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

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

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

No. AQCB 2014-3

TOLEDO'S RESPONSE IN OPPOSITION
TO SMITH'S MOTION TO DISMISS FOR LACK OF STANDING

COMES NOW Pat Toledo ("Toledo"), by and through undersigned counsel of record, and hereby submits his Response in Opposition to Smith's Motion to Dismiss for Lack of Standing. Toledo respectfully request that, for the following reasons, the Board deny Smith's Motion to Dismiss him from this action,

INTRODUCTION

A. Standard of Review for Motion to Dismiss based on standing.

For purposes of ruling on Smith's motion to dismiss based on an alleged lack of standing, all material allegations in the Petition for Hearing must be accepted as true and the Petition for Hearing must be construed in favor of the Petitioners. *Protection & Advocacy System v. Albuquerque,* 2008-NMCA-149, ¶17, 145 N.M. 156. In addition, the Board should allow additional evidence from the Petitioners in support of standing. *Id.* If, after providing the Petitioners with the opportunity to add evidence to the record, the Petitioners' standing "does not adequately appear from all materials in the record," only then may the Petition for Review be dismissed. *Id.*

B. Toledo is adversely affected by the refusal of the Environmental Health Department ("EHD") to give weight to threatened quality of life concerns at the Public Information Hearing ("PIH") hearings including but not limited to increased VOCs, odors, fumes, increased traffic, pollution and other adverse health impacts.

In the Petition for Hearing, Toledo states, he has broad public standing in this action. Amended Petition, p.3 Further, Toledo took part in and alleges that the PIH hearings conducted on March 25 and April 23, 2014 failed to consider the public comments which were in opposition to the proposed permit in total. *Id.*, p.4. The fact that Smith's submitted signatures in favor of the permit without detailed address information shows that the EHD did not give any weight to members of the public, including Petitioners, that live adjacent to the proposed gas station. *Id.*, p.3. Smith's submission of signatures from the public at large reinforces the notion that broad public standing is applicable in this matter.

The question raised by Smith's Motion to Dismiss is whether Toledo qualify as a person who is "adversely affected" by the Department's decision in issuing Permit No. 3136. 72-2-7(H) NMAC; 20.11.81.2 NMAC (Air Quality Control Board Adjudicatory Procedures). Smith's concedes Toledo does so qualify in its motion when it states, "*Complainants who wish to challenge a permit decision must meet two criteria in order to have standing under the Act: (1) they must have participated in the permitting action, and (2) they must be adversely affected by the permitting action.... As explained below, Toledo cannot meet the second factor of being adversely affected.*" Motion, p. 4.

Neither the New Mexico Air Quality Act ("AQCA") nor the Air Quality Control Board regulations define the term "adversely affected by the permitting action." But the Air Board provided guidance when it found Toledo had standing under *In Re Air Quality Permit* No. 1677-M2. There has not been a final ruling by the New Mexico appellate courts on the meaning of

"adversely affected" as the term is used in a number of statutory provisions, including the Air Quality Act. The New Mexico Court of Appeals recently issued a decision interpreting similar language in the Water Control Act, which is being reviewed by the New Mexico Supreme Court. *New Mexico Cattle Growers' Assoc. v. NMWQCC, et al.*, 2013-NMCA-006; *certiorari granted* March 29, 2013, No. 34,010. The Court of Appeals analogized the "adversely affected" requirement to the injury-in-fact requirement of standing, which is also the approach taken by Smith's.

The question of whether a party is "adversely affected" by agency action does not go to the merits of the petition for review but to the question of whether the party requesting review has a "genuine and legitimate interest" in the outcome of the issue being reviewed. *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1323 (S.Ct. 1975)("the purpose of the standing question is quite distinct-to protect against improper plaintiffs"). The focus is on the party seeking to get his complaint heard, not on the issues that are to be decided by the appeal. *Id.* A petitioner challenging governmental action need only "allege that he is injured in fact or is imminently threatened with injury, economically or otherwise." *Id.* at 473 (emphasis added).

Once the party seeking review alleges that he is, or will be, adversely affected by the agency action, the extent of injury can be very slight. *Id.* at 472; *ACLU of New Mexico v. City of Alb.*, 2008-NMSC-045, ¶11, 144 N.M. 471. "An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Ramirez v. City of Santa Fe,* 115 N.M. 417, 420, 852 P.2d 690 (quoting *United States v. SCRAP,* 412 U.S. 669, 689-90, 93 S.Ct. 2405 (1973)). In the SCRAP case, five law student protesters sued to contest the Interstate Commerce Commission's decision not to suspend

a surcharge on certain freight rates. *Id.* As the New Mexico Court of Appeals explained, "the attenuate harm the plaintiffs alleged, which was sufficient to fulfill the federal injury in fact requirement for standing, was simply that the rate increase would cause economic, recreational, and aesthetic harm due to an increase in the use of non-recyclable goods. This in turn would negatively impact upon the environment." *Id.*

The injury does not have to be an economic injury but can be aesthetic and environmental well-being, which are recognized as "important ingredients of the quality of life in our society, and the fact that such interests are shared by the many rather than the few does not make them less deserving of legal protection." *De Vargas*, 87 N.M. at 474; *Ramirez,* 115 N.M. at 421 (the injury in fact or imminent threat of injury can include concerns about increased traffic, crime, pollution, detrimental effects on aesthetics of an area, intensification of traffic hazards at street intersections, changes in the nature of a neighborhood). Similarly, the right to public participation in governmental permitting actions is recognized as important by both the Legislature and the Courts and, like aesthetic, quality of life, and environmental concerns, is deserving of legal protection. *See Colonias Dev. Council v. Rhino Environmental Services,* 2005-NMSC-024, ¶¶2, 21, 138 N.M. 133; *Martinez v. Maggiore,* 2003-NMCA-043, ¶15, 133 N.M. 472.

In *Martinez v. Maggiore*, residents of Wagon Mound appealed a final order from the Secretary of the New Mexico Environment Department (NMED) granting a modification to the an existing landfill permit. 2003-NMCA-043, ¶15, 133 N.M. 472. The basis for the appeal was improper notice. On appeal, NMED claimed that the community members lacked standing because they had not shown that they were "adversely affected" by the Landfill's failure to properly publish notice. In holding that the community members had standing, the Court of

Appeals stated that the Solid Waste Act "reflects a Legislative policy favoring involvement of the general public in the permitting process" and that "this policy was frustrated by the Landfill's failure" to provide proper notice. *Id.* The Court found that the appellants were proper persons to raise issues of public notice because (1) they had shown how their quality of life as residents of Wagon Mound would be adversely affected by the permitting action; (2) the appellants and the absent opponents of the Landfill (who were absent because of the failure to provide proper public notice) "share an important interest in insuring that modifications to Landfill's permit do not adversely affect the quality of life in Wagon Mound; (3) the absent opponents of the application were hindered in participating in the permitting process because of the failure to provide proper public notice. The Court found that the appellants had standing to assert that the Landfill did not provide proper public notice. *Id.* at ¶19.

In order to determine standing, the Board is required to focus on Toledo and not on the substance of his petition. The specific injury alleged in this matter is the failure of the Air Program to give any weight to the negative cumulative impacts the proposed fuel dispensing station would have 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 at the PIHs held in March and April, 2014. As stated in the Petition,

"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." *Id.* pgs-7-8.

Further discovery in the case shows that Toledo visits and runs in the neighborhood on a routine basis and is also considering buying the property in the neighborhood where Smith's intends to build the station. Upon information and belief, Smith's cannot show it owns the parcel and

cannot show it has any offer to buy it. Smith's in fact has no 'concrete" interest by its own argument tha,t "[b]eing interested in purchasing the property is obviously not the same as owning it." Motion, p.6. Smith's claims of lack of concrete injury are without merit as it is established that threated injury "however slight" is enough to satisfy standing. *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 472-473, 535 P.2d 1320, 1323 (S.Ct. 1975); *ACLU of New Mexico v. City of Alb.,* 2008-NMSC-045, ¶11, 144 N.M. 471.

Further, the Air Board should determine Toledo has standing simply as a citizen of Albuquerque. Smith's does not cite to any statutory or regulatory provision in support of limiting standing to a given mile radius or any other geographical area. In fact, by attempting to limit standing to persons who either own property or live within a specific geographical area, Smith's is relying on the older, formulistic notion that standing requires the invasion of a "legally protected interest," which was rejected in *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1323 (S.Ct. 1975). *ACLU of New Mexico v. City of Alb.,* 2008-NMSC-045, ¶11, 144 N.M. 471. The Court in *Ramirez* reiterated that the standing requirements set forth in *De Vargas* apply to any claims "arguing the unlawfulness of governmental action." 115 N.M. at 421. "There is no presumption against judicial review and in favor of administrative absolutism...unless that purpose is fairly discernible in the statutory scheme." *Id.* (quoting *De Vargas*, 87 N.M. at 473). In this case, both NMSA §74-2-7.H 20.11.81.2 NMAC demonstrate the intent that the participants in the permitting action be able to obtain review by the Board of the Department's action.

The possible adverse effects that Toledo has identified that may result from the permitting action are more than the "identifiable trifle" that is required for standing. Interestingly, Smith's states that "there is no hindrance to the ability of any citizen of

Albuquerque who participates in a permitting action to challenge the issuance of a minor stationary source permit such as Permit No 3136." Motion, p 8. Based on this statement alone, Mr. Toledo has standing, as citizens of Albuquerque, to challenge the issuance of Permit No. 3135, which he has done. Additionally, Toledo has been adversely affected by the permitting action in this matter and more than meets the minimal requirements for showing an injury in fact. Therefore, Smith's Motion to Dismiss must be denied.

C. Toledo will provide testimony and other evidence in support of their standing at the dispositive motion hearing scheduled for October 22, 2014.

The Board has scheduled to hear Smith's Motion to Dismiss on October 22, 2014. As stated in *Protection& Advocacy System v. Albuquerque,* Toledo should be given the opportunity to supplement the record in support of his standing. The Petitioners may present testimony and evidence at the October 22, 2014 hearing, including direct testimony by Mr. Toledo. The Petitioners may also call representatives of Smith's and the City as witnesses.

CONCLUSION

WHEREFORE, for all the foregoing facts, circumstances and authorities, Toledo respectfully request that the Board deny Smith's Motion to Dismiss for lack of Standing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing with attachments was e-mailed to counsel for the City of Albuquerque and Smith's Food & Drug Centers, Inc. on the 20th day of October, 2014.

I further certify that a true and correct copy of the same was e-mailed to the Hearing Officer and that requisite hard copies of the same were hand delivered to the hearing clerk on October 20th, 2014.

Pete V. Domenici, Jr., Esq.