PROPOSED NEW PROCEDURAL REGULATION FOR ADMINISTRATIVE ENFORCEMENT ACTIONS:

20.11.80 NMAC, *ADJUDICATORY PROCEDURES – ENVIRONMENTAL HEALTH DEPARTMENT - ADMINISTRATIVE ENFORCEMENT – HEARINGS BY DIRECTOR*

Testimony before the Albuquerque-Bernalillo County Air Quality Control Board at the July 13, 2011 rulemaking hearing

by Adelia Kearny, Deputy City Attorney, witness for Albuquerque Environmental Health Department

1. Background:

- **Role of Air Quality Control Board (AQCB):**
  - **quasi-legislative** (acting like a legislator, e.g., deciding whether to adopt rules/regulations at tonight's rulemaking hearing); and
  - **quasi-judicial/"adjudicatory"** (acting like a judge, e.g., deciding whether an action taken by AQD EHD re an application for an air quality permit or permit modification should be sustained, modified or reversed).

- **Role of the City Environmental Health Department. Director:**
  - The City of Albuquerque Environmental Health Department **(EHD) Director also has an "adjudicatory" role** under the New Mexico Air Quality Control Act **when hearings are held in administrative enforcement actions.**

New Mexico Air Quality Control Act, Chapter 74, Article 2, NMSA (New Mexico Statutes Annotated):

- **NMSA Section 74-2-14, *Criminal penalties*** (Metropolitan or District Court)
- **NMSA Section 74-2-12.1, *Civil penalty ...*** (Metropolitan or District Court)
- **NMSA Section 74-2-12,** (administrative) ***Enforcement; compliance orders...*** (See Tab #8.) Initiated by Compliance Order issued by Environmental Health Dept. Director or designee) per NMSA §74-2-12(A): "When on the basis of any information, ... the director determines that a person has violated or is violating a requirement of prohibition of the Air Quality Control Act, a regulation promulgated pursuant to that act or a condition of a permit issued under that act, ...**the director may**: (1) **issue a compliance order** within one year after the violation becomes known by ... the local agency (EHD) stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for a past or current violation, or both ..."

NMSA §74-2-12(B): "An (a compliance) order issued pursuant to … (NMSA 74-2-12(A)) may include a suspension or revocation of the permit or portion thereof issued by … the director… . Any penalty assessed in the order shall not exceed … ($15,000.00) per day of noncompliance for each violation."

NMSA §74-2-12(C): "An order issued pursuant to … (NMSA 74-2-12(A)) shall become final unless, not later than thirty days after the order is served, the person named therein submits a written request to … the director for a public hearing. Upon such request, … the director shall promptly conduct a public hearing. The … director shall appoint an independent hearing officer to preside over the public hearing. The hearing officer shall make and preserve a complete record of the proceedings and forward the hearing officer's recommendation based thereon to … the director, who shall make the final decision."

NMSA §74-2-12(H): In connection with a proceeding under this section, … the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures."

NMSA 74-2-9, *Judicial review; administrative actions*, at 74-2-9(A): "Any person adversely affected by an administrative action taken by … the director may appeal to the (New Mexico) court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action." (= the decision of the EHD Director cannot go to AQCB).

The parallel City of Albuquerque "Joint Air Quality Control Board Ordinance" and the Bernalillo County "Joint Air Quality Control Board Ordinance" repeat the Air Quality Control Act wording regarding administrative enforcement actions. (See 9-5-1-98 (ROA [Revised Ordinances of Albuquerque] 1994) and Bernalillo County Ord. No. 94-5, section 13.)

- **AQD usually uses other approaches before AQD asks the EHD Director or designee to issue a Compliance Order.**

  - Education, outreach and informal actions (e.g. free fugitive dust workshop).
  - Post Inspection Notification (PIN) issued (and may be resolved at this point).
  - Notice of Violation (NOV) issued, which initiates a less-formal administrative enforcement action. If AQD and respondent to NOV action cannot agree on the terms of a written Compliance Agreement, AQD may ask the EHD Director or the Director's designee to issue a Compliance Order as provided by the NM Air Quality Control Act, NMSA Section 74-2-12.

- **If a Compliance Order is issued, what procedures and deadlines apply?**
  - Compliance Orders have been issued rarely (most recent in 2009, e.g.: Andalucía at SE corner of Coors & Montano NW issued in April 2009).

  - When Compliance Orders are issued, the procedures used for guidance are the adjudicatory procedures adopted by the State of New Mexico Environmental Improvement Board (EIB), which apply to New Mexico Environment Department administrative enforcement hearings.

However…

Regarding EIB rule 20.1.5 NMAC, *Adjudicatory Procedures* – (NM) *Environment Department* (see Tab #9):

The problem with using EIB Part 5 as guide for procedure in Bernalillo County:

- **Jurisdiction of EIB Part 5:**

20.1.5 NMAC, *Adjudicatory Procedures – Environment Department* (see Tab #9), is a state Environmental Improvement Board (EIB) regulation (EIB Part 5), not an AQCB regulation. EIB Part 5 is in force only outside Bernalillo County and can be used for procedural guidance to provide due process, but has caused some confusion.

- **Scope/application of EIB Part 5:** 20.1.5.7A(1) NMAC establishes EIB Part 5 applies to:
  - the Dept. of Environment Act (which applies to the NM Environment Dept.);
  - the Air Quality Control Act;
  - the Hazardous Waste Act (over which AQCB has no authority);
  - the Solid Waste Act (over which AQCB has no authority);
  - the Ground Water Protection Act (over which AQCB has no authority);
  - the Tire Recycling Act (over which AQCB had no authority, then was repealed).

EIB Part 5 - potential sources of confusion - examples:

- **Objective of EIB Part 5** (Tab # 9)**:**

  20.1.5.6 NMAC: The objective of EIB Part 5 is "to establish regulations that govern adjudicatory proceedings of the (state of NM) Environment Department", so no reference in EIB Part 5 is made to the **"local authority"** in Albuquerque and Bernalillo County regarding air quality (the City of Albuquerque and Bernalillo County governments) or to the **"local agency"** (the Albuquerque agency [EHD] per: 1.) the City Joint Air Quality Control Board Ordinance; and 2.) the Bernalillo County Joint Air Quality Control Board Ordinance, by delegation).

- **Definitions:**

  - 20.1.5.7.A(3) NMAC: "Complainant" includes "the party requesting a hearing on a Compliance

- **Using EIB Part 5 for EHD administrative enforcement actions causes potential confusion for *pro se* respondents and attorneys if they have to sort through EIB Part 5 for the first time to determine what terminology and deadlines apply to administrative enforcement actions within Bernalillo County.**
- **Due process can be provided locally using EIB Part 5 as a guide, but we need a local AQCB procedure for administrative hearings re alleged violations of the Air Quality Control Act, AQCB regulations and air quality permits issued by EHD AQD.**

2. <u>The solution</u>:

- **Proposed AQCB regulation/rule 20.11.80 NMAC** (see Public Review Draft at Tab #1, document #1b) **provides a procedure that applies exclusively to administrative enforcement actions within Albuquerque and Bernalillo County when:**
  - **an administrative Compliance Order has been issued; and**
  - **the respondent has requested a hearing by the 30-day deadline imposed by the NM Air Quality Control Act and the ABQ and Bernalillo County Joint Air Quality Control Board Ordinances.**
- **AQD will continue to use the PIN/NOV process before AQD requests Compliance Order except in unusual circumstances.**

Summary of proposed 20.11.80 NMAC - selected provisions:

- **Scope of 20.11.80 NMAC (Part 80)** (See Tab #1, doc. 1b, Public Review Draft):
  - A. What Part 80 governs. (See 20.11.80.2.A NMAC.)
  - B. What Part 80 does <u>not</u> govern. (See 20.11.80.2.B NMAC.)

Part 80 uses locally-applicable definitions (see 20.11.80.7 NMAC) **and selected procedures in existing AQCB procedural regulations: 20.11.81 NMAC, *Adjudicatory Procedures – AQCB*** (regarding applications for air quality permits or permit modifications that were issued or refused by EHD), **and 20.11.82 NMAC, *Rulemaking Procedures-AQCB*** (which is the kind of hearing AQCB is holding tonight re Part 80).

Part 80 incorporated staff experience and input from an experienced administrative hearing officer.

AQD conducted stakeholder outreach and provided a courtesy copy to the EPA. (See Tab #2, documents 2a, 2b and 2c.) Adoption of the Part 80 procedural regulation is not a SIP (State Implementation Plan) action. **The Public Review Draft was posted on AQD web site. Notice of Proposed Rulemaking was provided.** (See Tab #3, documents 3a, 3b, 3c .)

AQD received no substantive feedback. The AQD Regulatory Development Committee did some minor editing, then produced the Public Review Draft (PRD) of Part 80 and attached the PRD to the "Petition to Adopt 20.11.80 NMAC and Request for Hearing". (See Tab #1, documents 1a and 1b.)

•Highlights regarding Selected Part 80 Sections:

- **20.11.80.12.NMAC, General Provisions** (PRD at Tab #1, doc. 1b, page 3, line 6):
  - **20.11.80.12.A NMAC**: Court Rules of Civil Procedure and Evidence used for guidance, but do not change NM Air Quality Control Act deadlines.
  - **20.11.80.12.C NMAC:** qualification and disqualification of Hearing Officer and Director to hear and decide administrative Compliance Order issues.
  - **20.11.80.12.G(3) and J NMAC**: requirements regarding documents filed, "caption" (heading) on pleadings filed in a Part 80 hearing.

- **20.11.80.13 NMAC, Prehearing Procedures** (PRD at Tab #1, doc. 1b, pg. 5, line 54):
  - **20.11.80.13.A NMAC:** deadline for Respondent to the Compliance Order to file a timely Request for Hearing with accompanying Answer to allegations in Compliance Order.
  - **20.11.80.13.C(1) and 20.11.80.13.D NMAC:** Include requirements re the Hearing Clerk's role and filing of Motions, Responses and Replies by the parties.

- **20.11.80.14 NMAC, Discovery** (PRD at Tab #1, doc. 1b, pg. 7, line 14):
  - **20.11.80.14.B(1) NMAC:** requirements if party expects to call expert witness.
  - **20.11.80.14.B(2) NMAC:** requirements if party expects to call non-expert witness.
  - **20.11.80.14.D NMAC:** regarding subpoenas issued by Hearing Clerk.
  - **20.11.80.14.E NMAC:** regarding Request for Admissions.

Highlights regarding Selected Part 80 Sections continued:

- **20.11.80.15 NMAC, Hearing procedures** (PRD, Tab #1, doc 1b, pg. 9, line 32):
  - **20.11.80.15.A(2) NMAC:** "...only parties shall have the right to cross-examine a witness. The hearing officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the direct testimony of the witness."
  - **20.11.80.15.C NMAC, Burden of persuasion:** "The complainant (AQD) has the burden of going forward (first) with the evidence and proving ... that the facts ... show the violation occurred and that the proposed civil penalty is appropriate." After that, "the respondent shall have the burden of going forward with adverse evidence or a defense ... ."
- **20.11.80.16 NMAC, Post-hearing procedures** (PRD, Tab #1, doc. 1b, pg.10, line 12):
  - **20.11.80.16.B NMAC:** "Within 30 days after the transcript (of the hearing) is filed, or by the deadline established by the hearing officer, any party may submit to the hearing officer proposed findings of fact and conclusions of law or discretion and a closing argument."
  - **20.11.80.16.C NMAC:** Thirty days after the deadline for the parties to file findings conclusions and a closing argument, the hearing officer issues: 1.) recommended decision with the hearing officer's findings of fact, conclusions and reasons; 2.) if applicable, a recommended civil penalty; and 3.) proposed final order.

Highlights regarding Selected Part 80 Sections continued:

- **20.11.80.16.C(2) NMAC** (PRD, Tab #1, doc. 1b, pg.10, line 32) **:** Fifteen days after service of Hearing Officer's recommended decision, "any party may file comments…and .. argument…" in response.
- **20.11.80.16.C(3) NMAC:** A party may request or the Director may decide on his or her own to allow oral arguments by the parties re the recommended decision.
- **20.11.80.16.D and D(1) NMAC:** No later than 30 days after the later of the filing of comments by the parties or the oral argument, "the director shall issue a written final order", with reasons the director adopted, modified or set aside the hearing officer's recommended decision. "The director may change the amount and nature of the civil penalty, if any …and shall set forth the reasons … ."
- **20.11.80.16.E NMAC:** Respondent has 60 days after receiving the final order to pay the full amount of any monetary penalty.
- **20.11.80.16.F NMAC:** The director's final order can be appealed to the New Mexico Court of Appeals as provided by the NM Air Quality Control Act at NMSA §74-2-9.A: "Any person adversely affected by an administrative action taken by … the director may appeal to the court of appeals… upon the record…. within thirty days following the date of the action."

- **20.11.80.17 NMAC, Alternate Resolution** (PRD, Tab #1, doc. 1b, pg. 11, line 3)**:**
  - **20.11.80.17.B(2):** Stipulated final order agreed to by the parties.
  - **20.11.80.17.B(3):** Withdrawal by Respondent of Respondent's request for hearing.

The Process Map (see Tab #5, AQD Technical Exhibit #1) **provides an overview of some of the Part 80 requirements and options that apply to:**

- **the EHD Director,**
- **the Hearing Officer,**
- **the Hearing Clerk, and**
- **"the Respondent** (to the Compliance Order) **or other party as identified" (e.g., AQD)**

and deadlines that apply to the participants in the administrative enforcement action hearing.

3. Request by Environmental Health Department.

EHD initiated this rulemaking hearing by filing Petition to Adopt 20.11.80 NMAC (AQCB Petition No. 2011-4) **with attached PRD**. (at Tab #1, documents 1.a and 1.b.). EHD asks the AQCB to adopt the PRD (at Tab #1, document 1.b) with the changes proposed in the Floor Amendments (at Tab #7, AQD Non-technical Ex. #1).

AQD moves admission of:

- **AQD Technical Ex. #1,** a hard copy of this PowerPoint (at Tab #5);
- **AQD Technical Ex. #2,** the Process Map (at Tab #5); and
- **AQD Non-technical Ex. #1** the proposed Floor Amendments (at Tab #7).

QUESTIONS?