VPMD EXHIBIT 3

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO AMEND *MOTOR VEHICLE INSPECTION-DECENTRALIZED*, 20.11.100 NMAC, AS AMENDED THROUGH 9/1/2004, AND INCORPORATE AMENDMENTS INTO THE NEW MEXICO STATE IMPLEMENTATION PLAN (SIP) FOR AIR QUALITY.

AQCB Petition No. 2011-3

Vehicle Pollution Management Division,
Environmental Health Department,
City of Albuquerque, Petitioner.

STATEMENT OF REASONS

The Vehicle Pollution Management Division, (VPMD) through its attorney, Assistant City Attorney Donna Griffin, submits this Statement of Reasons in support of the proposed amendments to 20. 11. 100 NMAC - *Motor Vehicle Inspection-Decentralized.* (Part 100). This Statement of Reasons is intended to clarify the basis for changes made to Part 100 which are not substance specific but rather have been made to improve the efficiency, logic and defendability of the regulation itself.

AUTHORITY AND BACKGROUND

1. VPMD operates a decentralized vehicle emissions testing program authorized by the federal Clean Air Act (42 U.S.C. A. § 7401 to 7671q) and its regulations for motor vehicle emission programs enforced by the Environmental Protection Agency (EPA). (Code of Federal Regulations, Environmental Protection Agency, Supart S, *Inspection/Maintenance Program Requirements.* (I/M program), 40 CFR §§ 51.350 to 51.390).

2. The I/M program is required because the City of Albuquerque airshed was found by EPA to be in nonattainment as recently as 1990 for carbon monoxide. The airshed is currently in maintenance status for carbon monoxide and, the I/M program is also considered one of the key control strategies for ground level ozone and particulate matter.

3. I/M programs are decentralized when EPA has authorized the program to allow privately owned air care stations and its employees, referred to as air care inspectors, to perform the motor vehicle emission testing. VPMD works with the privately owned air care stations to certify the station and its equipment and train the air care inspectors. VPMD oversees the emissions testing by performing onsite audits at the air care stations and analyzing computer data that is uploaded from the station testing equipment to VPMD databases. VPMD has enforcement, penalty assessment, and hearing procedures.

PROPOSED AMENDMENTS

4. **Part 100.** In addition to specific CFR-driven language changes, and language and substantive changes to address the evolving technology of emission testing that will be discussed and explained by the VPMD manager at the hearing, the proposed amended Part 100 has significant global changes as follows:

a. Reorganization of Sections. Over the last two decades, Part 100 has been amended as necessary, with the last amendment occurring in 2004. This, at times, piecemeal approach has resulted in a Part 100 that is internally inconsistent and does not proceed logically through the administration of a regulatory program. For example, the current Part 100 does not inform the reader which vehicles are exempt from emission testing until paragraph 20.11.100.23 NMAC, whereas, the proposed amended Part 100 presents this important information immediately to the reader at

20.11.100.2 NMAC. In the current Part 100, air care testing and station certification is discussed before VPMD is introduced as the regulatory and certifying entity and its duties explained. Therefore, there are large sections of language underlined in the proposed amended Part 100 that is not new regulation or changed or more stringent language, it is merely language that already exists in Part 100, but that has been moved to create a more efficient and logical regulatory document.

b. Anachronistic and/or Useless References. Throughout the document the term VEGAS has been struck and replaced with "emission analyzer" simply because VEGAS was a specific emission testing equipment previously used which has been replaced with new equipment in all air care stations. Similarly, Part 100 was written to include an "air care technician." However, the need for, and the presence of, air care technicians in the program never materialized. There are other minor changes made simply because the language no longer applies to the current regulatory scheme.

c. Additional definitions. During the extensive review that occurred in the rewriting of Part 100, the regulatory development team determined that several words used in the existing Part 100 were not defined in the definition section. Both these, and other necessary terms were added to the definitions section.

5. **The Albuquerque/ Bernalillo County Vehicle Pollution Management Program Procedures Manual (Procedures Manual).** Referenced within the current Part 100 and incorporated as law, and made enforceable, (20.11.12 NMAC) is the Procedures Manual, which was last revised 1995. The Procedures Manual is significantly outdated. For example, it refers to Board Regulation 28, which was Part 100's predecessor. It references equipment, testing procedures and program reasoning that no

longer exists or is inapplicable. It is inconsistent with Part 100. As stated in the Petition submitted to this Board on February, 22, 2011, VPMD moved necessary regulatory language that was contained in the Procedures Manual to the proposed amended Part 100. It is VPMD's intent to have only a technical guidance document that is, basically, a handbook for air care stations and operators.

All regulatory language that provides the basis of enforcement, as well as the enforcement processes itself, must be fully provided in Part 100. In two administrative hearings appealing enforcement actions taken by VPMD, petitioner's attorneys challenged the validity of the Procedures Manual, stating it was so outdated as to no longer be good law. This argument certainly had merit, and had it been successful, VPMD would have lost its capability to take enforcement action as necessary. Therefore, all pertinent enforcement, penalty assessment and hearing procedures have been moved nearly verbatim from the Procedure Manual to Part 100. It is VPMD's desire, with concurrence of its counsel, to abandon the Procedures Manual as an incorporated and referenced additional regulation. A future handbook or a technical guidance manual that reinforces the air care station knowledge in executing valid emission testing can be created apart from the notice and comment rulemaking procedures of the Board, as long as the document lacks any binding legal effect. This position is supported by case law involving federal regulatory agencies.[1]

---

[1] In Virginia Vermiculite, Ltd. v. W.R. Grace & Co. 2000 WL 1456338 W.D.Va., 2000. August 14, 2000. the Court was asked to interpret the federal Wetlands Delineation Manual (the Manual) as a matter of law but the Court determined the Manual is not "law" at all, stating: [I]t seems clear that the four agencies that promulgated the 1989 Manual [the EPA, the COE, the Fish and Wildlife Service, and the Soil Conservation Service] intended it to be only an interpretive guide to the regulatory definition of wetlands, primarily for the use of agency personnel. The agencies have described the manual as 'a technical guidance document' ... The manual does not purport to 'create new law or impose new rights or duties...' . (Citing United States v. Ellen, 961 F.2d 462, 466 (4th Cir.1992).) The Court concluded that the Manual was interpretive rather than legislative in nature and not a law, regulation or even a contract.

The change of the character of the Procedures Manual is explained in the proposed amended Part 100 at 20.11.100.15.A NMAC. Upon further review and discussion, it has become apparent that 20.11.100.15.A NMAC is unnecessary because VPMD can provide informative handouts to its air care stations as it deems appropriate, as long as the handout or guidance document is not a "rule" or "regulation" and is of a nature that it cannot be used for a basis of an enforcement action. VPMD plans to update this planned technical guidance document in a contemporary manner whenever, the technology, equipment, software or hardware is changed. To avoid any confusion on this matter, VPMD has determined that it would be best to strike the language at 20.11.100.15.A NMAC and a floor amendment to address this change will be submitted prior to the hearing.

SUMMARY

The current Part 100 is inconsistent, illogical and hard to follow. The current Procedures Manual is so outdated as to be an embarrassment and impediment to enforcement. Making the global changes and deleting the Procedures Manual improves these situations. With the adoption of the proposed amended Part 100, VPMD will be in a position to better administer the air care program, enforce against any stations or inspectors fraudulently passing polluting vehicles, and be defended in any administrative hearings on the matter.