FENNEMORE CRAIG

WHITE PAPER

FROM: Scott McDonald and Phil Fargotstein

DATE: September 14, 2010

RE: Air Quality Permit Processing in Pima County, Arizona

EXECUTIVE SUMMARY

As part of its plan to construct and operate a mine, milling and leaching facility southeast of Tucson, Rosemont Copper Company ("Rosemont") submitted an application and more than 250 pages of supporting documentation to the Pima County Department of Environmental Quality ("PDEQ") for a Class II Air Quality Permit. In processing that permit application, PDEQ, and all county officials, are required to comply with the law.

1. **The Director of PDEQ, as the control officer, has the exclusive authority over individual air quality permits under PDEQ jurisdiction.** The control officer has the exclusive responsibility to review, issue and administer individual air quality permits. Neither the Board of Supervisors nor the County Administrator has authority over such permits.

2. **The control officer must make a completeness determination within 60 days.** The control officer must first determine if the application is administratively complete. The failure to make that determination within 60 days will result in the application automatically being deemed complete. The Pima County Code specifies what must be included in an application to be complete. The control officer is prohibited from finding the application incomplete for any reasons other than as specified in the regulations.

3. **The control officer must publish a proposed permit decision within nine months and must take final action within 18 months of completeness.**

4. **The contents of the air permit must be authorized under the law.** Pima County regulations list what must be included in the final air permit. The control officer must specify and reference the origin and authority for each term or condition in the permit and cannot require conditions not specifically authorized by law.

5. **Public comments are authorized only after the control officer has made a permit decision and prepared a proposed permit.** The public comment period must be for at least 30 days and must include a public hearing, if one is requested in writing.

6. **The control officer's decision can be challenged administratively and in court.** The applicant or any person who submitted comments during the public comment period can file an appeal with the Air Quality Hearing Board ("Hearing Board") within 30 days of the control officer issuing a final permit. The Hearing Board has the authority to sustain, modify or reverse the control officer's decision and that decision can be judicially appealed.

7. **The control officer can be sued for failing to comply with deadlines.** If the application is not processed within legally established deadlines, the control officer can be sued by any person having an interest or who may be adversely affected. The court has the authority to require the control officer to act without additional delay.

Arizona law establishes that the control officer (the Director of PDEQ) is the exclusive authority with respect to individual air quality permits under PDEQ's jurisdiction. This was intended to remove decisions relating to individual air quality permits from the political arena. The separation of individual permit decisions from the political process has served Pima County citizens well in the past and should be honored in the present case.

INTRODUCTION

Rosemont Copper Company ("Rosemont") proposes to construct and operate an open pit mining, milling, leaching and solvent extraction/electrowinning facility, known as the Rosemont Copper Project (the "Project"). The Project is located approximately thirty (30) miles southeast of Tucson, west of State Highway 83, within Pima County, Arizona.

As part of the planning process, Rosemont submitted an application to the Pima County Department of Environmental Quality ("PDEQ") for a Class II air quality permit. The application was submitted on July 29, 2010 and was prepared by Applied Environmental Consultants. The application consisted of more than 250 pages of supporting documents, and is currently pending at PDEQ.

The purpose of this white paper is to summarize the statutory and regulatory requirements that PDEQ must satisfy. As set forth below, the air quality permitting process is controlled by federal law, Arizona statutes and Pima County regulations.

In determining compliance with the law, it is important to understand that under the Supremacy Clause, Article VI, of the United States Constitution, federal law supersedes state law. Further, state statutes supersede county regulations. Thus, while county regulations can establish a minimum requirement, federal and state requirements can impose additional requirements on PDEQ above and beyond those set forth in the Pima County regulations. For the purposes of this white paper, however, the current Pima County Code ("P.C.C.") will be referenced. Such reference, however, does not excuse Pima County or PDEQ from complying with all legal requirements. Further, an administrative agency, such as PDEQ, must follow its own rules and regulations. To do otherwise is unlawful. Clay v. Arizona Interscholastic Ass'n., Inc., 161 Ariz. 474, 779 P.2d 349 (1989).

1. The Director of PDEQ has exclusive authority over individual air quality permits under PDEQ jurisdiction.

Arizona Revised Statutes ("A.R.S.") §49-471 et. seq. authorizes counties in Arizona to establish and operate their own air quality permit programs. A.R.S. §49-480A provides as follows:

> The board of supervisors may adopt a program for the review, issuance, revision, administration and enforcement of [air quality] permits and for public review of proposed permits for sources that are subject to section 49-426, subsection A, that are not under the jurisdiction of the state .... and that are not otherwise exempt .....

The Project is required to obtain an air quality permit under A.R.S. §49-426, is not currently under the jurisdiction of the state and is not otherwise exempt.

The ability of Pima County to adopt an air quality permit program, however, is also limited by statute. A.R.S. §49-480B provides that county procedures for the review, issuance revision and administration of permits must be substantially identical to procedures for the review, issuance revision and administration permits issued by the Arizona Department of Environmental Quality ("ADEQ"). Thus, Pima County's program cannot impose procedural burdens significantly different from those imposed on facilities that are permitted by ADEQ.

In addition, A.R.S. §49-471.01 imposes additional limits on the authority of PDEQ. That statute states in relevant part as follows:

> A. To ensure fair and open regulation under this article by counties, a person: . . . .
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> 7. Is entitled to have the control officer not base a permitting decision under this article in whole or in part on conditions or requirements that are not specifically authorized by a provision of this state's law as provided in section 49-471.10, subsection C.

A.R.S. §49-471.10C in turn states as follows:

> A control officer shall not base an air quality permitting decision in whole or in part on a requirement or condition that is not specifically authorized by a provision of this state's law. . . . A general grant of authority in this article does not constitute a basis for imposing a permitting requirement or condition unless a rule or ordinance is adopted pursuant to that general grant of authority that specifically authorizes the requirement or condition.

Pima County has instituted an air quality permit program. The current regulations are contained in Pima County Code ("P.C.C.") Title 17. P.C.C. §17.04.080 established the Pima County Air Pollution Control District (the "District"). P.C.C. §17.04.090 designated the Director

of PDEQ as the air pollution control officer and executive head of the District and specifically states that the director of PDEQ "shall perform such duties and exercise such powers as are prescribed by law and shall be known hereafter as the air quality control officer."

The foregoing clearly establishes that the director of PDEQ, as the control officer, has the exclusive authority to review, issue, revise, administer and enforce individual air quality permits under the jurisdiction of Pima County. Further, in performing those duties, the control officer must comply with and is bound by federal and state statutes, and the P.C.C.. The corollary to this conclusion is that neither the Pima County Administrator nor the Pima County Board of Supervisors has authority or responsibility for individual air quality permits. Once the Board of Supervisors passes an air quality regulation or ordinance, responsibility for implementing that regulation or ordinance in individual permit situations rests exclusively with the control officer.

2. What is a completeness determination?

Many of the time limits in the Arizona statutes and P.C.C. concerning the processing of air quality permits are premised on when an application is determined to be complete. "Complete" means "that the application contains all the information necessary for processing an application." P.C.C. §17.04.340A.52.

a. How long does the control officer have to determine completeness?

Once it is determined that a source is required to obtain an air quality permit, the source is required to submit an application to PDEQ utilizing the PDEQ approved form. The Project submitted the Standard Permit Application Form for a Class II source on July 29, 2010. In addition, the Project also submitted with the application form over 250 pages of supporting and explanatory documents.

The current Pima County regulations provide that "an application for a new permit . . . . shall be deemed complete unless within sixty (60) days of receipt of the application, the control officer notifies the applicant by certified mail that the application is not complete." P.C.C. §17.12.165E.2. Thus, the deadline for the control officer to advise Rosemont that the application is not complete is September 27, 2010. If the control officer does not notify Rosemont pursuant to the provisions in the P.C.C., the application will automatically be deemed complete.

If the control officer notifies Rosemont that the application is not complete, and Rosemont submits additional information in response to the incomplete determination, the current Pima County regulations provide that the application may not be deemed automatically complete again until an additional sixty (60) days after the control officer receives the response from Rosemont. P.C.C. §17.12.165E.5.

b. What is the standard for completeness?

In determining if an application is complete, the control officer is required to comply with the law. P.C.C. §17.12.165E states that in order to be complete, an application must include the following:

1. A complete "Standard Permit Application Form" and all information required by the "Filing Instructions" developed and published by PDEQ. P.C.C. § 17.12.165E.1; P.C.C. § 17.12.165B. (See Appendix A to the Rosemont Application)

2. A listing of all applicable requirements under federal, state, and local law. P.C.C. § 17.12.165B.1 (See Chapter 4 of the Rosemont Application)

3. A statement or evidence that the source is designed, controlled, or equipped with such air pollution control equipment that it may be expected to operate without emitting air contaminants in violation of state law. P.C.C. § 17.12.165B.2 (See documentations provided in support of the Rosemont Application)

4. Proposed emission limitation, control or other requirement that meets the requirement of P.C.C. § 17.12.190 relating to synthetic minor sources (if the facility is seeking that status). P.C.C. § 17.12.165B.4. (See Chapter 9 of the Rosemont Application).

5. An assessment concerning the applicability of any requirements relating to hazardous air pollutants, if any, under P.C.C. §17.16 Article IX. P.C.C. § 17.12.165E.3. (See documents submitted in support of the Rosemont Application).

6. The information in the permit application must be certified as true, accurate and complete by a responsible official. P.C.C. § 17.12.165H. (See Appendix A of the Rosemont Application)

If after determining that an application is complete or after an application is automatically deemed complete, the control officer determines that additional information is necessary in order to evaluate or take final action on the application, the control officer can request additional information and set a reasonable deadline for a response. P.C.C. §17.12.165E.5.

3. How long does the control officer have to review and act on the permit application?

Under the current Pima County regulations, the control officer must publish a proposed permit decision within nine (9) months after an application is determined or automatically deemed to be complete, or after the receipt of any requested supplemental information. P.C.C. §17.12.165I.7.

The control officer must provide a statement that sets forth the legal and factual basis for any proposed permit conditions including references to the applicable statutory and regulatory provisions. P.C.C. §17.12.165I.5.

Under the current Pima County regulations, the control officer must take final action on a permit application within eighteen (18) months after receipt of a complete application. P.C.C. §17.12.165I.6.

4. What must be included in the air quality permit?

P.C.C. §17.12.185 sets forth the items that must be included in an individual Class II air quality permit. Among the requirements are "enforceable emission limitations and standards, including operational requirements and limitations that assure compliance with all applicable requirements at the time of issuance". The control officer is also required under P.C.C. §17.12.185A.2.a to include the following:

> The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

The requirement to specify the origin and authority for each term or condition is to ensure the control officer is complying with the requirements of A.R.S. §49-471.10C and not basing the decision in whole or in part on a requirement or condition that is not specifically authorized by state law.

5. Public comments are authorized after the control officer publishes a proposed permit decision.

When the control officer publishes the proposed permit decision within nine (9) months of receipt of a complete application, the control officer must provide notice of that decision. P.C.C. §17.12.165I.7. That decision must include the "proposed permit" which is the version of the permit which the control officer offers for public comment. P.C.C. §17.04.340A.184. The notice must include a statement that any person may submit written comments on the proposed permit action or request a hearing, or both, and must establish a deadline for such comments or request for hearing. P.C.C. §17.12.340. The notice must allow for a comment period of at least thirty (30) days.

Any requested hearing must be held as expeditiously as possible. P.C.C. §17.12.170I.7. Further, the hearing must be noticed at least thirty (30) days in advance of the hearing. P.C.C. §17.12.340E.

Thus, comments by the public are only authorized to be submitted after the control officer has published the proposed permit decision and proposed permit. Comments to the control officer by anyone outside PDEQ prior to that time are not authorized and may not be considered by the control officer in making the proposed permit decision. This is different from the situation where the control officer initiates a new rule or regulation. A.R.S. §49-471.06A specifically provides that the control officer can meet informally with any interested party to discuss a proposed rules or ordinance making action. There is no such authorization with respect to individual air quality permits or applications. The only avenue for comments by those outside PDEQ is the public comment process under the P.C.C. once the control officer has made and published a proposed permit decision.

6. What happens once the control officer acts on an individual air quality permit?

A.R.S. §49.480.02A provides that within thirty (30) days after the control officer gives notice of an approval or denial of a permit, the applicant or any person who submitted comments during the public comment period or hearing may file a petition for a public hearing before the

Pima County Air Quality Control Hearing Board (the "Hearing Board"). A.R.S. §49-482 provides that the Hearing Board must conduct the hearing within thirty (30) days of receipt of a petition to the Hearing Board. The Hearing Board, after notice and a public hearing, may sustain, modify or reverse the action of the control officer.

A.R.S. §49-480.02A also provides that the decision of the Hearing Board constitutes a final permit action which can then be further appealed to the Superior Court for the State of Arizona. The foregoing is one possible appeal mechanism.

7. What if the control officer fails to comply with the deadlines in state law and the P.C.C.

With respect to the completeness determination, if the control officer does not affirmatively indicate that the application is incomplete, it will be automatically deemed complete 60 days after it was submitted to PDEQ. P.C.C. §17.12.165E. With respect to other deadlines, A.R.S. §49-482B provides as follows:

> Any person having an interest that is or may be adversely affected may commence a civil action in Superior Court against the control officer alleging the control officer has failed to act in a timely manner as provided in section 49-480, subsection B and section 49-426, subsection C.

Thus, if a control officer fails too meet all legally required deadlines, the control officer is subject to being sued. If that happens, the Superior Court has jurisdiction to require the control officer to "act without additional delay." A.R.S. §49-482B also states the control officer must be given 60 days advance notice before such a lawsuit can be filed.

CONCLUSION

The Arizona statutes and the current Pima County Code clearly establish that the control officer (the director of PDEQ) is the exclusive authority to review, approve, deny and administer individual air quality permits in Pima County that are under the jurisdiction of PDEQ. The intent is to remove decisions relating to individual air quality permits from the political arena and vest them in PDEQ. Thus, the Pima County Board of Supervisors and the County Administrator, as well as the public at large, have no authority beyond participating in the public hearing process and the public comment process provided for under the regulations after the control officer has made a permit decision and published a proposed permit. The vesting of individual permit decisions in the control officer, and the separation of that decision from the political influences of other county agencies, has served Pima County well in the past and should be honored in the present case.