

**TITLE 20 ENVIRONMENTAL PROTECTION**  
**CHAPTER 2 AIR QUALITY (STATEWIDE)**  
**PART 7 EXCESS EMISSIONS**

**20.2.7.1 ISSUING AGENCY.** Environmental Improvement Board.  
[11/30/95; 20.2.7.1 NMAC - Rn, 20 NMAC 2.7.100 10/31/02]

**20.2.7.2 SCOPE.** All geographic areas within the jurisdiction of the Environmental Improvement Board.  
[11/30/95; 20.2.7.2 NMAC - Rn, 20 NMAC 2.7.101 10/31/02]

**20.2.7.3 STATUTORY AUTHORITY.** Environmental Improvement Act, NMSA 1978, section 74-1-8(A)(4) and (7), and Air Quality Control Act, NMSA 1978, sections 74-2-1 et seq., including specifically, section 74-2-5(A), (B) and (C).  
[11/30/95; 20.2.7.3 NMAC - Rn, 20 NMAC 2.7.102 10/31/02]

**20.2.7.4 DURATION.** Permanent.  
[11/30/95; 20.2.7.4 NMAC - Rn, 20 NMAC 2.7.103 10/31/02]

**20.2.7.5 EFFECTIVE DATE.** xx/xx/08.  
[11/30/95; 20.2.7.5 NMAC - Rn, 20 NMAC 2.7.104 10/31/02]

**20.2.7.6 OBJECTIVE.**  
**A.** Establish reporting requirements for the operation of a facility inconsistent with an air quality regulation or permit condition that result in an excess emission.  
**B.** Establish criteria for a facility complying with such reporting requirements to claim an affirmative defense in an administrative or judicial enforcement action from a civil penalty.  
[11/30/95; 20.2.7.6 NMAC - Rn, 20 NMAC 2.7.105 10/31/02; Rp, xx/xx/xx]

**20.2.7.7 DEFINITIONS.** In addition to the terms defined in 20.2.2 NMAC (Definitions), as used in this part, the following definitions apply.

**A. "Air pollution control equipment"** means any apparatus, including acid plants, afterburners, baghouses, cyclones, electrostatic precipitators, flares, incinerators, and particulate or gaseous scrubbers, utilized to control the emission of a regulated air contaminant, including a fugitive emission.

**B. "Air quality regulation or permit condition"** means any regulation adopted by the Board, including a federal regulation adopted 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. "Excess emission"** means the emission of a regulated air contaminant, including a fugitive emission, in excess of the amount allowed by an air quality regulation or permit condition. Emissions in excess of an opacity limit are also considered an excess emission.

**E. "Malfunction"** means any sudden and unavoidable failure of air pollution control equipment or process equipment, 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.

**F. "Part"** means an air quality regulation under Title 20, Chapter 2 of the New Mexico Administrative Code.

**G. "Shutdown"** means the cessation of operation of any pollution control equipment or process equipment.

**H. "Startup"** means the setting into operation of any air pollution control equipment or process equipment.

[11/30/95; 20.2.7.7 NMAC - Rn, 20 NMAC 2.7.107 10/31/02; Rp, xx/xx/xx]

**20.2.7.8 AMENDMENT OR SUPERSESION OF PRIOR REGULATIONS.** This part supersedes New Mexico Administrative Code ("NMAC") 20.2.7 -- Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance last filed October 30, 1995.  
[11/30/95; 20.2.7.8 NMAC - Rn, 20 NMAC 2.7.106 10/31/02, Rp, xx/xx/xx]

**20.2.7.9 DOCUMENTS.** No documents are cited in this part.  
[11/30/95; 20.2.7.9 NMAC - Rn, 20 NMAC 2.7.108 10/31/02]

**20.2.7.10 SEVERABILITY.** If any provision of this part, or the application of such provision to any person or circumstance, is held invalid, the remainder of this part, or the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.  
[20.2.7.10 NMAC - N, xx/xx/xx]

**20.2.7.11 CONSTRUCTION.** This part shall be liberally construed to carry out its purpose.  
[20.2.7.11 NMAC - N, xx/xx/xx]

**20.2.7.12 SAVINGS CLAUSE.** Repeal or supersession of a prior version of this part shall not affect any administrative or judicial action initiated under that prior version.  
[20.2.7.12 NMAC - N, xx/xx/xx]

**20.2.7.13 COMPLIANCE WITH OTHER REGULATIONS.** Compliance with this part does not relieve a person from the responsibility to comply with any other applicable federal, state, or local statute or regulation.  
[20.2.7.13 NMAC - N, xx/xx/xx]

**20.2.7.14 TRANSITION SCHEDULE.** This schedule applies to any source whose current emissions for startup, shutdown, and maintenance were not considered in the issuance of a notice of intent under 20.2.73 NMAC - *Notices of Intent and Emissions Inventory Requirements*, or a permit under 20.2.72 NMAC - *Construction Permits*, 20.2.70 NMAC - *Operating Permits*, 20.2.74 - *Permits - Prevention of Significant Deterioration (PSD)*, or 20.2.79 - *Permits - Nonattainment Areas*. Such source shall notify the department in writing no later than six (6) months after the promulgation of this part. The Department may grant an extension to this deadline upon submittal of an appropriate justification. The notice shall identify how the source proposes to address these emissions, and shall include the submittal of emission quantities where emissions are reasonably quantifiable, and the submittal of work practice standards that will mitigate such emissions where emissions are not reasonably quantifiable. This notification authorizes an applicant to continue operating the source until a final permit is issued or denied, provided that the applicant submits requested information by the deadlines specified by the department. During the pendency of this authorization, the applicant shall not be liable for violating 20.2.73 NMAC - *Notices of Intent and Emissions Inventory Requirements*, or a permit under 20.2.72 NMAC - *Construction Permits*, 20.2.70 NMAC - *Operating Permits*, 20.2.74 - *Permits - Prevention of Significant Deterioration (PSD)*, or 20.2.79 - *Permits - Nonattainment Areas*, solely on the basis of excess emissions during startup, shutdown, or scheduled maintenance.  
[20.2.7.15 NMAC - N, xx/xx/xx]

**20.2.7.15 to 20.2.7.107 [RESERVED]**

**20.2.7.108 APPLICABILITY.** Any source who is subject to 20.2.73 NMAC - *Notices of Intent and Emissions Inventory Requirements*, or a permit under 20.2.72 NMAC - *Construction Permits*, 20.2.70 NMAC - *Operating Permits*, 20.2.74 - *Permits - Prevention of Significant Deterioration (PSD)*, or 20.2.79 - *Permits - Nonattainment Areas*. Deviations under 20.2.70 NMAC - *Operating Permits* that do not result in excess emissions are not subject to the provisions of 20.2.7 NMAC, except when such excess emissions would cause the source to exceed the applicable threshold in any of those regulations.

**20.2.7.109 OPERATION RESULTING IN AN EXCESS EMISSION.** The operation of a facility inconsistent with an air quality regulation or permit condition that results in an excess emission is a

violation. The owner or operator of a facility having such an excess emission shall comply with the notification requirements in Section 110.

[11/30/95; 20.2.7.109 NMAC - Rn, 20 NMAC 2.7.109 10/31/02; Rp, xx/xx/xx]

**20.2.7.110 NOTIFICATION.**

**A.** The owner or operator of a facility having an excess emission shall report the following information to the department on forms provided by the department and in accordance with guidance issued by the department.

(1) Initial 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, that includes all available information for each item in subsection B.

(2) Final Report: The owner or operator shall file a final report that contains specific and detailed information for each item in subsection B, no later than ten (10) days after the end of the excess emission.

**B.** The report shall include the following information.

(1) The name of the facility.

(2) The name of the owner and operator of the facility.

(3) The name and title of the person preparing the report.

(4) Identifying information such as permit and database numbers.

(5) The specific date(s) and time(s) the excess emission occurred.

(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 measure(s) taken to eliminate the excess emission.

(13) The corrective measure(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) An analysis and the supporting evidence for each applicable criterion, if the owner or operator claims an affirmative defense under Sections 111 or 112. The department may grant an extension to submit this information no later than the deadline specified in Section 113.

(16) The contents of the final report shall contain a certification of truth, accuracy, and completeness. This certification shall be signed by:

(a) the responsible official for Title V sources; or

(b) the reporting official for non-Title V sources.

**C.** If necessary, the department may request that the owner or operator of a facility provide additional information. This information shall be reported within a time period specified by the department.

**D.** If the period of an excess emission extends beyond the deadline specified in subsection A (2), the owner or operator shall notify the department in writing of the exact time period when the excess emission ceased. This notification shall include all of the information required in subsection B.

[11/30/95; 20.2.7.110 NMAC - Rn, 20 NMAC 2.7.110 10/31/02; Rp, xx/xx/xx]

**20.2.7.111 AFFIRMATIVE DEFENSE FOR MALFUNCTION.** The owner or operator of a facility subject to this part may claim, in an administrative or judicial enforcement action for the violation of an air quality control regulation or permit condition, except for a federal regulation incorporated by reference, an affirmative defense of malfunction for a civil penalty. There shall be no affirmative defense for the owner or operator's liability, its obligation to implement a corrective action, or a claim by the department for injunctive relief. The owner or operator claiming an affirmative defense of malfunction shall bear the burden of proof to demonstrate the following criteria to the department's satisfaction. If necessary, the department may request that the owner or operator of a facility provide additional

information beyond what is required in this Section (Section 20.2.7.111 NMAC). This additional information shall be reported within a time period specified by the department.

- A. The excess emission was caused by a malfunction.
  - B. The excess emission:
    - (1) was not caused by an activity or event that could have been foreseen and avoided, or planned for; and
    - (2) could not have been avoided by better operation and maintenance practices.
  - C. The air pollution control equipment or process equipment were maintained and operated in a manner consistent with good practice for minimizing emissions.
  - D. Repairs were made expeditiously, including the use of off-shift labor and overtime if necessary.
  - E. The magnitude and duration of the excess emission (including any bypass) were minimized to the maximum extent possible.
  - F. All possible steps were taken to minimize the impact of the excess emission on ambient air quality.
  - G. All emission monitoring systems were kept in operation unless specifically involved in the malfunction or subject to damage as a result of the malfunction provided that the owner or operator complied with all applicable alternative monitoring requirements.
  - H. The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.
  - I. The owner or operator complied with the notification requirements in Section 110.
  - J. The owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs or other relevant evidence.
- [20.2.7.15 NMAC - N, xx/xx/xx]

**20.2.7.112 AFFIRMATIVE DEFENSE FOR STARTUP OR SHUTDOWN.** The owner or operator of a facility subject to this part may claim, in an administrative or judicial enforcement action for the violation of an air quality control regulation or permit condition, except for a federal regulation incorporated by reference, an affirmative defense of startup or shutdown liability for a civil penalty. There shall be no affirmative defense for the owner or operator's liability, its obligation to implement a corrective action, or a claim by the department for injunctive relief. The owner or operator claiming an affirmative defense of startup or shutdown shall bear the burden of proof to demonstrate the following criteria to the satisfaction of the department. If necessary, the department may request that the owner or operator of a facility provide additional information beyond what is required in this Section (Section 20.2.7.112 NMAC). This additional information shall be reported within a time period specified by the department.

- A. The excess emission occurred during a startup or shutdown.
  - B. The duration of the excess emission was short and infrequent and could have not been prevented through careful planning and design.
  - C. The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.
  - D. If the excess emission was caused by a bypass, then the bypass was necessary to prevent loss of life, personal injury, or severe property damage.
  - E. The facility was maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions.
  - F. The frequency and duration of the startup or shutdown mode was minimized to the maximum extent possible.
  - G. All possible steps were taken to minimize the impact of the excess emission on ambient air quality.
  - H. All emissions monitoring systems were kept in operation if at all possible.
  - I. The owner or operator complied with the notification requirements in Section 110.
  - J. The owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence.
- [20.2.7.15 NMAC - N, xx/xx/xx]

**20.2.7.113 ROOT CAUSE ANALYSIS AND CORRECTIVE ACTION.** The owner or operator of the facility shall submit a report to the department that shall include the following information no later

than forty-five (45) days after the submittal of the initial report. The department may grant an extension in writing upon the showing of good cause by the source. If necessary, the department may request that the owner or operator of a facility provide additional information beyond what is required in this Section (Section 20.2.7.113 NMAC). Notwithstanding the previous sentence, the department may establish by written guidance a de minimus threshold below which a portion or all of the following information is not required.

**A.** A detailed analysis that determines the root cause and all contributing causes of the excess emission.

**B.** An analysis of the corrective actions available to reduce the likelihood of a recurrence of the excess emission resulting from the same root cause or contributing causes, including:

- (1) The alternatives for corrective action, such as changes in design, operation and maintenance;
- (2) The cost associated with each alternative for correction action;
- (3) The probable effectiveness of each alternative for corrective action;
- (4) Whether or not an outside consultant should be retained to evaluate the alternatives for corrective action; and
- (5) To the extent that the investigation of the root cause and contributing causes, or alternatives for corrective action, are ongoing on the due date of the report, a statement of the anticipated date of completion, and the date on which the additional information will be submitted.

**C.** If one or more corrective actions are required, a schedule for implementation with associated progress reports. If no corrective actions are required, a detailed explanation for that conclusion.

**D.** The department may make a determination on an affirmative defense claim on the basis of any information it receives pursuant to this section or any other information, including inspections and other documentation.

[20.2.7.15 NMAC - N, xx/xx/xx]

#### **20.2.7.114 APPEALS FROM THE DEPARTMENT'S DETERMINATIONS UNDER SECTIONS 111 and 112.**

If the department issues a written determination denying a claim of affirmative defense under Sections 111 or 112, it may initiate an administrative or judicial enforcement action for the excess emission. Appeals from the department's written determination denying a claim of affirmative defense under Sections 111 or 112 shall be raised in the context of such enforcement action only, and such determination shall be entitled to substantial deference.

[20.2.7.15 NMAC - N, xx/xx/xx]

#### **20.2.7.115 FUTURE ENFORCEMENT ACTION.**

The department reserves the right, at its discretion, to take enforcement action against an owner or operator of a source for excess emissions already granted an affirmative defense should the department find that there is evidence of a recurring pattern of excess emission events, poor maintenance at the source, careless or marginal operations, or for any other reason the department deems appropriate.

[20.2.7.15 NMAC - N, xx/xx/xx]

#### **HISTORY OF 20.2.7 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.

HSSD 70-1, Ambient Air Quality Standards And Air Quality Control Regulations, 01/27/70.

ACQR 801, Air Quality Control Regulation 801 - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, 04/29/81.

**History of Repealed Material:** [RESERVED]

#### **Other History:**

ACQR 801, Air Quality Control Regulation 801 - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 04/29/81 was **renumbered** into first version of the New Mexico Administrative Code as 20 NMAC 2.7, Air Quality (Statewide) - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 10/30/95.

20 NMAC 2.7, Air Quality (Statewide) - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 10/30/95 was **renumbered, reformatted and replaced** by 20.2.7 NMAC, Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, effective 10/31/02.

DRAFT