

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*

ENVIRONMENTAL HEALTH
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**ENVIRONMENTAL HEALTH DEPARTMENT'S
REPLY IN SUPPORT OF ITS
MOTION FOR CLARIFICATION OF RULING**

I. INTRODUCTION

The Environmental Health Department (“EHD”) files this reply in support of its Motion for Clarification of Ruling (“Motion”). EHD’s Motion serves the express policies adopted by the Albuquerque-Bernalillo County Air Quality Control Board’s (“Air Board”) Adjudicatory Rules. Clarification enables the Hearing Officer to determine whether evidence is relevant and therefore should be admitted, since that determination is based on how the Air Board interprets the applicable law. 20.11.81.16(D)(1) NMAC; Rule 11-401 NMRA (2012). Clarification also serves the policy that hearings should not be “unreasonably lengthy,” by focusing the evidence on the open issues under the applicable law. 20.11.81.16(B) NMAC. For these same reasons, clarification “expedite[s] the efficient resolution of the action” and promotes efficiency. 20.11.81.12(B)(2)(b) NMAC. Conversely, nothing in the Adjudicatory Rules prohibits clarification. Given the obvious value of clarification and the lack of a legal basis to oppose it, EHD’s Motion should be granted.

II. ARGUMENT

EHD seeks clarification of the Air Board's ruling, not reconsideration. As stated in the Motion, EHD acknowledges that the Air Board decided to hold a hearing; EHD only requests that the Air Board clarify its ruling so that it can reasonably and efficiently prepare for that hearing.

Although Air Board members each made statements about the individual rationales for each member's vote, the Air Board itself did not articulate a single rationale. Three of the four Air Board members present stated that EHD had followed the law in issuing the Honstein permit. The fourth member did not opine on the legal issue. Conversely, only one Air Board member suggested that there were disputed facts, but did not identify which facts were actually in dispute.

An individual board member's statement does not reflect the reasoning of the Air Board. As the Court of Appeals recently explained, the Air Board's final decision on a permit must be supported by an express and unified statement:

[W]e will not search the record to supply evidence to support the Board's decision...an agency's decision 'cannot be sustained on a ground appearing in the record to which [the agency] made no reference; to the contrary, the [agency's] decision stands or falls on its express findings and reasoning.'

In the Matter of Two Petitions for a Hearing on the Merits Regarding Air Quality Permit No. 2037-M1 Issued to Smith's Food & Drug Centers, Inc., No. 32,790, pp. 9-10 (Nov. 26, 2014) (citing *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 21, 125 N.M. 786).

The Air Board can streamline the hearing by expressly stating whether the Air Act's definition of air pollution imposes a new standard on the Honstein permit, and identifying the facts that it considers relevant to applying this new standard. Such clarification would focus the hearing on the legal issue and disputed facts relevant to the permit. EHD contends, and SWOP

does not dispute, that the Honstein permit meets all applicable requirements for bulk gasoline plants. Conversely, SWOP contends that the Air Act imposes a new standard on the Honstein permit, and that Honstein is violating that standard as a result of emissions by other unidentified or unregulated sources. Absent clarification, if the hearing were held today, EHD would have to present testimony both to defend those permit terms that are not in dispute and to respond to a cumulative impact claim based on amorphous allegations about mobile air toxic pollutants and emissions (such as chlorobenzene) that are not even authorized by Honstein's permit. To do this effectively, EHD would have to conduct discovery to learn the basis for SWOP's claims. For example, the evidence on which it bases its claim regarding toxic air pollution in the area (the SWOP testimony refers to data that is not publically available or relies on links that no longer work), and the evidence regarding SWOP's sampling for chlorobenzene which does not appear to meet minimal EPA quality control requirements.

Rather than embrace the benefits of clarification, SWOP contends that EHD actually seeks reconsideration, and then argues that reconsideration is not authorized by the Air Board's adjudicatory rules, citing cases that concern the enforcement of final judgments. But as EHD has repeatedly acknowledged, this is not a motion to reconsider, but rather to clarify a decision that has already been made. Moreover, there is no final judgment, as SWOP admits, and nothing prohibits the Air Board from clarifying non-final decisions. In this regard, the Air Board may

rely upon the rules of civil procedure for guidance. 20.11.81.12(A) NMAC. When a court announces a decision on less than all of the claims brought by a party, it is not a final order and it is subject to revision at any time prior to the entry of a judgment adjudicating all claims. Rule 1-054(B)(1).

SWOP next cites *Pharmaceutical Mfrs. Ass'n v. New Mexico Board of Pharmacy* for the proposition that a board member's comment is sufficient to support a board's decision. However, that case arose in the context of a final decision for a rulemaking under a different law, not an intermediate decision for a permit adjudication under the Air Act. 1974-NMCA-038, ¶ 17, 86 N.M. 571. For final decisions about permit adjudications, the Court of Appeals in *Smith's Food and Drug Centers* has stated the requirement for an express and unified statement to support a final decision. The decision EHD for which is requesting clarification is not a rulemaking, is not a final decision, and is made under a different law. *Pharmaceutical Mfrs. Ass'n* does not apply. Clarification serves the policies set out in the Air Board's rules and EHD's Motion should be granted.

SWOP also asserts that the Air Board's clarification would undermine the Hearing Officer's authority to determine the relevance of evidence during the hearing. SWOP again misses the point. The Hearing Officer cannot determine the relevance of evidence in a vacuum. To be relevant, a fact must be "of consequence in determining the action." Rule 11-401(B). EHD seeks clarification of the scope of the hearing, which could be, among an even broader range of possibilities, whether the Honstein permit violates an applicable local, state, or federal

air pollution requirement, NMSA 1978, § 74-2-7(L); whether the Air Act imposes a new standard on the Honstein permit; or whether the Air Act bars the issuance of any permits in the San Jose neighborhood. Which facts the Hearing Officer considers to be relevant depends on which statutory interpretation is adopted by the Air Board.

Finally, SWOP cites *McDaniel v. New Mexico Bd. of Medical Examiners*, for the proposition that an administrative board should not act arbitrarily. 1974-NMSC-062, 86 N.M. 447. Of course, EHD agrees with this proposition, but there would be nothing arbitrary about the Air Board clarifying its decision.¹

III. CONCLUSION

EHD understands that the Air Board has decided to hold a hearing on the Honstein permit. It seeks only to clarify the scope of that hearing. Clarification would allow EHD to prepare to address the disputed facts that the Air Board believes should be addressed so that in turn, the hearing would be expedited and efficient. 20.11.81.12(B)(2)(b) NMAC. These goals serve the Air Board's policies announced in its rules and allow EHD – and the Air Board - to manage their resources wisely. EHD's Motion for Clarification should be granted.

¹ SWOP itself could benefit from clarification. SWOP's counsel twice has acknowledged before the Air Board that the Air Act does not require the analysis of cumulative impacts. SWOP Rulemaking Transcript, 10:19-22 (“...the fact that there’s no cumulative impacts mandate in the ...Air Quality Control Act, doesn’t preclude this Board from adopting the proposed rule change at all.”); 14:11-15 (“that same argument posits or suggests that the very fact that there’s no cumulative impacts section in the Air Quality Control Act automatically means that this rule violates stringency standards.”) Exhibit A.

Respectfully submitted,

CITY OF ALBUQUERQUE

Jessica M. Hernandez, City Attorney

A handwritten signature in cursive script that reads "Carol M. Parker". The signature is written in black ink and is positioned above a horizontal line.

Carol M. Parker, Assistant City Attorney

P.O. Box 2248

Albuquerque, NM 87103

(505) 768-4500

cparker@cabq.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served as described below on Aug 13, 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:

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

*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 a 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
jblock@nmelc.org
ejantz@nmelc.org

*Attorneys for Southwest Organizing Project ("SWOP")
And Esther and Steven Abeyta, Petitioners*

Rod Honstein, Managing Member
Honstein Oil & Distributing, LLC
11 Paseo Real
Santa Fe, NM 87507
rod@honsteinoil.com

Pro Se

By: 
Carol M. Parker, Assistant City Attorney

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

REGULAR MONTHLY MEETING

March 12, 2014

5:43 p.m.

Vincent E. Griego Chambers

Albuquerque-Bernalillo County Government Center

One Civic Plaza, Northwest

Albuquerque, New Mexico

Item #4: Request for a Hearing in the Matter of the
Petition to Amend Title 20, Chapter 11 of the New
Mexico Administrative Code to Require Review and
Consideration of Cumulative Air Impacts (AQCB
Petition No. 2014-1) -- Mr. Eric Jantz, Environmental
Law Center

REPORTED BY: Mary Abernathy Seal, RDR, CRR, NM CCR 69

Bean & Associates, Inc.

Professional Court Reporting Service

201 Third Street, Northwest, Suite 1630

Albuquerque, New Mexico 87102

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1 Industry will also have up to ten minutes.

2 After those presentations, we'll ask who
3 in the audience opposes the petition by a show of
4 hands, and again, if there are people in the
5 audience who have new information to offer, then
6 you'll be invited to present that. Again, we don't
7 want repetition. And then we'll close comments and
8 we'll go to Board deliberation.

9 I'd like to reiterate that this petition
10 is for a hearing. It's not the hearing itself. And
11 we're not going to be judging the merits of a
12 hearing. We're going to be judging whether we have
13 jurisdiction over the topic and then, as a Board, we
14 can also decide whether or not a hearing is
15 justified in our opinions.

16 So we'll have Mr. Jantz.

17 **MR. JANTZ:** Thank you, Madam Chair,
18 members of the Board. My name is Eric Jantz. I'm a
19 staff attorney with the New Mexico Environmental Law
20 Center. I'm here with Emily Alsen. She's our legal
21 intern this semester from the University of New
22 Mexico Law School.

23 We are here to present SWOP's petition,
24 the reason why this Board should hold a hearing on
25 the merits, and SWOP's petition for a rule change to

1 require the inclusion of an ordinance for
2 consideration of cumulative air impacts.

3 Now, as I go through this presentation,
4 I'd like the Board to keep in mind three things and
5 ask itself three questions during this about whether
6 or not it should hold a hearing on the merits of our
7 petition. One: Is there a problem? Have we
8 identified a problem on the ground in the petition
9 for our rule change? Second: Is there authority
10 for the Board to consider and adopt this proposed
11 rule change? And third: Does the proposed
12 ordinance offer a solution, a remedy, to the problem
13 that's been identified? And if the answer to those
14 three questions is yes, then this Board should hold
15 a hearing on the merits of SWOP's petition, and SWOP
16 submits that the answer to those three questions are
17 yes.

18 I want to go through each in turn. First,
19 is there an air pollution problem on the ground?
20 The answer to that is yes. And as I talk about this
21 issue, I'm going to stress some slides from some of
22 the folks who are members of SWOP and in communities
23 who are impacted disproportionately by cumulative
24 air impacts. All of these pictures are from the San
25 Jose neighborhood downtown, in the South Valley, and

1 all are from residential areas that are located near
2 industrial zones.

3 Now, the petition cites several studies,
4 in particular the Morello-Frosch and Straif studies
5 that indicate there is a causal link between air
6 pollution and disease, including cancer. Those
7 studies also indicate that low-income communities
8 and minority communities are much more susceptible
9 to the health impacts of cumulative air impacts than
10 nonminority and affluent communities.

11 Now, these studies are more generalized.
12 They're not particular to Albuquerque/Bernalillo
13 County, but the Place Matters study, which I have
14 attached to the petition, is. And the Place Matters
15 study confirms the conclusions in these more general
16 studies for Albuquerque and Bernalillo County.

17 In that study, Place Matters found that
18 exposure to environmental hazards -- and granted, it
19 looked at many different environmental hazards,
20 including air pollution, and identified some very
21 specific sources of air pollution: Industrial
22 emissions, traffic emissions, and hazardous air
23 pollutants -- all those are more likely to occur in
24 low-income communities and Latino communities in
25 Albuquerque and Bernalillo County.

1 The study, the Place Matters study, also
2 concluded that life expectancy in these
3 neighborhoods that were more at risk for being
4 exposed to pollution hazards was 5.2 years less than
5 the life expectancy in more affluent and nonminority
6 communities. So where you live in
7 Albuquerque-Bernalillo County affects how long you
8 live. And that's in part due to living near
9 environmental hazards, including air pollution.

10 This is a conclusion that is supported by
11 findings of this Board's 2008 Environmental Justice
12 Task Force. That Environmental Justice Task Force
13 found two relevant findings that are relevant to
14 this petition. One is that there is inadequate
15 enforcement of industrial emissions, air pollution
16 emissions in Bernalillo County. And second, the
17 existing health burdens on low-income and minority
18 communities make them more susceptible to health
19 problems from air emissions.

20 So in answer to the first question,
21 whether there's enough information in the petition
22 to identify a problem, the answer is yes.

23 And these next two photos were taken from
24 the window of a residence near these industrial
25 sites.

1 Now, the second question regards: Does
2 this commission have the authority, the
3 jurisdiction, to entertain and adopt SWOP's proposed
4 rule change? The answer to that question is also
5 yes. The Air Quality Act, the Clean Air Act, are
6 the specific sources of authority for this. In the
7 Air Quality Control Act, the Board's authority stems
8 from two places. One is the general charge to
9 prevent and abate air pollution, and second is the
10 Air Board's authority under section 74-2-5(C)(6)(a)
11 through (e), and in particular subsection (C)(6)(e)
12 to require any information regarding the emissions
13 of air contaminants and pollutants. So this is a
14 mandate for gathering and recording on data, which
15 is really what this ordinance is about. It's a
16 data-generating and reporting ordinance.

17 Now, there are some limitations on this
18 Board's authority. Those limitations are very
19 limited. The Board can't enact standards that are
20 more stringent than the Clean Air Act standards in
21 three instances, and I bullet-pointed them here.
22 Those are protecting the visibility and achieving
23 NAAQS, performance standards for hazardous air
24 deciare pollutants, and regulating emissions from
25 waste incinerators. And the proposed ordinance

1 doesn't set standards for any of those things, and
2 thus doesn't conflict with them.

3 More important, though, is that in 1987,
4 the New Mexico Attorney General rendered an
5 opinion -- and I passed this out to you before the
6 proceeding of today's hearing -- where the AG was
7 asked this very same question, and the AG's opinion
8 was this. In those areas not preempted by the Clean
9 Air Act, and not specifically -- and that's
10 important -- specifically precluded in the Air
11 Quality Control Act, New Mexico and, in this case,
12 the Board, since this Board and the Environmental
13 Improvement Board have the same powers, just in
14 different geographical regions, New Mexico can
15 promulgate standards and regulations that are more
16 stringent than federal standards and regulations,
17 and can promulgate standards and regulations for
18 which there is no equivalent standard or regulation.
19 So the fact that there's no cumulative air impacts
20 mandate in the Air Quality Act, Air Quality Control
21 Act, doesn't preclude this Board from adopting the
22 proposed rule change at all.

23 Now, with respect to the third question,
24 will the proposed ordinance, proposed rule change,
25 address the problem, the answer to that question is

1 argues that the proposed rule change violates
2 stringency requirements. But as I have said, this
3 proposed rule change doesn't set any standards and
4 doesn't contemplate denial of permits for a showing
5 of disproportionate cumulative impacts. It's a
6 data-generating statute or rule only. And so that
7 argument is premised on an assumption that permit
8 denial for disproportionate cumulative impact is
9 something that's going to happen and something
10 required under this proposed rule, and it's not.

11 Second, that same argument posits or
12 suggests that the very fact that there's no
13 cumulative impacts section in the Air Quality
14 Control Act automatically means that this proposed
15 rule violates stringency standards. But again,
16 that's without merit. As the Attorney General said
17 in 1987, if there is no equivalent in the Clean Air
18 Act or Air Quality Control Act, this Board has the
19 authority to promulgate that rule, and it should.

20 Secondly, the ACI argues that this rule
21 violates statutory deadlines, but again, that's an
22 argument without merit. This, as we conceive it, is
23 a precursor to a permit decision. So for example,
24 in the regulations governing construction permits at
25 20.2.72.203 NMAC -- and just as an aside, there's