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

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

AQCB No. 2014-4

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

ENVIRONMENTAL HEALTH DEPARTMENT AIR QUALITY PROGRAM REPLY IN SUPPORT OF ITS MOTION TO RESOLVE THE MERITS OF THE PETITION USING SUMMARY PROCEDURES OR, IN THE ALTERNATIVE, BY SUMMARY JUDGMENT

I. INTRODUCTION

In Petitioners' Response in Opposition to the Environmental Health Department's Motion and Brief for Summary Disposition ("Response"), the Southwest Organizing Project ("SWOP") admits that "the dispute in this matter is over the correct interpretation of the Air Act [Air Quality Control Act] and whether the New Mexico legislature intended to require administrative agencies implementing and enforcing the [Air] Act to consider cumulative air pollution impacts on public health." Response at 5-6. Because the parties agree that this is a legal dispute and not a factual dispute, summary disposition is appropriate.

Below, EHD shows that SWOP's arguments are based on irrelevant, immaterial facts, use inflammatory but legally flawed arguments, and demonstrates why they should be disregarded. It is SWOP, not EHD, who is misinterpreting the Clean Air Act and the Air Act. SWOP

improperly tries to shift its burden of proof to EHD, even though the Air Act requires SWOP to carry it, not EHD. SWOP provides no justification for any decision other than sustaining the Honstein Permit, #3131.

EHD has faithfully applied all of the applicable regulations to the Honstein facility's operation. SWOP does not offer any evidence or legal argument to show otherwise. SWOP's allegations are legally insufficient and do not relate to the construction of the Honstein facility. Instead, SWOP attempts to change the subject to raise concerns about how air quality is regulated generally in Bernalillo County. Generalized concerns about the Bernalillo County air quality program cannot be resolved in a adjudicatory proceeding concerning a single permit for a stationary source. A permit adjudication for a single facility applies the law as it is now, not the law as SWOP wishes it was. Because SWOP has not demonstrated any flaw with Permit #3131 for the Honstein facility, SWOP's Petition and its requested relief should be denied and Permit #3131 should be sustained.

II. ARGUMENT

A) The purpose of hearings.

Hearings are intended to consider relevant facts. 20.11.81.16(D)(1) NMAC. Unduly repetitious or unreliable information or material with little probative value should be excluded. *Id.* For that reason, a hearing officer is instructed by the Air Board's rules to maintain order and conduct an "efficient, fair and impartial adjudication of *issues arising under 20.11.81 NMAC...*" 20.11.81.12(B)(2)(b) NMAC [emphasis added]. The Air Board has directed a hearing officer to assure that the relevant facts are fully elicited and to "avoid delay." 20.11.81.12(B)(2)(b) and 16(D)(1).

The central issue that arises when the Air Board is hearing a challenge to an EHD issued permit is whether the source "will or will not" meet all applicable air pollution standards and regulations. NMSA 1978, § 74-2-7(L). Hearings are intended to allow witnesses to provide factual testimony focused on that pivotal issue with the goal of resolving disputed material facts so the Air Board can make this required determination. If there is no dispute about material facts, hearings cannot serve their function. Instead, they can create new problems.

Hearings are far from cost free. The parties and the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") members invest hours of time participating in or listening to hours, perhaps even days, of factual testimony. For example, here, SWOP has proposed to offer five hours of direct technical testimony in its case in chief. A transcript is prepared at substantial cost.[1] If there are no disputes of material fact, much of that effort does not contribute to the right Air Board decision on the issue that the Air Act requires it to resolve and instead invites confusion on immaterial issues. The parties can provide informative oral argument about their interpretations of the law in much less time than it takes to put on factual witnesses. If there is no genuine dispute about material facts, this approach can produce the right result and reserve public resources to be applied where they are truly needed.

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[1] To illustrate, at the Air Board hearing for the Smith's Carlisle Gas Station air quality permit, Petitioners counsel began his opening statement as follows: "Let me start by saying the facts in this case are really not in dispute, at least in my judgment." Tr. 16:19-20 (Aug. 21, 2012). Yet that hearing lasted three days and all of the transcripts together cost more than $17,000. It is fair to ask why it should take three days and $17,000 worth of transcripts to resolve a legal question where the facts are undisputed.

1) Hearings on immaterial facts can cause confusion.

SWOP's Response illustrates the confusion that can result from a hearing about immaterial facts. SWOP alleges that chlorobenzene has been found at the Honstein fence line. Resp. at p. 13. However, SWOP has the burden of proof and SWOP's NOI contains no evidence that this emission is coming from the Honstein facility rather than dispersing from some nearby activity.[2] SWOP has also not provided any evidence that this emission comes from an EHD regulated activity. Lacking these essential connections to this proceeding, this fact is not relevant and not material to the question of whether EHD correctly permitted the Honstein facility as a bulk gasoline plant.

SWOP contends that the continuous emission monitoring it has asked the Air Board to impose "would ensure compliance with Clean Air Act standards" and either "confirm or refute the evidence of chlorobenzene concentrations." Resp. at p. 13. SWOP has the burden of proof and this language demonstrates that SWOP cannot carry that burden.

SWOP cites no Clean Air Act ambient air quality standard[3] for chlorobenzene and EHD is aware of none. Thus, monitoring for violations of Clean Air Act standards would not shed any light on chlorobenzene emissions.

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[2] As SWOP knows, SWOP's own expert admitted that the source of these chlorobenzene emissions was unknown. Breathe in New Mexico Air Quality Report, San Jose Air Quality Report p. 5 ("What the source of chlorobenzene in southwest Albuquerque is, therefore, an important question, but for which there is not a clear answer, only reasonable possibilities.")

[3] The term "Clean Air Act standards" usually applies to standards for criteria pollutants which include nitrogen oxides, sulfur dioxides, particulate matter, carbon monoxide, lead and ozone. Honstein does not emit these pollutants.

This does not make 20.11.41.18(B)(6) NMAC meaningless as SWOP's Response contends. Resp. at p. 13. Monitoring is imposed on a permitted activity when appropriate to monitor for that source's permitted emissions. EHD is not permitting any emissions of chlorobenzene in the Honstein Permit #3131. Without any evidence that the Honstein facility is emitting chlorobenzene from an EHD regulated activity, imposing monitoring for that purpose exceeds the purpose of the permitting regulations. Thus, the chlorobenzene issue is revealed to be immaterial to whether EHD correctly permitted the Honstein facility as a bulk gasoline plant.

2) Inflammatory immaterial facts invite reversible error.

SWOP contends that its witness Dr. George Thurston has demonstrated disparate impacts in "a material breach of the EHD's and the [Air] Board's obligations to prevent racial discrimination in effect under the Convention on the Elimination of All Forms of Racial Discrimination ("CERD")." Response at p. 12. This allegation implies that SWOP is raising a question relating to a citizen's most fundamental rights. Yet legal research reveals that CERD is not self-executing. Senate Rpt. 103-29, Declarations, 1. Non-self-executing (Jun. 2, 1994). As the Senate Report explained:

> In view of the extensive provisions present in U.S. law to provide protections and remedies sufficient to satisfy the requirements of the Convention, the Administration sees no need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. Therefore, the Administration proposes a declaration to the effect that the Convention is not self-executing.

As early as 1888, the United States Supreme Court explained that when "treaty stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson,* 124 U.S. 190, 194 (1888). SWOP's argument accusing EHD and the Board of racial discrimination is revealed to be inflammatory over-reaching that lacks any basis in law.

SWOP does not rebut EHD's argument that the U.S. Supreme Court has held that there is no private right of action for disparate impact claims. *Alexander v. Sandoval,* 532 U.S. 275 (2001). In United States' reporting to the United Nations on its obligations under CERD, the United States reviewed the effects of *Alexander* and emphasized that there is no private right of action and, "such claims must be brought by the government." *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* p. 7, n. 2 (June 12, 2013). The United States has explained to the United Nations, as EHD did in its Motion to the Air Board, that there is an administrative process where disparate impact complaints may be brought for further investigation. *Id.* SWOP and its counsel know this because they have brought such a complaint before EPA. That is the appropriate venue for such complaints, not an individual permit adjudication before the Air Board. *Martinez v. N.M. State Engineer Office,* 2000-NMCA-074, ¶ 27, 129 N.M. 413 (holding that administrative enforcement of civil rights claims rests exclusively in administrative agencies that have express statutory authority to hear such claims and have specialized knowledge and expertise in preventing and remedying unlawful discrimination). No hearing is necessary to delve into the factual basis of SWOP's disparate impact claims because they are immaterial to the issues that the Air Board is authorized to decide in this proceeding. The question before the Air Board is whether EHD

followed all applicable laws and Air Board regulations in issuing Permit # 3131 to the Honstein facility. EHD faithfully followed the Air Board's requirements and SWOP's inflammatory and legally flawed allegations of discrimination cannot change that fact.

Finally, the applicable air quality laws and regulations do not require pollution to be the same everywhere. For criteria pollutants, they are required to be less than EPA's health based standards. NMSA 1978, § 74-2-7(C)(1)(b). For hazardous pollutants, they are regulated by performance based standards, not ambient air standards.

For bulk gasoline plants, they are required to comply with the Air Board's rules which include Part 64 (hazardous air pollutants) (incorporating 40 C.F.R. Part 63 and subpart BBBBBB) and Part 65 (volatile organic compounds). SWOP has not pointed to any law or regulation that requires all pollution sources to be evenly distributed throughout Bernalillo County. SWOP's facts relating to disparate impacts of hazardous air pollutants are not material because the emissions from Honstein are not regulated in that manner. Allowing a hearing so that SWOP can offer inflammatory evidence concerning legally flawed allegations that do not relate to any applicable air quality laws and regulation only invites reversible error. The correct result on SWOP's Petition can be reached through oral argument about the law.

3) Factual testimony relating to a proposed standard is irrelevant, immaterial and causes avoidable delay.

SWOP maintains that "the nearest EHD air monitor indicates that ground level ozone may be close to violating proposed standards." Resp. at p. 12. SWOP maintains that there is a dispute of genuine material fact "*whether* the Honstein facility is or may contribute to the exceedance 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 that it is warranted." Resp. at p. 12 [emphasis added]. SWOP's allegation is not relevant because the proposed standard is not yet known and is not a standard permittees must meet or EHD must impose. It is not a material fact because it is based on flawed legal reasoning. As a result, considering the proposed ozone standard can only lead to avoidable delay, contrary to the Air Board's rules. 20.11.81.12(B)(2)(b) NMAC.

First, it is not possible to violate a proposed standard because it does not have the force of law. A law that a regulatory body is considering enacting cannot be violated unless and until it is adopted. *See In re Murray Energy,* ----- F.3d ----- (D.C. Cir. Jun. 9, 2015). That has not yet occurred and is not expected to occur until October 1, 2015. Furthermore, the proposed standard that has been announced is only a range of 65 to 70 parts per billion (ppb) and EPA is accepting comments on levels as low as 60 ppb and on retaining the existing standard which is at 75 ppb. *Overview of EPA's Proposal to Update the Air Quality Standards for Ground-Level Ozone* available at http://www.epa.gov/groundlevelozone/pdfs/20141125fs-overview.pdf. Thus, depending on what level EPA chooses, a given monitoring result today may or may not exceed the new standard that EPA adopts in October 2015. It would not be legally possible to violate a proposed standard even if the proposed standard were only a single number, let alone a range. Thus, SWOP's alleged potential ozone exceedance that may occur is speculative, irrelevant and immaterial.

Second, this argument is a transparent effort by SWOP to improperly shift its burden of proof to EHD. It is not sufficient for SWOP to allege that an exceedance of a ground level ozone standard "may" occur and then shift the burden to EHD to conduct further studies. SWOP's

burden is to prove that it is more probable than not that an exceedance will occur. NMSA 1978, § 74-2-7(K); 20.11.81.16(C) NMAC. Mere speculation is insufficient to carry its burden of proof and SWOP cannot shift that burden to EHD. No hearing is necessary because speculation is irrelevant and cannot be the basis to reverse or modify EHD's Permit #3131. There is no dispute of material fact. To conduct a hearing for irrelevant and immaterial speculation invites avoidable delay at significant public expense. 20.11.81.12(B)(2)(b) NMAC.

B) Summary disposition does not undermine the purpose of public participation.

SWOP suggests that members of the public may come forward and offer new facts that the Air Board must consider at the summary disposition hearing. Summary disposition is only appropriate if the merits of the petition can be resolved on legal argument alone. 20.11.81.20(A)(1) NMAC. For example, SWOP's allegation of disparate impacts can be resolved by legal argument alone because there is no law that requires emissions to be equal everywhere; there is no private right of action for disparate impact claims, *Alexander,* 532 U.S. at 293; and CERD is not self-executing as explained previously. Regardless of what facts may come in about disparate impact, the applicable laws and regulations do not create a claim that the Air Board can hear. Allowing public participation on this issue cannot change this result. It can, however, cause confusion, avoidable delay and invite reversible error.

Moreover, it is SWOP who bears the burden of proof, NMSA 1978, § 74-2-7(K), not an unknown and speculative member of the public who, in any event, would only be authorized to make a general non-technical comment, 20.11.81.14.(I)(2) NMAC.[4] With respect to its claim of disparate impact, SWOP cannot carry its burden because it has chosen to bring a legally insufficient claim for which there is no private right of action. When that flaw was pointed out in EHD's Motion, SWOP attempted to enforce an international treaty that is not self-executing, i.e., it is likewise not enforceable by SWOP before the Air Board. Summary disposition does not undermine appropriate public participation when the party with the burden of proof cannot carry it and is offering irrelevant, immaterial facts about inflammatory claims that are legally flawed. Similar analyses apply to SWOP's allegations of chlorobenzene that SWOP cannot connect to the Honstein facility and potential future exceedances of a proposed ozone standard.

C) The Air Board has provided adequate notice under 20.11.81.20 NMAC.

SWOP complains that the Air Board has not provided adequate notice to the public under Rule 20. However, SWOP points to no rule or law that entitles members of the public to notice of each regulatory provision that may be used at any particular meeting. SWOP and EHD have received actual notice of what is occurring. Members of the public are entitled to the "date, time and location of the hearing, a brief description of the *petition*, and information on the requirements for entry of appearance and for submitting a statement of intent to present

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[4] No member of the public entered an appearance or filed a statement of intent to provide technical testimony. Because the deadlines to enter appearances or file statements of intent have now passed, at this point under Air Board rules, the only information that may come in from members of the public are general non-technical comments. 20.11.81.14(I) NMAC.

evidence." 20.11.81.14(G) NMAC [emphasis added]. All of this has been timely provided. *See* Affidavit Certifying Amended Notice of Hearing (May 8, 2015) (noting publication on May 10, 2015) and Notice of Filing (June 19, 2015) (noting publication on June 14, 2015). Members of the public are not entitled to notice of each intervening step in consideration of a petition.

D) Summary disposition is authorized if its conditions are met.

Summary procedures are allowed by Air Board rule. 20.11.81.20(A) NMAC. SWOP argues that the petitions' facts should not be the only facts considered. In this case it does not matter because, regardless of whether SWOP's petition is the sole source of facts or whether its NOI is considered, SWOP has not carried its burden of proof in either case. Because the Air Board's rules allow summary disposition, the Air Board can appropriately consider whether it is appropriate in this case.

With respect to summary judgment, under the New Mexico Rules of Civil Procedure, Rule 1-056, summary judgment is authorized and serves a valuable purpose under New Mexico law. It is only disfavored when there is a genuine dispute of material fact. If there is no such dispute, a hearing cannot serve its intended purpose of resolving material factual disputes.

In order for there to be a "material" dispute of fact, the factual dispute has to have a basis created by the law at issue in that proceeding. Sometimes, there is dispute about the legal effect of undisputed facts. That is not a genuine dispute of material facts—it is a legal dispute—the Court of Appeals has upheld an administrative agency's summary judgment in such circumstances. *Junge v. John D. Morgan Construction Co.,* 1994-NMCA-106, ¶ 32, 118 N.M. 457.

In *Junge,* there was no genuine dispute of material fact. The dispute was about the legal effect of the undisputed material facts in an administrative proceeding before the Worker's Compensation Administration. *Id.* at ¶ 15. The Court found that summary judgment was appropriate. *Id.* at ¶ 32.

In this case, there are no disputes of material fact arising from SWOP's Petition or SWOP's NOI. EHD has explained above why SWOP's allegations about chlorobenzene, disparate impact, and speculation are immaterial, irrelevant and legally flawed. SWOP's NOI which must contain the complete narrative for SWOP's technical testimony, Revised Prehearing Order ¶ 6 (Dec. 19, 2014), does not allege, let alone offer evidence, that the chlorobenzene is coming from the Honstein operation. Thus, the evidence of chlorobenzene detections in ambient air is irrelevant and immaterial and hearing evidence about it invites confusion rather than clarity.

With respect to SWOP's disparate impact claims, there is no private right of action. *Alexander,* 532 U.S. at 293. As EHD has explained above, SWOP's allegations of violations of CERD are legally flawed because CERD is not self-executing and cannot be enforced by the Air Board in response to SWOP's allegations and the Air Board is not authorized to hear discrimination claims in any event. Senate Rpt. 103-29, Declarations, 1. Non-self-executing (Jun. 2, 1994); *Whitney,* 124 U.S. 190, 194 (1888); *Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination* p. 7, n. 2 (June 12, 2013); *Martinez,* 2000-NMCA-074, ¶ 27. SWOP's allegations about discrimination are inflammatory and legally flawed. They do not require a factual hearing to resolve them.

Finally, SWOP's speculation about "violation" of a proposed ozone standard is irrelevant and immaterial. Allegations about what might happen if a law is adopted are not even ripe for adjudication. *In re Murray Energy,* ----F.3d.---- (D.C. Cir. Jun. 9, 2015) (declining to review proposed EPA rule restricting carbon emissions from existing power plants and finding, in part, that a proposed rule does not determine rights or obligations or impose legal consequences). Summary disposition is fully appropriate for such claims, if not outright dismissal.

SWOP contends that because petitioners are raising "issues of public health and safety in relation to air quality...which are within [the Air]...Board's mandate and authority to consider under the New Mexico Air Quality Control Act" and because they have "expressed concerns about the Honstein operation's impact on quality of life" that they "deserve to be heard." Resp. at 10. This statement is strong advocacy without any legal foundation.

Petitioners have been heard. First, Petitioners have been heard by the New Mexico Legislature when they advocated (unsuccessfully) for their proposed statute, HB 458, requiring consideration of cumulative impacts during environmental permitting, among other things. Second, as SWOP knows, the Air Board heard SWOP's quality of life concerns at its rulemaking hearing earlier in 2014. Third, SWOP cites EHD's notes summarizing the public comments from its public information hearing on the Honstein facility. Resp. at p. 10. Plainly, EHD heard and considered SWOP's concerns and those concerns are in the administrative record before the Air Board. Fourth, Petitioners have submitted a Notice of Intent reviewing the technical basis of their concerns which describe emissions of chlorobenzene that are not tied to the Honstein facility, allege disparate impacts from hazardous air pollutants that have no basis in law, and speculate about violations of a proposed ambient air quality standard. Petitioners have had

repeated opportunities to be heard about their concerns. The question before the Air Board is not whether they have been heard—it is whether the Honstein facility will or will not meet all applicable air quality standards and regulations. NMSA 1978, § 74-2-7(L). EHD correctly issued Permit #3131 to the Honstein facility based on current law. Petitioners do not dispute the genuine material facts that support EHD's issuance of Permit #3131. Thus, summary disposition is appropriate in this case.

With respect to SWOP's allegations of "public health and safety," SWOP does not dispute that the Honstein facility is a bulk gasoline plant and that the Air Board has adopted specific rules which prevent or abate air pollution from such facilities. The Air Board has adopted Part 64 (incorporating 40 C.F.R. Part 63 subpart BBBBBB) to reduce hazardous air emissions, and Part 65 to reduce emissions of volatile organic compounds. There is no dispute that EHD has properly imposed those rules in issuing Permit #3131 and public health and safety is protected. Summary disposition is appropriate here.

E) Summary disposition is not contrary to the Supreme Court's holding in Rhino.

SWOP contends that EHD's reasoning is contrary to *Colonias Dev. Council v. Rhino Envt'l Serv.*, 2005-NMSC-024, 138 N.M. 133. *Rhino* is a case that arose under the Solid Waste Act and the Supreme Court relied heavily on the language of the Solid Waste Act regulations to reach its result in *Rhino*. SWOP argues that the definition of "air pollution" provides a nexus for the Air Board to require the cumulative impacts of a project. Resp. at p. 14. SWOP is mistaken.

1) **The definition of air pollution does not play the same role in air quality permitting as the regulatory provisions regarding public nuisance and potential hazards to public health, welfare and the environment in the Solid Waste Act regulations.**

SWOP points to the Solid Waste Act regulations that the Supreme Court found created a nexus to require the New Mexico Environment Department ("NMED") to consider cumulative impacts in permitting under the Solid Waste Act. In *Rhino,* the Court pointed to a regulation that set a standard for issuing a solid waste permit:

> The secretary shall issue a permit if the applicant demonstrates that the requirements of 20.9.2 - 20.9.10 NMAC and the Solid Waste Act are met and that neither a hazard to public health, welfare or the environment nor undue risk to property will result.

20.9.3.18 NMAC (2007) [emphasis added].[5]

Because the NMED Secretary was required by rule to determine whether the landfill would result in a hazard to public health or cause undue risk to property (as well as whether it complied with all applicable rules), the Supreme Court concluded that the NMED Secretary was required to consider cumulative impacts before issuing a permit. No such provision exists in the air quality permitting law or regulations.

It is true that the definition of air pollution relies on whether emissions cause a reasonable probability of injury to human health or public welfare, among other things. NMSA 1978, § 74-2-2(B). But SWOP has pointed to no law or regulation that applies the definition of air pollution during permitting. The Air Act does not say, either in the Air Act or any applicable regulation

[5] This is not the same citation for the language cited in *Rhino* because the Solid Waste Regulations have been reorganized since 2005 when the Court issued its *Rhino* decision. The cited rule above appears to have the same language that the Supreme Court pointed to in its *Rhino* decision.

that, "a permit shall be issued if it does not cause air pollution or harm health and safety," like the Solid Waste Act regulation does. Instead, there are only two entities commanded to "prevent or abate air pollution" and they are the New Mexico Environmental Improvement Board ("EIB") and the Air Board—not EHD and not NMED who are responsible for issuing most permits in New Mexico. *Compare* NMSA 1978, § 74-2-5(A) *with* NMSA 1978, § 74-2-7 (A)(1) (requiring the EIB and the Air Board to adopt rules requiring persons intending to construct a source to obtain a permit *from the department or the local agency* prior to construction) [emphasis added].

SWOP argues that a more appropriate reading of the Air Act would be 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." Resp. at 19. The problem with this argument is that the Legislature did not say that.

In this case, the local authority is the City Council and the Bernalillo County Commission. The Air Act commands them to adopt ordinances, not to adopt regulations or prevent or abate air pollution. NMSA 1978, § 74-2-4(A).

There is no wide ranging statutory command like SWOP wishes. There is, instead, a far more nuanced approach placing specific tasks on certain entities. The Legislature empowered the Air Board to prevent or abate air pollution, § 5(A), and to do so by adopting rules, standards and plans, § 5(B). During permitting, the Air Board evaluates whether EHD, *e.g.*, § 7A(1), (C) and (D), has faithfully followed those rules, standards and plans, § 7(L), thus preventing or abating air pollution. If EHD has not followed its rules and standards, the Air Board can reverse

or modify EHD's action, § 7(K); if the Air Board determines that a source will meet all of its standards and rules, it sustains EHD's action, *id.* Because a correctly issued air quality permit faithfully follows all Air Board rules, it prevents or abates air pollution as the Legislature intended.

2) The Legislature did require a cumulative impact analysis regarding ambient air quality standards but not for emissions of hazardous air pollutants.

The Legislature knows how to require consideration of cumulative impacts because it has required exactly that with respect to ambient air quality standards. Subsection 7(C)(1)(b) requires an analysis of whether the construction "will cause or contribute" to exceedances of ambient air quality standards. This requirement is only for ambient air quality standards, not for hazardous air pollutant emissions which are generally not subject to ambient air quality standards. When the Legislature demonstrates that it knows how to include a requirement by including it under some circumstances but not others, the omission is presumed to be intentional. *State v. Antonio T.*, 2014-NMSC-_____, ¶ 21, (No. 33,997 (Oct. 23, 2014)). Thus, the Air Act does not require a cumulative impact analysis except for exceedances of ambient air quality standards.

In this case, Petitioners have not alleged any facts and have not offered any modeling to prove that the construction of the Honstein source will cause or contribute to any exceedance of currently applicable ambient air quality standards. Petitioners bear the burden of proof. NMSA 1978, § 74-2-7(K). Thus, SWOP has neither alleged nor offered evidence of any violation of the Air Act's sole requirement for cumulative impact analysis relating to exceedances of ambient air quality standards.

SWOP posits that it is conceivable that multiple permits can cause emissions of hazardous air pollutants which result in a cumulative impact that the Air Board must prevent and abate. This is an argument that SWOP must make to the Legislature, not to the Air Board. The Legislature has already provided for an analysis of cumulative impacts with respect to ambient air quality standards but not with respect to hazardous air pollutant emissions. *Antonio T.*, 2014-NMSC-_____, ¶ 21, (No. 33,997 (Oct. 23, 2014)). There is a good reason for the exclusion of hazardous air pollutant emissions which is discussed in Section (F) below.

3) The Legislature knows how to require consideration of health and safety but it did not require such consideration during permitting.

The Legislature knows how to require consideration of health and safety. It required it during rulemaking, NMSA 1978, § 74-2-5(E), and when considering a request for a variance, NMSA 1978, § 74-2-8(A)(2)(a). Each of these subsections is significant to understanding legislative intent for different reasons.

Subsection 5(E) (rulemaking) is significant because the adoption of a regulation represents the Air Board's balanced determination that the rule will provide appropriate protection for health and safety, among other things, as required under the Air Act. The Air Board cannot label emissions in compliance with all of its rules "air pollution" because such emissions have already been determined to provide appropriate protection to health and safety, among other things. *See* NMSA 1978, § 74-2-5(E); *Bass Enterprises Production Co. v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 20, 148 N.M. 516 (agency cannot ignore its own rules). Such emissions, therefore, are reasonable and cannot meet the definition of air pollution.

If the Air Board believed that its rules were inadequate, the remedy would be to change the rules while providing the required public notice under Section 6, not by imposing an unnoticed surprise determination that its rules are insufficient during a permit adjudication where the central focus should be whether the source "will or will not" meet all applicable standards and regulations. *Smith v. Bernalillo County,* 2005-NMSC-012; NMSA 1978, § 74-2-7(L).

Subsection 8(A)(2)(a) (variances) is also significant because a request for a variance is a request not to follow a rule that the Air Board has imposed on a source. In such cases, the Legislature required a consideration of the impacts to health and safety that might occur from not following Air Board rules. NMSA 1978, § 74-2-8(A)(2)(a). That is not occurring here.

This is why Petitioners' citation, Resp. at p. 16, to *Duke City Lumber Co. v. New Mexico Envt'l Improvement Bd.,* 1984-NMSC-042, ¶¶ 16-17, 101 N.M. 291 does not provide any support for Petitioners' argument. That case was, as Petitioners admit, in the context of issuing a variance. No variance is at issue here, so *Duke City* does not apply. All Air Board rules have been imposed on the Honstein Permit.

Together, Subsection 5(E) and 8(A)(2)(a) offer a logical explanation of the Legislature's intent in not requiring consideration of health and safety during permitting. During permitting all applicable Air Board rules and standards are followed. *See* NMSA 1978, § 74-2-7(C) (application may be denied if rules and standards not met); § 7(D) (conditions requiring control technology and emission limits required by rules and standards may be imposed); § 7(L) (authorizing each entity that issues or reviews a permitting decision to make a final conclusive determination, which is binding state wide, whether the source will or will not meet all air pollution standards and regulations). If all Air Board limitations are not imposed, an applicant

must request a variance. NMSA 1978, § 74-2-8. Thus, the Air Board's rules and standards provide appropriate protection for health and safety during permitting and a new consideration of health and safety is not necessary unless a variance is requested. The above scheme is fully appropriate when considering the numerous permits granted to various sources of air emissions.

4) The Air Act's language authorizing consideration of a violation of "any other provision of the [Air] Act" does not help Petitioners here.

SWOP contends that EHD's interpretation of the Air Act ignores the Legislature's language authorizing permit denial for a violation of "any other provision of the Air Quality Control Act." Resp. at p. 20. SWOP contends that this language "imparts a level of discretion to the local authority." To the contrary, it is SWOP, not EHD, who is ignoring statutory language.

SWOP's cited language begins as follows: "...the...local agency may deny any application for: (1) a construction permit if it appears that *the construction or modification* ...(c) *will violate any other provision* of the Air Quality Control Act or the federal act." NMSA 1978, § 74-2-7(C)(1)(c). Thus, it is the construction or the modification that must violate a provision of the Air Act. SWOP has pointed to no such violation here.

Unlike the case in the Solid Waste Act regulations, there is no language in the Air Act or any applicable regulation which says "No person may cause air pollution," or "No applicant or permittee may cause air pollution," "No permitted construction or modification may cause air pollution," or, using the Solid Waste Act regulations as a model, "A permit shall be issued it if

does not cause air pollution." Moreover, if a permit complies with all Air Board rules and standards, it cannot properly be said to be causing air pollution as explained previously. Thus, construction of the Honstein facility would not violate any other provision of the Air Act, so the statutory subsection SWOP cites offers no support for its requested result.

SWOP contends that this EHD argument is disingenuous because the Honstein operation is already constructed and has operated without a permit for decades.[6] It is true that EHD issued Permit #3131 after the fact. However, that does not change the intent of Section 7 of the Air Act and Part 41 which commonly apply before a source is constructed. NMSA 1978, § 74-2-7(A)(1); *and see* 20.11.41.2(B) NMAC (2002). The meaning of Section 7 and Part 41 do not change because a permit is issued after the fact and a previously unregulated source is brought into compliance with air quality requirements.[7]

Moreover, both subsections 7(C)(1)(a) and (c) apply to the construction related to a single permit. It is the *construction* which must violate a provision or requirement of the Air Act or the Clean Air Act and not in combination with other permits or other non-permitted activities such as mobile sources. It is only subsection 7(C)(1)(b) which implicitly requires an analysis of cumulative impacts with regard to exceedances of ambient air quality standards only. Thus, subsection 7(C)(1)(c) provides no support for SWOP's request for an analysis of the cumulative impacts of hazardous air pollutant emissions.

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[6] The Honstein facility was constructed before permits were required.

[7] EHD conducted an enforcement action against Honstein for its failure to obtain a permit previously and required it to apply and obtain a permit.

5) Petitioners' citations relating to licensing of nuclear reactors are irrelevant.

Petitioners cite law and cases that relate to licensing of nuclear reactors. Resp. at p. 17. This is irrelevant and contrary to the New Mexico Supreme Court's holding in *Rhino:*

> Like the Court of Appeals, we are not persuaded that the general purposes of the Environmental Improvement Act and the Solid Waste Act, considered alone, provide authority for requiring the Secretary to deny a landfill permit based on public opposition. ... *The purposes of the enabling acts, which include the goal of protecting the "public health, safety and welfare," are designed to invoke the general police power of the state.... Thus, the Court of Appeals was correct to reject CDC's reliance on the purposes of the acts as a statutory mandate to respond to issues that fit ever so loosely under the umbrella of "sociological concerns." Such a broad mandate would offer no guidance to the Department, and violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency.*

2005, NMSC-0024, ¶ 29.

The lesson from the Supreme Court's holding in *Rhino,* is that the Legislature's purpose for adopting a statute that merely invokes an intent to protect public health and safety is not sufficient guidance for an administrative agency's action. The Legislature must provide more guidance to avoid an unconstitutional delegation of power.

In the case of the Solid Waste Act, the Supreme Court found the required nexus in a regulation (not in a statute invoking the police power). The regulation required, before a permit could be issued, an assessment of whether a landfill would create a hazard to public health or cause an undue risk to property and whether all other requirements of the Solid Waste regulations were met. SWOP has not pointed to any similar air quality regulatory language here and EHD is aware of none.

F) The Clean Air Act's purpose of protecting public health cannot be interpreted to require cumulative impact analysis with regard to hazardous air pollutants.

SWOP contends that, because the Clean Air Act has the purpose of protecting public health and welfare, the Air Board must be required to do so in the context of local air permitting. Resp. at p. 22. SWOP's concerns focus on levels of hazardous air pollutants such as benzene. *See, e.g.,* Petitioners' NOI, Test. of Dr. George Thurston, pp. 5, 7-17. SWOP's argument is directly contrary to express Congressional intent and the New Mexico Legislature's intent concerning how hazardous air pollutant emissions would be regulated.

1) SWOP's argument is belied by the legislative history of the Clean Air Act.

When Congress passed the Clean Air Act in 1970, it required the U.S. Environmental Protection Agency ("EPA") to adopt emission standards for hazardous air pollutants with an "ample margin of safety to protect public health." This approach to regulating hazardous air pollutants was a failure. *Clean Air Act Amendments of 1989*, S. Rep. 101-549, 3387, 3513 (Dec. 20. 1989) ("The law has worked poorly.") [Hereinafter the "Senate Rpt."].

Many, if not most hazardous air pollutants are known or suspected human carcinogens. *Id.* Many people interpreted an "ample margin of safety to protect public health" to mean zero exposure to carcinogens. *Id.* Yet the sources of hazardous air pollutants are ubiquitous, numerous and deeply ingrained in the United States economy. To illustrate, the largest source of benzene (a known human carcinogen and hazardous air pollutant) in air emissions are mobile

sources like the cars driven by millions of individuals. *Control of Hazardous Air Pollutants from Mobile Sources,* 72 Fed. Reg. 8428, 8428 (Feb. 26, 2007) (noting that the largest source of benzene is cars). As the Senate described it, "EPA has not been willing to write standards so stringent because they would shut down major segments of American industry." *Id.*

As a result of this conundrum, by the end of the first two decades of EPA's efforts to control hazardous air pollutants under the Clean Air Act, it had adopted a total of seven emission standards, six of which were subject to legal challenges. Senate Rpt. at 3516. In other words, after two decades, the EPA had made virtually no progress at protecting public health from hazardous air pollutants.

Congress decided to adopt a different approach for hazardous air pollutants when it passed the 1990 Clean Air Act amendments. Clean Air Act: A Summary of the Act and Its Major Requirements, CRS Report for Congress p. 10 (May 9, 2005) (describing the 1990 amendments as having "completely rewritten" the hazardous air pollutants section of the Clean Air Act) [hereinafter "CRS Rpt."]. The major points of the new law were: First, major sources (more than 10 tons per year of one hazardous air pollutant or 25 tons per year of all hazardous air pollutants, 42 U.S.C. § 7412(a)(1)) would now be required to use the maximum available control technology ("MACT"). CRS Rpt. at 10; 42 U.S.C. § 7412(d). For area sources (sources which are not major, 42 U.S.C. § 7412(a)(2)), EPA may set standards based on generally available control technology ("GACT"), rather than MACT. CRS Rpt. at p. 10-11; 42 U.S.C. § 7412(d)(5). EPA is required to periodically review the results of this approach and must, for major sources

only, consider whether further standards based on any residual risk should be imposed. CRS Rpt. at p. 10; 42 U.S.C. § 7412(f)(2). EPA is not required to consider the residual risk remaining for area sources. 42 U.S.C. § 7412(f)(5). This is what Congress intended—the most stringent requirements are placed on hazardous air pollutant emissions from the largest sources.

This approach has been far more effective and has achieved substantial reductions of hazardous air pollutants nationwide. *National Air Toxics Program: The Second Integrated Urban Air Toxics Report to Congress,* p. 3-3 to 3-4, and Exhibit 3-1 (Aug. 21, 2014) (noting large reductions in stationary and mobile source toxic emissions as the result of standards adopted since 1990).

In the case of bulk gasoline plants like the Honstein facility, it is an area source and is required to use generally available control technology known as Stage I vapor control. 20.11.64.12 NMAC (incorporating 40 C.F.R. Part 63, subpart BBBBBB). There is no "emission standard" that limits the maximum quantity of hazardous air emissions from bulk gasoline plants.[8]

SWOP cannot argue that applying this standard to the Honstein permit is contrary to congressional intent to protect public health from hazardous air pollutant emissions. It is exactly what Congress required and intended to protect public health from area sources of hazardous air

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[8] There is a maximum daily throughput limit for bulk gasoline plants of 20,000 gallons of gasoline a day. 40 C.F.R. § 63.11100. If a bulk gasoline plant exceeds that limit, it becomes a gasoline bulk terminal and different regulations apply. At that point, there is still no maximum emission limit of hazardous air pollutant emissions but at some point, it could become a major source. This is not a concern for the Honstein facility which has requested an annual throughput limit of 250,000 gallons per year with annual VOC emissions of 2.26 tons per year. Petition, Ex. A, p. 2 of 4.

pollutant emissions in the 1990 Clean Air Amendments. *See also, National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, and Gasoline Dispensing Facilities,* 1916, 1917 (Jan. 10, 2008) (explaining the statutory basis of hazardous air emission standards applied to the source category of gasoline distribution, including bulk gasoline plants). SWOP also cannot dispute that this approach has been far more effective approach than imposing a standard based on an "ample margin of safety." That approach has been tried and failed.

2) The Legislature has limited the Air Board's discretion regarding hazardous air pollutants.

SWOP contends that, because the Air Act implements the Clean Air Act in New Mexico, it must, by extension, contain a "mandate that the local authority prevent and abate emissions that pose a reasonable risk to public health." Resp. at 22. As EHD has explained above, the best way of protecting public health from hazardous air pollutants is not always the obvious method of imposing a standard of "reasonable risk" or an "ample margin of safety." Congress already tried that approach and after twenty years rejected it because it worked "poorly" at achieving the result SWOP wants here. In the case of the Air Act, there is more information clearly demonstrating that SWOP's interpretation of the Air Act with respect to hazardous air pollutants is incorrect.

SWOP's Response fails to address the very clear legislative intent expressed in subsection 5(C)(2). There, the Legislature restricted the Air Board's authority to regulate hazardous air pollutants. The Air Board must adopt rules that are "as stringent as" but "no more stringent than" federal standards. While this language applies only to rulemaking, the Air Board

adopts rules to prevent or abate air pollution. NMSA 1978, § 74-2-5(B). Thus, in combination, subsection 5(B) and 5(C)(2) demonstrate that the Legislature intended that the Air Board closely follow the federal standards for hazardous air pollutants and that those federal standards are the Legislature's chosen method of preventing and abating hazardous air pollution.

This language is inconsistent with SWOP's assertion that the Air Board, in reviewing an EHD permitting decision, is supposed to engage in a wide ranging inquiry into how best to prevent or abate air pollution from sources of hazardous air pollutants. The Legislature already answered this question—air pollution from stationary sources of hazardous air pollutants is properly prevented and abated by applying rules that are no more stringent than EPA regulations. That is what the New Mexico Legislature intended by its express language in subsection 5(C)(2). The Legislature did not intend an ad hoc inquiry during each permitting decision into how best to prevent or abate hazardous air pollution. SWOP has ignored this important Air Act language and, as a result, is wrong about New Mexico legislative intent.

3) EHD's interpretation of the Air Act does not undermine its legislative purpose.

SWOP contends that "the 'orderly' process by which EHD claims air pollution is prevented has failed." Resp. p. 23. This is irrelevant hyperbole unsupported by facts.

It is irrelevant because the Air Board is not reviewing the results of EHD's permitting program. The Air Board is reviewing EHD's decision to issue the Honstein Permit #3131. By the clear language of the Air Act, the construction of the Honstein source will not violate any regulation or standard or any provision of the Air Act. It will not cause or contribute to any exceedances of any ambient air quality standards. The Air Board should sustain EHD's permitting decision because SWOP does not dispute that EHD has faithfully followed all

applicable Air Board rules and standards and applied them to Permit #3131. Construction of the Honstein source will meet all applicable air quality standards and regulations. NMSA 1978, § 74-2-7(L).

Even if this were a broad ranging inquiry into the effectiveness of EHD's stationary source program, which EHD disputes, SWOP has provided no evidence to support a conclusion that the EHD stationary source program has failed. SWOP has shown some emissions of chlorobenzene but it has not even shown that they were coming from a stationary source. Thus, SWOP's chlorobenzene results are not evidence of a "failed" stationary source program.

SWOP has largely relied on a ten year old air toxics assessment for broader arguments about hazardous air pollutants. Ten year old data cannot possibly shed any light on the current effectiveness of EHD's stationary source permitting program. Moreover, as EHD has explained above, some hazardous air emissions, such as benzene, come primarily from mobile sources. Mobile emissions and ten year old data cannot be used to demonstrate that EHD's stationary source program has "failed" as SWOP contends.

SWOP does not deny that Bernalillo County is in attainment for all federal ambient air quality standards and only alleges that exceedances of a proposed ozone standard "may" occur. SWOP's overreaching allegations of "failure" can only be described as unsupported hyperbole that should be rejected.

G) SWOP's requested relief must be denied.

SWOP has requested two forms of relief in its Petition. First, SWOP has requested that the Honstein Permit be denied until a cumulative impact study has been done. As EHD has explained above, the construction of the Honstein source does not meet any of the criteria that the Legislature has authorized to deny a permit. NMSA 1978, § 74-2-7(C)(1). Thus, this relief must be denied.

Next, SWOP requests that, if the Honstein Permit is issued, the Air Board require continuous emission monitoring to assure that Clean Air Act standards are not violated. This is unreasonable as a matter of law.

The Honstein facility does not emit any pollutants subject to Clean Air Act standards. Thus, what SWOP is really seeking is a monitor located in the San Jose neighborhood to monitor the aggregate air emissions in San Jose. This is simply unreasonable. Bernalillo County has air monitoring in compliance with all EPA requirements and there is no basis for imposing such a burdensome requirement on a source that does not even emit any pollutants subject to Clean Air Act standards. Furthermore, as EHD has explained in its Motion, such monitoring would violate EPA's monitoring guidance, even if it were reasonable, which it is not. 40 C.F.R. Part 58, App. E, Spacing from Minor Sources.

With respect to SWOP's contention that the volatile organic compounds from the Honstein facility might cause an exceedance of the proposed ozone standard, that is not legally plausible and even if it were, which EHD disputes, SWOP has provided no air quality modeling to support its request. Its request is unreasonable and unsupported and should be denied.

III. CONCLUSION

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

1) The Air Board decide the merits of the Petition solely on legal argument and sustain the Honstein Permit, #3131;

2) In the alternative, grant EHD summary judgment because there is no genuine dispute of material fact and the Air Board should sustain the Honstein Permit #3131 as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served as described below on June 22, 2015:

1) The City's original document was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered to the Hearing Clerk.

2) One additional copy was hand-delivered to the Hearing Clerk for delivery to the Hearing Officer/Air Board Attorney and one copy was sent by electronic mail to:

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

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