

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF THE PETITION TO
AMEND TITLE 20, CHAPTER 11 OF THE
NEW MEXICO ADMINISTRATIVE CODE
TO REQUIRE REVIEW AND
CONSIDERATION OF HEALTH,
ENVIRONMENT AND EQUITY IMPACTS**

AQCB PETITION NO. 2022-3

**MOUNTAIN VIEW NEIGHBORHOOD
ASSOCIATION, MOUNTAIN VIEW
COMMUNITY ACTION, AND FRIENDS
OF VALLE DE ORO,**

PETITIONERS.

**CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT'S
RESPONSE TO THE PETITION**

Pursuant to 20.11.82.18(C) NMAC, the City of Albuquerque Environmental Health Department (“Department”) hereby responds to the petition before the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) to amend Title 20, Chapter 11 of the New Mexico Administrative Code to require review and consideration of health, environment and equity impacts (“Petition”) filed by Mountain View Neighborhood Association, Mountain View Community Action, and Friends of Valle De Oro (collectively “Petitioners”).

The Albuquerque-Bernalillo County Joint Air Quality Program (“Program”) has conducted an initial review of the contents of the proposed regulatory changes in Exhibit A to the Petition (“Proposed Rule”) and states the following:

1. The City of Albuquerque as a whole prioritizes equity and inclusion across City-services and programs, and the Program is committed to furthering environmental justice in the air quality planning, permitting, and enforcement processes.

2. To the Program's knowledge, this is only the second time that a petition for rulemaking has been filed with the Air Board by an entity other than the Program.

3. Since the Proposed Rule was not prepared or submitted by the Program, the Proposed Rule has not gone through the Program's voluntary rigorous pre-petition regulation development and stakeholder engagement processes that are above and beyond the requirements in 20.11.82 NMAC. For example, before presenting proposed rules to the Air Board, the Program ordinarily issues notices and provides opportunities to comment, holds public listening sessions, holds public meetings, distributes a draft of the rule for review and written comment, reviews the written and oral comments received, responds to stakeholder comments, makes revisions to the proposal as necessary, etc. It is only after these pre-petition activities take place that the Program begins the formal legal proceedings to initiate a rulemaking, including filing a petition with attached exhibits documenting the pre-petition process.

4. The Program respects and supports this community-driven approach where impacted members of the community with lived experiences are directly involved in the development of solutions to meet their community's needs.

5. The Program highly values the Petitioners and their perspectives regarding the manner in which a rule addressing environmental justice concerns is realized, but recognizes that stakeholders also include existing permittees, future permit applicants in the business community, and the public at large.

6. The Program supports a permitting process that is fair, efficient, transparent, and enforceable with well-defined expectations for facilities, meaningful opportunities for community involvement, and accessible dispute resolution options.

7. To respond to environmental justice concerns in the air quality context, the Program favors a robust pre-application process and using a methodology to identify communities based on a variety of metrics and indices where the results do more than just provide information, but are reliable, defensible, and persuasive sources of authority for decision-making (*i.e.*, information is used to inform specific activities an applicant must complete or conditions in a permit) and that provide certainty about the applicable pre-application procedures based on a facility's proposed location.

8. The Proposed Rule, as currently drafted, does not fully realize the Program's objectives for an implementable or enforceable rule.

9. Upon review of the Proposed Rule, as currently drafted, the Program cannot readily identify how the Proposed Rule fits with existing permitting regulations and their processes because it is unclear whether the process in the Proposed Rule is a prerequisite or supplemental. If the Proposed Rule's process occurs completely before the processes in the other regulations, then the process is missing essential requirements, such as requiring the applicant to file an application so that the Program has a document to deny. *See* Proposed Rule, § 20.11.72.9(B). On the other hand, if the Proposed Rule is supplementary to the existing process in other regulations such that the requirements of two rules are intended to be intermingled, the Program cannot decipher a streamlined process. For example, the modeling requirements in the Proposed Rule do not align with the existing process for reviewing air dispersion modeling submitted to the Program. *See* Proposed Rule, § 20.11.72.9(C)(14).

10. Based on the Program's initial review of the Proposed Rule as it is currently drafted, the Program cannot readily identify what certain terms are intended to mean and how certain

standards are intended to be applied, which significantly impacts the scope of the Proposed Rule, and whether it is implementable and enforceable.

a. For example, the references to “permit” and “sources” capture different authorizations from the Program, not just “permit” in reference to the particular type of documentation necessary for a “stationary source” to conduct business lawfully. It is unclear whether certain authorizations that cover other types of sources, besides stationary sources, are included since they also require a “permit” or are a permitting action. These other sources generally either cause emissions from some conveyance other than a stack (*e.g.*, blowing dust or a controlled fire) or cause emissions too small to qualify as a stationary source.¹ Additionally, the Proposed Rule seemingly applies to any entity that requires an air permit, including small businesses, schools, hotels, office buildings, gas stations, and larger entities.

b. Also, the definition for “overburdened community” is ambiguous and can be interpreted to apply in several different plausible ways. First, the definition, as explicitly drafted, applies to areas with an exact amount of emissions rather than an amount of emissions in excess of a certain threshold. In other words, the definition is not based on an exceedance standard, which the Program believes is likely a drafting error. *See* Proposed Rule, § 20.11.72.7(N) (“combined permitted emissions from all sources *are* 10 tons per year”) (emphasis added). Second, the calculation of permitted emissions depends on the types of authorizations deemed “permits” under the Proposed Rule, which is unclear. Lastly, there are at least three ways to calculate the “combined permitted emissions from all sources” that all yield different results.

¹ *See e.g.*, 20.11.20 (Fugitive Dust Control Permits); 20.11.21 (Open Burning Permits); 20.11.40 NMAC (Source Registrations); 20.11.39 NMAC (Air Quality Notifications) (issued in lieu of a construction permit for certain stationary reciprocating internal combustion engines that serve solely as a secondary source of mechanical or electrical power during the loss of commercial power, and for certain gasoline dispensing facilities); 20.11.64 NMAC, 20.11.20.22 NMAC (Asbestos Notifications); 20.11.22 NMAC (Woodburning); 20.11.100 NMAC (Certifications for Air Care Vehicle Emissions Testing Stations and Inspectors)

11. Additionally, the Proposed Rule, as drafted, does not connect the applicant's new information gathering requirements with the Program's additional decision-making authority. The Proposed Rule requires the Program to make application denial decisions, Sections 20.11.72.9(B) and (E), and to impose mitigation measures in a permit, Section 20.11.72.9(F). Under those requirements, there is not an opportunity for the Program to consider most of the information from the Disparate Impacts Screening, Section 20.11.72.9(A); the Health, Environment and Equity Impact Analysis and Report, Section 20.11.72.9(C); and the public hearing, Section 20.11.72.9(D). Thus, many of the requirements in the Proposed Rule are lacking enforceable standards and have no connection with the remedies of denial and mitigation.

12. The record does not reflect whether the Proposed Rule was developed with insight from U.S. Environmental Protection Agency Region 6 staff, or whether their feedback on a draft of the Proposed Rule was sought and considered, as is customary for regulations developed by the Program. Without this partnership, the Proposed Rule may not comply with federal air quality requirements. For example, the Proposed Rule appears to modify processes in regulations that have been already approved by EPA as meeting federal requirements, *see* 40 C.F.R., Part 52, Subpart GG, and may require EPA approval as a prerequisite to codification in the Albuquerque - Bernalillo County Section of the New Mexico State Implementation Plan ("SIP").

13. Neither the Petition nor the Proposed Rule indicate the source of funding for the new requirements that would be imposed on the Program. Also, neither the Petition nor the Proposed Rule indicate what the Proposed Rule's funding requirements would be.

14. The Program notes that Air Board Member Kitty Richards had substantial involvement in the "Place Matters" study cited in the Petition and attached as Exhibit B to the Petition, *see* Petition at 7-8, and Member Richards has previously recused herself in similar matters

(the Title VI Complaint and the Honstein permit appeal). Due to the subject matter of the Petition and Proposed Rule, the Program encourages Member Richards and the Air Board to consider whether Member Richards' recusal in this matter may be appropriate. See 20.11.82.14 NMAC (recusal is required where a member's "impartiality or fairness may reasonably be questioned" or if there is "personal bias or prejudice concerning a party").

15. No legal standard is imposed in 20.11.81 NMAC to guide the Air Board in determining whether to hold a hearing under 20.11.82.18(C) NMAC. Therefore, the Air Board has discretion whether or not to hold a hearing.

16. The Program is not opposed to the Air Board holding a hearing on the Petition, as the Program supports continued conversations about equity and environmental justice in the air quality context. But, the Program has concerns about whether the Proposed Rule is implementable and enforceable as it is currently drafted.

17. The Program will provide more specific analyses after due consideration, if appropriate.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on December 13, 2022 an original and 15 copies of the City of Albuquerque Environmental Health Department's Response to the Petition was filed with the Air Board Hearing Clerk via hand delivery at:

Albuquerque-Bernalillo County Air Quality Control Board
Attn: Valerie Armijo, AQCB Liaison
Environmental Health Department
One Civic Plaza
Room 3023
Albuquerque, New Mexico 87102

A digital copy was sent as a courtesy on December 13, 2022 to Valerie Armijo at airboard@cabq.gov.

Also, I hereby certify that on December 13, 2022 a copy of the City of Albuquerque Environmental Health Department's Response to the Petition was served via first class mail and email, as follows:

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