

# Implementation of the Clean Air Act in Albuquerque/Bernalillo County

Presentation Regarding the Air Board's Various Adjudicatory and Regulatory Functions  
Felicia Orth, Air Quality Control Board Attorney/Hearing Officer  
June 8, 2016

# Overview

- I. Hierarchy of Air Quality Regulatory Authority
  - A. Federal Clean Air Act & EPA Regulations
  - B. New Mexico Air Quality Control Act
  - C. City and County Ordinances
  - D. Regulations and Plans Adopted by ABCAQCB
- II. Limitations on Board's Authority
- III. Quasi-legislative and Quasi-Judicial Roles
- IV. Roles and Responsibilities of the Division

## A. Federal Clean Air Act & EPA Regulations

Law of the Land under Supremacy Clause of U.S. Const.



## B. NM Air Quality Control Act

Enables State and Local Regulations to implement CAA



## C. BC Joint AQCB Ord. & COA Joint AQCB Ord.

Create and Authorize this Board



## D. Air Board Regulations, Standards, State Implementation Plans (SIPs)

# I. HIERARCHY OF AIR QUALITY REGULATORY AUTHORITY IN ALBURQUERQUE/BERNALILLO COUNTY.

# I.A[1]: CAA Title I – State and Federal Roles

- “Cooperative Federalism” Approach at heart of CAA:
  - EPA Sets Standards (NAAQS) (CAA § 109)
  - States determine how to attain via “State Implementation Plans” (SIPs) (CAA § 110)
    - SIPs include regulations and non-regulatory provisions
  - EPA reviews SIPs, must approve if standards will be met
  - Once approved, SIP provision is enforceable by EPA as well as state
  - If SIP is disapproved, EPA must step in with “FIP,” sanctions may apply
- Per federal law, states must be at least as stringent as CAA, may go beyond (CAA § 116)
  - In many states, including New Mexico, state statutes prohibit or limit attempts to impose more stringent requirements than CAA

# I.A[2]: CAA Title I – some other major Provisions

Section	
§ 111	New Source Performance Standards – category specific standards issued by EPA
§ 112	Hazardous Air Pollutants – category-specific standards issued by EPA.
§ 113	Federal Enforcement
§§ 160 – 169	Prevention of Significant Deterioration
§§ 169A – B	Visibility Protection
§§ 171 – 193	Non-attainment Area Requirements

# I.A[3]: Other CAA Titles

Title	
II	Mobile Sources – tailpipe standards. Only EPA and California may set standards. State and locals have role in inspection and maintenance
III	General Provisions – Definitions, Judicial Review, other Misc.
IV	Acid Rain – EPA-run Cap and Trade Program for Major SO <sub>2</sub> Sources
V	Operating Permits for Major Sources – compile all applicable requirements for each major facility
VI	Stratospheric Ozone Protection – EPA program for phase-out of production and use of ozone depleting chemicals

Net Effect – CAA starts with proposition that states have great latitude to choose the strategies necessary to meet ambient standards, but also contains numerous substantive and procedural requirements that apply irrespective of attainment status.

# I.A[4]: Federal Statutory Requirements Governing SIPs

- CAA 110(a)(1) – SIPs must be adopted and submitted to EPA within 3 years of any NAAQS revision
- CAA 110(a)(2)(A) – (M): “Infrastructure” Elements. Include among other things:
  - Emission limits, control requirements, other measures as necessary to meet ambient standards
  - Ambient Monitoring
  - Enforcement
  - Permit program, including permit fees
  - Prohibition of emissions that would interfere with other state’s SIPs
  - Adequate Personnel, funding, and authority
  - Emission measurement and reporting by sources
  - Air Quality modeling

# I.A.[5]: EPA Regulations Implementing CAA

- Federal Regulations adopted through notice and comment rulemaking via Federal Register
  - Dockets available at [www.regulations.gov](http://www.regulations.gov)
- Codified in Code of Federal Regulations (CFR)
  - Air regulations contained in 40 CFR Parts 50 – 99
- Examples:
  - NAAQS (CAA § 109) → 40 CFR Part 50
  - New Source Performance Standards (CAA § 111) → 40 CFR Part 60
  - Ambient Air Monitoring Reference Methods → 40 CFR Part 53
  - State Operating Permits (CAA Title V) → 40 CFR Part 70





# I.A[6]: Federal Regulatory Requirements Governing SIPs

- 40 CFR § 51.102 Public Hearings.
  - State must provide notice and an opportunity for public hearing. Certain notice requirements apply; state must maintain a record of the hearing.
- 40 CFR 51.230 – Legal Authority
  - Each plan must show that the State has legal authority to carry out the plan, including authority to: (a) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.(b) Enforce applicable laws, regulations, and standards, and seek injunctive relief 40 C.F.R. § 51.230
- 40 CFR 51.232 – Assignment of Legal Authority to Local Agency
  - state may delegate to local agency implementation of plan if it demonstrates to EPA’s satisfaction that the local agency has the legal authority necessary to implement the plan; does not relieve the State of responsibility under the Act for carrying out the plan

# I.B: New Mexico ACQA

Federal Clean Air Act & EPA Regulations



**NM Air Quality Control Act**



BC Joint AQCB Ord. & COA Joint AQCB Ord.



Air Board Regulations, Standards, State  
Implementation Plans (SIPs)

# I.B[1]: EIB & Local Board(s)

- Environmental Improvement Board
  - Created under Environmental Improvement Act, NMSA 1978 §§ 74-1-1 – 74-1-15; jurisdiction over numerous areas (air, radiation, solid and hazardous waste, ground water, etc.)
  - Quasi-legislative functions under AQCA §§74-2-5, 74-2-6
  - Quasi- adjudicatory functions under AQCA § 74-2-7 (permit appeals)
- Local Boards
  - Per AQCA 74-2-4, a county/municipality of certain size may create a local board to assume functions of EIB under AQCA
  - Must also create local agency to assume functions of NMED
  - Some functions may be reserved to EIB and NMED
  - Local Board/Agency subject to EIB/NMED oversight regarding acts or failures to act which cause or contribute to air pollution
  - Albuquerque/Bernalillo County is only local air authority in NM

# I.B[3] Board Authorities

Per AQCA at NMSA 74-2-5.B, EIB and Local Board shall:

- 1.) adopt ... **regulations consistent with** the ... [AQCA]... to attain and maintain national ambient air quality standards and prevent or abate air pollution, including (by adopting) regulations prescribing air standards within the geographic area of the ... (EIB's) jurisdiction or the local (Air) board's jurisdiction; and
- 2.) adopt a **plan** for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the .... board's jurisdiction ...”

These provisions establish the EIB/Local Board as the authority for adopting the regulatory and non-regulatory components of SIPs to achieve the NAAQS as required by CAA 110.

# I.B[4] Board Authorities

- Per the AQCA at NMSA 74-2-5.C(1), the EIB and Air Board are authorized to adopt regulations to protect **visibility** in mandatory class I areas, to **prevent significant deterioration** of air quality & to achieve NAAQS in **nonattainment areas** if the regulations are “**no more stringent than** but at least **as stringent as** required by the **federal** act and federal regulations pertaining to” those subjects, and the regulations can only apply to sources subject to regulation under the Clean Air Act

These provisions establish the EIB/Local Board as the authority to adopt SIPs pursuant to the visibility provisions of CAA 169§ A&B, the PSD provisions of CAA §§ 160 – 169, and the non-attainment provisions of CAA §§ 171 – 193

# I.B[5] Board Authorities

- The AQCA at NMSA 74-2-5.C (2) authorizes the EIB and Air Board to prescribe **standards** of performance for sources and emission standards for **hazardous air pollutants** that “shall be no more stringent than but at least **as stringent as** required by **federal** standards of performance”, and the HAPs standards shall apply only to sources subject to federal standards of performance.

This provision allows the EIB/Local Board to adopt regulations equivalent to federal regulations adopted under CAA § 112.

Note: This provision allows regulations applicable to solid waste incinerators and mercury emissions from coal fired power plants to be more stringent than federal regulation is.

# I.C: Ordinances

Federal Clean Air Act & EPA Regulations



NM Air Quality Control Act



**BC Joint AQCB Ord. & COA Joint AQCB Ord.**



Air Board Regulations, Standards, State Implementation Plans (SIPs)

# I.C.[1] Ordinances

- In 1967, both Albuquerque and Bernalillo County adopted a (parallel) “Joint Air Quality Control Board Ordinance”.
- Ordinances accepted delegated state air quality jurisdiction, effective throughout Bernalillo County (except on Indian land).
- Ordinances established 7 member joint “Albuquerque-Bernalillo County Air Quality Control Board” (**Air Board**).
- City Mayor (with advice and consent of Council) appoints 4 Air Board members. The County Commission appoints 3 members.



# I.D Air Board Regulations

Federal Clean Air Act & EPA Regulations



NM Air Quality Control Act



BC Joint AQCB Ord. & COA Joint AQCB Ord.



**Air Board Regulations, Standards, State Implementation Plans (SIPs)**

# I.D[1]: Air Board Regulations, and(SIPs)

- Adopted by Board in accordance with AQCA authority and other applicable laws (e.g., Open Meetings Act)
- Regulations codified at 20.11 NMAC
  - Currently, 20.11.1 – .104 NMAC
- Where appropriate, submitted to EPA for incorporation into SIP
  - Approved elements of New Mexico's SIP, including for Abq/Bernco, are listed at 40 CFR Part 52 Subpart GG

## II. LIMITATIONS ON BOARD AUTHORITY

## II.[1] Standard of Review

- Standard of Review to determine if Board exceeded authority, per NMSA 74-2-9.C: Upon appeal, the court of appeals shall set aside the action only if found to be:
  - (1) arbitrary, capricious or an abuse of discretion;
  - (2) not supported by substantial evidence in the record;
    - [In applying this test, the appeal court will review the **whole record** to determine whether the record contains substantive evidence sufficient to uphold the board's decision].
    - or
  - (3) otherwise not in accordance with law.

## II.[2] Statutory Limitations

- Stringency limitations with respect to visibility, PSD, Non-attainment, and hazardous air pollutant regulations, as compared to respective federal regulations, contained in NMSA 74-2-5 as previously noted.
- Per NMSA 74-2-4.A, If the EIB has reserved a specific function to the EIB, then the Air Board and COA (AEHD) has no authority to administer or enforce that function within Bernalillo County.
- Per NMSA 74-2-4.D, the EIB and NMED retain jurisdiction to administer and enforce the NM Air Act within Bernalillo County if the local authority fails to act, and if the failure causes or contributes to air pollution.

## II.[3] Statutory Limitations

- When the Air Board or EIB adopts, amends or repeals a regulation, the ACQA at NMSA 4-2-5.E **requires** the board to **consider** and “give weight it deems appropriate to all facts and circumstances, including but not limited to”:
  - “character and degree of injury to or interference with health, welfare, visibility and property”
  - the public interest, including the social and economic value of the sources and subjects of air contaminants”; and
  - “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”..

## II.[4] Statutory Limitations

- Per the AQCA at NMSA 74-2-11.1.A, the local board and the EIB are **not** authorized to make a regulation “with respect to any condition or quality of the **outdoor** atmosphere if the condition or air quality level and its effect are **confined entirely within the boundaries** of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries”..

## II.[5] Constitutional Limitations

- Administrative bodies are the creatures of statute. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them. The mandate under the NM Air Act is that the (air) board should prevent or abate air pollution. Accomplishing the legislative intent or policy of the Bd. does not authorize amending or enlarging its authority under the guise of making rules and regulations. *Public Serv. Co. v. NM EIB*, 89 NM 223, 549 P.2d 638 (Ct. App. 1976).



## II.[6] Case Law

- There is nothing in the air board's mandate that gives the board authority to plan for (and adopt regulations regarding) industrial **development**, although the air quality standards and regulations adopted by the board will have an impact on industrial development. *Public Serv. Co. v. NM EIB*, 89 NM 223, 549 P.2d 638 (Ct. App. 1976)
- *Smith's Carlisle*: Findings of fact must support the Board's decision; conflicting findings lead to reversal.
- *Smith's Tramway*: Standing to challenge a permit requires participation below and being adversely affected. The Board does review whether the Division properly determined 'significant public interest.'

### III. QUASI-LEGISLATIVE AND QUASI-JUDICIAL ROLES

# III[1] Rulemaking and Adjudication

- Different types of **hearings**:
  - A.) Rulemaking (quasi-legislative) When Air Board members are acting like legislators (adopting, amending or repealing regulations or standards & modifying SIP). Rulemakings generally entail provisions that have future effect and implement, prescribe, or interpret laws.
  - B.) Adjudication (quasi-judicial): When Air Board members are acting like judges (conducting hearings on the merits regarding permit challenges, variance petitions). Generally, involves determination of rights and duties of particular individuals based on facts of an individual case.

## III.[2]: Rulemaking

- All SIP revisions and adoptions of standard and regulations discussed thus far in this presentation fall into this category.
- The Board has adopted 20.11.82 NMAC to govern such proceedings.
- Board decision can be at end of hearing or at Air Board meeting that follows. Per parallel Ordinances: In order to adopt, amend or repeal regulation, must have quorum and vote of **four** members who attended hearing or reviewed record.
- Open Meetings Act Applies

# III.[3]: Adjudication

- The Board's adjudicatory role arises from:
  - AQCA at NMSA 74-2-7.H , which provides:
    - "Any person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board.
    - NMSA 74-2-7.I – K further govern the hearing process.
  - AQCA at NMSA 74-2-8 , which provides that the EIB or local board may grant variances from statutory, regulatory, or permit requirements under certain specified conditions.
- Note – The AQCA does not provide for board review of enforcement actions. Per NMSA 74-2-9, such actions are reviewable by the court of appeals.

# III.[4]: Adjudication

CAA § 128 requires that SIPs provide that:

- (1) any board or body which approves **permits** or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and
- (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.
- Ordinances insure representation of public interest. Conflicts of interest must be addressed case-by-case.

## III.[4]: Adjudication

- Board has adopted 20.11.81 NMAC to Govern adjudicatory hearings.
  - Ex Parte contact prohibition– applies from time petition “expected to be filed” to final decision or withdrawal.
  - Rules of evidence and civil procedure may be used as guidance
  - Hearing Officer broadly empowered to conduct fair and impartial hearing, avoid delay, elicit facts, avoid delay.
    - may decide all motions except dispositive ones (e.g., motion for summary judgment.
    - may provide recommended decision if directed by the board
  - Transcript to be provided to any member not in attendance who is not disqualified to vote on decision.
  - Deliberation Must be in open meeting, unless an exception applies under the Open Meetings Act. Final decision must be in open meeting

# Board Composition

- City: § 9-5-1-3 (B)(4)(a); County: 94-5 § 3 (B)(4)(a):
- (a) At least a majority of the membership of the Board shall be individuals who represent the public interest and meet the requirements of the state and federal guidelines set forth in the New Mexico Air Quality Control Act, as amended, and the federal Clean Air Act, 42 U.S.C.A. Section 7401, et seq., as amended.  
Further, to the extent that the requirement does not conflict with this division (a), Board members will be selected for their concerns about, and commitment to, the local ambient air quality. Therefore, selections may be made from a broad range of persons representing the public interest and who are experienced or trained in disciplines including natural sciences, humanities, social studies, finance, medicine and health, engineering or physics, law, law enforcement, education, business and industry.



## Federal Provisions: CAA § 128

- **(a)**<sup>1</sup> Not later than the date one year after August 7, 1977, each applicable implementation plan shall contain requirements that--
- **(1)** any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders under this chapter, and
- **(2)** any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed

# 1978 EPA Guidance

- “Represent Public Interest” means does not own a controlling interest in, have 5% or more of his or her capital invested in, serve as an attorney for, act as a consultant for, serve as officer or director of, or hold any other official or contractual relationship with any person subject to permits or enforcement orders under the CAA or any trade or business association of which such person is a member

# 1978 EPA Guidance

- “Significant portion of income” means 10 percent or more of gross personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends, except that it shall mean 50 percent of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement.

# 1978 EPA Guidance

- “Potential conflict of interest” includes (1) any income from persons subject to permits or enforcement orders under [the CAA], and (2) any interest or relationship that would preclude the individual having the interest or relationship from being considered one who represents the public interest.

# 1978 EPA Guidance

- “Adequately disclosed” means explained in detail in a signed written statement prepared at least annually and available for public inspection.

# Recusal

- City: § 9-5-1-3 (B), County 94-5 § 3 (B):
- (E) Any member of the Board who has a conflict of interest regarding a matter before the Board shall disqualify himself or herself from the discussion and shall abstain from the vote on such matter. A conflict of interest means any interest which may yield, directly or indirectly any monetary or other material benefit to the Board member or the member's spouse or minor child.

## IV. ROLES AND RESPONSIBILITIES OF THE DIVISION

## IV[1] The Environmental Health Department & the Air Quality Division

The City's Environmental Health Dept.

is the “local agency” for Air Board. Throughout Bernalillo County, EHD/AQD administers and enforces the federal Clean Air Act, the NM Air Quality Control Act, and the programs and regulations of the Air Board. EHD's authority and activities are established and limited by the N.M. Air Act and include:



# IV[2]The EHD & the Air Quality Division, cont.

## EHD (AQD and VPMD)

- Monitor air quality and report to the EPA & public.
- Provide public notice, education and opportunities for meaningful public participation.
- Meet with people who are proposing to construct air contaminant sources. Issue permits. Investigate. Institute legal proceedings for violations & work with Legal to attain compliance and resolve enforcement actions.
- Classify & record air contaminant sources, and develop & present to the Board plans & regulations for controlling, preventing & abating air pollution.
- Operate the Vehicle Pollution Mgm Div & its programs.

# IV[3]Duties of AQD attorney

The AQD attorney:

- Analyzes federal, state & local air quality laws.
- With the Regulatory Development Committee, reviews, drafts and edits regulations and amendments to present to the Air Board at rulemaking hearings.
- Represents AQD in enforcement actions involving violations of air quality permits and regulations.
- Represents AQD before the Board.

**NOTE:** The AQD attorney does not provide legal advice to the Air Board. The AQD attorney attends Air Board meetings and represents AQD's positions on a variety of issues.

# It all really does work

(source: <http://www.epa.gov/airtrends/images/comparison70.jpg>)

## Comparison of Growth Areas and Emissions, 1970-2014

