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

Margaret Freed, Mary Ann Roberts,
Pat Toledo, Petitioners

No. AQCB 2014-2

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

Summary judgment is available in this proceeding and is an appropriate means for deciding the merits of this case. Specifically, the Board can dismiss the Petition as a matter of law because the undisputed facts demonstrate that the emissions authorized by Permit No. 3135 will "meet applicable local, state and federal air pollution *standards and regulations*[.]" Section 74-2-7(L) (emphasis added). Petitioners' response fails to demonstrate any genuine issue of material fact that could lead the Board to conclude otherwise.

Rather than identifying genuine factual disputes, Petitioners assert several erroneous legal arguments. This greatly simplifies the Board's task in evaluating and deciding summary judgment. The question before the Board is no longer whether there is a genuine dispute of material fact (there is none). The question is whether the Board may look beyond its existing standards when adjudicating a challenge to a permit that EHD issued in accordance with those standards. New Mexico law is clear that the answer is no; the Board has limited authority under the Air Quality Control Act ("Air Act") and must follow its own standards. There are avenues such as rulemaking for

Petitioners to seek to change those standards, but an adjudicatory permit appeal is not one of them.

This becomes especially clear when considering the type of evidence Petitioners propose to offer at a full hearing on the merits. Petitioners seek to offer the testimony of Dr. Rowangould, who merely concludes that further study is needed "to ensure that the potential air quality and health impacts associated with the [Montgomery GDF] are better understood." Exhibit 1 to Petitioners' NOI at 4. Nothing in the Board's existing regulations governing GDF air permits establishes a regulatory framework based on alleged health impacts, much less a requirement to perform an undefined health impact analysis for a GDF that is not yet even constructed. The Board has never promulgated such a rule and it is not positioned to do so in this adjudicatory proceeding. Rather, the New Mexico Legislature and the Board have chosen to protect public health through adoption of performance standards such as those set forth in Hex C. Both Smith's and the City have shown that Permit No. 3135 was issued in accordance with those standards and both are therefore entitled to judgment as a matter of law.[1]

Petitioners completely ignore the applicable standards and instead advance the following erroneous legal arguments: (1) summary judgment is not available in these proceedings, (2) federal law does not preempt the Board from reversing the issuance of Permit No. 3135, (3) the Board can rely upon its rulemaking authority in reviewing EHD's permitting decisions in an adjudicatory proceeding like this one, (4) the Board's decision in the Smith's Carlisle case is somehow binding precedent, and (5) Petitioners' proposed technical testimony has a nexus to the Board's rulemaking authority. As

[1] Smith's concurs with and incorporates by reference the City's Motion for Summary Judgment and supporting Reply Brief.

explained below, these arguments are without merit and the Board should therefore dismiss the Petition with prejudice.

ARGUMENT

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

"The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party has competent evidence to support his pleadings." *Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶ 4, 105 N.M. 681, 736 P.2d 135. Summary judgment "serve[s] a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims." *Id.* (quoted authority omitted). Summary judgment in the present case will serve this important purpose because none of Petitioners' evidence demonstrates that Permit No. 3135 "will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L).

The Board's adjudicatory procedures contemplate the use of dispositive motion practice, such as summary judgment, in several ways. First, the Board's adjudicatory procedures provide that the New Mexico Rules of Civil Procedure (including Rule 1-056 NMRA concerning summary judgment) may be used in the absence of a specific provision in 20.11.81 NMAC. *See* 20.11.81.12(A) NMAC. Second, the Board's procedures provide that the Board or a Hearing Officer "may specify procedures in addition to, or that vary from the procedures provided in 20.11.81 NMAC *in order to expedite the efficient resolution of the action* or to avoid obvious injustice, if the procedures do not conflict with the [Air Act] or the [Board's] regulations, or prejudice the

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

2. Smith's Undisputed Material Facts Should Be Deemed Admitted Because Petitioners Fail To Controvert Them Specifically.

Rule 1-056(D)(2) provides that "[a]ll material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted." Petitioners' statement of disputed material facts does not specifically controvert any of the facts set forth in Smith's statement of undisputed material facts. Response Brief at 5-6 (¶¶ 1-7). Rather, Petitioners advance arguments about the significance of the facts, which is insufficient to meet their burden under Rule 1-056(D)(2). Each of the undisputed material facts set forth in Smith's motion for summary judgment is fully supported by citation to the record and to the exhibits attached to the motion. The Board should deem these facts admitted.

3. Petitioners' Preemption Argument Is Misplaced.

Petitioners set up and knock down a straw man by arguing that Smith's and the City fail to establish federal preemption in this case. Response Brief at 1, 11-12, 14. Neither Smith's nor the City asserts that federal law preempts the Board's regulations. Smith's relies exclusively on New Mexico law as set forth in the Air Act and in the

Board's existing regulations, some of which adopt relevant federal regulations such as Hex C. *See* 20.11.64.12 NMAC (incorporating Hex C by reference). The performance-based approach to regulation of GDF emissions is therefore a policy choice of the federal EPA *as well as* the New Mexico Legislature and the Board.

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

The Air Act and the Board's regulations establish why the Board should reject Petitioners' effort to conflate the Board's rulemaking function with its adjudicatory function. Rulemaking is the process by which the Board articulates and codifies the standards that are applicable to air quality permitting and that are to be applied uniformly within the Board's jurisdiction. *Cf. Smith v. Bd. of County Comm'rs*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496 ("Owners have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all."). This process requires enhanced notice so that the public, including the regulated community, can have input regarding a range of considerations that the Board must balance. *Compare* 20.11.82.19 NMAC (requiring the Board to give notice of a rulemaking proceeding through a variety of media and "as the [B]oard may direct") *with* 20.11.41.14(A)(3) NMAC (2002) (requiring EHD to give notice of a Part 41 permitting action by publication in a local newspaper); *also compare* Section 74-2-6(C) (requiring notice of rulemaking by publication "in a newspaper of general circulation in the area affected") *with* Section 74-2-7(B)(5) (granting the Board discretion to specify "the public notice, comment period and public hearing, *if any*, required prior to the issuance of a permit[.]") (emphasis added). The scope of public input at the rulemaking stage is expansive; it includes, among several other things, the

potential impact on public health and welfare and the economic feasibility of the proposed regulation. Section 74-2-5(E); 20.11.82.32(A) NMAC.

Once the Board establishes the rules through the rulemaking process, the Board need not and cannot expand or limit the rules in an adjudicatory proceeding such as a permit appeal. The Board's focus in a permit appeal is whether the source "will or will not meet applicable local, state and federal air pollution standards and regulations[.]" Section 74-2-7(L). Accordingly, the Board must apply the rules it has adopted and upon which EHD and the permit applicant have reasonably relied. This is why Section 7 of the Air Act, which governs permits, and the Board's permitting regulations in Part 41 establish bases for permit denial that are framed in terms of compliance with existing standards and not in terms of broad considerations like public health and welfare. Section 74-2-7(C); 29.11.41.16 NMAC (2002). Considerations of public health and welfare have already been incorporated into the rules during the rulemaking process.

Provisions of the Air Act and the Board's regulations governing variances underscore this point. A request for a variance is a request for an exception to the rules, which could negate the protections for public health that are incorporated into the rules. Thus, unlike Section 7 of the Air Act (which authorizes the permit hearing requested here), Section 8 *does* enable the Board to consider whether the granting of a variance will, among other things, "result in a condition injurious to health or safety[.]" Section 74-2-8(A)(2)(a). Section 8 also requires the Air Board to consider "the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public." Section 74-2-8(B); 20.11.7.12(B)(8) and .16(M)7 NMAC. The New Mexico Supreme Court has held that these considerations in a

variance proceeding are limited by the definition of "air pollution" set forth in Section 74-2-2(B), which requires a showing of a "reasonable probability" of harm. *Duke City Lumber Co. v. NM Envtl. Imp. Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291, 681 P.2d 717. Petitioners acknowledge that Smith's did not seek a variance in this case and that the Board's variance procedures do not apply. Response Brief at 7 (¶ 18), 20.

Petitioners nevertheless repeatedly cite to portions of the Air Act concerning the Board's rulemaking authority in an effort to broaden the scope of relevant public input in this adjudicatory permit appeal. Petitioners' efforts to conflate rulemaking with permit adjudication fly in the face of the canons of statutory construction Petitioners cite in their response brief. Specifically, petitioners encourage the Board to follow the plain language of the Air Act and to give persuasive weight to longstanding construction of statutes by the agency charged with administering them. Response Brief at 12. The plain language of the Air Act shows that the Legislature contemplated broad inquiries regarding public health and welfare in the rulemaking and variance sections, but not in the permitting section, which expressly frames the bases for permit denial in terms of standards. With regard to EHD's longstanding interpretation of the Air Act, it is undisputed that EHD has consistently applied the existing, performance-based GDF air quality permitting regulations. Smith's UMF No. 8. There is no evidence that EHD has ever required a health impact analysis as Petitioners suggest doing here. Accordingly, there is no basis in the Air Act for the Board to hear the evidence and testimony the Petitioners are proposing.

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

Petitioners claim that the Board's decision in the Smith's Carlisle case, Docket Nos. 2012-1 and -2, is binding precedent or at least persuasive authority. Response Brief at 2-3, 13-16. It is neither. Petitioners point to no authority that requires the Board to follow the approach it took in the Smith's Carlisle case or that prevents the Board from abandoning it. With all due respect to the Board, the Carlisle decision is not persuasive authority and the Board should decline to follow it in this case.

First, the Carlisle decision was the result of a divided vote that initially did not even garner the majority of Board members present at the Board's February 13, 2013 meeting. Second, the Board's decision was contrary to the advice of its own counsel and the Hearing Officer's recommendation; both suggested that the Board was exceeding its authority by reversing the issuance of Permit No. 2037-M1 despite concluding that the permit met all applicable standards and regulations. Third, the Court of Appeals initially proposed to summarily reverse the Board's decision precisely because of its failure to reference a discernible standard. Although the appeal was later assigned to the general calendar, this initial proposed ruling casts serious doubt on the continuing viability of the Board's decision.

Perhaps more importantly, the Carlisle decision provides no guidance in this case. The Board did not specify in its final order how the increase in throughput allowed by Permit No. 2037-M1 would "contribute indirectly to increased air pollution" and would "increase risks to public health[.]" Exhibit 2 to Response Brief at 4 (¶¶ i-j). The Board mentioned its "interest in minimizing air pollution caused by vehicles," *id.* at 3 (¶ b), but did not specify how much traffic at the already constructed and operational Carlisle GDF

would be too much. Put simply, there are no standards that can be gleaned from the decision that could be applied in this case. The Board should decline Petitioners' invitation to follow the Carlisle decision in this case and instead should rely on the standards it has appropriately adopted and codified through the established rulemaking process.

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

Petitioners' reliance on *Colonias Dev. Council v. Rhino Envtl. Servs.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, a case construing the Solid Waste Act and its related regulations, is misplaced. The Court in *Colonias* specifically held that an agency's authority to address community concerns "requires a nexus to a regulation" and that the agency in that case "must consider whether lay concerns *relate to violations of the Solid Waste Act and its regulations*." 2005-NMSC-024, ¶¶ 24, 29 (emphasis added). The Court observed that to conclude otherwise would "offer no guidance to the [agency]," and would "violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency." *Id.* ¶ 29. The Court held that the applicable solid waste regulations specifically required the Environment Department to consider whether the proposed landfill would cause a public nuisance or create a potential hazard to public health, welfare or the environment, which could encompass the nearby community's quality of life concerns. *Id.* ¶¶ 30-32. *Colonias* therefore stands for the proposition that the role of public input is to ensure that government agencies follow, rather than circumvent, applicable regulations when making permitting decisions.

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

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

Smith's agrees that Dr. Rowangould's testimony, and even Petitioners' proposed non-technical testimony, would be appropriate for a rulemaking proceeding. The testimony is not appropriate in a permit appeal, such as in this case, because it lacks a nexus to an applicable permitting standard as required under *Colonias*. The Board should therefore grant Smith's motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Motion for Summary Judgment was served on the following parties, counsel and other individuals by the method indicated:

The original of the Reply was filed with the Hearing Clerk in this matter along with nine copies, all of which were delivered to the Hearing Clerk by hand delivery.

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By