

**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 [SWOP]  
By Juan Reynosa, Environmental Justice  
Organizer; Esther and Steven Abeyta,  
Members of SWOP, Petitioners*

**ORDER ON THE MANDATE FROM THE NEW MEXICO COURT OF APPEALS**

This matter is before the Albuquerque-Bernalillo County Air Quality Control Board (the “Board”) upon the New Mexico Court of Appeals’ Mandate dated December 30, 2020 (the “Mandate”), which includes a copy of the Court’s opinion dated October 15, 2020 in Docket No. A-1-CA-36398 (the “Opinion”). The Board, being fully advised, FINDS:

1. The Court of Appeals has affirmed the Board’s Final Order, entered herein on April 17, 2017, which upheld the City of Albuquerque Environmental Health Department’s (“EHD”) issuance of authority-to-construct permit No. 3131 to Honstein Oil & Distributing, LLC (“Honstein”) pursuant to the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -17 (the “AQCA”). Opinion ¶ 1.

2. On appeal, Petitioners argued to the Court that: “(1) the Board erred in upholding EHD’s issuance of the permit because EHD failed to apply a ‘reasonable probability of injury’ standard when evaluating the permit; (2) the Board and EHD violated the AQCA’s public participation provisions by failing to consider quality of life impacts and non-technical testimony from public participants; (3) the Board’s hearing officer allowed overly burdensome and

prejudicial discovery; and (4) the Board’s hearing officer applied the rules of evidence in a manner contrary to the Board’s adjudicatory regulations.” Opinion ¶ 8.

3. Regarding Petitioners’ first argument, the Court held that “the language of Section 74-2-7 [of the AQCA] does not impose on EHD or the Board a requirement to independently apply the reasonable probability of injury standard when considering whether to grant a permit.” Opinion ¶ 14.

4. Regarding Petitioners’ second argument, the Court concluded that, in the absence of “any regulatory provision supplying the requisite nexus to quality of life evidence,” EHD and the Board “were not required to address public testimony regarding quality of life issues in resolving the permit application.” Opinion ¶ 24.

5. Regarding Petitioners’ third argument, the Court observed that the hearing officer can “order discovery for the parties to fill in gaps of information and resolve underlying issues[.]” and discerned “no error in the hearing office’s order granting EHD’s request for additional discovery.” Opinion ¶ 27. The Court concluded “that the hearing officer did not act arbitrarily, capriciously, or not in accordance with the law in granting the request for discovery.” Opinion ¶ 28.

6. Finally, regarding Petitioners’ fourth argument, the Court observed that the Board’s regulations “provide that the Board and the hearing officer may look to the [New Mexico] rules of evidence for guidance ‘[i]n the absence of a specific provision in 20.11.81 NMAC governing an action[.]’” Opinion ¶ 29 (citing 20.11.81.12(A) NMAC). The Court then addressed Petitioners’ following claims of error:

a. Petitioners first contended that “the hearing officer erroneously sustained EHD’s objection to a witness testifying ‘about health concerns that community members

had expressed to him.” Opinion ¶ 30. EHD objected to that testimony “based on its belief that the witness was testifying to ‘causation’ and the hearing officer concluded that ‘causation as to health concerns is a matter of . . . technical expertise.’” *Id.* The Court held that, “[p]ursuant to 20.11.81.14(I)(2) NMAC, only ‘non-technical’ testimony is permitted at a public comments hearing. As such, it was proper for the hearing officer to exclude the testimony on causation pursuant to the regulations.” Opinion ¶ 30 (citing 20.11.81.12(B)(2)(b) NMAC).

b. Petitioners also argued “the hearing officer improperly applied the legal residuum rule, which requires that administrative actions be ‘supported by some evidence that would be admissible in a jury trial.’” Opinion ¶ 31 (quoting *Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.*, 1984-NMSC-042, ¶ 19, 101 N.M. 291, 681 P.2d 717). The Court held that “the hearing officer was permitted to apply the rules of evidence that govern the admissibility of evidence[.]” and observed that the Court itself “has previously applied the legal residuum rule to proceedings before the Board.” Opinion ¶ 31 (citing *Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.*, 1984-NMCA-058, ¶ 6, 102 N.M. 8, 690 P.2d 451). Consequently, the Court “detect[ed] no error in the hearing officer’s application of the legal residuum rule.” Opinion ¶ 31.

7. The Board's Final Order, having been affirmed by the New Mexico Court of Appeals on the grounds set forth above, is now fully adjudicated and this matter should therefore be closed.

IT IS THEREFORE ORDERED that Docket No. 2014-4 is hereby CLOSED.

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Susan Langner, Vice Chair  
Albuquerque-Bernalillo County Air  
Quality Control Board

**Submitted by:**

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**Approved as to form by:**

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