

submit a legal opinion from the Attorney General (or the attorney for the State or local air pollution control agency that has independent legal counsel) demonstrating adequate authority to carry out all aspects of a title V operating permits program. The Albuquerque City Attorney submitted a Final City Attorney's Opinion and a First and Second Supplemental City Attorney's Opinion on behalf of both the City of Albuquerque and Bernalillo County.

This is because, as explained in the Second Supplemental City Attorney's Opinion, the City Attorney provides legal advice to the City pursuant to City Ordinance 1-20-1 R.O. 1974, and the City Attorney, with the consent of Bernalillo County, is independent counsel for the joint Albuquerque/Bernalillo County Air Quality Control Board. The administrative agency for this joint board is the City Environmental Health Department, as provided in Albuquerque/Bernalillo County AQC regulations 2.12 and 1.13. The APCD, a subdivision of the City Environmental Health Department, was given the responsibility of preparing and implementing the City/County title V program. Therefore, under the authority of NMSA 1978 section 74-2-1, *et seq.*, and consistent with his role as independent counsel for the City of Albuquerque/Bernalillo County Air Quality Control Board and the City Environmental Health Department, the City Attorney in his First and Second Supplemental City Attorney's Opinion addressed the required authority to implement the City/County title V operating permits program.

As explained in the Second Supplemental City Attorney's Opinion, the City Amended Ordinance and the County Amended Ordinance do not repeat the felony violation language of Air Quality Control (AQC) Act section 74-2-14.C verbatim. This is because of a New Mexico Constitutional requirement that felony violations must be initiated and prosecuted by the State Attorney General or the State District Attorney. State law requires all violations of City and County ordinances to be prosecuted in Metropolitan Court, for which the New Mexico Constitution limits jurisdiction to non-felony cases. Therefore, the City and County ordinances do not state that the felony violations detailed in AQC Act section 74-2-14.C are also ordinance violations. Since State statute requires that felonies committed within the City and County be initiated and prosecuted by the State Attorney General or District Attorney, this is not an obstacle to part 70 approval.

The legal opinions submitted by the City Attorney demonstrate adequate legal authority as required by Federal law and regulation to implement and enforce a part 70 operating permits program except with regard to criminal fine authority as discussed below. The City Attorney, in Albuquerque's Final City Attorney's Opinion, acknowledged that the EPA had determined that a statutory revision would be required to render the State's criminal fine authority consistent with the requirements of 40 CFR 70.11 (a)(3)(ii).

The State statutes and City and County ordinances cited in the Final City Attorney's Opinion for Albuquerque/Bernalillo County authorize the imposition of criminal fines in the amounts of only \$1,000 and \$5,000 for misdemeanor and felony violations, respectively, rather than the \$10,000 per violation amounts required by 40 CFR 70.11(a)(3)(ii) for knowing violations of applicable requirements, permit conditions and fee and filing requirements. Further, those statutes and ordinances do not appear to authorize the fine amounts to be imposed per day per violation as required by 40 CFR 70.11(a)(3)(ii). Although these defects in criminal fine authority preclude the EPA from granting full approval of the City/County's operating permits program at this time, the EPA may grant interim approval, subject to the State, City and County obtaining and submitting to the EPA the needed criminal fine authority within 18 months after the Administrator's approval of the Albuquerque/Bernalillo County title V program pursuant to 40 CFR 70.4(f)(2). This will need to be accomplished through statutory revisions by the State of New Mexico and revisions to the City Joint AQC Board Ordinance and the County Joint AQC Board Ordinance by the City and County consistent with the amendments to State statute, and submission of those revisions to the EPA within the prescribed 18-month period.

As noted in the City Attorney's cover letter accompanying Albuquerque's First Supplemental City Attorney's Opinion, the State statute which provides for the delegation of authority from the State to Albuquerque/Bernalillo County for the City/County's operating permits program, New Mexico Statutes Annotated (NMSA) 1978 section 74-2-4, provides that any ordinances adopted by the City/County must be consistent with the substantive provisions of State statute and provide for standards and regulations not lower than those required by regulations adopted by the New Mexico

Environmental Improvement Board. Therefore, as explained in the above-mentioned City Attorney's cover letter, the City/County rely on the interpretation of the State Attorney General contained in the Attorney General's Opinion and Supplemental Attorney General's Opinion submitted with the New Mexico Operating Permits Program, with respect to a number of issues discussed below.

The City/County rely on the State's Supplemental Attorney General's Opinion submitted as part of the New Mexico Operating Permits Program and contained in the EPA's docket for the New Mexico part 70 program, in their interpretation of NMSA 1978 section 74-2-14.E with regard to the underlying criminal fine authority required by 40 CFR 70.11(a)(3)(iii) for tampering and false statement. The Albuquerque Supplemental City Attorney's Opinion and accompanying cover letter also reflect that the City and County rely on the requirements of NMSA 1978 section 74-2-4 for their interpretation of the identical City Amended Ordinance, section 6-16-17.B, and the identical County Amended Ordinance, section 17.B, consistent with State statute.

The EPA is also relying on the State's interpretation of its statute, NMSA 1978 section 74-2-14.E set out in New Mexico's Supplemental Attorney General's Opinion referenced above, as demonstrating that New Mexico law allows criminal fines of at least \$10,000 per day for each act of tampering and for each false statement as required by 40 CFR 70.11(a)(3)(iii), and on the City and County interpretation of their identical provisions in the City and County Amended Ordinances reflected in Albuquerque's First Supplemental City Attorney's Opinion consistent with this statutory interpretation as meeting the Federal requirement.

40 CFR 70.4(b)(3)(i) requires that a State/local agency demonstrate adequate legal authority to issue permits and assure compliance with each applicable requirement of 40 CFR part 70. Both the New Mexico regulation, Air Quality Control Regulation (AQCR) 770.III.C.1.d and the Albuquerque/Bernalillo County regulation, Air Quality Control (AQC) 41.03(C)(1)(d), state that "the department may impose conditions regulating emissions during start-up and shutdown." The EPA is relying on the State's interpretation of this language, discussed in the State's Supplemental Attorney General's Opinion referenced above, and the City/County interpretation of their corresponding regulation as set out in Albuquerque's First Supplemental City Attorney's Opinion, in interpreting this language to