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

FINAL ORDER AND STATEMENT OF REASONS

Pursuant to 20.11.81.18.D (2) NMAC, the Albuquerque/Bernalillo County Air Quality Control Board issues this Final Order in this matter, setting aside the Hearing Officer's recommended decision and reversing the action of the Air Quality Division of the City of Albuquerque Environmental Health Department. As reasons for doing so the Board States the following:

1 The hearing on the merits regarding Petition AQCB 2012-1 and Petition AQCB 2012-2 was held On August 21, 22, and 23, 2012 by the Air Board's Hearing Officer, with members of the Board in attendance.

2. Subsequent to post-hearing procedures conducted in accordance with 20.11.81 NMAC, the Hearing Officer on December 7, 2012 filed with the Board her Hearing Officer's Report, Recommended Findings of Fact and Conclusions of Law, and a proposed Final Order.

3 At the regularly scheduled monthly meeting of the Board held on January 9, 2013, the Board deliberated on the merits of this appeal, in accordance with 20.11.81.18 NMAC. Each Board member verified that he or she had either attended the entire three day hearing or had read

Exhibit F

the transcript for any portion of the hearing which he or she did not attend. Deliberation, including a possible decision on the merits, was listed as an item on the meeting agenda, which was publicly available more than 24 hours before the meeting. The deliberation and decision were conducted in a meeting open to the public, and were transcribed by a court reporter.

4. At the January 9, 2013 meeting, by a majority vote the Board adopted a resolution reversing the Division's April 17th, 2012 issuance of minor source air quality Authority-to-Construct Permit Modification No. 2037-M1 (Resolution 2013-01). In support of the reversal, the resolution stated that "The Air Quality Control Board is required to protect public health and welfare. Increases in throughput increase risks to publish health. The quality-of-life concerns raised by the community could be indirectly related to air quality."

5. The resolution reversing the decision indicated that the Board rejected the Hearing Officer's proposed Findings of Fact, Conclusions of Law, and Recommended Decision. After adopting the resolution, the Board indicated that it did not dispute any of the proposed Findings of Fact. The Hearing Officer's proposed Findings of Fact are hereby adopted in their entirety and incorporated herein by reference, notwithstanding anything in Resolution 2013-01.

6. In further support of the reversal of the permit modification, the Board took exception to the following proposed Conclusions of Law submitted by the Hearing Officer, and directed counsel to amend them as indicated in the Board's deliberations.

a. Conclusion 7 is amended as follows: "The scope of the Board's review is to determine whether the Station "will or will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L) and to ensure that air pollution is prevented or abated. NMSA, §§ 74-2-5.A"

b. Conclusion 23 is amended as follows: "The Department and the Air Board have no authority over traffic patterns, construction of streets and highways, traffic violations or fire violations within the City municipal boundaries. See NMSA, §§ 74-2-5.1, 74-2-5, & 74-2-7. The Board has an interest in minimizing air pollution caused by vehicles, to the extent allowed by the Air Act and the federal Clean Air Act. See NMSA, § 74-2-5.D."

c. Conclusion 27 is amended as follows: "20.11.41.18(B)(4) NMAC, which allows air quality permit conditions to impose "reasonable restrictions and limitations other than those relating specifically to emission limits or emission rates[,]" ~~does not broaden the scope of the Board's authority to include traffic planning, zoning, or any other matter beyond that which has been delegated to the Board by the NM Act.~~ authorizes permit conditions designed to effectuate the general purpose of the Board's regulations – to prevent or abate air pollution. See NMSA, § 74-2-5.A."

e. Conclusion 28 is amended as follows: "AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of the original Permit No. 2037. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC."

f. Conclusion 31 is amended as follows: "AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of Permit No. 2037-M1. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC."

g. Conclusion 37 is amended as follows: "Any person seeking to construct a new stationary source or modify an existing stationary source must obtain ~~an~~ valid authority-to-construct permit pursuant to 20.11.41NMAC."

h. Conclusion 48 is amended as follows: "Notwithstanding a written statement by Division staff apparently to the contrary, Smith's did not commence a "modification" to the

Station prior to AQD's issuance of Permit No. 2037-M1 as that term is used in the NM Act and in 20.11.41 NMAC. NMSA 1978, § 74-2-2(M); 20.11.41.2(B)(3)(c) and .7(H) NMAC.

i. Conclusion 52 is amended as follows: "Petitioners ~~failed to carry~~ carried their burden of proving that the modification sought by Smith's ~~will~~ would violate any other provision of the NM Act or the Federal Act. NMSA 1978, § 74-2-7(C)(1)(c). Specifically, petitioners demonstrated by a preponderance of the evidence that the increase in throughput allowed by the modification would contribute indirectly to increased air pollution, in violation of the Air Act's mandate to the Board to prevent or abate air pollution. See NMSA 1978, § 74-2-5.A

j. Conclusion 56 is amended as follows: "The operation of the Smith's GDF facility in accordance with Permit #2037 M1 ~~will~~ would not violate ~~any provision of the Air Act, the City Joint Ordinance,~~ 20.11.41 NMAC, Authority to Construct, 20.11.42 NMAC, Operating Permits, 20.11.65 NMAC, Volatile Organic Compounds, 20.11.64 NMAC, Emission Standards for Hazardous Air Pollutants for Stationary Sources, or 40 CFR 63, Subpart CCCCCC, but would increase air pollution and increase risks to public health, in violation of the Air Act's mandate to the Board to prevent or abate air pollution. See NMSA 1978, § 74-2-5.A.

k. Conclusion 57 is deleted.

l. Conclusion 58 is renumbered as 57 and amended as follows: "The Division's decision to issue Permit #2037 M1 was not arbitrary or capricious. ~~was supported by substantial evidence in the record, and was in accordance with the law. Accordingly, Petitioners' requested relief must be denied.~~"

m. A new Conclusion 58 is inserted to read: "The Board's authorization to prevent or abate air pollution permits the Board to consider quality of life concerns that are directly or indirectly related to air quality. See NMSA 1978, § 74-2-2.B (defining air pollution in terms of

injury to human health or animal and plant life or interference with public welfare or reasonable use of property), See also NMSA 1978, § 74-2-5 E (requiring consideration of injury to health, welfare, visibility and property, and the public interest, including the social and economic value of the sources and subjects of air contaminants, when making regulations)."

n. A new Conclusion 59 is inserted to read: "Even if the Division's actions in considering and approving the requested permit modification complied with all regulatory provisions applicable at the time, including but not limited to Part 41 of 20.11 NMAC, the isolation of this decision process from that of other governmental entities resulted in a failure to consider all related factors, and thereby failed to achieve the purposes of the Air Act of protecting public health and welfare."

7. The Hearing Officer's proposed Conclusions of Law are incorporated herein by reference, with the modifications noted in paragraph 6 above.

IT IS THEREFORE ORDERED:

The Hearing Officer's recommended decision is set aside. The City's April 17, 2012 issuance of minor stationary source air quality Authority-to-Construct Permit Modification #2037-M1 to Smith's Food & Drug Center, Inc., is REVERSED.

Dr. Dona Upson, M.D., Chair
Albuquerque-Bernalillo County
Air Quality Control Board

NOTICE OF RIGHT TO REVIEW

Pursuant to Section 74-2-9, NMSA 1978, any person adversely affected by an administrative action of the Board may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date notice is given of this action.