

City of Albuquerque
Environmental Health Department
Albuquerque-Bernalillo County Joint Air Quality Program

Policy Regarding Written Comments to the
Albuquerque-Bernalillo County Air Quality Control Board

Effective Date: February 1, 2023

Policy Owner: Environmental Health Department, Air Quality Program

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I. Scope

This Policy identifies internal procedures for the Albuquerque-Bernalillo County Joint Air Quality Program (“Program”) to manage written comments submitted to the Albuquerque-Bernalillo County Joint Air Quality Control Board (“Air Board”) through the Air Board Liaison, who is the support staff for the Air Board. This Policy does not govern actions by the Air Board. The Program will proceed in accordance with this policy when the Air Board Liaison receives written comments on behalf of the Air Board.

II. Authority

The Program, administered by the City of Albuquerque Environmental Health Department (“EHD”), is authorized to implement and enforce clean air laws within the boundaries of the City of Albuquerque (“City”) and Bernalillo County (“County”). The Air Board is an appointed, volunteer citizen board created to carry out duties to prevent or abate air pollution under the New Mexico Air Quality Control Act and the federal Clean Air Act. The Air Board serves as a joint local authority acting on behalf of both the City and County. The EHD Director is a non-voting officer of the Air Board and serves as Secretary of the Board, but has delegated certain responsibilities of the Secretary to the Air Board Liaison to “assist the Board in meeting its duties.”¹ The Air Board Liaison supports the Air Board by, inter alia, receiving written public comments on behalf of the Air Board, keeping the minutes for Air Board proceedings, and serving as the Hearing Clerk for adjudicatory and rulemaking proceedings.

Nothing in this policy is intended to, or does, supersede requirements in applicable law, including the Air Board Bylaws, for accepting or recording public comment. In the event of a conflict, applicable law, including the Bylaws, shall govern. Moreover, nothing in this Policy is intended to, or does, create a private right of action based upon compliance or noncompliance with its provisions.

¹ Air Board Bylaws, ARTICLE V-OFFICERS, Section D (as amended July 14, 2021); *see* Revised Ordinances of the City of Albuquerque 1994 (“ROA 1994”), § 9-5-1-3(D); 20.11.1.7(S)-(T) NMAC; Bernalillo County Ordinances, Art. II, § 30-32(d); ROA 1994, § 9-5-1-5(A); Bernalillo County Ordinances, Art. II, § 30-34(a) ; 20.11.1.7(D) NMAC.

III. Procedures

The Air Board Liaison will adhere to the following procedures for receiving written comments and providing them to Air Board Members:

A. Receiving Written Comments

1. Persons desiring to submit written comments to the Air Board may do so at any time. The Air Board Liaison will accept written comments to the Air Board by email, mail, or in-person delivery at any of the addresses below, or by other verifiable communication means.

Email:

airboard@cabq.gov

Mailing Address:

Environmental Health Dept.
Attn: Air Board
P.O. Box 1293
Albuquerque, NM 87103

Physical Address:

Environmental Health Dept.
Attn: Air Board
3rd Floor Room 3023
1 Civic Plaza NW
Albuquerque, NM 87102

2. Written comments must be received by the Air Board Liaison at least two (2) hours before an Air Board meeting for the Air Board Liaison to provide the comment to the Air Board before the meeting.
3. The Air Board Liaison may receive written comments during a meeting. For example, a member of the public may have difficulty speaking during a verbal public comment session and choose to submit their comment to the Liaison in writing instead. Or, a member of the public may exceed the time limit for verbal public comment before finishing and submit their full comment to the Liaison in writing after they finish speaking.
 - a. If the Air Board Liaison receives written comments during a meeting the Liaison will, if possible, inform Air Board Members before the meeting is adjourned that the Board has received written comments during the meeting.
 - b. If the Air Board invites written comment during the course of a meeting, the Air Board Liaison will adhere to this Policy unless otherwise directed by the Board.
4. The Air Board Liaison may receive messages during a virtual or hybrid meeting through a virtual platform (*e.g.*, Zoom) chat function. Such messages shall not be considered written comments under this Policy.

B. Acknowledgement and Review of Written Comments

1. Acknowledgement of Receipt.
 - a. Upon receipt of a written comment that includes an email or return mailing address, the Air Board Liaison will respond by email or mail to the commenter to confirm that the written comment has been received.
 - b. If an email or return mailing address is not provided, the commenter will not receive confirmation of the Air Board Liaison's receipt of the written comment.

2. Internal Review.

- a. *Comment Type.* After acknowledging receipt of a written comment, the Air Board Liaison will determine whether the comment is for general matters or related to an adjudicatory or rulemaking proceeding and then provide it to the Board in accordance with the applicable procedures in Policy Section III.C, below.
 - i. A written comment relates to an adjudicatory or rulemaking proceeding if the comment: (a) specifically states that it is submitted for a pending adjudicatory or rulemaking proceeding; (b) mentions a matter or circumstances (*e.g.*, a permit or draft rule) pertaining to an adjudicatory or rulemaking proceeding that is *currently pending* before the Air Board;² (c) mentions the merits of *an expected* petition before the Air Board for an adjudicatory proceeding (*e.g.*, states that a permit should be revoked or upheld);³ or (d) is otherwise a public comment for an adjudicatory or rulemaking proceeding under applicable law.
 - ii. Any written comment that does not relate to an adjudicatory or rulemaking proceeding will be considered a general written comment.
 - iii. If the Air Board Liaison cannot determine if a written comment is a general written comment or related to a pending adjudicatory or rulemaking proceeding, the Liaison will request a determination from the Air Board's Attorney and, if appropriate, the Hearing Officer for the pending adjudicatory or rulemaking proceeding. In such circumstances, the time of the Attorney's or Hearing Officer's determination will be used to ascertain timeliness, not the time the Air Board Liaison received the comment.
 - iv. If the Air Board Liaison requests a determination pursuant to Policy Section III.B.2.a.iii, above, the Air Board Liaison will inform the Air Board Chair that a written comment has been sent to the Air Board's Attorney and, if appropriate, the Hearing Officer for a determination. However, the actual written comment and its topic shall not be provided to the Air Board Chair.

C. **Providing Written Comments to the Air Board**

1. The Air Board Liaison will not read aloud written public comments during a public meeting

² The purpose of this provision is to limit ex parte contact with the Air Board Members. See 20.11.81.7(J) NMAC (emphasis added) ("Ex parte contact" is defined as "oral or other communication with a board member or a board hearing officer regarding the merits of an expected or pending petition or related proceeding if: (1) the communication is made by a person who is not a board member, hearing clerk or hearing officer; (2) the person communicating knows or has reason to know a petition will be or has been filed pursuant to 20.11.81 NMAC; (3) the communication is made without all other parties being present or receiving the same communication received by the board member or board hearing officer; and (4) the communication is intended to affect, or reasonably may be expected to affect the board member's or the hearing officer's opinion regarding the merits of the expected or pending petition or related proceeding."); 20.11.81.12(E) NMAC (At no time before a petition is expected to be filed pursuant to 20.11.81 NMAC, and at no time between the filing of a petition and the final decision of the board or withdrawal of the petition or related permit action shall any person other than the hearing officer or hearing clerk have ex parte contact with a board member or the hearing officer regarding the merits of the expected or pending petition or related proceeding. This prohibition does not apply to a hearing officer's consideration of, and decision regarding a motion filed pursuant to 20.11.81 NMAC.").

³ The purpose of this provision is to limit ex parte contact with the Air Board Members. See 20.11.81.7(J) NMAC; 20.11.81.12(E) NMAC.

of the Air Board unless otherwise directed by the Air Board Chair.

2. Adjudicatory/Rulemaking Written Comments. The Air Board Liaison, as the Hearing Clerk, will stamp each written comment with the date and time received, and file it in accordance with applicable law. If appropriate, the Air Board Liaison may notify the Air Board's Attorney and the Hearing Officer, which may be a Board Member, that a written comment has been received and state how it has been filed. A written comment relating to an adjudicatory or rulemaking proceeding shall not be directly sent to any Air Board Member because it may be considered a prohibited ex parte contact.
3. General Written Comments.
 - a. *Timely Comments.* The Air Board Liaison will strive to provide general written comments that are timely received to all Air Board Members and the Air Board's Attorney as soon as possible after receiving them, but will always provide them to Air Board Members and the Air Board's Attorney no later than one (1) hour before the upcoming meeting.
 - b. *Untimely Comments.* The Air Board Liaison will provide general written comments that are not timely received to all Air Board Members and the Air Board's Attorney no later than one (1) hour before the following meeting.
4. Written Comments Received During a Meeting. If the Air Board Liaison notifies the Air Board of written comments received during a meeting pursuant to Policy Section III.A.3, above, the Liaison will strive to ask the Board, before the meeting is adjourned, whether it wants to consider the written comments during the current meeting or at the following meeting.
 - a. *Adjudicatory/Rulemaking Written Comments.* If written comments received during a meeting relate to an adjudicatory or rulemaking proceeding and the Air Board decides to consider such written comments during the current meeting, the Air Board Liaison will provide them to all Air Board Members and the Air Board's Attorney. The Air Board Liaison will also file the comments in accordance with the procedures in Policy Section III.C.2, above. If written comments received during a meeting relate to an adjudicatory or rulemaking proceeding and the Air Board decides to consider such written comments at the following meeting, the Air Board Liaison will follow the procedures in Policy Section III.C.2, above.
 - b. *General Written Comments.* If written comments received during a meeting are general written comments and the Air Board decides to consider such written comments during the current meeting, the Air Board Liaison will provide them to all Air Board Members and the Air Board's Attorney. If written comments received during a meeting are general written comments and the Air Board decides to consider such written comments at the following meeting, the Air Board Liaison will follow the procedures in Policy Section III.C.3.b, above.
5. Distribution. The Air Board Liaison will send written comments to all Air Board Members and the Air Board's Attorney, typically in the form of an email with recipients bcc'd, unless the written comments relate to an adjudicatory or rulemaking proceeding, in which case

the Liaison will follow the procedures in Policy Section III.C.2 or III.C.4.a, above, as applicable.

D. Recording Written Comments

1. Adjudicatory/Rulemaking Written Comments. The Air Board Liaison, as the Hearing Clerk, will file written comments relating to an adjudicatory or rulemaking proceeding in accordance with applicable law, which shall serve to record the comments.
2. General Written Comments. If a general written comment was provided to all Air Board Members and the Air Board's Attorney before a meeting, the Air Board Liaison will identify the commenter and summarize the comment in that meeting's minutes.
3. Written Comments Received During a Meeting.
 - a. *Adjudicatory/Rulemaking Written Comments*. The Air Board Liaison, as the Hearing Clerk, will file written comments relating to an adjudicatory or rulemaking proceeding in accordance with applicable law, which shall serve to record the comments. The Air Board Liaison will identify in that meeting's minutes that written comments relating to an adjudicatory or rulemaking proceeding were received during the meeting and identify whether they were provided to all Air Board Members and the Board's Attorney before the meeting adjourned.
 - b. *General Written Comments*. If a general written comment was provided to all Air Board Members and the Air Board's Attorney before the meeting adjourned, the Air Board Liaison will identify the commenter and summarize the comment in that meeting's minutes.

E. Public Availability of Written Comments

Written comments submitted to the Program and Air Board Liaison for the Air Board are public records and not confidential.⁴ Under the Inspection of Public Records Act ("IPRA"), every person has the right to inspect public records maintained by the City.⁵ In accordance with IPRA, the City makes public records available for inspection. The City shall not be responsible for any disclosure of confidential information pursuant to IPRA or to the City's public records act laws, rules, regulations, instructions, or any other legal requirement.

F. Addressing Questions/Information Requests Submitted as Written Comments

A written comment may be in the form of a question or a request for information instead of a statement. In such circumstances, the Air Board Liaison will adhere to the following procedures after providing the comment to Air Board Members in accordance with Policy Section III.C, above:

1. The Air Board Liaison may assist the Air Board in responding to the question/information request upon request by the Air Board (*i.e.*, majority vote with a quorum present) or Air

⁴ See NMSA 1978, § 74-2-11.

⁵ NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2019).

Board Chair. Such a request may be made during a public meeting or in writing to the Air Board Liaison. The Air Board Liaison will not substantively respond to a question/information request absent direction from the Air Board or Air Board Chair.

2. If asked to respond to a question/information request by the Air Board (*i.e.*, majority vote with a quorum present) or Air Board Chair, the Air Board Liaison may seek assistance from other Program staff or the Air Board Attorney to compile the substantive content of the response.
3. The Air Board Liaison will strive to provide “full and prompt responses” to questions/information requests,⁶ which may include directing the commenter to the appropriate entity if the question/information request pertains to matters outside of the Air Board’s authority or jurisdiction. For example, if a written comment seeks information about radon in homes or buildings, the Air Board Liaison may direct the commenter to the New Mexico Environment Department, Radiation Control Bureau, Indoor Radon Outreach Program, because the Air Board and the Program do not regulate indoor radon.
4. Unless otherwise directed, the timing and substance of the response to the question/information request shall be at the Air Board Liaison’s sole discretion. For example, the Air Board will not be given an opportunity to review the response before it is sent unless an opportunity to review the response is specifically requested.
5. The Air Board Liaison will send the response to the question/information request to all Air Board Members and the Air Board’s Attorney, typically in the form of an email to the commenter with the other recipients bcc’d.
6. The Air Board Liaison will also upload the response to the question/information request to a publicly available forum, such as the Air Board’s DropBox linked on the Board’s webpage under the heading Air Board Documents: <https://www.dropbox.com/sh/eaowdknbnkhdnlt/AADUcmN0RvR3iK6PQn9Nwiyoa?dl=0>

IV. Deviations from this Policy

The Air Board Liaison has discretion to deviate from this Policy. Unless a process is specifically set forth in this Policy, the Air Board Liaison shall only be required to deviate from this Policy based on a vote of a majority of the Air Board Members when a quorum is present.

⁶ Air Board Bylaws, ARTICLE III-MISSION AND SCOPE (as amended July 14, 2021).