

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

IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
NO. 3131

AQCB No. 2014-4

Southwest Organizing Project
By Juan Reynosa, Environmental Justice Organizer
Esther and Steven Abeyta
Petitioners

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PETITIONERS' RESPONSE IN OPPOSITION TO THE ENVIRONMENTAL
HEALTH DEPARTMENT'S OPPOSED MOTION FOR DISCOVERY

I. INTRODUCTION

Albuquerque Environmental Health Department ("EHD"), in its most recent pre-hearing motion, seeks additional information related to Petitioners' community air sampling efforts. In its Opposed Motion for Discovery ("Discovery Motion") EHD claims it is "entitled" to data, correspondence, and communications about the San Jose community's efforts to establish unsafe air pollution conditions in their neighborhood. This sampling was a result of months of effort on the community's part after years of EHD ignoring their complaints of poor air quality and requests for air monitoring in San Jose.

EHD is not entitled to any discovery in this administrative proceeding. EHD's discovery requests satisfy neither the standards to justify obtaining discovery that are provided in the Albuquerque/Bernalillo County Air Quality Board's ("Board") adjudicatory regulations—nor, significantly, any legal standard established in case law. EHD's Discovery Motion should therefore be denied.

II. FACTS AND PROCEDURE

EHD's Discovery Motion is apparently related to its recent efforts to supplement its technical testimony with testimony from Dr. Kathryn Kelly. After EHD retained Dr. Kelly, EHD's counsel approached Petitioners' counsel and notified them that EHD would be seeking discovery of certain information. In an effort to expedite the hearing process and provide the Board with a complete and accurate record, Petitioners agreed to provide information to EHD, Honstein Petroleum, and the Board.

Petitioners provided this information to all the parties and the Board on November 23, 2015. *See*, Petitioners' Notice of Record Supplementation (Nov. 23, 2015). The information consists of raw data from San Jose community air sampling efforts, information about sampling methodology and quality assurance/quality control ("QA/QC") steps, training protocols, sampling protocols followed, and other details related to the community's air sampling efforts. In all, the information provided consists of 268 pages of data, manuals, chain of custody information, notes, QA/QC information and an affidavit from SWOP employee Juan Reynosa.

Approximately two weeks after receiving this information, counsel for EHD contacted Petitioners' counsel to inform Petitioners' counsel that EHD intended to seek still more information. Petitioners' counsel responded that Petitioners believed that EHD had already received more information than it was entitled to and would object to any further disclosures.

III. ARGUMENT

A. EHD Is Not Entitled to Any Discovery.

EHD repeatedly - and erroneously - asserts that it is entitled to discovery. *See, e.g.*, Discovery Motion at 2 ("EHD is entitled to examine the methodology and data of the Bucket Brigade"); 7 ("EHD is entitled to discover whether Mr. Reynosa has a personal interest in the San Jose neighborhood"); 9 ("EHD is entitled to discover information regarding the identity of ... any unidentified persons involved in collecting air quality samples."). However, neither the Board's adjudicatory procedures nor case law supports any entitlement to discovery in this case.

1. Air Board adjudicatory procedures and case law discourage discovery.

The regulation governing pre-hearing discovery in Air Board adjudications, such as this case, provides that 1) formal discovery is not a right; and 2) discovery is discouraged and shall only be allowed in two circumstances. 20.11.81.14.J NMAC. Those two circumstances are: 1) the type of discovery sought will not be unreasonably burdensome or unreasonably expensive; and 2) the information to be obtained is

relevant and not otherwise reasonably obtainable or may become unavailable. *Id.* at 20.11.81.14.J.(1)(a),(b). Thus, by its plain language, the regulation governing pre-hearing discovery demonstrates that EHD is not entitled to any discovery.

Case law similarly supports significant limitations on discovery in administrative adjudications. In *Archuleta v. City of Santa Fe Police Dept.*, the New Mexico Supreme Court held that there is no constitutional right to discovery in administrative hearings. *Id.*, 2005-NMSC-006, ¶ 31, 137 N.M. 161, 172 (N.M. 2005), citing *Lopez v. United States*, 129 F. Supp. 2d 1284, 1289 (D.N.M. 2000).¹ Further, the Court noted that in administrative proceedings, the only process that is typically due is notice of the opposing party's claims and a reasonable opportunity to meet them. *Id.* at ¶ 32. The opportunity to cross-examine witnesses is considered a reasonable opportunity to obtain information as an alternative to discovery in administrative hearings. *Kelly v. United States EPA*, 203 F.3d 519, 523 (10th Cir. 2000).

The Federal District Court in *Lopez v. United States*, elaborated on what circumstances might constitute a due process violation. There, the court determined that absent a showing of actual and specific prejudice, no due process violation would be found. *Lopez v. United States*, 129 F. Supp. 2d 1284, 1289 (D.N.M. 2000).

¹ The Court in *Archuleta* stated that while the New Mexico and federal Administrative Procures Acts were not applicable in that case, they were instructive to whether denial of discovery was reasonable. *Id.*, 2005-NMSC-006, ¶ 21.

2. EHD does not identify any way it would be prejudiced in the absence of discovery.

Based on case law, the only conceivable way that EHD might be allowed to conduct discovery in this administrative proceeding is to demonstrate that it will suffer actual and specific prejudice in the absence of discovery. *Lopez v. United States*, 129 F.Supp. 2d 1289. As demonstrated in more detail in Petitioners' response to each discovery request, below, EHD has failed entirely to show any actual or specific prejudice if any of its discovery requests are denied. Indeed, EHD has failed to even allege that it will be prejudiced in any way if it does not receive the information it seeks. EHD's requests for discovery simply fail to meet any applicable legal standard and should be denied.

3. Discovery would be unreasonably burdensome.

In the spirit of providing a full and accurate record for the Board's review, as explained in Section II, above, Petitioners agreed to voluntarily provide information related to community air sampling efforts, i.e., the "Bucket Brigade". By providing over 250 pages of information to EHD and the Board, Petitioners spent significant amounts of staff time and effort. Further, SWOP spent over \$400 on copying expenses alone to provide the Board and parties with copies of the information Petitioners provided. Given the significant amounts of staff time devoted to gathering and organizing the information provided, the total monetary expense was certainly much larger. As a non-profit organization, SWOP's time and financial resources are extremely limited. As an

exclusively volunteer community organization whose members hold full time jobs, the San Jose community volunteers' time resources are even more limited and their financial resources are non-existent.

Nevertheless, without knowledge or basis, EHD claims that providing the information it demands will not be unduly burdensome.² Discovery Motion at 6. Notwithstanding that EHD lacks the knowledge to make such a statement, Petitioners' experience with gathering, reviewing and organizing the information already provided indicates that fulfilling EHD's requests will require significant additional resources and will be unduly burdensome.

4. Information EHD seeks is generally available elsewhere.

As explained in more detail in Section III.B., below, the information EHD seeks is reasonably available by means other than discovery. The Board's adjudicatory regulations specifically provide that discovery will only be granted if the information sought is unavailable by other means. 20.11.81.14.J.(1).(b) NMAC. Thus, where the information sought is available through cross-examination, as is the case with most of the information EHD seeks to discover, discovery is inappropriate. *Id.*; see also, *Kelly v. United States EPA*, 203 F.3d at 523.

² EHD claims the revised schedule includes time to respond to discovery, should EHD's Discovery Motion be granted. Discovery Motion at 6. This is inaccurate. The revised hearing schedule only accounts for the additional time necessary to brief and decide whether discovery should occur. Approved EHD Unopposed Motion to Revise Hearing Schedule at ¶ 5 (Dec. 9, 2015). If discovery is granted, Petitioners will need additional time in which to gather, review and organize the information EHD requests.

5. Information EHD seeks is generally irrelevant.

Most of the information EHD seeks is irrelevant. As Petitioners demonstrate in more detail in Section III.B., below, most of the information EHD seeks is unrelated to Petitioners' primary claims in this case: whether the Honstein bulk petroleum facility is contributing to unsafe levels of air pollution in the San Jose neighborhood and whether EHD and the Board are required to conduct cumulative air impact analyses under the New Mexico Air Quality Control Act.

Particularly troubling in EHD's Discovery Motion is its repeated insistence that it is "entitled" to information that might "clarify" alleged discrepancies between Petitioners' proposed testimony, of which EHD has received ample notice, and a report entitled *Breathe In New Mexico* that Petitioner SWOP produced several years ago. *See, e.g.,* Discovery Motion at 4. However, EHD concedes that Petitioners have not introduced the *Breathe In New Mexico* report into evidence (Discovery Motion at 4) and does not point to any instance where SWOP's technical experts have relied on that report for their opinion. Because there is no indication that Petitioners rely on or even obliquely refer to the *Breathe In New Mexico* report as a basis for any of their claims or testimony, all of EHD's discovery requests that are premised on clarifying aspects of this report are wholly irrelevant and should be rejected.

B. EHD's Specific Discovery Demands.

The regulation governing Board adjudications and case law is clear that EHD is not entitled to any discovery. Moreover, in its specific discovery demands, EHD fails to identify how its discovery requests are either relevant or how the information it seeks is otherwise unavailable. Likewise, EHD does not allege, much less demonstrate, how it will be prejudiced if its discovery requests are denied. Indeed, EHD essentially argues its case in chief in its Discovery Motion, undermining its position that discovery is necessary.

1. Information regarding Juan Reynosa and Javier Benavidez.

EHD claims it is "entitled" to discover whether SWOP organizer Juan Reynosa lives in the San Jose neighborhood. Discovery Motion at 7. Where Mr. Reynosa resides is entirely irrelevant to the issue of whether the Honstein facility is emitting pollution above permitted levels or whether EHD is required to conduct cumulative air impact analyses pursuant to the New Mexico Air Quality Control Act ("Act").

Further, this information is readily available by other means and therefore not subject to discovery under the Board's adjudicatory regulations. 20.11.81.14.J.(1).(b). First, SWOP intends to offer Mr. Reynosa as a fact witness and he will therefore be available for cross-examination. The court in *Archuleta* indicated that if a witness was available for cross-examination in an administrative proceeding, discovery was not appropriate. *Archuleta v. Santa Fe Police Dep't*, 2005-NMSC-006 at ¶ 32; *Kelly v. United*

States EPA, 203 F.3d at 523. Second, Mr. Reynosa's address is clearly indicated on his resume, attached to SWOP's record supplementation at Attachment 1.

With respect to Mr. Benavidez, SWOP has not indicated that he will be an expert witness at the upcoming hearing before the Board, so any information related to Mr. Benavidez is based exclusively on rank speculation that he will testify at the upcoming Board hearing in this matter. In any event, whatever Mr. Benavidez has said in the past is wholly irrelevant to the pending hearing. Moreover, if Mr. Benavidez chooses to testify at the upcoming hearing, he, like any witness, lay or expert, will be subject to cross examination. 20.11.81.16.C.(2) NMAC.

2. Identity and training of "trained community members" and other persons "present" during collection of air samples.

EHD seeks the identities and other details about the training of "trained community members". Discovery Motion at 8-9. EHD also demands that SWOP identify any people, other than "trained community members" present during the collection or handling of Bucket Brigade air samples. *Id.* at 10. SWOP should not be required to provide any of this information.

EHD does not identify how the identities of community members is relevant to whether the Honstein facility is emitting unpermitted air pollution or whether EHD is required to conduct cumulative air impact analyses under the Act. Further, EHD does not identify how it may be actually or specifically be prejudiced if it does not receive this information. Additionally, EHD's request is based on assertions in SWOP's *Breathe*

In New Mexico report - a report that it concedes SWOP has not entered into the record in this proceeding. Discovery Motion at 4. Thus, the *Breathe In New Mexico* report, and the entirety of its contents, is wholly irrelevant to this proceeding. Finally, EHD's demand raises serious privacy concerns. Publicizing the identities of community members who have voluntarily participated in an effort to protect and improve their community will have a chilling effect on similar future efforts and expose these community members to potential harassment and intimidation.

EHD's demand that SWOP identify people who were not "trained community members" is preposterous on its face. This demand expects SWOP to recreate events from two to three years ago and identify people who it may not even know. This demand is not just burdensome, it is effectively impossible to fulfill. Moreover, EHD does not indicate why the identity of these people is relevant or how it will be prejudiced if it does not receive this information.

3. Identity of each person who recorded information in an air quality log.

EHD demands the identity of each person who kept an air quality log and a copy of each log. Discovery Motion at 10-11. EHD should not receive this information.

EHD has not identified how this information is relevant to the issues in this case nor how it will be actually and specifically prejudiced if it does not receive this information.

Moreover, this information is already available, as EHD acknowledges, in SWOP's

Attachment 17, and any additional information can be gained through cross-examining

Mr. Reynosa. Also, as noted above, disclosing community members' identities raises significant privacy concerns. Finally, EHD's demand appears to be based upon information in SWOP's *Breath In New Mexico* report, a document that Petitioners have not entered into the record and upon which they do not rely.

4. Identity of each person who collected air samples and documents associated with each sample.

Once again, EHD demands information that it contends would clarify alleged contradictions between SWOP's *Breath In New Mexico* report and Mr. Reynosa's affidavit supplementing the record in this matter. Discovery Motion at 11-12. However, the *Breath In New Mexico* report has not been introduced into the record in this case, and none of Petitioners' expert witnesses, nor Mr. Reynosa in his affidavit supplementing the record, has relied upon this extra-record evidence. Thus, the information EHD demands is wholly irrelevant. Moreover, EHD has failed to allege any actual and specific prejudice not receiving this information would cause. EHD's request should therefore be denied.

5. EPA's QA/QC document.

EHD demands a copy of the EPA approve Quality Assurance/Quality Control document the Bucket Brigade used during its sampling effort. Discovery Motion at 12-13. Unfortunately, because several years have passed since the Bucket Brigade was active, a link in the training manual Petitioners relied upon is no longer functional. *See, Id.* Information on the EPA QA/QC documents that are used in Global Community

Monitor Bucket Brigades, like the one conducted in the San Jose neighborhood, are available at: <http://www.gcmonitor.org/wp-content/uploads/2013/06/QAQCPLAN-Buckets.pdf>.

6. Identity of individuals recording contemporaneous field data and copies of those data.

EHD again demands the identities of individuals who performed Bucket Brigade tasks - in this demand, those who made certain field notes. Discovery Motion at 13.

EHD's request should be denied. EHD concedes that it has the field notes themselves.

Id. However, EHD fails to allege how the identities of the individuals making these notes is relevant or how EHD would be prejudiced by not receiving this information.

7. Five VOC samples from *Breathe In New Mexico* report.

EHD again demands information to clarify alleged contradictions between SWOP's *Breathe In New Mexico* report and information relied upon by SWOP's expert witnesses. Discovery Motion at 14. For the reasons described above, this information is neither relevant to Petitioners' claims nor prejudicial if not revealed. Moreover, EHD will have the opportunity to cross-examine Petitioners' witnesses at the upcoming hearing on this matter on the bases for their expert opinions.

8. All communications between SWOP and any sampling laboratory relating to air samples.

EHD seeks all communications between SWOP and the laboratories that analyzed air samples for the Bucket Brigade. Discovery Motion at 14. EHD's request should be denied.

In its demand, EHD explains alleged failings in QA/QC relating to Bucket Brigade air samples. *Id.* Thus, EHD appears to already have enough information to make its case, obviating any possible claim of prejudice. Additionally, EHD can get any additional information it believes it may need through cross-examination of Petitioners' witnesses. Finally, this request in particular would be unduly burdensome for Petitioners. It would require sifting through potentially hundreds of electronic and paper files that are several years old. Once the relevant files are identified, if they exist, they would have to be printed and copied at significant expense to Petitioners.

9. Clarify Williams and Broadway location.

EHD was unable to identify the intersection of Williams and Broadway identified in one of Petitioners' air samples. Discovery Motion at 15. After reviewing the request, Petitioners discovered that the air sample location was mistakenly identified as "William and Broadway". The mistake is apparently due to combining two separate sampling locations, indicated in Attachment 16 to SWOP's information supplementing the record. The results in question are actually from two sampling

locations: Woodward and William (sample date: 6/10/13, Attachment 16 at 3) and Woodward and Broadway (sample date: 8/13/13, Attachment 16 at 3).³

10. Photographs and Videos of Air Sampling.

EHD demands all photos and videos of Petitioners' air sampling efforts. Discovery Motion at 15. This request should be denied. EHD already has extensive information about the methodology and conditions of Petitioners' air sampling efforts, based on their November 23, 2015 record supplementation. Further, any additional information can be obtained by cross-examining Petitioners' witnesses. As with producing all communications between Petitioners and the laboratories that analyzed the air samples, producing all pictures and videos of air sampling will require significant amounts of Petitioners' resources and is unduly burdensome. Finally, EHD has failed to allege how it will be specifically and actually prejudiced if it is unable to view photos and videos of Petitioners' air sampling efforts.

11. Correspondence between Dr. Chernaik, SWOP and Petitioners' technical experts.

EHD demands all correspondence between SWOP, Dr. Chernaik, Dr. Rowangould and Dr. Thurston in order to determine whether Dr. Rowangould and Dr. Thurston reviewed the sampling plan, methodology, or lab reports relating to the

³ Similarly, EHD points out that Petitioners' record supplementation Exhibit 13, has a cover sheet labeling San Jose air quality data as Navajo/Diné Care. Discovery Motion at 5. While the cover sheet is mislabeled, the data for which the cover sheet was provided is obviously from San Jose. Exhibit 13 at 3, 5, and 6 (clearly identifying sampling site as 2600 Williams SE, 87102).

Bucket Brigade air samples or whether Dr. Rowangould or Dr. Thurston consulted with Dr. Chernaik on these issues. Discovery Motion at 16. EHD's request should be denied. The information EHD seeks can be easily obtained by cross-examining Dr. Rowangould and Dr. Thurston, which EHD will be entitled to do at the hearing on this matter.

12. Dr. Thurston's references.

EHD seeks information regarding incomplete references in Dr. Thurston's Notice of Intent to Present Technical testimony. Discovery Motion at 17. Those complete references are as follow:

Symanski E, Stock TH, Tee PG, Chan W.. *Demographic, residential, and behavioral determinants of elevated exposures to benzene, toluene, ethylbenzene, and xylenes among the U.S. population: results from 1999-2000 NHANES.*

J Toxicol Environ Health A. 2009;72(14):915-24.

doi: 10.1080/15287390902959706.

<<http://www.ncbi.nlm.nih.gov/pubmed/19557620>>

PMID: 19557620

Collins JJ, Anteau SE, Swaen GM, Bodner KM, Bodnar CM.. *Lymphatic and hematopoietic cancers among benzene-exposed workers.*

J Occup Environ Med. 2015 Feb;57(2):159-63.

doi: 10.1097/JOM.0000000000000324.

<<http://www.ncbi.nlm.nih.gov/pubmed/25654516>>

PMID: 25654516

Schnatter AR, Glass DC, Tang G, Irons RD, Rushton L.. *Myelodysplastic syndrome and benzene exposure among petroleum workers: an international pooled analysis.*

J Natl Cancer Inst. 2012 Nov 21;104(22):1724-37.

doi: 10.1093/jnci/djs411. Epub 2012 Oct 30.

<<http://www.ncbi.nlm.nih.gov/pubmed/23111193>>

PMID: 23111193

Triggiani M, Loffredo S, Granata F, Staiano RI, Marone G. *Modulation of mast cell and basophil functions by benzene metabolites.*

Curr Pharm Des. 2011 Nov;17(34):3830-5. Review.
<<http://www.ncbi.nlm.nih.gov/pubmed/22103854>>
PMID: 22103854

Terry MB, Delgado-Cruzata L, Vin-Raviv N, Wu HC, Santella RM.. *DNA methylation in white blood cells: association with risk factors in epidemiologic studies.* Epigenetics. 2011 Jul;6(7):828-37. Epub 2011 Jul 1. Review.
<<http://www.ncbi.nlm.nih.gov/pubmed/21636973>>
PMID: 21636973

Bollati V, Baccarelli A, Hou L, Bonzini M, Fustinoni S, Cavallo D, Byun HM, Jiang J, Marinelli B, Pesatori AC, Bertazzi PA, Yang AS.. *Changes in DNA methylation patterns in subjects exposed to low-dose benzene.* Cancer Res. 2007 Feb 1;67(3):876-80.
<<http://www.ncbi.nlm.nih.gov/pubmed/17283117>>
PMID: 17283117

U.S. Environmental Protection Agency. 2003. Integrated Risk Information System: Acrolein (CASRN 5107-02-8) (last updated June 3, 2003). Available from www.epa.gov/iris/subst/0364.htm. Accessed February 7, 2011.

Feron, VJ; Kryusse, A; Til, HP; et al. (1978) *Repeated exposure to acrolein vapor: subacute studies in hamsters, rats and rabbits.* Toxicology 9:47-57.

ATSDR
(Agency for Toxic Substances and Disease Registry), 2005. Toxicological profile for acrolein. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

US EPA (IRIS). TOXICOLOGICAL REVIEW OF BENZENE (NONCANCER EFFECTS) October 2002. (www.epa.gov/iris)

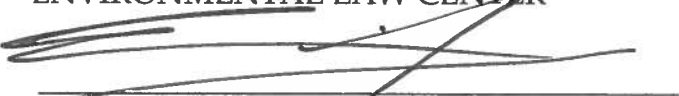
IV. CONCLUSION

Whether EHD should be allowed to conduct discovery turns on whether EHD can demonstrate that it will be unable to meet Petitioners' claims in the absence of that information. EHD has failed to even allege such a scenario, much less demonstrate it. Moreover, EHD essentially argues its case in its Discovery Motion, which begs the question how it believes it will be prejudiced if it is not permitted to discover the information it requests. In sum, no reasonable reading of the law governing discovery in administrative proceedings could lead to the conclusion that EHD should get the information it seeks, particularly in light of the information Petitioners have already provided and EHD's opportunity to conduct cross-examination.

For all the foregoing reasons, EHD's Discovery Motion should be denied. Further, because EHD's Discovery Motion effectively argues its case in chief prior to the hearing before the Board, EHD's motion should be stricken from the record.

DATED: 12/29/15

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2015, I have hand delivered or placed a copy of the foregoing pleading in the above-captioned case in the US Mail, First Class to the following:

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