

STATE OF NEW MEXICO  
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*

**ANSWER OF THE ENVIRONMENTAL HEALTH DEPARTMENT  
TO PETITION FOR HEARING**

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The City of Albuquerque (the “City”) Environmental Health Department (“EHD”) files this Answer in response to the Petition for Hearing (“Petition”) filed by Southwest Organizing Project (“SWOP”), Juan Reynosa, Environmental Justice Organizer and Esther and Steven Abeyta, Members of SWOP (collectively “Petitioners”) in AQCB No. 2014-4. EHD’s answers to each sentence in the Petition are set forth below, following language from the Petition which is set out in *italics*. EHD answers as follows:

*Pursuant to Chapter 74, Article 2, Section 7.G-I, NMSA 1978, and 20.11.81.14 NMAC, Petitioners, by and through counsel Jon Block and Eric Jantz, New Mexico Environmental Law Center, hereby request a hearing on the above captioned permit for the reasons of fact and law below.*

Petition, p. 1.

1) EHD admits that it issued Permit No. 3131 (“the above captioned permit”) to Honstein Oil & Distributing LLC (“Honstein”). EHD admits that the Albuquerque-Bernalillo County Air Quality Control Board has authority to conduct hearings concerning permits issued by EHD pursuant to NMSA 1978, § 74-2-7(H); 20.11.81.14(A and B) NMAC, among other authorities. EHD admits that Petitioners submitted a petition through counsel for a hearing

concerning EHD's issuance of Permit No. 3131. EHD is without information sufficient to form a belief regarding whether any of the Petitioners are adversely affected by the issuance of Permit No. 3131 and, on that basis, denies that Petitioners have petitioned pursuant to Chapter 74, Article 2 Section 7(H) or pursuant to 20.11.81.14(B)(2)(c) NMAC or as required by other applicable laws or ordinances. EHD denies all remaining allegations in this Paragraph.

*Petitioners also set forth below the hearing request information required by regulation, and have provided the Clerk or designated person with an original and nine copies of the Petition with the permit attached as Exhibit 'A' and a certificate of service, and will serve stamped copies on (or to a designated person for) Department counsel, Board Counsel, Hearing Officer and Permittee.*

*Id.*

2) EHD denies that the Petition contains the information required by regulation.

EHD admits that Petitioners have provided the Clerk or designated person with an original and nine copies of the Petition. EHD admits that Petitioners have attached Permit No. 3131 to their Petition. EHD admits that EHD was served with a copy of the Petition with the permit attached as Exhibit 'A' via Department counsel. EHD admits that Petitioners served Board Counsel.

EHD denies that the Albuquerque-Bernalillo County Air Quality Control Board had appointed a Hearing Officer in this matter when the Petition was filed. EHD is without information sufficient to form a belief whether Petitioners served the Permittee (Honstein) and on that basis denies same. EHD denies all remaining allegations in this Paragraph.

*Petitioners and Counsel have below certified they attest to the truth of the information in this petition.*

*Id.*

3) EHD admits that Petitioners and Counsel certified below that they attest to the truth of the information in their Petition.

*Notice of the Department's granting of the permit was served on Petitioners by certified mailing on July 16, 2014.*

*Id.*

4) EHD admits that it mailed notice of the Department's issuance of Permit No. 3131 with a letter dated July 14, 2014 on or about July 14, 2014 and emailed notice of the Department's issuance of Permit No. 3131 on July 16, 2014. EHD affirmatively states that Petitioner SWOP signed for certified mail of the Department's notice on July 16, 2014 and Petitioner Esther Abeyta signed for certified mail of the Department's notice on July 18, 2014. AR No. 72, Bates No. 239-240.

*This Petition is filed with the Clerk on August 12, 2014, less than 30 consecutive days from the date notice was given to Petitioners of the permitting action taken by the department that this Petition contests.*

*Id.*

5) EHD admits that Petitioners filed the Petition on August 12, 2014 less than thirty days from the date notice was given to Petitioners of EHD's issuance of Permit No. 3131.

*[Contact information for Petitioners and Petitioners' Attorneys].*

*Id.* at p. 2.

6) EHD is without information sufficient to form a belief regarding the correct contact information for Petitioners or their relationship with their attorneys and on that basis denies same.

*Petitioners submitted written and oral comments during the Public Information Hearing.*

*Id. at p. 3.*

7) EHD admits that Petitioners submitted written and oral comments during the Public Information Hearing that EHD held concerning the application by Honstein on May 22, 2014.

*Petitioners have also obtained information concerning the permit at issue through the IPRA process.*

*Id.*

8) EHD admits that Petitioners sought information about Honstein and the application for Permit No. 3131 through the process authorized by the Inspection of Public Records Act.

*Petitioner organization SWOP, by and through representative members Esther and Steven Abeyta who live in the South Valley in the San Jose Community, an United States Environmental Protection Agency recognized Environmental Justice community, are directly affected by the permitting action in that it allows an addition to the already existing cumulative impacts upon them from the polluted air they breathe in that community.*

*Id.*

9) EHD is without information sufficient to form a belief whether Esther and Steven Abeyta live in the South Valley or in the San Jose Community and on that basis denies same. EHD is without information sufficient to form a belief whether San Jose Community or the

South Valley is “an[sic] United States Environmental Protection Agency recognized Environmental Justice community” or what significance Petitioners maintain such status may have in this proceeding and on that basis denies same. EHD is without information sufficient to form a belief whether any Petitioner is “directly affected by the permitting action” or what meaning or significance Petitioners attach to the term “directly affected” and on that basis denies same. EHD denies that the emissions authorized by Permit No. 3131 are “in addition to the already existing cumulative impacts upon them from the polluted air they breathe in that community.” EHD states affirmatively that the Honstein facility has been operating for decades at 101 Anderson SE without a permit and that, due to a citizen’s complaint, EHD learned about the Honstein facility, conducted an enforcement action and required that the Honstein facility apply for an air quality permit for its already existing emissions. EHD denies all remaining allegations in this Paragraph.

*Air Quality Permit No. 3131 ~ Honstein Oil Distributing, LLC  
(Honstein), Authority-to-Construct Permit - 101 Anderson Ave.  
SE, Effective date: June 16, 2014.*

*Id.*

10) EHD admits Petitioners have appealed its issuance of Authority-to-Construct Permit No. 3131 to Honstein which is located at 101 Anderson Ave. SE. EHD denies that Permit No. 3131 became effective on June 16, 2014 and states affirmatively that EHD issued Permit No. 3131 on June 12, 2014.

*Petitioners object to issuing the entire permit without consideration of health and safety of the affected community given cumulative impacts on air quality from industrial facilities in the South Valley, particularly the San Jose community; no attempt was made to assess cumulative impacts despite some evidence of excess emissions; no attempt was made to assess the public health and safety aspects of granting another permit for the type of emissions the facility at issue emits; no consideration in the permitting*

*process for the Honstein facility was given to the adverse impacts issuing the permit has on the quality of life-- particularly in relation to existing permitted cumulative impacts--in the San Jose community, and Petitioner SWOP, by and through its San Jose community members Esther and Steven Abeyta.*

*Id. at p. 3-4.*

11) EHD admits that Petitioners “object” to the issuance of Permit No. 3131. EHD denies that it issued Permit No. 3131 “without consideration of the health and safety of the affected community” and states affirmatively that EHD applied all standards and regulations applicable to the Honstein facility in Permit No. 3131. EHD is without information sufficient to form a belief what Petitioners mean by “...given cumulative impacts on air quality from industrial facilities in the South Valley, particularly the San Jose community;” and on that basis denies same. EHD is without information sufficient to form a belief about what Petitioners mean by “...no attempt was made to assess cumulative impacts despite some evidence of excess emissions;” and on that basis denies same. EHD is without information sufficient to form a belief about what Petitioners mean by “...no attempt was made to assess the public health and safety aspects of granting another permit for the type of emissions the facility at issue emits;” and on that basis denies same. EHD is without information sufficient to form a belief about what Petitioners mean by “...no consideration in the permitting process for the Honstein facility was given to the adverse impacts issuing the permit has on the quality of life-- particularly in relation to existing permitted cumulative impacts--in the San Jose community, and Petitioner SWOP, by and through its San Jose community members Esther and Steven Abeyta[.]” and on that basis denies same.

*Petitioners object to the Albuquerque-Bernalillo Air Quality Bureau failing to take any investigative steps to assess the impacts of continued permitting of facilities such as Honstein's upon the quality of life of persons living in proximity to the facility, particularly those of the San Jose Community in which SWOP members Ester and Steven Abeyta reside.*

*Id.*

12) EHD is without information sufficient to form a belief about the existence of the “Albuquerque-Bernalillo Air Quality Bureau” and on that basis denies same. EHD states affirmatively that EHD’s Air Quality Program [emphasis added] conducts its air quality related activities. EHD admits that Petitioners “object” to EHD’s issuance of Permit No. 3131. EHD denies all remaining allegations in this Paragraph.

*Petitioners object to the Albuquerque-Bernalillo Air Quality Bureau failing to take any investigative steps to assess the cumulative impacts of continued permitting of facilities such as Honstein's upon the air quality for persons living in proximity to the facility, particularly those of the San Jose Community in which SWOP members Ester and Steven Abeyta reside.*

Petition at p. 4.

13) EHD is without information sufficient to form a belief about the existence of the “Albuquerque-Bernalillo Air Quality Bureau” and on that basis denies same. EHD states affirmatively that EHD’s Air Quality Program [emphasis added] conducts its air quality related activities. EHD admits that Petitioners “object” to EHD’s issuance of Permit No. 3131. EHD denies all remaining allegations in this Paragraph.

*Relying upon the facts as set forth above, statutory basis for this Petition is contained in Chapter 74, Article 2, NMSA 1978, the Air Quality Control Act, and, in pertinent part, but not limited to the following, "The ... local board shall prevent or abate air pollution." Id. at 74-2-5.A; see also 74-2-5.1.A (local agency "shall" develop facts and make investigations and studies*

*consistent with the Air Quality Control Act..."); 74-2-7.C and D (under state law, a permit could be issued with a condition that requires continuous air monitoring at the site to assure compliance with federal Clean Air Act standards), and see Colonias Development Council v. Rhino Environmental Services, 2005-NMSC-024 at ¶¶30-35 (requiring consideration of quality of life and cumulative impacts in making a permitting determination).*

*Id.* at p. 4.

14) EHD denies that the Air Quality Control Act (“Air Act”) authorizes consideration of quality of life factors as a basis for denying a permit. EHD denies that continuous air quality monitoring would be appropriate in the case of the Honstein facility which does not emit any criteria pollutants. EHD denies that the Supreme Court’s decision in *Colonias Development Council v. Rhino Environmental Services*, 2005-NMSC-024 at ¶¶30-35 applies to permitting decisions made under the Air Act. In the alternative, EHD affirmatively states that the *Colonias* decision required that any Solid Waste Act permitting decision have a nexus to a regulation and EHD denies that any of Petitioners’ claims have any nexus to a regulation. EHD denies all remaining allegations in this Paragraph.

*Petitioners seek rescinding the permit until a cumulative impact assessment on the effects upon air quality in the San Jose community due to granting yet another permit such as the Honstein permit may be conducted.*

*Id.* at p. 5.

15) EHD denies that the Air Act authorizes the Air Board to reverse the issuance of Permit No. 3131 “until a cumulative impact assessment on the effects upon air quality in the San Jose community due to granting yet another permit such as the Honstein permit may be conducted.” EHD affirmatively states that the Air Act authorizes the denial of a construction permit only if the construction would (1) violate a rule or standard, (2) cause or contribute to an exceedance of an ambient air quality standard, or (3) violate any other provision of the Air Act or



the Clean Air Act. NMSA 1978, § 74-2-7(C)(2). EHD denies that any of those statutory criteria are met in the case of Permit No. 3131. EHD affirmatively states that it imposed all applicable standards and rules to Honstein's facility and that the construction authorized by Permit No. 3131 does not violate any provision of the Clean Air Act or Air Act. EHD denies all remaining allegations in this Paragraph.

*The impact should assess cumulative air emissions on this community from the aspect of public health and safety, particularly to children, the elderly, and persons with handicapped conditions.*

*Id.*

16) EHD denies that the Air Act authorizes the Air Board to instruct the EHD Director or its Air Quality Program to conduct particular investigations. EHD affirmatively states that EHD is charged with administering and enforcing the provisions of the Air Act within Bernalillo County and that the EHD Director's authority to conduct investigations in Section 5.2 of the Air Act is delegated to her, not to the Air Board; which investigations she directs her staff to conduct is within her discretion. EHD denies all remaining allegations in this Paragraph.

*Additionally, if a permit is issued for the facility, the permit can be conditioned to require continuous monitoring at the permit site for any exceedance of the federal Clean Air Act standards.*

*Id.*

17) EHD denies that Permit No. 3131 should be conditioned to require "continuous monitoring at the permit site for any exceedance of the federal Clean Air Act standards." EHD affirmatively states that the only emissions authorized by Permit No. 3131 are of volatile organic compounds ("VOC") from gasoline vapors which have no federal, state or local ambient air quality standards.

*Petitioners contend that the New Mexico Air Quality Control act authorizes and provides jurisdiction for the Board to take such actions as are necessary to assure public health and safety by regulating air emissions and that consideration of cumulative impacts is a prudent and necessary consideration in the granting or denying of an air emissions permit. See generally statutes and law cited above.*

*Id.*

18) EHD denies that the Air Act authorizes the Air Board “to take such actions as are necessary to assure public health and safety by regulating air emissions and that consideration of cumulative impacts is a prudent and necessary condition in the granting or denying of an air permit.” EHD affirmatively states that the Legislature has specified that health and safety considerations should be applied only in certain sections of the Air Act and that the permitting section, Section 7, is not among them. EHD affirmatively states that the Air Act authorizes the denial of a construction permit only if the construction would (1) violate a rule or standard, (2) cause or contribute to an exceedance of an ambient air quality standard, or (3) violate any other provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(2). EHD denies that any of those statutory criteria are met in the case of Permit No. 3131. EHD affirmatively states that it imposed all applicable standards and rules on Honstein’s facility and that the construction authorized by Permit No. 3131 does not violate any provision of the Clean Air Act or Air Act. EHD denies all remaining allegations in this Paragraph.

*A copy of the permit at issue is attached to this Petition as Exhibit 'A'.*

*Id.*

19) EHD admits that Petitioners have attached a copy of Permit No. 3131 as Exhibit A to the Petition.

### **AFFIRMATIVE DEFENSES**

20) To the extent that Petitioners seek to have Permit No. 3131 denied on the basis of quality of life concerns that have no nexus to any Air Board regulation, Petitioners fail to state a claim upon which relief can be granted.

21) The Petitioners have failed to describe how they are adversely affected by the issuance of Permit No. 3131 and therefore the Air Board does not have jurisdiction over their Petition.

22) The Petition does not demonstrate how the proposed construction “will not meet applicable standards, rules or requirements of the Air Quality Control Act or the ...[Clean Air Act]; “will cause or contribute to air contaminant levels in excess of ...[an ambient air quality standard];” or “will violate any other provision of the Air Quality Control Act or the ...[Clean Air Act]” as required by subsection 7(C)(1) of the Air Act for denial of Permit No. 3131.

23) EHD states affirmatively that all of Bernalillo County, including the South Valley, are in compliance with all federal, state and local health based air quality standards.

24) EHD states affirmatively that it required compliance with all air quality standards and rules applicable to the Honstein facility in Permit No. 3131.


25) EHD states affirmatively that it conducted monitoring for eighty different toxic pollutants in Bernalillo County from 2007 to 2009 which included monitoring in the South Valley. Of the eighty toxic pollutants, only seventeen were found with regularity and they were in low concentrations. Risk analysis demonstrated that those concentrations presented no significant health risks.

26) EHD reserves the right to assert such additional affirmative defenses as may arise and prove applicable during the course of the hearing.

WHEREFORE, having fully answered, EHD respectfully requests that the Air Board issue a Final Order denying the remedies requested by Petition No. 2014-4, dismissing Petition No. 2014-4, sustaining EHD's issuance of Permit No. 3131 and granting EHD any additional relief that the Air Board deems just and proper.

Respectfully Submitted,

CITY OF ALBUQUERQUE  
David J. Tourek, City Attorney

A handwritten signature in cursive script, reading "Carol M. Parker", written over a horizontal line.

Carol M. Parker, Assistant City Attorney  
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Answer of the Environmental Health Department to Petition for Hearing* was served on Nov 4, 2014 by the method indicated below:

- 1) The City's original *Answer of the Environmental Health Department to Petition for Hearing* 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:

Felicia Orth  
c/o Andrew Daffern, Hearing Clerk  
Control Strategies Section  
Environmental Health Department  
One Civic Plaza, Room 3023  
Albuquerque, NM 87102  
[orthf@yahoo.com](mailto:orthf@yahoo.com)  
*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board  
and Hearing Officer for AQCB Petition No. 2014-4*

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

Jon Block and Eric Jantz  
New Mexico Environmental Law Center  
1405 Luisa Street, Ste. 5  
Santa Fe, NM 87505  
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By:   
Carol M. Parker, Assistant City Attorney