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

Margaret Freed, Mary Ann Roberts,
Pat Toledo, Petitioners

No. AQCB 2014-2

SMITH'S FOOD & DRUG CENTERS, INC.'S AND CITY OF ALBUQUERQUE'S JOINT RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO RECONSIDER

Smith's Food & Drug Centers, Inc. and the City of Albuquerque (collectively, "Respondents") hereby jointly respond to Petitioners' Motion to Reconsider ("Motion"). The Board should deny the Motion because the Board lacks jurisdiction to hear it. However, even assuming the Board has jurisdiction, Petitioners fail to give the Board a valid reason to revisit its decision in this case. After considering extensive briefing and argument, the Board found "no genuine issue of material facts of the case; no support for a contention that a standard, rule or statute would be violated by the permit, or construction under the permit; no authority for the Board to address the Petitioners' stated concerns; and no nexus between the Petitioners' stated concerns and the air quality permitting rules." *See* Board's December 1, 2014 Order ("Order") at 1-2. Nothing in Petitioners' Motion even hints that any of these findings were incorrect. The Board should therefore deny the Motion.

ARGUMENT

1. The Board Lacks Jurisdiction to Hear Petitioners' Motion.

Before reaching the merits of Petitioners' Motion, the Board must first decide whether it has jurisdiction to do so given Petitioners' filing of a Notice of Appeal on

December 22, 2014. Ordinarily, in the district court setting, a motion to reconsider filed pursuant to Rule 1-059(E) NMRA will toll the time allowed for taking an appeal. *See* Rule 12-201(D) NMRA (listing various post-judgment motions, including motions to reconsider under Rule 1-059, that will toll the time for taking an appeal). However, Rule 12-201 NMRA only expressly applies to appeals from district court. Rule 12-601 NMRA governs direct appeals from administrative entities and is silent about the effect, if any, on the appellate process of post-judgment motion practice in the administrative tribunal.

New Mexico courts have not addressed this question in the context of the Air Quality Control Act ("Air Act"). There are New Mexico cases holding that, under the Workers' Compensation Act ("WCA"), the time for taking an appeal from an order of a Workers' Compensation Judge will be tolled if a party files a motion to reconsider. *See Bianco v. Horror One Prods.*, 2009-NMSC-006, ¶ 10, 145 N.M. 551, 202 P.3d 810; *Baca v. Los Lunas Community Programs*, 2011-NMCA-008, ¶ 8, 149 N.M. 198, 246 P.3d 1070. However, the courts in these cases base their holdings on language in Section 52-5-8(B) of the WCA providing, in relevant part, that "[a] decision of the workers' compensation judge is reviewable by the court of appeals *in the manner provided for in other cases*[.]" *Baca*, 2011-NMCA-008, ¶ 8 (quoting Section 52-5-8(B); emphasis in *Baca* opinion but not in statute). The courts concluded that Section 52-5-8 "incorporates the statutory and appellate scheme for taking appeals from district courts into workers' compensation cases." *Id.* (internal quotation marks and quoted authority omitted).

The Air Act, in contrast, does not have similar language providing that appeals from the Board's adjudicatory decisions should be reviewed in the manner provided for

in other cases. *See* Section 74-2-9. To the contrary, the Air Act simply provides that appeals "*shall be taken to the court of appeals within thirty days* following the date of the action." *Id.* (emphasis added). The Board should presume that the Legislature knew when it amended Section 74-2-9 in 1992 that it could have included similar language to that contained in Section 52-5-8, which was last amended in 1989. Accordingly, as a matter of statutory construction, it appears that the Board lacks jurisdiction to hear Petitioners' Motion.

Respondents acknowledge that sound policy reasons exist to allow a tribunal of first instance, such as a district court or an administrative tribunal like the Board, the opportunity to reconsider a final order before the appellate process begins. This approach serves to avoid piecemeal appeals and promotes efficiency by allowing the tribunal of first instance the opportunity to correct errors. *See Capco Acquisub, Inc. v. Greka Energy Corp.*, 2007-NMCA-011, ¶¶ 16-20, 140 N.M. 920, 149 P.3d 1017. For these reasons the Board may deem it preferable to hear and render a decision on the Motion. However, neither the Air Act nor the Rules of Appellate Procedure grant the Board the authority to do so. The Board therefore should deny the Motion based on the Board's lack of jurisdiction.

In the event the Board determines that it does have jurisdiction to hear the Motion, Respondents address the merits of the Motion below.

2. Petitioners Fail to Identify A Disputed Issue of Material Fact.

The central issue in connection with Respondents' summary judgment motions was that, after completion of discovery and after filing their Notice of Intent to Present Technical Testimony ("NOI"), Petitioners raised no genuine issue of material fact

concerning whether the emissions authorized by Permit No. 3135 will "meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L). Petitioners sought to introduce wide-ranging evidence and testimony bearing on other questions, but the Board properly determined that there was "no nexus between the Petitioners' stated concerns and the air quality permitting rules." Order at 2; *see also Colonias Dev. Council v. Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939 (authority to address public concerns requires a nexus to a regulation). Petitioners make no effort in their Motion to identify any genuine issue of material fact or to identify any standard, rule or statute with which Permit No. 3135 fails to comply. The Motion should therefore be denied.

3. The Court of Appeals Memorandum Opinion in the Smith's Carlisle Case Has No Bearing on this Case.

Petitioners suggest, without arguing directly, that the Court of Appeals Memorandum Opinion in the Smith's Carlisle case signals the Court's tacit agreement that the Board has the authority to address Petitioners' concerns. The Court's Opinion does no such thing. As Petitioners acknowledge, the Court did not decide the issue of the Board's jurisdiction to consider "quality of life" concerns in a permit appeal. *See* Opinion (attached to Petitioners' Motion) at 9, n.1. Rather, the Court reversed the Board's decision based on the Board's failure to make findings of fact supporting its conclusion that reversing Permit No. 2037-M1 would prevent or abate air pollution. *Id.* at 9-10, ¶¶ 12-13. Nothing in the Opinion supports Petitioners' unfounded suggestion that the Board can consider "wide ranging evidence" in deciding whether to reverse, modify or sustain an air quality permit. To the contrary, the Court acknowledged that "there must be a nexus between the quality of life concerns and an applicable

regulation[.]" *Id.* at 9, n.1 (citing *Colonias*, 2005-NMSC-024, ¶ 29). Significantly, the Petitioners in the Smith's Carlisle case filed motions for rehearing asking the Court of Appeals to reconsider its decision, but the Court denied those motions. See, Order on Motions for Rehearing, attached as Exhibit A.

The Board properly granted summary judgment because Petitioners failed to identify a nexus. Petitioners have repeatedly referred to the Board's rulemaking authority under Section 5 of the Air Act in order to establish a nexus. However, as explained in Respondents' briefing on their motions for summary judgment, which are incorporated herein by reference, the Board's rulemaking authority does not apply to permit adjudications under Section 7 of the Air Act. Instead, Section 7 requires the Board to determine whether the emissions authorized by Permit No. 3135 "will or will not meet applicable local, state and federal air pollution *standards and regulations*[.]" Section 74-2-7(L) (emphasis added). Again, there is no genuine dispute in this case that Permit No. 3135 meets the applicable standards and regulations.

4. The Board Should Reject Petitioners' New Argument Concerning Permit Conditions as Untimely and Without Merit in Any Event.

Petitioners attempt for the first time in their Motion to argue that the Board could consider Petitioners' proposed evidence under Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (2002), which allow the Board to specify permit conditions imposing, among other things, reasonable restrictions and limitations not relating to emission limits or emission rates. The Board should reject this argument as untimely because nothing prevented Petitioners from raising the argument in their briefs or at the summary judgment hearing. *See Nance v. L.J. Dolloff Associates, Inc.*, 2006-NMCA-012, ¶¶ 23-25, 138 N.M. 851, 126 P.3d 1215 (affirming trial court's denial of a motion to reconsider

on the basis that the motion raised new matters that could have been, but were not, presented at the summary judgment hearing).

But even if the Board entertains Petitioners' new argument, the argument is without merit. Petitioners make no effort to specify what conditions the Board should impose on Permit No. 3135 or how their proposed evidence would support the imposition of such conditions under Section 74-2-7(D) and 20.11.41.18(B)(4) NMAC (2002). As pointed out in Respondents' motions for summary judgment, the report of Petitioners' sole proposed technical expert, Dr. Dana Rowangould, was inconclusive. Dr. Rowangould "recommend[ed] conducting additional analysis to ensure that the potential air quality and health impacts associated with the [Montgomery GDF] are better understood." Exhibit 1 to Petitioners' NOI at 4. Dr. Rowangould provided no hint as to what type of analysis should be done or what standards should apply to the analysis. More importantly, she did not identify any air pollution standard or regulation which the permit would not meet. Petitioners cannot carry their burden of proof, either to have the permit reversed or to have conditions imposed on it, simply by raising questions and calling for additional analysis. Accordingly, the Board should deny Petitioners' Motion.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Joint Response in Opposition to Petitioners' Motion to Reconsider was served on the following parties, counsel and other individuals by the method indicated:

The original of the Joint Response was filed with the Hearing Clerk in this matter along with nine copies, all of which were delivered to the Hearing Clerk by hand delivery.

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By _____

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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. PENA-KUES, ANDY CARRASCO, JAMES A. NELSON and SUMMIT PARK NEIGHBORHOOD ASSOCIATION,

Petitioners-Appellees,

v.

No. 32,790

SMITH'S FOOD & DRUG CENTERS, INC. and THE CITY OF ALBUQUERQUE,

Respondents-Appellants.

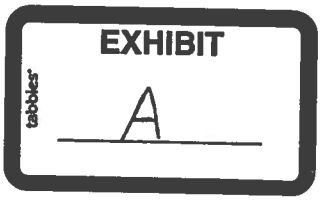
CYNTHIA A. FRY
Presiding Judge
JAMES J. WECHSLER
Judge
TIMOTHY L. GARCIA
Judge

_____/

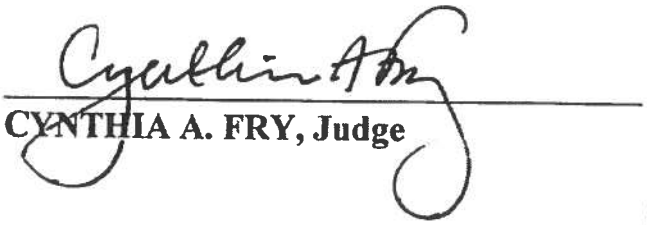
ORDER ON MOTIONS FOR REHEARING

THIS MATTER came before this Court on Petitioners' motions for rehearing. The motions were considered by the members of the original panel. The panel has determined to deny the motions for rehearings.

IT IS THEREFORE ORDERED that the motions for rehearing are **DENIED.**



IT IS SO ORDERED.



CYNTHIA A. FRY, Judge