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

IN THE MATTER OF THE PETITION FOR
A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. 3340-RMD
[NEW MEXICO TERMINAL SERVICES, LLC.]

MOUNTAIN VIEW NEIGHBORHOOD ASSOCIATION,
as an organization, and
NORA GARCIA and LAURO SILVA, as individuals,
and
MOUNTAIN VIEW COMMUNITY ACTION,
Petitioners.

PETITION FOR A HEARING

Pursuant to Chapter 74, Article 2, Section 7(H), NMSA 1978, and Section 20.11.81.14 NMAC, the Mountain View Neighborhood Association ("MVNA"), Lauro Silva and Nora Garcia, and Mountain View Community Action ("MVCA") (collectively "Petitioners"), by and through counsel Eric Jantz, Gail Evans and Maslyn Locke of the New Mexico Environmental Law Center, request a hearing on Air Quality Permit No. 3340, New Mexico Terminal Services, LLC. Petitioners set forth below the information required by regulation to request a review hearing, and have provided the original and nine copies of this petition, including a copy of the permit attached as "Exhibit A," and a certificate of service, to the Albuquerque/Bernalillo County Air Quality Control Board ("Board"). A copy of this petition has been served on the Environmental Health Department ("Department"), the Board's legal counsel, and New Mexico Terminal Services, LLC ("Applicant"). In addition to the petition, Petitioners submit the filing fee of $125.00 pursuant to 20.11.2 NMAC. Petitioners and counsel attest to the truth of the information contained in this petition.

Pursuant to Section 20.11.81.14(B)(2)(a)-(f) NMAC, Petitioners provide the following information and request a hearing on the merits.

A. Section 20.11.81.14(B)(2)(a) NMAC provides that a petition shall be filed with the Board within 30 consecutive days from the date notice is given of the permitting action taken by the department and regarding which the petition objects.

This petition is filed within 30 consecutive days from the date notice was given of the permitting action. Notice of the issuance of Permit No. 3340 is dated October 26, 2020. This petition was filed with the Board and Department on November 25, 2020 within 30 days of receiving notice of the permitting action of which Petitioners object. Thus, this petition is timely.

B. Section 20.11.81.14(B)(2)(b) provides that a petition shall state the Petitioners' name, address, telephone number, facsimile number, cellular telephone number, and other contact information.

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C. Section 20.11.81.14(B)(2)(c) NMAC provides that the petition states the manner in which the petitioner participated in the permitting action that was pending before the department and how the petitioner is adversely affected by the permitting action taken by the department.

Petitioners Mountain View Neighborhood Association, Nora Garcia and Lauro Silva first requested a Public Information Hearing on April 10, 2018. Petitioners Mountain View Neighborhood Association and its individual representatives presented public comments and hand delivered information at the first Public Information Hearing ("PIH") that was held on August 30, 2018. Members of the public emailed the Air Quality Program when application documents online had been taken down and were not available and when maps and images were illegible. Petitioner MVNA participated in the second PIH, held on April 24, 2019 by submitting written comments through counsel and providing oral comments at the PIH. Petitioner MVNA participated in the third PIH, held on July 24, 2019, by submitting written comments through counsel and providing oral comments at the hearing. Petitioner MVNA provided supplemental written comments on August 3, 2019 through counsel.

The Mountain View Neighborhood Association encompasses the proposed facility and the pollution the proposed operation will emit is of concern to Neighborhood Association members. Petitioners MVNA are adversely affected by the permitting action by living nearby and in the same community as the proposed facility. Mountain View is also recognized as an EPA environmental justice community which is deemed to be an "impacted and vulnerable community," meaning this proposed facility would adversely impact an already disproportionately impacted community. This new facility would add to the existing impacts from other polluting sources. Petitioner MVNA and its individual members live in the neighborhood of the proposed facility and are adversely impacted by breathing polluted air, resulting in adverse health impacts to themselves and their families. The proposed facility would impact the Petitioner MVNA's quality of life and quiet enjoyment of their property because of increased traffic in their neighborhood, asphalt fumes and other odors, increased dust, noise and light pollution. Petitioner MVNA is concerned with the proliferation of polluting industries in their neighborhood, dust, and noxious odors coming from existing facilities. Permitting a new operation would only exacerbate existing conditions adversely impacting Petitioners MVNA's health, quality of life, and property values.

Petitioner MVCA participated in the permitting action by receiving "Interested Party" correspondence from the Department. MVCA also engaged in correspondence with the Department and the Department's community liaison regarding an appeal of the Department's decision to issue a permit to the Applicant.

Mountain View Community Action is located and works in the Mountain View neighborhood. The pollution the proposed operation will emit is of concern to MVCA members. Petitioners MVCA are adversely affected by the permitting action by living nearby and in the same community as the proposed facility. Mountain View is also recognized as an EPA environmental justice community which is deemed to be an "impacted and vulnerable community," meaning this proposed facility would adversely impact an already disproportionately impacted community. This new facility would add to the existing impacts from other polluting sources. Petitioner MVCA and its individual members live in the neighborhood of the proposed facility and are adversely impacted by breathing polluted air, resulting in adverse health impacts to themselves and their families. The proposed facility would impact the Petitioner MVCA's quality of life and quiet enjoyment of their property because of increased traffic in their neighborhood, asphalt fumes and other odors, increased dust, noise and light pollution. Petitioner MVCA is concerned with the proliferation of polluting industries in their neighborhood, dust, and noxious odors coming from existing facilities. Permitting a new operation would only exacerbate existing conditions adversely impacting Petitioners MVCA's health, quality of life, and property values.

D. Section 20.11.81.14(B)(2)(d) NMAC provides that the petition (1) identify the specific permitting action appealed from; (2) specify the portions of the permitting action to which petitioner objects; and (3) state the factual and legal basis of petitioner's objections to the permitting action taken by the department.

1. This petition addresses the issuance of Air Quality Permit No. 3340-RMD, New Mexico Terminal Services, LLC. Construction Permit, located at 9615 Broadway SE, Albuquerque, NM, 87105. The permit was issued by the Environmental Health Department and notice of issuance of permit was sent on October 26, 2020. The Department did not make a copy of the approved permit available on October 26, so counsel for Petitioners requested a copy from the Department. Petitioners received a copy of the approved Permit No. 3340-RMD on November 5, 2020.

2. Petitioners appeal the Department's decision to issue Permit No. 3340-RMD on the following grounds:

a. The Department's decision violates the Petitioners' right to Equal Protection under the law pursuant to Article II, Section 18 of the New Mexico Constitution.

The Department's decision violates the Equal Protection Clause because it is unconstitutional discrimination. The permitting decision treats Petitioners differently from other similarly situated people, with no justifiable or constitutionally sufficient reason. The State Equal Protection Clause guarantees that the government will treat individuals similarly situated

in an equal manner. The Department's decision permits a land use in an under-resourced community of color, where similar uses are not permitted in predominantly affluent and White neighborhoods. The permitted land use is impermissible under the County Zoning Code. Similar uses are not permitted in predominantly affluent and White neighborhoods that are also not zoned for industrial uses.

The Department's decision violates the Equal Protection Clause because it subjects Petitioners, primarily a community of color, to disparate environmental, quality of life, and public health impacts compared to predominantly White neighborhoods.

b. The Department violated Petitioners' right to due process under Article II, Section 18 of the New Mexico Constitution.

Petitioners are entitled to due process, meaning notice and an opportunity to be heard. The right to be heard includes the opportunity to be heard at a reasonable time and in a reasonable manner. The Department violated Petitioners' right to be meaningfully heard in several ways.

First, deceptive answers from Applicant during the first Public Information Hearing violated Petitioners' right to be heard. During the first PIH, the Department prohibited a line of questioning regarding the zoning purposes of the land when the consultant for Applicant incorrectly stated, in response to a question from the public, that the land for the proposed plant was currently zoned as "M-2" and that a hot mix asphalt plant is allowed under the current zoning requirements. *See,* Transcript of August 30, 2018 Public Information Hearing at 1:28:50-1:30:10. As explained further in Section D.2.c. of this Petition, a hot mix asphalt plant is not a proper use under the current zoning designation. The Hearing Officer denied any further questioning despite the Applicant's incorrect assurance that the area is zoned for a hot mix asphalt plant. By allowing that inaccurate assertion to stand and denying any further questions challenging this misleading assertion, the Department improperly denied Petitioners a meaningful opportunity to be heard on whether the Department was permitting an illegal land use.

Second, even after Petitioners presented evidence that the land upon which the asphalt batch plant is to be located is not zoned for heavy industrial use, the Petitioners were not permitted to comment on this issue at any subsequent PIH. When Petitioners attempted to do so, the Hearing Officer administering the PIH deemed information about the illegal land use "irrelevant" and prevented Petitioners from presenting any testimony on that issue, again violating Petitioners' due process right by denying Petitioners the opportunity to be heard.

Third, the Department's acceptance of the Applicant's description of "new" equipment in the permit application is misleading to the public, as the public interprets the use of the word "new" to mean brand new equipment, never used before. Meanwhile, the Department has indicated that this equipment has not yet been identified, and that the equipment may be new or used, not "new" as commonly understood by the public. The Department's acceptance and allowance of this misleading language further deprives Petitioners of their Due Process right as it constitutes inadequate notice and prevents a meaningful opportunity to be heard.

Fourth, the Department has not required the Applicant to provide the make and model of the equipment the applicant intends to use in its operation, in order to protect the Applicant's economic position vis a vis equipment sellers. The Department's failure to require the disclosure of this information prior to issuing a permit deprives Petitioners and other members of the public of the opportunity to challenge the efficiency and efficacy of that equipment, which is critical to determining the emissions of the equipment, violating both the notice and hearing requirements of Petitioners' due process right. Community evaluation of the Applicant's pollution control equipment is particularly important because the Applicant's uncontrolled emissions are significant enough to require a Prevention of Significant Deterioration review and permit pursuant to 20.11.41.2.C.(3) and 20.11.61.7.KK.(1).(b) NMAC.

c. The Environmental Health Department issued Permit No. 3340-RMD for a use that is inconsistent with the land's proper zoning in violation of the Clean Air Act.

The Department cannot issue an air quality permit for a use inconsistent with Bernalillo County's zoning determinations. Clean Air Act, 42 USCS §§ 7401-7431 (2018). The Clean Air Act ("the Act") provides that implementation of the Clean Air Act shall not infringe on local land use laws. 42 USCS §7431 (2018). Bernalillo County has sole authority to plan and control land use. As explained below, the land at issue in this case is zoned A-1 and does not allow for the operation of a hot mix asphalt plant, meaning that by approving permit no. 3340-RMD, the Department has impermissibly attempted to usurp Bernalillo County's authority to plan and control land use.

The address 9615 Broadway SE, Albuquerque, New Mexico, 87105 has a current zoning designation of A-1. This means it is zoned for Agricultural use. New Mexico Terminal Services applied for and received a Special Use Permit for an Industrial Park at this location in 2016. The uses specified under the Special Use Permit included office space, rail spurs for storage and transfer of train cars, on-site storage of sand, gravel, lumber, and building products such as sheetrock, siding, and shingles, and transfer of petroleum products from rail cars to trucks. The Special Use Permit application specifically states that there will be no onsite storage of petroleum products. The Special Use Permit does not authorize operating a hot mix asphalt plant.

d. The Department's permitting decision is in violation of the law because it conflicts with Bernalillo County's zoning code.

The Department issued a construction permit under the New Mexico Air Quality Control Act and its implementing regulations for a hot mix asphalt plant on land which is not zoned for such a plant, and therefore the Department's decision conflicts with the Bernalillo County Zoning Code. The County Commission has plainly stated when the Zoning Code places a more restrictive land use on a parcel of land than another ordinance, the Zoning Code will prevail. Zoning Code, § 3(B). In this case, however, the Department's proposed decision would authorize the Applicant to construct an asphalt plant, i.e., allow a particular use, on land where such use is not permitted.

e. The air dispersion modeling is deficient in several respects.

Petitioners and other community members raised concerns about the concentrations of particulate matter ("PM") and volatile organic compounds ("VOCs") coming from the facility. The modeling submitted by the Applicant and reviewed by the Department fails to include emissions concentrations of PMs and VOCs coming from neighboring facilities. According to the Department's Modeling Guidelines, modeling for this facility should have included particulates from nearby operations, particularly because this area is a designated environmental justice community - i. e., a community that has already borne the brunt of governmental agency decisions that have negatively impacted their health and well-being. *See*, Air Dispersion Modeling Guidelines for Air Quality Permitting, available at: https://www.cabq.gov/airquality/documents/feb2016-coa-dispersion-modeling-guidelines-1.pdf. Emissions of particulate matter coming from neighboring facilities, as well as volatile organic compounds, should be taken into account when evaluating the effect of numerous polluting industries in the same neighborhood, especially given the high concentrations of polluting industries in this area.

Further, the Department approved using emissions factors with high degrees of uncertainty to model the emissions from the combustion of "used oil" and "waste oil". A more conservative and protective approach would be to either model emissions based on actual equipment performance or, alternatively, to require the use of natural gas as the sole fuel source for equipment. Moreover, the concerns with how emissions from the use of "used oil" and "waste oil" were modeled notwithstanding, burning "used oil" and "waste oil" as fuel for the operations generates significant amounts of heavy metals and other air toxics the impacts of which the Department failed to consider.

Finally, the Department approved modeling which placed "receptors", i.e., people who are likely to breathe emissions from the approved asphalt plant, at ground level rather than at a

five foot “flagpole” height, which better represents the height at which people would inhale any contaminants. The air dispersion modeling the Department approved, therefore, does not reflect a realistic scenario for impacts on people in the community.

E. Section 20.11.81.14(B)(2)(e) provides that the petitioner (1) state the remedy sought; (2) the legal basis for the remedy; and (3) state how granting the remedy is within the air quality jurisdiction of the board.

1. Petitioners request that the Board reverse the Department’s decision to approve Permit No. 3434-RMD because:

a. The Department’s decision violates the Petitioners’ constitutional guarantees to equal protection;
b. The Department’s decision violates Petitioners’ constitutional right to due process;
c. The Department’s decision violates the Clean Air Act;
d. The Department's decision violates Bernalillo County zoning law;
e. The Department’s decision violates the New Mexico Air Quality Control Act or its implementing regulations.

Alternatively, Petitioners request that the Board (a) find the permit void and reverse the Department’s decision, unless and until, a zoning permit is secured; (b) require Applicant to conduct continuous fence-line ambient air quality monitoring by installing at least four ambient air monitoring systems around the facility, particularly for PM_{10} and $PM_{2.5}$ and volatile organic compounds that the operation will emit; and (c) require Applicant to submit quarterly reports of actual emissions, including emissions of particulate matter and volatile organic compounds, to the Department.

2. Legal basis for remedy (1), reverse the Department’s decision to approve Permit No. 3340-RMD: Article II, Section 18 of the New Mexico Constitution (no person shall be denied equal protection of the law; no person shall be denied life, liberty or property without due process of law); NMSA, 1978 §74-2-7(K) (local Board shall sustain, modify or reverse appealed permitting action of local agency); 42 USCS §7431(provisions of Clean Air Act shall not infringe on a local government’s land use authority); 20.11.41.2.C.(3) and 20.11.61.7.KK.(1).(b) NMAC (major stationary sources required to undergo Prevention of Significant Deterioration review).

Legal basis for alternative remedy (1a) find the permit void, unless and until, a zoning permit is secured: Clean Air Act, 42 USCS §§ 7431 (2018) (provisions of Clean Air Act shall not infringe on a local government’s land use authority); NMSA 1978, § 74-2-7(K) (local Board shall sustain, modify or reverse appealed permitting action of local agency); Zoning Code §

18(A) (Special Use Permits are permits the Bernalillo County Commission issues for a specific non-conforming land use); Zoning Code § 18(B) (specific non-conforming land uses that the County Commission may approve are limited); *Abbott v. Armijo*, 1983-NMSC-065, ¶ 7, 100 N.M. 190, 668 P.2d 306 (when local ordinances conflict, the most recently enacted ordinance prevails).

Legal basis for alternative remedy (1b), require continuous fence-line ambient air monitoring systems around the facility to determine any exceedance of air quality standards, particularly particulate matter: NMSA 1978, § 74-2-7(K).

Legal basis for remedy (1c), require the applicant to submit quarterly reports of actual emissions, including emissions of particulate matter and volatile organic compounds: NMSA 1978, § 74-2-7(K).

3. The Air Quality Control Board has jurisdiction under NMSA 1978, section 74-2-7(K) to reverse, or modify, i.e., place conditions upon, a permit.

F. Section 20.11.81.14(B)(2)(f) requires that petitioner attach a copy of the permitting action being addressed.

A copy of the permitting action at issue is attached to this petition as "Exhibit A."

Petitioners and Counsel certify and attest that the foregoing is true and correct to the best of our knowledge and belief:

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CERTIFICATE OF SERVICE

On this 25th day of November, 2020, Eric Jantz, counsel for Petitioners, caused to be served by electronic mail a copy of this Petition with Exhibit A to the following:

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