

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

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IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
NO. 3135

AQCB No. 2014-2

**ANSWER OF THE ENVIRONMENTAL HEALTH DEPARTMENT
TO PETITION FOR HEARING**

The City of Albuquerque (the “City”) Environmental Health Department (“EHD”) files this Answer in response to the Petition for Hearing (“Petition”) filed by Margaret M. Freed, Mary Ann Roberts and Pat Toledo in AQCB No. 2014-2. EHD’s answers to each sentence in the Petition are set forth below following language from the Petition which is set out in *italics*. EHD answers as follows:

The Petitioners in this matter, Margaret Freed, Mary Ann Roberts, and Pat Toledo, by and through undersigned counsel of record, pursuant to Section 74-2-7 NMSA 1978 and 20.11.81 NMAC, hereby petition the City of Albuquerque Environmental Health Department (EHD) and the Albuquerque-Bernalillo County Air Quality Control Board for a hearing as authorized by law with reference to Air Quality Permit No. 3135 issued effective April 30, 2014 to Smith’s Food & Drug Centers, Inc. (Smith’s).

Petition, p. 1.

1) EHD admits that it issued Air Quality Permit No. 3135 to Smith’s Food & Drug Centers, Inc. (“Smith’s”) on April 30, 2014. EHD admits that the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) has authority to conduct hearings concerning permits issued by the City. NMSA 1978, § 74-2-7(H); 20.11.81.14(A and B) NMAC. EHD denies that it has authority to grant a hearing before the Air Board. EHD admits that Petitioners Margaret Freed (also listed as Margaret M. Freed), Mary Ann Roberts and Pat Toledo have

submitted a petition through counsel for a hearing concerning EHD's issuance of Permit No.

3135. The City is without information sufficient to form a belief regarding whether each of the Petitioners is adversely affected by the issuance of Permit No. 3135 and on that basis denies that all Petitioners petitioned "as authorized by law."

The notification letter and the permit are attached as Exhibit 1.

Id.

2) EHD admits that Exhibit 1 contains the Interested Participant Letter and a copy of Permit No. 3135.

The permit authorizes Smith's to have an annual throughput of 7 million gallons per year at a fuel dispensing station Smith's proposes to build at 6941 Montgomery Blvd. NE., Albuquerque, New Mexico.

Id.

3) EHD admits that Permit No. 3135 authorizes Smith's to have an annual throughput of 7 million gallons at a gasoline dispensing facility Smith's proposes to build at 6941 Montgomery Blvd. NE, Albuquerque, New Mexico.

In accordance with 20.11.81.14 NMAC, the Petitioners provide the following information.

Id. (purporting to list Petitioners' names, addresses and telephone numbers)

4) EHD admits that Petitioners listed some contact information required by 20.11.81.14(B)(2)(b) NMAC but is without information sufficient to form a belief regarding its accuracy or completeness and on that basis denies this allegation.

Petitioner Margaret Freed owns property located at 6921 Montgomery Blvd. NE, which is adjacent to the property on which Smith's proposes to construct the fuel dispensing station.

Id. at p. 2.

5) EHD is without information sufficient to form a belief regarding Margaret Freed's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Mary Ann Roberts owns property located at 6940 Montgomery Blvd. NE, which is directly across the street from the property on which Smith's proposes to construct the fuel dispensing station.

Id.

6) EHD is without information sufficient to form a belief regarding Mary Ann Robert's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Pat Toledo's 94-year-old father, Joe Toledo, resides at 3232 La Ronda NE, close to the property on which Smith's proposes to construct the fuel dispensing station.

Id.

7) EHD is without information sufficient to form a belief regarding Petitioner Pat Toledo's father, his residence, or its location, if any, and on that basis denies this allegation.

Pat Toledo provides regular assistance and care for his father, is regularly in the area of the proposed fuel dispensing station and is concerned regarding the impact of the fuel dispensing station on his father's property and quality of life.

Id.

8) EHD is without information about Petitioner Pat Toledo's activities or concerns relating to his father, his father's property or his father's quality of life and on that basis denies this allegation. EHD denies that Pat Toledo's "concerns" about his father's property and quality of life are sufficient to confer standing on Pat Toledo to petition for a hearing before the Air Board regarding Permit No. 3135. Furthermore, 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 EHD. A statement that Petitioner Toledo is concerned about

other persons being adversely affected does meet the requirements of Section 74-2-7(H) NMSA or 20.11.81.14(B)(2)(c) NMAC to petition for a hearing before the Air Board.

Each of the Petitioners participated in the April 3, 2014 Public Information Hearing (PIH).

Id.

9) EHD admits that each of the Petitioners participated in the April 3, 2014 Public Information Hearing.

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.

Id.

10) EHD is without information sufficient to form a belief about whether each Petitioner is adversely affected by the permitting action and on that basis denies this allegation. EHD denies that the Air Quality Control Act ("Air Act") authorizes consideration of quality of life factors as a basis for denial of an air quality permit.

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.

Id.

11) EHD is without information sufficient to form a belief that 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" and on that basis denies this allegation. Furthermore, Section 74-2-7(H) NMSA and 20.11.81.14(B)(2)(c) NMAC require a petitioner to

state how each petitioner “is” adversely affected by the permitting action taken by EHD [emphasis added]. A statement that petitioners are likely to be adversely affected is speculative and does meet the requirements of Section 74-2-7(H) NMSA or 20.11.81.14(B)(2)(c) NMAC to petition for a hearing before the Air Board.

In addition, see Exhibit 2, attached hereto, from Petitioner Margaret Freed.

Petition at p. 2.

- 12) EHD admits that Exhibit 2 states that it is from Margaret Freed.

This permit request has been made by Smith’s Food and Drug Centers, Inc. for 6941 Montgomery Blvd. NE, Albuquerque, NM 87109.

Exhibit 2.

- 13) EHD admits that Smith’s requested Permit No. 3135 for a gasoline dispensing facility at 6941 Montgomery Blvd., NE, Albuquerque, NM 87109 by submitting an application to EHD.

The requested annual gasoline throughput of 7,000,000 gallons per year, results in 45.5 tons per year of emissions of Volatile Organic Compounds (VOC’s).

Ex. 2.

- 14) EHD admits that Smith’s application sought an annual gasoline throughput limit of 7,000,000 gallons which, if actually used, EHD expects to result in emissions equal to or less than 45.5 tons per year of VOCs based on EPA emission factor calculations.

The area in question is a C-2 zone and therefore their request is in violation of proper zoning regulations.

Ex. 2.

15) EHD affirmatively states that compliance with zoning matters is the responsibility of the City Planning Department. EHD denies that it has authority to consider zoning in making decisions about whether to issue air quality permits. To the extent that this sentence in the Petition raises any air quality related factual allegations, EHD denies them.

This permit would be more properly permitted in an industrial (C-3) zone; not in this C-2 zone.

Ex. 2.

16) EHD affirmatively states that compliance with zoning matters is the responsibility of the City Planning Department. EHD denies that it has authority to consider zoning in making decisions about whether to issue air quality permits. To the extent that this sentence in the Petition raises any air quality related factual allegations, EHD denies them.

According to the summary of "Regulations Controlling Air Emissions from Gasoline Dispensing Facilities," the permit request is not for an "Area Source" but is instead for a "Major Source" due to their stated 45.5 tons of VOCs.

Ex. 2.

17) EHD denies that Smith's proposed gasoline dispensing facility that is the subject of Permit No. 3135 would be a Major Source. EHD affirmatively states that a Major Source is, among other things, a facility that emits, or has the potential to emit in the absence of controls, at least 10 tons per year (TPY) of individual hazardous air pollutants (HAP) or 25 TPY of combined HAPs. EHD affirmatively states that VOCs from gasoline vapors primarily consist of substances which are not HAPs and contain a small percentage of hazardous air pollutants. While the percentage of HAPs in gasoline vapors changes somewhat depending on the season and blend used, the VOCs from gasoline vapors are generally less than 17% HAPs. *See, e.g.,* http://www.epa.gov/ttnchie1/eiip/techreport/volume03/iii11_apr2001.pdf, Table 11.3-2. As a

result, 45.5 TPY VOC emissions from gasoline vapors would be expected to produce 7.7 TPY or less of HAPs which is less than either the 10 or 25 TPY thresholds. Therefore, the gasoline dispensing facility permitted by EHD in Permit No. 3135 would not be a Major Source as the result of the HAP emissions caused by VOC emissions from gasoline vapors. EHD affirmatively states that the Smith's gasoline dispensing facility authorized by Permit No. 3135 is an Area Source, not a Major Source, as those terms are defined in the Clean Air Act, Section 7612.

The rules and regulations listed are for permitting "Area Source" and not for "Major Source" facilities.

Ex. 2.

18) EHD admits that the "Regulations Controlling Air Emissions from Gasoline Dispensing Facilities" referenced in Exhibit 2 pertain to Area Sources. EHD affirmatively states that the Smith's gasoline dispensing facility permitted in Permit No. 3135 is an Area Source, not a Major Source, as those terms are defined in the Clean Air Act, Section 7612.

Therefore, I request that the permit #3135 be denied and be re-submitted as an "Area Source" which is limiting emissions to less than 10 tons of VOCs per year.

Ex. 2.

19) EHD denies that VOC emissions are synonymous with HAP emissions and affirmatively states that VOCs from gasoline vapors contain a small percentage of HAPs by weight. EHD affirmatively states that there is no air quality rule or standard which requires an upper limit of 10 TPY for VOCs from gasoline dispensing facilities in order to qualify as an Area Source. Instead, the limit of 10 TPY for individual HAPs or 25 TPY of combined HAPs refers to the list of HAPs in the Clean Air Act Section 7612(b) as they may be periodically updated by the U.S. Environmental Protection Agency. EHD denies that there is any legal basis

for denial of Permit No. 3135. EHD affirmatively states that Permit No. 3135 complies with all applicable air quality laws, rules and standards.

My property, 6921 Montgomery Blvd., NE, is right next door to 6941 (the permit request property) where we would receive a large portion of the 45.5 tons per year of VOCs.

Ex. 2.

20) EHD is without information sufficient to form a belief regarding Petitioner Margaret Freed's property ownership and on that basis denies this allegation. EHD affirmatively states that VOCs from gasoline vapors are, as a general rule, lighter than air, photochemically reactive and unstable. Their persistence in the vicinity of a gasoline dispensing facility depends on the weather, the time of day, and other factors. As a result, EHD is without information sufficient to form a belief whether a neighboring property owner would "receive a large portion of the 45.5 tons per year of VOCs" and on that basis denies this allegation.

Also, one block away is a middle school and their students and parents would be greatly affected.

Ex. 2.

21) EHD admits that a middle school is 1-2 blocks from Smith's gasoline dispensing facility permitted by Permit No. 3135. EHD is without information sufficient to form a belief that students or parents of students at the middle school will be greatly affected and on that basis denies this allegation. Furthermore, the phrase "greatly affected" is vague and EHD cannot speculate what Petitioners mean by it. EHD affirmatively states that VOCs from gasoline vapors volatilize rapidly, dissipate and disperse into and are diluted by ambient air. EHD affirmatively states that Permit No. 3135 meets all federal, state and local requirements including requirements regarding gasoline throughputs, emissions and performance measures (also known as management practices). EHD affirmatively states that the EPA regulation which it followed in

issuing Permit No. 3135, 40 C.F.R. §§ 63.11110 to 63.11126 (also known as “Hex C”) was developed by the United States Environmental Protection Agency to protect the public from emissions of hazardous air pollutants in urban areas.

There is a group of 3/4 story apartment homes next door to the NW of the permit property.

Ex. 2.

22) EHD is without information sufficient to form a belief whether there are apartment homes “next door,” to the NW of the permit property, or how many stories they might be and on that basis denies these allegations. EHD affirmatively states that there is residential property north of the permit property.

Were they notified of the requested permit #3135?

Ex. 2.

23) This sentence is a question, not an allegation, and no response is required. To the extent that a response is required, EHD affirmatively states that it complied with all legal requirements for notice for Permit No. 3135 and also affirmatively states that the applicable rules did not require nearby property owners to receive individualized notice.

I understand that some of Smith’s gasoline dispensing facilities have been quite heavily fined by the City of Albuquerque and this ignores health issues.

Ex. 2.

24) EHD admits that it has assessed and collected fines from Smith’s for exceeding its permitted throughput limits at certain of its gasoline dispensing facilities. EHD denies that it has ignored health issues and denies that throughput limits are imposed to protect public health.

EHD affirmatively states that throughput limits are imposed to allow EHD to calculate permit fees which are based on tons per year of pollutants emitted. *See* 20.11.2 NMAC.

Could you please expedite my request since I come late to this process because I was never notified that this permit had been requested or that the land had even been sold for this reason?

Ex. 2.

25) This sentence contains a question, not an allegation, and no response is required.

To the extent that a response is required, EHD affirmatively states that it complied with all legal requirements for notice and also affirmatively states that the applicable rules did not require nearby property owners to receive individualized notice. EHD denies that nearby property owners are entitled to notice when nearby land is sold for a particular purpose.

I learned about the request from a concerned citizen the last week in March that the permit process was started 11-5-13.

Ex. 2.

26) EHD is without information sufficient to form a belief about how Petitioner Freed learned of the request for Permit No. 3135 and on that basis denies this allegation. EHD affirmatively states that EHD received the application for Permit No. 3135 from Smith's on November 5, 2013, deemed it complete on December 3, 2013, published the public notice on December 6, 2013 and issued Permit No. 3135 on April 30, 2014.

I attended the public meeting on April 3, 2014 which did not produce any answers to our concerns about health issues.

Ex. 2.

27) EHD admits that Petitioner Freed attended the public meeting held on April 3, 2014. EHD affirmatively states that the EPA regulation that it followed in issuing Permit No. 3135, Hex C, was adopted to protect the public in urban areas from emissions of hazardous air

pollutants. EHD denies that it has authority to impose more stringent emissions limits for hazardous pollutants than the federal emission limit established in Hex C. EHD denies that no answers were provided to concerns raised about health issues at the public meeting on April 3, 2014.

I would think that because of the health issues of the very high amounts of pollutants that it would be required that I be notified of this permit request #3135.

Ex. 2.

28) EHD is without information sufficient to form a belief about what Petitioner Freed does or does not think and on that basis denies this allegation. EHD denies that there are “health issues of the very high amounts of pollutants.” EHD denies that there is any law, regulation, or standard which requires EHD or an applicant to provide individualized notice to nearby residents or property owners prior to permitting a minor source of air pollutants or an Area Source of HAPs.

I cannot stress enough how important it is for the City of Albuquerque not to make the mistake of permitting this “Major Source” gasoline dispensing facility in the wrong zone which will result in polluting the area with the very large amount of VOCs per year at the location proposed.

Ex. 2.

29) EHD denies that Permit No. 3135 authorizes emissions sufficient to qualify the Smith’s gasoline dispensing facility as a “Major Source” of air pollutants. EHD affirmatively states that compliance with zoning matters is the responsibility of the City Planning Department. EHD denies that it has authority to consider zoning in making decisions about whether to issue air quality permits. To the extent that this sentence in the Petition raises any air quality related allegations, EHD denies them.

I do not believe that such a decision should be allowed to stand.

Ex. 2.

30) EHD is without information sufficient to form a belief about what Petitioner Freed does or does not believe and on that basis denies this allegation. EHD affirmatively states that its issuance of Permit No. 3135 complied with all applicable laws, ordinances, rules, and standards.

31) With respect to any other allegations raised by Exhibit 2 which have not been answered above, EHD denies them.

The Petitioners are appealing the issuance of Permit 3135, issued to Smith's on April 30, 2014, with notice provided to Petitioners by letter dated April 30, 2014. (See Exhibit 1, attached).

Petition, p. 3.

32) EHD admits that Petitioners have filed a petition seeking a hearing before the Air Board concerning EHD's issuance of Permit No. 3135. EHD admits that it issued Permit No. 3135 on April 30, 2014 and that it sent a letter to interested participants dated April 30, 2014. EHD admits that Exhibit 1 attached to the Petition is a copy of the letter EHD sent to interested participants. EHD is without information sufficient to form a belief whether each Petitioner is adversely affected as required to petition for a hearing before the Air Board and on that basis denies that Petitioners have standing to appeal the issuance of Permit No. 3135.

The Petitioners object to the issuance of the permit allowing for a throughput of 7 million gallons at a fuel dispensing station proposed to be constructed at 6941 Montgomery NE, Albuquerque, New Mexico.

Id.

33) EHD admits that Petitioners object to the issuance of Permit No. 3135 which allows a throughput of 7 million gallons at a gasoline dispensing facility to be constructed at

6941 Montgomery NE in Albuquerque, New Mexico. EHD affirmatively states that Permit No. 3135 meets all federal, state and local requirements including requirements regarding gasoline throughputs, emissions and performance measures (also known as management practices).

*Permit No. 3135 was issued pursuant to §20.11.41 NMAC,
Authority to Construct.*

Petition, p. 3.

34) EHD admits that Permit No. 3135 was issued pursuant to 20.11.41 NMAC,
Authority to Construct.

*The PIH was held on April 3, 2014 and approximately 25 people
attended the meeting in opposition to the issuance of the permit,
with approximately 14 people providing public comments opposing
the issuance of the permit.*

Petition, p. 3.

35) EHD admits that it held a Public Information Hearing on the application for Permit No. 3135 on April 3, 2014. EHD affirmatively states that 28 people signed the sign-in sheet at the Public Information Hearing but EHD does not tally how many are in favor of or opposed to a permit application. Therefore, EHD is without information sufficient to form a belief about the number of persons opposed to the issuance of the permit and on that basis denies this allegation.

*Approximately 12 Smith's employees appeared at the PIH in
support of the permit issuance.*

Id.

36) EHD admits that twelve people who signed the sign-in sheet at the Public Information Hearing stated their affiliation as "Smith's." EHD does not tally how many are in favor of or opposed to a permit application. Therefore, EHD is without information sufficient to

form a belief about the number of persons attending “in support of the permit issuance” and on that basis denies this allegation.

In addition, a petition with over 100 signatures objecting to the issuance of the permit was submitted to the administrative record.

Id.

37) EHD denies that a petition with over 100 signatures objecting to the issuance of Permit No. 3135 was submitted to the administrative record. EHD affirmatively states that it received one letter and two petitions with 70 signatures in favor of a Public Information Hearing. EHD affirmatively states that petitions pro or con are not an appropriate criteria by which to decide whether to grant or deny a permit to construct an air emissions source.

The purpose of regulatory provisions regarding public notice and hearings is to ensure that persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. Colonias Dev. Council v. Rhino Enviro. Services, 2005-NMSC-024, 21, 138 N.M. 133.

Petition, p. 3.

38) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that the New Mexico Supreme Court’s decision in *Colonias Dev. Council v. Rhino Enviro. Services* (“*Colonias*”) applies to permits issued under the Solid Waste Act. EHD denies that any New Mexico court has concluded that *Colonias* applies to permitting decisions made under the Air Act. EHD denies that the Air Act contains any language comparable to the language that the Supreme Court analyzed in *Colonias*. EHD affirmatively states that Paragraph 21 of *Colonias* cited as support for this statement in the Petition is interpreting language in the Solid Waste Act, not the Air Act, and that similar statutory language is not present in the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The New Mexico Supreme Court has recognized that “the public plays a vital role” in an administrative environmental permitting process and must be allowed a reasonable opportunity to be heard. Id.

Petition, p. 3.

39) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that the New Mexico Supreme Court stated that “the public plays a vital role in the hearing process” in referring to its analysis of the Solid Waste Act, Section 74-9-29(A)(4) and the New Mexico Environment Department hearing permitting procedures, 20.1.4 NMAC. EHD denies that either of these provisions applies to the administrative process by which EHD considers an application for an air quality permit. EHD affirmatively states that it issued Permit No. 3135 pursuant to the procedures in Section 7 of the Air Act and 20.11.41 NMAC, and applied the substantive regulations in 20.11.65 NMAC and federal regulation 40 C.F.R. §§ 63.11110 to 63.11126 (incorporated by reference by 20.11.64 NMAC). To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Pursuant to the Colonias decision, 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. Id. at ¶24.

40) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Quality of life issues may include concerns about public health and welfare and other impacts on the community not addressed by specific technical regulations. Id.

Petition, p. 3-4.

41) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Such concerns may also include impacts on private property.

Petition, p. 4.

42) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Adverse public testimony, whether in the form of technical testimony or public comment, must be taken into account when reaching a final decision. Id. at ¶¶24, 41, 43.

Petition, p. 4.

43) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The New Mexico 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. Id. at ¶¶7, 8, 24.

Petition, p. 4.

44) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Board has already held, in regard to Smith's Permit No. 2037-M1 for the Smith's fuel dispensing station located at 1313 Carlisle Blvd. NE, Albuquerque, NM, that the Air Quality Act and regulations require permitting decisions to take into account quality-of-life issues.

Petition, p. 4.

45) EHD affirmatively states that the Air Board's decision in regard to Smith's Permit No. 2037-M1 for the Smith's gasoline dispensing facility located at 1313 Carlisle Blvd. NE, Albuquerque, NM, is presently before the Court of Appeals, that legal issues arising in that proceeding are disputed and the final decision from the appellate process is as yet unknown. As a result, EHD denies that the Air Board's decision on Permit No. 2037-M1 is binding precedent or persuasive guidance for this proceeding. To the extent that any air other quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Act mandates that the Board "shall prevent or abate air pollution." NMSA §74-2-5.

Petition, p. 4.

46) This sentence states a legal conclusion to which no response is required. To the extent that any response is required, EHD admits that Section 5(A) of the Air Act requires, among other things, that the Air Board prevent or abate air pollution. EHD affirmatively states that Section 5(B) of the Air Act requires the Air Board to “adopt...regulations...to...prevent or abate air pollution” and that EHD has followed all Air Board regulations in issuing Permit No. 3135. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

In addition, Part 41 of the Air Quality Control Board Regulations, which governs authority to construct permits, states that the objective of the part “is to insure that new facilities or modified existing facilities will not emit air pollution, which will cause violations of air pollution control regulations upon operation following construction. This procedure will protect the source owner’s investment as well as uphold public concern and desire for input prior to commencement of air pollution sources in Bernalillo County.” 20.11.41.6 NMAC.

Petition, p. 4.

47) This sentence states a legal conclusion to which no response is required. To the extent that any response is required, EHD admits that the applicable Part 41 of the Air Board’s regulations contains the quote set forth in this sentence of the Petition. EHD affirmatively states that the term “air pollution” is defined in Section 74-2-2(B) of the Air Act and that it does not encompass all emissions of any amount of air pollutants. EHD affirmatively asserts that subsection 5(B) of the Air Act provides that air pollution is to be prevented and abated by adopting rules and subsection 7(C)(1) limits the authority to deny permits to only three reasons— if the construction or modification would (1) violate a rule, (2) violate a standard, or (3) violate any other provision of the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Act and the Board's regulations, as well as the Board's decision in the Carlisle permitting matter, clearly express that the issuance of permits must be made in the context of impacts to public welfare and the reasonable use of property.

Petition, p. 4.

48) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that public welfare and reasonable use of property lacking any nexus to an air quality regulation may be used as a basis for denying a permit. *See* NMSA 1978, § 74-2-7(C)(1). EHD affirmatively states that public health and reasonable use of property is considered when the Air Board adopts rules. NMSA 1978, § 74-2-5(E). In turn, during permitting, those rules are applied in order to protect public health and property. EHD affirmatively states that the Air Board has adopted a rule to prevent excessive emissions of hazardous air pollutants at gasoline dispensing facilities, 40 C.F.R. Part 63, Subpart Hex CCC (incorporated by reference by 20.11.64 NMAC), and a rule to prevent excessive emissions of volatile organic compounds at gasoline dispensing facilities, among other sources, 20.11.65 NMAC. EHD affirmatively states that Permit No. 3135 requires compliance with both Hex C and Part 65 and that this protects public health and reasonable use of property. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

In issuing Permit No. 3135, the City of Albuquerque Air Quality Program (Air Program) refused to take into consideration the concerns raised by the public comments at the PIH.

Petition, p. 4.

49) EHD denies that it refused to take into consideration the concerns raised by the public comments at the PIH. EHD affirmatively states that it gave appropriate consideration to the concerns raised at the PIH.

The Air Program stated: "An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety." (Exhibit 1, attached hereto).

Petition, p. 4.

50) EHD admits that the Air Program made the quoted statement in the letter attached as Exhibit 1 to the Petition.

The Program further 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 the particular issue." Id.

Petition, pp. 4-5.

51) EHD admits that the Air Program made the quoted statement.

Permit No. 3135 is for a fuel dispensing station that has not yet been built.

Petition, p. 5.

52) EHD admits that the Smith's gasoline dispensing facility that is the subject of Permit No. 3135 has not yet been built.

Smith's proposes to build the station at the intersection of Montgomery and Louisiana, one of busiest intersections in New Mexico.

Id.

53) EHD admits that the gasoline dispensing facility that is the subject of Permit No. 3135 would be built at the intersection of Montgomery and Louisiana NE in Albuquerque. EHD is without information sufficient to form a belief whether the intersection of Montgomery and

Louisiana NE is “one of the busiest intersections in New Mexico” and on that basis denies that allegation.

There are already two gas stations at the intersection, one of which is owned by Petitioner Mary Ann Roberts.

Id.

54) EHD admits that there are two existing gas stations at the intersection of Montgomery and Louisiana NE in Albuquerque. EHD is without information sufficient to form a belief whether one of the two existing gas stations is or is not owned by Petitioner Mary Ann Roberts and on that basis denies this allegation. EHD affirmatively states that it has issued Permit No. 1519 for the Chevron gas station at 6940 Montgomery Blvd NE in Albuquerque to Rocking R Enterprises.

The Chevron station owned by Ms. Roberts has an annual throughput of 800,000 gallons, as compared to the 7 million gallons approved for the proposed Smith's station.

Id.

55) EHD denies that the Chevron gas station at the intersection of Louisiana and Montgomery NE in Albuquerque has an annual throughput of 800,000 gallons. EHD affirmatively states that its most recent emission inventory record for the Chevron gas station at 6940 Montgomery Blvd NE in Albuquerque is from the 2010 emission inventory and states an annual throughput of 877,299 gallons for that Chevron station. EHD affirmatively states that the permitted throughput for the Chevron gas station at 6940 Montgomery Blvd NE in Albuquerque is 1,200,000 gallons per year. EHD admits that the permitted annual throughput for the proposed Smith's gasoline dispensing facility that is the subject of Permit No. 3135 is 7,000,000 gallons but the actual throughput may be different. EHD is without information sufficient to form a belief whether the Chevron gas station at 6940 Montgomery Blvd NE in Albuquerque is or is not

owned by Petitioner Mary Ann Roberts and on that basis denies this allegation. EHD affirmatively states that it has issued Permit No. 1519 for the Chevron gas station at 6940 Montgomery Blvd NE in Albuquerque to Rocking R Enterprises.

The location borders residential areas and is close to Cleveland Middle School.

Id.

56) EHD admits that the proposed location of the gasoline dispensing facility that is the subject of Permit No. 3135 is close to residential areas and Cleveland Middle School.

The construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution.

Id.

57) EHD is without information sufficient to form a belief whether the construction of the proposed Smith's gasoline dispensing facility that is the subject of Permit No. 3135 will result in significantly increased traffic which will cause an increase in air pollution and on that basis denies these allegations.

The property owned by Ms. Freed is immediately adjacent to the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic.

Id.

58) EHD is without information sufficient to form a belief about what property is or is not owned by Ms. Freed and on that basis denies this allegation. EHD is without information sufficient to form a belief about whether Ms. Freed's property would be impacted by increased traffic and on that basis denies this allegation. EHD is without information sufficient to form a belief that nearby property will be impacted by increased VOCs and fumes and on that basis denies these allegations. Furthermore, the Air Quality Control Act, 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 EHD [emphasis added]. A general statement that the “property owned by Ms. Freed...would be impacted by the VOCs, fumes and increased traffic” does not meet the requirements of the Air Quality Control Act or the New Mexico Administrative Code to support a petition.

The proposed fuel dispensing station would have negative and cumulative impacts on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area.

Id.

59) EHD is without information sufficient to form a belief that the gasoline dispensing facility in Permit No. 3135 would have the negative impacts alleged in this sentence in the Petition and on that basis denies these allegations. EHD affirmatively states that Permit No. 3135 meets all legal requirements.

These and other concerns were raised at the PIH. Exhibit 2, attached, includes the specific concerns of Petitioner Margaret Freed.

Id.

60) EHD admits that these and a variety of other concerns were raised at the PIH. EHD admits that specific concerns of Petitioner Margaret Freed are included in Exhibit 2.

The Air Program’s refusal to take into consideration issues regarding quality of life, public health, impacts to private property and impacts to the community is inconsistent with the holding in Colonias, with the applicable statutes and regulations, and with the Board’s decision in the Carlisle permitting matter.

Petition, p. 6.

61) This sentence states legal conclusions and does not require a response. To the extent that a response is required, EHD denies this allegation.

“Duly noting” the concerns raised by the public is insufficient.

Id.

62) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

The Air Program is incorrect in stating that they may only rely on technical requirements.

Id.

63) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

If the concerns of the public are not addressed, including quality of life issues, impacts to the community, and impacts to property, then the requirements for public participation are merely a pro forma process that has no meaning and no relation to the actual permit decision.

Id.

64) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

Public participation is rendered meaningless, despite statutory and regulatory provisions for public input and numerous decisions by the New Mexico appellate courts emphasizing the importance of public participation in environmental permitting.

Id.

65) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

Pursuant to §74-2-7 NMSA and 20.11.81 NMAC, the Petitioners, persons who participated in the permitting action before the Department, request that the Air Quality Board hold an evidentiary hearing on Permit No. 3135, including but not limited to the failure of the Air Quality Program to properly take into consideration public comments and concerns regarding quality of life and impacts on the community, impacts on air quality, cumulative effects of the permitting action, impacts on private property and other issues raised by the public, including those raised by Petitioner Margaret Freed, in Exhibit 2, attached hereto.

Petition, p. 6.

66) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

As stated above, pursuant to Colonias Dev. Council v. Rhino Enviro. Services, 2005-NMSC-024, 138 N.M. 133, NMSA §74-2-5., 20.11.41.6 NMAC, and the Board's decision in the Smith's Carlisle permitting matter, permitting decisions must take into consideration community concerns and cannot rely solely on technical considerations.

Petition, p. 6.

67) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

The requested remedy is within the Board's jurisdiction to review decisions made by the Air Quality Program and to prevent and abate air pollution set forth in §74-2-5 and the applicable air quality regulations.

Petition, pp. 6-7.

68) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

AFFIRMATIVE DEFENSES

69) To the extent that Petitioners seek to have Permit No. 3135 denied on the basis of quality of life concerns that have no nexus to any Air Board regulation, Petitioners fail to state a claim upon which relief can be granted.

70) Petitioner Pat Toledo does not have standing to petition for a hearing for Permit No. 3135.

71) Petitioner Mary Ann Roberts does not have standing to petition for a hearing for Permit No. 3135.

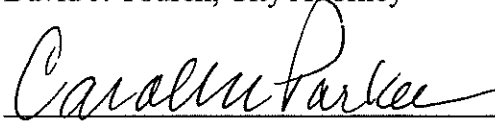
72) The Petition does not demonstrate how the proposed construction “will not meet applicable standards, rules or requirements of the Air Quality Control Act or the ...[Clean Air Act]; “will cause or contribute to air contaminant levels in excess of ...[an ambient air quality standard];” or “will violate any other provision of the Air Quality Control Act or the ...[Clean Air Act]” as required by subsection 7(C)(1) of the Air Act for denial of Permit No. 3135.

73) EHD reserves the right to assert such additional affirmative defenses as may arise and prove applicable during the course of the hearing.

WHEREFORE, having fully answered, EHD respectfully requests that the Air Board issue a Final Order denying the remedies requested by Petition No. 2014-2, dismissing Petition No. 2014-2, sustaining EHD’s issuance of Permit No. 3135 and granting EHD any additional relief that the Air Board deems just and proper.

Respectfully Submitted,

CITY OF ALBUQUERQUE
David J. Tourek, City Attorney

A handwritten signature in black ink, reading "Carol M. Parker". The signature is written in a cursive style with a large, looped "C" and "P".

Carol M. Parker, Assistant City Attorney
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500
cparker@cabq.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer to the Petition for Hearing was served on July 14, 2014 by the method indicated below:

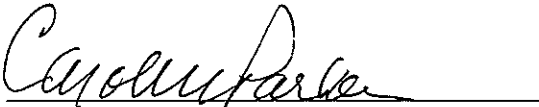
- 1) The City's original *Answer to the Petition for Hearing* was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered to the Hearing Clerk.
- 2) One additional copy was hand-delivered to the Hearing Clerk for delivery to the Hearing Officer/Air Board Attorney and one copy was sent by electronic mail to:

Felicia Orth
c/o Andrew Daffern, Hearing Clerk
Control Strategies Section
Environmental Health Department
One Civic Plaza, Room 3023
Albuquerque, NM 87102
orthf@yahoo.com
*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board
and Hearing Officer for AQCB Petition No. 2014-2*

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

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By: 
Carol M. Parker, Assistant City Attorney