

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

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

AQCB PETITION NO. 2022-3

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

PETITIONERS.

**FINAL ORDER AND STATEMENT OF
REASONS FOR ADOPTION OF REGULATION CONCERNING
HEALTH ENVIRONMENT AND EQUITY IMPACTS**

I. AUTHORITY AND SCOPE

1. The regulation attached as Attachment 1, requires the Environmental Health Department (EHD), in consultation with the public, to create a Map of Overburdened Areas within the County of Bernalillo by January 1, 2025. After public notice and by July 1, 2025, EHD is directed to require Best Available Control Technology (BACT) for any source permit or modification subject to part 41 or part 61 of the New Mexico Administrative Code containing the Albuquerque Bernalillo County Air Quality Control Board Regulations that is located in or within one mile from an Overburdened area. (20.11.41 and 20.11.61 NMAC). The adopted

regulation defines an Overburdened Area as an area with the highest 20 percent of environmental, health, and social determinants of health stressors as defined in the adopted regulation. The adopted regulation also requires BACT when a source subject to part 41 or 61 emits any of the pollutants that are on the most common Hazardous Air Pollutants (HAPS) whether or not it is in an overburdened area.

2. The authority of the Albuquerque-Bernalillo County Air Quality Control Board (“Board”) to adopt new rules that regulate air quality and protect public health is found in the Air Quality Control Act, NMSA 1978, Sections 74-2-4 and 74-2-5(B) NMSA 1978, § 74-2-5(G). (as amended through Jan. 2022); the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 (“City Ordinance”), Sections 9-5-1-4(B) and 9-5-1-6; Bernalillo County Code, Article II, Sections 30-33 and 30-35; and 20.11.82 NMAC, Rulemaking Procedures – Air Quality Control Board. *See* Federal EPA Regulation [40 CFR Part 7](#). —Nondiscrimination in Programs or Activities Receiving Federal Assistance From the Environmental Protection Agency.

3. “Air pollution” is defined as “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.” NMSA 1978, § 74-2-2(B) (emphasis added); City Ordinance, § 9-5-1-2; County Code, § 30-31; *see* 20.11.1.7(F) NMAC (substantially similar).

4. “Air contaminant” is defined as “a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof.” NMSA 1978, § 74-2-2(A); *see*

City Ordinance, § 9-5-1-2; County Code, § 30-31; *see also* 20.11.1.7(E) NMAC.

5. Under the definition of air contaminant, common pollutants, (Criteria Air Pollutants) such as nitrogen oxides, sulfur dioxide, particulate matter 2.5 microns and less, particulate matter 10 microns and less, carbon monoxide, lead and ozone, as well as greenhouse gasses, such as carbon dioxide, and toxic air pollutants (TAPS) and hazardous air pollutants (HAPS) are “air contaminants.” Emission of these air contaminants constitutes “air pollution” because they may injure human health or animal or plant life or may unreasonably interfere with public health and welfare.

II. CIRCUMSTANCES OF THE RULEMAKING

6. The Board undertook this rulemaking hearing under extraordinary circumstances. After the Board voted to hold a rulemaking hearing on the proposed HEEI regulations, the Albuquerque City Council passed Resolution 23 -176 and Ordinance 23-88 attempting to unilaterally stop the Joint Albuquerque Bernalillo County Air Quality Control Board from holding a hearing and considering the proposed regulation. Bernalillo County passed a Resolution asking the City Council to delay the vote so that the two governmental agencies could work together to update, improve, and fix any issues related to the joint Board. The Mayor vetoed the Resolution and Ordinance, and on the evening of the first day of the rulemaking hearing, the City Council overrode the Mayor’s veto. After the Board filed an application for a Temporary Restraining Order, the City provided the space, security, zoom technology, interpretation and hearing clerk through December 11, 2023 pursuant to its obligation to do so under City Ordinance and statute. Albuq. Ordinance 9-5-1-5 (A) “The staff for the Board shall be

provided by the City.” See NMSA 74-2-A (4) (2)

7. A City Councilor came to the Rulemaking Proceeding and during public comment attempted to disrupt the proceeding by asking the Board to “cease and desist” and delivering purported “cease and desist” letters to the Board. When told the Resolution and Ordinance had not yet gone into effect, the City Councilor threatened the Board with legal action. It was after this incident that the Board sought a Temporary Restraining Order to protect the ongoing rulemaking.

8. After the Board completed its rulemaking proceedings and made a decision to adopt the attached rule, the Board withdrew its application for a Temporary Restraining Order and amended its Complaint for Declaratory and Injunctive Relief to get clarification on whether the unilateral Ordinance and Resolution is legal under state law and pursuant to agreements with Bernalillo County as well as effective date of said Ordinance and Resolution..

9. Bernalillo County, because of its legal interests in the Joint Air Quality Control Board, entered the litigation as a party plaintiff.

10. The litigation is pending as of this date in *Albuquerque-Bernalillo County Air Quality Control Board v. City of Albuquerque*, D-202 CV-2023-09295 in the Second Judicial District Court.

III. PROJECTED BENEFITS OF THE RULES

11. The adopted regulation requires a higher standard of analysis and of control technology for sources of criteria air pollutants (CAPS) and hazardous air pollutants (HAPS) in and within one mile of overburdened communities. The adopted regulation helps to ensure that

current pollution levels in Overburdened Areas are not exceeded and instead will promote a decline in pollution levels in Overburdened Areas over time. BACT requires consideration of best standards for air pollution control technology balanced with cost. The adopted regulation also strengthens notice requirements including adding a requirement for permitting application notices to include neighborhood associations under Part 41 and more individual and neighborhood notices under Part 61. The adopted regulation also requires the use of BACT in any area throughout Bernalillo County where Hazardous Air Pollutants (HAPS) are emitted. This will reduce HAPS throughout the County which will help all residents within Bernalillo County by reducing the incidence of HAPS within the County. This will benefit public health for everyone in Bernalillo County, but particularly those in overburdened communities.

12. The adopted regulation places a modest burden on anyone seeking to obtain an air quality permit under Parts 41 and 61 in overburdened communities or within one mile around an overburdened community. The adopted regulation is easy to understand and relies on already existing provisions of the New Mexico Administrative Code containing the Board's regulations explaining BACT and how it is applied.. The adopted regulation also places a modest burden on those seeking to emit HAPS by requiring BACT analysis, whether or not the permit applicant seeks to emit HAPS in an Overburdened Area.

13. BACT is a standard known throughout the nation and there is supporting documentation and guides from the Environmental Protection Agency (EPA) the Texas Commission on Environmental Quality (TCEQ) and California Air Resources Board (CARB) among others. The use of BACTS has been shown to reduce emissions.

14. The evidence revealed that all individuals in Bernalillo County are subject to health effects of HAPS, whether in an overburdened community or not.

15 The technical evidence and public comment was clear that some communities are more burdened by pollutants than others and that the communities in the South Valley, including the Petitioners are overburdened. Overburdened areas will be identified by EHD by January 1, 2025 and mapped, using criteria identified in the adopted regulation, and thereafter EHD will require permit applicants within Overburdened areas and within one mile of the Overburdened area to use BACT for permit applications subject to Parts 41 and 61 of the Albuquerque Air Quality Board regulations.

16. The rules adopted are more protective of air quality and public health. The increased use of BACT will reduce emissions and reduced emissions, including the reduction of HAPS, will protect public health.

IV. COMPLIANCE WITH STATUTORY RULEMAKING REQUIREMENTS

17. The adopted regulation is at least as stringent as federal law *See* NMSA 1978, § 74-2-5(E) ; *see also* City Ordinance, § 9-5-1-4(D); County Code, § 30-33(d).

18. The adopted regulation is more protective of public health and the environment than current federal regulations and thus is more stringent than federal law.. *See* NMSA 1978, §74-2-5(G).

19. The adopted ordinance is justified given the character and degree of injury to or interference with health, welfare, visibility, and property caused by the sources of air contaminants involved. *See* NMSA 1978, § 74-2-5(F)(1); *see also* City Ordinance, § 9-5-1-4(E)(1); County Code, § 30-33(e)(1); 20.11.82.32(A)(1) NMAC.

20. The adopted ordinance is in the public interest, including when considering the

social and economic value of the sources and subjects of air contaminants involved, and considering environmental justice principles. *See* 20.11.82.32(A)(2) NMAC; NMSA 1978, § 74-2-5(F)(2); *see also* City Ordinance, § 9-5-1-4(E)(2); County Code, § 30-33(e)(2);.

21. The adopted ordinance is technically practicable and economically reasonable in the methods the rule employs to reduce or eliminate air contaminants from the sources involved. *See* NMSA 1978, § 74-2-5(F)(3); *see also* City Ordinance, § 9-5-1-4(E)(3); County Code, § 30-33(e)(3); 20.11.82.32(A)(3) NMAC.

22. The adopted ordinance is justified given prior experience with the equipment and the methods that are available to control the air contaminants involved. *See* NMSA 1978, § 74-2-5(F)(3); *see also* City Ordinance, § 9-5-1-4(E)(3); County Code, § 30-33(e)(3); 20.11.82.32(A)(3) NMAC.

23. Both substantial evidence presented by the technical evidence and by the public comments support the attached modifications of 20.11.41 and 20.11.61 NMAC adopted by the Board.

V. STAKEHOLDER OUTREACH AND PUBLIC HEARING

24. Because this rulemaking was initiated by a community group and not EHD, the Board ensured that outreach was conducted with all stakeholders.

25. The Board organized and EHD paid for a hearing officer and experienced mediator, Richard Virtue, to conduct meetings with all parties with the goal of sharing information and finding agreement where possible. The confidential meetings among the parties were conducted for approximately five months before the rulemaking hearing began and included a meeting of the parties' experts.

26. All public notice requirements for this rulemaking were met.

27. The Board decided several ancillary motions filed by the parties prior to the rulemaking hearing. The motions and Board orders deciding the motions are in the docket of these proceedings, as are the minutes of the meetings.

28. A hybrid public rulemaking hearing conducted by former District Court judge, William Sanchez, was held from December 4 through December 11. All interested persons were provided with an opportunity to provide their views and comment on the proposed rule. The parties were all heard from with few time limits and there was at least one hour of public comment each day. The parties who submitted Notice of Intent (NOI) to present expert testimony were allowed to present their expert witnesses, live and by ZOOM. Public Comments were allowed for 3 minutes each individual, both live and on Zoom. Closing arguments by all parties were allowed for about 5 minutes.

29. Virtually all parties to the rulemaking expressed a concern about Environmental Justice and or Cumulative Impacts in Overburdened Areas.

VI. DELIBERATIONS IN OPEN MEETING

30. After the close of the administrative record, the Board deliberated in open meeting. All seven Board members participated. The Board started with a consideration of the version of the Proposed Regulation filed by the Environmental Law Center on October 6, 2023 and the version for which the Board provided formal Notice of the rulemaking hearing. The Board considered the evidence in the record and considered multiple proposals for modification proposed by the parties and contained in the docket. The Board concluded, in light of the evidence, to begin its steps toward environmental equity by protecting the most overburdened

communities in Bernalillo County with a rule that was easily understandable by permit applicants and requires them to mitigate their emissions in Overburdened Areas and within a mile around those areas. There is no provision for denial of permits based on cumulative impact.

31. The Board had a full discussion and deliberated on “friendly” and “unfriendly” amendments to a Motion made by a Board member to use BACT analysis in overburdened communities. Multiple votes were taken on various attempts to amend the rule by the Board to arrive at a final ordinance that identifies overburdened communities, protects them by requiring permit applicants to use BACT and to require BACT for those permit applicants emitting HAPS identified in the rule. It also expands required notice to include neighborhood associations. It suggests updating the map when air monitoring justifies an update, but at least within 2 years after every decennial census. The Board used one of the screening tools presented by a party witness concerning the damage caused by the emission of HAPS to protect air quality for all of Bernalillo County, as the evidence revealed the toxic impact of HAPS in all areas. Testimony by EHD suggested that EHD, due to capacity issues, required time to implement the adopted regulation. Thus, EHD has until January 1, 2025 to complete the Map of Overburdened Areas and to implement the adopted regulation, which modifies 20.11.41 and 20.11.61. Toward the end of the hearing the Board denied all pending motions, one by one, with a majority vote of the Board. The deliberations were concluded on a 5 for, 1 against and one abstention on a vote to adjourn.

FINAL ORDER

32. WHEREFORE, by a vote of 5 for and 2 against, the full seven member Board of the Albuquerque-Bernalillo County Air Quality Control Board adopts the regulation contained in Attachment 1.

33. In light of the passage of this regulation, the Board denies all pending motions filed by the parties.

34. A copy of this Order and Attachment 1 will be electronically served on all of the parties and made available to the public by posting on the Air Quality Control Board website, sending the Order and adopted regulation to all media outlets, and sending it out on the Air Quality Control Board listserv.

35. The adopted regulation shall be expeditiously filed with the New Mexico State Records Center as required by law.

36. This Order and the attachment will be filed in the docket of these proceedings.



Maxine Paul, Chair
Albuquerque-Bernalillo County Air Quality Control Board

12/19/2023

Date

Attachment 1

Health Equity Environmental Regulation Adopted by the Albuquerque - Bernalillo County Air Quality Control Board on December 11, 2023

The following amendments are made to the Air Quality Control Board Regulations and will go into effect, January 1, 2025.

NEW MATERIAL

20.11.41.7 DEFINITIONS

XX. “Best Available Control Technology” or “BACT” means the same in 20.11.41 NMAC as it is defined in Subsection M of 20.11.61.7 NMAC.

XX. “Overburdened Area” means the twenty (20) percent of census block groups in Bernalillo County that experience the highest cumulative environmental and public health stressors considering at least the following: Environmental factors shall include annual particulates (PM2.5) ozone, diesel particulate matter, traffic proximity, as monitored in the area. Public health factors shall include adult asthma prevalence, pediatric asthma prevalence, Chronic Obstructive Pulmonary Disease prevalence in adults 18 years of age and older; heart disease prevalence among adults 18 years of age and older, persons with disabilities, life expectancy, and cancer prevalence. Socio-economic factors shall include non-high school attainment at 25 years of age, total household income less than two-hundred (200) percent of the federal poverty level, the percent of limited English proficiency, percent of children under five years of age with limited English proficiency, percent of the population under the age of five, percent of the population over the age of sixty-four and percent of non-white residents. Hispanics are not considered white for purposes of this provision.

20.11.41.35 OVERBURDENED AREA REQUIREMENTS

- A. The department shall, in consultation with the public, using the latest and best available science and data on public health and the environment, including already developed state and county maps, develop a map of overburdened areas in Bernalillo County.
- B. The department shall publish and provide public notice of the overburdened areas map developed per subsection A of 20.11.41.35.A NMAC by January 1 of 2025, and the map shall go into effect to be used for this regulation on July 1, 2025. The EHD may make minor adjustments to the Map to correct errors and for other significant concerns based on public input.
- C. The Department shall require every new or modified stationary source subject to permitting under 20.11.41 NMAC, and located within an Overburdened Area or within 1 mile from an overburdened area, as indicated by the Overburdened Areas map in effect as of the permit application date, to apply Best Available Control Technology (BACT) as determined by the department, even if the source or modification is not a major stationary source or major modification.
- D. BACT is also required for permit applicants that emit emissions of common hazardous air pollutants (HAPS) listed in Table 2 in quantities as described in 20.11.41.2.B.3 NMAC whether or not the source is within an Overburdened Area.
- E. The department shall, in consultation with the public, using the latest and best available science and data on public health and the environment, update its Overburdened Areas map when warranted by environmental monitoring, but at a minimum, within two years after every decennial U.S. Census, and provide notice to potentially regulated entities at least six months before an updated map goes into effect.

Table 2: Hazardous Air Pollutants	
Formaldehyde,	Methyl Bromide,
Acetaldehyde,	Hydrochloric Acid,
Acrolein,	Ethylene Oxide,
Carbon Tetrachloride,	Methylene Chloride,

Naphthalene,	Toluene,
Benzene,	Xylenes,
1,3-Butadiene,	Vinyl Chloride
Ethylbenzene,	

20.11.41.14 (3) is amended to read

the department shall provide the notice required by Paragraph (2) of Subsection B of 20.11.41.14 NMAC by regular mail or electronic mail to all individuals, **neighborhood associations in the overburdened areas near the proposed permit location**, and other organizations identified on a list maintained by the department of persons who have stated in writing a desire to receive notices of all applications filed pursuant to 20.11.41 NMAC.

NEW MATERIAL

20.11.61.7 Definitions

XX. “Overburdened Area” means the twenty (20) percent of census block groups in Bernalillo County that experience the highest cumulative environmental and public health stressors considering at least the following: Environmental factors shall include annual particulates (PM2.5) ozone, diesel particulate matter, traffic proximity, as monitored in the area. Public health factors shall include adult asthma prevalence, pediatric asthma prevalence, COPD prevalence and heart disease prevalence, persons with disabilities and cancer prevalence. Socio-economic factors shall include non-high school attainment at 25 years of age, total household income less than two-hundred (200) percent of the federal poverty level, the percent of individuals with limited English proficiency, and percent of non-white residents. Hispanics are not considered white for purposes of this provision.

20.11.61.32 OVERBURDENED AREA REQUIREMENTS

The department shall, in consultation with the public, using the latest and best available science and data on public health and the environment, including already developed state and county maps develop a map of overburdened areas in Bernalillo County.

- A. The department shall publish and provide public notice of the overburdened areas map developed per subsection A of 20.11.41.35. NMAC by January 1 of 2025, and the map shall go into effect to be used for this regulation on that date. The EHD may make minor adjustments to the Map to correct errors and for other significant concerns based on public input.
- B. The Department shall require every new or modified stationary source subject to permitting under 20.11.41 NMAC, and located within an Overburdened Area or within 1 mile from an overburdened area, as indicated by the Overburdened Areas map in effect as of the permit application date, to apply Best Available Control Technology (BACT) as determined by the department, on a case-by-case basis, even if the source or modification is not a major stationary source or major modification.
- C. BACT is also required for permit applicants that emit emissions of common hazardous air pollutants (HAPS) listed in Table XX in quantities as described in 20.11.41.2.B.3 NMAC whether or not the source is within an Overburdened Area.
- D. The department shall, in consultation with the public, using the latest and best available science and data on public health and the environment, update its Overburdened Areas map when warranted by environmental monitoring, but at a minimum, within two years after every decennial U.S. Census, and provide notice to potentially regulated entities at least six months before an updated map goes into effect.

Table XX: Hazardous Air Pollutants	
Formaldehyde,	Methyl Bromide,
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Acrolein,	Ethylene Oxide,
Carbon Tetrachloride,	Methylene Chloride,
Naphthalene,	Toluene,
Benzene,	Xylenes,
1,3-Butadiene,	Vinyl Chloride
Ethylbenzene,	

20.11.61.21(c) (4) (c) is amended to read

officials and agencies having jurisdiction over the location where the proposed construction would occur as follows: any other state or local air pollution control agencies; the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency; and any state, federal land manager, or Indian governing body whose lands may be affected by emissions from the source or modification. (5) Provide by regular mail or electronic mail to all individuals, neighborhood associations in the overburdened areas near the proposed permit location, and other organizations identified on a list maintained by the department of persons who have stated in writing a desire to receive notices of all applications filed pursuant to this part.