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ADMINISTRATIVE RECORD DOCUMENT # 5

BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION TO ADOPT 20.11.80 NMAC, *ADJUDICATORY PROCEDURES-ENVIRONMENTAL HEALTH DEPARTMENT - ADMINISTRATIVE ENFORCEMENT AND HEARINGS BY DIRECTOR*

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AQCB Petition No. 2011-4

City of Albuquerque, Petitioner

CITY OF ALBUQUERQUE'S NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

Pursuant to 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*, the City of Albuquerque (City), through the City Environmental Health Department (EHD), Air Quality Division (AQD), hereby submits its Notice of Intent to Present Technical Testimony at the rulemaking hearing regarding the proposed adoption of a new regulation initially identified in AQCB Petition No. 2011-4 as 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health Department – Administrative Enforcement and Hearings by Director*, but now proposed by AQD to be named *Adjudicatory Procedures – Administrative Enforcement Hearings by Director*.

1. **<u>The person for whom the witnesses will testify.</u>**

City of Albuquerque Environmental Health Department, Air Quality Division

2. **<u>Name and qualifications of each technical witness – educational and work background.</u>**

Adelia W. Kearny, Deputy City Attorney, Legal Department, City of Albuquerque. Juris Doctor UNM School of Law 1978; admitted to New Mexico Bar Association 1978, New Mexico Federal District Court 1979, Tenth Circuit United States Court of Appeals 1979. Associate, then partner in Moses, Dunn, Beckley & Tuthill, P.A. 1978 – 1983. City of

Albuquerque Legal Department January 1984 to present. Initially Assistant City Attorney for various departments with emphasis on contracts and legislative drafting. Ultimately lawyer for all divisions in the Environmental Health Department. As air quality issues increased (including administrative enforcement actions and regulation drafting), in July 1997 became the assigned attorney for AQD only. With AQD staff, initiated current administrative enforcement program, which applies throughout Bernalillo County, including on federal and state facilities. Participated in resolving scores of enforcement actions, which resulted in compliance with air quality laws, addition or upgrading of air pollution control devices, training of permittees' employees, and penalties. Since June 2004, resolved approximately 270 formal air quality administrative enforcement actions. Attend and participate in AQD Regulatory Development Committee and Subcommittee meetings and Albuquerque-Bernalillo County Air Quality Control Board (AQCB) hearings and meetings. City appointee to New Mexico Municipal League's Environment, Energy & Natural Resources Policy Committee.

Matthew B. Stebleton, Compliance Supervisor, Air Quality Division, Environmental Health Department, City of Albuquerque. Master of Science, Biology (1987) University of New Mexico. Employed by the City of Albuquerque for 17 years in the Environmental Health Department, Air Quality Division. Previously employed by the State of New Mexico Air Quality Bureau for seven years. Have performed various duties as a stationary source inspector and for the past 15 years have worked in a compliance capacity. Issued notices of violation (NOV's) and have participated in resolving over 750 enforcement actions ranging from fugitive dust to large utilities and oil and gas facilities and returned the facilities to compliance, improved facilities' pollution control capacity and collected penalties. Have extensive air quality compliance training, including several advanced EPA and WESTAR environmental enforcement courses.

3. **Summary of Direct Testimony and Estimated Duration of Testimony.**

A summary of Ms. Kearny's written testimony in the form of a PowerPoint presentation is attached as AQD Technical Exhibit # 1. (See Tab #5 in the comb-bound set of documents that will be provided at the hearing for the convenience of the AQCB.) Ms. Kearny will testify regarding the reasons the AQCB should adopt proposed new administrative enforcement procedural rule 20.11.80 NMAC, which include the following. When AQD has initiated an administrative enforcement action against a respondent for an alleged violation of an air quality permit or air quality statute, ordinance, regulation or standard, and AQD and the respondent have not been able to resolve the alleged violation, the Department Director or the Director's designee is authorized by the New Mexico Air Quality Control Act, Chapter 74, Article 2, at NMSA 1978, Section 74-2-12(A)(1) to issue a Compliance Order. The Compliance Order initiates an administrative enforcement action, as opposed to a civil or criminal enforcement action, which would be filed in civil or criminal court.

Currently, when a respondent receives an administrative Compliance Order and requested an administrative enforcement hearing on the merits, the parties have referred to New Mexico Environmental Improvement Board (EIB) procedural regulation 20.1.5 NMAC, *Adjudicatory Procedures* – (NM) *Environment Department* for guidance. The EIB regulation was adopted to establish adjudicatory administrative procedures for violations of several varied state acts including the New Mexico Air Quality Control Act, the Hazardous Waste Act, the Solid Waste Act, the Groundwater Protection Act and the Tire Recycling Act. Because the EIB regulation addresses a wide range of laws and subjects, and uses varying terminology, some confusion has resulted regarding the procedures and terminology that should be applied in administrative enforcement actions that are initiated when the City EHD Director issues a Compliance Order that applies within Bernalillo County.

Proposed 20.11.80 NMAC provides the procedures that would apply to administrative enforcement proceedings that are conducted by or on behalf of the EHD Director, as authorized

and required by the NM Air Quality Control Act at NMSA 1978, Sections 74-2-4, 74-2-5 and 74-2-12; Bernalillo County Joint Air Quality Control Board Ordinance No. 94-5 Sections, 4, 5 and 13; and City of Albuquerque Joint Air Quality Control Board Ordinance Sections 9-5-1-4, 9-5-1-5 and 9-5-1-98 (ROA [revised ordinances of Albuquerque] 1994). The direct testimony of Ms. Kearny is expected to last approximately 45 minutes.

Mr. Stebleton also will be available to answer questions and provide clarifications.

4. Recommended Changes to the Public Review Draft of 20.11.80 NMAC.

In addition to AQD asking the AQCB to adopt the Public Review Draft (PRD) that is attached to the Petition to Adopt 20.11.80 NMAC (see, in the comb-bound set of documents, Hearing Record Tab #1, document 1b), AQD also asks the AQCB to adopt floor amendments that will change the name of the proposed new rule to "Adjudicatory Procedures – Administrative Enforcement Hearings by Director" (see Tab #7, AQD Non-technical Exhibit #1). After additional review of the PRD, AQD concluded the proposed replacement name for 20.11.80 NMAC is clearer. The New Mexico State Records and Archives Center has approved the change in the name. See Tab #4. The proposed floor amendments (Tab #7) also include one additional minor change to the PRD.

5. List and Description of Selected Administrative Record Documents; Technical and Non-Technical Exhibits to be Offered into Evidence; Legal Authority.

Tab #1 Administrative Record - (Documents 1a & 1b)	**Petition to Adopt 20.11.80 NMAC:** (Document #1a:) Petition to Adopt 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health Department – Administrative Enforcement and Hearings by Director*, with attached (Document #1b:) Public Review Draft of 20.11.80 NMAC
Tab #2 Administrative Record - (Documents 2a, 2b, & 2c)	**Stakeholder Outreach and Courtesy Copy to EPA:** (Document #2a:) 12/21/10 Stakeholder letter sent via List Serve; (Document 2b:) 1/6/11 Stakeholder Letter sent to EPA and EPA's 6/11/11 response thereto; (Document #2c:) List Serve e-mail subscription list

Tab #3 Administrative Record - (Documents 3a, 3b, & 3c)	**Notice of Proposed Rulemaking:** (Document #3a:) Albuquerque Journal 5/15/11; (Document #3b:) NM Register 5/31/11; (Document #3c:) Legal Ad sent to the Air Quality Announce List Serve 6/2/11
Tab #4 Administrative Record - (Document 4)	**New Mexico Administrative Code, New Rule Name & Number:** 6/7/11 letter from State Records Center granting new name and Part number: "20.11.80 NMAC, Adjudicatory Procedures – Administrative Enforcement Hearings by Director"
Tab #5 Administrative Record - (Document 5)	**City of Albuquerque's Notice of Intent to Present Technical Testimony with attached exhibits:** 6/16/11 Notice of Intent to Provide Technical Testimony with attached **AQD Technical Exhibit #1:** PowerPoint presentation of technical testimony regarding the legal basis of and reasons for adopting proposed administrative enforcement procedural rule 20.11.80 NMAC; and **AQD Technical Exhibit #2**: Process map showing overview of deadlines and roles when using proposed rule 20.11.80 NMAC
Tab #6 Administrative Record - (Document 6)	**Air Quality Control Board Draft Agenda, July 13, 2011:**
Tab #7 (Document 7)	**Proposed Floor Amendments:** **AQD Non-technical Ex. #1:** AQD-proposed Floor Amendments changing name of 20.11.80 NMAC to "Adjudicatory Procedures – Administrative Enforcement Hearings by Director" and correcting one minor typographical error
Tab #8 Legal authority (Document 8)	**Air Quality Control Act, Chap. 74, Art. 2, NMSA 1978, Section 74-2-12, *Enforcement; compliance orders; field citations* :** (Applies to specified administrative enforcement actions statewide.)
Tab #9 Legal authority (Document 9)	**20.1.5 NMAC, *Adjudicatory Procedures – Environment Department*:** (New Mexico Environmental Improvement Board Rule regarding administrative enforcement hearings conducted by New Mexico Environment Department.)

6. **Reservation of Rights.**

This Notice of Intent to Present Technical Testimony is based on AQD's Petition to Adopt 20.11.80 NMAC (AQCB Petition No. 2011-4) and the attached Public Review Draft. AQD reserves the right to call any person to testify and to present any exhibit in response to any

other notice of intent or public comment filed in this matter or to any testimony or exhibit offered at the public rulemaking hearing. AQD also reserves the right to call any person as a rebuttal witness and to present any exhibit in support thereof.

Respectfully submitted,

CITY OF ALBUQUERQUE
Robert J. Kidd, Interim City Attorney

Adelia W. Kearny
Deputy City Attorney
P. O. Box 2248
Albuquerque, New Mexico 87103
(505) 758-4530

CERTIFICATION

I hereby certify that on June 16, 2011, an original and nine copies of this Notice of Intent to Present Technical Testimony (NOI) with attached AQD Technical Exhibit #1 and #2 and attached AQD Non-technical Exhibit #1 were delivered to the following person for filing.

Margaret Nieto for
Air Quality Control Board Liaison / Hearing Clerk
Environmental Health Department
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103

and that on June 16, 2011, a copy of this NOI with attached AQD Technical Exhibit #1 and #2 and attached AQD Non-technical Exhibit #1 were sent to Bill Grantham, the attorney for the AQCB, at the following e-mail address: Bill.grantham@state.nm.us

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