

The Legal Authority and Role of the Air Board

Albuquerque-Bernalillo County Air Quality Control
Board

New Member Orientation

March 29, 2007



Overview of Legal Authority and Role of the Air Board

1. Federal, State and Local Air Quality Laws
2. Jurisdiction of the Air Board
3. Limitations on Air Board Jurisdiction
4. Potential New Air Board Regulations
5. Air Board Roles: Quasi-Legislative
and Quasi-Judicial



Federal, State and Local Air Quality Laws

Succession of Authority

Federal Clean Air Act & Code of Federal Regulations (CFR)



NM Air Quality Control Act & EIB Regulations



BC Joint AQCB Ord. & COA Joint AQCB Ord.



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



1. FEDERAL, STATE AND LOCAL AIR QUALITY LAWS

A. FEDERAL Laws

- ❖ U S Congress enacted the **Clean Air Act** to apply throughout United States.
- ❖ Bills that are enacted (**federal statutes/acts**) are renumbered, then codified in **United States Code (USC)**
- ❖ Proposed, more detailed **regulations** are published in the **Federal Register (FR)**
- ❖ Final **federal regulations** are published in FR, then are renumbered and codified in **Code of Federal Regulations (CFR)**



1.A. FEDERAL Laws (continued)

- Federal Clean Air Act authorizes states (and certain local agencies) to administer and enforce **state (and certain local) air quality (AQ) laws and programs** if the programs have been **approved by the United States Environmental Protection Agency (EPA)**.
- If the EPA approves a state's (or local agency's) air quality laws and programs, and if the laws and programs are added to the **State Implementation Plan (SIP)**, then both the state (or the EPA-approved local agency) and **the EPA can enforce the laws**.



1.B. STATE AQ Laws-NM Air Quality Control Act and EIB Regulations

- ❖ In 1967 New Mexico enacted the **NM Air Quality Control Act (NM Air Act)**.
- ❖ NM Air Act authorized the state Environmental Improvement Board (EIB) to adopt air quality regulations, standards, programs & State Implementation Plans (SIPs).
- ❖ NM Air Act authorized Albuquerque and Bernalillo County to:
 - adopt **ordinances** establishing a local air quality board
 - **accept delegated** state (and federal) air quality **authority applicable throughout Bernalillo County.**



1.C. Bernalillo Co. Joint AQCB ORDINANCE & City of Albuquerque Joint AQCB Ordinance

- ❖ 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.



1.C. Bernalillo Co. Joint AQCB ORDINANCE & City of Albuquerque Joint AQCB Ordinance (cont.)

- ❖ **AQ jurisdiction over state properties** within Bernalillo County is granted by NM Air Act, and the Ordinances accept jurisdiction.
- ❖ **AQ jurisdiction over Federal properties** within Bernalillo County is granted by 42 USC 7401 (a)(3), 42 USC 7418(a) and Exec. Order No. 12088 (1978), as amended by Exec. Order No. 12580 (1987) . Federal facilities obtain air quality permits and have enforcement actions brought against them.



1.C. Bernalillo Co. Joint AQCB ORDINANCE &
City of Albuquerque Joint AQCB Ordinance (cont.)

❖ Air Board:

- adopts, amends & repeals AQ regs. & standards
- approves modifications to State Implem. Plan

(Originally SIP was one comb-bound volume. As of July 2005, the SIP had been amended approximately 74 times and filled several four-drawer file cabinets.)

- ❖ Holds meetings and hearings.



1.C. Bernalillo Co. Joint AQCB ORDINANCE & City of Albuquerque Joint AQCB Ordinance (cont.)

- ❖ Bern. Co. & COA Ordinances authorize City staff to administer and enforce air quality programs throughout Bernalillo County (except on Indian land).
- ❖ Federal laws, NM laws and the Ordinances authorize **higher penalties** for violating Air Board regulations than can be imposed for violating other Bern. Co. and COA ordinances and regulations.



1.D. Air Board REGULATIONS, Standards & SIPs

- ❖ NM Air Act, NMSA 74-2-5.B, requires local Air Bd and NM EIB to:
 - “1.) adopt ... **regulations consistent with** the ... (NM) Air ... Act 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** (*e.g.*, **SIP**) 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 ...”
- ❖ Bern. Co. & COA Ordinances repeat and, therefore, adopt and agree to the wording quoted in the immediately preceding paragraphs.



2. JURISDICTION OF THE AIR BOARD

- ❖ The authority/jurisdiction of the EIB and the local Air Board is to “prevent or abate **air pollution**. NMSA 74-2-5.A.
- ❖ “**Air pollution**” is defined as “the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property”. NMSA 74-2-2.B.



2. JURISDICTION OF THE AIR BOARD (cont.)

- ❖ The NM Air Act requires the Bernalillo County & the City of Albuquerque Joint AQCB Ordinances to be “**consistent** with the substantive provisions of the (NM) Air ... Act and shall provide for (Air Board) standards and **regulations** not lower than (= **as stringent as**) those required by **regulations adopted by the ... (EIB)**”.
NMSA 74-20-4.C.



2. JURISDICTION OF THE AIR BOARD (cont.)

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



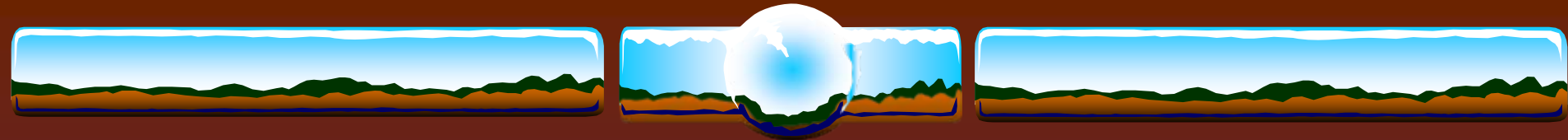
2. JURISDICTION OF THE AIR BOARD (cont.)

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



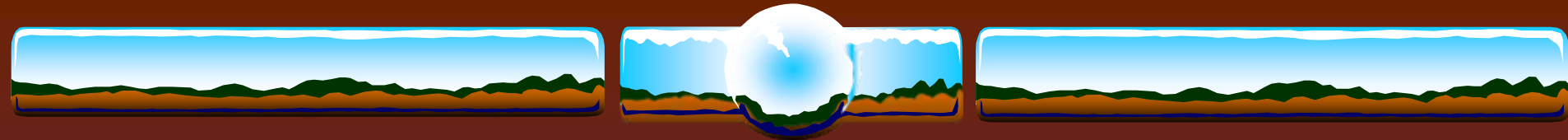
2. JURISDICTION OF THE AIR BOARD (cont.)

- ❖ The NM Air Act also authorizes the Air Board to: adopt regs governing emissions from **solid waste incinerators** that “shall be as stringent as, and may be **more** stringent than, any applicable federal emission limitations (NMSA 74-2-5.C(3)); require notice of intent to introduce an air contaminant in the area (NMSA 74-2-5.C(4)); and require emission monitoring devices, sampling, records, reports and other reasonable information (NMSA 74-2-5.C(5)).
- ❖ The NM Air Act also authorizes the Air Board to adopt regulations “consistent with federal law ... relating to control of **motor vehicle emission.**” NMSA 74-2-5.D.



3. LIMITATIONS ON AIR BOARD JURISDICTION

- ❖ 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. NMSA 74-2-4.A.
- ❖ The EIB and NMED retain jurisdiction to administer and enforce the NM Air Act within Bernalillo County if the local authority (COA/Bern. Co.) fails to act, and if the failure causes or contributes to air pollution. NMSA 74-2-4.D.



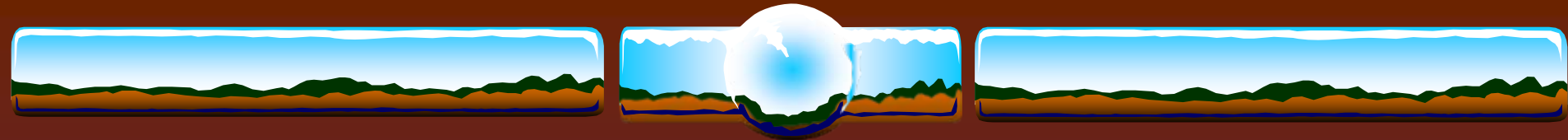
3. LIMITATIONS ON AIR BOARD JURISDICTION (cont.)

❖ The NM Air Act specifically states the Air 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”. NMSA 74-2-11.1.A.



3. LIMITATIONS ON AIR BOARD JURISDICTION (cont.)

❖ 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).



3. LIMITATIONS ON AIR BOARD JURISDICTION (cont.)

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)



3. LIMITATIONS ON AIR BOARD JURISDICTION (cont.)

- ❖ When the Air Board or EIB adopts, amends or repeals a regulation, the NM Air Act **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”. NMSA 4-2-5.E.



3. LIMITATIONS ON AIR BOARD JURISDICTION (cont.)

- ❖ For a statute (ordinance or regulation) to withstand challenge, the appeal court will review the **whole record** to determine whether the record contains substantive evidence sufficient to uphold the board's decision.
- ❖ Equal protection does not absolutely prohibit a regulation from applying to one **classification** but not another. For instance, motor vehicle testing is required for certain vehicles manufactured after 1968, but does not require testing for prior years. If the classification is challenged on an **equal protection** basis, then on appeal the whole record must show the classification:
 - has a rational and natural basis;
 - is based on a substantial difference between those to whom it does and does not apply; and
 - is framed to embrace equally all who are in similar circumstances and situations.



4. POTENTIAL NEW AIR BOARD REGULATIONS

- ❖ The Air Board has adopted a number of air quality regulations and programs that have **not been adopted by the EIB or are more stringent than, or significantly different than EIB regulations**, including:
 - Fugitive Dust Control, 20.11.20 NMAC
 - Woodburning (no burn periods), 20.11.22 NMAC
 - Incinerators and Crematories, 20.11.68 NMAC
 - Motor Vehicle Inspection-Decentralized, 20.11.100 NMAC
 - Motor Vehicle Inspection-Centralized, 20.11.101 NMAC
 - Oxygenated Fuels, 20.11.102 NMAC
 - Motor Vehicle Visible Emissions, 20.11.103 NMAC



4. POTENTIAL NEW AIR BOARD REGS (cont.)

When the Air Bd, AQD staff and others consider whether to propose that the Air Bd adopt, amend or repeal an AQ reg or standard, or modify the AQ SIP, the proposal being considered must be researched on a case-by-case basis. It would be inefficient to adopt a reg or standard, or a SIP mod that could not withstand later legal challenge. Consider:

- 1. What are the federal requirements and limitations, if any, regarding the subject?**



POTENTIAL NEW AIR BOARD REGS (cont.)

2. What requirements & limitations, if any, have been imposed on the subject by the NM Air Quality Control Act?

- Will the proposal withstand the consideration by the Air Bd that is required by NMSA 74-2-5.E?

- Will the proposed local reg, standard or SIP mod be as stringent as any existing EIB reg on the subject?

3. Is the subject within the authority accepted by the Bern Co and COA in their parallel enabling ordinances (Joint AQCB Ord)?



POTENTIAL NEW AIR BOARD REGS (cont.)

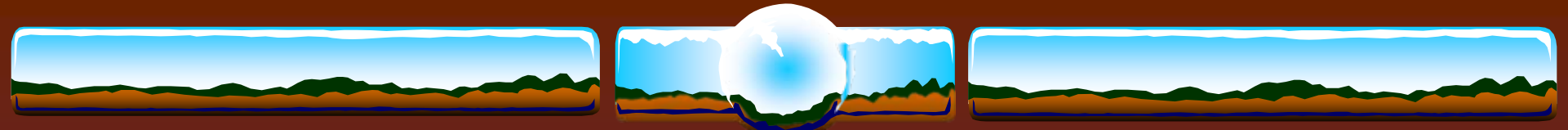
4. Will there be adequate staffing and funding to effectively administer and enforce the proposed change? Because EPA's approval of local AQ programs, and the EPA's funding of some of the AQ programs, depends on the EPA's determination that AQD can adequately staff and fund the programs, it is advisable for AQD staff to discuss any significant proposed change with the EPA, then later submit a proposed final draft to the EPA for comment.
5. Can evidence be submitted at the hearing that is sufficient to meet the standard of review on appeal to the NM Court of Appeals?
 - ❖ The multiple steps that should be taken before a proposed reg, standard or SIP mod is drafted and presented to the Air Bd does not prevent change. New and amended regulations & standards and SIP modifications have been adopted and will continue to be adopted.



5. AIR BOARD ROLES:

A.) Quasi-Legislative and B.) Quasi-Judicial

- ❖ Board monthly meetings second Wednesday each month.
- ❖ Different types of hearings:
 - A.) quasi-legislative: When Air Board members are **acting like legislators (adopting, amending or repealing regulations or standards [laws] & modifying SIP)**, members are acting in quasi-**legislative** capacity.
 - ❖ B.) quasi-judicial: When Air Board members are **acting like judges (conducting hearings on the merits regarding permit challenges, variance petitions)** members are acting in quasi-**judicial** capacity.



5. AIR BOARD ROLES: A.) Quasi-Legislative and B.) Quasi-Judicial (cont.)

- ❖ A.) Quasi-legislative hearing (regulation, standard, SIP):
 - Members are like legislators & can be “lobbied” outside the related hearing and meeting.
 - Regulation hearing 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 of **four** and vote of **four** members who attended Hr. or reviewed record..



5. AIR BOARD ROLES: A.) Quasi-Legislative and B.) Quasi-Judicial (cont.)

- ❖ B.) Quasi-**judicial** hearing (hearings on the merits regarding **permit challenges, variances petitions**):
 - Members must be neutral “judges”, cannot have a legal “conflict” regarding a party or the subject of the hearing. Cannot prejudge.
 - Members must **not** be “lobbied” outside the related hearing and meeting, before the Board’s decision. It is improper to “*ex parte*” Bd. members = members **cannot** have contact with only one side re the merits before the Board makes its decision. Members must halt *ex parte* contacts outside the hearing & meeting, reveal improper contact on the record, and turn over any written materials received. Communications re the merits must be on the hearing record, in front of all parties and the public.

Quasi-**judicial** hearing on the merits decision can be at end of hearing or at Air Board **meeting** that follows. Must have quorum of **four** and vote of **majority** of members at the meeting who also attended hearing or reviewed record.



AIR QUALITY PROGRAMS

Isreal Tavarez, P.E.
Environmental
Engineering
Manager

Vehicle Pollution
Glen Dennis
Environmental
Manager

Monitoring & Support
Fabian Macias
Environmental
Manager

Regulatory Programs
Chris Albrecht
Environmental
Manager