

Albuquerque-Bernalillo County
Air Quality Control Board

Adjudicatory Procedures Guidebook

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I. Introduction

The Albuquerque-Bernalillo County Air Quality 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 Air Quality Control 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 Board ensures compliance with its regulations by reviewing the air quality permitting work of the City of Albuquerque Environmental Health Department staff through its adjudicatory procedures.

This Guidebook has been prepared to provide members of the public and other interested parties with information about the Board's process by which it considers appeals of air permitting actions by permittees, permit applicants, or other persons. If you wish to participate in the adjudicatory 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 74-2-7; Revised Ordinances of Albuquerque § 9-5-1-7; and the Bernalillo County Code of Ordinances, Art. II § 30-36; and the Board's Adjudicatory Procedures set out in Section 20.11.81 of the New Mexico Administrative Code (NMAC). The Board hopes this Guidebook will facilitate public involvement and improve understanding of the adjudicatory process.

Anyone interested in participating in adjudication process is strongly 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 81 or any applicable law. The reader should refer to the above laws and to Part 81 and follow the specific requirements for any adjudicatory process.

For further information regarding adjudicatory procedures 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. Requesting an Adjudicatory Hearing

A. An Adjudicatory Hearing is Requested by an Appeal Petition

An appeal is initiated when a petition is filed in writing within thirty consecutive days from the date notice is given of a permitting action, submitted to the hearing clerk as an original with nine copies, and served on the Environmental Health Department.

An appeal petition has several required parts:

1. Petitioner's name, address, telephone number, and other contact information.
2. A statement describing how the petitioner participated in the permitting action before the department, and how the petitioner is adversely affected by that action; or a citation to a Board regulation that otherwise authorizes the request for hearing and a statement as to how the petitioner qualifies to make the request.
3. If a permitting action is being challenged, the identity of the permitting action, the portions of the permitting action to which the petitioner objects, and the factual and legal basis for the petitioner's objections.
4. A statement of the remedy the petitioner is seeking, the legal basis for the remedy, and how granting the remedy is within the Board's jurisdiction.
5. A copy of the permitting action or other action regarding which petitioner is filing the appeal.

The petition must be signed under oath or affirmation to attest to the truth of the information therein, and a filing fee specified in Section 20.11.2 NMAC must be paid when the petition is filed.

B. Hearing Delay and Waiver

The Board's Adjudicatory Procedures include very short timelines that are usually waived in order to allow more time for the parties to gather their resources, submit the necessary filings, and prepare for hearing.

The Petitioner may be asked to file a waiver staying all deadlines for an additional 30 days or longer to allow more time to prepare for the hearing.

C. The Environmental Health Department's Response

Following receipt of a petition, if a permitting action is being challenged, the department must file with the hearing clerk:

1. The administrative record of the permitting action being challenged, with an index of that record. The department must serve the index on all parties.
2. A list of interested persons, including those who have expressed interest in writing, and those who attended a public information meeting or hearing and provided their contact information.
3. The department's answer to the petition, responding to each objection therein.

D. Board Appointment of Hearing Officer

After a petition has been received, the Board usually appoints a hearing officer to handle the pre-hearing process, rule on non-dispositive motions, issue subpoenas, conduct the hearing, maintain order, and take all necessary measures to assure fair and impartial adjudication of the issues in the proceeding.

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

The hearing clerk docket each appeal and is responsible for providing all required public notice of the appeal hearing and notice about the manner in which interested persons may participate. The hearing clerk is also responsible for arranging for a hearing room and verbatim transcription or recording of the hearing. Parties requesting a transcript bear the cost of that transcript. Petitioners should bear in mind that the cost of such a transcript can run from hundreds to thousands of dollars. Petitioners who feel they are unable to pay this cost should consult with the hearing officer on potential alternative arrangements.

In the event of a timely request (i.e. one that meets deadlines in the regulations or in a prehearing order by the hearing officer), the hearing clerk may also arrange for interpreters or other special services necessary to provide accommodation.

III. The Prehearing Process

A. Prehearing Scheduling Order

After being appointed, the hearing officer will issue a pre-hearing order setting the date for the hearing and addressing specific deadlines and procedures for the hearing.

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.

Formal discovery (depositions, interrogatories, requests for admission) is discouraged, and will be allowed only by an order of the hearing officer in certain circumstances. If allowed, it will be guided by the New Mexico rules of civil procedure.

B. Notice of Intent to Present Technical Testimony

Apart from any requirements set out in a pre-hearing order, the adjudicatory procedures 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 nine copies, and has required elements:

1. The name of the person for whom the witness(es) will testify (here, "person" can refer to an organization as well as an individual).
2. A statement of whether the filer supports or oppose the petition.
3. The name of each witness, and an estimate of the length of their direct testimony.
4. A summary or outline of the direct testimony of each technical witness. The hearing officer may impose more stringent requirements in the pre-hearing order.
5. A list of all exhibits that will be offered, and a copy of each exhibit.

NOIs must be timely filed with the hearing clerk; check the pre-hearing order for the deadline. NOIs must be served on all 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 testimony or exhibits offered at hearing.

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

In addition to participating in an adjudicatory 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 means that person will be entitled to key documents filed with the Board during the adjudicatory process. A person becomes a party without presenting technical evidence 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.

IV. The Adjudicatory Hearing

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. The burden of presenting evidence in opposition to EHD's action and the burden of proof by a preponderance of evidence is on the petitioner.

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

Motions and objections may be made and argued such that evidentiary rulings are necessary. The hearing officer will look to the rules of evidence and the rules of civil procedure for guidance.

The hearing typically proceeds as follows:

- a. An introduction by the hearing officer on the 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.

V. 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 proposed findings of fact and conclusions of law. If the Board requests a hearing officer report, the report will include a discussion of the issues raised at hearing, the parties' final arguments and the evidence supporting the arguments, a recommended decision, and proposed final order.

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 appeal hearing.

C. Board Decision-Making Criteria

In making its decision on the appeal, the Board shall give appropriate weight to all evidence presented at the hearing. The Board does not use the same criteria used for rulemaking.

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. 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.

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

A. Staying Informed

1. 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 appeal are available for public review and copying from the hearing clerk. In matters of special public interest, the hearing clerk may post all 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.

4. Questions or comments about a permit issued by EHD should be directed to EHD staff as early in the process as practicable—there is no need to wait for the hearing. EHD staff does respond to written comments and questions throughout the adjudicatory process.
5. The New Mexico Legislature has imposed significant constraints on the Board's authority to impose on a permittee activities or equipment that are not required by federal law. A full understanding of any permit will include an attorney's review of rules and standards and the scope of the Board's authority.

B. Engaging Without Frustration

1. Choose your level of engagement in the adjudicatory process with care. Advice from an attorney will greatly aid in understanding the process and participating effectively.
 - a. Public commenter: If you wish to comment on a permit appeal 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 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 permit appeal should consider retaining experienced legal counsel and potentially technical experts.
2. The Board's Adjudicatory Procedures include very short timelines that are usually waived in order to allow more time for the parties to gather their resources, submit the necessary filings, and prepare for hearing.
3. 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.
4. After an appeal is initiated, and until it is concluded (including conclusion of any court action regarding the appeal), 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 an appeal petition. Discussion of procedural matters with the hearing officer is appropriate.
5. Know that before voting the Board reads all submissions which have been filed and either listens to all input during the hearing on a permit appeal or reads the transcript. Form letters may not weigh heavily in deliberations, but constructive comments from individuals or associations are appreciated and help guide the Board's important policy decisions.