

**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. 3131**

**Southwest Organizing Project (SWOP)
By Juan Reynosa, Environmental Justice Organizer;
Esther and Steven Abeyta, Members of SWOP, Petitioners**

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AQCB Petition No. 2014-4

**ORDER ON ENVIRONMENTAL HEALTH DEPARTMENT'S
OPPOSED MOTION FOR DISCOVERY**

This matter comes before the Hearing Officer on a Motion filed by the Environmental Health Department (EHD) requesting allowance to serve discovery on Petitioner Southwest Organizing Project (SWOP). Petitioners filed a Response to the Motion, opposing it; EHD filed a Reply to Petitioners' Response.

Having considered the Parties' written submittals, the Motion for Discovery is granted in part based on EHD's Reply and denied in part based on SWOP's Response. For those parts granted, as EHD notes, the discovery it describes is reasonably calculated to lead to admissible evidence regarding San Jose's Bucket Brigade data, upon which SWOP and its experts rely to show that the Honstein facility is causing air pollution in the San Jose neighborhood.

With the exceptions noted below, the information sought will not unreasonably delay the proceeding; is relevant and not otherwise obtainable; and should not be unreasonably burdensome or expensive. No prejudice to EHD need be shown in support of the Motion, and although SWOP observes that cross-examination will be had during the hearing, cross-examination is not a substitute for discovery.

Although there are some respects in which the discovery requested is limited below, these statements do not represent a pre-emptive restriction on cross-examination at the hearing.

Using the lettering set out in the Reply in Support of the Motion:

- A. EHD has withdrawn its requests for information about Mr. Reynosa's residence. Although SWOP characterizes Mr. Reynosa as a fact witness, his affidavit contains opinions on the health effects of air and water pollution, leading EHD to question his credentials to offer technical testimony. Opinion testimony goes beyond what a fact witness can offer, and the exploration of Mr. Reynosa's credentials is appropriate.
- B. EHD has withdrawn its requests for information about Mr. Benavidez's residence. SWOP states that Mr. Benavidez may or may not testify at the hearing. EHD replies that he already testified in June 2015 when the Board decided to hold the hearing, and is a party representative. I find these arguments unpersuasive, but if Mr. Benavidez will offer opinion testimony at the hearing, the exploration of his credentials is appropriate. SWOP may either offer his credentials or state that he will be limited to factual testimony.
- C. Discovery is appropriate for most of the information requested about the training of those who conducted the Bucket Brigade, including the identity of the trainers, the identity of those who were trained and became samplers, the training received, the date and location of the training and the materials distributed or created there. Those who were trained but then did not become samplers need not be identified. EHD does not explain why communications

between SWOP and the trainers is relevant, and that request should not be part of the discovery propounded.

- D. Because SWOP relies on the Bucket Brigade data, it is appropriate and relevant for EHD to explore the reliability of that data. The information requested in paragraph D should be produced. SWOP does not provide any grounds on which to conclude that the identification of those who participated would lead to harassment or intimidation.
- E. EHD does not adequately explain why the information in paragraph E is relevant. Having discovered who was trained and took samples, it is not clear why the fact that someone else was present raises questions about the integrity of the process.
- F. The request for the Bucket Brigade air quality logs and the identity of the persons preparing them is reasonably calculated to lead to admissible evidence regarding the air quality sampling plan; this information should be produced.
- G. If, as implied, SWOP used Exhibit 1 to EHD's Reply as its QA/QC plan, SWOP should state that plainly. Otherwise, SWOP should produce the QA/QC plan that it did use for the Bucket Brigade.
- H. If there is no contemporaneous field data beyond that already produced, SWOP should state as much. If there is additional field data, it should be produced.
- I. Mr. Reynosa refers to monthly VOC samples for twelve or thirteen months, but only half of the samples were provided to SWOP's consultant or to EHD.

Information regarding the missing samples is relevant and may lead to admissible evidence.

- J. If there are photographs or video recordings that SWOP intends to introduce at the hearing, either through experts or lay witnesses, SWOP should produce that information now. Otherwise, photographs or videos that may exist that SWOP will not offer would seem to be of attenuated relevance and will not be ordered.
- K. Weighing the burden of producing all communication between the laboratory analyzing air samples and SWOP against the value of the evidence sought by EHD, this discovery is not ordered.
- L. SWOP has not identified Mark Chernaik as a technical witness in its Notice of Intent to Present Technical Testimony or its Supplemental Notice of Intent to Present Technical Testimony filed January 29, 2016. SWOP has submitted a report prepared by Dr. Chernaik into the record and Dr. Rowangould relies upon it to conclude that air pollution may be affecting the San Jose neighborhood. Relevant discovery would include a question as to whether Dr. Rowangould and Dr. Thurston consulted with Dr. Chernaik, and whether they reviewed the sampling plan, methodology or lab reports related to the Bucket Brigade data. Beyond that, balancing the burden of producing the information with the likelihood that it will lead to admissible non-hearsay evidence, this discovery will not be ordered. Dr. Rowangould and Dr. Thurston can certainly expect to be cross-examined about their reliance on the Chernaik report, and their understanding of the integrity of the information contained there.

M. The requested discovery in paragraph M is appropriate. Information forming the basis for Ms. Richard's conclusions regarding air pollution sources and emissions in the San Jose neighborhood should be produced.

Pursuant to Section 20.11.81.14.5.(J)(1) NMAC, and consistent with the statements above, EHD may propound Interrogatories (not to exceed 25), Requests for Production and Requests for Admission on SWOP.

The parties are requested to submit a proposed revised hearing schedule based on the time necessary for the discovery to be propounded and answered.



Felicia L. Orth, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing ORDER ON ENVIRONMENTAL HEALTH DEPARTMENT'S OPPOSED MOTION FOR DISCOVERY on this 2nd day of February, 2016, to the following:

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Respectfully submitted,


Andrew Daffern, AQCB Hearing Clerk