Draft Revisions to the State Implementation Plan (SIP) regarding Startup, Shutdown and Malfunctions

The SIP revision entails removing applicable sections of 20.2.7 NMAC - *Excess Emissions* (Part 7) during Malfunction, Startup, Shutdown, or Scheduled Maintenance from the SIP. The applicable sections to be removed from the SIP are highlighted in yellow, while text highlighted in blue is informative information only and is not part of the SIP. The remaining rule language will continue to be part of the SIP.

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

20.2.7.1 ISSUING AGENCY. Environmental Improvement Board.
[20.2.7.1 NMAC - Rp, 20.2.7.1 NMAC, 08/01/08]

20.2.7.2 SCOPE. All geographic areas within the jurisdiction of the environmental improvement board.
[20.2.7.2 NMAC - Rp, 20.2.7.2 NMAC, 08/01/08]

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).
[20.2.7.3 NMAC - Rp, 20.2.7.3 NMAC, 08/01/08]

20.2.7.4 DURATION. Permanent.
[20.2.7.4 NMAC - Rp, 20.2.7.4 NMAC, 08/01/08]

20.2.7.5 EFFECTIVE DATE. 08/01/08, unless a later date is cited at the end of a section.
[20.2.7.5 NMAC - Rp, 20.2.7.5 NMAC, 08/01/08]
[The latest effective date of any section in this part is xx/xx/xx.]

20.2.7.6 OBJECTIVE.

A. Establish requirements for a source whose operation results in an excess emission.

B. Establish criteria for a source whose operation results in an excess emission to claim an affirmative defense in an administrative or judicial enforcement action from a civil penalty.

[20.2.7.6 NMAC - Rp, 20.2.7.6 NMAC, 08/01/08]
[Subsection B of 20.2.7.6 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

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 new source performance standard adopted by reference, or any condition of an air quality permit issued by the department. National emission standards for hazardous air pollutants and maximum achievable control technology standards are not included in this definition.

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 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.

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E. **"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.

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

G. **"Regular business day"** means any day on which state government offices are open for normal business. Saturdays, Sundays, and official federal and state holidays are not regular business days.

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

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

[20.2.7.7 NMAC - Rp, 20.2.7.7 NMAC, 08/01/08]

20.2.7.8 **AMENDMENT OR SUPERSESSION 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.

[20.2.7.8 NMAC - Rp, 20.2.7.8 NMAC, 08/01/08]

20.2.7.9 **DOCUMENTS.** No documents are cited in this part.

[20.2.7.9 NMAC - N, 08/01/08]

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, 08/01/08]

20.2.7.11 **CONSTRUCTION.** This part shall be liberally construed to carry out its purpose.

[20.2.7.11 NMAC - N, 08/01/08]

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, 08/01/08]

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, 08/01/08]

20.2.7.14 **REQUIREMENTS REGARDING ROUTINE OR PREDICTABLE EMISSIONS DURING STARTUP, SHUTDOWN, AND MAINTENANCE.**

A. The owner or operator of a source subject to a permit or to the notification requirement under section 15 of this part, shall establish and implement a plan to minimize emissions during routine or predictable startup, shutdown, and scheduled maintenance through work practice standards and good air pollution control practices. This requirement shall not apply to any affected facility defined in and subject to an emissions standard and an equivalent plan under 40 CFR Part 60 (NSPS), 40 CFR Part 63 (MACT), or an equivalent plan under 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas.

B. The owner or operator shall maintain the plan at the location authorized by the permit, at the facility, or at the nearest occupied facility, and provide the plan to the department upon written request.

C. This requirement shall become effective 180 days after the effective date of this part.

[20.2.7.14 NMAC - Rp, 20.2.7.14 NMAC, 08/01/08]

20.2.7.15 **TEMPORARY PROVISIONS FOR ROUTINE OR PREDICTABLE EMISSIONS DURING STARTUP, SHUTDOWN, AND SCHEDULED MAINTENANCE.**

A. If the inclusion of emissions during routine or predictable startup, shutdown, or scheduled maintenance in addition to the potential emission rate or potential to emit of a source could exceed an applicable

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emissions limitation, or would cause the source to exceed an applicability threshold in 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC - Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas, the owner or operator shall notify the department in writing no later than 180 days after the effective date of this part. The notice shall include a preliminary estimate of emissions by pollutant to the extent practicable and identify the nature of permitting action likely to be required.

B. The owner or operator shall submit the necessary permit application no later than 120 days after receiving a request from the department.

C. If a timely notice is submitted under Subsection A of 20.2.7.15 NMAC for any excess emission during routine or predictable startup, shutdown, or scheduled maintenance, the owner or operator shall comply only with Paragraph (2) of Subsection A of 20.2.7.110 NMAC - Final Report, until the permit is issued or denied.

D. At the request of the department, the owner or operator of a source that does not submit a notification under Subsection A of 20.2.7.15 NMAC shall submit the basis for its determination and supporting analysis.

[20.2.7.15 NMAC - N, 08/01/08]

20.2.7.16 to 20.2.7.107 [RESERVED]

20.2.7.108 APPLICABILITY.

A. Any source:

(1) whose operation results in an 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; or

(2) subject to the requirements of 20.2.73 NMAC - Notices of Intent and Emissions Inventory Requirements, 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.

B. 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.

C. This part does not create a separate cause of action for failure to obtain 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.

[20.2.7.108 NMAC - N, 08/01/08]

20.2.7.109 OPERATION RESULTING IN AN EXCESS EMISSIONS. The emission of an air contaminant 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.

[20.2.7.109 NMAC - Rp, 20.2.7.109 NMAC, 08/01/08]

20.2.7.110 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.

(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 of 20.2.7.110 NMAC.

(2) Final report: the owner or operator shall file a final report that contains specific and detailed information for each item in Subsection B of 20.2.7.110 NMAC, 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 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 such as permit and database numbers.

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(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 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 Sections 111, 112, or 113 of 20.2.7 NMAC. If claiming an affirmative defense, an analysis with and the supporting evidence for each criterion shall be submitted no later than thirty (30) days after submittal of the final report required by this subsection (Subsection B of 20.2.7.110 NMAC). Upon the department's receipt of a written request by the owner or operator no later than thirty (30) days after submittal of the final report, the department may grant an extension to complete the analysis not to exceed thirty (30) additional days.

(16) The contents of the final report shall contain a signed certification of truth, accuracy, and completeness. This certification shall be signed by the person who is reporting the excess emission.

C. The department may request that the owner or operator of a source 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 Paragraph (2) of Subsection A of 20.2.7.110 NMAC, the owner or operator shall notify the department in writing within seventy-two (72) hours of the date and time when the excess emission ceased. This notification shall include all items required in Subsection B of 20.2.7.110 NMAC.

[20.2.7.110 NMAC - Rp, 20.2.7.110 NMAC, 08/01/08]

[Paragraph 15 of Subsection B of 20.2.7.110 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.111 AFFIRMATIVE DEFENSE FOR AN EXCESS EMISSION DURING MALFUNCTION.

A. The owner or operator of a source subject to this part may claim an affirmative defense for an excess emission during malfunction for a civil penalty in an administrative or judicial enforcement action, except for an action to enforce a federal new source performance standard. There shall be no affirmative defense for an excess emission during malfunction for 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 to demonstrate 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 excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

(9) The owner or operator complied with the notification requirements in Section 110 of 20.2.7 NMAC.

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

B. The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.111 NMAC). This additional information shall be reported within the time period specified by the department.

[20.2.7.111 NMAC - N, 08/01/08]

[20.2.7.111 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.112 AFFIRMATIVE DEFENSE FOR AN EXCESS EMISSION DURING STARTUP OR SHUTDOWN.

A. The owner or operator of a source subject to this part may claim an affirmative defense for an excess emission during startup or shutdown for a civil penalty in an administrative or judicial enforcement action, except for an action to enforce a federal new source performance standard. There shall be no affirmative defense for an excess emission during startup or shutdown for 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 to demonstrate the following criteria.

(1) The excess emission occurred during a startup or shutdown.

(2) The duration of the excess emission that occurred during startup and shutdown was short and could not have been prevented through careful planning and design.

(3) The excess emission was not part of a recurring pattern indicative of inadequate design, operation, or maintenance.

(4) If the excess emission was 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 complied with the notification requirements in Section 110 of 20.2.7 NMAC.

(10) The owner or operator's actions during the period of the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence.

B. The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.112 NMAC). This additional information shall be reported within the time period specified by the department.

C. An excess emission due to malfunction during a period of startup or shutdown which is authorized by permit shall be treated as a malfunction under 20.2.7.111 NMAC.

[20.2.7.112 NMAC - Rp, 20.2.7.112 NMAC, 08/01/08]

[20.2.7.112 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.113 AFFIRMATIVE DEFENSE FOR AN EMERGENCY.

A. An “emergency” means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God, 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.

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

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

(2) the source was at the time being properly operated;

(3) 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

(4) the owner or operator fulfilled the notification requirements under Subsection A of 20.2.7.110 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

C. In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.

D. The department may request that the owner or operator of a source provide additional information beyond what is required in this section (20.2.7.113 NMAC). This additional information shall be reported within the time period specified by the department.

[20.2.7.113 NMAC - N, 08/01/08]

[20.2.7.113 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.114 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS.

A. The owner or operator of a source having an excess emission, upon written request of the department, shall prepare an analysis that uses appropriate analytical tools and contains the following information.

(1) an analysis describing the root cause and all contributing causes of the excess emission;

(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 20.2.7.114 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 request no later than ninety (90) days after receipt of the final report under Subsection A of 20.2.7.110 NMAC.

C. The department may request the analysis specified in Subsection A of 20.2.7.114 NMAC after considering relevant factors. Examples of such relevant factors may include but are not limited to the significance of the excess emission, the nature or pattern of excess emissions, or the history of the source, as well as other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than sixty (60) days after the request for submittal pursuant to Subsection A of 20.2.7.114 NMAC. The department may grant an extension to submit the analysis for good cause shown.

E. The owner or operator of a source complying with this section may assert a claim for confidential information protection pursuant to 20.2.1.115 NMAC.

[20.2.7.114 NMAC - N, 08/01/08]

20.2.7.115 REVIEW OF THE DEPARTMENT'S DETERMINATIONS UNDER SECTIONS 111, 112, AND 113. The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Section 111, 112, or 113 of 20.2.7 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to this part 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 Section 116 of 20.2.7 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 Section 111, 112, or 113 of 20.2.7 NMAC in an

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administrative or judicial enforcement action unless it asserted such defense pursuant to Subsection B of 20.2.7.110 NMAC.
[20.2.7.115 NMAC - Rp, N, 08/01/08]
[20.2.7.115 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

20.2.7.116 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 it has made a determination pursuant to Section 115 of 20.2.7 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.
[20.2.7.116 NMAC - Rp, 20.2.7.116 NMAC, 08/01/08]
[20.2.7.116 NMAC is not federally enforceable and is not included as a part of New Mexico's State Implementation Plan.]

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: 20.2.7 NMAC, Excess Emissions during Malfunction, Startup, Shutdown, or Scheduled Maintenance (filed 10/16/02) repealed 08/01/08/

Other History:
ACQR 801, Air Quality Control Regulation 801 - Excess Emissions During Malfunction, Startup, Shutdown, or Scheduled Maintenance, filed 04/29/81was 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.
Excess Emissions during Malfunction, Startup, Shutdown, or Scheduled Maintenance (filed 10/16/02) was replaced by 20.2.7 NMAC, Excess Emissions, effective 08/01/08.

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