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. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,
Petitioners.

No. AQCB 2014-2

PETITIONERS' RESPONSE IN OPPOSITION TO SMITH'S MOTION FOR SUMMARY JUDGMENT

COME NOW the Petitioners, by and through undersigned counsel of record, and hereby submit their Response in Opposition to Smith's Motion for Summary Judgment ("Motion").

INTRODUCTION

Smith's filed its motion for summary judgment on Petitioner's request for a NMSA §74-2-7 hearing on the merits regarding permit No. 3135 two days after the City filed its motion for summary judgment. Petitioners filed their response in opposition to the City's motion for summary judgment on October 2, 2014. As the City's and Smith's positions to deny required public participation under the Act and selectively enforce provisions of the Air Quality Control Act ("AQCA") in favor of industry are substantially the same, Petitioners hereby incorporate their arguments and authorities in opposition to the City's motion in full, but address Smith's separate arguments where appropriate.

Smith's arguments rely on the misplaced notion that the Air Board has no authority to consider Petitioners' evidence or grant their requested relief on purported pre-emption doctrine. This erroneous argument flows from the City's historic and isolated enforcement of performance standard requirements incorporated under the Act in reviewing and issuing air permits. Like the

City, however, Smith's can point to no evidence of express or implied pre-emption under federal law sufficient to grant its motion, and the AQCA (and associated regulations) on its face do not mutually exclude the Air Board's broader regulatory authority from enforcement of performance standards. NMSA (1978) § 74-2-5 (A) (The environmental improvement board or the local board shall prevent or abate air pollution.); ABQ Ord.§ 9-5-1-7 (C) (2) (a) (The AQCA provides authority for the Board to deny a permit for new sources if "the source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance, or a regulation of the board.") (emphasis added); NMSA (1978) § 74-2-5 (E) ("In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to … character and degree of injury to or interference with health, welfare, visibility and property … the public interest, including the social and economic value of the sources and subjects of air contaminants…); NMSA § 74-2-5.3 (C) ("In adopting regulations, the environmental improvement board or the local board shall consider the following: … the public interest, including the social and economic value of the sources of emissions and subjects of air contaminants …energy, environmental and economic impacts and other social costs…").

Tellingly, Smith's completely ignores the final decision of the Air Board decided against the City under *In re Air Quality Permit* No. 2037-M1 that was not stayed; involves substantially the same parties and issues, and which held in part that, "[t]he Board's authorization to prevent or abate air pollution permits the Board to consider quaility of life concerns that are directly or indirectly related to air quality." **Exhibit 1**—Smith Motion to Stay, *attached*; **Exhibit 2**—Final Order and Satement of Reasons at m; **Exhibit 3**—Order denying Stay, *attached.* *In re Air Quality Permit* No. 2037-M1 should be binding in this matter. This decision appropriately

refrained from further limiting and impermissible statutory interpretation in reviewing the requirements of the AQCA and reaching its decision.

Because the plain language of the AQCA taken as a whole is unambiguous and clear, it is necessary for Smith's to advance a forced and limiting interpretation of the Act to attempt denial of Petitioners' right to the evidentiary hearing on the merits, which such statutory interpretation under the law is impermissible. 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction, § 45:12, 126 (7th ed.2007) (stating that "[a] statute should be read according to its natural and most obvious import of language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation" (footnote omitted)); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

Like the City, Smith's attempts to pre-empt Petitioner's timely filed Petition for hearing on the basis of burden of proof under NMSA (1978) §74-2-7 (K) that Petitioners must carry *at hearing* regarding their Petition in opposition to permit No. 3135. Motion, p.2; *see also* Prehearing order, ¶ 2 ("Petitioners with the burden of proof under Section 74-2-7.K will present their evidence first."). The City admits there is no summary judgment proceeding under the Act. [1] Smith's own misplaced reliance on *Duke City Lumber*, discussed below, went through adminsitrative hearing. NMSA (1978) §74-2-7 (K) is not intended to pre-empt timely filed Requests for Hearings under 74-2-7 NMSA 1978 and 20.11.81 NMAC.

[1] Petitioners do not waive and hereby reassert their objections made at pre-hearing telephonic status conference to the hearing officer and the parties that dispositive motion practice is inappropriate and not in compliance with the legislative intent of §74-2-7 NMSA and 20.11.81 NMAC.

Smith's intends to disallow important public participation clearly contemplated by the Legislature under the Air Quality Control Act ("AQCA") and established precedent. Smith's motion for summary judgment admits that the City did not weigh and consider various factors that involve the character and degree of injury to or interference with health, welfare, visibility and property and the public interest in this matter as required under the AQCA. Motion, ¶ 8 ("Tavarez and Eyerman explained that GDF emissions are controlled through performance standards…Taverez and Eyerman explained that GDFs are not regulated by imposing limits on the quantity of pollutants that GDFs may emit. AR 53, p. 149; AR 55, pp. 159-62; PIH 4/3/14 audio at 22:35 to 39:09; AR 52, p. 143.).

Ignoring the aforementioned important considerations that the Air Board must consider when adopting and enforcing regulations under its jurisdiction allows Smith's to not only attack the Petitioner-fact witnesses with personal knowledge in this case (clearly admissible evidence) but also allows Smiths to attack Petitioner's expert Dr. Rowangould's intended technical witness testimony that is contemplated under the AQCA, grounded on reliance materials, subject to further factual development at hearing, and that points to multiple provisions of the Act that the City and Smith's in concert ignore.

For all of the foregoing and following reasons, the Hearing Officer should deny Smith's Motion for Summary Judgment. The Hearing Officer should allow Petitioners to put on evidence, data, and views in support of further factual development of their case to review permit No. 3135 at a hearing on the merits such that the Air Board thereafter orders such further study and amendment to permit No. 3135 as justice requires.

DISPUTED MATERIAL FACTS

1. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 3 because the record, and the City's position clearly shows that the EHD did not properly consider other factors other than isolated performance standard on ruling the proposed permit "complete." AR 53, p. 149; AR 55, pp. 159-62; PIH 4/3/14 audio at 22:35 to 39:09; AR 52, p. 143.

2. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 7 to the extent that Smith's offered no explanation as to why its steps taken in obtaining the permit did not consider other enumerated factors addressing health, welfare, safety of the public, community and property concerns as prescribed under the Air Quality Control Act ("AQCA").

3. Petitioners dispute Smith's "Undisputed Material Fact" ¶¶ 8, 12 to the extent that the City does not understand its own regulations and mandate under the AQCA which is supported by the Air Board's own decision under *In re Air Quality Permit* No. 2037-M1 which is not stayed and should be binding on the Air Quality Program and by other established case law such as *Colonias Dev. Council v. Rhino Enviro. Services,* 2005-NMSC-024, 21, 138 N.M. 133.

4. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 9 to the extent that the City gave no weight to comments and concerns of the public at the public information hearing ("PIH") regarding health, welfare, safety of the public, community, and property concerns.

5. Petitioners dispute Smith's "Undisputed Material Fact" ¶¶ 10, 14, 18 to the extent that Smith's does not understand the City's regulations and mandate under the AQCA which is supported by the Air Board's own decision under *In re Air Quality Permit* No. 2037-M1 which is not stayed and should be binding on the Air Quality Program and by other established case law such as *Colonias Dev. Council v. Rhino Enviro. Services,* 2005-NMSC-024, 21, 138 N.M. 133.

6. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 11 to the extent that the mental impressions of Petitioner Freed regarding adverse impacts of the gas station are "major" and not to be understood in a technical sense. Petitioner Freed is a layperson and member of the public that the City should be serving and protecting under the AQCA.

7. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 15. Bare contentions of counsel are insufficient to support a prima facie showing that Smith's is entitled to summary judgment.

8. Petitioners dispute that the AQCA "expressly prohibits" the Air Board from "deviating" from Hex C, Part 41 and Part 64 to the extent that other enumerated regulatory factors in issuing a permit are not mutually exclusive from these regulations, do not constitute "deviation", and all provisions of the AQCA should be given effect as a matter of basic Horn book law regarding statutory construction Motion, p. 6.

9. Petitioners dispute that Summary Judgment proceedings are appropriate or allowable under the AQCA, NMSA (1978) § 74-2-1 et seq. and that "there is no need for a hearing on the merits. Motion, pgs. 6, 7, 9.

10. Petitioners dispute that NMSA (1978) § 74-2-7 (K) prescribes a summary judgment standard of review intended to pre-empt timely filed Requests for Hearings under 74-2-7 NMSA 1978 and 20.11.81 NMAC. *Id.*

11. Petitioners dispute that their requested relief constitutes a "standardless" approach as the Air Board's regulatory authority under the AQCA is not mutually exclusive from or isolated from standards incorporated under the Act. *Id.*, pgs. 8, 10.

12. Petitioners dispute that their community, health, property and safety concerns do not have a nexus to the AQCA and associated regulations. *Id.*

13. Petitioners dispute that the Air Board does not have the authority to hear and provide relief as stated under Petitioners' request for hearing. *Id.*

14. Petitioners dispute that more could not be done under the issued permit to prevent or abate air pollution under the mandate of the AQCA and affirmatively state that the Act required such further action that the City chose to unilaterally ignore in favor of industry. *Id.*

15. Petitioners dispute that the permit complies with existing regulations. *Id.*

16. Petitioners dispute that "they must go through legislative and rulemaking processes" to obtain their requested relief as the AQCA already prescribes their requested relief and Petitioners therefore seek to enforce existing law rather than change it. *Id.*, p.9.

17. Petitioners dispute that their Notice of Intent ("NOI") contains no evidence to prove that the Albuquerque Environmental Health Department ("EHD") should not have issued Permit No. 3135. *Id.*, p. 10, 11.

18. Petitioners dispute that variance proceeding is relevant in this action. *Id.*

UNDISPUTED MATERIAL FACTS

1. Petitioners do not dispute Smith's "Undisputed Material Fact" ¶¶ 1, 2, 4, 5, 6, 13, 16, 17.

2. Petitioners do not dispute that air quality permitting in New Mexico is governed by the AQCA and associated regulations including "Part 41." Motion, p. 6.

3. Petitioners do not dispute that a question before the Air Board is whether the emissions authorized meet applicable local, state and federal air pollution standards and regulations. *Id.*, p. 7.

4. Petitioners do not dispute that the grounds for permit denial regards determination of compliance with standards and regulations. *Id.*, p. 9.

STANDARD OF REVIEW

If a party makes a prima facie showing of no genuine issue of material fact and that as a matter of law they are entitled to summary judgment, then the burden shifts to claimant to show at least a reasonable doubt as to whether a genuine issue for trial exists. *Koenig v. Perez*, 1986-NMSC-066, 104 N.M. 664, 726 P.2d 341. Moreover, mere argument or bare contentions of the existence of a material issue of fact is insufficient. *Spears v. Canon de Carnue Land Grant*, 1969-NMSC-163, 80 N.M. 766, 769, 461 P.2d 415, 418. The party opposing the summary judgment motion must adduce evidence to justify a trial on the issues. *Id.*

"An inference is not a supposition or a conjecture, but is a logical deduction from facts proved... " *Stambaugh v. Hayes,* 1940-NMSC-048, 44 N.M. 443, 451, 103 P.2d 640, 645 (citation omitted). "In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must "look to the substantive law governing the dispute, *Farmington Police Officers Ass'n. v. City of Farmington,* 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204. The inquiry's focus should be on whether, under substantive law, the fact is "necessary to give rise to a claim." *Eoff v. Forrest,* 1990-NMSC-033, 109 N.M. 695, 702, 789 P.2d 1262, 1269; *see also Martin v. Franklin Capital Corp.,* 2008-NMCA-152, ¶ 6, 145 N.M. 179, 195 P.3d 24 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute.")." *Romero v. Philip Morris Inc.*, 2010-NMSC- 35, ¶ 11, 242 P.3d 280, 148 N.M. 713.

"Summary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is esssential for determination of the central legal

issues involved." *National Excess Ins. Co. v. Bingham*, 1987-NMCA-109, 106 NM 325, 328, 742 P.2d 537, 540.

APPLICABLE LAW

Standing in New Mexico

Unlike the federal courts, "New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution." *ACLU of N.M.,* 2008–NMSC–045, ¶ 9, 144 N.M. 471, 188 P.3d 1222 (internal quotation marks and citation omitted). New Mexico courts, however, generally expect a litigant to demonstrate the traditional standing requirements of "injury in fact, causation, and redressability to invoke the court's authority to decide the merits of the case." *Id.*, ¶ 10, 144 N.M. 471, 188 P.3d 1222. Where the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue. *Id.*, ¶ 9 n. 1, 144 N.M. 471, 188 P.3d 1222. "Requiring that the party bringing suit show that he is threatened with injury in a direct and concrete way serves well-established goals of sound judicial policy. *Id.*, ¶ 19. Once the party seeking review alleges that he is, or will be, adversely affected by the agency action, the extent of injury can be very slight. *De Vargas Sav. & Loan Ass'n. v. Campbell*, 1975-NMSC-026, 87 N.M. 469, 472, 535 P.2d 1320, 1323; *ACLU of New Mexico v. City of Alb.,* 2008-NMSC-045, ¶11, 144 N.M. 471.

Pursuant to NMSA 1978 § 74-2-7 (H), "[a] person who participated in a permitting action before [EHD] and who is adversely affected by such permitting action before [EHD] and who is adversely affected by such permitting action may file a petition for hearing before the [Air Board]." *Id.*

Relevant considerations and provisions of NMSA (1978) § 74-2-1 et seq. (AQCA)

The question of whether the board's rule-making actions exceeded its legislative authority is ripe for judicial review where final rule-making action has occurred. *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC- 49, ¶19, 149 N.M. 42, 243 P.3d 746, 750. "It is only upon the adoption of a regulation that the parties can be certain that they are aggrieved and that there is an actual controversy." *Id.* at ¶18, 243 P.3d 746, 750.

The environmental improvement board or the local board shall prevent or abate air pollution. NMSA (1978) § 74-2-5 (A).

"A person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board." NMSA (1978) § 74-2-7 (H). "The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing. All hearings shall be recorded." *Id.* at (J). "The burden of proof shall be upon the petitioner. Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively." *Id.* at (K) (emphasis added).

The AQCA provides authority for the Board to deny a permit for new sources if "the source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance, or a regulation of the board." ABQ Ord.§ 9-5-1-7 (C) (2) (a) (emphasis added). "In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

> (1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and

(3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved."

NMSA (1978) § 74-2-5 (E).

Pursuant to NMSA § 74-2-5.3 (C), "[i]n adopting regulations, the environmental improvement board or the local board shall consider the following:

(1) the public interest, including the social and economic value of the sources of emissions and subjects of air contaminants;

....

(3) energy, environmental and economic impacts and other social costs..." among other criteria. *Id.*

Pre-emption

"Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw V. Delta Airlines, Inc.,* 463 U.S. 85, 95 (1983) (internal quotation marks and citation omitted). "Express preemption occurs when Congress has unmistakably ... ordained that its enactments alone are to regulate a [subject, and] state laws regulating that [subject] must fall." *Mass. Assoc. of Health Maintenance Org's. v. Ruthardt,* 194 F.3d 176, 179 (5th Cir. 1999) (internal quotation marks and citation omitted) (alteration in original); *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs,* 199 F.3d 1185, 1190 (10th Cir.1999) ("To find express preemption, Congress must have explicitly stated by statute its intent to preempt state and local regulation of [the] issues.").

Implied preemption, and more specifically, conflict preemption, requires a determination whether compliance with both state and federal law is impossible or whether state

law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992); *Ruthardt,* 194 F.3d at 179.

Statutory construction

The first rule of statutory construction is the plain language of a statute is the primary indicator of legislative intent. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998–NMSC–050, ¶¶ 5-6, 126 N.M. 413, 970 P.2d 599, 600-601. Where language of the statute is "clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Quynh Truong v. Allstate Ins. Co.*, 2010–NMSC–009, ¶ 37, 147 N.M. 583, 227 P.3d 73.

The second rule of statutory construction is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." *TBCH, Inc. v. City of Albuquerque*, 1994-NMCA-048, 117 N.M. 569, 572, 874 P.2d 30, 33. Where no long-standing administrative construction of a statute by an agency charged with its administration is shown, the agency is not entitled to any deference by way of "administrative gloss." *See High Ridge Hinkle Joint Venture*, 1998–NMSC–050, ¶ 9, 126 N.M. 413, 970 P.2d at 602.

General rule on precedential authority

"The courts are vested with the power and authority to set aside an order of such agency if it is unreasonable, unlawful, arbitrary, capricious, or not supported by evidence…" *Ferguson-Steere Motor Co. v. State Corporation Commission*, 1957-NMSC-050, 63 N.M. 137, 314 P.2d 894. The corollary of this rule is courts are not allowed to substitute their own judgment for reasoned decisions of a given agency. *Id.* A fact finder in an administrative hearing serves the

same role as any other fact finder and should be given the same deference on factual questions. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶22, 125 N.M. 786. A stay halts proceedings "without destroying the force and effect of the judgment and leaves the proceedings in the condition in which it finds them." *Higgins v. Fuller,* 1943-NMSC-033, 48 N.M. 215, 217, 148 P.2d 573, 574.

ARGUMENT

I. The permit does not comply with the AQCA on its face, as already decided by the Board under *In re Air Quality Permit* No. 2037-M1.

Under *In re Air Quality Permit* No. 2037-M1, decided by the Air Board, the Board affirmed that it must consider the public comment and quality of life concerns under the Act. **Exhibit 2**—Final Order and Satement of Reasons at m. ("A new conclusion 58 is inserted to read: "The Board's authorization to prevent or abate air pollution permits the Board to consider quaility 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 or plant life or interfernce with public welfare or reasonably use of property"), See also NMSA 1978 § 74-2-5.E (requiring considerertion of injury to health, welfare, visibilty and property, and the public interest, including the social and economic value of the sources and subjects of air contaminants, when making regulations)."). The Board further held that even if the Division acted in compliance with all applicable regulatory provisions, including but not limited to, Part 41 of 20.11 NMAC, the "isolation" of the underlying decision process resulted in a failure to "consider all related factors, and thereby failed to achieve the purposes of the Act of protecting public health and welfare." *Id.*

Smith's motion for summary judgment admits that the City did not weigh and consider various factors that involve the character and degree of injury to or interference with health,

welfare, visibility and property and the public interest in this matter as required under the AQCA. Motion, ¶ 8 ("Tavarez and Eyerman explained that GDF emissions are controlled through performance standards…Taverez and Eyerman explained that GDFs are not regulated by imposing limits on the quantity of pollutants that GDFs may emit. AR 53, p. 149; AR 55, pp. 159-62; PIH 4/3/14 audio at 22:35 to 39:09; AR 52, p. 143.). The final decision *In re Air Quality Permit* No. 2037-M1 was not stayed on appeal and remains binding on the Board or at a minimum persuauive authority. **Exhibit 3**—Order denying Stay, *attached.*

Smith's can point to no authority that the Air Board is pre-empted from denying the issuance of the subject permit. Appeals to the Hex C performance standard, "Part 41" and "Part 64" are neither sufficient to carry the City's burden to support its improvidently filed motion for summary judgment, nor does consideration of Petitioners' evidence and concerns constitute "deviation" from such standards. Motion, p.6. Smith's can not show that compliance with both state law as enunciated under *In re Air Quality Permit* No. 2037-M1 and federal law is impossible or whether this and other state law such as *Colonias Dev. Council v. Rhino Envt'l Services* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of federal law. *See e.g., Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992).

To adopt the City's contention and Smith's tacit approval that the fact finder (Air Board) in an administrative hearing is not entitled to deference on a decision involving substantially the same parties and same issues on its final decision that has not been stayed on appeal is to <u>not</u> promote uniformity of the law and does not serve the public, but rather the special interests of industry alone. Motion, pgs. 7-9.

The plain language of NMSA (1978) § 74-2-7 (K) states that the burden of proof shall be on Petitioners based upon evidence presented at hearing. The City admits there is no provision

for summary judgment under the AQCA. The statutory language of § 74-2-7 is clear and unambiguous requiring that the Hearing Examiner deny Smith's motion for summary judgment and proceed to hearing on the merits. Smith's, however, engages in impermissible further statutory interpretation in arguing that a public hearing, which intends presentation of further evidence and public participation, should be denied in favor of industry.

It is important to note for the record that undersigned counsel never waived objection to the City's and Smith's pre-hearing motion at telephonic status conference for dispositive motion practice in this action. Smith's holds to the unilateral position that only performance standard as delegated by federal law is appropriate to determine whether a permit will issue. This position is flatly refuted by the Board's own decision in *In re Air Quality Permit* No. 2037-M1; other analogous case law such as *Colonias Dev. Council v. Rhino Envt'l Services*, 2005-NMSC-024, 138 N.M. 133 and provisions of the Act such as § 74-2-5.E and § 74-2-5.3 (C) that explicitly require the local board to regulate giving due consideration to public concerns of health, safety, community sentiment and property concerns.

The environmental improvement board or the local board shall prevent or abate air pollution. NMSA (1978) § 74-2-5 (A). Where the Board does not consider its own precedent and provisions of the Act that require due public participation and consideration of social costs and impacts, and public sentiment, the Board engages in *de facto* and informal rule making exceeding or breaching its own legislative authority.

Smith's motion for summary judgment must be denied not only because it fails to make a prima facie case for summary judgment, but also upon undersigned counsel's renewed objections to the impropriety of such dispositive motion practice in the context of the public evidentiary hearing the Legislature intended under § 74-2-7.

II. The Air Board has authority to hear the Petition and grant Petitioner's requested relief under the AQCA, *In re Air Quality Permit* No. 2037-M1, and *Colonias Dev. Council v. Rhino Envt'l Services.*

The AQCA provides authority for the Board to deny a permit for new sources if "the source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance, *or a regulation of the board*." ABQ Ord.§ 9-5-1-7 (C) (2) (a) (emphasis added). As discussed, the Air Board has also recently ruled under *In re Air Quality Permit* No. 2037-M1 that "[t]he Board's authorization to prevent or abate air pollution permits the Board to consider quaility of life concerns that are directly or indirectly related to air quality." **Exhibt 1**. The Board's decision under *In re Air Quality Permit* No. 2037-M1 expressly refers to NMSA 1978 § 74-2-2.b (defining air pollution in terms of injury to human health or animal or plant life or interfernce with public welfare or reasonably use of property") and NMSA 1978 § 74-2-5.E (requiring consideration of injury to health, welfare, visibilty and property, and the public interest, including the social and economic value of the sources and subjects of air contaminants, when making regulations) to support its final decision. *Id.*

The position taken by Smith's is in fact contrary to the New Mexico Supreme Court's holding in *Colonias Dev. Council v. Rhino Envt'l Services*, 2005-NMSC-024, 138 N.M. 133. If the Hearing Officer accepts the arguments put forth by Smith's, the Air Quality Board, and other regulatory decision-makers, would be limited to determining if a permit application meets the technical requirements of the regulations, an approach that was specifically rejected by the Supreme Court in *Colonias* and the Air Board under *In re Air Quality Permit* No. 2037-M1. As stated by the Supreme Court, such a narrow view of the Air Board's role "has the potential to

chill public participation in the permitting process contrary to legislative intent." 2005-NMSC-024, ¶21.

The New Mexico Supreme Court, in *Colonias*, held that adverse impacts on a community's social well-being and quality of life may be raised during public hearings concerning permit applications and the final decision-maker must take such concerns into consideration when deciding whether to approve or deny a permit. 2005-NMSC-024, ¶24, 138 N.M. 133. Quality of life issues may include concerns about public health and welfare and other impacts on the community that are not addressed by specific technical regulations. *Id.* Adverse public testimony, whether in the form of direct testimony or public comment, must be taken into account when reaching a final decision. *Id.* at ¶¶24, 41, 43. The Supreme Court specifically found that the hearing officer was incorrect in stating that the only determination to be made was whether the permit application met the technical requirements of the regulations. ¶¶7, 8, 24.

The Supreme Court reiterated the importance of public participation in environmental permitting actions and held that the Secretary of the New Mexico Environment Department, acting as the final decision-maker, "must use discretion in implementing the Solid Waste Act and its regulations to encourage public participation in the permitting process." *Id. citing* Joab *v. Espinosa*, 1993-NMCA-113, 116 N.M. 554. The Court specifically rejected the argument that concerns of individual residents about the negative impacts from a landfill on their community are an insufficient basis for the denial of a permit. *Id.* at ¶25.

After determining that testimony concerning the impact of the permitted facility on a community's quality of life must be allowed and considered, the Court stated that "[t]he authority to address such concerns requires a nexus to a regulation," and that "the general purposes of the Environmental Improvement Act and the Solid Waste Act, considered alone, [do

not] provide authority for requiring the Secretary to deny a landfill permit based on public opposition." *Id.* at ¶29. The Court found that the expression of the general purpose of the Solid Waste Act, which included protection of "public health, safety and welfare," do not create a standard for protecting "public health, safety and welfare." *Id.* Even though the Court did not find the required nexus in the purpose of the *Solid Waste Act*, it did find such a nexus in the regulatory requirement that "the solid waste facility application demonstrates that neither a hazard to public health, welfare or the environment nor undue risk to property will result." *Id.* at ¶31. Based on this requirement, the Court found that the Secretary's review is not limited to technical regulations, "but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit." *Id.*

In conclusion, the Court ordered that the Colonias Development Council be allowed to present testimony regarding the impact of the proliferation of industrial sites on the local community. The Court also instructed the Secretary "to reconsider the public testimony opposing the landfill and explain the rationale for rejecting it, if the Secretary decides to do so. We are not suggesting that the Secretary must reach a different result, but we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making." *Id.* at ¶43.

Like the *Solid Waste Act*, the AQCA provides for public involvement in permitting actions regarding air quality. NMSA §74-2-7.B(5)(requiring regulations regarding public notice, comment period and public hearing prior to the issuance of a permit); §74-2-7.H and I (providing for hearing before local board following the permit decision of the local agency). The AQCA, like the *Solid Waste Act*, requires that, during a hearing before the Air Board, the "public...shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing

and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing." §74-2-7.I. As explained by the Supreme Court, these provisions establish that "an essential goal of public hearings during the permitting process is to provide community members the opportunity to ask questions, offer their own technical evidence, cross-examine witnesses, and make non-technical statements." 2005-NMSC-024, ¶2.

As The Parties do not dispute that Petitioners timely filed their request for an evidentiary hearing under §74-2-7 NMSA and 20.11.81 NMAC, and the City does not dispute that the Air Board can either sustain, modify, or reverse the EHD permit, the Hearing Officer should deny the City's Motion for Summary Judgment and proceed to the evidentiary hearing on the merits. Petitioners do not seek to "change" the law as erroneously suggested by Smith's, rather Petitioners seek to enforce provisions of the AQCA already in place and ignored by the City and Smith's. Motion, p. 9. Unlike *Colonias*, the concerns outlined in Petitioners' petition for hearing, further discovery and Notice of Intent to present technical testimony ("NOI") adequately show nexus such that Smith's Motion for summary judgment should be denied. *See* Petition, p.2 ("Each of the Petitioners are adversely affected by the permitting action because the Air Program refused and failed to take into consideration quality-of-life concerns raised by the participants at the PIH. In addition, each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station at the proposed location."); **Exhibit 4**—Petitioners' responses to discovery (abridged) Rogs. 1-4 (indicating concern for already high levels of VOCs at intended site; Petitioner Pat Toledo's frequent/weekly care of elderly father in the neighborhood causing health concerns for both

petitioner and father; indicating increased traffic congestion, air pollution as a result of the intended station and upon reasonable analogy to adverse documented effects of Smith's gas station in place on Carlilse ave.); **Exhibit 5**—Supplemental responses to discovery (abridged) Rogs. 1-3 (incorporating Dr. Rowangould's NOI indicating the Board should consider health and safety risks and community sentiment as prescribed under NMSA 1978 § 74-2-5.E); **Exhibit 6**, p.2 (NOI) (recommending additional analysis on the basis of reliance materials to address potential air quality and other health impacts and community sentiment the permitted gas station threatens); *De Vargas Sav. & Loan Ass'n v. Campbell*, 1975-NMSC-026, 87 N.M. 469, 472, 535 P.2d 1320, 1323 (Once the party seeking review alleges that he is, or will be, adversely affected by the agency action, the extent of injury can be very slight); *ACLU of New Mexico v. City of Alb.*, 2008-NMSC-045, ¶11, 144 N.M. 471.

III. Dr. Rowangould's and Petitioners' intended testimony points to relevant provisions of the AQCA that should be considered in granting the permit, provides conclusive evidence, in part, at this stage of the proceeding and this testimony and further factual development of other evidence is required at hearing under the Act.

Preliminarily, Smith's citation to *Duke City Lumber Co. v. NM Envtl. Imp. Bd.*, 1984-NMSC-042, 101 NM 291, 681 P.2d 717 is unavailing to deny Petitioners their requested hearing on the merits because it again isolates and relates only to performance standard under the AQCA, is not relevant to this proceeding to the extent that the case involved a variance request by a member of the regulated community such as Smith's, and the case did not address the broader scope of the Air Board's regulatory powers Petitioners now seek, which was affirmed under *In re Air Quality Permit* No. 2037-M1 by the Air Board. With respect to the legal residuum rule discussed under *Duke City Lumber*, Smith's attempts to deny fact witness and technical witness participation at hearing also fail for the following reasons.

Dr. Rowangould intends to testify that the direct vehicle emission is a function of vehicles entering and exiting the gas station and applied to the 7,000,000 gallon annual throughput permit vs. the typical permit of 1,000,000 throughput, greater emissions are indicated. **Exhibit 6**— Rowangould NOI (abridged), ¶ 1, p.2, *attached.* Such elevated emissions increase risk of health impacts such as respiratory inflammation, increased risk of cancer and exacerbation of pre-existing conditions, including premature death. *Id.* This testimony, subject to further development at hearing as intended by the Legislature under §74-2-7 NMSA, directly implicates and invokes regulatory criteria under ABQ Ord.§ 9-5-1-7 (C) (2) (a); NMSA (1978) § 74-2-5 (E), and NMSA § 74-2-5.3 (C). Increased pollutants of concerns as a result of the permit include carbon monoxide, nitrogen oxide, and VOCs. *Id.* Dr. Rowangould further cites to quantitative study and concludes that vapor losses particularly with respect to benzene multiplies an increased risk of cancer by a factor of 7 under the permit. *Id.*, ¶ 2, p.2. The methodology cited is certainly subject to authentication, cross examination and recognized exception(s) to hearsay. Receptors such as homes, at least one school and vulnerable populations that include children and elderly citizens such as Petitioner Pat Toledo's father are subject to greater health risks and impacts as a result of the permit. *Id.*, ¶ 3, p.2. Petitioner fact witnesses with personal knowledge of their health and safety concerns and the social or economic impacts on their properties and community as a result of the intended gas station are certainly competent to testify under the rules of evidence and such testimony is not necessarily subject to hearsay objection.

The Board must give weight to this testimony under the AQCA as it impacts the health, welfare, the public interest, and relates to the subject of air contaminants. NMSA (1978) § 74-2-5(E). The record establishes that the Air Quality Program has failed to consider quality of life

and health impacts in any qualitative manner to date in choosing only to enforce a performance standard under its broader regulatory powers. Motion, ¶ 8, pgs. 2-3; AR 53, p. 149; AR 55, pp. 159-62; PIH 4/3/14 audio at 22:35 to 39:09; AR 52, p. 143. Smith's motion in total shows it does not understand or refuses to give complete effect to the regulatory regime regarding the ACQA.

In accordance with the Hearing Officer's prehearing order, Petitioners timely and appropriately filed and disclosed the intended technical testimony of Dr. Rowangould and other fact witnesses on August 8, 2014. Nothing more is required that could or should be allowed to prevent Petitioners' witnessess from testifying at the hearing on the merits.

CONCLUSION

WHEREFORE, for all the foregoing facts, circumstances, and authorities, Petitioners pray the Hearing Officer will deny Smith's motion for summary judgment and proceed to conduct the hearing on the merits as requested by their Petition and grant any further relief the Hearing Officer deems justice requires.

Respectfully submitted,
DOMENICI LAW FIRM, P.C.

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Albuquerque, New Mexico 87102
505-883-6250

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. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,	No. AQCB 2014-2
Petitioners.	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing with attachments was e-mailed to counsel for the City of Albuquerque and Smith's Food & Drug Centers, Inc. on the 3rd day of October, 2014.

I further certify that a true and correct copy of the same was e-mailed to the Hearing Officer and that requisite hard copies of the same were hand delivered to the hearing clerk on October 3, 2014.

Pete V. Domenici, Jr., Esq.

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

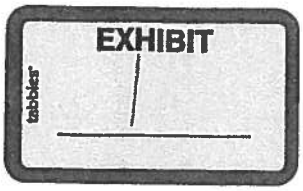
Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association, Petitioners No. AQCB 2012-2

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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Timothy J. Atler
Attorneys for Smith's Food & Drug Centers, Inc.
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Albuquerque, New Mexico 87103-1945
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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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Petitioner pro se in Petition No. AQCB 2012-1

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orthf@yahoo.com
Hearing Officer

on the 6th day of February, 2013.

SUTIN, THAYER & BROWNE
A Professional corporation

By_____

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,

Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association, Petitioners.

No. AQCB 2012-1 and

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 2

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 accordancewith 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.

Dona Upson MD

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.

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**

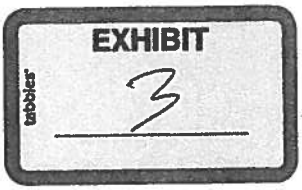
Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association, Petitioners. **No. AQCB 2012-2**

ORDER DENYING STAY

This matter comes before the Board upon Smith's Food & Drug Centers, Inc.'s Motion for Stay of the Air Quality Board's Final Order. Having considered the motion, the responses of petitioners, Smith's replies, and oral arguments by all parties at a hearing on the motion conducted March 13, 2013, the Board rejected a motion to grant the stay by a vote of 4-2.

IT IS THEREFORE ORDERED: Smith's motion for a stay of the final order pending judicial review is DENIED.

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



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. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,

Petitioners.

No. AQCB 2014-2

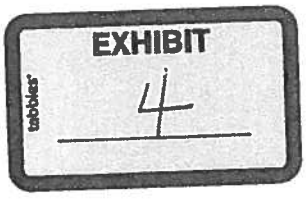
PETITIONERS' RESPONSES TO SMITH'S INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUEST FOR PRODUCTION

COME NOW the Petitioners, by and through undersigned counsel of record, and hereby provide the following responses to Smith's Food & Drug Centers, Inc.'s Interrogatories, Requests for Admissions and Request for Production.

INTERROGATORIES

Interrogatory No. 1: If any petitioner contends he or she will personally suffer from any negative effects of "air pollution," as that term is defined in NMSA 1978, § 74-2-2(B) (2001), as a result of the emissions authorized by Permit No. 3135, please identify: (1) the specific negative effects each petitioner contends he or she will suffer, (2) the specific factual basis for each petitioner's contention that he or she personally will suffer negative effects, (3) any medical, environmental or other scientific evidence that supports the contention, and (4) all witnesses and exhibits petitioners will present in support of the contention at the September 10, 2014 hearing on the merits (the "Hearing").

ANSWER: The Petitioners object to subparts 3 and 4 of Interrogatory No. 1 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. Ms. Roberts states that the VOCs produced at the intersection of Montgomery and



Louisiana are already high and are adversely affecting her health and that of her employees. See Petition for Hearing and answers to remaining interrogatories.

Interrogatory No. 2: With regard to the allegation on page 2 of the Petition that Petitioner Toledo "provides regular assistance and care for his father [and] is regularly in the area of the proposed fuel dispensing station [at 6941 Montgomery Blvd NE ("Montgomery GDF")]," please state specifically: (1) what type of care Toledo provides to his father, (2) how often Toledo provides such care (e.g. days per week or per month), (3) what specific distance encompasses the "area" of the Montgomery GDF to which Toledo refers, (4) how often Toledo is in that "area" (e.g. days per week or per month), and (5) the route Toledo takes when visiting his father's residence.

ANSWER: Petitioner Toledo's father is 94-years-old and lives less than a mile north of the proposed GDF. His health is fragile and hi suffers from respiratory conditions. Mr. Toledo provides his father assistance with daily living, including but not limited to companionship, health and home care assistance, running errands, and transportation to appointments. Mr. Toledo's father does not drive and is dependent on Mr. Toledo for assistance and companionship. Mr. Toledo visits his father 3 to 4 times per week. The routes to and from his father's house vary depending on what they are doing but they regularly travel through the intersection of Montgomery and Louisiana.

Interrogatory No. 3: With regard to Petitioner Toledo's allegation on page 2 of the Petition that the Montgomery GDF will have an "impact" on his father's property and quality of life, describe: (1) the specific impact alleged, (2) the specific factual basis for the allegation, (3) any medical, environmental or other scientific evidence that supports the allegation, and (4) all witnesses and exhibits petitioners will present at the Hearing in support of the allegation.

ANSWER: Petitioner Toledo objects to subparts 3 and 4 of Interrogatory No. 3 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. The specific impacts alleged include, but are not limited to, odors, increased air pollution, increased traffic and congestion and cumulative effects that may result from adding a large GDF that will necessarily attract more traffic to an already congested area. The proposed GDF has not yet been built so there is no existing direct evidence of the impacts from the GDF. However, as Mr. Toledo will testify at the hearing, he is familiar with the impacts resulting from the Smith's GDF located at Carlisle and Constitution and it is reasonable to expect that similar impacts will occur from the proposed GDF at the Montgomery and Louisiana location.

Interrogatory No. 4: With regard to the allegation on page 2 of the Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, state: (1) what specific concerns EHD allegedly failed to consider and, (2) if petitioners contend that EHD's consideration of those concerns should have led to a denial of Permit No. 3135, state the specific factual and legal bases for that contention.

ANSWER: EHD, in the letter of April 30, 2014, stated: "Before the Department made a decision regarding Smith's application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health, and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over particular issues." EHD's refusal to consider the public comments in

opposition to the GDF, and the issues raised by the public, as identified in the EHD letter, in determining whether to issue the permit is contrary to the decision of the Air Quality Board in the Carlisle case, AQCB 2012-1 and 2012-2 and to the requirement to fully consider public comments regarding quality of life issues set forth in *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 138 N.M. 133. The issues raised by the public include increased VOC emissions, odors, fumes, impacts to the children attending Cleveland Middle School, which is directly south of the proposed location, traffic increases and the cumulative effect of building a large-scale GDF at the proposed location.

Petitioner Roberts further states that adding a third gas station plus the emissions testing business at this intersection will increase the VOCs, emissions, odors and fumes. EHD did not consider the impact on Cleveland Middle School, the dental complex, the Church, the shopping centers, and the people, both children and adults, who will be exposed to the increased emissions and traffic conditions that will result from the proposed GDF.

See Answer to Interrogatory No. 10.

Interrogatory No. 5: With regard to the allegation on page 2 of the Petition that "each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the [Montgomery GDF]," please state: (1) the specific factual basis for the allegation, (2) what specifically are the "other negative impacts" to which Petitioners refer, and (3) every statute or regulation supporting Petitioners' contention that any of these alleged impacts should compel reversal or revocation of EHD's issuance of Permit No. 3135.

ANSWER: Petitioners Margaret Freed and Mary Ann Roberts own property in the immediate vicinity of the proposed GDF location and will be adversely affected by the identified

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. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,

Petitioners.

No. AQCB 2014-2

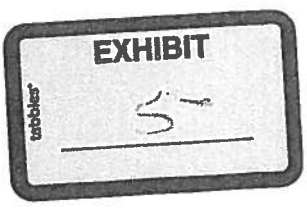
PETITIONERS' SUPPLEMENTAL RESPONSES TO SMITH'S INTERROGATORIES, REQUESTS FOR ADMISSIONS

COME NOW the Petitioners, by and through undersigned counsel of record, and hereby provide the following supplemental responses to Smith's Food & Drug Centers, Inc.'s Interrogatories, and Requests for Admissions.

INTERROGATORIES

Interrogatory No. 1: If any petitioner contends he or she will personally suffer from any negative effects of "air pollution," as that term is defined in NMSA 1978, § 74-2-2(B) (2001), as a result of the emissions authorized by Permit No. 3135, please identify: (1) the specific negative effects each petitioner contends he or she will suffer, (2) the specific factual basis for each petitioner's contention that he or she personally will suffer negative effects, (3) any medical, environmental or other scientific evidence that supports the contention, and (4) all witnesses and exhibits petitioners will present in support of the contention at the September 10, 2014 hearing on the merits (the "Hearing").

ANSWER: The Petitioners object to subparts 3 and 4 of Interrogatory No. 1 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. Ms. Roberts states that the VOCs produced at the intersection of Montgomery and



Louisiana are already high and are adversely affecting her health and that of her employees. *See* Petition for Hearing and answers to remaining interrogatories.

Without waiving this objection, Petitioners supplement (pursuant to Petitioner's August 8, 2014 filed NOI):

1) the direct vehicle emission is a function of number of vehicles entering and exiting the station and the degree to which their entry and exit slows traffic on adjacent streets. Applied to the specific permit of annual throughput of 7,000,000 gallons vs. the typical permit of annual throughput of 1,000,000, greater number of vehicles exiting and entering the Smith's gas station is expected to cause greater emissions from those vehicles and from other vehicles experiencing delays on adjacent streets. As a result, elevated levels of pollutants that are linked to health impacts* increase the risk of respiratory inflammation, including asthma and related lung/ breathing disorders, non-fatal heart attacks, increased risk of cancer, premature death due to pre-existing conditions, and other neurophysiological symptoms among other health effects.

   The elevated levels of pollutants of concern include carbon monoxide, nitrogen oxide, and toxic air pollutants including some volatile organic compounds and increased particulate matter.

2) Vapor losses which are not captured contain volatile organic compounds. Although the Smith station allows for "Stage I" recovery, the station is not required to have a "Stage II" vapor recovery at the pump, thus older vehicles without onboard vapor recovery systems will likely emit VOCs from the gas tanks into the air. Vapor losses are associated with health risks, and particularly the release of benzene is determined to elevate cancer risk among other health effects. Applying the quantitative study (South Coastal Air Quality Management District (CA), increased cancer risk is multiplied by a factor of 7 under the Smith permit.

3) Location of potential receptors are identified near the Smith's gas station on the basis of available data, including aerial imagery. These receptors include homes, and at least one school. Distance of receptors relevant to the Smith's station is a key factor in determining health impacts from vehicle pollution. Health risks from vehicle pollution/emissions are greater on vulnerable populations that include children, elderly, and people with respiratory conditions.

In conclusion and in light of the above technical testimony supported by the reliance materials attached to the NOI, Dr. Rowangould (intended witness providing technical testimony) recommends additional analysis be conducted to ensure potential air quality and health impacts associated with the proposed Smith's fueling station are better understood. If impacts are found to exceed acceptable levels on the basis of regulations,

increased health risks and community sentiment then mitigation and or other alternatives should be explored.

Please note that supporting reliance materials and other exhibits were previously provided to counsel on August 8, 2014 under cover of Petitioner's submitted NOI.

Interrogatory No. 3: With regard to Petitioner Toledo's allegation on page 2 of the Petition that the Montgomery GDF will have an "impact" on his father's property and quality of life, describe: (1) the specific impact alleged, (2) the specific factual basis for the allegation, (3) any medical, environmental or other scientific evidence that supports the allegation, and (4) all witnesses and exhibits petitioners will present at the Hearing in support of the allegation.

ANSWER: Petitioner Toledo objects to subparts 3 and 4 of Interrogatory No. 3 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. The specific impacts alleged include, but are not limited to, odors, increased air pollution, increased traffic and congestion and cumulative effects that may result from adding a large GDF that will necessarily attract more traffic to an already congested area. The proposed GDF has not yet been built so there is no existing direct evidence of the impacts from the GDF. However, as Mr. Toledo will testify at the hearing, he is familiar with the impacts resulting from the Smith's GDF located at Carlisle and Constitution and it is reasonable to expect that similar impacts will occur from the proposed GDF at the Montgomery and Louisiana location.

Without waiving this objection Petitioners supplement and refer Smith's to its supplemental response to Rog. # 1, above.

Please note that supporting reliance materials and other exhibits were previously provided to counsel on August 8, 2014 under cover of Petitioner's submitted NOI.

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. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo,

Petitioners.

No. AQCB 2014-2

NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

COME NOW the Petitioners, by and through undersigned counsel of record, and hereby submit their Notice of Intent ("NOI") to Present Technical Testimony.

(A) Name of persons filing the NOI.

Petitioners Margaret M. Freed, Mary Ann Roberts and Pat Toledo

(B) Statement clarifying whether the person filing the statement supports or opposes the petition at issue.

The Petitioners support the petition at issue.

(C) Name of each witness to present technical testimony, estimated length of direct testimony and summary of anticipated direct testimony:

Dr. Dana (Rowan) Rowangould

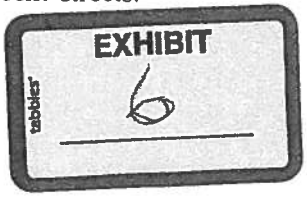
1 hour estimated direct testimony

Summary of testimony

For a more detailed summary of Dr. Rowangould's anticipated technical testimony including her affiliation, qualifications, educational and work background please find, *attached*, Rowangould Memorandum—**Exhibit 1**; CV—**Exhibit 2**.

Rowangould is expected to testify to:

1) the direct vehicle emission is a function of number of vehicles entering and exiting the station and the degree to which their entry and exit slows traffic on adjacent streets.



Applied to the specific permit of annual throughput of 7,000,000 gallons vs. the typical permit of annual throughput of 1,000,000, greater number of vehicles exiting and entering the Smith's gas station is expected to cause greater emissions from those vehicles and from other vehicles experiencing delays on adjacent streets. As a result, elevated levels of pollutants that are linked to health impacts increase the risk of respiratory inflammation, including asthma and related lung/ breathing disorders, non-fatal heart attacks, increased risk of cancer, premature death due to pre-existing conditions, and other neurophysiological symptoms among other health effects.

The elevated levels of pollutants of concern include carbon monoxide, nitrogen oxide, and toxic air pollutants including some volatile organic compounds and increased particulate matter.

2) Vapor losses which are not captured contain volatile organic compounds. Although the Smith station allows for "Stage I" recovery, the station is not required to have a "Stage II" vapor recovery at the pump, thus older vehicles without onboard vapor recovery systems will likely emit VOCs from the gas tanks into the air. Vapor losses are associated with health risks, and particularly the release of benzene is determined to elevate cancer risk among other health effects. Applying the quantitative study (South Coastal Air Quality Management District (CA), increased cancer risk is multiplied by a factor of 7 under the Smith permit.

3) Location of potential receptors are identified near the Smith's gas station on the basis of available data, including aerial imagery. These receptors include homes, and at least one school. Distance of receptors relevant to the Smith's station is a key factor in determining health impacts from vehicle pollution. Health risks from vehicle pollution/emissions are greater on vulnerable populations that include children, elderly, and people with respiratory conditions.

In conclusion and in light of the above technical testimony supported by the attached reliance materials, Dr. Rowangould recommends additional analysis be conducted to ensure potential air quality and health impacts associated with the proposed Smith's fueling station are better understood. If impacts are found to exceed acceptable levels on the basis of regulations, increased health risks and community sentiment then mitigation and or other alternatives should be explored.

(D) Additional witnesses to be called.

The Petitioners may call the following witnesses to offer non-technical testimony:

1. Pat Toledo

2. Mary Ann Roberts

3. Margaret M. Freed

The above-listed fact witnesses/interested parties reserve the right to rely on and or refer to the attached numbered exhibits (reliance materials). Such reliance or reference is intended for the limited purpose/ extent of supporting fact witness testimony.

The Petitioners reserve the right to call additional non-technical witnesses, including any witnesses/interested parties identified by Smith's and the City.

(E) List of exhibits, if any, to be offered into evidence at the hearing on the merits.

The Petitioners may offer the following as exhibits at the hearing on the merits:

Any documents in the Administrative Record.

Any exhibits identified by Smith's and the City.

Exhibit 1—Memorandum of technical testimony (Dr. Rowangould).

Exhibit 2—Dr. Dana (Rowan) Rowangould, CV

Exhibit 3—Gregory M. Rowangould, *A Census of the U.S. Near-Roadway Population: Public Health and Environmental Justice Considerations*, Transportation Research Part D 25, 59-67 (2013).

Exhibit 4—Alex A. Karner, et al., *Near-Roadway Air Quality: Synthesizing the Findings from Real-World Data*, Vol. 44, No. 14, Envtl. Sci. & Tech. 5334-5344 (2010).

Exhibit 5—*On Behalf of the American Lung Association and the American Thoracic Society Before the Senate Committee on Environment; Public Works Subcommittee on Clean Air; Nuclear Safety ; Subcommittee on Children's Health, and Environmental Responsibility*, Air quality and Children's Health Hearing (2011) (Statement of Dona J. Upson, MD, MA).

Exhibit 6— American Academy of Pediatrics (Policy Statement) Committee on Environmental Health, *Ambient Air Polution: Health Hazards to Children*, Vol. 114, No. 6, Pediatrics, 1699-1707 (2010).

Respectfully Submitted,
DOMENICI LAW FIRM, P.C.

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Albuquerque, New Mexico 87102
(505) 883-6250

I hereby certify that a true and correct copy of the foregoing with attachments was e-mailed to counsel for the City of Albuquerque and Smith's Food & Drug Centers, Inc. on the 8th day of August, 2014.

Pete V. Domenici, Jr., Esq.