

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

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

AQCB No. 2014-4

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

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**ENVIRONMENTAL HEALTH DEPARTMENT'S
REPLY IN SUPPORT OF OPPOSED MOTION FOR DISCOVERY**

I. INTRODUCTION

The Environmental Health Department (EHD) files this reply in support of its motion for an order allowing the service of discovery on Petitioner Southwest Organizing Project ("SWOP"). The discovery is reasonably calculated to lead to the discovery of admissible evidence regarding SWOP's "San Jose Bucket Brigade," which collected and analyzed volatile organic compound and particulate air quality samples in the San Jose neighborhood. SWOP relies on the Bucket Brigade data to meet its burden to prove that the Honstein facility, alone or in conjunction with other sources, is causing air pollution in the San Jose neighborhood.

Discovery is critical to the fair resolution of a dispute on its merits. *Sandoval v. Martinez*, 109 NM. 5, 8, 780 P.2d 1152, 1157 (N.M.App. 1989) ("The essential purposes of discovery [are] to insure full access to information to make fair the process of judicial resolution

of disputes on their merits"). A party in discovery may "obtain any information which is relevant to the subject matter involved in the pending action." NMRA 1-026(B).¹ The information itself need not be admissible if it is "reasonably calculated to lead the discovery of admissible evidence." *Id.* A party's right "to examine [another party] fully and exhaustively...is fundamental to our system of jurisprudence." *Marchiondo v. Brown*, 98 N.M. 394, 397, 649 P.2d 462, 465 (N.M. 1982). To this end, "the scope of discovery should be broadly and liberally construed to achieve the full disclosure of all potential relevant information." *Sanchez v. Matt*, 229 F.R.D. 649, 654 (D.N.M. 2004); *Hickman v. Taylor*, 329 U.S. 495, 501 (1974) (the scope of discovery must be broad to ensure that the parties can obtain "the fullest possible knowledge of the issues and facts before trial"). These principles "apply equally in the administrative context." *Redman v. Board of Regents of New Mexico School for Visually Handicapped*, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (N.M.App. 1984) (discovery is essential "to eliminate surprise and allow for full preparation of a case").

A discovery request is relevant "if there is any possibility that the information sought may be relevant to the claim or defense of any party." *Zuniga v. Bernalillo County*, Civ. No. 11-877 RHS/ACT, at 4 (D.N.M. 2013) (internal citation omitted). Here, the requested information bears directly on the Bucket Brigade, a key piece of evidence cited by SWOP to support its

¹ In conducting the hearing, the Air Board and the hearing officer "look to the New Mexico Rules of Civil Procedure, NMRA 1-001 *et seq.* and the New Mexico Rules of Evidence, NMRA 11-101 *et. seq.*, for guidance." 20.11.81.12(A) NMAC.

allegation that there are unsafe levels of air pollution in the San Jose neighborhood. Specifically, SWOP compares the Bucket Brigade data to federal standards to support its allegation that the Honstein facility, alone or in conjunction with other sources, is causing air pollution. EHD requests specific information that SWOP created or used in the course of the Bucket Brigade, including the sampling plan, air quality logs, field data, photographs and videos, and QA/QC documentation. EHD also requests the laboratory reports for samples of Volatile Organic Compounds (VOCs) that SWOP collected but did not disclose to its consultant or technical witnesses or to EHD, the raw data for samples of Particulate Matter (PM), and the communications between SWOP, its laboratory, its consultant, and its technical witnesses regarding the samples and their analysis. The discovery requests are precise and direct. SWOP either has the information and should produce it, or it does not have the information and should admit that. SWOP can either explain the apparent errors, omissions, and discrepancies in the Bucket Brigade process and data, or it should admit that it has no explanation. Either way, SWOP should be required to respond under oath.

SWOP opposes discovery, contending that it has provided EHD with all of the information to which it is entitled. Response at 3. Of course, this is the Hearing Officer's decision to make, not the objecting party's. SWOP also argues that the discovery is not relevant, but does not explain why. Next, it contends that responding to discovery would be burdensome, arguing that its staff would be inconvenienced by having to review its own files. Finally, it suggests that the Hearing Officer should add a new standard of specific and actual prejudice to the Air Board's discovery rules.

EHD is entitled to more than SWOP's cherry-picked information.² SWOP led EHD to believe that it would provide all of the available information about the Bucket Brigade. Instead, SWOP provided an affidavit and several attachments that fail to address the most basic questions. It now asserts blanket objections, refusing even to admit or deny the existence of the requested information.

Evasive or incomplete responses leave the requesting party unable to determine whether the responding party has agreed to produce all of the requested documents, when production will be made and, once made, whether the production is complete. The responding party gains an immediate tactical advantage by serving an evasive or incomplete response – the ability to prevent, or at least delay, the production of damaging documents, and to shift to the requesting party the obligation to enforce the responding party's discovery obligations.

Girard & Espinosa, *Limiting Evasive Discovery: A Proposal For Three Cost-Saving Amendments to the Federal Rules*, 87 Denver U. L. Rev. 473, 475 (2010); *Sandoval*, 109 N.M. at 8, 780 P.2d at 1155 ("an answer can be so useless as to be equivalent to no answer").

² SWOP takes exception to the notion that EHD is "entitled" to discovery. Response at 3. This is a mere distraction. As reflected in the motion and this reply, EHD recognizes that it must satisfy the standard in the Air Board's rules to obtain discovery. Upon that showing, SWOP is obligated to provide facts about the Bucket Brigade, not political statements.

The Bucket Brigade data either satisfies the legal requirements for admissibility or it does not.³ SWOP either has the requested information or it does not. SWOP cannot represent that the Bucket Brigade is a valid scientific study whose results are suitable for comparison to federal standards and then refuse to produce the information necessary for the parties and the Air Board to verify that representation.

II. STANDARD OF REVIEW

A) THE AIR BOARD RULES ESTABLISH THE TEST FOR DISCOVERY.

The Air Board's adjudicatory rules authorize the Hearing Officer to allow discovery if: (1) the discovery will not unreasonably delay the proceeding; (2) the discovery is not unreasonably burdensome or expensive; and (3) the information to be obtained is relevant and not otherwise reasonably obtainable, may be lost, or may become unavailable. 20.11.81.14.5(J)(1) NMAC. Each element of this test is well-defined by case law.

III. EHD'S DISCOVERY REQUESTS SATISFY THE AIR BOARD'S RULES.

A) THE REQUESTED INFORMATION IS RELEVANT.

The New Mexico Rules of Evidence state that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." NMRA 11-401. EHD's

³ The Air Board's final decision must be based on some evidence that would be admissible in a jury trial. *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 101 N.M. 291, 295, 681 P.2d 717, 721 (1984) ("the legal residuum rule"). To determine whether scientific evidence is admissible in a jury trial, the New Mexico courts apply the six-part *Daubert/Alberico* test. *Firstenberg v. Monribot*, 2015-NMCA-62, ¶22.

requested discovery regarding the San Jose Bucket Brigade is clearly relevant under this standard. SWOP's claim of unsafe levels of air pollution in the San Jose neighborhood depends on three pieces of evidence: (1) a private database that purports to identify the permitted stationary sources and VOC emissions in the San Jose neighborhood, *see* Technical Testimony of Kitty Richards at 7; (2) the 2005 National Air Toxics Assessment, a modeling analysis based on data collected more than a decade ago, and now superseded by the 2011 National Air Toxics Assessment,⁴ *see* Technical Testimony of George Thurston at 6-7 and Dana Rowangould at 14; and (3) the San Jose Bucket Brigade, *see* Technical Testimony of Dana Rowangould at 16. Of this evidence, only the San Jose Bucket Brigade involves air quality monitoring data.⁵

SWOP represents to the Air Board that the San Jose Bucket Brigade is a scientifically sound sampling project that demonstrates that the Honstein facility, alone or in conjunction with other sources, is causing air pollution in the San Jose neighborhood. SWOP's technical witness Dana Rowangould cites the Bucket Brigade as evidence of unsafe levels of air pollution, repeating the "notable findings" in the Chernaik report. Rowangould at 16, *citing* the document SWOP has now produced as Attachment 19. SWOP's employee Juan Reynosa declares that he organized, trained, and managed the Bucket Brigade, and procured the Chernaik report. Reynosa

⁴ *See* <http://www.epa.gov/national-air-toxics-assessment>.

⁵ SWOP complains that EHD's motion is basically its case-in-chief. Response at 8. In fact, the motion primarily seeks discovery regarding one piece of evidence supporting SWOP's allegation that the Honstein facility, alone or in conjunction with other sources, is causing air pollution in the San Jose neighborhood. EHD's case-in-chief is far broader, encompassing both the legal claims in its Motion for Summary Disposition and its challenges to SWOP's other evidence and technical testimony.

Aff. at ¶8 and 9. He also testifies that the persons who collected the bucket samples were properly trained, followed a valid sampling plan, and complied with QA/QC requirements. *Id.* SWOP's executive director, Javier Benavidez, testifies that SWOP conducted the research and created the Chernaik report in order to demonstrate that air pollution is causing injury to human health in the San Jose neighborhood. Hearing Transcript (Tr.), June 30, 2015, 81:20 – 82:1-15. SWOP member and individual petitioner Steven Abeyta cites the Bucket Brigade as evidence of chlorobenzene and particulate matter (“PM”) pollution in the San Jose neighborhood. Tr. at 61:6-17.

EHD's request for discovery is reasonably calculated to lead to the discovery of admissible evidence regarding these claims, and specifically, whether the Bucket Brigade data supports the conclusions reached by SWOP and its technical witness. EHD requests, *inter alia*, a copy of SWOP's sampling plan, the documents used for training, the identity of the persons who were trained, the identity of the persons who collected the samples, their air quality logs and field data, including photographs and videos, the QA/QC document that guided the sampling process, the laboratory reports for each VOC sample that was collected, the raw data for each PM sample that was collected, and SWOP's communications with the laboratory and Mr. Chernaik, and between Mr. Chernaik and SWOP's technical witnesses.

This discovery is important because the information provided by SWOP in the voluntary phase raises serious questions about the reliability, accuracy, and admissibility of the Bucket Brigade data. For instance, the Bucket Brigade failed to complete chain-of-custody forms, failed

to collect field blanks, and exceeded holding times, in some cases, by weeks or months. Five (5) VOC samples that SWOP admits exist have not been accounted for, and may not have been disclosed to Mr. Chernaik or SWOP's technical witnesses.

SWOP denies that the information requested by EHD is relevant, arguing that the discovery is "unrelated [to] Petitioners' primary claims in this case: whether the Honstein bulk petroleum facility is contributing to unsafe levels of air pollution in the San Jose neighborhood and whether EHD and the Board are required to conduct cumulative impact analyses under the New Mexico Air Quality Control Act." Response at 7. This is less an objection than an admission of relevance. Indeed, SWOP admits - on the first page of its Response - that it set up the Bucket Brigade to prove the presence of air pollution in the San Jose neighborhood. Response at 1.⁶

⁶ According to SWOP, the Bucket Brigade "was a result of months of effort on the community's part after years of EHD ignoring their complaints of poor air quality and requests for air monitoring in San Jose." SWOP has a proclivity for political statements, *see, e.g.*, Reynosa Aff. at ¶¶6-7, but the Air Board cannot grant relief on that basis. To prevail at the hearing, SWOP must produce admissible evidence of poor air quality in the San Jose neighborhood, among other things. EHD deserves a fair opportunity to dispute that evidence, particularly discovery of the missing VOC results.

For the record, EHD disputes SWOP's characterization of the Bucket Brigade as the last resort of a besieged community lacking real data about air quality. EHD conducted an air toxics monitoring study between September 1, 2007 and March 31, 2009 in full compliance with EPA-approved QA/QC requirements that demonstrated that air quality posed no health concerns in the South Valley or elsewhere in Bernalillo County. *See* <http://documents.cabq.gov/environmental-health/airquality/documents/community-scale-air-toxics-report-february-2010.pdf> (Albuquerque-Bernalillo County Community-Scale Air Toxics Monitoring and Risk Assessment Project (Feb. 2010) EHD's study was far more extensive, met all EPA requirements, and is of significantly higher probative value than the Bucket Brigade's aggregated 14 minutes of VOC sampling collected only when an odor

It is axiomatic that

[w]hen discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish that the requested discovery does not come within the scope of relevance as defined in 26(b)(1), or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.

Zuniga, Civ. No. 11-877 at 4.

The Bucket Brigade is SWOP's evidence. If EHD's discovery is not relevant, then the Bucket Brigade is not relevant. If the Bucket Brigade is not relevant, then it is also not admissible, and SWOP should withdraw it. Because SWOP relies on the Bucket Brigade to support its allegations, EHD's discovery requests about the Bucket Brigade are relevant.

SWOP also argues that EHD's discovery is not relevant to clarify apparent errors, omissions, and discrepancies in the Bucket Brigade documents and process. As noted earlier, EHD identified several problems, including incomplete chain-of-custody forms, missing field blanks, excessive holding times, uncalibrated equipment, and perhaps most seriously, the lack of a sampling plan and QA/QC document, and five (5) missing VOC samples. These problems bear directly on the reliability and admissibility of the Bucket Brigade's data and the conclusions that may be drawn from that data, and it is unlikely that a court would deny discovery to a party seeking clarification.

was “especially strong” at odd times over the course of a year. *See Reynosa Aff.* ¶ 8 (stating that each VOC sample was taken for two minutes “when odors were especially strong”).

SWOP takes exception to EHD's identification of apparent discrepancies between Mr. Reynosa's affidavit and attachments and SWOP's "Breathe in New Mexico" report ("Report"), arguing that EHD has no reason to clarify discrepancies in the Report, that SWOP did not introduce the Report into evidence, and that its technical witnesses did not rely upon it.⁷ These objections are easily rebutted.

First, EHD is not seeking to clarify discrepancies in the Report, but rather conflicts between Mr. Reynosa's affidavit and a prior inconsistent statement by SWOP. For instance, Mr. Reynosa represents (under oath) to the Air Board that the Bucket Brigade collected only seven (7) VOC samples, but SWOP in its Report states that it collected twelve (12) VOC samples. SWOP averages the results of the seven VOC samples to calculate a concentration of chlorobenzene that it alleges is dangerous, but it inexplicably omitted the other five VOC samples from its calculation, calling into question the calculated average and its own credibility.

Second, the Report is already in the record. EHD attached the Report as an exhibit to its motion, and SWOP authenticated the Report in its response. Response at 7.

⁷ Strangely, SWOP says that it "produced the report several years ago." Response at 7. In fact, SWOP must have produced the Report less than two years ago because it contains the findings from the Chernaik analysis, which was issued on January 24, 2014.

Finally, the Report constitutes an opposing party's prior inconsistent statement. It is not hearsay, *see* NMRA 11-801(D)(2), is directly relevant, and has been authenticated, and is therefore admissible regardless whether it is cited by SWOP's technical witnesses. Discovery into conflicts between SWOP's testimony and its prior inconsistent statements is essential, particularly when it concerns the missing VOC samples.

B) THE REQUESTED INFORMATION IS NOT OTHERWISE OBTAINABLE OR MAY BE LOST OR BECOME UNAVAILABLE.

The information requested in EHD's discovery is not otherwise obtainable. SWOP is the only party with access to the Bucket Brigade documents and data, and the communications with the laboratory, consultant, and technical witnesses. In response, SWOP argues that EHD already has the requested information. If this were true, EHD would not have filed the discovery motion. SWOP also contends that EHD can obtain this information on cross-examination of SWOP's witnesses. Response at 6. This argument reflects a fundamental misunderstanding of legal process.

Cross-examination is not a substitute for discovery. First, as a matter of timing, discovery is the tool used by parties to obtain information to evaluate the claims and defenses of opposing parties, to obtain admissible evidence to meet those claims and defenses, and to guide the development of testimony and cross-examination. Discovery also is used to obtain information to decide whether to file a motion in limine to exclude inadmissible evidence. Discovery leads to information bearing on the credibility of witnesses, who may have faulty memories or may lie. EHD expects to use information obtained through this discovery for all of these purposes.

Second, EHD could not even obtain some of the requested information through cross-examination. EHD has requested numerous documents, including written communications. EHD might be able to examine a witness about the existence of a document, but could not obtain that document, and would be unable to effectively question the witness about its contents.

Third, EHD cannot compel SWOP to produce any witness for cross-examination. There is no subpoena power under the Air Board rules. SWOP can refuse to produce witnesses with information about the Bucket Brigade and EHD would have no recourse. Even if SWOP did call an employee or member as a witness, he could deny any knowledge and pass the responsibility to another person who has not been called. The situation with Mr. Chernaik is particularly problematic. SWOP relies on his technical report but has not identified him as a witness. Whether Mr. Chernaik knew about the missing VOC samples or consulted with SWOP about the QA/QC problems or its decision to discontinue VOC sampling when he wrote his report is obviously a critical issue.

Fourth, cross-examination is limited to subjects that were covered in direct testimony. Rule 11-611(B). EHD cannot assume that SWOP will cover material in its direct testimony about which EHD is seeking discovery.

SWOP cites *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519 (7th Cir. 2000), to support its proposition that cross-examination is an adequate substitute for discovery. *Kelly* does not say that.

In *Kelly*, the EPA filed an administrative action to fine a developer for filling a wetland without a permit in violation of the Clean Water Act. The applicable rules did not allow discovery. Having been denied discovery, the developer appealed, contending that the lack of discovery prevented him from showing that EPA's enforcement action was retaliatory. The court dismissed this contention on the facts. *Kelly*, 203 F.3d at 523 ("What Kelly and Prisk hoped to uncover is a mystery, though, because their accusations of retaliation make no sense.") The court saw no factual basis for the discovery, concluding that, "Seeking modest fines against individuals who twice defied the law sounds to us not like retaliation, but like an agency that was—if anything, cautiously—carrying out its responsibilities." *Id.* at 524. Because there were no rules entitling the developer to discovery, the only question for the court was whether the developer was entitled to a constitutional right to discovery. The court answered in the negative, observing in dicta that the developer had other options to obtain information, including (1) requesting documents through the Freedom of Information Act, (2) suing the government, and (3) conducting cross-examination. *Id.* at 523.

Kelly is inapposite to this proceeding. Unlike *Kelly*, the rules in this proceeding allow discovery. Also unlike *Kelly*, EHD's discovery request is based on the Air Board rules, not a constitutional right.

SWOP is playing hide-the-ball with admissible evidence. Discovery, not cross-examination, is the appropriate method for a party to obtain information to prepare for an Air Board hearing. Discovery ensures that the parties present a full record and obtain a fair

resolution from the Air Board. "A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues." *Sandoval*, 109 N.M. at 11, 780 P.2d at 1159.

C) THE REQUESTED INFORMATION CAN BE PROVIDED WITHOUT UNREASONABLE BURDEN OR EXPENSE.

The requested discovery is not unreasonably burdensome or expensive. EHD asks for specific information, such as its sampling plan, QA/QC documents, laboratory reports for missing VOC samples, and written communications regarding the Bucket Brigade. Even the scope of communications is narrowly limited to certain persons over the course of one year. EHD does not request that SWOP create documents or dig through years of records. SWOP either has the documents or it does not. If SWOP has them, EHD will inspect and copy them at its own expense. *See* Rule 1-034(A)(1) (allowing the requesting party to "inspect [and] copy..." documents within the scope of Rule 1-26 within the possession, custody or control of the responding party). If SWOP has no such documents, it can respond accordingly. In either case, SWOP experiences no unreasonable burden or expense.

Nonetheless, SWOP argues that the discovery would be too burdensome because its voluntary effort was so exhaustive. It says that "[i]n the spirit of providing a full and accurate record for the Board's review," it spent \$400 to copy "more than two hundred and fifty (250) pages" and expended "significant amounts of staff time." Response at 5. However SWOP might characterize its "spirit," it fell well short on execution. SWOP was required to produce "all related documents and communications" for its Bucket Brigade. Revised Scheduling Order at ¶ 2 (Nov. 6, 2015). But of the information provided by SWOP, many pages were useless or non-

responsive and SWOP did not identify which requests it was responding to or whether it was withholding responsive documents. Mr. Reynosa in his affidavit neither provided the requested information nor authenticated any of his attachments.

SWOP's cost to copy documents is not an unreasonable burden because it will incur no cost at all. Under the discovery rules, SWOP is obligated only to make the documents available for inspection. EHD, as the requesting party, is responsible for making the copies. NMRA 1-034(A).

As for SWOP's \$400 cost to copy documents during the voluntary phase, SWOP is like the man who, having shot himself in the foot, complains about his aim. The copy cost is a self-inflicted wound. SWOP incurred the bulk of this cost in making unnecessary copies for the Air Board, not for EHD or Mr. Honstein.⁸ The Revised Scheduling Order ¶ 2 (Nov. 6, 2015) did not require SWOP to file its discovery responses with the Air Board, and it could have sent the documents electronically to the other parties at no cost at all. SWOP proposed to make voluntary disclosure, and then incurred unnecessary costs, and now seeks to use its self-inflicted costs to thwart discovery of the very information that it agreed to produce in the first place.

⁸ SWOP provides no evidence that it actually spent \$400, but assuming it were true, it would have spent about \$31 each to serve EHD and Mr. Honstein with hard copies in compliance with the Hearing Officer's Order. SWOP's submission was 258 pages and SWOP unnecessarily filed 11 copies (an original, 9 copies for the Air Board and a copy for the Hearing Officer) (this is inconsistent with its Certificate of Service which states that only EHD, Mr. Honstein and the Hearing Officer were served and does not reflect that the item was filed with the Hearing Clerk for the Air Board). This is a total of 3354 copies for \$400 or \$0.12 per page. Thus, the copies for EHD and Mr. Honstein would have amounted to a total of \$61.92, not \$400.

Similarly, SWOP's staff time to respond to discovery is not an unreasonable burden. As an initial matter, SWOP's staff time in the voluntary phase is not relevant. SWOP provides no accounting of the time it spent in the voluntary phase nor explains why this time is related to EHD's discovery. For instance, Mr. Reynosa appears to have spent a considerable amount of time writing his affidavit, but EHD's discovery requests call for specific information, not a political statement or a history lesson about the San Jose neighborhood. SWOP initiated this litigation and should not be heard to complain that answering discovery about a key piece of its evidence is too exhausting for its paid staff.⁹

The recent case of *Baylon v. Wells Fargo Bank*, Civ. No. 12-52 KG/KBM (D.N.M. 2013) is instructive on the topic of unreasonable burden. The plaintiffs sought all complaints filed in state or federal courts, the attorney generals' offices of the fifty (50) states, and two federal agencies over the previous three (3) years in which the bank tried to collect a debt discharged in bankruptcy. The bank objected that "it is self evident that compliance with the request would be extremely time-consuming and costly." *Id.* at 2. The magistrate judge rejected this argument

⁹ SWOP's paid staff, Mr. Reynosa and Mr. Benavidez, organized and directed the Bucket Brigade and brought this litigation in the organization's name. SWOP complains that discovery will burden its members, who are volunteers, but EHD's discovery requests are primarily directed to SWOP, not its members. To the extent that its members have information, such as the air quality logs, it is not a burden to produce them because SWOP must have obtained them to prepare the summary in Attachment 17 to the Reynosa Affidavit.

because the discovery request was limited to three (3) years, and the benefits to the plaintiffs of the information outweighed the burden on the bank. The bank then filed an objection, arguing that the request would require it "to study, in detail, by hand, each of the thousands of cases it is involved in." *Id.* at 3 (internal quotations omitted).

The district court disagreed with the bank and found that the request did not impose an unreasonable burden. The court stated that "a request which is limited in time and confined to a discrete topic is likely not to be overly broad or unduly burdensome on its face." *Id.* at 4. The court further stated that "it is not sufficient to simply state that the discovery is overly broad and burdensome, nor is a claim that answering the discovery will require the objecting party to expend considerable time and effort analyzing huge volumes of documents and information a sufficient factual basis for sustaining the objection." *Id.*

Like *Wells Fargo*, EHD's discovery requests are specific, clearly identified, and limited to a fixed period of time. EHD requests specific documents by name, such as the sampling plan, QA/QC document, and laboratory reports for missing VOC samples. In fact, EHD can name these specific documents because SWOP itself identified them in its affidavit, attachments or Report. Similarly, EHD's requests for written communications are identified by person, topic, and a fixed period of time. Like the bank, SWOP makes the "unsupported assertion" that finding this information will take lots of time. If a request for thousands of complaints from every state

and federal court and attorney general's office in the country is not burdensome, neither is EHD's request for a small number of identified documents regarding the collection of twelve (12) air quality samples between September 2012 and September 2013 and relating to a Report written in January 2014.

It is extraordinary that SWOP would allege an unreasonable burden in response to EHD's narrowly targeted discovery. SWOP filed the petition alleging unsafe levels of air pollution in the San Jose neighborhood, relying in part on the Bucket Brigade data. It imposed litigation costs on EHD and Honstein. SWOP should not be heard to complain that the marginal cost of answering interrogatories, providing a handful of documents regarding a key piece of its evidence and responding to requests for admission is too burdensome for its paid staff.

D) DISCOVERY OF THE REQUESTED INFORMATION WILL NOT UNREASONABLY DELAY THE PROCEEDING.

EHD's discovery will not cause an unreasonable delay in the proceedings. The parties proposed and the Hearing Officer issued a revised scheduling order that authorizes EHD to file the motion, reflecting an understanding that a further delay might be necessary to accommodate SWOP's response. For its part, SWOP does not complain that discovery will cause an unreasonable delay, but rather observes that the deadlines in the order must be extended to allow its response. Response at 6 n.2. EHD agrees that an extension would be required, but it need not be long, provided that SWOP provides a meaningful response. In any event, discovery serves the vital function of obtaining the facts to allow the Air Board to make an informed decision, which outweighs a short delay in the hearing.

E) THE AIR BOARD RULES DO NOT REQUIRE A SHOWING OF ACTUAL OR SPECIFIC PREJUDICE.

SWOP contends that EHD must show "actual and specific prejudice" to obtain discovery regarding the Bucket Brigade. No such test exists in the Air Board rules, and SWOP mischaracterizes and conflates the case law to support its argument.

SWOP's argument runs thus: There is no constitutional right to discovery. *Archuleta v. City of Santa Fe Police Dep't*, 2005-NMSC-006, ¶ 311. Therefore, the only basis for discovery must be due process. *Lopez v. United States*, 9 F.Supp. 2d 1284 (D.N.M. 2000). Because a litigant must show actual or specific prejudice to prove a due process violation, *Lopez, supra*, EHD must show actual or specific prejudice to obtain discovery. Response at 4-5.

These cases have no bearing on discovery before the Air Board. EHD requests discovery pursuant to the Air Board rules. Those rules establish an explicit test, which does not include any reference to "actual or specific prejudice." EHD neither invokes a constitutional right to discovery nor the protection of due process.

The cases cited by SWOP actually *support* discovery in this proceeding. In *Archuleta*, a police officer subject to disciplinary action was given the city's exhibit list, position statements, informal interviews, and two depositions, even though the applicable rules did not authorize any discovery. Five days before the hearing, the police officer sought discovery of "all prior cases involving the suspension, demotion or termination of any SFPD officer (of any rank) in the last five years." *Archuleta* at ¶6. The city opposed the discovery on the grounds of relevance and

overbreadth, and the hearing officer agreed without written explanation. *Id.* On appeal, the Supreme Court upheld the hearing officer's decision, observing that the police officer had been given discovery not required by the applicable rules and that he had no constitutional right to more. *Id.* at ¶31-35.

In *Lopez*, an accountant appealed the IRS's decision to disbar him from practice before the agency. The accountant had been given discovery, including documents and depositions, even though discovery was not authorized by the applicable rules. The accountant appealed, arguing that he had been denied the right to depose other witnesses. The district court held that the accountant had been given sufficient discovery, and that he had no constitutional right to more, but observed that if the agency had denied discovery altogether, it would have constituted "clear prejudice" and violated due process. *Lopez* at 1288-1289.

Unlike *Archuleta* and *Lopez*, the Air Board rules allow discovery and establish the same test that applies under the New Mexico Rules of Civil Procedure. There is no reason to cite a constitutional right or show prejudice. Also unlike *Archuleta* and *Lopez*, EHD requests discovery to obtain basic information about the Bucket Brigade, not depositions or records dating back several years. But even in *Archuleta* and *Lopez* - two cases in which the applicable rules did not authorize discovery - the parties were allowed some discovery.

IV. EHD'S DISCOVERY EXAMPLES SATISFY THE TEST ESTABLISHED IN THE AIR BOARD'S RULES.

EHD's specific discovery examples each satisfy the test in the Air Board rules. By contrast, SWOP's objections are a transparent attempt to avoid turning over any information that bears on the reliability of the Bucket Brigade data.

A) INFORMATION REGARDING THE QUALIFICATIONS OF JUAN REYNOSA TO TESTIFY ON SCIENTIFIC AND MEDICAL MATTERS.

EHD requests discovery to obtain additional information regarding the qualifications of Juan Reynosa to offer technical testimony.¹⁰ This discovery is calculated to lead to admissible evidence regarding his qualifications to make decisions about air quality sampling and to testify about the health effects of air pollution. Mr. Reynosa in his affidavit declares that he organized and directed the Bucket Brigade, trained community members, wrote the sampling plan, mailed the samples to the laboratory, and discontinued the VOC sampling, and offers his opinion regarding the health effects of air and water pollution. Aside from a bachelor's degree in environmental science, Mr. Reynosa does not identify any credentials or experience regarding air quality science, medicine, or public health. EHD cannot obtain this information from another source, and it would not be burdensome for SWOP to respond to an interrogatory on the subject. If Mr. Reynosa does not have such credentials or experience, he can respond accordingly and withdraw the offending portions of his affidavit.

¹⁰ EHD withdraws its request for information regarding the residence of Mr. Reynosa and Mr. Benavidez in order to focus discovery on the Bucket Brigade.

SWOP does not object to providing additional information on Mr. Reynosa's qualifications. It also acknowledges that Mr. Reynosa is likely to be a witness at the hearing. Response at 8.

B) INFORMATION REGARDING THE QUALIFICATIONS OF JAVIER BENAVIDEZ TO TESTIFY ON SCIENTIFIC AND MEDICAL MATTERS.

EHD requests discovery regarding the qualifications of Javier Benavidez, SWOP's executive director. This discovery is calculated to lead to admissible evidence regarding his qualifications to make decisions about air quality sampling. Mr. Benavidez worked in concert with Mr. Reynosa to set up and manage the Bucket Brigade. He testified at the June 30, 2015 hearing about the findings of the Bucket Brigade. Mr. Benavidez may have been involved in the decision to discontinue VOC sampling.

SWOP argues that Mr. Benavidez's qualifications are not relevant because his prior testimony is not relevant and he may not be called to testify again. Response at 9. Mr. Benavidez's prior testimony is already in the record. The Air Board considered his testimony when it decided to hold this hearing and it could cite his testimony about the Bucket Brigade in support of its final decision. Moreover, Mr. Benavidez is a party representative. His prior statements – and his qualifications to make those statements - are relevant to both the content and credibility of SWOP's testimony in the hearing.

C) THE IDENTITY OF THE PERSONS THAT SWOP TRAINED TO CONDUCT THE BUCKET BRIGADE AND THE TRAINING RECEIVED BY EACH PERSON, INCLUDING THE NAME, DATE AND LOCATION OF THE TRAINING, AND THE IDENTITY AND AFFILIATION OF EACH TRAINER, AND PRODUCE ANY DOCUMENTS CREATED OR DISTRIBUTED AS PART OF THAT TRAINING AND ALL COMMUNICATIONS WITH ANY ORGANIZATION OR PERSONS WHO CONDUCTED THE TRAINING.

EHD requests discovery of the identity of the persons who SWOP trained to conduct the Bucket Brigade and related information about their training. SWOP repeatedly cites these persons and their training to support the legitimacy of the Bucket Brigade data. *See Reynosa Affidavit at ¶8; Attachment 19 at 1-2.* These persons are likely to have discoverable information regarding their training, including the need to comply with QA/QC requirements, the identity and affiliation of the trainers, the identity of the persons who collected the samples for which the sampler is not identified on the chain of custody forms, and the fate of the missing VOC samples. NMRA 1-026(B)(3) (discovery is allowed to obtain the "name, address, and telephone number of each individual likely to have discoverable information that another party may use to

support its claims or defenses as well as the subjects of such information"). Finally, EHD requests discovery of documents related to the training, including the sampling plan and QA/QC document. SWOP acknowledges that these documents exist but failed to provide them during the voluntary phase.¹¹

EHD cannot otherwise obtain the identity of who was trained to conduct the Bucket Brigade or the documents created or used at their training. It cannot obtain this information on cross-examination because SWOP may not call these persons as witnesses and documents cannot be obtained during cross-examination. It not unreasonably burdensome to require SWOP to disclose this information by answering an interrogatory or responding to a request for production of documents. If SWOP does not know the identity of who it trained, cannot recall the date or location of their training or the identity and affiliation of the trainers, or does not have a document, it should state so or provide clarification.

SWOP objects to this discovery request. First, it asserts that the identity of who was trained is not relevant to whether Honstein is emitting air pollution. To the contrary, SWOP relies on the results of its Bucket Brigade and its "trained community volunteers," including the

¹¹ Of the four "training" documents provided by SWOP in the voluntary phase, none are responsive to EHD's request. Attachment 2 is a list of bucket parts. Attachment 3 is an unattributed document describing the Bucket Brigade project in three communities in New Mexico, which was written *after* the training ("During the training, GCM *provided* a day-long classroom training...We *worked* with the local community to co-design an environmental sampling plan"). As such, it could not have been used to deliver the training. Attachment 4 is the Global Community Monitor manual, which SWOP admits is outdated and contains a broken link for the alleged QA/QC document. Attachment 5 is a set of step-by-step instructions for using the PM monitor, but does not include the QA/QC document.

sample taken at the Honstein facility and the two samples collected by unknown persons, to support its claim of "poor air quality" in the San Jose neighborhood. Response at 1. The Chernaik report, which SWOP submitted to the record, and on which SWOP's technical witness Dana Rowangould relies in her testimony, also relies on the Bucket Brigade and implicitly on the training of community members to conduct it properly. Second, SWOP objects to EHD's reference to the "Breathe in New Mexico" Report, which discusses the training and the documents created by SWOP. Whether construed as a prior inconsistent statement or an admission against interest, SWOP's own Report is relevant and admissible, and is already in the record. Finally, SWOP asserts that disclosing the identity of persons who were trained exposes them to harassment and intimidation. This scare tactic is baseless and offensive. EHD has no intention of harassing residents. It is requesting discovery to understand who was trained and how they were trained to conduct the Bucket Brigade.

D) IDENTIFY EACH PERSON WHO COLLECTED SAMPLES FOR THE BUCKET BRIGADE, WHICH SAMPLES EACH PERSON COLLECTED; THE DATE, TIME, AND LOCATION OF COLLECTION, THE METHODOLOGY FOR SELECTING THE DATE, TIME AND LOCATION OF COLLECTION; AND THE SAMPLING METHOD USED FOR EACH COLLECTION; AND HOW THE SAMPLES WERE HELD BETWEEN SAMPLING AND SUBMISSION TO THE LABORATORY; AND PRODUCE ANY DOCUMENTS DESCRIBING THE METHODOLOGY AND SAMPLING METHOD(S), INCLUDING ANY CALENDAR OR MAP PREPARED IN CONNECTION WITH THE SAMPLES, AND ANY DOCUMENTS OR ANALYSES REGARDING THE DECISION TO DISCONTINUE VOC SAMPLING.

EHD requests discovery regarding the identity of persons who collected samples, the sampling plan, calendar, map, and documents regarding SWOP's decision to discontinue sampling. The request is calculated to lead to admissible evidence regarding the reliability of the Bucket Brigade and will be used to examine witnesses about the sampling process. EHD asks SWOP to specify which samples each person collected, information about each sampling event and to state how each sample was held between sampling and submission to the laboratory.¹² The persons who collected each sample must be called at the hearing to authenticate the chain-of-custody form for each sample collected by the Bucket Brigade. NMRA 1-026(B)(3) (discovery is allowed to obtain "the identity of each person expected to be called as a witness at trial").

¹² SWOP's response to this request may overlap with its response to subsection IV(C) and (F). However, separate requests are warranted to properly identify all persons involved in the Bucket Brigade and the scope and nature of their involvement.

This information is necessary. None of the particulate sampling chain of custody forms identifies the sampler. In some cases, samples were held for weeks or months before submission to the laboratory. At least one chain of custody form appears to have been created after the fact rather than completed contemporaneously with the sampling. These issues raise questions about the sample collection, who participated, what they actually did, who held the sample between collection and submission to the laboratory and under what conditions it was held. The persons who collected or had custody of the samples are the appropriate persons to respond to these questions. In turn, this information will help the Air Board reach an informed decision whether each sample is reliable and whether the related result is admissible at the hearing.

Moreover, the discovery is designed to obtain information explaining why SWOP collected samples only when its members smelled an odor, *see* Reynosa Affidavit at ¶9, why SWOP collected twelve (12) VOC samples but gave only seven (7) samples to Mr. Chernaik, the identity of the persons who were involved with the samples but whose roles are unclear, *see* Att. 6 (sampler was Esther Abeyta but sample is relinquished by someone else); Att. 11-16, (sampler is unidentified), why the samples do not have field blanks and exceeded holding times, and why SWOP discontinued the VOC sampling, *see* Reynosa Affidavit at ¶10.

This is not unreasonably burdensome. SWOP admits that it has a sampling plan. *See* EHD's Motion, Exhibit 1 at 3 (SWOP "outlined a roadmap of how and where to begin air sampling" and "established a calendar with community members that included benchmarks to

help them schedule their sample set that would be collected over the course of a year."). SWOP knows the identities of the trained community members who collected the samples. It admits that it collected twelve (12) VOC samples. The laboratory reports state that the raw data is available. *See* Att. 13-16. SWOP should produce this information.

SWOP objects to the discovery request, arguing that its only purpose would be to clarify contradictions between Mr. Reynosa's affidavit and the "Breathe in New Mexico" Report. As explained above, the discovery request is calculated to lead to admissible evidence about the Bucket Brigade, not to clarify the Report.¹³ SWOP also contends that the Report cannot be cited in support of the discovery request because it has not been introduced in the record. As explained previously, the Report is both in the record and admissible as a prior inconsistent statement.

E) IDENTIFY EACH PERSON, OTHER THAN THOSE WHO WERE TRAINED BY SWOP IN THE TRAINING DESCRIBED IN PARAGRAPH IV(C) ABOVE, WHO WAS PRESENT DURING THE COLLECTION OR HANDLING OF ANY SAN JOSE BUCKET BRIGADE AIR SAMPLES, INCLUDING HIS/HER TRAINING TO COLLECT OR HANDLE AIR SAMPLES AND INVOLVEMENT IN GATHERING ANY INFORMATION ABOUT AIR QUALITY IN THE SAN JOSE NEIGHBORHOOD.

EHD requests discovery to learn the identity of other persons who may have been present at the collection of San Jose Bucket Brigade air quality samples. There is reason to believe that such persons were present during the sampling process. For instance, Mr. Reynosa admits being

¹³ SWOP does not argue that the discovery request is not relevant to clarify Mr. Reynosa's affidavit. Given that Mr. Reynosa wrote both the affidavit and the Report, discovery regarding their contradictions is relevant and the information obtained may assist EHD's preparation for cross-examination.

present when the air sample at the Honstein facility was taken on February 5, 2013. Reynosa Affidavit at ¶10. SWOP has not stated whether Mr. Reynosa attended all of the trainings for sample collection. The chain-of-custody form identifies him as receiving the February 5, 2013 sample from the sampler but does not describe his role other than that. The discovery may lead to admissible evidence regarding the presence of other persons during sampling events who may not have been trained, which raises questions about the integrity of the sampling process and its results. EHD cannot obtain information about these persons from another source and it would not be a burden for SWOP to identify them in response to an interrogatory.

SWOP assails this request as "preposterous," arguing that it would have to "recreate events from 2-3 years ago." Response at 10. There is nothing preposterous about expecting a litigant who offers a small number of air quality samples collected by its members only a couple of years ago to identify who was present during the sampling events. It cannot be that hard; Mr. Reynosa remembered that he was present for the February 2013 sampling event. SWOP does not need to "recreate" the event, only identify the persons who were present. If SWOP's members cannot remember who was present or SWOP cannot produce documentation, it can admit that it does not know who was present during the sampling events.

F) IDENTIFY EACH PERSON WHO RECORDED INFORMATION IN AN AIR QUALITY LOG FOR THE SAN JOSE BUCKET BRIGADE AND PRODUCE EACH LOG.

EHD seeks discovery of the air quality logs maintained by SWOP's "trained community members." SWOP admits that these logs exist. Mr. Reynosa acknowledges that Attachment 17 consists of "[p]ollution logs." Reynosa Affidavit at ¶10. Similarly, SWOP's "Breathe in New Mexico" Report states that community members were trained to maintain air quality logs, which SWOP describes as "a narrative of the community member's day-to-day-experience." The logs are relevant for evaluating SWOP's claims regarding pervasive and harmful air pollution in the San Jose neighborhood. The request is calculated to lead to admissible evidence regarding SWOP's compliance with its sampling plan, which according to Mr. Reynosa's affidavit, called for sampling whenever an odor is detected. The logs are contemporaneous accounts by the persons taking the samples, may provide useful information about the reasons for taking the samples, and may inform the Air Board whether the sample accurately reflects San Jose air quality.

SWOP responded to EHD's initial request for the air quality logs by producing Attachment 17, a series of calendar sheets from July 2012 to September 2013, with typewritten notes regarding the detection of odors on certain days. Attachment 17 does not satisfy EHD's discovery request. First, the document is hearsay. The author is not identified, and the typewritten notes refer to persons by their first name or contain no name at all.

Second, the document is not the air quality logs prepared by trained community members. It may be a summary of those logs, and SWOP may use a summary to prove the content of voluminous writings, but it must make the originals available for inspection by the other parties. NMRA 11-1006. EHD cannot obtain the air quality logs from another source. SWOP's trained community members prepared the air quality logs which were compiled into Attachment 17. SWOP should provide the actual logs or admit that they do not exist.

SWOP asserts that the air quality logs are not relevant, but a general objection is insufficient. SWOP also contends that EHD already has the requested information in Attachment 17, but as noted earlier, this document is hearsay and does not satisfy NMRA 11-1006. Next, SWOP suggests that EHD should rely on cross-examination, but EHD is requesting documents, which cannot be obtained in this manner. In any event, EHD would not know the identity of the persons responsible for the entries in Attachment 17, and therefore could not know who to cross-examine or would not even be able to recognize who they were if SWOP called them as witnesses. Finally, SWOP argues that providing the air quality logs violates the privacy of the trained community members. SWOP based its sampling plan on the observations of these members, who recorded their observations in air quality logs. The summary is not admissible

without allowing EHD to examine the originals to see whether the summary fairly represents those air quality logs. SWOP's members collected the samples on which SWOP predicates its allegation of unsafe air quality, presumably based on their perceptions of odors. SWOP cannot hide the identities of these witnesses by the simple expedient of making an unsupported assertion of privacy.

G) PRODUCE THE EPA-APPROVED "QUALITY CONTROL/QUALITY ASSURANCES DOCUMENT" FOR THE BUCKET BRIGADE.

EHD requests discovery of the QA/QC document for the air quality sampling by the Bucket Brigade. This document is relevant because it establishes the QA/QC procedures that are supposed to ensure the reliability of the air quality samples. SWOP claims to have followed these procedures so it must have had documents setting out the procedures to follow. However, EHD has already identified several potential flaws in SWOP's handling of the samples, including incomplete forms, no field blanks, and excessive holding times, that raise reasonable questions whether QA/QC procedures were in place.

EHD previously requested the QA/QC document, but so far, SWOP has failed to produce it. In response to EHD's first request, SWOP provided Attachments 3, 4, and 5, which Mr. Reynosa characterizes as training documents that the Bucket Brigade followed during the sampling process. Reynosa Aff. ¶ 8. As explained *supra* at footnote 11, none of these attachments are the QA/QC document for the San Jose Bucket Brigade. Attachment 4, the

Global Community Monitor manual states that EPA Region 9 has determined that “Bucket samples were credible” but, of course that depends on whether appropriate QA/QC procedures were developed for the specific sampling event and whether they were followed. Att. 4, p. 19. SWOP has not yet shown that to be the case here.

SWOP does not object to EHD's request for the QA/QC document. Rather, it excuses the faulty link, saying only that "several years have passed since the Bucket Brigade was active." Response at 11. SWOP then provides a link to another document which it describes as "the EPA QA/QC documents that are used in Global Community Monitor Bucket Brigades, *like* the one conducted in the San Jose neighborhood." Response at 12 [emphasis added].

On its face, the linked document is not a QA/QC document for the San Jose Bucket Brigade. A copy of the document is attached as Exhibit 1. The document concerns a pilot project conducted in California in August 1998. The purpose of the pilot project was to test whether buckets could be used to collect samples and to evaluate concerns about contamination and replicability. The document expressly states that data from the pilot project should not be used for "any regulatory, medical, or legal uses." It also states that the QA/QC plan for the pilot project must be revised before it can be used in another context.

Having a QA/QC plan and following it are fundamental principles of air quality sampling. SWOP implies – but never says - that Exhibit 1 is the QA/QC document for the San Jose Bucket Brigade. The document appears to have been procured for the sole purpose of

responding to EHD's motion. EHD requests discovery to determine when SWOP obtained this document, and to obtain either the QA/QC document that SWOP relied on for the San Jose Bucket Brigade or an admission that it had no such document.

H) IDENTIFY EACH PERSON WHO RECORDED CONTEMPORANEOUS FIELD DATA FOR AN AIR SAMPLE FOR THE SAN JOSE BUCKET BRIGADE AND PRODUCE THE CONTEMPORANEOUS FIELD DATA.

EHD requests discovery to obtain the contemporaneous field notes taken by the Bucket Brigade. This information is relevant because it provides details about the field conditions and handling of the air quality samples. For instance, the field notes may explain why the sample was taken, why field blanks were not collected, whether there were problems with the sampling equipment, and the fate of the missing VOC samples. SWOP understands the importance of field notes. The chain-of-custody forms have a "comments" field for recording this information, and Mr. Reynosa states in his affidavit that the Bucket Brigade members "learned how to and the importance of filling out chain of custody forms for each sample." Reynosa Aff. at ¶8. The Global Community Monitor Manual echoes the importance of collecting field data. Attachment 4 at 21 (the person collecting a sample must fill out the chain-of-custody form completely, including observations and pertinent environmental information). Despite this strong emphasis, several of the chain-of-custody forms do not contain information on field conditions or sample handling, and several of the forms fail to identify the person who took the sample or recorded

information in the "comments" field. SWOP refuses to identify these persons or to provide the field notes. SWOP is the only source for this information and it suffers no burden to either provide it or admit that the only field data is recorded in the "comments" section of the chain-of-custody forms.

SWOP contends that this discovery request should be denied because EHD has conceded that it already has the field notes and that the identity of the persons completing the chain-of-custody forms is irrelevant. EHD has the chain-of-custody forms, but it does not know if there are other field data or notes and it cannot identify all of the persons who completed the chain of custody forms. SWOP has provided only one form labeled "Field Data Sheet" demonstrating that SWOP's Bucket Brigade had a form which it used at least once. Att. 13, p. 7. Why it failed to provide the remaining forms to EHD or stopped using the form is unknown. SWOP's response could be interpreted as an admission that it does not have any other contemporaneous field data for any of its other samples but EHD should not be required to guess at its intent. An evasive answer is no better, and may be worse, than no answer at all. SWOP should be required to produce the contemporaneous field data for each sample or to admit that it has nothing beyond what it has already provided.

I) PRODUCE THE LABORATORY REPORTS FOR THE VOC SAMPLES COLLECTED BY THE SAN JOSE BUCKET BRIGADE WHICH ARE REFERENCED IN SWOP'S "BREATHE IN NEW MEXICO" REPORT BUT NOT DESCRIBED IN THE CHERNAIK REPORT, AND IF A SAMPLE WAS NOT SUBMITTED TO THE LABORATORY OR WAS INVALIDATED BY THE LABORATORY, OR WAS NOT PROVIDED TO EHD IN SWOP'S VOLUNTARY PRODUCTION EXPLAIN THE REASON AND PRODUCE ALL SUPPORTING DOCUMENTATION.

EHD requests discovery about the missing VOC samples collected by the Bucket Brigade. Compare Attachment 19 (analyzing seven VOC samples) and Exhibit 1 at 3 to EHD's Discovery Motion (SWOP's statement that it collected twelve VOC samples). Mr. Reynosa confirms that the Bucket Brigade collected twelve (or thirteen) VOC samples. Reynosa Aff. at ¶10 ("Beginning in the fall of 2012, community members of San Jose took monthly air samples until the fall of 2013.")¹⁴ Information regarding the missing samples is relevant and may lead to admissible evidence. SWOP represents to the Air Board that it collected and analyzed monthly samples for a year pursuant to a sampling plan, but provided only half of the samples to its consultant for the preparation of his report and refuses to explain the fate of the remaining

¹⁴ Since SWOP collected a sample every month from September 2012 to September 2013, the actual number of samples may be thirteen (13), not twelve (12). SWOP analyzed VOC samples collected in September, October, and December of 2012, and February, April, July, and September of 2013. The missing VOC samples would have been collected in November 2012, and January, March, May, June, and August of 2013.

samples. Perhaps SWOP did not have a sampling plan or did not follow it. Perhaps the laboratory analysis detected no air pollutants. These are serious questions that go directly to the reliability and admissibility of evidence and the credibility of witnesses. SWOP is the only source of this information. It can either provide the laboratory reports or explain why it cannot.

Despite the significance of the missing samples, SWOP merely states that the information is not relevant "for reasons described above." Response at 12. SWOP also contends, again, that EHD can obtain information about the missing samples on cross-examination. As explained earlier, EHD seeks admissible evidence about the missing samples to prepare for the hearing. The evidence also may be used to support a motion in limine. Moreover, there is no guarantee that EHD would be able to examine any witness about the missing samples. None of SWOP's technical witnesses have that information and SWOP's consultant, Mr. Chernaik, has not been identified as a technical witness. Mr. Reynosa and Mr. Benavidez may know about the missing samples, but SWOP may not call them as witnesses.

J) IDENTIFY AND PRODUCE ANY PHOTOGRAPHS AND VIDEO RECORDINGS THAT WERE TAKEN AS PART OF THE SAN JOSE BUCKET BRIGADE, INCLUDING THE DATE, TIME, PLACE AND IDENTITY OF THE PHOTOGRAPHER OR VIDEOGRAPHER.

EHD requests discovery of photographs and video recordings taken by the Bucket Brigade. SWOP admits that its trained community members took photographs during three sampling events. *See* Attachment 17 (November 12, 2013, January 7, 2013, and April 13, 2013). SWOP also published several photographs of Bucket Brigade activities in the "Breathe in New Mexico" report. There are likely to be more photographs. *See* Attachment 3 at p. 1 (encouraging community members to take photographs and video recordings "to catch a visual image of the

pollution.") This information is relevant and likely to lead to admissible evidence regarding SWOP's allegations about air pollution and the Bucket Brigade's compliance with QA/QC requirements. See Attachment 3 at 14 ("Recording evidence during a pollution incident is extremely important...This will help validate your community's experience. Taking pictures and video of the pollution is very strong evidence.") The information cannot be obtained from another source. The request is not burdensome because it is limited to photographs and video recordings associated with a specific set of activities during a fixed period of time.

SWOP objects to this request, arguing that EHD "already has extensive information" about the Bucket Brigade. Response at 14. EHD is asking for photographs that SWOP has in its possession. It is not SWOP's call to decide which relevant and admissible evidence it will or will not produce to the other parties. SWOP also argues that EHD can obtain the photographs on cross-examination. EHD cannot obtain physical evidence on cross-examination. In any event, it would not know which witness to ask because SWOP refuses to identify the persons who attended its training, collected its samples, or made the entries in Attachment 17, and EHD does not know who SWOP will call as witnesses. SWOP also claims that searching its files for photographs would be an unreasonable burden, but if the district court in *Wells Fargo* allowed discovery for thousands of complaints to every state and federal court and attorney general's office in the country and two federal agencies over a period of three years, it is hard to see how producing photographs and videos associated with a couple days of training and several sampling events could be considered an unreasonable burden.

K) IDENTIFY AND PRODUCE EACH WRITTEN OR ELECTRONIC COMMUNICATION BETWEEN SWOP AND THE LABORATORY REGARDING ANY OF THE AIR SAMPLES FOR THE SAN JOSE BUCKET BRIGADE OR THE METHODOLOGY USED TO COLLECT ANY OF THE SAMPLES, INCLUDING ALL RESULTS PROVIDED BY THE LABORATORY FOR ANY SAMPLING EVENT CONDUCTED BY SWOP IN SAN JOSE.

EHD requests discovery of the communications between SWOP and the laboratory that analyzed the Bucket Brigade's air samples. The discovery is relevant and likely to lead to admissible evidence regarding SWOP's compliance with QA/QC requirements, including the lack of field blanks and custody seals and excessive holding times, as well as the fate of the missing VOC samples. EHD cannot obtain this information from another source, such as the laboratory, which is not a party to this proceeding, and it would not be an unreasonable burden for SWOP to produce communications related to a small number of samples submitted to the laboratory over the course of one year.

SWOP again complains that EHD does not need this discovery because "EHD appears to already have enough information to make its case[.]" Response at 13. It is not SWOP's prerogative to say how much information EHD needs to make its case or what is sufficient for the Air Board to make an informed decision. The Bucket Brigade is obviously flawed, but EHD cannot determine the full extent of the problem because SWOP refuses to disclose relevant information. Until SWOP withdraws the Bucket Brigade data, questions about its reliability and admissibility will be relevant.

SWOP also complains that the discovery is unduly burdensome because it would have to "sift[] through potentially hundreds of electronic and paper files that are several years old." Response at 13. The argument has no merit. First, the discovery request is narrowly targeted at specific communications relating to samples taken in a fixed time period between September 2012 and September 2013. These documents are not "several years old." Second, SWOP's objection is speculative ("potentially") and lacks any factual support, and the notion that it has "hundreds" of electronic and paper files for twelve VOC samples is ludicrous. Finally, SWOP argues that copying these communications would be expensive. Pursuant to NMRA 1-034, SWOP need only make the communications available for inspection; EHD will pay for any copies.

L) IDENTIFY AND PRODUCE EACH WRITTEN OR ELECTRONIC COMMUNICATION BETWEEN SWOP, ITS TECHNICAL WITNESSES, OR MARK CHERNAIK OR HIS ORGANIZATION OR REPRESENTATIVE, REGARDING THE SAMPLING PLAN OR ANALYSIS OF ANY AIR SAMPLE FOR THE SAN JOSE BUCKET BRIGADE OR THE METHODOLOGY USED TO COLLECT ANY AIR SAMPLE FOR THE SAN JOSE BUCKET BRIGADE, INCLUDING ANY DRAFTS OF THE FINAL CHERNAIK REPORT.

EHD requests discovery of communications between SWOP, its technical witnesses, and its consultant Mark Chernaik regarding his report on the laboratory results of the Bucket Brigade. This discovery is relevant and may lead to the discovery of admissible evidence because SWOP's technical witness Dana Rowangould relies on the Chernaik report to conclude that air pollution may be affecting the San Jose neighborhood. Additionally, SWOP submitted the Chernaik report to the record, and references the findings of the report throughout its pleadings. It is relevant whether SWOP disclosed the missing VOC samples to Mr. Chernaik

and Dr. Rowangould; whether SWOP's technical witnesses consulted with Mr. Chernaik about the sampling plan, the Bucket's Brigade's compliance with QA/QC requirements, and the interpretation of the sampling results; whether SWOP consulted with any of these persons regarding its decision to discontinue VOC sampling, *see Reynosa Aff.* at ¶10; and whether Mr. Chernaik had any reservations about the conclusions that SWOP intended to draw from his report.

SWOP does not object to producing these communications on the grounds of relevance or burden. Rather, it argues that EHD can obtain this information by cross examining Dr. Rowangould and Dr. Thurston. As explained earlier, discovery is the process for obtaining admissible evidence. Cross-examination cannot be used to obtain written communications. Moreover, neither Dr. Rowangould or Dr. Thurston may know about SWOP's communications with Mr. Chernaik (and vice versa),¹⁵ and SWOP has not identified Mr. Chernaik as a technical witness.

¹⁵ Even if they did know about these communications, their testimony would be hearsay.

M) PRODUCE THE DATA FOR THE AIR POLLUTION SOURCES AND THEIR EMISSIONS IN THE SAN JOSE NEIGHBORHOOD CITED IN THE TECHNICAL TESTIMONY OF KITTY RICHARDS AND THE IDENTITY OF THE PERSONS WHO COMPILED THE DATA AND THE RELATED MAP AND IDENTIFY THEIR SOURCES OF INFORMATION AND ANY WAYS IN WHICH INFORMATION HAS BEEN ADDED THAT DID NOT ORIGINATE FROM THE ORIGINAL SOURCE OF THE DATA.

EHD requests discovery on the data cited by SWOP's technical witness Kitty Richards regarding air pollution sources and emissions in the San Jose neighborhood. Specifically, Ms. Richard cites "publically[sic] available information regarding the concentration of air pollution sources in the San Jose neighborhood relative to the rest of Bernalillo County, Pollution Permits and Sites, available at <http://nmcddc.maps/arcgis.com/home/webmap/viewer.html?webmap=03a2f2d4e19f41378d9c5e511c7e6ffc>, accessed on April [sic] 2015." Technical Testimony of Kitty Richards at 7. The discovery is relevant and likely to lead to admissible evidence because it is the only data that Ms. Richards cites to support her opinion that the San Jose neighborhood "appears [to be] disproportionately impacted by the number of sources of particulate matter and volatile organic compounds emissions when compared to the remainder of Bernalillo County." *Id.*

There are serious questions about this data. The data is not "publically[sic] available information." The map at the NMCDC website can be viewed, but the underlying data cannot be accessed. "NMCDC" is a private entity who apparently aggregates and manipulates information for display in GIS maps, but it does not identify the source(s) of the information or the person(s) who collected or manipulated the information, or the manner in which the information has been

was manipulated. As such, the data is hearsay. It does not meet any hearsay exception.¹⁶ See Rule 11-803(8), 11-803(6).

EHD requests that SWOP produce the data that Ms. Richards relies on for her testimony, along with the identification of its provenance and each person who manipulated the data and how and why it was manipulated. EHD cannot obtain this information because the NMCCDC website does not provide access to the underlying data.

V. CONCLUSION

EHD's discovery requests satisfy the Air Board's rules. They are relevant and calculated to lead to admissible evidence regarding the Bucket Brigade's collection and analysis of air samples, which SWOP uses to support its allegation of "air pollution" in the San Jose neighborhood. The requests are carefully limited in scope and time. SWOP created and directed the Bucket Brigade and is the only source of information about it. EHD cannot obtain the information without discovery.

SWOP's objections are erroneous and unsupported. The discovery is clearly relevant. In the petition, SWOP alleges that the Honstein facility, alone or in conjunction with other sources, is causing "air pollution" in the San Jose neighborhood, arguing that this triggers the obligation

¹⁶ Ms. Richards has not established a foundation in her testimony to show that experts in her field would "reasonably rely" on data whose ultimate source is unknown and which has been manipulated by one or more unknown persons in undisclosed ways. Rule 11-703.

of EHD and the Air Board to conduct a cumulative impact assessment. It then relies on the Bucket Brigade data to allege the presence of toxic pollutants in the ambient air of the San Jose neighborhood. The discovery is not unreasonably burdensome. EHD bears the expense of making copies, while the time of SWOP's paid staff is an expense of litigation, which SWOP should have anticipated when it filed the petition.

SWOP represents that the Bucket Brigade was conducted in accordance with scientific principles and that its results are reliable and accurate. Yet when asked for basic documents about its sampling process and data, it objects strenuously. SWOP wants to cherry-pick the data. This is not compatible with the principles of a fair process or the objective of creating a full record for the Air Board.

Therefore, for the reasons stated above, EHD requests that the Hearing Officer authorize EHD to propound Interrogatories (not to exceed twenty-five (25)), Requests for Production and Requests for Admission on SWOP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Reply in Support of Motion for Discovery was served as described below on January 15, 2015:

- 1) The City's original document was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered to the Hearing Clerk.
- 2) One additional copy was hand-delivered to the Hearing Clerk for delivery to the Hearing Officer/Air Board Attorney and one copy was sent by electronic mail to:

Felicia Orth

c/o Andrew Daffern, Hearing Clerk
Control Strategies Section
Environmental Health Department
One Civic Plaza, Room 3023
Albuquerque, NM 87102

orthf@yahoo.com

*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board
and Hearing Officer for AQCB Petition No. 2014-4*

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

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**Quality Assurance Program Plan for the
“Bucket Brigade” Community Air Sampling Pilot Project**

August, 1998

Written by
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The Bucket Brigades are a collaborative project of:

Contra Costa Health Services Director's Office,
Contra Costa Health Services Hazardous Materials Division,
Communities for a Better Environment (San Francisco),
West County Toxics Coalition (West County),
People Do! (Richmond),
Healthy Neighborhoods Project (West County)
Rodeo Citizen's Association,
Shoreline Environmental Association (West County),
Communities for a Safe Environment (Martinez), and
Community Abatement of Pollution – Industrial Toxins (CAP-IT, East County)

Approvals:

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The contents of this plan, excepting appendices, will also be distributed to the Bucket Brigade Working Group:

- Henry Clark, West County Toxics Coalition
 - Sarah Eeles, People Do!
 - Sheryl Walton, Healthy Neighborhoods Project
 - Kenny Lukas, Rodeo Citizen's Association
 - Kasha Kessler, Shoreline Environmental Association
 - Ralph Sattler, Communities for a Safe Environment
 - Paulette Lagana, Community Abatement of Pollution – Industrial Toxins
- AND to Community Bucket Coordinators for each area in the project:
- Richmond area: Sarah Eeles
 - Crockett/Rodeo area: Sandra Dare, Shoreline Environmental Association
 - Martinez/N. Concord/Clyde area: To be determined
 - East County: Paulette Lagana, CAP-IT

A. Project Description

1. Project/Task Organization

The attached organizational chart (see appendices) shows the Bucket Brigade's organization. The Bucket Brigade Working Group is responsible for all project decision-making, delegating implementation to various project members. Project member responsibilities are described below. This quality assurance project plan refers to the initial implementation of the Bucket Brigade idea, referred to as the "pilot project" stage. The project goals and intended data uses are circumscribed in this pilot project stage (see below). If and when the Bucket Brigade Working Group decides to expand the scope of the project, this quality assurance plan may require revision.

2. History and Background Data

There are four major oil refineries and many large industrial facilities located along the San Francisco Bay in Contra Costa County. Major accidents from these facilities have heightened community concerns about air pollution from both accidental and permitted releases. Community residents are concerned both about the direct human health impacts of pollution exposure and about their ability to get high-quality and timely information about that exposure. To address these concerns, some residents have formed "Bucket Brigades" to do air toxics sampling. Community members sample during industrial releases – for example, during a fire or other visible release, or when they smell an odor that is not momentary and that they believe originates from an industrial source.

During 1995, community groups in Crockett and Rodeo, with the assistance of a local lawyer, started the Bucket Brigades. With the assistance of Communities for a Better Environment, the project spread to Martinez and Richmond. Sampling experience during this period has often shown post-incident concentrations of various compounds at levels on the order of 1 – 100 ppb. Toluene is the most common compound detected in our samples, appearing at levels on the order of 10-100 ppb after spills and refinery fires in the Bay Area. Prior experience and reports from other agencies suggest that toluene may be a common contaminant of Tedlar bag samples - this question will be explored in the project's quality assurance procedures. Post-incident samples have also routinely detected other compounds such as benzene, acetone, carbon disulfide, hydrogen sulfide, MTBE, xylenes, styrene, carbon tetrachloride, chloromethane, and methylene chloride (at levels ranging from sub ppb levels to concentrations on the order of 10 ppb, occasionally on the order of 100 ppb).

Background levels of VOCs present in the Bay Area range from 2.0 ppb to the level-of-detection for those compounds (BAAQMD Toxic Air Contamination Control Program Annual Report, 1994). For example, these background levels show toluene at 2.0 ppb on average for the entire Bay Area. However, the BAAQMD's monitoring study design deliberately sites monitoring stations in mostly residential communities that are not adjacent to industrial areas. To more accurately assess background levels in residential communities that *are* adjacent to industrial areas, it will be necessary to develop additional background data.

3. Project Description

a. Partner Roles

The "Bucket Brigade" includes volunteer members in three jobs: Sniffers, Samplers, and Community Bucket Coordinators (CBCs). "Sniffers" are responsible for alerting the bucket brigade samplers when they notice a pollution incident. "Samplers" are community members who keep the air sampling devices in their homes and take a sample when they suspect a pollution incident. After taking a sample, the sampler will call a "Community Bucket Coordinator" (CBC). The CBC will retrieve the sampling bag and arrange for delivery to the analytical laboratory. Each of these project members will receive training, as described below. Recruiting flyers for each role are included in the appendices.

b. Project Goals and Intended Data Uses

Overall project goals include:

- Provide the community and the County with more information about chemicals in the air than is currently available.
- Increase public confidence in information about emissions during refinery and chemical plant incidents,

- and in the Health Services Department's efforts to protect the public from hazardous materials exposures.
- Build a partnership between the community and the Health Services Department.
- Evaluate the sampling technology and the overall project design, including the County-community partnership at its center.
- Evaluate whether results of the monitoring are useful for policy initiatives that could contribute to public education and reduction of incidents.
- Increase the number of people and organizations involved in conducting air monitoring to complement and build upon existing government and industry monitoring efforts.
- Encourage government agencies to expand their existing monitoring efforts, both of ambient pollution levels and of levels during industrial incidents.

This project intends that analytical results will be used for public information purposes only. This limited scope of use is motivated in large part by the experimental nature of the project design. The major intended use is to provide public information to allow community members to request further and more thorough investigations. Results will be communicated through the local media, community meetings, and other methods for distributing information at a neighborhood level. The project expects that community members will use this data at their own discretion, making follow-up requests with community groups, government agencies and facilities on the basis of this data and drawing on other sources for information about the health effects of pollution levels. The project does not intend to use the data for any regulatory, medical, or legal uses for the duration of the pilot project.

One of the goals of the pilot project is to evaluate potential expansion of the intended data uses. If such expansion is indicated, the project will review quality assurance procedures accordingly.

4. Monitoring Planning Process

Compounds of concern were identified by community members during their past experience with pollution releases from industrial facilities. These compounds include aromatic hydrocarbons, sulfur compounds, and a broad array of other air toxics, all of which can be measured in this project. Several other commonly-released compounds from these facilities will not be covered by this project. These include particulate matter, some combustion by products, and metal refinery catalysts.

a. Sampler Criteria

Because this is a volunteer monitoring project, it is necessary to combine criteria for sampling device locations with criteria for volunteer characteristics. A primary criterion is that the "sampler" must live or work in a location that often receives emissions and odors from an industrial facility. Project personnel have examined maps indicating industrial facilities and volunteers' addresses, along with knowledge of the prevailing wind direction, to qualify volunteers for the project. The project area includes areas adjacent to significant industrial facilities in Contra Costa County. This area approximately includes the populated areas west of Interstate 80 or north of Highway 4 in the county. In some areas, the project area extends beyond those highways. Other desired characteristics include:

- Is home often, usually in town, reachable by telephone, and/or will return messages
- Is willing to stand outside and activate the bucket in case of an industrial incident (however, the project also emphasizes that community members should stay inside if a "Shelter-in-Place" announcement has been made, and that the "Shelter-in-Place" recommendation takes precedence over Bucket Brigade efforts)
- Can take a sample immediately when an incident occurs
- Has a car and, if necessary, may be willing to drive across town to take a sample
- Will attend Bucket Brigade trainings (required)

b. Choice of Sampling and Analysis Technology

The project chose its sampling technique based on the known compounds of concern and prior familiarity with one particular technology: Tedlar bag-based air sampling. Analysis techniques were similarly chosen based on prior familiarity with analysis results for volatile organic and reduced-sulfur compounds.

Prior sampling experience has suggested that the most desirable option for analysis is to obtain the lowest level of detection possible. Known background levels are < 3 ppb for all compounds, <1 ppb for most compounds. Past experience has shown post-incident concentrations in the 1 - 100 ppb range. This project wants to obtain results that are accurate at the parts-per-billion (ppb) level. Since the majority of prior sampling data falls below 10 ppb, the

project hopes to get as accurate resolution as possible.

Tedlar bag based sampling, combined with TO-14 analyses (for volatile organics) and either EPA Method 16 or ASTM D-5504 (for reduced sulfur compounds) provides the optimum balance of wide coverage of compounds, low detection levels, and affordable analyses.

5. Documentation and Records

After each sample, the sampler will record relevant information on a Sampler's Data Sheet and fill out a Chain of Custody Record (see appendices). Relevant information includes the date, time, and location of sampling, the reason for taking the sample, and observations about weather conditions and other local conditions. The analytical laboratory will provide analytical results (see appendices for example). The project will establish a database to record results and facilitate comparisons between incidents, or between incidents and background levels.

B. Measurement (Post-Incident and Quality Assurance Analyses)

1. Air Sampling Hardware

Air sampling hardware consists of two devices – a “bucket” and a “suitcase.” Both devices include a rigid plastic enclosure, within which plumbing leads to a Tedlar sampling bag. A simple vacuum draws air from the inside of the enclosure, creating a vacuum inside the enclosure and drawing air into the Tedlar sampling bag. Sampled air does not come into contact with the sampling vacuum, only passing through a small amount of plumbing before entering the sampling bag.

One device, the “bucket” for which the project has been named, is constructed of a five-gallon plastic bucket with stainless steel plumbing. Several of these devices have previously been constructed and have been used by community members. A second device, called a “suitcase”, is constructed of a pelican box to which non-metal plumbing is attached. These “Vac-U Chambers” are manufactured and distributed by SKC-West, the Fullerton, CA, branch of Pennsylvania-based SKC Inc. Product information is included in the appendices.

The project will use Tedlar sampling bags, outfitted with polypropylene valves and purged with lab-grade nitrogen before delivery. The vacuum pump is a Radio Shack Energvac electronics vacuum.

Sampling devices will be quality-checked before being put into service. Quality-checking will consist of testing whether assembly was completed properly, whether the device properly fills a sample bag in the expected time, and whether the device leaks under negative pressure.

2. Receipt and Storage of Devices

All Tedlar sampling bags will be purged three times with research-grade nitrogen (grade 5.5) before installation in a sampling device. Nitrogen-purging will either be completed by the county Hazardous Materials Division or by a laboratory expected to perform the analyses – in most cases this will be Air Toxics Ltd in Folsom, CA. Nitrogen-purging removes trace contamination remaining from the manufacturing process.

Sampling devices, equipped with an open and prepared sampling bag, will be provided to volunteer members (“samplers”) of the project. The project will provide training in the proper storage of these devices. This training will specify that devices should be kept in a clean location, away from combustion sources and other potential sources of contamination. The training will also instruct participants not to open their sampling devices without assistance from a CBC or county staff.

In addition, this project will also conduct a pilot study to check on the potential for contamination and permeation during storage (See Section B5a, below).

3. Sample-Taking and Delivery to Laboratory

The project will provide training to every sampler in proper operation of the device. This training will specify a protocol for when and where to take a sample, how to operate the device, and how to document proper operating

procedures. These instructions are included in the appendices. Key points of this protocol include the following:

- Make sure your sampling area is away from other sources of contamination.
- Start the vacuum before opening the valve or removing the inlet port plug.
- Run the vacuum for 2-3 minutes, or until bag is half full.
- Close the valve or replace the inlet port plug before turning off the vacuum.
- Record all relevant information on the Sampler's Data Sheet (SDS) and the Chain of Custody (CoC) form.
- Call the Community Bucket Coordinator (CBC).
- Remember that the laboratory needs to receive the sample in enough time to complete analysis (within 24 hours for reduced sulfur analyses, 72 hours for volatile organics, or TO-14, analyses).
- Keep the sampling device in a cool dark clean place until the CBC arrives.

After taking a sample, the sampler will call the Community Bucket Coordinator (CBC) for his or her town. As long as it is safe to venture outside, the CBC will travel to the location where the sampling took place. The CBC will be a paid community member who will receive training in air sampling techniques and quality assurance procedures, including more detailed information about the purpose of these procedures. County and CBE staff shall serve as backup to CBCs where needed.

The CBC's protocol is included in the appendices. For bag removal, key points of this protocol include the following:

- Interview the sampler to check that he/she has completed operating instructions properly.
- Check that sampler has completed SDS and CoC forms properly. Ask additional questions to complete the form, if needed.
- Have Sampler sign the SDS and CoC forms to relinquish the sampling bag to the CBC, and sign the form to accept the bag.
- Include a unique sample number on the SDS and CoC forms, using the format described below.
- Open the sampling device and check for under/over-inflation.
- Close valve on sampling bag.
- Check integrity of bag (check for holes).
- Remove bag from device.
- Perform a visual inspection of the sampling device; check rubber seal, vacuum, general cleanliness, and test that vacuum works as expected.
- Install a new sampling bag in the sampling device.

For mailing the sampling bag to the analytical laboratory, key points of the CBC protocol include the following:

- Coordinate with county staff regarding to which laboratory to deliver the sample.
- Request overnight or courier service if necessary (ground transport only).
- Insure that the laboratory receives the sample in enough time to complete analysis (within 24 hours for reduced sulfur analyses, 72 hours for volatile organics, or TO-14, analyses).
- Place the bag in an approved shipping container.
- Sign the CoC form to relinquish the sampling bag to the overnight/courier service (or directly to the laboratory, if the CBC delivers the bag to the laboratory).
- Send copies of SDS and CoC forms to county staff.

Sample Numbering

Sample numbers shall follow the following format: XXX-YYMMDD-Z, where XXX is the number of the sampling device, YY is the year, MM is the month, DD is the day, and Z is an arbitrary number. Duplicates, split samples, or other situations where the same device creates more than one sample in a given day shall be distinguished by using different values for the number Z. In all cases the same sample number should be written on both the SDS and CoC forms. Sample numbering examples:

202-980723-3	Sampler #202, taken on July 23, 1998,
202-980723-5	Sampler #202, taken on July 23, 1998, split sample
315-980818-1	Sampler #315, taken on August 18, 1998

4. Laboratory Analytical Methods

The project will only use analytical laboratories that follow EPA reference document guidelines for volatile organic

gas (EPA TO-14 or TO-15) and sulfur gas (Method 16 or ASTM D-5504) analyses. To date, potential laboratories include Air Toxics Ltd, Performance Analytical Inc., and the EPA air toxics laboratory in Richmond. See appendices for standard operating procedures and a quality assurance plan from Air Toxics Ltd.

The project will also request that the EPA Region IX Quality Assurance Division perform a laboratory audit or report the results of a recent audit, for the analytical laboratory.

5. Quality Control Analyses

In addition to the quality assurance procedures to be followed during device commissioning and storage and post-incident sampling and analysis, there are also important quality assurance procedures that must be followed on a less frequent basis. For detail on the use of these analyses for data review, see Data Review (section C1).

a. Pilot Study

Because of concerns of contamination and permeation of Tedlar sampling bags during long-term storage, this project is conducting a pilot study into storage contamination. This study includes four analyses (VOCs and sulfur) of sampling bags, stored in sampling devices over a period of up to 8 months. Results of this study will be used to guide technology choices and data review procedures. The term "pilot study" refers only to this investigation of storage contamination. Note that the term "pilot project" (see section A1) refers to the entire Bucket Brigade project as currently envisioned.

b. Field Duplicates

To check contamination in field methods and the consistency of laboratory analyses, the project will include periodic field duplicates. For a field duplicate, a sampler will take two samples at once, using separate devices, in a circumstance in which he/she would normally take a single sample. The two bags will be labeled so as to disguise this similarity from the laboratory and the bags will be delivered to the laboratory in the normal fashion. Where possible, field duplicates will be collected during post-incident sampling. However, because of the unpredictable and sporadic timing of pollution releases, these duplicates may not be taken in exactly the same manner as post-incident samples. Instead, they may be taken on a pre-planned basis, for background samples or another pre-planned event.

The project will include quarterly field duplicates, or about one duplicate for every 7.5 post-incident samples (at the expected 30 samples/year rate).

c. Field Blanks

To check for contamination in field methods and the consistency of laboratory analyses, the project will include periodic field blanks. Field blanks may be collected in one of two ways. The first way will be to store a second sampling device in a sampler's house, along with her or his standard device. If an incident occurs, the sampler will take a sample as usual with one of the devices but do nothing with the second device. The second way will be to take a sampling bag from a different sampler (not the one performing the analysis). In either case, when the CBC arrives to retrieve the sampling bag, she/he will fill the second bag with lab-grade nitrogen (either at the sampling location or in the CCHS laboratory). The two bags will be labeled so as to disguise this difference from the laboratory and the bags will be delivered to the laboratory in the normal fashion.

This process will be guided by the Quality Assurance personnel's professional judgment, balancing logistical concerns with the effort to maximize the similarity between the handling of field blanks and actual samples. Choosing the samplers and coordinators to be responsible for field blanks will be done on a more or less random basis, with the requirement that different samplers and different coordinators have the responsibility over the course of the project.

The project will include quarterly field blanks, or about one field blank for every 7.5 post-incident samples (at the expected 30 samples/year rate).

d. Performance Certification

The project will use assistance from the EPA Region IX's air toxics laboratory ("the Richmond lab") to allow

performance certification analyses. At least once during the duration of the project, the project will ask the Richmond lab personnel to fill a Tedlar bag with a known set of compounds at known concentrations. This performance certification sample will be labeled so as to disguise this difference from the laboratory and delivered to the laboratory in the normal fashion. See appendices for letters between project personnel and the Richmond lab detailing the lab's offer of laboratory services.

The project will include at least one performance certification analysis during the first year of the project.

e. Split Samples

With the assistance of the EPA Region IX's air toxics laboratory, the project will also conduct split samples on some post-incident analyses. For a split sample, the Community Bucket Coordinator will deliver a Tedlar bag directly to the Richmond lab. The Richmond lab will draw a partial sample from the bag and forward it to the independent analytical laboratory. These split samples may be analyzed on a pre-planned basis, for background samples, the performance certification, or another pre-planned event. See appendices for letters between project personnel and the Richmond lab detailing the lab's offer of laboratory services.

The project will conduct split samples at least once during the first year of the project.

f. Comparative Testing and Background Characterization

With the assistance of the EPA Region IX's air toxics laboratory, the project will also contribute to the state of knowledge about the comparative validity of different sampling techniques and technologies. Comparative testing will include side-by-side samples taken by several different devices, including community-built "buckets", manufactured "suitcases", and Silco-steel lined Summa canisters. These comparative tests will be taken on a pre-planned basis, for background samples or another pre-planned event.

The Richmond lab has offered to complete 4 analyses per month during the first year of the project.

6. Additional Data Sources

The project will also seek additional data sources for information on background pollution levels in the community. Existing monitoring stations operated by the Bay Area Air Quality Management District and the California Air Resources Board do not cover industrial areas of the county, the service area of this project. The project will investigate whether there are any other existing data from industrial facilities or government agencies. In addition, project members will investigate the possibility of generating background data from other sources.

C. Assessment

1. Data Review

a. Sample Results Data Review Process

If the pilot study, lab method blanks, field blanks, split samples, or comparative testing shows systematic contamination, project members will either conduct follow-up studies to determine the source of contamination or revise data review procedures to note potential contamination. For example, if field blanks consistently show toluene contamination, the project may establish a "contamination level" to be used as described below.

Quality assurance personnel will review performance certification and split sample data to determine the need for a laboratory audit, additional performance certifications, or other assistance. This review will be based on the criteria described below. If these results indicate potential laboratory performance concerns, the project will submit a request to the EPA Project Officer for assistance from the EPA Region IX Quality Assurance section.

When post-incident sample results are delivered to Contra Costa Health Services by the analytical laboratory, CCHS personnel will review post-incident samples to inform public distribution of analytical results. Data will be reviewed based on data review guidance similar to the EPA Region IX "RCRA Corrective Action Program Data Review Guidance Manual." Review will consist of the following:

- Review Sampler's Data Sheet and Chain of Custody Record: Were the forms completed properly? Were sample collection procedures followed correctly? Do the forms adequately indicate the time, date, and

location of sample collection, and include a sample number? If there are any problems, communicate them to the appropriate Community Bucket Coordinator and/or Sampler.

- Check if field blanks, field duplicates, split samples, or a performance certification were submitted and completed. See above (section C1a) for specific review procedures on these types of analyses.
- Review laboratory results: Check if method blanks or laboratory duplicates were completed. Check whether the correct analysis method was used, the correct list of analytes was reported, and if detection limits meet project requirements. If there is a problem, resolve the issue with the laboratory conducting the analysis.
- Attach data flags to results as appropriate (see section C1c below); generate paragraph summarizing results; attach to sampling results, and disseminate reviewed data to project members (see section C2, below).

b. Review and Flagging Criteria

Lab Method Blanks and Field Blanks

If the blank shows a level above the detection limit and if the associated sample result is less than 5x the level seen in the blank, the sample result will list a “B” next to the result to indicate contamination in the blank. Note that if the blank shows non-detect for any given compound, no “B” flag will be attached.

Field Duplicates and Split Samples

Reviewers shall calculate the relative percent difference (RPD) between the pair of results for each compound (note that the RPD cannot be calculated if one of the results is a non-detect). The RPD is calculated from the following formula:

$$\text{RPD} = \frac{\text{Result \#1} - \text{Result \#2}}{\text{Mean of Results \#1 \& \#2}} \quad (\text{expressed in \%})$$

Where both results are at least 5x the detection limit, an RPD > 50% indicates a need to investigate the source of the error. Precision near the detection limit is often inherently poor due to instrument limitations; therefore, where the results are less than 5x the detection limit, project QA personnel will exercise professional judgment as to whether there is a problem.

In either case, if results indicate the need for further investigation, each associated sample result will list a “X” to indicate that the analyte was positively identified but that the numerical concentration reported is an estimate because of data uncertainties.

Performance Certification

Performance certification samples will be prepared with all compounds at 5x the detection limit or higher. For all performance certification results, reviewers shall calculate the recovery percentage (%R) from the following formula:

$$\%R = \frac{\text{Analyzed Result} - \text{Actual Concentration}}{\text{Actual Concentration}} \quad (\text{expressed in \%})$$

A %R outside of the 70-130% range indicates the need to investigate the source of the error.

Common Contaminants

Existing experience with Tedlar-bag based sampling suggests that there may be problems with permeation of sampling bags or manufacturing residues, particularly in a situation where the bags are stored for long periods of time before being used. The Pilot Study (see above) will investigate this concern and ongoing experience with field blanks may provide additional information.

If the sample analysis shows a level less than 5x greater than the previously established contamination level for a common contaminant (see above), that result will list a “Y” next to it to indicate that the result may be due to sample contamination.

Summary of Project Data Flags

“B”	Analyte was present in a lab or field blank at a level that may have contaminated sample results
“X”	Analyte was positively identified in laboratory results but numerical concentration is an estimate due to discrepancies in split samples or field duplicates
“Y”	Analyte was positively identified in laboratory results but previous experience shows this analyte to be a common contaminant, and sample results at a level that may be due to this contamination

Laboratory Flags

The analytical laboratory used for this project has its own definitions for its data flags (see “Laboratory Quality Assurance Plan”, Air Toxics Ltd, in appendices, p. 74). Where these flags do not conflict with the data review procedures described above, the laboratory’s flags will be retained for data distribution.

2. Assessment and Response Actions

For post-incident analyses, project QA officers will forward data to all appropriate project members after data review (see “Responding to an Incident....” flyer, appendices). Forwarded data will include quality assurance information, including at least data flags and a brief narrative description of the sample results. This quality assurance information will not include any information about potential health risks or commentary about the significance of these results.

The project expects that community members and project members will use this data at their own discretion, making follow-up requests with community groups, government agencies and facilities on the basis of this data and drawing on other sources for information about the health effects of pollution levels. The project does not intend to use the data for any regulatory, medical, or legal uses for the duration of the pilot project.

This project will also include community education to provide information about the potential health effects of reported pollution levels. This information may include fact sheets about specific chemicals, information about background levels, known health effects, regulatory levels, trends of specific compounds over time, quality assurance information, and the results of the latest group of samples.

D. References

- “EPA Guidance for Quality Assurance Project Plans” (EPA QA/G-5), US EPA Office of Research and Development, Quality Assurance Division (8724R), August 1997.
- “RCRA Corrective Action Data Review Guidance Manual”, US EPA Region IX, US EPA Region IX RCRA Corrective Action Data Validation QAT Members, July 1995.
- “Volunteer Monitor’s Guide to Quality Assurance Project Plans” (EPA 841-B-96-003), US EPA Office of Wetlands, Oceans and Watersheds (4503F), September 1996.

APPENDICES

Bucket Brigade Organizational Chart

Sniffer's Recruiting & How-To Sheet

Sampler's Recruiting Sheet

How to Take an Air Sample - training instructions for Samplers

Community Bucket Coordinators Recruiting Sheet and "Responding to an Incident...." flyer

Instructions for Community Bucket Coordinators, or "How to Get Your Sample Analyzed"

Sampler's Data Sheet and sample Chain of Custody Record (original supplied by Air Toxics, Ltd)

Sample of Analytical Results – Air Toxics, Ltd.

"How to Make a Bucket" – excerpted from *Communities for a Better Environment, The Bucket Brigade Manual, 2nd edition, Spring 1998*

Manufacturer's information on "Vac-U Chamber"

Letter from Schuyler Fishman, CBE, and Jeff Hobson, CCHS to Brenda Bettencourt, Lab Director, EPA Region IX,
June 1, 1998

Responding letter from Brenda Bettencourt to Schuyler Fishman and Jeff Hobson, June 26, 1998

Laboratory Quality Assurance Plan for Air Toxics Ltd.

Standard Operating Procedures for EPA Method TO-14, for Air Toxics Ltd.

Standard Operating Procedures for ASTM Method D-5504 (Reduced Sulfur), for Air Toxics Ltd.