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
By Juan Reynosa, Environmental Justice Organizer
Esther and Steven Abeyta
Petitioners

PETITIONERS' RESPONSE IN OPPOSITION TO THE ENVIRONMENTAL HEALTH DEPARTMENT'S MOTION AND BRIEF FOR SUMMARY DISPOSITION

I. INTRODUCTION

In over forty pages of text, the City of Albuquerque Environmental Health Department Air Quality Program ("EHD") makes numerous arguments opposing the SouthWest Organizing Project's ("SWOP") August 12, 2014 Petition for Hearing ("Petition") scattered throughout its 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 ("EHD Brief"). The vast bulk of the motion for summary disposition, however, is smoke, which is both insubstantial and obscures the simple and straightforward issue in this case: whether the New Mexico Air Quality Control Act ("Air Act" or "Act") compels EHD and the Albuquerque-Bernalillo County Air Quality Board ("Board") to consider the cumulative impacts of air pollution sources on public health and property. Once the smoke is cleared away, it is apparent

that the Air Act requires a cumulative air impact analysis, which the EHD failed to conduct in granting Permit No. 3131. While SWOP will address all of EHD's multitudinous arguments, including why this matter is inappropriate for summary disposition, the Board should never lose sight of the primary issue at stake in this case. Based on the statute's plain language and legislative purpose, the Air Act requires that when evaluating permit applications, the EHD must consider the cumulative impacts of air pollution on the public health and property. Therefore, EHD's motion for summary disposition must be denied.

II. FACTS AND PROCEDURE

The EHD received Honstein Oil & Distributing, LLC ("Honstein") bulk petroleum facility permit application on October 3, 2013. Administrative Record ("A.R.") 66 at 192. EHD required this permit after it realized the Honstein facility had been operating for decades without a permit. A.R. 70 at 215. The application was deemed complete on December 17, 2013. A.R. 66 at 192. On January 29, 2014, EHD received the first of several requests for a public information hearing on the Honstein permit application. *Id.* On May 8, 2014 EHD sent out the first notice of the Honstein public information hearing. *Id.* EHD held the public information hearing on May 22, 2014 at the Herman Sanchez Community Center in the San Jose neighborhood. *Id.*

At that public information hearing, several community members voiced their concern over the Honstein facility's impacts on their health and quality of life. A.R. 58 at 169-172. Despite community concern, EHD granted Honstein's permit application on June 12, 2014, issuing Permit No. 3131. A.R. 67. The permit allows the Honstein facility to emit 2.26 tons per year of volatile organic compounds ("VOCs"). *Id.* at 196. In granting the Honstein permit application, EHD did not consider how the Honstein operation either alone or in combination

with other pollution sources impacted public health. A.R. 70 at 213. Significantly, when confronted with community concerns that air quality data taken at the Honstein facility fence line showed elevated levels of ethanol, toluene, and chlorobenzene, EHD deflected the concerns by stating the source of the pollution was not established. *Id.* at 219.

On August 12, 2014 Petitioners filed their Petition appealing EHD's issuance of Permit No. 3131. Among the bases upon which Petitioners appealed were that: (1) EHD failed to consider the Honstein facility's impacts on community members' health; (2) EHD failed to consider the Honstein facility's contribution to the cumulative air emissions in the San Jose neighborhood; and (3) EHD failed to consider the Honstein facility's impact on community members' quality of life. SWOP Petition at 3-4. Petitioners subsequently supported their Petition, pursuant to the Hearing Officer's December 19, 2014 Pre-Hearing Order, with pre-filed expert testimony. *See generally*, Petitioners' Notice of Intent to Present Technical Testimony (April 8, 2015) (" SWOP NOI").

In their NOI, Petitioners provided sworn declarations from several health experts about the health risks associated with the Honstein facility. *See, generally,* NOI Exhibit 1, Written Testimony of Kitty M. Richards; Exhibit 2, Written Testimony of Dr. George D. Thurston; Exhibit 3, Written Testimony of Dana Rowangould. EHD subsequently filed its own written expert testimony. *See generally*, Environmental Health Department Air Quality Program Notice of Intent to Present Technical Testimony (April 29, 2015) ("EHD NOI"). The same day EHD filed its NOI, it also filed a motion to vacate the scheduled Board hearing on this matter and sought resolution of this matter by summary procedures. Motion of the Environmental Health Department Air Quality Program to: Vacate and Reschedule Air Board Hearing and Amend the Prehearing Order to Resolve the Petition's Claims Via Summary Procedures or Summary

Judgment (April 29, 2015). ("Motion to Vacate"). Petitioners immediately requested an emergency status Conference to discuss the motion. Petitioners' letter to the Hearing Officer (April 30, 2015). On May 3, 2015, a status conference was held to discuss the disposition of the Motion to Vacate and the parties agreed to a briefing schedule for dispositive motions. Prehearing Order Revisions (May 15, 2015). Pursuant to that Order, on May 18, 2015, EHD filed its 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.

III. STATUTORY AND REGULATORY FRAMEWORK

This proceeding is governed by three statutory and regulatory frameworks and one human rights instrument: the federal Clean Air Act, the New Mexico Air Quality Control Act, the regulations implementing the Air Act, and the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). The Clean Air Act provides the minimum requirements for states to protect air quality and human health. 42 U.S.C. § 7416. Nevertheless, state and local governments still have the primary responsibility for protecting air quality and human health. *Id.* at § 7401(a)(3). VOCs emitted from the Honstein facility are governed by the regulations at 40 C.F.R. 63, Subpart A and Subpart BBBBBB. Hazardous Air Pollutants ("HAPs") emitted from the Honstein facility are governed by the regulations at 40 C.F.R. Part 63. HAPs are also regulated under 20.11.64.1 NMAC *et. seq*.

The Air Act provides that the primary responsibility of the local authority is to prevent and abate air pollution. NMSA 1978, § 74-2-5(A). Further, "air pollution" is defined as an:

> emission, except emission that occurs in nature, into the outdoor atmosphere 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.

Id. at § 74-2-2(B). This definition of air pollution is echoed in the regulations governing implementation of the Air Act. 20.11.1.7.F NMAC.

The Air Act also specifies the local authority's permitting duties. The Act allows the local authority to deny a construction permit[1] application, such as for Permit 3131, if it will not meet applicable requirements of the Air Act or will violate any provision of the Act. NMSA 1978, § 74-2-7(C)(a),(c). The local authority may also specify conditions on any permit. *Id.* at § 74-2-7(D). For construction permits, such as Permit 3131, the local authority may require that the pollution source be equipped for continuous emissions monitoring and measuring ambient air quality. 20.11.41.18 NMAC.

Finally, the CERD, which the United States has ratified, prohibits racial discrimination in effect, i.e., by disparate impacts or treatment. CERD Article 2(1)(c). *See also*, U.S. Const., Article II, Section 2, Clause 2. Further, the prohibition on racial discrimination in effect applies to all levels of government of state signatories, including state and local governments. CERD Article 2(1)(a); U.S. Const., Article VI, Clause 2.

IV. ARGUMENT

Based on the Board's regulations, summary disposition, which the EHD urges the Board to exercise, is inappropriate. Summary disposition would effectively eliminate the Act's public participation requirements and frustrate full development of facts.

Further, and more fundamentally, the dispute in this matter is over the correct interpretation of the Air Act and whether the New Mexico legislature intended to require administrative agencies implementing and enforcing the Act to consider cumulative air pollution

[1] Construction permits are generally governed by 20.11.41.1 NMAC *et. seq.*

impacts on public health. Based on the Act's plain language and purpose, it is clear that the Legislature intended for cumulative air pollution impacts to be considered in order to protect public health.

For these reasons, EHD's motion for summary disposition should be denied. Alternatively, if the Board decides this matter pursuant to its summary disposition process, the Board should decide in favor of the Petitioners as a matter of law.

A. Summary Disposition Under 20.11.81.20 is Inappropriate in this Matter.

The primary basis for EHD's motion for summary disposition is the Board's regulations governing alternate resolution. 20.11.81.20 NMAC ("Rule 20"). This rule is intended to provide parties with rapid disposition of a matter. *Id.* at 20.11.81.20.(1), (2). It requires that there be an expedited hearing on a motion for summary disposition and that there be public notice of that hearing and an opportunity for public participation. *Id.* In this case, however, there are several circumstances that make summary disposition inappropriate.

1. Summary Disposition in this Case Would Undermine Public Participation.

EHD offers an argument that because Rule 20 establishes a procedure for deciding a petition solely on the legal merits, the Board must only consider the facts alleged in the Petition, analogous to a Rule 12(B)(6) motion. EHD Brief at 4. However, as the EHD concedes, its interpretation of Rule 20 conflicts with the notice and public participation requirements in that same rule. EHD Brief at 5. Thus, EHD's request for summary disposition under Rule 20 should be denied.

a. *EHD's interpretation of Rule 20 violates a cardinal canon of statutory construction.*

Rule 20's language establishing a process for deciding a petition solely on the legal merits does not lead to the conclusion that **only** the facts alleged in a petition should be considered.

Indeed, Rule 20's provisions requiring public participation at an expedited public hearing demonstrate that the Board must consider facts beyond those alleged in a petition. 20.11.81.20.(A)(2)(b) NMAC. Thus, if a member of the public had factual information that is relevant to the legal issue to be resolved, under EHD's interpretation of Rule 20, the Board could never hear nor consider that information. If the EHD's interpretation of Rule 20 is accepted, the only facts the Board would be able to consider are those in a petition, making Rule 20's mandate to allow the public to address all aspects of the summary disposition in a public hearing meaningless. This result violates the fundamental canon of statutory construction that any interpretation of a statute or regulation[2] which renders any of the regulatory language extraneous or leads to unreasonable results should be avoided. *State v. Juan*, 2010-NMSC-041, ¶ 39, 148 N.M. 747, 759, *quoting State v. Javier M.,* 2001 NMSC-030, ¶ 32, 131 N.M. 1, 14.

b. *EHD's interpretation of Rule 20 is contrary to the New Mexico Supreme Court's holding in Rhino.*

Equally as important, EHD's interpretation of Rule 20 also effectively eliminates the public's ability to raise quality of life issues, contrary to the mandate in *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2005-NMSC-024, 138 N.M. 133 ("*Rhino*"). In that case, the New Mexico Supreme Court held that the Solid Waste Act's public participation provisions, whose operative language guaranteed the opportunity for members of the public to submit data and information, submit technical information and conduct cross examination, evinced the legislature's intent for the public to play a vital role in the landfill permitting process, including providing information on quality of life impacts. *Id.*, 2005-NMSC-024 at ¶¶ 21-24.

[2] The canons of statutory construction apply equally to regulations. *Johnson v New Mexico Oil Conservation Commission*, 199-NMSC-021, ¶ 27, 127 N.M. 120, 126 (*citing Wineman v. Kelly's Restaurant*, 1991-NMCA-128 ¶ 6, 113 N.M. 184, 185).

The legislature's intent to compel the agency to consider quality of life impacts, then, was based on the statute's public participation requirements. *Id.* at ¶¶ 19-23.

Under EHD's interpretation of Rule 20, factual information would be limited to what is presented in a petition. If the petition does not include any facts mentioning quality of life impacts, then under the EHD's interpretation, any other quality of life testimony would be prohibited in a Rule 20 expedited proceeding. Any quality of life testimony differing from that in a petition would likewise be prohibited.

While the opportunity for public participation in Rule 20 may be circumscribed in some respects, i.e., limiting testimony to that which is relevant to the issue before the Board, Rule 20 does not eliminate public participation entirely. 20.11.81.20.(2).(a), (b) NMAC. Moreover, nothing in Rule 20 indicates that the core legislative purpose in mandating public participation -- for example, insuring the public has the opportunity to express quality of life concerns, insuring the public has the opportunity to comment on permit conditions, and maximizing public input -- have been eliminated by the expedited hearing process. *See*, *Rhino*, 2005-NMSC-024 at ¶¶ 21-24. Under EHD's interpretation, however, the public participation provision becomes meaningless, contrary to the legislature's intent and the Supreme Court's holding in *Rhino*.

2. The Board's Summary Disposition Processes are Under Court Review.

In its brief, the EHD notes that there are two pending appeals before the New Mexico Court of Appeals over the use of summary judgment in permitting cases. Brief at 2. While the appeals address the issue of summary judgment, rather than summary disposition under Rule 20, the main issue the appellants in that case raised -- interference with public participation -- is identical to Petitioners' main concern in this matter. *Freed v. City of Albuquerque*, Docketing Statement, New Mexico Court of Appeals No. 34,285 (filed January 21, 2015) at 10-11; *see also*

Gradi v. City of Albuquerque, Docketing Statement, New Mexico Court of Appeals No. 34, 284 (filed January 21, 2015) at 4, 9-13. While the EHD professes it is "confident" that it will prevail in these appeals, EHD's bravado is no substitute for guidance from the Court of Appeals. *See*, EHD Brief at 2. In the absence of a decision from the Court of Appeals, the Board should take a conservative course of action and maximize, rather than restrict, public participation. Summary disposition under Rule 20 is therefore inappropriate.

3. The Board Has Not Provided Adequate Notice Under Rule 20.

The notice that issued in this case, reflecting the Hearing Officer's Prehearing Order Revisions, does not state that the motion hearing on June 30 is being conducted pursuant to 20.1.81.20 NMAC, nor does not state that if the Board grants the motion there will be no hearing on August 12 through 14. For all intents and purposes, it is a notice to the public there will be a public hearing on August 12, that the public has an opportunity to submit testimony, and that public comment will be taken at that time and at additional times. Because the notice for the June 30 hearing is inadequate, the Board should deny EHD's request for summary disposition under Rule 20.

4. Summary Disposition is Disfavored in New Mexico.

Whether summary procedures are used pursuant to Rule 20 or a process analogous to the summary judgment Rule 1-056 of the New Mexico Rules of Civil Procedure , the use of a summary procedure is historically disfavored in New Mexico. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 720 ("*Romero*") (New Mexico courts view summary judgment with disfavor, preferring a trial on the merits; summary judgment is a drastic remedy to be used with great caution) (citations omitted). Further, the New Mexico Supreme Court has reiterated that the chief objection to the use of summary procedures is that it substitutes "paper"

proceeding for getting one's "day in court." *Id.* at ¶ 9 ("We continue to refuse to loosen the reins of summary judgment, as doing so would 'turn what is a summary proceeding into a full-blown paper trial on the merits'.").

In *Romero*, the court was interpreting the rule of civil procedure governing summary judgment in the context of constitutional safeguards for the availability of trial by jury and having a jury weigh the factual evidence. *Id.* In this matter, the Board is responsible for adjudicating the Petition, which includes not only interpretation of law, but, perhaps more important, finding facts. *See*, 20.11.81.12.A.2.b ("[a] hearing officer shall exercise all powers and duties .. [to] assure the facts are **fully** elicited ...") (emphasis added). Under the rationale of *Romero*, this type of administrative adjudication offers an even stronger argument against the use of summary procedures, particularly where there is community interest in the matter. However, EHD's interpretation of Rule 20, wherein facts are limited to those alleged in a petition, effectively eliminates this important Board function.

In this case, Petitioners raise issues of public health and safety in relation to air quality as well as quality of life issues in relation to public health and safety issues which are within this Board's mandate and authority to consider under the New Mexico Air Quality Act. SWOP Petition at 3-4. Moreover, members of the affected community in addition to Petitioners have expressed concerns about the Honstein operation's impact on quality of life and deserve to have their concerns heard. *See, e.g.,* A.R. 58 at 169-172 (EHD's notes summarizing the public comments from Public Information Hearing on Permit No. 3131). Summary disposition in this case is therefore unwarranted.

B. Summary Judgment Is Not Appropriate.

For the same reasons that the Rule 20 process is inappropriate in this case, summary judgment is likewise inappropriate, and Petitioners adopt the above arguments with respect to summary judgment. Summary judgment, however, is also inappropriate in this case because EHD has failed entirely to establish that there is no genuine issue of material fact.

In *Romero* the court cited the requirement for the moving party in a motion for summary disposition to establish that there are no genuine issues of material fact before the burden shifts to the non-movant to defend its position. *Romero,* 2010-NMSC-035 at ¶ 10 (making a *prima facie* case requires that the moving party present "evidence … sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted") (citations omitted).

In this case EHD provides a list of nine undisputed facts that it claims are material and sufficient to support granting summary judgment. EHD Brief at 34-35. However, this list is incomplete and ignores several factual issues that should be developed and adjudicated, **even if** it is assumed the EHD's interpretation of whether the Air Act requires a cumulative impact analysis is correct.

For example, the Petitioners' witness, Dr. George Thurston, raised the issue of disparate impacts on the San Jose community in his pre-filed technical testimony. SWOP NOI Ex. 2, Testimony of Dr. George Thurston at 7. Dr. Thurston relied on U.S. Environmental Protection Agency ("EPA) National Air Toxics Assessment ("NATA") database information to support his testimony. *Id.* However, an EHD witness, Ms. Regan Eyerman, challenges the validity of the data in her pre-filed testimony. EHD NOI, Ex. 2, Written Testimony of EHD Technical Witness Regan V. Eyerman, P.E. at 9-11. This is a factual dispute that requires a hearing.

Moreover, the dispute over whether the NATA data are valid involves facts material to the resolution of this matter. The disparate impacts of air pollution, including VOCs, on minority communities such as San Jose, is a material breach of the EHD's and Board's obligations to prevent racial discrimination in effect under the CERD. CERD, Article 2(1)(a); *see also*, CERD Committee recommendations at 4, ¶ 10(a), (b), CERD/C/USA/CO/7-9 (Aug. 29, 2014).[3]

Further, Dr. Rowangould, in her written testimony, notes that the nearest EHD air monitor indicates that ground level ozone may be close to violating proposed standards. SWOP NOI, Ex. 3, Written Testimony of Dana Rowangould at 14-15. Thus, EHD should have considered whether VOC emissions, which cause ozone formation, from the Honstein facility would contribute to an exceedence. EHD Witness Isreal Tavarez disputes whether Dr. Rownagould's concern is valid because the Honstein facility emits relatively few VOCs in his opinion. EHD NOI, Ex. 1, Written Testimony of City Technical Witness Isreal L. Tavarez, P.E. at 12. There is a genuine issue of fact material to whether the Honstein facility is or may contribute to the exceedence of an ozone standard and, pending the results of necessary study, whether EHD can condition permit issuance to require facility modification in the event that study results show it is warranted. NMSA 1978, 74-2-5.3(B) and (C).

Finally, the record in this matter indicates that Petitioners measured concentrations of the hazardous air pollutant chlorobenzene at the Honstein facility fence line in excess of EPA reference levels. A.R. 61 at 180-181. EHD disputes the validity of Petitioners' data. EHD NOI, Ex. 3, Written Testimony of EHD Witness Daniel Gates at 1- 3. Therefore, there is a dispute over Petitioners' data showing a chlorobenzene concentration in excess of EPA standards and

[3] EHD asserts that filing an administrative complaint with the U.S. EPA is the only means by which a community can address disparate impacts. Brief at 40. EHD is apparently unaware of its obligations under the CERD.

that dispute is material because EHD could deny or modify Permit No. 3131 based on those data's accuracy. Because there are genuine issues of material fact, EHD has failed to establish a prima facie case for summary judgment and its motion must be denied.

C. The Air Act Regulations Require Reasonable Permit Conditions.

In their Petition, Petitioners seek continuous air quality monitoring at the Honstein facility to ensure compliance with federal Clean Air Act and Air Act standards. Petition at 5. EHD asserts that the Honstein facility emits VOCs which are not subject to federal Clean Air Act ambient air quality standards and Petitioners' demand is therefore not reasonable as a matter of law. EHD Brief at 22.

EHD's argument, however, ignores two important factors. First, the record in this matter indicates that Petitioners measured concentrations of the hazardous air pollutant chlorobenzene in excess of EPA reference levels at the Honstein facility fence line. A.R. 61 at 180-181. EHD disputes the validity of Petitioners' data. EHD NOI, Ex. 3, Written Testimony of EHD Witness Daniel Gates at 1- 3. Continuous air monitoring at the Honstein facility would either confirm or refute the evidence of these chlorobenzene concentrations; it would ensure compliance with Air Act standards. Thus, Petitioners' request is neither unreasonable as a matter of law nor as a practical matter.

Second, EHD's argument ignores the very clear regulatory authority in the Air Act regulations requiring air quality monitoring. 20.11.41.18.B.(6) NMAC. That regulation allows EHD to require that a construction permit source be equipped for performance testing, continuous emissions monitoring, and measuring ambient air quality. *Id.* The EHD's position that requiring air monitoring is unreasonable in the face of record evidence of potential HAP concentration exceedences effectively makes this provision under Section 41.18.B.(6)

meaningless, contrary to the canons of statutory construction. *Regents of the Univ. of N.M. v. N.M Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 411 (statutes must be interpreted so that no part is rendered superfluous or meaningless). EHD's argument is without merit, and the Board should find for Petitioners as a matter of law.

D. Both the Air Quality Control Act and the *Rhino* Decision Compel the Department to Consider Cumulative Impacts.

As Petitioners demonstrate in Sections IV.A and B, above, summary disposition in this matter is inappropriate in part because the New Mexico Supreme Court's decision in *Rhino* mandates that EHD and Board hold a hearing to both take **and** consider evidence about quality of life impacts, which EHD failed to do in this case, and which summary disposition would frustrate. However, if the Board determines that summary disposition is appropriate, it should find for Petitioners as a matter of law because the Air Quality Control Act and the *Rhino* decision compel EHD to consider cumulative impacts, which it has failed to do.

1. The *Rhino* Decision Requires Consideration of Cumulative Impacts When there is a Statutory or Regulatory Nexus.

EHD correctly notes that *Rhino* requires a legal nexus before an administrative agency is required to consider cumulative impacts of a project. EHD Brief at 27-28. However, EHD is wrong that neither the Air Act nor its implementing regulations provides such a legal nexus.

In *Rhino*, the petitioners argued that the New Mexico Environment Department ("NMED") was required to take into account the proliferation of landfills in a particular area, i.e., the cumulative impacts of landfills. *Id.*, 2005-NMSC-024 at ¶ 28. There, the New Mexico Supreme Court found that the neither the Solid Waste Act nor the Environmental Improvement Act compelled the NMED to consider cumulative impacts or reject a permit application based on public opposition. *Id.* at ¶ 29. The Court in that case was unable to find a specific standard in

either statute that would support the petitioners' requested relief. *Id.* Specifically, the Court held that a statute's general expression of legislative police power providing that the goal of a statute is to protect the "public health, safety and welfare" without more, is insufficient to create a standard by which NMED could consider cumulative impacts. *Id.* Such a broad mandate, reasoned the Court, would violate the principle that a legislative body may not vest unbridled or arbitrary power in an administrative body. *Id.* (citations omitted).

Because the enabling statutes did not have specific standards governing consideration of cumulative impacts, the court looked to NMED's regulations to determine whether there was a standard that would compel NMED to consider cumulative landfill impacts. *Id.* at ¶¶ 31-33. The Court found that regulatory provisions prohibiting landfills which create a public nuisance or create a potential hazard to public health, welfare or the environment were sufficient to require NMED to consider the cumulative effects of large scale garbage dumps and industrial sites on a single community. *Id.* Hence, the regulations' prohibition on a landfill creating a risk to public health created a sufficient standard to avoid the prohibition on unbridled and arbitrary delegation of legislative power to an administrative agency.

2. Both the Air Quality Control Act and Regulations Provide a Legal Nexus to Compel the Department to Consider Cumulative Impacts.

In the *Rhino* case, the New Mexico Supreme Court was forced to look to the Solid Waste Act regulations in order to find a legal standard that would compel an agency to consider cumulative impacts, because the statute contained none. *Id.*, 2005- NMSC-024 at ¶ 29. In this case, however, the Board does not need to resort to EHD's regulations[4] because the Air Quality Act contains the standard that compels EHD to consider cumulative impacts.

[4] Nevertheless, the regulations implementing the Act likewise contain the "reasonable risk" standard. 20.11.1.7.F NMAC.

The Air Quality Act contains two mandates for local pollution control authorities: 1) prevent and abate air pollution and 2) promulgate regulations that maintain national ambient air quality standards and prevent and abate air pollution. NMSA 1978, § 74-205(A), (B). However, the mandate to "prevent and abate air pollution" is not a general declaration of legislative authority as the EHD asserts. EHD Brief at 10, 12, 15-16, 24.

Instead, the definition of "air pollution" contains within it a standard intended to guide local pollution authorities in evaluating the cumulative impacts of a polluting operation. In the Act, "air pollution" is defined as "the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with **reasonable probability injure human health** ... or as **may unreasonably interfere with ... the reasonable use of property**". NMSA 1978, § 74-2-2(B) (emphasis added). Thus, by its plain language, the Air Act provides a standard by which multiple, i.e. cumulative, emissions should be evaluated: whether those emissions pose a reasonable probability of injuring human health or interfering with property use. *See*, *Duke City Lumber Co. v. New Mexico Envt'l Improvement Bd.*, 1984-NMSC-042, ¶¶ 16-17, 101 N.M. 291, 294-295 (in the context of considering a variance, the Environmental Improvement Board was required to apply the "reasonable probability" of risk to health standard found in the definition of "air pollution"). Put another way, the Air Quality Act requires local regulatory authorities to prevent and abate emissions of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or may unreasonably interfere with the use of property. The Air Quality Act therefore provides a legal nexus that compels EHD to consider cumulative impacts.

Moreover, this provision does not vest the administrative agency with unbridled authority, as EHD repeatedly asserts. EHD Brief at 11-12, 18, 23-25. Indeed, legislatures

regularly direct administrative agencies to apply "reasonable probability" of injury standards. For example, the United States Congress, in the Atomic Energy Act, which governs the civilian use of nuclear materials, directed the U.S. Nuclear Regulatory Commission to ensure "adequate protection of public health" as the standard by which to evaluate and issue nuclear materials licenses. 42 U.S.C. § 2232(a); *see also*, *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 109 (D.C. Cir. 1987); *In the Matter of Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), 18 N.R.C. 445, 464 (Sept. 21, 1983); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 167-168 (2d Cir. 2004) (U.S. Court of Appeals for the Second Circuit applied this standard without use of technical or numerical criteria).

Further, the New Mexico Supreme Court in *Rhino* ultimately endorses this very kind of narrative standard. There, the Court found two regulatory provisions that compelled NMED to consider cumulative impacts. 2005-NMSC-024 at ¶ 31. The first provision required that a solid waste permit be granted if the permit application demonstrated neither a **hazard to public health** nor **undue risk** to property. *Id.* The second provision required that solid waste facilities must be located and operated "in a manner that does not cause a public nuisance or create a **potential hazard to public health**". *Id.* (emphasis added) (citations omitted). These provisions were applied in addition to the other numerical and performance standards found throughout the Solid Waste Act regulations.[5] Therefore, the New Mexico Supreme Court does not require a

[5] In an implicit acknowledgement of the "reasonable risk" standard in the definition of "air pollution", EHD attempts to distinguish the Air Act from the Solid Waste Act, arguing that the Court in *Rhino*'s reliance on the Solid Waste Act regulations' "reasonable risk" standards is not analogous to this case because the Air Act has numerous numerical and performance standards which are intended to protect public health. EHD Brief at 23. This is wrong. The Solid Waste Act is replete with technical, numerical, and performance standards analogous to those in the Air Act. *See, e.g.*, 20.9.4.9-12 NMAC (siting criteria for various waste facilities); 20.9.4.13 NMAC (design criteria for municipal landfills, special waste landfills, and monofills); 20.9.9.9 NMAC (ground water monitoring systems and ground water monitoring system plans). The Supreme Court in *Rhino* held that the "reasonable risk" standard in the

numerical standard as a nexus for considering cumulative impacts, but has endorsed the use of "reasonable risk" standards, that vest a certain amount, but not unbridled, discretion in an administrative agency.

3. The EHD Reading of the Air Quality Act Violates Several Canons of Statutory Construction.

EHD's reading of the Air Quality Act also violates several canons of statutory construction. A court's primary purpose in interpreting a statute is to ascertain and give effect to legislative intent. *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-047, ¶ 11, 142 N.M. 235, 238. Statutes are to be interpreted to facilitate their operation and the legislature's goals. *Id.* Legislative intent is determined by the statute's plain language and context in which it was enacted. *Id.* Giving effect to legislative intent is accomplished by adopting a construction that will not render the statute's application absurd or unreasonable and will not lead to injustice or contradiction. *Id.*

Further, the entire statute must be construed as a whole "so that all the provisions will be considered in relation to one another." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 34, 140 N.M. 77, 86-87 (*quoting Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401. Statutes must be construed so that no part of the statute is rendered surplusage or superfluous. *Id.; see also, New Mexico Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 253.

a. *EHD's interpretation makes parts of the Act extraneous.*

EHD argues when read as a whole, the various numerical and performance standards in the Act are the only means by which pollution can be controlled in an "orderly" manner. EHD Brief at 18. Further, according to EHD, in contrast to the Act's provisions calling on the Board

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Solid Waste Act compelled NMED to consider the cumulative impacts of landfill proliferation **in addition** to the technical standards applicable to each individual landfill.

to promulgate regulations where human health concerns can be considered, permitting is limited to the application of regulations and standards, and consideration of human health impacts is beyond EHD's authority. *Id.* at 14. Therefore, EHD argues, air pollution can be abated and prevented, and thus human health considered, **only** through the adoption of rules, standards and plans and not through the "ad hoc" process of permitting. EHD Brief at 11-12, citing *State ex. rel. Lyons v. King*, 2011-NMSC-004, ¶ 36.

EHD's interpretation of the Act effectively makes significant portions of the Act extraneous. If the EHD's interpretation of the Act is accepted, only the numerical and performance standards the EHD alludes to are permissible for preventing and abating air pollution. This effectively reads out the "reasonable risk" standard enumerated in the definition of "air pollution" and renders the first duty of a local authority, as provided in § 74-2-5(A) meaningless.

A more appropriate reading -- and one that harmonizes §§ 74-2-5(A) and (B) -- is that the local authority must prevent and abate air pollution under all circumstances **and** promulgate regulations to attain national ambient air quality standards and prevent and abate air pollution. This is the only construction that gives full effect to subsections 5(A) and 5(B) and fulfills the legislative purpose of both the Air Act and the federal Clean Air Act (*see* Section IV.D.3.b., below). Moreover, if the New Mexico Legislature had intended for the regulations to be the exclusive means by which air pollution is prevented and abated, it could have so provided by eliminating §75-2-5(A) altogether.

Further, EHD's interpretation of the Act makes the Act's provisions granting the local authority discretion in permitting actions superfluous. The Act's permitting provisions allow a

local authority to deny a construction permit[6] when the operation will not meet applicable standards of the Act or will violate **any** provision of the Act. 1978 NMSA, § 74-2-7(C)(1)(a), (c) (emphasis added). Had the New Mexico Legislature intended numerical standards to be the exclusive means by which pollution is prevented and abated, thereby protecting public health, it would not have included the clause "or will violate any provision of the Act." Therefore, this clause plainly imparts a level of discretion to the local authority in the permitting context for evaluating compliance with the Act's provisions **other than** its numerical standards.

Finally, EHD's reliance on *State ex. rel. Lyons v. King,* 2011-NMSC-004, ¶ 36, 149 N.M. 330 ("*Lyons*") and *Smith v. Bernalillo County*, 2005-NMSC-012, 137 N.M. 280 ("*Smith*") is misplaced. EHD relies on *Lyons* for the proposition that when the legislature prescribes a certain way in which an agency must implement a statute, the agency must implement the statute in that way. EHD Brief at 11, citing *Lyons*, 2011-NMSC-004 at ¶ 36. EHD argues that the Act provides an exclusive means by which a local authority may prevent and abate air pollution: promulgating standards, regulations, and plans, but not through permitting. EHD Brief at 11-12.

However, as demonstrated above, this construction of the Act effectively reads out significant portions of it, in violation of the canons of statutory construction. Moreover, in *Lyons*, the Court interpreted a provision of the New Mexico Enabling Act which explicitly prohibited the New Mexico Land Commissioner from disposing of public lands except by sale or lease. *Lyons*, 2011-NMSC-004 at ¶¶ 35-36. In this case, however, the Air Act contains no

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[6] EHD asserts that nothing in SWOP's Petition alleges that the construction or modification of the Honstein operation will violate the Act or the federal Clean Air Act, apparently arguing that SWOP's challenge to the Honstein's construction permit is improper. EHD Brief at 14, 21. This argument, however, is disingenuous because as EHD well knows, the Honstein facility operated without a permit for decades. The current permitting process is intended to retroactively permit the existing facility rather than permit construction or modification to it. EHD NOI, Ex. 1, Written Testimony of Isreal Tavarez at 15; Ex. 2, Written Testimony of Regan Eyerman at 7. EHD denominated Honstein's permit as a "construction permit" and SWOP can only challenge the permit as initially issued by EHD.

language (and EHD cites none) explicitly limiting a local authority's discretion in preventing and abating air pollution. Indeed, as demonstrated above, the opposite is true. Thus, *Lyons* is inapposite in this case.

EHD relies on *Smith* to support its argument that because the Board has adopted specific performance standards that govern VOC emissions -- standards which EHD applied to Honstein's permit -- the Board cannot now rescind the permit to protect public health. EHD Brief at 26-27. However, as with the *Lyons* case, *Smith* is distinguishable from this matter.

In *Smith*, the Court held that a county could not rescind a building permit based on a standard that did not appear in the zoning ordinance governing the building project. *Id.*, 2005-NMSC-012 at ¶ 22. Here, however, the legislature included statutory language that allows a local authority to deny a permit based on a violation of any statutory requirement, such as an emission source creating a reasonable risk to public health. *See*, NMSA §§ 74-2-7(C)(1)(a),(c); *Duke City Lumber Co. v. New Mexico Envt'l Improvement Bd.*, 1984-NMSC-042 at ¶¶ 16-17. Again, EHD offers no explanation or statutory text to justify a local authority failing to both apply numerical standards **and** consider the cumulative impacts of air pollution on public health[7] under the reasonable risk standard.

b. *EHD's interpretation of the Act frustrates the goal of both the Air Act and the federal Clean Air Act, which is to protect public health.*

The Act's plain language compelling the local authority to consider the impacts of cumulative air emissions sources on public health and property is supported by the purpose of

[7] EHD asserts that because SWOP has stated publicly that "cumulative impacts are not considered by regulatory bodies", SWOP is conceding that cumulative impacts analysis is not required. Brief at 27. However, EHD fails to recognize the simple distinction between a statement of fact, i.e., that regulatory agencies do not consider cumulative impacts, and a legal position, i.e., that regulatory agencies are statutorily required to consider cumulative impacts, yet do not. In this case, both SWOP's statement of fact and legal position are consistent and accurate.

the federal Clean Air Act, which the Air Quality Act implements locally. EHD's construction of the Act therefore violates the canon of construction requiring that a statute be interpreted to further the legislative purpose. *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-047 at ¶ 11.

Congress declared that the purpose of the federal Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the **public health and welfare** and the productive capacity of its population." 41 U.S.C § 7401(b)(1) (emphasis added). Congress' straightforward declaration is supported by the federal Clean Air Act's legislative history. For example, in adopting Clean Air Act Section 102, the House of Representatives Report states that the main purpose in adopting that section was to "emphasize the preventative or precautionary nature of the act, i.e, to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health." H.R. Rep. 95-294, 1977 U.S.S.C.A.N 1077, 1127. Likewise, in adopting Section 108, Prevention of Significant Deterioration, the House Report notes: "[s]ome people have attempted to characterize the policy of prevention of significant deterioration as one of protecting trees and wilderness areas at the expense of people. However, in the committee's view, the need to prevent significant deterioration in so-called clean air areas arises in substantial part from the need to protect the public's health." *Id.* at 1184. Thus, it is imminently clear that the federal Clean Air Act's primary purpose is to protect human health.

Because the Air Act implements the federal Clean Air Act's provisions locally, it must, by extension, also have the primary purpose of protecting human health. This goal is demonstrated by the Air Act's primary mandate that the local authority prevent and abate emissions that pose a reasonable risk to public health. NMSA 1978, § 74-2-5(A).

Incredibly, however, the EHD takes the position that public health considerations may never be taken into account during permitting. EHD Brief at 15, 18. This interpretation not only undermines the Air Act's and Clean Air Act's purposes on its face, it also undermines those purposes in practice.

For example, assuming all the Board's emissions and performance standards protect public health, EHD does not apply those standards in a way that accomplishes the goal of protecting public health. EHD's interpretation of the Act forces it to apply standards to each operation in a vacuum. Thus, EHD could (and does) assert that block after block of closely co-located polluting sources meeting emissions standards -- looking solely at each facility in isolation-- do not represent a health risk. In reality, the **combined** pollution from all the sources which, when only considered individually, may meet emissions standards, in fact has a significant impact on human health. EHD's interpretation leads to the absurd result that the Act protects human health only on paper.

The evidence in the record clearly demonstrates that EHD's construction of the Act undermines its legislative purpose. As SWOP has shown, emissions of air contaminants from multiple sources in the San Jose neighborhood, including the Honstein operation, pose a reasonable risk to human health and property. *See, e.g.*, SWOP NOI, Ex. 1, Written Testimony of Kitty M. Richards at 7-9; Ex. 2, Written Testimony of Dr. George D. Thurston at 5-6, 18; Ex. 3, Written Testimony of Dana Rowangould at 4-6. It is clear that the "orderly" process by which the EHD claims air pollution is prevented has failed. Therefore, EHD's interpretation of the Air Act frustrates the Act's purpose. The Board should find for Petitioners as a matter of law.

VI. CONCLUSION

For the foregoing reasons, EHD's request for summary disposition should be denied. Alternatively, if EHD's request for summary disposition is granted, the Board should find for Petitioners as a matter of law.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, I have hand delivered or placed a copy of the foregoing pleading in the above-captioned case in the US Mail, First Class to the following:

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