

Albuquerque-Bernalillo County
Air Quality Control Board

Rulemaking Process Guidebook

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I. Introduction

The Albuquerque-Bernalillo County Air Quality Control Board (Board) is an administrative agency responsible for ensuring that provisions of the federal Clean Air Act, the state Air Quality Control Act, and the Air Quality Control Board Ordinances adopted by the Albuquerque City Council and the Bernalillo County Commission are implemented within Albuquerque-Bernalillo County (except Indian Country).

The Board consists of seven members appointed for three-year terms. Four members are appointed by the City and three members are appointed by the County. A majority of the membership of the Board are individuals who represent the public interest. Board members are selected for their concerns about, and commitment to, local ambient air quality. Additionally, the City Environmental Planning Commission and the County Planning Commission may each appoint a non-voting member to be liaisons to the Board.

Through adoption of regulations and air quality standards (together, 'regulations'), the Board has authorized an air quality management program that promotes clean air for the County's residents and visitors. The process of adopting regulations is known as "rulemaking," and regulations may also be referred to as "rules." The City of Albuquerque Environmental Health Department develops and presents proposed regulations to the Board to prevent or abate air pollution. Additionally, any person may propose a rule for adoption.

The Board's existing regulations are available online at [http://164.64.110.239/nmac/ title20/T20C011.htm](http://164.64.110.239/nmac/title20/T20C011.htm).

This Guidebook has been prepared to provide members of the public and interested parties with information about the Board's rulemaking process. If you wish to participate in the rulemaking process, you are responsible for reviewing the relevant statutes and rules to assure understanding of your rights and responsibilities. See the New Mexico Air Quality Control Act, NMSA 1978, Sections 74-2-4 and 74-2-5; the Board's Rulemaking Procedures in Section 20.11.82 of the New Mexico Administrative Code (NMAC) (Part 82); Revised Ordinances of Albuquerque §§ 9-5-1-5 and -6; and the Bernalillo County Code of Ordinances, Art. II §§ 30-34 and -35.

The Board hopes this Guidebook will facilitate public involvement and improve understanding of the rulemaking process by describing how members of the public can propose their own rules or become involved in a rulemaking begun by others.

Anyone interested in participating in Board rulemaking is advised to consult with an attorney on the most effective means of doing so. The Board, the hearing officer, the hearing clerk or EHD staff cannot provide legal advice. The State Bar of New Mexico offers an attorney referral program, as well as other resources on obtaining legal services, at www.nmbar.org. This Guidebook does not constitute legal advice and is not intended to substitute for advice provided by a licensed attorney. Nor does this Guidebook supersede or replace Part 82 or any applicable law. The reader should refer to the above laws and to Part 82 and follow the specific requirements for any rulemaking process.

For further information regarding the rulemaking process or the Board, please contact:

Albuquerque-Bernalillo County Air Quality Control Board
City of Albuquerque Environmental Health Department Air Quality Program
One Civic Plaza NW, Room #3023
Albuquerque, New Mexico 87102
www.cabq.gov/airquality/air-quality-control-board

II. Developing a Draft Regulation Prior to Bringing It to the Air Board

Although typically the City of Albuquerque Environmental Health Department (EHD) proposes new and amended rules, or rule repeals, any person may propose a new or amended rule or repeal by filing a rulemaking petition. Filing this petition will be described in the next section of this Guidebook.

Persons proposing their own rules may wish to consider the following. Air quality agencies in the United States typically undertake a number of steps prior to proposing new regulations to a regulatory authority such as the Air Board. These steps often require months or years to complete. They include obtaining access to technical and legal expertise, performing necessary technical and legal research; writing a draft of the proposed regulation; sending the draft to affected stakeholders for comment; and revising the draft based on stakeholder comment. This process is not legally required but following steps such as these will help ensure that a proposed regulation is legally and technically sound. It also alerts the person proposing a rule if some aspect of the rule is unreasonable or impractical so that changes can be made to the proposal before filing a petition. Once a petition has been filed, a public notice about the proposal has been made, only certain changes can be made without starting over again with a new public notice. As a result, it is important to discuss a proposed rule with those who will be affected by the rule before proposing it.

III. Requesting a Rulemaking Hearing

A. New Rules, Amendments and Repeal are Requested by Petition

A regulation is proposed to the Air Board by filing a rulemaking petition. The rulemaking petition begins a lengthy administrative process that may result in a Board hearing on the proposed regulation. At the hearing, the Board will decide whether to adopt the proposed regulation.

A rulemaking petition must be in writing, filed with the Board's hearing clerk as an original with fifteen copies, and has several required parts:

1. Name of the regulation.
2. A statement of reasons for the proposed change.
3. Citation to the relevant statutes authorizing the proposed change.
4. Estimate of the time needed for the rulemaking hearing.
5. A copy of the entire proposed rule, including the text of a new rule or amendments to an existing rule. The copy of the proposed new or amended

rule must be printed with individual line numbers and indicate with strike-out and underline all proposed changes to language in an existing regulation.

If a petition is filed without all required elements, the Board's hearing clerk shall return the documents to the petitioner, who will be asked to resubmit the petition in the required form. Examples of rulemaking petitions and related documents may be found on the Board's webpage.

B. Board Decision to Hold a Hearing on the Petition

After a proper petition has been received, the Board has sixty days to determine at a public meeting whether to hold a hearing on the proposal. Any person may respond to the petition in writing, or respond in person at the public meeting before the Board makes its decision.

If the Board decides by a majority vote to hold a public hearing on the petition, the Board may appoint a hearing officer to handle the pre-hearing process and conduct the hearing. The Board may choose not to hold a hearing on a petition if it appears to be outside the scope of the Board's legal authority, not cost-effective, or otherwise impractical or unreasonable in implementation, based on factors that state and local law require the Board to consider in its rulemaking (discussed below).

C. Public Notice, Arrangements for Hearing Room, Transcription or Recording

The hearing clerk is responsible for providing all required public notice of the hearing and the proposed regulatory change. The hearing clerk is also responsible for arranging for a hearing room and verbatim transcription or recording of the hearing. A petitioner bears the costs of transcription for itself and the Board. Petitioners should bear in mind that the cost of such a transcript can run from several hundred to thousands of dollars. Petitioners who feel they are unable to pay this cost should consult with the hearing officer on potential alternative arrangements.

IV. The Prehearing Process

A. Prehearing Scheduling Order

Typically, the hearing officer will issue a pre-hearing order addressing specific deadlines and procedures for the hearing. The petitioner or any party may request the order, or the hearing officer may issue one on her own initiative.

Examples of provisions in a pre-hearing order may include the scheduling of a pre-hearing teleconference; the scheduling of public comment sessions; a requirement that interpreters or special equipment be provided or additional public notice be provided; early deadlines for pre-filed technical testimony; and permission to present technical witnesses in panels.

B. Notice of Intent to Present Technical Testimony

Apart from any requirements set out in a pre-hearing order, the rulemaking rules require all persons, including the petitioner, who intend to present technical testimony (scientific, engineering, economic or other specialized testimony) to file a 'Notice of

Intent' (NOI). The NOI must be filed as an original with fifteen copies, and has required elements:

1. The name of the person for whom the witness(es) will testify ("person" can refer to an organization as well as an individual).
2. Each technical witness to be presented and their qualifications, including educational and work background.
3. A copy of the direct testimony of each technical witness and the anticipated duration of testimony.
4. The text of any recommended modifications to the proposed regulatory change. "Modifications" refers to changes to the proposed rule that was filed with the petition. A petitioner, or other parties filing an NOI, may seek such changes after the petition is filed. Petitioners should bear in mind that an NOI proposing a major change to a rule as filed with the petition may require that notice for the hearing be reissued. Reissuing the notice would result in a delay in the scheduled date of the hearing.
5. An original and fifteen copies of all exhibits that will be offered, including any proposed statement of reasons for adoption.

NOIs must be filed with the hearing clerk no later than fifteen days before the hearing, unless an earlier deadline has been set, and must be served on the petitioner and other parties. The hearing clerk can provide contact information for all parties. If an NOI is not timely filed or lacks the necessary information, the hearing officer may exclude the testimony or exhibits offered at hearing.

C. Alternatives: Entry of Appearance or Non-Technical Public Comment

In addition to participating in a rulemaking hearing by presenting technical evidence via an NOI, a person may participate in two other ways. First, a person may choose to become a party, which entitles that person to key documents filed with the Board during the rule-making process, after the person becomes a party. A person becomes a party by filing an entry of appearance at least fifteen days prior to hearing, or as required by a pre-hearing order. Second, a person may choose not to become a party at all, and instead to offer non-technical public comment at the hearing. No filings are necessary to offer non-technical public comment at a hearing.

V. The Rulemaking Hearing

The rules of civil procedure and the rules of evidence, which would govern how parties make their case in a court room, do not apply in a rulemaking hearing. However, the rulemaking hearing typically has some legal formalities. Motions and objections may be made and argued such that evidentiary rulings are necessary and the rules of evidence will be looked to for guidance.

The hearing officer shall conduct the hearing in a way that provides a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy, cumbersome, or repetitious.

All testimony is taken under oath and is subject to cross-examination by the Board, hearing officer, other parties, and other interested persons.

The hearing proceeds as follows:

- a. An introduction by the hearing officer on the subject matter and procedures for the hearing.
- b. Opening statements by any party wishing to make one.
- c. The petitioner's presentation of evidence.
- d. Other parties' presentation of evidence, in an order determined by the hearing officer based on the NOIs and witness availability.
- e. Non-technical public comment, which is always invited at the end of the parties' technical presentations and is usually invited at other times as well. Every day of a multi-day hearing includes an opportunity to provide public comment.
- f. Closing statements by any party who wishes to make one, unless the hearing officer directs that closing statements be put in writing as part of a post-hearing submittal.
- g. A closing discussion by the hearing officer on whether the record will be left open for post-hearing submittals and the deadline for those submittals.

VI. The Post-Hearing Process

A. Post-Hearing Submittals

Post-hearing submittals from the parties are typically due after the transcript is prepared and include written closing arguments and a final proposed statement of reasons. If the Board requests a hearing officer report, the report will include a discussion of the issues raised at hearing, the parties' final proposals and the evidence supporting those proposals, and a recommendation for Board action.

B. Deliberations Immediately Following the Hearing

If the record is not left open for post-hearing submittals or a hearing officer report, the Board may choose to deliberate and take action immediately following the close of the rulemaking hearing.

C. Board Decision-making Criteria

In making its regulations, state and local law requires the Board to give appropriate weight to all facts and circumstances, including but not limited to:

- (1) character and degree of injury to or interference with health, welfare, visibility and property;

- (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
- (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

There are also legal constraints on certain regulations which the Board must observe. For example, regulations prescribing emission standards for hazardous pollutants must be no more stringent than but at least as stringent as those adopted by the Environmental Protection Agency (EPA) and can only apply to those sources which the EPA has applied its regulations.

D. Notice and Publication of Board Action, Appeals

The hearing clerk will provide notice of the Board's action to all parties and other interested persons. The hearing clerk will also assure the necessary publication of the action in the New Mexico Register and other places. Any appeal of that action must be taken to the New Mexico Court of Appeals within thirty days of the date of the Board's written order issued after the proceeding.

VII. Participating in Rulemaking Proposals by the Environmental Health Department.

The City of Albuquerque Environmental Health Department (EHD) periodically files rulemaking petitions with the Board using the procedures discussed above. Members of the public are encouraged to participate in these rulemaking actions. Several means of doing this are described below.

A. Comment Prior to Filing of a Petition

EHD begins developing a proposed regulation several months prior to filing a petition with the Board. EHD follows the process of researching and writing a proposed regulation described earlier. As part of this pre-petition development process, EHD circulates proposed drafts for public comment to the Air Board listserv. Members of the public may sign up for the Air Board listserv by contacting the Board's hearing clerk.

B. Comment after Filing of a Petition

When EHD has completed its proposed draft regulation, it will file a petition for rulemaking with the Air Board. EHD will distribute the draft to the Air Board listserv. Written comments on the draft may be sent to the hearing clerk for consideration by the Board. Members of the public may come to the Air Board meeting at which the Board considers the EHD petition in order to comment in person.

C. Participation by NOI, Entry of Appearance, or Non-Technical Comment

Procedures for these forms of participation are described above. If the Board grants a hearing on EHD's proposed rule, members of the public may participate by filing an NOI to present technical testimony on EHD's proposal. Alternately, members of the public may file an entry of appearance. They may also file written, non-technical comments with the hearing clerk for consideration by the Board at the hearing.

D. Participation at the Hearing

Any member of the public may deliver non-technical public comment on EHD's proposal in person at the hearing, either orally or in writing. They may do this even if they have not filed an NOI, entry of appearance, or prior written comment.

E. Participation after the Hearing

If the hearing officer orders the hearing record to be kept open, parties may file additional post-hearing documents as described above. However, once the Board has deliberated and made a decision about the proposed regulation, no further information will be considered.

VIII. Participating as a Member of the Public—Some Practical Observations

A. Staying Informed

1. As noted above, the Board has a listserv for providing notice of upcoming meetings and hearings related to air quality management in Bernalillo County. To join the listserv, contact the hearing clerk. You may subscribe or unsubscribe at any time.
2. Documents related to any rulemaking are available for public review and copying from the hearing clerk. The hearing clerk posts all filed documents on the Board webpage for easy access.
3. The hearing clerk can serve as a resource to answer questions about the status of an action and upcoming deadlines, provide contact information for those involved, supply copies of documents filed or a link to a webpage where they can be found, and offer other practical information. The Board's hearing clerk cannot offer legal advice, including advice on how to interpret or act on a proposed regulation.
4. Questions or comments about the substance of a rule proposed by EHD should be directed to EHD staff as early in the regulation development process as practicable—there is no need to wait for the hearing. As described earlier, EHD solicits public comment on draft regulations well before filing a petition with the Air Board. EHD staff does respond to written comments and questions throughout the rule development and rulemaking process.
5. The New Mexico Legislature has imposed significant constraints on the Board's authority to adopt regulations or air quality standards that are not required by federal law. A full understanding of any proposed rule will include an attorney's review of the authorizing legislation and the scope of the Board's authority in that area.

B. Engaging Without Frustration

1. Choose your level of engagement in the rulemaking process with care. Levels of your potential engagement are as follows. Here again, advice from an attorney will greatly aid in understanding the process and participating effectively.
 - a. Public commenter: If you wish to comment on a proposed rule without filing any pleadings (i.e. documents required by law for the rulemaking process) with the hearing clerk, you may submit written non-technical public comment of any length to the hearing clerk before or during the hearing, or you may deliver your comment verbally during the hearing. Occasionally time limits are imposed on verbal comments, and you may be cross-examined (asked to answer questions) about your verbal comment. As a public commenter you may not enter scientific or other technical evidence or exhibits into the record.
 - b. Party: If you wish to file pleadings and receive pleadings filed by others, including post-hearing submittals, you must enter an appearance. At the hearing, you may offer non-technical, non-scientific testimony.
 - c. Party presenting technical testimony: If you wish to present technical or scientific testimony, you must file an NOI. The NOI should be prepared very carefully, as its contents will be reviewed for the scientific basis of the conclusions set out there and the education and expertise of the witnesses. Testimony or exhibits about toxicology must be offered by a toxicologist, for example. Internet research by a layperson will likely not be accepted as having a sufficient basis. Exhibits or testimony not reflected in the NOI will likely be excluded from the record unless offered as rebuttal to another party's evidence. If the hearing officer rules that your evidence should be excluded from consideration by the Board, you should request that it be included in the record as an "offer of proof."
 - d. Petitioner: Air quality management is an exceptionally complex area of environmental law. Anyone bringing a petition for rulemaking will likely require experienced legal counsel and technical experts to succeed. The air quality rule development process typically occurs over months or years. Although public outreach prior to filing a petition is not legally required, every petitioner should consider stakeholder engagement a critical part of the rulemaking process. Stakeholders include air quality permittees, regulators, neighborhood associations, and civic coalitions. It is appropriate to share draft rules with the New Mexico Environment Department and the U.S. Environmental Protection Agency as well.
2. Understand the reach of the Air Quality Control Board's jurisdiction regardless of your role. The Board's legal authority does not include several issues of importance to people, such as noise, traffic, or property values.
3. After a petition is filed, and until the rulemaking is concluded (including conclusion of any court action regarding the rulemaking), all input must be

submitted through the hearing clerk or during the hearing. No one may have 'ex parte' contact (off-the-record communications) with any Board member or the hearing officer regarding the merits of a rulemaking. Discussions of procedural matters with the hearing officer are appropriate.

4. Know that before voting the Board reads all submissions which have been filed and either listens to all input during the hearing on a proposed rule or reads the transcript. Form letters may not weigh heavily in the Board's deliberations, but constructive comments from individuals or associations are appreciated and help guide the Board's important policy decisions.