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

REPLY IN SUPPORT OF SMITH'S FOOD & DRUG CENTERS, INC.'S MOTION FOR SUMMARY JUDGMENT

Petitioners appear to misapprehend the role of air quality permitting in the broader regulatory framework governing the development, construction and operation of gasoline dispensing facilities ("GDFs") in Albuquerque and Bernalillo County. The role of air quality permitting in this case is to reduce the stationary source emissions from the 4th Street GDF by requiring Smith's to comply with performance standards set forth in the Board's existing regulations. Petitioners attended two public information hearings and learned about these regulations, yet failed to come forward with information in their Amended Petition to show that Permit No. 3136 does not comply with the regulations. Summary judgment is appropriate now because the undisputed facts demonstrate Permit No. 3136 meets "applicable local, state and federal *air pollution* standards and regulations[.]" Section 74-2-7(L) (emphasis added).

Petitioners nevertheless urge the Board to look beyond its own regulations and to consider the broad categories of concerns the petitioners raise, including, traffic, zoning and planning issues, as well as alleged impacts on their health and quality of life. The Board should not, and cannot as a matter of law, broaden its authority to address petitioners' concerns that lack a nexus to an applicable air permitting regulation. *Colonias Dev. Council v. Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939; *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288, 466 P.2d 565 (an administrative agency "is bound by its own rules and regulations."). To the extent the Board has the power to address any of the petitioners' concerns, it can only do so in a properly noticed rulemaking proceeding. Moreover, there are other government agencies which are directly charged with responsibility for addressing concerns related to traffic, zoning and planning. Petitioners and other members of the public who attended the public information hearings were given the contact information for these specific agencies. Smith's UMF No. 7.

Rather than raise their concerns through the appropriate government channels, petitioners seek to use the Board's air permit hearing process as a referendum on issues that have nothing to do with air permits. Petitioners rely on the Board's decision in the Smith's Carlisle permitting matter, Docket Nos. 2012-1 and -2, as authority allowing them to raise their concerns that fall outside the established permitting framework. Response Brief at 2, 4, 6, 11 and 19. The proceedings and result in the Carlisle case demonstrate precisely why the Board should not follow that decision; the Board expressly ignored its own permitting standards and reversed a properly issued

permit without relying on specific evidence or referring to any standard. *See* Carlisle Final Order and Statement of Reasons, attached hereto as Exhibit D, at 2-5 (¶¶ 5-7).

The standardless approach taken in the Carlisle case is understandably attractive to the petitioners in this case. The Board's decision in the Carlisle case suggests that any petitioner can persuade the Board to veto an otherwise valid permit simply by raising concerns about any alleged consequence that might attend the operation of a gas station at the proposed site. This is plainly not the law; the Air Quality Control Act ("Air Act") and the Board's own regulations require the Board to review permits based on existing standards, Section 74-2-7(C)(1), (L); 20.11.41.16 NMAC (2002), and the Board can only consider public input that has a nexus to those standards. *Colonias*, 2005-NMSC-024, ¶ 29. None of the petitioners' evidence shows this nexus.

Concluding otherwise invites the Board to exceed its authority by making standardless, ad-hoc decisions based on emotion and threatens to saddle EHD, the Board and permit applicants with unreasonable and costly litigation over permits that are issued in accordance with established regulatory standards. The Board has already seen this pattern emerge with the petitions filed in Docket Nos. 2013-6 (Smith's Tramway), 2014-2 (Smith's Montgomery) and in the present case. The Board recently rejected the standardless approach espoused by the petitioners in the Smith's Montgomery proceeding and the Board should do the same here.

Petitioners' arguments in opposition to Smith's motion for summary judgment do not compel a different conclusion. Petitioners claim that: (1) there are disputed material facts, (2) the summary judgment hearing was not properly noticed, (3) the City and

Smith's failed to comply with their discovery obligations, (4) the Smith's Carlisle case has preclusive effect in this case, and (5) the Board's requirement that interested parties enter their appearances by a certain deadline violates the Air Act. As explained below, Petitioners' first, third and fourth arguments fail if the Board applies controlling statutory and case law, as it must, and rejects the Smith's Carlisle decision as it did in the Smith's Montgomery proceeding. Petitioners' second and fifth arguments fail because the current summary judgment proceedings comply with the Air Act and with the Board's adjudicatory procedures. The Board should grant Smith's motion for summary judgment for all these reasons and because petitioners failed to come forward with evidence that Permit No. 3136 does not comply with applicable air permitting regulations.

ARGUMENT

1. The Board's Decision In The Smith's Carlisle Case Is Not Binding Precedent And The Board Should Not Follow It.

Petitioners fail in their Amended Petition, discovery responses, notice of intent to present technical testimony ("NOI") or response brief to identify evidence demonstrating that Permit No. 3136 fails to comply with applicable air quality permitting regulations. Rather, petitioners rely on the Carlisle decision in support of their claim that the Board can consider their concerns that fall outside of the established permitting framework based on the Board's general authority to prevent and abate air pollution. Response Brief at 19; *see* Exhibit D, at 2-5. That argument fails because it overlooks the *Colonias* nexus requirement, which is based upon the well-settled law that agencies may not be vested with unfettered power, as well as the Board's inability to deviate from the federal standards regulating hazardous air pollutants. Section 74-2-5(C)(2). The Board

implicitly recognized that its Carlisle decision was contrary to law when it rejected an identical argument advanced by the petitioners in the Montgomery case.

Petitioners nevertheless assert that the parties and the Board are bound by the Carlisle decision based on the doctrine of offensive collateral estoppel. Response Brief at 10-11, 19. This argument fails for at least three reasons. First, collateral estoppel applies to facts or mixed questions of law and fact previously decided against a party, but it does not apply to pure legal issues decided in a previous action. As the New Mexico Supreme Court explained:

> [Collateral estoppel] is not intended to tie the hands of judges nor to be a way to amend the law of New Mexico by forcing one judge to accept the conclusions of pure law made by another without benefit of an appeal to this Court. . . . [A] conclusion or statement purely of law which is not dependent for its meaning or validity on the facts of a particular case is not binding on the judge in a later suit between the parties; *litigants have no vested right to an erroneous conclusion of law*.

Torres v. Village of Capitan, 1978-NMSC-065, ¶ 18, 92 N.M. 64, 582 P.2d 1277 (internal quotation marks and quoted authority omitted) (emphasis added); *see also Edwards v. First Federal Sav. & Loan Ass'n of Clovis*, 1985-NMCA-015, ¶ 46, 102 N.M. 396, 696 P.2d 484 (quoting *Torres*). Accordingly, nothing prevents the Board from revisiting its pure legal conclusions in the Carlisle decision regarding the scope of the Board's authority and the scope of relevant public input in a hearing challenging the issuance of a GDF air permit.

The second reason that collateral estoppel does not apply in this case is that the Board did not make any factual findings against Smith's or the City in the Carlisle case. To the contrary, the Board adopted all of the Hearing Officer's proposed findings of fact, Exhibit D at 2 (¶ 5), which were derived from the proposed findings that Smith's and the

City submitted. Petitioners fail to show that any of those findings establishes a material fact that can be used against Smith's or the City in this case. *See Silva v. State*, 1987-NMSC-107, ¶ 12, 106 N.M. 472, 745 P.2d 380 (holding that "it is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule whether the doctrine is applicable.").

Third, collateral estoppel requires that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. *Shovelin v. Central N.M. Elec. Coop.*, 1993-NMSC-015, ¶ 12, 115 N.M. 293, 850 P.2d 996. "In making this determination, [courts] weigh countervailing factors including, but not limited to, the incentive for vigorous prosecution or defense of the prior litigation; procedural differences between the prior and current litigation, including the presence or absence of a jury; and the possibility of inconsistent verdicts." *Id.* ¶ 15.

Smith's did not have a full and fair opportunity in the Carlisle case to litigate the issue the Board confronts here, i.e., whether the Board can consider the petitioners' concerns falling outside the established permitting framework based on the Board's general authority to prevent and abate air pollution. The Carlisle petitioners never raised that argument in their petition, during the hearing on the merits or in their closing briefs. Rather, the Board decided during its deliberations, against the advice of the Hearing Officer and the Board's own counsel, that it could reverse the issuance of Permit No. 2037-M1 based on its general authority to prevent and abate air pollution. Smith's did not have a *full* and *fair* opportunity to litigate that specific issue since the

petitioners never raised it and Smith's did not have fair notice of it.[1] In any event, as explained above, that aspect of the Board's decision is a pure conclusion of law that is not entitled to collateral estoppel effect. *Torres*, 1978-NMSC-065, ¶ 18.

Finally, the Board should decline to follow the Carlisle decision because it provides no guidance in this or in any other permitting case. The Board did not specify in its final order how the increase in throughput allowed by Permit No. 2037-M1 would "contribute indirectly to increased air pollution" and would "increase risks to public health[.]" Exhibit D at 4 (¶¶ 6i-6j). The Board mentioned its "interest in minimizing air pollution caused by vehicles," *id.* at 3 (¶ 6b), but did not specify how much traffic at the already constructed and operational Carlisle GDF would be too much.

Put simply, there are no standards that can be gleaned from the Carlisle decision that could be applied in this case. Following the Carlisle decision will lead to additional ad-hoc and inconsistent decisions based on the whims of the particular Board members deciding a given case. *Cf. ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 21, 144 N.M. 471, 188 P.3d 1222 (declining to exchange New Mexico's rule-based system of determining standing for an "impulse-based, visceral type of evaluation" because "it is difficult to see how the ultimate determination would not be merely a reflection of the whim of the particular judge."); *Safeway Stores, Inc. v. City of Las Cruces*, 1971-NMSC-052, ¶ 5, 82 N.M. 499, 484 P.2d 341 (holding that liquor licensing authority lacked discretion to deny license where applicant met all statutory

[1] Smith's did argue in its closing brief that the Board could not consider issues outside of the established permitting framework. However, Smith's argument did not specifically address the Board's general authority to prevent and abate air pollution because no one raised that authority as a potential basis for the Board's decision in a permit appeal. Presumably, this is because the Board's authorization to prevent and abate air pollution applies to its rulemaking function and not its adjudicative function. *See* pages 14-17 below.

prerequisites; to conclude otherwise "would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter."). The Board should decline to follow the Carlisle decision in this case and instead should rely on the standards it has appropriately adopted and codified through the established rulemaking process.

2. Summary Judgment Is An Available And Appropriate Means For Conserving Administrative Resources When, As Here, Petitioners Cannot Meet Their Evidentiary Burden.

"The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party has competent evidence to support his pleadings." *Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶ 4, 105 N.M. 681, 736 P.2d 135. Summary judgment "serve[s] a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims." *Id.* (quoted authority omitted). Summary judgment in the present case will serve this important purpose because none of Petitioners' evidence demonstrates that Permit No. 3136 "will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L).

The Board's adjudicatory procedures contemplate the use of dispositive motion practice, such as summary judgment, in several ways. First, the Board's adjudicatory procedures provide that the New Mexico Rules of Civil Procedure (including Rule 1-056 NMRA concerning summary judgment) may be used in the absence of a specific provision in 20.11.81 NMAC. *See* 20.11.81.12(A) NMAC. Second, the Board's procedures provide that the Board or a Hearing Officer "may specify procedures in addition to, or that vary from the procedures provided in 20.11.81 NMAC *in order to*

expedite the efficient resolution of the action or to avoid obvious injustice, if the procedures do not conflict with the [Air Act] or the [Board's] regulations, or prejudice the rights of any party." 20.11.81.12(B)(1) NMAC (emphasis added). Third, the Board's procedures allow the Hearing Officer to decide motions and procedural requests "that do not seek final resolution of the proceeding," which suggests that motions seeking final resolution are permissible but that the Board itself retains exclusive power to decide them. 20.11.81.12(B)(2)(b)(ii) NMAC. Finally, the Board allows the use of summary procedures and expedited hearings when the merits of a petition can be decided solely on legal arguments. 20.11.81.20(A)(1) NMAC. Summary judgment is therefore an available and appropriate method of resolving this case.

Petitioners argue that the Board's October 22, 2014 hearing on Smith's and the City's motions for summary judgment should have been noticed pursuant to 20.11.81.20(A)(2)(a) NMAC, which governs notice for summary proceedings based solely on legal arguments. Response Brief at 15. Among other things, 20.11.81.20(A)(2)(a) NMAC requires that public notice of an expedited hearing contain instructions for non-parties wishing to participate in the hearing to submit an NOI. However, neither Smith's nor the City invoked the summary procedure set forth in 20.11.81.20(A) NMAC, in part because petitioners have claimed that there are material fact issues in dispute.

The summary procedure described in 20.11.81.20(A) NMAC is presented as an alternative to a full hearing on the merits where only legal issues are involved. In this case, the Hearing Officer issued a Prehearing Order scheduling a full hearing on the merits for November 12-13, 2014 while simultaneously allowing the parties to file

dispositive motions if filed in time for the Board to consider them at a hearing on October 22, 2014. *See* Prehearing Order filed on August 8, 2014 at 2 (¶ 1), 4 (¶ 13). In other words, the current summary judgment proceedings are not intended to replace the hearing on the merits but to determine whether a full merits hearing is necessary in the first place.

The scheduling of the hearing on the merits did not waive the prehearing procedures of discovery and dispositive motion practice that are allowed under the Board's adjudicative procedures and under the Prehearing Order. Smith's served discovery and brought its motion for summary judgment so that petitioners would be required to disclose any evidence they might have that could sustain their burden of proof and justify holding a full hearing on the merits. Petitioners have failed to do so.

Moreover, the public notice in this case has been extensive and dates back to December 2013 when EHD first published notice of the proposed permitting action and contacted nearby neighborhood organizations. Smith's UMF No. 4. EHD later published notice for and held two public information hearings that were well attended by the public. Smith's UMF No. 5. As mentioned above, on August 8, 2014 the Hearing Officer issued a Prehearing Order identifying the dates for both the October dispositive motions hearing and the November hearing on the merits, as well as a deadline for interested persons to enter their appearances. *See* Prehearing Order at 2 (¶ 1), 3 (¶ 8), 4 (¶ 13). The hearing clerk published notice of the hearing on the merits and included instructions for interested persons to submit NOIs. *See* Clerk's Affidavit of Service filed on September 30, 2014. No one other than petitioners Gradi, McGonagil, Ledden,

Kelly,[2] Chavez and Toledo submitted a timely NOI. The hearing clerk later sent 93 notices of the motion hearing scheduled for October 22, 2014 to persons who signed up to receive information about this case. *See* Clerk's Affidavit of Service filed on October 10, 2014. Finally, anyone interested in the Board's pending permit appeals can receive up-to-date information on the internet at http://www.cabq.gov/airquality/air-quality-control-board. Petitioners cannot reasonably argue that interested members of the public have been prevented from participating in the summary judgment proceedings in this case.

3. The Deadline For Interested Persons to Enter Their Appearances Does Not Violate the Air Act.

Petitioners claim the Board's requirement in 20.11.81.14(I) NMAC that interested members of the public enter their appearances violates the requirement in Section 74-2-7(I) that the public "shall . . . be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." Response Brief at 3, 12-14, 19. Petitioners fail to explain why it is unreasonable to require interested members of the public to enter their appearances. The requirement does not prevent members of the public from having a reasonable opportunity to participate in the hearing on the merits. More importantly, the requirement serves the important purpose of giving notice to the parties of the identities of all participants and the evidence upon which they intend to rely.

[2] Petitioner Susan Kelly has since withdrawn as a petitioner in this case. See Notice of Withdrawal filed on October 20, 2014. Petitioner Jerri Paul-Seaborn did not sign the NOI submitted by the other petitioners and did not file her own NOI.

4. Smith's Undisputed Material Facts Should Be Deemed Admitted Because Petitioners Fail To Controvert Them Specifically And Because Petitioners' Disputed Facts Are Not Material.

Rule 1-056(D)(2) provides that "[a]ll material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted." Petitioners' statement of disputed material facts does not specifically controvert any of the facts set forth in Smith's statement of undisputed material facts. Response Brief at 5-7 (¶¶ 1-6). Rather, Petitioners advance arguments about the significance of the facts or about other facts that they deem significant, with little or no explanation, which is insufficient to meet their burden under Rule 1-056(D)(2). Each of the undisputed material facts set forth in Smith's motion for summary judgment is fully supported by citation to the record and to the exhibits attached to the motion. The Board should deem these facts admitted.

Petitioners identify a number of disputed facts, but none of them are material. "New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must look to the substantive law governing the dispute[.]" *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 11, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and quoted authority omitted). "The inquiry's focus should be on whether, under substantive law, the fact is necessary to give rise to a claim." *Id.* (internal quotation marks and quoted authority omitted). As discussed above, the substantive law in this case is contained in the applicable air permitting regulations. Petitioners' disputed facts lack a nexus to those regulations.

For example, petitioners claim that it is disputed whether EHD gave weight to "comments and concerns of the public at the public information hearing[s] regarding health, welfare, safety of the public, community, and property concerns." Response

Brief at 6 (¶ 4), 14. Even if this fact is disputed, it is not material because none of those concerns identifies a violation of an applicable air permitting standard. EHD could not give weight to non-air quality concerns in making its permitting decision because there is no regulatory standard that it could apply in doing so. EHD appropriately advised members of the public to contact the relevant government agencies to address those concerns. Smith's UMF No. 7.

4. Petitioners Made No Effort To Resolve Their Discovery Disputes Pursuant to Rule 1-037 NMRA And Smith's Asserted Valid Objections to Petitioners' Discovery Requests In Any Event.

Petitioners claim that Smith's and the City committed discovery abuse by objecting to some of petitioners' discovery requests and refusing to provide certain information. Response Brief at 15-18. As a threshold matter, petitioners never communicated to Smith's that they disputed Smith's objections. Under Rule 1-037 NMRA, petitioners are first required to make a good faith effort to resolve a discovery dispute with opposing counsel before filing a motion to compel discovery or requesting sanctions. Smith's served its discovery responses on September 19, 2014, a full month before petitioners filed their response brief on October 17, 2014. *See* Smith's Certificate of Service filed on September 19, 2014. Petitioners should not be heard to complain about the adequacy of Smith's discovery responses after failing to give Smith's a reasonable opportunity to address any concerns.

Even if petitioners' complaints about Smith's discovery responses were timely and properly asserted, Smith's has not committed discovery abuse. Rather, the various discovery requests detailed in the response brief demonstrate why petitioners' standardless approach is completely unworkable. Petitioners sought information

regarding, among many other things: (1) inspections for all Smith's GDFs in Albuquerque over the past five years, (2) record-keeping and monitoring of underground storage tanks for all Smith's GDFs in Albuquerque over the past five years, (3) proof of compliance with various testing requirements for all Smith's GDFs in Albuquerque over the past five years. Response Brief at 17-18.

These requests are not reasonably calculated to lead to the discovery of admissible evidence in this case because they concern GDFs and permits that are not the subject of the present permitting action. Nothing in the regulations governing air permitting authorizes EHD to grant or deny an air permit based on the compliance or non-compliance of *other* GDFs with *other* permits. Yet petitioners would have Smith's spend time and resources gathering all of this information that could have no bearing on the outcome of this case. Accordingly, the Board should reject petitioners' argument that Smith's has committed discovery abuse.

5. The Board Cannot Rely On Its Rulemaking Authority When Adjudicating A Permit Appeal.

Petitioners in their response brief incorporate by reference the response of the Montgomery petitioners to Smith's motion for summary judgment in that case. *See* Exhibit 2 to Response Brief. The arguments set forth in the Montgomery petitioners' response brief conflate the Board's rulemaking function with its adjudicatory function. The Air Act and the Board's regulations establish why the Board should reject that approach.

Rulemaking is the process by which the Board articulates and codifies the standards that are applicable to air quality permitting and that are to be applied uniformly within the Board's jurisdiction. *Cf. Smith v. Bd. of County Comm'rs*, 2005-

NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496 ("Owners have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all."). This process requires enhanced notice so that the public, including the regulated community, can have input regarding a range of considerations that the Board must balance. *Compare* 20.11.82.19 NMAC (requiring the Board to give notice of a rulemaking proceeding through a variety of media and "as the [B]oard may direct") *with* 20.11.41.14(A)(3) NMAC (2002) (requiring EHD to give notice of a Part 41 permitting action by publication in a local newspaper); *also compare* Section 74-2-6(C) (requiring notice of rulemaking by publication "in a newspaper of general circulation in the area affected") *with* Section 74-2-7(B)(5) (granting the Board discretion to specify "the public notice, comment period and public hearing, *if any*, required prior to the issuance of a permit[.]") (emphasis added). The scope of public input at the rulemaking stage is expansive; it includes, among several other things, the potential impact on public health and welfare and the economic feasibility of the proposed regulation. Section 74-2-5(E); 20.11.82.32(A) NMAC.

Once the Board establishes the rules through the rulemaking process, the Board need not and cannot expand or limit the rules in an adjudicatory proceeding such as a permit appeal. The Board's focus in a permit appeal is whether the source "will or will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L). Accordingly, the Board must apply the rules it has adopted and upon which EHD and the permit applicant have reasonably relied. This is why Section 7 of the Air Act, which governs permits, and the Board's permitting regulations in Part 41 establish bases for permit denial that are framed in terms of compliance with existing

standards and not in terms of broad considerations like public health and welfare. Section 74-2-7(C); 29.11.41.16 NMAC (2002). Considerations of public health and welfare have already been incorporated into the rules during the rulemaking process.

Provisions of the Air Act and the Board's regulations governing variances underscore this point. A request for a variance is a request for an exception to the rules, which could negate the protections for public health that are incorporated into the rules. Thus, unlike Section 7 of the Air Act (which authorizes the permit hearing requested here), Section 8 *does* enable the Board to consider whether the granting of a variance will, among other things, "result in a condition injurious to health or safety[.]" Section 74-2-8(A)(2)(a). Section 8 also requires the Air Board to consider "the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public." Section 74-2-8(B); 20.11.7.12(B)(8) and .16(M)7 NMAC. The New Mexico Supreme Court has held that these considerations in a variance proceeding are limited by the definition of "air pollution" set forth in Section 74-2-2(B), which requires a showing of a "reasonable probability" of harm. *Duke City Lumber Co. v. NM Envtl. Imp. Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291, 681 P.2d 717. Petitioners acknowledge that Smith's did not seek a variance in this case and that the Board's variance procedures do not apply. Response Brief at 8 (¶ 16).

Petitioners nevertheless repeatedly cite to portions of the Air Act concerning the Board's rulemaking authority in an effort to broaden the scope of relevant public input in this adjudicatory permit appeal. *See* Exhibit 2 to Response Brief. Petitioners' efforts to conflate rulemaking with permit adjudication fly in the face of the canons of statutory construction the Montgomery petitioners cited in their response brief. Specifically, the

Montgomery petitioners encouraged the Board to follow the plain language of the Air Act and to give persuasive weight to longstanding construction of statutes by the agency charged with administering them. Exhibit 2 to Response Brief at 12. The plain language of the Air Act shows that the Legislature contemplated broad inquiries regarding public health and welfare in the rulemaking and variance sections, but not in the permitting section, which expressly frames the bases for permit denial in terms of standards. With regard to EHD's longstanding interpretation of the Air Act, it is undisputed that EHD has consistently applied the existing, performance-based GDF air quality permitting regulations. Smith's UMF No. 6. There is no evidence that EHD has ever required a health impact analysis as Petitioners suggest doing here. *See* Petitioners' NOI filed on October 7, 2014 at 2 ("Dr. Rowangould recommends additional analysis be conducted to ensure potential air quality and health impacts associated with the proposed Smith's fueling station are better understood."). Accordingly, there is no basis in the Air Act for the Board to hear the evidence and testimony the Petitioners are proposing.

6. Petitioners Cannot Meet The *Colonias* Nexus Requirement By Relying Upon The Board's Rulemaking Authority.

Petitioners' reliance on *Colonias*, a case construing the Solid Waste Act and its related regulations, is misplaced. The Court in *Colonias* specifically held that an agency's authority to address community concerns "requires a nexus to a regulation" and that the agency in that case "must consider whether lay concerns *relate to violations of the Solid Waste Act and its regulations*." 2005-NMSC-024, ¶¶ 24, 29 (emphasis added). The Court observed that to conclude otherwise would "offer no guidance to the [agency]," and would "violate the well-settled principle that a legislative

body may not vest unbridled or arbitrary power in an administrative agency." *Id.* ¶ 29. The Court held that the applicable solid waste regulations specifically required the Environment Department to consider whether the proposed landfill would cause a public nuisance or create a potential hazard to public health, welfare or the environment, which could encompass the nearby community's quality of life concerns. *Id.* ¶¶ 30-32. *Colonias* therefore stands for the proposition that the role of public input is to ensure that government agencies follow, rather than circumvent, applicable regulations when making permitting decisions.

Unlike the solid waste regulations at issue in *Colonias*, Petitioners cannot point to a single air permitting regulation that would trigger the Board's discretion to consider public health and welfare beyond that which the Board has already incorporated into its regulations. Again, the provisions in the Air Act and in the Board's regulations concerning GDF air permits refer to specific standards and not to the broad public health and welfare inquiries that come into play during rulemaking or when considering a variance.

Perhaps recognizing that their proposed evidence lacks a nexus to an applicable *permitting* regulation, Petitioners assert that their proposed evidence relates to the Board's rulemaking authority. Exhibit 2 to Response Brief at 21. Specifically, they argue that Dr. Rowangould's proposed testimony in the Montgomery proceeding "invokes the regulatory criteria under . . . [Section] 74-2-5(E), and [Section] 74-2-5.3(C)[,]" which are rulemaking statutes. *Id.* Again citing Section 74-2-5(E), Petitioners claim that "[t]he Board must give weight to this testimony under the [Air Act] as it

impacts the health, welfare [sic], the public interest, and relates to the subject of air contaminants." Exhibit 2 to Response Brief at 21.

Like the Montgomery petitioners, petitioners in the present case identify Dr. Rowangould as a proposed technical expert and attach to their NOI a memorandum from Rowangould that is virtually identical to the one attached to the Montgomery petitioners' NOI. Petitioners' NOI at 1-2. Smith's agrees that Dr. Rowangould's testimony, and even Petitioners' proposed non-technical testimony, would be appropriate for a rulemaking proceeding. The testimony is not appropriate in a permit appeal, such as in this case, because it lacks a nexus to an applicable permitting standard as required under *Colonias*. The Board should therefore grant Smith's motion for summary judgment.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____
Frank C. Salazar
Timothy J. Atler
P. O. Box 1945
Albuquerque, New Mexico 87103-1945
Telephone: (505) 883-2500
Attorneys for Smith's Food & Drug Centers, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply In Support of Smith's Motion for Summary Judgment 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.

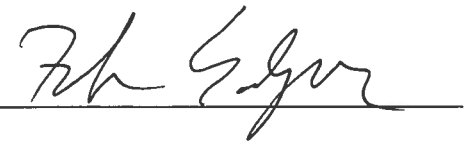
Pete V. Domenici, Jr. – by Email
Reed Easterwood
Domenici Law Firm, PC
320 Gold Avenue SW, Suite 1000
Albuquerque, NM 87102
pdomenici@domenicilaw.com
REasterwood@domenicilaw.com
Attorneys for Petitioners

Carol M. Parker – by Email
Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103
cparker@cabq.gov
Attorney for City of Albuquerque,
Environmental Health Department

Felicia Orth, Esq. – by Hand Delivery and Email
c/o Margaret Nieto
Control Strategies Supervisor
Air Quality Division, Environmental Health Dept.
One Civic Plaza
3rd Floor, Room 3023
Albuquerque, NM 87103
orthf@yahoo.com
Board Attorney

on the 22nd day of October, 2014.

SUTIN, THAYER & BROWNE
A Professional corporation

By 

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

IN THE MATTER OF THE TWO PETITIONS FOR A HEARING ON THE MERITS REGARDING AIR QUALITY PERMIT NO. 2037-M1 ISSUED TO SMITH'S FOOD & DRUG CENTERS, INC.

Georgianna E. Peña-Kues, Petitioner, **No. AQCB 2012-1 and**

Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association, Petitioners. **No. AQCB 2012-2**

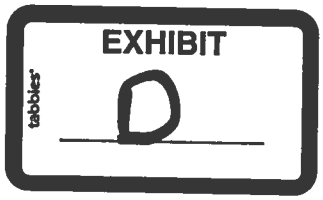
FINAL ORDER AND STATEMENT OF REASONS

Pursuant to 20.11.81.18.D (2) NMAC, the Albuquerque/Bernalillo County Air Quality Control Board issues this Final Order in this matter, setting aside the Hearing Officer's recommended decision and reversing the action of the Air Quality Division of the City of Albuquerque Environmental Health Department. As reasons for doing so the Board States the following:

1. The hearing on the merits regarding Petition AQCB 2012-1 and Petition AQCB 2012-2 was held On August 21, 22, and 23, 2012 by the Air Board's Hearing Officer, with members of the Board in attendance.

2. Subsequent to post-hearing procedures conducted in accordance with 20.11.81 NMAC, the Hearing Officer on December 7, 2012 filed with the Board her Hearing Officer's Report, Recommended Findings of Fact and Conclusions of Law, and a proposed Final Order.

3 At the regularly scheduled monthly meeting of the Board held on January 9, 2013, the Board deliberated on the merits of this appeal, in accordance with 20.11.81.18 NMAC. Each Board member verified that he or she had either attended the entire three day hearing or had read



the transcript for any portion of the hearing which he or she did not attend. Deliberation, including a possible decision on the merits, was listed as an item on the meeting agenda, which was publicly available more than 24 hours before the meeting. The deliberation and decision were conducted in a meeting open to the public, and were transcribed by a court reporter.

4. At the January 9, 2013 meeting, by a majority vote the Board adopted a resolution reversing the Division's April 17th, 2012 issuance of minor source air quality Authority-to-Construct Permit Modification No. 2037-M1 (Resolution 2013-01). In support of the reversal, the resolution stated that "The Air Quality Control Board is required to protect public health and welfare. Increases in throughput increase risks to publish health. The quality-of-life concerns raised by the community could be indirectly related to air quality."

5. The resolution reversing the decision indicated that the Board rejected the Hearing Officer's proposed Findings of Fact, Conclusions of Law, and Recommended Decision. After adopting the resolution, the Board indicated that it did not dispute any of the proposed Findings of Fact. The Hearing Officer's proposed Findings of Fact are hereby adopted in their entirety and incorporated herein by reference, notwithstanding anything in Resolution 2013-01.

6. In further support of the reversal of the permit modification, the Board took exception to the following proposed Conclusions of Law submitted by the Hearing Officer, and directed counsel to amend them as indicated in the Board's deliberations:

a. Conclusion 7 is amended as follows: "The scope of the Board's review is to determine whether the Station "will or will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L) ~~.~~ and to ensure that air pollution is prevented or abated. NMSA, §§ 74-2-5.A"

b. Conclusion 23 is amended as follows: "The Department and the Air Board have no authority over traffic patterns, construction of streets and highways, traffic violations or fire violations within the City municipal boundaries. See NMSA, §§ 74-2-5.1, 74-2-5, & 74-2-7. The Board has an interest in minimizing air pollution caused by vehicles, to the extent allowed by the Air Act and the federal Clean Air Act. See NMSA, § 74-2-5.D."

c. Conclusion 27 is amended as follows: "20.11.41.18(B)(4) NMAC, which allows air quality permit conditions to impose "reasonable restrictions and limitations other than those relating specifically to emission limits or emission rates[,]" ~~does not broaden the scope of the Board's authority to include traffic planning, zoning, or any other matter beyond that which has been delegated to the Board by the NM Act.~~ authorizes permit conditions designed to effectuate the general purpose of the Board's regulations – to prevent or abate air pollution. See NMSA, § 74-2-5.A."

e. Conclusion 28 is amended as follows: "AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of the original Permit No. 2037. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC."

f. Conclusion 31 is amended as follows: "AQD gave ~~proper and~~ legally sufficient public notice regarding the proposed issuance of Permit No. 2037-M1. NMSA 1978, § 74-2-7(B)(5); 20.11.41.14 NMAC."

g. Conclusion 37 is amended as follows: "Any person seeking to construct a new stationary source or modify an existing stationary source must obtain ~~an~~ valid authority-to-construct permit pursuant to 20.11.41NMAC."

h. Conclusion 48 is amended as follows: "Notwithstanding a written statement by Division staff apparently to the contrary, Smith's did not commence a "modification" to the

Station prior to AQD's issuance of Permit No. 2037-M1 as that term is used in the NM Act and in 20.11.41 NMAC. NMSA 1978, § 74-2-2(M); 20.11.41.2(B)(3)(c) and .7(H) NMAC.

i. Conclusion 52 is amended as follows: "Petitioners ~~failed to carry~~ carried their burden of proving that the modification sought by Smith's ~~will~~ would violate any other provision of the NM Act or the Federal Act. NMSA 1978, § 74-2-7(C)(1)(c). Specifically, petitioners demonstrated by a preponderance of the evidence that the increase in throughput allowed by the modification would contribute indirectly to increased air pollution, in violation of the Air Act's mandate to the Board to prevent or abate air pollution. See NMSA 1978, § 74-2-5.A

j. Conclusion 56 is amended as follows: "The operation of the Smith's GDF facility in accordance with Permit #2037 M1 ~~will~~ would not violate ~~any provision of the Air Act, the City Joint Ordinance,~~ 20.11.41 NMAC, Authority to Construct, 20.11.42 NMAC, Operating Permits, 20.11.65 NMAC, Volatile Organic Compounds, 20.11.64 NMAC, Emission Standards for Hazardous Air Pollutants for Stationary Sources, or 40 CFR 63, Subpart CCCCCC, but would increase air pollution and increase risks to public health, in violation of the Air Act's mandate to the Board to prevent or abate air pollution. See NMSA 1978, § 74-2-5.A,

k. Conclusion 57 is deleted.

l. Conclusion 58 is renumbered as 57 and amended as follows: "The Division's decision to issue Permit #2037 M1 was not arbitrary or capricious. ~~, was supported by substantial evidence in the record, and was in accordancewith the law. Accordingly, Petitioners' requested relief must be denied."~~

m. A new Conclusion 58 is inserted to read: "The Board's authorization to prevent or abate air pollution permits the Board to consider quality of life concerns that are directly or indirectly related to air quality. See NMSA 1978, § 74-2-2.B (defining air pollution in terms of

injury to human health or animal and plant life or interference with public welfare or reasonable use of property), See also NMSA 1978, § 74-2-5.E (requiring consideration of injury to health, welfare, visibility and property, and the public interest, including the social and economic value of the sources and subjects of air contaminants, when making regulations)."

n. A new Conclusion 59 is inserted to read: "Even if the Division's actions in considering and approving the requested permit modification complied with all regulatory provisions applicable at the time, including but not limited to Part 41 of 20.11 NMAC, the isolation of this decision process from that of other governmental entities resulted in a failure to consider all related factors, and thereby failed to achieve the purposes of the Air Act of protecting public health and welfare."

7. The Hearing Officer's proposed Conclusions of Law are incorporated herein by reference, with the modifications noted in paragraph 6 above.

IT IS THEREFORE ORDERED:

The Hearing Officer's recommended decision is set aside. The City's April 17, 2012 issuance of minor stationary source air quality Authority-to-Construct Permit Modification #2037-M1 to Smith's Food & Drug Center, Inc., is REVERSED.

Dr. Dona Upson, M.D., Chair
Albuquerque-Bernalillo County
Air Quality Control Board

NOTICE OF RIGHT TO REVIEW

Pursuant to Section 74-2-9, NMSA 1978, any person adversely affected by an administrative action of the Board may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date notice is given of this action.