

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

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

**AQCB No. 2014-4**

**Southwest Organizing Project  
By Juan Reynosa, Environmental Justice Organizer  
Esther and Steven Abeyta  
Petitioners**

**PETITIONERS' CLOSING ARGUMENTS, PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**I. INTRODUCTION**

For decades, working class communities of color like San Jose have borne a disproportionate burden of air pollution and the industries that cause it, not because of legal barriers, but because of systemic bureaucratic failures. These bureaucratic failures have led to widespread health problems and property destruction or devaluation. This matter is just the latest bureaucratic failure. The Albuquerque Environmental Health Department ("EHD") and the very process of this proceeding have failed the San Jose community in multiple ways.

First, the New Mexico Air Quality Control Act ("Act" or "Air Act") and its implementing regulations require that EHD determine that a proposed polluting operation, either alone or in combination with other polluting operations, will not

reasonably pose a threat to human health or property before issuing a permit. The record is clear that EHD has failed to make this required determination.

Second, the initial burden of making that determination is squarely on EHD. The evidence in this hearing is uncontested that EHD made no such determination prior to issuing Permit No. 3131 to Honstein Oil & Distributing, LLC ("Honstein").

Third, the process in this matter violated Petitioners' due process rights. The pre-hearing processes lacked any reasonable notice of which rules of civil procedure and which rules of evidence were being applied. The hearing held before the Albuquerque/Bernalillo County Air Quality Control Board ("Board") on January 11-13, 2017, likewise failed to ensure that the parties and the public were apprised of whether and to what extent the rules of evidence would apply. A fundamental aspect of due process is that parties to a proceeding are informed of the rules that apply during the proceeding. In this case, the rules of the proceeding have been unclear. The Hearing Officer refused Petitioners' requests to clarify whether the New Mexico rules of civil procedure and evidence are being applied to this proceeding, and if so, which rules and to what extent they apply. The Hearing Officer has also made vague indications that certain rules may apply. The resulting confusion has prejudiced Petitioners' ability to prosecute its case and deprived them of their due process rights.

Fourth, the process imposed in this hearing conflicts with the Legislature's and New Mexico Supreme Court's public participation mandates enumerated in *Colonias*

*Development Council v. Rhino Env't'l Svcs., Inc. ("Rhino")*. The Legislature's mandate of expansive public participation, as interpreted in *Rhino*, was undermined in this case by arbitrary application of evidentiary rules and allowing EHD counsel to harass and intimidate the public during public comment periods.

Fifth, the process imposed in this hearing conflicts with the Board's own regulations on adjudicatory hearings. While the Board's adjudicatory rules indicate that discovery and the rules of evidence may serve limited purposes in adjudications, both are disfavored. Moreover, the rules of evidence, if applied, are only to be applied as guidance, not wholesale, as they apparently were in this case.

Finally, no reasonable interpretation of the evidence presented in this matter can result in a conclusion that the EHD properly determined that air contamination from the Honstein operation, either alone or in combination with contamination from other sources in the San Jose neighborhood, does not reasonably pose a threat to public health or private property. The Honstein permit should be rescinded and the matter remanded to EHD for review consistent with its mandate to prevent and abate air pollution. Alternatively, the Honstein permit should be revoked unless and until Honstein reapplies for a pollution permit.

## II. FACTS AND PROCEDURE

The EHD received Honstein's bulk petroleum facility permit application on October 3, 2013. Administrative Record ("A.R.") 66 at 192. EHD required this permit

after it realized the Honstein facility had been operating for decades without a permit.

A.R. 70 at 215. The application was deemed complete on December 17, 2013. A.R. 66 at 192. On January 29, 2014, EHD received the first of several requests for a public information hearing on the Honstein permit application. *Id.* On May 8, 2014 EHD sent out the first notice of the Honstein public information hearing. *Id.* EHD held the public information hearing on May 22, 2014 at the Herman Sanchez Community Center in the San Jose neighborhood. *Id.*

At that public information hearing, several community members voiced their concern over the Honstein facility's impacts on their health and quality of life. A.R. 58 at 169-172. Despite community concern, and without making the required determination how the Honstein operation either alone or in combination with other pollution sources impacts public health or property, EHD granted Honstein's permit application on June 12, 2014, issuing Permit No. 3131. A.R. 67; A.R. 70 at 213. This permit allows the Honstein facility to emit 2.26 tons per year of volatile organic compounds ("VOCs"). *Id.* at 196. Significantly, when confronted with community concerns that air quality data taken at the Honstein facility fence line showed elevated levels of ethanol, toluene, and chlorobenzene, EHD deflected the concerns by stating the source of the pollution was not established. *Id.* at 219.

On August 12, 2014 Petitioners filed their Petition appealing EHD's issuance of Permit No. 3131. Among the bases upon which Petitioners appealed were that: (1) EHD

violated the Air Act by failing to consider the Honstein facility's impacts on community members' health; (2) EHD violated the Air Act by failing to consider the Honstein facility's contribution to the cumulative air emissions in the San Jose neighborhood; and (3) EHD violated the Air Act and the mandates of *Rhino* by failing to consider the Honstein facility's impact on community members' quality of life. SWOP Petition at 3-4, Docket No. 1. Petitioners subsequently supported their Petition, pursuant to the Hearing Officer's December 19, 2014 Pre-Hearing Order, with pre-filed expert testimony. *See generally, Petitioners' Notice of Intent to Present Technical Testimony* (April 8, 2015) ("SWOP NOI"), Docket No. 10.

In their NOI, Petitioners provided sworn declarations from several health experts about the health risks associated with the Honstein facility. *See, generally, NOI Exhibit 1, Written Testimony of Kitty M. Richards; Exhibit 2, Written Testimony of Dr. George D. Thurston; Exhibit 3, Written Testimony of Dana Rowangould.* EHD subsequently filed its own written expert testimony. *See generally, Environmental Health Department Air Quality Program Notice of Intent to Present Technical Testimony* (April 29, 2015) ("EHD NOI"), Docket No. 12.

The same day EHD filed its NOI, it also filed a motion to vacate the scheduled Board hearing on this matter and sought resolution of this matter by summary procedures. *Motion of the Environmental Health Department Air Quality Program to: Vacate and Reschedule Air Board Hearing and Amend the Prehearing Order to Resolve the Petition's*

*Claims Via Summary Procedures or Summary Judgment* (April 29, 2015), ("Motion to Vacate"), Docket No. 13. On May 3, 2015, a status conference was held to discuss the disposition of the Motion to Vacate and the parties agreed to a briefing schedule for dispositive motions. *Prehearing Order Revisions* (May 6, 2015), Docket No. 15. The parties briefed the summary disposition arguments, and the Board denied EHD motion for summary disposition in a meeting held on June 30, 2015.

On July 17, 2015, EHD filed a motion to "clarify" the Board's ruling denying summary disposition. *Environmental Health Department's Opposed Motion for Clarification of Ruling* (July 17, 2015), Docket No. 23. This motion was nothing more than an attempt to re-litigate its summary disposition motion, and EHD's clarification motion was denied. *Order Denying Department's Motion for Clarification of Ruling* (Sept. 1, 2015), Docket No. 28.

Failing to dispose of Petitioners' claims summarily, EHD moved for discovery. *Environmental Health Department's Opposed Motion for Discovery* (Dec. 14, 2015), Docket No. 32. Petitioners opposed EHD's motion for discovery on the grounds that the Board's adjudicatory procedures discouraged discovery and that applying discovery and other rules of civil procedure to an administrative adjudication is prejudicial. *Petitioners' Response in Opposition to the Environmental Health Department's Opposed Motion for Discovery* (Dec. 29, 2015), Docket No. 32. Moreover, EHD's discovery requests were tantamount to harassment. Despite the fact that nearly all the information EHD

requested through discovery was 1) irrelevant; 2) available to EHD through means other than discovery; 3) available to EHD through cross-examination; or 4) primarily calculated to delay a hearing on the merits, the Hearing Officer nevertheless granted EHD's motion for discovery. *Order on Environmental Health Department's Opposed Motion for Discovery* (Feb. 2, 2016), Docket No. 39. After a year of delay, the hearing on the merits was held before this Board on January 11-13, 2017.

### III. LEGAL FRAMEWORK

This proceeding is governed by three statutory and regulatory frameworks: the federal Clean Air Act, the New Mexico Air Quality Control Act and the regulations implementing the Air Act. The Clean Air Act provides the minimum requirements for states to protect air quality and human health. 42 U.S.C. § 7416. Nevertheless, state and local governments still have the primary responsibility for protecting air quality and human health. *Id.* at § 7401(a)(3). VOCs emitted from the Honstein facility are governed by the regulations at 40 C.F.R. 63, Subpart A and Subpart BBBBBB. Hazardous Air Pollutants ("HAPs") emitted from the Honstein facility are governed by the regulations at 40 C.F.R. Part 63. HAPs are also regulated under 20.11.64.1 NMAC *et. seq.*

The Air Act provides that the primary responsibility of the local authority is to prevent and abate air pollution. NMSA 1978, § 74-2-5(A). Further, "air pollution" is defined as an:

emission, except emission that occurs in nature, into the outdoor atmosphere 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.

*Id.* at § 74-2-2(B). This definition of air pollution is echoed in the regulations governing implementation of the Air Act. 20.11.1.7.F NMAC.

The Air Act also specifies EHD's permitting duties. The Act allows the local regulatory agency to deny a construction permit<sup>1</sup> application, such as for Permit No. 3131, if it will not meet applicable requirements of the Air Act or will violate any provision of the Act. NMSA 1978, § 74-2-7(C)(a),(c). The local regulatory agency may also specify conditions on any permit. *Id.* at § 74-2-7(D). For construction permits, such as Permit No. 3131, EHD may require that the pollution source be equipped for continuous emissions monitoring and measuring ambient air quality. 20.11.41.18 NMAC.

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<sup>1</sup> Construction permits are generally governed by 20.11.41.1 NMAC *et. seq.*



#### IV. ARGUMENT

**A. The Air Quality Control Act Requires EHD to Determine Whether Emissions from the Honstein Facility, Alone or in Combination with Other Emission Sources, Poses a Reasonably Probable Risk to Human Health or Property.**

**1. The Act's plain language governs the Board's decision.**

The Board's decision in this case must be guided by the Air Act's "reasonable probability of injury to health or property" standard. This standard is contained within the definition of "air pollution". The Air Act defines "air pollution" as:

the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health ... or as may unreasonably interfere with ... the reasonable use of property.

NMSA 1978, § 74-2-2(B) (emphasis added). Thus, when the Air Act directs the Board and EHD to "prevent and abate air pollution" it is directing regulatory agencies to prevent and abate "the emission ... into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health ... or as may unreasonably interfere with ... the reasonable use of property". *Id.* at § 74-2-5(A); 20.11.41.16.5 NMAC.

By its plain language, the Air Act provides a standard by which multiple, i.e. cumulative, emissions should be evaluated: whether those emissions pose a reasonable probability of injuring human health or interfering with property use. *See, Duke City Lumber Co. v. New Mexico Env't Improvement Bd.*, 1984-NMSC-042, ¶¶ 16-17, 101 N.M.

291, 294-295 (in the context of considering a variance, the Environmental Improvement Board was required to apply the "reasonable probability" of risk to health standard found in the definition of "air pollution"). Put another way, the Air Act requires local regulatory authorities to prevent and abate emissions of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or may unreasonably interfere with the use of property. The Air Act therefore provides a legal nexus that compels EHD to consider cumulative impacts.

2. The purpose of both the Air Act and the federal Clean Air Act is to protect public health.

The Act's plain language compelling EHD to consider the impacts of cumulative air emissions sources on public health and property is supported by the purpose of the federal Clean Air Act, which the Air Act implements locally. *See, Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 238 (NM 2007) (statutes must be interpreted consistently with their legislative purpose).

Congress declared that the purpose of the federal Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 41 U.S.C § 7401(b)(1) (emphasis added). Congress' straightforward declaration is supported by the federal Clean Air Act's legislative history. For example, in adopting Clean Air Act Section 102, which outlines the cooperative nature of the Clean Air Act between states and the Federal Government, the House of Representatives Report states that the main purpose in

adopting that section was to "emphasize the preventative or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs; to emphasize the predominant value of protection of public health." H.R. Rep. 95-294, 1977 U.S.S.C.A.N 1077, 1127.

Likewise, in adopting Section 108, Prevention of Significant Deterioration, the House Report notes: "[s]ome people have attempted to characterize the policy of prevention of significant deterioration as one of protecting trees and wilderness areas at the expense of people. However, in the committee's view, the need to prevent significant deterioration in so-called clean air areas arises in substantial part from the need to protect the public's health." *Id.* at 1184. Thus, it is imminently clear that the federal Clean Air Act's primary purpose is to protect human health.

Because the Air Act implements the federal Clean Air Act's provisions locally, it must, by extension, also have the primary purpose of protecting human health. This goal is demonstrated by the Air Act's primary mandate that the local authority prevent and abate emissions that pose a reasonable risk to public health. NMSA 1978, § 74-2-5(A).

Incredibly, however, the EHD takes the position that public health considerations may never be taken into account during permitting. *See, e.g.,* Testimony of Israel Tavarz ("Tavarez Testimony"), Transcript ("Tr."), 507:21-25, 508:1-8, 591:1-15.

This interpretation not only undermines the Air Act's and Clean Air Act's purposes on its face, it also undermines those purposes in practice.

For example, the manner in which EHD applies the Air Acts standards undermines the Act's purpose of protecting public health. EHD asserts that block after block of closely co-located polluting sources meeting emissions standards -- looking solely at each facility in isolation-- do not represent a health risk. In reality, the combined pollution from all the sources which, when only considered individually, may meet emissions standards, in fact has a significant impact on human health. EHD's interpretation leads to the absurd result that the Act protects human health only on paper.

**B. EHD has the Initial Burden of Demonstrating That an Operation to be Permitted Does Not Present a Reasonable Probability of Injury to Public Health or Property.**

In evaluating pollution permit applications like Honstein's, EHD has the initial burden of demonstrating whether the operation will have a reasonable probability of injuring human health or interfering with the reasonable use of property. In this case, EHD asserts that the burden to show such injury lies on the community. This argument effectively turns the Air Act's permitting requirements on their head, resulting in an absurd and untenable result.

EHD's initial burden of determining whether a pollution permit application will with a reasonable probability injure human health or property is mandated in the Act.

The Act requires permit applicants to submit information that allow the local agency to determine whether Air Act standards, such as the reasonable probability of injury standard, will be violated. NMSA 1978, § 74-2-7(B)(1). Further, the regulations implementing the Air Act allows EHD to deny a permit if any provision or standard of the Air Act is violated. 20.11.41.16.5 NMAC.

In this case, the record is clear that EHD failed to determine, prior to issuing Permit No. 3131, whether air contaminants from the Honstein operation, alone or in combination with contaminants from other operations, would pose a reasonable probability of injury to health or property. Tavaréz Testimony, Tr., 591:1-15; Testimony of Regan Eyerman ("Eyerman Testimony"), Tr., 606:20-25, 607:1-22; Administrative Record ("AR") 66 at 190-198.

**C. This Proceeding Violated Petitioners' Due Process Rights.**

It is well settled, rising to the status of an expectation, that proceedings before administrative bodies, such as the Board, are significantly less formal than proceedings in a court of law. There are both historical and structural reasons for this difference, but irrespective of the reasons, litigants in contemporary administrative agency proceedings have come to have a reasonable expectation that those proceedings will not be conducted with the same level of formality as a court proceeding. This expectation is supported by decades of judicial decisions. *See, e.g., Archuleta v. Santa Fe Dept. ex. Rel. City of Santa Fe*, 2005-NMSC-006, ¶ 16, 137 N.M. 161, 169 (2005); *Sorenson v. National*

*Transp. Safety Bd.*, 684 F.2d 683, 686 (10th Cir. 1982); *Morton v. Dow*, 525 F.2d 1302, 1307 (10th Cir. 1975).

Furthermore, applying the Rules of Evidence (and Civil Procedure) in this proceeding - without specifying which rules will be used as "guidance" or even defining what "guidance" means - elevates the formality of the hearing to that of a judicial proceeding while simultaneously denying Petitioners their rights to notice of the procedural rules and a fair and impartial hearing.

1. Due process requires reasonable notice; the Board hearing process violated the parties' due process right to reasonable notice by not specifying the applicable rules in this case.

Due process is flexible and procedural protections will vary depending on the circumstances of each case. *Morrissey v. Brewer*, 92 S. Ct. 2593, 2600 (1972).

Notwithstanding this flexibility, reasonable notice and the opportunity to be heard are fundamental and concrete requirements of due process in administrative proceedings.

*TW Telecom of New Mexico, L.L.C. v New Mexico Public Regulation Com'n*, 2011-NMSC-029, ¶ 17, 150, N.M. 12, 28. Reasonable notice must be "more than a mere gesture," and "reasonably calculated" to inform the parties about the action and provide them the opportunity to properly present their case. *Albuquerque Bernalillo County Water Utility Authority v. New Mexico Public Regulation Com'n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32 (internal quotation marks and citation omitted).

Here, in response to Petitioners' objections and requests for clarification,<sup>2</sup> the Hearing Officer notified the parties that the rules of evidence may be used as guidance but refused to further explain what that means. *Further Revised Scheduling Order* at 2, ¶8, Docket No. 44 (June 1, 2016); *Order on Motions in Limine Relating to Prefiled Testimony and Exhibits* at 8 (Dec. 1, 2016), Docket No. 72 (New Mexico Rule of Evidence 1-702 and *Daubert* will not apply "directly"). Knowing the extent to which the Board and the Hearing Officer will rely on the rules of evidence is at the heart of the parties' due process right to reasonable notice. Reasonable notice under these circumstances, therefore, requires that the Board and the Hearing Officer specifically explain the evidentiary rules of the game.

Which evidentiary rules apply and the extent to which they might apply was likewise relevant to the merits hearing. There, EHD's counsel repeatedly raised evidentiary objections. *See, In re: Permit No. 3131, Tr., passim*. The Hearing Officer made some evidentiary rulings, but testimony was allowed to continue, subject to an offer of proof. *See, e.g., Tr., 61:5-15*. There has been no determination yet which evidence the Board may eventually consider or to what extent that evidence will be considered.

Merely stating that such rules may be used as guidance does not reasonably notify the parties. The parties are left in the dark—forced to wade through the murky,

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<sup>2</sup> *See, Petitioners' Objections to the Ad Hoc Application of the New Mexico Rules of Evidence or, in the Alternative, Petitioners' Motion in Limine to Exclude Environmental Health Department Evidence* (July 15, 2016), Docket No. 51.

unknown evidentiary territory left in the wake of this vague “guidance” instruction.

The Board and the Hearing Officer are violating the parties’ due process right to reasonable notice by leaving them ill-informed on this matter and thus unable to properly prepare and present the best case they possibly can.

2. Board Member Deichmann prejudged the outcome of the hearing and should recuse himself from participating further in the proceeding.

Due process also requires, at a minimum, a fair and impartial tribunal. *Reid v. N.M. Bd. of Examiners in Optometry*, 1979-NMSC-005, ¶ 6, 92 N.M. 414, 415-416 (N.M. 1979). A fair and impartial tribunal requires a trier of fact to be disinterested and free from any bias or predisposition regarding the outcome of the case. *Id.* at ¶ 7 (citations omitted). Moreover, our system of justice requires that the appearance of complete fairness is present. *Id.* These principles of fairness apply even more strictly to administrative proceedings where court procedural safeguards have been relaxed in the interest of efficiency. *Id.* at ¶ 8.

This proceeding is unquestionably an administrative adjudication because determining whether EHD properly approved Permit No. 3131 determines Honstein's rights, obligations and duties under the Air Act. Thus, the minimum due process mandate of an impartial tribunal is applicable. *Reid v. N.M. Bd. of Examiners in Optometry*, 1979-NMSC-005, ¶ 6.



However, during the merits hearing, Board Member Deichmann demonstrated bias when he prejudged the hearing outcome before all the evidence had been submitted. One of the remedies that Petitioners are seeking is the revocation of Honstein's air pollution permit. *Petition for a Hearing* at 5, ¶E (Aug. 12, 2014), Docket No. 1. The Air Quality Act clearly authorizes the Board to deny a permit which EHD has granted. NMSA 1978, § 74-2-7(K). The result of overturning EHD's decision would be that the Honstein operation could not legally operate. Here, however, on day two of the three day merits hearing, Board Member Deichmann clearly stated - in the process of cross-examining one of Petitioners' technical witnesses - that a result where Honstein was not operating was "not an option." Tr., 453:4-7. Member Deichmann's statement clearly reveals that he has prejudged this matter to the extent that he is unwilling to consider one of Petitioners' fundamental remedy requests. This prejudgment of the case warrants Member Diechmann's recusal from this matter.

**D. The Hearing Process Violated the Board's Adjudicatory Regulations.**

Despite their less formal structure, administrative proceedings, like judicial proceedings, must adhere to basic procedural guarantees and notions of fundamental fairness. Foremost among those procedural guarantees is a litigant's right to know beforehand the "rules of the game"; those basic rules by which the administrative proceeding is run.

In this case, the regulations for hearing indicate that the Rules of Evidence may serve as “guidance” to the hearing officer in the conduct of the proceeding when needed. Instead of following this directive limiting the use of these court rules to a source of guidance in making rulings, the Rules of Evidence have been inconsistently and arbitrarily applied contrary to the Board's own regulations.

1. Because the regulations governing adjudicatory proceedings already contain an evidentiary standard of admissibility, the regulations preclude using the Rules of Evidence.

Regulations set forth in the New Mexico Administrative Code, dictating the Board’s adjudicatory actions, explain that the Board and the Board’s hearing officer “may look to . . . the New Mexico Rules of Evidence, NMRA 11-101 *et. seq.*, for guidance.” 20.11.81.12.(A) NMAC. However, this may only be done “in the absence of a specific provision in 20.11.81 NMAC governing an action. . .” *Id.* (emphasis added). The regulations specific to Board adjudicatory hearings state that the hearing officer “shall admit any relevant evidence, unless the hearing officer determines that the evidence is unduly repetitious, otherwise unreliable or of little probative value.” 20.11.81.16.(2)(C)(1) NMAC (emphasis added). Therefore, the Board's adjudicatory hearing regulation specifically provides that the primary evidentiary standard that governs these proceedings is relevancy. Relevancy, in turn, is conditioned by reliability and probative value.

Accordingly, no “absence of a specific provision in 20.11.81 NMAC governing an action” exists to warrant the Board and the Hearing Officer’s reliance on the New Mexico Rules of Evidence for guidance. Basic rules of statutory construction<sup>3</sup> dictate that the plain language of a statute or regulation is the primary guide to interpretation. *State v. Juan*, 2010-NMSC-041, ¶ 37, 148 N.M. 747, 759. Here, the regulations expressly state the Board’s directive on this matter—the standard of admissibility is relevancy. Therefore, the New Mexico Rules of Evidence should not be used as guidance.

Alternatively, the rules of adjudicatory procedure make clear that the Rules of Evidence and jurisprudence interpreting those rules shall only be used to implement the Board’s own evidentiary standard. Hence, the Rules of Evidence and court cases interpreting them could be used for the limited purposed of determining whether a particular piece of evidence is “relevant” or not. Beyond this limited circumstance, the Rules of Evidence should not be applied.

2. The nature of administrative adjudications make applying the rules of evidence prejudicial.

Proceedings before administrative boards are informal and typically do not strictly adhere to the rules of evidence. *Archuleta v. Santa Fe Dept. ex. Rel. City of Santa Fe*, 2005-NMSC-006, ¶ 21, 137 N.M. 161, 169; *Sorenson v. Nat’l Transp. Safety Bd.*, 684 F.2d 683, 686 (10th Cir. 1982); *Morton v. Dow*, 525 F.2d 1302, 1307 (10th Cir. 1975). These

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<sup>3</sup> The canons of statutory construction apply equally to regulations. *Johnson v New Mexico Oil Conservation Commission*, 199-NMSC-021, ¶ 27, 127 N.M. 120, 126 (citing *Wineman v. Kelly’s Restaurant*, 1991-NMCA-128 ¶ 6, 113 N.M. 184, 185).

relatively rigid rules, typically only reserved for judicial settings, are relaxed in administrative proceedings in order to facilitate—rather than restrict—the process of presenting evidence. *Redman v. Bd. of Regents of New Mexico School For Visually Handicapped*, 1984-NMCA-117, ¶ 12, 102 N.M. 234, 238. A primary purpose of administrative law proceedings is to provide the kind of flexibility and informality not possible in traditional court settings. *First Nat'l Bank v. Bernalillo County Valuation Protest Bd.*, 1977-NMCA-005, ¶ 42, 90 N.M. 110, 116 (Judge Hernandez concurring).

This informality is not only apparent in section 20.11.81.16.(2)(C)(1) of the regulations—the specific provision detailing the relevancy standard of evidentiary admissibility the Board must follow in this case—but other Board regulations demonstrate this relaxed adherence to judicial rules as well. Regulations regarding the actions of the Board's hearing officer and director in administrative enforcement hearings by the EHD director state that "the hearing officer shall admit all evidence, unless the hearing officer determines that the evidence is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value." 20.11.80.15.(A)(1) NMAC. Additionally, in variance hearings before the Board, the regulations state that "the technical rules of evidence and rules of civil procedure shall not apply, but the hearings shall be conducted so that all relevant views are amply and fairly presented without undue repetition. 20.11.7.16(G) NMAC.

In contrast, the purpose of evidentiary rules are to exclude evidence and limit information, particularly prejudicial information, revealed to the fact finder, typically a jury. However, the finder of fact in this case, i.e., the Board, consists of individuals who have technical expertise relating to air pollution and are therefore in a better position to identify and give appropriate weight to irrelevant and prejudicial evidence than a jury of laypersons or a lawyer. Further, as an administrative body, the Board's adjudicatory regulations are intended to foster, rather than suppress, public participation. The more lenient relevancy standard of evidentiary admissibility presented in section 20.11.81.16.(2)(C)(1) of the regulations and employed in this case, coupled with the similar relevancy language used in these other sections of the Board's regulations, show that the Board has chosen to adopt this informal relevancy standard over the strict judicial rules of evidence. This is the norm in administrative hearings and the Board's regulations plainly express an adherence to this norm. Accordingly, the New Mexico Rules of Evidence should not apply.

**E. The Legal Residuum Rule is Inapplicable in this Matter Because there is No Substantial Right at Issue.**

The New Mexico Supreme Court has held that the legal residuum rule, and thus the rules of evidence, apply to administrative hearings only where an agency action affects a substantial right. *Duke City Lumber v. New Mexico Env't Improvement Bd.*, 1984-NMSC-042, ¶ 20, 101 N.M. 291, 295 (1984); *see also, Dick v. City of Portales*, 1993-NMCA-

125, ¶ 14, 116 N.M. 472, 476 (Ct. App. 1993) (reversed on other grounds, 1994-NMSC-092).

A substantial right is a material property right or the ability to make a livelihood. *Dick v. City of Portales*, 1993-NMCA-125 at ¶ 14. However, Honstein has no property right in its air permit. The Federal regulation setting the minimum requirements for state air quality programs mandates, as a standard condition for each permit issued by a state or local agency, that a permit include the following language: "the permit does not convey any property rights of any sort, or any exclusive privilege." 40 C.F.R. § 70.6.(a)(6)(iv); *see also, In re: Propex, Inc.*, 415 B.R. 321, 333 (Bankr. E.D. Tenn., 2009).<sup>4</sup> The plain language of the Clean Air Act's implementing regulations, to which EHD and this Board are bound, clearly demonstrates that a pollution permit conveys no property right and therefore pollution permits cannot be a "significant right" as defined by New Mexico jurisprudence.

Even if this federal regulation were inapplicable, however, Honstein would still not have a property right in its air pollution permit. The New Mexico Supreme Court has found that similar permits, such as liquor licenses, are not substantial rights. In *Floeck v. Bureau of Revenue*, the Court held that the "right" to sell liquor is within the control of the legislature. *Id.*, 1940-NMSC-014, ¶ 15, 44 N.M. 194 (1940). It is not a property right, but a privilege only, which may be revoked at any time. *Id.* The Court

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<sup>4</sup> Significantly, Permit No. 3131 does not contain this required language.

reasoned that the New Mexico Liquor Control Act is an exercise of the state's police power to ensure "the welfare, health, peace, temperance and safety of its people." *Id.*, ¶ 20. "It prescribes the terms and conditions upon which licenses shall be issued and the grounds and procedure for their cancellation; all of which are made purely administrative." *Id.*; see also, *Chronis v. State*, 1983-NMSC-081, ¶ 10, 100 N.M. 342 (1983) (a liquor license is neither a property right nor a right of contract, but a mere license, revocable under certain conditions).

In this case, no party has identified any substantial right at issue, and no finding of a substantial right has been made. Further, the reasoning that liquor licenses are not a material property right and are therefore not substantial applies equally to air pollution permits. See, NMSA § 74-2-12(A),(B) (permit may be revoked if a person is found to have violated or is violating any provision of the Act, its implementing regulations, or permit condition). Thus, no substantial rights are at issue in this matter. Accordingly, the legal residuum rule, and thereby the rules of evidence, do not apply.

**F. The Merits Hearing Process Conflicted with Public Participation Requirements Mandated in the New Mexico Supreme Court's *Rhino* Decision.**

In addition to all the foregoing substantive and procedural failings that require reversal of EHD issuance of Permit No. 3131 or, at a minimum, a new hearing, the hearing process in this matter also runs afoul of the New Mexico Supreme Court's interpretation of similar public participation provisions in *Colonias Development Council*

*v. Rhino Environmental Services, Inc.*, 2005-NMSC-024, 138 N.M. 133. In that case, the New Mexico Supreme Court held that the Solid Waste Act's public participation provisions, whose operative language guaranteed the opportunity for members of the public to submit data and information, submit technical information and conduct cross examination, evinced the legislature's intent for the public to play a vital role in the landfill permitting process, including providing information on quality of life impacts. *Id.*, 2005-NMSC-024 at ¶¶ 21-24. The legislature's intent to compel the agency to consider quality of life impacts, then, was based on the statute's public participation requirements. *Id.* at ¶¶ 19-23. Troublingly, in this case, however, counsel for EHD used the public's opportunity to participate in the regulatory process as a pretext for harassing and intimidating community members.

1. *Duke City Lumber's* admissibility standard is inapplicable to this matter.

Prior to public testimony during the merits hearing, counsel for EHD alleged that cross-examination of the public would be necessary based on a New Mexico Supreme Court case that allegedly holds that uncontroverted lay testimony can be probative unless challenged on cross-examination. Tr. at 257:19-25, 258:1-6. Consultation with EHD counsel revealed that EHD relied on *Duke City Lumber Co. v. N.M. Env't'l Improvement Bd.*, 1984-NMSC-042, 101 N.M. 291 (N.M. 1984) as authority for that proposition. However, nothing in the holding of *Duke City Lumber* suggests such an interpretation.



In that case, the Supreme Court examined, in relevant part, whether there was competent evidence to support a finding in a variance proceeding that wood smoke from a lumber company's wood waste burner was injurious to health or safety. *Duke City Lumber*, 1984-NMSC-042 at ¶ 5. The Court addressed both testimony from a medical doctor and lay witnesses who testified that smoke from the burner caused asthma attacks and irritation of the eyes, nose and throat. *Id.* at ¶ 18. The Court evaluated the admissibility of evidence under the New Mexico Administrative Procedures Act and held that the standard for admissibility under that act was whether the evidence has any probative value. *Id.* at ¶ 19 (emphasis added). The Court did not consider the standard of admissibility for evidence in an administrative hearing under the Air Act or the Board's regulations. Hence, the holding in *Duke City Lumber* is wholly inapplicable to this proceeding.

Nevertheless, the Hearing Officer permitted counsel for EHD to interrupt public witnesses over twenty times with evidentiary objections and aggressively cross-examine three different members of the public. *See, e.g.*, Tr., 260:6-25, 261:1-2 (public witness Javier Benevidez prohibited from continuing testimony on general health impacts in environmental justice communities); 264:22-25, 265:1-25, 266:1-8; 294:18-25, 295:1-25, 296:1-17 (EHD counsel cross-examining public witness Sister Joan Brown). This kind of aggressive treatment of public witnesses can only lead to intimidation and suppression of public participation. The treatment of the public in this proceeding is in

direct opposition to the expansive view of public participation the Court in *Rhino* contemplated.

2. The Hearing Officer violated *Rhino* by allowing EHD counsel to harass and intimidate public witnesses.

Even if *Duke City Lumber* were applicable to this case, which it is not, the Hearing Officer ran afoul of *Rhino*'s requirements by failing to restrain EHD counsel. The Court of Appeals case preceding the Supreme Court *Duke City Lumber* decision specifically evaluated the parameters of cross-examination of public witnesses. *Duke City Lumber Co. v. N.M. Envt'l Improvement Div.*, 1983-NMCA-079, ¶ 32, 101 N.M. 301, 308 (Ct. App. 1983). There, the permittee complained that it was deprived of the right to cross-examine members of the public. *Id.* However, the Court of Appeals found that the permittee was fully able to cross-examine public witnesses, but that it was entirely appropriate for the board chair in that case to discourage badgering and undue pressure during questioning. *Id.*

In this case, the Hearing Officer made no meaningful effort to restrain EHD counsel, thereby balancing the mandate of the *Rhino* decision with the EHD's ability to cross-examine the public. Rather than discourage badgering, undue pressure, and intimidation, the Hearing Officer only made a statement that she disfavored cross-examination of public witnesses. Tr., 257:7-12. During the actual harassment of witnesses, she failed to intervene, and indeed, on several occasions supported EHD's objections, directing public witnesses to curtail their testimony. *See, e.g.*, Tr., 260:23-25.

The Hearing Officer allowed suppression of public participation, contrary to *Rhino's* mandate by failing to restrain EHD counsel.

**G. The Preponderance of the Evidence Shows that EHD Failed to Consider Whether Emissions from the Honstein Operation, Alone or in Combination with Emissions from Other Air Pollution Sources, Posed a Reasonable Probability of Harm to Public Health or Property Before Issuing Permit No. 3131.**

The multitude of procedural and substantive errors that this hearing has presented notwithstanding, it is clear from the record that the preponderance of the evidence presented shows that EHD failed entirely to consider whether emissions from the Honstein facility, alone or in combination with other air pollution sources, pose a reasonable probability of harm to the health of San Jose community members or harm to their property. Moreover, even if the Board considers the evidence EHD presented at the hearing, it still cannot lead to the conclusion that emissions from the Honstein operation will not contribute to health or property risks.

1. Not only did EHD fail to consider Honstein's risk prior to issuing Permit No.3131, but reviewing staff are unqualified to make such a determination.

The evidence that EHD failed to consider Honstein's risk to public health or property damage is both clear and undisputed. First, it is important to acknowledge that EHD employees who reviewed and approved Permit No. 3131 have no experience or expertise in evaluating health effects of air pollution. Israel Tavarez, the EHD supervisor who ultimately approved permit No. 3131, conceded that he has no

experience or expertise in epidemiology or medicine. Tavaréz Testimony, Tr., 588:21-22; 589:16-18. Mr. Tavaréz has no expertise in toxicology, and his educational experience in toxicology is limited to a semester long toxicology course in graduate school and a "handful" of EPA trainings on toxicology. *Id.*, Tr., 588:18-24; 589:5-8.

Regan Eyerman, the EHD employee to initially reviewed and processed Permit No. 3131, likewise conceded she has no education or experience in epidemiology, toxicology or medicine. Eyerman Testimony, Tr., 605:19-25; 606:1-6. Thus, no EHD employee who reviewed or approved Permit No. 3131 has any expertise that might qualify them to assess the health effects of the Honstein operation's air emissions alone or in combination with emissions from other air pollution sources.<sup>5</sup>

Further, Mr. Tavaréz admitted that EHD went through what he characterized as a non-discretionary checklist - that does not include a public health effects or property risk evaluation - to approve Permit No. 3131. Tavaréz Testimony, Tr., 591:1-5. Ms. Eyerman provided substantially similar testimony. Eyerman Testimony, Tr., 607:1-22. In sum, the evidence is undisputed that EHD failed to consider the public health or property damage risk of the Honstein facility prior to issuing Permit No. 3131 and that the staff responsible for reviewing Permit No. 3131 are unqualified to analyze such risks.

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<sup>5</sup> It is also significant that both Mr. Tavaréz and Ms. Eyerman confined their direct testimony largely to scripted statements that EHD counsel helped them prepare. *See*, Tavaréz Testimony at Tr. 589:19-25; 590:1-2; Eyerman Testimony at 606:8-13. This reliance on counsel prepared scripted testimony calls into question the credibility of those witnesses' testimony on direct examination.

2. EHD failed to provide any relevant or credible evidence justifying its failure to consider the Honstein operation's effects on public health or property.

Although the evidence is irrefutable that EHD failed to consider the Honstein operation's effects on health and property prior to approving Permit No. 3131, EHD also failed to offer any credible or relevant *post hoc* justification for failing to conduct such an analysis.

- a. **EHD's witnesses lack credibility.**

- i. *Kathryn Kelly's testimony lacks credibility because of her history of misleading the public, her financial interests in this matter, and her contradictory statements.*

EHD's witness, Dr. Kathryn Kelly, is the sole witness that EHD offered who might conceivably have a background in an environmental health related field. *See*, Exhibit 5-A attached to Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony, Docket No. 45 (June 10, 2016). However, her credibility is suspect because of her history of representing polluting industry and her efforts to mislead the public on their behalf. Moreover, Dr. Kelly has a significant pecuniary interest in making findings consistent with EHD actions. Finally, Dr. Kelly contradicts herself on several occasions, making her testimony even less credible.

First, it is undisputed that EHD is compensating Dr. Kelly up to \$40,000 for her work on the Honstein matter. Testimony of Kathryn Kelly ("Kelly Testimony"), Tr., 758:2-6. This level of remuneration is a typical source of bias in expert testimony. *See*,

*e.g., Spencer v. United States*, 2003 U.S. Dist. LEXIS 25277, 34 (D. Kan. 2003).

Second, and more troubling, is evidence that Dr. Kelly is willing to ignore and manipulate data to help her clients achieve their goals. On cross-examination, counsel for SWOP confronted Dr. Kelly with comments to an Agency for Toxic Substances and Disease Registry document regarding a past incident where Dr. Kelly advised a client to ignore and manipulate data about a cement kiln in Midlothian, Texas. Tr., 751-754. Dr. Kelly claimed not to recollect the incident and instead criticized the commenter. Kelly Testimony, Tr., 756:1-3. However, Dr. Kelly testified that she would "definitely stand behind anything I have ever written." *Id.*, Tr., 756:9-13.

The original memo, upon which that comment is based, clearly reveals Dr. Kelly's penchant for manipulating information to benefit her client's position. *See*, Memorandum from Kathryn Kelly to Randy Jones (July 26, 1991), attached as Exhibit 1. As that memo indicates, Dr. Kelly advised her client to conceal risk data for carcinogenic emissions from a cement kiln burning hazardous waste because those data exceeded EPA risk guidelines. Exhibit 1 at 1, ¶ 1. Further, Dr. Kelly advised her client to compare the kiln carcinogenic emissions to another, non-EPA guideline that was less protective, but only for 30 minutes of emissions rather than a year's worth of emissions, as the annual emission rate exceeded even the more lenient guidelines. *Id.* at 1, ¶ 2. Dr. Kelly's own work product, which she testified she stands behind, indicates she is willing to mislead in order to advance her clients' goals.

This propensity to mislead manifested itself in this proceeding. Dr. Kelly testified that the cancer risk from air toxics, based on NATA data, was lower in San Jose than in her community, Incline Village, Nevada. Kelly Testimony, Tr., 739:15-17.

However, according to NATA, Incline Village has a cancer risk ranging between 24 and 31 in a million. A copy of those NATA data are attached as Exhibit 2. Incline Village's cancer risk is therefore significantly lower than San Jose's cancer risk of 44 in a million.

Moreover, as Dr. Rowangould testified, based on NATA data rankings from EPA, more than 75% of communities in the United States have greater cancer and respiratory hazard risks than Incline Village, whereas San Jose has a greater cancer risk than 70% of other communities in the U.S. and a greater respiratory hazard risk than 80% of the communities in the U.S. Rowangould Testimony, Tr., 826:9-25. Dr. Kelly's testimony is inherently unreliable.

Finally, Dr. Kelly contradicts her own testimony on a critical point. Dr. Kelly relied heavily on the Albuquerque-Bernalillo County Community Scale Air Toxics Monitoring and Risk Assessment Project ("Air Toxics Survey") to support her conclusion that VOC concentrations in San Jose do not pose a health threat. Kelly Testimony, Tr., 711-713, 715:19-25. Dr. Kelly acknowledged that the air monitor nearest to the Honstein facility which gathered data for the Air Toxics Survey was approximately three miles away. *Id.*, Tr., 774:12-14.

At the same time, however, Dr. Kelly argues that it is "inconceivable" that VOCs from Honstein's operation could have health impacts on individuals living 3/4 of a mile away because VOCs dissipate over distance. Exhibit 5 at 19, attached to *Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony*, Docket No. 45 (June 10, 2016); Kelly Testimony at 776:1-9. Dr. Kelly cannot simultaneously assert that a residence 3/4 of a mile away from the Honstein operation will not be subject to health risks from VOCs from Honstein because the VOCs will have dissipated over that distance, but at the same time claim that an air monitor three miles away accurately reflects the air quality in San Jose.

- ii. *Israel Tavarez's and Regan Eyerman's testimony is not credible because they read from comments scripted by legal counsel.*

Mr. Tavarez's and Ms. Eyerman's direct testimony is likewise not credible. During each of their direct examinations, both Mr. Tavarez and Ms. Eyerman continually read from documents in front of them. On cross-examination, each revealed that those documents were scripted responses to their counsel's questions, which counsel helped them prepare. Tavarez Testimony at Tr. 589:19-25; 590:1-2; Eyerman Testimony at 606:8-13. Because legal counsel helped script their direct testimony, its credibility is questionable. Moreover, legal counsel's intimate involvement in EHD witnesses' oral testimony raises serious questions about whether Mr. Tavarez's and Ms. Eyerman's written testimony was a product of legal counsel's efforts, or their own words.



b. **Much of EHD's evidence is irrelevant.**

i. *Gates' Testimony irrelevant because it is speculative and only addresses regulatory compliance protocols.*

aa. Gates' speculation about cross-contamination is irrelevant.

On page two of his April 29, 2015 written testimony, EHD witness Daniel Gates speculates about possible sources of contamination of the air samples that San Jose community members took in their neighborhood. Exhibit 3 at 2-3 attached to Environmental Health Department Notice of Intent to Present Technical Testimony (April 29, 2015), Docket No. 12. In speculating about sources of contamination, Mr. Gates relies upon photographs in Petitioner SWOP's *Breathe In New Mexico Report*, attached as Exhibit 3-B to EHD's Notice of Intent, Docket No. 12. Importantly, however, none of the photos Mr. Gates presents document how actual, specific air samples in the San Jose neighborhood were collected, as Mr. Gates conceded. Testimony of Daniel Gates ("Gates Testimony"), Tr., 681:12-25, 682:1-12.

In the *Breathe In New Mexico Report*, the captions accompanying the first two photographs Mr. Gates present explicitly indicate the photos are documenting a training session and not an actual air sampling event. *Breathe In New Mexico Report* at 7 ("San Jose community members at the SWOP office learning how to build and operate air monitoring buckets") (emphasis added). Mr. Gates did not (and cannot) comment about whether participants in the training were instructed to avoid contamination and

how to do so or whether such precautionary measures were actually taken when air samples were taken in the field.

Mr. Gates further conceded in his direct oral testimony that he had no information about whether the photographs had any relationship to conditions under which actual air quality samples were taken. Testimony of Daniel Gates ("Gates Testimony"), Tr. at 681:12-25; 682:1-12. Mr. Gates' testimony on this matter is wholly irrelevant.

The first two photos in Exhibit 3-B are irrelevant because they do not make the alleged fact of contamination for any actual, specific air quality sample more or less likely. Similarly, because the photographs do not document any actual sampling event they are of no consequence to determining whether any particular air sample was contaminated.

The third photograph in Exhibit 3-B is likewise irrelevant. That photo not only does not document actual air sampling, it was not even taken in the San Jose neighborhood. The caption accompanying that photo clearly indicates that the photo was taken of the Mesquite community in southern New Mexico. *Breathe In New Mexico Report* at 26. Thus, even if the third photo in Exhibit 3-B documented an actual air sampling event, it would do so for a completely different community and involving people who were not involved in the San Jose air sampling effort. The third

photograph in Exhibit 3-B is therefore irrelevant and should be excluded, along with all of Mr. Gates' testimony that is based upon that photograph.

- bb. Gates' testimony about cross-contamination of Bucket Brigade samples is pure speculation and therefore unreliable and irrelevant.

Similarly, Mr. Gates' testimony about cross-contamination is irrelevant, unreliable, and entirely speculative because neither EHD nor Mr. Gates provides any evidence that Petitioners' air quality samples were contaminated. Mr. Gates speculates that Petitioners' air quality samples, provided to the Board in the Petitioners' Notice of Record Supplementation, are contaminated. Exhibit 3 at 2-3, attached to EHD NOI, Docket No. 12. However, Mr. Gates relies on photographs that do not document any actual sampling that Petitioners engaged in to support his speculation. EHD provides no photographic, documentary, lab analysis or any other proof that the San Jose air quality samples were actually contaminated.

- cc. Sampling protocol intended to insure NAAQS compliance is irrelevant.

Mr. Gates spends a significant portion of his June 10, 2016 written testimony claiming that Petitioners' air sampling cannot be compared with the National Ambient Air Quality Standards ("NAAQS"), because Petitioners allegedly failed to adhere to several EPA approved sampling protocols. Gates Supplemental Testimony, Exhibit 7 at 4-18; Exhibits 7-A, 7-B1, 7-B2 attached to Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony (June 10, 2016), Docket

No. 45. Mr. Gates repeated this allegation in his oral testimony. Gates Testimony, Tr., 644-660.

However, Mr. Gates' testimony criticizing Petitioners' sampling methodology relies on EPA regulations and guidance that govern how state, local and tribal administrative agencies set up and maintain regional stationary air monitoring systems to demonstrate compliance with the NAAQS. 40 C.F.R. § 50.7(b),(c); Gates Testimony, Tr., 675:8-25, 676:1-4, 11-20. For example, the EPA's *Quality Assurance Handbook for Air Pollution Measurement System*, to which Mr. Gates refers throughout his testimony and which is attached to the EHD Supplemental NOI as Exhibit 7-A, specifically provides:

The SLAMS [State and Local Air Monitoring Stations] consist of a network of monitoring stations whose size and distribution is largely determined by the monitoring requirements for NAAQS comparison and the needs of monitoring organizations to meet their respective tribal/state implementation plan (SIP/TIP) requirements. The TIP/SIPs provide for the implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS) in each air quality control region within a tribe/state. The Handbook is largely devoted to guidance related to the SLAMS network.

United States Environmental Protection Agency, *Quality Assurance Handbook for Air Pollution Measurement System*, EPA-454/B-13-003, Sec. 1.0 at 2 (May 2013); Gates Testimony, Tr. 674:9-25, 675:1-7. Further, 40 C.F.R. Part 50, Appendix N, to which Mr. Gates also refers to repeatedly in his testimony and which is attached to EHD's Supplemental NOI as Exhibit 7-B2, provides that its purpose is to "explain[] the data handling conventions and computations necessary for determining when the national

ambient air quality standards (NAAQS) for PM<sub>2.5</sub> are met ...". 40 C.F.R. Part 50, Appendix N, Sec. 1(a). Both the EPA guidance and Appendix N unequivocally demonstrate that those documents were intended to govern how state, tribal and local governments monitor air quality for the purposes of complying with federal law. They are clearly not intended to guide how citizens and individuals conduct air quality sampling. Gates Testimony, Tr., 676:11-20.

Indeed, Mr. Gates conceded this very point in his oral testimony. Gates Testimony, Tr. at 673:6-14. There, Mr. Gates testified that the Bucket Brigade data could not be compared to the NAAQS for the purposes of regulatory compliance. *Id.* However, Mr. Gates conceded that if the goal of sampling were different than for regulatory compliance, the procedures for collecting samples would also be different. *Id.* at 677:3-8. As Mr. Reynosa testified, the primary goal of the Bucket Brigade was to produce data to encourage regulators to take a closer look at air quality in the San Jose community and hopefully take steps to address community concerns. Testimony of Juan Reynosa, Tr. 137:1-20; *see also*, Gates Testimony, Tr. 676:21-24 (conceding that organizations like SWOP are not responsible for regulatory compliance). Thus all of Mr. Gates' testimony regarding the applicability of the sampling protocols in EHD Exhibits 7-A, 7-B1, 7-B2, attached to EHD's Supplemental NOI, Docket No. 45, is irrelevant and should be disregarded. Moreover, the sampling protocols in those Exhibits are

themselves irrelevant as is Mr. Gates' oral testimony supporting his written testimony and should likewise be disregarded.

dd. Mr. Gates' testimony and evidence about NAAQS data handling is irrelevant.

The EPA data handling guidance upon which Mr. Gates relies for his testimony is likewise irrelevant. *See*, Exhibit 7-C, attached to EHD's Supplemental NOI, Docket No. 45. Like the other handbooks upon which Mr. Gates relies, Exhibit 7-C is intended as guidance for state or local administrative agencies who design and operate regional air quality sampling networks that are used to demonstrate state or local compliance with federal law using stationary monitors. Supplemental Exhibit 7-C at 1 ("This guidance provides information you, the state or local agency responsible for monitoring and interpreting air quality, need to determine whether you are meeting the standards for particulate matter in 40 CFR Part 50.") (emphasis added).

This EPA guidance does not apply to community initiated air sampling efforts designed to determine whether there may be a need for cumulative impacts analysis. Exhibit 7-C therefore does not make the validity of Petitioners' air quality samples any more or less likely, nor is it of consequence about whether Petitioners' followed an acceptable sampling protocol appropriate to citizen groups using mobile monitoring devices. Exhibit 7-C is therefore irrelevant and should be excluded.

ee. Mr. Gates' evidence about equivalent particulate matter monitoring methods is irrelevant.

Supplemental Exhibit 7-H, attached to EHD's Supplemental NOI, Docket No. 45, which is a copy of EPA's *List of Designated Reference and Equivalence Methods*, is also irrelevant. As with all the other EPA documents Mr. Gates relies upon to speculate that Petitioners' air quality results from San Jose are inadequate, Exhibit 7-H is intended to apply to regulatory agencies, like EHD. Indeed, the EPA website, from which Mr. Gates retrieved exhibit 7-H, specifically states "[t]his site is primarily intended for use by air monitoring staff responsible for collecting ambient air monitoring data."<sup>6</sup>

Further, the EPA website upon which Mr. Gates relies for his information includes a specific link intended for communities entitled "Air Sensor Toolbox for Citizen Scientists". This part of the EPA website, not the section from which Mr. Gates retrieved Exhibit 7-H, contains guidance applicable to community based monitoring programs such as that in San Jose. Hence, Exhibit 7-H does nothing to establish whether it is more or less likely that Petitioners' air quality samples were validly taken. Nor is Exhibit 7-H consequential in establishing the validity of Petitioners' air samples. The information in Exhibit 7-H and Mr. Gates' testimony based thereon is irrelevant and should be excluded.

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<sup>6</sup> <https://www3.epa.gov/ttn/amtic/index.html> (last viewed July 12, 2016).

ff. EPA memo concerning 1998 California Bucket Brigade is irrelevant.

Just as he did in his 2015 written testimony, in his 2016 written testimony Mr. Gates speculates about cross-contamination of the air samples that Petitioners collected. Gates Supplemental Testimony at 20. Mr. Gates refers to his 2015 testimony and the photographs attached thereto in support of his current arguments. Mr. Gates' 2016 testimony is irrelevant for the same reasons it was irrelevant in 2015, as explained above.

Additionally, Mr. Gates refers to an EPA memorandum regarding a 1998 California community air sampling effort, attached to EHD Supplemental NOI, Docket No. 45, as Exhibit 7-K, that notes possible contamination issues sometimes associated with Tedlar bags. Gates Supplemental Testimony at 20; EHD Supplemental NOI, Exhibit 7-K. Tedlar bags are one mechanism Petitioners used to collect air quality samples in the San Jose neighborhood. *See, Petitioners' Notice of Record Supplementation*, Attachment 3 at 2 (Nov. 23, 2015). Exhibit 7-K is irrelevant, however, for two reasons.

First, the memorandum addresses only generic concerns with Tedlar bags, not any specific problems Petitioners may or may not have encountered. EHD Supplemental Exhibit 7-K at 2. Without pointing to specific problems encountered in Petitioners' sampling efforts, Exhibit 7-K has no probative value, i.e., it does nothing to make a fact more or less probable, nor is it of consequence to determining whether there were any problems with Petitioners' air quality samples.



Second, to the extent the EPA memorandum identifies particular concerns with how Tedlar bags were used in the California sampling program, those concerns were directed at the California effort. There is no indication that Petitioners encountered similar obstacles in the San Jose sampling program and EHD makes no such allegation. Exhibit 7-K is therefore irrelevant and should be excluded.

ii. *Kelly Testimony relies on an irrelevant air toxics survey.*

Dr. Kelly relied heavily on the Air Toxics Survey to support her conclusion that VOC concentrations in San Jose do not pose a health threat. Kelly Testimony, Tr., 711-713, 715:19-25. However, her own testimony and the testimony of Dr. Rowangould both demonstrate that those data have only limited relevance to air quality in San Jose. First, Dr. Kelly herself indicates that VOCs, the primary emission from the Honstein operation, dissipate over distances of less than a mile. Exhibit 5 at 19, attached to *Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony*, Docket No. 45 (June 10, 2016); Kelly Testimony at 776:1-9. Thus, the data that the Air Toxics Survey collected three miles from the Honstein operation and nearly a mile from the southernmost boundary of the San Jose neighborhood, has no probative value as to the air quality in San Jose, much less near the Honstein operation.

Second, Dr. Rowangould presented testimony that the data collected by the Air Toxics Survey was of limited utility because the South Valley monitor where those data were collected was too far away from San Jose to be able to measure air quality in the

neighborhood. Rowangould Testimony, Tr., 214:20-21, 846:17-23. Dr. Rowangould's interpretation of the Air Toxics Survey data is supported by air quality monitoring that Honstein provided, which indicated that VOC concentrations were higher at the Honstein fenceline compared with locations within the San Jose neighborhood further away from the Honstein operation. *Id.*, Tr., 859:11-18. Thus, Dr. Kelly's testimony relying on the Air Toxics Survey and its data is irrelevant and should be disregarded.

## V. CONCLUSION

For all the foregoing reasons, EHD's decision approving Permit No. 3131 should be reversed. The Board should vacate Permit 3131 until such time as EHD conducts an analysis, consistent with the Air Act, about whether the Honstein operation's air emissions, alone or in combination with other air emissions from nearby pollution sources, pose an unreasonably probable risk to public health or a risk to property. Further, Board Member Deichmann should recuse himself from considering the merits of EHD's decision to approve Permit No. 3131.

## FINDINGS OF FACT

1. Honstein Oil Distributing, LLC ("Honstein"), operates a bulk petroleum facility at 101 Anderson Avenue SW, Albuquerque, New Mexico 87102.
2. Honstein Oil is located in the San Jose neighborhood.
3. Honstein, the permittee, presented no witnesses and conducted no cross-examination.
4. Honstein is located in a residential neighborhood. Rowangould Testimony, Tr., 229:18-24.
5. Based on United States Census data, the two primary census tracts comprising the San Jose neighborhood contain populations that are between 71% and 88% Latino. Richards Testimony, Tr., 46:9-19;
6. Based on United States Census data, the two census tracts that comprise the San Jose neighborhood have between 29.3% and 37.1% of families living below the poverty line. Richards Testimony, Tr. 48:21-25;
7. The San Jose neighborhood has a higher proportion of Latinos and families living in poverty than Bernalillo County as a whole. Richards Testimony, Tr., 47:11-16.
8. Although it has operated for decades, the Albuquerque Environmental Health Department ("EHD") first issued Honstein a permit under the New Mexico Air Quality Control Act ("Act" or "Air Act") in 2014.
9. The EHD air pollution permit, Permit No. 3131, allows Honstein to emit 2.6 tons of volatile organic compounds ("VOCs") per year.
10. The Honstein operation is within 100 feet of occupied residences. Rowangould Testimony, Tr., 230:2-4.
11. The Honstein operation is within 1/10th of a mile of an elementary school. Rowangould Testimony, Tr., 230:4-6.

12. The San Jose neighborhood has a disproportionate number of air pollution sources in its two main census tracts compared to the rest of Bernalillo County. Richards Testimony, Tr., 50:7-21.

13. The San Jose neighborhood has a disproportionate amount of air pollution in its two primary census tracts compared to the rest of Bernalillo County. Rowangould Testimony, Tr., 234:13-17,24-25; 235:1-2, 19-21.

14. Most neighborhoods in Bernalillo County have a lower health risk from air pollution than San Jose according to EPA data. Rowangould Testimony, Tr., 236:14-18.

15. Because of its demographics and concentration of air pollution sources, the San Jose community is considered a "vulnerable population." Rowangould Testimony, Tr., 207:14-25; 208:1-16.

16. Vulnerable populations are more susceptible to adverse impacts from pollution, including air pollution. Rowangould Testimony, Tr., 207:3-25; Thurston Testimony, Tr., 375:15-19.

17. High concentrations of air pollution sources are associated with increases in negative health outcomes. Richards Testimony, Tr., 64:1-25; 65:1-23.

18. EHD failed to conduct any assessment of whether Honstein's emissions, alone or in combination with other air emissions sources would cause a reasonable probability of harm to public health or private property. Kelly Testimony, Tr., 710:8-11;

19. In contrast, Petitioners' screening investigation revealed that available information indicates that cumulative air pollution in San Jose may pose a health risk and that further investigation is warranted. Rowangould Testimony, Tr., 204:8-18.

20. The National Ambient Air Quality ("NAAQS") data indicates that regional air quality is in attainment for all criteria pollutants. Rowangould Testimony, Tr., 210:18-22.

21. NAAQS data for the South Valley air quality monitor indicate that while readings for ozone and particulate matter 10 microns or less in diameter ("PM 10") do not exceed national standards, they are very close to doing so. Rowangould Testimony, Tr., 211:4-23.

22. NAAQS data are not useful for determining air quality in the San Jose neighborhood for many of the NAAQS criteria pollutants, for example, particulate matter less than 2.5 microns in diameter ("PM 2.5"). Rowangould Testimony, Tr., 212:17-25; 213:1-5.

23. The Albuquerque-Bernalillo County Community Scale Air Toxics Monitoring and Risk Assessment Project ("Air Toxics Survey") also produced regional air quality data and limited health risk assessment. Rowangould Testimony, Tr., 213:7-20.

24. The Air Toxics Survey revealed that for VOCs the variation between air quality monitors was strong enough to indicate that VOC levels at any given monitor were more related to pollution sources near the monitor. Rowangould Testimony, Tr., 213:21-25; CITE DRI Rpt. also.

25. The Air Toxics Survey did not use an air quality monitor in the San Jose neighborhood. Rowangould Testimony, Tr., 213:12-15.

26. The nearest air quality monitor to the San Jose neighborhood that gathered data for the Air Toxics Survey was in the Mountainview neighborhood, approximately three miles from the Honstein operation and nearly a mile from the southernmost boundary of the San Jose neighborhood. Rowangould Testimony, Tr., 214:8-21.

27. VOCs disperse and dilute very close to their source. Rowangould Testimony, Tr., 214:1-5, 822:13-25, 823:1-18; Kelly Testimony, Tr., 775:12-25, 776:1-9; EHD Ex. 5 at 19.

28. The Air Toxics Survey data do not represent local air quality in the San Jose neighborhood because the closest air quality monitor gathering data for that survey is too far away. Rowangould Testimony, Tr., 214:20-21, 846:17-23.

29. EPA maintains a database modeling health risks from air pollution in communities nationwide; these are the National Scale Air Toxics Assessment ("NATA") data. Rowangould Testimony, Tr., 215:4-16.

30. NATA provides a coarse indication of community risk. Rowangould Testimony, Tr., 215:23-35; 216:1-7.

31. Based on NATA data, the San Jose community exhibits an elevated health risk from air pollution. Rowangould Testimony, Tr., 216:13-15.

32. Based on NATA data, the San Jose community exhibits an exposure risk from benzene, which is a VOC present in gasoline, that is higher than the health based standards used for screening purposes in New York state. Thurston Testimony, Tr., 394:1-2; 444:18-24.

33. The only data presented in this matter that measures air quality in the San Jose neighborhood is from the Southwest Organizing Project's ("SWOP") community monitoring project or "Bucket Brigade". Rowangould Testimony, Tr., 223:4-6.

34. The goal of the Bucket Brigade was to encourage EHD and the Air Board to look more closely at citizens' complaints about air quality in San Jose. Reynosa Testimony, Tr. 137:1-19.

35. The Bucket Brigade data show levels of chlorobenze above EPA's provisional reference concentrations in four instances in the San Jose neighborhood. Rowangould Testimony, Tr., 224:12-15.

36. The Bucket Brigade data also showed that on one occasion, the concentration of PM 2.5 exceeded the level that EPA considers a reasonable amount of exposure for a 24 hour period. Rowangould Testimony, Tr., 225:7-20.

37. The Bucket Brigade data are indicative of a health risk in the San Jose neighborhood and indicate that additional assessment is necessary. Rowangould Testimony, Tr., 226:1-4.

38. Data distribution analysis is inappropriate for situations, like the Bucket Brigade monitoring effort, where different measurements are taken at different times. Rowangould Testimony, Tr., 245:5-21.

39. High air contaminant measurements from the Bucket Brigade indicate a need to examine the possible reasons for those readings further, rather than discount them. Thurston Testimony, Tr., 865:8-25, 866:1-13.

40. The permitted emissions from the Honstein operation, in combination with other air emissions in the San Jose neighborhood, pose a reasonable probability of health risks. Rowangould Testimony, Tr., 244:1-3.

41. Members of the San Jose community and the public complain of foul odors and health effects associated with air pollution in San Jose. Testimony of Esther Abeyta, Tr., 270:15-22; 463:11-25; Testimony of Roberto Roibal, Tr., 284:17-21; Testimony of Sister Joan Brown, Tr., 291:6-12; Testimony of Lauro Silva, Tr., 325:17-22, 327:10-12; Testimony of Lucero Velasquez, Tr., 336:19-25; Testimony of Patrick West, Tr., 338:7-10; Testimony of Marisol Archuleta, Tr., 686:3-7.

42. Air emissions from the Honstein facility have increased the risk of negative health effects for San Jose residents. Thurston Testimony, Tr., 445:8-11.

43. Epidemiology, rather than toxicology, is the preferred discipline for evaluating the health impacts of pollutants on human populations because toxicology relies on controlled laboratory environments. Richards Testimony, Tr., 118:16-25; 119:1-24.

#### CONCLUSIONS OF LAW

1. Based on her education and experience, Petitioners' witness Ms. Kitty Richards is qualified as an expert in the field of environmental health. Richards Testimony, Tr., 24-43;

2. Based on his education and experience, Petitioners' witness, Dr. George Thurston is qualified as an expert in the field of environmental health science.

3. Based on her education and experience, Petitioners' witness, Dr. Dana Rowangould is qualified as an expert in environmental science.

4. Based on his education and experience, EHD's witness, Israel Tavarez is qualified as an expert in reviewing and approving air pollution permits.

5. Based on her education and experience, EHD's witness, Regan Eyerman is qualified as an expert in reviewing and approving air pollution permits.

6. Based on her education and experience, EHD's witness, Daniel Gates, is qualified as an expert in regulatory compliance under the Clean Air Act and New Mexico Air Quality Control Act.

7. Based on her education and experience, EHD's witness, Dr. Kathryn Kelly is qualified as an expert in toxicology.

8. The Clean Air Act provides the minimum requirements for states to protect air quality and human health. 42 U.S.C. § 7416.

9. State and local governments have the primary responsibility for protecting air quality and human health under the Clean Air Act. 42 U.S.C. § 7401(a)(3).

10. Volatile Organic Compounds emitted from the Honstein facility are governed by the regulations at 40 C.F.R. 63, Subpart A and Subpart BBBBBB.

11. Hazardous Air Pollutants ("HAPs") emitted from the Honstein facility are governed by the regulations at 40 C.F.R. Part 63.

12. HAPs are also regulated under 20.11.64.1 NMAC *et. seq.*

13. The New Mexico Air Quality Control Act provides that the primary responsibility of the local authority is to prevent and abate air pollution. NMSA 1978, § 74-2-5(A).

14. The New Mexico Air Quality Control Act defines "air pollution" is as an:

emission, except emission that occurs in nature, into the outdoor atmosphere 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.

*Id.* at § 74-2-2(B).

15. The regulations governing implementation of the New Mexico Air Quality Control Act defines "air pollution" identically to the Act. 20.11.1.7.F NMAC.

16. Reasonable probability of injury to human health is a regulatory standard. *Duke City Lumber Co. v. New Mexico Env't'l Improvement Bd.*, 1984-NMSC-042, ¶¶ 16-17, 101 N.M. 291, 294-295.

17. Unreasonable interference with use of property is a regulatory standard.

*Id.*



18. The Environmental Health Department has the initial burden of determining whether a permit applicant's operation will pose a reasonable probability of injury to human health or unreasonable interference with property because EHD is required to insure a permit meets all the standards in the New Mexico Air Quality Control Act. NMSA 1978, § 74-2-7(C)(a),(c).

19. The preponderance of the evidence presented in this matter indicates that the Environmental Health Department failed to conduct any analysis of whether Honstein's operations would present an unreasonable threat to public health or interference with property, and EHD therefore failed to satisfy its initial burden of making such a determination.

20. In an adjudication before the Albuquerque/Bernalillo County Air Quality Control Board, the Petitioner has the burden of proof. NMSA, 1978 § 74-2-7(K).

21. The Board has authority to sustain, modify or reverse EHD's decision to approve Permit No. 3131. *Id.*

22. The Petitioners in this case carried their burden of showing that EHD failed to conduct any analysis of whether Honstein's operations would present an unreasonable threat to public health or interference with property, and EHD therefore failed to satisfy its initial burden of making such a determination.

23. The local regulatory agency may also specify conditions on any permit. *Id.* at § 74-2-7(D).

24. The regulations implementing the Air Quality Control Act provide that EHD may require that the pollution source be equipped for continuous emissions monitoring and measuring ambient air quality. 20.11.41.18 NMAC.

25. The regulations governing adjudications before the Board are at 20.11.81.2 NMAC.

26. The Board's adjudicatory regulations provide that the Board and the Board's hearing officer "may look to . . . the New Mexico Rules of Evidence, NMRA 11-101 *et. seq.*, for guidance", but only "in the absence of a specific provision in 20.11.81 NMAC governing an action. 20.11.81.12.(A) NMAC.

27. The Board's adjudicatory hearing regulation specifically provides that the primary evidentiary standard that governs these proceedings is relevancy, conditioned by reliability and probative value. 20.11.81.16.(2)(C)(1) NMAC.

28. Because the Board's adjudicatory regulation specifically provides that the primary evidentiary standard is relevancy, the New Mexico Rules of Evidence are inapplicable in this proceeding.

29. The legal residuum rule applies to administrative hearings only where an agency action affects a substantial right. *Duke City Lumber v. New Mexico Env't'l Improvement Bd.*, 1984-NMSC-042, ¶ 20, 101 N.M. 291, 295 (1984); *Dick v. City of Portales*, 1993-NMCA-125, ¶ 14, 116 N.M. 472, 476 (Ct. App. 1993) (reversed on other grounds, 1994-NMSC-092).

30. A substantial right is a material property right or the ability to make a livelihood. *Dick v. City of Portales*, 1993-NMCA-125 at ¶ 14.

31. A permit issued by a state pursuant to the provisions of the Clean Air Act does not confer any property right. 40 C.F.R. § 70.6.(a)(6)(iv); *see also, In re: Propex, Inc.*, 415 B.R. 321, 333 (Bankr. E.D. Tenn., 2009).

32. Because there are no substantial rights at issue in this matter, the legal residuum rule is inapplicable.

DATED: March 3, 2017

NEW MEXICO  
ENVIRONMENTAL LAW CENTER



Eric Jantz  
Jonathan Block  
New Mexico Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, New Mexico 87505  
Telephone: (505) 989-9022  
Fax: (505) 989-3769

## CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of March, 2017, I have hand delivered, delivered by electronic mail, or placed a copy of the foregoing pleading in the above-captioned case in the US Mail, First Class to the following:

Felicia Orth  
c/o Andrew Daffern  
Control Strategies Section  
Environmental Health Department  
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Assistant City Attorney  
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[rod@honsteinoil.com](mailto:rod@honsteinoil.com)  
[sboyle@bradhallfuel.com](mailto:sboyle@bradhallfuel.com)

By:

A handwritten signature in black ink, appearing to be "Rod Honstein", written over a horizontal line.

Kirk Assessment / An Moulton

ENVIRONMENTAL TOXICOLOGY INTERNATIONAL, INC.

Plaza 600 Building, Sixth & Stewart, Suite 700, Seattle, WA 98101

TELEFAX TRANSMITTAL

To: Mr. Randy Jones  
Texas Industries

From: Richard Blanchet  
E-TI

Telefax Number: (214) 647-3877

Date: 07/26/91 Job Code: 259

Number of Pages (Including this cover page) = 6

If this transmission is not legible or if the specified number of pages were not received, please call our office.  
Telephone: (206) 441-6142, Facsimile: (206) 443-1812

Dear Randy:

What an interesting task! Sorry not to have been able to discuss this with you this week, but I'm sending along some initial thoughts for your consideration. I'll be out Monday and Tuesday but available by phone, or you can feel free to call Richard Blanchet in our office who has been working with me on this.

Briefly my thoughts regarding how to present the data are as follows.

1. We ran the health risk numbers -- in this case, comparing the ambient air concentrations to EPA standards with which you would have to comply under BIF. (That's what EPA does in lieu of a health risk assessment for cement kilns.) We thought this would be favorable because the BIF numbers are not very conservative.

The results are shown in page 2. Good. all the non-carcinogens are present at levels below that allowed. all hazard index numbers should be less than 1. But some carcinogens are present above the allowable concentrations. The risk is about 1 in 5,000. This is greater risk than EPA de in general (i.e., between 1 in 10,000 and 1 in 1,000,000), and g that allowed under BIF (1 in 100,000). So I would suggest you not p risk data, at least not for carcinogens.

2. So we then tried to look at other ways of presenting the data. Emissions are best compared to other emissions; ambient air data are best compared to other ambient air data or air standards. Presenting them as percentages of each other also seems more effective than presenting raw data. See page 3 for our summary table of ambient air data, criteria, and percentages.

From this table you can see that the concentrations you measured are generally within the range of concentrations measured in other rural US communities. The comparison would be even more favorable to urban areas, of course, but or to present to rural communities (who inevitably point out that if they wanted to breathe urban air they wouldn't be living in Nihilothuan). The ESL numbers look good, but only the 30-minute data -- not for annual. The PM<sub>10</sub> PSD column gives the counterpart EPA data

3. So we ran a table showing how favorably the air than compares with all other rural communities, even at the high-imp (page 4). This graph reflects the first and second columns on page 3. The graph seems fairly



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effective to me, although it does take some effort on the part of the reader to realize what it says. We ran out of time to generate a nicer copy for now, but if you like we can run a cleaner version next week. One downside: It will be assumed by most readers that all measured concentrations of any pollutant will have originated at your stack. It should be reiterated that the measured concentrations are from many sources, not just your plant.

4. But the most effective presentation seems to be a comparison of the measured concentration to the ESL (page 5). This is the only basis of comparison where the ambient air concentration of all metals is not exceeded, and is basically a graphical representation of the seventh column on page 3. Downside: the ESL could be challenged, somewhat correctly, as an inadequately scientific basis of comparison (it is simply an occupational standard divided by an arbitrary uncertainty factor). But heck, I didn't make up the rules, and they are published state guidelines, so I'd say let's go with them.

Remaining questions:

1. Why were 3-hour data taken (instead of 30-minute or 8-hour or other basis)?
2. Was any speciation of the chemical compounds done? E.g., having to assume total chromium instead of Cr(III) does not work to your advantage.

I'll be interested to hear your thoughts!

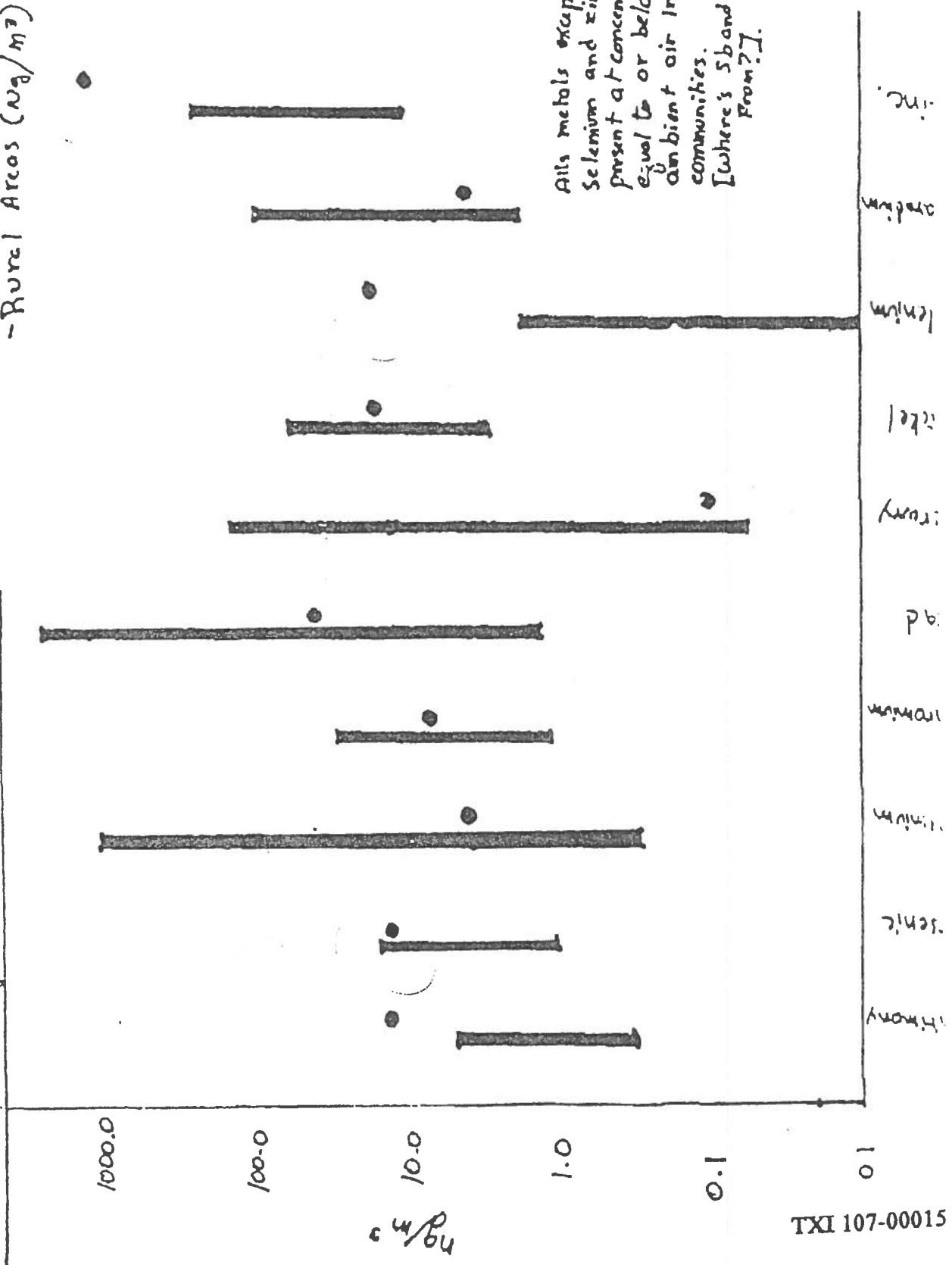
Regards,



Kathryn E. Kelly, Dr.P.H.  
President

Range of U.S. ambient air quality measurements  
rural areas

Comparison of Metal concentrations  
in Midwestern high-impact area  
with National Ambient Air Quality  
- Rural Areas ( $\mu\text{g}/\text{m}^3$ )



All metals except antimony, selenium and zinc are present at concentrations equal to or below that of ambient air in rural U.S. communities. [where's S and Se coming from?]

PAGE 2

HEALTH RISK CRITERIA			
NONCARC. COMPOUNDS	Hazard Index	CARCINOGENIC COMPOUNDS	RSD
Antimony	0.07	Arsenic	1.10E-04
Barium	0.005	Beryllium	1.50E-05
Lead	0.52	Cadmium	1.20E-05
Mercury	0.0003	Chromium	1.00E-04
Selenium	0.005	Cancer risk Total	2.37E-04
Copper	0.002		
Gallium	0.002		
Vanadium			

Page 2

TXI 107-000158

COMPARISON OF AMBIENT CONCENTRATIONS OF METALS AT MIDLOTHIAN CEMENT PLANT  
WITH NATIONAL AMBIENT AIR TEXAS' ESLs, EPA'S RACs AND RSDs.

Compound	Average ug/m3	Ambient Rural ug/m3	TACB ESL (30 min) ug/m3	TACB ESL (ann) ug/m3	RAC or RSD* ug/m3	% Rural Ambient	% 30 min ESL	% RAC or RSD*
Partic.	79	48	200.00	NA	NA	163.50	39.50	NA
Antimony	0.0195	0.0006-0.0070	5.00	0.50	0.30	278.50	0.39	6.50
Arsenic	0.0258	0.001-0.028	0.10	0.01	0.0023	92.10	25.80	1121.70*
Barium	0.0287	NA	5.00	0.50	0.00	NA	0.57	5
Beryllium	0.0065	NA	NA	NA	0.042	NA	65.00	NA
Boron	0.7935	NA	NA	5.00	NA	NA	1.59	11.07*
Cadmium	0.0065	0.0004-1.000	0.00	0.01	0.0056	0.65	6.50	1000.00*
Chromium	0.0083	0.0011-0.044	0.25	0.025	0.00083	18.90	3.32	52.44
Lead	0.0472	0.002-1.70	1.50	0.01	0.09	2.78	3.15	0.93
Mercury	0.0001	0.00005-0.160	0.10	0.01	0.3	0.06	0.10	61.43 #
Nickel	0.0258	0.006-0.078	0.15	0.015	0.042	33.10	17.20	0.52
Selenium	0.0258	0.00001-0.0030	2.00	0.20	5	860.00	1.29	0.22
Silver	0.0065	NA	0.10	0.01	3	NA	6.50	1.90
Thallium	0.0357	NA	1.00	0.10	0.3	NA	3.57	0.02
Vanadium	0.0035	0.003-0.097	0.50	0.05	20	3.60	0.70	NA
Zinc	0.0537	0.011-0.403	50.00	5.00	NA	13.30	0.11	NA

NA = not applicable

# = USEPA guidance has determined that carcinogenic forms of nickel are not likely to be emitted from combustion sources where reducing conditions exist. In the absence of a RAC for nickel, a RSD is given.

\* = RSDs refer to carcinogenic compounds; RACs refer to non-carcinogenic compounds



TEXAS INDUSTRIES, INC.  
MIDLOTHIAN CEMENT PLANT  
HIGH VOLUME AMBIENT AIR SAMPLING

DATE	JUNE 21, 1991		JUNE 28, 1991		JULY 03, 1991		AVG	TACB ESL
	LOC. #1 * wg/m3	LOC. #2 wg/m3	LOC. #1 wg/m3	LOC. #2 wg/m3	LOC. #1 wg/m3	LOC. #2 wg/m3	wg/m3	wg/m3
PARTIC.	99.8	78.0	75.8	78.5	88.5	53.3	79.0	200.0
ANTIMONY	< 0.035	< 0.028	< 0.027	< 0.027	0	0	< 0.0195	5.00
ARSENIC	< 0.046	< 0.037	< 0.036	< 0.036	0	0	< 0.0258	0.10
BARIUM	0.038	0.038	0	0.009	0.065	0.022	0.0287	5.00
BERYLLIUM	< 0.012	< 0.009	< 0.009	< 0.009	0	0	< 0.0065	0.01
BORON	1.096	0.869	0	0.098	1.889	0.809	0.7935	50.00
CADMIUM	< 0.012	< 0.009	< 0.009	< 0.009	0	0	< 0.0065	0.10
CHROMIUM	0.015	0.012	0	.000892	0.015	0.008	0.0083	** 0.25
LEAD	0.075	0.034	0.055	< 0.027	0.092	0	< 0.0472	1.50
MERCURY	.000138	.000215	0	0	0	0	0.0001	0.10
NICKEL	< 0.048	< 0.037	< 0.036	< 0.036	0	0	< 0.0258	0.15
SELENIUM	< 0.046	< 0.037	< 0.036	< 0.036	0	0	< 0.0258	2.00
SILVER	< 0.012	< 0.009	< 0.009	< 0.009	0	0	< 0.0065	0.10
THALLIUM	< 0.115	< 0.009	< 0.045	< 0.045	0	0	< 0.0357	2.00
VANADIUM	< 0.012	< 0.009	0	0	0	0	< 0.0035	0.50
ZINC	0.087	0.139	0	0	0.098	0	0.0537	50.00

\* wg/m3 = MICROGRAM/CUBIC METER

\*\* ESL IS FOR CHROMIUM-VI, NO ESL FOR CHROME-III

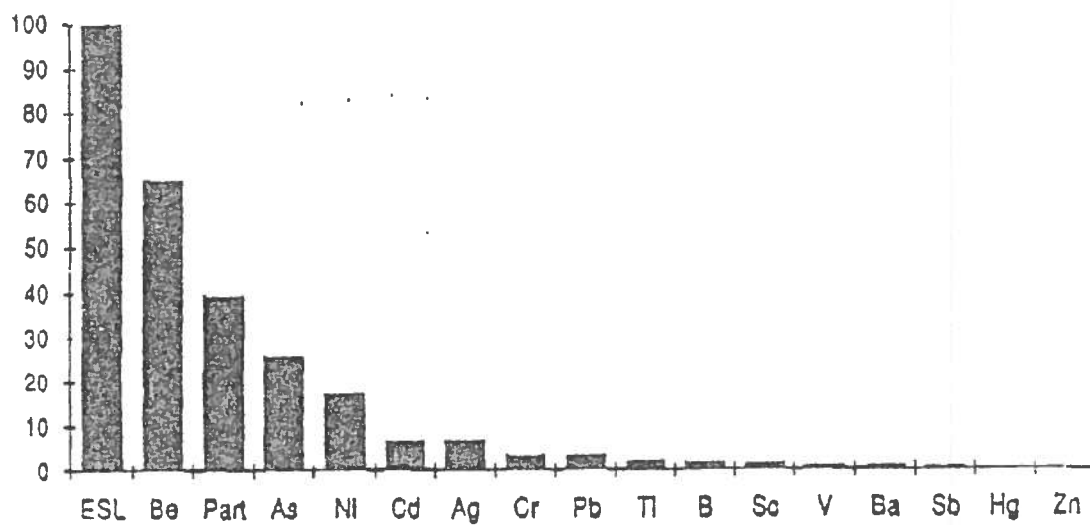
0 = NON DETECTABLE

< = BELOW DETECTION LIMITS

*Final Rpt.*  
*Af Moyer*  
*7/22/91*

TXI 107-000152

CONCENTRATIONS OF METALS IN HIGH-IMPACT AREA AS A PERCENTAGE  
OF THE ALLOWABLE 30-MIN STANDARD

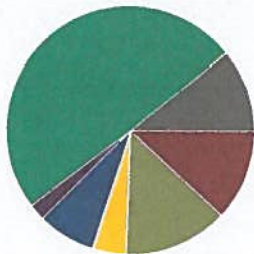


# 2011 National Air Toxics Assessment (NATA) App

**Total Cancer Risk is 31 in a million (all risks are on an "in a million" basis)**

STCOFIPS	32031
State	NV
County	Washoe County
FIPS	32031003306
POP2010	1,730
Area (m2)	1,537,616
Total Risk	31
Point Risk	0.00
Nonpoint Risk	3.74
Onroad Risk	4.29
Nonroad Risk	1.37
Biogenics Risk	2.36
Fires Risk	0.68
Secondary Risk	15.60
Background Risk	3.37

**Risk by Broad Source Group**



5

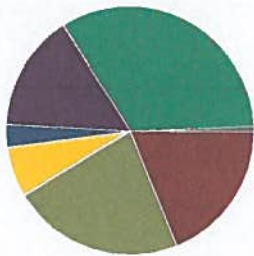


# 2011 National Air Toxics Assessment (NATA) App

Total Respiratory Hazard Index is 1.09

STCQFIPS	32031
State	NV
County	Washoe County
FIPS	32031003306
POP2010	1,730
Area (m2)	1,537,616
Total HI	1.09
Point HI	0.00
Nonpoint HI	0.21
Onroad HI	0.24
Nonroad HI	0.07
Biogenics HI	0.03
Fires HI	0.17
Secondary HI	0.36
Background HI	0.01

HI by Broad Source Group



5

2011 National Air Toxics Assessment (NATA) App

Annual Ambient Concentrations for Tract 32031003307

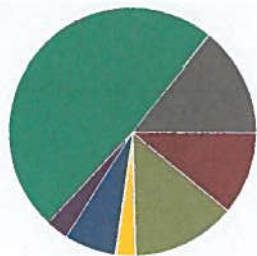
STCOFIPS	32031
State	NV
County	Washoe County
FIPS	32031003307
POP2010	1,231
Area (m2)	2,195,007
1_1-Dimethylhydrazine (µg/m3)	0.000000
1_1_1-Trichloroethane (µg/m3)	0.064923
1_1_2-Trichloroethane (µg/m3)	0.000386
1_1_2_2-Tetrachloroethane (µg/m3)	0.000009
1_2-Dibromo-3-Chloropropane (µg/m3)	0.000001
1_2-Diphenylhydrazine (µg/m3)	0.000000
1_2-Epoxybutane (µg/m3)	0.000000
1_2-Propyleneimine (µg/m3)	0.000000
1_2_3_4_5_6-Hexachlorocyclohexane (µg/m3)	0.000000
1_2_4-Trichlorobenzene (µg/m3)	0.000000
1_3-Butadiene (µg/m3)	0.028171
1_3-Dichloropropene (µg/m3)	0.000884
1_3-Propane Sultone (µg/m3)	0.000000
1_4-Dichlorobenzene (µg/m3)	0.002419
1_4-Dioxane (µg/m3)	0.000005
2-Acetylamino fluorene (µg/m3)	0.000000
2-Chloroacetophenone (µg/m3)	0.000000
2-Nitropropane (µg/m3)	0.000000
2_2_4-Trimethylpentane (µg/m3)	0.188305
2_4-D_ Salts And Esters (µg/m3)	0.000000
2_4-Dinitrophenol (µg/m3)	0.000000
2_4-Dinitrotoluene (µg/m3)	0.000000
2_4-Toluene Diamine (µg/m3)	0.000000
2_4-Toluene Diisocyanate (µg/m3)	0.000000
2_4_5-Trichlorophenol (µg/m3)	0.000000
2_4_6-Trichlorophenol (µg/m3)	0.000000
3_3'-Dichlorobenzidine (µg/m3)	0.000000
3_3'-Dimethoxybenzidine (µg/m3)	0.000000
3_3'-Dimethylbenzidine (µg/m3)	0.000000
4-Aminobiphenyl (µg/m3)	0.000000
4-Dimethylaminoazobenzene (µg/m3)	0.000000
4-Nitrobiphenyl (µg/m3)	0.000000
4-Nitrophenol (µg/m3)	0.000001
4_4'-Methylene Bis(2-Chloroaniline) (µg/m3)	0.000000
4_4'-Methylenedianiline (µg/m3)	0.000000
4_4'-Methylenediphenyl Diisocyanate (MDI) (µg/m3)	0.000000
4_6-Dinitro-O-Cresol (Including Salts) (µg/m3)	0.000000
Acetaldehyde (µg/m3)	1.113538

# 2011 National Air Toxics Assessment (NATA) App

Total Cancer Risk is 24 in a million (all risks are on an "in a million" basis)

STCQFIPS	32031
State	NV
County	Washoe County
FIPS	32031003307
POP2010	1,231
Area (m2)	2,195,007
Total Risk	24
Point Risk	0.00
Nonpoint Risk	2.58
Onroad Risk	3.24
Nonroad Risk	0.63
Biogenics Risk	1.58
Fires Risk	0.69
Secondary Risk	11.56
Background Risk	3.37

Risk by Broad Source Group



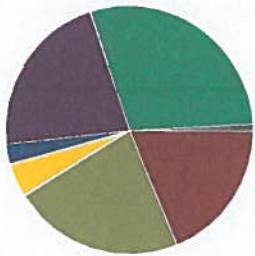
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# 2011 National Air Toxics Assessment (NATA) App

Total Respiratory Hazard Index is 0.84

STCOFIPS	32031
State	NV
County	Washoe County
FIPS	32031003307
POP2010	1,231
Area (m2)	2,195,007
Total HI	0.84
Point HI	0.00
Nonpoint HI	0.16
Onroad HI	0.19
Nonroad HI	0.04
Biogenics HI	0.02
Fires HI	0.18
Secondary HI	0.24
Background HI	0.01

HI by Broad Source Group



5

## 2011 National Air Toxics Assessment (NATA) App

### Annual Ambient Concentrations for Tract 32031003306

STCOFIPS	32031
State	NV
County	Washoe County
FIPS	32031003306
POP2010	1,730
Area (m2)	1,537,616
1_1-Dimethylhydrazine (µg/m3)	0.000000
1_1_1-Trichloroethane (µg/m3)	0.065948
1_1_2-Trichloroethane (µg/m3)	0.000386
1_1_2_2-Tetrachloroethane (µg/m3)	0.000016
1_2-Dibromo-3-Chloropropane (µg/m3)	0.000001
1_2-Diphenylhydrazine (µg/m3)	0.000000
1_2-Epoxybutane (µg/m3)	0.000000
1_2-Propyleneimine (µg/m3)	0.000000
1_2_3_4_5_6-Hexachlorocyclohexane (µg/m3)	0.000000
1_2_4-Trichlorobenzene (µg/m3)	0.000000
1_3-Butadiene (µg/m3)	0.048745
1_3-Dichloropropene (µg/m3)	0.000313
1_3-Propane Sultone (µg/m3)	0.000000
1_4-Dichlorobenzene (µg/m3)	0.001152
1_4-Dioxane (µg/m3)	0.000008
2-Acetylaminofluorene (µg/m3)	0.000000
2-Chloroacetophenone (µg/m3)	0.000000
2-Nitropropane (µg/m3)	0.000000
2_2_4-Trimethylpentane (µg/m3)	0.202967
2_4-D_ Salts And Esters (µg/m3)	0.000000
2_4-Dinitrophenol (µg/m3)	0.000000
2_4-Dinitrotoluene (µg/m3)	0.000000
2_4-Toluene Diamine (µg/m3)	0.000000
2_4-Toluene Diisocyanate (µg/m3)	0.000000
2_4_5-Trichlorophenol (µg/m3)	0.000000
2_4_6-Trichlorophenol (µg/m3)	0.000000
3_3'-Dichlorobenzidine (µg/m3)	0.000000
3_3'-Dimethoxybenzidine (µg/m3)	0.000000
3_3'-Dimethylybenzidine (µg/m3)	0.000000
4-Aminobiphenyl (µg/m3)	0.000000
4-Dimethylaminoazobenzene (µg/m3)	0.000000
4-Nitrobiphenyl (µg/m3)	0.000000
4-Nitrophenol (µg/m3)	0.000002
4_4'-Methylene Bis(2-Chloroaniline) (µg/m3)	0.000000
4_4'-Methylenedianiline (µg/m3)	0.000000
4_4'-Methylenediphenyl Diisocyanate (MDI) (µg/m3)	0.000000
4_6-Dinitro-O-Cresol (Including Salts) (µg/m3)	0.000000
Acetaldehyde (µg/m3)	1.432420



Acetamide (µg/m3)	0.000000
Acetonitrile (µg/m3)	0.170000