

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

**IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
NO. 3131**

AQCB No. 2014-4

*Southwest Organizing Project [SWOP]
By Juan Reynosa, Environmental Justice Organizer;
Esther and Steven Abeyta, Members of SWOP, Petitioners*

**MOTION AND BRIEF OF THE
ENVIRONMENTAL HEALTH DEPARTMENT AIR QUALITY PROGRAM TO
RESOLVE THE MERITS OF THE PETITION
USING SUMMARY PROCEDURES OR,
IN THE ALTERNATIVE,
BY SUMMARY JUDGMENT**

In its petition (“Petition”), the Southwest Organizing Project (“SWOP”) challenges the decision of the Environmental Health Department (“EHD”) Air Quality Program (“Program”) to issue an air quality permit to the Honstein bulk gasoline plant (“Honstein Permit” aka “Permit No. 3131”). The SWOP Petition is based on a faulty legal premise.

SWOP does not dispute the facts on which EHD relied to issue Permit No. 3131. Instead, SWOP is attempting, through its Petition, to persuade the Air Board to impose a standard on the Honstein Permit that is an iteration of the controversial rule that SWOP sought a year ago.

Petition to Amend Title 20, Chapter 11 of the New Mexico Administrative Code to Require Review and Consideration of Cumulative Air Impacts, AQCB 2014-1 (Jan. 27, 2014) (“SWOP

RECEIVED
ENVIRONMENTAL HEALTH
MAY 18 PM 4:38

Rulemaking Petition”). The Air Board declined to adopt SWOP’s proposed rule by order dated March 21, 2014. *SWOP Rulemaking Petition, Order Denying Hearing*, AQCB 2014-1 (Mar. 21, 2014). Thus, neither SWOP’s proposed rule nor any iteration of it applies to EHD’s issuance of the Honstein Permit.

In its Petition, SWOP seeks two remedies: First, rescission of the Honstein Permit until a cumulative impact assessment is conducted; second, if the Honstein Permit is issued, imposition of a condition requiring Honstein to continuously monitor to assure that no exceedances of Clean Air Act standards occur. Petition, p. 5. The legal authority that SWOP cites as support for its Petition does not, in fact, support it and does not justify the relief SWOP seeks. SWOP’s Petition can be resolved as a matter of law. The Air Board should sustain the Honstein Permit either through consideration of the Petition using the Air Board’s Summary Procedures or through Summary Judgment.

EHD moves the Air Board to resolve the merits of the Petition under Section 20 (Summary Procedures) and, in the alternative, Section 12 (using Rules of Civil Procedure for guidance, specifically Rule 1-056 NMRA) of Part 81. EHD moves the Air Board for two rulings in the alternative because two recent Air Board decisions using summary judgment are being challenged at the Court of Appeals. AQCB 2014-2 (Smith’s Gas Station at Louisiana and Montgomery); AQCB 2014-3 (Smith’s Gas Station at Fourth Street). While EHD is confident that the Air Board’s Adjudicatory Rules allow motions for summary judgment, the allegations in the SWOP Petition can be resolved using either the Air Board’s summary procedures rule or summary judgment, so EHD is making its Motions based on two alternative theories in the interests of administrative efficiency.

If the Air Board denies one or both of these Motions, EHD reserves the right to challenge any of the facts in the SWOP Petition and the SWOP NOI at any full merits hearing that may be held. As support for its motions, EHD states the following.

I. PROCEDURAL BACKGROUND

On June 12, 2014, EHD issued an air quality permit (“Honstein Permit” aka “Permit No. 3131”) to Honstein Oil & Distributing LLC (“Honstein”). AR 67, Bates No. 195-198. Over July 14-16, 2015, EHD provided public notice of its issuance of Permit No. 3131. AR 70-72, Bates No. 212-259. On August 12, 2014, SWOP timely filed a Petition seeking a hearing (“Hearing”) before the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) objecting to EHD’s issuance of Permit No. 3131. SWOP Petition (Aug. 12, 2014). On August 20, 2014, SWOP waived the 30-day deadline for the Hearing. Letter from Jon Block, Staff Attorney, New Mexico Environmental Law Center to Andrew Daffern, Air Quality Control Board Liaison (Aug. 20, 2014). The Hearing was initially set on February 18 and 19, 2015, Prehearing Order (Nov. 10, 2014) and re-set on May 13 and 14, 2015, Revised Prehearing Order (Dec. 19, 2014). Deadlines for statements of intent were established and noticed by mail and by publication. *See, e.g.*, Revised Prehearing Order (Dec. 19, 2014) (setting a deadline of April 8, 2015 for filing entries of appearance; setting a deadline for statements of intent by persons opposing the permit of April 8, 2015; setting a deadline for statements of intent for persons supporting the permit of April 29, 2015); *and* Affidavit (Mar. 26, 2015). No additional entries of appearances were received. *See* Docket.

On April 8, 2015, SWOP filed a statement of intent (also called “Notice of Intent” or “NOI”) (“SWOP’s NOI”) with the full narrative testimony of three witnesses expected to provide five hours of direct testimony. SWOP’s NOI (Apr. 8, 2015). On April 29, 2015, EHD submitted a statement of intent (“EHD’s NOI”) with the full narrative testimony of four witnesses. EHD’s NOI (Apr. 29, 2015). Because the deadlines for filing statements of intent and entries of appearances have now passed and no additional persons other than parties submitted statements of intent, there are three parties in this proceeding as of April 29, 2015: SWOP, EHD and the Applicant, Honstein. 20.11.81.7(N) NMAC.

II. MOTION TO RESOLVE THE MERITS OF THE PETITION THROUGH THE USE OF SUMMARY PROCEDURES

A) The Summary Procedures Rule

EHD moves the Air Board to resolve the merits of the Petition through the use of summary procedures. 20.11.81.20(A) NMAC. The Air Board’s Adjudicatory Rules provide a process to decide the merits of a petition after an expedited public hearing “if a party makes a written request...to decide the merits of the petition solely on legal arguments presented in written briefs and oral arguments.” 20.11.81.20(A) NMAC. EHD requested the use of summary procedures by motion on April 29, 2015.

The summary procedures rule refers to “decid[ing] the merits of the petition solely on legal arguments.” 20.11.81.20(A)(1) NMAC [emphasis added]. Thus, the summary procedure rule is based on the petition, and it must assume its facts are true because its merits are resolved solely on legal arguments. Therefore, it is similar to a motion to dismiss under the Rules of Civil Procedure. Rule 1-012(B)(6) NMRA; see *Sanders v. Estate of Sanders*, 1996-NMCA-102, ¶ 6,

122 N.M. 468 (“Because a motion to dismiss addresses only the legal sufficiency of a complaint, both the trial and reviewing courts assume the veracity of all properly pleaded allegations in the complaint.”) However, this interpretation creates some tension with subsection 20(A)(2)(a).

That subsection requires the Air Board, prior to considering the merits of a petition using summary procedures, to give persons other than parties an opportunity to submit a statement of intent if they wish to participate in the oral argument. *See* 20.11.81.14(H) NMAC (requiring a statement of intent for a person who wishes to submit technical testimony); and 20.11.81.7(T) NMAC (defining technical evidence). It is inconsistent to require submission of technical testimony when the merits of the petition are being resolved solely based on legal argument.

20.11.81.20(A)(1) NMAC. Under the Rules of Civil Procedure, if matters beyond the pleadings (like technical testimony) were considered, a motion to dismiss would be converted to a motion for summary judgment. Rule 1-012(C); *Sanchez v. Church of Scientology*, 1993-NMSC-034, ¶ 16, 115 N.M. 660.

However, if the summary procedures are analogous to motions for summary judgment, it is striking that the summary procedures rule contains no language directing the Air Board to deny the motion if there is a genuine dispute of material fact. This is a threshold issue in summary judgment practice. 20.11.81.12(A) NMAC; Rule 1-056(C) NMRA.

A different purpose for requiring the Air Board to provide an opportunity for a statement of intent becomes apparent if the summary procedures rule is analyzed in the context of the hearing deadlines anticipated when the Air Board adopted the rule. The Air Act requires the Air Board to hold a hearing within sixty days of the filing of the petition. NMSA 1978, § 74-2-7(I). The Air Board’s rules applicable here require the petition to be heard within thirty days.

20.11.81.7(A-B) NMAC; *and* 20.11.41.15(F) NMAC (2002).¹ The opportunity to submit a statement of intent may have been provided to assure that all persons participating are identified before a final decision on the merits of a petition is made. NMSA 1978, § 74-2-7(I) (requiring a “reasonable opportunity” for the public to submit views or arguments orally or in writing). This allows the Air Board to learn the identity of any other participants in order to give them the required “reasonable opportunity” to participate in oral argument before the merits of a petition are resolved.² This interpretation resolves the otherwise inconsistent requirement to submit technical testimony to participate in arguments where that testimony will not be considered.

Because the summary procedures rule is based on the petition and legal issues only, EHD assumes below, for the purposes of the Motion to Resolve the Merits of the Petition using Summary Procedures only, that the Petition’s allegations are true.

B) SWOP’s Petition

The Honstein Permit, Petition, Ex. A, describes the activity occurring at the Honstein facility: it is a bulk gasoline plant, with an underground storage tank of 6,000 gallons, which is equipped with Stage I vapor balance and submerged filling, contains regular unleaded gasoline, is limited to annual emissions of 2.26 tons per year of volatile organic compounds, and is limited to emissions during gasoline loading of 1.15 pounds of VOCs per 1,000 gallons of gasoline

¹ As explained above, Petitioner waived these deadlines.

² In this case, deadlines were established for submissions of NOI’s but only SWOP and EHD submitted them—no other parties entered appearances. (Honstein is defined as a party notwithstanding its failure to submit a notice of intent. 20.11.81.7(N) NMAC.) Thus, the requirement to provide an opportunity to submit a statement of intent was offered but no one else elected to submit one.

loaded. SWOP's Petition does not allege any contrary facts about the activities conducted at the Honstein Facility. Instead, SWOP alleges that EHD should have considered "the health and safety of the affected community given the cumulative impacts on air quality from industrial facilities in the South Valley, particularly the San Jose community..." The Petition continues in a similar vein to allege that EHD did not assess cumulative impacts, did not consider impacts on quality of life in the San Jose community, and failed to take investigative steps to assess the impacts of continued permitting of facilities such as Honstein's upon the quality of life of persons living in proximity to the facility. SWOP Petition, pp. 3-4. The first question the Air Board should ask is, what law, if any, required EHD to consider cumulative impacts? The answer is none.

C) SWOP's Petition is legally unsound.

SWOP knows that an analysis of cumulative impacts of air quality permitting is not required. Based on its knowledge that this analysis was not required under current laws, SWOP advocated for a bill before the New Mexico Legislature in the 2013 Session to require it. Consolidated Environmental Review Act, HB 458, 2013 Legislative Session; *and see* Breathe In New Mexico, San Jose Air Quality Report at p. 9 available at: <http://www.swop.net/> (describing Petitioner's efforts to require consideration of cumulative impacts in environmental permitting through support of HB 458 as well as a similar bill in the 2009 legislative session) ("*Cumulative impacts are not considered by regulatory bodies*, which is how San Jose can become infested with overbearing industry presence.") [Emphasis added.]

After HB 458 was defeated,³ SWOP petitioned the Air Board to adopt a rule requiring monitoring and cumulative impact analysis of the “anticipated environmental and public health impacts [a permitted activity] ... is likely to have when combined with existing and reasonably foreseeable emissions.” Petition, ¶¶ 8 and 10, in ACQB 2014-1 (Jan. 27, 2014) (“SWOP Rulemaking Petition”). SWOP was present when the Air Board held a lengthy public meeting, heard heated arguments favoring and opposing SWOP’s Rulemaking Petition and the Air Board decided not to grant it a rulemaking hearing. Order Denying Hearing, in AQCB 2014-1 (Mar. 21, 2014).

Notwithstanding these facts, SWOP has presented its Petition to the Air Board, now implicitly contending that neither HB 458 nor the SWOP Rulemaking Petition were ever necessary because the Air Board had the authority to impose cumulative impacts analyses on an ad hoc basis.

D) The legal basis of the SWOP Petition is flawed.

The Air Board’s adjudicatory rules require that a petition contain certain information including, among other things, the “factual and legal basis for the petitioner’s objections to the permitting action...” 20.11.81.14(B)(2)(d) NMAC.

The Petition identifies the following legal bases: (1) NMSA 1978, § 74-2-5(A) (the local board shall prevent or abate air pollution); (2) NMSA 1978, § 74-2-5.1(A) (local agency shall develop facts and make investigations and studies consistent with the Air Act); (3) NMSA 1978,

³ In the Fiscal Impact Report for HB 458, the New Mexico Environment Department estimated that preparing a cumulative impact analysis on each permit might cost between \$15,000 and over \$1,000,000 per permit.

§ 74-2-7(C) and (D) (allowing conditions and requiring compliance with applicable standards); and (4) *Colonias Development Council v. Rhino Environmental Services*, 2005-NMSC-024, ¶ 30-35, 138 N.M. 33. None of these legal bases provides support for Petitioner's objections to the Honstein Permit. Below, EHD summarizes how air pollution is prevented or abated under the the Clean Air Act and the Air Act, followed by its analysis as to why the legal authorities that SWOP has alleged do not provide relief to the Petitioner.

E) The overall approach for protecting air quality.

1) The Clean Air Act and its relationship to state and local law.

The Clean Air Act and its implementing regulations created a "cooperative federalism" structure for protecting the nation's air quality under which the federal government develops baseline standards that the states individually implement and enforce. *US Magnesium, LLC v. U.S. E.P.A.*, 690 F.3d 1157, 1159 (10th Cir. 2012). Congress began the quest for cleaner air in 1955 with federal funding for air quality research followed by a federal focus on interstate transport of air pollutants. *History of Clean Air Act*, at: <http://www.epa.gov/air/caa/amendments.html>. That research provided the foundation for the future regulatory approach to air quality regulation which is heavily focused on and influenced by scientific understanding. *See, e.g.*, 42 U.S.C. § 7409(d) (requiring regular review of ambient air quality standards by a committee of scientists).

In 1970, Congress passed the Clean Air Act which contained most of the framework that applies today. The Clean Air Act limited emissions from stationary (industrial) sources and mobile sources. *History of Clean Air Act*, at: <http://www.epa.gov/air/caa/amendments.html>. Congress created the four major programs that still dictate the approach for protecting national,

state and local air quality—creation of national ambient air quality standards (“NAAQS”), State Implementation Plans (“SIPs”), New Source Performance Standards (“NSPS”) and National Emission Standards for Hazardous Air Pollutants (“NESHAPS”). *Id.* States (or local jurisdictions in some cases) submit plans or SIPs to the United States Environmental Protection Agency (“EPA”) explaining what strategies the state will use to control air quality and achieve the NAAQS in that jurisdiction. 42 U.S.C. § 7410. The Clean Air Act allows states to be more stringent than federal law with regard to stationary sources but they may not be less stringent, 42 U.S.C. § 7412(r)(11); 42 U.S.C. § 7416. States are preempted from most mobile source regulation other than vehicle inspection programs. 42 U.S.C. § 7416; *see* 40 C.F.R. § 51.350.

As broad as the Clean Air Act is, certain limitations exist. Even if EPA delegates authority to a local jurisdiction to conduct activities pursuant to the Clean Air Act, a local government’s power to regulate air quality is subject to limitations in state law. *New Mexico Environmental Improvement Div. v. Thomas*, 789 F.2d 825, 833 (10th Cir. 1986) (upholding Clean Air Act sanctions against New Mexico after an Albuquerque-Bernalillo County air quality law was invalidated because it exceeded state law); *Chapman v. Luna*, 1984-NMSC-029, ¶ 8, 101 N.M. 59 (invalidating vehicle inspection fee because of conflict with state law); *Southeastern Oakland County Resource Recovery Authority v. City of Madison Heights*, 5 F.3d 166, 169-170 (1993) (invalidating local regulation of solid waste disposal facility due to preemption by state law which retained authority at the state level). Furthermore, the Clean Air

Act does not preempt most state law tort, nuisance and trespass claims. *See, e.g., Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-199 (2013); *and see* 42 U.S.C. § 7604(e); *see also, South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 2006 WL 1097498 (D. New Jersey).

Thus, if the Clean Air Act and state or local air quality regulations do not address a local air quality issue, it may be successfully addressed through state tort, nuisance and trespass laws. States may limit air quality regulations that are more stringent than the Clean Air Act; local governments are required to comply with those limitations in state laws, notwithstanding the Clean Air Act language which allows states to be more stringent.

2) The Air Quality Control Act

a) Rulemaking

The New Mexico Legislature has adopted the Air Quality Control Act (“Air Act”) to accept its part in the Clean Air Act cooperative federalism scheme. NMSA 1978, § 74-2-5.2(A). Subsection 5(A) of the Air Act says, “The ...local board shall prevent or abate air pollution.”

Air pollution is a defined term in the Air Act:

“air pollution” means the emission...of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

NMSA 1978, § 74-2-2(B).

Subsection 5(B) provides that air pollution is prevented or abated by the adoption of rules, standards, and plans. When the Legislature authorizes an agency to do something and prescribes the manner of doing it, it may only be done in that manner. *State ex rel. Lyons v.*

King, 2011-NMSC-004, ¶ 36, 149 N.M. 330. In the Air Act, the Legislature authorized the Air Board to prevent and abate air pollution and directed that it should be prevented and abated by adopting rules, standards and plans, not in an ad hoc manner each time someone applies for an air quality permit.

It would be impossible to apply the definition of air pollution uniformly to ubiquitous, diverse sources based on ad hoc considerations. As one commenter has explained,

Air pollution problems typically derive from many sources, which interact in complex and nonlinear ways. Consequently, determining on an ad hoc, project-by project basis what level of emissions should trigger regulation would be nearly impossible, and the Clean Air Act instead compels states to develop “state implementation plans” (SIPs) that address all emission sources, and it only allows approval of plans that simulation models predict will attain the ultimate air quality goal.

Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 43 *Env. L. Rep. News and Analysis* 10662, 10669 (Aug. 2013).

This comment is consistent with the Legislature’s mandate that air pollution be prevented or abated in an orderly manner by the adoption of regulations, standards and plans.⁴ It is consistent with the express legislative policy that those subject to the Air Board’s rules will receive public notice and a hearing before regulations are adopted rather than face ad hoc regulation. NMSA 1978, § 74-2-6(B).

⁴ This comment is also consistent with Justice Ginsberg’s opinion last year explaining the complexity of one rule to control ozone and particulate pollution. *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1594 and n. 1 (2014) (noting that for one interstate rule, EPA considered 2,479 separate linkages between downwind and upwind states. EPA also had to consider that pollutants produced in upwind states were converted to other pollutants while being transported to downwind states) (“EPA’s chore is to quantify the amount of upwind gases (NO_x and SO₂) that must be reduced to enable downwind states to keep their levels of ozone and PM_{2.5} in check.”)

In addition to being orderly and planned, prevention and abatement of air pollution in New Mexico is strictly limited in three areas which are central to public health. In these areas, the Legislature has created both a floor and a ceiling for prevention and abatement of air pollution (no more stringent than but at least as stringent as the Clean Air Act regulations). NMSA 1978, § 74-2-5(C)(1) (prevention of significant deterioration (only applicable to major sources), *and see* 20.11.61.2 NMAC); nonattainment (only applies if Bernalillo County air quality fails to meet health based standards), *and see* 20.11.60.2 NMAC (only applicable to major sources); § 74-2-5(C)(2) (hazardous air pollutants (i.e., emissions of known human carcinogens and other toxic pollutants). The Legislature has made a policy choice that must be respected. In these three areas, the Clean Air Act requirements are sufficient for preventing and abating air pollution in New Mexico.

When the Air Board adopts a rule, it “shall give the weight it deems appropriate to *all facts and circumstances*” including injury or interference with health, welfare, visibility and property, the public interest including the social and economic value of the sources and subjects of air contaminants, and technical practicability and economic reasonableness. NMSA 1978, § 74-2-5(E) [emphasis added]. This language sounds broad but, as explained earlier, in important areas, the Air Board’s rulemaking discretion is further constrained to be as stringent as but no more stringent than the Clean Air Act regulations. The consideration of health and the public interest do not allow the Air Board to exceed these express limitations on stringency.

b) Permitting

The Air Act's permitting section (Section 7 of the Air Act) is focused on application of regulations and standards. Construction permits may only be denied if the construction or modification (1) will not meet applicable standards, rules or requirements of the Air Act or Clean Air Act; (2) will cause or contribute to air contaminants levels exceeding ambient air quality standards; or (3) will violate any other provision of the Air Act or Clean Air Act. NMSA 1978, § 74-2-7(C)(1) [emphasis added].

Subsection 7(D) authorizes conditions on permits but this authority is subject to significant limitations. EHD (or the Air Board) can require a source to install and operate technology to control the source's emissions but only to the extent necessary to meet the standards, rules and requirements of the Air Act and the Clean Air Act. NMSA 1978, § 74-2-7(D)(1)(a) [emphasis added]. Emission limits may be imposed but only as restrictive as necessary to meet the requirements of the Air Act or the Clean Air Act or the emission rate specified in the application, whichever is most stringent. NMSA 1978, § 74-2-7(D)(1)(b) [emphasis added]. Conditions may be imposed which require compliance with applicable federal standards of performance. NMSA 1978, § 74-2-7(D)(1)(c). These three areas (control technology, emission limits, and standards of performance) are three important methods of preventing or abating air pollution but all three are limited to express rules and standards (or as requested by the applicant in its application). These limitations demonstrate a legislative policy choice preferring to prevent or abate air pollution through an orderly, planned approach—not ad hoc as each permit comes before EHD or the Air Board.

Subsection 7(D)(1)(d) is an exception—it authorizes permit conditions imposing “reasonable restrictions and limitations not relating to emission limits or emission rates.” EHD interprets this subsection as authorizing conditions reasonably related to assuring that EHD can ascertain a source’s compliance with its permit and regulatory requirements. These might include recordkeeping, monitoring, and reporting conditions provided that those conditions are “reasonable” and do not relate to emission limits or emission rates. Monitoring conditions will be discussed further below.

When the Air Board reviews EHD’s decision to issue a permit, it may “sustain, modify or reverse” EHD’s decision. NMSA 1978, § 74-2-7(K). The Air Board evaluates whether the source “will or will not meet applicable local, state and federal air pollution standards and regulations[.]” NMSA 1978, § 74-2-7(L). Here again, the language demonstrates a focus on assuring that express standards and regulations are met rather than the Air Board making an ad hoc determination each time it considers a permit.

Importantly, the Air Act does not envision consideration of public health or how to prevent or abate air pollution during permitting proceedings. Instead, the statutory language directs the Air Board to consider whether the construction or modification would violate regulations, standards, requirements or prohibitions of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(1). This does not mean that public health or prevention or abatement of air

pollution is unimportant. Public health is considered during the rulemaking process.⁵ When a permitted activity complies with the Air Board's rules then, by definition, its emissions cannot be "unreasonable" and those emissions cannot meet the definition of air pollution that the Air Board "shall" prevent or abate. NMSA 1978, § 74-2-2(B); -5(A).

c) EHD's Authority to Investigate and Study Air Pollution

Subsection 5.1(A) of the Air Act requires that EHD conduct investigations but it does not specify which studies or investigations it should perform. That decision rests in the sound discretion of the EHD Director. NMSA 1978, § 74-2-5.1(A). If EHD were to fail to satisfactorily fulfill its Air Act or Clean Air Act duties, the Air Act empowers the New Mexico Environment Department ("NMED") to initiate proceedings against the local authority. NMSA 1978, § 74-2-2(J); and -4(D). If neither NMED nor EHD were to fulfill their duties under the Clean Air Act, EPA could step in. *See, e.g.*, 42 U.S.C. § 7509(a)(3)(B) and § 7413.

The Air Act does not authorize a petitioner who claims being adversely affected by a permit to request the Air Board to order EHD to conduct different studies or investigations. Instead, the Air Board's authority in a permitting proceeding is to "sustain, modify or reverse" a permit and to make a determination whether the permit "will or will not meet applicable local,

⁵ Health and safety is also considered when a variance is requested. NMSA 1978, § 74-2-8(A)(2)(a). This is consistent with a Legislative intent that public health is protected by adopting rules consistent with the Air Act and applying those rules during the permitting process. If a variance is issued, a rule would not be followed. Thus, health and safety must be considered anew when a variance is requested but not when a permit is issued that will comply with all applicable rules.

state and federal air pollution standards and regulations.” NMSA 1978, § 74-2-7(K) and (L).

The Air Board is not authorized to oversee EHD or direct it to conduct particular studies by denying a permit or imposing conditions requiring a permittee to conduct studies or make investigations relating to pollutants the permittee’s facility does not emit.⁶

F) SWOP’s Petition and its requested relief.

SWOP’s Petition requests two kinds of relief. First, it requests that the Honstein Permit be rescinded until a cumulative impact assessment has been conducted. Petition, p. 5. Second, if a permit is issued for the Honstein facility, it requests that it be subject to a condition to require continuous monitoring at the permit site for exceedances of federal Clean Air Act standards. Petition, p. 5.

SWOP’s Petition contends that the statutory basis for its Petition is contained in four subsections of the Air Act and one decision of the New Mexico Supreme Court: (1) NMSA 1978, § 74-2-5(A) (requiring the local board to prevent or abate air pollution); (2) NMSA 1978, § 74-2-5.1(A) (EHD is to develop facts and make investigations and studies); (3) NMSA 1978, § 74-2-7(C) and (D) (SWOP construes these two subsections in the aggregate as authorizing a condition to require continuous air monitoring to assure compliance with Clean Air Act); and (4)

⁶ With respect to ambient air quality monitoring, the detailed requirements for maintaining an EPA compliant monitoring network are beyond the scope of this brief, however, EHD’s monitoring network is subject to extensive and detailed EPA rules. *See, e.g.*, 40 C.F.R. § Part 58, Ambient Air Quality Surveillance. Locations of stations in each jurisdiction’s monitoring network are reviewed annually and the results of that review are made available for public comment annually prior to submission to EPA. 40 C.F.R. § 58.10.

Colonias Development Council v. Rhino Environmental Services, 2005-NMSC-024, ¶¶ 30-35, 138 N.M. 133 (which SWOP asserts requires consideration of quality of life and cumulative impacts in making a permitting determination). SWOP is mistaken in its reading of these subsections of the Air Act and misreads the holding of the *Rhino* decision.

1) When the Air Act is interpreted as a coherent whole, the Air Board prevents or abates air pollution by assuring that its rules have been faithfully applied in permits issued by EHD.

SWOP suggests that subsection 5(A) of the Air Act, requiring the Air Board to “prevent or abate air pollution,” authorizes the Air Board to grant the relief it has requested. SWOP’s reliance on subsection 5(A) of the Air Act ignores a cardinal rule of statutory interpretation—a statute is interpreted as a coherent whole so that an interpretation of one part does not render another part inoperative. *Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *State ex rel. Clinton Realty Co. v. Scarborough*, 1967-NMSC-152, ¶ 9, 78 N.M. 132. When the Air Act is considered as a whole, it becomes clear that air pollution is controlled in an orderly planned manner—not by ad hoc consideration of each permit.

While it is true that the Air Board is required to prevent or abate air pollution in subsection 5(A), the very next subsection, 5(B), says that the Air Board is to prevent or abate air pollution by adopting rules, standards and plans. These two sections must be read together as parts of a coherent whole. *Clinton Realty*, 1967-NMSC-152, ¶ 9.

Another statutory limitation is important. The Honstein facility is a source of hazardous air pollutants. Petition Ex. A (describing the Honstein facility as a bulk gasoline plant); *and see* 42 U.S.C.A. § 7412(B) (listing benzene including benzene from gasoline vapor as a hazardous air pollutant). Hazardous air pollutant sources are to be subject to rules that are “no more

stringent than but at least as stringent as required by federal standards of performance[.]” NMSA 1978, § 74-2-5(C)(2); *and see* -2(G) (defining a “federal standard of performance” as including emission standards adopted pursuant to Section 7412 [hazardous air pollutants] of the Clean Air Act); *and see* National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Bulk Terminals, *Bulk Plants*, and Pipeline Facilities, 40 C.F.R. § Part 63, Subpart BBBB (§§ 63.11080-11100) [emphasis added] (aka “Hex B”); *and see* 73 Fed. Reg. 1916, 1916 (Jan. 10, 2008) (noting that Hex B was adopted pursuant to Section 112 of the Clean Air Act (aka Section 7412) which addresses hazardous air pollutants). The Air Board may not adopt rules more stringent than federal regulations for controlling hazardous air pollutant emissions from the Honstein facility. It cannot evade that prohibition by denying permits or imposing conditions to more stringently control hazardous air pollutants. Subsections 5(A), 5(B), 5(C)(2) and the Air Board’s authority in reviewing permits, subsection 7 (L) (Air Board is to determine whether the permitted activity will or will not meet standards and regulations), must be read together so that no subsection is rendered inoperative. *Clinton Realty*, 1967-NMSC-152, ¶ 9. The policy choices of elected officials as set forth in the rulemaking limitations of the Air Act must be respected.

Consistent with the Legislature’s limitation in subsection 5(C)(2), the Air Board has adopted the EPA’s standard to control emissions of hazardous air pollutants from bulk gasoline plants. 20.11.64.12 NMAC (incorporating 40 C.F.R. Part 63, including subpart BBBB also known as “Hex B”). EHD imposed Hex B in the Honstein Permit to control its hazardous air pollutant emissions. Petition, Ex. A. The Air Board cannot define hazardous air pollutant emissions which comply with its own rules as “air pollution” which it must prevent or abate.

Similarly, EHD has applied Part 65, the Air Board's rule for controlling photochemical oxidants to the Honstein Permit. Again, the Air Board cannot define emissions compliant with its own specific rules as "air pollution" which it must prevent or abate.

With respect to SWOP's request to "rescind" the Honstein Permit, granting that request would require denying the Honstein Permit. The Legislature has established criteria for denial of a construction permit in subsection 7(C) and SWOP's Petition does not allege facts showing any criterion has been met. The Air Board cannot define a permit in compliance with all of its standards and rules as causing air pollution. To do so would render meaningless the Legislature's language in subsection 5(B) that provides that creating a rule or standard prevents or abates air pollution. *Clinton Realty*, 1967-NMSC-152, ¶ 9.

When the Air Act is read as a coherent whole, it is clear that air pollution is prevented and abated by several interwoven activities. First, the Air Board promulgates rules and standards in the context of the definition of air pollution and subject to the Legislature's policy limitations—the results of promulgating rules is standards that define emissions which are reasonable and not air pollution. When an applicant applies for a permit, EHD compares the applicant's proposed activities to the Air Board's rules and standards. EHD requires compliance with those rules and standards by issuing permits. If a petitioner alleges he or she has been adversely affected by the permit's issuance, the Air Board evaluates for itself whether the permit complies with all of its rules and standards. If it does, the Air Board sustains the permit.

In this case, because the Honstein Permit is an activity that is covered by specific Air Board rules and complies with them, subsection 5(A) provides no legal authority to do anything other than sustain the Honstein Permit.

2) NMSA 1978, § 74-2-5.1(A) (local agency shall develop facts and make investigations and studies consistent with the Air Act).

The subsection of the Air Act that SWOP seeks to rely on says, “The...local agency...shall: (A) develop facts and make investigations and studies consistent with the Air Quality Control Act...” NMSA 1978, § 74-2-5.1(A). SWOP misreads this authority and its relevance during permitting.

As explained earlier, EHD does develop facts and make investigations and studies. If it fails to do so, which EHD denies, both NMED and EPA could take appropriate steps to address that failure but not a petitioner before the Air Board. The Air Board cannot deny a permit because a petitioner believes that EHD should conduct more investigations or studies. In an Air Board hearing, the petitioner has the burden of proof to demonstrate that either a denial criterion is met or that a rule should have been imposed but was not. The SWOP Petition is based on an entirely different legal approach unlike the process the Legislature created in the Air Act. The Air Act does not authorize the Air Board to shift EHD’s assigned duties to develop facts and make investigations and studies in subsection 5.1(A) to a permittee through imposing conditions on a permit.

3) NMSA 1978, § 74-2-7(C) and (D) (allowing conditions and requiring compliance with applicable standards).

Subsection 7(C) authorizes denial of construction permits if the construction or modification violates certain criteria. SWOP’s Petition does not allege that the construction or modification of the underground gasoline storage tank at the Honstein facility violates any of the Legislature’s criteria—subsection 7(C), therefore, provides no basis to grant SWOP relief.

Subsection 7(D) authorizes conditions on permits. The only authority that might allow a monitoring condition would be the one allowing “reasonable restrictions and limitations not relating to emission limits or emission rates.” NMSA 1978, § 74-2-7(D)(1)(d). However, in this case, such a condition could not be “reasonable” as a matter of law.

SWOP’s Petition seeks a condition requiring the Honstein facility to “conduct continuous monitoring at the permit site for any exceedance of Clean Air Act standards.” Petition, p. 5. The Honstein facility emits VOCs which are not subject to any Clean Air Act ambient standards. Petition Ex. A, p. 2 of 4.

SWOP’s Petition alleges no facts to support this relief. The Petition does not allege that the Honstein facility may “cause or contribute” to an exceedance of any ambient air standard. Instead, the alleged facts in SWOP’s Petition focus on emissions from previously permitted facilities whose permits can no longer be challenged. NMSA 1978, § 74-2-7(L) (once a final decision is reached on a permit that it complies with all rules and standards, that decision is final). Conditions cannot be imposed on the Honstein Permit because of past final permitting decisions made to others.

Moreover, it would not be “reasonable” to require Honstein to monitor for pollutants it does not emit when SWOP is not even alleging that Honstein could cause or contribute to any exceedances. SWOP’s Petition is focused more on the aggregate emissions of all permittees in the vicinity—EHD assesses the aggregate impact of all emissions by ambient air quality monitoring in compliance with EPA regulations. That monitoring is conducted by EHD and the Air Board can take administrative notice that Bernalillo County is in attainment for all ambient air quality standards.

SWOP's proposed condition seeking monitoring for all possible exceedances of federal Clean Air Act standards is utterly unreasonable. For example, one federal Clean Air Act standard is lead. *See, e.g.*, 42 U.S.C. § 7514. It cannot be reasonable to expect a permittee to monitor for ambient lead pollution when the permittee's activities are not allowed to emit any ambient lead.⁷ In short, SWOP's requested relief could not be "reasonable" under any state of facts provable in this Petition. Subsection 7(C) and (D) provide no basis for either rescinding the Honstein Permit or for subjecting it to a condition to monitor for exceedances of Clean Air Act standards. The Air Board should sustain the Honstein Permit.

4) *Colonias Development Council v. Rhino Environmental Services, 2005-NMSC-024, ¶ 30-35, 138 N.M. 33.*

The holding in *Rhino* arose from a permitting proceeding under the Solid Waste Act and its implementing regulations. Those regulations required solid waste facilities to be located and operated "in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment." *Rhino*, 2005-NMSC-024, ¶ 31. The New Mexico Supreme Court concluded that, based on this quoted regulatory language, the Solid Waste Act did not limit the Secretary's review to technical regulations. *Id.*

Neither the Air Act nor the applicable air quality regulations contain similar language. Moreover, unlike the Solid Waste Act, the Air Act is replete with constraints based on standards, rules, and plans or references to express requirements or prohibitions of the Air Act or Clean Air Act.

⁷ There are only two stationary sources of lead air pollution in Bernalillo County; both are near I-25 and neither one is in either the North or South Valley.

There is another key distinction between the Solid Waste Act and its regulations and the related laws and regulations relating to air quality. In *Rhino*, the Court said,

We also reject the argument that any consideration of testimony and other evidence of proliferation [of landfills] would be ambiguous, without adequate standards, and impossible to enforce. In certain situations, when an agency is charged with protecting public health, safety and welfare, it may be difficult to lay down a definite comprehensive rule.

Rhino, 2005-NMSC-024, ¶ 35.

In the case of air quality, EPA has solved the difficulty the Court posited in *Rhino*. It has created a massive list of specific rules and standards covering a wealth of possible sources of emissions running from the mundane to the spectacular.

Consider these examples. On the mundane end, there is an EPA standard for volatile organic compound emissions from underarm antiperspirant (60%) which is different from the standard for underarm deodorants (20%), as well as specific EPA emission limits for VOC emissions from air fresheners to laundry prewash to shaving creams. 40 C.F.R. § Part 59, Subpart C, Tables 1 and 2.

Jumping up in size, there are specific numerical standards for emissions of nonmethane organic compounds from municipal landfills. 40 C.F.R. § 60.752. There are different standards for emissions from Petroleum Refinery Wastewater Systems depending on whether the “system” is an individual drain system or an oil-water separator (or something else). 40 C.F.R. § Part 60, Subpart QQQ. These standards are not to be confused with the standard of performance that

applies to Petroleum Refineries, 40 C.F.R. Part 60, Subpart J, or the standards of performance for equipment leaks at petroleum refineries, 40 C.F.R. Part 60, Subpart GGG or GGGA (depending on when the facility was constructed), or emissions from a refinery's Catalytic Cracking Units, Reforming Units, or Sulfur Recovery Units, 40 C.F.R. Part 63, Subpart UUU.

On the spectacular end, there are specific emission standards for Beryllium Rocket Motor Firing, 40 C.F.R. Part 61, Subpart D and Gold Mine Ore Processing, 40 C.F.R. Part 63, Subpart EEEEEEE.

These diverse examples illustrate that air quality is not regulated by application of a "comprehensive" rule such as the Supreme Court posited in *Rhino*. Instead, EPA or the Air Board adopt regulations and standards which apply to specific activities. In some cases, Congress may impose a more ambiguous criterion but it is far more specific than the "reasonable" standard in the definition of air pollution. For example, more complex sources might be subject to regulations requiring use of the "best available retrofit technology," 42 U.S.C. § 7491(b)(2)(A) ("BART" for visibility protection for federal Class I areas); or "LAER," i.e., lowest achievable emission rate, 42 U.S.C. § 7503 (certain permits in nonattainment areas). The emissions from diverse and ubiquitous sources subject to air quality permits could not be efficiently permitted by determining the "reasonableness" of emissions each time an application is received.

Among the emissions for which EPA has adopted a specific regulation are the hazardous air emissions from bulk gasoline plants—such as the Honstein facility. 40 C.F.R. Part 63 Subpart BBBBBB. The Air Board has adopted this regulation. 20.11.64.12 NMAC (incorporating 40 C.F.R. Part 63). This is critically important because there is another Supreme Court precedent that should guide the Air Board’s decision here.

In that case, the Court considered what a government body may do when it has issued a permit for an activity and then faces a groundswell of opposition. Bernalillo County chose to reverse course and rescind the permit—a decision the Supreme Court reversed. *Smith v. Bernalillo County*, 2005-NMSC-012, 137 N.M. 280.

In *Smith*, the plaintiff had applied for and received a permit to construct two 130-foot amateur radio towers on residential property. After neighbors complained, Bernalillo County changed its mind and ordered the work to stop—contending for the first time that the towers were unreasonably high. 2005-NMSC-012, ¶¶ 2-14.

In reversing the decision, the Court noted that the County could have adopted a specific standard but had not. The Court reasoned that “the failure to provide detailed standards to guide administrative officials may only be excused where it is difficult or impractical to lay down a definite, comprehensive rule or some discretion is necessary...” *Smith*, 2005-NMSC-012, ¶ 36.

In this case, there can be no doubt that EPA can and has adopted a specific, definite hazardous emission standard which applies in this case. The Air Board has incorporated it into the Bernalillo County SIP —20.11.81.12 NMAC (incorporating 40 C.F.R. Part 63 which includes Hex B). It is a specific, definite standard which dictates how emissions of hazardous air pollutants from bulk gasoline plants, among other things, are controlled.

With respect to emissions of volatile organic compounds from the Honstein underground gasoline storage tank, the Air Board has also adopted a specific, definite standard:

No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded.

20.11.65.14(A) NMAC, Petition Ex. A, p. 1 of 4.

When the Air Board has adopted specific standards which apply to an applicant's activity and the applicant will meet all of those standards, the Air Board may not rescind that permit to protect quality of life. *Smith*, 2005-NMSC-012, ¶ 36; and see NMSA 1978, § 74-2-5(C)(2) (prohibiting regulations that are more stringent than federal standards for hazardous air pollutants). The Air Board cannot rescind a permit complying with all of its regulations because a petitioner asserts that a cumulative impact study should be done when no law or rule requires such a study. SWOP has admitted that, "Cumulative impacts are not considered by regulatory bodies..." See <http://www.swop.net/>. SWOP has already admitted that cumulative impact analysis is not required by any existing rule and the Air Board may not rescind a permit when it meets the Air Board's regulatory standards. *Smith*, 2005-NMSC-012.

Moreover, although *Rhino* dealt with a permitting proceeding controlled by a very different statute and regulations, one *Rhino* holding almost certainly applies here—the requirement that permitting decisions have a nexus to a regulation.

Although we hold that [NMED] must allow testimony regarding the impact of a landfill on a community's quality of life, we agree with [NMED] that its authority to address such concerns requires a nexus to a regulation.

2005-NMSC-024, ¶ 29.

The "nexus" requirement is imposed to prevent delegation of excessive authority to unelected administrative agencies because that would be unconstitutional. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 41, 140 N.M. 77 ("The Legislature may not vest unbridled or arbitrary authority in an administrative body, however, and must provide reasonable standards to guide it.")

In this case, no nexus to any regulation allows the Air Board to rescind the Honstein Permit. To the contrary, the Legislature has established the criteria for denying a construction permit and none apply here. NMSA 1978, § 74-2-7(C)(1).

No nexus to any regulation allows the Air Board to impose an unreasonable condition on a permittee to monitor for pollutants it does not emit just in case Clean Air Act standards might someday be exceeded by other permittees in the vicinity. Moreover, SWOP cannot dispute that Bernalillo County is in attainment for all Clean Air Act standards. *See Current Nonattainment Counties for All Criteria Pollutants*, available at:

<http://www.epa.gov/airquality/greenbook/ancl.html> (listing only Dona Ana County in New Mexico as exceeding the federal PM₁₀ standard).

Finally, with respect to monitoring conditions to assure that federal Clean Air Act standards are not exceeded, EPA has adopted a specific regulation which actually precludes the relief SWOP is seeking:

It is important to understand the monitoring objective for a particular location in order to interpret this particular requirement. Local minor sources of a primary pollutant, such as SO₂, lead, or particles, can cause high concentrations of that particular pollutant at a monitoring site. If the objective for that monitoring site is to investigate these local primary pollutant emissions, then the site is likely to be properly located nearby. This type of monitoring site would in all likelihood be a microscale type of monitoring site. *If a monitoring site is to be used to determine air quality over a much larger area, such as a neighborhood or city, a monitoring agency should avoid placing a monitor probe, path, or inlet near local, minor sources.*

40 C.F.R. Part 58, App. E, Spacing from Minor Sources [emphasis added].

In this case, SWOP's Petition is not requesting monitoring of criteria pollutants produced by the Honstein facility because the Honstein Permit does not authorize emissions of criteria pollutants—the Honstein Permit authorizes emissions of volatile organic compounds to which no federal ambient air quality standard applies. Instead, SWOP is seeking an assessment of whether the other previously permitted sources in the San Jose neighborhood are causing exceedances of ambient air quality standards in the aggregate. This is a neighborhood scale monitor and EPA's rules specifically preclude ambient air quality monitoring near minor sources like the Honstein facility for the purpose of assessing compliance with ambient air standards. 40 C.F.R. Part 58, App. E.

- G) The Air Board should resolve the merits of the SWOP Petition using summary procedures because, even if all allegations in the SWOP Petition were true, they would not justify any relief that SWOP is seeking.**

EHD has explained that the SWOP Petition is not based on air quality regulations as they exist. The legal authority that SWOP has suggested in its Petition does not authorize the relief SWOP is seeking.

The Honstein Permit facts that have a nexus to a regulation include the following (1) it is a bulk gasoline plant, (2) it is allowed to emit 2.26 tons per year of volatile organic compounds, (3) its allowed annual throughput is 250,000 gallons of gasoline, (4) the Honstein facility does not dispense gasoline into fuel tanks of motor vehicles, (5) its underground storage tank is 3,000 gallons or larger, (6) it will operate with Stage I Vapor Balance, (7) its storage tank provides submerged filling, and (8) its Stage I vapor balance must limit emissions of displaced gasoline vapor during filling to less than 1.15 pounds VOCs per 1,000 gallons of gasoline loaded.

Petition, Ex. A.

As a result of the above facts, two specific Air Board rules control the emissions of the Honstein facility on a daily basis: 20.11.64.12 NMAC (incorporating 40 C.F.R. Part 63 including Hex B) and 20.11.65 NMAC. Both of these rules have been appropriately imposed in the Honstein Permit. Petition Ex. A.

SWOP seeks two forms of relief: first, it seeks rescission of the Honstein Permit until a cumulative impacts study is conducted. Second, if the Honstein Permit is issued, SWOP seeks a condition requiring continuous monitoring at the permit site to assure that no exceedances of the federal Clean Air Act standards occur. Petition, p. 5. Neither form of relief is allowed by law.

The Honstein Permit may not be denied. It meets all applicable Air Board standards and regulations, and does not violate any requirement or prohibition of the Air Act or Clean Air Act. Thus, it does not satisfy any of the criteria the Legislature has established to deny an air quality construction permit. NMSA 1978, § 74-2-7(C)(1).

A condition requiring the Honstein facility to monitor for exceedances of federal Clean Air Act standards would not be reasonable. The Honstein facility does not emit pollutants subject to federal Clean Air Act ambient air quality standards. SWOP's Petition does not allege that the Honstein facility would cause or contribute to exceedances of ambient air pollution standards. Bernalillo County is in attainment for all federal ambient air quality standards. In any event, it would be unreasonable to require Honstein to monitor for other permittees' emissions. Assessing the aggregate impact of all permittees' emissions is the purpose of EHD's ambient air quality monitoring which satisfies all EPA requirements.

For all of the reasons stated above, EHD requests that the Air Board sustain the Honstein Permit and dismiss SWOP's Petition based on its summary procedures rule. 20.11.81.20(A) NMAC. Even assuming that everything in the Petition is true, the Honstein Permit should be sustained.

III. MOTION TO RESOLVE THE MERITS OF THE PETITION BY SUMMARY JUDGMENT

The Air Board's adjudicatory 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 NMAC.

In this case, the Air Board has adopted a summary procedures rule, but it applies where the Air Board decides the merits of a petition solely on legal arguments. 20.11.81.20(A)(1) NMAC. To resolve a petition using summary judgment requires a threshold factual analysis that

is not made under summary procedures—is there a genuine dispute about material facts? Rule 1-056(C) NMRA. Summary judgment may only be granted if there is no such dispute. *Id.* Since a motion seeking summary judgment entails analysis of facts (rather than assuming they are true), there is no specific provision in 20.11.81 NMAC and Rule 1-056 can be used for guidance.

The summary judgment rule provides:

The judgment sought shall be rendered forthwith if the [admissible evidence] show[s] that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 1-056(C) and (E) (requiring such facts “as would be admissible in evidence”).

In order to determine which facts are material, the Air Board must look to the substantive law that governs the dispute. *Romero v. Philip Morris*, 2010-NMSC-035, ¶ 11. A fact is “material” if that fact is necessary to support a claim. *Id.* In this case, the substantive law which provides the filter through which facts are analyzed to determine their materiality are the Air Act statute and the applicable substantive regulations that the Air Board has adopted such as Parts 64 (hazardous air pollutants) and Part 65 (emissions which may cause the formation of photochemical oxidants).

In a motion for summary judgment, the Air Board is being asked to examine: first, whether there is a genuine dispute of material fact; and, if the answer is no, whether the undisputed facts show that the party moving for summary judgment is entitled to prevail. Summary judgment does not deprive the opposing party of its “day in court.” If the arguments in question are legal arguments, then witness testimony is not needed and oral argument is sufficient to resolve the dispute:

The fact that difficult questions of law exist or that the parties differ on the legal conclusions to be drawn from the facts is not in and of itself a ground for denying summary judgment inasmuch as refusing to grant the motion does not obviate the court's obligation to make a difficult decision; a denial merely postpones coming to grips with the problem at the cost of engaging in a full-dress trial that is unnecessary for a just adjudication of the dispute. Therefore, when the only question is what legal conclusions are to be drawn from an established set of facts, the entry of a summary judgment usually should be directed.

Federal Practice & Procedure (Wright & Miller), § 2725, Grounds for Summary Judgment—in General.

On the other hand, if there is a genuine dispute of material fact, the Air Board should hear the testimony and decide which witnesses it finds most credible and persuasive on the disputed points. Thus, hearings are worthwhile when there are disputed, material facts.

EHD will explain below why there is no genuine dispute of material fact and why the Air Board should grant EHD summary judgment and sustain the Honstein Permit. In the interests of brevity, EHD incorporates the arguments made in its previous Motion to resolve the merits of the Petition using summary procedures and will only summarize its arguments made in the previous section and EHD will then provide any additional legal authority in support of its Motion to resolve the merits of the Petition using summary judgment.

A) Material facts about which there is no genuine dispute.

1) The Honstein facility is a bulk gasoline plant. Petition, Ex. A, p. 1 of 4; SWOP NOI, Rowangould Test. p. 4; Undisputed Material Fact (“UMF”) #1;

2) The Honstein Permit allows the emission of 2.26 tons per year of volatile organic compounds per year. Petition, Ex. A, p. 2 of 4; SWOP NOI, Rowangould Test. p. 6; UMF #2;

- 3) The Honstein Permit authorizes an annual gasoline throughput of up to 250,000 gallons. Petition, Ex. A, p. 2 of 4; UMF #3;
- 4) The Honstein permit authorizes a daily gasoline throughput of up to 20,000 gallons. Petition, Ex. A, p. 2 of 4; SWOP NOI, Rowangould Test. p. 4; UMF # 4;
- 5) The Honstein facility does not dispense gasoline into fuel tanks of motor vehicles. Petition, Ex. A, p. 2 of 4; UMF #5;
- 6) The Honstein Permit authorizes the use of a 3,000 gallons or larger underground storage tank or larger for gasoline deliveries. Petition, Ex. A, p. 1 of 4; SWOP NOI, Rowangould Test. p. 4; UMF #6;
- 7) The Honstein Permit requires the Honstein underground gasoline storage tank to operate with Stage I Vapor Balance. Petition, Ex. A, p. 1 of 4; SWOP NOI, Rowangould Test. p. 6; UMF #7;
- 8) The Honstein Permit requires the Honstein underground gasoline storage tank to use submerged filling. Petition, Ex. A, p. 1 of 4; UMF #8;
- 9) The Honstein Permit requires that the underground storage tank Stage I Vapor Balance system at the Honstein facility must limit emissions of displaced gasoline vapor during filling to less than 1.15 pounds VOCs per 1,000 gallons of gasoline loaded. Petition, Ex. A, p. 1 of 4; UMF #9.

Under the applicable substantive law, these are the material facts that dictate which air quality standards and regulations apply to the stationary source Honstein Permit and how the Honstein facility must control emissions of stationary source air pollutants. SWOP's Petition and the witness testimony in its statement of intent (SWOP's NOI") do not dispute these facts.

No facts in SWOP's Petition or SWOP's NOI suggest that any other rules or standards should have been applied in the Honstein Permit. There is no allegation or evidence that the Honstein facility will cause or contribute to any exceedance of any ambient air quality standard in either SWOP's Petition or SWOP's NOI. There is no genuine dispute of material fact. EHD imposed all of the applicable Air Board regulations and standards to the Honstein Permit. The dispute here is a legal dispute that the Air Board can resolve using summary judgment procedures.

B) The legal authority SWOP has cited as support for its Petition is flawed.

1) The Air Board's authority to prevent or abate air pollution in subsection 74-2-5(A) does not empower the Air Board to reverse a permitting decision made in compliance with specific Air Board regulations adopted to prevent or abate air pollution from a specific kind of source.

As explained in detail previously, subsection 5(A) of the Air Act must be read with the remaining Air Act language so that the Air Act is construed as a coherent whole. *Clinton Realty*, 1967-NMSC-152, ¶ 9. This includes numerous subsections that are not consistent with the Air Act interpretation that SWOP is asserting. For example, subsection 5(B) (air pollution is prevented or abated by adopting rules, standards and plans), subsection 5(C)(2) (limiting stringency of hazardous air pollutant regulations), subsection 5(E) (Air Board considers public health when it adopts a rule), Section 7 (silent about considerations of public health or preventing or abating air pollution during permitting), and subsection 7(C)(1) (specifying criteria for denying a construction permit) all must be analyzed as a coherent whole to understand legislative intent. The Legislature clearly knows how to require consideration of public health because it

has done so elsewhere in the Air Act. Thus, the omission of public health or preventing or abating air pollution from the permitting section must have been by design. *State v. Ramos*, 2013-NMSC-031, ¶ 15, 305 P.3d 921 (reasoning that when the Legislature knows how to include certain language but does not, the omission is intentional).

As a result, subsection 5(A) which requires the Air Board to prevent or abate air pollution, does not empower the Air Board to reverse the Honstein Permit. The Air Board has already adopted specific standards and regulations to prevent and abate air pollution from bulk gasoline plants like the Honstein facility. 20.11.64.12 NMAC (incorporating Hex B). The Air Board has already adopted a specific rule to prevent and abate emission of pollutants that can lead to the creation of photochemical oxidants. 20.11.65 NMAC. No other pollutants are allowed to be emitted by the Honstein Permit so there is no air pollution to prevent or abate. The Air Board should sustain the Honstein Permit because there is no genuine dispute of material fact and the Honstein Permit should be sustained as a matter of law.

2) EHD's duty to develop facts and conduct investigations and studies does not allow the Air Board to deny the Honstein Permit or to subject it to unreasonable conditions.

As explained earlier, if EHD had failed to fulfill its responsibilities under Section 5.1(A), which EHD denies, both NMED and EPA could take appropriate steps to address that failure but not a petitioner before the Air Board. The Air Board cannot deny a permit because a petitioner believes that EHD should conduct more investigations or studies. NMSA 1978, § 74-2-7(C)(1).

The Air Board may not subject a permit to unreasonable conditions. NMSA 1978, § 74-2-7(D).

The Air Act does not authorize the Air Board to shift EHD's assigned duties to develop facts and make investigations and studies in subsection 5.1(A) to a permittee through imposing conditions on a permit.

- 3) **The Air Board's authority to deny, subsection 7(C)(1), and to impose conditions, subsection 7(D), on permits does not allow it either to deny (or reverse EHD's issuance of) the Honstein Permit when there is no evidence that the emissions from the underground storage tank at the Honstein facility would violate any air quality regulation or standard; cause or contribute to an exceedance of any ambient air quality standard, or violate any other requirement or prohibition of the Air Act or Clean Air Act; and a condition requiring Honstein to conduct ambient air quality monitoring is unreasonable and conflicts with EPA monitoring regulations.**

As explained in detail previously and becomes even more clear when the SWOP NOI is considered, there is no lawful basis for granting either form of relief that SWOP's Petition seeks.

SWOP seeks either denial of the Honstein Permit until a cumulative impact analysis is conducted or, if the Honstein Permit is issued, SWOP requests that a condition be imposed requiring

Honstein to monitor for exceedances of ambient air quality standards. Petition, p. 5.

Consideration of the facts provided in SWOP's NOI show an utter lack of evidence that supports the Air Board granting either form of relief.

With regard to subsection 7(C)(1) which allows denial of a permit, there are no facts in SWOP's NOI that have any nexus to the criteria for denying the Honstein Permit. For example, SWOP alleges facts about possible exceedances of the PM₁₀ or the 24-hour PM_{2.5} ambient air quality standards. However, these allegations, even if they were true, are immaterial and cannot be tied to the stationary source emissions from the Honstein facility which are volatile organic

compounds and are neither PM₁₀ nor PM_{2.5}. Moreover, the SWOP NOI contains no ambient air quality modeling to support any allegation that emissions from the underground storage tank at the Honstein facility would cause or contribute to any violation of any ambient air quality standard.

For the same reason, it would be unreasonable to impose a condition requiring the Honstein facility to conduct ambient air quality monitoring to assure that no exceedances of federal Clean Air Act ambient air quality standards occur. The Honstein Permit does not authorize any emissions of pollutants subject to those federal ambient air quality standards. EPA regulations caution against conducting site specific monitoring in the proximity of a minor source of air emissions to evaluate the quality of ambient air in a neighborhood. 40 C.F.R. Part 58, App. E. Finally, EHD conducts ambient air quality monitoring in compliance with all EPA regulations and the Air Board can take administrative notice that Bernalillo County is in compliance with all ambient air quality standards. *See* Current Nonattainment Counties for All Criteria Pollutants, available at: <http://www.epa.gov/airquality/greenbook/ancl.html> (listing only Dona Ana County in New Mexico as exceeding the federal PM₁₀ standard).

4) The New Mexico Supreme Court's *Rhino* decision provides no support for granting SWOP's requested relief and a different New Mexico Supreme Court decision requires the Air Board to sustain the Honstein Permit.

In *Rhino*, the Court construed specific language in the Solid Waste Act and regulations. No similar language is present in either the Air Act or the Air Board's regulations. Thus, the legal support which led to the *Rhino* decision is absent here. Moreover, in *Rhino*, the Court focused on the difficulty of developing specific standards and the need for discretion due to that

difficulty. In contrast, EPA has no difficulty developing specific regulations controlling specific emissions from specific kinds of sources. The Air Board has adopted specific standards and regulations that apply to bulk gasoline plants, 20.11.64.12 NMAC (incorporating Hex B) and underground storage tanks in gasoline service, 20.11.65 NMAC. EHD has applied those specific regulations to the Honstein Permit. Thus, the difficulty the Court addressed in *Rhino* for permits under the Solid Waste Act and regulations does not exist here. Air quality is regulated by adopting specific regulations that control specific emissions from specific kinds of sources. As a result, the binding Supreme Court precedent that the Air Board should follow is *Smith*. 2005-NMSC-012, ¶ 36.

As the Court noted in *Smith*, the Air Board not only can develop specific standards—it has adopted specific standards. Those standards have been applied to the Honstein Permit. *Rhino* provides no support for granting either relief SWOP has requested. *Smith* requires that the Air Board sustain the Honstein Permit.

5) The Air Board cannot grant relief based on SWOP's assertions about disparate impact.

SWOP's Petition and SWOP's NOI contain many allegations that EHD's permitting program causes a disparate impact in the San Jose neighborhood. EHD denies those allegations but they are immaterial here.

The Supreme Court has clearly stated that Congress did not intend to allow a private right of action for such claims. *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001) (there is no private right of action for disparate impact discrimination claims under Section 602 of Title VI of the Civil Rights Act). This means that, as a matter of federal law, such claims may not be brought by individuals or organizations such as SWOP.

Instead, EPA has provided an administrative mechanism where citizens can bring such complaints and EPA will investigate them. *See, e.g.*, 40 C.F.R. § 7.120 (complaint investigations).⁸ That is the appropriate venue for disparate impact claims challenging EHD's permitting program generally.

It is not appropriate to use a (very) minor source permit as a platform to attack EHD's process for issuing permits. If that process is to change, it will require a rulemaking—not an adjudication of a single permit. Here, the Air Board is to determine whether the Honstein Permit “will or will not meet applicable local, state and federal air pollution standards and regulations.[.]” NMSA 1978, § 74-2-7(L). Facts about disparate impacts are not material to that determination.

For all of the reasons stated above, EHD requests that:

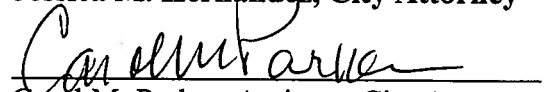
- 1) The Air Board decide the merits of the Petition solely on legal argument and sustain the Honstein Permit;

⁸ SWOP knows this because SWOP has a pending complaint before the EPA.

- 2) In the alternative, grant EHD summary judgment because there is no genuine dispute of material fact and the Air Board can sustain the Honstein Permit as a matter of law.

Respectfully submitted,

CITY OF ALBUQUERQUE
Jessica M. Hernandez, City Attorney



Carol M. Parker, Assistant City Attorney

P.O. Box 2248

Albuquerque, NM 87103

(505) 768-4500

cparker@cabq.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served as described below on May 18, 2015:

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

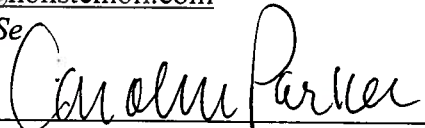
Felicia Orth
c/o Andrew Daffern, Hearing Clerk
Control Strategies Section
Environmental Health Department
One Civic Plaza, Room 3023
Albuquerque, NM 87102
orthf@yahoo.com
*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board
and Hearing Officer for AQCB Petition No. 2014-4*

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

Jon Block and Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
jblock@nmelc.org
ejantz@nmelc.org
*Attorneys for Southwest Organizing Project ("SWOP")
And Esther and Steven Abeyta, Petitioners*

Rod Honstein, Managing Member
Honstein Oil & Distributing, LLC
11 Paseo Real
Santa Fe, NM 87507
rod@honsteinoil.com

Pro Se

By: 
Carol M. Parker, Assistant City Attorney

SWOP Petition

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

**IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]**

**SouthWest Organizing Project [SWOP]
by Juan Reynosa, Environmental Justice Organizer;
Esther and Steven Abeyta, Members of SWOP,
*Petitioners***

**RECEIVED
ENVIRONMENTAL HEALTH
14 AUG 12 PM 1:23**

PETITION FOR A HEARING

Pursuant to Chapter 74, Article 2, Section 7.G-I, NMSA 1978, and 20.11.81.14 NMAC, Petitioners, by and through counsel Jon Block and Eric Jantz, New Mexico Environmental Law Center, hereby request a hearing on the above captioned permit for the reasons of fact and law below. Petitioners also set forth below the hearing request information required by regulation, and have provided the Clerk or designated person with an original and nine copies of the Petition with the permit attached as Exhibit 'A' and a certificate of service, and will serve stamped copies on (or to a designated person for) Department counsel, Board Counsel, Hearing Officer and Permittee. Petitioners and Counsel have below certified they attest to the truth of the information in this petition.

A. Notice of the Department's granting of the permit was served on Petitioners by certified mailing on July 16, 2014. This Petition is filed with the Clerk on August 12, 2014, less than 30 consecutive days from the date notice was given to Petitioners of the permitting action taken by the department that this Petition contests.

B. Contact Information for Petitioners and Petitioners' Attorneys:

Petitioners:

1. Southwest Organizing Project ("SWOP")

**Juan Reynosa, Environmental Justice Organizer
Southwest Organizing Project
222 Tenth Street, S.W.
Albuquerque, NM 87102
(505) 247-8832
Juan Reynosa, SWOP <juan@swop.net>**

2. Representative SWOP Members from the community affected by the permit at issue:

**Esther and Steven Abeyta
2419 William SE
Albuquerque, NM 87102
(505) 440-1669
Esther Abeyta <sjna1@live.com>
Steven Abeyta <stevenabeyta@gmail.com>**

Counsel for Petitioners:

**Attorneys for the Petitioners:
Jon Block and Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022 (Voice)
(505) 989-3769 (Faximile)
jblock@nmelc.org
ejantz@nmelc.org**

C. Statement of the manner of Petitioners' participation in the permitting action that was pending before the department and how the petitioner is adversely affected by the permitting action taken by the department:

Petitioners submitted written and oral comments during the Public Information Hearing. Petitioners have also obtained information concerning the permit at issue through the IPRA process. Petitioner organization SWOP, by and through representative members Esther and Steven Abeyta who live in the South Valley in the San Jose Community, an United States Environmental Protection Agency recognized Environmental Justice community, are directly affected by the permitting action in that it allows an addition to the already existing cumulative impacts upon them from the polluted air they breathe in that community.

D. (i) The specific permitting action appealed from, (ii) specify the portions of the permitting action to which petitioner objects, and (iii) state the factual and legal basis of petitioner's objections to the permitting action taken by the department:

(i) Air Quality Permit No. 3131 ~ Honstein Oil Distributing, LLC (Honstein), Authority-to-Construct Permit - 101 Anderson Ave. SE, Effective date: June 16, 2014.

(ii) Petitioners object to issuing the entire permit without consideration of health and safety of the affected community given cumulative impacts on air quality from industrial facilities in the South Valley, particularly the San Jose community; no attempt was made to assess cumulative impacts despite some evidence of excess emissions; no attempt was made to assess the public health and safety aspects of granting another permit for the type of emissions the facility at issue emits; no consideration in the permitting process for the Honstein facility was given to the adverse impacts issuing the

permit has on the quality of life-- particularly in relation to existing permitted cumulative impacts--in the San Jose community, and Petitioner SWOP, by and through its San Jose community members Esther and Steven Abeyta. Petitioners object to the Albuquerque-Bernalillo Air Quality Bureau failing to take any investigative steps to assess the impacts of continued permitting of facilities such as Honstein's upon the quality of life of persons living in proximity to the facility, particularly those of the San Jose Community in which SWOP members Ester and Steven Abeyta reside. Petitioners object to the Albuquerque-Bernalillo Air Quality Bureau failing to take any investigative steps to assess the cumulative impacts of continued permitting of facilities such as Honstein's upon the air quality for persons living in proximity to the facility, particularly those of the San Jose Community in which SWOP members Ester and Steven Abeyta reside.

(iii) Relying upon the facts as set forth above, statutory basis for this Petition is contained in Chapter 74, Article 2, NMSA 1978, the Air Quality Control Act, and, in pertinent part, but not limited to the following, "The ... local board shall prevent or abate air pollution." *Id.* at 74-2-5.A; *see also* 74-2-5.1.A (local agency "shall" develop facts and make investigations and studies consistent with the Air Quality Control Act..."); 74-2-7.C and D (under state law, a permit could be issued with a condition that requires continuous air monitoring at the site to assure compliance with federal Clean Air Act standards), *and see Colonias Development Council v. Rhino Environmental Services*, 2005-NMSC-024 at ¶¶30-35 (requiring consideration of quality of life and cumulative impacts in making a permitting determination).

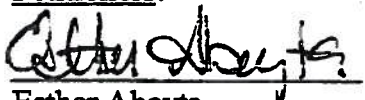
E. The remedy Petitioners seek, the legal basis for the remedy, and how granting the remedy is within the air quality jurisdiction of the board:

Petitioners seek rescinding the permit until a cumulative impact assessment on the effects upon air quality in the San Jose community due to granting yet another permit such as the Honstein permit may be conducted. The impact should assess cumulative air emissions on this community from the aspect of public health and safety, particularly to children, the elderly, and persons with handicapped conditions. Additionally, if a permit is issued for the facility, the permit can be conditioned to require continuous monitoring at the permit site for any exceedance of the federal Clean Air Act standards. Petitioners contend that the New Mexico Air Quality Control act authorizes and provides jurisdiction for the Board to take such actions as are necessary to assure public health and safety by regulating air emissions and that consideration of cumulative impacts is a prudent and necessary consideration in the granting or denying of an air emissions permit. See generally statutes and law cited above.

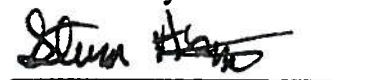
F. A copy of the permit at issue is attached to this Petition as Exhibit 'A'

Petitioners and Counsel hereby certify and attest that the foregoing is true and correct to the best of our knowledge and belief:

Petitioners:



Esther Abeyta



Steven Abeyta

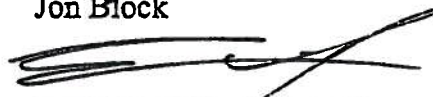


Juan Reynosa

Counsel for Petitioners:

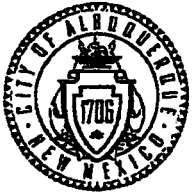


Jon Block

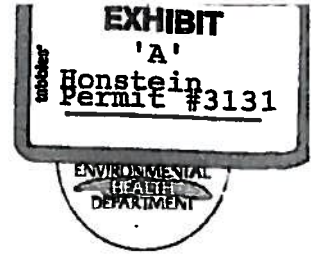


Eric Jantz

SWOP Petition Ex. A
(Honstein Permit)



AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
 Facility ID: FA0005668 Record ID: PR0006305



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
 Company Name

Certified Mail # 7010 3090 0001 4486 6999
 Return Receipt Requested

11 Paseo Real
 Mailing Address

Santa Fe
 City

NM
 State

87507
 Zip

Responsible Official: Rod Honstein, Managing Member
 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.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014
Isted L. Tovar David J. Jorjny
 Print Name Sign Name

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
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER: No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) 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 annual gasoline throughput. Allowable ton per year (tpy) emissions.

Unit	Unit Description	Daily Throughput Threshold of Gasoline (in gallons) ¹	Allowable Annual Throughput of Gasoline (in gallons) ²	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) ²
1	Underground Storage Tank	≤20,000	For Stage 1 Vapor Recovery 250,000	2.26 tons per year

¹ Daily throughput threshold is the maximum calculated design throughput for any day, and is not an average

² Based on the annual gasoline throughput requested in the permit application

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 or tons per calendar year) shall be submitted to the department by March 15 each year.

6. MODIFICATION.

- A. 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. 20.11.41.7.11 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.
- B. This facility shall obtain a permit modification and comply with the requirements of 40 CFR 63 Subpart CCCCCC - National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities if the facility 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.

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. **PERFORMANCE TEST REQUIREMENTS.** Each owner or operator, at the time of installation, of a vapor loss control system required under 20.11.65.14.A.(1) NMAC and every 3 years thereafter, must comply with the requirements below:

A. 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 CCCCC, for pressure-vacuum vent valves installed on your gasoline storage tank(s) using one of the test methods below:

1. California Air Resources Board Vapor Recovery Test Procedure TP-201.11.—Leak Rate and Cracking Pressure of Pressure/Vacuum Vent Valves, adopted October 8, 2003 (incorporated by reference, see §63.14); or

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

B. You must demonstrate compliance with the static pressure performance requirement, specified in item 1(h) of Table 1 of 40 CFR Part 63, Subpart CCCCC, for your vapor loss control system by conducting a static pressure test on your gasoline storage tank(s) using one of the test methods below:

1. 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); or

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

10. **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.

11. **FEDERAL RULEMAKING.** In addition to Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65 NMAC, *Volatile Organic Compounds*; 40 CFR Part 63, Subpart BBBBBB – *National Emission Standards for Hazardous Air Pollutants for Source Category: Gasoline Distribution Bulk Plants* applies to this facility. Based on the requested annual throughput for gasoline, this facility's daily throughput would amount to 20,000 gallons or less of gasoline. Therefore, the permittee shall ensure the applicable requirements of 40 CFR Part 63, Subpart BBBBBB, §63.11085 and §63.11086 are met as well as the Subpart A – *General Provisions* of 40 CFR Part 63.

A. **GENERAL APPLICABLE REQUIREMENTS.**

1. §63.11085(a) You must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions.

2. §63.11086(d) 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. Measures to be taken include, but are not limited to, the following:

(d)(1) Minimize gasoline spills;

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

(d)(3) Cover all open gasoline containers and all gasoline storage tank fill-pipes with a gasketed seal when not in use; and

(d)(4) Minimize gasoline sent to open waste collection systems that collect and transport gasoline to reclamation and recycling

devices, such as oil/water separators.

B. **SUBMERGED FILLING OF GASOLINE STORAGE TANKS (§63.11086).**

1. §63.11086(a) You must only load gasoline into storage tanks and cargo tanks at your facility by utilizing submerged filling, as defined in §63.11100, and as specified in paragraph (a)(1) or (a)(2) of this section:

(a)(1) Submerged fill pipes installed on or before November 9, 2006, must be no more than 12 inches from the bottom of the tank; or

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

C. **LEAK INSPECTION REQUIREMENTS.**

1. §63.11086(c) You must perform a monthly leak inspection of all equipment in gasoline service according to the requirements specified in §63.11089(a) through (d).

2. §63.11089(a) You shall perform a monthly leak inspection of all equipment in gasoline service, as defined in §63.11100. For this inspection, detection methods incorporating sight, sound, and smell are acceptable.

3. §63.11089(b) A log book shall be used and shall be signed by the owner or operator at the completion of each inspection. A section of the log book shall contain a list, summary description, or diagram(s) showing the location of all equipment in gasoline service at the facility.

4. §63.11089(c) Each detection of a liquid or vapor leak shall be recorded in the log book. When a leak is detected, an initial attempt at repair shall be made as soon as practicable, but no later than 5 calendar days after the leak is detected. Repair or replacement of leaking equipment shall be completed within 15 calendar days after detection of each leak, except as provided in §63.11089(d).

5. §63.11089(d) Delay of repair of leaking equipment will be allowed if the repair is not feasible within 15 days. The owner or operator shall provide in the semi-annual report specified in §63.11095(d), the reason(s) why the repair was not feasible and the date each repair was completed.

D. NOTIFICATIONS.

1. §63.11086(e) You must submit an Initial Notification that you are subject to this subpart by May 9, 2008. 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 (e)(1) through (3) of this section as follows:

(e)(1) the name and address of the owner and the operator;

(e)(2) the address (i.e., physical location) of the bulk plant; and

(e)(3) a statement that the notification is being submitted in response to this subpart and identifying the requirements in paragraphs (a), (c) and (d) of §63.11086 that apply to you;

2. §63.11086(f) You must submit a Notification of Compliance Status to the applicable EPA Regional Office and the delegated State authority, as specified in §63.13, by May 9, 2008. 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 (e) 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 (e) of this section.

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.

E. RECORDKEEPING.

1. §63.11085(b) - You must keep records and submit reports as specified in §63.11094(g) and §63.11095(d).

2. §63.11094(g) - Each owner or operator of an affected source under this subpart shall keep records as specified in paragraphs (g)(1) and (2) of this section:

(g)(1) Records of the occurrence and duration of each malfunction of operation (i.e., process equipment) or the air pollution control and monitoring equipment.

(g)(2) Records of actions taken during periods of malfunction to minimize emissions in accordance with §63.11085(a), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

3. §63.11095(d) - Each owner or operator of an affected source under this subpart shall submit a semiannual report including the number, duration, and a brief description of each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with §63.11085(a), including actions taken to correct a malfunction. Owners or operators are not required to submit reports for periods during which no malfunctions occurred.

12. 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.

13. 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)

14. 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

UMF # 1



AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
Facility ID: FA0005668 Record ID: PR0006305



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
 Company Name

Certified Mail # 7010 3090 0001 4486 6999
 Return Receipt Requested

11 Paseo Real
 Mailing Address

Santa Fe
 City

NM
 State

87507
 Zip

Responsible Official: Rod Honstein, Managing Member
 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.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014
Isreal L. Tovar Isreal L. Tovar
 Print Name Sign Name

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
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

¹ **TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER:** No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) NMAC, Volatile Organic Compounds.]

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

**IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]**

WRITTEN TESTIMONY OF DANA ROWANGOULD

I, Dana Rowangould, do hereby swear and affirm that the following is true to the best of my knowledge. I am qualified and competent to give this declaration, and the factual statements herein are true and correct to the best of my knowledge, information and belief. The opinions expressed herein are based on my best professional judgment.

I. Name and Title

My name is Dana Rowangould. I am a principal in Sustainable Systems Research, LLC, a private consulting firm that specializes in environmental, public health and social equality issues. I am also an Affiliate Associate Professor with the University of Washington, Department of Civil and Environmental Engineering.

II. Education and Experience

I received my Bachelor's of Science (*cum laude*) in Civil and Environmental Engineering (with an emphasis in Environmental Engineering) in 2002 from Rice University. I received my Master's of Science in Agricultural and Resource Economics (with an emphasis in Environmental Economics) in 2009 from the University of California, Davis. I received my Ph.D. in Ecology (with an emphasis in Environmental Policy) in 2013 from the University of California, Davis.

SWOP Exhibit 3

With the assistance of my colleagues (Dr. Deb Niemeier and Melody Eldridge), I have detailed my findings in SWOP Exhibit 3.B. Deb Niemeier and Melody's Eldridge's qualifications *Curricula Vita* are included in SWOP Exhibit 3.B.

IV. Introduction

The Honstein Oil bulk gasoline plant is located at 101 Anderson Ave. SE in the San Jose Neighborhood of Albuquerque. The facility receives gasoline by cargo tank trucks, stores the gasoline, and distributes gasoline to dispensing facilities via cargo tank trucks; throughput at the facility does not exceed 20,000 gallons per day. The City of Albuquerque Air Quality Authority to Construct Permit #3131 applies to an existing (and previously unpermitted) 6,000 gallon underground storage tank used for unleaded gasoline.

Gasoline storage and transport tanks emit volatile organic compounds (VOCs). The emissions from the permitted tank occur in the context of the San Jose neighborhood, which is home to approximately 2,500 residents, a school, and several other locations where people congregate. The neighborhood is also home to a number of industrial facilities emitting VOCs and other types of air pollution.

In this testimony I discuss the context, the state of knowledge and the conditions under which a comprehensive cumulative risk analysis may be warranted. Although data are limited, existing analyses and data sources suggest that there is potential for cumulative health risks to residents of the San Jose neighborhood. In particular, I find that:

1. The San Jose community is particularly vulnerable to incremental health effects: it is home to a greater percentage of people of color, people under age 18, and families living in poverty than the City of Albuquerque and Bernalillo County.

UMF #2

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 annual gasoline throughput. Allowable ton per year (tpy) emissions.

Unit	Unit Description	Daily Throughput Threshold of Gasoline (in gallons) ¹	Allowable Annual Throughput of Gasoline (in gallons) ²	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) ²
1	Underground Storage Tank	≤20,000	For Stage 1 Vapor Recovery 250,000	2.26 tons per year

¹ Daily throughput threshold is the maximum calculated design throughput for any day, and is not an average

² Based on the annual gasoline throughput requested in the permit application

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 or tons per calendar year) shall be submitted to the department by March 15 each year.

6. MODIFICATION.

- A. 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. 20.11.41.7.11 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.
- B. This facility shall obtain a permit modification and comply with the requirements of 40 CFR 63 Subpart CCCCCC – National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities if the facility 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.

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.

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

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]

WRITTEN TESTIMONY OF DANA ROWANGOULD

I, Dana Rowangould, do hereby swear and affirm that the following is true to the best of my knowledge. I am qualified and competent to give this declaration, and the factual statements herein are true and correct to the best of my knowledge, information and belief. The opinions expressed herein are based on my best professional judgment.

I. Name and Title

My name is Dana Rowangould. I am a principal in Sustainable Systems Research, LLC, a private consulting firm that specializes in environmental, public health and social equality issues. I am also an Affiliate Associate Professor with the University of Washington, Department of Civil and Environmental Engineering.

II. Education and Experience

I received my Bachelor's of Science (*cum laude*) in Civil and Environmental Engineering (with an emphasis in Environmental Engineering) in 2002 from Rice University. I received my Master's of Science in Agricultural and Resource Economics (with an emphasis in Environmental Economics) in 2009 from the University of California, Davis. I received my Ph.D. in Ecology (with an emphasis in Environmental Policy) in 2013 from the University of California, Davis.

SWOP Exhibit 3

various activities on those impacts and the benefits of implementing various mitigations.

V. Exposure to Permitted Emissions

Gasoline storage and transport tanks emit VOCs in a number of ways, including when they are filled and vapors are displaced, from leaks, and from breathing (venting of vapors as the tank temperature fluctuates). The rate of emissions from fuel storage tanks and tanks used to transport fuel depends on the storage conditions, the throughput of the tanks, and the nature of the transport tanks.

According to the Honstein Oil permit application, the tank age and manufacturer are unknown, although correspondence from the Environmental Health Department indicates that the tank was installed in the 1960's. The permitted tank is required to have at least a Stage I vapor recovery system, which would capture a significant portion of the gasoline vapors. The permit application indicates that estimated VOC emissions are expected to come from the tank working and breathing (0.87 tons/year), filling (0.14 tons/year), and tanker truck loading (1.24 tons/year). In total, the tank will be permitted to emit 2.26 tons of VOCs per year.

Gasoline generally contains over 150 hydrocarbons, including benzene, toluene and xylenes. Breathing gasoline vapors can cause lung irritation and induce a variety of nervous system effects, ranging from headaches and dizziness to coma or even death at high concentrations. Inhalation of benzene is of particular concern. Long term exposure to benzene (even at relatively low levels) can harm bone marrow, cause anemia, and increase the risk for infections. A lifetime of exposure to benzene concentrations of 0.13 - 0.45 micrograms per cubic meter (μm^3) (equivalent to 0.000041 - 0.00014 parts per million (ppm) at 25 °C) is expected to increase a person's lifetime risk of cancer by one in a million. Inhalation of higher concentrations

UMF #3

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 annual gasoline throughput. Allowable ton per year (tpy) emissions.

Unit	Unit Description	Daily Throughput Threshold of Gasoline (in gallons) ¹	Allowable Annual Throughput of Gasoline (in gallons) ²	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) ²
1	Underground Storage Tank	≤20,000	For Stage 1 Vapor Recovery 250,000	2.26 tons per year

¹ Daily throughput threshold is the maximum calculated design throughput for any day, and is not an average

² Based on the annual gasoline throughput requested in the permit application

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 or tons per calendar year) shall be submitted to the department by March 15 each year.

6. MODIFICATION.

A. 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. 20.11.41.7.11 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.

B. This facility shall obtain a permit modification and comply with the requirements of 40 CFR 63 Subpart CCCCCC – National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities if the facility 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.

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.

UMF #4

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 annual gasoline throughput. Allowable ton per year (tpy) emissions.

Unit	Unit Description	Daily Throughput Threshold of Gasoline (in gallons) ¹	Allowable Annual Throughput of Gasoline (in gallons) ²	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) ²
1	Underground Storage Tank	≤20,000	For Stage 1 Vapor Recovery 250,000	2.26 tons per year

¹ Daily throughput threshold is the maximum calculated design throughput for any day, and is not an average
² Based on the annual gasoline throughput requested in the permit application

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 or tons per calendar year) shall be submitted to the department by March 15 each year.

6. MODIFICATION.

- A. 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. 20.11.41.7.11 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.
- B. This facility shall obtain a permit modification and comply with the requirements of 40 CFR 63 Subpart CCCCCC – National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities if the facility 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.

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.

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

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]

WRITTEN TESTIMONY OF DANA ROWANGOULD

I, Dana Rowangould, do hereby swear and affirm that the following is true to the best of my knowledge. I am qualified and competent to give this declaration, and the factual statements herein are true and correct to the best of my knowledge, information and belief. The opinions expressed herein are based on my best professional judgment.

I. Name and Title

My name is Dana Rowangould. I am a principal in Sustainable Systems Research, LLC, a private consulting firm that specializes in environmental, public health and social equality issues. I am also an Affiliate Associate Professor with the University of Washington, Department of Civil and Environmental Engineering.

II. Education and Experience

I received my Bachelor's of Science (*cum laude*) in Civil and Environmental Engineering (with an emphasis in Environmental Engineering) in 2002 from Rice University. I received my Master's of Science in Agricultural and Resource Economics (with an emphasis in Environmental Economics) in 2009 from the University of California, Davis. I received my Ph.D. in Ecology (with an emphasis in Environmental Policy) in 2013 from the University of California, Davis.

SWOP Exhibit 3

With the assistance of my colleagues (Dr. Deb Niemeier and Melody Eldridge), I have detailed my findings in SWOP Exhibit 3.B. Deb Niemeier and Melody's Eldridge's qualifications *Curricula Vita* are included in SWOP Exhibit 3.B.

IV. Introduction

The Honstein Oil bulk gasoline plant is located at 101 Anderson Ave. SE in the San Jose Neighborhood of Albuquerque. The facility receives gasoline by cargo tank trucks, stores the gasoline, and distributes gasoline to dispensing facilities via cargo tank trucks; throughput at the facility does not exceed 20,000 gallons per day. The City of Albuquerque Air Quality Authority to Construct Permit #3131 applies to an existing (and previously unpermitted) 6,000 gallon underground storage tank used for unleaded gasoline.

Gasoline storage and transport tanks emit volatile organic compounds (VOCs). The emissions from the permitted tank occur in the context of the San Jose neighborhood, which is home to approximately 2,500 residents, a school, and several other locations where people congregate. The neighborhood is also home to a number of industrial facilities emitting VOCs and other types of air pollution.

In this testimony I discuss the context, the state of knowledge and the conditions under which a comprehensive cumulative risk analysis may be warranted. Although data are limited, existing analyses and data sources suggest that there is potential for cumulative health risks to residents of the San Jose neighborhood. In particular, I find that:

1. The San Jose community is particularly vulnerable to incremental health effects: it is home to a greater percentage of people of color, people under age 18, and families living in poverty than the City of Albuquerque and Bernalillo County.

UMF #5

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 annual gasoline throughput. Allowable ton per year (tpy) emissions.

Unit	Unit Description	Daily Throughput Threshold of Gasoline (in gallons) ¹	Allowable Annual Throughput of Gasoline (in gallons) ²	Allowable Annual Emissions of Volatile Organic Compounds (VOC's) ²
1	Underground Storage Tank	≤20,000	For Stage 1 Vapor Recovery 250,000	2.26 tons per year

¹ Daily throughput threshold is the maximum calculated design throughput for any day, and is not an average

² Based on the annual gasoline throughput requested in the permit application

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 or tons per calendar year) shall be submitted to the department by March 15 each year.

6. MODIFICATION.

A. 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. 20.11.41.7.11 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.

B. This facility shall obtain a permit modification and comply with the requirements of 40 CFR 63 Subpart CCCCCC – National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Dispensing Facilities if the facility 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.

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.

UMF #6



AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
Facility ID: FA0005668 Record ID: PR0006305



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
 Company Name

Certified Mail # 7010 3090 0001 4486 6999
 Return Receipt Requested

11 Paseo Real
 Mailing Address

Santa Fe
 City

NM
 State

87507
 Zip

Responsible Official: Rod Honstein, Managing Member
 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.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014
Isreal L. Tovar Isreal L. Tovar
 Print Name Sign Name

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
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

¹ **TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER:** No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) NMAC, Volatile Organic Compounds.]

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

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]

WRITTEN TESTIMONY OF DANA ROWANGOULD

I, Dana Rowangould, do hereby swear and affirm that the following is true to the best of my knowledge. I am qualified and competent to give this declaration, and the factual statements herein are true and correct to the best of my knowledge, information and belief. The opinions expressed herein are based on my best professional judgment.

I. Name and Title

My name is Dana Rowangould. I am a principal in Sustainable Systems Research, LLC, a private consulting firm that specializes in environmental, public health and social equality issues. I am also an Affiliate Associate Professor with the University of Washington, Department of Civil and Environmental Engineering.

II. Education and Experience

I received my Bachelor's of Science (*cum laude*) in Civil and Environmental Engineering (with an emphasis in Environmental Engineering) in 2002 from Rice University. I received my Master's of Science in Agricultural and Resource Economics (with an emphasis in Environmental Economics) in 2009 from the University of California, Davis. I received my Ph.D. in Ecology (with an emphasis in Environmental Policy) in 2013 from the University of California, Davis.

SWOP Exhibit 3

With the assistance of my colleagues (Dr. Deb Niemeier and Melody Eldridge), I have detailed my findings in SWOP Exhibit 3.B. Deb Niemeier and Melody's Eldridge's qualifications *Curricula Vita* are included in SWOP Exhibit 3.B.

IV. Introduction

The Honstein Oil bulk gasoline plant is located at 101 Anderson Ave. SE in the San Jose Neighborhood of Albuquerque. The facility receives gasoline by cargo tank trucks, stores the gasoline, and distributes gasoline to dispensing facilities via cargo tank trucks; throughput at the facility does not exceed 20,000 gallons per day. The City of Albuquerque Air Quality Authority to Construct Permit #3131 applies to an existing (and previously unpermitted) 6,000 gallon underground storage tank used for unleaded gasoline.

Gasoline storage and transport tanks emit volatile organic compounds (VOCs). The emissions from the permitted tank occur in the context of the San Jose neighborhood, which is home to approximately 2,500 residents, a school, and several other locations where people congregate. The neighborhood is also home to a number of industrial facilities emitting VOCs and other types of air pollution.

In this testimony I discuss the context, the state of knowledge and the conditions under which a comprehensive cumulative risk analysis may be warranted. Although data are limited, existing analyses and data sources suggest that there is potential for cumulative health risks to residents of the San Jose neighborhood. In particular, I find that:

1. The San Jose community is particularly vulnerable to incremental health effects: it is home to a greater percentage of people of color, people under age 18, and families living in poverty than the City of Albuquerque and Bernalillo County.

UMF #7



**AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
Facility ID: FA0005668 Record ID: PR0006305**



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
Company Name

Certified Mail # 7010 3090 0001 4486 6999
Return Receipt Requested

11 Paseo Real
Mailing Address

Santa Fe
City

NM
State

87507
Zip

Responsible Official: Rod Honstein, Managing Member
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 (AQC'B) regulation, Title 20, New Mexico Administrative Code (20 NMAC), Chapter 11, Part 40 (20.11.40 NMAC), Source Registration; and AQC'B regulation, Title 20, NMAC, Chapter 11, Part 41 (20.11.41 NMAC), Authority to Construct.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014
Isidro L. Tovar Isidro L. Tovar
 Print Name Sign Name

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

1. **AUTHORITY TO CONSTRUCT PERMIT THRESHOLD (74-2-7A.(1) NMS4)**. 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
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER: No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) NMAC, Volatile Organic Compounds.]

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

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3131 [Honstein Oil]

WRITTEN TESTIMONY OF DANA ROWANGOULD

I, Dana Rowangould, do hereby swear and affirm that the following is true to the best of my knowledge. I am qualified and competent to give this declaration, and the factual statements herein are true and correct to the best of my knowledge, information and belief. The opinions expressed herein are based on my best professional judgment.

I. Name and Title

My name is Dana Rowangould. I am a principal in Sustainable Systems Research, LLC, a private consulting firm that specializes in environmental, public health and social equality issues. I am also an Affiliate Associate Professor with the University of Washington, Department of Civil and Environmental Engineering.

II. Education and Experience

I received my Bachelor's of Science (*cum laude*) in Civil and Environmental Engineering (with an emphasis in Environmental Engineering) in 2002 from Rice University. I received my Master's of Science in Agricultural and Resource Economics (with an emphasis in Environmental Economics) in 2009 from the University of California, Davis. I received my Ph.D. in Ecology (with an emphasis in Environmental Policy) in 2013 from the University of California, Davis.

SWOP Exhibit 3

various activities on those impacts and the benefits of implementing various mitigations.

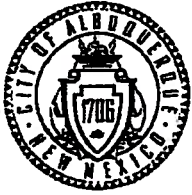
V. Exposure to Permitted Emissions

Gasoline storage and transport tanks emit VOCs in a number of ways, including when they are filled and vapors are displaced, from leaks, and from breathing (venting of vapors as the tank temperature fluctuates). The rate of emissions from fuel storage tanks and tanks used to transport fuel depends on the storage conditions, the throughput of the tanks, and the nature of the transport tanks.

According to the Honstein Oil permit application, the tank age and manufacturer are unknown, although correspondence from the Environmental Health Department indicates that the tank was installed in the 1960's. The permitted tank is required to have at least a Stage I vapor recovery system, which would capture a significant portion of the gasoline vapors. The permit application indicates that estimated VOC emissions are expected to come from the tank working and breathing (0.87 tons/year), filling (0.14 tons/year), and tanker truck loading (1.24 tons/year). In total, the tank will be permitted to emit 2.26 tons of VOCs per year.

Gasoline generally contains over 150 hydrocarbons, including benzene, toluene and xylenes. Breathing gasoline vapors can cause lung irritation and induce a variety of nervous system effects, ranging from headaches and dizziness to coma or even death at high concentrations. Inhalation of benzene is of particular concern. Long term exposure to benzene (even at relatively low levels) can harm bone marrow, cause anemia, and increase the risk for infections. A lifetime of exposure to benzene concentrations of 0.13 - 0.45 micrograms per cubic meter (μm^3) (equivalent to 0.000041 - 0.00014 parts per million (ppm) at 25 °C) is expected to increase a person's lifetime risk of cancer by one in a million. Inhalation of higher concentrations

UMF #8



**AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
Facility ID: FA0005668 Record ID: PR0006305**



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
Company Name

Certified Mail # 7010 3090 0001 4486 6999
Return Receipt Requested

11 Pasco Real
Mailing Address

Santa Fe
City

NM
State

87507
Zip

Responsible Official: Rod Honstein, Managing Member
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 (AQC'B) regulation, Title 20, New Mexico Administrative Code (20 NMAC), Chapter 11, Part 40 (20.11.40 NMAC), Source Registration; and AQC'B regulation, Title 20, NMAC, Chapter 11, Part 41 (20.11.41 NMAC), Authority to Construct.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014
Isted L. Tovar David J. Javary
 Print Name Sign Name

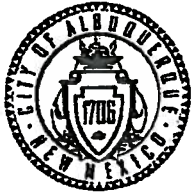
Air Quality Protection Programs - Permitting Section
Air Quality Program
City of Albuquerque Environmental Health Department

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
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage I Vapor Balanced, Submerged Filling

¹ **TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER:** No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) NMAC, Volatile Organic Compounds.]

UMF #9



AIR QUALITY AUTHORITY TO CONSTRUCT PERMIT #3131
FACILITY CDS # NM/001/02259
Facility ID: FA0005668 Record ID: PR0006305



Richard J. Berry, Mayor

Mary Lou Leonard, Director

Issued to: Honstein Oil & Distributing, LLC
 Company Name

Certified Mail # 7010 3090 0001 4486 6999
 Return Receipt Requested

11 Pasco Real
 Mailing Address

Santa Fe
 City

NM
 State

87507
 Zip

Responsible Official: Rod Honstein, Managing Member
 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.

Honstein Oil Company ("permittee") is hereby issued this **AUTHORITY TO CONSTRUCT PERMIT** as a **NEW STATIONARY SOURCE**.

This **AUTHORITY TO CONSTRUCT** Permit Number 3131 has been issued based on the review of the applications received by the Albuquerque Environmental Health Department (Department), Air Quality Program (Program) on October 3, 2013 and May 15, 2014 and additional information received December 13, 2013, which was deemed complete on December 17, 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 3131 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
Honstein Oil 101 Anderson Avenue SE Albuquerque, New Mexico 87102	349473 Easting 3881234 Northing	Bulk Gasoline Plant ¹	5171	424710

¹Bulk Gasoline Plant means any gasoline storage and distribution facility that receives gasoline by pipeline, ship or barge, or cargo tank, and subsequently loads the gasoline into gasoline cargo tanks for transport to gasoline dispensing facilities, and has a gasoline throughput of less than 20,000 gallons per day.

Issued on the 12th day of June, 2014

Isidro L. Tovar
 Print Name

Mary Lou Leonard
 Sign Name

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

1. AUTHORITY TO CONSTRUCT PERMIT THRESHOLD (74-2-7A.(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 ¹
1	Underground Storage Tank	6,000	Unknown	Regular Unleaded Gasoline	Stage 1 Vapor Balanced, Submerged Filling

¹ **TRANSPORT AND DELIVERY OF GASOLINE BY MOBILE TANK TRUCKS OR TRAILER:** No person shall unload gasoline into any underground storage tank with a capacity of 3,000 gallons or more unless such tank is equipped with an approved vapor loss control system, including a submerged fill pipe, in which displaced vapors from the underground storage tank are either contained or are processed such that final emissions to the atmosphere do not exceed 1.15 pounds of VOCs per 1,000 gallons of gasoline loaded. [Albuquerque-Bernalillo Air Quality Control Board Regulation 20.11.65.14.A.(1) NMAC, Volatile Organic Compounds.]