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New Mexico Register

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

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New Mexico Register

Volume XXIX, Issue 16

August 28, 2018

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ENVIRONMENTAL IMPROVEMENT BOARD

NOTICE OF RULEMAKING HEARING

The New Mexico Environmental Improvement Board (“Board”) will hold a public hearing on November 30, 2018, at 9:30 a.m., in Room 307 of the State Capitol Building, 490 Old Santa Fe Trail, Santa Fe, New Mexico. The purpose of the hearing is to consider the matter of EIB 18-07 (R), proposed revisions to the New Mexico State Implementation Plan (SIP) regarding the Air Quality Control Regulation codified in the New Mexico Administrative Code (NMAC) at 20.2.20 NMAC, *Lime Manufacturing Plants - Particulate Matter*.

The proponent of this regulatory amendment is the New Mexico Environment Department (NMED).

The purpose of the public hearing is to consider and take possible action on a petition from NMED to repeal 20.2.20 NMAC. The purpose of the proposed repeal of 20.2.20 NMAC is to remove outdated requirements. This rule was identified in the November 2012 *Improving Environmental Permitting Report* for potential revision or repeal. 20.2.20 NMAC establishes particulate matter emissions limits for lime manufacturing plants and lime hydrators. The Air Quality Bureau has conducted a thorough analysis of this rule and similar federal rules and has concluded that the rule can be repealed without a relaxation of emissions controls or an adverse effect on air quality, and is not necessary to maintain the NAAQS for PM. If adopted by the Board, the repeal of 20.2.20 NMAC would be submitted to EPA for consideration for removal from New Mexico’s SIP.

The full text of NMED’s proposed regulation repeal is available on the Air Quality Bureau’s web site at

<https://www.env.nm.gov/air-quality/proposed-regs/> or by contacting Neal Butt at 505-476-4317 or neal.butt@state.nm.us. The proposed regulation repeal may also be examined during office hours at the Air Quality Bureau office, 525 Camino de los Marquez, Suite 1, Santa Fe, New Mexico, 87505. Please contact Neal Butt at (505) 476-4317 or neal.butt@state.nm.us if you have questions or comments concerning the proposed repeal. Stakeholders are requested to provide comments by October 28, 2018.

The hearing will be conducted in accordance with: 20.1.1 NMAC, *Rulemaking Procedures – Environmental Improvement Board*; the *Environmental Improvement Act*, Section 74-1-9 NMSA 1978; the *Air Quality Control Act*, Section 74-2-6 NMSA 1978; and other applicable procedures.

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

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Persons wishing to present technical testimony must file with the Board a written *Notice of Intent* to do so. Pursuant to 20.1.1.302 NMAC, *Technical Testimony*, The *Notice of Intent* shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background;
- (3) include a copy of the direct testimony of each technical witness in narrative form;
- (4) include the text of any

recommended modifications to the proposed regulatory change; and (5) 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.

Notices of Intent to present technical testimony at the hearing must be received in the Office of the Board not later than 5:00 pm on November 9, 2018, and should reference the docket number, EIB 18-07 (R), and the date of the hearing. *Notices of Intent* to present technical testimony should be submitted to:

Pam Castañeda, Administrator for
Boards & Commissions
Environmental Improvement Board
c/o New Mexico Environment
Department
P. O. Box 5469
Santa Fe, NM 87502
Phone: (505) 827-2425, Fax (505)
827-2836
e-mail: pam.castaneda@state.nm.us

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 their testimony, so long as the exhibit is not unduly repetitious of the testimony.

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

Persons having a disability and needing help to participate in this hearing process should contact Pam Castañeda, Administrator for Boards & Commissions, at least ten days prior to the meeting or as soon as possible at the above address or e-mail pam.castaneda@state.nm.us. TDY users please access her number via the New Mexico Relay Network at 1-800-659-8331.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact:

Kristine Pintado, Non-Discrimination Coordinator
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2855
nd.coordinator@state.nm.us

If you believe that you have been discriminated against with respect to an NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit our website at to <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> to learn how and where to file a complaint of discrimination.

ENVIRONMENTAL IMPROVEMENT BOARD

AVISO DE AUDIENCIA DE REGLAMENTACIÓN

La Junta de Mejora Ambiental de Nuevo México (Junta) celebrará una audiencia pública el 30 de noviembre de 2018, a partir de las 9:30 a.m., en el Edificio del Capitolio del Estado, en la sala 307,

490 Old Santa Fe Trail, Santa Fe, Nuevo México. El propósito de la audiencia es considerar el asunto de EIB 18-07 (R), propuestas revisiones al Plan de Implementación del Estado de Nuevo México (SIP, por sus siglas en inglés) con relación a las Reglamentación de Control de Calidad del Aire establecidas en el Código Administrativo de Nuevo México (NMAC, por sus siglas en inglés) en 20.2.20 NMAC, *Plantas de Fabricación de Cal – Material Particulado*.

El Departamento de Medio Ambiente de Nuevo México (NMED, por sus siglas en inglés) es el que propone estas enmiendas normativas.

El propósito de la audiencia pública es considerar y tomar una posible acción sobre una petición de NMED para derogar la 20.2.20 NMAC. El propósito de la propuesta derogación de la 20.2.20 NMAC es eliminar requisitos obsoletos. Esta norma se identificó en el Informe de Permiso de Mejora Ambiental de noviembre de 2012 para posible revisión o derogación. La 20.2.20 NMAC establece límites de emisiones de material particulado para plantas de fabricación de cal e hidratantes de cal. La Oficina de Calidad del Aire ha llevado a cabo análisis rigurosos de esta norma y normas federales similares y ha llegado a la conclusión de que la norma se puede derogar sin relajar los controles de emisiones o un efecto adverso en la calidad del aire y no es necesaria para mantener los NAAQS para PM. Si la Junta la adopta, la derogación de la 20.2.20 NMAC se presentaría a EPA para considerar su eliminación del SIP de Nuevo México.

El texto completo de la propuesta derogación de esta norma de NMED está disponible en el sitio web de la Oficina de Calidad del Aire: <https://www.env.nm.gov/air-quality/proposed-regs/> o comunicándose con Neal Butt llamando al 505-476-4317, o por correo electrónico neal.butt@state.nm.us. La propuesta derogación también se puede examinar durante

horas hábiles en la Oficina de Calidad del Aire, 525 Camino de los Marquez, Suite 1, Santa Fe, Nuevo México, 87505. Por favor comuníquese con Neal Butt llamado al (505) 476-4317 o por el correo electrónico neal.butt@state.nm.us si tiene preguntas o comentarios con relación a la propuesta derogación. Se ruega que las partes interesadas presenten comentarios a más tardar el 28 de octubre del 2018.

La audiencia se llevará a cabo en conformidad con la 20.1.1 NMAC, *Procedimientos de Reglamentación – Junta de Mejora Ambiental*; la *Ley de Mejora Ambiental* Sección 74-1-9 NMSA 1978; la *Ley de Control de Calidad del Aire*, Sección 74-2-6 NMSA 1978; y otros procedimientos pertinentes.

La Junta puede tomar una decisión sobre la propuesta derogación normativa al terminar la audiencia o puede convocar a una reunión después de la audiencia para considerar una acción sobre la propuesta.

A todas las personas interesadas se les dará una oportunidad razonable en la audiencia para presentar pruebas pertinentes, información, puntos de vista y argumentos en forma oral o por escrito, presentar documentos u objetos de pruebas e interrogar a testigos. Las personas que deseen dar testimonio de carácter técnico deben presentar por escrito a la Junta un Aviso de Intención de hacerlo. De conformidad con la 20.1.1.302 NMAC, el *Testimonio de carácter Técnico*, el *Aviso de Intención* debe:

- (1) identificar a la persona por quien el testigo/os dará/n testimonio.
- (2) identificar a cada testigo técnico que la persona presentará e indicar las cualificaciones del testigo incluyendo una descripción de su historial académico y laboral;
- (3) incluir una copia de las declaraciones directas en forma narrativa de cada testigo técnico;
- (4) incluir el texto de cualquier modificación recomendada al cambio normativo propuesto; y

(5) hacer una lista y adjuntar todas las pruebas que la persona anticipa ofrecer en la audiencia, incluso cualquier declaración propuesta de las razones para adoptar las normas.

Los Avisos de Intención para presentar testimonio de carácter técnico en la audiencia deben recibirse en la oficina de la Junta a más tardar el 9 de noviembre de 2018 hasta las 5:00 pm, y deben hacer referencia al número de expediente EIB 18-07 (R) y la fecha de la audiencia. Los Avisos de Intención para presentar testimonio de carácter técnico deben presentarse a:

Pam Castañeda, Administrator for Boards & Commissions
Environmental Improvement Board
c/o New Mexico Environment
Department
P. O. Box 5469
Santa Fe, NM 87502
Tel.: (505) 827-2425, Fax (505) 827-2836 e-mail: pam.castaneda@state.nm.us

Cualquier miembro del público puede ofrecer declaraciones en la audiencia. No es necesario avisar previamente para ofrecer declaraciones que no sean de carácter técnico en la audiencia. También, cualquier persona puede ofrecer pruebas con relación a su testimonio, siempre y cuando dichas pruebas no sean exageradamente repetitivas del testimonio.

Un miembro del público que en lugar de hacer declaraciones orales en la audiencia desee presentar una declaración por escrito para que conste en el acta deberá registrar la declaración por escrito antes de la audiencia o la puede entregar en la audiencia.

Las personas con discapacidades y que necesiten ayuda para participar en este proceso deben comunicarse con Pam Castañeda, Administrator for Boards & Commissions, por lo menos diez días antes de la reunión o tan pronto como sea posible a la

dirección indicada arriba o al correo electrónico: pam.castaneda@state.nm.us. Los usuarios de TDY pueden acceder a su número por la Red de Retransmisión de Nuevo México llamando al 1-800-659-8331.

El Departamento de Medio Ambiente de Nuevo México (NMED, por sus siglas en inglés) no discrimina por motivos de raza, color, origen nacional, discapacidad, edad o sexo en la administración de sus programas o actividades, según lo exigido por las leyes y reglamentos correspondientes. NMED es responsable de la coordinación de los esfuerzos de cumplimiento y la recepción de consultas relativas a los requisitos de no discriminación implementados por 40 C.F.R., partes 5 y 7, incluido el Título VI de la Ley de Derechos Civiles de 1964, según enmendada; Sección 504 de la Ley de Rehabilitación de 1973; la Ley de Discriminación por Edad de 1975, Título IX de las Enmiendas de Educación de 1972 y la Sección 13 de las Enmiendas a la Ley Federal de Control de Contaminación del Agua de 1972. Si usted tiene preguntas sobre este aviso o sobre cualquier programa, política o procedimiento de no discriminación de NMED, usted puede comunicarse con la Coordinadora de No Discriminación:

Kristine Pintado, Non-Discrimination Coordinator
New Mexico Environment
Department
1190 St. Francis Dr., Suite N4050
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2855
nd.coordinator@state.nm.us

Si usted cree que ha sido discriminado/a con relación a un programa o actividad de NMED, usted se puede comunicar con la coordinadora antidiscriminación mencionada arriba o visitar nuestro sitio electrónico: <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> para aprender más sobre cómo y dónde presentar una queja de discriminación.

GENERAL SERVICES DEPARTMENT

NOTICE OF PROPOSED RULEMAKING

The New Mexico General Services Department, Risk Management Division and the Facilities Management Division, (“GSD” or “Department”) hereby gives notice that the Department will conduct a public hearing as indicated to obtain input on the following rule revisions:

Repealing and replacing **1.6.4 NMAC - STATE LOSS PREVENTION AND CONTROL PROGRAM** current rule and replacing it with the following rule:

SUMMARY AND PURPOSE OF THE PROPOSED RULE: The current State Loss Prevention and Control Program rule 1.6.4 NMAC, addressed direction for agencies in the prevention and control of insurable losses, required training for state employees, articulated management’s responsibility regarding safety and loss control and prevention, and implemented reporting requirements of the Risk Management Division to the Legislature regarding agencies that are noncompliant with the rule. The new rule provides additional detail to address situations not outlined in the original rule, including:

1. Clarifying the scope and definitions sections of the rule;
 2. Clarifying the roles and responsibilities of the State Loss Control Manager, the Agency Loss Prevention and Control Coordinator and the Loss Prevention and Control Committee;
 3. Providing direction on Incident and Loss Investigations; Addressing safety and loss prevention and control training for employees; and
 4. Clarifying procedures for agencies on job-related injury or illness claims management.
- The State Loss Prevention and Control Program rule revisions are based on cross-industry risk

management best practices and emerging trends in the field. While the new program is designed to help agencies mitigate losses, no technical information serves as a basis for this proposed rule.

Repealing and replacing **1.6.3 NMAC - BUDGETING AND PAYMENT OF ASSESSMENTS FOR UNEMPLOYMENT COMPENSATION BENEFITS BY STATE AGENCIES AND LOCAL PUBLIC BODIES** current rule and replacing it with the following rules:

SUMMARY AND PURPOSE OF THE PROPOSED RULE: The current rule 1.6.3 NMAC - Budgeting And Payment Of Assessments For Unemployment Compensation Benefits By State Agencies And Public Bodies did not provide procedures in which local public bodies could enter and leave the local public body unemployment fund. The new rule provides additional detail to address situations not outlined in the original rule, including:

1. Clarifying scope and objective, and;
2. Providing procedures for local public bodies that want to participate in the Local Public Body Unemployment Compensation Reserve Fund.

Covered Local Public Bodies have asked for Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Public Bodies rule revisions to clarify the administration process and focus operations. No technical information serves as a basis for this proposed rule.

A proposed new rule: **1.5.9 NMAC - PUBLIC FACILITY NAMING** as follows:

SUMMARY AND PURPOSE OF THE PROPOSED NEW RULE: The new rule Public Facility Naming provides procedures for the naming of public facilities that are owned by the General Services Department. The new rule provides the following details:

1. Definitions;
2. Scope and Objective;
3. Procedures for soliciting proposed names; and
4. Process in selecting the name.

Senate Bill 46, passed in the 2018 session requires the General Services Department to promulgate a Public Facility Naming rule. No technical information serves as a basis for this proposed rule.

PUBLICATION: The proposed rules and hearing agenda have been published and are also posted for public view for NMAC 1.6.4 and NMAC 1.6.3 on the Risk Management Division website: <http://www.generalservices.state.nm.us/riskmanagement/>. The proposed rules and hearing agenda have been published and are also posted for public view for the new rule on Public Facility Naming on the Facilities Management Division website: <http://www.generalservices.state.nm.us/facilitiesmanagement/>.

A public hearing regarding the rules will be held on Wednesday, September 26, 2018 at 9:00 A.M. in the State Purchasing Bid Room on the first floor of the Joseph Montoya Building, 1100 S. St. Francis Drive, Santa Fe, New Mexico 87505.

HOW TO COMMENT ON THE PROPOSED RULE: Interested individuals may testify regarding the proposed rulemaking relating to NMAC 1.6.4 STATE LOSS PREVENTION AND CONTROL PROGRAM, NMAC 1.6.3 BUDGETING AND PAYMENT OF ASSESSMENTS FOR UNEMPLOYMENT COMPENSATION BENEFITS BY STATE AGENCIES AND LOCAL PUBLIC BODIES and NEW RULE PUBLIC FACILITY NAMING at the public hearing scheduled on Wednesday, September 26, 2018 in the State Purchasing Bid Room on the first floor of the Joseph Montoya Building, 1100 S. St. Francis Drive, Santa Fe, New Mexico 87505.

Written comments may also be

submitted no later than the date of the public hearing to: Rebecca Abbo, Internal Auditor, Office of the Secretary, New Mexico General Services Department, Room 1004, 1100 St. Francis Drive, Santa Fe, New Mexico 87505 or Rebecca.abbo2@state.nm.us.

PROPOSED RULE COPIES: The public hearing agenda and the full text of the proposed rule for NMAC 1.6.3 and 1.6.4 may be accessed on the Risk Management Division website and the new rule on Public Facility Naming on the Facilities Management Division website: <http://www.generalservices.state.nm.us/riskmanagement/> or <http://www.generalservices.state.nm.us/facilitiesmanagement/> or obtained from Rebecca Abbo by request to: Rebecca Abbo, Internal Auditor, Office of the Secretary, New Mexico General Services Department, Room 1004, 1100 St. Francis Drive, Santa Fe, New Mexico 87505 or Rebecca.abbo2@state.nm.us, or Phone 505-476-1453, or Fax 505-827-2041.

SPECIAL NEEDS: Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this hearing are asked to contact, Rebecca Abbo (contact information provided above). The Department requests at least seven days advanced notice (by close of business 5:00 P.M. on Tuesday, September 18, 2018) for all requests regarding special accommodations.

STATUTORY AUTHORITY: Section 9-17-5 NMSA 1978, and Section 15-7-3(A)(9) NMSA 1978 (Loss Prevention and Control Program), Section 51-1-46 NMSA 1978 (Budgeting and Payment of Assessments for Unemployment Compensation Benefits by State Agencies and Local Public Bodies) and Section 15-3B-1 NMSA 1978, et seq. (Public Facility Naming).

**HUMAN SERVICES
DEPARTMENT
INSPECTOR GENERAL, OFFICE
OF**

**NOTICE OF RULEMAKING
HEARING**

The Human Services Department (the Department), through the Office of the Inspector General (OIG) is proposing a new rule: 8.1.2 NMAC, GENERAL OPERATING PROCEDURE FOR THE OFFICE OF INSPECTOR GENERAL.

This is a new rule, the objective of which is to provide general operating policy for the OIG.

Statutory Authority for this new rule is pursuant to Section 9-8-6, NMSA 1978 (2017), which authorizes the Human Services Department (Department) Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions; and creates the OIG under authority by the Department Secretary.

The proposed new rule is available on and can be printed from the Department's website at: <http://www.hsd.state.nm.us/2017-comment-period-open.aspx>. A copy of the proposed new rule is available in written format upon request. Please contact:

Office of the Secretary
OIG - Rule Promulgation
PO Box 2438
Santa Fe, NM 87505

To request a copy or to address written comments. Recorded comments may be left at 505-827-6201 Interested persons may also address comments via electronic mail to: HSD-SubmitAComment@state.nm.us. Written mail, electronic mail and recorded comments must be received no later than 5 p.m. MDT on 10/3/2018. Written and recorded comments will be given the same consideration as oral testimony made at the public hearing.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Office of the Secretary in Santa Fe at 505-827-6201. The Department requests at least 10 working days advance notice to provide requested alternative formats and special accommodations.

Copies of all comments will be made available by the Office of Investigator General upon request by providing copies directly to a requestor or by making them available on the HSD website or at a location within the county of the requestor.

A public hearing to receive testimony on this proposed regulation will be held on 10/4/2018, from 1 p.m. to 3 p.m. The hearing will be held in the Pinon Conference Room of the State Library, located at 1209 Camino Carlos Rey, Santa Fe, NM 87507. Accessible parking for persons with physical impairments is available.

**HUMAN SERVICES
DEPARTMENT
INCOME SUPPORT DIVISION
NOTICE OF PUBLIC HEARING**

The Human Service Department (HSD) will hold a public hearing to allow public comment on the Cash Assistance Program regulations to be published August 28, 2018, pursuant to Section 14-4-5.2 NMSA.

The hearing will be held on October 1, 2018, from 9:30 a.m. to 10:30 a.m., at the HSD Administrative Services Division (ASD) conference room on the first floor, 1474 Rodeo Road, Santa Fe, NM 87505.

In August 2015, HSD reduced the budgetary adjustment to 7.5% from the original 15% Budgetary Adjustment, which increased the monthly benefits for the New Mexico Works (NMW) cash assistance recipients. In Fiscal Year 2019,

the Department was appropriated requested NMW funding and is now proposing to remove the remaining 7.5% budgetary adjustment and is promulgating proposed regulations found in 8.102.620 NMAC.

HSD is proposing to:

- Remove the 7.5% Budgetary Adjustment amount from the calculation of monthly benefits for TANF, NMW Program, EWP and SFA. The effect of this change will be an increase to monthly benefit amounts.
- As requested by HSD, the Fiscal Year 2019 appropriated to HSD included funding to eliminate the 7.5% budget adjustment.
- This change went into effect on July 1, 2018, and this proposed rule aligns with the change.

The Human Services Register Vol. 41 No. 17 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 505-827-7289.

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, October 1, 2018. 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.

**HUMAN SERVICES
DEPARTMENT
MEDICAL ASSISTANCE
DIVISION**

NOTICE OF RULEMAKING

The Human Services Department (the Department), through the Medical Assistance Division (MAD), is proposing to amend the following New Mexico Administrative Code (NMAC) rules: 8.308.6 Managed Care Program - Eligibility; 8.308.7 Managed Care Program - Enrollment and Disenrollment; 8.308.9 Managed Care Program - Benefit Package; 8.308.10 Managed Care Program - Care Coordination; and 8.308.12 Managed Care Program - Community Benefit.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: August 28, 2018
Hearing Date: September 26, 2018
Adoption Date: Proposed as January 1, 2019
Technical Citations: Centennial Care 2.0 1115 Waiver, Federal Register/ Vol. 81, No. 230, 42 CFR 435.119(b) (2)

The Department is proposing to revise these rules to align with the Department's Centennial Care 1115 Demonstration Waiver renewal effective January 1, 2019.

8.308.6 NMAC

Part Title

The Department proposes amending the title to better describe the section and actions within the regulation.

Section 10: Special Situations

The Department proposes revisions that better describe the action of enrollment with a managed care organization (MCO) rather than eligibility for Medicaid. Proposed language was added to clarify that an eligible mother and her newborn are enrolled with the same MCO for the month of the birth. The Department also proposes deleting current language and adding clarifying language related to MCO enrollment requirements for individuals who meet a Nursing Facility Level of Care (NF LOC).

Other proposed amendments within this section include updating the date of proposed changes, and minor edits for consistency and clarity.

8.308.7 NMAC

Section 9: Managed Care Enrollment

The Department proposes new language outlining the conditions for enrollment and retroactive enrollment with a MCO. Proposed language was added to clarify enrollment provisions for inmates and individuals being released from incarceration and for individuals who miss their enrollment switch period due to incarceration, hospitalization or incapacitation.

The Department proposes clarifying language defining the open enrollment period. Proposed language was also added to this section regarding Native American opt-in and opt-out enrollment provisions.

Other proposed amendments within this section include updating the date of proposed changes, and minor edits for consistency and clarity.

8.308.9 NMAC

Section 7: Definitions

The Department proposes adding definitions for Early Childhood Home Visiting Program and Evidence-Based, Early Childhood Home

Visiting Program in this section.

Section 17: Preventive Physical Health Services

The Department proposes adding language including referral to a home visiting pilot program for eligible pregnant women and children as a component of the prenatal care benefit under the managed care program.

Section 23: Centennial Home Visiting (CHV) Pilot Program Services

The Department proposes new language outlining the rules for a Centennial Home Visiting (CHV) pilot program that will be available under the managed care program starting January 1, 2019. The proposed language explains who will be served under the CHV pilot program and where such services will be available. The Department includes proposed language defining the CHV pilot program delivery models as the Nurse Family Partnership (NFP) model for first-time parents; and the Parents as Teachers (PAT) model. Proposed language describing covered services under the CHV pilot program is also included in this section.

Remaining sections of the rule were renumbered.

8.308.10 NMAC

Section 9: Care Coordination

The Department proposes adding new language allowing the MCOs to delegate care coordination activities and requiring the MCOs to share information about release from incarceration with the member's providers for care coordination purposes. The Department also proposes moving language regarding Electronic Visit Verification to NMAC 8.308.12, Community Benefit, under relevant services.

Other amendments have been proposed within the rule for consistency and clarity.

8.308.12 NMAC

Section 7: Definitions

The Department proposes to add a new definition for Electronic Visit Verification (EVV). The Department also proposes clarifying language on the role of the Employer of Record (EOR) when the member has a Power of Attorney (POA).

Section 13: Covered Services in Agency Based Community Benefit (ABCB)

In this section, the Department proposes language for inclusion of a security deposit for an assisted living facility placement of up to \$500. The Department also proposes the addition of nutritional counseling service in the Agency-Based Community Benefit (ABCB). New proposed language in this section also includes the 21st Century Cures Act federal requirement that all personal care services must be documented with the use of an EVV system. The Department also proposes an increase in the annual limit for respite service hours from 100 to 300.

Section 18: Covered Services in Self-Directed Community Benefit (SDCB)

The Department proposes implementing a cost limit for certain SDCB services effective January 1, 2019. There are currently no limits on these services, and members who are in the program prior to January 1, 2019 with amounts above the new proposed limits are “grandfathered”. SDCB budgets will not be reduced for grandfathered individuals for these services. The new proposed limits include:

- Specialized therapies (such as acupuncture or massage) - proposed limit of \$2,000 annually.
- Related goods (such as gym membership or supplements) - proposed limit of \$2,000 annually.
- Non-medical transportation (such as to events in the community) - proposed limit of \$1,000 annually.

The Department proposes to change in name of the SDCB “homemaker” service to “self-directed personal care service (PCS)”. There is no change in the service definition.

The Department also proposes the addition of a new service in SDCB called start-up goods. This new service allows for the one-time purchase of items that a new SDCB member needs to self-direct, such as a computer, printer, and fax machine. There is a one-time limit of up to \$2,000 for start-up goods.

Other amendments are proposed within this section of the rule for consistency and clarity.

This register and the proposed rules are available on the HSD website at: <http://www.hsd.state.nm.us/2017-comment-period-open.aspx> and <http://www.hsd.state.nm.us/LookingForInformation/registers.aspx>. If you do not have internet access, a copy of the proposed register and rules may be requested by contacting MAD at (505) 827-6252.

The Department proposes to implement these rules effective January 1, 2019. A public hearing to receive testimony on these proposed rules will be held in the Rio Grande Conference Room, Toney Anaya Building, 2550 Cerrillos Road, Santa Fe, New Mexico on September 26, 2018 from 9 a.m. to 12 p.m., Mountain Daylight Time (MDT).

Interested parties may submit written comments directly to: Human Services Department, Office of the Secretary, ATT: Medical Assistance Division Public Comments, P.O. Box 2348, Santa Fe, New Mexico 87504-2348.

Recorded comments may be left by calling (505) 827-1337. Electronic comments may be submitted to madrules@state.nm.us. Written, electronic and recorded comments will be given the same consideration as oral testimony made at the public hearing. All comments must be received no later than 5:00 p.m. MDT, September 28, 2018.

If you are a person with a disability and you require this information in an alternative format or require a

special accommodation to participate in the public hearing, please contact MAD in Santa Fe at 505-827-6252. The Department requests at least ten (10) days advance notice to provide requested alternative formats and special accommodations.

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

**WORKFORCE
SOLUTIONS,
DEPARTMENT OF
NOTICE OF RULEMAKING
HEARING**

The New Mexico Department of Workforce Solutions (“Department”), Apprenticeship Program, hereby gives notice that the Department will conduct a public hearing in the auditorium of the State Personnel Office located at 2600 Cerrillos Road, Santa Fe, New Mexico on October 2, 2018 from 11:00 am to 1:00 pm. The purpose of the public hearing will be to obtain input and public comment on the repeal of the current 11.2.2 NMAC which will be replaced with an updated version of 11.2.2 NMAC.

Under Section 21-19A-6 NMSA 1978, the Department of Workforce Solutions Labor Relations Division is responsible for making such rules and regulations as are necessary to carry out the provisions of the Apprenticeship Assistance Act.

The proposed rules align the Department’s procedures with New Mexico statutes and Department of Labor regulations, including updating the Equal Employment Opportunity provisions of the regulation to comply with current DOL requirements and standards.

Interested individuals may testify at the public hearing or submit written comments to the Department of

Workforce Solutions, 401 Broadway NE, P.O. Box 1928, Albuquerque, N.M., 87103, attention Andrea Christman. Written comments must be received no later than 5 p.m. on October 1, 2018. However, the submission of written comments as soon as possible is encouraged.

Copies of the proposed rules may be accessed at <http://www.dws.state.nm.us> or obtained by calling Andrea Christman at (505) 841-8478 or sending an email to Andrea.Christman@state.nm.us. The proposed rules will be made available at least thirty days prior to the hearing.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Ms. Christman as soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

**WORKFORCE
SOLUTIONS,
DEPARTMENT OF**

**NOTICE OF RULEMAKING
HEARING**

The New Mexico Department of Workforce Solutions (“Department”) hereby gives notice that the Department will conduct a public hearing in the auditorium of the State Personnel Office located at 2600 Cerrillos Road, Santa Fe, New Mexico on October 2, 2018 from 9:00 am to 11:00 am. The purpose of the public hearing will be to obtain input and public comment on the repeal of the current 11.3.300 NMAC which will be replaced with an updated version of 11.3.300 NMAC.

Under Section 9-26-4 NMSA 1978, the Workforce Solutions Department is responsible for the administration of the Workforce Technology Division and the Workforce Transition Services Division. The Department

is therefore responsible for the administration of the Unemployment Compensation Law pursuant to Section 51-1-1 et seq NMSA 1978.

The proposed rules align the Department’s procedures with New Mexico statutes and Department of Labor regulations, including the implementation of a prohibition of non-chargeability on employers for failure to respond timely or adequately to Department inquiries regarding claimant eligibility. The Department also clarified procedures and definitions from the former version of the rules and removed procedures which are no longer in effect.

Interested individuals may testify at the public hearing or submit written comments to the Department of Workforce Solutions, 401 Broadway NE, P.O. Box 1928, Albuquerque, N.M., 87103, attention Andrea Christman. Written comments must be received no later than 5 p.m. on October 1, 2018. However, the submission of written comments as soon as possible is encouraged.

Copies of the proposed rules may be accessed at <http://www.dws.state.nm.us> or obtained by calling Andrea Christman at (505) 841-8478 or sending an email to Andrea.Christman@state.nm.us. The proposed rules will be made available at least thirty days prior to the hearing.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Ms. Christman as soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

**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.

ENVIRONMENT DEPARTMENT

TITLE 20

ENVIRONMENTAL PROTECTION

CHAPTER 5 PETROLEUM STORAGE TANKS

PART 123 CORRECTIVE ACTION FUND ADMINISTRATION

20.5.123.1 ISSUING

AGENCY: New Mexico Environment Department.
[20.5.123.1 NMAC - N/E, 07/31/2018]

20.5.123.2 SCOPE: This part applies to owners and operators of storage tanks as provided in 20.5.101 NMAC through 20.5.103 NMAC, 20.5.105 NMAC through 20.5.111 NMAC, 20.5.115 NMAC, 20.5.117 NMAC through 20.5.122, 20.5.124 NMAC, and 20.5.125 NMAC and as provided in 20.5.101 NMAC, contractors, offerors, and designated representatives, and to all payments made by the department to or on behalf of storage tank owners and operators under the Ground Water Protection Act. If the owner and operator are separate persons, only one person is required to comply with the requirements of this part, including any notice and reporting requirements; however, both parties are liable in the event of noncompliance.

[20.5.123.2 NMAC - N/E, 07/31/2018]

20.5.123.3 STATUTORY AUTHORITY:

20.5.123 NMAC is adopted by the secretary of environment pursuant to the provisions of the Department of Environment Act, Sections 9-7A-1 through 9-7A-15 NMSA 1978 and

the Ground Water Protection Act, Sections 74-6B-1 through 74-6B-14 NMSA 1978.

[20.5.123.3 NMAC - N/E, 07/31/2018]

20.5.123.4 DURATION:

Permanent.

[20.5.123.4 NMAC - N/E, 07/31/2018]

20.5.123.5 EFFECTIVE

DATE: July 31, 2018, unless a later date is indicated in the rule history note at the end of a section.

[20.5.123.5 NMAC - N/E, 07/31/2018]

20.5.123.6 OBJECTIVE:

The purpose of 20.5.123 NMAC is to establish the procedures for administering and making payments from the corrective action fund (fund) created by the Ground Water Protection Act (act), Sections 74-6B-1 through 74-6B-14 NMSA 1978, including procedures for:

A. payment of the costs of a minimum site assessment in excess of ten thousand dollars (\$10,000), or in excess of lesser amounts as permitted by the act;

B. payment of the costs of corrective action other than the minimum site assessment;

C. determinations of compliance with the act;

D. determinations of eligibility of costs for payment;

E. competitive bidding for corrective action work; and

F. disposition of remediation equipment acquired through the fund.

[20.5.123.6 NMAC - N/E, 07/31/2018]

20.5.123.7 DEFINITIONS:

A. Terms used in this part shall have the meanings given to

them in the Ground Water Protection Act and 20.5.101 NMAC except as provided in Subsection B of this section.

B. As used in 20.5.123 NMAC:

(1) “cost-effectiveness” means completing tasks in a manner that is economical in terms of goods or services received for the money spent;

(2) “major remediation equipment” means any transportable unit or system which has been acquired specifically for remediation using the corrective action fund and which the department must inventory pursuant to Section 12-6-10 NMSA 1978;

(3) “pay for performance” means payment of a previously approved amount based on completion or achievement of previously determined criteria including but not limited to a given task or set of tasks, specified reductions in contaminant levels, or achievement of other measurable milestones, as approved by the department;

(4) “payment” means payment from the fund to a person that the owner or operator has assigned the right of reimbursement or reimbursement from the fund to an owner or operator for the costs of corrective action;

(5) “phase of corrective action” means any one of the following activities, required by 20.5.119 or 20.5.120 NMAC:

(a) minimum site assessment (MSA), as defined in 20.5.101.7 NMAC and tier 1 evaluation and report;

(b) secondary investigation and report, tier two evaluation and report, or tier three evaluation and report, which are known as phase one;

(c) interim removal of non-aqueous phase liquid or contaminated soil, which is known as phase two;

(d) development of a conceptual and final remediation plan or a monitored natural attenuation plan, which are known as phase three;

(e) implementation of the remediation plan, which is known as phase four; or

(f) operating, monitoring, maintaining and reporting under the implemented remediation plan or monitoring and reporting under the approved monitored natural attenuation plan, which are known as phase five;

(6) “proposal” means an offer to complete work submitted in response to given specifications issued for a responsible party-lead site or for a state-lead site;

(7) “resident business” means:

(a) a business enterprise which is authorized to do and is doing business under the laws of New Mexico and which maintains its principal place of business in New Mexico, or has staffed an office and has paid applicable New Mexico taxes for two years prior to the awarding of the proposal and has five or more employees who are residents of New Mexico, or is an affiliate of a business which meets either of these two requirements; as used in this paragraph, “affiliate” means an entity that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the qualifying business through ownership of voting securities representing a majority of the total voting power of the entity; or

(b) a business enterprise, including a sole proprietorship, partnership or corporation, that offers for sale or lease or other form of exchange, goods, commodities or services that are substantially manufactured, produced or assembled in New York state, or, in the case of construction

services, has its principal place of business in New York state;

(8) “responsible party-lead site” means a site where the owner or operator takes corrective action and applies to the fund for payment of corrective action costs, as distinct from a site where the state takes corrective action;

(9) “specifications” means a detailed written statement of particulars prescribing corrective action to be taken, conditions to be met, materials to be used, or standards of workmanship to which something is to be built, installed, or operated, which is provided to prospective contractors on responsible party-lead sites and state-lead sites;

(10) “state-lead site” means a site where the department takes corrective action using the fund because the owner and operator are unknown, unable or unwilling to take corrective action as described in 20.5.121.2102 NMAC or because the department determines that a single entity is necessary to lead the corrective action;

(11) “technical merit” means those characteristics of a proposal including but not limited to strategies, expertise, methods, materials and procedures meeting the specifications included in a request for proposals.

[20.5.123.7 NMAC - N/E, 07/31/2018]

20.5.123.8 to 20.5.123.2299 [RESERVED]

20.5.123.2300 CONSTRUCTION:

This part shall be liberally construed to effectuate the purposes of the Ground Water Protection Act and shall be construed, to the extent possible, so as not to conflict with the Hazardous Waste Act or 20.5.101 NMAC through 20.5.103 NMAC, 20.5.105 NMAC through 20.5.111 NMAC, 20.5.115 NMAC, 20.5.117 NMAC through 20.5.122, 20.5.124 NMAC, and 20.5.125 NMAC.

[20.5.123.2300 NMAC - N/E, 07/31/2018]

20.5.123.2301 SEVERABILITY:

If any section or application of this part (20.5.123 NMAC) is held invalid, the remainder of this part (20.5.123 NMAC) or its application to other persons or situations shall not be affected.

[20.5.123.2301 NMAC - N/E, 07/31/2018]

20.5.123.2302 EFFECT ON OTHER REGULATIONS:

This part does not relieve any owner or operator of the obligation to comply with any federal or state laws or regulations, including 20.5 NMAC.

[20.5.123.2302 NMAC - N/E, 07/31/2018]

20.5.123.2303 COMPLIANCE DETERMINATIONS:

A. The department shall make compliance determinations in the following circumstances.

(1) Corrective action by owner or operator. Pursuant to Section 74-6B-13 NMSA 1978, in order to be eligible for payment of corrective action costs other than those costs associated with a minimum site assessment, the owner or operator shall be in compliance with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, as outlined in 20.5.123.2304 NMAC, during the owner or operator’s term of ownership or operation for all storage tanks owned or operated at the site where the corrective action was or is being taken. Compliance for underground storage tanks (USTs) shall be determined for the period from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for above-ground storage tanks (ASTs) shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

(2) Corrective action by the department. Before bringing an action in district court against an owner or operator to recover expenditures from the fund incurred by the department to take corrective action at a site, the department shall determine,

in accordance with 20.5.123.2304 NMAC, whether the owner or operator has complied with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, during his term of ownership or operation for all storage tanks owned or operated at the site. Compliance for USTs shall be determined for the period from March 7, 1990 to the date the department determines that corrective action is complete. Compliance for ASTs shall be determined for the period from July 1, 2001 to the date the department determines that corrective action is complete.

B. The owner or operator shall request a compliance determination before submitting the initial request for payment of the costs of corrective action, other than the costs of an MSA. Once the department has completed an initial compliance determination at the owner or operator's request, it may initiate and make separate compliance determinations at one or more phases of corrective action, other than an MSA, for which payment is requested. If the department determines that a tank owner or operator is not in compliance with 20.5.123.2304 NMAC, the tank owner or operator will be ineligible for payment of corrective action costs, other than an MSA.

C. No compliance determination is necessary when, pursuant to Section 74-6B-13 NMSA 1978, an owner or operator applies to the department for payment of MSA costs exceeding the deductible. However, the department shall determine prior to payment that the work performed meets the definition of an MSA provided in 20.5.101.7 NMAC.

[20.5.123.2303 NMAC - N/E, 07/31/2018]

20.5.123.2304 DETERMINATION OF COMPLIANCE UNDER SECTION 74-6B-8 NMSA 1978:

A. For sites where all USTs were removed or properly abandoned prior to March 7, 1990, and for sites where all ASTs were removed or properly abandoned prior

to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.123.2303 NMAC shall include findings as to whether the owner or operator has:

(1) paid all storage tank fees required by Section 74-4-4.4 NMSA 1978, and, for all storage tanks removed or properly abandoned prior to March 7, 1990, a two hundred (\$200) fee per site;

(2) conducted a minimum site assessment as defined in 20.5.101.7 NMAC; and

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring.

B. For sites where USTs were not removed or properly abandoned prior to March 7, 1990, or where ASTs were not removed or properly abandoned prior to July 1, 2001, the determination of compliance required by Subsections B and C of 20.5.123.2303 NMAC shall include findings as to whether the owner or operator has:

(1) paid all storage tank fees required by Sections 74-4-4.4 and 74-6B-9 NMSA 1978;

(2) conducted a minimum site assessment as defined in 20.5.101.7 NMAC and, if contamination is found, taken action to prevent continuing contamination;

(3) cooperated in good faith with the department and granted access to the department for investigation, cleanup, and monitoring; and

(4) substantially complied with all of the requirements and provisions of regulations adopted by the EIB under Subsection C of Section 74-4-4 NMSA 1978 for storage tanks at the site for which payment is sought (including installation, upgrade, operation and maintenance of storage tanks in accordance with 20.5.106 NMAC through 20.5.109 NMAC; release detection in accordance with 20.5.108 NMAC and 20.5.111 NMAC; for any storage tanks which have been abandoned or closed at the site, proper closure in accordance

with 20.5.115 NMAC; reporting, investigating, confirming and remediating the release in accordance with 20.5.118 NMAC, 20.5.119 NMAC and 20.5.120 NMAC; proof of financial responsibility in accordance with 20.5.117 NMAC; and record keeping in accordance with the record keeping provisions of 20.5.101 through 20.5.103 NMAC, 20.5.106 through 20.5.111 NMAC, 20.5.115 NMAC, 20.5.117 through 20.5.120 NMAC, 20.5.124 NMAC, and 20.5.125 NMAC).

C. In determining whether the owner or operator has substantially complied with the regulations referenced in Paragraph (4) of Subsection B of this section, the department may consider, among other things, the severity of the non-compliance, the period of non-compliance, the actions taken by the owner or operator to come into compliance, and the timeliness of the owner or operator's actions in coming into compliance.

[20.5.123.2304 NMAC - N/E, 07/31/2018]

20.5.123.2305 PROCEDURES FOR DETERMINING COMPLIANCE:

A. When the owner or operator submits a written request for a compliance determination to the department, the request shall provide the following information for all storage tanks located at the site where the owner or operator is performing corrective action:

(1) the applicant's name, address, telephone number and federal tax identification number;

(2) a description of the applicant's interest in the site (for example, landowner, tank owner, lending institution, operator);

(3) the name, address and telephone number of the tank facility at the release site;

(4) the facility and owner numbers for the tank facility at the release site;

(5) information on all systems that exist

or that have existed at the release site during the owner or operator's term of ownership or operation, including:

(a) tank type (UST or AST), tank number, installation dates, tank capacity, product contained and removal date, if applicable;

(b) information on installation, upgrade, operation and maintenance standards, including type of tank construction, piping system, corrosion protection, spill and overflow protection, release detection for tanks and piping, operation and maintenance plans, and secondary containment, if applicable; and

(c) dates of permanent closure, if applicable;

(6) proof of financial responsibility that includes:

(a) name and address of the facility that is the subject of the compliance determination;

(b) type of financial responsibility;

(c) name of insurance provider, policy number, and period of coverage; and

(d) information about insurance coverage, including: type or types of coverage for corrective action or third-party liability, amount of coverage per occurrence, and amount of annual aggregate coverage for sudden accidental releases, non-sudden accidental releases, and accidental releases;

(7) corrective action information for each release that includes:

(a) date the release was reported to the department;

(b) methods of preventing further release; and

(c) completion of the MSA report;

(8) certification on oath or affirmation of the truthfulness of all matters and facts contained in the request.

B. When the

department initiates a compliance determination pursuant to Subsection B of 20.5.123.2303 NMAC:

(1) the department shall, in writing, notify the owner or operator of the reason for the compliance determination and explain that if the department determines that the owner or operator is not in compliance with 20.5.123.2304 NMAC, the owner or operator will be ineligible for payment of corrective action costs other than an MSA; and

(2) the owner or operator shall submit in writing all information requested by the department by a date specified by the department; the department may request any of the information required for an MSA pursuant to Subsection A of this section and shall establish a deadline for submission of this information that is reasonable under the circumstances.

C. The department shall review all written submissions in the order received and shall, within 30 days of receipt, notify the owner or operator in writing of any inadequacies in the submittal. The owner or operator may then correct any inadequacies and resubmit the application. Submissions shall be determined "complete" by the department when the submissions are adequately documented or inadequacies identified by the department have been corrected.

D. The owner or operator has the burden of establishing each point of fact relevant to such a determination. For such purpose, the submissions shall state specific facts which demonstrate compliance with Subsection B of 20.5.123.2304 NMAC.

E. The department shall make a compliance determination within 45 days following the department's determination that a submission is complete and shall promptly notify the owner or operator of its determination. If the department finds an owner or operator to be out of compliance, the department shall also notify the owner or operator

in writing of the manner in which the owner or operator has failed to comply with 20.5.123.2304 NMAC and inform the owner or operator that he or she is ineligible for payment of corrective action costs, other than the costs of an MSA.

[20.5.123.2305 NMAC - N/E, 07/31/2018]

[The department provides a form that may be used to request a compliance determination that may be obtained from the petroleum storage tank bureau at 1301 Siler Road, Building B, Santa Fe, New Mexico 87507 address or on the department's webpage: www.nmenv.state.nm.us.]

20.5.123.2306 COMPETITIVE CONTRACTOR SELECTION FOR REMEDIATION AT RESPONSIBLE PARTY-LEAD SITES:

A. Payments made from the fund shall be made in accordance with 20.5.123.2309 NMAC and only for work performed by contractors that were selected using a competitive procedure based upon technical merit and cost-effectiveness, as defined in this part except as provided in Subsections C and D of this section. The solicitation and evaluation of proposals are required prior to workplan approval.

B. At a minimum, the department shall obtain proposals and select contractors competitively for remediation activities under 20.5.119.1922 through 20.5.119.1928 NMAC and under 20.5.120.2019 through 20.5.120.2025 NMAC, including conceptual and final remediation plans, design, construction, installation, operation and maintenance, and monitoring.

C. Competitive contractor selection is not required for the following activities:

(1) initial abatement or emergency response under 20.5.119.1902 or 20.5.120.2002 NMAC;

(2) 72 hour and 14 day reports under 20.5.119.1903 or 20.5.120.2003 NMAC;

(3) interim

removal of non-aqueous phase liquid (NAPL), directed or approved by the department under 20.5.119.1906 or 12.5.120.2006 NMAC;

(4) interim removal of contaminated soil, directed or approved by the department under 20.5.123.1906 or 12.5.120.2006 NMAC;

(5) investigation activities under 20.5.118.1801 NMAC and 20.5.119.1907 through 20.5.119.1913 NMAC or 20.5.120.2007 through 20.5.120.2011 NMAC;

(6) development of and monitoring and reporting under a monitored natural attenuation plan under 20.5.119.1915 through 20.5.119.1921 NMAC or 20.5.120.2012 through 20.5.120.2018 NMAC;

(7) work at sites for which the owner or operator is not seeking payment, including but not limited to federal facilities and sites determined to be out of compliance pursuant to 20.5.123.2304 NMAC; or

(8) work at sites under contract as described in Subsection D of this section.

D. Work at sites with releases from USTs where the owner or operator and a contractor entered into a contract approved by the department and initiated remediation prior to October 1, 1995, shall be exempt from competitive contractor selection requirements. Work at sites with releases from ASTs at which the owner or operator and a contractor entered into a contract for and initiated remediation prior to June 14, 2002, shall be exempt from competitive contractor selection requirements. The owner or operator shall obtain a contractor for any subsequent site through the competitive contractor selection process in accordance with the requirements of 20.5.123.2306 through 20.5.123.2307 NMAC. [20.5.123.2306 NMAC - N/E, 07/31/2018]

20.5.123.2307 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION CONTRACTORS AT RESPONSIBLE PARTY-LEAD SITES:

A. Within two weeks of written notification from the department that remediation is required, the owner or operator shall provide to the department either a written list with a minimum of five names of consultants from which the department shall solicit proposals for remediation or a written request that the department solicit proposals for remediation on its website.

The department shall follow the procedures outlined in Subsections B through E of this section.

B. Specifications.

(1) The department shall develop specifications for remediation, which shall state which sections of 20.5.119 or 20.5.120 NMAC the work is intended to fulfill.

(2) The department may require that specifications including primary responsibility for operation or maintenance of remediation systems with electrical or mechanical components contain the requirement that winning proposals shall include pay-for-performance criteria as defined in this part.

(3) Proposals shall meet all requirements outlined in the specifications.

(4) Costs for all tasks outlined in the specifications shall be submitted by short-listed firms only and shall be submitted under separate, sealed cover from the technical portion of the proposal.

C. Solicitation of proposals.

(1) If the owner or operator provides a list of contractors, the department shall mail the specifications to those contractors. However, if the owner or operator fails to provide the department with the names of five contractors, fails to respond to the department's notice that remediation is required, or chooses to allow the department

to solicit proposals, the department may solicit proposals from and make specifications available to any interested contractor using the department's webpage.

(2) Any questions concerning the solicitation, including any requests for clarification of the specifications, shall be submitted in writing to the department, within two weeks prior to the deadline for submission of proposals. Any response from the department shall be provided promptly to all contractors through a posting on the department's webpage.

(3) Each proposal shall contain a notarized affidavit signed by the contractor certifying under oath that the contractor has participated and will continue to participate in the competitive contractor selection process as described in this section and Section 74-6B-7C NMSA 1978 without misrepresentation and without collusion with other contractors during the entire solicitation, evaluation and selection process.

D. Evaluation of proposals and contractor selection.

(1) Once the department and the owner or operator have received a proposal, they shall not discuss the solicitation or any proposal received in response to the solicitation with anyone other than department staff or the owner or operator.

(2) If fewer than three responsive proposals are obtained by the deadline in the solicitation, the department shall consult with the owner or operator and solicit additional proposals pursuant to Subsection A of this section or Paragraph (1) of Subsection C of this section.

(3) If fewer than three responsive proposals are obtained after two attempts, the department may select a proposal following the procedures in this section, provided the technical merit is acceptable for the proposed work.

(4) The department shall, and the owner or operator may, evaluate proposals

based on technical merit as defined in this part. The technical merit score shall be based on an understanding of site-specific conditions and the appropriateness of proposed remediation technology.

(a)

A team approved by the department shall evaluate the proposals in a timely manner. The owner or operator or their representative is encouraged to participate as a part of the evaluation team. Each team member shall independently evaluate each proposal for technical merit. After discussion, the team shall determine the preliminary technical merit score for each proposal.

(b)

The team shall prepare a short list of proposals for further consideration. The short list shall consist of the names of the firms that have submitted proposals with the highest preliminary technical merit scores.

(c)

The team shall present the short list of firms to a department task force for a discussion of proposals to ensure consistency among team evaluation and scoring. The task force shall consist of senior department technical staff. After discussion with the task force, the team shall assign the technical merit scores.

(5) Within

two weeks of being notified that they are on the short list, short-listed firms shall provide the department's project manager with proposed costs for all tasks outlined in the specifications.

(6) The

department may request all firms selected for the short list to conduct an oral presentation outlining their proposals for the task force, the team and the owner or operator. The owner or operator's attendance during the oral presentations is encouraged, but not required. During the oral presentations, members of the task force, the team and the owner or operator may ask questions. Only the team shall assign the scores to each proposal on the short list.

(a)

Any firm that is requested by the department to conduct an oral

presentation and chooses not to do so, shall be eliminated from the short list.

(b)

All short-listed firms shall submit a sealed cost proposal to the department no later than two days prior to the oral presentations. The team shall open and review the sealed cost information submitted for each proposal on the short list.

(c)

Prior to or during the oral presentations, contractors on the short list may withdraw the original cost submission and substitute a best and final offer for the cost portion of the proposal.

(7) Following

the oral presentations, the team may adjust the technical merit score, based on demonstrated general expertise, site-specific knowledge and application, or information clarified or provided.

(8) At any

point in the evaluation process, when, in the team's opinion, a proposal does not substantially meet the technical merit or cost effectiveness standards set forth in the solicitation, the team may reject the proposal.

(9) The team

shall assign a final score for each proposal on the short list, which shall be the cost effectiveness score plus the technical merit score.

(a)

The technical merit score, with a maximum of 700 points, shall be assigned pursuant to the procedure described in this subsection.

(b)

The cost effectiveness score is the technical weight factor times the cost weight factor times 300, where the technical weight factor is the proposal's technical merit score divided by the highest technical merit score of proposals on the short list; the cost weight factor is the lowest cost of proposals on the short list divided by the proposal's cost; and 300 is the maximum cost effectiveness score.

(10) The

department shall notify the owner or operator and all submitting firms of the highest scoring proposal. The

owner or operator shall enter into a contract with the selected firm within 30 days of this notification. If, for any reason, the selected firm cannot complete the project, the department shall either select the firm with the second highest scoring proposal, provided the technical merit is acceptable for the proposed work, or repeat the contractor selection process in accordance with this section. In order for the work to qualify for payment from the fund, the owner or operator shall use the firm selected in accordance with this part.

(11) After the

department has been notified that the owner or operator has entered into a contract with the selected firm, the department shall make available to the owner, operator, contractors and the public all proposals submitted and the evaluation team's scores.

(12) An owner,

operator or offeror aggrieved by the department's selection may request administrative review pursuant to 20.5.123.2320 NMAC within 15 days of the post mark on the notification.

(13) For

purposes of owner and operator participation in the process set forth in this subsection, the owner or operator may appoint a representative who is not affiliated with anyone who submitted a proposal. Any owner or operator representative may not later work for the contractor, the owner, or the operator on any work generated by the proposal.

E. When proposals are

received from nonresident businesses and resident businesses, and the proposal with the highest evaluation is from a nonresident business, the contract shall be awarded to the resident business whose technical merit is comparable and whose cost is nearest to the cost of the high scoring nonresident business proposal if the cost of the resident proposal is made lower than the cost of the nonresident business when multiplied by a factor of 0.95.

[20.5.123.2307 NMAC - N/E, 07/31/2018]

20.5.123.2308 PROCEDURES AND REQUIREMENTS FOR SELECTION OF REMEDIATION CONTRACTORS AT STATE-LEAD SITES: When selecting remediation contractors for state-lead sites, the department shall comply with the Procurement Code, Sections 13-1-21 through 13-1-199 NMSA 1978, 1.4.1 NMAC and the request for proposals procurement guide, which is incorporated by reference. [20.5.123.2308 NMAC - N/E, 07/31/2018]

20.5.123.2309 WORKPLAN APPROVAL, CHANGE ORDERS FOR CORRECTIVE ACTION AND APPROVAL OF DELIVERABLES:

A. Except as provided in Subsection C of 20.5.123.2310 NMAC, a written workplan and budget to complete any phase of corrective action shall be approved in writing by the department prior to any corrective action work being done in order for that work to be eligible for payment under this part.

B. For responsible party-lead sites, the owner or operator shall submit the corrective action workplan and cost in a fixed-fee format unless the department determines that a time-and-materials format is appropriate. If the department approves a time-and-materials format, any increase in approved amounts for specific tasks, categories or subcategories or any reallocation of an amount from one task to another task, one category to another category or within categories must be approved in advance by the department in writing.

C. If required by Paragraph (2) of Subsection B of 20.5.123.2307 NMAC, a workplan including the operation and maintenance of a remediation system that includes mechanical or electrical installations shall list the performance criteria required for payment and amount of payment.

D. If a workplan is rejected after two attempts to receive approval by the department, the department may select the contractor

who received the second highest evaluation, repeat the contractor selection process in accordance with Subsection B of 20.5.123.2307 NMAC, or, in the case of activities which do not require competitive contractor selection under Subsection D of 20.5.123.2306 NMAC, require the owner or operator to submit a workplan from a different contractor.

E. Changes to the technical approach or increases in costs beyond the approved workplan shall not be eligible for payment unless approved in writing by the department prior to implementation.

F. The department may increase or reduce payments for work based on pay-for-performance criteria because of *force majeure* or unforeseen changes in site conditions.

G. After receiving a deliverable, the department shall assess whether the deliverable is satisfactory. If the department finds that the deliverable is satisfactory, it shall issue a written or electronic notice of approval to the owner, operator or contractor. The notice of approval shall explain that any application for payment of costs associated with the approved deliverable must be received by the department within 90 days of the date the owner, operator or contractor received the certification of approval and that no extensions of this deadline shall be granted except extensions for good cause pursuant to 20.5.123.2318 NMAC. If the department finds the deliverable to be unsatisfactory, it shall, within 30 days of receiving a deliverable, provide to the owner, operator or contractor a written or electronic notice of exception explaining the defect in the deliverable and any steps the owner, operator or contractor may take to remedy the defect.

[20.5.123.2309 NMAC - N/E, 07/31/2018]

20.5.123.2310 CORRECTIVE ACTION ELIGIBLE AND INELIGIBLE COSTS AND EXPENDITURES FOR STATE-LEAD AND RESPONSIBLE PARTY-LEAD SITES:

A. Payments shall be made only for corrective action conducted by firms qualified under 20.5.122 NMAC or in accordance with Subsection H of 20.5.119.1900 NMAC.

B. No expenditures from the fund shall be paid to or on behalf of owners or operators for corrective action, other than the minimum site assessment or any sampling done for purposes of Paragraph (3) of Subsection A of 20.5.119.1921 or 20.5.119.1929 NMAC or Paragraph (2) of Subsection A of 20.5.120.2018 or 20.5.120.2026 NMAC, where the corrective action was conducted by firms or entities that are subsidiaries, parents or otherwise affiliate firms or entities of the owner or operator.

C. Payments shall be made for only those deliverables that the department has approved as satisfactory in writing, as required by 20.5.123.2309 NMAC.

D. For USTs, payment shall not be made for corrective action performed on or after September 22, 1992, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.119.1901 or 20.5.119.1902 NMAC or 20.5.120.2001 or 20.5.120.2002 NMAC. For ASTs, payment shall not be made for corrective action performed on or after June 14, 2002, if the owner or operator does not obtain department approval of workplans and costs prior to work being performed or costs incurred, exclusive of initial response or initial abatement measures performed in accordance with 20.5.119.1901 or 20.5.119.1902 NMAC.

E. Costs eligible for payment from the fund are all costs except those excluded by Subsections H and I of this section, and that are reasonable and necessary to confirm releases in accordance with 20.5.118 NMAC, to complete the minimum site assessment in excess of the deductible, and to complete corrective

action beyond the minimum site assessment, in accordance with 20.5.119 NMAC or 20.5.120 NMAC, the department's fee schedule, and any workplan required by 20.5.123.2309 NMAC and approved by the department.

F. Before making payments, the department shall determine that the owner or operator has reimbursed the department for all federal LUST trust funds expended for contractual services at the site.

G. Unpaid invoices are eligible for payment on an assignment basis from the applicant to the party who rendered the invoiced services or goods, or the party who actually made payment. Invoices resulting from assignments as described in this subsection are not contractual between the department and the party who rendered the service or the party who actually made payment. Payments of such invoices are made pursuant to provisions of Section 74-6B-13 NMSA 1978, including being subject to the availability of funds in the corrective action fund.

H. For USTs, costs ineligible for payment include, but are not limited to, the following:

- (1) costs incurred prior to March 7, 1990;
- (2) costs incurred on or after September 22, 1992, that exceed those in the department fee schedule in effect at the time the work was performed;
- (3) costs paid or reimbursed by insurance companies or any other third party as described in 20.5.123.2319 NMAC;
- (4) unpaid invoices, unless allowed under Subsection F of this section;
- (5) costs of removing, repairing, retrofitting or replacing any USTs;
- (6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;
- (7)

costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;

(8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;

(9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;

(10) attorneys' fees or other legal costs;

(11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;

(12) costs associated with real estate transactions;

(13) rush charges for laboratory or other services, unless required by the department;

(14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;

(15) economic losses and liability to third parties; and

(16) costs associated with corrective action that fails to conform with the preapproved workplan or with the requirements of 20.5.119 NMAC or 20.5.120 NMAC.

I. For ASTs, costs ineligible for payment include but are not limited to the following:

- (1) costs incurred prior to July 1, 2001;
- (2) costs incurred that exceed those in the department fee schedule in effect at the time the work was performed;
- (3) costs paid or reimbursed by insurance companies or any other third party described in 20.5.123.2319 NMAC;
- (4) unpaid invoices, unless allowed under

Subsection F of this section;

(5) costs of removing, repairing, retrofitting or replacing any ASTs;

(6) costs of destroying, repairing, relocating or constructing any utility line unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;

(7) costs of destroying any structure unless required for cost-effective remediation or in response to a threat to public health, safety or welfare or the environment, as determined by the department;

(8) costs of repairing or replacing any remediation equipment or groundwater monitoring wells negligently or intentionally damaged or destroyed by the owner or operator;

(9) insurance premiums, the loss of interest on funds used to pay for a minimum site assessment, or loss of business;

(10) attorneys' fees or other legal costs;

(11) costs of monitoring a contractor and the owner's, operator's and designated representative's participation in the contractor selection process;

(12) costs associated with real estate transactions;

(13) rush charges for laboratory or other services, unless required by the department;

(14) payment made to property owners for property access to install or place monitoring wells or other investigation-related or remediation-related equipment;

(15) economic losses and liability to third parties; and

(16) costs associated with corrective action that fails to conform with the preapproved workplan or with the requirements of 20.5.119 NMAC or 20.5.120 NMAC. [20.5.123.2310 NMAC - N/E, 07/31/2018]

20.5.123.2311 DESIGNATED REPRESENTATIVES:

A. Subject to approval by the department, an owner or operator may designate a representative to facilitate compliance with Parts 118, 119 or 120, 121, 122 and 123 of Chapter 5, Title 20 NMAC. Designation of a representative shall include assignment to the designated representative of any rights the owner or operator may have to payment from the corrective action fund.

B. In the event that an owner or operator is incapable of both directing required corrective action and assigning rights to a designated representative, a person may request in writing to be designated as a representative by the department and to be assigned any rights the owner or operator may have had to payment from the corrective action fund.

C. Anyone requesting to designate or be designated as a representative pursuant to this section shall submit a written request to the department that includes the:

- (1) owner identification number;
- (2) facility identification number;
- (3) release identification number;
- (4) reason for the requested designation (for example sale of property or owner, out-of-state move or operator illness, age or death); and
- (5) proposed representative's name, address, e-mail address, telephone number and federal tax identification number.

D. When determining whether to approve or designate a person as a representative pursuant to Subsection A or B of this section, the department shall consider: the reason or reasons a designated representative may be necessary; the nature of the proposed representative's relationship to the owner or operator, if any; the proposed representative's interest in the facility or real property where corrective action is being or shall be performed; and the proposed representative's ability to direct

corrective action activities. The department shall approve or deny the request for designation of a representative in a writing to the requesting party and the owner or operator that explains the department's decision.

E. Requests for payment from the fund resulting from assignments described in Subsection A or B of this section are not contractual between the department and the designated representative. Payments of such requests are made pursuant to the provisions of Section 74-6B-13 NMSA 1978, and are subject to the availability of funds in the corrective action fund.

F. Designation of a representative does not waive owner or operator responsibility or liability. Regardless of appointment of a designated representative, or assignment to the designated representative of rights to the corrective action fund, owners and operators remain responsible for compliance with the provisions of this chapter. The designation of a representative shall not affect the department's right to seek compliance at any time from the owner or operator or both. The designation of a representative is intended to facilitate compliance with corrective action requirements only and shall not relieve the owner and operator of their legal responsibilities or liabilities under this chapter.

[20.5.123.2311 NMAC - N/E, 07/31/2018]

[The department provides an optional form on its website, www.nmenv.state.nm.us, that may be used to designate a representative pursuant to this section. The form may also be obtained from the bureau at or by writing to 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

20.5.123.2312 MEANS TEST TO DETERMINE DEDUCTIBLE:

A. An owner or operator otherwise responsible for paying the first \$10,000 of minimum site assessment costs under Section 74-6B-13 NMSA 1978 may request that the first \$10,000 be paid from

the fund (a "zero deductible") if the owner or operator proves to the department an inability to pay the deductible.

B. An owner or operator otherwise responsible for a \$10,000 deductible is allowed a \$5,000 deductible if the owner or operator proves to the department an inability to pay the full deductible.

C. The owner or operator shall submit an application for a zero or reduced deductible before or with submission of the MSA workplan, pursuant to 20.5.119 or 20.5.120 NMAC. The application shall include the following:

- (1) a letter explaining why the owner or operator is unable to afford to pay all or a portion of the initial \$10,000 cost of an MSA;
- (2) copies of the owner's or operator's federal tax returns for the immediately preceding two years; and
- (3) any additional financial documentation that will assist the department in determining whether the owner or operator is unable to pay (for example, copies of bankruptcy filings or medical bills).

D. The department shall determine inability or reduced ability to pay by using one of the environmental protection agency's published computer analysis programs, and by considering the owner's or operator's ability to maintain basic business operations if required to pay the full or reduced deductible, including consideration of the overall financial condition of the owner or operator and demonstrable constraints on the ability of the owner or operator to raise revenues.

E. Notwithstanding the provisions of Subsections A and B of this section, an owner or operator otherwise responsible for paying a deductible shall be allowed a zero deductible if the owner or operator has proven to the department that the owner or operator is a municipality or county.

[20.5.123.2312 NMAC - N/E, 07/31/2018]

20.5.123.2313 OWNERSHIP AND DISPOSITION OF MAJOR REMEDIATION EQUIPMENT:

A. The department shall be the owner of all major remediation equipment paid for by the fund, unless the equipment is leased as a more cost-effective approach, and shall be responsible for disposition of all major remediation equipment. No owner or operator shall dispose of any major remediation equipment without the written permission of the department. Disposition by the department shall be in accordance with all applicable laws and regulations, and by any of the following means:

- (1) relocation to another fund remediation site, as provided in Subsections C through E of this section;
- (2) interim rental to a non-fund remediation site, subject to Subsection F of this section;
- (3) sale or salvage, subject to Subsection G of this section; or
- (4) when options in Paragraphs (1) through (3) of this subsection are not available, any other form of disposal consistent with federal and state law.

B. Any major remediation equipment shall be installed, maintained and disposed of in accordance with Subsections A through G of this section.

C. An owner or operator requiring the use of major remediation equipment for corrective action paid for with fund money shall use equipment on the department's reuse list, if available and provided such equipment can be refurbished to the manufacturer's operating specifications for a cost not to exceed one-half of the replacement cost of the equipment.

D. For all major remediation equipment, new or used, the owner or operator shall enter into a written installation and maintenance agreement with a company qualified to install and maintain the equipment and shall furnish a copy of the agreement, executed

by the company, to the department. Installation and maintenance shall be performed by factory authorized personnel or a contractor specified by the manufacturer, or as otherwise approved by the department. Complete and proper installation must be verified by both the manufacturer, or its designated representative, and the installation personnel or company. Installation and maintenance contract costs shall be stated together with the purchase price of the equipment quoted to the department in proposals, workplans and applications for payment from the fund.

E. For all new major remediation equipment and for all used major remediation equipment under warranty when acquired, the owner or operator shall also furnish a copy of the manufacturer's warranty to the department.

F. If major remediation equipment is rented to a non-fund remediation site, a reasonable rental fee shall be paid into the fund. The department shall determine the reasonable rental fee based on the lowest price quote from three equipment renters.

G. Major remediation equipment shall be depreciated over its useful life and have a salvage value, method and schedule as approved by the department. If the equipment is sold or salvaged, the proceeds from the sale or salvage value shall be paid into the fund. Gain or loss shall be calculated based on the net book value or salvage value in accordance with generally accepted accounting principles.

H. The department shall remove all major remediation equipment from a site within 90 days after issuing a "no further action" letter for that site. [20.5.123.2313 NMAC - N/E, 07/31/2018]

20.5.123.2314 FUND APPLICATION, PAYMENT AND SUBROGATION:

A. Nothing in 20.5.123 NMAC establishes or creates any liability or responsibility on the part of the department or the state to pay

corrective action costs from any source other than the fund, nor shall the department or the state have any liability or responsibility to make any payments of corrective action costs if the balance in the fund is insufficient to cover those costs.

B. Payment shall be made only for work that has been performed in accordance with 20.5.118, 20.5.119 or 20.5.120 and 20.5.123 NMAC, subject to the provisions of 20.5.121.2105 NMAC. [20.5.123.2314 NMAC - N/E, 07/31/2018]

20.5.123.2315 OBTAINING FACILITY AND OWNER IDENTIFICATION NUMBERS FOR PURPOSES OF CORRECTIVE ACTION:

A. An owner or operator who is exempt from registration and tank fee requirements pursuant to 20.5.101.7 NMAC (because the owner had a UST taken out of operation on or before January 1, 1974, had a UST taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984, or had an AST taken out of operation on or before July 1, 2001) remains responsible for all corrective action requirements otherwise imposed on all owners and operators.

B. To access the fund, an owner or operator shall apply for and receive from the department a facility identification number and owner identification number upon submitting the following information:

(1) the owner's or operator's name, address, e-mail address, and telephone number; and

(2) the address of the UST, AST or site that requires corrective action but that is exempt from registration and tank fee requirements pursuant to 20.5.101.7 NMAC.

[20.5.123.2315 NMAC - N/E, 07/31/2018]

20.5.123.2316 CONTENTS OF APPLICATION FOR PAYMENT AT RESPONSIBLE PARTY-LEAD SITES:

A. When a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the owner or operator shall submit one original and one copy of the application for payment to the department. The application shall include:

- (1) information about the applicant, including: the owner's or operator's name, address, e-mail address, telephone number, federal tax identification number, owner identification number and the name of an individual to contact about the claim;
- (2) the name of the owner at the time of the release;
- (3) the name of the operator at the time of the release;
- (4) the name of the responsible party at the time of the release;
- (5) information about the facility, including: the name, address, site number, and facility number for which payment is sought; the phase of corrective action being claimed; the type of tank (UST or AST); the workplan approval date and workplan identification number; the amount approved for the deliverable and the amount of the claim; the invoice number; the deliverable identification; and the exact name and date of the deliverable;
- (6) references to all work products or deliverables for which payment is sought;
- (7) the date or dates of the department's compliance determination or determinations under 20.5.123.2303 NMAC;
- (8) information about the payee if the owner or operator has assigned payment to another person, including: name, mailing address, telephone number, e-mail address, federal tax identification number and the nature of the payee's interest in the site;
- (9) a copy of any claim or claims the owner or operator has filed against any third

party who caused or contributed to the release;

- (10) copies of invoices showing the work performed for the minimum site assessment or other required corrective action for which payment is sought;
- (11) a copy of the letter from the department determining the owner's or operator's eligibility for a zero or reduced deductible, if applicable, as determined in accordance with 20.5.123.2312 NMAC;
- (12) a statement that requirements to use a qualified firm in accordance with 20.5.122 NMAC have been met;
- (13) a signed and notarized statement of an officer or agent of the qualified firm performing the corrective action:
 - (a) consenting to an audit of time sheets, payroll and bank records, tax records, purchase orders, manifests and bills of lading, internal expense records and any other documents required to verify the costs claimed in the application; and
 - (b) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts;
- (14) copies of the workplan approval letter and any subsequent amendments to the workplan covering work for which payment is requested;
- (15) a copy of any and all notices from the department approving as satisfactory the deliverable for which payment is requested;
- (16) information about the contractor, including: the contractor's name, address and telephone number; and the name of the contractor's project manager for the site; and
- (17) if payment has been assigned by the owner or operator to a contractor, proof that the contractor has paid all subcontractor invoices.

B. When work is performed on a fixed fee basis, the owner or operator shall also submit the following as part of the application:

- (1) a description of the deliverable and the date delivered;
- (2) verification that any performance criteria required for payment were achieved; and
- (3) any other requirements of the workplan approval.

C. When work is performed on a time-and-materials basis, the owner or operator shall also submit the following as part of the application:

- (1) detailed billings of labor and equipment for each task performed; contractor staff must be identified by name and hourly rate; equipment must be identified as owned or rented, with the hourly or daily rate; laboratory and subcontractor charges must be clearly explained;
- (2) timesheets, invoices, or statements with staff name, labor category, and description and date of work performed;
- (3) copies of receipts for all equipment and supplies;
- (4) travel and expense logs;
- (5) if work is billed on an hourly basis, timesheets, invoices or statements which include the hourly rate and number of hours billed to the nearest one-quarter hour; and
- (6) any other requirements of the workplan approval.

D. Upon the department's request, the owner or operator shall submit copies of all subcontractor invoices and an accounting of the amount paid and any remaining balance on each invoice.

E. In the first application for payment of corrective action costs for each workplan, the owner or operator shall submit one original and one copy of:

(1) an original, signed oath or affirmation in accordance with Sections 14-13-1 and 14-13-2 NMSA 1978:

(a) certifying that the owner or operator has read the approved workplan and understands that the corrective action described in the workplan shall be completed at the identified facility;

(b) certifying that all matters and facts contained in that application, and in any subsequent applications for payment for the same workplan, are and will be truthful and that all invoices reflect actual costs paid or otherwise incurred;

(c) consenting to an audit of financial records pertaining to the current and any future claims for the same workplan; and

(d) agreeing to return to the department, upon demand, any and all amounts paid from the fund if the department determines that the owner or operator misrepresented or omitted any relevant facts in this or any future application for payment for the same workplan;

(2) a signed, dated, and notarized disclosure statement indicating the site name and number where the release occurred; the type of tank (UST or AST); the facility number; the name, address, and telephone number of the entity that performed the work for which payment is claimed; the full name of all owners and operators of the tank for which payment is claimed; the name of each individual and business entity that owns or controls the entity that performed the work for which payment is claimed; and the name of every business concern that is a partner or subsidiary of the entity that performed the work for which payment is claimed;

(3) a completed internal revenue service W-9 form (request for taxpayer identification number and certification form);

(4) information about insurance coverage, including:

whether the owner or operator has insurance for releases of regulated substances at the site of the release for which a claim is being made; the name, address, and telephone number of the insurance company; the name, address, and telephone number of a contact person within the insurance company; the amount of coverage; whether the applicant has filed an insurance claim for this release, and if so, the amount sought; and the amount the insurance company has paid; and

(5) copies of any insurance policies in effect on the date of the report or at the time of the release that may insure the owner or operator against all or part of the costs of corrective action.

F. After the first application for payment of corrective action costs for each workplan, an owner or operator who has properly submitted the documents required by Subsection E of this section and received a payment need not submit these documents with future applications for payment unless any information provided in the first application has changed or the department has modified the scope of the work or the budget of the workplan.

G. The owner or operator shall not submit costs of any portion of a minimum site assessment in the same application for payment of costs of other required corrective action.

H. Documents submitted as part of an application for payment of corrective action costs shall not contain alterations, corrections, or erasures.

[20.5.123.2316 NMAC - N/E, 07/31/2018]

[The department provides forms that may be used to comply with this section. The address of the department's petroleum storage tank bureau, reimbursement section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

20.5.123.2317 CONTENTS OF APPLICATION FOR PAYMENT AT STATE-LEAD SITES: When

a deliverable is completed and the department has determined in writing that the work for which payment is sought is satisfactory, the contractor shall submit one original and one copy of the application for payment to the department. All applications shall include:

A. the payee's name, address, e-mail address and telephone number;

B. the contractor's name, address, e-mail address and telephone number;

C. information about the workplan, including: the date the workplan was approved, the workplan identification number, the deliverable identification numbers and the date or dates each deliverable was delivered;

D. information about the facility, including: the name, address, site number, and facility number of the facility for which payment is sought; the phase of corrective action being claimed; the contract number; and the expiration date of the contract;

E. the invoice number or numbers and the amount of each invoice for which payment is sought;

F. copies of each invoice for which payment is sought; and

G. copies of the workplan approval letter and any subsequent amendments to the workplan.

[20.5.123.2317 NMAC - N/E, 07/31/2018]

[The department provides a form that may be used to comply with this section. The address of the department's petroleum storage tank bureau, reimbursement section is: 1301 Siler Road, Building B, Santa Fe, New Mexico 87507.]

20.5.23.2318 APPLICATION AND PAYMENT PROCESS:

A. All applications for payment shall be received by the department within 90 days of the date upon which the owner, operator or contractor received a notice of approval of the deliverable from the department, pursuant to 20.5.123.2309 NMAC. The

department shall not grant extensions of the deadline for applications for payment except for good cause shown, in which case the department shall grant a 30-day extension. For purposes of this section, "good cause" means unavoidable circumstances beyond the owner's, operator's, or contractor's control. All requests for an extension shall describe the reason or reasons an extension is necessary and shall be submitted to the department in writing within the 90-day period for submitting an application for payment.

B. Applications for payment shall be sent to the New Mexico environment department, petroleum storage tank bureau, reimbursement section.

C. The department shall review all applications for payment in the order received and shall, within 60 days of receipt, either:

(1) pay the owner, operator or contractor for all eligible costs or as required by 20.5.121.2105 NMAC; or

(2) reject the application and notify the owner, operator or contractor in writing of the inadequacies in the application that caused the rejection.

D. The department may reject an application for payment:

(1) of the cost of any deliverable if:

(a) the application is received after the deadlines imposed by this section;

(b) the application does not contain all of the information or documents required by 20.5.123.2316 or 20.5.123.2317 NMAC (including but not limited to, all required disclosures, affirmations, timesheets, receipts, logs, and invoices);

(c) the application itself or the attached documents are incomplete, inaccurate or unclear;

(d) the application contains information that is intentionally misleading or false;

(e)

the application seeks payment for work that was not pre-approved by the department; or

(f) the application seeks payment for work that was not approved by the department as satisfactory;

(g) the application seeks payment of costs that exceed the amount approved in the workplan; and

(2) of the cost of any deliverable other than an MSA if:

(a) the department has not made a compliance determination; or

(b) tank fees are past due.

E. The owner, operator or contractor may correct any inadequacies in the application and resubmit one completed original application and one copy within 30 days of the date of the notice of inadequacies.

F. Upon receiving a resubmitted application, the department shall follow the procedures in Subsections C, D and H of this section for reviewing and accepting or rejecting applications for payment.

G. The owner, operator or contractor may submit a total of three applications (an initial application and two resubmitted applications) for any deliverable. After the owner, operator or contractor submits a total of three inadequate applications, the department may decline to review additional applications for the same deliverable.

H. Payment for eligible costs shall occur not later than 60 days, or in accordance with 20.5.121.2105 NMAC, after the department determines the application is complete and approves the technical adequacy of the application. The department shall mail the check for payment to the person designated as payee in the application.

I. Payment under this section shall not foreclose the department's right to recover excessive or illegal payments.

[20.5.123.2318 NMAC - N/E, 07/31/2018]

[The address of the department's petroleum storage tank bureau, reimbursement section, is: 2905 Rodeo Park Drive East, Building 1, Santa Fe, New Mexico 87505.]

20.5.123.2319 SUBROGATION:

A. The department has a right of subrogation to any insurance policies in existence at the time of the release to the extent of any rights the owner or operator of a site may have had under that policy, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. The department's subrogation rights are limited to the extent of the department's expenditures from the corrective action fund or other sources. The owner or operator shall include in the first application for payment a copy of any insurance policies which were in effect on the date of the report, as well as any policies which were in existence at the time the release may have occurred and which may insure the owner or operator against all or part of the costs of taking corrective action. The owner or operator shall also report to the department any claims filed against any policy identified in accordance with this section or Subsection G of 20.5.123.2310 NMAC.

B. The department has a right of subrogation against any third party who caused or also contributed to the release, pursuant to Subsection D of Section 74-6B-8 NMSA 1978. This right of subrogation shall apply regardless of any applications for payment the owner or operator may have made or intends to make for payment from the fund. The owner or operator shall report to the department the identity of any third party against whom a claim is filed and provide a copy of any claim filed against that party.

[20.5.123.2319 NMAC - N/E, 07/30/2018]

20.5.123.2320 ADMINISTRATIVE REVIEW:

A. With the exception of compliance determinations

under 20.5.123.2303 through 20.5.123.2305 NMAC, an owner, operator or contractor aggrieved by a decision made by the department under Title 20, Chapter 5 NMAC may obtain review of the decision using the procedures and subject to the limitations set forth in 20.5.125 NMAC.

B. An offeror aggrieved by a selection decision made by the department pursuant to 20.5.123.2306 through 20.5.123.2307 NMAC may obtain review of the decision using the procedures and subject to the limitations set forth in 20.5.125 NMAC.

C. A person denied designation by the department as a representative pursuant to 20.5.123.2311 NMAC may obtain review of the department's decision using the procedures and subject to the limitations set forth in 20.5.125 NMAC.

D. Compliance determinations shall be appealed as provided in 20.5.123.2321 and 20.5.123.2322 NMAC. [20.5.123.2320 NMAC - N/E, 07/31/2018]

20.5.123.2321 REVIEW OF DETERMINATIONS OF COMPLIANCE:

A. Any owner or operator aggrieved by a decision made by the department regarding determinations of compliance 20.5.123.2303 through 20.5.123.2305 NMAC, may appeal the decision by submitting a request for reconsideration of the decision to the director. Any owner or operator aggrieved by a decision made under these regulations by the director may appeal the decision by submitting a request for reconsideration to the director. The reconsideration will be based on written submittals. Any such request for reconsideration must be in writing and must specify the grounds upon which the petitioner objects to the decision being appealed. The request shall be accompanied by any and all written material and argument which the owner or operator wishes the director

to consider upon reconsideration. The request for reconsideration shall be postmarked within 15 days of the date of the determination.

B. Department staff shall respond to the request for reconsideration within 15 days of receipt of the complete submittal of the owner or operator's request for reconsideration. The response of the department staff shall be sent to both the director and the owner or operator and shall be accompanied by any and all written materials and argument in support of the position of the staff on the issues raised by the owner or operator.

C. For good cause shown, the director may permit either party additional time in which to submit the supporting written materials or argument for which Subsections A and B of this section provide. Any request for additional time and all evidence for good cause shall be submitted in writing prior to the end of the 15-day period described in Subsection A of this section. The department shall act on the request for additional time within a reasonable period of time.

D. The director's action on the request for reconsideration shall be based on the written materials and argument submitted pursuant to this section unless the director, in the director's discretion, schedules a conference on the request for reconsideration.

E. The director's action on the request for reconsideration shall be by written decision and shall state the reason therefor. The director shall send a copy of the decision to the owner or operator and furnish a copy to department staff promptly after the decision is rendered.

F. The owner or operator may appeal the decision of the director made under Subsection E of this section by requesting a hearing in accordance with 20.5.123.2322 NMAC.

[20.5.123.2321 NMAC - N/E, 07/31/2018]

20.5.123.2322 REQUEST FOR HEARING ON DETERMINATIONS OF COMPLIANCE:

A. An owner or operator may obtain review by the secretary of a decision by the director made pursuant to Subsection E of 20.5.123.2321 NMAC by filing a written request for a hearing as provided in the environment department adjudicatory procedures, 20.1.5 NMAC, within 30 days after the date the owner or operator receives the director's decision pursuant to Subsection E of 20.5.123.2321 NMAC.

The procedures set forth in the environment department adjudicatory procedures, 20.1.5 NMAC, shall govern the proceeding.

B. The complainant shall attach to the request for hearing a copy of the determination for which review is sought.

C. With the request for hearing, the complainant shall file a reply to the determination. The reply shall address each of the findings in the determination, including any facts which support the complainant's position that the complainant has complied with the requirements of Subsection B of Section 74-6B-8 NMSA 1978.

D. The secretary shall schedule the hearing for no later than 90 days after service of the notice of docketing.

[20.5.123.2322 NMAC - N/E, 07/31/2018]

20.5.123.2323 EFFECT OF APPEAL ON PAYMENT, ENFORCEMENT:

A request for hearing or other administrative review shall not delay payment for any phase of corrective action, other than that which is being contested. A request for hearing shall not affect the secretary's authority to issue compliance orders or otherwise seek enforcement of Title 20, Chapter 5 NMAC under the provisions of the Hazardous Waste Act or relieve an owner or operator of any responsibility under Title 20, Chapter 5 NMAC.

[20.5.123.2323 NMAC - N/E, 07/31/2018]

20.5.123.2324 CONTRACTOR FEE SCHEDULE:**A.**

| Professional services | Hourly rate |
|------------------------------------|--------------------|
| Principal scientist | \$150.00 |
| Senior scientist | \$125.00 |
| Project scientist/engineer-manager | \$100.00 |
| Staff scientist/engineer | \$80.00 |
| Field technician | \$74.00 |
| Draftsperson | \$65.00 |
| Administrator | \$68.00 |
| Secretary | \$44.00 |
| Clerk | \$37.00 |

B.

| Field equipment | Cost per day |
|---|---------------------|
| Carbon monoxide, sulphur dioxide oxide and oxygen meters | \$50.00 |
| Water quality meter | \$50.00 |
| Dissolved oxygen meter (water) | \$37.50 |
| Electroconductivity meter | \$47.50 |
| Explosimeter | \$42.50 |
| Fluid field detector | \$30.00 |
| Interface probe | \$65.00 |
| Organic vapor meter | \$70.00 |
| Photionization detector | \$70.00 |
| Flame ionization detector | \$75.00 |
| pH Meter | \$22.50 |
| Other. Costs shall be pre-approved by the department. The department may require justification. | |

C. Per diem will be paid in accordance with the current state allowance.

D. Earth-moving equipment. Costs shall be pre-approved by the department. The department may require justification.

- (1) backhoe, light duty (12 feet-19 feet);
- (2) backhoe, medium duty (14 feet-19 feet);
- (3) trackhoe, light duty;
- (4) trackhoe, medium duty;
- (5) trackhoe, heavy duty.
- (6) other. Costs shall be pre-approved by the department. The department may require

justification.

E. Well supplies. Costs shall be pre-approved by the department. The department may require justification.

- (1) two-inch blank;
- (2) four-inch blank;
- (3) two- inch screen PVC 10 feet;
- (4) four-inch screen PVC 10 feet;
- (5) filter pack, per 100 pounds;
- (6) bentonite pellets, per 50 pounds;
- (7) bentonite chips, per 50 pounds;
- (8) bentonite gel, per 100 pounds;
- (9) grout, per 50 pounds;
- (10) eight-inch manhole;
- (11) twelve-inch manhole.
- (12) Other. Costs shall be pre-approved by the department. The department may require

justification.

F. Drilling. Costs shall be pre-approved by the department. The department may require justification.

(1) mobilization/demobilization;

(2) hollow stem auger;

(3) air rotary;

(4) sonic drilling;

(5) other drilling methods;

(6) plug and abandon.

(7) Other. Costs shall be pre-approved by the department. The department may require justification.

G. Lab services. Costs shall be pre-approved by the department. The department may require justification.

(1) EPA methods.

(a) 8310;

(b) 601/8010, 602/8020;

(c) Modified 8015;

(d) 418.1;

(e) 610/8100;

(f) 624/8240;

(g) 625/8270;

(h) 8260;

(i) RCRA 8 metals.

(2) benzene, toluene, ethyl benzene, and xylenes; methyl tertiary-butyl ether;

(3) pH;

(4) total organic carbon;

(5) geotechnical soil analyses;

(a) sieve analysis;

(b) soil moisture;

(c) density;

(d)

porosity;

(e) fraction organic carbon.

(6) Other. Costs shall be pre-approved by the department. The department may require justification. [20.5.123.2324 NMAC - N/E, 07/31/2018]

HISTORY OF 20.5.123 NMAC: [RESERVED]

PUBLIC DEFENDER DEPARTMENT

**TITLE 10 PUBLIC SAFETY AND LAW ENFORCEMENT
CHAPTER 12 PUBLIC DEFENDER DEPARTMENT
PART 14 INTERIM CASE REFUSAL PROTOCOL**

10.12.14.1 ISSUING AGENCY: New Mexico Public Defender Commission. [10.12.14.1 NMAC - N, 8/28/18]

10.12.14.2 SCOPE: Applies to all employees of the New Mexico public defender department and to its contract attorneys. [10.12.14.2 NMAC - N, 8/28/18]

10.12.14.3 STATUTORY AUTHORITY: N.M. Const., Article VI, Section 39; Subsection B of Section 31-15-2.4 NMSA 1978. [10.12.14.3 NMAC - N, 8/28/18]

10.12.14.4 DURATION: Permanent. [10.12.14.4 NMAC - N, 8/28/18]

10.12.14.5 EFFECTIVE DATE: August 28, 2018, unless a later date is cited at the end of a section. [10.12.14.5 NMAC - N, 8/28/18]

10.12.14.6 OBJECTIVE: The objective of Part 14 of Chapter 12 is: to create guidelines for the department to use when excessive attorney workloads would make acceptance of additional clients by the affected attorneys ethically irresponsible

or would violate the New Mexico rules of professional conduct or the constitutional rights of clients. [10.12.14.6 NMAC - N, 8/28/18]

10.12.13.7 DEFINITIONS: “The 2007 report” means the report published by the New Mexico sentencing commission in 2007 on a workload study conducted in conjunction with the national center for state courts. [10.12.14.7 NMAC - N, 8/28/18]

10.12.14.8 DEPARTMENT COLLECTION AND REPORTING OF INFORMATION REGARDING ATTORNEY CASE ASSIGNMENTS AND TIME KEEPING:

A. Each office of the public defender department shall maintain a continuing record of the case assignments per year for each attorney employed by that office.

B. This record shall include for each case assignment the nature of the charges, whether the case includes felony charges or charges only misdemeanors, and whether the case involves a juvenile respondent.

C. The department shall maintain similar records of cases it assigns to contract attorneys.

D. The chief public defender or the chief’s designee shall review case assignment reports for department attorneys and contract attorneys on a quarterly basis, and these reports shall include the information described in Subsections A and B of 10.12.14.8 NMAC.

E. The department shall institute mandatory timekeeping by department attorneys and contract attorneys as soon as possible.

F. The department shall maintain records of the time recorded by department attorneys and contract attorneys in working on their assigned cases.

G. The time records described in Subsection F of 10.12.14.8 NMAC shall include the identity of the client and the nature of the attorney’s work for each unit of time recorded.

H. These time records shall be provided upon request to the chief or the chief's designee.
[10.12.14.8 NMAC - N, 8/28/18]

10.12.14.9 DUTY OF THE CHIEF TO INVESTIGATE EXCESSIVE WORKLOAD LEVELS:

A. When reported case assignments for three or more months how the attorneys of a particular office have or a contract attorney has case assignments in excess of quarterly standards derived from the 2007 report, the chief shall conduct an investigation. In conducting this investigation, the chief shall review available attorney time records for the period during which workloads for the affected attorneys have exceeded the 2007 report's quarterly standards.

B. In conducting this investigation, the chief shall also obtain information from the affected office and attorneys and staff regarding the attorneys' ability to provide competent representation to existing clients.

C. In deciding whether the affected office and attorneys can provide competent representation to existing clients, the chief shall consider whether the affected offices and attorneys consistently are able to comply with the department's 2016 performance standards.

D. After the investigation described above, the chief should determine whether additional case assignments would create a significant risk that the affected office's and attorneys' obligation to provide competent representation to existing clients would materially limit their representation of additional clients.

E. If the chief determines that a significant risk exists that the affected attorneys' duty to existing clients would materially limit their representation of additional clients as described in Subsection D of 10.12.14.9 NMAC, the chief then shall determine whether administrative measures are reasonably available that would alleviate that risk short of refusing

additional case assignments.

F. If the chief determines such administrative measures are reasonably available, the chief shall institute these measures and evaluate their effectiveness on a quarterly basis as long as affected attorney workloads exceed the 2007 report's quarterly standards.

G. In the event of multiple investigations, the chief shall decide the priority in which they are conducted and what further steps are taken.

[10.12.14.9 NMAC - N, 8/28/18]

10.12.14.10 DETERMINATION BY THE CHIEF TO REFUSE ADDITIONAL CASE ASSIGNMENTS BASED ON EXCESSIVE WORKLOADS:

A. If the chief determines that reasonably available administrative measures would fail or have failed to alleviate the risk described in Subsection E of 10.12.14.9 NMAC, the chief shall state in writing that accepting additional cases would be ethically irresponsible.

B. The chief's determination under Subsection A of 10.12.14.10 NMAC shall include a summary of the facts and copies of all documents considered while preserving from disclosure confidential client and personnel information except as otherwise provided by law.

C. The chief shall continue to monitor affected office and attorney workloads on a monthly basis and shall report in writing when quarterly workloads drop below the 2007 report standards.

D. When quarterly workload levels have dropped below the 2007 report standards, the chief shall determine on a monthly basis whether the affected office and attorneys are able to represent additional clients in an ethically responsible manner as described in Subsection A of 10.12.14.10 NMAC and shall maintain a record of this determination and the facts supporting it.

[10.12.14.10 NMAC - N, 8/28/18]

10.12.14.11 NOTICE TO AFFECTED COURTS OF CASE REFUSAL; MOTIONS TO WITHDRAW; AND NOTICES OF RENEWED AVAILABILITY:

A. When the chief determines that affected office and attorney workloads make it ethically irresponsible for affected offices and attorneys to accept additional case assignments as described in Subsection A of 10.12.14.10 NMAC the chief shall prepare a notice of case refusal.

B. The notice of case refusal shall state that it would be ethically irresponsible for affected office and attorneys to accept additional cases at the present time and shall bear the chief's signature.

C. The Notice shall have attached to it a copy of the chief's written determination and supporting documents as provided in 10.12.14.10 NMAC.

D. The chief shall deliver a copy of the notice to the chief district judge of the affected jurisdiction; all affected courts within that jurisdiction; and the administrative office of the courts.

E. Notwithstanding the above provisions, if the chief determines it would be ethically responsible, case assignments may continue to be accepted for cases involving homicides, violent felonies, sexual offenses, and juvenile respondents.

F. The affected attorneys shall promptly move to withdraw from case assignments that occurred after the chief's determination, subject to the exceptions listed in Subsection E of 10.12.14.11 NMAC.

G. The affected office and attorneys shall continue to be unavailable to accept new cases except as provided herein until such time as the chief determines pursuant to Subsection C of 10.12.14.10 NMAC and Subsection D of 10.12.14.10 NMAC that workload levels have fallen below 2007 report standards and it would be ethically responsible to accept additional cases.

H. The chief shall

provide a copy of his monthly determination of continued unavailability pursuant to Subsection C of 10.12.14.10 NMAC and Subsection D of 10.12.14.10 NMAC to all parties listed in Subsection D of 10.12.14.11 NMAC until such time as he determines it would be ethically responsible for the affected office and attorneys to accept additional case.

I. When the chief determines as provided above that the affected office and attorneys are able to accept additional cases, the chief shall issue a notice of renewed availability, which shall bear the chief's signature.

J. The notice of renewed availability shall be delivered to the chief district judge of the affected jurisdiction; all affected courts within that jurisdiction; and the administrative office of the courts.

K. Upon communication of the chief's notice of renewed availability, the office and attorneys previously disqualified from accepting additional cases shall begin accepting new cases under normal case assignment procedures.
[10.12.14.11 NMAC - N, 8/28/18]

**HISTORY OF 10.12.14 NMAC:
[RESERVED]**

**REGULATION AND LICENSING DEPARTMENT
FINANCIAL INSTITUTIONS
DIVISION**

The director of the financial institutions division of the New Mexico regulation and licensing department, after rule hearings conducted on both 04/03/2018 and 05/15/2018, has approved a repeal of its rule 12.18.2 NMAC, Lenders' Exchange (originally filed on May 1, 1976), adopted August 14, 2018, and effective September 15, 2018.

The director of the financial institutions division of the New Mexico regulation and licensing department, after rule hearings conducted on both 04/03/2018 and 05/15/2018, has approved a repeal of

its rule 12.18.5 NMAC, Annual Data Report for Payday Lenders (originally filed on January 1, 2004), adopted August 14, 2018, and effective September 15, 2018.

The director of the financial institutions division of the New Mexico regulation and licensing department, after rule hearings conducted on both 04/03/2018 and 05/15/2018, has approved a repeal of its rule 12.18.6 NMAC, Annual Report for Title Loan Companies (originally filed on January 1, 2004), adopted August 14, 2018, and effective September 15, 2018.

The director of the financial institutions division of the New Mexico regulation and licensing department, after rule hearings conducted on 04/03/2018 and 05/15/2018, approved to repeal its rule 12.18.7 NMAC - Terms and Conditions of Payday Loan Agreements (originally filed 11/01/2007) and replace it with 12.18.7 NMAC - Hearing Procedures for Small Loan Companies, adopted on 08/14/2018 with amendments, and effective 09/15/2018.

The director of the financial institutions division of the New Mexico regulation and licensing department, after rule hearings conducted on 04/03/2018 and 05/15/2018, approved to repeal its rule 12.18.8 NMAC - Licensing of Nonresident Lenders (originally filed 11/09/1979) and replace it with 12.18.8 NMAC - Licensing of Nonresident Lenders, adopted on 08/14/2018 with amendments, and effective 09/15/2018.

**REGULATION AND LICENSING DEPARTMENT
FINANCIAL INSTITUTIONS
DIVISION**

**TITLE 12 TRADE,
COMMERCE AND BANKING
CHAPTER 18 LOAN
COMPANIES
PART 7 HEARING
PROCEDURES FOR SMALL
LOAN COMPANIES**

12.18.7.1 ISSUING AGENCY: Financial Institutions Division of the Regulation and Licensing Department.
[12.18.7.1 NMAC - Rp, 12.18.7.1 NMAC, 09/15/2018]

12.18.7.2 SCOPE: Small loan licensees conducting business in New Mexico.
[12.18.7.2 NMAC - Rp, 12.18.7.2 NMAC, 09/15/2018]

12.18.7.3 STATUTORY AUTHORITY: Section 58-15-11 NMSA 1978.
[12.18.7.3 NMAC - Rp, 12.18.7.3 NMAC, 09/15/2018]

12.18.7.4 DURATION: Permanent.
[12.18.7.4 NMAC - Rp, 12.18.7.4 NMAC, 09/15/2018]

12.18.7.5 EFFECTIVE DATE: September 15, 2018, unless a later date is cited at the end of a section.
[12.18.7.5 NMAC - Rp, 12.18.7.5 NMAC, 09/15/2018]

12.18.7.6 OBJECTIVE: The objective of this part is to establish regulations governing the conduct of small loan licensees.
[12.18.7.6 NMAC - Rp, 12.18.7.6 NMAC, 09/15/2018]

12.18.7.7 DEFINITIONS:
[RESERVED]
[12.18.7.7 NMAC - Rp, 12.18.7.7 NMAC, 09/15/2018]

12.18.7.8 HEARING PROCEDURES:

A. Venue for all hearings held pursuant to the New Mexico Small Loan Act of 1955 shall be in Santa Fe, New Mexico unless the director, upon motion by a party, finds that it would be appropriate to hold the hearing elsewhere in New Mexico.

B. Service of subpoenas, summary orders, findings, and final orders shall be made either:

- (1) personally;
- (2) by certified

mail, return receipt requested, sent to the last known address of the person; or

(3) by such other means as are reasonably calculated to give actual notice.

C. Upon written request to another party, any party is entitled to:

- (1) obtain the names and addresses of witnesses who will or may be called by the other party to testify at the hearing; and
- (2) inspect and copy any documents or items which the other party will or may introduce in evidence at the hearing.

D. Default orders: A respondent that has received actual or constructive notice of a hearing having been set and fails to appear, either in person or through counsel, at the time and place set for such hearing shall be deemed to have admitted the allegations set forth in the summary order or notice of intent that was entered in the matter before the hearing officer and shall be deemed to have consented to entry of a final order.

[12.18.7.8 NMAC - Rp, 12.18.7.9 NMAC, 09/15/2018]

12.18.7.9 - 12.18.7.16

[RESERVED]

[12.18.7.9 NMAC - 12.18.7.16 NMAC - Repealed 09/15/2018]

HISTORY OF 12.18.7 NMAC:

12.18.7 NMAC - Terms And Conditions Of Payday Loan Agreements, filed 11/01/2007 was repealed and replaced by 12.18.7 NMAC - Hearing Procedures For

Small Loan Companies, effective 09/15/2018.

**REGULATION AND LICENSING DEPARTMENT
FINANCIAL INSTITUTIONS
DIVISION**

**TITLE 12 TRADE,
COMMERCE AND BANKING
CHAPTER 18 LOAN
COMPANIES**

**PART 8 LICENSING OF
NONRESIDENT LENDERS**

12.18.8.1 ISSUING

AGENCY: Financial Institutions Division of the Regulation and Licensing Department.

[12.18.8.1 NMAC - Rp, 12.18.8.1 NMAC, 09/15/2018]

12.18.8.2 SCOPE: Loan companies conducting business in New Mexico.

[12.18.8.2 NMAC - Rp, 12.18.8.2 NMAC, 09/15/2018]

12.18.8.3 STATUTORY AUTHORITY: Section 58-15-11 NMSA 1978.

[12.18.8.3 NMAC - Rp, 12.18.8.3 NMAC, 09/15/2018]

12.18.8.4 DURATION: Permanent.

[12.18.8.4 NMAC - Rp, 12.18.8.4 NMAC, 09/15/2018]

12.18.8.5 EFFECTIVE DATE: September 15, 2018, unless a later date is cited at the end of a section.

[12.18.8.5 NMAC - Rp, 12.18.8.5 NMAC, 09/15/2018]

12.18.8.6 OBJECTIVE: The objective of this part is to define the requirements for licensure for persons conducting a business of making small loans to residents of New Mexico solely from locations outside of New Mexico.

[12.18.8.6 NMAC - Rp, 12.18.8.6 NMAC, 09/15/2018]

12.18.8.7 DEFINITIONS:

[RESERVED]

[12.18.8.7 NMAC - Rp, 12.18.8.7 NMAC, 09/15/2018]

12.18.8.8 LICENSING OF NONRESIDENT LENDERS:

A. When the proceeds of a small loan in the amount or of the value of \$5,000 or less have been delivered to a New Mexico resident borrower by mail within New Mexico or have been otherwise made available to a New Mexico resident borrower within New Mexico, by a lender who solicited such small loan by mail or otherwise and the solicitation is received by a New Mexico resident in New Mexico, the loan is considered to have been made in New Mexico for the purposes of the New Mexico Small Loan Act of 1955, and both the lender and the loan are thereby subject to the provisions contained in said act. Any person making small loans under such circumstances is deemed to be engaging in the business of lending, as that term is used in Section 58-15-3 NMSA 1978, and the person must first have obtained a license from the director under the provisions of the New Mexico Small Loan Act of 1955 and this regulation if the person contracts for, exacts or receives, directly or indirectly on or in connection with the loan, charges, whether for interest, compensation, consideration or expense, which in the aggregate are greater than the maximum as provided by the applicable laws of New Mexico.

B. Such loans and licensees must comply with all the requirements and provisions contained in the New Mexico Small Loan Act of 1955, including the limitations on the maximum allowable charges contained in Section 58-15-14.1 NMSA 1978.

C. Such a loan made by a licensee under such conditions is not considered to have been made outside of New Mexico so as to be unenforceable under Section 58-15-24 NMSA 1978, even though the lender's place of business is located outside of New Mexico.

D. If a person applies

for a small loan license in order to engage in the business of making small loans to resident borrowers solely from locations outside of New Mexico, the “community” in which the business of the applicant is to be conducted, as that term is used in Section 58-15-5 NMSA 1978, shall mean the geographic area, which may be statewide, in which the applicant proposes to solicit such small loans.

E. Upon the granting of a small loan license to a lender who indicates an intention to conduct a small loan business solely from locations outside of New Mexico, that lender shall establish and maintain a toll-free telephone service available in New Mexico to resident borrowers, or shall agree to accept collect calls at the lender’s principal place of business from resident borrowers so that borrowers may contact the lender or his representatives concerning details of their loan transactions. Upon the delivery of the proceeds of such a small loan to a resident of New Mexico, the licensee shall immediately notify the borrower in writing of the existence of such toll-free telephone service, or of the agreement to accept collect calls.

F. If a licensee engages in the business of making small loans to New Mexico residents solely from locations outside of New Mexico, the director will conduct, in his discretion, the examinations authorized by Section 58-15-9 NMSA 1978, in either of two ways:

(1) the licensee may be required to make available to the director for examination at the offices of the director such of the loans, transactions, books, papers and records of the licensee, insofar as they pertain to the business licensed under the New Mexico Small Loan Act of 1955, as the director may deem necessary; or

(2) the examinations of the loans, transactions, books, papers and records of the licensee, insofar as they pertain to the business licensed under the New Mexico Small Loan Act of 1955, may be conducted by the

director or the director’s authorized representative at the licensee’s principal place of business outside of New Mexico, and the licensee shall be required to pay to the director the actual and reasonable travel and living expenses incurred during such examinations for one examiner per examination. Said payments for expenses shall be in addition to such other fees and expenses as may be authorized under the New Mexico Small Loan Act of 1955. The director may require the licensee to pay such expenses prior to the examination. [12.18.8.8 NMAC - Rp, 12.18.8.8 NMAC, 09/15/2018]

HISTORY OF 12.18.8 NMAC:
Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under: FID 79-2, Regulation 79-, CCB, Licensing of Nonresidential Lenders, filed 10/25/79.

Other History:
 12.8.8 NMAC - Licensing of Nonresident Lenders, filed 9/30/1997 was repealed and replaced by 12.8.8 NMAC - Licensing of Nonresident Lenders, effective 09/15/2018.

**REGULATION AND LICENSING DEPARTMENT
 FINANCIAL INSTITUTIONS
 DIVISION**

**TITLE 12 TRADE,
 COMMERCE AND BANKING
 CHAPTER 18 LOAN
 COMPANIES
 PART 9 REFUND
 ANTICIPATION LOANS**

12.18.9.1 ISSUING
AGENCY: Financial Institutions Division of the Regulation and Licensing Department.
 [12.18.9.1 NMAC - N, 09/15/2018]

12.18.9.2 SCOPE: Loan companies conducting refund anticipation loans in the state of New Mexico.
 [12.18.9.2 NMAC - N, 09/15/2018]

12.18.9.3 STATUTORY AUTHORITY: Section 58-15-11 NMSA 1978.
 [12.18.9.3 NMAC - N, 09/15/2018]

12.18.9.4 DURATION:
 Permanent.
 [12.18.9.4 NMAC - N, 09/15/2018]

12.18.9.5 EFFECTIVE DATE: September 15, 2018, unless a later date is cited at the end of a section.
 [12.18.9.5 NMAC - N, 09/15/2018]

12.18.9.6 OBJECTIVE:
 The objective of this part is to require a small loan licensee engaged in the business of making refund anticipation loans to provide the consumer with a disclosure of the loan information on a form as prescribed by the director.
 [12.18.9.6 NMAC - N, 09/15/2018]

12.18.9.7 DEFINITIONS:
[RESERVED]
 [12.18.9.7 NMAC - N, 09/15/2018]

12.18.9.8 MANDATORY DISCLOSURE OF LOAN INFORMATION: All small loan companies engaged in the business of making refund anticipation loans must provide a form to consumers that includes the following:

A. a statement that “refund anticipation loan” means a loan that is secured by or that the creditor arranges or expects to be repaid, directly or indirectly, from the proceeds of the consumer’s federal or state personal income tax refunds or tax credits, including any sale, assignment or purchase of a tax refund or tax credit at a discount or for a fee;

B. a list of the annual percentage rate and all fees that the borrower may be charged upon entering the refund anticipation loan agreement;

C. the estimated time to which the consumer may receive the proceeds from their anticipated tax refund or tax credit; and

D. the following statement in at least 12-point bold

type:

(1) This agreement is considered to be a loan and not your actual tax refund or tax credit. You are borrowing money against your anticipated tax return.

(2) Neither the internal revenue service (IRS) nor the New Mexico taxation and revenue department guarantees that you be paid the full anticipated amount of a tax refund or tax credit, nor do they guarantee that a tax refund or tax credit will be deposited into your bank account or mailed on a specific date.

(3) You are responsible for the full repayment of this refund anticipation loan and for the payment of the total interest, fees, and charges incurred.

(4) Prior to executing a refund anticipation loan agreement, a small loan licensee shall require the borrower to provide a hand written or electronic signature acknowledging that the borrower understands the all required disclosures and has received a copy of the required disclosure. A copy of the acknowledgment form must be permanently kept with the loan records.

(5) This business is licensed and regulated by the New Mexico Regulation and Licensing Department, Financial Institutions Division, P.O. Box 25101, 2550 Cerrillos Road, Santa Fe, New Mexico 87504. To report any unresolved problems or complaints, contact the division by telephone at (505) 476-4885 or visit the website: www.rld.state.nm.us/financial_institutions/.
[12.18.9.8 NMAC - N, 09/15/2018]

12.18.9.9 PROHIBITED ACTS: All small loan licensees engaged in the business of making refund anticipation loans shall not:

- A. directly or indirectly represent a refund anticipation loan as a refund or tax credit;
- B. require a borrower to enter into a loan agreement in order to complete a tax return;
- C. engage in a

transaction, practice, or course of business that operates a fraud upon a borrower in connection with a refund anticipation loan, including making oral statements contradicting any of the information required to be disclosed pursuant to 12.18.9.7 NMAC - Mandatory Disclosure of Loan Information;

D. take or arrange for a creditor to take possession of or a security interest in any property of the consumer other than the proceeds of the consumer's tax refund or tax credit to secure payment of a refund anticipation loan; and

E. withhold from a consumer, or from a dependent of a consumer, original personal identification documents.
[12.18.9.9 NMAC - N, 09/15/2018]

HISTORY of 12.18.9 NMAC:
[RESERVED]

REGULATION AND LICENSING DEPARTMENT FINANCIAL INSTITUTIONS DIVISION

TITLE 12 TRADE, COMMERCE AND BANKING CHAPTER 18 LOAN COMPANIES PART 10 ELECTRONIC MEDIA REQUIREMENTS

12.18.10.1 ISSUING AGENCY: Financial Institutions Division of the Regulation and Licensing Department.
[12.18.10.1 NMAC - N, 09/15/2018]

12.18.10.2 SCOPE: All licensees conducting business in the state of New Mexico.
[12.18.10.2 NMAC - N, 09/15/2018]

12.18.10.3 STATUTORY AUTHORITY: Section 58-15-11 NMSA 1978.
[12.18.10.3 NMAC - N, 09/15/2018]

12.18.10.4 DURATION: Permanent
[12.18.10.4 NMAC - N, 09/15/2018]

12.18.10.5 EFFECTIVE DATE: September 15, 2018, unless a later date is cited at the end of a section.
[12.18.10.5 NMAC - N, 09/15/2018]

12.18.10.6 OBJECTIVE: The objective of this part is to establish required content to be included on electronic marketing and business sites utilized by small loan lenders.
[12.18.10.6 NMAC - N, 09/15/2019]

12.18.10.7 DEFINITIONS:

A. "Business of lending" means any person or business entity engaged in the origination of any extension of credit in the amount of \$5,000.00 or less, or the acceptance of a credit application containing a consumer's personal information beyond the below listed items:

- (1) consumer's name;
- (2) consumer's home address;
- (3) consumer's phone number or electronic mail address;
- (4) purpose of the potential loan; and
- (5) loan amount requested.

B. "Marketing site" means any website, social media page, or mobile application utilized only for marketing, advertising or referring a consumer to complete a credit application and which is not utilized by a small loan business for the business of lending.

C. "Business site" means any website, social media page, or mobile application which a small loan business utilizes to engage in the business of lending through such site.
[12.18.10.7 NMAC - N, 09/15/2018]

12.18.10.8 MARKETING SITE REQUIREMENTS:

A. Small loan businesses operating one or more marketing site(s) shall be responsible for providing all mandatory disclosures and consumer information as required by Subsection C of

12.18.3.8 NMAC and Subsection A of 12.18.4.8 NMAC to consumers. The required disclosures and consumer information shall be easily accessible to consumers to review on a New Mexico specific web page maintained by the small loan company. The small loan company must ensure active links to the New Mexico specific web page are included on all company marketing sites utilized for loans made to borrowers in New Mexico.

B. All small loan businesses operating one or more marketing site(s) shall provide a disclosure in a location or locations on the marketing site that will be easily accessible and visible to consumers accessing such marketing site with the following words “TO REPORT A PROBLEM OR COMPLAINT WITH THIS LENDER, YOU MAY WRITE OR CALL _____.”

The blank shall be filled in with a position title, address, phone number, and email address of the company’s problem resolution person.

C. The above shall also contain a separate disclosure stating the following words, “This lender is licensed and regulated by the New Mexico Regulation and Licensing Department, Financial Institutions Division, P.O. Box 25101, 2550 Cerrillos Road, Santa Fe, New Mexico 87504. To report any unresolved problems or complaints, contact the division by telephone at (505) 476-4885 or visit the website <http://www.rld.state.nm.us/financialinstitutions/>.”

[12.18.10.8 NMAC - N, 09/15/2018]

12.18.10.9 BUSINESS SITE REQUIREMENTS:

A. Small loan businesses operating one or more business site(s) shall obtain a separate license for each site pursuant to Subsection A of Section 58-15-3 NMSA 1978.

B. Small loan businesses shall make the most current small loan license certificate easily accessible and available for review within the business site.

C. Small loan businesses operating one or more

business site(s) shall be responsible for all disclosures to be posted on such site(s). This shall include making the mandatory consumer information brochure pursuant to Subsection C of 12.18.3.8 NMAC and the mandatory signage for all small loan companies pursuant to Subsection A of 12.18.4.8 NMAC.

D. All small loan businesses operating one or more business site(s) shall provide a disclosure in an easily accessible and visible location the following words “TO REPORT A PROBLEM OR COMPLAINT WITH THIS LENDER, YOU MAY WRITE OR CALL _____.” The blank shall be filled in with a position title, address, phone number, and email address of the company’s problem resolution person.

E. The above shall also contain a separate disclosure stating the following words: “This lender is licensed and regulated by the New Mexico Regulation and Licensing Department, Financial Institutions Division, P.O. Box 25101, 2550 Cerrillos Road, Santa Fe, New Mexico 87504. To report any unresolved problems or complaints, contact the Division by telephone at (505) 476-4885 or visit the website <http://www.rld.state.nm.us/financialinstitutions/>.”

[12.18.10.9 NMAC - N, 09/15/2018]

HISTORY of 12.18.10 NMAC: [RESERVED]

REGULATION AND LICENSING DEPARTMENT FINANCIAL INSTITUTIONS DIVISION

This is an amendment to 12.18.3 NMAC, Section 8, effective 09/15/2018.

12.18.3.8 MANDATORY BROCHURE FOR SMALL LOAN BUSINESS:

A. All small loan companies licensed by New Mexico must have an informational brochure readily available to all small loan

consumers.

B. The brochure rack containing the brochure must be placed by the main door entrance. The brochure rack must always be stocked with the brochure.

C. Using lettering no smaller than 24-point font, the front of the brochure shall have in bold capital letters, the words, “IMPORTANT CONSUMER INFORMATION” followed by the words in bold 14-point font, “This brochure contains some common terms and definitions, which are intended to help you better understand your credit transaction. Credit costs money, so it is important that you fully understand the terms of your credit transaction. If you come across terms you do not understand, look up the terms, or ask our personnel to explain the terms to you. Ask questions. Make certain the questions that you ask are answered. Make certain you understand the terms and costs of your loan.”

D. Using lettering no smaller than ~~10-point~~ 12-point font, the brochure shall state:

(1) Common terms and definitions.

(2) Equal Credit Opportunity Act (ECOA). A federal regulation which requires lenders to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to whether all or part of the applicant’s income derives from a public assistance program; or to whether the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The regulation prohibits creditor practices that discriminate on the basis of any of these factors.

(3) Contract. A written binding document, describing terms of an agreement between two or more persons. (Keep all paperwork. Later, if there are any questions, you will have your agreement in writing.)

(4) Annual percentage rate (APR). The cost of your credit as a yearly rate. [This-

measures the cost of credit expressed as a yearly interest rate.] APR is a combination of the interest rate plus the fees charged on your loan. APR is higher than the interest rate because it includes both fees and interest as finance charges. It is intended to provide a single value for a consumer to compare the cost of credit between one lender and another. Under New Mexico law, the APR for a loan in an amount of \$5,000 or less made pursuant to the Small Loan Act of 1955 or the Bank Installment Loan Act of 1959 cannot exceed one hundred seventy-five percent, effective January 1, 2018.

(5) Finance charge. The dollar amount the credit will cost you. Finance charges include interest, and may also include transaction fees and service fees.

(6) Principal. The amount of money owed on a debt, on which interest is calculated.

(7) Interest. The cost of borrowing money, generally a percentage of the amount owed.

(8) Balance. The total amount of money owed to a lender.

(9) Default. Failure to pay a debt as agreed to on a contract. When a loan is in default, the lender may demand full payment of the remaining debt.

(10) Collateral. Security pledged by a borrower to protect the interests of the lender; in case of default, the lender may take ownership of the security, if any, pledged by the borrower.

(11) Credit bureau. A private company that keeps a record of your credit history for distribution upon request by authorized parties. When you apply for credit, a lender may request a credit report to review when considering your application.

(12) Credit history. A record containing information about you, including your payment history on previous debts.

(13) Credit report. A report of the credit history and other information about you

that is kept by credit bureaus, which may include: your name, address, social security number, payment history (good and bad), current and previous debts, employers, income, etc. Accurate information on a credit report may not be legally removed. Incorrect information may be removed by disputing the information to the credit bureau involved.

E. The brochure shall have the following words, using lettering no smaller than [~~10-point~~] 12-point font: “This [~~business~~] lender is licensed and regulated by the New Mexico Regulation and Licensing Department, Financial Institutions Division, P.O. Box 25101, 2550 Cerrillos Road, Santa Fe, New Mexico [87505] 87504. To report any unresolved problems or complaints, contact the division by telephone at (505) 476-4885 or visit the website: www.rld.state.nm.us/financialinstitutions/.”

[12.18.3.8 NMAC - N, 10/1/2001; A, 08/13/2004; A, 09/15/2018]

REGULATION AND LICENSING DEPARTMENT FINANCIAL INSTITUTIONS DIVISION

This is an amendment to 12.18.4 NMAC, part name, Sections 2, 6, 7 and 8, effective 09/15/2018.

PART 4 MANDATORY SIGNAGE FOR [~~PAYDAY- LENDERS AND TITLE~~] ALL SMALL LOAN COMPANIES:

12.18.4.2 SCOPE: Loan companies conducting [~~Title Loan and Payday Loan~~] business in New Mexico.

[12.18.4.2 NMAC - N, 10/1/2001, A, 09/15/2018]

12.18.4.6 OBJECTIVE: The objective of this part is to require prominent signage disclosing the [~~schedule of charges to obtain a~~] loan rates and fees to obtain a loan and to assist consumers in the loan decision process.

[12.18.4.6 NMAC - N, 10/1/2001, A

09/15/2018]

12.18.4.7 DEFINITIONS:
[~~_____ A. _____~~ “Title” loan means a loan secured by the borrower’s vehicle title, which is structured to be a short term, fixed rate, closed-end transaction usually paid in one installment.

~~_____ B. _____~~ “Payday” loan means a loan where the business operator cashes a personal check tendered by the customer and agrees in writing to defer presentment of that check until the customer’s next payday, or another date agreed to by the business operator and the customer.] “Annual percentage rate” or “APR” means the measure of the cost of credit, expressed as a yearly rate.

[12.18.4.7 NMAC - N, 10/1/2001; A, 09/15/2018]

12.18.4.8 MANDATORY SIGNAGE FOR ALL SMALL LOAN COMPANIES:

A. All [~~Title and Payday~~] small loan companies must display in each licensed place of business a prominent sign, readily visible to borrowers, disclosing the [~~schedule of charges~~] annual percentage rate and fees. [~~The prominent sign in a reduced form, with font, no smaller than 10-point, must be displayed at every workstation where loans are originated.~~] On all company websites, social media pages, and mobile applications where content regarding loans offered or made to borrowers in New Mexico may be accessed by consumers, the prominent sign, in a reduced form, shall be easily accessible to consumers to review via an interactive link to a New Mexico specific web page maintained by the company containing all information required to be on the sign mandated by this section.

B. The lettering on the prominent sign must be no smaller than 24-point font, unless specified otherwise.

C. The sign must state in bold capital letters, the words, [~~“SCHEDULE OF CHARGES”~~]

“LOAN RATES AND FEES.”

D. Below the words [“schedule of charges”] “loan rates and fees,” in bold capital letters, the sign shall state, [“THE CHART BELOW REPRESENTS ILLUSTRATIVE EXAMPLES OF THE COST OF A LOAN TO THE BORROWER.”] “BELOW IS GENERAL INFORMATION REGARDING ALL RATES AND FEES THAT WILL ASSIST YOU IN MAKING YOUR LOAN DECISION. IF YOU HAVE ANY QUESTIONS, OR WOULD LIKE MORE INFORMATION, PLEASE ASK. MAKE CERTAIN THE QUESTIONS THAT YOU ASK ARE ANSWERED. MAKE CERTAIN YOU UNDERSTAND THE TERMS AND COSTS OF YOUR LOAN.”

E. The [chart must have the following headings starting from left to right. The borders for the first two] disclosure shall consist of two distinctive sections. Each section heading must be printed from left to right. The borders for the two section headings must be more prominent than the others.

(1) The first heading shall have in bold capital letters the words, “ANNUAL PERCENTAGE RATE (APR)” followed by the words in bold [14-point] font, “The cost of your credit as a yearly rate. [Assumes a _____ day repayment period. The blank is to be replaced with the actual number of days used for the illustrative Annual Percentage Rate calculation shown on the chart.] APR is a combination of the interest rate plus the fees charged on your loan. APR is higher than the interest rate because it includes both fees and interest as finance charges.”

(a)
Below the preceding sentences in bold type the following words shall appear: “Your actual terms and the annual percentage rate (APR) will be determined at the time your application is submitted and will be based upon your application and credit information. Not all applicants will qualify for the lowest rate.”

(b)
Below the preceding sentences in bold

type the following words shall appear: “Under New Mexico law, the APR for a loan in an amount of \$5,000 or less made pursuant to the Small Loan Act of 1955 or the Bank Installment Loan Act of 1959 cannot exceed one hundred and seventy-five percent, effective January 1, 2018.”

(2) The second heading shall have in bold capital letters the [~~words, “FINANCE CHARGE”~~] word “FEES” followed by the [~~in 14-point font~~] words: [~~“The dollar amount the credit will cost you.”~~] “A list of all fees that you may be charged.” The heading shall be followed with a table containing a list of all fees that a borrower may be charged.

(3)—The third heading shall have the words, “Amount Financed” followed by the words in 14-point font, “The amount of credit provided to you or on your behalf.”

(4)—The fourth heading shall have the words “Total of Payments” followed by the words in 14-point font, “The amount you will have paid after you have made all payments as scheduled.”

(5)—The fifth heading shall have the words “Number of Payment(s) used in the APR calculation.”

F. Below the chart headings, the company must have illustrative examples of each class of loans the company offers:]

[G:] E. Below the [chart] second heading in bold capital letters the following words shall appear: “TO REPORT A PROBLEM OR COMPLAINT WITH THIS LENDER, YOU MAY WRITE OR CALL _____.” The blank shall be filled in with a position title, address, phone number, and email address of the company’s problem resolution person.

[H:] G. The bottom of the sign shall have the following words, “This [business] lender is licensed and regulated by the New Mexico Regulation and Licensing Department, Financial Institutions Division, P.O. Box 25101, 2550 Cerrillos Road, Santa Fe, New Mexico [87505] 87504. To report any

unresolved problems or complaints, contact the division by telephone number (505) 476-4885 or visit the website <http://www.rld.state.nm.us/financialinstitutions/>.” [12.18.4.8 NMAC - N, 10/1/2001; A, 08/13/2004; A, 09/15/2018]

**SECRETARY OF STATE,
OFFICE OF THE**

The office of the secretary of state repeals its rule entitled The Use of Alternative Ballots for Emergency Voting Purposes, 1.10.5 NMAC, filed 12/15/1997, adopted 8/15/2018 and effective 8/28/2018.

The office of the secretary of state repeals its rule 1.10.6 NMAC, Party Position on General Election Ballot (originally filed on 12/15/1997), adopted on 8/15/2018 and effective on 8/28/2018.

**SECRETARY OF STATE,
OFFICE OF THE**

**TITLE 1 GENERAL
GOVERNMENT
ADMINISTRATION
CHAPTER 10 ELECTIONS AND
ELECTED OFFICIALS
PART 6 PARTY
POSITION ON GENERAL
ELECTION BALLOT**

1.10.6.1 ISSUING AGENCY: Office of the Secretary of State. [1.10.6.1 NMAC - Rp, 1.10.6.1 NMAC, 8/28/2018]

1.10.6.2 SCOPE: This rule applies to any general election. [1.10.6.2 NMAC - Rp, 1.10.6.2 NMAC, 8/28/2018]

1.10.6.3 STATUTORY AUTHORITY: Election Code, Section 1-10-8.1 and Section 1-2-1 NMSA 1978. [1.10.6.3 NMAC - Rp, 1.10.6.3 NMAC, 8/28/2018]

1.10.6.4 DURATION:

Permanent.

[1.10.6.4 NMAC - Rp, 1.10.6.4 NMAC, 8/28/2018]

1.10.6.5 EFFECTIVE DATE: August 28, 2018 unless a later date is cited at the end of a section.

[1.10.6.5 NMAC - Rp, 1.10.6.5 NMAC, 8/28/2018]

1.10.6.6 OBJECTIVE: To provide the procedures to determine the order for political parties for the partisan offices on the general election ballot.

[1.10.6.6 NMAC - Rp, 1.10.6.6 NMAC, 8/28/2018]

1.10.6.7 DEFINITIONS: [RESERVED]

[1.10.6.7 NMAC - Rp, 1.10.6.7 NMAC, 8/28/2018]

1.10.6.8 PROCEDURES FOR DETERMINING BALLOT POSITION:

A. The names of the candidates of each political party qualified to participate in a general election shall be placed by party on the general election ballot in the order of preference as determined by lot at a drawing held for that purpose.

B. The secretary of state shall send notice to each chairperson of a qualified political party not less than two weeks prior to such drawing.

C. On the last Friday in the month of August in the year in which a general election is to be held, the state chairperson of each political party qualified to participate in the election, or a designated representative with written authorization by such chairperson, shall meet in the office of the secretary of state at a time specified in the notice. At this time, the chairperson, or the designated representative, shall proceed to draw by lot for the position of the chairperson's party on the general election ballot.

D. There shall be placed in a suitable container, capsules containing numbers one

through the number that is equivalent to the total number of political parties participating in the general election. The number drawn by each chairperson, or chairperson's designated representative, shall determine the position on the general election ballot that the chairperson's party and the candidates of that party shall occupy, with number one being the first position on the ballot, number two being the second, number three being the third, and so on down the ballot until all parties are placed on the ballot. In the event no state chairperson or designated representative appears as notified for such drawing, the secretary of state shall draw on behalf of that political party.

E. The names of all unaffiliated candidates, or candidates who decline to state a party affiliation shall be printed on the ballot as "Independent" and shall be positioned on the ballot below or after candidates affiliated with a political party, if any. In the event two or more independent candidates run for the same office, their names shall be located on the ballot in alphabetical order.

F. If a person has filed to be a qualified write-in candidate for a particular office, a space shall be printed on the ballot after the listing of other candidates for that office pursuant to Section 1-10-13 NMSA 1978.

[1.10.6.8 NMAC - Rp, 1.10.6.8 NMAC, 8/28/2018]

HISTORY OF 1.10.6 NMAC:

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives under: SOS Rule No. 79-2, Rule for Determination of Ballot Position in General Elections, 7/27/1979. SOS Rule No. 79-2, Amendment No. 1, 2/9/1982.

History of Repealed Material:

1.10.6 NMAC - Party Position On General Election Ballot, filed 12/15/1997, was repealed and replaced by 1.10.6 NMAC - Party

Position On General Election Ballot, effective 8/28/2018.

**TRANSPORTATION,
DEPARTMENT OF**

This is an amendment to 18.27.5 NMAC, Sections 3, 7, 8, 11, 12, 13 and 15 effective 1/1/2019.

18.27.5.3 STATUTORY AUTHORITY: Section 13-1-82 NMSA 1978 (1984, as amended through 2012) and Section 13-1-133 to -134 NMSA 1978 (1984, as amended through 2012) Sections 67-3-2 (2003), 67-3-11 (2003), 67-3-14 (2003), and 67-3-43 (1983) NMSA 1978, 23 USC Section 112(b), 23 CFR Sections 635.110 and 635.114. [18.27.5.3 NMAC - Rp, 18.27.5.3 NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.7 DEFINITIONS:

A. This rule adopts the abbreviations, symbols and definitions in the division 100-general provisions of the New Mexico department of transportation current edition of the standard specifications for highway and bridge construction and incorporates the same by reference.

B. CID is the abbreviation of construction industries division.

C. Compass form means the New Mexico department of transportation form generated at project closure that documents certain contractor performance measurement data.

D. Innovative contracting is an alternate form of competitive bidding consistent with federal and state procurement laws that can result in work being awarded to a responsible bidder that may not submit the lowest monetary bid.

E. Modified bid amount means the contractor's bid multiplied by the contractor's prequalification factor rolling average or Pqfra. The modified bid amount will be used solely for determining the apparent lowest responsible bidder. The modified bid amount will not be used for payment.

F. Packet means the current New Mexico department of transportation contractor prequalification application from the office of inspector general.

G. Performance factor or Pf means the numerical quantification of a contractor's past performance on closed projects for certain objectively measurable criteria.

H. Pf claim or Pfc means the performance measurement of a contractor's unsuccessful demand for reconsideration seeking additional compensation or contract time beyond the cabinet secretary administrative remedy level.

I. Pf disincentive or Pfd means the performance measurement of a contractor's quality of work related to certain contract items. Applicable contract items for disincentive are the following sections 401 pavement smoothness measurement, 403 [and] open graded friction course, 403 - a warm mix asphalt - open graded friction course, 404 rubberized open graded friction course, 416 minor paving, 417 miscellaneous paving, 423 hot mix asphalt - [superpave qta and non-qta] major paving, 424 warm mix asphalt [qta and non-qta] - major paving, 450 [and] major portland cement concrete pavement, 451 [qta and non-qta] minor portland cement concrete pavement, 456 continuously reinforced concrete pavement, and 901 quality control/quality assurance.

J. Pf liquidated damages or Pfld means the performance measurement of a contractor's timely completion of the contract.

K. Pf non-conformance or Pfn means the performance measurement of a contractor's compliance with the terms and conditions of the contract.

L. Pf safety or Pfs means the performance measurement of a contractor's safety reflected by the contractor's experience modifier rate or emr provided by the contractor's bonding company.

M. Pf subcontractor or Ppsc means the performance

measurement of a contractor's prompt payment of its first tier subcontractors [or suppliers].

N. Pqf rolling average or Pqfra means the final measure of responsibility that is applied to the contractor's bid resulting in the modified bid amount.

O. Prequalification factor year or Pqfyf means the yearly calculation of a contractor's performance factors.

P. Prequalification factor or Pqf means the overall mathematical analysis of the performance factors that measures contractor responsibility. Prequalification factor is abbreviated Pqf.

Q. Prequalification packet means the New Mexico department of transportation form submitted annually.

R. [Responsibility means an objective determination based on past performance by the New Mexico department of transportation of the contractor's capability in all respects to perform fully and make satisfactory delivery the requirements of the contract including the integrity and reliability that will assure good faith performance.] Project closure means completion of the project and occurs on the date that the state construction engineer or New Mexico department of transportation designee signs the compass form.

S. [Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set.] Responsibility means an objective determination based on past performance by the New Mexico department of transportation of the contractor's capability in all respects to perform fully and make satisfactory delivery the requirements of the contract including the integrity and reliability that will assure good faith performance.

T. Rolling average means a calculation to analyze data points by creating a series of averages of different subsets of the full data set. [18.27.5.7 NMAC - Rp, 18.27.5.7

NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.8 PREQUALIFICATION

PROCEDURE: The most current version of the prequalification packet to obtain prequalified status [may] must be obtained from the office of inspector general of the New Mexico department of transportation website. Each contractor and subcontractor seeking to become prequalified shall submit the prequalification packet and any supporting information to the New Mexico department of transportation office of inspector general [at the address] as indicated in the prequalification packet. Deadlines are calculated from the date office of inspector general receives the new or renewal packet. Requests for prequalification will not be processed without the submission of a timely, complete and conforming packet. All packets shall contain a complete affidavit, executed under penalty of perjury by an authorized individual, certifying that the information contained in the packet is true and correct. Untimely, incomplete and non-conforming packets will not be processed.

A. Prequalified status will be granted upon the approval of a timely, complete and conforming prequalification packet by the office of inspector general.

B. An untimely, incomplete, or nonconforming packet will result in delays affecting prequalification status and will negatively impact the prime contractor's ability to bid on New Mexico department of transportation projects.

(1) Obtaining prequalified status is a condition to submitting a bid. Prime contractors submitting a new prequalification packet or renewal prequalification packet must [submit it] be approved no later than seven calendar days before the opening of any bid.

(2) Prime contractors submitting a bid without timely obtaining prequalified status shall result in a determination that its bid is non-responsive and the bid shall be rejected.

C. Subcontractors, at any tier, must obtain prequalified status before performing any work [or supplying goods or services to] on the project.

~~Subcontract packets for subcontractors who fail to obtain prequalified status before performing any work or supplying goods or services to the project shall be rejected.~~

~~(2)] Work performed [or goods or services supplied] without prequalified status shall be non-compensable.~~

D. For prime contractors and subcontractors who are currently prequalified by the effective date of this rule the applicant will not need to submit a new prequalification packet until the anniversary date of their last packet.

E. For prime contractors and subcontractors submitting [new] packets, within five calendar days from the receipt of a [new] prequalification packet the office of inspector general will provide notice of receipt of the packet.

(1) If the packet submitted is complete and conforming then the office of inspector general will provide written notice to the applicant of approved prequalified status.

(2) If the packet submitted is incomplete or does not conform to the requirements then the office of inspector general will provide written notice to the applicant that the packet will not be processed until the packet is complete and conforms to the requirements.

(3) The date of the written notice of approved prequalified status shall establish prequalification eligibility for a period of one year. Prequalified status shall automatically terminate if not renewed prior to the expiration date established by the written notice of approved prequalification status.

F. Renewal packets shall be submitted no [later than seven days] more than 30 calendar days before the expiration date on the

document published by the office of inspector general titled prequalified contractors and subcontractors list. Prequalified status shall automatically terminate for the failure to submit a timely, complete and conforming renewal packet. Prequalified status shall be re-established upon the approval of a complete and conforming renewal packet.

G. Appeal of the denial of prequalification eligibility based upon the receipt of untimely, incomplete or non-conforming packet shall be submitted in writing to the office of inspector general with supporting documentation within seven calendar days of the denial of prequalified status. If the appeal is untimely the aggrieved party waives the right to appeal. The inspector general, or designee, will issue a final written decision upholding or reversing the denial of prequalified status within seven calendar days of the receipt of a timely appeal. The inspector general's decision constitutes the final action taken by the office of inspector general related to a denial of prequalified status under this section.

H. Obtaining prequalification status, a performance factor, or a prequalification factor rolling average does not grant a license to do business, a right to bid or to be awarded a contract.

I. In the event a contractor or subcontractor is suspended or debarred, its prequalification status shall immediately and automatically terminate without further notice. In order to obtain renewed prequalification status after a period of suspension or debarment a new complete and conforming prequalification packet must be submitted and approved. [18.27.5.8 NMAC - Rp, 18.27.5.8, 18.27.5.9, 18.27.5.10, 18.27.5.11, 18.27.5.12 NMAC, 1/1/2015; A, 1/1/2019]

18.27.5.11 PREQUALIFICATION CALCULATION: The New Mexico department of transportation will gather prime contractor

performance data from each project upon project closure. The data collected will be used to calculate a yearly prequalification factor. The prequalification factor rolling average will be applied to each prequalified prime contractor to evaluate the prime contractor's bid for department projects as indicated in the invitation for bids.

A. The performance factors are claims, disincentives, liquidated damages, non-conformance, safety, and subcontractor.

(1) Pf claim data will be documented on the compass form and will be collected from the New Mexico department of transportation's closed project records.

(2) Pf disincentive data will be documented on the compass form and will be collected from the New Mexico department of transportation's closed project records indicating whether disincentives were assessed on standard specification division for surface treatment and pavements and division for quality criteria items.

(3) Pf liquidated damages data will be documented on the compass form and will be collected from the New Mexico department of transportation's closed project records indicating whether liquidated damages were assessed.

(4) Pf non-conformance data will be documented on the compass form and will be collected from the New Mexico department of transportation's closed project records indicating whether non-conformances were assessed.

(5) Pf safety data will be the contractor's experience modifier rating as reported on its prequalification packet.

(6) Pf subcontractor data will be documented on the compass form and will be collected from the New Mexico department of transportation's construction and civil rights [state-construction] bureau records indicating findings for the failure

to promptly pay subcontractors [or suppliers] without good cause.

B. The performance factors are assigned percentage values within the yearly prequalification factor calculation.

(1) The percentage associated with claims is [15%] fifteen percent.

(2) The percentage associated with disincentives is [30%] thirty percent.

(3) The percentage associated with the liquidated damages is [30%] thirty percent.

(4) The percentage associated with non-conformances is [10%] ten percent.

(5) The percentage associated with safety is [5%] five percent.

(6) The percentage associated with subcontractor is [10%] ten percent.

C. Pf claim or Pfc is calculated in the following manner:

(1) Claims that are not pursued beyond the cabinet secretary administrative remedy level will not be included in the calculation for Pf claim.

(2) For claims that are pursued beyond the cabinet secretary administrative remedy level a binary system will be used to assign a value of zero or one to evaluate claims.

(a) Claims resolved for the value of the claim or more brought beyond the cabinet secretary level will be assigned a value of zero.

(b) Claims resolved for less than the value of the claim brought beyond the cabinet secretary level will be assigned a value of one.

(3) Pf claim is calculated by adding the number one to the outcome of the sum of the claim value divided by the sum of closed projects.

(4) Pf claim resulting in a value of one will be assigned a bonus value for Pf claim equal to 0.9.

(5) Pf

claim will then be multiplied by the percentage associated with Pf claim. The resulting value will be incorporated into Pqfy.

D. Pf disincentive or Pfd is calculated in the following manner:

(1) For each closed project:

(a) Sum paid and accepted applicable contract items.

(b) Sum of paid and accepted applicable contract items less applicable contract disincentives.

(c) Divide the total of Subparagraph (a) by the total of Subparagraph (b) of Paragraph (1) of Subsection D of this Section.

(2) Sum all closed projects of [~~Subsection D- Paragraph (1) Subparagraph (e)~~ Subparagraph (c) of Paragraph (1) of Subsection D] of this Section in a given year and divide by the count of closed projects resulting in Pfd.

(3) Pf disincentive resulting in a value of [~~zero or~~ exactly one with paid and accepted applicable contract items] will be assigned a bonus value for Pf disincentive equal to 0.9.

(4) Pf disincentive will then be multiplied by the percentage associated with Pf disincentive. The resulting value will be incorporated into Pqfy.

E. Pf liquidated damages or Pfd has two separate methods of calculation one for mandatory completion date projects and one for calendar or working day projects:

(1) For mandatory completion date projects liquidated damages equivalence is calculated:

(a) Subtract the mandatory completion date including any awarded time from the notice to proceed date to equate to a whole number.

(b) Subtract the actual completion date from the notice to proceed date to equate to a whole number.

(c) Divide the total of Subparagraph (b) by the total of Subparagraph (a) of Paragraph (1) of Subsection E of this Section.

(d) A resulting value less than or equal to one from Subparagraph (c) of Paragraph (1) of Subsection E of this Section will be assigned a bonus value equal to 0.9.

(2) For calendar or working day projects liquidated damages equivalence is calculated:

(a) Sum of the total days charged.

(b) Sum of the total days contracted.

(c) Divide the total of Subparagraph (a) by Subparagraph (b) of Paragraph (2) of Subsection E of this Section.

(d) A resulting value less than or equal to one from Subparagraph (c) of Paragraph (2) of Subsection E of this Section will be assigned a bonus value equal to 0.9.

(3) Pf liquidated damages for a given year is the calculated from all project liquidated damages. Pf liquidated damages is the sum of liquidated damages equivalence for mandatory completion date, calendar or working day projects divided by the count of closed projects resulting in Pfd.

(4) Pf liquidated damages will then be multiplied by the percentage associated with Pfd. The resulting value will be incorporated into Pqfy.

F. Pf non-conformance or Pfn is calculated in the following manner:

(1) Sum the number of progress payments per project.

(2) Sum the number of progress payments without non-conformance.

(3) Divide Paragraph (1) by Paragraph (2) of this Subsection.

(4) A resulting value of one for Paragraph (3) of this Subsection will be assigned a bonus

value equal to 0.9.

(5) Sum all closed projects of Paragraph (4) of this Subsection in a given year and divide by the count of closed projects resulting in Pfn.

(6) Pf non-conformance for a given year will then be multiplied by the percentage associated with Pfn. The resulting value will be incorporated into Pqfyr.

G. The performance factor for safety or Pfs is the contractor's experience modifier rate supplied annually by the contractor at the time of submission of the prequalification packet.

(1) Pfs for a given year is the numerical value of the contractor's experience modifier rate.

(2) If the experience modifier is equal to or less than one the Pfs is assigned a value of 0.9.

(3) The experience modifier rate is multiplied by the percentage associated with Pfs. The resulting value will be incorporated into Pqfyr.

H. Pf subcontractor or Pfsc is calculated in the following manner:

(1) Negative findings against the prime contractor per project will result in a value of one per finding.

(2) Pfsc for a given year is the sum of all negative findings in the year.

(3) Zero findings on all closed projects within the year will receive a bonus of Pf subcontractor equal to 0.9.

(4) The sum of Pfsc for a given year is multiplied by the percentage associated with Pfsc. The resulting value will be incorporated into Pqfyr.

I. The contractor's yearly performance factor is the sum of the individual performance factors multiplied by their associated percentages.

J. The equation is $Pqfyr = Pfc * [15\% \text{ fifteen percent} + Pfd * [30\% \text{ thirty percent} + Pfd * [30\% \text{ thirty percent} + Pfn * [10\% \text{ ten percent} + Pfs * [5\% \text{ five percent} + Pfsc * [10\% \text{ ten percent}]]]]]$

thirty percent+Pfn*[10%]
ten percent+Pfs*[5%] five percent+Pfsc*[10%] ten percent.

K. In the absence of data for any given year a contractor's Pqfyr will be assigned a value of one.

L. For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.

M. The contractor's prequalification factor rolling average will be denoted as Pqfra.

(1) The Pqfra will be calculated through the use of a rolling average covering a period of three years. Each rolling average year will be assigned a weighting factor and will be multiplied by the appropriate weighting factor starting with the most recent year.

(2) The most recent year, denoted as Pqfyr 1, will be multiplied by the weighting factor of 0.9.

(3) The preceding year, denoted as Pqfyr 2, will be multiplied by the weighting factor of 0.6.

(4) The preceding year, denoted as Pqfyr 3, will be multiplied by the weighting factor of 0.3.

(5) The sum of Pqfyr 1 through Pqfyr 3, is multiplied by their appropriate weighting factors and then divided by the sum of all weighting factors to result in the contractor's overall Pqfra.

N. The equation for $Pqfra = (Pqfyr 1 * 0.9 + Pqfyr 2 * 0.6 + Pqfyr 3 * 0.3) / (0.9 + 0.6 + 0.3)$.

O. All equations and calculations whether interim or final will be rounded to the thousandths place.

[18.27.5.11 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.12 POSTING, REVIEW AND APPLICATION OF PREQUALIFICATION FACTOR:

The following procedures will apply to the posting, review and application of the prequalification factor:

A. The Pqfra will be calculated once a year on projects closed between January first and

December thirty-first of the previous year.

B. The Pqfra will be posted on the office of inspector general list titled prequalified contractors and subcontractors list by the second Friday in January.

C. The Pqfra will be applied to a prime contractor's bid(s) beginning with the March bid opening until superseded by an updated Pqfra.

D. The Pqfra will be used to determine the modified bid amount.

E. A Pqfra may be recalculated and reposted at times other than the second Friday in January in order to implement the decision of a hearing officer, a court order or a required correction.

[18.27.5.12 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.13 APPEAL

PROCEDURE: In the event of the appeal of a contractor's prequalification factor the following procedures shall apply:

A. Only a contractor disputing their own prequalification factor shall have the right to appeal their factor to the New Mexico department of transportation under this section.

B. To be considered an appeal must conform in timing, form and service to all requirements in this section or the appeal shall be rejected.

C. A contractor disputing only the misapplication of its prequalification factor to their bid shall file the appeal according to the bidding dispute resolution procedures in the division 100-general provisions of the New Mexico department of transportation current edition of the standard specifications for highway and bridge construction [bidding-dispute resolution procedures].

D. A contractor disputing only the calculation of its prequalification factor shall file its appeal within seven calendar days of the publication of their prequalification factor.

E. The appeal filed must conform to the requirements below and contain the following

information:

(1) The appeal shall be in writing.

(2) Appeals made by electronic mail shall not be considered.

(3) The appeal shall clearly and concisely state the party's right to appeal, the grounds for appeal, the requested relief, and contain relevant laws, rules, regulations and documents to support the appeal.

(a) Sufficient copies of cited laws, rules, regulations, or documentary evidence shall be included with the appeal.

(b) Supporting documentary evidence not submitted at the time of filing the appeal shall be submitted no later than five calendar days before the hearing.

(4) The documents submitted in the appeal process shall not be considered confidential and will be subject to the Inspection of Public Records Act, Sections 14-2-1 to 14-2-12 NMSA 1978 (1993, as amended through 2011).

F. Service of the appeal shall occur as follows:

(1) A contractor disputing its prequalification factor shall serve the appeal upon the New Mexico department of transportation's cabinet secretary. The contractor shall contemporaneously provide a copy of the appeal to the office of the general counsel and the office of inspector general at the respective address for each.

(2) Service upon the cabinet secretary must be made either in person, by certified mail return receipt requested, or by delivery by a nationally recognized courier.

(3) Service must be made during regular business hours.

(4) Service made outside of regular business hours will be considered effective the next business day.

G. 10 calendar days after receipt of a timely and complete

appeal the cabinet secretary shall provide the following:

(1) Notice to all parties advising the parties that an informal hearing will be convened and designating a neutral hearing officer or designating himself the cabinet secretary themselves as the hearing officer.

(2) Within seven calendar days of the cabinet secretary's designation the hearing officer will provide a notice to all parties of hearing with the date, time and location of the hearing. The notice of hearing will be provided no later than seven calendar days before the chosen hearing date for the informal hearing.

H. The formal rules of civil procedure, formal discovery processes, and the formal rules of evidence shall not apply to the informal hearing.

(1) Any party to the appeal may choose to have legal counsel present.

(2) The hearing officer has the authority to determine the degree of formality of the hearing.

(3) The hearing officer has the authority to determine the total time allotted for the informal hearing and how the time will be apportioned between the parties.

I. The hearing officer shall be responsible for maintaining a record of the evidence and proceedings.

(1) The hearing officer will weigh the credibility of the evidence provided by both parties.

(2) The hearing officer may use any reliable information, no matter the source, in arriving at a determination.

(3) If the hearing officer uses information in the determination not provided by either party then the hearing officer will allow a reasonable amount of time for rebuttal from either party.

J. The hearing officer shall issue a decision regarding the appeal within seven calendar days of

the hearing unless otherwise extended by the hearing officer in writing, no extension shall exceed 21 calendar days from the hearing.

(1) The hearing officer's decision will constitute the final department action on the appeal.

(2) No further action on the appeal may be taken by the either party if the hearing officer's decision is accepted by both parties.

(3) If [~~the appealing~~] either party does not fully accept the hearing officer's decision then [~~the appealing~~] that party may proceed with [~~litigation~~] an appeal in state district court by filing the appropriate pleadings.

K. Record of the appeal through the hearing officer's decision will be maintained by the office of inspector general for seven years after the date of the informal hearing.

L. For bidding purposes and during the period of appeal the contractor's previous prequalification factor will apply. [18.27.5.13 NMAC - N, 1/1/2015; A, 1/1/2019]

18.27.5.15
~~[PREQUALIFICATION FOR CONSOLIDATED COMPANIES, JOINT VENTURES AND OTHER SPECIAL BUSINESS FORMATIONS:~~ The following prequalification packet procedure and Pqfra will apply to consolidated companies, consolidated companies related by common ownership and joint ventures:

~~A. For consolidated companies not related by common ownership and the parent company is not included in the consolidation each subsidiary within the consolidated company must be individually prequalified seven calendar days before a notice to proceed will be issued for the project. The Pqfra scores of the subsidiaries survive the merger or consolidation and the highest Pqfra of the subsidiaries joined by consolidation will be used for the modified bid amount.~~

~~B. For consolidated~~

companies related by common ownership each subsidiary and parent company in the merger or consolidated company must be individually prequalified before a notice to proceed will be issued for the project. The Pqfra scores of the subsidiaries survive the merger or consolidation and the highest Pqfra of the subsidiaries or parent company joined by consolidation will be used for the modified bid amount.

C. Each prime contractor participating in the joint venture must be individually prequalified seven days before bid opening to join forces as a joint venture for bidding and performing work related to a single project. The joint venture itself need not prequalify.

(1) In addition to being individually prequalified each prime contractor participating in the joint venture shall file with the office of inspector general statement of joint venture.

(2) For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.] **PREQUALIFICATION FOR CONSOLIDATED CORPORATIONS, MERGED CORPORATIONS, AND JOINT VENTURES:** The following prequalification packet procedure and Pqfra will apply to consolidated corporations, merged corporations and joint ventures:

A. For a consolidated corporation pursuant to Subsection A of 54-1A-303 NMSA 1978, or a similar statutory provision, the new corporation must be prequalified no later than seven calendar days before the opening of any bid.

B. For a merged corporation pursuant to Subsection A of 54-1A-303 NMSA 1978, or a similar statutory provision, the surviving corporation must be prequalified no later than seven calendar days before the opening of any bid. The Pqfra score of the surviving corporation will be the highest Pqfra of the individual corporations who merged and will be

used for the modified bid amount.

C. Each prime contractor participating in the joint venture must be individually prequalified seven calendar days before bid opening to join forces as a joint venture for bidding and performing work related to a single project. The joint venture itself need not prequalify.

(1) The joint venture shall file with the office of inspector general at least seven calendar days before the opening of any bid a completed statement of joint venture form. The most current version of the statement of joint venture form must be obtained from the New Mexico department of transportation website.

(2) For joint ventures the higher value of all joint venture applicant's Pqfra will be used for the modified bid amount.

(3) Each prime contractor participating in the joint venture will receive a compass form for the project to be used in calculating the prime contractor's individual prequalification factor. [18.27.5.15 NMAC - Rp, 18.27.5.15, 1/1/2015; A, 1/1/2019]

End Of Adopted Rules

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Other Material Related To Administrative Law

ENVIRONMENT DEPARTMENT RESOURCE PROTECTION DIVISION

NOTICE OF THE NEW MEXICO ENVIRONMENT DEPARTMENT SECRETARY'S DECISION TO ISSUE 20.5.123 NMAC ON AN EMERGENCY BASIS

20.5.17 NMAC was inadvertently repealed without the New Mexico Environment Department Secretary's authority during a rulemaking procedure before the Environmental Improvement Board that involved other Petroleum Storage Tank regulations. Therefore, the Secretary of the Department invoked the emergency rulemaking procedures on July 31, 2018 to promulgate 20.5.123 NMAC (which is identical to 20.5.17 NMAC, but renumbered) in accordance with Section 14-4-5.6 NMSA 1978. This emergency rule shall remain in place until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 days from the effective date of the emergency rule, the emergency rule shall expire.

CONCISE EXPLANATORY STATEMENT

This rulemaking is undertaken as a result of changes to the federal regulations in 40 CFR Part 280 and 40 CFR Part 281. In 2015, the federal Environmental Protection Agency ("EPA") revised the Underground Storage Tank ("UST") regulations in 40 CFR Part 280 and also amended the regulations for state program approval ("SPA") in 40 CFR Part 281. These revisions strengthen the 1988 federal UST regulations by increasing emphasis on properly operating and maintaining UST equipment which will then help prevent and detect UST releases, among other things. New Mexico currently has State Program Approval with the EPA but due to the revisions to 40 CFR Part 281 in 2015

New Mexico must reenter into an agreement with the EPA.

Paragraph 1 of Subsection A of Section 14-4-5.6 NMSA 1978 requires that the time required to complete rulemaking procedures would cause an imminent peril to the public health, safety, or welfare. In accordance with Section 74-6B-2 NMSA 1978, the corrective action funds and rules governing the corrective action fund were enacted to protect public health and safety and the environment resulting from pollution of ground water resources as a result of leaking storage tanks. 20.5.123 NMAC is required to continue to provide financial assurance coverage, take corrective action in response to releases from storage tanks, and pay for the costs of minimum site assessments in excess of \$10,000 as well as other provisions set forth in Section 74-6B-7 NMSA 1978. There are approximately 900 storage tank release sites throughout the state that require ongoing corrective action to protect human health and the environment, including the state's groundwater resources.

Paragraph 2 of Subsection A of Section 14-4-5.6 NMSA 1978, requires that the time required to complete rulemaking procedures would cause the unanticipated loss of funding for an agency program. The rules provided in 20.5.123 NMAC are required in order for the state to retain its primacy to administer the federal underground storage tank regulations as provided in 40 C.F.R. § 281.37. Primacy allows the Petroleum Storage Tank Bureau to receive federal funds to operate the related corrective action and prevention programs. 20.5.123 NMAC governs payment for corrective action at state-lead sites as well as reimbursement of eligible costs for corrective action at responsible party-lead sites. These regulations are required in order to continue corrective action at approximately 900 storage tank release sites throughout the state,

which is necessary to protect human health and the environment, including the state's groundwater resources.

Paragraph 3 of Subsection A of Section 14-4-5.6 NMSA 1978 requires that the time required to complete rulemaking procedures would place the Department in violation of federal law. The rules laid out in 20.5.123 NMAC are required to fulfill the federal regulatory requirement for financial assurance in 40 C.F.R. § 280.93 as well as payment of corrective action of releases from storage tanks 40 C.F.R. § 280.101.

If any person requires assistance, an interpreter or auxiliary aid to access documents, please contact Bonney Hughes at 505.476.5552 (Relay users please access the number via the New Mexico Relay Network) or bonney.hughes@state.nm.us.

NMED does not discriminate on the basis of race, color, national origin, disability, age or sex in the administration of its programs or activities, as required by applicable laws and regulations. NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7, including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact: Kristine Pintado, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM 87502, (505) 827-2855, nd.coordinator@state.nm.us. If you believe that you have been discriminated against

with respect to a NMED program or activity, you may contact the Non-Discrimination Coordinator identified above or visit our website at <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> to learn how and where to file a complaint of discrimination.

**NOTIFICACIÓN DE LA
DECISIÓN DEL SECRETARIO
DEL DEPARTAMENTO DE
MEDIO AMBIENTE DE NUEVO
MÉXICO A EMITIR 20.5.123
NMAC SOBRE UNA BASE DE
EMERGENCIA**

20.5.17 NMAC fue derogado inadvertidamente sin la autorización del Secretario del Departamento de Medio Ambiente de Nuevo México durante un procedimiento de reglamentación ante la Junta de Mejora Ambiental que involucró otras regulaciones de Tanques de Almacenamiento de Petróleo. Por lo tanto, el Secretario del Departamento invocó los procedimientos de reglamentación de emergencia el 31 de julio de 2018 para promulgar 20.5.123 NMAC (que es idéntico a 20.5.17 NMAC, pero reenumerado) de acuerdo con Sección 14-4-5.6 NMSA 1978. Esta norma de emergencia debe permanecer en vigencia hasta que una norma permanente entre en vigencia bajo el proceso normal de reglamentación. Si no se adopta una norma permanente dentro de los 180 días a partir de la fecha de vigencia de la norma de emergencia, la norma de emergencia expirará.

**DECLARACIÓN EXPLICATIVA
CONCISA**

Esta reglamentación se lleva a cabo como resultado de cambios a los reglamentos federales en 40 CFR Parte 280 y 40 CFR Parte 281. En 2015, la Agencia de Protección Ambiental (“EPA, por sus siglas en inglés”) revisó los reglamentos de Tanques de Almacenamiento Subterráneo (“UST”) en 40 CFR Parte 280 y también modificó los reglamentos para la aprobación del programa estatal (“SPA”) en 40 CFR

Parte 281. Estas revisiones refuerzan los reglamentos federales de UST de 1988 al aumentar el énfasis en operar y mantener adecuadamente el equipo UST que luego ayudará a prevenir y detectar fugas de UST, entre otras cosas. Actualmente, Nuevo México cuenta con la Aprobación del Programa Estatal ante EPA, pero debido a las revisiones de 40 CFR Parte 281 en 2015, Nuevo México debe volver a entrar en un acuerdo con EPA.

Párrafo 1 de Subsección A de Sección 14-4-5.6 NMSA 1978 requiere que el tiempo requerido para completar los procedimientos de reglamentación cause un peligro inminente a la salud, la seguridad o el bienestar del público. De conformidad con Sección 74-6B-2 NMSA 1978 se promulgaron los fondos de acción correctiva y las normas que rigen el fondo de acción correctiva para proteger la salud pública, la seguridad y el medio ambiente resultante de la contaminación de los recursos de agua subterránea como resultado de fugas de tanques de almacenamiento. 20.5.123 NMAC es requerido para continuar proporcionando cobertura de aseguramiento financiero, tomar medidas correctivas en respuesta a los escapes provenientes de tanques de almacenamiento y pagar por los costos de las evaluaciones mínimas del sitio en exceso a \$10.000, así como otras disposiciones establecidas en Sección 74-6B-7 NMSA 1978. Hay aproximadamente 900 sitios con fugas provenientes de tanques de almacenamiento en todo el estado que requieren medidas correctivas continuas para proteger la salud humana y el medio ambiente, incluidos los recursos de aguas subterráneas del estado.

Párrafo 2 de Subsección A de Sección 14-4-5.6 NMSA 1978 requiere que el tiempo requerido para completar los procedimientos de reglamentación ocasione la pérdida imprevista de fondos para un programa de la agencia. Las normas provistas en 20.5.123 NMAC son requeridas para que el estado conserve su

primacía para administrar los reglamentos federales de tanques de almacenamiento subterráneo según lo dispuesto en 40 C.F.R. § 281.37. La primacía permite que la Oficina de Tanques de Almacenamiento de Petróleo reciba fondos federales para operar las medidas correctivas y los programas de prevención relacionados. 20.5.123 NMAC rige el pago de acciones correctivas en sitios liderados por el estado, así como también el reembolso de los costos elegibles para acciones correctivas en los sitios principales de las partes responsables. Estos reglamentos son necesarios para continuar la acción correctiva en aproximadamente 900 sitios con fugas provenientes de tanques de almacenamiento en todo el estado, lo cual es necesario para proteger la salud humana y el medio ambiente, incluidos los recursos de aguas subterráneas del estado.

Párrafo 3 de Subsección A de Sección 14-4-5.6 NMSA 1978 requiere que el tiempo requerido para completar los procedimientos de reglamentación coloque al Departamento en violación de la ley federal. Las reglas establecidas en 20.5.123 NMAC están obligadas a cumplir con los requisitos reglamentarios federales para la garantía financiera en 40 C.F.R. § 280.93, así como el pago de la acción correctiva de las fugas proveniente de tanques de almacenamiento 40 C.F.R. § 280.101.

Toda persona que necesite asistencia, intérprete o un dispositivo auxiliar para acceder a los documentos, deberá comunicarse con Bonney Hughes llamando al 505.476.5552 (los usuarios de servicios de retransmisión podrán acceder a ese número a través de la red de retransmisión de Nuevo México) o enviando un mensaje a bonney.hughes@state.nm.us.

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por las leyes y los reglamentos correspondientes. NMED es responsable de la coordinación de esfuerzos para el cumplimiento de los reglamentos y la recepción de consultas relativas a los requisitos de no discriminación implementados por 40 C.F.R. Parte 7, que incluye el Título VI de la Ley de Derechos Civiles de 1964, según enmendado; la Sección 504 de la Ley de Rehabilitación de 1973; la Ley de Discriminación por Edad de 1975; el Título IX de las Enmiendas de Educación de 1972; y la Sección 13 de las Enmiendas a la Ley Federal de Control de la Contaminación del Agua de 1972. Si tiene preguntas sobre este aviso o sobre cualquier programa de no discriminación, política o procedimiento de NMED, usted puede comunicarse con la Coordinadora de No Discriminación: Kristine Pintado, Non-Discrimination Coordinator, New Mexico Environment Department, 1190 St. Francis Dr., Suite N4050, P.O. Box 5469, Santa Fe, NM, 87502, (505) 827-2855, nd.coordinator@state.nm.us. Si piensa que ha sido discriminado con respecto a un programa o actividad de NMED, puede comunicarse con la Coordinadora de No Discriminación antes indicada o visitar nuestro sitio web en <https://www.env.nm.gov/non-employee-discrimination-complaint-page/> para saber cómo y dónde presentar una queja por discriminación.

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