

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

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IN THE MATTER OF THE PETITION
FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT
NO. 3136

AQCB No. 2014-3

ANSWER OF THE ENVIRONMENTAL HEALTH DEPARTMENT
TO PETITION FOR HEARING

The City of Albuquerque (the “City”) Environmental Health Department (“EHD”), on behalf of its Air Quality Program, files this Answer in response to the Petition for Hearing (“Petition”) filed by Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo in AQCB No. 2014-3. EHD’s answers to each sentence in the Petition are set forth below following language from the Petition which is set out in *italics*. EHD answers as follows:

The Petitioners in this matter, Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo, pursuant to Section 74-2-7 NMSA 1978 and 20.11.81 NMAC, hereby petition the City of Albuquerque Environmental Health Department (EHD) and the Albuquerque-Bernalillo County Air Quality Control Board for a hearing as authorized by law with reference to Air Quality Permit No. 3136 issued effective June 3, 2014 to Smith’s Food & Drug Centers, Inc. (Smith’s).

Petition, p. 1.

1) EHD admits that it issued Air Quality Permit No. 3136 to Smith’s Food & Drug Centers, Inc. (“Smith’s”) on May 29, 2014. EHD admits that the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) has authority to conduct hearings concerning permits issued by the City. NMSA 1978, § 74-2-7(H); 20.11.81.14(A and B) NMAC. EHD denies that it has authority to grant a hearing before the Air Board. EHD admits that Petitioners Arthur Gradi,

Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, and Pat Toledo have submitted a Petition for a hearing concerning EHD's issuance of Permit No. 3136. The City is without information sufficient to form a belief regarding whether each of the Petitioners is adversely affected by the issuance of Permit No. 3136 as required by Section 74-2-7(H) and 20.11.81.14(B)(2)(c) NMAC and on that basis denies that all Petitioners petitioned "as authorized by law." Furthermore, EHD affirmatively states that the Petition is not properly verified under oath as required by 20.11.81.14(A)(1) NMAC and does not contain a copy of Permit No. 3136 that was issued by EHD as required by 20.11.14(B)(2)(f) NMAC and on that basis EHD denies that Petitioners have petitioned "as authorized by law."

The notification letter and the permit are attached as Exhibit 1.

Id.

2) EHD admits that Petitioners attached the Interested Participant Letter (notification letter) as Exhibit 1. EHD denies that Permit No. 3136 is attached to the Petition. EHD affirmatively states that the document attached to the Petition that purports to be Permit No. 3136 is unsigned and is not a true and correct copy of Permit No. 3136 as issued by EHD. EHD also denies that the document that is attached to the Petition which purports to be Permit No. 3136 was attached "as Exhibit 1."

The permit authorizes Smith's to have an annual throughput of 7 million gallons per year at a fuel dispensing station Smith's proposes to build at 6310 4th St. NW, Albuquerque, New Mexico.

Id.

3) EHD admits that Permit No. 3136 authorizes Smith's to have an allowable annual throughput of up to 7 million gallons at a gasoline dispensing facility Smith's proposes to build at 6310 4th St. NW, Albuquerque, New Mexico.

In accordance with 20.11.81.14 NMAC, the Petitioners provide the following information.

Id. (purporting to list Petitioners' names, addresses and telephone numbers).

4) EHD admits that Petitioners listed some contact information required by 20.11.81.14(B)(2)(b) NMAC but is without information sufficient to form a belief regarding its accuracy or completeness and on that basis denies this allegation.

Petitioner Arthur Gradi owns property located at 6338 4th St NW, next door to the property on which Smith's proposes to construct the fuel dispensing station.

Id. at p. 2.

5) EHD is without information sufficient to form a belief regarding Petitioner Arthur Gradi's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Ruth A. McGonagil owns property located at 505 Camino Español NW, on the opposite side of 4th Street, located inclose [sic] proximity to the property on which Smith's proposes to construct the fuel dispensing station.

Id.

6) EHD is without information sufficient to form a belief regarding Petitioner Ruth McGonagil's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Jerri Paul-Seaborn owns property located at 610 Camino Español NW, located on the street directly adjacent to the property on which Smith's proposes to construct the fuel dispensing station.

Id.

7) EHD is without information sufficient to form a belief regarding Petitioner Jerri Paul-Seaborn's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Bernice Ledden owns property located at 427 Mullen Rd NW, which is located within several blocks of the property on which Smith's proposes to construct the fuel dispensing station.

Id. at p. 3.

8) EHD is without information sufficient to form a belief regarding Petitioner Bernice Ledden's property ownership or its location, if any, and on that basis denies this allegation.

Petitioner Susan Kelly owns property located at 713 Camino Español NW, which is located within ½ mile of the site on which Smith's proposes to construct the fuel dispensing station and her property can only be accessed from the intersection of Camino Español and 4th Street at the proposed Smiths fuel station site.

Id.

9) EHD is without information sufficient to form a belief regarding Petitioner Susan Kelly's property ownership, its location, if any, or its access and on that basis denies this allegation.

Petitioner Americo Chavez owns property located at 721 Camino Español NW, which is located within ½ mile of the site on which Smith's proposes to construct the fuel dispensing station and his property can only be accessed from the intersection of Camino Español and 4th Street at the proposed Smiths fuel station site.

Id.

10) EHD is without information sufficient to form a belief regarding Petitioner Americo Chavez's property ownership or its location, if any, or its access and on that basis denies this allegation.

Petitioner Pat Toledo is involved in the matter of the Smith's fuel station at Carlisle and Constitution which is on appeal.

Id.

11) EHD is without information sufficient to form a belief about what Petitioners mean by "involved" in this sentence in the Petition and on that basis denies this allegation. Furthermore, the word "involved" is vague and imprecise and EHD cannot speculate what Petitioners mean by it. EHD denies that Petitioner Pat Toledo is a party to the appeal of the Air Board's decision on EHD's Permit No. 2037-M1 which applies to Smith's gas station at Constitution and Carlisle in Albuquerque, NM.

He is also involved in a court case regarding the site at Tramway and Central, where standing is an issue.

Id.

12) EHD is without information sufficient to form a belief about what Petitioners mean by "involved" in this sentence in the Petition and on that basis denies this allegation. Furthermore, the word "involved" is vague and imprecise and EHD cannot speculate what Petitioners mean by it. EHD affirmatively states that Petitioner Pat Toledo is one of three appellants of the Air Board's decision to dismiss a petition in Air Board proceeding No. 2013-6 which had the effect of upholding EHD's issuance of Permit No. 1677-M2 which was for a Smith's gas station at 200 Tramway Blvd. SE, Albuquerque, NM.

As Smith's presented 2400 signatures on a petition submitted in the 4th Street application with no indication of the addresses of those signatories, Smith's has indicated it views that the broad public has standing.

Id.

13) EHD admits that Smith's submitted a petition without addresses in support of the application for Permit No. 3136. EHD denies that the Smith's petition contained 2400 signatures. EHD affirmatively states that the Smith's petitions it received contain 2366 signatures. EHD is without information sufficient to form a belief that "Smith's has indicated it views that the broad public has standing" and on that basis denies this allegation.

Pat Toledo has standing in this matter.

Id.

14) EHD is without information sufficient to form a belief regarding whether Petitioner Pat Toledo has standing in this matter and on that basis denies this allegation.

Each of the Petitioners participated in either or both of the Public Information Hearings (PIH) held on March 25, 2014 and April 23, 2014.

Id.

15) EHD admits that each of the Petitioners participated in either or both of the Public Information Hearings (PIH) on March 25, 2014 and April 23, 2014.

Each of the Petitioners is adversely affected by the permitting action because the Air Program refused and failed to take into consideration quality-of-life concerns raised by the participants at the PIH.

Id.

16) EHD is without information sufficient to form a belief about whether each Petitioner is adversely affected by the permitting action and on that basis denies this allegation. EHD denies that the Air Quality Control Act ("Air Act") authorizes consideration of quality of life factors as a basis for denial of an air quality permit.

In addition, each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and resulting pollution, and other negative impacts on their persons, property and quality of life resulting from the construction of the Smith's fuel dispensing station at the proposed location.

Id. at p. 3-4.

17) EHD is without information sufficient to form a belief that Petitioners are “likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith’s fuel dispensing station at the proposed location” and on that basis denies this allegation. Furthermore, Section 74-2-7(H) NMSA and 20.11.81.14(B)(2)(c) NMAC require a petitioner to state how each petitioner “is” adversely affected by the permitting action taken by EHD [emphasis added]. A statement that petitioners are “likely” to be adversely affected is speculative and does not meet the requirements of Section 74-2-7(H) NMSA or 20.11.81.14(B)(2)(c) NMAC to petition for a hearing before the Air Board.

The Petitioners are appealing the issuance of Permit 3136, issued to Smith's with notice provided to Petitioners by letter dated June 3, 2014. (See Exhibit 1, attached).

Id. at p. 4.

18) EHD admits that Petitioners have filed a petition concerning EHD’s issuance of Permit No. 3136. EHD admits that it provided notice of its issuance of Permit No. 3136 to Petitioners, as well as to others, by a letter dated June 3, 2014. EHD admits that Exhibit 1 is a copy of the letter it sent to Interested Persons about its issuance of Permit No. 3136. EHD denies

that the document attached to the Petition that purports to be Permit No. 3136 is a true and correct copy of Permit No. 3136. EHD is without information sufficient to form a belief whether each Petitioner is adversely affected as required to petition for a hearing before the Air Board and on that basis denies that Petitioners have standing to appeal the issuance of Permit No. 3136.

The Petitioners object to the issuance of the permit allowing for a throughput of 7 million gallons at a fuel dispensing station proposed to be constructed at 6310 4th St NW, Albuquerque, New Mexico.

Id.

19) EHD admits that Petitioners object to EHD's issuance of Permit No. 3136 which authorizes an allowable annual throughput of 7 million gallons at a fuel dispensing station proposed to be constructed at 6310 4th St. NW, Albuquerque, New Mexico. EHD affirmatively states that Permit No. 3136 meets all federal, state and local requirements including requirements regarding gasoline throughputs, emissions and performance measures (also known as management practices).

Permit No. 3136 was issued pursuant to §20.11.41 NMAC, Authority to Construct.

Id.

20) EHD admits that it issued Permit No. 3136 pursuant to 20.11.41 NMAC, Authority to Construct.

The first PIH was held on March 25, 2014.

Id.

21) EHD admits that it held a Public Information Hearing ("PIH") on March 25, 2014.

Approximately 75 people attended the meeting in opposition to the issuance of the permit, with approximately 20 people providing public comments opposing the issuance of the permit.

Id.

22) EHD is without information sufficient to form a belief about how many people attended the meeting and on that basis denies this allegation. EHD affirmatively states that 72 persons signed the sign-in sheet. EHD does not maintain a tally of persons in support of or opposed to permits and therefore EHD is without information sufficient to form a belief about how many people are opposed to the issuance of Permit No. 3136 or how many people spoke in opposition to Permit No. 3136. EHD denies that public support or opposition can be the basis for a decision on a permit issued under the Air Quality Control Act.

No one from the public spoke in favor of the permit.

Id.

23) EHD is without information sufficient to form a belief about whether anyone from the public spoke in favor of the permit and on that basis denies this allegation. EHD states affirmatively that it does not prepare and does not keep a tally of the number of persons in favor of or opposed to permits. EHD denies that public support or opposition can be the basis for a decision on a permit issued under the Air Quality Control Act.

The PIH was continued due to the inability to hear all public comment within the allotted time and a second hearing was held April 23, 2014.

Id.

24) EHD admits that the PIH held on March 25, 2014 was continued because EHD was unable to hear all public comment within the allotted time on March 25, 2014. EHD admits that the continuation of the PIH was held on April 23, 2014. EHD denies that public support or opposition can be the basis for a decision on a permit issued under the Air Quality Control Act.

At that meeting, approximately 70 people attended the meeting and approximately 20 spoke against the issuance of the permit.

Id.

25) EHD denies that 70 people attended the PIH on April 23, 2014. EHD states affirmatively that 77 persons signed the sign-in sheet and that Petitioner Pat Toledo's name is on it twice. EHD is without information sufficient to form a belief about how many people attended the meeting and on that basis denies this allegation. EHD does not maintain a tally of persons in support of or opposed to permits and therefore EHD is without information sufficient to form a belief about how many people spoke in support of or opposition to Permit No. 3136. EHD denies that public support or opposition can be the basis for a decision on a permit issued under the Air Quality Control Act.

Again, no one from the public spoke in favor.

Id.

26) EHD is without information sufficient to form a belief about whether anyone from the public spoke in favor of the permit and on that basis denies this allegation. EHD states affirmatively that it does not prepare and does not keep a tally of the number of persons in favor of or opposed to permits. EHD denies that public support or opposition can be the basis for a decision on a permit issued under the Air Quality Control Act.

In addition, petitions with approximately 60 signatures of nearby residents objecting to the issuance of the permit were submitted to the administrative record.

Id.

27) EHD denies that petitions with approximately 60 signatures of nearby residents objecting to the issuance of Permit No. 3136 were submitted to the Administrative Record. EHD affirmatively states that petitions with a total of 55 signatures were received requesting a Public Information Hearing. EHD affirmatively states that petitions pro or con are not an appropriate criteria by which to decide whether to grant or deny a permit to construct an air emissions source.

The purpose of regulatory provisions regarding public notice and hearings is to ensure that persons with an interest in environmental permitting matters be allowed to participate before a final decision is made. Colonias Dev. Council v. Rhino Enviro. Services, 2005-NMSC-024, 21, 138 N.M. 133.

Petition, at p. 4.

28) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that the New Mexico Supreme Court's decision in *Colonias Dev. Council v. Rhino Enviro. Services* ("Colonias") applies to permits issued under the Solid Waste Act. EHD denies that any New Mexico court has concluded that *Colonias* applies to permitting decisions made under the Air Act. EHD denies that the Air Act contains any language comparable to the language that the Supreme Court analyzed in *Colonias* and which led to its conclusions. EHD affirmatively states that Paragraph

21 of *Colonias* cited as support for this statement in the Petition is interpreting language in the Solid Waste Act, not the Air Act, and that comparable statutory language is not present in the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The New Mexico Supreme Court has recognized that “the public plays a vital role” in an administrative environmental permitting process and must be allowed a reasonable opportunity to be heard. Id.

Petition, at p. 4-5.

29) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that the New Mexico Supreme Court stated that “the public plays a vital role in the hearing process” in referring to its analysis of the Solid Waste Act, Section 74-9-29(A)(4) and the New Mexico Environment Department hearing permitting procedures, 20.1.4 NMAC. EHD denies that either of these provisions applies to the administrative process by which EHD considers an application for an air quality permit or to the process by which the Air Board considers a challenge to a permit issued by EHD. EHD affirmatively states that it issued Permit No. 3136 pursuant to the procedures in Section 7 of the Air Act and 20.11.41 NMAC, and applied the substantive regulations in 20.11.65 NMAC and federal regulation 40 C.F.R. §§ 63.11110 to 63.11126 (incorporated by reference by 20.11.64 NMAC). To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Pursuant to the Colonias decision, adverse impacts on a community's social well-being and quality of life may be raised during public hearings concerning permit applications and the final decision maker must take such concerns into consideration when deciding whether to approve or deny a permit. Id. at ¶24.

Petition, at p. 5.

30) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Quality of life issues may include concerns about public health and welfare and other impacts on the community not addressed by specific technical regulations. Id.

Petition, p. 5.

31) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Such concerns may also include impacts on private property.

Petition, p. 5.

32) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

Adverse public testimony, whether in the form of technical testimony or public comment, must be taken into account when reaching a final decision. Id. at ¶¶24, 41, 43.

Petition, p. 5.

33) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The New Mexico Supreme Court specifically found that the hearing officer was incorrect in stating that the only determination to be made was whether the permit application met the technical requirements of the regulations. Id. at ¶¶7, 8, 24.

Petition, p. 5.

34) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD affirmatively states that *Colonias* interpreted language in the Solid Waste Act and that comparable language is not found in the Air Act. EHD denies that *Colonias* applies to permitting actions taken pursuant to the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Board has already held, in regard to Smith's Permit No. 2037-M1 for the Smith's fuel dispensing station located at 1313 Carlisle Blvd. NE, Albuquerque, NM, that the Air Quality Act and regulations require permitting decisions to take into account quality-of-life issues.

Petition, p. 5.

35) EHD affirmatively states that the Air Board's decision in regard to Smith's Permit No. 2037-M1 for the Smith's gasoline dispensing facility located at 1313 Carlisle Blvd. NE, Albuquerque, NM, is presently before the Court of Appeals, that legal issues arising in that proceeding are disputed and the final decision from the appellate process is as yet unknown. As a result, EHD denies that the Air Board's decision on Permit No. 2037-M1 is binding precedent or persuasive guidance for this proceeding. To the extent that any air other quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Act mandates that the Board "shall prevent or abate air pollution." NMSA §74-2-5.

Petition, p. 5.

36) This sentence states a legal conclusion to which no response is required. To the extent that any response is required, EHD admits that Section 5(A) of the Air Act requires, among other things, that the Air Board prevent or abate air pollution. EHD affirmatively states that Section 5(B) of the Air Act requires the Air Board to "adopt...regulations...to...prevent or abate air pollution" and that EHD has followed all Air Board regulations in issuing Permit No. 3136. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

In addition, Part 41 of the Air Quality Control Board Regulations, which governs authority to construct permits, states that the objective of the part "is to insure that new facilities or modified existing facilities will not emit air pollution, which will cause violations of air pollution control regulations upon operation

following construction. This procedure will protect the source owner's investment as well as uphold public concern and desire for input prior to commencement of air pollution sources in Bernalillo County." 20.11.41.6 NMAC.

Petition, p. 5.

37) This sentence states a legal conclusion to which no response is required. To the extent that any response is required, EHD admits that the applicable Part 41 of the Air Board's regulations contains the quote set forth in this sentence of the Petition. EHD affirmatively states that the term "air pollution" is defined in Section 74-2-2(B) of the Air Act and that it does not encompass all emissions of any amount of air pollutants. EHD affirmatively asserts that subsection 5(B) of the Air Act provides that air pollution is to be prevented and abated by adopting rules and subsection 7(C)(1) limits the authority to deny permits to only three reasons— if the construction or modification would (1) violate a rule, (2) violate a standard, or (3) violate any other provision of the Air Act. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

The Air Quality Act and the Board's regulations, as well as the Board's decision in the Carlisle permitting matter, clearly express that the issuance of permits must be made in the context of impacts to public welfare and the reasonable use of property.

Petition, p. 5-6.

38) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that public welfare and reasonable use of property lacking any nexus to an air quality regulation may be used as a basis for denying a permit. *See* NMSA 1978, § 74-2-7(C)(1). EHD affirmatively states that when the Air Board adopts rules, it gives such weight as it finds appropriate to interference with health, welfare, visibility and property. NMSA 1978, § 74-2-5(E)(1). In turn, during permitting, EHD applies Air Board rules

to appropriately protect health, welfare, visibility and property. EHD affirmatively states that the Air Board has adopted a rule to prevent excessive emissions of hazardous air pollutants at gasoline dispensing facilities, 40 C.F.R. Part 63 Subpart CCCCCC (incorporated by reference by 20.11.64 NMAC) ("Hex C"), and a rule to prevent excessive emissions of volatile organic compounds at gasoline dispensing facilities, among other sources. 20.11.65 NMAC. EHD affirmatively states that Permit No. 3136 requires compliance with both Hex C and 20.11.65 NMAC and thus, that issuance of Permit No. 3136 gave appropriate weight to protecting public health, welfare and property. To the extent that any other air quality factual allegations are raised in this sentence in the Petition, EHD denies them.

In issuing Permit No. 3136, the City of Albuquerque Air Quality Program (Air Program) refused to take into consideration the concerns raised by the public comments at the PIH.

Petition, p. 6.

39) EHD denies that it refused to take into consideration the concerns raised by the public comments at the Public Information Hearing. EHD affirmatively states that it gave appropriate consideration to the concerns raised at the Public Information Hearing.

The Air Program stated: "An air quality permit cannot address zoning, non-air-quality building issues, road and traffic control and public safety." (Exhibit 1, attached hereto).

Petition, p. 6.

40) EHD admits that the Air Program made the quoted statement in the letter attached as Exhibit 1 to the Petition.

The Program further stated: "Before the Department made a decision regarding Smith's application, the Department considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The Department considered whether the application complied with the technical requirements of the Clean Air Act, the Air Act, and

applicable air quality ordinances and regulations. Public opinion regarding air quality issues, wider public health and environmental issues, and additional public safety and welfare issues were duly noted and, in some cases, conveyed to City Departments with jurisdiction over the particular issue.” Id.

Id.

- 41) EHD admits that the Air Program made the quoted statement.

It should be noted there is nothing in the record to indicate that the Air Program did, in fact, convey concerns to appropriate City Departments.

Id.

- 42) EHD denies that there is “nothing in the record to indicate that the Air Program did, in fact, convey concerns to appropriate City Departments.” EHD affirmatively states that its staff contacted other programs at the City and the State and alerted those programs to non-air quality concerns that came up and acquired specific contact information for persons who could respond to the concerns. EHD affirmatively states that the contact information was provided to persons at the second Public Information Hearing on the agenda and that the agenda is in the Administrative Record. EHD affirmatively states that Part 41 requires that the administrative record contain “the application, any other evidence submitted by the applicant, any evidence or written comments submitted by interested persons, any other evidence considered by the Department, a statement of matters officially noticed, and if a public hearing is held, the evidence submitted at the hearing.” 20.11.41.15(B) NMAC (2002). EHD affirmatively states that its Administrative Record for Permit No. 3136 that will be filed with the Hearing Clerk in this matter will contain all of the items that Part 41 requires it to contain.

Also, "duly noted" is not equivalent to preparation of a response to the serious concerns of the public.

Id.

43) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation. EHD affirmatively states that it administers the Clean Air Act, the Air Quality Control Act, the City and County Joint Air Quality Control Board ordinances and regulations adopted by the Air Board pursuant to those laws and ordinances. EHD affirmatively states that it issued Permit No. 3136 in accordance with all legal requirements.

The Air Program dismissal of public concerns by stating the concerns were "duly noted" and "in some cases" conveyed to City Departments, is an insufficient response to a meaningful public input process.

Id.

44) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

Permit No. 3136 is for a fuel dispensing station that has not been built on property that is currently developed as a car wash.

Id.

45) EHD admits that Permit No. 3136 is for a fuel dispensing station that has not yet been built. EHD admits that there is currently a car wash on the property.

The car wash is no longer operational.

Id.

46) EHD is without information sufficient to form a belief whether the car wash is or is not operational and on that basis denies this allegation.

The property is within the City of Albuquerque, but is on the boundary with the Village of Los Ranchos.

Id.

47) EHD admits that the property on which the fuel dispensing station will be constructed that is permitted by Permit No. 3136 is within the City of Albuquerque. EHD is without information sufficient to form a belief whether it is on the boundary of the Village of Los Ranchos and on that basis denies this allegation.

Fourth Street is a busy arterial with volumes approaching 20,000 cars per day.

Id.

48) EHD is without information sufficient to form a belief about what Petitioners mean by “busy arterial” and on that basis denies that allegation. EHD further states that the phrase “busy arterial” is vague and undefined and EHD does not know what Petitioners mean by it and is not required to guess. EHD is without information sufficient to form a belief whether the traffic volume on Fourth Street approaches 20,000 cars per day and on that basis denies this allegation.

There is a Giant gas station about 300 feet from the proposed site; another gas station on the east side of Fourth Street at the nearby intersection with Montano; and a Phillips 66 station on the northwest corner of that intersection.

Petition, at p. 7.

49) EHD is without information sufficient to form a belief whether there is a Giant gas station about 300 feet from the proposed site and on that basis denies this allegation. EHD affirmatively states that there is a Giant gas station at 6242 4th St. NW which is south of the

proposed site of the Smith's gas station. EHD admits that there is a gas station on the east side of Fourth Street at the intersection with Montañño and EHD affirmatively states that it is an ABQ Fill Up gas station at 5640 4th St. NW on the east side of 4th Street. EHD admits that there is a Phillips 66 gas station on the northwest corner of the intersection with Montañño and EHD affirmatively states that its address is 5605 4th St. NW.

The proposed fuel station is allowed to pump 7 million gallons per year.

Id.

50) EHD admits that its permit No. 3136 for the Smith's fuel station at 6310 4th St. NW in Albuquerque authorized an allowable annual throughput of up to 7,000,000 gallons.

This would be the largest throughput volume in the Albuquerque metropolitan area.

Id.

51) EHD denies this allegation. EHD affirmatively states that there are at least eight gas stations in Bernalillo County permitted for an allowable throughput larger than 7 million gallons per year, ranging from 8 million to 15 million gallons per year. EHD affirmatively states that there are at least four additional gas stations in Bernalillo County permitted for an allowable throughput of 7 million gallons per year. Furthermore, other facilities in Bernalillo County that handle gasoline have much higher allowable throughputs, such as the Vecenergy Gasoline Terminal in the South Valley which has a permitted allowable annual throughput of 438 million gallons of gasoline.

The location borders residential areas and is close to Taft Middle School.

Id.

52) EHD admits that the location of the proposed fuel dispensing station described in Permit No. 3136 borders residential areas. EHD is without information sufficient to form a belief about whether the proposed fuel dispensing location is close to Taft Middle School and on that basis denies this allegation. EHD affirmatively states that the word “close” is vague and undefined and EHD does not know what Petitioners mean by it and is not required to guess.

The construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution.

Id.

53) EHD is without information sufficient to form a belief whether the construction of the Smith’s station will result in significantly increased traffic and on that basis denies this allegation. EHD is without information sufficient to form a belief whether an increase in traffic, if any, would cause an increase in air pollution and on that basis denies this allegation.

The property owned by Mr. Gradi is immediately north and east of the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic.

Id.

54) EHD is without information sufficient to form a belief about the location of property owned by Mr. Gradi and on that basis denies this allegation.

The proposed fuel dispensing station would have negative and cumulative impacts on the quality of life in the area and on the health, welfare and safety of people who own property, live, go to school and regularly travel in the area.

Id.

55) EHD is without information sufficient to form a belief about the allegations in this sentence and on that basis denies them.

All Petitioners live near the proposed Smith's fueling station and would be directly impacted by the VOC's, fumes and increased traffic and pollutants.

Id.

56) EHD is without information sufficient to form a belief about the allegations in this sentence and on that basis denies them. EHD affirmatively states that VOCs from gasoline vapors are, as a general rule, lighter than air, photochemically reactive and unstable. Their persistence in the vicinity of a gasoline dispensing facility depends on the weather, the time of day, and other factors. As a result, EHD is without information sufficient to form a belief that Petitioners would be "directly impacted by the VOCs, fumes and increased traffic and pollutants" and on that basis denies this allegation.

There are residents in the vicinity that have breathing difficulties, and some are on oxygen.

Id.

57) EHD is without information sufficient to form a belief about the allegations in this sentence and on that basis denies them.

There are low income residents nearby with small children and elderly populations.

Id.

58) EHD is without information sufficient to form a belief about the allegations in this sentence and on that basis denies them.

These and other concerns (including an unreadable site plan; the safety of fuel tanker deliveries; conflicts with North Fourth Street Rank III Corridor Plan, which plans for North Fourth Street to be a transit/pedestrian oriented corridor; nuisance issues similar to what occurs at other Smith's stations; safety and operational issues concerning how drainage will be handled; the lack of need for an additional gas station in the area; fuel station operational considerations; cell tower proximity; and other concerns) were raised at the PIH.

Id.

59) EHD admits that the following concerns were raised at the Public Information Hearing: an unreadable site plan; the safety of fuel tanker deliveries; conflicts with North Fourth Street Rank III Corridor Plan which plans for North Fourth Street to be a transit/pedestrian oriented corridor; safety and operational issues concerning how drainage will be handled; the lack of need for an additional gas station in the area; and cell tower proximity. EHD admits that concerns were raised at the Public Information Hearing about the Smith's Constitution and Carlisle gas station. EHD is without information sufficient to form a belief whether concerns were raised about "other nuisance issues similar to what occurs at other Smith's stations" and on that basis denies this allegation. EHD is without information sufficient to form a belief about "fuel station operational considerations" and on that basis denies this allegation.

The Air Program's refusal to take into consideration issues regarding quality of life, public health, impacts to private property and impacts to the community is inconsistent with the holding in Colonias, with the applicable statutes and regulations, and with the Board's decision in the Carlisle permitting matter.

Petition, pp. 7-8.

60) This sentence states legal conclusions and does not require a response. To the extent that a response is required, EHD denies this allegation.

"Duly noting" the concerns raised by the public is insufficient.

Petition, p. 8.

61) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

Petitioners were informed by the Air Program officials during the PIH that Smith's application 3136 essentially met technical requirements and that only those technical requirements would be considered in making a decision on the application.

Id.

62) EHD is without information sufficient to form a belief about what Petitioners mean by "technical requirements" and on that basis denies this allegation. Furthermore, EHD states that the phrase "technical requirements" is vague and undefined and EHD is not required to guess what Petitioners mean by it. EHD denies that it informed members of the public that the Smith's application for Permit No. 3136 "essentially met technical requirements." EHD admits that it informed the members of the public who attended the Public Information Hearings that its process of deciding whether to issue a permit is based on determining whether the proposed activity satisfies the regulations and the applicable laws and that its permitting decision is based on that determination.

The Air Program is incorrect in stating that they may only rely on technical requirements.

Id.

63) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD is without information sufficient to form a belief about what Petitioners mean by “technical requirements” and on that basis denies this allegation. Furthermore, EHD states that the phrase “technical requirements” is vague and undefined and EHD is not required to guess what Petitioners mean by it. To the extent that any other air quality factual allegation is raised by this sentence, EHD denies it.

If the concerns of the public are not addressed, including quality of life issues, impacts to the community, and- impacts to property, then the requirements for public participation are merely a pro forma process that has no meaning and no relation to the actual permit decision.

Id.

64) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

Public participation is rendered meaningless, despite statutory and regulatory provisions for public input and numerous decisions by the New Mexico appellate courts emphasizing the importance of public participation in environmental permitting.

Id.

65) This sentence states a legal conclusion and does not require a response. To the extent that a response is required, EHD denies this allegation.

Pursuant to §74-2-7 NMSA and 20.11.81 NMAC, the Petitioners, persons who participated in the permitting action before the Department, request that the Air Quality Board hold an evidentiary hearing on Permit No. 3136, including but not limited to the failure of the Air Quality Program to properly take into

consideration public comments and concerns regarding quality of life and impacts on the community, impacts on air quality, cumulative effects of the permitting action, impacts on private property and other issues raised by the public.

Petition, p. 8.

66) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

As stated above, pursuant to Colonias Dev. Council v. Rhino Enviro. Services, 2005-NMSC-024, 138 N.M. 133, NMSA §74-2-5., 20.11.41.6 NMAC, and the Board's decision in the Smith's Carlisle permitting matter, permitting decisions must take into consideration community concerns and cannot rely solely on technical considerations.

Petition, p. 8.

67) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

The requested remedy is within the Board's jurisdiction to review decisions made by the Air Quality Program and to prevent and abate air pollution set forth in §74-2-5 and the applicable air quality regulations.

Petition, p. 8-9.

68) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

Air Program improperly considered Smith's petition signatures.

Petition, at p. 9.

69) EHD denies that it gave the Smith's petition signatures any weight in its decision to issue Permit No. 3136. In Exhibit 1, page 3 of 4, which Petitioners attached to their Petition, EHD stated that "While petitions pro or con may serve other functions, they cannot be the basis for a decision on an air quality permit application."

In the second hearing, Smith's proposed for inclusion as part of the record a petition in favor of the fueling station.

Petition at p. 9.

70) EHD admits this allegation.

Petitioner's objected because, as admitted by Smith's representatives on the record, the signatories on the petition did not provide any information about the signatory.

Id.

71) EHD is admits that at least one Petitioner objected to the Smith's petition because it did not provide any information about the signatory.

There was no indication of whether the signatories were neighborhood residents, whether they lived in the North Valley, or whether in fact they even lived in the state of New Mexico.

Id.

72) EHD admits that the Smith's petitions contained only names, not addresses or other contact information.

These petition signatures should not have been considered by the Air Program.

Id.

73) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that its decision on Permit No. 3136 was based in any part on the Smith's petition. In Exhibit 1, page 3 of 4, which Petitioners attached to their Petition, EHD stated that "While petitions pro or con may serve other functions, they cannot be the basis for a decision on an air quality permit application."

They were simply the signatures of sporadic customers who would not be impacted by the Air Program decision; they might have been only indicating support for cheap gasoline prices and were unaware of the proposed fuel station location.

Id.

74) EHD is without information sufficient to form a belief whether the persons who signed the Smith's petitions would or would not be impacted by Permit No. 3136, whether they were "sporadic customers," whether they were indicating support for cheap gasoline prices or whether they were aware of the proposed fuel station location and on that basis denies these allegations.

They should not have been considered by the Air Program.

Id.

75) This sentence states a legal conclusion to which no response is required. To the extent that any response is required, EHD denies that its decision on Permit No. 3136 was based in any part on the Smith's petition. In Exhibit 1, page 3 of 4, which Petitioners attached to their Petition, EHD stated that "While petitions pro or con may serve other functions, they cannot be the basis for a decision on an air quality permit application."

Air Program did not attempt to provide adequate notice to the affected public.

Id.

76) EHD denies that it "did not attempt to provide adequate notice to the affected public." EHD affirmatively states that it provided all notice it was legally required to provide and in addition to the notice it was legally required to provide, it provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County

(collectively “NA Lists”). EHD affirmatively states that it uses the term “neighborhood associations” in this context to mean any entity listed on the NA Lists regardless of whether it is called a “neighborhood association,” “homeowner association,” or some other entity.

Smith’s is required to provide public notice of application and notice of public hearing in a newspaper, to persons on a mailing list developed by the AQD and “by other means if necessary to assure adequate notice to the affected public.”

Id.

77) EHD denies that Smith’s was required to perform the public notice activities described in this sentence. EHD affirmatively states that the quoted referenced requirement, which in the Petition lacks a citation to any law or regulation, is found in 20.11.42.13(B)(2) NMAC which applies to major sources, not minor sources like the Smith’s gas distribution facility permitted in Permit No. 3136. EHD affirmatively states that the quoted language in this sentence in the Petition is not found in any New Mexico air quality regulation which applies to the Smith’s gas distribution facility proposed to be constructed at 6310 4th St. NW in Albuquerque.

Clearly, this standard has not been met.

Id.

78) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that Smith’s is required to meet the identified standard. In addition, EHD is without information sufficient to form a belief what measures Smith’s may have taken, other than its petition, to notify the public and on that basis denies this allegation.

The Air Program stated on the record at the first hearing on 3136 that notice was only given to three recognized neighborhood associations in the area based on a google search.

Id.

79) EHD admits that it stated on the record at the first hearing that notice was given to three recognized neighborhood associations in the area based on a Google Maps (aka Google Earth) search. EHD denies that it only gave notice to neighborhood associations; EHD also published a public notice in the Albuquerque Journal as required by rule. EHD affirmatively states that it provided all notice it was legally required to provide and in addition to the notice it was legally required to provide, it provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively “NA Lists”). EHD affirmatively states that it uses the term “neighborhood associations” in this context to mean any entity listed on the NA Lists regardless of whether it is called a “neighborhood association,” “homeowner association,” or some other entity.

Notice should have been given to individuals and neighborhoods directly adjacent to the proposed site.

Id.

80) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies this allegation.

In approving the Permit 3136, the Air Program states that Spanish Walk Homeowner's Association, even though it is directly adjacent to the site, was not notified because it is not a recognized neighborhood association.

Petition, pp. 9-10.

81) EHD denies this allegation. EHD affirmatively states that it did not notify Spanish Walk Homeowner's Association because it is not registered with the City Office of Neighborhood Coordination or Neighborhood Coordination for Bernalillo County. EHD also affirmatively states that it has been unable to locate "Spanish Walk Homeowner's Association" at the Secretary of State's Office as a formally organized entity. EHD affirmatively states that it does not have contact information for "Spanish Walk Homeowner's Association" or know its location or boundaries. EHD affirmatively states that it provided all notice it was legally required to provide and, in addition to the notice it was legally required to provide, it also provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively "NA Lists"). EHD affirmatively states that it uses the term "neighborhood associations" in this context to mean any entity listed on the NA Lists regardless of whether it is called a "neighborhood association," "homeowner association," or some other entity.

There has been a history of faulty notice regarding fueling stations in the Albuquerque area.

Petition, p. 10.

82) EHD is without information sufficient to form a belief about the alleged history of faulty notice regarding fueling stations and on that basis denies this allegation.

This resulted in a new regulation taking effect January 1, 2014.

Id.

83) EHD admits that a repealed and replaced regulation, 20.11.41 NMAC (2014), took effect on January 1, 2014. EHD denies that the new regulation was the result of any alleged history of faulty notices regarding fueling stations and denies that it applies to fuel stations as a specific class. EHD affirmatively states that 20.11.41 NMAC (2014) applies to sources which require a minor source air quality permit; this includes gas distribution facilities but also includes many other sources of air emissions such as gravel crushers, facilities with large emergency generators, and dry cleaners, among others.

Since then, a large yellow sign is required to be posted at the site of a proposed fuel station.

Id.

84) EHD denies that the recently repealed and replaced 20.11.41 NMAC (2014) requires a large yellow sign to be posted at the site of a proposed fuel station. EHD affirmatively states that 20.11.41.13(B)(2) NMAC (2014) speaks for itself and that, among other things, it requires a weather-proof sign provided by the Department to be posted at the site of the proposed or existing facility. EHD denies that the recently repealed and replaced 20.11.41 NMAC (2014) specifically applies to fuel stations as a class. EHD denies that 20.11.41 NMAC (2014) applies to the processing of the Smith's application for Permit No. 3136 because it was not in force when EHD received the Smith's application for Permit No. 3136.

The subject application 3136, managed to be completed in December 2013, just prior to the new requirements taking effect.

Id.

85) EHD admits that the application for Permit No. 3136 was received on November 5, 2013, was determined to be administratively complete on December 3, 2013, and that public notice was published on December 6, 2013. EHD denies any other allegations in this sentence, either expressed or implied.

Given the past record of lack of notice and associated problems, the Air Program and Smiths were obligated to give actual notice to nearby residents.

Id.

86) EHD denies the allegations of “a past record of lack of notice and associated problems.” EHD denies that the Air Program and Smith’s were obligated to give “actual notice” to nearby residents. EHD denies that any law or rule requires it to provide individualized notice of applications for minor source permits. EHD affirmatively states that 72 persons signed into its first Public Information Hearing and 77 persons signed into its second Public Information Hearing which, in total lasted five hours. EHD affirmatively states that it provided all notice it was legally required to provide and, in addition to the notice it was legally required to provide, it also provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively “NA Lists”). EHD affirmatively states that it uses the term “neighborhood associations” in this context to mean any entity listed on the NA Lists regardless of whether it is called a “neighborhood association,” “homeowner association,” or some other entity.

In the case of an application for a Smith's fueling station at Tramway and Central in Albuquerque, the Air Program is on record as having notified several homeowner's associations (not registered neighborhood associations) of the proposed application.

Id.

87) EHD denies the allegation that, "in the case of an application for a Smith's fueling station at Tramway and Central in Albuquerque, the Air Program is on record as having notified several homeowner's associations (not registered neighborhood associations) of the proposed application." EHD affirmatively states that in the proceeding for the Permit for the Smith's gas station at 200 Tramway SE in Albuquerque, EHD provided all notice it was legally required to provide and, in addition to the notice it was legally required to provide, it also provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively "NA Lists"). EHD affirmatively states that it uses the term "neighborhood associations" in this context to mean any entity listed on the NA Lists regardless of whether it is called a "neighborhood association," "homeowner association," or some other entity. EHD denies any other allegation in this sentence whether express or implied.

The Spanish Walk Homeowner's Association is adjacent to the site and it would have been easy for the Air Program or Smith's to provide nearby residents with notice.

Id.

88) EHD is without information sufficient to form a belief about the location of Spanish Walk Homeowner's Association, whether or not it would have been "easy" for the Air Program or Smith's to provide nearby residents with notice, and EHD does not have Spanish Walk Homeowner's Association's address or other contact information and on that basis denies the allegations in this sentence. EHD affirmatively states that EHD provided all notice it was

legally required to provide and, in addition to the notice it was legally required to provide, it also provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively “NA Lists”). EHD affirmatively states that it uses the term “neighborhood associations” in this context to mean any entity listed on the NA Lists regardless of whether it is called a “neighborhood association,” “homeowner association,” or some other entity. EHD affirmatively states that Spanish Walk Homeowner’s Association is not registered with the City of Albuquerque Office of Neighborhood Coordination or Neighborhood Coordination with Bernalillo County. EHD admits that it did not provide notice to Spanish Walk Homeowner’s Association. EHD affirmatively states that, despite not having received notice from EHD, a number of individuals at the Public Information Hearings stated that they were members of Spanish Walk Homeowner’s Association and apparently received notice by some other means.

The Air Program chose not to do so.

Id.

89) EHD denies that its Air Quality Program “chose” not to provide notice to Spanish Walk Homeowner’s Association. EHD affirmatively states that it did not know of the existence of Spanish Walk Homeowner’s Association prior to the first Public Information Hearing and does not know its contact information or its boundaries. EHD affirmatively states that EHD provided all notice it was legally required to provide and, in addition to the notice it was legally required to provide, it also provided email notice to neighborhood associations which were registered with the City of Albuquerque Office of Neighborhood Coordination or registered with Neighborhood Coordination at Bernalillo County (collectively “NA Lists”). EHD affirmatively

states that it uses the term “neighborhood associations” in this context to mean any entity listed on the NA Lists regardless of whether it is called a “neighborhood association,” “homeowner association,” or some other entity.

Air Program improperly approved a permit for an applicant (Smiths) that is a chronic violator of the conditions of its other permits within the City of Albuquerque

Id.

90) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that it should have denied a permit to Smith’s for its previous violations of some of the requirements of its air quality permits. Furthermore, EHD states that the term “chronic violator” is vague and undefined and EHD is not required to guess at what Petitioners mean by it.

Smith’s routinely pays fines related to exceeding the pumping quantities allowed under its permits.

Id.

91) EHD admits that Smith’s has paid fines related to exceeding the pumping quantities allowed under its permits. EHD is without information sufficient to form a belief about what Petitioners mean by the term “routinely” because it is vague and undefined and on that basis EHD denies this allegation. EHD affirmatively states that throughput levels are imposed in permits for gasoline distribution facilities to establish the amount of the annual permit fee, not to protect public health. EHD further states that its authority to impose permit conditions restricting emissions is limited by 20.11.41.18(B)(1) NMAC (2002) or 20.11.41.19(B)(1) NMAC (2014). EHD further states that the Air Act does not allow permits to

be denied based on past compliance history. NMSA 1978, § 74-2-7(C)(1) (authorizing denial of a construction permit or permit modification if (1) it will violate regulations, (2) it will cause or contribute to an exceedance of an ambient air quality standard, or (3) if it would violate any other provision of the Air Act or Clean Air Act).

The Air Program should refuse to issue Smiths additional permits until Smith's can demonstrate that it has a good track record of compliance.

Id.

92) This sentence states a legal conclusion to which no response is required. To the extent that a response is required, EHD denies that it should “refuse to issue additional permits until Smith’s can demonstrate that it has a good track record of compliance.” EHD affirmatively states that the basis for denial of a permit issued pursuant to 20.11.41 NMAC is stated in Section 74-2-7(C)(1) (authorizing denial of a construction permit or permit modification if (1) it will violate regulations, (2) it will cause or contribute to an exceedance of an ambient air quality standard, or (3) if it would violate any other provision of the Air Act or Clean Air Act).

The enforcement tools and regulatory programs appear insufficient to deter future violations by the applicant.

Id.

93) This sentence states an opinion to which no response is required. To the extent that a response is required, EHD denies this allegation.

Smith's appears to be treating penalties and other sanctions as merely an on-going business expense and the Air Program should view this as symptomatic of underlying compliance problems and, potentially, threats to the City's environment that should be addressed and corrected.

Petition, pp. 10-11.

94) This sentence states an opinion to which no response is required. To the extent that a response is required, EHD denies this allegation.

Since violations of the throughput volumes by Smith's appears to be a routine matter, it raises the question of whether there are other violations of the terms and conditions of Smith's permits that might be occurring that the City is either unaware of, or aware of, that could result in the release of harmful pollutants into the air or create dangerous conditions.

Petition, p. 11.

95) This sentence states an opinion or a speculation to which no response is required. To the extent that a response is required, EHD denies this allegation.

AFFIRMATIVE DEFENSES

96) To the extent that Petitioners seek to have Permit No. 3136 denied on the basis of quality of life concerns that have no nexus to any Air Board regulation, Petitioners fail to state a claim upon which relief can be granted.

97) Petitioner Pat Toledo does not have standing to petition for a hearing for Permit No. 3136.

98) The Petition does not demonstrate how the proposed construction "will not meet applicable standards, rules or requirements of the Air Quality Control Act or the ...[Clean Air Act]; "will cause or contribute to air contaminant levels in excess of ...[an ambient air quality

standard];” or “will violate any other provision of the Air Quality Control Act or the ...[Clean Air Act]” as required by subsection 7(C)(1) of the Air Act for denial of Permit No. 3136 and therefore, the Petition fails to state a claim upon which relief can be granted.

99) EHD reserves the right to assert such additional affirmative defenses as may arise and prove applicable during the course of the hearing.

WHEREFORE, having fully answered, EHD respectfully requests that the Air Board issue a Final Order denying the remedies requested by Petition No. 2014-3, dismissing Petition No. 2014-3, sustaining EHD’s issuance of Permit No. 3136 and granting EHD any additional relief that the Air Board deems just and proper.

Respectfully Submitted,

CITY OF ALBUQUERQUE
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer to the Petition for Hearing was served on July 23, 2014 by the method indicated below:

- 1) The City's original *Answer to the Petition for Hearing* 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. 2014-3*

- 3) An electronic copy was sent by electronic mail to:

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4) One hard copy was mailed by first class mail to:

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Petitioner

Americo Chavez
721 Camino Espanol NW
Albuquerque, NM 87107
Petitioner

By: 
Carol M. Parker, Assistant City Attorney