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 ISSUED TO SMITH'S FOOD AND DRUG CENTERS, INC.

AQCB No. 2014-3

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

CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The City of Albuquerque Environmental Health Department ("EHD") replies ("Reply") to "Petitioners' Consolidated Response in Opposition to City's and Smith's Motion for Summary Judgment" ("Response") and re-affirms its position that there is no genuine dispute of material fact that EHD correctly issued Permit No. 3136 and the Air Quality Control Board ("Air Board") can decide the issues raised by the Petition as a matter of law. In support of its Reply, EHD states the following:

I. Introduction.

Contrary to the Response, summary judgment is appropriate here. The Legislature, the City Council, the County Commission and the Air Board's rules all provide that a petitioner must be "adversely affected" in order to receive a hearing before the Air Board. NMSA 1978, § 74-2-7(H); Revised Ordinances of Albuquerque ("ROA") § 9-5-1-7(H); Bernalillo County Ordinances, Art. II, § 30-36(h); and 20.11.81.14(B)(2)(c) NMAC. To be adversely affected means, in part, to have suffered an invasion of a legally protected interest. *N.M. Cattle Growers Ass'n v. New Mexico Water Quality Control Com'n,* 2013-NMCA-046, ¶ 13, 299 P.3d 436 (adversely affected means to have standing); *Protection and Advocacy System v. City of Albuquerque,* 2008-NMCA-149, ¶

18, 145 N.M. 156 (elements of standing are injury in fact, causation and redressability); *Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 24, 130 N.M. 368 (injury in fact means an invasion of a legally protected interest which is concrete and particularized and not conjectural or hypothetical). The Response fails to address any of these important concepts and fails to provide admissible evidence that show that the Petitioners have been adversely affected. Instead, the Response evades the real issue and relies on emotional arguments rooted in a different statute altogether. The Air Board should see through this and grant EHD summary judgment because there is no dispute of material fact that EHD correctly issued Permit No. 3136 and the Air Board can sustain Permit No. 3136 as a matter of law.

Petitioners incorporate by reference their arguments made in response to EHD's and Smith's Motion for Summary Judgment from a separate proceeding, Permit No. 3135 relating to the Louisiana and Montgomery Smith's Gasoline Dispensing Facility ("GDF"). The EHD likewise incorporates its Reply to that document and attaches it to this Reply for the Air Board's record in Permit No. 3136 as Exhibit A.

II. Petitioners alleged "Disputed Material Facts" re City's Motion for Summary Judgment, pp. 3-5 of Petitioners' Response, do not demonstrate any genuine disputes of material fact.

1) Petitioners dispute that notice was adequate but fail to identify any deficiency. In any event, whether notice is "adequate" is a question of law and the Air Board can review the Administrative Record ("AR") to which EHD has cited, Bates No. 142-43, and decide this question as a matter of law—it does not demonstrate a genuine dispute of material fact.

2) Petitioners do not dispute that the public hearings were held but dispute whether EHD properly considered their concerns. Again, Petitioners have failed to provide admissible evidence of how they have been adversely affected and experienced an invasion of a legally protected interest that EHD was required to consider. What EHD should consider in issuing a permit is spelled out by subsection 7(C)(1) of the Air Act and the Air Board can resolve this question as a matter of law.

3) Petitioners dispute whether summary judgment proceedings are appropriate. This is a dispute of law, not a genuine dispute of material fact.

4) Petitioners dispute whether subsection 7(K) of the Air Act "prescribes a summary judgment standard of review..." This is a dispute of law, not a genuine dispute of material fact.

5) Petitioners dispute that they are not adversely affected. However, this contention fails to provide admissible evidence to show the affirmative—that they are adversely affected and how they are adversely affected. If Petitioners fail to provide that evidence, there is no need to hold an Air Board hearing on Permit No. 3136. NMSA 1978, § 74-2-7(H).

6) Petitioners dispute that they have suffered no injury in fact or have not suffered an invasion of a legally protected interest. To respond to a summary judgment motion, Petitioners must show evidence that they have suffered such injuries, not just deny EHD's assertion. Petitioners have the burden of proof in an Air Board hearing and if they cannot carry it now, they cannot carry it, period.

7) Petitioners dispute that the Air Board does not have authority to consider quality of life concerns. This is a dispute of law, not a genuine dispute of material fact.

8) Petitioners dispute that they cannot point to any rule which "the gas station will violate if built." To respond to a summary judgment motion, Petitioners must show evidence that have been adversely affected. If they can prove that the Smith's GDF authorized by Permit No. 3136 would violate some rule, they must set it out now. Again, if they cannot carry their burden of proof here, they cannot carry it, period.

9) Petitioners dispute that the Air Board's authority to hear this matter and provide remedial relief is preempted by federal law under Hex C. Petitioners misstate EHD's legal arguments. In any event, this is a dispute of law, not a genuine dispute of material fact.

10) Petitioners dispute that Petitioner Toledo does not have standing. This is a dispute of law, not a genuine dispute of material fact.

11) Petitioners dispute that *In re Air Quality Permit No.* 2037-M1 is irrelevant to the issuance of Permit No. 3136. This is a dispute of law, not a genuine dispute of material fact.

12) Petitioners dispute whether *In re Air Quality Permit No.* 2037-M1 has precedential value. This is a dispute of law, not a genuine dispute of material fact.

13) Petitioners dispute whether other New Mexico case law, such as *Colonias Development Council v. Rhino Environmental Serv.,* 2005-NMSC-024, 138 N.M. 133, should apply. This is a dispute of law, not a genuine dispute of material fact.

14) Petitioners dispute whether the Air Quality Control Act has a purpose of protecting public health, safety and welfare. This is a dispute of law, not a genuine dispute of material fact.

15) Petitioners dispute whether notice was adequate in this case. As explained above in Paragraph # 1, this is a question of law not a dispute of material fact.

16) Petitioners dispute whether public hearings are pro forma or otherwise allow meaningful democratic participation. This is simply an opinion, neither a dispute of law nor a dispute of fact.

III. Petitioners' Undisputed Material Facts re: City's Motion for Summary Judgment, p. 5 in Petitioners' Response, do not demonstrate any genuine dispute of material fact.

1) Petitioners do not dispute EHD's Undisputed Material Facts.

2) Petitioners assert that EHD does not dispute that the Air Board rules do not have a specific provision for summary judgment. This is correct. As EHD has explained, the Air Board's rules allow the Rules of Civil Procedure to be used for guidance, 20.11.81.12(A) NMAC, and EHD has done so by filing its motion for summary judgment in reliance on Rule 1-056. This does not demonstrate that there is any genuine dispute of material fact.

3) EHD does not dispute that gasoline vapors contain benzene and that benzene has important and serious impacts on human health. This is undisputed but immaterial. The rules and standards that the Air Board has adopted implicitly acknowledge these facts—that's why Hex C was adopted by the Air Board as part of the Air Board's "Emission Standards for Hazardous Air Pollutants." 20.11.64 NMAC [emphasis added]. The only dispute here is what standard should apply to control benzene

emissions. EHD contends it is Hex C. Petitioners have not contended that any particular standard should apply. This is not a genuine dispute of material fact; it is a dispute of law.

4) EHD does not dispute that benzene is a known human carcinogen—this fact cannot be disputed—it is established by EPA rulemakings justifying certain regulations relating to the control of benzene air emissions. However, it is immaterial in this permitting proceeding because the applicable standard to control benzene air emissions, Hex C, has already been adopted by the Air Board and EHD has properly applied it to Permit No. 3136.

5) EHD does not dispute that, "where benzene emissions are concerned, reasonable minds might differ how best to balance public health versus economic reasonableness and technical practicability." This is undisputed but immaterial. This is a permitting proceeding and protecting public health versus economic reasonableness and technical practicability is considered during rulemaking pursuant to subsection 5(E) of the Air Act.

6) EHD does not dispute that the Air Board can sustain, modify or reverse an EHD permit. This does not create a genuine dispute of material fact.

IV. Petitioners' Disputed Material Facts re: Smith's Motion for Summary Judgment, pp. 5-8 Petitioners' Response, do not demonstrate any genuine disputes of material fact.

1) Petitioners dispute what EHD considered in ruling Smith's application complete. This is not a genuine dispute of material fact. Petitioners have failed to provide any evidence that shows the Smith's application was incomplete and their interpretation of what should have been considered in that step is a question of law.

2) Petitioners allege that notice was deficient but fail to provide any admissible evidence showing any deficiency and offer no explanation comparing the notice that was done (which Petitioners admit) to the applicable rule to identify any deficiency.

3) Petitioners contend that EHD does not understand its own regulations and mandate under the Air Quality Control Act based on the *In re Air Quality Permit* No. 2037-M1 and *Colonias*. This is a dispute of law, not a genuine dispute of material fact.

4) Petitioners contend that the City gave no weight to comments and concerns of the public at the public information hearing. This does not create a genuine dispute of material fact. It is a dispute of law about what should or should not be considered in issuing a permit under the Air Act.

5) Petitioners dispute whether any written or public comments at the public information hearing identified any aspect of the permitting process that failed to comply with applicable law, but Petitioners offer no admissible evidence to demonstrate any failure to comply with law. This does not create a genuine dispute of material fact.

6) Petitioners dispute Smith's Undisputed Material Facts ¶¶ 10, 13, and 15 because Petitioners contend that weight should have been given to health, welfare, safety of the public, community and property concerns. This is a dispute of law, and does not create a genuine dispute of material fact.

7) Petitioners contend that the Air Board can deviate from Hex C, Part 41 and Part 64. This is a dispute of law, not a genuine dispute of material fact.

8) Petitioners dispute whether summary judgment proceedings are appropriate. This is a dispute of law, not a genuine dispute of material fact.

9) Petitioners dispute whether subsection 7(K) of the Air Act prescribes a summary judgment standard of review. This is a dispute of law, not a genuine dispute of material fact.

10) Petitioners dispute that their requested relief constitutes a standardless approach. Petitioners have not explained how their request is grounded in any standard and, in any event, the appropriate standard to apply is a dispute of law, not a genuine dispute of material fact.

11) Petitioners dispute that their community, health, property and safety concerns do not have a nexus to the Air Quality Control Act and associated regulations. Petitioners have failed to identify one regulation that protects the concerns they have voiced. This does not create a genuine dispute of material fact.

12) Petitioners dispute that the Air Board does not have the authority to hear and provide relief as stated in Petitioners' request for hearing. This is a dispute of law, not a genuine dispute of material fact.

13) Petitioners dispute that more could not be done to prevent or abate air pollution. This is a dispute of law, not a genuine dispute of material fact.

14) Petitioners dispute that the existing permit complies with the existing regulations. If Petitioners actually have any evidence to support this allegation, they must bring it forward now if it is to be considered. Having failed to do so, this is not a genuine dispute of material fact.

15) Petitioners dispute whether they must go through legislative and rulemaking processes to obtain their requested relief. This is a dispute of law, not a genuine dispute of material fact.

16) Petitioners dispute whether the variance proceeding is relevant in this action. This is a dispute of law, not a genuine dispute of material fact.

17) Petitioners dispute that they do not have evidence establishing reasonable probability of harm. This is a dispute of law, questioning the basis for denial of a permit, not a genuine dispute of material fact.

V. Petitioners' Undisputed Material Facts re: Smith's Motion for Summary Judgment, p. 8, Petitioners' Response, do not demonstrate any undisputed material facts.

1) Petitioners do not dispute Smith's Undisputed Material Facts ¶¶ 1, 2, 5, 7, 11, 12, 14. EHD's response to the remaining alleged disputed facts is addressed in the previous section which demonstrates that none of Petitioners' "disputes" demonstrate a genuine dispute of material fact.

2) Petitioners do not dispute that air quality permitting in New Mexico is governed by the Air Quality Control Act and associated regulations including Part 41. This is a question of law, not one of fact.

3) Petitioners do not dispute that a question before the Air Board is whether the emissions authorized meet applicable local, state and federal air pollution standards. What the questions are that are properly before the Air Board is a question of law, not one of fact.

4) Petitioners do not dispute that the grounds for permit denial regard determination of compliance with standards and regulations. What the grounds are for permit denial is a question of law, not one of fact.

VI. Petitioners have not carried their burden to withstand summary judgment.

As EHD explained in its Motion, when a motion for summary judgment is made, the opposing party may not rely merely on the allegations in his pleading; instead, his response must set forth specific facts based on admissible evidence, showing that there is a genuine issue for trial (in this an Air Board adjudicatory hearing). NMRA 1-056(D) [emphasis added].

Here, Petitioners have yet to identify a single fact coupled with a regulation, standard, or provision of the Air Act showing that there is a genuine issue to be heard by the Air Board. A party resisting summary judgment may not simply argue that facts might exist which would demonstrate that there is a genuine issue for the Air Board to hear. *Dow v. Chilili Co-op Ass'n,* 1986-NMSC-084, ¶ 13, 105 N.M. 52. There is a simple reason why Petitioners have not done so—because this dispute is a dispute about the law, not about the facts. Petitioners have no evidence to show any fault with EHD's decision to issue Permit No. 3136. There is no genuine dispute of material fact and the Air Board can decide the issues raised in the Petition as a matter of law.

VII. The Air Board's rule providing for Summary Procedures does not apply and would not change the result here in any event.

EHD did not invoke the Air Board's rule regarding Summary Procedures, 20.11.81.20 NMAC. The Summary Procedure deals with cases where the merits of a petition are decided solely on legal arguments. 20.11.81.20(A)(1) NMAC. A summary judgment motion depends on undisputed facts and frequently may rely on evidence arising from discovery efforts. EHD did not invoke that procedure because its arguments

depend both on facts that EHD alleges are undisputed facts (petitioners disagreement with this conclusion is addressed above) as well as legal arguments. Thus, the Summary Procedure process is inapplicable.

In this case, the Prehearing Order expressly contemplated dispositive motions after discovery. Prehearing Order ¶ 13 (Aug. 8, 2014). The Air Board's rules expressly authorize reliance on the rules of civil procedure for guidance where there is no specific provision. 20.11.81.12 NMAC. Since the Legislature, the City Council and the County Commission all required that petitioners be "adversely affected" to request a hearing before the Air Board, it is not objectionable to require Petitioners to provide admissible evidence showing exactly that.

Even if 20.11.81.20 (A) NMAC applied, which EHD disputes, notice of the motion hearing was provided by the Hearing Clerk and the deadline set in the Prehearing Order for filing statements of intent has already passed. No additional members of the public entered appearances or filed a statement of intent. Despite Petitioners protestations to the contrary, their obligation is to provide admissible evidence showing how they are adversely affected. If they have no such evidence, no one has been adversely affected and the Air Act would not allow a hearing in which the public could participate. NMSA 1978, § 74-2-7(H). The Air Act's language in subsection 7(I) would not come into effect in that case.

Finally, it is the Air Board's standard practice to allow an opportunity for public comment at its meetings. Members of the public who have concerns about air quality in general or permitting specifically therefore have a regular opportunity to address the Air

Board at its meetings on topics of concern. However, the Air Board is not required to hold an adjudicatory hearing to delay a decision to sustain a permit that EHD has issued that has not adversely affected anyone.

VIII. The Air Board's rule requiring members of the public to enter an appearance to cross-examine witnesses is founded on a reasonable interpretation of the Air Act and is lawful.

Petitioners have contended that the Air Board's rule requiring an entry of appearance by persons who want to cross-examine and otherwise act as parties in a permit adjudication is void because it violates subsection 7(I) of the Air Act. That subsection provides:

> If the subject of the petition is a permitting action deemed by the ...local board to substantially affect the public interest, the ...local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a *reasonable opportunity* to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

NMSA 1978, § 74-2-7(I) [emphasis added].

Petitioners are wrong in concluding that the Air Board's rule violates this subsection of the Air Act. This subsection, by its express language, only requires "a reasonable opportunity," and there is nothing unreasonable about requesting persons who wish to participate by cross-examination and submission of data and arguments to file an entry of appearance.

Moreover, the rationale and importance for imposing exactly the provision that Petitioners dispute has already been analyzed and upheld by the New Mexico Supreme Court. *New Energy Economy, Inc. v. Vanzi,* 2012-NMSC-005, ¶ 52-54, 274 P.3d 53.

In *New Energy Economy,* the Supreme Court considered how much participation should be required during an administrative proceeding to be considered a "party" if the case is appealed. Three administrative cases on appeal had been decided by the New Mexico Environmental Improvement Board ("EIB") or the New Mexico Water Quality Control Commission ("WQCC"). One was a rulemaking case before the EIB pursuant to the Air Act, *id.*, at ¶¶3-10; the second was a rulemaking proceeding before the WQCC pursuant to the Water Quality Act, *id.,* at ¶¶ 11-12; and the third was an Air Permit appeal before the EIB, *id.,* at ¶¶ 51-57. The Air Board performs the functions of the EIB within Bernalillo County, so this interpretation of similar language in EIB's adjudicatory rules is binding precedent for the Air Board. NMSA 1978, s 74-2-4(A)(1).

The EIB permit appeal called on the Supreme Court to consider the language in the Air Act requiring that members of the public be given a "reasonable opportunity" to cross-examine witnesses, among other things, *id.,* at ¶ 52, and to consider the EIB rule which is similar to Air Board rule 20.11.81.14(I) NMAC, and which requires an entry of appearance.

In the EIB permit appeal case considered by the Supreme Court in *New Energy Economy,* the person seeking to be treated as a party at the appellate level had failed to enter an appearance. *Id.* at ¶ 53-54. The Supreme Court relied on the requirement to enter an appearance to deny the right to be a party at the appellate level.

The Supreme Court expressly relied on the EIB's rule requiring an entry of appearance to determine who was (or was not) a party and discussed the importance of being able to make such a determination when cases are appealed. Contrary to finding fault with the requirement of entering an appearance, the Supreme Court pointed out how

valuable and useful it was. *New Energy Economy* shows that the Supreme Court found no fault with the notion that persons who want to be a party and who want to act like a party by conducting cross-examination must enter an appearance. The Court also discussed the consequences of not imposing such requirements, noting the prospects of large numbers of persons who might conceivably be appellants. Not knowing who was or wasn't a party in the administrative proceeding below could create "havoc" at the appellate level. *New Energy Economy. Id.* at ¶¶ 48-50. Thus, the requirement to enter an appearance is fully consistent with the "reasonable opportunity" required by Air Act subsection 7(I).

Requiring an entry of appearance prevents other difficulties during Air Board proceedings. It is through an entry of appearance that it becomes possible to identify and contact all of the parties, cooperatively work out changes in the schedule with all of the parties, to seek their consent for motions, or to agree to new or different procedural requirements. The entry of an appearance allows a person to be given a notice of the hearing, 20.11.81.14(G)(c) NMAC, and a procedural order so he or she can follow it, 20.11.81. 14(F)(2) NMAC (requiring a scheduling order). The procedural order informs the person of the requirement of a notice of intent for submission of technical evidence. In turn, the requirement to file a notice of intent prevents surprise technical evidence at the hearing, allowing other technical witnesses to respond knowledgeably to technical issues raised. This assures that technical evidence is presented to the Air Board in the orderly, rational manner that is most conducive to resolving technical disputes. In short, the requirement of an entry of appearance is a reasonable way to manage Air Board adjudications and is also useful when the case reaches the appellate level. There is

nothing about requiring an entry of appearance that violates the "reasonable opportunity" required by Air Act subsection 7(I). Air Board rule 20.11.81.14(I) NMAC does not conflict with the Air Act and is not void.

In this case, the deadline for entering appearances as set forth in procedural order was October 7, 2014. No additional members of the public have entered an appearance or filed an NOI. Thus, at this point, the only parties are the petitioners as represented by counsel, the applicant, and EHD. 20.11.81.7(N) NMAC.

IX. Petitioners' arguments about EHD's discovery responses violate the Rules of Civil Procedure and should be disregarded.

The Rules of Civil Procedure provide guidance when discovery is conducted during Air Board adjudicatory procedures. 20.11.81.14(J) NMAC. The Rules of Civil Procedure provide a specific procedure for resolving discovery disputes. It begins with a requirement to make a good faith effort to resolve the discovery dispute before involving the court, or in this case, the Air Board. Rule 1-037(A)(4) NMRA. After the Petitioners make a good faith effort to resolve a discovery response, they can move for an order to compel, Rule 1-037(A); Petitioners did not make any effort to resolve this so-called discovery dispute and have not filed a motion to compel. In addition, when they move for an order to compel, the Petitioners must attach the disputed discovery, Rule 1-037(A)(4); Petitioners have failed to follow this requirement as well.

EHD stands by its objections to Petitioners' discovery questions. This is an adjudicative proceeding about the correctness of EHD's issuance of Permit No. 3136. It is not about how EHD conducts enforcement actions and inspections. As is made clear by the Air Act, the basis for EHD denying a construction permit modification is whether the permit modification would (1) violate a regulation or requirement of the Air Act, (2)

cause or contribute to an exceedance of an ambient air quality standard, or (3) violate any other provision of the Air Act or Clean Air Act. NMSA 1978 § 74-2-7(C)(1). EHD's administrative procedures to carry out inspections or enforcement responsibilities are irrelevant to test EHD's compliance with Air Act subsection 7(C)(1).

The Air Act expressly delegates authority for enforcement to the EHD Director, not to the Air Board. NMSA1978, § 74-2-4(A)(2). EHD is proud of its enforcement activities. The Air Board is not given authority to review EHD's enforcement procedures or inspection or to direct that they be carried out differently. EHD's enforcement procedures and inspections are irrelevant here.

Whether or how EHD inspects gasoline dispensing facilities ("GDFs"), the dates and types of inspections it conducts of GDFs, how it follows up on irregularities discovered in inspections of GDFs, and record-keeping requirements for other Smith's permits are all irrelevant. Nothing about Section 7 of the Air Act which authorizes permitting of stationary sources invites inquiries into EHD's enforcement procedures in order to sustain the issuance of a permit.

The question before the Air Board is whether Petitioners have been adversely affected by EHD's issuance of Permit No. 3136. As explained above, the question is whether or how Petitioners have experienced an invasion of a legally protected interest by EHD's issuance of Permit No. 3136. There is no connection between EHD's enforcement activities and whether or how Petitioners have experienced an invasion of a legally protected interest. Petitioners' objections to EHD's discovery responses are both

improper and irrelevant. They represent another effort to distract the Air Board from the issue here—Petitioners have no admissible evidence that they have been adversely affected and the Air Board can sustain Permit No. 3136 as a matter of law.

X. The Petitioners have had an adequate opportunity for public input.

In this case, the Petitioners had not one public information hearing but two. They had an opportunity to respond to discovery and spell out how they are adversely affected and have experienced an invasion of a legally protected interest. They have had an opportunity to respond to a motion for summary judgment asking them to spell out how they are adversely affected and have experienced an invasion of a legally protected interest. Petitioners have been unable to show that they are adversely affected and have been unable to show how they have suffered an invasion of a legally protected interest. The Air Act does not require an Air Board hearing if no person who petitioned has been adversely affected. NMSA 1978, § 74-2-7(H). The proper remedy in such cases is a dispositive motion as EHD has filed here. There is no genuine dispute of material fact and the Air Board can resolve the issues raised by the Petition as a matter of law.

XI. The Air Act limits the ability of the Air Board to further restrain hazardous air emissions from a gas dispensing facility.

The Air Act provides that the Air Board shall prevent or abate air pollution, subsection 5(A), and that it shall prevent or abate air pollution by the adoption of regulations, standards and plans *consistent with the Air Quality Control Act*, subsection 5(B) [emphasis added]. Thus, in adopting a regulation to limit emissions of hazardous air pollution from gasoline dispensing facilities, the Air Board may not adopt a rule that is inconsistent with the Air Act's limitation imposed on rules for hazardous air emissions in subsection 5(C)(2). The Air Board has correctly adopted the federal standard that applies

to gasoline dispensing facilities known as Hex C. When it reviews EHD's issuance of Permit No. 3136, its role with respect to hazardous air emissions is to assure that EHD correctly applied Hex C to appropriately prevent or abate air pollution from the Smith's GDF. In this case, there is no dispute that EHD has done so and so the compliance of Permit No. 3136 with requirements for hazardous air emissions cannot be disputed.

XII. There is no federal preemption issue here.

Petitioners misrepresent EHD's argument regarding Hex C and the limitation imposed on the Air Board's regulation of hazardous air pollutants. EHD does not contend that the Clean Air Act "preempts" state or local regulation of hazardous air pollutants. To the contrary, the Clean Air Act expressly authorizes states and local governments to be to be more stringent than the federal standards for stationary sources. 42 U.S.C. § 7416. Thus, as a matter of law, there can be no federal preemption issue here.

However, the New Mexico Legislature has imposed limitations on the stringency of certain air quality rules. The Legislature has made this policy choice for New Mexico as it is entitled to do. To illustrate, rules for prevention of significant deterioration, nonattainment, and hazardous air pollutants all must be no more stringent than federal rules. NMSA 1978, § 74-2-5(C)(1 and 2). These state imposed limitations have important consequences which are discussed in the next section.

XIII. The Air Board is not bound by the principles of collateral estoppel.

Petitioners contend that the Air Board must apply its decision in Permit No. 2037-M1 (the Constitution and Carlisle decision) based on the doctrine of non-mutual offensive collateral estoppel.[1] Petitioners are mistaken.

A) Non-mutual offensive collateral estoppel does not apply against the government when important public interests are at issue.

When important public interests are at stake, courts allow the government to re-litigate an issue it has lost in previous litigation. *Bogle Farms, Inc. v. Baca,* 1996-NMSC-051, ¶ 25, 122 N.M. 422 (allowing the State Land Commissioner to re-litigate whether state land patents do or do not reserve sand and gravel deposits as mineral rights); *Edwards v. Bd. of County Comm'rs of Bernalillo,* 1994-NMCA-160, ¶¶ 5-6, 119 N.M. 114 (allowing Bernalillo County to re-litigate the validity of a County zoning ordinance). As the Court of Appeals has explained it:

> ...ordinarily the doctrine of collateral estoppel should not bar a state agency from arguing a point of law on the ground that it lost on that issue in prior litigation with a different party....the rule does not apply solely to state agencies, but rather to governmental agenc[ies] responsible for continuing administration of a body of law applicable to many similarly situated persons.

Edwards, 1994-NMCA-160, ¶ 6 (citing Restatement (Second) of Judgments § 29(7) (internal citations omitted).

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[1] Petitioners contend that this issue was "raised" in their Response in the Louisiana and Montgomery hearing which occurred on October 8, 2014. EHD re-iterates its contention made in oral argument that this issue was not raised in Petitioners' Response in a way that could reasonably have alerted EHD to this issue and states that the term "non-mutual offensive collateral estoppel" was not used in the Response, nor was any case cited in the Response brief that could have alerted EHD to the issue of non-mutual offensive collateral estoppel.

B) Important public interests are at stake in the Constitution and Carlisle decision.

In the Constitution and Carlisle decision, the Air Board denied a permit modification while admitting that the permit modification met all regulations and standards. The Air Board denied the permit modification based on the indirect air pollution caused by vehicles visiting the gas station and based on a failure of government processes, among other things. The Air Board justified its decision by invoking its need to protect public health and quality of life and relied on its authority to prevent or abate air pollution in subsection 5(A) of the Air Act. Petitioners are wrong that the Air Board must apply the Constitution and Carlisle decision going forward because it is founded on a misinterpretation of the Air Act that would be unconstitutional. Strong public interests are at stake when statutes are not correctly interpreted and the interpretation relied upon would violate the constitutional nondelegation doctrine.

1. The Air Board misinterpreted the Air Act in its Constitution and Carlisle decision.

a. The Air Board's authority to consider public health in subsection 5(E) applies to rulemaking, not permitting.

The Air Board relied on subsection 5(E), in part, for its Constitution and Carlisle decision because it instructs the Air Board to consider health, welfare and property. But this reliance conflicts with the language of the Air Act. The Air Board's authority to consider health, welfare and property arises during rulemaking, not permitting, and is supposed to be considered along with other countervailing factors:

> In making its *regulations,* ...the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to: (1) *character and degree of injury to or interference with health, welfare, visibility and property*; (2) the public interest, *including the social and economic value of the sources and subjects of air contaminants*; and (3) *technical practicability and economic reasonableness* of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

NMSA 1978, § 74-2-5(E) [emphasis added].

This is not a rulemaking proceeding—it is a permitting *adjudication* where the Air Board applies the law as it exists to the facts. If the Air Board is going to adopt rules, it must provide public notice, NMSA 1978, § 74-2-6(C) and that notice must include a copy of the proposed regulation. The Air Board did not give any notice that it would make any rules in the Constitution and Carlisle proceeding and did not provide a copy of any rule it would adopt for the simple reason that it wasn't a rulemaking proceeding. Thus, the Air Board should not have relied on its rulemaking authority arising in subsection 5(E) to reach a decision in the Constitution and Carlisle permitting proceeding.

b. The Air Board's authority in subsection 5(A) to "prevent or abate air pollution" is linked to regulations, standards and plans adopted pursuant to subsection 5(B).

The Air Board also relied on its authority to "prevent or abate air pollution" in subsection 5(A) of the Air Act. But that authority is linked to regulations, plans and standards which are consistent with the Air Act:

> The ...local board shall (1) adopt, promulgate, publish, amend and repeal...*regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards* and *prevent or abate air pollution*...; and (2) adopt a *plan for the regulation, control, prevention or abatement of air pollution*....

NMSA 1978, § 74-2-5(B) [emphasis added].

Of course to merely "adopt, promulgate, publish, amend and repeal" regulations or to merely "adopt" a plan does not do anything to prevent or abate air pollution. Those regulations, plans and standards must be followed to achieve their purpose and that is how the Air Board's mandate to prevent or abate air pollution in subsection 5(A) is applied. In reviewing EHD's permitting decisions the Air Board evaluates whether EHD has faithfully followed the Air Board's regulations, plans and standards. The Air Board's authority to "prevent or abate air pollution" in subsection 5(A) of the Air Act is tied to the Legislature's direction in subsection 5(B) that air pollution is to be prevented or abated through regulations, standards and plans. This conclusion is buttressed by the fact that of the twenty-two sections of the Air Act, seventeen of them address how regulations, standards or plans should be used. In contrast, only five of them address health and when they do, they usually qualify its consideration, as discussed earlier. The Air Act's focus on regulations, standards and plans has been repeated by both the City Council, ROA § 9-5-1-4(A and B) and the Bernalillo County Commission, County Ordinances § 30-33(a and b). Three separate sets of elected officials have determined that air pollution in Bernalillo County should be prevented and abated by the adoption of regulations, standards and plans. The Air Board cannot act contrary to these express choices of these elected officials.

c. The Air Board misapplied the Air Act authority in Section 7 to deny the Constitution and Carlisle gas station permit modification.

The Air Board relied for its Constitution and Carlisle decision on subsection 7(C)(1)(c) of the Air Act. The Legislature has determined the permissible bases for denying a permit modification. It may only be denied if the modification:

> (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal Act;
> (b) will cause or contribute to air contaminant levels in excess of a[n]...ambient air standard; or
> (c) will violate any other provision of the Air Quality Control Act or the federal act[.]

NMSA 1978, § 74-2-7(C)(1).

In the case of the Smith's gas station at Constitution and Carlisle, the Air Board relied on indirect emissions from vehicles visiting the Carlisle Gas Station to deny the permit modification. Only one of subsection 7(C)(1)'s provisions, (b), allows consideration of emissions from other sources (such as vehicles) because it allows consideration of whether the modification "causes or contributes" to an exceedance of an ambient air quality standard. However, here, the Air Board admitted that the gas station itself satisfied subsections 7(C)(1)(a and B).

The Air Board instead relied on subsection 7(C)(1)(c) for its authority in the Constitution and Carlisle decision, concluding that the permit modification would violate a provision of the Air Act—the Air Board's "mandate" to prevent or abate air pollution in subsection 5(A). Subsection 7(C)(1)(c) does not allow consideration of emissions from

other sources such as vehicles. So, it cannot be used to support the Air Board's decision based on indirect emissions from vehicles. The Air Board misinterpreted its authority in the Air Act to deny a permit modification based on emissions beyond those of the stationary source itself.

d. In the aggregate, the Legislature's limitations on the Air Board's rulemaking discretion and the permitting deadlines it imposed in Section 7 demonstrate that the Legislature did not intend either EHD or the Air Board to conduct a broad inquiry into protection of public health and welfare during permitting.

It is noteworthy to examine together three areas where the Legislature greatly narrowed the Air Board's rulemaking discretion: prevention of significant deterioration, nonattainment, and hazardous air pollutants. When these limitations are considered in the aggregate and combined with certain language regarding permitting deadlines, it becomes clear that the Legislature did not intend a broad inquiry into protection of public health and welfare during permitting. This is because these three sections together demonstrate a Legislative intent to constrain the Air Board's ability to protect public health.

"Prevention of significant deterioration," only applies to large (i.e., major) sources of air pollution. 20.11.61.11(A) NMAC. When it is a major source of air pollution and prevention of significant deterioration rules apply, the Air Board may not be more stringent than federal rules. NMSA 1978, § 74-2-5(C)(1). Here, the Legislature has done the opposite (constraining the Air Board's rulemaking authority) of what it would have done if it wanted the Air Board to maximize protection of New Mexico air quality from significant deterioration and maximize public health.

"Nonattainment" only applies when the ambient air quality in a jurisdiction is demonstrably worse than federal ambient air quality standards require, i.e., ambient air is bad for public health at least with respect to one air contaminant. As the EPA has explained, "Areas of the country where air pollution levels persistently exceed the national ambient air quality standards may be designated, 'nonattainment.'" *See,* http://www.epa.gov/airquality/greenbook/. The Legislature's limitation on nonattainment rules provide that the Air Board cannot be more stringent than federal rules. NMSA 1978, § 74-2-5(C)(1). Again, the Legislature has done the opposite (constraining the Air Board's rulemaking authority) of what it would have done if it wanted to maximize protection of public health from demonstrably unhealthy air quality.

Finally, with respect to hazardous air pollutants, which include substances like benzene which is a known human carcinogen, the Air Board again may not be more stringent than federal rules. NMSA 1978, § 74-2-5(C)(2). And, once again, the Legislature has done the opposite (constraining the Air Board's rulemaking authority) of what it would have done if it wanted to maximize public health due to consequences of emissions of hazardous air pollutants.

In the aggregate then, the Legislature did not try to maximize protection of public health from large sources of pollution, from demonstrably unhealthy air quality, or from emissions of known human carcinogens. It is impossible to look at these three limitations in the aggregate and still conclude that air quality permits are intended to provide broad protections for public health such as the Court considered in *Colonias,* particularly when there is no express language suggesting such a result and there is express language intended to expedite the processing of permits.

When these three statutory constraints on the Air Board's authority are combined with the tight deadlines for issuing permits (90 or 180 days) in subsection 7(B)(2), and the importance of regulations, standards and plans in subsection 5(B), the only reasonable conclusion is that the Legislature intended that, for the most important areas of air quality regulation, the federal standards were good enough for New Mexico, that air quality should be protected by expeditiously following the standards and regulations established during rulemaking, NMSA 1978, § 74-2-5(B) and NMSA 1978, § 74-2-7(B)(2). The Legislature did not intend an open ended inquiry into every imaginable impact on quality of life such as might occur during a zoning proceeding. *Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶ 61 (stating that zoning statutes seek to protect the welfare of the entire community by making a balanced an effective use of land and providing for the public need of various types of uses and structures).

That's not to say that such issues should go unconsidered. The City of Albuquerque has a zoning code and the Planning Department administers it. ROA § 14-1-1 to 14-19-99.

The Air Board administers only the air quality issues relating to the Smith's Permit No. 3136. If the Air Board sustains Permit No. 3136, it still may or may not comply with the City's zoning ordinance. Compliance with the zoning code is not within either EHD's or the Air Board's jurisdiction. To the extent that Petitioners have concerns about the North Fourth Corridor Plan, lighting, the intensity of the use, traffic, and other land use issues, Petitioners should address those concerns to the Planning Department, not to the Air Board.

2. *The Air Board's misinterpretation of the Air Act would violate the nondelegation doctrine and would be an interpretation of the Air Act which would be unconstitutional.*

The above discussion explains why the Air Board's interpretation of the Air Act in the Constitution and Carlisle proceeding was incorrect. However, even if it were correct, it was standardless and that raises a different issue that is legally significant. The Air Board has no rule that limits the number of vehicles that can visit a stationary source before the emissions cause "air pollution," raising an obvious difficulty of how to "follow" that decision in the future. Furthermore, sources don't need a permit if they don't create emissions into the atmosphere and it is difficult to imagine a stationary source that vehicles do not visit. Thus, this Air Board authority exercised in the Constitution and Carlisle decision, if it exists, which EHD disputes, could be used to deny any or all construction permits or permit modifications for any reason.

Such power in an administrative agency, if it existed, would be unconstitutional. *Cobb v. State Canvassing Bd.,* 2006-NMSC-034, ¶ 40-41, 140 N.M. 77 (finding amendment of the Election Code unconstitutional where the Legislature failed to provide standards to guide the State Canvassing Board in imposing recount costs); *Colonias Development Council v. Rhino Environmental Services,* 2005-NMSC-024, ¶ 29, 138 N.M. 133 (noting that administrative decisions must have a nexus to a regulation); *and see* Exhibit A to City's Reply to Petitioners Response in Opposition to City's Motion for Summary Judgment (attached) pp. 31-34 (explaining the requirement of standards to avoid unconstitutional delegation of power and the lack of standards underlying the Air Board's decision in the Constitution and Carlisle proceeding).

As the New Mexico Supreme Court has explained, "The Legislature may not vest unbridled or arbitrary authority in an administrative body...and must provide reasonable standards to guide it." *Cobb,* 2006-NMSC-034, ¶ 41 [emphasis added]. As explained earlier, the Legislature has done so here because it has tied the Air Board's authority to prevent or abate air pollution in subsection 5(A) to regulations, plans and standards in subsection 5(B) which are adopted after consideration of the rulemaking factors set out in subsection 5(E) along with other limitations in Section 5. EHD contends that New Mexico's elected public officials have provided standards here to guide the Air Board in preventing and abating air pollution but the Air Board did not follow them in the Constitution and Carlisle decision. If the Air Board's interpretation of its authority to prevent or abate air pollution were correct, the Air Act and the related City and County ordinances would be unconstitutional because they would give the Air Board unbridled authority to deny any permit for any reason.

3. The doctrine of collateral estoppel cannot be used to require EHD or the Air Board to agree with a misinterpretation of law or concede that the Air Act is unconstitutional.

As explained above, there are important public interests at stake here—misinterpretation of law and a possible unconstitutional interpretation of a state statute, and the related city and county ordinances. The doctrine of collateral estoppel, particularly non-mutual offensive collateral estoppel, does not bar a government agency from re-litigating an issue it has previously lost when such important public interests are at stake. As the United States Supreme Court has explained,

> The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.

United States v. Mendoza, 464 U.S. 154, 162-63 (1984) (as cited in *Bogle,* 1996-NMSC-051, ¶ 22).

As a matter of law, the doctrine of non-mutual offensive collateral estoppel does not require the Air Board to follow its decision in the Constitution and Carlisle matter and it should not do so here.

XIV. Conclusion.

An Air Board hearing is an adjudicative procedure where Petitioners are required to prove their allegations. Fears based on speculation, unfounded allegations and generalized beliefs or concerns about what happened elsewhere or what might happen here do not add up to admissible evidence that Permit No. 3136 should be reversed or modified. Petitioners have not demonstrated that there is any genuine dispute of material fact and have not offered any evidence that they have been adversely affected. Petitioners have not suffered any invasion of a legally protected interest. They cannot carry their burden of proof that Permit No. 3136 should be modified or reversed. There is no genuine dispute of material fact and the Air Board should sustain Permit No. 3136 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 *City of Albuquerque Environmental Health Department's Reply in Support of Its Motion for Summary Judgment* was served on Oct 22 _____, 2014 by the method indicated below:

1) The City's original *City of Albuquerque Environmental Health Department's Reply in Support of Its Motion for Summary Judgment* was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered.

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

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107289

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

IN THE MATTER OF THE PETITION FOR A HEARING ON THE MERITS REGARDING AIR QUALITY PERMIT NO. 3135 ISSUED TO SMITH'S FOOD AND DRUG CENTERS, INC.

AQCB No. 2014-2

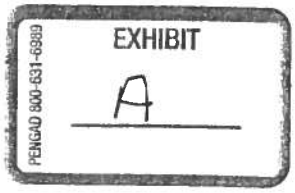
Margaret M. Freed, Mary Ann Roberts, and Pat Toledo, Petitioners

CITY OF ALBUQUERQUE'S REPLY TO PETITIONERS' RESPONSE IN OPPOSITION TO CITY'S MOTION FOR SUMMARY JUDGMENT

The City of Albuquerque Environmental Health Department ("EHD") replies to Petitioners' Response ("Response") in Opposition to City's Motion ("Motion") for Summary Judgment and re-affirms its position that there is no genuine dispute of material fact that EHD correctly issued Permit No. 3135 and the Air Quality Control Board ("Air Board") can decide the issues raised by the Petition as a matter of law. In support of its reply, EHD states the following:

INTRODUCTION

Contrary to Petitioners' assertions, summary judgment is appropriate here. The Legislature expressly required a petitioner to be adversely affected. To be adversely affected means that a petitioner has suffered an invasion of a legally protected interest. The legally protected interests are created by the Air Board's rules and standards, which in this case are highly prescriptive. Petitioners have provided no admissible evidence on which the Air Board could rely to conclude that they are adversely affected. There may be disputes about the law here, but there is no genuine dispute of material fact. The Air Board can decide the merits of the Petition as a matter of law.



I. REPLIES TO PETITIONERS LEGAL ARGUMENTS

A) This is not a rulemaking proceeding.

Petitioners repeatedly contend that statutes and ordinances which establish standards for adopting rules should be applied by the Air Board in this permitting proceeding. No petition for rulemaking has been filed, no notice for rulemaking has been published, and all of the procedures thus far are being administered under 20.11.81 NMAC (Air Board's adjudicatory procedures for permitting, among other things) not 20.11.82 NMAC (Air Board's rulemaking procedures). This is a permitting proceeding, not a rulemaking proceeding and the Air Board should not accept Petitioners' invitation to commit error by relying on rulemaking statutes and ordinances when evaluating EHD's issuance of Permit No. 3135.

The Legislature was clear what standard the Air Board should apply. The Air Board should evaluate whether the construction of the Smith's GDF (1) would violate any rule or standard; (2) would cause or contribute to exceedance of any ambient air quality standard; or (3) would violate any other provision of the Air Act or Clean Air Act. NMSA 1978, § 74-2-7(C)(1). The Air Board is to determine whether the Smith's GDF, if it is constructed and operated as required by Permit No. 3135, "will or will not meet applicable local, state and federal air pollution standards and regulations..." NMSA 1978, § 74-2-7(L).

With respect to the specific rulemaking references in Petitioners' Response:

1) P. 2 – NMSA 1978, § 74-2-5.3 – This is a statutory section that allows the Air Board to adopt more stringent plans and rules than federal standards subject to certain determinations which have not yet been made. Because those determinations have not

been made, no rules may yet be adopted pursuant to this section. In addition, neither the City nor the County ordinance has ever been amended to incorporate this 2009 amendment to the Air Act. Furthermore, it is a section that authorizes rulemaking and plans and does not apply during a permitting proceeding. In short, this section cannot help Petitioners here.

2) P. 2 – NMSA 1978, § 74-2-5(E) – counsel fails to explain that the Air Board is charged with considering health, welfare, visibility and property etc. when it is adopting rules. Since this is not a rulemaking, this section does not apply.

3) P. 3 – NMSA 1978, § 74-2-5(A) – this section provides that the Air Board shall prevent or abate air pollution. The next subsection 5(B) instructs the Air Board that it shall prevent or abate air pollution by adopting rules, standards and plans. When interpreting the Air Act, the Air Board should consider all statutory sections together so that all parts are given effect. *Bishop v. Evangelical Samaritan Society,* 2009-NMSC-036, ¶ 11, 146 N.M. 473. The Air Board should not interpret subsection 5(A) in isolation—it should consider it together with subsection 5(B) and together with the bases for denying a permit in subsection 7(C)(1) and the determination contemplated in subsection 7(L) (whether the Smith's GDF will or will not satisfy rules and standards). When considered together, it becomes clear that the intent is to prevent and abate air pollution by adopting rules, plans and standards (during rulemaking) and then by applying those rules and standards (during permitting).

4) P. 9 – ABQ Ord. § 9-5-1-7(C)(2) – Petitioners' cited section applies to operating permits which are only issued to major sources. As explained in the City's Motion for Summary Judgment, the Smith's GDF is not a major source, so this section of the City ordinance does not apply.

B) Summary judgment is appropriate in Air Board permitting decisions.

The purpose of an adjudicatory hearing is to hear from both sides in a dispute so that the fact finder can decide which witness to believe about disputed facts. For example, in this case, Petitioner Freed alleged in the Petition that the Smith's GDF emissions were so large that it should have been permitted as a major source. EHD denied that allegation. At that stage, there was (1) a dispute about a fact—how large the emissions from Smith's GDF would be; and (2) a legal argument about whether, in view of the size of those emissions, the Smith's GDF should have been permitted as a major source.

At the summary judgment stage, the movant (EHD) asserts that certain dispositive facts are undisputed—in this case, EHD has asserted that the Smith's GDF permitted emissions would total 45.5 tons per year of volatile organic compounds. EHD also explained why, under applicable law, those 45.5 tons did not require permitting as a major source. In response, Petitioners are required to provide admissible evidence to show that there is a genuine dispute about this issue. Petitioners have failed to do so. Thus, there is no genuine dispute of material fact that the Smith's GDF was properly permitted as a minor source. This factual issue can be resolved as a matter of law.

Following this process with each issue, it quickly becomes apparent that summary judgment is appropriate in Air Board hearings. Hearings are expensive and burdensome—if Petitioners cannot prove what they have alleged or what they allege does not, even if proven, show that they were adversely affected, a hearing is unnecessary.

Petitioners contend that allowing summary judgment practice would cut off input from the public. But such a cutoff is clearly contemplated by the Act, the Ordinance and the Board's rules.

The Legislature's statute, the City Council's ordinance, and the Air Board's rules all require a petitioner to be adversely affected to get a hearing. If the Petitioners are not adversely affected, there will be no Air Board hearing and no input from the public. NMSA 1978, § 74-2-7(H). That result is a natural consequence of what the Legislature and the City Council intended by requiring that petitioners be adversely affected.

In addition, members of the public cannot raise additional claims from those raised by the Petitioners. Otherwise, there would be no purpose to requiring that within thirty days, a petition must be filed and that after thirty days a permitting decision becomes final. NMSA 1978, § 74-2-7(H) [emphasis added]. Thus, claims that have not been raised in a petition within thirty days of notice of EHD's permitting decision may no longer be raised by the public or anyone else. *Id.*

C) *In re Air Quality Permit No. 2037-M1* should not be applied by the Air Board in this proceeding; this is not a decision "involving substantially the same parties." PP. 12-16.

Petitioners contend that the Air Board's decision relating to Constitution and Carlisle should be applied in this permitting proceeding. EHD respectfully disagrees. That decision is presently disputed before the Court of Appeals. If, nonetheless, the Air

Board wishes to consider applying its reasoning from that decision to Permit No. 3135, EHD provides as attachments to this Reply, its briefing from the Court of Appeals explaining why EHD believes that decision was incorrect. *See* Exhibits A and B.[1]

Petitioners contend that the parties in this proceeding are "substantially the same parties" as in Permit No. 2037-M1. As a matter of record, the petitioners in *In re Permit No. 2037-M1* were Georgianna E. Peña-Kues, Andy Carrasco, James A. Nelson, and Summit Park Neighborhood Association and it related to a gas station at the corner of Constitution and Carlisle. The petitioners in this proceeding are Pat Toledo, Margaret Freed, and Mary Ann Roberts and it relates to a gas station on the corner of Louisiana and Montgomery. These are not substantially the same parties.

D) Petitioners contend and EHD disputes whether *Colonias* should be applied to Air Board permitting proceedings.

EHD refers the Air Board to its arguments in its Reply Brief submitted to the Court of Appeals in Exhibit B, pp. 1-6.

E) The City has not argued about preemption.

Petitioners contend that the City maintains that federal law preempts the Air Board. Petitioners are mistaken. Preemption is a legally theory that applies when states or local governments attempt to regulate in a way that interferes with the application of federal law. *See, e.g., Godwin v. Memorial Medical Ctr.*, 2001-NMCA-033, ¶ 77, 130 N.M. 134. EHD's arguments have nothing to do with federal preemption.

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[1] EHD does not object if Petitioners and Smith's wish to provide their Court of Appeals briefing for *In re Air Quality Permit No. 2037-M1* to the Air Board.

Instead, EHD contends that the Legislature, in Air Act Section 5(C)(2), and the City Council, in ROA § 9-5-1-4(C)(2), intended that rules and standards for hazardous air pollutants should be no more stringent than federal standards. Thus, EHD is not contending that Congress intended this result—EHD is contending that the Legislature and the City Council intended this result. That is not preemption.

As explained previously, Section 5.3 of the Air Act is not to the contrary. The Legislature has provided an exception to this narrow rulemaking authority if certain determinations have been made. Those determinations have not yet been made and, in any event, neither the City nor Bernalillo County have amended their Joint Air Quality Control Board ordinances to accommodate this recent amendment to the Air Act. Thus, Section 5.3 provides no assistance to the Petitioners here.

F) Petitioners have not identified any admissible evidence showing that Permit No. 3135 should be reversed or modified.

1) None of Petitioners' "Disputed" Facts establish that there are genuine issues of material fact.

a) Petitioners "dispute" that Summary Judgment proceedings are appropriate or allowable—this is a dispute of law, not a genuine dispute of material fact.

b) Petitioners "dispute" that subsection 7(K) of the Air Act prescribes a summary judgment standard of review—this is a dispute of law, not a genuine dispute of material fact.

c) Petitioners "dispute" whether the Air Board has the authority to hear and provide the kinds of relief that Petitioners have requested – this is a dispute of law, not a dispute of material fact.

d) Petitioners "dispute" that their NOI contains no evidence to prove that EHD should not have issued Permit No. 3135 – this is a dispute of law questioning whether the facts set out in the Petitioners' NOI would be sufficient to justify modification or reversal of Permit No. 3135—the Air Board can make this determination as a matter of law.

e) Petitioners dispute that they are not adversely affected—this is a dispute of law, not a dispute of material fact—the Air Board can apply the law to the allegations that Petitioners have made to determine whether they indicate that the Petitioners are adversely affected.

f) Petitioners dispute whether they have suffered an injury-in-fact or invasion of a legally protected interest—again, this is dispute about the legal effect of the Petitioners' technical testimony which the Air Board can resolve as a matter of law.

g) Petitioners dispute that Dr. Rowangould's intended testimony does not establish that any standard or rule would be violated by the activities under Permit No. 3135—notably, Petitioners have yet to point to any standard or rule that would be violated—in any event, the Air Board can make this determination as a matter of law and this is not a dispute of material fact.

h) Petitioners dispute that *Colonias* does not apply to this matter. This is a dispute of law, not a dispute of material fact.

i) Petitioners dispute that the Air Act does not have a purpose in protecting public health, safety and welfare—this is a dispute of law, not a dispute of material fact.

j) Petitioners dispute that issuing a permit does not require a new assessment of how to protect health, welfare, visibility and property—this is a legal dispute about how to interpret the Air Act and the fact that the Legislature spelled out when to consider protection of health, welfare, visibility and property, i.e., during rulemaking, not during permitting. This is not a genuine dispute of material fact.

k) Petitioners dispute that "community sentiment" is not a criterion that may factor into a permitting decision—this is a dispute of law, not a genuine dispute of material fact.

l) Petitioners dispute that Dr. Rowangould does not understand the regulatory regime (this is immaterial) and dispute whether her intended technical testimony could support remedial action on the issued permit—this is a dispute of law, specifically about what the Legislature meant when it set out the three bases for denying a construction permit in subsection 7(C)(1).

m) Petitioners dispute that rulemaking is relevant to or possible in adjudicative proceedings—this is a dispute of law, not a genuine dispute of material fact.

n) Petitioners dispute whether *In re Air Quality Permit No. 2037-M1* has precedential value—this is a dispute of law, not a genuine dispute of material fact.

2) *None of Petitioners "Undisputed" Material Facts create any impediment to the Air Board sustaining EHD's issuance of Permit No. 3135 by summary judgment.*

a) Petitioners do not dispute that EHD held a public hearing on April 3, 2014, but contend that the City gave no weight to their quality of life and social concerns. This is a legal dispute about what kinds of facts are relevant to deciding whether to "sustain, modify or reverse" EHD's issuance of Permit No. 3135. It is not a genuine dispute of material fact.

b) Petitioners state that the City does not dispute that their concerns are sincere and heartfelt—this is immaterial to the Air Board's decision.

c) EHD does not dispute that gasoline vapors contain benzene and that benzene has important, serious impacts on public health. Petitioners' statement is correct--but again, immaterial. The rules and standards that the Air Board has adopted implicitly acknowledge these facts—that's why Hex C was adopted by the Air Board as part of the Air Board's "Emission Standards for Hazardous Air Pollutants." 20.11.64 NMAC [emphasis added]. The dispute is what rule or standard applies to control those benzene emissions—EHD contends that it is Hex C. Petitioners have not identified any standard that would apply other than conducting an unnoticed rulemaking in the midst of a permitting proceeding. This is a dispute of law, not a genuine dispute of material fact.

d) EHD does not dispute that benzene is a known human carcinogen—this fact cannot be disputed—it is established in EPA rulemakings justifying certain regulations relating to control of benzene air emissions. However, it is immaterial in this permitting proceeding because the applicable standard, Hex C, has already been adopted and EHD has applied it to Permit No. 3135.

e) EHD agrees that reasonable minds might differ how best to balance public health versus economic reasonableness and technical practicability—this is undisputed

but immaterial. This is a permitting standard and these standards (public health, economic reasonableness, and technical practicability) are applied during rulemaking, not permitting. Again, the dispute here is a legal dispute—whether rulemaking sections of the Air Act apply during permitting. The Air Board can make this determination as a matter of law.

f) No one disputes that the Petitioners have requested an evidentiary hearing. However, in response to EHD's motion for summary judgment, Petitioners have, as yet, offered no admissible evidence that would justify reversing or modifying Permit No. 3135. Thus, the fact that Petitioners have requested an evidentiary hearing is immaterial. The Air Board can evaluate Petitioners' technical testimony for itself to determine, as a matter of law, whether summary judgment should be granted to EHD.

g) EHD does not dispute that the Air Board has authority to "sustain, modify or reverse" Permit No. 3135. Thus, the Parties agree that the Air Board has this authority. This does not create a genuine dispute of material fact and the Air Board can grant summary judgment as a matter of law.

h) EHD does not dispute that the Air Board's review of Permit No. 3135 is whether the permit will or will not meet local, state and federal air pollution standards and regulations. Like the previous paragraph, the Parties agree on this point of law. This does not create a genuine dispute of material fact and the Air Board can grant summary judgment as a matter of law.

i) EHD does not dispute that EPA is conducting research on near-roadway air pollution. This is immaterial. Unless and until rules are adopted applying to near roadway air pollution, this EPA research does not change the result in evaluating EHD's issuance of Permit No. 3135.

II. CONCLUSION

Petitioners have no evidence that they were adversely affected and cannot carry their burden of proof that Permit No. 3135 should be modified or reversed. There is no genuine dispute of material fact and the Air Board should sustain Permit No. 3135 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 *Reply to Petitioners Response in Opposition to the City's Motion for Summary Judgment* was served on October 3, 2014 by the method indicated below:

1) The City's original *Reply to Petitioners Response in Opposition to the City's Motion for Summary Judgment* was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered.

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

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

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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

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, Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association,

Petitioners-Appellees,

v.

Smith's Food & Drug Centers, Inc. and the City of Albuquerque,

Respondents-Appellants.

Ct. App. No. 32,790

Air Quality Control Board
Nos. 2012-1 and 2012-2

APPELLANT CITY OF ALBUQUERQUE'S BRIEF-IN-CHIEF

Appeal from the Albuquerque-Bernalillo County Air Quality Control Board
Felicia L. Orth, Hearing Officer

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE

Undersigned counsel states that this Brief-In-Chief complies with Rule 12-213(F) NMRA in that the body of the brief is prepared in Times New Roman typeface and contains 10,014 words. This word count was obtained using Microsoft Office Word 2010 software.

TABLE OF AUTHORITIES

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LIST OF ABBREVIATIONS AND ACRONYMS

"Air Act" – Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -22

"Air Board" – Albuquerque-Bernalillo County Air Quality Control Board

"Carlisle Gas Station" – Smith's gas station at 1313 Carlisle NE, Albuquerque

"Carrasco Petitioners" – Andy Carrasco, James A. Nelson, and Summit Park Neighborhood Association

"City" – Albuquerque Environmental Health Department Air Quality Division (now known as the "Air Quality Program")

"Clean Air Act" – 42 U.S.C. §§ 7401 to 7671

"Division" - Albuquerque Environmental Health Department Air Quality Division (now known as the "Air Quality Program")

"EHD" – Albuquerque Environmental Health Department

"EIB" – Environmental Improvement Board

"EPA" – United States Environmental Protection Agency

"GDFs" – Gasoline dispensing facilities or gas stations

"Hex C" – 40 C.F.R. Part 63 Subpart CCCCCC

"Initial Throughput Limit" – Initial throughput limit on gasoline imposed by Permit #2037; set at 3,369,925 gallons

"NMED" – New Mexico Environment Department

"Permit #2037" – Initial air quality permit granted to Smith's for the Carlisle Gas Station

"Permit #2037-M1" – Modified air quality permit granted to Smith's for the Carlisle Gas Station and reversed by the Air Board

"PIH" – Public information hearing

"Smith's" – Smith's Food & Drug Centers, Inc.

"VOCs" – Volatile organic compounds

I. Summary of Proceedings

This appeal arises from the reversal by the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") of the issuance by the Albuquerque Environmental Health Department ("EHD") Air Quality Division[1] (the "Division" or the "City") of an air quality permit modification to Smith's Food and Drug Centers, Inc. ("Smith's") to increase gasoline throughput at one of its gas stations.

Smith's owned a gas station at 1313 Carlisle Boulevard NE in Albuquerque ("Carlisle Gas Station"). **[2 RP 988 Final Order and Statement of Reasons ("FO") ¶ 5 and 2 RP 820 FOF 1]** The Division issued a permit ("Permit #2037") to Smith's on November 30, 2009 for the Carlisle Gas Station. Prior to the issuance of Permit #2037 and after public notice was published, no one submitted public comment about the proposed permit, requested a hearing, or otherwise challenged Smith's request for Permit #2037. **[2 RP 988 FO ¶ 5 and 2 RP 821 FOF 10]**

Permit #2037 limited the Carlisle Gas Station to an annual gasoline throughput of 3,369,925 gallons per 12-month rolling period ("Initial Throughput Limit") as requested by Smith's in its application. **[2 RP 988 FO ¶ 5 and 2 RP 822 FOF 11 and 14]** The Division imposes throughput limits on gas stations for two reasons: (1) to determine the annual fee to be paid and (2) to allow the Division to forecast an emissions inventory of the volatile organic compounds

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[1] The Air Quality Division is now called the Air Quality Program.

("VOCs") emitted from gas stations in Albuquerque and Bernalillo County. **[2 RP 988 FO ¶ 5 and 2 RP 833 FOF 53]** Throughput limits are not imposed to reduce or control air pollution. **[2 RP 988 FO ¶ 5 and 2 RP 837 FOF 77]** Instead, air pollution from gas stations is controlled by requiring that gas stations use certain vapor recovery systems. **[2 RP 988 FO ¶ 5 and 2 RP 837 FOF 77]**

By April 2011, the Carlisle Gas Station was exceeding its permitted throughput limit. **[2 RP 988 FO ¶ 5 and 2 RP 827 FOF 21]** On September 22, 2011, Smith's applied to the Division to modify its permit by increasing the allowed throughput to 4,500,000 gallons. **[2 RP 988 FO ¶ 5 and 2 RP 839 FOF 91]** The Division received a number of requests for a public hearing about the modification to Permit #2037. **[2 RP 988 FO ¶ 5 and 2 RP 842-843 FOF 102 and 108]** Division staff responded to inquiries and attended meetings with the media, neighborhood associations, City Council and Bernalillo County Commission staff, and nearby residents. **[2 RP 988 FO ¶ 5 and 2 RP 842 FOF 103-107]** The Division held a public information hearing ("PIH") about the proposed modification on February 27, 2012. **[2 RP 988 FO ¶ 5 and 2 RP 844 FOF 116]** Concerns voiced at the hearing included increased traffic and traffic congestion, truck traffic, exhaust fumes, gasoline vapors, and noise, among other things. **[*See, e.g.,* 2 RP 988 FO ¶ 5 and 2 RP 847 FOF 128 and 3 RP 1333-1341 Administrative Record ("AR") 97- 98]**

After the hearing, the Division reviewed the application and considered the public input and concluded that the Carlisle Gas Station met the applicable regulations and standards under the Air Quality Control Act (the "Air Act") and the Clean Air Act. **[2 RP 988 FO ¶ 5 and 2 RP 850 FOF 139-142]** On April 17, 2012, the Division issued the modified permit, Permit #2037-M1, to Smith's for the Carlisle Gas Station. Permit #2037-M1 increased the allowed throughput limit to 4,500,000 gallons per year as requested by Smith's. **[2 RP 988 FO ¶ 5 and 2 RP 839 and 850 FOF 91 and 143]**

The United States Environmental Protection Agency ("EPA") also reviewed the Division's issuance of Permit #2037 and Permit #2037-M1 and determined that both permits were issued appropriately, that both permits incorporated the applicable federal standard to limit emissions of hydrocarbons, and that there was no basis for federal action regarding the permits. **[2 RP 988 FO ¶ 5 and 2 RP 861 FOF 190; *and see,* 1 RP 332-336]**

On May 17, 2012, four petitioners sought a hearing before the Air Board pursuant to the Air Act, Section 74-2-7, NMSA 1978 and the Adjudicatory Procedures—Air Quality Control Board, 20.11.81.14 NMAC, to challenge the issuance of Permit #2037-M1 and seek the revocation of Permit #2037. **[2 RP 988 FO ¶ 5 and 2 RP 863-64 FOF 199-201]** Petitioner Georgianna Peña-Kues filed the first petition. **[2 RP 988 FO ¶ 5 and 2 RP 864 FOF 200]** Petitioners Andy

Carrasco, James A. Nelson and Summit Park Neighborhood Association filed the second petition ("Carrasco Petitioners"). **[2 RP 988 FO ¶ 5 and 2 RP 864 FOF 201]** On May 24, 2012, the Air Board scheduled a hearing and appointed Felicia Orth as Hearing Officer. **[2 RP 988 FO ¶ 5 and 2 RP 864-865 FOF 203-204]** Smith's and the City each filed Notices of Intent to Provide Technical Testimony, as did the Carrasco Petitioners. **[2 RP 988 FO ¶ 5 and 2 RP 866 FOF 209]** The Carrasco Petitioners were represented by attorney, Robert P. McNeill. **[*See, e.g.*, 1 RP 339-342]** Smith's and the City objected to the expert witness offered by the Carrasco Petitioners. **[2 RP 988 FO ¶ 5 and 2 RP 866 FOF 210-12]** The Hearing Officer later recommended and the Air Board agreed that the Carrasco Petitioners' expert was not qualified to testify as a technical witness or expert concerning air quality permitting. **[2 RP 991 FO ¶¶ 7 and 2 RP 830 COL 34]** Thus, neither Petitioner Peña-Kues nor the Carrasco Petitioners had an expert to support their petitions.

The Air Board held the hearing over three days on August 21st, 22nd and 23rd, 2012, and a court reporter transcribed the hearing. **[2 RP 988 FO ¶ 5 and 2 RP 867 FOF 216-217]** On December 7, 2012, the Hearing Officer filed her Recommended Findings of Fact and Conclusions of Law and recommended upholding the issuance of Permit #2037-M1. **[2 RP 819-881]** On January 9, 2013, the Air Board deliberated and decided to reverse the issuance of Permit

#2037-M1 and assigned the task of writing the final order and statement of reasons to the Air Board's counsel. **[1-9-2013 2 Tr. 11:141 – 14:144]** The Air Board's reversal of Permit #2037-M1 left the Smith's Carlisle Gas Station limited to a throughput of 3,369,925 gallons per year rather than the requested 4.5 million gallons per year. **[2 RP 988 FO ¶¶ 4-5 and 2 RP 822 FOF 14 and 2 RP 91]**

The Air Board adopted all of the Hearing Officer's Findings of Fact in their entirety. **[2 RP 988 FO ¶ 5]** Of the Hearing Officer's fifty-eight Conclusions of Law, the Air Board rejected one Conclusion, amended ten, added two and incorporated the remainder by reference. **[2 RP 988-991 FO ¶¶ 6-7]**

The Final Order was filed March 14, 2013, Smith's filed a Notice of Appeal on March 29, 2013 and the City filed its Notice of Appeal on April 5, 2013. **[2 RP 995-1012]**

II. Argument

A. Applicable Standard of Review

The Court shall set aside the Air Board's action only if it is found to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978, § 74-2-9(B).

A court reviews de novo whether a ruling by an administrative agency is in accordance with the law. *Archuleta v. Santa Fe Police Dep't,* 2005-NMSC-006, ¶

18, 137 N.M. 161, 108 P.3d 1019. If an appellate court finds that an administrative agency has revoked a permit in a manner that was not in accordance with law, the appropriate remedy is for the court to remand with directions to reinstate the permit. *In re Final Order in Alta Vista Subdivision DP No. 1498 WQCC 07-11(A),* 2011-NMCA-097, ¶ 10, 150 N.M. 694, 265 P.3d 745; *Matter of Proposed Revocation of Food and Drink Purveyor's Permit for House of Pancakes,* 1984-NMCA-109, ¶ 16, 102 N.M. 63, 691 P.2d 64.

A court reviewing an agency's decision under the arbitrary and capricious standard evaluates whether the agency has "articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer Ass'n of U.S. v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983) (internal citations omitted); *see also Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 11, 133 N.M. 97, 61 P.3d 806. If an agency offers an explanation for its decision that runs counter to the evidence before the agency, a reviewing court should not attempt to supply a reasoned basis that the agency itself has not given. *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶ 20, 125 N.M. 786, 965 P.2d 370; *Rio Grande Chapter of Sierra Club,* 2003-NMSC-005, ¶ 12.

B. The Air Board's reversal of the City's issuance of Permit #2037-M1 exceeded its authority under the Air Act and was not in accordance with law.

1. Statutory Construction

A statute's text is the primary, essential source of its meaning and the language that the Legislature chose is the primary indicator of legislative intent. *Bishop v. Evangelical Good Samaritan Soc.*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361; NMSA 1978, § 12-2A-19. When the Legislature conveys authority to do a particular thing and prescribes a mode of doing it, all other modes are excluded. *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 36, 149 N.M. 330, 248 P.3d 878 (discussing the doctrine of *expressio unius est exclusio alterius)*. If a statute is clear and unambiguous, a court must give effect to that language and refrain from further statutory interpretation. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 18, 117 N.M. 346, 871 P.2d 1352 (internal quotation marks and citation omitted); *United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, 2010-NMSC-030, ¶ 9, 148 N.M. 426, 237 P.3d 728 (internal citations omitted). Courts do not depart from the plain meaning of a statute unless it is necessary to resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 34, 140 N.M. 77, 140 P.3d 198 (internal citations omitted).

The goal in interpreting a statute is to determine and give effect to legislative intent. *Cobb,* 2006-NMSC-034, ¶ 34, (internal citations omitted). A statute must be examined in its entirety, "construing each section in connection with every other section." *Romero Excavation and Trucking, Inc. v. Bradley Construction Inc.,* 1996-NMSC-010, ¶ 6, 121 N.M. 471, 913 P.2d 659.

A statute should be construed to avoid unconstitutional results. NMSA 1978, § 12-2A-18(A)(3). A statutory scheme that vests unbridled or arbitrary power in an administrative agency is unconstitutional because it violates the nondelegation doctrine and the principle of separation of powers. *Cobb,* 2006-NMSC-034, ¶¶ 40-41; *and see Colonias Development Council v. Rhino Environmental Services Inc.,* 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939. An administrative agency's action cannot be supported solely by a statutory grant of general police power; it must have a nexus to a rule. *Rhino,* 2005-NMSC-024, ¶ 29.

2. The Overall Statutory and Regulatory Scheme

Air pollution in Bernalillo County is controlled by a complex interrelated web of federal rules and standards adopted by the EPA pursuant to the federal Clean Air Act, limitations imposed by the New Mexico Legislature in the Air Quality Control Act, rules adopted by the Environmental Improvement Board, and the Air Board's adoptions of rules and standards pursuant to City and County

ordinances. In order to appreciate where the Air Board erred, it is necessary to first set out some of the key elements of these interwoven applicable laws and regulations.

Through the Clean Air Act, Congress authorized the EPA to regulate air quality. 42 U.S.C. §§ 7401 to 7671q. The Clean Air Act authorizes state and local governments to more stringently regulate stationary sources (such as gas stations) than federal regulations would otherwise require. 42 U.S.C. § 7416. In contrast, the Clean Air Act preempts certain state and local control over mobile emissions (e.g., motor vehicles). 42 U.S.C. § 7416 (noting preemption of certain state regulation of moving sources); *and see, e.g.*, § 7521((m)(3) (authorizing the EPA Administrator to require states with vehicle inspection and maintenance programs to meet certain federal regulatory standards); § 7543 (preempting state or local standards for new vehicle engines) *but see* § 7507 (allowing state or local adoption of certain California motor vehicle emission standards) in nonattainment areas; and § 7545(c)(4)(A) (preempting state or local regulation of fuel additives for motor vehicle emissions control). In summary then, the Clean Air Act (1) authorizes broad authority for states and local governments to control emissions from stationary sources, (2) preempts certain state and local control over emissions from mobile sources, (3) controls mobile source emissions by national (or California) emission standards for new engines and national standards for certain fuel

additives, and (4) requires states and local governments to adhere to federal standards in their vehicle inspection and maintenance programs.

In New Mexico, the Legislature adopted the New Mexico Air Quality Control Act ("Air Act"), in part to fulfill its role under the Clean Air Act. *See* NMSA 1978, § 72-2-5.2. Among other things, the Air Act authorized the creation of a local authority to regulate air quality in counties or municipalities meeting certain criteria. NMSA 1978, §§ 74-2-2(J) and 4. Albuquerque and Bernalillo County have created a joint air quality control board ("Air Board") that promulgates air quality regulations and provides public hearings to consider petitions contesting the issuance of permits by EHD, among other things. NMSA 1978, §§ 74-2-5(B) and 7; Revised Ordinances of Albuquerque 1994 ("ROA") 9-5-1-3, -4, -6, and -7; Bernalillo County Code of Ordinances, § 30-32, -33, -35, and -36.

EHD is the local agency that administers and enforces the provisions of the Air Act for Albuquerque and Bernalillo County. NMSA 1978, § 74-2-4(A)(2); ROA 9-5-1-5; Bernalillo County Code of Ordinances 30-34; 20.11.1.7(D) NMAC. For the remainder of the state, the Environmental Improvement Board ("EIB") promulgates regulations and the New Mexico Environment Department ("NMED") administers and enforces the Air Act. NMSA 1978, § 74-2-5; *but see*

42 U.S.C. § 7601(d) (EPA may treat Indian tribes as States under the Clean Air Act).

The Air Act instructs both the EIB and the Air Board that they "shall prevent or abate air pollution." NMSA 1978, § 74-2-5(A). The Legislature also directed how air pollution is to be prevented and abated—through the adoption of rules, standards and plans:

> The...local board shall...(1) adopt...regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and *prevent or abate air pollution*...and (2) adopt a plan for the regulation, control, *prevention or abatement of air pollution*...

NMSA 1978, § 74-2-5(B) [emphasis added].

Thus, in the Air Act, the Legislature conveyed authority to prevent or abate air pollution and also prescribed a method of preventing or abating air pollution—by adopting rules, standards and plans. As a result, this language sets forth the exclusive method of preventing and abating air pollution. *Lyons,* 2011-NMSC-004, ¶ 36 (discussing the doctrine of *expression unius exclusion alterius*). The Legislature did not convey authority to the Air Board to determine during permitting how to prevent or abate air pollution on an ad hoc, project-by-project basis. *Id.*

This conclusion is buttressed by consideration of the Legislature's chosen language in other sections of the Air Act, beginning with the definition of "air pollution":

> the emission...into the outdoor atmosphere of one or more air contaminants *in quantities and of a duration* that may *with reasonable probability* injure human health or animal or plant life or as may *unreasonably interfere* with the public welfare, visibility or the reasonable use of property.

NMSA 1978, § 74-2-2(B) [emphasis added].

Thus, "air pollution" is a term of art in the Air Act. It is not sufficient to have evidence of a puff of smoke, a whiff of something or a release of air contaminants detectable to human senses. There must be a basis to determine that the quantity and duration of the release of air contaminants has a reasonable probability of injuring humans, animals or plants, or of unreasonably interfering with public health, safety and welfare, including reasonable use of property. NMSA 1978, § 74-2-2(B). The Air Board may not expand on this definition of air pollution. *See Duke City Lumber Co. v. New Mexico Environmental Improvement Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291, 681 P 2d. 717.

The definition of air pollution implicitly relates to the quality of life concerns raised by the Air Board, i.e., the need to protect "public health and welfare." **[2 RP 990-991 FO ¶ 6(j, m-n)]** Notably, the Legislature authorized the consideration of health and welfare in five places in the Air Act— in the definition

of air pollution, NMSA 1978, § 74-2-2(B); during rulemaking, NMSA 1978, § 74-2-5(E); in classifying sources of air pollution, NMSA 1978, § 74-2-5.1(G); during consideration of variances, NMSA 1978, § 74-2-8(A)(2)(a); and in issuing emergency orders, NMSA 1978, § 74-2-10. The Legislature has demonstrated that it knows how to require consideration of public health and welfare but did not intend to do so in the section in which it authorized permits and denial of permits. *See* NMSA 1978, § 74-2-7; *see State v. Ramos,* 2013-NMSC-031, ¶ 15, 305 P.3d 921. (reasoning that when the Legislature knows how to include language and does not, the omission was intentional).

As will become clear, intentionally omitting express consideration of public health and welfare during permitting makes logical sense when all of the sections of the Air Act are construed together. *Romero,* 1996-NMSC-010, ¶ 6.

The Legislature authorized EHD to deny an application for a construction permit if the construction or modification:

> (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act;
> (b) will cause or contribute to air contaminant levels in excess of a national ...state or...local...ambient air quality standard; or
> (c) will violate any other provision of the Air Quality Control Act or the federal act[.]

NMSA 1978, § 74-2-7(C)(1).

In this case, subsection 7(C)(1)(c) is at issue. This is because (1) the Air Board admitted that both subsections 7(C)(1)(a) and (b) were satisfied, **[2 RP 991 FO ¶ 7 and 2 RP 879 COL 50-51]** and (2) the Air Board relied on subsection 7(C)(1)(c) to support its reversal of Permit #2037-M1, contending that the construction or modification would violate a provision of the Air Act: the board's "mandate" to prevent or abate air pollution. **[2 RP 990 FO ¶ 6(i) amended COL 52]**

Preliminarily, both subsections 7(C)(1)(a) and (c) address compliance with the Air Act. The former authorizes denial of a permit if construction or modification will not meet an applicable "requirement" of the Air Act; the latter authorizes denying a permit if the construction or modification "will violate any other provision" of the Air Act. It is not clear what the Legislature's intent was in breaking these aspects of compliance with the Air Act into separate subsections. It seems likely, given its language of "any other provision," that the Legislature intended subsection 7(C)(1)(c) simply as a catchall provision to incorporate language that might not be characterized as a "requirement" captured by subsection 7(C)(1)(a). This will be addressed further below.

Importantly, only one of the three bases for denying a permit allows EHD to consider emissions from other sources besides the applicant's. Subsection 7(C)(1)(b) allows permit denial if the construction or modification will "cause or

contribute" [emphasis added] to air contaminant levels that exceed ambient air quality standards. This language allows EHD to consider the effect of the construction or modification in combination with other sources of air emissions in determining whether a permit should be denied. However, subsection 7(C)(1)(b) only applies to compliance with ambient air quality standards which are not at issue in this case. For the other two subsections, the plain language of the Air Act requires that the construction or modification itself must either not meet the applicable rules, standards or requirements of the Air Act, § 7(C)(1)(a); or must violate a provision of the Air Act, § 7(C)(1)(c). This clear plain language must be followed. *United Rentals,* 2010-NMSC-030, ¶ 9.

The grounds for the Air Board to deny a construction permit or modification are the same grounds applicable to EHD in subsection 7(C)(1). [**2 RP 989-991 FO ¶ 7 2 RP 879 COL 49**]

Notably, the Legislature made no mention in the Air Act's permitting section about preventing or abating air pollution or protecting public health, safety and welfare despite repeated mention of these issues elsewhere in the Air Act. *Compare* NMSA 1978, § 74-2-7 (permitting) *to* NMSA 1978, § 74-2-2(B) (defining air pollution); NMSA 1978, § 74-2-5(A-B and E) (rulemaking); NMSA 1978, § 74-2-5.1(G-H) (classifying sources of air pollution); NMSA 1978, § 74-2-8(A)(2)(a) and (C)(1) (variances); NMSA 1978, § 74-2-10 (emergency orders).

However, both issues are considered implicitly in permitting because the Legislature required that permits comply with applicable regulations, subsection 7(C)(1)(a), and...prevention and abatement of air pollution and quality of life concerns are considered in promulgating regulations, NMSA 1978, § 74-2-5(B and E).

As explained previously, air pollution is to be prevented and abated by adopting rules, plans and standards, NMSA 1978, § 74-2-5(B), and the definition of air pollution is couched in terms of protecting public health, safety and welfare. NMSA 1978, § 74-2-2(B). Public health, safety and welfare are expressly considered during the adoption of regulations:

> In making its regulations, ...the [Air Board] *shall* give weight it deems appropriate to all facts and circumstances, including...(1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources of subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

NMSA 1978, § 74-2-5(E) [emphasis added].

Thus, when the definition of air pollution and the rulemaking and permitting sections are construed together, it is clear that the Legislature intended that air pollution should be prevented and abated in an orderly, planned manner, not

through standardless ad hoc decision making when a permit comes before the Air Board. *Romero,* 1996-NMSC-010, ¶ 6 (sections of a statute should be construed together).

This conclusion is buttressed when the Legislature's limitations on the Air Board's rulemaking authority are considered. An examination of the Air Act as a whole, as required, *Romero,* 1996-NMSC-010, ¶ 6, reveals that the Legislature imposed numerous substantive limitations on the rules that the Air Board may adopt and greatly limited the Air Board's discretion, notwithstanding its broad authority about what it may consider in subsection 5(E).

The statutory limitations the Legislature imposed on the Air Board include, (1) local rules must be consistent with the substantive provisions of the Air Act, NMSA 1978, § 74-2-4(C); (2) local rules must be at least as stringent as those promulgated by the EIB, NMSA 1978, § 74-2-4(C); (3) rules to control motor vehicle emissions must be consistent with federal law, NMSA 1978, § 74-2-5(D); (4) rules for standards of performance and emission standards for sources of hazardous pollutants must be as stringent as but no less stringent than federal standards[2] and may only apply to those sources to which the federal rules apply, NMSA 1978, § 74-2-5(C)(2); and (5) rules to achieve national ambient air quality

[2] From a practical perspective, a requirement to be "as stringent as" but "no less stringent than" a federal rule limits the Air Board to incorporating federal rules by reference. There is little motivation to craft a different rule if the end result has to be exactly as stringent, no more or less, than the federal rule.

standards in nonattainment[3] areas or for prevention of significant deterioration of air quality must be as stringent as but no less stringent than federal standards and may only apply to those sources to which federal rules apply, NMSA 1978, § 74-2-5(C)(1). Thus, the Air Act, in combination with the Clean Air Act, federal regulations adopted under the Clean Air Act, and EIB regulations, create a web of constraints that narrow the Air Board's rulemaking discretion notwithstanding the wide latitude about what the Air Board may "consider" in adopting rules. NMSA 1978, § 74-2-5(E).

The rulemaking limitations the Legislature imposed imply that not all air pollution will be prevented or abated if doing so requires adopting rules more stringent than certain federal rules or, for vehicle emissions, adopting rules which would be inconsistent with federal law. NMSA 1978, § 74-2-5(B)((1-2) and (D). Clearly then, the Legislature did not intend to authorize prevention or abatement of all air pollution. If the Air Board had authority to reverse any permit that meets all rules and standards in the name of "preventing or abating air pollution," then the Legislature's rulemaking limits which were clearly expressed in Section 5 could be readily circumvented during permitting under Section 7. When Sections 5 and 7 are construed together and the Legislature's intent is given effect, *Cobb*, 2006-NMSC-034, ¶ 34; *Romero*, 1996-NMSC-010, ¶ 6, it is clear that the Legislature

[3] A "nonattainment area" is one in which certain federal standards for air quality are not met. 42 U.S.C. § 7501(2) *and* § 7407(d)(1)(A)(i).

intended a planned, orderly approach to preventing and abating air pollution as defined in rules—not the ad hoc standardless approach adopted by the Air Board.

3. Specific Statutes and Rules Applicable to Gas Stations

At the time of its decision in this matter, the Air Board had previously defined how to prevent or abate air pollution from gas stations—the Air Board adopted a key federal rule (twice) specifically about air pollution from gas stations. The rationale underlying that federal rule is significant to understanding why there is no air pollution, as defined under the Air Act, for the Air Board to prevent or abate at a gas station complying with the Air Board's rules.

The federal standard that applies to gasoline dispensing facilities ("gas stations" or "GDFs") is found at 40 C.F.R. Part 63 Subpart CCCCCC [hereinafter "Hex C"]. **[2 RP 988 FO ¶ 5 and 2 RP 822-823, 832 FOF 14-19, 46-49 and 74-76]** Gas stations are an air quality concern because, among other things, gasoline contains volatile organic compounds ("VOCs") which contribute to ozone and because hazardous air pollutants may constitute 2-11% of VOCs in gasoline. **[2 RP 988 ¶ 5 and 2 RP 832 FOF 46-49]**

In adopting Hex C, EPA relied upon three Clean Air Act sections that provide key information about air pollution from gas stations. **[*See* 2 RP 988 FO ¶ 5 and 2 RP 832 FOF 49 (*citing* Ex. EHD #3 at 1 RP 254-291 (containing 73 Fed. Reg. 1916-1917)]**

Section 112 of the Clean Air Act addresses hazardous air pollutants. 42 U.S.C. § 7412. As authority for Hex C, EPA first identified subsection 112(c)(3). That subsection is used if the EPA determines that gas stations are "area sources," i.e., are not major sources of hazardous pollutants, but that they "present a threat of adverse effects to human health or the environment warranting regulation." 42 U.S.C. § 7412(c)(3); *and see* § 7412(a)(2) (defining area sources as sources which are not major).

Next, EPA relied upon subsection 112(k)(3)(B), where Congress directed the EPA to develop a national comprehensive strategy to control hazardous pollutants from area sources in urban areas. 42 U.S.C. § 7412(k)(3)(B); *see also* **[8-22-12 1 Tr. 390:10-13]**

Finally, EPA relied on subsection 112(d)(5) which authorizes the EPA to promulgate standards for certain sources which require the use of generally available control technologies or management practices to reduce emissions of hazardous air pollutants. 42 U.S.C. § 7412(d)(5). Hex C is an example of such a standard. Pursuant to Hex C, all gas stations must utilize certain good management practices and, as their throughput of gasoline increases, additional procedures are required which will limit the evaporation of gasoline. 73 Fed. Reg. 1918. These procedures are known as Stage I vapor recovery. **[2 RP 988 FO ¶ 5 and 2 RP 837 FOF 74-76]** Thus, Hex C was adopted specifically to protect urban communities

from emissions of hazardous air pollutants at gas stations by requiring certain good management practices.

As explained previously, the Legislature authorized the Air Board to adopt regulations establishing standards of performance for sources and emissions standards for hazardous pollutants. NMSA 1978, § 74-2-5(C)(2). The Air Board has promulgated 20.11.64 NMAC to regulate stationary sources of hazardous air pollutants. Part 64 is a very short rule that simply incorporates certain federal rules by reference, subject to certain exceptions not relevant here. Among those federal rules is 40 C.F.R. Part 63 which includes Hex C. *See* 20.11.64.12 NMAC.

The Air Board's initial incorporation of the Hex C emission standard became effective on February 16, 2009. 20.11.64.12 NMAC (Feb. 16, 2009). The Air Board's update of that incorporation became effective December 12, 2011. 20.11.64.12 NMAC (Dec. 12, 2011). The Air Board, then, has determined twice how to prevent or abate hazardous air pollution from gas stations. It incorporated a federal rule specifically developed to prevent or abate air pollution from gas stations, a rule whose legal underpinnings evidence an understanding that (1) gas stations affect urban areas; (2) they produce hazardous air pollutants; and, (3) proper regulation is important to protect public health.

4. The Air Board's Decision to Reverse #2037-M1

The Air Board admitted that Permit #2037-M1 for the Carlisle Gas Station satisfied all applicable rules and standards. **[2 RP 991 FO ¶ 7 and 2 RP 833 COL 50-51]** However, in the Air Board's view, it had a "mandate" to "prevent or abate air pollution," and that "mandate" allowed it to protect quality of life by denying the requested throughput increase to address indirect air pollution from vehicles visiting the Carlisle Gas Station, to prevent any increase in gasoline throughput at the Carlisle Gas Station because it would create air pollution and harm public health, and to deny a permit because of insufficient coordination between itself and other government entities. **[2 RP 990 FO ¶ 6(i- j and l-m) amended COL 52, amended COL 56 and new COL 58 and 59]**

i. The Air Board misinterpreted the Air Act when it reversed Permit #2037-M1 based on its "mandate" to prevent or abate air pollution.

The Air Board's primary justification for its decision was its mandate to prevent or abate air pollution. **[2 RP 988-991 FO ¶ 6(a-c and i-j, m)]** As explained previously, the Air Board's mandate to "prevent or abate air pollution" in subsection 5(A) does not arise in a vacuum, isolated from the remainder of the statute. Indeed, the very next subsection, 5(B), instructs the Air Board how to prevent or abate air pollution—by adopting rules, standards and plans. *Compare* NMSA 1978, § 74-2-5(A) *with* § 5(B). It is during rulemaking that the Air Act

authorizes the Air Board to consider the character and degree of injury to or interference with health, welfare, visibility and property and the public interest. NMSA 1978, § 74-2-5(E). The Legislature did not authorize ad hoc prevention and abatement of air pollution in the midst of an individual permitting action. *Romero,* 1996-NMSC-010, ¶ 6.

During consideration of a construction permit or modification, the correct scope of the Air Board's review is to prevent and abate air pollution by evaluating whether EHD correctly determined that the construction or modification would comply with the Air Board's adopted rules and standards and does not violate any requirements or provisions of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(1). In this case, the Air Board agreed that all applicable standards and rules were met. **[2 RP 990 FO ¶ 6(j), 2 RP 991 FO ¶ 7 and 2 RP 833 COL 50-51]**

Nonetheless, the Air Board concluded that the indirect increase in air pollution from vehicles visiting the Carlisle Gas Station would increase air pollution and would violate the Board's mandate to prevent or abate air pollution. The Air Board's interpretation of the Air Act violated several canons of statutory construction.

First, it violates the canon of statutory construction that provides that clear and unambiguous text must be applied as written. *Gallegos,* 1994-NMSC-023, ¶

18. Only subsection 7(C)(1)(b), which uses the phrase "cause or contribute to" allows permit denial based on consideration of air contaminants from other sources. The other two bases for permit denial, including subsection 7(C)(1)(c) on which the Air Board relied for its decision, only allow consideration of the emissions from the applicant's source itself. In order to reverse the issuance of Permit #2037-M1, the express language of subsection 7(C)(1)(c) would require that the "...construction or modification...will violate any other provision of the Air Quality Control Act..." Thus, the Air Board's concern about controlling "indirect" air pollution coming from vehicles in reliance on its authority in subsection 7(C)(1)(c) is impermissible because it fails to follow the express language chosen by the Legislature. *Gallegos,* 1994-NMSC-023, ¶ 11.

Instead, the Air Board implicitly seems to have followed this causation chain: (1) the requested increase in throughput in Permit #2037-M1 would cause more vehicles to visit the Carlisle Gas Station; (2) the additional vehicles would produce emissions which would contribute indirectly to increased air pollution; (3) the Air Board was being asked to approve additional throughput; and (4) therefore, if the Air Board upheld the issuance of Permit #2037-M1, the Air Board would violate its mandate to prevent or abate air pollution. This is not what the Legislature required in its language in subsection 7(C)(1)(c).

The Legislature's plain language requires that the construction or modification itself violate some provision of the Air Act or the Clean Air Act. NMSA 1978, § 74-2-7(C)(1)(c). Here, the Air Board identified no such violation. Its decision to rely on subsection 7(C)(1)(c) to deny Permit #2037-M1 was not in accordance with law because it failed to apply the express statutory text as written. *Gallegos,* 1994-NMSC-023, ¶ 11.

Next, the Air Board's interpretation of the Air Act failed to construe the statute as a whole. Specifically, it ignored the process the Air Act requires during rulemaking and disregarded its significance during permitting. *Romero,* 1996-NMSC-010, ¶ 6.

The Air Act provides that air pollution is prevented and abated through the adoption of rules and plans. NMSA 1978, § 74-2-5(B)(1 and 2). The Air Board has already adopted rules for gas stations to follow—Hex C. And there is no dispute here that Permit #2037-M1 would require the Smith's Carlisle Gas Station to comply with Hex C. **[2 RP 990 FO ¶ 6(j)]** In adopting Hex C, the Air Board was required to consider the character and degree of injury to or interference with health, welfare, visibility and property and the public interest. NMSA 1978, § 74-2-5(E). Thus, in adopting Hex C, the Air Board already determined that the appropriate way to prevent and abate hazardous air pollution from gas stations was to require compliance with Hex C which Permit #2037-M1 would require.

Because the Carlisle Gas Station modification would be required to comply with Hex C (and all other applicable rules), the Carlisle Gas Station would not cause air pollution as it is defined in the Air Act. NMSA 1978, § 74-2-2(B). When Air Act subsections 2(B), 5(A-B and E) and 7(C)(1)(a) are construed together and the Air Board's previous rulemaking activities under the Air Act are considered, there is no air pollution caused by the modification of the Carlisle Gas Station for the Air Board to prevent or abate during the permitting process.

Finally, the Air Board concluded that it had authority to consider quality of life issues during permitting by relying on a phrase from the definition of air pollution and linking that phrase with subsection 5(E). Subsection 5(E) arguably authorizes consideration of what could be characterized as quality of life factors—but during rulemaking, not permitting. Prevention and abatement of air pollution is intended to occur by adopting rules, standards and plans, NMSA 1978, § 74-2-5(B); and then applying those rules, standards and plans during the permitting process. NMSA 1978, § 74-2-7(C)(1)(a and b). The Air Board exceeded the express language of the Air Act by relying on its subsection 5(E) rulemaking authority during a Section 7 permitting proceeding. *Bishop,* 2009-NMSC-036, ¶ 11 (a statute's text is the primary, essential source of its meaning). The Air Board should have given effect to the applicable statutory language, subsection 7(C)(1), and should have refrained from further statutory interpretation. *Gallegos,* 1994-

NMSC-023, ¶ 18. The Court should remand this matter to the Air Board with directions to uphold the issuance of Permit #2037-M1 pursuant to Section 7 of the Air Act.

ii. The Air Board may not rely on its "interest" in minimizing air pollution caused by vehicles to deny a stationary source permit that complies with all applicable rules.

The Air Board has authority to regulate motor vehicle emissions to the extent not preempted by the Clean Air Act. NMSA 1978, § 74-2-4(E-I) (vehicle inspection and maintenance programs) and § 74-2-5 (rules must be consistent with federal law). The Air Board has adopted rules for motor vehicles. 20.11.100 to 104 NMAC. None of those rules authorize the reversal of Permit #2037-M1. No applicable Air Board rule authorizes denial of a stationary source permit due to motor vehicle emissions. No rule sets forth how many vehicles it takes to create "air pollution" versus how many vehicles may visit a business without jeopardizing issuance of an air permit.

If the Air Board wants to regulate vehicle emissions, those rules must first be proposed to the Air Board, the Air Board must provide public notice and then consider any proposed rules at a public hearing. NMSA 1978, § 74-2-6. The Air Board cannot circumvent the public rulemaking process required by the Legislature by imposing ad hoc standardless requirements on stationary source permits coming before the Air Board. *Cobb*, 2006-NMSC-034, ¶ 34 (statute should

be construed to give effect to the Legislature's intent); *Romero,* 1996-NMSC-010, ¶ 6 (statute must construed as a whole).

Furthermore, in such a rulemaking, the Air Board would have to grapple with how many vehicles visiting a gas station it takes to cause "air pollution" as defined in the Air Act, how many should be permissible, and how such standards should be applied and enforced. Suffice it to say, these are thorny issues the Air Board has never considered because it has no such rules.

Instead, by denying the modification to increase the permitted throughput, the Air Board implicitly decided that even one more gallon would cause air pollution. It strains credulity to imagine that the vehicle emissions resulting from the sale of one more gallon of gasoline from the Carlisle Gas Station could meet the definition of air pollution, i.e. that those emissions could, "with reasonable probability, injure human health or animal or plant life...[or] unreasonably interfere with the public welfare, visibility or the reasonable use of property." NMSA 1978, § 74-2-2(B).

iii. The Air Board's authority to "prevent or abate air pollution" does not broaden the Air Board's authority to include traffic planning, zoning, or any other matter beyond that which has been delegated to the Air Board by the Air Act.

The Air Board's amendments to the Hearing Officer's Conclusions of Law make it clear that the Air Board believed its permitting authority extended to

traffic, planning and zoning as long as it related to air pollution. The language that the Air Board struck from the Hearing Officer's Conclusion of Law #27 makes that conclusion inescapable.

Conclusion of Law #27 addressed permit conditions. It is odd that the Air Board would amend it because the Air Board did not impose any conditions. It reversed the decision to issue Permit #2037-M1. However, the Air Board's rationale for amending Conclusion #27 becomes apparent when the deleted language is examined.

The Air Board struck out the latter portion of Conclusion #27 which provided that the authority to impose conditions "does not broaden the scope of the Air 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." Instead, the Board replaced that language by inserting, "authorizes permit conditions designed to effectuate the general purpose of the Board's regulations – to prevent or abate air pollution."

Implicitly then, the Air Board concluded that the authority to impose reasonable permit conditions other than emission limits, NMSA 1978, § 74-2-7(D)(1)(d), meant that the Air Board's authority also included traffic planning, zoning, and other matters if the Air Board were acting to prevent or abate air pollution. This is incorrect as a matter of law.

As explained previously, air pollution is prevented and abated by adopting rules, standards and plans, NMSA 1978, § 74-2-5(B); the required application of those rules during permitting serves implicitly to prevent and abate air pollution. NMSA 1978, § 74-2-7(C)(1)(a).

Moreover, by adopting Conclusions of Law ##10-22, the Air Board admitted that traffic, planning and zoning are delegated to other bodies. **[2 RP 991 FO ¶ 7 2 RP 825-827 COL 10-22]** No language in the Air Act envisions that the Air Board should be an "*uber*-board" controlling traffic, planning and zoning issues relating to a stationary source on an ad hoc standardless basis during permitting.

Even if a modification of a stationary source causes traffic, which is true of most municipal development, traffic flow is regulated through other state laws regarding planning and zoning and traffic. *See e.g.*, NMSA 1978, § 3-17-6(A)(8) (municipality may adopt a traffic code); *and* § 3-19-6(A)(3) (municipal subdivisions to provide adequate space for traffic); *and* § 3-49-1(L) (municipalities may regulate traffic). The Air Board does not have authority to deny permits to stationary sources because of potential indirect impacts on traffic. *Public Service Company of New Mexico v. New Mexico Environmental Improvement Board,* 1976-NMCA-039, ¶ 10, 89 N.M. 223, 549 P.2d 638 (board's mandate to prevent or abate air pollution does not extend to planning for industrial development).

The Air Board's authority during permitting is to assure that EHD correctly applied all rules and standards and assured that the proposed construction or modification would not violate the Air Act and the Clean Air Act. NMSA 1978, § 74-2-7(C)(1). In this case, there is no dispute that EHD correctly applied all rules and standards. **[2 RP 991 FO ¶ 7 2 RP 879 COL 50-51]** When the applicable sections of the Air Act are considered together, it is clear that the proposed modification does not violate the Air Act. The Air Board's reversal of Permit #2037-M1 must be reversed with instructions to issue Permit #2037-M1. *Alta Vista Subdivision DP No. 1498,* 2011-NMCA-097, ¶ 10; *House of Pancakes,* 1984-NMCA-109, ¶ 16.

C. The Air Board's decision to reverse Permit #2037-M1 must be reversed because it had no nexus to a rule and was not in accordance with law.

There is no dispute that the Air Board's decision to reverse the City's issuance of Permit #2037-M1 lacked the essential nexus to a rule. *Rhino,* 2005-NMSC-024, ¶ 29. The Air Board admitted that the operation of the Carlisle Gas Station would not violate the applicable rules. **[2 RP 990 FO ¶ 6(j) and amended COL 56]** The sole purported authorization for the Air Board's action here is its "mandate" to "prevent or abate air pollution" to protect "quality of life" concerns for which there is no standard.

The New Mexico Supreme Court has foreclosed the Air Board's reasoning. *See Rhino,* 2005-NMSC-024, ¶ 29. The *Rhino* Court was considering authority arising under the Solid Waste Act; the Air Act's language is substantially different from the Solid Waste Act. Nonetheless, the Court's its reasoning on this issue is instructive.

In *Rhino,* the Court found that the NMED was required to allow testimony regarding the impact of a landfill on a community's quality of life. 2005-NMSC-024, ¶ 29. However, the Court agreed that "its authority to address such concerns requires a nexus to a regulation." The Court explained that statutory language protecting public health, safety and welfare is designed to invoke the general police powers of the state and such language, standing alone, does not create any standard. *Rhino,* 2005-NMSC-024, ¶ 29. Justice Bosson wrote, "Such a broad mandate would offer no guidance to the Department, and [would] violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency." *Rhino,* 2005-NMSC-024, ¶ 29 (internal citation omitted); *see also, Cobb,* 2006-NMSC-034, ¶¶ 40-41 (finding that the Legislature's failure to provide standards to the State Canvassing Board to guide its discretion in deciding whether to impose the full cost of a recount on a petitioner rendered an amendment to the Election Code unconstitutional).

In *Rhino,* Justice Bosson was repeating a conclusion the Court had reached just a few months earlier in a zoning matter. *Smith v. Bernalillo County,* 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 296. In *Smith,* the Court considered an appeal by a property owner who had originally been issued a permit to construct two amateur radio towers at his East Mountain residence in Bernalillo County. After neighbors complained, the County rescinded its approval, contending for the first time that the towers could not be approved based on a new "reasonableness" standard. *Id.* at ¶ 1 and ¶ 13. In *Smith,* Justice Bosson explained, "Ad hoc standard-less regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner." 2005-NMSC-012, ¶ 33.

In this case, the Legislature's instruction to "prevent or abate air pollution" in subsection 5(A) is a phrase designed to invoke the general police powers of the state. Such language, standing alone, does not create any standard. *Rhino,* 2005-NMSC-024, ¶ 29. The Air Board cannot "prevent or abate air pollution" in a standardless ad hoc manner any more than Bernalillo County could impose undefined "reasonableness" restrictions in zoning matters. *Smith,* 2005-NMSC-012, ¶ 33. However, in the Air Act, the Legislature provided a mechanism to develop standards for the Air Board to apply when preventing and abating air pollution.

In subsection 5(B), the Legislature instructed the Air Board how to prevent or abate air pollution: by adopting rules, standards and plans. NMSA 1978, § 74-2-5(B)(1). Thus, the Air Board's authority to prevent or abate air pollution in subsection 5(A) is exercised during permitting by applying its rules, standards and plans developed pursuant to subsection 5(B). NMSA 1978, § 74-2-7(C)(1)(a).

Here the Air Board relied solely upon its "mandate" in subsection 5(A) to reverse Permit #2037-M1 while admitting that the Carlisle Gas Station satisfied all rules and standards. **[2 RP 991 FO ¶ 7 2 RP 879 COL 50-51]** The Air Board's reliance on subsection 5(A) lacked any nexus to a rule and its decision to reverse Permit #2037-M1 should be reversed. *Rhino,* 2005-NMSC-024, ¶ 29.

If subsection 5(A) gave the Air Board unbounded discretion to go beyond its rules, standards and plans to "prevent or abate air pollution," the Air Act would be unconstitutional because it would give the Air Board unfettered discretion. *Cobb,* 2006-NMSC-034, ¶¶ 40-41; *and see* NMSA 1978, § 12-2A-18(A)(3) (A statute should be interpreted to be constitutional.) Thus, the Air Board's interpretation that it had authority to "prevent or abate air pollution," lacking any nexus to a rule, is not in accordance with law and must be reversed with directions to issue Permit #2037-M1. *Alta Vista Subdivision DP No. 1498,* 2011-NMCA-097, ¶ 10; *House of Pancakes,* 1984-NMCA-109, ¶ 16.

D. The Air Board exceeded its authority under the Air Act when it denied a permit due to a general concern about the adequacy of governmental processes and the need to protect public health and welfare.

In its Final Order, the Air Board concluded that:

> Even if the Division's actions in considering and approving the requested permit modification complied with all regulatory provisions applicable at the time...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.

[2 RP 991 FO ¶ 6(n)]

It is black letter law that administrative agencies are creatures of statute. *Public Service Co.,* 1976-NMCA-039, ¶ 7. "They have no common law powers and can act only as to those matters which are within the scope of the authority delegated to them." *Public Service Co.,* 1976-NMCA-039, ¶ 7 (internal citation omitted).

Even if the Air Board had participated in a hypothetical interagency consultation with other government entities that regulate planning, zoning, and traffic, etc., the Air Board would still not have authority to deny an application for a stationary source permit that meets all statutory and regulatory requirements. NMSA 1978, § 74-2-7(C)(1). Other entities regulate planning, traffic and zoning. NMSA 1978, § 3-19-5(A) (planning jurisdiction granted to municipalities); NMSA 1978, §§ 3-21-1 and -2 (zoning authority granted to municipalities and authorizing

municipal zoning authorities); NMSA 1978, § 66-7-9 (authorizing local authorities to regulate their streets and highways). The Air Board is charged with preventing or abating air pollution as defined by the Air Act and as defined by its rules, plans and standards, and subject to all of the limitations the Legislature imposed in the Air Act. *Public Service Co.,* 1976-NMCA-039, ¶ 7.

E. In accepting the Hearing Officer's Findings of Fact in their entirety but reversing the outcome, the Air Board's end result was arbitrary and capricious because it failed to articulate a rational connection between the facts found and the choice made.

The Air Board adopted all of the Hearing Officer's Findings of Fact in their entirety and stated that it did not dispute any of them. **[2 RP 988 FO ¶ 5]** These Findings included, (1) the vapor control technology that Smith's used met the standards under the New Mexico Air Quality Control Act and the federal Clean Air Act, **[2 RP 988 FO ¶ 5 and 2 RP 850 FOF 140]**; and (2) the permit complied with applicable local and federal regulations and there was no technical basis for denying the permit, **[2 RP 988 FO ¶ 5 and 2 RP 850 FOF 142]**. The Air Board admitted in its Conclusions of Law that the modification sought by Smith's would meet applicable standards, rules and requirements of the Air Act and the Clean Air Act, **[2 RP 988 FO ¶ 5 and 2 RP 833 COL 50]**; and admitted that the modification sought by Smith's would not cause or contribute to air contaminants

in excess of federal, state and local standards, **[2 RP 988 FO ¶ 5 and 2 RP 833 COL 51]**.

The Air Board found no facts to support a conclusion that air pollution, as defined and limited by the Air Act, would be created. It found no facts to support disallowing the entire increase in throughput. It strains the imagination to believe that one more gallon of gasoline throughput could cause emissions "in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property." NMSA 1978, § 74-2-2(B). In short, the Air Board did not articulate any connection, let alone a rational connection, between the facts that it found and the choice that it made. *Motor Vehicle Manufacturer Ass'n of U.S.*, 463 U.S. at 43. The Air Board's decision to reverse Permit #2037-M1 was arbitrary and capricious and must be reversed with directions to issue Permit #2037-M1.

Separately, the Air Board also offered no explanation for how Permit #2037-M1 met the "requirements" of the Air Act as set forth in subsection 7(C)(1)(a), **[2 RP 989-991 FO ¶ 7 2 RP 833 COL 50]**, but simultaneously would violate a "provision" of the Air Act as set forth in subsection 7(C)(1)(c), **[2 RP 989-991 FO ¶ 6(i) amended COL 52]**. The Air Board's decision was irrational and was

arbitrary and capricious. It should be reversed with directions to issue Permit #2037-M1.

F. There was substantial evidence underlying the facts found by the Air Board.

There are 255 Findings of Fact[4] recommended by the Hearing Officer and incorporated by reference in their entirety by the Air Board. **[2 RP 819-881 and 2 RP 988 FO ¶ 5]** Those facts are undisputed, thoroughly supported by citations to the underlying record, and supported by substantial evidence.

As explained previously, the Air Board did not adopt any facts in support of its amended Conclusions of Law other than the facts recommended to be found by the Hearing Officer which led to the Hearing Officer's recommended decision to deny the Petitioners any relief, i.e., upholding the City's issuance of Permit #2037-M1. **[2 RP 881]** Therefore, the Hearing Officer's recommended facts, standing alone, cannot support the Air Board's decision to reverse Permit #2037-M1. Moreover, the Petitioners had no expert to support their petitions or to offer any technical evidence of air pollution.

The City contends that the Air Board misinterpreted the Air Act and that, as a result, the Court should remand this matter to the Air Board with directions to

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[4] There is a numbering error in the Recommended Findings of Fact such that facts 1-19 occur on pages 1-5 and then the numbering starts over on page 6. The second round of numbers ends at 236. When 236 is added to 19, there are a total of 255 facts found.

issue Permit #2037-M1. *Alta Vista Subdivision DP No. 1498*, 2011-NMCA-097, ¶ 10; *House of Pancakes*, 1984-NMCA-109, ¶ 16.

In the alternative, if the Court decides to remand this matter to the Air Board with directions to identify the facts supporting its decision to reverse Permit #2037-M1, the City reserves the right to dispute whether such facts, if any, are supported by substantial evidence.

III. Preservation of Issues

The issues set out above were preserved by the City's Answer to Petition No. AQCB 2012-1 and Petition No. AQCB 2012-2, [**1 RP 71-95**]; the City's written closing argument and brief, [**2 RP 728-777**]; and the City's proposed findings of fact and conclusions of law. [**2 RP 648-727**]

IV. Conclusion and Statement of Relief Sought

The Air Board's ad hoc standardless decision exceeded its statutory authority and was based on a misinterpretation of the Air Act. The Legislature intended that air pollution should be prevented and abated in a planned, orderly manner, based on rules, standards and plans adopted through an open, public process. Similarly, quality of life concerns are expressly considered during rulemaking but not during permitting. In permitting, rules and standards and laws are applied, thus preventing and abating air pollution and protecting quality of life. This construction of the Air Act follows from multiple branches of legal reasoning.

First, this construction follows from the Legislature's express language. The Legislature authorized prevention and abatement of air pollution and stated how it was to be prevented and abated—by the adoption of rules, standards and plans whose adoption must consider quality of life factors. NMSA 1978, § 74-2-5(A-B) and (E). When the Legislature's language authorizes an activity and states how it is to be accomplished, no other mechanisms are permissible. *Lyons*, 2011-NMSC-004, ¶ 36.

Second, construing the Air Act as a coherent whole leads to the same conclusion—air pollution is prevented and abated and quality of life is protected by the development of rules and standards in a planned, orderly process and then applying those rules and standards and applicable laws during permitting. The Legislature addressed protection of health and safety and prevention and abatement of air pollution in multiple sections of the Air Act—but not in the permitting section. The Legislature knows how to require consideration of these issues and its failure to do so in the permitting section is intentional. Instead, the Legislature provided that construction permits may only be denied for three reasons. Only one of those reasons, protection of ambient air standards, considers emission from other sources. The other two reasons allow denial of permits only if the construction or modification itself (1) will not meet applicable standards, rules or requirements of the Air Act or the Clean Air Act or (2) will violate any other

provision of the Air Act or the Clean Air Act. The Legislature did not intend that permits could be denied based on ad hoc standardless concerns over air pollution and protection of quality of life.

Finally, the New Mexico Supreme Court has repeatedly criticized ad hoc standardless discretionary decisionmaking by public officials in administrative proceedings. *Rhino,* 2005-NMSC-024, ¶ 29; *Cobb,* 2006-NMSC-034, ¶¶ 40-41; *Smith,* 2005-NMSC-012, ¶ 33. If the Air Act granted such authority to the Air Board it would have been unconstitutional. *See Cobb,* 2006-NMSC-034, ¶¶ 40-41. In the Air Act, the Legislature did not grant the Air Board authority to make ad hoc standardless discretionary permitting decisions based solely on police power. The Legislature required a nexus to a rule, a standard or a law as required in *Rhino.* NMSA 1978, § 74-2-5(B); 2005-NMSC-024, ¶ 29. The Air Board's decision to reverse Permit #2037-M1 exceeded its statutory authority and did exactly what the Supreme Court has repeatedly rejected. The Court should reverse the Air Board's decision and remand this matter to the Air Board with instructions to issue Permit #2037-M1. *Rio Grande Chapter of Sierra Club,* 2003-NMSC-005, ¶ 17; *Alta Vista Subdivision DP No. 1498,* 2011-NMCA-097, ¶ 10; *House of Pancakes,* 1984-NMCA-109, ¶ 16.

In the alternative, the Air Board's decision was arbitrary and capricious because the Air Board did not articulate a rational connection between the facts

found and the choice made. It found no facts about traffic yet concluded that traffic was causing air pollution. It found no facts to show that air pollution, as defined in the Air Act, was occurring at all. It offered no rationale why increasing gasoline throughput by even one gallon at the Carlisle Gas Station could plausibly cause air pollution as defined in the Air Act. The Board simultaneously concluded that Permit #2037-M1 met the "requirements" of the Air Act while it violated a "provision" of the Air Act. The Air Board's Statement of Reasons and Final Order was irrational, its decision should be reversed. Permit #2037-M1 should be issued. *Motor Vehicle Manufacturer Ass'n of U.S.*, 463 U.S. at 43; *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 17; *Alta Vista Subdivision DP No. 1498*, 2011-NMCA-097, ¶ 10; *House of Pancakes*, 1984-NMCA-109, ¶ 16.

V. Request for Oral Argument

The City requests oral argument because it believes oral argument may assist the Court in understanding the complex interrelated federal, state and local laws applicable to Permit #2037 and Permit #2037-M1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief-in-Chief were served on the following by the method indicated on April 14, 2014.

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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

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, Andy Carrasco, James A. Nelson and Summit Park Neighborhood Association,

Petitioners-Appellees,

v.

Smith's Food & Drug Centers, Inc. and the City of Albuquerque,

Respondents-Appellants.

Ct. App. No. 32,790

Air Quality Control Board Nos. 2012-1 and 2012-2

APPELLANT CITY OF ALBUQUERQUE'S CONSOLIDATED REPLY BRIEF

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE

Undersigned counsel states that this Reply Brief complies with Rule 12-213(F) NMRA in that the body of the brief is prepared in Times New Roman typeface and contains 4312 words. This word count was obtained using Microsoft Office Word 2010 software.

TABLE OF AUTHORITIES

NEW MEXICO REGULATIONS

CITY ORDINANCES

LIST OF ABBREVIATIONS AND ACRONYMS

"Air Act" – Air Quality Control Act, NMSA 1978, §§ 74-2-1 to -22

"Air Board" – Albuquerque-Bernalillo County Air Quality Control Board

"Carlisle Gas Station" – Smith's gas station at 1313 Carlisle NE, Albuquerque

"City" – Albuquerque Environmental Health Department Air Quality Division (now known as the "Air Quality Program")

"Clean Air Act" – 42 U.S.C. §§ 7401 to 7671

"Hex C" – 40 C.F.R. Part 63 Subpart CCCCCC

"Permit No. 2037" – Initial air quality permit granted to Smith's for the Carlisle Gas Station

"Permit No. 2037-M1" – Modified air quality permit granted to Smith's for the Carlisle Gas Station and reversed by the Air Board

"Smith's" – Smith's Food & Drug Centers, Inc.

I. Argument

A. Applicable Standard of Review

The City incorporates by reference the applicable standard of review in the City's Brief in Chief. **[City's BIC 5-6]** Appellees have not disputed the City's arguments about the appropriate standard of review. **[Carrasco AB 11; Peña-Kues AB 7]**

B. This Court should reject Appellee Carrasco's reliance on case law interpreting the Solid Waste Act.

The only case law cited in Appellee Carrasco's Answer Brief are three cases construing the Solid Waste Act, primarily *Colonias Dev. Council v. Rhino Envt'l Serv.*, 2005-NMSC-024, 138 N.M. 133. **[Carrasco AB Table of Authorities]** Appellee Peña-Kues cited no case law. **[*See* Peña-Kues AB Table of Authorities]** The City agrees that this case is about statutory construction—but about the Air Act, NMSA 1978, §§ 74-2-1 to -17, not the Solid Waste Act. Neither Appellee cites a single authority addressing statutory construction.

The Uniform Statute and Rule Construction Act requires that a statute be construed to "(1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd, or unachievable result." NMSA 1978, § 12-2A-18(A) [emphasis added]. "The text of a statute... is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19 [emphasis

added]. These fundamental principles of statutory construction require this Court to focus on the Air Act and its text, not text in a different statute.

1. The Legislature required a more streamlined public participation process in the Air Act than it did in the Solid Waste Act.

Appellee Carrasco asserts that "*like* the Solid Waste Act, the Air Quality Control Act provides for public involvement in permitting actions regarding air quality." **[Carrasco AB 14] [emphasis added]** Appellee Carrasco fails to compare the text of these two statutes. Their public participation provisions are quite different.

Notice: In the Air Act, the Legislature has not imposed specific notice requirements and has delegated discretion to the Air Board to develop them. NMSA 1978, § 74-2-7(B)(5). The Air Board has required notice by publication. 20.11.41.14(A)(3) NMAC (2002).

In contrast, the Solid Waste Act requires stringent public notice, mandating duplicate notices in different newspaper sections, among other things. NMSA 1978, § 74-2-22; *Martinez v. Maggiore,* 2003-NMCA-043, ¶ 8, 133 N.M. 472 (noting that the Solid Waste Act is only one of two New Mexico statutes containing such stringent public notice provisions). The notice provisions of the Air Act are much less stringent than those in the Solid Waste Act. These notice provisions are not "like" each other.

Hearing Requirements Prior to Permitting: The Legislature has required a hearing for *every permit* issued under the Solid Waste Act—there is no need to petition, no requirement to have previously participated and no requirement to be adversely affected. NMSA 1978, § 74-9-28(A); *and see Martinez*, 2003-NMCA-043, ¶ 14 (rejecting standing argument).

In contrast, the Legislature did not require any hearing prior to issuing an air quality permit. NMSA 1978, § 74-2-7(B)(5) (authorizing adoption of rules for hearings "*if any*" before permitting); and 20.11.41.14(B) NMAC (2002) (granting discretion to determine whether a hearing will occur). The Legislature's choice in the Air Act not to require a hearing before permitting is the opposite of what it required in the Solid Waste Act. These pre-permitting hearing provisions are not "like" each other.

Hearing after Permitting: After a permit is issued, if a person wants an Air Board hearing, he must petition and show that (1) he participated in the permitting action and (2) he is adversely affected by it. NMSA 1978, § 74-2-7(H). The requirement to be "adversely affected" imposes a heightened standard on a petitioner and indicates a legislative intent to restrict the field of potential petitioners. *See N.M. Cattle Growers v. N.M. Water Quality Com'n*, 2013-NMCA-046, ¶ 8, 299 P.3d 436. In contrast, after a permit is issued under the Solid Waste Act there is no additional administrative hearing.

The Air Act requirement to show that a petitioner is "adversely affected" requires a petitioner to meet the elements of standing: (1) an injury in fact (an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not hypothetical), (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. The interest sought to be protected must be within the zone of interests protected by the Air Act. *N.M. Cattle Growers,* 2013-NMCA-046, ¶¶ 7-11; *Protection and Advocacy Systems v. City of Albuquerque,* 2008- NMCA-149, ¶ 18, 145 N.M. 156; *Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 24, 130 N.M. 368. Under the Solid Waste Act, no one is required to meet the elements of standing for an administrative hearing.

Burden of Proof: The Air Act requires that the petitioner has the burden of proof. NMSA 1978, § 74-2-7(K). This is not an issue under the Solid Waste Act regulations which place the burden of proof on the applicant, other than proof to support challenged conditions. 20.1.4.400(A)(1) NMAC.

Because the petitioner has the burden of proof, it is clear that an Air Board hearing must focus on the law or regulation creating the legally protected interest that the petitioner contends has been invaded, *Protection and Advocacy Systems*, 2008-NMCA-149, ¶¶ 18-20, and the facts the petitioner offers to prove his claim, NMSA 1978, § 74-2-7(K). The Air Act does not create legally protected interests

in the areas of zoning, traffic, drainage, public restrooms, lighting, groundwater quality or general quality of life, so facts relating to these issues are irrelevant. Under some circumstances, the Air Act allows the public a "reasonable opportunity to submit data, views or arguments...and to examine witnesses..." NMSA 1978, § 74-2-7(I). It does not allow members of the public who have not petitioned to bring additional claims—that would evade the Legislature's limitations on Air Board permit hearings. NMSA 1978, § 74-2-7(H). Unlike the Air Act, an administrative permit hearing under the Solid Waste Act is not focused on a claim brought by a petitioner because there is no petition and no requirement to prove how someone was adversely affected.

Thus, the Air Act public participation provisions are utterly unlike the public participation provided in the Solid Waste Act. The Air Act provides narrower public notice, narrower opportunities for a hearing, a heightened standard that evidences a legislative intent to narrow the field of qualified petitioners, and a narrower focus at the hearing. Appellee Carrasco's contention that the public participation process in the Air Act is "like" the Solid Waste Act must be rejected.

The Legislature's different policy approach in the Air Act makes sense. Air pollution is regulated by numerous federal prescriptive regulations. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants for Source Categories, 40 C.F.R. Part 63, Subpart A through Subpart HHHHHHH. The Legislature has

delegated very narrow rulemaking authority in some of these areas. *See e.g.*, NMSA 1978, § 74-2-5(C)(1 and 2). In the Air Act, the Legislature focused on air pollution, not general quality of life.

2. Appellee Carrasco's reliance on 20.11.41.6 NMAC to buttress his Solid Waste Act argument is fatally flawed.

Appellee Carrasco combines 20.11.41.6 NMAC with the definition of air pollution and the authority to "prevent or abate air pollution" to argue that the Air Board's authority to protect quality of life is akin to the authority that the Supreme Court found in the Solid Waste Act in *Colonias*. Appellee Carrasco's reasoning is flawed.

In *Colonias,* the Supreme Court reasoned that solid waste rules requiring that a landfill pose, "neither a hazard to public health, welfare or the environment nor undue risk to property" and that it operate "in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment," together with the purpose of the Solid Waste Act and the Environmental Improvement Act meant that the Solid Waste Act was intended to protect general quality of life. *Colonias,* 2005-NMSC-024, ¶¶ 14-22. The Air Act and its rules do not lead to the same conclusion.

Unlike the Solid Waste Act, the Air Act has no overarching purpose of protecting public health, safety and welfare. To the contrary, even when the

Legislature authorized consideration of public health, safety or welfare, it has required consideration of competing factors. Even the definition of air pollution is qualified—it must be more than an emission that "tends to cause harm." *Duke City Lumber Co. v. N.M. Environmental Improvement Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291.

The Air Board has a mandate to "prevent or abate air pollution" by adopting rules, standards and plans. NMSA 1978, § 74-2-5(A and B). But when adopting its rules, the Air Board considers "interference with health, welfare, visibility and property," and economics and technical practicability. NMSA 1978, § 74-2-5(E).

Rules central to protecting public health (nonattainment and hazardous air pollutants) may be no more stringent than federal rules, even if a more stringent rule might better protect public health. NMSA 1978, § 74-2-5(C)(1 and 2). The Air Act's text demonstrates that the Legislature intended a more nuanced and balanced policy approach.

The only section where the Legislature required the Air Board to protect public health and safety is during a variance proceeding-- where, if it is granted, one or more rules will not be followed. NMSA 1978, § 74-2-8(A)(2). In that case, the Legislature imposed protection of health and safety as a minimum standard. *Id.* Other than variances, the Legislature required consideration of countervailing factors to develop a balanced approach to controlling air pollution.

It is correct that the objective of 20.11.41.6 NMAC is to prevent sources from causing air pollution after they are constructed, but the Air Board concluded that the Smith's Constitution and Carlisle gas station ("Carlisle Gas Station") would not violate Part 41. **[2 RP 990 FO ¶ 6(j) and amended COL 56]** It follows that Part 41's objective was met and the Carlisle Gas Station would not cause air pollution if Permit No. 2037-M1 were issued. The Air Board did not rely on achieving compliance with 20.11.41.6 NMAC as justification for its decision; it relied solely on its purported "mandate" in subsection 5(A) of the Air Act. Appellee Carrasco is offering a post-hoc rationalization which is not consistent with the Air Board's Final Order. His rationalization is factually and legally flawed and should be rejected.

C. This Court should overturn the Air Board's decision because the interpretation of the Air Act on which it is based will lead to absurd results.

The Air Act provides, among other things, that the Air Board "shall prevent or abate air pollution." NMSA 1978, § 74-2-5(A). Both Appellees Carrasco and Peña-Kues take this language out of context and suggest that it means that the Air Board may act to prevent and abate air pollution in an adjudicatory proceeding even if the activity alleged to cause air pollution meets all Air Board rules and standards. This interpretation leads to absurd results and must be rejected. *Cobb*, 2006-NMSC-034, ¶ 34.

1. The Air Board's interpretation evades the Legislature's mandate to the Air Board to consider competing policy interests when adopting rules to prevent or abate air pollution.

When the Air Board adopts rules, it is required to consider competing policy interests. In addition to considering public health, welfare and property, the Air Board is also required to consider the social and economic value of sources of air contaminants and the technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved, among other things. NMSA 1978, § 74-2-5(E); and ROA § 9-5-1-4(E). When the Air Board makes a decision about air pollution that has no nexus to its rules, it evades the balanced consideration that the Legislature intended. This is an absurd result caused by excising subsection 5(A) from the context of the Air Act as a whole and should be rejected. *Cobb,* 2006-NMSC-034, ¶ 34.

2. The Air Board's interpretation allows it to evade the Legislature's limitations on specific Air Board rules.

It is clear that neither the Legislature nor the City Council intended the Air Board to prevent or abate <u>all</u> possible air pollution. Beyond the balancing required during rulemaking, the Legislature and the City Council also imposed limits on rules in specific areas.

Key to the case before the Court, the Legislature and the City Council limited the Air Board's authority over hazardous air pollutants to rules which are

as stringent as but no more stringent than federal rules. NMSA 1978, § 74-2-5(C)(2); *see also* ROA § 9-5-1-4(C)(2). This limitation is important for gas stations because hazardous air pollutants may constitute 2-11% of the volatile organic compounds in gasoline vapors. **[2 RP 988 ¶ 5 and 2 RP 832 FOF 46-49]** The Environmental Protection Agency has adopted a federal standard known as "Hex C" to address hazardous air pollutants from gas stations. 40 C.F.R. Part 63 Subpart CCCCCC **[City's BIC 19-21]** Even if more stringent rules than Hex C would reduce more hazardous air pollutants, the Air Board may not adopt a more stringent rule. NMSA 1978, § 74-2-5(C)(2). If the Air Board's mandate allowed it to "prevent or abate air pollution" beyond its own rules, it would allow the Air Board to evade the Legislature's and the City Council's prescriptive limitations on certain rules. *See e.g.,* NMSA 1978, § 74-2-5(C). This is contrary to legislative intent, is an absurd interpretation and must be rejected. *Cobb,* 2006-NMSC-034, ¶ 34.

3. The Air Board's interpretation leads to ad hoc protection from air pollution and violates Air Act subsection 5(B).

The Air Board concluded in its Final Order that the Carlisle Gas Station was indirectly causing air pollution that risks public health. **[2 RP 990 FO ¶ 6(i-j) and amended COL 52 and 56]** If true, which the City disputes, the Air Board's conclusion leads to absurd results.

The text of this purported mandate to prevent or abate air pollution applies to the Air Board, not to the City. NMSA 1978, § 74-2-5(A). The City administers and enforces the Air Act, among other things, NMSA 1978, § 74-2-4(A)(2), but it is not tasked with the mandate in subsection 5(A). Thus, if there is additional air pollution to be prevented or abated after the Air Board's rules have been applied by the City during permitting, only the Air Board can address it.

The narrowness of this Air Board mandate conflicts with the breadth of its function. It does not become effective unless someone petitions for a hearing, alleges being adversely affected and successfully carries the burden of proof. NMSA 1978, § 74-2-7(H-K). Thus, the Air Board's interpretation would leave the central function of the Air Act, prevention and abatement of air pollution, dependent on a successful petitioner. It is implausible that the Legislature intended such an absurd result.

The Legislature intended to protect all of the citizens of New Mexico from air pollution – by a board adopting rules, plans and standards, NMSA 1978, § 74-2-5(A and B), which would be applied in permitting, NMSA 1978, § 74-2-7(C and L). A hearing would occur in that uncommon situation where a board's rules, plans and standards were not followed. This mechanism buttresses the Air Act's permitting section by empowering those adversely affected to require that rules, plans and standards be followed. NMSA 1978, § 74-2-7(H, I and L). The Air

Board erred by examining subsection 5(A) in isolation, rather than considering the Air Act as a whole. *Romero Excavation & Trucking, Inc. v. Bradley Construction, Inc.*, 1996-NMSC-010, ¶ 6, 121 N.M. 471 (statute should be examined in its entirety).

4. The Air Board's interpretation leads to an administratively unmanageable and unachievable result.

It also follows from the Air Board's interpretation that air pollution prevention and abatement requires an adjudicatory hearing for every permit since it is not being prevented and abated by following the Air Board's rules. The City's stationary source program covers numerous and ubiquitous sources like gas stations. As a result, the City issues many permits every year. [*See e.g.*, **8-22-12 2 Tr. 364:5-15; 8-23-12 3 Tr. 741:18-21**] The Legislature and the City Council did not intend and the City cannot administratively sustain a permitting system where air pollution can only be prevented or abated through an individual adjudicatory hearing for every permit.

Instead, the Air Act envisions that Air Board rules prevent and abate air pollution by the City applying them uniformly during permitting. This results in an efficient and manageable administrative process and obviates the need for a hearing for every permit. The Air Board's erroneous interpretation would require

an unmanageable and unachievable permitting scheme and should be rejected. NMSA 1978, § 12-2A-18(A)(3).

D. This Court should overturn the Air Board's decision because it was based on a general mandate to "prevent or abate air pollution" without a nexus to any rule or standard.

There is no dispute that the Air Board's decision lacked any reference to a discernible rule or standard. Notwithstanding Appellee Carrasco's reference to 20.11.41.6 NMAC, the Air Board concluded that all regulations and standards were met, **[2 RP 990 FO ¶ 6(j) and amended COL 56]**, yet it reversed the City's issuance of Permit No. 2037-M1.

Even if this Court were to conclude that the reasoning in *Colonias* applies generally to permitting under the Air Act, which the City disputes, *Colonias* concluded that the authority to address a quality of life issue required a nexus to a regulation:

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

2005-NMSC-024, ¶ 29.

Here, the Air Board admits there was no nexus to any regulation. **[2 RP FO ¶ 6(j) and amended COL 56]** Even if *Colonias* applies generally, which the City disputes, the Air Board's decision must be reversed. 2005-NMSC-024, ¶ 29.

Without any standard, any permitted activity can be said to cause undefined amounts of air pollution. As this Court has correctly said, "Every entity that applies for a permit or a modification will necessarily add emissions to the air; otherwise the entity would not qualify as a major or minor source and would not need a permit." Notice Proposed Summary Disposition at p. 3 (Aug 8, 2013). If the Legislature had limitless power to prevent or abate air pollution, it would be an unconstitutional delegation of power to an administrative agency because it would lack any standard. *Cobb,* 2006-NMSC-034, ¶¶ 36 and 40-45.

In the Air Act, the Legislature did not delegate limitless power - it required the Air Board to prevent or abate air pollution by adopting rules, standards and plans for which the Legislature provided adequate standards in subsection 5(E). In a permitting hearing, the Air Board prevents or abates air pollution by applying those rules, standards and plans. NMSA 1978, § 74-2-7(C)(1). Because there was no nexus to a regulation, the Air Board's decision must be reversed. *Colonias,* 2005-NMSC-024, ¶ 29.

E. This Court should reject Appellee Peña-Kues' contention that the Air Board was enforcing the initial Permit No. 2037 because it is contrary to the Air Board's Final Order and would have exceeded its authority in the Air Act and violated the Air Board's regulations.

Appellee Peña-Kues repeatedly contends in her Answer Brief that the Air Board was enforcing the original terms of Permit No. 2037. [*See, e.g.,* **Peña-Kues**

AB pp. 12-13] This rationale was not set forth in the Final Order of the Air Board and it is Appellee Peña-Kues' post-hoc rationalization offered to support the Air Board's ultra vires decision.

The Air Act does not delegate authority to the Air Board to enforce permit conditions or regulations. That authority is delegated to a local agency or to the Environment Department. *See, e.g.*, NMSA 1978, § 74-2-4(A)(2-3); NMSA 1978, § 74-2-5.1(B); and NMSA 1978, § 74-2-12(A). The Air Board has no enforcement role under the Air Act. Its decision, if it were an effort to enforce Permit No. 2037, which the City disputes, would exceed the authority delegated to it in the Air Act.

Appellee Peña-Kues also contends that the Air Board was applying 20.11.41.18(B)(1)(c) NMAC which authorizes permissible permit conditions about emission limits, among other things. Her rationale is incorrect. The subsection that she cites allows an emission rate as stringent as three possible emission rates, among them, the emission rate specified in the application.

In this case, the application at issue was the application for Permit No. 2037-M1 in which Smith's sought an increased emission limit. Subsection 20.11.41.18(B)(1)(c) NMAC does not allow either the City or the Air Board to impose an emission limit requested in an previous application that the Air Board admitted was not before it. [**2 RP 875 COL 29**] Moreover, the Air Board concluded that Permit No. 2037-M1, which incorporated the higher emission limit,

met all of Part 41. **[2 RP FO ¶ 6(j) and amended COL 56]** Thus, Appellee Peña-Kues' rationale is both legally and factually flawed and should be rejected.

F. The public participation authorized in the Air Act serves important and meaningful functions while upholding the rule of law.

Appellee Carrasco maintains that if the Air Board "cannot take into account the testimony, evidence and public comments presented by the community, what is left is a pro forma requirement for a public participation process that has no meaning and no relation to the actual permit decision." **[Carrasco AB 23]** Appellee Carrasco offers a false choice that this Court should reject.

The Legislature has provided meaningful and important opportunities for public involvement in the Air Act. In doing so, the Legislature was envisioning the traditional purposes of public involvement in a democratic government—fostering advocacy, promoting the rule of law and transparency. The public participation provided by the Air Act and conducted by the City is meaningful and in keeping with our nation's traditions.

The public participation process provided by the Air Act serves many important functions. First, public access promotes transparency and openness of government which are values protected by the First Amendment. *See New York Civil Liberties Union v. New York City Transit Authority,* 684 F.3d 286, 299-300 (2d Cir. 2012) (concluding that the First Amendment requires administrative

adjudicatory proceedings to be public). In turn, transparency and openness promote public confidence that the law is being followed and that rules are applied equally and impartially to all. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703 (6th Cir. 2002) (describing a "fair and open hearing" as essential to the validity of administrative regulation and to the maintenance of public confidence in its value and soundness).

Public participation serves an educational function. When the public participates in a permit hearing and learns that the rules are not as stringent as they wish, it empowers them to propose different rules as the Legislature allowed in Section 6 of the Air Act. These provisions do not guarantee citizens that air quality rules or the Air Act will be changed to their liking. Being empowered and informed to advocate knowledgeably for change is essential to participation in a democracy—it is not "meaningless."

The Air Act's public participation provisions also allow someone who is adversely affected by improper permitting of a facility to take an active role in persuading the Air Board that the City has failed to follow the Air Board's rules. This is similar to the Clean Air Act which allows a citizen to file suit to enforce rules, orders and permits. 42 U.S.C. § 7604. Such a power is not "meaningless."

On the other hand, the public participation provisions in the Air Act are not all powerful either. If they were, they would render the Air Board's requirement

for rules, standards and plans meaningless. NMSA 1978, § 74-2-5(B). There would be little purpose to rules if the Air Board could follow them or disregard them based on public input.

II. Conclusion

This is a case about statutory construction of the Air Act, not the Solid Waste Act. The Air Act applies to numerous and ubiquitous sources that justify a more streamlined public participation process than the process the Legislature required in the Solid Waste Act. The Legislature provided some public participation in the Air Act but it is narrower than what the Legislature required in the Solid Waste Act.

The Air Board cannot rely on its statutory mandate to "prevent or abate air pollution" to go beyond the protection that its own rules provide. To conclude otherwise allows the Air Board to evade prescriptive limitations imposed by the Legislature, causes absurd results and creates an administratively unmanageable process. The Air Board's decision had no nexus to any rule. For all of these reasons, its decision must be reversed.

This does not render the public participation process meaningless. Public participation in a democracy cannot trump the rule of law. Public participation means that the process will be transparent, that government officials may be required to defend their decisions in public, and, if rules or laws do not provide the

protection someone desires, people can participate and knowledgably advocate for different rules and laws. Public participation upholds the rule of law; it does not override it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing City of Albuquerque Reply Brief were served on the following by the method indicated on August 11, 2014.

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