

STATE OF NEW MEXICO  
Before the  
ALBUQUERQUE-BERNALILLO COUNTY  
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION  
FOR A HEARING ON THE MERITS  
REGARDING AIR QUALITY PERMIT  
NO. 3131

AQCB No. 2014-4

*Southwest Organizing Project [SWOP]  
By Juan Reynosa, Environmental Justice Organizer;  
Esther and Steven Abeyta, Members of SWOP, Petitioners*

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**ENVIRONMENTAL HEALTH DEPARTMENT'S  
OPPOSED MOTION FOR CLARIFICATION OF RULING**

**I. INTRODUCTION**

On June 30, 2015, the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) met to hear oral argument and public comment on the City of Albuquerque Environmental Health Department’s (“EHD”) Motion to Resolve the Merits of the Petition Using Summary Procedures or, in the Alternative, by Summary Judgment (“Motion for Summary Disposition”) in the above matter. After each board member present at the hearing stated an opinion regarding the motion, the Air Board voted to deny the Motion for Summary Disposition, but did not identify the legal or factual basis for its decision. EHD respectfully files this motion so that it can understand the basis for the Air Board’s decision and better prepare for the hearing.

## II. ARGUMENT

The Air Board's clarification of the basis for its decision to deny EHD's Motion for Summary Disposition comports with its "Adjudicatory Procedures," which are intended to assure that its consideration of a petition challenging an EHD permitting decision will "expedite the efficient resolution of the action," "assure that the facts are fully elicited," and "avoid delay." 20.11.81.12((B)(1) and (2)(b) NMAC. The purpose of a hearing on the merits is to "provide a reasonable opportunity for all parties...to be heard without making the hearing unreasonably lengthy or cumbersome..." 20.11.81.16(B)(1) NMAC. Because EHD does not have any specifics about the rationale for the Air Board's decision, it is difficult for EHD to determine whether and to what extent it should supplement its testimony to address the concerns of the Air Board.

The Air Board's interpretation of a statute is a legal question. *Board of Education for the Carlsbad Municipal Schools v. Department of Public Education*, 1999-NMCA-156, ¶ 16, 128 N.M. 398. This interpretation does not require the Air Board to hear the facts alleged by a petitioner. *Id.* A law must be interpreted consistent with legislative intent, and that interpretation is not dependent on the facts in a specific matter. *New Mexico Bd. of Licensure for Professional Engineers and Professional Surveyors v. Turner*, 2013-NMCA-067, ¶ 9, 303 P.3d 875.

While the Air Board's interpretation of the Air Act is a legal question that does not depend on any particular set of facts, the Air Board's decision to interpret the Air Act in a particular manner determines which evidence is relevant and which facts are material at a hearing. *Romero v. Philip Morris*, 2010-NMSC-035, ¶ 11. Evidence is "relevant" if (1) it makes a fact more or less probable than it would be without the evidence, and (2) the fact is of consequence in determining the action. Rule 11-401 NMRA (2012). A fact is "material" if it is

necessary to support a claim. *Romero*, 2010-NMSC-035, ¶ 11. Thus, it is essential for the parties to understand the particular manner in which the Air Board interpreted the Air Act to know which evidence is relevant and which facts are material, which in turn allows the EHD to determine how it will supplement its NOI. This clarification serves not only the interests of the Air Board in having a meaningful hearing and the parties in preparing and presenting their arguments, but also the public interest by ensuring the prudent use of public resources to resolve only those matters within the Air Board's jurisdiction.

This is not an attempt to reargue EHD's Motion for Summary Disposition. The Air Board has decided that Motion. However, three of the four board members who decided the motion indicated that EHD was proceeding in compliance with the law, and that the regulations do not address the issues raised in SWOP's Petition. *See infra*. These statements raise a significant question whether the Air Board simply wanted to hear SWOP's testimony, or intended to hold that the Air Act imposed a new standard on the Honstein permit under which Honstein must show, in addition to compliance with the Air Board's regulations, that its emissions do not cause "air pollution." In turn, the definition of air pollution would require that Honstein show that there is no "reasonable probability" that its emissions will cause injury to human health, among other things. NMSA 1978, § 74-2-2(B). If the Air Board intended to hold that the Air Act imposed this reasonable probability standard on the Honstein permit, EHD will be compelled to expend significant resources to retain expert witnesses and prepare additional data and testimony for a hearing that could last several days.

### **III. THE JUNE 30, 2015 HEARING**

While each Air Board member present at the hearing expressed an opinion, the Air Board as a whole did not announce its rationale for denying the motion. After the completion of oral argument on June 30, 2015, the Air Board briefly deliberated on the Motion for Summary Disposition. According to the written transcript, Chair Curran first opined that

I guess, in hearing all of the arguments from both parties and then also the testimony or comments from the public, I feel personally, as my own entity, that we are, the Air Quality Control Board is enforcing following the regulations that we have adopted and have been set forth by Clean Air Act, the EPA, that we have adopted those regulations, and that revoking or asking that the city take away Permit 3131 would be outside the bounds.

In looking at the information that I saw here, I didn't see anything outside of the regulations, and I would see that revoking the permit could be seen as stepping outside of the bounds.

Honstein Motion for Summary Disposition Transcript 96:25 – 97:14 (Jun. 30, 2015) [“Trscpt.”]

Member Deichman then moved to deny the motion, stating

I will just say that certainly the counsel on both sides presented their cases. I can't say I was particularly swayed by either of them. But the public comments did help me decide, because I feel like just on the basis of how we have to make a decision, as I read it, I think there's sufficient doubt that there are no undisputed facts. And clearly, just on the basis of that, I move that we deny the motion for summary judgment.

Trscpt. 98:9-10. Member Deichman did not explain whether he interpreted the Air Act to impose a new standard on the Honstein permit, what facts would be material or relevant under that standard, or which facts he considered to be in dispute.

Member Upson seconded the motion without comment, but later stated

...I agree with the other members, that I think the Environmental Health Department does a great job. I think they abide by the law and they do the best they can to protect the health of the public, and I have never found them to be dismissive of public concerns.

And I agree, that I don't know that we have the legal authority to make any changes at this point, and I am certainly not a lawyer. We have counsel on both sides saying there's, you know, some sway either way.

I was also moved by the community, and I think that they are probably – that we are behind in our laws, and this board is not going to change the law in this case. That's not what we are allowed to do. But I think there can be a good discussion about what's going on, and we can see if there are solutions or ways to address the issues and the valid concerns of the community.

Trsrpt. 100:6-25.

Member Goldstein stated that he had no doubt that EHD complied with the applicable standards and regulations, even if those regulations did not go far enough

...first of all, I have no doubt that the division is following its standards and following its regulations in good faith. I have no doubt that they are doing it, but I also think that those standards and regulations may not protect public health in all circumstances.

And I also think that the concerns regarding cumulative impacts may, indeed, be valid. What I don't know is how we can deal with them. And I think that the biggest problem is we don't have a single regulatory agency that can deal with everything put together –water, air, soil, waste, so on and so forth. So I hope the community understands that this board is supposed to deal with air quality only and really isn't empowered to address all the other sources of pollution that you deal with. But that being said, I support going forward with the hearing just so these issues can be brought up.

Trsrpt. 99:16-100:4.

The Air Board then voted on the motion. Chair Curran voted to grant the Motion for Summary Disposition. The three remaining Air Board members voted to deny it.

Following the Air Board's decision, EHD's Counsel moved for an opportunity to supplement its Notice of Intent ("NOI"), observing that it would need to supplement its testimony to respond to the Air Board's decision to hold a hearing. The hearing officer and all four board members agreed that supplementation would make for a better hearing, and Petitioners' counsel did not object, asking only for the same opportunity. Trnscpt. 102-108.

To determine whether and how to supplement this testimony, however, EHD requires clarification of the Air Board's decision. With respect to the legal issue raised in the Motion for Summary Disposition, SWOP and EHD offered written and oral arguments regarding whether the Air Act imposes a new standard on the Honstein permit, which required Honstein to show that it did not cause air pollution. SWOP argued that Honstein was required to show this; EHD argued that it was not. Both arguments cannot simultaneously be correct. The purpose of a hearing on the merits is to "provide a reasonable opportunity for all parties...to be heard without making the hearing unreasonably lengthy or cumbersome..." 20.11.81.16(B)(1) NMAC. There is little point in EHD supplementing its NOI if the Air Board agreed with EHD that the Air Act does not impose a new standard on the Honstein permit. Conversely, if the Air Board intended to impose this new standard, EHD must prepare to dispute SWOP's factual claim that the facility's emissions are causing injury to human health. Accordingly, clarifying the legal ruling will achieve this objective by "expedit[ing] the efficient resolution of the action," "assur[ing] that the facts are fully elicited," and "avoid[ing] delay." 20.11.81.12((B)(1) and (2)(b) NMAC.

Similarly, SWOP and EHD disagreed about the material facts and whether they were in dispute. EHD (Motion for Summary Disposition at pp. 33-34); SWOP (Petitioners' Response pp. 11-13). The Air Board did not identify which, if any, facts it considered to be material or in dispute. As a result, the Air Board's clarification of this issue would expedite efficient resolution of the action, 20.11.81.12((B)(1) and (2)(b) NMAC, and avoid making the hearing unreasonably cumbersome, 20.11.81.16(B)(1) NMAC.

Simply put, the basis for the Air Board's decision will determine whether and to what extent EHD supplements its NOI. On the one hand, if the Air Board wants to hear general testimony on air quality issues in the South Valley, it certainly has the authority to do that. On the other hand, if the Air Board holds that the Honstein permit is subject to a new standard, EHD will have to present testimony disputing that the permit violates this standard, e.g., that there is a reasonable probability that the facility's emissions are causing injury to human health, which will require the retention of expert witnesses, and the expenditure of the EHD's Air Quality Program's limited resources.

#### IV. CONCLUSION

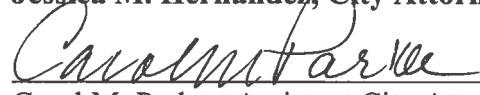
For the reasons stated above, EHD requests that the Air Board clarify the legal and factual basis for its decision to deny the Motion for Summary Disposition.

EHD sought the position of opposing counsel and the position of the Applicant Honstein Oil & Distributing LLC on this Motion for Clarification. SWOP and the San Jose Community Members oppose this motion. Honstein agrees with the form and substance of the motion. Thus, this motion is opposed.

Respectfully submitted,

CITY OF ALBUQUERQUE

**Jessica M. Hernandez, City Attorney**

A handwritten signature in cursive script, appearing to read "Carol M. Parker", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served as described below on July 17, 2015:

- 1) The City's original document was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered to the Hearing Clerk.
- 2) One additional copy was hand-delivered to the Hearing Clerk for delivery to the Hearing Officer/Air Board Attorney and one copy was sent by electronic mail to:

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- 3) One hard copy was mailed by first class mail and a copy was sent by electronic mail to:

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