

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 7 VARIANCE PROCEDURE

20.11.7.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, c/o Environmental Health Department, P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-2600. [3/24/82. . .12/1/95; 20.11.7.1 NMAC - Rn, 20 NMAC 11.07.I.1, 10/1/02; A, 8/1/04]

20.11.7.2 SCOPE:

A. 20.11.7 NMAC establishes procedures and criteria for obtaining a variance from a limitation or other requirement (together referred to as “limitation” in 20.11.7 NMAC) prescribed under the Air Quality Control Act, a regulation of the Albuquerque-Bernalillo county air quality control board or a permit condition imposed by the department. However, the board cannot grant a variance from federal requirements in 20.11.8 NMAC, 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC, 20.11.62 NMAC, 20.11.63 NMAC and 20.11.64 NMAC. Granting or approval of a variance by the board does not mean automatic approval by the EPA.

B. Exempt: 20.11.7 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. [12/1/95; 20.11.7.2 NMAC - Rn, 20 NMAC 11.07.I.2, 10/1/02; A, 8/1/04]

20.11.7.3 STATUTORY AUTHORITY: 20.11.7 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 and 74-2-8; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5 Sections 3, 4 and 8; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 Sections 9-5-1-3, 9-5-1-4 and 9-5-1-8. [3/24/82. . .12/1/95; 20.11.7.3 NMAC - Rn, 20 NMAC 11.07.I.3, 10/1/02; A, 8/1/04]

20.11.7.4 DURATION: Permanent. [12/1/95; 20.11.7.4 NMAC - Rn, 20 NMAC 11.07.I.4, 10/1/02]

20.11.7.5 EFFECTIVE DATE: December 1, 1995, unless a later date is cited at the end of a section. [12/1/95; 20.11.7.5 NMAC - Rn, 20 NMAC 11.07.I.5 & A, 10/1/02]

20.11.7.6 OBJECTIVE: The objective of 20.11.7 NMAC is to establish procedures and criteria by which a petitioner may seek a variance from a limitation prescribed under the Air Quality Control Act, a regulation of the Albuquerque-Bernalillo county air quality control board or a permit condition imposed by the department. However, the board cannot grant a variance from federal requirements in 20.11.8 NMAC, 20.11.41 NMAC, 20.11.42 NMAC, 20.11.60 NMAC, 20.11.61 NMAC, 20.11.62 NMAC, 20.11.63 NMAC and 20.11.64 NMAC. [12/1/95; 20.11.7.6 NMAC - Rn, 20 NMAC 11.07.I.6, 10/1/02; A, 8/1/04]

20.11.7.7 DEFINITIONS: In addition to the definitions in 20.11.7.7 NMAC, the definitions 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.7 NMAC shall govern.

A. “Division” means the air quality division of the city of Albuquerque environmental health department or its successor agency.

B. “Ex parte contact” means oral or other communication with a board member or the board hearing officer regarding the merits of a pending variance petition if the contact occurs between the date the petition for variance is filed and the conclusion of the variance procedure, and if the contact is intended to or may affect the board member’s or hearing officer’s opinion regarding the merits of the pending variance petition.

C. “Petitioner” means a person seeking a variance from a limitation of the Air Quality Control Act, the City of Albuquerque Joint Air Quality Control Board ordinance, the Bernalillo County Joint Air Quality Control Board ordinance, a regulation of the Albuquerque-Bernalillo county air quality control board, or a permit condition imposed by the department.

D. “Prima facie case” means evidence submitted by the petitioner during a hearing if the evidence is sufficient on its face to entitle the petitioner to prevail, before adverse evidence is presented at the hearing. [12/1/95; 20.11.7.7 NMAC - Rn, 20 NMAC 11.07.I.7, 10/1/02; A, 8/1/04]

20.11.7.8 VARIANCES: [Reserved]

[12/1/95; 20.11.7.8 NMAC - Rn, 20 NMAC 11.07.I.8, 10/1/02]

20.11.7.9 SAVINGS CLAUSE: Any amendment to 20.11.7 NMAC that is filed with the state records center shall not affect actions pending for violation of the Air Quality Control Act, a city of Albuquerque or county of Bernalillo ordinance, a regulation of the board or any permit condition imposed by the department. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, regulation or permit condition in effect at the time the violation was committed.

[12/1/95; 20.11.7.9 NMAC - Rn, 20 NMAC 11.07.I.9, 10/1/02; A, 8/1/04]

20.11.7.10 SEVERABILITY: If any section, paragraph, sentence, clause, or word of 20.11.7 NMAC is for any reason held to be unconstitutional or otherwise invalid by any court, the decision shall not affect the validity of remaining provisions of 20.11.7 NMAC.

[12/1/95; 20.11.7.10 NMAC - Rn, 20 NMAC 11.07.I.10, 10/1/02; A, 8/1/04]

20.11.7.11 DOCUMENTS: Documents incorporated and cited in 20.11.7 NMAC may be viewed at the Albuquerque Environmental Health Department, 400 Marquette NW, Albuquerque, NM.

[12/1/95; 20.11.7.11 NMAC - Rn, 20 NMAC 11.07.I.11 & A, 10/1/02; A, 8/1/04]

20.11.7.12 PETITION FOR VARIANCE - FEE:

A. A person seeking a variance from a regulation of the board or a permit condition imposed by the department shall do so by delivering a written petition for variance to the director and the division manager. The petitioner shall use petition forms obtained from the department. The petition form shall include information regarding how the public may obtain additional information from the division regarding the petition, including information regarding the date, time and place of any variance petition hearing before the board.

B. Petitions shall:

(1) be delivered to the director and the division manager within 30 consecutive days after the date the petitioner had actual or constructive knowledge of the limitation regarding which the petitioner is seeking a variance;

(2) state the petitioner's name, address, telephone number, and, if available, facsimile number, cellular telephone number and other contact information;

(3) state the date the petition is delivered to the director and the division manager;

(4) describe the facility or activity regarding which the variance is sought, if applicable;

(5) state the address or description of the property upon which the facility is located, if applicable;

(6) identify and provide a citation to the limitation prescribed by the Air Quality Control Act, the regulation of the board or the permit condition imposed by the department regarding which the variance is sought;

(7) state in detail the extent to which the petitioner wishes to vary from the limitation;

(8) state why the petitioner believes the variance is justified and can be approved by the board consistent with the requirements of the Air Quality Control Act, specifically, Subsections A and B of 74-2-8 NMSA 1978, Variances;

(9) state any time periods, limitations and other conditions that must be included in the variance in order to comply with Subsection C of 74-2-8 NMSA 1978; and

(10) be signed by the petitioner or by a person who is authorized to sign on the petitioner's behalf. If the person signing is not the petitioner, the person signing shall state in writing the source of the authority to sign on petitioner's behalf and shall attach the proof of authority to the petition that is delivered to the division manager.

C. The fee for filing a variance petition that is required by Subsection J of 20.11.2.18 NMAC shall accompany the copy of the petition that is delivered to the division manager.

D. No later than five consecutive days after the petitioner delivers a copy of the variance petition to the director and division manager, the petitioner shall send by certified mail a copy of the variance petition to the president of each city of Albuquerque and county of Bernalillo neighborhood association within one-half mile of the existing or proposed stationary source or location, if any, that is the subject of the petition for variance. When it is considered to be warranted, because of the characteristics and mobility of the pollutant(s) and density of the population, the department and the petitioner may agree that the petitioner will notify by certified mail additional neighborhood associations beyond the one-half mile line. The address of each president shall be obtained from the city of Albuquerque government and the county of Bernalillo government, as applicable. The petitioner shall pay all costs related to the mailing. If the petitioner receives notice from the United States postal service that a certified letter was not delivered, the petitioner shall make a second, good faith effort to determine the valid neighborhood

association contact and mailing address, and the petitioner shall mail or hand deliver a copy of the variance petition to that person. The petitioner shall complete a proof of delivery form obtained from the division, attach documentation establishing delivery of a copy of the petition and any additional good faith efforts to deliver, and shall deliver the completed proof of delivery form and related documentation to the division seven consecutive days before the start of the evidentiary phase of the variance petition hearing.

[3/24/82. . .12/1/95; 20.11.7.12 NMAC - Rn, 20 NMAC 11.07.I.12 & Repealed, 10/1/02; Rn, 20 NMAC 11.07.II.1, 10/1/02; A, 8/1/04; A, 11/1/04]

20.11.7.13 ACTION BY THE DIRECTOR:

A. Within 15 consecutive days after receipt of the variance petition, the director shall promptly investigate and evaluate the petition, deliver a written recommendation to each member of the board, and mail a copy of the recommendation to the petitioner by certified mail. The director may deliver a second copy of the recommendation to the petitioner by facsimile or hand delivery. When the circumstances justify, the director may extend the period of time by which the director must submit the director's recommendation to the board. The director shall notify the board and the petitioner in writing of the length of the extension and the reason for the extension. Sufficient reasons for an extension shall include failure by the petitioner to provide technical information necessary for the director to determine whether to recommend that the board grant or deny a variance.

B. The director's recommendation shall:

- (1) state the date that the recommendation is made;
- (2) state the director's recommendation; and
- (3) state the director's reason for the recommendation.

[3/24/82. . .12/1/95; 20.11.7.13 NMAC - Rn, 20 NMAC 11.07.II.2, 10/1/02; A, 8/1/04]

20.11.7.14 PETITIONER, DIRECTOR AND BOARD DEADLINES AND ACTIONS:

A. When the board receives the director's written recommendation, if the director recommends that the board grant a variance in whole or in part, then the board shall hold a public variance hearing. The board shall meet and decide whether to appoint a board hearing officer for the evidentiary phase of the board variance hearing, whether any hearing officer shall provide the board with proposed findings of fact and conclusions of law and a recommended decision, and the date, time and place the board will make a final decision regarding the variance petition. The board shall make a final decision regarding the variance petition no sooner than 20 consecutive days after the petitioner receives the director's recommendation required by 20.11.7.13 NMAC, and no later than 65 consecutive days after the board receives the director's recommendation that the board grant a variance in whole or in part.

B. Within 10 consecutive days after the board makes the procedural decisions required by Subsection A of 20.11.7.14 NMAC, the board shall send notice by certified mail to the petitioner regarding the date, time and place of the evidentiary phase of the hearing, and the date, time and place the board will make a final decision regarding the variance petition. Within the same 10-day period, the board shall deliver a copy of the notice to the division manager. The board may also deliver a second copy of the hearing notice to the petitioner by facsimile or hand delivery.

C. When the board receives the director's written recommendation, if the director is opposed to the board granting the variance as requested by the petitioner, the board shall only hold a public variance hearing if the board receives a timely written request for hearing from the petitioner. The petitioner shall deliver a written request for a board variance hearing to the director and the division manager within 15 consecutive days after the petitioner receives the director's recommendation that the board deny the variance. If the petitioner delivers a timely written request for a board variance hearing to the director and the division manager, the board shall meet and decide whether to appoint a board hearing officer for the evidentiary phase of the board variance hearing, whether any hearing officer shall provide the board with proposed findings of fact and conclusions of law and a recommended decision, and the date, time and place the board will make a final decision regarding the variance petition. The board shall make a final decision regarding the variance petition no sooner than 20 consecutive days after the petitioner delivers a timely written request for a board variance hearing as required by Subsection C of 20.11.7.14 NMAC, and no later than 80 consecutive days after the board receives the director's recommendation that the board not grant the variance.

D. Within 10 consecutive days after the board makes the procedural decisions required by Subsection C of 20.11.7.14 NMAC, the board shall send notice by certified mail to the petitioner regarding the date, time and place of the evidentiary phase of the hearing, and the date, time and place the board will make a final decision regarding the variance petition. Within the same 10-day period, the board shall deliver a copy of the notice to the

division manager. The board may also deliver a second copy of the hearing notice to the petitioner by facsimile or hand delivery.

E. If the petitioner fails to deliver a timely request for a board variance hearing as required by Subsection C of 20.11.7.14 NMAC, the petition shall be deemed denied, with prejudice.

[3/24/82. . .12/1/95; 20.11.7.14 NMAC - Rn, 20 NMAC 11.07.II.3, 10/1/02; A, 8/1/04; A, 11/1/04]

20.11.7.15 NOTICE:

A. At least 14 consecutive days before the beginning of the evidentiary phase of a board variance hearing, the board shall publish notice of the subject of the variance hearing in a newspaper of general circulation in Bernalillo county, and shall also publish the date, time and place of the evidentiary phase of the hearing and the date, time and place the board will make a final decision regarding the variance petition.

B. The director shall maintain a file of persons who have delivered to the director a written statement of their interest in variance hearings. The director shall make a reasonable effort to mail notice to all persons who have delivered a written statement of interest within the previous 12 months. The director shall mail written notice regarding variance recommendations made by the director, upcoming variance hearings before the board, and variance decisions made by the board.

[3/24/82. . .12/1/95; 20.11.7.15 NMAC - Rn, 20 NMAC 11.07.II.4, 10/1/02; A, 8/1/04]

20.11.7.16 HEARINGS - ACTIONS BY BOARD - WRITTEN ORDER:

A. Board variance hearings shall be public and shall be held at a public facility with public seating available.

B. Between the dates the petition for variance is filed and the conclusion of the variance procedure, no ex parte contact shall be made with a board member or the board's hearing officer. No board member or board hearing officer shall knowingly accept or participate in ex parte contact with any person regarding the merits of a pending proceeding unless the petitioner, the department and all other parties are present.

C. The board may designate a hearing officer to take evidence at the evidentiary phase of the variance hearing, and may designate a hearing officer to conduct the entire variance hearing. The board may direct the hearing officer to provide the board with proposed findings of fact, proposed conclusions of law and a recommended decision. A board member shall review the hearing officer's proposed findings, conclusions and recommended decision before the board member makes a final decision regarding the variance petition.

D. A record shall be made at each variance hearing. If the board directs a hearing officer to hold the evidence phase of a board variance hearing, and if any of the board members who will make a decision regarding the petition for variance are absent during the evidence phase of the hearing, then the absent board members shall be provided with an audio recording or transcription of the evidence phase, and the hearing record will be made available to the absent board members before the absent members make a decision regarding the variance.

E. In a board variance hearing, the petitioner has the burden of proof, which requires the petitioner to present a prima facie case. The petitioner shall present the petitioner's case first and must prove by a preponderance of evidence the facts the petitioner is relying on to justify the relief the petitioner seeks in the petition for variance.

If the petitioner has not established a prima facie case, the board shall dismiss or deny the petition for variance, and no other person shall be required to present evidence in opposition to the petition. If the petitioner has established a prima facie case, then any person opposed to the relief sought in the petition may present evidence in opposition to the petition to show why the petition should not be granted.

F. A petitioner may represent himself at the hearing or be represented by any other individual authorized to represent the petitioner.

G. In variance hearings, the technical rules of evidence and rules of civil procedure shall not apply, but the hearings shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The board may require reasonable substantiation of statements or records tendered and may require any view to be stated in writing when the circumstances justify.

H. At the hearing, the board shall allow all persons a reasonable opportunity to submit non-technical written and oral evidence and arguments and to introduce non-technical exhibits. Persons ***including the petitioner, but not the division for purposes of this sentence, who want to*** present oral or written technical evidence must deliver a timely statement of intent to present technical evidence as required in Subsection I of 20.11.7.16 NMAC. No later than five business days before the beginning of the evidentiary phase of the board variance hearing begins, if the division wants to present oral or written technical evidence, the division must deliver to the petitioner a statement of intent as required in Paragraphs (1) through (6) of Subsection I of 20.11.7.16 NMAC.

I. No later than five business days before the beginning of the evidentiary phase of the board variance hearing begins, any person who wishes to present oral or written technical evidence shall deliver a statement of intent to the director on a form obtained from the division. The statement of intent to present technical evidence shall include:

- (1) the name of the person filing the statement;
- (2) an indication of whether the person filing the statement supports or opposes the petition at issue;
- (3) the name of each witness;
- (4) an estimate of the length of the direct testimony of each witness;
- (5) a list of exhibits, if any, to be offered into evidence at the hearing; and
- (6) a summary or outline of the anticipated direct testimony of each witness.

J. The petitioner, the division and any person at the hearing other than a board member may call witnesses and introduce exhibits. The petitioner, the division, board members and any person present at the hearing may cross-examine any person who testifies.

K. No variance shall be granted until the board has considered the relative interests of the petitioner, other owners of property likely to be affected by the variance if granted, or any discharge involved, and the interests of the general public.

L. The board may grant the requested variance, in whole or in part, or may deny the variance. The decision made by the board shall be by written order and, at the sole discretion of the board, may be issued by the board at the end of the hearing or by the next regularly scheduled board meeting after the variance hearing is closed, or, if the hearing was conducted before a hearing officer, by the next regularly scheduled board meeting after the date the transcript of the hearing and exhibits are available for review by board members who were absent from the hearing. A copy of the board's order shall be mailed to the petitioner by certified mail. The board shall send notice of the board's decision by regular mail to all persons who appeared before, or were represented at the hearing.

M. Orders of the board shall:

- (1) state the petitioner's name and address;
- (2) state the date the order is made;
- (3) describe the facility for which the variance is sought, if applicable;
- (4) identify the limitation prescribed under the Air Quality Control Act, the regulation of the board, or the permit condition imposed by the department regarding which the variance was sought;
- (5) state the decision of the board;
- (6) if a variance is granted, state the period of time for which it is granted and specify a compliance schedule, if applicable; and
- (7) state the reasons for the board's decision including whether and for what reasons the board has found, upon presentation of adequate proof, both (a) that compliance with the requirement of the Air Quality Control Act, the board regulation or the permit condition regarding which the variance is being granted either will result in an arbitrary and unreasonable taking of property or will impose an undue economic burden upon a lawful business, occupation or activity, and (b) that the granting of the variance will not either result in a condition injurious to health or safety, or cause or contribute to an air contaminant level in excess of any primary national ambient air quality standards; the order of the board also shall state that the board's decision regarding the variance petition complies with all applicable requirements of NMSA 1978 Section 74-2-8.

N. The director shall maintain a file of all variance orders issued by the board. The file shall be open for public inspection.

O. The requirements of 20.11.7.16 NMAC shall apply to the stay hearing authorized by Subsection B of 20.11.7.18 NMAC.

[3/24/82. . .12/1/95; 20.11.7.16 NMAC - Rn, 20 NMAC 11.07.II.5, 10/1/02; A, 8/1/04]

20.11.7.17 EFFECT OF ORDER OF BOARD - FAILURE TO APPEAR AT HEARING:

A. An order of the board is a final administrative decision and bars the petitioner from petitioning for the same variance without specific permission from the board. At a public hearing by the board to consider again petitioner's proposal regarding the same variance, the board may consider, among other things, the development of new information and techniques to be sufficient justification for hearing a second petition.

B. If the petitioner or his authorized representative fails to appear at a public hearing on the variance petition, the board shall proceed with the hearing on the basis of the petition.

[3/24/82. . .12/1/95; 20.11.7.17 NMAC - Rn, 20 NMAC 11.07.II.6, 10/1/02; A, 8/1/04]

20.11.7.18 STAY OF ENFORCEMENT:

A. From the date the petition for variance is delivered to the director and the division manager until the board takes final action on the petition for variance, the petitioner may file a motion for stay with the board, requesting a stay from enforcement action by the department. The board shall only grant the stay of enforcement if the motion for stay establishes:

- (1) the likelihood that the petitioner will prevail on the merits of the petition for variance;
- (2) a showing of irreparable harm to the petitioner unless the stay is granted;
- (3) evidence that no substantial harm will result to other interested persons if the stay is granted; and
- (4) a showing that there will be no resulting harm to the public interest if the stay is granted.

B. When the petitioner files the motion for stay with the board, the petitioner shall also deliver a copy of the motion for stay to the department. Within 65 days after the petitioner files the motion for stay and delivers a copy to the department, the board shall hold a hearing on the motion for stay (“stay hearing”). Twenty-one days before the board holds the stay hearing, the board shall deliver to the petitioner and to the department written notice of the date, time and place of the stay hearing before the board. The requirements of 20.11.7.16 NMAC, 20.11.7.17 NMAC, and 2.11.7.19 NMAC shall apply to the stay hearing as if the stay hearing were a variance hearing. [3/24/82. . .12/1/95; 20.11.7.18 NMAC - Rn, 20 NMAC 11.07.II.7, 10/1/02; A, 8/1/04]

20.11.7.19 TIMELINESS: When the last day for performing an act falls on a Saturday, Sunday or a city of Albuquerque or Bernalillo county legal holiday, the performance of the act is timely if performed on the next succeeding day that is not a Saturday, Sunday or a city of Albuquerque or Bernalillo county legal holiday. [3/24/82. . .11/27/91; 20.11.7.19 NMAC - Rn, 20 NMAC 11.07.II.8, 10/1/02; A, 8/1/04]

HISTORY OF 20.11.7 NMAC:

Pre-NMAC History: The material in 20.11.7 NMAC was derived from that previously filed with the commission of public records - state records center and archives.

Resolution No. 1, Air Pollution Control Regulations Of The Albuquerque Bernalillo County Air Quality Control Board, 8/6/71;

Regulation No. 1, Air Pollution Control Regulations, 6/6/73;

Regulation No. 1, Air Pollution Control Regulations, 7/9/73;

Regulation No. 1, Air Pollution Control Regulations, 3/21/77;

Regulation No. 24, Variance Procedure, 3/24/82;

Regulation No. 24, Variance Procedure, 11/27/91;

History of Repealed Material: [Reserved]

Other History: Regulation No. 24, Variance Procedure; filed 11/27/91 was **renumbered** and **reformatted** into first version of the New Mexico Administrative Code as 20 NMAC 11.07, Variance Procedure, filed 10/27/95. 20 NMAC 11.07, Variance Procedure, filed 10/27/95 was **renumbered, reformatted, amended and replaced** by 20.11.7 NMAC, Variance Procedure, effective 10/1/02.