

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

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

No. AQCB 2014-2

**TOLEDO’S RESPONSE IN OPPOSITION
TO SMITH’S MOTION TO DISMISS FOR LACK OF STANDING**

COME NOW Pat Toledo (“Toledo”), by and through undersigned counsel of record, and hereby submits his Response in Opposition to Smith’s Motion to Dismiss for Lack of Standing.

INTRODUCTION

Smith’s filed its motion to dismiss Toledo for lack of standing from this case on September 19, 2014. Toledo has statutory standing under the Air Quality Control Act (“AQCA”) and meets the required threshold elements of standing under the common law. Accordingly, respectfully submits that the Air Board should deny Smith’s motion for the foregoing and following reasons.

A. Standard of Review for Motion to Dismiss based on standing.

For purposes of ruling on Smith’s motion to dismiss based on an alleged lack of standing, all material allegations in the Petition for Hearing must be accepted as true and the Petition for Hearing must be construed in favor of the Petitioners. *Protection & Advocacy System v. Albuquerque*, 2008-NMCA-149, ¶17, 145 N.M. 156. In addition, the Board should allow

additional evidence from the Petitioners in support of standing. *Id.* If, after providing the Petitioners with the opportunity to add evidence to the record, the Petitioners' standing "does not adequately appear from all materials in the record," only then may the Petition for Review be dismissed. *Id.*

B. Toledo is adversely affected by the refusal of the Environmental Health Department ("EHD") to give weight to his threatened quality of life concerns at the April 3, 2014 Public Information Hearing ("PIH") as alleged.

In the Petition for Hearing, Toledo states,

"Petitioner Pat Toledo's 94-year-old father, Joe Toledo, resides at 3232 La Ronda NE, close to the property on which Smith's proposes to construct the fuel dispensing station. Pat Toledo provides regular assistance and care for his father, is regularly in the area of the proposed fuel dispensing station and is concerned regarding the impact of the fuel dispensing station on his father's property and quality of life.

Each of the Petitioners participated in the April 3, 2014 Public Information Hearing (PIH). Each of the Petitioners are adversely affected by the permitting action because the Air Program refused and failed to take into consideration quality-of-life concerns raised by the participants at the PIH. In addition, each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station at the proposed location." *Id.*, p. 2.

Toledo further states,

"The purpose of regulatory provisions regarding public notice and hearings is to ensure that persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 21, 138 N.M. 133. The New Mexico Supreme Court has recognized that "the public plays a vital role" in an administrative environmental permitting process and must be allowed a reasonable opportunity to be heard. *Id.* Pursuant to the *Colonias* decision, adverse impacts on a community's social well-being and quality of life may be raised during public hearings concerning permit applications and the final decision maker must take such concerns into consideration when deciding whether to approve or deny a permit. *Id.* at ¶24. Quality of life issues may include concerns about public health and welfare and other impacts on the community not addressed by specific technical regulations. *Id.* Such concerns may also include impacts on private property. Adverse public testimony, whether in the form of technical testimony or public comment, must be taken into account when reaching a final decision. *Id.* at ¶¶24, 41, 43. The New Mexico Supreme Court specifically found that the hearing officer was

incorrect in stating that the only determination to be made was whether the permit application met the technical requirements of the regulations. *Id.* at ¶¶7, 8, 24.

The Air Quality Board has already held, in regard to Smith's Permit No. 2037-M1 for the Smith's fuel dispensing station located at 1313 Carlisle Blvd. NE, Albuquerque, NM, that the Air Quality Act and regulations require permitting decisions to take into account quality-of-life issues. The Air Quality Act mandates that the Board "shall prevent or abate air pollution." NMSA §74-2-5. In addition, Part 41 of the Air Quality Control Board Regulations, which governs authority to construct permits, states that the objective of the part "is to insure that new facilities or modified existing facilities will not emit air pollution, which will cause violations of air pollution control regulations upon operation following construction. This procedure will protect the source owner's investment as well as uphold public concern and desire for input prior to commencement of air pollution sources in Bernalillo County." 20.11.41.6 NMAC. The Air Quality Act and the Board's regulations, as well as the Board's decision in the Carlisle permitting matter, clearly express that the issuance of permits must be made in the context of impacts to public welfare and the reasonable use of property." *Id.* pgs. 3-4.

The question raised by Smith's Motion to Dismiss is whether Toledo qualify as a person who is "adversely affected" by the Department's decision in issuing Permit No. 1677-M2. 72-2-7(H) NMAC; 20.11.81.2 NMAC (Air Quality Control Board Adjudicatory Procedures). Smith's concedes Toledo does so qualify in its motion when it states,

"Complainants who wish to challenge a permit decision must meet two criteria in order to have standing under the Act: (1) they must have participated in the permitting action, and (2) they must be adversely affected by the permitting action.... As explained below, Toledo cannot meet the second factor of being adversely affected." Motion, pgs. 5-6.

Neither the New Mexico Air Quality Act nor the Air Quality Control Board regulations define the term "adversely affected by the permitting action." But the Air Board provided guidance when it found Toledo had standing under *In Re Air Quality Permit No. 1677-M2*. There has not been a final ruling by the New Mexico appellate courts on the meaning of "adversely affected" as the term is used in a number of statutory provisions, including the Air Quality Act. The New Mexico Court of Appeals recently issued a decision interpreting similar language in the Water Control Act, which is being reviewed by the New Mexico Supreme Court. *New Mexico Cattle Growers' Assoc. v. NMWQCC, et al.*, 2013-NMCA-006; *certiorari granted*

March 29, 2013, No. 34,010. The Court of Appeals analogized the “adversely affected” requirement to the injury-in-fact requirement of standing, which is also the approach taken by Smith’s.

The question of whether a party is “adversely affected” by agency action does not go to the merits of the petition for review but to the question of whether the party requesting review has a “genuine and legitimate interest” in the outcome of the issue being reviewed. *De Vargas Sav. & Loan Ass’n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1323 (S.Ct. 1975)(“the purpose of the standing question is quite distinct-to protect against improper plaintiffs”). The focus is on the party seeking to get his complaint heard, not on the issues that are to be decided by the appeal. *Id.* A petitioner challenging governmental action need only “allege that he is injured in fact or is imminently threatened with injury, economically or otherwise.” *Id.* at 473 (emphasis added).

Once the party seeking review alleges that he is, or will be, adversely affected by the agency action, the extent of injury can be very slight. *Id.* at 472; *ACLU of New Mexico v. City of Alb.*, 2008-NMSC-045, ¶11, 144 N.M. 471. “An identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.” *Ramirez v. City of Santa Fe*, 115 N.M. 417, 420, 852 P.2d 690 (quoting *United States v. SCRAP*, 412 U.S. 669, 689-90, 93 S.Ct. 2405 (1973)). In the SCRAP case, five law student protesters sued to contest the Interstate Commerce Commission’s decision not to suspend a surcharge on certain freight rates. *Id.* As the New Mexico Court of Appeals explained, “the attenuate harm the plaintiffs alleged, which was sufficient to fulfill the federal injury in fact requirement for standing, was simply that the rate increase would cause economic, recreational,

and aesthetic harm due to an increase in the use of non-recyclable goods. This in turn would negatively impact upon the environment.” *Id.*

The injury does not have to be an economic injury but can be aesthetic and environmental well-being, which are recognized as “important ingredients of the quality of life in our society, and the fact that such interests are shared by the many rather than the few does not make them less deserving of legal protection.” *De Vargas*, 87 N.M. at 474; *Ramirez*, 115 N.M. at 421 (the injury in fact or imminent threat of injury can include concerns about increased traffic, crime, pollution, detrimental effects on aesthetics of an area, intensification of traffic hazards at street intersections, changes in the nature of a neighborhood). Similarly, the right to public participation in governmental permitting actions is recognized as important by both the Legislature and the Courts and, like aesthetic, quality of life, and environmental concerns, is deserving of legal protection. *See Colonias Dev. Council v. Rhino Environmental Services*, 2005-NMSC-024, ¶¶2, 21, 138 N.M. 133; *Martinez v. Maggiore*, 2003-NMCA-043, ¶15, 133 N.M. 472.

In *Martinez v. Maggiore*, residents of Wagon Mound appealed a final order from the Secretary of the New Mexico Environment Department (NMED) granting a modification to the an existing landfill permit. 2003-NMCA-043, ¶15, 133 N.M. 472. The basis for the appeal was improper notice. On appeal, NMED claimed that the community members lacked standing because they had not shown that they were “adversely affected” by the Landfill’s failure to properly publish notice. In holding that the community members had standing, the Court of Appeals stated that the Solid Waste Act “reflects a Legislative policy favoring involvement of the general public in the permitting process” and that “this policy was frustrated by the Landfill’s failure” to provide proper notice. *Id.* The Court found that the appellants were proper persons to

raise issues of public notice because (1) they had shown how their quality of life as residents of Wagon Mound would be adversely affected by the permitting action; (2) the appellants and the absent opponents of the Landfill (who were absent because of the failure to provide proper public notice) “share an important interest in insuring that modifications to Landfill’s permit do not adversely affect the quality of life in Wagon Mound; (3) the absent opponents of the application were hindered in participating in the permitting process because of the failure to provide proper public notice. The Court found that the appellants had standing to assert that the Landfill did not provide proper public notice. *Id.* at ¶19.

In order to determine standing, the Board is required to focus on Toledo and not on the substance of his petition. The specific injury alleged in this matter is the failure of the Air Program to give any weight to the negative cumulative impacts the proposed fuel dispensing station would have on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area at the PIH held April 3, 2014.

As stated in the Petition,

“The Air Program’s refusal to take into consideration issues regarding quality of life, public health, impacts to private property and impacts to the community is inconsistent with the holding in *Colonias*, with the applicable statutes and regulations, and with the Board’s decision in the Carlisle permitting matter. “Duly noting” the concerns raised by the public is insufficient.” *Id.* p.6.

Further discovery in the case shows that Toledo visits and provides care, and companionship for his 94-year old father four times per week which includes attending to daily living, health and home care assistance, running errands, and transportation to appointments. Mr. Toledo’s father does not drive and is dependent on Mr. Toledo for assistance and the routes to and from his father’s house vary depending on what they are doing but they regularly travel through the

intersection of Montgomery and Louisiana. **Exhibit 1**—discovery responses (abridged), *attached*.

The discovery shows that Toledo, like his father, “is likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith’s fuel dispensing station at the proposed location” and as alleged in the Petition. p.2. the conclusion follows from his regular presence in the neighborhood which is proximately located to the intended gas station. Thus, Smith’s claims of lack of concrete injury are without merit as it is established that threatened injury “however slight” is enough to satisfy standing. *De Vargas Sav. & Loan Ass’n v. Campbell*, 87 N.M. 469, 472-473, 535 P.2d 1320, 1323 (S.Ct. 1975); *ACLU of New Mexico v. City of Alb.*, 2008-NMSC-045, ¶11, 144 N.M. 471.

The claims in the case are different from Toledo’s assertion of standing found in *In Re Air Quality Permit* No. 1677-M2. Motion, p. 8. However, the Air Board should determine Toledo has standing simply as a citizen of Albuquerque which is not waived in this action.

Smith’s argues that Toledo does not have standing because “his home address is four miles away from the subject neighborhood and that his father’s address is purportedly outside the relevant vicinity of elevated vehicle emissions as defined by technical witness Dr. Rowangould. Motion, pgs. 3-4. Smith’s does not cite to any statutory or regulatory provision in support of limiting standing to a given mile radius or any other geographical area. In fact, by attempting to limit standing to persons who either own property or live within a specific geographical area, Smith’s is relying on the older, formulistic notion that standing requires the invasion of a “legally protected interest,” which was rejected in *De Vargas Sav. & Loan Ass’n v. Campbell*, 87 N.M. 469, 471, 535 P.2d 1320, 1323 (S.Ct. 1975). *ACLU of New Mexico v. City of Alb.*, 2008-NMSC-

045, ¶11, 144 N.M. 471. The Court in *Ramirez* reiterated that the standing requirements set forth in *De Vargas* apply to any claims “arguing the unlawfulness of governmental action.” 115 N.M. at 421. “There is no presumption against judicial review and in favor of administrative absolutism...unless that purpose is fairly discernible in the statutory scheme.” *Id.* (quoting *De Vargas*, 87 N.M. at 473). In this case, both NMSA §74-2-7.H 20.11.81.2 NMAC demonstrate the intent that the participants in the permitting action be able to obtain review by the Board of the Department’s action.

The possible adverse effects that Toledo has identified that may result from the permitting action are more than the “identifiable trifle” that is required for standing. Interestingly, Smith’s states that “there is no hindrance to the ability of any citizen of Albuquerque who participates in a permitting action to challenge the issuance of a minor stationary source permit such as Permit No 3135.” Motion, p 9. Based on this statement alone, Mr. Toledo has standing, as citizens of Albuquerque, to challenge the issuance of Permit No. 3135, which he has done. Additionally, Toledo has been adversely affected by the permitting action in this matter and more than meets the minimal requirements for showing an injury in fact. Therefore, Smith’s Motion to Dismiss must be denied.

D. The Petitioners will provide testimony and other evidence in support of their standing at the dispositive motion hearing scheduled for September 8, 2014.

The Board has scheduled to hear Smith’s Motion to Dismiss on September 8, 2013. As stated in *Protection & Advocacy System v. Albuquerque*, the Petitioners should be given the opportunity to supplement the record in support of their standing. The Petitioners may present testimony and evidence at the September 8, 2013 hearing, including direct testimony by Mr.

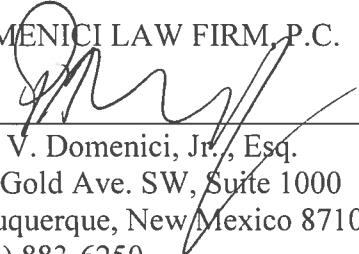
Toledo. The Petitioners may also call representatives of Smith's and the City as witnesses. Petitioners incorporate by reference the NOI and supplemental discovery filed in this matter.

CONCLUSION

WHEREFORE, for all the foregoing facts, circumstances and authorities, Toledo respectfully request that the Board deny Smith's Motion to Dismiss for lack of Standing.

Respectfully Submitted,

DOMENICI LAW FIRM, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing with attachments was e-mailed to counsel for the City of Albuquerque and Smith's Food & Drug Centers, Inc. on the 3rd day of October, 2014.

I further certify that a true and correct copy of the same was e-mailed to the Hearing Officer and that requisite hard copies of the same were hand delivered to the hearing clerk on October 3, 2014.



Pete V. Domenici, Jr., Esq.

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

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

INTERROGATORIES

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

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



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

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

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

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

ANSWER: Petitioner Toledo objects to subparts 3 and 4 of Interrogatory No. 3 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. The specific impacts alleged include, but are not limited to, odors, increased air pollution, increased traffic and congestion and cumulative effects that may result from adding a large GDF that will necessarily attract more traffic to an already congested area. The proposed GDF has not yet been built so there is no existing direct evidence of the impacts from the GDF. However, as Mr. Toledo will testify at the hearing, he is familiar with the impacts resulting from the Smith's GDF located at Carlisle and Constitution and it is reasonable to expect that similar impacts will occur from the proposed GDF at the Montgomery and Louisiana location.

Interrogatory No. 4: With regard to the allegation on page 2 of the Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, state: (1) what specific concerns EHD allegedly failed to consider and, (2) if petitioners contend that EHD's consideration of those concerns should have led to a denial of Permit No. 3135, state the specific factual and legal bases for that contention.

ANSWER: EHD, in the letter of April 30, 2014, stated: "Before the Department made a decision regarding Smith's application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health, and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over particular issues." EHD's refusal to consider the public comments in

opposition to the GDF, and the issues raised by the public, as identified in the EHD letter, in determining whether to issue the permit is contrary to the decision of the Air Quality Board in the Carlisle case, AQCB 2012-1 and 2012-2 and to the requirement to fully consider public comments regarding quality of life issues set forth in *Colonias Dev. Council v. Rhino Enviro. Services*, 2005-NMSC-024, 138 N.M. 133. The issues raised by the public include increased VOC emissions, odors, fumes, impacts to the children attending Cleveland Middle School, which is directly south of the proposed location, traffic increases and the cumulative effect of building a large-scale GDF at the proposed location.

Petitioner Roberts further states that adding a third gas station plus the emissions testing business at this intersection will increase the VOCs, emissions, odors and fumes. EHD did not consider the impact on Cleveland Middle School, the dental complex, the Church, the shopping centers, and the people, both children and adults, who will be exposed to the increased emissions and traffic conditions that will result from the proposed GDF.

See Answer to Interrogatory No. 10.

Interrogatory No. 5: With regard to the allegation on page 2 of the Petition that “each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the [Montgomery GDF],” please state: (1) the specific factual basis for the allegation, (2) what specifically are the “other negative impacts” to which Petitioners refer, and (3) every statute or regulation supporting Petitioners’ contention that any of these alleged impacts should compel reversal or revocation of EHD’s issuance of Permit No. 3135.

ANSWER: Petitioners Margaret Freed and Mary Ann Roberts own property in the immediate vicinity of the proposed GDF location and will be adversely affected by the identified

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**PETITIONERS' SUPPLEMENTAL RESPONSES TO SMITH'S INTERROGATORIES,
REQUESTS FOR ADMISSIONS**

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

INTERROGATORIES

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

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

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

Without waiving this objection, Petitioners supplement (pursuant to Petitioner's August 8, 2014 filed NOI):

- 1) the direct vehicle emission is a function of number of vehicles entering and exiting the station and the degree to which their entry and exit slows traffic on adjacent streets. Applied to the specific permit of annual throughput of 7,000,000 gallons vs. the typical permit of annual throughput of 1,000,000, greater number of vehicles exiting and entering the Smith's gas station is expected to cause greater emissions from those vehicles and from other vehicles experiencing delays on adjacent streets. As a result, elevated levels of pollutants that are linked to health impacts increase the risk of respiratory inflammation, including asthma and related lung/ breathing disorders, non-fatal heart attacks, increased risk of cancer, premature death due to pre-existing conditions, and other neurophysiological symptoms among other health effects.

The elevated levels of pollutants of concern include carbon monoxide, nitrogen oxide, and toxic air pollutants including some volatile organic compounds and increased particulate matter.

- 2) Vapor losses which are not captured contain volatile organic compounds. Although the Smith station allows for "Stage I" recovery, the station is not required to have a "Stage II" vapor recovery at the pump, thus older vehicles without onboard vapor recovery systems will likely emit VOCs from the gas tanks into the air. Vapor losses are associated with health risks, and particularly the release of benzene is determined to elevate cancer risk among other health effects. Applying the quantitative study (South Coastal Air Quality Management District (CA), increased cancer risk is multiplied by a factor of 7 under the Smith permit.
- 3) Location of potential receptors are identified near the Smith's gas station on the basis of available data, including aerial imagery. These receptors include homes, and at least one school. Distance of receptors relevant to the Smith's station is a key factor in determining health impacts from vehicle pollution. Health risks from vehicle pollution/emissions are greater on vulnerable populations that include children, elderly, and people with respiratory conditions.

In conclusion and in light of the above technical testimony supported by the reliance materials attached to the NOI, Dr. Rowangould (intended witness providing technical testimony) recommends additional analysis be conducted to ensure potential air quality and health impacts associated with the proposed Smith's fueling station are better understood. If impacts are found to exceed acceptable levels on the basis of regulations,

increased health risks and community sentiment then mitigation and or other alternatives should be explored.

Please note that supporting reliance materials and other exhibits were previously provided to counsel on August 8, 2014 under cover of Petitioner's submitted NOI.

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

ANSWER: Petitioner Toledo objects to subparts 3 and 4 of Interrogatory No. 3 in that it requests information that will be provided pursuant to the Notice of Intent to Present Technical Testimony. The specific impacts alleged include, but are not limited to, odors, increased air pollution, increased traffic and congestion and cumulative effects that may result from adding a large GDF that will necessarily attract more traffic to an already congested area. The proposed GDF has not yet been built so there is no existing direct evidence of the impacts from the GDF. However, as Mr. Toledo will testify at the hearing, he is familiar with the impacts resulting from the Smith's GDF located at Carlisle and Constitution and it is reasonable to expect that similar impacts will occur from the proposed GDF at the Montgomery and Louisiana location.

Without waiving this objection Petitioners supplement and refer Smith's to its supplemental response to Rog. # 1, above.

Please note that supporting reliance materials and other exhibits were previously provided to counsel on August 8, 2014 under cover of Petitioner's submitted NOI.

Interrogatory No. 7: Do Petitioners contend that any applicable law prohibits the construction or operation of more than two gas stations at a single intersection in Albuquerque or in Bernalillo County? If so, please identify any such law.

ANSWER: The Petitioners object to Interrogatory No. 7 in that it requests a legal conclusion, which is not the proper subject of interrogatories. In addition, the Petitioners have not made any such claims and that is not the basis for the Petition for Hearing before the Board. *See Answer to Interrogatory No. 4.*

Without waiving these objections Petitioners further supplement and object that Interrogatory No. 7 is not relevant. Without waiving the foregoing objections, Petitioners state that the *Carlisle* decision Air Quality Control Board Nos. 2012-1 and 2012-2 indicates secondary impacts and other evidence to determine no detriment to the public is relevant to the application of any regulatory or statutory regime that may permit construction of gas stations. Further, city planning investigation, guidance, zoning, other study, research and review protocol can provide a reasonable basis to not construct or operate more than two gas stations at a single intersection in Albuquerque or in Bernalillo County.

Interrogatory No. 9: With regard to the allegation on page 5 of the Petition that the “construction of the [Montgomery GDF] will result in significantly increased traffic, which will cause an increase in air pollution[,]” please identify: (1) the specific factual basis for the allegation, (2) all witnesses and exhibits petitioners will present at the Hearing in support of the allegation, and (3) if petitioners contend that an actual or potential increase in traffic from mobile sources, such as motor vehicles, can be a basis for denying an application for a minor stationary source permit, all legal authority supporting that contention.