

EXHIBIT 1

**IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO**

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, 2022-03,

NATIONAL TECHNOLOGY AND
ENGINEERING SOLUTIONS OF SANDIA, LLC;
ALBUQUERQUE ASPHALT, INC.; BLACK
ROCK SERVICES, LLC; VITAL CONSULTING
GROUP, LLC; MOUNTAIN STATES
CONSTRUCTORS, INC.; CURIA NEW MEXICO;
and NEW MEXICO CHAMBER OF COMMERCE,

Appellants,

v.

No. A-1-CA-41666

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD,

Appellee,

and

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

Intervenors-Appellees.

_____/

**[PROPOSED] BRIEF OF AMICI CURIAE DR. SOFIA MARTINEZ, LOS
JARDINES INSTITUTE, PUEBLO OF ISLETA, NATURAL RESOURCES
DEFENSE COUNCIL, IN SUPPORT OF APPELLEE ALBUQUERQUE-
BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

APPEAL FROM THE ALBUQUERQUE-BERNALILLO COUNTY AIR
QUALITY CONTROL BOARD

No. AQCB 2022-3

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TABLE OF CONTENTS

INTRODUCTION	6
CITATIONS TO RECORDS PROPER AND EXHIBITS	7
STATEMENT OF FACTS	7
I. Air pollution is a serious problem in the City of Albuquerque and Bernalillo County.....	7
II. The HEEI Rule responds to the public health need to address localized air pollution burdens.....	11
ARGUMENT	14
I. New Mexico law authorizes the Air Board to promulgate the HEEI Rule.....	15
II. The Air Board did not exceed or abuse its authority when considering social determinants of health in promulgating the HEEI Rule.....	17
III. There is substantial evidence demonstrating that certain communities are more vulnerable to air pollution harms.....	19
IV. There is substantial evidence to show that the HEEI Rule will be more protective of public health	21
V. The Air Board considered HEEI Rule’s technical practicability and economic reasonableness.....	23
VI. The HEEI Rule is consistent with environmental justice principles that the Air Board is required to give “due consideration”	26
CONCLUSION	29

TABLE OF AUTHORITIES

New Mexico Cases

<i>City of Albuquerque v. Sanchez</i> , 1992-NMCA-038, 113 N.M. 721	17
<i>Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regul. Comm’n</i> , 2006-NMSC-032, 140 N.M. 6	14
<i>Duke City Lumber Co. v. New Mexico Env’t Improvement Bd.</i> , 1984-NMSC-042, 101 N.M. 291	14
<i>Old Abe Co. v. N.M. Mining Comm’n</i> , 1995-NMCA-134, 121 N.M. 83	17
<i>State v. Ortiz</i> , 2009-NMCA-092, 146 N.M. 873, 215 P.3d 811	24
<i>Sw. Pub. Serv. Co. v. New Mexico Pub. Regul. Comm’n</i> , 2024-NMSC-012, 548 P.3d 97	26

Cases

<i>Corrigan v. Buckley</i> , 271 U.S. 323 (1926)	27
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New Mexico Statutes

20.11.61 NMAC	22, 25
20.11.72 NMAC	12, 13, 17, 19, 22, 23, 25
20.11.82 NMAC	26, 27
Albuquerque, N.M., Ordinances of Albuquerque ch. 9, art. 5, § 9-5-1	11, 12
Bernalillo Cnty., N.M., Bernalillo Cnty. Code ch. 30, art. II	11, 12
NMSA 1978, § 74-2 (1992)	14, 15, 16, 17, 21, 23, 24, 25, 26

Statutes

40 C.F.R. § 52.1620	11
42 U.S.C. § 7407	11
Pub. L. No. 90-284, 82 Stat. 81 (1968)	27

Other Authorities

Am. Lung Ass’n, <i>Albuquerque-Santa Fe-Las Vegas</i> , https://www.lung.org/research/sota/city-rankings/msas/albuquerque-santa-fe-las-vegas-nm (last visited Mar. 8, 2025)	8
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Am. Lung Ass’n, New Mexico: Bernalillo https://www.lung.org/research/sota/city-rankings/states/new-mexico/bernalillo (last visited Mar. 8, 2025)	8
Am. Lung Ass’n, State of the Air 2023 Report, https://www.lung.org/getmedia/338b0c3c-6bf8-480f-9e6e-b93868c6c476/SOTA-2023.pdf	8
Am. Lung Ass’n, State of the Air 2024 Report, https://www.lung.org/getmedia/dabac59e-963b-4e9b-bf0f-73615b07bfd8/State-of-the-Air-2024.pdf	8
City of Albuquerque & MASS Design Group, Housing and Entrepreneurship Part 1: Needs Assessment Report 45 (Oct. 11, 2022), https://www.cabq.gov/office-of-equity-inclusion/documents/221107abq-housing_needs-assessment_final.pdf	27
City of Albuquerque, <i>Overburdened Areas Map Version 1.0</i> , https://www.cabq.gov/environmentalhealth/public-health/overburdened-areas-map-version-0.1 (last visited Mar. 5, 2025)	14
Larry Barker, Albuquerque’s Dirty Little Secret, KRQE (Nov. 10, 2020), https://www.krqe.com/news/larrybarker/albuquerque-dirty-little-secret/ ...	27
U.S. EPA, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum 2 (Jan. 2023), https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf	19

Dr. Sofia Martinez, Los Jardines Institute, the Pueblo of Isleta, and the Natural Resources Defense Council, together *Community Amici*, submit this brief¹ in support of Appellee Albuquerque-Bernalillo County Air Quality Control Board's Answer Brief.

INTRODUCTION

Community Amici are a longtime Albuquerque resident, two nonprofit organizations, and a federally recognized Indian tribe committed to promoting clean air and environmental justice. They submit this brief to address a single issue central to this appeal: Whether New Mexico law confers on the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) the authority to promulgate the challenged Health, Environment and Equity Impacts Rule (HEEI Rule). In *Community Amici*'s view, New Mexico law clearly confers that authority on the Air Board.

As set forth below, the City of Albuquerque and surrounding areas in Bernalillo County suffer from poor air quality—a disproportionate amount of that pollution located in certain communities. State law gives the Air Board wide discretion to consider the unique characteristics of these communities and commands it to weigh the impact of air pollution on human health in these areas.

¹ Counsel for *Community Amici* authored the brief in whole and no party or counsel for any party made any monetary contribution to fund the preparation or submission of *Community Amici*'s brief.

The Air Board faithfully carried out state law when it adopted the HEEI Rule, which requires polluters to add as little air pollution as possible in those places using standard technologies. Preventing air pollution in this way is well within the Air Board's authority, and the Air Board's promulgation of the HEEI Rule is supported by substantial evidence.

CITATIONS TO RECORDS PROPER AND EXHIBITS

Appellee filed an administrative record referred to as **[RP-xxxx-xxxx]**, which corresponds to the record proper and the specific page numbers. On May 21, 2024, Appellee also filed (via USB drive) written technical testimony, exhibits, rebuttal testimony and exhibits, and transcripts in connection with the HEEI Rule proceedings separate from the record proper. The written technical testimony and exhibits are attached to each NOI (Notice of Intent to Present Testimony). Written technical testimony is identified by the party's NOI that filed that testimony and exhibit number, for example, **[11-17-2023 Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 2-5]**.

STATEMENT OF FACTS

I. Air pollution is a serious problem in the City of Albuquerque and Bernalillo County

The Albuquerque-Bernalillo County area has some of the worst air quality in the country, and it only continues to degrade. **[12-7-2023 4 Tr. 1797:19-1798:18 (referencing the American Lung Association reports on Bernalillo County)]**. The

American Lung Association has found that air quality in the Albuquerque-Bernalillo County area falls below federal standards for a healthy environment when all data is considered.² In 2023, its State of the Air report gave Bernalillo County an “F” grade for ozone (i.e. smog) and “D” grade for 24-hour particulate matter pollution (i.e. soot).³ The County received “F” grades in 2024 for both pollutants, with Albuquerque ranking among the 25 worst cities in the nation for ozone.⁴

Excessive air pollution harms human health. Ground-level ozone and particle pollution are the two pollutants that pose the greatest threat to human health in the United States.⁵ Ozone irritates the lungs. Particle pollution increases the risk of lung cancer, strokes, and emergency room visits.⁶ There is scientific consensus that air pollutants cause adverse health effects even at levels below the thresholds set by the

² Am. Lung Ass’n, State of the Air 2024 Report, at 25, <https://www.lung.org/getmedia/dabac59e-963b-4e9b-bf0f-73615b07bfd8/State-of-the-Air-2024.pdf>; *see id.* at 7-10 (explaining the report’s grading system and how federal methodology for calculating ozone and particulate pollution do not fully capture harm to public health).

³ Am. Lung Ass’n, State of the Air 2023 Report, at 116, <https://www.lung.org/getmedia/338b0c3c-6bf8-480f-9e6e-b93868c6c476/SOTA-2023.pdf>.

⁴ *Supra* n.2, at 25, 21, 120; *see also* Am. Lung Ass’n, New Mexico: Bernalillo <https://www.lung.org/research/sota/city-rankings/states/new-mexico/bernalillo> (last visited Mar. 8, 2025) (air quality report card showing “F” grade); Am. Lung Ass’n, *Albuquerque-Santa Fe-Las Vegas*, <https://www.lung.org/research/sota/city-rankings/msas/albuquerque-santa-fe-las-vegas-nm> (last visited Mar. 8, 2025) (showing ranking as among the “worst” for ozone and particle pollution among metropolitan areas).

⁵ *Supra* n.2, at 27, 30.

⁶ *Supra* n.2, at 28-31.

federal national ambient air quality standards (NAAQS). **[12-5-2023 2 Tr. 444:12-24** (environmental health scientist Dr. Morello-Frosch explaining this scientific consensus to the Air Board); **11-17-2023 Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 6-7; Ex. 1 (Written Testimony of Dr. Bilsback) at 4-5]**. Consistent with this, at the time the Air Board promulgated the HEEI Rule, the County's ozone measurements were at levels that decrease lung function. Average particulate matter concentrations also surpassed the levels at which cardiovascular mortality and other health outcome risks increase. **[12-1-2023 Petitioners' Notice of Filing of Rebuttal Testimony Ex. 1 (Written Rebuttal Testimony of Dr. Clark) at 26-30** (addressing the issue of particulate matter in Bernalillo County)]. When compared to the rest of New Mexico, Bernalillo County was in the top 25% for air toxics cancer risk. **[12-1-2023 Petitioners' Second Notice of Errata Corrected Ex. 2 (Written Testimony of Dr. Clark) at 4, 7** (providing additional detail on Air Toxics Risk)].

The record evidence available to the Air Board, as this brief refers to throughout, demonstrates that air pollution is a persistent problem in the City of Albuquerque and Bernalillo County. It is unassailable that localized chronic exposure to air contaminants increases risk for adverse health outcomes. **[Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 8-16** (explaining the impact of disparities in air pollution exposure)]. The Mountain View

area in Bernalillo County is frequently identified as a community with a significant air pollution burden due to the presence of multiple industrial facilities and transportation-related emissions. [12-5-2023 2 Tr. 685:7-18 (calling for environmental justice), 736:9-17 (public comment from head of Mountain View Action), 777:7-778:9 (public comment from president of Mountain View Neighborhood Ass'n); 11-17-2023 Sofia Martinez and Martin Criollo NOI Ex. 1 (Written Testimony of Dr. Sofia Martinez) at 3-4]. Residents' chronic exposure to air contaminants has increased their risk for adverse health outcomes when compared to other communities across the county and state. Cancer risk in Mountain View is 20 in a million, well above the state average. [12-5-2023 2 Tr. 528-29 (testimony of Dr. Clark)]. Mountain View also experiences a significantly higher rate of respiratory health conditions. [*Id.*]. Studies further show that cumulative exposures to air, water, and soil pollution reduce the life expectancy of Mountain View residents by ten years. [12-5-2023 2 Tr. 677:3-7 (testimony of Dr. Martinez)].

Chronic air pollution is not limited to the Mountain View community. Permitting trends reveal that sources of dangerous air pollution are clustered in other neighborhoods within Albuquerque, as well. The United States Environmental Protection Agency (U.S. EPA) Enforcement and Compliance History Online database shows that 36% of active air permits for industrial sources in Bernalillo County are in the four zip codes covering San Jose, Mountain View, Greater

Gardner, Martineztown, and the International District, despite those areas accounting for only 21% of the County's population.

II. The HEEI Rule responds to the public health need to address localized air pollution burdens

There is a cooperative approach at the heart of the federal Clean Air Act. The U.S. EPA sets standards for criteria air pollutants and hazardous air pollutants and then delegates authority to the states to implement and enforce those standards through the adoption of State Implementation Plans. *See* 42 U.S.C. §§ 7407, 7410. The State of New Mexico administers all parts of the state's air program, Chapter 74, Article 2 of the New Mexico Statutes (Air Quality Control Act), except for the areas within the City of Albuquerque and Bernalillo County. *See* 40 C.F.R. §§ 52.1620-40 (New Mexico's plan, noting New Mexico regulations pertaining to Albuquerque/Bernalillo County). The governments of Albuquerque and Bernalillo County share authority over a single air pollution program that covers the entire County, including the City. The Air Board is the local regulatory and appellate authority that promulgates rules that the City's Environmental Health Department (EHD) must implement in its permitting decisions.⁷ *See* Albuquerque, N.M., Ordinances of Albuquerque ch. 9, art. 5, §§ 9-5-1-3(A), -5-1-4(B); Bernalillo Cnty.,

⁷ EHD enforces the regulations promulgated by the Air Board in both the City of Albuquerque and Bernalillo County. Albuquerque, N.M., Ordinances of Albuquerque ch. 9, art. 5, §§ 9-5-1-5(A); Bernalillo Cnty., N.M., Bernalillo Cnty. Code ch. 30, art. II, §§ 30-34(a).

N.M., Bernalillo Cnty. Code ch. 30, art. II, §§ 30-33(a)-(c).

Worsening air quality prompted residents to petition⁸ the Air Board in 2022 to address disproportionate air pollution burdens borne by certain local communities. **[12-5-2023 2 Tr. 701:6-703:6, 777:8-778:9]**. In response, after a lengthy administrative process, in December 2023 the Air Board adopted the HEEI Rule, 20.11.72 NMAC. The express purposes of the HEEI Rule are:

[t]o 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.

20.11.72.6 NMAC.

To achieve these purposes, the HEEI Rule directed EHD to “us[e] the latest and best available science and data” to create a map of “Overburdened Areas” with localized vulnerability to air pollution. 20.11.72.8(A) NMAC. EHD must update the map when circumstances warrant or at a minimum every five years, using prescribed, official federal and state data sources. 20.11.72.8(E) NMAC. EHD published its initial map on January 1, 2025.⁹

⁸ Any member of the public may petition the Air Board to promulgate a rule. *See* Albuquerque, N.M., Ordinances of Albuquerque ch. 9, art. 5, § 9-5-1-6(A); Bernalillo Cnty., NM., Bernalillo Cnty. Code ch. 30, art. II, § 30-35(a).

⁹ City of Albuquerque, *Overburdened Areas Map Version 1.0*,

The HEEI Rule requires any new or modified source to employ Best Available Control Technology (BACT) to abate air pollution if the source is located in or within one mile of an Overburdened Area identified on the EHD map. 20.11.72.8(C) NMAC. It also requires BACT in any location for new or modified stationary sources that emit one or a combination of fifteen identified hazardous air pollutants. 20.11.72.8(D) NMAC. And to ensure the opportunity for public input, the HEEI Rule requires EHD to provide specific notice of permit applications to individuals, neighborhood associations, and others within or near identified Overburdened Areas. 20.11.72.9 NMAC.

The HEEI Rule is a modest approach to abating emissions in areas more exposed and vulnerable to air pollution impacts. It requires the identification of Overburdened Areas (the map); the opportunity for meaningful community involvement after a permit application has been filed (the notice provision); that new or modified stationary sources add as little air pollution as practicable to Overburdened Areas (the first BACT requirement); and the protection of all local communities from certain hazardous air pollutants (the second BACT requirement). It does not demand that EHD deny any particular permit application, and it does not apply to *de minimis* sources. [*Contra* NTESS BIC 52]. See also 20.11.72.2(A)

<https://www.cabq.gov/environmentalhealth/public-health/overburdened-areas-map-version-0.1> (last visited Mar. 5, 2025).

NMAC (clarifying the HEEI Rule only applies to sources that are first subject to the listed permitting provisions).

ARGUMENT¹⁰

New Mexico courts defer to administrative actions like the Air Board's promulgation of the HEEI Rule unless the action was (1) arbitrary, capricious, or an abuse of discretion; (2) not in accordance with law, or (3) not supported by substantial evidence in the record. NMSA 1978, § 74-2-9(C) (1992). Substantial evidence is determined in the context of the "whole record" and evidence must be viewed "in the light most favorable to the [agency] decision." *Duke City Lumber Co. v. New Mexico Env't Improvement Bd.*, 1984-NMSC-042, ¶ 14, 101 N.M. 291, 294. This case raises statutory interpretation questions about the scope of the Air Board's authority and its factual findings, both of which are entitled to deference. *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6, 10, 17. In this case, the Air Board's promulgation of the HEEI Rule was reasonable, permitted—if not compelled—by applicable law, and supported by substantial evidence in the administrative record.

¹⁰ *Community Amici* address only Appellants' arguments related to the Air Board's authority and challenges to the merits of the HEEI Rule, which are within the *Community Amici's* core interests and expertise. Appellants' challenges to aspects of the Air Board's process and notice requirements are not addressed here.

I. New Mexico law authorizes the Air Board to promulgate the HEEI Rule

As noted above, pursuant to the Clean Air Act, the U.S. EPA has delegated air regulatory authority to the State of New Mexico. In turn, for Bernalillo County and the City of Albuquerque, the State has delegated that authority to the Air Board and EHD, with the Air Board providing the regulations governing EHD's permitting actions.

The Air Board's specific authority and responsibilities are set forth in NMSA 1978, Section 74-2-5 (1992). The Air Board's fundamental legal duty is "to prevent or abate air pollution." Section 74-2-5(A); *see also* § 74-2-5(B)(1) (authorizing the Air Board to adopt rules "consistent with the Air Quality Control Act to attain and maintain [NAAQS] compliance **and** prevent or abate air pollution" (emphasis added)). To protect public health, the Air Board is free to promulgate rules that exceed federal requirements. Section 74-2-5(G) (explaining criteria for rules that are "more stringent" than federal regulations, or that apply "to sources not subject to regulation pursuant to the federal act or regulations").

In "adopt[ing] a plan for the regulation, control, prevention or abatement of air pollution," the statute directs the Air Board to "recogniz[e] **the differences, needs, requirements and conditions within [its] geographic area ... or any part thereof.**" Section 74-2-5(B)(2) (emphasis added). Section 74-2-5(F) then demands, "[i]n making its rules, [] the local board **shall give weight it deems appropriate to**

all facts and circumstances, including:

- (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.

Id. (emphasis added).

The identification and protection of vulnerable subpopulations falls squarely within the Air Board’s statutory duty and discretion. Presented with empirical data that certain communities are exposed to more air pollution than others, the Air Board was duty-bound to consider the unique attributes of these communities in response to the petition. As State law directs, the Air Board assessed the “character and degree of injury” caused by air pollution in these areas, and the “interference” of air pollution with “health” and “welfare.” Section 74-2-5(F)(1). The Air Board naturally assessed that injury and interference by considering factors known to make populations vulnerable, ultimately finding that air pollution and the associated injuries were not evenly distributed. There is no question that New Mexico law permits the Air Board to adopt a regulation that prioritizes protecting health and welfare because embedded within section 74-2-5(F)’s directive is the broad discretion to “give the weight [the Air Board] deems appropriate” to those factors. The Air Board then took practicable steps to “abate” harmful air pollution, as is its

duty under New Mexico law, near Overburdened Areas as identified by the map. NMSA § 74-2-5(A).

II. The Air Board did not exceed or abuse its authority when considering social determinants of health in promulgating the HEEI Rule

Contrary to Appellants' claim, the HEEI Rule does not *regulate* socioeconomic factors.¹¹ To identify Overburdened Areas, EHD must consider “Environmental factors,” 20.11.72.7(B) NMAC, including existing sources of air pollution; “Health indicators,” 20.11.72.7(C) NMAC, including asthma prevalence; and “Social determinants of health indicators,” 20.11.72.7(E) NMAC, including, *inter alia*, poverty level and English language proficiency. Appellants do not challenge the use of “environmental factors” or “health indicators” to define vulnerable communities.¹² They exclusively attack the social determinants of health

¹¹ Rather, the HEEI Rule regulates air polluters by mandating certain control technology. *See* [RP-1778 (“EHD is directed to require Best Available Control Technology (BACT) for any source permit or modification . . . that is located within one mile from an Overburdened area.”)].

¹² To the extent Appellants assert these terms are too vague to decipher, that rings hollow compared to the language of the rule. *See Old Abe Co. v. N.M. Mining Comm’n*, 1995-NMCA-134, ¶¶ 34-34, 121 N.M. 83, 94 (dismissing challenges of vagueness and ambiguity after reading the regulation’s clear definitions). Appellants incorrectly aver that “social determinants of health indicators” is a vague, ambiguous term not susceptible to clear interpretation or application. [NTESS BIC 52-53; Appellants BIC 31-32]. The HEEI Rule expressly requires the use of accepted federal and state databases in creating and updating the overburdened-areas map. 20.11.72.8(D) NMAC. This is the opposite of guesswork. *See also City of Albuquerque v. Sanchez*, 1992-NMCA-038, ¶ 21, 113 N.M. 721, 727 (explaining the challenged provisions could be interpreted with “reasonable certainty”).

indicators factor as unrelated to air pollution. [NTESS BIC 39-42; Appellants BIC 28-31]. But the record contains plentiful evidence refuting appellants' claim.

The essential purpose of air pollution regulation is to protect people from the health harm that air pollution causes. It is widely accepted that health outcomes are not strictly determined by environmental factors. [12-1-2023 Petitioners' Second Notice of Errata Corrected Ex. 2 (Written Testimony of Dr. Clark) at 5-8, 19 (explaining that social determinants of health impact overall health and reaction to air contaminant exposure)]. Health outcomes are also impacted by factors that correspond with barriers to health care, or exacerbate poor health, making certain demographics particularly vulnerable to pollution. [*Id.*; 12-4-2023 1 Tr. 262:1-282:3; 12-6-2023 3 Tr. 918:5-920:11; 11-17-2023 Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 6-16 (explaining the factors that lead to increased risk of adverse health outcomes)]. Social determinants of health indicators capture those factors, including income level, availability of community services, home and school settings, demographics, and safety. The Air Board received unrefuted¹³ evidence from reputable medical authorities, all concluding that these socioeconomic circumstances can compromise a person's ability to cope with or recover from the adverse effects of air pollution.

¹³ NTESS and Appellants did not provide testimony in the record to refute these scientifically based findings.

Federal experts echo this scientific consensus. U.S. EPA advises that considering these factors and prevalent health patterns by location will help characterize the “potential state of vulnerability or resilience” of “geographically defined communities.”¹⁴ The U.S. Department of Health and Human Services and the Centers for Disease Control and Prevention (CDC) also recognize the significance of social determinants to public health. These agencies list housing, education, income, access to nutritious foods, existing pollution, language, and literacy skills among the factors affecting health outcomes. **[12-1-2023 Petitioners’ Second Notice of Errata Corrected Ex. 2 (Written Testimony of Dr. Clark) at 18-19]**. These factors—including those the Air Board set forth in 20.11.72.7(E) NMAC—are associated with particular vulnerability to health harms from increased air pollution. **[12-4-2023 1 Tr. 378:9-379:15; 12-5-2023 2 Tr. 537:8-538:1; and 12-6-23 3 Tr. 915:16-5, 918:-920:11 (Drs. Morello-Frosch, Clark, and Johnston on social determinants of health); 12-4-2023 1 Tr. 270:12-75:20 (describing several studies that demonstrate marginalized communities face greater health risks); 11-17-2023 Petitioners’ NOI Ex. 1 (Written Testimony of Dr. Bilsback) at 10-12]**.

III. There is substantial evidence demonstrating that certain communities are more vulnerable to air pollution harms

¹⁴ U.S. EPA, EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum 2 (Jan. 2023), <https://www.epa.gov/system/files/documents/2022-12/bh508-Cumulative%20Impacts%20Addendum%20Final%202022-11-28.pdf>.

The record offers substantial evidence identifying a need for the HEEI Rule in the Air Board's jurisdiction.

As a cumulative impact regulation, the HEEI Rule helps understand the totality of exposures of chemical and nonchemical stressors that, combined, impact public health. **[12-5-2023 Tr. 509:10-:20] [11-17-2023 Petitioners' NOI Ex. 1 (Written Testimony of Dr. Bilsback) at 9-21]**. The Air Board heard testimony about jurisdictions conducting similar analyses¹⁵; how to adapt and customize existing tools into its own decision-making framework¹⁶; and how to assign meaningful numerical values to the vulnerability factors in order to identify which communities need additional protection under the HEEI Rule.¹⁷

The HEEI Rule's mapping for cumulative impacts has helped identify communities experiencing particularly high pollution levels and other non-

¹⁵ **[12-8-2023 5 Tr. 1545:3-1546:5]** (discussing U.S. EPA's tool for measuring public health impacts, called EJScreen, and how other states such as Colorado have used it); **12-5-2023 2 Tr. 495:12-496:7** (Dr. Bilsback supporting combining national data with local information and naming Colorado and North Carolina as states that have their own screening tools); **11-17-2023 Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 18-20** (citing explanations for the White House Environmental Justice Advisory Committee Environmental Justice Index, New Jersey EJ analysis, and Cal-EPA's CalEnviroScreen].

¹⁶ **[12-5-2023 2 Tr. 594:10-595:8]** (Dr. Clark noting that EJScreen also relies in part on CDC Places data and that ideally local data would be used) **473:10-475:8** (Dr. Morello-Frosch noting that good local data can be a helpful supplement to national data)].

¹⁷ **[12-4-2023 1 Tr. 360:10-366:15; 12-5-2023 2 Tr. 462:21-463:11; 12-6-2023 3 Tr. 1082:2-11]** (discussing what percentile of vulnerability should trigger further protection from air pollution)].

environmental factors that worsen public health outcomes. The record shows that people in these communities are more likely to develop cancer, respiratory difficulties, and cardiovascular disease, with several barriers to recovery or managing these conditions due to social factors. Informing the Air Board's deliberations were academics and federal authorities singling out communities in Bernalillo County for their environmental burdens and social vulnerability. **[11-17-2023 Petitioners' NOI Ex. 3 (Written Testimony of Dr. Morello-Frosch) at 8-10, 18-19** (noting that, based on maps reviewed for the testimony, emitting sources in Albuquerque are disproportionately located in communities of color or have high rankings in the Environmental Justice Index)]. Testifying experts presented maps showing the overlap between the census blocks with high concentrations of environmental, health, and social indicators of vulnerability to air pollution. **[11-17-2023 Petitioners' NOI Ex. 1 (Written Testimony of Dr. Bilsback) at 14-21]**. This evidence underscores the rational nature of the Air Board's action. It would have been arbitrary for the Air Board to ignore these unrefuted facts and give them no weight. The Air Board's decision should not be disturbed.

IV. There is substantial evidence to show that the HEEI Rule will be more protective of public health

New Mexico law permits the Air Board to enhance the requirements of federal law, so long as the enhancements "will be more protective of public health." § 74-2-5(G). The HEEI Rule's BACT requirement does just that.

The HEEI Rule is the first of its kind in New Mexico to apply BACT to address the cumulative and synergistic impact of multiple stressors on public health, which current federal standards and local rules do not. For instance, NAAQS and the National Emission Standards for Hazardous Air Pollutants (NESHAP) do not “specifically take into account cumulative impacts or . . . other vulnerability factors.” **[12-5-2023 1 Tr. 488:1-11; 11-17-2023 Sofia Martinez and Martin Criollo NOI Ex. 5 (Written Testimony of Dr. Sheats) at 10-12** (explaining why both NAAQS and NESHAP are not sufficient to address cumulative health and environmental impacts)]. Nor do any of the Air Board’s other regulations. *See* **[12-1-2023 Petitioners’ Notice of Filing of Rebuttal Testimony Ex. 1 (Written Rebuttal Testimony of Dr. Clark) at 5** (explaining that N.M.A.C. Part 41 requirements are not by themselves sufficient to protect the public health and welfare of Bernalillo County residents)]. The NAAQS also do not consider synergistic impacts between multiple criteria pollutants or social demographic information. *See* **[12-5-2023 Tr. 488:18-25 – 489:1-4]**.

The Air Board’s application of BACT is reasonable: requiring stronger pollution controls where they are currently not applied will lead to more reductions in emissions. BACT refers to an emission limitation based on the maximum degree of reduction achievable for a given pollutant. *See* 20.11.72.7(A), 20.11.61.7(M) NMAC. The technology chosen will be one that is *best* at removing air pollution

for that source. [12-11-2023 8 Tr. 2129:9-2132:12 (discussing how requiring BACT is more protective of vulnerable communities); 12-5-2023 2 Tr. 616:25-618:23 (testimony of Dr. Clark)]. However, at the time, federal and state law only required applying BACT for major sources. [12-8-2023 5 Tr. 1658:12-1660:1]. The HEEI Rule extends BACT to more sources subject to the Air Board's jurisdiction. *See* 20.11.72.2(A) NMAC. By applying BACT to more sources, it will enhance protections for public health by preventing more air pollution from entering the local environment. [12-1-2023 **Petitioners' Second Notice of Errata Corrected Ex. 2 (Written Testimony of Dr. Clark) at 32, 28** (discussing the one-mile radius); 12-11-2023 8 Tr. 2181:5-18 (noting additional protections afforded by BACT)].

V. The Air Board considered HEEI Rule's technical practicability and economic reasonableness

The Air Board dutifully fulfilled the "technical practicability and economic reasonableness" analysis required by section 74-2-5(F)(3). "[P]revious experience with equipment and methods available to control air contaminants", *id.*, was acknowledged because BACT is currently being used in the Air Board's regulatory framework. [12-11-2023 6 Tr. 2171-73, 2183-84 (noting BACT's definition)]. Testimony also showed that standard industry implementation protocols for BACT do exist. [12-5-2023 2 Tr. 614:6-625:16 (Dr. Clark discussing the steps in the

analysis); **12-8-2023 5 Tr. 1658-60, 1678:7-12** (testimony of Mr. Steven Branoff); **12-7-2023 4 Tr. 1535:5-1538:14** (testimony of Mr. Michael Celente)].¹⁸ Appellants’ declaration that there was “no evidence presented supporting a BACT mandate” [**Appellants BIC 25**] falls flat along with its broad claim that “the evidence at the hearing undermined a BACT mandate because of the logistical and financial burdens” [**Appellants BIC 26**].¹⁹ *See State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 (“A party cannot throw out legal theories without connecting them to any elements and any factual support for the elements”) (cleaned up).

The testimony and evidence in the record supports the Air Board’s decision to give little weight to feasibility concerns.²⁰ Although section 74-2-5(F)(3), the only authority appellants point to for their feasibility argument, requires the Air Board to take “technical practicability and economic reasonableness” into account, it does not mandate “feasibility” for Air Board rules. *See* [**NTESS BIC at 52-53** (referring to failure to consider feasibility)]. Yet, by its very language, BACT takes feasibility

¹⁸ Also noting that other jurisdictions have applied BACT to non-major sources. [**12-8-2023 5 Tr. 1658:12-1660:1**].

¹⁹ *See also* **12-5-2023 2 Tr. 564-65** (testimony noting that the costs Appellants claim this rule would impose on permittees are excessive); *cf.* **614:6-616:24** (explaining the resources available to businesses applying for permits that fall under this rule); **625:7-16** (explaining excessive cost is associated with expansive monitoring but costs for technology are standard).

²⁰ *See, supra* n.18-19.

into account when deciding what emission technology that source must install. BACT is decided on a case-by-case basis according to the menu of already *available* technologies tailored for that source. But that choice is also based on economic factors to ensure the best choice is also *feasible*. See 20.11.72.7(A), 20.11.61.7(M) NMAC (explaining that if “technological or economic limitations...would make the imposition of an emissions standard infeasible,” then “a design, equipment, work practice, operational standard, or combination thereof [] may be prescribed [] to satisfy the requirement for” BACT). Ultimately the Air Board took into account industry concerns because BACT will protect vulnerable communities without imposing undue costs on businesses. [12-5-2023 2 Tr. 565:3-21; 12-8-2023 5 Tr. 1658:12-1660:1 (describing how a BACT analysis takes costs into account when assessing potential emissions controls)].

Embedded within this section’s directive is the broad discretion to “give the weight [the Air Board] deems appropriate” to the section 74-2-5(F) factors. The Air Board, here, decided that “character and degree of injury to or interference with health [and] welfare” caused by air pollution in these subpopulations, § 74-2-5(F)(1), outweighed the modest costs of imposing a common pollution control standard to more polluters, *id.* at (F)(3). See [RP-1784 (“The adopted ordinance is technically practical and justified given prior experience with the equipment.”)]. Having weighed the evidence before it, the Air Board exercised its discretion to require

BACT in limited, justified circumstances. *See Sw. Pub. Serv. Co. v. New Mexico Pub. Regul. Comm'n*, 2024-NMSC-012, ¶ 40, 548 P.3d 97 (explaining that the broad statutory cost-benefit analysis leaves interpretative policy to agency in carrying out its mandate).

VI. The HEEI Rule is consistent with environmental justice principles that the Air Board is required to give “due consideration”

The Air Board’s fundamental duty is to prevent and abate air pollution. The Air Board is duty-bound to consider the degree of injury experienced by different parts of its geographic area. In promulgating regulations, State law instructs the Air Board to consider the three factors in section 74-2-5(F), which the Air Board did here. Empowered to assign whatever “weight” to health and welfare it chooses, the Air Board was allowed to set aside speculative infeasibility concerns and adopt a modest, but important technology standard to protect communities more vulnerable to air pollution.

The administrative code that governs the Air Board’s activities mirrors State law language, but also specifically **requires** the Air Board to give “**due consideration** for environmental justice principles” when considering the “public interest.” 20.11.82.32(A)(2) NMAC (emphasis added). “Environmental justice” is defined as “the fair treatment of all residents [within Bernalillo County], including communities of color and low income communities, ... in the development,

implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level.” 20.11.82.7(F) NMAC.

Racial segregation has a long legacy in Albuquerque. The city expanded during the period when racial covenants, a tool to enforce residential segregation by preventing property sales to people of color, were in their prime. Racial covenants surged following the Supreme Court’s decision upholding the practice in 1926. *See Corrigan v. Buckley*, 271 U.S. 323 (1926).²¹ Albuquerque’s population boomed following World War II: between 1940 and 1950 alone, the city’s population tripled. Concentrated housing construction during this period allowed developers to create planned neighborhoods that were white-only. Albuquerque’s zoning laws also contributed to segregation, allowing areas with better air quality to be “claim[ed]... for larger/more expensive homes.”²²

Industrial air pollution sources—by historical design—are concentrated predominantly in neighborhoods of color in Albuquerque, and the Air Board was required to consider this during the rulemaking. The four zip codes where 36% of

²¹ Congress did not outlaw discriminatory housing practices until the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81.

²² City of Albuquerque & MASS Design Group, Housing and Entrepreneurship Part 1: Needs Assessment Report 45 (Oct. 11, 2022), https://www.cabq.gov/office-of-equity-inclusion/documents/221107abq-housing_needs-assessment_final.pdf. *See also* Larry Barker, Albuquerque’s Dirty Little Secret, KRQE (Nov. 10, 2020), <https://www.krqe.com/news/larrybarker/albuquerque-dirty-little-secret/>.

the county’s air permits are clustered—San Jose, Mountain View, Greater Gardner, and Martineztown—are communities of color. **[See RP-0020-0051]**. The Air Board considered testimony regarding the relationship between air emissions and health outcomes, including studies demonstrating heightened health risks for historically marginalized communities and the benefits of reducing air pollution through targeted measures. **[12-4-2023 1 Tr. 270-75** (going through several studies showing that marginalized communities face greater health risks)]. The Air Board heard testimony from concerned community members who have “learned and seen firsthand the impacts of environmental racism in Albuquerque’s most impacted communities” and expressed support for regulation informed by cumulative impact analyses like the HEEI Rule. **[12-5-2023 2 Tr. 731]**.

Appellants claim their industries are being discriminated against based on their choice to locate in neighborhoods of color. **[NTESS BIC 42]**. But equal protection principles do not require the Air Board to ignore the fact that certain communities within its jurisdiction are more vulnerable to the adverse health effects of additional air pollution. Instead, state law wisely and explicitly requires the Air Board to take reasonable steps to protect public health in light of all relevant factors. Social determinants of health are among those facts and circumstances, and they align with the Air Board’s environmental justice imperatives.

The HEEI Rule disrupts a long tradition of harmful discrimination in the

distribution of environmental and health harms in Bernalillo County. It wisely includes consideration not only of physical sources of pollution, but also the social factors that influence or produce health disparities and harms. Cumulative impacts measures like the HEEI Rule are grounded in sound science and promote the environmental justice principles that help govern the exercise of the Air Board's regulatory authority.

In *Community Amici's* view, the Air Board's promulgation of the HEEI Rule is not only proper—it is just.

CONCLUSION

The HEEI Rule addresses not only physical sources of pollution, but also the broader health disparities impacting communities and the social context in which Albuquerque and Bernalillo County residents live. By considering social determinants of health, the HEEI Rule ensures that permitting decisions account for real-world conditions. The record provides substantial evidence for the Air Board's decision consistent with its broad authority to abate air pollution and to promote public health equally across all communities within its jurisdiction.

Respectfully submitted,

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