

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

**IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING PERMIT NO. 1655-M1-RV1,
SMITH'S FOOD AND DRUG CENTERS, INC.**

RECEIVED
MAR 23 2016

BY: 

**Pat Toledo, as an individual,
Petitioner,**

v.

AQCB No. 2016-1

**City of Albuquerque, Environmental
Health Department, Air Quality Program,
Respondent.**

**ENVIRONMENTAL HEALTH DEPARTMENT
AIR QUALITY PROGRAM'S
MOTION TO REVERSE AND REMAND THE PERMIT**

COMES NOW, the City of Albuquerque Environmental Health Department Air Quality Program ("EHD") and moves the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") to reverse and remand Permit No. 1655-M1-RV1 ("Permit") to EHD because the Permit was issued without compliance with certain notice requirements in 20.11.41 NMAC. As reasons, EHD states as follows:

- 1) On December 22, 2015, EHD issued the Permit to Smith's Food and Drug Centers, Inc. ("Smith's).
- 2) The Permit included a modification that allowed the gas station to increase its throughput from 3 to 5 million gallons per year. For a modification, there are regulations requiring notice procedures by both an applicant, *see e.g.*, 20.11.41.13(B) NMAC; and by EHD, *see e.g.*, 20.11.41.14 NMAC.

3) After EHD issued the Permit, it sent out notification of its decision to all interested persons on February 4, 2016. NMSA 1978, § 74-2-7(G); and 20.11.41.16(D) NMAC.

4) On March 4, 2016, Petitioner Pat Toledo (“Petitioner Toledo”) filed a Petition challenging the issuance of the Permit.

5) The Air Board’s Adjudicatory Rules for reviewing permit decisions provides that the Department is required to file the administrative record within thirty days after the filing of a Petition. 20.11.81.14(D) NMAC (setting a deadline of thirty days for a “60 day hearing procedure”); 20.11.81.7(A and B) NMAC (defining “30 day” and “60 day” hearing procedures) and *see e.g.*, 20.11.41.16(F) NMAC (requiring the Air Board to hold a hearing no later than 60 days after a Petition is filed).

6) In preparing the administrative record in response to the Petition, EHD realized that required notice provisions for the modification had not been followed.

7) Specifically, EHD failed to provide required notice of the proposed modification to the City, to Bernalillo County, to the New Mexico Environment Department and to EPA. 20.11.41.14(B)(8 and 9) NMAC.

8) The failure to substantially comply with the notice requirements for the modification of the Permit renders the modification invalid. *Martinez v. Maggiore*, 2003-NMCA-043, ¶ 13, 133 N.M. 472.

9) EHD sought Smith’s position on this Motion but as of this filing, Smith’s had not responded with its position.

10) EHD sought Petitioner Toledo’s position on this Motion but as of this filing, Petitioner Toledo had not responded with his position.

11) Thus, the Air Board should assume that this Motion is opposed unless Smith's and Petitioner Toledo respond otherwise.

WHEREFORE, EHD respectfully requests that the Air Board reverse and remand the Permit to EHD so that EHD can re-notice the modification in compliance with all notice requirements and decide whether to issue the Permit after it has received and reviewed any public comment that results.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have emailed a true and correct copy of the foregoing pleading on this 23rd day of March, 2016, by the method indicated to the following:

Hand-delivered

EHD's original pleading was filed with the Hearing Clerk in the above-captioned matter and nine copies were provided.

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