

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

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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

**RESPONSE IN OPPOSITION TO
PETITION TO AMEND
NEW MEXICO ADMINISTRATIVE CODE**

The Environmental Health Department (“EHD”) Air Quality Program (the “Program”) submits this Response (“Response”) to the Petition (the “Petition”) filed by Southwest Organizing Project, (the “Petitioner”). The Petition requests that the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) adopt a new air quality regulation (“Proposed Rule”) requiring, as a condition to issuing a new air permit, that any person who is planning to construct, modify, or operate a source within Bernalillo County first conduct a “cumulative impact analysis.” This Response is filed pursuant to 20.11.82.18(C) NMAC. The Program respectfully requests that the Air Board deny the Petitioner’s request for a hearing for the reasons set forth below.

This Response is not an exhaustive list of all of the Program’s concerns with the Proposed Rule. If the Air Board determines to send the Proposed Rule to a hearing, the Program reserves the right to address all of its concerns at the hearing.

BACKGROUND

The Petition asks the Air Board to hold a hearing to consider adopting a rule which would require assessment of cumulative impacts of air pollution before making air permitting decisions. The Proposed Rule seeks monthly monitoring for one year for (1) all criteria pollutants, (2) all hazardous pollutants and (3) all chemicals listed on the California Cancer or Reproductive Toxicity Chemicals List before the Program can consider whether or not to issue a permit. In the aggregate, these three lists total to more than 1000 substances. The Proposed Rule would require an evaluation of the public health impacts including impacts on vulnerable subpopulations such as children, pregnant women, and the elderly.

In support of its Proposed Rule, the Petitioner offers a study, "*Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All*," ("*Place Matters Study*"). The *Place Matters Study* documents differences in longevity and the percentage of low birth weight infants in different census tracts in Bernalillo County. These are key differences in important health outcomes that should cause decision makers to take note.

Importantly, the *Place Matters Study* does not conclude that this difference in health outcomes is caused by air quality differences between census tracts. Instead, it concludes that the two most important predictors of the different health outcomes are levels of educational attainment (p. 2) and poverty (p. 5). Other community level risk factors identified include (1) violent crime rates, (2) foreclosure rates, (3) unemployment rates, and (4) percentage of overcrowded households. The Proposed Rule does nothing to improve any of these neighborhood factors and, as will be explained below, may make them worse.

The *Place Matters Study* only “suggests” that “environmental hazards,” in combination with the above factors “make it more difficult for people in [low-income and minority communities] to live healthy lives.” P. 19. But the “environmental hazards” evaluated in the *Place Matters Study* weren’t actual hazards. Instead, the “environmental hazards” referred to in the *Place Matters Study* were simply locations where different sites are subject to various environmental regulations. Thus, the *Place Matters Study* provides no scientifically valid support for the Proposed Rule.

REASONS TO DENY THE PETITION

The Air Quality Control Act and the related Albuquerque and Bernalillo County Ordinances, all provide, “Any person may recommend or propose regulations to ...the local board [Air Board] for adoption. The ...[Air Board] shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.” NMSA 1978, § 74-2-6(A); *see also* Revised Ordinances of Albuquerque, § 95-5-1-6; *and* Bernalillo County Ordinances Art. II, Ch. 30, § 30-35. No legal standard is imposed to guide the Air Board in “determining” whether to hold a hearing. Hence, the Air Board has discretion whether or not to hold a hearing.

The Program requests that the Air Board deny the Petition’s request for a hearing on the Proposed Rule for the reasons set out below.

- 1) Evidence from previous studies conducted by the Program demonstrated that there is not a significant health risk from toxic air pollutants in Bernalillo County.**

Albuquerque/Bernalillo County currently meets all health based standards for air quality. In addition, the Program has conducted monitoring for certain toxic pollutants in ambient air. Exhibit A, *Desert Research Institute, Albuquerque/Bernalillo County Community-Scale Air*

Toxics Monitoring and Risk Assessment Project: Final Technical Report prepared for the Albuquerque Environmental Health Department (February 2010) [hereinafter “Air Toxics Study”]. The Program’s *Air Toxics Study*, paid for by a \$500,000 grant from EPA, was done from 2007 to 2009 and monitored sites in the South Valley, the North Valley and at Del Norte High School. Eighty different toxic pollutants were monitored using four EPA approved methods. Of the eighty pollutants, only seventeen were found with any regularity. The substances found were in low concentrations. Risk analysis demonstrated that those concentrations presented no significant health risks. The contaminants found were typical for urban communities dominated by traffic emissions, not industrial pollution. Although the grant was for approximately \$500,000, the grant did not include costs for infrastructure, Program staff time, and overhead. The results of the Program’s *Air Toxics Study* of toxic contaminants in ambient air demonstrates that the monitoring required by the Proposed Rule is not necessary.

2) The Proposed Rule would be extraordinarily burdensome to applicants and the Program.

The monitoring required by the Proposed Rule is much more extensive than the Program’s *Air Toxics Study*. Monthly monitoring for one year would be required for more than 1,000 contaminants instead of the eighty that were monitored in the Program’s eighteen month study. Proposed Rule, 20.11.72.8(A)(1) NMAC. As a result, the Program anticipates that the Proposed Rule would cost each permittee substantially more than the \$500,000 that the Program’s previous monitoring of eighty pollutants cost. This is a staggering cost to impose on all businesses seeking an air permit.

The Proposed Rule applies to any entity that requires an air permit. This includes schools, hotels, office buildings, gas stations, and larger entities. Based on the Program's previous *Air Toxics Study*, there is no reason to believe that the proposed monitoring would yield any improvement in public health yet the Proposed Rule would impose an enormous cost on businesses. There is no justification for the Proposed Rule and the Air Board should decline to grant it a hearing.

Contrary to the description of the Proposed Rule in the Petition, the "emitter" of air pollution would not be required to "monitor and report" about air quality. Petition, ¶ 10. Instead, the Proposed Rule provides, "For every application for a permit under the Air Quality Control Act, . . . the *Board or Department* shall prepare or cause to be prepared a cumulative impact analysis." Proposed Rule 20.11.72.8(A) NMAC [emphasis added]. Neither the Air Board nor the Department has staff available to conduct this monitoring and reporting.

The Proposed Rule allows the Department to hire an independent third party contractor to prepare the required cumulative impacts analysis at the cost of the applicant. Proposed Rule 20.11.72.8(C) NMAC. In any given year, the Program issues about 100 to 150 permits. Even if contractors do the work, overseeing the preparation of 100-150 reports will require additional Program staff. No Program budget is available for this purpose.

The Proposed Rule contains extensive notice requirements that will require staff to prepare the notice and acquire the funds to pay for the processing, mailing, publication and posting. No Program budget is available for this purpose.

The Proposed Rule authorizes enforcement against the Department and the applicant in district court. This is contrary to the Air Quality Control Act and applicable ordinances. *See, e.g.,* NMSA 1978, § 74-2-9(A) ("Any person adversely affected by an administrative action

taken by...the local board...or the [EHD] director may appeal *to the court of appeals.*")

[Emphasis added.] Thus, the Legislature has already determined how persons can challenge a Department action. *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 36, 149 N.M. 330, 248 P.3d 878. (When the Legislature grants authority to do a particular thing and a mode of doing it is prescribed, all other modes are excluded.)

In this case, the Legislature, the City Council and the County Commission have already empowered persons adversely affected to challenge decisions made by the Air Board or the EHD director by filing an appeal in the court of appeals, not in district court. The Air Board has no authority to expand on the remedies provided by law by adopting a rule authorizing challenges in district court.

Moreover, the Proposed Rule not only allows such challenges; it also allows the district court to award attorney's fees and expert witness fees. Again, the Air Board has no authority to impose these costs and there is no Program budget available for this purpose.

The Proposed Rule is extremely burdensome to applicants and the Department. The Air Board should decline to grant a hearing for it.

3) The *Place Matters Study* offered in support of the Proposed Rule reaches conclusions about "environmental hazards" that are scientifically unsound.

The *Place Matters Study* did not and cannot conclude that air pollution is a cause of the documented differences in longevity and percentage of low-birth weight infants in Bernalillo County because it didn't study air pollution. Instead, the *Place Matters Study* aggregated a large number of sites that are regulated in some way under environmental laws and called this measure

“environmental hazards.” That aggregated category included such disparate sites as hospitals, landfills, water discharge permits, superfund sites and places where stationary air permits were issued. This approach is scientifically flawed.

Sites that are regulated by environmental regulations are not “hazardous” in the common use of the term. Indeed, the point of regulating such sites is to protect the public from the hazards that could result from unregulated operation. Characterizing all such sites as “hazardous” simply because they are regulated isn’t valid and an analysis founded on such a characterization cannot lead to scientifically valid conclusions.

Similarly, in order to determine whether air pollution was contributing to the health disparities identified in the *Place Matters Study*, air pollution should have been measured and compared, as it was in the Program’s *Air Toxics Study*. It is not scientifically sound to aggregate environmentally regulated sites affecting land, air and water to support conclusions about air pollution.

4) The *Place Matters Study* admits that its data do not show a cause and effect relationship between the health disparities it has identified and air pollution in Bernalillo County (p. 19).

In view of the fact that Bernalillo County is in compliance with all health based standards for ambient air and that the Program’s *Air Toxics Study* identified no significant health risks based on the levels of the eighty air toxics monitored, the Program was perplexed to find the *Place Matters Study* submitted in support of the Proposed Rule.

On examination, it becomes clear that the *Place Matters Study* does not, in fact, support the adoption of the Proposed Rule. The *Place Matters Study* states that, “Although researchers cannot say with certainty that these neighborhood conditions *cause* poor health, the overall

pattern suggests that the clustering of social, economic, and environmental health risks in low-income and nonwhite neighborhoods make it difficult for people in these communities to live healthy lives.” (P. 19) . The *Place Matters Study* does not analyze whether each of the neighborhood factors it identifies are independent causes of poor health and, if so, what their relative contribution might be. It does not differentiate between factors that are causes and factors that may merely be correlations. Without such analyses, the *Place Matters Study* provides no support for the Proposed Rule. This is particularly true when combined with the Program’s *Air Toxics Study* that found that levels of toxic air pollutants did not present a significant health risk in Bernalillo County. The Air Board should deny the request for a hearing on the Proposed Rule because there is no scientific support for it.

5) The requested hearing will likely take much longer than the Petitioner estimates.

In this case, the Petitioner estimates that the requested hearing on the Proposed Rule would last eight hours. Association of Commerce and Industry of New Mexico (“ACI-NM”), has suggested that the hearing may last five days. *Response in Opposition to Petition to Amend New Mexico Administrative Code* p. 15 (Feb. 25, 2014). The Program believes that the ACI-NM estimate is a better estimate of the time commitment that the Air Board should expect. A hearing represents a large investment of time and money on the part of all participants. A lengthy hearing imposes opportunity costs on all participants because other productive work that could have been done will not be done while preparing for and participating in the hearing. Thus, a lengthy hearing represents both express and implicit investments of time and money.

Here, there is no demonstration that the remedy proposed (analysis of cumulative air impacts) would lead to an improvement in the health disparities identified by the Petitioner. It is not appropriate to hold a hearing on the Proposed Rule without a reasonable basis to believe that

the analysis of cumulative impacts might improve the health disparities identified. The *Place Matters Study* asserts that the two biggest predictors to the health disparities identified were the level of educational attainment and poverty. The Proposed Rule would do nothing to improve these factors and may even worsen them by discouraging employment and business expansion in Bernalillo County.

The results of the Program's *Air Toxics Study* demonstrate that air pollution from toxic pollutants is not a significant health risk in Bernalillo County. As a result, the Program requests that the Air Board deny the Request for a hearing on the Proposed Rule.

CONCLUSION

Bernalillo County is in compliance with all health based ambient air standards. The Program has previously monitored Bernalillo County ambient air for eighty different toxic air pollutants. Only seventeen pollutants were found regularly and none of these were present in amounts expected to present a significant risk to public health. The toxic air pollutants that were found are typical of urban communities dominated by traffic pollution, not industrial pollution.

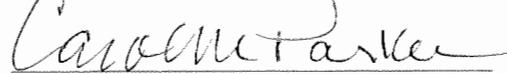
As the *Place Matters Study* explains, the most important predictors of the health disparities it identified are low educational attainment and poverty. These factors, and others, predict significant health disparities. Thus, Petitioners have identified a problem. But Petitioners have not demonstrated that the Proposed Rule will even contribute to solving that problem. Indeed, it may worsen it by decreasing employment and discouraging business development, thus worsening poverty. The Program respectfully requests that the Air Board deny the request for a hearing on the Petition.

Respectfully submitted,

CITY OF ALBUQUERQUE

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, a true and correct copy of the City's Entry of Appearance was served on the following persons by the method indicated:

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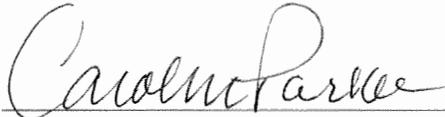
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Air Quality Control Board

A handwritten signature in cursive script, reading "Carol M. Parker", written over a horizontal line.

Carol M. Parker