

**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

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**SMITH'S FOOD & DRUG CENTERS, INC.'S MOTION FOR STAY OF
AIR QUALITY CONTROL BOARD'S FINAL ORDER**

Pursuant to NMSA 1978, § 74-2-9(D)(1) and 20.11.81.18(E) NMAC, Smith's Food & Drug Centers, Inc. ("Smith's") hereby moves the Albuquerque-Bernalillo County Air Quality Control Board ("Board") for entry of an order staying the Board's Final Order until the New Mexico Court of Appeals resolves Smith's appeal of the Final Order. As grounds for this Motion, Smith's states:

1. On December 7, 2012, Hearing Officer Felicia Orth filed her: (1) Hearing Officer's Report ("Report"), (2) Recommended Findings of Fact and Conclusions of Law, and (3) proposed Final Order. Hearing Officer Orth recommended that the Board sustain the City of Albuquerque ("City") Air Quality Division's ("AQD") issuance of Permit No. 2037-M1 to Smith's. See Report at 13.

2. On January 9, 2013, the Board held a meeting to consider the Hearing Officer's recommendations and to render a decision on Petition Nos. AQCB 2012-1 and -2 in this matter.

3. Board Member Stephen Baca made a motion to set aside the Hearing Officer's recommended decision at the January 9, 2013 meeting. Transcript of 1/9/13 Board Meeting (hereafter "Tr.") at 64:17-22. Board Member Baca presented draft Air Quality Control Board Resolution # 2013-1 ("Draft Resolution") in connection with his motion. Tr. at 64:24 – 69:14. The Draft Resolution stated, among other things, that the Board "reverses [AQD's issuance of Permit No. 2037-M1 to Smith's], and provides reasons therefore[,]" but no reasons were stated in the typewritten version of the Draft Resolution. See Air Quality Control Board Resolution # 2013-1, filed on or about January 9, 2013 ("Resolution # 2013-1") at 2-3.

4. Hearing Officer Orth and Board Counsel Bill Grantham advised the Board that it must have a factual and/or legal basis in the record to support a reversal of AQD's issuance of Permit No. 2037-M1 to Smith's. Tr. at 5:21 – 7:13; 81:9-17; 85:14 – 88:20.

5. No Board Member disagreed with any of the Hearing Officer's Proposed Findings of Fact. Tr. 97:20 – 99:17.

6. A majority of the Board voted in favor of Member Baca's motion, concluding that AQD's issuance of Permit No. 2037-M1 to Smith's should be reversed because:

- 1) The [Board] is required to protect public health and welfare. Increases in throughput increase risks to public health.
- 2) The Quality of Life concerns raised by the community could be indirectly related to air quality.

Resolution # 2013-1 at 2-3; Tr. at 103:10 – 104:8.

7. The Board discussed revising several of the Hearing Officer's Proposed Conclusions of Law at the January 9, 2013 meeting. Tr. at 104:9 – 141:10.

8. The Board directed Mr. Grantham to prepare a proposed final order consistent with the discussed revisions to the Hearing Officer's Proposed Conclusions of Law and which the Board would consider adopting at its next meeting. Resolution # 2013-1 at 3; Tr. at 143:3 – 144:11.

9. Based on the Board's discussion at the January 9, 2013 meeting and its majority approval of Board Member Baca's motion, Smith's expects the Board to enter a Final Order reversing AQD's issuance of Permit No. 2037-M1 to Smith's at the Board's upcoming meeting on February 13, 2013.

10. As Mr. Grantham stated at the January 9, 2013 meeting, once such a Final Order is entered, the Smith's #496 Fuel Center (the "Station") will be subject to the conditions set forth in its original Permit No. 2037. Tr. 37:5-14. The original Permit No. 2037 contains a throughput limit of 3,369,925 gallons per year on a 12-month rolling average. It does not contain the enhanced record-keeping, reporting and testing requirements set forth in Permit No. 2037-M1.

11. If the Board enters the expected Final Order, Smith's intends to appeal the Board's Final Order to the New Mexico Court of Appeals pursuant to NMSA 1978, § 74-2-9(A).

12. Section 72-2-9(D)(1) provides that "[a]fter a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted . . . by . . . the local board . . . [which] took the action being appealed[.]"

13. New Mexico courts look to four factors to determine whether to grant a stay from an order adopted by an administrative agency: “(1) [the] likelihood that [the] applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to [the] applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.” *Tenneco Oil Co. v. New Mexico Water Quality Control Com'n*, 105 N.M. 708, 710, 736 P.2d 986, 988 (Ct. App. 1986). Each of these factors is met in this case because:

A. The likelihood that Smith’s will prevail on appeal is high. Among other things, NMSA 1978, § 74-2-9(C)(3) provides that the Court of Appeals “shall set aside the [Board’s] action” if the action is “not in accordance with law.” There is no dispute in this case that AQD lawfully granted Permit No. 2037-M1 to Smith’s and that none of the grounds for permit denial under NMSA 1978, 74-2-7(C) were met in this case. Mr. Grantham advised the Board that, in light of these facts, the Board’s decision “will not withstand scrutiny in the Court of Appeals.” Tr. 85:14 – 88:20.

B. Smith’s will suffer irreparable harm if the stay is not granted because, although market demand has declined in recent months, Smith’s may exceed the throughput limit of the original Permit No. 2037 if market demand increases. Exceeding the throughput limit will cause Smith’s to incur additional fines from the AQD’s enforcement section. Smith’s has already paid two such fines totaling well over \$100,000. Smith’s is not

aware of any procedure by which it could obtain a refund of fines incurred after entry of the Board's Final Order if the Court of Appeals reverses the Final Order, but in the meantime fines are imposed.

C. There is no evidence in the record that substantial harm will result to other interested persons if the Board grants this Motion. While Smith's understands that the petitioners and certain Board Members feel that "[i]ncreases in throughput increase risks to public health[,]" Smith's respectfully disagrees that the record supports that assertion. The petitioners did not present any expert or technical evidence at the August 21-23, 2012 hearing on the merits that demonstrated that the Station poses an imminent or even long-term threat to public health, or that any alleged detrimental threat to public health increased, if such a threat existed at all, after the issuance of Permit No. 2037-M1. Nor did they present any medical records or medical testimony showing the negative health effects allegedly suffered as a result of the Station's operations. Accordingly, there is no basis in the record for concluding that a stay of the Board's Final Order will result in substantial harm to anyone.

D. For these same reasons, there is no evidence that harm will ensue to the public interest if the Board grants this Motion.

14. For the reasons set forth above, good cause exists to stay enforcement of the Board's Final Order.

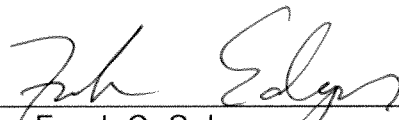
15. The City concurs in this Motion.

16. Due to the nature of this Motion and petitioners' opposition to the issuance of Permit No. 2037-M1, Smith's has not sought petitioners' concurrence in this Motion.

WHEREFORE Smith's respectfully requests that the Board enter an order staying its Final Order pending the decision of the New Mexico Court of Appeals.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____


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I hereby certify that a true and correct copy of the foregoing **Smith's Motion for Stay of Final Board Order** was served on the following parties, counsel and other individuals by the method indicated:

The original of Smith's Motion for Stay of Final Board Order 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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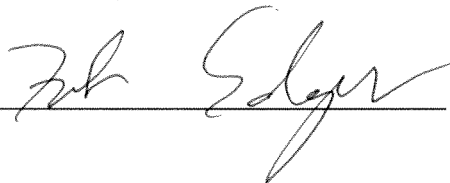
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on the 6th day of February, 2013.

SUTIN, THAYER & BROWNE
A Professional corporation

By  _____