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. 3136

Arthur Gradi, Ruth A. McGonagil,
Jerri Paul-Seaborn, Bernice Ledden,
Americo Chavez, Pat Toledo, as individuals,
and Pat Toledo,
Petitioners.

No. AQCB 2014-3

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

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

INTRODUCTION

Attached hereto, Petitioners incorporate in full the responses in opposition to the City's and Smith's motions for summary judgment which was granted by the Air Board October 8, 2014 in the separate petition for a hearing on the merits regarding air quality permit No. 3135 (AQCB No. 2014-2) ("Louisiana-Montgomery"). Petitioners supplement their arguments and authorities as stated below and recite their specific disputed material facts for the record.

The Air Board did not consider multiple disputed material facts listed in AQCB No. 2014-2 but took advice of the City's and Smith's counsel that somehow there were not material disputed facts for review, but only legal issues presented. The application of facts to law is indicated in this or any summary judgment proceeding. As discussed in further detail below, summary judgment in any adjudicative proceeding is a drastic and disfavored remedy of courts

of law, and thus all indulgence in a Petitioner's right to proceed must be applied. Opposing counsel overstates and inaccurately submits that no "material facts are disputed."

Petitioners reassert that NMSA (1978) §74-2-7 (K) is not an appropriate statutory provision to allow the City and Smith's to pre-empt public hearings. Petitioners reassert that summary judgment on timely filed petitions for hearing under the Air Quality Control Act ("AQCA") is not intended by the Legislature. Despite Petitioners' position, the City and Smith's do not even bring their inappropriate motions under alternative adjudicatory procedures which could provide the only basis for these motions. 20.11.81.20 NMAC.

The City and Smith's accuse Petitioners of not having admissible evidence in order to proceed to hearing but evade Petitioners' discovery responses as 'irrelevant" where the requested discovery is clearly applicable to the matter. In bad faith and in violation of rules of discovery applicable to the District Courts—and applicable to this proceeding by the City's and Smith's own arguments— the City and Smith's allege Petitioners do not have any evidence in response to its separately propounded discovery requests. The City and Smith's then seek summary judgment to pre-empt Petitioners' timely filed request for public hearing on the basis of no admissible evidence to support a public hearing.

The City and Smith's have their cake and eat it to as the Air Board can allegedly only proceed to rubber stamp any air permit challenged on the misguided notion that isolated performance standard federally pre-empts the Air Board from weighing regulatory factors in reviewing permits. The Air Board in fact decided otherwise under *In re Air Quality Permit* No. 2037-M1 which does constitute a persuasive decision (at a minimum) that the Board should apply in this matter. *In re Air Quality Permit* No. 2037-M1 is appropriate for issue preclusion in this administrative proceeding which in fact was raised in the attached incorporated responses in

opposition to summary judgment under AQCB No. 2014-2. Response to City, p. 16-17 ¶¶ 2 (full); Response to Smith's. p. 14 ¶ 2 (full).

Finally, the City's previous argument at the October 8, 2014 summary judgment hearing under AQCB No. 2014-2 that pursuant to 20.11.81.16.I (1) NMAC the public must enter appearances in order to examine witnesses testifying at hearing is void as a matter of law. This regulation conflicts with the AQCA, § 74.2.7 (I) that provides that the public may examine witnesses testifying at hearing. As discussed further below, the statute controls where there is conflict with an associated regulation as a matter of law. Petitioners request the Air Board declare 20.11.81.16.I (1) NMAC illegal.

DISPUTED MATERIAL FACTS **re: City's Motion for Summary Judgment**

1. Petitioners dispute "undisputed material fact" ¶ 3 to the extent that notice was deficient.

2. Petitioners dispute "undisputed material fact" ¶ 4 to the extent that the EHD/City does not give any weight to public concerns re: air permitting under its limiting construction of the AQCA.

3. Petitioners dispute that Summary Judgment proceedings are appropriate or allowable under the AQCA, NMSA (1978) § 74-2-1 et seq. Motion, pgs. 6, 7, 8.

4. 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.*, pgs.7, 30.

5. Petitioner's dispute that they are not adversely affected by the issuance of the permit. *Id.*, pgs. 8, 9, 29, 30

6. Petitioners dispute that they have suffered no "injury-in-fact" or otherwise have not suffered "invasion of a legally protected interest." *Id.*, pgs. 9-10.

7. Petitioners dispute the Air Board does not have the authority to consider quality of life concerns when issuing an air permit. *Id.*, pgs. 14-15, 31.

8. Petitioners dispute that they can allegedly not point to any rule that the intended gas station will violate if built. *Id.*, pgs. 18.

9. Petitioners dispute that the Air board's authority to hear this matter and provide remedial relief is preempted by federal law under Hex C. *Id.*, p. 19.

10. Petitioners dispute that Petitioner Toledo does not have standing to challenge the permit. *Id.*, p. 21-22.

11. Petitioners dispute that *In re Air Quality Permit* No. 2037-M1 is irrelevant to the issuance of the permit. *Id.*, pgs. 23-24, 31.

12. Petitioners dispute that *In re Air Quality Permit* No. 2037-M1 has no precedential value on the Air Board merely because it is on appeal and because it has not been stayed. *Id.* p. 27. *Id.*, pg. 31.

13. Petitioners dispute that other New Mexico case law such as *Colonias Dev. Council v. Rhino Enviro. Services,* 2005-NMSC-024, 21, 138 N.M. 133 is not analogous to the issue of public participation in this case with respect to matters of environmental concern which should require Petitioners' intended hearing on the merits. Petitioners dispute that *Colonias Dev. Council* does not stand for the proposition that hearings ensure persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. *Id.*, pgs. 25-26.

14. Petitioners dispute that the AQCA does not have a purpose in protecting public health, safety, and welfare, including effective regulation of air pollution, the manner of which evolves functionally over time. *Id.*, p. 26-27.

15. Petitioners dispute that notice was adequate in this case. *Id.*, p. 28.

16. Petitioners dispute that the PIH are not pro forma or otherwise allows meaningful democratic participation under the EHD and City's own isolated adherence to performance standard alone in deciding the issuance of permits. *Id.*, pgs. 32-33

UNDISPUTED MATERIAL FACTS **re: City's motion for Summary Judgment.**

1. Petitioners do not dispute the City's "Undisputed Material Facts" [*Id.* ¶¶ 1-2, 7 pgs. 5-6].

2. The City does not dispute that the Air Board has no specific provision for summary judgment. Motion, p. 7.

3. The "EHD does not dispute that gasoline vapors contain benzene and that benzene has important and serious impacts on human health." *Id.*, p. 19.

4. The City does not dispute that benzene is a known human carcinogen. *Id.*

5. The Parties do not dispute that "[w]here benzene emissions are concerned, reasonable minds might differ how to best balance public health versus economic reasonableness and technical practicality." *Id.*, p. 20.

6. The City does not dispute that the Air Board can either sustain, modify, or reverse an EHD permit. *Id.*, p. 30.

DISPUTED MATERIAL FACTS **re: Smith's motion for Summary Judgment.**

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 10, p. 157.

2 Petitioners dispute Smith's "Undisputed Material Fact" ¶ 4 to the extent that the City's notice of the proposed permitting action was deficient.

3. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 6 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. Smith's undisputed fact ¶ 6 is dispositive that the PIHs provide meaningless public participation in the permitting process. AR 55, pp. 302, 305; AR 95, pp. 442-45; PIH 3/25/14 Audio at 20:37 to 22:23, 24:32-47; AR 53, p. 289; PIH 4/23/14 Audio at 27:50 to 33:00, 35:14 to 36:30; AR 91, p. 423.

4. Petitioners dispute Smith's "Undisputed Material Fact" ¶ 8 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" ¶ 9 that none of the verbal or written public comments identified by the public at the PIH identified any aspect of the permitting process that failed to comply with applicable law.

6. Petitioners dispute Smith's "Undisputed Material Fact" ¶¶ 10, 13, 15 because the record and the City's position in interpreting its own regulations clearly show the City gives no weight to comments and concerns of the public at PIHs regarding health, welfare, safety of the

public, community, and property concerns which is not in accordance with applicable air quality regulations and the Air Board's previous decision under *In re Air Quality Permit* No. 2037-M1.

7. 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.

8. 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. 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.*

10. 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.

11. Petitioners dispute that their community, health, property and safety concerns do not have a nexus to the AQCA and associated regulations. *Id.*, pgs. 8-11.

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

13. 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.*

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

15. 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.11.

16. Petitioners dispute that variance proceeding is relevant in this action. *Id.* p. 12

17. Petitioners dispute that they do not have evidence establishing reasonable probability of harm. *Id.*

UNDISPUTED MATERIAL FACTS **re: Smith's motion for Summary Judgment**.

1. Petitioners do not dispute Smith's "Undisputed Material Fact" ¶¶ 1, 2, 5, 7, 11, 12, 14.

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. 5.

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. 6.

4. Petitioners do not dispute that the grounds for permit denial regards determination of compliance with standards and regulations. *Id.*, p. 10.

SUPPLEMENTED 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.

Summary judgment is a drastic remedy and should not be granted where there are issues of credibility or even a color of a triable issue. *Sillman v Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395 (1957). "Summary judgment is an extreme remedy that should be imposed with caution." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539, 91 P.3d 58. "If there is the slightest doubt as to the existence of material factual issues, summary judgment

should be denied." *Garcia-Montoya v. State Treasurer's Office,* 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084 (internal quotation marks and citation omitted). "[Appellate courts] review de novo an order granting . . . summary judgment." *Amethyst Land Co. v. Terhune,* 2013-NMCA-059, ¶ 28, 304 P.3d 434.

"If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy." *Bd. of Cnty. Comm'rs v. Risk Mgmt. Div.,* 1995-NMSC-046, ¶ 4, 120 N.M. 178, 899 P.2d 1132 *Thompson v. Fahey,* 1980-NMSC-013, ¶ 6, 94 N.M. 35, 607 P.2d 122 ("So long as one issue of material fact exists [summary judgment] may not be properly granted.").

SUPPLEMENTED APPLICABLE LAW

Collateral estoppel

"[T]he doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action." *Silva v. State*, 106 N.M. 472, 476, 745 P.2d 380, 384 (N.M., 1987.

Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Under collateral estoppel, or "issue preclusion," the cause of action in the second suit need not be identical with the first suit. *See Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 102 N.M. 396, 400, 696 P.2d 484, 488 (Ct.App.1985). Fundamental fairness requires that the party against whom estoppel is asserted had a full and fair opportunity to litigate. To give rise to estoppel, the finding of ultimate facts in the prior action must have been final. *See C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 160-61, 597 P.2d 1190,

1200-01 (Ct.App.1979). The same parties are not required for application of issue preclusion. *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974).

A final judgment "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." RESTATEMENT (SECOND) OF JUDGMENTS (1982) § 13, cmnt. g. Factors for this Board or the New Mexico Court of Appeals to consider whether *In re Air Quality Permit* No. 2037-M1 is "firm" include whether **1)** No. 2037-M1 was adequately deliberated; **2)** whether the parties under No. 2037-M1 where fully heard; **3)** whether the Board supported its decision under No. 2037-M1 with reasoned opinion, and **4)** whether No. 2037-M1 was subject to appeal or in fact was reviewed on appeal. *Id*; *see also Blea v. Sandoval*, 1988-NMCA-036, 107 NM 554, 761 P.2d 432 (noting New Mexico Courts adopt the Restatement (Second) of Judgments regarding collateral estoppel).

Finding of fact made by administrative bodies may be given collateral estoppel effect in subsequent judicial proceedings, "if rendered under conditions in which parties have the opportunity to fully and fairly litigate the issue at the administrative hearing." *Shovelin v. Central N.M. Elec. Coop, Inc.*, 1993-NMSC-015, 115 N.M. 293, 850 P.2d 996, 1001 (internal citation omitted).

Supplemented relevant considerations and provisions of
NMSA (1978) § 74-2-1 et seq. (AQCA) and 20.11.81 NMAC

20.11.81.20 NMAC (alternate resolution) states,

"A. Summary procedures:

(1) Use of summary procedures: The board may dispose of a petition after an expedited public hearing if a party makes a written request that the board decide the merits of the petition solely on legal arguments presented in written briefs and oral arguments.

(2) Expedited hearing: If the hearing officer determines that the request has a likelihood of success and could fairly expedite the resolution of the proceeding, the hearing officer may allow the parties and interested participants to brief the issue and present oral arguments at an expedited public hearing, and then present the issue to the board for a decision. If an expedited hearing is conducted, the hearing officer shall:

(a) assure that public notice is given in accordance with Subsection G of 20.11.81.14 NMAC, and include in the public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Paragraph (2) of Subsection H of 20.11.81.14 NMAC; and

(b) allow the public to attend the expedited hearing but may limit presentations at the hearing to oral arguments by parties and interested participants regarding the specific issue before the board.

(3) Decision: After an expedited hearing, the board may either decide the matter and issue a final order, or, if the board decides not to dispose of the matter, the board shall proceed with a full hearing as provided by 20.11.81.16 NMAC." *Id.* (emphasis added).

NMSA (1978) § 74-2-7 (I) states in relevant part, "[i]f a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within sixty days after receipt of the petition.... If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances 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." *Id.*

In conflict with the statute, NMAC 20.11.81.14.I (1) states in relevant part, "[n]o later than seven days (for a 30-day hearing procedure) or 10 days (for a 60-day hearing procedure) before the beginning of the hearing on the merits, any person who wishes to be treated as an interested participant and to cross-examine witnesses at the hearing shall file an entry of appearance with the hearing clerk and serve the entry of appearance upon all parties..." *Id.*

An agency abuses its discretion when its decision is not in accord with legal procedure *Oil Transp. Co. v. N.M. State Corp. Comm'n,* 1990-NMSC-072, ¶ 25, 110 N.M. 568, 798 P.2d 169. An agency's ruling regarding statutory construction is reviewed de novo. *See Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n,* 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494 ("Statutory construction is not a matter within the purview of [the Commission's] expertise and, therefore, we afford little, if any, deference to [the Commission] on this matter." (internal quotation marks, citations, and alterations omitted)).

"'When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation.' " *Rodriguez v. Permian Drilling Corp.,* 2011-NMSC-032, ¶ 8, 150 N.M. 164, 258 P.3d 443 (quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28). Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance. *See State v. Nick R.,* 2009-NMSC-050, ¶ 18, 147 N.M. 182, 218 P.3d 868 (recognizing that our courts interpret the intended meaning of statutory language by consulting the dictionary to ascertain the words' ordinary meaning). The plain meaning rule requires that statutes "be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason." *State v. Maestas,* 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 (internal quotation marks and citation omitted).

Where a statute and a regulation are inconsistent, the statute will prevail. *Jones v. Employment Servs. Div.*, 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) ("If there is a conflict or

inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail.").

SUPPLEMENTED ARGUMENT

I. Legal interpreation of the facts are not the sole disputed material facts that remain, making summary judgment inappropriate on the Petition.

Petitioners' disputed material facts present factual issues that are not merely disputed legal matters. Namely, Petitioners allege that the City does not give any weight to quality of life concerns at the PIHs conducted. Petitioners' Disputed Material Facts ¶¶ 2, 5, 6, 7, 13, 14, 17 (City's motion); Petitioners' Disputed Material Facts ¶¶ 1, 3, 4, 5, 6 (Smith's motion), *supra*. The parties clearly dispute this issue factually. "EHD did not prevent anyone from testyfing or submitting evidence." Smith's Motion for Summary judgment, p. 3, ¶ 8. The material facts disputed are confirmed by Smith's own admission that the City explains at the PIHs that it is prohibited from giving any weight to quality of life concerns at the PIHs by operation of federal preemption. *Id.*, pgs. 2-3, ¶ 6. The City's and Smith's position flies in the face of the final order and decision under *In re Air Quality Permit* No. 2037-M1 requiring such factoral analysis. The contention that the Air Board cannot regulate and develop law in the context of permit decisions is flatly not supported by the law and was not so held in *In re Air Quality Permit* No. 2037-M1.

In support of a hearing on the merits, Petitioners allege, among other allegations, they live in close proximity to the intended gas station, an elementary school is in close proximity to the intended gas station coupled with another vulnerable population of elderly residents with health issues and concerns constitute material facts the Air Board must weigh and consider in review and potential reversal of the air permit. Amended Petition for Hearing, pgs. 2, 3, 7. Petitioners are clearly adversely affected by the intended gas station and the Board should proceed to hearing on the merits. Alternatively, and at a minimum, attendees must be provided

an opportunity to make an offer of proof before the Air Board rules against them at the October 22, 2014 summary judgment hearing. NMAC 20.11.81.16 E (2).

II. The instant summary motion hearing was not properly noticed in violation of the Air Board's own adjudicatory procedures.

Upon information and belief, the City and Smith's brought their motions without proper notice under alternative resolution adjudicatory procedures. The public should have been noticed in accordance with Subsection G of 20.11.81.14 NMAC, which notice should have included public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Paragraph (2) of Subsection H of 20.11.81.14 NMAC. Deficient notice requirements regarding the instant summary judgment motions provides the Board an independent basis to deny the motions.

III. The City and Smith's have abused rules of civil procedure in disallowing Petioners dicoverable information that could lead to admissible evidence in support of their allegations.

Petitioners propounded the following discovery, in part, on the City:

"*-Does the City inspect GDFs to insure that vapor venting or recovery systems and pressure vent caps are maintained in good working order? If so, please provide details of the City's practices related to these inspections.*

- Please provide dates of inspections and types of inspections conducted by the City of Albuquerque for all Smiths GDFs (gasoline dispensing facilities) in the Albuquerque metropolitan area in the past 5 years.

-If irregularities were found in any of the inspections described in the preceding interrogatory, please provide copies of the documents regarding those irregularities and state what actions were taken, on what date, and which City personnel inspected and approved that corrective actions were taken.

- With regard to record-keeping requirements for Smiths GDFs in the Albuquerque Metropolitan area, please state whether the City allowed for any modification or variance from the basic requirements? If so, please provide the date and nature of the modification and provide any document which evidences that modification or variance.

- Has the City established a periodic visual surveillance system to detect and investigate violation of emission limitations and complaints? If so, please describe in detail.

- Has Smith's provided accurate records and monitoring to the City of Albuquerque of gasoline storage tanks for its GDFs in the Albuquerque Metropolitan Area for annual throughput for the past 5 years? Have these records indicated any irregularities? If so, please describe the nature of the irregularity and how the City and Smiths resolved.

- Does the City monitor idling activity at GDFs in the Albuquerque metropolitan area? If so, please describe procedures in detail, whether these measures are effective in preventing idling activity, and any enforcement actions taken in regard to idling issues."

In bad faith response, the City merely responded "Not relevant, EHD has no authority to deny or condition a permit because of pending or past violations." The City was required to provide any responsive information whether or not it mounted objections on the basis of relevancy and whether or not the requested discovery is admissible evidence. The discovery is legitimately within the scope of public welfare considerations and the requested responses and production would otherwise be expected to show nexus to public welfare concerns regarding the Air permitting process. The City's conduct under the rules of civil procedure is sanctionable for discovery violations and the Board may deny the City's motion on the independent basis of violating rules of discovery.

In Like manner, Smith's failed to respond and provide production on petitioners' following discovery stating in all cases the information is purportedly "not relevant to any question before the AQCB.... The only question is whether emissions authorized by permit No. 3136 will or will not meet applicable standards."

-Please provide dates and names of inspectors and types of inspections for all Smiths GDFs in the Albuquerque metropolitan area in the past 5 years.

- If irregularities were found in the course of inspections, please provide copies of the documents regarding those irregularities and state what actions were taken, the date, and whether the City of Albuquerque (City) allowed for any modification or variance from the basic

requirements? If so, please provide the date and location of any document which evidences that modification or variance.

- Has Smith's provided accurate records regarding monitoring to the City of Albuquerque of gasoline storage tanks for its GDFs in the Albuquerque Metropolitan Area for annual throughput for the past 5 years? Please provide the date of the records for each GDF.

- Please identify and describe for each Smiths GDF in the Albuquerque metropolitan area proof of compliance with leak rate and cracking pressure requirements, describe the test methodology, dates, and any irregularities (for the past 5 years). If irregularities, what actions were taken?

- Did the City allow for any modification or variance from the basic requirements for proof of compliance with reporting of leak rate and cracking pressure testing? If so, please provide the date and location of any document which evidences that modification or variance.

- Please identify and describe for each Smiths GDF in the Albuquerque metropolitan area proof of compliance with static pressure requirements, describe the test methodology, dates, and any irregularities (for the past 5 years). If irregularities, what actions were taken?

- Did the City allow for any modification or variance from the basic requirements for proof of compliance with reporting of static pressure requirements testing? If so, please provide the date and location of any document which evidences that modification or variance.

- Please identify and describe for each Smiths GDF in the Albuquerque metropolitan area proof of compliance with vapor tightness testing requirements, describe the test methodology, dates, and any irregularities (for the past 5 years). If irregularities, what actions were taken?

- Did the City allow for any modification or variance from the basic requirements for proof of compliance with reporting of vapor tightness testing? If so, please provide the date and location of any document which evidences that modification or variance.

- Please identify and describe for each Smiths GDF in the Albuquerque metropolitan area proof of compliance volumetric efficiency tests, describe the test methodology, dates, and any irregularities (for the past 5 years). If irregularities, what actions were taken?

- Did the City allow for any modification or variance from the basic requirements for proof of compliance with reporting of volumetric efficiency test? If so, please provide the date and location of any document which evidences that modification or variance.

- Please provide a description and dates of any malfunction reports regarding Smiths GDFs in the Albuquerque metropolitan area in the past 5 years, a description of how each malfunction was addressed, and what actions were taken on what dates, and which City official signed off approving the action. For any malfunction reports and corrective action reports, please provide copies.

- Please provide the date of all performance tests for the start- up of each Smiths GDF in the Albuquerque area in the past five years.

- Please provide dates and locations of each random performance test by the City of each Smith's GDF in the Albuquerque area for the past five years.

- Please provide dates and locations for each Compliance Status report for each Smiths GDF in the Albuquerque metropolitan area for the past five years.

- Has Smiths applied for an extension of time in reporting compliance requirements for any of the required record-keeping for GDFs in the Albuquerque Metropolitan area in the past 5 years? If so, when and for what reason, state whether the request was granted, and which City personnel approved the extension?

- Does Smiths monitor idling activity at its GDFs in the Albuquerque metropolitan area? If so, please describe procedures in detail

The language of the above-described interrogatories are directly from or tied to the permit at issue. The requested discovery is clearly relevant. Bare contentions of counsel otherwise do not provide a sufficient basis for the City or Smith's to completely evade responses and such conduct does not support the motions for summary judgment. The Hearing Officer ordered exchange of discovery between the parties. The City and Smith's are thus also in in violation of the Hearing Officer's order in failing to comply in good faith with her order regarding discovery. Worse yet, the City and Smith's use their bad faith non- responses as a strategy to prevent petitioners (the public) from supporting their claims at hearing on the merits. Smith's conduct under the rules of civil procedure is sanctionable for discovery violations and the Board may deny Smith's motion for summary judgment on the independent basis of violating rules of discovery.

IV. Contention that *In re Air Quality Permit* No. 2037-M1 does not have preclusive effect is without merit.

Opposing counsel and the Air Board cannot dispute that *In re Air Quality Permit* No. 2037-M1 was properly before the Air Board and that the parties had a full and fair opportunity to litigate the issues. The same issues regarding quality of life concerns were under the management and control of opposing counsel, the Hearing officer and the Air Board. The Final Decision under *In re Air Quality Permit* No. 2037-M1 is sufficiently firm such that it is a "final" decision on the merits. That decision provides at a minimum persuasive authority for the Air Board to proceed to hearing on the merits to "permit[] 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")—**Exhibit 1** (*In re Air Quality Permit* No. 2037-M1 Air Board Final Decsision and Order referenced in attached responses to summary judgment).

V. NMAC 20.11.81.14.I (1) is inconsistent with NMSA (1978) § 74-2-7 (I) and is therefore illegal.

NMSA (1978) § 74-2-7 (I) states the public under the circumstances of the instant timely filed petition shall also be given a reasonable opportunity to examine witnesses testifying at the hearing. The plain language of the statute conflicts with NMAC 20.11.81.14.I (1). The regulation is unreasonable and against the spirit of the Act. Reliance by opposing counsel on this regulation in further attempts to prevent public participation in this action should not be considered by the Air Board. The Petitioners request the Air Board determine NMAC 20.11.81.14.I (1) is void and of no legal force and effect.

CONCLUSION

WHEREFORE, for all the foregoing facts, circumstances, and authorities, Petitioners pray the Hearing Officer will deny the City'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.

Pete V. Domenici, Esq.,
320 Gold Ave. SW, Suite 1000
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. 3136

Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Americo Chavez, Pat Toledo, as individuals, and Pat Toledo,	No. AQCB 2014-3

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 17th 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 17th, 2014.

Pete V. Domenici, Jr., Esq.

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.

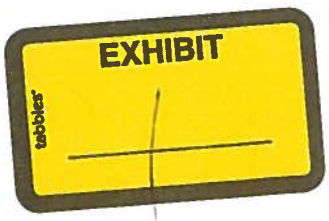
No. AQCB 2014-2

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

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

INTRODUCTION

The City admits "[t]he Air Board's procedural rules do not have a specific provision for summary judgment." Motion, p.7. The City's Motion essentially argues 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."). In doing so, the City intends to disallow important public participation clearly contemplated under the Air Quality Control Act ("AQCA") and established precedent, regarding but not limited to, "the public interest, including the social and economic value of the sources of emissions and subjects of air contaminants" .... and " environmental and economic impacts and other social costs..." that the disputed permit entails if it is allowed to stand under its current requirements. NMSA (1978) § 74-2-5.3 (C). The purpose of the Petition for hearing on the merits under the AQCA is to develop further factual



resolution esssential for determination of the central legal issues involved. Accordingly, the City's motion for summary judgment should be denied on that basis.

Ignoring the aforementioned important considerations that the Air Board must consider when adopting and enforcing regulations under its jurisdiction allows the City to attack Petitioner's expert Dr. Rowangould's intended technical witness testimony that is clearly contemplated under the AQCA. Dr. Rowangould's intended testimony speaks in part to, "the public interest, including the social and economic value of the sources of emissions and subjects of air contaminants" .... and " environmental and economic impacts and other social costs..." that the disputed permit entails if it is allowed to stand unchecked in in its current form. *Compare* NMSA (1978) § 74-2-5.3 (C) *with* Motion, Exhibit 1, 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); *see also* NMSA (1978) § 74-2-5 (E) (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; and technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved...).

The balance of the City's motion argues 1) that the AQCA "does not even have a purpose" to protect public health, safety and welfare except in a "nuanced way" [Motion, p.19], thus 2) other New Mexico case law holding hearings are necessary to ensure people with interests in environmental permitting matters be allowed to participate before a final decision is made is not purportedly relevant by analogy to this public proceeding [*id.*, p.18]; 3) by implication, the Air Quality Board has no ability to evolve with the times in the administration of

its statutory duties; 4) by implication, and contrary to established law, a regulatory regime cannot be implemented in a more expansive or liberal manner; 5) *In re Air Quality Permit* No. 2037-M1 decided against the City has no precedential value despite the fact that the Air Quality Board denied Smith's Motion to stay the Board's final decision and because it is merely on appeal [*id.*, p. 27]; and 5) Petitioners allegedly cannot prove they have been adversely affected by the issuance of permit No. 3135 even though Petitioners have statutory standing on the basis of previous participation in the permitting action, property ownership/possession nearby the gas station, and alleged negative impacts on the use and enjoyment of their properties, as well as the health of the Petitioners and surrounding community. Petition for Hearing, pgs. 5-6. The City's remaining arguments are also insufficient for purposes of summary judgment despite the fact that summary judgment proceedings to disallow a timely filed petition for evidentiary hearing under the AQCA was clearly not intended by the Legislature pursuant to established canons of statutory construction.[1]

For all of the foregoing and following reasons, the Hearing Officer should deny the City'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 that Summary Judgment proceedings are appropriate or allowable under the AQCA, NMSA (1978) § 74-2-1 et seq. Motion, pgs. 2, 6, 9, 22.

[1] Petitioners do not waive and hereby reassert there 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.

2. 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.*

3. Petitioners dispute the Air Board does not have the authority to hear and provide relief as stated under Petitioners' request for hearing. *Id.*, pgs. 3, 5, 12, 15, 25.

4. 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. 8.

5. Petitioners dispute that they are not adversely affected in order to petition the Air Board for hearing on the permit. *Id.*, p.9.

6. Petitioners dispute that they have suffered no "injury-in-fact" or otherwise have not suffered "invasion of a legally protected interest." *Id.*, pgs. 10-12.

7. Petitioners dispute that Dr. Rowangould's intended testimony does not establish that any standard or rule would be violated by the activities authorized under the permit. *Id.*, p. 12.

8. Petitioners dispute that other New Mexico case law such as *Colonias Dev. Council v. Rhino Enviro. Services,* 2005-NMSC-024, 21, 138 N.M. 133 is not analogous to the issue of public participation in this case with respect to matters of environmental concern which should require Petitioners' intended hearing on the merits. *Id.*, p. 18. Petitioners dispute that *Colonias Dev. Council* does not stand for the proposition that hearings ensure persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. *Id.*

9. Petitioners dispute that the AQCA does not have a purpose in protecting public health, safety, and welfare, including effective regulation of air pollution, the manner of which evolves functionally over time. *Id.*, p. 19.

10. Petitioners dispute that issuing a permit for air quality does not necessarily require new assessment of how to protect health, welfare, visibility and property. *Id.*, p. 20.

11. Petitioners dispute that "community sentiment" is not a criterion that may factor into a permitting decision under the AQCA. *Id.*, p. 24.

12. Petitioners dispute that Dr. Rowangould does not allegedly "understand the regulatory regime established by the Legislature" and Petitioners dispute that her intended technical testimony is not capable of supporting remedial action on the issued permit as requested by Petitioners. *Id.*, pgs. 23-24, 26.

13. Petitioners dispute that rulemaking is not relevant to or possible in adjudicative proceedings, including this one. *Id.* p. 24.

14. Petitioners dispute that *In re Air Quality Permit* No. 2037-M1 has no precedential value on the Air Board merely because it is on appeal and because it has not been stayed. *Id.* p. 27.

UNDISPUTED MATERIAL FACTS

1. Petitioners do not dispute the City's "Undisputed Material Facts" [*Id.* ¶¶ 1-8., pgs. 3-5] with the exception that at the EHD public hearing held on April 3, 2014, the City did not give any weight or consideration to public comments made with respect to quality of life concerns and other environmental and social concerns caused by the intended permitted gas station. *Id.*, ¶ 4.

2. The City does not dispute that Petitioners' concerns may be sincere and heartfelt. Motion, p. 13.

3. The "EHD does not dispute that gasoline vapors contain benzene and that benzene has important and serious impacts on human health." *Id.*, p. 16.

4. The City does not dispute that benzene is a known human carcinogen. *Id.*

5. The Parties do not dispute that "[w]here benzene emissions are concerned, reasonable minds might differ how to best balance public health versus economic reasonableness and technical practicality." *Id.*, p. 17.

6. The Parties do not dispute that Petitioners requested an evidentiary hearing. *Id.*, p. 25.

7. The City does not dispute that the Air Board can either sustain, modify, or reverse an EHD permit. *Id.*, p. 26.

8. The City does not dispute that the Air Board's review of the EHD permit is whether the permit meets local, state and federal air pollution standards and regulations. *Id.*

9. The EHD does not dispute that EPA is conducting research about near-roadway air pollution in efforts to reduce those emissions. *Id.*, p. 27.

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. Petitioners have standing and suffer injury-in-fact.

The City does not dispute that a public infromation hearing ("PIH") was granted by EDH on April 3, 2014 Motion, ¶ 4. Further the record establishes that this hearing was granted at Petitioners' request of which Petitioners participated and provided comment with respect to quality of life concerns and other social impacts that the City did not consider. AR 6, p. 16; AR 12, p. 25-31. 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 qaulity of life concerns under the Act. **Exhibit 1**—Smith Motion to Stay,¶ 6, *attached*; **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 considererton 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 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.* Accordingly, Petitioners meet the first element of standing under the Act which allows the subject "cause of action"—"a petition for hearing before the environmental improvement board or the local board." NMSA (1978) § 74-2-7 (H).

Further, Petitioners have alleged and provided sufficient indicia of adverse impact or injury-in-fact both in their filed petition (the timely filing of which is undisputed) and in

discovery in this matter such that they meet the second prong of § 74-2-7 (H) making any dismissal of their petition before hearing *ultra vires* both under the Act and upon public policy grounds. *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."); Motion, Exhibit 1, 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); **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); *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.

Petitioners have statutory standing and have made a prima facie showing of adverse impact such that their timely filed petition for hearing on the merits must proceed.

II. Summary judgment is not appropriate under this statutory public proceeding as further factual resolution is esssential for determination of the central legal issues involved on Petitioner's granted petition for hearing.

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. Motion, p.7. The statutory language of § 74-2-7 is clear and unambiguous requiring that the Hearing Examiner deny the City's motion for summary judgment and proceed to hearing on the merits. The City, 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. The City can point to no persuasive weight to long-standing administrative construction that timely and appropriately filed petitions for hearings under § 74-2-7 are amenable to motions for summary judgment. The City therefore is not entitled to any "administrative gloss" that such requests for public evidentiary hearings are appropriate for summary judgment. *See High Ridge Hinkle Joint Venture*, 1998–NMSC–050, ¶ 9, 126 N.M. 413, 970 P.2d at 602.

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. The City holds to the unilateral position that only performance standard as delegated by federal law is appropriate to determine whether a permit will issue. As discussed in further detail below, 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. These provisions

are contrary to the City's position that there is no such explicit and enumerated purpose to consider the sentiment and public welfare under the Act before making final permitting decisions that implicate environmental, property, and health interests.

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.

The City's motion for summary judgment must be denied not only because the City 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.

III. 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 2**. 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 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.* (emphasis added).

The City, however, makes unsupported argument against such authority on the purported basis that the AQCA "does not even have a purpose" to protect public health, safety and welfare except in a "nuanced way", or rather, on the unsupported basis of express and or implied federal pre-emption that isolates the Board's required decision process fom considering related factors such as public participation, community sentiment and quality of life concerns. Motion, p. 15-17, 19. The City can point to no authority that the Air Board is pre-empted from denying the issuance of the subject permit. *Id.* Appeals to the Hex C performance standard is insufficient to carry the City's burden to support its improvidently filed motion for summary judgment. Motion, p. 15. The City 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 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 not promote uniformity of the law and does not serve the public, but rather the special interests of industry alone. Motion, p. 27. To adopt the City's contention that *Colonias Dev. Council v. Rhino Envt'l Services* is not analogous authority to the same issues presented under the petition for hearing is disingenuous. Motion, p. 18.

The position taken by the City 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 the City, 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*. As stated by the Supreme Court, such a narrow view of the Air Quality 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.

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. Motion, pgs. 25- 26.

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 is in violation of the AQCA and established precedent as discussed above The requested remedy to consider this further evidence, data and views 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. Accordingly, The Board can consider such evidence and reverse or modify the permit as justice and the law requires.

IV. Dr. Rowangould's intended technical testimony evidences relevant provisions of the AQCA that should be considered in granting the permit and this testimony and further factual development of other evidence is required at hearing under the Act.

If the Air Board is not required under the AQCA to abate or prevent air pollution then Dr. Rowangould's technical testimony is not relevant to this proceeding. This argument advanced by the City, however, is refuted by the clear language of the Board's mandate under NMSA (1978) § 74-2-5 (A). 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. 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.

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, p. 15; 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 City's contention that "community sentiment" is not a criterion that may factor into the Board's permitting decsion is not supported under the AQCA and shows that the City does not understand its regulatory regime rather than Dr. Rowangould, as alleged. NMSA (1978) § 74-2-5 (E) (2) ("the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to ...the public interest, including the social and economic value of the sources and subjects of air contaminants"); Motion, pgs. 23-24, 26.

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. The face of the Hearing Officer's pre-hearing order supports that "Petitioners with the burden of proof under Section 74-2-7.K will present their evidence first", which necessarily entails that the burden Petitioners must carry is decided at the merits hearing, and thus Dr Rowangould's testimony is not subject to denial under the City's improvidently filed motion for summay judgment. Pre-hearing Order, ¶ 2.

CONCLUSION

WHEREFORE, for all the foregoing facts, circumstances, and authorities, Petitioners pray the Hearing Officer will deny the City'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.

Pete V. Domenici, Esq.,
320 Gold Ave. SW, Suite 1000
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 2nd 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 2, 2014.

Pete V. Domenici, Jr., Esq.

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.

Pete V. Domenici, Esq.,
320 Gold Ave. SW, Suite 1000
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.