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October 7, 2011

BY HAND DELIVERY

Ms. Vicky Bennie
Secretary
Air Quality Hearing Board
Pima County Department of Environmental Quality
33 North Stone Avenue, Suite 700
Tucson, AZ 85701-1317

Re: Notice of Appeal of Denial of Rosemont Copper Company Permit Application No. 6112 by Ursula Kramer, Control Officer, Pima County Air Quality Control District

Dear Ms. Bennie:

We represent Rosemont Copper Company ("Rosemont"), an Arizona corporation. Rosemont is planning to construct a copper mine and associated operations in Pima County, Arizona (the "Rosemont project"). In preparation for the project, Rosemont submitted an air quality permit application (No. 6112) to the Control Officer, Ursula Kramer, and the Pima County Air Control District on June 29, 2010. On November 30, 2010, the Control Officer issued a decision finding that the permit application was complete. On August 30, 2011, the Control Officer promulgated a draft Class II Air Quality Permit (Permit No. 6112) for the Rosemont project and announced a 90-day public comment period.

On September 8, 2011, Rosemont filed a complaint against the Control Officer and Air Quality District in U.S. District Court on the basis that the Pima County State Implementation Plan ("PCSIP"), which became effective in 1982, requires the Control Officer to act on the permit application within 30 days of the application being complete. On September 28, 2011, the day before the Control Officer's answer was due in federal court, the Control Officer denied the permit application and terminated the previously announced comment period.

Rosemont hereby appeals the denial of its permit application and submits this Notice of Appeal in accordance with Pima County Hearing Board Rule 6.A and Rule 233 of the PCSIP,

which provide that appeals from a permit denial must be filed within 10 days of the notice of denial of the application.

The Hearing Board has jurisdiction pursuant to Rule 233, of the PCSIP, and has the authority to sustain, modify or reverse the actions of the Control Officer. The Control Officer's denial is subject to being reversed if it is contrary to law or is arbitrary and capricious or is an abuse of discretion. In accordance with Rule 233 of the PCSIP, Rosemont requests the Hearing Board (1) reverse the actions of the Control Officer and reinstate the permit application, (2) require the Control Officer to re-notice the permit application for a 30-day comment period to include a public hearing (inasmuch as the permit was previously open for public comment for approximately 30 days) and (3) issue a final permit decision within 30 days of the conclusion of the 30-day comment period in accordance with PCSIP Rule 233. As set forth in greater detail below, (1) the Control Officer's actions are contrary to law because the reasons relied upon by the Control Officer are not valid and are contrary to the PCSIP and federal Clean Air Act, (2) the denial was arbitrary and capricious because it is inconsistent with how the Control Officer has applied the PCSIP and treated other similarly situated facilities, and (3) it is an abuse of discretion.

1. **The denial of the permit application is contrary to law.**

In her September 28, 2011 letter, the Control Officer denied Rosemont's permit application because she determined that Rosemont is a "major source" of air contaminants pursuant to Pima County SIP Rule 171(C)(2) because of fugitive particulate emissions and CO emissions in excess of 100 tons/year and, based upon this determination, determined that Rosemont failed to provide allegedly required modeling information applicable to new "major sources." In reaching this conclusion, the Control Officer acted contrary to law and violated both the Clean Air Act and the PCSIP.

First, the Control Officer concluded that the Rosemont project is a major source because the anticipated emissions of CO were 615.22 tons/year, which is "greater than 100 tons per year." However, less than 100 tons of Rosemont's CO emissions are from stationary sources. The balance of the CO emissions is from mobile sources (e.g., haul trucks, pickup trucks and similar mobile equipment). PCSIP Rule 171(C)(2) specifically excludes mobile source emissions: "However, emissions from mobile sources as defined below, as well as emissions which result solely from construction and/or any other closely related, temporary emissions operation or activity, shall not be use in calculating or estimating potential emissions." Accordingly, the Control Officer acted contrary to law when she determined that Rosemont's emissions of CO made it a major source.

Second, the Control Officer erred twice when she included fugitive particulate emissions and CO emissions from the Rosemont project in determining that the project is a

major source. Section 302(j) of the Clean Air Act specifically provides that "fugitive emissions" are to be used to determine whether a source is major only as determined by rule of the Administrator. EPA has not promulgated such a rule and the Control Officer cannot arrogate that power to herself as she is not the Administrator. The Control Officer thus erred by including fugitive emissions from the Rosemont project as a basis for the determination.

Third, the Control Officer violated the PCSIP because the Air Quality Control District made a binding commitment in 1988 to regulate "major sources" in attainment areas consistent with the federal program. The federal program does not include fugitive emissions for mines in determining whether a source is "major." 40 C.F.R. §§ 51.165(a)(1)(iv)(C), 51.166(b)(1)(iii), and 52.21(b)(1)(iii). The Control Officer thus acted contrary to law in disregarding her obligations under the PCSIP.

Rosemont also appeals from and denies that it failed to comply with any of the applicable requirements set forth in the denial letter. The other failures alleged by the Control Officer in the denial apply to new "major sources" and are predicated on the erroneous conclusion that the Rosemont project is a major source. Because the Rosemont project is not a major source and because Rosemont has satisfied all applicable requirements, Rosemont has not misrepresented its status or failed to meet any applicable requirements warranting denial of its permit application.

2. **The denial of the permit application is arbitrary and capricious.**

The treatment of different cases, which are functionally indistinguishable, must be consistent. The failure to treat such cases consistently is arbitrary and capricious. *Independent Petroleum Ass'n of Arizona v Babbitt*, 92 F3d 1248, 1260 (D.C. Cir. 1996). The Control Officer's denial indicates that the Control Officer interpreted PCSIP Rule 171(C)(2) to require fugitive particulate emissions to be considered in determining whether a facility is a Class II or Class I (major) source. The Control Officer's interpretation of PCSIP Rule 171(C)(2) concerning fugitive particulate emissions in this case is inconsistent with and contrary to the treatment of fugitive emissions in air quality permits issued by the Control Officer to similarly situated sources. If the Control Officer treated Rosemont the same as the other similarly situated facilities, it would not be considered a major source. Thus, the denial is arbitrary and capricious.

The Control Officer's denial indicates that the Control Officer interpreted the PCSIP to require all CO emissions, regardless of source, to be considered in determining whether a facility is a Class II or Class I (major) source. The Control Officer's interpretation of the PCSIP as it relates to CO in this case is inconsistent with and contrary to the treatment of CO in air quality permits issued by the Control Officer to similarly situated sources. If the Control Officer treated Rosemont the same as other similarly situated sources, it would not be considered a major source. Thus, the denial is arbitrary and capricious.

The Control Officer's denial indicates that the Control Officer denied the application because she concluded that Rosemont had failed to provide all required information. The denial of the application, after a proposed permit had been promulgated and noticed for public comment, instead of requesting Rosemont to provide additional information or providing Rosemont the opportunity to discuss the Control Officer's conclusions, is arbitrary and capricious. It is not consistent with the approach taken by the Control Officer with respect to similarly situated sources and ignores the history of prior requests from the Control Officer, which were responded to in a timely and complete manner.

The denial indicates the Control Officer concluded that Rosemont failed to reference all applicable requirements. To the extent the Control Officer's denial is because Rosemont did not cite the PCSIP provisions, but rather the Pima County Code ("PCC") provisions, the Control Officer's denial was arbitrary and capricious because Rosemont followed the customary practice relating to referencing applicable requirements for a non-major source, which was consistent with applications submitted by similarly situated sources.

Further, the Control Officer's failure to comply with applicable federal law, including the PCSIP, is arbitrary and capricious.

3. **The denial of the permit application is an abuse of discretion.**

The PCSIP, Clean Air Act and federal regulations establish the limits of the Control Officer's discretion. As set forth above, the Control Officer's denial exceeds those limits and, as a result, the denial is an abuse of the Control Officer's discretion. Further, the denial of the permit application after promulgation of a proposed permit and after noticing it for public comment, instead of requesting information from Rosemont, is an abuse of discretion.

For all the reasons set forth above, the Control Officer's denial of Rosemont's Air Quality Permit Application No. 6112 should be reversed and the Control Officer should be required to reinstate the permit application and to complete the processing of that permit application in accordance with the time limits set forth in the PCSIP.

Yours very truly,

FENNEMORE CRAIG, P.C.

Scott McDonald

Phillip F. Fargotstein
Scott McDonald

PFF/elp

cc: Ursula Kramer, Control Officer,
Pima County Air Quality Control District
Pima County Attorney

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