, 1995, the state minimum is \$31,290 and the federal maximum CSRA is \$74,820.
- H.** On or after January 1, 1996, the state minimum is \$31,290 and the federal maximum CSRA is \$76,740.
- I.** On or after January 1, 1997, the state minimum is \$31,290 and the federal maximum CSRA is \$79,020.
- J.** On or after January 1, 1998, the state minimum is \$31,290

and the federal maximum CSRA is \$80,760.

- K.** On or after January 1, 1999, the state minimum is \$31,290 and the federal maximum CSRA is \$81,960.
- L.** On or after January 1, 2000, the state minimum is \$31,290 and the federal maximum CSRA is \$84,120.
- M.** On or after January 1, 2001, the state minimum is \$31,290 and the federal maximum CSRA is \$87,000.
- N.** On or after January 1, 2002, the state minimum is \$31,290 and the federal maximum CSRA is \$89,280.
- O.** On or after January 1, 2003, the state minimum is \$31,290 and the federal maximum CSRA is \$90,660.
- P.** On or after January 1, 2004, the state minimum is \$31,290 and the federal maximum CSRA is \$92,760.
- Q.** On or after January 1, 2005, the state minimum is \$31,290 and the federal maximum CSRA is \$95,100.
- R.** On or after January 1, 2006, the state minimum is \$31,290 and the federal maximum CSRA is \$99,540.
- S.** On or after January 1, 2007, the state minimum is \$31,290 and the federal maximum CSRA is \$101,640.
- T.** On or after January 1, 2008, the state minimum is \$31,290 and the federal maximum CSRA is \$104,400.
- U.** On or after January 1, 2009, the state minimum is \$31,290 and the federal maximum CSRA is \$109,560.
- V.** On or after January 1, 2010, the state minimum is \$31,290 and the federal maximum CSRA remains \$109,560.
- W.** On or after January 1, 2011, the state minimum is \$31,290 and the federal maximum CSRA remains \$109,560.
- X.** On or after January 1, 2012, the state minimum is \$31,290 and the federal maximum CSRA is \$113,640.

Y. On or after January 1, 2013, the state minimum is \$31,290 and the federal maximum CSRA is \$115,920.

Z. On or after January 1, 2014, the state minimum is \$31,290 and the federal maximum CSRA is \$117,240.

AA. On or after January 1, 2015, the state minimum is \$31,290 and the federal maximum CSRA is \$119,220.

BB. On or after January 1, 2016, the state minimum is \$31,290 and the federal maximum CSRA is \$119,220.

CC. On or after January 1, 2017, the state minimum is \$31,290 and the federal maximum CSRA is [~~\$119,220~~] \$120,900.

DD. On or after January 1, 2018, the state minimum is \$31,290 and the federal maximum CSRA is \$123,600.

[8.200.510.11 NMAC - Rp, 8.200.510.11 NMAC, 7/1/2015; A/E, 1/1/2016; A/E, 3/1/2017; A/E, 8/30/2018; A, 12/11/2018]

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8.200.510.12 POST-ELIGIBILITY CALCULATION (MEDICAL CARE CREDIT): Apply applicable deductions in the order listed below when determining the medical care credit for an institutionalized spouse.

DEDUCTION	AMOUNT
A. Personal needs allowance for institutionalized spouse [\$69]	
(1) July 1, 2018	\$72
(2) July 1, 2017	\$70
B. Minimum monthly maintenance needs allowance (MMMNA) [\$2,002]	
(1) July 1, 2018	\$2,058
(2) July 1, 2017	\$2,030
C. The community spouse monthly income allowance (CSMIA) is calculated by subtracting the community spouse's gross income from the MMMNA:	
(1) If allowable shelter expenses of the community spouse [exceed \$600] <u>exceeds the minimum allowance then</u> deduct an excess shelter allowance from community spouse's income that includes: expenses for rent; mortgage (including interest and principal); taxes and insurance; any maintenance charge for a condominium or cooperative; and an amount for utilities (if not part of maintenance charge above); use the standard utility allowance (SUA) deduction used in the food stamp program for the utility allowance.	
(a) July 1, 2018	\$617
(b) July 1, 2017	\$609
(2) Excess shelter allowance may not exceed [a] <u>the maximum</u> [of \$1,021]	
(a) July 1, 2018	\$1,032
(b) Jan. 1, 2018	\$1,060
(c) July 1, 2017	\$993
D. Any extra maintenance allowance ordered by a court of jurisdiction or a state administrative hearing officer.	
E. Dependent family member income allowance (if applicable) calculated as follows: 1/3 X MMMNA - dependent member's income).	
F. Non-covered medical expenses.	
G. The maximum total of the community spouse monthly income allowance and excess shelter deduction may not exceed [\$3,023] <u>\$3,090</u> .	

[8.200.510.12 NMAC - Rp, 8.200.510.12 NMAC, 7/1/2015; A/E, 3/1/2017; A/E. 8/30/2018; A, 12/11/2018]

8.200.510.13 AVERAGE MONTHLY COST OF NURSING FACILITIES FOR PRIVATE PATIENTS USED IN TRANSFER OF ASSET PROVISIONS: Costs of care are based on the date of application registration.

DATE	AVERAGE COST PER MONTH
A. July 1, 1988 - Dec. 31, 1989	\$1,726 per month
B. Jan. 1, 1990 - Dec. 31, 1991	\$2,004 per month
C. Jan. 1, 1992 - Dec. 31, 1992	\$2,217 per month
D. Effective July 1, 1993, for application register on or after Jan. 1, 1993	\$2,377 per month
E. Jan. 1, 1994 - Dec. 31, 1994	\$2,513 per month
F. Jan. 1, 1995 - Dec. 31, 1995	\$2,592 per month
G. Jan. 1, 1996 - Dec. 31, 1996	\$2,738 per month
H. Jan. 1, 1997 - Dec. 31, 1997	\$2,889 per month
I. Jan. 1, 1998 - Dec 31, 1998	\$3,119 per month
J. Jan. 1, 1999 - Dec. 31, 1999	\$3,429 per month
K. Jan. 1, 2000 - Dec. 31, 2000	\$3,494 per month
L. Jan. 1, 2001 - Dec. 31, 2001	\$3,550 per month
M. Jan. 1, 2002 - Dec. 31, 2002	\$3,643 per month
N. Jan. 1, 2003 - Dec. 31, 2003	\$4,188 per month
O. Jan. 1, 2004 - Dec. 31, 2004	\$3,899 per month
P. Jan. 1, 2005 - Dec. 31, 2005	\$4,277 per month
Q. Jan. 1, 2006 - Dec. 31, 2006	\$4,541 per month
R. Jan. 1, 2007 - Dec. 31, 2007	\$4,551 per month
S. Jan. 1, 2008 - Dec. 31, 2008	\$4,821 per month
T. Jan. 1, 2009 - Dec. 31, 2009	\$5,037 per month
U. Jan. 1, 2010 - Dec. 31, 2010	\$5,269 per month
V. Jan. 1, 2011 - Dec. 31, 2011	\$5,774 per month
W. Jan. 1, 2012 - Dec. 31, 2012	\$6,015 per month

X.	Jan. 1, 2013 - Dec. 31, 2013
	\$6,291 per month
Y.	Jan. 1, 2014 - Dec. 31, 2014
	\$6,229 per month
Z.	Jan. 1, 2015 - Dec. 31, 2015
	\$6,659 per month
AA.	Jan. 1, 2016 - Dec. 31, 2016
	\$7,786 per month
BB.	Jan. 1, 2017 - Dec. 31, 2017
	\$7,485 per month
CC.	Jan. 1, 2018

\$7,025 per month
 [8.200.510.13 NMAC - Rp, 8.200.510.13 NMAC, 7/1/2015; A/E, 1/1/2016; A/E, 3/1/2017; A/E, 8/30/2018; A, 12/11/2018]

8.200.510.14 RESOURCE AMOUNTS FOR SUPPLEMENTAL SECURITY INCOME (SSI) RELATED MEDICARE SAVINGS PROGRAMS (QMB, SLIMB/QI AND QD): The following resource standards are inclusive of the \$1,500 per person burial exclusion.

A.	Individual
	[\$8,780]
	(1) Jan. 1, 2018
	<u>\$9,060</u>
	(2) Jan. 1, 2017
	<u>\$8,890</u>
B.	Couple
	[\$13,930]
	(1) Jan. 1, 2018
	<u>\$14,340</u>
	(2) Jan. 1, 2017
	<u>\$14,090</u>

[8.200.510.14 NMAC - Rp, 8.200.510.14 NMAC, 7/1/2015; A/E, 8/30/2018; A, 12/11/2018]

8.200.510.15 EXCESS HOME EQUITY AMOUNT FOR LONG-TERM CARE SERVICES:

A.	Jan. 2018
	<u>\$572,000</u>
[A:] B.	Oct. 2017

	\$560,000
[B:] C.	Jan. 2017
	<u>\$840,000</u>
[C:] D.	Jan. 2016
	<u>\$828,000</u>
[D:] E.	Jan. 2015
	<u>\$828,000</u>
[E:] F.	Jan. 2014
	<u>\$814,000</u>
[F:] G.	Jan. 2013
	<u>\$802,000</u>
[G:] H.	Jan. 2012
	<u>\$786,000</u>
[H:] I.	Jan. 2011
	<u>\$758,000</u>
[I:] J.	Jan. 2010
	<u>\$750,000</u>

[8.200.510.15 NMAC - Rp, 8.200.510.15 NMAC, 7/1/2015; A/E, 1/1/2016; A/E, 3/1/2017; A, 3/1/18; A/E, 8/30/2018; A, 12/11/2018]

HUMAN SERVICES DEPARTMENT MEDICAL SERVICES DIVISION

This is an amendment to 8.308.6 NMAC, Sections 9, 10 and part name, effective 1/1/2019.

TITLE 8 SOCIAL SERVICES CHAPTER 308 MANAGED CARE PROGRAM PART 6 [ELIGIBILITY] MANAGED CARE ORGANIZATION (MCO) ENROLLMENT

8.308.6.9 MANAGED CARE ELIGIBILITY:

A. General requirements: HSD determines eligibility for medicaid. An eligible recipient is required to participate in a HSD managed care program unless specifically excluded as listed below. Enrollment in a particular managed care organization (MCO) will be according to the eligible recipient's selection of a MCO at the time of application for eligibility, or during other permitted selection periods, or as assigned by HSD, if the eligible recipient makes no selection.

B. The following eligible recipients, as established by

their eligibility category, are excluded from managed care enrollment:

- (1) qualified medicare beneficiaries (QMB)-only recipients;
- (2) specified low income medicare beneficiaries (SLIMB) only;
- (3) qualified individuals;
- (4) qualified disabled working individuals;
- (5) refugees;
- (6) participants in the program of all inclusive care for the elderly (PACE);
- (7) children and adolescents in out-of-state foster care or adoption placements.; and
- (8) family planning-only eligible recipients.

C. Native Americans may opt into managed care. If a native American is dually-eligible or in need of long-term care services, he or she is required to enroll in a MCO.

D. For those individuals who are not otherwise eligible for medicaid and who meet the financial and medical criteria established by HSD, HSD or its authorized agent may further determine eligibility for managed care enrollment through a waiver allocation process contingent upon available funding and enrollment capacity.

[8.308.6.9 NMAC - Rp, 8.308.6.9 NMAC, 5/1/2018; A, 1/1/2019]

8.308.6.10 SPECIAL SITUATIONS:

A. HSD [has-established] newborn [eligibility] enrollment criteria.

(1) When a child is born to a member enrolled in a MCO, the hospital or other providers will complete a MAD [Form] form 313 (notification of birth) or its successor, prior to or at the time of discharge. HSD shall ensure that upon receipt of the MAD [Form] form 313 and upon completion of the eligibility process, the newborn is enrolled into his or her mother's MCO. The newborn is eligible for a period of 13 months,

starting with the month of his or her birth.

(2) When the newborn's mother is covered by health insurance through the New Mexico health insurance exchange and the mother's qualified health plan is also a HSD-contracted MCO, HSD will enroll the newborn into the mother's MCO as of the month of his or her birth.

(3) When the newborn member's mother is covered by health insurance through New Mexico health insurance exchange and the mother's qualified health plan is not a HSD-contracted MCO, HSD shall auto-assign and enroll the newborn in a medicaid MCO as of the month of his or her birth. ~~[The newborn's parent or legal guardian will have one opportunity during the three-month period from the effective date of enrollment to change the newborn's MCO assignment.]~~

(4) The newborn member's parent or legal guardian will have three months from the first day of the month of birth to change the newborn's MCO assignment. After the three month period, the newborn's MCO enrollment may only be changed for cause, as set forth in Paragraph (2) of Subsection H of 8.308.7.9 NMAC.

B. Community benefit eligibility:

(1) A member who meets a nursing facility (NF) level of care (LOC) and who does not reside in a NF will be eligible to receive home and community-based services and may choose to receive such services either through an agency-based or self-directed ~~[model according to the self-direction criteria]~~ approach as outlined in 8.308.12 NMAC.

(2) ~~[An individual who is not otherwise eligible for medicaid services but meets certain financial requirements and has a NF LOC determination may be eligible for enrollment through a waiver allocation process, contingent upon funding and enrollment capacity.]~~ Members who meet NFLOC and are eligible to receive

community benefits must be enrolled in a centennial care MCO.
[8.308.6.10 NMAC - Rp, 8.308.6.10 NMAC, 5/1/2018; A, 1/1/2019]

**HUMAN SERVICES
DEPARTMENT
MEDICAL SERVICES DIVISION**

This is an amendment to 8.308.7 NMAC, Sections 9 and 10, effective 1/1/2019.

8.308.7.9 MANAGED CARE ENROLLMENT

A. General: A medical assistance division (MAD) eligible recipient is required to enroll in a HSD managed care organization (MCO) unless he or she is:

- (1) a Native American and elects enrollment in MAD's fee-for-service (FFS); or
- (2) is in an excluded population. See 8.200.400 NMAC and 8.308.6 NMAC.

Enrollment in a MCO may be the result of the eligible recipient's selection of a particular MCO or assignment by HSD. The MCO shall accept as a member an eligible recipient in accordance with 42 CFR. 434.25 and shall not discriminate against, or use any policy or practice that has the effect of discrimination against the potential or enrolled member on the basis of health status, the need for health care services, or race, color, national origin, ancestry, spousal affiliation, sexual orientation or gender identity. HSD reserves the right to limit enrollment in a specific MCO.

B. Newly eligible recipients: An individual who applies for a MAP category of eligibility (COE) and has an approved ~~[eligibility]~~ COE effective date of January 1, ~~[2014]~~ 2019, or later, and who is required to enroll in a MCO, must select a MCO at the time of his or her application for a MAP ~~[category of eligibility]~~ COE. An eligible recipient who fails to select a MCO at such time will be auto assigned to a MCO. See Subsection C of this section. Members may

choose a different MCO one time during the first three months of their enrollment.

C. Auto assignment: HSD will auto-assign an eligible recipient to a MCO in specific circumstances, including but not limited to: a) the eligible recipient is not exempt from managed care and does not select a MCO at the time of his or her application for MAD eligibility; b) the eligible recipient cannot be enrolled in the requested MCO pursuant to the terms of this rule (e.g., the MCO is subject to and has reached its enrollment limit). HSD may modify the auto-assignment algorithm, at its discretion, when it determines it is in the best interest of the program, including but not limited to, sanctions imposed on the MCO, consideration of quality measures, cost or utilization management performance criteria.

(1) The HSD auto-assignment process will consider the following:

(a) if the eligible recipient was previously enrolled with a MCO and lost his or her eligibility for a period of six months or less, he or she will be re-enrolled with that MCO;

(b) if the eligible recipient has a family member enrolled in a specific MCO, he or she will be enrolled with that MCO;

(c) if the eligible recipient has family members who are enrolled with different MCOs, he or she will be enrolled with the MCO that the majority of other family members are enrolled with;

~~[(c)]~~ (d) if the eligible recipient is a newborn, he or she will be assigned to the mother's MCO for the month of birth, at a minimum; see Subsection A of 8.308.6.10 NMAC; or

~~[(c)]~~ (e) if none of the above applies, the eligible recipient will be assigned to an MCO using the default logic that auto assigns an eligible recipient to a MCO.

D. Effective date for a newly eligible recipient's enrollment in managed care: In most instances, the effective date of enrollment with a MCO will be the same as the effective date of eligibility approval. [~~In instances of an award of retroactive MAD eligibility, the effective date of managed care enrollment of the eligible recipient may not exceed a two-year retroactive span.~~]

E. Retroactive MCO enrollment is limited to up to six months prior to the current month for the following reasons:

- (1) retroactive medicare enrollment; or
- (2) retroactive changes in eligibility; or
- (3) retroactive nursing facility coverage; or
- (4) changes in race code from Native American to non-Native American.

~~[E.]~~ **E. Eligible recipient member lock-in:** A member's enrollment with a MCO is for a 12-month lock-in period. During the first three months [after] of his or her initial or annual MCO enrollment, either by the member's choice or by auto-assignment, he or she shall have one option to change MCOs for any reason, except as described below.

(1) If the member does not choose a different MCO during his or her first three months of enrollment, the member will remain with this MCO for the full 12-month lock-in period before being able to switch MCOs.

(2) If during the member's first three months of enrollment in the initially or annually-selected or a HSD assigned MCO, and he or she chooses a different MCO, he or she is subject to a new 12-month lock-in period and will remain with the newly selected MCO until the lock-in period ends. After that time, the member may switch to another MCO.

(3) At the conclusion of the 12-month lock-in period, the member shall have the option to select a new MCO, if desired. The member shall be notified of the option to switch MCOs 60 days

prior to the expiration date of the member's lock-in period, the deadline by when to choose a new MCO.

(4) If a member loses his or her MAD eligibility for a period of six months or less, he or she will be automatically re-enrolled with the former MCO. [If the member misses what would have been his or her annual switch MCO enrollment period, he or she may select another MCO within three months of reinstated MAD eligibility.]

(5) If an inmate, as defined at 8.200.410.17 NMAC, becomes a newly eligible recipient during incarceration and remains eligible at the time of their release, he or she will be enrolled with the MCO of their choice or auto-assigned to a MCO, unless they are Native American. Their initial 12 month lock-in period will begin on the first of the month of their release from incarceration.

(6) If a member misses what would have been his or her annual switch enrollment period due to incarceration, hospitalization or incapacitation, the member will have two months to choose a new MCO.

~~[F.]~~ **G. [Open MCO] Eligible recipient MCO open enrollment period:** The open [Open] enrollment [periods] period is the last two months of an eligible recipient's 12-month lock-in period, and is the time period during which [are when] a member can change his or her MCO [without having to wait until the end of the 12-month lock-in period] without having to provide a specific reason to HSD. The open enrollment period [and] may be initiated at HSD's discretion in order to support program needs.

~~[G.]~~ **H. Mass transfers from another MCO:** A MCO shall accept any member transferring from another MCO as authorized by HSD. The transfer of membership may occur at any time during the year.

~~[H.]~~ **I. Change of enrollment initiated by a member during a MCO lock-in period:**

(1) A member may select another MCO during his

or her annual renewal of eligibility, or re-certification period.

(2) A member may request to be switched to another MCO for cause, even during a lock-in period. The member must submit a written request to HSD or may submit an oral request by calling the New Mexico medicaid call center. Examples of "cause" include, but are not limited to:

(a) the MCO does not, because of moral or religious objections, cover the service the member seeks;

(b) the member requires related services (for example a cesarean section and a tubal ligation) to be performed at the same time, not all of the related services are available within the network, and his or her PCP or another provider determines that receiving the services separately would subject the member to unnecessary risk; and

(c) poor quality of care, lack of access to covered benefits, or lack of access to providers experienced in dealing with the member's health care needs.

(3) No later than the first calendar day of the second month following the month in which the request is filed by the member, HSD must respond in writing. If HSD does not respond timely, the request of the member is deemed approved. If the member is dissatisfied with HSD's determination, he or she may request a HSD administrative hearing; see 8.352.2 NMAC for detailed description.

(4) Native American opt-in and opt-out:

(a) Native American members in fee-for-service (FFS) may opt-in to managed care at any time during the year. MCO enrollment begins on the first calendar day of the month following HSD's receipt of the member's MCO opt-in request.

(b) Native American members may opt-out of managed care at any time during the year. MCO enrollment ends on the last calendar day of the

enrollment month in which HSD receives the opt-out request.

(c)

Native Americans who opt-in to managed care are not retroactively enrolled into managed care for prior months.

(d)

A Native American who is approved for a category of eligibility that is required to be enrolled with a MCO must follow Subsection E, F and H of 8.308.7.9 NMAC regarding MCO enrollment.

[8.308.7.9 NMAC - Rp, 8.308.7.9 NMAC, 5/1/2018; A, 1/1/2019]

8.308.7.10

DISENROLLMENT

A. Member

disenrollment initiated by a

MCO: The MCO shall not, under any circumstances, disenroll a member. The MCO shall not request disenrollment because of a change in the member’s health status, because of [the] his or her utilization of medical or behavioral health services, his or her diminished mental capacity, or uncooperative or disruptive behavior resulting from his or her special needs.

B. Other HSD

member disenrollment: A member may be disenrolled from a MCO or may lose his or her MAD eligibility if:

(1) he or

she moves out of the state of New Mexico;

(2) he or

she no longer qualifies for a MAP category of eligibility or has a change to a MAP category of eligibility that is not eligible for managed care enrollment;

(3) he or

she requests disenrollment for cause, including but not limited to the unavailability of a specific care requirement that none of the contracted MCOs are able to deliver and disenrollment is approved by HSD;

(4) a member

makes a request for disenrollment which is denied by HSD, but the denial is overturned in the member’s

HSD administrative hearing final decision; or

(5) HSD

imposes a sanction on the MCO that warranted disenrollment.

C. Effective date of

disenrollment: All HSD-approved disenrollment requests are effective on the first calendar day of the month following the month of the request for disenrollment, unless otherwise indicated by HSD. In all instances, the effective date shall be indicated on the termination record sent by HSD to the MCO.

[8.308.7.10 NMAC - Rp, 8.308.7.10 NMAC, 5/1/2018; A, 1/1/2019]

HUMAN SERVICES DEPARTMENT MEDICAL SERVICES DIVISION

This is an amendment to 8.308.9 NMAC, Sections 7, 17, and 23 through 26, effective 1/1/2019.

8.308.9.7 DEFINITIONS:

A. Alternative

benefits plan services with

limitations (ABP): The medical assistance division (MAD) category of eligibility “other adults” has an alternative benefit plan (ABP). The HSD contracted managed care organization (MCO) covers ABP specific services for an ABP member. Services are made available through MAD under a benefit plan similar to services provided by commercial insurance plans. ABP benefits include preventive services and treatment services. An ABP member has limitations on specific benefits; and does not have all MCO medicaid benefits available.

All early and periodic screening, diagnosis and treatment (EPSDT) program services are available to an ABP member under 21 years. ABP services for an ABP member under the age of 21 years are not subject to the duration, frequency, and annual or lifetime benefit limitations that are applied to an ABP eligible recipient 21 years of age and older. A MCO ABP contracted provider and an ABP member have rights and

responsibilities as described in Title 8 Chapter 308 NMAC, Social Services.

B. Alternative

benefits plan general benefits for ABP exempt member (ABP exempt):

An ABP member who self-declares he or she has a qualifying condition is evaluated by the MCO’s utilization management for determination if he or she meets the qualifying condition. An ABP exempt member utilizes his or her benefits described in 8.308.9 NMAC and in 8.308.12 NMAC.

C. Early childhood

home visiting program: A program that uses home visiting as a primary service delivery strategy and offers services on a voluntary basis to eligible pregnant women and their children from birth up to kindergarten entry, according to the program standard.

D. Evidence-based,

early childhood home visiting

program: A home visiting program that is recognized by the U.S. department of health & human services maternal, infant, and early childhood home visiting (MIECHV) project and:

(1) is

grounded in relevant, empirically-based best practice and knowledge that:

(a) is

linked to and measures the following outcomes:

(i)

babies that are born healthy;

(ii)

children that are nurtured by their parents and caregivers;

(iii)

children that are physically and mentally healthy;

(iv)

children that are ready for school;

(v)

children and families that are safe; and

(vi)

families that are connected to formal and informal supports in their communities;

(b)

has comprehensive home visiting standards that ensure high-quality

service delivery and continuous quality improvement; and

(c) _____

has demonstrated significant, sustained positive outcomes;

(2) _____ follows program standards that specify the purpose, outcomes, duration and frequency of services that constitute the program;

(3) _____ follows the curriculum of an evidence-based home visiting model;

(4) _____ employs well-trained and competent staff and provides continual professional supervision and development relevant to the specific program and model being delivered;

(5) _____ demonstrates strong links to other community-based services;

(6) _____ operates within an organization that ensures compliance with home visiting standards;

(7) _____ continually evaluates performance to ensure fidelity to the program standards;

(8) _____ collects data on program activities and program outcomes; and

(9) _____ is culturally and linguistically appropriate.

[8.308.9.7 NMAC - Rp, 8.308.9.7 NMAC, 5/1/2018; A, 1/1/2019]

8.308.9.17 PREVENTIVE PHYSICAL HEALTH SERVICES:

The MCO shall follow current national standards for preventive health services, including behavioral health preventive services. Standards are derived from several sources, including the U.S. preventive services task force, the centers for disease control and prevention; and the American college of obstetricians and gynecologists. Any preventive health guidelines developed by the MCO under these standards shall be adopted and reviewed at least every two years, updated when appropriate and disseminated to its practitioners and members. Unless a member refuses and the refusal is documented, the MCO shall provide the following

preventive health services or screens or document that the services (with the results) were provided by other means. The MCO shall document medical reasons not to perform these services for an individual member. Member refusal is defined to include refusal to consent to and refusal to access care.

A. Initial assessment:

The MCO shall conduct a health risk assessment (HRA), per HSD guidelines and processes, for the purpose of obtaining basic health and demographic information about the member, assisting the MCO in determining the need for a comprehensive needs assessment (CNA) for care coordination level assignment.

B. Family planning:

The MCO must have a family planning policy. This policy must ensure that a member of the appropriate age of both sexes who seeks family planning services is provided with counseling and treatment, if indicated, as it relates to the following:

- (1) methods of contraception; and
- (2) HIV and other sexually transmitted diseases and risk reduction practices.

C. Guidance:

The MCO shall adopt policies that shall ensure that an applicable asymptomatic member is provided guidance on the following topics unless the member's refusal is documented:

- (1) prevention of tobacco use;
- (2) benefits of physical activity;
- (3) benefits of a healthy diet;
- (4) prevention of osteoporosis and heart disease in a menopausal member citing the advantages and disadvantages of calcium and hormonal supplementation;
- (5) prevention of motor vehicle injuries;
- (6) prevention of household and recreational injuries;
- (7) prevention

of dental and periodontal disease;

- (8) prevention of HIV infection and other sexually transmitted diseases;
- (9) prevention of an unintended pregnancy; and
- (10) prevention or intervention for obesity or weight issues.

D. Immunizations:

The MCO shall adopt policies that to the extent possible, ensure that within six months of enrollment, a member is immunized according to the type and schedule provided by current recommendations of the state department of health (DOH). The MCO shall encourage providers to verify and document all administered immunizations in the New Mexico statewide immunization information system (SIIS).

E. Nurse advice line:

The MCO shall provide a toll-free clinical telephone nurse advice line function that includes at least the following services and features:

- (1) clinical assessment and triage to evaluate the acuity and severity of the member's symptoms and make the clinically appropriate referral; and
- (2) pre-diagnostic and post-treatment health care decision assistance based on the member's symptoms.

F. Prenatal care:

The MCO shall operate a proactive prenatal care program to promote early initiation and appropriate frequency of prenatal care consistent with the standards of the American college of obstetrics and gynecology. The program shall include at least the following:

- (1) educational outreach to a member of childbearing age;
- (2) prompt and easy access to obstetrical care, including an office visit with a practitioner within three weeks of having a positive pregnancy test (laboratory or home) unless earlier care is clinically indicated;
- (3) risk assessment of a pregnant member to identify high-risk cases for special management;

(4) counseling which strongly advises voluntary testing for HIV;

(5) case management services to address the special needs of a member who has a high risk pregnancy, especially if risk is due to psychosocial factors, such as substance abuse or teen pregnancy;

(6) screening for determination of need for a post-partum home visit; ~~and~~

(7) coordination with other services in support of good prenatal care, including transportation, other community services and referral to an agency that dispenses baby car seats free or at a reduced price; and

(8) referral to a home visiting pilot program for eligible pregnant women and children residing in the HSD-designated counties for services as outlined at 8.308.9.23 NMAC.

G. Screens: The MCO shall adopt policies which will ensure that, to the extent possible, within six months of enrollment or within six months of a change in screening standards, each asymptomatic member receives at least the following preventive screening services listed below.

(1) *Screening for breast cancer:* A female member between the ages of 40-69 years shall be screened every one to two years by mammography alone or by mammography and annual clinical breast examination.

(2) *Blood pressure measurement:* A member 18 years of age or older shall receive a blood pressure measurement at least every two years.

(3) *Screening for cervical cancer:* A female member with a cervix shall receive cytopathology testing starting at the onset of sexual activity, but at least by 21 years of age and every three years thereafter until reaching 65 years of age when prior testing has been consistently normal and the member has been confirmed not to be at high risk. If the member is at high risk, the frequency shall be at least annual.

(4) *Screening for chlamydia:* All sexually active female members 25 years of age and younger shall be screened for chlamydia. All female members over 25 years of age shall be screened for chlamydia if they inconsistently use barrier contraception, have more than one sex partner, or have had a sexually transmitted disease in the past.

(5) *Screening for colorectal cancer:* A member 50 years of age and older, who is at normal risk for colorectal cancer shall be screened with annual fecal occult blood testing or sigmoidoscopy or colonoscopy or double contrast barium at a periodicity determined by the MCO.

(6) *EPSDT screening for elevated blood lead levels:* A risk assessment for elevated blood lead levels shall be performed beginning at six months and repeated at nine months of age. A member shall receive a blood lead measurement at 12 months and 24 months of age. A member between the ages of three and six years, for whom no previous test exists, should also be tested, and screenings shall be done in accordance with the most current recommendations of the American academy of pediatrics.

(7) *EPSDT newborn screening:* A newborn member shall be screened for those disorders specified in the state of New Mexico metabolic screen and any screenings shall be done in accordance with the most current recommendations of the American academy of pediatrics.

(8) *Screening for obesity:* A member shall receive body weight, height and length measurements with each physical exam. A member under 21 years of age shall receive a BMI percentile designation.

(9) *Prenatal screening:* All pregnant members shall be screened for preeclampsia, Rh (D) incompatibility, down syndrome, neural tube defects, hemoglobinopathies, vaginal and rectal group B streptococcal infection

and screened and counseled for HIV in accordance with the most current recommendations of the American college of obstetricians and gynecologists.

(10) *Screening for rubella:* All female members of childbearing ages shall be screened for rubella susceptibility by history of vaccination or by serology.

(11) *Screening for tuberculosis:* Routine tuberculin skin testing shall not be required for all members. The following high-risk members shall be screened or previous screenings noted:

(a) a member who has immigrated from countries in Asia, Africa, Latin America or the middle east in the preceding five years;

(b) a member who has substantial contact with immigrants from those areas; a member who is a migrant farm worker;

(c) a member who is an alcoholic, homeless or is an injecting drug user. HIV-infected persons shall be screened annually; and

(d) a member whose screening tuberculin test is positive (>10 mm of induration) must be referred to the local DOH public health office in his or her community of residence for contact investigation.

(12) *Serum cholesterol measurement:* A male member 35 years and older and a female member 45 years and older who is at normal risk for coronary heart disease shall receive serum cholesterol and HDL cholesterol measurement every five years. A member 20 years and older with risk factors for heart disease shall have serum cholesterol and HDL cholesterol measurements annually.

(13) *Tot-to-teen health checks:* The MCO shall operate the tot-to-teen mandated EPSDT program as outlined in 8.320.2 NMAC. Within three months of enrollment lock-in, the MCO shall ensure that the member is current according to the screening schedule,

unless more stringent requirements are specified in these standards. The MCO shall encourage its PCPs to assess and document for age, height, gender appropriate weight, and body mass index (BMI) percentage during EPSDT screens to detect and treat evidence of weight or obesity issues in members under 21 years of age.

(14) Screening for type 2 diabetes: A member with one or more of the following risk factors for diabetes shall be screened. Risk factors include:

- (a)** a family history of diabetes (parent or sibling with diabetes); obesity (>twenty percent over desired body weight or BMI >27kg/m2);
- (b)** race or ethnicity (e.g. hispanic, native American, African American, Asian-Pacific islander);
- (c)** previously identified impaired fasting glucose or impaired glucose tolerance; hypertension (>140/90 mmHg); HDL cholesterol level <35 mg/dl and triglyceride level >250 mg/dl; history of gestational diabetes mellitus (GDM); and
- (d)** a delivery of newborn over nine pounds.

(15) A member 21 years of age and older must be screened to detect high risk for behavioral health conditions at his or her first encounter with a PCP after enrollment.

(16) The MCO shall require its PCPs to refer a member, whenever clinically appropriate, to behavioral health provider, see 8.321.2 NMAC. The MCO shall assist the member with an appropriate behavioral health referral.

(17) Screens and preventative screens shall be updated as recommended by the United States preventative services task force.
[8.308.9.17 NMAC - Rp, 8.308.9.17 NMAC, 5/1/2018; A, 1/1/2019]

8.308.9.23 CENTENNIAL HOME VISITING (CHV) PILOT PROGRAM SERVICES:

Beginning January 1, 2019, the benefit is available to approximately 300 eligible pregnant medicaid managed care enrolled members and their children who reside in Bernalillo county (other HSD-designated counties may be included at a later time and with a distinct enrollment limit) in accordance with the program standard. The MCO shall contract with agencies operating in the HSD-designated counties that provide services that are in alignment with one of the two following evidence-based early childhood home visiting delivery models:

A. Nurse family partnership (NFP): The services to be delivered under the NFP national program standards are for first-time parents only. In Bernalillo county, the program is anticipated to serve up to 132 families by the end of the first year of implementation using one NFP team and to approximately 240 eligible members (annual average at full implementation) thereafter using two NFP teams. The number of families served will be determined based on the number of active NFP teams in any program year. HSD may expand this program to other counties at HSD’s discretion dependent upon provider capacity. The NFP services will be suspended once the child reaches two years of age.

B. Parents as teachers (PAT): The PAT evidence-based program services will adhere to the national model and curriculum and serve approximately 60 families (annual average at full implementation) in Bernalillo county. Services will begin during pregnancy and may continue until the child reaches five years of age or kindergarten entry. HSD may expand this program to other counties at HSD’s discretion dependent upon provider capacity. The number of families served in other counties will be determined based on the number of active PAT teams in the program year. The MCO may propose other evidence-based early childhood home visiting delivery models with similar services in lieu of the PAT model if available in the HSD-designated service areas.

C. Description of services: The services available under the CHV pilot program are described below:

- (1) Prenatal home visits:** the benefit package includes the following services for eligible pregnant women during their pregnancy:
 - (a)** monitoring for high blood pressure or other complications of pregnancy (only covered under the NFP model);
 - (b)** diet and nutritional education;
 - (c)** stress management;
 - (d)** sexually transmitted disease (STD) prevention education;
 - (e)** tobacco use screening and cessation education;
 - (f)** alcohol and other substance misuse screening and counseling;
 - (g)** depression screening; and
 - (h)** domestic and intimate partner violence screening and education.
- (2)**

Postpartum home visits: the benefit package includes the following services that may be delivered as part of a postpartum home visit, when provided during the 60 day postpartum period to an eligible member:

- (a)** diet and nutritional education;
- (b)** stress management;
- (c)** sexually transmitted disease (STD) prevention education;
- (d)** tobacco use screening and cessation education;
- (e)** alcohol use and other substance misuse screening and counseling;
- (f)** depression screening;
- (g)** domestic and intimate partner violence screening and education;
- (h)**

breastfeeding support and education. Members may be referred to a lactation specialist, but lactation consultant services are not covered as a home visiting service;

(i)

guidance and education regarding wellness visits to obtain recommended preventive services;

(j)

medical assessment of the postpartum mother and infant (only covered under the NFP model);

(k)

maternal-infant safety assessment and education, such as safe sleep education for sudden infant death syndrome (SIDS) prevention;

(l)

counseling regarding postpartum recovery, family planning, and needs of a newborn;

(m)

assistance to the family in establishing a primary source of care and a primary care provider, including help ensuring that the mother/infant has a postpartum/newborn visit scheduled; and

(n)

parenting skills and confidence building.

(3) Infant and

children home visits: the benefit package includes the following services that may be delivered to newborn infants born to CHV Pilot Project members until the child reaches two years of age for NFP and five years of age or kindergarten entry for PAT, as part of an infant home visit;

(a)

breastfeeding support and education. Members may be referred to a lactation specialist, but lactation consultant services are not covered as a home visiting service;

(b)

child developmental screening at major developmental milestones from birth to age two for NFP according to the model standard practice, and age five or kindergarten entry for PAT; and

(c)

parenting skills and confidence building.

[8.308.9.23 NMAC - N, 1/1/2019]

[8.308.9.23] 8.308.9.24

SERVICES EXCLUDED FROM THE MCO BENEFIT PACKAGE:

MAD does not cover some services. For the following services that are covered in another MAP category of eligibility, reimbursement shall be made by MAD or its contractor. However, the MCO is expected to coordinate these services, when applicable, and ensure continuity of care by overseeing PCP consultations, medical record updates and general coordination.

A. Medicaid in the schools: Services are covered under 8.320.6 NMAC. Reimbursement for services is made by MAD or its contractor.

B. Special rehabilitation services-family infant toddler (FIT):

Early intervention services provided for a member birth to three years of age who has or is at risk for a developmental delay. Reimbursement for services is made by MAD or its contractor.

[8.308.9.23 NMAC - Rp, 8.308.9.23 NMAC, 5/1/2018; A and Rn, 1/1/2019]

[8.308.9.24] 8.308.9.25

EMERGENCY AND POST STABILIZATION SERVICES:

A. In this section, emergency medical condition means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in the following:

(1) Placing the health of the individual (or, for a pregnant woman, the health of the woman or her unborn child) in serious jeopardy.

(2) Serious impairment to bodily functions.

(3) Serious dysfunction of any bodily organ or part.

B. In this section, emergency services means covered inpatient and outpatient services as follows.

(1) Furnished by a provider that is qualified to furnish these services under the federal rules. See 42 CFR 438.114.

(2) Needed to evaluate or stabilize an emergency medical condition.

C. Post-stabilization care services means covered services, related to an emergency medical condition that are provided after a member is stabilized to maintain the stabilized condition, or, under the circumstances described 42 CFR 438.114 (e), to improve or resolve the member's condition.

D. The MCO is responsible for coverage and payment of emergency services and post-stabilization care services. The MCO must cover and pay for emergency services regardless of whether the provider that furnishes the services has a contract with the MCO. The MCO may not deny payment for treatment obtained under either of the following circumstances.

(1) A member had an emergency medical condition, including cases in which the absence of immediate medical attention would not have had the outcomes specified in the definition of emergency medical condition in Subsection A of 8.308.9.24 NMAC.

(2) A representative of the MCO instructs the member to seek emergency services.

E. The MCO may not:

(1) limit what constitutes an emergency medical condition with reference to Subsection A of 8.308.9.24 NMAC on the basis of lists of diagnoses or symptoms; or

(2) refuse to cover emergency services based on the emergency room provider or hospital not notifying the member's PCP or the MCO.

F. A member who has an emergency medical condition may not be held liable for payment of subsequent screening and treatment needed to diagnose the specific condition or stabilize the member.

G. The attending emergency physician, or the provider

actually treating the member, is responsible for determining when the member is sufficiently stabilized for transfer or discharge, and that determination is binding on the MCO that is responsible for coverage and payment.

[8.308.9.24 NMAC - Rp, 8.308.9.24 NMAC, 5/1/2018; A and Rn, 1/1/2019]

[8.308.9.25] 8.308.9.26

ADDITIONAL COVERAGE REQUIREMENTS:

A. The MCO may not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the member.

B. The services supporting members with ongoing or chronic conditions or who require long-term services and supports must be authorized in a manner that reflects the member’s ongoing need for such services and supports.

C. Family planning services are provided in a manner that protects and enables the member’s freedom to choose the method of family planning to be used consistent with 42 CFR 441.20, family planning services.

D. The MCO must specify what constitutes “medically necessary services” in a manner that:

(1) is no more restrictive than that used in the New Mexico administrative code (NMAC) MAD rules, including quantitative and non-quantitative treatment limits, as indicated in state statutes and rules. The state plan, and other state policy and procedures; and

(2) addresses the extent to which the MCO is responsible for covering services that address:

(a) the prevention, diagnosis, and treatment of a member’s disease, condition, or disorder that results in health impairments or disability;

(b) the ability for a member to achieve age-appropriate growth and development;

(c) the ability for a member to attain, maintain, or regain functional capacity; and

(d) The opportunity for a member receiving long-term services and supports to have access to the benefits of community living, to achieve person-centered goals, and live and work in the setting of his or her choice.

E. Authorization of services: For the processing of requests for initial and continuing authorizations of services, the MCO must:

(1) have in place, and follow, written policies and procedures;

(2) have in effect mechanisms to ensure consistent application of review criteria for authorization decisions;

(3) consult with the requesting provider for medical services when appropriate;

(4) authorize long term services and supports (LTSS) based on an enrollee’s current needs assessment and consistent with the person-centered service plan;

(5) assure that any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by an individual who has appropriate expertise in addressing the member’s medical, behavioral health, or LTSS needs;

(6) notify the requesting provider, and give the member written notice of any decision by the MCO to deny a service authorization request, or to authorize a service in an amount, duration, or scope that is less than requested and the notice must meet the requirements of 42 CFR 438.404, timely and adequate notice of adverse benefit determination; and

(7) for drug items that require prior authorization and drug items that are not on the MCO preferred drug list:

(a) provide a response by telephone

or other telecommunication device within 24 hours of a request for prior authorization;

(b) provide for the dispensing of at least a 72-hour supply of a covered outpatient prescription drug in an emergency situation;

(c) consider in the review process any medically accepted indications for the drug item consistent with the American hospital formulary service drug information; United States pharmacopeia-drug information (or its successor publications); the DRUGDEX information system; and peer-reviewed medical literature as described in section 1927(d)(5)(A) of the Social Security Act.

[8.308.9.25 NMAC - Rp, 8.308.9.25 NMAC, 5/1/2018; 8.308.9.26 NMAC - Rn, 8.308.9.25 NMAC, A and Rn, 1/1/2019]

HUMAN SERVICES DEPARTMENT MEDICAL SERVICES DIVISION

This is an amendment to 8.308.10 NMAC, Section 9, effective 1/1/2019.

8.308.10.9 CARE COORDINATION:

A. General requirements:

(1) Care coordination services are provided and coordinated with the eligible recipient member and his or her family, as appropriate. Care coordination involves, but is not limited to, the following: planning treatment strategies; developing treatment and service plans; monitoring outcomes and resource use; coordinating visits with primary care and specialists providers; organizing care to avoid duplication of services; sharing information among medical and behavioral care professionals and the member’s family; facilitating access to services; and actively managing transitions of care, including participation in hospital discharge planning.

Managed care organizations (MCOs) may delegate care coordination functions through a full delegation model or a shared functions model, while retaining oversight of all care coordination activities.

(a)

Full delegation model allows the MCO to delegate the full set of care coordination functions to a provider/health system (delegate) through a value-based purchasing (VBP) arrangement.

(b)

Shared functions model allows the MCO to delegate some care coordination functions such as conducting health risk assessments, conducting comprehensive needs assessments, conducting periodic touch points, coordinating referrals to community services, and locating and engaging difficult to engage medicaid members.

(2) Every member has the right to refuse to participate in care coordination. In the event the member refuses this service, the managed care organization (MCO) or MCO delegate will document the refusal in the member's file and report it to HSD. The member remains enrolled with the MCO with no reduction in the availability of services.

(3) If a native American member requests assignment to a native American care coordinator, the MCO or MCO delegate must employ or contract with a native American care coordinator or contract with a community health representative (CHR) to serve as the care coordinator.

(4) Individuals with special health care needs (ISHCN) require a broad range of primary, specialized medical, behavioral health and related services. ISHCN are individuals who have, or are at an increased risk for, a chronic physical, developmental, behavioral, neurobiological or emotional condition and who require health and related services of a type or amount beyond that required by other members. ISHCN have ongoing health conditions, high or complex

service utilization, and low to severe functional limitations. The primary purpose of the definition is to identify these members so that the MCO or MCO delegate shall facilitate access to appropriate services through its care coordination process and comply with provisions of 42 CFR Section 438.208.

B. Health risk assessment (HRA): The MCO or MCO delegate shall conduct a HSD approved health risk assessment (HRA) either by telephone, in person or as otherwise approved by HSD. The HRA is conducted for the purpose of:

- (1) introducing the MCO or MCO delegate to the member;
- (2) obtaining basic health and demographic information about the member; and
- (3) confirming the need for a comprehensive needs assessment (CNA); and
- (4) determining the need for a nursing facility (NF) level of care (LOC) assessment, as applicable.

Requirements for health risk assessments are defined in the HSD managed care policy manual (section 04 care coordination).

C. Assignment to care coordination levels two and three: The MCO or MCO delegate shall conduct a HSD approved CNA to assess the member's medical, behavioral health, and long term care needs and determine the care coordination level. Requirements for care coordination level two and three determinations are defined in the HSD managed care policy manual (section 04 care coordination).

D. Increase in the level of care coordination services: The requirements establishing a need for a CNA for a higher level of care coordination determination are defined in the HSD managed care policy manual (section 04 care coordination).

E. Comprehensive care plan requirements: The MCO or MCO delegate shall develop a comprehensive care plan (CCP) for

members in care coordination levels two and three. Requirements for CCP development are defined in the HSD managed care policy manual (section 04 care coordination).

F. On-going reporting: The MCO or MCO delegate shall require that the following information about the member's care is shared amongst medical, behavioral health, and long-term care providers:

- (1) drug therapy;
- (2) laboratory and radiology results;
- (3) sentinel events, such as hospitalization, emergencies, or incarceration;
- (4) discharge from a psychiatric hospital, a residential treatment service, treatment foster care, [or from] other behavioral health services, or release from incarceration; and
- (5) all LOC transitions.

~~**G. Electronic visit verification (EVV) system:**~~

~~(1) The MCO, together with the other MCOs, shall contract with a vendor to implement an EVV system in accordance with the federal Twenty-First Century Cures Act.~~

~~(2) The MCO shall maintain an EVV system capable of leveraging up to date technology as it emerges to improve functionality in all areas of the state, including rural areas.]~~

[8.308.10.9 NMAC - Rp, 8.308.10.9 NMAC, 5/1/2018; A, 1/1/2019]

**HUMAN SERVICES
DEPARTMENT
MEDICAL SERVICES DIVISION**

This is an amendment to 8.308.12 NMAC, Sections 7, 13, 16, 18 through 21 add 22, effective 1/1/2019.

8.308.12.7 DEFINITIONS:

A. Agency based community benefit (ABCB): The community benefit (CB) services offered to a member who does not wish to self-direct his or her CB services.

B. ABCB care plan: For a member who is participating in the ABCB approach, the care plan outlines the specific community benefit services that the member and the care coordinator have identified as needed services through the comprehensive needs assessment (CNA).

C. Authorized representative: The individual designated to represent and act on the member's behalf. The member or authorized representative must provide formal documentation authorizing the named individual or individuals to access the identified case information for a specified purpose and time frame. An authorized representative may be an attorney representing a person or household, a person acting under the authority of a valid power of attorney, a guardian, or any other individual or individuals designated in writing by the member.

D. Budget: The maximum budget allotment available to a self-directed community benefit (SDCB) member, determined by his or her CNA. Based on this maximum amount, the eligible member will develop a care plan in collaboration with their support broker to meet his or her assessed functional, medical and habilitative needs to enable that member to remain in the community.

E. Care coordinator: The care coordinator provides care coordination activities that comply with all state and federal requirements. This includes, but

is not limited to: assigning an appropriate care coordination level; performing a CNA a minimum of annually to determine physical, behavioral and long-term care needs; developing a comprehensive care plan and budget based on those needs; and delivering on-going care coordination services based on the member's assessed need and in accordance with the care plan and contractual obligations.

F. Community benefits (CB): Services that allow a member to receive care in his or her home or in the community as an alternative to being placed in a long-term care facility. Services are intended to supplement natural supports and are not available 24-hours per day.

G. Comprehensive care plan: A comprehensive plan that includes community benefit services that meet the member's long-term, physical and behavioral health care needs which must include, but is not limited to: the amount, frequency and duration of the community benefit services, the cost of goods and services; the type of provider who will furnish each service; other services the member will access; and the member's available supports that will complement community benefit services in meeting the member's needs. The member works with his or her care coordinator, support broker or both to develop a care plan which is submitted to the managed care organization (MCO) for review and approval.

H. Comprehensive needs assessment (CNA): The comprehensive needs assessment will be conducted in person, in the member's primary place of residence, by the MCO care coordinator for a member who is assigned a care coordination level of two or three. The CNA will assess the physical health, behavioral health, and long-term care needs; identify potential risks and provide social and cultural information. The results of the CNA will be used to create the care plan which is based on the member's assessed needs.

I. Electronic Visit Verification (EVV): A telephone and computer based system that electronically verifies the occurrence of HSD selected services visits and documents the precise time the service begins and ends.

[F.] J. Eligible member: A medical assistance programs (MAP) enrolled MCO member who meets a specific level of care (LOC) and who selects to receive his or her MCO community benefits either through the ABCB or the self-directed community benefit (SDCB) approach. The eligible member must continue to meet a specific LOC and financial eligibility to continue accessing his or her MCO community benefits.

[F.] K. Employer of record (EOR): The employer of record is the individual responsible for directing the work of the member's SDCB employees, including recruiting, hiring, managing and terminating all employees. The EOR tracks expenditures for employee payroll, goods, and services. The EOR authorizes the payment of timesheets by the financial management agency (FMA). A member through the use of the EOR self-assessment instrument is either deemed able to be his or her own EOR or the member must assign the EOR duties to another eligible individual meeting specific EOR qualifications. A member who is a minor or a member who has a plenary or limited guardianship or conservatorship over financial matters in place is not able to be his or her own EOR. If the recipient is his or her own EOR and delegates any EOR responsibilities through a power of attorney (POA) or other legal instrument, the delegate must be the designated EOR. A POA or other legal instrument shall not be used to assign the responsibilities of an EOR, in part or in full, to another individual and shall not be used to circumvent the requirements of the EOR as designated in this rule.

[K.] L. Financial management agency (FMA): An entity that contracts with a HSD MCO to provide the fiscal administration

functions for members participating in the SDCB approach.

[E.] M. Individual Plan of Care (IPoC): The plan for the provision of an ABCB member’s personal care services. The plan is developed by the personal care services (PCS) agency and approved by the member’s MCO.

[M:] N. Legally responsible individual (LRI): A legally responsible individual is any person who has a duty under state law to care for another person. This category typically includes: the parent (biological, legal, or adoptive) of a minor child; the guardian of a minor child who must provide care to the child; or a spouse.

[N:] O. Nursing Facility level of care (NF LOC): The member’s functional level is such that (2) two or more activities of daily living (ADLs) cannot be accomplished without consistent, ongoing, daily provision, of some or all of the following levels of service: skilled, intermediate or assistance. A member must meet the NF LOC to be eligible for community benefit services.

[O:] P. Self-directed community benefit (SDCB): The CB services offered to a member who is able to and who chooses to self-direct his or her CB services.

[P:] Q. SDCB care plan: For a member who selected the SDCB approach, the care plan includes the services that the member and the support broker have identified through the CNA that will be purchased with the member’s budget.

[Q:] R. Support broker: The function of the support broker is to directly assist the member in implementing the care plan and budget to ensure access to SDCB services and supports and to enhance success with self-direction. The support broker’s primary function is to assist the member with employer or vendor related functions and other aspects of implementing his or her care plan and budget.

[8.308.12.7 NMAC - Rp, 8.308.12.7 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.13 COVERED SERVICES IN AGENCY BASED COMMUNITY BENEFIT (ABCB):

A. Adult day health: adult day health services provide structured therapeutic, social and rehabilitative services designed to meet the specific needs and interests of a member that are incorporated into the member’s care plan.

(1) Adult day health services are provided by a licensed community-based adult day-care facility that offers health and social services to assist a member to achieve his or her optimal functioning.

(2) Private duty nursing services and skilled maintenance therapies (physical, occupational and speech) may be provided within the adult day health setting and in conjunction with adult day health services but are reimbursed separately from adult day health services.

(3) Adult day health settings must be integrated and support full access of individuals receiving medicaid home and community-based services (HCBS) to the greater community, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving medicaid HCBS.

B. Assisted living is a residential service that provides a homelike environment, which may be in a group setting, with individualized services designed to respond to the member’s needs as identified and incorporated in the care plan.

(1) Core services are a broad range of activities of daily living (ADL) including: personal support services (homemaker, chore, attendant services, meal preparation); companion services; medication oversight (to the extent permitted under state law); 24-hour on-site response capability:

(a) to meet scheduled or unpredictable member’s needs; and

(b) to provide supervision, safety, and security.

(2) Services include social and recreational programming. Coverage does not include 24-hour skilled care or supervision or the cost of room or board. Nursing and skilled therapy services are incidental, rather than integral to, the provision of assisted living services. Services provided by third parties must be coordinated with the assisted living provider.

(3) Assisted living settings must be integrated and support full access of individuals receiving Medicaid home and community-based services (HCBS) to the greater community, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving medicaid HCBS.

(4) Assisted living settings must meet CMS requirements for residential settings as outlined in the MAD MCO policy manual.

C. Behavior support consultation is the provision of assessment, treatment, evaluation and follow-up services to assist the member, his or her parents, family, and primary caregivers with coping skills which promote maintaining the member in a home environment.

(1) Behavior support consultation:

(a) informs and guides the member’s paid and unpaid caregivers about the services and supports that relate to the member’s medical and behavioral health condition;

(b) identifies support strategies for a member that ameliorate contributing factors with the intention of enhancing functional capacities, adding to the provider’s competency to predict, prevent and respond to interfering behavior and potentially reducing interfering behavior;

(c) supports effective implementation based on a member’s functional assessment;

(d) collaborates with medical and ancillary therapists to promote coherent and coordinated services addressing behavioral issues and to limit the need for psychotherapeutic medications; and

(e) monitors and adapts support strategies based on the response of the member and his or her services and supports providers.

(2) Based on the member’s care plan, services are delivered in an integrated, natural setting or in a clinical setting.

D. Community transition services are non-recurring set-up expenses for a member who is transitioning from an institutional or another provider-operated living arrangement (excluding assisted living) to a living arrangement in a private residence where the member is directly responsible for his or her own living expenses.

(1) Allowable expenses are those necessary to enable the member to establish a basic household that does not constitute room and board and may include:

(a) security deposits that are required to obtain a lease on an apartment or home;

(b) essential household furnishings required to occupy and use a community domicile, including furniture, window coverings, food preparation items, and bed and bath linens;

(c) set-up fees or deposits for utility or service access, including telephone, electricity, heating and water;

(d) services necessary for the member’s health and safety, such as, but not limited to, pest eradication and one-time cleaning prior to occupancy; [and]

(e) moving expenses; and

(f) security deposit for an assisted living facility placement up to five hundred dollars (\$500).

(2) Community transition services do not include monthly rental or mortgage expenses, food, regular utility charges, household appliances, or items that are intended for purely diversional or recreational purposes.

(3) Community transition services are limited to three thousand five hundred dollars (\$3500) per member every five years. In order to be eligible for this service, the member must have a NF stay of at least 90-consecutive days prior to transition to the community.

E. Emergency response services provide an electronic device that enables a member to secure help in an emergency at his or her home, avoiding institutionalization. The member may also wear a portable “help” button to allow for mobility. The system is connected to the member’s phone and programmed to signal a response center when the “help” button is activated. The response center is staffed by trained professionals. Emergency response services include: testing and maintaining equipment; training the member, his or her caregivers and first responders on use of the equipment; 24-hour monitoring for alarms; checking systems monthly or more frequently (if warranted by electrical outages, severe weather, etc.); and reporting member emergencies and changes in the member’s condition that may affect service delivery.

F. Employment supports include job development, job seeking and job coaching supports after available vocational rehabilitation supports have been exhausted.

(1) The job coach provides:

(a) training, skill development;

(b) employer consultation that a member may require while learning to perform specific work tasks on the job;

(c) co-worker training;

(d) job site analysis;

(e) situational and vocational assessments and profiles;

(f) education of the member and co-workers on rights and responsibilities; and

(g) benefits counseling. The service must be tied to a specific goal in the member’s care plan.

(2) Job development is a service provided to a member by skilled staff. The service has five components:

(a) job identification and development activities;

(b) employer negotiations;

(c) job restructuring;

(d) job sampling; and

(e) job placement.

(3) Employment supports are provided by staff at current or potential work sites. When supported employment services are provided at a work site where persons without disabilities are employed, payment is made only for the adaptations, supervision and training required by the member receiving services as a result of his or her disabilities, and does not include payment for the supervisory activities rendered as a normal part of the business setting.

(4) Payment shall not be made for incentive payments, subsidies, or unrelated vocational training expenses such as the following:

(a) incentive payments made to an employer to encourage or subsidize the employer’s participation in a supported employment program;

(b) payments that are passed through to users of supported employment programs; or

(c) payments for training that is not directly related to a member’s supported employment program.

(5) Federal financial participation cannot be claimed to defray expenses associated with starting up or operating a business.

(6) Employment supports settings must be integrated and support full access of individuals receiving medicaid HCBS to the greater community, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving medicaid HCBS.

G. Environmental modification services include: the purchase of, the installation of equipment for the physical adaptations to a member's residence that are necessary to ensure the health, welfare, and safety of the member or enhance the member's level of independence.

(1) Adaptations include the installation of:

- (a) ramps and grab-bars;
- (b) widening of doorways and hallways;
- (c) installation of specialized electric and plumbing systems to accommodate medical equipment and supplies;
- (d) lifts and elevators;
- (e) modification of bathroom facilities (roll-in showers, sink, bathtub, and toilet modifications, water faucet controls, floor urinals and bidet adaptations and plumbing);
- (f) turnaround space adaptations;
- (g) specialized accessibility/safety adaptations/additions;
- (h) trapeze and mobility tracks for home ceilings;
- (i) automatic door openers/doorbells;
- (j) voice-activated, light-activated, motion-activated and electronic devices;

(k) fire safety adaptations; air filtering devices;

(l) heating and cooling adaptations;

(m) glass substitute for windows and doors; modified switches, outlets or environmental controls for home devices; and

(n) alarm and alert systems, including signaling devices.

(2) All services shall be provided in accordance with applicable federal and state statutes, regulations and rules and local building codes.

(3) Non-covered adaptations or improvements to the member's home include:

- (a) adaptations for general utility which are not for direct medical or remedial benefit to the member; and
 - (b) adaptations that add to the total square footage of the member's resident except when necessary to complete an approved adaptation.
- (4) The environmental modification provider must:
- (a) ensure proper design criteria is addressed in planning and design of the adaptation;
 - (b) provide or secure the appropriate licensed contractor or approved vendor to provide construction and remodeling services;
 - (c) provide administrative and technical oversight of construction projects;
 - (d) provide consultation to members, family members, providers and contractors concerning environmental modification projects to the member's residence; and
 - (e) inspect the final environmental modification project to ensure that the adaptations meet the approved plan submitted for environmental adaptation.

(5) Environmental modification services to a member are limited to five-thousand dollars (\$5,000) every five years. Additional services may be requested if the member's health and safety needs exceed the specified limit.

H. Home health aide services provide total care or assist the member in all ADLs.

(1) Total care includes: the provision of bathing (bed, sponge, tub, or shower); shampoo (sink, tub, or bed); care of nails and skin; oral hygiene; toileting and elimination; safe transfer techniques and ambulation; normal range of motion and positioning; and adequate oral nutrition and fluid intake.

(2) The home health aide services assist the member in a manner that promotes an improved quality of life and a safe environment for him or her. Home health aide services can be provided outside the member's home.

(3) Home health aides may provide basic non-invasive nursing assistant skills within the scope of their practice. Home health aides perform an extension of therapy services including:

- (a) bowel and bladder care;
- (b) ostomy site care;
- (c) personal care;
- (d) ambulation and exercise;
- (e) household services essential to health care at home;
- (f) assisting with medications that are normally self-administered;
- (g) reporting changes in patient conditions and needs; and
- (h) completing appropriate records.

(4) Home health aide services must be provided under the supervision of a registered nurse (RN) licensed by the New Mexico board of nursing, or other

appropriate professional staff. Such staff must make a supervisory visit to the member's residence at least every two weeks to observe and determine whether the member's goals are being met.

I. Nutritional counseling services include assessment of the member's nutritional needs, development and revision of the member's nutritional plan, counseling and nutritional intervention, and observation and technical assistance related to implementation of the nutritional plan.

[F] J. Personal care services (PCS) are provided to a member unable to perform a range of ADLs and instrumental activities of daily living (IADL). PCS shall not replace natural supports such as the member's family, friends, individuals in the community, clubs, and organizations that are able and consistently available to provide support and service to the member. Use of the Electronic Visit Verification (EVV) system is required for payment of PCS. The managed care organizations shall collaborate to offer a single EVV vendor for PCS and monitor compliance with the federal 21st Century Cures Act.

(1) PCS is a benefit for a member 21 years of age or older who meets the eligibility for CB services. A member under 21 years of age must access PCS through the EPSDT program.

(2) PCS delivery models: A member may select either the consumer-delegated or the consumer-directed delivery of his or her PCS. The PCS consumer-delegated or consumer-directed agency must be certified as such by MAD or its designee to perform such duties and to be reimbursed for the delivery model of those services. The MCO's care coordinator is responsible for explaining both models to each member, initially, and annually thereafter.

(a) The consumer delegated (PCS/ CDelegated) model allows the member to select his or her PCS

agency to perform all PCS employer-related tasks. This agency is responsible for ensuring all PCS are delivered to the member.

(b) The consumer-directed (PCS/ CDirected) model allows the member to oversee his or her own PCS delivery, and requires that the member work with his or her PCS agency who then acts as a fiscal intermediary agency to process all financial paperwork to be submitted to the MCO.

(c) If a member is unable to select or unable to communicate which PCS delivery model he or she selects, then his or her authorized representative will select on behalf of the member. The member's authorized representative status must be properly documented with the member's PCS agency.

(d) For both models, the member may select his or her family member, with the exception of the member's spouse. A friend; neighbor; or other person may also be selected as his or her PCS attendant. A family member shall not be reimbursed for a service he or she would have otherwise provided as a natural support. A PCS attendant, regardless of family relationship, who resides with the member shall not be paid to deliver household services, or supports such as shopping, errands, or meal preparation that are routinely provided as part of the household division of chores, unless those services are specific to the member.

(e) A member may have a relative, friend, or other spokesperson assisting him or her with communicating information or instructions to the member's attendant, providing information concerning the member's natural services or supports needs during the member's assessment, or fulfilling additional roles as designated by the member or the member's authorized representative in writing. A spokesperson may not make decisions on behalf of a member, which is the member or member's authorized representative's sole responsibility, unless the member's authorized

representative is also the member's spokesperson.

(3) Eligible PCS agencies: PCS agencies electing to provide PCS must obtain agency certification. A PCS agency provider, must comply with the requirements as listed in the MAD MCO policy manual PCS agencies must be an enrolled MAD provider.

(4) Bladder and bowel care: PCS must be related to the member's functional level to perform ADLs and IADLs as indicated in the members CNA. PCS will not include those services, or supports the member does not need or is already receiving from other sources including tasks provided by natural supports.

(a) A member who has a signed statement by his or her primary care provider (PCP) stating he or she is medically stable and able to communicate and assess his or her bladder and bowel care needs may access this service when included in his or her individual care plan.

(i) bowel care includes the evacuation and ostomy care, changing and cleaning of such bags and ostomy site skin care;

(ii) bladder care includes the attendant cueing the member to empty his or her bladder at timed intervals to prevent incontinence; and

(iii) catheter care, including the changing and cleaning of such bag.

(b) A member who is determined by his or her PCP in a signed statement to not be medically stable and not able to communicate and assess his or her bladder and bowel care needs may access these services:

(i) perineal care including cleansing of the perineal area and changing of feminine sanitary products;

(ii) toileting including assisting with bedside commode or bedpan;

(iii) cleaning perineal area,

(iv) changing adult briefs or pads;
 (v) cleaning changing of wet or soiled clothing; and

(vi) assisting with adjustment of clothing before and after toileting.

(5) Meal preparation and assistance: Meal preparation includes cutting ingredients to be cooked, cooking meals, placing and presenting the meal in front the member to eat, cutting up food into bite-sized portions for the member, or assisting the member as stated in his or her individual plan of care (IPoC). This includes provision of snacks and fluids and may include mobility assistance and prompting or cueing the member to prepare meals.

(6) Eating: Feeding or assisting the member with eating a prepared meal using a utensil or specialized utensils is a covered service. Eating assistance may include mobility assistance and prompting or cueing a member to ensure appropriate nutritional intake and monitor for choking. If the member has special needs in this area, the PCS agency will include specific instruction in the member's IPoC on how to meet those needs. Gastrostomy feeding and tube feeding are not covered services.

(7) Household support services: This service is for assisting and performing interior household activities and other support services that provide additional assistance to the member. Interior household activities are limited to the upkeep of the member's personal living areas to maintain a safe and clean environment for the member, particularly a member who may not have adequate support in his or her residence. Assistance may include mobility assistance and prompting and cueing a member to ensure appropriate household support services.

(a) An attendant who resides in the same household as the member may not be paid for household support

services routinely provided as part of the household division of chores, unless those services are specific to the member such as, changing the member's linens, and cleaning the member's personal living areas.

(b) Services include:

(i) sweeping, mopping, or vacuuming;

(ii) dusting furniture;

(iii) changing linens;

(iv) washing laundry;

(v) cleaning bathrooms includes tubs, showers, sinks, and toilets;

(vi) cleaning the kitchen and dining area including washing dishes, putting them away; cleaning counter tops, and eating areas, etc.; household services do not include cleaning up after other household members or pets;

(vii) minor cleaning of an assistive device, wheelchair and durable medical equipment (DME) is a covered service. A member must have an assistive device requiring regular cleaning that cannot be performed by the member and is not cleaned regularly by the supplier of the assistive device to be eligible to receive services under this category;

(viii) shopping or completing errands specific to the member with or without the member;

(ix) cueing a member to feed and hydrate his or her documented personal assistance animal or feed and hydrate such an animal when the member is unable;

(x) assistance with battery replacement and minor, routine wheelchair and DME maintenance is a covered service. A member must have an assistive device that requires regular maintenance, that is not already provided by the supplier of the assistive device, and that the member cannot maintain in order to be eligible to receive services under this category;

(xi) assisting a member self-administering: assistance with self-administering physician ordered (prescription) medications is limited to prompting and reminding only. The use of over the counter medications does not qualify for this service. A member must meet the definition of "ability to self-administer" defined in this section, to be eligible to receive time for this task. A member who does not meet the definition of ability to self-administer is not eligible for this service. This assistance does not include administration of injections, which is a skilled/nursing task; splitting or crushing medications or filling medication boxes. Assistance includes: getting a glass of water or other liquid as requested by the member for the purpose of taking medications; at the direction of the member, handing the member his or her daily medication box or medication bottle; and at the direction of the member, helping a member with placement of oxygen tubes for members who can communicate to the caregiver the dosage or route of oxygen; and

(xii) transportation of the member: transportation shall only be for non-medically necessary events and may include assistance with transfers in and out of vehicles. Medically necessary transportation services may be a covered PCS service when the MCO has assessed and determined that other medically necessary transportation services are not available through other state plan services.

(8) Hygiene and grooming: The attendant may perform for the member or the attendant may cue and prompt the member to perform the following services:
 (a) bathing to include giving a sponge bath in the member's bed, bathtub or shower; transferring in and out of the bathtub or shower, turning water on and off; selecting a comfortable water temperature; bringing in water from outside or heating water for the member;

(xi) assisting a member self-administering: assistance with self-administering physician ordered (prescription) medications is limited to prompting and reminding only. The use of over the counter medications does not qualify for this service. A member must meet the definition of "ability to self-administer" defined in this section, to be eligible to receive time for this task. A member who does not meet the definition of ability to self-administer is not eligible for this service. This assistance does not include administration of injections, which is a skilled/nursing task; splitting or crushing medications or filling medication boxes. Assistance includes: getting a glass of water or other liquid as requested by the member for the purpose of taking medications; at the direction of the member, handing the member his or her daily medication box or medication bottle; and at the direction of the member, helping a member with placement of oxygen tubes for members who can communicate to the caregiver the dosage or route of oxygen; and

(xii) transportation of the member: transportation shall only be for non-medically necessary events and may include assistance with transfers in and out of vehicles. Medically necessary transportation services may be a covered PCS service when the MCO has assessed and determined that other medically necessary transportation services are not available through other state plan services.

(8) Hygiene and grooming: The attendant may perform for the member or the attendant may cue and prompt the member to perform the following services:

(a) bathing to include giving a sponge bath in the member's bed, bathtub or shower; transferring in and out of the bathtub or shower, turning water on and off; selecting a comfortable water temperature; bringing in water from outside or heating water for the member;

(b) dressing to include putting on, fastening, and removing clothing including shoes;

(c) grooming to include combing or brushing hair, applying make-up, trimming beard or mustache, braiding hair, shaving under arms, legs or face;

(d) oral care for a member with intact swallowing reflex to include brushing teeth, cleaning dentures or partials including the use of floss, swabs, or mouthwash;

(e) nail care to include cleaning, filing to trim, or cuticle care for member's without a medical condition. For a documented medically at-risk member; nail care is not covered under PCS; it is a skilled nurse service. Medically at risk conditions include, but are not limited to venous insufficiency, diabetes, peripheral neuropathy;

(f) applying lotion or moisturizer to intact skin for routine skin care;

(g) physician ordered skin care is limited to the application of skin cream when a member has a documented chronic skin condition and is determined by his or her PCP unable to self-administer the medication. The member's PCP must order a prescription or over-the-counter medication to treat the condition.

(i) When the PCP determines the member is able to self-administer the prescribed or over-the-counter medication the attendant is limited to prompting and reminding the member.

(ii) PCS does not include the care of a member's wounds, open sores, debridement or dressing of open wounds.

(h) prompting or cueing to ensure appropriate bathing, dressing, grooming, oral care, nail care and application of lotion for routine skin care; and

(i) mobility assistance to ensure

appropriate bathing, dressing, grooming, oral care and skin care.

(9) Supportive mobility assistance: Physical or verbal prompting and cueing mobility assistance provided by the attendant that is not already included as part of other PCS includes assistance with:

(a) ambulation to include moving around inside or outside the member's residence or living area with or without an assistive device such as a walker, cane or wheelchair;

(b) transferring to include moving to and from one location or position to another with or without an assistive device such as in and out of a vehicle;

(c) toileting to include transferring on or off a toilet; and

(d) repositioning to include turning or changing a bed-bound member's position to prevent skin breakdown.

(10) Non-covered services: The following services are not covered as PCS:

(a) services to an inpatient or resident of a hospital, NF, ICF-IID, mental health facility, correctional facility, or other institutional settings, with the exception when a member is transitioning from a NF;

(b) services that are already provided by other sources, including natural supports;

(c) household services, support services such as shopping, errands, or meal preparation that are routinely provided as part of the household division of chores;

(d) services provided by a person not meeting the requirements and qualifications of a personal care attendant; including but not limited to, training and criminal background checks;

(e) services not approved in the member's IPoC;

(f) childcare, pet care, or personal care

for other household members. This does not include the member's documented assistant service animal;

(g) retroactive services;

(h) services provided to an individual who is not a MCO member or does not meet the eligibility criteria for CB services;

(i) member assistance with finances and budgeting;

(j) member appointment scheduling;

(k) member range of motion exercises;

(l) wound care of open sores and debridement or dressing of open wounds;

(m) filling of medication boxes, cutting or grinding pills, administration of injections, assistance with over-the-counter medication or medication that the member cannot self-administer;

(n) skilled nail care for a member documented as medically at-risk;

(o) medically necessary transportation when available through the member's MCO general benefit services;

(p) bowel and bladder services that include insertion or extraction of a catheter or digital stimulation; and

(q) gastrostomy feeding and tube feeding.

[F] K. Private duty nursing services include activities, procedures, and treatment for a physical condition, physical illness, or chronic disability for a member who is 21 years of age and older with intermittent or extended direct nursing care in his or her home.

(1) Services include:

(a) medication management;

(b) administration and teaching;

(c) aspiration precautions;

(d) feeding tube management;

(e) gastrostomy and jejunostomy;
 (f) skin care;
 (g) weight management;
 (h) urinary catheter management;
 (i) bowel and bladder care;
 (j) wound care;
 (k) health education;
 (l) health screening;
 (m) infection control;
 (n) environmental management for safety;
 (o) nutrition management;
 (p) oxygen management;
 (q) seizure management and precautions;
 (r) anxiety reduction;
 (s) staff supervision; and
 (t) behavior and self-care assistance.

(2) All services are provided under a written physician's order and must be rendered by a New Mexico board of nursing licensed RN or a licensed practical nurse (LPN) who provides services within his or her scope of practice.

[K:] L. Respite services are provided to a member unable to care for him or herself and are furnished on a short-term basis to allow the member's primary caregiver a limited leave of absence in order to reduce stress, accommodate a caregiver illness, or meet a sudden family crisis or emergency. Respite provides a temporary relief to the primary caregiver of a CB member during times when he/she would normally provide unpaid care.

(1) Respite care is furnished at home, in a private residence of a respite care provider, in a specialized foster care home,

in a hospital or NF, that meet the qualifications for MAD provider enrollment requirements. For purposes of ABCB eligibility, when respite services are delivered through an institutional provider, the member is not considered a resident of the institution.

(2) Respite care services include:

- (a) medical and non-medical health care;
- (b) personal care; bathing;
- (c) showering; skin care;
- (d) grooming;
- (e) oral hygiene;
- (f) bowel and bladder care;
- (g) catheter and supra-pubic catheter care;
- (h) preparing or assisting in preparation of meals and eating;
- (i) administering enteral feedings;
- (j) providing home management skills;
- (k) changing linens;
- (l) making beds;
- (m) washing dishes;
- (n) shopping; errands;
- (o) calls for maintenance;
- (p) assisting with enhancing self-help skills, such as promoting use of appropriate interpersonal communication skills and language, working independently without constant supervision or observation;
- (q) providing body positioning, ambulation and transfer skills;
- (r) arranging for transportation to medical or therapy services;
- (s) assisting in arranging health care needs and follow-up as directed by

primary care giver, physician, and care coordinator; and

(t) ensuring the health and safety of the member at all times.

(3) Respite may be provided on either a planned or an unplanned basis and may be provided in a variety of settings. If unplanned respite is needed, the appropriate agency personnel will assess the situation, and with the caregiver, recommend the appropriate setting for respite services to the member. Services must only be provided on an intermittent or short-term basis because of the absence or need for relief of those persons normally providing care to the member.

(4) Respite services are limited to a maximum of [100] 300 hours annually per care plan year. Additional hours may be requested if a member's health and safety needs exceed the specified limit.

[H:] M. Skilled maintenance therapy services for a member 21 years and older are provided when his or her MCO's general physical health benefit skilled therapy services are exhausted or are not a MCO covered benefit. The community benefit skilled maintenance therapy services include physical therapy, occupational therapy or speech language therapy. Therapy services focus on improving functional independence, health maintenance, community integration, socialization, and exercise, and enhance the support and normalization of the member's family relationships.

(1) Physical therapy services promote gross and fine motor skills, facilitate independent functioning and prevent progressive disabilities. Specific services may include but are not limited to:

- (a) professional assessment, evaluation and monitoring for therapeutic purposes;
- (b) physical therapy treatments and interventions;

(c) training regarding PT activities;

(d) use of equipment and technologies or any other aspect of the member’s physical therapy services;

(e) designing, modifying or monitoring use of related environmental modifications;

(f) designing, modifying, and monitoring use of related activities supportive to the care plan goals and objectives; and

(g) consulting or collaborating with other service providers or family enrollees, as directed by the member.

(2) Occupational therapy (OT) services promote fine motor skills, coordination, sensory integration, and facilitate the use of adaptive equipment or other assistive technology. Specific services may include but are not limited to:

(a) teaching of daily living skills;

(b) development of perceptual motor skills and sensory integrative functioning;

(c) design, fabrication, or modification of assistive technology or adaptive devices;

(d) provision of assistive technology services;

(e) design, fabrication, or applying selected orthotic or prosthetic devices or selecting adaptive equipment;

(f) use of specifically designed crafts and exercise to enhance function; training regarding OT activities; and

(g) consulting or collaborating with other service providers or family enrollees, as directed by the member.

(3) Speech and language therapy (SLT) services preserve abilities for independent function in communication; facilitate oral motor and swallowing function; facilitate use of assistive technology;

and prevent progressive disabilities. Specific services may include but are not limited to:

(a) identification of communicative or oropharyngeal disorders and delays in the development of communication skills;

(b) prevention of communicative or oropharyngeal disorders and delays in the development of communication skills;

(c) development of eating or swallowing plans and monitoring their effectiveness;

(d) use of specifically designed equipment, tools, and exercises to enhance function;

(e) design, fabrication, or modification of assistive technology or adaptive devices;

(f) provision of assistive technology services;

(g) adaptation of the member’s environment to meet his or her needs;

(h) training regarding SLT activities; and

(i) consulting or collaborating with other service providers or family enrollees as directed by the member.

(4) A signed therapy referral for treatment must be obtained from the member’s PCP. The referral will include frequency, estimated duration of therapy and treatment, and procedures to be provided.
[8.308.12.13 NMAC - Rp, 8.308.12.13 NMAC, 3/1/2017; A. 1/1/2019]

8.308.12.16 ELIGIBLE PROVIDERS:

A. The FMA, member or his or her EOR shall verify that a potential provider meets all applicable qualifications prior to rendering a service. If a provider or employee is unable to pass a nationwide criminal history screening pursuant to NMSA 1978, 29-12-2 et seq. or is listed in

the abuse registry as defined in 27-7a-1 et seq., NMSA 1978 he or she may not be employed to render any service to the member. Following formal approval from the MCO, LRIs may serve as a SDCB provider under extraordinary circumstances in order to assure the health and welfare of the member and to avoid his or her institutionalization. The MCO shall make decisions regarding LRIs serving as providers for members on a case by case basis. Following formal approval from the MCO, a spouse of a member may serve as a provider under extraordinary circumstances in order to assure the health and welfare of the member and to avoid institutionalization. The MCO shall provide such approval on a case by case basis. SDCB providers must meet all Federal and state requirements for home and community based providers.

B. An EOR shall have an employment agreement or vendor agreement with each of the member’s providers. The employee or vendor agreement template shall be prescribed by MAD. Prior to a payment being made to a provider for SDCB services, the FMA shall ensure that: the provider meets all qualifications; and an employee agreement or vendor agreement is signed between the EOR and the provider. A member’s employee agreement shall be updated anytime there is a change in any of the terms or conditions specified in the agreement. Employee agreements and vendor agreements shall be signed by the new EOR when there is a change in EORs. A copy of each employee agreement or vendor agreement shall be provided to the member and EOR. Refer to the MAD MCO policy manual for a complete listing of all SDCB provider qualifications and responsibilities.
[8.308.12.16 NMAC - Rp, 8.308.12.16 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.18 COVERED SERVICES IN SELF-DIRECTED COMMUNITY BENEFIT SDCB: MAD and the member’s MCO

cover certain procedures, services, and miscellaneous items. For those services that are the same in ABCB and SDCB, detailed descriptions are found in 8.308.12.13 NMAC. Other services may be available to a member in the SDCB approach and detailed descriptions are included in each subsection of this section.

A. Behavior support consultation is the provision of assessment, treatment, evaluation and follow-up services to assist the member, his or her parents, family, and primary caregivers with coping skills which promote maintaining the member in a home environment. See Subsection C of Section 8.308.12.13 NMAC for a detailed description of this service.

B. Customized community supports include participation in community congregate day programs and centers that offer functional meaningful activities that assist with acquisition, retention or improvement in self-help, socialization and adaptive skills. Customized community supports may include day support models. Customized community supports are provided in community day program facilities and centers and can take place in non-institutional and non-residential settings. These services are provided at least four or more hours per day one or more days per week as specified in the member's care plan. Customized community supports settings must be integrated and support full access of individuals receiving medicaid HCBS to the greater community, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving medicaid HCBS.

C. Emergency response services provide an electronic device that enables a member to secure help in an emergency at his or her home, avoiding institutionalization. The member may also wear a portable "help" button to allow for mobility. The system is connected to the member's phone and programmed

to signal a response center when the "help" button is activated. The response center is staffed by trained professionals. See Subsection E of Section 8.308.12.13 NMAC for a detailed description of this service.

D. Employment supports include job development, job seeking and job coaching supports after available vocational rehabilitation supports have been exhausted. Employment supports settings must be integrated and support full access of individuals receiving medicaid HCBS to the greater community, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving medicaid HCBS. See Subsection F of Section 8.308.12.13 NMAC for a detailed description of this service.

E. Environmental modification services include: the purchase of, the installation of equipment for the physical adaptations to a member's residence that are necessary to ensure the health, welfare, and safety of the member or enhance the member's level of independence. See Subsection G of Section 8.308.12.13 NMAC for a detailed description of this service.

F. Home health aide services provide total care or assist the member in all ADLs. See Subsection H of Section 8.308.12.13 NMAC for a detailed description of this service.

G. [Homemaker] Self-directed personal care services (SD PCS) are provided on an episodic or continuing basis to assist the member with ADLs, performance of general household tasks, provide companionship to acquire, maintain, or improve social interaction skills in the community, and enable the member to accomplish tasks he or she would normally do for him or herself if he or she did not have a disability.

(1) [Homemaker services] Self-directed PCS are provided in the member's home and in the community, depending on the member's needs. The member identifies the

[homemaker's] caregiver's training needs, and, if the member is unable to do the training himself or herself, the member arranges for the needed training.

(2) [Services] Self-directed PCS are not intended to replace supports available from a primary caregiver. [Homemaker services] Self-directed PCS are not duplicative of home health aide services.

(3) Home health aides may provide basic non-invasive nursing assistant skills within the scope of their practice. [Homemakers] Self-directed PCS caregivers do not have this ability to perform such tasks.

(4) Use of the Electronic Visit Verification (EVV) system is required for payment of Self-directed PCS.

H. Non-medical transportation services are offered to enable a member to gain access to services, activities, and resources, as specified by his or her care plan. [Non-medical transportation services in the SDCB are offered in accordance with the member's care plan.] Payment for non-medical transportation is limited to the costs of transportation needed to access community benefit services, activities, and resources identified in the member's care plan. Payment for SDCB non-medical transportation services is made to the member's individual transportation employee or to a public or private transportation service vendor. Payment cannot be made to the member. Non-medical transportation services for minors is not a covered service [as these are services that a LRI would ordinarily provide for household members of the same age who do not have a disability or chronic illness]. Non-medical transportation for members entering the SDCB on or after January 1, 2019 is limited to a maximum of one thousand dollars (\$1,000) annually per care plan year.

I. Nutritional counseling services include assessment of the member's nutritional needs, development and

revision of the member’s nutritional plan, counseling and nutritional intervention, and observation and technical assistance related to implementation of the nutritional plan.

J. Private duty nursing services include activities, procedures, and treatment for a physical condition, physical illness, or chronic disability for a member who is 21 years of age and older with intermittent or extended direct nursing care in his or her home. See [~~Subsection J~~ Subsection K of Section 8.308.12.13 NMAC for a detailed description of this service.

K. Related goods are equipment, supplies or fees and memberships, not otherwise provided through the member’s MCO general benefits.

(1) Related goods must address a need identified in the member’s CNA including improving and maintaining the member’s opportunities for full membership in the community, and meet all the following requirements:

(a) be responsive to the member’s qualifying condition or disability;

(b) accommodate the member in managing his or her household;

(c) facilitate the member’s ADL;

(d) promote the member’s personal safety and health;

(e) afford the member an accommodation for greater independence;

(f) advance the desired outcomes in the member’s care plan; and

(g) decrease the need for other medicaid services.

(2) Related goods will be carefully monitored by the member’s MCO to avoid abuses or inappropriate use of this benefit.

(3) Services and goods that are recreational or diversional in nature are excluded. Recreational and diversional in nature is defined as inherently and

characteristically related to activities done for enjoyment.

(4) Related goods for members entering the SDCB on or after January 1, 2019 are limited to a maximum of two thousand dollars (\$2,000) annually per care plan year.

L. Respite services are provided to a member unable to care for him or herself and are furnished on a short-term basis to allow the member’s primary caregiver a limited leave of absence in order to reduce stress, accommodate a caregiver illness, or meet a sudden family crisis or emergency. See [~~Subsection K~~ Subsection L of Section 8.308.12] Subsection L of Section 8.308.12.13 NMAC for a detailed description of this service.

M. Skilled maintenance therapy services for a member 21 years and older are provided when his or her MCO’s general physical health benefit skilled therapy services are exhausted or not a covered MCO benefit. The community benefit skilled maintenance therapy services include physical therapy, occupational therapy or speech language therapy. Therapy services focus on improving functional independence, health maintenance, community integration, socialization, and exercise, and enhance the support and normalization of the member’s family relationships. See [~~Subsection L~~ Subsection M of 8.308.12] Subsection M of 8.308.12.13 NMAC for a detailed description of this service.

N. Specialized therapies are non-experimental therapies or techniques that have been proven effective for certain conditions. A member may include specialized therapies in his or her care plan when the services enhance opportunities to achieve inclusion in community activities and avoid institutionalization. Services must be related to the member’s disability or condition, ensure the member’s health and welfare in the community, supplement rather than replace the member’s natural supports and other community services for which the member may be eligible, and prevent the member’s admission to institutional services.

(1) Acupuncture is a distinct system of primary health care with the goal of prevention, cure, or correction of any disease, illness, injury, pain or other physical or behavioral health condition by controlling and regulating the flow and balance of energy, form, and function to restore and maintain physical health and increased mental clarity to a member. Acupuncture may provide effective pain control, decreased symptoms of stress, improved circulation and a stronger immune system, as well as other benefits to the member.

(2) Biofeedback uses visual, auditory or other monitors to feed back physiological information of which the member is normally unaware. This technique enables a member to learn how to change physiological, psychological and behavioral responses for the purposes of improving emotional, behavioral, and cognitive health and performance. The use of biofeedback may assist in strengthening or gaining conscious control over the above processes in order for the member to self-regulate. Biofeedback therapy is also useful for muscle re-education of specific muscle groups or for treating the member’s pathological muscle abnormalities of spasticity, incapacitating muscle spasm, or weakness.

(3) Chiropractic care for a member is designed to locate and remove interference with the transmissions or expression of nerve forces in the human body by the correction of misalignments or subluxations of the vertebral column and pelvis for the purpose of restoring and maintaining health for treatment of human disease primarily by, but not limited to, the adjustment and manipulation of the human structure. Chiropractic therapy may positively affect neurological function, improve certain reflexes and sensations, increase range of motion, and lead to improved general health of the member.

(4) Cognitive rehabilitation therapy services for

a member are designed to improve cognitive functioning by reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems. Treatments may be focused on improving a particular cognitive domain such as attention, memory, language, or executive functions. Alternatively, treatments may be skill-based, aimed at improving performance of ADL. The overall goal is to restore the member's function in a cognitive domain or set of domains, or to teach compensatory strategies to overcome specific cognitive problems.

(5)

Hippotherapy is a physical, occupational, and speech-language therapy treatment strategy that utilizes equine movement as part of an integrated intervention program to achieve functional outcomes. Hippotherapy applies multidimensional movement of a horse for a member with movement dysfunction and may increase mobility and range of motion, decrease contractures and aid in normalizing muscle tone. Hippotherapy requires that the member use cognitive functioning, especially for sequencing and memory. A member with attention deficits and maladaptive behaviors is redirecting attention and behaviors by focusing on the activity. Hippotherapy involves therapeutic exercise, neuromuscular education, kinetic activities, therapeutic activities, sensory integration activities, and for individual speech therapy. The activities may also help improve respiratory function and assist with improved breathing and speech production of the member.

(6) Massage

therapy for a member is the assessment and treatment of soft tissues and their dysfunctions for therapeutic purposes primarily for comfort and relief of pain. It includes gliding, kneading, percussion, compression, vibration, friction, nerve strokes, stretching the tissue

and exercising the range of motion, and may include the use of oils, salt glows, hot or cold packs or hydrotherapy. Massage increases the circulation, helps loosen contracted, shortened muscles and can stimulate weak muscles to improve posture and movement, improves range of motion and reduces spasticity. Massage therapy may increase, or help sustain, a member's ability to be more independent in the performance of ADL; thereby, decreasing dependency upon others to perform or assist with basic daily activities.

(7)

Naprapathy focuses on the evaluation and treatment of neuro-musculoskeletal conditions, and is a system for restoring functionality and reducing pain in muscles and joints. The therapy uses manipulation and mobilization of the spine and other joints, and muscle treatments such as stretching and massage. Based on the concept that constricted connective tissue (ligaments, muscles and tendons) interfere with nerve, blood and lymph flow, naprapathy uses manipulation of connective tissue to open these channels of body function for a member.

(8) A

[Native] native American healer is an individual who is recognized as a healer within his or her respective native American community. A native American member may be from one of the 22 sovereign tribes, nations and pueblos in New Mexico or may be from other tribal backgrounds. A native American healer delivers a wide variety of culturally-appropriate therapies that support the member by addressing the member's physical, emotional and spiritual health. Treatments delivered by a native American healer may include prayer, dance, ceremony and song, plant medicines and foods; participation in sweat lodges, and the use of meaningful symbols of healing, such as the medicine wheel or other sacred objects. A native American healer provides opportunities for the member to remain connected with his or her tribal community. The communal and spiritual support provided by this type

of healing can reduce pain and stress and improve quality of life. It is also important to note that some tribes, nations and pueblos prefer to keep these healing therapies and practices safeguarded due to the significance of their religious ties.

(9) Specialized therapies for members entering the SDCB on or after January 1, 2019 are limited to a maximum of two thousand dollars (\$2,000) annually per care plan year.

O. Start-up goods are used when a member is transitioning from the ABCB model to the SDCB model. Start-up goods enable a member to begin to self-direct his/her services. Start-up goods include, but are not limited to, computers, printers and fax machines. Start-up goods are provided one-time during the member's first full or prorated care plan year and are limited to two thousand dollars (\$2,000).

[8.308.12.18 NMAC - Rp, 8.308.12.18 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.19 SDCB NON-COVERED SERVICES AND SERVICE LIMITATIONS: MAD

and the member's MCO do not cover certain procedures, services, or miscellaneous items. Services and goods that are not covered by the SDCB approach include, but are not limited to the following:

A. services covered by third-parties; MAD or the MCO is the payer of last resort;

B. any service or good, the provision of which would violate federal or state statutes, rules or guidance; this includes services that are considered primarily recreational or diversional [~~which are not deemed eligible SDCB services by CMS;~~] in nature as defined in Paragraph (3) of Subsection K of Section 8.301.12.18 NMAC, including but not limited to, tickets for movies, theatrical and musical performances, sporting events, zoos, and museums;

C. formal academic degrees or certification-seeking education, educational services covered by IDEA or vocational

training provided by the public education department (PED), division of vocational rehabilitation (DVR);

D. room and board, meaning shelter expenses, including property-related costs, such as rental or purchase of real estate and furnishing(s), home and property maintenance, utilities and utility deposits, and related administrative expenses; utilities include gas, electricity, propane, fire wood, wood pellets, water, sewer, and waste management;

E. experimental or investigational services, procedures or goods, as defined in 8.325.6 NMAC;

F. any goods or services that a household that does not include a person with a disability would be expected to pay for as a routine household expense;

G. personal goods or items not related to the SDCB member's condition or disability;

H. purchase of animals and the costs of maintaining animals, including the purchase of food, veterinary visits, grooming and boarding but with the exception of training and certification for service dogs;

I. gas cards and gift cards; items that are purchased with SDCB program funds may not be returned for store credit, cash or gift cards;

J. purchase of insurance, such as car, health, life, burial, renters, home-owners, service warranties or other such policies. This includes purchase of cell phone insurance;

K. purchase of a vehicle, and long-term lease or rental of a vehicle;

L. purchase of recreational vehicles, such as motorcycles, campers, boats or other similar items;

M. firearms, ammunition or any other type of weapons;

N. gambling, games of chance (such as bingo or lottery), alcohol, tobacco, or similar items;

O. vacation expenses, including airline tickets, cruise

ship or other means of transport, guided tours, meals, hotel, lodging or similar recreational expenses; this also includes mileage or driver time reimbursement for vacation travel by automobile;

P. purchase of usual and customary furniture and home furnishings, unless adapted to the SDCB member's disability or use, or of specialized benefit to the SDCB member's condition; requests for adapted or specialized furniture or furnishings must include a doctor's order from the member's health care provider and, when appropriate, a denial of payment from any other source;

Q. regularly scheduled upkeep, maintenance and repairs of a home and addition of fences, storage sheds or other outbuildings, except upkeep and maintenance of modifications or alterations to a home which are an accommodation directly related to the SDCB member's qualifying condition or disability;

R. regularly scheduled upkeep, maintenance and repairs of a vehicle, or tire purchase or replacement, except upkeep and maintenance of modifications or alterations to a vehicle or van, which is an accommodation directly related to the SDCB member's qualifying condition or disability; requests must include documentation that the adapted vehicle is the SDCB member's primary means of transportation;

S. clothing and accessories, except [specialized] adaptive clothing or accessories based on the SDCB member's disability or condition;

T. training expenses for paid employees;

U. conference or class fees may be covered for SDCB members or unpaid caregivers, but costs associated with such conferences or classes cannot be covered, including airfare, lodging or meals;

V. for member electronics such as cell phones, computers, printers and fax machines, or other electronic equipment, no

more than one of each type of item may be purchased at one time, and member electronics may not be replaced more frequently than once every three years; laptops or any electronic tablets are considered computers;

W. home schooling materials or related supplemental materials and activities;

X. cell phone services that include more than one cell phone or cell phone line per SDCB member; cell phone service, including data, is limited to the cost of one hundred dollars per month; and

Y. moving expenses are limited to, the cost of moving truck rental, gas/mileage, labor, moving equipment, supplies, boxes, tape and moving blankets.

[8.308.12.19 NMAC - Rp, 8.308.12.19 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.20 TRANSITION TO THE SELF-DIRECTED COMMUNITY BENEFIT: A

member who meets a NF LOC and who qualifies for MCO CB must first access services through his or her MCO's ABCB approach. After 120 calendar days, the member may continue his or her CB services provided through the MCO's ABCB or may select the MCO's SDCB approach. The member's MCO shall obtain a signed statement from the member regarding his or her decision to participate in the SDCB approach. The signed statement will include member attestation that he or she understands the responsibilities of self-directing his or her CB services, including the management of his or her care plan. For a member transitioning from a NF: and the member continues to meet NF LOC; the member selects his or her MCO's SDCB approach; the member must access CB services through the MCO's ABCB approach for the first 120 calendar days of eligibility; and after 120 calendar days, the member may transition to the MCO's SDCB.

A. Self-assessment: The member's care coordinator shall provide him or her with the MAD

self-assessment instrument. The self-assessment instrument shall be completed by the member with assistance from the member's care coordinator upon request. The care coordinator shall file the completed self-assessment in the member's file.

B. Employer of record (EOR): A member who is an unemancipated minor or has an authorized representative over financial matters in place cannot serve as his or her own EOR. When the member's care coordinator, based on the results of the member's self-assessment, determines the member requires assistance to direct his or her SDCB services, the member must designate in writing an EOR to assume the functions on behalf of the member. A member that serves as his or her EOR has the option to do so or may, on his or her own, designate a person to serve as his or her EOR in writing. A designated EOR may not also be an employee of the member. The member's file must have documentation of either the member acting as his or her EOR or of the designated EOR. The member's MCO will make the final determination on whether the member may be his or her own EOR.

C. Supports for self-direction: A member or his or her authorized representative may designate a person to provide support to the member's self-directed functions. The member or his or her authorized representative may act as his or her EOR. A member's authorized representative may function as the member's spokesperson. The member's care coordinator shall include a copy of any EOR or spokesperson forms in the member's file and provide copies to the member, the member's authorized representative, spokesperson and the FMA.

(1) Care coordination for self-direction: The MCO shall ensure that the member or the member's authorized representative fully participates in developing and administering SDCB services and that sufficient supports, such as care coordinators

and support brokers, are made available to assist the member or the member's authorized representative who requests or requires assistance. In this capacity, the care coordinator shall fulfill, in addition to contractual requirement, the following tasks:

- (a)** understand member and EOR roles and responsibilities;
- (b)** identify resources outside the member's MCO SDCB, including natural and informal supports, that may assist in meeting the member's long term care needs;
- (c)** understand the array of SDCB services;
- (d)** assign the annual SDCB budget based on the member's CNA to address the needs of the member;
- (e)** monitor utilization of SDCB services on a regular basis;
- (f)** conduct employer-related activities such as assisting a member in identifying a designated EOR as appropriate;
- (g)** identify and resolve issues related to the implementation of the member's SDCB care plan;
- (h)** assist the member with quality assurance activities to ensure implementation of the member's SDCB care plan and utilization of his or her authorized budget;
- (i)** recognize and report critical incidents, including abuse, neglect, exploitation, emergency services, law enforcement involvement, and environmental hazards;
- (j)** monitor quality of services provided by the member's support broker; and
- (k)** work with the member to provide the necessary assistance for successful SDCB implementation.

(2) A support broker is a qualified vendor for a SDCB member who is either employed by or contracted by the

member's MCO. At a minimum, the support broker shall perform the following functions:

- (a)** educate the member on how to use self-directed supports and services and provide information on program changes or updates;
- (b)** review, monitor and document progress of the member's SDCB care plan;
- (c)** assist in managing budget expenditures, complete and submit SDCB care plan and revisions;
- (d)** assist with employer functions such as recruiting, hiring and supervising SDCB providers;
- (e)** assist with developing and approving job descriptions for SDCB direct supports;
- (f)** assist with completing forms related to the member's employees;
- (g)** assist with approving timesheets, purchase orders or invoices for goods, obtain quotes for services and goods, as well as identify and negotiate with vendors;
- (h)** assist with problem solving of an employee or vendor payment issue with the FMA and other appropriate parties;
- (i)** facilitate resolution of any disputes regarding payment to a provider for services rendered;
- (j)** develop the care plan for SDCB based on the member's budget amount as determined by the CNA; and
- (k)** assist in completing all documentation required by the FMA.

(3) The FMA acts as the intermediary between the member and the member's MCO's payment system and assists the member or the member's EOR with employer-related responsibilities. The FMA pays employees and vendors based upon the member's approved SDCB care plan and budget. The

FMA assures member and program compliance with state and federal employment requirements, monitors, and makes available to the member and MAD reports related to utilization of services and budget expenditures. Based on the member's approved individual care plan and budget, the FMA must:

- (a) verify that the member is eligible for SDCB services prior to making payment for services;
- (b) receive and verify that all required employee and vendor documentation and qualifications are in compliance with applicable NMAC rules and the MAD MCO policy manual;
- (c) establish an accounting for each member's budget;
- (d) process and pay invoices for goods, services, and supports approved in the member's SDCB care plan and supported by required documentation; and
- (e) process all payroll functions on behalf of the member and EOR including:
 - (i) collects and processes timesheets of employees in accordance with the MAD approved payment schedule;
 - (ii) processes payroll, withholding, filing, and payment of applicable federal, state and local employment-related taxes and insurance;
 - (iii) tracks and reports disbursements and balances of the member's budget and provides a monthly report of expenditures and budget status to the member and his or her support broker, and quarterly and annual documentation of expenditures to MAD;
 - (iv) receives and verifies a provider's agreement, including collecting required provider qualifications;
 - (v) monitors hours billed for services provided and the total amounts billed for all goods and services during the month;

(vi) answers inquiries from the SDCB member and solves problems related to the FMA's responsibilities; and

(vii) reports any concerns related to the health and safety of the member or when the member is not following his or her approved SDCB care plan to the MCO and MAD as appropriate.

D. Budget: The member's MCO will determine the maximum annual budget allotment based on the member's CNA. The member may request a revision to the SDCB care plan and budget when a change in circumstances warrants such revisions, such as a change in health condition or loss of natural supports. All changes are subject to assessment and approval by the MCO.

E. SDCB care plan: The support broker and the member shall work together to develop an annual SDCB care plan for the SDCB services the member is identified to need as a result of his or her CNA. The SDCB care plan will not exceed the MCO determined budget. The support broker and member shall refer to the rates specified by HSD in selecting payment rates for qualified providers and vendors. The care plan for SDCB services shall be based upon the member's assessed needs and approved by the member's MCO. The support broker shall closely monitor the utilization of SDCB care plan services to ensure that the member does not exceed the approved annual budget.

(1) SDCB care plan review criteria: Services and goods identified in the member's requested SDCB care plan may be considered for approval by the MCO if all of the following requirements are met:

- (a) the services or goods must be responsive to the member's qualifying condition or disability;
- (b) the services or goods must address the member's clinical, functional, medical or rehabilitative needs;
- (c) the services or goods must facilitate

- the member's ADL per his or her CNA;
- (d) the services or goods must promote the member's personal health and safety;
- (e) the services or goods must afford the member an accommodation for greater independence;
- (f) the services or goods must support the member to remain in the community and reduce his or her risk for institutionalization;
- (g) the need for the services or goods must be approved and documented in the CNA and advance the desired outcomes in the member's SDCB care plan;
- (h) the services or goods are not available through another source;
- (i) the service or good is not prohibited by federal regulations, applicable NMAC rules, supplements, the MAD MCO policy manual, service standards, and instructions;
- (j) the proposed rate for each service is within the MAD approved rate range for that chosen service;
- (k) the proposed cost for each good is reasonable, appropriate and reflects the lowest available cost for that chosen good; and
- (l) the estimated cost of the service or good is specifically documented in the member's SDCB care plan.
- (2) SDCB care plan revisions:** The SDCB care plan may be revised based upon a change in the member's needs or circumstances, such as a change in the member's health status or condition or a change in the member's support system, such as the death or disabling condition of an individual who was providing services. The member or the EOR is responsible for assuring that all expenditures are in compliance with the most current determination of need. SDCB care plan revisions involve requests to

add new goods or services to a care plan or to reallocate funds from any line item to another approved line item. SDCB care plan revisions must be submitted to the member's MCO for review and determination. Other than for critical health and safety reasons, SDCB care plan revisions may not be submitted to the MCO for review within the last 60 calendar days of the care plan year. Prior to submitting a SDCB care plan revision request, the member is responsible for communicating any utilization of services that are not in compliance with the care plan to the support broker. At the MCO's discretion, a revision to the SDCB care plan may require another CNA. If the SDCB care plan revision includes a request for additional services, another CNA must be performed by the MCO to determine whether the change in circumstance or need warrants additional funding for additional services prior to SDCB care plan revision approval.

F. SDCB back-up plan: The support broker shall assist the member and his or her EOR in developing a back-up plan for the member's SDCB services that identifies how the member and EOR will address situations when a scheduled provider is not available or fails to show up as scheduled. The member's support broker shall assess the adequacy of the member's back-up plan at least on an annual basis and when changes in the type, amount, duration, scope of the SDCB or the schedule of needed services, or a change of providers (when such providers also serve as back-up to other members) or change in availability of paid or unpaid back-up providers to deliver needed care.

G. Member and EOR training: The member's MCO shall require the member electing to enroll in the SDCB approach and his or her EOR to receive relevant training. The support broker shall be responsible for arranging for initial and ongoing training of the member and his or her EOR.

(1) At a minimum, self-direction training for

member and his or her EOR shall address the following issues:

- (a)** understanding the role of the member and EOR with SDCB;
- (b)** understanding the role of the care coordinator, support broker, the MCO, and the FMA;
- (c)** selecting providers and vendors;
- (d)** critical incident reporting;
- (e)** member abuse and neglect prevention and reporting;
- (f)** being an employer, evaluating provider performance and managing providers;
- (g)** fraud and abuse prevention and reporting;
- (h)** performing administrative tasks, such as, reviewing and approving electronically captured visit information and timesheets and invoices; and
- (i)** scheduling providers and back-up planning.

(2) The member's MCO shall arrange for ongoing training for the member and his or her EOR upon request or if a support broker, through monitoring, determines that additional training is warranted.

H. Claims submission and payment: The [member or] EOR shall review and approve timesheets of the member's providers and invoices from the member's vendors to determine accuracy and appropriateness. No SDCB provider shall exceed 40 hours paid work in one work week per EOR. Timesheets must be submitted and processed on a two-week pay schedule according to the FMA's prescribed payroll payment schedule. The FMA shall be responsible for processing the member's timesheets and invoices for approved SDCB services and goods. [8.308.12.20 NMAC - Rp, 8.308.12.20 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.21 TERMINATION FROM ABCB PCS/CDIRECTED OR SDCB:

The MCO may involuntarily terminate a member from the PCS/CDirected or the SDCB approach under any of the following circumstances.

A. The member, the member's authorized representative or his or her EOR refuses to follow NMAC rules, the MAD MCO policy manual, or his or her MCO policies after receiving focused technical assistance on multiple occasions and support from his or her care coordinator, PCS agency or FMA, which is supported by documentation of the efforts to assist the member. For purposes of this rule, focused technical assistance is defined as a minimum of three separate occasions where the member, authorized representative or his or her EOR have received training, education or technical assistance, or a combination of both, from the MCO, the FMA, the PCS agency or MAD.

B. There is an immediate risk to the member's health or safety by continued consumer direction or self-direction of services, i.e., the member is in imminent risk of death or serious bodily injury. Examples include but are not limited to the following:

(1) the member refuses to include and maintain services in his or her PCS/CDirected or SDCB care plan that would address health and safety issues identified in the member's CNA or challenges the assessment after repeated and focused technical assistance and support from program staff, the care coordinator, PCS agency or the FMA;

(2) the member is experiencing significant health or safety needs and, refuses to incorporate the care coordinator's recommendations into his or her IPoC or care plan, or exhibits behaviors that endanger him or her or others;

(3) the member misuses his or her SDCB budget following repeated and focused technical assistance and

support from the care coordinator and the FMA, which is supported by documentation;

(4) the member expends his or her entire SDCB budget prior to the end of the care plan year; or

(5) the member or authorized representative intentionally misuses the member's PCS/CDirected or SDCB services or goods.

C. The MCO shall submit to MAD any requests to terminate a member from the PCS/CDirected or the SDCB approach with sufficient documentation regarding the rationale for termination. Upon MAD approval, the MCO shall notify the member regarding termination in accordance with NMAC rules and MCO policies. The member shall have the right to appeal the determination by requesting a MCO appeal and, if the termination is still upheld by the MCO, ~~[an]~~ a HSD administrative hearing. ~~[The]~~ Within 120 days of the final decision, the MCO shall facilitate a seamless transition from the PCS/CDirected to PCS/CDelegated or SDCB to ABCB ~~[approach]~~ to ensure there are no interruptions or gaps in services. Involuntary termination of a member from SDCB shall not affect a member's eligibility for ABCB covered services or continued MCO membership. However, a member that has been involuntarily terminated from SBCB must access PCS from the PCS/CDelegated model for at least one year. Involuntary termination of a member from PCS/CDirected shall not affect a member's eligibility for other CB services or PCS/CDelegated services.

D. A member who has voluntarily switched to PCS/CDelegated or ABCB or who has been involuntarily terminated from PCS/CDirected or from SDCB may request to be reinstated in the PCS/CDirected or the SDCB approach to his or her MCO. Such requests may not be made more than once in a calendar year. The member's PCS/CDirected or SDCB reinstatement when he or she was involuntarily

terminated is at the discretion of his or her MCO. The care coordinator shall work with the member's PCS agency or FMA to ensure that the issues previously identified as reasons for termination have been adequately addressed prior to such reinstatement. A member shall be required to participate in SDCB training programs prior to his or her SDCB reinstatement. A member shall be required to participate in PCS/CDirected training programs and the MCO may request the member's PCP provide a signed statement that the PCS/CDirected approach is appropriate for the member prior to his or her PCS/CDirected reinstatement.

[8.308.12.21 NMAC - Rp, 8.308.12.21 NMAC, 3/1/2017; A, 1/1/2019]

8.308.12.22 Electronic Visit Verification (EVV) System:

A. The MCO, together with the other MCOs, shall contract with a vendor to implement an EVV system in accordance with the federal Twenty First Century Cures Act.

B. The MCO shall maintain an EVV system capable of leveraging up-to-date technology as it emerges to improve functionality in all areas of the state, including rural areas.

[8.308.12.22 NMAC - N, 1/1/2019]

PUBLIC EDUCATION DEPARTMENT

The New Mexico Public Education Department approved at its 10/16/2018 hearing, to repeal its rule 6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau (filed 12/15/2016) and replace it with 6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau (adopted on 11/29/2018) and effective 12/11/2018.

PUBLIC EDUCATION DEPARTMENT

**TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 75
INSTRUCTIONAL MATERIALS AND TECHNOLOGY
PART 2 RELATING TO THE PUBLIC EDUCATION DEPARTMENT INSTRUCTIONAL MATERIAL BUREAU**

6.75.2.1 ISSUING AGENCY: Public Education Department, hereinafter the department.
[6.75.2.1 NMAC - Rp, 6.75.2.1 NMAC, 12/11/2018]

6.75.2.2 SCOPE: This rule governs all public schools and eligible state education institutions pursuant to Section 22-15-7 NMSA 1978. If any part of application of this rule is held invalid, the remainder of the rule or its application in other situations shall not be affected.
[6.75.2.2 NMAC - Rp, 6.75.2.2 NMAC, 12/11/2018]

6.75.2.3 STATUTORY AUTHORITY: This rule is promulgated pursuant to Sections 9-24-8, 22-2-1, 22-15-4, and 22-15-8 NMSA 1978.
[6.75.2.3 NMAC - Rp, 6.75.2.3 NMAC, 12/11/2018]

6.75.2.4 DURATION: Permanent.
[6.75.2.4 NMAC - Rp, 6.75.2.4 NMAC, 12/11/2018]

6.75.2.5 EFFECTIVE DATE: December 11, 2018, unless a later date is cited at the end of a section.
[6.75.2.5 NMAC - Rp, 6.75.2.5 NMAC, 12/11/2018]

6.75.2.6 OBJECTIVE: This rule governs the procedures for the adoption, purchase, and delivery of instructional material.
[6.75.2.6 NMAC - Rp, 6.75.2.6 NMAC, 12/11/2018]

6.75.2.7

DEFINITIONS:

A. “Adoption” means authorization by the department of core and supplementary instructional material for use in public school districts, charter schools, and state educational institutions.

B. “Adoption cycle” means the period during which instructional material adopted by the department shall be considered current.

C. “Core instructional material” means the comprehensive print or digital educational material, including basal material, which constitutes the necessary instructional components of a full academic course of study in those subjects for which the department has adopted content standards and benchmarks.

D. “Core subject areas” means those subject areas for which the department has adopted content standards and benchmarks.

E. “Depository” means an entity approved by the department that represents providers for the purpose of managing district or school instructional material orders. Responsibilities of the depository include:

- (1) accounting;
- (2) acquisition;
- (3) storage;
- (4) distribution; and
- (5) disposition of adopted instructional material.

F. “In-adoption” means currently adopted instructional material that is approved by the department, and included on the multiple list.

G. “Instructional material” means school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media.

H. “Instructional material manual” means written guidance issued and updated by the department that outlines detailed

requirements and procedures related to instructional material.

I. “Interoperability standards” means the current industry standards that measure the seamless sharing of data, content, and services among systems and applications.

J. “Local education agency” or “LEA” means a local school district, charter school, or state educational institution.

K. “Multiple list” means a written list of those instructional materials approved by the department.

L. “Open educational resources” or “OER” means teaching, learning, and research material that is freely available for use, adaptation, and sharing.

M. “Open source curriculum” or “OSC” means a planned sequence of instructional and educational material that covers a full academic course of study, and that may be freely accessed, distributed, and modified.

N. “Other adoptions” means an adoption of new material that is not conducted during the summer review institute.

O. “Other classroom material” means materials other than textbooks that are used to support direct instruction to students.

P. “Out-of-adoption” means previously adopted instructional material that is no longer considered current by the department and that is not included on the multiple list.

Q. “Processing fee” means the bid fees charged to vendors for each item of instructional material submitted for adoption, not to exceed the retail price.

R. “Provider” means an organization or individual, including publishers, who develops and submits instructional material.

S. “Request for applications” or “RfA” means the written notice issued by the department soliciting the submission of new instructional material in specified subject areas, and outlining the terms and conditions of the

department’s review and adoption process.

T. “Research-based effectiveness” means the demonstrated effectiveness of instructional material in supporting students to meet or exceed grade-level goals according to New Mexico content standards, and as demonstrated by the best available evidence for curricula in the relevant grade and subject. For core instructional material, evidence shall include an independently conducted experimental or quasi-experimental research study or review by nationally-recognized, independent experts in curricula review. LEA-created core instructional materials may also demonstrate effectiveness using correlational evidence that students using the core instructional material meet or exceed grade-level proficiency as measured by the state assessment.

U. “Reviewer of record” means a reviewer who is a qualified teacher with a level 2 or 3-A license with experience in the content area being reviewed.

V. “Substitution” means the replacement of an adopted item under the provider’s agreement with a revised edition of the item.

W. “Supplementary instructional material” means supporting instructional material used to reinforce, enrich, or enhance instruction driven by core instructional material. Pursuant to Section 22-15-8 NMSA 1978, the department may choose not to review supplementary materials. [6.75.2.7 NMAC - Rp, 6.75.2.7 NMAC, 12/11/2018]

6.75.2.8 INSTRUCTIONAL MATERIAL ELIGIBLE FOR ADOPTION:

A. The department shall review and adopt instructional material in core subject areas for use in public school districts, charter schools, and eligible state educational institutions. Providers that meet the criteria set forth in Subsection B of 6.75.2.9 NMAC may submit instructional material

to the department for consideration through the process outlined in 6.75.2.9 NMAC. Providers may submit print format, digital format, or both of instructional material for consideration and shall certify whether their instructional materials are one of the following:

- (1) core instructional material; or
- (2) supplementary instructional material.

B. OER and OSC instructional material may be considered for adoption by the department as either core or supplementary instructional material.

C. OER and OSC instructional material may be:

- (1) submitted by the department for adoption consideration;

- (2) submitted by schools, districts, or providers for adoption consideration; or

- (3) exempt from the processing fee associated with adoption.

D. LEAs may submit instructional material to the department for adoption consideration.

E. Pursuant to Section 22-23B NMSA 1978 and 22-23A NMSA 1978, the *Hispanic Education Advisory Council* and the *Indian Education Advisory Council* may submit instructional material to the department for adoption consideration.

- (1) If the *Hispanic Education Advisory Council* or the *Indian Education Advisory Council* submits instructional material as a provider, there shall not be a fee associated with the adoption.

- (2) If the *Hispanic Education Advisory Council* or the *Indian Education Advisory Council* submits instructional material created by a separate provider with the consent of the provider, there shall be a fee associated with the adoption as determined by the department.

F. Digital instructional material submitted for consideration shall comply with current interoperability standards, along

with any other specifications deemed necessary by the department.

G. Providers shall incur any costs associated with the provision of hardware, software, or special equipment necessary for the review of instructional material.

H. The department shall not consider instructional material that requires proprietary equipment provided by or through the provider to view.

[6.75.2.8 NMAC - Rp, 6.75.2.8 NMAC, 12/11/2018]

6.75.2.9 INSTRUCTIONAL MATERIAL ADOPTION PROCESS:

A. Adoption cycle. The department shall conduct an annual summer review institute during which reviewers of record shall review instructional material for alignment with state content standards and benchmarks and other criteria deemed relevant by the department. The department's annual summer review institute shall serve as the primary opportunity for new instructional material to be reviewed and considered for adoption.

- (1) Annual review and adoption of new instructional material shall cover those core subject areas with adoption periods expiring at the end of the year in which the review is being conducted.

- (2) Instructional material shall be adopted by the department for a period of six years, unless the department determines a need to alter the adoption cycle.

- (3) Off-cycle reviews and adoptions of new instructional material may occur at any time the department deems necessary, based on educational need.

- (4) Providers submitting core instructional material for off-cycle review shall incur the costs associated with review, as determined by the department.

- (5) The department shall notify LEAs of any cycle alterations no later than December 31 of the year prior to the summer review institute.

B. Request for applications.

- (1) The department shall issue an RfA annually to solicit submissions of proposed new instructional material. The RfA shall include:

- (a) the core subject area(s) for which new instructional material is being considered;

- (b) timelines for adoption, requisition, and distribution of adopted instructional material;

- (c) length of contracts between the department and approved providers;

- (d) criteria for demonstrating research-based effectiveness of instructional material;

- (e) instructional material review criteria which shall include but is not limited to the following:

- (i) alignment with state standards;

- (ii) grade level appropriateness;

- (iii) cultural and linguistic relevance; and

- (iv) full academic course of study;

- (f) processing fee guidelines; and

- (g) other terms, conditions, and forms deemed necessary by the department.

- (2) Providers shall certify whether each submission is core or supplementary instructional material. The department shall determine whether or not the provider has appropriately categorized each submission and may reclassify material if necessary.

- (3) Providers shall submit instructional material for consideration in the format and by the dates set forth by the department.

- (4) The department may accept any applications that:

- (a) satisfy all criteria outlined in the RfA;

(b) are determined to be advantageous to the state, considering the educational value of the instructional material submitted, cost to the state, and reliability of the provider; and

(c) meet all other factors deemed relevant by the department.

(5) The department may reject any applications that fail to satisfy criteria outlined in the RfA.

C. Review teams.

(1) Each review team shall be composed of reviewers of record and facilitated by department-selected facilitators.

(2) The department shall ensure that reviewers of record are compensated in accordance with Sections 22-15-8 NMSA 1978.

(3) The department shall ensure that reviewers of record receive adequate training and utilize the review forms developed by the department.

D. Review forms. The review forms utilized by reviewers of record shall include the scoring rubric which shall consist of a minimum of two sections.

(1) Section one shall focus on whether or not proposed instructional material aligns with department adopted content standards and shall include scorable performance indicators.

(2) Section two shall focus on the extent to which the proposed instructional material under review:

(a) is culturally relevant, as outlined by the following:

(i) informs culturally and linguistically responsive pedagogy;

(ii) reflects the cultural diversity represented within the community, state, and nation;

(iii) reflects the cultures, languages, and lived experiences of a multicultural society;

(iv)

addresses multiple ethnic descriptions, interpretations, or perspectives of events and experiences; and

(v) encourages critical pedagogy.

(b) provides opportunities for both formative and summative assessment;

(c) integrates opportunities for digital learning into the text; and

(d) meets any other criteria deemed relevant by the department.

E. The department may send instructional material through a secondary review process, at its discretion, to ensure scores are valid.

F. The department shall ensure that collaboration occurs with New Mexico pueblos, tribes and designated tribal organizations, pursuant to Section 11-18-3 NMSA 1978 and shall ensure instructional materials for American Indian students enrolled in public schools are culturally relevant pursuant to Section 22-23A-2 NMSA 1978.

G. The department shall appoint community members, parents, level one teachers, and students preparing for careers as teachers to observe the reviewers of record during the review.

H. At the time of review, providers shall provide the department with any hardware, software, or special equipment necessary to review instructional material submitted.

I. Other adoptions.

(1) Other adoptions may be processed at the request of a provider with the approval of the instructional material bureau chief or for other reasons as determined by the instructional material bureau chief.

(2) Other adoptions may be for core instructional material which is reviewed or for supplementary material which may not be reviewed.

(3) Other adoptions shall require a processing fee to vendors of instructional materials not to exceed the retail value of the instructional material

submitted for adoption.

J. Substitution.

(1) Providers may submit formal substitution requests to the department for in-adoption instructional material.

(2) Providers wishing to request substitutions shall submit to the department a written request along with justification for the proposed substitution. The department shall allow substitutions of instructional material when it determines:

(a) the proposed substitution is in the best interest of students;

(b) all terms and conditions of the original contract with the provider are still being met; and

(c) the proposed substitution is limited to minor revisions and contains substantially the same material as the previous edition.

K. Pursuant to Sections 22-15-4 NMSA 1978 and 22-15-8 NMSA 1978 the department shall enforce rules that require local school boards to implement a process that ensures parental and community member involvement within the instructional material review process. A local school board shall give written and public notice to families and community members to extend an invitation for participation in the adoption process at the district level. [6.75.2.9 NMAC - Rp, 6.75.2.9 NMAC, 12/11/2018]

6.75.2.10

CLASSIFICATION AND ADOPTION OF

INSTRUCTIONAL MATERIAL:

A. The department shall make adoption recommendations to the secretary using the following guidelines. Ranges of scores may vary and shall be determined and communicated by the department.

(1) Core instructional material:

(a) that meets or exceeds expectations on all identified criteria, including research-based effectiveness, may be designated as recommended and may also receive recognition for special

features identified by the department;
(b) that approaches expectations on identified criteria, including research-based effectiveness, may be designated as recommended with reservations; or

(c) that is reviewed but does not meet the criteria shall not be recommended for adoption.

(2) Supplementary instructional material certified by providers and accepted by the department as such may not be reviewed.

B. The secretary shall consider recommendations from the reviewers of record and shall make final decisions regarding the adoption of core and supplementary instructional material.

(1) Instructional material selected for adoption shall:

(a) meet all requirements outlined in the RfA; and

(b) meet all requirements outlined in Subsection B of 6.75.2.9 NMAC.

(2) The secretary shall authorize adoption of instructional material no later than 90 calendar days after the conclusion of the instructional material review. [6.75.2.10 NMAC - Rp, 6.75.2.10 NMAC, 12/11/2018]

6.75.2.11 CONTRACTS WITH PROVIDERS:

A. In accordance with law, the department may enter into contracts with providers that will provide for the purchase of adopted instructional material by LEAs.

B. Contracts with providers may last for a period of six years, unless the department determines that an amended contract is necessary.

C. The department shall only enter into a contract when the provider agrees to:

(1) facilitate the distribution of adopted instructional material to LEAs;

(2) keep sufficient stock of adopted instructional material at the designated depository;

(3) ensure timely delivery of instructional material according to the schedule determined by the department;

(4) pay late fees for any delays in delivery according to a schedule determined by the department;

(5) bill the appropriate LEA for instructional material ordered;

(6) ensure that all instructional material adopted and sold under the contract conforms to the requirements of the Federal Consumer Product Safety Improvement Act;

(7) submit adopted instructional material to the national instructional material accessibility center repository at the American printing house for the blind at no additional cost and in accordance with applicable law; and

(8) maintain copies of all billings generated under the contract for three years after the termination or expiration of the contract or after any court proceedings involving the contract.

D. The department may grant exemption from the contracting process or may approve an alternative contract for:

(1) OER, OSC, or any instructional material for which there is not a provider, vendor, or agent to fulfill the requirements outlined in the RfA; or

(2) instructional material developed by a school or LEA. [6.75.2.11 NMAC - Rp, 6.75.2.10 NMAC, 12/11/2018]

6.75.2.12 DISTRIBUTION OF FUNDS:

A. The department shall oversee the administration of the instructional material law pursuant to Section 22-15-1 NMSA 1978 and shall issue guidance through the instructional material manual posted on the department’s website to outline effective, efficient, and equitable

processes related to the free use of instructional material for all entities subject to 6.75.2 NMAC.

B. The department may conduct periodic audits of instructional material accounts and textbook inventories of any entities receiving instructional material funds. [6.75.2.12 NMAC - Rp, 6.75.2.11 NMAC, 12/11/2018]

6.75.2.13 SELECTION AND PURCHASE OF INSTRUCTIONAL MATERIAL:

A. Each local school board or governing body shall develop and implement a process for the review and adoption of instructional material which shall include:

(1) family and community member involvement in the instructional material review and adoption process;

(2) written notification to families and community members regarding the instructional material selection process;

(3) public notification, which may include publication in a newspaper of general circulation in the school district; and

(4) a review of material for cultural and linguistic relevance.

B. Each LEA purchasing instructional material through an authorized depository shall follow the timelines and requirements outlined in the instructional material manual.

C. Each public school district and eligible state educational institution:

(1) may spend up to one hundred percent of its total instructional material allocations to purchase department-adopted instructional material posted on the department’s website;

(2) shall not spend more than fifty percent of its total instructional material allocations to purchase instructional material not adopted by the department; and

(3) may spend up to twenty-five percent of the

funds referenced in Paragraph (2) of Subsection C of 6.75.2.13 NMAC on other classroom materials.

D. Charter schools may spend up to one hundred percent of their total instructional material allocations to purchase adopted or non-adopted instructional material, and up to twenty-five percent of this amount may be spent on other classroom materials.

E. The department may consider waiver requests from school districts and state-supported schools to use instructional material funds for purchases that fall outside the spending limits enumerated in Paragraph (2) of Subsection C of 6.75.2.13 NMAC. Waiver requests shall be submitted on forms provided by the department.

F. Instructional material funds allocated to an LEA during any fiscal year that are not obligated or expended prior to the close of that fiscal year shall be available to that public school district, charter school, or state-supported school for expenditure in subsequent fiscal years, consistent with the requirements of Subsections C and F of Section 22-15-9 NMSA 1978.

G. Annually, at a time and in a format specified by the department, each LEA receiving instructional material allocations shall file a report with the department. The report shall include:

- (1) the total instructional material allocation received;
- (2) the average cost per pupil based on the instructional material allocation;
- (3) year-end cash balances of the instructional material fund;
- (4) documentation of effective professional learning aligned to purchased core instructional material;
- (5) documentation of parental and community involvement in the instructional material review process and parental involvement in the adoption process; and

(6) other documentation specified by the department.

H. Each local school board or governing body shall keep an itemized list of instructional material purchased in a format prescribed by the department.

I. Guidance pertaining to obtaining funds, ordering instructional materials, receiving funds, returning funds for sold or lost materials, and completing the annual report shall be included in the instructional material manual.

[6.75.2.13 NMAC - Rp, 6.75.2.13 NMAC, 12/11/2018]

6.75.2.14 DISTRIBUTION OF INSTRUCTIONAL MATERIALS BY DEPOSITORIES:

Depositories shall distribute instructional material to LEAs according to a schedule outlined by the department in the instructional material manual.

A. Depositories shall:

- (1) demonstrate that the financial viability is adequate to ensure performance of all obligations outlined in a contract between the provider and the depository for the purpose of distributing instructional material to LEAs;

- (2) maintain warehouse facilities, with location(s), equipment, and staffing adequate to ensure performance of all obligations under the contract between the provider and the depository for the purpose of distributing instructional material to LEAs;

- (3) demonstrate capacity to generate and electronically submit reports to the department;

- (4) provide training to all LEAs on the process for ordering instructional materials;

- (5) implement procedures and systems with the capacity to run department-approved online ordering systems, and inventory and reporting systems to receive and process instructional material orders; and

(6) maintain sufficient inventory of instructional material to fill requisitions in accordance with the timelines set forth by the department.

B. The department may disapprove depositories that fail to meet requirements necessary for the successful and timely distribution of instructional material.

[6.75.2.14 NMAC - N, 12/11/2018]

6.75.2.15 DISPOSAL OF INSTRUCTIONAL MATERIAL:

A. Out-of-adoption instructional material deemed unusable or obsolete by LEAs may be disposed of at the LEA's discretion and shall not require department approval.

B. An LEA wishing to discard in-adoption instructional material listed on the current multiple list shall obtain prior department approval. Request for approval shall:

- (1) be in writing;
- (2) include justification for the request; and
- (3) include a list of the materials to which the request pertains.

C. An LEA wishing to sell in-adoption instructional material listed on the current multiple list shall obtain prior approval to do so from the department. The selling price may be determined by the LEA; however, it shall not exceed the original cost of the instructional material. All funds received from the sale of such instructional material shall be remitted to the department for redeposit into the LEA's instructional material account.

[6.75.2.14 NMAC - N, 12/11/2018]

HISTORY OF 6.75.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives: SDE 75-2, (Certificate No. 75-2) Regulation Relating to the State Department of Education Instructional Materials Division, filed 6/4/1975. SDE 77-2, Regulation Relating to

the State Department of Education Instructional Materials Division, filed 2/7/1977.

SBE 79-12, Relating to the State Department of Education Instructional Material Division, Procedures for the Adoption, Purchase and Delivery of Instructional Material, filed 9/21/1979.

SBE Regulation No. 83-5, Relating to the State Department of Education Instructional Material Division - Procedures for the Adoption, Purchase, and Delivery of Instructional Material, filed 8/31/1983.

SBE Regulation 93-20, Relating to the State Department of Education Instructional Materials Bureau - Procedures for the Adoption, Purchase, and Delivery of Instructional Material, filed 10/19/1993.

History of Repealed Material:

6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, filed 11/1/2000, Repealed effective 1/31/2006.

6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, filed 1-13-2006, Repealed effective 10/15/2010.

6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, filed 9/28/2010, Repealed effective 12/15/2016.

6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, filed 12/15/2016, Repealed effective 12/11/2018.

Other History:

6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, filed 12/15/2016, was repealed and replaced by 6.75.2 NMAC, Relating to the Public Education Department Instructional Material Bureau, effective 12/11/2018.

**END OF ADOPTED
RULES**

Other Material Related to Administrative Law

**WORKFORCE
SOLUTIONS
DEPARTMENT**

**NOTICE OF MINOR,
NONSUBSTANTIVE
CORRECTION**

The New Mexico Workforce Solutions Department gives Notice of Minor, Nonsubstantive Correction.

Pursuant to the authority granted under State Rules Act, Subsection D of Section 14-4-3 NMSA 1978, please note that the following minor, non-substantive corrections to spelling, grammar and format have been made to all published and electronic copies of the following rules:

11.3.300 NMAC, Claims Administration:

Internal rule and statutory citations have been changed to conform to proper legislative citation style throughout the rule.

Corrected the improper rule citation “11.3.300.500.9” to “11.3.500.9” within Subsection E of 11.3.300.308 NMAC.

11.2.2 NMAC, Equal Employment Opportunity in Apprenticeship State Plan:

Internal rule citations have been changed to conform to proper legislative citation style throughout the rule.

11.1.2 NMAC, Public Works Minimum Wage Act Policy Manual:

Brackets were added around strikethrough language in the tables contained in 11.2.20 NMAC.

A copy of this Notification was filed with the official version of the above rule.

**END OF OTHER
MATERIAL RELATED
TO ADMINISTRATIVE
LAW**

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Submittal Deadlines and Publication Dates

Volume XXX, Issues 1-24

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Issue 1	January 4	January 15
Issue 2	January 17	January 29
Issue 3	January 31	February 12
Issue 4	February 14	February 26
Issue 5	February 28	March 12
Issue 6	March 14	March 26
Issue 7	March 28	April 9
Issue 8	April 11	April 23
Issue 9	April 25	May 14
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Issue 22	November 14	November 26
Issue 23	December 5	December 17
Issue 24	December 19	December 31

The *New Mexico Register* is the official publication for all material relating to administrative law, such as notices of rulemaking, proposed rules, adopted rules, emergency rules, and other material related to administrative law. The Commission of Public Records, Administrative Law Division, publishes the *New Mexico Register* twice a month pursuant to Section 14-4-7.1 NMSA 1978.

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