



NEW MEXICO
ENVIRONMENT DEPARTMENT

Occupational Health and Safety Bureau



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RON CURRY
Secretary
CINDY PADILLA
Deputy Secretary

November 19, 2007

Re: Advisory Notice of Proposed Changes to New Mexico Occupational Health and Safety Regulations, 11.5 NMAC

Dear Business Owner, Trade Group Executive, Labor Representative, Industry Representative, State/Municipal Official, Safety/Health Professional, or Concerned Citizen:

The Occupational Health and Safety Bureau of the New Mexico Environment Department is in the process of developing proposed changes to several regulations. We anticipate going before the Environmental Improvement Board (EIB) in January to request a public hearing that will likely take place in May or June of 2008.

The purpose of this notice is to alert you to the substantive changes we are seeking to make and to request comments from you regarding the proposed changes. While many of the proposed changes are procedural or editorial in nature, the changes shown in the attachment to this letter are draft substantive changes we currently intend to recommend to the EIB for adoption.

We value the input from employers, employees, and their representatives regarding existing and proposed regulations. Please review our proposed revisions and contact me with your comments, whether they are supportive or non-supportive of the proposed changes. If you represent other companies, labor organizations, or government entities, please let them know about the proposed changes and ask them to comment as well. Comments may be submitted at any time prior to the hearing, but in order to be considered for inclusion in the final draft, we need to receive them no later than **December 21, 2007**. We will review every comment and consider your input as we prepare the final draft for presentation to the EIB.

You can submit your comments to me by email at butch.tongate@state.nm.us or by mail at 525 Camino de los Marquez, Santa Fe, NM, 87505. I look forward to hearing from you as we strive to make New Mexico the safest state in the Union in which to work.

Sincerely,

Butch Tongate
Chief, Occupational Health and Safety Bureau

**PROPOSED SUBSTANTIVE CHANGES TO THE NEW MEXICO
OCCUPATIONAL HEALTH AND SAFETY REGULATIONS
NOVEMBER 19, 2007**

Re: 11.5 Part 1 OCCUPATIONAL HEALTH AND SAFETY - GENERAL PROVISIONS

The substantive changes in Part 1 include a new definition for the term “in-private” as this term applies generally and specifically to two areas concerning private questioning and informal conferencing. The proposed language for these two areas is:

11.5.1.7 DEFINITIONS:

A. General.

....

(7) “In private” means:

(a) for employee interviews, to the exclusion of an employer or employer representative (including counsel employed by the employer or representing the employer) not an employee representative, unless the employee expresses a desire to be interviewed out of the hearing of both the employer and the employee representatives; and

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

[Note: Under our proposed revision, this definition will be moved from 11.5.1.21 to 11.5.1.7 and the underlined language will be added.]

11.5.1.21 Compliance Inspections

....

E. Private questioning:

(1) Purpose: ~~[Section 50-9-10(A)(2) NMSA 1978,]~~ Paragraph 2 of Subsection A of Section 50-9-10 NMSA 1978 provides that the department’s ~~representative is~~ 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 ~~such questioning~~ privately questioning employees is to obtain useful information ~~[in the course of a department inspection or investigation]~~ 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 act, providing an opportunity to an employee to bring any potential violation of the act to the bureau's attention in confidence, and to protect the ~~rights of the individual~~ 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 ~~individual~~ 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 ~~individual requests,~~ compliance officer has not already chosen to conduct the interview in private, the employee may request that the questioning ~~shall~~ be conducted in private; and

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

(3) ~~[Private questioning]~~ Interview process:

(a) ~~[at the time the compliance officer questions the employer or any employee, he shall advise the individual being questioned of his right to a private interview and to counsel and shall ask if he desires the interview to be conducted in private]~~ 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 three 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 ~~[entered upon the statement by the compliance officer]~~ 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.

(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.

(5) Obstruction of investigation: Employers or their representatives, agents or counsel, that obstruct or hamper an investigation violate the 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.

~~[(6) Definitions: As used in this section:~~

~~(a) "counsel" means an attorney licensed to practice law;~~

~~(b) "employee representative" means a representative of the employee's recognized or certified bargaining agent;~~

~~(c) "in private" means:~~

~~(i) for employee interviews, to the exclusion of an employer or employer representative not an employee representative, unless the employee expresses a desire to be interviewed out of the hearing of both the employer and the employee representatives; and~~

~~(ii) for employer interviews, to the exclusion of an employee or employee representative;~~

~~(d) "interviewee" means the individual being questioned by the department's representative.]~~

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, xx/xx/2007]

RE: 11.5 Part 2 OCCUPATIONAL HEALTH AND SAFETY - GENERAL INDUSTRY

No substantive changes. References to National Fire Protection Association standards will be updated.

RE: 11.5 Part 3 OCCUPATIONAL HEALTH AND SAFETY - CONSTRUCTION INDUSTRY

No substantive changes.

RE: 11.5 PART 4 OCCUPATIONAL HEALTH AND SAFETY - AGRICULTURE

11.5.4.12 EMERGENCY MEDICAL CARE:

A. In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.

B. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

RE: 11.5 Part 5 – There are no proposed changes to Part 5 at this time.

RE: 11.5 Part 6 CONVENIENCE STORES

11.5.6.8 SECURITY REQUIREMENTS

D. ~~[Limits on Store Window Signage]~~Unobstructed View of the Service Counter: The employer shall maintain door and window signage, product displays, shelving, equipment, and other similar items so that a clear and unobstructed view of the service counter and cash register exists from outside the building.

...

H. Cash Management: The employer shall not have more than ~~[fifty]~~one hundred fifty dollars in any cash register at any time between the hours of 11:00 p.m. and 5:00 a.m. To protect employee safety, the employer shall maintain ~~[small]~~minimal amounts of cash in the cash registers at all other times.

TITLE 11 LABOR AND WORKERS' COMPENSATION

11-19-07

Draft

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, xx/xx/07]

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, xx/xx/07]

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, xx/xx/07]

11.5.1.4 DURATION: Permanent.
[5/1/95; 11.5.1.4 NMAC - Rn, 11 NMAC 5.1.4, xx/xx/07]

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~~[- or paragraph].~~

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, xx/xx/07]

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, xx/xx/07]

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.

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

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

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

~~(4)~~(6) "Department" means the New Mexico environment department.

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

(8) "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.

(9) "In private" means:

(a) for employee interviews, to the exclusion of an employer or employer representative, including counsel employed by the employer or representing the employer; and

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

(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.

~~[(5)]~~(12) "Secretary" means the secretary of environment.

~~[(6)]~~(13) "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.

(14) "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.

~~[(7)]~~(15) "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. ~~[Specifically:]~~

(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 ~~chief~~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 5.1.7, xx/xx/07]

11.5.1.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:[

~~A. Amendment and supersession: This part shall be construed as amending and superseding the following regulations:~~

~~(1) EIB/OHSR 100, definitions; application, filed January 19, 1994;~~

~~(2) EIB/OHSR 100.1, limitations, filed January 19, 1994;~~

~~(3) EIB/OHSR 101, recordkeeping and reporting occupational injuries and illnesses, filed April 10, 1981, as amended;~~

~~(4) EIB/OHSR 102, posting of occupational health and safety information poster, filed January 19, 1994;~~

~~————— (5) EIB/OHSR 103, petitions for variance from job safety and health regulations, filed March 27, 1981;~~
~~————— (6) EIB/OHSR 104, on-site consultative inspections, filed November 9, 1984;~~
~~————— (7) EIB/OHSR 106, inspections; authority; objection, filed January 19, 1994;~~
~~————— (8) EIB/OHSR 106.1, private questioning, filed November 1, 1983;~~
~~————— (9) EIB/OHSR 106.6, advance notice of inspections, filed March 27, 1981;~~
~~————— (10) EIB/OHSR 106.7, conduct of inspections, consultation with employees, filed October 17, 1983;~~
~~————— (11) EIB/OHSR 106.8, representatives of employers and employees; accompaniment during inspection, filed March 27, 1981;~~
~~————— (12) EIB/OHSR 106.9, trade secrets, filed April 10, 1981;~~
~~————— (13) EIB/OHSR 106.11, complaints by employees; review procedures, filed March 27, 1981;~~
~~————— (14) EIB/OHSR 106.13, imminent danger, filed April 10, 1981;~~
~~————— (15) EIB/OHSR 106.14, citations; notices of de minimus violations, filed March 27, 1981;~~
~~————— (16) EIB/OHSR 106.15, proposed penalties, filed December 21, 1979;~~
~~————— (17) EIB/OHSR 106.16, posting of citations, filed December 21, 1979; and~~
~~————— (18) EIB/OHSR 106.18, failure to correct a violation for which a citation has been issued, filed February 7, 1983.~~

~~————— B. ——— References in other regulations: Any reference in any other rule to any regulation listed in subsection A of 11.5.1.8 NMAC of this part shall be construed as a reference to the corresponding provision of this part.] This part shall be construed as amending and superseding all prior regulations. See history notes 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 5.1.8, xx/xx/07]~~

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 5.1.9, xx/xx/07]

11.5.1.10 SAVING CLAUSE:[

~~————— A. ——— General: Supersession of any regulation listed in subsection A of 11.5.1.8 NMAC of this part shall not affect any administrative or judicial enforcement action pending on the effective date of such supersession.~~

~~————— B. ———] 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 5.1.10, xx/xx/07]~~

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 5.1.11, xx/xx/07]

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 5.1.12, xx/xx/07]

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 [~~Section 50-9-5(A)NMSA 1978~~]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, xx/xx/07]

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, xx/xx/07]

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, xx/xx/07]

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, [~~telegraph~~] or facsimile machine, to the bureau in lieu of the location specified in 29 CFR [~~1904.8~~] 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) [~~827-4230~~] 476-8700, Fax: (505) [~~827-4422~~] 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, xx/xx/07]

11.5.1.17 POSTING OF OCCUPATIONAL HEALTH AND SAFETY

INFORMATION POSTER: Posting of the occupational health and safety information poster is required by [~~Section 59-9-5(C)NMSA 1978~~]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, 11 NMAC 5.1.17, xx/xx/07]

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 ~~[department]~~bureau. Petition forms may be obtained from the ~~[department]~~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 ~~[department]~~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 ~~[department]~~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 ~~department~~ 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 ~~department~~ secretary for a modification or revocation of any variance issued under this section. The petition shall:

_____ (i) —] state the petitioner's name and mailing address;[

_____ (ii) —] describe the relief sought;[

_____ (iii) —] state with particularity the grounds for relief;[

_____ (iv)] 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;[

_____ (v)] if the petitioner is an affected employee, certify that a copy of the petition has been furnished to the employer; and[

_____ (vi)] 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 ~~[department]~~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 ~~[department]~~secretary determines that no substantial public interest is involved, the ~~[department]~~secretary shall promptly investigate the petition and make a decision thereon. The ~~[department]~~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 ~~[department]~~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 ~~[department]~~secretary shall be final.

(3) Decisions:

(a) Decisions or orders of the department or secretary shall~~[-~~
_____ (i)] state the petitioner's name and mailing address;[
_____ (ii)] state the date the order was made;[
_____ (iii)] describe the facility or activity for which the variance was
sought;[
_____ (iv)] state the address or description of the property upon which the
facility or activity is located;[
_____ (v)] identify the provision from which the variance was sought;[
_____ (vi)] state the nature of the variance requested;[
_____ (vii)] state the decision of the department or secretary;[
_____ (viii)] 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;[
_____ (ix)] state the reasons for the decision; and[
_____ (x)] 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 ~~[department]~~bureau shall maintain a file of all variance orders. The file shall be open for public inspection subject to the limitations contained in ~~[11-NMAC 5.1.22.F]~~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 ~~[department]~~secretary without hearing, as authorized by ~~[11-NMAC 5.1.19.E.2.e]~~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 ~~[department]~~secretary shall send the order to the petitioner by certified mail with a statement of the reasons for ~~[its]~~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, xx/xx/07]

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 ~~[Section 50-9-6(B) NMSA 1978]~~Subsection B of Section 50-9-6 NMSA 1978 shall be in writing and filed with the ~~[department]~~bureau.

C. On-site consultations shall be provided as ~~[department]~~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 ~~[department's]~~bureau's consultant enters the workplace until the violation noted during the inspection are corrected or until the ~~[department]~~bureau determines that no such corrective action will be taken.

D. ~~[Department]~~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 ~~[department]~~bureau personnel for necessary compliance action.

E. ~~[Department]~~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.

~~_____ F. _____ For purposes of this section:~~

~~_____ (1) _____ "on-site consultation" means an inspection conducted by the ~~[department]~~bureau pursuant to Section 50-9-6(B) NMSA 1978, and~~

~~(2) “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.~~
[10/9/75, 9/3/78, 4/26/81, 11/16/83, 1/1/96; 11.5.1.19 NMAC - Rn & A, 11 NMAC 5.1.19, xx/xx/07]

11.5.1.20 COMPLAINTS BY EMPLOYEES; REVIEW PROCEDURES:

A. Any employee or representative of employees may file a written complaint with the [department]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 [department]bureau.

B. If upon receipt of such complaint the [department]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 [department]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 [department]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 [department]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 [department]bureau shall notify the complainant and include in the notice the reasons therefor.

F. If the [department]bureau determines that no compliance action will be taken, the complainant may obtain review of such determination by submitting a written request ~~[with]~~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 [department]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, 11 NMAC 5.1.20, xx/xx/07]

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]~~ 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 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 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: ~~[Section 50-9-10(A)(2) NMSA 1978,]~~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 [such questioning]privately questioning employees is to obtain useful information [in the course of a department inspection or investigation]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 act, providing an opportunity to an employee to bring any potential violation of the act to the bureau's attention in confidence, and to protect the [rights of the individual]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 ~~[individual]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 ~~[individual requests,]~~compliance officer has not already chosen to conduct the interview in private, the employee may request that the questioning [shall] be conducted in private; and

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

(3) ~~[Private questioning]~~Interview process:

(a) ~~[at the time the compliance officer questions the employer or any employee, he shall advise the individual being questioned of his right to a private interview and to counsel and shall ask if he desires the interview to be conducted in private]~~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 three 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 ~~[entered upon the statement by the compliance officer]~~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.

(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 NMSA 1978, Section 50-9-8D.

(5) Obstruction of investigation: Employers or their representatives, agents or counsel, that obstruct or hamper an investigation violate the 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.

~~{(6) Definitions: As used in this section:~~

~~(a) "counsel" means an attorney licensed to practice law;~~

~~(b) "employee representative" means a representative of the employee's recognized or certified bargaining agent;~~

~~(c) "in private" means:~~

~~(i) for employee interviews, to the exclusion of an employer or employer representative not an employee representative, unless the employee expresses a desire to be interviewed out of the hearing of both the employer and the employee representatives; and~~

~~(ii) for employer interviews, to the exclusion of an employee or employee representative;~~

~~(d) "interviewee" means the individual being questioned by the department's representative.]~~

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.

~~(3) As used in this section, "trade secret" means the whole or any portion or 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.~~

[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, xx/xx/07]

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, xx/xx/07]

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 11.5.1.21 NMAC~~]Subsection A of 11.5.1.20 NMAC, or a notification of violation under [~~Subsection D of 11.5.1.21 NMAC~~]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 11.5.1.21 NMAC~~]Subsection A of 11.5.1.20 NMAC, or a notification of violation under [~~Subsection D of 11.5.1.21 NMAC~~]Subsection D of 11.5.1.20 NMAC, the informal review procedures prescribed in [~~Subsections F to H of 11.5.1.21 NMAC~~]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 ~~correct~~ 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, xx/xx/07]

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, xx/xx/07]

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, xx/xx/07]

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, xx/xx/2007]

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 100.1, Limitations, filed 12/21/79.

EIB/OHSR 100.1, Limitations, filed 1/19/94.

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.

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 106.6, 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 106.11, Occupational Health and Safety Regulation 106.11, Complaints by Employees; Review Procedures, filed 3/27/81.

EIB/OHSR 106.9, Occupational Health and Safety Regulation 106.9, Trade Secrets, filed 4/10/81.

EIB/OHSR 106.13, Occupational Health and Safety Regulation 106.13, Imminent Danger, filed 4/10/81.

EIB/OHSR 106.1, Occupational Health and Safety Regulation 106.1, Private Questioning, filed 11/1/83.

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 101, Occupational Health and Safety Regulation 101, Recordkeeping and Reporting Occupational Injuries and Illnesses, filed 4/10/81.

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.

Draft

CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY

**PART 2 OCCUPATIONAL HEALTH AND SAFETY - GENERAL
INDUSTRY**

11.5.2.1 ISSUING AGENCY: Environmental Improvement Board.
[5/1/95; 11.5.2.1 NMAC - Rn, 11 NMAC 5.2.1, xx/xx/07]

11.5.2.2 SCOPE: All employment and places of employment subject to the Occupational Health and Safety Act, except as otherwise covered by 11.5.3 NMAC, Occupational Health and Safety - Construction Industry, or 11.5.4 NMAC, Occupational Health and Safety - Agriculture. In addition to this part, convenience stores are specifically covered in 11.5.6 NMAC.
[5/1/95; 11.5.2.2 NMAC - Rn & A, 11 NMAC 5.2.1, xx/xx/07]

11.5.2.3 STATUTORY AUTHORITY: Sections 50-9-7, 50-9-13 and 74-1-8 NMSA 1978.
[5/1/95; 11.5.2.3 NMAC - Rn, 11 NMAC 5.2.3, xx/xx/07]

11.5.2.4 DURATION: Permanent.
[5/1/95; 11.5.2.4 NMAC - Rn, 11 NMAC 5.2.4, xx/xx/07]

11.5.2.5 EFFECTIVE DATE: May 1, 1995, unless a later effective date is indicated in the history note at the end of a section[~~or paragraph~~].
[5/1/95, 7/15/96, 3/16/97; 11.5.2.5 NMAC - Rn & A, 11 NMAC 5.2.5, xx/xx/07]

11.5.2.6 OBJECTIVE: To establish standards related to employee occupational health and safety in general industry.
[5/1/95; 11.5.2.6 NMAC - Rn, 11 NMAC 5.2.6, xx/xx/07]

11.5.2.7 DEFINITIONS:

- A. The provisions of 11.5.1.7 NMAC are applicable to this part.
- B. **Additional definitions:** The following definitions, in addition to these contained in 11.5.1.7 NMAC and the state act, are applicable to this section:
 - (1) "ANSI" means american national standards institute;
 - (2) "approved" means tested and listed as satisfactory by the bureau of mines of the United States department of interior, or jointly by the MSHA and NIOSH;
 - (3) "confined space" means an enclosure, usually having limited means of access or egress, or both, and poor natural ventilation, which may contain hazardous contaminants or be oxygen deficient, including but not limited to a storage tank, process tank, tank car, boiler, duct, sewer, tunnel, pipeline, pit or tube;
 - (4) "contaminant" means a harmful, irritating or nuisance material that is foreign to the normal atmosphere;
 - (5) "controlled breathing" means the ability of the wearer of an SCBA to maintain a breathing rate that is near normal for the activities being performed;

- (6) “corrective lens” means a lens ground to the wearer’s individual corrective prescription;
- (7) “dB” means decibel(s), a unit for measuring the relative loudness of sounds equal approximately to the smallest degree of difference of loudness ordinarily detectable by the human ear;
- (8) “education” means the process of imparting knowledge or skill through systematic instruction, whether or not through formal classroom instruction;
- (9) “exhalation valve” means a device that allows exhaled air to leave a facepiece and prevents outside air from entering through the valve;
- (10) “eyepiece” means a gas-tight, transparent window or lens in a full facepiece through which the wearer can see;
- (11) “face shield” means a heat and flame resistant device worn in front of the eyes and face, the predominant function of which is protection of the wearer’s eyes and face;
- (12) “firefighter” means an individual who is assigned to firefighting activity, and is required to respond to alarms and performs emergency action at the location of a fire or fire danger;
- (13) “firefighting activity” means physical action taken in the direct act of fire suppression, and rescue or hazardous duties performed at the location of a fire emergency and supportive activities related to firefighting;
- (14) “fire department” means a paid or volunteer service group organized and trained for the prevention and control of loss of life and property from any fire or disaster;
- (15) “full facepiece” means the portion of an SCBA covering the wearer’s nose, mouth, and eyes and designed to make a gas-tight fit with the face, including the head harness, exhalation valves, and connections for a source of respirable gas;
- (16) “gas” means an aeriform fluid that is in the gaseous state at standard temperature and pressure;
- (17) “hazardous atmosphere” means any atmosphere, whether or not immediately dangerous to life or health, that is oxygen deficient or that contains a toxic or disease-producing contaminant;
- (18) “hazardous substance” means a substance which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritant or otherwise harmful, is likely to cause injury;
- (19) “Hg” means the element mercury;
- (20) “head harness” means a device for holding the facepiece securely in place on the wearer’s head;
- (21) “health professional” means a licensed physician, registered nurse, practical nurse, or certified emergency medical technician;
- (22) “helmet” means a head protective device consisting of a shell, energy absorption system, and chin strap intended to be worn to provide protection for the head or portions thereof, against impact, flying or falling objects, electric shock, penetrations, heat and flame;
- (23) “Hz” means hertz, a unit of frequency equal to one cycle per second;
- (24) “immediately dangerous to life or health” means posing an immediate hazard to life or producing immediate irreversible effects on health that may be debilitating;
- (25) “inhalation valve” means a device that allows respirable air or oxygen to enter the facepiece and prevents exhaled air or oxygen from leaving the facepiece through the intake opening;

(26) “MSHA” means the mine safety and health administration of the United States department of labor;

(27) “negative-pressure type apparatus” means an open or closed-circuit apparatus in which the pressure inside the facepiece, in relation to the immediate environment, is positive during exhalation and negative during inhalation;

(28) “NIOSH” means the national institute for occupational safety and health of the United States department of health and human services;

(29) “NFPA” means national fire protection association;

(30) “overhaul” means:

(a) the final stages of fire control, following suppression of the main body of fire, during which smoke conditions and visibility gradually improve and pockets of fire are sought out to complete extinguishment, searching for victims continues, and salvage operations may be carried out; or

(b) in a situation other than fire, the cleanup stage following the elimination of the emergency phase of the incident;

(31) “oxygen-deficient atmosphere” means an atmosphere that causes an oxygen partial pressure of 100 millimeters of mercury or less in the freshly inspired air saturated with water vapor in the upper portion of the lungs;

(32) “positive-pressure apparatus” means an open- or closed-circuit apparatus in which the pressure inside the facepiece in relation to the immediate environment is positive during both inhalation and exhalation;

(33) “provide” means to furnish, supply or to make arrangements for monetary reimbursement;

(34) “qualitative SCBA fitting test” means a fitting test in which the person wearing an SCBA is exposed to an irritant smoke, an odorous vapor, or another suitable test agent;

(35) “quantitative SCBA fitting test” means a fitting test in which a person wears an SCBA in a test atmosphere containing a test agent in the form of an aerosol, vapor, or gas, and instrumentation that samples the test atmosphere and the air inside the facepiece of the SCBA is used to measure quantitatively the penetration of the test agent into the facepiece;

(36) “sanitization” means the removal of dirt and the inhibiting of the action of agents that cause infection or disease;

(37) “SCBA” means self-contained breathing apparatus, which is a portable device that includes the supply of respirable breathing gas for the firefighter, but does not include a rebreather;

(38) “smoke” means the products of incomplete combustion or organic substances in the form of solid and liquid particles and gaseous products in air;

(39) “speaking diaphragm” means a device integral with the facepiece, designed to improve direct voice communication;

(40) “structural firefighting” means physical activity of fire suppression, rescue or both, of buildings or structures that are involved in a fire situation beyond the incipient stage; and

(41) “training” means the process of making proficient through instruction and hands-on practice in the operation of equipment, including respiratory protection equipment, that is expected to be used [and] in the performance of assigned duties.

[9/12/84; 2/21/86; 5/1/95; 11.5.2.7 NMAC - Rn, 11 NMAC 5.2.7, xx/xx/07]

11.5.2.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding:

- (1) EIB/OHSR 200, General Standards, filed July 9, 1992, as amended; and
- (2) EIB/OHSR 202, Firefighting, filed June 12, 1989, as amended.

B. References in other regulations: Any reference to EIB/OHSR 200 or EIB/OHSR 202 in any other rule shall be construed as a reference to the corresponding section of this part.

[5/1/95; 11.5.2.8 NMAC - Rn, 11 NMAC 5.2.8, xx/xx/07]

11.5.2.9 INCORPORATED FEDERAL STANDARDS:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards (internet: www.osha.gov), are hereby incorporated into this section.

B. Modifications, exceptions and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1910 incorporated by Subsection A of this section:

- (1) omit 1910.1;
- (2) omit 1910.2(c), (d) and (e);
- (3) omit 1910.4;
- (4) omit 1910.5(a) and (f); and

~~(5) references in 1910.20 to 29 CFR 1913 shall be construed as to the appropriate department policy; and~~

~~(6)]~~**(5)** amend 1910.1200 Hazard Communication, as follows:

(a) 1910.1200(g)(9) is amended to read: Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. The information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(b) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training: (1) employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g. flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[1/20/80, 5/1/95, 7/15/96; 3/16/97, 9/15/97, 8/15/98; 11.5.2.9 NMAC - Rn & A, 11 NMAC 5.2.9, xx/xx/07]

11.5.2.10 FIREFIGHTING:

A. Scope and application:

(1) **Scope and purpose:** This standard establishes minimum requirements for personal protective clothing and equipment, training, respiratory protection, and medical surveillance for firefighters when exposed to the hazards of firefighting activity. This standard is not intended to supersede any more stringent requirements in effect at any fire department in the state. Fire departments are encouraged to provide protection that exceeds the minimum requirements specified in the standard. This standard is not intended to cover catastrophic situations where private citizens not trained in firefighting are pressed into service.

(2) **Application:** The requirements of this standard apply to public fire departments, including those composed of private or contractual type fire departments primarily performing duties normally performed by public fire departments, and forest firefighting operations. For the requirements applicable to fire brigades, industrial fire departments, and private or contractual type fire departments generally, see 29 CFR Part 1910.156, fire brigades.

B. Firefighting equipment:

(1) **General requirements:**

(a) All firefighting equipment acquired after July 1, 1989 shall meet or exceed the requirements of the appropriate NFPA standard as published in the national fire codes as specified in Subsection K of ~~[11.5.2.10 NMAC]~~this section.

(b) The employer shall inspect firefighting equipment at least annually and maintain records of such inspections. Firefighting equipment that is damaged or in an unserviceable condition shall be repaired or removed from service.

(c) A visual inspection of all equipment which has been utilized for firefighting shall be performed after each fire run or daily, whichever is less frequent.

(d) Personal protective clothing and equipment specified in this regulation shall be provided at no cost to the employee, or the employee shall be reimbursed for the purchase of such clothing and equipment. The protective clothing and equipment shall be used whenever such employees are required to work in a hazardous environment that may be encountered during firefighting activities or under similar conditions during training activities.

(e) The employer shall assure that protective clothing protects the head, body, and extremities, and consists of at least the following components: foot and leg protection; hand protection; eye, face and head protection.

(f) The employer shall assure proper maintenance and use of all protective clothing and equipment.

(g) Employees shall be instructed to wear or utilize appropriate personal protective clothing and equipment when directed to work in a hazardous environment until such time as the officer in charge determines that such protection is no longer required.

(h) Personal protective clothing and equipment that has become damaged or otherwise defective to the point of voiding its intended protection shall be repaired or removed from service.

(2) **Foot and leg protection:**

(a) Foot and leg protection for structural firefighting ~~[shall meet the requirements of Sections 10.B.2.b and 9.B.2.c., and]~~ may be achieved by either of the following methods:

(i) fully extended boots which provide protection for the entire leg; or
(ii) protective shoes or boots worn in combination with protective trousers that meet the requirements of Subsection E of ~~[11.5.2.10 NMAC]~~this section.

(b) Protective footwear for structural firefighting or turnout boots shall meet the requirements of ANSI Z41.1 (1967 (R-1972)) for class 75 footwear and shall have sole

penetration resistance of 300 pounds (1330N) when tested in accordance with MIL-B-2885D (1973) and amendment dated 1975, "Military Specification for Firemen's Boots". In addition, protective footwear shall be water resistant for at least five inches (12.7 cm) above the bottom of the heel and shall be equipped with slip resistant outer soles.

(c) Foot and leg protection provided for other than structural fires shall be appropriate for the potential hazards.

(3) Body protection:

(a) ~~[As required in Subsection B of 11.5.2.10 NMAC, body]~~Body protection shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Body protection shall consist of turnout clothing or an appropriate combination of a turnout coat and protective clothing meeting the requirements of this section.

(b) Performance, construction, testing and certification of firefighter turnout clothing and protective clothing shall be at least equivalent to the requirements of NFPA Standard No. 1971 "Protective ~~[Clothing]~~Ensemble for Structural Fire Fighting" (~~[1981]~~2007 Edition).

(c) Turnout coats in combination with turnout trousers, or turnout coats and protective clothing meeting these requirements shall be worn on all structural fires until such time as the officer in charge determines that such protection is no longer required. Body protection provided for other than structural fires shall be appropriate for the potential hazards.

(4) Hand protection:

(a) Protective gloves shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Such protective gloves shall be properly sized and suitable to the hazards encountered in fires and fire related emergencies.

(b) Protective gloves for firefighting shall be made of durable material designed to withstand the effects of flame, heat, vapor, liquids, sharp objects and other hazards encountered in fires and firefighting or shall be appropriate for the hazards encountered.

(c) Protective gloves shall meet the requirements of ~~[National Fire Protection Association (NFPA) Standard No. 1973, "Gloves for Structural Fire Fighters" (1983 Edition)]~~NFPA Standard No. 1971, "Protective Ensemble for Structural Firefighting" (2007 Edition), or a similar nationally approved standard.

(5) Head protection:

(a) Head protection shall be provided for each firefighter, and shall be maintained in a location of readiness for immediate response to fires and like emergencies. Head protection shall be worn by firefighters whenever they are exposed to head injury hazard. Head protection is normally provided for firefighters through the use of helmets.

(b) Helmets provided for use in structural firefighting shall meet the performance, construction, and testing requirements of ~~[National Fire Protection Association (NFPA) Standard No. 1972, "Structural Firefighters Helmets" (1979 Edition)]~~NFPA Standard No. 1971, "Protective Ensemble for Structural Firefighting" (2007 Edition).

(6) Eye and face protection: Employees exposed to eye or facial hazards shall be protected in accordance with the following provisions.

(a) Face shields of plastic or glass shall meet the optical qualities, impact resistance, and light transmission standards specified in ANSI Z87.1-1968, "Practice for Occupational and Educational Eye and Face Protection".

(b) Whenever eye and face protection is not provided by the breathing apparatus facepiece, the face of the firefighter engaged in structural firefighting shall be protected by a face shield attached to the helmet or goggles and either{-

~~_____ (i)] heat and flame resistant hood; or[~~
~~_____ (ii)] high collar and throat strap.~~

(c) Eye and face protection provided for other than structural fires shall be appropriate for the potential hazards.

C. Medical review:

(1) Firefighting activity requires that a firefighter be able to work with extreme exertion and with agility and endurance in a wide variety of hazardous situations in order to assure the safety of the firefighter and others. The exposures include ranges of heat and cold, smoke, possible allergens and toxins, and noise. The settings include those with poor lighting, slippery surfaces, confined spaces, and heights. The firefighter must be able to work using a self-contained breathing apparatus. The firefighter's life and safety as well as the lives and safety of others depend upon the firefighter's being physically and emotionally fit to work effectively in such situations.

(2) The employer shall assure that firefighters are physically and emotionally capable of performing the specific duties which may be assigned to them by instituting a program of medical review.

(3) Medical review is not intended to eliminate those volunteer firefighters from performing firefighting activities consistent with their medical limitations.

(4) Initial requirements:

(a) At the time of initial assignment the employer shall ensure that each firefighter completes the following forms or equivalents~~[which contain the minimum information specified in the following:~~

~~_____ (i) the "Medical History for Firefighters" Subsection L of 11.5.2.10 NMAC.~~

~~_____ (ii) the "Performance Criteria for Firefighters" Subsection M of 11.5.2.10 NMAC.~~

~~_____ (iii) a medical screening examination, performed in conformance with the "Medical Screening Form for Firefighters" Subsection N of 11.5.2.10 NMAC];~~
"Medical History for Firefighters" Subsection L of this section; "Performance Criteria for Firefighters" Subsection M of this section; and a medical screening examination, performed in conformance with the "Medical Screening Form for Firefighters" Subsection N of this section.

(b) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the "Medical History for Firefighters" Subsection L of ~~[11.5.2.10 NMAC]~~this section shall be certified for firefighting activities by a physician in accordance with the "Physician's Certification Criteria for Firefighters" Subsection O of ~~[11.5.2.10 NMAC]~~this section with the following exceptions:

(i) if a firefighter answers "yes" to item 21 or 22 of the "Medical History for Firefighters" Subsection L of ~~[11.5.2.10 NMAC]~~this section, a certification from a specialist (e.g. optometrist, ophthalmologist, or audiologist) that the individual can function as a firefighter will suffice in lieu of a complete physician's certification;

(ii) if a firefighter answers "no" to item 27 of the "Medical History for Firefighters" Subsection L of ~~[11.5.2.10 NMAC]~~this section, the employer is required to make a tetanus immunization available to the firefighter.

(c) A physician certifying a firefighter shall be provided with a copy of the medical requirements of this section.

(d) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the "Performance Criteria for

Firefighters” Subsection M of ~~[11.5.2.10 NMAC]~~this section may be allowed to perform only those duties for which the employer determines they are fit.

(e) Candidates for firefighting activities who have been screened in accordance with the “Medical Screening for Firefighters” Subsection N of ~~[11.5.2.10 NMAC]~~this section and the health professional has designated an answer as “yes”, the candidate shall be certified by a physician in accordance with the “Physician’s Certification Criteria for Firefighters” Subsection O of ~~[11.5.2.10 NMAC]~~this section with the following exception.

(f) If the response to item 4, 5, 6 or 7 is “yes”, a certification from an optometrist or ophthalmologist that the individual can function as a firefighter in accordance with item 2 of the “Physician’s Certification Criteria for Firefighters” Subsection O of ~~[11.5.2.10 NMAC]~~this section will suffice in lieu of a complete physician’s certification.

(5) **Periodic requirements:** The employer shall ensure that the medical surveillance required by this standard be performed every five years for firefighters below age 35, every two years from ages 35 to 45, and annually after age 45.

(6) **Removal:** A firefighter may be removed from firefighting activities when the employer becomes aware of a physical or mental condition as specified in Subsections K through R of ~~[11.5.2.10 NMAC]~~this section which would affect the safe performance of specifically assigned duties. A firefighter shall be removed from those firefighting duties when it is certified that a firefighter has a physical or mental condition as specified in Subsections K through R of ~~[11.5.2.10 NMAC]~~this section which would affect the safe performance of specifically assigned duties. The firefighter may return to such activities only after the changed capability is restored or the firefighter has been approved for those duties by a physician.

(7) **Records:**

(a) The employer shall maintain the medical records required in this standard for the length of employment of each firefighter plus five years.

(b) The employer shall make available upon request all records required to be maintained by this standard to the bureau for examination and copying.

D. Training:

(1) The employer shall provide training and education for all firefighters commensurate with those duties and functions that firefighters are expected to perform. Such training and education shall be provided to firefighters before they perform emergency activities.

(2) Formal training or education shall be provided at least annually, and at least quarterly for those expected to perform interior structural firefighting.

(3) Suggested training sources are included in Subsection P of ~~[11.5.2.10 NMAC]~~this section.

E. Respiratory protection equipment: Employers shall comply with the provisions of 29 CFR Part 1910.134, Respiratory Protection ([internet: www.osha.gov](http://www.osha.gov)).

F. Confined spaces: All confined spaces shall be considered to be immediately dangerous to life or health unless proven otherwise. No firefighter shall be permitted to enter a confined space for firefighting operations, including emergency rescue operations, without wearing a SCBA. Confined spaces include, but are not limited to, wells, cisterns, tunnels, pits and other such spaces where oxygen deficiency or hazardous airborne materials, or both, may be present.

G. Vision: Corrective lenses, if required, shall be fitted in the facepiece in way that provides good vision and shall be worn in such a manner as not to interfere with the seal of the face of the facepiece.~~[-The wearing of contact lenses by personnel while fighting fires shall not be permitted.]~~

H. Absorption through or irritation of the skin: If toxic materials which irritate or can be absorbed through the skin are encountered or suspected and protective clothing worn by firefighters as specified in Subsection E of [11.5.2.10 NMAC] this section does not provide adequate protection, an effective fully body covering suit of impermeable materials shall be worn with the SCBA, as specified in Hazardous Chemical Data, NFPA 49-1978.

I. Effects of ionizing radiation on the skin and whole body: The SCBA will not protect the skin or whole body against ionizing radiation from airborne concentrations of certain radioactive materials. All users of SCBA in such contaminated atmospheres shall be made aware of the fact that special protection is necessary in addition to the SCBA.

J. Notification requirements: Employers shall comply with the provisions of 11.5.1.16 NMAC, Recordkeeping and Reporting Occupational Injuries and Illnesses.

K. References:

(1) The following references are published by the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269:

~~(a) NFPA Standard No. 1500, "Fire Department Occupational Safety and Health Program" (2002 Edition);~~

~~[(a)](b) NFPA Standard No. 1901, "Automotive Fire Apparatus" (1979 Edition);~~

~~(b) NFPA Standard No. 1904, "Aerial Ladders and Elevated Platforms" (1980 Edition);~~

(c) NFPA Standard No. 1961, "Fire Hose" (1979 Edition);

(d) NFPA Standard No. 1962, "Care, Use, and Maintenance of Fire Hose Including Connections and Nozzles" (1979 Edition);

(e) NFPA Standard No. 1971, "Protective ~~[Clothing]~~ Ensemble for Structural Fire Fighting" (~~[1984]~~ 2007 Edition);

~~(f) NFPA Standard No. 1972, "Structural Fire Fighter's Helmets" (1979 Edition);~~

~~[(g)](f) NFPA Standard No. 1981, "Self Contained Breathing Apparatus for Firefighter" (1981 Edition); and~~

~~(h) NFPA Standard No. 1973, "Gloves for Structural Firefighters" (1983 Edition); and~~

~~[(i)](g) NFPA 49-1978, "Hazardous Chemical Data".~~

(2) The following references are published by the American National Safety Institute Inc. (ANSI), 1430 Broadway, New York, 10018:

(a) ANSI Standard No. Z41.1-1967 (R 1972), "Mens Safety -- Toe Footwear";

(b) Standard No. Z89.1-1969, "Safety Requirements for Industrial Head Protection";

(c) ANSI Standard No. Z87.1-1968, "Practice for Occupational and Educational Eye and Face Protection";

(d) ANSI Standard No. Z88.5-1981, "Practices for Respiratory protection for the Fire Service";

(e) ANSI/CGA G-7.1-1973, "American National Standard Commodity Specification for Air";

(f) ANSI Z88.2-1980, "Standard Practices for Respiratory Protection"; and

(g) ANSI S3.6-1969 (R1973) "Specifications for Audiometers".

(3) Copies of the references listed in [~~Sections 10.L.1 and 2~~]Paragraphs (1) and (2) of this subsection are available for review in the [~~offices~~]Santa Fe office of the bureau.

L. Medical history form: The following form shall be used to record each firefighter's medical history:

MEDICAL HISTORY FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question.

Do you have or have you ever had:

	NO	YES	
1. Emphysema	()	()	
2. Chronic bronchitis	()	()	
3. Asthma		()	()
4. Daily cough persistent for more than eight (8) weeks		()	()
5. Coronary heart disease (heart attack or angina pectoris)		()	()
6. History of heart murmur, congenital heart problem or rheumatic fever.		()	()
7. Shortness of breath, difficulty staying up with healthy adults, or walking briskly 1/4 mile.		()	()
8. Irregular heart beat or palpitations of heart		()	()
9. Chest pain with exertion		()	()
10. Other heart problem	()	()	
11. High blood pressure	()	()	
12. Diabetes		()	()
13. Epilepsy or seizures	()	()	
14. Emotional illness		()	()
15. Arthritis		()	()
16. Back disease or injury	()	()	
17. Neurologic disorder (nerve or brain disease)		()	()
18. Disease of muscle or bone		()	()
19. Recurrent fainting or dizziness		()	()

Do you now have:

20. Other respiratory problem (severe or persistent)		()	()
21. Impaired hearing		()	()
22. Impaired vision (unless corrected with glasses)		()	()
23. Hernia	()	()	
24. Allergies to substances in the environment or to smoke		()	()
25. Other chronic serious disorders or disease requiring medication or medical care	()	()	
26. Alcohol or drug abuse problems		()	()
27. Tetanus immunization within 10 years is important. For prevention of Tetanus. Have you had a Tetanus immunization within 10 years?		()	()

I certify that the answers to the above questions are true to the best of my knowledge.

DATE

SIGNATURE

M. Performance criteria form. The following form shall be used to record each firefighter's performance criteria:

PERFORMANCE CRITERIA FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes". You need only answer the questions which apply to your work.

Do you have any physical or mental condition that would hamper your ability to do any of the following:

	NO	YES	
1. Use self-contained breathing apparatus (SCBA)		<input type="checkbox"/>	<input type="checkbox"/>
2. Run	<input type="checkbox"/>	<input type="checkbox"/>	
3. Stand continuously for three (3) hours		<input type="checkbox"/>	<input type="checkbox"/>
4. Keep balance	<input type="checkbox"/>	<input type="checkbox"/>	
5. Crawl	<input type="checkbox"/>	<input type="checkbox"/>	
6. Kneel	<input type="checkbox"/>	<input type="checkbox"/>	
7. Climb/work at heights greater than 10 feet		<input type="checkbox"/>	<input type="checkbox"/>
8. Work in tight or enclosed places		<input type="checkbox"/>	<input type="checkbox"/>
9. Reach above shoulder height with both arms		<input type="checkbox"/>	<input type="checkbox"/>
10. Fully use both hands	<input type="checkbox"/>	<input type="checkbox"/>	
11. Use heavy exertion suddenly and continuously		<input type="checkbox"/>	<input type="checkbox"/>

Is there any reason that you cannot work under any of the following environmental conditions?

	NO	YES	
1. Very dry air	<input type="checkbox"/>	<input type="checkbox"/>	
2. Very humid air		<input type="checkbox"/>	<input type="checkbox"/>
3. On slippery surfaces	<input type="checkbox"/>	<input type="checkbox"/>	
4. Heat	<input type="checkbox"/>	<input type="checkbox"/>	
5. Cold	<input type="checkbox"/>	<input type="checkbox"/>	
6. Very bright light		<input type="checkbox"/>	<input type="checkbox"/>
7. Very dim light	<input type="checkbox"/>	<input type="checkbox"/>	
8. Noise	<input type="checkbox"/>	<input type="checkbox"/>	
9. Dust	<input type="checkbox"/>	<input type="checkbox"/>	
10. Smoke	<input type="checkbox"/>	<input type="checkbox"/>	

I certify that my answers to the above questions are true to the best of my knowledge.

DATE

SIGNATURE

N. Medical screening form. The following form shall be used for medical screening of each firefighter:

MEDICAL SCREENING FORM FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes".

NO / YES

- | | | | |
|----|--|-----|-----|
| 1. | Systolic blood pressure (sitting) above 150 mm Hg | () | () |
| 2. | Diastolic blood pressure (sitting) above 100 mm Hg | () | () |
| 3. | Pulse (sitting) above 95 beats/min. | () | () |
| | Snellen test (contact lens not allowed) | | |
| 4. | Left eye (corrected) worse than 20/30 | () | () |
| 5. | Right eye (corrected) worse than 20/30 | () | () |
| 6. | Left eye (uncorrected) worse than 20/200 | () | () |
| 7. | Right eye (uncorrected) worse than 20/200 | () | () |

I certify that the findings are accurate.

DATE

SIGNATURE

PRINT NAME

PRINT PROFESSIONAL TITLE

O. Physician's certification criteria. The following criteria shall be used by any physician in the examination of any firefighter for certification:

PHYSICIAN'S CERTIFICATION CRITERIA FOR FIREFIGHTERS

1. Hearing threshold level (corrected) in both ears not over 30 dB average at 500, 1000 and 2000 Hz, with no single frequency over 35 dB and not over 55 dB at 4,000 Hz based on the zero reference level as specified in the American National Standards Institute (ANSI) S3.6-1969 (R1973) "Specifications for Audiometers".

1. Regulator Check: The functions of the reducing valve and of the emergency by-pass valve shall be checked for proper operation.
2. Cylinder Check: Cylinder pressure shall be at least 80% of the full operating pressure. Observation of cylinder pressure gauge and regulator gauge for corresponding pressure.
3. Audi-Larm Check: Check for Audi-Larm function when system is activated and again when system is deactivated and pressure falls below 400-600 psi.
4. Apparatus Check: Inspect conditions of straps on harness, tightness of screws and fasteners, and locking devices.
5. Facepiece Check: Inspect facepiece components for damage and the condition of headband straps, exhalation valve, speaking diaphragm, breathing tube and facepiece lens.
6. Gasket & Airleak Test: Inspect condition of breathing tube, "O" rings, and speaking diaphragm. If a leak is suspected, apply soapy water to the threaded connection between the valve body and the cylinder, to the pressure gauge and its connection between the valve body, to the safety plug, and to the regulator. Open the cylinder valve and apply soapy water to the valve stem and packing gland nut. Expanding bubbles indicate leaks.
7. Remarks: Use this column to list and describe any replacement parts used or any repairs made to the SCBA.

R. Qualitative fit test protocols (QLFT):

(1) **Irritant smoke test:** The irritant smoke is produced by air flowing through a commercially available stannic tetrachloride or titanium tetrachloride smoke tube normally used to check the performance of ventilation systems. Ventilation should be provided in the test room to prevent contamination of the room with smoke. If the respirator wearer detects penetration of smoke in the respirator during the test, the wearer should be permitted to readjust the seal of the SCBA. The test operator operates the smoke tube to direct smoke over the SCBA while the wearer is inhaling, keeping the smoke tube about one foot from the facepiece, and watches the reactions of the wearer. If the wearer does not detect penetration of smoke into the facepiece, the test operator moves the smoke tube closer to the facepiece and observes the reactions of the wearer. When the smoke tube has moved to within six inches of the facepiece and the wearer still has not detected penetration of smoke, the smoke may be directed at potential sources of leakage (for example, beneath the chin and around the cheeks, temples and forehead) in the seal of the facepiece to the wearer. If the wearer still does not detect penetration of smoke, the wearer should carry out a series of exercises such as deep breathing, turning the head from side to side, nodding the head up and down, frowning, and talking while smoke is directed at the respirator. If the wearer is unable to detect penetration of smoke, a satisfactory fit has been achieved.

(2) **Odorous vapor test:**

(a) A material commonly used in the odorous vapor test is isoamyl acetate. The simplest means of carrying out the test is to saturate a piece of fabric or sponge or fill a stencil brush with liquid isoamyl acetate and then move the fabric, sponge or stencil brush around the facepiece of a respirator worn by a person. The fabric, sponge, or stencil brush should be passed close to the potential sources of leakage in the seal of the facepiece while the wearer is inhaling and performing the recommended exercises. If the wearer detects the odor of isoamyl acetate vapor during the test, the wearer should be permitted to readjust the seal of the facepiece. If the wearer is unable to detect the odor of isoamyl acetate vapor when inhaling, a satisfactory fit has been achieved.

(b) A major drawback of a test using isoamyl acetate vapor as the test agent is that the odor threshold varies widely among people. Most can detect by odor a concentration of isoamyl acetate vapor in air as low as 0.1 parts per million by volume. After a person has smelled the odor for a long period of time, olfactory fatigue may cause a failure to detect the odor of low concentration of isoamyl acetate vapor in the air. Several hours before a facepiece fitting test is performed, all those who are to undergo the test should first be tested to determine their ability to detect the odor of isoamyl acetate vapor in air. It should also be noted that people being tested can fake the test by indicating that they do not detect the odor when they actually do, or vice versa.

S. Availability of forms: The forms illustrated in Subsections L through Q of [~~11.5.2.10 NMAC~~]this section are available from the bureau. [9/12/84, 2/21/86, 6/16/88, 7/11/89, 2/13/90, 4/13/90, 5/1/95, 9/15/98; 11.5.2.10 NMAC - Rn & A, 11 NMAC 5.2.10, xx/xx/07]

HISTORY OF 11.5.2 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 through 109, 200, 300 and 400, filed 9/9/75.

EIB/OHSR 200, General Standards, filed 12/21/79.

EIB/OHSR 200, Occupational Health and Safety Regulation 200, General Standards, filed 7/14/80.

OHSR 200, Occupational Health and Safety Regulation 200, General Standards, filed 2/7/83.

EIB/OHSR 200, Occupational Health and Safety Regulation 200, General Standards, filed 6/1/87.

EIB/OHSR 200, Occupational Health and Safety Regulation 200, General Standards, filed 2/5/91.

EIB/OHSR 200, Occupational Health and Safety Regulation 200, General Standards, filed 7/9/92.

History of Repealed Material: [RESERVED]

Draft

CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY

PART 3 OCCUPATIONAL HEALTH AND SAFETY - CONSTRUCTION INDUSTRY

11.5.3.1 ISSUING AGENCY: Environmental Improvement Board.
[5/1/95; 11.5.3.1 NMAC - Rn, 11 NMAC 5.3.1, xx/xx/07]

11.5.3.2 SCOPE: All employment and places of employment of every employee engaged in work for construction, alteration, ~~and~~ or repair, including painting and decorating.
[5/1/95; 11.5.3.2 NMAC - Rn, 11 NMAC 5.2.1, xx/xx/07]

11.5.3.3 STATUTORY AUTHORITY: Sections 50-9-7, 50-9-13 and 74-1-8, NMSA 1978.
[5/1/95; 11.5.3.3 NMAC - Rn, 11 NMAC 5.3.3, xx/xx/07]

11.5.3.4 DURATION: Permanent
[5/1/95; 11.5.3.4 NMAC - Rn, 11 NMAC 5.3.4, xx/xx/07]

11.5.3.5 EFFECTIVE DATE: May 1, 1995, unless a later effective date is indicated in the history note at the end of a section ~~or paragraph~~.
[5/1/95, 7/15/96, 3/16/97; 11.5.3.5 NMAC - Rn & A, 11 NMAC 5.3.5, xx/xx/07]

11.5.3.6 OBJECTIVE: To establish standards related to employee occupational health and safety in the construction industry.
[5/1/95; 11.5.3.6 NMAC - Rn, 11 NMAC 5.3.6, xx/xx/07]

11.5.3.7 DEFINITIONS: The provisions of 11.5.1.7 NMAC are applicable to this part.
[5/1/95; 11.5.3.7 NMAC - Rn, 11 NMAC 5.3.7, xx/xx/07]

11.5.3.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding EIB/OHSR 300, Construction Standards, filed December 17, 1992, as amended.

B. References in other regulations: Any reference to EIB/OHSR 300 in any other rule shall be construed as a reference to this part.
[1/16/93; 7/28/93; 5/1/95; 11.5.3.8 NMAC - Rn, 11 NMAC 5.3.8, xx/xx/07]

11.5.3.9 INCORPORATED FEDERAL STANDARDS:

A. General. Except as otherwise provided in Subsection C of this section, the provisions of 29 CFR Part 1926, Safety and Health Regulations for Construction (internet: www.osha.gov), are hereby incorporated into this section.

B. Incorporation of applicable general standards: Additionally, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards, identified by the United States department of labor as applicable to the construction industry and incorporated by 11.5.2

NMAC, Occupational Health and Safety-General Standards, are hereby made applicable to construction.

C. Modifications, exceptions, and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1926, incorporated by Subsection A of this section:

- ~~(1)~~ [omit 1926.1;
- ~~(2)~~ amend 1926.2(a) by adding “(a) for multi state employers only....”;
- ~~(3)~~ omit 1926.3;
- ~~(4)~~ omit 1926.4]omit Subpart A-general 1926.1 through 5;
- ~~(5)~~**(2)** omit Subpart B general interpretations (1926.10 through 1926.16); and
- ~~(6)~~**(3)** amend 1926.59, Hazard Communication, as follows:
 - ~~(a)~~ [1926.59(g)(9)]**1910.1200(g)(9)** is amended to read: Where employees must travel between work places during a workshift, i.e. their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. This information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(b) The introductory paragraph to ~~[1926.59(h)]~~**1910.1200(h)** is amended to read: Employee information and training: (1) employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[3/21/79, 1/20/80, 5/21/88, 5/1/95, 7/15/96, 3/16/97, 9/15/97, 8/15/98; 11.5.3.9 NMAC - Rn & A, 11 NMAC 5.3.9, xx/xx/07]

HISTORY OF 11.5.3 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 through 109, 200, 300 and 400 filed 9/9/75.

EIB/OHSR 300, Occupational Health and Safety Regulation 300, Construction Standards, filed 12/21/79.

EIB/OHSR 300, Occupational Health and Safety Regulation 300, Construction Standards, filed 4/21/88.

EIB/OHSR 300, Occupational Health and Safety Regulation 300, Construction Standards, filed 2/5/91.

EIB/OHSR 300, Occupational Health and Safety Regulation 300, Construction Standards, filed 12/17/92.

History of Repealed Material: [RESERVED]

TITLE 11 LABOR AND WORKERS' COMPENSATION

11-19-07

Draft

CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY

PART 4 OCCUPATIONAL HEALTH AND SAFETY - AGRICULTURE

11.5.4.1 ISSUING AGENCY: Environmental Improvement Board.
[5/1/95; 11.5.4.1 NMAC - Rn, 11 NMAC 5.4.1, xx/xx/07]

11.5.4.2 SCOPE: All employment and places of employment in agriculture subject to the provisions of the Occupational Health and Safety Act.
[5/1/95; 11.5.4.2 NMAC - Rn, 11 NMAC 5.4.2, xx/xx/07]

11.5.4.3 STATUTORY AUTHORITY: Sections 50-9-7, 50-9-13 and 74-1-8, NMSA 1978.
[5/1/95; 11.5.4.3 NMAC - Rn, 11 NMAC 5.4.3, xx/xx/07]

11.5.4.4 DURATION: Permanent
[5/1/95; 11.5.4.4 NMAC - Rn, 11 NMAC 5.4.4, xx/xx/07]

11.5.4.5 EFFECTIVE DATE: May 1, 1995, unless a later effective date is indicated in the history note at the end of a section~~[-or paragraph]~~.
[5/1/95, 8/15/98; 11.5.4.5 NMAC - Rn & A, 11 NMAC 5.4.5, xx/xx/07]

11.5.4.6 OBJECTIVE: To establish standards related to employee occupational health and safety in agriculture.
[5/1/95; 11.5.4.6 NMAC - Rn, 11 NMAC 5.4.6, xx/xx/07]

11.5.4.7 DEFINITIONS:

A. General: The provisions of 11.5.1.7 NMAC are applicable to this part.

B. Additional definitions: The following definitions, in addition to those contained in ~~[11.5.1.12]~~ 11.5.1.7 NMAC and the state act, are applicable to this part.

(1) "Agricultural employer" means any person who owns or operates an agricultural establishment or on whose premises or in whose interest an agricultural establishment is operated and any person who is responsible for the management and condition of an agricultural establishment or who acts directly or indirectly in the interest of an employer in relation to any employee.

(2) "Agricultural establishment" means a business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants, or parts of plants.

(3) "Hand-labor operations" means agricultural activities or operations performed by hand or with hand tools, including but not limited to the hand harvest of vegetables, nuts, and fruit, hand weeding of crops and hand planting of seedlings, but not including such activities as logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures such as canning facilities or packing houses.

(4) "Handwashing facility" means a facility providing a basin, container, or outlet with an adequate supply of potable water, soap and single-use towels.

(5) "Potable water" means:

(a) water that meets the standards for drinking purposes by the state or local authority having jurisdiction; or

(b) water that meets the quality standards prescribed by the United States environmental protection agency's National Interim Primary Drinking Water Regulations, published in 40 CFR Part 141.

(6) "Toilet facility" means a fixed or portable facility designed for defecation and urination, including a biological or chemical toilet, [~~a combustion toilet, or a sanitary privy,~~]which is supplied with toilet paper adequate to employee needs.
[7/23/86, 5/1/95; 11.5.4.7 NMAC - Rn, 11 NMAC 5.4.7, xx/xx/07]

11.5.4.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding:

- (1) EIB/OHSR 400, Agricultural Standards, filed January 20, 1994, as amended;
- (2) EIB/OHSR 401, Tools for Weeding and Thinning Crops, filed June 23, 1986;

and

- (3) EIB/OHSR 402, Field Sanitation, filed June 23, 1986.

B. References in other regulations: Any reference to EIB/OHSR 400, EIB/OHSR 401, or EIB/OHSR 402 in any other rule shall be construed as a reference to the corresponding section of this part.

[1/20/94, 5/1/95; 11.5.4.8 NMAC - Rn, 11 NMAC 5.4.8, xx/xx/07]

11.5.4.9 INCORPORATED FEDERAL STANDARDS:

A. General: Except as otherwise provided, the provisions of 29 CFR Part 1928, Safety and Health Standards for Agriculture (internet: www.osha.gov), are hereby incorporated into this section.

B. Amendments: Amend 1928.21(a)(5), Hazard Communication 1910.1200, as follows:

(1) 1910.1200(g)(9) is amended to read: Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. The information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(2) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training. (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employee have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g. flammability, carcinogenicity, or specific chemical). Chemical-specific information must always be available through labels and material safety data sheets.

[3/21/79, 1/27/80, 1/20/94, 7/14/94, 5/1/95, 8/15/98; 11.5.4.9 NMAC - Rn, 11 NMAC 5.4.9, xx/xx/07]

11.5.4.10 TOOLS FOR WEEDING AND THINNING CROPS:

A. Scope: This section applies to any agricultural establishment where employees are engaged on any given day in hand-labor operations in the field.

B. Requirements: The use of a hoe, knife, or fork less than four feet in length for weeding and thinning crops is prohibited.

[7/23/86, 5/1/95; 11.5.4.10 NMAC - Rn, 11 NMAC 5.4.10, xx/xx/07]

11.5.4.11 FIELD SANITATION:

A. Scope: This section applies to any agricultural establishment where ~~[11 or more employees are engaged on any given day]~~ on any given day there are employees engaged in hand-labor operations in the field.

B. Requirements: Agricultural employers shall provide the following for employees engaged in hand-labor operations in the field, without cost to the employee, and employees shall be allowed reasonable opportunities during the workday to use the toilet facilities.

(1) Potable drinking water:

(a) Potable water shall be provided and shall be placed in locations readily accessible to all employees.

(b) The water shall be suitably cool and in sufficient amounts, taking into account the air temperature, humidity and the nature of the work performed to meet employees' needs.

(c) The water shall be dispensed in single use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.

(2) Toilet and handwashing facilities:

(a) One toilet facility and one handwashing facility shall be provided for each 20 employees or fraction thereof, except as stated in Subparagraph (d) of ~~[Paragraph 2 of Subsection B of 11.5.4.11 NMAC]~~ this paragraph.

(b) Toilet facilities shall have doors that can be closed and latched from the inside and shall be constructed to insure privacy.

(c) Toilet and handwashing facilities shall be accessibly located, in close proximity to each other, and within one-quarter (1/4) mile (0.4 kilometers) of each employee's place of work in the field. Where it is not feasible to locate facilities accessibly and within the required distance due to the terrain, they shall be located at the point of closest vehicular access.

(d) Toilet and handwashing facilities are not required for employees who perform field work for a period of three hours or less (including transportation time to and from the field) during the day.

(3) Maintenance: Potable drinking water and toilet and handwashing facilities shall be maintained in accordance with appropriate public health sanitation practices, including the following:

(a) drinking water containers shall be covered, cleaned and refilled daily;

(b) toilet facilities shall be operational and maintained in clean and sanitary condition;

(c) handwashing facilities shall be maintained in clean and sanitary condition; and

(d) disposal of wastes from facilities shall not cause unsanitary conditions.
~~(4) Reasonable use. Employees shall be allowed reasonable opportunities during the workday to use the toilet facilities.]~~

[7/23/86, 5/1/95; 11.5.4.11 NMAC - Rn & A, 11 NMAC 5.4.11, xx/xx/07]

11.5.4.12 EMERGENCY MEDICAL CARE:

A. In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available.

B. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

HISTORY OF 11.5.4 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 through 109, 200, 300 and 400 filed 9/9/75.

EIB/OHSR 400, Occupational Health and Safety Regulation 400, Agricultural Standards, filed 12/28/79.

EIB/OHSR 400, Occupational Health and Safety Regulation 400, Agricultural Standards, filed 12/10/87.

EIB/OHSR 400, Occupational Health and Safety Regulation 400, Agricultural Standards, filed 1/20/94.

History of Repealed Material: [RESERVED]

Draft

CHAPTER 5 OCCUPATIONAL HEALTH AND SAFETY

PART 6 CONVENIENCE STORES

11.5.6.1 ISSUING AGENCY: New Mexico Environmental Improvement Board.
[11.5.6.1 NMAC - N, 6/1/04]

11.5.6.2 SCOPE: All convenience store employers and employees.
[11.5.6.2 NMAC - N, 6/1/04]

11.5.6.3 STATUTORY AUTHORITY: NMSA 1978, Sections 50-9-7, 50-9-13, and 74-1-8.
[11.5.6.3 NMAC - N, 6/1/04]

11.5.6.4 DURATION: Permanent.
[11.5.6.4 NMAC - N, 6/1/04]

11.5.6.5 EFFECTIVE DATE: June 1, 2004, unless a later date is cited at the end of a section.
[11.5.6.5 NMAC - N, 6/1/04]

11.5.6.6 OBJECTIVE: To establish standards related to the occupational health and safety of employees in the convenience store industry.
[11.5.6.6 NMAC - N, 6/1/04]

11.5.6.7 DEFINITIONS: General: Unless otherwise specified, the following definitions, in addition to those contained in 11.5.1.12 NMAC and the state act, are applicable to this part.

A. "American society for testing materials standard D3935" means the American society for testing materials classification standards for transparent polycarbonate bullet-resistant materials.

B. "B rated" means a safe box industry standard, which, at a minimum, conforms to the specifics of a one-fourth inch body and a one-half inch door constructed of steel or an equivalent material.

C. "Controlled access area" means an enclosure of the service counter area with transparent polycarbonate or other bullet-resistant material that meets American society for testing materials or underwriters laboratory standards.

D. "Convenience store" means any business that is primarily engaged in the retail sale of convenience goods, or both convenience goods and gasoline, and employs one or more employees during the normal operating hours of the establishment. This term excludes businesses that operate as hotels, taverns, lodging facilities, restaurants, stores that sell prescription drugs, gasoline service stations, grocery stores, supermarkets, businesses that have more than 10,000 square feet of retail floor space, farmer's markets, roadside stands, on-site farm markets, and other agricultural activities or operations.

E. "Convenience goods" means articles that are purchased frequently for immediate use in readily accessible stores and with a minimum of effort. This term includes consumable

items that are generally limited in quantity and variety, and sold in their original containers. This definition is not intended to exclude convenience stores that sell a small quantity of fresh food or unpackaged products in addition to other convenience goods.

F. “Depository or time lock safe” means a B or higher rated safe box equipped with an electronic or manually programmed time lock, or drop slot, that prevents unauthorized access.

G. “Environmental engineering controls” means an established store floor plan adopted or developed by the employer to reduce theft or robbery by measures, which include, but are not limited to, cash register placement in plain view of customers, properly functioning indoor and outdoor lighting, and proper placement of security cameras.

H. “Pass-through window” means a manually operated mechanical pass-through trough, front-loading deposit door, or other similar device that is encased in a transparent polycarbonate window or other bullet-resistant material that meets American society for testing materials standard D3935, or underwriters laboratory standard 752.

I. “Security surveillance system” means a VHS or digital camera surveillance system that is capable of recording and retrieving a clear video or digital recorded image.

J. “Security alarm system” means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to notify law enforcement or a private security agency of an unlawful act in progress.

K. “Underwriters laboratories 752 rated” means the underwriters laboratory standards for transparent polycarbonate bullet-resistant materials.

L. “Service counter” means, at a minimum, the counter space designated by the employer to include the service transaction area of the money register(s) and the surrounding perimeter.

M. “Signage” means posters, placards, neon lights, or logos, positioned in the convenience store windows and doors.

N. “Training curriculum” means the instruction manual or pamphlet adopted or developed by the employer containing security policies, safety and security procedures, and personal safety and crime prevention techniques.

[11.5.6.7 NMAC - N, 6/1/04; A, 12/01/04]

11.5.6.8 SECURITY REQUIREMENTS: All convenience stores shall be equipped with the following security devices and standards:

A. Exterior Lighting: The employer shall provide and maintain exterior lighting during all evening and nighttime operating hours that ensures clear visibility of the parking areas, walkways, building entrances and exits, and gasoline pump areas.

B. Employee Training:

(1) The employer shall provide each employee, at the time of his or her initial appointment, and by periodic review not to exceed four-month intervals, crime prevention and safety training in accordance with a written training curriculum. The training curriculum may include computer-based training. Periodic reviews shall include, at a minimum, review of the written training curriculum and site-specific issues. Training shall be conducted in a language that is understood by the employee. The employer shall conduct training, or designate a knowledgeable representative to conduct training, in accordance with the written training curriculum that includes but is not limited to:

- (a) an overview of the potential risk of assault;

(b) operational procedures, such as cash handling rules, that are designed to reduce risk;

(c) proper use of security measures and engineering controls that have been adopted in the workplace;

(d) behavioral strategies to defuse tense situations and reduce the likelihood of violence, such as techniques of conflict resolution and aggression management;

(e) specific instructions on how to respond to a robbery and how to respond to attempted shoplifting; and

(f) emergency action procedures to be followed in the event of a robbery or violent incident.

(2) Store specific training shall be conducted by the employee's immediate supervisor.

(3) Current employees shall receive training within ninety days of the effective date of this regulation.

(4) All employers shall prepare training documentation for each employee and have employees sign a statement indicating the date, time, and place they received their safety training. Employers shall maintain documentation of an employee's training for a period of at least twelve months, or six months after termination of an employee's employment. Employee training documentation shall be made available within forty-eight hours of a department representative's request. The forty-eight hour period shall exclude holidays and weekends. Failure to provide employee training documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). Training curricula shall be kept on the convenience store premises and made available on request by the department.

C. Late night security measures:

(1) In addition to the other security requirements of this part, convenience stores operating between the hours of 11:00 p.m. and 5:00 a.m. shall employ at least one of the following security measures:

(a) two employee shift: the employer shall employ a minimum of two employees during the operating hours of 11:00 p.m. to 5:00 a.m.; or, shall substitute the second employee requirement by employing security personnel on the premises;

(b) controlled access area: the employer shall provide a controlled access area by means of a secured safety enclosure of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935 or underwriters laboratory standard 752;

(c) pass-through window(s): the employer shall provide a pass-through window of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935 or underwriters laboratory standard 752 that restricts access to and encompasses the service counter area, providing an enclosure that extends not less than five feet above the service counter; or

(d) alternative operation: between the hours of 11:00 p.m. and 5:00 a.m., the employer shall close the store and prohibit all sales transactions but allow employees to perform duties such as store stocking, maintenance, cleaning and other non-sales transaction duties. Signs shall be conspicuously posted on all entryways stating the store is closed.

D. ~~[Limits on Store Window Signage]~~ Unobstructed View of the Service Counter: The employer shall maintain door and window signage, product displays, shelving,

equipment, and other similar items so that a clear and unobstructed view of the service counter and cash register exists from outside the building.

E. Security Surveillance System:

(1) The employer shall provide each convenience store with a fully operational VHS or digital security surveillance system that, at a minimum, shall:

(a) record a continuous unobstructed view of the service counter area and all entryways and exits during all operating hours; and

(b) include a high resolution black and white or color screen monitor with on screen date and time capabilities.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the security surveillance system, and, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises;

(b) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the security surveillance system. All documentation shall be made available within forty-eight hours of a department representative's request; and

(c) maintain a VHS or digital library of all in-store transactions recorded by the security surveillance system during normal operating hours of the convenience store for a period of no less than twenty business days.

(d) Failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

F. Security Alarm System:

(1) The employer shall provide and maintain in each convenience store a fully operational security alarm system with a working personal panic alarm for each employee that, when activated, notifies law enforcement or a private security agency when an unlawful act is in progress.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the alarm system, and, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(b) maintain documentation for a period of at least twenty-four months of all inspections, servicing, alterations, and upgrades performed on the security alarm system; all documentation shall be made available within forty-eight hours of a department representative's request. Failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(3) The security alarm activators shall be located in a location accessible to the employees and be available to the employees as a portable device that can be carried on their person.

G. Depository or Time Lock Safe:

(1) The employer shall:

(a) provide at least one B or higher rated depository or time lock safe in each store;

(b) utilize each depository or time lock safe to ensure controlled access to cash;

(c) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the depository or time lock safe system, or, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(d) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the depository or time lock safe; all documentation shall be made available within forty-eight hours of a department representative's request. Failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(2) The location of the depository time lock safe may be determined by the employer but shall be located within the service counter area, or in an office adjacent to the service counter area.

H. Cash Management: The employer shall not have more than ~~[fifty]~~one hundred fifty dollars in any cash register at any time between the hours of 11:00 p.m. and 5:00 a.m. To protect employee safety, the employer shall maintain ~~[small]~~minimal amounts of cash in the cash registers at all other times.

I. Required Signs:

(1) The employer shall conspicuously post a notice in English and in Spanish in the convenience store that contains, at a minimum, the following information:

- (a) there is a safe in the store;
- (b) employees do not have access to the safe;
- (c) there is an active security alarm system;
- (d) there is an active surveillance system; and
- (e) there is a limited amount of cash in the cash register.

(2) Employers will not be cited by the department for providing employees access to a time lock or other safe.

J. Pay Phones: The owner shall provide adequate lighting to the pay phone area.

K. Unobstructed View of Sales Area: The employer shall ensure an unobstructed view throughout the store from the service counter area. This may be accomplished by different means, including mirrors and video monitors.

[11.5.6.8 NMAC - N, 6/1/04; A, 12/01/04]

11.5.6.9 to 11.5.6.20 [RESERVED]

11.5.6.21 COMPLIANCE PROVISION: Unless otherwise provided, compliance with the sections of this part shall be achieved within sixty days of its effective date.

[11.5.6.21 NMAC - N, 6/1/04; A, 12/01/04]

11.5.6.22 CONSTRUCTION: This regulation shall be liberally construed to carry out the purposes of the Occupational Health and Safety regulations and Act.

[11.5.6.22 NMAC - N, 6/1/04]

11.5.6.23 SEVERABILITY: If any provision or application of this regulation is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[11.5.6.23 NMAC - N, 6/1/04]

11.5.6.24 ENFORCEMENT AUTHORITY: Department representatives shall be responsible for the enforcement of this regulation.

[11.5.6.24 NMAC - N, 6/1/04]

11.5.6.25 REFERENCES IN OTHER REGULATIONS: Any reference to the Convenience Store regulations or 11.5.6 NMAC in any other rule shall be construed as a reference to this regulation.

[11.5.6.25 NMAC - N, 6/1/04]

11.5.6.26 COMPLIANCE WITH OTHER REGULATIONS: Compliance with this regulation does not relieve a person from the obligation to comply with any other applicable federal, state, or local regulations.

[11.5.6.26 NMAC - N, 6/1/04]

11.5.6.27 SAVINGS CLAUSE: Future amendments: no future amendment to 11.5.6 NMAC shall affect any administrative or judicial enforcement action pending on the effective date of the amendment.

[11.5.6.27 NMAC - N, 6/1/04]

HISTORY OF 11.5.6 NMAC: [RESERVED]