

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 with supporting references to the administrative record:

1. the Board is mandated to "protect public health and welfare." Id. at 7, ¶ 1.
2. "We are aware of the general concerns petitioners raised about the station at the multiple public hearings. Some of the concerns are unrelated to air-quality, while others, as the Board noted in its statement of reasons, "could be indirectly related to air quality". But we will not search the record to supply evidence to support the Board's decision where the Board made no such express findings.

However, such findings do exist:

A. According to finding of fact number 46. "The pollutants of concern to air quality regulators with respect to GDFs are known as volatile organic compounds (VOCs). Tavarez, Tr. Vol. II, 360:17-25, 395:19 – 396:13. 47"

B. According to finding of fact number 51, "The annual throughput requirement for authority-to-construct permits enables AQD to calculate the annual emissions of VOCs from the subject facility by applying an emissions factor of .013 pounds of VOCs per gallon of gasoline pumped. Tavaréz, Tr. Vol. II, 378:7-23; AR 1, p.2."

C. According to finding of fact number 100, "The Public Notice stated that Smith's had submitted an Application for Modification of its fuel dispensing station authority to construct permit, the station was located at 1313 Carlisle Blvd, NE in Albuquerque, and Smith's was asking to increase gasoline throughput from 3,369,925 gallons of gasoline per year to 4,500 gallons of gasoline per year. The Public Notice also provided an estimate of the proposed increase in volatile organic compound emissions per year "from 21.9 tons per year to 29.25 tons per year, which results in an estimated increase of 7.35 tons per year of volatile organic compound emissions". See AR 6, p. 36, AR 7, p. 38, AR 8, p. 40 & AR 9, p. 44.

3. "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).

4. "The Board's reasons are summed up in conclusion of law No. 52, which states, '[P]etitioners demonstrated by a preponderance of the evidence that the increase in throughput allowed by the modification would contribute indirectly to increased air pollution, in violation of the Air Act's mandate to the Board to prevent or abate air pollution." Id. at 7, ¶ 5-9.

5. "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..

#### IT IS THEREFORE ORDERED:

1. As the Court erred when it decline to acknowledge findings that supported the Board's decision, and to eliminate confusion regarding the role of emissions related to gasoline throughput and public health risks, the Air Board will provide for the conduct of

such air quality studies - as needed - to ensure air pollution levels at the facility do not pose a public-health risk to the before the Final Order is VACATED; and

2. As the Court erred by not reviewing the Board's legal mandate in NMSA, §§ 74-2-5.A, and to ensure air pollution levels are totally abated by use of Phase I pollution controls, as inferred but not substantiated during the hearing, the Environmental Health Department's issuance of Permit No. 2037-M1 to Smith's Food & Drug Centers, Inc. will only be AFFIRMED if sufficient data are collected and analyzed that indicate no increase in air pollution will result from such affirmation.

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

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