

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

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

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Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Susan Kelly, Americo Chavez, Pat Toledo, as individuals,

Petitioners,

v.

AQCB Petition No. 2014-3

City of Albuquerque Environmental Health Department, Air Quality Program, and Smith's Food & Drug Centers, Inc.,

Respondents.

**SMITH'S FOOD & DRUG CENTERS, INC.'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 1-056 NMRA, Smith's Food & Drug Centers, Inc. ("Smith's") moves the Albuquerque-Bernalillo County Air Quality Control Board ("Board") for summary judgment and dismissal of the Amended Petition For Hearing ("Petition") with prejudice. As grounds, Smith's states that none of the material facts are in dispute and Smith's is entitled to judgment as a matter of law. Specifically, it is undisputed that Permit No. 3136 was issued in accordance with applicable air quality permitting statutes and regulations. The Board should therefore dismiss the Petition with prejudice.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On November 5, 2013, Smith's filed with the Air Quality Division of the City of Albuquerque Environmental Health Department ("EHD") an application for an

authority-to-construct permit for a proposed gasoline dispensing facility (“GDF”) to be located at 6310 4th Street NW (the “4th Street GDF”). AR 2, pp. 142-43.

2. Smith’s requested authorization to pump up to 7,000,000 gallons of gasoline per year (also known as “throughput”), which equates to 45.5 tons per year of Volatile Organic Compounds (“VOCs”). AR 2, p.143; AR 9, p. 156.

3. EHD evaluated Smith’s application and ruled it complete on December 3, 2013. AR 10, p. 157. EHD assigned No. 3136 to the proposed permit. AR 11, p. 158.

4. On December 6, 2013, EHD published in the Albuquerque Journal a notice of the proposed permitting action. AR 14, pp. 164-66; AR 18, p. 174. EHD sent a draft of the public notice to several neighborhood organizations in the vicinity of the 4th Street GDF before publishing it. AR 74, p. 369; AR 113, p. 596.

5. EHD held public information hearings on March 25, 2014 and April 23, 2014. AR 53, p. 289; AR 91, p. 423. According to the Petition, approximately 70-75 people who were opposed to the issuance of Permit No. 3136 attended each public information hearing. Petition at 4.

6. EHD Air Quality Program Manager Isreal Tavarez and permit writer Regan Eyerman spoke at the public information hearings about how GDF emissions are regulated pursuant to EPA and local regulations. Tavarez and Eyerman explained that GDF emissions are controlled through performance standards, which require, among other things: (1) management practices to minimize gasoline spills and to clean them expeditiously, (2) submerged filling of gasoline storage tanks to reduce splashing and release of vapors, and (3) use of Stage I vapor recovery and vapor balance systems. See National Emission Standards for Hazardous Air Pollutants for Source Category:

Gasoline Dispensing Facilities, 40 CFR Part 63, Subpart CCCCCC (“Hex C”). Tavaréz and Eyerman explained that GDFs are not regulated by imposing limits on the quantity of pollutants that GDFs may emit. AR 55, pp. 302, 305; AR 95, pp. 442-45; PIH 3/25/14 Audio at 20:37 to 22:23, 24:32-47; AR 53, p. 289; PIH 4/23/14 Audio at 27:50 to 33:00, 35:14 to 36:30; AR 91, p. 423.

7. Members of the public with questions concerning non-air quality issues such as traffic, planning and zoning were provided with contact information for individuals in the appropriate City departments who could answer those questions. AR 84, p. 403; AR 86, p. 409.

8. Members of the public gave comments and asked questions at the public information hearings. AR 53, p. 289; AR 91, p. 423. Some individuals submitted written comments, articles and other documents to the hearing officer. EHD also received written submissions following the public information hearings. AR 59, pp. 331-32; AR 60, pp. 333-39; AR 63, pp. 343-44; AR 77, pp. 375-77; AR 89, pp. 421-21A; AR 99, p. 483; AR 100, p. 484; AR 101, p. 485-93; AR 102, pp. 494-501; AR 104, pp. 510-11; AR 105, pp. 512-13; AR 107, pp. 516-20. EHD did not prevent anyone from testifying or submitting evidence.

9. None of the verbal or written public comments identified any aspect of the permitting process that failed to comply with the applicable statutes and regulations for GDF air quality permitting.

10. EHD considered all of the documents and comments it received at the public information hearing and during the public comment period. AR 113, p. 596-97. EHD determined that the permit application met all of the requirements of the federal

Clean Air Act, the New Mexico Air Quality Control Act, and the applicable air quality ordinances and regulations. *Id.*

11. On May 30, 2014, EHD issued Permit No. 3136 to Smith's. AR 110, pp. 587-88; AR 111, pp. 589-93. Among other things, Section 10 of Permit No. 3136 incorporates all of the performance standards that are mandated under Hex C. AR 111, pp. 591-93.

12. Petitioners filed their original petition on or about July 1, 2014, but the petition was not properly verified. Petitioners filed a verified amended Petition on August 4, 2014, which is substantively identical to the original petition.

13. The Petition does not identify any aspect of the permitting process that failed to comply with applicable air quality permitting statutes and regulations. Instead, the Petition asserts general concerns about issues that fall outside of the established permitting framework, such as: traffic, odors, fumes, safety of fuel deliveries, alleged conflicts with the North Fourth Corridor Plan, Smith's throughput issues at other gas stations, and a variety of other vaguely-defined issues that are not germane to GDF air quality permitting. Petition at 7. Petitioners further claim that EHD and Smith's failed to provide "adequate" public notice of the permitting action, although Petitioners do not identify any non-compliance with the applicable public notice regulation, which is 20.11.41.14(A)(3) NMAC (2002). Petition at 9-10; AR p.109.

14. In order to obtain and evaluate any evidence Petitioners have to support their Petition, Smith's served each individual petitioner with a set of discovery requests on August 22, 2014. Petitioner Pat Toledo served responses and objections to Smith's discovery requests on September 10, 2014. See Exhibit A. Petitioner Susan Kelly

served responses and objections to Smith's discovery requests on September 15, 2014. See Exhibit B. The remaining five petitioners collectively served responses and objections to Smith's discovery requests on September 15, 2014. See Exhibit C.

15. None of the petitioners' discovery responses identifies any aspect of the permitting process that failed to comply with applicable air quality permitting statutes and regulations. See Exhibits A, B and C (e.g. Int. Nos. 10, 11, 14 and RFA Nos. 1, 2, 3, 6, 7, 13).

ARGUMENT

1. Smith's Is Entitled To Summary Judgment Because Permit No. 3136 Unquestionably Complies With Applicable Statutes and Regulations.

"Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Perea v. Snyder*, 1994-NMCA-064, ¶ 9, 117 N.M. 774, 877 P.2d 580; see also Rule 1-056(C). "The movant need only make a prima facie showing that he is entitled to summary judgment." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241. "Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* None of the material facts in this case are in dispute and Smith's is entitled to judgment as a matter of law because Permit No. 3136 undeniably complies with all applicable statutes and regulations.

Air quality permitting in New Mexico is governed by the Air Quality Control Act, NMSA 1978, §§ 74-2-1 through -17 ("Air Act"), and by the regulations promulgated pursuant to the Air Act. Permit No. 3135 was issued pursuant to 20.11.41 NMAC (2002, prior to 2014 amendments) ("Part 41"). Part 41 incorporates by reference 20.11.64

NMAC (“Part 64”), which is entitled “Emissions Standards for Hazardous Air Pollutants for Stationary Sources.” See 20.11.41.2(B)(2)(a) NMAC (2002). Part 64, in turn, incorporates the EPA’s National Emission Standards for Hazardous Air Pollutants (“NESHAP”), which includes the regulation governing GDF emissions known as “Hex C.” 20.11.64.12 NMAC. Hex C employs a performance-based approach to controlling GDF emissions and does not set specific pollutant limits. See UMF No. 6.

The Air Act expressly prohibits the Air Board from deviating from Hex C by providing that “[r]egulations adopted by the [Air Board] may . . . prescribe standards of performance for sources and emission standards for hazardous air pollutants that . . . *shall be no more stringent than but at least as stringent as* required by federal standards of performance[.]” Section 74-2-5(C)(2) (emphasis added). The Air Board’s wholesale adoption of Hex C in Part 64 is consistent with this legislative mandate. 20.11.64.12 NMAC. The Air Board has also promulgated variance regulations stating that “the [Air Board] cannot grant a variance from federal requirements in . . . [Part 41] . . . and [Part 64].” 20.11.7.2, .6 NMAC. These authorities leave the Air Board with no room to depart from the federal requirements in Part 41, Part 64 or Hex C. See *City of Albuquerque v. State Labor & Indus. Comm’n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288, 466 P.2d 565 (holding that an administrative agency “is bound by its own rules and regulations.”).

The question before the Board in this case is whether the emissions authorized by Permit No. 3136 “will or will not meet applicable local, state and federal air pollution standards and regulations[.]” Section 74-2-7(L) (2003). Petitioners have the burden of proving by a preponderance of the evidence that Permit No. 3136 does not meet those standards. Section 74-2-7(K); 20.11.81.16(C) NMAC. Petitioners fail in their Petition

and in their discovery responses to identify any facts that would enable Petitioners to carry that burden. UMF Nos. 13, 15. To the contrary, Permit No. 3136 imposes upon Smith's all of the federal and local requirements for record-keeping, testing and emissions reduction. AR 111, pp. 590-93 (¶¶ 5-10). Accordingly, there is no need for a hearing on the merits and Smith's is entitled to judgment as a matter of law.

2. EHD Met And Exceeded Applicable Public Notice Requirements And The Public Was Substantially Involved In The Permitting Process.

20.11.41.14(A)(3) NMAC (2002) authorized EHD to provide notice of the proposed permitting action by publishing notice "in a local newspaper of general circulation." The content of the notice "shall include the name and address of the applicant, location of the source, a brief description of the proposed construction or modification, a summary of the estimated emissions and shall identify the manner in which comments or evidence on the application may be submitted to [EHD.]" *Id.* EHD not only met the requirements of the regulation by publishing notice in the Albuquerque Journal, but EHD exceeded those requirements by providing direct notice to neighborhood organizations in the vicinity of the 4th Street GDF. UMF No. 4.

Petitioners assert a number of complaints about the adequacy of EHD's public notice, but none of the complaints identify a violation of 20.11.41.14(A)(3) NMAC (2002). For example, Petitioners assert without citation to authority that public notice should have been accomplished "by other means if necessary to assure adequate notice to the affected public." Petition at 9 (quotation marks in original). This language appears nowhere in 20.11.41.14(A)(3) NMAC (2002). The language does appear verbatim in 20.11.42.13(B)(2) NMAC, which Petitioners cite in their discovery responses. See Exhibit B at 11 (Int. No. 11) and Exhibit C at 17 (same).

20.11.42.13(B)(2) NMAC governs public notice for major sources and is not applicable to GDF air quality permitting. In the Smith's Tramway case, Docket No. 2013-6, the Board rejected similar efforts to impose public notice requirements beyond those that are contained in the applicable regulation. The Board should do the same here.

It is also important to note that Petitioners have not identified any injury or prejudice resulting from any alleged flaws in EHD's public notice. To the contrary, the public was substantially involved in the permitting process. The EHD Director authorized not one but *two* public information hearings that were well-attended. UMF No. 5. The Administrative Record and the audio recordings of the public information hearings demonstrate that members of the public were allowed multiple opportunities to submit questions, comments and documents. UMF No. 8. They were also provided with contact information for other departments within the City where they could voice their concerns over issues such as traffic, planning and zoning. UMF No. 7. There is simply no reason to think that the public did not have an adequate opportunity to provide input in the permitting process or that anything would be gained from requiring EHD to hold additional public information hearings.

3. The Board Cannot Address Petitioners' Concerns That Lack A Nexus To Applicable Regulations.

Petitioners raise a number of issues that fall outside of the existing GDF permitting framework. Petitioners rely on a solid waste permitting case, *Colonias Dev. Council v. Rhino Env'tl. Servs.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, to circumvent New Mexico's well-established law on the limits of agency power and to open up the Board's permit appeal process to any issue petitioners apparently seek to advance. See Petition at 4-5, 7-8. Rather than supporting Petitioners' standardless

approach, *Colonias* actually forbids it. Specifically, the New Mexico Supreme Court held that an agency's authority to address community concerns "requires a nexus to a regulation" to avoid violating "the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency." *Colonias*, 2005-NMSC-024, ¶ 29. The solid waste regulations at issue in *Colonias* expressly required the Environment Department to consider whether the proposed landfill would cause a public nuisance or create a potential hazard to public health, welfare or the environment. *Id.* ¶¶ 30-32. The Court held that the nearby community's concerns about the landfill's impact on their quality of life had a nexus to these specific factors. *Id.*

Petitioners' stated concerns in the present case have no such nexus to the applicable air quality regulations, which contain standards that are much more specific than those at issue in *Colonias*. For example, Petitioners claim that they "are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and resulting pollution, and other negative impacts[.]" Petition at 3. However, even if these vague allegations had an evidentiary basis in fact, which Smith's disputes and which Petitioners failed to demonstrate in their discovery responses, the Board cannot address the allegations beyond what is already required under the existing permitting framework. As explained above, the Board regulates VOC emissions by imposing, among other things, the performance measures required under Hex C. *See also* 20.11.65 NMAC. These performance measures protect public health and welfare by reducing GDF emissions and associated health risks. The question before the Board in this case is not whether more could be done to reduce or prevent VOC emissions, fumes, odors, traffic, "other negative impacts" or health risks; the question is whether

Permit No. 3136 complies with existing standards and regulations. Section 74-2-7(L). There is no dispute that it does.

The purpose of an air permit appeal is to ensure that the permitting process was done in accordance with applicable law. The Board's hearing procedure is not a mechanism for permit opponents to raise any and all concerns they may have that are directly or indirectly related to the permit. Concluding otherwise is a recipe for the Board to exceed its statutory authority, contrary to the nexus requirement in *Colonias*, and threatens to circumvent the applicable law. The Board is required to follow the specific regulations it has promulgated for GDF air permits. See *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288, 466 P.2d 565 (holding that an administrative agency "is bound by its own rules and regulations."); see also *Pub. Serv. Co. of NM v. NM Env'tl. Imp. Bd.*, 1976-NMCA-039, ¶ 19 ("The Board having set the standard is bound by it, the same as any one [sic] else.").

Petitioners presume that the Board can consider the issues raised in the Petition under the Board's general authority to prevent or abate air pollution. Petition at 5-8. That argument overlooks both the *Colonias* nexus requirement as well as the Board's inability to deviate from the federal standards regulating HAPs. Section 74-2-5(C)(2). Moreover, the grounds for permit denial set forth in Section 7 of the Air Act and in Part 41 emphasize whether the proposed permitting action will comply with applicable standards and regulations. See Section 74-2-7(C)(1); 20.11.41.16(A) NMAC (2002). Thus, Petitioners cannot circumvent the applicable standards and regulations based on the Board's general authority to prevent or abate air pollution; otherwise there would be no point in having standards and regulations. See *Colonias*, 2005-NMSC-024, ¶ 29

(holding that an agency's general statutory purpose does not provide a sufficient standard for making permit decisions).

The performance measures required under Hex C reflect the EPA's policy decision concerning the appropriate methods for reducing GDF emissions. The New Mexico Legislature and the Board have adopted the EPA's regulatory approach and it is the law applicable to this case. Petitioners may disagree with the policy choice to regulate GDF emissions through performance measures, but that disagreement does not change the law. If Petitioners wish to change the law, they must go through the legislative and rulemaking processes. Petitioners are not entitled to raise these issues in a full-blown evidentiary hearing concerning a permit that unquestionably complies with applicable law. *Cf. Safeway Stores, Inc. v. City of Las Cruces*, 1971-NMSC-052, ¶ 5, 82 N.M. 499, 484 P.2d 341 (holding that liquor licensing authority lacked discretion to deny license where applicant met all statutory prerequisites; to conclude otherwise "would result in an unmistakably ambiguous application of liquor law requirements, belying any legislative intent as to uniform, statewide regulation of the affected subject matter."). Accordingly, the Board should grant summary judgment to Smith's and dismiss the Petition with prejudice.

4. Petitioners Cannot Carry Their Burden Of Proof.

Even if the Board could address issues lacking a nexus to the applicable regulations, which Smith's disputes, Petitioners cannot carry their burden of proving Permit No. 3136 would lead to "air pollution" because they fail to identify any admissible evidence that would meet the statutory definition of air pollution.

The Air Act defines air pollution as “the emission . . . of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property[.]” Section 74-2-2(B). The New Mexico Supreme Court has interpreted this provision in the context of a variance procedure under Section 8 of the Air Act. *Duke City Lumber Co. v. NM Env'tl. Imp. Bd.*, 1984-NMSC-042, ¶ 17, 101 N.M. 291, 681 P.2d 717. Unlike Section 7 (which governs permits), Section 8 expressly allows the Board to consider: (1) whether the granting of a variance will “result in a condition injurious to health or safety[.]” and (2) “the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public.” Section 74-2-8(A)(2)(a), (B). The *Duke City Lumber* Court held that the definition of air pollution requires the opponent of a variance to show a “reasonable probability” of harm, not just a condition which “tends to cause harm.” 1984-NMSC-042, ¶ 17. The Court further held that administrative agencies must apply the legal residuum rule, which requires “that an administrative action be supported by some evidence that would be admissible in a jury trial.” *Id.* ¶ 19.

Petitioners do not purport to have admissible evidence establishing a reasonable probability of harm. Instead, Petitioners rely on vague and speculative claims about increases in traffic and emissions, noise, issues with fuel deliveries, alleged conflicts with the North Fourth Street Corridor Plan, drainage issues, so-called “hyper-marketing,” and conjecture about whether the City is properly scrutinizing Smith’s compliance with its other GDF air permits. See *e.g.* Exhibit A at 34; Exhibit B at 3-14; Exhibit C at 3-18. Petitioners do not identify any actual evidence they propose to bring

forward at the hearing to support these claims that is not based on speculation or hearsay.¹

Petitioners cannot meet their burden of proof by raising concerns and fears that are not supported by evidence showing a reasonable probability of harm. *Duke City Lumber*, 1984-NMSC-042, ¶¶ 17, 19; see also *Atlixco Coalition v. County of Bernalillo*, 1999-NMCA-088, ¶ 19, 127 N.M. 549, 984 P.2d 796 (“[U]nsubstantiated opinions are not substantial evidence.”); *Tallman v. ABF (Arkansas Best Freight)*, 1988-NMCA-091, ¶ 9, 108 N.M. 124, 767 P.2d 363 (“If the only support found is inadmissible hearsay, then we may set aside the agency’s finding or decision.”). More importantly, with respect to the statutory definition of air pollution, Petitioners do not specify what quantity of pollutants emitted from the 4th Street GDF, and of what duration, would “with reasonable probability injure human health[.]” Section 74-2-2(B). As Mr. Tarez explained at the public information hearings, the EPA and the Board do not regulate GDF emissions by quantity but instead require GDFs to meet the performance standards discussed above. UMF No. 6.


CONCLUSION

In sum, Petitioners’ answers to Smith’s discovery requests provide no evidentiary basis to conduct a hearing. Petitioners cannot carry their burden of proof under the applicable GDF air permitting standards incorporated in Part 41, nor can they meet the broader, variance-based standard of “air pollution” as defined under the Air Act. Allowing Petitioners to raise all of their concerns at a full-blown hearing on the merits

¹ Petitioners have not yet filed their Notice of Intent to Present Technical Testimony (“NOI”). Smith reserves the right to address any additional evidentiary issues raised in Petitioners’ NOI at the Board’s hearing on dispositive motions, which is currently scheduled for October 22, 2014.

can lead to nothing more than confusion of the issues and the needless waste of time and resources. The Board should therefore dismiss the Petition with prejudice.

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A Professional Corporation

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*Attorneys for Smith's Food & Drug
Centers, Inc.*

CERTIFICATE OF SERVICE

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

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

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Susan Kelly – by First Class Mail and Email
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Board Attorney

on the 3rd day of October, 2014.

SUTIN, THAYER & BROWNE
A Professional corporation

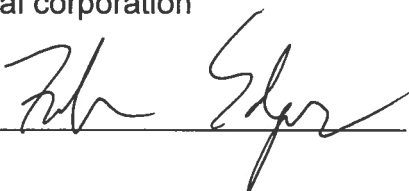
By  _____

Exhibit A

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

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

PAT TOLEDO'S

Arthur Gradi, Ruth A. McGonagil, Jerri
Paul-Seaborn, Bernice Ledden, Susan
Kelly, Americo Chavez, Pat Toledo, as
individuals,

ANSWERS

9/10/14

Petitioners,

v.

AQCB Petition No. 2014-3

City of Albuquerque Environmental Health
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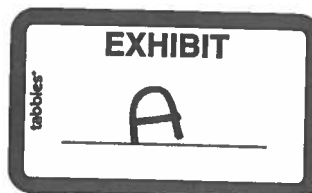
Respondents.

**SMITH'S FOOD & DRUG CENTERS, INC.'S
INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO PETITIONER PAT TOLEDO**

Smith's Food & Drug Centers, Inc. ("Smith's") propounds the following discovery requests to Petitioner Pat Toledo pursuant to Rules 1-033, -034 and -036 NMRA, 20.11.81.14(J) NMAC and the Hearing Officer's Prehearing Order filed on August 8, 2014.

INSTRUCTIONS

When an interrogatory or document request seeks or inquires of knowledge, information or documents in the possession or control of the party served, such request or inquiry extends to the knowledge, information or documents in the possession or under the control of the party served, his/her representatives or agents, including his/her attorneys, unless privileged. If you believe that any of the following interrogatories,



requests for admissions or request for production call for information or documents subject to objection, respond to the extent there is no objection, state that part of each interrogatory or request as to which you raise objection, and set forth the specific legal basis for your objection with respect to such information or documents as you refuse to give.

INTERROGATORIES

Interrogatory No. 1: With regard to the allegation on page 3 of the Amended Petition that "Pat Toledo has standing in this matter[,]" please identify: (1) the specific factual basis for the allegation, including but not limited to a detailed description of how you will be directly adversely affected by the permitting action at issue, and (2) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the allegation.

ANSWER:

(1) As the response to this question is before the ~~appeals court~~ court in regards to the tramway - Central Smiths Location. Refer to Dempsey Powers, Toledo Carrasco.

(2)

Interrogatory No. 2: With regard to the allegation on page 3 of the Amended Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, please state: (1) the specific concerns you personally raised at the public information hearing that EHD allegedly failed to consider and, (2) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon those concerns.

ANSWER:

(1)

Compromised interrogatory

(2)

Interrogatory No. 3: With regard to the allegation on pages 3 and 4 of the Amended Petition that "each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station" at issue," please state in detail, without merely restating the allegations of the Amended Petition, and in your own words: (1) specifically how you will be adversely affected by increased VOC emissions, odors, fumes, and increased traffic, (2) what are the "other negative impacts," if any, to which you refer, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged adverse affects, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

Compound interrogatory
by interrogatory #7 you have
already exceeded the 20
interrogatories allowed

(2)

~~was~~ I object to the
improper format and
you are in violation of
the agreement calling for
20 interrogatories

Interrogatory No. 4: Are you personally aware of any instance in which a person suffered a documented physical injury or medical condition that a medical professional determined was the result of emissions from one or more gas stations in Albuquerque or in any other location? If so, please provide all details about any such instances, including but not limited to name of person injured, contact information, type of physical injury or medical condition suffered, date of injury, and location of injury.

ANSWER: SEE NO 1
and Mary ANN ROBERTS
Husband see interrogatories
on Louisiana - Montgomery
Smiths station

Interrogatory No. 5: With regard to the allegation on page 7 of the Amended Petition that the "construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution[.]" without merely restating the allegations of the Amended Petition, please state: (1) how you define "significantly increased traffic[.]" i.e., approximately how many additional vehicles per day you anticipate in the area of the Smith's station, (2) the specific factual basis for the allegation (i.e. explain how you arrived at the number of anticipated additional vehicles), (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon a potential increase in traffic, (4) assuming such legal authority exists, which Smith's disputes, what standard do you contend applies to EHD's consideration of possible traffic increases (i.e., what do you contend is the threshold number of anticipated additional vehicles beyond which EHD must deny a gas dispensing facility air permit?), and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compound interrogatory
see # 3 interrogatory

(2)

Interrogatory No. 6: With regard to the allegation on page 7 of the Amended Petition that seven million gallons of gasoline throughput per year "would be the largest throughput volume in the Albuquerque metropolitan area[.]" please state: (1) the factual basis for the allegation, (2) what efforts you personally made prior to signing and verifying the Amended Petition to investigate the truth of that allegation, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon Smith's request for seven million gallons of gasoline throughput per year, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

- (1) compound
interrogatory
see # 3 interrogatory
- (2)

(3)

Interrogatory No. 7: With regard to the allegation on page 7 of the Amended Petition that your property "is immediately north and east of the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic[.]" please identify: (1) the source(s) of the alleged fumes, (2) all statutory or regulatory standards for VOC emissions, fumes or increased traffic that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, and (3) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1) compound
interrogatory
see #3 interrogatory

(2)

(3)

Interrogatory No. 8: With regard to the allegation on page 7 of the Amended Petition that the Smith's 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[.]" without merely restating the allegations of the Amended Petition, please identify: (1) the specific negative impacts to which you refer, (2) the specific cumulative impacts to which you refer, including an explanation of how you define "cumulative impacts," (3) the specific factual or evidentiary basis for the allegation, (4) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged negative and cumulative impacts, and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

(1)

compared
interrogatory
see # 3 interrogatory

(2)

Interrogatory No. 9: With regard to the allegations on page 7 of the Amended Petition concerning: (A) the alleged demographics of the residents in the vicinity of the proposed Smith's station (e.g. residents with breathing difficulties, low income residents, children), (B) the site plan that you allege is "unreadable," (C) the "safety of fuel tanker deliveries[.]" (D) the alleged "conflicts with the North Fourth Street Rank III Corridor Plan," (E) the alleged "nuisance issues similar to what occurs at other Smith's stations[.]" (F) the alleged "safety and operational issues concerning how drainage will be handled[.]" (G) the alleged "lack of need for an additional gas station in the area[.]" (H) the alleged "fuel station operational considerations[.]" (I) the alleged "cell tower proximity[.]" and (J) the alleged "other concerns" that were raised at the public information hearings, please identify: (1) the specific factual basis for each allegation, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon any of these issues, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER:

(A)(1)

ridiculous,
compound
interrogatory
see #3 interrogatory

(A)(2)

Interrogatory No. 10: Do you contend that the construction and operation of the Smith's station in accordance with Permit No. 3136 will: (A) not meet applicable standards, rules or requirements of the New Mexico Air Quality Control Act or the federal Clean Air Act, (B) cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of the City of Albuquerque and Bernalillo County, applicable local ambient air quality standards, or (C) violate any other provision of the New Mexico Air Quality Control Act or the federal Clean Air Act? If so, please identify: (1) the specific standard, statute or regulation that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, (2) the specific factual basis supporting the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1)

compound interrogatory
see #3 interrogatory

(2)

Interrogatory No. 11: With regard to the allegations on pages 9 and 10 of the Amended Petition regarding public notice and public participation, do you contend that either Smith's or EHD failed to comply with applicable regulations governing public notice and/or public participation prior to issuing Permit No. 3136? If so, please identify: (1) the specific regulation you contend EHD or Smith's violated, (2) the specific factual basis for the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

- (1) *Compund
interrogatory*
- (2) *see # 3 interrogatory*
- (3)

Interrogatory No. 12: With regard to the allegations on pages 10 and 11 of the Amended Petition regarding Smith's allegedly being a "chronic violator of the conditions of its other permits[.]" please identify: (1) any evidence you have that Smith's is not presently in compliance with its current air quality permits in Albuquerque, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon an applicant's compliance history with other permits, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER:

(1)

ditto

see # 3 in interrogatory

(2)

(3)

Interrogatory No. 13: Do you contend that EHD should have issued Permit No. 3136 with an annual throughput limit that is less than seven million gallons per year? If so, please identify: (1) the maximum throughput limit you contend EHD was authorized to approve for the Smith's station, (2) the specific factual basis for the contention, (3) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the contention, and (4) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1)

Compound interrogatory
see # 3 interrogatory

(2)

(3)

Interrogatory No. 14: With regard to EHD's participant notification letter dated June 3, 2014, and which is attached to your Amended Petition as Exhibit 1, do you contend that any statement in that letter is factually or legally incorrect? If so, please identify: (1) every statement that you contend is factually or legally incorrect, (2) the specific factual and/or legal basis for your contention that the statement is factually or legally incorrect, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

(1) compound interrogatory
see #3 interrogatory

(2)

(3)

Interrogatory No. 15: If your response to any of the requests for admission set forth below is anything other than an unqualified admission, then for each such response, please state: (1) every reason, factual or legal, why you do not admit the request without qualification, (2) the name, position or job title, and current or last known address of every person you will call to testify as a witness in support of your position on that matter; and (3) a detailed description of every document or other item that you will offer as an exhibit in support of your position on that matter.

ANSWER: Please provide answers to this interrogatory below each applicable request for admission.

Compounded Interrogatory
see #3 Interrogatory

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) Calls for legal conclusion

(2)

(3)

Request for Admission No. 2: Admit that you have no specific evidence that EHD failed to follow the applicable air quality permitting laws by issuing Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

objection
Improper Form

(2)

~~also~~ also see
Admission 3

(3)

Request for Admission No. 3: Admit that operation of the Smith's station on 4th Street in accordance with Permit No. 3136 would not violate any applicable air quality statute or regulation.

RESPONSE:

Admit

Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

See Carlisle Constitution
brief of proposed summary
disposition NO 32,790

Exhibit
A+B 32

~~Admission~~
Air Quality Control Board
NOS. 2012-1 and 2012-2
submitted by Domenico Law
& Georgianna Penn-Kies

(2)

(3)

Request for Admission No. 4: Admit that you have no specific evidence that you will be adversely affected by the operation of the Smith's station on 4th Street in accordance with Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) *calls for legal conclusion*

(2)

(3)

Request for Admission No. 5: Admit that you have no specific evidence that the operation of the Smith's station on 4th Street will result in "significantly increased traffic."

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

- (1) the marketing scheme Smiths employs attracts swarms of customers that create much more traffic, congestion and odors - hyper marketing, is illegal in several countries
- (2) the big pink elephant in the room is this marketing strategy that we are going to create public awareness of so that new law will limit this dangerous marketing strategy.
- (3)

Request for Admission No. 6: Admit that the public notice provided by EHD for the permitting action in this case complied with the requirements of 20.11.41.14(A)(3) NMAC (2002), which provides as follows: "[W]ithin fifteen (15) days after [EHD] deems an application complete, [EHD shall] publish a public notice in a local newspaper of general circulation. The notice shall include the name and address of the applicant, location of the source, a brief description of the proposed construction or modification, a summary of the estimated emissions and shall identify the manner in which comments or evidence on the application may be submitted to [EHD]."

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

calls for legal conclusion

(2)

(3)

Request for Admission No. 7: Admit that Smith's meets all requirements under the Air Quality Control Act and applicable regulations adopted pursuant to that Act for receiving Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) calls for legal conclusion

(2)

(3)

Request for Admission No. 8: Admit that the Petitioners have no specific evidence of a "cumulative impact" on any person or community resulting from the operation of Smith's fuel centers in Albuquerque.

RESPONSE: Admit Deny

with our ~~that~~ technical testimony
this will come

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

(2)

(3)

Request for Admission No. 9: Admit that the sole purposes of the annual throughput limit in air quality permits for gas stations in Albuquerque and Bernalillo County are to enable EHD to (1) determine annual fees, and (2) forecast an emissions inventory of VOCs in Albuquerque and Bernalillo County.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) Calls for a legal conclusion on what constitutes a sole purpose

(2)

(3)

Request for Admission No. 10: Admit that 40 CFR Part 63, Subpart CCCCCC ("Hex C") is the federal regulation governing emission standards for gasoline dispensing facilities.

RESPONSE: Admit ___ Deny ___

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

Improper form

(2)

(3)

Request for Admission No. 11: Admit that in promulgating Hex C, the federal Environmental Protection Agency chose to regulate VOC emissions by requiring gasoline dispensing facilities to use Stage I vapor recovery systems and other performance measures rather than by setting ambient air standards for VOCs.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1)

Improper form

(2)

(3)

Request for Admission No. 12: Admit that there are no ambient air standards for VOC emissions from gasoline dispensing facilities.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) calls for legal conclusion

(2)

(3)

Request for Admission No. 13: Admit that Petitioners have no evidence that Smith's will be unable to comply with the requirements of Hex C that are incorporated by reference in Permit No. 3136.

RESPONSE: Admit Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

improper form

(1)

(2)

(3)

Request for Admission No. 14: Admit that Smith's application for Permit No. 3136 was not an application for a variance pursuant to NMSA 1978, § 74-2-2(B) (1992).

RESPONSE: Admit ___ Deny ✓

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

(1) *in proper form*

(2)

(3)

Request for Admission No. 15: Admit that you do not own, rent or otherwise have an interest in real property within a three-mile radius of the proposed Smith's GDF.

RESPONSE: Admit ___ Deny

If your response is not an unqualified admission, please provide your answer to Interrogatory No. 15 here:

- (1) I have an interest in purchasing the old car wash on North 4 st. and have had several conversations with the owner. negotiations and pricing are still being bandied about. I will keep you
- (2) informed if I purchase the property.
- (3)

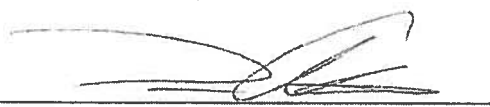
REQUEST FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1: Produce all written and electronically stored documents, including all exhibits you will present at the Hearing, identified or relied upon in your answers to the interrogatories and requests for admissions set forth above and, for each document produced, identify the corresponding interrogatory(ies) or request(s) for admissions to which that document is responsive.

RESPONSE: *Forthcoming in our NOI*

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____


Frank C. Salazar
Timothy J. Atler

P. O. Box 1945
Albuquerque, New Mexico 87103-1945
Telephone: (505) 883-2500
*Attorneys for Smith's Food & Drug
Centers, Inc.*
3337094.doc

VERIFICATION

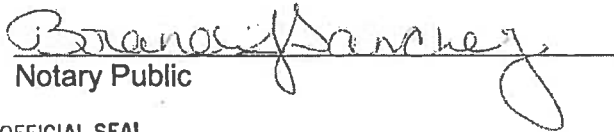
STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Pat Toledo, being of legal age, having been first duly sworn upon his oath, states that he participated in answering and has read, knows and understands the contents of his answers to Smith's interrogatories, and the statements and information provided therein are true of his own knowledge and belief.



PAT TOLEDO

SUBSCRIBED AND SWORN TO before me on this 9th day of September 2014, by Pat Toledo.



Notary Public

My Commission Expires:

2/13/16
3337094.ddc



OFFICIAL SEAL
Brandi J. Sanchez
NOTARY PUBLIC-STATE OF NEW MEXICO
My commission expires: 2/13/16

Exhibit

A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

IN RE: AIR QUALITY PERMIT NO.
2037-M1 ISSUED TO SMITH'S FOOD
& DRUG CENTERS, INC.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 13 2013

Wendy Jones

GEORGIANNA E. PEÑA-KUES,
ANDY CARRASO, JAMES A.
NELSON, and SUMMIT PARK
NEIGHBORHOOD ASSOCIATION,

Petitioners-Appellees,

No. 32,790

Air Quality Control Board

Nos. 2012-1 and 2012-2

vs.

SMITH'S FOOD & DRUG CENTERS,
INC. and CITY OF ALBUQUERQUE,

Respondents-Appellants.

MEMORANDUM IN RESPONSE TO
AMENDED NOTICE OF PROPOSED SUMMARY DISPOSITION

Submitted by:

DOMENICI LAW FIRM, P.C.

Pete V. Domenici, Jr., Esq.

Lorraine Hollingsworth, Esq.

320 Gold Ave. SW, Suite 1000

Albuquerque, New Mexico 87102

Attorneys for Petitioner-Appellee

Andy Carrasco

COMES NOW Petitioner-Appellee Andy Carrasco, by and through undersigned counsel of record, and, pursuant to NMRA 12-210.D(3), hereby submits the following memorandum in response to the Amended Notice of Proposed Summary Disposition.

This case brings to the forefront the relationship between the right of concerned members of the public, who oppose a permit application, to raise issues regarding quality of life and other impacts related to the proposed permit as part of the public participation process and the scope of an administrative body ability to rely on such concerns to support the denial of a permit application.

During the Air Quality Board's deliberations, the Hearing Officer specifically stated that it was her belief that the Board was not authorized to consider quality-of-life issues that were raised by the neighbors. (Transcript, Jan. 9, 2013, at 72/lns4-13). The Hearing Officer's statement is directly contrary to the New Mexico Supreme Court's holding in *Colonias Dev. Council v. Rhino Env't'l Services*, 2005-NMSC-024. The Hearing Officer's comments and the Court's proposed summary disposition, have the effect of limiting the Board to a determination as to whether the permit application meets the technical requirements of the regulations, an approach that was specifically rejected by the Supreme Court in the *Colonias*. As stated by the Supreme Court, such a narrow

view of the Board's role "has the potential to chill public participation in the permitting process contrary to legislative intent." 2005-NMSC-024, ¶21.

The case now before the Court is the next step after *Colonias*. As allowed in *Colonias*, the community presented testimony and evidence demonstrating that the Smith's facility and the increased throughput not only might impact their quality-of-life but are in fact impacting it. The Board carefully considered the public comments and found a basis in the Air Quality Act for both hearing and acting on the quality-of-life issues. The Court now proposes to overturn that decision, reasoning that the permit application met all of the technical requirements and the Board improperly denied the permit.

The Petitioners request that the Court either grant summary affirmance, finding that the Board acted within its mandate, or that the matter be put on the general calendar in order to allow full briefing to address the issue of the Board's authority to address quality-of-life issues that are clearly related to the issuance of the permit modification.

A. Public concerns about the impacts from the Smith's gasoline station and the Board's decision.

The Smith's gasoline station that is at the heart of this matter is located on the corner of Carlisle and Constitution in Albuquerque on a small piece of property that formerly contained a small auto repair business. It is a very high volume fueling station located at an already problematic intersection immediately adjacent

to a residential neighborhood. The Carlisle and Constitution intersection is poorly designed for the amount of traffic it is required to handle and the Smith's gasoline station has made the traffic problems significantly worse. The operations at the gasoline station have spilled over onto neighboring properties and into the alley between the station and the adjacent residential property. The people who live in the residential neighborhood have suffered numerous impacts from the facility, including substantial odors and fumes that have limited their ability to use their backyards and, which, in some cases, have permeated into the interior of homes. (See, for example, RP 00001-00005; RP 00012-00015; RP 00778-00797; 00569; 00510-00516; RP 00778-00782; RP 00868-00870).

The gasoline station was opened in late June, 2010 and within a year of construction the station exceeded Smith's original estimate of the annual throughput. (RP 00827). At that point, the gasoline station was in violation of its air quality permit and the City took enforcement action. (RP 00828). Smith's then sought a permit modification to allow it to operate at the higher throughput level, rather than taking steps to ensure that the station was operating within the limits of its existing permit. (RP 00828-00829). After notice of the permit modification was published, the Department received a number of public comments and requests for hearing. (RP 1099-1151). The comments raised numerous concerns about the impacts the increased throughput would have on the neighborhood. A

public hearing was held and thirty-seven people signed the sign-in sheet. (RP 01312-01317). Verbal and written comments were submitted as part of the public hearing. (RP 1318-1351).

On April 17, 2012, the Department granted Smith's request for a modified permit and issued Permit No. 2037-M1 with conditions. (RP 00850). The Department issued the modified permit based on the conclusion that there was no technical basis for denying the permit. (RP 00850). On May 17, 2012, Andy Carrasco, James A. Nelson, the Summit Park Neighborhood, and Georgianna E. Pena-Kues requested a hearing before the Air Board. (RP 00863). The hearing was held on August 21, 22, and 23, 2012. (RP 00867). The hearing was conducted by a hearing officer and the members of the Board were present to hear all of the testimony and evidence. (*Id.*).

The Board deliberated in open session on January 9, 2013. During the deliberations, the Board engaged in extensive discussions concerning the quality of life issues raised by the neighbors during the hearing and the appropriate way to address such issues. (See, e.g., Jan. 9, 2013 Transcript of Hearing (TR) at 13/ln20-19/ln5; 21/ln13-25/ln25; 34/ln2-20; 38/ln15 to 41/ln7; 62/lns 14-22; 64/lns5-14; 78/lns3-13; 89/ln13-90/ln9; 94/ln15 to 97/ln6; 103/lns3-8). During the deliberations, the Hearing Officer made the following statement: "I believe that the Board's authority is limited to considering whether this permit modification was

issued within certain law and regulations, and that the quality-of-life issues of the local neighborhood are beyond the reach of this board, except to the extent, obviously, that they are addressed by a vapor recovery system already in place and the other air quality standards, emissions, limitations, et cetera, that are already in place.” (TR 72/Ins3-13).

After hearing and considering all of the evidence, and considering the applicable statutory and regulatory requirements, including the Board’s clear mandate to “prevent or abate air pollution” set forth in §74-2-5 NMSA.A, the Board reversed the Department’s grant of the permit modification.

B. The Board has the authority to consider and base its decision on quality-of-life issues raised by the public.

The New Mexico Supreme Court, in *Colonias Dev. Council v. Rhino Env’t Services*, 2005-NMSC-024, ¶24, 138 N.M. 133, held that adverse impacts on a community’s social well-being and quality of life may be raised during public hearings concerning permit applications and that the final decision maker must take such concerns into consideration when deciding whether to approve or deny a permit. 2005-NMSC-024, ¶24, 138 N.M. 133. Quality of life issues may include concerns about public health and welfare and other impacts on the community that are not addressed by specific technical regulations. *Id.* Adverse public testimony, whether in the form of technical testimony or public comment, must be taken into account when reaching a final decision. *Id.* at ¶¶24, 41, 43. The 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. ¶¶7, 8, 24.

The Supreme Court reiterated the importance of public participation in environmental permitting actions and held that the Secretary, acting as the final decisionmaker, “must use discretion in implementing the Solid Waste Act and its regulations to encourage public participation in the permitting process.” *Id.* (citing to *Joab v. Espinosa*, 116 N.M. 554, 558, 865 P.2d 1189, 1202 (Ct.App. 1993)). The Court specifically rejected the argument that the concerns of individual residents about the negative impacts from a landfill on their community are an insufficient basis for the denial of the permit. *Id.* at ¶25. Citing to the decision in *Joab*, the Court stated that “community concerns can affect the Secretary’s decision to deny a permit or impose conditions on one. *Joab* is consistent with the idea that the Secretary must consider public testimony in deciding whether a landfill permit affects an entire community’s health, welfare or safety.” *Id.* at ¶26.

After determining that testimony concerning the impact of the permitted facility on a community’s quality of life must be allowed and considered, the Court stated that “[the] authority to address such concerns requires a nexus to a regulation,” and that “the general purposes of the Environmental Improvement Act and the Solid Waste Act, considered alone, [do not] provide authority for requiring

the Secretary to deny a landfill permit based on public opposition.” *Id.* at ¶29. The Court found that the expression of the general purpose of the Solid Waste Act, which included protection of “public health, safety and welfare,” do not create a standard for protecting “public health, safety and welfare.” *Id.* Even though the Court did not find the required nexus in the purpose of the Solid Waste Act, it did find such a nexus in the regulatory requirement that “the solid waste facility application demonstrates that neither a hazard to public health, welfare or the environment nor undue risk to property will result.” *Id.* at ¶31. Based on this requirement, the Court found that the Secretary’s review is not limited to technical regulations, “but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit.” *Id.*

In conclusion, the Court ordered that Colonias Development Council be allowed to present testimony regarding the impact of the proliferation of industrial sites on the local community. The Court also instructed the Secretary “to reconsider the public testimony opposing the landfill and explain the rationale for rejecting it, if the Secretary decides to do so. We are not suggesting that the Secretary must reach a different result, but we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making.” *Id.* at ¶43.

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 construction of air pollution sources in Bernalillo County." 20.11.41.6 NMAC. The Air Quality Act and the Board's regulations express an intent to consider air quality and air pollution in the context of impacts to public welfare and the reasonable use of property.

Section 74-2-5 and 74-2-2.B, coupled with the purpose of Part 41, are analogous to the requirements that an applicant for a solid waste permit demonstrate that the facility will pose "neither a hazard to public health, welfare, or the environment nor undue risk to property" and that solid waste facilities be operated "in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment." 2005-NMSC-024, ¶31. The Supreme Court found that these provisions of the Solid Waste Act and regulations "do not limit the Secretary's review to technical regulations, but clearly extend to the impact of public health or welfare resulting from the environmental effects of a proposed permit." *Id.* Similarly, the mandate to prevent or abate air pollution, coupled with the definition of air pollution, require the Board to consider the impact of a proposed permit or permit modification on public welfare, visibility

and the reasonable use of property, which is precisely what the Board did in reaching their decision to deny Smith's application to increase the throughput at the Carlisle gasoline station.

The testimony presented at the hearing before the Board demonstrated that the increased throughput would have both direct and indirect impacts on air quality. The increased throughput has a direct impact on air quality because it results in an increased release of volatile organic compounds (VOCs). (RP 00832). Petitioner Gerogianna E. Pena-Kues presented evidence that the VOCs include known human carcinogens. The increased throughput of gasoline directly results in increased emissions of VOCs, increased emissions of carcinogenic compounds and degradation of air quality, all of which interfere with the public welfare. The Department investigated the gasoline station, prior to Smith's submitting the permit modification, and found that Smith's was in violation of its existing permit, which meant that it was violating the permitted emission rate. (See RP 00015-00018, 00787-00789 for discussion of Smith's permit violations). Instead of requiring Smith's to bring the gasoline station throughput and emissions into compliance with its existing permit, the Department approved a permit modification that allowed Smith's to increase its throughput and its emissions, without considering the impact of those increases on the air quality and air pollution in the vicinity of the station. Because this is a gas station, increased

throughput necessarily means increased traffic, which also results in increased air pollution.

The neighbors complained to the City about the odors and fumes being generated by the gas station. (Hearing Transcript (TR) 1124/lns3-9). At the hearing, adjacent property owners testified that they could smell fumes from the gasoline station in their backyards, inside their homes and throughout the neighborhood, which had a direct impact on the reasonable use of their property. (RP 00790-00792). Community members testified that their outdoor activities had been limited or impacted by the odors and fumes from the Smith's gasoline station. (*Id.*). There was also testimony about the impact of the increased semi-truck and vehicle traffic, which is a direct result of the increased throughput, on adjacent properties and on the neighborhood generally.

It is evident from the transcript of the Board's deliberations that the Board did consider the impact of the increased throughput on air quality, air pollution, as defined in the Air Quality Act and the quality of life in the area, and determined that the increased throughput allowed by the requested modification would contribute to increased air pollution. (RP 01002). On that basis, the Board denied the permit modification.

The proposed disposition does not adequately address the first part of the *Colonias* decision—that is, whether and to what extent may the Board hear, consider

and act on quality of life issues raised by the public. As directed by the Supreme Court, the community was given a voice and the concerns of the community were properly considered in the decision making process. The Board's decision is consistent with the *Colonias* decision and the Petitioner requests that the Court grant summary affirmance.

The proposed disposition is inconsistent with the requirement that deference is owed to the Board both as to its interpretation of the statute that governs it and as the fact finders in this matter. Generally, the Court gives some deference to an agency's interpretation of a statute that governs it but the Court is not bound by the agency's interpretation because it is a matter of law that is reviewed de novo. *Id.* Under basic principles of statutory construction, the plain language of the statute governs and is given full effect. *Id.*; *New Mexico Board of Veterinary Medicine v. Riegger*, 2007-NMSC-044, ¶11, 142 N.M. 248. The Board's interpretation of the mandate set forth in §74-2-5 is not unreasonable and should be given deference, especially in light of the *Colonias* decision.

A fact finder in an administrative hearing serves the same role as any other fact finder and should be given the same deference on factual questions. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶22, 125 N.M. 786 (a "hearing officer is not an interested party who submits proposed findings to a trial court but rather an impartial official who presides at a formal, adjudicatory hearing, where he or she is

in a position to assess the credibility of witnesses and rule on evidentiary motions”). In this case, the Board heard all of the testimony and evidence and acted as the ultimate fact finders and should be given deference on factual questions.

The proposed summary reversal will have the effect of chilling public participation in environmental permitting matters because it makes public participation meaningless, despite the fact that the Air Quality Control Act and the Board’s regulations provide for public participation in permit proceedings. In the *Colonias* decision, the Supreme Court reversed the Court of Appeals based a similarly narrow view on the role of the decision-maker because it “has the potential to chill public participation in the permitting process contrary to legislative intent.” 2005-NMSC-024, ¶21. Instead of carefully considering how the *Colonias* decision regarding public participation and quality of life issues should apply in this matter, the proposed summary reversal only focuses on the nexus aspect and the technical requirements for an authority to construct permit application. What is left is a pro forma requirement for a public participation process that has no meaning and no relation to the actual permit decision. Public participation is rendered meaningless, despite statutory and regulatory provisions for public input and numerous appellate decisions emphasizing the importance of public participation in environmental permitting. In the future, members of the

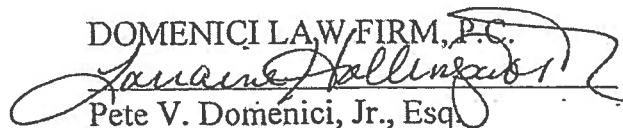
public will be reluctant to participate because of the very real perception that their concerns will not be considered and it is simply not worth the effort to become involved. Because of such concerns, the Supreme Court in *Colonias* found a way to connect the publication participation with the actual permit decision. The Air Quality Board's decision is consistent with the *Colonias* decision and should be upheld on summary affirmance.

C. Conclusion

The Petitioner respectfully requests that the Court grant summary affirmance rather than summary reversal. If summary affirmance is not granted, the Petitioner requests that the matter be placed on the general calendar to allow full briefing on the very important question of the scope of authority for an administrative agency to rely on quality of life concerns in reaching a final decision on an environmental permit application and other issues identified above.

Respectfully submitted,

DOMENICI LAW FIRM, P.C.



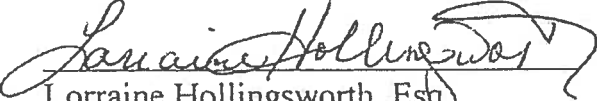
Pete V. Domenici, Jr., Esq.

Lorraine Hollingsworth, Esq.

320 Gold Ave. SW, Suite 1000

Albuquerque, New Mexico 87102

I hereby certify that a true and correct copy of the
foregoing was mailed to counsel and parties of record on this
13th day of September, 2013.


Lorraine Hollingsworth, Esq.

Exhibit

B

Sept 3.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

IN RE: AIR QUALITY PERMIT NO.
2037-M1 ISSUED TO SMITH'S FOOD
& DRUG CENTERS, INC.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

DESK COPY

AUG 12 2013

Wendy Elms

GEORGIANNA E. PEÑA-KUES,
ANDY CARRASCO, JAMES A.
NELSON, and SUMMIT PARK
NEIGHBORHOOD ASSOCIATION,

Petitioners-Appellees,

vs.

No. 32,790

Air Quality Control Board

Nos. 2012-1 and 2012-2

SMITH'S FOOD & DRUG CENTERS,
INC. and CITY OF ALBUQUERQUE,

Respondents-Appellants.

AMENDED NOTICE

PROPOSED SUMMARY DISPOSITION

You are hereby notified that the:

Record Proper

was filed in the above-entitled cause on **May 10, 2013**.

This case has been assigned to the SUMMARY CALENDAR pursuant to Rule 12-210(D) NMRA.

Summary reversal is proposed.

Note: This is a *proposal* of how the Court views the case. It is not a final decision. You now have twenty (20) days to file a memorandum telling the Court any reasons why this proposed disposition should or should not be made.

See Rule 12-210(D) NMRA.

Issues: We address the issues raised in both docketing statements together. Appellants, the City of Albuquerque and Smith's Food & Drug Centers, contend the decision of the Air Quality Control Board in this matter should be reversed because it was arbitrary, capricious, and an abuse of discretion; not supported by substantial evidence in the record; and otherwise not in accordance with law. *See* NMSA 1978, § 74-2-9(C) (1992). We propose to agree, for several reasons.

It is undisputed that the increase in throughput authorized by the permit modification would not violate any local, state, or national air-quality standard. Despite this fact, the Board rejected the hearing officer's recommendation and reversed the City's approval of the permit modification, relying on the following reasoning: (1) A statutory mandate requires the Board to prevent or abate air pollution, *see* NMSA 1978, § 74-2-5(A); (2) the permit modification allowing increases in throughput would contribute indirectly to increased air pollution, in violation of that mandate; (3) the modification would also increase risks to public health, another factor that may be considered by the Board; and (4) the Board's

mandate allowed it to consider quality-of-life concerns that are directly or indirectly related to air quality, such as increases in traffic and noise levels. [RP 988-991] Thus, the central pillar of the Board's decision is the general authorization to prevent or abate air pollution. However, we propose to hold this exceedingly broad statement of authority is devoid of any meaningful standards for the agency to apply, and would impermissibly grant the Board unlimited discretion to deny any permit application or application for permit modification.

The Legislature may not vest unbridled or arbitrary power in an administrative agency. *See In re Colonias Dev. Council v. Rhino Emt'l Servs. Inc.*, 2005-NMSC-024, ¶ 29, 138 N.M. 133, 117 P.3d 939. For this reason, general expressions concerning the authority granted to an agency, such as the power to protect the public health, safety, and welfare, do not create an acceptable standard which the agency may apply in deciding whether to grant or deny an application for a permit. *See id.* The broad authorization relied on by the Board in this case, to "prevent or abate air pollution," similarly purports to confer on the Board essentially limitless discretion to deny permit applications. Every entity that applies for a permit or a modification will necessarily add emissions to the air; otherwise the entity would not qualify as a minor or major source and would not need a permit. *See* NMSA 1978, §§ 74-2-7 (2003) and 74-2-2(T) (1992) (amended 2001) (respectively, defining a "source" as

something that “emits or may emit an air contaminant[,]” and requiring a person who intends to construct or modify a “source” to obtain a permit from the local board prior to such construction or modification). Thus, the authority apparently claimed by the Board to prevent any increase in emissions by, for example, minimizing vehicle traffic, would allow the Board to deny any and all applications for permits or modifications, on the basis that an increase in emissions will result. The only guiding standard that would be applicable would be the Board’s own view of what is appropriate. We propose to reject this view of the Board’s authority, and to hold, in line with *Colonias*, that the statutory language relied on by the Board is simply general authorization language that invokes the police power of the government and does not provide any specific authority for the Board’s actions.

A second reason for our proposed reversal is the fact that the Board appears to have considered matters that were beyond the scope of its authority. In making its decision the Board did not limit its consideration to the actual emissions that would issue from the source if the requested modification was granted. Instead, the Board considered “quality of life” factors such as increased traffic in the neighborhood, reasoning that these concerns would contribute indirectly to increased air pollution in the neighborhood. [RP 988, 990] However, the Board’s mandate does not seem to include the authority to control traffic in a given area by means of granting or

denying permit applications or modifications. We can find nothing in the statute that allows the Board to deny a permit modification by relying on indirect effects the modification might have on air quality. Instead, the statutory grounds for denying an application require the Board to determine whether the modification itself, rather than indirect effects flowing from the modification, will: (1) fail to meet applicable standards, rules, or requirements of the state Air Quality Control Act or the federal Clean Air Act; (2) cause or contribute to air-contaminant levels exceeding federal, state, or local standards; or (3) violate any other provision of the Air Quality Control Act or the Clean Air Act. § 74-2-7(C)(1)(a)-(c). The focus of the statute, therefore, is on the source's direct effects on air quality vis a vis standards promulgated by the federal, state, or local government. We propose to reverse the Board's reliance on alleged indirect effects on air quality in this case.

The third basis for this proposed reversal is the fact that the Board's decision appears to violate the Board's regulations. An administrative agency must follow its own regulations. *See City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 5, 81 N.M. 288, 466 P.2d 565; *Hillman v. Health & Social Servs. Dep't*, 1979-NMCA-007, ¶ 8, 92 N.M. 480, 590 P.2d 179. The Board's own regulations authorize it to deny a permit or modification for specific reasons such as exceeding an applicable air-quality standard, emitting a hazardous air pollutant in

follows: “emission . . . of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility[,] or the reasonable use of property[.]” In other words, the emissions must reach a certain level of harmfulness before they will be considered air pollution. There appears to be no evidence in the record indicating that the indirect effects of the permit modification would include emission amounts rising to the level of air pollution. Unless that floor is reached, it appears the Board has no statutory authority to deny the modification even under its own expansive view of its power. We propose to hold that the Board has misapprehended its role in the permitting process; rather than possessing the authority to prevent any increase at all in emissions, at most it is empowered to limit such emissions below when they occur within a certain harmful level. In the apparent absence of any evidence indicating that level was reached in this case, we propose to reverse the Board’s decision for this reason as well.


TIMOTHY L. GARCIA, Judge

Exhibit B

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

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

Arthur Gradi, Ruth A. McGonagil, Jerri
Paul-Seaborn, Bernice Ledden, Susan
Kelly, Americo Chavez, Pat Toledo, as
individuals,

Petitioners,

v.

AQCB Petition No. 2014-3

City of Albuquerque Environmental Health
Department, Air Quality Program, and
Smith's Food & Drug Centers, Inc.,

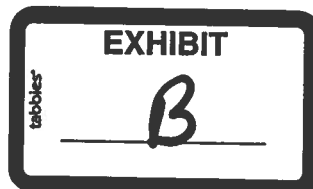
Respondents.

**SMITH'S FOOD & DRUG CENTERS, INC.'S
INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO PETITIONER SUSAN KELLY**

Smith's Food & Drug Centers, Inc. ("Smith's") propounds the following discovery requests to Petitioner Susan Kelly pursuant to Rules 1-033, -034 and -036 NMRA, 20.11.81.14(J) NMAC and the Hearing Officer's Prehearing Order filed on August 8, 2014.

INSTRUCTIONS

When an interrogatory or document request seeks or inquires of knowledge, information or documents in the possession or control of the party served, such request or inquiry extends to the knowledge, information or documents in the possession or under the control of the party served, his/her representatives or agents, including his/her attorneys, unless privileged. If you believe that any of the following interrogatories,



requests for admissions or request for production call for information or documents subject to objection, respond to the extent there is no objection, state that part of each interrogatory or request as to which you raise objection, and set forth the specific legal basis for your objection with respect to such information or documents as you refuse to give.

INTERROGATORIES

Interrogatory No. 1: With regard to the allegation on page 3 of the Amended Petition that you own property located at 713 Camino Español NW, please state: (1) whether you reside at the property and for how long, (2) the names of any other owners of the property, and (3) if the property is not your residence, how many hours per week you regularly spend on the property.

ANSWER: Yes, I reside at the property with my husband, John Kelly, since 2004.

Interrogatory No. 2: With regard to the allegation on page 3 of the Amended Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, please state: (1) the specific concerns you personally raised at the public information hearing that EHD allegedly failed to consider and, (2) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon those concerns.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Without waiving that objection, Petitioner answers as follows:

See attached letters from Susan Kelly to Israel Tavarez, dated April 23, 2014 and April 25, 2014 (Labeled exhibits 1 and 2)

Interrogatory No. 3: With regard to the allegation on pages 3 and 4 of the Amended Petition that "each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station" at issue," please state in detail, without merely restating the allegations of the Amended Petition, and in your own words: (1) specifically how you will be adversely affected by increased VOC emissions, odors, fumes, and increased traffic, (2) what are the "other negative impacts," if any, to which you refer, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged adverse affects, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

Petitioners will be adversely affected by Increased gasoline vapors from additional traffic, idling cars and tanker refills at a site that is already improperly configured to handle turning movements; See answer to Interrogatory number 3. These conditions will create higher emissions. The projected impacts and the emission effects should be studied, in a site specific manner, before making a decision on permit

approval. Also, see Exhibits 1 and 2 to Answers to Interrogatories; in addition, refer to the provisions of the North Fourth Street Corridor Plan with regard to land use planning considerations for this property and the provisions that indicate Fourth Street will be a pedestrian – transit corridor. The Plan is a public document located at this website: <http://www.cabq.gov/council/documents/north-fourth-street-plan/n4thrankiii-082010.pdf>.

Interrogatory No. 4: Are you personally aware of any instance in which a person suffered a documented physical injury or medical condition that a medical professional determined was the result of emissions from one or more gas stations in Albuquerque or in any other location? If so, please provide all details about any such instances, including but not limited to name of person injured, contact information, type of physical injury or medical condition suffered, date of injury, and location of injury.

ANSWER: Objection. This interrogatory contains subparts. Without waiving that objection, Petitioner answers as follows: No.

Interrogatory No. 5:

With regard to the allegation on page 7 of the Amended Petition that the “construction of the Smith’s station will result in significantly increased traffic, which will cause an increase in air pollution[.]” without merely restating the allegations of the Amended Petition, please state: (1) how you define “significantly increased traffic[.]” i.e., approximately how many additional vehicles per day you anticipate in the area of the Smith’s station, (2) the specific factual basis for the allegation (i.e. explain how you arrived at the number of anticipated additional vehicles), (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon a potential increase in traffic, (4) assuming

such legal authority exists, which Smith's disputes, what standard do you contend applies to EHD's consideration of possible traffic increases (i.e., what do you contend is the threshold number of anticipated additional vehicles beyond which EHD must deny a gas dispensing facility air permit?), and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

Significantly increased traffic is an amount which will create additional congestion and safety concerns near the "T" intersection with Camino Español. To my knowledge there has not been a traffic impact study at this site, and it should have been done. The assessment of the level of impact of a high volume gas station at this location should be conducted prior to permit approval in order to consider: the number of current and projected trips without the station; the additional trips attracted to visit a high volume, hyper-marketed, cheaply priced gas station; the amount of idling that might be expected to occur; the frequency of tank deliveries and the slower traffic due to congestion and turning movements related to the gas pumping operation. From my personal observations of the situation at Carlisle and Constitution, it is clear to me that a station as proposed on North Fourth would create continuous traffic back-up and idling, and unsafe conditions with regard to turning movements, along with congestion, delays and safety issues with regard to tanker deliveries.

Interrogatory No. 6: With regard to the allegation on page 7 of the Amended Petition that seven million gallons of gasoline throughput per year “would be the largest throughput volume in the Albuquerque metropolitan area[,]” please state: (1) the factual basis for the allegation, (2) what efforts you personally made prior to signing and verifying the Amended Petition to investigate the truth of that allegation, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon Smith’s request for seven million gallons of gasoline throughput per year, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

I heard this figure mentioned at the PIH, several times by several different people who I considered knowledgeable. Parts of the tape are unclear and I am continuing to listen to portions of it.

Interrogatory No. 7: With regard to the allegation on page 7 of the Amended Petition that your property “is immediately north and east of the proposed Smith’s location and would be impacted by the VOCs, fumes and increased traffic[,]” please identify: (1) the source(s) of the alleged fumes, (2) all statutory or regulatory standards for VOC emissions, fumes or increased traffic that you contend would be violated by the operation of the Smith’s station in accordance with Permit No. 3136, and

(3) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: This does not apply to me.

Interrogatory No. 8: With regard to the allegation on page 7 of the Amended Petition that the Smith's 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[,] without merely restating the allegations of the Amended Petition, please identify: (1) the specific negative impacts to which you refer, (2) the specific cumulative impacts to which you refer, including an explanation of how you define "cumulative impacts," (3) the specific factual or evidentiary basis for the allegation, (4) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged negative and cumulative impacts, and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

This site is inadequate for the proposed use. The site plan attached to the application is unreadable so the proposal as portrayed in the application is unclear. The site plan is incomplete and lacks basic site data; it doesn't show lot lines, buffering and other basic requirements required under the city development code. None of the site

construction notes are listed on the drawing, so it is not possible to tell what is intended. The site also has potentially toxic soils and has potential of drainage of pollutants into the ground, adjacent property, and the local storm drain system, which discharges to the MRGCD Alameda Drain. There are also numerous errors, such as it does not indicate the existence of a large cell tower on the property.

At 7,000,000 gallons of gasoline per year, the station could draw several thousand cars per day, creating exhaust fumes and other toxic gases. Several tankers each day would be required to enter and exit the property in addition to automobile traffic, and there has been no consideration regarding how that would impact Fourth Street. There is a possibility of an accidental spill given that this site is inadequate for the proposed use. The site plan evidences no intention to comply with the North Fourth Street Corridor Plan Design Overlay Zone requirements, nor in any way address public welfare considerations.

Interrogatory No. 9: With regard to the allegations on page 7 of the Amended Petition concerning: (A) the alleged demographics of the residents in the vicinity of the proposed Smith's station (e.g. residents with breathing difficulties, low income residents, children), (B) the site plan that you allege is "unreadable," (C) the "safety of fuel tanker deliveries[.]" (D) the alleged "conflicts with the North Fourth Street Rank III Corridor Plan," (E) the alleged "nuisance issues similar to what occurs at other Smith's stations[.]" (F) the alleged "safety and operational issues concerning how drainage will be handled[.]" (G) the alleged "lack of need for an additional gas station in the area[.]" (H) the alleged "fuel station operational considerations[.]" (I) the alleged "cell tower proximity[.]" and (J) the alleged "other concerns" that were raised at the public

information hearings, please identify: (1) the specific factual basis for each allegation, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon any of these issues, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

From personal observations of Smith's gas station locations, in particular, Constitution and Carlisle, where the site is inadequate for the high volume gas station usage, there are many negative effects: idling cars, traffic congestion, tankers obstructing traffic, pedestrian conflicts with traffic, interruption with mass transit function, unsafe vehicular movements which have required significant investments by the City, The North Fourth site is similarly unsuitable for this type of high volume gas station usage. I have read and viewed stories and have discussed other nuisance issues related to Smiths with persons who live in the vicinity of Carlisle and Constitution. Please see previous answers for further details.

Interrogatory No. 10: Do you contend that the construction and operation of the Smith's station in accordance with Permit No. 3136 will: (A) not meet applicable standards, rules or requirements of the New Mexico Air Quality Control Act or the federal Clean Air Act, (B) cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of the City of Albuquerque and

Bernalillo County, applicable local ambient air quality standards, or (C) violate any other provision of the New Mexico Air Quality Control Act or the federal Clean Air Act? If so, please identify: (1) the specific standard, statute or regulation that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, (2) the specific factual basis supporting the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

The Air Quality Control Board's decision in Nos. 2012-1 and 2012-2 (related to the Smith's station at Carlisle and Constitution) should guide this decision. In that case, the AQCB expressed an intention to consider air quality and air pollution in the context of impacts to public welfare and reasonable use of property. When those considerations are taken into account, I believe that the AQCB would find that Permit No. 3136 should not be issued. Further, I believe that Smiths is not being closely scrutinized by the City of Albuquerque regarding whether it is in compliance with rules regarding operation of its permits. This inquiry is the subject, in part, of Petitioners Interrogatories. If the EHD is not closely monitoring Smith's compliance, there is a likelihood that activities are occurring which are contributing to excessive air contaminant levels which could violate the NM Air Quality Control Act, the federal Clean Air Act, or local air quality standards.

Interrogatory No. 11: With regard to the allegations on pages 9 and 10 of the Amended Petition regarding public notice and public participation, do you contend

that either Smith's or EHD failed to comply with applicable regulations governing public notice and/or public participation prior to issuing Permit No. 3136? If so, please identify: (1) the specific regulation you contend EHD or Smith's violated, (2) the specific factual basis for the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

Yes, I believe that Smith's or EHD had a duty to notify nearby residents. Both entities were capable of obtaining addresses for nearby residential properties and mailing notice to those residents who were located close by. In addition, more stringent notice requirements are located at 20.11.42.13 (B) (2) NMAC.

Interrogatory No. 12: With regard to the allegations on pages 10 and 11 of the Amended Petition regarding Smith's allegedly being a "chronic violator of the conditions of its other permits[,] please identify: (1) any evidence you have that Smith's is not presently in compliance with its current air quality permits in Albuquerque, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon an applicant's compliance history with other permits, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and

exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

There is testimony on the record at the PIHs that Smiths has had to pay numerous fines for exceeding the pumping limits allowed under their permits. With regard to other examples of violations, I am awaiting the City's and Smith's responses to Petitioner's Interrogatories. In addition, because of the broad duties of the EHD to consider public health issues in issuing permits, a prudent approach would dictate that the EHD should look at the applicant's previous violations and ascertain whether the permittee has taken measures to correct those violations. If there is a routine disregard for the conditions of the permit, that should lead the EHD to suspect that the applicant may not take the terms of the permit seriously. That disregard of the permit terms could lead to unsafe conditions, emissions in excess of those stated in the permit, fumes and odors which are detrimental to public health. Continued approvals of permits of chronic violators would lead to a permit approval process that is almost meaningless.

Interrogatory No. 13: Do you contend that EHD should have issued Permit No. 3136 with an annual throughput limit that is less than seven million gallons per year? If so, please identify: (1) the maximum throughput limit you contend EHD was authorized to approve for the Smith's station, (2) the specific factual basis for the contention, (3) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the contention, and (4) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and

exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

No, I believe the permit should have been denied due to unsuitability of the proposed gasoline station at this location, the numerous public welfare concerns brought up in the PIHs, and the obvious non-compliance of the proposal with the North Fourth Street Corridor Plan.

Interrogatory No. 14: With regard to EHD's participant notification letter dated June 3, 2014, and which is attached to your Amended Petition as Exhibit 1, do you contend that any statement in that letter is factually or legally incorrect? If so, please identify: (1) every statement that you contend is factually or legally incorrect, (2) the specific factual and/or legal basis for your contention that the statement is factually or legally incorrect, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER: Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

These are the items that I find are incorrect: I do not agree that the Air Program cannot address public welfare issues, including public safety, such as stated in the first paragraph of the EHD letter. I do not believe that issues not related to air quality were brought to the attention of the appropriate City departments, I do not believe that the Air Program sincerely attempted to provide notice to affected residents and neighborhoods; I do not believe that the EHD considered all written comments and evidence, testimony,

exhibits and questions opposing the permit application; I do not believe the Air Program should have taken into account a petition submitted by Smiths with signatures (supposedly) favoring the gas station, but with no stated addresses; I do not believe the administrative record was prepared and reviewed prior to the EHD making its decision.

Interrogatory No. 15: If your response to any of the requests for admission set forth below is anything other than an unqualified admission, then for each such response, please state: (1) every reason, factual or legal, why you do not admit the request without qualification, (2) the name, position or job title, and current or last known address of every person you will call to testify as a witness in support of your position on that matter; and (3) a detailed description of every document or other item that you will offer as an exhibit in support of your position on that matter.

ANSWER: Please provide answers to this interrogatory below each applicable request for admission.

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit.

RESPONSE: Admit x Deny

Petitioner admits that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit, including, as part of the decision-making framework, application of AQCB policy as set forth in AQCB No. 2012-1 and 2012-2 where the AQCB decided after hours of hearing, that public welfare concerns were required to be taken into account.

Request for Admission No. 2: Admit that you have no specific evidence that EHD failed to follow the applicable air quality permitting laws by issuing Permit No. 3136.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same. In addition, this Request calls for submittal of evidence prior to the requirements in the pre-hearing order.

Request for Admission No. 3: Admit that operation of the Smith's station on 4th Street in accordance with Permit No. 3136 would not violate any applicable air quality statute or regulation.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 4: Admit that you have no specific evidence that you will be adversely affected by the operation of the Smith's station on 4th Street in accordance with Permit No. 3136.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it calls for submittal of evidence prior to the requirements in the pre-hearing order.

Request for Admission No. 5: Admit that you have no specific evidence that the operation of the Smith's station on 4th Street will result in "significantly increased traffic."

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it calls for submittal of evidence prior to the requirements in the pre-hearing order.

Request for Admission No. 6: Admit that the public notice provided by EHD for the permitting action in this case complied with the requirements of 20.11.41.14(A)(3) NMAC (2002), which provides as follows: “[W]ithin fifteen (15) days after [EHD] deems an application complete, [EHD shall] publish a public notice in a local newspaper of general circulation. The notice shall include the name and address of the applicant, location of the source, a brief description of the proposed construction or modification, a summary of the estimated emissions and shall identify the manner in which comments or evidence on the application may be submitted to [EHD].”

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 7: Admit that Smith’s meets all requirements under the Air Quality Control Act and applicable regulations adopted pursuant to that Act for receiving Permit No. 3136.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 8: Admit that the Petitioners have no specific evidence of a “cumulative impact” on any person or community resulting from the operation of Smith’s fuel centers in Albuquerque.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it calls for Petitioner to provide information in advance of the deadline for a Notice of Intent to Present Technical Testimony.

Request for Admission No. 9: Admit that the sole purposes of the annual throughput limit in air quality permits for gas stations in Albuquerque and Bernalillo County are to enable EHD to (1) determine annual fees, and (2) forecast an emissions inventory of VOCs in Albuquerque and Bernalillo County.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 10: Admit that 40 CFR Part 63, Subpart CCCCCC ("Hex C") is the federal regulation governing emission standards for gasoline dispensing facilities.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 11: Admit that in promulgating Hex C, the federal Environmental Protection Agency chose to regulate VOC emissions by requiring gasoline dispensing facilities to use Stage I vapor recovery systems and other performance measures rather than by setting ambient air standards for VOCs.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 12: Admit that there are no ambient air standards for VOC emissions from gasoline dispensing facilities.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 13: Admit that Petitioners have no evidence that Smith's will be unable to comply with the requirements of Hex C that are incorporated by reference in Permit No. 3136.

RESPONSE: Admit ___ Deny x

Petitioner objects to the Request for Admission because it calls for Petitioner to provide information in advance of the deadline for a Notice of Intent to Present Technical Testimony.

Request for Admission No. 14: Admit that Smith's application for Permit No. 3136 was not an application for a variance pursuant to NMSA 1978, § 74-2-2(B) (1992).

RESPONSE: Admit ___ Deny xx

Petitioner objects to the Request for Admission because it requires a legal conclusion and therefore denies the same.

REQUEST FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1: Produce all written and electronically stored documents, including all exhibits you will present at the Hearing, identified or relied upon in your answers to the interrogatories and requests for admissions set forth above

and, for each document produced, identify the corresponding interrogatory(ies) or request(s) for admissions to which that document is responsive.

RESPONSE:

Petitioner objects to the Request for Production of Documents because it calls for Petitioner to provide information in advance of the deadlines in the rules governing this proceeding and the prehearing order.

Without waiving the objection, Petitioner attaches the following:

Exhibit 1, Susan Kelly letter to Israel Tavarez (4-23-14) - pdf

Exhibit 2, Susan Kelly letter to Israel Tavarez (4-25-14) - pdf

Exhibit 3, Non-Technical Testimony on Behalf of the New Mexico Public Health Association Regarding Amendments to Current 20.11.41 NMAC *Authority to Construct* as Proposed in "20.11.41 NMAC 2nd Amended Public Review Draft 4/23/13" - pdf

Petitioner also relies may rely on the following documents, which are in the possession of Smiths:

Letters describing odor complaints at Smiths fuel station at Constitution and Carlisle: Administrative Record AQCB 2012-1 and 2012-2 at pages 416-422; and in AQCB 2012-1 and 2012-2 Transcripts of Proceedings, August 21, 2012, p. 89, lines 2-8; and August 23, 2012, p 1123, lines 8-25 and p. 1124, lines 1-21. Petitioner may also refer to items in the Administrative Record for AQCB No. 2014-3. Petitioner may refer to minutes or recordings of AQCB proceedings pertaining to the 2013 revisions to the notice requirements for permitting fuel dispensing stations in Albuquerque/Bernalillo County.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____

Frank C. Salazar
Timothy J. Adler

P. O. Box 1945
Albuquerque, New Mexico 87103-1945
Telephone: (505) 883-2500
*Attorneys for Smith's Food & Drug
Centers, Inc.*
3337091.doc

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Susan Kelly, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

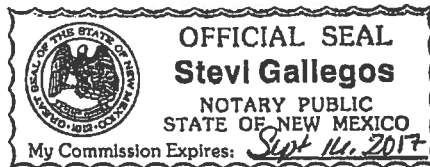
Susan Kelly
SUSAN KELLY

SUBSCRIBED AND SWORN TO before me on this 12th day of September 2014, by Susan Kelly.

Stevl Gallegos
Notary Public

My Commission Expires:

September 16, 2017
3333545.doc



April 23, 2014

Israel Tavarez, Manager
Air Quality Division
City of Albuquerque
Environmental Health Department

Re: Smith's Application for Air Quality Permit #3136

Dear Mr. Tavarez:

Please consider the following comments regarding the above application. These comments only represent some of our concerns; we also support many of the neighborhood and other concerns voiced at the hearing on March 26, 2014. The site plan attached to the application is unreadable and it is unclear what exactly is proposed. One thing is clear; it does not show the large cell tower on the property. At 7,000,000 gallons of gasoline per year, the station could draw several thousand cars per day, creating exhaust fumes and other toxic gases. The site also has potentially toxic soils and has potential for drainage of pollutants into the ground, adjacent property, and the local storm drain system, which discharges to the MRGCD Alameda Drain. Tankers will come and go and there is a real possibility of accidental spills given that this site is inadequate for the proposed use. Given that the site plan is unclear and inaccurate, to approve a permit based upon it is to knowingly anticipate and approve a public nuisance and potentially dangerous use.

We have submitted as part of the record a letter from attorney Tim Flynn O'Brien to the City's Planning Department expressing concerns from a broader traffic and neighborhood compatibility standpoint. But in this letter, I would like to focus on what I view as a defective air quality permitting process.

Chronic violator:

From our review of available information, it appears that Smith's is a chronic violator of previously issued air quality permits: I have read that they have paid fines of \$40,000 in 2011 and \$97,000 in 2012. The latest information indicated they were in negotiations on the amount of the 2013 fine, so I do not know that amount. The Air Quality Division should require that Smiths develop and maintain a good track record of compliance before issuing any new or modified air quality permits. The enforcement tools and regulatory programs appear insufficient to deter future violations by the applicant. Smith's appears to be treating penalties and other sanctions as merely an on-going business expense and the Air Quality Program should view this as symptomatic of underlying compliance problems and threats to the City's environment that should be addressed and corrected.

EXHIBIT 1 PETITIONER KELLY ANSWERS TO SMITHS INTERROGATORIES

If exceedance of the throughput volumes is a routine matter, then what other violations of the terms and conditions of Smith's permits might be occurring that the City is either aware or unaware of that could result in the release of harmful pollutants into the air or create dangerous conditions?

Lack of Notice:

Smith's is required to provide public notice of their application and notice of public hearing in a newspaper, to person on a mailing list developed by the AQD and "by other means if necessary to assure adequate notice to the affected public." Clearly, this standard has not been met.

Smith's has been chastised by the AQ Board for failure to provide proper notice to adjacent neighborhoods. The AQ Board has now enacted a provision requiring a large posted sign at locations, yet Smith's filed this application under the old notice provision and makes the case that notification to several recognized neighborhood associations was sufficient. Yet Smith's, and the AQD, failed to notify the neighborhood directly across from the proposed site -- the neighborhood that would be the most affected by this proposal. This shows a bad faith attempt to skirt "actual" notice.

At Tramway/Central, the Environmental Health Department is on record as notifying several homeowner's associations, in addition to recognized neighborhood associations as part of a Smith's application/public notification process. But in our case, even though Spanish Walk is a Homeowner's Association, directly across Fourth Street from the site, no notice was provided to the HA. This is a defect in this permitting process. It also indicates a pattern of Smith's efforts to avoid actual notice and the Air Quality Division should consider this action unacceptable.

Public Health and Welfare:

The AQD is required to protect the public health and welfare. The safety issues and anticipated nuisance activities, traffic and other concerns raised by the public in addition to air quality concerns are part of the public welfare consideration. If the AQD considers all of these concerns irrelevant because it has already determined that the Smiths application will be approved, the hearing process is defective. These concerns should be part of the consideration on whether the permit should be granted.

Very truly yours,

Susan Kelly

713 Camino Espanol NW

Albuquerque, NM 87107

April 25, 2014

Israel Tavarez, Manager
Air Quality Division
City of Albuquerque
Environmental Health Department

**EXHIBIT 2 PETITIONER KELLY
ANSWERS TO SMITHS
INTERROGATORIES**

Re: Smith's Application for Air Quality Permit #3136

Dear Mr. Tavarez:

Please consider the following comments as follow up to the hearing on April 23 regarding the above application. These comments are based upon new information revealed by the applicant at the hearing and should be included in the record.

Smith's admitted that it no longer has any real estate interest by contract or otherwise in the subject parcel. This renders the hearing and procedure invalid and this application should be rejected and cancelled.

The signatures Smiths offered should not be included in the record. The signatures do not indicate the addresses of the people who signed, they could have been people out of the area and even from out of state who have no real interest in the matter.

The site plan discussed at the meeting dated Nov 11, 2013 is different than the site plan submitted as part of the application and is different than the site plan discussed with the City's planning department at the PRT meeting on 6-21-13. The site plan is incomplete and lacks basic site data—it doesn't even show lot lines—nor does it show buffering and other basic requirements required under the city development code. None of the site construction notes are listed on the drawing, so it is impossible to tell what is intended. There are also numerous errors, such as it does not indicate the existence of a large cell tower on the property. Due to the incomplete and inaccurate nature of the plan attached to the application, the application should be considered invalid.

Smith's stated that it intends to construct a station limited to four pumps with 2 dispensers on each side (8 total dispensers), which indicates an intention to comply with the amended C-1 zoning. Smith's repeatedly stated it intends to comply with the North Fourth Street Corridor Plan Design Overlay Zone requirements, but did not describe how they intend to do that.

Protection of the public health, safety and welfare is part of the role of the AQD. Concerns brought up that should be considered in addition to the many mentioned at the meetings, include such items as the following: If the throughput volumes on the application were reached, Smith's admitted that several tankers each day would be required to enter and exit the property in addition to automobile traffic, and there has been no consideration regarding how that would impact Fourth Street and adjacent neighborhoods. Further, Smith's indicated the station is intended to be operated 24/7, but not manned during the night after a certain hour and the restroom doors will be locked. This will create a public

nuisance thereby impacting the public health and welfare and should be legitimately considered in reviewing this application. Smith's stated that their storm water management plan is to use a retention pond to capture all storm water on-site. We have concerns about vector control.

Several community members reported that in inquiring about the project, they were directed to Smith's attorney who told members of the public that this matter was a "done deal" which may have had some effect on quelling community input. In spite of this, the neighborhoods were well represented, and not one person spoke in favor of the applicant.

Smiths agreed to provide the names and dates of all City personnel they have met with regarding the site plan review process. I will look for that information from Smiths.

Finally, enclosed are copies of additional petition signatures that people signed the night of the meeting.

Thank you for considering and including these additional comments in the public record.

Very truly yours,

Susan Kelly

Susan Kelly
713 Camino Espanol NW
Albuquerque, NM 87107

cc: Tim Flynn O'Brien
Russell Brito, City Planning Department
Bret Wahlen, Smiths
Neighbors on Camino Espanol other neighbors

Non-Technical Testimony on Behalf of the New Mexico Public Health Association

**Regarding Amendments to Current 20.11.41 NMAC Authority to Construct as Proposed in
"20.11.41 NMAC 2nd Amended Public Review Draft 4/23/13"**

The New Mexico Public Health Association is dedicated to improving the health and well-being of our residents and to ensuring our residents are well informed and can fully participate in environmental and health decisions that directly affect them and their neighborhoods.

On the face of the language contained in the *Notice of Hearing and Meeting* published in the Albuquerque Journal on May 19, 2013 it appears the City's Environmental Health Department is attempting to strengthen the public notification and participation requirements; however, when comparing the 20.11.41 NMAC 2nd Amended Public Review Draft 4/23/13 (hereinafter referenced as "amended draft") with the state's Construction Permit Regulation (found at 20.2.72) it appears the proposed amendments favor applicants through language that provides for: 1) accelerated reviews, 2) shorter timelines for Department decisions on permit applications, 3) life-time permits, and 4) public notification alternatives for campus-like facilities and facilities having large boundaries, at the expense of public participation by decreasing rather than increasing public notification and public comment requirements.

We believe that economic development can be stimulated while providing for the public notification/participation rights of our residents and protecting the environment. In other words, responsible economic development and healthy neighborhoods do not present an "either or" scenario, but rather a "best of" scenario.

Although the City's Environmental Health Department states in the *Notice of Hearing and Meeting* they are amending 20.11.41 NMAC Authority to Construct to achieve further alignment with the state's Construction Permit Regulation, we feel the language provided in the amended draft is less stringent than the state's Construction Permit Regulation and is in violation of the Air Act at NMSA 1798, 74-2-4.C (1967 as amended through 2009) which requires air quality standards and regulations within Bernalillo County to be "not lower than those required by regulations adopted by the state Environmental Improvement Board (EIB)."

Following is an example, pulled from a comparison of the state's Construction Permit Regulation and the amended draft, demonstrating the concerns mentioned above:

Example:

As proposed in the amended draft, an applicant requesting a new or modified permit application, must follow these public notification requirements (found at 20.11.41.13.B NMAC):

- 1) copy of public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 2) post and maintain a weather proof sign at a visible location at the site or the proposed site.

As proposed in the amended draft, the City must follow these public notification requirements (found at 20.11.41.14.B NMAC):

- 1) publish public notice in the newspaper of largest circulation with 30 days for public comments to be submitted,
- 2) send a copy of the public notice to neighborhood associations and neighborhood coalitions within ½ mile of the exterior boundary of the property on which the source is or is proposed to be located, and
- 3) provide notice to all individuals and organizations on the list maintained by the City's Environmental Health Department.

By contrast, the state's Construction Permit Regulation requires applicants for permits or significant permit revisions to perform the following public notification requirements:

- 1) notification by certified mail of property owners within 100 feet of the property on which the facility is located or proposed to be located, if the facility is in a Class A county (Bernalillo County is a Class A county) (20.2.72.203.B.1.a),
- 2) notification by certified mail to all municipalities and counties in which the facility is or will be located and to all municipalities, Indian tribes, and counties within a ten mile radius of the property on which the facility is or is proposed to be constructed or operated (20.2.72.203.B.2),
- 3) notification through publication once in a newspaper of general circulation in the county in which the property on which the facility is or is proposed to be constructed or operated. This notice shall appear in either the classified or legal advertisements section of the newspaper and at one other place in the newspaper calculated to give the general public the most effective notice, and, when appropriate, shall be printed in both English and Spanish (20.2.72.203.B.3),
- 4) notification through signage at 4 publicly accessible and conspicuous places, including the proposed or existing facility entrance on the property on which the facility is, or is proposed to be, located, until the permit or significant permit revision is issued or denied, and 3 locations commonly frequented by the general public, such as nearby post office, public library, or city hall (20.2.72.203.B.4.a-b),
- 5) notification through public service announcement to at least one radio or television station serving the municipality or county in which the source is or is proposed to be located and containing information outlined in 20.2.72.203.D.1-5 (20.2.72.203.B.5).

Further, the state's Construction Permit Regulation requires the respective agency (e.g., City's Environmental Health Department) to perform the following notification requirements (20.2.72.206):

- 1) all individuals and organizations identified on a list maintained by the Department of those who have indicated in writing a desire to receive notices, and
- 2) mail a copy of the public notice at the time it is sent for publication to the appropriate county (e.g., Bernalillo County).

While we recognize the intent of the City is to save the applicant expense and the City money, public notification/public participation is not the appropriate area for these cost savings. The language in the state's Construction Permit Regulation is far more inclusive of adjacent property owners and the general public, many of whom may not belong to a neighborhood association

(many of which meet only annually to keep their status) or neighborhood coalition, do not read the paper on a daily basis, and are not on the City's Environmental Health Department list.

To ensure the fullest possible public participation, we request the public notification requirements in the amended draft be consistent with the state's Construction Permit Regulation, as stated in 20.2.72.203 and 20.2.72.206 NMAC. Additionally, we request these public notification requirements be applied for the following types of permit applications: technical permit revisions, permits, permit modifications, temporary permits, general permits, and permits for campus-like facilities and facilities having large boundaries.

The New Mexico Public Health Association encourages the City to retain the language of 20.11.41 NMAC *Authority to Construct* as it pertains to the time periods for public comment on permit applications, requests for public information hearings, accelerated application reviews, and general construction permits.

Specifically, we request the following:

- 1) Providing all interested persons with at least 45 days to submit written comments, evidence, or to request a public hearing on the permit application (20.11.41.14.A.4 of NMAC *Authority to Construct*), and, if a person expresses in writing an interest in the permit application, providing 45 days (rather than the 30 days as proposed in the amended draft at 20.11.41.14.C NMAC, 20.11.41.14.B.2.f NMAC) after the Department's analysis is available to submit written comments and to request a public information hearing. Recognizing the very technical nature of air quality permitting and regulatory processes, we believe the original 45 day period is more appropriate and will provide residents with the time necessary to learn more about the proposed operations and to garner technical and legal expertise, if necessary.
- 2) No provision for accelerated reviews of permit applications as occurs in 20.11.41 NMAC *Authority to Construct*. We feel that an accelerated review will further decrease opportunities for meaningful public participation and may introduce bias into the permit approval process due to possible conflicts of interest given the small universe of environmental consultants within New Mexico.
- 3) No provision for general construction permits as occurs in 20.11.41 NMAC *Authority to Construct*. The geographic characteristics of Bernalillo County and Albuquerque are quite different from the state, with a predominantly urban setting. While a single permit for facilities having similar operations, processes and emissions may make sense for a state that is largely open and rural, it can have a deleterious impact on residents living in more densely populated urban areas and within closer proximity to these facilities.
- 4) No provision for alternative public notification requirements for campus-like facilities and facilities having large boundaries (draft amendment – 20.11.41.13.B.1). As mentioned above, we believe that permits for these types of facilities should follow the public notification requirements outlined in the state's Construction Permit Regulation at 20.2.72.203, particularly since these types of facilities cover more acreage and are more likely to impact a greater number of people living in the surrounding communities.

In terms of Department permitting decision making processes, we also request that final action on an application be made by the Department within 120 days, or 180 days if a public hearing

has been called, from the date the application was ruled complete rather than the proposed 90 day time period stated in the amended draft (20.11.41.16.B NMAC).

Finally, and perhaps most importantly, although potential applicants would undoubtedly favor the proposed language provided in the amended draft to not have an expiration date or renewal date for authority to construct permits, we believe it is irresponsible to issue life-time permits and request the re-insertion of proposed language for a 10-year permit term as stated in 20.11.41 NMAC 1st Amended Public Review Draft for Stakeholder Review 7/18/12 at 11.41.19, subsection E of 20 NMAC, for the following reasons:

- 1) life-time permits provide residents with only one opportunity to participate in the permitting process,
- 2) life-time permits could contribute to an "out of sight out of mind" mentality on behalf of the City's Air Quality Division in terms of enforcement and review,
- 3) life-time permits could decrease the accountability of the facility's owner to the impacted community, and
- 4) life-time permits provide little protection for impacted residents should cumulative impacts increase and neighborhood conditions change.

Exhibit C

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

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

Arthur Gradi, Ruth A. McGonagil, Jerri
Paul-Seaborn, Bernice Ledden, Susan
Kelly, Americo Chavez, Pat Toledo, as
individuals,

Petitioners,

v.

AQCB Petition No. 2014-3

City of Albuquerque Environmental Health
Department, Air Quality Program, and
Smith's Food & Drug Centers, Inc.,

Respondents.

**SMITH'S FOOD & DRUG CENTERS, INC.'S
INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO PETITIONERS**

Smith's Food & Drug Centers, Inc. ("Smith's") propounds the following discovery requests to Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Americo Chavez, pursuant to Rules 1-033, -034 and -036 NMRA, 20.11.81.14(J) NMAC and the Hearing Officer's Prehearing Order filed on August 8, 2014. **("Smith's") propounded discovery requests to petitioners separately. Five petitioners, named above, are responding here. [Where preferences differ, the petitioners are identified separately.]**

INSTRUCTIONS

When an interrogatory or document request seeks or inquires of knowledge, information or documents in the possession or control of the party served, such request



or inquiry extends to the knowledge, information or documents in the possession or under the control of the party served, his/her representatives or agents, including his/her attorneys, unless privileged. If you believe that any of the following interrogatories, requests for admissions or request for production call for information or documents subject to objection, respond to the extent there is no objection, state that part of each interrogatory or request as to which you raise objection, and set forth the specific legal basis for your objection with respect to such information or documents as you refuse to give.

INTERROGATORIES

Interrogatory No. 1: With regard to the allegation on page 3 of the Amended Petition that you own property located at 6338 Fourth Street NW, 505 Camino Español NW, 610 Camino Español NW, 427 Mullen Rd NW, 721 Camino Español NW please state: (1) whether you reside at the property and for how long, (2) the names of any other owners of the property, and (3) if the property is not your residence, how many hours per week you regularly spend on the property.

ANSWER:

Yes, I, Arthur Gradi, reside at 6338 Fourth Street NW as a lifetime resident (co-owners Anita F. Gradi & L. Enrico Gradi;)

Yes, I, Ruth A. McGonagil, reside at 505 Camino Español since August 2012 (co-owner JoAnn Rice);

Yes, I, Jerri Paul-Seaborn, reside at 610 Camino Español with my husband, Guy Seaborn, since 1986;

Yes, I, Bernice Ledden, reside at 427 Mullen Rd NW, for 41 years;

Yes, I, Americo Chavez, reside at 721 Camino Español as a lifetime resident.

Interrogatory No. 2: With regard to the allegation on page 3 of the Amended Petition that the City of Albuquerque Environmental Health Department's Air Quality Program ("EHD") "refused and failed to take into consideration quality-of-life concerns" raised at the public information hearing, please state: (1) the specific concerns you personally raised at the public information hearing that EHD allegedly failed to consider and, (2) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon those concerns.

ANSWER:

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Without waiving that objection, Petitioner answers as follows:

Not raised by any of these petitioners at the public information hearing; however numerous quality of life concerns were raised by several others attending these meetings.

I, Arthur Gradi, did raise the subject of contamination of the existing site in which I had a very old tree near this property that died of contamination.

Interrogatory No. 3: With regard to the allegation on pages 3 and 4 of the Amended Petition that "each of the Petitioners are likely to be adversely affected by increased VOC emissions, odors, fumes, increased traffic and other negative impacts on their property and quality of life resulting from the construction of the Smith's fuel dispensing station" at issue," please state in detail, without merely restating the

allegations of the Amended Petition, and in your own words: (1) specifically how you will be adversely affected by increased VOC emissions, odors, fumes, and increased traffic, (2) what are the "other negative impacts," if any, to which you refer, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged adverse affects, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

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

Similar to #2 above:

A fuel dispensing business of this nature would impact the rural nature of this community by increasing odors, toxic fumes, increasing traffic that is not currently in this area; increase noise levels as well as introduce more danger to local citizens that enjoy bicycling and walking in this area. There are children and families that walk and bike in this area – some en-route to school or work or errands in general.

In addition the ingress and egress to Camino Espanol NW to/from Fourth Street will be directly impacted by additional traffic volumes localized at this particular location; limiting the ability for residents on this street to access Camino Espanol and/or Fourth

Street considering the traffic flow from Solar Drive North to Osuna Rd especially during peak hours around 7:30 a.m. – 9:00 a.m. and 3:00 p.m. – 5:30 p.m.

Petitioners will be adversely affected by increased gasoline vapors from additional traffic, idling cars and tanker refills at a site that is already improperly configured to handle turning movements; the traffic backups at Camino Espanol NW during certain times (7:30 A.M. – 8:00 A.M.; 4:00 P.M. – 5:30P.M.) of the day will be amplified by people attempting to enter the “low cost” gas station from both directions as well as the tankers trying to turn in. See answer to Interrogatory number 3. These conditions will create higher emissions as well as affecting ingress and egress to Camino Espanol NW. The projected impacts and the emission effects should be studied, in a site specific manner, before making a decision on permit approval. Also, see Exhibits 1 and 2 to Answers to Interrogatories; in addition, refer to the provisions of the North Fourth Street Corridor Plan with regard to land use planning considerations for this property and the provisions that indicate Fourth Street will be a pedestrian – transit corridor. The Plan is a public document located at this website: <http://www.cabq.gov/council/documents/north-fourth-street-plan/n4thrankiii-082010.pdf>.

Additionally we refer to our answers to the City’s interrogatories No. 2 and 3, which are inserted below from Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden and Americo Chavez.

This type of business does not conform to the spirit of the North Fourth Corridor Plan or the North Valley in general.

Americo Chavez: In reference to the Scientific American Profession Journal Article “IS IT SAFE TO LIVE NEAR A GAS STATION?” (see exhibit 1) I believe many of

the conditions stated in the referenced article certainly apply to my current living situation. For example, despite all the modern health and safety guidelines, fueling dispensing facilities can still pose significant hazards to neighbors – especially children. I have children and grandchildren in and out of my home. Two of my grandchildren have been diagnosed as asthmatic; a third one is in remission. My wife recently passed away from lung and kidney cancer. Their medical diagnosis puts them at particular susceptibility to the hazards of poor air quality. In addition, in a written testimony (see *exhibit 2*) presented the Maryland Senate on February 27, 2014 by Dr. Maria Jison, a Board Certified Pulmonologist and an expert on air quality and its effects on health, stated the ill effects of mega fueling stations and those with chronic conditions such as cardiovascular and respiratory disease. I have personal friends and relatives living in close proximity to the proposed of Smith's fueling dispensary at 4th Street. The proposed station will certainly pose a health and safety threat to all of us. I am enclosing a copies of the above referenced articles as exhibits 1 & 2.

Americo Chavez: Refer to interrogatory No. 2.

Petitioner: Ruth A. McGonagil ("Ruthie") -

I am 72 years old and I have breathing problems, heart problems, auto-immune disorders and allergies (including sensitivity to chemicals). I retired two years ago and moved from Brooklyn, NY to Albuquerque, NM - a city touted for its healthy climate and clean, clear air. After an intensive search, I chose to live in the North Valley - a part of the City that has worked hard to retain its rural setting and to provide stewardship for the land by the River and its people. I bought land on Camino Español and built a

house intended to be my "grow old gracefully" home. This was an expensive endeavor. Now comes a proposed large discount fuel dispensing facility to be built at the end of my street - less than the length of two football fields from my front door. Nothing about this project will enhance my life. In fact, the very nature of the business and the traffic it will attract are detrimental to everyone's health - especially the elderly and the children. The additional congestion at the intersection of Fourth and Camino Español NW will certainly contribute to more stress (another serious, negative health contributor). Please be aware that the residents of and visitors to Camino Español have no entrance or exit to their street except at this already dangerous intersection. None of this will improve my property values or the quality of my life. In fact, they contribute only negative factors. Who wants to buy residential property or to live by a gas station?

And what will become of the three horses, many bunnies, song birds, raptors and other wildlife and domestic animals that live between me and the proposed site? Good luck to us all as we are pitted against a corporate giant focused on profits and a governmental body, charged with protecting us, that wraps itself in endless procedures and letter- vs spirit- of the law. 'Nuff said."

Arthur Gradi: I am concerned with the light pollution a 24 hour operation will produce as my proximity to the proposed station is much closer than other petitioners. I am highly concerned as the impact to me and my property is compounded multifold due to the close proximity of my property to the proposed gas station!

I, Bernice Ledden, am asthmatic. I have lived in Manhattan, NY and had to leave because auto pollution exacerbated this disease and in addition caused me to

have a constant sore throat. Upon my doctor's recommendation to leave this polluted environment, I moved to Albuquerque. Now at age 79, I also have heart problems. When pollution rises, my sensitivity to fumes and odors makes walking outside so uncomfortable that I am house-bound. This also means that I cannot use my cooler or furnace which draw air from outside to operate. In order to decrease the load on my heart, cooling is essential – to illustrate; when Albuquerque has high smoke pollution, seniors are advised to go to centers where the air would be safer. In the case of pollution from VOC's and car exhaust, I will not be able to protect myself, it will be omnipresent.

Interrogatory No. 4: Are you personally aware of any instance in which a person suffered a documented physical injury or medical condition that a medical professional determined was the result of emissions from one or more gas stations in Albuquerque or in any other location? If so, please provide all details about any such instances, including but not limited to name of person injured, contact information, type of physical injury or medical condition suffered, date of injury, and location of injury.

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

No.

Interrogatory No. 5:

With regard to the allegation on page 7 of the Amended Petition that the "construction of the Smith's station will result in significantly increased traffic, which will cause an increase in air pollution[,]" without merely restating the allegations of the Amended Petition, please state: (1) how you define "significantly increased traffic[,]"

i.e., approximately how many additional vehicles per day you anticipate in the area of the Smith's station, (2) the specific factual basis for the allegation (i.e. explain how you arrived at the number of anticipated additional vehicles), (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon a potential increase in traffic, (4) assuming such legal authority exists, which Smith's disputes, what standard do you contend applies to EHD's consideration of possible traffic increases (i.e., what do you contend is the threshold number of anticipated additional vehicles beyond which EHD must deny a gas dispensing facility air permit?), and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER: Petitioners Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn, Bernice Ledden, Americo Chavez

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

Significantly increased traffic is an amount which will create additional congestion and safety concerns near the "T" intersection with Camino Español. To our knowledge there has not been a traffic impact study at this site, and it should have been done. The assessment of the level of impact of a high volume gas station at this location should be conducted prior to permit approval in order to consider: the number of current and projected trips without the station; the additional trips attracted to visit a high volume, hyper-marketed, cheap price gas facility; the amount of idling that might be expected to

occur; the frequency of tank deliveries and the slower traffic due to congestion and turning movements related to the gas pumping operation. From our understanding of the situation at Carlisle and Constitution, it is clear to us that a station as proposed on North Fourth would create continuous traffic back-up and idling, and unsafe conditions with regard to turning movements, along with congestion, delays and safety issues with regard to tanker deliveries. This area has a high amount of pedestrian and bicycle traffic and the added congestion poses a great risk to both.

Interrogatory No. 6: With regard to the allegation on page 7 of the Amended Petition that seven million gallons of gasoline throughput per year "would be the largest throughput volume in the Albuquerque metropolitan area[,]" please state: (1) the factual basis for the allegation, (2) what efforts you personally made prior to signing and verifying the Amended Petition to investigate the truth of that allegation, (3) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon Smith's request for seven million gallons of gasoline throughput per year, and (4) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

This point was brought up in the first public information hearing at the Los Ranchos Village Hall and was not disputed or denied by the City or Smith's. In the absence of dispute or denial, we considered this verified. When the public asked what is the largest throughput volume in the Albuquerque metropolitan area, the response was Costco and Sam's but no permit volume was given by the City or Smith's. Again, there was no disagreement or dispute of the public comment made about the "largest throughput volume in the Albuquerque metropolitan area". This led this group of petitioners to believe this as fact.

Interrogatory No. 7: With regard to the allegation on page 7 of the Amended Petition that your property "is immediately north and east of the proposed Smith's location and would be impacted by the VOCs, fumes and increased traffic[.]" please identify: (1) the source(s) of the alleged fumes, (2) all statutory or regulatory standards for VOC emissions, fumes or increased traffic that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, and (3) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

ANSWER:

This interrogatory only applies to Arthur Gradi - it is my understanding that my residence is considered the oldest residential property on North Fourth Street north of Central Ave. A gas station of this type will ruin the livability of my lifetime, historical home. I will not be able to continue to live there due to the vapors, fumes, odors, light pollution, trash and general decline in the air quality. This will also impact the property value in the event we decide to sell it.

Interrogatory No. 8: With regard to the allegation on page 7 of the Amended Petition that the Smith's 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[.]" without merely restating the allegations of the Amended Petition, please identify: (1) the specific negative impacts to which you refer, (2) the specific cumulative impacts to which you refer, including an explanation of how you define "cumulative impacts," (3) the specific factual or evidentiary basis for the allegation, (4) what legal authority (e.g. statute, regulation or case law) you contend would have authorized EHD to deny Permit No. 3136 based in whole or in part upon these alleged negative and cumulative impacts, and (5) all witnesses and exhibits you will present in support of the allegation at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

This site is inadequate for the proposed use. The site plan attached to the application is unreadable so the proposal as portrayed in the application is unclear. The site plan is incomplete and lacks basic site data; it doesn't show lot lines, buffering and other basic requirements required under the city development code. None of the site construction notes are listed on the drawing, so it is not possible to tell what is intended.

The site also has potentially toxic soils and has potential of drainage of pollutants into the ground, adjacent property, and the local storm drain system, which discharges to the MRGCD Alameda Drain. There are also numerous errors, such as it does not indicate the existence of a large cell tower on the property, that is currently being modified in some manner.

At 7,000,000 gallons of fuel per year, the station could draw several thousand cars per day, creating exhaust fumes and other toxic gases. Several tankers each day would be required to enter and exit the property in addition to automobile traffic, and there has been no consideration regarding how that would impact Fourth Street. There is a possibility of an accidental spill given that this site is inadequate for the proposed use. The site plan evidences no intention to comply with the North Fourth Street Corridor Plan Design Overlay Zone requirements, nor in any way address public welfare considerations. It does not appear to have proper ingress and egress and considering the traffic volume from a restaurant next door to this property and both being directly across from Camino Espanol NW there will probably be an increase in traffic accidents in this area.

Interrogatory No. 9: With regard to the allegations on page 7 of the Amended Petition concerning: (A) the alleged demographics of the residents in the vicinity of the proposed Smith's station (e.g. residents with breathing difficulties, low income residents, children), (B) the site plan that you allege is "unreadable," (C) the "safety of fuel tanker deliveries[,]" (D) the alleged "conflicts with the North Fourth Street Rank III Corridor Plan," (E) the alleged "nuisance issues similar to what occurs at other Smith's

stations[,]” (F) the alleged “safety and operational issues concerning how drainage will be handled[,]” (G) the alleged “lack of need for an additional gas station in the area[,]” (H) the alleged “fuel station operational considerations[,]” (I) the alleged “cell tower proximity[,]” and (J) the alleged “other concerns” that were raised at the public information hearings, please identify: (1) the specific factual basis for each allegation, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon any of these issues, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

It is our understanding and some personal observations of Smith’s gas station locations, in particular, Constitution and Carlisle, where the site is inadequate for the high volume gas station usage, that there are many negative effects: idling cars, traffic congestion, tankers obstructing traffic, pedestrian conflicts with traffic, interruption with mass transit function, unsafe vehicular movements which have required significant investments by the City, The North Fourth site is similarly unsuitable for this type of high volume gas station usage. We have read and viewed stories and have discussed other nuisance issues related to Smiths with persons who live in the vicinity of Carlisle and

Constitution. Please see previous answers for further details. (see exhibit 3 – "Fuel to the Fire" article)

Interrogatory No. 10: Do you contend that the construction and operation of the Smith's station in accordance with Permit No. 3136 will: (A) not meet applicable standards, rules or requirements of the New Mexico Air Quality Control Act or the federal Clean Air Act, (B) cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of the City of Albuquerque and Bernalillo County, applicable local ambient air quality standards, or (C) violate any other provision of the New Mexico Air Quality Control Act or the federal Clean Air Act? If so, please identify: (1) the specific standard, statute or regulation that you contend would be violated by the operation of the Smith's station in accordance with Permit No. 3136, (2) the specific factual basis supporting the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

The Air Quality Control Board's decision in Nos. 2012-1 and 2012-2 (related to the Smith's station at Carlisle and Constitution) should guide this decision. In that case, the AQCB expressed an intention to consider air quality and air pollution in the context of impacts to public welfare and reasonable use of property. When those considerations

are taken into account, we believe that the AQCB would find that Permit No. 3136 should not be issued. Further, we believe that Smiths is not being closely scrutinized by the City of Albuquerque regarding whether it is in compliance with rules regarding operation of its permits. This inquiry is the subject, in part, of Petitioners Interrogatories. If the EHD is not closely monitoring Smith's compliance, there is a likelihood that activities are occurring which are contributing to excessive air contaminant levels which could violate the NM Air Quality Control Act, the federal Clean Air Act, or local air quality standards.

Interrogatory No. 11: With regard to the allegations on pages 9 and 10 of the Amended Petition regarding public notice and public participation, do you contend that either Smith's or EHD failed to comply with applicable regulations governing public notice and/or public participation prior to issuing Permit No. 3136? If so, please identify: (1) the specific regulation you contend EHD or Smith's violated, (2) the specific factual basis for the contention, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

ANSWER:

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioner answers as follows:

Yes, we believe that Smith's or EHD had a duty to notify nearby residents. Both entities were capable of obtaining addresses for nearby residential properties and

mailing notice to those residents who were located close by. In addition, more stringent notice requirements are located at 20.11.42.13 (B) (2) NMAC.

Interrogatory No. 12: With regard to the allegations on pages 10 and 11 of the Amended Petition regarding Smith's allegedly being a "chronic violator of the conditions of its other permits[.]" please identify: (1) any evidence you have that Smith's is not presently in compliance with its current air quality permits in Albuquerque, (2) all legal authority (e.g. statute, regulation or case law) you contend authorizes EHD to deny a gas station air quality permit based in whole or in part upon an applicant's compliance history with other permits, and (3) all witnesses and exhibits you will present in support of the allegations at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

There is testimony on the record at the PIHs that Smiths has had to pay numerous fines for exceeding the pumping limits allowed under their permits. With regard to other examples of violations, we are awaiting the City's and Smith's responses to Petitioner's Interrogatories. In addition, because of the broad duties of the EHD to consider public health issues in issuing permits, a prudent approach would dictate that the EHD should look at the applicant's previous violations and ascertain whether the permittee has taken measures to correct those violations. If there is a routine disregard

for the conditions of the permit in practice that should lead the EHD to suspect that the applicant may not take the terms of the permit seriously. That disregard of the permit terms could lead to unsafe conditions, emissions in excess of those stated in the permit, fumes and odors which are detrimental to public health. Continued approvals of permits of chronic violators would lead to a permit approval process that is almost meaningless.

Interrogatory No. 13: Do you contend that EHD should have issued Permit No. 3136 with an annual throughput limit that is less than seven million gallons per year? If so, please identify: (1) the maximum throughput limit you contend EHD was authorized to approve for the Smith's station, (2) the specific factual basis for the contention, (3) all legal authority (e.g. statute, regulation or case law) upon which you rely in support of the contention, and (4) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

No, we believe the permit should have been denied due to unsuitability of the proposed gasoline station at this location, the numerous public welfare concerns brought up in the PIHs, and the obvious non-compliance of the proposal with the North Fourth Street Corridor Plan.

Interrogatory No. 14: With regard to EHD's participant notification letter dated June 3, 2014, and which is attached to your Amended Petition as Exhibit 1, do you contend that any statement in that letter is factually or legally incorrect? If so, please identify: (1) every statement that you contend is factually or legally incorrect, (2) the specific factual and/or legal basis for your contention that the statement is factually or legally incorrect, and (3) all witnesses and exhibits you will present in support of the contention at the hearing on the merits.

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

Objection. This interrogatory contains subparts and calls for a legal conclusion, which is not the proper subject of Interrogatories. Further, witnesses and exhibits will be provided as outlined in the pre-hearing order and the rules governing this proceeding. Without waiving that objection, Petitioners answer as follows:

These are the items that we find to be incorrect: We do not agree that the Air Program cannot address public welfare issues, including public safety, such as stated in the first paragraph of the EHD letter. We do not believe that issues not related to air quality were brought to the attention of the appropriate City departments, we do not believe that the Air Program sincerely attempted to provide notice to affected residents and neighborhoods; we do not believe that the EHD considered all written comments and evidence, testimony, exhibits and questions opposing the permit application; we do not believe the Air Program should have taken into account a petition submitted by Smiths with signatures (supposedly) favoring the gas station, but with no stated

addresses; we do not believe the administrative record was prepared and reviewed prior to the EHD making its decision.

Interrogatory No. 15: If your response to any of the requests for admission set forth below is anything other than an unqualified admission, then for each such response, please state: (1) every reason, factual or legal, why you do not admit the request without qualification, (2) the name, position or job title, and current or last known address of every person you will call to testify as a witness in support of your position on that matter; and (3) a detailed description of every document or other item that you will offer as an exhibit in support of your position on that matter.

ANSWER: Please provide answers to this interrogatory below each applicable request for admission.

REQUESTS FOR ADMISSION

Request for Admission No. 1: Admit that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit.

RESPONSE: Admit X Deny ___

Petitioners admit that EHD is required to follow the applicable air quality permitting laws when deciding whether to issue an air quality permit, including, as part of the decision-making framework, application of AQCB policy as set forth in AQCB No. 2012-1 and 2012-2 where the AQCB decided after hours of hearing, that public welfare concerns were required to be taken into account.

Request for Admission No. 2: Admit that you have no specific evidence that EHD failed to follow the applicable air quality permitting laws by issuing Permit No. 3136.

RESPONSE: Admit Deny

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 3: Admit that operation of the Smith's station on 4th Street in accordance with Permit No. 3136 would not violate any applicable air quality statute or regulation.

RESPONSE: Admit Deny

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 4: Admit that you have no specific evidence that you will be adversely affected by the operation of the Smith's station on 4th Street in accordance with Permit No. 3136.

RESPONSE: Admit Deny

Petitioners object to the Request for Admission because it calls for submittal of the evidence prior to the requirements in the pre-hearing order.

Request for Admission No. 5: Admit that you have no specific evidence that the operation of the Smith's station on 4th Street will result in "significantly increased traffic."

RESPONSE: Admit Deny

Petitioners object to the Request for Admission because it calls for submittal of the evidence prior to the requirements in the pre-hearing order.

Request for Admission No. 6: Admit that the public notice provided by EHD for the permitting action in this case complied with the requirements of 20.11.41.14(A)(3) NMAC (2002), which provides as follows: “[Within fifteen (15) days after [EHD] deems an application complete, [EHD shall] publish a public notice in a local newspaper of general circulation. The notice shall include the name and address of the applicant, location of the source, a brief description of the proposed construction or modification, a summary of the estimated emissions and shall identify the manner in which comments or evidence on the application may be submitted to [EHD].”

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 7: Admit that Smith’s meets all requirements under the Air Quality Control Act and applicable regulations adopted pursuant to that Act for receiving Permit No. 3136.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 8: Admit that the Petitioners have no specific evidence of a “cumulative impact” on any person or community resulting from the operation of Smith’s fuel centers in Albuquerque.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it calls for Petitioner to provide information in advance of the deadline for a Notice of Intent to Present Technical Testimony.

Request for Admission No. 9: Admit that the sole purposes of the annual throughput limit in air quality permits for gas stations in Albuquerque and Bernalillo County are to enable EHD to (1) determine annual fees, and (2) forecast an emissions inventory of VOCs in Albuquerque and Bernalillo County.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 10: Admit that 40 CFR Part 63, Subpart CCCCCC ("Hex C") is the federal regulation governing emission standards for gasoline dispensing facilities.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 11: Admit that in promulgating Hex C, the federal Environmental Protection Agency chose to regulate VOC emissions by requiring gasoline dispensing facilities to use Stage I vapor recovery systems and other performance measures rather than by setting ambient air standards for VOCs.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 12: Admit that there are no ambient air standards for VOC emissions from gasoline dispensing facilities.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

Request for Admission No. 13: Admit that Petitioners have no evidence that Smith's will be unable to comply with the requirements of Hex C that are incorporated by reference in Permit No. 3136.

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it calls for Petitioner to provide information in advance of the deadline for a Notice of Intent to Present Technical Testimony.

Request for Admission No. 14: Admit that Smith's application for Permit No. 3136 was not an application for a variance pursuant to NMSA 1978, § 74-2-2(B) (1992).

RESPONSE: Admit ___ Deny X

Petitioners object to the Request for Admission because it requires a legal conclusion and therefore denies the same.

REQUEST FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1: Produce all written and electronically stored documents, including all exhibits you will present at the Hearing, identified or relied upon in your answers to the interrogatories and requests for admissions set forth above

and, for each document produced, identify the corresponding interrogatory(ies) or request(s) for admissions to which that document is responsive.

RESPONSE:

Petitioners object to the Request for Production of Documents because it calls for Petitioners to provide information in advance of the deadlines in the rules governing this proceeding and the prehearing order. *Without waiving the objection, we did provide exhibits 1 & 2 in reference to interrogatory No. 3 and exhibit 3 in reference to interrogatory No. 9.*

Petitioners may also rely on the following documents, which are in the possession of Smiths:

Letters describing odor complaints at Smith's fuel station at Constitution and Carlisle; Administrative Record AQCB 2012-1 and 2012-2 at pages 416 – 422; and in AQCB 2012-1 and 2012-2 Transcripts of Proceedings, August 21, 2012, p. 89, lines 2 – 8; and August 23, 2012, p. 1123, lines 8 – 25 and p. 1124, lines 1 – 21. Petitioners may refer to minutes or recordings of AQCB proceedings pertaining to the 2013 revisions to the notice requirements for permitting fuel dispensing stations in Albuquerque/Bernalillo County.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____

Frank C. Salazar

Timothy J. Adler

P. O. Box 1945

Albuquerque, New Mexico 87103-1945

Telephone: (505) 883-2500

Attorneys for Smith's Food & Drug

Centers, Inc.

3337091.doc

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Jerri Paul-Seaborn, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

Jerri Paul-Seaborn
Jerri Paul-Seaborn

SUBSCRIBED AND SWORN TO before me on this 15th day of September 2014, by Jerri Paul-Seaborn.

Heidi A. Lorne
Notary Public

My Commission Expires:

8/19/16
3333
545.doc



VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Arthur Gradi, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

Arthur Gradi
Arthur Gradi

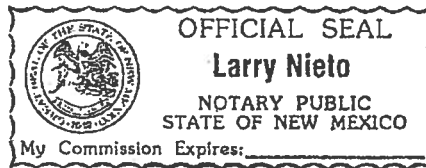
SUBSCRIBED AND SWORN TO before me on this 26 day of September 2014, by Arthur Gradi.

Larry Nieto
Notary Public

My Commission Expires:

December 7 2014

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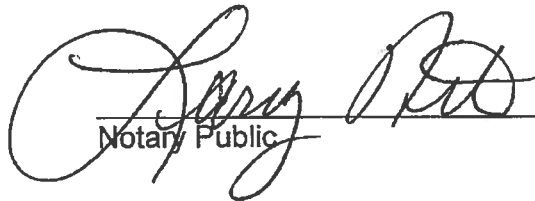
VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Ruth A. McGonagil, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

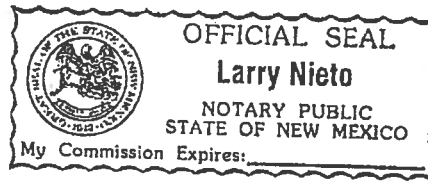

Ruth A. McGonagil

SUBSCRIBED AND SWORN TO before me on this 16 day of September 2014, by Ruth A. McGonagil.


Notary Public

My Commission Expires:

December 7 2014
3333
545.doc



VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

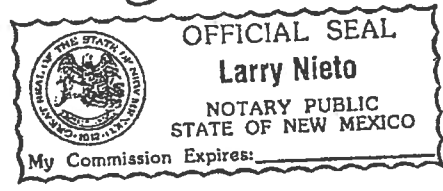
Bernice Ledden, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

Bernice Ledden
Bernice Ledden

SUBSCRIBED AND SWORN TO before me on this 16 day of September 2014, by Bernice Ledden.

Larry Nieto
Notary Public

My Commission Expires:
December 7 2014
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VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Americo Chavez, being of legal age, having been first duly sworn upon her oath, states that she participated in answering and has read, knows and understands the contents of her answers to Smith's interrogatories, and the statements and information provided therein are true of her own knowledge and belief.

Americo Chavez
Americo Chavez

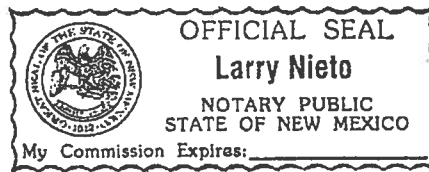
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Exhibit 1-Smith's interview
No. 3

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Health » EarthTalk

Is It Safe to Live Near a Gas Station?

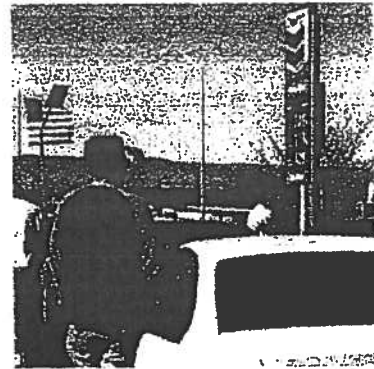
The health concerns for you or your family with living by the pump

Apr 14, 2009 |

Dear EarthTalk: I am looking at possibly buying a house that is very close to a gasoline station. Is it safe to live so close to a gas station? What concerns should I have? I have toddler and infant babies.

— Ranjeeta, Houston, TX

Despite all the modern health and safety guidelines they must follow, gas stations can still pose significant hazards to neighbors, especially children. Some of the perils include ground-level ozone caused in part by gasoline fumes, groundwater hazards from petroleum products leaking into the ground, and exposure hazards from other chemicals that might be used at the station if it's also a repair shop.



Getty Images

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Ozone pollution is caused by a mixture of volatile organic compounds, some of which are found in gasoline vapors, and others, like carbon monoxide, that come from car exhaust. Most gas pumps today must have government-regulated vapor-recovery boots on their nozzles, which limit the release of gas vapors while you're refueling your car. A similar system is used by the station when a tanker arrives to refill the underground tanks. But if those boots aren't working properly, the nearly odorless hydrocarbon fumes, which contain harmful chemicals like benzene, can be released into the air.

Higher ozone levels can lead to respiratory problems and asthma, while benzene is a known cancer-causing chemical, according to the National Institutes of Health (NIH). The quest to reduce ozone levels has led the state of California to implement a more stringent vapor-recovery law, effective April 1, 2009, which requires that all gasoline pumps have a new, more effective vapor-recovery nozzle.

Underground gasoline storage tanks can also be a problem. The U.S. Environmental Protection Agency (EPA) estimates that there are some 660,000 of them from coast-to-coast. Many a lawsuit has been filed against oil firms in communities across the country by people whose soil and groundwater were fouled by a gas station's leaking underground storage tank. In the past, most tanks were made of uncoated steel, which will rust over time. Also, pipes leading to the tanks can be accidentally ruptured.

When thousands of gallons of gasoline enter the soil, chemicals travel to groundwater, which the EPA says is the source of drinking water for nearly half the U.S. If buying a home, consider its potential loss in value if a nearby underground storage tank were to leak.

<http://www.scientificamerican.com/article/is-it-safe-to-live-near-gas-station/?print=true>

7/31/2014

Gasoline additives such as methyl tertiary-butyl ether (MTBE), which has been outlawed in some states, make the water undrinkable—and that is only one of 150 chemicals in gasoline. Repeated high exposure to gasoline, whether in liquid or vapor form, can cause lung, brain and kidney damage, according to the NIH's National Library of Medicine.


Spilled or vaporized gasoline is not the only chemical hazard if the station is also a repair shop. Mechanics use solvents, antifreeze and lead products, and may work on vehicles that have asbestos in brakes or clutches. Auto refinishers and paint shops use even more potentially harmful chemicals.

In today's car-centric world, we can't escape exposure completely, because these chemicals are in our air just about everywhere. But by choosing where we live, keeping an eye out for spills, and pressuring the oil companies to do the right thing for the communities they occupy, we can minimize our exposures.

CONTACTS: U.S. EPA, www.epa.gov; National Institutes of Health, www.nih.gov.

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Exhibit 2 - Smith's
interrog
No. 3

SB 0631 Testimony: Brief Summary

As a physician who takes care of people with lung disease I am well aware of the harmful effects of air pollution particularly on children and adults with chronic lung disease such as asthma or emphysema.

Studies show that even what would be categorized by industry and the EPA as low levels of fine particulates (PM2.5), a type of air pollution generated by combustible engines and motor vehicles, are associated with increased asthma symptoms and clinically relevant declines in lung function.

Ambient levels of fine particulate pollution would likely increase in local areas where mega gas stations are built due to the increased number of idling cars waiting to fuel. In addition to increasing health risks in the general population, **people with chronic lung disease such as asthma or emphysema would be at increased risk. Children are especially vulnerable.**

Conclusion and Take Away Points:

- Studies show that although central site monitors may reflect fine particulate pollution levels that are below EPA limits the personal exposure to fine particulates as a result of daily activities and point source exposures are likely to be much higher and can exceed EPA limits.
- Numerous scientific studies have demonstrated that individual, micro environmental exposures to air pollution and fine particulates may be much higher than expected (due to individual circumstances affecting people and their specific local environment) and can contribute to negative health effects even when central site monitor levels remain below current EPA standards.
- **Even short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.**
- **Chronic exposure to ambient air pollution even when average levels are within EPA limits leads to declines in lung development.**
- The negative health effects of placing a mega gas station in close proximity to homes, public spaces and near communities where there are children and adults who may have chronic health conditions can be significant. Many of the potentially exposed people may have underlying respiratory conditions which would mean increased harmful effects.
- **The risks to public health far outweigh any benefits. Not only will the risks have negative impact on the health of local residents and vulnerable populations but they can impact the economy of the area through increased costs of health care and decreased productivity of affected residents.**

We are not opposed to economic development. We are not opposed to the business model of high volume mega gas stations. But such development has to be done in a socially and environmentally responsible way. Passage of SB 0631 will protect the health of all Maryland residents. We thank Senator Madaleno for introducing this bill.

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Synopsis of Scientific Studies:

- A growing body of scientific literature demonstrates the adverse health effects of ambient air pollution and fine particulate matter (PM_{2.5}) (generated by motor vehicles and other combustion sources) on asthma and lung function.
- Studies show that higher levels of fine particulate pollution (PM_{2.5}) are associated with greater odds of having asthma symptoms exacerbated, having a more severe asthma attack and increased rescue inhaler use.
- High personal fine particulate exposures, which involve exposures or sources not well represented by stationary site monitors (such as idling cars at a mega gas station, high traffic areas) at local or central sites can be quite high and can exceed EPA limits even when central monitoring station levels fall well below EPA limits. This is referred to as the "personal dust cloud" effect.
- Children will be especially sensitive as studies show that children's personal cloud PM_{2.5} is significantly higher than adults, thus placing them at increased risk.
- Incremental increases in fine particulate pollution are associated with decreased lung function. Ambient air pollution, fine particulates (PM_{2.5}) in particular, has adverse effects on the lungs even when levels are within currently accepted EPA guidelines.
- **Studies demonstrate that short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.**
- **Local exposure to traffic such as on a freeway has adverse effects on children's lung development and is independent of regional air quality.** Residential distance from a freeway is associated with significant deficits in respiratory growth during adolescent years, which results in important deficits in lung function at age 18 years. This could result in important deficits in attained lung function later in life.
- In a study of 12 southern California communities, **clinically low lung function was correlated with the levels of exposure to various pollutants including fine particulates. Low lung function in children was observed even in communities where the average level of fine particulate matter over the 8 year period was within EPA limits.** This study shows that lung development from the ages of 10 to 18 years is reduced in children exposed to higher levels of ambient air pollution.

A few simple facts about asthma:

- Asthma is chronic lung disease characterized by periods of quiescence interspersed with acute attacks. Asthma attacks can range in severity from mild to life threatening.
- Asthma is the third-ranking cause of hospitalization in children.
- **Asthma is the #1 chronic cause of school absenteeism among children, accounting for an annual loss of more than 14 million school days per year** (approximately 8 days for each student with asthma) and more hospitalizations than any other childhood disease.
- **Asthma accounts for more than 10 million total missed days of work for adults each year and is the fourth leading cause of work absenteeism** and "presenteeism," resulting in nearly 15 million missed or lost ("less productive") workdays each year (. . .)
- **Asthma cost the US about \$3,300 per person with asthma each year in medical expenses, missed school and work days, and early deaths** (based on statistics from

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2002-2007). **[END SUMMARY]**

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COMPLETE WRITTEN TESTIMONY FOR SB 0631

February 25, 2014

To: Maryland State General Assembly

RE: SB 0631, 300 ft set back certification for retail gas stations

Dear Maryland State Legislators,

This written testimony is provided to support SB 0631. As a Maryland resident and a Physician who is Board Certified in Pulmonary Disease, Critical Care Medicine and Internal Medicine by the American Board of Internal Medicine I wholeheartedly support SB 0631. This bill will protect the health of all Maryland residents and especially those with chronic cardiovascular and respiratory diseases such as asthma or emphysema.

As a physician who takes care of people with lung disease I am well aware of the harmful effects of air pollution particularly on children and adults with chronic lung disease such as asthma. Studies have shown that even what would be categorized by industry and the EPA as low levels of fine particulates (PM_{2.5}), a type of air pollution generated by combustible engines and motor vehicles, are associated with increased asthma symptoms and clinically relevant declines in lung function.¹ Ambient levels of fine particulate pollution would likely increase in local areas where mega gas stations are built due to the increased number of idling cars waiting to fuel. This would expose local area residents to increased ambient air pollution and increase the risk of adverse health effects. People with chronic lung disease such as asthma or emphysema would be at increased risk.

Asthma is highly misunderstood in the non-medical community and many myths abound. I will provide a brief introduction to asthma and it's effect on health care morbidity and health care costs. I will then discuss the growing body of literature demonstrating the adverse health effects of ambient air pollution and fine particulate matter (PM_{2.5}) on asthma and lung function. These data show a clear and immediate risk and support community concerns that the risks posed by placement of mega gas stations close to (within 1000 feet of) residences, public spaces and schools are not negligible. Not only will the risks have negative impact on the health of local residents and vulnerable populations but they can impact the economy of the area through increased costs of health care and decreased productivity of affected residents.

Asthma Facts

Asthma is characterized by inflammation of the air passages resulting in the temporary narrowing of the airways that transport air from the nose and mouth to the lungs. Asthma symptoms can be caused by allergens or irritants (such as air pollution) that are inhaled into the lungs, resulting in inflamed, clogged and constricted airways. Symptoms include difficulty breathing, wheezing, coughing, and tightness in the chest.

Asthma is a chronic disease characterized by periods of quiescence and seemingly normal respiratory status interspersed with acute exacerbations which range from mild to severe. In severe cases, asthma can be deadly. There are many triggers of an acute asthma attack including environmental exposures. Asthma accounts for a large amount of health care and economic costs due to hospitalization, emergency room visits, missed days of school and missed work days. There is no cure for asthma, but asthma can be managed with proper prevention and treatment.

¹ Ralph J Delfino, Penelope JE Quintana, Josh Floro, Victor M Gastanaga, Behzad S Samimi, Michael T D Kleinman, L-J Sally Liu, Charles Bufalino, Chan-Fu Wu, Christine E McLaren. Association of FEV1 in Asthmatic Children with Personal and Microenvironmental Exposure to Airborne Particulate Matter. Environmental Health Perspectives 2004; 112(8).

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Every day in America:²

- 44,000 people have an asthma attack.
- 36,000 kids miss school due to asthma.
- 27,000 adults miss work due to asthma.
- 4,700 people visit the emergency room due to asthma.
- 1,200 people are admitted to the hospital due to asthma.
- 9 people die from asthma.

Asthma Morbidity²

- Asthma accounts for one-quarter of all emergency room visits in the U.S. each year, with 1.75 million emergency room visits.
- Each year, asthma accounts for more than 10 million outpatient visits and 479,000 hospitalizations.
- The average length of stay (LOS) for asthma hospitalizations is 4.3 days.
- Nearly half (44%) of all asthma hospitalizations are for children.
- **Asthma is the third-ranking cause of hospitalization children.**
- **Asthma is the #1 chronic cause of school absenteeism among children each year accounting for more than 13 million total missed days of school.**
- **Asthma accounts for more than 10 million total missed days of work for adults each year.**
- African Americans are three times more likely to be hospitalized from asthma.

Social and Economic Costs²

- The annual cost of asthma is estimated to be nearly \$18 billion.
- Direct costs accounted for nearly \$10 billion (hospitalizations the single largest portion of direct cost) and indirect costs of \$8 billion (lost earnings due to illness or death).
- **For adults, asthma is the fourth leading cause of work absenteeism and "presenteeism," resulting in nearly 15 million missed or lost ("less productive") workdays each year (this accounts for nearly \$3 billion of the "indirect costs" shown above).**
- **Among children ages 5 to 17, asthma is the leading cause of school absences from a chronic illness. It accounts for an annual loss of more than 14 million school days per year (approximately 8 days for each student with asthma) and more hospitalizations than any other childhood disease. It is estimated that children with asthma spend an nearly 8 million days per year restricted to bed.**
- **Asthma cost the US about \$3,300 per person with asthma each year from 2002 to 2007 in medical expenses, missed school and work days, and early deaths³**
- More than half (59%) of children and one-third (33%) of adults who had an asthma attack missed school or work because of asthma in 2008. On average, in 2008 children missed 4 days of school and adults missed 5 days of work because of asthma²

Scientific literature summary

Studies show that higher levels of fine particulate pollution (PM^{2.5}) are associated with greater odds of having asthma symptoms exacerbated, having a more severe asthma attack and increased rescue inhaler use.⁴

² <http://www.aafa.org/display.cfm?id=8&sub=42>

³ <http://www.aaaai.org/about-the-aaaai/newsroom/asthma-statistics.aspx>

⁴ James C Slaughter, Thomas Lumley, Lianne Sheppard, Jane Q Koenig, Gail G Shapiro. Effects of ambient air pollution on symptoms severity and medication use in children with asthma. *Annals of Allergy, Asthma and Immunology* 2003;91:346-353.

Onchee Yu, Lianne Sheppard, Thomas Lumley, Jane Q Koenig, Gail G Shapiro. Effects of Ambient Air Pollution on Symptoms of Asthma in Seattle-Area Children Enrolled in the CAMP Study. *Environmental Health Perspectives*. 2000;108(12):1209-1214

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Increased chronic exposure to ambient air pollution emanating from a mega gas station and its resultant traffic will have negative effects on patients with asthma.

In the case of children, high levels of physical activity are expected to generate higher levels of particle exposure in a variety of microenvironments. Some activities may bring the child close to an undiluted source of particulate exposure such as idling cars waiting to fuel at a mega gas station located within 1000 feet of their home or school. This phenomenon is referred to as the "personal dust cloud," which accounts for the difference between total personal exposure as measured by a personal monitor worn on the body and the estimated time-weighted exposure measurement in indoor/outdoor microenvironments and central sites which are typically utilized in many studies and reports.

Studies have shown that the personal dust cloud is a combined result of particles generated from personal activities and exposures to local sources such as next to traffic exhaust on the street. In a study of asthmatic children in southern California, Delfino et. al. evaluated the effect of fine particle exposure ($PM_{2.5}$) on lung function using hourly measurements of fine particulate exposure from a personal monitor attached to the subject as well as 24 hour average indoor/outdoor stationary and central site measurements. **The study demonstrated that short-term exposure lasting minutes to hours has clinically relevant negative respiratory effects.** The study found that personal fine particulate exposure was negatively associated with lung function as measured by FEV1 percent predicted (a common measure of lung function which is the amount of air you can forcefully blow out). Stationary indoor/outdoor and central site exposures were also negatively associated with lung function **but the effects of personal exposure were more profound.** **Children with concurrent allergies and asthma were even more affected.** This study demonstrates that ambient air pollution that would be expected to be emitted in the vicinity of a mega gas station has negative effects on lung function and respiratory health. **Additionally, high personal fine particulate exposures, which involve exposures or sources not well represented by stationary site monitors at local or central sites, can be quite high and can exceed EPA limits even when central station levels fall well below EPA limits.**

The Delfino study demonstrates that the "personal dust cloud" is a combined result of particles generated from personal activities and exposures to local sources (e.g. next to traffic exhaust on the street or idling vehicles at a mega gas station) that are not well captured by stationary indoor and outdoor monitors. The study also found that children's personal cloud $PM_{2.5}$ is significantly higher than adults. Short term exposures lasting minutes to hours may be relevant to respiratory responses and may not be fully captured by time-integrated $PM_{2.5}$ measurements, as is done with 24 hour monitors.⁵

While EPA regulations lag behind the accepted science, adjustments to air quality regulations are slowly being made. In 1997 the EPA had set the 24 hour standard exposure limit for $PM_{2.5}$ to $65 \mu g/m^3$ in order "to protect against peak concentrations that might occur due to strong local or seasonal sources over limited areas and/or time periods." In 2006 based on the growing scientific evidence that ambient air pollution and fine particulate matter have adverse health effects the EPA further lowered the 24 hour exposure limit to $35 \mu g/m^3$ and considered an even lower $30 \mu g/m^3$ limit.⁶ Unfortunately, the regulations in place still do not take into account current understanding of the impact of poor air quality at ground level. As observed in the the Delfino study, children in southern California experienced personal exposure levels that far exceeded current EPA 24 hour limits ($35 \mu g/m^3$) even though central site levels were within EPA limits. Such exposures were associated with clinically relevant decreases in lung function.

In a study of the effects of outdoor air pollution on lung function in school children with asthma Dales et. al.

⁵ Ralph J Delfino, Penelope JE Quintana, Josh Floro, Victor M Gastanaga, Behzad S Samimi, Michael T D Keinman, L-J Sally Liu, Charles Bufalino, Chan-Fu Wu, Christine E McLaren. Association of FEV1 in Asthmatic Children with Personal and Microenvironmental Exposure to Airborne Particulate Matter. Environmental Health Perspectives 2004; 112(8).

⁶ http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_008798.pdf

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found that lung function decreased with increased ambient air concentrations of fine particulate matter (PM_{2.5}). The levels of fine particulates measured throughout this study were within standard EPA limits. The authors found that **incremental increases in fine particulate pollution were associated with decreased lung function**. This study showed that **ambient air pollution, fine particulates (PM_{2.5}) in particular, has adverse effects on the lungs even when levels are within currently accepted EPA guidelines.**⁷

Studies have demonstrated that proximity (within 500 meters or ~1500 feet) to traffic from major freeways is associated with decreased lung development in children age 10 to 18. **Children who lived within 500 meters of a freeway attained much lower lung function levels by age 18** compared to children who lived greater than 1500 meters from a freeway. These lower levels of attained lung function were considered clinically low. **Residential distance from a freeway is associated with significant deficits in 8-year respiratory growth, which result in important deficits in lung function at age 18 years.** The authors conclude that **local exposure to traffic on a freeway has adverse effects on children's lung development and is independent of regional air quality and could result in important deficits in attained lung function later in life.**⁸

WJ Gauderman et al. studied 1700+ school children in 12 southern California communities. Across the 12 communities, a clinically low FEV₁ (measure of lung function) was correlated with the levels of exposure to various pollutants including fine particulates. In southern California the most common source of these pollutants is motor vehicles. Low lung function in children was observed even in communities where the average level of fine particulate matter over the 8 year period was within EPA limits. These correlations were statistically significant. **The results of this study provide robust evidence that lung development from the ages of 10 to 18 years is reduced in children exposed to higher levels of ambient air pollution.**⁹

Conclusions

In conclusion, studies show that although central site monitors may reflect fine particulate pollution levels that are below EPA limits the personal exposure to fine particulates as a result of daily activities and point source exposures are likely to be much higher and can exceed EPA limits. These personal exposures have adverse respiratory health consequences. Chronic exposure to ambient air pollution even when average levels are within EPA limits leads to declines in lung development. The negative health effects of placing a mega gas station in close proximity to homes, public spaces and near communities where there are children and adults who may have chronic health conditions can be significant.

The EPA periodically re-evaluates and updates their air quality standards based on growing scientific evidence. NAAQS standards were last updated in 2006 and fine particulate exposure limits were lowered based on growing scientific evidence. In the interim numerous scientific studies have demonstrated that individual, micro environmental exposures to air pollution and fine particulates may be much higher than expected and can contribute to negative health effects even when central site monitor levels remain within current EPA standards.

⁷ R dales, L Chen, AM Frescura, L Liu, PJ Villeneuve. Acute effects of outdoor air pollution on forced expiratory volume in 1 s: a panel study of schoolchildren with asthma. *European Respiratory Journal* 2009; 34: 316-323.

⁸ W James Gauderman, Hita Vora, Rob McConnell, Kiros Berhane, Frank Gilliland, Duncan Thomas, Fred Lurmann, Edward Avol, Nino Kunzli, Michael Jerrett, John Peters. Effect of exposure to traffic on lung development from 10 to 18 years of age: a cohort study. *Lancet* 2006:368

⁹ W. James Gauderman, Edward Avol, Frank Gilliland, Hita Vora, Duncan Thomas, Kiros Berhane, Rob McConnell, Nino Kuenzli, Fred Lurmann, Edward Rappaport, Helene margolis, David Bates, John Peters. The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age. *New England Journal of Medicine* 351(11); 1057

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While central site, regional and local area average ambient air pollution and particulate matter levels may be within recommended EPA limits scientific studies have shown that personal, micro environmental exposures to pollutants are likely to be higher and can exceed EPA limits due to special circumstances affecting individuals and their specific local environment. Such circumstances include personal exposures to pollution point sources such as standing in traffic while waiting for a bus, living near a mega gas station, or walking past a mega gas station during your daily commute or shopping trip.

The number of individuals who will be exposed to pollutants resulting from placing a mega gas station in close proximity to homes, schools and public spaces are likely to be numerous. Many of the potentially exposed people may have underlying respiratory conditions which would mean increased harmful effects.

Passage of SB 0631 will protect the health of all Maryland residents. I applaud Senator Madaleno for introducing this bill which will protect all Maryland families from the harmful effects of air pollution related to placement of mega gas stations in close proximity to homes, schools and public spaces. Please protect the health of our communities and pass SB 0631

Sincerely,

Maria Jison, MD, FCCP
Montgomery County Resident

Fuel to the Fire

BY ELISE KAPLAN

Every day, fumes, traffic snarls and tanker trucks aggravate neighbors of the Smith's gas station on Constitution and Carlisle. And with a permit for the station to sell more fuel, the situation isn't going to get any easier.

Over-Pumping

Smith's started construction of a gas station at the intersection across from the Carlisle grocery store in June 2010. The company received a permit from the city to dispense 3.3 million gallons of gasoline per year, according to Bill Westmoreland, deputy director of the Environmental Health Department. In October, the Air Quality Division slapped Smith's with a fine of \$38,400 for exceeding this limit by half a million gallons.

"We issued them a fine and a strong suggestion that they stop doing that, but that's pretty much all we can do," says Westmoreland. "At the same time, they applied for a permit for 4.5 million gallons a year on the basis that they were already doing so much business." Smith's also requested allowance for 350,000 gallons of diesel.

The company did not make an effort to reduce sales while awaiting approval of the permit, adds Westmoreland, an oversight that could result in another fine. Neighbors of the gas station argued that upping the allowance rewards Smith's for sales that are already too high for a residential area. But on April 17, the station received the permit for the increase anyway.

As the owner of the medical center at Carrasco Plaza and the de-facto leader of the crusade, Andy Carrasco says the gas station may be selling at a much higher volume than pumping numbers suggest. Carrasco's property abuts the gas station, and he's spent more than eight months recording traffic congestion. He says refueling trucks arrive at all hours. Based on observations of three to four trucks per day, Carrasco calculates the gas station could in fact be storing—and then selling—an estimated 6.4 million gallons a year. Requests for comment from the supplier, Western Refinery, were not returned.

However, Westmoreland says those calculations are not correct. "These trucks deliver all over town, and at some point, they come and deliver here. They may only have 1,000 gallons left in the truck," he says. "We don't know how much is being pumped in there, but we do know how much is being pumped out because the gauge really cannot be tampered with."

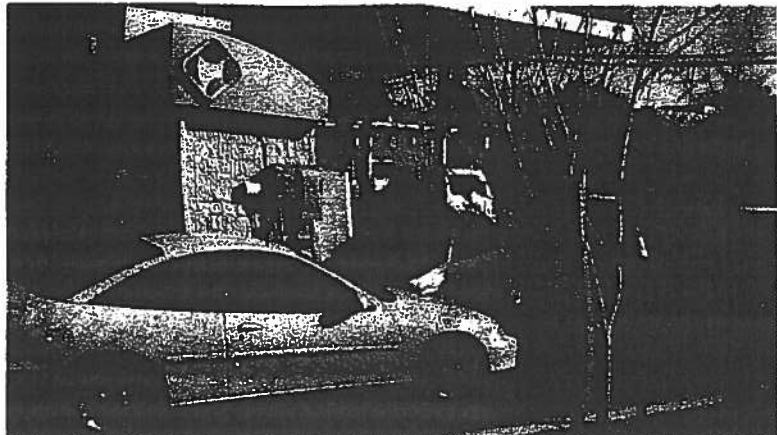


PHOTO BY ANDY CARRASCO

The small lot of the Smith's gas station on Constitution and Carlisle lacks space for cars to wait while others refuel.

The permitting process for dispensing gas only takes into account the emissions produced by the gas station and does not consider traffic or space issues, Westmoreland says. With the amount it's allowed to pump, the Smith's station could produce 29.25 tons of volatile organic compounds over the course a year. That number is standard for gas stations and does not raise any concerns for his office, Westmoreland adds.

Traffic and Tankers

The neighbors have expressed fears that allowing an already high-volume gas station to increase its pumping will exacerbate existing traffic problems. Michael Geier, the Southeast area commander for APD, says his officers try to do as much as possible to enforce traffic rules. "We'll write citations for cutting through property, but there's not much room on that lot," he says. "It was a neighborhood corner gas station at that location for 30 years, and now there's a high-volume station."

The delivery tankers compound traffic problems because there isn't much space for maneuvering, and they often jut into the street, blocking visibility for bikes and cars. Carrasco and others say they worry the Western Refinery drivers are forced to get too close to homes when delivering and that there is little oversight by the station's employees during the refueling process. "The problem is hazardous materials, and there are houses directly across the street," he says. "The city is allowing them to come down the alleyway next to people's homes because there is no other way to deliver fuel there."

Westmoreland agrees that the trucks present a host of issues when making deliveries, including failing to block off the area surrounding the tanks. "If someone came through and hit one of these trucks you'd have a huge gas spill. It pumps out pretty quickly."

In February 2011, a car backed into a Western Refinery truck while it was filling the tanks, causing slight damage to the truck, according to the police report.

Bureaucracy

Carrasco says he's been trying to sell his property because he can't rent out the offices in his plaza, but he hasn't been able to find a buyer. When Smith's offered to buy him out initially, he refused, he says, due to pre-existing leases with his tenants. Myrsha Gilford, the vice president of public affairs for Smith's, says the company won't purchase his property now that the gas station has already been built.

The city granted Smith's the initial permit for construction because it's in a commercial zone fit for neighborhood businesses, such as gas stations. "Zoning code does not require that we take the size of the lot into consideration," says Juanita Garcia, the acting code compliance official for Code Enforcement Division of the Planning Department. "All we're looking for is whether or not it is zoned for that type of business. All that is stated in the zoning code is that [gas stations] are allowed, permissively."

As a result of the concerns voiced by the neighbors over the last year, City Councilors Isaac Benton and Trudy Jones proposed an amendment to the zoning code. Andrew Webb, policy analyst for council staff, says the amendment would require an allotted area for cars waiting to refuel. If there were 10 spots to fill up at the station, there would have to be room for 20 vehicles. "This is designed to keep the traffic from backing up into the road, as I'm sure happens at that gas station," he says. "It would, in fact, limit the number of pumps you could have on the site."

The amendment would also require companies to erect trees or walls between the station and homes, and deliveries would have to be made away from where people drive on the lot. The vote on this amendment is slated for Monday, May 7, Webb says.

Neighbor Pat Toledo testified at a City Council meeting in mid-April. "The proper response from the city should not be to prevent this from ever happening again but to have kept it from ever happening at all." He said the city should evaluate whether there is a need for more gas stations, period. ☉