BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

May 31, 2024

By Email to Title_VI_Complaints@epa.gov and By Certified Mail

cc: Kurt Temple
Acting Director
Office of External Civil Rights Compliance
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Ave., NW
Washington, DC 20460
temple.kurt@epa.gov

Marianne Engleman-Lado
Deputy General Counsel for Environmental Initiatives
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
engelmanlado.marianne@epa.gov

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
Mail Code 1102A
1200 Pennsylvania Avenue, NW
Washington, DC 20460
regan.michael@epa.gov

MOUNTAIN VIEW
NEIGHBORHOOD ASSOCIATION,
MOUNTAIN VIEW COMMUNITY ACTION, and
FRIENDS OF VALLE DE ORO,
Complainants,

-vs-

CITY OF ALBUQUERQUE, NEW MEXICO,
and
CITY OF ALBUQUERQUE CITY COUNCIL.
Respondents.

I. INTRODUCTION

For decades, industries and local governments have intentionally designated communities of color and low-income communities in Albuquerque and Bernalillo County, New Mexico, as sacrificial zones for pollution through their permitting practices and policy decisions, with more industrial sites located in and adjacent to these neighborhoods than in predominantly white, more affluent communities. ¹ Albuquerque’s communities of color and low-income communities are exposed to higher concentrations of environmental toxins and pollutants than white, more affluent communities, contributing to higher rates of cancer, heart disease, respiratory-related illnesses, and other diseases as they disproportionately bear the adverse health impacts of pollution.² In an effort to address this ongoing and systemic issue, and protect their communities from further bearing this disproportionate burden, community residents belonging to the Mountain View Neighborhood Association, Mountain View Community Action, and Friends of Valle de Oro (hereinafter, “Complainants”), petitioned the joint City of Albuquerque-Bernalillo

¹ See Joint Center for Political and Economic Studies, Place Matters for Health in Bernalillo County: Ensuring Opportunities for Good Health for All (Sept. 2012) at 16-19, https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-Bernalillo-County.pdf; see Complaint by SWOP, Complainant, to EPA at 4-6 (Sept. 15, 2014) [hereinafter 2014 Complaint] (discussing various construction and air quality permits issued in Albuquerque’s low-income communities of color); see also Gabriel Pacyniak et. al., Climate, Health, and Equity Implications of Large Facility Pollution Sources in New Mexico, University of New Mexico & PSE Health Energy, at 55 (Feb. 2023), https://www.psehealthyenergy.org/wp-content/uploads/2023/02/FINAL_Climate-Health-and-Equity-Implications-of-Large-Facility-Pollution-Sources-in-NM.pdf (noting the location of most Albuquerque pollution sources are within low-income communities); see also Tina Deines, In Albuquerque, a Pollution Problem All Too Familiar to Communities of Color, Bitterroot Magazine (May 31, 2019), (https://bitterrootmag.com/2019/05/31/in-albuquerque-a-pollution-problem-all-too-familiar-to-communities-of-color/ (detailing the intentional placement of pollution facilities in and near communities of color in Albuquerque, specifically noting that even two major federally-designated Superfund sites exist within a 2.5 square-mile neighborhood).

County Air Quality Control Board for a rulemaking to adopt a rule designed to require the local Environmental Health Department to consider these overburdened communities, and the disproportionate health impacts they bear, when reviewing an application for an air pollution permit. This proposed rule, known as the Health, Environment, and Equity Impacts Rule (hereinafter, “HEEI Rule”), was a community-led effort that culminated from decades of community organizing and advocacy by Albuquerque’s communities of color, low-income communities, and communities that historically and continually bear the disproportionate burdens of air pollution.

As detailed throughout this Complaint, the City of Albuquerque and its City Council intentionally interfered with the HEEI Rule rulemaking efforts both leading up to and during the HEEI Rule’s Rulemaking Proceeding. The City Council’s actions, including the use and abuse of its legislative powers through the City’s resources and funds, were motivated by the City’s intent to halt the Rulemaking Proceeding and communities of color-led rulemaking efforts completely – violating Complainants’ rights to meaningfully participate in and have access to the rulemaking process, discouraging public participation in and advocacy for local regulation, and ultimately, discriminating against Complainants on the basis of race, color, and national origin.

Title VI of the Civil Rights Act of 1964, 42. U.S.C. §§ 2000d et. seq. and the United States Environmental Protection Agency’s (“EPA”) implementing regulations (hereinafter, “Title VI”) strictly prohibit entities receiving federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, and national origin, which includes the deterrence and exclusion of individuals from meaningfully participating in and having access to public processes, like a public rulemaking process.³ Accordingly, for the

---

reasons described below, Complainants respectfully request that EPA promptly and comprehensively investigate whether the City of Albuquerque and its City Council are in compliance with Title VI based on the discriminatory acts that occurred throughout the community-led rulemaking efforts. Moreover, Complainants respectfully request EPA take all actions necessary to ensure the City of Albuquerque and its City Council’s compliance with Title VI, including the specific relief requested within this Complaint. EPA’s authority to hold the City of Albuquerque and its City Council accountable for its intentionally discriminatory acts, and to bring these entities into compliance with federal anti-discrimination laws, is particularly significant when viewed in the larger scheme of foreseeable, longstanding impacts of the City and its City Council’s discriminatory acts: if EPA does not hold these entities accountable and bring them into compliance with Title VI, instead allowing a local government to abuse its power, authority, and resources to discriminatorily interfere in a community-led rulemaking effort – especially when such rulemaking efforts are led by low-income communities of color seeking to remedy past and ongoing discrimination on the basis of race, color, and national origin – the City will ultimately be allowed to perpetuate and uphold a discriminatory barrier to the public participation process for communities of color and low-income communities in the City of Albuquerque, New Mexico.

II. THE COMPLAINANTS

EPA’s Title VI implementing regulations permit any person “who believes that he or she or a specific class of persons has been discriminated against in violation of” Title VI and EPA’s implementing regulations to file a complaint. The complaint may be filed by an authorized representative.

---

4 40 C.F.R. § 7.120(a).
5 Id.
Complainants in this instance are the Mountain View Neighborhood Association, Mountain View Community Action, and Friends of Valle de Oro. Complainants represent the Mountain View residential community consisting of approximately 6,000 residents, adjacent to the Rio Grande River and located in the South Valley of Albuquerque in Bernalillo County, New Mexico. The residents are predominantly Hispanic and working-class to low-income.

According to EPA’s EJScreen, the South Valley is ranked within the 80th to 95th percentile both nationwide and statewide for residents identifying as people of color and residents with limited English proficiency.

The Mountain View community has borne the disproportionate share of toxic and hazardous contamination and pollution for decades due to the intentional placement of several major polluting sources in and around the community. Several oil terminals, scrap yards, chemical storage facilities, the municipal sewage plant, as well as two Superfund sites, are located within the Mountain View community and larger South Valley area, while the community is also located downwind from the Kirtland Air Force Base, Sandia National Lab, and the Albuquerque International Sunport airport. The placement of these various pollution sources in and around the community has resulted in extreme health disparities in Mountain View, including high levels of asthma, cancer, heart disease, and other health issues among residents – with the Centers for Disease Control and Prevention (“CDC”) ranking the community region in the top percentiles.

---

7 Id.; see also 87105 Demographics Summary, New Mexico Demographics, https://www.newmexico-demographics.com/87105-demographics#:~:text=The%20largest%20racial%20and%20American%20Indian%20(4.0%25) (last visited Feb. 6, 2024) (listing 79.9% of residents in the 87105-area code as Hispanic, and the median household income of the community at $46,124).
8 See (87105) Albuquerque, New Mexico, EPA’s Environmental Justice Screening and Mapping Tool (Version 2.2), https://ejscreen.epa.gov/mapper/ (last visited March 13, 2024) [hereinafter Albuquerque EJScreen].
9 Mountain View is City’s Industrial Sacrificial Zone, supra note 6.
10 See Fischer, supra note 2.
nationwide in its Environmental Justice Index, Social Vulnerability, and Environmental Burden ranks.\(^{11}\) As a result, on average, Mountain View residents have a 10- to 24-year shorter life expectancy than more affluent, predominantly white communities in Albuquerque.\(^{12}\)

Complainants have collectively worked to address this systemic discrimination impacting their communities through numerous community organizing efforts, media and public outreach, and regulatory proposals, including the proposed HEEI Rule that spurred the discriminatory acts by the City of Albuquerque and Albuquerque City Council that are the subject of and detailed throughout this Complaint. Accordingly, the New Mexico Environmental Law Center ("NMELC"), as the Complainants’ authorized representative, files this Title VI Complaint.

III. JURISDICTION

Title VI charges EPA with the responsibility of ensuring that its funds are not used to subsidize discrimination based on race, color, or national origin.\(^{13}\) Any person may file administrative complaints that allege discrimination based on race, color, or national origin with the federal departments and agencies that provide financial assistance from federal funds.\(^{14}\)

EPA has identified four jurisdictional requirements to accepting a complaint for investigation under Title VI: (1) the complaint is in writing; (2) the complaint alleges discriminatory acts that, if true, violate EPA’s Title VI regulations; (3) the complaint identifies a recipient of EPA funding that committed the alleged discriminatory act; and (4) the complaint is filed within 180 days of the alleged discriminatory act.\(^{15}\) Once a complaint is accepted, EPA’s External Civil Rights

\(^{11}\) See Census Tract 40.01, Bernalillo County, New Mexico, Centers for Disease and Control Prevention EJI Index, https://onemap.cdc.gov/portal/apps/sites/#/eji-explorer (last visited March 13, 2024) [hereinafter CDC EJI]; see also Albuquerque EJScreen, supra note 8; see also Fischer, supra note 2.

\(^{12}\) Mountain View is City’s Industrial Sacrificial Zone, supra note 6.


\(^{14}\) See 42 U.S.C § 2000d; 28 C.F.R. § 42.408.

Compliance Office (“ECRKO”) has the jurisdiction to investigate the allegations in the complaint.\textsuperscript{16}

This Complaint satisfies all four jurisdictional requirements. Complainants allege that the City of Albuquerque and its City Council intentionally discriminated against them on the basis of race, color, and national origin through these recipients’ illegal and intentional discriminatory interference with a community-led rulemaking petition that sought to address the disproportionate impacts of air pollution borne by communities of color and low-income communities in the city of Albuquerque and Bernalillo County. Complainants, through this Complaint, further identify the repeated and ongoing violations by the City through its use and abuse of the City Council’s legislative powers, federal funds and resources to intentionally interfere with low-income communities of color’s right to petition the government and to disrupt community-led efforts to meaningfully regulate air pollution, thereby effectively discriminating on the basis of race, color, and national origin in violation of Title VI.

The City of Albuquerque is a recipient of federal financial assistance, as defined under EPA’s Title VI regulations.\textsuperscript{17} The City of Albuquerque City Council is also a recipient, for purposes of Title VI, because recipients include secondary or subrecipients that receive federal funding indirectly through another entity, and the City Council receives, and is responsible for, the City of Albuquerque’s funds.\textsuperscript{18} Moreover, the legislative history of Title VI indicates that Congress

\textsuperscript{17} Under the EPA’s Title VI regulations, a “[r]ecipient” is “any State or its political subdivision, any instrumentality of a State or its political subdivision, [and] any public or private agency… to which Federal financial assistance is extended directly or through another recipient . . .” 40 C.F.R. § 7.25. “EPA assistance” is “any grant or cooperative agreement, loan, contract . . ., or any other arrangement by which EPA provides or otherwise makes available assistance in the form of funds.” \textit{Id.}
\textsuperscript{18} See Civil Rights Division, U.S. Dept. of Justice, Title VI Legal Manual at Section V, p.14, https://www.justice.gov/crt/book/file/1364106/download [hereinafter Title VI Legal Manual]; \textit{see} Exhibit 1 [Final Version of City Council Resolution] and Section IV.4 of this Complaint for discussion of the City Council’s use of authority to distribute, use, and withdraw City of Albuquerque federal funds.
intended a “broad application” of Title VI to local governments and their entities. In FY 2023, the City of Albuquerque received $2,196,822 in federal funding from EPA. This includes the ongoing provision of grants, well over a million dollars, “to provide assistance to [the] City of Albuquerque in its efforts to implement air pollution control programs throughout the City of Albuquerque.” Further, the City of Albuquerque continues to receive federal grants from EPA into this current fiscal year to “improve and maintain the public’s air quality” and address the cumulative impacts of air pollution, with the “intended,” “direct beneficiaries” to be the “residents of Albuquerque” and “state residents who will have decreased risk of adverse health effects, including cancer and neurological effects” from particulate matter pollution.

Finally, this Complaint is timely because it has been filed within 180 days of the alleged discriminatory acts, and the discriminatory acts by the City of Albuquerque and its City Council are ongoing as of the date of this Complaint’s filing. The first alleged discriminatory act occurred on October 16, 2023, when City Councilor Dan Lewis formally introduced to the City Council two pieces of legislation intended to disrupt the Albuquerque-Bernalillo County Air Quality Control Board’s (hereinafter, “Air Board”) rulemaking abilities and dissolve the current Air Board, and halt the ongoing public rulemaking process initiated by Complainants.

---

19 See Title VI Legal Manual supra note 18, at Sec. V, p. 24 (quoting S. Rep. No. 100-64, at 16 (1988), reprinted in 1988 U.S.C.C.A.N. 18 (“[W]hen any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered”)).

20 See City of Albuquerque and the Environmental Protection Agency (EPA), USA Spending, https://www.usaspending.gov/search/?hash=ef0ea73ad44389d19d5856069df90132 (last visited Feb. 20, 2024).


22 See Grant Summary, FAIN 02F66201, https://www.usaspending.gov/award/ASST_NON_02F66201_6800 (last visited Feb. 20, 2024); see also Grant Summary, FAIN 01F98001, https://www.usaspending.gov/award/ASST_NON_01F98001_6800 (last visited Feb. 20, 2024).

Discriminatory acts associated with the two pieces of legislation continued throughout November and December 2023, as the City Council formally passed the legislation on November 8, 2023, and on December 4, 2023, overrode the City of Albuquerque Mayor’s vetoes of the legislation. Discriminatory acts associated with the City Council’s legislation became even more formalized, at latest, on December 15, 2023, and December 20, 2023, when the City of Albuquerque published the Ordinance, which was slated to go into effect five days after publication. The discriminatory acts by the City of Albuquerque and City Council remain ongoing, with the entities’ current involvement in litigation defending the legitimacy of the discriminatory legislation. Therefore, because this written Complaint is timely and alleges discriminatory acts on the basis of race, color, and national origin by recipients of EPA financial assistance, this Complaint meets the EPA’s jurisdictional prerequisites and ECRCO has the jurisdiction to investigate this Complaint.

IV. DISCRIMINATORY ACTS & TITLE VI VIOLATIONS

Title VI prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin, and provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

24 See City Council Overrides Mayor’s Vetoes, Albuquerque City Council (Dec. 4, 2023), https://www.cabq.gov/council/find-your-councilor/district-5/news/city-council-overrides-mayor2019s-vetoes; see also Exhibit 1 [Final Version of the City Resolution], Exhibit 2 [Final Version of the City Ordinance] (documenting the Mayor’s vetoes of the Ordinance and Resolution as overridden on December 4, 2023).
25 To date, the publication date and effective date of the Ordinance are under contention by parties in litigation. See also Article XI, Section 6, of the Charter of the City of Albuquerque, Article XI, Sec. 6(b) (stating that “[a]n ordinance shall not become effective until five days after it has been published…”).
financial assistance.” Title VI applies to all programs and activities receiving federal financial assistance.

When determining whether a recipient’s actions amount to intentional discrimination prohibited by Title VI, agencies can evaluate a complaint under a variety of factors probative of the intent to discriminate. Under the Arlington Heights framework, ECRCO is to consider the following six factors when analyzing whether a discriminatory purpose, at least in part, motivated a recipient’s actions, effectuating intentional discrimination in violation of Title VI: (1) relevant historical and discriminatory background; (2) the sequence of events leading up to the action; (3) relevant legislative or administrative history; (4) departures from normal procedures; (5) statistical evidence “demonstrating a clear pattern of discriminatory effect;” and (6) any evidence of a consistent pattern of disparate impact on communities of color, such that the “actions of decision-makers [...] impose much greater harm on minorities than on non-minorities.” To be successful in alleging intentional discrimination under this framework, a Complainant “need provide very little such evidence ... to raise a genuine issue of fact ...; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a fact-finder,” like an investigating agency such as ECRCO.

Applying Arlington Heights here, as discussed in depth below, evidences the City of Albuquerque and City Council’s discriminatory motives, at least in part, behind the consistent

---

28 See Title VI Legal Manual, supra note 18, at Sec. V, p.6.
29 Id. at Sec. VI, p.9-10 (explicitly stating that the Arlington Heights framework applies to claims of intentional discrimination under Title VI).
31 See Title VI Legal Manual, supra note 18, at Sec. VI, p.10 (citing Pac. Shores Props., 730 F.3d at 1159 (citations omitted)).
and debilitating interference with a community-led rulemaking effort and the associated Rulemaking Proceeding. The City Council and its members' acts, in furtherance of the introduction, passage, and enforcement of City Legislation that directly interfered with a legal, community-led Rulemaking Proceeding, relied upon funds, staff, and resources from the City of Albuquerque, a recipient of EPA funding. Thus, the City Council used federal funding to intentionally discriminate on the basis of race, color, and national origin, in violation of Title VI. Accordingly, ECRCO should accept Complainants’ Title VI Complaint for investigation, and commence a prompt and comprehensive investigation into the City of Albuquerque and its City Council’s compliance with Title VI.

1. Historical Background

The first factor of the Arlington Heights framework requires ECRCO to consider the relevant historical background, which includes the state’s, and its local governing bodies’, history, particularly in relation to the subject matter at issue. Relevant historical background includes any prior history of discriminatory permitting and regulatory practices, as well as any information that “reveals a series of official actions [were] taken for invidious purposes.”

The subject matter at issue here is the discriminatory acts committed by the City of Albuquerque and its City Council, as well as the City’s air quality permitting practices and intentional placement of industrial sites in and adjacent to the City of Albuquerque’s low-income communities of color, and the City of Albuquerque’s historical and ongoing resistance to meaningfully regulate and address the issue of these communities bearing the disproportionate

32 Id. at Sec. VI, p.11-12; see N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 223 (4th Cir. 2016) (in a case alleging intentional discrimination in the passage of a voting law, the 4th Circuit considered the historical background in the state generally and related to voting in particular, identifying “North Carolina’s history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state” as particularly relevant).


34 See Arlington Heights, 429 U.S. at 267.
adverse impacts of air pollution. This intentional discrimination was most recently evidenced by the City Council’s interference with a communities of color-led rulemaking effort, through the introduction and passage of City Legislation to interfere with a legal rulemaking, led by a City Councilor with personal interests in the industries purported to be regulated by the community’s proposed HEEI Rule.

A. The City of Albuquerque’s Historical Discriminatory Practices

The City of Albuquerque’s practice of permitting pollution sources in and adjacent to its communities of color and low-income communities dates back several decades, as do the community-led advocacy efforts to protect these communities’ air, water, and soil from further contamination – with little to no meaningful remediation, but instead resistance, from the local government. The City’s long history of discriminatory air pollution permitting, enforcement and other regulatory practices is evidenced by the sheer number of polluting facilities and industries within and surrounding Albuquerque’s communities of color and low-income communities. Fifteen large stationary sources, which include fossil fuel-fired power plants, oil refineries, gas processing plants and compressor stations, manufacturing plants, and landfills that emit large amounts of toxic and hazardous air pollutants,35 are located within Albuquerque and Bernalillo County: the majority of which are sited in low-income neighborhoods and neighborhoods of color.36 In fact, these sources are located in more low-income communities of color than anywhere else in the state, and more residents live near these facilities than any other residential population in the state of New Mexico.37 Consequently, the Bernalillo County communities with the highest concentrations of pollution and environmental hazards in Bernalillo County are also the communities with the highest populations of people of color; immigrants; and people living

35 Pacyniak et al., supra note 1, at 5.
36 Id. at 55.
37 Id.
150% below the federal poverty line.\textsuperscript{38} Despite the majority of air-polluting facilities already sited within and surrounding the City’s low-income communities of color, the City of Albuquerque’s Environmental Health Department continues to issue more industrial air quality permits for sources proposed in low-income communities and communities of color, than in predominantly white, more affluent neighborhoods, for seemingly no reason other than intentional discrimination.\textsuperscript{39} This trend of discriminatory permitting practices was highlighted recently, when the City of Albuquerque’s Environmental Health Department approved an air pollution permit in October 2020 for a proposed asphalt batch plant to be located in the already overburdened Mountain View community – despite the respective land being zoned for rural agricultural use with a special use permit for an industrial park of limited uses, none of which included a hot mix asphalt plant.\textsuperscript{40} It was not until years later in February 2023, after an outpouring of community opposition and under the scrutiny of the Air Board, that EHD rescinded the permit.\textsuperscript{41}

When these communities’ air, water, and soil are inevitably polluted and community members raise their concerns regarding their health and environment, the City of Albuquerque’s response has historically been and continues to be, at best, to dismiss communities’ concerns and continue to fail to regulate industries or abate pollution accordingly, and at worst, explicitly

\textsuperscript{38} See Joint Center for Political and Economic Studies, supra note 1, at 16-17.
\textsuperscript{39} To compare the sites of the currently issued and active air quality permits in Albuquerque to the Albuquerque neighborhoods with predominantly residents of color, see Map of City of Albuquerque Active Air Quality Permits, https://cabq.maps.arcgis.com/apps/instant/interactivelegend/index.html?appid=530f5c65ce544fe2911aff23b68c9905 (last visited March 13, 2024) and Albuquerque Race and Ethnicity Map, https://bestneighborhood.org/race-in-albuquerque-nm/ (last visited March 13, 2024).
\textsuperscript{40} See New Mexico Terminal Services, LLC., 9615 Broadway Boulevard SE, City of Albuquerque, https://www.cabq.gov/airquality/news/air-quality-permit-application-new-mexico-terminal-services-llc-9615-broadway-boulevard-se-albuquerque-nm-87105 (last visited April 23, 2024); see also Dkt. 25.3 at 4-5 [Petitioner's Memo in Support of Motion for Summary Disposition Regarding EHD's Permitting of an Illegal Land Use], AQCB Docket No. 2020-1 (New Mexico Terminal Services), https://www.dropbox.com/sh/ixgnva4i7pajuw/AADFnrOYsYq1YQLzjKApUYV/af2d=0&u=1 (emphasis added).
interfere with and hinder any meaningful regulatory effort, especially if such effort is led by impacted communities of color. For example, in the 1960s, extremely high nitrate concentrations were reported in South Valley residents’ groundwater, but the City of Albuquerque and state authorities’ response to residents for over two decades was simply to dig deeper wells for clean drinking water and ignore the problem as much as possible. It was not until a child was poisoned and hospitalized in 1984 with a case of “blue baby syndrome,” or methemoglobinemia, that the City and State were prompted to conduct a more rigorous investigation and subsequently extend the municipal public water supply to the South Valley community. This negligent response to Albuquerque low-income communities of color’s concerns regarding the pollution of their environments and consequent adverse health impacts remains today, as the City continues to ignore and actively oppose community requests for stronger air pollution regulations and environmental justice protections. In 2014, for example, community residents petitioned the Air Board for a rulemaking to address the cumulative impacts of air pollution disproportionately burdening Albuquerque’s low-income communities and communities of color, but the Air Board declined to even consider the community-led petition. The Air Board voted 6 to 1 to deny the community a rulemaking hearing because, as stated by Air Board members during the March 2014 deliberations, the disproportionate adverse health impacts from air pollution experienced by Albuquerque communities of color are a “land use/zoning issue;” an ordinance regulating air pollution permit applications in these communities is not “the solution to the problem” of communities overburdened by air pollution; and “Albuquerque isn’t normally an area with an environmental justice issue,” despite EPA’s earlier designation of Albuquerque’s Mountain View.

42 See Fischer, supra note 2.
43 See id.; see also Christina L. Keleher, Nitrate Contaminated Groundwater in Albuquerque’s South Valley: Is Monitored Natural Attenuation an Appropriate Strategy?, University of New Mexico Water Resources (April 26, 2009), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1103&context=wr_sp.
44 See 2014 Complaint, supra note 1, at 7 (issued Complaint No. 13R-14-R6).

14
community as an “Environmental Justice Community.” Further, when the Air Board created an “Environmental Justice Task Force” in 2007 to attempt to address ongoing environmental justice issues related to City entities’ work, the City’s legal counsel and employees, seated as members on the Environmental Justice Task Force, continuously obstructed every recommendation made in support of impacted communities for years, such that none of the Task Force’s duties could ever be fulfilled.

The City of Albuquerque’s ongoing acceptance of discriminatory air pollution permitting and regulatory practices has been brought to ECRCO’s attention before, with a Title VI Complaint filed against the Air Board and the City of Albuquerque Environmental Health Department’s Air Quality Division in 2014, in part based on the City’s interference with the Environmental Justice Task Force and refusal to consider the 2014 community-led petition for rulemaking. EPA accepted the 2014 Complaint for investigation, evaluating, among other things, “[w]hether the Albuquerque-Bernalillo County Air Quality Control Board’s and/or the Albuquerque Air Quality Division’s permitting process discriminates against minority residents on the basis of race and/or national origin, in violation of Title VI of the Civil Rights Act and EPA’s implementing regulations…” Initially, parties to the 2014 Complaint entered into an Alternative Dispute Resolution with ECRCO; however, the parties were unable to reach a unanimous agreement and ECRCO subsequently reopened its investigation in 2020. Following ECRCO’s reopening of its investigation, the parties entered into an informal resolution process with ECRCO. To date, this

---

45 See Albuquerque-Bernalillo County Air Quality Control Board, Regular Monthly Meeting Transcript at 124, 127 131 (March 12, 2014) (emphasis added).
46 See 2014 Complaint, supra note 1, at 6-7.
47 See id.
48 Letter from Lilian Dorka, EPA, to Eric Jantz, NMELC, and Monica Cordova, SWOP, at 2 (July 19, 2016).
49 See Letter from Lilian Dorka, EPA, to Susan Chappell (April 17, 2019) (Air Board Tolling Letter); see Letter from Lilian Dorka, EPA, to Carol Parker, EHD (April 17, 2019) (Air Quality Division Tolling Letter); see Letter from Lilian Dorka, EPA, to Susan Chappell, Board, and Joel Young, Division at 1 (Oct. 16, 2020).
50 See Letter from Lilian Dorka, EPA, to Ryan Mast, EHD (Nov. 18, 2020) [hereinafter IRA Initiation Letter]
informal resolution process is ongoing, and no formal resolution agreement has been reached, although ECRCO proposed an Informal Resolution Agreement in 2022 and included language supporting the need to adopt a cumulative impacts rule similar to the HEEI Rule in order to address the City’s history of discriminatory permitting. Notably, the Albuquerque Environmental Health Department, the controlling entity of the Air Quality Division and a party to the 2014 Complaint, was also a party to the HEEI Rule Rulemaking Proceeding at issue in this Title VI Complaint,\(^{51}\) opposed the HEEI Rule in its entirety, and likely colluded with the City to interfere with the Rulemaking.\(^{52}\)

**B. Background of the HEEI Rulemaking Petition & Introduction of City Council Legislation**

To address these ongoing adverse and discriminatory impacts of air pollution that the Mountain View community and larger South Valley community continue to experience, in November 2022, Complainants once again turned to the Air Board, asking the Air Board to adopt an air quality regulation that would ensure the protection of their health and the public welfare. The New Mexico Air Quality Control Act charges the Air Board with the duty and authority to consider, adopt, and promulgate regulations to prevent and abate air pollution, including emissions that interfere with public welfare, in the City of Albuquerque and Bernalillo County.\(^{53}\) Consistent with this duty, the Air Board’s rulemaking procedures allow “any person,”

\(^{51}\) See AQCB Docket No. 2022-3 (20.11.72 NMAC), https://www.dropbox.com/sh/dzxzfuu5lkenswc5/AADfoyX4nxQrAqoqjTFhdz6ta?dl=0.&e=11 Dkt. 6 [EHD Entry of Appearance].

\(^{52}\) See id.: Dkt. 229 [EHD’s Legal Memorandum]; see also Proceedings Transcript at 1792-93 (Dec. 8, 2023); see also EHD Notice of Appeal No. A-1-CA-41669 (Jan. 26, 2024). Furthermore, during EHD’s active opposition to and interference with the proposed HEEI Rule and associated Rulemaking Proceedings, EHD only proposed one alternative to the community-led rule, which would have added procedural requirements, but would in no way have addressed the core issue of discriminatory permitting. In fact, the EHD proposal would have allowed discriminatory permitting to continue unabated. EHD called its alternative rule the “Environmental Justice Concepts” – which were ultimately a diluted, ineffective version of the proposed HEEI Rule by Complainants. EHD has further stated that these Concepts are in no way a rule in workable or implementable form, or meant to be. See AQCB Docket, supra note 51: Dkt. 96 [EHD’s Notice of Environmental Justice Concepts].

\(^{53}\) New Mexico Air Quality Control Act, NMSA 1978 §§ 74-2-5(B); 74-2-2(B).
including members of the public, to petition the Air Board to adopt a regulation.\(^{54}\) Thus, pursuant to the New Mexico Air Quality Control Act and the Air Board’s regulations, Complainants began their community-led rulemaking efforts and associated Rulemaking Proceeding that gave rise to the City of Albuquerque and its City Council’s discriminatory acts alleged within this Complaint. On November, 21, 2022, Complainants petitioned the Air Board to adopt a proposed regulation, the HEEI Rule, pursuant to 20.11.82.18 NMAC. On December 14, 2022, the Air Board granted Complainants’ petition and voted 5-0 to hold a rulemaking hearing on the petition and the proposed HEEI Rule.\(^{55}\) Following numerous pre-hearing meetings, motions arguments, and rescheduling of the Rulemaking Proceeding date from October 23, 2023, as ordered by the Air Board in September 2023,\(^{56}\) to December 4, 2023, and, as discussed by the Air Board at the October 11, 2023, Air Board meeting,\(^{57}\) on October 24, 2023, the Air Board published notice in the New Mexico Register, setting the Rulemaking Proceeding to begin on December 4, 2023.\(^{58}\)

In response, on October 16, 2023, Albuquerque City Councilor Dan Lewis introduced a Resolution seeking to place a moratorium on the Air Board prohibiting it from promulgating regulations addressing “quality of life” impacts, and an Ordinance (collectively, “Legislation”) that, among other things, if adopted, also unilaterally restricted the Air Board’s ability to promulgate regulations addressing “quality of life” impacts and purged the then-sitting Air Board, in order to stop the scheduled HEEI Rule public rulemaking hearing. The introduction of

\(^{54}\) See 20.11.82.18 NMAC (“Any person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board”).

\(^{55}\) See AQCB Meeting 2022-12-14 Minutes at 7-8, AQCB Docket, supra note 51.

\(^{56}\) See Order Appointing Replacement Hearing Officer 2 (September 15, 2023), Dkt. 134.

\(^{57}\) See Albuquerque-Bernalillo County Joint Air Quality Control Board October 11 Meeting Minutes, Accessible here: https://www.cabq.gov/airquality/air-quality-control-board/documents/2023-10-11-aqcb-meeting-minutes-signed.pdf.

the Legislation was in direct response to Complainants’ rulemaking efforts before the Air Board. The Resolution, for example, explicitly mentioned the Complainants’ petition for rulemaking in its reasoning for its moratorium, and the Ordinance extended the Resolution’s moratorium indefinitely.\(^{59}\) After the Legislation was passed, Councilor Lewis’ office also issued a number of press releases, using City resources and funding to do so, acknowledging the fact that the City Council Legislation directly targeted Complainants’ petition for rulemaking, with the intent to impede the Air Board from even considering Complainants’ petition.\(^{60}\)

Coincidentally, Councilor Lewis, during the time in which he introduced the Legislation and the City Council passed the Legislation, held an executive position, and was in negotiations for another executive position, at two separate industry organizations that would be subject to additional regulation under the proposed HEEI Rule.\(^{61}\) Notably, Councilor Lewis’ appointment as

\(^{59}\) See Exhibit 1 at ¶6, ¶9; ¶15 [Final Version of R-23-176]; see Exhibit 2 at § 9-5-1-12 [Final Version of O-23-88].

\(^{60}\) See Council Passed Two Bills that Address Serious Concerns with the Air Board, Albuquerque City Council (Nov. 9, 2023), https://www.cabq.gov/council/find-your-councilor/district-5/news/council-passed-two-bills-that-address-serious-concerns-with-the-air-board (“At last night’s City Council Meeting, the City Council approved two pieces of legislation (O-23-88 and R-23-176) that are necessary to prevent the Air Board Quality Control Board (Air Board) from passing a rule that will devastate Albuquerque’s economy and harm the safety and health of the community”); see Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs, Albuquerque City Council (Nov. 22, 2023), https://www.cabq.gov/council/find-your-councilor/district-5/news/mayor-keller-chooses-environmental-extremists-over-major-economic-development-and-jobs (“Moments ago, the Albuquerque City Council received Mayor Tim Keller’s veto for Bill O-23-88, which aimed to repeal and replace the Air Quality Control Board, and R-23-176, which imposed a specific moratorium on the Board, preventing it from passing a Health, Environment and Equity Impacts rule without scientific evidence because it is outside of their jurisdiction based on case law”); see City Council Overrides Mayor’s Vetoes, supra note 24 (“Tonight, the Albuquerque City Council overrode the Mayor’s vetoes of O-23-88 and R-23-176. R-23-176 put’s a moratorium on the current Air Quality Board’s Hearing of the HEEI environmental justice rule effective immediately”).

Executive Director of the New Mexico Asphalt Pavement Association, of which several members were also parties to the HEEI Rule Rulemaking Proceeding and actively opposed the HEEI Rule, occurred only one month after the Rulemaking Proceeding concluded.62

Even more significantly, in May 2024, Councilor Lewis reached a settlement with the New Mexico State Ethics Commission, stemming from multiple complaints alleging violations of the New Mexico Government Conduct Act based on Councilor Lewis’ industry interests and his actions taken as a City Councilor to interfere with the HEEI Rule rulemaking efforts. The State Ethics Commission found Councilor Lewis likely violated state law when he engaged in an official government act that directly affected his personal financial interests.64 As part of his settlement agreement with the State Ethics Commission, Councilor Lewis has agreed to recuse himself from any City Council matters that relate to the Air Board, while he holds his executive position at the Albuquerque Pavement Association of New Mexico.65 If he fails to timely recuse himself, Councilor Lewis will be required to pay double the usual civil penalty for violations of

---

62 See Member Roster, New Mexico Asphalt Pavement Association, https://apanm.org/members/ (last visited Feb. 28, 2024) (listing Mountain States Constructors, Inc.; Albuquerque Asphalt, Inc.; and BlackRock Services, LLC, as members, who were also all parties to the Rulemaking Proceeding); see AQCB Docket No. 2022-3 (20.11.72 NMAC), https://www.dropbox.com/sh/dzxzfu5lkenswc5/AADfoyX4nxQrAqojTFhdx6ta?dl=0.&e=11, for the following copies of technical testimony and relevant exhibits submitted by New Mexico Asphalt Pavement Association members in opposition to the proposed HEEI Rule: Dkt. 189 [Albuquerque Asphalt, Inc.; Black Rock Services, LLC; and Mountain States Constructors, Inc. Notice of Intent to Present Testimony]; Dkt. 189.1 [Written Testimony of Paul Wade]; Dkt. 189.5 [Companies’ Redline of Petition]; Dkt. 189.6 [Written Testimony of Karl Lany]; Dkt. 189.8 [Written Testimony of Dr. Tami McMullen]; Dkt. 189.10 [Written Testimony of Robert Wood, President and Partner of Albuquerque Asphalt, Inc.]; Dkt. 189.12 [Written Testimony of Robert Caldwell, Founder of Black Rock Services, LLC]; Dkt. 189.14 [Written Testimony of Vincent Martinez]; Dkt. 189.16 [Written Testimony of David Otoski, President and Owner of Mountain States Constructors, Inc.]; Dkt. 189.19 [Written Testimony of Michael F. Menicucci]; Dkt. 189.20 [Written Testimony of Jim Garcia]; Dkt. 189.24 [Written Testimony of Sherman McCorkle].

63 See Goretzka, supra note 61 (emphasis added).


the Government Conduct Act. While the recent findings and settlement with the State Ethics Commission restricts Councilor Lewis from further interference with Air Board matters, it does not remedy nor address the discriminatory harm inflicted by Councilor Lewis through his actions detailed throughout the entirety of this Complaint, nor address or prevent future discriminatory conduct that is not specific to Air Board matters. Complainants offer the recent findings and settlement agreement here to emphasize that state regulatory entities have recognized and condemned Councilor Lewis’ discriminatory actions throughout the HEEI Rule rulemaking efforts, taken in his capacity as a City official using and abusing City resources, funding, staff, and legal support, while holding conflicting executive and financial interests – further emphasizing that the actions taken by Councilor Lewis and adopted by the City Council were for invidious purposes in violation of Title VI.

The entanglement of Councilor Lewis’ industry interests and executive positions, while holding office as a City Councilor, further suggests his introduction and fervent advocacy for the passage of the City Legislation was not in the public’s interests, but rather for invidious purposes, indicating a discriminatory intent behind Councilor Lewis’ actions. Clearly for Councilor Lewis, ensuring the City’s discriminatory permitting continued was more lucrative than remedying decades of civil rights violations and discriminatory conduct against Albuquerque’s communities of color and low-income communities. Given the discriminatory history of the City of Albuquerque, especially in the context of air quality permitting and the siting of polluting operations, combined with the City representative’s personal financial interests in these industries and his championing of the City Legislation that was intended to cease a community-led rulemaking that would regulate such industries and protect low-income communities of color, the historical background of the City’s practices shows a discriminatory

66 See id.; see Segarra, supra note 64. (emphasis added).
motive, against Albuquerque’s low-income communities of color, behind the City’s actions leading up to and during the Rulemaking Proceeding. Accordingly, this factor supports a finding of intentional discrimination on the part of the City of Albuquerque and its City Council against Complainants and Albuquerque’s low-income communities of color.

2. Sequence of Events Surrounding the City Council Legislation

The second factor, the examination of the sequence of events surrounding an official action, includes the consideration of the timing of the action; a legislative body’s urgency in its enactment of the action; and any other indicator that “provides another compelling piece of the puzzle” in evaluating a recipient’s motivation.67 Applying this factor here, the timing and urgency surrounding the introduction and passage of the City Legislation indicate the City Council’s motivation was, in large part, driven by the intent to hinder low-income communities of color’s ability to meaningfully participate in the public regulatory process and to address the disparate and cumulative impacts of air pollution on low-income communities and communities of color in Albuquerque, in violation of Title VI.

The Complainants’ petition for rulemaking, submitted on November 21, 2022, sought to address the detrimental cumulative impacts of polluting sources in the City of Albuquerque and Bernalillo County’s most overburdened communities: almost exclusively communities of color and low-income communities. The proposed HEEI Rule would have required the City of Albuquerque’s Environmental Health Department (“Department”) to consider social determinants of health and public welfare impacts when issuing air quality and construction permits in already overburdened communities, and would have required the Department, in some instances, to deny such permits proposed in already overburdened communities.

67 See N.C. State Conf. of NAACP, 831 F.3d at 227, 229; see Title VI Legal Manual, supra note 18, at Sec. VI, p.12.
As previously mentioned, the same week the Air Board announced it would publish public notice setting the Rulemaking Proceeding’s commencement date for December 4, 2023, Albuquerque City Councilor Dan Lewis introduced the Ordinance and Resolution to the Albuquerque City Council for consideration. On November 8, 2023, the City Council voted 5-4 to pass both the Resolution and the Ordinance. On November 22, 2023, the Mayor of the City of Albuquerque vetoed both the Resolution and the Ordinance based on concerns about interference with the public’s ability to petition the Air Board for rulemaking; the interference with the Air Board’s work unilaterally; and the necessity to preserve communities’ abilities to petition for rulemaking concerning the cumulative effects of pollution and the incorporation of environmental justice principles.

As such, the Rulemaking Proceeding began as scheduled on December 4, 2023, and at a regularly scheduled meeting that same evening, the City Council voted 7-2 to override the Mayor’s veto of the Resolution and 6-3 to override the Mayor’s veto of the Ordinance. The Ordinance was published on December 15, 2023, and went into effect on December 20, 2023, although the effective date of both the Ordinance and Resolution were unclear while the Rulemaking Proceeding was ongoing. The Rulemaking Proceeding continued, despite the threatened withdrawal of City support and resources consistent with the requirements of the City Legislation, as well as public statements by City Councilors demanding the Air Board cease the Rulemaking Proceeding. City Councilor Dan Lewis, the sponsor of the discriminatory legislation, accompanied by a City Attorney, even spoke during the public comment period on

---

68 See AQCB Docket, supra note 51: Dkt. 142 [Affidavit of Publication]; Dkt. 142.1 [ABQ Journal Affidavit of Publication]; Dkt. 142.2 [NM Register Affidavit of Publication]; Dkt. 142.3 [AQCB Listserv] (public notices setting the date for the Rulemaking Proceeding to begin on December 4, 2023).
69 For Mayor Keller’s veto messages, see Mayor Keeps City-County Joint Air Board, City of Albuquerque (Nov. 22, 2023), https://www.cabq.gov/mayor/news/mayor-keeps-city-county-joint-board#:~:text=Mayor%20Keller%20vetoed%20twopieces,standing%20partnership%20with%20Bernalillo%20County.
the second day of the Rulemaking Proceeding, December 5, 2023, claiming that the Rulemaking Proceeding was unlawful and noting that everyone in attendance was breaking the law, in an intentional attempt to intimidate the public and the Air Board and stop the Rulemaking Proceeding. Despite these efforts, on December 11, 2023, the Air Board adopted a version of the HEEI Rule, although noticeably less robust in comparison to the HEEI Rule proposed and advocated for by Complainants throughout the Rulemaking Proceeding. The intentional discriminatory acts by the City of Albuquerque and City Council were intended to interfere with and ultimately halt this community-led rulemaking effort, the products of which led to the Air Board quickly adopting a limited version of the HEEI Rule proposed by Complainants.

The sequence of events leading up to and surrounding the HEEI Rule Rulemaking Proceeding, including the timing of the hasty introduction and passage of the City Legislation seeking to dismantle the Air Board and restrict its rulemaking abilities in the midst of a communities of color-led rulemaking hearing, suggests an improper, intentionally discriminatory motive behind the City Council’s actions. Even the then-City Council President, Pat Davis, at the time of the City Council’s passage of the City Legislation, recognized and called attention to the suspicious timing and air of foul play surrounding the City Legislation during the Council’s initial deliberations on the Resolution and Ordinance on November 8th, stating “I don’t think we can make a wholesale change of this with one bill in two weeks in sort of this emergency, knee-jerk reaction.”\(^70\) He went on to warn the City Council during its November 8th deliberations that, “We should not be doing this two weeks before the hearing y’all are worried about.”\(^71\) The timing and hastiness of the introduction and enactment of the City Legislation, coupled with the recognition and acknowledgement by the City Council’s own members that the


\(^71\) Id. at 4:57:23.
timing, urgency, and language of the City Legislation were indicative of ulterior motives, ultimately provides more “compelling piece[s] to the puzzle” demonstrating that the City’s motivation behind the City Legislation was intentionally discriminatory against Albuquerque’s low-income communities of color, who were seeking to remedy decades of historic discriminatory air pollution permitting practices through a lawful petition for a public rulemaking.\textsuperscript{72}

3. Legislative and Administrative History Showing Intentional Discrimination

Relevant legislative history indicative of discriminatory intent may include “contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.”\textsuperscript{73} Relevant legislative history may also include information and records requested and considered by members of the legislative body.\textsuperscript{74}

It is important to note that Complainants’ actions, which City Council directly targeted and discriminatorily interfered with, included a petition for rulemaking – not an adopted rule or regulation, but merely a community’s attempt to actively participate in their local government and its rulemaking and regulatory processes, asking the Air Board to consider adopting a rule to address decades of discriminatory air permitting. The Air Board was not required to adopt any proposed rule brought forth by Complainants and, at the time of City Council’s discriminatory actions, Complainants’ proposed HEEI Rule was only under consideration by the Air Board during the Rulemaking Proceeding. City Council, however, through its introduction and passage of the Resolution and Ordinance, sought to interfere with Complainants’ ability and right to participate in their local government by preventing the Air Board from even considering

\textsuperscript{72} See N.C. State Conf. of NAACP, 831 F.3d at 229 (emphasis added).
\textsuperscript{73} Id.; see Arlington Heights, 429 U.S. at 268; see Title VI Legal Manual, supra note 18, at Sec. VI, p.12.
\textsuperscript{74} N.C. State Conf. of NAACP, 831 F.3d at 230 (finding that the legislative body at issue had requested a report on voting patterns, the data of which informed legislators that African Americans in North Carolina disproportionately used early voting, same-day registration, and out-of-precinct voting).
Complainants’ proposed Rule, and moreover, preventing the Air Board from adopting any regulation that would address the systemic, ongoing discriminatory permitting processes committed and allowed by the City of Albuquerque for decades.

Councilor Lewis’ actions and statements leading up to and during the Rulemaking Proceeding, at times going so far as to target specific community and Air Board members, provide further indica of the intentionally discriminatory nature of the City Council’s actions and Legislation. These statements and actions by Councilor Dan Lewis were taken in his official capacity as a City Council member, using City resources and his platform as a City Councilor, to publicly intimidate and harass members of the public and the Air Board from further participating in and advocating for the proposed HEEI Rule. Leading up to the Rulemaking Proceeding, Councilor Lewis used his platform as a City official, as well as City financial and legal resources, to publish a media statement on the City of Albuquerque’s web page, explicitly naming individual Complainants and community members involved in the HEEI Rule rulemaking process, to disparage the HEEI Rule rulemaking efforts.75 He placed blame on community members for “the risk of losing thousands of jobs” if the publicly-contentious Rule was enacted, using the City’s public platform in the midst of public controversy surrounding the rulemaking to do so.76 The released press statement was not the only instance in which Councilor Lewis used his platform as a representative of the City of Albuquerque to publicly intimidate and harass individuals involved in the rulemaking efforts. During City Council meetings, Councilor Lewis made explicit public remarks about Air Board members, as well as dismissive comments

75 See Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs, supra note 60.
76 Id.
about community members' concerns during public comment.\textsuperscript{77} It was also during these City Council meetings that other City Council members noted Councilor Lewis’ introduction of the Resolution and Ordinance had an ulterior motive of harassment and intimidation towards individuals involved in the rulemaking effort. Former City Council President Pat Davis even remarked that the language and design of the Resolution is “all but a veiled personal attack on personal members of the [Air] Board and their attorney and other people,” and “reeks of personal animus.”\textsuperscript{78} Notably, at this same City Council meeting, on November 8th, immediately following the close of the public comment session and before City Council initially voted the City Legislation into effect, Councilor Lewis reflected, “I think I was only called a racist like five or six times…,”\textsuperscript{79} suggesting that even Councilor Lewis understood the discriminatory motive behind his own actions and proceeded anyway.

Councilor Lewis’ targeted statements in support of the City Legislation and in an attempt to halt the community-led rulemaking efforts continued when he made an appearance, in his capacity as a City Councilor, and accompanied by a City Attorney, at the Rulemaking Proceeding’s public comment session, as mentioned above. During his public comment, Councilor Lewis called members of the Air Board “environmental extremists” and “professional job killers.”\textsuperscript{80} The ramifications of such targeted statements and acts of public intimidation were emphasized during Councilor Lewis’ public comment, when Air Board Member Kitty Richards stated Councilor Lewis’ targeted statements and media pressure has made her “fear for my own

\textsuperscript{77} For full video recordings of the City Council meetings, see \textit{Meeting Minutes, Agendas, and Videos}, City of Albuquerque, https://cabq.legistar.com/Calendar.aspx (last visited March 5, 2024) (specifically, the videos for the City Council Meetings on the dates of October 16, November 8, and December 4, 2023).


\textsuperscript{79} \textit{See id.} at 2:58:20.

\textsuperscript{80} \textit{See} Proceedings Transcript at 721.
life,” “fear for my family,” and has “put my family at risk.” Councilor Lewis’ presence and “presentation” at the Rulemaking Proceeding’s public comment session ultimately served as an additional attempt to intimidate both the Air Board and members of the public from further participation in the Rulemaking Proceeding, as well as intentional discrimination against Albuquerque’s low-income communities of color, because Councilor Lewis leveraged his position as a City official and his access to City resources, including City attorneys, to intimidate members of the public and prevent them from continuing forward with a public, communities of color-led rulemaking process under the alleged premise that continuing the Rulemaking Proceeding would be breaking the law.

There is also evidence, although public access to these documents has been repeatedly, and likely unlawfully, restricted by the City of Albuquerque, that City Council members were working alongside, and potentially provided data, information, and advice by the City of Albuquerque’s Environmental Health Department staff and attorneys in the drafting and passage of the City Resolution and Ordinance – meaning that a party to the Rulemaking Proceeding, arguably the most important party to the Rulemaking Proceeding as the agency charged with implementing any rule adopted by the Air Board, aided the City Council in its intentional discrimination. An ongoing New Mexico Inspection of Public Records Act (“IPRA”) request has revealed that communications between Department staff and attorneys, City Council attorneys and staff, and City Councilors took place prior to and near the introduction of the Resolution and

81 Id. at 718 (the following statement was made by Air Board Member Kitty Richards, addressing Councilor Lewis during his public comment: “I am very, very deeply, deeply disturbed by how you have divided our community. I -- I have seen all of the stuff in the newspapers, and I think a lot of it was promulgated by your actions. I fear for my family. I fear for my own life, and it was absolutely unnecessary. And I really -- if you're an elected official, to try and dis -- to villainize me because of your statements, which were utterly untrue, and put my family at risk, it's just unjustifiable. I feel like I am a poll worker in Georgia. It's absolutely unnecessary”).

82 To note, at this time, contention already existed between City legal staff on whether the legislation applied to the Rulemaking Proceeding, and continues presently. See ongoing litigation discussed in Section IV.B.

83 See Exhibit 7 [IPRA Request Communications].
Ordinance. Specifically, the currently available communications, received by NMELC in May 2024, explicitly show the Department’s Deputy Director Christopher Albrecht, who also participated at the Rulemaking Proceeding as the Department’s sole technical witness, participated in discussions surrounding the City Legislation’s drafting and passage – while also advising industry applicants to submit their air quality permit applications to the Department for approval before the Rulemaking Proceeding concluded. The City of Albuquerque has continued to withhold the subject and contents of the rest of these communications between the Department, its staff and attorneys, and its City Council on the basis that “they contain privileged communications between attorneys in the City Attorney’s Office… attorneys in Council Services… Council Services staff…, and City Councilors,” without providing any indication that such a privilege applies to the communications. Though the content of the majority of these communications is unavailable to Complainants at this time, the parties involved, the timing of these communications, the request by City Council for the Department’s review of the discriminatory City Legislation’s language, the Department’s communications with the City surrounding the City Legislation’s passage and effects – including collusion with industry applicants for air quality permit applications, and the City’s reluctance to divulge any additional information surrounding these communications, all raise questions as to what Department data, information, and advice City Councilors and City staff considered in drafting the City Legislation, and ultimately, whether these records would provide further insight into City Council’s discriminatory motives and intent in enacting the City Legislation.

84 See id; see Exhibit 8 [EHD and City Council Communications Around City Legislation Drafting and Passage].
85 See id (emphasis added).
86 See Exhibit 7. To note, while the City of Albuquerque did finally furnish some documents following a final IPRA request by NMELC in April 2023, the City continues to withhold communications and documents, leaving the IPRA process ongoing to date. See Exhibit 9 [Redacted IPRA Documents] (as an example, some of the documents NMELC has received from the IPRA request unexplainably block out entire documents that are otherwise public information, such as a draft press release for the public) (emphasis added).
An examination of the available legislative and administrative history behind the passage of the City Council Resolution and Ordinance, explicitly designed to halt the Rulemaking Proceeding and dissolve the Air Board, ultimately suggests malintent and intentional discrimination on the basis of race, color, and national origin. Certainly, the actions conducted and statements made by members of the City Council, in furtherance of the Legislation’s passage, reveal a power dynamic, and the effects thereof, that are all too familiar in cases of intentional discrimination, where communities of color’s efforts to gain equal treatment under the law are met with intimidation. As the former City Council President recognized early on, the City Legislation, and the surrounding City Councilor media efforts and statements made in support of its passage, “reek[ed] of personal animus” – a hallmark of discriminatory intent. Thus, while ECRCO should investigate the possible collusion between the City Council and the Department, the consideration of all available legislative and administrative history surrounding the City Legislation supports the conclusion that the City Council acted with discriminatory intent in, or at least was aware of the discriminatory effects of, its passage of the City Legislation, against Albuquerque’s communities of color and low-income communities, in violation of Title VI.

4. The Passage of the City Council Legislation was a Significant Departure from Normal Procedures

The fourth factor requires ECRCO to consider any departures from a legislative body’s normal procedures in a matter, as such departures can be indicative of “improper purposes” at play. Here, City Council departed from the normal procedures governing how the joint City-County Air Board is supported by the City of Albuquerque, using city legislation to unilaterally dismantle and restructure an Air Board authorized by State law; dictate to the Air

87 See City Council Live Recording, supra note 70.
88 See Arlington Heights, 429 U.S. at 267.
Board its abilities and duties; withdraw funds and resources from the Air Board; and rely upon City Attorneys for assistance in these acts – indicating intentional discrimination, based on race, color, and national origin, in the City Council’s creation and passage of the Resolution and Ordinance, in violation of Title VI. The City Council’s departure from standard procedures is even more significant when considered in the context of the fact that the City Council has never dismantled any local board or commission immediately prior to, nor during, a rulemaking proceeding that the board or commission is conducting.\(^9\)

City Councilor Dan Lewis introduced the Legislation on October 16, 2023, five days after the Air Board announced the scheduled start-date of the Rulemaking Proceeding, in a unilateral attempt by the City to restrict the Air Board’s rulemaking authority and dismantle the existing Air Board,\(^9,1\) despite the Air Board serving as a joint local authority acting on behalf of and subject to the supervision of both the City of Albuquerque and Bernalillo County.\(^9,1\) In fact, the City Council did not provide the Bernalillo County Board of Commissioners notice, consultation, or any form of involvement in the City-produced legislation.\(^9,2\) The initial version of the Ordinance endowed the City Council with the unilateral authority to strike any rule or amendment adopted by the joint Air Board, giving the City Council veto power over any decision made by the Air Board, while the joint governing body, the Bernalillo County Board of

\(^9\) The City Council has dismantled a purely advisory board created by local ordinance in the past, the Civilian Police Oversight Agency Board, in order to strip the Board of its current membership, restrict its authority to oversee citizen complaints alleging police misconduct, and place more power in the City Council. However, unlike the Air Board, this Oversight Board was not created by state statute and was merely an advisory committee with no power to promulgate regulations. See Jessica Dyer, \textit{ABQ City Council Votes to Replace Citizen Police Oversight Board}, Albuquerque Journal (Jan. 19, 2023), https://www.abqjournal.com/news/local/abq-city-council-votes-to_REPLACE_Citizen_Police_Oversight_Board/article_9d00d5e-e9f6-54ea-9a7a-29f0c5a0991ec.html.

\(^9,1\) See City Councilor Dan Lewis Introducing Legislation to Create New Air Quality Control Board, supra note 23.

Commissioners, would not retain the same power.93 The Ordinance, upon adoption on December 4, 2023, by City Council, was amended to remove this provision due to issues with its legality. However, the adopted Ordinance still purports to unilaterally dissolve the current City and County jointly-operated Air Board and change the composition of the Air Board, as well as restrict the Air Board’s authority and powers to regulate air quality.94

Furthermore, the City Ordinance unilaterally limits the Air Board’s advisory authority by prohibiting the Air Board from recommending and advising the Mayor, Director, Department, County Manager, City Council, County Commission, and Environmental Planning Commission on any air quality matters, needs, programs, and policies.95 This is contrary to the Air Board’s statutory advisory and rulemaking authorities under the New Mexico Air Quality Control Act and the Bernalillo County Code, established in support and in furtherance of the Air Board’s duties to abate air pollution and protect the public health and welfare.96 Thus, while the Air Board holds both advisory and rule-making powers under the Bernalillo County Code and the New Mexico Air Quality Control Act, the City Ordinance explicitly and unilaterally restricts the Air Board’s advisory powers. This is yet another departure by the City Council from the standard procedures under which the joint Air Board is governed and managed. Former City Council President Pat Davis also noted this departure from regular practice regarding the City

93 See id.; see Exhibit 3 at § 9-5-1-6(K)(2) [Initial Version of O-23-88].
94 See Exhibit 2 at § 9-5-1-3; § 9-5-1-12 [Final Version of O-23-88].
95 See Exhibit 2 at § 9-5-1-12(B)(7) (“The Board shall have no authority to… [r]ecommend to the Mayor, Director, Department, County Manager, City Council, or County Commission policies for air quality matters, needs, improvements, and programs”); see id.(8) (“The Board shall have no authority to… [a]dvise the Mayor, Director, Department, County Manager, City Council, or County Commission regarding air quality matters, needs and programs”); see id.(9) (“The Board shall have no authority to… [a]dvise the Environmental Planning Commission or County Planning Commission regarding air quality matters”).
96 See Bernalillo County Code, Ch. 2, Article VI, Sec. 2-432(f) (“The board of county commissioners may establish by ordinance or resolution such other advisory boards as it determines necessary or desirable. All such boards shall have powers and duties that are advisory only, except as otherwise provided by law, and the board of county commissioners shall reserve the power and duty to make the final decision with respect so all such matters”); see id. (stating the Air Board “shall have powers and duties that are advisory only, except as otherwise provided by law”); see NMSA 1978 §§ 74-2-5(B); 74-2-2(B) (establishing the Air Board’s rulemaking authority).
Legislation’s unilateral infringement on the Air Board’s authorities and powers, emphasizing that, “...there’s a process by which the County did open the door, they cracked open the door to have a joint conversation about how to do this, but I think the way… the Resolution and the Ordinance was presented basically said we’re doing this on our own, we don’t need you, we’re not going to hear from you, instead of creating a process that we have done on housing and homelessness, and all other things that we made some progress on. I think this was just the wrong approach.”

The Albuquerque City Council further departed from its standard procedures when it abused its power to distribute the City of Albuquerque’s funds and resources in order to interfere with the Rulemaking Proceeding. The City, by order of the Air Board, was responsible for providing the venue, hearing clerk, and technology for the hybrid Rulemaking Proceeding, as well as the funds necessary for these provisions. Despite these obligations, however, the City of Albuquerque actively resisted providing such support and threatened to pull its funding and resources for the Rulemaking Proceeding – unless the expenditure of said resources could aid in the interference with the Rulemaking.

The City Council’s Resolution, once adopted, sought to explicitly withdraw the City’s resources for use by the Air Board in the Rulemaking Proceeding. Specifically, the Resolution, passed by City Council on the first evening of the Rulemaking Proceeding, mandated that “[t]he City of Albuquerque shall not use its resources to facilitate any action by the Board to make,

---

98 See Albuquerque, N.M., Rev. Ordinances § 9-5-1-5(A) (obligating the City to provide staff for the Board); see also AQCB Docket, supra note 51: Dkt. 84 [Order Granting Motion for Alternative Record] (City agrees to obtain and pay for a Court Reporter); Dkt. 36 [Air Board Attorney Response to City Attorney Email] (reiterating City due process obligations triggered when providing forums for public participation).
99 See id.: Dkt. 35 [Email Communication from City Attorney] (City refusing to provide City resources for recording technology for Rulemaking Proceeding); Dkt. 36 [Air Board Attorney Response to City Attorney Email].
100 See Exhibit 1, at Section 2.
adopt, or amend any regulation or standard described in Section 1 until February 1.”101 The City Council’s Cease and Desist Letter regarding the Rulemaking Proceeding, issued on December 5, 2023, further reiterated that “the Resolution prohibits the City of Albuquerque from using its resources to facilitate any action by the Board to make, adopt, or amend any regulation as described above until February 1, 2024.”102 Councilor Lewis, during his public display at the second day of the Rulemaking Proceeding, also stated that the City of Albuquerque was prohibited from expending any further resources or funds towards the Rulemaking Proceeding.103 Accordingly, the City of Albuquerque sought to withdraw City funds supporting the remainder of the Rulemaking Proceeding. The City, though resistant, seemingly provided these funds and resources for the duration of the Rulemaking Proceeding, once faced with the threat of a temporary restraining order; although, the County ultimately paid the required fees for the publication of the adopted HEEI Rule.104

The City Council abused its power to allocate and appropriate City funds in order to interfere with a public rulemaking process and the Air Board’s ability to continue forward in a rulemaking meant to meaningfully address decades of discriminatory air permitting, with both threats and legal measures taken to withdraw such support. The City Council’s threat to withdraw City resources and support in the middle of a legally-authorized public Rulemaking Proceeding, ultimately, was a strategic and direct attempt by City Council to cause chaos and interfere with

101 Id. (this section explicitly applies to the Rulemaking Proceeding in order to withdraw City support and resources from it, as Complainants’ petition that triggered the Rulemaking Proceeding is stated in the Resolution to be the target of the Resolution).
102 AQCB Docket, supra note 51: Dkt. 222 [Cease and Desist Letter to Air Quality Board].
103 See Proceedings Transcript at 707 (“I did want to remind you and wanted to share with you that the Albuquerque council did make a law last night, and that law prohibits the hearing -- this hearing today. And it also prohibits resources of the City of Albuquerque to be spent on behalf of this hearing today as well”); id. at 708 (“Furthermore, the resolution prohibits the City of Albuquerque from using its resources to facilitate any action by the Board to make, adopt or amend any regulation as described above, until February 1st, 2024. Therefore, the continued participation of the city board appointees in the current hearing violates the resolution passed last evening”).
104 See AQCB Docket, supra note 51: Dkt. 241 [Final Order and Statement of Reasons for Adoption of Regulation Concerning Health Environment and Equity Impacts] (Air Board's statement of reasons para. 6 only after the Air Board filed its TRO application).
the Air Board’s ability to hold the Rulemaking Proceeding – a tactical step in the City’s larger efforts to halt the community-led rulemaking efforts and continue to intentionally discriminate against Albuquerque’s low income communities of color.

Importantly, this was not the only misuse of City resources during the Rulemaking Proceeding. As mentioned, when Councilor Lewis attended the Rulemaking Proceeding’s public comment session on December 5, 2023, he was accompanied by Kevin Morrow, a Deputy City Attorney and Deputy Director of City Council Services. Mr. Morrow had signed up for public comment, but upon being called to the stand and sworn in by the Hearing Officer, Mr. Morrow announced he would “yield [his] time” for public comment to Councilor Lewis, noting that Councilor Lewis was “the fourth person signed up on the list,” immediately following Mr. Morrow. The placement of Mr. Morrow and Councilor Lewis’ positions on the public comment list, with Mr. Morrow first and Councilor Lewis immediately following the City Attorney, indicates that this was a strategic measure by the City Attorney and City Councilor to not only work around the public comment time limitations of three minutes per speaker to give the City Councilor more time to speak, but also to further intimidate the Air Board and the public by giving both the City Council Legislation and Councilor Lewis’ actions the appearance and threat of legal legitimacy.

Throughout Councilor Lewis’ “public comment,” he further relied on the Deputy City Attorney to wrongfully assert the City Council Legislation was already in effect, when it was not, claiming that the Air Board must cease the Rulemaking Proceeding immediately.

---

105 Id. at 705.
106 Id. at 706; id. at 389 (listing Kevin Morrow, City Attorney, as third on the list for public comment, and City Councilor Dan Lewis as fourth on the list for public comment)
107 See id. at 713-17 (Mr. Morrow engaged in a lengthy debate with the Air Board’s attorney regarding the effective date of the Resolution, during which he openly contradicted statements made by the Albuquerque City Attorney, Lauren Keefe, and reiterated Councilor Lewis’ sentiment that the City would be taking legal action against the Air Board for continuing forward with the Rulemaking Proceeding).
presence and use of City legal staff, by a City Councilor, to attempt to enforce a City Council policy not yet effective, falsely assert the policy had become “law,” and that the Air Board was breaking the law by continuing forward with the Rulemaking Proceeding, was a further abuse of City staff and resources by City Council to further intentional discrimination by the City against Albuquerque and Bernalillo County’s low-income communities of color. The use of City legal staff to intimidate the Air Board under false pretenses and threatened legal action served as yet another direct and intentional interference with the Rulemaking Proceeding, in an attempt to halt it completely. Likewise, this act was a direct interference with community members’ right to participate in the public rulemaking process, a rulemaking process that was commenced and led by local low-income communities and communities of color to address decades of intentional discrimination authorized, ultimately, by the City of Albuquerque.

The egregiousness and severity with which City Council departed from normal procedures to interfere with a community-led rulemaking is further evidenced by current litigation resulting from the Rulemaking Proceeding, specifically three separate lawsuits questioning the validity and legality of the City Council Legislation. On December 5, 2023, the Air Board filed the lawsuit, *Albuquerque-Bernalillo County Air Quality Control Board and the Board of County Commissioners of the County of Bernalillo v. City of Albuquerque, New Mexico*, No. D-202-CV-2023-09295, challenging the validity of the City Council’s Resolution and Ordinance and asserting the City’s illegal interference with the Rulemaking Proceeding. On December 11, 2023, industrial permittees and commercial associations filed the lawsuit, *GCC Rio Grande, Inc., et al. v. Albuquerque-Bernalillo County Air Quality Control Board, City of Albuquerque*, No. D-202-CV-2023-09435, challenging the validity of the adopted HEEI Rule and the Air Board’s authority and jurisdiction to adopt the HEEI Rule. On December 11, 2023, Complainants filed
their lawsuit, *Mountain View Community Action et al. v. City of Albuquerque*, No. D-202-CV-2023-09449, also challenging the validity and legality of the City Council’s Resolution and Ordinance, as well as asserting the City’s illegal interference with the Rulemaking Proceeding and Complainants’ constitutional right to petition the government. To date, all three lawsuits are ongoing. Notably, on January 25, 2024, the Air Board received a favorable ruling in its case, with the issuance of a preliminary injunction against the City of Albuquerque enjoining the City from enforcing the Resolution and Ordinance until the merits of the matter, primarily the question of whether the City acted illegally when it interfered with the Rulemaking Proceeding, are resolved. Complainants note that while the pending litigation addresses the validity and legality of the City Council Legislation and associated interferences with the Rulemaking Proceeding, the pending litigation does not address, nor remediate, the City of Albuquerque and City Council’s intentionally discriminatory acts and ongoing noncompliance with Title VI. Thus, ECRCO’s acceptance of and investigation into this Title VI Complaint is necessary to address the continuing intentional discrimination and Title VI violations against Albuquerque’s communities of color and low-income communities, and to bring the City of Albuquerque and its City Council into compliance with Title VI. Complainants merely mention the ongoing litigation here as further evidence that the City Council departed from normal procedures in its enactment of the City Legislation, indicating improper, discriminatory motives were at play.

The City Council’s introduction, passage, and subsequent actions taken to enforce the Resolution and Ordinance were an extraordinary departure from the standard procedures under which Albuquerque’s regulatory processes are carried out and how the joint Air Board is

---

108 See Exhibit 4 [District Court Order issuing preliminary injunction, enjoining the City’s enforcement of the Resolution and Ordinance].
governed and managed, for the primary purpose of preventing communities of color from exercising their rights. Again, as mentioned, former City Council President Pat Davis called attention to this significant departure when Councilor Lewis first introduced the City Legislation, stating during the November 8th City Council meeting that the City Legislation was “a wholesale change of how we do this type of regulation.”\textsuperscript{109} The former Council President further warned the City Council, before the local government entity went on to approve of and pass the City Legislation, that “[t]his is the wrong approach… It’s bad legislation, it’s bad process.”\textsuperscript{110} This departure from the City and County’s normal procedures and processes was thus not only extreme, but entirely improper, evident even to other members of the City Council – all of which further supports the inference that improper purposes were at play in the City’s introduction, passage, and enforcement of the City Resolution and Ordinance and a finding of intentional discrimination against Albuquerque’s low-income communities of color, in violation of Title VI.

5. Statistics Demonstrating a Clear Pattern of Discriminatory Effect

The fifth factor requires ECRCO to consider any statistical evidence that demonstrates a clear pattern of discriminatory impacts and effects on communities of color and low-income communities. The statistical evidence often considered here includes the demographics of the affected communities and region,\textsuperscript{111} and any other statistical evidence “of racial inequality in the location and regulatory enforcement” of industrial facilities and their pollution.\textsuperscript{112} This includes statistical evidence of higher concentrations of air polluting facilities in “poor, high percent minority neighborhoods with low educational attainment,” and the disproportionate adverse health impacts borne by the area’s communities of color.\textsuperscript{113}

\textsuperscript{110} Id. at 4:58:40.
\textsuperscript{111} See Arlington Heights, 429 U.S. at 269.
\textsuperscript{112} S. Camden, 2006 WL 1097498 at *23.
\textsuperscript{113} Id. at *23-24.
As discussed in the above description of Complainants, Complainants are residents of the Mountain View community of Albuquerque, New Mexico – a predominantly Latino, working class to low-income community that has borne and continues to be affected by the disproportionate impacts of air pollution in the City.\textsuperscript{114} Due to the significant number of polluting facilities and sites located within and adjacent to the Mountain View community and larger South Valley, including auto recyclers, Albuquerque’s municipal wastewater treatment plant, paint facilities and fertilizer suppliers, residents live alongside and are subjected to “a legacy of contaminated groundwater, two Superfund sites and high levels of air pollution.”\textsuperscript{115} Within and adjacent to the 87105 ZIP code, where the Mountain View community is located, a dense concentration of polluting operations exists.\textsuperscript{116} Specifically, as of June 2016, some of the polluting operations in and near the Mountain View community include: Albuquerque Asphalt, Inc., which is permitted to emit 12.29 tons per year (“TPY”) of Nitrogen Oxides (“NOX”), 5.84 TPY of PM$_{10}$, and 2.38 TPY of PM$_{25}$; Albuquerque Metals Recycling, Inc., which is permitted to emit 13.66 TPY of Total Suspended Particulates (“TSP”), 7.67 TPY of PM$_{10}$, and 6.21TPY of PM$_{25}$; the municipal wastewater treatment plant, which is permitted to emit 191.97 TPY of Carbon, 109.48 TPY of Volatile Organic Compounds (“VOC”), 19.36 TPY of Hazardous Air Pollutants (“HAP”), 4.98 TPY of PM$_{10}$, and 4.88 TPY of PM$_{25}$; Phillips 66 Albuquerque Product Terminal, which is permitted to emit 20.5 TPY of Carbon and 93.8 TPY of VOC; Southway Recycle Plant, which is permitted to emit 6.61 TPY of Carbon, 28.85 TPY of NO, 41.8 TPY of TSP, 17.6 TPY of PM$_{10}$, and 5.5 TPY of PM$_{25}$; Portable Concrete Batch Facility-Transit Mix, 

\textsuperscript{114} See Section II for further discussion.
\textsuperscript{116} See CABQ Air Pollution Sources, https://hub.arcgis.com/datasets/CABQ::air-pollution-sources/explore?location=35.064097%2C-106.669176%2C13.01 (last visited March 15, 2024) (all individual pollution operation information is available and was accessed from this source).
which is permitted to emit 20.4 TPY of TSP, 8.02 TPY of PM$_{10}$, and 1.25 TPY of PM$_{2.5}$, and; Albuquerque Asphalt Terminal, which is permitted to emit 10.74 TPY of Carbon, .98 TPY of VOC, 1.35 TPY of PM$_{10}$, and 1.35 TPY of PM$_{2.5}$.\textsuperscript{117}

A 2012 study on public health, pollution exposure, poverty and race defined Bernalillo County’s “high risk neighborhoods” as neighborhoods subject to dense concentrations of pollution facilities and higher exposure levels to environmental pollution, which also typically have higher populations of Latino residents and recent immigrants – like the Mountain View and South Valley neighborhoods.\textsuperscript{118} The EPA’s EJScreen further confirms the Mountain View and South Valley communities’ status as “high risk neighborhoods,” with the South Valley ranked within the 80th to 100th percentile in Air Toxics Respiratory Hazard Index; the 90th to 100th percentile in Diesel Particulate Matter; the 90th to 100th percentile in Ozone; and the 60th to 100th percentile in Air Toxics Cancer Risk compared to both the rest of the state of New Mexico and the United States.\textsuperscript{119}

As a result of the high volume of polluting facilities in Mountain View and the larger South Valley, residents also have an elevated risk of adverse health impacts from air pollution, including, but not limited to, cancer, heart disease, respiratory illnesses, and other chronic illnesses and diseases.\textsuperscript{120} The EPA EJScreen currently ranks the South Valley community in the

\textsuperscript{117} See id.
\textsuperscript{118} See Joint Center for Political and Economic Studies, supra note 1, at 16-19.
\textsuperscript{119} Albuquerque EJScreen, supra note 8.
60-70th percentile for Asthma, with the CDC Environmental Justice Index also designating the South Valley community with a “high estimated prevalence of asthma,” both in comparison to the rest of the United States. Consequently, more residents from the South Valley have sought emergency health services for asthma than in any other region of Bernalillo County. Overall, the CDC has categorized the South Valley community in the 97th percentile on its Social Vulnerability Index; in the 94th percentile on its Environmental Justice Index; and in the 85th percentile for Environmental Burdens, compared to the rest of the nation.

Notably, residents of the South Valley, especially residents of color, also have lower life expectancies than predominantly white residents of more affluent neighborhoods throughout the City of Albuquerque and Bernalillo County. In comparison to the northern half of Albuquerque and Bernalillo County, Albuquerque’s South Valley experiences significantly higher rates of resident deaths from chronic diseases. Within the South Valley, considerably more residents of color die from chronic diseases than white residents.

---

121 See Albuquerque EJScreen, supra note 8; see CDC EJI Index, supra note 11.
122 See Bernalillo County Community Health Council, Bernalillo County Community Health Profile at 30 (2019), https://www.healthequitycouncil.net/wp-content/uploads/2021/06/BCHP_2021-.pdf (displaying a map showing rates of over 100 asthma-related emergency room visits per 10,000 residents in the South Valley).
123 See CDC EJI Index, supra note 11 (the CDC’s Social Vulnerability Index ranks census tracts based on the potential negative effects on communities caused by external stresses on human health).
124 Id. (the CDC’s Environmental Justice Index uses data from the U.S. Census Bureau, the EPA, the U.S. Mine Safety and Health Administration, and the U.S. Centers for Disease Control and Prevention to rank the cumulative impacts of environmental injustice on health for every census tract).
125 Id.; see also Environmental Justice Index Indicators, CDC, https://www.atsdr.cdc.gov/placeandhealth/eji/indicators.html (last updated May 31, 2023) (the CDC’s Environmental Burdens include, and categorize census indexes according to, air pollution, potentially hazardous and toxic sites, built environment characteristics, transportation infrastructure, and water pollution).
126 See Joint Center for Political and Economic Studies, supra note 1, at 33; see also Mountain View is City’s Industrial Sacrificial Zone, supra note 6.
127 See Bernalillo County Chronic Disease Deaths Map (2008-2017), https://www.arcgis.com/home/webmap/viewer.html?webmap=a730af844786482882df08c801e8ee57&extent=-107.0246,34.9188,-106.3064,35.2475 (some areas of Northern Albuquerque experience rates of 371.0 chronic disease deaths per 100,000 residents; whereas, in some areas of the South Valley, chronic disease death rates range from 492.5 to 568.2 per 100,000 residents).
128 See id. (for example, Hispanic residents in the South Valley map area defined as “Rio Bravo Second,” experience chronic disease deaths at a rate of 504.0 per 100,000 residents, whereas white residents in the area experience chronic disease deaths at a rate of 377.8 per 100,000 residents).
Ultimately, the significantly larger presence of polluting facilities and higher concentrations of environmental pollutants, emissions, and hazards within the Mountain View and larger South Valley communities of Albuquerque – sited in predominantly low-income communities of color and resulting in higher illness and disease rates, as well as lower life expectancy rates – points to the ongoing legacy of discriminatory pollution practices in the City of Albuquerque. The statistical evidence, when considered all together, is thus indicative and supportive of a clear pattern of intentional discrimination and its impacts and effects on Albuquerque’s low-income communities and communities of color, particularly in Albuquerque’s South Valley.

Conversely, these statistics demonstrate the long-overdue need to remedy discriminatory siting of pollution sources, as Complainants attempted to do. The City Council’s efforts to deliberately obstruct communities of color’s efforts to remedy historic discrimination and protect the health and welfare of themselves and their neighbors, while knowing those communities are the ones most heavily impacted by the ongoing pollution and discriminatory permitting practices, is evidence that the City Council’s majority acted primarily out of racial animus.

6. The Harm from the City of Albuquerque’s and the City Council’s Actions Fall Disproportionately and Foreseeably on Communities of Color

The final factor ECRCO must consider is the difference in the extent of harm the policy or practice disproportionately causes communities of color and low-income communities, as well as the foreseeability of the harm.129 Typically, this requires demonstrating “that the extent of harm the policy or practice causes minorities and non-minorities is different.”130 Furthermore, if the discriminatory impact of the action was “foreseeable,” then this factor further supports ECRCO’s finding of intentional discrimination.131 The evaluation of this final factor, alongside the

129 See Title VI Legal Manual, supra note 18, at Sec. IV, p.13-17.
130 Id. at 14.
131 Id. at p.15-17; see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979) (“[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose…”).
statistical evidence considered in the previous factor, ultimately “acknowledges that disparate impact evidence can be probative of discriminatory intent,”132 which, accordingly, involves the consideration of whether the effect of the action will “bear[] more heavily on one race than another.”133 Thus, the discriminatory impact of an action is highly indicative of discriminatory intent behind the action, because the “impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.”134

Here, it is clear that the City Council’s interference with the community-led rulemaking efforts caused immediate harm to communities of color and low-income communities by interfering with their ability to meaningfully participate in the public regulatory process and allowing the disproportionate and discriminatory impacts of air pollution these communities unjustly continue to bear. Furthermore, the City Council’s interference has foreseeable, longstanding impacts to Albuquerque’s low-income communities of color as it pertains to these communities’ ability to participate in public processes; the Air Board’s ability to address discriminatory air quality permitting practices; and ultimately, to the quality of life and the ongoing disparate impacts of pollution the City of Albuquerque subjects these communities to. The discriminatory impact of the City Council’s actions is both far-reaching and unequivocally foreseeable, with the continuous permitting of facilities emitting hazardous and toxic air pollutants into the air and bodies of Albuquerque’s low-income communities of color – while

---

132 See Title VI Legal Manual, supra note 18, at Sec. VI, p. 12; see Arlington Heights, 429 U.S. at 266.
133 Id.; see also N.C. State Conf. of NAACP, 831 F.3d at 239 (concluding that because “African American voters” disproportionately used each of the voting mechanisms removed by the new provisions of the voting law, “sufficient disproportionate impact” had been established); see also Melendres v. Arpaio, 989 F. Supp. 2d 822, 902 (D. Ariz. 2013) (awarding injunctive relief to Title VI plaintiffs and finding that plaintiffs demonstrated “racially disparate results” and “additional indicia of discriminatory intent”); see also Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690 (9th Cir. 2009) (Title VI and equal protection case finding that statistical evidence was sufficient to create inference of intent where a race-neutral precondition to receiving municipal services served to exclude Latino-majority neighborhoods).
restricting and creating further barriers to these communities’ ability to advocate for and achieve meaningful air quality regulations – as the natural consequences of the City Council’s actions.

A. Immediate Harm Caused by the City Council Legislation

The City Council Legislation, and intentional associated acts by City Council, effectuated an immediate harm to Albuquerque’s communities of color and low-income communities by interfering with their ability to participate in public processes and obtain air quality regulations for their communities that would meaningfully address decades of intentional discrimination in the City’s execution of its air permitting program. Namely, the introduction and passage of the City Council’s Resolution and Ordinance was a direct and intentional attempt to disrupt and dismantle Complainants’ petition for rulemaking to the Air Board, effectuating an abuse of the City Council’s power in order to discriminate on the basis of race, color, and national origin, in violation of Title VI. As previously mentioned, the legality and validity of this legislation is currently undergoing litigation, most recently with a preliminary injunction issued against the City, enjoining the enforcement and applicability of the Resolution and Ordinance because the Air Board “has a substantial likelihood of prevailing on the merits on the matter,”135 such that the City Council’s actions are likely to be determined to be contrary to law.

The City Council, through the passage of its Legislation and subsequent acts, was able to accomplish such goals and effectively interfere with Complainants’ right to petition the Air Board for rulemaking, despite the validity and legality of the Legislation now undergoing litigation. The initial passage of the City Council Legislation on November 8, 2023, prior to the Mayor’s vetoes, led to chaos and confusion regarding whether the Rulemaking Proceeding would continue forward as scheduled. Following the Mayor’s vetoes on November 22, 2023, based on concerns with the City Council’s unlawful interference with communities’ right and ability to

135 See Exhibit 4 [PI Order from 2nd Judicial Court of State of New Mexico].
petition the Air Board for rulemaking, the Rulemaking Proceeding continued as scheduled for the week of December 4 through December 8, 2023; but, as mentioned above, on the first evening of the Rulemaking Proceeding, City Council overrode the Mayor’s vetoes, approving the Resolution and Ordinance for enactment. Immediate confusion ensued as to when the Resolution and Ordinance would become effective because the City Charter and the City Municipal Code are silent on the effective date of the Resolution, but state that City ordinances become effective five days after publication. Contention remains regarding when the Legislation went into effect, with the earliest effective date of the Ordinance claimed to be on December 11, 2023, and the latest effective date of the Ordinance asserted to be on December 20, 2023.

Because the Rulemaking Proceeding was already underway when City Council overrode the Mayor’s vetoes and approved the Resolution and Ordinance, certain industry parties to the Rulemaking Proceeding raised arguments, during the Rulemaking Proceeding, that the Air Board could not legally proceed with the Rulemaking Proceeding due to the City Council’s actions. As mentioned, Councilor Lewis, accompanied by a Deputy City Attorney, even showed up during the public comment portion of the Rulemaking Proceeding, on December 5, 2023, to insist the Air Board’s continuation of the Rulemaking Proceeding was unlawful, while also

---

136 See Exhibit 1, Exhibit 2 (documenting the Mayor’s vetoes of the Ordinance and Resolution as overridden on December 4, 2023).
137 Albuquerque City Charter, Article XI, Sec. 6(b) (“An ordinance shall not become effective until five days after it has been published…”).
138 See pending litigation dockets and associated filings discussed in Section IV.B.
139 See HEEI AQCB Volume 6 Petition to Amend Title 20 Chapter 11, Transcript of Proceedings at 570-71 (parties’ objections to the Rulemaking Proceeding due to the passage of the City Council Legislation) (Dec. 5, 2023) [hereinafter Proceedings Transcript]; see also AQCB Docket, supra note 51: Dkt. 237 [Email Companies’ Joinder in New Mexico Mining Association and New Mexico Chamber of Commerce Objection]; Dkt. 238 [Email NTES JOinder in NMMA/NMCC Objection]; Dkt. 239 [Email Federal Parties’ Joinder in NMMA/NMCC Objection]; Dkt. 240 [Email New Mexico Asphalt Pavement Association Members’ Joinder in NMMA/NMCC Objection].
140 See Proceedings Transcript at 705-721 (Councilor Lewis, during public comment, repeatedly asserts to the Air Board that “[t]he resolution prohibits you from having this hearing. This hearing is absolutely illegal”), see also Spencer Schact, Air Quality Control Board Meets in Defiance of City Council Ruling, KOB4 (Dec. 6, 2023),
serving a Cease and Desist Letter to the Air Board. The Hearing Officer to the Rulemaking Proceeding ordered that the Air Board could proceed with the Rulemaking Proceeding because he determined that the Ordinance would be effective, at earliest, on December 11, 2023. Because of the confusion surrounding the City Council Legislation’s validity and the effective date of the Ordinance, the Air Board was ultimately rushed into deliberations on the final day of the Rulemaking Proceeding in order to adopt any form of a rule to address the City’s decades of discriminatory air pollution permitting. What resulted was a hastened discussion between Air Board members in a single afternoon and an adopted HEEI Rule that is less robust than what was proposed and advocated for throughout the entire Rulemaking Proceeding by Complainants.

The adopted HEEI Rule is set to go into effect on January 1, 2025. Although the Air Board’s adoption of some form of the HEEI Rule petitioned for by Complainants is a measurable success, the intentional discriminatory acts by the City of Albuquerque and its City Council assuredly resulted in a less robust and less effective regulation than what was advocated for by the overburdened communities of Albuquerque and Bernalillo County, and it is not yet known whether the adopted HEEI Rule will effectively address the historical and ongoing discriminatory impacts of air permitting in Albuquerque. Ultimately, the City Council’s passage of the Resolution and Ordinance and the resulting confusion that ensued directly and intentionally interfered with Complainants’ right to have their petition for rulemaking adequately considered by the Air Board, and resulted in the hastened passage of a rule that likely does not


141 See AQCB Docket, supra note 51: Dkt. 222 [Cease and Desist Letter to Air Quality Control Board]. Notably, the City failed to take any legal action enjoining the Air Board after the Air Board ignored its Cease and Desist Letter, suggesting that the City Attorneys realized the City Legislation were specious.

142 See Proceedings Transcript at 391 (Hearing Officer’s determination that the Rulemaking Proceeding would proceed as scheduled).

143 To compare, see Exhibit 5 [Complainants’ Final Version of the Proposed HEEI Rule] and Exhibit 6 [Final Version of Adopted HEEI Rule].

144 20.11.72.5 NMAC.
effectuate the purpose of addressing the discriminatory air permitting that Complainants have advocated against for decades.

Moreover, Councilor Lewis’ appearance during the Rulemaking Proceeding’s public comment session, as a representative of the City of Albuquerque, supported by City of Albuquerque employees and legal staff, served only to intimidate community and Air Board members participating in the Rulemaking Proceeding. Such harassment, with the obvious motive and effect of deterring community members from participating in a public rulemaking process, ultimately rises to the level of intentional discrimination on the basis of race, color, and national origin prohibited by Title VI.\(^\text{145}\)

Complainants, as community members, brought forth a lawful petition for a public rulemaking to address the historical and discriminatory impacts of pollution disproportionately borne by their communities. However, City Council repeatedly and consistently interfered with this public rulemaking process in an attempt to stop the Air Board from considering a communities of color-led regulation addressing community concerns. The City of Albuquerque and its City Council’s continuous interference caused direct and immediate harm to Albuquerque’s low-income communities of color and interfered with their right and ability to meaningfully participate in their local government and regulatory processes by successfully

\(^{145}\text{See Title VI, 42 U.S.C § 2000d (prohibiting recipients from excluding persons from participating in any program or activity receiving federal financial assistance); see also Title VI Legal Manual, supra note 18, at Sec. VI, p.15 (stating that a recipient’s actions having a foreseeable discriminatory effect is relevant evidence of a Title VI violation); see also Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979) (“[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose…”); see, e.g., N.C. State Conf. of NAACP, 831 F.3d at 223; Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983) (discussing “obviously foreseeable” outcome of the town’s decision to spend nearly all of its revenue-sharing monies on the white community, at the expense of communities of color); see also United States v. Bannister, 786 F. Supp. 2d 617, 665–66 (E.D.N.Y. 2010) (expressing support for using discriminatory impact and foreseeable consequences and historical background to demonstrate discriminatory intent); see also Almendares v. Palmer, 284 F. Supp. 2d 799, 806 (N.D. Ohio 2003) (finding that state agencies’ failure to provide bilingual services for food stamp applicants had a foreseeable effect of deterring Spanish-speaking applicants and beneficiaries from participating in the state’s food stamps program, and such foreseeability of a discriminatory impact was sufficient evidence to state a Title VI claim that defendants intentionally discriminated on the basis of national origin).}
hindering a community-led rulemaking effort to address the disproportionate impacts of air pollution on local low-income communities and communities of color.

B. Foreseeable Future Harm Caused by the City Council Legislation

Actions that have a “foreseeable and anticipated disparate impact” to low-income communities of color, such that the action will “bear[] more heavily on one race than another,” are relevant and indicative of intentional discrimination.\textsuperscript{146} Here, the future harm caused by the City Council Legislation, and associated City Council actions, have a reasonably foreseeable and anticipated disparate and \textit{intentional} impact to Albuquerque’s communities of color and low-income communities. The future harm is both extensive and predictable, as the City Council’s acts not only permit the continuation of the City’s historical practice of siting polluting facilities within low-income communities of color, but also discriminatorily interfered with and prospectively inhibits these communities’ ability to meaningfully and effectively participate in their local government and its public processes – namely, to petition for a rulemaking to address the City of Albuquerque’s ongoing legacy of disproportionately subjecting these communities to the adverse health impacts of air pollution, without adequate regulation.

As discussed throughout this Complaint, Albuquerque’s low-income communities and communities of color disproportionately bear the adverse health impacts of air pollution, due to the intentional placement of polluting facilities and operations in and adjacent to these communities.\textsuperscript{147} Without adequate regulation and meaningful protections, air quality permits for polluting operations have continued to be issued for sources located within communities like the Mountain View neighborhood and larger South Valley area, without the adequate and necessary consideration of the adverse health impacts these communities are already experiencing. It is

\textsuperscript{146} \textit{Columbus Bd. of Educ. v. Penick}, 443 U.S. at 464–65; see \textit{Arlington Heights}, 429 U.S. at 266.

\textsuperscript{147} See Section IV.5 for larger discussion on disparate impacts to Albuquerque’s communities of color and associated statistical evidence.
reasonably foreseeable that, due to the actions of the City Council and the City of Albuquerque, the City’s intentionally discriminatory air pollution permitting practices will continue forward in the same fashion – thereby preserving the City of Albuquerque’s practices of subjecting its low-income communities and communities of color to a higher concentration of environmental health hazards and, consequently, placing these communities’ health at a significant detriment, as they bear the disproportionate burden of the adverse health impacts from air pollution.\textsuperscript{148} As discussed above, while a rule was adopted by the Air Board, the adopted Rule is likely far from adequate and may not address the historic and ongoing discrimination and disparate impacts of air pollution in Albuquerque. Further, the regulatory authority responsible for implementing the adopted Rule, the City of Albuquerque’s Environmental Health Department, continues to oppose the adopted Rule.\textsuperscript{149} Thus, the adopted HEEI Rule is likely to do little to significantly abate the foreseeable disparate impact that the City Council’s discriminatory acts will have on Albuquerque’s low-income communities of color.

The continuing subjection of Albuquerque’s most vulnerable communities to a disproportionate amount of air pollution and the consequent adverse health impacts is not the only foreseeable future harm caused by the City Council’s Legislation and associated discriminatory acts. Perhaps most important, and the crux of this Complaint, is the fact that the City Council’s Legislation, and associated discriminatory acts in support of the Legislation, also have the foreseeable effect of discouraging low-income communities and communities of color from further participating in public processes and rulemaking efforts in the City of Albuquerque.

\textsuperscript{148} See Joint Center for Political and Economic Studies, supra note 1, at 19 (reporting that Albuquerque’s communities of color and low-income communities “face a higher concentration of environmental health hazards such as air pollution and toxic industrial wastes than do whiter and higher income census tracts,” and that the “[c]ommunities facing the greatest array of health risks have a larger percentage of low-income, immigrant, and Hispanic families than communities facing the least health risks”) (emphasis added).

\textsuperscript{149} See Proceedings Transcript at 1792-93 (Dec. 8, 2023) (EHD requesting the Air Board not adopt the HEEI Rule); see also AQCB Docket, supra note 51: Dkt. 229 [EHD’s Legal Memorandum]; see also EHD Notice of Appeal No. A-1-CA-41669 (Jan. 26, 2024) (appealing the adopted rule in its entirety).
As demonstrated throughout this Complaint, the City Council’s introduction, passage, and enforcement of the Resolution and Ordinance were an extreme deviation from the City’s normal procedures, in an explicit attempt to halt the communities of color-led rulemaking effort in its entirety. The City Council’s Legislation and associated acts were publicized widely throughout the region, garnering both local and statewide media coverage and attention. It is also important to note that this community-led rulemaking effort was only the second time in Albuquerque’s history that a community, rather than a government body, has proposed a rulemaking to the Air Board. Perhaps even more significantly, the HEEI Rule Rulemaking Proceeding was the first time a community-led rulemaking effort has been accepted by the Air Board for consideration and held for public hearing.

Thus, the significance of this community-led rulemaking effort, and the City’s discriminatory acts to hinder these efforts, is evident. Although Councilor Lewis was certainly at the forefront of many of these discriminatory acts by City Council, these discriminatory acts amount to intentional discrimination against Albuquerque’s low-income communities of color by the entirety of City Council, as an entity of the City of Albuquerque, in the passage of the Resolution.


151 See 2014 Complaint, supra note 1, at 6-7 (describing the first community petition for a proposed air quality regulation, which was swiftly denied a rulemaking hearing by the Air Board) (emphasis added).

152 See Fischer, supra note 2 (describing the community-proposed HEEI Rule as “the first-ever air quality regulation to be petitioned by the community and given a rulemaking hearing”) (emphasis added).
and Ordinance; the City Council and the City’s indifference and/or approval of a City Council member’s statements, acts, and use of City staff and resources, including legal resources, to intimidate members of the public; and the City Council and City’s failure to condemn Councilor Lewis’ discriminatory acts and instead, reward such behavior by electing Councilor Lewis to serve as the Albuquerque City Council President in January 2024. To allow such blatant and discriminatory interference in a public rulemaking process, through the use of City funds, staff, resources, and power, to prevent local low-income communities of color’s petition for rulemaking to be properly considered, is to endorse and allow the intentional and unequivocal discrimination by a local government body against its own low-income communities and communities of color – in violation of Title VI. While the validity of the adopted HEEI Rule is under appeal, it does not change the fact that the City of Albuquerque and its City Council’s actions served to intentionally discriminate against Albuquerque and Bernalillo County’s low-income communities of color and their rights to meaningfully engage with and participate in the public regulatory process, in violation of Title VI, and that these entities may continue to do so in future community-led rulemaking efforts if these violations are not accounted for and remedied accordingly.

By allowing the City Council’s discriminatory abuse of its powers and authority to go unchecked, Albuquerque’s most vulnerable communities of color will likely be dissuaded from participating in future public regulatory processes, especially in relation to air quality regulation, knowing their own local government will use its power and authority to interfere with and potentially halt any community-led efforts. These communities’ ability to meaningfully

---

153 See City Councilor Dan Lewis Elected City Council President, City of Albuquerque, (Jan. 8, 2024) https://www.cabq.gov/council/news/city-councilor-dan-lewis-elected-city-council-president; see also Title VI Legal Manual, supra note 18, at Sec. VI, p.28 (“A recipient is liable under Title VI for its own conduct when it fails to take adequate steps to address discriminatory harassment” that it knew of or should have reasonably known of) (emphasis added).
participate and be involved in public regulatory processes is not only a protected right afforded to these communities as members of the public, but also a vital and integral component for ensuring effective regulations exist that adequately protect these communities’ health, lives, and futures.

Without EPA’s scrutiny and enforcement, the City of Albuquerque and its City Council will assuredly continue engaging in discriminatory conduct against Albuquerque’s communities of color and low-income communities. This creates the foreseeable risk of future discrimination, harassment, and intimidation by the local government against members of the public, essentially empowering the City of Albuquerque and its City Council to continue interfering with communities of color’s ability to meaningfully engage in public processes, like a local board’s public rulemaking process. Accordingly, accountability is necessary to prevent future intentional discriminatory acts and abuses of local government power and resources, and to ensure the City of Albuquerque and its City Council come into, and remain in, compliance with Title VI.

V. RELIEF REQUESTED

The discriminatory actions by the City of Albuquerque and its City Council exemplify a concerning trend and practice that needs to be scrutinized for compliance with federal civil rights laws, and addressed accordingly. A lack of accountability risks future intentional obstruction to the public rulemaking process by local governments, signifying that discrimination on the basis of race, color, and national origin are acceptable so long as these discriminatory actions are executed under the guise of “putting jobs” and “economic growth” before the health and well-being of Albuquerque’s overburdened communities, low income communities and communities of color. Accountability is thus necessary to ensure Albuquerque and Bernalillo County’s low-income communities and communities of color are able to participate in the functions of their local government without the fear, risk, or experience of discrimination by

154 See City Council Overrides Mayor’s Vetoes, supra note 24.
their own local government; and to ensure the City of Albuquerque and its City Council come
into and remain in compliance with Title VI.

Accordingly, Complainants respectfully request that EPA grant the following relief:

1) Conduct an investigation into the City of Albuquerque and its City Council’s
discriminatory conduct and interference in the HEEI Rule Rulemaking Proceeding
and associated rulemaking efforts;

2) Hold a public listening session and an opportunity to submit public comments on the
matter;

3) If warranted, reduce or eliminate federal funding for the City of Albuquerque; and

4) Take all other actions equitable and necessary, including an affirmative compliance
review of the City of Albuquerque, to ensure the City of Albuquerque and its City
Council come into and remain in compliance with Title VI and EPA's implementing

NI. CONCLUSION

For all the reasons outlined above, Complainants request that EPA accept this Complaint for
investigation, and upon a finding of discrimination, bring the City of Albuquerque and the City
Council of Albuquerque into compliance with Title VI of the Civil Rights Act of 1964 and EPA's
implementing regulations.

Thank you for your consideration of this matter.

RESPECTFULLY SUBMITTED on this 31st day of May, 2024, by:

NEW MEXICO ENVIRONMENTAL
LAW CENTER

/s/ Kacey J. Hovden
Kacey J. Hovden
Eric D. Jantz
Maslyn K. Locke
P.O. Box 12931
Albuquerque, NM 87195
Tel.: (505) 989-9022
Fax.: (505) 629-4769
khovden@nmelc.org
ejantz@nmelc.org
mlocke@nmelc.org
TO: U.S. ENVIRONMENTAL PROTECTION AGENCY - OFFICE OF EXTERNAL CIVIL RIGHTS

DATE: DISCRIMINATION OCCURRED: DEC. 4-11, 2023

DATE: Apr. 5, 2024

Dear Mr./Ms.

Dan Lewis, of the Albuquerque City Council proposed Resolution R-23 that interfered with the Health, Environment & Equity Impacts (HEEI) rulemaking, which had already been scheduled for a hearing on Dec. 4-11, 2023. He therefore, proceeded with proposing Resolution R-23 to abolish the entire Air Quality Control Board and replace the board members with better qualified professionals. The Dan Lewis Resolution R-23 was passed by the Albuquerque City Council. He later influenced the Albuquerque City Commissioners by stating that the HEEI rulemaking would destroy the economy of Albuquerque and later, was nominated as President.

Dan Lewis also made slanderous accusations about certain Bernallillo County Air Quality Board members in which they felt threatened about the safety of their families, producing anger and anxiety. Dan Lewis also challenged the qualifications of the Board, which in the case all board members stated their qualifications, expertise and professionalism. Being highly qualified, he still insisted on their removal, highly intimidating the board.

He later interrupted the Bernallillo County Commission Board during the Health, Environment & Equity Impacts (HEEI) hearing saying that it was illegal to proceed with the hearing because, Resolution R-23 was passed by the Albuquerque City Commissioners and that he was being accompanied by his attorney, which was described as personnel from the City Planning Department. Dan Lewis also stated that the Health, Environmental & Equity Impacts (HEEI) hearing was unlawful. I do feel however, that his actions and outburst were unlawful and he should have been removed from the hearing. I have never seen such discrimination being displayed as this individual has portrayed toward a poor, underserved community that is constantly being discriminated against for trying to improve their quality of life while maintaining their racial heritage.

Sincerely,

Nora Garcia: Mountain View Coalition

SIGNATURE: [Signature]
April 22, 2024

U.S. Environmental Protection Agency - Office of External Civil Rights

Hello, I am writing to bear witness to a continuing history and pattern of civil rights violations against the Mountain View community in Bernalillo County, New Mexico, where I live.

I have witnessed and been the target of civil rights abuses over the past 25 years of participation in my neighborhood’s struggle for environmental justice. The recent shutdown of the Health, Environment, and Equity Impacts (HEEI) rulemaking hearing on December 4-11, 2023, before the Albuquerque-Bernalillo County Air Quality Control Board is the most blatant case of civil rights violations our community has experienced in a history of non-compliance. The City Council, Councillor Dan Lewis, and the City of Albuquerque, Environmental Health Department, willfully and knowingly stopped a public hearing and dismantled a lawfully constituted Air Quality Review Board from hearing a petition filed to address the racial and class discrimination perpetrated upon the Mountain View Neighborhood for the past 60 years.

After years of community organizing, data compilation, and researching the law, The Mountain View Coalition petitioned for a hearing by the Bernalillo County/City of Albuquerque Air Quality Control Board on a proposed regulation to address our community’s grievances over years of abuse, racism, and environmental assault. During this process, my community and I personally have experienced blatant discrimination, bias, and a taking of our rights to redress our government for grievances.

I request a compliance review of the Environmental Health Department (EHD), the Albuquerque City Council, and Councillor Dan Lewis due to discriminatory actions taken by these parties during the rulemaking hearing.

Actions taken by the City of Albuquerque, the City Council, Councillor Dan Lewis, and the EHD violate Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin (including limited-English proficiency) in their programs or activities.

When the hearing on the HEEI regulation began in December 2023, City Councillor Dan Lewis proposed a regulation to the Albuquerque City Council calling for the shutdown of the hearings and the dissolution of the duty seated Air Board, legally empowered under the Clean Air Act to consider our proposed regulation. The Albuquerque City Environmental Health Department did nothing to intervene in the illegality of Councillor Lewis’ resolutions. Because it took a few days for the resolutions to be legally filed, there was one evening for the Air Board to deliberate on the proposed rule, which is substantial in its length and content.

On the night of the community testimony, the City Councillor, Dan Lewis, disrupted the hearing and tried to shut it down. He walked into the hearing room, up to the podium out of order, and called for a shutdown, naming it an illegal hearing. He pronounced that the Air Board was dismantled, even though it is a county and city air board and not just a city air board. Our petition was not allowed a fair hearing in which the community could present our case. This would have never happened had grievances emanated from a white neighborhood.
The long line of people waiting to testify on Zoom was cut off. The legal testimony was shut down, and our voices were muted. The Air Board had time to consider one tiny sliver of the overall regulation we petitioned them to consider and adopt.

Over the past 25 years, I have witnessed a consistent and persistent pattern of discrimination toward our community of primarily Spanish-speaking poor and working-class residents. Over the years, our community has attempted to challenge further issuance of air pollution permits in our neighborhood. Our voices have been silenced in appeal hearings based on residents presenting non-technical testimony as opposed to industry-sponsored technical testimony. While well-heeled industrial interests can hire slick scientists to justify their pollution permits, we have only been able to offer our experience of toxic contamination and the health outcomes of disproportionate amounts of pollution generated near our homes, school, and Community Center. We have data and lived experience to counter the claims that pollution does not harm our neighborhood’s well-being. We have been told that it is the unhealthy lifestyle of the residents that causes the health disparities, not the poisons spewed into our air and soil.

Finally, with the help of the non-profit NM Environmental Law Center, our community of Mountain View generated a regulation to remedy some of our environmental burdens. The Mountain View Coalition petitioned the joint Bernalillo County/City of Albuquerque Air Quality Control Board to adopt the Health, Environment, and Equity Impacts regulation (HEEI). We brought in our expert witnesses on environmental health and law to join community members to testify regarding the need for regulation, the argument for blatant environmental racism, and how this regulation would begin to mitigate our injuries. However, the city government only allowed us to present our case partially before shutting down a legal public hearing, denying our community due process.

Over the years, we have stood up to City and State appointed Hearing Officers insulting us for our lack of degrees and “technical expertise,” cutting us off at five-minute testimony while industrial attorneys and witnesses are allowed to go on for hours about how, no matter the consequences to our daily quality of life, industry must prevail in the name of free enterprise and economic development. Again, this censuring does not happen in affluent neighborhoods.

We are weary of the double standard. People with money and class/white skin privilege have a voice in the standard of environmental quality in their neighborhoods. But not poor people.

In the 1960s and 1970s, Bernalillo County decided to zone all land not previously zoned for any use in Mountain View for light or heavy industrial use. Most of this land was formerly agricultural land in poorer neighborhoods of the South Valley. This zoning move was instituted despite the reality that people had lived here for generations. There was not one public hearing on the zoning. One State Representative told me he thought it was a good idea to put industry next to low-income neighborhoods “so that those poor, little people could walk to work in the new industrial development.” This was systemic racism operating without shame.

By the very fact that no second thought is given to institutionally locating polluting industry in a neighborhood where generations of Chicano, native, and poor white people have lived for over a hundred years and then not allowing remedies or relief to the Mountain View neighborhood is a blatant civil rights injury that needs addressing by the EPA. Particularly
when, in our attempts to address the inequities, we have now been shut down by the City Government.

When the Mountain View neighborhood protests the inequitable treatment of our residents, we are discounted by some political leaders and the Albuquerque Journal as radical naysayers. Despite the data and the history, the newspaper has expressed no outrage over the disproportionate burden of industrial pollution we live with. I was cited in an Albuquerque Journal Editorial as an “environmental extremist,” and my husband was dubbed “a domestic terrorist.” The FBI visited us to see if we needed FBI protection because of “the noise” these allegations generated. In, we assume, social media. The Albuquerque Journal editorial was a direct reflection of opinions expressed by Councilor Dan Lewis, who introduced the City Council resolutions to dismantle the Bernco/City of Albuquerque Air Quality Review Board and throw out the small portion of the proposed HEEI Regulation that the Mountain View Coalition petitioned the Air Board to consider. We surmise the newspaper decided to be the voice of Councilor Lewis because their editorial mimicked the public comments of Councilor Lewis.

The HEEI is designed to relieve our community of further air pollution in Mountain View. Yet, the City Council voted to cancel our attempt to protect our right to a healthier, less toxic environment in our community. And further, to disparage our right to promote a healthier environment in our targeted neighborhood as “extremist.” In other words, our civil right to redress our government for unequal treatment under the law is sidelined as unreasonable and extreme, leading to potential harm and loss of reputation by community members and a total shutdown of our right to petition the Air Board for reparation.
My name is Lauro Silva and I’m a board member of the Mountain View Neighborhood Association and member of the Mountain View Coalition.

I joined with other members in submitting a civil rights complaint to the EPA against the City of Albuquerque and ABQ City Council because my community has been discriminated against not only recently but for decades.

THE POLITICAL PATTERN OF CIVIL RIGHTS VIOLATIONS THRU DISCRIMINATORY POLICIES OF THE CITY OF ALBUQUERQUE AGAINST MEXICAN-AMERICAN /CHICANO COMMUNITIES OF THE SOUTH VALLEY, HAS BEEN HISTORICAL AND MUST NO LONGER CONTINUE. WE ARE THE DUMPING GROUNDS AND A PLACE WHERE POLICYMAKERS EXPLOIT US TO MAKE A NAME FOR THEMSELVES.

ENVIRONMENTAL CONTAMINATION FROM INDUSTRIAL HAZARDOUS, TOXIC, AND CARCINOGENIC POLLUTION AFFECTING THE HEALTH AND WELLBEING OF RESIDENTS OF MOUNTAIN VIEW HAS RESULTED FROM THE CITY OF ALBUQUERQUE’S OVERT DISCRIMINATORY POLICIES IN THE PERMITTING PROCESS SINCE THE EARLY 1970’S.

THE ALBUQUERQUE-BERNALILLO COUNTY ENVIRONMENTAL HEALTH DEPARTMENT HAS ALLOWED IN A GREAT NUMBER OF THESE INDUSTRIES BY GRANTING SPECIAL USE PERMITS DESPITE OPPOSITION BY COMMUNITY RESIDENTS AND THE NEIGHBORHOOD ASSOCIATION. IN FACT, CITY STAFF HAVE OFTEN RIDICULED RESIDENTS AT PUBLIC HEARINGS. CITY OFFICIALS HAVE STATED “OUR ROLE IS TO PROMOTE AND PROTECT INDUSTRY AND NOT ENVIRONMENTAL HEALTH”.

EHD HAS SYSTEMATICALLY DIRECTED THE INDUSTRIAL APPLICANTS TO MOUNTAIN VIEW, WHICH IS NOT IN THE CITY LIMITS, BUT IS IN THE COUNTY.

RESIDENTS WORKED FOR MORE THAN 12 YEARS TO ESTABLISH A MOUNTAIN VIEW SECTOR DEVELOPMENT PLAN TO ADDRESS ENVIRONMENTAL PUBLIC HEALTH CONCERNS, BUT THE PLAN WAS
TABLED AND NEVER REVIVED. RESIDENTS HAVE ALSO DEVELOPED TWO HEALTH IMPACT ASSESSMENT ANALYSES IN COLLABORATION WITH THE UNIVERSITY OF NEW MEXICO, THE PLACE MATTERS TEAM, AND NATIONAL GROUPS THROUGH SOUTH VALLEY PARTNERS FOR ENVIRONMENTAL JUSTICE.

THE COMMUNITY’S MOST RECENT ATTEMPT TO ESTABLISH A REGULATION BY THE AIR QUALITY CONTROL BOARD HAS RESULTED IN EXTREME ENVIRONMENTAL RACISM AGAINST THE 80+% MEXICAN AMERICAN/CHICANO COMMUNITY BY THE ALBUQUERQUE CITY COUNCIL, WHICH IS WHY WE FILED OUR CIVIL RIGHTS COMPLAINT TO THE EPA.

/s/ Lauro Silva
Lauro Silva
CITY of ALBUQUERQUE
TWENTY FIFTH COUNCIL

COUNCIL BILL NO. R-23-176 ENACTMENT NO. R-2023-097

SPONSORED BY: Dan Lewis

RESOLUTION

ESTABLISHING A MORATORIUM FOR THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD TO ACT UNDER CHAPTER 9, ARTICLE 5, PART 1 ROA 1994, THE JOINT AIR QUALITY CONTROL BOARD ORDINANCE UNTIL FEBRUARY 1, 2024.

WHEREAS, in R-2023-044 Council declared that Petition 2022-3 before the Albuquerque-Bernalillo County Air Quality Board ("Board") could be harmful to the welfare of the City; and

WHEREAS, the City Council declares the proposed rules in the record for Petition 2022-3 addresses quality of life impacts absent scientific evidence that there is a nexus to air pollution by identifying the quantities and durations of air contaminants that may, with reasonable probability, cause injury, contrary to New Mexico case law as held in Southwest Organizing Project v. Albuquerque-Bernalillo Cty. Air Quality Control Bd., 2021-NMCA-005; and

WHEREAS, the City Council declares the proposed rules in the record for Petition 2022-3 purport to impact on industrial development by design and not as a consequence of preventing or abating air pollution, contrary to New Mexico case law as held in Service Co. of New Mexico v. New Mexico Environmental Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976); and

WHEREAS, the City Council is considering making changes to Sections 9-5-1-1 to -99 and needs time to carefully deliberate about further action; and

WHEREAS, the intended purpose of the resolution is to advance the health, safety and welfare of the public and to further goals and policies adopted by the Council.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:
SECTION 1. ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY
CONTROL BOARD. The Albuquerque-Bernalillo County Air Quality Board shall
have no authority to, and shall not make any regulation or standard to,
address quality of life impacts absent scientific evidence that there is a nexus
to air pollution by identifying the quantities and durations of air contaminants
that may, with reasonable probability, cause injury; or adopt or amend a
standard or regulation whereby the impact on industrial development is by
design and not a consequence of preventing or abating air pollution until
February 1, 2024.

SECTION 2. CITY OF ALBUQUERQUE. The City of Albuquerque shall not
use its resources to facilitate any action by the Board to make, adopt, or
amend any regulation or standard described in Section 1 until February 1.

SECTION 3. The City is directed to collaborate with Bernalillo County to
address any differences in City and County air quality policies.

SECTION 4. SEVERABILITY CLAUSE. If any section, paragraph, sentence,
clause, word, or phrase of this resolution is for any reason held to be invalid
or unenforceable by any court of competent jurisdiction, such decision shall
not affect the validity of the remaining provisions of this resolution. The
Council hereby declares that it would have passed this resolution and each
section, paragraph, sentence, clause, word, or phrase thereof irrespective of
any provision being declared unconstitutional or otherwise invalid.
PASSED AND ADOPTED THIS 8th DAY OF November, 2023

BY A VOTE OF: 5 FOR 4 AGAINST.

For: Bassan, Grout, Jones, Lewis, Sanchez
Against: Benton, Davis, Fiebelkorn, Peña

[Signature]

Pat Davis, President
City Council

APPROVED THIS 22 DAY OF _______ 2023

Bill No. R-23-176

Timothy M. Keller, Mayor
City of Albuquerque

The Mayor's veto was overridden by EC-23-403 on December 4, 2023 by a vote of 7 FOR and 2 AGAINST. For: Bassan, Davis, Grout, Jones

ATTEST: Lewis, Pena, Sanchez Against: Benton, Fiebelkorn

[Signature] for Ethan Watson

Ethan Watson, City Clerk
EXHIBIT 2

CITY of ALBUQUERQUE
TWENTY FIFTH COUNCIL

COUNCIL BILL NO.  O-23-88  ENACTMENT NO.  O-2023-020

SPONSORED BY:  Dan Lewis

ORDINANCE

REPEALING CHAPTER 9, ARTICLE 5, PART 1 ROA 1994, THE JOINT AIR QUALITY CONTROL BOARD ORDINANCE; ABOLISHING THE CURRENT ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD;
ADOPTING CHAPTER 9, ARTICLE 5, PART 1 ROA 1994, THE JOINT AIR QUALITY CONTROL ORDINANCE; CREATING THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD.

WHEREAS, it has been asserted by legal counsel representing the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) that said Board is an autonomous entity established by state statute, and not subject to control by Environmental Health, the City Council, or the County Commission; and

WHEREAS, it has been further affirmed by legal counsel representing the Air Board that the Air Board maintains collaborative relations with Environmental Health, the New Mexico Environmental Department, and the Environmental Protection Agency, without being governed by them; and

WHEREAS, these statements suggest that the Air Board may not be answerable to elected officials and, consequently, the electorate; and

WHEREAS, the absence of adherence to state law by the Air Board could result in a lack of accountability; and

WHEREAS, not all meetings sanctioned by the body regarding policy changes are accessible to the general public; and

WHEREAS, the Air Board conducts sub-committee meetings and engages select members of the public in those meetings; and

WHEREAS, the Open Meetings Act was established with the intent of ensuring that policy decisions affecting the public are made in a transparent
and open manner, to serve the best interests of all residents of New Mexico; and

WHEREAS, adherence to the Open Meetings Act is essential to the preservation of a free society and the democratic process, as it is crucial for a policymaking body to maintain the trust of the public; and

WHEREAS, a significant portion of the Air Board comprises individuals advocating for specific interests rather than a diverse representation of experts in the relevant subject matter; and

WHEREAS, historically, the Air Board has strived to include members with backgrounds in the fields of medicine, science, industry, advocacy, law, and technical academia; and

WHEREAS, it is imperative to maintain a composition that reflects the diverse expertise required for the comprehensive consideration of pertinent matters.

BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

SECTION 1. REPEALER. Chapter 9, Article 5, Part 1 is hereby repealed.

SECTION 2. NEW MATERIAL. Chapter 9, Article 5, Part 1 is hereby added to read as follows:

"PART 1: AIR QUALITY CONTROL BOARD.

§ 9-5-1-1 SHORT TITLE.

Sections 9-5-1-1 et seq. may be cited as the "Joint Air Quality Control Board Ordinance."

§ 9-5-1-2 DEFINITIONS.

As provided in the New Mexico Air Quality Control Act, Sections 74-2-1 through 74-2-17 NMSA 1978 (hereinafter referred to as the "Air Quality Control Act"), the following definitions shall apply to terms used in §§ 9-5-1-1 et seq.

AIR CONTAMINANT. Any substance, including but not limited to any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, microorganisms, radioactive material, any combination thereof or any decay or reaction product thereof.

AIR POLLUTION. The emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a
duration that may with reasonable probability injure human health or animal or
plant life or as may unreasonably interfere with the public welfare, visibility or
the reasonable use of property.

BOARD. The Albuquerque-Bernalillo County Air Quality Control Board
created by §§ 9-5-1-1 et seq.

DEPARTMENT. The administrative agency that is the local agency under
the Air Quality Control Act.

DIRECTOR. The administrative head of the Department or his or her
authorized representative.

EMISSION LIMITATION and EMISSION STANDARD. A requirement
established by the Board, the Department, or pursuant to the Federal Act that
limits the quantity, rate or concentration, or combination thereof, of emissions
of air contaminants on a continuous basis, including any requirements
relating to the operation or maintenance of a source to assure continuous
reduction.

ENVIRONMENT DEPARTMENT. The Environment Department of the state.

EX PARTE COMMUNICATION. An oral or other communication with a board
member, a board hearing officer, or board attorney regarding the merits of an
expected or pending petition or related proceeding if:

(1) the communication is made by a person, including a board member,
hearing clerk, hearing officer, or board attorney;

(2) the person communicating knows or has reason to know a petition
will be or has been filed for a hearing before the Board;

(3) the communication is made without all other parties to the
proceeding being present or receiving the same communication received by
the board member, board hearing officer, or board attorney, except where
authorized by the closed meeting provisions of the Open Meetings Act; and

(4) the communication is intended to affect, or reasonably may be
expected to affect the board member's, board hearing officer's, or board
attorney's opinion regarding the merits of the expected or pending petition or
related proceeding.

FEDERAL ACT. The Federal Clean Air Act, 42 U.S.C. 7401 through 7642, its
subsequent amendments and successor provisions.
FEDERAL STANDARD OF PERFORMANCE. Any standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412.

HAZARDOUS AIR POLLUTANT. An air contaminant that has been classified as a hazardous air pollutant pursuant to the Federal Act.

MANDATORY CLASS I AREA. Any of the following areas in the state of New Mexico that were in existence on August 7, 1977:

1. National wilderness areas that exceed 5,000 acres in size; and
2. National parks that exceed 6,000 acres in size.

MAYOR. The Mayor or his or her authorized representative.

MODIFICATION. Any physical change in, or change in the method of operation of a source that results in an increase in the Potential Emission Rate of any Regulated Air Contaminant emitted by the source or that results in the emission of any Regulated Air Contaminant not previously emitted, but does not include:

1. A change in ownership of the source;
2. Routine maintenance, repair or replacement;
3. Installation of air pollution control equipment and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the board or pursuant to the Federal Act; or
4. Unless previously limited by enforceable permit conditions:
   a. An increase in the production rate, if such increase does not exceed the operating design capacity of the source;
   b. An increase in the hours of operation; or
   c. Use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material, or if use of an alternate fuel or raw material is caused by any natural gas curtailment or emergency allocation or any other lack of supply of natural gas.

NONATTAINMENT AREA. For any air contaminant, an area that is designated "nonattainment" with respect to that contaminant within the meaning of Section 107(d) of the Federal Act.
PERSON. An individual, partnership, corporation, association, the state or political subdivision of the state or any agency, department, or instrumentality of the United States and any of their officers, agents or employees.

PLAN. Any and all parts of the state implementation plan that pertain to the County that are adopted by the Board for submittal by the Governor of the state to the Federal Environmental Protection Agency pursuant to 42 U.S.C. Section 7410.

POTENTIAL EMISSION RATE. The emission rate of a source at its maximum capacity in the absence of air pollution control equipment that is not vital to production of the normal product of the source or to its normal operation; also defined by Board regulations as “pre-controlled” emissions.

REGULATED AIR CONTAMINANT. Any air contaminant, the emission or ambient concentration of which is regulated pursuant to the Air Quality Control Act or the Federal Act.

SIGNIFICANT DETERIORATION. Any increase in the ambient concentrations of any air contaminant above the levels allowed by the Federal Act or Federal regulations for that air contaminant in the area within which the increase occurs.

SOURCE. Any structure, building, equipment, facility, installation or operation that emits or may emit any air contaminant.

STANDARD OF PERFORMANCE. A requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure continuous emission reduction.

STATE IMPLEMENTATION PLAN. Any plan submitted by the Governor of the state of New Mexico to the Federal Environmental Protection Agency pursuant to 42 U.S.C. Section 7410.

§ 9-5-1-3 JOINT AIR QUALITY CONTROL BOARD.

(A) In accordance with the New Mexico Air Quality Control Act, a joint air quality control board known as the Albuquerque-Bernalillo County Air Quality Control Board is created. The Board shall serve as a joint local authority acting on behalf of both the City and the County. Within the exterior boundaries of the county, the Board shall have authority and jurisdiction to exercise the same functions pertaining to air quality as the functions that have
been delegated by the Air Quality Control Act to the New Mexico Environmental Improvement Board except any functions reserved exclusively for the Environmental Improvement Board.

(B) The membership and organization of the Board shall be as described in this section.

(1) The Board shall consist of seven members, four of whom shall be appointed by the Mayor with the advice and consent of the City Council and three of whom shall be appointed by the County Commission. The Mayor shall submit qualified appointments to City Council within 30 days of the effective date. If the Mayor does not timely submit qualified persons for appointment, City Council may appoint the initial members of the Board.

(2) Members shall be appointed for three-year terms. No member shall serve more than two consecutive terms at a time. If a person is appointed to fill an unexpired term of another member, that term shall be considered a term for the purpose of this limitation. The positions on the Board shall be staggered appointments so no more than two City appointee's terms expire in any single year. Vacant positions shall be filled by individuals appointed by the same authority that appointed the outgoing member.

(3) Nominations and appointments to the Board shall be made as follows:

(a) At least a majority of the membership of the Board shall be individuals who represent the public interest and meet the requirements of the state and federal guidelines set forth in the New Mexico Air Quality Control Act, as amended, and the Federal Clean Air Act, 42 U.S.C.A. Section 7401, et seq., as amended. The board should be comprised of members who broadly represent the diversity and demographics of the City by way of, including but not limited to, cultural, gender, and geographic diversity. Further, to the extent that the requirement does not conflict with this division (a), Board members will be selected as follows: one Board member shall be a registered professional licensed engineer who shall have at least five (5) years' experience in the field of air pollution control; one Board member shall be a physician licensed in New Mexico who shall be experienced in the health effects of air contaminants; one Board member shall be a person involved in
the program of an institute of higher learning in the state involved in the
centering of training in air pollution evaluation and control; and one Board
member shall be a person from City industry with current full-time
employment in a private manufacturing concern and have a college degree
and 8 years of combined technical training and experience in permit
compliance or air pollution abatement for Title 5 or non-Title 5 sources for a
source permitted in the City or County. As used in this section: REPRESENT
THE PUBLIC means does not have a controlling interest in, have 5 percent or
more of his or her capital invested in, serve as attorney for, act as consultant
for, serve as officer or director of, or hold any other official or contractual
relationship with any person subject to permits or enforcement orders or any
trade or business association of which such a person is a member;
SIGNIFICANT PORTION OF INCOME means 10 percent or more of gross
personal income for a calendar year, including retirement benefits, consultant
fees, and stock dividends, except that it shall mean 50 percent or more of
gross personal income for a calendar year if the recipient is over 60 years of
age and is receiving such portion pursuant to retirement, pension, or singular
arrangement. Income derived from mutual-fund payments, or from other
diversified investments as to which the recipient does not know the identity of
the primary sources of income, shall be considered part of the recipient’s
gross personal income but shall not be treated as income derived from
persons subject to permits or enforcement orders; and PERSONS SUBJECT
to PERMITS OR ENFORCEMENT ORDERS includes any individual,
corporation, partnership, or association who holds, is an applicant for, or is
subject to any permit, or who is or may become subject to any enforcement
order under the Federal Clean Air Act, Air Quality Control Act, any regulation
of the Board or any permit condition issued thereto, except that it does not
include (1) an individual who is or may become subject to an enforcement
order solely by reason of his or her ownership or operation of a motor vehicle
or (2) any department or agency of, a state, local or regional government.
(b) No person employed on a full time basis by either the City or the
County shall be a member of the Board. No elected City or County official, and
no member of the immediate family of any elected City or County official shall
 Members shall submit to the Department a signed written statement to assure compliance with the applicable law on Board composition, upon appointment and renewed annually or with any change in employment, and such statement shall be available for public inspection. In the event either the Department cannot make a finding that at least a majority of the Board as constituted by appointment of its members meets the requirements of applicable law, the Department shall notify the City Council and the County Commission of the determination that at least a majority of its membership does not meet the requirements. The Department shall advise and make recommendations regarding corrective action necessary to allow the Board to be qualified under applicable law, including substitutionary appointments of a member or members. The Board shall not act to hear petitions of permit appeals, variances, or regulatory changes until the City Council and County Commission have both determined that it can do so consistent with applicable law.

(d) City-appointed members shall be residents of the City and County-appointed members shall be residents of the County.

(e) A Board member may be removed from office by the appointing authority if:

(i) The appointing authority determines the member has violated any law, regulation, or ordinance, or for other good cause such as malfeasance or the intentional failure to carry out the duties of the Board, or is otherwise incapable or unfit to discharge the duties of the office;

(ii) the member has missed three consecutive meetings or has been absent from more than 50% of the meetings during any 12 consecutive meetings; or

(iii) to comply with the requirements of division (B)(3)(a) for member composition of the Board.

(f) At least two months before a Board member’s term expires, the Department shall solicit a recommended list of qualified members for the City vacancy as suggested by the City Council and the Department for consideration by the Mayor. The County Commission will appoint its
representatives to the Board. The list shall include a brief biography
describing the qualifications of each candidate. From the list, as modified or
enlarged by the appointing authority, appointments to the Board will be made.

(g) Candidates appointed shall be notified in writing, and the candidate
must accept or reject the appointment in writing.

(h) Unless a member retires or is removed, each member shall serve
until a successor has been appointed.

(i) If a vacancy occurs for reasons other than expiration of a term, the
Department shall promptly utilize the procedure described in division (e)
above. Each vacancy shall be filled by the authority that appointed the
departing member. The replacement member shall serve for the remainder of
the unexpired term.

(4) Four members present shall constitute a quorum. A quorum shall be
present for all matters decided by a vote of the Board.

(5) Any action, order or decision of the Board requires a simple majority
vote of the members present, except for adoption, amendment or repeal of a
Board regulation, in which case the concurrence of four members shall be
required.

(6) All officers of the Board shall be elected annually by the Board for
one-year terms. No officer shall serve in the same position for more than two
consecutive years at a time.

(7) The Board may adopt rules to govern its proceedings. Such rules
shall not take effect until reviewed and approved by the City Attorney and
County Attorney.

(C) The Board shall meet in public facilities with public seating available.

(D) The Board shall meet monthly if a quorum is available unless a
meeting is unnecessary or delayed for good reason. The Board shall hold a
minimum of six monthly meetings a year. Special additional meetings may be
held as needed.

(E) Notice of time, place and agenda of meetings, work sessions,
committee meetings, hearings, any other gathering of a quorum of the Board,
and subcommittee meetings shall be published according to the requirements
of law, including the Open Meetings Act. Meetings, work sessions, committee
meetings, hearings and any other gathering of a quorum of the Board, and
subcommittee meetings shall be open to the public and shall follow the
procedures described in the Open Meetings Act.

(F) In addition to any requirements applicable to each member based on
the member's appointing authority as set forth in the City and County codes of
conduct, any member of the Board who has a conflict of interest regarding a
matter before the Board shall disqualify himself or herself from the discussion
and shall abstain from the vote on such matter. If a potential conflict of
interest is raised during a meeting a member of the board shall submit the
question to the entire Board for a determination of whether disqualification is
necessary. The member with the potential conflict being voted on shall not
vote in this determination. The Board's determination of whether
disqualification is necessary shall be final. In the event a member is made
aware of a conflict of interest requiring disqualification or abstention outside
of a meeting, the member shall disclose the potential conflict of interest to the
board and may seek guidance concerning disqualification from the board
attorney or seek an advisory opinion from the County or City, as applicable to
each member based on the member's appointing authority. A conflict of
interest means any interest which may yield, directly or indirectly any
monetary or other material benefit to the Board member or the member's
spouse or minor child.

(G) The City Environmental Planning Commission (EPC) and the County
Planning Commission (CPC) may appoint a member of the EPC and of the
CPC, respectively, to be liaisons to the Air Quality Control Board. The EPC
and CPC liaisons may attend Board meetings and may participate in Board
discussions, but will not be members of the Board and will not vote. The
respective liaisons may communicate with the Board and their respective
planning commissions regarding air quality issues.

(H) The City shall provide the administrative support it deems necessary
to the Board to assist the Board with carrying out the administrative functions
of its powers and duties under the Air Quality Control Act. Nothing herein
shall limit the City's authority and ability to maintain full oversight and control
over City resources.
The Department shall attend all meetings of the Board, but not be entitled to a vote. The Department shall record all transactions and proceedings of the Board. The Department shall handle correspondence, keep records, prepare reports, and perform such other duties as the City may direct or authorize to carry out the administrative functions of the City and Board’s powers and duties under the Air Quality Control Act.

(2) The Director is the custodian of all files and records of the Board and the Board shall provide such files and records to the Director upon request.

(3) The Director shall be an ex officio member of the Board and may meet with the Board, but does not have a vote. Nothing herein limits or waives ex parte communication prohibitions which shall apply to the Director.

(4) Staff may be an employee of the City but shall not include such employee’s supervisory staff.

(5) In the exercise of any of its powers or duties, the Board may act with legal advice received in accordance with the Open Meetings Act, Chapter 10, Article 15, NMSA 1978. Such legal advice shall be provided by the City. Such legal research shall be distributed to all Board members. Legal advice and legal research shall only be requested with the concurrence of four Board members. An attorney to the Board shall not be a member of the Board or serve as an ex-officio member, and shall act only in an advisory capacity. The Board shall not delegate its authority to the Board’s attorney.

§ 9-5-1-4 DUTIES AND POWERS OF THE BOARD.

(A) The Board, in accordance with the Air Quality Control Act, shall prevent or abate Air Pollution within the City and County.

(B) The Board shall:

(1) Adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act and §§ 9-5-1-1 et seq. to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the Board’s jurisdiction, or any part thereof; and

(2) Adopt a plan for the regulation, control, prevention or abatement of Air Pollution, recognizing the differences, needs, requirements and conditions within the County or any part thereof.
(C) Regulations adopted by the Board may:

1. Include regulations to protect visibility in Mandatory Class I Areas, to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas, provided that such regulations:
   (a) shall be no more stringent than but at least as stringent as required by the Federal Act and federal regulations pertaining to visibility protection in Mandatory Class I Areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and
   (b) Shall be applicable only to sources subject to such regulation pursuant to the Federal Act;

2. Prescribe standards of performance for Sources and Emission Standards for Hazardous Air Pollutants that, except as provided in division (3) below:
   (a) Shall be no more stringent than but at least as stringent as required by federal standards of performance; and
   (b) Shall be applicable only to sources subject to such federal standards of performance;

3. Include regulations governing emissions from solid waste incinerators that shall be as least as stringent as, and may be more stringent than, any applicable federal emission limitations:

4. Require notice to the Department of the intent to introduce or allow the introduction of an air contaminant into the air within the geographical area of the Board's jurisdiction; and

5. Require any person emitting any air contaminant to:
   (a) Install, use and maintain emission monitoring devices;
   (b) Sample emissions in accordance with methods and at locations and intervals as may be prescribed by the Board;
   (c) Establish and maintain records of the nature and amount of emissions;
   (d) Submit reports regarding the nature and amounts of emissions and the performance of emission control devices; and
   (e) Provide any other reasonable information relating to the emission of air contaminants.
(D) Any regulation adopted under this section shall be consistent with federal law, if any, relating to control of motor vehicle emission.

(E) In making its regulations, the Board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) Character and degree of injury to or interference with health, welfare, visibility and property;

(2) The public interest, including the social and economic value of the sources and subjects of air contaminants; and

(3) Technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

§ 9-5-1-5 DUTIES AND POWERS OF THE DEPARTMENT.

The Department shall:

(A) Administer and enforce the provisions of the Air Quality Control Act, §§ 9-5-1-1 et seq. and any regulations adopted pursuant thereto and any other laws relating to Air Pollution applicable within the City and the County. The Department shall perform, within the boundaries of the County, all functions delegated to the New Mexico Environment Department under the Act, except for the duties and powers reserved exclusively for the Environment Department.

(B) Develop facts and make investigations and studies consistent with the Air Quality Control Act and §§ 9-5-1-1 et seq., and in connection therewith, enter at all reasonable times in or upon any private or public property, except private residences, that the Department has reasonable cause to believe is or will become a source of air contaminants contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy thereof shall be furnished to the owner or occupant of the premises before the action is filed.

(C) Institute legal proceedings to compel compliance with the Air Quality Control Act, §§ 9-5-1-1 et seq., or any regulation of the Board.
(D) Encourage and make every reasonable effort to obtain voluntary cooperation by the owner or occupants to preserve, restore or improve air purity.

(E) Consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system, or mechanism or the air pollution problem that may be related to the source, device, system or mechanism, provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, §§ 9-5-1-1 et seq., regulations in force, pursuant thereto, or any other provision of law.

(F) Establish a small business stationary source technical and environmental compliance assistance program, consistent with the provisions of Section 507 of the Federal Act.

(G) Accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government or from any person.

(H) Classify and record air contaminant sources that in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution, provided that classifications may be for application to the County as a whole or to any designated area of the City or County, and shall be made with special reference to the effects on health, economic and social factors and physical effects on property.

(I) Develop and present to the Board a Plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the Department’s responsibility as established by §§ 9-5-1-1 et seq.

§ 9-5-1-6 ADOPTION OF REGULATIONS; NOTICE AND HEARING.

(A) Any person may recommend or propose regulations to the Board for adoption.

(B) Persons interested in recommending or proposing regulations shall engage other interested persons, the Department, and any other relevant regulatory entities in the regulation development process. The petition shall
identify the activities undertaken for development of the proposed regulation

text and how the petitioner engaged other interested persons, the Department,

and any other relevant regulatory entities. Failure to solicit and consider the

positions of others may result in the denial of a hearing.

(C) The Board shall determine whether to hold a hearing within 60 days

of the submission of a proposed regulation. In addition to other applicable

notice requirements, notice of the Board’s intention to consider whether to

hold a hearing shall be given at least 15 days prior to the meeting at which the

matter will be considered. At a minimum, notice shall be posted in the lobby of

City Hall and County offices; electronically on the Board’s web site; and in

writing to the Director. The notice shall state the subject, the time and the

place of the meeting and the manner in which interested persons may obtain

relevant information and present their views.

(D) No regulation or emission control requirement shall be adopted until

after a public hearing by the Board. As used in this section, REGULATION

includes any amendment or repeal thereof.

(E) Notice of hearing shall be given at least 30 days prior to the hearing

date and shall state the subject, the time and the place of the hearing and the

manner in which interested persons may present their views. The subject shall

include a summary of the full text of the proposed rule and a short explanation

of the purpose of the proposed rule with reasonable specificity. The notice

shall also state where interested persons may secure copies of any proposed

regulation or air quality standard. The notice shall be published in a

newspaper of general circulation in the City and County. Reasonable effort

shall be made to give notice to all persons who have made a written request to

the Board for advance notice of its hearings.

(F) The Board shall not consider alternate proposals at the hearing,

though it can consider modifications to a proposal which simply deletes,

clarifies or elaborates on elements of the already-submitted proposal without

adding or changing substantive new obligations or requirements.

(G) At the hearing, the Board shall allow all interested persons

reasonable opportunity to submit data, views or arguments orally or in writing

and to examine witnesses testifying at the hearing. Any person heard or
represented at the hearing shall be given written notice of the action of the
Board.

(H) The Board shall designate a hearing officer to take evidence in the
hearing.

(I) All hearings shall be recorded verbatim and any transcription costs
shall be borne by the petitioner.

(J) At no time before a petition is expected to be filed and at no time
between the filing of a petition and the final decision of the Board or
withdrawal of the petition or related regulatory action shall any person have ex
parte communication.

(K) No regulation or emission control requirement shall be filed under
the State Rules Act, Sections 14-3-24, 14-3-25, 14-4-1 through 14-4-9 NMSA
1978, until at least 60 days after it is presented by the Department to City
Council. No regulation or emission control requirement adopted by the Board
shall become effective until 30 days after its filing under the State Rules Act,
Sections 14-3-24, 14-3-25, 14-4-1 through 14-4-9 NMSA 1978.

(L) A copy of adopted air quality control regulations shall be on file in
the office of the City Clerk and shall be available for inspection by the public
during regular business hours. Copies of the regulations shall be available to
any person upon request and payment of a reasonable charge set by the
Mayor.

§ 9-5-1-7 PERMITS; APPEALS; FEES.

(A) By regulation, the Board shall require:

(1) Any person intending to construct or modify any source, except as
otherwise specifically provided by regulation, to obtain a construction permit
from the Department prior to such construction or modification; and

(2) Any person intending to operate any source for which an operating
permit is required pursuant to the 1990 amendments to the Federal Act, except
as otherwise specifically provided by regulation, to obtain an operating permit
from the Department.

(B) Regulations adopted by the Board shall include at least the following
provisions:

(1) Requirements for the submission of relevant information, including
but not limited to information the Department deems necessary to ensure that
regulations and standards under §§ 9-5-1-1 et seq., the Air Quality Control Act
or the Federal Act will not be violated.

(2) Specification of the deadlines for processing permit applications;
provided, the deadline for a final decision by the Department on a
construction permit application may not exceed:

(a) One hundred and eighty days after the application is determined to
be complete, if the application is not affected by requirements for prevention
of significant deterioration; or

(b) Two hundred and forty days after the application is determined to be
complete, if the application is affected by requirements for prevention of
significant deterioration;

(3) Specification of the public notice, comment period and public
hearing, if any, required prior to the issuance of a permit, provided the permit
regulations adopted include provisions requiring that notice be given to the
New Mexico Environment Department of all applications by any source that
emits, or has a Potential Emission Rate of 100 tons per year or more of any
Regulated Air Contaminant, including any source of fugitive emissions of any
Regulated Air Contaminant, at least 60 days prior to the date on which
construction or major modification is to commence;

(4) A schedule of construction permit fees sufficient to cover:

(a) The reasonable costs of reviewing and acting upon any application
for such permit; and

(b) The reasonable costs of implementing and enforcing the terms and
conditions of the permit, excluding any court or other costs associated with
an enforcement action.

(5) A schedule of emission fees consistent with the provisions of
Section 502(b)(3) of the 1990 amendments to the Federal Act;

(6) Specification of the maximum length of time for which a permit shall
be valid, provided that for an operating permit, such period may not exceed
five years; and

(7) For an operating permit only:

(a) Provisions, consistent with Sections 502(b) and 505(b) of the Federal
Act, that require:

1. Notice to and review and comment by the United States Environmental Protection Agency (EPA); and

2. If the Department receives notice of objection from the United States Environmental Protection Agency before the operating permit is issued, the Department shall not issue the permit unless the permit is revised and issued pursuant to Section 505(c) of the Federal Act;

(b) Provisions governing renewal of the operating permit; and

(c) Specification of the conditions under which the operating permit may be terminated, modified or revoked and reissued prior to the expiration of the term of the operating permit.

(C) The Department may deny any application for:

(1) A construction permit if it appears that the construction or modification will not meet applicable requirements of §§ 9-5-1-1 et seq., the Air Quality Control Act, the Federal Act or any regulation adopted pursuant thereto; or

(2) An operating permit if:

(a) The source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance or a regulation of the Board; or

(b) It appears that the source for which the permit is sought will cause or contribute to air contaminant levels in excess of any national, state or applicable local ambient air quality standard; or

(c) Any other provision of §§ 9-5-1-1 et seq. and the Air Quality Control Act or the Federal Act will be violated.

(D) The Department may specify conditions to any permit granted under this section, including:

(1) For a construction permit, a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the requirements of §§ 9-5-1-1 et seq., the Air Quality Control Act, the Federal Act or any regulations promulgated pursuant thereto; and

(2) For an operating permit:

(a) Imposition of, individual emission limits, determined on a case-by-
case basis, but only as restrictive as necessary to meet the requirements of
the Air Quality Control Act and the Federal Act or the emission rate specified
in the operating permit application, whichever is most stringent;
(b) Compliance with applicable federal standards of performance;
(c) Imposition of reasonable restrictions and limitations not relating to
emission limits or emission rates; or
(d) Any combination of the conditions listed above.
(E) This section does not authorize the Department to require the use of
machinery, devices or equipment from a particular manufacturer if the federal
standards of performance, regulations of the Board and permit conditions
may be met by machinery, devices or equipment otherwise available.
(F) The issuance of a construction or operating permit does not relieve
any person from the responsibility of complying with the provisions of the Air
Quality Control Act, §§ 9-5-1-1 et seq. or any applicable regulations of the
Board. Any conditions placed upon a permit by the Department shall be
enforceable to the same extent as a regulation of the Board.
(G) Any person who participated in a permitting action before the
Department shall be notified by the Department of the action taken by the
Department and the reasons for the action. Notification of the applicant shall
be by certified mail.
(H) Any person who participated in a permitting action before the
Department and who is adversely affected by such permitting action may file a
petition for hearing before the Board. The petition shall be made in writing to
the Board within 30 days from the date notice is given of the Department’s
action. Unless a timely request for hearing is made, the decision of the
Department shall be final.
(I) If a timely petition for hearing is made, the Board shall hold a hearing
within 90 days after receipt of the petition. The Board shall notify the petitioner
and the applicant or permittee, if other than the petitioner, by certified mail of
the date, time and place of the hearing. If the subject of the petition is a
permitting action deemed by the Board to substantially affect the public
interest, the Board shall ensure that the, public receives notice of the date,
time and place of the hearing. The public in such circumstances shall also be
given a reasonable opportunity to submit data, views or arguments orally or, in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

(J) The Board shall designate a hearing officer to take evidence in the hearing. All hearings shall be recorded verbatim and any transcription and administrative costs shall be borne by the petitioner.

(K) The burden of proof shall be upon the petitioner. Based upon the evidence presented at the hearing, the Board shall sustain, modify or reverse the action of the Department.

(L) At no time before a petition is expected to be filed and at no time between the filing of a petition and the final decision of the Board or withdrawal of the petition or related permit action shall any person have ex parte communication.

(M) Notwithstanding any other provision of law, and subject to the provisions of Section 74-2-4 NMSA 1978, a final decision on a permit by the Department, the Board or the court of appeals that a new source will or will not meet applicable local, state and federal air pollution standards and regulations shall be conclusive and is binding on every city, county and state agency, and as an issue before any such agency shall be deemed resolved in accordance with that final decision.

(N) Fees collected pursuant to this section shall be deposited in a fund created pursuant, to Section 74-2-16 NMSA 1978 if collected pursuant to a permit regulation adopted by the Board pursuant to this section.

§ 9-5-1-8 VARIANCES.

(A) The Board may grant an individual variance from the limitations prescribed under the Air Quality Control Act, §§ 9-5-1-1 et seq., any regulation of the Board, or any permit condition imposed by the Department whenever it is found, upon presentation of adequate proof:

(1) That compliance with any part of the Air Quality Control Act, §§ 9-5-1-1 et seq., any regulation of the Board, or any permit condition will:

(a) Result in an arbitrary and unreasonable taking of property; or

(b) Impose an undue economic burden upon any lawful business,
(2) That the granting of the variance will not:
   (a) Result in a condition injurious to health or safety; or
   (b) Cause or contribute to an air contaminant level in excess of any
primary national ambient air quality standard.
   (B) No variance shall be granted pursuant to this section until the Board
has considered the relative interests of the applicant, other owners of property
likely to be affected by the discharges and the general public.
   (C) Any variance or renewal thereof shall be granted within the
requirements of Subsection A of this section and for time periods and under
conditions consistent with the reasons therefore, and within the following
limitations:
   (1) If the variance is granted on the ground that there are no practicable
means known or available for the adequate prevention, abatement or control
of the air pollution involved, it shall be only until the necessary means for
prevention, abatement or control become known and available; If the variance
is granted on the ground that compliance with the particular requirement or
requirements from which variance is sought will necessitate the taking of
measures that, because of their extent or cost, must be spread over a
considerable period of time, it shall be for a period not to exceed such
reasonable time as, in the view of the Board, is requisite for the taking of the
necessary measures. A variance granted on the ground specified in this
division (2) shall contain a timetable for the taking of action in an expeditious
manner and shall be conditioned on adherence to the timetable; or
   (2) If the variance is granted on the ground that it is justified to relieve
or prevent hardship of a kind other than that provided for in divisions (1) and
(2) of this division (C), it shall be for not more than one year.
   (D) Any person seeking a variance shall do so by filing a petition for
variance with the Director. The Director shall promptly investigate the petition
and make a recommendation to the Board as to the disposition of the petition.
   (E) Upon receiving the recommendation of the Director on the variance,
the Board shall:
   (1) If the recommendation of the Director favors a variance, hold a
public hearing prior to the granting of any variance; and
(2) If the Director is opposed to the granting of the variance, hold a
hearing only upon the request of the petitioner.
(F) In the hearing, the burden of proof shall be upon the petitioner.
(G) At no time before a petition is expected to be filed and at no time
between the filing of a petition and the final decision of the Board or
withdrawal of the petition or related variance action shall any person have ex
parte communication.
§ 9-5-1-9 JUDICIAL REVIEW; ADMINISTRATIVE ACTIONS.
(A) Any person adversely affected by an administrative action taken by
the Board or the Director may appeal to the Court of Appeals. All appeals shall
be upon the record made at the hearing and shall be taken to the Court of
Appeals within 30 days following the date of the action being appealed.
(B) For appeals of regulations, the date of the action shall be the date of
the filing of the regulation by the Board pursuant to the State Rules Act,
Sections 14-3-24, 14-3-25, and 14-4-1 through 14-4-9 NMSA 1978.
(C) Upon appeal, the Court of Appeals shall set aside the action only if
found to be:
(1) Arbitrary, capricious or an abuse of discretion;
(2) Not supported by substantial evidence in the record; or
(3) Otherwise not in accordance with law.
(D) After a hearing and a showing of good cause by the appellant, a stay
of the action being appealed may be granted:
(1) By the Board or the Director, whichever took the action being
appealed; or
(2) By the Court of Appeals if the Board or the Director denies a stay or
fails to act upon an application for a stay within 60 days after receipt of the
application.
§ 9-5-1-10 EMERGENCY POWERS OF THE DIRECTOR.
(A) Notwithstanding any other provision of the Air Quality Control Act,
§§ 9-5-1-1 et seq., or any regulation of the Board, if the Director of the
Department determines that a source or combination of sources presents an
imminent and substantial endangerment to the public health or welfare or to
the environment, the Director may bring suit in the District Court for the
County to restrain immediately any person causing or contributing to the
alleged air pollution to stop the emission of air contaminants causing or
contributing to such air pollution or to take such other action as may be
necessary.

(B) If it is not practicable to assure prompt protection of the public
health or welfare or the environment by commencement of a civil action, the
Director may issue orders necessary to protect the public health or welfare or
the environment. An order shall be effective for a period of not more than 24
hours, unless the Director brings a civil action before the expiration of the 24
hours. If the Director brings an action within that time, the order shall be
effective thereafter for 48 hours or for such longer period as may be
authorized by the court pending litigation.

§ 9-5-1-11 CONFIDENTIAL INFORMATION.

(A) Any records, reports or information obtained under the Air Quality
Control Act or §§ 9-5-1-1 et seq. by the Board or the Department shall be
available to the public, except that upon a satisfactory showing by any person
to the Director or the Board that records, reports or information, except
emission data, or particular parts thereof, to which the Director or the Board
has access under the Air Quality Control Act, if made public would divulge
confidential business records or methods or processes entitled to protection
as trade secrets of that person, the Director or the Board, as applicable, shall
consider such record, report or information, or particular portion thereof,
confidential in accordance with the provisions of Section 14-2-1 NMSA 1978
and 18 U.S.C. Section 1905, except that such record, report or other
information may be disclosed:

(1) To other officers, employees or authorized representatives of the
Department or the Board concerned with carrying out the Air Quality Control
Act;

(2) To officers, employees or authorized representatives of the United
States Environmental Protection Agency concerned with carrying out the
Federal Act; or

(3) When relevant, in any proceeding under the Air Quality Control Act
or the Federal Act.
(B) The Board shall adopt regulations to implement this section, including regulations specifying those business records entitled to treatment as confidential records.

§ 9-5-1-12 LIMITATIONS ON AUTHORITY AND REGULATIONS.
(A) Sections 9-5-1-1 et seq. do not:
(1) Authorize the Board to make any regulation with respect to any condition or quality of the outdoor atmosphere if the condition or air quality level and its effect are confined entirely within the boundaries of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries;
(2) Grant to the Board any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of air quality; or
(3) Supersede or limit the applicability of any law relating to industrial health, safety or sanitation.
(B) The Board shall have no authority to:
(1) Make any regulation to address quality of life impacts absent scientific evidence that there is a nexus to air pollution by identifying the quantities and durations of air contaminants that may, with reasonable probability, cause injury;
(2) Adopt or amend a standard or regulation whereby the impact on industrial development is by design and not a consequence of preventing or abating air pollution;
(3) Expand the definition of air pollution;
(4) Serve as a forum for public discussion for matters not on the agenda;
(5) Draft and present to itself regulations, except it may adopt bylaws to govern its non-hearing proceedings in accordance with § 9-5-1-3(B)(7);
(6) Direct the work of the Director or Department, including no authority, express or implied, to advise, recommend or determine costs associated with Board activities and the City's ability to pay such costs;
(7) Recommend to the Mayor, Director, Department, County Manager,
City Council, or County Commission policies for air quality matters, needs, improvements, and programs;

(8) Advise the Mayor, Director, Department, County Manager, City Council, or County Commission regarding air quality matters, needs and programs; and

(9) Advise the Environmental Planning Commission or County Planning Commission regarding air quality matters.

§ 9-5-1-13 LOCAL AIR QUALITY PERMIT FUND ESTABLISHED.

(A) Pursuant to Section 74-2-16 NMSA 1978 and §§ 9-5-1-1 et seq., an Environmental Health Department air quality permit fund is established.

(B) All fees collected by the Department pursuant to §§ 9-5-1-1 et seq. shall be deposited in the fund created in division (A) above, and shall be used by the City only for the purpose of paying the reasonable costs of funding the department’s performance of the following permitting functions required by the Federal Clean Air Act Amendments of 1990 as follows:

(1) Reviewing and acting upon any application for a permit;

(2) If the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit, not including any court costs or other costs associated with any enforcement action;

(3) Emissions and ambient monitoring;

(4) Preparing generally applicable regulations or guidance;

(5) Modeling, analysis and demonstration; and

(6) Preparing inventories and tracking emissions.

§ 9-5-1-14 INSPECTION.

The Director or an authorized representative, upon presentation of Departmental credentials:

(A) Shall have a right of entry to, upon or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the Board or by any permit condition are located; and

(B) May at reasonable times:

(1) Have access to and copy any records required to be established and maintained by regulations of the Board or any permit condition; and
(2) Inspect any monitoring equipment and method required by regulations of the Board or by any permit condition; and
(3) Sample any emissions that are required to be sampled pursuant to regulation of the Board or any permit condition.
(C) If premises described in divisions (A) or (B) above are unoccupied, a Department employee shall first make a reasonable effort to locate the owner or other person having charge or control of the premises and demand entry.
(D) If entry is refused, the Department shall proceed to obtain a search warrant by filing the documents and following the procedures required by the Metropolitan Court or District Court. The sworn statement filed in conjunction with the application for the search warrant or order shall:
(1) Set forth the particular premises, or portion thereof, sought to be inspected;
(2) State that the owner or occupant of the premises or portion thereof, has refused entry;
(3) State that inspection of the premises or portion thereof is necessary to determine whether it complies with the requirements of §§ 9-5-1-1 et seq.;
(4) Set forth the particular provisions of §§ 9-5-1-1 et seq. sought to be enforced;
(5) Set forth any other reason necessitating the inspection, including knowledge or belief that a particular condition exists in the premises, or portion thereof, which constitutes a violation of §§ 9-5-1-1 et seq.; and
(6) State that the Department or the Department’s designated representative is authorized by the Mayor to make the inspection.
In any court action to enforce the provisions of the Air Quality Control Act, §§ 9-5-1-1 et seq. or any regulation, permit condition or emergency order adopted, imposed or issued pursuant thereto:
(A) The City and the Department shall be represented by the City Attorney; and
(B) The County or City Attorney shall be represented by the District Attorney.
§ 9-5-1-98 VIOLATIONS; COMPLIANCE ORDERS; FIELD CITATIONS.

(A) Whenever, on the basis of any information, the Director determines that any person has violated or is violating any requirement, or prohibition of the Air Quality Control Act, §§ 9-5-1-1 et seq., any regulation promulgated pursuant to §§ 9-5-1-1 et seq., or any condition of a permit issued pursuant thereto, the Director may:

(1) Issue a compliance order 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 any past or current violation, or both; or

(2) Commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

(B) Any order issued pursuant to division (A) above may include a suspension or revocation of any permit, or portion thereof, issued by the Director. Any penalty assessed in the order shall not exceed $15,000 per day of noncompliance for each violation.

(C) Any order issued pursuant to division (A) above shall become final unless, no later than 30 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.

(D) The Board may adopt a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $1,000 per day of violation may be issued by officers or employees of the Department as designated by the Director. The program will be implemented by the Department.

(E) Any person to whom a field citation is issued pursuant to division (D) above may, within a reasonable time as prescribed by regulation by the Board, elect to pay the penalty assessment or to request a hearing by the issuing agency on the field citation. If a request for hearing is not made within
the time specified in the regulation, the penalty assessment in the field
citation shall be final.

(F) Payment of a civil penalty required by a field citation issued
pursuant to division (D) above shall not be a defense to further enforcement
by the Department to correct a violation or to assess the maximum statutory
penalty pursuant to other authorities in the Air Quality Control Act or §§ 9-5-1-
1 et seq. if the violation continues.

(G) In determining the amount of any penalty to be assessed pursuant to
this section, the Director or the individual issuing a field citation shall take
into account the seriousness of the violation, any good-faith efforts to comply
with the applicable requirements and other relevant factors.

(H) In connection with any 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.

(I) Penalties collected pursuant to an administrative order or a field
citation shall be deposited in the City or the County general fund, as
applicable.

§ 9-5-1-99 PENALTY.

(A) Civil Penalty. Any person who violates any provision of the Air
Quality Control Act, §§ 9-5-1-1 et seq., any regulation of the Board or any
permit condition or emergency order adopted or issued pursuant to the Air
Quality Control Act or §§ 9-5-1-1 et seq. may be assessed a civil penalty not to
exceed $15,000 for each day during any portion of which a violation occurs.

(B) Criminal Penalties.

(1) Any person who knowingly commits any violation of §§ 9-5-1-1 et
seq. or a regulation of the Board which is not described as a felony in Section
74-2-14.C or 74-2-14.D NMSA 1978 is guilty of a misdemeanor and shall be
sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

(2) Any person who knowingly makes any false statement,
representation or certification in any application, record, report, plan or other
document filed or required to be maintained under the Air Quality Control Act
or who falsifies, tampers with or knowingly renders inaccurate any monitoring
device or method to be maintained under the Air Quality Control Act or §§ 9-5-1-1 et seq. or regulation adopted pursuant thereto is guilty of a petty misdemeanor and shall, upon conviction, be punished by a fine of not more than $10,000, per day for each violation, or by imprisonment for not more than six months, or by both."

Section 3. SEVERABILITY CLAUSE. If any section, paragraph, sentence, clause, word, or phrase of this ordinance is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the validity of the remaining provisions of this ordinance. The Council hereby declares that it would have passed this ordinance and each section, paragraph, sentence, clause, word, or phrase thereof irrespective of any provision being declared unconstitutional or otherwise invalid.

Section 4. COMPILATION. This ordinance shall be incorporated in and made part of the Revised Ordinances of Albuquerque, New Mexico 1994.

Section 5. EFFECTIVE DATE. This ordinance shall take effect December 3, 2023.
PASSED AND ADOPTED THIS __8th__ DAY OF __November__ 2023

BY A VOTE OF: ___5___ FOR ___4___ AGAINST.

For: Bassan, Grout, Jones, Lewis, Sanchez
Against: Benton, Davis, Fiebelkorn, Peña

__________________________
Pat Davis, President
City Council

APPROVED THIS __22__ DAY OF __November__, 2023

Bill No. O-23-88

__________________________
VETO

Timothy M. Keller, Mayor
City of Albuquerque

The Mayor's veto was overridden by EC-23-404 on December 4, 2023

ATTEST: by a vote of 6 FOR and 3 AGAINST.

For: Bassan, Grout, Jones, Lewis, Pena, Sanchez
Against: Benton, Davis, Fiebelkorn

__________________________
Ethan Watson, City Clerk
CITY of ALBUQUERQUE  
TWENTY FIFTH COUNCIL

COUNCIL BILL NO. O-23-88  ENACTMENT NO. ______________________

SPONSORED BY: Dan Lewis

ORDINANCE

REPEALING CHAPTER 9, ARTICLE 5, PART 1 ROA 1994, THE JOINT AIR QUALITY CONTROL BOARD ORDINANCE; ABOLISHING THE CURRENT ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD; ADOPTING CHAPTER 9, ARTICLE 5, PART 1 ROA 1994, THE JOINT AIR QUALITY CONTROL ORDINANCE; CREATING THE ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

WHEREAS, it has been asserted by legal counsel representing the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) that said Board is an autonomous entity established by state statute, and not subject to control by Environmental Health, the City Council, or the County Commission; and

WHEREAS, it has been further affirmed by legal counsel representing the Air Board that the Air Board maintains collaborative relations with Environmental Health, the New Mexico Environmental Department, and the Environmental Protection Agency, without being governed by them; and

WHEREAS, these statements suggest that the Air Board may not be answerable to elected officials and, consequently, the electorate; and

WHEREAS, the absence of adherence to state law by the Air Board could result in a lack of accountability; and

WHEREAS, not all meetings sanctioned by the body regarding policy changes are accessible to the general public; and

WHEREAS, the Air Board conducts sub-committee meetings and engages select members of the public in those meetings; and
WHEREAS, the Open Meetings Act was established with the intent of ensuring that policy decisions affecting the public are made in a transparent and open manner, to serve the best interests of all residents of New Mexico;

WHEREAS, adherence to the Open Meetings Act is essential to the preservation of a free society and the democratic process, as it is crucial for a policymaking body to maintain the trust of the public; and

WHEREAS, a significant portion of the Air Board comprises individuals advocating for specific interests rather than a diverse representation of experts in the relevant subject matter; and

WHEREAS, historically, the Air Board has strived to include members with backgrounds in the fields of medicine, science, industry, advocacy, law, and technical academia; and

WHEREAS, it is imperative to maintain a composition that reflects the diverse expertise required for the comprehensive consideration of pertinent matters.

BE IT ORDAINED BY THE COUNCIL, GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

SECTION 1. REPEALER. Chapter 9, Article 5, Part 1 is hereby repealed.

SECTION 2. NEW MATERIAL. Chapter 9, Article 5, Part 1 is hereby added to read as follows:

“PART 1: AIR QUALITY CONTROL BOARD

§ 9-5-1-1 SHORT TITLE.

Sections 9-5-1-1 et seq. may be cited as the “Joint Air Quality Control Board Ordinance.”

§ 9-5-1-2 DEFINITIONS.

As provided in the New Mexico Air Quality Control Act, Sections 74-2-1 through 74-2-17 NMSA 1978 (hereinafter referred to as the “Air Quality Control Act”), the following definitions shall apply to terms used in §§ 9-5-1-1 et seq.

AIR CONTAMINANT. Any substance, including but not limited to any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, microorganisms, radioactive material, any combination thereof or any decay or reaction product thereof.
AIR POLLUTION. The emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

BOARD. The Albuquerque-Bernalillo County Air Quality Control Board created by §§ 9-5-1-1 et seq.

DEPARTMENT. The administrative agency that is the local agency under the Air Quality Control Act of the Albuquerque-Bernalillo County Air Quality Control Board.

DIRECTOR. The administrative head of the Department or his or her authorized representative.

EMISSION LIMITATION and EMISSION STANDARD. A requirement established by the Board, the Department, or pursuant to the federal Act that limits the quantity, rate or concentration, or combination thereof, of emissions of air contaminants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction.

ENVIRONMENT DEPARTMENT. The Environment Department of the state.

EX PARTE COMMUNICATION. An oral or other communication with a board member, a board hearing officer, or board attorney regarding the merits of an expected or pending petition or related proceeding if:

1. the communication is made by a person, including a board member, hearing clerk, hearing officer, or board attorney;
2. the person communicating knows or has reason to know a petition will be or has been filed for a hearing before the Board;
3. the communication is made without all other parties to the proceeding being present or receiving the same communication received by the board member, board hearing officer, or board attorney, except where authorized by the closed meeting provisions of the Open Meetings Act; and
4. the communication is intended to affect, or reasonably may be expected to affect the board member's, board hearing officer's, or board attorney's opinion regarding the merits of the expected or pending petition or related proceeding.
FEDERAL ACT. The Federal Clean Air Act, 42 U.S.C. 7401 through 7642, its subsequent amendments and successor provisions.

FEDERAL STANDARD OF PERFORMANCE. Any standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412.

HAZARDOUS AIR POLLUTANT. An air contaminant that has been classified as a hazardous air pollutant pursuant to the Federal Act.

MANDATORY CLASS I AREA. Any of the following areas in the state of New Mexico that were in existence on August 7, 1977:

1. National wilderness areas that exceed 5,000 acres in size; and
2. National parks that exceed 6,000 acres in size.

MAYOR. The Mayor or his or her authorized representative.

MODIFICATION. Any physical change in, or change in the method of operation of a source that results in an increase in the Potential Emission Rate of any Regulated Air Contaminant emitted by the source or that results in the emission of any Regulated Air Contaminant not previously emitted, but does not include:

1. A change in ownership of the source;
2. Routine maintenance, repair or replacement;
3. Installation of air pollution control equipment and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the board or pursuant to the Federal Act; or
4. Unless previously limited by enforceable permit conditions:
   (a) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;
   (b) An increase in the hours of operation; or
   (c) Use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material, or if use of an alternate fuel or raw material is caused by any natural gas curtailment or emergency allocation or any other lack of supply of natural gas.
NONATTAINMENT AREA. For any air contaminant, an area that is designated “nonattainment” with respect to that contaminant within the meaning of Section 107(d) of the Federal Act.

PERSON. An individual, partnership, corporation, association, the state or political subdivision of the state or any agency, department, or instrumentality of the United States and any of their officers, agents or employees.

PLAN. Any and all parts of the state implementation plan that pertain to the county that are adopted by the Board for submittal by the Governor of the state to the federal Environmental Protection Agency pursuant to 42 U.S.C. Section 7410.

POTENTIAL EMISSION RATE. The emission rate of a source at its maximum capacity in the absence of air pollution control equipment that is not vital to production of the normal product of the source or to its normal operation; also defined by Board regulations as “pre-controlled” emissions.

REGULATED AIR CONTAMINANT. Any air contaminant, the emission or ambient concentration of which is regulated pursuant to the Air Quality Control Act or the Federal Act.

SIGNIFICANT DETERIORATION. Any increase in the ambient concentrations of any air contaminant above the levels allowed by the Federal Act or Federal regulations for that air contaminant in the area within which the increase occurs.

SOURCE. Any structure, building, equipment, facility, installation or operation that emits or may emit any air contaminant.

STANDARD OF PERFORMANCE. A requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure continuous emission reduction.

STATE IMPLEMENTATION PLAN. Any plan submitted by the Governor of the state of New Mexico to the federal Environmental Protection Agency pursuant to 42 U.S.C. Section 7410.

§ 9-5-1-3 JOINT AIR QUALITY CONTROL BOARD.

(A) In accordance with the New Mexico Air Quality Control Act, a joint air quality control board known as the Albuquerque-Bernalillo County Air Quality Control Board is created. The Board shall serve as a joint local authority acting
on behalf of both the city and the county. Within the exterior boundaries of the county, the Board shall have authority and jurisdiction to exercise the same functions pertaining to air quality as the functions that have been delegated by the Air Quality Control Act to the New Mexico Environmental Improvement Board except any functions reserved exclusively for the Environmental Improvement Board.

(B) The membership and organization of the Board shall be as described in this section.

(1) Members of the Board previously appointed and serving at the time §§9-5-1-1 et seq. are enacted shall continue serving their terms on the Board. The length and termination date of their terms of office shall not be affected by the passage of §§ 9-5-1-1 et seq.

(2) The Board shall consist of seven members, four of whom shall be appointed by the Mayor with the advice and consent of the City Council and three of whom shall be appointed by the County Commission. The Mayor shall submit qualified appointments to City Council within 30 days of the effective date. If the Mayor does not timely submit qualified persons for appointment, City Council may appoint the initial members of the Board.

(3) Members shall be appointed for three-year terms. No member shall serve more than two consecutive terms at a time. If a person is appointed to fill an unexpired term of another member, that term shall be considered a term for the purpose of this limitation. The positions on the Board shall be staggered appointments so no more than two city appointee’s terms expire in any single year. Vacant positions shall be filled by individuals appointed by the same authority that appointed the outgoing member.

(4) Nominations and appointments to the Board shall be made as follows:

(a) At least a majority of the membership of the Board shall be individuals who represent the public interest and meet the requirements of the state and federal guidelines set forth in the New Mexico Air Quality Control Act, as amended, and the federal Clean Air Act, 42 U.S.C.A. Section 7401, et seq., as amended. Further, to the extent that the requirement does not conflict with this division (a), Board members will be selected as follows: one Board member shall be a registered professional licensed engineer who shall have at least five...
(5) years’ experience in the field of air pollution control; one Board member shall be a physician licensed in New Mexico who shall be experienced in the health effects of air contaminants; one Board member shall be a person involved in the program of an institute of higher learning in the state involved in the conducting of training in air pollution evaluation and control; and one Board member shall be a person from City industry with current full-time employment in a private manufacturing concern and have a college degree and 8 years of combined technical training and experience in permit compliance or air pollution abatement for Title 5 or non-Title 5 sources for a source permitted in the city or county. Therefore, selections may be made from a broad range of persons representing the public interest and who are experienced or trained in disciplines including natural sciences, humanities, social studies, finance, medicine and health, engineering or physics, law, law enforcement, education, business and industry. As used in this section: REPRESENT THE PUBLIC means does not have a controlling interest in, have 5 percent or more of his or her capital invested in, serve as attorney for, act as consultant for, serve as officer or director of, or hold any other official or contractual relationship with any person subject to permits or enforcement orders or any trade or business association of which such a person is a member; SIGNIFICANT PORTION OF INCOME means 10 percent or more of gross personal income for a calendar year, including retirement benefits, consultant fees, and stock dividends, except that it shall mean 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant, to retirement, pension, or singular arrangement. Income derived from mutual-fund payments, or from other diversified investments as to which the recipient does not know the identity of the primary sources of income, shall be considered part of the recipient’s gross personal income but shall not be treated as income derived from persons subject to permits or enforcement orders; and PERSONS SUBJECT TO PERMITS OR ENFORCEMENT ORDERS includes any individual, corporation, partnership, or association who holds, is an applicant for, or is subject to any permit, or who is or may become subject to any enforcement order under the Federal Clean Air
Act, Air Quality Control Act, any regulation of the Board or any permit condition
issued thereto, except that it does not include (1) an individual who is or may
become subject to an enforcement order solely by reason of his or her
ownership or operation of a motor vehicle or (2) any department or agency of,
a state, local or regional government.

(b) No person employed on a full time basis by either the city or the
county shall be a member of the Board. No elected city or county official, and
no member of the immediate family of any elected city or county official shall
be appointed to the Board.

(c) Members shall submit to the Department a signed written statement
to assure compliance with the applicable law on Board composition, upon
appointment and renewed annually or with any change in employment, and
such statement shall be available for public inspection. In the event either the
Department cannot make a finding that at least a majority of the Board as
constituted by appointment of its members meets the requirements of
applicable law, the Department shall notify the City Council and the County
Commission of the determination that at least a majority of its membership does
not meet the requirements. The Department shall advise and make
recommendations regarding corrective action necessary to allow the Board to
be qualified under applicable law, including substitutionary appointments of a
member or members. The Board shall not act to hear petitions of permit
appeals, variances, or regulatory changes until the City Council and County
Commission have both determined that it can do so consistent with applicable
law.

(c)(d) City-appointed members shall be residents of the city and
county-appointed members shall be residents of the county.

(d)(e) A Board member may be removed from office by the appointing
authority if:

(i) The appointing authority determines the member has violated any law,
regulation, or ordinance, or for other good cause such as malfeasance or the
intentional failure to carry out the duties of the Board, or is otherwise incapable
or unfit to discharge the duties of the office;

(ii) the member has missed three consecutive meetings or has been
absent from more than 50% of the meetings during any 12 consecutive meetings; or

(iii) to comply with the requirements of division (B)(3)(a) for member composition of the Board.

(f) At least two months before a Board member’s term expires, the Department shall solicit a recommended list of qualified members for the city vacancy as suggested by the City Council and the Department for consideration by the Mayor. The County Commission will appoint its representatives to the Board. The list shall include a brief biography describing the qualifications of each candidate. From the list, as modified or enlarged by the appointing authority, appointments to the Board will be made.

(g) Candidates appointed shall be notified in writing, and the candidate must accept or reject the appointment in writing.

(e)(h) Unless a member retires or is removed, each member shall serve until a successor has been appointed.

(i) If a vacancy occurs for reasons other than expiration of a term, the Department shall promptly utilize the procedure described in division (e) above. Each vacancy shall be filled by the authority that appointed the departing member. The replacement member shall serve for the remainder of the unexpired term.

(5)(4) Four members present shall constitute a quorum. A quorum shall be present for all matters decided by a vote of the Board.

(6)(5) Any action, order or decision of the Board requires a simple majority vote of the members present, except for adoption, amendment or repeal of a Board regulation, in which case the concurrence of four members shall be required.

(7)(6) All officers of the Board shall be elected annually by the Board for one-year terms. No officer shall serve in the same position for more than two consecutive years at a time.

(8)(7) The Board may adopt rules to govern its proceedings. Such rules shall not take effect until reviewed and approved by the City Attorney and County Attorney.

(C) The Board shall meet in public facilities with public seating available.
The Board shall meet monthly if a quorum is available unless a meeting is unnecessary or delayed for good reason. The Board shall hold a minimum of six monthly meetings a year. Special additional meetings may be held as needed.

Notice of time, place and agenda of meetings, work sessions, committee meetings, hearings, any other gathering of a quorum of the Board, and subcommittee meetings shall be published according to the requirements of law, including the Open Meetings Act. Meetings, work sessions, committee meetings, and hearings and any other gathering of a quorum of the Board, and subcommittee meetings shall be open to the public and shall follow the procedures described in the Open Meetings Act.

In addition to any requirements applicable to each member based on the member’s appointing authority as set forth in the City and County codes of conduct, any member of the Board who has a conflict of interest regarding a matter before the Board shall disqualify himself or herself from the discussion and shall abstain from the vote on such matter. If a potential conflict of interest is raised during a meeting a member of the board shall submit the question to the entire Board for a determination of whether disqualification is necessary. The member with the potential conflict being voted on shall not vote in this determination. The Board’s determination of whether disqualification is necessary shall be final. In the event a member is made aware of a conflict of interest requiring disqualification or abstention outside of a meeting, the member shall disclose the potential conflict of interest to the board and may seek guidance concerning disqualification from the board attorney or seek an advisory opinion from the County or City, as applicable to each member based on the member’s appointing authority. A conflict of interest means any interest which may yield, directly or indirectly any monetary or other material benefit to the Board member or the member’s spouse or minor child.

The City Environmental Planning Commission (EPC) and the County Planning Commission (CPC) may appoint a member of the EPC and of the CPC, respectively, to be liaisons to the Air Quality Control Board. The EPC and CPC liaisons may attend Board meetings and may participate in Board discussions, but will not be members of the Board and will not vote. The respective liaisons
may communicate with the Board and their respective planning commissions regarding air quality issues.

(H) The City shall provide the staff administrative support it deems necessary to the Board to assist the Board with carrying out the administrative functions of its powers and duties under the Air Quality Control Act. Nothing herein shall limit the city’s authority and ability to maintain full oversight and control over such staff City resources.

(1) The Director of the Department shall attend all meetings of the Board, but not be entitled to a vote. The Department shall record all transactions and proceedings of the Board and shall perform the duties required by the Air Quality Control Act. The Department shall handle correspondence, keep records, prepare reports, and perform such other duties as the city may direct or authorize to carry out the administrative functions of the city and Board’s powers and duties under the Air Quality Control Act.

(2) The Director is the custodian of all files and records of the Board and the Board shall provide such files and records to the Director upon request.

(4) Staff may be an employee of the city but shall not include such employee’s supervisory staff.

(5) In the exercise of any of its powers or duties, the Board may act with legal advice received in accordance with the Open Meetings Act, Chapter 10, Article 15, NMSA 1978. Such legal advice shall be provided by the city. Such legal research shall be distributed to all Board members. Legal advice and legal research shall only be requested with the concurrence of four Board members. An attorney to the Board shall not be a member of the Board or serve as an ex-officio member, and shall act only in an advisory capacity. The Board shall not delegate its authority to the Board’s attorney.

§ 9-5-1-4 DUTIES AND POWERS OF BOARD.

(A) The Board, in accordance with the Air Quality Control Act, shall prevent or abate Air Pollution within the city and county.

(B) The Board shall:
(1) Adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act and §§9-5-1-1 et seq. to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the Board's jurisdiction, or any part thereof; and

(2) Adopt a plan for the regulation, control, prevention or abatement of Air Pollution, recognizing the differences, needs, requirements and conditions within the county or any part thereof.

(C) Regulations adopted by the Board may:

(1) Include regulations to protect visibility in Mandatory Class I Areas, to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas, provided that such regulations:

   (a) shall be no more stringent than but at least as stringent as required by the Federal Act and federal regulations pertaining to visibility protection in Mandatory Class I Areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and

   (b) Shall be applicable only to sources subject to such regulation pursuant to the Federal Act;

(2) Prescribe standards of performance for Sources and Emission Standards for Hazardous Air Pollutants that, except as provided in division (3) below:

   (a) Shall be no more stringent than but at least as stringent as required by federal standards of performance; and

   (b) Shall be applicable only to sources subject to such federal standards of performance;

(3) Include regulations governing emissions from solid waste incinerators that shall be as least as stringent as, and may be more stringent than, any applicable federal emission limitations;

(4) Require notice to the Department of the intent to introduce or allow the introduction of an air contaminant into the air within the geographical area of the Board's jurisdiction; and

(5) Require any person emitting any air contaminant to:

   (a) Install, use and maintain emission monitoring devices;
(b) Sample emissions in accordance with methods and at locations and intervals as may be prescribed by the Board;

(c) Establish and maintain records of the nature and amount of emissions;

(d) Submit reports regarding the nature and amounts of emissions and the performance of emission control devices; and

(e) Provide any other reasonable information relating to the emission of air contaminants.

(D) Any regulation adopted under this section shall be consistent with federal law, if any, relating to control of motor vehicle emission.

(E) In making its regulations, the Board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) Character and degree of injury to or interference with health, welfare, visibility and property;

(2) The public interest, including the social and economic value of the Sources and subjects of air contaminants; and

(3) Technical practicability and economic reasonableness of reducing or eliminating air contaminants from the Sources involved and previous experience with equipment and methods available to control the air contaminants involved.

§ 9-5-1-5 DUTIES AND POWERS OF THE DEPARTMENT.

The Department shall:

(A) Administer and enforce the provisions of the Air Quality Control Act, §§9-5-1-1 et seq. and any regulations adopted pursuant thereto and any other laws relating to Air Pollution applicable within the city and the county. The staff for the Board shall be provided by the city. The Department shall perform, within the boundaries of the county, all functions delegated to the New Mexico Environment Department under the Act, except for the duties and powers reserved exclusively for the Environment Department.

(B) Develop facts and make investigations and studies consistent with the Air Quality Control Act and §§9-5-1-1 et seq., and in connection therewith, enter at all reasonable times in or upon any private or public property, except private residences, that the Department has reasonable cause to believe is or
will become a source of air contaminants contributing to air pollution and
require the production of information relating to emissions that cause or
contribute to air pollution. The results of any such investigations shall be
reduced to writing if any enforcement action is contemplated, and a copy
thereof shall be furnished to the owner or occupant of the premises before the
action is filed.

(C) Institute legal proceedings to compel compliance with the Air Quality
Control Act, §§9-5-1-1 et seq., or any regulation of the Board.

(D) Encourage and make every reasonable effort to obtain voluntary
cooperation by the owner or occupants to preserve, restore or improve air
purity.

(E) Consult with any person proposing to construct, install or otherwise
acquire an air contaminant source, device, system or control mechanism
concerning the efficiency of the device, system, or mechanism or the air
pollution problem that may be related to the source, device, system or
mechanism, provided that consultation shall not relieve any Person from
compliance with the Air Quality Control Act, §§ 9-5-1-1 et seq., regulations in
force, pursuant thereto, or any other provision of law.

(F) Establish a small business stationary source technical and
environmental compliance assistance program, consistent with the provisions
of Section 507 of the Federal Act.

(G) Accept, receive and administer grants or other funds or gifts from
public and private agencies, including the federal government or from any
person.

(H) Classify and record air contaminant sources that in its judgment, may
cause or contribute to air pollution, according to levels and types of emissions
and other characteristics that relate to air pollution, provided that
classifications may be for application to the county as a whole or to any
designated area of the city or county, and shall be made with special reference
to the effects on health, economic and social factors and physical effects on
property.

(I) Develop and present to the Board a Plan for the regulation, control,
prevention or abatement of air pollution, recognizing the differences, needs,
requirements and conditions in the different portions of the geographical area of the Department’s responsibility as established by §§ 9-5-1-1 et seq.

§ 9-5-1-6 ADOPTION OF REGULATIONS; NOTICE AND HEARING.

(A) Any person may recommend or propose regulations to the Board for adoption. The Board shall determine whether to hold a hearing within 60 days of submission of a proposed regulation.

(B) Persons interested in recommending or proposing regulations shall engage other interested persons, the Department, and any other relevant regulatory entities in the regulation development process. The petition shall identify the activities undertaken for development of the proposed regulation text and how the petitioner engaged other interested persons, the Department, and any other relevant regulatory entities. Failure to solicit and consider the positions of others may result in the denial of a hearing.

(C) The Board shall determine whether to hold a hearing within 60 days of the submission of a proposed regulation. In addition to other applicable notice requirements, notice of the Board’s intention to consider whether to hold a hearing shall be given at least 15 days prior to the meeting at which the matter will be considered. At a minimum, notice shall be posted in the lobby of City Hall and County offices; electronically on the Board’s web site; and in writing to the Director. The notice shall state the subject, the time and the place of the meeting and the manner in which interested persons may obtain relevant information and present their views.

(D) No regulation or emission control requirement shall be adopted until after a public hearing by the Board. As used in this section, REGULATION includes any amendment or repeal thereof.

(E) Notice of hearing shall be given at least 30 days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The subject shall include a summary of the full text of the proposed rule and a short explanation of the purpose of the proposed rule with reasonable specificity. The notice shall also state where interested persons may secure copies of any proposed regulation or air quality standard. The notice shall be published in a newspaper of general circulation in the city and county. Reasonable effort shall be made to
1 give notice to all persons who have made a written request to the Board for
2 advance notice of its hearings.
3 (C)(F) The Board shall not consider alternate proposals at the hearing,
4 though it can consider modifications to a proposal which simply deletes,
5 clarifies or elaborates on elements of the already-submitted proposal without
6 adding or changing substantive new obligations or requirements.
7 (D)(G) At the hearing, the Board shall allow all interested persons reasonable
8 opportunity to submit data, views or arguments orally or in writing and to
9 examine witnesses testifying at the hearing. Any person heard or represented
10 at the hearing shall be given written notice of the action of the Board.
11 (H) The Board may shall designate a hearing officer to take evidence in the
12 hearing.
13 (I) All hearings shall be recorded verbatim and any transcription costs
14 shall be borne by the petitioner.
15 (J) At no time before a petition is expected to be filed and at no time
16 between the filing of a petition and the final decision of the Board or withdrawal
17 of the petition or related regulatory action shall any person have ex parte
18 communication.
19 (K) The Department shall present to City Council any regulatory change
20 promulgated by the Board.
21 (1) City Council may grant a stay of any regulatory change or emission
22 control requirement promulgated by the Board after a hearing and upon a
23 determination of good cause, including whether harm to the public interest will
24 result. City Council shall state the length of time the stay is in effect. If City
25 Council fails to approve a stay of any regulatory change within 60 days after
26 presentation, the regulatory change or emission control requirement shall be in
27 full force and effect.
28 (2) City Council may disapprove any regulatory change or emission
29 control requirement promulgated by the Board by two-thirds of the entire
30 membership of City Council disapproving the regulatory change or emission
31 control requirement. If City Council fails to disapprove any regulatory change
32 or emission control requirement within 60 days after presentation, the
33 regulatory change or emission control requirements shall be in full force and
effect.

(3) Any person adversely affected by a City Council decision in divisions (1) and (2) may appeal to the court of appeals.

(E)(L) No regulation or emission control requirement shall be filed under the State Rules Act, Sections 14-3-24, 14-3-25, 14-4-1 through 14-4-9 NMSA 1978, until at least 60 days after it is presented by the Department to City Council. No regulation or emission control requirement adopted by the Board shall become effective until 30 days after its filing under the State Rules Act, Sections 14-3-24, 14-3-25, 14-4-1 through 14-4-9 NMSA 1978.

(F)(M) A copy of adopted air quality control regulations shall be on file in the office of the City Clerk and shall be available for inspection by the public during regular business hours. Copies of the regulations shall be available to any person upon request and payment of a reasonable charge set by the Mayor.

§ 9-5-1-7 PERMITS; APPEALS; FEES.

(A) By regulation, the Board shall require:

(1) Any person intending to construct or modify any source, except as otherwise specifically provided by regulation, to obtain a construction permit from the Department prior to such construction or modification; and

(2) Any person intending to operate any source for which an operating permit is required pursuant to the 1990 amendments to the Federal Act, except as otherwise specifically provided by regulation, to obtain an operating permit from the Department.

(B) Regulations adopted by the Board shall include at least the following provisions:

(1) Requirements for the submission of relevant information, including but not limited to information the Department deems necessary to ensure that regulations and standards under §§ 9-5-1-1 et seq., the Air Quality Control Act or the Federal Act will not be violated.

(2) Specification of the deadlines for processing permit applications; provided, the deadline for a final decision by the Department on a construction permit application may not exceed:

(a) One hundred and eighty days after the application is determined to be complete, if the application is not affected by requirements for prevention of
significant deterioration; or

(b) Two hundred and forty days after the application is determined to be complete, if the application is affected by requirements for prevention of significant deterioration;

(3) Specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit, provided the permit regulations adopted include provisions requiring that notice be given to the New Mexico Environment Department of all applications by any source that emits, or has a Potential Emission Rate of 100 tons per year or more of any Regulated Air Contaminant, including any source of fugitive emissions of any Regulated Air Contaminant, at least 60 days prior to the date on which construction or major modification is to commence;

(4) A schedule of construction permit fees sufficient to cover:

(a) The reasonable costs of reviewing and acting upon any application for such permit; and

(b) The reasonable costs of implementing and enforcing the terms and conditions of the permit, excluding any court or other costs associated with an enforcement action.

(5) A schedule of emission fees consistent with the provisions of Section 502(b)(3) of the 1990 amendments to the Federal Act;

(6) Specification of the maximum length of time for which a permit shall be valid, provided that for an operating permit, such period may not exceed five years; and

(7) For an operating permit only:

(a) Provisions, consistent with Sections 502(b) and 505(b) of the Federal Act, that require:

1. Notice to and review and comment by the United States Environmental Protection Agency (EPA); and

2. If the Department receives notice of objection from the United States Environmental Protection Agency before the operating permit is issued, the Department shall not issue the permit unless the permit is revised and issued pursuant to Section 505(c) of the Federal Act;

(b) Provisions governing renewal of the operating permit; and
(c) Specification of the conditions under which the operating permit may be terminated, modified or revoked and reissued prior to the expiration of the term of the operating permit.

(C) The Department may deny any application for:

(1) A construction permit if it appears that the construction or modification: will not meet applicable requirements of §§ 9-5-1-1 et seq., the Air Quality Control Act, the federal Act or any regulation adopted pursuant thereto or

(2) An operating permit if:

(a) The source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance or a regulation of the Board;

(b) It appears that the source for which the permit is sought will cause or contribute to air contaminant levels in excess of any national, state or applicable local ambient air quality standard; or

(c) Any other provision of §§ 9-5-1-1 et seq. and the Air Quality Control Act or the Federal Act will be violated.

(D) The Department may specify conditions to any permit granted under this section, including:

(1) For a construction permit, a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the requirements of §§ 9-5-1-1 et seq., the Air Quality Control Act, the Federal Act or any regulations promulgated pursuant thereto; and

(2) For an operating permit:

(a) Imposition of, individual emission limits, determined on a case-by-case basis, but only as restrictive as necessary to meet the requirements of the Air Quality Control Act and the Federal Act or the emission rate specified in the operating permit application, whichever is most stringent;

(b) Compliance with applicable federal standards of performance;

(c) Imposition of reasonable restrictions and limitations not relating to emission limits or emission rates; or

(d) Any combination of the conditions listed above.

(E) This section does not authorize the Department to require the use of
machinery, devices or equipment from a particular manufacturer if the federal standards of performance, regulations of the Board and permit conditions may be met by machinery, devices or equipment otherwise available. 

(F) The issuance of a construction or operating permit does not relieve any person from the responsibility of complying with the provisions of the Air Quality Control Act, §§ 9-5-1-1 et seq. or any applicable regulations of the Board. Any conditions placed upon a permit by the Department shall be enforceable to the same extent as a regulation of the Board.

(G) Any person who participated in a permitting action before the Department shall be notified by the Department of the action taken by the Department and the reasons for the action. Notification of the applicant shall be by certified mail.

(H) Any person who participated in a permitting action before the Department and who is adversely affected by such permitting action may file a petition for hearing before the Board. The petition shall be made in writing to the Board within 30 days from the date notice is given of the Department's action. Unless a timely request for hearing is made, the decision of the Department shall be final.

(I) If a timely petition for hearing is made, the Board shall hold a hearing within 90 days after receipt of the petition. The Board shall notify the petitioner and the applicant or permittee, if other than the petitioner, by certified mail of the date, time and place of the hearing. If the subject of the petition is a permitting action deemed by the Board to substantially affect the public interest, the Board shall ensure that the, public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or, in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

(J) The Board shall designate a hearing officer to take evidence in the hearing. All hearings shall be recorded verbatim and any transcription and administrative costs shall be borne by the petitioner.

(F) The burden of proof shall be upon the petitioner. Based upon the
evidence presented at the hearing, the Board shall sustain, modify or reverse
the action of the Department.

(F)(G) At no time before a petition is expected to be filed and at no time
between the filing of a petition and the final decision of the Board or withdrawal
of the petition or related permit action shall any person have ex parte
communication.

(K) Notwithstanding any other provision of law, and subject to the
provisions of Section 74-2-4 NMSA 1978, a final decision on a permit by the
Department, the Board or the court of appeals that a new source will or will not
meet applicable local, state and federal air pollution standards and regulations
shall be conclusive and is binding on every city, county and state agency, and
as an issue before any such agency shall be deemed resolved in accordance
with that final decision.

(L) Fees collected pursuant to this section shall be deposited in a fund
created pursuant, to Section 74-2-16 NMSA 1978 if collected pursuant to a
permit regulation adopted by the Board pursuant to this section.

§ 9-5-1-8 VARIANCES.

(A) The Board may grant an individual variance from the limitations
prescribed under the Air Quality Control Act, §§9-5-1-1 et seq., any regulation
of the Board, or any permit condition imposed by the Department whenever it
is found, upon presentation of adequate proof:

(1) That compliance with any part of the Air Quality Control Act, §§9-5-1-
1 et seq., any regulation of the Board, or any permit condition will:

(a) Result in an arbitrary and unreasonable taking of property; or

(b) Impose an undue economic burden upon any lawful business,

occupation or activity; and

(2) That the granting of the variance will not:

(a) Result in a condition injurious to health or safety; or

(b) Cause or contribute to an air contaminant level in excess of any

primary national ambient air quality standard.

(B) No variance shall be granted pursuant to this section until the Board
has considered the relative interests of the applicant, other owners of property
likely to be affected by the discharges and the general public.

21
(C) Any variance or renewal thereof shall be granted within the requirements of Subsection A of this section and for time periods and under conditions consistent with the reasons therefor, and within the following limitations:

(1) If the variance is granted on the ground that there are no practicable means known or available for the adequate prevention, abatement or control of the air pollution involved, it shall be only until the necessary means for prevention, abatement or control become known and available; If the variance is granted on the ground that compliance with the particular requirement or requirements from which variance is sought will necessitate the taking of measures that, because of their extent or cost, must be spread over a considerable period of time, it shall be for a period not to exceed such reasonable time as, in the view of the Board, is requisite for the taking of the necessary measures. A variance granted on the ground specified in this division (2) shall contain a timetable for the taking of action in an expeditious manner and shall be conditioned on adherence to the timetable; or

(2) If the variance is granted on the ground that it is justified to relieve or prevent hardship of a kind other than that provided for in divisions (1) and (2) of this division (C), it shall be for not more than one year.

(D) Any person seeking a variance shall do so by filing a petition for variance with the Director. The Director shall promptly investigate the petition and make a recommendation to the Board as to the disposition of the petition.

(E) Upon receiving the recommendation of the Director on the variance, the Board shall:

(1) If the recommendation of the Director favors a variance, hold a public hearing prior to the granting of any variance; and

(2) If the Director is opposed to the granting of the variance, hold a hearing only upon the request of the petitioner.

(F) In the hearing, the burden of proof shall be upon the petitioner.

(G) At no time before a petition is expected to be filed and at no time between the filing of a petition and the final decision of the Board or withdrawal of the petition or related variance action shall any person have ex parte communication.
§ 9-5-1-9 JUDICIAL REVIEW; ADMINISTRATIVE ACTIONS.

(A) Any person adversely affected by an administrative action taken by the Board or the Director may appeal to the Court of Appeals. All appeals shall be upon the record made at the hearing and shall be taken to the Court of Appeals within 30 days following the date of the action being appealed.

(B) For appeals of regulations, the date of the action shall be the date of the filing of the regulation by the Board pursuant to the State Rules Act, Sections 14-3-24, 14-3-25, and 14-4-1 through 14-4-9 NMSA 1978.

(C) Upon appeal, the Court of Appeals shall set aside the action only if found to be:

(1) Arbitrary, capricious or an abuse of discretion;
(2) Not supported by substantial evidence in the record; or
(3) Otherwise not in accordance with law.

(D) After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

(1) By the Board or the Director, whichever took the action being appealed; or
(2) By the Court of Appeals if the Board or the Director denies a stay or fails to act upon an application for a stay within 60 days after receipt of the application.

§ 9-5-1-10 EMERGENCY POWERS OF THE DIRECTOR.

(A) Notwithstanding any other provision of the Air Quality Control Act, §§9-5-1-1 et seq., or any regulation of the Board, if the Director of the Department determines that a source or combination of sources presents an imminent and substantial endangerment to the public health or welfare or to the environment, the Director may bring suit in the District Court for the county to restrain immediately any person causing or contributing to the alleged air pollution to stop the emission of air contaminants causing or contributing to such air pollution or to take such other action as may be necessary.

(B) If it is not practicable to assure prompt protection of the public health or welfare or the environment by commencement of a civil action, the Director may issue orders necessary to protect the public health or welfare or the environment. An order shall be effective for a period of not more than 24 hours,
unless the Director brings a civil action before the expiration of the 24 hours. If
the Director brings an action within that time, the order shall be effective
thereafter for 48 hours or for such longer period as may be authorized by the
court pending litigation.

§ 9-5-1-11 CONFIDENTIAL INFORMATION.

(A) Any records, reports or information obtained under the Air Quality
Control Act or §§ 9-5-1-1 et seq. by the Board or the Department shall be
available to the public, except that upon a satisfactory showing by any person
to the Director or the Board that records, reports or information, except
emission data, or particular parts thereof, to which the Director or the Board
has access under the Air Quality Control Act, if made public would divulge
confidential business records or methods or processes entitled to protection
as trade secrets of that person, the Director or the Board, as applicable, shall
consider such record, report or information, or particular portion thereof,
confidential in accordance with the provisions of Section 14–2-1 NMSA 1978
and 18 U.S.C. Section 1905, except that such record, report or other information
may be disclosed:

(1) To other officers, employees or authorized representatives of the
Department or the Board concerned with carrying out the Air Quality Control
Act;

(2) To officers, employees or authorized representatives of the United
States Environmental Protection Agency concerned with carrying out the
Federal Act; or

(3) When relevant, in any proceeding under the Air Quality Control Act or
the Federal Act.

(B) The Board shall adopt regulations to implement this section, including
regulations specifying those business records entitled to treatment as
confidential records.

§ 9-5-1-12 LIMITATIONS ON AUTHORITY AND REGULATIONS.

(A) Sections 9-5-1-1 et seq. do not:

(1) Authorize the Board to make any regulation with respect to any condition
or quality of the outdoor atmosphere if the condition or air quality level and its
effect are confined entirely within the boundaries of the industrial or
manufacturing property within which the air contaminants are or may be
emitted and public access is restricted within such boundaries; 2.

(2) Grant to the Board any jurisdiction or authority affecting the relation
between employers and employees with respect to or arising out of any
condition of air quality; or

(3) Supersede or limit the applicability of any law relating to industrial
health, safety or sanitation.

(B) The Board shall have no authority to:

(1) Make any regulation to address quality of life impacts absent scientific
evidence that there is a nexus to air pollution by identifying the quantities and
durations of air contaminants that may, with reasonable probability, cause
injury;

(2) Adopt or amend a standard or regulation whereby the impact on
industrial development is by design and not a consequence of preventing or
abating air pollution;

(3) Expand the definition of air pollution;

(4) Serve as a forum for public discussion for matters not on the agenda;

(5) Draft and present to itself regulations, except it may adopt bylaws to
govern its non-hearing proceedings in accordance with § 9-5-1-3(B)(7);

(6) Direct the work of the Director or Department, including no authority,
express or implied, to advise, recommend or determine costs associated with
Board activities and the City’s ability to pay such costs;

(7) Recommend to the Mayor, Director, Department, County Manager,
City Council, or County Commission policies for air quality matters, needs,
improvements, and programs;

(8) Advise the Mayor, Director, Department, County Manager, City
Council, or County Commission regarding air quality matters, needs and
programs; and

(9) Advise the Environmental Planning Commission or County Planning
Commission regarding air quality matters.

§ 9-5-1-13 LOCAL AIR QUALITY PERMIT FUND ESTABLISHED.

(A) Pursuant to Section 74-2-16 NMSA 1978 and §§ 9-5-1-1 et seq., an
Environmental Health Department air quality permit fund is established.
(B) All fees collected by the Department pursuant to §§ 9-5-1-1 et seq. shall be deposited in the fund created in division (A) above, and shall be used by the city only for the purpose of paying the reasonable costs of funding the department’s performance of the following permitting functions required by the Federal Clean Air Act Amendments of 1990 as follows:

1. Reviewing and acting upon any application for a permit;
2. If the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit, not including any court costs or other costs associated with any enforcement action;
3. Emissions and ambient monitoring;
4. Preparing generally applicable regulations or guidance;
5. Modeling, analysis and demonstration; and
6. Preparing inventories and tracking emissions.

§ 9-5-1-14 INSPECTION.

The Director or an authorized representative, upon presentation of Departmental credentials:

(A) Shall have a right of entry to, upon or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the Board or by any permit condition are located; and

(B) May at reasonable times:

1. Have access to and copy any records required to be established and maintained by regulations of the Board or any permit condition; and
2. Inspect any monitoring equipment and method required by regulations of the Board or by any permit condition; and
3. Sample any emissions that are required to be sampled pursuant to regulation of the Board or any permit condition.

(C) If premises described in divisions (A) or (B) above are unoccupied, a Department employee shall first make a reasonable effort to locate the owner or other person having charge or control of the premises and demand entry.

(D) If entry is refused, the Mayor-Department shall proceed to obtain a search warrant by filing the documents and following the procedures required by the Metropolitan Court or District Court. The sworn statement filed in
conjunction with the application for the search warrant or order shall:

(1) Set forth the particular premises, or portion thereof, sought to be inspected;

(2) State that the owner or occupant of the premises or portion thereof, has refused entry;

(3) State that inspection of the premises or portion thereof is necessary to determine whether it complies with the requirements of §§ 9-5-1-1 et seq.;

(4) Set forth the particular provisions of §§ 9-5-1-1 et seq. sought to be enforced;

(5) Set forth any other reason necessitating the inspection, including knowledge or belief that a particular condition exists in the premises, or portion thereof, which constitutes a violation of §§ 9-5-1-1 et seq.; and

(6) State that the Department Mayor or the Department’s Mayor’s designated representative is authorized by the city Mayor to make the inspection.


In any court action to enforce the provisions of the Air Quality Control Act, §§ 9-5-1-1 et seq. or any regulation, permit condition or emergency order adopted, imposed or issued pursuant thereto:

(A) The city and the Department shall be represented by the City Attorney; and

(B) The County or City Attorney shall be represented by the District Attorney.

§ 9-5-1-98 VIOLATIONS; COMPLIANCE ORDERS; FIELD CITATIONS.

(A) Whenever, on the basis of any information, the Mayor Director determines that any person has violated or is violating any requirement, or prohibition of the Air Quality Control Act, §§ 9-5-1-1 et seq., any regulation promulgated pursuant to §§ 9-5-1-1 et seq., or any condition of a permit issued pursuant thereto, the Director Mayor may:

(1) Issue a compliance order 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 any past or current...
violation, or both; or

(2) Commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

(B) Any order issued pursuant to division (A) above may include a suspension or revocation of any permit, or portion thereof, issued by the Director. Any penalty assessed in the order shall not exceed $15,000 per day of noncompliance for each violation.

(C) Any order issued pursuant to division (A) above shall become final unless, no later than 30 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.

(D) The Board may adopt a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed $1,000 per day of violation may be issued by officers or employees of the Department as designated by the Director. The program will be implemented by the Department.

(E) Any person to whom a field citation is issued pursuant to division (D) above may, within a reasonable time as prescribed by regulation by the Board, elect to pay the penalty assessment or to request a hearing by the issuing agency on the field citation. If a request for hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final.

(F) Payment of a civil penalty required by a field citation issued pursuant to division (D) above shall not be a defense to further enforcement by the Department to correct a violation or to assess the maximum statutory penalty pursuant to other authorities in the Air Quality Control Act or §§ 9-5-1-1 et seq. if the violation continues.

(G) In determining the amount of any penalty to be assessed pursuant to this section, the Director or the individual issuing a field citation shall take into
account the seriousness of the violation, any good-faith efforts to comply with
the applicable requirements and other relevant factors.

(H) In connection with any 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.

(I) Penalties collected pursuant to an administrative order or a field
citation shall be deposited in the city or the county general fund, as applicable.

§ 9-5-1-99 PENALTY.

(A) Civil Penalty. Any person who violates any provision of the Air Quality
Control Act, §§9-5-1-1 et seq., any regulation of the Board or any permit
condition or emergency order adopted or issued pursuant to the Air Quality
Control Act or §§ 9-5-1-1 et seq. may be assessed a civil penalty not to exceed
$15,000 for each day during any portion of which a violation occurs.

(B) Criminal Penalties.

(1) Any person who knowingly commits any violation of §§9-5-1-1 et seq.
or a regulation of the Board which is not described as a felony in Section 74-2-
14.C or 74-2-14.D NMSA 1978 is guilty of a misdemeanor and shall be sentenced
in accordance with the provisions of Section 31-19-1 NMSA 1978.

(2) Any person who knowingly makes any false statement, representation
or certification in any application, record, report, plan or other document filed
or required to be maintained under the Air Quality Control Act or who falsifies,
tampers with or knowingly renders inaccurate any monitoring device or method
to be maintained under the Air Quality Control Act or §§ 9-5-1-1 et seq. or
regulation adopted pursuant thereto is guilty of a petty misdemeanor and shall,
upon conviction, be punished by a fine of not more than $10,000, per day for
each violation, or by imprisonment for not more than six months, or by both.”

Section 3. SEVERABILITY CLAUSE. If any section, paragraph, sentence,
clause, word, or phrase of this ordinance is for any reason held to be invalid or
unenforceable by any court of competent jurisdiction, such decision shall not
affect the validity of the remaining provisions of this ordinance. The Council
hereby declares that it would have passed this ordinance and each section,
paragraph, sentence, clause, word, or phrase thereof irrespective of any
provision being declared unconstitutional or otherwise invalid.

Section 4. COMPILATION. This ordinance shall be incorporated in and made part of the Revised Ordinances of Albuquerque, New Mexico 1994.

Section 5. EFFECTIVE DATE. This ordinance shall take effect December 3, 2023.
SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD and the
BOARD OF COUNTY COMMISSIONERS
OF BERNALILLO COUNTY,

Plaintiffs,

vs. No. D 202-CV-2023-09295

CITY OF ALBUQUERQUE,

Defendant.

[PROPOSED] ORDER GRANTING
PRELIMINARY INJUNCTIVE RELIEF

THIS MATTER CAME before the Court upon Bernalillo County Air Quality
Control Board, Plaintiff’s application for a Preliminary Injunction pending a trial on
the merits, and considering the City of Albuquerque, Defendant’s response thereto, as
well as the position of the County of Bernalillo and arguments presented at a hearing
on January 25, 2024, and being otherwise fully advised of the premises, pursuant to
NMRC P 1-066 and applicable case law including National Trust for Historic

THE COURT FINDS AND CONCLUDES:

1) Plaintiffs have a substantial likelihood of prevailing on the merits of
the pending matter.

2) A Preliminary Injunction during the pendency of the litigation will not
cause damage to the Defendant’s interests.

3) A Preliminary Injunction is not adverse to the public interest.
4) Granting Preliminary Relief prevents irreparable harm to the Plaintiffs.

5) This Preliminary Injunction will maintain the status quo that existed prior to the passage of Resolution 23-176 and Ordinance 23-88.

WHEREFORE, THE COURT GRANTS the requested Preliminary Injunction and enjoins the enforcement and applicability of Resolution 23-176 and Ordinance 23-88 which were passed by the Albuquerque City Council on December 4th, 2023. This Preliminary Injunction will stay in place pending final Court findings and conclusions on the validity of the Resolution and Ordinance after a trial on the merits.

IT IS SO ORDERED.

[Signature]
Honorable Francis J. Mathew, District Judge

Submitted by:

[Signature]
Antoinette Sedillo Lopez
Attorney for Plaintiff Albuquerque Air Quality Control Board

Approved:

Email approval dated Jan 31, 2024
W. Ken Martinez
Attorney for Plaintiff Bernalillo County

Email approval as to form dated Jan. 31, 2024
Randy M. Autio
Attorney for Defendant City of Albuquerque
TITLE 20 ENVIRONMENTAL PROTECTION

CHAPTER 11 ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY

CONTROL BOARD

PART 72 HEALTH, ENVIRONMENT AND EQUITY IMPACTS

20.11.72.1 ISSUING AGENCY: Albuquerque/Bernalillo County Air Quality Control Board, P.O. Box 1293, Albuquerque, New Mexico 87102

20.11.72.2 SCOPE: 20.11.72 applies to any applicant seeking a permit for an emissions source subject to 20.11.41, 60 or 61 NMAC, or a modification of an existing permit issued under Title 20, Chapter 11 Parts 41, 60 or 61 that will result in an increase in emissions.

20.11.72.3 STATUTORY AUTHORITY: 20.11.72 is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 §§ 74-2-4, 74-2-5(B), as amended; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 945, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque, 1994 § 9-5-1-4.

20.11.72.4 DURATION: Permanent.

20.11.72.5 EFFECTIVE DATE: __________, unless a later date is cited at the end of a section.

20.11.72.6 OBJECTIVE: Consistent with the Department’s authority to prevent and abate air pollution, the Department shall ensure that the health, environmental and equity impacts of combined air contaminant emissions sources are considered and addressed by the Department such that no neighborhood or population group bears the disproportionate health impacts of air contaminant emissions that may with reasonable probability injure human health or interfere with public welfare, and that all the Department’s air pollution permitting is consistent with the goals does not discriminate based on race, color, or national origin as required by Title VI of the National Integrated Urban Air Toxics Strategy and in the furtherance of environmental justice—1964, 42 U.S.C. § 2000d et seq., as implemented by the U.S. Environmental Protection Agency pursuant to Executive Order
Evaluation of the cumulative and disparate impacts of air contaminant emissions, including the social, environmental and economic context that affects the vulnerability of communities to the health harms of air pollution, such as race, poverty and existing pollution burden, is intended to enable the Department to develop a complete understanding of the current and future effects of permitting actions on human health, plant and animal life, public welfare, or reasonable use of property in Bernalillo County and the City of Albuquerque, to evaluate and recognize the differences, needs, requirements and conditions within the County and parts thereof, and to make permitting decisions that meaningfully consider such cumulative or disparate impacts, including all possible opportunities to mitigate air pollution emissions.

20.11.72.7 DEFINITIONS:
In addition to the definitions in this Section, the definitions in 20.11.1 NMAC shall apply unless there is a conflict between definitions, in which case the definition in this Part shall govern.

A. “Applicant” means the person applying for a permit under this Part.

B. “ADAF” means Age-Dependent Adjustment Factors that shall be applied when assessing cancer risks from early-life exposure.

C. “Air Contaminant” means a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay reaction product thereof;

D. “Air Pollution” means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

C.E. “Air Toxics Cancer Risk” means the probability of developing cancer over the course of seventy years, assuming continuous exposure. The lifetime cancer risk from inhalation of air toxics is expressed in terms of risk per lifetime per million people.
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by
Community Intervenors and Mountainview Coalition and Pueblo of Isleta

D. F. “Best Available Control Technology” or “BACT” means an emission
limitation based on the maximum degree of reduction of each pollutant subject to
regulation under this chapter emitted from or which results from any emitting
source, which the Department, on a case-by-case basis, taking into account
energy, environmental, and economic impacts and other costs, determines is
achievable for such source through application of production processes and
available methods, systems, and techniques, including fuel cleaning, clean fuels,
or treatment or innovative fuel combustion techniques for control of each such
pollutant. In no event shall application of “best available control technology”
result in emissions of any pollutants that will exceed the emissions allowed by
any applicable standard established pursuant to section 7411 or 7412 of Title 42
of the United States Code or any applicable standard established by the Board
pursuant to the New Mexico Air Quality Control Act.

G. “Community with Age-Related Vulnerability” means a federally-recognized
Tribe, Nation, or Pueblo, or census block group where the percentile of residents
aged less than five years old is at or above the 50th percentile for Bernalillo
County or the percentile of residents aged more than 64 years old is at or above
the 50th percentile for Bernalillo County.

E-H. “Criteria Air Pollutants” means the air pollutants for which there are
national ambient air standards provided for in 40 C.F.R. Part 50.

F-I. “Community-based Participatory Research” means a collaborative approach to
research that equitably involves community members, organizational
representatives, and researchers (collectively, “partners”) early in all aspects of
the research process including methodology. The partners contribute
methodology, unique strengths and shared responsibilities to enhance
understanding of a given phenomenon and the social and cultural dynamics of the
community, and integrate the knowledge gained with action to improve the health
and well-being of community members.

G-J. “Cumulative Impacts” or “Cumulative Effects” means the exposures,
public effects on human health and environmental effects, public welfare from the
combined emissions and discharges in a geographic area, including air emissions
from all existing and reasonably foreseeable sources, routinely, accidentally or
otherwise released and non-chemical stressors. Cumulative Impacts shall take into
account sensitive populations, such as children and the elderly and socio-economic factors and social determinants of health.

H.K. “EJ database” means the United States Environmental Protection Agency Environmental Justice Screening and Mapping tool or an equivalent tool created or adopted by the Department after approval by the Albuquerque-Bernalillo County Air Quality Control Board.

H.L. “Emergency generator” means a stationary combustion device, such as a reciprocating internal combustion engine or turbine, that serves solely as a secondary source of mechanical or electrical power whenever the primary energy supply is disrupted or discontinued during power outages or natural disasters that are beyond the control of the owner or operator of a source. An emergency generator operates only during emergencies, for training of personnel under simulated emergency conditions, as part of emergency demand response procedures, or for standard performance testing procedures as required by law or by the generator manufacturer. A generator that serves as a back-up power source under conditions of load shedding, peak shaving, power interruptions pursuant to an interruptible power service agreement, or scheduled source maintenance shall not be considered an emergency generator.

J.M. “Emissions or Discharges” means chemical or physical agents released in the environment, routinely or accidentally, continuously, intermittently, or cyclically.

K. “Environmental Effects” means the adverse environmental conditions caused by emissions, including various aspects of environmental degradation, ecological effects and threat to environment and communities. These effects may be direct, indirect, immediate or delayed.

L.N. “Environmental Risk Factor” means those factors the City of Albuquerque Environmental Health Department has to consider in the Health, Environment and Equity Impact Report under 20.11.72.10.B.1 NMAC.

M.O. “Exposure” means direct or indirect contact of any magnitude or dose, through inhalation, ingestion or skin absorption, with emissions or pollution_air contaminant discharges transported through the air, water or soil. Contact may be continuous, discontinuous but regular, or intermittent.
“Hazardous Air Pollutants” or “Air Toxics” means those air pollutants designated pursuant to 40 C.F.R. Part 63 and 20.2.72.502 NMAC.

“Hazard Index (HI)” means the sum of hazard quotients for air toxics that affect the same target organ or organ system.

“Hazard Quotient (HQ)” means the ratio of the potential exposure to a substance and the level at which no adverse effects are expected, calculated as the exposure divided by the appropriate chronic or acute value.

“Health” means a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity.

“Health Risk Assessment Analysis” means the process of conducting an exposure and risk assessment to estimate the extent of public exposure to and risk from emitted substances for potential cancer, non-cancer health hazards for chronic, acute, and repeated 8-hour exposure.

“Language spoken in the overburdened community” means a language spoken by 3 percent or more of the population in the overburdened community. “HEEI” means Health, Environment and Equity Impacts.

“Lowest Achievable Emission Rate” or “LAER” means for any source, that rate of emissions which reflects— (1) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (2) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under any applicable standard established pursuant to section 7411 of Title 42 of the United States Code or any applicable standard established by the Albuquerque/Bernalillo County Air Quality Control Board pursuant to the New Mexico Air Quality Control Act.

“Maximum Available Control Technology” or “MACT” means the maximum degree of reduction in emissions of hazardous air pollutants (including a prohibition on such emissions, where achievable) that the Environmental Protection Agency Administrator or the Department, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and
environmental impacts and energy requirements, determines -is- achievable for
new -or existing -sources- in the category or subcategory to which such emission
standard applies under Section 112(d) of the Clean Air Act, through application
of measures, processes, -methods, systems or techniques including, but not limited
to, measures which -
(1) reduce the volume of, -or eliminate emissions -of, such -pollutants -through
process changes, -substitution of materials- or other modifications, or
(2) enclose systems or processes to eliminate emissions, or
(3) collect, capture or treat such pollutants when released from a process,
stack, storage or fugitive emissions point, or
(4) are design, -equipment, work-2 process; or -operational standards
(including -requirements -for -operator -training or -certification), or
(5) are a combination of the above.

The maximum degree of reduction in -emissions -that is -deemed achievable -for
new sources -in a category or -subcategory shall -not -be less -stringent than -the
emission -control that -is -achieved -in -practice -by -the -best controlled similar
source, as determined -by the -Department.

X. “Mutagenic Chemical” means a chemical that is expected to cause
irreversible changes to DNA, would exhibit a greater effect in early-life versus
later-life exposure, including, but not limited to, the chemicals listed in Table 1 in
Appendix A of this Part.

Y. “Net decrease in emissions” means a source decreases the total amount of
uncontrolled emissions of a criteria pollutant or a hazardous air pollutant.

Z. “Other language spoken in the overburdened community” means a language
spoken by 3 percent or more of the population in the census tract in which an
overburdened community is located.

AA. “Optimum Emissions Control Strategies” means the more stringent, as
appropriate, of Reasonably Available Control Technology, Best Available Control
Technology, Lowest Achievable Emission Rate, or Maximum Available Control
Technology.

BB. “Overburdened Community” means a federally-recognized Tribe, Nation,
or Pueblo, or census block group that meets the following criteria based on data in
an EJ database: _____

(1) Has two or more environmental risk factors listed in
20.11.72.10.B.1 that are in the .50th. percentile or above of
Bernalillo County; or
(2) Meets one or more of the following population vulnerability criteria:

(a) Has two or more health indicators listed in 20.11.72.10.B.3 that are in the 50th percentile or above of Bernalillo County; or

(b) Is a community with age-related vulnerability and is in the 50th percentile compared to Bernalillo County for population at or below 200 percent of the federal poverty level.

If environmental risk or health indicator data for a census block group are unavailable, the value for each risk factor or indicator from the next largest geographic area, such as census tract, small area, or ZIP code in which the census block group is located shall be attributed to the block group.

Z. “Pollution” means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

AA. “Public Health” means the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society.

BB.CC. “Radius” means the distance measured from the center of the source extending outward in every direction the number of -miles provided by this part.

CC.DD. “Reasonably Available Control Technology” or “RACT” means implementation of the lowest emission limitation that an emission source is capable of meeting by the application of a control technology that is reasonably available, considering technological and economic feasibility. A RACT analysis must include the latest information when evaluating control technologies. Control technologies evaluated for a RACT analysis can range from work practices to add-on controls. As part of the RACT analysis, current control technologies already in use sources can be taken into consideration. To conduct a RACT analysis, a top-down analysis is used to rank all control technologies.

DD.EE. “Social Determinants of Health” means the nonmedical factors that influence health outcomes. They are the conditions in which people are born,
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

grow, work, live and age, and the wider set of forces and systems shaping the conditions of daily life, including economic policies and systems, development agendas, social norms, social policies, racism, climate change and political systems, when and how emissions of air contaminants may injure human health or interfere with public welfare as listed in 20.11.72.10.

**FF.** “Source” means a structure, building, equipment, facility, installation or operation that emits or may emit an air contaminant.

**GG.** “Stressor” means any factor that contributes to increased vulnerability of a community or individual to environmental health harms from air contaminant emissions, including everything listed in 20.11.72.8.A10.B(1)-(3).

**HH.** “Tribal Consultation” means an enhanced form of communication that emphasizes trust and respect with Pueblos, Tribes, and Nations. It is a shared responsibility that allows the City, through the Department, and Pueblos, Tribes, and Nations to exchange, in an open and free manner, timely and accurate information and opinions for the purpose of fostering mutual understanding and comprehension. Consultation recognizes Indigenous peoples’ specialized expertise in traditional and cultural property and natural resources management and is a mutually satisfying deliberation that results in collaboration and joint decision-making. Consultation is a uniquely government-to-government process and shall occur prior to the issuance of an HEEI permit.

**20.11.72.8 PRE-APPLICATION REQUIREMENT:**

An applicant seeking a permit pursuant to the Air Quality Control Act shall contact the Department in writing and request a pre-application meeting for information regarding the contents of a health, environment and equity impact report and the health, environment and equity impact permitting process. The meeting may include discussion of approved emissions factors and control efficiencies, air dispersion modeling guidelines, department policies, permit fees, public notice requirements and regulatory timelines.

**20.11.72.9 HEEI PERMIT IMPACTS SCREENING.**

If the Applicant is able to demonstrate by a health risk assessment analysis that its source meets both of the following criteria in paragraph A below, it will not be required to go through any additional HEEI permitting processes. If the Applicant cannot demonstrate its source meets both of the following criteria in paragraph A, the Applicant must comply with the process outlined in Section 20.11.72.10 and obtain an HEEI Permit.
A. Criteria for de minimis exemption. Construction and operation of the source will not result in an increased increase in the cancer risk of any overburdened community within a one-mile radius by more than 1 in 1 million, and will not result in an increased increase in the non-cancer respiratory hazard index of greater than 1.0 for any receptor in any overburdened community within a one-mile radius of where the source is located or proposed to be located; and

B. Construction and operation of the source will not increase cancer risk or non-cancer respiratory hazard index above the county average in any overburdened community within a one-mile radius of where the source is located or proposed to be located.

A. The standards for emissions equivalent to 1 in 1 million cancer risk and 1.0.1 non-cancer respiratory hazard index are provided in Table 2 to Appendix A to this Part.

A-B. The Department’s determination that a source is not required to obtain a permit under this Part pursuant to this Section shall constitute a final agency action. The Department shall provide notice, consistent with the requirements of 20.11.72.10.F.1 – 11, of its decision that an applicant is not required to obtain a permit under this Part.

20.11.72.10 HEALTH, ENVIRONMENT AND EQUITY IMPACTS PERMIT PRE-APPLICATION


If the new or proposed source or modification is proposed to be or is located in an overburdened community or within a one-mile radius of an overburdened community, and the Applicant cannot demonstrate the source meets the requirements of Section 20.11.72.9, the Applicant shall prepare a Draft Health, Environment and Equity Impact Analysis and Report to assess the cumulative effects of the new or modified source on every overburdened community within a one-mile radius of the source.

B. Draft Report Requirements.

The Applicant shall prepare a report that assesses the impacts of air emissions from its proposed new or modified source on every overburdened community within a
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

one-mile radius. The report shall include at a minimum all the requirements specified in this Section. The Applicant may include additional information that may be helpful to the Department’s analysis. At any time during this process the Applicant may consult with the Department about the sufficiency of data, HEEI permit application requirements or any other requirement of this Section.

1. 4.——Environmental Risk Factors:

The draft report shall include the types and amounts of emissions that will be released from the operation of the new or modified source. The draft report shall also include the county percentile and block group percentile for each overburdened community within the one-mile radius of the new or modified source for each of the environmental risk factors listed below, and shall note whether each type of air pollutant expected to be released by the construction and operation of the source will be dispersed into that overburdened community as shown by unmitigated air dispersion modeling pursuant to this rule. If no environmental risk data for a census block group are available, the value for each risk factor from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. For each environmental risk factor, the Applicant must indicate from which EJ database the relied upon data was found. The environmental risk factors are the following:

a. Annual PM 2.5 expressed in micrograms per meter cubed (ug/m3); and
b. Annual ozone expressed in parts per million (ppm); and
c. Annual diesel particulate matter expressed in ug/m3; and
d. Annual toxic releases to air expressed in pounds; and
e. Traffic proximity and Volume expressed as daily traffic count divided by the distance to major roads.

2. 2.——Social Determinants of Health:

The draft report shall include the county percentile and block group percentile for each of the social determinants of health listed below. If no data for a particular social determinant of health is available for a census block group, the value for each social determinant of health from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. For each social determinant of health, the Applicant must indicate from which EJ database the relied upon data was found. The environmental risk factors, social determinants of health are the following:
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

1. a. Percent of population that is non-White who list their racial status as a race other than white alone and/or list their ethnicity as Hispanic or Latino; and

2. b. Percent of population in households with total household income below 200% of the federal poverty level for the current year; and

3. c. Percent of population over age 5 that speaks a language other than English at home and speaks English less than “very well;” and

4. d. Percent of population 25 and older who do not have a high school diploma or equivalent credential; and

5. e. Percent of population under age five; and

6. f. Percent of population over age 64.

3. Health Indicators:

The draft report shall include rates of data for the following health indicators for each overburdened community within a one-mile radius of the modified or proposed source for the last year for which data are available. If no health indicator data for a census block group are available, the value for each health indicator from the next largest geographic area, such as census tract or ZIP code, in which the census block group is located shall be attributed to the block group. The health indicators are the following:

1. a. Adult asthma prevalence; and

2. b. Pediatric asthma prevalence; and

3. c. Chronic obstructive pulmonary disease prevalence; and

4. d. Heart disease 18 and over prevalence; and

5. e. Stroke death rate.

4. Other Requirements:

The Applicant must also include the following information in the report:

1. a. Environmental law and regulation compliance history of the Applicant pursuant to 1978 NMSA Section 74-2-7(P); and
b. Proposed emissions control measures and operation and maintenance procedures and mitigation measures to ensure long-term compliance with permit conditions, should an HEEI permit be issued; and

c. Proposed emissions control measures and operation and maintenance procedures and mitigation measures to ensure compliance with the standards in 20.11.72.10(E);12(C); and

d. Unmitigated air dispersion modeling of all hazardous air pollutants expected to be released from the source; and

e. Mitigated air dispersion modeling of all hazardous air pollutants expected to be released from the source; and

f. Air Toxics Cancer Risk Assessment (risk per million); and

g. Air Toxics Respiratory Hazard Index; and

h. A qualitative assessment of Quality of life public welfare impacts expected from the construction and operation of the source including but not limited to:

i. Off-site potential for odor generation; and

ii. Off-site potential for dust generation; and

iii. Off-site potential for noise generation; and

iv. Off-site potential for proliferation of other emissions sources in the area; and

v. The health impacts of the proposed new or modified source using the CO-Benefits Risk Assessment (COBRA) screening and mapping tool or an equivalent tool approved by the Department.

C. C. Air Dispersion Modeling.

Any health risk assessment required under this Part shall comply with the following criteria:

1. The Applicant shall provide both mitigated and unmitigated air dispersion modeling of all potential emissions of hazardous air
pollutants and toxic air pollutants identified in Section 20.11.72.7(E) and 20.11.72.7(N).

2. The Applicant’s potential emissions must be modeled in accordance with the most up-to-date United States Environmental Protection Agency guidelines; and

3. At a minimum, all air dispersion modeling required under this Part shall include:

   a. Receptor Grid Spacing. -All receptor grid spacing must be no less than 25 meter spacing out to one mile from the source; and

      i. For a point source, the receptor distance is the distance from the center of the stack to the nearest receptor location; and

      ii. For a volume source, the receptor distance is the distance from the edge of the source to the nearest receptor location; and

   b. Source Specific Emissions.

      i. If the source is an existing source, the Applicant must use data from Continuous Emissions Monitoring Systems, stack testing, or fenceline monitoring if both continuous emissions monitoring systems and stack testing are infeasible, to determine potential emissions; or

      ii. If the source is a new source, the Applicant must rely on data from vendor guarantees and stack test or fenceline monitoring data from similar facilities to determine potential emissions; and

      iii. The Applicant shall not use AP-42 emissions factors unless the Applicant can demonstrate by a preponderance of the evidence that no feasible alternative to the use of AP-42 emissions factors exists; and

      iv. If the Applicant demonstrates that no feasible alternative to the use of AP-42 emissions factors exists, the Applicant shall use the most conservative data for the emissions factors chosen; and

   c. Receptor Height. Receptor heights shall be set at a reasonable human breathing height; and

   d. Emissions Rates. The Applicant shall not use multiplying factors to correct for averaging times greater than one hour. The maximum one-hour emissions concentration shall be
D. Air Toxics Cancer Risk Assessment.

Any Air Toxics Cancer Risk Assessment required under this Part shall include the following:

1. Hazard Identification. The Applicant shall determine the type of adverse health effect associated with exposures of all hazardous air pollutants emitted by the facility, including whether a hazardous air pollutant is considered a human carcinogen or a potential human carcinogen; and

2. Exposure Assessment. The Applicant shall estimate the extent of public exposure to emitted hazardous air pollutants for potential cancer, non-cancer health hazards for chronic and acute, and repeated 8-hour exposures. The Applicant shall estimate long-term (annual), short-term (1-hour maximum) and 8-hour average exposure levels; and

3. Dose-Response Assessment. The Applicant shall characterize the relationship between exposure to a chemical by its modeled concentration. Dose shall be calculated as concentration multiplied by exposure; and

4. Risk Characterization. The Applicant shall assess the total risk to the community by combining the results of the exposure assessment with the dose-response assessment; and

1. The risk shall be characterized for the receptor location nearest the source (as identified in the Air Dispersion Model); and

2. The maximum incremental cancer risk within the community shall be assessed using the nearest receptor location to the source; and

3. The risk shall be calculated in individual age bins (e.g. Third trimester, 0-2 years, etc.) for assessment of residential cancer risk.
The cancer risk shall be calculated in a manner consistent with U.S. EPA’s Risk Assessment Guidance for Superfund (RAGS). The Applicant shall rely on the cancer slope factors provided in Table 3 to Appendix A in calculating the cancer risk. The use of the ADAF is required to ensure that sensitive populations are included in the analysis of cancer risk. For mutagenic chemicals, the risk shall be calculated in a manner consistent with the method outlined by U.S. EPA in its Regional Screening Level (RSLs) Guidance. An ADAF of 10 shall be applied for exposures spanning the 2-year interval from birth until second birthday. An ADAF of 3 shall be applied from ages 2 through 16 (i.e., spanning a 14-year interval from second until sixteenth birthday). For mutagenic chemicals, the cancer risk shall be calculated using the ADAF for early life-exposures;

E. E. Air Toxics Respiratory Hazard Assessment Index.  
Any Air Toxics Respiratory Hazard Assessment Index required under this Part shall include the following:

1. Hazard Identification. The Applicant shall determine the type of adverse health effect associated with exposures of all hazardous air pollutants emitted by the facility, including whether a hazardous air pollutant is considered a human carcinogen or a potential human carcinogen; and
2. Exposure Assessment. The Applicant shall estimate the extent of public exposure to emitted hazardous air pollutants for potential cancer, non-cancer health hazards for chronic and acute, and repeated 8-hour exposures. The Applicant shall estimate long-term (annual), short-term (1-hour maximum) and 8-hour average exposure levels; and
3. Dose-Response Assessment. The Applicant shall characterize the relationship between exposure to a chemical by its modeled concentration. Dose shall be calculated as concentration multiplied by exposure; and
4. Risk Characterization. The Applicant shall assess the total risk to the community by combining the results of the exposure assessment with the dose-response assessment; and
   a. The risk shall be characterized for the receptor location nearest the source (as identified in the Air Dispersion Model; and
   b. The maximum incremental cancer risk within the community shall be assessed using the nearest receptor location to the source; and
   c. The risk shall be calculated in individual age bins (e.g. Third trimester, 0-2 years, etc.) for assessment of residential cancer risk; and
5. Shall assess the average concentration and the maximum 8-hour average concentration for each receptor within the air dispersion model.

The Air Toxics Hazard Index is the sum of the hazard quotients for each chemical of concern and shall be calculated in a manner consistent with U.S. EPA’s Risk Assessment Guidance for Superfund (RAGS) for inhalation pathway and U.S. EPA
Regional Screening Level (RSL) guidelines. The Applicant shall rely on the Acute Reference Exposure Levels and Chronic Reference Exposure Levels identified in Table 3, Appendix A in calculating the hazard index.

**F. Notice.**

Whenever a health, environmental and equity impact analysis and draft report must be conducted for a permit, notice of the draft report shall be:

1. Provided by certified mail in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community, to the owners of record, as shown by the most recent property tax schedule, of all properties within one mile of the property on which the source or proposed source is located or proposed to be located; and
2. Posted on the source property in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community and clearly visible to the public; and
3. Posted in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community, in at least three other conspicuous places in the immediate vicinity of the source such as a post office, library, or grocery store notice board; and
4. Provided in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community to all local neighborhood associations, schools and community centers; and
5. Posted in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community, in an easily accessible location on the Department’s website; and
6. Posted in English, Spanish, and any other language spoken by 3 per cent or more of the population in the overburdened community, on all Department social media accounts; and
7. Mailed directly to Pueblo of Sandia, Pueblo of Laguna and Pueblo of Isleta, to the Governor’s office, to the Director of the Environmental Resources Department, and general counsel, with an offer to conduct a tribal consultation on the permit application; and
8. Published in the largest circulation newspaper serving the overburdened community in at least a business card-sized advertisement that appears in a place in the newspaper calculated to give the general public the most effective notice, which shall not be in either the classifieds or the legal advertisement section, and shall be printed in both English, Spanish, and
any other language spoken by 3 per cent or more of the population in the
overburdened community; and

9. Provided in English, Spanish, and any other language spoken by 3 per cent
or more of the population in the overburdened community and any
overburdened community within a one-mile radius by certified mail and
electronic mail to all residential addresses in the overburdened
community.

10. Within three days of receipt of a draft health, environmental and equity
impacts report, the Department shall post the draft HEEI report on its
website.

11. Any member of the general public may request a copy of the draft health,
environmental and equity impacts report by requesting a copy from the
Department. Upon receiving a request for a copy of a draft health,
environmental and equity impacts report, the Department shall either
provide the requestor with a copy of the draft report, free of charge, within
fifteen (15) calendar days of receiving the request or direct the requestor to
a publicly available copy. If the requestor needs a copy of the health,
environmental and equity impacts draft report translated into Spanish or
any other language necessary, the Department shall provide an adequate
translation of the draft report within fifteen (15) calendar days of the
request.

12. The requirements of this Section represent the minimum notice
requirements. The Department may provide additional notice in additional
forums as identified by either residents of the impacted overburdened
communities or the Department.

13. Within forty-five (45) days of the Draft Health, Environment and Equity
Impact Report being made publicly available, but no sooner than fifteen
(15) days, the Department, upon request, shall hold at least one public
meeting to receive public comment on the Draft Report in each
overburdened community within a one-mile radius of the source.

14. The Department shall accept written public comments on the Draft Health,
Environment and Equity Impact Report for sixty (60) days after the Draft
Report is made available to the public. The Department may extend the
comment period for an additional thirty (30) days.

15. In the event of a conflict with any other public participation provisions in
this Chapter, this provision prevails.

G. Public Hearing.
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

The Department shall hold a public hearing on the Applicant’s Health, Environment and Equity Impact report consistent with the requirements of 20.11.41.15 NMAC, except that:

1. The Department shall follow the notice and comment requirements applicable to the relevant permit application and this section. The Applicant shall be responsible for arranging and paying all expenses of the Public Information Hearing under this part.

2. At the public hearing, community testimony, community based participatory research data and community air monitoring data shall be given the same weight as technical expertise provided by the Department and the Applicant.

20.11.72.11 HEALTH, ENVIRONMENT AND EQUITY IMPACTS PERMIT APPLICATION

A. Application contents:

The following are the minimum elements that shall be included in a permit application before the Department can determine whether an application is administratively complete and ready for review. The permit application shall include:

1. A final Health, Environment and Equity Impact Report that shall include:
   a. All elements required in 20.11.72.10.B NMAC;
   b. Proof that the notice and comment provisions in 20.11.72.10.B – G have been satisfied; and
   c. A summary of the public comments received, including any community based participatory research data; and
2. Air dispersion model results pursuant to 20.11.72.10.C NMAC; and
3. Air toxics cancer risk assessment pursuant to 20.11.72.10.D; and
4. Air toxics respiratory hazard index pursuant to 20.11.72.10.E; and
5. Any proposed air emissions mitigation strategies informed by the data collected pursuant to Section 20.11.72.10.B(4)(h); and
6. Any proposed quality of life public welfare impacts mitigation strategies informed by the data collected pursuant to Section 20.11.72.10.B(4)(h).
Within thirty (30) days of receiving an HEEI permit application, the Department shall review the application and determine whether it is administratively complete.

If the application is deemed administratively incomplete or the Department determines a different type of permit application is required, the Department shall send a letter by certified mail or electronic mail to the applicant stating what additional information or fees are necessary before the Department can deem the application administratively complete. The Department may require information that is necessary to perform a thorough review of the application including: technical clarifications, emission calculations, emission factor usage, additional application review fees if any are required, and new or additional air dispersion modeling or health risk assessment analysis. The letter shall state a reasonable deadline for the applicant to deliver the information, fees, health risk assessment analysis or air dispersion modeling by the deadline set by the Department. The Department may extend the deadline for good cause as determined by the Department. If the Department does not receive the additional information, fees, health risk assessment analysis or modeling by the deadline, the Department may deny the application. If the Department has ruled an application administratively incomplete three times, the Department shall deny the permit application and send a letter by certified mail or electronic mail to the applicant stating that the permit application has been denied. Fees submitted for processing an application that has been denied shall not be refunded. If the Department has denied the application, the applicant may submit a new application and the fee required for a new application.

20.11.72.12 DEPARTMENT DECISION

A. Department Decision.

Upon determining the application is administratively complete, the Department shall evaluate the application using the process provided for in this Section. The Department shall assign the following numerical values to each environmental risk factor, social determinant of health and health impact above the county average in each overburdened community within one mile of the new or modified source, in the following manner:

1. 90th percentile and above a value of 5;

2. 80th to 89th percentile a value of 4;
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by
Community Intervenors and Mountainview Coalition and Pueblo of Isleta

3. 70th to 79th percentile a value of 3;

4. 60th to 69th percentile a value of 2;

5. 50th to 59th percentile a value of 1;

6. below the 50th percentile a value of 0.

B. Application Denial.

1. The Department shall deny the application if the new or modified source will increase the air toxics cancer risk above the County mean or median, whichever is more conservative, or increase the air toxics cancer risk beyond 5 in \(1,000,000\) million, whichever is lower, in any overburdened community within a one-mile radius of the source as long as the unmitigated air dispersion modelling performed pursuant to this rule demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; or

2. The Department shall deny the application if the new or modified source will increase the air toxics hazard index score in any overburdened community within a one-mile radius of the source above the County mean or median, whichever is more conservative, or increase the chronic or acute hazard index by a value of 1.0, whichever is lower as long as the unmitigated air dispersion modelling demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; and

3. The Department may deny the application or require more stringent mitigation measures, including air pollution control measures, than would otherwise be required by this Part if it determines based on the Applicant’s health, environment and equity impact assessment and unmitigated air dispersion modeling that the quantity and duration of the emissions from the source would with reasonable probability disproportionately injure human health or unreasonably interfere with public welfare in any overburdened community within a one-mile radius as long as the unmitigated air dispersion modelling demonstrates that air pollution emissions from the source will be dispersed to that overburdened community; and

4. The Department may deny the application or require more stringent mitigation measures, including pollution control measures, than would otherwise be required by this Part if it determines based on information
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

received from the Public Information Hearing or through public comment, including from community based participatory research, that the quantity and duration of the emissions from the source would with reasonable probability disproportionately injure human health or interfere with public welfare in any overburdened community within a one-mile radius.

A. Application Approval.

If the Department does not deny the Application pursuant to 20.11.72.12.B, the Department shall issue the HEEI Permit. In any HEEI permit, the Department shall require emission controls, emissions monitoring and reporting, and quality of life public welfare impacts mitigation based on the sum of the values provided in 20.11.72.12.A NMAC and the data collected pursuant to Section 20.11.72.4012 B(4)(h) NMAC for each overburdened community within a one-mile radius of the new or modified source where unmitigated air dispersion modelling demonstrates that emissions of air pollutants will be dispersed to that overburdened community. Where there is more than one overburdened community within a one-mile radius of the new or modified source where the unmitigated air dispersion modelling demonstrates that emissions of air pollutants will be dispersed to that overburdened community, the Department shall require emission controls, emissions monitoring and reporting and quality of life public welfare impacts mitigation based on the overburdened community with the highest total score. Under no circumstances shall the emission control required be less stringent than the emission control required by any applicable provision of federal or state laws, rules, regulations or requirements.

1. If the sum of the values for any overburdened community within a one-mile radius of the source where the unmitigated air dispersion modelling demonstrates that air pollution emissions will be dispersed to that overburdened community is within the upper 25th percentile of the highest possible score for an overburdened community, the Department shall require:

-------------------a. LAER for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

-------------------b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

c. Quarterly stack test or equivalent emissions monitoring of permitted emissions; and

d. Continuous fenceline monitoring of permitted emissions; and

e. Contemporaneous reporting of permitted emissions; and

f. Provide a plan for off-site odor, light and noise mitigation; and

g. Provide a diesel particulate matter mitigation plan.

2. If the sum of the values for any overburdened community within a one-mile radius of the source is between the 50th and 74th percentile of the highest possible score for an overburdened community, the Department shall require:

a. LAER for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline monitoring of permitted emissions; and

d. Contemporaneous reporting of permitted emissions; and

e. Provide a plan for off-site odor, light and noise mitigation; and

f. Provide a plan for diesel particulate matter, as appropriate.

3. If the sum of the values for any overburdened community within a one-mile radius of the source is between the 25th and 49th percentile of the highest possible score for an overburdened community, the Department shall require:
Proposed Changes to Petitioners’ Amended Exhibit A filed Jointly by Community Intervenors and Mountainview Coalition and Pueblo of Isleta

a. BACT for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

b. MACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline emissions monitoring of permitted emissions; and

d. Semi-annual permitted emissions reporting; and

e. Provide a plan for off-site odor, light and noise mitigation; and

f. Provide a plan for diesel particulate matter mitigation, if appropriate.

4. If the sum of the values for any overburdened community within a one-mile radius of the source is within the lowest 25th percentile of the highest possible score for an overburdened community, the Department shall require:

a. RACT for criteria pollutants, for each criteria pollutant where unmitigated air dispersion modelling demonstrates that emissions of that criteria pollutant shall be dispersed to that overburdened community; and

b. BACT for hazardous air pollutants, for each hazardous air pollutant where unmitigated air dispersion modelling demonstrates that emissions of that hazardous air pollutant shall be dispersed to that overburdened community; and

c. Continuous fenceline emissions monitoring of permitted emissions; and

d. Annual permitted emissions reporting; and
e. A plan for off-site odor, light and noise mitigation; and
f. A plan for diesel particulate matter mitigation, if appropriate.

20.11.72.13 MAPPING OF OVERBURDENED COMMUNITIES BY THE DEPARTMENT.

A. Within sixty (60) calendar days of implementation of this Part, the Department shall publish on its website a map of overburdened communities.

B. Within ninety (90) calendar days of implementation of this Part, the Department shall begin developing its own EJ database. The Department shall collect locally-sourced air quality and emissions data including data from community based participatory research and air quality monitoring data and compiling health data and data for social determinants of health from publicly available sources. The database will be updated continually and at a minimum, annually, in order to ensure most up-to-date data is used in all HEEI permit applications.

20.11.72.14 PERMIT CANCELLATION, SUSPENSION OR REVOCATION:

A. The Department shall cancel any permit for any new source that ceases operation for five years or more, or permanently. Reactivation of any source after the five-year period shall require a new permit.

B. For any permit issued under this Part, the Department shall review the permittees’ fenceline monitoring data semiannually to ensure efficacy of all control technologies.

C. The Department shall suspend any permit issued under this Part if review of the permittees’ fenceline monitoring data show a failure in required control technologies or a violation of any permit condition that persists for more than thirty (30) days.

D. A violation of a requirement of the state act, a board regulation or a condition of a permit that has been issued pursuant to 20.11.72 NMAC may result in a suspension or revocation of the permit. If the Department initiates an enforcement action to suspend or revoke a permit, the Department and the permittee shall comply with the procedures required by 20.11.81. NMAC.
E. Any permit cancellation, suspension or revocation shall be subject to the following procedures:

1. At least thirty (30) days before cancelling, suspending or revoking a permit, the Department shall notify the permittee by certified mail of the impending cancellation, suspension or revocation and the reasons therefor. Construction, modification and, if required, interim operation shall cease upon the effective date of cancellation contained in the notice of cancellation, suspension or revocation. A permittee who has received notice that a permit is or will be cancelled may request a hearing before the Board. Any request for a hearing must be made in writing to the Board within thirty (30) days after the notice of the Department’s action has been received by the permittee. Unless a timely request for hearing is made, the decision of the Department shall be final.

2. If a timely request for hearing is made, the Board shall hold a hearing within sixty (60) days after receipt of the request. The hearing shall comply with the procedures required by 20.11.81 NMAC.

20.11.72.15 EXEMPTIONS.
Exempted from a health, environmental and equity impacts analysis under this part are:

A. Enforcement activities;
B. Emergency permit applications under 20.11.41.24;
C. Purely ministerial actions;
D. Administrative or technical permit revisions, provided such administrative or technical revisions meet the requirements of 20.11.41.28 NMAC;
E. Activities excluded from “modifications” as provided by 20.11.41.7.U(1)-(4) NMAC;
F. Emergency generators;
G. Modifications resulting in a net decrease in emissions.

20.11.72.16 ADMINISTRATIVE APPEALS–JUDICIAL REVIEW.

A. Any person adversely affected by a final action by the Department under 20.11.72 NMAC may file a petition for hearing before the Board for further relief pursuant to 20.11.81.1 et seq.
B. Any person who is adversely affected by a final decision of the Board or who participated in an appeal to the Board of a Department decision and who is adversely affected by such action may appeal the Board’s final decision to the New Mexico Court of Appeals pursuant to NMSA 1978 § 74-2-9.

20.11.72.17 SEVERABILITY:
If any part or application of this Part is held invalid, the remainder or its application to other situations or persons shall not be affected.

20.11.72.18 CONFLICT:
If any part or application of this Part is in conflict with the requirements found in Title 20, Chapter 11, Part 41, -Part 60, or Part 61, the provision in this Part shall apply.
ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, P.O. Box 1293, Albuquerque, NM 87103. Telephone: (505) 768-1972.

SCOPE: Any person who intends to construct a new stationary source or modify an existing stationary source that is subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC.

Exemptions: 20.11.72 NMAC does not apply to:
1. technical permit revisions under Subsection B of 20.11.41.28 NMAC;
2. administrative permit revisions under Subsection A of 20.11.41.28 NMAC;
3. emergency permits applications under Subsection A of 20.11.41.24NMAC;
4. relocations for portable sources under Paragraph (2) of Subsection F of 20.11.41 NMAC;
5. any source exempt from 20.11.41 NMAC, 20.11.60 NMAC, 20.11.61 NMAC; and
6. sources within Bernalillo county that are located on Indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction.

STATUTORY AUTHORITY: 20.11.72 NMAC is adopted pursuant to the authority provided in Title VI, Sections 74-2-4 and 74-2-5, NMSA 1978; Bern. Co. Ord. Ch. 30, Art. II, Sec. 32.

DURATION: Permanent.

EFFECTIVE DATE: January 1, 2025, except where a later date is cited at the end of a section.

OBJECTIVE: To establish additional permitting requirements for new or modified stationary sources of air pollution that are located, or proposed to be located, in or within a one-mile radius of an overburdened area in order to prevent disproportionate health impacts or environmental effects from air emissions on the overburdened area, to protect all residents from certain hazardous air pollutants, and to encourage meaningful public participation in the permitting process.

DEFINITIONS: In addition to the definitions in 20.11.72 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.72 NMAC shall govern.

A. “Best Available Control Technology” or “BACT” means the same in 20.11.72 NMAC as it is defined in Subsection M of 20.11.61.7 NMAC.

B. “Environmental Factors” shall include particulate matter 2.5 microns or less (annual average PM 2.5 levels in air), ozone (average of the annual top ten daily maximum 8-hour ozone concentrations in air), diesel particulate matter (diesel particulate matter level in air), annual toxic releases (in pounds), and traffic proximity and volume (count of vehicles (average annual daily traffic) at major roads within 500 meters, divided by the distance in meters).

C. “Health Indicators” shall include asthma prevalence among adults 18 years of age and older, asthma prevalence among children 17 years of age and younger, chronic obstructive pulmonary disease (COPD) prevalence among adults 18 years of age and older, cardiovascular disease prevalence among adults 18 years of age and older, age-adjusted cancer incidence per 100,000 population, persons with disabilities, and life expectancy.

D. “Overburdened Area” means the twenty percent of census block groups in Bernalillo County that experience the highest cumulative environmental and public health stressors (using the most recent version of the Environmental Protection Agency’s Environmental Justice (EJ) Screen and New Mexico Department of Health’s New Mexico Indicator Based Information System (NMIBIS) as on-line resources), considering at least the
following: environmental factors, health indicators, and social determinants of health indicators as defined in this regulation.

E. "Social Determinants of Health Indicators" shall include percent of population age 25 years and older who do not have a high school diploma or equivalent, percent of households with a total household income below two hundred percent of the federal poverty level, percent of population over the age of five that speak a language other than English at home and speak English less than "very well", and percent of population that is non-white, and also those who list their ethnicity as Hispanic or Latino.

[20.11.72.7 NMAC – N, 1/1/2025]

20.11.72.8 OVERBURDENED AREA REQUIREMENTS:

A. The City of Albuquerque Environmental Health Department (department) shall, in consultation with the public and using the latest and best available science and data on health and the environment, develop a GIS map, along with map layers displaying environmental factors, health indicators, and social determinants of health indicators, representing overburdened areas in Bernalillo County.

B. The department shall publish and provide public notice of the overburdened areas map developed per section A of 20.11.72.8 NMAC by January 1, 2025 and, for purposes of 20.11.72 NMAC, the map shall go into effect on July 1, 2025. The department may make minor adjustments to correct errors and for other significant concerns based on public input per Subsections A & B of 20.11.72.9 NMAC in the six months before the overburdened area map goes into effect.

C. The department shall require every new or modified stationary source subject to permitting under 20.11.41 NMAC, 20.11.60 NMAC, or 20.11.61 NMAC that is located, or proposed to be located, in or within a one-mile radius of an overburdened area, as indicated by the overburdened areas map in effect as of the permit application date, to apply BACT even if the new or modified stationary source is not a major stationary source.

D. The department shall require BACT for new or modified stationary sources throughout Bernalillo County that emit any one, or combination of, the following fifteen hazardous air pollutants (HAPs): acetaldehyde, acrolein, benzene, 1,3-butadiene, carbon tetrachloride, ethyl benzene, ethylene oxide, formaldehyde, hydrochloric acid, methyl bromide, methylene chloride, naphthalene, toluene, vinyl chloride, and xylenes.

E. The department shall, in consultation with the public and using the latest and best available science on health and the environment, update its overburdened areas map when a change in circumstances warrant or at a minimum of every five years using data from the following on-line sources: U.S. Census Bureau’s American Community Survey (ACS) 5-Year Data, U.S. Environmental Protection Agency’s Environmental Justice (EJ) Screen, and New Mexico Department of Health’s New Mexico Indicator Based Information System (NMIBIS), and provide notice to potentially regulated entities at least six months before an updated overburdened areas map goes into effect.

[20.11.72.8 NMAC – N, 1/1/2025]

20.11.72.9 PUBLIC NOTICE BY DEPARTMENT – PUBLIC PARTICIPATION: In addition to the requirements for public notice by department – public participation set forth under 20.11.72.9 NMAC, the public notice by department – public participation requirements in 20.11.41.14 NMAC apply unless there is a conflict between requirements, in which case the more expansive notice requirements shall govern.

A. The department shall provide notice by regular mail or electronic mail to all individuals, neighborhood associations, and other organizations, and to those persons having stated a desire to receive notices of all applications filed pursuant to 20.11.41 NMAC, 20.11.60 NMAC or 20.11.61 NMAC as identified on a list maintained by the department, who reside in or represent persons residing in an overburdened area that is within a one-mile radius of a located, or proposed to be located, new or modified stationary source.

B. Public participation shall be encouraged and at least include opportunities for written, live, and online public comment and engagement.

[20.11.72.8 NMAC – N, 1/1/2025]

HISTORY OF 20.11.72 NMAC: [RESERVED]
Ethan Watson
City Clerk
Office of the City Clerk
600 Second Street NW, Albuquerque NM 87102
505-924-3650
ewatson@cabq.gov

April 18, 2024
Sent via email and U.S. Mail

Re: IPRA Request # 23-11777

Mr. Watson:

As you know, on December 5, 2023, the New Mexico Environmental Law Center submitted the following New Mexico Inspection of Public Records Act (“IPRA”) request:

“Any and all electronic messages, e-mail messages, text messages, documents or other communications to or from City Councilor Dan Lewis regarding the drafting, promoting, and passing of Resolution **R-23-176**, Establishes a moratorium for the AQCB to make any regulation or standard addressing quality of life impacts until February 2024 and/or **O-23-88**: Repeals the current AQCB ordinance and abolish the current Board; Creates a new ordinance with more specific requirements regarding the Board composition, as well as establishes the Board’s lack of authority to make any regulation addressing quality of life impacts and provide advice/recommendations on air quality matters to pretty much any entity.”

Your office provided a response on January 12, 2024, stating that it was necessary to withhold the production of certain emails responsive to the request because the emails were exempt from disclosure pursuant to the attorney-client privilege exception to the Inspection of Public Records Act, NMSA 1978 § 14-2-1(F) (attorney-client privilege) and NMSA 1978 § 14-2-1(L) (as otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege).

I then submitted a letter on January 29, 2024, included as Attachment 1, explaining that, while the substance of the withheld emails may be exempt from disclosure due to the attorney-client privilege, facts, such as the name of the attorney communicating, as well as the email addresses
of the sender and recipient, the dates of the communication, and the subject heading are not privileged simply because they are communicated to a lawyer by a client. *S.F. Pac. Gold Corp. v. United Nuclear Corporation*, 2007-NMCA-133, ¶ 13, 143 N.M. 215; *See also, Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

Your office provided little additional substantive information in response to this letter, simply providing a list of the names of individuals, including some attorneys employed by the City of Albuquerque, that engaged in the sought-after communications. Specifically, your office responded stating:

“Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney’s Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors.”

Importantly, your office failed to provide any explanation of how it was determined that the attorney-client privilege applied to each individual communication. As such, I submitted a second letter, dated February 22, 2024 and included here as Attachment 2, again asking for the email communications with privileged information redacted.

Again, rather than meaningfully responding to the request, your office simply closed the request, stating that, “the City had made all responsive (non-exempt) records available to you … Your request will remain closed.”

This letter serves as our final attempt to retrieve the 13 email records we are entitled to under the New Mexico Inspection of Public Records Act. Based on the responses to our request provided by your office, it is impossible to determine whether the 13 email messages withheld actually fall under the attorney-client privilege exception to IPRA, because you have provided no information about the content of the communications withheld.

Because the City’s responses failed to include the name and title of the person who determined that the attorney-client privilege exception applies to these withheld records, violating NMSA 1978 § 14-2-11(B), I cannot reach out directly to whoever made the determination that the emails are protected under attorney-client privilege, since the city unlawfully deprived us of that information. As such, I am sending this letter directly to you.
Additionally, the City’s blanket assertion that the attorney-client privilege exempts these emails from disclosure, without any description of the contents of the emails, is a direct violation of NMSA 1978 § 14-2-11(B), which requires the records custodian to provide a written explanation of any denial under IPRA – this includes a description of the records withheld.

In *Tawater v. Bd. of Commissioners forCnty. of Sandoval*, 2023-NMCA-052, the New Mexico Court of Appeals discussed at length the attorney-client privilege exception under IPRA, as it related to three emails withheld by Sandoval County under the attorney-client privilege exception. The *Tawater* Court described, in detail, the exempted emails as emails from the Public Information Officer to the county manager that contained summaries of conversations between the Public Information Officer and county attorneys that related to the IPRA lawsuit brought by the plaintiff. In doing so, the Court discussed the attorney’s interpretation of the scope of the IPRA request and direction on responding to the request, as well as the Public Information Officer’s concerns with the attorney’s interpretation and direction. *Id.* at ¶¶ 12–15. The Court went on to describe one email as containing a summary of a conversation between the Public Information Officer and county attorneys about the pending lawsuit and how the county should respond to an interrogatory relating to an IPRA request from the plaintiff. *Id.* at ¶ 13. Though the Court determined two of the three emails were made for the purpose of facilitating litigation, such that they should be exempt from disclosure under IPRA, the description of such communications by the *Tawater* Court clearly demonstrates not only that such a description of an attorney-client privileged communication is allowed under IPRA, but necessary to any determination of whether an exemption on the basis of attorney-client privilege allowing the refusal to release such communications is appropriate.

In this instance, however, the City has failed to provide any description justifying why the 13 sought-after communications have been withheld pursuant to the attorney-client privilege exception to IPRA, and instead, merely lists the names of those communicating, some of who are attorneys, and broadly, baselessly asserting that the attorney-client privilege exception applies to each communication in the absence of any reasoning.

Furthermore, the intent of the New Mexico State Legislature, in enacting IPRA, was to ensure that all persons are entitled to the greatest possible information regarding the affairs of government, such that any denial of the release of records should provide enough information to allow the requestor to obtain the greatest possible information. *See Am. C.L. Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38, 392 P.3d 181, 190; *See also* NMSA 1978 § 14–2–5. Thus, in order to justify invoking the attorney-client privilege exception under NMSA 1978 § 14-2-11(B), the City of Albuquerque must describe the content of each withheld email,
consistent with Tawater, as well as identify the specific sender and recipient of each email, and the dates on which the email was sent.

Please provide the information sought above no later than April 25, 2024. Because the City’s responses to our requests for information clearly do not comply with IPRA, we anticipate the City will promptly correct its mistake by the aforementioned date and I am certain we can resolve this matter without further legal action.

Thank you for your prompt attention to this matter.

/s/ Maslyn Locke  
Maslyn Locke  
Senior Staff Attorney

New Mexico Environmental Law Center  
722 Isleta Blvd. SW  
Albuquerque, NM  
87105  
C: (505) 231-7130  
mlocke@nmelc.org
January 29, 2024

Nyvia Barraza  
Council Operations Coordinator  
400 Marquette Ave NW  
Albuquerque, NM 87102

Re: Closure of IPRA Request #23-11777

Good afternoon-

Thank you for your correspondence on Friday, January 12, 2023, at approximately 4:54 pm, informing me that your office determined that it was necessary to withhold the production of certain emails responsive to my IPRA request because the emails are exempt from disclosure pursuant to attorney-client privilege, NMSA 1978, § 14-2-1(F) (attorney-client privilege) and NMSA 1978, § 14-2-1(L) (as otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege).

While the substance of the withheld emails may very well be exempt from disclosure due to attorney-client privilege, facts, such as the names of the attorney and or the e-mail addresses of the sender and recipient, are not subject to this exemption. As such, I write to respectfully request the City release all emails responsive to request #23-11777 with the confidential, exempt information subject to attorney-client privilege redacted from each communication, rather than withhold the communications and documents in their entirety.

Facts, such as the name of the attorney and the name of the recipient of a confidential communication, are not privileged simply because they are communicated to a lawyer by a client. S.F. Pac. Gold Corp. v. United Nuclear Corporation, 2007-NMCA-133, ¶ 13, 143 N.M. 215. Thus, while attorney-client privilege protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

A fact is one thing; a communication concerning that fact is an entirely different thing – such that the attorney-client privilege does not extend to a refusal to disclose any relevant fact within the client’s knowledge merely because they incorporated a statement of such fact into their communication to their attorney. Id. The fact of one person communicating to another is simply that – a fact, subject to disclosure consistent with the Inspection of Public Records Act, NMSA 1978, Chapter 14, Article 2. As such, while the substance of the responsive communications
withheld by your office may be subject to attorney client privilege, the names of the individuals communicating are subject to release.

For the reasons stated above, I respectfully request your office release the emails identified as responsive to IPRA request #23-11777, redacted as necessary, no later than February 10, 2024.

Best,

Maslyn Locke
Senior Staff Attorney
New Mexico Environmental Law Center
February 22, 2024

Nyvia Barraza  
Council Operations Coordinator  
400 Marquette Ave NW  
Albuquerque, NM 87102

Re: Additional Response to IPRA Request #23-11777

Good afternoon-

Thank you for your additional correspondence on February 9, 2024, responding to my request to release withheld emails responsive to IPRA Request #23-11777, with privileged information withheld. Specifically, I requested the release of facts, including the names of the attorney and or the e-mail addresses of the sender and recipient, that are not subject to the attorney-client privilege exemption under New Mexico’s Inspection of Public Records Act. Instead of releasing redacted emails, I was provided the following response:

“Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney’s Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors.”

I appreciate the release of the names of those who either sent or received the withheld emails, and would again request that the City provide additional facts found in the withheld emails, such as the dates of each correspondence, the sender and the recipient of each individual email and the subject line of each withheld email, because, as I explained in the letter dated January 29, 2024, facts, such as the name of the attorney and the name of the recipient of a confidential communication, and the date upon which the communication occurred, are not privileged simply because they are communicated to a lawyer by a client. S.F. Pac. Gold Corp. v. United Nuclear Corporation, 2007-NMCA-133, ¶ 13, 143 N.M. 215. Thus, while attorney-client privilege protects disclosure of communications, it does not protect disclosure of the underlying facts by those who communicated with the attorney. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). Nor does this privilege extend to prevent the dates of such communication from disclosure or the subject line of the email communication.

Again, I note that fact is one thing; a communication concerning that fact is an entirely different thing – such that the attorney-client privilege does not extend to a refusal to disclose any relevant facts.
fact within the client’s knowledge merely because they incorporated a statement of such fact into their communication to their attorney. *Id.* The fact of one person communicating to another is simply that – a fact, subject to disclosure consistent with the Inspection of Public Records Act, NMSA 1978, Chapter 14, Article 2. As such, while the substance of the responsive communications withheld by your office may be subject to attorney client privilege, the subject line of the email communication and the date the communication took place, similar to the names of the individuals communicating, is not subject to attorney client privilege and cannot be withheld under IPRA.

If you could please provide the dates during which each withheld email communication occurred, as well as the subject line of each withheld email and identify the specific sender and recipient, no later than March 1, 2024, I would appreciate it.

Best,

Maslyn Locke
Senior Staff Attorney
New Mexico Environmental Law Center
A message was sent to you regarding record request #23-11777:

Dear Ms. Locke:

On December 5, 2023, Council Services received your public records request identified as 23-11777. On January 12, 2024, my office completed your public records request specific to City Council records. My office withheld production of certain emails because those emails are exempt from production pursuant to attorney-client privilege (NMSA 1978, § 14-2-1(F)) and as
otherwise provided by law, including but not limited to Rule 11-503 NMRA, lawyer-client privilege (NMSA 1978, § 14-2-1(L)).

On January 29, 2024, you provided a letter requesting “the City release all emails responsive to request #23-11777 with the confidential, exempt information subject to attorney-client privilege redacted from each communication, rather than withhold the communications and documents in their entirety.”

Thirteen (13) exempt emails were withheld and will not be produced because they contain privileged communications between attorneys in the City Attorney’s Office (Lauren Keefe, Kinzer Jackson, Alan Heinz, Kelsea Sona), attorneys in Council Services (Kevin Morrow, Julia Ronquillo), Council Services staff (Isaac Padilla), and City Councilors.

Sincerely,
Nyvia Barraza
Council Operations Coordinator

View Request 23-11777

https://nextrequest.cabq.gov/requests/23-11777
Questions about your request? Reply to this email or sign in to contact staff at City of Albuquerque.

Technical support: See our help page
Good morning,

Please see the Bernalillo County Commission Administrative Meeting agenda item 3(A) and supporting documents regarding the City Council Resolution for a Moratorium.

KELSEA E. SONA  
Assistant City Attorney | Air Quality  
Lauren Keefe | City Attorney  
One Civic Plaza NW | PO Box 2248 | Albuquerque, New Mexico 87103  
<ksona@cabq.gov>

Note: If you are a client, DO NOT forward this email or any attachments to anyone. If you do, you may be waiving the attorney-client privilege.

Note: This e-mail is confidential and it is intended solely for the use of those to whom it is addressed. It may contain information that is privileged and exempt from disclosures under the law. The unauthorized disclosure or interception of e-mail is a federal crime. See 18 U.S.C. § 2517(4). If you have received this e-mail in error or are not the intended recipient, do not distribute or copy. Please delete immediately and e-mail confirmation to the sender. Thank you.

Angel,

I am forwarding you, Kelsea, and Nathan this email that I received from Councilor Lewis last night. It is relative to the meeting and discussion we all had last Tuesday regarding the air board. Very interesting.

I will start reviewing the attached documents. Please let us all know what the next steps are regarding this as the Councilor states he wants to introduce today at noon.

Chris
Chris,

These are drafts of an ordinance and a resolution regarding the current air quality board.

The resolution puts a moratorium on their ability to decide on rules related to "environmental injustice" which is the current rule that effects so many groups and businesses right now. There are over 25 business groups including Kirtland Air Force Base, and Los Alamos Labs and others that are interested parties fighting against this rule. If implemented it will kill business in this city.

The ordinance is a change to the make up of the board and - it reorganizes the board and adds some much needed accountability.

Please take some time to check it out and let me know what you think.

My plan is to finalize these bills and introduce them on Friday at Noon.

Thanks!

Dan
All,

I just spoke with Mr. Whelan regarding Maxeon who is the solar company manufacturing company proposing to locate to Mesa del Sol. We (the permitting team) met with Maxeon yesterday morning for a pre-application meeting. Maxeon is concerned about the HEEI rule and has been keeping an active ear in the HEEI development and Councilor Lewis moratorium and resolution to the air pollution ordinance, and the Mayor's decision to veto or not veto. We have been encouraging Maxeon to submit an application sooner than later and they are planning to submit an application by November 30th.

I updated Mr. Whelan with respect to Maxeon’s concern and he will be discussing this with the administration this morning. Maxeon will be meeting with the administration today and this topic will most definitely be discussed.

Chris

CHRIS ALBRECHT
Deputy Director | air quality programs | environmental health department
m 505.350.0090
o 505.768-1965

Hi Everyone,
I know y’all are holding it down at CC2 (great job by the way) but I would like to schedule a half hour to hour long regroup- maybe sometime on Friday when you have had a moment to rest? Because we have a deadline tomorrow, 11/17 and with Dir. Martinez out of office Thursday 11/16 & Friday 11/17 I have asked Mr. Whelan for updates from the administration related to the HEEI.

Gracias,
-maria 😊

Sinceramente,

Maria Gallegos
public health compliance manager | environmental health
The mission of the Environmental Health Department is to responsively and professionally serve the people of Albuquerque by promoting and protecting public health, by preventing disease, and by preserving the integrity and quality of our environment through sustainable management and responsible stewardship.

*The City of Albuquerque is located on the traditional, unceded territory of the Tiwa People*
Get Outlook for iOS

From: sanchezsettled@gmail.com <sanchezsettled@gmail.com>
Sent: Tuesday, November 14, 2023 4:12:28 PM
To: SdeArmijo, Anita <asdearmijo@cabq.gov>; Antoinette Sedillo Lopez <asedillolopez@gmail.com>; stuart.butzier@modrall.com <stuart.butzier@modrall.com>; Stan N. Harris <sharris@modrall.com>; benjamin.rossi@modrall.com <benjamin.rossi@modrall.com>; katalina.hadfield@modrall.com <katalina.hadfield@modrall.com>; knparkkh@sandia.gov <knparkkh@sandia.gov>; Richards, Dori <dori.richards@nnsa.doe.gov>; Eric Jantz <ejantz@nmelc.org>; Maslyn Locke <mlocke@nmelc.org>; Keefe, Lauren <lkeefe@cabq.gov>; Sona, Kelsea <ksona@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>; pdomenici@domenicilaw.com <pdomenici@domenicilaw.com>; lhollingsworth@domenicilaw.com <lhollingsworth@domenicilaw.com>; lrose@montand.com <lrose@montand.com>; kbrooks@montand.com <kbrooks@montand.com>; Moellenberg, Dalva L. <DLM@gknet.com>; Richards, Dori <dori.richards@nnsa.doe.gov>; lpmartinez@salud.unm.edu <lpmartinez@salud.unm.edu>; Michael B Calderon <MBCalderon@salud.unm.edu>; snavarrette@salud.unm.edu <snavarrette@salud.unm.edu>; reaughfield@law.unm.edu <reaughfield@law.unm.edu>; Annalisa Miller <annalisamiller@law.unm.edu>; Gabriel Pacyniak <pacyniak@law.unm.edu>; florecermucho1953@gmail.com <florecermucho1953@gmail.com>; WILLARD, DANIEL C CIV USAF AFGSC 377 ABW/JA <daniel.willard@us.af.mil>; Manuel Criollo <manuelcriollo@unm.edu>; Elaine Cimino <ecimino10@gmail.com>; Cutler, Lindsay <Lindsay.Cutler@isletapueblo.com>; vanessa.hidalgo@isletapueblo.com <vanessa.hidalgo@isletapueblo.com>
Subject: Albuquerque/Bernalillo County Petition Number 2022-03

[EXTERNAL] Forward to phishing@cabq.gov and delete if an email causes any concern.

Everyone,
I am the Hearing Officer appointed by the Air Quality Control Board, on AQCB Petition Number 2022-3. Because my Contract was formalized about 2 weeks ago on October 27th, and because of time constraints and calendar conflicts, there will not be an opportunity to set a pre hearing conference.

We are scheduled to have a Scheduling Meeting on November 20th, and we can use that time to address scheduling as well as any further matters concerning the rulemaking hearing scheduled to commence on December 4th. First and foremost, I need to emphasize this hearing is scheduled to be concluded in 5 days. The challenge I have as the Hearing Officer is to limit duplication and repetitive testimony, while allowing a reasonable opportunity for everyone to present their positions.

It is my understanding, that the City Counsel Ordinance and the City Counsel Resolution passed last week, but have not gone into effect. It is my position that it would be prudent to continue to prepare for the upcoming rulemaking hearing. In light of this, I am sending this email to everyone to give a little advance notice concerning our Zoom Scheduling meeting that we have scheduled for next Monday, November 20th, starting at 10:00 am.

In an effort to get this rulemaking hearing concluded by December 8th, I am going to suggest the following:

1. Petitioner will present their case first with their presentation of witnesses. Petitioners (as well as any parties presenting witnesses), will have an opportunity to give a brief Opening Statement concerning their presentation of witnesses. Petitioners and all parties supporting the Petition, will have up to one and a half days to complete their presentation. It is my suggestion that Petitioners collaborate with supporting parties to organize their witnesses and time allotted.

2. In an effort to get the case completed timely, cross examination of witnesses will be permitted by one or two representatives of the opposing party. Cross examination will be limited to 90 minutes. The Board will thereafter have the opportunity to ask follow up questions.

3. The City of Albuquerque can choose to follow the Petitioners or elect to follow the Parties in opposition of the Petition. The City will be allowed a half day for their presentation.

4. Parties in opposition to the Petition will be allowed one and a half days for their presentation. It would be helpful if these parties could collaborate and organize their witnesses and time. Again, cross examination of each witness will be limited to 90 minutes, by one or two representatives of the opposing side.

5. Any neutral parties remaining will have their opportunity to present witnesses in the same manner as above.

6. Petitioners will have the opportunity to present one rebuttal witness, and have no more than one hour for this presentation. Opposing party will be allowed 30 minutes for cross examination.

7. Pro Se parties and any party without witnesses will have the opportunity to present a closing statement. Dependent on time constraints, Closing Statements may be limited drastically. I am inclined to limit Closing Arguments to 60 minutes for each side. Each side can agree on one or more presenting their closing argument, but cumulatively not exceeding the time limit.

There are further matters that we can discuss at our November 20th scheduling meeting.

(P.S. Please let me know if I omitted anyone.)

William A. Sanchez, Esq.
Sanchez Settlement and Legal Services, LLC

Mailing Address:
P.O. Box 11841
Albuquerque, NM 87192-1841
(505) 720-1904
Mayor Keller Chooses Environmental Extremists Over Major Economic Development and Jobs

Mayor Vetoes Legislation that puts checks and balances on rogue Air Quality Control Board.

Albuquerque, NM – Moments ago, the Albuquerque City Council received Mayor Tim Keller’s veto for Bill O-23-88, which aimed to repeal and replace the Air Quality Control Board, and R-23-176, which imposed a specific moratorium on the Board, preventing it from passing a Health, Environment and Equity Impacts rule without scientific evidence because it is outside of their jurisdiction based on case law.

“By vetoing these bills, the Mayor has put the City of Albuquerque and State of New Mexico at risk of losing thousands of jobs” said City Councilor Dan Lewis. “It’s unfortunate that the Mayor has sided with environmental extremists such as Marla Painter who claims to solely represent the South Valley, and her domestic terrorist husband Mark Rudd of the notorious Weather Underground, and against crucial economic development and thousands of family owned businesses in our City who have expressed grave concern over this proposed rule.”
The Air Quality Control Board has every intention of passing regulations making it extremely difficult, if not entirely impossible for companies to obtain air permits in the City of Albuquerque. The Mayor’s veto message demonstrates that he has serious concerns with the proposed rule, yet he chose to veto the two pieces of Council legislation that would prevent the board from implementing this extreme proposal.

The Albuquerque Journal wrote, “the so-called Health, Environment and Equity Impacts rule is perhaps the most restrictive regulatory rule in New Mexico history. And environmentalists love it because it would apply to a vast array of businesses that require air quality permits — from dry cleaners, auto body shops and concrete plants to schools, hospitals and university facilities.”

The University of New Mexico said, “UNM believes that the proposed regulations will negatively impact UNM operations on main campus and the Health Sciences Center, UNM Hospital, and UNM’s anticipated development of the South Campus TIDD and UNM Health infrastructure.”

Even the City’s Environmental Health Department has grave concerns with the regulations and stated, “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.”

The undemocratic decisions and behind-the-scenes deals of the extremists on the Air Board are poised to inflict severe damage on our major employers, putting at risk our capacity to attract businesses essential for job growth. The Air Quality Control Board is scheduled to hear the proposed rule on December 4th-8th. The City Council has an opportunity to override the Mayor’s veto with 6 votes at the December 4th regular City Council meeting.

###

**Julian Moya**  
Deputy Director  
Council Services Department  
(505) 768-2511  
julianmoya@cabq.gov  
cabq.gov/council
Get Outlook for iOS

From: Nick Maxwell <inspector@sunshineaudit.com>
Sent: Monday, December 11, 2023 1:43:27 AM
To: kittyrichards1@gmail.com <kittyrichards1@gmail.com>; asedillolopez@gmail.com <asedillolopez@gmail.com>; inspector@sunshineaudit.com <inspector@sunshineaudit.com>; ContactUs@da2nd.state.nm.us <ContactUs@da2nd.state.nm.us>
Cc: SdeArmijo, Anita <asdearmijo@cabq.gov>; sanchezsettled@gmail.com <sanchezsettled@gmail.com>; Keefe, Lauren <lkeefe@cabq.gov>; Mulvihill, Nathan <nmulvihill@cabq.gov>; Sona, Kelsea <ksona@cabq.gov>; ejantz@nmelc.org <ejantz@nmelc.org>; mlocke@nmelc.org <mlocke@nmelc.org>; khovden@nmelc.org <khovden@nmelc.org>; pdomenici@domenicilaw.com <pdomenici@domenicilaw.com>; lhallingsworth@domenicilaw.com <lhallingsworth@domenicilaw.com>; sbutzier@modrall.com <sbutzier@modrall.com>; sharris@modrall.com <sharris@modrall.com>; benjamin.rossi@modrall.com <benjamin.rossi@modrall.com>; katalina.hadfield@modrall.com <katalina.hadfield@modrall.com>; knparkh@sandia.gov <knparkh@sandia.gov>; dlm@gknet.com <dlm@gknet.com>; ajt@gknet.com <ajt@gknet.com>; dori.richards@nnsa.doe.gov <dori.richards@nnsa.doe.gov>; lpmartinez@salud.unm.edu <lpmartinez@salud.unm.edu>; mbcalderon@salud.unm.edu <mbcalderon@salud.unm.edu>; snavarrette@salud.unm.edu <snavarrette@salud.unm.edu>; pacyniak@law.unm.edu <pacyniak@law.unm.edu>; rcbaughfield@law.unm.edu <rcbaughfield@law.unm.edu>; annalisamiller@law.unm.edu <annalisamiller@law.unm.edu>; daniel.willard@us.af.mil <daniel.willard@us.af.mil>; ecimino10@gmail.com <ecimino10@gmail.com>; lindsay.cutler@isletapueblo.com <lindsay.cutler@isletapueblo.com>; vanessa.hidalgo@isletapueblo.com <vanessa.hidalgo@isletapueblo.com>; ariel.noffke@us.af.mil <ariel.noffke@us.af.mil>
Subject: Urgent Follow-Up and Notice of Violation of the Open Meetings Act by the Air Quality Control Board
[EXTERNAL] Forward to phishing@cabq.gov and delete if an email causes any concern.
Subject: Urgent Follow-Up and Notice of Violation of the Open Meetings Act by the Air Quality Control Board

Dear Vice Chair Kitty Richards,

In light of the recent reorganization following the passage of an ordinance affecting the City's appointees to the Albuquerque-Bernalillo County Air Quality Control Board, I am writing to urgently follow up on my previous communication. Given that this reorganization has effectively vacated the positions of the City appointees, including the Office of Chair of the Board, and considering that it has been 5 days since the ordinance’s publication on December 5, 2023, there appears to be no longer a lawful quorum of the Board. As one of the three county appointees, I wish to draw your attention to a significant violation of the Open Meetings Act (OMA) of New Mexico, NMSA 1978 § 10-15-1(F), which was served in a prior Notice on December 8, 2023 to your email and is also attached to this email.

Let me first state, there has been a notable absence of a new event listing on the Board's website regarding the extended continuance of the HEEI public hearing over the weekend to Monday. This lack of transparency and public participation is concerning and may inadvertently contravene the guidelines set forth in Section 1(A) of the Act. The failure to continue listing each day of the HEEI hearing, especially this crucial continuance to Monday, and after each prior day had its own individual listing, could be perceived as arbitrary or capricious, undermining the public's right to access information about the activities of the Board.

Furthermore, at approximately 9:00 P.M. on December 8, 2023, the Board published an amended agenda for a special meeting scheduled at 9:00 A.M. on December 11, 2023. This amended agenda, especially the inclusion of the item 'a) Request to ratify the Chair’s decision to authorize the Board Attorney to pursue litigation to protect the Board's current rulemaking,' contravenes Section 1(F) of the Act. This section requires that the agenda be available and posted at least seventy-two hours prior to the meeting. The requirement was not met for all items added to the amended agenda that were not part of the initial agenda.

It is also pertinent to note that the Chair does not have the authority, as per various governing laws and regulations, to unilaterally authorize litigation on behalf of the Board. This action, therefore, represents a potentially serious misuse of city government resources, bordering on fraud, waste, or abuse.

Additionally, the Board's attorney's interactions with the media appear to contravene Section 1(K) of her contract with the Board, potentially amounting to professional misconduct. That contract has been attached for your review.

As a concerned citizen, I demand that the Board address these violations
immediately in line with NMSA 1978, Section 10-15-1. While the initial agenda was published within the timeframe mandated by the Act, the subsequent modification without full public notification is a clear violation of the Act. This violation casts doubt on the lawfulness of the Board's actions regarding those modified items, even in the event that a lawful quorum were to be established.

In the interest of maintaining public trust and adherence to established protocols, I urge the Board to update its website immediately with the relevant information regarding the hearing on Monday and to rectify the noted violations of the Open Meetings Act.

Thank you for your prompt attention to this matter. I look forward to a response and the timely resolution of these issues.

Warmest Regards,
-s- Nicholas R. Maxwell

On 2023-12-09 09:55, Nick Maxwell wrote:
> Greetings,
> 
> Does the Board intend to post any kind of notice on its website to include meeting access for the continuance of the public hearing on Monday?
> 
> Regrettably, the Board has failed to provide any public notice on their website that the hearing has not been adjourned and that the quorum will be continuing on Monday morning, supposedly after the improperly-noticed special meeting.
> 
> I would argue the failure to post a hearing continuation notice on the website violates Section 1(A) of the Act.
> 
> Regards,
> Mr. Nicholas R. Maxwell
> 
> On December 8, 2023 11:25:12 PM MST, Nick Maxwell
> <inspector@sunshineaudit.com> wrote:
> 
> >> Warmest Greetings,
> >>
> >> Enclosed, please find a notice regarding the Albuquerque-Bernalillo County Air Quality Control Board's breach of the Open Meetings Act. This pertains to the amended agenda posted on their website this evening, which was done after the expiration of the mandated 72-hour deadline.
> >>
> >> Sincerely,
> >> Mr. Nicholas R. Maxwell
> >> P.O. Box 1064
> >> Hobbs, New Mexico
>> Telephone: 575.441.3560
>> E-mail: inspector@sunshineaudit.com