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

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

AQCB No. 2014-4

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

PETITIONERS' OBJECTIONS TO THE HEARING OFFICER'S REPORT, PROPOSED FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Pursuant to the *Hearing Officer's Order Setting Out Post-Hearing Deadlines* (Feb. 21, 2017) (Docket No. 78) in the above-captioned matter, Petitioners hereby submit the following objections to the Hearing Officer's Report, Proposed Findings of Fact, and Conclusions of Law.

I. Objections to the Hearing Officer's Report

Petitioners object to the following general issues raised by the Hearing Officer's Report. These general objections are in addition to Petitioners objections to specific Findings of Fact and Conclusions of Law in Sections II and III, below.

A. The "Reasonable Probability of Injury" Standard Applies to Permitting.

The Hearing Officer devotes a substantial number of her legal conclusions to arguing that the reasonable probability of injury standard contained in the Air Quality Control Act's ("Air Act" or "Act") definition of air pollution does not apply to permitting actions. Proposed Conclusions of Law ("CoL")14-56. However, the Hearing Officer's conclusions, which are identical to the Environmental Health Department's ("EHD") proposed legal conclusions (as are nearly all the proposed Findings of Fact), fail to address Petitioners' main legal argument.

1. *Reasonable probability of injury is a standard.*

The Hearing Officer's Conclusions of Law repeat EHD's argument against applying the reasonable probability of injury standard. CoLs 14-56. However, both the Hearing Officer and EHD fail to address the most fundamental and essential part of Petitioners' interpretation of the Air Act: that the reasonable probability of injury standard in the definition of "air pollution" is an enforceable standard, just like any other performance standard or numerical standard.

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 Envt'l 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").

2. *EHD is required to implement standards in the permitting process.*

The Air Act specifies EHD's permitting duties. The Act allows the local regulatory agency to deny a construction permit[1] application, such as for Permit No. 3131, if it will not meet applicable "standards, rules or 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). Thus,

[1] Construction permits are generally governed by 20.11.41.1 NMAC *et. seq.*

the Act's plain language directs EHD to reject any permit application that would not meet any of the Act's standards, rules or requirements. This mandate includes all numerical and performance standards, including the reasonable probability of injury to health or property standard.

3. *The reasonable probability of injury standard is the only interpretation of the Air Act's provisions consistent with the Act's 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). Petitioners' interpretation of the reasonable probability of injury standard is the only interpretation of the Act that is consistent with this goal.

B. Board Member Deichmann Should Recuse Himself.

In their Closing Arguments, Petitioners argued that Board Member Deichmann should recuse himself from rendering a decision on this matter because he demonstrated bias by prejudging the outcome of the hearing before all the evidence had been presented. Petitioners' Closing Arguments at 16-17. The Hearing Officer's Report asserts that rather than having prejudged the hearing's outcome, Member Deichmann was merely attempting to clarify Dr. Thurston's testimony. Hearing Officer Report at 6.

The lengthy recitation of the exchange between Dr. Thurston and Member Deichmann clearly indicates that Dr. Thurston's analysis of risks from air pollution in the San Jose neighborhood relied on considering two scenarios: one where the Honstein

operation's emissions contributed to air quality in San Jose and one where it did not. Hearing Officer Report at 6-7. Member Deichmann revealed in that exchange that evaluating San Jose air quality without considering Honstein's contribution was "not an option", thereby also revealing that he is unwilling to consider reversing EHD's decision to issue Permit No. 3131. Because Member Deichmann has clearly prejudged whether or not the Board should reverse EHD's decision, he should recuse himself from further proceedings on this matter.

C. Petitioners' Due Process Rights Were Violated Because the Evidentiary and Procedural Rules Were Insufficiently Explained.

In her report, the Hearing Officer rejects Petitioners' arguments that their due process rights were violated by her failure to clearly state the extent to which the Rules of Evidence and Rules of Civil Procedure applied to this proceeding. Hearing Officer Report at 13-15. Petitioners repeat and incorporate those arguments by reference herein. The Hearing Officer's primary defense of her evidentiary rulings is that her *Order on Motions in Limine Relating to Pre-Filed Testimony and Exhibits* (Docket No. 72) clarified her understanding of the evidentiary standards applicable to this proceeding. Hearing Officer Report at 14. However, this defense fails for four reasons.

1. *The Hearing Officer's Order on Motions in Limine does not indicate which evidentiary standard applies in this matter.*

First, despite the length of the *Order on Motions in Limine,* that order ultimately failed to indicate which evidentiary standard would apply in the hearing. Indeed, the

Order on Motions in Limine contains contradictory statements. On page 6 of that Order, the Hearing Officer states: "Even without applying Rule 1-702 or Daubert to exclude the evidence, neither the Hearing Officer or the Board is compelled to accept as true any unreliable or unsound scientific testimony, regardless of its admission into the record." This determination implies that the rules of evidence would not apply and that the Board would base its decisions on whether the evidence was relevant and reliable, i.e., using the standard in the Board's adjudicatory rules.

However, in the next paragraph, the Order states that the legal residuum rule appears to apply and therefore there must be at least some judicially admissible evidence in support of the decision and each finding the Board makes. This determination implies that the Rule of Evidence would apply.

Further, on page 8 of the Order, the Hearing Officer states that she would not "directly apply" Rule 1-702 or Daubert. This statement appears to cast doubt on the earlier determination that the Board should evaluate evidence based on its reliability and relevance. The language in the *Order on Motions in Limine* is anything but clear.

2. *The Rules of Evidence as applied in the hearing on the merits was inconsistent with the Order on Motions in Limine.*

Second, the application of the Rules of Evidence in the hearing on the merits was inconsistent with the *Order on Motions in Limine*. The *Order on Motions in Limine,* holding #3 at 8, indicates that aside from allowing all experts to present testimony, Petitioners' objections to the ad hoc application of evidence was overruled. This

holding would imply that that the Rules of Evidence would be applicable in the hearing. However, the Hearing Officer allowed - on a number of different occasions - evidence that was clearly hearsay into the record. *See, e.g.*, Tr., 523:17 - 529:1-7; Tavarez Powerpoint Presentation, slide 16. Indeed, several of the Hearing Officer's proposed findings of fact are based on hearsay, which is not only in violation of the Rules of Evidence, but also in direct contradiction to the *Order on Motions in Limine* language indicating that each of the Board's findings must be supported by some judicially admissible evidence. *See, e.g..*, Finding of Fact No. 257 (hearsay); 276 (hearsay); 338 (speculative). This sort of confusing and contradictory process is precisely why Petitioners objected and continued to object to a process in which the procedural rules are not explicitly and precisely spelled out.

3. *No significant right has been identified.*

Finally, the Hearing Officer has failed to explain why - if the Rules of Evidence are indeed being applied to this proceeding - they are being applied in the absence of any asserted substantial right. As Petitioners pointed out in their Closing Arguments, 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 Envt'l 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. Petitioners' Closing Arguments at 21-23.

If the Rules of Evidence are being applied in this proceeding pursuant to the legal residuum doctrine, as the *Order on Motions in Limine* suggests they are, a substantial right must be at stake. Neither the Hearing Officer in her Report, nor any of the parties to this proceeding have identified a substantial right at issue that would trigger the legal residuum doctrine. Thus, the only evidentiary standard that should apply in this proceeding are those listed in the Board's regulations governing adjudicatory hearings, i.e., relevance, qualified by reliability and probative weight. 20.11.81.16.D.1 NMAC.

4. *The failure to designate the evidentiary and procedural rules in this matter has harmed Petitioners.*

The failure to adequately and consistently provide for which evidentiary and process rules would apply to this proceeding has placed significant resources costs on Petitioners. Petitioners have spent significant time and money responding to EHD's evidentiary and discovery motions and their own attempts to clarify the evidentiary and procedural rules. *See, e.g., Petitioners' Response in Opposition to the Environmental Health Department's Opposed Motion for Discovery* (Dec. 29, 2015) (Docket No. 34); *Environmental Health Department's Motion in Limine for Petitioners' Technical Testimony of Dana Rowangould, George Thurston and Kitty Richards* (July 15, 2016) (Docket No. 48); *Environmental Health Department's Motion in Limine for Petitioners' Exhibits* (July 15,

2016)(Docket No. 49); *Environmental Health Department's Motion to Strike Petitioners' Notice Record Supplementation and Motion in Limine for Reynosa Affidavit and Attachments* (July 15, 2016) (Docket No. 50); *Petitioners' Objections to the Ad Hoc Application of the New Mexico Rules of Evidence* (July 15, 2016) (Docket No. 51); *Petitioners' Response to EHD's Motions in Limine for Petitioners' Technical Testimony and Exhibits* (July 29, 2016) (Docket No. 52); *Petitioners' Response to EHD's Motion to Strike* (July 29, 2016) (Docket No. 53); *Environmental Health Department's Opposed Expedited Motion for Discovery* (Aug. 5, 2016) (Docket No. 57); *Petitioners' Reply to EHD's Motion to Re-Open Discovery* (Aug. 15, 2016) (Docket No. 58). These resource commitments are particularly burdensome on a community with few resources at its disposal to begin with. In contrast, virtually no resource burdens have been placed on the permittee, whose interests have been represented at taxpayer expense by EHD.

Further, the lack of clarity about the evidentiary rules made it impossible to adequately prepare for the hearing on the merits. Without knowing which, if any, evidentiary rules would apply makes meaningfully preparing for making and defending evidentiary objections at hearing impossible.

Finally, the evidentiary and procedural morass is the primary reason Petitioners had to wait three years before they received a hearing on the merits of their Petition. Responding to piles of evidentiary motions and often frivolous or vexatious discovery requests (*e.g.*, Juan Reynosa's and Javier Benavidez's places of residence [*Petitioners'*

Response in Opposition to EHD's Opposed Motion for Discovery, Docket No. 34 at 8]; the identities and residence location of every Bucket Brigade participant [*Id.* at 9-11]; air quality monitoring results that Petitioners' repeated stated, at times under oath, were never taken and did not exist) took the bulk of the three years between Petitioners' petition in this matter and the hearing on the merits. This result clearly undermines one of the primary goals of administrative hearings, i.e., to be more efficient, less expensive, and quicker than formal court proceedings.

II. Objections to Proposed Findings of Fact

In addition to the foregoing general objections, Petitioners make the following objections to specific proposed findings of fact:

Proposed Finding of Fact ("FoF") No. 69: Petitioners object to this FoF to the extent that it implies that EHD meaningfully considered public comments. There is no evidence in the record that EHD did anything more than record public concerns about the Honstein operation and then ignore them. Indeed, testimony from EHD's witnesses indicate that EHD views itself as having no discretion to deny, modify or place conditions on Permit No. 3131. Tr., 591:1-15, 606:20-25, 607:1-22; Administrative Record ("AR") 66 at 190-198. This indicates that EHD gave no meaningful consideration to the public's concerns.

FoF Nos. 73-75: Petitioners object to FoF Nos. 73-75 to the extent they fail to acknowledge that the Honstein facility, under the current and prior owners, operated

without a pollution permit for decades after it was required to have one. Petitioners also object these FoFs to the extent they ignore that EHD failed entirely to competently enforce the applicable statutes by requiring Honstein to have a pollution permit until community concerns brought the issue to light. Tr., 271:24 - 272:18. Indeed, EHD waited nearly a year after being notified of concerns about the Honstein operation before it determined that Honstein needed a permit. Tr., 272:8-18.

FoF No. 77: Petitioners object to FoF No. 77 for the same reasons they object to FoF No. 69 and incorporate those arguments by reference herein.

FoF No. 78: Petitioners object to this FoF because the record of public comment indicates that they established that Honstein's emissions, alone and in combination with other emissions, may have violated the "reasonable probability of injury" standard in the Air Act by injuring property and health. AR 58 at 167 - 168, 171,-172; Tr., 265:1-8, 267:19 - 268:8, 270:8-22, 271:7-22, 278:3-11, 284:11-21, 291:5-7, 297:11-15, 311:6 - 312:15, 336:16-21, 686:3-6, 16-18.

FoF No. 92: Petitioners object to this FoF on the grounds that Petitioners' witnesses provided substantial testimony to show that the Honstein facility violates the reasonable probability of injury standard in the Air Act. *See, e.g.*, Tr., 203:13 - 245:21, 265:1-8, 267:19 - 268:8, 270:8-22, 271:7-22, 278:3-11, 284:11-21, 291:5-7, 297:11-15, 311:6 - 312:15, 336:16-21, 686:3-6, 16-18, 374:2 - 401:15, 815:8 - 826:25.

FoF Nos. 94-95: Petitioners object to these FoFs on the grounds that under the Act, Petitioners do not have the initial burden of proving that air pollution exists in San Jose; instead, this initial burden rests with EHD and the permit applicant. NMSA 1978, § 74-2-7(B)(1); 20.11.41.16.C, 20.11.41.17.A NMAC. There is ample evidence in the record that EHD failed to meet this burden. Tr., 591:1-15; 606:20-25, 607:1-22; AR 66 at 190-198.

FoF No. 97: Petitioners object to this FoF on the grounds that the Air Act plainly requires a cumulative effects analysis. *See*, General Objections, above.

FoF No. 104: Petitioners object to this FoF on the grounds that it mischaracterizes Ms. Richards' testimony. Ms. Richards' testimony in favor of a less racially discriminatory distribution of pollution sources within Albuquerque and Bernalillo County in no way implies Petitioners are advocating for a uniformly even pollution source distribution.

FoF No. 110: Petitioners object to this FoF on the grounds it is irrelevant. Noting that vehicle emissions, dust and wood smoke are pollution sources in Bernalillo County are irrelevant to the issue in this matter; whether EHD took any steps to determine whether Honstein's emissions, alone or in combination with emissions from other sources, pose a reasonable risk to the health or property of residents in San Jose.

FoF No. 148: Petitioners object to this FoF on the grounds it is irrelevant. Neither Mr. Gates nor any other EHD witness produced any evidence that any of the

Bucket Brigade samples was contaminated. Moreover, this FoF ignores the fact that all of the Tedlar bags used to gather air samples for the Bucket Brigade were sealed by the labs and were changed out for each sample taken. Tr., 144:8-13, 147:7-17; 223:10-14.

FoF Nos. 160-162: Petitioners object to FoF Nos. 160-162 on the grounds they are irrelevant and speculative. Neither Mr. Gates nor any other EHD witness produced any evidence that any of the Bucket Brigade samples was actually contaminated or that conditions that could have led to contamination existed when actual samples were taken.

FoF No. 166: Petitioners object to FoF No. 166 on the grounds that it improperly characterizes Dr. Rowangould's use of the term "cumulative impact assessment" as "incorrect". Dr. Rowangould testified in detail that the screening processes - which was the focus of her testimony - for cumulative impact assessments and cumulative risk assessments were not substantially different. Tr., 227:20-24. *See also*, objection to FoF No. 168. This testimony was uncontroverted.

FoF No. 168: Petitioners object to FoF No. 168 on the grounds it mischaracterizes Dr. Rowangould's testimony. At no time did Dr. Rowangould, or any of the Petitioners' other witnesses, testify that a cumulative air effects assessment include "historical" or "archaeological" sites or any other resource aside from air quality.

FoF No. 174: Petitioners object to this FoF on the grounds it is irrelevant. Total VOCs for Bernalillo County say nothing about the quality of air people in San Jose are

breathing. It also says nothing about the proportion of VOCs in San Jose in relation to population as compared to the rest of Bernalillo County. Those proportions were the focus of Dr. Rowangould's testimony.

FoF No. 176: Petitioners object to FoF No. 176 on the grounds it is irrelevant. The record indicates that EHD conducts no site specific or fence line air pollution monitoring. Tr. 594:7-11; 595: 13-16. Therefore, EHD has no actual, monitored, emissions data for particular pollution sources or even particular neighborhoods and produced none in this proceeding. Permitted emissions are therefore the only reasonable metric by which to gauge emissions from a pollution source.

FoF Nos. 180-181: Petitioners object to FoF Nos. 180-181 on the grounds they mischaracterize Dr. Rowangould's and Petitioners' other witnesses' testimony. Dr. Rowangould specifically concluded that cumulative air impacts in the San Jose neighborhood pose a reasonable probability of injury. Tr., 242:22 - 243:2, 243:21 - 244:3. Nothing in Dr. Rowangould's or any other testimony from Petitioners' witnesses indicated they conflated the mere possibility of harm with the reasonable probability of harm.

FoF No. 186: Petitioners object to FoF No. 186 on the grounds it mischaracterizes the evidence cited and Dr. Rowangould's testimony. First, the Community Scale Air Toxics Monitoring ("CSATM") study cited in FoF No. 186 does not specifically refer to the Del Norte monitor when it states that VOC concentrations in Bernalillo County do

not indicate significant health risks. Instead, that statement referred to conclusion reached based on data from all monitoring sites taken together.

Second, the CSATM only modeled risks for four VOCs, while the National Air Toxics Assessment ("NATA") modeled risks for many air pollutants. Tr., 246:25 - 247:7, 851:1-16. Thus, the CSATM and NATA modeled very different risks and cannot be fairly compared to each other.

Finally, assuming for the sake of argument that the CSATM and NATA modeling can be fairly compared, Dr. Rowangould's Powerpoint Slide 12, while showing the cancer risks as modeled by the CSATM for the Del Norte location and the 2011 NATA for San Jose may be similar, the respiratory hazard index for San Jose is significantly higher than for the Del Norte location.

FoF No. 191: Petitioners object to FoF No. 191 on the grounds it mischaracterizes Dr. Kelly's testimony. Rather than stating that San Jose's respiratory risk is similar to other neighborhoods in Albuquerque as asserted in FoF No. 191, in her written testimony, Dr. Kelly testified that the San Jose neighborhood falls within the range of respiratory risks experienced by the urban area of Bernalillo County. EHD Supp. NOI, Ex. 5 at 57. As a neighborhood within the Albuquerque urban area, this testimony merely states the obvious. However, as both Dr. Rowangould and Dr. Thurston pointed out in their testimony, the San Jose neighborhood sits at the upper end of that

range, particularly compared with more affluent and white neighborhoods. Tr., 231:1 - 236:18, 396:6-18.

FoF No. 192: Petitioners object to FoF No. 192 on the grounds it mischaracterizes the evidence and is irrelevant. FoF No. 192 asserts that the CSATM study (EHD Supp. NOI, Ex. 5-C2, p. 569) states that non-cancer risk at the Del Norte monitor was within acceptable limits. However, Exhibit 5-C2 at 569 makes no specific mention of the Del Norte monitor, stating only that the CSTM study as a whole found no unacceptable risk.

The Hearing Officer's mischaracterization of the evidence notwithstanding, however, this FoF is irrelevant, because, as Dr. Rowangould testified, the results of CSATM study only provides information about regional air quality and the air quality in close proximity to the air monitors used in that study. Tr., 214:1-5, 20-21, 822:13-25, 823:1-18, 846:17-23. Thus, the CSATM study is irrelevant to air quality in San Jose. *See also*, Kelly Testimony, Tr., 776:1-9; Exhibit 5 at 19, attached to *Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony*, Docket No. 45.

FoF No. 202: Petitioners object to this FoF on the grounds there is no citation to any authority or evidence in the record to support the assertion that air pollution standards and guidelines are intended to protect sensitive populations.

FoF No. 214: Petitioners object to FoF No. 214 on the grounds that the conclusion it asserts does not follow from its premise and because it is irrelevant.

First, all the Bucket Brigade air samples were taken in the San Jose neighborhood, while none of the CSATM monitoring occurred in San Jose. Further, it is undisputed that any VOCs monitored by the South Valley CSATM monitor would disperse well before reaching the San Jose neighborhood. Tr., 214:1-5, 20-21, 776:1-9, 822:13-25, 823:1-18, 846:17-23; Exhibit 5 at 19, attached to *Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony*, Docket No. 45. Thus, the fact that the two monitoring projects yielded different results is not surprising and in no way supports the conclusion that the CSATM results are more indicative of ambient air quality in San Jose than the Bucket Brigade data.

Second, because the closest CSATM VOC data was collected approximately 0.7 miles from the southernmost boundary of San Jose and more than a mile from the Honstein facility and it is undisputed that VOCs would have dispersed well before reaching the San Jose boundary, the CSATM VOC data is irrelevant to determining ambient air quality in San Jose. Tr., 214:1-5, 20-21, 776:1-9, 822:13-25, 823:1-18, 846:17-23; Exhibit 5 at 19, attached to *Environmental Health Department's Supplemental Notice of Intent to Present Technical Testimony*, Docket No. 45.

FoF No. 216: Petitioners object to FoF No. 216 on the grounds that it is speculative and irrelevant. Mr. Gates testified he had no actual knowledge or evidence of contamination. Tr. 681: 8-25; 682:1-12.

FoF No. 217: Petitioners object to FoF No. 217 on the grounds it is irrelevant. Mr. Gates testified that the guidance upon which he relied was applicable only to regulatory bodies for the purpose of regulatory compliance. Tr. 673-677:1-2.

FoF No. 219: Petitioners object to FoF No. 219 on the grounds it is irrelevant. Mr. Gates testified that the guidance upon which he relied was applicable only to regulatory bodies for the purpose of regulatory compliance. Tr. 673-677:1-2.

FoF No. 220: Petitioners object to FoF 220 on the grounds it is hearsay and irrelevant. Mr. Tavarez testified that he received the information asserted from an EPA employee who did not testify in the Honstein hearing. Tr. 603:2-3. Mr. Tavarez's testimony is therefore hearsay.

This FoF is also irrelevant and inherently unreliable. The assertion in FoF No. 220 is not a second hand account of a statement by EPA staff who actually conducted any evaluation or analysis of Bucket Brigade data. Tr. 604:18-25; 605:1-11. Instead, it is the second hand account of a statement by an EPA staff person who supposedly received evaluation and analysis from yet another EPA staff person or persons. Hence, the record contains no evidence about whether the proper analyses were done, or even if <u>any</u> analyses were done. Moreover, the record contains no evidence about whether the Bucket Brigade samples showed air quality "typical" of heavily polluted urban areas such as Houston, Texas or Los Angeles, California, or some other municipality.

FoF No. 230: Petitioners object to this FoF because it ignores parts of the record which established that Dr. Thurston's use of NATA data is appropriate. *See, Petitioners' Objections to the Ad Hoc Application of the New Mexico Rules of Evidence, or In the Alternative, Motion in Limine to Exclude Environmental Health Department Evidence* at 35 (Docket No. 51).

FoF No. 231: Petitioners object to this FoF on the grounds it is irrelevant. Dr. Thurston's Powerpoint presentation was a demonstrative exhibit. Any implication that it is synonymous with his oral testimony is objectionable.

FoF No. 253: Petitioners object to this FoF on the grounds it contradicts existing EHD practice. EHD currently administers the reasonable probability of injury standard when it issues variances. NMSA 1978, § 74-2-8(A)(2)(a); 20.11.7.12.B.8 NMAC.

FoF No. 255: Petitioners object to FoF No. 255 on the grounds it is based on a legal conclusion offered by a non-lawyer.

FoF No. 257: Petitioners object to this FoF on the grounds it is based on hearsay.

FoF No. 262: Petitioners object to this FoF on the grounds it is irrelevant. According to EHD witnesses, EHD has no discretion in granting permits such as Permit No. 3131. Tr., 591:1-15, 606:20-25, 607:1-22; AR 66 at 190-198. Therefore, public input on permits is superfluous under current EHD practice.

FoF Nos. 266-269: Petitioners object to FoF Nos. 266-269 on the grounds they are irrelevant and based on unreliable evidence. There is no evidence in the record that the

reported emissions from the Rio Bravo Generating Station, which is not located in the San Jose neighborhood, have any impact on residents in San Jose. Moreover, the emissions reported from the generating station are self-reported numbers and no one from the generating station testified to their reliability. Finally, the self-reported emissions have not been verified by any air quality monitoring and are therefore unreliable. Tr. 594:7-11; 595: 13-16.

FoF Nos. 274-275: Petitioners object to FoF Nos. 274-275 on the grounds they are irrelevant. Whether the VOC emissions from the Honstein operation are larger or smaller than other VOC sources is irrelevant to whether the emissions from the Honstein operation, alone or in combination with other sources, pose a reasonable probability of injury to health or property.

FoF No. 276: Petitioners object to FoF 276 on the grounds it is hearsay and irrelevant. Mr. Tavarez testified that he received the information asserted from an EPA employee who did not testify in the Honstein hearing. Tr. 603:2-3. Mr. Tavarez's testimony is therefore hearsay.

This FoF is also irrelevant and inherently unreliable. The assertion in FoF No. 276 is not a second hand account of a statement by EPA staff who actually conducted any evaluation or analysis of Bucket Brigade data. Tr. 604:18-25; 605:1-11. Hence, the record contains no evidence about whether the proper analyses were done, or even if any analyses were done. Moreover, the record contains no evidence about whether the

Bucket Brigade samples showed air quality "typical" of heavily polluted urban areas such as Houston, Texas or Los Angeles, California, or some other municipality.

FoF No. 284: Petitioners object to FoF No. 284 on the grounds it mischaracterizes the evidence in the record. The record contains uncontroverted evidence that Honstein has already conducted air quality monitoring for VOCs, directly contradicting the assertion that requiring VOC monitoring would be unreasonable. Petitioners' Supplemental Exhibit 1.A, attached to *Petitioners' Supplemental Notice of Intent to Present Technical Testimony* (Docket No. 38); Tr., 230:22 - 232:17.

FoF Nos. 310-311: Petitioners object to FoF Nos. 310-311 on the grounds they mischaracterize the evidence in the record and are irrelevant. The EPA guidance upon which these FoFs are based is only applicable to governmental regulatory agencies for the purpose of demonstrating regulatory compliance. Tr. 673-677:1-2.

FoF Nos. 314-333: Petitioners object to FoF Nos. 314-333 on the grounds they mischaracterize the evidence in the record and are irrelevant. The EPA guidance upon which these FoFs are based is only applicable to governmental regulatory agencies for the purpose of demonstrating regulatory compliance. Tr. 673-677:1-2.

FoF No. 337-338: Petitioners object to FoF Nos. 337-338 on the grounds they are speculative and irrelevant. There is no evidence in the record that the air samples the Bucket Brigade took were contaminated or even that there were circumstances present during actual sampling which could have led to contamination.

FoF No. 343: Petitioners object to FoF No. 343 on the grounds that it mischaracterizes evidence in the record. The record indicates that existing Quality Assurance Project Plans ("QAPP") may be adapted to new projects if there are overlapping goals. Exhibit 7-M at 11, attached to EHD's *Notice of Intent to Present Technical Testimony* (Docket No. 45). The goals in the California QAPP were, among others, to provide the community with more information about the quality of the air they were breathing than was currently available; increase the number of people and organizations conducting monitoring to complement existing government and industry efforts; evaluate whether the monitoring results would be useful for policy initiatives that would result in public education and incident reduction; encourage government agencies to expand their current air quality monitoring efforts, both for ambient air and for air quality after industrial accidents. Exhibit 7-J at 3-4, attached to EHD's *Notice of Intent to Present Technical Testimony* (Docket No. 45).

Mr. Reynosa testified that the Bucket Brigade goals were to provide the community with data about the air quality in San Jose, fill data gaps in agency air quality monitoring, and provide air quality information as the basis for policy initiatives. Tr., 137:13-19, 168:10-21. Hence, the objectives of the California QAPP and the Bucket Brigade overlapped and adapting the California QAPP to the Bucket Brigade was appropriate.

FoF No. 370: Petitioners object to FoF on the grounds it is irrelevant. The CSATM study did not monitor air quality in San Jose and its results are inapplicable to local air quality in the San Jose neighborhood. Rowangould Powerpoint, Slides 9-10; Tr., 213:7 - 214:21.

FoF No. 373: Petitioners object to FoF No. 373 on the grounds it is irrelevant. The factors listed in FoF No. 373 are toxicological principles at most only partially applicable to the epidemiological inquiry required to determine health risks to populations or health effects impacts screening required to determine whether an impacted area requires additional scrutiny. Rowangould Powerpoint, Slides 18-19; Richards Powerpoint, Slide 22; Tr., 64:1-16, 227:3 - 229:4, 772:10 - 773:5, 864:1 - 865:7.

FoF Nos. 375-381: Petitioners object to FoF Nos. 375-381 on the grounds they are irrelevant and mischaracterize the evidence. The investigatory steps in FoF Nos. 375-379 have already been taken by many researchers for many studies linking air pollution to disease. Tr., 64:1-16; 767:4 - 768:20. Hence, requiring Petitioners to reproduce toxicological and epidemiological studies is not only unreasonable and punitive, it is unnecessary.

FoF No. 387: Petitioners object to FoF No. 387 on the grounds it mischaracterizes the evidence. During the hearing on the merits, Dr. Thurston acknowledged the reference to "RAC" in his written testimony was a typographical error, which should have referred to "RfC". Tr., 374:2-4. The numbers in his written testimony

corresponding to RfCs are accurate and his typographical errors did not change his opinion. 374:24 - 375:2.

FoF No. 388: Petitioners object to FoF No. 388 on the grounds it does not accurately reflect the record. The New York screening guidelines, while not legally binding in New Mexico, are health based guidelines that are relevant to establishing a reasonable probability of injury to health. Tr., 393:9-24.

FoF No. 393: Petitioners object to FoF No. 393 on the grounds it is irrelevant. Honstein's emissions are certainly significant to the San Jose community members living within approximately 200 feet of the Honstein facility.

FoF No. 398: Petitioners object to FoF No. 398 for the same reasons they object to FoF Nos. 375-381. Petitioners incorporate those arguments by reference herein. Moreover, the record reflects that the CSATM study so heavily relied upon by EHD and the Hearing Officer failed to take all these investigatory steps. Tr., 772:10 - 773:5.

FoF Nos. 405-421: Petitioners object to all of the FoFs based upon Mr. Navarez's testimony on the grounds they are irrelevant to whether EHD failed to determine whether Honstein's emissions, alone or in combination with emissions from other pollution sources, poses a reasonable probability of injury to health or property in San Jose.

III. Objections to Proposed Conclusions of Law

Petitioners object to the following specific proposed conclusions of law:

Conclusion of Law ("CoL") No. 12: Petitioners object to CoL No. 12 on the grounds that they were not required to prove that the Honstein facility would violate any standard of the Clean Air Act or Air Act. Instead, Petitioners had the burden of proving that EHD failed to consider whether the emissions from the Honstein facility pose a reasonably probable risk of injury to health or property. That EHD failed to do so is undisputed.

CoL Nos. 14-52: Petitioners object to these CoLs on the grounds enumerated in their General Objections and incorporate those arguments by reference herein.

CoL No. 25: CoL No. 25 correctly points out that the phrase "prevent or abate air pollution" does not appear in the Air Act's permitting provisions. However, the permitting provisions also do not include the term "National Ambient Air Quality Standards", "Hex B", "BBBBBB", nor do they identify with particularity any other standard that applies to pollution sources. Thus, the argument that since the Act's permitting provision does not include the term "prevent or abate air pollution", EHD is not required to consider the reasonable probability of injury standard in permitting is entirely meritless. To accept that argument would be to accept that EHD is powerless to implement or enforce any standard that is not specifically named in NMSA § 74-2-7. EHD would therefore be unable to enforce any standards, rules or requirements at all,

since none are specifically named. Such a result is plainly absurd and clearly not what the Legislature intended. *See, Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-047, ¶ 11, 142 N.M. 235, 238. EHD obviously has the authority and obligation under NMSA § 74-2-7 to implement and enforce all numerical and performance standards, including the reasonable probability of injury standard, when considering pollution source permit applications.

CoL No. 35: The assertion in CoL No. 35 that the reasonable probability of injury standard could only be invoked through a permit appeal to the Board has no legal merit. The conclusion in CoL No. 35 relies on conflating an injured person's appeal rights with the implementation and enforcement of the reasonable probability of injury standard contained in the definition of air pollution. As demonstrated in Petitioners' objection to CoL No. 25, EHD clearly has the authority to consider all Air Act standards, including the reasonable probability of injury standard, in the permitting process. Thus, EHD has the initial responsibility of implementing the reasonable probability of injury standard in the permitting process, which would then be subject to appeal to the Air Board just as an affected party could appeal any basis for a permitting decision to the Air Board.

CoL Nos. 42-43: CoL Nos. 42-43 assert that Petitioners' insistence that EHD implement the reasonable probability of injury standard in the permitting process would cause the stringency limitations on hazardous air pollutants to become

superfluous. This assertion is without legal merit and if accepted would lead to an absurd result and undermine the Air Act's purpose, in violation of the canons of statutory construction. *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-047, ¶ 11, 142 N.M. 235, 238.

The logic in CoL Nos. 42-43 would lead to the result that instead of having to meet all the Act's applicable standards, rules and requirements as required by NMSA 1978, § 74-2-7(C)(1)(a), if an applicant could meet only the HAP standard (or any other standard subject to the stringency requirement) EHD would have to issue it a permit. For example, if a proposed pollution source were subject to both the NAAQS and HAP requirements based on the contaminants it would emit, but could not comply with the NAAQS, the Hearing Officer's logic says that rejecting the permit on the grounds it cannot meet the NAAQS reads out the HAP stringency requirements. Ultimately, accepting the Hearing Officer's logic would require issuing a permit for any source that could meet the HAP requirements, irrespective of whether it could meet any other of the Act's provisions. Advocating that the HAP provision supersede every other provision of the Air Act effectively makes every other standard, rule or requirement in the Act superfluous. CoL Nos. 42-43 should therefore be rejected.

CoL Nos. 44-48: As with CoL Nos. 42-43, CoL Nos. 44-48 assert that implementing the reasonably probability of injury standard would cause the Air Act's non-attainment provisions to become superfluous. These conclusions, however, suffer

from the same logical flaw as CoL Nos. 42-43, and must be rejected for the same reasons.

Moreover, CoL Nos. 46-47 seem to premise the supposed conflict between the reasonable probability of injury standard and the non-attainment requirements on the assumption that implementing the reasonable probability of injury standard somehow equates to a moratorium on permitting. Nowhere have Petitioners advocated for a moratorium on air pollution permits. Further, neither the Hearing Officer nor EHD have demonstrated that implementing the reasonable probability of injury standard would lead to a moratorium on air pollution permits. As Petitioners have repeatedly argued, the reasonable probability of injury standard is simply another standard the Legislature imposed to protect public health and property, just like the NAAQS, Hex B and every other standard, rule and requirement in the Air Act. By the Act's plain language, implementing this standard involves evaluating the impacts of multiple pollution sources and whether those impacts would, with reasonable probability, injure human health or interfere with the reasonable use of property. NMSA 1978, § 74-2-2(B).

CoL Nos. 57-61: These conclusions assert that the Supreme Court's holding in *Colonias Development Council v. Rhino Envt'l Svcs.*, 2005-NMSC-024, 138 N.M. 133 is inapplicable to this matter because in *Rhino*, the Supreme Court interpreted the Solid Waste Act's public participation provisions and not the Air Act. However, as Petitioners have argued extensively elsewhere, while the Court in *Rhino* interpreted the

Solid Waste Act's public participation provisions, the Air Act's public participation provisions are similar to those in the Solid Waste Act and demand the same implementation based on the Court's reasoning and to implement the Legislature's intent. *See, e.g., Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, ¶ 14, 134 N.M. 421 (2003). The Hearing Officer's conclusions offer no reason why similar legislative language should not be treated similarly.

IV. Conclusion

For all the foregoing reasons, Petitioners request that the Board reject the identified proposed findings of fact and conclusions of law.

DATED: April 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 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:

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