

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

IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
No. 1677-M2 ISSUED TO SMITH'S FOOD
AND DRUG CENTERS, INC.

RECEIVED
ENVIRONMENTAL HEALTH
13 JUL -8 AM 11:52

Dempsey Power, Pat Toledo
and Andy Carrasco,

Petitioners,

vs.

AQCB Petition No. 2013-6

The City of Albuquerque and Smith's Food
and Drug Centers, Inc.,

Respondents.

**ANSWER OF THE CITY OF ALBUQUERQUE
TO AQCB PETITION No. 2013-6**

The City of Albuquerque (City), through the City Environmental Health Department (EHD), files this Answer in response to the Petition for Hearing on the merits filed on June 24, 2013 by Dempsey Power, also referred to in the Petition as Dempsey Powers, and Pat Toledo and Andy Carrasco. The City Answers as follows.

City's Answer to AQCB Petition No. 2013-6.

1. Page 1 of the Petition, first para., first sentence: The City admits that the Petitioners have petitioned the City EHD and the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) for a hearing. The City admits that the Air Board has authority to conduct hearings on the merits to address timely petitions that meet the requirements of the New Mexico Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -17 (1967, as amended through 2009) (NM Air Act), specifically NMSA 1978, Section 74-2-7(H), and the requirements of Air Board regulation 20.11.81, *Adjudicatory Procedures - - Air Quality Control Board*, specifically 20.11.81 14.A and B NMAC. The City denies that the EHD has the authority to grant an Air Board hearing on the merits.

The City denies that Petition No. 2013-6 meets the requirements of Section 74-2-7(H) NMSA and 20.11.81.14.A and B NMAC. Therefore, the City denies the allegation that the Petitioners petitioned as authorized by law. The City affirms it issued minor stationary source (Authority-to-Construct) air quality Permit No. 1677-M2 on April 30, 2013 to Smith's Food & Drug Centers, Inc. (Smith's), effective April 30, 2013. To the extent the remainder of the first sentence of the first paragraph on page 1 includes additional factual or legal allegations, the City denies.

2. Page 1, first para., second sentence: The City admits a copy of Permit No. 1677-M2 was attached to the Petition as Exhibit 1.

3. Page 1, first para., third sentence: The City admits Permit No. 1677-M2 authorized Smith's to increase the annual volume of gasoline, also known as "throughput", that is loaded into or is dispensed from the two underground storage tanks at the GDF to 5 million gallons.

4. Page 1, first para., fourth sentence: The City admits Petitioners provided some of the contact information required by 20.11.81.14.B(2)(b) NMAC. To the extent the remainder of the fourth sentence of the first paragraph on page 1 includes additional factual or legal allegations, the City denies.

5. Page 1, I, A, B, C: The City admits the Petitioners provided some of the contact information required by 20.11.81.14. B(2)(b) NMAC. The City notes the discrepancy between the spelling of the last name of Petitioner "Dempsey Powers" in the first line on page 1 of the Petition, the spelling "Dempsey Power" at I.A on page 1, and the name "Dempsey Power" that is both printed and written in cursive letters at Petition Exhibit 2.

6. Page 2, Section II, first para., first sentence: The City is without information sufficient to form a belief regarding the allegation contained in the first sentence of the first paragraph of Section II and therefore denies.

7. Page 2, II, first para., second sentence: The City denies the allegations in the second sentence of the first paragraph of section II. The City affirms that the reasons the City can deny an application for an air quality "construction" permit modification are listed at Section 74-2-7(C)(1) NMSA and 20.11.41.16 NMAC, *Basis for Permit Denial*. The NM Air Act and the applicable permitting regulation do not authorize the City to deny an application because of general allegations about possible future, unspecified and speculative effects on an individual's quality of life expressed after the deadline for public comment and the statutory deadline for the EHD to make a decision regarding the permit application has passed. See § 74-2-7(B)(2)(a).

8. Page 2, II, first para., third sentence: The City is without information sufficient to form a belief regarding the allegations contained in the third sentence of the first paragraph of Section II and therefore denies.

Regarding the reference to Petition Exhibit 2 following the third sentence of the first paragraph in section II, the Exhibit 2 sign-up sheet is entitled “Petition to appeal Smith’s permit for increase (*sic*) throughput” and begins with a “Petition summary and background” description at the top of the page. The description is inaccurate, misleading and inflammatory. Petitioners’ Exhibit 2 states the increase in gasoline throughput at the GDF will subject “the Four Hills Neighborhood ... to approximately 30 tons of cancer causing VOC’s”. The City affirms that the referenced 30 tons of VOCs includes both the original throughput and the modified increases in throughput. The VOCs are released over a twelve-month period, the VOCs from gasoline consist of compounds that are predominantly non-carcinogenic and carcinogenic compounds in gasoline make up less than 5% by weight. VOCs volatilize rapidly, dissipate into the ambient air, and are dispersed and diluted over a large area. Contrary to the introductory statement on the Exhibit 2 sign-up sheet, “the Four Hills Neighborhood” will not be “subject to approximately 30 tons of cancer causing VOC’s” “(i)f this throughput is granted”. The City denies the allegations in Petition Exhibit 2.

The City also notes regarding Exhibit 2 that Petitioners Toledo and Carrasco, who on June 19, 2013 apparently were the first two individuals to sign Exhibit 2, live approximately 6.5 miles from the Smith’s GDF. Some of the individuals who apparently signed Exhibit 2 after June 19, 2013, appear to have signed on June 13, 2013. Regarding Emily DeWolf, who also appears to be listed as Emily DeWeld on Exhibit 2: Ms. DeWolf is shown twice on Exhibit 2 at a 318 Kaylyn SE address.

9. Page 2, II, first para., fourth sentence. The City is without information sufficient to form a belief regarding the allegation contained in the fourth sentence of the first paragraph of Section II and therefore denies.

10. Page 2, II, first para, fifth sentence: The City denies the allegations in the fifth sentence of the first paragraph of Section II. The City affirms that public notice was provided by publication in the *Albuquerque Journal* as required by 20.11.41.14.A(3) NMAC, and that, in addition to complying with the 20.11.41.14.A(3) NMAC public notice requirement, the City sent an email and a copy of the public notice to officers of the following home owners associations, neighborhood associations and coalition in the vicinity of the Smith’s GDF:

Four Hills Village Home Owners Association (HOA)
East Gateway Coalition
Singing Arrow Neighborhood Association (NA)
Executive Hills Home Owners Association

Winterwood Park Home Owners Association
Four Hills Village Neighborhood Association.

The City affirms that, in response to the public notice emailed to officials of the organizations listed above, the President of Four Hills Village NA send questions via email to EHD permit writer Regan Eyeran, P.E., and received an email response from Ms. Eyeran. The President of Executive Hills HOA also sent an email to Ms. Eyeran with questions, and received an email response. Thereafter, no individual or entity in the vicinity of Smith's GDF requested a public information hearing by the deadline in the public notice. Petitioners Carrasco and Toledo, who live approximately 6.5 miles from the Smith's GDF, were the only individuals or entities who requested a PIH. 20.11.41.14.B NMAC authorizes the EHD Director to determine whether there was significant public interest to warrant holding a PIH. The City further affirms that it was within the EHD Director's discretion to deny Petitioner Carrasco's and Petitioner Toledo's request for a PIH under the circumstances.

11. Page 2, II, first para., sixth sentence. The City denies the allegations in the sixth sentence of the first paragraph of Section II.

Regarding the citation to *Martinez v. Maggiore*, 2003-NMCA-0403, 133 N.M. 472, following the sixth sentence of the first paragraph in section II: Petition AQCB 2013- 6 must meet all requirements of 20.11.81.14.B NMAC. 20.11.81.14.B(2)(d) requires the Petitioners to "state the factual or legal basis of petitioner's objections to the permitting action taken by the department". The Petition does not allege that the City failed to meet any specific requirement of NM Air Act Section 74-2-7 or the applicable permitting regulation, 20.11.41 NMAC, or any other applicable regulation. *Martinez* is regarding the New Mexico Solid Waste Act, the related solid waste regulations, an application for modification of a landfill permit that, if granted, would allow "special waste" including asbestos to be accepted at the landfill, and the failure of the applicant and the New Mexico Environment Department to comply with specific, cited requirements of the Solid Waste Act and the solid waste regulations regarding providing public notice. The specific public notice requirements of the Solid Waste Act and solid waste regulations do not apply to air quality minor stationary source Permit No. 1677-M2. Citations to *Martinez* do not substitute for proof - or even allegations, which are absent from the Petition - that the City failed to comply with specific, cited requirements of 20.11.41 NMAC. The City affirms that the public notice requirement that applied to the application for Permit No. 1677-M2 is established by 20.11.41.14.A(3) NMAC, and that the City met all federal, state and local public notice requirements regarding the application for modification of the permit. The City denies that the public notice requirements of the Solid Waste Act and the solid waste regulations cited in *Martinez* apply to the application for modification of Permit No. 1677-M1.

12. Page 2, II, second para., first sentence: The City admits the allegations asserted in the first sentence of the second paragraph of Section II.

13. Page 2, II, second para., second sentence: The City admits the allegations asserted in the second sentence of the second paragraph of Section II.

14. Page 2, II, second para., third sentence: The City admits the allegations asserted in the third sentence of the second paragraph of Section II and affirms there is no requirement in the NM Air Act or 20.11.41 NMAC that the City send a response to a request for a PIH before the City makes a final decision regarding a pending application. To the extent the remainder of the third sentence of the second paragraph of Section II includes additional factual or legal allegations, the City denies.

15. Page 2, II, second para., fourth sentence: The City denies that the quoted wording is from a May 23, 2013 letter from Acting Deputy Director Danny Nevarez and denies that Exhibit 5, which is referenced, is a May 23, 2013 letter. To the extent the remainder of the fourth sentence of the second paragraph of section II includes additional factual or legal allegations, the City denies.

16. Page 3, II, third para. of section II, first sentence (top of pg. 3): The City denies the allegations in the first sentence of the third paragraph of section II. Section 74-2-7(H) NMSA and 20.11.81.14.B(2)(c) NMAC require a petitioner to state how the petitioner “**is** adversely affected by the permitting action” taken by the EHD. Emphasis added. A general statement by Petitioners Toledo and Carrasco that, as “members of the Albuquerque community”, they have an interest in protecting the “quality of life in Albuquerque” does not meet the requirements of 20.11.81.14.B(2)(c) NMAC. The City can only deny an application for a permit or permit modification for the reasons listed in the NM Air Act at Section 74-2-7C(1) and in 20.11.41.16 NMAC. The Air Board can only reverse EHD’s issuance of a permit or permit modification if EHD has not complied with applicable federal regulatory requirements, applicable NM Air Act requirements or applicable Air Board regulatory requirements. *See* NM Air Act Section 74-2-7(K) NMSA.

Regarding the citation to *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, following the first sentence in the third paragraph of section II: the New Mexico Supreme Court in *Martinez* reviewed the permitting and notice requirements of the Solid Waste Act and the solid waste regulations, not the NM Air Act and 20.11.41 NMAC. The court in *Martinez* held that the appellants had standing to pursue their claims in part because they claimed an “injury in fact” from the decision granting the landfill application and because the applicant for the landfill permit modification had failed “to publish notice as required” by a specific, cited subsection of the Solid Waste Act. *Martinez*, 2003-NMCA-043, ¶¶ 19, 20, 133 N.M. 472. The Petitioners before the Air Board in AQCB 2013-6 have not cited a single NM Air Act or 20.11.41 NMAC public notice requirement that the

City failed to meet, nor have the Petitioners alleged the City had a legal basis for denying the application because of quality of life issues. Petitioners Toledo and Carrasco do not have standing as a result of the Petitioners alleging a generalized concern as “members of the Albuquerque community” that the permit modification might in some manner “adversely affect the quality of life in Albuquerque”.

17. Page 3, II, third para. of section II, second sentence: The City is without information sufficient to form a belief regarding Petitioner Carrasco’s and Petitioner Toledo’s beliefs and thought processes, and therefore the City denies. The City also denies that the increase in throughput at the Smith’s GDF authorized by Permit No. 1677-M2 “poses serious health, safety and environmental hazards to any citizens who happen to be traveling near the facility”. The City affirms that Permit No. 1677-M2 meets all federal, state and local requirements, including requirements regarding gasoline throughputs, emissions and performance measures, which also are known as management practices. To the extent the remainder of the second sentence of the third paragraph of section II includes additional factual or legal allegations, the City denies.

18. Page 3, II, third para. of section II, third sentence: The City is without information sufficient to form a belief regarding the management and marketing structure of Smith’s and therefore denies. The City affirms that the City and Bernalillo County are in compliance with all federal, state and local air quality standards, and the City had no legal basis for denying the application. The Petitioners have not cited to any legal requirement regarding alleged cumulative impacts that authorized the City to deny the application. To the extent the remainder of the third sentence of the third paragraph of section II includes additional factual or legal allegations, the City denies.

19. Page 3, III, first para., first sentence: The City admits the Petitioners are requesting a first hearing on the merits before the Air Board regarding the City’s issuance of Permit No. 1677-M2 and admits the remainder of the first sentence of the first paragraph of Section III.

20. Page 3, III, first para., second sentence: The City admits that the Petitioners object to the issuance of Permit No. 1677-M2 and affirms that Permit No. 1677-M2 meets all federal, state and local requirements, including requirements regarding gasoline throughputs, emissions and management practices.

21. Page 3, III, first para., third sentence: The City denies the allegations in the third sentence of the first paragraph of section III.

22. Page 3, III, first para., fourth sentence: The City admits that Permit No. 1677-M2 was issued pursuant to 20.11.41 NMAC, *Authority to Construct*, and also affirms that Permit No. 1677-M2 was issued pursuant to 20.11.64 NMAC, *Emission Standards for Hazardous Air Pollutants for Stationary Sources*; 20.11.65 NMAC,

Volatile Organic Compounds; Section 74-2-7; and applicable federal regulations including 40 CFR 63, Subpart CCCCCC, *National Emission Standards for Hazardous Source Categories: ... Gasoline Distribution Facilities*.

23. Page 3, III, first para., fifth sentence: The City admits that 20.11.41.14.A(3) NMAC requires EHD to “publish a public notice in a local newspaper of general circulation” and admits that 20.11.41.14.B NMAC requires EHD to hold a PIH “if the director determines that there is significant public interest”. The City affirms that the newspaper publication of the public notice met all requirements of 20.11.41.14.A(3) NMAC, that substantial additional public notice was provided as described in Answer 10, and that a PIH was denied by the EHD Director as authorized by 20.11.41.14.B NMAC. To the extent the fifth sentence of the first paragraph of Section III includes additional factual or legal allegations, the City denies.

24. Page 4, III, second para. of III, first sentence: The City denies the allegations in the first sentence of the second paragraph of section III. Regarding the reference to Petition Exhibit 2 following the first sentence in the second paragraph in section III, the Exhibit 2 sign-up sheet is entitled “Petition to appeal Smith’s permit for increase (*sic*) throughput” and begins with a “Petition summary and background” description at the top of the page. The description is inaccurate, misleading and inflammatory. Petitioners’ Exhibit 2 states the increase in gasoline throughput at the GDF will subject “the Four Hills Neighborhood ... to approximately 30 tons of cancer causing VOC’s”. The City affirms that the referenced 30 tons of VOCs includes both the original throughput and the modified increases in throughput. The VOCs are released over a twelve-month period, the VOCs from gasoline consist of compounds that are predominantly non-carcinogenic and carcinogenic compounds in gasoline make up less than 5% by weight. VOCs volatilize rapidly, dissipate into the ambient air, and are dispersed and diluted over a large area. Contrary to the introductory statement on the Exhibit 2 sign-up sheet, “the Four Hills Neighborhood” will not be “subject to approximately 30 tons of cancer causing VOC’s” “(i)f this throughput is granted”. The City denies the allegations in Petition Exhibit 2.

The City also notes regarding Exhibit 2 that Petitioners Toledo and Carrasco, who on June 19, 2013 apparently were the first two individuals to sign Exhibit 2, live approximately 6.5 miles from the Smith’s GDF. Some of the individuals who apparently signed Exhibit 2 after June 19 appear to have signed on June 13, 2013. Regarding Emily DeWolf, who also appears to be listed as Emily DeWeld on Exhibit 2: Ms. De Wolf is shown twice on Ex. 2 at a 318 Kaylyn SE address.

25. Page 4, III, second para. of III, second sentence: The City denies that there was “not adequate or proper notice” and denies that a PIH was required. In addition, the wording of Exhibit 2 speaks for itself. The City cannot speculate about the information that was provided to the individuals before they signed Exhibit 2 or about the state of

mind of the individuals who signed as a result of the inaccurate, misleading and inflammatory information they may have received when Exhibit 2 was offered for signature. See Answers 8 and 24 above. The City affirms that the newspaper publication of public notice met all requirements of 20.11.41.14.A(3) NMAC, substantial additional public notice was provided as described in Answer 10, and a PIH was denied by the EHD Director as authorized by 20.11.41.14.B NMAC. To the extent the remainder of the second sentence of the second paragraph of section III includes additional factual or legal allegations, the City denies.

26. Page 4, III, second para. of III (at the top of pg. 4), third sentence: The City admits that Petitioners Toledo and Carrasco requested a PIH and that the EHD Director denied the PIH as authorized by 20.11.41.14.B NMAC. To the extent the remainder of the third sentence of the second paragraph of section III includes additional factual or legal allegations, the City denies.

27. Page 4, III, second para. of III, fourth sentence: Petition Exhibit 4 speaks for itself. Although the facts stated in quoted wording are accurate, the quoted wording is not included in Petition Exhibit 4. To the extent the remainder of the fourth sentence of the second paragraph of section III includes additional factual or legal allegations, the City denies.

28. Page 4, III, second para. of III, fifth sentence: Petition Exhibit 4 speaks for itself. The City denies the allegations in the fifth sentence of the second paragraph of section III because the quoted wording does not appear in Exhibit 4 and because the fifth sentence of the second paragraph of section III mischaracterize the meaning of Exhibit 4. Exhibit 4 states:

The Four Hills Village Neighborhood Association and the Four Hills Village Homeowners Association are located south of the Tramway GDF. No officer or member of either association – or any other entity or individual from the vicinity of the [Smith’s] Tramway GDF – contacted the Department by the April 24, 2013 deadline to ask for a PIH. ... [Mr. Toledo] and Mr. Carrasco state in your April 24 request that you are members of the Summit Park Neighborhood Association (Summit Park NA), which is located north of Lomas and west of Carlisle NE. Other than you and Mr. Carrasco, no officer or member of the Summit Park NA has contacted the Department asking for a PIH. No one in addition to you and Mr. Carrasco has requested a PIH.

To the extent the remainder of the fifth sentence of the second paragraph of section III includes additional factual or legal allegations, the City denies.

29. Page 4, III, third para. of III, first sentence: The City denies the allegations in the first sentence of the third paragraph of section III.

30. Page 4, III, third para. of III, second sentence: The City admits Petitioners Toledo and Carrasco requesting a PIH on April 24, 2013. The City denies that significant public interest was expressed by individuals or entities before the April 24, 2013 deadline. The City admits that Petitioner Power apparently agreed to be a Petitioner after the public comment and PIH request deadline passed. However, the Petitioners did not sign AQCB Petition No. 2013-6 “under oath or affirmation and attest to the truth of the information contained” in AQCB Petition No. 203-6 as required by 20.11.81.14.A(1) NMAC. After the April 24, 2013 deadline, individuals appear to have signed Petition Exhibit 2 on June 19 and then on June 13, 2013. However, as stated in Answers 8 and 24, the introductory wording of the Exhibit 2 sign-up sheet is inaccurate, misleading and inflammatory. To the extent the remainder of the second sentence of the third paragraph of section III includes additional factual or legal allegations, the City denies.

31. Page 4, III, third para. of III, third sentence: The City denies the allegations in the third sentence of the third paragraph of section III, affirms that the City provided all public notice required by 20.11.41.14A(3) NMAC and affirms that substantial additional notice was provided as described in Answer 10 above.

32. Page 4, III, third para. of III, fourth sentence: The allegations in the fourth sentence of the third paragraph of section III are speculative and unsubstantiated. The City is without information sufficient to form a belief regarding the allegations and therefore denies.

33. Page 4, III, third para. of III, fifth sentence: The City denies the allegations in the fifth sentence of the third paragraph of section III.

34. Page 4, III, third para. of III, sixth sentence: The City affirms that that the City provided the public notice that was required by 20.11.41.14.A(3) NMAC, substantial additional notice was provided as established in Answer 10 above and the EHD Director denied the PIH as authorized by 20.11.41.14.B NMAC. The City denies the allegations in the sixth sentence of the third paragraph of section III, which are speculative and unsubstantiated.

Regarding the citation to *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, following the sixth sentence of the third paragraph in section III: *Martinez* is regarding the New Mexico Solid Waste Act and solid waste regulations, an application for modification of a landfill permit that, if granted, would allow “special waste” including asbestos to be accepted at the landfill, and the failure of the applicant and the New Mexico Environment Department to comply with specific, cited requirements of the Solid Waste Act and the solid waste regulations regarding providing public notice. The specific public notice requirements of the Solid Waste Act and solid waste regulations do not apply to air quality minor stationary source Permit No. 1677-M2. Citations to

Martinez do not substitute for proof - or even allegations, which are absent from the Petition - that the City failed to comply with the specific, cited public notice or PIH requirements of 20.11.41.14.A and B NMAC. The City affirms that the specific, applicable public notice requirement that applied to the application for Permit No. 1677-M2 is established by 20.11.41.14.A(3) NMAC, and that the City met all federal, state and local public notice requirements regarding the application for modification of Permit No. 1677-M1. The City denies that the public notice requirements of the Solid Waste Act and the solid waste regulations cited in *Martinez* apply to the application for modification of Permit No. 1677-M1.

35. Page 5, III, fourth para. of III, first sentence: The City denies that the Solid Waste Act and solid waste regulation requirements regarding public notice and hearings cited and analyzed in *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, ¶ 21, 138 N.M.133, apply to air quality minor stationary source permit applications and denies the argument and allegations asserted in the first sentence of the fourth paragraph of section III. The City admits the New Mexico Supreme Court in *Rhino*, 2005-NMSC-024, ¶ 21, 138 N.M.133, cited the Solid Waste Act and the solid waste regulations regarding the objective of the New Mexico Environment Department hearing that is required by the Solid Waste Act. The NM Air Act permitting section establishes at NMSA 1978, Section 74-2-7(B)(5), that the EHD is not required to hold a hearing before the EHD makes a decision regarding a pending air quality permit application. Citations to *Rhino* and general statements about the purposes of the Solid Waste Act and the solid waste regulations do not substitute for proof - or even allegations, which are absent from the Petition - that the City failed to comply with specific, cited requirements of 74-2-7 NMSA or the applicable permitting regulation, 20.11.41 NMAC.

The City affirms that the City provided the public notice required by 20.11.41.14A(3) NMAC, provided substantial additional notice as described in Answer 10 above, and the EHD Director denied the PIH as authorized by 20.11.41.14.B NMAC. To the extent the remainder of the first sentence of the fourth paragraph of Section III includes additional factual or legal allegations, the City denies.

36. Page 5, III, fourth para. of III, second sentence: As established in Answer 35 immediately above, *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, ¶ 21, 138 N.M.133, analyzes the requirements of the Solid Waste Act and the solid waste regulations. Citations to *Rhino* and short quotations excerpted from *Rhino* do not substitute for proof - or even allegations, which are absent from the Petition - that the City failed to comply with specific requirements of 74-2-7 NMSA or the applicable permitting regulation, 20.11.41 NMAC. The City affirms that that the City provided all public notice required by 20.11.41.14.A(3) NMAC, substantial additional notice was provided as described in Answer 10 above and the EHD Director denied the PIH as authorized by 20.11.41.14.B NMAC. To the extent the remainder of the second sentence

of the fourth paragraph of Section III includes additional factual or legal allegations, the City denies.

37. Page 5, III, fourth para. of III, third sentence: The City admits the New Mexico Court of Appeals in *Martinez v. Maggiore*, 2003-NMCA-043, ¶ 13, 133 N.N. 472, held that “the administrative proceedings conducted subsequent to Landfill’s defective notice are invalid”. The court in *Martinez* determined that the notice provided by the applicant and the New Mexico Environment Department did not comply with specific, cited requirements of the Solid Waste Act and the solid waste regulations. The City affirms that the City met all federal, state and local requirements when reviewing the application for Permit No. 1677-M2 and that Permit No. 1677-M2 was issued consistent with all legal requirements. Citations to general principles in *Martinez* do not substitute for proof - or even allegations, which are absent in the Petition - that the City failed to meet the requirements of 74-2-7 NMSA or the applicable permitting regulation, 20.11.41 NMAC. To the extent the remainder of the third sentence of the fourth paragraph of Section III includes additional factual or legal allegations, the City denies.

**The City’s Affirmative Defenses and
Responses to Requests for Relief Asserted in Petition No. AQCB 2013-6**

38. Petition No. AQCB 2013-6 fails to state a claim upon which relief may be granted by the Air Board.

39. Petitioner Power does not have standing to be a Petitioner because he has not complied with the statutory requirements for filing a petition to the Air Board. Petitioner Power must have both “participated in ... (the) permitting action before ... the (EHD)” “**and**” be a person who “**is** adversely affected by such permitting action”. See § 74-2-7(H) and 20.11.81.2.A(1) NMAC. Emphasis added. The permitting action is no longer “before” the EHD because the EHD issued Permit No. 1677-M2 on April 30, 2013. If either of the two requirements established by Section 74-2-7(H) are not met, Petitioner Power does not have standing. Petitioner Power did not meet either requirement.

40. Petitioners Toledo and Carrasco do not have standing to be Petitioners because they have not complied with the statutory requirements for filing a petition to the Air Board. Petitioner Toledo and Petitioner Carrasco must have both: 1.) “participated in ... (the) permitting action before ... the (EHD)”; “**and**” be 2.) a person who “**is** adversely affected by such permitting action”. See § 74-2-7(H) and 20.11.81.2.A(1) NMAC. Emphasis added. The permitting action is no longer “before” the EHD because the EHD issued Permit No. 1677-M2 on April 30, 2013. If either of the two requirements of Section 74-2-7(H) are not met, Petitioner Toledo and Petitioner Carrasco do not have

standing. Neither Petitioner Toledo nor Petitioner Carrasco established he is a person who “**is** adversely affected by such permitting action”. Emphasis added.

41. The Petition does not cite to any applicable federal regulation, NM Air Act provision or Air Board regulation that supports Petitioners’ claim that the City failed to provide the required, adequate public notice or the required opportunity to request a PIH.

42. The Petition does not cite to any applicable federal regulation, NM Air Act provision or Air Board regulation that required or authorized the City EHD to deny the permit modification requested by Smith’s.

43. The Petition does not comply with the requirement of 20.11.81.14.A(1) NMAC that the Petition must be signed “under oath or affirmation and attest to the truth of the information contained therein”.

44. The Petition does not include all of the elements required by Paragraph (2) of Subsection B of 20.11.81.14 NMAC.

45. The Petition does not “state in what manner ... petitioner (Power) participated in the permitting action that was pending before the department”. 20.11.81.14.B(2)(c) NMAC. Word in parenthesis added.

46. The Petition does not state “how the petitioner (Power, Carrasco and Toledo) **is** affected by the permitting action taken by the department”. 20.11.81.14.B(2)(c) NMAC. Words in parenthesis added. Emphasis added.

47. The Petition does not state “the factual **and** legal basis of petitioner’s objections to the permitting action taken by the department” as required by 20.11.81.14.B(2)(d) NMAC. Emphasis added. The Petition does not allege that the City failed to comply with any specific, applicable federal regulation, NM Air Act permitting provision or Air Board regulation and does not cite to the applicable law or regulation. Stating general legal concepts or principles and citing to cases that analyze requirements of the Solid Waste Act and solid waste regulations does not provide the factual and legal basis required by 20.11.81.14.B(2)(d) NMAC.

48. The Petition does not “state the ... legal basis for the remedy” requested as required by 20.11.81.14.B(2)(e) NMAC. The Petition does not allege the City failed to comply with any specific, applicable federal regulation, NM Air Act permitting provision or Air Board regulation and cite to the applicable law or regulation. Summarizing general legal concepts or principles and citing to cases that analyze requirements of the Solid Waste Act and solid waste regulations does not provide the “legal basis for the remedy” that is required by 20.11.81.14.B(2)(e) NMAC.

49. The Petition does not state “how granting the remedies (requested) is within the air quality jurisdiction of the board” as required by 20.11.81.14.B(2)(e) NMAC. Word in parenthesis added.

50. In the Petition, at page 5, in the first and second paragraphs of section IV, the Petition does not request a remedy that is authorized by either Section 74-2-7(K) or 20.11.41.15.F NMAC, which authorize the Air Board to “sustain, modify or reverse the action of” the EHD. For the reasons stated in Answers 11, 16, 34 and 37, the court’s analysis and decision in *Martinez v. Maggione*, 2003-NMCA 043, ¶ 13 does not apply to EHD’s review and decision regarding the application for Permit No. 1677-M2.

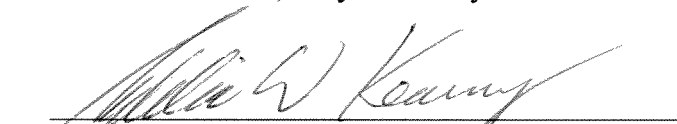
51. Pursuant to 74-2-7(K) NMSA, 20.11.41.15.F NMAC and 20.11.81.16.C NMAC, at the hearing on the merits the burden of proof is on the Petitioners, who must prove their case by a preponderance of evidence. Based on the allegations and arguments in the Petition, the Petitioners cannot carry their burden of proof and prevail at the hearing.

52. The City reserves the right to assert such additional affirmative defenses as may appear and prove applicable during the course of the hearing.

WHEREFORE, having fully answered, the City respectfully asks the Air Board to issue a Final Order denying the remedies requested in Petition No. 2013-6, dismissing Petition No. 2013-6, sustaining the issuance of air quality minor stationary source Authority-to-Construct Permit No. 1677-M2, and granting the City any additional relief the Air Board deems just and proper.

Respectfully submitted,

CITY OF ALBUQUERQUE
David J. Tourek, City Attorney



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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, a true and correct copy of the foregoing *Answer of the City of Albuquerque to AQCB Petition No. 2013-6* was served on the following as indicated:

1. The City's original *Answer* 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.

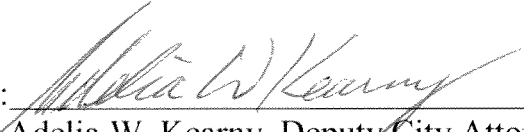
3. One copy was hand-delivered to the Hearing Clerk for delivery to the Air Board Attorney and one copy was sent by electronic mail to:

Bill Grantham
c/o Elizabeth Jones, Hearing Clerk
Control Strategies Section
Environmental Health Department
One Civic Plaza
Room 3023
Albuquerque, NM 87102
wggrantham@gmail.com
*Attorney for the Albuquerque-Bernalillo
County Air Quality Control Board*

4. One copy was mailed by regular mail and sent by electronic mail to:

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