

The Air Board's Quasi-Judicial and Quasi-Legislative Roles and Responsibilities:

A discussion of procedure, authority,
conflict of interest, ex parte communications,
public records, open meetings and the
advancement of environmental justice objectives

By Felicia Orth, Board Hearing Officer and
Bill Grantham, Board Attorney

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The Legal Hierarchy

Federal Clean Air Act & EPA Regulations



NM Air Quality Control Act



BC Joint AQCB Ord. & COA Joint AQCB Ord.



**Air Board Regulations, Standards, and State
Implementation Plans (SIPs)**

New Mexico EIB & The Local Board

- **Environmental Improvement Board**

- Created under Environmental Improvement Act, NMSA 1978 §§ 74-1-1 – 74-1-15; jurisdiction over numerous areas (air, radiation, solid and hazardous waste, ground water, etc.)
- Quasi-legislative functions under AQCA §§74-2-5, 74-2-6
- Quasi- adjudicatory functions under AQCA § 74-2-7 (permit appeals)

- **Local Board**

- Per AQCA 74-2-4, a county/municipality of certain size may create a local board to assume functions of EIB under AQCA
- Must also create local agency to assume functions of NMED
- Some functions may be reserved to EIB and NMED
- Local Board/Agency subject to EIB/NMED oversight regarding acts or failures to act which cause or contribute to air pollution
- Albuquerque/Bernalillo County is only local air authority in NM

Quasi-Legislative Identity

Per AQCA at NMSA 74-2-5.B, EIB and Local Board shall:

1. adopt ... regulations consistent with the ... [AQCA]... to attain and maintain national ambient air quality standards and prevent or abate air pollution, including (by adopting) regulations prescribing air standards within the geographic area of the ... (EIB's) jurisdiction or the local (Air) board's jurisdiction; and
2. adopt a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the board's jurisdiction ...”

These provisions establish the EIB/Local Board as the authority for adopting the regulatory and non-regulatory components of SIPs to achieve the NAAQS as required by CAA 110.

Quasi-Judicial Identity

Hearing Permit Appeals

- 20.11.41.15-- Appeal from the applicant if dissatisfied
- Section 74-2-7.H-- Appeal from participant in permitting action

Board Composition

- City: § 9-5-1-3 (B)(4)(a); County: 94-5 § 3 (B)(4)(a):
- (a) At least a majority of the membership of the Board shall be individuals who represent the public interest and meet the requirements of the state and federal guidelines set forth in the New Mexico Air Quality Control Act, as amended, and the federal Clean Air Act, 42 U.S.C.A. Section 7401, et seq., as amended.
Further, to the extent that the requirement does not conflict with this division (a), Board members will be selected for their concerns about, and commitment to, the local ambient air quality.
Therefore, selections may be made from a broad range of persons representing the public interest and who are experienced or trained in disciplines including natural sciences, humanities, social studies, finance, medicine and health, engineering or physics, law, law enforcement, education, business and industry.

Recusal

- City: § 9-5-1-3 (B), County 94-5 § 3 (B):
- (E) Any member of the Board who has a conflict of interest regarding a matter before the Board shall disqualify himself or herself from the discussion and shall abstain from the vote on such matter. A conflict of interest means any interest which may yield, directly or indirectly any monetary or other material benefit to the Board member or the member's spouse or minor child.

Process Requirements

- Open to the public, public notice given
- Filings designed to avoid surprise
- Burden of proof, burden of going forward on the applicant or appellant
- Testimony under oath, with cross-examination
- Board meets in open session after the hearing to reach a decision, which is based on the evidence and documented carefully for appeal

Process, cont'd

- No ex parte communications-discussing merits

If attempted, direct to the Administrator to be included in the record

- Must consider everything in the record, and read transcript for time missing
- Media inquiries best handled by City or County, not by individual Board members, especially where matter not finished.

Open Meetings Act

Has been amended very recently:

- the agenda must be provided at least 72 hours (not 24) prior to the meeting, and there are new requirements applicable to emergency meetings.
- Most common temptations resulting in violation include “rolling quorum” discussions via e-mail. Just don’t hit “reply all.”

Inspection of Public Records

- Wise to assume that every bit of correspondence related to Board business will eventually become public. (EIB e.g. GHG)
- Most obvious and usual exception: counsel from counsel.
- The Administrator and Hearing Clerk are keeping the “official” files and records for the Board but other communication still subject.

Environmental Justice, Defined

- Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.
- It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

Advancement of EJ Objectives

- Generally, assure that the Division is following the law, including monitoring, reporting, permitting, and enforcement.
- Generally, consider fullest process feasible where public interest is significant.
- In particular cases, review modeling for conservative assumptions and take a “hard look” at the Division’s technical and administrative review and process.

Paradoxes

- Any serious endeavor or important discussion is likely to reveal paradoxes—something that feels contradictory or illogical.
- Paradoxes can be explored to help with critical thinking, and can be put in their place with resolute commitment.
- Contemporary example: *The Paradoxical Commandments* by Kent Keith.

These Commandments are Harder to Follow!

- People are illogical, unreasonable, and self-centered.
Love them anyway.
- If you do good, people will accuse you of selfish ulterior motives.
Do good anyway.
- If you are successful, you will win false friends and true enemies.
Succeed anyway.
- The good you do today will be forgotten tomorrow.
Do good anyway.

And 6 more!

PCs for Service on the Board?

It's uncomfortable to know that our charge is to abate air pollution but we find ourselves "permitting" it anyway!

More?

Any discomfort around working with lawyers, for example?

PCs for Service, contd

How about---

- Service as a volunteer can be challenging....serve anyway.
- You can't address everyone's problems....fix what you can anyway.

More?

Thank You for Your Service

- Questions?
- Further Discussion?