

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 3135
ISSUED TO SMITH'S FOOD AND DRUG CENTERS, INC.**

Margaret M. Freed, Mary Ann Roberts, and Pat Toledo, Petitioners.

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No AQCB 2014-2

MOTION TO RECONSIDER

COMES NOW, Petitioners and for their Motion to Reconsider state:

1. An Order granting dismissal was entered on December 1, 2014.
2. As part of the record presented to the Board in favor of dismissal, the City of Albuquerque presented briefs that were filed in the Court of Appeals regarding a similar case.
3. The relevancy of the briefs is marginal at best. Since that time, however, the Court of Appeals has issued an Opinion. In that Opinion, the Court of Appeals reversed the Air Board, but not on any basis for lack of jurisdiction for the Air Board to hear arguments regarding public welfare or to consider arguments regarding public welfare within the Appeal challenging the City of Albuquerque's issuance of a permit.
4. In fact, in a footnote the Court of Appeals specifically restated this position. See Opinion, p. 9, fn. 1, *attached*.
5. Further, pursuant to the relevant statutory provisions and regulations, including but not limited to, NMSA 1978 §§ 74-2-5.A, 74-2-2.B, 74-2-7.D, 74-2-5.E; 20.11.41.18 (B) (4) NMAC (2002), the Air Board clearly has jurisdiction to consider a broad range of information in

establishing permit conditions or in overruling/reversing the failure of the City of Albuquerque to establish conditions on a permit.

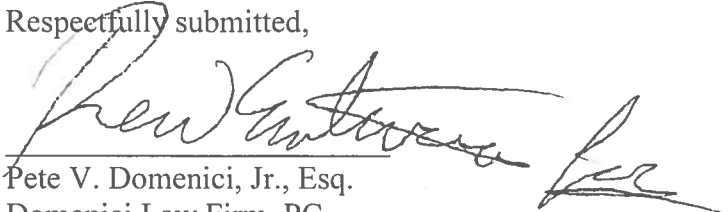
6. This statutory/regulatory authority clearly allows wide ranging evidence to be presented and considered to the Air Board. This is the type of information that several of the Board members previously indicated they expected to be heard at a hearing on the merits.

7. Because statutory and regulatory provisions are so clear that this type of evidence should be allowed to be heard by the Board in establishing permit conditions, including conditions that would go directly to the issues which are part of the public welfare and other concerns set forth in summary judgment motions and the public comment at that hearing, the Air Board should have held a hearing that would address both whether the permit should be denied and, if not denied, what appropriate conditions should be placed on the permit. *See* NMSA 1978 § 74-2-7 D (**allowing for conditions and reasonable limitations and restrictions on permits not relating to emission limits or emission rates in order to comply with applicable standards and the Air quality Control Act**); NMAC 20.11.41.18 (B) (4) (2002) (**allowing for imposition of reasonable restrictions and limitations other than those relating specifically to emission limits or emission rates**).

8. For the reasons above, the Air Board's December 1, 2014 Decision should be reconsidered and the Air Board should schedule a hearing on the merits in this matter and allow testimony to be presented regarding the concerns set forth in the briefs and the public comments that would be used by the Board to weigh whether or not the permit should be reversed or appropriate conditions should be placed on the permit to avoid undue impact to the community and to abate air pollution.

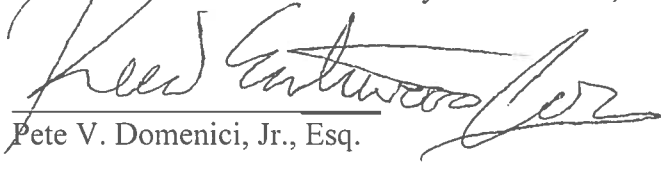
It is so requested.

Respectfully submitted,



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I hereby certify that a true and correct copy of the foregoing was served on all counsel of record via e-mail on the 10th day of December, 2014.



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17 **MEMORANDUM OPINION**

18 **FRY, Judge.**

19 {1} In this appeal, the City of Albuquerque and Smith's Food and Drug Centers,
20 Inc. (collectively, Respondents) appeal the decision of the Albuquerque-Bernalillo
21 County Air Quality Control Board denying Smith's application to increase the
22 amount of fuel it is permitted to annually dispense at its gas station located at the
23 intersection of Carlisle and Constitution in Albuquerque (the Station). Respondents
24 raise a number of issues regarding the Board's decision. Because we agree with

1 Respondents that the Board made no findings of fact that support its decision to deny
2 the permit, we conclude that the Board's decision was arbitrary and capricious.
3 Accordingly, we reverse.

4 **BACKGROUND**

5 {2} Smith's first sought and received an authority-to-construct permit from the
6 Albuquerque Air Quality Division (Division) in 2009 to dispense fuel at the Station.
7 The permit limited the Station to an annual throughput (the amount of fuel dispensed)
8 of 3,369,925 gallons. This limit was requested by Smith's as the maximum amount
9 of fuel it estimated it would dispense in a given year. No challenge was lodged
10 against the initial permit allowing Smith's to open the Station. The Station opened
11 for business in June 2010 after receiving its permit.

12 {3} By 2011, the Station was exceeding its permitted throughput limit. The
13 Division issued Smith's two "Notices of Violation" and imposed monetary penalties.
14 The Division also ordered Smith's to take corrective action, which included
15 submission of a permit modification application. Smith's subsequently applied for
16 a modification that would allow it to increase its annual throughput to 4,500,000
17 gallons.

18 {4} The Division published notice of the requested permit modification in the
19 Albuquerque Journal and also notified local neighborhood associations. In response,

1 the Division received numerous requests to hold a public information hearing. The
2 nearby residents who attended the hearing raised concerns about the Station. After
3 the hearing, the Division determined that, notwithstanding the public's concerns, the
4 requested permit modification complied with the provisions under the New Mexico
5 Air Quality Control Act, the federal Clean Air Act, and all other relevant regulations.
6 The Division, therefore, issued the requested permit modification to increase the
7 Station's throughput to 4,500,000 gallons.

8 {5} After receiving notice that the Division issued the permit, Petitioners initiated
9 an appeal before the Board to challenge the permit modification. The Board
10 approved their requests to hold a public hearing and appointed a hearing officer. The
11 hearing was held over three days and included opportunities for Petitioners to provide
12 comment and testimony. After the hearing, the hearing officer submitted
13 recommended findings of fact and conclusions of law to the Board. The hearing
14 officer recommended affirming the Division's issuance of the permit modification
15 because the requested modification was in compliance with all requirements of New
16 Mexico and federal law, it would not cause or contribute to air contaminant levels in
17 excess of state, local, or federal standards, and the modification would not violate any
18 other provision of New Mexico or federal air quality laws. NMSA 1978, § 74-2-
19 7(C)(1)(a)-(c) (2003) (providing that a permit may be denied if it "(a) will not meet

1 applicable standards, rules or requirements of the Air Quality Control Act or the
2 federal act; (b) will cause or contribute to air contaminant levels in excess of a
3 national or state standard or, within the boundaries of a local authority, applicable
4 local ambient air quality standards; or (c) will violate any other provision of the Air
5 Quality Control Act or the federal act[.]”).

6 (6) The Board considered the hearing officer’s recommendation at its next
7 scheduled meeting. Contrary to the hearing officer’s recommendation, the Board
8 decided to reverse the issuance of the permit modification. The Board stated that it
9 is “required to protect public health and welfare. Increases in throughput increase
10 risks to public health. The quality-of-life concerns raised by the community could be
11 indirectly related to air quality.” Despite its decision, the Board voted to adopt all of
12 the hearing officer’s recommended findings of fact and most of her recommended
13 conclusions of law, although with some modifications to the conclusions of law in
14 order to align them with the Board’s decision to reverse the issuance of the permit.
15 These modifications included the Board’s conclusion that the Petitioners met their
16 burden of proving that the permit would “contribute indirectly to increased air
17 pollution, in violation of the Air Act’s mandate to the Board to prevent or abate air
18 pollution [pursuant to NMSA 1978, § 74-2-5(A) (2007).]” The Board determined
19 that its mandate to prevent or abate air pollution allows it to “consider quality of life

1 concerns that are directly or indirectly related to air quality.” Respondents now
2 appeal the Board’s decision.

3 **DISCUSSION**

4 **Standard of Review**

5 {7} We will only set aside the Board’s decision if it is found to be “(1) arbitrary,
6 capricious or an abuse of discretion; (2) not supported by substantial evidence . . . ;
7 or (3) otherwise not in accordance with law.” NMSA 1978, § 74-2-9(C) (1992).

8 **The Board Found No Facts Supporting Its Decision**

9 {8} Both the City and Smith’s argue that the Board’s decision was arbitrary and
10 capricious because none of the hearing officer’s recommended findings of fact, which
11 the Board adopted in their entirety, support its decision to reverse the Division’s grant
12 of the permit modification. We agree. The parties also devote significant arguments
13 to whether the Board had the authority to base its decision on its general statutory
14 mandate to prevent and abate air pollution. Even if we assume—without
15 deciding—that the Board had such authority, we nonetheless reverse the Board’s
16 decision because the Board made no findings that would support its decision.

17 {9} The Board’s findings do not dispute that the permit modification complied with
18 all applicable federal regulations and technical specifications. The crux of the
19 Board’s conclusions, however, was that “[i]ncreases in throughput increase risks to

1 publish (sic) health” and the Board is mandated to “protect public health and
2 welfare.” The Board decided that the “quality of life concerns raised by the
3 community could be indirectly related to air quality” and that its statutory mandate
4 to “prevent or abate air pollution permits the Board to consider quality of life
5 concerns that are directly or indirectly related to air quality.” The Board’s reasons are
6 summed up in conclusion of law No. 52, which states, “[P]etitioners demonstrated by
7 a preponderance of the evidence that the increase in throughput allowed by the
8 modification would contribute indirectly to increased air pollution, in violation of the
9 Air Act’s mandate to the Board to prevent or abate air pollution.”

10 {10} “[A]n agency’s action is arbitrary and capricious if it provides no rational
11 connection between the facts found and the choices made.” *Atlixco Coalition v.*
12 *Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370. Our review of the
13 findings of fact reveals no instance where the Board identified the “quality of life”
14 concerns it was taking into account. The closest the findings come to discussing the
15 Petitioners’ concerns is the section entitled “Smith’s Efforts to Address
16 Neighborhood Concerns.” This section discusses the actions Smith’s took to address
17 the residents’ concerns such as creating a visual barrier between the gas station and
18 the neighborhood, lowering the volume of the gas station attendant’s intercom,
19 encouraging idling vehicles to turn off their engines, posting signs to make drivers

1 aware of potential traffic hazards, installation of a public restroom, changes to fuel
2 delivery times to increase traffic safety, and providing money for the construction of
3 a gate on a nearby property. This section also addresses Smith's relocation of its
4 underground storage tank's vent following complaints by a neighbor. The findings
5 state that Smith's passed air quality tests performed by the New Mexico Occupational
6 Health and Safety Bureau and the Division after the vent was relocated. Despite
7 indicating what some of the nearby residents' concerns were, these findings provide
8 no definitive statement or inference that the public concerns and remedial actions that
9 were addressed by Smith's also constitute findings identifying the "quality of life"
10 concerns that formed the basis for the Board's decision.

11 (11) Furthermore, some findings of fact actually contradict the Board's decision.
12 For instance, the findings state that the purpose of the throughput requirements is to
13 "allow[the Division] to determine the annual emission fee" and "keep inventories of
14 [volatile organic compounds] emissions from [gas stations]." The Board found that
15 "[n]o evidence was presented that the annual throughput limit is intended to reduce
16 or control air emissions. Rather, [the Division's] primary means of reducing or
17 controlling air emissions is its requirement, based on local and federal regulations,
18 that [gas stations] use Stage I vapor recovery systems." The findings noted that
19 Smith's uses a Stage I vapor recovery system and that the Division determined that

1 the station “employed vapor control technology sufficient to meet the standards of the
2 New Mexico Air Quality Control Act and the federal Clean Air Act.”

3 {12} In sum, without findings of fact regarding the quality of life concerns that the
4 Board relied on, this Court cannot properly review whether the Board’s reliance on
5 those facts was sufficiently connected to its mandate to prevent and abate air
6 pollution and the regulations passed pursuant thereto.¹ *See Colonias Dev. Council*
7 *v. Rhino Env’tl. Serv., Inc.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939
8 (stating that while the environmental department must allow testimony regarding
9 quality of life concerns when review of a permit application under the Solid Waste
10 Act, its authority to address those concerns “requires a nexus to a regulation”). We
11 are aware of the general concerns Petitioners raised about the Station at the multiple
12 public hearings. Some of the concerns are unrelated to air quality, while others, as
13 the Board noted in its statement of reasons, “could be indirectly related to air quality.”
14 But we will not search the record to supply evidence to support the Board’s decision

15 ¹We emphasize that because the Board did not make findings in support of its
16 decision, we are not reviewing whether the Board’s general mandate to prevent and
17 abate air pollution provides a sufficient basis to deny permit applications. Similarly,
18 we are also not reviewing whether the Board’s mandate to prevent or abate air
19 pollution allows it to consider quality of life concerns that are “indirectly” related to
20 air quality. The rule, as stated in *Rhino*, is that there must be a nexus between the
21 quality of life concerns and an applicable regulation, regardless of whether the Board
20 considered those concerns to be directly or indirectly related to air quality. 2005-
21 NMSC-024, ¶ 29.

1 where the Board made no such express findings. *See Atlixco*, 1998-NMCA-134, ¶ 21
2 (stating that an agency’s decision “cannot be sustained on a ground appearing in the
3 record to which the [agency] made no reference; to the contrary, the [agency]’s
4 decision stands or falls on its express findings and reasoning” (internal quotation
5 marks and citation omitted)).

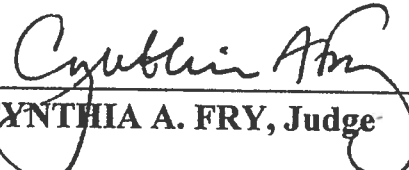
6 {13} Additionally, we cannot discern how the Board’s adoption of findings that air
7 pollution is not controlled by throughput limits can be squared with its conclusion
8 that an increase in throughput would increase air pollution and present a risk to public
9 health and welfare that necessitated the denial of the permit. *Atlixco*, 1998-NMCA-
10 134, ¶ 24. The findings indicate that emissions are controlled by Stage I vapor
11 recovery systems, not limitations on throughput. That is not to say that it cannot be
12 inferred that an increase in the throughput limitation would also increase the amount
13 of fuel dispensed. Any additional connection between the amount of fuel dispensed
14 and any “quality of life” concerns that are related to air quality/pollution was the
15 responsibility of the Board when it issued its findings. But with findings indicating
16 that throughput limitations are not a means of controlling emissions, it is
17 contradictory for the Board to make those findings and also to conclude that denying
18 the permit would prevent or abate air pollution. Accordingly, we conclude that the

1 Board's decision was arbitrary and capricious because it lacked support from the
2 findings that were made.

3 **CONCLUSION**

4 {14} For the foregoing reasons, we reverse the Board's decision and remand for
5 proceedings consistent with this Opinion.

6 {15} **IT IS SO ORDERED.**

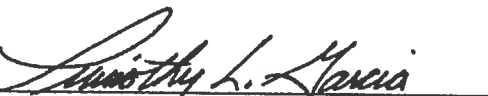
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CYNTHIA A. FRY, Judge

9 **WE CONCUR:**

10 
11

JAMES J. WECHSLER, Judge

12 
13

TIMOTHY L. GARCIA, Judge