BEFORE THE ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

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Greater Gardner Neighborhood Association, North Valley Coalition of Neighborhood Associations, Kyle Silfer, David Wood, Marcia Finical, as individuals.,

Appellants

Vs.

Permit Modification
Permit No. #0902-M3

City of Albuquerque Air Quality Division,

Appellee

APPEAL
PETITION FOR HEARING

PRELIMINARY STATEMENT

This is an appeal of the granting of Air Quality Authority-to-Construct Permit #0902-M3, Facility #35/001/00012 to American Cement Corporation by the City of Albuquerque Air Quality Division ("AQD"). This appeal is brought by community organizations Greater Gardner Neighborhood Association, North Valley Coalition of Neighborhood Associations, and individuals Kyle Silfer, David Wood, Marcia Finical.

This case involves the failure to protect the health, safety and welfare of the public without a proper review of all relevant evidence and the failure to incorporate principles of environmental justice in the permitting process which resulted in the Air Quality Permit Modification #0902-M3.

The Appellants respectfully request that the Albuquerque/Bernalillo County Air Quality Control Board ("AQCB") reverse the action granting Air Quality Permit Modification #0902-M3 under the New Mexico Air Quality Control Act, NMSA 74-2-7(K).

STATUTORY AND OTHER BASES FOR CLAIMS

Factual and evidentiary issues related to the issuance of a permit may be raised per NMSA 74-2-7(I)(K). Failure to ensure an environment that will confer optimum health, safety, comfort and economic and social well-being on its inhabitants and maximize their economic and

cultural benefits is a violation of NMSA 1978 § 74-1-2. Failure to consider public welfare, visibility and the reasonable use of property in granting an Air Quality Permit violates the definition of "air pollution" in NMSA 1978, § 74-2-2(B). Permits that disproportionately affect certain populations violate 42 U.S.C.A. § 2000d.

JURISDICTION

The Albuquerque/Bernalillo County Air Quality Control Board has jurisdiction to hear this appeal under NMSA 74-2-7(H). The Albuquerque/Bernalillo County Air Quality Control Board was created by Albuquerque Code of Ordinances §9-5-1-3 as a local board to perform, within the boundaries of the local authority, those functions delegated to the environmental improvement board under the Air Quality Control Act, except any functions reserved exclusively for the environmental improvement board under NMSA 74-2-4. Albuquerque Code of Ordinances §9-5-1-7(H) also provides for this petition for hearing before the Board.

TIMELINESS

As notice of this permit was granted on September 15, 2009, and notice was received by Appellants on October 2, 2009, this appeal is timely filed under NMSA 74-2-7(H).

PARTIES

Appellants are community organizations and individuals who participated in the permitting action before the Air Quality Division and who are adversely affected by the permitting action.

Appellant Greater Gardner Neighborhood Association is a neighborhood association of residents in Albuquerque's Near North Valley, an area that is, clockwise from the east, bounded by the Burlington North-Santa Fe Railroad tracks; bounded on the south by Mescalero Rd. NW, Fourth St. NW, the north border of the back lots of San Clemente Ave NW, Eleventh St. NW and La Luz Dr. NW, respectively; bounded on the west by Twelfth St. NW; bounded on the north by Griegos Rd. NW, bounded on the west (north of Griegos Rd. NW) by Fourth St. NW; and bounded on the north (east of Fourth St. NW) by Montano Rd. NW. The Greater Gardner area represents a portion of zip code 87107, which covers 14.5 square miles in the North Valley area of Albuquerque; it is bounded on the north by Los Ranchos Blvd, on the west by the Rio Grande, on the south by Menaul Blvd. and on the east by Carlisle Blvd. The population of zip code 87107 is 32,617, nearly 19,000 (58%) of whom are Hispanic. The median yearly household income of residents is $33,788. The area has five aggregate processing plants, three asphalt production facilities, six concrete production operations, and two cement distribution terminals, among other pollution sources. In Bernalillo County there are 939 permitted stationary sources of pollution which are permitted a total of 2388.62 tons per year of all suspended particulates. Zip code 87107 (with 5% of the county population) contains 11% of the stationary sources of pollution and 17% of the permitted yearly tonnage of total suspended particulates. The American Cement transfer facility is located less than 2000 feet from from La

Luz Elementary School and less than 3000 feet from Mountain Mahogany Community School.

Appellant North Valley Coalition of Neighborhood Associations provides a forum for an exchange of ideas between residents, businesses, property owners, neighborhood associations, institutions, and government toward preserving, protecting, and enhancing the North Valley Area consistent with the adopted Goals and Policies of the North Valley Area Plan. The Plan's chief goal is to "recognize the North Valley area as a unique and fragile resource and as an inestimable and irreplaceable part of the entire metropolitan community." A specific purpose of this plan is to "preserve air, water and soil quality in the North Valley area" and to "encourage quality commercial/industrial development and redevelopment." Members of the North Valley Coalition include Los Griegos Neighborhood Association, Stronghurst Neighborhood Association, Near North Valley Neighborhood Association, and Monkbridge Gardens Neighborhood Association.

Appellant Kyle Silfer is president of the Greater Gardner Neighborhood Association. Since moving into the neighborhood in 2003, he has suffered multiple cases of bronchial pneumonia. His residence is located less than 2000 feet from the facility. He has two small children.

Appellant David Wood is vice-president of the Greater Gardner Neighborhood Association and a long-time resident of the neighborhood directly abutting the American Cement facility. His residence is located little more than 1000 feet from the facility.

Appellant Marcia Finical is Secretary of the of the Greater Gardner Neighborhood Association and lives less than 1000 feet from the American Cement facility.

Appellee City of Albuquerque Air Quality Division is the local agency assigned to the role of the New Mexico Environment Department in enforcing the New Mexico Air Quality Control Act by the Joint Air Quality Control Board Ordinance, §9-5-1-1, et seq. The Joint Air Quality Control Board Ordinance also created the Albuquerque-Bernalillo County Air Quality Control Board to serve as a joint local authority acting on behalf of both the city and the county. This Board assumed jurisdiction under the New Mexico Air Quality Control Act NMSA §74-2-4.

ESSENTIAL FACTS

American Cement Corporation was granted an Authority-to-Construct Permit Modification on September 15, 2009 by the Air Quality Division of the City of Albuquerque's Environmental Health Department.

The original permit application from American Cement Corporation was received by the Air Quality Division on February 26, 2009. Additional information was received March 2, 2009, March 13, 2009, and March 19, 2009.

The application was deemed complete on March 19, 2009.

Public information hearings on the permit application were held on June 23, 2009 and August 5, 2009.

STATEMENT OF CLAIMS

FIRST CLAIM

The American Cement Authority-to-Construct permit was issued without adequate conditions to protect the health, safety and welfare of the public and without a proper review of all relevant evidence. Neighborhood residents provided substantial testimony regarding continued fugitive dust problems with the facility. Video footage date-stamped June 19, 2008 and documenting an obvious violation of the existing permit 0902-M1 while the facility was under the management of the new owners was not given proper weight. Officers of the Greater Gardner Neighborhood Association and North Valley Coalition of Neighborhood Associations made a clear request for the best available control technology, including more efficient pulse-jet fabric filters instead of cartridge-type collectors, completely enclosed transfer points for loading and unloading at all silos, and fence-line monitoring. None of these requests were included in the conditions of the permit as issued, despite the fact that the applicant proposed building a neighborhood PM monitor in a list of proposed capital improvements provided to the Air Quality Division on June 11, 2008.

SECOND CLAIM

The action of the Air Quality Division in granting the Authority-to-Construct permit failed to incorporate principles of environmental justice in its decision. Per Attorney General of New Mexico Opinion No. 08-03, "Environmental justice principles center on the concept that a government agency should notify the public, and factor in public testimony regarding a company's environmental impact on the community, particularly in a minority or impoverished community, prior to issuing a permit to that company." The New Mexico Department of Health provided data derived from the historical record and could not rule out causation with regard to exposure to cement dust and certain of the ailments listed in the table, nor the possibility that future risk and burden to the community will emulate past risk and burden. Additionally, the decision to grant the permit was made without asthma data from La Luz Elementary School that had been requested by Bernalillo County Environmental Health. Studies have linked increased exposure to particles of 10 micrometers or less with bronchitis and phlegm in children with asthma. Furthermore, studies indicate that hospital admissions for bronchitis and asthma increase as PM10 levels increase. Without incorporating principles of environmental justice into the decision-making process, a concentration of pollution in a single area can continue to grow without meaningful regulation or planning.

THIRD CLAIM

Air Quality Authority-to-Construct Permit #0902-M3 as written does not appear to be

"enforceable as a practical matter." It is unclear how control efficiency will be verified either initially or as the source continues to operate. The permit should be clear enough for the public, the source, and the enforcing agency to know exactly what is being emitted and how it is being emitted, how it is being controlled and at what levels. A review of the text of Air Quality Authority-to-Construct Permit #0902-M3 is currently in progress by Environmental Protection Agency Region 6 staff. Questions about the federal enforceability of the permit as issued have been raised. The deadline for appealing the permit decision is likely to pass before these questions are answered.

FOURTH CLAIM

Any other factual or legal issues identified by Petitioner prior to the hearing.

RELIEF REQUESTED

Appellants hereby request that the Board reverse the decision by the Air Quality Division to grant the American Cement Corporation's Authority-to-Construct permit.

DATED: November 1, 2009

Kyle Silfer, Appellant
Greater Gardner Neighborhood Association, Appellant
North Valley Coalition of Neighborhood Associations, Appellant
David Wood, Appellant
Marcia Finical, Appellant