

ALBUQUERQUE-BERNALILLO COUNTY  
AIR QUALITY CONTROL BOARD

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IN THE MATTER OF PETITION TO AMEND  
20.11.49 NMAC – *EXCESS EMISSIONS*

AQCB Petition No.2016-3

Environmental Health Department,  
City of Albuquerque, Petitioner

ENVIRONMENTAL HEALTH DEPARTMENT'S  
PETITION TO AMEND 20.11.49 NMAC – *EXCESS EMISSIONS* AND  
REQUEST ITS REMOVAL FROM THE STATE IMPLEMENTATION PLAN

The City of Albuquerque's Environmental Health Department (“EHD”) petitions the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) to authorize a hearing on EHD's proposed regulatory change to remove affirmative defense provisions from 20.11.49 NMAC, *Excess Emissions*, and make certain minor changes for clarity and consistency. As EHD explains below, this amendment is necessary because the United States Environmental Protection Agency (“EPA”) has taken final action determining that “affirmative defense” provisions in 20.11.49 NMAC (“Part 49”) are substantially inadequate to comply with the federal Clean Air Act (“CAA”) and must be removed from the Albuquerque – Bernalillo County element of the New Mexico State Implementation Plan (“SIP”). This EPA action requires Albuquerque – Bernalillo County to revise the SIP to come back into compliance with the CAA or face possible sanctions. EHD’s proposed draft of a revised 20.11.49 NMAC (“Proposed Rule”) to comply with the EPA determination is attached to this petition.

1. An affirmative defense is a legal concept. Black's Law Dictionary defines "affirmative defense" as, "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."

*Black's Law Dictionary* (10th ed. 2014).<sup>1</sup>

2. Under the current version of 20.11.49 NMAC, an owner or operator may claim an affirmative defense for certain types of "excess emissions," i.e., violations of an emission limit in a regulation or permit. If the owner or operator can prove the facts specified in 20.11.49.16 NMAC, the owner or operator may be relieved of any liability for civil penalties in an administrative or judicial enforcement action for that excess emission.

3. To be excused from civil penalties under the current Part 49, the owner or operator must meet certain criteria in the affirmative defense claim, demonstrating that exceptional, extenuating circumstances existed. Those criteria include showing that the excess emission occurred during one of four specific modes of operation – startup, shutdown, malfunction or emergency. 20.11.49.16(A-C) NMAC. Claiming an affirmative defense requires the owner or operator to demonstrate certain additional facts, e.g., the excess emission is not part of a recurring pattern and the source took all reasonable steps to prevent the excess emission. If the source proves the necessary facts, the owner or operator has established the affirmative defense and will be relieved from civil penalties in an enforcement action by EHD, whether in an administrative or judicial forum.

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<sup>1</sup> A classic example is a statute of limitations which bars a legal claim after a certain amount of time has passed, regardless whether a defendant violated the law. If a defendant can prove that an applicable statute of limitations has lapsed, the defendant would be entitled to dismissal of the alleged violation regardless of the defendant's culpability or the consequences of the violation.

4. EHD enforcement actions, including penalties, are authorized by the state Air Quality Control Act, NMSA 1978 §§ 74-2-12 to 74-2-14; Revised Ordinances of the City of Albuquerque (“ROA”) §§ 9-5-1-14, -15, -98, -99; and Bernalillo County Ordinances, §§ 30-42 to -46. The federal CAA requires states to maintain sufficient legal authority under state law to enforce CAA requirements. *See, e.g.*, CAA, 42 U.S.C.A. §§ 7410(a)(2), 7661a(D).

5. On February 4, 2010, EPA approved Part 49 as part of the Albuquerque – Bernalillo County element of the New Mexico SIP. 75 Fed. Reg. 5,698 (February 4, 2010).

6. EPA has recently determined that affirmative defense provisions in a SIP are not permissible under the CAA. On May 22, 2015, EPA issued a final action, known as a “SIP Call,” determining that affirmative defenses in SIP regulations in 36 states were substantially inadequate to comply with the federal Clean Air Act. *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33,840 at 33,844 (June 12, 2015). The affected states have until November 22, 2016 to submit to EPA a proposed revision to bring the SIP back into compliance with the CAA. *Id.* at 33,848. Failure to do so may result in EPA issuing a Federal Implementation Plan. EPA may also impose sanctions under the CAA, 42 U.S.C. § 7509(b), including restrictions on federal highway funding. *Id.*

7. The Albuquerque-Bernalillo County portion of the New Mexico SIP was included in EPA’s SIP Call. 80 Fed. Reg. at 33,968. Thus, Part 49 must be amended. *Id.*

8. EPA’s SIP Call says that affirmative defense provisions in a SIP violate the CAA because they unlawfully limit the jurisdiction and enforcement discretion of EPA, citizens, or federal courts under CAA, 42 U.S.C. §§ 7413 and 7604. 80 Fed. Reg. 33845, 33847.

9. EPA identifies three affirmative defense provisions in 20.11.49 NMAC that violate the CAA for the above described reasons. These provisions are: 20.11.49.16(A), 20.11.49.16(B), and 20.11.49.16(C) NMAC. 80 Fed. Reg. at 33,968 and *see, e.g., State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal to Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States*, 79 Fed. Reg. 55,920, at 55,930 and 55,944 (September 17, 2014).

10. EPA states that removal of these provisions from the SIP would bring the regulation back into CAA compliance. Such removal would make certain other provisions superfluous and thus EPA recommends removing them as well: 20.11.49.15(B), -16(D), -16(E), -18 NMAC. 80 Fed. Reg. at 33,968.

11. Beyond recommending removal of the above provisions from the SIP, EPA's SIP Call offers additional guidance on substituting new, CAA-compliant provisions to replace affirmative defense provisions. *See, e.g.,* 80 Fed. Reg. 33,978 to 33,982. Among other things, EPA notes that states may replace affirmative defense provisions with enforcement discretion criteria to guide, but not bind, state air agency personnel in the exercise of their enforcement discretion when addressing excess emissions violations. *Id.* at 33,980. Enforcement discretion criteria for these circumstances must apply only to state or local enforcement actions, not to EPA, citizens, or the courts. *Id.* at 33,981.

12. In consultation with EPA, EHD has drafted its Proposed Rule to meet all of the above requirements. EHD's Proposed Rule removes all affirmative defense provisions from the regulation and replaces them with Albuquerque-Bernalillo County-only enforcement discretion criteria as recommended by EPA. EHD's proposed draft also makes certain minor changes for clarity and consistency.

13. As required by 20.11.82.18(B) NMAC, EHD's Proposed Rule is attached to this petition and indicates the proposed regulatory changes in legislative-edit form, with strike-through and underlines to indicate amended language. See EHD's Proposed Rule, p. 1, ln 28-30; p. 2, ln 54, 56; p. 3 ln 5-12, 17-22, 25, 28, 32-34, 48-49, 50-56; p. 4, ln 1-3, 11, 13-48; p. 5, 13-22, 39-56; p. 6, 1-45; p. 7, ln 7, 18, 20-25.

14. EPA has recommended removal of the entire 20.11.49 NMAC from the SIP because the federal Clean Air Act does not require a SIP to contain enforcement discretion provisions related to excess emissions.

15. If the Air Board adopts EHD's Proposed Rule, EHD also petitions the Air Board to authorize EHD to request that EPA remove 20.11.49 NMAC from the SIP. The revised version of 20.11.49 NMAC, as reflected in EHD's Proposed Rule, would then be effective as state law but not federal law.

16. The Air Board is authorized to adopt this proposed regulatory change under NMSA 1978 § 74-2-5(B)(1), Revised Ordinances of the City of Albuquerque § 9-5-1-4, and Bernalillo County Ordinances § 30-33.

17. EHD estimates that the hearing will take no more than one hour.

18. EHD requests permission to provide a court reporter for the hearing.

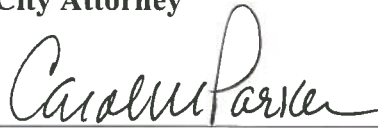
19. EHD requests that the Air Board designate a hearing officer for the hearing.

Wherefore, EHD requests that the Air Board,

- a. Authorize a hearing to consider:
  - i. whether to adopt EHD's Proposed Rule;
  - ii. whether to authorize EHD to request that EPA remove Part 49 from the State Implementation Plan;
- b. Designate a hearing officer;
- c. Authorize EHD to provide a court reporter for its hearing.

Respectfully submitted,

**CITY OF ALBUQUERQUE**  
**Jessica M. Hernandez**  
**City Attorney**



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**CERTIFICATE OF SERVICE**

I certify that an original and fifteen copies of this *Petition to Amend 20.11.49 NMAC* were hand-delivered on June 27, 2016, to:

Andrew Daffern, Hearing Clerk  
Albuquerque-Bernalillo County Air  
Quality Control Board  
One Civic Plaza, NW, Room 3023  
Albuquerque, New Mexico 87103



Carol M. Parker  
Assistant City Attorney

250235

1 **TITLE 20 ENVIRONMENTAL PROTECTION**  
2 **CHAPTER 11 ALBUQUERQUE - BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**  
3 **PART 49 EXCESS EMISSIONS**  
4

5 **20.11.49.1 ISSUING AGENCY:** Albuquerque - Bernalillo County Air Quality Control Board, c/o  
6 Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-  
7 2601.

8 [20.11.49.1 NMAC - N, 10/13/09]  
9

10 **20.11.49.2 SCOPE:**

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

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

14 [20.11.49.2 NMAC - N, 10/13/09]  
15

16 **20.11.49.3 STATUTORY AUTHORITY:** 20.11.49 NMAC is adopted pursuant to the authority provided in  
17 the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air Quality Control Board  
18 Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board  
19 Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-1-5.

20 [20.11.49.3 NMAC - N, 10/13/09]  
21

22 **20.11.49.4 DURATION:** Permanent.

23 [20.11.49.4 NMAC - N, 10/13/09]  
24

25 **20.11.49.5 EFFECTIVE DATE:** 10/13/09, unless a later date is cited at the end of a section.

26 [20.11.49.5 NMAC - N, 10/13/09]  
27

28 **20.11.49.6 OBJECTIVE:** To implement requirements for the reporting of excess emissions [and establish  
29 affirmative defense provisions] for facility owners and operators[ for excess emissions].

30 [20.11.49.6 NMAC - N, 10/13/09; A, XX XX 16]  
31

32 **20.11.49.7 DEFINITIONS:** In addition to the definitions in 20.11.49 NMAC, the definitions in 20.11.1  
33 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.49 NMAC shall  
34 govern.

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

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

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

45 D. **“Building, structure, facility, or installation”** means all of the pollutant-emitting activities  
46 which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are  
47 under the control of the same person (or persons under common control) except the activities of any vessel.  
48 Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same  
49 major group ( i.e. , which have the same two-digit code) as described in the *standard industrial classification*  
50 *manual, 1972*, as amended by the 1977 supplement (U.S. government printing office stock numbers 4101-0065 and  
51 003-005-00176-0, respectively).

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



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

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

5 G. "Malfunction" means any sudden and unavoidable failure of air pollution control equipment or  
6 process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown.  
7 A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable  
8 equipment breakdown shall not be considered a malfunction.

9 H. [Reserved]

10 I. "Regular business day" means any day on which city of Albuquerque government offices are  
11 open for normal business. Saturdays, Sundays, and official federal and city of Albuquerque holidays are not regular  
12 business days.

13 J. "Shutdown" means the cessation of operation of any air pollution control equipment or process  
14 equipment.

15 K. "Startup" means setting into operation any air pollution control equipment or process equipment.

16 L. "Stationary source" or "source" means any building, structure, facility, or installation which  
17 emits or may emit a regulated air pollutant.

18 [20.11.49.7 NMAC - N, 10/13/09]

19  
20 **20.11.49.8 VARIANCES:** [Reserved]

21 [20.11.49.8 NMAC - N, 10/13/09]

22  
23 **20.11.49.9 SAVINGS CLAUSE:** Any amendment to 20.11.49 NMAC which is filed with the state records  
24 center shall not affect actions pending for violation of a city or county ordinance, or 20.11.49 NMAC. Prosecution  
25 for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part, or  
26 regulation section in effect at the time the violation was committed.

27 [20.11.49.9 NMAC - N, 10/13/09]

28  
29 **20.11.49.10 SEVERABILITY:** If for any reason any section, subsection, sentence, phrase, clause, wording or  
30 application of 20.11.49 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States  
31 environmental protection agency, the decision shall not affect the validity or application of remaining portions of  
32 20.11.49 NMAC.

33 [20.11.49.10 NMAC - N, 10/13/09]

34  
35 **20.11.49.11 DOCUMENTS:** Documents incorporated and cited in 20.11.49 NMAC may be viewed at the  
36 Albuquerque environmental health department, 400 Marquette NW, Room 3023, Albuquerque, NM 87102.

37 [20.11.49.11 NMAC - N, 10/13/09]

38  
39 **20.11.49.12 COMPLIANCE WITH OTHER REGULATIONS:** Compliance with 20.11.49 NMAC does  
40 not relieve a person from the responsibility to comply with any other applicable federal, state, or local statute or  
41 regulation.

42 [20.11.49.12 NMAC - N, 10/13/09]

43  
44 **20.11.49.13 APPLICABILITY:**

45 A. Any source:

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

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

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

53 C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under  
54 20.11.41 NMAC [~~Authority-To-Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61  
55 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

56 [20.11.49.13 NMAC - N, 10/13/09; A, XX/XX/16]

1  
2 **20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION:** The emission of a regulated air  
3 pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit  
4 condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be  
5 subject to an enforcement action. ~~[The owner or operator of a source having an excess emission shall, to the extent~~  
6 ~~practicable, operate the source, including associated air pollution control equipment, in a manner consistent with~~  
7 ~~good air pollution control practices for minimizing emissions.] If the owner or operator of a source having an excess~~  
8 ~~emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all~~  
9 ~~appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration~~  
10 ~~and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be~~  
11 ~~considered by the department in any resulting enforcement action.~~  
12 [20.11.49.14 NMAC - N, 10/13/09; A, XX/XX/16]  
13

14 **20.11.49.15 NOTIFICATION:**

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

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

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

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

- 29 (1) the name of the source;  
30 (2) the name of the owner and operator of the source;  
31 (3) the name and title of the person preparing the report;  
32 (4) identifying information **for the source** (e.g. permit and database numbers);  
33 (5) the specific date(s) ~~[and time(s) the excess emission occurred;]~~ **time(s), and duration of the**  
34 **excess emission;**  
35 (6) identification of the equipment involved and the emission point(s) (including bypass) from which  
36 the excess emission occurred;  
37 (7) the air quality regulation or permit condition that was exceeded;  
38 (8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the  
39 units of the air quality regulation or permit condition;  
40 (9) the method for determining the magnitude and duration of the excess emission;  
41 (10) the cause and nature of the excess emission;  
42 (11) the steps taken to limit the duration and magnitude of the excess emission;  
43 (12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more  
44 corrective actions are required, the report shall include a schedule for implementation of those actions, with  
45 associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for  
46 that conclusion.  
47 (13) the corrective action(s) taken to prevent a recurrence of the excess emission;  
48 (14) whether the owner or operator attributes the excess emission to malfunction, startup~~[-of]~~ ,  
49 shutdown **or emergency;**  
50 (15) whether the owner or operator ~~[will claim an affirmative defense under Subsections A, B or C of~~  
51 ~~20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason~~  
52 ~~shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later~~  
53 ~~than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final~~  
54 ~~report, if the department receives a request for an extension from the owner or operator of the source, the department~~  
55 ~~may grant an extension to complete the analysis not to exceed 30 additional days; and] intends to file a supplemental~~  
56 ~~report under Subsections A, B, or C of 20.11.49.16 NMAC; and~~



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

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

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

11 [20.11.49.15 NMAC - N, 10/13/09; A, XX/XX/16]

12  
13 **20.11.49.16 [AFFIRMATIVE DEFENSES:] EXCESS EMISSIONS DURING STARTUP, SHUTDOWN,**  
14 **MALFUNCTION, OR EMERGENCY:** All periods of excess emissions regardless of cause are violations ~~[of the~~  
15 ~~act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated~~  
16 ~~thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative~~  
17 ~~defense to owners and operators for civil or administrative penalty actions brought for excess emissions during~~  
18 ~~periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16~~  
19 ~~NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act. The~~  
20 ~~department may require the owner or operator of a source to provide supplemental information in addition to that~~  
21 ~~already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by~~  
22 ~~the department.] of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit.~~  
23 ~~The owner or operator of a source who contends that an excess emission occurred during startup, shutdown,~~  
24 ~~malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in~~  
25 ~~Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental~~  
26 ~~report described in Subsections A, B, or C of 20.1.49.16 NMAC below must be submitted to the department no later~~  
27 ~~than thirty days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department~~  
28 ~~may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends~~  
29 ~~that enforcement action for an excess emission is not warranted must provide information in a supplemental report~~  
30 ~~as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the~~  
31 ~~department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The~~  
32 ~~department may require the owner or operator of a source to provide further information in addition to that already~~  
33 ~~contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the~~  
34 ~~supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable~~  
35 ~~in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not~~  
36 ~~be construed to preclude EPA or federal court jurisdiction under section 113 of the federal act to assess civil~~  
37 ~~penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the~~  
38 ~~statutory factors for the assessment of civil penalties under section 113 of the federal act, or to interfere with the~~  
39 ~~rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 of~~  
40 ~~the federal act.~~

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 **C. ~~[Affirmative defense] Supplemental report for an emergency:~~**

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

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

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

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

49 ~~\_\_\_\_\_ (d) the owner or operator fulfilled the notification requirements under Subsection A of~~  
50 ~~20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective~~  
51 ~~actions taken.~~

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

55 ~~\_\_\_\_\_ (1) an emergency occurred;~~

56 ~~\_\_\_\_\_ (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.** Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for an excess emission. 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 involving:~~

- ~~\_\_\_\_\_ (1) injunctive relief;~~
- ~~\_\_\_\_\_ (2) exceedance of limits which already take into account startup and shutdown emissions;~~
- ~~\_\_\_\_\_ (3) exceedance of the NAAQS or PSD increments;~~
- ~~\_\_\_\_\_ (4) failure to meet federally promulgated emission limits, including, but not limited to, emission limits in 40 CFR Parts 60, 61 and 63; or~~
- ~~\_\_\_\_\_ (5) violation of any requirement that derives from 40 CFR Parts 60, 61, and 63 or any other federally promulgated performance standard or emission limit.~~

~~[20.11.49.16 NMAC - N, 10/13/09; A, XX/XX/16]~~

**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;

1 (b) the estimated cost associated with each corrective action alternative;  
2 (c) the probable effectiveness of each corrective action alternative;  
3 (d) if no corrective action alternatives are available, a clear explanation providing an adequate  
4 justification for that conclusion; and  
5 (e) if one or more corrective actions are identified, a schedule for implementation and progress  
6 reports.

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

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

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

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

18 [20.11.49.17 NMAC - N, 10/13/09; A, XX/XX/16]

19  
20 **20.11.49.18** ~~[FUTURE ENFORCEMENT ACTION: The department may commence an administrative or~~  
21 ~~judicial enforcement action against the owner or operator of a source for an excess emission for which the~~  
22 ~~department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines~~  
23 ~~that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal~~  
24 ~~operation, or other appropriate reason.] [Reserved]~~

25 [20.11.49.18 NMAC - N, 10/13/09; Repealed, XX/XX/16]

26  
27 **HISTORY OF 20.11.49 NMAC:**

28 **Pre-NMAC History:** The material in this part was derived from that previously filed with the Commission of  
29 Public Records - State Records Center and Archives.  
30 Regulation No. 19, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance; filed 3/24/82.

31  
32 **History of Repealed Material:** 20.11.90.12 NMAC, Breakdown, Abnormal Operating Conditions, or Scheduled  
33 Maintenance (filed 8/30/02) was repealed and replaced by 20.11.49 NMAC, effective 10/13/09.