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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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IN THE MATTER OF THE PETITION FOR A HEARING ON THE MERITS REGARDING AIR QUALITY PERMIT NO. 3135

Margaret M. Freed, Mary Ann Roberts and Pat Toledo
Petitioners-Appellees,

v.

The City of Albuquerque and Smith's Food & Drug Centers, Inc.
Respondents-Appellants.

Ct. App. No. 34,285

Air Quality Control Board No. AQCB 2014-2

APPELLEE CITY OF ALBUQUERQUE'S ANSWER BRIEF

Appeal from the Albuquerque-Bernalillo County Air Quality Control Board
Felicia L. Orth, Hearing Officer

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ORAL ARGUMENT IS REQUESTED

E. The Solid Waste Act language, regulations and previous precedents are inapplicable to a case arising under the Air Act. 36

1. The facts in this case are different. 37

2. A Supreme Court precedent interpreting Solid Waste Act language is not persuasive where the statute being interpreted contains completely different language.......... 37

3. The language of the Solid Waste Act regulations that the Supreme Court found significant in *Colonias* is not found in the applicable air quality regulations. 46

F. There is no federal preemption at issue.......... 47

G. Petitioners arguments about offensive collateral estoppel based on the Carlisle decision are legally flawed and are now moot. 47

IV. Preservation of Issues 48

V. Conclusion and Statement of Relief Sought.......... 49

VI. Request for Oral Argument 50

STATEMENT OF COMPLIANCE

Undersigned counsel states that this Answer Brief complies with Rule 12-213(F) NMRA in that the body of the brief is prepared in Times New Roman typeface and contains 10,591words. This word count was obtained using Microsoft Office Word 2010 software.

TABLE OF AUTHORITIES

Page

Federal Statutes

42 U.S.C. § 7407(d)(1)(A)(i) 43
42 U.S.C. § 7412(a)(1) 18
42 U.S.C. § 7416 9
42 U.S.C. § 7431 9
42 U.S.C. § 7661 (2) 18

N.M. Cases

Aragon & McCoy v. Albuquerque Nat'l Bank, 1983-NMSC-020, ¶ 13, 99 N.M. 420, 424 31
Archuleta v. Santa Fe Police Dep't, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019 13
Baker v. Bhajan, 1994-NMSC-028, n. 2, 117 N.M. 278 14
Bernalillo County Health Care Corp. v. New Mexico Public Regulation Com'n, 2014-NMSC-008, ¶ 23 .... 22, 23
Bishop v. Evangelical Good Samaritan Soc., 2009-NMSC-036, ¶ 11, 146 N.M. 473 .... 16, 37, 41
Bogle Farms, Inc. v. Baca, 1996-NMSC-051, ¶ 17-25, 122 N.M. 422 48
Colonias Dev. Council v. Rhino Environmental Services, 2005-NMSC-024, 138 N.M. 133 .... 9, 36, 37, 38, 39, 46
Duke City Lumber Co. v. N.M. Environmental Improvement Bd., 1984-NMSC-042, ¶ 19, 101 N.M. 291 .... 15, 16
Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC, 2012-NMSC-004, ¶ 31 .... 9, 32, 45
Hillman v. Health & Soc. Services Dep't, 1979-NMCA-007, ¶ 5, 92 N.M. 480 25
Jones v. Human Services Dep't, 1980-NMSC-120, ¶3, 95 N.M. 97 46
Juneau v. Intel, Corp., 2006-NMSC-002, ¶ 8, 139 N.M. 12 14
Junge v. John D. Morgan Construction Co., 1994-NMCA-106, ¶15, 118 N.M. 457 26
Leon, Ltd. v. Carver, 1985-NMSC-015, ¶ 31, 104 N.M. 29 .... 15, 37
Lucero v. Hart, 1995-NMCA-121, ¶ 12, 120 N.M. 794 31
Martinez v. Maggiore, 2003-NMCA-043, ¶¶ 8, 15, 17, 133 N.M. 472 .... 8, 38
Oil Transport Co. v. New Mexico State Corporation Com'n, 1990-NMSC-072, ¶ 25, 110 N.M. 568 13

Parker v. E.I. DuPont de Nemours, Inc., 1995-NMCA-086, ¶ 9, 121 N.M. 120 14
Romero Excavation and Trucking, Inc. v. Bradley Construction Inc., 1996-NMSC-010, ¶ 6, 121 N.M. 471 .... 20, 25
Sanders-Reed ex re. Sanders-Reed v. Martinez, 2015-NMCA-063, ¶ 15 .... 21, 42
State ex rel. Human Services Dep't v. Gomez, 1982-NMSC-153, ¶¶ 26-27, 99 N.M. 261 25
State of New Mexico ex rel. King v. Lyons, 2011-NMSC-004, ¶ 36, 149-N.M. 330 21
State v. Javier M., 2001-NMSC-030, ¶ 31, 131 N.M. 1 .... 37, 40
V.P. Clarence Co. v. Colgate, 1993-NMSC-022, ¶ 2, 115 N.M. 471 14

N.M. Statutes

NMSA 1978, § 10-15-1(B) and (F) 28
NMSA 1978, § 74-2-2(B) 45
NMSA 1978, § 74-2-2(T) 7
NMSA 1978, § 74-2-5(B) 20, 44
NMSA 1978, § 74-2-5(C)(1) 43
NMSA 1978, § 74-2-5(E) 42
NMSA 1978, § 74-2-6 .... 25, 44
NMSA 1978, § 74-2-6(C) 24
NMSA 1978, § 74-2-7 7
NMSA 1978, § 74-2-7(B)(1) 44
NMSA 1978, § 74-2-7(B)(5) 40, 42
NMSA 1978, § 74-2-7(C)(1) .... passim
NMSA 1978, § 74-2-7(C)(1)(a) 19
NMSA 1978, § 74-2-7(D)(1)(a) 33
NMSA 1978, § 74-2-7(D)(1)(b) 4, 33
NMSA 1978, § 74-2-7(K) 15, 16, 44, 49
NMSA 1978, § 74-2-7(L) 16, 17
NMSA 1978, § 74-2-9(B) 13
NMSA 1978, § 74-2-9(C)(2) 15, 16
NMSA 1978, § 74-9-22 38
NMSA 1978, § 74-9-28 42

N.M. Session Laws

L. 1972, ch. 51, § 4 .... 40, 41, 44
L. 1981, ch. 373, § 5 .... 40, 41
L. 1983, ch. 34 § 3 41
L. 1990, ch. 99 § 22, § 28 39
L. 1992, ch. 20, § 8 .... 40, 41
L. 2003, ch. 8, § 1 40

N.M. Rules

20.1.4.400(A)(1) NMAC 44
20.11.41 NMAC (10/1/2002) 2
20.11.41.18(A) NMAC 33
20.11.42.7(S) NMAC 18
20.11.61.2 NMAC 43
20.11.64.12 NMAC 4
20.11.65 NMAC 4
20.11.65.15 NMAC 19
20.11.81.12(A) NMAC 18, 27, 30
20.11.81.12(A) NMAC. 26
20.11.81.12(B) NMAC 27
20.11.81.14 NMAC 27, 28
20.11.81.14(H) NMAC 5
20.11.81.14(I)(2) NMAC 6
20.11.81.20(A) NMAC 27, 30
20.11.81.20(A)(2)(a) NMAC 28
20.11.81.20(A)(2)(b) NMAC 29
20.11.81.7(M) NMAC 6, 29
20.11.81.7(T) NMAC 5
20.9.1.200(L)(10) NMAC 46
20.9.1.200(L)(16)(c) NMAC 46
Rule 1-012(B) 27
Rule 1-056 .... 27, 30
Rule 1-056(C) NMRA 14
Rule 1-056(D) 14
Rule 1-056(D)(2) 9
Rule 11-701(C) 17
Rule 12-213(B) NMRA 1

Albuquerque Ordinances

Albuquerque, N.M. Rev. Ordinances ("ROA") § 9-5-1-7(C)(2)(a) 8, 15

Other Authorities

Douglas Meicklejohn, *The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of* Enchantment, 21 N. M. Law Rev. 167, 169 (1990) 39

National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities; and Gasoline Dispensing Facilities, 73 Fed. Reg. 1916, 1924 ¶ 6 (Jan. 10, 2008) 43

Prairie Rivers Network v. Illinois Pollution Control Bd., 781 N.E.2d 372, 401 (Ill. App. Ct. 2002) 15

COMES NOW, Appellee City of Albuquerque, Environmental Health Department (the "City") by and through undersigned counsel, Carol M. Parker, and for its Answer to Appellants' Brief-in-Chief states as follows:

I. Summary of Proceedings

This administrative appeal concerns a decision by the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") to sustain the issuance of an air quality permit ("Permit No. 3135") to Smith's Food and Drug Centers, Inc. ("Smith's") to construct a new gas station ("Gas Station") at 6941 Montgomery Blvd NE, Albuquerque, New Mexico (aka Louisiana and Montgomery NE). The City Environmental Health Department ("EHD") issued Permit No. 3135 to Smith's on April 30, 2014. **[2 RP 320]** Petitioners Margaret Freed, Mary Ann Roberts, and Pat Toledo, [hereinafter "Petitioners" or "Appellants"] petitioned the Air Board to review the issuance of Permit No. 3135 on June 2, 2014. **[3 RP 562-568]** The Air Board sustained Permit No. 3135 using summary judgment. **[4 RP 1149-1150]**

Pursuant to Rule 12-213(B) NMRA, the City submits its own Summary of Proceedings to shed light on the muddled case presented by Appellants and to accurately represent the Air Board's decision. Following its Summary, the City includes an objection to Appellants' offer of new facts not in the record which did not provide the basis for the Air Board's decision to sustain Permit No. 3135.

Petitioners disputed the City's cited fact) or to a statute or case law. In responding to the City's Motion, Petitioners did not show that they had any evidence that would create a genuine dispute of material fact.

With respect to their Response to Smith's Motion, Petitioners relied on the same mistaken legal authority as described above, **[4 RP 965]** and identified eighteen purported disputed facts. **[4 RP 969-971]** Despite calling these "disputed" facts, Petitioners again did not point to any evidence in support of them. Instead, Petitioners confined themselves to arguing over the legal significance of the facts rather than providing evidence to show that there was a genuine dispute of material fact. **[4 RP 922]**

On October 8, 2014, the Air Board held a hearing on the motions for summary judgment, as well as a separate motion submitted by Smith's seeking to dismiss Petitioner Toledo based on standing. **[4 RP 1137-1143]** The Air Board deliberated, **[10-8-14 1 Tr. 105:15-113:10]**, and granted the motions for summary judgment. **[4 RP 1149-1150; 5 RP 1370-1372]** The Hearing Officer determined that Smith's motion to dismiss Petitioner Toledo based on standing was rendered moot by the decision to grant summary judgment. **[5 RP 1372]** The Air Board hearing on the merits was cancelled. **[5 RP 1372]** The Air Board's Order Granting Dismissal was filed December 1, 2014. **[5 RP 1149-1150]**

In sustaining the issuance of Permit No. 3135, the Air Board properly focused on the stationary source emissions that would be produced by the Gas Station. The Air Board found:

> …no genuine issue of material facts of the case; no support for a contention that a standard, rule or statute would be violated…; no authority for the Board to address Petitioners' stated concerns; and no nexus between Petitioners' stated concerns and the air quality permitting rules.

[4 RP 1150]

On December 11, 2014, Petitioners filed a Motion to Reconsider. **[4 RP 1151-1164]** Petitioners raised a new legal argument that could have been made previously: that the Air Board should have considered imposing conditions on the permit. **[4 RP 1151-1152]** Petitioners had never asked for a specific condition before the Air Board and had never offered any evidence in support of a specific condition. Petitioners also relied on this Court's recent ruling in the *Carlisle* decision. Ct. App. No. 32,790 (Nov. 26, 2014).

On January 9, 2015, Smith's and the City filed a joint response disputing the Air Board's jurisdiction to accept Motions for Reconsideration after an appeal was filed. **[4 RP 1165-1172]** Smith's and the City disputed the applicability of this Court's recent ruling in the *Carlisle* decision and noted that the Motion to

Reconsider did not identify any disputed material facts. Smith's and the City objected to Petitioners' new argument about permit conditions and pointed out that Petitioners had not even suggested a condition that could be lawfully imposed or pointed to any evidence in support of one. **[4 RP 1169-1170]**

On May 6, 2015, the Air Board issued an order denying Petitioners' Motion to Reconsider. **[4 RP 1174a]**. Appellants are not appealing the denial of their Motion for Reconsideration. *See* Notice of Appeal (filed December 22, 2014 before the Motion for Reconsideration was decided); *compare* Docketing Statement (Jan. 21, 2015) (*stating* that the date of the order being reviewed is December 1, 2014) *with* Agreed Order Denying Petitioners' Request for Hearing on Petitioners' Motion to Reconsider (May 6, 2015) *and* **[4 RP 1174a]**

II. Objection to Appellants' discussion of materials not in the record.

Appellants raise arguments about a separate Air Board proceeding which occurred <u>after</u> the one before the Court in this appeal. **[BIC 9]** That proceeding related to a separate Smith's gas station on Fourth Street in Albuquerque which was also appealed to this Court. *See Gradi et al. v. City of Albuquerque et al.*, Ct. App. No. 34,284, Order of Dismissal (Jun. 18, 2015) [hereinafter "Fourth Street Matter"]. The City objects to Appellants' introduction of facts not in the record for this appeal and upon which Appellants could not have relied below—namely Appellants' contentions about how other matters have been handled by the Air

Board and allegations about discovery issues in the Fourth Street Matter. **[BIC 9]** The Appellants in the Fourth Street Matter were represented by the same counsel representing Appellants before this Court and one of the Appellants in the Fourth Street Matter, Appellant Toledo, is an Appellant here. Both Appellant Toledo and his counsel know that the Fourth Street Appellants stipulated to a dismissal. Any issues the Fourth Street Appellants could have raised in that appeal are now moot. Appellants' arguments about the Fourth Street Matter and other Air Board proceedings were not raised and could not have been relied on below and are not in the record. The City objects to their consideration.

III. Argument

A. Applicable Standard of Review

1. The arbitrary and capricious standard.

The Court shall set aside the Air Board's action only if it is found to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978, § 74-2-9(B). An agency abuses its discretion when its decision is contrary to logic and reason. *Oil Transport Co. v. New Mexico State Corporation Com'n,* 1990-NMSC-072, ¶ 25, 110 N.M. 568.

A court reviews de novo whether a ruling by an administrative agency is in accordance with the law. *Archuleta v. Santa Fe Police Dep't,* 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019.

2. Summary judgment is reviewed de novo.

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Juneau v. Intel, Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12 (internal citations omitted); Rule 1-056(C) NMRA. All reasonable inferences should be made in favor of the nonmoving party. *Juneau,* 2006-NMSC-002, ¶ 8. Summary judgment is reviewed on appeal de novo. *Id.*

When a motion for summary judgment is made, the opposing party may not rely solely on the allegations in his pleading; instead, his response must set forth specific facts based on admissible evidence showing that there is a genuine issue for trial. Rule 1-056(D). A party may not escape summary judgment "on the mere hope that at trial he will be able to discredit the movant's evidence." *See Baker v. Bhajan*, 1994-NMSC-028, n. 2, 117 N.M. 278 (internal citations omitted).

A fact is "material" for the purposes of summary judgment if it will affect the outcome of a case. *Parker v. E.I. DuPont de Nemours, Inc.,* 1995-NMCA-086, ¶ 9, 121 N.M. 120. To avoid summary judgment, it is not sufficient for counsel to merely dispute a fact; a nonmovant must show, rather than merely argue, the existence of evidence that warrants a trial on the merits. *V.P. Clarence Co. v. Colgate,* 1993-NMSC-022, ¶ 2, 115 N.M. 471.

3. Legal standards for Air Act permit proceedings

i. Evidentiary standards

A petitioner appealing a permit before the Air Board bears the burden of proof. NMSA 1978, § 74-2-7(K); *see also,* ROA § 9-5-1-7(K). A person challenging a permit "has the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence the facts relied upon by the petitioner to justify the relief sought in the petition." 20.11.81.16(C) NMAC. When, as here, a third party challenges a permit and bears the burden of proof, the third party "must show that the permit, as issued, would violate the Act or the Board's regulations." *See Prairie Rivers Network v. Illinois Pollution Control Bd.,* 781 N.E.2d 372, 401 (Ill. App. Ct. 2002).

For this Court to uphold an Air Board decision, it must be supported by substantial evidence. NMSA 1978, § 74-2-9(C)(2). Moreover, New Mexico requires that an administrative action be supported by some evidence that would be admissible in a jury trial. *Duke City Lumber Co. v. N.M. Environmental Improvement Bd.,* 1984-NMSC-042, ¶ 19, 101 N.M. 291 (the legal residuum rule).

Expert testimony may be admitted if, and only if, "the expert possesses such facts as would enable him [or her] to express a reasonably accurate conclusion as distinguished from mere conjecture." *Leon, Ltd. v. Carver,* 1985-NMSC-015, ¶ 31, 104 N.M. 29.

The Air Board must apply these evidentiary rules in their decisions to sustain, modify or reverse a permit. NMSA 1978, § 74-2-7(K).

A final decision on an air quality permit determines whether a source "will or will not meet applicable local, state and federal air pollution standards and regulations." NMSA 1978, § 74-2-7(L). This is a significant determination—it has preclusive effect by statute throughout New Mexico in all courts and administrative bodies. *Id.* The Legislature's express language demonstrates that it intended compliance with standards and regulations to be the central focus of an Air Act permitting decision. *Bishop v. Evangelical Good Samaritan Soc.*, 2009-NMSC-036, ¶ 11, 146 N.M. 473 (the text of a statute is the primary indicator of legislative intent); NMSA 1978, § 12-2A-19 (same).

In summary, petitioners wishing to modify or reverse a permit, § 7(K), must prove facts by a preponderance of the evidence, 20.11.81.16(C) NMAC, showing that the permit issued by EHD would violate a standard or regulation or that the permit must be modified to comply with a standard or regulation, § 7(L). Only if such showings are made may the Air Board modify or reverse a permit, § 7(K). The Air Board's findings in support of such a decision must be supported with substantial evidence that meets the legal residuum rule. NMSA 1978, § 74-2-9(C)(2); *Duke City Lumber Co.*, 1984-NMSC-042, ¶ 19.

The Petitioners could not carry this burden. The Appellants admit that they are not challenging the technical aspects of the permit. **[BIC 27]** This is a de facto admission that there was no genuine dispute of material fact that the permit met all "applicable local, state and federal air pollution standards and regulations." NMSA 1978, § 74-2-7(L). The Air Board correctly sustained the permit. *Id.* at § 74-2-7(K).

Petitioners' expert did not provide evidence that would prove by a preponderance of the evidence that any unacceptable air pollution or health impact would occur. 20.11.81.16(C) NMAC. Instead, she testified that further study could be done to see "if" the gas station would result in air quality or health impacts that exceeded acceptable levels. **[3 RP 654]**. She did not suggest any level that was excessive or speculate what levels of pollutants might occur. Petitioners' expert did not prove by a preponderance of the evidence that Petitioners' quality of life would be affected.

Without expert testimony to carry their evidentiary burden, Petitioners would have only inadmissible lay witness opinion to support their allegation that their quality of life would be affected. Opinion testimony from a lay witness about the air pollution that might result from the future construction of a gas station or the health impacts that may result is clearly "scientific, technical or other specialized knowledge" which is inadmissible from a lay witness. Rule 11-701(C);

and 20.11.81.12(A) NMAC (rules of evidence may be used as guidance). As a result of their unsupportive expert opinion, Petitioners could not carry their burden of proof. They could not prove by a preponderance of the evidence that would meet the legal residuum rule that Permit No. 3135 should be reversed or modified. The Air Board properly granted summary judgment.

ii. Legal standard for denying a permit.

In the Air Act, the New Mexico Legislature has established specific criteria which must be met for the City to deny a construction[4] permit. NMSA 1978, § 74-2-7(C)(1). The permit may be denied if the construction (a) does not meet standards, rules or requirements of the Air Act or the Clean Air Act; (b) causes or contributes to air contaminant levels in excess of an ambient air quality standard; or (c) violates any other provision of the Air Act or the Clean Air Act. The

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[4] The Air Act refers to "construction" permits and "operating" permits. The majority of air quality permits are construction permits which authorize the construction or modification of a source. Permit No. 3135 issued to Smith's for the Montgomery and Louisiana gas station was a "construction" permit. **[2 RP 320]** (titled "Authority to Construct" permit). "Operating" permits are required for certain large sources (known as "major" sources). 42 U.S.C. § 7661 (2); 42 U.S.C. § 7412(a)(1); 20.11.42.7(S) NMAC.

Legislature intended that the Air Quality Program and the Air Board focus on whether the construction will or will not comply with applicable legal standards, regulations and ambient air quality standards, subsection 7(L).

For example, a gas station must have an approved vapor loss control system that limits the emissions of volatile organic compounds from underground storage tanks to less than 1.15 pounds per thousand pounds of gasoline loaded. 20.11.65.15 NMAC. Subsection 7(C)(1)(a) authorizes the City to deny a permit for a gas station without this system. This is only one example of the substantive rules that limit emissions from various stationary sources.

Appellants are not challenging the technical sufficiency of the permit. **[BIC 27]** This is an admission that the construction would not violate any standards, rules or requirements of the Clean Air Act or Air Act and may not be lawfully denied. NMSA 1978, § 74-2-7(C)(1)(a).

Appellants contend that, in addition to compliance with regulations, the Air Board must consider impacts to their quality of life. But unless the construction satisfies one of the criteria in subsection 7(C)(1)(a), a permit may not be denied.

iii. The Legislature intended air pollution to be prevented and abated during permitting by the application of regulations and standards.

Petitioners argue that the Air Board "shall prevent or abate air pollution," citing Section 5(A) of the Air Act and that, therefore, an Air Board permit hearing must consider whether there is "air pollution" for the Air Board to prevent or abate. This is an impermissible reading of the Air Act by carving one section out and reading it in isolation rather than reading the statute as a coherent whole. *Romero Excavation and Trucking, Inc. v. Bradley Construction Inc.,* 1996-NMSC-010, ¶ 6, 121 N.M. 471.

Immediately following 5(A) is subsection 5(B), where the Legislature required that the Air Board prevent or abate air pollution by adopting regulations, standards and plans:

> The…local board shall…(1) adopt…regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and *prevent or abate air pollution*…and (2) adopt a plan for the regulation, control, *prevention or abatement of air pollution*…

NMSA 1978, § 74-2-5(B) [emphasis added].

Reading the Air Act as a coherent whole, the Legislature conveyed authority to prevent or abate air pollution and also prescribed a method of preventing or abating air pollution—by adopting regulations, standards and plans. This language sets forth the exclusive method of preventing or abating air pollution. *State of New Mexico ex rel. King v. Lyons,* 2011-NMSC-004, ¶ 36, 149-N.M. 330. (discussing the doctrine of *expression unius exclusion alterius*).

When the Air Act is read as a coherent whole, a specific approach to preventing and abating air pollution is apparent. The Legislature intended that the Air Board would adopt regulations that would prevent or abate air pollution, subsection 5(B), as defined in the Air Act, subsection 2(B), with public notice, subsection 6(B). Regulations balance competing factors such as public health and economic reasonableness. Subsection 5(B); *see also, Sanders-Reed ex re. Sanders-Reed v. Martinez,* 2015-NMCA-063, ¶ 15 (*noting* that the Air Quality Control Act establishes how "competing interests are addressed and decisions are made regarding regulation of the atmosphere.") During a permitting appeal, the Air Board assures that its regulations have been followed by the City, preventing or abating air pollution. Subsection 7(L). The Legislature did not intend that the Air Board would disregard this detailed process and the significance of its own rules to determine how to prevent or abate air pollution ad hoc whenever a permit is appealed. *Id.*

iv. Petitioners' statutory interpretation causes absurd and unreasonable results.

A court must avoid statutory constructions that lead to absurd and unreasonable results. *Bernalillo County Health Care Corp. v. New Mexico Public Regulation Com'n,* 2014-NMSC-008, ¶ 23 (courts must take care "to avoid adoption of a construction that would render the statute's application absurd or unreasonable…").

a) The Petitioners' interpretation causes the absurd result that air pollution would only be prevented or abated if a permit were appealed to a board.

The Legislature's command to "prevent or abate air pollution" is only directed at the Air Board or the Environmental Improvement Board, not to either the New Mexico Environment Department ("NMED") or the City's Environmental Health Department. The Legislature directed that permits be issued by NMED and a local agency, subsection 7(A)(1), yet did not command either entity to perform this ad hoc "air pollution" determination Petitioners contend the Air Board should perform. Under the Petitioner's interpretation, air pollution is only prevented or abated during permitting when a petitioner happens to participate in the permitting action, subsection 7(H), realizes he or she is adversely affected, *id.,* timely petitions the Air Board, *id.,* <u>and</u> carries his burden of proof, subsection 7(K). This would be an absurd and unreasonable interpretation because it implies that most air pollution will never be prevented or abated. *Bernalillo County Health Care Corp.,* 2014-NMSC-008, ¶ 23.

b) The Petitioners' interpretation causes unreasonable results because it allows evasion of the balancing of countervailing factors that the Legislature required.

Under the Air Act, regulations are adopted with consideration of countervailing factors such as public health versus economic reasonableness and technical practicability. Subsection 5(E). Yet, the definition of air pollution does not consider the countervailing factors identified in subsection 5(E).

Petitioners would have this Court conclude that the Legislature intended boards to adopt regulations after balancing competing interests, subsection 5(E), intended permitting agencies to apply those balanced regulations, subsection 7(C)(1), but then intended boards to be unconstrained by their own regulations, discard balanced consideration of countervailing factors, and focus only on preventing or abating air pollution even if a board's decision resulted in outcomes that were economically unreasonable and technically impractical. This is an unreasonable construction of the Air Act and conflicts with the plain text. *Bernalillo County Health Care Corp.,* 2014-NMSC-008, ¶ 23.

c) The Petitioners' interpretation causes unreasonable results because it destroys the value of the required notice of regulations.

The Legislature required that Air Act regulations be adopted with prior public notice and required that "interested persons" be given an opportunity to present their views. NMSA 1978, § 74-2-6(C). No regulations become effective until notice is provided in compliance with the State Rules Act. *Id.* at 6(F).

Yet, under Petitioners' interpretation of the Air Act, this notice has no value. The City cannot predict whether it is proceeding in compliance with the Air Board's expectations because under the Petitioners' interpretation, application of the Air Board's regulations is insufficient. Applicants cannot rely on a board's regulations and standards to know what they have to do to obtain a permit. Similarly situated applicants for ubiquitous sources like gas stations can be treated completely differently depending on a subjective "quality of life" standard rather than an objective and knowable standard announced with prior notice. Under Petitioners' interpretation, there is no purpose served by providing public notice of regulations and standards because they are not a reliable indicator of what would be required if there permit were appealed to the Air Board. This is an unreasonable result because it is contrary to the Legislature's express requirement of notice, *id.* at § 6, and contrary to longstanding precedents which require administrative agencies to follow their own regulations. *Hillman v. Health & Soc.*

Services Dep't, 1979-NMCA-007, ¶ 5, 92 N.M. 480 (overruled on other grounds by *State ex rel. Human Services Dep't v. Gomez,* 1982-NMSC-153, ¶¶ 26-27, 99 N.M. 261.

v. Summary of permitting legal standards.

In the Air Act, the Legislature intended that boards prevent or abate air pollution, subsection 5(A), by adopting regulations, standards and plans, subsection 5(B), after balancing countervailing factors, subsection 5(E), and applying the other limitations that the Legislature has imposed, *see, e.g.,* subsection 5(C). *Romero Excavation,* 1996-NMSC-010, ¶ 6. Permitting agencies like the City fulfill their responsibilities under the Act by assuring that sources which are constructed or modified meet all standards and regulations and all Air Act requirements. Subsection 7(C)(1). Under the Air Act, boards review permits to determine whether they "will or will not meet applicable local, state and federal air pollution standards and regulations." Subsection 7(L). Permits that comply with all standards and regulations prevent and abate air pollution as interpreted through a board's currently applicable regulations. Subsection 5(B).[5]

[5] Petitioners who believe there is air pollution remaining to be prevented or abated under the present regulations may petition for different regulations, NMSA 1978, § 74-2-6, or seek a legislative amendment.

B. The Air Board may decide permit appeals by summary judgment.

It is proper for an administrative agency to issue summary judgment when there are no disputed facts. *Junge v. John D. Morgan Construction Co.,* 1994-NMCA-106, ¶15, 118 N.M. 457. In *Junge,* this Court examined a Workers' Compensation Administration Rule, Rule 92.3.1, which provided, "[e]xcept where explicitly provided or necessarily implied in these Rules, the Workers' Compensation Act or the Occupational Disease Disablement Act, the Rules of Civil Procedure for the District Courts of New Mexico shall apply." This Court concluded that this language in the agency's rule would incorporate the Rules of Civil Procedure because the agency did not have a specific rule for summary judgment. *Junge,* 1994-NMCA-106, ¶ 9.

Similarly here, the Air Board's procedural rules provide that:

> In the absence of a specific provision in 20.11.81 NMAC governing an action, the board and the board's hearing officer may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance. No provision of the rules of civil procedure shall be construed to extend or otherwise modify the authority and jurisdiction of the board.

20.11.81.12(A) NMAC.

The Air Board does not have a specific rule for summary judgment. Thus, it was proper for the Air Board to rely on Rule 1-056 for guidance. 20.11.81.12(A) NMAC; *see also,* 20.11.81.12(B) NMAC (allowing procedures to vary from Part 81 to expedite the efficient resolution of the action).

Appellants argue that the Air Board has a rule on summary procedures. 20.11.81.20(A) NMAC. However, that rule resolves the merits of the petition solely based on legal arguments and does not provide any process to determine whether there are genuine disputes of material facts. It is analogous to a motion to dismiss under Rule 1-012(B) where all of the facts in the complaint are assumed to be true.

The motions for summary judgment were made after discovery and after Petitioners submitted their technical testimony—the issues could not have been appropriately resolved by legal argument only because they relied on materials outside of the pleadings. The Air Board properly relied on Rule 1-056 for guidance and evaluated Petitioners' permit appeal using summary judgment because its rules allow it to do so.

All procedural requirements of 20.11.81.20(A) NMAC were satisfied. Subsection 20(A)(2)(a) requires that public notice of the hearing be provided "in accordance with subsection G of 20.11.81.14 NMAC" and requires that the public notice provide instructions about how persons other than parties can file statements of intent (aka notices of intent) to participate in the oral argument. Subsection G of 20.11.81.14 NMAC requires that the public notice of the hearing be provided at least 15 days prior to the hearing. These requirements were satisfied.

Appellants contend that no affidavit certifying that notice was provided is in the record. **[BIC 5 n.2]** Appellants have overlooked it. It can be found at **[3 RP 637]**.

Public notice of the hearing was initially provided on August 3, 2014 for a hearing to begin on September 10, 2014, **[3 RP 637-643]**, which was later rescheduled to begin on November 5, **[3 RP 695-700]**. Notice of the motion hearing was provided to all parties. **[4 RP 915-917]**. The motion hearing was conducted as part of a regularly scheduled Air Board meeting. **[4 RP 917]**. All Air Board meetings are conducted in accordance with the Open Meetings Act which requires public notice of both the meeting and the agenda at least three days in advance. NMSA 1978, § 10-15-1(B) and (F). All of the public notice requirements of subsection 20(A)(2)(a) were satisfied.

In addition, the August 3, 2014 public notice included instructions for persons other than parties who wished to participate to submit an entry of appearance and explained how to file a notice of intent as required by 20.11.81.20(A)(2)(a) NMAC. **[3 RP 639]**. This notice was provided more than fifteen days before the hearing and, had any member of the public entered a timely appearance, he or she would have been treated as a party, would have been entitled to service and, thus individual notice of the date of the summary judgment hearing. Petitioners cannot complain that notice was inadequate when proper notice was provided to the public, Petitioners received proper notice, public notice of the hearing was properly provided, and no member of the public entered an appearance or has complained of inadequate notice.

Subsection 20(A)(2)(b) requires the Air Board to allow the public to attend an expedited hearing but allows the Air Board to limit presentations to parties and "interested participants," i.e., persons other than parties who have entered an appearance. 20.11.81.7(M) NMAC.

The Air Board heard the Motions for Summary Judgment at a regularly scheduled meeting on October 8, 2014, which the public was allowed to attend. The Air Board heard presentations from all parties and there were no interested participants, so all persons entitled to be heard under the summary procedures rule were heard. The Air Board was not required to take public comment at a summary procedures hearing, 20.11.81.20(A)(2)(b) NMAC, but it did so earlier in its meeting, **[5 RP 1370-1373]** Appellants cannot complain that the summary procedures would have led to a different result here because all procedural requirements were met.

The Air Board may use Rule 1-056 and resolve matters by summary judgment when there are no genuine disputes of material fact. 20.11.81.12(A) NMAC. In the alternative, all of the procedural requirements of 20.11.81.20(A) NMAC were met and following those procedures would not have led to a different result. Whether 20.11.81.20(A) NMAC or Rule 1-056 applied, all requirements were met in either case and either rule would have led to the same result because there were no genuine disputes of material fact and it was clear that the Air Board should sustain the permit.

C. Contrary to Appellants' arguments, the Air Board did not dismiss the Petition for a lack of standing.

As explained above, the Air Board granted summary judgment. **[4 RP 1149-1150]** The Air Board did not dismiss the petition due to a lack of standing.

D. Appellants did not preserve arguments below about conditions that could have been imposed on Permit No. 3135.

Appellants devote considerable argument to the effect that case law decided under the Solid Waste Act and the Hazardous Waste Act would allow the Air Board to impose "reasonable conditions" on Permit No. 3135. Petitioners failed to preserve this argument below.

Appellate courts will not review arguments that were not preserved below. *Aragon & McCoy v. Albuquerque Nat'l Bank,* 1983-NMSC-020, ¶ 13, 99 N.M. 420, 424. "To preserve an issue for appeal, …, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Lucero v. Hart,* 1995-NMCA-121, ¶ 12, 120 N.M. 794.

On page 22 of their Brief in Chief, Appellants provide the following citations as their evidence of preservation: AR 563-565 **[3 RP 563-565]**; 1151-1164 **[4 RP 1115-1164]**; 1334 **[5 RP 1334]**; Notice of Appeal; Docketing Statement, pp. 15-16; Tr. 61:25-63:1-7; 69:18-21 **[10-08-14 1 Tr. 61:25-63:1-7 and 69:18-21]** On page 23 of their Brief in Chief, Appellants also rely on Tr. 105:24-106:4 **[10-08-14 1 Tr. 69:18-21]** Despite this long string of citations, all of them are unavailing.

AR 563-565 **[3 RP 563-565]** are pages of Appellants' petition. Nowhere on those pages do Petitioners argue for a condition to be imposed on Permit No. 3135 or suggest a rationale in support of any condition. Nothing on these pages requests a ruling from the Air Board imposing a condition or describes a specific condition that Petitioners were seeking.

AR 1151-1164 **[4 RP 1151-1164]** are pages of Petitioners' Motion to Reconsider. A post-trial motion cannot preserve an argument that could have been made, but was not, during trial. *Gutierrez ex rel. Jaramillo v. Meteor Monument, LLC,* 2012-NMSC-004, ¶ 31.

AR 1334 **[5 RP 1334]** is an email dated December 10, 2014 to which Petitioners attached their Motion to Reconsider, nine days after the Air Board proceeding concluded on December 1, 2014.

Likewise, Petitioners' Notice of Appeal and Docketing Statement cannot preserve an argument that Petitioners never made to the Air Board prior to its December 1, 2014 ruling. Petitioners never sought to have any conditions imposed on Permit No. 3135.

Finally, Appellants point to certain pages of the transcript from the Air Board's hearing. The Court will search in vain for any language on Appellants' cited pages that even mentions "condition" let alone invokes a ruling on one. Appellants did not seek any ruling from the Air Board to impose a condition on the permit and have waived that argument on appeal.

1. No conditions could have been lawfully imposed which would have been responsive to Petitioners' concerns.

Even if the Court finds that Appellants preserved a claim that conditions should have been imposed, which the City disputes, the Air Act's and the Air Board's statutory and regulatory limitations on conditions preclude any conditions responsive to Petitioners' concerns.

The Air Act limits the conditions that may be imposed on permits. The City may require certain air pollution control technology to be used—but only that which is sufficient to meet the requirements of the standards, rules, and requirements of the Air Act and the Clean Air Act. NMSA 1978, § 74-2-7(D)(1)(a). The Air Act authorizes conditions that impose emission limits—but only as restrictive as necessary to meet the requirements of the Air Act and the Clean Air Act or the emission rate specified in the application, whichever is more stringent. NMSA 1978, § 74-2-7(D)(1)(b).

The Air Board's Authority to Construct regulations provide that the contents of the application "shall form the basis for the terms and conditions contained in the permit." 20.11.41.18(A) NMAC. Petitioners' quality of life concerns cannot form the basis of permit conditions.

Permit No. 3135 requires that Smith's use gasoline storage tanks with vapor balance and submerged fill, among other control technology. **[2 RP 320-323]** Technology that goes beyond those requirements may not be imposed through a condition.

With regard to emission limits, neither the Air Act nor the Clean Air Act imposes an emission limit on a gas station. There are no ambient air quality standards for VOCs, the only air contaminant that gas stations emit. As a result, in Permit No. 3135, the City properly imposed the emission limit, 45.5 tons per year of VOCs, **[2 RP 321]**, that Smith's requested in its application, **[2 RP 10]**. The Air Board properly sustained Permit No. 3135, in part, because the permit imposed conditions requiring technology sufficient to meet the requirements of the Air Act and the Clean Air Act and because it applied the emission limit requested in the application.

The Appellants point to subsection 7(D)(1)(c) which allows "reasonable restrictions and limitations not relating to emission limits or emission rates." Appellants have offered no explanation of what condition they would be seeking that would be allowable under subsection 7(D)(1)(c) and would be responsive to the concerns they raised below.

Appellant Roberts' concern was that the intersection "cannot support another gas station." **[2 RP 29]** Nothing in the Air Act allows the City to deny a permit to protect nearby businesses from competition. There is no nexus between Appellant Roberts' competitive concerns and the air quality regulations.

Appellant Toledo has concerns about traffic and air pollution. **[2 RP 16]** With respect to air pollution, Appellants are not challenging the technical sufficiency of the permit, **[BIC 27]**, and their own expert did not testify that any unacceptable air quality impact would result. Thus, there was no evidence in the record that air pollution would occur. The Air Act would not authorize a condition to be imposed limiting emissions from the gas station notwithstanding Petitioner Toledo's air pollution concern.

With respect to Appellant Toledo's concern about traffic, the Air Board does not regulate traffic. The Air Board correctly found that there is no nexus between Appellant Toledo's traffic concerns and the air quality regulations.

Finally, Appellant Margaret Freed raised zoning concerns, alleged that the gas station would be a "major source," (a claim Appellants later abandoned) and requested that Permit No. 3135 be denied. **[2 RP 315]** The City's Environmental Health Department Air Quality Program does not regulate zoning through air quality permits. The Air Board correctly determined that there is no nexus between Appellant Freed's zoning concerns and the air quality regulations. No conditions could have been imposed to address Appellant Freed's zoning concerns and, as discussed earlier, a permit may not be denied unless it meets the criteria identified in subsection 7(C)(1).

Appellants' argument about conditions has no substance. Appellants did not preserve it so it is impossible to know what sort of condition they might have requested. However the Air Act's restrictions on conditions and the Air Board's regulations make it difficult to imagine a condition that would have been responsive to the concerns that Appellants voiced.

E. The Solid Waste Act language, regulations and previous precedents are inapplicable to a case arising under the Air Act.

Appellants point to the Supreme Court's interpretation of the Solid Waste Act ("SWA") to suggest that the Air Board's decision was contrary to it. *Colonias Dev. Council,* 2005-NMSC-024. Appellants provided no analysis to explain why *Colonias* would apply. The SWA's language, its precedents interpreting that language, and its facts were clearly important to the Supreme Court's conclusion. *See e.g., Colonias,* 2005-NMSC-024, ¶¶ 22, 23, 24 and 31. Appellants offer no explanation why *Colonias* would be persuasive precedent for a dispute arising under a different law with different language applying to different facts.

1. The facts in this case are different.

In *Colonias,* the factual issues involved, first, a ruling by the hearing officer denying cross-examination about whether the landfill operator had conducted social impact studies, *Colonias,* 2005-NMSC-024, ¶ 8; and second, whether the Secretary gave sufficient weight to testimony about the social impact of the landfill. *Id.* at ¶ 10.

The factual issues here are different. None of Appellants' evidence was excluded by the Hearing Officer or insufficiently weighed by the Air Board. Appellants offered speculative and conjectural technical testimony that failed to support their allegations, *Leon, Ltd.,* 1985-NMSC-015, ¶ 31, and any lay witness testimony on air pollution or health impacts would have been inadmissible. The *Colonias* holding does not assist Appellants because its factual issues are not similar.

2. A Supreme Court precedent interpreting Solid Waste Act language is not persuasive where the statute being interpreted contains completely different language.

A statute's text is the primary, essential source of its meaning and the language that the Legislature chose is the primary indicator of legislative intent. *Bishop,* 2009-NMSC-036, ¶ 11; NMSA 1978, § 12-2A-19. Courts may also look at the history and evolution of a statute to determine legislative intent. *State v. Javier M.,* 2001-NMSC-030, ¶ 31, 131 N.M. 1.

Colonias was a decision interpreting the public participation provisions of the SWA. *Id.* at ¶ 21 ("the Solid Waste Act is replete with references to public input and education"). Two provisions were central to the *Colonias* holding—the public notice and the hearing provisions.

The Supreme Court cited with approval this Court's decision in *Martinez v. Maggiore*, noting that the stringent SWA public notice provisions demonstrated a legislative policy that "favors the public's ability to participate meaningfully in the landfill permitting process[.]" *Colonias,* 2005-NMSC-024, ¶ 22 (*citing Martinez v. Maggiore,* 2003-NMCA-043, ¶¶ 8, 15, 17, 133 N.M. 472 (holding that failure to comply with statutory notice requirements invalidated permit approval).

Those SWA notice provisions required that notice be published somewhere in the newspaper other than the legal notices or the classifieds—as the legislature described it: "[a] place in the newspaper calculated to give the general public the most effective notice." NMSA 1978, § 74-9-22. In *Martinez,* this Court noted that the SWA was only one of two New Mexico statutes containing such stringent public notice provisions. *Id.* This Court's *Martinez* decision focused on the evident legislative policy choice demonstrated by the stringent language promoting the public's involvement. *Martinez,* 2003-NMCA-043, ¶ 8. The Supreme Court agreed with this Court's analysis. *Colonias,* 2005-NMSC-024, ¶¶22-23.

The Supreme Court highlighted the SWA requirement for a public hearing before any permit could be issued, placing it in context with the requirement for most effective public notice.

> In finding *public participation <u>and</u> the hearing requirement central to the Solid Waste Act*, our courts have protected and promoted the role of public input in the Department's decision to issue a permit.

Colonias, 2005-NMSC-24, ¶¶ 23-24 (internal citations omitted) [emphasis added].

The *Colonias* decision rests on two statutory requirements imposed by the Legislature—the most effective public notice and mandatory pre-issuance hearings. Those requirements have been part of the SWA since it was first passed. L. 1990, ch. 99 § 22, § 28.

There is a good reason why these stringent protections were adopted in 1990. By then, it was apparent that improper disposal of solid waste could produce a trifecta of soil, water and air pollution. Douglas Meicklejohn, *The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of Enchantment,* 21 N. M. Law Rev. 167, 169 (1990). In 1990, New Mexico was receiving proposals to import other states' waste; one landfill would have been the largest in the United States. *Id.* at 179. The major waste disposal companies had a poor reputation for environmental protection and organized crime infested the waste hauling and disposal businesses. *Id.* at 177. These contemporaneous facts make it unsurprising that the Legislature imposed protections for nearby communities with stringent public participation and hearing provisions.

The Air Act's language and its history are very different. This Court may rely on the history and background of a statute to determine the Legislature's intent. *Javier M.,* 2001-NMSC-030, ¶ 31. The Legislature has never imposed heightened public notice and does not require <u>any</u> public hearing before a permit is issued. NMSA 1978, § 74-2-7(B)(5).

The history of the Air Act and its amendments make it clear that these differences in language reflect intentionally different policy choices. From 1972, when the Air Act permitting section was first passed, through today, there has never been a requirement for an adjudicatory public hearing before issuing every air quality permit. *Compare* L. 1972, ch. 51, § 4 *with* NMSA 1978, § 74-2-7(B)(5). The Legislature amended the Air Act's permitting section over several decades, both before and after the Legislature passed the SWA in 1990. *See, e.g.,* L. 1981, ch. 373, § 5; L. 1992, ch. 20, § 8; *and* L. 2003, ch. 8, § 1.The Legislature has repeatedly not required a pre-issuance hearing for air quality permits. The Legislature knows how to require pre-issuance hearings because it did so in the SWA. Its deliberate choice of a different process in the Air Act demonstrates an intentionally different policy choice. *Bishop,* 2009-NMSC-036, ¶ 11.

This conclusion is buttressed by other Air Act provisions and their history. In 1972, the Legislature restricted air quality permit challenges to applicants only. L. 1972, ch. 51, § 4. The bar to permit appeals by "any person" remained in place for two decades through several amendments to the Air Act permitting section—it was not a simple oversight. *See, e.g.,* L. 1972, ch. 51, § 4; L. 1981, ch. 373, § 5; L. 1983, ch. 34 § 3; L. 1992, ch. 20, § 8.

The Legislature's solicitude toward applicants went further—in 1972, an applicant needed only to be "dissatisfied" with his permit to appeal it to the Air Board. L. 1972, ch. 51, § 4. The Legislature did not impose the requirement to be "adversely affected" until 1992 when it opened permit appeals to "any person" for the first time. L. 1992, ch. 20, § 8. The Legislature offered the public the ability to appeal but only if they were "adversely affected." The Legislature knew it could allow the public to appeal it they were "dissatisfied" and knew it could require mandatory pre-issuance hearings as it had done in the SWA two years earlier—but the Legislature intentionally chose a different policy in the Air Act.

The public does not have to petition or demonstrate that they are adversely affected to obtain a hearing on a SWA permit because a hearing is required before every permit is issued. NMSA 1978, § 74-9-28. Unlike the SWA, where the Legislature showed a special emphasis on heightened public participation from inception, in the Air Act the Legislature did the opposite. NMSA 1978, § 74-2-7(B)(5). Other Air Act language offers a likely rationale for the differences between these two statutes.

The Legislature was concerned about balancing the economic burdens of air quality regulation with the benefits of preventing or abating air pollution. This is apparent from the language the Legislature chose in setting criteria to be considered in adopting regulations.

First, the Legislature required a board to consider more than protection of public health and welfare—a board should also consider "the public interest <u>including the social and economic value of the sources …and technical practicability and economic reasonableness….</u> " NMSA 1978, § 74-2-5(E) [emphasis added]. This express language shows the Legislature expected a balanced weighing of competing factors. *Sanders-Reed,* 2015-NMCA-063, ¶ 15.

Second, the Legislature imposed limitations on the stringency of regulations in areas important to public health. For example, regulations addressing nonattainment, (when air quality has been shown to be unhealthy), 42 U.S.C. §

7407(d)(1)(A)(i), may be no more stringent than federal regulations. NMSA 1978, § 74-2-5(C)(1). This is true regardless of the benefits offered by more stringent regulations.

The Legislature imposed similar restrictions in other areas important to public health. NMSA 1978, § 74-2-5(C)(1) (prevention of significant deterioration—a program that applies to major sources, *see* 20.11.61.2 NMAC); and subsection 5(C)(2) (hazardous air pollutants). The Legislature knew it could be more stringent than federal law because it allowed more stringent regulations for emissions from solid waste incinerators. Subsection 5(C)(3). The restrictions in subsections 5(C)(1 and 2) are impossible to square with a legislative intent to maximize the protection of public health and quality of life as Appellants imply.

Appellants cite a Federal Register notice published by the Environmental Protection Agency to suggest that these stringency limitations have no meaningful effect. **[BIC 26-27]** (*citing National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities; and Gasoline Dispensing Facilities,* 73 Fed. Reg. 1916, 1924 ¶ 6 (Jan. 10, 2008). Appellants are incorrect. A statute's text is the primary, essential source of its meaning, NMSA 1978, § 12-2A-19, not a conclusory statement made without any analysis by a federal agency and which contradicts the plain text of a New Mexico statute.

Constraints imposed on public participation are found in other aspects of the Air Act. From inception through today, a person challenging an air quality permit has borne the burden of proof under the Air Act to appeal a permit. *Compare* L. 1972, ch. 51, § 4 *to* NMSA 1978, § 74-2-7(K). This is no small burden since air quality regulation is a highly complex and technical field necessitating expertise. This is a burden that the participating public does not bear under the SWA where the applicant bears the burden of proof that the permit should be issued. 20.1.4.400(A)(1) NMAC (subject to limitations not relevant here). A member of the public challenging an air quality permit carries a heavier burden under the Air Act than under the SWA.

The Legislature intended the Air Act to have a streamlined permitting process, focused on objective standards and regulations. *See, e.g.,* NMSA 1978, § 74-2-7(B)(1) (requiring submittal of information during permitting necessary to determine that *standards and regulations* will not be violated) [emphasis added] *and* 7(L) (giving preclusive effect to a final determination that applicable *standards and regulations* are met). Air pollution is prevented or abated by the adoption of regulations, standards and plans, NMSA 1978, § 74-2-5(B), all of which require notice and a hearing. NMSA 1978, § 74-2-6. The very definition of air pollution is an objective, not a subjective standard:

> "air pollution" means 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 animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property[.]

NMSA 1978, § 74-2-2(B).

The Supreme Court has consistently interpreted legislation using "reasonable" as imposing an objective standard. *Gutierrez ex rel. Jaramillo,* 2012-NMSC-004, ¶ 9. Thus, the proof that there is "air pollution" requires meeting an objective standard, not an inherently subjective standard like "quality of life." It is a reasonable inference that, in the case of air quality, the Legislature was aware that Clean Air Act regulations would assure air quality that would protect public health. Based on that assurance, the Legislature saw no need for the heightened public participation provisions it imposed in the SWA and which the Supreme Court found significant in *Colonias*.

The legislative intent for the Air Act was different than the SWA. That is a policy choice the Legislature is entitled to make and which must be respected. Appellants cannot simply assume, as they have, that the Supreme Court's precedents interpreting the SWA apply to the Air Act.

3. The language of the Solid Waste Act regulations that the Supreme Court found significant in *Colonias* is not found in the applicable air quality regulations.

The Supreme Court's *Colonias* holding was based on language in the Solid Waste Act regulations which addressed the criteria the Secretary should consider in determining whether the landfill permit should be granted or denied:

> The regulations regarding permit issuance direct the Secretary to issue a permit if the applicant fulfills the technical requirements *and* "the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result." 20.9.1.200(L)(10) NMAC; *see also* 20.9.1.200(L)(16)(c) NMAC…

Colonias, 2005-NMSC-024, ¶ 31 [emphasis in original].

The *Colonias* Court concluded that this regulation's broad language was sufficient to require consideration of the excluded cross-examination and to require the Secretary to place more weight on the testimony about the social impact of the landfill. It required the Secretary to consider whether this evidence was sufficient evidence of harm to public health and welfare to justify permit denial. *Colonias,* 2005-NMSC-024, ¶ 31.

There is no analogous language in the applicable air quality regulations. To the contrary, the Legislature has preempted regulations like the Court pointed to in *Colonias* by establishing statutory criteria for denying a permit in the Air Act. *Jones v. Human Services Dep't,* 1980-NMSC-120, ¶ 3, 95 N.M. 97 (an agency cannot overrule a statute by an inconsistent regulation). To deny a construction permit, the construction must violate a regulation, cause or contribute to an exceedance of an ambient air quality standard, or violate a provision of the Air Act or Clean Air Act. NMSA 1978, § 74-2-7(C)(1) [emphasis added].

By admitting that Permit No. 3135 meets all technical standards, Appellants have admitted that none of these statutory criteria are met—the permit may not be lawfully denied. Language in a solid waste regulation cannot help Appellants in a hearing conducted under the air quality regulations.

F. There is no federal preemption at issue.

Appellants contend that there is no federal preemption that prevents Appellants' claims. **[BIC 8]**. The City never suggested that federal preemption applied and expressly disclaimed it below when Petitioners' misinterpreted the City's arguments before the Air Board. **[4 RP 1036-1037]** Federal preemption is irrelevant. The Air Board did not decide this matter using federal preemption.

G. Petitioners arguments about offensive collateral estoppel based on the Carlisle decision are legally flawed and are now moot.

Before the Air Board and now before this Court, **[BIC 12]**, Appellants contend that non-mutual offensive collateral estoppel arising from the Air Board's decision in another matter, the Smith's Carlisle Gas Station, *Peña-Kues et al. v.*

Smith's et al., Ct. App. No, 32, 790, Memo. Op. (Nov. 26, 2014) ["*Carlisle* Appeal"], precluded the City and Smith from making the arguments they made in the matter presently before this Court. This argument is now moot and is incorrect.

Petitioners' arguments before the Air Board were made October 8, 2014, when this Court was still considering the *Carlisle* Appeal. Oral argument was held October 24, 2014 and on November 26, 2014, this Court reversed the Air Board's *Carlisle* decision. It is no longer good law.

Second, offensive collateral estoppel does not apply here. The United States Supreme Court and New Mexico Supreme Court have explained that collateral estoppel should not be used to preclude the government from re-litigating an issue. *United States v. Mendoza,* 464 U.S. 154, 162 (1984); *Bogle Farms, Inc. v. Baca,* 1996-NMSC-051, ¶ 17-25, 122 N.M. 422.

IV. Preservation of Issues

The issues set out above were preserved by the City's Answer to the Petitioner for Hearing, **[3 RP 608-635]**; the City's Motion for Summary Judgment, **[3 RP 701-803, 4 RP 804-818],** the City's Reply in Support of its Motion for Summary Judgment, **[4 RP 1031-1124]**, and the City's arguments made at the hearing held on the City's Motion for Summary Judgment, **[10-08-2014 1 Tr. 20:17-35:11; 87:3-95:4; 102:5-105:10]**.

V. Conclusion and Statement of Relief Sought

Smith's application proposed to build a gas station at the corner of Louisiana and Montgomery NE—an intersection that already had two operating gas stations, one owned by Appellant Roberts. The Petitioners/Appellants could not carry their burden of proof. They submitted a report prepared by an expert of their own choosing. In her report, the expert discussed the potential harms of air pollution, particularly vehicular air pollution which is not part of a stationary source permit analysis. Petitioners' expert discussed the proposed Smith's Gas Station and stated that she could do studies to determine "if" it would cause a problem. She did not conclude that the proposed gas station would violate any regulation, standard or law, or harm anyone's health or quality of life. Her report was purely conjectural and speculative.

This could not carry the Petitioners' burden of proof to show that the permit should be reversed or modified. NMSA 1978, § 74-2-7(K). They could not meet the Legislature's standard for denying a construction permit. NMSA 1978, § 74-2-7(C)(1). They provided no basis for modifying the permit and did not preserve an argument that a condition should be imposed on the permit.

The Air Board correctly concluded that there was no genuine dispute of material fact; the permit did not violate any regulation, standard or law; there was no nexus between Petitioners stated concerns and the air quality regulations or no authority for the Air Board to address the Petitioners' concerns. The Air Board properly decided the merits of the Petition using summary judgment and sustained the permit.

The City requests that the Court of Appeals uphold the Air Board's decision.

VI. Request for Oral Argument

The City requests oral argument because it may assist the Court in understanding the complex legal issues that arise in applying the statutory mandate to prevent and abate air pollution through regulations, standards and plans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief were served on the following by the method indicated on Dec. 18, 2015.

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