BEFORE THE PIMA COUNTY AIR QUALITY HEARING BOARD

In the matter of Rosemont Copper Company	Docket No. 11.001 **[DRAFT] RULING ON APPEAL BY ROSEMONT COPPER COMPANY, INC., OF DENIAL OF AIR QUALITY PERMIT**

I. Background.

This is an appeal by Rosemont Copper Company, Inc., of the denial of its air quality permit application (No. 6112) by Control Officer Ursula Kramer and the Pima County Air Quality Control District ("PCAQCD"). Rosemont had filed the application in connection with its proposal to construct a copper mine and associated operations in Pima County, Arizona. The Control Officer denied the permit on September 28, 2011 after concluding, *inter alia*, that Rosemont would be a "major source" of air contaminants because of its potential fugitive emissions of particulate matter and carbon monoxide, and accordingly had failed to submit information necessary to support application for a new major source. "Fugitive emissions" are emissions of air pollutants that escape from industrial facilities and equipment, rather than being reasonably emitted through a vent or a stack. 40 CFR 51.166 (b)(20); Pima County Code § 17.04.340(A)(96).

Rosemont argues that the Control Officer improperly concluded that the company's mine would be a major source of air emissions, and that the Control Officer acted arbitrarily and capriciously and contrary to law in denying Rosemont's permit application on that basis. Rosemont requests that the Board reverse the Control Officer's determination that Rosemont must be treated as a potential major source and order its application to be reinstated.

Although most of the underlying facts are not in dispute, the application of relevant federal and state law to them is exceedingly complex. The ultimately controlling issue is whether, under applicable law, Rosemont's projected fugitive emissions of particulates and carbon monoxide ("CO") should be considered when determining whether the company is properly classified as a major source of air contaminants. If fugitive

emissions of particulates and CO are included, then there is no dispute that Rosemont is a major source. That, in turn, would lead to the conclusion that the Control Officer properly denied Rosemont's air quality permit application because the application failed to include certain information required to be submitted by potential major sources. Conversely, if federal, state, or local law requires that Rosemont's fugitive emissions be disregarded for purposes of determining whether Rosemont is a potential major source, then there is no dispute that Rosemont is a minor source. That, in turn, would lead to the conclusion that the Control Officer's denial of the Rosemont permit application was contrary to law, if not arbitrary and capricious.

Resolving this controlling issue is law requires some further exploration of the regulatory regime under which Rosemont's application which submitted. We begin with the federal Clean Air Act, 42 U.S.C. §§ 7401et seq. The modern Clean Air Act was passed in 1970 and substantially amended in 1990. The Act establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution. *General Motors Corp. v. United States,* 496 U.S. 530, 532 (1990). The Act expressly states that "air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State").

Among other things, the Act required the United States Environmental Protection Agency ("EPA") to establish primary and secondary national ambient air quality standards for "criteria" pollutants, 42 U.S.C. §7609.[1] Pursuant to 42 U.S.C. § 7609, EPA subsequently established national ambient air quality standards ("NAAQS") for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. 40 CFR Part 50.

The Act also established a process for those standards to be achieved and maintained through the cooperative action of EPA, States, and other relevant jurisdictions.

[1] Primary NAAQS are designed to protect the public health; secondary NAAQS are to protect the public welfare.

That process was set forth in 42 U.S.C. § 7610, which requires each State to submit for EPA approval a "State Implementation Plan" ("SIP"), which establishes enforceable emissions limitations and other control measures designed to ensure that the State attains and/or maintains national ambient air quality standards. Each State's SIP is required to include emission limitations, schedules, compliance timetables, and other measures insuring timely attainment and subsequent maintenance of the national ambient air quality standards. Although the Act sets forth certain minimum requirements for SIPs, States are granted discretion to adopt their own mix of regulatory requirements and control measures. As long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

The State is also authorized to delegate certain enforcement responsibilities to political subdivisions who demonstrate the capability to handle enforcement within their jurisdiction. 42 U.S.C. § 7410(3)(3). Pima County is one such political subdivision.

Like all SIPs, the Arizona SIP is not a readily identifiable single document. Rather, it is comprised of a diverse collection of state, county, local, and tribal laws and regulations. 40 C.F.R. § 52.20. The original Arizona SIP was submitted to EPA on January 28, 1972. It has been continuously amended and modified since. Merely listing the titles of the diverse elements of the Arizona SIP now requires 25 pages of dense text in the Code of Federal Regulations. *Id.* Some of the listed elements, such as later-adopted codes, supersede or amend earlier-listed versions thereof.

The Clean Air Act also established a preconstruction review and permitting program that applies to proposed new major sources of criteria pollutants or to major modifications of existing sources. State SIPs are required to have a program that at least meets the federally established minimum standards. The legal requirements vary based upon the proposed source's location and type. Obtaining preconstruction approval for a new major source in an area with degraded air quality is considerably more difficult than doing so in an area with clean air. In areas whose air quality achieves national ambient air

quality standards, the relevant program is generally referred to as the "Prevention of Significant Deterioration" ("PSD") program. The federal version of this program is found in Part C of Subpart I of the Act, 42 U.S.C. §§ 7470 *et seq.* In areas whose air quality does not comply with national ambient air quality standards, the relevant program is generally referred to as "New Source Review" ("NSR"). The federal version of this program, referred to as the "Part D" program, is found at 42 U.S.C. §§ 7501 *et seq.*[2]

A source generally is defined as "major" in an attainments area if it has the potential to emit 250 tons per year of any regulated pollutant, although the threshold is 100 tons per year for certain source categories. 42 U.S.C. § 7479 (1); 40 CFR 52.21 (b)(1). In non-attainment areas, the threshold for "major" source definition is 100 tons per year, or less in certain areas of more serious non-attainment. 40 CFR 51.165(a)(1)(iv)(A). A source is defined as "major" or not based upon its "potential to emit" regulated air pollutants. "Potential to emit" is the maximum capacity of a source to emit a pollutant, given its physical and operational design, operating 24 hours a day for 365 days per year, and discounting the effects of air pollution control technology that is not legally enforceable. 40 CFR §§ 52.21 (b), 51.165 (a)(1)(iii), 51.166 (b)(4).[3]

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[2] Major new sources in non-attainment areas are obliged to obtain offsetting emissions reductions from other sources and to apply air pollution control technology that achieves the "lowest achievable emissions rate" ("LAER"). 42 U.S.C. §7503. LAER is typically determined by evaluating the most stringent emissions limitation applied to a similar source, without regard to the economic impact of requiring adoption of that technology by the new proposed source. 40 CFR 51.165(a)(1)(xiii), New sources in attainment areas need not obtain offsetting emissions reductions, and are obliged to apply air pollution control technology constituting the "best available control technology." ("BACT"). 42 U.S.C. § 7475. BACT is determined on a case-by-case basis, generally involving selection of the maximum emissions reduction achievable, considering environmental and economic factors. 40 CFR 166(b)(2). Essentially, the cost-effectiveness of control technology is a consideration in determining BACT but not LAER.

[3] A source's potential to emit is usually expressed in tons per year and is calculated by multiplying the source's maximum hourly emissions rate in pounds per hour times 8,760 hours (the number of hours in a year) and dividing by 2,000 (the number of pounds in a ton). If a source is restricted by enforceable permit conditions (as defined in 40 CFR 49.152), the source's potential to emit is calculated based on the restricted operating conditions.

Under the federal program, fugitive emissions are not included for purposes of determining a source's potential to emit unless the source belongs to one of the source categories EPA has listed pursuant to § 302 (j). Those source categories are listed in 40 CFR Part 51, Appendix S, paragraph II.A.4 (iii) and in 40 CFR 52.21 (b)(1)(iii). EPA has determined that these sources have the potential "significantly degrade air quality" and "it has been demonstrated to be reasonable and cost effective" for these sources to quantify and include their fugitive emissions in calculating their potential to emit. 77 Fed. Reg. 38748, 38755-76 (July 1, 2011).

Although primary copper smelters are included on the list of such sources, copper mines are not. EPA states that is has thus far not expanded the list of § 302 (j) sources because of the "unreasonable economic costs" of doing so. 77 Fed. Reg. at 38755-76. The current Pima County Code is identical to the federal regime in all material respects. *See, e.g.,* Pima County Code § 17.04.340.A (128) (adopting federal definition of "major source," which disregards fugitive emissions except for certain listed sources not including copper mines).

The Control Officer's position is that portions of the Arizona SIP submitted on October 9, 1979 on behalf of Pima County ("Pima County SIP")[4] require that Rosemont's fugitive emissions be included in the potential to emit estimates of the facility. As noted above, fugitive emissions are generally disregarded in emissions calculations prepared under federal law and the current Pima County Code. However, the August 6, 1979 air quality control regulations adopted by the Pima County Board of Supervisors, later submitted as part of the Arizona SIP, arguably required fugitive emissions to be counted for all sources.[5] That 1979 provision has been superseded by newer County regulations and is also inconsistent with current state law. Nevertheless, because of her uncertainty

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[4] In their briefs and during the hearing, the parties have consistently referred to relevant portions of the 1979 Pima County Air Quality Control Regulations as the "Pima County SIP." Portions of those regulations, were, indeed, indisputably part of the Arizona SIP at one time. For purposes herein, the Board will employ that term, without presupposing that those 1979 regulations (for instance, Rule 171) remain enforceable parts of the Arizona SIP.

[5] The parties disagree, as explored further below, whether the 1979 regulations were intended to apply only in non-attainment areas of Pima County.

about whether the 1979 fugitive emissions provision remains part of the EPA-approved Arizona SIP, the Control Officer decided to apply it to Rosemont. Rosemont itself had previously invoked a different provision of the 1979 regulations, arguing that a deadline for action by the Control Officer contained in those regulations was part of the current Pima County SIP and hence provided a vehicle for suit. The Control Officer's position, supported generally by the Clean Air Act and cases decided under it, is that the SIP remains enforceable as a matter of both federal and state law unless and until EPA approves a SIP revision.[6]

For the reasons set forth below, the Board finds that the Control Officer's action, while not arbitrary and capricious, was contrary to law.

Before turning to the applicable legal analysis, this Ruling will set forth relevant Findings of Fact, based on the parties' joint submittal of undisputed facts and other facts established by the record or during testimony at the hearing herein on November 7, 2011.

II. Findings of Fact.

1. Rosemont is planning to construct a copper mine and associated operations in Pima County, Arizona (the "Rosemont project"). Joint Statement of Stipulated Facts, ¶ 1.

2. To construct and operate the Rosemont project, Rosemont must obtain an air quality permit from the Pima County Air Quality Control Officer or other legally authorized agency. Joint Statement of Stipulated Facts, ¶ 2.

3. On July 29, 2010, Rosemont submitted to the Pima County Department of Environmental Quality ("PDEQ") an application for a Class II air quality permit ("Permit Application"). Joint Statement of Stipulated Facts, ¶ 3.

4. On September 23, 2010 the Control Officer advised Rosemont that the application was incomplete and requested Rosemont to provide additional information.

[6] Pima County Code 8 provides that "No rule adopted in this title shall preempt or nullify any applicable requirement or emission standard in an applicable implementation plan unless the control officer revises the applicable implementation plan in conformance with the requirements of 40 CFR Part 51, subpart F, A.R.S 49-404, and the administrator approves the revision."

Rosemont provided the requested additional information to the Control Officer on October 8, 2010. Joint Statement of Stipulated Facts, ¶ 4.

5. On November 30, 2010, the Control Officer found Rosemont's Permit Application "complete" under the requirements of the Pima County Code ("P.C.C."). Joint Statement of Stipulated Facts, ¶ 5.

6. On May 12, 2010, the Control Officer requested additional information from Rosemont concerning the technical aspects of the mine processes including control efficiencies of the Pollution Control Equipment. On June 1, Rosemont provided the additional information requested by the Control Officer. Joint Statement of Stipulated Facts, ¶ 6.

7. On June 23, 2011, Rosemont notified the Control Officer and Pima County Air Quality Control District ("District") of Rosemont's intent to sue them for alleged failure to comply with the Pima County portion of the State Implementation Plan ("Pima County SIP"). Specifically, Rosemont claimed that the 1979 version of the Pima County air quality control regulations remained a part of the Arizona SIP, and that Rule 213(C) therein required the Control Officer to "either grant or deny [the Permit Application] within 30 days from the date of receipt of the complete application." Joint Statement of Stipulated Facts, ¶ 7.

8. On August 29, 2011, the Control Officer and the District gave public notice that a Proposed Air Quality Operating Permit for Rosemont had been prepared, and gave notice of the commencement of a 90-day public comment period ending November 28, 2011. Also on August 29, 2011 the Control Officer posted the proposed Class II Air Quality Permit for the Rosemont project on the Pima County Department of Environmental Quality ("PDEQ"). A Class II permit is issued to facilities that are not "major sources" under the Pima County Code. Joint Statement of Stipulated Facts, ¶ 8.

9. On September 2, 2011, Rosemont filed a lawsuit against the Control Officer and the District in the United States District Court for the District of Arizona, alleging that the Pima County SIP required the Control Officer to act on the Permit Application within 30 days of the application being complete. Rosemont asked the District Court to:

a. Issue a finding declaring that the Control Officer and District were in violation of Rule 21-213(C) for failing to issue or deny the Permit Application within thirty days of it being complete;

b. Issue a permanent injunction directing the Control Officer and District to comply with Rule 21-213(C) and all applicable requirements of the CAA; and

c. Order the Control Officer and District to either grant or deny the Permit Application within forty-five days of the date of the injunction. Joint Statement of Stipulated Facts, ¶ 9.

10. On September 28, 2011, the Control Officer denied Rosemont's Permit Application. Joint Statement of Stipulated Facts, ¶ 10.

11. Specifically, the Control Officer's findings in her written notice of denial included:

a. The Rosemont project is a major source under the PC SIP because the potential to emit CO, including fugitive emissions, was 615.22 tons/year, which is "greater than 100 tons per year";

b. The Rosemont project is a major source under the Pima County SIP because the potential to emit PM_{10}, including fugitive emissions, was 909.62 tons/year, which is "greater than 100 tons per year";

c. Rosemont did not comply with Pima County SIP Rule 504 by failing to provide necessary modeling;

d. Rosemont did not list all applicable requirements as mandated by P.C.C.§ 17.12.165; and

e. Rosemont did not demonstrate to the Control Officer that the "source is designed, controlled, equipped, or capable of being operated" in such a way that "compliance with all applicable provisions of the SIP rules would be possible throughout the term of the permit." Joint Statement of Stipulated Facts, ¶ 11.

12. On September 29, 2011, the Control Officer filed an answer in the District Court litigation stating that since a permit decision had been made and the application had been denied the case should be dismissed as moot. Joint Statement of Stipulated Facts, ¶ 12.

13. Before the Control Officer denied Rosemont's Permit Application, she had not applied the Pima County SIP permitting rules to any air quality permit applications processed by the District. Joint Statement of Stipulated Facts, ¶ 13.

14. Rosemont did not identify any SIP rules as being applicable requirements in its Permit Application or in any supplement to the application. Joint Statement of Stipulated Facts, ¶ 14.

15. The Rosemont project is not a major source under the current Pima County Code. Joint Statement of Stipulated Facts, ¶ 15.

16. The Rosemont project is not located in an area that has been designated as non-attainment by the EPA. Joint Statement of Stipulated Facts, ¶ 16.

17. Before issuing the proposed Class II permit, the Control Officer and her office were in contact with EPA Region IX. Joint Statement of Stipulated Facts, ¶ 17.

18. Before issuing the permit denial, the Control Officer and her office were again in contact with EPA Region IX. Joint Statement of Stipulated Facts, ¶ 18.

19. Rosemont submitted a public records request to the Control Officer, the District and PDEQ for a copy of the 1988 committal letter that was referenced in 40 C.F.R. § 52.120(c)(66)(i). The Control Officer has indicated that she is unable to locate a copy of the 1988 committal letter. Joint Statement of Stipulated Facts, ¶ 19.

III. **Legal Discussion.**

The parties have raised a variety of legal arguments. The Board first turns to the dispositive one. In denying Rosemont's permit application on the basis that the proposed Rosemont facilities constituted a major source, the Control Officer relied upon the definition of "major source" in the 1979 Pima County air quality control regulations, on the basis that they remained part of the Pima County SIP despite subsequent amendment of the Pima County Code. The Control Officer determined that the 1979 regulations

required fugitive emissions of a proposed source in an attainment area to be included when determining that source's potential to emit, despite the fact that this 1979 provision is inconsistent with current federal, state, and county law.

The parties agree that the Rosemont project is not a major source under the current Pima County Code. The Control Officer testified that, once Rosemont argued that the 1979 regulations remained a part of the Pima County SIP, she was obliged to enforce all of the purported SIP provisions -- including the definition of major source that calls for fugitive emissions to be included. That result, reasoned the Control Officer, was required because upon approval the Pima County SIP became enforceable as a matter of both state and federal law. Further, the Control Officer testified that EPA personnel urged her that the SIP had to be enforced. This, she testified, put her in a dilemma: the current Pima County Code does not call for fugitive emissions to be included in determining a source's potential to emit, but an older version of the code that was at least once included within the EPA-approved Pima County SIP did. Moreover, EPA regulations at 40 C.F.R. 121 do not expressly state that the 1979 regulations have been deleted as Pima County SIP requirements. Meanwhile, unofficial versions of the SIP posted at the EPA and Pima County DEQ web sites include the 1979 regulations. Under those circumstances, the Control Officer testified she felt obliged to enforce the older, more stringent provisions arguably remaining in the SIP rather than the less stringent ones in the current Code (which less stringent regulations are identical to federal requirements).

It is certainly correct, as a general proposition, that upon their approval by EPA, state implementation plans become enforceable as a matter of both state and federal law. But that is only the beginning of the analysis. The 1979 County Rules and Regulations that were embodied in the approved Pima County SIP are not a model of clarity. At the time they were prepared, much of Pima County was designated as non-attainment -- that is, much of the County did not comply with the national ambient air quality standards.[7]

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[7] On March 3, 1978, EPA had designated Pima County as a nonattainment area for carbon monoxide and total suspended particulates. 43 Fed. Reg. 8970 (March 3, 1978). EPA later twice adjusted the boundaries of the carbon monoxide nonattainment area to exclude suburban and rural areas, leaving only the urban Tucson Air Planning Area ("TAPA") as nonattainment for carbon monoxide. 44 Fed. Reg. 16392 (March 19, 1979);

That is no longer the case. The rules do not expressly state that they were intended to apply solely to the County's then-non-attainment areas. *See, e.g.*, Rule 112. But the substance of them reveals a heavy focus on issues relevant only to the construction of new sources in non-attainment areas. For instance, the rules call for new sources to provide for emissions off-sets and to install technology that allows them to achieve the lowest achievable emission rate. Those requirements apply under federal and state law to new sources in non-attainment areas, but not to those in attainment areas.

Entirely clear, however, is that -- regardless of the ambiguity of the original rules submitted as part of the Pima County SIP -- EPA included these rules in the approved SIP solely because of its demand that the County develop additional regulations, consistent with the Clean Air Act, for the County's non-attainment areas. There was no EPA mandate that the County promulgate these regulations for purposes of governing regulations in attainment areas. The 1979 County rules were promulgated in response to an EPA finding that the County's program at that time failed to comply with Clean Air Act requirements applicable only to non-attainment areas. The rules were approved by the County on August 6, 1979, during a time when the County was taking multiple steps to address EPA's finding that the County had failed to adequately develop a plan for addressing its non-attainment issues.

The rules were ultimately submitted to EPA on October 6, 1979. 40 CFR § 52.120 (c)(38). Submittal of the rules was preceded by a host of additional amendments to the Pima County SIP. EPA's Notice of Proposed Rulemaking of July 6, 1979, 44 Fed. Reg. 39480 (July 6, 1979), is clear on this point, describing the first set of Pima County SIP revisions as addressing the agency's concerns about air quality enforcement in non-attainment areas of the County. The notice stated:

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48 Fed. Reg. 51160 (March 4, 1983). EPA redesignated the TAPA area as attainment for ozone effective July 10, 2000, noting that at that time the area had not suffered an ozone exceedance since 1988. 65 Fed. Reg. 36353 (June 8, 2000). Pima County is also now in attainment with NAAQS for particulate matter, now regulated as PM-10 (10 microns) and PM-2.5 (the even smaller 2.5 microns).

> Revisions to the Metropolitan Pima County portion of the Arizona State Implementation Plan (SIP) have been submitted to the Environmental Protection Agency (EPA) by the Governor's designee. The intended effect of the revisions is to meet the requirements of Part D of the Clean Air Act, as amended in 1977, "Plan Requirements for *Nonattainmen*t Areas."

44 Fed. Reg. at 39480 (emphasis added).

The first submittal to EPA by the Arizona designee, on behalf of the County, was described as the "*Nonattainment Area* Plan for Metropolitan Pima County." *Id.* at 39481 (emphasis added). The plan had been submitted to EPA on March 27, 1979. 40 CFR 51.120 (c)(34). The CFR reference is to "Metropolitan Pima County Nonattainment Area Plan for TSP." *Id.* That EPA viewed the Pima County SIP provisions as required only to address Clean Air Act requirements applicable in non-attainment areas is further illustrated by the Notice's discussion of ozone. At the time of its SIP amendment activity, portions of the County were designated as non-attainment by EPA for, *inter alia,* ozone. That was pursuant to a March 18, 1979 Notice at 44 Fed. Reg. 21261. However, on May 21, 1979, Arizona had asked EPA to redesignate Pima County as a whole to attainment for ozone, based on updated air quality readings. At the time of the Notice of Proposed Rulemaking on the SIP, EPA had yet to decide whether to grant the redesignation.

In the course of describing the regulatory background, EPA specifically acknowledged that the purpose of the SIP submittal was to comply with EPA's mandates regarding non-attainment areas. The Notice stated:

> If EPA approves this redesignation in the subsequent final rulemaking notice, the Clean Air Act, Part D requirements for ozone would not be applicable to Metropolitan Pima County and those portions of the nonattainment area plan concerning ozone would no longer be required.

44 Fed. Reg. at 39481.

EPA's description of the Pima County SIP submittal as necessary solely to address non-attainment areas was consistent throughout the rulemaking process. On July 23, 1980, EPA issued another Notice of Proposed Rulemaking regarding the Metropolitan Pima County Nonattainment Area Plan for carbon monoxide and total suspended

particulates. 45 Fed. Reg. 49112 (July 23, 1980). The Notice again confirmed that the SIP submittal under review was requested by EPA because of recent Clean Air Act requirements applicable solely to non-attainment areas. 45 Fed. Reg. at 49112. EPA took final action on the full set of Pima County SIP submittals on July 7, 1982. 47 Fed. Reg. 29532. While conditionally approving the SIP submittal, the agency again left no doubt that it viewed the provisions under review as required solely in order for the County to satisfy its obligations with regard to non-attainment areas: "EPA is today conditionally approving Pima County's NSR [New Source Review] rules." *Id.* at 29532. It is also instructive that EPA used the term "New Source Review," as that term most commonly refers to the stringent pre-construction review of proposed sources to be located in non-attainment areas. In attainment areas, the term for the less onerous review process is "Prevention of Significant Deterioration."

Accordingly, it is clear that EPA viewed the 1979 regulations as necessary components of the Pima County SIP only to the extent they pertained to non-attainment areas. Because Pima County is now an attainment area, the 1979 regulations are irrelevant.

Furthermore, subsequent EPA regulatory approvals of Pima County's air quality program confirm that, even with regard to non-attainment areas, the 1979 fugitive emissions rule (Rule 171) no longer remained a part of the Pima County and Arizona SIP. There is nothing in the record to suggest that EPA determined that Rule 171 would apply as part of the SIP to areas that later achieved attainment. That result would have required EPA to conclude that a superseded County ordinance that is more strict than today's federal, state, and county law and which was driven by the need to regulate non-attainment areas should nevertheless be enforced in attainment areas, rather than current federal, state, and County law specifically developed for that purpose.

Subsequent to 1979, the County undertook a comprehensive reform of its air quality regulations, which today are essentially identical to those set forth in the federal Clean Air Act. Among other things, the County Code now provides that fugitive emissions should not be included in determining a source's potential to emit, except as

required under federal law. Pima County Code § 17.04.340 (129). *Id.* The Pima County Code has not included fugitive emissions in major source determinations since 1993. In that year, the Pima County Board of Supervisors adopted Ordinance 1993-128, which substantially amended the Air Quality Control regulations set forth in Chapter 17. Among other things, Ordinance 1993-128 abandoned the 1979 provision that called for fugitive emissions to be included in all source determinations. Instead, the County adopted the federal definition set forth in Clean Air Act § 302 (j), pursuant to which fugitive emissions are only included with regard to specifically listed facilities not including copper mines. *See* Ordinance 1993-128, § 17.04.340 (133)(c), p. 27. Although the Code was thereafter amended again, the County has never strayed in substance from faithfully adhering to the federal definition. *See, e.g.,* Ordinance 1994-83, § 17.04.340.(A)(132) (defining "major source" by reference to the definition of the same term in Ariz. Admin. Code R17-2-101, which in term adopted the federal § 302 (j) definition); Ordinance 1994-83, §17.04.340(A)(132)(same, but cross-referencing re-numbered Ariz. Admin. Code R18-7-201).

In 1994, EPA delegated authority to Pima County to enforce the federal Prevention of Significant Deterioration program – that is, the preconstruction review program that applies to areas whose air quality has attained national ambient air quality standards. 49 Fed. Reg. 26129 (May 19, 1994). The administrative record makes it clear that EPA understood during its consideration of the proposed delegation that the Pima County regulations now duplicated federal law and no longer called for fugitive emissions to be included in source calculations, as had been the case in 1979. For instance, on May 9, 1986, EPA published a proposed rule stating that it intended to approve Pima County's new source review rules, provided the County and State made some technical amendments not relevant here. 51 Fed. Reg. 17210 (May 9, 1986). EPA's discussion of the technical deficiencies made no reference whatsoever to the County's abandonment of the fugitive emissions provision from the 1979 regulations.

The same is true of the final rulemaking on August 10, 1988, then EPA issued its final rule approving Revisions to the Arizona SIP and the Pima County carbon monoxide

attainment plan. 53 Fed. Reg. 30220 (August 10, 1988). Among other things, the agency stated that it was approving as meeting the requirements of federal law the County's new source review ("NSR") regulations, adopted on July 16, 1985. The agency stated:

> EPA has concluded that the NSR rules for Pima County and the State of Arizona can now be fully approved based upon commitments by Pima County and the State of Arizona to implement their NSR rules consistent with EPA's requirements. EPA has determined that the rules as written are adequate to meet the requirements of 40 CFR 51.165 (a) if certain ambiguous provisions are always interpreted consistent with EPA's requirements. The State submitted a letter for the State on June 1, 1988, and a letter for Pima County on July 22, 1988, making all of the necessary commitments. These commitment letters, which are appended to the TSD for this notice, concern stack heights, temporary sources, growth allowances, net emission decreases, reasonable further progress, volatile organic compounds, stationary sources, allowable offsets, permittee responsibility and visibility protection.

EPA thus has confirmed that the relevant version of the Pima County Code embodied in the Pima County and Arizona SIP was no longer the superseded 1979 regulations.

In short, Rule 171 of the 1979 Pima County regulations is not enforceable against Rosemont as a part of the Pima County and Arizona SIP, for two reasons. The first is that the record is clear that EPA adopted it as part of the Pima County SIP only with regard to non-attainment areas. The second is that, in any event, EPA later approved Pima County's comprehensive regulatory overhaul, which included an abandonment of Rule 171. It is therefore inappropriate to conclude that EPA continues to view old Rule 171 as a necessary component of the Pima County SIP.

The Control Officer is not bound by federal law or EPA's SIP approval to enforce Rule 171 as promulgated in 1979 and contained in the 1979 Pima County SIP submittal to EPA. Rather, she is free to apply instead the requirements of the current Pima County Code, which do not call for inclusion of fugitive emissions in source potential to emit calculations.

Having now decided that the Control Officer may, consistent with federal law and the Pima County SIP, choose not to apply old Rule 171, the issues becomes whether she is prohibited from doing so. Rosemont argues that the Control Officer is prohibited from

applying Rule 171 for a variety of reasons. First , Rosemont argues that including fugitive emissions in the calculations of the Rosemont project's potential to emit would violate federal law, because (a) Clean Air Act § 302 (j), 42 U.S.C. § 7602 (j), provides that major source status shall not be defined with regard to fugitive emissions unless the EPA Administrator has promulgated a rule so providing, and the Administrator has promulgated no such rule[8]; and (b) the Control Officer committed in 1988 to manage "major sources" in Pima County in a manner consistent with the federal program.

In response, the Control Officer argues that, by approving the Pima County SIP provisions that did call for including fugitive emissions in source definitions, the EPA Administrator did effectively promulgate the regulation called for by Clear Air Act § 302 (j). The Control Officer's argument is not well-taken. There is no suggestion in the record that the EPA Administrator would choose to comply with a Congressional mandate to promulgate a fugitive emissions regulation of nationwide applicability by approving without comment a single jurisdiction's State Implementation Plan. Nothing in the Federal Register notices discussed above suggests that the Administrator intended, by approving the Pima County SIP, to promulgate the sort of rulemaking envisioned by § 302 (j). Further, subsequent EPA rulemakings expressly confirm that, at least as of October 26, 1984, EPA itself acknowledged that it had yet to promulgate the type of fugitive emissions rulemaking required under § 302 (j). On that date, EPA issued a final rule announcing how it would henceforth regulate fugitive emissions in light of the ruling in *Alabama Power Company v. Costle*, 636 F. 2d 325, 369 (D.C. Cir. 1979). In *Alabama Power*, the Court held that EPA may require the inclusion of fugitive emissions in threshold applicability determinations only if the agency has first satisfied the rulemaking requirements of § 302 (j). 636 F.2d at 369. In its rulemaking, EPA explained on what basis it would undertake future rulemakings, as appropriate, in compliance with § 302 (j) and the holding in *Alabama Costle*. Had EPA intended that its 1982 approval of the Pima County SIP act as a nationwide rule of general applicability, it would not have

[8] The Control Officer has argued that, by approving the Pima County SIP, the EPA Administrator did in essence promulgate the requisite rule providing for inclusion of fugitive emissions

acknowledged two years later that it had yet to promulgate such a rule. *See also* 48 Fed. Reg. 38742 (August 25, 1983) (EPA acknowledges that, because it had misinterpreted the requirements of § 302 (j), it had failed to undertake the necessary rulemaking).

Rosemont is correct that EPA's approval of the Pima County SIP did not constitute the sort of rule on fugitive emissions required under § 302 (j). Nevertheless, the Board is not persuaded by Rosemont's argument that federal law, operating by itself, precludes the Control Officer from applying Rule 171 and including fugitive emissions in calculating potential to emit. Nothing in the Clean Air Act generally or § 302 (j) specifically precludes state or local air quality authorities from adopting as a matter of their own law more stringent regulation of fugitive emissions. Rather, the Act mandates merely that, in order to comply with the federal program, state and local authorities maintain a program that is at least as strict as the federal one. More stringent regulation of fugitive emissions is not inconsistent with federal law. Indeed, § 116 of the Act, 42 U.S.C. § 7416, expressly provides that States and political subdivisions are free to adopt emissions limitations for stationary sources more stringent than those required under federal law.

Rosemont next argues that the Control Officer is precluded from newly interpreting Rule 171 to include fugitive emissions in potential to emit calculations because Arizona law restricts the ability of counties to adopt environmental rules and policies more strict that federal and state law. A.R.S. § 49-104 (17) generally precludes the Arizona Department of Environmental Quality from adopting environmental regulations more strict than their federal counterparts.[9] A.R.S. § 49-112, in turn, limits the circumstances under which counties may adopt environmental laws more stringent than federal and state law. The provision requires that the County demonstrate with credible evidence that the rule or regulation is required to address peculiar local condition and is either required by federal law or necessary to prevent a significant threat to public health or the environment.

[9] Federal environmental law generally requires that, in order to obtain delegated authority to be the primary enforcer of a federal environmental law, a state's program must be at least as stringent as federal law. Taken together with the state mandate against adopting environmental law more stringent than federal programs, these twin mandates have the effect of requiring ADEQ to adopt laws and regulations identical to their federal counterparts.

There is nothing in the record suggesting that the Control Officer undertook to comply with A.R.S. § 49-112 prior to deciding to modify the County's historic practice and begin applying Pima County SIP Rule 171.

In light of the foregoing, it was contrary to law for the Control Officer to apply Pima County SIP Rule 171 to Rosemont and require that Rosemont's projected fugitive emissions be included in determining its potential to emit. Nothing in federal law requires the Control Officer to apply Pima County SIP Rule 171 in this fashion, and state law prohibits it (even if Rule 171 retained viability as a County Ordinance).

The Control Officer's Conduct Was Not Arbitrary and Capricious.

Rosemont independently argues that the Control Officer's decision also was arbitrary and capricious. Rosemont argues that the arbitrary and capricious nature of the Control Officer's conduct is demonstrated, *inter alia,* by her decision to apply Pima County SIP Rule 171 to Rosemont after failing to apply it to any other source for a period of at least 11 years; by her refusal to allow Rosemont leave to amend its application; and by her failure to fully review the implications of the Pima County SIP.

In response, the Control Officer testified that she failed constrained by federal law regarding SIP enforcement and by general EPA statements that the SIP must be honored.

Given the complexity of the issues and the circumstances, the Board cannot find that the Control Officer acted in an arbitrary and capricious manner. Although the Board has concluded that the Control Officer erred in her interpretation of the implications of a variety of federal, state, and local laws, the record does not support a finding that she was arbitrary and capricious. Indeed, Rosemont itself has displayed no small measure of confusion about this complex situation. Although Rosemont itself initially invoked the jurisdiction of the Control Officer, its most recent legal position is that ADEQ, rather than Pima County, has exclusive jurisdiction over its permit application. Similarly, although Rosemont cited a provision of the Pima County SIP in its District Court claim demanding that the Control Officer act on its permit, the company's current position is that the Pima County SIP does not apply to Rosemont at all, since its proposed facility is located in an attainment area. While the Board happens to agree with that current position, Rosemont's

own confusion over the issue illustrates the complexity of the legal issues relevant to this proceeding. Under these circumstances, the Board declines to find that the Control Officer acted in an arbitrary and capricious manner. The Control Officer's attempt to apply a set of complex and arguably conflicting laws was no more flawed than Rosemont's.

That leaves one major issue. Rosemont has most recently argued that the Control Officer lacked authority to deny its permit application based on Pima County SIP Rule 171 because the Rosemont project will generate more than 75 tons per day of uncontrolled emissions. On November 1, 2011, Rosemont asked ADEQ to assert sole jurisdiction over air permitting for the Rosemont mine. Letter from Rosemont counsel Eric Hiser to Eric Massey, ADEQ, dated November 1, 2011, Exhibit A to Control Officer's Proposed Supplemental Statements of Fact and Conclusions of Law. Nothing in the record indicates ADEQ has acted on this request.

As the Control Officer has noted, this position is inconsistent with the position taken by Rosemont in its District Court litigation, in which it urged the Court to require the Control Officer to timely grant its permit based upon a timing provision in the Pima County SIP. That position is also, of course, inconsistent with Rosemont's initial decision to seek a permit from Pima County. Rosemont has requested that ADEQ accept jurisdiction over all aspects of its permit, to the exclusion of the County. It is unclear if Rosemont believes that, in the absence of an ADEQ grant of that request, the County would lack jurisdiction to any portion of the Rosemont facility, or merely jurisdiction to enforce now-defunct County regulations regarding Rosemont's fugitive emissions.

Rosemont's prayer for relief asks the Board to order the Control Officer to take further action with regard to its application, however. Additionally, had Rosemont concluded that its decision to invoke the County's permitting authority was erroneous from the outset, its appeal would seemingly be moot. Accordingly, the Board concludes that further action by the Control Officer is appropriate, as set forth below.

On that issue, the parties disagree about whether and when the Rosemont permit application was complete. The Control Officer's position is that the application has yet to

be completed, since Rosemont has failed to submit information the Control Officer contends is required under old Rules 171 and 504. The Control Officer does not appear to contend that the application was incomplete for reasons other than those pertaining to the disputed provision of the 1979 Rules.

Rosemont contends that the permit application was complete as of November 30, 2010, when the Control Officer informed Rosemont that the application was administratively complete. A third possible date of completion is June 1, 2011, when Rosemont provided the Control Officer with additional information concerning issues other than those pertaining to Rule 171.

The current Pima County Code provides a definition of "complete," for purposes of permit applications, in § 17.04.340(a)(52). It provides that an application shall be deemed complete when it "contains all the information necessary for processing the application." Importantly, the definition further provides that an application remains "complete" even if the Control Officer subsequently requests or accepts additional information. That clarification confirms that June 1, 2011 cannot be deemed the date of completion.

Because the Board has found that Rule 171 is inapplicable to the Rosemont application, the relevant completion date must be determined by reference to the date on which the Control Officer received an application that adequately addressed the other issues. The Board finds that November 30, 2011, was the date of completion.

In a separate proceeding in the United States District Court for the District of Arizona, Rosemont has contended that the Control Officer was obliged to act on its permit within 30 days of the date the company submitted its completed application. Plaintiff's Complaint, *Rosemont Copper Company v. Ursula Kramer, et al,* No. 4:11-CV-00552-RCC, ¶ 3. Rosemont contends in that case that the 30-day time limit to act arises from Rule 21-213 (C) of the 1979 County Regulations, later adopted as part of the Pima County SIP. Rosemont urges that the 30-day time limit remains in effect because it was approved by EPA as part of the Arizona SIP, and the County was without the power to amend it without approval. Rosemont cites 42 U.S.C. § 7416, which prohibits States from

unilaterally "adopting or enforcing any emissions standard or limitation which is less stringent" than a previously approved SIP.

As discussed above, the Board finds that EPA's approval of the comprehensive overhaul of the Pima County air quality regime effectively, if not expressly, removed the 1979 regulations from the SIP. Even were that not the case, however, Rosemont's argument would not be well-taken. Rosemont's District Court pleading cites § 7604 (f) for the proposition that the 1979 Pima County regulation requiring the Control Officer to act within 30 days remains today an enforceable part of the SIP, violation of which can support a citizen suit. *Plaintiff Rosemont Copper Company's Motion for Summary Judgment*, filed September 2, 2011, pp. 5-6. A proper reading of § 7604, however, confirms that a citizen's suit is authorized only when an event occurs that will have the effect of relaxing emissions standards or compliance deadlines by sources or categories of sources. The relevant stringency relates to the goal of achieving cleaner air. Relaxing the deadline for the Control Officer to act on a permit application is not the sort of relaxed progress toward achieving better air quality that can support a citizen suit. Accordingly, nothing in federal law or the SIP precluded the County from modifying its regulations regarding the deadlines for acting on permit approvals, as the County did. The applicable deadline for acting upon Rosemont's application is found in Pima County Code § 17.12.165, which requires the Control Officer to take final action on the Rosemont application within 18 months of receipt of the completed application, or by May 30, 2012.

IV. Conclusions of Law.

1. The 1979 version of the Pima County Air Quality Rules and Regulations, including but not limited to Rules 171 and 504 therein, are not enforceable by the Control Officer against Rosemont. Those rules have been superseded. Additionally, even had the County not itself amended such rules, they would be unenforceable by the County and Control Officer pursuant to A.R.S. § 49-112. Rosemont's application shall be governed by the current Pima County Code, Title 17, to the extent Title 17 is not more stringent than federal or state law. Rule 171 provides no basis for treating Rosemont as a major source of carbon monoxide or particulates.

3. Rule 171 of the 1979 version of the Pima County Air Quality Rules and Regulations was intended to be enforceable as a part of the Pima County and Arizona State Implementation Plan only with regard to proposed major sources in non-attainment areas of Pima County. Further, Rule 171 is no longer an enforceable portion of the Arizona State Implementation Plan.

4. Rule 21-213 (C) of the 1979 version of the Pima County Air Quality Rules and Regulations has been superseded and is not enforceable by Rosemont against the Control Officer. Pima County Code § 17.12.165 provides the deadlines for action by the Control Officer with regard to the Rosemont permit. Pursuant to § 17.12.165, the Control Officer is required to take final action on the Rosemont permit application within 18 months of receiving the completed permit application.

5. The Control Officer's decision to deny Rosemont's permit application based upon the provisions of Rules 171 and 504 was contrary to law, but not arbitrary and capricious.

6. November 30, 2010 is the date upon which the Control Officer received Rosemont's completed permit application.

V. **Order.**

In light of the foregoing, it is hereby ORDERED:

1. The Control Officer's September 28, 2011 decision to deny Rosemont's permit application is hereby reversed.

2. The permit application is remanded to the Control Officer for further proceedings consistent with this ruling.

3. The Control Officer shall proceed expeditiously with public comment on the draft Rosemont permit, as provided in Pima County Code § 172.12.165 (I)(7). Public comment shall be conducted for no less than thirty days and may be conducted for a longer period, provided it does not preclude the Control Officer from complying with the deadline below.

4. The Control Officer shall take final action on the Rosemont permit application no later than eighteen months after receipt of Rosemont's completed permit

application, as provided in Pima County Code § 172.12.165 (I)(6). November 30, 2010 shall be treated as the date of receipt by Control Officer of Rosemont's completed application, meaning that the Control Officer shall take final action on the Rosemont permit application no later than May 30, 2012.

5. Each party shall bear its own costs and attorney's fees.

Dated this __ day of December, 2011.

PIMA COUNTY AIR QUALITY HEARING BOARD

By: _____
Barry A. Friedman, Chairman

Original filed with the
following on this __ day of December, 2011:

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