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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

MOTION OF THE ENVIRONMENTAL HEALTH DEPARTMENT AIR QUALITY PROGRAM TO:
VACATE AND RESCHEDULE AIR BOARD HEARING
AND
AMEND THE PREHEARING ORDER TO RESOLVE THE PETITION'S CLAIMS VIA SUMMARY PROCEDURES OR SUMMARY JUDGMENT

In its petition ("Petition"), the Southwest Organizing Project ("SWOP") challenges the decision of the Environmental Health Department ("EHD") Air Quality Program ("Program") to issue an air quality permit to a small source of volatile organic compounds in the South Valley—the Honstein bulk fuel plant ("Honstein Permit" aka "Permit No. 3131"). Bulk fuel plants distribute gasoline which is a source of hazardous air pollutants.

The Air Board is authorized to "sustain, modify or reverse" EHD's decision to issue the Honstein Permit. NMSA 1978, § 74-2-7(K). Petitioner has petitioned the Air Board to have the Honstein Permit "rescind[ed] until a cumulative impact assessment on the effects upon air quality…may be considered." Petitioner is also requesting that, if the Honstein Permit is to be issued, "continuous air monitoring [be required] at the permit site for any exceedance of the Clean Air Act standards." Petition p. 5 (Aug. 12, 2014). The Petitioner bears the burden of proof.

Attachment 2

NMSA 1978, § 74-2-7(K). On April 8, 2015, Petitioner filed a Notice of Intent ("NOI") identifying three technical witnesses for the hearing on the Honstein Permit. NOI (Apr. 8, 2015). Petitioner's NOI does not carry its burden of proof.

Petitioner's NOI fails to satisfy the statutory standard for denial of an air quality permit and fails to establish any basis to impose continuous air monitoring. In its NOI, Petitioner barely mentions the Honstein Permit or its projected impact on air quality in its proposed five hours of direct testimony. NOI at p. 5. Instead, Petitioner is seeking to use the Honstein Permit hearing before the Air Board for a different purpose than the Legislature intended—to advocate for assessment of cumulative impacts during air quality permitting—the rulemaking proposal that Petitioner has already proposed to the Air Board and to the New Mexico Legislature. *See* AQCB Petition No. 2014-1; *and* Consolidated Environmental Review Act HB 458 2013 Legislative Session; *and see* Breathe In New Mexico, San Jose Air Quality Report at p. 9 (describing Petitioner's efforts to require consideration of cumulative impacts in environmental permitting through support of HB 458). Neither the Legislature nor the Air Board decided to adopt Petitioner's proposal, thus, it does not apply to the Honstein Permit.

An Air Board hearing on a permit is an adjudicatory proceeding to evaluate whether EHD's initial permitting decision should be reversed, modified or sustained. NMSA 1978, § 74-2-7(K); and *see* 20.11.81 NMAC. It is distinct from a rulemaking proceeding which proceeds pursuant to NMSA 1978, § 74-2-6 and 20.11.82 NMAC and which considers a broader range of issues including public health. NMSA 1978, § 74-2-5(E).

The question before the Air Board in this adjudicatory hearing is whether EHD correctly determined the facts and correctly applied the <u>existing</u> law and regulations in issuing the Honstein Permit. In this case, Petitioner's NOI does not dispute the relevant facts or the

applicable law. Thus, Petitioner has provided no basis for making any decision other than sustaining EHD's decision to issue the Honstein Permit.

Because the Petitioner is attempting to use an Air Board hearing for an improper purpose, EHD requests that the Hearing Officer vacate and reschedule the pending Air Board hearing to allow time for consideration of the Petition through Summary Procedures or Summary Judgment and amend the Prehearing Order accordingly.

As reasons, the Environmental Health Department Air Quality Program states as follows:

1) Petitioner's NOI does not provide a basis to reverse EHD's issuance of the Honstein Permit.

Petitioner's NOI admits the relevant facts on which EHD relied to issue the Honstein Permit. Other than those admissions, Petitioner hardly discusses the Honstein Permit. Petitioner admits that the Honstein facility is a bulk fuel plant with a gasoline throughput which does not exceed 20,000 gallons per day and that the Honstein Permit applies to a 6,000 gallon underground gasoline storage tank used for unleaded gasoline. Rowangould Test p. 4. Petitioner does not challenge EHD's method of calculating the emissions for the Honstein Permit or that the applicable substantive Air Board regulations are 20.11.64.12 NMAC (incorporating 40 C.F.R. Subpart BBBBBB ("Hex B")) and 20.11.65 NMAC (volatile organic compounds).

Petitioner's NOI does not allege any applicable regulation that EHD failed to apply to the Honstein Permit or offer any facts in support of such an allegation. Petitioner does not allege or offer any evidence which would show that the Honstein Permit would cause or contribute to an exceedance of an ambient air quality standard. It does not allege or offer any evidence to show that the Honstein Permit violates the Air Quality Control Act or the Clean Air Act. In short,

Petitioner has failed to address the statutory standard for denying a construction permit. NMSA 1978, § 74-2-7(C)(1). Petitioner's requested relief to rescind the Honstein Permit until a cumulative impact study is done is unsupported by facts, is legally insufficient and should be rejected through the use of Summary Procedures or Summary Judgment.

2) Petitioner's NOI does not provide a basis for imposing a condition requiring Honstein to monitor for exceedance of Clean Air Act standards.

Petitioner's NOI barely discusses ambient air quality in Bernalillo County but Petitioner admits, as it must, that Bernalillo County is in compliance with all ambient air quality standards. Rowangould Test p. 14. Honstein's emissions are volatile organic compounds for which there is no ambient air quality standard. None of Petitioner's witnesses lays any foundation for requiring the Honstein facility to monitor for pollutants it does not produce.

Petitioner's witness testifies that PM10 for 2011 to 2013 exceeds ambient air quality standards "according to EPA's summary." Rowangould Test. p. 14. Petitioner's witness also asserts that SWOP's Bucket Brigade had one sample that exceeded the 24-hour standard for PM2.5. Rowangould Test. p. 16. Petitioner fails to attach any exhibit to support these assertions and EHD denies them.

But even if Petitioner were correct, these assertions are irrelevant to the approval of the Honstein Permit. Petitioner admits that the Honstein facility is a source of volatile organic compounds, not PM10 or PM2.5. Rowangould Test. p. 6. Since the Honstein facility does not produce PM10 or PM2.5, it cannot possibly "cause or contribute" to an exceedance of a PM10 or PM2.5 ambient air quality standard. NMSA 1978, § 74-2-7(C)(1) and (D)(1). Thus, whatever the levels of PM10 and PM2.5 may be in Bernalillo County, they provide no basis for denying or imposing any conditions on a source to monitor for pollutants it does not produce.

Petitioner's witness testifies that Bernalillo County's ozone level "appears to exceed *proposed* ozone standards." Rowangould p. 14 [emphasis added]. Until EPA decides what the new ozone standard will be, it is impossible to tell whether it will be met. An air quality permit cannot be denied and conditions cannot be imposed on it for violation of a standard that is not yet determined.

Petitioner's requested relief to require Honstein to perform continuous monitoring to assure that Clean Air Act standards are not exceeded is unsupported by facts, is legally insufficient and should be rejected through the use of Summary Procedures or Summary Judgment.

3) Petitioner's NOI does not provide a basis for imposing a condition to conduct a cumulative impact study to obtain a permit.

Petitioner contends that the existing sources in the San Jose neighborhood have permitted allowable emissions of 330 tons of volatile organic compounds per year. Rowangould Test. p. 5. The allowable emissions from the Honstein Permit are 2.26 tons of volatile organic compounds per year, Rowangould Test. p. 6, or 0.7% of the existing permitted allowable stationary source emissions in San Jose.

No law requires Honstein to conduct a cumulative impact study to obtain a permit. In 2014, the Air Board heard vociferous public comment on both sides of the question whether a cumulative impact study should be required prior to air quality permitting. After hearing lengthy public debate, the Air Board decided not to move forward on Petitioner's proposed rule to require consideration of cumulative impacts. As a result, no law or rule requires Honstein to prepare a cumulative impact study prior to receiving an air quality permit. AQCB 2014-1.

Moreover, it is not a "reasonable" permit condition to require a permittee to comply with a rule that the Air Board declined to adopt. It is not a reasonable condition to require a permittee to study the cumulative impact of all emissions when the permittee produces only 0.7% of one of several pollutants. NMSA 1978, § 74-2-7(D)(1)(d); *and see South Camden Citizens in Action, et al., v. New Jersey Dep't of Environmental Protection, et al.,* 2006 WL 1097498 * 9 (D. N.J. 2006) (describing a district court proceeding where an air quality applicant sought contribution from over thirty different previous permittees plus John Does by filing a third party complaint to resolve complaints of private nuisance due to air impacts).

No law or rule currently requires Honstein to conduct a cumulative impact study. There is no standard limiting the amount of volatile organic compound emissions which are permissible against which such a study's results could be compared. Without an applicable standard or rule, EHD could not limit Honstein's emissions via a permit condition. NMSA 1978, § 74-2-7(D)(1)(b). With respect to Honstein's emissions of hazardous air pollutants, the Legislature has limited the Air Board's authority to those rules which are "at least as stringent" but "no more stringent" than federal regulations. NMSA 1978, § 74-2-5(C)(2). For this reason, the Air Board has incorporated 40 C.F.R. Subpart BBBBBB by reference into 20.11.64 NMAC and EHD has applied it to the Honstein Permit. Petitioner's request to condition the Honstein Permit to pay for a study of the cumulative impacts of EHD's Air Program is unreasonable for both factual and legal reasons and should be rejected using Summary Procedures or Summary Judgment.

4) Petitioner cannot challenge the Honstein Permit based on "disparate impact."

EHD denies Petitioner's discrimination allegations based on disparate impact. More importantly for this proceeding, Petitioner cannot challenge disparate impacts from air quality permitting either at the Air Board or in a district court. *Alexander v. Sandoval,* 532 U.S. 275,

285-86 (2001) (there is no private right of action for disparate impact discrimination claims under Section 602 of Title VI of the Civil Rights Act). Congress and EPA have created an administrative proceeding where such claims can be brought—Petitioner knows this because it has filed a claim against EHD and the Air Board in EPA's administrative proceeding.

Even if all of Petitioner's allegations were true, which EHD denies, an effective solution could not be developed in an Air Board permit hearing focused on a single permit, particularly a very minor source accounting for only 0.7% of the stationary source volatile organic compound emissions in the vicinity. Denying the Honstein Permit altogether would result in no meaningful change to the alleged cumulative impacts and would leave EHD's permitting practices unchanged. This illustrates why an Air Board permit hearing is not the right place to litigate disparate impact claims.

Turning an Air Board permit hearing into a referendum on EHD's past permitting practices diverts this process from its purpose and invites ineffective use of public resources. Petitioner's proposed testimony would lead the Air Board to hear hours of testimony about demography, toxicology, and cumulative impacts even though no applicable Air Board rules establish any standards or procedures that the Air Board can apply to the Honstein Permit and EHD did not consider these subjects in issuing the Honstein Permit.

EHD has no staff in the fields of demography, toxicology, and cumulative impacts and to fully respond to Petitioner's testimony EHD would have to identify, select and pay for expert testimony. EHD should not be required to pay to obtain experts on demography, toxicology or cumulative impacts to defend a permitting decision made under laws and rules that do not consider those issues.

Even if EHD were required to obtain these experts, EHD cannot do so in the remaining time before the hearing and more time would be needed to allow EHD to submit its technical testimony on those additional subjects. Trying to resolve this issue every time a permit is challenged would greatly increase the cost of EHD's permitting decisions and would divert EHD's resources from other tasks such as enforcement and control strategies.

Environmental justice issues are important—important enough to be addressed in venues designed for that purpose. As Petitioner knows, EPA has just such a venue. An Air Board permitting proceeding is not the appropriate venue for resolving disparate impact claims.

EHD is confident that it applies its permitting regulations uniformly across its jurisdiction without discrimination. To the extent that Petitioner disagrees, it should bring its disparate impact claims in EPA's administrative process where they can be appropriately considered and addressed. Because Petitioner has no private right of action to bring such claims, they should be dismissed using Summary Procedures or Summary Judgment.

WHEREFORE, EHD moves the Hearing Officer to vacate and reschedule the upcoming Air Board hearing and amend the Prehearing Order to accommodate resolving the Petition's claims through Summary Procedures or Summary Judgment:

(1) Vacate the Honstein Permit hearing scheduled for May 13 and 14;

(2) Hold a teleconference to reschedule the Air Board hearing and to hear from all parties to allow sufficient time for briefing and Air Board consideration of a decision on the Honstein Permit pursuant to Summary Procedures. 20.11.81.10(A) NMAC. EHD requests that the Air Board decide the merits of the Petition solely on legal arguments presented in written briefs and oral argument;

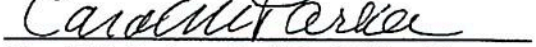
(3) In the alternative, hold a teleconference to reschedule the Air Board hearing to allow sufficient time for briefing and Air Board consideration of an EHD motion for summary judgment on the Petition with adequate time for all parties to respond or reply. 20.11.81.12(A) NMAC.

(4) Amend the prehearing order as required.

In light of the limited time remaining before the adjudicatory hearing commences in this matter on May 13, 2015, EHD request that the Hearing Officer hold an expedited telephone conference at a mutually convenient time during the week of May 4, 2015 to hear argument on this motion. In light of the nature of this motion, concurrence of opposing counsel was not sought.

Respectfully Submitted,

CITY OF ALBUQUERQUE
Jessica M. Hernandez, City Attorney



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served as described below on April 29, 2015:

1) The City's original pleading was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered to the Hearing Clerk.

2) One additional copy was hand-delivered to the Hearing Clerk for delivery to the Hearing Officer/Air Board Attorney and one copy was sent by electronic mail to:

Felicia Orth
c/o Andrew Daffern, Hearing Clerk
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Environmental Health Department
One Civic Plaza, Room 3023
Albuquerque, NM 87102
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Attorney for the Albuquerque-Bernalillo County Air Quality Control Board and Hearing Officer for AQCB Petition No. 2014-4

3) One hard copy was mailed by first class mail and an electronic copy was sent by electronic mail to:

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