TITLE 11 LABOR AND WORKERS' COMPENSATION
CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY
PART 1 OCCUPATIONAL HEALTH AND SAFETY - GENERAL PROVISIONS

11.5.1.1 ISSUING AGENCY: Environmental Improvement Board.
[5/1/95; 11.5.1.1 NMAC - Rn, 11 NMAC 5.1.1, 10/30/08]

11.5.1.2 SCOPE: All employment and places of employment covered by the Occupational Health and Safety Act.
[5/1/95; 11.5.1.2 NMAC - Rn, 11 NMAC 5.1.2, 10/30/08]

11.5.1.3 STATUTORY AUTHORITY: Sections 50-9-7, 50-9-13 and 74-1-9 NMSA 1978.
[5/1/95; 11.5.1.3 NMAC - Rn, 11 NMAC 5.1.3, 10/30/08]

11.5.1.4 DURATION: Permanent.
[5/1/95; 11.5.1.4 NMAC - Rn, 11 NMAC 5.1.4, 10/30/08]

11.5.1.5 EFFECTIVE DATE: May 1, 1995, except where a later effective date is indicated in the history note at the end of a section.

A. Initial promulgation: sections 1 through 14 of this part were effective May 1, 1995.

B. Amendments and additions: the amendments to sections 5 and 7 through 13 of this part and sections 15 through 24 of this part are effective January 1, 1996.

[5/1/95, 1/1/96, 9/15/97; 11.5.1.5 NMAC - Rn & A, 11 NMAC 5.1.5, 10/30/08]

11.5.1.6 OBJECTIVE: To establish definitions and procedures applicable to all employers subject to the Occupational Health and Safety Act.
[5/1/95; 11.5.1.6 NMAC - Rn, 11 NMAC 5.1.6, 10/30/08]

11.5.1.7 DEFINITIONS:

A. General: Unless otherwise specified, the terms used in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed in accordance with definitions contained in the state act. In addition, the following terms have the indicated meanings.

(1) "Bureau" means the occupational health and safety bureau of the department, or any other bureau of the department to which responsibility for enforcement of the state act may be assigned.

(2) "Chief" means the chief of the bureau or his or her designee.

(3) "Commission" means the occupational health and safety review commission.

(4) "Compliance officer" means a department employee who is carrying out the provisions of the state act.

(5) "Compliance program manager" means the person in the bureau who is primarily responsible for managing the compliance program.

(6) "Counsel" means an attorney licensed to practice law.

(7) "Department" means the New Mexico environment department.

(8) "Employee representative" means a representative of the employee's recognized or certified bargaining agent.

(9) "Imminent danger situations" means those situations in a place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement provisions otherwise provided by the state act.

(10) "Interviewee" means the individual being questioned by the department's representative.

(11) "On-site consultation" means an inspection conducted by the bureau pursuant to Subsection B of 50-9-6 NMSA 1978.

(12) "Personal counsel" means counsel for an employee who requests representation for an employee interview, but does not want to use employer counsel. The employer may, if the employee requests such counsel prior to the interview, or the employer must, if employee uses company counsel during the interview and a conflict of interest arises during the interview in violation of the New Mexico rules of professional conduct, retain and pay for a counsel for the empoyee: (i) who is not currently representing the employer; (ii) does not have a

retainer agreement with the employer; (iii) is not in-house counsel with the employer; (iv) will have a duty to represent employee in the context of the OSHA investigation; (v) will abide by the relevant New Mexico rules of professional conduct and (vi) and is a comparable attorney to the employer's counsel.

(13) **"Private"** means:

(a) for employee interviews, to the exclusion of an employer or employer representative, except if employee requests employee's representative, or requests employer counsel abides by the relevant New Mexico rules of professional conduct; and

(b) for employer interviews, to the exclusion of an employee or employee representative.

(14) **"Secretary"** means the secretary of the environment department.

(15) **"State act"** means the Occupational Health and Safety Act, NMSA 1978, Sections 50-9-1 to 50-9-25, as it may be amended from time to time.

(16) **"Trade secret"** means the whole or any portion of a phase of any scientific or technical information, design, process, procedure, formula or improvement that is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(17) **"USDOL"** means the United States department of labor.

B. **Terms in incorporated federal standards:** Terms in the federal occupational safety and health standards incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed to be references to the corresponding entities in the state occupational health and safety program.

(1) "Act" shall be construed to mean the corresponding section of the state act.

(2) "Assistant secretary of labor" shall be construed to mean the secretary.

(3) "OSHA area director or area office" shall be construed to mean the compliance program manager.

(4) "OSHA area office" shall be construed to mean the bureau.

[8/30/73, 9/3/78, 3/21/79, 5/10/81, 1/19/94, 5/1/95, 1/1/96; 11.5.1.7 NMAC - Rn & A, 11 NMAC 5.1.12, 10/30/08]

11.5.1.8 **AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:** This part shall be construed as amending and superseding all prior regulations. See history of 11.5.1 NMAC at the end of this part.
[1/19/94, 5/1/95, 1/1/96; 11.5.1.8 NMAC - Rn & A, 11 NMAC 5.1.7, 10/30/08]

11.5.1.9 **SEVERABILITY:** If any provision or application of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC is held invalid, the remainder, or its application to other situations or persons, shall not be affected.
[5/1/95, 1/1/96; 11.5.1.9 NMAC -Rn & A, 11 NMAC 5.1.8, 10/30/08]

11.5.1.10 **SAVING CLAUSE:** Future amendments: No future amendment to 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC shall affect any administrative or judicial enforcement action pending on the effective date of the amendment.
[5/1/95, 1/1/96; 11.5.1.10 NMAC - Rn & A, 11 NMAC 5.1.9, 10/30/08]

11.5.1.11 **CONSTRUCTION:** The provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be liberally construed to effectuate the purpose of the state act.
[5/1/95, 1/1/96, 11.5.1.11 NMAC - Rn & A, 11 NMAC 5.1.10, 10/30/08]

11.5.1.12 **COMPLIANCE WITH OTHER REGULATIONS:** Compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC does not relieve a person from the obligation to comply with other applicable state and federal regulations.
[5/1/95, 1/1/96; 11.5.1.12 NMAC - Rn & A, 11 NMAC 5.1.11, 10/30/08]

11.5.1.13 **COMPLIANCE WITH INCORPORATED STANDARDS; EFFECT:** An employer who is in compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC, including any incorporated federal standards, shall be deemed in compliance with the requirement of Subsection A of Section 50-9-5 NMSA 1978, but only to the extent of the condition, practice, means, methods, operation or process covered by the provision.
[5/10/81, 5/1/95, 1/1/96; 11.5.1.13 NMAC - Rn & A, 11 NMAC 5.1.13, 10/30/08]

11.5.1.14 STAY OR INVALIDATION OF INCORPORATED FEDERAL STANDARDS; EFFECT: If a federal court stays, invalidates, or otherwise renders unenforceable by USDOL, in whole or in part, any federal standard incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, such incorporated federal standard shall be enforceable by the department only to the extent it is enforceable by USDOL.
[5/1/95; 11.5.1.14 NMAC - Rn & A, 11 NMAC 5.1.14, 10/30/08]

11.5.1.15 LIMITATIONS: The exemptions and limitations contained in the appropriation for the USDOL, including those applicable to the proposal or assessment of penalties, shall be construed as limitations on the department's use of any federal grant funds for enforcement of the state act and the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC; but nothing in such exemptions and limitations shall be construed to prohibit the department from enforcing any otherwise applicable provisions with the use of state funds only.
[1/20/80, 7/19/94, 1/1/96, 11.5.1.15 NMAC - Rn & A, 11 NMAC 5.1.15, 10/30/08]

11.5.1.16 RECORDKEEPING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESSES:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1904, Recording and Reporting Occupational Injuries and Illnesses (internet: www.osha.gov), are hereby incorporated into this section.

B. Exception: Fatalities and multiple hospitalization accidents shall be reported, by telephone, or facsimile machine, to the bureau in lieu of the location specified in 29 CFR Part 1904.39. The bureau's address and telephone/facsimile numbers are: occupational health and safety bureau, New Mexico environment department, P.O. Box 26110, Santa Fe, NM 87502, Tel: (505) 476-8700, Fax: (505) 476-8734.
[10/9/75, 9/3/78, 3/21/79, 5/10/81, 11/17/83, 7/19/94, 1/1/96, 8/15/98; 11.5.1.16 NMAC - Rn & A, 11 NMAC 5.1.16, 10/30/08]

11.5.1.17 POSTING OF OCCUPATIONAL HEALTH AND SAFETY INFORMATION POSTER: Posting of the occupational health and safety information poster is required by Subsection C of Section 50-9-5 NMSA 1978. Each employer shall post and keep posted one or more notices, to be furnished by the bureau, informing employees of the protections and obligations provided for in the state act, and that for assistance and information, employees should contact the department. The notices shall be posted where employees report each day or from which the employees operate to carry out their activities. Each employer shall take steps to insure that the notices are not altered, defaced, removed, or covered by other material.
[10-9-75, 9-3-78, 3-21-79, 4-26-81, 7-19-94, 1-1-96; 11.5.1.17 NMAC - Rn & A, 11 NMAC 5.1.17, 10/30/08]

11.5.1.18 PETITIONS FOR VARIANCES FROM JOB SAFETY AND HEALTH REGULATIONS:

A. Permanent variances:

(1) The department may grant an individual variance from any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, whenever it is found that the proponent of the variance has demonstrated by a preponderance of the evidence, that the conditions, practices, means, methods, operations and processes used by an employer, although not conforming to a regulation, will, in fact, provide protection to the health and safety of the employees to a degree which is equal to or greater than that which is provided by the regulations.

(2) Any employer seeking a variance under this section shall do so by filing a written petition with the bureau. Petition forms may be obtained from the bureau. Petitions shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility or activity for which the variance is sought;

(d) state the address or description of the property upon which the facility or activity is located;

(e) identify the provision, including incorporated federal standard, if applicable, from which the variance is sought;

(f) state in detail the extent to which the petitioner wishes to vary from the provision;

(g) state why the petitioner believes the requested variance will provide protection to the health and safety of the petitioner's employees to a degree that is equal to or greater than that which is provided by the provision from which variance is sought;

(h) certify that the petitioner's employees have been informed of the petition, by giving a copy thereof to their authorized representatives; posting a statement giving a summary of the application and specifying

where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(i) describe how employees have been informed of the application and of their right to request a hearing before the bureau;

(j) state the name and mailing address of the representatives of the petitioner's employees, if known; and

(k) be signed by the petitioner, or the petitioner's attorney or other authorized representative.

(3) The petitioner may submit with the petition any relevant documents or material which the petitioner believes would support the petition and may request a hearing, as provided in this section.

B. Temporary variance:

(1) The secretary may grant a temporary variance from any provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, if it is found that the proponent of the variance has demonstrated by a preponderance of the evidence that:

(a) the petitioner is unable to comply with the provision by its effective date because of unavailability of professional or technical personnel or because necessary construction or alteration of facilities cannot be completed by the effective date;

(b) the petitioner is taking all available steps to safeguard the petitioner's employees against the hazards covered by the provision; and

(c) the petitioner has an effective program for coming into compliance with the provision as quickly as practicable.

(2) The petition for a temporary variance shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility and activity for which the temporary variance is sought;

(d) identify the provision from which the variance is sought;

(e) describe the extent of current deviation from the provision, including numbers of employees affected;

(f) state the period of time for which the variance is desired;

(g) describe why the petitioner is unable to comply with the provision from which the variance is sought by its effective date;

(h) describe the methods taken to safeguard employees;

(i) show that the petitioner has an effective program for coming into compliance with the provision from which variance is sought;

(j) certify that the petitioner's employees have been informed of the petition by giving a copy thereof to their authorized representatives, posting a statement giving a summary of the application and specifying where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(k) describe how employees have been informed of the application and of their right to request a hearing before the department; and

(l) contain any request for hearing, as provided in this section.

(3) After an opportunity for a hearing, the secretary may issue an order granting a temporary variance. A temporary variance may be effective for one year or for the period needed by the petitioner to come into compliance, whichever is shorter. A temporary variance may be renewed no more than twice provided that:

(a) the application for a renewal must be submitted 90 days before expiration of the temporary variance; and

(b) no renewal may be for more than 180 days.

C. Modification, revocation and renewal of variances:

(1) Modification or revocation: The secretary may at any time on his own motion, or upon application by an employer or affected employee after six months have elapsed from the date of issuance of the order granting a temporary or permanent variance, after hearing, modify or revoke such order.

(a) An employer or affected employee (including employee representative) may petition the secretary for a modification or revocation of any variance issued under this section. The petition shall state the petitioner's name and mailing address; describe the relief sought; state with particularity the grounds for relief; if the petitioner is an employer, certify that the petitioner has informed the affected employees of the petition in the manner described for the original variance request; if the petitioner is an affected employee, certify that a copy of the petition has been furnished to the employer; and request a hearing, as provided in this section.

(b) If the secretary, on his own motion, proceeds to modify or revoke the variance, he shall so notify the affected employer by certified mail and shall take such action as necessary to give actual notice to affected employees. The secretary shall promptly schedule a hearing on the matter and notify the employer and affected employees of the time, date and place of said hearing.

(2) Renewal: Any final order for a variance may be renewed or extended as permitted by this section and in the manner prescribed for its issuance.

D. Interim order during variance consideration:

(1) An application may be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The secretary may rule ex parte upon the application.

(2) If an application filed for an interim order is denied, the applicant shall be given prompt notice of the denial which shall include, or be accompanied by, a brief statement of the grounds therefore.

(3) If an interim order is granted, a copy of the order including the terms of the order shall be served upon the applicant for the order and other parties. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

E. Action on petition:

(1) Defective petitions: If a petition does not conform with the requirements of this section, the secretary may deny the petition. Prompt notice of denial of a petition shall be given to the petitioner. A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial. Such denial shall be without prejudice to the filing of another or amended petition.

(2) Adequate petitions:

(a) If a petition conforms with the requirements of this section, the department shall promptly notify the petitioner and employee representative that the petition has been accepted for review. The notice shall be posted by the employer in the same place and manner as the petition. In addition, the department shall publish notice of the filing of the petition in a newspaper of general circulation in the state. Such notice shall describe the relief requested and shall state the manner in which interested persons may submit data, views or arguments concerning the petition.

(b) The petitioner, any of the petitioner's employees, or an employee representative may request a hearing on the petition before the department. The request must be made in writing to the secretary within 15 days after the petition has been accepted by the department as being adequate.

(c) Where no timely request for a hearing has been made and the secretary determines that no substantial public interest is involved, the secretary shall promptly investigate the petition and make a decision thereon. The secretary shall notify the employer and the employees or the employee representative of the decision and reasons therefor. The decision shall be posted in the same place and manner as the petition. If the secretary is opposed to the granting of the variance, the petitioner may, within 15 days from receipt of the decision, request a hearing before the secretary. Unless a timely request for hearing is made, the decision of the secretary shall be final.

(3) Decisions:

(a) Decisions or orders of the department or secretary shall state the petitioner's name and mailing address; state the date the order was made; describe the facility or activity for which the variance was sought; state the address or description of the property upon which the facility or activity is located; identify the provision from which the variance was sought; state the nature of the variance requested; state the decision of the department or secretary; describe the conditions the employer must maintain, and the practices, means, methods, operations, and procedures which the employer must adopt and utilize to the extent they differ from the provision from which the variance was sought; state the reasons for the decision; and be signed by the secretary or his authorized representative.

(b) The decision shall be posted by the employer in the same place and manner as the petition.

(c) No variance shall be granted until the department or the secretary has considered the relative interests of the petitioner, his employees, and the general public.

(d) The bureau shall maintain a file of all variance orders. The file shall be open for public inspection subject to the limitations contained in Subsection F of 11.5.1.21 NMAC.

F. Hearings:

(1) If a timely request for hearing is made, the department shall, within 30 days after receipt of the request, notify the petitioner and his employees or employee representative by certified mail of the date, time and place of the hearing.

(2) The hearing shall be held not less than 10 nor more than 30 days from the date the notice of the hearing is mailed. Where a hearing is being held subsequent to an initial determination by the secretary without hearing, as authorized by Subparagraph (c) of Paragraph (2) of Subsection E of 11.5.1.18 NMAC, the hearing shall be conducted by a department employee who did not participate in the original decision on the petition.

(3) A record shall be made at each hearing, the cost of which shall be borne by the department. Transcript cost shall be paid by those persons requesting transcripts. In the hearings, the technical rules of evidence and rules of civil procedure shall not apply, but the hearing shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The hearing officer may require reasonable substantiation of statements or records rendered and may require any view to be stated in writing when the circumstances justify. The hearing officer shall allow all parties to the hearing a reasonable opportunity to submit written and oral evidence and arguments, to examine witnesses and to introduce exhibits. All witnesses shall be subject to questioning by the hearing officer.

(4) Based upon the evidence presented at the hearing and the recommendation of the hearing officer, the secretary shall grant the variance, grant the variance subject to conditions, or deny the variance. All actions taken by the secretary shall be by written order within 10 days after the closing of the hearing. The secretary shall send the order to the petitioner by certified mail with a statement of the reasons for his order. A copy of the order shall be mailed to all persons testifying at the hearing, or who request a copy.

G. Multi-state variances: Where action has been taken by the USDOL, pursuant to the federal Occupational Safety and Health Act of 1970, on any temporary or permanent variance request to a federal standard that is identical to a provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC such action shall be an authoritative interpretation of an employer's compliance obligation with regard to the provision, or portion thereof, identical to the federal standard, or portion thereof, affected by the action in the employment or places of employment covered by the variance application.

[8/30/73, 10/9/75, 9/3/78, 4/26/81, 1/1/96; 11.5.1.18 NMAC - Rn & A, 11 NMAC 5.1.18, 10/30/08]

11.5.1.19 ON-SITE CONSULTATIVE INSPECTIONS:

A. Upon an employer's request, the department shall provide an on-site consultation inspection of conditions and practices of the employer's work place.

B. Requests by employers for on-site consultation, pursuant to Subsection B of Section 50-9-6 NMSA 1978 shall be in writing and filed with the bureau.

C. On-site consultations shall be provided as bureau consultants are available. No compliance inspection will be delayed by a request for an on-site consultation. No regularly scheduled compliance inspection shall be made during any on-site consultation. An on-site consultation shall be deemed to exist for purposes of this regulation from the date that the bureau's consultant enters the workplace until the violations noted during the inspection are corrected or until the bureau determines that no such corrective action will be taken.

D. Bureau consultants shall upon arrival at the workplace, announce the nature, purpose, and scope of their visit. At the conclusion of the consultation, the consultant shall confer with the employer or his representative and advise him of any apparent violations of the state act or the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC disclosed by the consultation. If the employer fails to take necessary action to correct a serious violation within the duly established time frame for correction, or any extension therefore, the matter shall immediately be forwarded to appropriate bureau personnel for necessary compliance action.

E. Bureau consultants shall not issue citations or propose penalties for violations noted, provided imminent danger situations found during the on-site consultative visit must be pointed out to the employer. In the event imminent danger situations are pointed out but immediate steps are not taken by the employer to eliminate such danger, the emergency procedures provided in Section 50-9-14 NMSA 1978 shall be pursued by the department to assure timely abatement of the imminent danger situation.

[10/9/75, 9/3/78, 4/26/81, 11/16/83, 1/1/96; 11.5.1.19 NMAC - Rn & A, 11 NMAC 5.1.19, 10/30/08]

11.5.1.20 COMPLAINTS BY EMPLOYEES; REVIEW PROCEDURES:

A. Any employee or representative of employees may file a written complaint with the bureau concerning any alleged violation of a regulation or any hazardous condition in any workplace where such employee is employed. Any such complaint shall set forth with reasonable particularity the grounds therefore, and shall be signed by the employee or representative of employees. A copy of the complaints shall be provided to the employer or his agent by the compliance officer at the time of the inspection. However, upon the request of the complainant, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released or made available by the bureau.

B. If upon receipt of such complaint the bureau determines that the complaint meets the requirements set forth in Subsection A of this section, it shall cause an investigation of the complaint to be made as soon as practicable. Investigations under this section are not limited to the matters referred to in the complaint.

C. If the bureau determines that the requirements of Subsection A of this section have not been met, it shall notify the complainant in writing of such determination. Such determination shall be without prejudice to the filing of a new complaint meeting the requirements of Subsection A of this section.

D. Prior to or during an inspection of a workplace, any employee or representative of employees employed in such workplace may notify the bureau or the compliance officer, in writing, of any violation of the state act which they have reason to believe exists in the workplace. Any such notice shall comply with the requirements of Subsection A of this section.

E. The bureau shall promptly notify the complainant and employer in writing of the results of the investigation and any action to be taken. If no action is contemplated, the bureau shall notify the complainant and include in the notice the reasons therefor.

F. If the bureau determines that no compliance action will be taken, the complainant may obtain review of such determination by submitting a written request to the secretary within 15 days of receipt of the notice specified in Subsection E of this section. Within five days after receiving the request, the secretary shall notify the employer by certified mail of the request and shall include a copy thereof. However, upon the request of the complainant, his name shall not appear on such copy.

G. Within 30 days after notice to the employer, the secretary shall hold such informal conferences as may be necessary for the complainant and the employer to present their views. After considering all written and oral views presented, the secretary shall affirm, modify, or reverse the determination of the bureau and furnish the complainant and the employer a written notification of his decision and the reasons therefore.

H. The secretary may designate an employee of the department to conduct the review, but such employee may not be the person who investigated the complaint. The decision of the secretary shall be final and not subject to further review.

[9/3/78, 4/26/81, 1/1/96; 11.5.1.20 NMAC - Rn & A, 11 NMAC 5.1.20, 10/30/08]

11.5.1.21 COMPLIANCE INSPECTIONS:

A. Authority; objection:

(1) The department's authorized representatives are authorized, in accordance with Section 50-9-10 NMSA 1978, to enter and inspect any place of employment at reasonable times and without delay; to question privately the employer and any employees of the employer; to inspect and investigate the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and other records which are directly related to the purpose of the inspection during regular working hours and at other reasonable times and in a reasonable manner.

(2) Upon a refusal to permit a compliance officer, in the exercise of official duties, to enter without delay and at reasonable times, any place of employment or portion thereof, to inspect, to review records, or to question privately any employer, owner, operator, agent or employee, in accordance with Section 50-9-10 NMSA 1978, and Paragraph (1) of Subsection A of this section, or to permit a representative of employees to accompany the compliance officer during the physical inspection of any workplace, the compliance officer shall either terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records or interviews concerning which no objection is raised. Nothing in this paragraph shall be construed to preclude the department from obtaining an administrative inspection order and returning to the place of employment to conduct an inspection, interview(s), or to review records as authorized by such order.

(3) Any permission to enter, inspect, review records or question any person shall not imply or be conditioned upon a waiver of any cause of action, citation or penalty under the state act. Compliance officers are not authorized to grant any such waiver.

B. Advance notice of inspections:

(1) Section 50-9-10 NMSA 1978, declares it unlawful for any person to give advance notice of any inspection to be conducted under the state act without the written approval of the secretary or his authorized representative.

(2) Advance notice of inspections may be given only:

(a) in cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible;

(b) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for the inspection;

(c) where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; or

(d) in other circumstances where the secretary determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(3) Advance notice in any of the situations described shall not be given more than 24 hours before the inspection is scheduled to be conducted, except in unusual circumstances.

(4) In the situations described in this section, advance notice of inspections may be given only if authorized by the secretary, except that in cases of apparent imminent danger, advance notice may be given by the compliance officer without such authorization if the secretary is not immediately available. When advance notice is given, it shall be the employer's responsibility promptly to notify the authorized representative of employees of the inspection, if the identity of such representatives is known to the employer.

C. Conduct of inspections; consultation with employees:

(1) At the beginning of an inspection, compliance officers shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in Subsection A of this section which they wish to review. However, such designation of records shall not preclude access to additional records specified in Subsection A of this section.

(2) Compliance officers shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent or employee of an establishment. As used in this paragraph, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other similar devices to employees in order to measure their exposures.

(3) In taking photographs and samples, compliance officers shall take reasonable precautions to insure that such actions with flash, spark-producing or other equipment would not be hazardous. Compliance officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and shall wear and use appropriate protective clothing and equipment.

(4) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment.

(5) In addition to compliance officers' private questioning of any employee, compliance officers may consult with employees concerning matters of occupational health and safety to the extent they deem necessary for the conduct of an effective and thorough inspection. Separately, employees may request a private interview with the compliance officers to inform the compliance officers of any information relevant to the investigation and to bring any violation of the state act that the employee has reason to believe exists in the workplace to the attention of the compliance officers.

D. Representative of employers and employees; accompaniment during physical site inspection:

(1) Compliance officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the compliance officer during the physical inspection of any workplace for the purpose of aiding such inspection as required by Section 50-9-10 NMSA 1978. A different employer and employee representative may accompany the compliance officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(2) Compliance officers shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees, for purposes of this section. If there is no authorized representative of employees or if the compliance officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(3) The representative authorized by employees shall be an employee of the employer. However, if in the judgement of the compliance officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the compliance officer during the inspection.

(4) Compliance officers are authorized to deny the right of accompaniment under this regulation to any person whose conduct interferes with a fair and orderly inspection.

E. Private questioning:

(1) Purpose: Paragraph (2) of Subsection A of Section 50-9-10 NMSA 1978 provides that the department's representatives, including but not limited to compliance officers, are authorized to, and may, question

privately the employer or any employee, subject to regulation of the environmental improvement board. The purpose of privately questioning employees is to obtain useful information regarding the health and safety of the workplace being inspected or investigated. Information being sought includes but is not limited to uncovering any violation of the state act, providing an opportunity to an employee to bring any potential violation of the state act to the bureau's attention in confidence, and to protect the employee being questioned from employer intimidation, retaliation, and discrimination. The purpose of questioning the employer is to, among other things, obtain useful information regarding the employer's health and safety policies, practices, and procedures and the employer's implementation thereof.

(2) General requirements:

(a) an employee being questioned by the department shall have the right to have personal counsel or other representative of his or her choosing present during the department's questioning, except that counsel employed by the employer shall be excluded from personally representing an employee because of the inherent conflict of interest at issue;

(b) if the compliance officer has not already chosen to conduct the interview in private, the employee may request that the questioning be conducted in private; and

(c) the results of questioning not conducted in private shall be disclosable in accordance with Subsection B of Section 50-9-21 NMSA 1978.

(3) Interview process:

(a) in the event the compliance officer has not already determined that an interview will be conducted in private, prior to commencing an interview the compliance officer shall advise the individual to be interviewed of his or her right to a private interview; whenever the individual being interviewed expresses a preference for a private interview, the compliance officer shall honor the request; if the employee requests to have personal counsel present, the employee shall be given seven business days to secure personal counsel for the interview to be rescheduled as soon as possible;

(b) at the conclusion of the department's private questioning or a reasonable time thereafter, the department shall provide the interviewee the opportunity to read or be read, the statement given to the compliance officer; any changes in form or substance which the interviewee desires to make shall be made; the statement shall then be signed by the interviewee unless the interviewee cannot be found or refuses to sign; if the statement is not signed within seven days of its submission to the interviewee, the compliance officer shall sign it and indicate on the statement that the interviewee was absent or refused to sign the statement, together with the reason, if any, given therefor; the interviewee shall be provided with a copy of the completed statement; any statement given in private shall be treated by the department as confidential to the extent allowed by law.

(4) Refusal to be privately interviewed: In the event the employer or any employee refuses to consent to a private interview, the department may compel by subpoena the individual to be interviewed privately pursuant to Subsection D of Section 50-9-8, NMSA 1978 and Section 50-9-18, NMSA 1989 (1993).

(5) Obstruction of investigation: Employers or their representatives, agents or counsel, that obstruct or hamper an investigation violate the state act and may also be in violation of the Sarbanes-Oxley Act (18 U.S.C.A. 1514A, 1543(e)2002). Obstruction may include, but is not limited to, instructing employees to not cooperate with the department during an investigation; instructing employees to refuse to be interviewed by the department; directing employees to insist on counsel that represents the employer be present during a private interview; preventing employees directly or indirectly from being interviewed by the department; encouraging employees to lie; or suggesting to employees to withhold information or potential violations from the department.

F. Trade secrets:

(1) At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the compliance officer has no clear reason to question such identification, information obtained in such areas, including all negative and prints of photographs, and environmental samples, shall be labeled "confidential - trade secret" and shall not be disclosed except in accordance with the provisions of Section 50-9-2 NMSA 1978.

(2) Upon the request of an employer, any representative of employees accompanying the compliance officer during the inspection of an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. When there is no such representative or employee, the compliance officer shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

[10/9/75, 9/3/78, 4/26/81, 5/10/81, 10/1/83, 1/19/94, 1/1/96; 11.5.1.21 NMAC - Rn & A, 11 NMAC 5.1.21, 10/30/08]

11.5.1.22 IMMINENT DANGER: Whenever and as soon as a compliance officer concludes on the basis of an inspection that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided in the state act, the compliance officer shall inform the employer and affected employees of the danger and that he is recommending that appropriate relief in accordance with the provisions of the state act be taken. Appropriate citations and notices of proposed penalties may be issued with respect to an imminent danger even though the employer immediately eliminates the imminence of the danger and initiates steps to abate such danger.
[3/21/79, 5/10/81, 1/1/96; 11.5.1.22 NMAC - Rn, 11 NMAC 5.1.22, 10/30/08]

11.5.1.23 ISSUANCE OF CITATIONS AND PROPOSED PENALTIES; FAILURE TO CORRECT VIOLATIONS:

A. Citations; notices of *de minimis* violations:

(1) The secretary or the secretary's authorized representative shall review the compliance officer's inspection report. If, on the basis of the report, the secretary or authorized representative believes that the employer has violated a requirement of Section 50-9-5 NMSA 1978, or any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, he shall issue to the employer, by certified mail, either a citation or, for violations that have no direct or immediate relationship to health or safety, a notice of *de minimis* violations. An appropriate citation or notice of *de minimis* violations shall be issued even though after being informed of an alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate, such alleged violation. Any citation or notice of *de minimis* violations shall be issued with reasonable promptness after termination of the inspection. No citation may be issued under this subsection after the expiration of six months following the occurrence of any alleged violation.

(2) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of the state act or of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC (including incorporated federal standard) alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(3) If a citation or notice of *de minimis* violations is issued for a violation alleged in a request for inspection under Subsection A of 11.5.1.20 NMAC, or a notification of violation under Subsection D of 11.5.1.20 NMAC, a copy of the citation or notice of *de minimis* violations shall be sent to the employee or representative of employees who made such request or notification.

(4) After an inspection, if the secretary or authorized representative determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under Subsection A of 11.5.1.20 NMAC, or a notification of violation under Subsection D of 11.5.1.20 NMAC, the informal review procedures prescribed in Subsections F through H of 11.5.1.20 NMAC shall be applicable.

(5) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the state act has occurred unless there is a failure to contest as provided for in the state act, or if contested, unless the citation is affirmed by the commission.

B. Proposed penalties:

(1) After, or concurrent with, the issuance of a citation and within a reasonable time after the termination of the inspection, the department shall notify the employer by certified mail of the penalty, if any, proposed to be assessed under the state act, or that no penalty is being proposed. Any notice of proposed penalty shall state that the proposed penalty shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notice, the employer notifies the department in writing that he intends to contest the citation or the notification of proposed penalty before the commission.

(2) The department shall determine the amount of any proposed penalty, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(3) Appropriate penalties may be proposed with respect to an alleged violation even though after being informed of such alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate such alleged violation. Penalties shall not be proposed for *de minimis* violations.

C. Failure to correct a violation for which a citation has been issued:

(1) If an inspection discloses that an employer has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, the department shall notify the employer by certified mail of such failure and of the additional penalty proposed under the act by reason of such failure. The

period for correction of a violation for which a citation has been issued shall not begin to run until the entry of a final order of the commission in the case of any review proceedings initiated by the employer in good faith and not solely for delay or avoidance of penalties.

(2) Any employer receiving a notification of failure to correct a violation and of proposed additional penalty may notify the department in writing that he intends to contest such notification or proposed additional penalty before the commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notification of failure to correct a violation and of proposed additional penalty. The department shall immediately transmit such notice to the commission in accordance with the rules of procedure prescribed by the commission.

(3) Each notification of failure to correct a violation and of proposed additional penalty shall state that it shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notification, the employer notifies the department in writing that he intends to contest the notification or the proposed additional penalty before the commission.
[9/3/78, 3/21/79, 1/20/80, 4/26/81, 3/9/83, 1/1/96; 11.5.1.23 NMAC - Rn & A, 11 NMAC 5.1.23, 10/30/08]

11.5.1.24 POSTING OF CITATIONS:

A. Upon receipt from the department of any notice of violation of any occupational health and safety regulation or incorporated standard, the employer shall immediately post the notice or a copy of it, unedited, at or near each place at which an alleged violation referred to in the notice occurred. Where, because of the nature of the employer's operations, it is not practicable to post the citation at or near each place of alleged violation, such citation shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. Where employees do not primarily work at or report to a single location, the citation may be posted at the location from which the employees operate to carry out their activities. The employer shall take steps to insure that the notice is not altered, defaced, removed or covered by other material. Notices of *de minimis* violations need not be posted.

B. Each notice or copy shall remain posted until the violation is abated or for three working days, whichever is later. The filing by the employer of a notice of intention to contest citations shall not affect his posting responsibility under this section unless and until the commission issues a final order vacating the citation.

C. An employer to whom the citation has been issued may post a notice in the same location where such citation is posted indicating that the citation is being contested before the commission, and such notice may explain the reasons for such contest. The employer may also indicate that specified steps have been taken to abate the violation.
[9/3/78, 1/20/80, 1/1/96; 11.5.1.24 NMAC - Rn, 11 NMAC 5.1.24, 10/30/08]

11.5.1.25 ABATEMENT VERIFICATION: The provisions of 29 CFR Part 1903.19, Abatement Verification (internet: www.osha.gov), are hereby incorporated into this section.
[9-15-97, 8-15-98; 11.5.1.25 NMAC - Rn & A, 11 NMAC 5.1.25, 10/30/08]

11.5.1.26 INFORMAL CONFERENCE: At the request of an employer, affected employee, or representative of employees, the chief or the chief's designee, may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, proposed penalty, proposed petition for modification of abatement date or proposed petition for variance. When the conference is requested by the employer, an affected employee or representative shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee. When the conference is requested by an employee or representative of employees, the employer shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee.

A. The request for an informal conference and the informal conference meeting shall not extend or modify in any manner:

(1) an abatement date established in the citation;
(2) the filing deadline for an employer to file a notice of contest;
(3) any other filing deadline related to the citation; or
(4) any matter that is pending before the bureau.

B. Once an employer files a notice of contest, a petition for modification of the abatement date, a request for a commission hearing, a petition for variance, or other filing with the commission or department, the informal conference opportunity ends.

C. The settlement of any issue at the informal conference shall be subject to the commission's settlement procedural rules set forth in 11.5.5.503 NMAC.
[11.5.1.26 NMAC - N, 10/30/2008]

HISTORY OF 11.5.1 NMAC:
Pre-NMAC History: The material in this part was derived from that previously filed with the state records center:
OHSR 73-1, Occupational Health and Safety Regulations, filed 7/31/73.
OHSR 75-1, Occupational Health and Safety Regulations, No. 101 thru 109, 200, 300 and 400, filed 9/9/75.
EIB/OHSR 100, Occupational Health and Safety Regulation 100, Definitions; Application, filed 4/10/81.
EIB/OHSR 100, Occupational Health and Safety Regulation 100, Definitions; Application, filed 1/19/94.
EIB/OHSR 100.1, Limitations, filed 12/21/79.
EIB/OHSR 100.1, Limitations, filed 1/19/94.
EIB/OHSR 101, Occupational Health and Safety Regulation 101, Recordkeeping and Reporting Occupational Injuries and Illnesses, filed 4/10/81.
EIB/OHSR 102, Occupational Health and Safety Regulation 102, Posting of Occupational Health and Safety Information Poster, filed 3/27/81.
EIB/OHSR 102, Occupational Health and Safety Regulation 102, Posting of Occupational Health and Safety Information Poster, filed 1/19/94.
EIB/OHSR 103, Occupational Health and Safety Regulation 103, Petitions for Variances from Safety and Health Regulations, filed 3/27/81.
EIB/OHSR 104, Occupational Health and Safety Regulation 104, On-Site Consultative Inspections, filed 3/27/81.
EIB/OHSR 104, Occupational Health and Safety Regulation 104, On-Site Consultative Inspections, filed 10/17/83.
EIB/OHSR 104, Occupational Health and Safety Regulation 104, On-Site Consultative Inspections, filed 11/9/84.
EIB/OHSR 106, Occupational Health and Safety Regulation 106, Inspections; Authority; Objection, filed 3/27/81.
EIB/OHSR 106, Occupational Health and Safety Regulation 106, Inspections; Authority; Objection, filed 1/19/94.
EIB/OHSR 106.1, Occupational Health and Safety Regulation 106.1, Private Questioning, filed 11/1/83.
EIB/OHSR 106.6, Occupational Health and Safety Regulation 106.6, Advance Notice of Inspections, filed 3/27/81.
EIB/OHSR 106.7, Occupational Health and Safety Regulation 106.7, Conduct of Inspections; Consultation with Employees, filed 3/27/81.
EIB/OHSR 106.7, Occupational Health and Safety Regulation 106.7, Conduct of Inspections; Consultation with Employees, filed 6/15/81.
EIB/OHSR 106.7, Occupational Health and Safety Regulation 106.7, Conduct of Inspections; Consultation with Employees, filed 10/17/83.
EIB/OHSR 106.8, Occupational Health and Safety Regulation 106.8, Representatives of Employers and Employees; Accompaniment During Inspection, filed 3/27/81.
EIB/OHSR 106.9, Occupational Health and Safety Regulation 106.9, Trade Secrets, filed 4/10/81.
EIB/OHSR 106.11, Occupational Health and Safety Regulation 106.11, Complaints by Employees; Review Procedures, filed 3/27/81.
EIB/OHSR 106.13, Occupational Health and Safety Regulation 106.13, Imminent Danger, filed 4/10/81.
EIB/OHSR 106.14, Citations; Notices of De Minimis Violations, filed 12/21/79.
OHSR 106.14, Occupational Health and Safety Regulation 106.14, Citations; Notices of De Minimis Violations, filed 3/27/81.
EIB/OHSR 106.15, Proposed Penalties, filed 12/21/79.
EIB/OHSR 106.16, Posting of Citations, filed 12/21/79.
EIB/OHSR 106.18, Failure to Correct a Violation for Which a Citation Has Been Issued, filed 12/21/79.
OHSR 106.18, Occupational Health and Safety Regulation 106.18, Failure to Correct a Violation for Which a Citation Has Been Issued, filed 2/7/83.
EIB/OHSR 107, Employer and Employee Contests - Informal Administrative Review, filed 12/21/79.
EIB/OHSR 107, Occupational Health and Safety Regulation 107, Employer and Employee Contests - Informal Administrative Review, filed 3/19/87.

History of Repealed Material:
OHSR 75-1, Occupational Health and Safety Regulations, filed 9/9/75 - Repealed 4/26/95.
EIB/OHSR 107, Occupational Health and Safety Regulation 107, Employer and Employee Contests - Informal Administrative Review (filed 3/19/87), repealed 1/19/94.

Other History:

EIB/OHSR 100, Occupational Health and Safety Regulation 100, Definitions; Application (filed 1/19/94) was renumbered into first version of the New Mexico Administrative Code as 11 NMAC 5.1, Occupational Health and Safety - General Provisions, effective 5/1/95.
11 NMAC 5.1, Occupational Health and Safety - General Provisions (filed 4/26/95); EIB/OHSR 100.1, Limitations, (filed 1/19/94); EIB/OHSR 101, Occupational Health and Safety Regulation 101, Recordkeeping and Reporting Occupational Injuries and Illnesses (filed 4/10/81); EIB/OHSR 102, Occupational Health and Safety Regulation 102, Posting of Occupational Health and Safety Information Poster (filed 1/19/94); EIB/OHSR 103, Occupational Health and Safety Regulation 103, Petitions for Variances from Safety and Health Regulations (filed 3/27/81); EIB/OHSR 104, Occupational Health and Safety Regulation 104, On-Site Consultative Inspections (filed 11/9/84); EIB/OHSR 106, Occupational Health and Safety Regulation 106, Inspections; Authority; Objection (filed 1/19/94); EIB/OHSR 106.1, Occupational Health and Safety Regulation 106.1, Private Questioning (filed 11/1/83); EIB/OHSR 106.6, Occupational Health and Safety Regulation 106.6, Advance Notice of Inspections (filed 3/27/81); EIB/OHSR 106.7, Occupational Health and Safety Regulation 106.7, Conduct of Inspections; Consultation with Employees (filed 10/17/83); EIB/OHSR 106.8, Occupational Health and Safety Regulation 106.8, Representatives of Employers and Employees; Accompaniment During Inspection (filed 3/27/81); EIB/OHSR 106.9, Occupational Health and Safety Regulation 106.9, Trade Secrets (filed 4/10/81); EIB/OHSR 106.11, Occupational Health and Safety Regulation 106.11, Complaints by Employees; Review Procedures (filed 3/27/81); EIB/OHSR 106.13, Occupational Health and Safety Regulation 106.13, Imminent Danger (filed 4/10/81); OHSR 106.14, Occupational Health and Safety Regulation 106.14, Citations; Notices of De Minimis Violations (filed 3/27/81); EIB/OHSR 106.15, Proposed Penalties (filed 12/21/79); EIB/OHSR 106.16, Posting of Citations (filed 12/21/79); OHSR 106.18, Occupational Health and Safety Regulation 106.18, Failure to Correct a Violation for Which a Citation Has Been Issued (filed 2/7/83) were all renumbered, reformatted, amended and replaced by 11 NMAC 5.1, Occupational Health and Safety - General Provisions, effective 1/1/96.
11 NMAC 5.1, Occupational Health and Safety - General Provisions (filed 10/27/95) renumbered, reformatted, amended and replaced by 11.5.1 NMAC, Occupational Health and Safety - General Provisions, effective 10/30/2008.