

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

IN THE MATTER OF THE TWO PETITIONS FOR  
A HEARING ON THE MERITS REGARDING  
AIR QUALITY PERMIT NO. 2037-M1 ISSUED TO  
SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Peña-Kues, Petitioner,                      No. AQCB 2012-1

and

Andy Carrasco, James A. Nelson and  
Summit Park Neighborhood Association,  
Petitioners    No. AQCB 2012-2

**ORDER ON APPELLATE MANDATE**

This matter comes before the Board on the Mandate of the New Mexico Court of Appeals dated September 2, 2015. The Mandate attaches a copy of the Court's November 26, 2014 Memorandum Opinion ("Opinion"), which reversed the Board's March 14, 2013 Final Order and Statement of Reasons ("Final Order"), and which directs the Board to conduct "further proceedings consistent with said [Opinion]."

In its Opinion, the Court concluded, in relevant part, as follows:

1. "[A]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made." Opinion at 7, ¶ 10 (internal quotation marks and quoted authority omitted).
2. "The Board found that '[n]o evidence was presented that the annual throughput limit is intended to reduce or control air emissions. Rather, [the Division's] primary means of reducing or controlling air emissions is its requirement, based on local and federal regulations, that [gas stations] use Stage I vapor recovery systems." *Id.* at 8, ¶ 11 (alterations in original).
3. "The Board's findings do not dispute that the permit modification complied with all applicable federal regulations and technical specifications." *Id.* 6, ¶ 9.

4. “[W]e cannot discern how the Board’s adoption of findings that air pollution is not controlled by throughput limits can be squared with its conclusion that an increase in throughput would increase air pollution and present a risk to public health and welfare that necessitated denial of the permit.” *Id.* at 10, ¶ 13.
5. “[W]ith findings indicating that throughput limitations are not a means of controlling emissions, it is contradictory for the Board to make those findings and also to conclude that denying the permit would prevent or abate air pollution.” *Id.*
6. “We emphasize that because the Board did not make findings in support of its decision, we are not reviewing whether the Board’s general mandate to prevent and abate air pollution provides a sufficient basis to deny permit applications. Similarly, we are also not reviewing whether the Board’s mandate to prevent or abate air pollution allows it to consider quality of life concerns that are ‘indirectly’ related to air quality.” *Id.* at 9, ¶ 12 n.1.
7. “[W]e conclude that the Board’s decision was arbitrary and capricious because it lacked support from the findings that were made.” *Id.* at 10-11, ¶ 13.
8. “For the foregoing reasons, we reverse the Board’s decision and remand for proceedings consistent with this Opinion.” *Id.* at 11, ¶ 14.

IT IS THEREFORE ORDERED:

1. The Final Order is hereby VACATED; and
2. The Environmental Health Department’s issuance of Permit No. 2037-M1 to Smith’s Food & Drug Centers, Inc. is hereby AFFIRMED.

---

Kelsey Curran, Chair  
Albuquerque-Bernalillo County  
Air Quality Control Board

**Submitted by:**

SUTIN, THAYER & BROWNE  
A Professional Corporation

By           /s/ Timothy J. Adler            
          Frank C. Salazar  
          Timothy J. Adler  
*Attorneys for Smith's Food & Drug Centers, Inc.*  
Post Office Box 1945  
Albuquerque, New Mexico 87103-1945  
Telephone: (505) 883-2500

CITY OF ALBUQUERQUE  
Jessica M. Hernandez, City Attorney

By           /s/ Approved by phone on 10/2/15            
          Carol M. Parker  
          Donna Griffin  
Assistant City Attorney  
P.O. Box 2248  
Albuquerque, New Mexico 87103  
Telephone: (505) 768-4500  
Facsimile: (505) 768-4525  
cparker@cabq.gov

**Approved as to form:**

Domenici Law Firm, PC

By:           /s/ Approved by phone on 10/2/15            
          Pete V. Domenici, Jr.  
          Reed Easterwood  
320 Gold Avenue SW, Suite 1000  
Albuquerque, NM 87102  
pdomenici@domicilaw.com  
reasterwood@domicilaw.com  
*Attorneys for Petitioner Andy Carrasco*