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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. 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]

20.11.7.2 SCOPE:

A. This Part establishes procedures and criteria for obtaining a variance from requirements prescribed by the Board.

B. Exempt: This Part does not apply to sources within Bernalillo County, which are located on Indian lands over which the Albuquerque/Bernalillo County Air Quality Control lacks jurisdiction.
[12/1/95; 20.11.7.2 NMAC – Rn, 20 NMAC 11.07.I.2, 10/1/02]

20.11.7.3 STATUTORY AUTHORITY: This Part is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5.C; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5 Section 4; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 Section 9-5-1-4.
[3/24/82. . .12/1/95; 20.11.7.3 NMAC – Rn, 20 NMAC 11.07.I.3, 10/1/02]

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 this Part is to establish procedures and criteria by which a petitioner may seek a variance to a limitation or regulation prescribed by the Board.
[12/1/95; 20.11.7.6 NMAC – Rn, 20 NMAC 11.07.I.6, 10/1/02]

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 this Part shall govern.

A. "Petitioner" means a person seeking a variance from a regulation of the Board or limitation prescribed under any Part in Chapter 11, Title 20 NMAC.
[12/1/95; 20.11.7.7 NMAC – Rn, 20 NMAC 11.07.I.7, 10/1/02]

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, which is filed, with the State Records Center shall not affect actions pending for violation of a City or County Ordinance, Air Quality Control Board Regulation 24, or Part 07. Prosecution for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, Part, or regulation section in effect at the time the violation was committed.
[12/1/95; 20.11.7.9 NMAC – Rn, 20 NMAC 11.07.I.9, 10/1/02]

20.11.7.10 SEVERABILITY: If any section, paragraph, sentence, clause, or word of this Part or any federal standards incorporated herein 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 this Part.
[12/1/95; 20.11.7.10 NMAC – Rn, 20 NMAC 11.07.I.10, 10/1/02]

20.11.7.11 DOCUMENTS: Documents incorporated and cited in this Part 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]

20.11.7.12 PETITIONS:

A. Any person seeking a variance from a regulation of the Board shall do so by filing a written petition with the Director. Petition forms may be obtained from the Department.

B. Petitions shall:

- (a) State the petitioner's name and address.
- (b) State the date of the petition.
- (c) Describe the facility or activity for which the variance is sought.
- (d) State the address or description of the property upon which the facility is located.
- (e) Identify the regulation of the Board from which the variance is sought.
- (f) State in detail the extent to which the petitioner wishes to vary from the regulation or

limitation.

- (g) State why the petitioner believes the variance is justified.
- (h) State why the petitioner believes the variance is desired.
- (i) Be signed by the petitioner or by some person on his behalf. Where the person signing is

not the petitioner, it shall set forth his authority to sign.

[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]

20.11.7.13 ACTION BY THE DIRECTOR:

A. Within forty-five (45) days after receipt of the variance petition, the Director shall make written recommendation to the Board and mail a copy of the recommendation to the petitioner. The Director may, when the circumstances justify, extend the period of time by which he must submit his recommendation to the Board. The Director shall notify the Board and the petitioner of the length of the extension.

B. The Director's recommendation shall:

- (a) State the date that it is made.
- (b) State the Director's recommendation.
- (c) 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]

20.11.7.14 ACTION BY BOARD:

A. Within seven (7) days after the next regularly scheduled Board meeting at which a quorum is present following the date of the Director's recommendation:

(1) If the Board initially favors the granting of a variance, the Director shall notify the petitioner by certified mail of the date, time and place of the public hearing.

(2) If the Board is initially opposed to the granting of a variance, the Director shall notify the petitioner by certified mail of the Board's opposition, the reasons for its opposition and the fact that no public hearing will be held unless the petitioner requests one. The notice shall also inform the petitioner of the date by which he must request a public hearing.

B. If the petitioner fails to request a public hearing within fifteen (15) days of the date the notice of the Board's opposition is received by him, the petition shall be deemed denied, with prejudice.

C. If the petitioner makes a timely request for a public hearing, the Director shall, within five (5) days of the date of the receipt of the request, notify the petitioner by certified mail of the date, time and place of the hearing.

[3/24/82. . .12/1/95; 20.11.7.14 NMAC – Rn, 20 NMAC 11.07.II.3, 10/1/02]

20.11.7.15 NOTICE:

A. At least seven (7) days prior to each hearing date, the Director shall publish notice of the date, time, place and subject of the variance hearing in a newspaper of general circulation in Bernalillo County.

B. The Director shall maintain a file of persons interested in variance hearings and shall make a reasonable effort to notify them by mail of any actions of the Director or Board taken subject to 20.11.7.14 NMAC. [3/24/82. . .12/1/95; 20.11.7.15 NMAC – Rn, 20 NMAC 11.07.II.4, 10/1/02]

20.11.7.16 HEARINGS - ACTIONS BY BOARD - WRITTEN ORDER:

A. Public hearings shall be held before the Board not less than fifteen (15) days nor more than forty-five (45) days from the date the Director mails the notice of the hearing to the petitioner.

B. Public hearings shall be held at a location agreeable to the Board and the petitioner.

- C. The Board may designate a hearing officer to take evidence at the hearing.
- D. All costs of the hearing shall be borne by the petitioner, except those costs associated with Department witnesses or evidence.
- E. A record shall be made at each hearing and an official transcript of the record shall be provided to the Board.
- F. 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.
- G. The Board shall allow all persons a reasonable opportunity at a hearing to submit written and oral evidence and arguments and to introduce exhibits.
- H. The petitioner and the Board shall have the right to call and examine witnesses, introduce exhibits and cross-examine persons who testify.
- I. The Board shall allow reasonable cross-examination of persons who testify at a hearing by persons who have submitted a written request to do so. Requests must be submitted to the Director by 4 p.m. on the day before each hearing.
- J. A petitioner may represent himself at the hearing or be represented by any other individual.
- K. The Board may grant the requested variance, in whole or in part, or may deny the variance. All action taken by the Board shall be by written order by the next regularly scheduled Board meeting after each hearing, 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 is available. A copy of the order shall be mailed to the petitioner. All persons appearing or represented at the hearing shall be mailed notice of the Board's action.
- L. **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.
 - (4) Identify the regulation of the Board from 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.
 - (6) State the reasons for the Board's decision.
- M. The Director shall maintain a file of all orders made by the Board. The file shall be open for public inspection.
[3/24/82. . .12/1/95; 20.11.7.16 NMAC – Rn, 20 NMAC 11.07.II.5, 10/1/02]

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

- A. An order of the Board is final and bars the petitioner from petitioning for the same variance without special permission from the Board. The Board may consider, among other things, the development of new information and techniques to be sufficient justification for a second petition.
- B. If the petitioner or his authorized representative fails to appear at the 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]

20.11.7.18 STAY OF ENFORCEMENT:

- A. Subject to the emergency provisions of Section 12-14-9, NMSA, 1953, as amended, while a variance petition is pending and before the Board takes final action on the petition, the Department may not enforce the corresponding regulation of the Board from which the variance is sought unless, in the opinion of the Director:
 - (1) Enforcement is reasonably necessary to protect the public interest of Bernalillo County.
 - (2) The variance petition was not filed in good faith.
 - (3) The petitioner is causing or contributing to air pollution to a greater degree than that requested by the variance petition.
- B. The petitioner may submit with his variance petition, a statement showing why he believes that non-enforcement is in the public interest of Bernalillo County.
- C. The Director's opinion on the questions of public interest and good faith is discretionary and not subject to review.

D. The Director may re-examine his opinion at any time and, when the circumstances justify, make a different determination.

E. Provisions of this section do not apply to any subsequent petitioner for the same variance by the same petitioner, except as the Director may otherwise determine.

[3/24/82. . .12/1/95; 20.11.7.18 NMAC – Rn, 20 NMAC 11.07.II.7, 10/1/02]

20.11.7.19 TIMELINESS:

A. When the last day for performing an act falls on Saturday, Sunday or a legal, state or national holiday, the performance of the act is timely if performed on the next succeeding day which is not a Saturday, Sunday or a legal, state, or national holiday.

B. All matters required to be filed or mailed under this Part are timely if deposited in the United States mail on or before the required date, except as provided under Subsection I. of 20.11.7.16 NMAC.

[3/24/82. . .11/27/91; 20.11.7.19 NMAC – Rn, 20 NMAC 11.07.II.8, 10/1/02]

HISTORY OF 20.11.7 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.

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.