

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

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

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

Petitioners,

v.

City of Albuquerque Environmental Health
Department, Air Quality Program, and
Smith's Food & Drug Centers, Inc.,

Respondents.

AQCB Petition No. 2014-3

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**REPLY IN SUPPORT OF SMITH'S FOOD & DRUG CENTERS, INC.'S
MOTION TO DISMISS PETITIONER PAT TOLEDO FOR LACK OF STANDING**

Petitioner Toledo's general opposition to Smith's fuel centers does not give him standing to appeal every GDF air permit that is ever issued to Smith's. The Air Quality Control Act ("Air Act"), the Board's regulations and the common law undoubtedly require him to be adversely affected in a direct and concrete way in order to have standing. Section 74-2-7(H); 20.11.81.2 NMAC; *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222 ("ACLU II"). Toledo fails in his response brief to establish that he is directly adversely affected by the permitting action in this case. Toledo instead reasserts his vague claims of hypothetical harm and argues that he has standing merely because: (1) he is a citizen of Albuquerque, (2) he "visits and runs in the neighborhood on a routine basis," and (3) he is considering buying the property where Smith's proposes to construct the 4th Street GDF. These are

the same types of claims by Toledo that the Board rejected in the Smith's Tramway case. The Board should reject these claims here, as well.

ARGUMENT

1. EHD's Permitting Action Did Not Adversely Affect Toledo.

Toledo claims in his response brief that "[t]he specific injury alleged in this matter is the failure of [EHD] to give any weight" to testimony at the two public information hearings concerning "the negative cumulative impacts the [4th Street GDF] would have on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area[.]" Response Brief at 5. Nothing that Toledo said at the public information hearings or that is alleged in the Petition shows how *Toledo* is directly adversely affected. See *De Vargas Sav. & Loan Ass'n v. Campbell*, 1975-NMSC-026, ¶ 11, 87 N.M. 469, 535 P.2d 1320 ("New Mexico has always required allegations of *direct injury to the complainant* to confer standing.") (emphasis added).

Petitioners' Notice of Intent to Present Technical Testimony ("Petitioners' NOI") likewise fails to establish Toledo's standing. Petitioners identify Dr. Dana Rowangould as their sole proposed technical witness. Petitioners' NOI at 1. Petitioners expect Dr. Rowangould to testify that emissions from vehicles entering and exiting the 4th Street GDF, in addition to emissions from vapor losses associated with refueling activities, could increase the risk of health impacts in the vicinity of the 4th Street GDF. *Id.* at 2; Rowangould Memorandum Attached to Petitioners' NOI ("Rowangould Memo") at 1-3.

Dr. Rowangould defines the relevant vicinity by stating that "evidence suggests that vehicle emissions from busy roads are elevated for distances as great as 377-1870

feet[.]” Rowangould Memo at 3. Based upon this information, Dr. Rowangould identifies groups of residences up to “380+ feet” from the 4th Street GDF as “potential receptors” of air pollution. See *id.* at 4 (Table 1). Significantly, Dr. Rowangould does not conclude that the 4th Street GDF will cause, or is reasonably likely to cause, adverse health impacts in the vicinity of the 4th Street GDF. Instead, Dr. Rowangould recommends “conducting additional analysis to ensure that the potential air quality and health impacts associated with the [4th Street GDF] are better understood.” *Id.*

Nothing in Petitioners’ NOI suggests that Toledo will be adversely affected by the 4th Street GDF. Dr. Rowangould’s opinion regarding the potential for health impacts is based entirely on the idea that there are “potential receptors” of air pollution that are in close proximity to the 4th Street GDF. Toledo lives on the other side of town, yet tries to overcome his lack of physical proximity to the GDF by asserting that he “visits and runs in the neighborhood on a routine basis[.]” Response Brief at 5. This claim is virtually identical to the one Toledo made in the Smith’s Tramway case, Docket No. 2013-6, that he has friends “who live in the Four Hills area” whom he visits “regularly.” See Affidavit of Pat Toledo, attached as Exhibit C, at 1, ¶ 3. Toledo made a strikingly similar claim in the Smith’s Montgomery case, Docket No. 2014-2, asserting that he regularly visits his father who lives 4/5 of a mile from the proposed Montgomery GDF and that the two regularly travel through the intersection of Montgomery and Louisiana. See Excerpts of Montgomery Petitioners’ Discovery Responses, attached as Exhibit D (Int. No. 2, RFA

No. 3). Based on this pattern one wonders if there is anywhere in Albuquerque where Toledo cannot be found “regularly.”¹

In any event, Toledo fails to explain how traveling by or running near the 4th Street GDF at some unknown frequency would directly injure him. He does not own the real property where Smith’s proposes to construct the 4th Street GDF and he cannot have standing merely by claiming to be interested in purchasing it. Toledo also cannot base his standing on Smith’s conduct; whether Smith’s owns the property or has submitted signatures to EHD in support of the 4th Street GDF are irrelevant to the question of whether Toledo is adversely affected.

Again, New Mexico courts are looking for “something more than an ingenious exercise in the conceivable[.]” *Ramirez v. City of Santa Fe*, 1993-NMCA-049, ¶ 9, 115 N.M. 417, 852 P.2d 690 (quoted authority omitted), or an “undifferentiated threat of a hypothetical harm[.]” *ACLU II*, 2008-NMSC-045, ¶ 18. Rather, in order to have standing in New Mexico, a claimant “must show injury or a *real risk* of future injury.” *N.M. Cattle Growers Ass’n v. New Mexico Water Quality Control Com’n*, 2013-NMCA-046, ¶ 13, 299 P.3d 436 (emphasis added). The Air Board concluded in the Smith’s Tramway Appeal that Toledo did not have a sufficient connection to the Tramway GDF to be adversely affected in that case. The same is true in the present case.

It is also not enough that Toledo professes to have a sincere interest in advocating for the health and well being of residents in the vicinity of the 4th Street GDF or throughout the City of Albuquerque. *See United States v. SCRAP*, 412 U.S. 669, 687 (1973) (holding that the direct injury requirement of standing “prevents the judicial

¹ Toledo’s pattern of asserting standing based on his regular presence near whichever Smith’s GDF is at issue is consistent with the view he expressed at the Board’s July 9, 2014 meeting that the Board’s petition and hearing process is “cookie cutter.”

process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders”); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”). Toledo “must show that the action injures him in a concrete and personal way” in order to have standing. *ACLU II*, 2008-NMSC-045, ¶ 19 (quoted authority omitted).

Toledo cannot make this showing simply by alleging that EHD failed to take his comments into consideration. EHD did consider Toledo’s comments but did not find that any of them warranted denial of Permit No. 3136 under the applicable air quality permitting statutes and regulations. AR 113, pp. 596-97. EHD’s disagreement with Toledo about the significance of his comments cannot amount to a direct injury conferring Toledo with standing to challenge Permit No. 3136. Concluding otherwise means that any person who disagrees with EHD’s permit decisions has standing merely by alleging that EHD did not consider that person’s comments. This is not the law. The issue is whether the person is directly adversely affected by the issuance of the permit. *DeVargas*, 1975-NMSC-026, ¶ 11; *ACLU II*, 2008-NMSC-045, ¶ 18.

This is exactly why the Board should also reject Toledo’s request that it recognize his standing “simply as a citizen of Albuquerque[.]” Response Brief at 6. Neither Section 74-2-7(H) nor 20.11.81.14(B)(2)(c) NMAC opens the permit appeal process to all citizens of Albuquerque. To the contrary, these laws require that a petitioner be “adversely affected” by the permitting action. *Id.* Ignoring that requirement would render the provisions imposing it meaningless, which the Board cannot do. See *Int’l Ass’n of Firefighters v. City of Carlsbad*, 2009-NMCA-097, ¶ 11, 147 N.M. 6, 216

P.3d 256 (“We seek to give meaning to all parts of the statute, such that no portion is rendered surplusage or meaningless.”).

Similarly, Toledo fails to rebut Smith’s argument that he cannot meet the elements for establishing third-party standing set forth in *New Mexico Right To Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 13, 126 N.M. 788, 975 P.2d 841. See Motion at 9. Third-party standing is an approach recognized by the courts that allows an individual or organization standing to assert claims on behalf of others under certain circumstances. The Court in *Johnson* held that the litigant seeking standing must meet the following three factors: “[t]he litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Id.*

Toledo makes no attempt in his response brief to explain how he meets the elements of third-party standing in *Johnson*. Instead, Toledo misquotes Smith’s Motion in an effort to suggest that Smith’s concedes that any citizen of Albuquerque has standing to challenge any air permit. Smith’s obviously does not take that position and the law does not support it in any event. Toledo tries to suggest otherwise by misquoting the following statement from Smith’s Motion: “[T]here is no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action to challenge the issuance of a minor stationary source permit such as Permit No. 3135.” Response Brief at 6-7 (misquoting Smith’s Motion at 8).

Toledo omits key language from the quotation in an effort to mislead the Board about Smith’s argument. The actual quote from Smith’s Motion is as follows: “[T]here is

no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action and who is adversely affected by it to challenge the issuance of a minor stationary source permit such as Permit No. 3135.” Motion at 8 (emphasis added). Toledo also takes the quote out of context. Smith’s was addressing the third *Johnson* factor (hindrance to third parties) after having addressed the first two factors, i.e., Toledo’s lack of direct injury and his lack of a close relationship to the entire population of Albuquerque. Thus, reading the entire quote in context demonstrates that Smith’s does not take the position that every citizen of Albuquerque has standing to challenge the issuance of an air permit.

More importantly, as set forth above and in Smith’s Motion, New Mexico law does not support such a position. New Mexico law requires a direct and concrete injury in order for a claimant to have standing. *DeVargas*, 1975-NMSC-026, ¶ 11; *ACLU II*, 2008-NMSC-045, ¶ 18. Toledo plainly does not have a direct and concrete injury. The Board should therefore dismiss him from this action.

2. The Board Should Not Allow Toledo To Present Additional Evidence In Support Of His Standing At The October 22, 2014 Hearing On Dispositive Motions.


Toledo claims that he will “provide testimony and other evidence in support of [his] standing at the dispositive motion hearing scheduled for October 22, 2014.” Response Brief at 7. There is no reason for allowing Toledo to do so. Toledo had a sufficient opportunity in responding to Smith’s discovery and to Smith’s motion to dismiss to marshal and present all of the evidence purportedly demonstrating how he has been adversely affected in this case. Toledo’s responses make clear that he has

not been adversely affected and he fails to specify what other evidence he intends to present to the Board.

Allowing Toledo to present new evidence in support of his standing at this late stage would be extremely prejudicial to Smith's. Pursuant to the Hearing Officer's August 8, 2014 Prehearing Order, Smith's timely served Toledo with discovery seeking any evidence purportedly supporting Toledo's standing in this case. See Smith's August 22, 2014 Certificate of Service; Exhibit B to Smith's Motion to Dismiss (Int. Nos. 1, 3; RFA Nos. 4, 15). Toledo should not be allowed to provide vague and evasive answers to discovery and then present to the Board new evidence that Smith's has not had a fair opportunity to evaluate. But even if the Board allows Toledo to present new evidence at the hearing, it is clear from the Amended Petition, from Toledo's discovery responses and NOI, and from Toledo's response brief that he cannot offer any additional facts that would confer him with standing. The Board should therefore dismiss Toledo from this action.

SUTIN, THAYER & BROWNE
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By



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply In Support of Smith's Motion to Dismiss Petitioner Pat Toledo for Lack of Standing was served on the following parties, counsel and other individuals by the method indicated:

The original of the Reply was filed with the Hearing Clerk in this matter along with nine copies, all of which were delivered to the Hearing Clerk by hand delivery.

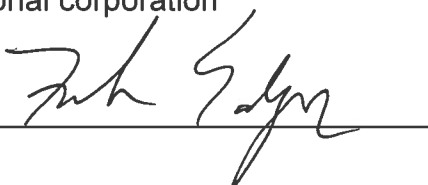
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on the 22nd day of October, 2014.

SUTIN, THAYER & BROWNE
A Professional corporation

By 

AFFIDAVIT OF PAT TOLEDO

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

COMES NOW Affiant, Pat Toledo, being first duly sworn upon his oath, and states as follows:

1. My name is Pat Toledo and I am a retired citizen of the City of Albuquerque, New Mexico.

2. I live approximately 6 miles from the Smith's gas station located at Tramway and Central. I can drive there, and often do, in 10 minutes and ride my bike there in about 25 minutes.

3. I have friends who live in the Four Hills area who I visit regularly.

4. I became interested and active in matters involving the increased throughput at Smith's gas stations and the negative impacts of those increases on the air quality in the City of Albuquerque because of the permit modification that was requested for the Smith's gasoline station located at 1313 Carlisle. I participated in that matter and, as a result of my participation, I became aware of the number of Smith's gas stations located in the City of Albuquerque. I also became aware that Smith's was requesting similar permit modifications at those locations.

5. The air quality in Albuquerque is not confined to one neighborhood or one part of town. Impacts to air quality in one location can have a negative impact on the entire City. As a long-time resident of the City, I am concerned about air quality throughout the entire City.

6. I participated in the permitting procedure for the increased throughput at the Tramway location by submitting comments and requesting a public hearing. My request for a public hearing was denied by the Department because they determined that there was not enough



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public interest to justify holding a hearing.


7. After the permit modification was approved by the Department, I took the time to draft a petition and to get signatures from people living in the area of the Smith's Tramway location.

8. As part of my involvement at the Carlisle location, I became aware that Smith's has a business model that links all of its stores and gas stations throughout the City. I am concerned that the increased VOCs resulting from the permit modifications at the numerous Smith's gasoline stations have the potential to impact air quality throughout the City and that there is a cumulative effect from these permitting actions.

9. I am also aware of the Smith's has had violations of its existing permits and am concerned that the Department, by granting the modifications, is simply allowing Smith's to keep increasing throughputs with little to no real oversight or incentive to comply with its existing permits.

10. I also have firsthand knowledge of the importance of public participation. Without the public participation at the Carlisle location, the Board would not have heard the full story of what has happened and is happening at the Carlisle location. We were given the opportunity to participate in the permitting process for the modification and I believe very strongly that the citizens of Albuquerque, particularly those who live close to the Tramway location, should be given the same opportunity, including the opportunity to participate in a public hearing before the permit modification is granted.

FURTHER AFFIANT SAYETH NOT.



Pat Toledo

SUBSCRIBED AND SWORN TO before me this 11 day of September,

2013.



OFFICIAL SEAL
Jeanne Cameron Washburn
NOTARY PUBLIC - STATE OF NEW MEXICO
My commission expires: 8/11/14

Jeanne Cameron Washburn
NOTARY PUBLIC

My Commission Expires:

8/11/14

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

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

Margaret M. Freed, Mary Ann Roberts
and Pat Toledo,

No. AQCB 2014-2

Petitioners.

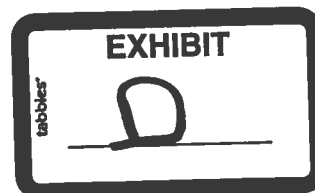
**PETITIONERS' RESPONSES TO SMITH'S INTERROGATORIES,
REQUESTS FOR ADMISSIONS AND REQUEST FOR PRODUCTION**

COME NOW the Petitioners, by and through undersigned counsel of record, and hereby provide the following responses to Smith's Food & Drug Centers, Inc.'s Interrogatories, Requests for Admissions and Request for Production.

INTERROGATORIES

Interrogatory No. 1: If any petitioner contends he or she will personally suffer from any negative effects of "air pollution," as that term is defined in NMSA 1978, § 74-2-2(B) (2001), as a result of the emissions authorized by Permit No. 3135, please identify: (1) the specific negative effects each petitioner contends he or she will suffer, (2) the specific factual basis for each petitioner's contention that he or she personally will suffer negative effects, (3) any medical, environmental or other scientific evidence that supports the contention, and (4) all witnesses and exhibits petitioners will present in support of the contention at the September 10, 2014 hearing on the merits (the "Hearing").

ANSWER: The Petitioners object to subparts 3 and 4 of Interrogatory No. 1 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. Ms. Roberts states that the VOCs produced at the intersection of Montgomery and



Louisiana are already high and are adversely affecting her health and that of her employees. See Petition for Hearing and answers to remaining interrogatories.

Interrogatory No. 2: With regard to the allegation on page 2 of the Petition that Petitioner Toledo “provides regular assistance and care for his father [and] is regularly in the area of the proposed fuel dispensing station [at 6941 Montgomery Blvd NE (“Montgomery GDF”)],” please state specifically: (1) what type of care Toledo provides to his father, (2) how often Toledo provides such care (e.g. days per week or per month), (3) what specific distance encompasses the “area” of the Montgomery GDF to which Toledo refers, (4) how often Toledo is in that “area” (e.g. days per week or per month), and (5) the route Toledo takes when visiting his father’s residence.

ANSWER: Petitioner Toledo’s father is 94-years-old and lives less than a mile north of the proposed GDF. His health is fragile and he suffers from respiratory conditions. Mr. Toledo provides his father assistance with daily living, including but not limited to companionship, health and home care assistance, running errands, and transportation to appointments. Mr. Toledo’s father does not drive and is dependent on Mr. Toledo for assistance and companionship. Mr. Toledo visits his father 3 to 4 times per week. The routes to and from his father’s house vary depending on what they are doing but they regularly travel through the intersection of Montgomery and Louisiana.

Interrogatory No. 3: With regard to Petitioner Toledo’s allegation on page 2 of the Petition that the Montgomery GDF will have an “impact” on his father’s property and quality of life, describe: (1) the specific impact alleged, (2) the specific factual basis for the allegation, (3) any medical, environmental or other scientific evidence that supports the allegation, and (4) all witnesses and exhibits petitioners will present at the Hearing in support of the allegation.

C. A detailed description of every document or other item that Petitioners will offer as an exhibit in support of Petitioners' position on that matter.

ANSWER: The Petitioners object to subparts B and C of Interrogatory No. 20 because it requests information that is required to be included in the Notice of Intent to Present Technical Testimony.

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that Petitioner Toledo does not own, rent or otherwise have an interest in real property within a three-mile radius of the Montgomery GDF.

RESPONSE: Admit x Deny ____

Petitioner Toledo specifically denies that a three-mile radius has any relevancy to this matter.

Request for Admission No. 2: Admit that Petitioner Toledo will not suffer a direct injury in fact as a result of the issuance of Permit No. 3135.

RESPONSE: Admit ____ Deny x

Petitioner Toledo objects to this Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 3: Admit that Joe Toledo's residence, located at 3232 La Ronda NE, is located approximately 4/5 of one mile from the Montgomery GDF.

RESPONSE: Admit x Deny ____

Request for Admission No. 4: Admit that Petitioner Toledo has filed a lawsuit against Smith's in the New Mexico Second Judicial District Court, Case No. D-202-DV-2013-08822, in which Toledo seeks, among other things, money damages from Smith's.