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
By Juan Reynosa, Environmental Justice Organizer
Esther and Steven Abeyta
Petitioners

PETITIONERS' RESPONSE IN OPPOSITION TO THE ENVIRONMENTAL HEALTH DEPARTMENT'S OPPOSED MOTION FOR CLARIFICATION OF RULING

I. INTRODUCTION

The Environmental Health Department's ("EHD") Opposed Motion for Clarification of Ruling ("Motion for Clarification") is nothing more than a thinly veiled attempt to re-litigate the legal issue of whether the Air Quality Control Act ("Air Act" or "Act") requires cumulative air impact analyses that EHD presented in its Motion and Brief of the Environmental Health Department Air Quality Program to Resolve the Merits of the Petition Using Summary Procedures or, In the Alternative, by Summary Judgment ("Summary Disposition Motion"). However, the Albuquerque/Bernalillo County Air Quality Board ("Board") specifically declined to decide this issue. The Hearing Officer or Board should deny EHD's motion because: 1) EHD is seeking reconsideration of summary disposition and making improper evidentiary objections; 2) the Air Board denied the Summary Disposition Motion, and issuing a decision on cumulative impacts prior to development of the facts would undermine the Board's decision; and 3) there is no legal basis for revisiting the Air Board's denial of EHD's Summary Disposition Motion.

II. ARGUMENT

A. EHD is Seeking Reconsideration of Summary Disposition and Making Improper Evidentiary Objections

While EHD purports to seek clarification of the Board's decision denying its Summary Disposition Motion, its Motion to Clarify is, in substance, asking the Board to reconsider its decision and to make evidentiary rulings prior to the hearing that the Board decided to hold. EHD's Motion is improper and should be denied.

1. EHD Improperly Seeks Reconsideration of the Board's Decision of its Summary Disposition Motion.

EHD, under the guise of seeking clarification of the Board's ruling, asks the Board to reconsider its prior decision. The fact that EHD titled its motion "Motion for Clarification" and asserts it is not trying to re-argue its Summary Disposition Motion is unpersuasive because "[t]he manner in which the relief is requested and the nomenclature used is not significant." *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶ 18, 92 N.M. 47, 50 (1978); *see also Century Bank v. Hymans*, 1995-NMCA-095, ¶ 10, 120 N.M. 684, 689 (Ct.App.1995) (asserting that the substance of the motion, not its title, controls). The substance of EHD's Motion to Clarify reveals that EHD again seeks a decision on the legal issue of whether the Air Act requires a cumulative impacts analysis. Motion to Clarify at 2-3 and 6-7. EHD essentially repeats the summary judgment argument it used in its Summary Disposition Motion. *Compare* Motion to Clarify at 2-3 *with* Summary Disposition Motion at 5-6. For instance, it emphasizes the legal nature of determining the cumulative impacts issue and discusses which facts are material to that determination. *Id.* For the reasons that follow, EHD's Motion to Clarify is actually a second bite of the summary disposition apple and should be denied.

2. The Board's Decision Requires No Clarification.

Even assuming that EHD is sincere in its request for clarification, nothing in the record suggests that the Board's decision is ambiguous. First, it is clear that the Board denied EHD's Summary Disposition Motion. In its briefings supporting summary disposition, EHD attempted to establish that nothing in the Air Act compels the Board to consider cumulative impacts and the Board should therefore forego a merits hearing. *See* Summary Disposition Motion at 7; *see also* EHD Air Quality Program Reply in Support of its Motion to Resolve the Merits of the Petition Using Summary Procedures or, in the Alternative, by Summary Judgment at 15-16. However, because of the "valid concerns of the community" and to develop a "good discussion of what's going on," the Air Board rejected EHD's Summary Disposition Motion. Honstein Motion for Summary Disposition Transcript ("TR") at 100:22-101:19; *see also* TR at 99:16-19 ("[C]oncerns that have been expressed regarding cumulative impacts may, indeed, be valid. What I don't know is how we can deal with them").

Second, Board members' statements during deliberations before the Board rendered a decision clearly indicate the Board intended to defer any decision on the legal issue EHD presented in its Summary Disposition Motion and further develop facts. Board member statements may reflect the reasoning of the Board. *See, Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy*, 1974-NMCA-038, ¶ 17, 86 N.M. 571, 576 (N.M. 1974) (ruling that board member statements sufficiently state the reasoning of the Board and because comments were uncontradicted by other Board members, the Board adopted the comments). Based on Board members' statements, it is clear that the Air Board ordered a hearing to develop the facts. For example, in moving to deny EHD's Summary Disposition Motion, member Deichmann stated that he was not "particularly swayed either way" by legal arguments of counsel, but based

on public comments he indicated that, "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." TR at 98:3-12 (emphasis added). Similarly, member Upson indicated the need for greater factual development as the reason for her vote in favor of denying EHD's Summary Disposition Motion. During deliberations, Dr. Upson stated, " [b]ut I think that 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." *Id.* at 100:22-25. From the record, it is clear the Board sought greater factual development as the basis for its decision.

It is equally clear that the Board deferred its decision on the legal issue of whether the reasonable probability standard in NMSA 1978 § 74-5-5(B) requires the Air Board to consider cumulative impacts of polluting sources. As noted above, member Deichmann voted to deny EHD's Motion for Summary Disposition exclusively because there were material facts in dispute. TR at 98:9-12. Member Goldstein offered a slightly different rationale for deferring a decision on the legal issue. Dr. Goldstein indicated, "I also think the concerns that have been expressed regarding cumulative impacts may, indeed, be valid. What I don't know is how we can deal with them." *Id.* at 99:16-19. Likewise, Dr. Upson expressed her opinion 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." *Id.* at 100:13-15. The record therefore indicates that the Board deferred a decision on the legal issue of whether the Air Act requires a cumulative impacts analysis, and as explained in Section II.A.3, below, there is no requirement that such a decision be made until the Board issues its final decision.

Moreover, the scope of the yet to be scheduled hearing is clear. SWOP and the San Jose neighborhood have the burden of proof and the burden of going forward with the evidence.

20.11.81.16.C NMAC. Petitioners have submitted their petition and their NOI. SWOP and San Jose have not proposed any new evidence. EHD need only respond to the evidence SWOP has provided in its written submissions. Indeed, at the end of the hearing on June 30, 2015, counsel for EHD stated that EHD could discern what it must respond to if Petitioners file a supplemental NOI first.[1] TR at 102:10-103:13 ("EHD would prefer that it go in the same order as before, where SWOP needs to submit its experts and its testimony first, so that EHD can discern what areas it has to respond to"). It is clear that EHD need only proceed as any defendant in any adjudication would, and it is beyond the Board's authority to direct how EHD (or any party) should litigate its case. EHD's Motion should therefore be denied.

3. Nothing Requires a Final Decision from the Board at this Time

EHD is actually seeking reconsideration of the arguments in its Summary Disposition Motion opposing any review of the cumulative air pollution impacts upon the San Jose neighborhood. However, reconsidering the Summary Disposition Motion presupposes a final decision on that issue.

There is no rule requiring the Board to issue a final decision at this time. The only part of the Board's rules that address this issue is found in the section on "Alternative Resolution." That section provides that the Board may defer deciding an issue until it issues its final, written decision. Whereas some post-hearing procedures require final written decisions after the board reaches a decision on the petition, the Alternate Resolution provision states that, on a hearing for using summary procedures, "the board may either decide the matter and issue a final order, or, if

[1] EHD incorrectly asserts that Petitioners did not object to its motion to supplement its NOI. Motion to Clarify at 6. Now, as at the June 30 hearing, Petitioners object to EHD supplementing its NOI. *See*, TR at 103:22-104:1-25. However, *if* EHD is allowed to supplement its NOI, as a matter of due process, Petitioners should be afforded the same opportunity.

the board decides not to dispose of the matter, the board shall proceed with a full hearing as provided by 20.11.81.16." 20.11.81.20.A.3 NMAC.

Proceeding with a full hearing is precisely what the Board said it would do. This means the Board neither disposed of the matter nor issued a final order about the key legal issue. The EHD knows that the Board did not make a decision. *See* Summary Disposition Motion, 4; *see also id.* at 3 (statements raise a question whether the Board wanted to hear SWOP testimony or imposed a "new" standard). Even though it wanted to place SWOP's petition on the Alternate Resolution track, EHD's clarification request still demands that the Board should have given a final decision on the issue of cumulative impacts. Nothing in the record suggests that the Board decided the legal issue of whether the Act requires a cumulative impacts analysis. Indeed, statements from individual Board members clearly indicate that the Board purposely deferred that issue. Three of the Board members opined on why they denied the Summary Disposition Motion and never indicated that their opinions were a final decision on the cumulative impacts standard. To the contrary, they wished to hold a hearing to explore the community's situation in depth. TR at 98:3-12 and 100:1-25. The Board acted within its discretion to defer a decision on the legal issue upon which EHD's Summary Disposition Motion was based, and EHD has presented no legal authority which would compel the Board to revisit deferring its decision. EHD's Motion to Clarify should therefore be denied.

4. <u>EHD's evidentiary objections are improper</u>

In addition to seeking reconsideration of its summary disposition motion, the EHD's current motion also improperly seeks rulings on several evidentiary issues. Motion to Clarify at 2-3. The Hearing Officer can determine the relevancy of evidence when and where evidentiary objections are properly made: at the hearing. The rules lay out a simple process for presenting

evidence and relevancy. The hearing officer determines what evidence is relevant and may do so after a party objects and provides an offer of proof. 20.11.81.16.D, E NMAC. The regulation governing Air Board adjudications provide that evidentiary objections occur *"at the hearing"* or "*during the hearing.*" *See id.* at E ("Any objection concerning the conduct of the hearing . . . may be stated *during* the hearing"); *see also id.* at D ("*At the hearing* on the merits, the board members . . . shall have the right to cross-examine a witness"). Thus, the evidentiary objections EHD raises in its Motion to Clarify are improper.

B. Issuing a Decision on Cumulative Impacts Prior to the Hearing Would Undermine the Board's Order for and the Purpose of the Hearing

Notwithstanding the arguments above, revisiting EHD's request for summary disposition at this time would effectively undermine the Board's decision to proceed to a hearing to develop a "good discussion" of the legal and factual problem to "see if there are solutions or ways to address the issues and valid concerns of the community." TR at 100:22-25.

In *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶8, 148 N.M. 713, 720 (2010) ("*Romero*"), the court interpreted the rule of civil procedure governing summary judgment in the context of constitutional safeguards for the availability of trial by jury and having a jury weigh the factual evidence. *Id.* at ¶ 9. In this matter, the Board is responsible for adjudicating the Petition, which includes not only interpretations of law, but perhaps more important, finding facts. *See*, 20.11.81.12.A.2.b NMAC ("hearing officer shall exercise all powers and duties . . . [to] assure the facts are **fully** elicited . . . .") (emphasis added). Under the rationale of *Romero*, this type of administrative adjudication offers an even stronger argument against prematurely issuing a decision on the key legal issue before a hearing, particularly where there is community interest in the matter. However, approving EHD's Motion to Clarify would eliminate this important Board function.

At the hearing, the factual disputes warranted deferral of the final decision on the legal issue. The Board found the facts were very much in dispute—that was a necessary result of the EHD losing its summary disposition motion. TR at 98:9-10 and 101:19. By deferring the final decision on the need to assess cumulative impacts of air pollutants, the Board can develop and organize all the facts before it can appropriately apply them to the law. Having rejected EHD's Summary Disposition Motion, there is now no other mechanism by which the Board may consider the key legal issue without first developing the facts at hearing. Therefore, a written final decision now would undermine the purpose of fully developing facts and legal arguments that the hearing and post-hearing process provide.

C. EHD Provides No Basis for Reconsideration.

Nothing in either the Air Act or the Air Board's adjudicatory procedures authorizes the Air Board to reconsider any decisions other than its final decision. However, in the absence of any provision in the Act or its regulations, the Board may look to the New Mexico Rules of Civil Procedure for guidance. 20.11.81.12.A NMAC. The New Mexico Rules of Civil Procedure's requirements for reconsidering a decision are clear: a court may only reconsider **final** judgments and orders. *See* NMSA 1978, § 39-1-1 (giving courts control over "*[f]inal judgments and decrees* . . . entered by district courts in all cases tried pursuant to the provisions of this section.")(emphasis added); *see also* Rule 1–059(E) NMRA (providing: "A motion to alter, amend, or reconsider a *final judgment* . . . .") (emphasis added). Here, the Board has not issued a final decision or order and reconsideration of EHD's Summary Disposition Motion is inappropriate.

However, even assuming that the Board has the authority to reconsider its decision denying EHD's Summary Disposition Motion, EHD must still present "material grounds" to

support its request. *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶ 16, 92 N.M. 47, 50 (1978). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir.2000).[2] The pleading should "raise errors of fact or law committed by the [Board] in its prior decision, and must be supported by pertinent authority." *Diegnan v. Gonzales*, 190 F. App'x 680, 681 (10th Cir. 2006) (quoting *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 n. 3 (10th Cir.2005)). A motion for reconsideration is an "inappropriate vehicle[ ] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion." *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). Essentially, "[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

As established in Parts A and B of this argument, the Board has not made a final decision. The Board was clear in its decision to proceed to a hearing rather than issue a final decision on whether or not it is required to consider the cumulative impacts of air pollution in the San Jose neighborhood. EHD has neither alleged nor demonstrated any grounds or circumstances (much less material grounds or exceptional circumstances) to support its motion. EHD has neither alleged nor demonstrated a factual mistake or any mistake of law, and none were made. EHD provides no showing of injustice or prejudice to its interests that would justify holding a hearing on these issues prior to the issuance of the Board's decision. What is more, an agency such as the Air Board may not act arbitrarily; it must have a rational basis for its decisions.

---

[2] While this case interprets Federal Rule of Civil Procedure 59, the Federal Rule's language is virtually identical to the language in NMRA 1-059 and the Tenth Circuit's reasoning should therefore also apply to the state rule of civil procedure. *Century Bank v. Hymans*, 1995-NMCA-095, ¶ 12.

McDaniel v. New Mexico Bd. of Medical Examiners, 1974-NMSC-062, ¶ 11, 86 N.M. 447, 449 (N.M. 1974). This holding has particular relevance in a situation such as this in which the Board has been asked to reconsider its earlier decision even though there has been no change in law, new evidence, or manifest injustice from the earlier decision. Without making such a showing, EHD's present motion should be rejected.

III. CONCLUSION

For the foregoing reasons, EHD's request for clarification should be denied.

Dated: August 3, 2015.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

Eric Jantz
Jonathan Block
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87507
Telephone: (505) 989-9022
Fax: (505) 989-3769

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2015, I have hand delivered or placed a copy of the foregoing pleading in the above-captioned case in the US Mail, First Class to the following:

Felicia Orth
c/o Andrew Daffern
Control Strategies Section
Environmental Health Department
One Civic Plaza, Room 3023
Albuquerque, New Mexico 87102
orthf@yahoo.com

Carol M. Parker
Assistant City Attorney
PO Box 2248
Albuquerque, New Mexico 87103
cparker@cabq.gov

Rod Honstein and Shawn Boyle
Managing Member
Honstein Oil & Distributing, LLC
11 Paseo Real
Santa Fe, New Mexico 87507
rod@honsteinoil.com
sboyle@bradhallfuel.com

By: _____