



AQCB Regulation 20.11.39 NMAC Permit Waivers and Air Quality Notifications for Certain Source Categories

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**Environmental Health Department
Air Quality Program**

Presentation Outline

- Big Picture - Stationary Source Permits in Bernalillo Co.
- Why? - Part 39, 20.11.39 NMAC, *Permit Waivers and Air Quality Notifications for Certain Source Categories*
- Distinction between Part 39 and Air Quality Notifications
- Air Quality Notifications vs Construction Permits
- Realized benefits of Part 39
- Questions/Supplemental Information

Stationary Source Impact & Requirements by Permit Category

Permit Category	Total Permits in Category	Average Permitted Pollution per Source (tons per year)	Potential Air Quality Impact to Near by Neighbors	Air Quality Requirements
Title V	7	2375	High	Various & Complex
Synthetic Minor	21	134	High/Medium	Various & Complex
Minor	147	35	Medium	Various & Possibly Complex
Gas Stations	205	14	Low	Established & effective
Emergency Engines	323	6	Low	Established & effective

Gas Station and Emergency Engine Operations

Permit Category	Air Quality Requirements	Operating Characteristics	Potential Air Quality Impact to Near by Neighbors
Gas Stations	Stage I Vapor Recovery Submerged Fill		Low Impact - due to effective emission controls
Emergency Engines	Engine manufacture must certify to EPA emission standards Operator required to maintain engine	Operated on the average of 25 hours per year or about 1 hour every 2 weeks	Low Impact - due to limited operation and strict EPA emissions standards

Problem – Unsustainable Process

- 80% of applications - gas stations or emergency engines
- Federal requirements for gas stations and emergency engines are well defined and effective in reducing emissions
- Emergency engines operate about 25 hours per year
- All gas stations contribute to only 3% of benzene in the Bernalillo County urban air
- Significant time spent on permitting small contributors

Solution – Streamlined Process

- Create a more streamlined regulatory approach to process applications for gas stations or emergency engines
- Regulatory approach needs to imposed the well established and effective air quality requirements
- **Environmental Health Department developed the Part 39 Regulation for stand-alone gas stations and stand-alone emergency engines**

Gas Station and Emergency Engine Operations

Permit Category	Air Quality Requirements	Operating Characteristics	Potential Air Quality Impact to Near by Neighbors
Gas Stations	Stage I Vapor Recovery Submerged Fill	Reduces emissions by 95% or more for most retail gas stations	Low Impact - due to effective emission controls
Emergency Engines	Engine manufacture must certify to EPA emission standards Operator required to maintain engine	Operated on the average of 25 hours per year or about 1 hour every 2 weeks	Low Impact - due to limited operation and strict EPA engine emission standards

Key Events for Part 39 Regulation

- **May 30, 2017 – Stakeholder Draft/Meeting Invitation**
- **June 28, 2017 - Stakeholder Meetings**
- **November 8, 2017 - Air Board Hearing & Approval**
- **December 7, 2017 – Appeal filed to NM Court of Appeals**
- **July 3 & 4, 2019 – Public comments during EPA Review**
- **July 16, 2019 – EHD Notification Information to EPA**
- **January 16, 2020 - EPA Approval of Part 39**
- **June 4, 2020 – NM Court of Appeals Upholds Air Board Decision to Approve Part 39**
- **August 12, 2020 – NM Court of Appeals Mandate to Air Board for Part 39**

Part 39 Regulation – Efficient Process

- Allows for the issuance of an air quality notification to a qualifying gas station or emergency engine
- Does **not** decrease the amount of air quality protection
- Provides an alternative mechanism of imposing the Air Board regulations for gas stations and emergency engines
- Air Quality Notifications are not allowed for major sources and not allowed if other pollution sources

Part 39 and Air Quality Notifications

Part 39 (20.11.39 NMAC)

- Regulation which establishes the alternative mechanism to impose Board requirements for qualifying gas stations & emergency engines
- Defines requirements for the listed source categories
- Defines the process for evaluating an air quality notification application

AQ Notifications

- The document issued by EHD to the owner or operator of either a qualifying gas station or emergency engine and requires the source to comply with the applicable regulatory requirements

AQ Notifications & Construction Permits

Only AQ Notifications	Only Construction Permits	Both AQ Notifications & Construction Permits
Qualifying gas stations & emergency engines	Required for stationary sources which trigger emissions thresholds or have federal or Board standards	Approves both construction and operation of source
Imposes air quality requirements thru Part 39	Imposes air quality requirements thru permit	Subject to inspection
Streamlined process	Multi Step process	No term limit but updates required when changes occur

What Have Been the Benefits?

- Permit Division resources are redirected
 - Stronger permits for most important sources
 - Stronger permitting role in compliance
 - Stronger community integration in air quality
- 126 AQNs have been issued
 - 98 Emergency Engine AQNs
 - 28 Gasoline Station AQNs

TAKEAWAY: More air quality protection

Questions?

Supplemental Information

- Link to Part 39 Regulation,
<http://164.64.110.134/parts/title20/20.011.0039.pdf>
- Link to EPA Approval of Part 39 Regulation,
<https://www.govinfo.gov/content/pkg/FR-2020-01-16/pdf/2020-00286.pdf>
- Link to EPA Summary of Gas Station Requirements,
<https://epa.ohio.gov/Portals/41/sb/NESHAP%206C%20obrochure.pdf>

Air Board Member Questions from 8/12

- Member Sandoval: What does Part 39 do in terms of enforcement or standards?

Response: Enforcement and the standards are not lowered in anyway. An air quality notification requires the same standards and enforcement as a permit for the same type of source (gas station or emergency engine)

Air Board Member Questions from 8/12

- Member Sandoval: Does Part 39 in any way lower standards if it had to go through the regular process? Does Part 39 marginalize public input in any way?

Response: The standards for the source are not lowered. There was opportunity for public input during Part 39 development and during the Part 39 Air Board hearing. Part 39 requires web posting of the list of air quality notifications issued.

Air Board Member Questions from 8/12

- Member Meiklejohn: Is there a time limit for air quality notifications and construction permits? Is there an expiration date?
- Response: There is no time limit for air quality notifications or construction permits. The source is required to provide updates when changes occur for both an air quality notification and a construction permit.

Air Board Member Questions from 8/12

- Member Paul: What size of permit and are they operational?

Response: An air quality notification can **not** be issued to a major source. An air quality notification can **not** be issued to a gas station or emergency engine if they are located with sources which require a construction permit. An issued air quality notification approves both construction and operation of the source.

CITY OF ALBUQUERQUE



Environmental Health Department

Sandra K. Begay, Director

July 16, 2019

Mr. Jeffrey Robinson
U.S. Environmental Protection Agency, Region 6
1201 Elm Street, Suite 500 (MAIL CODE: ARP)
Dallas, TX 75270

Dear Mr. Robinson:

The City of Albuquerque Environmental Health Department (EHD) received your July 9, 2019 request regarding the public notification process that was used by the EHD and the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) in the development of 20.11.39 NMAC - *Permit Waivers and Air Quality Notifications for Certain Source Categories* (Part 39) and to revise 20.11.41 NMAC – *Construction Permits* (Part 41). This letter provides the information you requested.

PO Box 1293

Albuquerque

NM 87103

www.cabq.gov

EHD understands that the U.S. Environmental Protection Agency (“EPA”) received comments on the proposed State Implementation Plan (“SIP”) approval for the adoption of Part 39 and revisions to Part 41. The commenters raised questions about the public participation process used in the development and promulgation of this regulatory change. This letter provides detailed information about the public notification process that was followed. It addresses: (1) the efforts made by EHD staff, prior to requesting its regulatory change, to seek stakeholder involvement in the development of the proposed rule; (2) how the process met the federal requirements for regulatory changes affecting State Implementation Plans; and (3) how the process met the Air Board’s requirements for regulatory changes.

I. OVERVIEW

EHD always distributes its proposed regulations to stakeholders prior to petitioning for a regulatory change. It followed that standard practice in this case. Below, EHD provides documentation of the process that it used to invite stakeholder participation in the development of Part 39 and 41 prior to submitting its petition for a proposed regulatory change to the Air Board.

Federal regulations for preparation, adoption, and submittal of implementation plans require, among other things: notice (at least thirty days before the hearing) by prominent advertisement, the opportunity to submit written comments, the opportunity to request a public hearing, and notice of the hearing, which must include the date, place and time of the public hearing and be provided by certain methods. 40 C.F.R. § 51.102(a) and (d).

Below, EHD provides a detailed explanation of how these federal regulatory requirements were met.

Similarly to EPA, the Air Board has adopted procedural requirements, 20.11.82 NMAC [hereinafter “Air Board’s Rulemaking Procedures”], which require, among other things: notice at least thirty days before the hearing which must be published in a newspaper with the largest general circulation in Bernalillo County; published in the New Mexico Register; and, if technically feasible, published by electronic media. The board also requires reasonable efforts to provide notice to persons who have made a written request for advance notice of regulatory change hearings. 20.11.82.19 NMAC. Such public notices must state, among other things:

- (1) the subject, including a description of the proposed regulatory change, date, time and place of the hearing;
- (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
- (3) the manner in which persons may present their views or evidence to the board;
- (4) the location where persons may obtain copies of the proposed regulatory change;
- (5) if applicable, that the Board may make a decision on the proposed regulatory change at the conclusion of the hearing or at a separate board meeting.

To demonstrate that EHD sought public involvement prior to petitioning for its regulatory change and that all federal, state and local regulatory requirements were met, I am enclosing the following documents:

Attachment #	Description of Document
1.	Technical Testimony of Isreal Tavarez
2.	Affidavit of Publication and Notice of Filing
3.	Part 39-41 Email Stakeholders Constant Contact 05-30-2017
4.	Snail Mail – Email Part 39-41 Stakeholders
5.	Part 39-41 Constant Contact data – opened email report 6-1-2017
6.	EHD’s NOI Exhibit 12 – Comments and Responses
6a.	Additional Comment Letter Sent to Air Board
7.	Mailchimp Recipients of 9-26-2017 Hearing Notice
8.	ABQ Journal Electronic Publication of Hearing Notice 9-26-2017
9.	Notice of Filing of Affidavit of Publication
10.	Order and Statement of Reasons

II. STAKEHOLDER OUTREACH

A. EHD sought public involvement in its development of Part 39 and the related amendments to Part 41.

As a policy matter, EHD goes beyond the legal requirements for promulgating regulations by seeking public involvement in proposed rules before finalizing petitions for rulemaking.

In this case, on May 30, 2017, EHD notified stakeholders of its proposed regulatory change. (“Stakeholder Notice”). The stakeholders that EHD notified of its proposed regulatory change included recognized Albuquerque and Bernalillo County Neighborhood Associations and Coalitions; persons holding air quality permits for gas stations or emergency generators; and members of the community who had asked to be on the Air Board’s email list-serve to receive notification of proposed regulatory changes. Att. 1, Technical Testimony of Isreal Tavarez p. 6 (filed as part of EHD’s NOI October 25, 2017) [hereinafter Tavarez Testimony]. The Stakeholder Notice that EHD distributed is in Att. 2, Affidavit of Publication and Notice of Filing, Ex. 4. EHD does not have a single comprehensive list of all persons who were sent the Stakeholder Notice. It has a list of 836 email addresses to which EHD’s Stakeholder Notice was sent. Att. 3, Part 39-41 Email Stakeholder Constant Contact 05-30-2017. It has a second list of email and snail mail addresses to which its Stakeholder Notice was sent. Att. 4 Snail Mail – Email Part 39-41 Stakeholders. And it has a third list of 341 email addresses of persons who opened EHD’s Stakeholder Notice. Att. 5, Part 39-41 Constant Contact data – opened email report 6-1-2017.¹

EHD’s cover letter invited stakeholders to two public comment meetings held on June 28, 2017, one held in the afternoon and one in the evening. Four people attended the afternoon meeting. No one attended the evening meeting. Att. 1, Tavarez Testimony, p. 6.

EHD received four written comments on its draft regulation. One was from Public Service Company of New Mexico and as a result of this comment, EHD amended its proposed regulatory change to include a deadline for making a decision on an Air Quality Notification (“AQN”). Att. 1, Tavarez Testimony p. 7.

Three of the written comments were from community members. EHD invited the community members to a meeting at EHD on July 19, 2017, and several EHD staff attended. After that meeting, and as a result of their input and to assure transparency about new AQNs, EHD amended its proposed regulatory change to include a requirement that EHD publish, at regular intervals, all AQNs on its website after they have been issued. Att. 1, Tavarez Testimony, p. 7. EHD’s Deputy Director Danny Nevarez also sent written responses to each person from the public who commented on the proposed regulation. *See* Att. 6, EHD’s NOI Exhibit 12 – Comments and Responses; *see also* Att. 6a, Additional Comment Letter sent to Air Board.

EHD conducts public outreach about proposed regulatory changes in order to enhance public participation. In this case, EHD conducted a stakeholder outreach process and actively sought to understand all concerns raised. While EHD did not agree with all of the concerns, it did more than was required by federal, state and local requirements to inform the public and provide notice of its proposed regulatory change prior to submitting its petition to the Air Board.

¹ Note that the list of persons who opened EHD’s Stakeholder Notice appears to include four of the commenters: Steven Abeyta, stevenabeyta@gmail.com; Esther Abeyta, sjna1@live.com; Marisol Archuleta, lindsaymarisol@yahoo.com; and Frances Armijo, fparmijo@gmail.com.

III. ALL REGULATORY REQUIREMENTS WERE MET.

A. Timely and proper public notice was provided in accordance with federal requirements.

For context, the Air Board held the hearing at which it considered whether to adopt Part 39 and the related amendments to Part 41 on November 8, 2017. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2. That date establishes certain regulatory deadlines for public notice.

1. The public notice was timely.

Timely public notice for the Air Board's November 8, 2017 hearing was provided by, among other things, a legal notice published in the Albuquerque Journal on September 26, 2017. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2. That legal notice was provided 43 days prior to the hearing which is more than the required 30 days. 40 C.F.R. § 51.102(d). This public notice was timely.

2. The public notice was proper and met federal regulatory requirements.

The public notice was proper because it contained all of the federally required information. The legal notice published in the Albuquerque Journal stated that the hearing would take place on November 8, 2017, at 5:30 p.m., in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM 87102. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2; 40 C.F.R. 51.102(d)(1) (requiring the public notice to state the date, time and place of the hearing).

A legal notice published in a newspaper meets the federal requirement for a "prominent advertisement" of the date, time and place of the hearing. 40 C.F.R. § 51.102(d)(1); *Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices,"* from Janet McCabe, EPA Deputy Assistant Administrator, Office of Air & Radiation to Regional Administrators, Regions I-X, Att. B – Public Notices/Hearing Required by Sec. 110 of the CAA (Apr. 6, 2011) [hereinafter "Consistency Letter"] (stating that the requirement for a "prominent advertisement" is media neutral and may be met by newspaper publication or alternative publishing venues).

The public notice stated a place where the proposed regulatory changes were available for public inspection (Environmental Health Department, One Civic Plaza NW, Suite 3023, Albuquerque, NM 87102). Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2; 40 C.F.R. § 51.102(d)(2) (requiring availability of the proposed regulatory change for public inspection in at least one location where it would apply).

The public notice also informed the public, as required, that the new regulations would be submitted to the EPA as a proposed revision to the New Mexico State Implementation Plan under the federal Clean Air Act. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2; *see* Consistency Letter, Att. B, ¶ 3.

The Administrator (through Region 6 staff) and staff from the New Mexico Environment Department (“NMED”) received copies of the hearing public notice. *See*, Att. 7, Mailchimp Recipients of 9-26-2017 Hearing Notice (listing EPA staff members Erica LaDoux, Carl Young, Guy Donaldson, John Walser, Adina Wiley, Alan Shar, Dayana Medina, Ashley Mohr, and Randy Pitre and listing NMED staff members Rita Bates, Kerwin Singleton, and Sufi Mustafa; 40 C.F.R. § 51.102(d)(3) and (4).

The public notice for the hearing for Part 39 and the related amendments to Part 41 contained all of the required information for that notice to be proper pursuant to federal regulation.²

B. Timely and proper public notice was provided in accordance with state and local requirements.

1. The public notice was timely.

Like the federal regulations, state law and the Air Board’s Rulemaking Procedures require that notice for a rulemaking hearing be provided at least thirty days prior to the hearing. NMSA 1978, § 74-2-6(C); 20.11.82.19(A) NMAC.

Timely public notice for the Air Board’s November 8, 2017 hearing was provided by, among other things, a legal notice published in the Albuquerque Journal on September 26, 2017. *See* Enclosed Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2; *see also* Ex. 1 (New Mexico Register Publication on the same date); Ex. 3 (electronic notice to those who had requested to receive notice of proposed regulatory changes); and Att. 8, ABQ Journal Electronic Publication of Hearing Notice 9-26-2017. These notices were provided 43 days prior to the hearing which is more than the required 30 days. NMSA 1978, § 74-2-6(C); 20.11.82.19(A) NMAC. This public notice was timely.

2. The public notice was proper and met all state and local regulatory requirements.

The state Air Quality Control Act requires that notices of rulemaking hearings state the subject, time and place of the hearing and the manner in which interested persons may present their views. Notices must also state where interested persons may secure copies of any proposed regulation. NMSA 1978, § 74-2-6(C). Similarly, Section 19 of the Air Board’s Rulemaking Procedures provides that:

² In regard to 40 C.F.R. § 51.102(d)(4) and (5) (notice to other air agencies and states that are “significantly impacted”), no notice was required to other air agencies or other states because none was significantly impacted by the proposed regulatory change. Part 39 (and the related amendments to Part 41) do not change the substantive ways that emissions from gas stations and emergency generators are regulated. The proposed regulatory change only changed the procedure used to authorize these sources. Before the regulatory change, gasoline dispensing facilities were required to comply with 40 C.F.R. Part 63, Subpart CCCCC, and 20.11.65 NMAC through receiving a permit containing appropriate permit conditions. Emergency generators were required to comply with 40 C.F.R. Part 60, Subparts IIII or JJJJ, and Part 63, Subpart ZZZZ, through receiving a permit containing appropriate permit conditions (or a registration if these rules did not apply). After the proposed regulatory change, these same requirements were imposed through regulation (Part 39) rather than through permit conditions. Because no substantive changes occurred in the manner by which emissions from these sources were controlled, no other local air pollution control agency or other State could be significantly impacted by the regulatory change. Thus, no notice was required to other air agencies or other states. 40 C.F.R. § 51.102(d)(4) and (5).

Public notice shall include at a minimum:

- (1) a single publication in the newspaper with the largest general circulation in Bernalillo county;
- (2) publication in the New Mexico Register;
- (3) if technically feasible at the time, publication by electronic media; and
- (4) other means of providing notice as the board may direct or are required by law.

B. The board shall make reasonable efforts to give notice to persons who have made a written request to the board for advance notice of regulatory change hearings. Requests for notice shall be addressed to the hearing clerk, shall designate the areas of board activity that are of interest, and provide a legible address to which notice can be sent.

C. Public notice of the hearing shall state:

- (1) the subject, including a description of the proposed regulatory change, date, time and place of the hearing;
- (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
- (3) the manner in which persons may present their views or evidence to the board;
- (4) the location where persons may obtain copies of the proposed regulatory change; and
- (5) if applicable, that the board may make a decision on the proposed regulatory change at the conclusion of the hearing or at a separate board meeting.

All of these requirements were met, as explained in detail below.

The public notice was published in the Albuquerque Journal, a newspaper with the largest circulation in Bernalillo County. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 2; 20.11.82.19(A)(1) NMAC. It was published in the New Mexico Register. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 1; 20.11.82.19(A)(2) NMAC. It was published electronically by the Albuquerque Journal on its website. Att. 8, ABQ Journal Electronic Publication of Hearing Notice 9-26-2017; 20.11.82.19(A)(3) NMAC. Electronic notice was provided to persons who requested to receive advance notice of the Air Board's regulatory change hearings. Att. 2, Affidavit of Publication and Notice of Filing, Ex. 3; Att. 7, Mailchimp Recipients of 9-26-2017 Hearing Notice;³ 20.11.82.19(B).

³ This list of persons who received the electronic notice of the public hearing for Part 39/41 includes commenters Steven Abeyta, stevenabeyta@gmail.com; Esther Abeyta, sjnal@live.com; and Frances Armijo, fparmijo@gmail.com.

The content of the above public notices also satisfied the Air Board’s regulatory requirements. The public notice provided the subject, and a description of the proposed regulatory change (e.g., “adopt 20.11.39 NMAC, waiving permit requirements for specified gasoline distributing facilities and emergency stationary reciprocating internal combustion engines”), and the date, time and place of the hearing (stating that the hearing would take place on November 8, 2017, at 5:30 p.m., in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM 87102). Att. 2, Affidavit of Publication and Notice of Filing, Exs. 1-3; 20.11.82.19(C)(1) NMAC.

The public notice described the statutes, regulations and procedural rules governing the conduct of the hearing. 20.11.82.19(C)(2) NMAC. Specifically, the notice stated that:

The hearing ...will be conducted in accordance with NMSA 1978, § 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, ROA § 9-5-1-6, Adoption of Regulations, Notice and Hearing; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings; and 20.11.82 NMAC, Rulemaking Procedures—Air Quality Control Board.

Att. 2, Affidavit of Publication and Notice of Filing, Exs. 1-3.

The public notice stated the manner in which persons may present their views or evidence to the board. 20.11.82.19(C)(3) NMAC; Att. 2, Affidavit of Publication and Notice of Filing, Exs. 1-3 (describing procedural requirements for submission of technical testimony and stating that any member of the public may offer non-technical testimony at the hearing or may submit written comments).

The public notice stated the location where persons may obtain copies of the proposed regulatory change (at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102). Att. 2, Affidavit of Publication and Notice of Filing, Exs. 1-3; 20.11.82.19(C)(4) NMAC.

The public notice informed the public that the board may make a decision at the conclusion of the hearing or at a separate board meeting. Att. 2, Affidavit of Publication and Notice of Filing, Exs. 1-3; 20.11.82.19(C) NMAC (“Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the regulatory changes and related submittal to EPA proposed in the EHD petition.”).

Prior to the hearing on November 2, 2017, the Albuquerque Journal’s Affidavit of Publication of the Hearing Notice was filed for the record. Att. 9, Notice of Filing of Affidavit of Publication. The Air Board summarized its findings and described how its procedural requirements were met in its Order and Statement of Reasons. Att. 10, Order and Statement of Reasons, ¶¶ 1-5 (Nov. 8, 2017).

The inclusion of the above items demonstrates that the public notice met all of the Air Quality Control Act's and the Air Board's Rulemaking Procedures for proper public notice. NMSA 1978, § 74-2-6(C); 20.11.82.19 NMAC.

IV. SUMMARY

The stakeholder process preceding EHD's petition for a regulatory change was robust and provided commenters with substantial opportunity to discuss the proposed change and ask questions about it. While all of the members of the public do not agree with the substance of the proposed regulatory change, there is no basis to question the adequacy of stakeholder outreach. The public notification process for Part 39 and the related amendments to Part 41 was timely and proper. It met all federal, state and local regulatory requirements.

Thank you for allowing EHD to respond to these questions. If you need further information, please do not hesitate to call me.

Sincerely,



Sandra K. Begay
Director

Attachments

Cc: Lawrence Rael, City of Albuquerque Chief Operating Officer