

BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY  
AIR QUALITY CONTROL BOARD

RECEIVED  
ENVIRONMENTAL  
COMMISSION  
MAY 11 2009

IN THE MATTER OF THE PETITION TO REPEAL SECTION 20.11.90.12 NMAC, *BREAKDOWN, ABNORMAL OPERATING CONDITIONS, OR SCHEDULED MAINTENANCE* AND REPLACE WITH A NEW RULE, 20.11.49 NMAC, *EXCESS EMISSIONS*. ALSO AMENDING 20.11.65 NMAC, *VOLATILE ORGANIC COMPOUNDS*, AND 20.11.69 NMAC, *PATHOLOGICAL WASTE DESTRUCTORS*, TO CORRECT CROSS-REFERENCING. SUBMIT NEW 20.11.49 NMAC, AND AMENDED 20.11.90 NMAC, AND 20.11.65 NMAC TO EPA AS A REVISION TO THE STATE IMPLEMENTATION PLAN (SIP)

AQCB Petition No. 2009- 4

Air Quality Division,  
Environmental Health Department,  
City of Albuquerque, Petitioner

CITY OF ALBUQUERQUE'S NOTICE OF INTENT TO PRESENT TECHNICAL  
TESTIMONY

Pursuant to 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*, the City of Albuquerque Environmental Health Department, Air Quality Division (“the Division”) hereby submits its Notice of Intent (NOI) to present technical testimony in this proceeding.

1. **The person for whom the witness will testify.**

City of Albuquerque Environmental Health Department, Air Quality Division

2. **The name and qualifications of each technical witness.**

**Neal T. Butt.** Environmental Health Scientist, Control Strategies Section, Air Quality Division. M.S. Biology (Wildlife Biology), University of North Dakota; B.S. Biology (Zoology), University of New Mexico; A.A.S. Criminal Justice, Central New Mexico Community College; A.A.S. Environmental Protection Technology, CNM; WERC Waste Management Certificate, UNM Chemical & Nuclear Engineering Department. Employed by the City of Albuquerque’s Environmental Health Department for 12 + years; the last eight of which have been with the Air Quality Division. Chief responsibility is the promulgation of air quality regulations for implementation within the County of Bernalillo.

**Damon R. Reyes.** Supervisor, Enforcement Section, Air Quality Division. B.S. Environmental Science, College of Santa Fe. Employed by the City of Albuquerque's Environmental Health Department, Air Quality Division for 4+ years. Previously employed by the State of New Mexico, Air Quality Bureau (2001 - 2005). Chief responsibility is to supervise the Enforcement Section, which includes regulating both Fugitive Dust and Stationary Sources

**Dario Rocha.** Supervisor, Permitting and Technical Analysis Section, Air Quality Division. B.S. Mechanical Engineering, New Mexico State University. Employed by the City of Albuquerque's Environmental Health Department, Air Quality Division for 9 + years. Previously employed by the State of New Mexico, Air Quality Bureau (1997-2000). Chief responsibility is to supervise Permitting and Technical Analysis Section.

**Alan Shar.** Environmental Engineer, (P.E.), Air Planning Section, U.S. Environmental Protection Agency, Region VI, Dallas, Texas. B.S. Chemical Engineering, University of Arkansas, M.S. Chemical Engineering, University of Arkansas. Employed by the EPA for the past 12 years. Previously employed as an Air Permit Engineer, Air Division, Arkansas Department of Environmental Quality for 10 years. Chief responsibility is the technical and regulatory review of air quality regulations promulgated by the States of Oklahoma, New Mexico, Arkansas, Texas, and Louisiana. Responsible for evaluation and approval of the excess emissions related regulations and Nitrogen Oxides control techniques within EPA Region VI. Has written eight Federal Registers on excess emissions rules. Has been on two national rule workgroups regarding excess emissions. Has worked with New Mexico, Oklahoma and Texas on their effort to promulgate an excess emissions rule, including testifying at Oklahoma's rule hearing.

**Matt Stebleton.** Compliance Supervisor, Compliance Section, Air Quality Division. M.S. Biology, University of New Mexico. Employed by the City of Albuquerque's Air Quality Division for 15+ years. Previously employed by the State of New Mexico Air Quality Bureau for 8 years. Chief responsibilities are reviewing Notices of Violation and settling them by participating in informal and formal settlement conferences which lead to Compliance Agreements and penalties following EPA guidance and regulations.

**Isreal Tavarez.** Environmental Engineering Manager, Air Quality Division. M.S. Chemical Engineering, New Mexico State University; B.S. Chemical Engineering, NMSU. Registered Professional Engineer (New Mexico). Employed by the City of Albuquerque's Environmental Health Department, Air Quality Division for 13 + years. Previously employed by the State of New Mexico, Air Quality Bureau (1994-1996). Chief responsibility is the oversight of the regulatory programs in the Air Quality Division.

### **3. Summary and Estimated Duration of Testimony**

Mr. Butt's written testimony is attached as AQD Exhibit # 13. Mr. Butt will testify that Section 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, Or Scheduled*

*Maintenance* should be repealed and replaced with a new rule, 20.11.49 NMAC, *Excess Emissions*; and that 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69 NMAC, *Pathological Waste Destructors*, should be amended to change cross-references.

The Division is petitioning the Board to repeal Section 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, Or Scheduled Maintenance* and replace with a new rule, 20.11.49 NMAC, *Excess Emissions*, as well as amending 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69 NMAC, *Pathological Waste Destructors*, to correct cross-referencing for the following reasons:

# 1. On March 4<sup>th</sup>, 1981, the 'Air Pollution Control Division' received a letter from EPA, dated March 2, 1981 (AQD Exhibit # 5b), stating that Regulation No. 19 (AKA Section 11 of Resolution No. 1 or Section 19 of Regulation No. 1 or 20.11.90.12 NMAC) "provides automatic exemptions from emission limitations for excess emissions during scheduled maintenance and some other situations. According to EPA guidance, all emissions that exceed emission limitations during startup, shut down, breakdown, or maintenance are a violation of the SIP unless there is a sudden and unavoidable malfunction that is totally beyond the control of the owner and/or operator. The automatic exemption provision is too broadly written and should be limited to sudden unavoidable exceedances". Also, "the information which the source must report to the agency must be more specific. Enough detail must be reported to enable the agency to determine that the excess emissions were caused by a sudden and unavoidable occurrence". In light of this letter, the Air Quality Division evaluated the need for a SIP revision to address EPA's concerns. However, because a SIP revision was not mandated by EPA, this effort never came to fruition.

# 2. On September 28, 1982, September 20, 1999, and again on December 5, 2001, the U.S. Environmental Protection Agency (EPA) issued guidance on how states should address excess emissions during malfunction, startup and shutdown in their State Implementation Plan (SIP)[AQD Exhibits 8a-8d].

# 3. In 2004, the New Mexico Environment Department's Air Quality Bureau (AQB) received a letter from EPA (AQD Exhibit # 7), stating that "Section 20.2.7.109 NMAC is not consistent with the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act as outlined in a 1999 memorandum, entitled '*State Implementation Plans: Policy Regarding Excess Emissions During Malfunction, Startup, and Shutdown*'. . .because the provision can be interpreted to exempt emissions from compliance with SIP limits. Because excess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards, EPA views all excess emissions as violations of the applicable emission limitation. However, the State or EPA can exercise enforcement discretion to refrain from taking enforcement action in certain circumstances. Also, the State has discretion to provide an affirmative defense to actions for penalties brought for excess emissions that arise during certain malfunction, startup, and shutdown episodes".

#4. To bring New Mexico's rule into alignment with federal guidance, the Air Quality Bureau (AQB) proposed to the Environmental Improvement Board (EIB), that it repeal 20.2.7 NMAC, *Excess Emissions*, [filed 4/29/1981], and replace it with a new rule that complies with EPA guidance. The Air Quality Bureau's proposal tightened notification requirements, established criteria recommended by EPA for affirmative defenses, and required "root cause"

and “corrective action” analysis. The EIB adopted this new excess emissions rule, which became effective on 8/1/08 (AQD Exhibit # 12).

#5. The extant version of the excess emissions rule for Bernalillo County, entitled *Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*, 20.11.90.12 NMAC was first adopted by the Albuquerque – Bernalillo County Air Quality Control Board (Air Board) as Section 11 of Resolution No. 1, and subsequently filed on 8/6/1971 (AQD Exhibit # 9a). This rule was subsequently changed, replacing the term “upset” with the term “abnormal operating conditions”, replacing the term “Secretary” with the term “Director” and becoming “Section 19” instead of “Section 11”. This amended rule was filed on 6/6/1973 (AQD Exhibit # 9b). Section 19 of Regulation # 1 was filed again on 7/19/1973 (AQD Exhibit # 9c) and 3/21/1977 (AQD Exhibit # 9d), but without any changes. The rule that was filed on 3/21/1977 was subsequently submitted to EPA for inclusion into the SIP and was approved by EPA on 4/10/1980, and made effective that same day (AQD Exhibit # 6). The name of the rule was changed from “Section 19” to “Regulation 19”, and filed on 3/24/1982 (AQD Exhibit # 9e). The rule was reformatted twice [Filed 10/27/1995 & 10/1/2002] to conform to the New Mexico Administrative Code. Except for formatting differences and phraseology, this rule has not changed substantively since 1971. Thus, in order to comply with current EPA guidance, and to comport with New Mexico’s new rule, the Air Board’s excess emissions rule needs to be replaced. Therefore, the Air Quality Division proposes that Section 20.11.90.12 NMAC, be repealed (while leaving the rest of 20.11.90 NMAC intact), and be replaced by a new rule, 20.11.49 NMAC, *Excess Emissions*. The proposed replacement rule, *Excess Emissions*, 20.11.49 NMAC is patterned after New Mexico’s rule, 20.2.7 NMAC, *Excess Emissions*, with some modifications made in response to comments received from EPA. These modifications include the deletion of Sections 14 and 15

of 20.2.7 NMAC (EIB's rule), and the incorporation of language from Oklahoma's rule, entitled *Excess Emission Reporting Requirements*, 252.100.9 OAC. The current proposal will reduce ambiguity within the rule, clearly define what is allowed and not allowed to qualify as an excess emissions event, and stipulate how reporting should take place.

#6. EPA considers startup, shutdown and scheduled maintenance as part of a facility's normal operation and as such, should be accounted for in the planning, design and implementation of operating procedures for the source's process and control equipment. Therefore, excess emissions should only occur under exceptional circumstances, and not during scheduled maintenance, startup or shutdown. Thus, current language at 20.11.90.12 NMAC regarding startup, shutdown, and scheduled maintenance is out of compliance with EPA guidance, and needs to be replaced. The proposed rule prohibits excess emissions for startup or shutdown unless they are the result of unavoidable and unforeseeable malfunctions.

# 7. In addition, as part of the required analysis for excess emissions events, the Air Quality Division is proposing a requirement for a "root cause analysis". This would be a detailed technical analysis of excess emission events that determines the underlying reason(s) that the event occurred and all contributing factors to the malfunction, to the extent possible. The analysis would also require an evaluation of alternative measures (if any) that can be implemented to reduce the likelihood of a recurrence of such an incident. Minimizing the likelihood of excess emissions from malfunctions will reduce the reporting burden for both facilities and the Air Quality Division. The Division recommends the use of *DOE's Root Cause Analysis Guidance Document 1992* (AQC Exhibit # 10).

#8. The cross-references made to 20.11.90.12 NMAC, found at 20.11.65.7.A NMAC and 20.11.69.25.A NMAC, are proposed to be changed to refer to 20.11.49 NMAC instead.

# 9. To fix style and formatting.

It is anticipated that the hearing will take approximately 2 hours or less.

#### **4. Text of Recommended Revisions to the New Mexico State Implementation Plan**

The Division recommends the proposed repeal of Section 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, Or Scheduled Maintenance*, as proposed in the Public Review Draft shown as AQD Exhibit 1a; and replacement with the new rule, 20.11.49 NMAC, *Excess Emissions*, proposed in the Public Review Draft shown as AQD Exhibit 1b; as well as amendments to 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69 NMAC, *Pathological Waste Destructors*, to correct cross-referencing, as proposed in the Public Review Drafts shown as AQD Exhibits 1c and 1d, respectively; as amended by Staff Proposed Floor Amendments shown as AQD Exhibit #14.

#### **5. List and Description of Exhibits**

The Division has attached the following exhibits to this Notice of Intent:

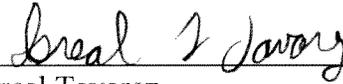
<u>Exhibit Number</u>	<u>Title of Exhibit</u>
AQD Exhibit 1	'Petition to Amend' filed on June 23, 2009
AQD Exhibit 1a	Public Review Draft {attached to AQD Exhibit 1} showing proposed repeal of Section 20.11.90.12 NMAC, <i>Breakdown, Abnormal Operating Conditions, Or Scheduled Maintenance</i> ;
AQD Exhibit 1b	Public Review Draft {attached to AQD Exhibit 1} showing proposed replacement rule, 20.11.49 NMAC, <i>Excess Emissions</i>
AQD Exhibit 1c	Public Review Draft {attached to AQD Exhibit 1} showing proposed amendments to 20.11.65 NMAC, <i>Volatile Organic Compounds</i>
AQD Exhibit 1d	Public Review Draft {attached to AQD Exhibit 1} showing proposed amendments to 20.11.69 NMAC, <i>Pathological Waste Destructors</i>

- AQD Exhibit 2 Approval of new rule name request from the New Mexico State Records Center
- AQD Exhibit 3 a/b/c Public notices of hearing, including the legal advertisement of this hearing in the Albuquerque Journal {3a} and the New Mexico Register {3b}, as well as the ‘Notice of Availability of the Public Review Draft’ which was sent to the Air Quality Announce List Serve as well as a list of those individuals’ e-mail addresses {3c}
- AQD Exhibit 4 Stakeholder Meeting
- AQD Exhibit 5a Comments received from EPA, 2009
- AQD Exhibit 5b Comments received from EPA, 1981
- AQD Exhibit 6 *Section 19, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*; approved by EPA for incorporation into the SIP 4/10/80 [45 FR 24468] @ 52.1620(c)(11), effective 4/10/80
- AQD Exhibit 7 Letter from EPA to the NMED, Air Quality Bureau, 9/10/04
- AQD Exhibits 8a/b/c/d/e EPA Guidance: 1982; 1983; 1999; 2001
- AQD Exhibits 9/a/b/c/d/e Excess emissions rule filings: 1971; 1973; 1973; 1977; 1982
- AQD Exhibit 10 *DOE Guideline Root Cause Analysis Guidance Document, February 1992*
- AQD Exhibit 11a December 2008 ruling in Sierra Club vs. EPA, DC Circuit Court of Appeals
- AQD Exhibit 11b Michigan DEQ v. EPA, U.S. Court of Appeals, June 22, 2000
- AQD Exhibit 12 20.2.7 NMAC, *Excess Emissions*
- AQD Exhibit 13 Direct Testimony by AQD
- AQD Exhibit 14 Air Quality Division staff proposed floor amendments
- AQD Exhibit 15 Draft Agenda, Air Quality Control Board, for September 9, 2009

## **6. Reservation of Rights**

This Notice of Intent to Present Technical Testimony is based on the Division's Petition to Amend. The Division reserves the right to call any person to testify and to present any exhibit in response to another notice of intent or public comment filed in this matter or to any testimony or exhibit offered at the public hearing. The Division also reserves the right to call any person as a rebuttal witness and to present any exhibit in support thereof.

Respectfully submitted,



Isreal Tavaréz  
Environmental Engineering Manager  
Air Quality Division  
Environmental Health Department  
One Civic Plaza, NW, Suite 3047  
Albuquerque, New Mexico 87103  
(505) 768-1965

**CERTIFICATION**

I hereby certify that on August 20, 2009, an original and nine copies of this Notice of Intent to present technical testimony (NOI), with attached exhibits were delivered to the following person for filing.

Janice Amend  
Air Quality Control Board Liaison / Hearing Clerk  
Environmental Health Department  
One Civic Plaza, NW, Suite 3023  
Albuquerque, New Mexico 87103

And that on August 20, 2009, a copy of this NOI with attached exhibits was sent to the Attorney for the Board, Bill Grantham, at the following e-mail address:

Bill.grantham@state.nm.us



Isreal Tavaréz  
Environmental Engineering Manager  
Air Quality Division