

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

IN THE MATTER OF PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 1677-M2

Andy Carrasco, Dempsey Power,
and Pat Toledo,

Petitioners,

v.

AQCB Petition No. 2013-6

The City of Albuquerque and Smith's Food
& Drug Centers, Inc.,

Respondents.

**THE CITY OF ALBUQUERQUE'S OBJECTIONS TO
PETITIONERS' WITNESS LIST AND EXHIBITS LIST**

Pursuant to the Hearing Officer's Order Scheduling Remand Hearing dated May 19, 2015 ("Remand Hearing Order"), the City of Albuquerque ("City") Environmental Health Department ("EHD") files these objections to Petitioners' Witness List and Exhibit List.

The Court of Appeals has identified a "narrow procedural issue" for the Air Board to decide on remand. Memorandum Opinion ["Memo. Op."] 11:12; 12:6-9 (Nov. 26, 2014). That issue is whether the EHD Director correctly determined in April 2013 that there was not significant public interest when she decided to deny the public information hearing requested by Petitioners Pat Toledo and Andy Carrasco. Petitioners' attempt to broaden this narrow procedural issue is contrary to the Court of Appeals' decision, is improper and misleading. EHD objects as set forth below.

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BACKGROUND

This proceeding arises from an EHD decision to issue Permit No. 1677-M2 (the “Permit”) to Smith’s Food & Drug Centers, Inc. (“Smith’s”). The modified Permit increased the allowed gasoline throughput at the Smith’s gas station at 200 Tramway SE from 3,500,000 to 5,000,000 gallons.

It is important to understand the posture of this remand hearing from the beginning. This is a remand hearing before the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) to address one “narrow procedural issue” identified by the New Mexico Court of Appeals—‘[T]he Board should determine whether Petitioners Toledo and Carrasco’s (collectively “Petitioners” or “Pet’ners”) request for a public hearing, together with the emailed questions received by the EHD from the local neighborhood associations, constituted “significant public interest” to necessitate a public hearing.’ Memo. Op. 11:12; 12:6-9.

On March 10, 2013, EHD published public notice for Smith’s application. AR 7, Bates 355. The public comment period ran from March 10, 2013 through April 24, 2013. *Id.* On April 24, 2013, EHD received one request for a public information hearing, signed by Petitioners Toledo and Carrasco. AR 10, Bates 394; Pet’ners Ex. 4. EHD also received one inquiry each from the Four Hills Neighborhood Association and the Executive Hills Homeowners Association (collectively the “Associations”). AR 9, Bates 393; AR 6, Bates 388; Pet’ners Exs. 14-15. However, the Associations did not request a hearing. *See* AR. The EHD Director determined that there was not significant public interest in the Permit and denied Petitioners’ request. The Permit was issued on April 30, 2013. AR 13, Bates 400. EHD provided notice that it had issued

the Permit on May 23, 2013 to Petitioners, to Edwin Barsis (“Mr. Barsis”), President of the Four Hills Village Neighborhood Association and to Annette Underhill (“Ms. Underhill”), President of the Executive Hills Homeowners Association. AR 14, Bates 405; AR 15, Bates 410; AR 16, Bates 415; AR 17, Bates 417.

Petitioners timely petitioned for a hearing before the Air Board, for the first time adding Dempsey Power’s name to their pleading. Bates 1. Petitioners and Dempsey Power limited the issues in their hearing to (1) public notice and (2) the refusal to hold a public hearing prior to issuing the Permit. Bates 53-55. A motion was made before the Air Board challenging the standing of Petitioners and Dempsey Power. The Air Board found they did not have standing. Bates 69-128. Petitioners and Dempsey Power appealed.

The Court of Appeals concluded that “the [Air] Board correctly determined that [Dempsey Power] did not have standing to challenge the permit modification.” Memo. Op. 8:11-12. However, the Court of Appeals found that Petitioners Toledo and Carrasco do have standing to challenge the denial of their request for a public information hearing. Memo. Op. 11:18-12:1. The Court of Appeals also held that there was “no viable dispute” regarding public notice. Memo. Op. 12:4-5.

Thus, the only issue that remains to be decided at this upcoming hearing is the “narrow procedural issue” of whether the EHD Director correctly determined, in April 2013, that there was not significant public interest. The Court of Appeals has identified the relevant documents that the Director had before her to inform her determination: (1) Petitioners’ request for a public hearing; and, (2) the Association’s emailed inquiries. Memo. Op. 12:6-8. This direction from the Court of Appeals must be followed.

APPLICABLE LAW AND REGULATIONS

The Air Board is reviewing only the EHD Director's April 2013 determination that there was not significant public interest. The applicable Air Board rule only required a public hearing prior to issuing a permit if the Director determined that there was significant public interest. 20.11.41.14(B) NMAC (2002). The Air Board's review is based on what the EHD Director knew when she made her April 2013 decision.

The Air Board is required to base its decisions on "substantial evidence." NMSA 1978, § 74-2-9(C)(2). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bernalillo County Health Care Corp. v. New Mexico Public Regulation Com'n*, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (internal citation omitted).

The Air Board has appointed a Hearing Officer. The Hearing Officer is authorized, in part, to take all measures necessary for the efficient, fair and impartial adjudication of the issues, to assure that the facts are fully elicited and to avoid delay. 20.11.81.12(B)(2)(b) NMAC. At the hearing, the Hearing Officer is to admit any relevant evidence, unless the Hearing Officer determines that the evidence is unduly repetitious, otherwise unreliable or of little probative value. 20.11.81.16(D)(1) NMAC. The Hearing Officer may rely on the Rules of Evidence for guidance. 20.11.81.12(A) NMAC.

The concept of relevance is key. It affects the determination of substantial evidence, NMSA 1978, § 74-2-9(C)(2), and only relevant evidence is to be admitted, 20.11.81.16(D)(1) NMAC. Evidence is relevant if it meets two criteria: (1) it has a tendency to make a fact more or

less probable than it would be without the evidence; and (2) the fact must be of consequence in determining the action. Rule 11-401. Irrelevant evidence causes inefficient adjudication and interposes delay—both of which are to be avoided. 20.11.81.12(B)(2)(b) NMAC. Because this is a narrow procedural issue, the evidence that is relevant is very limited.

With the above foundation, it is clear that none of the Petitioners' witnesses and most of their exhibits should be rejected. EHD explains its position for each witness and exhibit below.

GENERAL OBJECTIONS

1) General Objection #1: EHD objects to Petitioners' failure to adhere to the Remand Hearing Order.

The Remand Hearing Order required Petitioners to provide the "narrative testimony" for each witness. Remand Hearing Order p. 2 ("Witness and exhibit lists shall include the names and narrative testimony of all proposed witnesses presenting testimony...") [emphasis added]. Petitioners have failed to comply with this requirement. Without the full narrative testimony, EHD is prejudiced by being unable to discern potential additional objections beyond those raised below. EHD's objections can only address the general subject area about which the witness proposes to testify because that is the only information Petitioners have provided in their filing. Due to this violation of the Remand Hearing Order, EHD objects to any of Petitioners' witnesses offering testimony that goes beyond the short summary that has been provided in Petitioners' witness and exhibit list.

2) General Objection #2: EHD objects to Petitioners filing Exhibits which are mislabeled or unlabeled with the wrong Exhibit numbers that do not correspond to Petitioners' Exhibit List.

Referring to the list of exhibits in Petitioners' witness and exhibit list, apparent Exhibit 1 is unlabeled. Exhibit 2 is labeled Exhibit 1. Exhibit 3 is labeled Exhibit 2. Exhibit 4 is labeled Exhibit 3, etc. This is not intended to be a complete description of the labeling problems with

Petitioners' exhibit labeling. Any mislabeled and unlabeled exhibits that are admitted into evidence will cause confusion at the hearing and invite error by the Parties. EHD has attempted to respond to Petitioners' pleading in good faith but reserves the right to modify any of its arguments with corrections necessitated by Petitioners' careless and confusing exhibit labeling. To avoid confusion, EHD requests that Petitioners be required to serve corrected pleadings with clearly and correctly labeled exhibits at least one week before the hearing.

3) General Objection #3: EHD objects to Petitioners' reservation of the right to amend or supplement their witness list.

Petitioners have attempted to reserve the right to amend or supplement their witness list. EHD objects to this reservation because it violates the Remand Hearing Order deadlines. EHD requests that this reservation be stricken.

4) General Objection #4: EHD objects to Petitioners' reservation of the right to make an offer of proof regarding any testimony.

The Remand Hearing Order required Petitioners to provide the narrative testimony of each witness. Petitioners failed to follow the Remand Hearing Order and instead, reserve the right to make a separate "offer of proof" at the Air Board hearing. Had Petitioners complied with the Remand Hearing Order, no such "offers" would be necessary.

Making offers of proof for thirty witnesses, public comment, cross-examination and any witnesses offered by EHD or Smith's will turn this "narrow procedural issue" into a multiple day hearing about irrelevant issues at great public expense. Having failed to avail themselves of the expedient method created by the Remand Hearing Order to assure that their proposed testimony would be in the record, Petitioners cannot now complain that they need to make an offer of proof—Petitioners have waived that right. EHD requests that Petitioners' reservation of the right to make an offer of proof at the hearing be stricken.

SPECIFIC OBJECTIONS TO WITNESSES

1) Specific Objection #1: EHD objects to Pat Toledo's and Andrew Carrasco's testimony because it is irrelevant, hearsay and unduly repetitious.

Pat Toledo ("Mr. Toledo") and Andrew Carrasco ("Mr. Carrasco") propose to testify about the same information—the significance of their interest and that of ABQ citizens, and other petitioners in obtaining the Tramway public hearing. Their testimony is unduly repetitious.

Moreover, their proposed testimony is irrelevant. The standard is not the magnitude of the interest held by one or two individuals. The standard is whether there is significant public interest. The ordinary definition of "public" is "relating or belonging to an entire community." Black's Law Dictionary 995 (7th ed. abridged 2000). The ordinary definition of "significant" is "large enough to be noticed or have an effect." Merriam-Webster available at: <http://www.merriam-webster.com/dictionary/significant>. A request from two individuals with strong opinions unauthorized to represent anyone but themselves does not meet the standard of "significant public" interest. A request for a hearing from a person who is acting in a representative capacity such as an elected official or a president of an organization can be fairly characterized as a "significant public" interest but no such requests were received. Alternatively, requests from at least several individuals can constitute "significant public" interest. Thus, the "significance" of Petitioners Toledo and Carrasco's individual interests is not relevant.

No one, other than Petitioners Toledo and Carrasco, asked for a public hearing. They are not elected officials acting in a representative capacity. They are two individuals. Their request says that they are "members of the Summit Neighborhood Association" (near Constitution and

Carlisle, several miles from the Tramway gas station at issue here) and that their request was made “in alliance with the 4-Hills neighborhood association.” Petitioners Ex. 4. However, Petitioners offered no evidence that they were authorized to act on behalf of anyone. This is simply a request by two individuals—it does not demonstrate significant public interest.

Moreover, contrary to Mr. Toledo’s and Mr. Carrasco’s assertions, they cannot possibly have “personal knowledge” about the interests of every ABQ citizen and any knowledge they would have would necessarily be gleaned from communications from others not hear to speak for themselves—this is hearsay. Mr. Toledo’s and Mr. Carrasco’s assertion of personal knowledge about the interests of the entire ABQ citizenry is nothing but exaggerated, speculative hearsay that is not reliable, not based on personal knowledge and cannot provide the substantial evidence on which the Air Board must base its decisions. NMSA 1978, § 74-2-9(C)(2); 20.11.81.12(A) NMAC (rules of evidence may be used as guidance).

2) Specific Objection #2: EHD objects to Ed Barsis’ and Annette Underhill’s testimony to the extent that it exceeds information in the Administrative Record and is not relevant.

Petitioners’ witness list implies that, for Ed Barsis (“Mr. Barsis”), President of the Four Hills Village Neighborhood Association and Annette Underhill (“Ms. Underhill”), President of the Executive Hills Homeowners Association, there are “other communications” with city officials beyond the emails in the Administrative Record and Petitioners’ Exhibit lists. EHD does not object to the Air Board’s consideration of Mr. Barsis’ and Ms. Underhill’s emails which are included in the Administrative Record and in Petitioners’ Exhibits 14 and 15.

However, with regard to the “other communications” referenced in Petitioners’ brief overview of these witnesses’ proposed testimony, EHD has no idea what those “other communications” might be. Those “other communications” are not described in Petitioners’ witness list because Petitioners’ failed to provide the required narrative testimony. Petitioners’

have failed to include the “other communications” as an exhibit. No “other communications” from Mr. Barsis or Ms. Underhill are in the Administrative Record beyond those included in Petitioners’ Exhibits 14 and 15. These “other communications” were not before the EHD Director in April 2013 when she decided there was not significant public interest.

EHD is not required to guess what these “other communications” might be. This is a clear example of how EHD has been prejudiced by Petitioners’ failure to comply with the Remand Hearing Order. Petitioners were required to provide this information so that EHD would have a fair opportunity to respond to their witness list. EHD objects to the consideration of the substance of any “other communications” of which it has not received notice in Petitioners’ Witness List and which are not in the Administrative Record.

Furthermore, Ed Barsis and Annette Underhill did not submit written requests for a public hearing on behalf of their Associations during the public comment period despite having received notice which informed them that they could do so. Requests by persons such as Mr. Barsis and Ms. Underhill carry extra weight because of their representative capacity. However, they failed to make those requests.

Ed Barsis and Annette Underhill and their respective Associations also did not challenge the issuance of the Permit before the Air Board. Their proposed testimony about the significance of public interest is too late because this information was not provided to the EHD Director during the public comment period so that it could inform her April 2013 decision about whether there was significant public interest. It would be unfair to evaluate the EHD Director’s April 2013 decision based on new information that was not before her. This testimony is irrelevant.

Having failed to make a written request for a hearing during the public comment period, these Associations cannot raise their concerns now when the Air Board is evaluating only the narrow procedural issue the Court of Appeals has identified—whether the EHD Director properly determined in April 2013 that there was no significant public interest based on Petitioners’ Toledo and Carrasco’s request and the two emails from the Associations.

3) **Specific Objection #3: EHD objects to testimony by Clay Terry, Larry Nicholson, Emily Deweld, Don Stanoff, Fred Atencio, Jeffrey Vancina, Marie Ferenzy, Bennie English, and Joey Meyer based on relevance and because it is unduly repetitive and because they lack standing to challenge the Permit.**

Each of these nine people is expected to testify about the facts and circumstances which led them to sign a June 2013 petition indicating their interest in a public hearing. This Petition was not before the EHD Director when she made her April 2013 determination that there was not significant public interest. Their testimony is irrelevant because it exceeds the narrow procedural issue that the Court of Appeals has identified.

Even if their testimony were relevant, which EHD disputes, their testimony is also unduly repetitive. Their names are listed on the Petition which speaks for itself, if it is admitted over EHD’s objection. The Air Board does not need testimony from nine persons to establish that the Petition has their nine signatures.

Moreover, each of these persons is indistinguishable from Dempsey Power who did not participate in the permitting action and so does not have standing to challenge the Permit. (See next section). Lacking standing, they cannot challenge the Permit now.

4) **Specific Objection #4: EHD objects to testimony by Dempsey Power based on relevance and because the Court of Appeals has already made a final determination that he lacks standing to challenge the Permit because he failed to participate in the permitting action.**

The Court of Appeals has already determined that Dempsey Power does not have standing to challenge the Permit. Memo. Op. 8:10-12 (“Accordingly, because Petitioner Power did not participate in the permitting action, the [Air] Board correctly determined that he did not have standing to challenge the permit modification.”) His testimony is irrelevant to the question of whether the EHD Director correctly determined in April 2013 that there was not significant public interest.

5) **Specific Objection #5: EHD objects to testimony by Brian Sanderoff based on relevance and because the Court of Appeals has already determined that there is “no viable dispute about public notice.”**

The offer of Brian Sanderoff’s (“Mr. Sanderoff”) testimony is a transparent attempt to evade the Court of Appeals’ decision which held that “there is no viable dispute regarding public notice.” Memo. Op. 12:5. Mr. Sanderoff’s written testimony, which is already in the Air Board’s administrative record, is replete with contentions about the insufficiency of public notice, beginning with “I have been hired by attorney Pete Domenici, Jr. to review and comment on the sufficiency of the City[‘s]...public notice...” Bates 134-184; 188-231, Sanderoff Expert Report, p. 1. Mr. Sanderoff planned to testify that, due to public notice that he found inadequate, the City could not have determined whether there was significant public interest. This is just another way of disputing the sufficiency of public notice—an argument rejected by the Court of Appeals.

Mr. Sanderoff is entitled to his opinion—but he is not entitled to offer irrelevant evidence on an issue an appellate court has decided to the contrary. The public notice was sufficient. Memo. Op. 12:5.

6) **Specific Objection #6: EHD objects to testimony by Georgianna Peña-Kues, James Nelson and Judy Jennings based on relevance and waiver and because it is unduly repetitious.**

Each of these witnesses proposed to testify about the significance of the public interest in granting increased throughput to Smith's. This issue is not relevant because (1) it has been waived by the Petitioners and (2) it is not relevant to the "narrow procedural issue" identified by the Court of Appeals—whether the EHD Director correctly determined in April 2013 that, based on Petitioners' request and the two inquiries from the Associations, there was not significant public interest.

Even if their testimony were relevant, which EHD disputes, it is also unduly repetitive.

7) **Specific Objection #7: Objection to testimony by Juan Reynosa, Margaret Freed, Mary Ann Roberts, Dr. Dana Rowangould, Arthur Gradi, Ruth A. McGonagil, Jerri Paul Seaborn, Bernice Ledden, Americo Chavez, Susan Kelly, and Andy Burgess based on relevance, waiver and because it is unduly repetitive.**

Each of these witnesses are listed as providing public comment contending that there is significant public interest in granting increased throughput to Smith's. This issue is not relevant because (1) it has been waived by the Petitioners and (2) it is not relevant to the "narrow procedural issue" identified by the Court of Appeals—whether the EHD Director correctly determined in April 2013 that, based on Petitioners' request and the two inquiries from the Associations, there was not significant public interest.

Even if their testimony were relevant, which EHD disputes, it is also unduly repetitive.

8) **Specific Objection #8: EHD objects to testimony by Delano Garcia based on relevance and waiver.**

This witness proposes to testify that there is significant public interest particularly with respect to health impacts of air emissions and other Smith's operations on new born children. This issue is not relevant because (1) it has been waived by the Petitioners and (2) it is not

relevant to the “narrow procedural issue” identified by the Court of Appeals—whether the EHD Director correctly determined in April 2013 that, based on Petitioners’ request and the two inquiries from the Associations, there was not significant public interest.

SPECIFIC OBJECTIONS TO EXHIBITS

1) Objection to Exhibits ##1-3: EHD objects to the admission of the Petition, the Permit and the June 2013 Petition because they are irrelevant.

EHD objects to the admission of Exhibits 1 through 3 because they are irrelevant to the narrow procedural issue before the Air Board. None of these documents contributes to a review of whether the EHD Director correctly determined in April 2013, based on the Petitioners’ request and the two emailed inquiries from the Associations, that there was not significant public interest.

2) Objection to Exhibit #8: EHD objects to the admission of the List of Interested Persons because it is irrelevant.

EHD objects to the admission of Exhibit #8 because it is irrelevant to the narrow procedural issue before the Air Board. The List of Interested Persons is a list which includes the following persons:

Those who, within the preceding 12 months, have expressed an interest to the Department in the facility or the permitting action that is the subject of the petition (to the Air Board); or those who have participated in a public information meeting or hearing on the permitting action.

20.11.81.14(D)(2) NMAC.

This has no relevance to the narrow procedural issue before the Air Board.

3) **Objections to Exhibits ##10-11: EHD objects to the admission of the Sanderoff NOI and the Supplement to Sanderoff NOI because they are irrelevant.**

EHD objects to the admission of Exhibits ##10-11 because they are not relevant to the narrow procedural issue before the Air Board. The Court of Appeals has stated that the question for the Air Board is whether the EHD Director correctly determined that there was not significant public interest based on the Petitioners' request for a public information hearing and the two emailed inquiries from the Associations. Mr. Sanderoff has opined that the City's manner of providing public notice could not have allowed the City to determine significant public interest. This is simply an argument that the public notice was insufficient. This argument has already been decided against Petitioners. Further argument on this point is contrary to the Court of Appeals' opinion and is therefore irrelevant.

4) **Objection to Exhibits ##16-20: EHD objects to the admission of the EHD letters to Petitioners (Exhibits 16 and 17) and to the Associations (Exhibits 18-19) after the Permit was issued and the public notice (Exhibit 20) because they are irrelevant.**

There is "no viable dispute" about public notice. Memo. Op. 12:4-5. These exhibits all relate to the sufficiency of public notice, an issue that has already been resolved. Thus, these exhibits are irrelevant.

CONCLUSION

This hearing is not a referendum about EHD's notice procedures. Memo. Op. 12:4-5. It is not a rulemaking hearing where the Air Board can consider how to protect health, welfare, property and the public interest, among other things. NMSA 1978, § 74-2-5(E). It is not about whether there is significant public interest today. Memo. Op. 12:5-9. It is not about how much throughput should be granted to a Smith's gas station. Memo. Op. 12:5-9. Petitioners have waived that issue. Pet'ners Ex. 9.

This is a hearing about a “narrow procedural issue”:

The Board should determine whether Petitioners Toledo and Carrasco’s request for a public hearing, together with the emailed questions received from the local neighborhood associations, constituted “significant public interest” to necessitate a hearing.

Memo. Op. 12:5-9.

The Hearing Officer should reject Petitioners’ transparent attempts to evade the Court of Appeals’ decision. This is a narrow procedural issue that does not require thirty witnesses and twenty-two exhibits. The Air Board can examine the same three documents the EHD Director had before her and readily see that those three documents do not reflect significant public interest.

The Air Board should decline Petitioners’ invitation to turn a hearing on a narrow procedural issue into a referendum that goes well-beyond the issue the Court of Appeals has remanded to the Air Board. In this case, the Petitioners have repeatedly violated the Remand Hearing Order, have offered thirty different irrelevant witnesses, and have attempted to turn a narrow hearing into a referendum. The Hearing Officer should follow the Court of Appeals’ direction and, based on the Air Board’s procedural rules, reject irrelevant witnesses and exhibits and those that are unduly repetitious.

The Petitioners have offered nothing substantive in their witness list and exhibit list to challenge the EHD Director’s April 2013 determination that there was not significant public interest. The EHD Director correctly determined this question in April 2013. The Air Board should uphold the EHD Director’s decision to deny a public hearing prior to issuing the Permit.

Respectfully submitted,

CITY OF ALBUQUERQUE
Jessica M. Hernandez, City Attorney

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

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above document on this 17th day of June, 2015, to the following:

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

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