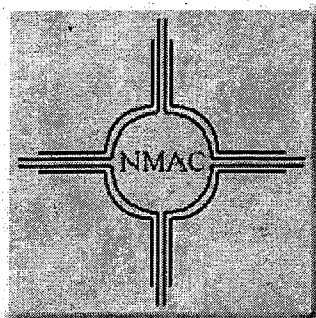


**TITLE 7 - HEALTH****CHAPTER 33****SCIENTIFIC, CHEMICAL AND BIOLOGIC
LABORATORIES AND TESTING**

7.33.1 NMAC	GENERAL PROVISIONS [RESERVED]	
7.33.2 NMAC	<u>BLOOD AND BREATH TESTING UNDER THE NEW MEXICO IMPLIED CONSENT ACT</u>	<u>pdf version</u>

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TITLE 7 HEALTH
CHAPTER 33 SCIENTIFIC, CHEMICAL AND BIOLOGIC LABORATORIES AND TESTING
PART 2 BLOOD AND BREATH TESTING UNDER THE NEW MEXICO IMPLIED CONSENT ACT

7.33.2.1 ISSUING AGENCY: New Mexico Department of Health - Scientific Laboratory Division (SLD).

[7.33.2.1 NMAC - Rp, 7.33.2.1 NMAC, 04-30-2010]

7.33.2.2 SCOPE: This rule governs the certification of laboratories, breath alcohol instruments, operators, key operators, and operator instructors of the breath alcohol instruments as well as establishes the methods of taking and analyzing samples of blood and breath testing for alcohol or other chemical substances under the New Mexico Implied Consent Act, Section 66-8-107 et seq. NMSA 1978.

[7.33.2.2 NMAC - Rp, 7.33.2.2 NMAC, 04-30-2010]

7.33.2.3 STATUTORY AUTHORITY: This rule is promulgated by the secretary of the department of health under the authority of Section 9-7-6(E), Section 24-1-22 and Section 66-8-107 et seq, NMSA 1978. Administration and enforcement of this rule is the responsibility of SLD of the department of health.

[7.33.2.3 NMAC - Rp, 7.33.2.3 NMAC, 04-30-2010]

7.33.2.4 DURATION: Permanent.

[7.33.2.4 NMAC - Rp, 7.33.2.4 NMAC, 04-30-2010]

7.33.2.5 EFFECTIVE DATE: 04-30-2010, unless a later date is cited at the end of a section.

[7.33.2.5 NMAC - Rp, 7.33.2.5 NMAC, 04-30-2010]

7.33.2.6 OBJECTIVE: The objective is to establish standards and procedures for the certification of laboratories, breath alcohol instruments, operators, key operators, and operator instructors as well as the methods of taking and analyzing samples for blood and breath testing for alcohol and other chemical substances under the New Mexico Implied Consent Act. The scientific laboratory division shall conduct blood/breath tests for alcohol and other chemical substances collected pursuant to the New Mexico Implied Consent Act and this administrative rule.

[7.33.2.6 NMAC - Rp, 7.33.2.6 NMAC, 04-30-2010]

7.33.2.7 DEFINITIONS:

A. "Adequate operational environment" - An area that has limited exposure to volatile organic compounds, has access restricted to authorized personnel and has been evaluated for radio frequency interference.

B. "Alcohol" - A hydrocarbon molecule that contains a hydroxyl group (oxygen, hydrogen) as its primary functional group.

C. "Blood" - Whole blood which contains the cellular components and the serum or plasma of blood or hemolyzed blood.

D. "Blood alcohol concentration (BAC)" - The concentration of alcohol in blood; the unit of measurement of alcohol in blood is the number of grams of alcohol per 100 milliliters of blood.

E. "Breath" - That portion of exhaled lung air that is collected for alcohol analysis.

F. "Breath alcohol concentration (BrAC)" - The concentration of alcohol in breath; the unit of measurement is the number of grams of alcohol per 210 liters of breath.

G. "Breath alcohol instrument" - Any evidential breath testing device that is capable of analyzing breath to establish the concentration of alcohol contained in a breath sample. Such instruments must be approved and individually certified by SLD for use in testing pursuant to the Implied Consent Act and this rule.

H. "Breath alcohol instrument modification" - Any alteration, variation or redesign of any part, device or electronic circuit that directly affects, alters, varies or changes the analytical or operational section of the equipment.

I. "Calibration check" - The analysis of an externally delivered, controlled, ethanol vapor specimen of known alcohol concentration. SLD shall determine the breath alcohol simulator solutions or gases to be used.

J. "Director" - The director of SLD.

K. "Drug" - Any chemical agent that affects living processes and has the potential to impair those processes.

- L. "Equipment" - Devices which are not a component of the breath alcohol instrument but assist in meeting the requirements of an evidentiary breath test, including but not limited to simulators, gas tanks, gas brackets, and reference standards.
- M. "Fixed location" - A location inside a building or breath testing mobile command center which is the primary or sole site for a breath alcohol instrument.
- N. "Foreign substance" - Material not commonly found in the human mouth; it does not include dental appliances, dental adhesives, orthodontics or orthotics.
- O. "Certified key operator" - An individual who has successfully completed the course for a certified operator and who has successfully completed a key operator class conducted by SLD.
- P. "Certified operator" - A person who has successfully completed a breath alcohol operator class conducted by a representative of SLD or a SLD certified instructor and who qualifies to conduct implied consent breath alcohol tests.
- Q. "Inspection" - A thorough examination and testing of a breath alcohol instrument by trained personnel to evaluate its accuracy and compliance with this SLD rule.
- R. "Operator instructor" - Operator instructors train, test, and grade breath operators in the use of breath alcohol instruments.
- S. "Portable instrument" - A breath alcohol instrument intended for use inside or outside buildings, including mobile applications (e.g. in vehicles).
- T. "Preservative" - Any chemical that inhibits the development of microbial growth in a collected blood sample.
- U. "Proficiency" - A solution of unknown alcohol concentration in blood or water used to evaluate the competency of an analyst or key operator conducting a chemical test and to assure the accuracy and precision of the instrument in reference to the target value(s).
- V. "Sample" - A quantity of a subject's blood or exhaled breath to be analyzed for the presence of alcohol or other drugs or both pursuant to the New Mexico Implied Consent Act.
- W. "Supplies" - Items that are used in the process of administering a breath or blood test but do not impact the test results, including but not limited to mouthpieces, and printer paper.
- X. "Scientific laboratory division (SLD)" - A division of the department of health.
- Y. "System blank" - A reference sample such as ambient air or distilled water containing no analyte of interest used to verify a negative test result for the purpose of testing blood or breath instruments.
- Z. "Test" - In the case of blood, "test" means the analysis of a blood sample for alcohol or other chemical substances or both. In the case of breath, "test" means the analysis of breath samples for alcohol or other chemical substances or both.

[7.33.2.7 NMAC - Rp, 7.33.2.7 NMAC, 04-30-2010]

7.33.2.8 LABORATORIES:

- A. Initial certification. Any laboratory seeking certified status for alcohol or drug testing in blood shall submit a request in writing to the director of SLD. Applicants shall furnish the materials listed below to the director of SLD for review and approval. SLD shall review the materials and inspect the location of the applicant laboratory within 60 days of receipt. SLD shall issue a certificate to any laboratory that meets the standards and successfully completes the required proficiency testing requirements.
- (1) Laboratories seeking SLD certification for blood alcohol analysis shall submit:
 - (a) written documentation of the scientific training and experience in toxicology or clinical/analytical chemistry of its director and all personnel who will perform tests;
 - (b) written copies of the analytical methods, techniques and equipment it proposes to use;
 - (c) a proposed set of quality control/ assurance measures;
 - (d) results of all required proficiency tests;
 - (e) evidence that the lab has adequate space, equipment and materials to perform blood alcohol analysis.
 - (2) Laboratories seeking SLD certification for drug analysis in blood shall submit:
 - (a) written documentation of the scientific training and experience in toxicology or clinical/analytical chemistry of its director and all personnel who will perform tests;
 - (b) written copies of the analytical methods, techniques and equipment it proposes to use;
 - (c) a proposed set of quality control/ assurance measures;
 - (d) results of all required proficiency tests;

(e) evidence that the lab has adequate space, equipment and materials to perform drug testing on blood.

(f) proof of accreditation by the American board of forensic toxicology (ABFT) in forensic toxicology or by the American society of crime lab directors /laboratory accreditation board (ASCLD/LAB) in the field of forensic science testing in the discipline of toxicology in the category of testing of blood/urine drug testing, or the current accrediting body.

B. Continuing responsibilities of laboratories.

(1) Each SLD-certified laboratory shall adhere to an SLD-approved written standard operating procedure and shall maintain evidence of its compliance.

(2) Each SLD-certified laboratory shall be subject to inspection by authorized personnel of SLD prior to certification and may be re-inspected at any time during the period for which certification was granted.

(3) SLD-certified laboratories are required to submit to the director of SLD any changes in their analytical personnel, analytical methodology or analytical equipment for approval a minimum of 20 days prior to commencing analysis with the new personnel, methodology or equipment.

(4) SLD-certified laboratories shall maintain records containing all pertinent facts relating to analyses performed for a minimum period of five years. All records shall be sufficiently complete as to allow verification by an independent chemist, unaffiliated with the SLD-certified laboratory. Such records shall be open to inspection by authorized personnel of SLD.

(5) SLD certified laboratories shall submit to SLD copies of all results of tests for alcohol or other drugs within 30 days of the completion of the blood analysis. The name of the scientist responsible for reviewing the test data and determining the final result shall be provided on the report.

(6) All SLD-certified laboratories shall establish and maintain adequate SLD-approved quality control measures and shall maintain complete records of their quality control programs. These records shall be available for inspection by SLD personnel upon demand and shall be maintained for a minimum period of five years.

(7) Those laboratories certified in drug testing shall maintain their ABFT or ASCLD/LAB accreditation or accreditation from the current accrediting body with required proficiencies.

(8) Proficiency testing.

(a) SLD shall require that each laboratory certified for blood alcohol testing complete the analysis of a minimum of eight samples each year. These tests include proficiencies issued by SLD as well as proficiencies issued by other certifying agencies. In the case of proficiency samples provided by SLD, certified laboratories must return test results within ten days of their receipt. Performance is considered satisfactory if the results of all analyses in a single year fall within acceptable limits based on considerations that include, but are not limited to, the subject analytes and the sample matrix. Acceptable limits for alcohol proficiencies for blood samples are:

(i) ± 10 percent of the alcohol content of the specimen if the known alcohol content is 0.10 grams per 100 milliliters or more;

(ii) ± 0.01 grams per 100 milliliters if the known alcohol content is less than 0.10 grams per 100 milliliters.

(b) Drug proficiency testing shall be in accordance with accrediting agency standards.

C. Recertification. SLD certified laboratories may be certified for a period not to exceed one year to conduct blood tests subject to the following standards, procedures, conditions and on-site inspections:

(1) all laboratory certifications shall expire annually on June 30;

(2) SLD certified laboratories must apply for renewal of certification annually; all applications must be received at least 60 days prior to the expiration date of the laboratory's certification;

(3) applications for renewal of certification shall include the following:

(a) the same information regarding personnel, techniques and equipment as described in Subsection A of this section;

(b) results of all proficiency tests performed in the previous year including SLD proficiencies as well as proficiencies issued by other certifying agencies;

(4) continued certification of a laboratory shall depend on compliance with approved methods, qualified staff and facilities, and satisfactory performance in the proficiency testing.

D. Denial, suspension, and revocation.

(1) SLD may refuse to certify or may suspend or revoke the certification of any SLD-certified laboratory for any one or more of the following causes:

(a) failure to comply with any of the previously stated requirements for certification in Subsection A of this section;

(b) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(c) loss of professional certification or affiliation of staff;

(d) loss of required accreditation of lab;

(e) any serious or repeated violation of any rule of SLD;

(f) any major violation of the standards for laboratories, facilities, personnel or equipment relevant to the testing procedures that are the subject of this rule;

(g) for good cause, including but not limited to perjury, fraud or incompetence;

(h) failure to perform analyses and proficiency testing in a satisfactory manner as specified by SLD.

(2) SLD shall provide notice to the laboratory of any proposed adverse action.

(3) Any laboratory seeking review of unsatisfactory proficiency test results may request a stay of suspension or revocation for good cause. The request must be in writing to the director of SLD.

(4) Any laboratory that has had their SLD certification denied, revoked or suspended may request a hearing pursuant to Subsection F of 7.33.2.18 NMAC.

(5) Any laboratory that has had their SLD certification revoked may not re-apply for a minimum of one year after the notice of final action or after the completion of any requested hearing whichever is later.

(6) Any laboratory denied certification or renewal of certification may not re-apply for certification until 90 days after the completion of any requested hearing or 90 days after the notice of final action, whichever is later. Subsequent denials will require that six months, not 90 days, elapse prior to re-application.

[7.33.2.8 NMAC - Rp, 7.33.2.9 NMAC & 7.33.2.16 NMAC, 04-30-2010]

7.33.2.9 SELECTION AND EVALUATION OF BREATH ALCOHOL INSTRUMENTS AND ASSOCIATED EQUIPMENT:

SLD shall select the primary breath alcohol instrument for use by law enforcement agencies in New Mexico. Selection shall be based on, but not be limited to, performance of the instrumentation in each section of SLD's evaluation process, the field history of the instrumentation, the manufacturer's support capability, and evaluations by other users of the instruments, including approval by the national highway traffic safety administration (NHTSA).

A. All manufacturers of breath alcohol instruments, wet-bath simulators, and reference standards for breath alcohol instruments seeking to introduce their instruments and equipment to law enforcement agencies in New Mexico for the purpose of implied consent evidential testing shall first submit their instrumentation and equipment to SLD for approval.

B. SLD will evaluate these instruments per SLD policy.

C. Manufacturers must also designate at least one representative knowledgeable in the technology and electronic configurations of the breath alcohol instrument to provide training to SLD personnel.

D. Manufacturers must provide all information concerning any modifications, changes or upgrades to SLD-approved breath alcohol instruments within two months of the modifications, changes or upgrades. SLD will evaluate the modifications, changes or upgrades and determine if they substantially affect the operation of the instruments and whether the instrument alterations require that the instruments be reevaluated.

E. All analytical results shall be reported as grams of alcohol per 210 liters of breath (g per 210L). These results shall be reported to two decimal places except in the case of standards and proficiency samples, which shall be reported to three decimal places.

F. Failure to comply with these or any subsequent manufacturer related rules may result in the withdrawal of approval for the manufacturers breath alcohol instruments to be utilized in testing under the New Mexico Implied Consent Act.

G. SLD reserves the right to withdraw the approval of any breath alcohol instrument and equipment if the manufacturer fails to comply with the provisions of the approval criteria or the terms of any contracts with SLD.

H. SLD reserves the right to make recommendations for equipment and supplies for breath alcohol instruments for use by law enforcement agencies in New Mexico based on, but not limited to, performance, manufacturer recommendations of the breath alcohol instrument, the field history, and evaluations by SLD and other users of the instruments.

[7.33.2.9 NMAC - Rp, 7.33.2.18 NMAC, 04-30-2010]

7.33.2.10 BREATH ALCOHOL INSTRUMENTS USED BY LAW ENFORCEMENT AGENCIES:

A. Initial certification. Any breath alcohol instrument to be used for implied consent evidential testing must be approved and certified by SLD. Certification for breath alcohol instruments shall be for a period of up to one year, expiring September 30. A certificate shall be issued for each instrument and shall be maintained by the responsible agency. Instruments requiring initial certification must meet all of the following criteria and such criteria must be met before placement and use of the instrument in the field.

- (1) SLD shall inspect and perform a calibration check. This check may take place at SLD.
- (2) At least one certified key operator shall be responsible for the maintenance of each breath alcohol instrument. The key operator is not required to be a member of the agency in which the instrument is placed.

B. Continuing responsibilities.

- (1) Instruments.
 - (a) Copies of the logbook forms should be submitted to SLD no later than the 10th day of the following month. Electronic records pertaining to all tests administered on the instrument(s) will be transmitted as scheduled by SLD.
 - (b) Four proficiency samples should be analyzed yearly on each such certified instrument.
 - (c) A calibration check on the instrument(s) shall be conducted at least once every seven calendar days or a 0.08 calibration check shall be conducted with each subject test or both.
 - (d) All breath alcohol instruments shall be returned to SLD twice annually for inspection. Such inspection shall consist of, but not be limited to:
 - (i) establishing the current status of the breath alcohol instrument;
 - (ii) evaluating the breath alcohol instrument's electronic functions and settings;
 - (iii) analyzing a series of controlled ethyl alcohol solutions with an accuracy requirement of ± 5 percent or .005, whichever is greater, on all target values;
 - (iv) installing all updates, modifications, or changes that have been approved by SLD;
 - (v) reviewing the breath alcohol instrument's sensitivity for the detection of any interfering substances.

(2) Instrument location.

- (a) All agencies maintaining a breath alcohol instrument in a fixed location shall furnish each instrument with an adequate operational environment.
- (b) An adequate operational environment for the breath alcohol instrument shall:
 - (i) have adequate ventilation to minimize volatile organic compounds;
 - (ii) restrict access to the instrument to only authorized personnel;
 - (iii) be evaluated for radio frequency interference.
- (c) A breath alcohol instrument assigned to a fixed location may be used as a portable breath alcohol instrument if the option is available. Transitions for instruments between portable and fixed shall be recorded in the logbook.
- (d) Any portable, certified breath alcohol instrument is approved for use anywhere in the state of New Mexico.

C. Recertification of instruments.

- (1) Certification is renewed annually based on compliance with this rule.
- (2) A certificate shall be issued for each instrument and shall be maintained by the responsible agency.

D. Denial, suspension, and revocation.

- (1) SLD may refuse to certify or may suspend or revoke the certification of any breath alcohol instrument for implied consent testing for any one or more of the following causes:
 - (a) the instrument in use is not on the list of SLD approved testing instruments;
 - (b) calibration results do not meet SLD established criteria;
 - (c) if an agency fails to identify and maintain a certified key operator for each breath alcohol instrument, certification of the instrument shall be suspended or revoked;
 - (d) other failures to abide by this rule may also result in suspension or revocation.
- (2) SLD shall provide notice to an agency before taking an adverse action with regard to the certification of the agency's instrument.
- (3) Agencies seeking review of a denial, suspension or revocation of the instrument's certification may request a stay of suspension or revocation for good cause. The request must be in writing and in accordance with Subsection B of 7.33.2.18 NMAC.
- (4) Agencies seeking review of any denial, suspension or revocation of an instrument's certification may request a review in writing pursuant to Subsection B of 7.33.2.18 NMAC.

E. Repair of instruments. SLD is not required to support or service any breath alcohol instruments that are not owned by SLD. Law enforcement agencies shall be required to pay for any repairs or adjustments of an SLD owned instrument caused as a result of any negligence, incompetence or misconduct in the operation or handling of the instrument as determined by SLD review.
[7.33.2.10 NMAC - Rp, 7.33.2.8 NMAC, 7.33.2.11 NMAC, 7.33.2.16 NMAC and 7.33.2.17 NMAC, 04-30-2010]

7.33.2.11 OPERATORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Initial certification. Certification shall be granted for up to two years and shall expire on the last day of the month issued. SLD shall provide training for operator applicants at SLD or other facilities in Albuquerque. SLD may authorize training classes in other areas of the state.

- (1) Qualified applicants for implied consent testing must:
 - (a) be a salaried peace officer commissioned in New Mexico or an employee of a detention facility in New Mexico; or
 - (b) be a reserve peace officer commissioned in New Mexico.
- (2) Accepted applicants who are not commissioned peace officers or detention employees will be given a certificate of completion and are not authorized to conduct implied consent testing.
- (3) SLD approved training shall meet the following requirements:
 - (a) the training shall be provided by representatives of SLD or SLD-certified operator instructors; the training formulated or approved by SLD must include:
 - (i) the value and purpose of blood and breath alcohol testing;
 - (ii) the effects of alcohol on the human body and its performance;
 - (iii) the methods of alcohol analysis and the theory of breath testing;
 - (iv) breath alcohol instruments and the procedures for breath testing;
 - (v) practical experience and demonstration of competency;
 - (vi) New Mexico Implied Consent Act, this rule and any amendments or revisions and court testimony;
 - (b) applicants must demonstrate competency by passing comprehensive practical and written examinations; these examinations will be formulated or approved by SLD and shall be graded by representatives of SLD or SLD-certified operator instructors.
- (4) Certified operators of an SLD approved model of breath alcohol instrument may be certified to operate additional SLD-approved breath alcohol instruments by demonstrating competency with the successful completion of training conducted by representatives of SLD or SLD-certified operator instructors. This training shall follow a course of instruction outlined or approved by SLD as well as written and practical examinations formulated or approved by SLD.

B. Recertification.

- (1) Applications for renewal shall show:
 - (a) the applicant has successfully completed an operator certification or recertification training formulated or approved by SLD within the previous 27 months;
 - (b) demonstration of competency by successful completion of recertification training formulated or approved by SLD and conducted by representatives of SLD or SLD-certified operator instructors; this training shall include a written as well as a practical, examinations formulated or approved by SLD.
- (2) Candidates for renewal who do not satisfy the requirements must attend and successfully complete the initial certification class, as stated in Subsection A of 7.33.2.11 NMAC above.
- (3) If the certification of an operator is due to expire before the certification is renewed, the operator may request an extension from SLD for good cause. This request must be received by SLD before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily.

C. Denial, suspension, and revocation.

- (1) Certification may be denied for inadequate scores or failure to complete any performance tests or examinations in the manner prescribed by SLD; or for any of the reasons set out in Paragraph (2) of this subsection below.
- (2) SLD may suspend or revoke certification of any SLD-certified operator for one or more of the following causes:
 - (a) fraud or deceit in applying for or obtaining the certification or renewal thereof;
 - (b) loss of professional certification or affiliation;

(c) any serious or repeated violation of any rule or rules of SLD;
(d) any major violation of the standards for personnel or equipment relevant to the testing procedures that are the subject of this rule;
(e) for good cause, including but not limited to perjury, fraud or incompetence;
(f) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA 1978).

(3) SLD shall provide notice of any proposed adverse action to the officer and the agency chief.
(4) A written request to stay suspension or revocation for good cause may be made by any operator who is unable to carry out his/her specific duties. The request must be made in accordance with Subsection B of 7.33.2.18 NMAC.

(5) If any operator is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any operator has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.11 NMAC - Rp, 7.33.2.13 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.12 KEY OPERATORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Initial certification. Certification shall be up to one year.
(1) Qualified applicants must have:
(a) status as a certified operator, or hold an operator certificate of completion for the instrument(s) on which they seek to be certified as a key operator; AND
(b) status as a salaried employee of a law enforcement agency or detention facility in New Mexico; OR
(c) SLD may certify as key operators, SLD-selected individuals of law enforcement agencies or corrections departments in New Mexico who successfully complete written and practical examinations formulated and administered by SLD.

(2) Required training.
(a) Training by SLD representatives shall consist of the following:
(i) the theory of breath testing;
(ii) the operational and theoretical principles of the selected breath testing instruments;
(iii) the preparation and use of a simulator;
(iv) calibration checks of selected breath alcohol instrument(s);
(v) quality control measures and proficiency testing;
(vi) minor maintenance and repair of breath alcohol testing equipment;
(vii) the New Mexico Implied Consent Act, this rule and any amendments or revisions and their application to court testimony on the operation and certification of the selected breath alcohol instruments;
(viii) laboratory practice and the demonstration of competency on the applicable equipment;

(ix) introduction to radio frequency interference (RFI) and how to prepare a RFI report.
(b) Demonstration of competency by successful completion of comprehensive practical and written examinations administered by SLD.

(3) Key operator certification shall be limited to the model of instruments upon which the key operator has been trained and examined or models considered equivalent by SLD.

(4) Certified key operators of a SLD approved model of breath alcohol instrument may be certified to operate additional SLD-approved breath alcohol instrument(s) by demonstrating competency with the successful completion of training conducted by representatives of SLD. This training shall include written as well as and practical examinations formulated by SLD.

B. Continuing responsibilities. Certified key operators shall be responsible for:
(1) the calibration checks of the instruments they oversee, maintenance of those instruments and their supplies;
(2) successful completion of the proficiency testing specified in this rule:
(a) solutions for proficiency testing of each certified key operator shall be issued at least four times every year by SLD;

(b) a minimum of one solution must be analyzed by each certified key operator within 30 days of receipt of the solutions; results on the proficiency report form provided by SLD must be received by SLD within 10 working days thereafter;

(c) the average of the proficiency test results must be within $\pm 10\%$ of target value; if the target value is less than 0.100 g/210L, then the results must be within ± 0.010 g/210L;

(3) insuring that the records and notifications specified in training are submitted as required by SLD rules;

(4) at least monthly submission to SLD of all logbook copies no later than the 10th day of the following month; electronic records pertaining to all tests administered on the instrument(s) will be transmitted as scheduled by SLD.

C. Recertification. Key operators shall be certified for a period of up to one year. All key operator certifications shall expire annually on March 31.

(1) Certifications may be renewed based on a demonstration of competency which may include successful completion of a refresher class as specified by SLD.

(2) If the certification of a key operator is due to expire before the certification is renewed, the key operator may request an extension of certification. This request must be received by SLD before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Extensions shall not be granted for more than a total of 60 consecutive days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily. New certification may be obtained by successfully completing the initial certification process as set out in Subsection A of 7.33.2.12 NMAC above.

D. Denial, suspension, or revocation.

(1) Certification may be denied for inadequate scores; or failure to complete any performance tests; or examinations in the manner prescribed by SLD; or for any of the reasons set out in Paragraph (2) of this subsection.

(2) SLD may refuse to certify or may suspend or revoke certification of any SLD-certified key operator for one or more of the following causes:

(a) fraud or deceit in applying for or obtaining the certification or renewal thereof;

(b) loss of professional certification or affiliation;

(c) any serious or repeated violation of this rule;

(d) any major violation of the standards for personnel or equipment relevant to the testing procedures that are the subject of this rule;

(e) for good cause, including but not limited to perjury, fraud or incompetence;

(f) failure to perform analyses and proficiency testing in a satisfactory manner as specified by SLD;

(g) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA 1978).

(3) SLD shall provide notice of a proposed adverse action to the key operator and the head of the agency maintaining the instrument for which the key operator is responsible.

(4) A written request to stay suspension or revocation for good cause may be made by any key operator who is unable to carry out his/her specific duties. The request must be made in accordance with Subsection B of 7.33.2.18 NMAC.

(5) If any key operator is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any key operator has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.12 NMAC - Rp, 7.33.2.14 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.13 OPERATOR INSTRUCTORS OF BREATH ALCOHOL TESTING EQUIPMENT:

A. Designation as operator instructors. Qualified employees of SLD shall be designated as operator instructors, as determined by the director.

B. Initial certification. Persons not employed by SLD shall be certified for up to one year and certification shall expire on December 31.

(1) Applicants shall demonstrate the following qualifications:

- (a) current certification as an operator and key operator of the applicable breath testing equipment;
- (b) at least 12 semester hours in which the applicant received a grade of C (or satisfactory) or higher in any combination of the following disciplines: chemistry, biology, physics, or mathematics from an accredited university or college; at least four of those 12 semester hours must be in chemistry;
- (c) a minimum of 32 hours of instruction in areas relating to blood/breath collection and analysis, to include the following:
 - (i) the value and purpose of blood and breath alcohol analysis;
 - (ii) the effects of alcohol on the human body;
 - (iii) the instruments and procedures for alcohol analysis;
 - (iv) the interpretation of the results of alcohol analysis;
 - (v) the New Mexico Implied Consent Act, this rule and any amendments or revisions and court testimony;
 - (vi) the methods of alcohol analysis;
 - (vii) the operational principles of the selected breath alcohol instruments;
 - (viii) practical experience and demonstration of competency in use of blood/breath collection and analyses;
- (d) as an alternative to completing the above course of instruction as listed in Subparagraph (c) of Paragraph (1) of Subsection B of this section, an operator instructor may be certified if he/she has earned a bachelor's degree in chemistry, biology or a related science from an accredited university or college and he/she demonstrates equivalent knowledge by successfully completing written and practical examinations formulated or approved by SLD.

(2) Comprehensive practical and written examinations shall be successfully completed by all applicants prior to certification. These examinations shall be administered by SLD.

C. Continuing responsibilities.

- (1) Operator instructors not employed by SLD must maintain their certification as operators and key operators.
 - (2) Requirements for conducting an operator class:
 - (a) a certified operator instructor should notify SLD in writing at least 10 working days in advance of the date, time and location of all training and examinations to be conducted; in case of emergency or unforeseen circumstances, the date, time, or location of such training or examinations may be changed if SLD is notified at least 24 hours before such a change is made;
 - (b) all operator training classes conducted by a certified operator instructor shall follow a course of instruction outlined or approved by SLD;
 - (c) tests must be outlined or approved by SLD for each type of breath alcohol instrument covered in the training;
 - (d) all students of the operator instructor must take and pass examinations designed or approved by SLD prior to certification;
 - (e) maintain records of the classes he or she has conducted for at least the previous three years; these records shall include but not be limited to the dates, times, locations and attendees of such classes; SLD may inspect the operator instructor's records concerning the courses taught by the instructor;
 - (f) allow representatives of SLD to observe any training sessions and examinations;
 - (g) forward all copies of the graded examinations to SLD within one month of class date with a written statement by the instructor that he or she has conducted the class in compliance with the requirements of this rule;
 - (h) notify an applicant's supervisor in writing if the candidate did not successfully complete the course; a copy of the letter shall be submitted to SLD.
 - (3) SLD instructors shall not release copies of any examinations to anyone other than applicants and approved certified instructors in order to protect the integrity of the training process and to insure that applicants for certification are tested on their knowledge of the materials presented. Applicants shall be required to return all copies of the tests they may have received at the end of the testing session.
 - (4) Operator instructors must conduct at least one operator class per certification year.
- D. Recertification: operator instructors are certified for a period of up to one year.
- (1) Certifications may be renewed based upon adequate performance of continuing responsibility requirements, a demonstration of competency, or successful completion of a refresher class as specified by SLD.

(2) If the certification of an operator instructor is due to expire before the certification is renewed, the operator instructor may request an extension of certification from SLD. This request must be received by SLD no later than five working days before certification is due to expire. Extension of certification shall be within the discretion of SLD based on good cause having been shown and shall be for a period of not more than 60 days. Certification shall be deemed to have expired at the end of the extension period if the renewal requirements have not been completed satisfactorily.

E. Suspension, revocation or denial.

(1) Certification may be denied for inadequate scores or failure to complete any performance tests or examinations in the manner prescribed by SLD or for any of the reasons set out in Paragraph (2) of Subsection E of 7.33.2.13 NMAC below.

(2) SLD may refuse to certify or may suspend or revoke the certification of any operator instructor for any one or more of the following causes:

- (a) fraud or deceit in applying for or obtaining the certification or renewal thereof;
- (b) loss of professional certification or affiliation;
- (c) any serious or repeated violation of any rule or rule of SLD;
- (d) failure to conduct classes in accordance with the rules and standards of SLD;
- (e) for good cause, including but not limited to perjury, fraud or incompetence;
- (f) as required by New Mexico Parental Responsibility Act (Section 40-5A-1-et. seq. NMSA

1978);

- (g) failure to maintain certification as an operator and key operator;
- (h) failure to demonstrate knowledge as established by SLD to be an operator instructor.

(3) SLD shall provide notice of any proposed adverse action to the instructor and the agency chief.

(4) An operator instructor may request a stay of suspension or revocation for good cause. The request must be in writing and in accordance with Subsection of B of 7.33.2.18 NMAC.

(5) If any operator instructor is denied certification or renewal of certification, they may re-apply for certification 90 days after the denial or final decision of the record review. Subsequent denials will require that six months elapse prior to re-application.

(6) If any operator instructor has had their SLD certification revoked, they may not re-apply for a minimum of one year after the denial or final decision of the record review.

[7.33.2.13 NMAC - Rp, 7.33.2.15 NMAC and 7.33.2.16 NMAC, 04-30-2010]

7.33.2.14 METHODS OF ANALYSIS:

A. Alcohol in blood.

(1) All analytical methods and any modifications of approved analytical methods must be approved in advance by SLD.

(2) The method used shall be capable of analyzing reference samples of known alcohol concentration with accuracy limits of $\pm 10\%$ of the actual blood alcohol concentration if the known alcohol concentration is 0.10 grams per 100 milliliters or more and ± 0.01 grams per 100 milliliters if the known concentration is less than 0.10 grams per 100 milliliters. The method shall also be capable of analyzing reference samples of known alcohol concentration within specificity and precision limits that will be established and reviewed by SLD.

(3) All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood. These results shall be reported to two decimal places except for analyses of standards, controls and proficiency samples, which shall be reported to three decimal places.

B. Drugs in blood.

(1) All analytical methods and any modifications of approved analytical methods must be approved in advance by SLD.

(2) The results of positive tests for drugs other than alcohol shall not be reported until they are confirmed. Confirmation tests must employ an approved method that is different than the one utilized to achieve the initial result unless the confirmation test method has been approved for that use by SLD.

(3) Accuracy limits for the reference samples and proficiencies shall be in accordance with the approved methods for the particular analysis as determined by the accrediting agency.

C. Alcohol in breath samples.

(1) Breath samples shall be collected by certified operators or certified key operators on instruments certified by SLD.

(2) The minimum requirements for an evidential breath sample for implied consent testing are:

- (a) a system blank analysis shall be used preceding each breath sample;

(b) a calibration check using SLD approved solutions and/or gases shall be performed in accordance with the following:

(i) the instrument shall be maintained and calibration checked by the key operator; calibration checks shall be made a minimum of once every seven days; these calibration checks shall consist of checking the instrument with two breath alcohol solutions or gases, one of which shall simulate 0.08 grams per 210 liters BrAC and the other shall simulate a BrAC of greater than 0.15 grams per 210 liters BrAC; satisfactory calibration results must be within ± 10 percent of the listed values for a BrAC of 0.10 grams per 210 liters and above or ± 0.01 for a BrAC below 0.10 grams per 210 liters; or

(ii) a single calibration check using solutions or gases which simulate 0.08 grams per 210 liters shall be performed with each subject test; satisfactory calibration check results must be within ± 0.01 ; these test results shall be valid for the purpose of determining if the subject test is 0.08 grams per 210 liters or more; or

(iii) both Items (i) and (ii) of this subparagraph.

(3) The minimum requirements for a non-implied consent test are:

(a) a system blank preceding each breath sample;

(b) a system blank after each breath sample.

(4) All analytical results shall be reported as grams of alcohol per 210 liters of breath (g /210L).

These results shall be reported to two decimal places except in the case of standards and proficiency samples, which shall be reported to three decimal places.

(5) A chronological log book shall be kept for each instrument to show calibration checks, maintenance, analyses performed, results and identities of the subjects tested, as well as the identities of the persons performing analyses. These records shall be kept on forms provided by SLD. Copies of these records shall be submitted to SLD each month as per Paragraph (4) of Subsection B of 7.33.2.12 NMAC above.

[7.33.2.14 NMAC - Rp, 7.33.2.10 NMAC, 04-30-2010]

7.33.2.15 APPROVED METHODS FOR SAMPLE COLLECTION, ANALYSIS, AND RETENTION:

A. Blood sample collection.

(1) Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. Blood samples shall be collected by veni-puncture as authorized by the New Mexico Implied Consent Act NMSA 1978, Sections 66-8-105 et. seq. The term laboratory technician shall include phlebotomists.

(2) The initial blood samples should be collected within three hours of arrest. Any blood samples collected subsequent to the initial blood or breath sample collection should be collected within 60 minutes of the initial sample collection.

(3) Ethyl alcohol shall not be used as a skin antiseptic in the course of collecting blood samples. The samples shall be dispensed or collected using an SLD-approved blood collection kit. SLD-approved blood collection kit will contain two or more sterile tubes with sufficient sodium fluoride so that the final concentration shall contain not less than 1.0 percent sodium fluoride. In the case of an insufficient sample, it shall be permissible to collect the sample in one tube only.

(4) The blood samples shall be delivered to SLD or a laboratory certified by SLD to conduct tests for alcohol or other drug content. At the laboratory, the seal shall be broken on one tube and the blood shall be analyzed. If necessary it shall be permissible to open more than one sample tube.

(5) The samples of blood shall be retained by the laboratory which performed the initial alcohol or drug testing for a period of not less than six months. Any interested party may request the laboratory retain the samples longer than 6 months. The request must be made in writing and include: the name of the donor of the sample; the date of arrest; the arresting agency; the county of arrest and; if available, any laboratory identification numbers.

(6) Retained samples shall be made available upon receipt of a court order directing the laboratory to release a portion of the remaining sample to a testing facility specified by the requesting party. The laboratory which performed the initial alcohol or drug testing is not responsible for the transport of the retained samples.

B. Breath sample collection.

(1) Samples of the subject's breath shall be collected and analyzed pursuant to the procedures prescribed by SLD and employing only SLD approved equipment and certified instruments.

(2) Breath samples shall be collected and analyzed by certified operators or certified key operators and shall be end expiratory in composition. The breath test operator should make a good faith attempt to collect and analyze at least two samples of breath. Breath shall be collected only after the certified operator or certified key operator has ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to

collection of the first breath sample. If during this time the subject eats, drinks or smokes anything, another 20 minute deprivation period must be initiated. The two breath samples shall be taken not more than 15 minutes apart. If the difference in the results of the two samples exceeds 0.02 grams per 210 liters (BrAC), a third sample of breath or blood shall be collected and analyzed. If the subject declines or is physically incapable of consent for the second or third samples, it shall be permissible to analyze fewer samples.
[7.33.2.15 NMAC - Rp, 7.33.2.12 NMAC, 04-30-2010]

7.33.2.16 SLD LISTS: SLD will maintain lists of the following:

- A. all certified laboratories;
- B. breath alcohol instruments and equipment that have been approved by SLD for use under the New Mexico Implied Consent Act;
- C. approved evidential blood collection devices to ensure the quality of test results.

[7.33.2.16 NMAC - Rp, 7.33.2.19 NMAC and 7.33.2.11 NMAC, 04-30-2010]

7.33.2.17 FEES: For the most current fee list visit the SLD website. SLD reserves the right to charge reasonable fees for the following:

- A. replacement or duplicate operator certification credentials;
- B. replacement or duplicate key operator certification credentials;
- C. replacement or duplicate operator instructor certification credentials.

[7.33.2.17 NMAC - Rp, 7.33.2.13 NMAC and 7.33.2.14 NMAC, 04-30-2010]

7.33.2.18 DENIAL OF CERTIFICATION FOR LABORATORIES, OPERATORS, KEY OPERATORS, OPERATOR INSTRUCTORS AND BREATH ALCOHOL TESTING EQUIPMENT:

A. Record review. All applicants whose certification has been denied, revoked or suspended may request a record review from SLD.

B. Procedure for requesting informal administrative review.

(1) An applicant or certified operator, key operator or operator instructor given notice of a denial, suspension or revocation of their certification or that of their instrument may submit a written request for a record review. To be effective, the written request shall:

- (a) be made within 30 calendar days, as determined by the postmark, from the date of the notice of action issued by SLD;
- (b) be properly addressed to SLD;
- (c) state the applicant's name, address, and telephone numbers;
- (d) state the status of the certification as denied, suspended, or revoked;
- (e) identify the instrument in question and the agency holding the instrument, if applicable; and
- (f) provide a brief narrative rebutting the circumstances of the denial, revocation or suspension.

(2) If the applicant or operator, key operator or operator instructor wishes to submit additional documentation for consideration, such additional documentation must be included with the request for a record review.

C. Record review proceeding. The review proceeding is intended to be an informal non-adversarial administrative review of written documentation. It shall be conducted by an administrative review committee designated for that purpose by SLD. In cases where the administrative review committee finds the need for additional or clarifying information, the review committee shall request that the applicant supply such additional information within the time set forth in the committees' request.

D. Final determination.

(1) Content: the administrative review committee shall render, sign and enter a written decision setting forth the reasons for the decision and the evidence upon which the decision is based.

(2) Effect: the decision of the administrative review committee is the final decision of the informal administrative review proceeding.

(3) Notice: a copy of the decision shall be mailed by registered or certified mail to the applicant/ agency.

E. Judicial review. Judicial review of the administrative review committee's final decision is permitted to the extent provided by law. The party requesting the appeal shall bear the cost of such appeal.

F. Request for hearing and hearing processes and procedure for laboratories.

(1) Any laboratory seeking to contest the denial of certification, denial of recertification, revocation or suspension of certification must request a hearing in writing. The request must be:

- (a) addressed to the director of SLD;
- (b) signed by the laboratory director;
- (c) delivered by hand or mail, return receipt requested; and
- (d) received within ten business days after being served with a notice of proposed action by SLD.

SLD.

(2) SLD will follow the hearing processes and other provisions of 7.1.2.16 NMAC through 7.1.2.43 NMAC as applicable. All references to the "licensing authority" or the "department" in that rule shall be understood and interpreted as references to the department of health and the SLD for purposes of this rule and any hearing relating to the certification of a laboratory by SLD.
[7.33.2.18 NMAC - N, 04-30-2010]

History of 7.33.2 NMAC:

Pre-NMAC History: Material in the part was derived from that previously filed with the commission of public records - state records center and archives:

HED 81-3 (SLD), Emergency Regulations Regarding Certification of Operators for Blood-and-Breath Testing Apparatus, filed 06-30-81.

HED 82-5 (SLD), Regulations Governing Blood and Breath Testing under the Implied Consent Act, filed 12-08-82

HED 87-5 (SLD), Regulations Governing Blood and Breath Testing under the Implied Consent Act, filed 08-25-87

HED 94-12 (SLD), Regulations Governing Blood and Breath Testing under the New Mexico Implied Consent Act, filed 01-23-95.

History of Repealed Material:

7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 10-18-96) repealed 03-14-01.

7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 02-21-01) repealed 04-30-2010.

Other History:

HED 94-12 (SLD), Regulations Governing Blood and Breath Testing under the New Mexico Implied Consent Act, (filed 01-23-95) was renumbered, reformatted, amended and replaced by 7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 10-31-96.

7 NMAC 33.2, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 10-18-96) was replaced by 7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 03-14-01.

7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act (filed 02-21-01) was replaced by 7.33.2 NMAC, Blood and Breath Testing under the New Mexico Implied Consent Act, effective 04-30-2010.