BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD
AQCB Petition No. 2010-6

IN THE MATTER OF THE PETITION TO AMEND 20.11.21 NMAC, OPEN BURNING, AND INCORPORATE SAID AMENDMENTS INTO THE NEW MEXICO STATE IMPLEMENTATION PLAN FOR AIR QUALITY (SIP).

Air Quality Division
Environmental Health Department
City of Albuquerque, Petitioner

HEARING BEFORE AIR QUALITY CONTROL BOARD

BE IT REMEMBERED that on the 9th day of March, 2011, this matter came on for hearing before BILL GRANTHAM, Hearing Officer, at the Vincent E. Griego Chambers of the Albuquerque-Bernalillo County Government Center, One Civic Plaza, NW, Albuquerque, New Mexico, at the hour of 6:07 p.m.



A P P E A R A N C E S

For the Albuquerque-Bernalillo County Air Quality Control Board:

MR. JENS DEICHMANN, Chairman
DR. MARGARET MENACHE, County
MR. AUGUST GRACE III, PE, City
MR. ART SHARPE, City
MR. STEVE BACA, County
DR. DONA UPSON, City
MR. JACK SULLIVAN, City
MR. GEORGE CASTILLO, BCPC Liaison

HEARING OFFICER:
MR. BILL GRANTHAM

For the City of Albuquerque:
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For the Environmental Health Department:

MR. NEAL BUTT
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MR. GRANTHAM: Thank you, Chairman Deichmann. This public hearing is being held on March 9th, 2011, in the Vincent E. Griego Chambers of the Albuquerque-Bernalillo County Government Center in Albuquerque, New Mexico.

The time is now 6:07 p.m. This is a hearing of the Albuquerque-Bernalillo County Air Quality Control Board to consider a petition by the Air Quality Division to amend 20.11.21 NMAC, Open Burning, and incorporate those amendments into the New Mexico State Implementation Plan.

My name is Bill Grantham and I am a lawyer and I advise the Board. I am not a member of the Board, but I have been authorized by the Board to conduct this hearing. All of the members of the Board are present tonight, specifically, Mr. Stephen Baca, Mr. George Castillo, Chairman Jens Deichmann, Mr. Gus Grace, Dr. Margaret Menache, Mr. Art Sharpe, Mr. Jack Sullivan, and Dr. Dona Upson.

We will begin the hearing with the testimony of the proponent, the Air Quality Division of the Albuquerque Environmental Health Department. No other parties have entered an appearance in this hearing. So there will be no other technical testimony; however, after the Division's testimony, we will take any

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1 comments from the public in support of or opposing the
2 Division's proposal.
3 So if you would like to testify and have not
4 signed up yet, please do so at this time by seeing Ms.
5 Nieto here at the front desk.
6 MS. NIETO: What's that?
7 MR. GRANTHAM: I am telling people, any
8 witnesses, members of the public, to sign up with you
9 if they want to testify.
10 MS. NIETO: Okay. Thank you.
11 MR. GRANTHAM: Air Board meetings do not
12 follow the rules of evidence as used in a court of
13 law. However, it is important for the Board to
14 remember that its decision must be made on sworn
15 testimony and evidence admitted at this hearing and
16 that the sworn testimony will become part of the
17 hearing record.
18 Everyone who testifies will be sworn in by
19 the court reporter before giving their testimony and
20 must identify him or herself for the record and
21 indicate whether they represent another person or
22 another organization.
23 After each witness has testified, the Air
24 Board members and I may question the witness, and after
25 that, any member of the audience who wishes to question

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1 the witness may do so provided the questions are
2 related to their testimony, and, if necessary, I will
3 limit testimony that is irrelevant or repetitive.
4 However, I don't think that will be necessary tonight.
5 After the hearing closes, since a quorum of
6 the Air Board is present, it's on the agenda tonight
7 for the Board to consider whether to adopt the
8 proposals that are the subject of this hearing.
9 I must instruct the Board that in making
10 these regulations in accordance with the New Mexico Air
11 Quality Act, Section 74-2-5(E), the Board shall give
12 the weight it deems appropriate to all facts and
13 circumstances, including, but not limited to, one, the
14 character and degree of injury to or interference with
15 health, welfare, visibility of property; two, the
16 public interest, including social and economic value of
17 the sources and those subject to air contaminants.
18 And before we start the hearing, if there is
19 anyone in the audience who has not signed the
20 attendance list in the back, please sign that sometime
21 whether or not you intend to testify or give comment
22 tonight.
23 Okay. Is the Division ready to proceed?
24 MR. BUTT: Yes.
25 MR. GRANTHAM: Mr. Butt, be sworn in and

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1 proceed with your testimony.
2 NEAL BUTT
3 after having been first duly sworn under oath,
4 testified as follows:
5 DIRECT TESTIMONY
6 MR. BUTT: Thank you, Mr. Hearing Officer,
7 Chairman Deichmann, Members of the Board. My name is
8 Neal Butt. I am an environmental health scientist with
9 the Air Quality Division, Control Strategies Section.
10 I am here in the matter of the petition to
11 amend 20.11.21 NMAC, Open Burning, and incorporate said
12 amendments into the New Mexico State Implementation
13 Plan for air quality, or SIP. This is Air Quality
14 Control Board Petition Number 2010-6.
15 So why amend open burning? The last time
16 that major amendments were made to the Open Burning
17 Rule was in 2003. Those amendments were required by
18 the Regional Haze Rule, specifically 40 CFR
19 51.309(k)(6)(i), which requires that prescribed fire
20 programs must address visibility impairment from smoke
21 in planning and application.
22 The rule requires that a smoke management
23 program manage smoke from prescribed fires by taking
24 actions to minimize emissions; evaluating smoke
25 dispersion; considering alternatives to fire;

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1 notification to the public regarding prescribed fires;
2 using air quality monitoring; conducting surveillance
3 and enforcement; and performing program evaluation.
4 The amended rule was submitted to EPA as a
5 revision to the SIP, but due to court appeal, EPA never
6 acted upon it. The majority of issues stemming from
7 these court appeals were addressed in 2008, when the
8 Air Board adopted amendments to the Regional Haze SIP.
9 The Open Burning Rule was not amended in this
10 action. The amended Regional Haze SIP was submitted to
11 EPA for approval with the understanding that they would
12 approve the amended Open Burning Rule along with the
13 Regional Haze SIP.
14 Unfortunately, EPA was not satisfied with
15 some of the details of the 2003 and 2008 Regional Haze
16 SIPs and required that "309" states amend their SIP
17 again to address concerns with the SO2 milestones. The
18 Air Quality Division is planning on proposing
19 amendments to the Regional Haze SIP to address these
20 concerns at a hearing this summer.
21 Unfortunately, this delay in approval by EPA
22 of the Regional Haze SIP has delayed the approval of
23 the amended Open Burning Rule. This being the case,
24 the Air Quality Division decided to use the delay in
25 approval of the open burning rule by EPA to make some

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1 changes to the Open Burning Rule to make it better.
2 The Air Quality Division is anticipating that
3 the proposed amendments to the Open Burning Rule will
4 be reviewed and approved by EPA at the same time that
5 they review and approve the Regional Haze SIP and the
6 same time that they approve 20.11.46 NMAC, entitled
7 "Sulfur Dioxide Emissions Inventory Requirements;
8 Western Backstop Sulfur Dioxide Training Program."
9 These proposed amendments include, one,
10 Adding a new definition for "Broadcast Burn" to clarify
11 the usage of this term within the rule; number two,
12 Clarifying language to differentiate requirements for
13 "multiple event" permits from those requirements for
14 "single event" permits, thereby distinguishing a
15 large, significant event from more "run-of-the-mill"
16 multiple events; three, Removing the requirement that
17 the Department acknowledge receipt of an applicant's
18 request for permit within 24 hours to relieve an
19 administrative burden; four, Decreasing the amount of
20 time that a "single event permit" shall remain valid
21 from one year down to one month, unless stipulated
22 otherwise in the permit; five, Clarifying language to
23 alert potential burners to the additional restrictions
24 placed upon them by the Bernalillo County Fire
25 Department, the Albuquerque Fire Department, and the

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1 International Fire Code; six, Restricting the burning
2 of dead and dry weeds to only that amount allowed by
3 the Bernalillo County Fire Department, the Albuquerque
4 Fire Department, and the International Fire Code;
5 seven, Adding "Small-Scale Fire Extinguisher Training"
6 to the list of conditionally allowed open burning in
7 Table II; eight, Deleting redundant language found at
8 20.11.21.21 NMAC that is now codified at 20.11.81 NMAC,
9 Adjudicatory Procedures - Air Quality Control Board;
10 and, nine, Making stylistic and formatting changes to
11 improve clarity and readability.
12 This hearing has been legally noticed as
13 shown by Air Quality Division Exhibits 7a, 7b, and 7c.
14 Comments were received from stakeholders and the
15 Division has responded to these comments as shown by
16 AQD Exhibits 5a, 5b, 5c, 5d, 5e, 5f, and 5g.
17 Therefore, the Environmental Health
18 Department of the City of Albuquerque, by and through
19 the Air Quality Division, respectfully requests the
20 Albuquerque-Bernalillo County Air Quality Control Board
21 adopt amendments to 20.11.21 NMAC, Open Burning, shown
22 as Air Quality Division Exhibit 1a, as amended by Staff
23 Proposed Floor Amendments shown as AQD Exhibit 8, and
24 submit said amendments to EPA as a revision to the
25 SIP.

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1 That concludes my testimony. And I would
2 like to move Exhibits 1 through 10 into the record.
3 And I stand for questions.
4 MR. GRANTHAM: Thank you, Mr. Butt. Exhibits
5 1 through 10 are admitted into the record.
6 (AQD Exhibits 1 through 10 admitted.)
7 MR. GRANTHAM: Are there questions from the
8 Board?
9 Member Grace?
10 EXAMINATION
11 BY THE BOARD:
12 MR. GRACE: First of all, I was glad to see
13 that cooking or barbecuing doesn't require a permit,
14 but why in the regulation can't we simply put an
15 exclusion that just says that rather than sort of
16 beleaguering the point and making people think that
17 maybe it might or might not be covered, because, for
18 example, it says, "Cooking food not intended for
19 resale," but what if somebody has got a barbecue out
20 there, smoking some barbecue at a park or something,
21 why would they even have to think they need a permit?
22 Why can't we just exclude that sort of
23 thing?
24 MR. BUTT: Chairman Deichmann, Member Grace,
25 that's the way it's always been, which is not a great

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1 answer, but that's the way the rule has been for as
2 long as I have been here, and I think one of the logic
3 points was to differentiate burning which is
4 significant in that first table, which can cause health
5 effects and affects the ambient levels; whereas, the
6 second table, generally speaking, won't be causing
7 deleterious effects unless you are affecting your
8 neighbors.
9 And so, theoretically, you could put in an
10 exclusion in there, get rid of the second table and
11 exclude cooking and fire extinguisher training and dry
12 weed burning and things like that, but I think it's
13 easier to leave in that table, because as you can see
14 from tonight, and, plus, the last few times we have
15 amended it, it's not a static table, it's fluid, things
16 change, restrictions get tighter, and so we have that
17 table as a mental place holder to put things that are
18 allowed and not allowed in there and move them around.
19 MR. GRACE: Okay. One follow-up.
20 MR. GRANTHAM: Sure.
21 MR. GRACE: So if someone is -- let's say a
22 business is doing a barbecue for some event, they have
23 to get a permit to operate that smoker or barbecue at
24 that event?
25 MR. BUTT: I believe so. I'd have to defer

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1 to one of the experts on the panel.
2 JEFF STONESIFER
3 after having been first duly sworn under oath,
4 was questioned and testified as follows:
5 MR. STONESIFER: Mr. Grace, let's see.
6 MR. GRANTHAM: Please identify yourself.
7 MR. STONESIFER: Oh. My name is Jeff
8 Stonesifer. I issue open burn permits for the City of
9 Albuquerque Air Quality Division.
10 And, okay, let's see, conditionally allowed,
11 it's for resale. So if they are not doing it for
12 resale, then definitely not, they don't need a permit.
13 If they are selling stuff, I don't know that that would
14 fall under -- that's kind of weird, because I don't
15 know if it would fall under -- it's not really covered
16 in the open burning regulation as it is right now,
17 because Table II says "for resale," but there is
18 nothing -- or, "not intended for resale," but there is
19 nothing specifically in the open burning regulation
20 that talks about a business selling food at a -- you
21 know, at a barbecue.
22 Obviously, other people within the
23 Environmental Health Department would regulate that,
24 but as far as the smoke goes, I guess we could issue a
25 permit under number ten of Table I, "Any special

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1 condition which would otherwise be prohibited for which
2 there is an unusual need," but that doesn't really seem
3 to --
4 MR. GRACE: Well, I raise the question
5 because I don't want anybody to get a permit for that.
6 I think it's stupid.
7 MR. STONESIFER: You mean, that they
8 shouldn't need a permit at all?
9 MR. GRACE: They shouldn't need a permit,
10 yes.
11 MR. STONESIFER: Yes. Well, it is kind of
12 strange that it mentions something for situations where
13 food is not intended for resale, but it's silent on
14 situations where people are selling.
15 MR. GRACE: Okay.
16 MR. GRANTHAM: Let's start with Dr. Menache.
17 Questions?
18 DR. MENACHE: I had a couple of questions
19 about just sort of different things.
20 So my first question is on page three at line
21 55, actually, where the health alert is referred to,
22 which then goes back to the preceding page, on item
23 "M," as in "Margaret," where "'Health alert' means an
24 air pollution alert, warning, or emergency issued by
25 the Department."

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1 And I wondered, is that available on the City
2 website?
3 Is it something specific, or would a
4 permittee need to call the City to find out if the City
5 had issued a health alert?
6 MR. BUTT: Chairman Deichmann, Member
7 Menache, I defer to the panel on that one, too.
8 DR. MENACHE: So I am talking about page
9 three, line 55 -- oh, no, page three, line 55, is where
10 it's referred to, but the definition for it is given on
11 page two, line "M." Well it's not line "M," it's line
12 19.
13 MR. BACA: 19. Yes.
14 ISREAL TAVAREZ
15 after having been first duly sworn under oath,
16 was questioned and testified as follows:
17 MR. TAVAREZ: Mr. Hearing Officer, Mr. Chair,
18 Members of the Board, my name is Isreal Tavarez. I am
19 an environmental health manager with the Air Quality
20 Division.
21 And to answer Dr. Menache's question, when we
22 call these health alerts, we usually have a very huge
23 level of cooperation from the local media and usually
24 we will work with typically the public information
25 officer or equivalent out of the mayor's office and

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1 they will help us get this information out to not only
2 the television stations, but the radio stations. So
3 that's usually advertised that way.
4 Also, we do post that information on the
5 website and we also send that information to our
6 Citizen Contact Center or the 311 Call Center. So that
7 way, in case that center gets those calls, they can
8 advise and inform, you know, the citizens calling in
9 appropriately.
10 We do have a couple of ways that we have been
11 sending out the information. One of them is we will
12 oftentimes utilize -- there is a listserv that's been
13 created to notify individuals with regard to Air Board
14 matters, we will send out through that mechanism, and
15 then a way that probably needs to be revisited and is a
16 little bit outdated, but we have a collection of fax
17 numbers from community centers and public schools and
18 so forth, not only for Albuquerque, but in the
19 metropolitan area, which includes Sandoval and Valencia
20 Counties.
21 So we will fax out a notice to those
22 individuals. So, definitely, there are other ways. We
23 have not even begun to start exploring utilizing the
24 other technology, tweeting and so forth, but,
25 definitely, those are, I think, options that we will be

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1 continuing to explore to figure out ways that we can
2 get that information out, because we do have the
3 technology -- there is technology available to be able
4 to get information out instantaneously, but those are
5 the methods that we currently utilize to get health
6 alert information out.
7 DR. MENACHE: Thank you. From the same --
8 that same section on page three, so it's section C at
9 the bottom of the page, and it says that open burning
10 is allowed -- open burning that is allowed to be
11 suspended during specific things "unless a waiver has
12 been issued."
13 I am wondering what sort of situation in
14 which there is a health alert and it's a no burn period
15 we would give a permittee a waiver to burn, anyway.
16 MR. TAVAREZ: That's a good question. I am
17 not aware that we have ever issued a waiver, but we
18 would -- there would probably have to be some real
19 impressive needs or requirements for us to be able to
20 grant that waiver, but I am not aware that we have ever
21 had to grant a waiver in the history and in my
22 experience with the program. Maybe before I joined the
23 Division. There could have been something in the early
24 1990s, mid-1990s.
25 DR. MENACHE: It just seems a little

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1 counterintuitive maybe, that you would want to allow
2 someone to burn and then you had a health alert and no
3 burn for the city, in general.
4 MR. TAVAREZ: Something that comes to mind
5 might be a religious ceremony possibly.
6 DR. MENACHE: Uh-huh.
7 MR. TAVAREZ: I'm trying to think as you are
8 asking the question. That's something that we might be
9 able to, you know, grant a waiver for.
10 DR. MENACHE: Yes.
11 MR. SULLIVAN: On the same subject of this
12 waiver, on the following page, page four, item "D,"
13 "The burner may apply for a waiver by submitting a
14 written application for waiver to the Department at
15 least two weeks prior to the planned burn project."
16 From what we have said -- first of all, I am
17 not quite sure what "Department" we are talking about.
18 MR. TAVAREZ: Mr. Hearing Officer, Chairman
19 Deichmann, Member Sullivan, the "Department" referenced
20 in these regulations refers to the City of Albuquerque
21 Environmental Health Department.
22 MR. SULLIVAN: Okay. Although it says that
23 throughout this, that they have to apply for permits
24 with the Environmental Department and the Bernalillo
25 Fire Department or the Albuquerque Fire Department. So

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1 we have got three departments that we have to apply for
2 permits, but when we apply for a waiver, "Department"
3 means "Environmental Department"?
4 MR. TAVAREZ: Mr. Hearing Officer, Chairman
5 Deichmann, Member Sullivan, your assessment is correct.
6 MR. SULLIVAN: Okay.
7 MR. GRANTHAM: Member Sullivan --
8 MR. SULLIVAN: And the other part of that is,
9 you know, how are they going to apply for a waiver two
10 weeks prior to this?
11 MR. BACA: This is a good example -- if I may
12 just interrupt, this is a good example of what Member
13 Grace was speaking to. A lot of us work in
14 environments, situations, where there are written
15 procedures, and those are important and useful, but
16 it's also incumbent on us to realize that after a
17 certain period of time, you need to step back and
18 really consider a complete rewrite of some of those
19 procedures.
20 Now, I am not -- I wouldn't be in a position
21 to judge that, but I would offer, respectfully, that
22 the point that Member Grace made, as exemplified by the
23 question Member Sullivan asked, is a good example of
24 where this may be that kind of an opportunity.
25 MR. GRANTHAM: Mr. Sharpe?

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1 MR. SHARPE: Yes. I'd like to maintain that
2 taking sections "C" and "D" together makes no sense
3 whatsoever. I mean, how in the world are you going to
4 ask for a waiver two weeks in advance of -- I mean, do
5 you have a Ouija board that can know when there is
6 going to be a no burn night? That doesn't make any
7 sense.
8 MR. BUTT: Chairman Deichmann, Member
9 Sullivan -- I mean, Member Sharpe, the new language for
10 "D" is not "D." I just moved it over from where it was
11 in 15. I can't say that it makes sense and I
12 definitely see your point because I have been inside
13 this rule for a long time now.
14 Before we proposed these amendments, the
15 waiver referred you to 20.11.21.15 NMAC and then you
16 had to go look at it and see what a waiver was, and,
17 for some reason, it never came up in the last few times
18 that we amended this rule that that didn't make sense,
19 and I was trying to make it more efficient and
20 expedient instead of making you have new -- or a burner
21 go hunt through Section 15 to try to find out what a
22 waiver consists of and how you comply with the law.
23 I thought I would make it easier for people
24 and move "F" up to where we are talking about waivers,
25 but as to whether or not it makes sense and what the --

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where we were with the waiver, I couldn't say unless the panel has an example. But that section "D" is moved straight from Section 15.

MR. GRANTHAM: Mr. Butt, I'd like to ask one clarifying question. Then, Dr. Upson, if you have a question, we will go to that.

Regarding the question about the use of the word "Department," would it clarify matters to use the word "Division" in that context of whom to apply for the waiver to better clarify this not being the fire department or another department?

MR. BUTT: If you want to propose that, that would be fine. Generally, in this rule, unless it says "Albuquerque Fire" or "Bernalillo County Fire" in front of it, the "Department" means "Environmental Health Department," but if it makes it clearer, that would be fine. That's how it appears sometimes in this rule.

MR. GRANTHAM: All right. Dr. Upson?

DR. UPSON: Okay. Thank you. I think my question was mostly answered, but just two comments.

One is that in regard to barbecues and things, there have been jurisdictions that have outlawed use of lighter fuel, for example. So I think it makes sense to keep it as a separate exclusion.

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And for the waiver, the example that you mentioned is for religious purposes, and I could see that a group might apply and have time for a waiver just in case it was going to be a no burn night at the time when they were going to do the burn.

That's it.

MR. GRANTHAM: Okay. I think Chairman Deichmann had a question first --

MR. DEICHMANN: Well, go ahead.

MR. GRANTHAM: -- then Mr. Sullivan.

MR. DEICHMANN: Thank you.

MR. SULLIVAN: I just want to note that we do have a definition of "Division" in the "Definitions" section, but we don't have a definition of "Department." I mean, if you want "Department" to mean "Department," your department, that's okay, but then let's add a definition in there. You have got one for "Division," and, of course, we don't use "Division" too much in here, we use "Department."

MR. BUTT: Mr. Hearing Officer, Chairman Deichmann, Member Sullivan, "Department" is defined in 20.11.1 NMAC, General Provisions, and there is a caveat in all of your rules that says you can look at the definitions inside the rule or you can look to the definition, this is Part 1, and if they conflict, then

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you go with the rule that's inside, but in this case, the definition of "Department" in Part 1 doesn't conflict. It's more jurisdiction.

MS. KEARNY: Mr. Chairman, if I might address Member Sullivan?

MR. GRANTHAM: Please.

ADELIA KEARNY

after having been first duly sworn under oath, was questioned and testified as follows:

MS. KEARNY: Adelia Kearny, Deputy City Attorney. And as we were just saying, if you look on page one of the proposed amended reg, under 7, in addition to the definitions in Section 20.11.21.7, "Definitions," those apply unless there is a conflict, but when you look at that section, there is a good definition at 7.

If you would like to do that for clarity, you could, by floor amendment, pick up the definition and just repeat it in the definitions of 21, or, as he said, you can do a floor amendment and just substitute the word "Division" for "Department" throughout.

MR. SULLIVAN: It confused me.

MR. GRANTHAM: Chairman Deichmann, do you have a question?

MR. DEICHMANN: Yes. Well, mine was going to

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be exactly the same thing that Member Sullivan brought up. And so I am not clear what the proposal was now, whether we are substituting "Division" for "Department" or "Department" for "Division," but one way or another, it seems like we need to have that consistent.

Then if there is potential for confusion between this department, the Environmental Health Department, and the fire department, then we have made that clear. So I don't know if we can clean that up readily or not, but I would certainly ask for some suggestions from staff on that.

MR. BUTT: Mr. Hearing Officer, Chairman Deichmann, I would suggest not replacing "Department" with "Division" because it could have unintended consequences, and in a lot of these rules, "Department" and "Division" have a -- there is a nuance between the differences.

So if you really think it's unclear to people that are reading this rule, my suggestion would be to add "Environmental Health" in front of anywhere in the rule where it says "Department," and that way, there is no -- I mean, because it would take me some time to go through here line by line and make sure there is nothing weird about changing the words "Environmental Health Department" to the "Air Quality Division."

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1 There is a high likelihood that it will
2 change the meaning of the rule. But if you want to
3 have the words "Environmental Health" placed in front
4 of anywhere where it says "Department," I don't think
5 that would cause any problem at all.
6 And then in terms of the waiver, it's up to
7 you. If the Board feels that they want to get rid of
8 the waiver, that's up to you. Again, I can't tell you
9 one way or the other on that.
10 MR. GRANTHAM: Other questions from the Board
11 at this time?
12 Dr. Menache?
13 DR. MENACHE: Waivers actually appear
14 throughout this pretty extensively. So I don't know
15 whether -- I mean, I guess maybe it should just stand.
16 As I read it, it reads sort of awkwardly.
17 And I think as Member Sullivan brought up,
18 the issue of how would you know two weeks ahead of
19 time, which I also was questioning in other places,
20 partly because you only need to request a permit a week
21 ahead.
22 So if you have only requested the permit a
23 week ahead, how would you request a waiver two weeks
24 ahead?
25 MR. BUTT: Mr. Hearing Officer, Chairman

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1 Deichmann, Vice Chairman Menache, I couldn't say.
2 That's historical, that wording. Our proposed wording
3 doesn't change anything about waivers or the stringency
4 of waivers or what they are used for. The language is
5 moved closer together so it makes it easier for people
6 to know how they get a waiver however they are going to
7 use it.
8 DR. MENACHE: I guess maybe in terms of
9 clarity and fine-tuning the language, I mean, I
10 understand that things are historical, but maybe some
11 more thought, I don't know whether a second round or
12 whatever would be appropriate the next time it comes up
13 for revision, sort of align that with what's actually
14 going on --
15 MR. BUTT: Okay.
16 DR. MENACHE: -- somehow. And then my -- I
17 think it's my last question, when you -- on page five,
18 section "B," where it's the person seeking a permit
19 shall deliver a list of information, and I am not -- I
20 think I didn't see, I have gotten a bit confused in
21 this, about fire department approval, and I know that
22 there is language throughout here in different places
23 about not doing anything that the fire department
24 wouldn't approve of, but is there some formal -- I
25 mean, how do you know that you have got fire department

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1 approval?
2 I am not asking it well because I am not
3 really sure how to ask it, but it seems like there
4 needs to be some kind of connection that that's part of
5 what this is saying, is that it needs to be connected
6 or consistent between the two entities, but I don't
7 know exactly what it is that would tell you, the
8 Environmental Health Department, that that connection
9 has happened.
10 MR. BUTT: Well, as far as whether or not we
11 know of this happening, I am not sure, but I know that
12 we made concerted effort to make it crystal clear that
13 unless you are in compliance with all three
14 departments, then you shouldn't burn.
15 And so that's why I put extra language in the
16 permitted -- when you are applying for a permit. Just
17 because we say it's all right because we look at the
18 weather and we don't think it's a problem, that doesn't
19 matter --
20 DR. MENACHE: Right.
21 MR. BUTT: -- because Bernalillo County Fire
22 Department also has to make sure it's right for safety
23 reasons, and if you are inside the city limits, you're
24 going to have to make sure the Albuquerque Fire
25 Department thinks it's safe.

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1 That's why I put extra language in there, to
2 make sure, and I don't know if, necessarily, we are
3 going to call the fire department or they are going to
4 call us, they might, but, I mean, that table, and,
5 also, I made that table, and, also, the next table,
6 crystal clear that you have to comply with those other
7 two departments.
8 DR. MENACHE: Right.
9 MR. BUTT: And I also wanted to make -- list
10 some example in 14 for people who don't happen to have
11 the International Fire Code handy of all the
12 restrictions that you might find in there so that a
13 light should go on, and if people are reading this rule
14 that if you are inside the city, then you probably
15 shouldn't be burning anything except a few weeds or hot
16 dogs or --
17 DR. MENACHE: Don't burn those.
18 MR. BUTT: -- something like that.
19 DR. MENACHE: But then you wouldn't -- you
20 are just telling people that they need to comply with
21 whatever else they need to comply with, it's not part
22 of the information they need to provide to you, but if
23 you find out somehow that they didn't comply, you might
24 fine them?
25 MR. BUTT: We can cite them and fine them if

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they don't ask their local fire department whether it's all right for them to burn, and that's what it says here, if you are in violation, if you don't consult them, you are in violation of the rule. And so all three of us can cite them.

DR. MENACHE: But you're not requesting that they provide you any information that indicates that they have or have not sought that approval?

MR. STONESIFER: Dr. Menache, no, we don't request that. When I get calls from public citizens, the first thing I ask them is are they in Bernalillo County or are they in the city, and there is a little bit different procedure for Albuquerque versus Bernalillo County.

Both fire departments require permits, and there is a burn line, that's 468-7200, that -- it's a recording, and if there are going to be high winds or if it's drought, they will say no burning for that day. And if it is okay to burn on that day, the next thing they need to do is check for any permits that they might need from the fire departments.

And once they have got all that cleared, they need to call the fire department before they drop the match, because, you know, someone is going to see the smoke, call it in, and you don't want the fire

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department running out there when there is a real emergency somewhere else.

And that's what you do for the City, is you call their fire dispatch number, and that's on their website, I can't remember the number off the top of my head, but for the County, you need to call the county fire marshal, and that's 468-1300 or 468-1310.

Does that --

DR. MENACHE: So that's the person who has the permit is supposed to do those things?

MR. STONESIFER: Yes.

DR. MENACHE: So when you issue a permit, you give them a list of instructions that this is what you're supposed to do?

MR. STONESIFER: No. I kind of tell them over the phone.

DR. MENACHE: But you provide them that information in some way so they know how to go about doing that?

MR. STONESIFER: Yes.

DR. MENACHE: And then enforcement really just depends on if somebody catches them doing something and you check it and it's not done properly?

MR. STONESIFER: Damon Reyes, here to my left, can answer what enforcement does.

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DAMON REYES

after having been first duly sworn under oath, was questioned and testified as follows:

MR. REYES: Chairman Deichmann, Dr. Menache, what enforcement goes to do, I will give you a recent example, we had a facility who was doing an open burn, we got complaints, we went out there, they were burning material that is not allowed, basically trash.

We cited them under our regulation for our violations. We did not go and cite them for any City of Albuquerque Fire Code violations. We let the Albuquerque Fire Department pursue those. They are far more knowledgeable than we are on their fire code. We just make them aware of the illegal burning.

DR. MENACHE: Okay. So then the process is really like someone files a permit, you walk them through what they need to do to be sure that they are complying, and then really enforcement depends almost on receiving the complaint, because it's sort of not -- I mean, it's not like a factory or an industry where you're going to have like stack emissions or something. So it's a little more random that way maybe.

MR. REYES: Chairman Deichmann, Dr. Menache, we get the complaints, they come in through 311,

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sometimes we get call-ins, we have also have gotten those just from doing surveillance. You know, they come in in different avenues.

DR. MENACHE: Okay. Thanks.

MR. GRANTHAM: Chairman Deichmann?

MR. DEICHMANN: Thank you, Mr. Hearing Officer.

Mr. Butt, going back to the waiver question, I am wondering, first of all, we heard that it's rarely ever requested, anyway. So we have got a lot of verbiage involved in something that may not really be all that, you know, relevant to what actually happens.

But what I am wondering is if, indeed, there is some valid reason for a waiver at some point or another, then, obviously, you can't anticipate needing it because of health alerts and such.

Could the request for the permit be aligned with a condition, let's say a conditional request for a waiver, so that at the time that the burn is to occur, if there is, in fact, a health alert, then you have got a waiver in place, and, if not, then it's moot?

MR. BUTT: What do you guys say?

MR. STONESIFER: Chairman Deichmann, I think the main reason that we would issue a waiver would be if a high school was doing a bonfire and they knew the

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1 night it was going to happen, say it was going to
2 happen on December 3rd and they are scared that a no
3 burn might be called and so they ask two weeks ahead of
4 time if they can have a waiver just in case there is a
5 no burn, that may or may not be granted. That's up to
6 the Director of the Environmental Health Department.
7 And I guess it might be granted, because what we are
8 really concerned with during a no burn is, you know,
9 100,000 chimneys going rather than one individual
10 bonfire going. So it might be granted. I can't say
11 that for sure.
12 MR. GRANTHAM: Can I ask a question on that?
13 MR. DEICHMANN: Yes.
14 MR. GRANTHAM: All right. I'd like to ask a
15 follow-up question to that waiver issue.
16 It's not clear to me, is a waiver only
17 applicable to the -- is it only relevant when there is
18 a health alert?
19 Are you only requesting a waiver to be able
20 to conduct open burning during the times of the health
21 alert, or can a waiver be from the provisions of the
22 open burn regulations more generally?
23 MR. BUTT: Mr. Hearing Officer, I defer to
24 the panel on that one, too.
25 MR. STONESIFER: That would be during no

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1 burn, there might also be a health alert out, but the
2 waiver would be from the no burn.
3 MR. TAVAREZ: Mr. Hearing Officer, if I may.
4 I think maybe a point of clarification. No burn nights
5 are typically called, you know, to be proactive in the
6 sense that if -- typically, it's Mr. Stonesifer, our
7 staff meteorologist, will evaluate what the monitors
8 are reading and what the predicted weather patterns are
9 going to be. And, essentially, if an inversion is
10 predicted, it's appropriate to mesh. So say not allow
11 burning that night.
12 Now, a no burn could also involve a health
13 alert now, if the pollution levels went high enough,
14 but a no burn doesn't always necessarily include or
15 involve calling health alert.
16 So I don't know if that helps kind of clarify
17 the question that you were asking.
18 MR. GRANTHAM: So then a waiver could be from
19 the no burn requirement?
20 MR. TAVAREZ: That's how I read it, reading
21 the regulation, it would allow, say, burning of a
22 bonfire for either, you know, a high school or a
23 religious ceremony, that type of thing, and they would
24 be able to go and burn even though other individuals --
25 if we called a no burn that night, you wouldn't be able

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1 to necessarily burn in your fireplace, but they may be
2 able, if they wanted the waiver, that religious group
3 or that high school could still burn that bonfire that
4 particular night.
5 MR. GRANTHAM: I have a bigger picture
6 question that I'll ask now.
7 MR. BACA: Yes.
8 MR. GRANTHAM: You talked earlier about the
9 relation of this open burn requirement with regulation
10 and the delays in that SIP approval have provided more
11 time to make these types of changes.
12 So my question is, are these changes -- is
13 anything -- any of the proposed changes being driven by
14 EPA requirements for SIP approval?
15 And the reason I ask that is that it seems
16 the Board has a lot of questions if you know the waiver
17 requirement and the effects on barbecues and cooking
18 and things of that nature; whereas, the SIP
19 requirements, it's my understanding, go more to, you
20 know, large scale forestry, wild land fire burning,
21 those type of things.
22 So I guess I'm trying to get at if the Board
23 isn't able to reach resolution on these issues
24 regarding the waivers and the barbecues, is that going
25 to -- what is going to be the effect on this SIP

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1 approval?
2 MR. BUTT: Mr. Hearing Officer, there won't
3 be -- they are not EPA-driven and they are not mandated
4 and it won't necessarily have an impact on the Regional
5 Haze SIP.
6 What I was trying to drive at during that
7 slide is that the last time you amended opening burning
8 was in 2003, and the only reason why we did it in 2003
9 was to comply with the federal Regional Haze Rule and
10 we were ordered to do it and we didn't have a choice
11 when we submitted the SIP in 2003 to EPA and then they
12 have been sitting on it since then.
13 Now, this is the third time that we are going
14 to propose changes to the Regional Haze SIP coming up
15 in June, and so I thought that since they have not
16 approved it and they are going to be reviewing open
17 burning along with Part 46 in the Regional Haze SIP all
18 in one action, then I am assuming, but I have not
19 gotten concurrence from EPA, but I am understanding
20 that they are going to review all three and approve all
21 three in the same action in the same Federal Register.
22 And so this gave us a window of opportunity
23 that if anyone on staff has been collecting problems
24 and issues and things, rules, as we always do, and just
25 certain sections, are intimate with certain rules, and

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so they have to use them on the ground, and so they make a list or notations as they go along things that bother them and things that don't work, and that was the case here.

Since they never approved the 2003 amendments, we figured there was a window of opportunity to change anything that was a problem for the Department or the Division or even for stakeholders, open it up, do whatever we want, and then send it out to EPA.

So if the Board is uncomfortable with the uncertainty and the history of the waiver, then they could recess the hearing. I am not sure what the legal way to do it is, but if you want to -- I don't even know, we might have to go all the way to closing the hearing and renoticing and re-releasing a public redraft.

That's going to exceed the scope of the ad, probably, if you guys want to start changing the waiver requirements. I would need a legal opinion on that, but the thrust is if you want to delay, pause, start over, it's not going to cripple Regional Haze.

And I don't know if I can make a June hearing for open burning or not, it might have to be July before we can do all the notice requirements if you

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guys want to have us readdress the waiver issues and the commercial cooking issues and come back with another draft, but it could take a number of months, but it's not going to hurt Regional Haze, per se.

MR. GRANTHAM: Thank you. That's helpful. And I am not trying to scuttle your rule here. I just wanted to try to see what the implications are for decisions tonight.

And I guess my opinion at this time would be that the types of changes that have been at least implied in the discussion wouldn't go beyond the scope of the notice, but, on the other hand, might take considerable amount of time to hammer out in a coherent way so that the rule still works as a whole. So that will be up to the Board to decide, whether to undertake that or basically remand for further rulemaking process, but we are kind of getting ahead of ourselves here.

So I will ask the Board now if there are additional questions regarding the rule.

MR. DEICHMANN: Thank you, Mr. Hearing Officer.

Mr. Butt, first of all, I appreciate the fact that you brought this forward to us and we get to review it all. And it sounds like from your efforts to

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try to bring some of these sections together, we actually get to see what does work or what's contradictory. So I appreciate it. And, also, I recognize it's a lot easier to second-guess what somebody else has done than to do something from scratch. So I appreciate it. And we will see what the Board decides afterwards. But I would like to get back to kind of the micro level here for a minute just to pose these questions so that depending on how the Board acts, perhaps we can get those addressed later on.

Going back again to the waiver question, I am still troubled by the sequencing and the logic there, or if there was a logic there, or maybe not, and they just kind of developed that way, which is maybe what it sounds like. Excuse me.

But since the way it's written right now as proposed, the burner would have to request the waiver two weeks in advance, on what basis would the Department make a decision on that waiver when they would have to make that decision prior to, ostensibly, or at least possibly, a health alert on a particular day?

Say that the application is requested, or, you know, made on December 1 for an event on the 14th, and, you know, the 14th is when a health alert comes

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up, you know, but we didn't know this before the 1st, or maybe even the 12th, I don't know, it just creates a problem as far as how the decisions are made, on what basis, and could we get this, you know, reformulated into a more integrated approach?

MR. BUTT: Mr. Hearing Officer, Chairman Deichmann, the way I would see it, and I will have to defer to the panel in a moment, would be that I wouldn't anticipate that we give a waiver to a health alert because I would think that would be an imminent-type problem.

And I know those words are strung together in that first part, and I can't say for sure, because I am not an archival historian, to tell you how this works, but I can see a scenario where someone would call for an event where it's a no burn night, call where it might not be that serious to have a burn on a no burn night, like we mentioned before, the bonfire or possibly some of the events that are mentioned in Table I, like if they are doing tests at Kirtland where all those rocket motor tests or gas tests or something like that go on, and if it takes a lot of scheduling and lining up material to do it on one day and it would be harder for them to move it, I could see that as a scenario, or any number of things where you have to

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1 line up a lot of things for that one day, maybe even a
2 prescribed burn, or who knows what.
3 So I am not sure because I don't -- I have
4 never been given one since I have been here. But I can
5 envision hypothetically a scenario where you plan
6 something in the future and it's so important, either
7 financially or for some other reason, you don't want it
8 to be shut down just because there is a cold air
9 inversion that night, especially if we have a lot of
10 money involved or a lot of planning involved for that
11 one night.
12 So that's how I would envision it, but if
13 they have another answer, I would entertain it.
14 MR. GRANTHAM: Any of the other witnesses
15 want to address that?
16 MR. STONESIFER: We were just discussing that
17 it might be feasible to have a waiver for no burns as
18 long as there is not a concurrent health alert, you
19 know, at the same time, because a lot of the times when
20 we call a no burn, it's ahead of time, we are expecting
21 conditions to be bad, and when you call the no burn, it
22 actually helps keep the air pretty clean across the
23 city, but having one bonfire may not cause a huge
24 problem; whereas, if the air is already really bad and
25 there is a health alert out, then you may want to

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1 prevent that bonfire.
2 MR. DEICHMANN: So that would require some
3 changes in the wording, anyway, okay.
4 MR. STONESIFER: Yes.
5 MR. DEICHMANN: Thank you.
6 MR. GRANTHAM: Member Sharpe?
7 MR. SHARPE: It seems to me sections "C" and
8 "D" just could use a little work, where somebody
9 reading it can get the idea that, "Hey, you know, I
10 would really like if the conditions were such that if
11 there is a no burn night, I would really like to have
12 a" -- "I'd like to apply for a waiver while I am asking
13 for the permit."
14 MR. BUTT: Uh-huh.
15 MR. SHARPE: I mean, just a little wording
16 like that could cover -- you know, takes care of the
17 problem, in my view, and then if it's not a no burn
18 night, it's so the guy has a waiver, big deal, he
19 didn't need it, anyway.
20 You know, that's what I think you need to do,
21 just change the wording on those two, maybe combine the
22 two sections and say, you know, "Hey" -- your high
23 school bonfire, for example -- "we would like to have a
24 waiver in case the conditions are such that night."
25 Takes care of the problem.

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1 That's all I have to say.
2 MR. GRANTHAM: Dr. Menache?
3 DR. MENACHE: Thank you. I think, actually,
4 on the waiver, I think you would have to be -- there
5 would have to be some kind of condition, though,
6 because, otherwise, everybody who wanted a permit would
7 say, "Well, gosh, I might need a waiver," and then, all
8 of a sudden, you have got 20 bonfires running that one
9 night, but I think that some kind of waiver that could
10 be integrated into the permit, itself, would be good.
11 My remaining question had to do with, on page
12 seven, it's in the section with smoke management, and
13 it has got some conditions about what the burner will
14 do in order to sort of do some monitoring.
15 MR. BACA: What line is it?
16 DR. MENACHE: It starts with line 22, "The
17 burner shall," and, "only burn during times when the
18 ventilation index category is rated 'good' or
19 'better.'" The way to calculate the ventilation index
20 category appears in Section 20.11.21.17.
21 So it might be nice to reference that that's
22 what you're supposed -- that you, as the burner, are
23 supposed to be calculating this thing. And the same
24 thing happens on line 29, although it's a little
25 different, but on line 29, it says that the burner is

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1 going "to conduct visual monitoring and document the
2 results in writing."
3 Is that like a formal presentation that goes
4 back to the Environment Department, then, or is there
5 some record-keeping requirement?
6 And I presume this is specifically for people
7 doing large burns, so, presumably, they have got
8 density measuring equipment?
9 MR. BUTT: Mr. Hearing Officer, Chairman
10 Deichmann, Vice Chairman Menache, all these
11 requirements are because of the Regional Haze. So all
12 the requirements -- yes, there are record-keeping
13 requirements and monitoring and it's very prescriptive,
14 these burns, and they are for large burns, prescribed
15 burns, one is over 1,000 cubic feet and over 1,000
16 acres, and prescribed burn two is even bigger than
17 that, very large scale.
18 DR. MENACHE: So this would be sort of common
19 information or common knowledge for someone at that
20 level?
21 MR. BUTT: It might be, but, also, if you
22 read through the rule, it will tell you what you have
23 to do, and, plus, the people who are going to be doing
24 this are going to be the Forest Service, and they are
25 intimately involved with Regional Haze and open

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1 burning.
2 DR. MENACHE: So they wouldn't need a
3 reference to a later part of this regulation that says,
4 "Here is how to calculate it"?
5 MR. BUTT: It wouldn't hurt. I'd be
6 surprised that nothing in subsection "B" refers to that
7 section, but if it doesn't, it wouldn't hurt it.
8 DR. MENACHE: Okay. Thanks.
9 MR. STONESIFER: Actually, Dr. Menache, the
10 Weather Service calculates the ventilation index
11 categories, and maybe we need to go back and change
12 this smoke management part, because what I have
13 actually been asking the Forest Service to do up in the
14 Sandia Ranger District is follow the new policy that's
15 been issued by the New Mexico Environment Department
16 that does allow them to burn under poor or fair
17 conditions, but it dramatically limits the amount that
18 they can burn.
19 And as ventilation conditions get better,
20 they can burn more and more. It's a more complex
21 policy that suits their needs better, in addition to
22 keeping the air clean. It's a real nice policy. And I
23 can give you a copy of that if you want to look at it.
24 DR. MENACHE: So in that case -- because this
25 sort of tells you what you have to do to calculate. Is

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1 this in this other section? That's on page ten. It
2 says go to this website and select this zone.
3 MR. STONESIFER: Yes.
4 DR. MENACHE: Calculate the mixing height as
5 appropriate.
6 MR. STONESIFER: The Weather Service actually
7 does that for them.
8 DR. MENACHE: Does that, okay.
9 MR. GRANTHAM: Are there other questions from
10 the members of the Board?
11 Seeing none, I will ask if there is anybody
12 in the audience who would like to ask questions of the
13 Division's witnesses? There appear to be no
14 questions.
15 Ms. Nieto, has anybody signed up for
16 comment?
17 MS. NIETO: No.
18 MR. GRANTHAM: No public comment. Before I
19 close the hearing, there appear to be a number of
20 unresolved issues. I would like to point out to the
21 Board that another option, rather than simply making a
22 decision on the proposal before you tonight, including
23 any amendments you may want to make, is to allow the
24 record to remain open for a specified length of time.
25 And that's allowed by the procedural regulations at

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1 Part 82, Section 29, that, "The Hearing Officer may
2 allow the record to remain open for a reasonable period
3 of time following the conclusion of the hearing for
4 written submission of additional evidence, comments and
5 arguments, and Proposed Statement of Reasons."
6 So that might be an option the Board would
7 want to consider here, which would allow the Division
8 to make additional refinements to the proposal without
9 having to completely start from scratch and renotice
10 this.
11 So, in addition, there is an option under the
12 procedural regulations for a Hearing Officer's Report,
13 that the Board could direct me to file a report "which
14 identifies the issues addressed in the hearing,
15 explains the testimony, and makes a recommendation for
16 Board action and shall be filed with the hearing clerk
17 within the time specified by the Board."
18 So I guess I would ask first of the Board if
19 they would like to allow the record to remain open and
20 also get the Division's input on whether that's an
21 option that they would be disposed towards.
22 MR. DEICHMANN: You want to ask the Board
23 first or the Division?
24 MR. GRANTHAM: Yes. Correct. Chairman
25 Deichmann, I think it would be appropriate to make sure

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1 that that's the Board's desire before proceeding.
2 MR. DEICHMANN: Okay. I will weigh in. And
3 I would say that I would prefer the first option that
4 you proposed, leaving the hearing open or the record
5 open to allow additional information, amendments, to
6 the proposed rule.
7 MR. GRANTHAM: And I should clarify that they
8 are not mutually exclusive. You can leave the record
9 open, get more evidence and argument, and then have a
10 Hearing Officer's Report, and I am not necessarily
11 advocating for that. I am just saying that that's an
12 option. But the first decision is whether to allow the
13 record to remain open.
14 MR. DEICHMANN: Could I ask, what's a
15 reasonable time?
16 MR. GRANTHAM: I guess a typical reasonable
17 time, in this context, I would suggest, would be 30
18 days. We want the Division's input on whether that's
19 reasonable in their opinion.
20 MR. BUTT: Mr. Hearing Officer, 30 days would
21 be reasonable for a Hearing Officer's Report, but it
22 would not be reasonable to fix the rule. It's going to
23 take -- I don't know how long it's going to take to fix
24 it. I mean, I am hoping it won't take too long, but I
25 can't guarantee I would have it fixed in 30 days.

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1 MR. GRANTHAM: Would you consider 60 days to
2 be reasonable?
3 MR. BUTT: Yes.
4 MR. DEICHMANN: Reasonable with respect to
5 the rules?
6 MR. GRANTHAM: Yes. I think the rules allow
7 discretion and I think 60 days is sufficient, not an
8 inordinate amount of time for the extent of changes,
9 given the Division's work load as a whole.
10 MR. DEICHMANN: So could I ask, procedurally,
11 how that works in terms of making that decision,
12 because if we leave the record open, do we then -- does
13 the Board make the decision after we leave the record
14 open, but close the procedure?
15 MR. GRANTHAM: No. The decision on -- if I
16 am understanding your question, the decision on the
17 merits of the rule would be made -- would not be made
18 at the Board meeting tonight. It would be made --
19 actually, I am seeing a problem here, that "The Board
20 shall reach" -- no. We are okay. Sorry.
21 "The Board shall reach its decision on the
22 proposed regulatory change within 60 days after the
23 later, the close of the record or the date the Hearing
24 Officer's Report is filed." So we would need to make a
25 decision 60 days after receiving the additional

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1 evidence from the Division, which would be 120 days
2 from now.
3 MR. DEICHMANN: But what I am wondering is,
4 when does the decision -- when is the decision made to
5 leave the record open, within the context of this
6 hearing or after?
7 MR. GRANTHAM: Correct, that needs to be made
8 before I close the hearing tonight.
9 MR. DEICHMANN: So we just poll the Board, is
10 that what we do?
11 MR. GRANTHAM: That would be helpful.
12 MR. DEICHMANN: Okay. Member Grace?
13 MR. GRACE: Once the record is left open,
14 will the Hearing Officer's Report include what looks to
15 me like four major items, you know, the cooking issue,
16 the Division/Department, the waiver, and something
17 else. I forgot.
18 DR. MENACHE: The visibility, is that the one
19 you were getting at?
20 MR. GRACE: But the Hearing Officer's Report,
21 would it include some suggested changes based on the
22 input?
23 MR. GRANTHAM: Yes. If the Board directs me
24 to file a report, it would include my recommendations,
25 and that's a separate decision from leaving the record

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1 open.
2 MR. GRACE: It's basically all the
3 alternatives together that you recommended, 60 days
4 plus the Hearing Officer's Report?
5 MR. GRANTHAM: Well, yes, if there is a
6 Hearing Officer's Report. Sorry. Obviously, this is
7 the first time we have had to use these procedures, so
8 we are kind of learning as we go, but, "The decision
9 will be made 60 days after the later, the close of the
10 record or the Hearing Officer's Report."
11 So I guess what we need to do tonight is
12 establish the schedule of first when the additional
13 evidence will be admitted, and the Division has
14 indicated that 60 days is a reasonable amount of time
15 for that, then the Board would have to decide a time
16 for me, subsequent to the receipt of the evidence, to
17 compile the Hearing Officer's Report, and then 60 days
18 after it's received, the Board would make a decision at
19 its meeting.
20 MR. DEICHMANN: Can I ask, what is the value
21 of the Hearing Officer's Report in this particular
22 situation?
23 MR. GRANTHAM: Well, hopefully, it would
24 compile and synthesize the information presented at the
25 hearing and evaluate the initial evidence. I guess

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1 until I would see the additional evidence submitted by
2 the Board -- I mean, the Division and the form that it
3 takes, it's hard to say what value added there would
4 be. Hopefully, there would be some, but that decision
5 needs to be made before you see the Hearing Officer's
6 -- I mean, before you see the additional evidence.
7 But, basically, you would bring it all together, I
8 would give my recommendations on what the Board's
9 decision should be.
10 MR. DEICHMANN: But you did mention that
11 that's optional. So the alternative would be for the
12 Division to come back with their additional changes and
13 clarifications and then just -- well, we wouldn't
14 reopen the hearing, but we would then allow that into
15 the record and we would just proceed from there?
16 MR. GRANTHAM: That's correct.
17 MR. DEICHMANN: I am just wondering if the
18 Hearing Officer's Report is really necessary in this
19 particular situation.
20 MR. GRANTHAM: That's a good question. It's
21 not an extremely complex case. There is not, you know,
22 days of testimony to sift through.
23 MR. DEICHMANN: All right.
24 MR. GRANTHAM: It may well be that the Board
25 will be perfectly, you know, well-advised in making its

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1 decision just based on the additional evidence that the
2 Division provides.
3 MR. DEICHMANN: So then I have one more
4 question and then I will ask for anyone else.
5 As an alternative, then, to a Hearing
6 Officer's Report, or maybe regardless, would we want to
7 leave specific directions to the Division with respect
8 to the items that we would like addressed, as Member
9 Grace was enumerating?
10 MR. GRANTHAM: Yes, I think that would be
11 appropriate and helpful.
12 MR. DEICHMANN: Thank you.
13 MR. BACA: I believe we have spoken to that
14 in the questions that have been posed and they are on
15 the record. I guess I would suggest that this -- a
16 question of staff, do they need some more specific
17 feedback than what's on the record right now?
18 MR. DEICHMANN: I was just thinking that it
19 wouldn't hurt to just summarize all that, because it's
20 been a rather extended discussion, and we could at
21 least help them out by giving a summary of that and
22 then they probably would go through the record, anyway.
23 MR. BACA: And I am very comfortable with
24 that; however, I would -- I'd be concerned that we
25 might miss something if we didn't make sure that the

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1 record was part of the feedback to staff.
2 MR. DEICHMANN: Uh-huh.
3 MR. GRANTHAM: Well, yes, the staff will have
4 access to the transcript of this hearing.
5 MR. BUTT: Yes.
6 MR. GRANTHAM: But as Chairman Deichmann
7 says, I think if there are specific points that the
8 Board members want to make sure that are covered, it
9 would certainly be helpful to get highlights.
10 MR. BACA: Sure.
11 MR. GRANTHAM: Member Sharpe?
12 MR. SHARPE: My opinion is that we have had
13 so much discussion about this that I think they know
14 dog-gone well what our problem is and I bet they could
15 fix it pretty easily. We don't need to make this more
16 complicated than it is. Just give Neal a chance to --
17 Mr. Butt the chance to rework those couple of sections
18 and let him bring it back to us.
19 MR. GRANTHAM: Okay. With that, I guess what
20 I will do here is -- well, first, Chairman Deichmann,
21 you were going to poll the -- or you asked for a poll
22 of the Board of whether the hearing record should
23 remain open.
24 So I guess all those in favor of leaving the
25 hearing record open signify by saying aye.

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1 MR. GRACE: Aye.
2 DR. UPSON: Aye.
3 MR. BACA: Aye.
4 MR. SULLIVAN: Aye.
5 MR. SHARPE: Aye.
6 DR. MENACHE: Aye.
7 MR. DEICHMANN: Aye.
8 MR. GRANTHAM: Those opposed? So the hearing
9 record shall remain open for 60 days, and unless there
10 are objections or additional last-minute instructions
11 to the Division, I will close the hearing at this
12 time.
13 MR. BUTT: Not close it, just recess it.
14 MR. GRANTHAM: Good point.
15 MR. BACA: I have just one question before we
16 close it, and this doesn't have anything to do with the
17 staff, but I think it's incumbent on the members of
18 this board to articulate their questions and concerns
19 in a pretty timely manner.
20 What are the provisions -- what would be the
21 provisions for reviewing this ahead of the actual
22 meeting? In other words, can we -- I know that staff
23 now has 60 days to explore some revisions. So I would
24 assume that would mean that it's unlikely that the
25 Board would see it before three months from now, and I

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1 don't know that their -- I didn't read any provisions
2 in the instructions for having this material ahead of
3 time, but I think it's incumbent on us to not wait
4 until the night of the hearing to craft our questions.
5 MR. GRANTHAM: Generally, there is a
6 prevision that all documents to be considered by the
7 Board have to be provided, I guess, 15-some days before
8 the Board meeting.
9 MR. BACA: That's right.
10 MR. GRANTHAM: And I'm going to clarify that
11 when you get the additional evidence -- well, once the
12 evidence is submitted, within the 60 days, at that
13 time, the record is closed. So at the next hearing, we
14 would go into deliberations based on the record before
15 you as we normally do tonight.
16 MR. BACA: Yes.
17 MR. GRANTHAM: So there won't be a further
18 questioning of the Division at that time. So it would
19 be solely based on the record.
20 MR. BACA: And my only point is to just
21 challenge us to make sure that we get some feedback to
22 staff, since we only have one more chance at this
23 before having to refile, to get those comments to staff
24 in enough time to get us something that we could work
25 with.

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MR. GRANTHAM: Actually, Member Baca, now is the time to make those comments. After we adjourn here tonight, other than the additional evidence --

MR. BACA: Fifteen days before the next meeting, is my understanding.

MR. GRANTHAM: If I am not mistaken, unless I am confusing this with an EIB requirement, but I believe there is a general requirement that any documents considered by the Board have to be presented to the board fifteen days before the meeting at which they are considered.

MR. BACA: Yes.

MR. GRANTHAM: Right. So you'll have at least fifteen days to review additional evidence, but there will be no opportunity for additional questions afterwards.

MR. BACA: Exactly. And my only point is, and I apologize for not making it more clearly, that that is a challenge to us, is to make sure that we review that material in a timely manner ahead of the meeting, so that if we have some issues that finally are reviewed that night, it's something that we can take some action on.

MR. GRANTHAM: Okay. Thank you. Sorry. I misunderstood.

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MR. BACA: No. I am sure you did not. I am sure it's just a comment on my inability to articulate my challenge.

MR. BUTT: Mr. Hearing Officer, if the Board does decide to go that way, then the Division would request that you make it until the May meeting, which would be 63 days, provided that would work out logistically better, the May meeting. I think it works out to 63 days.

MR. GRANTHAM: Okay. So the record shall remain open until May 3rd, was it?

MR. BUTT: May 11th.

MR. GRANTHAM: Yes. Ms. Kearny?

MS. KEARNY: Mr. Hearing Officer, Members of the Board, clarification. The Hearing Officer's reference to the record remaining open for 60 days does not mean that the meeting has to be held within 60 days, correct?

MR. GRANTHAM: Correct.

MS. KEARNY: So the 63 days, I am not sure how that matters, because if the record closes in 60 days, you don't have to have the meeting that day.

MR. GRANTHAM: Right.

MS. KEARNY: Or before that day.

MR. GRANTHAM: Because we wouldn't consider

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it until the June meeting, anyway.

MS. KEARNY: Does that fix that?

MR. BUTT: No.

MR. DEICHMANN: So it's later than 60.

MR. GRANTHAM: Yes. Are there any objections at this point from the Board to adjourning the hearing with the provision that the Division has 60 days to submit additional evidence and arguments?

MR. DEICHMANN: I have just one question.

Do we need to resolve the question about the Hearing Officer's Report within this context?

MR. GRANTHAM: You do not need to resolve that within the confines of the hearing.

MR. DEICHMANN: Okay.

MR. BUTT: Mr. Hearing Officer, can you clarify that it's going to be left open for 63 days until the May meeting?

MR. GRANTHAM: Well, it was my understanding from Ms. Kearny's comment that it really wasn't relevant whether it's 60 or 63 days, but if --

MR. BUTT: Okay. 60 is fine then.

MR. GRANTHAM: Okay. Let the record show the meeting is adjourned at -- the hearing is adjourned at 7:30 p.m. Thank you.

MR. BUTT: Thank you.

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(Proceedings adjourned at 7:30 p.m.)

1 STATE OF NEW MEXICO :
2 :
3 COUNTY OF BERNALILLO :
4 I, DENISE KOPAN, the undersigned Court
5 Reporter, HEREBY CERTIFY that the foregoing hearing was
6 recorded by me by machine shorthand; that I later
7 caused my notes to be transcribed under my personal
8 supervision; and that the foregoing is a true and
9 accurate record, to the best of my ability, of said
10 proceedings.
11 I FURTHER CERTIFY that I am not a relative or
12 employee of any of the parties or attorneys involved in
13 this matter and that I have no personal interest in the
14 final disposition of this matter.
15 DATED this 14th day of March, 2011.
16
17 Original Signed
18
19 by Denise Kopan
DENISE KOPAN, NM CCR #124
20 License Expiration: 12/31/11
21
22
23
24
25

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