ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND TITLE 20, CHAPTER 11 OF THE NEW MEXICO ADMINISTRATIVE CODE TO REQUIRE REVIEW AND CONSIDERATION OF CUMULATIVE AIR IMPACTS.

AQCB Petition No. 2014-1

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Southwest Organizing Project,

Petitioner.

The Southwest Organizing Project ("SWOP"), by and through its attorneys, the New Mexico Environmental Law Center, respectfully petitions the Albuquerque-Bernalillo County Air Quality Control Board ("Board") to hear and adopt the following proposed regulatory amendments to Title 20, Chapter 11 of the New Mexico Administrative Code, pursuant to its authority under the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 *et. seq.* (the "Act"), its implementing regulations, and NMAC 20.11.82.1 *et. seq.* That proposed regulatory change is attached as Exhibit A. SWOP submits this Petition and proposed rule change because environmental and public health impacts from air pollution in Albuquerque and Bernalillo County are heavily concentrated in low-income and minority neighborhoods causing increased risk of disease and lower life expectancy in those neighborhoods. In order to begin to address the profound inequalities in exposure to pollutants, the proposed rule would require that the Albuquerque Air Quality Division ("Department") consider the cumulative impacts of any new operation permitted under the Act and allow the Department to propose appropriate mitigation of those impacts. In support of its petition, SWOP STATES:

LEGAL AUTHORITY

1. The Board is authorized to adopt the proposed changes to the Board's regulations pursuant to NMSA 1978, § 74-2-5(B)(1) and 20.11.82.1 *et. seq.* NMAC.

2. Section 74-2-5(B)(1) specifically allows the Board to "adopt, promulgate … and amend" regulations, consistent with the Act.

3. Further, the Act provides that Board regulations "shall prevent or abate air pollution." NMSA 1978, § 74-2-5(B)(1).

4. The Act defines "air pollution" as emitting air contaminants into the outdoor atmosphere "in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare … or the reasonable use of property." Id. at § 74-2-2(B).

5. The Act places some restrictions on the Board's regulatory authority. Specifically, the Act restricts the Board from promulgating certain regulations that are more stringent than those of the Act or the federal Clean Air Act. Id. at § 74-2-5(C).

6. However, those restrictions are limited. The Board is only prohibited from promulgating regulations that are more stringent than the Air Quality Control Act or the Clean Air Act with respect to: protecting visibility in class I areas by preventing significant deterioration of air quality and achieving national ambient air quality standards in nonattainment areas (§ 74-2-5(C)(1)(a)); prescribing performance and emission standards for hazardous air pollutants (§ 74-2-5(C)(2)(a)); and regulating air emissions from solid waste incinerators (§ 74-2-5(C)(3).

7. Except for these limited circumstances, any regulation the Board promulgates need only be consistent with the Act. § 74-2-5(B)(1). *See*, Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board, 80 N.M. 633, 644, 459 P.2d 159, 171 (Ct. App. 1969) (Local board regulations need not be identical to state regulations adopted by state board, only consistent with statutory language).

8. The proposed regulations are consistent with the Act because they are intended to allow the Department and Board to evaluate the cumulative impacts of air emissions from any proposed source on the environment and human health, which would assist the Department and Board in preventing and abating air pollution.

9. Moreover, the proposed regulation is specifically authorized by the Act. To achieve the goal of preventing and abating air pollution, the Act gives the Board the authority to require "any person" emitting "any air contaminant" to install, use and maintain emission monitoring devices, sample emissions, and "provide ... reasonable information relating to the emission of air contaminants." NMSA 1978, § 74-2-5(C)(6).

10. The proposed regulation would require that any potential emitter of air contaminants monitor and report the current air quality within five miles of where the emitter seeks to locate its operation and report the anticipated environmental and public health impacts its operation is likely to have when combined with existing and reasonably foreseeable emissions.

11. In promulgating its regulations, the Act requires the Board to give weight it deems appropriate to all facts and circumstances including the "character and degree of injury to or interference with health, welfare, visibility and property." Id. at § 74-2-5(E).

12. As discussed below, the impacts of air pollution on low-income and minority neighborhoods in Bernalillo County are significant. The proposed regulation would provide information necessary for the Department and Board to make decisions that protect citizens' health, neighborhoods and property.

13. Finally, nothing in the proposed regulation is inconsistent with the substantive provisions of the Act. Nowhere does the Act expressly or impliedly prohibit the Board from promulgating a rule that requires sampling, monitoring, and reporting cumulative air impacts.

14. Indeed, the proposed rule furthers the purposes of the Clean Air Act, which is the federal law that serves as the authority for the New Mexico Air Quality Control Act. Congress declared that the Clean Air Act was intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

CUMULATIVE IMPACTS ANALYSIS IS NECESSARY

15. Research into the impacts of air pollution on human health firmly establishes that air pollution causes a range of health problems, including cancer. *See, e.g.*, Straif, K., *et. al.*, eds., Air Pollution and Cancer, International Agency for Research on Cancer, Scientific Publication No. 161 (2013), available at: http://www.iarc.fr/en/publications/books/sp161/index.php; Morello-Frosch, R. and Jesdale, B., Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas, 114 *Environmental Health Perspectives* 386 (2006).

16. Research also establishes that low-income and minority communities are particularly vulnerable to the effects of air pollution. Morello-Frosch, *et. al.*, Environmental Justice and Regional Inequality in Southern California: Implications for Future Research, 110 *Environmental Health Perspectives* 149 (2002).

17. Low-income communities and communities of color are particularly vulnerable to adverse health impacts of air pollution because polluting industries disproportionally locate in those communities. Id. at 151-152.

18. As a result, public health professionals have recommended analyzing the cumulative health effects of multiple air contaminants from multiple sources. Id. at 149.

19. Like similar communities elsewhere in the United States, poor and minority neighborhoods in Albuquerque and Bernalillo County are disproportionally impacted by air pollution and suffer disproportional health problems because of those impacts.

20. A 2012 study on public health, pollution exposure, poverty and race demonstrates that low-income and minority communities in Bernalillo County have a greater risk than more affluent and non-minority communities to being exposed to environmental pollutants. Joint Center for Political and Economic Studies, Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All (Sept. 2012) at 17-18 ("Good Health for All Study"). A copy of that study is attached as Exhibit B.

21. The Good Health for All Study examined the racial and economic data for census tracts in Bernalillo County and compared those data to data about life expectancy and sources of environmental pollution in the census tracts studied. Id. at 2.

22. The Good Health for All Study found that neighborhoods with higher populations of Hispanics and recent immigrants with high levels of poverty were more likely to contain dense concentrations of polluting facilities. Id. at 16; Map 11.

23. These neighborhoods were located primarily in Downtown, the Southeast Heights, the South Valley and the North Valley. Id.

24. Further, people in these "high risk neighborhoods" had an elevated risk for adverse health impacts and a shorter life expectancy. Id. at 17-19; 18, Figs. 6, 7.

25. Conversely, neighborhoods with higher proportions of non-minority and wealthy residents had a lower concentration of toxic facilities and a longer life expectancy, and were considered "low risk neighborhoods". Id.

26. Indeed, the difference in life expectancy between high risk neighborhoods and low risk neighborhoods is dramatic. The residents of high risk neighborhoods can expect to live an average of 5.2 fewer years than residents living in low risk neighborhoods. Id. at 1,13, Fig. 5.

27. The Good Health for All Study recommends several kinds of impact analyses as ways to address increased pollution risks in low-income and minority communities. Id. at 19-20.

28. Both the recommended impact assessments include evaluating the cumulative and combined impacts of multiple pollution sources. Id.

29. The Good Health for All Study recommendations echo those of the 2007 Environmental Justice Task Force ("Task Force") that the Board created to review and evaluate the Board's air quality permitting policies and practices.

30. The Task Force found that the Board's policies, procedures and regulations do not adequately address environmental and public health issues in communities disproportionately burdened by air pollution. Environmental Justice Task Force, Final Report Submitted to Albuquerque-Bernalillo County Air Quality Control Board at 5 (2008).

31. The Task Force recommended that the Board adopt cumulative environmental impact assessment provisions. Id.

32. The Task Force included a model environmental impact regulation as an attachment to its Report. Id., Attachment 1.

33. That model environmental impact regulation would have required assessing the cumulative air impacts of air pollution sources. Id.

34. Finally, other jurisdictions have acknowledged the health and environmental problems associated with the disparate impacts of pollution on the poor and minorities, and have enacted rules to address those disparities.

35. In 2008, Minnesota's legislature amended the Minnesota Environmental Policy Act to allow the Minnesota Pollution Control Agency ("MPCA") to evaluate and address the cumulative air impacts in a specific area of Minneapolis. Ellickson, Kristie, *et. al.*, Cumulative Risk Assessment and Environmental Equity in Air Permitting: Interpretation, Methods, Community Participation and Implementation of a Unique Statute, 8 *Int. J. Environ. Res. Public Health* 4140 (2011).

36. The amendment was enacted specifically to address the disproportionate impacts of air pollution in a low-income and minority area of Minneapolis that contained dense concentrations of polluting industry. Id. at 4142.

37. The statute requires not only that the MPCA consider the cumulative risks associated with sources of air pollution, but also environmental equity, i.e., the fairness of placing a polluting source in neighborhoods already burdened by air pollution.

38. Petitioners anticipate a hearing on this Petition will take approximately eight (8) hours.

39. For all the above reasons, SWOP requests that the Board hear and adopt the proposed cumulative impact regulation.

Respectfully submitted this 27th day of January, 2014.

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