

Overview of the Rulemaking Process and Roles

February 12, 2020

Source of Rulemaking Authority

Hierarchy of AQCB's Rulemaking Authority

- A. Federal Clean Air Act & EPA Regulations
- B. New Mexico Air Quality Control Act
- C. City and County Ordinances
- D. AQCB Regulations

HIERARCHY OF RULEMAKING AUTHORITY IN ALBUQUERQUE/BERNALILLO COUNTY

A. Federal Clean Air Act (“CAA”) and Federal Regulations

Adopts national air pollution prevention and control limitations and standards, and gives states and their political subdivisions the right to adopt and enforce laws to, at a minimum, implement the CAA’s standards, and, if the state/local authority elects to do so, to have stronger air pollution control laws.



B. NM Air Quality Control Act

Gives state Environmental Improvement Board (“EIB”) and local Albuquerque-Bernalillo County Air Quality Control Board (“AQCB”) authority to adopt and enforce laws (regulations) to prevent or abate air pollution, while limiting these agencies from adopting laws that are more stringent than the CAA’s standards in some areas.



C. Bernalillo County Joint AQCB Ordinance and City of Albuquerque Joint AQCB Ordinance

Create and authorize the AQCB, and authorizes the Board to “[a]dopt, promulgate, publish, amend and repeal regulations consistent with the NM Air Quality Control Act ” and the respective AQCB ordinances, “to attain and maintain national ambient air quality standards and prevent or abate air pollution.”



D. AQCB Air Quality Regulations

Include all Albuquerque-Bernalillo County air pollution prevention and control regulations, including regulations, at § 20.11.82 NMAC, for how to make regulations, or, in other words, for how to “rulemake”.

Rulemaking

20.11.82 NMAC sets forth the specific procedures the Board MUST follow to adopt, amend or repeal a regulation.

- Other provisions apply generally, such as:
 - § 9-5-1-2 Joint AQCB Ordinance Definitions
 - 20.11.1.7 NMAC Definitions
 - § 9-5-1-4(E) Ordinance Duties and Powers of Board
 - In making its regulations, the Board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:
 - (1) Character and degree of injury to or interference with health, welfare, visibility and property;
 - (2) The public interest, including the social and economic value of the Sources and subjects of air contaminants; and
 - (3) 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.

This AQCB Ordinance Duties and Powers language above duplicates the language in NMSA 1978, § 74-2-5.E, Duties and powers [of the AQCB].

Objective of Rulemaking Procedures

20.11.82.6 OBJECTIVE

The purposes of 20.11.82 NMAC are to:

- A. standardize the procedures used in rulemaking proceedings before the board;
- B. encourage participation in the hearings conducted by the board for the promulgation of regulations;
- C. make possible the effective presentation of the evidence and points of view of parties and members of the general public; and
- D. assure that board hearings are conducted in a fair and equitable manner.

Construction of Rulemaking Procedures

20.11.82.12 LIBERAL CONSTRUCTION

20.11.82 NMAC shall be **liberally construed** to carry out its objectives.

- In other words, while all mandatory procedures must be followed, the process is intended to be followed in a **liberal** way, rather than in a rigid, illiberal way.
 - to substantively accomplish the overarching objectives of the process, including encouraging participation by all stakeholders, and conducting hearings in a fair and equitable manner.

The Pre-hearing Process

20.11.82.18 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE

- A. Any person may **file a petition** with the board to adopt, amend or repeal any regulation within the jurisdiction of the board.
 - A “person” is defined in the NMAQC Act, the AQCB Ordinance and 20-11.82.7. In sum, A person means any individual or entity, including a governmental entity.
 - A member of the AQCB is a person.
 - However, if an AQCB Board member were to propose a rule, that person would have to consider his or her conflict of interest obligations under 20.11.82.14. That rule requires a board member whose “impartiality or fairness” regarding a proposed rule could be reasonably questioned to recuse him or herself from the rulemaking.

Filing and service

- The rules for **filing and service** are set forth in [20.11.82.16](#)
- A. **filing** is accomplished by delivering the original and 15 copies of the document to the hearing clerk [defined at [20.11.82.7.K](#)], at least **15 days before** any hearing or meeting at which the board will consider the document; and
- delivering a copy to the board attorney; and
- **servicing** a copy on all other parties (service is defined at [20.11.82.16\(C\)](#)).
 - A “party” is defined at [20.11.82.7.Q](#)
 - When a rulemaking petition is filed, there are no other parties. Parties may enter the process as it proceeds.

Pre-hearing process, continued.

- 20.11.82.18.B. The *petition* shall:
 - be in **writing**
 - include the **name** of the regulation and a **statement** of the reasons for the proposed regulation/change/repeal.
 - **cite** the relevant statute(s) that **authorize** the board to adopt/change/repeal.
 - **estimate** the time that will be needed to conduct the rulemaking hearing, **if at all possible**.
 - **attach** a copy of the entire proposed rule, indicating any language proposed to be added or deleted, in “**legislative-edit format**”, with strike-outs and underlines as appropriate, with individual line numbers.
- Non-compliant petitions will be returned, and the petition will have to be resubmitted.

Pre-hearing process, continued: The Board's role

- Within **60 days** after receipt of an accepted *petition*, at a properly noticed public meeting of the Board, the Board “**shall determine whether or not to hold a public hearing on the proposed regulatory change.**”
 - Any person may respond to the petition either in writing before the public meeting or in person at the public meeting.
- The Board has **discretion** to decide whether or not to hold a hearing on the petition. If the Board decides NOT to hold a hearing, the petition is effectively over, because under the NMAQCA, NMSA 1978, § 74-2-6(B), no regulation shall be adopted until after a public hearing by the EIB or the AQCB.

Pre-hearing, continued. Board's decision to hold hearing, and notice.

- **20.11.82.18.D.** If the Board **decides** by a majority of Board members present to hold a **public hearing** on the petition, the Board **may** issue orders specifying procedures for conduct of the hearing, in addition to procedural requirements established in 20.11.82 NMAC, **as may be necessary and appropriate to fully inform the board** of the matters at issue in the hearing **or control the conduct of the hearing**. The orders may include requirements for giving additional public notice, holding pre-hearing conferences, filing direct testimony in writing before the hearing, or limiting testimony or cross examination.
- **20.11.82.19 Notice of Hearing**
 - Hearing clerk shall give **public notice** of the hearing at least **30 days** before the date set for the hearing.

Entry of Appearance

- Any person **affected or possibly affected** by a petition may file an **Entry of Appearance** and become a **party**, entitled to service of any filed document.
- An EOA may be filed any time not later than **15 days** before the date of the hearing on the petition.

Appointment of Hearing Officer

20.11.82.11 Powers and Duties of Board and Hearing Officer

- The Board **shall** appoint a hearing officer, who may be a member of the Board.
- The Hearing Officer **shall** conduct "a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay."

Hearing Officer's responsibilities

The Hearing Officer **shall** exercise all powers and duties delegated or otherwise authorized by 20.11.82. These include:

- (1) **conducting hearings** pursuant to 20.11.82 NMAC;
- (2) taking, admitting or excluding **evidence**, examining **witnesses** and allowing post-hearing **submissions**;
- (3) making **orders** as may be necessary to preserve decorum and to protect the orderly hearing process;
- (4) **if requested by the board**, preparing a **report** of the hearing, with **recommendations** for board action;
- (5) requesting parties to file original documents with the hearing clerk;
- (6) establishing the **deadlines** for filing documents with the hearing clerk;
- (7) requesting the **prevailing party** to submit a proposed statement of reasons in support of the board's decision; and
- (8) **filing** with the hearing clerk all original documents issued by the hearing officer.

Technical Testimony

20.11.82.7.X. “Technical testimony” means **scientific, engineering, economic or other specialized testimony**, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

Technical Testimony, continued

20.11.82.20 TECHNICAL TESTIMONY; NOTICE OF INTENT (NOI)

- A. No later than **15 days** before the hearing, **any person**, including the petitioner, who intends to present technical testimony at the hearing shall file an **NOI**. The **NOI shall**:
 - (1) identify the person **for whom** the witness or witnesses will testify;
 - (2) **identify each technical witness** the person intends to present and **state the qualifications** of that witness, including a description of their educational and work background;
 - (3) include **a copy of the direct testimony** of each technical witness and state the anticipated duration of the testimony of that witness;
 - (4) include **the text of any recommended modifications to the proposed regulatory change**;
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Technical testimony, continued

- (5) list and attach **an original and 15 copies of all exhibits** anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and
- (6) **be served** on the **petitioner**, if the document is an NOI filed by any person other than the petitioner.
- B. The person filing an NOI **shall serve** the notice pursuant to 20.11.82.16 NMAC.
- C. **The hearing officer may enforce the provisions of 20.11.82.20 NMAC by taking whatever action the hearing officer deems appropriate, including exclusion of the technical testimony of any witness for whom an NOI was not timely filed.** If the testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to the testimony.

Conversely, the hearing officer is **not obligated to exclude** technical evidence for lack of a timely NOI.

A person who files an NOI becomes **a party**.

This version of § 20.11.82.20 has been in place since 2012.

Non-technical testimony and public participation

20.11.82.22 NON-TECHNICAL TESTIMONY; PARTICIPATION BY GENERAL PUBLIC

- A. Any member of the **general public** may provide non-technical testimony at the hearing. **Notification before the hearing is not required in order to present nontechnical testimony at the hearing.** A person providing non-technical testimony **may also offer non-technical exhibits** in connection with the testimony provided if the exhibit is not an undue repetition of previous non-technical testimony,. Members of the general public **are requested to deliver an original and 15 copies** of each non-technical exhibit offered, to the hearing clerk, either before or at the hearing.
- B. A member of the general public who wishes to submit **a non-technical written statement for the record** instead of providing oral testimony at the hearing **shall file the written statement before the hearing or submit it at the hearing,** and is **requested to provide an original and 15 copies** of the statement to the hearing clerk.

Motions

20.11.82.15 Motions

Generally, **a motion** is a tool available to a party to request something from the decision-maker. There is no limit on the subject matter of a motion.

- Must be written, filed and served, except for an oral motion made during a hearing.
- A response by the opposing party(ies) is allowed, to be filed within 15 days, as is a reply by the filing party, to be filed within 10 days.
- A hearing on a motion **may be requested**, but the hearing officer has broad discretion to rule without a hearing.
- The Board decides all **dispositive** motions.

Hearing process

20.11.82.26 HEARING PROCEDURES - CONDUCT OF HEARINGS

- A. **The rules of civil procedure and the rules of evidence shall not apply.**
- B. The hearing officer shall conduct the hearing in a manner that provides **a reasonable opportunity for all persons to be heard** without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary
- repetition. The hearing shall proceed as follows:

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Hearing process, continued

- (1) The hearing shall begin with a statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.
- (2) The hearing officer may allow a brief opening statement by any party who wishes to make one.
- (3) Unless otherwise ordered, the petitioner shall present its case first.
- (4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon NOI(s), sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.
- (5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the general public. Members of the general public who wish to present testimony should indicate their intent to testify on a sign-in sheet.
- (6) The hearing officer may allow a brief closing argument by any party who wishes to make one.

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Hearing process, continued

- (7) At the close of the hearing, the hearing officer shall determine **whether**
- **to keep the record open for written [post-hearing] submittals** in accordance 20.11.82.30 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject or subjects regarding which submittals will be allowed and the deadline for filing the submittals.
- (8) **Any board action to adopt, amend or repeal a board regulation requires**
- **the concurrence of four board members.**

Deliberation and decision

20.11.82.32 DELIBERATION AND DECISION

- A. As provided in the act at NMSA 74-2-5.E, **in making its regulations, the board shall** give weight it deems appropriate to all facts and circumstances, including:
 - (1) character and degree of injury to or interference with health, welfare, visibility and property;
 - (2) the public interest, including the social and economic value of the sources and subjects of air contaminants, **with due consideration for environmental justice principles**; and
 - (3) 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.

This language is not in the NMAQCA

Deliberation and decision, continued

- D. The **board shall reach its decision** on the proposed regulatory change **within 60 days** after the later of the close of the record or the date the hearing officer's report is filed, if a quorum of the board is available.
- F. The board shall issue its decision on the proposed regulatory change in a suitable format, **which shall include its reasons for the action taken**.
- G. The **board's written decision** is the official version of the board's action and the reasons for that action. Other written or oral statements by board members are not a part of the board's official decision or reasons.

Costs

- Requests for rulemaking hearings are not subject to any fees.
- However, as per [20.11.82.28](#), the hearing "shall" be **transcribed** by a court reporter unless the Board requires another method of recording. **The petitioner "shall pay the cost of the court reporter and the original transcription"** of the hearing, **plus** the cost of a copy of the transcript for each Board member, the hearing officer and the Board attorney if required by the hearing officer of the Board.