

**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 ISSUED TO  
SMITH'S FOOD AND DRUG CENTERS, INC.**

**AQCB No. 2014-3**

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

**CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT'S  
MOTION FOR SUMMARY JUDGMENT**

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The City of Albuquerque Environmental Health Department (“EHD”) moves the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) to grant it summary judgment on Petitioners’ request for a hearing before the Air Board (“Motion”) because there is no genuine dispute of material fact that EHD correctly issued Permit No. 3136 and the Air Board can decide the issues raised by the Petition as a matter of law. In support of its motion, EHD provides the information below.

**INTRODUCTION**

Permit No. 3136 is an air quality permit that EHD granted to Smith’s Food & Drug Centers, Inc. for a gas station (aka gasoline dispensing facility, “Smith’s GDF”). Petitioners are Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo. In their Amended Petition, all Petitioners allege that they have been adversely affected “because the Air Program refused and failed to take into consideration quality-of-life concerns raised by participants at the Public Information Hearings.” Amd. Petition at p. 3 (Aug. 4, 2014). Petitioners also allege that they are “likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and resulting pollution, and other negative impacts on their persons,

property and quality of life resulting from the construction of the Smith's fuel dispensing station..." Amd. Petition at p. 3-4.

The Air Board should sustain EHD's issuance of Permit No. 3136 because there can be no genuine dispute of material fact that EHD correctly issued it as a matter of law. All seven Petitioners filed a single Petition alleging how they were adversely affected by EHD's issuance of Permit No. 3136. Petition (Jul. 1, 2014, as amended Aug. 4, 2014) (providing verification and making minor corrections). As of the date of this filing, Petitioners have responded to discovery questions from the City and Smith's.<sup>1</sup> Prehearing Order, ¶¶ 9-11 (discovery responses due September 19, 2014). Six Petitioners filed consolidated responses to the City's discovery: Arthur Gradi, Ruth A. McGonagil, Jerri Paul Seaborn, Bernice Ledden, Susan Kelly, and Americo Chavez ("Six Petitioners"). Petitioner Pat Toledo provided separate responses. To the extent that Petitioner Toledo provided substantively different responses, they are dealt with separately below. Between their Petition, as amended, and their discovery responses, Petitioners have not identified a single instance that shows that they have been adversely affected by EHD's issuance of Permit No. 3136. They do not identify any facts that show that construction of the Smith's GDF as authorized by Permit No. 3136 would violate any rule or standard or provision of the Air Quality Control Act ("Air Act"), NMSA 1978, 74-2-1 to -22.

In their discovery, Petitioners raise an assortment of issues based on what they feel "should" happen, what they "believe" and what their "concerns" are. Despite being asked to identify any facts, laws or rules that would justify relief, Petitioners have not

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<sup>1</sup> Petitioners' Notice of Intent ("NOI") is not due until October 7, 2014. Prehearing Order, ¶ 7.

identified any. See Exhibits A and B, attached. None of the Petitioners' allegations amounts to an invasion of a legal interest protected by the Clean Air Act, the Air Quality Control Act ("Air Act"), the Joint Air Quality Control Board ordinance, or any applicable rule or standard. Petitioners have not revealed any facts or any legal authority to prove that the construction of the Smith's GDF would (1) not meet the applicable standards, rules or requirements of New Mexico's Air Act or the Clean Air Act; (2) would cause or contribute to any exceedance of an ambient air standard; or (3) would violate any other provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(1). Petitioners have the burden of proof, NMSA 1978, § 74-2-7(K), and they plainly cannot carry it.

Petitioners raise a number of concerns that relate indirectly to air pollution but fail to identify any facts or law that would justify reversal or modification of Permit No. 3136. All new air permits authorize incremental air emissions—the question is not whether emissions will occur; it is whether those emissions are legally permissible. Petitioners have offered no suggestion, let alone evidence, to prove that they are not.

Petitioners contend that no further permits should be granted to Smith's because of past enforcement actions relating to other permits. Petitioners point to no law that would authorize such a result and EHD is aware of none. As will be discussed further below, enforcement matters are delegated to EHD and the Director of EHD, not to the Air Board.

Petitioners contend that the Air Board's previous decision relating to the Carlisle/Constitution Smith's GDF, ("Permit No. 2037-M1") justifies a decision in their favor here. As the Air Board is aware, that decision is currently being disputed before the Court of Appeals and does not constitute a binding precedent.

Finally, Petitioners contend that their wide ranging complaints combine to form a cumulative 'quality of life' impact that, if it arose in a solid waste permit hearing under the Solid Waste Act, would have to be considered, citing *Colonias Dev. Council v. Rhino Environmental Services, Inc.*, 2005-NMSC-024, 138 N.M. 133. It is unclear why Petitioners believe that case law interpreting the language of the Solid Waste Act should be applied to the very different language of the Air Act. Cases do not stand for propositions that were not considered. *Fernandez v. Farmers Insurance Co. of Arizona*, 1993-NMSC-035, 115 N.M. 622.

Permit No. 3136 requires the Smith's GDF to comply with all applicable substantive rules. Notwithstanding EHD's faithful adherence to the regulations promulgated by the Air Board and the requirements of the Clean Air Act, the Air Act, and the Joint Air Quality Control Board Ordinance, Petitioners contend that they are entitled to more.

The far-reaching and ironic result of treating the Air Board regulations as non-dispositive would be ad hoc, standardless, and arbitrary permitting decisions that elevate emotion over science and politics over process. Embracing Petitioners' arguments would transform the Air Board's limited authority into virtually boundless, administrative-appellate discretion over every permit. Petitioners' request for a hearing should be denied because, based on their discovery answers, Petitioners have revealed no evidence to prove that Permit No. 3136 should be modified or reversed under applicable law.

## **I. UNDISPUTED MATERIAL FACTS**

1. On November 5, 2013, Smith's applied ("Application") for an air quality permit for a proposed Smith's GDF at 6310 4<sup>th</sup> St. NW, Albuquerque, NM. Administrative Record ["AR"] No. 2, Bates No. 142-43.

2. On December 3, 2013, EHD deemed the Application complete. AR No. 10, Bates No. 157.

3. On December 6, 2013, EHD published public notice of the Application in compliance with the notice requirements of 20.11.41.14(A)(3) NMAC (2002). AR No. 18, Bates No. 174.

4. On March 25, 2014 (at the Los Ranchos Village Hall) and April 23, 2014 (at the Albuquerque Police Academy), EHD held public hearings concerning Smith's Application. AR No. 54, Bates No. 290-297 (March 25, 2014) and AR No. 94, Bates No. 432-438 (April 23, 2014).

5. On May 29, 2014, EHD issued Permit No. 3136 to Smith's for the Smith's GDF at 6310 – 4<sup>th</sup> St. NW, Albuquerque, NM. AR #111, Bates No. 589-593.

- a. Permit No. 3136 authorizes the Smith's GDF to emit up to 45.5 tons per year of volatile organic compounds. AR # 111, Bates No. 590.
- b. Permit No. 3136 requires Smith's to comply with 40 C.F.R. Part 63 Subpart CCCCCC ("Hex C") to control benzene emissions from gasoline vapors at the Smith's GDF. AR # 111, Bates No. 591-593.
- c. Permit No. 3136 requires Smith's to comply with 20.11.65 NMAC to control emissions of volatile organic compounds from the Smith's GDF. AR # 111, Bates No. 589.

6. On June 3, 2014, EHD provided notice of the issuance of Permit No. 3136 in compliance with 20.11.41.14(A)(5) NMAC (2002). AR No. 113, Bates Nos. 595-598.

7. On July 1, 2014,<sup>2</sup> Petitioners petitioned (“Petition”) for an Air Board hearing on Permit No. 3136 alleging that they had participated in EHD’s permitting process and alleging that they were adversely affected by it; Petitioners amended their Petition on August 4, 2014 to correct certain non-fatal matters which had been brought to their attention in a procedural teleconference. *See* Amended Petition (Aug. 4, 2014).<sup>3</sup>

## **II. STANDARD OF REVIEW**

The Air Act allows EHD to deny an application for a construction permit if the construction (a) will not meet applicable standards, rules or requirements of the Air Act or the Clean Air Act; (b) will cause or contribute to air contaminant levels in excess of an ambient air standard; or (c) will violate any other provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(1).

The scope of the Air Board’s review of EHD’s permitting decisions is whether the permit “will or will not meet applicable local, state and federal air pollution standards and regulations.” NMSA 1978, § 74-2-7(L).

Any person who participated in the City’s permitting action and who is adversely affected by it can petition for a hearing on the permit before the Air Board. NMSA 1978, § 74-2-7(H). The petitioner bears the burden of proof to establish that the permit does not

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<sup>2</sup> The Petition is time stamped “June 31, 2014” which EHD believes should be construed to be July 1, 2014.

<sup>3</sup> EHD provides the Petition as admissible evidence of Petitioners’ allegations and does not concede that those allegations themselves are undisputed material facts.

“meet applicable local, state and federal air pollution standards and regulations.” NMSA 1978, § 74-2-7(K and L). The Air Board has the authority to “sustain, modify or reverse” EHD’s permitting action. NMSA 1978, § 74-2-7(K).

The Air Board’s procedural rules allow the Rules of Civil Procedure to be used for guidance in the absence of a specific provision in 20.11.81 NMAC. 20.11.81.12(A) NMAC. The Air Board’s procedural rules do not have a specific provision for summary judgment, so the Rules of Civil Procedure may be used as guidance.

The Rules of Civil Procedure provide that, if there is no genuine dispute of material fact, a party may move for summary judgment as a matter of law. NMRA 1-056(C). To move for summary judgment, the moving party submits a written memorandum containing a short concise statement of the reasons in support of the motion with a list of authorities relied upon, and a numbered, concise statement of all the material facts as to which the moving party contends no genuine issue exists. NMSA 1-056(D).

When a motion for summary judgment is made, the opposing party may not rely merely on the allegations in his pleading; instead, his response must set forth specific facts based on admissible evidence, showing that there is a genuine issue for trial. NMRA 1-056(D) [emphasis added]. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Paca v. K-Mart Corporation*, 1989-NMSC-034, ¶ 7, 108 N.M. 479.

A fact is “material” for the purposes of determining whether a motion for summary judgment should be granted if it will affect the outcome of the case. *Parker v. E.I. DuPont de Nemours & Co., Inc.*, 1995-NMCA-086, ¶ 9, 121 N.M. 120. Even if there

is a dispute over immaterial issues, summary judgment is proper as long as no material facts are disputed. *San Juan Com'n v. Taxpayers and Water Users of San Juan County*, 1993-NMSC-050, ¶ 22, 116 N.M. 106, 860 P.2d 748. Having reviewed the Amended Petition and Petitioners' discovery responses, EHD is aware of no facts that would justify reversal or modification of Permit No. 3136.

### III. ARGUMENT

#### A. **Petitioners Cannot Carry Their Burden of Proof that Permit No. 3136 Should be Modified or Reversed.**

The Air Act imposes the burden of proof on the petitioner. NMSA 1978, § 74-2-7(K). Petitioners have identified no facts in their discovery responses that, if true, would justify reversal or modification of Permit No. 3136. Therefore, Petitioners cannot meet their burden of proof to show that Permit No. 3136 should be reversed or modified, no Air Board hearing is necessary and EHD should be granted summary judgment as a matter of law.

##### 1. ***Petitioners have not alleged that they are adversely affected by the issuance of Permit No 3136.***

The Air Act requires that a petitioner be "adversely affected" in order to petition the Air Board for a hearing on an EHD permit. At the petition stage, it is sufficient to merely allege facts about being adversely affected but at the summary judgment stage, a petitioner must provide admissible evidence to prove how he or she is adversely affected in a way that requires a permit to be modified or reversed as a matter of law. NMRA 1-056(D); NMSA 1978, § 74-2-7(K and L). Petitioners cannot satisfy this standard.



The term “adversely affected” is a legal term of art that begins with the concept of standing to sue. When a statute creates a cause of action and identifies who may sue, standing is a prerequisite to bringing a civil action. *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶¶ 9-11, 144 N.M. 471, 188 P.3d 1222.

In this case, the Air Act creates a cause of action (to challenge an EHD issued permit before the Air Board) and identifies who may sue (someone who participated in the EHD permitting action and who is adversely affected by it). NMSA 1978, § 74-2-7(H). Thus, standing is a prerequisite to petitioning the Air Board. *ACLU of New Mexico*, 2008-NMSC-045, ¶¶ 9-11.

The Court of Appeals has interpreted the phrase “adversely affected” to mean standing to sue. *N.M. Cattle Growers Ass’n v. New Mexico Water Quality Control Com’n*, 2013-NMCA-046, ¶ 13, 299 P.3d 436. The elements of standing are “injury in fact, causation, and redressability.” *Protection and Advocacy System v. City of Albuquerque*, 2008-NMCA-149, ¶ 18, 145 N.M. 156. The interest sought to be protected must be within the zone of interests protected by or regulated by the statute in question. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368.

The term “injury in fact” is another legal term of art that means an “invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 24, 130 N.M. 368. Critically here, Petitioners have not alleged that they have suffered an injury in fact—the injuries they alleged in their Petition and in their discovery do not constitute invasions of an interest which is legally protected by the laws that EHD or the Air Board applies to permits.

Dissatisfaction with the issuance of a permit because of strongly held beliefs is not sufficient. Petitioners can point to no law that bases air quality permits on popular support or lack thereof. Instead, permit applications are evaluated in comparison to the requirements of the applicable standards and rules. If the application satisfies those standards and rules, the permit is issued.

For this very reason, rules and standards may not be adopted without public notice. NMSA 1978, § 74-2-6. Citizens must be able to know the law in order to follow it. *Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972) (discussing the problems with vague laws). This applies to both applicants and those who challenge permits. A vague permitting scheme dependent on the individual preferences of a few citizens would be impossible for EHD to administer and for applicants to follow.

Instead, the Legislature identified three clear standards for denial of a construction permit. NMSA 1978, § 74-2-7(C)(1). A construction permit may only be denied if the construction would (1) not meet applicable standards, rules or requirements of the Air Act or the Clean Air Act; (2) cause or contribute to an exceedance of an ambient air quality standard; or (3) violate any other provision of the Air Act or the Clean Air Act. *Id.* Those three standards inform the interpretation of how a petitioner might be adversely affected.

To illustrate, if EHD issued a stationary source permit that did not require compliance with all applicable rules or applied the wrong rule to an activity, this might adversely affect a nearby resident and could constitute an invasion of a legally protected interest. After all, requiring compliance with the wrong rule might inadvertently allow higher emissions than would have resulted had the correct rule been applied.

In contrast, an air quality permit that requires compliance with the correct rules and complies with the Air Act and the Clean Air Act is not objectionable because it will cause an increase in emissions. All permits entail increases in emissions, otherwise no permit would be necessary. 20.11.41.2(B) NMAC. Thus, proof that emissions will increase does not prove an invasion of a legally protected interest and does not prove that a Petitioner has been adversely affected. Petitioners cannot carry their burden of proof to show that they are adversely affected.

**a. Notice allegations.**

Petitioners raise numerous complaints about notice but cannot deny that they all received notice, attended one or more of EHD's Public Information Hearings, and have timely petitioned. They allege that Smith's "should" have complied with notice requirements of a not yet effective rule while citing no legal authority for holding an applicant to such a standard. Petitioners have not been injured by EHD's notice procedures which complied with all applicable rules and then some.

Specifically, Petitioners have complained that: (1) EHD did not follow the recently replaced Part 41 which became effective Jan. 1, 2014 when it published notice of Smith's application on December 6, 2013; (2) individualized notice was not provided; (3) notice procedures applicable to Title V facilities (and inapplicable to the Smith's GDF) were not followed; and (4) the notice provided was so "inadequate" and "unfair" that the notice provisions of Part 41 were later changed. None of these contentions shows that Petitioners were adversely affected by the notice procedures used.

Petitioners have not disputed that EHD followed the rule which did apply, 20.11.41.14 NMAC (2002), to the letter. All of the Petitioners participated in EHD's permitting action and therefore received adequate notice. Petitioners cannot show that they suffered an invasion of a legally protected interest by being provided the notice that was required by law.

**i. Notice under Part 42 is not required.**

Petitioners have implied that EHD was required to follow Part 42 in providing notice. In their Petition, they alleged that EHD was required to provide notice "by other means if necessary to assure adequate notice to the affected public." Amd. Petition at p. 9 (lacking a citation to the source of the quote). In their discovery answers, Petitioners admitted that this quote comes from 20.11.42.13(B)(2) NMAC. Part 42 applies to major sources and does not apply to the Smith's GDF.

In general, a "major source" is any stationary source<sup>4</sup> which emits at least 100 tons of any regulated air pollutant, 10 tons per year of any individual hazardous air pollutant, or 25 tons per year of all hazardous air pollutants combined. 20.11.42.2 and 7(S) NMAC (subject to certain exceptions including provisions for non-attainment areas which are not relevant here). The meaning of "hazardous air pollutants" as used in this definition means those listed pursuant to Clean Air Act Section 112(b). 20.11.42.7(S) NMAC.

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<sup>4</sup> The emissions from multiple sources which are located in one or more contiguous or adjacent areas *and* are under common control *and* are in the same standard industrial code are aggregated for the purpose of determining whether a source is a major source. 20.11.42.7(S) NMAC (emphasis added).

Permit No. 3136 authorizes the Smith's GDF to emit 45.5 tons per year of volatile organic compounds ("VOCs"). UMF No. 5(a). It is indisputable that "volatile organic compounds" are not listed as a hazardous air pollutant pursuant to Clean Air Act Section 112(b) or any regulation adopted pursuant to that Act. Thus, the 45.5 tons per year of VOCs authorized by Permit No. 3136 are not sufficient to regulate the Smith's GDF as a major source.

**ii. Based on EPA estimates, Permit No. 3136 would result in the emission of 2.2 tons of combined hazardous air pollutants per year and the Smith's GDF does not constitute a major source.**

The EPA has estimated the percentage of hazardous air pollutants in gasoline vapor to be 4.8%.<sup>5</sup> National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants and Pipeline Facilities, and Gasoline Dispensing Facilities, 73 Fed. Reg. 1916, 1930 (Jan. 10, 2008) (40 C.F.R. Part 63 Subpart CCCCCC). EPA has adopted various federal standards to address benzene emissions from gasoline vapor. Using EPA's estimate, the 45.5 tons per year of VOCs from the Smith's GDF, equate to 2.2 tons per year of all combined hazardous air pollutants and the Smith's GDF will not constitute a major source of hazardous air

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<sup>5</sup> Estimates of the percentage of hazardous air pollutants in volatile organic compounds in gasoline vapor vary. Older estimates may be 2-11% or generally less than 17%. As EPA explained when it adopted Hex C, 73 Fed. Reg. at 1930, EPA imposed a fuel standard in 2007 that reduced the percentage of benzene in gasoline and MTBE (another hazardous air pollutant in gasoline) has been phased out. Factoring in these recent regulatory changes led EPA to an estimate of 4.8%, as cited. Whether the estimate is 4.8%, 11% or 17%, all lead to a conclusion that the hazardous air pollutant emissions from the Smith's GDF do not require regulation as a major source. Regardless of which estimate is applied, all lead to a conclusion that the emissions of hazardous air pollutants would be less than 10 tons per year individually or in the aggregate:

$$4.8\% \times 45.5 \text{ tons VOC/yr} = 2.2 \text{ tons HAPs/yr}$$

$$11\% \times 45.5 \text{ tons VOC/yr} = 5.0 \text{ tons HAPs/yr}$$

$$17\% \times 45.5 \text{ tons VOC/yr} = 7.7 \text{ tons HAPs/yr}$$

pollutants. Part 42 does not apply to the Smith's GDF as a matter of law. EHD was not required to follow 20.11.42.13(B)(2) NMAC in providing notice for the Smith's GDF. Petitioners did not, therefore, suffer an invasion of a legally protected interest when EHD did not provide notice pursuant to Part 42.

**iii. Petitioner Toledo's contentions that EHD was required to give actual notice to nearby residents are legally frivolous.**

Petitioner Toledo has suggested two legal authorities which purportedly require EHD to provide actual notice to nearby residents. Both are legally frivolous.

Petitioner Toledo first identifies NMSA 1978, § 74-2-5.1 which is titled, "Duties and powers of the department and the local agency." That section does not even mention the word "notice" and it does not create any basis for alleging in the Petition that actual notice to nearby residents was required.

Petitioner Toledo next identifies NMSA 1978, § 74-2-5(E) which is the Air Act section which establishes what the Air Board should consider in promulgating rules. This is a permitting proceeding, not a rulemaking proceeding. EHD cannot imagine and Petitioner Toledo does not explain how that section could be interpreted to create a requirement to provide actual notice to nearby residents. Petitioner Toledo's contentions are legally frivolous.

**b. Zoning and other quality of life allegations.**

Petitioners raise numerous complaints which relate to zoning and quality of life issues. Among other things, Petitioners have complained about: (1) the lack of visual appeal from a city design or planning perspective and intrusiveness on nearby businesses including a failure to conform with the "spirit or the intent" of the North Fourth Corridor

Plan and a general lack of fitness for the area; (2) light pollution; (3) impacts on property, property values and quality of life; and (4) noise. None of these contentions shows that Petitioners were adversely affected by EHD's issuance of Permit No. 3136.

The Air Board is charged with preventing and abating air pollution "in accordance with the Air Quality Control Act." NMSA 1978, § 74-2-5(A); ROA § 9-5-1-4(A). To prevent and abate air pollution, the Air Board adopts rules, standards and plans. NMSA 1978, § 74-2-5(B); ROA § 9-5-1-4(B). EHD applies the Air Board's rules and standards in issuing permits. NMSA 1978, § 74-2-7(C)(1); ROA § 9-5-1-7(C)(1). When reviewing EHD's decision to issue a permit, the Air Board evaluates whether a source will or will not meet applicable local, state and federal air pollution standards and regulations. NMSA 1978, § 74-2-7(L); ROA § 9-5-1-7(L). Petitioners have pointed to no law that delegates authority to the Air Board to regulate zoning, corridor plans, noise, lighting, design standards, etc. and EHD is aware of none.

Complaints relating to zoning should be addressed to the City Planning Department. EHD has provided this information to Petitioners yet Petitioners continue to raise their zoning issues before the Air Board.

The Air Act and related City and County air quality ordinances, ROA §§ 9-5-1-1 to -99; Bernalillo County Ordinance § 30-1 to -47, do not create legally protected interests in the area of planning, zoning, and quality of life. Instead, these laws create legally protected interests in air quality pursuant to the rules and standards which have been adopted. Petitioners' planning and zoning and quality of life complaints are not

invasions of legally protected interests within the jurisdiction of the Air Board. Thus, Petitioners' complaints relating to planning, zoning and other quality of life issues do not demonstrate that Petitioners have been adversely affected by the issuance of Permit No. 3136.

**c. Traffic—non-air quality complaints.**

Petitioners raise two kinds of complaints about traffic impacts—air quality and non-air quality complaints. Turning first to the non-air quality complaints, Petitioners speculate that there will be road rage incidents, congestion of nearby roadways and increases in traffic incidents. Similar to planning and zoning, traffic control is not within the jurisdiction of either EHD or the Air Board. These are not invasions of interests protected by the applicable laws and rules within the jurisdiction of the Air Board.

**d. Air quality related allegations.**

**i. Mobile source emissions**

Petitioners complain about emissions from mobile sources, such as those from idling cars and increased traffic related emissions. Emissions from mobile sources (e.g., cars) are regulated differently and separately from stationary sources. As a general rule, mobile source emissions are federally regulated by imposing engine standards and fuel standards. Local governments fill a supporting role by conducting vehicle inspections to assure that vehicle air pollution equipment is working properly. *See, e.g.*, 20.11.100 NMAC.

The United States Environmental Protection Agency (“EPA”) decided long ago to regulate *all* tailpipe and vehicle evaporative emissions through the imposition of sophisticated technologies on vehicles. To illustrate, in February 2007 EPA finalized a



rule to reduce hazardous air pollutants (“HAPs”) from mobile sources like passenger vehicles. *See* Control of Hazardous Air Pollutants from Mobile Sources, February 26, 2007.<sup>6</sup> In adopting that rule, the EPA specifically addressed some of Petitioners’ concerns:

These controls will significantly reduce emissions of benzene and other mobile source air toxics such as 1, 3-butadiene, formaldehyde, acetaldehyde, acrolein, and naphthalene. There will be additional substantial benefits to public health and welfare because of significant reductions in emissions of particulate matter from passenger vehicles.

72 Fed. Reg. 8428 (Feb. 26, 2007), available at: <http://www.gpo.gov/fdsys/pkg/FR-2007-02-26/pdf/E7-2667.pdf>.

It is clear from this rulemaking that mobile source emissions are important concerns—but they are regulated by EPA, not EHD or the Air Board. It is equally clear that mobile source emissions of hazardous air pollutants are permitted by EPA, notwithstanding the public health consequences. Petitioners can point to no law that protects them from incremental mobile source air emissions that may result from EHD issuing a permit to construct a stationary source. Thus, these complaints do not demonstrate an invasion of a legally protected interest within the jurisdiction of EHD or the Air Board.

## **ii. Emissions from the Smith’s GDF**

Petitioners also complain that they will be exposed to increased “VOC emissions, odors, and fumes” from the Smith’s GDF. The daily activities of any gas station result in incremental VOC emissions, odors and fumes. The legally significant issue is not whether VOC emissions, odors and fumes occur—it is whether the emissions, odors or

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<sup>6</sup> An overview of the regulations controlling mobile source air toxics may be found at: <http://www.epa.gov/otaq/toxics-regs.htm>

fumes violate any standard or rule. Petitioners can point to no standard or rule that the Smith's GDF would violate which protects them from the VOC emissions authorized by Permit No. 3136 or any odors or fumes which may occur.

Petitioners' concerns may be sincere and heartfelt. But none of them add up to an invasion of a legally protected interest. Because Petitioners have not alleged and cannot prove that they will suffer an invasion of a legally protected interest from the construction of the Smith's GDF, the Air Board should sustain Permit No. 3136 as a matter of law.

**iii. The Air Board does not have authority to impose more stringent limitations on emissions of hazardous air pollutants from the Smith's GDF.**

The applicable standard for the emission of hazardous air pollutants from the Smith's GDF is known as Hex C. 40 C.F.R. Part 63, Subpart CCCCCC. The Air Board has adopted Hex C twice: initially, becoming effective on February 16, 2009 and second, updating it effective December 12, 2011. Hex C is a prescriptive standard which Petitioners ignore. The significance of Hex C to Permit No. 3136 and its emissions of hazardous air pollutants ("HAPs") cannot be overstated.

The Legislature and Albuquerque City Council have granted very narrow rulemaking authority to the Air Board to promulgate rules concerning hazardous air pollutants. Such rules must be "*no more stringent than but at least as stringent as*" the

federal rules. NMSA 1978, § 74-2-5(C)(2) [emphasis added]; *see also* ROA § 9-5-1-4(C)(2).<sup>7</sup> Thus, even if the Air Board wished to impose more stringent rules on hazardous air pollutant emissions from GDFs than Hex C would require, the Air Act and the applicable city ordinance does not grant it authority to do so.

**iv. Hex C is part of a national strategy to reduce the concentration of hazardous air pollutants in ambient air and appropriately prevents and abates air pollution.**

EHD does not dispute that gasoline vapors contain benzene and that benzene has important and serious impacts on human health. Benzene was one of the first eight hazardous air pollutants regulated by the Clean Air Act between its passage in 1970 and 1990. Clean Air Act Amendments of 1989, S. Rep. 101-228, 3385 at 3389 (Dec. 20, 1989). Benzene is a known human carcinogen. Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. 8428 (Feb. 26, 2007). Mobile sources (i.e., planes, trains, and automobiles) are the largest source of benzene emissions in the United States. 72 Fed. Reg. 8428. For obvious reasons, including technical practicability and economic reasonableness, EPA has not banned either gasoline or mobile sources.

Instead, EPA has been actively engaged for years in decreasing benzene concentrations in ambient air, particularly in urban areas. National Air Toxics Program: The Second Integrated Urban Air Toxics Report to Congress, pp. 3-8 (Aug 21, 2014) [“Second Air Toxics Report”].

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<sup>7</sup> Section 5.3 of the Air Act authorizes the Air Board to adopt more stringent regulations for nitrogen oxides and volatile organic compounds if certain determinations and findings are made but no such determinations and findings have yet been made. In addition, neither the City ordinance nor the Bernalillo County ordinance has been amended to incorporate Section 5.3 of the Air Act.

For example, in 2008, EPA adopted rules, including Hex C, to limit benzene emissions from gasoline dispensing facilities like the Smith's GDF and Hex B to limit benzene emissions from gasoline bulk terminals and small gasoline bulk plants. 73 Fed. Reg. 1916 (Jan. 10, 2008).

In 2011, an EPA rule adopted in 2007 became effective to mandate lowered benzene concentrations in gasoline. 72 Fed. Reg. 8428, 8431 (Feb. 26, 2007).

In April of 2014, EPA imposed more stringent motor vehicle emissions and fuel standards which will further reduce benzene emissions, among other things. 79 Fed. Reg. 23414 (Apr. 28, 2014). Thus, the reduction of benzene in ambient air from multiple sources is a clear focus of EPA's efforts. When the Air Board adopted Hex C and EHD applies it during permitting, the Air Board and EHD are EPA's partners in executing this national strategy aimed squarely at protecting the public from benzene air emissions.

This stepwise approach has been effective at reducing benzene in ambient air. From 1994 to 2009, the concentration of benzene in ambient air has declined 66%. Second Air Toxics Report at 3-8. The more recently adopted rules (post-2009) are likely to continue that trend.

Where benzene emissions are concerned, reasonable minds might differ how to best balance public health versus economic reasonableness and technical practicability. But there is no dispute how the New Mexico Legislature and the City Council expect the Air Board to resolve concerns about hazardous air emissions—by adopting and applying rules that are as stringent as EPA's rules and no more stringent. NMSA 1978, § 74-2-

5(C)(2); *see also* ROA § 9-5-1-4(C)(2). The Legislature and the City Council are the people's elected representatives and they have decided that hazardous air pollution is appropriately prevented and abated by participating in EPA's national strategy to reduce hazardous air pollution.

Accordingly, EPA and the Air Board have adopted Hex C which EHD has applied to Permit No. 3136. With respect to hazardous air pollutants from the Smith's GDF, Permit No. 3136 appropriately prevents and abates hazardous air pollutants from gasoline vapors. UMF No. 5(b). With respect to hazardous air pollutants, there is no genuine dispute of material fact that EHD appropriately issued Permit No. 3136 and the Air Board can sustain it as a matter of law.

**2. *Petitioner Toledo does not have standing to challenge Permit No. 3136 because he has not been adversely affected by it.***

When Petitioner Toledo was asked by EHD in discovery to explain how he has been adversely affected by EHD's issuance of Permit No. 3136, he responded that:

I am a citizen of Albuquerque and there is no basis for limiting the access of citizens of Albuquerque to appeal a final permitting decision of the EHD. The North Valley is one of my favorite areas in Albuquerque because of its natural beauty, great restaurants, and bike paths, which I run on weekly. This gas station would further contribute to traffic and odors which would cause a Public Nuisance. I have witnessed this firsthand at the Carlisle and Constitution station, where their air quality permit was reversed because of such odors, quality of life issues, etc. ...

Contrary to Petitioner Toledo's response, the limitations on petitioning for an Air Board hearing have been imposed, not by EHD or the Air Board, but by the Legislature and the City Council which required that a petitioner be "adversely affected." NMSA 1978, § 74-2-7(H); ROA § 9-5-1-7(H). The New Mexico Court of Appeals has

interpreted the phrase “adversely affected” to mean standing to sue and has concluded that it indicates a legislative intent to limit the field of potential petitioners. *New Mexico Cattle Growers’ Ass’n v. New Mexico Water Quality Control Com’n*, 2013-NMCA-046, ¶ 8 (concluding that the phrase “adversely affected” imposes a heightened requirement indicating the Legislature’s intent to narrow the field of potential appellants.) Despite Petitioner Toledo’s firm conviction that he should not be required to demonstrate how he is adversely affected, the law requires him to do so.

His contentions that he visits the North Valley and runs there regularly, or that he had a bad experience living near the Smith’s Gas Station near Constitution and Carlisle does not establish that the issuance of Permit No. 3136 adversely affects him.

His allegation that the Smith’s GDF authorized by Permit No. 3136 would cause a Public Nuisance is mistaken. Among other things, a “Public Nuisance” means

knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is injurious to public health, safety, morals or welfare; or interferes with the exercise and enjoyment of public rights, including the right to use public property.

NMSA 1978, § 30-8-1 [emphasis added].

By definition, a permitted activity cannot constitute a public nuisance because it done is with lawful authority. *Albuquerque v. Village of Los Ranchos de Albuquerque*, 1991-NMCA-015 ¶ 15, 111 N.M. 608. In short, Petitioner Toledo has not identified any way that EHD’s issuance of Permit No. 3136 adversely affects him.

**3. *Smith's previous enforcement actions are irrelevant to issuance of Permit No. 3136.***

Petitioners complain that Smith's is a "chronic violator" of its permits and that EHD should refuse to issue additional permits to Smith's until Smith's can demonstrate that it has a good record of compliance. Amd. Petition at p. 10. Petitioners fail to identify any law that would lead to such a result and EHD is aware of none.

To the extent that Petitioners expect the Air Board to rely on Smith's enforcement history in this proceeding, Petitioners' complaint runs directly counter to applicable law. First, the New Mexico Legislature has assigned enforcement duties to the "local agency," not to the "local board." *Compare* NMSA 1978, § 74-2-4 (A)(2) (authorizing the creation of a local agency "to administer and enforce" and to perform the duties of the New Mexico Environment Department within the local authority) *with* § 74-2-4(A)(1) (authorizing the creation of a local board to perform the duties of the environmental improvement board within the local authority). In this case, EHD is the local agency and the Air Board is the local board. *Compare* NMSA 1978, § 74-2-2(I) (defining "local agency" as the administrative agency established by a local authority) *with* -2(K) (defining a "local board" as, among other things, a joint air quality control board created by a local authority).

The assignment of enforcement duties to the local agency occurs in multiple sections of the Air Act. NMSA 1978, § 74-2-5.1 (A & B) (the local agency shall make investigations and studies as required for enforcement of the Air Act and shall institute legal proceedings to compel compliance); § 74-2-12(A) (authorizing the director to issue compliance orders and commence civil actions); *and* § 74-2-2(D) (defining "director" as the administrative head of a local agency).

The same separation of duties occurs in the applicable City ordinance. ROA § 9-5-1-5 (the “department” is to administer and enforce); *and* ROA § 9-5-1-2 (defining “department” as the administrative agency of the Air Board). The ordinance assigns issuance of a compliance order or instituting civil actions for enforcement to the Mayor,<sup>8</sup> not to the Air Board. If a person is adversely affected by an enforcement decision of the Director, the person may appeal to the Court of Appeals (not to the Air Board) within thirty days following the date of the action being appealed. ROA § 9-5-1-9(A). It is clear that the applicable laws delegate authority to conduct enforcement actions to the Director and EHD, not to the Air Board.

Moreover, the applicable laws are equally clear about what factors should be considered when the Air Board reviews an EHD permit. There are only three bases for denying a construction permit. Permit No. 3136 could be denied only if the construction of the Smith’s GDF would (1) violate a rule or standard, (2) cause or contribute to an exceedance of an ambient air quality standard, or (3) violate any other provision of the Clean Air Act or the Air Act. NMSA 1978, § 74-2-7(C)(1); *and* ROA § 9-5-1-7(C)(1). The fact that Smith’s has previously violated a different permit is irrelevant under these three bases for permit denial.

Petitioners contend that Smith’s may violate Permit No. 3136, leading to emissions higher than permitted. Any permit may be violated. If the possibility that it might be violated were sufficient to deny a permit, no permit would ever be granted. Fears that a future violation may occur is not a basis for denying a permit. Instead, it is a basis for an enforcement action when and if it occurs.

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<sup>8</sup> The Mayor has delegated his enforcement authority to the Director of the Environmental Health Department or to an EHD Deputy Director.



Finally, there is a remedy under applicable law for continual violators: “If a person fails to comply with a compliance order, the...director may ...suspend or revoke the permit...” NMSA 1978, § 74-2-12(I); *see also* ROA § 9-5-1-98(B) (allowing compliance orders to include a suspension or revocation of a permit). Thus, Petitioners’ contention that Permit No. 3136 should be denied due to Smith’s previous violations is inconsistent with the legal scheme the New Mexico Legislature and the City Council have adopted. The Air Board may not use its oversight of EHD’s permitting decisions to take enforcement actions against Smith’s for violating different permits.

**4. *Petitioners improperly invoke the Solid Waste Act and common law interpreting its provisions.***

Lacking any evidence to show they have been adversely affected by the issuance of Permit No. 3136, Petitioners attempt to justify their request for a hearing by pointing to *Colonias Dev. Council v. Rhino Env’tl Serv.*, 2005-NMSC-024, 138 N.M. 133. Petitioners suggest that *Colonias* stands for the sweeping proposition that “[t]he purpose of regulatory provisions regarding public notice and hearings is to ensure that persons with an interest in environmental permitting matters be allowed to participate before a final decision is made.” Petition, p. 4.

In fact, the Air Act was not before the Court in *Colonias*, which interpreted language in the Solid Waste Act and its related regulations. It is settled that “cases are not authority for propositions not considered.” *Sangre de Cristo Development Corp., Inc. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323. Moreover, the Uniform Statute and Rule Construction Act requires that a statute be construed to “(1) give effect to its objective and purpose; (2) give effect to *its* entire text; and (3) avoid an unconstitutional, absurd, or unachievable result.” NMSA 1978, § 12-2A-18(A) [emphasis

added]. “The text of a statute... is the primary, essential source of *its* meaning.” NMSA 1978, § 12-2A-19 [emphasis added]. These fundamental principles of statutory construction require the Air Board to focus on the provisions of the Air Act and not the provisions of a different statute that regulates solid waste rather than air pollution.

A comparison of the provisions of the Air Act with the provisions of the Solid Waste Act which the Court found significant in *Colonias* reveals the wisdom of the rule expressed in *Sangre de Cristo* and the above principles of statutory construction, because the Solid Waste Act is different from the Air Act in several important ways.

**a. Consideration of public health, safety and welfare**

Unlike the Solid Waste Act which has an overarching “purpose” of protecting public health, safety and welfare, NMSA 1978, § 74-9-2(C), the Air Act does not even have a “purpose” section. *See* NMSA §§ 74-2-1 to -22. That is not to say that the Legislature was unconcerned about health or welfare—the Legislature provided for it in the Air Act but in a more nuanced way.

Public health, safety or welfare is addressed by certain statutory subsections but the permitting section is not among them. NMSA 1978, § 74-2-2(B) (defining air pollution); § 74-2-5(E) (in making regulations to prevent or abate air pollution); § 74-2-5.1 (authorizing classification and recording of air contaminant sources); § 74-2-8(A)(2)(a) (variances); § 74-2-10 (emergency orders); § 74-2-11.1 (Air Act does not supersede laws relating to industrial health, safety or sanitation). Even when the Legislature authorized a focus on health, safety or welfare in a particular section, the Legislature generally imposed qualifications or required consideration of competing factors. *See, e.g.*, NMSA 1978, § 74-2-2(B) (qualifying the definition of air pollution);

*and* NMSA 1978, § 74-2-5(E) (requiring consideration during rulemaking of the economic value of sources of air pollution, technical practicability and economic reasonableness).

Only in the case of variances (where, by definition, one or more rules would not be applied) does protection of health and safety create a minimum floor. NMSA 1978, § 74-2-8(A)(2). The Legislature's approach is unsurprising when the practical realities of protecting air quality are considered.

In the Air Act, the Legislature intended that prevention and abatement of air pollution would result by rulemaking in which "injury to...health, welfare, visibility and property" would be considered simultaneously with "the public interest...the social and economic value of sources...of air contaminants and...technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved..." NMSA 1978, § 74-2-5(B and E); ROA § 9-5-1-4(E). Similarly, during rulemaking, the Air Board conscientiously applies the various limitations that the Legislature and City Council have imposed on rules such as limitations on rules about hazardous air pollutants. NMSA 1978, § 74-2-5(C)(2); ROA § 9-5-1-4(C)(2). This approach assures that air quality will be regulated in the manner envisioned by New Mexico's elected representatives and that due regard has been given to economic and technical challenges. Following this overall plan requires simultaneous consideration of both (1) the need to protect the public from air pollution and (2) the economic realities and technical challenges of meeting that need.

Once applicable rules are adopted, issuing a permit for an air quality source does not require a new assessment of how to protect health, welfare, visibility and property. Appropriate protection, based on considerations of public health, economic reasonableness and technical practicability, is provided by following the rules. Indeed, treating the rules as non-dispositive would upset the balanced approach the Legislature required the Air Board to follow in the Air Act. Thus, unlike the Solid Waste Act which has an overarching purpose of protecting public health, in the Air Act, air pollution is prevented and abated by adopting rules that provide balanced consideration of certain factors and then applying those rules during permitting. NMSA 1978, §§ 74-2-5 and -7; ROA § 9-5-1-4 and -7. Thus, the Air Board's role when reviewing EHD's permitting decisions is to evaluate whether the permit will or will not meet applicable local, state and federal standards and regulations. NMSA 1978, § 74-2-7(L); ROA § 9-5-1-7(L).

**b. Public Notice Provisions**

The Solid Waste Act imposes statutory public notice provisions which require, among other things, that public notice be published in a newspaper of general circulation in two places, the classified or legal notices and another place "calculated to give the general public the most effective notice." NMSA 1978, § 74-2-22. The Solid Waste Act is one of only two New Mexico statutes containing such stringent public notice provisions. *Martinez v. Maggiore*, 2003-NMCA-043, ¶¶ 7 and 8, 133 N.M. 472.

In contrast, the Legislature did not mandate any particular form of notice for permits in the Air Act. Instead, the Legislature delegated discretion to the Air Board to develop appropriate notice requirements. NMSA 1978, § 74-2-7(B)(5); ROA § 9-5-1-7(B)(3). The Air Board chose to require notice by publication, 20.11.41.14(A)(3) NMAC

(2002), and EHD has complied with that requirement for Permit No. 3136. UMF No. 3. Clearly then, the Legislature did not intend that involvement of the general public was as essential in air quality permitting as it is in solid waste permitting.

**c. Hearing Requirement**

The Solid Waste Act requires a hearing for every permit. There is no need to file a petition, no requirement to have previously participated in the permitting process, and no requirement to be adversely affected to get a hearing on the issuance of a permit. NMSA 1978, § 74-9-28(A); and see *Martinez*, 2003-NMCA-043, ¶ 14 (rejecting standing argument).

In contrast, the Air Act does not require a hearing prior to issuing a permit, NMSA 1978, § 74-2-7(B)(5) (authorizing adoption of rules for hearings “*if any*” before permitting); ROA § 9-5-1-7(B)(3) (same). The Air Board has granted EHD the discretion to determine whether a hearing should occur. 20.11.41.14(B) NMAC (2002). The Legislature’s choice not to require an adjudicatory hearing in each instance before issuing an air quality permit is the opposite of what the Legislature required in the Solid Waste Act.

To receive a hearing before the Air Board, a petitioner must demonstrate both participation and being adversely affected. NMSA 1978, § 74-2-7(H); ROA § 9-5-1-7(H). No such demonstrations are required for hearings under the Solid Waste Act which are required by law for every permit, even if no one participates and no one contends that they are adversely affected.

**d. Burden of Proof**

Finally, and essential to deciding this Motion, is that the Air Act imposes the burden of proof on the petitioner. NMSA 1978, § 74-2-7(K); ROA § 9-5-1-7(K). This is not an issue under the Solid Waste Act or its regulations, which place the burden of proof on the applicant, other than proof to support challenged conditions. 20.1.4.400(A)(1) NMAC.

The above differences, among others, between the Solid Waste Act and the Air Act, reflect the Legislature's conscious decisions, which in turn reflect the will of the people. If Petitioners want the Air Act and the Joint Air Quality Control Board Ordinance to provide the procedures that the Solid Waste Act provides, the appropriate course of action for Petitioners is to seek an amendment of the Air Act and the related ordinances, not to invite the Air Board to rely on case law interpreting the Solid Waste Act which does not apply to this matter. This is especially so when Petitioners have no evidence to show that EHD failed to comply with any requirement of the Clean Air Act, the Air Act, the Joint Air Quality Control Board Ordinance or the applicable air quality regulations. Petitioners' arguments based on *Colonias* are unavailing because the Solid Waste Act is not similar to the Air Act.

**5. *Because Petitioners have not been adversely affected, the Air Board should sustain Permit No. 3136.***

In practice, the Air Act's requirement that the Petitioners carry the burden of proof has a key consequence. There are only three possible outcomes of an Air Board hearing on an EHD issued permit—"[b]ased on the evidence presented at the hearing, the...[Air Board] shall sustain, modify or reverse the action of the [EHD]." NMSA 1978, § 74-2-7(K); ROA § 9-5-1-7(K). Thus, if the Petitioners have not raised any allegations

that they are adversely affected and if the Petitioners have not suffered an invasion of a legally protected interest, then Permit No. 3136 should be sustained. That is exactly the situation presented here.

**6. *Petitioners improperly rely on the Air Board's decision in In re Air Quality Permit No. 2037-M1.***

Petitioners' reliance on the Air Board's decision in *In re Air Quality Permit No. 2037-M1* is misguided. The propriety of the decision in *Air Quality Permit No. 2037-M1* is disputed and it is presently before the Court of Appeals for review. EHD will not re-litigate it here. Suffice it to say, it is not a precedent that the Air Board is required to follow.

**7. *Petitioners' demand for an Air Board hearing to consider the impact of the Smith's GDF on their quality of life has no legal basis.***

Petitioners' attempt to assert a cumulative 'quality of life' impact is not contemplated by the Air Act, is impossible to quantify, and is unworkable and contrary to existing law. Petitioners had a Public Information Hearing where they had an opportunity to raise their concerns. As evidenced by EHD's issuance of Permit No. 3136 and Petitioners' discovery answers, none of the Petitioners' concerns justify denial of Permit No. 3136. Since the issuance of Permit No. 3136, EHD has produced the Administrative Record which contains the full record of the Public Information Hearing and materials EHD relied upon. Petitioners have also been given an opportunity to ask and answer discovery questions. Based on all of the discovery information EHD has reviewed,

Petitioners have no admissible evidence to prove that Permit No. 3136 should be reversed or modified. Lacking such evidence, there is no need to go forward to an Air Board hearing. There is no genuine dispute of material fact and the Air Board can sustain Permit No. 3136 as a matter of law.

**8. *Petitioners' complaint about the Smith's petition signatures is unfounded.***

Petitioners complain that EHD's hearing officer allowed Smith's to submit petitions to the Administrative Record at the second PIH. Amd. Petition at p. 9. Petitioners complain that EHD should not have considered those petitions. In fact, EHD explained to Petitioners (and other Interested Persons) that EHD did not consider them in making its decision on Permit No. 3136. Petitioners' complaint provides no basis for reversing or modifying Permit No. 3136.

**9. *The Air Board's public participation procedures are not "pro forma."***

Petitioners contend that if their quality of life issues are not addressed, then the provisions for public participation in the Air Act are merely "pro forma." Amd. Petition at p. 8. Petitioners are mistaken.

The Air Board has provided a meaningful and important opportunity for public involvement in EHD's permitting process. Public Information Hearings serve the traditional purposes of public involvement in a democratic government—fostering advocacy, promoting the rule of law and transparency.

The public participation process provided by the Air Board serves many important functions. First, public access promotes transparency and openness of government which are values protected by the First Amendment. *See New York Civil*



*Liberties Union v. New York City Transit Authority*, 684 F.3d 286, 299-300 (2d Cir. 2012) (concluding that the First Amendment requires administrative adjudicatory proceedings to be public). In turn, transparency and openness promote public confidence that the law is being followed and that rules are applied equally and impartially to all. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703 (6<sup>th</sup> Cir. 2002) (describing a “fair and open hearing” as essential to the validity of administrative regulation and to the maintenance of public confidence in its value and soundness).

Public participation serves an educational function. When members of the public participate in a permitting hearing and learn that the rules are not as stringent as they wish, it empowers them to propose different rules as provided for in Section 6 of the Air Act. *See also*, ROA § 9-5-1-6. These provisions do not guarantee any individual that laws or rules will be changed to his or her liking. However, being informed and empowered to advocate knowledgeably for change is essential to participation in a democracy—it is not “meaningless.”

The Air Board’s public participation provisions also allow someone who is adversely affected by improper permitting of a facility to take an active role in persuading the Air Board that the City has failed to follow the Air Board’s rules. This is similar to the Clean Air Act which allows a citizen to file suit to enforce rules, orders and permits. 42 U.S.C. § 7604. Such a power is not “meaningless.”

Usually, by the time a Public Information Hearing occurs, EHD has become very familiar with a proposal and understands which rules will or will not apply to the activity. In such cases, it may seem as though the hearing process is pro forma but it is not. Hearings always serve the functions of providing enhanced public scrutiny and transparency, so they are not pro forma.

However, there have been cases where EHD learns something new about a facility late in the permitting process, including around the time of a Public Information Hearing. In such cases, EHD has taken appropriate action up to and including informing an applicant that a permit application will be denied if it is not withdrawn.

In the end, public participation provisions are meaningful, but they are not all powerful. If they were, they would render the requirement that air pollution be abated and prevented by adopting rules, standards and plans meaningless. NMSA 1978, § 74-2-5(B); ROA § 9-5-1-4(B). There would be little purpose to rules and standards if the Air Board could disregard them based on public input.

#### **IV. CONCLUSION**

An Air Board hearing is an adjudicative procedure where Petitioners are required to prove their allegations. Fears based on speculation, unfounded allegations and generalized beliefs or concerns about what happened elsewhere or what might happen here do not add up to admissible evidence that Permit No. 3136 should be reversed or modified. Petitioners have not alleged and have no evidence that they have been

adversely affected. Petitioners have not suffered any invasion of a legally protected interest. They cannot carry their burden of proof that Permit No. 3136 should be modified or reversed. There is no genuine dispute of material fact and the Air Board should sustain Permit No. 3136 as a matter of law.

Respectfully submitted,

**CITY OF ALBUQUERQUE**  
**David Tourek**  
**City Attorney**

A handwritten signature in cursive script, reading "Carol M. Parker", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment was served on Oct 3, 2014 by the method indicated below:

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

Felicia Orth  
c/o Andrew Daffern, Hearing Clerk  
Control Strategies Section  
Environmental Health Department  
One Civic Plaza, Room 3023  
Albuquerque, NM 87102  
[orthf@yahoo.com](mailto:orthf@yahoo.com)

*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board  
and Hearing Officer for AQCB Petition No. 2014-2*

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

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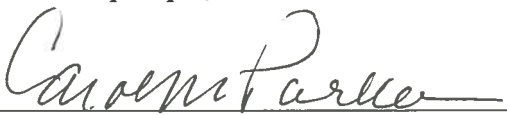
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By:   
Carol M. Parker, Assistant City Attorney

104372

IMF

No. 1



**CITY OF ALBUQUERQUE  
ENVIRONMENTAL HEALTH DEPARTMENT  
AIR QUALITY DIVISION**

Please mail this application, or hand deliver between 8:00am - 4:00pm Monday - Friday to:  
Environmental Health Department  
Air Quality Division  
Air Quality Permitting Section  
11850 Sunset Gardens SW  
Albuquerque, NM 87121  
Telephone: (505)768-1930

RECEIVED  
ENVIRONMENTAL HEALTH  
13 NOV -5 AM 10:15

**APPLICATION FOR SOURCE REGISTRATION AND AUTHORITY-TO-CONSTRUCT PERMITS FOR  
FUEL DISPENSING STATIONS LOCATED IN BERNALILLO COUNTY (20.11.40 NMAC & 20.11.41 NMAC)**

Notice of initial application fee and subsequent annual permit fees will be sent to the Company (20.11.02 NMAC).

**Section 1: General Information:**

Date Submitted: 11-5-13.

1. Name of Company: SMITH'S FOOD & DRUG CENTERS, INC. Company Ph: ( 801 ) 974 - 1400
2. Company Address: 1550 SO. REDWOOD ROAD, SALT LAKE CITY, UT. Zip 84104
3. Local Office Address: \_\_\_\_\_ Zip \_\_\_\_\_
4. Person to Contact: KERRY BUSEY Title: DIRECTOR OF OPERATIONS Ph: ( 801 ) 977 - 1048
5. Location of the station: 6310 4th ST. NW, ABA Zip \_\_\_\_\_  
(Please provide a detailed hand drawing, site plan or survey of the property)
6. UTM coordinates: east 350700 north 38A0810 (if available)
7. Is this a proposed (new) station?  Yes \_\_\_\_\_ No.  
If no, give original date of startup: Month \_\_\_\_\_ Day \_\_\_\_\_ Year \_\_\_\_\_
8. Date of (anticipated - new) startup: Month 4 Day 15 Year 14
9. Normal or requested operating hours: hrs/day 24 days/wk 7 mos/yr 12

**Section 2: Storage Tanks -- List all tanks that will contain any hydrocarbon liquid**

Individual Tank Information	Tank 1	Tank 2	Tank 3	Tank 4	Tank 5
Type of fuel stored (reg. unl., super unl., diesel, etc.)	REG. UNL.	SUPER UNL.	DIESEL		
Location (aboveground or underground)	UNDERGROUND	UNDERGROUND	UNDERGROUND		
Tank Construction (steel, fiberglass, both)	FIBERGLASS	FIBERGLASS	FIBERGLASS		
Cathodic Protection (Yes or No)	NO	NO	NO		
Storage Capacity (In Gallons)	20,000	8,000	10,000		
Date of installation or proposed installation (month/year)	2/14	2/14	2/14		

APPLICATION FOR SOURCE REGISTRATION AND AUTHORITY-TO-CONSTRUCT PERMITS FOR  
FUEL DISPENSING STATIONS LOCATED WITHIN BERNALILLO COUNTY

**Section 3: Submersible Pumps FOR GASOLINE ONLY**

(If possible, match pump number to tank number from Section 2 Table)

**Section 4: Fuel Throughput**

Individual Submersible Pump Information FOR GASOLINE(S)	Gasoline Submersible Pump Rating (In gallons/hour) (use 600 per pump if unknown)	Type of Fuel Dispensed from Submersible Pump (Reg. unl., super unl., unl. plus, etc.)	Date of Pump Installation (Month/Year if known)	TOTAL REQUESTED ANNUAL FUEL THROUGHPUT LIMIT IN GALLONS PER YEAR	
				GASOLINE(S)	DIESEL
Pump 1	600	REG UNL.	2/14 ±	RUE 3/24/14 7,000,000 <del>6,500,000</del> gallons per 12/3/13 email	500,000 gallons
Pump 2	600	SUPER UNL.			
Pump 3	600	DIESEL			
Pump 4					
Pump 5					
Total of pumps 1 - 5 gallons/hour					

**Section 5: Potential Emissions FOR GASOLINE(S) ONLY**

Total Submersible Pump Rating In Gallons/Hour, For Gasoline(s) Only, From Section 3 Table Above (Second Column Total)	T I M E S	Emission Rate (Given)	T I M E S	Theoretical Potential Operating Hours (Given) (12 hours/day & 365 days/year)	D I V I D E	Pounds Per Ton (Given)	E Q U A L S	Potential Tons Per Year of Volatile Organic Compounds (VOC)
1800 gallons/hour	X	0.013 pounds/gallon	X	4,380 hours/year	/	2,000	=	51.25

**Section 6: Actual Emissions FOR GASOLINE(S) ONLY**

Requested Annual Fuel Throughput of Gasoline(s) From Section 4 Table Above	T I M E S	Emission Rate (Given)	D I V I D E	Pounds Per Ton (Given)	E Q U A L S	Allowable Tons Per Year of Volatile Organic Compounds (VOC)
1,000,000 Gallons	X	0.013 pounds/gallon	/	2,000	=	45.5

**Section 7: Certification:**

I, the undersigned, a responsible officer of the applicant company, certify that to the best of my knowledge, the information stated on this application, together with associated drawings, specifications, and other data, give a true and complete representation of the planned new station or modifications to an existing station with respect to air pollution sources and control equipment. I also understand that any significant omissions, errors, or misrepresentations in these data will be cause for revocation of part or all of the resulting permit.

Printed Name: ROGER GUYSON

Title: CONSTRUCTION MANAGER

Signature: [Signature]

Date: 10-31-13

NOTE: Information relating to process or production techniques unique to owner, or data relating to profits and costs not previously made public can be protected as confidential if requested by applicant.



IMF

No. 2

**Eyerman, Regan V.**

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**From:** Eyerman, Regan V.  
**Sent:** Tuesday, December 03, 2013 2:05 PM  
**To:** 'Kirk Randall'  
**Cc:** 'kerry.busey@sfdc.com'  
**Subject:** RE: Smith's #485 and #423 Fuel Center Applications  
**Attachments:** Smiths Public Notice.doc

Kirk,  
Thank you, the applications for the gasoline dispensing facilities are complete and attached is the notice that will publish in the Albuquerque Journal this Friday. Thank you and if you have any questions or require additional information please do not hesitate to contact me.

Thank you,  
Regan Eyerman, P.E.  
Environmental Health Scientist  
City of Albuquerque, Air Quality Division  
505-767-5625

**From:** Kirk Randall [<mailto:kirk@greatbasinsouth.com>]  
**Sent:** Tuesday, December 03, 2013 10:09 AM  
**To:** Eyerman, Regan V.  
**Subject:** Smith's #485 and #423 Fuel Center Applications  
**Importance:** High

Regan,  
This email will confirm our conversation and our intent to request an annual throughput of 7,000,000 gallons of gasoline as noted in Section 6 of the application which as we discussed would revise the 6,500,000 gallons of gasoline listed in Section 4 to 7,000,000 for both the proposed Smith's #485 Fuel Center at 6941 Montgomery NE and the #423 Fuel Center at 6310 4<sup>th</sup> Street NW.  
Thanks for your help with this, let me know if this raises any problems or if you need anything else,

**Kirk Randall**  
Senior Project Manager  
**Great Basin Engineering - South**  
2010 No. Redwood Road  
Salt Lake City, UT 84116  
[kirk@greatbasinsouth.com](mailto:kirk@greatbasinsouth.com)  
801-521-8529

IMF

No. 3

**Published in the Albuquerque Journal on Friday December 06, 2013**

**PUBLIC NOTICE Air Quality Authority-to-Construct Permit For Smith's Food & Drug Centers, Inc.** Smith's Food & Drug Centers, Inc. (Smith's) has submitted authority-to-construct air quality permit applications to the Air Quality Division (Division) of the City of Albuquerque Environmental Health Department to construct two new gasoline dispensing facilities to be located across the street from two existing Smith's grocery stores. The two new gasoline dispensing facilities with their associated permit application numbers are to be located at the following addresses in Albuquerque, NM: Permit Application #3135 - Smith's #485 Fuel Center - 6941 Montgomery Blvd. NE, 87110 Permit Application #3136 - Smith's #423 Fuel Center - 6310 4th St. NW, 87107 For each air quality permit application, Smith's is requesting the following gasoline throughputs for each gasoline dispensing facility: Permit Application #3135 - 7,000,000 gallons of gasoline per year Permit Application #3136 - 7,000,000 gallons of gasoline per year The volatile organic compound (VOC) emissions are estimated to be the following amounts from each facility: Permit Application #3135 - 45.5 tons/year Permit Application #3136 - 45.5 tons/year The owner of the two new proposed facilities is Smith's Food & Drug Centers, Inc., 1550 South Redwood Rd., Salt Lake City, Utah, 84116. The Division expects to initiate formal action on each permit application by January 24, 2014. However, the final writing of the permits will be reserved pending receipt and analysis of any additional details or information developed during the public comment period. Interested persons may submit written comments or request a public hearing on Permits #3135 or #3136 to the City of Albuquerque Environmental Health Department, Air Quality Division, P.O. Box 1293, Albuquerque, NM 87103. Comments will be accepted and considered if postmarked by January 20, 2014. A copy of each permit application is available for inspection by the public at the Division offices, which are located at One Civic Plaza, Room 3047. For more information call Regan Eyerma, at (505) 767-5625. **NOTICE FOR PERSON WITH DISABILITIES:** If you have a disability and/or require special assistance, please call (505) 768-2600 (Voice) and special assistance will be made available to you to review the above referenced applications. TTY users call the New Mexico Relay at 1-800-659-8331 and special assistance will be made available to you to review the above referenced applications. Journal: December 6, 2013

IMF

No. 4

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107  
Sign-In Sheet

Page 1

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment
				Spoken Written
BRET WALTER	BretW@AuntysGreatBusiness.com	ENVIRONMENT	Represent Smith's	
Bernice Wensen			Yes	X
Elaine Hedderig	elainehedderig@gmail.com		No	
Israel Tovar		COA/END/AGP	No	
Regan Eyerman		COA/END/AGP	No	
KERRY BUSBY	Kerry.Busby@SFDK.Coh	Smith's	No	
DAVID HARRIS	David.Harris@sfdk.com	Smith's	No	
TIM ATHER	tja@smiths.com	Smith's	No	
DAVID HARRIS	David.Harris@sfdk.com	Smith's	No	
LARRY HAWKER	lhawker@gmail.com		No	
John Mahoney	John.Mahoney@Assoc		No	
Elaine Martinez	emartinez.art@gmail.com		No	

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107

Sign-In Sheet

Page 2

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?		If so, indicate the type of comment	
			Spoken	Written	Spoken	Written
CARISA JE MARTINEZ	e.jacrake@aol.com		NO			
Frank Salazar	fes@subinm.com	Smith's	NO			
CAMILLE VAREZ	<del>407</del> EL PARADISE NW	El Palace	YES	X		
Olga VAREZ	434 EL PARADISE NW	" "	NO			
Katelyn Iniguez	428 EL PARADISE NW		<del>NO</del>			
Betricia D. Martinez	512 Direccion NW	sect. D. 104	Yes	X		
Jesus MARTINEZ	512 GREGAN	Community	NO			
<del>ANITA C.</del>	<del>407 EL PARADISE NW</del>		<del>NO</del>			
Barbara Bowder	213 Vineyard Rd. NW barbowder@gmail.com		YES			
Pennis Bowder	dennisduster@gmail.com		YES			
Lauren Dickerson	N/A	EHD - AGP	NO			
Julia Mummert	330 Vineyard Rd NW 87107	Village resident	?			

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107  
Sign-In Sheet

Page 3

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?		If so, indicate the type of comment	
			Spoken	Written	Spoken	Written
Jeri Paul-Seaborn	Seaborn@osogrande.com	Camino Español / Nuts	✓		✓	
Yolanda Gradi	tonio.kroger@cybermesa.com	Resident				✓
Kimberly Stoppel	KSTOPP88@gmail.com	Resident		NO		
Nicholas Martinez	crazyquick007@aol.com	Resident		NO		
David Maldonado	607 Camino Esp	Resident				
Rmessa po Chumbe	721 Camino Español	Resident				
Nancy Romo	604 Camino Español	Resident				
Connie Hansen	" "	"				
Ren Martinez	512 Grecian NW	"				
Lynn Mallory	612 Camino Español NW	"		NO		
Kathleen McCorrell	" "	"		"		
Colby Shook	6704 Hwy NW 609 Camino Español NW	"		NO		



Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107  
Sign-In Sheet

Page 4

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment	
				Spoken	Written
Judith Lackner	17 Applewood Ln NW. 87107	resident			
Henry Lackner	" "	"	NO		
Carol Parker	ETHD	ETHD	NO		
Audrey A. Martinez	741 Chemical Rd. NW 87107	resident	NO		
Rebecca Ledden	427 Muller Rd NW 87107	resident	YES		
Barbara Chavez	6201 Yabar Rd NW	resident	YES		
PAT TORRES	!Lalle De / Rancho	resident	YES		
Anna-Lena Toledo	" "	resident	YES		
RUTH A. N. GONZALEZ	505 CAMINO ESPANOL NW 87107	"	NO		
ARTHUR A. GONZALEZ	6239 N. M. St. NW 87107	"	NO		
Richard Pitt	6404 4th. St. NW, 87107	Resident	NO		
JENNIFER CORONA DE ROYAL	115 CAMINO ESPANOL NW 87107	"	NO		

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107  
Sign-In Sheet

Page 5

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment Spoken    Written
DANNY ROUSA	1015 CAMINO ESPANOL NW 87107	RESIDENT	NO	
ANITA GREARDI	6338 4th St NW 87107	Resident	NO	
John Gallegos	504 Camino Espanol NW 87107	RES	NO	
Tessie Greenfield	747 Fairway Rd NW 87107	RES		
Larry Cookie, Zachary Jucker	421 Mullen Rd NW 87107	RES	YES	✓
Palsee: Julie	425 Mullen Rd NW 87107	RESIDENT	NO	
Susan Pearson	6216 Sabre Ct. NW 87107	Resident	YES	✓
Rico Ortiz	608 Camino Espanol NW 87107	RESIDENT	YES	✓
Nancy Romero	nr1putts@gmail.com 604 Camino Espanol NW 87107			
Connie J. Hansen	chickansat@gmail.com 604 Camino Espanol NW 87107			

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107

Sign-In Sheet

Page 6

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment	
				Spoken	Written
Jodi Hedderig	Hedderig@gmail.com	Resident			
Art Vall-Spinosa	artvall@hotmail.com	Resident	No		
John Kelly	j.p.kelype@gmail.com	MRO	Yes		
Taime + Irma Tamez	drjaimetamez@yahoo.com	Resident	NO		
Pete Domenici Jr	<del>P</del> Domenici@Domenicilaw.com	atty for Hardy Canaday			

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107

Sign-In Sheet

Page 7

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment	
				Spoken	Written
Richard Velasquez	dmsan@dmsanvelasquez.com	Resident/Neighbor			
Debbie Corona		Resident			
Julie Vancil		Commercial Pr.			
Pete Domenici Jr					
Susan Kelly	susan.kelly@qf.com	neighborhd	x	x	x

Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Village of Los Ranchos Village Hall, 6718 Rio Grande Boulevard NW, Albuquerque, NM 87107

Sign-In Sheet

Page 8

Please Print Name	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?		If so, indicate the type of comment	
			Spoken	Written	Spoken	Written
DON DUDLEY	don.dudley@donaldvolleydesign.com	CAANA	NO			
Theodore Varoz	TheodoreLVaroz@gmail.com	Los Ranchos Village Residents				
Luis A. Ortega	7509 Guadalupe Tr. - 87107	Village Resident	yes			
Richard Nieto	6401 4th. St. NW. 87107	Resident.				

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.  
 Tuesday, March 25, 2014 April 23, 2014  
 Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-in Sheet

Page 1

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?		If so, indicate the type of comment	
			Spoken	Written	Spoken	Written
Israel Tavaroz		COA/EHP/ABP	No			
Regan Eyerman		"	No			
<del>STEVE SALESER</del>		SMITHS	No			
Tim Atler	tja@sutwin.com	Smiths	No			
Frank Salazar	FCS@sutwin.com	Smiths	No			
<del>FRANK SALAZAR</del>	<del>FRANK SALAZAR</del>					
<del>FRANK SALAZAR</del>	N 01					
Jesus MARTINEZ	menudochoy@f.com	Village	No			
Patricia D. Martinez	PATRICIA G-Martinez	Resident	maybe as needed			
Dennis Azula		SMITHS	No			
Amonie Schull		Smiths	No			
Carlos Torola		Smiths	No			

12

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-In Sheet

Page 2

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment	
				Spoken	Written
✓ PAT TORO		Interested party	yes	X	
✓ Nancy Romero	604 Camino Espanol NW 87107	Homeowner	yes	X	
Connie Hansen	11	11	NO		
ROBERT TUTTLE			NO		
Martha Tuttle			NO		
Lena Houser	5700 Sandia Ct NW 87107	Homeowner	NO		
Sarah Gonzales	700 Camino Espanol NW	Homeowner	NO		
✓ Americo Chavez	721 Camino 100 Especial	Home Owner	yes		
✓ Arthur Sardi	6338 Ym Rd NW	Resident - Home Owner	yes		
Kristin Madden	Kristin.madden@state.nm.us	NM Game & Fish	NO		
Kelly Ward	kward@losranchosnm.gov	Village of Los Ranchos	yes	X	
Kathleen McCorckell	kmckell@g.com	resident	yes		

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.

Tuesday, March 25, 2014

Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-In Sheet

Page 4

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment	
				Spoken	Written
✓ Jeff Robb	jeffrey.m.robb@verizon.net	Resident	Yes	✓	
Carolyn Rodriguez	richcavo@aol.com	Resident	Yes	✓	
Richard Rodriguez	richcavo@aol.com	Resident	Yes	✓	
Ken Fasser	KDLFASSER@AOL.COM	Resident	No		
Katy Shaffer	kgshaff@flash.net	resident	No		
✓ Chris Kenney	ChrisKenney@comcast.net	Resident	Yes		X
✓ Susan Kalk	susan.kellyabq@gmail.com	Resident	✓		
✓ Camille Varot	el Pajarito	resident	✓		
✓ John Kalk	713 Camino Espanol	"	✓		
Catherine T-Gred	609 Camino Espanol NW	resident	No		
ART CORDOVA	436 GALLAN PL NW	"			
Julia Mummert	330 Vineyard Rd NW	resident	No		



Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.  
 Tuesday, March 25, 2014

Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107  
 Sign-In Sheet

Page 3

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment
			Spoken	Written
Donna Gately	611 Camino Espanol NW	neighbor	no	
John GATELY	611 Camino Espanol NW	NET 6 HOR	N	
Stanley Hutchinson	306 Vineyard NW	Neighborhood	No	
Kim Morgan	306 Vineyard NW	Neighborhood		
RUTHIE MCGONAGIL	505 CAMINO ESPANOL NW	NEIGHBORHOOD	YES	✓
Suan Reynosa	312 Anno St. NE	SWOP	yes	✓
Carol Barker	Warren @ Caber. gov	COA	No	
Mary Homan	7318 4th St. NW, Los Ranchos 87102 mhoman155@aol.com	Trustee, Los Ranchos	yes	✓
Virginia Cordova	436 Gavilan Pl. NW <del>436</del> vcord123@aol.com	NEIGHBOR	no	
Barbara Lowder	213 Vineyard Rd. NW	Resident	yes	✓
Dennis Lowder	213 Vineyard Rd. NW	Resident	no	
Angela Aragon	216 Garcia Rd. N.E.	Neighborhood	no	

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.  
 -Tuesday, March 25, 2014 Wed, April 23, 2014  
 Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-In Sheet

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment
			Spoken	Written
Barbara Olivas	101 Green Valley Rd NW 87107	Neighbor	NO	
Nancy Ellis-Hines	326 Willow Rd. NW	Resident	Maybe	✓
Joseph White	Willgreen Valley Rd NW 87107	Neighbor	NO	
Rolando Bara	218 Willow Rd. NW	Res	no	
Andrey Martinez	741 Chamisal Rd. NW 87107	Res	NO	
Math Byger	6125 4th St NW 87107	STORE	NO	
Wayne Ciddio	6212 Sabve Ct. W 87107	Neighbor	maybe	
Temperas Tamer	520 El Paraiso Rd NW 87107	Resident	No	
Camille Varon	427 El Paraiso Rd NW 87107	El Paraiso Neighbor	Yes	
SMITHA B. HALL	511 SOLAR RD, NW ALBUQUERQUE 87107	PRES, LEE ACRES N.A.	yes	
ALAN HALL	DO.	NONE	NO	
BRENICE LEDDEN	427 MULLEN RD NW- 87107	RESIDENT	YES-	✓

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.  
 Tuesday, March 25, 2014 Wed. April 23, 2014  
 Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-In Sheet

Page 6

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment Spoken    Written
Elaine Martinez	cemartinez.art@gmail.com	El Paraiso Neighborhood	NO	
Marcie Amendolagine	amendolagine@juno.com	Lee Acres N.A		
ADRIANA TORRES		Lee Acres		
Awita Gradi	awita@gradi.com	(Next Door)	NO	
ISAAC BENTON	ibenton@cabq.gov	CITY COUNCIL	YES	✓
KIM MELTON	kim.melton@yahoo.com			
Hank Bohneft	hbohneft@rody.com	Rody Law Firm		

Continued Public Information Hearing for Proposed Permit #3136 for Smith's G.D.F.  
 Tuesday, March 25, 2014 Wed, April 23, 2014  
 Albuquerque Police Academy 5412 2nd Street NW, Albuquerque, NM 87107

Sign-In Sheet

Page 7

Name (Please Print Legibly)	Email/Mailing Address (Please complete if you wish to receive a written notice of the action taken on the permit application)	Affiliation	Do you wish to comment?	If so, indicate the type of comment Spoken Written
Marcella Gallagos	348 Vineyard Rd NW 87107	Resident	No	maybe
Diego Gallagos	bigmanag348@yahoo.com	Resident	No	
Eric Fenar		Resident		
Nicole Raybal	222 Los Ranchos Rd NW			
Aurienne Lombardi	STELLA_LUNA@COMCAST.NET	Lee Acres		
HARRIET NEEK	hwmeek@earthlink.net	resident	NO	
Brady Womack	5933 Pauline St NW 87107	resident		
Blaine GOLDSTEIN	<del>5933 Pauline St NW</del> 5933 GOLDSTEIN ST NW 87107	resident	NO	
Cliff Crouch	1036 Solar 87107	resident		
Lucia Gallegos	1036 Solar Rd NW 87107	resident		

IMF

No. 5



**AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3136**  
**FACILITY CDS # NM/001/02261**  
**Facility ID: FA0003035 Record ID: PR0006343**



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Smith's Food & Drug Centers, Inc.  
 Company Name

Certified Mail # 7010 3090 0001 4486 6982  
 Return Receipt Requested

1550 South Redwood Road  
 Mailing Address

Salt Lake City  
 City

UT  
 State

84104  
 Zip

Responsible Official: Roger Gough, Construction Manager  
 Authorized Representative

Pursuant to the New Mexico Air Quality Control Act, Chapter 74, Article 2 New Mexico Statutes Annotated 1978 (as amended); the Joint Air Quality Control Board Ordinance, 9-5-1 to 9-5-99 ROA 1994; the Bernalillo County Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5; the Albuquerque-Bernalillo County Air Quality Control Board (AQCB) regulation, Title 20, New Mexico Administrative Code (20 NMAC), Chapter 11, Part 40 (20.11.40 NMAC), Source Registration; and AQCB regulation, Title 20, NMAC, Chapter 11, Part 41 (20.11.41 NMAC), Authority to Construct,

Smith's Food & Drug Centers, Inc. ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3135 has been issued based on the review of the application information received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on November 5, 2013, which was deemed complete on December 3, 2013, and on the National Ambient Air Quality Standards, New Mexico Ambient Air Quality Standards, and Air Quality Control Regulations for Albuquerque/Bernalillo County, as amended. As these standards and regulations are updated or amended, the applicable changes will be incorporated into this Air Quality Permit Number 3136 and will apply to the facility. This facility is authorized to construct and operate the following type of process at:

Facility Name & Address	UTM Coordinates	Process Description	SIC	NAICS
Smith's Food & Drug Centers, Inc. 6310 4 <sup>th</sup> St. NW Albuquerque, NM 87107	350700 Easting 3890810 Northing	Gasoline Dispensing Facility (GDF) <sup>1</sup>	5541	447190

<sup>1</sup> Gasoline dispensing facility (GDF) means any stationary facility which dispenses gasoline into the fuel tank of a motor vehicle, motor vehicle engine, nonroad vehicle, or nonroad engine, including a nonroad vehicle or nonroad engine used solely for competition. These facilities include, but are not limited to, facilities that dispense gasoline into on- and off-road, street, or highway motor vehicles, lawn equipment, boats, test engines, landscaping equipment, generators, pumps, and other gasoline-fueled engines and equipment.

Issued on the 29<sup>th</sup> day of May, 2014

Isreal L. Tovar  
 Print Name

Isreal L. Tovar  
 Sign Name

**ENTERED**

Air Quality Protection Programs - Permitting Section  
 Air Quality Program  
 City of Albuquerque Environmental Health Department

**1. AUTHORITY TO CONSTRUCT PERMIT THRESHOLD (74-2-7.A.(1) NMSA).** By regulation, the local board shall require a person intending to construct or modify any source, except as specifically provided by regulation, to obtain a construction permit from the local agency prior to such construction or modification. This permit recognizes the construction and operation of the following equipment:

Unit Number	Unit Description	Storage Capacity in gallons	Installation Date	Product Stored	Minimum Required Emissions Control <sup>1</sup>
1	Underground Storage Tank	20,000	2014	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling
2	Underground Storage Tank	8,000	2014	Premium Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

<sup>1</sup> **GASOLINE HANDLING AND HOLDING AT RETAIL OR FLEET SERVICE STATIONS:** No person shall allow loading of gasoline into an underground storage tank with greater than 3,000 gallons capacity, unless it is equipped with an approved vapor loss control system, including a submerged fill pipe, in which the displaced vapors are either continuously contained or processed such that the emission of gasoline vapors to the sphere do not exceed 1.15 pounds of gasoline per 1,000 gallons loaded into said tank. Liquid gasoline dispensing from the underground storage as well as momentary opening of the system for gasoline gauging purposes shall not be considered as vapor loss in the requirement of this tion. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.15 NMAC, Volatile Organic Compounds.]

**2. COMPLIANCE ASSURANCE.**

- A. All air pollution emitting facilities within Bernalillo County are subject to all applicable Albuquerque/Bernalillo County Air Quality Control Regulations, whether listed in this permit or not.
- B. The issuance of an Authority to Construct permit does not relieve the Company from the responsibility of complying with the provisions of the state air quality control act, federal clean air act, or any applicable regulations of the board. (20.11.41.17 NMAC)
- C. Any term or condition imposed by the department in an Authority to Construct permit shall apply to the same extent as a regulation of the board. 11.41.18.C NMAC)
- D. Whenever two or more parts of the Air Quality Control Act, or the laws and regulations in force pursuant to the Act, limit, control or regulate the emissions of a particular air contaminant, the more restrictive or stringent shall govern.
- E. The department is authorized to issue a compliance order requiring compliance and assessing a civil penalty not to exceed Fifteen Thousand and no/100 Dollars (\$15,000) per day of noncompliance for each violation, commence a civil action in district court for appropriate relief, including a temporary and permanent injunction. (74-2-12 NMSA).

**3. SUBSTITUTION.** Substitution of equipment is authorized provided the equipment has the same or lower process capacity as the piece of equipment being substituted. The department shall be notified in writing within 15 days of equipment substitution. Equipment that is substituted shall comply with the requirements in the Section 4 Gasoline Unit Emission Limits table.

**4. GASOLINE UNIT EMISSION LIMITS. Allowable monthly and annual gasoline throughput. Allowable ton per year (tpy) emissions.**

Unit	Unit Description	Allowable Average Monthly Throughput of Gasoline (in gallons) <sup>1</sup>	Allowable Annual Throughput of Gasoline (in gallons) <sup>2</sup>	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) <sup>2</sup> (in tons per year)
1	Underground Storage Tank	≥100,000	For Stage I Vapor Recovery 7,000,000	45.5 tons per year
2	Underground Storage Tank			

<sup>1</sup> Monthly throughput means the total volume of gasoline that is loaded into, or dispensed from, all gasoline storage tanks at each Gasoline Dispensing Facility (GDF) during a month. Monthly throughput is calculated by summing the volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the current day, plus the total volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the previous 364 days, and then dividing that sum by 12.

<sup>2</sup> Based on the annual gasoline throughput requested in the permit application. There is no restriction on individual tank throughput.

**5. EMISSIONS INVENTORY REQUIREMENTS (20.11.47 NMAC).** Subsection 20.11.47.14.A.(1) – Applicability - requires an emissions inventory of any stationary source in Bernalillo county that has an active permit issued pursuant to 20.11.41 NMAC Authority to Construct. Subsection 20.11.47.14.B.(1) – Reporting Requirements – requires the submittal of an emissions inventory report annually. Therefore, an annual emissions inventory (in pounds per calendar year) shall be submitted to the department by March 15 each year by:

Tripling the actual, annual gallons of gasoline throughput for the previous calendar year (January 1<sup>st</sup> through December 31<sup>st</sup>) for Units 1 and 2 in the Section 4 Gasoline Unit Emission Limits table above, by 0.013 pounds/gallon if Stage I Vapor Recovery or 0.0031 pounds/gallon if Stage II Vapor Recovery. An electronic emission inventory form is available at [cabq.gov/airquality](http://cabq.gov/airquality), under Business Resources - Business Applications, Permits and Forms.

**6. MODIFICATION.** Any future physical changes or changes in the method of operation which result in an increase in the pre-controlled emission rate may constitute a modification. Change in the method of control of emissions or in the character of emissions shall not be made unless submitted to the department as a modification to this permit. 20.11.41.7.H NMAC defines proposed changes to a facility that may constitute a permit modification. Compliance will be based on department inspections and the submittal of a new permit application for any modification. No modification shall begin prior to issuance of a permit and shall be processed in accordance with 20.11.41 NMAC.

**7. MONITORING and RECORDKEEPING (20.11.41.18.B.(8)NMAC).** Monitor and maintain a log of the total monthly gasoline throughput for the facility. These records must be retained for the most recent five-year period for the facility.

**8. REPORTING.**

A. The following reporting requirements, in accordance with 20.11.41.18, 20.11.41.20, 20.11.47 and 20.11.49 NMAC, to allow the department to determine compliance with the terms and conditions of the permit. Compliance will also be based on timely submittal of the reports. The permittee shall notify the department in writing of:

- 1. Any change in control or ownership, within 15 days of the change in control or ownership. In the event of any such change in control or ownership, the permittee shall notify the succeeding owner of the permit. The permit conditions apply in the event of any change in control or ownership of the facility. At minimum, an administrative permit modification is required to address any change in control or ownership of the facility;
- 2. Any substitution of equipment, within 15 days of equipment substitutions. Equipment may only be substituted if it has the same or lower process capacity as the piece of equipment being substituted, and there are no other federal, state, or local air quality permit requirements triggered by the introduction of the substituted piece of equipment. Substituted equipment shall comply with the Section 4 Gasoline Unit Emission Limits table;
- 3. The annual (January 1 through December 31 of previous year) throughput of gasoline and emission inventory, by March 15 of every year; and
- 4. Any breakdown of equipment or air pollution control devices or apparatus so as to cause emissions of air contaminants in excess of limits set by permit conditions. Any breakdown or abnormal operating conditions shall be reported to the department by submitting the following reports on forms provided by the department:
  - a) Initial Report: The permittee shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission pursuant to 20.11.49.15.A.(1) NMAC;
  - b) Final Report: The permittee shall file a final report, no later than 10 days after the end of the excess emission. If the period of an excess emission extends beyond 10 days, the permittee shall submit the final report to the department within 72 hours of the date and time the excess emission ceased. This condition is pursuant to 20.11.49.15.A.(2) NMAC and 20.11.49.15.C NMAC; and

c) Alternative Reporting the facility is subject to the federal reporting requirements of 40 CFR Parts, 60, 61, or 63 and the federal requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice. This condition is pursuant to 20.11.49.15.D NMAC.

B. The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions. This condition is pursuant to 20.11.49.14 NMAC.

#### 9. INSPECTION (74-2-13 NMSA).

- A. The department may conduct scheduled and unscheduled inspections, and, upon presentation of credentials:
1. Shall have a right of entry to, upon, or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the board or by any permit condition are located; and
  2. May, at reasonable times:
    - a) Have access to and copy any records required to be established and maintained by regulations of the board or any permit condition;
    - b) Inspect any monitoring equipment and method required by regulations of the board or by any permit condition; and
    - c) Sample any emissions that are required to be sampled pursuant to regulation of the board or any permit condition.
- B. Any credible evidence may be used to establish whether the facility has violated or is in violation of any regulation of the board, or any other provision of law. Credible evidence and testing shall include, but is not limited to 20.11.41.26.A and B NMAC as follows:
1. A monitoring method approved for the source pursuant to 20.11.42 NMAC, Operating Permits, and incorporated into an operating permit;
  2. Compliance methods specified in the regulations, conditions in a permit issued to the facility, or other provision of law;
  3. Federally enforceable monitoring or testing methods, including methods in 40 CFR parts 51, 60, 61, 63 and 75; and
  4. Other testing, monitoring or information-gathering methods that produce information comparable to that produced by any CFR method and approved by the department and the USEPA.
- C. Compliance will be based on department inspections of the facility, reviews of production records, submission of appropriate permit applications for modification, and timely notification to the department regarding equipment substitutions and relocations.

10. **FEDERAL RULEMAKING.** In addition to Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65 NMAC, *Volatile Organic Compounds*; 40 CFR Part 63, Subpart CCCCCC – National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities apply to this facility. Based on the requested annual throughput for gasoline, this facility's monthly throughput would amount to 100,000 gallons or more of gasoline. Therefore, the permittee shall ensure the applicable requirements of 40 CFR Part 63, Subpart CCCCCC, §63.11116, §63.11117, and §63.11118 are met as well as the Subpart A – General Provisions of 40 CFR Part 63.

#### A. GENERAL APPLICABLE REQUIREMENTS (§63.11116).

1. You must not allow gasoline to be handled in a manner that would result in vapor releases to the atmosphere for extended periods of time.
  2. §63.11116(a) requires that measures to be taken include, but are not limited to, the following:
    - (a)(1) Minimize gasoline spills;
    - (a)(2) Clean up spills as expeditiously as practicable;
    - (a)(3) Cover all open gasoline containers and all gasoline storage tank fill-pipes with a gasketed seal when not in use; [ §63.11116(d) Portable gasoline containers that meet the requirements of 40 CFR Part 59, Subpart F, are considered acceptable for compliance with this requirement]; and
    - (a)(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling devices, such as oil/water separators.
  3. §63.11116(b) requires that records be made available within 24 hours of request by the department to document your gasoline throughput.
- #### B. SUBMERGED FILLING OF GASOLINE STORAGE TANKS (§63.11117).
1. §63.11117(b) requires that except as specified in §63.11117(c), you must only load gasoline into storage tanks at your facility by utilizing submerged filling, as defined in §63.11132, and as specified in paragraph (b)(2) of this section:
    - (b)(2) Submerged fill pipes installed after November 9, 2006, must be no more than 6 inches from the bottom of the storage tank.
  4. §63.11117(c) Gasoline storage tanks with a capacity of < 250 gallons are not required to comply with the submerged fill requirements in paragraph (b) of this section.

#### C. CONTROL REQUIREMENTS.

1. §63.11118(b) requires that you must the requirements in paragraph (b)(1) of this section:
  - (b)(1) Each management practice in Table 1 of 40 CFR Part 63, Subpart CCCCCC that applies to your GDF by installing and operating a vapor balance system on your gasoline storage tanks that meets the following design criteria:
    - a) All vapor connections and lines on the storage tank shall be equipped with closures that seal upon disconnect;
    - b) The vapor line from the gasoline storage tank to the gasoline cargo tank shall be vapor-tight, as defined in § 63.11132;
    - c) The vapor balance system shall be designed such that the pressure in the tank truck does not exceed 18 inches water pressure or 5.9 inches water vacuum during product transfer;
    - d) The vapor recovery and product adaptors, and the method of connection with the delivery elbow, shall be designed so as to prevent the over-tightening or loosening of fittings during normal delivery operations;
    - e) If a gauge well separate from the fill tube is used, it shall be provided with a submerged drop tube that extends the same distance from the bottom of the storage tank as specified in § 63.11117(b);
    - f) Liquid fill connections for all systems shall be equipped with vapor-tight caps;
    - g) Pressure/vacuum (PV) vent valves shall be installed on the storage tank vent pipes. The pressure specifications for PV vent valves shall be: a positive pressure setting of 2.5 to 6.0 inches of water and a negative pressure setting of 6.0 to 10.0 inches of water. The total leak rate of all PV vent valves at an affected facility, including connections, shall not exceed 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63 cubic foot per at a vacuum of 4 inches of water;
    - h) The vapor balance system shall be capable of meeting the static pressure performance requirement of the following equation:

$$P_f = 2e^{-500.887/V}$$

Where:



- Pf = minimum allowable final pressure, inches of water.
- v = Total ullage affected by the test, gallons.
- e = Dimensionless constant equal to approximately 2.718.
- 2 = The initial pressure, inches water; and

i) If you own or operate a new or reconstructed GDF, or any storage tank(s) constructed after November 9, 2006, at an existing affected facility subject to § 63.11118, then you must equip your gasoline storage tanks with a dual-point vapor balance system as defined in § 63.11132, and comply with the requirements of item 1 in Table 1.

2. The management practices specified in Table 1 of 40 CFR Part 63, Subpart CCCCCC are not applicable if you are complying with the requirements in § 63.11118(b)(2), except that if you are complying with the requirements in § 63.11118(b)(2)(i)(B), you must operate using management practices at least as stringent as those listed in Table 1 of 40 CFR Part 63, Subpart CCCCCC.

**D. PERFORMANCE TEST REQUIREMENTS.**

Source Type	Initial Test Date	Additional Testing	Citation
New or Reconstructed Source (commenced construction after 11/9/06) with a monthly throughput <sup>1</sup> of ≥ 100,000 gal/month	Upon startup after 09/23/08	Every three years §63.11120(a)	63.11113(d)(2)

<sup>1</sup> Monthly throughput means the total volume of gasoline that is loaded into, or dispensed from, all gasoline storage tanks at each Gasoline Dispensing Facility (GDF) during a month. Monthly throughput is calculated by summing the volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the current day, plus the total volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the previous 364 days, and then dividing that sum by 12.

1. §63.11118(e) - You must comply with the applicable testing requirements contained in §63.11120.

2. §63.11120(a) - Each owner or operator, at the time of installation, as specified in §63.11113(e), of a vapor balance system required under §63.11118(b)(1), and every 3 years thereafter, must comply with the requirements in paragraphs (a)(1) and (2) as follows:

(a)(1) - You must demonstrate compliance with the leak rate and cracking pressure requirements, specified in item 1(g) of Table 1 of 40 CFR Part 63, Subpart CCCCCC, for pressure-vacuum vent valves installed on your gasoline storage tanks using the test methods identified in paragraph (a)(1)(i) or paragraph (a)(1)(ii) as follows:

(a)(1)(i) - California Air Resources Board Vapor Recovery Test Procedure TP-201.1E,—Leak Rate and Cracking Pressure of Pressure/Vacuum Vent Valves, adopted October 8, 2003 (incorporated by reference, see §63.14);

(a)(1)(ii) - Use alternative test methods and procedures in accordance with the alternative test method requirements in §63.7(f); and

(a)(2) - You must demonstrate compliance with the static pressure performance requirement, specified in item 1(h) of Table 1 of 40 CFR Part 63, Subpart CCCCCC, for your vapor balance system by conducting a static pressure test on your gasoline storage tanks using the test methods identified in paragraph (a)(2)(i) or paragraph (a)(2)(ii) as follows:

(a)(2)(i) - California Air Resources Board Vapor Recovery Test Procedure TP-201.3,—Determination of 2-Inch WC Static Pressure Performance of Vapor Recovery Systems of Dispensing Facilities, adopted April 12, 1996, and amended March 17, 1999 (incorporated by reference, see §63.14); and

(a)(2)(ii) - Use alternative test methods and procedures in accordance with the alternative test method requirements in §63.7(f).

§63.11120(b) - Each owner or operator choosing, under the provisions of §63.6(g), to use a vapor balance system other than that described in Table 1 of 40 CFR Part 63, Subpart CCCCCC must demonstrate to the Administrator or delegated authority under paragraph §63.11131(a) of this subpart, the equivalency of their vapor balance system to that described in Table 1 of 40 CFR Part 63, Subpart CCCCCC using the procedures specified in paragraphs (b)(1) through (3) as follows:

(b)(1) - You must demonstrate initial compliance by conducting an initial performance test on the vapor balance system to demonstrate that the vapor balance system achieves 95 percent reduction using the California Air Resources Board Vapor Recovery Test Procedure TP-201.1,—Volumetric Efficiency for Phase I Vapor Recovery Systems, adopted April 12, 1996, and amended February 1, 2001, and October 8, 2003, (incorporated by reference, see §63.14);

(b)(2) - You must, during the initial performance test required under paragraph (b)(1) of this section, determine and document alternative acceptable values for the leak rate and cracking pressure requirements specified in item 1(g) of Table 1 of 40 CFR Part 63, Subpart CCCCCC and for the static pressure performance requirement in item 1(h) of Table 1 of 40 CFR Part 63, Subpart CCCCCC; and

(b)(3) - You must comply with the testing requirements specified in paragraph §63.11120 (a).

§63.11120(c) - Conduct of Performance Tests. Performance tests conducted for this subpart shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance (i.e., performance based on normal operating conditions) of the affected source. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

§63.11126 - Each owner or operator subject to the management practices in §63.11118 shall report to the Administrator the results of all volumetric efficiency tests required under §63.11120(b). Reports submitted under this paragraph must be submitted within 180 days of the completion of the performance testing.

**E. NOTIFICATIONS.**

1. §63.11118(f) requires that you must submit the applicable notifications as required under §63.11124.

2. §63.11124(b) requires that each owner or operator subject to the control requirements in §63.11118 must comply with paragraphs (b)(1) through (5) of §63.11124 as follows:

(b)(1) You must submit an Initial Notification that you are subject to this subpart upon startup. The notification must be submitted to the applicable EPA Regional Office and the delegated State authority as specified in §63.13. The Initial Notification must contain the information specified in paragraphs (b)(1)(i) through (iii) of this section as follows:

(b)(1)(i) the name and address of the owner and the operator;

(b)(1)(ii) the address (i.e., physical location) of the GDF; and

(b)(1)(iii) a statement that the notification is being submitted in response to this subpart and identifying the requirements in paragraphs (a) through (c) of §63.11118 that apply to you;

(b)(2) You must submit notification of Compliance Status to the applicable TTA Regional Office and the delegated State authority, as specified in §63.13, in accordance with the schedule specified in §63.9(h). The Notification of Compliance Status must be signed by a responsible official who must certify its accuracy and must indicate whether the source has complied with the requirements of this subpart. If your facility is in compliance with the requirements of this subpart at the time the Initial Notification required under paragraph (b)(1) of this section is due, the Notification of Compliance Status may be submitted in lieu of the Initial Notification provided it contains the information required under paragraph (b)(1) of this section;

(b)(4) You must submit a Notification of Performance Test, as specified in §63.9(e) [60 calendar days before the performance test is scheduled to allow the Administrator to review and approve the site-specific test plan required under §63.7(c), if requested by the Administrator, and to have an observer present during the test], prior to initiating testing required by §63.1120(a) and (b); and

(b)(5) You must submit additional notifications specified in §63.9, as applicable.

3. Sources in Bernalillo county that are in compliance with a 20.11.41 NMAC, Authority to Construct should be meeting the 20.11.65 NMAC, Volatile Organic Compounds requirements for submerged fill pipe and vapor loss control system for loading of fuel storage tanks and vapor recovery, and therefore should not have to submit an Initial Notification or a Notification of Compliance Status. **Since all gasoline dispensing facilities permit through 20.11.41 NMAC, Initial Notifications and Notifications of Compliance Status are met through the permitting process and through the inspection program.**

**F. RECORDKEEPING.**

1. §63.11118(g) - You must keep records and submit reports as specified in §§ 63.11125 and 63.11126.

2. §63.11125(a) - Each owner or operator subject to the management practices in §63.11118 must keep records of all tests performed under §63.11120(a) and (b).

3. §63.11125(b) - Records required under paragraph (a) of this section shall be kept for a period of 5 years and shall be made available for inspection by the Administrator's delegated representatives during the course of a site visit.

11. **FEES (20.11.2 NMAC).** Every owner or operator of a source that is required to obtain an Authority to Construct permit shall pay an annual emission fee pursuant to 20.11.2 NMAC. The annual emission fee for maintenance of this permit will be based on the greater of a base annual fee or a per ton fee rate based on the per ton allowable annual emissions of volatile organic compounds (VOC's) given in the Section 4 - Gasoline Unit Emission Limits table.

12. **PERMIT CANCELLATION.** The department may cancel any permit if the construction or modification is not commenced within one (1) year from the date of issuance or if, during the construction or modification, work is suspended for a total of one (1) year. (20.11.41.19.A and B NMAC)

13. **INFORMATION SUBMITTALS [Air Quality Program contact numbers: (505) 768-1972 (voice); 1-800-659-8331 (NM Relay)].**

- Completed forms can be hand delivered to 1 Civic Plaza - Room 3047 (8:00am - 4:30pm Mon. - Fri. except city holidays) or can be mailed to:

Albuquerque Environmental Health Department  
Air Quality Program  
Permitting Section  
P.O. Box 1293  
Albuquerque, New Mexico 87103

- Test protocols and compliance test reports shall be submitted to:

Albuquerque Environmental Health Department  
Air Quality Program  
Attention Enforcement Supervisor  
P.O. Box 1293  
Albuquerque, New Mexico 87103

- All reports shall be submitted to:

Albuquerque Environmental Health Department  
Air Quality Program  
Attention Compliance Officer  
P.O. Box 1293  
Albuquerque, New Mexico 87103

IMF

No. 6

# CITY OF ALBUQUERQUE

Environmental Health Department  
Mary Lou Leonard, Director



June 03, 2014

**RE: Air Quality Permit No. 3136 ~ Smith's Food & Drug Centers,  
Inc. (Smith's) – Authority-to-Construct Permit – 6310 4<sup>th</sup> ST  
NW NE**

Dear Interested Person:

Environmental Health Dept.

Air Quality Program

PO Box 1293

Albuquerque, NM 87103

www.cabq.gov

This letter is to notify you that the Air Quality Program (Air Program) of the City of Albuquerque (City) Environmental Health Department (Department) has issued the above referenced permit. Smith's had submitted an application requesting a permit that would authorize Smith's to have an annual gasoline throughput of 7,000,000 gallons per year for a fuel dispensing (gas) station proposed to be located at 6310 4<sup>th</sup> St. NW (Smith's Gas Station).

**Applicable Laws and Regulations for Air Quality Permits**

When the Department receives an application for an air quality permit, it can only deny the application for the permit if (1) it will not meet the standards, rules or requirements of the Clean Air Act or the Air Quality Control Act (Air Act); (2) it will cause or contribute to an exceedance of an air quality standard; or (3) it will violate any other provision of the Clean Air Act or the Air Act. NMSA 1978, § 74-2-7(C)(1). As such, in reaching a decision on the permit, the Air Program can only address air quality issues and only to the extent authorized by the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety. Issues not related to air quality have been brought to the attention of the appropriate City departments by written, telephonic, or oral communication by interested participants and, in some cases, communication by Air Program staff.

The decision of the Department regarding Smith's application for a permit is based on the requirements of the Clean Air Act, the Air Act, and the applicable air quality ordinances and regulations. The applicable regulations include, in addition to the substantive regulations discussed below, 20.11.41 NMAC (2002) *Authority to Construct*, also known as "Part 41."

**Regulation of Air Quality at Gas Stations**

The primary regulated air pollutants emitted at gas stations are volatile organic compounds (VOCs). There are no ambient air standards for VOCs. VOCs are not controlled in the same manner as pollutants that are subject to the national ambient air

595

quality standards (NAAQS). Therefore, a VOC emission standard cannot be "exceeded" in the same manner as a NAAQS standard. Air dispersion modeling is not required by the United States Environmental Protection Agency (EPA) when an application for a gas station air quality permit or modification is submitted to the Air Program. Unlike NAAQS, there are no ambient VOC emission standards that can be the basis for denying a VOC permit or an application for modification of an existing gas station VOC permit pursuant to Section 74-2-7(C)(1).

Instead, for purposes of air quality, VOC emissions from gas stations are controlled by using federally-required "performance based" standards, which are found at 40 CFR 63 Subpart CCCCCC and locally-required 20.11.65 NMAC and 20.11.64 NMAC. Performance based standards for a gas station like the Smith's Gas Station proposed at 6310 4<sup>th</sup> St. NW include vapor recovery systems and work practice standards. The VOC tons-per-year numbers in such permits are not emission maximums. Rather, they are used for calculating emission fees pursuant to 20.11.2 NMAC.

#### **Public Notice and Public Information Hearing**

Once Smith's permit application was complete, the Air Program published notice of the application in the Albuquerque Journal and sent copies of the information from the public notice to surrounding neighborhood associations registered with the Office of Neighborhood Coordination and to permitting staff at EPA Region 6 and the New Mexico Environment Department (NMED). Neighborhoods, such as Spanish Walk, that are not represented by a neighborhood association are not registered with the Office of Neighborhood Coordination and so their contact information is not provided to the Air Program. The Air Program received requests for a Public Information Hearing (PIH) and the Director granted permission for the PIH. Notice of the March 25, 2014 PIH was published in the Albuquerque Journal and sent to those who requested the PIH. The Air Program placed the following documents on the Department's Air Program website for public access: the Smith's air quality permit application, the draft Smith's Gas Station air quality Permit No. 3136; the PIH flyer; and a summary of federal regulations controlling air emissions from gas stations.

The Air Program held the PIH on March 25, 2014 to solicit relevant testimony and documents and to provide an opportunity for interested participants to ask questions. City staff and supervisory/management personnel, including the Air Program permit writer assigned to primary review of the Smith's permit application, attended the PIH. After the allotted two and one-half hours for the hearing, there were still persons with questions and comments, so the PIH was continued. The Air Program published notice of the April 23, 2014 PIH Continuation in the Albuquerque Journal and sent approximately 90 letters and 32 emails providing notice of the PIH Continuation.

As explained by the Hearing Officer at both of the PIHs, the PIHs are not adjudicatory hearings and the Hearing Officer does not make a decision or recommendation relating to the application. Before the Department made a decision regarding Smith's application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The

Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over the particular issue.

In particular, during the PIH, Smith's submitted a petition signed by approximately 2400 people in favor of the Smith's application. An air quality permit application decision is not based on whether a particular application is or is not supported by the public. Instead, the Air Program is statutorily authorized to deny an application only if the proposed construction will (1) not meet applicable regulations; (2) will cause or contribute to violations of ambient air standards (e.g., violations of NAAQS); or (3) will violate any other provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C). While petitions pro or con may serve other functions, they cannot be the basis for a decision on an air quality permit application.

#### **Application Review Process**

As a part of the application review process, the Air Program established an "administrative record" regarding the permit application. The administrative record includes the application, evidence submitted by the applicant, all written comments and evidence received by the Air Program, and all written and oral questions, testimony and exhibits submitted at the PIH (the PIH record). Before the Department made a decision, Air Program staff reviewed the administrative record.

As stated by the Hearing Officer at both of the PIHs, and as authorized by Subsection C of 20.11.41.15 NMAC (2002), the Department can make three different decisions regarding an application for an air quality permit or modification.

1. The permit may be issued as requested in the application;
2. The permit may be issued with additional authorized air quality conditions not requested in the application; or
3. The permit may be denied as authorized by the Air Act or the applicable air quality ordinances or regulations

The Air Program determined the permit application met all requirements of the Clean Air Act, the Air Act, and the applicable air quality ordinances and regulations. In addition, the Air Program determined that, if the Smith's Gas Station is operated as required by Permit No. 3136, it will satisfy all applicable air quality laws and regulations.

#### **Decision**

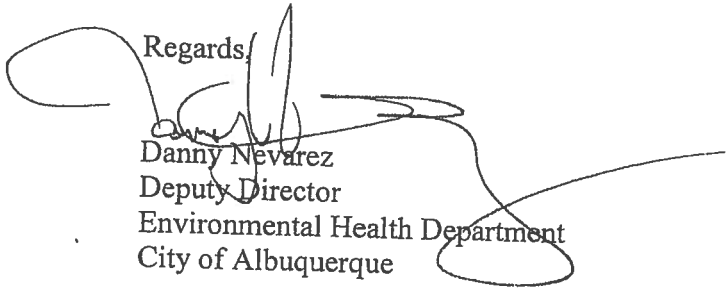
The Department issued Air Quality Permit No. 3136 effective May 29, 2014. If you have any questions concerning this permit issuance, or the permitting process, please contact Regan Eyerman at (505)767-5625 or at [reyerman@cabq.gov](mailto:reyerman@cabq.gov).

**Appeal Process**

Persons who participated in a permitting action and who are adversely affected by the permitting action may file a petition for a hearing on the merits before the Air Board, as provided by NMSA 1978, § 74-2-7(H) and 20.11.81 NMAC *Adjudicatory Procedures-AQCB* available at:

<http://www.nmcpr.state.nm.us/nmac/parts/title20/20.011.0081.htm>. At the time the petition is filed, the board hearing fee of \$125 shall be paid. 20.11.2.22(C) NMAC and 20.11.81.14(B)(1) NMAC.

Regards,



Danny Nevarez  
Deputy Director  
Environmental Health Department  
City of Albuquerque

cc: File

IMF

No. 7



RECEIVED  
ENVIRONMENTAL HEALTH

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

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IN THE MATTER OF THE PETITION  
FOR A HEARING ON THE MERITS  
REGARDING AIR QUALITY PERMIT  
NO. 3136

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

Petitioners

AMENDED PETITION FOR HEARING

The Petitioners in this matter, Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo, pursuant to Section 74-2-7 NMSA 1978 and 20.11.81 NMAC, hereby petition the City of Albuquerque Environmental Health Department (EHD) and the Albuquerque-Bernalillo County Air Quality Control Board for a hearing as authorized by law with reference to Air Quality Permit No. 3136 issued effective June 3, 2014 to Smith's Food & Drug Centers, Inc. (Smith's). The notification letter and the permit are attached as Exhibit 1. The permit authorizes Smith's to have an annual throughput of 7 million gallons per year at a fuel dispensing station Smith's proposes to build at 6310 4<sup>th</sup> St. NW, Albuquerque, New Mexico. In accordance with 20.11.81.14 NMAC, the Petitioners provide the following information:

- I. Petitioners' names and addresses:
  - A. Arthur Gradi  
6338 4<sup>th</sup> Street NW  
Los Ranchos, NM 87107  
505-350-5867

- B. Ruth A. McGonagil  
505 Camino Español NW  
Albuquerque, NM 87107  
505-340-9455
- C. Jerri Paul-Seaborn  
610 Camino Español NW  
Albuquerque, NM 87107  
505-344-8170
- D. Bernice Ledden  
427 Mullen Rd NW,  
Los Ranchos, NM 87107  
505-345-6686
- E. Susan Kelly  
713 Camino Español NW  
Albuquerque, NM 87107  
505-720-6651
- F. Americo Chavez  
721 Camino Español NW  
Albuquerque, NM 87107  
505-345-1565
- G. Pat Toledo  
3404 Calle Del Ranchero NE  
Albuquerque, NM 87106  
505-256-0848

**II. Petitioners' participation in permitting action and how Petitioners were adversely affected by permitting action**

Petitioner Arthur Gradi owns property located at 6338 4<sup>th</sup> St NW, next door to the property on which Smith's proposes to construct the fuel dispensing station.

Petitioner Ruth A. McGonagil owns property located at 505 Camino Español NW, on the opposite side of 4<sup>th</sup> Street, located in close proximity to the property on which Smith's proposes to construct the fuel dispensing station.

Petitioner Jerri Paul-Seaborn owns property located at 610 Camino Español NW, located on the street directly adjacent to the property on which Smith's proposes to construct the fuel dispensing station.

Petitioner Bernice Ledden owns property located at 427 Mullen Rd NW, which is located within several blocks of the property on which Smith's proposes to construct the fuel dispensing station.

Petitioner Susan Kelly owns property located at 713 Camino Español NW, which is located within ½ mile of the site on which Smith's proposes to construct the fuel dispensing station and her property can only be accessed from the intersection of Camino Español and 4<sup>th</sup> Street at the proposed Smiths fuel station site.

Petitioner Americo Chavez owns property located at 721 Camino Español NW, which is located within ½ mile of the site on which Smith's proposes to construct the fuel dispensing station and his property can only be accessed from the intersection of Camino Español and 4<sup>th</sup> Street at the proposed Smiths fuel station site.

Petitioner Pat Toledo is involved in the matter of the Smith's fuel station at Carlisle and Constitution which is on appeal. He is also involved in a court case regarding the site at Tramway and Central, where standing is an issue. As Smith's presented 2400 signatures on a petition submitted in the 4<sup>th</sup> Street application with no indication of the addresses of those signatories, Smith's has indicated it views that the broad public has standing. Pat Toledo has standing in this matter.

Each of the Petitioners participated in either or both of the Public Information Hearings (PIH) held on March 25, 2014 and April 23, 2014. Each of the Petitioners is 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 resulting pollution, and other negative impacts on their persons, property

and quality of life resulting from the construction of the Smith's fuel dispensing station at the proposed location.

**III. Specific permitting action appealed from, permitting action to which Petitioners object and factual and legal basis of Petitioners' objections to the permitting action**

The Petitioners are appealing the issuance of Permit 3136, issued to Smith's with notice provided to Petitioners by letter dated June 3, 2014. (See Exhibit 1, attached). The Petitioners object to the issuance of the permit allowing for a throughput of 7 million gallons at a fuel dispensing station proposed to be constructed at 6310 4<sup>th</sup> St NW, Albuquerque, New Mexico. Permit No. 3136 was issued pursuant to §20.11.41 NMAC, Authority to Construct. The first PIH was held on March 25, 2014. Approximately 75 people attended the meeting in opposition to the issuance of the permit, with approximately 20 people providing public comments opposing the issuance of the permit. No one from the public spoke in favor of the permit. The PIH was continued due to the inability to hear all public comment within the allotted time and a second hearing was held April 23, 2014. At that meeting, approximately 70 people attended the meeting and approximately 20 spoke against the issuance of the permit. Again, no one from the public spoke in favor. In addition, petitions with approximately 60 signatures of nearby residents objecting to the issuance of the permit were submitted to the administrative record.

The purpose of regulatory provisions regarding public notice and hearings is to ensure that persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 21, 138 N.M. 133. The New Mexico Supreme Court has recognized that "the public plays a vital role" in an administrative environmental permitting process and must be allowed a

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

The Air Quality Board has already held, in regard to Smith's Permit No. 2037-M1 for the Smith's fuel dispensing station located at 1313 Carlisle Blvd. NE, Albuquerque, NM, that the Air Quality Act and regulations require permitting decisions to take into account quality-of-life issues. The Air Quality Act mandates that the Board "shall prevent or abate air pollution." NMSA §74-2-5. In addition, Part 41 of the Air Quality Control Board Regulations, which governs authority to construct permits, states that the objective of the part "is to insure that new facilities or modified existing facilities will not emit air pollution, which will cause violations of air pollution control regulations upon operation following construction. This procedure will protect the source owner's investment as well as uphold public concern and desire for input prior to commencement of air pollution sources in Bernalillo County." 20.11.41.6 NMAC. The Air Quality Act and the Board's regulations, as well as the Board's decision in the Carlisle permitting matter, clearly express that

the issuance of permits must be made in the context of impacts to public welfare and the reasonable use of property.

In issuing Permit No. 3136, the City of Albuquerque Air Quality Program (Air Program) refused to take into consideration the concerns raised by the public comments at the PIH. The Air Program stated: "An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety." (Exhibit 1, attached hereto). The Program further stated: "Before the Department made a decision regarding Smith's application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over the particular issue." *Id.*

It should be noted there is nothing in the record to indicate that the Air Program did, in fact, convey concerns to appropriate City Departments. Also, "duly noted" is not equivalent to preparation of a response to the serious concerns of the public. The Air Program dismissal of public concerns by stating the concerns were "duly noted" and "in some cases" conveyed to City Departments, is an insufficient response to a meaningful public input process.

Permit No. 3136 is for a fuel dispensing station that has not been built on property that is currently developed as a car wash. The car wash is no longer operational. The property is within the City of Albuquerque, but is on the boundary with the Village of Los Ranchos. Fourth Street is a busy arterial with volumes approaching 20,000 cars per day. There is a Giant gas station about 300 feet from the proposed site; another gas station on the east side of Fourth

Street at the nearby intersection with Montano; and a Phillips 66 station on the northwest corner of that intersection. The proposed fuel station is allowed to pump 7 million gallons per year. This would be the largest throughput volume in the Albuquerque metropolitan area.

The location borders residential areas and is close to Taft Middle School. The construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution. The property owned by Mr. Gradi is immediately north and east of the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic. The proposed fuel dispensing station would have negative and cumulative impacts on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area. All Petitioners live near the proposed Smith's fueling station and would be directly impacted by the VOC's, fumes and increased traffic and pollutants. There are residents in the vicinity that have breathing difficulties, and some are on oxygen. There are low income residents nearby with small children and elderly populations. These and other concerns (including an unreadable site plan; the safety of fuel tanker deliveries; conflicts with North Fourth Street Rank III Corridor Plan, which plans for North Fourth Street to be a transit/pedestrian oriented corridor; nuisance issues similar to what occurs at other Smith's stations; safety and operational issues concerning how drainage will be handled; the lack of need for an additional gas station in the area; fuel station operational considerations; cell tower proximity; and other concerns) were raised at the PIH.

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

in the Carlisle permitting matter. "Duly noting" the concerns raised by the public is insufficient. Petitioners were informed by the Air Program officials during the PIH that Smith's application 3136 essentially met technical requirements and that only those technical requirements would be considered in making a decision on the application. The Air Program is incorrect in stating that they may only rely on technical requirements. If the concerns of the public are not addressed, including quality of life issues, impacts to the community, and impacts to property, then the requirements for public participation are merely a *pro forma* process that has no meaning and no relation to the actual permit decision. Public participation is rendered meaningless, despite statutory and regulatory provisions for public input and numerous decisions by the New Mexico appellate courts emphasizing the importance of public participation in environmental permitting.

**V. Remedies sought by Petitioners, legal basis therefor, and basis for jurisdiction of Board in this matter**

Pursuant to §74-2-7 NMSA and 20.11.81 NMAC, the Petitioners, persons who participated in the permitting action before the Department, request that the Air Quality Board hold an evidentiary hearing on Permit No. 3136, including but not limited to the failure of the Air Quality Program to properly take into consideration public comments and concerns regarding quality of life and impacts on the community, impacts on air quality, cumulative effects of the permitting action, impacts on private property and other issues raised by the public. As stated above, pursuant to *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 138 N.M. 133, NMSA §74-2-5., 20.11.41.6 NMAC, and the Board's decision in the Smith's Carlisle permitting matter, permitting decisions must take into consideration community concerns and cannot rely solely on technical considerations. The requested remedy is within the Board's jurisdiction to



review decisions made by the Air Quality Program and to prevent and abate air pollution set forth in §74-2-5 and the applicable air quality regulations.

**V. Air Program improperly considered Smith's petition signatures**

In the second hearing, Smith's proposed for inclusion as part of the record a petition in favor of the fueling station. Petitioner's objected because, as admitted by Smith's representatives on the record, the signatories on the petition did not provide any information about the signatory. There was no indication of whether the signatories were neighborhood residents, whether they lived in the North Valley, or whether in fact they even lived in the state of New Mexico. These petition signatures should not have been considered by the Air Program. They were simply the signatures of sporadic customers who would not be impacted by the Air Program decision; they might have been only indicating support for cheap gasoline prices and were unaware of the proposed fuel station location. They should not have been considered by the Air Program.

**VI. Air Program did not attempt to provide adequate notice to the affected public**

Smith's is required to provide public notice of application and notice of public hearing in a newspaper, to persons on a mailing list developed by the AQD and "by other means if necessary to assure adequate notice to the affected public." Clearly, this standard has not been met. The Air Program stated on the record at the first hearing on 3136 that notice was only given to three recognized neighborhood associations in the area based on a google search. Notice should have been given to individuals and neighborhoods directly adjacent to the proposed site. In approving the Permit 3136, the Air Program states that Spanish Walk

Homeowner's Association, even though it is directly adjacent to the site, was not notified because it is not a recognized neighborhood association.

There has been a history of faulty notice regarding fueling stations in the Albuquerque area. This resulted in a new regulation taking effect January 1, 2014. Since then, a large yellow sign is required to be posted at the site of a proposed fuel station. The subject application 3136, managed to be completed in December 2013, just prior to the new requirements taking effect. Given the past record of lack of notice and associated problems, the Air Program and Smiths were obligated to give actual notice to nearby residents.


In the case of an application for a Smith's fueling station at Tramway and Central in Albuquerque, the Air Program is on record as having notified several homeowner's associations (not registered neighborhood associations) of the proposed application. The Spanish Walk Homeowner's Association is adjacent to the site and it would have been easy for the Air Program or Smith's to provide nearby residents with notice. The Air Program chose not to do so.

**VII. Air Program improperly approved a permit for an applicant (Smiths) that is a chronic violator of the conditions of its other permits within the City of Albuquerque**


Smith's routinely pays fines related to exceeding the pumping quantities allowed under its permits. The Air Program should refuse to issue Smiths additional permits until Smith's can demonstrate that it has a good track record of compliance. The enforcement tools and regulatory programs appear insufficient to deter future violations by the applicant. Smith's appears to be treating penalties and other sanctions as merely an on-going business expense and the Air Program should view this as symptomatic of underlying compliance problems and,

potentially, threats to the City's environment that should be addressed and corrected. Since violations of the throughput volumes by Smith's appears to be a routine matter, it raises the question of whether there are other violations of the terms and conditions of Smith's permits that might be occurring that the City is either unaware of, or aware of, that could result in the release of harmful pollutants into the air or create dangerous conditions.

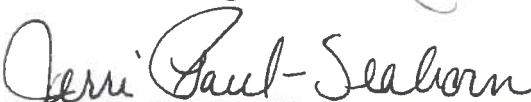
Respectfully Submitted,

  
\_\_\_\_\_


Arthur Gradi

  
\_\_\_\_\_


Ruth A. McGonagil

  
\_\_\_\_\_

Jerri Paul-Seaborn

  
\_\_\_\_\_

Bernice Ledden

  
\_\_\_\_\_

Susan Kelly

  
\_\_\_\_\_

Americo Chavez


  
\_\_\_\_\_

Pat Toledo

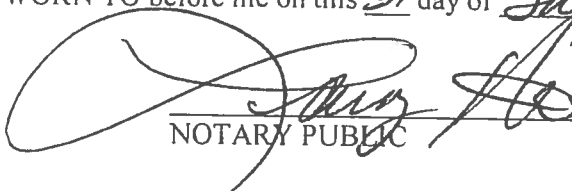
AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)

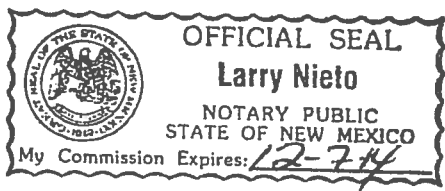
Arthur Gradi, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

  
\_\_\_\_\_  
Arthur Gradi

SUBSCRIBED AND SWORN TO before me on this 31 day of July 2014, by Arthur Gradi.

  
\_\_\_\_\_  
NOTARY PUBLIC

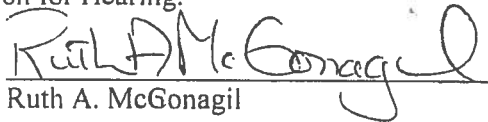
My Commission Expires:  
12-07-14



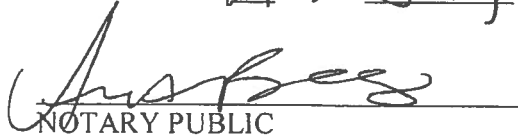
AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)

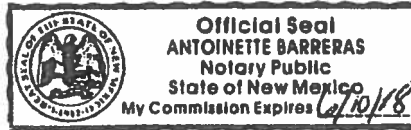
Ruth A. McConagil, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

  
Ruth A. McConagil

SUBSCRIBED AND SWORN TO before me on this 29 day of JULY 2014, by Ruth A. McConagil.

  
NOTARY PUBLIC

My Commission Expires:  
6/10/18



AFFIRMATION

STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF ~~BERNALILLO~~  
Sandoval

Jerri Paul-Seaborn, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

*Jerri Paul-Seaborn*  
\_\_\_\_\_  
Jerri Paul-Seaborn

SUBSCRIBED AND SWORN TO before me on this 30<sup>th</sup> day of July 2014, by Jerri Paul-Seaborn.

*Leticia Cruz*  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
6/17/2013



AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)

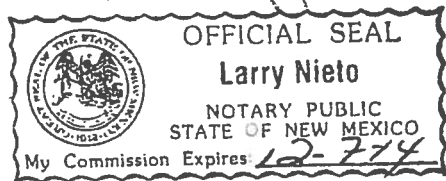
Bernice Ledden, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

*Bernice Ledden*  
\_\_\_\_\_  
Bernice Ledden

SUBSCRIBED AND SWORN TO before me on this 31 day of July, 2014, by Bernice Ledden.

*Larry Nieto*  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
12-7-14



AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)

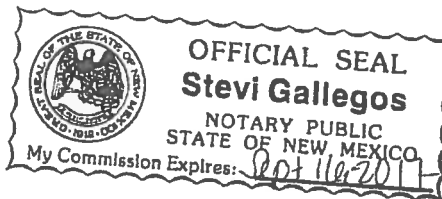
Susan Kelly, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

Susan Kelly  
Susan Kelly

SUBSCRIBED AND SWORN TO before me on this 29 day of July 2014, by Susan Kelly.

Stevi Gallegos  
NOTARY PUBLIC

My Commission Expires:  
September 16, 2017

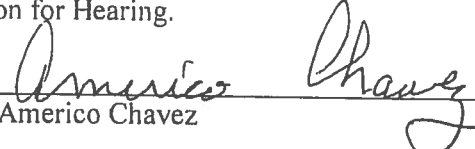





AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)


Americo Chavez, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

  
Americo Chavez

SUBSCRIBED AND SWORN TO before me on this 31 day of July 2014, by Americo Chavez.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
April 9 2018

  
**OFFICIAL SEAL  
DANIEL RAEL**  
NOTARY PUBLIC - State of New Mexico  
My Commission Expires April 9 2018

AFFIRMATION

STATE OF NEW MEXICO )  
  ) ss.  
COUNTY OF BERNALILLO)

Pat Toledo, being of legal age, hereby affirm and attest to the truth of the information contained in the foregoing Petition for Hearing.

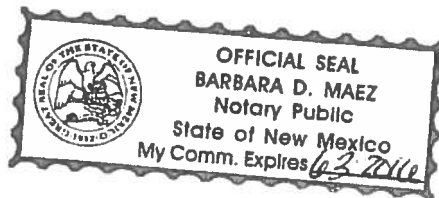
*Pat Toledo*

Pat Toledo

SUBSCRIBED AND SWORN TO before me on this 1 day of August 2014, by Pat Toledo.

*Barbara Maez*  
NOTARY PUBLIC

My Commjssion Expires:  
6-3-2016



# CITY OF ALBUQUERQUE

Environmental Health Department  
Mary Lou Leonard, Director



June 03, 2014

**RE: Air Quality Permit No. 3136 ~ Smith's Food & Drug Centers,  
Inc. (Smith's) – Authority-to-Construct Permit – 6310 4<sup>th</sup> ST  
NW-NE**

Environmental Health Dept.

Air Quality Program

PO Box 1293

Albuquerque, NM 87103

www.cabq.gov

Dear Interested Person:

This letter is to notify you that the Air Quality Program (Air Program) of the City of Albuquerque (City) Environmental Health Department (Department) has issued the above referenced permit. Smith's had submitted an application requesting a permit that would authorize Smith's to have an annual gasoline throughput of 7,000,000 gallons per year for a fuel dispensing (gas) station proposed to be located at 6310 4<sup>th</sup> St. NW (Smith's Gas Station).

**Applicable Laws and Regulations for Air Quality Permits**

When the Department receives an application for an air quality permit, it can only deny the application for the permit if (1) it will not meet the standards, rules or requirements of the Clean Air Act or the Air Quality Control Act (Air Act); (2) it will cause or contribute to an exceedance of an air quality standard; or (3) it will violate any other provision of the Clean Air Act or the Air Act. NMSA 1978, § 74-2-7(C)(1). As such, in reaching a decision on the permit, the Air Program can only address air quality issues and only to the extent authorized by the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety. Issues not related to air quality have been brought to the attention of the appropriate City departments by written, telephonic, or oral communication by interested participants and, in some cases, communication by Air Program staff.

The decision of the Department regarding Smith's application for a permit is based on the requirements of the Clean Air Act, the Air Act, and the applicable air quality ordinances and regulations. The applicable regulations include, in addition to the substantive regulations discussed below, 20.11.41 NMAC (2002) *Authority to Construct*, also known as "Part 41."

**Regulation of Air Quality at Gas Stations**

The primary regulated air pollutants emitted at gas stations are volatile organic compounds (VOCs). There are no ambient air standards for VOCs. VOCs are not controlled in the same manner as pollutants that are subject to the national ambient air

Albuquerque - Making History 1706-2006

**EXHIBIT 1**

quality standards (NAAQS). Therefore, a VOC emission standard cannot be “exceeded” in the same manner as a NAAQS standard. Air dispersion modeling is not required by the United States Environmental Protection Agency (EPA) when an application for a gas station air quality permit or modification is submitted to the Air Program. Unlike NAAQS, there are no ambient VOC emission standards that can be the basis for denying a VOC permit or an application for modification of an existing gas station VOC permit pursuant to Section 74-2-7(C)(1).

Instead, for purposes of air quality, VOC emissions from gas stations are controlled by using federally-required “performance based” standards, which are found at 40 CFR 63 Subpart CCCCCC and locally-required 20.11.65 NMAC and 20.11.64 NMAC. Performance based standards for a gas station like the Smith’s Gas Station proposed at 6310 4<sup>th</sup> St. NW include vapor recovery systems and work practice standards. The VOC tons-per-year numbers in such permits are not emission maximums. Rather, they are used for calculating emission fees pursuant to 20.11.2 NMAC.

### **Public Notice and Public Information Hearing**

Once Smith’s permit application was complete, the Air Program published notice of the application in the Albuquerque Journal and sent copies of the information from the public notice to surrounding neighborhood associations registered with the Office of Neighborhood Coordination and to permitting staff at EPA Region 6 and the New Mexico Environment Department (NMED). Neighborhoods, such as Spanish Walk, that are not represented by a neighborhood association are not registered with the Office of Neighborhood Coordination and so their contact information is not provided to the Air Program. The Air Program received requests for a Public Information Hearing (PIH) and the Director granted permission for the PIH. Notice of the March 25, 2014 PIH was published in the Albuquerque Journal and sent to those who requested the PIH. The Air Program placed the following documents on the Department’s Air Program website for public access: the Smith’s air quality permit application, the draft Smith’s Gas Station air quality Permit No. 3136; the PIH flyer; and a summary of federal regulations controlling air emissions from gas stations.

The Air Program held the PIH on March 25, 2014 to solicit relevant testimony and documents and to provide an opportunity for interested participants to ask questions. City staff and supervisory/management personnel, including the Air Program permit writer assigned to primary review of the Smith’s permit application, attended the PIH. After the allotted two and one-half hours for the hearing, there were still persons with questions and comments, so the PIH was continued. The Air Program published notice of the April 23, 2014 PIH Continuation in the Albuquerque Journal and sent approximately 90 letters and 32 emails providing notice of the PIH Continuation.

As explained by the Hearing Officer at both of the PIHs, the PIHs are not adjudicatory hearings and the Hearing Officer does not make a decision or recommendation relating to the application. Before the Department made a decision regarding Smith’s application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The

Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over the particular issue.

In particular, during the PIH, Smith's submitted a petition signed by approximately 2400 people in favor of the Smith's application. An air quality permit application decision is not based on whether a particular application is or is not supported by the public. Instead, the Air Program is statutorily authorized to deny an application only if the proposed construction will (1) not meet applicable regulations; (2) will cause or contribute to violations of ambient air standards (e.g., violations of NAAQS); or (3) will violate any other provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C). While petitions pro or con may serve other functions, they cannot be the basis for a decision on an air quality permit application.

### **Application Review Process**

As a part of the application review process, the Air Program established an "administrative record" regarding the permit application. The administrative record includes the application, evidence submitted by the applicant, all written comments and evidence received by the Air Program, and all written and oral questions, testimony and exhibits submitted at the PIH (the PIH record). Before the Department made a decision, Air Program staff reviewed the administrative record.

As stated by the Hearing Officer at both of the PIHs, and as authorized by Subsection C of 20.11.41.15 NMAC (2002), the Department can make three different decisions regarding an application for an air quality permit or modification.

1. The permit may be issued as requested in the application;
2. The permit may be issued with additional authorized air quality conditions not requested in the application; or
3. The permit may be denied as authorized by the Air Act or the applicable air quality ordinances or regulations

The Air Program determined the permit application met all requirements of the Clean Air Act, the Air Act, and the applicable air quality ordinances and regulations. In addition, the Air Program determined that, if the Smith's Gas Station is operated as required by Permit No. 3136, it will satisfy all applicable air quality laws and regulations.

### **Decision**

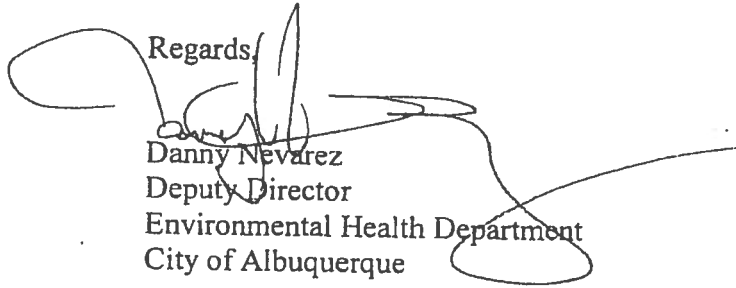
The Department issued Air Quality Permit No. 3136 effective May 29, 2014. If you have any questions concerning this permit issuance, or the permitting process, please contact Regan Eyerman at (505)767-5625 or at [reyerman@cabq.gov](mailto:reyerman@cabq.gov).

**Appeal Process**

Persons who participated in a permitting action and who are adversely affected by the permitting action may file a petition for a hearing on the merits before the Air Board, as provided by NMSA 1978, § 74-2-7(H) and 20.11.81 NMAC *Adjudicatory Procedures-AQCB* available at:

<http://www.nmcpr.state.nm.us/nmac/parts/title20/20.011.0081.htm>. At the time the petition is filed, the board hearing fee of \$125 shall be paid. 20.11.2.22(C) NMAC and 20.11.81.14(B)(1) NMAC.

Regards,



Danny Nevarez  
Deputy Director  
Environmental Health Department  
City of Albuquerque

cc: File



**AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3136**  
**FACILITY CDS # NM/001/02261**  
**Facility ID: FA0003035 Record ID: PR0006343**



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Smith's Food & Drug Centers, Inc.  
 Company Name

Certified Mail # 7010 3090 0001 4486 6982  
 Return Receipt Requested

1550 South Redwood Road  
 Mailing Address

Salt Lake City  
 City

UT  
 State

84104  
 Zip

Responsible Official: Roger Gough, Construction Manager  
 Authorized Representative

Pursuant to the New Mexico Air Quality Control Act, Chapter 74, Article 2 New Mexico Statutes Annotated 1978 (as amended); the Joint Air Quality Control Board Ordinance, 9-5-1 to 9-5-99 ROA 1994; the Bernalillo County Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5; the Albuquerque-Bernalillo County Air Quality Control Board (AQCB) regulation, Title 20, New Mexico Administrative Code (20 NMAC), Chapter 11, Part 40 (20.11.40 NMAC), Source Registration; and AQCB regulation, Title 20, NMAC, Chapter 11, Part 41 (20.11.41 NMAC), Authority to Construct.

Smith's Food & Drug Centers, Inc. ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3135 has been issued based on the review of the application information received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on November 5, 2013, which was deemed complete on December 3, 2013, and on the National Ambient Air Quality Standards, New Mexico Ambient Air Quality Standards, and Air Quality Control Regulations for Albuquerque/Bernalillo County, as amended. As these standards and regulations are updated or amended, the applicable changes will be incorporated into this Air Quality Permit Number 3136 and will apply to the facility. This facility is authorized to construct and operate the following type of process at:

Facility Name & Address	UTM Coordinates	Process Description	SIC	NAICS
Smith's Food & Drug Centers, Inc. 6310 4 <sup>th</sup> St. NW Albuquerque, NM 87107	350700 Easting 3890810 Northing	Gasoline Dispensing Facility (GDF) <sup>1</sup>	5541	447190

<sup>1</sup>Gasoline dispensing facility (GDF) means any stationary facility which dispenses gasoline into the fuel tank of a motor vehicle, motor vehicle engine, nonroad vehicle, or nonroad engine, including a nonroad vehicle or nonroad engine used solely for competition. These facilities include, but are not limited to, facilities that dispense gasoline into on- and off-road, street, or highway motor vehicles, lawn equipment, boats, test engines, landscaping equipment, generators, pumps, and other gasoline-fueled engines and equipment.

Issued on the 29<sup>th</sup> day of May, 2014

Israel L. Tovar  
 Print Name

Israel L. Tovar  
 Sign Name

Air Quality Protection Programs - Permitting Section  
 Air Quality Program  
 City of Albuquerque Environmental Health Department

**I. AUTHORITY TO CONSTRUCT PERMIT THRESHOLD (74-2-7.A.(1) NMSA).** By regulation, the local board shall require a person intending to construct or modify any source, except as specifically provided by regulation, to obtain a construction permit from the local agency prior to such construction or modification. This permit recognizes the construction and operation of the following equipment:

Unit Number	Unit Description	Storage Capacity in gallons	Installation Date	Product Stored	Minimum Required Emissions Control <sup>1</sup>
1	Underground Storage Tank	20,000	2014	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling
2	Underground Storage Tank	8,000	2014	Premium Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

<sup>1</sup>**GASOLINE HANDLING AND HOLDING AT RETAIL OR FLEET SERVICE STATIONS:** No person shall allow loading of gasoline into an underground storage tank with greater than 3,000 gallons capacity, unless it is equipped with an approved vapor loss control system, including a submerged fill pipe, in which the displaced vapors are either continuously contained or processed such that the emission of gasoline vapors to the atmosphere do not exceed 1.15 pounds of gasoline per 1,000 gallons loaded into said tank. Liquid gasoline dispensing from the underground storage tank as well as momentary opening of the system for gasoline gauging purposes shall not be considered as vapor loss in the requirement of this Section. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.15 NMAC, Volatile Organic Compounds.]

**2. COMPLIANCE ASSURANCE.**

- A. All air pollution emitting facilities within Bernalillo County are subject to all applicable Albuquerque/Bernalillo County Air Quality Control Regulations, whether listed in this permit or not.
- B. The issuance of an Authority to Construct permit does not relieve the Company from the responsibility of complying with the provisions of the state air quality control act, federal clean air act, or any applicable regulations of the board. (20.11.41.17 NMAC)
- C. Any term or condition imposed by the department in an Authority to Construct permit shall apply to the same extent as a regulation of the board. (20.11.41.18.C NMAC)
- D. Whenever two or more parts of the Air Quality Control Act, or the laws and regulations in force pursuant to the Act, limit, control or regulate the emissions of a particular air contaminant, the more restrictive or stringent shall govern.
- E. The department is authorized to issue a compliance order requiring compliance and assessing a civil penalty not to exceed Fifteen Thousand and no/100 Dollars (\$15,000) per day of noncompliance for each violation, commence a civil action in district court for appropriate relief, including a temporary and permanent injunction. (74-2-12 NMSA).

**3. SUBSTITUTION.** Substitution of equipment is authorized provided the equipment has the same or lower process capacity as the piece of equipment being substituted. The department shall be notified in writing within 15 days of equipment substitution. Equipment that is substituted shall comply with the requirements in the Section 4 Gasoline Unit Emission Limits table.

**4. GASOLINE UNIT EMISSION LIMITS. Allowable monthly and annual gasoline throughput. Allowable ton per year (tpy) emissions.**

Unit	Unit Description	Allowable Average Monthly Throughput of Gasoline (in gallons) <sup>1</sup>	Allowable Annual Throughput of Gasoline (in gallons) <sup>2</sup>	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) <sup>3</sup> (in tons per year)
1	Underground Storage Tank	≥100,000	For Stage I Vapor Recovery 7,000,000	45.5 tons per year
2	Underground Storage Tank			

<sup>1</sup> Monthly throughput means the total volume of gasoline that is loaded into, or dispensed from, all gasoline storage tanks at each Gasoline Dispensing Facility (GDF) during a month. Monthly throughput is calculated by summing the volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the current day, plus the total volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the previous 364 days, and then dividing that sum by 12.

<sup>2</sup> Based on the annual gasoline throughput requested in the permit application. There is no restriction on individual tank throughput.

**5. EMISSIONS INVENTORY REQUIREMENTS (20.11.47 NMAC).** Subsection 20.11.47.14.A.(1) – Applicability - requires an emissions inventory of any stationary source in Bernalillo county that has an active permit issued pursuant to 20.11.41 NMAC Authority to Construct. Subsection 20.11.47.14.B.(1) – Reporting Requirements – requires the submittal of an emissions inventory report annually. Therefore, an annual emissions inventory (in pounds per calendar year) shall be submitted to the department by March 15 each year by: multiplying the actual, annual gallons of gasoline throughput for the previous calendar year (January 1<sup>st</sup> through December 31<sup>st</sup>) for Units 1 and 2 in the Section 4 Gasoline Unit Emission Limits table above, by 0.013 pounds/gallon if Stage I Vapor Recovery or 0.0031 pounds/gallon if Stage II Vapor Recovery. An electronic emission inventory form is available at [cabq.gov/airquality](http://cabq.gov/airquality), under Business Resources - Business Applications, Permits and Forms.

**6. MODIFICATION.** Any future physical changes or changes in the method of operation which result in an increase in the pre-controlled emission rate may constitute a modification. Change in the method of control of emissions or in the character of emissions shall not be made unless submitted to the department as a modification to this permit. 20.11.41.7.H NMAC defines proposed changes to a facility that may constitute a permit modification. Compliance will be based on department inspections and the submittal of a new permit application for any modification. No modification shall begin prior to issuance of a permit and shall be processed in accordance with 20.11.41 NMAC.

**7. MONITORING and RECORDKEEPING (20.11.41.18.B.(8)NMAC).** Monitor and maintain a log of the total monthly gasoline throughput for the facility. These records must be retained for the most recent five-year period for the facility.

**8. REPORTING.**

A. The following reporting requirements, in accordance with 20.11.41.18, 20.11.41.20, 20.11.47 and 20.11.49 NMAC, to allow the department to determine compliance with the terms and conditions of the permit. Compliance will also be based on timely submittal of the reports. The permittee shall notify the department in writing of:

1. Any change in control or ownership, within 15 days of the change in control or ownership. In the event of any such change in control or ownership, the permittee shall notify the succeeding owner of the permit. The permit conditions apply in the event of any change in control or ownership of the facility. At minimum, an administrative permit modification is required to address any change in control or ownership of the facility:

2. Any substitution of equipment, within 15 days of equipment substitutions. Equipment may only be substituted if it has the same or lower process capacity as the piece of equipment being substituted, and there are no other federal, state, or local air quality permit requirements triggered by the introduction of the substituted piece of equipment. Substituted equipment shall comply with the Section 4 Gasoline Unit Emission Limits table:

3. The annual (January 1 through December 31 of previous year) throughput of gasoline and emission inventory, by March 15 of every year; and

4. Any breakdown of equipment or air pollution control devices or apparatus so as to cause emissions of air contaminants in excess of limits set by permit conditions. Any breakdown or abnormal operating conditions shall be reported to the department by submitting the following reports on forms provided by the department:

a) Initial Report: The permittee shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission pursuant to 20.11.49.15.A.(1) NMAC;

b) Final Report: The permittee shall file a final report, no later than 10 days after the end of the excess emission. If the period of an excess emission extends beyond 10 days, the permittee shall submit the final report to the department within 72 hours of the date and time the excess emission ceased. This condition is pursuant to 20.11.49.15.A.(2) NMAC and 20.11.49.15.C NMAC; and



c) Alternative Reporting: If the facility is subject to the federal reporting requirements of 40 CFR Parts. 60, 61, or 63 and the federal requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice. This condition is pursuant to 20.11.49.15 D NMAC.

B. The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions. This condition is pursuant to 20.11.49.14 NMAC.

9. **INSPECTION (74-2-13 NMSA).**

A. The department may conduct scheduled and unscheduled inspections, and, upon presentation of credentials:

1. Shall have a right of entry to, upon, or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the board or by any permit condition are located; and

2. May, at reasonable times:

n) Have access to and copy any records required to be established and maintained by regulations of the board or any permit condition;

b) Inspect any monitoring equipment and method required by regulations of the board or by any permit condition; and

c) Sample any emissions that are required to be sampled pursuant to regulation of the board or any permit condition.

B. Any credible evidence may be used to establish whether the facility has violated or is in violation of any regulation of the board, or any other provision of law. Credible evidence and testing shall include, but is not limited to 20.11.41.26.A and B NMAC as follows:

1. A monitoring method approved for the source pursuant to 20.11.42 NMAC. Operating Permits, and incorporated into an operating permit;

2. Compliance methods specified in the regulations, conditions in a permit issued to the facility, or other provision of law;

3. Federally enforceable monitoring or testing methods, including methods in 40 CFR parts 51, 60, 61, 63 and 75; and

4. Other testing, monitoring or information-gathering methods that produce information comparable to that produced by any CFR method and approved by the department and the USEPA.

C. Compliance will be based on department inspections of the facility, reviews of production records, submission of appropriate permit applications for modification, and timely notification to the department regarding equipment substitutions and relocations.

10. **FEDERAL RULEMAKING.**

In addition to Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65 NMAC, *Volatile Organic Compounds*; 40 CFR Part 63, Subpart CCCCCC – *National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities* apply to this facility. Based on the requested annual throughput for gasoline, this facility's monthly throughput would amount to 100,000 gallons or more of gasoline. Therefore, the permittee shall ensure the applicable requirements of 40 CFR Part 63, Subpart CCCCCC, §63.11116, §63.11117, and §63.11118 are met as well as the Subpart A – *General Provisions* of 40 CFR Part 63.

A. **GENERAL APPLICABLE REQUIREMENTS (§63.11116).**

1. You must not allow gasoline to be handled in a manner that would result in vapor releases to the atmosphere for extended periods of time.

2. §63.11116(a) requires that measures to be taken include, but are not limited to, the following:

(a)(1) Minimize gasoline spills;

(a)(2) Clean up spills as expeditiously as practicable;

(a)(3) Cover all open gasoline containers and all gasoline storage tank fill-pipes with a gasketed seal when not in use; [ §63.11116(d) Portable gasoline containers that meet the requirements of 40 CFR Part 59, Subpart F, are considered acceptable for compliance with this requirement]; and

(a)(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling devices, such as oil/water separators.

3. §63.11116(b) requires that records be made available within 24 hours of request by the department to document your gasoline throughput.

B. **SUBMERGED FILLING OF GASOLINE STORAGE TANKS (§63.11117).**

1. §63.11117(b) requires that except as specified in §63.11117(c), you must only load gasoline into storage tanks at your facility by utilizing submerged filling, as defined in §63.11132, and as specified in paragraph (b)(2) of this section:

(b)(2) Submerged fill pipes installed after November 9, 2006, must be no more than 6 inches from the bottom of the storage tank.

4. §63.11117(c) Gasoline storage tanks with a capacity of < 250 gallons are not required to comply with the submerged fill requirements in paragraph (b) of this section.

C. **CONTROL REQUIREMENTS.**

1. §63.11118(b) requires that you must the requirements in paragraph (b)(1) of this section:

(b)(1) Each management practice in Table 1 of 40 CFR Part 63, Subpart CCCCCC that applies to your GDF by installing and operating a vapor balance system on your gasoline storage tanks that meets the following design criteria:

a) All vapor connections and lines on the storage tank shall be equipped with closures that seal upon disconnect;

b) The vapor line from the gasoline storage tank to the gasoline cargo tank shall be vapor-tight, as defined in § 63.11132;

c) The vapor balance system shall be designed such that the pressure in the tank truck does not exceed 18 inches water pressure or 5.9 inches water vacuum during product transfer;

d) The vapor recovery and product adaptors, and the method of connection with the delivery elbow, shall be designed so as to prevent the over-tightening or loosening of fittings during normal delivery operations;

e) If a gauge well separate from the fill tube is used, it shall be provided with a submerged drop tube that extends the same distance from the bottom of the storage tank as specified in § 63.11117(b);

f) Liquid fill connections for all systems shall be equipped with vapor-tight caps;

g) Pressure/vacuum (PV) vent valves shall be installed on the storage tank vent pipes. The pressure specifications for PV vent valves shall be: a positive pressure setting of 2.5 to 6.0 inches of water and a negative pressure setting of 6.0 to 10.0 inches of water. The total leak rate of all PV vent valves at an affected facility, including connections, shall not exceed 0.17 cubic foot per hour at a pressure of 2.0 inches of water and 0.63 cubic foot per hour at a vacuum of 4 inches of water;

h) The vapor balance system shall be capable of meeting the static pressure performance requirement of the following equation:

$$Pf = 2e^{-500.887/v}$$

Where:

- Pf = Minimum allowable final pressure, inches of water.
- v = Total ullage affected by the test, gallons
- e = Dimensionless constant equal to approximately 2.718.
- 2 = The initial pressure, inches water; and

i) If you own or operate a new or reconstructed GDF, or any storage tank(s) constructed after November 9, 2006, at an existing affected facility subject to § 63.11118, then you must equip your gasoline storage tanks with a dual-point vapor balance system as defined in § 63.11132, and comply with the requirements of item 1 in Table 1.

2. The management practices specified in Table 1 of 40 CFR Part 63, Subpart CCCCCC are not applicable if you are complying with the requirements in § 63.11118(b)(2), except that if you are complying with the requirements in § 63.11118(b)(2)(i)(B), you must operate using management practices at least as stringent as those listed in Table 1 of 40 CFR Part 63, Subpart CCCCCC.

**D. PERFORMANCE TEST REQUIREMENTS.**

Source Type	Initial Test Date	Additional Testing	Citation
New or Reconstructed Source (commenced construction after 11/9/06) with a monthly throughput <sup>1</sup> of $\geq$ 100,000 gal/month	Upon startup after 09/23/08	Every three years §63.11120(a)	63.11113(d)(2)

Monthly throughput means the total volume of gasoline that is loaded into, or dispensed from, all gasoline storage tanks at each Gasoline Dispensing Facility (GDF) during a month. Monthly throughput is calculated by summing the volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the current day, plus the total volume of gasoline loaded into, or dispensed from, all gasoline storage tanks at each GDF during the previous 364 days, and then dividing that sum by 12.

1. §63.11118(e) - You must comply with the applicable testing requirements contained in §63.11120.
2. §63.11120(a) - Each owner or operator, at the time of installation, as specified in §63.11113(e), of a vapor balance system required under §63.11118(b)(1), and every 3 years thereafter, must comply with the requirements in paragraphs (a)(1) and (2) as follows:
  - (a)(1) - You must demonstrate compliance with the leak rate and cracking pressure requirements, specified in item 1(g) of Table 1 of 40 CFR Part 63, Subpart CCCCCC, for pressure-vacuum vent valves installed on your gasoline storage tanks using the test methods identified in paragraph (a)(1)(i) or paragraph (a)(1)(ii) as follows:
    - (a)(1)(i) - California Air Resources Board Vapor Recovery Test Procedure TP-201.1E.—Leak Rate and Cracking Pressure of Pressure/Vacuum Vent Valves, adopted October 8, 2003 (incorporated by reference, see §63.14);
    - (a)(1)(ii) - Use alternative test methods and procedures in accordance with the alternative test method requirements in §63.7(f); and

(a)(2) - You must demonstrate compliance with the static pressure performance requirement, specified in item 1(h) of Table 1 of 40 CFR Part 63, Subpart CCCCCC, for your vapor balance system by conducting a static pressure test on your gasoline storage tanks using the test methods identified in paragraph (a)(2)(i) or paragraph (a)(2)(ii) as follows:

(a)(2)(i) - California Air Resources Board Vapor Recovery Test Procedure TP-201.3.—Determination of 2-Inch WC Static Pressure Performance of Vapor Recovery Systems of Dispensing Facilities, adopted April 12, 1996, and amended March 17, 1999 (incorporated by reference, see §63.14); and

(a)(2)(ii) - Use alternative test methods and procedures in accordance with the alternative test method requirements in §63.7(f).

§63.11120(b) - Each owner or operator choosing, under the provisions of §63.6(g), to use a vapor balance system other than that described in Table 1 of 40 CFR Part 63, Subpart CCCCCC must demonstrate to the Administrator or delegated authority under paragraph §63.11131(a) of this subpart, the equivalency of their vapor balance system to that described in Table 1 of 40 CFR Part 63, Subpart CCCCCC using the procedures specified in paragraphs (b)(1) through (3) as follows:

(b)(1) - You must demonstrate initial compliance by conducting an initial performance test on the vapor balance system to demonstrate that the vapor balance system achieves 95 percent reduction using the California Air Resources Board Vapor Recovery Test Procedure TP-201.1.—Volumetric Efficiency for Phase I Vapor Recovery Systems, adopted April 12, 1996, and amended February 1, 2001, and October 8, 2003, (incorporated by reference, see §63.14);

(b)(2) - You must, during the initial performance test required under paragraph (b)(1) of this section, determine and document alternative acceptable values for the leak rate and cracking pressure requirements specified in item 1(g) of Table 1 of 40 CFR Part 63, Subpart CCCCCC and for the static pressure performance requirement in item 1(h) of Table 1 of 40 CFR Part 63, Subpart CCCCCC; and

(b)(3) - You must comply with the testing requirements specified in paragraph §63.11120 (a).

§63.11120(c) - Conduct of Performance Tests. Performance tests conducted for this subpart shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance (i.e., performance based on normal operating conditions) of the affected source. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

§63.11126 - Each owner or operator subject to the management practices in §63.11118 shall report to the Administrator the results of all volumetric efficiency tests required under §63.11120(b). Reports submitted under this paragraph must be submitted within 180 days of the completion of the performance testing.

**E. NOTIFICATIONS.**

1. §63.11118(f) requires that you must submit the applicable notifications as required under §63.11124.
2. §63.11124(b) requires that each owner or operator subject to the control requirements in §63.11118 must comply with paragraphs (b)(1) through (5) of §63.11124 as follows:

(b)(1) You must submit an Initial Notification that you are subject to this subpart upon startup. The notification must be submitted to the applicable EPA Regional Office and the delegated State authority as specified in §63.13. The Initial Notification must contain the information specified in paragraphs (b)(1)(i) through (iii) of this section as follows:

(b)(1)(i) the name and address of the owner and the operator;

(b)(1)(ii) the address (i.e., physical location) of the GDF; and

(b)(1)(iii) a statement that the notification is being submitted in response to this subpart and identifying the requirements in paragraphs (a) through (c) of §63.11118 that apply to you;

(b)(2) You must submit a Notification of Compliance Status to the applicable EPA Regional Office and the delegated State authority, as specified in §63.13, in accordance with the schedule specified in §63.9(h). The Notification of Compliance Status must be signed by a responsible official who must certify its accuracy and must indicate whether the source has complied with the requirements of this subpart. If your facility is in compliance with the requirements of this subpart at the time the Initial Notification required under paragraph (b)(1) of this section is due, the Notification of Compliance Status may be submitted in lieu of the Initial Notification provided it contains the information required under paragraph (b)(1) of this section;

(b)(4) You must submit a Notification of Performance Test, as specified in §63.9(e) [60 calendar days before the performance test is scheduled to allow the Administrator to review and approve the site-specific test plan required under §63.7(c), if requested by the Administrator, and to have an observer present during the test], prior to initiating testing required by §63.11120(a) and (b); and

(b)(5) You must submit additional notifications specified in §63.9, as applicable.

3. Sources in Bernalillo county that are in compliance with a 20.11.41 NMAC, Authority to Construct should be meeting the 20.11.65 NMAC, Volatile Organic Compounds requirements for submerged fill pipe and vapor loss control system for loading of fuel storage tanks and vapor recovery, and therefore should not have to submit an Initial Notification or a Notification of Compliance Status. **Since all gasoline dispensing facilities permit through 20.11.41 NMAC, Initial Notifications and Notifications of Compliance Status are met through the permitting process and through the inspection program.**

**F. RECORDKEEPING.**

1. §63.11118(g) - You must keep records and submit reports as specified in §§ 63.11125 and 63.11126.

2. §63.11125(a) - Each owner or operator subject to the management practices in §63.11118 must keep records of all tests performed under §63.11120(a) and (b).

3. §63.11125(b) - Records required under paragraph (a) of this section shall be kept for a period of 5 years and shall be made available for inspection by the Administrator's delegated representatives during the course of a site visit.

11. **FEES (20.11.2 NMAC).** Every owner or operator of a source that is required to obtain an Authority to Construct permit shall pay an annual emission fee pursuant to 20.11.2 NMAC. The annual emission fee for maintenance of this permit will be based on the greater of a base annual fee or a per ton fee rate based on the per ton allowable annual emissions of volatile organic compounds (VOC's) given in the Section 4 – Gasoline Unit Emission Limits table.

12. **PERMIT CANCELLATION.** The department may cancel any permit if the construction or modification is not commenced within one (1) year from the date of issuance or if, during the construction or modification, work is suspended for a total of one (1) year. (20.11.41.19.A and B NMAC)

13. **INFORMATION SUBMITTALS [Air Quality Program contact numbers: (505) 768-1972 (voice); 1-800-659-8331 (NM Relay)].**

- Completed forms can be hand delivered to 1 Civic Plaza – Room 3047 (8:00am – 4:30pm Mon. – Fri. except city holidays) or can be mailed to:

Albuquerque Environmental Health Department  
Air Quality Program  
Permitting Section  
P.O. Box 1293  
Albuquerque, New Mexico 87103

- Test protocols and compliance test reports shall be submitted to:

Albuquerque Environmental Health Department  
Air Quality Program  
Attention Enforcement Supervisor  
P.O. Box 1293  
Albuquerque, New Mexico 87103

- All reports shall be submitted to:

Albuquerque Environmental Health Department  
Air Quality Program  
Attention Compliance Officer  
P.O. Box 1293  
Albuquerque, New Mexico 87103

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, Susan Kelly,  
Americo Chavez, Pat Toledo, as individuals,

Petitioners

CERTIFICATE OF SERVICE

The Petitioners in this matter, Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo, hereby certify that a true and correct copy of the Petition for Hearing in the above-captioned matter was served on the following by the method indicated:

1. Mary Lou Leonard, Director  
City of Albuquerque EHD  
Air Quality Program  
PO Box 1293  
Albuquerque, NM 87103  
Hand-delivered on AUG 4, 2014
2. Felicia Orth, Esq.  
ABC-AQCB Attorney  
One Civic Plaza  
3<sup>rd</sup> Floor, Room 3023  
Albuquerque, NM 87103  
Hand-delivered on AUG 4, 2014
3. Frank C. Salazar, Esq.  
Timothy J. Adler, Esq.  
Sutin, Thayer & Browne, P.C.  
PO Box 1945  
Albuquerque, NM 87103-1945  
By mail on AUG 4, 2014

4. Carol Parker, Esq.  
Asst. City Attorney  
One Civic Plaza  
PO Box 1293  
Albuquerque, NM 87103  
Hand-delivered on *Aug 4<sup>th</sup>* 2014.

By:

*Arthur A. Gradi*

Arthur Gradi

*Ruth A. McGonagil*

Ruth A. McGonagil

*Terri Paul-Seaborn*

Terri Paul-Seaborn

*Bernice Ledden*

Bernice Ledden

*Susan Kelly*

Susan Kelly

*Americo Chavez*

Americo Chavez

*Pat Toledo*

Pat Toledo

**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.**

**No. AQCB 2014-3**

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

**CITY OF ALBUQUERQUE'S DISCOVERY REQUESTS TO PETITIONERS--  
INTERROGATORIES,  
REQUESTS FOR ADMISSIONS  
AND REQUEST FOR PRODUCTION**

**TO: ARTHUR GRADI, RUTH A. MCGONAGIL, JERRI PAUL-SEABORN,  
BERNICE LEDDEN, SUSAN KELLY, AMERICO CHAVEZ AND ~~PAT TOLEDO~~**

Pursuant to 20.11.81.12(A) NMAC; Rule 1-033 NMRA, Rule 1-034 NMRA and Rule 1-036 NMRA; and Paragraph 9 of the August 8, 2014 Prehearing Order issued by Hearing Officer Felicia Orth in this matter, the City of Albuquerque Environmental Health Department ("City") asks Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and ~~Pat Toledo~~ (collectively referred to as "Petitioners") to answer the following Interrogatories and Requests for Admissions, and respond to the following Request for Production (collectively referred to as the "City's Discovery.") Your answers to Interrogatories are to be verified under oath (individual verifications are provided). Your answers and responses to the City's Discovery are due back to the City, in writing, by September 19, 2014. Pursuant to Rule 1-026(E) NMRA, you have a duty to supplement and correct your answers to the Interrogatories and Requests for Admissions, and responses to the Request for Production.

Unless otherwise specified below, the City's Discovery is directed at each of the seven Petitioners and seeks responses from each Petitioner. Individual verifications are provided at the



end of the City's Discovery. Each Petitioner should answer based on his or her own personal knowledge. If a Petitioner does not know, the Petitioner may indicate that fact.

The term "Permit No. 3136" means the permit issued by the City to Smith's Food & Drug Centers, Inc. on May 29, 2014 which was attached to your Amended Petition filed August 4, 2014.

The term "Smith's" means Smith's Food & Drug Centers, Inc., the permittee for Permit No. 3136.

The term "Air Board" means the Albuquerque-Bernalillo County Joint Air Quality Control Board.

The term "Air Act" means the Air Quality Control Act, NMSA 1978, § 74-2-1 to -22.

## INTERROGATORIES

### INTERROGATORY NO. 1:

Petitioners, please state the names, addresses and telephone numbers of the person or persons who answered any interrogatory on your behalf; refer by number to the individual interrogatory each person answered and state why that person, instead of the Petitioner or Petitioners to whom the interrogatory was directed, answered that specific interrogatory.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**Not applicable to this group. All responses were prepared by the group of six except where preferences or emphasis was preferred by an individual; these are clearly identified by name.**



**INTERROGATORY NO. 2:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 that you would be adversely affected by the issuance of Permit No. 3136, please state each material fact that supports this allegation.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**A fuel dispensing business of this nature would impact the rural nature of this community by increasing odors, toxic fumes, increasing traffic that is not currently in this area; increase noise levels as well as introduce more danger to local citizens that enjoy bicycling and walking in this area. There are children and families that walk and bike in this area – some en route to school or work or errands in general.**

**This type of business does not conform to the spirit or intent of the North Fourth Corridor Plan or the North Valley in general.**

***Arthur Gradi: I am also concerned with the light pollution a 24 hour operation will produce as my property is much closer than other petitioners.***

***Americo Chavez: In reference to the Scientific American Profession Journal Article “IS IT SAFE TO LIVE NEAR A GAS STATION?” (see exhibit 1) I believe many of the conditions stated in the referenced article certainly apply to my current living situation. For example, despite all the modern health and safety guidelines, fueling dispensing facilities can still pose significant hazards to neighbors – especially children. I have children and grandchildren in and out of my home. Two of my grandchildren have been diagnosed as asthmatic; a third one is in remission. My wife***

*recently passed away from lung and kidney cancer. Their medical diagnosis puts them at particular susceptibility to the hazards of poor air quality.*

*In addition, in a written testimony presented the Maryland Senate on February 27, 2014 by Dr. Maria Jison, a Board Certified Pulmonologist and an expert on air quality and its effects on health, stated the ill effects of mega fueling stations and those with chronic conditions such as cardiovascular and respiratory disease. I have personal friends and relatives living in close proximity to the proposed of Smith's fueling dispensary at 4<sup>th</sup> Street. The station will certainly pose a health and safety threat to all of us. (see exhibit 2)*

**INTERROGATORY NO. 3:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 that your quality of life would be adversely affected by the issuance of Permit No. 3136, please state each material fact that supports this allegation.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**Similar to #2 above:**

**A fuel dispensing business of this nature would impact the rural nature of this community by increasing odors, toxic fumes, increasing traffic that is not currently in this area; increase noise levels as well as introduce more danger to local citizens that enjoy bicycling and walking in this area. There are children and families that walk and bike in this area – some en-route to school or work or errands in general.**

**In addition the ingress and egress to Camino Espanol NW to/from Fourth Street will be directly impacted by additional traffic volumes localized at this particular location; limiting the ability for residents on this street to access Camino Espanol and/or Fourth Street considering the traffic flow from Solar Drive North to Osuna Rd especially during peak hours around 7:30 a.m. – 9:00 a.m. and 3:00 p.m. – 6:00 p.m.**

***Arthur Gradi: I am also concerned with the light pollution a 24 hour operation will produce as his proximity is much closer than other petitioners.***

***Americo Chavez: Refer to interrogatory No. 2.***

**INTERROGATORY NO. 4:**

Petitioners, with respect to the allegation in your Amended Petition that the issuance of Permit No. 3136 would cause increased traffic, please state each material fact that supports this allegation, including each material fact supporting your apparent belief that the vehicles visiting the fuel dispensing station that Smith's proposes to build at 6310-4<sup>th</sup> St. NW would come from additional traffic on 4<sup>th</sup> Street rather than the existing traffic that already travels on 4<sup>th</sup> Street NW.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**It seems that Smith's incentive in having a fuel dispensing business this close to their store located on Fourth and Guadalupe is to increase sales and their customer base by promoting low cost fuel at high volumes. Thus resulting in more people being attracted to this area that normally would not be driving on Fourth Street. There have been issues raised at other Smith's fuel dispensing businesses where the City has had to contend with increased traffic.**

**A small restaurant opened at the corner of Fourth and Camino Espanol NW and customers from as far away as Juan Tabo NE and other areas of Albuquerque travel to dine here. While these customers do not have idling vehicles waiting to be served or make a purchase, neighbors have noticed significant high volume of traffic since the restaurant opened. So surely opening a Smith's mega fueling station will expand the volume of vehicular traffic even more so.**

**INTERROGATORY NO. 5:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 that Permit No. 3136 would allow the “largest throughput volume in the Albuquerque metropolitan area[,]” please state each material fact that supports this allegation and explain why you believed that the throughput allowed by Permit No. 3136 was the largest throughput volume in Albuquerque.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**This point was brought up in the first public information hearing at the Los Ranchos Village Hall and was not disputed or denied by the City or Smith’s. In the absence of dispute or denial, we considered this verified. When the public asked what is the largest throughput volume in the Albuquerque metropolitan area, the response was Costco and Sam’s but no permit volume was given by the City or Smith’s. Again, there was no disagreement or dispute of the public comment made about the “largest throughput volume in the Albuquerque metropolitan area”. This led this group of petitioners to believe this as fact.**

**INTERROGATORY NO. 6:**

Petitioners, if you contend in the answer to Interrogatory No. 5 that someone told you that the throughput allowed by Permit No. 3136 was the largest throughput volume in the Albuquerque metropolitan area, please state who told you this, when that person told you this, the substance of the conversation in which you were told this information, and the efforts you made to ascertain the correctness of this information before you verified your Petition or your Amended Petition.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez,  
Please refer to answer to interrogatory #5.**

**INTERROGATORY NO. 7:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI, that Smith's is required to provide notice "by other means if necessary to assure adequate notice to the affected public." Please provide the legal citation or authority for your quote.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez,**

**This calls for a legal conclusion, therefore Petitioners object. However, it seems that an entity applying for a permit does have a legal requirement to provide notice, see 20.11.42.13(B)(2) NMAC. (see exhibit 3)**

**It seems that an entity applying for a permit does have a legal requirement to provide notice. A business should use common sense and ethical practice; as a member of this community the applicant should notify affected parties when applying for this permit. During this timeframe Smiths took out a full page newspaper ad extolling the virtues of their charitable contribution to the community and what a good generous neighbor they are; however did not provide the same degree of publicity or notice concerning the proposed site to this same community.**

***Americo Chavez: Please refer to the laws pertaining to the Open Public Meeting Act in New Mexico.***

**INTERROGATORY NO. 8:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that “Notice should have been given to individuals and neighborhoods directly adjacent to the proposed site.” Please provide the citation for any legal authority that you contend required notice as you allege.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**This calls for a legal conclusion and Petitioners therefore object. At the time the permit was applied for the City’s requirement for notification was so inadequate and unfair to affected parties that the rules have subsequently changed. Again, this may be more a business ethical practice that common citizens would expect notification from this process when it may not be required by the City.**

*Americo Chavez: Please refer to interrogatory No. 7*



**INTERROGATORY NO. 9:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that "...the Air Program or Smith's were obligated to give actual notice to nearby residents[,]" please provide the citation for any legal authority that you contend required notice as you allege.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez,**

**This calls for a legal conclusion. Please refer to interrogatory answer to No. 8. Ethically, actual notice to residents in close proximity would have been better than what took place.**

*Americo Chavez: Please refer to interrogatory answer in No. 7*

**INTERROGATORY NO. 10:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that “There has been a history of faulty notice regarding fueling stations in the Albuquerque area[,]” please state each material fact which you contend supports this allegation and explain why you believe that “There has been a history of faulty notice regarding fueling stations in the Albuquerque area.”

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**This was brought up by several people speaking at the public information hearing at the Los Ranchos Village Hall; and also was a point mentioned by the City staff at that meeting. It is our understanding that the AQCB changed the notice requirements after concerns of notice regarding other fueling station permit requests with residents voicing their concern over the inadequate notice requirements. The granting of a second public information hearing due to the citizen concern about the proposed fuel dispensing business location on 4<sup>th</sup> Street validates this. We hope to receive accurate information about this from the City in their answers to our interrogatories.**

***Americo Chavez: The City has this record and information and under public records law the City should furnish this information.***

**INTERROGATORY NO. 11:**

Petitioners, if you contend in your answer to Interrogatory No. 10 that someone told you that “There has been a history of faulty notice regarding fueling stations in the Albuquerque area[,]” please state who told you this, when that person told you this, the substance of the conversation in which you were told this information and what efforts you made to confirm the correctness of this information prior to verifying your Petition or your Amended Petition.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**Please see response to interrogatory No. 10.**

**INTERROGATORY NO. 12:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VII that “The Air Program should refuse to issue Smith’s additional permits until Smith’s can demonstrate that it has a good track record of compliance[,]” please provide the citation for any legal authority that you contend would allow the Air Program to refuse to issue permits to Smith’s based on its compliance history.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**

**This Interrogatory calls for a legal conclusion. However it seems prudent that, if there is NOT a good track record of compliance by an entity applying for a permit, additional permits should not be approved. The City should have information on compliance or non-compliance and this should be a consideration. This seems to make good business sense as well as common sense. (see exhibit 4)**

*Americo Chavez: Please refer to response to interrogatory No. 10.*

**INTERROGATORY NO. 13:**

Petitioners, with respect to your Amended Petition filed August 4, 2014, please list each fact that you contend justifies the Air Board modifying or reversing Permit No. 3136.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez.**

**Please refer to answers to interrogatories 1 – 12 above. In addition, refer to the AQCB’s decision in the Carlisle/Constitution matter In Re: Air Quality Permit No. 2027-M1 reversing the Air Quality Division action, See Final Order and Statement of Reasons dated March 13, 2014. In pertinent part, the Order states: “The Air Quality Control Board is required to protect public health and welfare. Increases in Throughput increase risks to public health. The quality-of-life concerns raised by the community could be indirectly related to air quality.”**

***Americo Chavez: Please refer to answer to interrogatory No. 10.***

**INTERROGATORY NO. 14:**

Petitioners, with respect to your Amended Petition filed August 4, 2014, please list the citation for each legal authority that you contend would authorize modification or reversal of Permit No. 3136 by the Air Board when applied to the facts that you described in Interrogatory No. 13.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez.**

**Calls for a legal conclusion.**

*Americo Chavez: Please refer to answer to interrogatory No. 10.*

**INTERROGATORY NO. 15:**

Petitioners, please describe each injury in fact that you contend you will suffer, either to your person or to your property, as a result of the issuance of Permit No. 3136. For your answer to this question, the definition of “injury in fact” is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not hypothetical or conjectural. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 24, 130 N.M. 368.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez.**

**Calls for a legal conclusion, however, Petitioners believe they are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on property, property values, quality of life, and health and safety.**

*Americo Chavez: The term “injury in fact” becomes too legalistic and cannot be answered in any simple lay terms.*

**INTERROGATORY NO. 16:**

Petitioners, for each “injury in fact” that you described in Interrogatory No. 15, please provide a citation to the legal authority that protects you against the invasion of the legally protected interested that you described.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez.**

**This calls for a legal conclusion, however, our injuries are mainly to public health, effect on our property and property values. Our interests include the quality of life we have today and the fact that we chose to live in this area for the rural environment and having a mega dispensing station does not fit in this environment. The mega stations like Costco and Sam’s are located in commercial / more industrial like areas with already established streets designed for the high volume of vehicle and tanker traffic while the North Fourth Street area is not. This is not in line with the North Fourth Corridor plan and just does not fit the area.**



**INTERROGATORY NO. 17:**

If any Petitioner answers with anything other than an unqualified admission for any of the Requests for Admissions below, then for each such answer, state every reason, factual or legal, why Petitioners do not admit without qualification.

**ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez.**

**REQUESTS FOR ADMISSIONS**

**REQUEST FOR ADMISSION NO. 1:**

Petitioners, please admit that the phrase “by other means if necessary to assure adequate notice to the affected public[]” which you have quoted in Section VI of your Amended Petition filed August 4, 2014 is from 20.11.42.13(B)(2) NMAC.

ADMIT   X  

DENY           

**REQUEST FOR ADMISSION NO. 2:**

Petitioners, please admit that 20.11.42.13(B)(2) NMAC does not apply to Permit No. 3136.

ADMIT           

DENY   X  

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.**

**REQUEST FOR ADMISSION NO. 3:**

Petitioners, please admit that, from December 6, 2013 to April 23, 2014, Spanish Walk Homeowners Association was not registered with the City of Albuquerque Office of Neighborhood Coordination.

ADMIT           

DENY   X  

**Although Spanish Walk Homeowners Association was possibly not an officially “registered” neighborhood association, we believe that there has been communication with the Office of Neighborhood Coordination over the years and that the Office had knowledge of the existence of the Association.**

**REQUEST FOR ADMISSION NO. 4:**

Petitioners, please admit that, as of August 12, 2014, Spanish Walk Homeowners Association was still not registered with the City of Albuquerque Office of Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_ **X** \_\_\_\_\_

**See previous answer.**

**REQUEST FOR ADMISSION NO. 5:**

Petitioners, please admit that, from December 6, 2013 to April 23, 2014, Spanish Walk Homeowners Association was not registered with Bernalillo County Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_ **X** \_\_\_\_\_

**Petitioners were unaware that there is an office for Bernalillo County Neighborhood Coordination.**

**REQUEST FOR ADMISSION NO. 6:**

Petitioners, please admit that, as of the issuance of the August 2014 list distributed by Bernalillo County, Spanish Walk Homeowners Association was still not registered with Bernalillo County Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_ **X** \_\_\_\_\_

**Petitioners do not know about this list and therefore deny same.**

**REQUEST FOR ADMISSION NO. 7:**

Petitioners, please admit that Permit No. 3136 allows annual emissions of Volatile Organic Compounds (“VOCs) of 45.5 tons per year.

ADMIT \_\_\_\_\_

DENY   X  

**Petitioners do not have confidence that the terms of the permit, if issued, would be complied with and therefore deny same.**

**REQUEST FOR ADMISSION NO. 8:**

Petitioners, please admit that Permit No. 3136 does not allow the emission of 10 tons per year or more of any single hazardous air pollutant.

ADMIT \_\_\_\_\_

DENY   X  

**Petitioners do not have confidence that the terms of the permit, if issued, would be complied with and therefore deny same.**

**REQUEST FOR ADMISSION NO. 9:**

Petitioners, please admit Permit No. 3136 does not allow the emission of 25 tons per year or more of any combination of hazardous air pollutants.

ADMIT \_\_\_\_\_

DENY   X  

**Petitioners do not have confidence that the terms of the permit, if issued, would be complied with and therefore deny same.**

**REQUEST FOR ADMISSION NO. 10:**

Petitioners, please admit that the public notice provided by the City for Permit No. 3136 complied with the requirements of 20.11.41.14 NMAC (2002).

ADMIT \_\_\_\_\_ DENY  X

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore deny same.**

**REQUEST FOR ADMISSION NO. 11:**

Petitioners, please admit that 20.11.41.14 NMAC (2002) is the only applicable law or rule that required public notice for Permit No. 3136.

ADMIT \_\_\_\_\_ DENY  X

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore deny the same.**

**REQUEST FOR ADMISSION NO. 12:**

Petitioners, please admit that *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 138 N.M. 133 which you cite in your Amended Petition filed August 4, 2014 is a case which analyzed the requirements of the Solid Waste Act and its implementing regulations.

ADMIT \_\_\_\_\_ DENY  X

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore deny the same. The *Colonias* case has broad implications for the role of public participation in permitting proceedings.**

**REQUEST FOR ADMISSION NO. 13:**

Petitioners, please admit that the Solid Waste Act and its implementing regulations do not apply to the issuance of Permit No. 3136.

ADMIT   X  

DENY \_\_\_\_\_

**REQUEST FOR ADMISSION NO. 14:**

Petitioners, please admit that Permit No. 3136 meets all statutory requirements of the Clean Air Act, 42 U.S.C. §§ 7401 to 7671q, and meets all regulations promulgated pursuant to the Clean Air Act.

ADMIT \_\_\_\_\_

DENY   X  

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore deny the same.**

**REQUEST FOR ADMISSION NO. 15:**

Petitioners, please admit that Permit No. 3136 meets all statutory requirements of the Air Quality Control Act, NMSA 1978, §§ 1 to -22, and meets all regulatory requirements promulgated pursuant to the Air Quality Control Act.

ADMIT \_\_\_\_\_

DENY   X  

**Petitioners object to the Request for Admission because it requires a legal conclusion and therefore deny the same.**

**REQUEST FOR ADMISSION NO. 16:**

Petitioners, please admit that the largest throughput volume previously permitted for a fuel station by the City's Air Quality Program is 15,000,000 gallons of gasoline per year.

ADMIT \_\_\_\_\_

DENY   X

**Petitioners do not know the answer to this Request for Admission and therefore deny same.**

**REQUEST FOR ADMISSION NO. 17:**

Petitioners, please admit that the City's Air Quality Program has lawfully permitted a throughput of 438 million gallons of gasoline for Vecenergy Gasoline Terminal in the South Valley.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_ **X** \_\_\_\_\_

**Petitioners do not know the answer to this Request for Admission and therefore deny same.**

**REQUEST FOR ADMISSION NO. 18:**

Petitioners, please admit that no law or rule allows the City Air Quality Program or the Air Board to deny a permit to Smith's based on its past compliance history.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_ **X** \_\_\_\_\_

**Petitioners believe that the decision-making process is meaningless unless the decision maker has the power to exercise reasonable judgment.**

**REQUEST FOR ADMISSION NO. 19:**

Petitioner Pat Toledo, please admit that you will suffer no injury in fact as the result of the issuance of Permit No. 3136. For your answer to this question, the definition of “injury in fact” is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not hypothetical or conjectural. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 24, 130 N.M. 368.

ADMIT \_\_\_\_\_

DENY \_\_\_\_\_

**This request does not apply to Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly and Americo Chavez**



## **REQUEST FOR PRODUCTION**

### **REQUEST FOR PRODUCTION NO. 1:**

Please attach a copy of each document, in either hard copy or electronic PDF or Word, that you relied upon to prepare your answers to the City's Interrogatories or which substantiate the answers in your interrogatories and, for each document, identify by number the interrogatory or interrogatories to which each document pertains.

**Exhibits 1 & 2 refer to interrogatory No. 2**

**Exhibit 3 refers to interrogatory No. 7**

**Exhibit 4 refers to interrogatory No. 12**

Respectfully submitted,

CITY OF ALBUQUERQUE  
David J. Tourek, City Attorney

---

Carol M. Parker, Assistant City Attorney  
P.O. Box 2248  
Albuquerque, NM 87103  
(505) 768-4533 (t)  
(505) 768-4525 (f)  
[cparker@cabq.gov](mailto:cparker@cabq.gov)





STATE OF NEW MEXICO     )  
  ) ss.  
COUNTY OF BERNALILLO    )

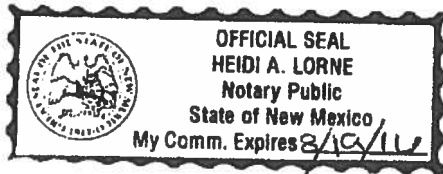
I, Jerri Paul-Seaborn, being first duly sworn, upon my oath, state that my answers to the City's Interrogatories are true and correct.

  
\_\_\_\_\_  
JERRI PAUL-SEABORN

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 15<sup>th</sup> day of September, 2014, by Jerri Paul Seaborn.


  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
8/19/16

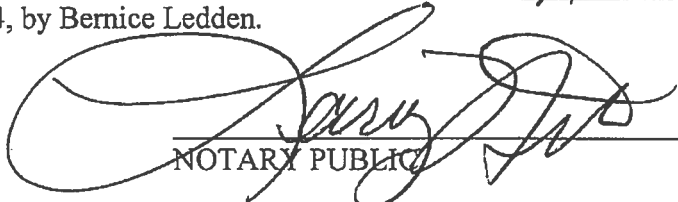


STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF BERNALILLO )

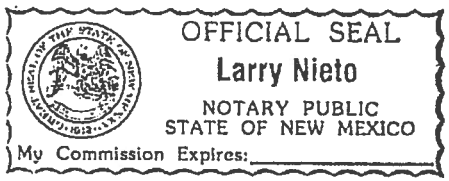
I, Bernice Ledden, being first duly sworn, upon my oath, state that my answers to the City's Interrogatories are true and correct.

  
BERNICE LEDDEN

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 16 day  
of September, 2014, by Bernice Ledden.

  
NOTARY PUBLIC

My Commission Expires:  
December 7 2014



STATE OF NEW MEXICO     )  
  ) ss.  
COUNTY OF BERNALILLO    )

I, Susan Kelly, being first duly sworn, upon my oath, state that my answers to the City's Interrogatories are true and correct.

Susan Kelly  
SUSAN KELLY

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 12th day of September, 2014, by Susan Kelly.

Stevi Gallegos  
NOTARY PUBLIC

My Commission Expires:  
September 16, 2017



STATE OF NEW MEXICO    )  
  ) ss.  
COUNTY OF BERNALILLO    )

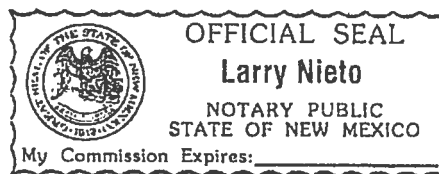
I, Americo Chavez, being first duly sworn, upon my oath, state that my answers to the City's Interrogatories are true and correct.

Americo Chavez  
AMERICO CHAVEZ

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 16 day  
of September, 2014, by Americo Chavez.

Larry Nieto  
NOTARY PUBLIC

My Commission Expires:  
December 7 2014







Gasoline additives such as methyl tertiary-butyl ether (MTBE), which has been outlawed in some states, make the water undrinkable—and that is only one of 150 chemicals in gasoline. Repeated high exposure to gasoline, whether in liquid or vapor form, can cause lung, brain and kidney damage, according to the NIH's National Library of Medicine.


Spilled or vaporized gasoline is not the only chemical hazard if the station is also a repair shop. Mechanics use solvents, antifreeze and lead products, and may work on vehicles that have asbestos in brakes or clutches. Auto refinishers and paint shops use even more potentially harmful chemicals.

In today's car-centric world, we can't escape exposure completely, because these chemicals are in our air just about everywhere. But by choosing where we live, keeping an eye out for spills, and pressuring the oil companies to do the right thing for the communities they occupy, we can minimize our exposures.

**CONTACTS:** U.S. EPA, [www.epa.gov](http://www.epa.gov); National Institutes of Health, [www.nih.gov](http://www.nih.gov).

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### SB 0631 Testimony: Brief Summary

As a physician who takes care of people with lung disease I am well aware of the harmful effects of air pollution particularly on children and adults with chronic lung disease such as asthma or emphysema.

Studies show that even what would be categorized by industry and the EPA as low levels of fine particulates (PM2.5), a type of air pollution generated by combustible engines and motor vehicles, are associated with increased asthma symptoms and clinically relevant declines in lung function.

Ambient levels of fine particulate pollution would likely increase in local areas where mega gas stations are built due to the increased number of idling cars waiting to fuel. In addition to increasing health risks in the general population, **people with chronic lung disease such as asthma or emphysema would be at increased risk. Children are especially vulnerable.**

#### Conclusion and Take Away Points:

- Studies show that although central site monitors may reflect fine particulate pollution levels that are below EPA limits the personal exposure to fine particulates as a result of daily activities and point source exposures are likely to be much higher and can exceed EPA limits.
- Numerous scientific studies have demonstrated that individual, micro environmental exposures to air pollution and fine particulates may be much higher than expected (due to individual circumstances affecting people and their specific local environment) and can contribute to negative health effects even when central site monitor levels remain below current EPA standards.
- **Even short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.**
- **Chronic exposure to ambient air pollution even when average levels are within EPA limits leads to declines in lung development.**
- The negative health effects of placing a mega gas station in close proximity to homes, public spaces and near communities where there are children and adults who may have chronic health conditions can be significant. Many of the potentially exposed people may have underlying respiratory conditions which would mean increased harmful effects.
- **The risks to public health far outweigh any benefits. Not only will the risks have negative impact on the health of local residents and vulnerable populations but they can impact the economy of the area through increased costs of health care and decreased productivity of affected residents.**

We are not opposed to economic development. We are not opposed to the business model of high volume mega gas stations. But such development has to be done in a socially and environmentally responsible way. **Passage of SB 0631 will protect the health of all Maryland residents. We thank Senator Madaleno for introducing this bill.**

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### Synopsis of Scientific Studies:

- A growing body of scientific literature demonstrates the adverse health effects of ambient air pollution and fine particulate matter (PM<sub>2.5</sub>) (generated by motor vehicles and other combustion sources) on asthma and lung function.
- Studies show that higher levels of fine particulate pollution (PM<sub>2.5</sub>) are associated with greater odds of having asthma symptoms exacerbated, having a more severe asthma attack and increased rescue inhaler use.
- High personal fine particulate exposures, which involve exposures or sources not well represented by stationary site monitors (such as idling cars at a mega gas station, high traffic areas) at local or central sites can be quite high and can exceed EPA limits even when central monitoring station levels fall well below EPA limits. This is referred to as the "personal dust cloud" effect.
- Children will be especially sensitive as studies show that children's personal cloud PM<sub>2.5</sub> is significantly higher than adults, thus placing them at increased risk.
- Incremental increases in fine particulate pollution are associated with decreased lung function. Ambient air pollution, fine particulates (PM<sub>2.5</sub>) in particular, has adverse effects on the lungs even when levels are within currently accepted EPA guidelines.
- **Studies demonstrate that short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.**
- **Local exposure to traffic such as on a freeway has adverse effects on children's lung development and is independent of regional air quality.** Residential distance from a freeway is associated with significant deficits in respiratory growth during adolescent years, which results in important deficits in lung function at age 18 years. This could result in important deficits in attained lung function later in life.
- In a study of 12 southern California communities, **clinically low lung function was correlated with the levels of exposure to various pollutants including fine particulates.** Low lung function in children was observed even in communities where the average level of fine particulate matter over the 8 year period was within EPA limits. This study shows that lung development from the ages of 10 to 18 years is reduced in children exposed to higher levels of ambient air pollution.

### A few simple facts about asthma:

- Asthma is chronic lung disease characterized by periods of quiescence interspersed with acute attacks. Asthma attacks can range in severity from mild to life threatening.
- Asthma is the third-ranking cause of hospitalization in children.
- **Asthma is the #1 chronic cause of school absenteeism among children, accounting for an annual loss of more than 14 million school days per year** (approximately 8 days for each student with asthma) and more hospitalizations than any other childhood disease.
- **Asthma accounts for more than 10 million total missed days of work for adults each year and is the fourth leading cause of work absenteeism** and "presenteeism," resulting in nearly 15 million missed or lost ("less productive") workdays each year.
- **Asthma cost the US about \$3,300 per person with asthma each year in medical expenses, missed school and work days, and early deaths** (based on statistics from

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2002-2007). **[END SUMMARY]**

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## COMPLETE WRITTEN TESTIMONY FOR SB 0631

February 25, 2014

To: Maryland State General Assembly

RE: SB 0631, 300 ft set back certification for retail gas stations

Dear Maryland State Legislators,

This written testimony is provided to support SB 0631. As a Maryland resident and a Physician who is Board Certified in Pulmonary Disease, Critical Care Medicine and Internal Medicine by the American Board of Internal Medicine I wholeheartedly support SB 0631. This bill will protect the health of all Maryland residents and especially those with chronic cardiovascular and respiratory diseases such as asthma or emphysema.

As a physician who takes care of people with lung disease I am well aware of the harmful effects of air pollution particularly on children and adults with chronic lung disease such as asthma. Studies have shown that even what would be categorized by industry and the EPA as low levels of fine particulates (PM<sub>2.5</sub>), a type of air pollution generated by combustible engines and motor vehicles, are associated with increased asthma symptoms and clinically relevant declines in lung function.<sup>1</sup> Ambient levels of fine particulate pollution would likely increase in local areas where mega gas stations are built due to the increased number of idling cars waiting to fuel. This would expose local area residents to increased ambient air pollution and increase the risk of adverse health effects. People with chronic lung disease such as asthma or emphysema would be at increased risk.

Asthma is highly misunderstood in the non-medical community and many myths abound. I will provide a brief introduction to asthma and its effect on health care morbidity and health care costs. I will then discuss the growing body of literature demonstrating the adverse health effects of ambient air pollution and fine particulate matter (PM<sub>2.5</sub>) on asthma and lung function. These data show a clear and immediate risk and support community concerns that the risks posed by placement of mega gas stations close to (within 1000 feet of) residences, public spaces and schools are not negligible. Not only will the risks have negative impact on the health of local residents and vulnerable populations but they can impact the economy of the area through increased costs of health care and decreased productivity of affected residents.

### Asthma Facts

Asthma is characterized by inflammation of the air passages resulting in the temporary narrowing of the airways that transport air from the nose and mouth to the lungs. Asthma symptoms can be caused by allergens or irritants (such as air pollution) that are inhaled into the lungs, resulting in inflamed, clogged and constricted airways. Symptoms include difficulty breathing, wheezing, coughing, and tightness in the chest.

Asthma is a chronic disease characterized by periods of quiescence and seemingly normal respiratory status interspersed with acute exacerbations which range from mild to severe. In severe cases, asthma can be deadly. There are many triggers of an acute asthma attack including environmental exposures. Asthma accounts for a large amount of health care and economic costs due to hospitalization, emergency room visits, missed days of school and missed work days. There is no cure for asthma, but asthma can be managed with proper prevention and treatment.

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<sup>1</sup> Ralph J Delfino, Penelope JE Quintana, Josh Floro, Victor M Gastanaga, Behzad S Samimi, Michael T Dkleanman, L-J Sally Liu, Charles Bufalino, Chan-Fu Wu, Christine E McLaren. Association of FEV1 in Asthmatic Children with Personal and Microenvironmental Exposure to Airborne Particulate Matter. Environmental Health Perspectives 2004; 112(8).

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## Every day in America:<sup>2</sup>

- 44,000 people have an asthma attack.
- 36,000 kids miss school due to asthma.
- 27,000 adults miss work due to asthma.
- 4,700 people visit the emergency room due to asthma.
- 1,200 people are admitted to the hospital due to asthma.
- 9 people die from asthma.

## Asthma Morbidity<sup>2</sup>

- Asthma accounts for one-quarter of all emergency room visits in the U.S. each year, with 1.75 million emergency room visits.
- Each year, asthma accounts for more than 10 million outpatient visits and 479,000 hospitalizations.
- The average length of stay (LOS) for asthma hospitalizations is 4.3 days.
- Nearly half (44%) of all asthma hospitalizations are for children.
- **Asthma is the third-ranking cause of hospitalization children.**
- **Asthma is the #1 chronic cause of school absenteeism among children each year accounting for more than 13 million total missed days of school.**
- **Asthma accounts for more than 10 million total missed days of work for adults each year.**
- African Americans are three times more likely to be hospitalized from asthma.

## Social and Economic Costs<sup>2</sup>

- The annual cost of asthma is estimated to be nearly \$18 billion.
- Direct costs accounted for nearly \$10 billion (hospitalizations the single largest portion of direct cost) and indirect costs of \$8 billion (lost earnings due to illness or death).
- **For adults, asthma is the fourth leading cause of work absenteeism and "presenteeism," resulting in nearly 15 million missed or lost ("less productive") workdays each year (this accounts for nearly \$3 billion of the "indirect costs" shown above).**
- **Among children ages 5 to 17, asthma is the leading cause of school absences from a chronic illness. It accounts for an annual loss of more than 14 million school days per year (approximately 8 days for each student with asthma) and more hospitalizations than any other childhood disease.** It is estimated that children with asthma spend an nearly 8 million days per year restricted to bed.
- **Asthma cost the US about \$3,300 per person with asthma each year from 2002 to 2007 in medical expenses, missed school and work days, and early deaths<sup>3</sup>**
- More than half (59%) of children and one-third (33%) of adults who had an asthma attack missed school or work because of asthma in 2008. On average, in 2008 children missed 4 days of school and adults missed 5 days of work because of asthma<sup>2</sup>

## Scientific literature summary

Studies show that higher levels of fine particulate pollution (PM<sup>2.5</sup>) are associated with greater odds of having asthma symptoms exacerbated, having a more severe asthma attack and increased rescue inhaler use.<sup>4</sup>

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<sup>2</sup> <http://www.aafa.org/display.cfm?id=8&sub=42>

<sup>3</sup> <http://www.aaaai.org/about-the-aaaai/newsroom/asthma-statistics.aspx>

<sup>4</sup> James C Slaughter, Thomas Lumley, Lianne Sheppard, Jane Q Koenig, Gail G Shapiro. Effects of ambient air pollution on symptoms severity and medication use in children with asthma. *Annals of Allergy, Asthma and Immunology* 2003;91:346-353.

Onchee Yu, Lianne Sheppard, Thomas Lumley, Jane Q Koenig, Gail G Shapiro. Effects of Ambient Air Pollution on Symptoms of Asthma in Seattle-Area Children Enrolled in the CAMP Study. *Environmental Health Perspectives*. 2000;108(12):1209-1214

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Increased chronic exposure to ambient air pollution emanating from a mega gas station and its resultant traffic will have negative effects on patients with asthma.

In the case of children, high levels of physical activity are expected to generate higher levels of particle exposure in a variety of microenvironments. Some activities may bring the child close to an undiluted source of particulate exposure such as idling cars waiting to fuel at a mega gas station located within 1000 feet of their home or school. This phenomenon is referred to as the "personal dust cloud," which accounts for the difference between total personal exposure as measured by a personal monitor worn on the body and the estimated time-weighted exposure measurement in indoor/outdoor microenvironments and central sites which are typically utilized in many studies and reports.

Studies have shown that the personal dust cloud is a combined result of particles generated from personal activities and exposures to local sources such as next to traffic exhaust on the street. In a study of asthmatic children in southern California, Delfino et. al. evaluated the effect of fine particle exposure (PM<sub>2.5</sub>) on lung function using hourly measurements of fine particulate exposure from a personal monitor attached to the subject as well as 24 hour average indoor/outdoor stationary and central site measurements. **The study demonstrated that short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.** The study found that personal fine particulate exposure was negatively associated with lung function as measured by FEV1 percent predicted (a common measure of lung function which is the amount of air you can forcefully blow out). Stationary indoor/outdoor and central site exposures were also negatively associated with lung function **but the effects of personal exposure were more profound.** **Children with concurrent allergies and asthma were even more affected.** This study demonstrates that ambient air pollution that would be expected to be emitted in the vicinity of a mega gas station has negative effects on lung function and respiratory health. **Additionally, high personal fine particulate exposures, which involve exposures or sources not well represented by stationary site monitors at local or central sites, can be quite high and can exceed EPA limits even when central station levels fall well below EPA limits.**

The Delfino study demonstrates that the "personal dust cloud" is a combined result of particles generated from personal activities and exposures to local sources (e.g. next to traffic exhaust on the street or idling vehicles at a mega gas station) that are not well captured by stationary indoor and outdoor monitors. The study also found that children's personal cloud PM<sub>2.5</sub> is significantly higher than adults. Short term exposures lasting minutes to hours may be relevant to respiratory responses and may not be fully captured by time-integrated PM<sub>2.5</sub> measurements, as is done with 24 hour monitors.<sup>5</sup>

While EPA regulations lag behind the accepted science, adjustments to air quality regulations are slowly being made. In 1997 the EPA had set the 24 hour standard exposure limit for PM<sub>2.5</sub> to 65 ug/m<sup>3</sup> in order "to protect against peak concentrations that might occur due to strong local or seasonal sources over limited areas and/or time periods." In 2006 based on the growing scientific evidence that ambient air pollution and fine particulate matter have adverse health effects the EPA further lowered the 24 hour exposure limit to 35 ug/m<sup>3</sup> and considered an even lower 30ug/m<sup>3</sup> limit.<sup>6</sup> Unfortunately, the regulations in place still do not take into account current understanding of the impact of poor air quality at ground level. As observed in the the Delfino study, children in southern California experienced personal exposure levels that far exceeded current EPA 24 hour limits (35 ug/m<sup>3</sup>) even though central site levels were within EPA limits. Such exposures were associated with clinically relevant decreases in lung function.

In a study of the effects of outdoor air pollution on lung function in school children with asthma Dales et. al.

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<sup>5</sup> Ralph J Delfino, Penelope JE Quintana, Josh Floro, Victor M Gastanaga, Behzad S Samimi, Michael T D Keinman, L-J Sally Liu, Charles Bufalino, Chan-Fu Wu, Christine E McLaren. Association of FEV1 in Asthmatic Children with Personal and Microenvironmental Exposure to Airborne Particulate Matter. Environmental Health Perspectives 2004; 112(8).

<sup>6</sup> [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs143\\_008798.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_008798.pdf)



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found that lung function decreased with increased ambient air concentrations of fine particulate matter (PM<sub>2.5</sub>). The levels of fine particulates measured throughout this study were within standard EPA limits. The authors found that **incremental increases in fine particulate pollution were associated with decreased lung function.** This study showed that **ambient air pollution, fine particulates (PM<sub>2.5</sub>) in particular, has adverse effects on the lungs even when levels are within currently accepted EPA guidelines.**<sup>7</sup>

Studies have demonstrated that proximity (within 500 meters or ~1500 feet) to traffic from major freeways is associated with decreased lung development in children age 10 to 18. **Children who lived within 500 meters of a freeway attained much lower lung function levels by age 18** compared to children who lived greater than 1500 meters from a freeway. These lower levels of attained lung function were considered clinically low. **Residential distance from a freeway is associated with significant deficits in 8-year respiratory growth, which result in important deficits in lung function at age 18 years.** The authors conclude that **local exposure to traffic on a freeway has adverse effects on children's lung development and is independent of regional air quality and could result in important deficits in attained lung function later in life.**<sup>8</sup>

WJ Gauderman e. al. studied 1700+ school children in 12 southern California communities. Across the 12 communities, a clinically low FEV1 (measure of lung function) was correlated with the levels of exposure to various pollutants including fine particulates. In southern California the most common source of these pollutants is motor vehicles. Low lung function in children was observed even in communities where the average level of fine particulate matter over the 8 year period was within EPA limits. These correlations were statistically significant. **The results of this study provide robust evidence that lung development from the ages of 10 to 18 years is reduced in children exposed to higher levels of ambient air pollution.**<sup>9</sup>

### Conclusions

In conclusion, studies show that although central site monitors may reflect fine particulate pollution levels that are below EPA limits the personal exposure to fine particulates as a result of daily activities and point source exposures are likely to be much higher and can exceed EPA limits. These personal exposures have adverse respiratory health consequences. Chronic exposure to ambient air pollution even when average levels are within EPA limits leads to declines in lung development. The negative health effects of placing a mega gas station in close proximity to homes, public spaces and near communities where there are children and adults who may have chronic health conditions can be significant.

The EPA periodically re-evaluates and updates their air quality standards based on growing scientific evidence. NAAQS standards were last updated in 2006 and fine particulate exposure limits were lowered based on growing scientific evidence. In the interim numerous scientific studies have demonstrated that individual, micro environmental exposures to air pollution and fine particulates may be much higher than expected and can contribute to negative health effects even when central site monitor levels remain within current EPA standards.

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<sup>7</sup> R dales, L Chen, AM Frescura, L Liu, PJ Villeneuve. Acute effects of outdoor air pollution on forced expiratory volume in 1 s: a panel study of schoolchildren with asthma. *European Respiratory Journal* 2009; 34: 316-323.

<sup>8</sup> W James Gauderman, Hita Vora, Rob McConnell, Kiros Berhane, Frank Gilliland, Duncan Thomas, Fred Lurmann, Edward Avol, Nino Kunzli, Michael Jerrett, John Peters. Effect of exposure to traffic on lung development from 10 to 18 years of age: a cohort study. *Lancet* 2006:368

<sup>9</sup> W. James Gauderman, Edward Avol, Frank Gilliland, Hita Vora, Duncan Thomas, Kiros Berhane, Rob McConnell, Nino Kuenzli, Fred Lurmann, Edward Rappaport, Helene margolis, David Bates, John Peters. The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age. *New England Journal of Medicine* 351(11); 1057

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**While central site, regional and local area average ambient air pollution and particulate matter levels may be within recommended EPA limits scientific studies have shown that personal, micro environmental exposures to pollutants are likely to be higher and can exceed EPA limits due to special circumstances affecting individuals and their specific local environment. Such circumstances include personal exposures to pollution point sources such as standing in traffic while waiting for a bus, living near a mega gas station, or walking past a mega gas station during your daily commute or shopping trip.**

The number of individuals who will be exposed to pollutants resulting from placing a mega gas station in close proximity to homes, schools and public spaces are likely to be numerous. Many of the potentially exposed people may have underlying respiratory conditions which would mean increased harmful effects.

Passage of SB 0631 will protect the health of all Maryland residents. I applaud Senator Madaleno for introducing this bill which will protect all Maryland families from the harmful effects of air pollution related to placement of mega gas stations in close proximity to homes, schools and public spaces. Please protect the health of our communities and pass SB 0631

Sincerely,

Maria Jison, MD, FCCP  
Montgomery County Resident

**Non-Technical Testimony on Behalf of the New Mexico Public Health Association**

**Regarding Amendments to Current 20.11.41 NMAC *Authority to Construct* as Proposed in  
"20.11.41 NMAC 2<sup>nd</sup> Amended Public Review Draft 4/23/13"**

The New Mexico Public Health Association is dedicated to improving the health and well-being of our residents and to ensuring our residents are well informed and can fully participate in environmental and health decisions that directly affect them and their neighborhoods.

On the face of the language contained in the *Notice of Hearing and Meeting* published in the Albuquerque Journal on May 19, 2013 it appears the City's Environmental Health Department is attempting to strengthen the public notification and participation requirements; however, when comparing the 20.11.41 NMAC 2<sup>nd</sup> Amended Public Review Draft 4/23/13 (hereinafter referenced as "amended draft") with the state's Construction Permit Regulation (found at 20.2.72) it appears the proposed amendments favor applicants through language that provides for: 1) accelerated reviews, 2) shorter timelines for Department decisions on permit applications, 3) life-time permits, and 4) public notification alternatives for campus-like facilities and facilities having large boundaries, at the expense of public participation by decreasing rather than increasing public notification and public comment requirements.

We believe that economic development can be stimulated while providing for the public notification/participation rights of our residents and protecting the environment. In other words, responsible economic development and healthy neighborhoods do not present an "either or" scenario, but rather a "best of" scenario.

Although the City's Environmental Health Department states in the *Notice of Hearing and Meeting* they are amending 20.11.41 NMAC *Authority to Construct* to achieve further alignment with the state's Construction Permit Regulation, we feel the language provided in the amended draft is less stringent than the state's Construction Permit Regulation and is in violation of the Air Act at NMSA 1798, 74-2-4.C (1967 as amended through 2009) which requires air quality standards and regulations within Bernalillo County to be "not lower than those required by regulations adopted by the state Environmental Improvement Board (EIB)."

Following is an example, pulled from a comparison of the state's Construction Permit Regulation and the amended draft, demonstrating the concerns mentioned above:

Example:

As proposed in the amended draft, an **applicant** requesting a new or modified permit application, must follow these public notification requirements (found at 20.11.41.13.B NMAC):

- 1) copy of public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 2) post and maintain a weather proof sign at a visible location at the site or the proposed site.

As proposed in the amended draft, the City must follow these public notification requirements (found at 20.11.41.14.B NMAC):

- 1) publish public notice in the newspaper of largest circulation with 30 days for public comments to be submitted,
- 2) send a copy of the public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 3) provide notice to all individuals and organizations on the list maintained by the City's Environmental Health Department.

By contrast, the state's Construction Permit Regulation requires applicants for permits or significant permit revisions to perform the following public notification requirements:

- 1) notification by certified mail of property owners within 100 feet of the property on which the facility is located or proposed to be located, if the facility is in a Class A county (Bernalillo County is a Class A county) (20.2.72.203.B.1.a),
- 2) notification by certified mail to all municipalities and counties in which the facility is or will be located and to all municipalities, Indian tribes, and counties within a ten mile radius of the property on which the facility is or is proposed to be constructed or operated (20.2.72.203.B.2),
- 3) notification through publication once in a newspaper of general circulation in the county in which the property on which the facility is or is proposed to be constructed or operated. This notice shall appear in either the classified or legal advertisements section of the newspaper and at one other place in the newspaper calculated to give the general public the most effective notice, and, when appropriate, shall be printed in both English and Spanish (20.2.72.203.B.3),
- 4) notification through signage at 4 publicly accessible and conspicuous places, including the proposed or existing facility entrance on the property on which the facility is, or is proposed to be, located, until the permit or significant permit revision is issued or denied, and 3 locations commonly frequented by the general public, such as nearby post office, public library, or city hall (20.2.72.203.B.4.a-b),
- 5) notification through public service announcement to at least one radio or television station serving the municipality or county in which the source is or is proposed to be located and containing information outlined in 20.2.72.203.D.1-5 (20.2.72.203.B.5).

Further, the state's Construction Permit Regulation requires the respective agency (e.g., City's Environmental Health Department) to perform the following notification requirements (20.2.72.206):

- 1) all individuals and organizations identified on a list maintained by the Department of those who have indicated in writing a desire to receive notices, and
- 2) mail a copy of the public notice at the time it is sent for publication to the appropriate county (e.g., Bernalillo County).

While we recognize the intent of the City is to save the applicant expense and the City money, public notification/public participation is not the appropriate area for these cost savings. The language in the state's Construction Permit Regulation is far more inclusive of adjacent property owners and the general public, many of whom may not belong to a neighborhood association

(many of which meet only annually to keep their status) or neighborhood coalition, do not read the paper on a daily basis, and are not on the City's Environmental Health Department list.

To ensure the fullest possible public participation, we request the public notification requirements in the amended draft be consistent with the state's Construction Permit Regulation, as stated in 20.2.72.203 and 20.2.72.206 NMAC. Additionally, we request these public notification requirements be applied for the following types of permit applications: technical permit revisions, permits, permit modifications, temporary permits, general permits, and permits for campus-like facilities and facilities having large boundaries.

The New Mexico Public Health Association encourages the City to retain the language of 20.11.41 NMAC *Authority to Construct* as it pertains to the time periods for public comment on permit applications, requests for public information hearings, accelerated application reviews, and general construction permits.

Specifically, we request the following:

- 1) Providing all interested persons with at least 45 days to submit written comments, evidence, or to request a public hearing on the permit application (20.11.41.14.A.4 of NMAC *Authority to Construct*), and, if a person expresses in writing an interest in the permit application, providing 45 days (rather than the 30 days as proposed in the amended draft at 20.11.41.14.C NMAC, 20.11.41.14.B.2.f NMAC) **after the Department's analysis is available** to submit written comments and to request a public information hearing. Recognizing the very technical nature of air quality permitting and regulatory processes, we believe the original 45 day period is more appropriate and will provide residents with the time necessary to learn more about the proposed operations and to garner technical and legal expertise, if necessary.
- 2) No provision for accelerated reviews of permit applications as occurs in 20.11.41 NMAC *Authority to Construct*. We feel that an accelerated review will further decrease opportunities for meaningful public participation and may introduce bias into the permit approval process due to possible conflicts of interest given the small universe of environmental consultants within New Mexico.
- 3) No provision for general construction permits as occurs in 20.11.41 NMAC *Authority to Construct*. The geographic characteristics of Bernalillo County and Albuquerque are quite different from the state, with a predominantly urban setting. While a single permit for facilities having similar operations, processes and emissions may make sense for a state that is largely open and rural, it can have a deleterious impact on residents living in more densely populated urban areas and within closer proximity to these facilities.
- 4) No provision for alternative public notification requirements for campus-like facilities and facilities having large boundaries (draft amendment – 20.11.41.13.B.1). As mentioned above, we believe that permits for these types of facilities should follow the public notification requirements outlined in the state's Construction Permit Regulation at 20.2.72.203, particularly since these types of facilities cover more acreage and are more likely to impact a greater number of people living in the surrounding communities.

In terms of Department permitting decision making processes, we also request that final action on an application be made by the Department within 120 days, or 180 days if a public hearing

has been called, from the date the application was ruled complete rather than the proposed 90 day time period stated in the amended draft (20.11.41.16.B NMAC).

Finally, and perhaps most importantly, although potential applicants would undoubtedly favor the proposed language provided in the amended draft to not have an expiration date or renewal date for authority to construct permits, we believe it is irresponsible to issue life-time permits and request the re-insertion of proposed language for a 10-year permit term as stated in 20.11.41 NMAC 1<sup>st</sup> Amended Public Review Draft for Stakeholder Review 7/18/12 at 11.41.19, subsection E of 20 NMAC, for the following reasons:

- 1) life-time permits provide residents with only one opportunity to participate in the permitting process,
- 2) life-time permits could contribute to an “out of sight out of mind” mentality on behalf of the City’s Air Quality Division in terms of enforcement and review,
- 3) life-time permits could decrease the accountability of the facility’s owner to the impacted community, and
- 4) life-time permits provide little protection for impacted residents should cumulative impacts increase and neighborhood conditions change.

# Fuel to the Fire

BY ELISE KAPLAN

Every day, fumes, traffic snarls and tanker trucks aggravate neighbors of the Smith's gas station on Constitution and Carlisle. And with a permit for the station to sell more fuel, the situation isn't going to get any easier.



PHOTO BY ANDY CARRASCO

The small lot of the Smith's gas station on Constitution and Carlisle lacks space for cars to wait while others refuel.

## Over-Pumping

Smith's started construction of a gas station at the intersection across from the Carlisle grocery store in June 2010. The company received a permit from the city to dispense 3.3 million gallons of gasoline per year, according to Bill Westmoreland, deputy director of the Environmental Health Department. In October, the Air Quality Division slapped Smith's with a fine of \$38,400 for exceeding this limit by half a million gallons.

"We issued them a fine and a strong suggestion that they stop doing that, but that's pretty much all we can do," says Westmoreland. "At the same time, they applied for a permit for 4.5 million gallons a year on the basis that they were already doing so much business." Smith's also requested allowance for 350,000 gallons of diesel.

The company did not make an effort to reduce sales while awaiting approval of the permit, adds Westmoreland, an oversight that could result in another fine. Neighbors of the gas station argued that upping the allowance rewards Smith's for sales that are already too high for a residential area. But on April 17, the station received the permit for the increase anyway.

As the owner of the medical center at Carrasco Plaza and the de-facto leader of the crusade, Andy Carrasco says the gas station may be selling at a much higher volume than pumping numbers suggest. Carrasco's property abuts the gas station, and he's spent more than eight months recording traffic congestion. He says refueling trucks arrive at all hours. Based on observations of three to four trucks per day, Carrasco calculates the gas station could in fact be storing—and then selling—an estimated 6.4 million gallons a year. Requests for comment from the supplier, Western Refinery, were not returned.

However, Westmoreland says those calculations are not correct. "These trucks deliver all over town, and at some point, they come and deliver here. They may only have 1,000 gallons left in the truck," he says. "We don't know how much is being pumped in there, but we do know how much is being pumped out because the gauge really cannot be tampered with."

The permitting process for dispensing gas only takes into account the emissions produced by the gas station and does not consider traffic or space issues, Westmoreland says. With the amount it's allowed to pump, the Smith's station could produce 29.25 tons of volatile organic compounds over the course a year. That number is standard for gas stations and does not raise any concerns for his office, Westmoreland adds.

## Traffic and Tankers

The neighbors have expressed fears that allowing an already high-volume gas station to increase its pumping will exacerbate existing traffic problems. Michael Geier, the Southeast area commander for APD, says his officers try to do as much as possible to enforce traffic rules. "We'll write citations for cutting through property, but there's not much room on that lot," he says. "It was a neighborhood corner gas station at that location for 30 years, and now there's a high-volume station."

The delivery tankers compound traffic problems because there isn't much space for maneuvering, and they often jut into the street, blocking visibility for bikes and cars. Carrasco and others say they worry the Western Refinery drivers are forced to get too close to homes when delivering and that there is little oversight by the station's employees during the refueling process. "The problem is hazardous materials, and there are houses directly across the street," he says. "The city is allowing them to come down the alleyway next to people's homes because there is no other way to deliver fuel there."

Westmoreland agrees that the trucks present a host of issues when making deliveries, including failing to block off the area surrounding the tanks. "If someone came through and hit one of these trucks you'd have a huge gas spill. It pumps out pretty quickly."

In February 2011, a car backed into a Western Refinery truck while it was filling the tanks, causing slight damage to the truck, according to the police report.

## Bureaucracy

Carrasco says he's been trying to sell his property because he can't rent out the offices in his plaza, but he hasn't been able to find a buyer. When Smith's offered to buy him out initially, he refused, he says, due to pre-existing leases with his tenants. Marsha Gilford, the vice president of public affairs for Smith's, says the company won't purchase his property now that the gas station has already been built.

The city granted Smith's the initial permit for construction because it's in a commercial zone fit for neighborhood businesses, such as gas stations. "Zoning code does not require that we take the size of the lot into consideration," says Juanita Garcia, the acting code compliance official for Code Enforcement Division of the Planning Department. "All we're looking for is whether or not it is zoned for that type of business. All that is stated in the zoning code is that [gas stations] are allowed, permissively."

As a result of the concerns voiced by the neighbors over the last year, City Councilors Isaac Benton and Trudy Jones proposed an amendment to the zoning code. Andrew Webb, policy analyst for council staff, says the amendment would require an allotted area for cars waiting to refuel. If there were 10 spots to fill up at the station, there would have to be room for 20 vehicles. "This is designed to keep the traffic from backing up into the road, as I'm sure happens at that gas station," he says. "It would, in fact, limit the number of pumps you could have on the site."

The amendment would also require companies to erect trees or walls between the station and homes, and deliveries would have to be made away from where people drive on the lot. The vote on this amendment is slated for Monday, May 7, Webb says.

Neighbor Pat Toledo testified at a City Council meeting in mid-April. "The proper response from the city should not be to prevent this from ever happening again but to have kept it from ever happening at all." He said the city should evaluate whether there is a need for more gas stations, period. ☐

INTERROGATORY ANSWERS  
FROM PAT TOLEDO # 3136  
North Valley

**INTERROGATORIES**

**INTERROGATORY NO. 1:**

Petitioners please state the names, addresses and telephone numbers of the person or persons who answered any interrogatory on your behalf; refer by number to the individual interrogatory each person answered and state why that person, instead of the Petitioner or Petitioners to whom the interrogatory was directed, answered that specific interrogatory.

**ANSWER:**

I (the Petitioner) answered the interrogatories myself.





**INTERROGATORY NO. 2:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 that you would be adversely affected by the issuance of Permit No. 3136, please state each material fact that supports this allegation.

**ANSWER:**

I am a citizen of Albuquerque and there is no basis for limiting the access of citizens of Albuquerque to appeal a final permitting decision of the EHD. The North Valley is one of my favorite areas in Albuquerque because of its natural beauty, great restaurants, and bike paths, which I run on weekly. This gas station would further contribute to traffic and odors, which would cause a Public Nuisance. I have witnessed this firsthand at the Carlisle and Constitution station, where their air quality permit was reversed because of such odors, quality of life issues, etc. Refer to attached documentation regarding the revocation of Air Quality Permit No. 3136.

**INTERROGATORY NO. 3:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 that your quality of life would be adversely affected by the issuance of Permit No. 3136, please state each material fact that supports this allegation.

**ANSWER:**

As was previously stated in my answer to interrogatory No. 2, "I am a citizen of Albuquerque and there is no basis for limiting the access of citizens of Albuquerque to appeal a final permitting decision of the EHD. The North Valley is one of my favorite areas in Albuquerque because of its natural beauty, great restaurants, and bike paths, which I run on weekly. This gas station would further contribute to traffic and odors, which would cause a Public Nuisance. I have witnessed this firsthand at the Carlisle and Constitution station, where their air quality permit was reversed because of such odors, quality of life issues, etc. Refer to attached documentation regarding the revocation of Air Quality Permit No. 3136."

**INTERROGATORY NO. 4:**

Petitioners, with respect to the allegation in your Amended Petition that the issuance of Permit No. 3136 would cause increased traffic, please state each material fact that supports this allegation, including each material fact supporting your apparent belief that the vehicles visiting the fuel dispensing station that Smith's proposes to build at 6310-4<sup>th</sup> St. NW would come from additional traffic on 4<sup>th</sup> Street rather than the existing traffic that already travels on 4<sup>th</sup> Street NW.

**ANSWER:**

As the proposed fuel dispensing station has not yet been built, the evidence to which I would base this allegation is what has occurred and continues to occur at other Smith's fuel dispensing stations, such as the Carlisle and Constitution location which is approximately 250 ft from my primary residence. The Air Quality Board reversed the permit for this location because of concerns over odor, quality of life issues, the negative impact to neighboring businesses, and increase in throughputs. This fuel dispensing location's permit was for an output of approximately 4.5 million gallons per year. This fuel output volume caused issues such as excess traffic creating severe traffic congestion and air pollution. Therefore it can reasonably be expected that a fuel dispensing location with a higher fuel output (7 million gallons per year) would cause an equal if not greater negative impact in regards to the air pollution and contribution of traffic causing excess traffic congestion as demonstrated by the current locations.

Further, because Smith's employs a rewards system for its customers whereby customers receive discounts on gas prices, making the gas prices significantly lower than other stations, customers drive from all over town to get the lower priced gas. This leads to

high volumes of customers which can be described as “swarms” to drive to Smith’s fuel stations rather than to other stations, in order to save money and get the least expensive gas in town. These swarms of customers driving to the fuel stations creates the excess traffic flow and over congestion of the roads and areas surrounding the fuel stations, including neighboring business parking lots and neighborhoods such as the neighborhood I reside in near Carlisle and Constitution. This over congestion causes frustrated drivers who engage in “road rage” incidents due to the difficulty in navigating the traffic in and around the fuel stations as well as impatience in having to wait in long lines for gas. The cars idling while waiting in line for gas create an inhospitable environment of odors, air and noise pollution, that significantly affects the residents in neighborhoods. In addition this excess traffic and congestion contributes to a higher incidence of traffic accidents, including accidents involving pedestrians and bicyclists traveling in the areas. The area of Carlisle and Constitution is recognized by city officials, the city fire department, and city police officers as a highly dangerous area with a high percentage of traffic accidents. Captain Commander Geir has submitted testimony attesting to this in the attached documentation.

**INTERROGATORY NO. 5**

Petitioners, with respect to the allegation in your Amended Petition filed August 4<sup>th</sup>, 2014 that Permit No. 3136 would allow the “largest throughput volume in the Albuquerque metropolitan area[,]” please state each material fact that supports this allegation and explain why you believed that the throughput allowed by Permit No. 3136 was the largest throughput volume in Albuquerque.

**ANSWER:**

The primary emphasis and concern in this issue is that a super volume 7 million gallon throughput station in the middle of a neighborhood is wrong as from a city design or planning perspective it would be visually unappealing, intrusive on the surrounding businesses and neighborhoods, dangerous, and a Public Nuisance. A typical gas station’s annual throughput is approximately 1million gallons a year on average. The proposed Smith’s fuel station would essentially be equivalent to 7 standard size fuel stations in one area. Other large volume fuel stations which also offer their customers’ discounts on fuel prices, such as Costco and Sam’s Club are typically built in industrial corridors through careful planning and consideration of their throughput due to the increased traffic volume which necessitate efficient road design planning to accommodate this increased traffic volume. Although this station may not allow the highest throughput volume in the Albuquerque metropolitan area, it does qualify as a “super volume” station due to the higher than usual volume of fuel it would dispense on an annual basis, thus it should be required to be located in an industrial corridor or an area more equipped to handle the resulting excess traffic volume and congestion.

**INTERROGATORY NO. 6:**

Petitioners, if you contend in the answer to Interrogatory No. 5 that someone told you that the throughput allowed by Permit No. 3136 was the largest throughput volume in the Albuquerque metropolitan area, please state who told you this, when that person told you this, the substance of the conversation in which you were told this information, and the efforts you made to ascertain the correctness of this information before you verified your Petition or your Amended Petition.

**ANSWER:**

Through my own personal research, I have discovered that a throughput of 7 million gallons of fuel a year, located in a mostly residential area, would be one of the largest throughputs located in an area that is not an industrial sector. The fact that the other Smith's fuel dispensing station which operates in a similar fashion with the same throughput and in a non-industrial sector has had its permit reversed by the Air Quality Board demonstrates that I am correct in my contention. Therefore the same action should be taken for the proposed location on 4<sup>th</sup> St. NW.

**INTERROGATORIES NO. 7:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4<sup>th</sup> 2014 in Section VI, that Smith's is required to provide notice 'by other means if necessary to assure adequate notice to the affected public.' Please provide the legal citation or authority for your quote.

**ANSWER:**

The Air Quality Board member named Mr. Baca that voted to reverse Smith's Air Quality Permit during the hearing on the merits at Constitution and Carlisle chastised Smith's for giving "legal" notice but not proper notice. The Air Quality Board has since changed its policy on giving notice. This is likely due to scenarios such as this which resulted in frustrated citizens who are residents and business owners in the Carlisle and Constitution area near the Smith's fuel station located there as well as residents that live near other Smith's fuel stations. The new policy regarding notice went into effect in January 2014, approximately 1-2 months before Smith's new permits were applied for at the 4<sup>th</sup> street, and the Louisiana and Montgomery locations. The fact that Smith's did not voluntarily abide by the new regulations is frustrating to the residents and business owners in these locations. The residents and business owners near the Carlisle and Constitution location were criticized by the Air Quality Board hearing on merits for not being good neighbors. Refer to exhibits 1 and 2.

**INTERROGATORY NO. 8:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that "Notice should have been given to individuals and neighborhoods directly adjacent to the proposed site." Please provide the citation for any legal authority that you contend required notice as you allege.

**ANSWER:**

As was previously stated in my answer to Interrogatory No. 7, "The Air Quality Board member named Mr. Baca that voted to reverse Smith's Air Quality Permit during the hearing on the merits at Constitution and Carlisle chastised Smith's for giving "legal" notice but not proper notice. The Air Quality Board has since changed its policy on giving notice. This is likely due to scenarios such as this which resulted in frustrated citizens who are residents and business owners in the Carlisle and Constitution area near the Smith's fuel station located there as well as residents that live near other Smith's fuel stations. The new policy regarding notice went into effect in January 2014, approximately 1-2 months before Smith's new permits were applied for at the 4<sup>th</sup> street, and the Louisiana and Montgomery locations. The fact that Smith's did not voluntarily abide by the new regulations is frustrating to the residents and business owners in these locations. The residents and business owners near the Carlisle and Constitution location were criticized by the Air Quality Board hearing on merits for not being good neighbors. Refer to exhibits 1 and 2."



**INTERROGATORY NO. 9:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that "...the Air Program or Smith's were obligated to give actual notice to nearby residents[,]" Please provide the citation for any legal authority that you contend required notice as you allege.

**ANSWER:**

NMSA 74-2-5.1. Duties and powers of the department and the local agency. States that, "The department and the local agency for their respective jurisdictions shall: A. develop facts and make investigations and studies consistent with the Air Quality Control Act and, as required for enforcement of that act, enter at all reasonable times in or upon any private or public property, except private residences, that the department or the local agency has reasonable cause to believe is or will become a source contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy shall be furnished to the owner or occupants of the premises before the action is filed;

Further, NMSA 74-2-5.E Duties and powers; environmental improvement board; local board. States that, "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.

**INTERROGATORY NO. 10:**

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VI that, "There has been a history of faulty notice regarding fueling stations in the Albuquerque area [,]" please state each material fact which you contend supports this allegation and explain why you believe that "There has been a history of faulty notice regarding fueling stations in the Albuquerque area."

**ANSWER:**

The fact that the Air Quality Board recently changed the requirements for giving notice attests to the fact that there has been a history of faulty and improper notice. Mr. Baca, a previous Air Quality Board member himself chastised Smith's for only giving legal notice but not proper notice. The Air Quality Board did not change the rules for giving proper notice without justification or cause; they changed the rules as a result of numerous complaints from the residents and business owners near the Constitution and Carlisle location as well as other citizen complaints of faulty and improper notice. See exhibits 1 and 2.

**INTERROGATORY NO. 11**

Petitioners, if you contend in your answer to Interrogatory No. 10 that someone told you that “There has been a history of faulty notice regarding fueling stations in the Albuquerque area [,]” please state who told you this, when that person told you this, the substance of the conversation in which you were told this information and what efforts you made to confirm the correctness of this information prior to verifying your Petition or your Amended Petition.

**ANSWER:**

It is not relevant and is not a basis for the petition for hearing before the board.

## INTERROGATORY NO. 12

Petitioners, with respect to the allegation in your Amended Petition filed August 4, 2014 in Section VII that “The Air Program should refuse to issue Smith’s additional permits until Smith’s can demonstrate that it has a good track record of compliance [.]” please provide the citation for any legal authority that you contend would allow the Air Program to refuse to issue permits to Smith’s based on its compliance history.

### **ANSWER:**

NMSA 74-2-5.1. Duties and powers of the department and the local agency.

“The department and the local agency for their respective jurisdictions shall:

- A. develop facts and make investigations and studies consistent with the Air Quality Control Act and, as required for enforcement of that act, enter at all reasonable times in or upon any private or public property, except private residences, that the department or the local agency has reasonable cause to believe is or will become a source contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy shall be furnished to the owner or occupants of the premises before the action is filed;
- B. institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board or the local board;**
- C. encourage and make every reasonable effort to obtain voluntary cooperation by the owner or occupants to preserve, restore or improve air purity;
- D. consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system or mechanism or the air pollution problem that may be related to the source, device, system or mechanism; provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, regulations in force pursuant to that act or any other provision of law;
- E. establish a small business stationary source technical and environmental compliance assistance program, consistent with the provisions of Section 507 of the federal act;
- F. accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, or from any person;
- G. classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution; provided, classifications may be for application to the entire geographical area of the department's responsibility or the local authority's responsibility or to any designated portion of that area and shall be made with special reference to the effects on health, economic and social factors and physical effects on property; and

**INTERROGATORY NO. 13:**

Petitioners, with respect to your Amended Petition filed August 4, 2014, please

list each fact that you contend justifies the Air Board modifying or reversing Permit No. 3136.

**ANSWER:**

Smith's has a history of a poor and almost non-existent public notice which is not in compliance with the Air Quality Board's rules regarding giving legal and proper notice. These rules were changed in January 2014 and Smith's continues to be non-compliant in following the rules despite being chastised by a former board member for only giving legal but not proper notice. Per NMSA 74-2-5.1. The Air Quality Control Act mandates that the Department and local agency **"B. institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board or the local board."**

Further, per NMSA 74-2-12. Enforcement; compliance orders; field citations.

**"A. When, on the basis of any information, the secretary or the director determines that a person has violated or is violating a requirement or prohibition of the Air Quality Control Act, a regulation promulgated pursuant to that act or a condition of a permit issued under that act, the secretary or the director may:**

- (1) issue a compliance order within one year after the violation becomes known by the department or the local agency stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for a past or current violation, or both; or**
- (2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.**

B. An order issued pursuant to Subsection A of this section may include a suspension or revocation of the permit or portion thereof issued by the secretary or the director that is alleged to have been violated. Any penalty assessed in the order shall not exceed fifteen thousand dollars (\$15,000) per day of noncompliance for each violation.

C. An order issued pursuant to Subsection A of this section shall become final unless, no later than thirty days after the order is served, the person named therein submits a written request to the secretary or the director for a public hearing. Upon such request, the secretary or the director shall promptly conduct a public hearing. The secretary or the director shall appoint an independent hearing officer to preside over the public hearing.

The hearing officer shall make and preserve a complete record of the proceedings and forward the hearing officer's recommendation based thereon to the secretary or the director, who shall make the final decision.

1. There is no evidence to support that the EHD attempted to provide notice to individuals residing in the vicinity of the proposed gas station. As shown by the petition, there is in fact public interest in the matter because the EHD knew that there has been significant public interest in other similar permit modifications requested by Smiths at other Albuquerque locations, particularly in high volume and high impact retail gas stations. EHD should have taken additional measures to ensure that notice was provided to residents and business owners in the vicinity of the station.
2. The Albuquerque Air Quality Board held a public hearing in July of 2013 to change the signage requirement and did in fact implement this as of January 1<sup>st</sup>, 2014. It is negligent of the air quality board and Smith's not to have been required to follow the new requirements. Smith's should be cited for non-compliance for not following the new requirements and it is improper conduct for the Air Quality Board to allow them not to follow the new requirements and remain in non-compliance.
3. On 01/09/2013 the Air Quality Board reversed Smith's Permit for the fuel station at Constitution and Carlisle. The resolution stated that the Air Quality Control Board is required to protect the health and welfare of the public. The Air Quality Control Board has a duty of care to protect the health and welfare of the public. Increases in throughput leads to an increased risk to the health and welfare of the public. The quality of life concerns raised by the community could be directly

related to air quality. Allowing the increase of throughput and putting the public's health and welfare at an increased risk demonstrates a breach of their duty and would constitute negligence. The Air Quality Board has a duty to minimize air pollution caused by vehicles to the extent allowed by the Air Act and the Federal Clean Air Act. NMSA 74-2-5-D states that, "The department and the local agency for their respective jurisdictions shall: "consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system or mechanism or the air pollution problem that may be related to the source, device, system or mechanism; provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, regulations in force pursuant to that act or any other provision of law." Further, the Air Quality Board is authorized to prevent or abate air pollution. Permits the board to consider quality of life concerns that are directly or indirectly related to air quality defining air pollution in terms of injury to human health or animal and plant life or interference with public welfare or reasonable use of property.

4. A super volume gas station of 7 million gallons throughput in an already high traffic area and with a marketing system that sells inexpensive gas to attract customers to its station is a combination that will cause the same problems that exist citywide at other current Smith's locations such as Carlisle and Constitution, Lomas and San Pedro, and Tramway and Central. See exhibit 2.

**INTERROGATORY NO. 14:**

Petitioners, with respect to your Amended Petition filed August 4, 2014, please list the citation for each legal authority that you contend would authorize modification or reversal of Permit No. 3136 by the Air Board when applied to the facts that you described in Interrogatory No. 13.

**ANSWER:**

The Air Quality Board's own legal authority that is now the law, that Smith's is appealing but was not granted a stay. See exhibit 3. The decision of the Air Quality Board in the Carlisle case AQCB-2012-1 and 2012-2t provides the basis for the denial of the permit on 4<sup>th</sup> St NW.



**INTERROGATORY NO. 15**

Petitioners, please describe each injury in fact that you contend you will suffer, either to your person or to your property, as a result of the issuance of Permit No. 3136. For your answer to this question, the definition of "injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not hypothetical or conjectural. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 24,130 N.M 368.

**ANSWER:**

Compounded interrogatory requires a legal conclusion as to what defines an injury in fact also see technical information that is already in the record.

**INTERROGATORY NO. 16**

Petitioners, for each “injury in fact” that you described in Interrogatory No. 15, please provide a citation to the legal authority that protects you against the invasion of the legally protected interested that you described.

**ANSWER:**

See Interrogatory No. 5.

NMSA 74-2-5.E Duties and powers; environmental improvement board; local board. States that, “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.

**INTERROGATORY NO. 17**

If any Petitioner answers with anything other than an unqualified admission for any of the Requests for Admissions below, then for each such answer, state every reason, factual or legal, why Petitioners do not admit without qualification.

**ANSWER:**

**REQUESTS FOR ADMISSIONS**

**REQUEST FOR ADMISSION NO. 1:**

Petitioners, please admit that the phrase “by other means if necessary to assure adequate notice to the affected public [ ]” which you have quoted in Section VI of your Amended Petition filed August 4, 2014 is from 20.11.42.13(B)(2)NMAC.

ADMIT  \_\_\_\_\_

DENY \_\_\_\_\_

**REQUEST FOR ADMISSION NO. 2:**

Petitioners please admit that 20.11.42.13(B) (2) NMAC does not apply to Permit No. 3136.

ADMIT \_\_\_\_\_

DENY  \_\_\_\_\_

I object to this request for admission in that it calls for a legal conclusion and therefore deny the same.

**REQUEST FOR ADMISSION NO. 3:**

Petitioners, please admit that, from December 6, 2013 to April 23, 2014, Spanish Walk Homeowners Association was not registered with the City of Albuquerque Office of Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY  \_\_\_\_\_

I the Petitioner object to this request on the grounds that it seeks information that exists in the public domain and is as accessible to the respondents as it is to the Petitioners.

Further per Rule 1-036 NMRA cannot reasonably be interpreted to impose a duty upon myself the Petitioner to investigate this issue on the City's behalf, subject to and without waiving this objection I lack the personal knowledge to admit or deny this request.

**REQUEST FOR ADMISSION NO. 4:**

Petitioners, please admit that, as of August 12, 2014, Spanish Walk Homeowners Association was still not registered with the City of Albuquerque Office of Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY   X  \_\_\_\_\_

I the Petitioner object to this request on the grounds that it seeks information that exists in the public domain and is as accessible to the respondents as it is to the Petitioners.

Further per Rule 1-036 NMRA cannot reasonably be interpreted to impose a duty upon myself the Petitioner to investigate this issue on the City's behalf, subject to and without waiving this objection I lack the personal knowledge to admit or deny this request.

**REQUEST FOR ADMISSION NO. 5:**

Petitioners, please admit that, from December 6, 2013 to April 23, 2014, Spanish Walk Homeowners Association was not registered with Bernalillo County Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY   X  

I the Petitioner object to this request on the grounds that it seeks information that exists in the public domain and is as accessible to the respondents as it is to the Petitioners.

Further per Rule 1-036 NMRA cannot reasonably be interpreted to impose a duty upon myself the Petitioner to investigate this issue on the City's behalf, subject to and without waiving this objection I lack the personal knowledge to admit or deny this request.

**REQUEST FOR ADMISSION NO. 6:**

Petitioners, please admit that, as of the issuance of the August 2014 list distributed by Bernalillo County, Spanish Walk Homeowners Association was still not registered with Bernalillo County Neighborhood Coordination.

ADMIT \_\_\_\_\_

DENY   X  

I the Petitioner object to this request on the grounds that it seeks information that exists in the public domain and is as accessible to the respondents as it is to the Petitioners.

Further per Rule 1-036 NMRA cannot reasonably be interpreted to impose a duty upon myself the Petitioner to investigate this issue on the City's behalf, subject to and without waiving this objection I lack the personal knowledge to admit or deny this request.

**REQUEST FOR ADMISSION NO. 7:**

Petitioners, please admit that Permit No. 3136 allows annual emissions of Volatile Organic Compounds ("VOCs) of 45.5 tons per year.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

Allows much greater emissions if Smith's violates its throughput as it has repeatedly done and can afford to pay the fines that are usually lowered or curtailed.

**REQUEST FOR ADMISSION NO. 8:**

Petitioners, please admit that Permit No. 3136 does not allow the emission of 10 tons per year or more of any single hazardous air pollutant.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

The city has not provided a basis for this request for admission and I deny the same.

**REQUEST FOR ADMISSION NO. 9:**

Petitioners, please admit Permit No. 3136 does not allow the emission of 25 tons per year or more of any combination of hazardous air pollutants.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

The city has not provided a basis for this request for admission and I deny the same.

**REQUEST FOR ADMISSION NO. 10:**

Petitioners, please admit that the public notice provided by the City for Permit No. 3136 complied with the requirements of 20.11.41.14 NMAC (2002),

ADMIT \_\_\_\_\_

DENY \_\_\_X\_\_\_

Calls for a legal conclusion.

**REQUEST FOR ADMISSION NO. 11:**

Petitioners please admit that 20.11.41.14 NMAC (2002) is the only applicable law or rule that required public notice for Permit No. 3136.

ADMIT \_\_\_\_\_

DENY \_\_\_X\_\_\_

The city is in violation of the Air Act at NMSA 1798, 74-2-4-C which requires air quality standards and regulations within Bernalillo County to be not lower than those required by regulations adopted by the State Environmental Board (EIB). For example: As now amended an applicant requesting a new permit application must as of January 2014 follow these public notifications requirements found at 20.11.41.13B NMAC. See exhibits 2 and 2A.

**REQUEST FOR ADMISSION NO. 12:**

Petitioners, please admit that Colonias Dev. Council v. Rhino Enviro. Services, 2005-NMSC-024, 138 N.M. 133 which you cite in your Amended Petition filed August



4, 2014 is a case which analyzed the requirements of the Solid Waste Act and its implementing regulations.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

The focus of Colonias Dev. Council v. Rhino was much broader than just the analysis of the requirements of the Solid Waste Act, it went into much wider discussion of public participation and the cumulative effort of the proliferation of landfills and other industrial sites on a community quality of life.

**REQUEST FOR ADMISSION NO. 13:**

Petitioners, please admit that the Solid Waste Act and its implementing regulations do not apply to the issuance of Permit No. 3136.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

Calls for a legal conclusion.

**REQUEST FOR ADMISSION NO. 14:**

Petitioners, please admit that Permit No. 3136 meets all statutory requirements of the Clean Air Act, 42 U.S.C §§ 7401 to 7671q, and meets all regulations promulgate pursuant to the Clean Air Act.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

Calls for a legal conclusion.

**REQUEST FOR ADMISSION NO. 15:**

Petitioners, please admit that Permit No. 3136 meets all statutory requirements of the Air Quality Control Act, NMSA 1978, §§ 1 to -22, and meets all regulatory requirements promulgated pursuant to the Air Quality Control Act.

ADMIT \_\_\_\_\_

DENY \_\_\_X\_\_\_

Calls for a legal conclusion.

**REQUEST FOR ADMISSION NO. 16:**

Petitioners, please admit that the largest throughput volume previously permitted for a fuel station by the City's Air Quality Program is 15,000,000 gallons of gasoline per year.

ADMIT \_\_\_\_\_

DENY \_\_\_X\_\_\_

The city has not provided any basis for this request for admission and I therefore deny the same.

**REQUEST FOR ADMISSION NO. 17:**

Petitioners, please admit that the City's Air Quality Program has lawfully permitted a throughput of 438 million gallons of gasoline for Vecenergy Gasoline Terminal in the South Valley.

ADMIT \_\_\_\_\_

DENY \_\_\_X\_\_\_

The city has not provided any basis for this request for admission and I therefore deny the same..

**REQUEST FOR ADMISSION NO. 18:**

Petitioners, please admit that no law or rule allows the City Air Quality Program or the Air Board to deny a permit to Smith's based on its past compliance history.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

Calls for a legal conclusion.

**REQUEST FOR ADMISSION NO. 19:**

Petitioner Pat Toledo, please admit that you will suffer no injury in fact as the result of the issuance of Permit No. 3136. For your answer to this question, the definition of "injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not hypothetical or conjectural. Forest Guardians v. Powell, 2001-NMCA-028, ¶ 24, 130 N.M. 368.

ADMIT \_\_\_\_\_

DENY X \_\_\_\_\_

Compounded interrogatory.

*and calls for a legal conclusion*

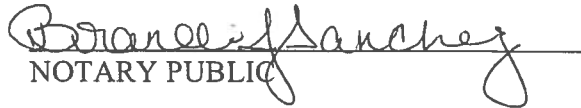
STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF BERNALILLO )

I, Pat Toledo, being first duly sworn, upon my oath, state that my answers to the City's Interrogatories are true and correct.



PAT TOLEDO

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 9<sup>th</sup> day of September, 2014, by Pat Toledo.

  
NOTARY PUBLIC

My Commission Expires:  
2/13/16



OFFICIAL SEAL  
Brandi J. Sanchez  
NOTARY PUBLIC-STATE OF NEW MEXICO  
My commission expires: 2/13/16

97631



Exhibit 1  
pat toledo <pinkopatricks@gmail.com>

## Fwd: News from City of Albuquerque

1 message

MARY ANN ROBERTS <rockingr6940@cs.com>  
To: pinkopatricks@gmail.com

Mon, Aug 4, 2014 at 3:21 PM

Hi Pat. This is the email I got from the city. It probably won't do us any good, but at least we have actual effective dates on these changes.  
Mary Ann Roberts

—Original Message—

From: City of Albuquerque Email Services <aqd@cabq.gov>  
To: rockingr6940 <rockingr6940@cs.com>  
Sent: Fri, Dec 13, 2013 8:16 am  
Subject: News from City of Albuquerque

# City of Albuquerque

## Environmental Health Department

Mary Lou Leonard, Director

### Part 41 Implementation

## REMINDER

To Facility Contact or Whom It May Concern:

This letter is to remind you of the policy changes to 20.11.41 NMAC that will go into effect **beginning January 1, 2014**. 20.11.41 NMAC applies to every person who intends to construct, operate, modify, relocate, or make a technical revision to a source that is subject to 20.11.41 NMAC. The new policy changes concern those who are seeking an air quality construction permit. Relevant changes regarding permit applications have been listed below. These changes will be made available, outlined in full, on our website at <http://www.cabq.gov/airquality>:

#### 20.11.41.13 Application for Permit

A. **Pre-application requirements:** A person who is seeking a permit pursuant to 20.11.41 NMAC shall contact the department in writing and request a pre-application meeting for information regarding the contents of the application and the application process.

**B. Applicant's public notice requirements:** Before the applicant submits the application, the applicant shall comply with the public notice requirements:

a. Prior to submitting the application, the applicant must provide public notice by certified mail or electronic mail to the designated representative(s) of the recognized neighborhood associations and recognized coalitions that are within one-half mile of the exterior boundaries of the property.

b. Prior to submitting the application, post and maintain a weather-proof sign provided by the department, posted at the proposed or existing facility entrance.

In summary, in order to apply for an air quality construction permit, a pre-application meeting with the Air Quality Program of the Environmental Health Department is now **required**. The meeting will include an overview of all relevant changes to 20.11.41 NMAC in addition to covering the application requirements and process. Additionally, the applicant must notify the relevant neighborhood associations of intent, as well as posting a sign of public notice provided by the department. **Again, these policy changes will go into effect January 1, 2014.**

If you have any questions, please contact the Environmental Health Department at **(505) 768-1972** or [aqd@cabq.gov](mailto:aqd@cabq.gov).

Sincerely,

Israel Tavaréz,  
Environmental Health Manager-Air Quality Program  
Environmental Health Department  
City of Albuquerque

Mailing address: P.O. Box 1293, Albuquerque, NM 87103

Physical address: 3rd Floor, Suite 3023 or Suite 3047 - One Civic Plaza NW, Albuquerque, NM 87103  
**(505) 768 - 1972** [aqd@cabq.gov](mailto:aqd@cabq.gov) **(505) 768 - 1977** (Fax)

This email was sent to [rockingr6940@cs.com](mailto:rockingr6940@cs.com) by [aqd@cabq.gov](mailto:aqd@cabq.gov) |  
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

City of Albuquerque | One Civic Plaza NW | Albuquerque | NM | 87102

Exhibit 2

June 26, 2013

RECEIVED  
ENVIRONMENTAL HEALTH

13 JUL -2 AM 10:54

Ms. Elizabeth Jones  
Albuquerque Bernalillo County Air Quality Control Board  
City of Albuquerque  
Environmental Health Department  
P.O. Box 1293  
Albuquerque, NM 87103

**RE: SUBMITTAL OF NON-TECHNICAL TESTIMONY – PETITION TO AMEND  
20.11.41 NMAC AUTHORITY TO CONSTRUCT**

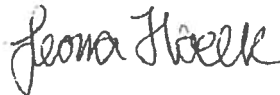
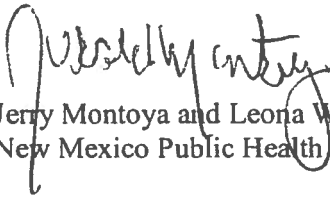
Dear Ms. Jones:

On behalf of the New Mexico Public Health Association, we respectfully submit the enclosed non-technical testimony for the July 10, 2013 AQCB hearing regarding amendments to 20.11.41 NMAC *Authority to Construct*.

Please see the attached non-technical testimony, along with 15 copies, that have been prepared in accordance with the provisions of 20.11.82.22 NMAC. Per the *Notice of Hearing and Meeting* published in the Albuquerque Journal on May 19, 2013, we understand that our written non-technical testimony will be placed into the public record if received prior to 5:00 p.m. on July 3, 2013.

If you have any questions regarding our written testimony, please do not hesitate to contact us at (505) 681-2727.

Sincerely,



Jerry Montoya and Leona Woelk, Co-Presidents  
New Mexico Public Health Association

Members of the Board  
New Mexico Public Health Association

Enclosures (1 original and 15 copies)

## Non-Technical Testimony on Behalf of the New Mexico Public Health Association

### Regarding Amendments to Current 20.11.41 NMAC *Authority to Construct* as Proposed in "20.11.41 NMAC 2<sup>nd</sup> Amended Public Review Draft 4/23/13"

The New Mexico Public Health Association is dedicated to improving the health and well-being of our residents and to ensuring our residents are well informed and can fully participate in environmental and health decisions that directly affect them and their neighborhoods.

On the face of the language contained in the *Notice of Hearing and Meeting* published in the Albuquerque Journal on May 19, 2013 it appears the City's Environmental Health Department is attempting to strengthen the public notification and participation requirements; however, when comparing the 20.11.41 NMAC 2<sup>nd</sup> Amended Public Review Draft 4/23/13 (hereinafter referenced as "amended draft") with the state's Construction Permit Regulation (found at 20.2.72) it appears the proposed amendments favor applicants through language that provides for: 1) accelerated reviews, 2) shorter timelines for Department decisions on permit applications, 3) life-time permits, and 4) public notification alternatives for campus-like facilities and facilities having large boundaries, at the expense of public participation by decreasing rather than increasing public notification and public comment requirements.

We believe that economic development can be stimulated while providing for the public notification/participation rights of our residents and protecting the environment. In other words, responsible economic development and healthy neighborhoods do not present an "either or" scenario, but rather a "best of" scenario.

Although the City's Environmental Health Department states in the *Notice of Hearing and Meeting* they are amending 20.11.41 NMAC *Authority to Construct* to achieve further alignment with the state's Construction Permit Regulation, we feel the language provided in the amended draft is less stringent than the state's Construction Permit Regulation and is in violation of the Air Act at NMSA 1798, 74-2-4.C (1967 as amended through 2009) which requires air quality standards and regulations within Bernalillo County to be "not lower than those required by regulations adopted by the state Environmental Improvement Board (EIB)."

Following is an example, pulled from a comparison of the state's Construction Permit Regulation and the amended draft, demonstrating the concerns mentioned above:

#### Example:

As proposed in the amended draft, an **applicant** requesting a new or modified permit application, must follow these public notification requirements (found at 20.11.41.13.B NMAC):

- 1) copy of public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 2) post and maintain a weather proof sign at a visible location at the site or the proposed site.



As proposed in the amended draft, the City must follow these public notification requirements (found at 20.11.41.14.B NMAC):

- 1) publish public notice in the newspaper of largest circulation with 30 days for public comments to be submitted,
- 2) send a copy of the public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 3) provide notice to all individuals and organizations on the list maintained by the City's Environmental Health Department.

By contrast, the state's Construction Permit Regulation requires **applicants** for permits or significant permit revisions to perform the following public notification requirements:

- 1) notification by certified mail of property owners within 100 feet of the property on which the facility is located or proposed to be located, if the facility is in a Class A county (Bernalillo County is a Class A county) (20.2.72.203.B.1.a),
- 2) notification by certified mail to all municipalities and counties in which the facility is or will be located and to all municipalities, Indian tribes, and counties within a ten mile radius of the property on which the facility is or is proposed to be constructed or operated (20.2.72.203.B.2),
- 3) notification through publication once in a newspaper of general circulation in the county in which the property on which the facility is or is proposed to be constructed or operated. This notice shall appear in either the classified or legal advertisements section of the newspaper and at one other place in the newspaper calculated to give the general public the most effective notice, and, when appropriate, shall be printed in both English and Spanish (20.2.72.203.B.3),
- 4) notification through signage at 4 publicly accessible and conspicuous places, including the proposed or existing facility entrance on the property on which the facility is, or is proposed to be, located, until the permit or significant permit revision is issued or denied, and 3 locations commonly frequented by the general public, such as nearby post office, public library, or city hall (20.2.72.203.B.4.a-b),
- 5) notification through public service announcement to at least one radio or television station serving the municipality or county in which the source is or is proposed to be located and containing information outlined in 20.2.72.203.D.1-5 (20.2.72.203.B.5).

Further, the state's Construction Permit Regulation requires the respective agency (e.g., City's Environmental Health Department) to perform the following notification requirements (20.2.72.206):

- 1) all individuals and organizations identified on a list maintained by the Department of those who have indicated in writing a desire to receive notices, and
- 2) mail a copy of the public notice at the time it is sent for publication to the appropriate county (e.g., Bernalillo County).

While we recognize the intent of the City is to save the applicant expense and the City money, public notification/public participation is not the appropriate area for these cost savings. The language in the state's Construction Permit Regulation is far more inclusive of adjacent property owners and the general public, many of whom may not belong to a neighborhood association

(many of which meet only annually to keep their status) or neighborhood coalition, do not read the paper on a daily basis, and are not on the City's Environmental Health Department list.

To ensure the fullest possible public participation, we request the public notification requirements in the amended draft be consistent with the state's Construction Permit Regulation, as stated in 20.2.72.203 and 20.2.72.206 NMAC. Additionally, we request these public notification requirements be applied for the following types of permit applications: technical permit revisions, permits, permit modifications, temporary permits, general permits, and permits for campus-like facilities and facilities having large boundaries.

The New Mexico Public Health Association encourages the City to retain the language of 20.11.41 NMAC *Authority to Construct* as it pertains to the time periods for public comment on permit applications, requests for public information hearings, accelerated application reviews, and general construction permits.

Specifically, we request the following:

- 1) Providing all interested persons with at least 45 days to submit written comments, evidence, or to request a public hearing on the permit application (20.11.41.14.A.4 of NMAC *Authority to Construct*), and, if a person expresses in writing an interest in the permit application, providing 45 days (rather than the 30 days as proposed in the amended draft at 20.11.41.14.C NMAC, 20.11.41.14.B.2.f NMAC) **after the Department's analysis is available** to submit written comments and to request a public information hearing. Recognizing the very technical nature of air quality permitting and regulatory processes, we believe the original 45 day period is more appropriate and will provide residents with the time necessary to learn more about the proposed operations and to garner technical and legal expertise, if necessary.
- 2) No provision for accelerated reviews of permit applications as occurs in 20.11.41 NMAC *Authority to Construct*. We feel that an accelerated review will further decrease opportunities for meaningful public participation and may introduce bias into the permit approval process due to possible conflicts of interest given the small universe of environmental consultants within New Mexico.
- 3) No provision for general construction permits as occurs in 20.11.41 NMAC *Authority to Construct*. The geographic characteristics of Bernalillo County and Albuquerque are quite different from the state, with a predominantly urban setting. While a single permit for facilities having similar operations, processes and emissions may make sense for a state that is largely open and rural, it can have a deleterious impact on residents living in more densely populated urban areas and within closer proximity to these facilities.
- 4) No provision for alternative public notification requirements for campus-like facilities and facilities having large boundaries (draft amendment – 20.11.41.13.B.1). As mentioned above, we believe that permits for these types of facilities should follow the public notification requirements outlined in the state's Construction Permit Regulation at 20.2.72.203, particularly since these types of facilities cover more acreage and are more likely to impact a greater number of people living in the surrounding communities.

In terms of Department permitting decision making processes, we also request that final action on an application be made by the Department within 120 days, or 180 days if a public hearing

has been called, from the date the application was ruled complete rather than the proposed 90 day time period stated in the amended draft (20.11.41.16.B NMAC).

Finally, and perhaps most importantly, although potential applicants would undoubtedly favor the proposed language provided in the amended draft to not have an expiration date or renewal date for authority to construct permits, we believe it is irresponsible to issue life-time permits and request the re-insertion of proposed language for a 10-year permit term as stated in 20.11.41 NMAC 1<sup>st</sup> Amended Public Review Draft for Stakeholder Review 7/18/12 at 11.41.19, subsection E of 20 NMAC, for the following reasons:

- 1) life-time permits provide residents with only one opportunity to participate in the permitting process,
- 2) life-time permits could contribute to an “out of sight out of mind” mentality on behalf of the City’s Air Quality Division in terms of enforcement and review,
- 3) life-time permits could decrease the accountability of the facility’s owner to the impacted community, and
- 4) life-time permits provide little protection for impacted residents should cumulative impacts increase and neighborhood conditions change.