

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

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**IN THE MATTER OF PETITION TO:
ADOPT A NEW REGULATION,
20.11.39 NMAC, *PERMIT WAIVERS AND
AIR QUALITY NOTIFICATIONS
FOR CERTAIN SOURCE CATEGORIES;*
AND TO AMEND 20.11.41 NMAC,
*CONSTRUCTION PERMITS***

AQCB PETITION NO. 2017-3

**ENVIRONMENTAL HEALTH
DEPARTMENT, PETITIONER**

**ENVIRONMENTAL HEALTH DEPARTMENT'S
PETITION TO:
ADOPT A NEW REGULATION,
20.11.39 NMAC, PERMIT WAIVERS AND
AIR QUALITY NOTIFICATIONS
FOR CERTAIN SOURCE CATEGORIES;
AND TO ADOPT RELATED AMENDMENTS TO
20.11.41 NMAC, CONSTRUCTION PERMITS.**

The City of Albuquerque's Environmental Health Department ("EHD") petitions the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") to authorize a hearing on EHD's petition to: (1) adopt a new regulation, 20.11.39 NMAC, *Permit Waivers and Air Quality Notifications for Certain Source Categories*, waiving permit requirements for some gas stations and emergency generators¹ and creating an alternative process for owners and operators

¹ For simplicity, EHD will use the terms "gas station" and "emergency generators" throughout this petition to indicate air pollution sources denoted by different, more technical terminology in the attached regulations that EHD is proposing. Those draft regulations refer to gas stations as "gasoline dispensing facilities" or "GDF," because that is the term EPA uses for them in the applicable federal air quality standard, which is 40 CFR Part 63, Subpart CCCCC, *National Emission Standards for Hazardous Air Pollutants for Gasoline Dispensing Facilities*. EHD and EPA sometimes refer to this regulation as "Hex C," because the letter "C" is repeated six times in the codified federal regulation.

Similarly, EHD's proposed draft regulations refer to fossil fuel-powered emergency generators as "emergency stationary reciprocating internal combustion engines" (abbreviated by EHD as "ES-RICE") because that is the term used for these devices in the applicable federal air quality standards. These standards are 40 CFR Part 60, Subpart IIII, *Standards of Performance for Stationary Compression Ignition Internal Combustion Engines*, also known colloquially as "Quad I"; 40 CFR Part 60, Subpart JJJJ, *Standards of Performance for Stationary Spark*

of these sources to comply with air quality standards; (2) make related amendments to 20.11.41 NMAC, *Construction Permits*.

As required by 20.11.82.18(B) NMAC, *Rulemaking Procedures – Air Quality Control Board*, drafts of EHD's proposed regulations are attached to this petition, with individual line numbers included. Exhibit A shows EHD's proposed new regulation, 20.11.39 NMAC. Exhibit B shows related amendments to an existing regulation, 20.11.41 NMAC (“existing Part 41”). The amendments are marked in red, in legislative edit format (i.e. strikethroughs and underlines to indicate altered language).

In preparing the draft regulations attached to this petition, EHD sought comment from interested stakeholders. On May 30, 2017, EHD sent copies of proposed draft regulations to Albuquerque and Bernalillo County neighborhood associations; persons holding air quality permits for gas stations or emergency generators; and members of the community on the email list-serve of the Air Board. EHD's cover letter invited these 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. EHD received four written comments on its draft regulations. EHD also consulted with the US Environmental Protection Agency, Region 6. EHD considered all comments received and will discuss these in its hearing testimony.

These changes to the Air Board’s regulations are needed for two reasons: first, to allow EHD permitting staff to focus its efforts on permitting of larger sources with more significant air quality impacts; and second, to allow EHD permitting staff to focus its efforts on sources for

Ignition Internal Combustion Engines, also known colloquially as "Quad J"; and 40 CFR Part 63, Subpart ZZZZ, *National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*, colloquially known as "Quad Z."

which the applicable regulatory scheme provides more discretion and requires more technical judgment than those regulations which apply to gas stations and emergency generators.

As EHD will explain at hearing, gas stations and emergency generators represent a minimal potential contribution of pollutants to local air quality compared to emissions from other sources. Yet EHD experience has shown that a majority of permitting staff time has been devoted to managing the process required by existing Part 41 for permit applications for these less significant contributors. Devoting the majority of an air quality agency's permitting resources to sources with minimal impact on air quality is not a wise use of resources.

This imbalance in resource allocation does not serve the public interest because it distracts EHD from a focus on larger facilities with more potential to impact air quality. The regulatory changes EHD proposes in this petition will correct this imbalance of resources, thus more effectively protecting air quality.

The regulatory schemes which apply to emergency generators and gas stations are highly prescriptive. This leaves EHD with little room to apply technical judgment or discretion when drafting a permit. In contrast, regulatory schemes for sources other than emergency generators and gas stations, especially those which require modeling or which offer more alternatives for applicants, present greater room for judgment and discretion and likewise require more time to permit appropriately.

To better allocate limited permitting resources, EHD proposes to eliminate permitting for most gas stations and emergency generators. Instead of a permit, these sources would receive an "Air Quality Notification" or "AQN" pursuant to proposed 20.11.39 NMAC ("Part 39"). Part 39 would require sources receiving an AQN to comply with the same substantive regulatory requirements as before, would continue to subject these sources to the same enforcement

measures as before and would require these sources to pay similar fees and submit similar emission inventories as before. Part 39 does not provide for public notice of each individual application, for hearings (whether before or after EHD approval), or for petitions to the Air Board. As a result, the regulation provides that, if an AQN is appropriate, an AQN would be issued within 45 days of EHD receiving an application, as opposed to 90-180 days after a construction permit application is deemed complete.²

The procedural protections of notice, hearings, and Air Board petitions are unnecessary to assure that all applicable requirements are imposed. In the case of Part 39 sources, where the substantive regulations are so prescriptive, Part 39 would impose all applicable requirements rendering a permit unnecessary. By limiting the full permitting process to sources which require more technical judgment and discretion, EHD will be able to reduce the time spent on permitting gas stations and emergency generators and use that time to focus on larger sources with more significant potential impacts on air quality.

As reasons for its petition, EHD states as follows:

1. For gas stations and emergency generators, EPA has adopted “standards of performance” under section 7411 of the Clean Air Act (“CAA”), “emission standards for hazardous air pollutants” under section 7412 of the CAA, or both.³

2. Significant consequences flow from the above quoted terms. Under state and local law, the Air Board may adopt standards of performance and emission standards for hazardous air

² 20.11.41(A) and (B) NMAC.

³ 40 C.F.R. Part 60, Subpart IIII (*Standards of Performance for Stationary Compression Ignition Internal Combustion Engines*); 40 C.F.R. Part 60, Subpart JJJJ (*Standards of Performance for Stationary Spark Ignition Internal Combustion Engines*); 40 C.F.R. Part 63 Subpart ZZZZ (*National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*); and 40 C.F.R. Part 63 Subpart CCCCC (*National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Dispensing Facilities*).

pollutants, except that they “shall be no more stringent than and at least as stringent as required by federal standards of performance[.]”⁴

3. In turn, the term “federal standards of performance,” is defined in state and local law as “a standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412.”⁵

4. When the Air Board adopts such standards of performance or emissions standards for hazardous air pollutants, those standards of performance or emission standards for hazardous air pollutants may apply only to “sources subject to such federal standards of performance.”⁶

5. Since the standards of performance or emissions standards for hazardous air pollutants which EPA has adopted for gas stations and emergency generators meet the definition of federal standards of performance and are subject to these rulemaking constraints, the Air Board has adopted regulations which incorporate by reference EPA's standards for gas stations and emergency generators, making them locally enforceable.⁷ Incorporating a federal regulation by reference assures that the resulting local regulation will be “no more stringent” and “no less stringent” than federal regulations.

6. Not all federal standards of performance are as prescriptive as those which apply to emergency generators and gas stations.

7. Some sources subject to federal standards of performance require air quality dispersion modeling, offer multiple alternative mechanisms to satisfy the federal standard of

⁴ N.M.S.A. § 74-2-5(C)(2)(a); Revised Ordinances of Albuquerque, N.M. (“ROA”) § 9-5-1-4(C)(2)(a); Bernalillo County, N.M. Code of Ordinances (“Bern. Code”) § 30-33(c)(2)(a).

⁵ N.M.S.A. § 74-2-2(G); ROA § 9-5-1-2; Bern. Code § 30-31.

⁶ N.M.S.A. § 74-2-5(C)(2)(b); ROA § 9-5-1-4(C)(2)(b); Bern. Code § 30-33(c)(2)(b).

⁷ 20.11.63 NMAC, *New Source Performance Standards for Stationary Sources*; 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*.

performance or otherwise present more complexity in applying them than those for gas stations and emergency generators.

8. Nonetheless, the Air Board's permitting regulation, 20.11.41 NMAC, requires all sources subject to federal standards of performance to obtain a construction permit.⁸

9. The federal Clean Air Act and EPA regulations do not require states or local jurisdictions to require pre-construction permitting for all minor sources. If a state determines that air pollution from a category of small minor sources is too low to merit the process of permitting, the state may waive or exempt permit requirements and regulate those sources by other means.⁹

10. The New Mexico Air Quality Control Act ("Air Act") likewise does not require pre-construction permitting for all sources. The Air Act says: "By regulation, the environmental improvement board or the local board shall require...a person intending to construct or modify any source, *except as otherwise specifically provided by regulation*, to obtain a construction permit from the department or the local agency prior to such construction or modification[.]"¹⁰ The same language occurs in local air quality ordinances.¹¹ Thus, state and local law allow the Air Board to adopt a regulation which identifies sources that are not required to obtain a pre-construction permit.

11. Consistent with this federal, state, and local authority, the Air Board's regulations currently do not require pre-construction permitting for all stationary sources. For example, small sources with emissions levels below a specified threshold are allowed to obtain a source

⁸ 20.11.41.2(C)(1) NMAC.

⁹ 40 CFR § 51.160(e) requires a state to identify which minor sources of air pollution "will be subject to review" and the basis for its determination. In making that determination, a state may determine that some minor sources are not subject to permit requirements.

¹⁰ NMSA 1978 § 74-2-7(A)(1) (emphasis added).

¹¹ ROA § 9-5-1-7(A)(1); Bern. Code § 30-36(a)(1).

registration, rather than a permit.¹² Similarly, the Air Board's construction permit regulation lists a variety of activities with *de minimus* emissions and states that such activities do not require a pre-construction permit, including building and grounds maintenance, maintenance of equipment (including equipment for pollution control), operation of certain small vehicles used in construction and maintenance, use of certain firefighting equipment, certain government military activities, certain equipment to support aircraft operation at an airfield, use of certain portable equipment to support maintenance and repair activities, and use of gasses to calibrate plant instrumentation.¹³

12. Outside of Albuquerque and Bernalillo County, the Environmental Improvement Board (“EIB”) has already exempted gas stations¹⁴ and emergency generators¹⁵ from pre-construction permitting.

13. EPA has approved EIB’s regulation authorizing these exemptions as part of the State Implementation Plan for New Mexico.¹⁶ EPA found that EIB’s regulation with these exemptions was legally and technically sufficient to protect air quality in accordance with federal requirements. EPA agreed with the state's demonstration that this regulatory change would not reduce air quality protection because emissions by these small minor sources excused from permitting were minimal and federal standards for those sources would continue to apply even in the absence of permitting.

14. EHD’s petition proposes a regulatory change that would eliminate permitting requirements for most gas stations and emergency generators. This change would be

¹² 20.11.40 NMAC, *Source Registration*.

¹³ 20.11.41.2(F)(2) NMAC.

¹⁴ See 20.2.72.200(A)(1), (2) and (3) NMAC, *Construction Permits*. These provisions have the effect of removing permit requirements from most gas stations and other source categories, although they do not expressly identify particular source categories.

¹⁵ See 20.2.72.202(B)(3) NMAC, which expressly exempts emergency generators from permitting.

¹⁶ 78 Fed. Reg. 15,296 (Mar. 11, 2013).

accomplished through language in the proposed Part 39¹⁷ and amendments to existing Part 41 waiving permit requirements for eligible sources.¹⁸

15. However, pursuant to proposed Part 39, gas stations and emergency generators with sufficient emissions to constitute a major source of air pollution would still be required to obtain a pre-construction permit.¹⁹

16. In addition, gas stations and emergency generators would still require a permit if they are located at the same facility with other types of air pollution sources that themselves require a permit.²⁰ This will allow EHD to consider all emission generating activities from a particular stationary source so that nothing is missed in evaluating overall emissions.

17. Other than major sources or gas stations and emergency generators associated with other stationary source emissions, all other gas stations and emergency generators will not be required to obtain a permit but instead will receive a different type of authorization from EHD, known as an "Air Quality Notification ("AQN").²¹

18. If the Air Board approves Part 39 and the amendments to Part 41 which EHD proposes in its petition, an owner or operator of a source eligible for an AQN (known as a "Part 39 source") would go through a more streamlined application and review process than would be required for a pre-construction permit.²²

¹⁷ 20.11.39.7(D) NMAC, Exhibit A, p. 2, line 26; 20.11.39.12 NMAC, p. 3, lines 6-19.

¹⁸ 20.11.41.2(E)(2) NMAC, Exhibit B, p. 2, line 22; 20.11.41.2(G) NMAC, p. 3, lines 18-22.

¹⁹ 20.11.39.2(B)(2)(a) and (d) NMAC, Exhibit A, p. 1, lines 20-23, 28. As a practical matter, it is highly unlikely that most gas stations or emergency generators would be major sources. In the unlikely event that such a source applied for an AQN, its application would be rejected since Part 39 does not apply to major sources.

²⁰ 20.11.39.2(B)(2)(c), Exhibit A, p. 1, lines 25-27.

²¹ 20.11.39.6 NMAC, Exhibit A, p. 1, lines 45-52; 20.11.39.7(A) NMAC, p. 2, lines 3-5; 20.11.39.13(A)(2) NMAC, p. 3, lines 27-28.

²² The process for initial application and review of AQNs appears at 20.11.39.14 NMAC and 20.11.39.15 NMAC, Exhibit A, p. 4, lines 24 to 55; p. 5, lines 1 to 12. The process for changes and review for existing AQNs appears at 20.11.39.18 NMAC, Exhibit A, p. 6, lines 13-41. For comparison to the current pre-construction permitting requirements, the initial application and review process appears at 20.11.41.13 to 20.11.41.18 NMAC, Exhibit B, pp. 7-14. The process for changes and review for existing permits appears at 20.11.41.21, 20.11.41.23,

19. If EHD approves and issues an AQN for a gas station or emergency generator, the owner or operator would be required to comply with the same substantive regulations that would have been applied through the permitting process.²³

20. Part 39 sources would be subject to enforcement action for a failure to comply with applicable substantive air quality regulations such as 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.64 NMAC (incorporating 40 C.F.R. Part 63 Subpart CCCCCC) (for gas stations) and the applicable federal regulations for emergency generators which the Air Board has incorporated by reference into its Part 63, *New Source Performance Standards for Stationary Sources* and Part 64, *Emission Standards for Hazardous Air Pollutants*.²⁴

21. EHD recommends this change because experience has shown that addressing gas stations and emergency generators consumes a disproportionate share of permitting staff resources for their air quality impact relative to larger, more complex sources with much greater potential air quality impact. Because of that potential impact, more regulatory requirements may apply to larger sources. In order to better allocate staff resources, EHD proposes the streamlined process in Part 39.

22. For the period from March 1, 2014 to February 28, 2017, approximately 80% of permit applications processed by EHD's permitting division were for gas stations and emergency generators. Over the same period EHD processed applications for Title V permit modifications, revisions, or renewals for the PNM Reeves and Rio Bravo generating stations, the University of New Mexico, and the Albuquerque Bernalillo County Water Utility Authority Southside Water Reclamation Facility. EHD also processed applications for permit modifications or revisions to

20.11.41.28, 20.11.41.29, 20.11.41.30 NMAC, Exhibit B, pp. 15-17, 19-21. Alternative, expedited forms of permit application and review appear at 20.11.41.24, 20.11.41.31, 20.11.41.32 NMAC, Exhibit B, pp. 17-18, 21-26.

²³ 20.11.39.13 NMAC, Exhibit A, p. 3, lines 22-55, p. 4, lines 1-21.

²⁴ 20.11.39.17 NMAC, Exhibit A, p. 5, lines 35-55, p. 6, lines 1-10.

larger industrial sources such as a General Mills breakfast cereal manufacturing plant, an American Gypsum Company wall board manufacturing plant, Calmat materials manufacturing facilities, a Cre-Med medical tape manufacturing facility, a Phillips 66 gasoline storage facility, the Albuquerque Products Terminal, the Black Rock Services hot mix asphalt plant, and the Kiewit New Mexico hot mix asphalt plant. The potential total emissions from sources such as these are dramatically larger than the typical gas station or emergency generator. Yet diversion of staff time to smaller, less significant sources makes it more difficult for EHD permitting staff to fully analyze larger sources, which require greater technical judgment and discretion. For those sources, EHD permitting staff must determine the applicable regulatory requirements, analyze alternative control methods to meet the requirements, incorporate the appropriate methods into the permit, and review complex air dispersion modeling.

23. Gas stations and emergency generators do not require such extensive analysis and the applicable regulations are highly prescriptive. The extensive time processing applications for these less significant sources with prescriptive regulations is inefficient.²⁵ The same requirements apply for each one of these sources, with minimal variation. Thus it makes more sense to put all of those requirements in a single regulation, Part 39, with no permit required, than to repeatedly process the same permit over and over again for each source.

24. EHD anticipates that improved permitting procedures following adoption of Part 39 will strengthen enforcement of air quality regulations for the largest sources with the greatest potential air quality impact. Inspectors from EHD's compliance and enforcement division rely upon the permit as an accurate, up to date description of what the regulated facility is required to

²⁵ The applicable federal regulations for emergency generators 40 CFR Part 60, Subparts IIII and JJJJ; 40 CFR Part 63, Subpart ZZZZ. The applicable federal regulation for gas stations is 40 CFR Part 63, Subpart CCCCC. These federal regulations set standards that are implemented locally by 20.11.63 NMAC, *New Source Performance Standards for Stationary Sources*, and 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*. Gas stations are also subject to 20.11.65 NMAC, *Volatile Organic Compounds*.

do. Eliminating the permit application and review process for less significant sources in favor of more streamlined procedures will help ensure that EHD permitting staff can deliver the most accurate, up to date permits for larger facilities.

25. As part of its streamlined application and review process for Part 39 sources, EHD's proposed regulation does not provide public notice or comment procedures.

26. Federal regulations do not require that all stationary sources be subject to a permitting requirement. Instead, EPA requires that a jurisdiction identify the types and sizes of stationary sources which will be subject to permitting review and thus to associated notice, comment, and hearing requirements.²⁶

27. Likewise, state and local law do not require that all stationary sources be subject to a permit requirement. To the contrary, state and local law expressly authorize the Air Board to identify sources which do not require permits.²⁷ The Air Act and local ordinances impose notice, comment, and hearing requirements only for permitted sources.²⁸

28. To assure transparency about new AQNs, EHD's draft of a proposed 20.11.39 NMAC requires EHD to publish, at regular intervals, all AQNs on its website after they've been issued.²⁹ Any person concerned about a potential violation of air quality standards and regulations relating to a gas station or emergency generator may contact EHD at any time so that EHD inspectors may investigate potential violations and pursue enforcement action if appropriate.³⁰

²⁶ 40 CFR § 51.160(e).

²⁷ NMSA 1978 § 74-2-7(A)(1); ROA § 9-5-1-7(A)(1); Bern. Code § 30-36(a)(1).

²⁸ NMSA 1978 § 74-2-7(B)(5); ROA § 9-5-1-7(B)(3); Bern. Code § 30-36(b)(3).

²⁹ 20.11.39.15(C) NMAC, Exhibit A, p. 5, lines 9-12.

³⁰ 20.11.39.17 NMAC, Exhibit A, p. 5, lines 35-55; page 6, lines 1-10.

29. Because EHD's draft of a proposed 20.11.39 NMAC waives permit requirements for gas stations and emergency generators, it is not a permitting action. Only permitting actions can be challenged via a petition to the Air Board.³¹

30. This procedure is similar to one that already exists in Air Board regulations for sources that do not require a permit. 20.11.40 NMAC, *Source Registration*, which requires sources with emissions too low for a permit, but above a de minimus amount, to obtain a document called a "registration certificate." Because a registration certificate is not a permit, EHD's issuance of one is not subject to petition to the Air Board, public notice or hearings. The AQN process established by 20.11.39 takes the same approach and is likewise permissible under state and local law.

31. If the Air Board adopts the above described regulatory changes, EHD also petitions the Air Board to authorize EHD to submit the changes to EPA for approval as proposed revisions to the New Mexico State Implementation Plan under Section 110(a) of the Clean Air Act.

32. The Air Board is authorized to adopt this proposed regulatory change under NMSA 1978 § 74-2-5(B)(1), Revised Ordinances of the City of Albuquerque § 9-5-1-4, and Bernalillo County Ordinances § 30-33.

33. EHD estimates that the hearing for this regulatory change will take approximately two to three hours.

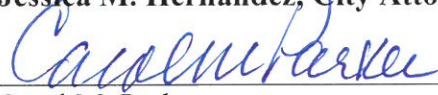
³¹ NMSA 1978, § 74-2-7(H); ROA § 9-5-1-7(H); Bern. Code § 30-36(h).

WHEREFORE, EHD requests that the Air Board,

- a. Schedule a hearing to consider the merits of EHD's petition;
- b. Authorize EHD to provide a court reporter for the hearing;
- c. Designate a hearing officer for the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that an original and fifteen copies of this Petition were hand-delivered on August 29, 2017, to:

Andrew Daffern, Hearing Clerk
Albuquerque-Bernalillo County Air Quality Control Board
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103



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