MEMORANDUM

Pima County Department of Environmental Quality

DATE: July 17, 2012

TO: C.H. Huckelberry
County Administrator

FROM: Ursula Kramer
Director UK

RE: Rosemont Copper Company's Air Quality Permit Application

On July 5, 2012, Judge Kenneth Lee issued his ruling on Rosemont Copper Company's appeal of the denial of its air quality permit application. The following is a summary of events leading to that Superior Court decision and a summary of the ruling.

Background

Rosemont applied for an air quality permit on July 29, 2010. Under Pima County Code (PCC), a determination of whether an application is complete must be made within 60 days of the filing of the application. A draft permit must be published within nine months, and a final permit action must be taken within 18 months after the application is deemed "complete." Rosemont's application was found to be complete on November 30, 2010. In June 2011, Rosemont sent a Notice of Intent to Sue, claiming a decision on the permit should have been made by December 30, 2010 under the PC State Implementation Plan Rules (PCSIP), which is a set of air quality rules submitted to the US Environmental Protection Agency (EPA) for approval. After Rosemont raised the issue of applicability of the PCSIP, the Control Officer and District staff began assessing Rosemont's claim about the PCSIP Rules and how they applied to Rosemont's application. A proposed permit was published on August 29, 2011, within the nine-month time period required by the PCC. Publication of the proposed permit began what was planned as a 90-day public comment period due to significant public interest in the proposed facility. On September 2, 2011, Rosemont filed a lawsuit in United States District Court alleging the PCSIP applied to its application and stating they were entitled to a permit decision within the shorter time requirements contained in the PCSIP.

When Rosemont applied for its application, it did not identify any SIP issues as applicable, nor did it identify any SIP requirements in later application amendments. Rosemont abandoned its position that there are no applicable SIP requirements when it filed its federal lawsuit. Rosemont claimed Pima County air quality control regulations from 1979 contained in the PCSIP governed the permit issuance, not the current PCC. The two processes are very different. PCC requirements, similar to State requirements, specify a detailed process including public participation and permitting timeframes. The PCSIP has no such detail and requirements.

In my capacity as the Control Officer, I denied Rosemont's permit application on September 28, 2011, citing two reasons. First, Rosemont's application failed to list all applicable federal requirements as required by the PCC and SIP rules. Second, the application failed to comply with certain substantive requirements of the PCSIP Rules, specifically modeling to demonstrate compliance with federal health-based air quality standards. Rosemont appealed the denial to the Air Quality Hearing Board. The Board upheld the denial. Subsequently, Rosemont appealed the denial and the Hearing Board's decision in Superior Court. Rosemont continued to change its legal position during the hearing process by arguing the Arizona SIP, not the PCSIP, now applies.

Ruling Summary

In its appeal, Rosemont asked for the following:

1. The court vacate the Order;
2. Reverse the denial of the permit application;
3. Grant declaratory relief;
4. Instruct defendants to approve Rosemont's permit application.

The only item granted to Rosemont was relief from the denial of the permit. Rosemont was not granted any of its other requests. The judge ordered that Rosemont be given 30 days to amend its application to include citations to all applicable requirements and for timely reconsideration of the application.

Unfortunately, the judge ruled the decision to deny the permit application was arbitrary and capricious. Under Arizona Law administrative decisions, such as the Control Officer's decision to deny Rosemont's application and the Hearing Board's decision to uphold that denial, can be reversed if the decision is "arbitrary and capricious" or is an abuse of discretion. When determining whether a decision is arbitrary and capricious, a reviewing court should review the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." When testifying before the Air Quality Hearing Board, I explained my reasons for denying the permit application without asking Rosemont to supplement the application. Both I and the Hearing Board considered the facts and circumstances, including Rosemont's repeated changes in position. Based on the legal standard, the decision should not be characterized as arbitrary and capricious because neither the Control Officer's denial nor the Hearing Board's decision to uphold that denial can be fairly described as unreasoning or made without due consideration of the facts and circumstances.

The Court decision is essentially a victory for the Air Quality District and the County. We have repeatedly suggested that Rosemont resubmit its application and include all applicable requirements. The judge's order to allow an amended application is, practically speaking, substantially similar to submitting a new application, since the amendment must include the initial application plus the additional applicable requirements from the PCSIP. Once the amended application is received, we will process it expeditiously and proceed to public comment with a draft provided Rosemont demonstrates compliance with all air quality requirements. Following the ruling, Rosemont requested a meeting with air quality permitting staff to discuss how best to proceed. The meeting was held on July 13, 2012. I provided Rosemont with the attached letter, which identifies the additional requirements.

We are available at your convenience to answer any questions you may have.

UK/mk

Attachment

c: John Bernal, Deputy County Administrator for Public Works

PIMA COUNTY DEPARTMENT OF ENVIRONMENTAL QUALITY
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Ursula Kramer, P.E. **(520) 243-7400**
Director **Fax (520) 838-7432**

July 13, 2012

Mr. Jamie Sturgess
Vice President, Sustainable Development
Rosemont Copper Company
P.O. Box 35130
Tucson, AZ 85740-5130

Re: Amended Rosemont Copper Air Quality Permit Application for an Air Quality Permit

Dear Mr. Sturgess:

As ordered by the Ruling from Judge Lee, dated July 5, 2012, the Pima County Air Quality Control District has granted Rosemont Copper Mine (RCM) 30 days to amend its air quality permit application to include all applicable requirements including any federal applicable requirement as defined by Pima County Code (PCC) 17.04.340 (A) (85). The additional applicable requirements include the Pima County State Implementation Plan (PC SIP) Rules identified in the Statement of Basis for Denial dated September 28, 2011. Specifically, the District will be reconsidering the application with respect to the requirements of PC SIP Rule 504 Pre-Installation Testing or Modeling Requirements. This Rule states:

> "…..an estimate of the concentration of a pollutant in the ambient air near a proposed new major source shall be made in accordance with the reference Guideline on Air Quality Models (EXPOS 1.2-080) contained in Chapter IX, provided such document includes a method applicable to the proposed source. If this document does not contain an applicable model, the Control Officer shall refer to Workbook for the Comparison of Air Quality Models contained in Chapter IX herein, and other pertinent guidance furnished to the Control Officer in writing by the Administrator of the Environmental Protection Agency, in specifying to the permit applicant a suitable method for meeting these requirements."

Please ensure that the information that is submitted is accompanied by a statement of truth, accuracy and completeness signed by the responsible official as required by PCC 17.12.165 (E) (1). If you would like to discuss this matter, please contact Richard Grimaldi, Deputy Director for EQ Division at (520) 243-7363.

Sincerely,

Ursula Kramer

Ursula Kramer, P.E.
Control Officer, Pima County Air Quality Control District

UK/RG/vb

cc: Kathy Arnold, Rosemont Copper Company
Richard Grimaldi, PDEQ