

MINUTES – May 10, 2023
Regular Hybrid Meeting

This Albuquerque-Bernalillo County Air Quality Control Board (“Board”) meeting was conducted in a hybrid format with both in-person and remote participation via Zoom video conference.

1. CALL TO ORDER

Chair Paul called the meeting to order at 5:30pm. Board Liaison Anita SdeArmijo then called roll and the Chair determined a quorum was present.

Present: 7 - Judy Calman, Elis Eberlein, Joseph Galewsky, Johnnye Lewis, Lauren Meiklejohn, Maxine Paul, Kitty Richards

Chair Paul attended the meeting virtually and all other members were present in person.

Before taking up the Consent Agenda, Chair Paul made a couple of announcements. She addressed the topic of decorum at the meetings, stating that there had been allegations of harassment occurring during the recess at last month’s meeting. Chair Paul asked that everyone who attends the Board meetings respect the personal space of others and to treat them with respect. She stated that does not mean that people cannot disagree or show emotion, but to not let it cross the line into harassment. Chair Paul also asked that the Board’s process be respected and that audience members not speak out of turn or on the wrong agenda item.

Chair Paul then announced the reassignment of committees to accommodate new Board members. The assignments are as follows:

- Committee on Technology – Eberlein, Lewis
- Committee on Mapping – Galewsky, Richards
- Committee on Public Interest – Calman, TBD

Chair Paul stated that the Director of the Environmental Health Department (“EHD”) reached out to her regarding the issue of EHD paying for a transcript for the Health, Environment and Equity Impacts rulemaking. She also stated that there was a meeting on April 25, 2023 between her, the Board attorney Ms. Sedillo Lopez and Director Martinez, and that the filing by EHD [sic, Air Quality Program] about this meeting was unnecessary as the Board notified the Parties that this meeting would take place. Chair Paul stated that “they” were planning to report on this meeting at the regular Board meeting to be transparent. Ms. Sedillo Lopez added that the Board notified the Parties that “they” would be seeking this meeting to get support for the process, including the transcript and would report on the meeting. The Board Attorney stated that when she felt the conversation at the April 25th meeting was veering into the rulemaking, she stopped it. Chair Paul stated that the contents of the letter filed by the Air Quality Program went beyond the substance of the conversation she and the Board Attorney had with Director Martinez, but

that she does not recall the general matters discussed except that they did discuss the court reporter.

Following the announcements, at 5:42 p.m., since Chair Paul was attending virtually, Chair Paul turned the running of the Board meeting over to Vice Chair Richards to run in person.

Member Lewis left the meeting at 5:42 p.m. due to illness.

2. CONSENT AGENDA

- a. Approval of the May 10, 2023 Meeting Agenda**
- b. Approval of the March 30, 2023 Special Meeting Minutes**
- c. Approval of the April 12, 2023 Meeting Minutes**

Vice Chair Richards stated that she wanted to switch the order of items 5.d and 5.e on the agenda so that the court reporter can leave after the discussion of 5.e. Member Meiklejohn moved to approve the agenda with the proposed switch and to approve the minutes for the March 30, 2023 Special Meeting and the April 12, 2023 meeting. Chair Paul seconded the motion. The motion passed by the following vote:

For: 6 - Calman, Eberlein, Galewsky, Meiklejohn, Paul, Richards
Absent: 1 - Lewis

3. AIR PROGRAM REPORT

Mr. Albrecht, Acting Deputy Director of EHD for the Air Quality Program, stated that Director Martinez was unable to make it to the meeting due to a scheduling conflict and would be unable to give his update. He then stood for questions from Board members regarding the April Air Quality Program report.

Member Eberlein and Chair Paul asked questions about Gateway and the asbestos matter. Member Eberlein noted that the Air Program Report mentions asbestos notifications and he connected that with the media about Gateway. He wanted to know what involvement Air Quality Inspectors had. Acting Deputy Director Chris Albrecht informed him that an inspector did go out on March 3, 2023 and identified that there were revocation activities but that no asbestos was present. He confirmed that a Post Inspection Notice had been issued for a failure to inspect prior to renovation and that enforcement would be a “two-phase approach.” He stated the investigation is ongoing and he cannot share further details that night but would provide an update once the inspection report was complete.

Chair Paul followed up asking for more detail about the happenings and the Air Program’s involvement following the report of asbestos. She had seen the television news report and did not realize the Air Quality Program also dealt with asbestos. Acting Deputy Director Albrecht responded that OSHA handled much of it and explained the types of documents that inspectors requested and reviewed as part of the investigation. He concluded that he could not provide more details since the investigation was ongoing.

4. FIRST PUBLIC COMMENT OPPORTUNITY

Four members of the public gave comment during the first comment opportunity.

Pete Domenici Jr., representing Albuquerque Asphalt *et al.*, stated his objections to the meeting and the letter between Chair Paul and Director Martinez: the descriptions of the conversation between Director Martinez and the Board differed from the contents of the Board's Notice; had he known of the true intentions of the meeting, he would have asked to be there; and he objected to any further *ex parte* communications of the nature described during the Board meeting.

Xavier Barraza stated that he would like to comment on later agenda items.

Stan Harris, representing NTESS, opted to save his comment for a later agenda item.

Ramona Montoya, on behalf of Governor Max A. Zuni of the Pueblo of Isleta, wished to comment in support of the Health, Environment and Equity rulemaking. Vice Chair Richards asked that she hold those comments until the hearing as it concerns the merits of the rulemaking and invited her to submit them in writing in the meantime.

5. REPORTS/DISCUSSION/ACTION ITEMS

- a. Discussion and Possible Action on [Docket Entry 78: Motion to Amend March 2, 2023 Order to Dismiss](#), AQCB Docket No. 2020-1, In the Matter of the Petition for a Hearing on the Merits Regarding Air Quality Permit No. 3340-RMD (New Mexico Terminal Services, LLC.) (Board)

Vice Chair Richards stated that this discussion was to be transcribed for the record. Jazmine Johnston, representing the Air Quality Program, gave a brief recap of the Motion to Amend the March 2, 2023 Order to Dismiss and the changes requested. She asked the Board to revise the order to: (i) include conclusions of law, as required by 20.11.81.18(D)(2)(b) NMAC; (ii) correct a misstatement of fact, so the order correctly reflected that the decision was made at a meeting and not a hearing; and (iii) properly serve the order in accordance with the regulation. Ms. Johnston noted the Petitioners in the NMTS case supported the request. She then stood for questions from the Board.

Board Attorney Ms. Sedillo Lopez gave her comments on the Motion. The Board Attorney agreed to correct the misstatement of fact about the matter being decided at a meeting and not a hearing, and advised the Board of the same. The Board Attorney advised, and the Board agreed, that the order would not be amended to include conclusions of law about mootness, as proposed in the proposed form of order granting the Joint Motion to Dismiss. Her reasoning was that the Board did not discuss mootness during its deliberations and she only includes in the orders what the Board states. Ms. Johnston then asked that conclusions of law be added to the amended order to be consistent with the regulation. Member Meiklejohn commented that the amended order should not include the legal theory of mootness and when making the motion for amending the order expressly stated that the order should not include mootness.

After some brief discussion by the Board, Member Meiklejohn moved to edit the motion to include conclusions of law but to not mention mootness, and to correct the order to reflect the decision being made at a regularly scheduled Board meeting. Member Calman seconded the motion. The motion passed by the following vote:

For: 6 - Calman, Eberlein, Galewsky, Meiklejohn, Paul, Richards

Absent: 1 – Lewis

b. Discussion and Possible Action on Delegation of Authorities to the Hearing Officer and Topics of Pre-Hearing Conferences, AQCB Petition No. 2022-3, 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 [*sic*] and Equity Impacts (Board)

Vice Chair Richards stated that this item will be transcribed for the record but is a matter separate from item 5.a. Board Attorney Ms. Sedillo Lopez presented to the Board a second draft order delegating authority to the hearing officer that included changes requested at the April 12, 2023 AQCB meeting. She stood for questions from the Board. Vice Chair Richards opened the floor for discussion amongst the Board and presented Member Lewis's comments for the record. These comments included concerns about the pre-hearing process, the goals for it, and clarification on the date for the pre-hearing process

Vice Chair Richards accepted two-minute statements from counsel for Parties in the rulemaking.

Mr. Domenici, representing representing Albuquerque Asphalt *et al.*, stated his objections to the two minute time limit given by Vice Chair Richards and to parts of the draft order. Mr. Harris, representing NTESS, requested that the hearing officer prepare a report of the hearing with a recommendation for Board action and summarized his objections to the draft order. Ms. Johnston, representing the Air Quality Program, joined the other parties in their objections. Mr. Dalva Mollenburg, representing New Mexico Mining Association and the New Mexico Chamber of Commerce, stated he shared the concerns and objections presented by the other parties. He urged to Board to have more respect for the input from counsel for the Parties, as they have experience with these kinds of matters and are trying to offer that insight but being limited on the time allowed to present. Ms. Maslyn Locke, representing the Petitions, asked about a deadline for parties to join in the process and if the Board would consider a specific day deadline by which the Parties could file motions so that they would be considered at a Board meeting.

Ms. Sedillo Lopez gave her opinions on the objections presented by the Parties. The Board deliberated as follows:

- The Board decided that the pre-hearing process, including settlement negotiations, must be completed by July 30, 2023.
- The Board stated the purpose of the pre-hearing process: Parties were not supposed to re-write the rule but only determine where there is consensus.
- The Board clarified the Parties would not be prohibited from using evidence not shared during the negotiations but would have to explain why it was not shared earlier in the process.
- The Board also clarified that the order would not mandate a three-day hearing but would strongly encourage one.
- The Board discussed the confidentiality concerns raised by the Parties and changed the proposed order to make it so the Board members would not see the tracking notes on the spreadsheet.
- The Board chose to not have the Board Attorney attend the negotiation meetings but wanted any party dissatisfied with the progress of negotiations to report it to the Board Attorney, who would inform the Board so it could take action if necessary.

- The Board decided that persons must become parties to the rulemaking proceeding five days in advance of the pre-hearing negotiation process beginning to be able to participate in the negotiations.
- In considering whether there would be limits on when persons can become parties in the proceeding, Ms. Kelsea Sona, representing the Air Quality Program, offered to the Board the citation for entries of appearance. The Board decided to follow the rule in Part 82 and require new parties to join no later than 15 days before the hearing.
- The Board agreed to amended the proposed order to separate the pre-hearing and negotiation processes.

Following discussion by the Board, Chair Paul moved to amend the second draft of the order on delegation of authorities to the hearing officer with the proposed changes. Member Meiklejohn seconded. The motion passed by the following vote:

For: 6 - Calman, Eberlein, Galewsky, Meiklejohn, Paul, Richards
Absent: 1 – Lewis

The Board took a short break at approximately 7:30pm. Vice Chair Richards called the meeting back to order at 7:45pm.

c. Discussion and Possible Action on Establishing a Deadline for Filing Motions Before AQCB Meetings, AQCB Petition No. 2022-3, 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 [sic] and Equity Impacts (Board)

Vice Chair Richards opened the floor for discussion.

Mr. Eric Jantz, representing the Petitioners, asked a clarifying question about the deadlines already in place for responding to opposed motions and asked that the Board keep those in mind when discussing this issue. Ms. Sona, representing the Air Quality Program, echoed the sentiment and pointed out an example from a past meeting. Mr. Lewis Rose, representing GCC Rio Grande, Inc., *et al.*, also echoed the sentiments of Mr. Jantz and Ms. Sona. Board Attorney Ms. Sedillo Lopez gave her opinion.

Vice Chair Richards made a motion to require that motions/briefings that are not covered by 20.11.82.16(b)(4) NMAC be submitted/filed seven days in advance. Chair Paul seconded the motion. The motion passed by the following vote:

For: 6 Calman, Eberlein, Galewsky, Meiklejohn, Richards, Paul
Absent: Lewis

Mr. Harris pointed out that the seven day in advance deadline may not work. Vice Chair Richards asked the Board Liaison and Mr. Miller, Control Strategies Division Manager in the Air Quality Program, if it was possible to post the agenda earlier so as to give the Parties time to respond. Mr. Miller stated the agenda sometimes is not finalized until the Friday it is posted but suggested posting the documents on the website when the Liaison receives them. Member Meiklejohn suggested posting any proposed order within a week or two of the most recent meeting. Mr. Miller indicated that that it would be possible to post meeting materials on the web as soon as they are received with a temporary links and then replace them with links in the agenda when it is posted. Vice Chair Richards stated that any orders from the Board will be sent

to the Board Liaison for posting 2 weeks after the meeting. Ms. Sona stated a concern about limitations on filings like objections because they are a way for the Parties to communicate with the Board and express concerns.

Chair Paul suggested a 72-hour deadline with exceptions for items that already have rules regarding deadlines in place. Vice Chair Richards struck the previously made motion. Member Calman moved to have a 72-hour deadline for filing briefings before a meeting. Vice Chair Richards seconded. The motion passed by the following vote:

For: 6 Calman, Eberlein, Galewsky, Meiklejohn, Richards, Paul
Absent: 1 Lewis

e. Discussion and Possible Action on Appointment of Court Reporter for the Formal Rulemaking proceeding: Docket Entry 24: Motion Seeking Alternative Methods of Recording, AQCB Petition No. 2022-3, 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 (Board)

Vice Chair Richards asked the court reporter Ms. Dubois to continue transcribing the meeting and opened the floor for discussion among the Board members. Chair Paul asked why the court reporter was here today and if EHD has changed its position on paying for a court reporter going forward. Ms. Johnston responded that the court reporter was present to capture an unofficial record that will be used to supplement the official record but that the official record for the hearing was still the responsibility of the Petitioners. The Board Attorney stated that it was not a violation of the Anti-Donation Clause for the City to pay for a court reporter. Chair Paul expressed frustration with hearing two different positions, one from Director Martinez and one from counsel for the Air Quality Program. She pushed for a commitment about what EHD will provide.

Vice Chair Richards tabled the matter and asked Ms. Sedillo Lopez to write up a draft order for this item. The Board Attorney stated she wanted to meet with the Air Quality Program's counsel to discuss what EHD will do. Ms. Sona requested that any conversations happening around the draft order include counsel for all parties to the rulemaking. Chair Paul stated the Air Quality Program was delaying the process, contrary to the letter, by not just agreeing to pay for a court reporter. The Board Attorney cautioned against her suggestion that the Board order EHD to pay for a court reporter to end the delays. The Board Attorney stated that if EHD declines to follow the order, it would have to be taken to district court to enforce. Vice Chair Richards opined that such an order was not necessary because the Board had the Zoom audio recording and the unofficial court reporter transcript.

Vice Chair Richards again decided to table the matter and asked the Board Attorney to prepare a draft order for the next meeting.

The court reporter, Ms. Dubois, was dismissed at the conclusion of this discussion.

d. Discussion and Possible Action on Updating the Board's Rulemaking Process Guidebook (Board)

Vice Chair Richards opened the floor for discussion. Ms. Sedillo Lopez briefly went over the proposed change in the rulemaking guidebook. Member Meiklejohn moved to approve the change. Vice Chair Richards seconded. The motion passed by the following vote:

For: 6 - Calman, Eberlein, Galewsky, Meiklejohn, Richards, Paul

Absent: 1- Lewis

- f. Presentation on the Final 2021 Regional Sulfur Dioxide Emissions and Milestone Report (EHD); Action on Report in Accordance with the *Section 309 Regional Haze State Implementation Plan Element, Albuquerque-Bernalillo County, New Mexico, Section A3.10* (“The Albuquerque-Bernalillo County Air Quality Control Board (AQCB) shall review and approve the final regional emissions report.”) (Board)**

Mr. Allen Smith, Regulation Development Coordinator for the Air Quality Program, gave a brief presentation of the Final 2021 Regional Sulfur Dioxide Emissions and Milestone Report and stood for questions from the Board. After a quick discussion Member Galewsky moved to approve the report. Member Calman seconded. The report was approved by the following vote:

For: 6 - Calman, Eberlein, Galewsky, Meiklejohn, Richards, Paul

Absent: 1- Lewis

- g. Discussion of Possible Future Agenda Items (Board)**

- Draft order for appointment of court reporter for the rulemaking proceeding (Vice Chair Richards)
- Discussion of the Board’s hybrid meeting policies (Ms. Sedillo Lopez)

6. SECOND PUBLIC COMMENT OPPORTUNITY

Two members of the public gave comment at this time, Ms. Marla Painter and D. Richards.

Ms. Marla Painter stated the community met with EHD Director Martinez and that he promised to pay for a court reporter. She also asked who runs EHD, stating that Adler Law is controlling the process.

D. Richards commented about her concern that the prehearing proceedings, which the Board is using solely for settlement discussions contrary to typical prehearing proceedings could run afoul the Open Meetings Act. She also raised that the settlement discussions may be subject to Inspection of Public Records Act requests and would not be confidential as the Board Attorney represented during the meeting.

7. OTHER BUSINESS

None.

8. ADJOURNMENT

Chair Paul adjourned the meeting at 8:54 p.m.

NEXT SCHEDULED BOARD MEETING: June 14, 2023 at 5:30 p.m.

SUBMITTED:

READ AND APPROVED:

Mr. Angel Martinez Jr.
Director
Environmental Health Department

Ms. Lauren Meiklejohn
Chair
Albuquerque-Bernalillo County Air Quality
Control Board

DRAFT