

**TITLE 20 ENVIRONMENTAL PROTECTION**  
**CHAPTER 11 ALBUQUERQUE - BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**  
**PART 49 EXCESS EMISSIONS**

**20.11.49.1 ISSUING AGENCY:** Albuquerque - Bernalillo County Air Quality Control Board, c/o Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2601.

[20.11.49.1 NMAC - N, 10/13/09]

**20.11.49.2 SCOPE:**

**A.** 20.11.49 NMAC is applicable to every stationary source within Bernalillo county.

**B. Exempt:** 20.11.49 NMAC does not apply to sources within Bernalillo county that are located on indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction.

[20.11.49.2 NMAC - N, 10/13/09]

**20.11.49.3 STATUTORY AUTHORITY:** 20.11.49 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-1-5.

[20.11.49.3 NMAC - N, 10/13/09]

**20.11.49.4 DURATION:** Permanent.

[20.11.49.4 NMAC - N, 10/13/09]

**20.11.49.5 EFFECTIVE DATE:** 10/13/09, unless a later date is cited at the end of a section.

[20.11.49.5 NMAC - N, 10/13/09]

**20.11.49.6 OBJECTIVE:** To implement requirements for the reporting of excess emissions [~~and establish affirmative defense provisions for facility owners and operators for excess emissions.~~] for facility owners and operators.

[20.11.49.6 NMAC - N, 10/13/09; A, XX/XX/2016]

**20.11.49.7 DEFINITIONS:** In addition to the definitions in 20.11.49 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.49 NMAC shall govern.

**A. “Air pollution control equipment”** means any device, equipment, process or combination thereof, the operation of which may limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state (e.g. sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection).

**B. “Air quality regulation or permit condition”** means any regulation adopted by the board, including a federal new source performance standard or national emission standard for hazardous air pollutants incorporated by reference, or any condition of an air quality permit issued by the department.

**C. “Bypass”** means the diversion of a regulated air contaminant around air pollution control equipment or process equipment.

**D. “Building, structure, facility, or installation”** means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group ( i.e. , which have the same two-digit code) as described in the *standard industrial classification manual, 1972*, as amended by the 1977 supplement (U.S. government printing office stock numbers 4101-0065 and 003-005-00176-0, respectively).

**E. “Emergency”** means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God or nature, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include

noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.

**F. “Excess emission”** means the emission of an air contaminant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition.

**G. “Malfunction”** means any sudden ~~[and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction.]~~ , infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

**H. [Reserved]**

**I. “Regular business day”** means any day on which city of Albuquerque government offices are open for normal business. Saturdays, Sundays, and ~~[official federal and]~~ city of Albuquerque holidays are not regular business days.

**J. “Shutdown”** means ~~[the cessation of operation of any air pollution control equipment or process equipment.]~~ the cessation of operation of an affected source or portion of an affected source for any purpose.

**K. “Startup”** means ~~[setting into operation any air pollution control equipment or process equipment.]~~ the setting in operation of an affected source or portion of an affected source for any purpose.

**L. “Stationary source” or “source”** means ~~[any building, structure, facility, or installation which emits or may emit a regulated air pollutant.]~~ a structure, building, equipment, facility, installation or operation that emits or may emit an air contaminant.

[20.11.49.7 NMAC - N, 10/13/09; A, XX/XX/2016]

**20.11.49.8 VARIANCES:** [Reserved]

[20.11.49.8 NMAC - N, 10/13/09]

**20.11.49.9 SAVINGS CLAUSE:** Any amendment to 20.11.49 NMAC which is filed with the state records center shall not affect actions pending for violation of a city or county ordinance, or 20.11.49 NMAC. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part, or regulation section in effect at the time the violation was committed.

[20.11.49.9 NMAC - N, 10/13/09]

**20.11.49.10 SEVERABILITY:** If for any reason any section, subsection, sentence, phrase, clause, wording or application of 20.11.49 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States environmental protection agency, the decision shall not affect the validity or application of remaining portions of 20.11.49 NMAC.

[20.11.49.10 NMAC - N, 10/13/09]

**20.11.49.11 DOCUMENTS:** Documents incorporated and cited in 20.11.49 NMAC may be viewed at the Albuquerque environmental health department, 400 Marquette NW, Room 3023, Albuquerque, NM 87102.

[20.11.49.11 NMAC - N, 10/13/09]

**20.11.49.12 COMPLIANCE WITH OTHER REGULATIONS:** Compliance with 20.11.49 NMAC does not relieve a person from the responsibility to comply with any other applicable federal, state, or local statute or regulation.

[20.11.49.12 NMAC - N, 10/13/09]

**20.11.49.13 APPLICABILITY:**

**A.** Any source:

(1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41 NMAC, *Authority-To-Construct*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

**B.** Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions, are not subject to the provisions of 20.11.49 NMAC.

**C.** 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under 20.11.41 NMAC, ~~[*Authority To Construct*;~~ Construction Permits, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*. [20.11.49.13 NMAC - N, 10/13/09; A, XX/XX/2016]

**20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION:** The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. ~~[The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.]~~ If the owner or operator of a source having an excess emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be considered by the department in any resulting enforcement action. [20.11.49.14 NMAC - N, 10/13/09; A, XX/XX/2016]

**20.11.49.15 NOTIFICATION:**

**A.** The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic format. The department may require that the owner or operator of a source provide supplemental information in addition to that already required by 20.11.49.15 NMAC ~~[The additional information shall be reported by the]~~ by a deadline specified by the department.

(1) **Initial excess emission report:** The owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission. The initial report shall include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

(2) **Final excess emission report:** No later than 10 days after the end of the excess emission, the owner or operator shall file a final report that contains specific and detailed information for each item required by Subsection B of 20.11.49.15 NMAC.

**B.** ~~[The]~~ Each excess emission report shall include the following information:

- (1) the name of the source;
- (2) the name of the owner and operator of the source;
- (3) the name and title of the person preparing the report;
- (4) identifying information for the source (e.g. permit and database numbers);
- (5) the specific date(s) ~~[and time(s) the excess emission occurred;]~~ , time(s), and duration of the excess emission;
- (6) identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred;
- (7) the air quality regulation or permit condition that was exceeded;
- (8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition;
- (9) the method for determining the magnitude and duration of the excess emission;
- (10) the cause and nature of the excess emission;
- (11) the steps taken to limit the duration and magnitude of the excess emission;
- (12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for that conclusion.
- (13) the corrective action(s) taken to prevent a recurrence of the excess emission;
- (14) whether the owner or operator attributes the excess emission to malfunction, startup or shutdown;

(15) whether the owner or operator ~~[will claim an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later~~

than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final report, if the department receives a request for an extension from the owner or operator of the source, the department may grant an extension to complete the analysis not to exceed 30 additional days; and] intends to file a supplemental report under Subsections A, B, or C of 20.11.49.16 NMAC; and

(16) the ~~[contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission.]~~ person signing the final report shall certify that it is true, accurate, and complete.

**C.** If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.

**D. Alternative reporting.** If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice.

[20.11.49.15 NMAC - N, 10/13/09; A, XX/XX/2016]

**20.11.49.16** ~~[AFFIRMATIVE DEFENSES:]~~ **EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY**

All periods of excess emissions regardless of cause are violations ~~[of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act. The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.]~~ of the Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.1.49.16 NMAC below must be submitted to the department no later than thirty days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. All supplemental reports must provide sufficient information to show by a preponderance of the evidence that each of the claimed criteria applied. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under section 113 of the act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under section 113 of the act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 of the act.

**A. ~~[Affirmative defense]~~ Supplemental report for an excess emission during malfunction:** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
  - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
  - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

(4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(7) all emission monitoring systems were kept in operation if at all possible;

(8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

(9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the owner or operator complied with ~~the~~ all notification requirements in 20.11.49.15 NMAC.

**B. ~~[Affirmative defense] Supplemental report for an excess emission during startup or~~**

**~~shutdown:~~** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following criteria:

(1) the excess emission occurred during a startup or shutdown;

(2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;

(3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

(7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(8) all emissions monitoring systems were kept in operation if at all possible;

(9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and

(10) the owner or operator complied with ~~the~~ all notification requirements in 20.11.49.15 NMAC.

**C. ~~[Affirmative defense for an emergency.~~**

~~(1) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;~~

~~(b) the source was being properly operated at the time;~~

~~(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology based emission limitation; and~~

~~(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.] **Supplemental report for an emergency:** The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:~~

~~(1) an emergency occurred;~~

- (2) the excess emission occurred during the emergency;
- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;
- (6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (7) at the time the excess emission and emergency occurred, the source was being properly operated;
- (8) during the period of the excess emission, the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and
- (9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken;

~~**[D. Affirmative defenses prohibited.** The affirmative defense provisions of this section shall not be available for:~~

- ~~(1) claims for injunctive relief;~~
- ~~(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;~~
- ~~(3) excess emissions that cause an exceedance of the NAAQS or PSD increments;~~
- ~~(4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or~~
- ~~(5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.]~~

~~**[E. Department's determination of adequacy of affirmative defense.** The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]~~

~~**D. Department's determination of adequacy of supplemental report.** The department may consider any relevant information, including information submitted in a supplemental report, in assessing or negotiating a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion and the department shall not consider information in a supplemental report in any enforcement action seeking:~~

- ~~(1) injunctive relief;~~
- ~~(2) exceedance of limits which already take into account startup and shutdown emissions;~~
- ~~(3) failure to meet federally promulgated emission limits; or~~
- ~~(4) violations of any federally promulgated performance standard.~~

~~[20.11.49.16 NMAC - N, 10/13/09; A, XX/XX/2016]~~

## **20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:**

**A.** Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

- (1) an analysis describing the root cause and all contributing causes of the excess emission; and
- (2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:
  - (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;
  - (b) the estimated cost associated with each corrective action alternative;
  - (c) the probable effectiveness of each corrective action alternative;

(d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and

(e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

**B.** The department shall make the demand for ~~[an]~~ a root cause and corrective action analysis no later than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

**C.** The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant by the department.

**D.** The completed analysis shall be submitted to the department no later than 60 days after the department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

**E.** The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for confidential information protection.

[20.11.49.17 NMAC - N, 10/13/09]

~~[20.11.49.18 — FUTURE ENFORCEMENT ACTION: The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which the department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.~~

~~[20.11.49.18 NMAC - N, 10/13/09]~~

#### **HISTORY OF 20.11.49 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives.

Regulation No. 19, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance; filed 3/24/82.

**History of Repealed Material:** 20.11.90.12 NMAC, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance (filed 8/30/02) was repealed and replaced by 20.11.49 NMAC, effective 10/13/09.