STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR A HEARING ON THE MERITS
REGARDING AMERICAN CEMENT CORPORATION AIR QUALITY PERMIT No. 0902-M3

Greater Gardner Neighborhood Association, North Valley Coalition of Neighborhood Associations, Kyle Silfer, David Wood, Marcia Finical, as individuals, Petitioners/Appellants, v. City of Albuquerque Environmental Health Department, Air Quality Division, Respondent/Appellee	AQCB No. 2009-7

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ANSWER OF THE CITY OF ALBUQUERQUE

The City of Albuquerque (City) files this Answer in response to the *Appeal Petition for Hearing* that was filed on November 2, 2009 (hereafter, the "November 2 Petition" or "Petition"), by Kyle Silfer individually and as President of the Greater Gardner Neighborhood Association, on behalf of the North Valley Coalition of Neighborhood Associations, on behalf of David Wood individually, and on behalf of Marcia Finical individually. Mr. Silfer is not an attorney and no evidence was provided in the November 2 Petition that Mr. Silfer was authorized to represent the North Valley Coalition of Neighborhood Associations, David Wood (Mr. Wood) or Marcia Finical (Mr. Finical). Mr. Silfer also did not provide his mailing address or the mailing addresses of the other Petitioners.

Because Mr. Silfer filed the Answer *pro se*, the undersigned Deputy City Attorney Adelia Kearny, on the direction of her client, brought the following issues to the attention of Mr. Silfer by letter and e-mail dated November 5, 2009: the absence of an oath or affirmation attesting to the truth of the information in the Petition, which is required by 20.11.81.14.A(1) NMAC; the lack of an address at which Mr. Silfer is to be served, although required by 20.11.81.B(2)(b) NMAC; the absence of documentation establishing that Mr. Silfer is authorized to represent the North Valley Coalition of Neighborhood Associations, Mr. Wood individually or Ms. Finical individually; and non compliance with other requirements of

20.11.81 NMAC that are less critical to the City Environmental Health Department Air Quality Division permitting staff, including failure to file nine copies of the Petition with the Hearing Clerk as required by 20.11.81.14.A(2) NMAC, and a caption that does not conform to 20.11.81.12.G(1) NMAC.

As a result of communications between the undersigned and Mr. Silfer, Mr. Silfer delivered a signed and dated Waiver and Release, a copy of which is Attachment 1 to this Answer. As provided by 20.11.81.14.C NMAC, the Waiver and Release waives the Petitioners' right to begin a public hearing regarding the permit challenge within 30 days of receipt of the request for public hearing. By signing the Waiver and Release, Mr. Silver warranted he is authorized to represent the two organizations and three individuals named as Appellants/petitioners in the Petition, and that Mr. Silfer has full legal authority to execute the Waiver and Release and bind all the Petitioners.

By November 9 and November 10, 2009 e-mails, Ms. Silfer committed to filing a first amended Answer. However, November 17 is the deadline for the City to file its answer to the November 2 Petition. The City Answers as follows.

Answer to Petitioners' *Appeal Petition for Hearing*

1. Petitioners' "Preliminary Statement": The City admits the allegations in the first sentence of the first paragraph of Petitioners' "Preliminary Statement".

2. Petitioners' "Preliminary Statement": The City admits the allegations contained in the second sentence of the first paragraph of Petitioners' "Preliminary Statement".

3. Petitioners' "Preliminary Statement": The City admits the allegations in the second paragraph of Petitioners' "Preliminary Statement" contain Petitioners' description of Petitioners' arguments on appeal, which consist of legal conclusions and legal arguments, and which the City denies. To the extent the remainder of the second paragraph contains factual allegations, the City denies all allegations.

4. Petitioners' "Preliminary Statement": The City respectfully requests that the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) deny the relief requested by the Petitioners in the third paragraph of Petitioners' "Preliminary Statement", and that the Air Board sustain the issuance of air quality Authority-to-Construct Permit 902-M3 by the City Environmental Health Department Air Quality Division.

5. Petitioners' "Statutory and Other Bases for Claims" section: The City admits a timely petition for hearing may be heard by the Air Board if the petitioners meet the requirements of the New Mexico Air Quality Control Act, NMSA Section 74-2-1 et seq. (1978) (Air Act), specifically NMSA §§ 74-2-7(H) and (I), and 20.11.81 NMAC and that facts and other

evidence regarding permitting may be raised if authorized by NMSA § 74-2-7 and 20.11.81 NMAC. The City denies that factual and evidentiary issues may be raised per NMSA § 74-2-7(K), and, to the extent the remainder of the first sentence of Petitioners' "Statutory and Other Bases for Claims" section contains additional factual allegations, the City denies all such allegations.

6. Petitioners' "Statutory and Other Bases for Claims": The wording in the second sentence of Petitioners' "Statutory and Other Bases for Claims" section is taken from the New Mexico Environmental Improvement Act (EIA), NMSA 74-1-1 et seq. (1978), specifically NMSA § 74-1-2, *Purpose of Environmental Improvement Act*. The EIA does not apply to the Air Board or political subdivisions. Therefore, City denies all allegations contained in the second sentence of Petitioners' "Statutory and Other Bases for Claims" section.

7. Petitioners' "Statutory and Other Bases for Claims": The City denies the allegations contained in the third sentence of Petitioners' "Statutory and Other Bases for Claims" section.

8. Petitioners' "Statutory and Other Bases for Claims": To the extent the allegations contained in the fourth sentence of Petitioners' "Statutory and Other Bases for Claims" section are intended to assert a claim under Title VI of the Civil Rights Act of 1964 (42 U.S.C § 2000d to 2000d-7) in this administrative appeal to the Air Board, the City denies 42 U.S.C § 2000d applies to AQCB No. 2009-7. The City further states that 42 U.S.C § 2000d speaks for itself, and Petitioners' statement in the fourth sentence is nothing more than a legal argument and legal conclusion. To the extent the fourth sentence of Petitioners' "Statutory and Other Bases for Claims" section contains legal or factual allegations, the City denies all allegations.

9. Petitioners' "Jurisdiction" section: The City admits the Air Board has jurisdiction to hear appeals pursuant to NMSA 74-2-7(H) and 20.11.81 NMAC. The City denies the Air Board has jurisdiction to hear all of the issues raised on appeal in AQCB No. 2009- 7. To the extent the remainder of the first sentence of Petitioners' "Jurisdiction" section contains additional factual allegations, the City denies.

10. Petitioners' "Jurisdiction" section: The City admits the allegations contained in the second sentence of Petitioners' "Jurisdiction" section and states the Air Board also was created by Bernalillo County Joint Air Quality Control Board Ordinance No. 94-5 (County Ordinance), Section 3.

11. Petitioners' "Jurisdiction" section: The City admits the City Joint Air Quality Control Board Ordinance, 9-5-1-1 et seq. ROA 1994 (City Ordinance) at 9-5-1-7(H) authorizes

appeals to the Air Board that comply with the requirements of the Air Act and the City Ordinance. The City denies the Air Board has jurisdiction to hear all of the issues raised on appeal in AQCB No. 2009-7. To the extent the remainder of the third sentence of Petitioners' "Jurisdiction" section contains additional factual allegations, the City denies.

12. Petitioners' "Timeliness" section: The City denies that notice of the permit was granted on September 15, 2009; the City affirms that the air quality Authority-to-Construct Permit # 902-M3 was signed on September 15, 2009. The City admits the Petitioners received the participant notification letter on or after October 2, 2009, and that the Petition was timely filed.

13. Petitioners' "Parties" section: The City admits Petitioners are community organizations and individuals who participated in the permitting action before the Air Quality Division of the City, but is without information sufficient to form a belief regarding the remaining allegations in the first paragraph of Petitioners' "Parties" section and therefore denies the remainder of the allegations.

14. Petitioners' "Parties" section: The City admits the allegations contained in the first sentence of the second paragraph of Petitioners' "Parties" section.

15. Petitioners' "Parties" section: The City admits Greater Gardner NA is a portion of zip code 87107; admits the area of zip code 87107 is approximately 14.5 square miles; that Greater Gardner NA comprises approximately 0.34 square miles, which is 2.3% of the area of zip code 87107; and admits the accuracy of the boundary description of zip code 87107 in the second sentence of the second paragraph of Petitioners' "Parties" section. The City denies all other allegations contained in the second sentence of the second paragraph of Petitioners' "Parties" section.

16. Petitioners' "Parties" section: The information asserted by Petitioners in third sentence of Petitioners' "Parties" section does not include a reference to a year. The City affirms that, as of November 126, 2009, the Year 2000 Census reports a population of 30,781 for zip code 87107, that the 2000 Census reports that 17,043 people within zip code 87107 (55.4%) are Hispanic, and denies all additional allegations contained in the third sentence of the second paragraph of Petitioners' "Parties" section.

17. Petitioners' "Parties" section: The information asserted by Petitioners in the fourth sentence of Petitioners' "Parties" section does not include a reference to a year. The City affirms that, as of November 16, 2009, the Year 2000 Census reports the median yearly household income for zip code 87107 is $34,645, and denies all additional allegations contained in the fourth sentence of the second paragraph of Petitioners' "Parties" section.

18. Petitioners' "Parties" section: The Petitioners did not define the "area" when it provided information in the fifth sentence of Petitioners' "Parties" section. As a result, the City is without information sufficient to respond, and therefore denies the allegations contained in the fifth sentence of the second paragraph of Petitioners' "Parties" section.

19. Petitioners' "Parties" section: The information provided in the sixth sentence of the second paragraph of Petitioners' "Parties" section did not include a reference to a date. However, the City affirms that, as of the date the City filed this Answer, within Bernalillo County there are 993 stationary sources with both air quality permits and air quality registrations, and that the stationary sources are permitted to emit a total of 2,550 tons per year of total suspended particulates (TSP), which includes TSP PM10 and PM2.5 as subsets of TSP. The City denies all other allegations contained in the sixth sentence of the second paragraph of Petitioners' "Parties" section.

20. Petitioners' "Parties" section: The information provided in the seventh sentence of the second paragraph did not include a reference to a date. However, the City affirms that, as of November 16, 2009, according to 2000 Census data, zip code 87107 was 5.5% of the total population of Bernalillo County, and zip code 87107 contained 10.4% of the stationary sources of air pollution and 8.1% of the permitted annual tonnage of total suspended particulates. The City denies all other allegations contained in the seventh sentence of the second paragraph of Petitioners' "Parties" section.

21. Petitioners' "Parties" section: The City admits the allegations contained in the eighth sentence of the second paragraph of Petitioners' "Parties" section.

22. Petitioners' "Parties" section: The City states that the North Valley Coalition of Neighborhood Associations documents speak for themselves. To the extent the wording of the first sentence of the third paragraph of Petitioners' "Parties" sections does not accurately and completely quote from or summarize those documents, the City denies.

23. Petitioners' "Parties" section: The City states that the North Valley Area Plan speaks for itself. To the extent the wording of the second sentence of the third paragraph of Petitioners' "Parties" section does not accurately and completely quote from or summarize the Plan, the City denies.

24. Petitioners' "Parties" section: The City states that the North Valley Area Plan speaks for itself. To the extent the wording of the third sentence of the third paragraph of Petitioners' "Parties" section does not accurately and completely quote from or summarize the Plan, the City denies.

25. Petitioners' "Parties" section: The City admits the allegations contained in the fourth sentence of the third paragraph of Petitioners' "Parties" section.

26. Petitioners' "Parties" section: The City admits the allegations contained in the first sentence of the fourth paragraph of Petitioners' "Parties" section.

27. Petitioners' "Parties" section: The City is without information sufficient to form a belief regarding the accuracy of the statements contained in the second sentence of the fourth paragraph of Petitioners' "Parties" section and therefore denies.

28. Petitioners' "Parties" section: The City admits the allegations contained in the third sentence of the fourth paragraph of Petitioners' "Parties" section.

29. Petitioners' "Parties" section: The City is without information sufficient to form a belief regarding the accuracy of the statements contained in the fourth sentence of the fourth paragraph of Petitioners' "Parties" section and therefore denies.

30. Petitioners' "Parties" section: The City is without information sufficient to form a belief regarding the accuracy of the statements contained in the first sentence of the fifth paragraph of Petitioners' "Parties" section and therefore denies.

31. Petitioners' "Parties" section: The City admits Mr. Wood's residence is located approximately 1,000 feet from the American Cement facility, as alleged in the second sentence of the fifth paragraph of Petitioners' "Parties" section.

32. Petitioners' "Parties" section: The City is without information sufficient to form a belief regarding the accuracy of the statement regarding Ms. Finical's role in the Greater Gardner Neighborhood Association, and admits Ms. Finical lives approximately 1,000 feet from the American Cement facility as alleged in the sixth paragraph of Petitioners' "Parties" section.

33. Petitioners' "Parties" section: The City admits the Air Act and the City Ordinance authorize the City Environmental Health Department to be the local agency to administer and enforce air quality regulations and programs within Bernalillo County, just as the New Mexico Environment Department has authority to administer and enforce air quality regulations and programs within the state of New Mexico, outside Bernalillo County. The City denies all other allegations contained in the first sentence of the seventh paragraph of Petitioners' "Parties" section.

34. Petitioners' "Parties" section: The Air Act at NMSA §74-2-2(J) defines "local authority" as a qualifying political subdivision. Therefore, the City denies the allegations in the second sentence of the seventh paragraph of Petitioners' "Parties" section.

35. Petitioners' "Parties" section: The City admits the Air Board assumed authority over air quality within Bernalillo County pursuant to the Air Act at NMSA § 74-2-4, the City Ordinance at 9-5-1-3, and the Bernalillo County Ordinance at Section 3.

36. Petitioners' "Essential Facts" section: The City admits the allegations contained in the first paragraph of Petitioners' "Essential Facts" section.

37. Petitioners' "Essential Facts" section: The City admits the allegations contained in the first sentence of the second paragraph of Petitioners' "Essential Facts" section.

38. Petitioners' "Essential Facts" section: The City admits the allegations contained in the second sentence of the second paragraph of Petitioners' "Essential Facts" section.

39. Petitioners' "Essential Facts" section: The City admits the allegations contained in the third paragraph of Petitioners' "Essential Facts" section.

40. Petitioners' "Essential Facts" section: The City admits the allegations contained in the fourth paragraph of Petitioners' "Essential Facts" section.

41. Petitioners' "Statement of Claims – First Claim": The City denies the allegations contained in the first sentence of Petitioners' "First Claim".

42. Petitioners' "Statement of Claims – First Claim": The City admits the allegations contained in the second sentence of Petitioners' "First Claim".

43. Petitioners' "Statement of Claims – First Claim": The City admits video footage with a manually-affixed date stamp of June 19, 2008 was submitted at a summer of 2009 Public Information Hearing (PIH). The City denies all other allegations contained in the third sentence of Petitioners' "First Claim".

44. Petitioners' "Statement of Claims – First Claim": The City admits participants in the PIHs requested inclusion of best available control technology (BACT) in American Cement's proposed air quality Permit No. 902-M3. However, the City states affirmatively that federal, state, and Air Board regulations only require installation of BACT technology at major stationary sources that are subject to prevention of significant deterioration (PSD) requirements imposed by 20.11.61 NMAC, *Prevention of Significant Deterioration* (Part 61). The American Cement facility is a minor, not major, stationary source. American Cement is subject to the minor source permitting regulation 20.11.41 NMAC, *Authority-to-Construct,* not to Part 61 PSD BACT requirements. The City denies all other allegations contained in the fourth sentence of Petitioners' "First Claim".

45. Petitioners' "Statement of Claims – First Claim": The City admits BACT requirements were not included in Permit 902-M3 for the reasons stated in the Answer 44. The City also admits that during negotiations with the new owner regarding resolution of the

prior owner's violations, the Air Quality Division received a June 11, 2008 letter and attachment from the new owner of American Cement with a list of potential improvements at the facility. The City admits the new owner initially offered to install and operate a neighborhood PM monitor for one year and to turn the facility over to the Air Quality Division for operation. The City affirmatively states that in 2008 the new owner of the American Cement facility performed an air quality self-audit of the facility, self-reported existing violations to the Air Quality Division, and was issued a Notice of Violation by the Air Quality Division that ultimately was resolved pursuant to the EPA's *Interim Approach to Applying the Audit Policy to New Owners.* The City affirms that the new owner ultimately signed a Compliance Agreement that included significant changes and improvements at the facility that were not required by the air quality permit in effect at the time or by applicable laws, and that the new owner paid a $61,525 penalty into the City general fund. In addition, the City affirms that the Air Quality Division operates more air quality monitoring stations within Bernalillo County than are required by the EPA, and that air quality within Bernalillo County is well within all federal, state of New Mexico, and local health-based air quality standards, which includes the standards for particulates. The City denies all other allegations contained in the fifth sentence of Petitioners' "First Claim".

46. Petitioners' "Statement of Claims – Second Claim": The City denies the allegations contained in the first sentence of Petitioners' "Second Claim".

47. Petitioners' "Statement of Claims – Second Claim": The City states the Attorney General of New Mexico Opinion No. 08-03 speaks for itself. To the extent the wording of the second sentence of Petitioners' "Second Claim" does not accurately and completely quote from the opinion, the City denies.

48. Petitioners' "Statement of Claims – Second Claim": The City admits the allegations contained in the third sentence of Petitioners' "Second Claim", and affirmatively states the data did not establish causation.

49. Petitioners' "Statement of Claims – Second Claim": The City admits the allegations contained in the fourth sentence of Petitioners' "Second Claim".

50. Petitioners' "Statement of Claims – Second Claim": The City admits the allegations contained in the fifth sentence of Petitioners' "Second Claim".

51. Petitioners' "Statement of Claims – Second Claim": The City admits the allegations contained in the sixth sentence of Petitioners' "Second Claim".

52. Petitioners' "Statement of Claims – Second Claim": The City denies the allegations contained in the seventh sentence of Petitioners' "Second Claim", and states

affirmatively that Permit 902-M3 was issued consistent with all requirements of the New Mexico Air Act, the City Ordinance, and the Air Board regulations.

53. Petitioners' "Statement of Claims – Third Claim": The City denies the allegations contained in the first sentence of Petitioners' "Third Claim".

54. Petitioners' "Statement of Claims – Third Claim": The City denies the allegations contained in the second sentence of Petitioners' "Third Claim".

55. Petitioners' "Statement of Claims – Third Claim": The City admits a minor source air quality permit should be clear enough for the public, the source, and the enforcing agency to know what is being emitted and how it is being emitted, how it is being controlled and at what levels. The City denies all other allegations contained in the third sentence of Petitioners' "Third Claim".

56. Petitioners' "Statement of Claims – Third Claim": The City admits the allegations contained in the fourth sentence of Petitioners' "Third Claim".

57. Petitioners' "Statement of Claims – Third Claim": The City admits the allegations contained in the fifth sentence of Petitioners' "Third Claim".

58. Petitioners' "Statement of Claims – Third Claim": The City admits the allegations contained in the sixth sentence of Petitioners' "Third Claim".

59. Petitioners' "Statement of Claims – Fourth Claim": The City is without information sufficient to form a belief regarding potential facts or legal issues that may be identified or raised by Petitioner prior to hearing. Therefore, the City denies all allegations contained in Petitioners' "Fourth Claim".

Affirmative Defenses

60. Regarding Petitioners' "Relief Requested" section, the Petitioners did not allege how the Petitioners are adversely affected by the permitting action. Therefore, the City respectfully asks the Air Board to deny the relief requested, dismiss Petitioners' *Appeal Petition for Hearing* with prejudice, and sustain the issuance of Permit No. 902-M3.

61. Regarding Petitioners' "Relief Requested" section, the Petitioners did not allege how the petitioner is adversely affected by the permitting action or cite to a board regulation other than 20.11.81 NMAC that authorizes the Petitioners to request a hearing on the merits as required by 20.11.81.14.B(2)(c) NMAC. Petitioners also failed to specify the portions of the permitting action to which the petitioner objects as required by 20.11.81.18.B(2)(d) NMAC. Therefore, the City respectfully asks the Air Board to deny the relief requested,

dismiss Petitioners' *Appeal Petition for Hearing* with prejudice, and sustain the issuance of Permit No. 902-M3.

62. Regarding Petitioners' "Relief Requested" section, the City Petitioners failed to state a claim upon which relief may be granted. Therefore, the City respectfully asks the Air Board to deny the relief requested, dismiss Petitioners' *Appeal Petition for Hearing* with prejudice, and sustain the issuance of Permit No. 902-M3.

Response to Prayer for Relief

63. In response to Petitioners' "Relief Requested", and based on the foregoing Answer, the City respectfully asks the Air Board to deny the relief requested, dismiss Petitioners' *Appeal Petition for Hearing* with prejudice, sustain the issuance of Permit No. 902-M3, and grant the City any additional relief deemed appropriate by the Air Board.

Respectfully submitted,

CITY OF ALBUQUERQUE
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Deputy City Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2009, a copy of the foregoing *Answer of the City of Albuquerque,* with Attachment 1 (copy of Waiver and Release) attached, was mailed by regular mail, postage prepaid to Kyle Silfer, individually and as representative of Greater Gardner Neighborhood Association; North Valley Coalition of Neighborhood Associations; David Wood, individually; and Marcia Finical, individually, at follows:

Kyle Silfer, individually, and as
President of Greater Gardner NA
4465 Jupiter NW
Albuquerque, NM 87107

and that a copy was sent by electronic mail to Kyle Silfer at kyle@rtoads.com

by: Adelia W. Kearny, Deputy City Attorney

WAIVER AND RELEASE

Regarding Extension of Deadline for Holding Hearing

The Air Quality Division (AQD) of the City of Albuquerque (City) Environmental Health Department issued American Cement Authority-to-Construct Permit modification # 0902-M3, effective September 15, 2009. Kyle received the participant notification letter sent by AQD informing Mr. Silfer that the permit modification had been issued, the process followed by AQD during its review, the conditions incorporated in the permit modification, and the deadline for requesting a hearing before the Albuquerque-Bernalillo County Air Quality Control Board (Air Board). On November 2, 2009, Kyle Silfer filed an *Appeal Petition for Hearing* dated November 1, 2009 with the Air Board Hearing Clerk.

The Air Board is directed by subsection F of 20.11.41.14 NMAC and paragraph (1) of subsection F of 20.11.81.14 NMAC to hold a public hearing regarding an authority-to-construct permit challenge within 30 days of receipt of the request for public hearing unless the Petitioner waives the deadline pursuant to 20.11.81.14.C NMAC. By signing this Waiver and Release, Kyle Silfer, on behalf of the two organizations and three individuals named as Appellants (petitioners) in the Appeal Petition for Hearing filed November 2, 2009, hereby waives the 30-day deadline, and forever waives, releases and discharges any and all rights and claims for damages or other relief that the Appellants/petitioners may have against the Air Board, each individual member of the Board, the City, and all City officials, officers, employees, contractors and agents as a result of the Air Board not holding the public hearing within 30 days of receipt of the Appeal Petition for Hearing.

The individual signing this Waiver and Release warrants he is authorized to represent the two organizations and three individuals named as Appellants/petitioners in the Appeal Petition for Hearing and has full legal authority to execute this Waiver and Release on behalf of the Greater Gardner Neighborhood Association (GGNA), the North Valley Coalition of Neighborhood Associations (NVCNA), David Wood individually and Marcia Finical individually, and to bind GGNA, NVCNA, David Wood, Marcia Finical, and himself to its terms.

By: _____
Kyle Silfer, individually, and
as authorized representative of
Greater Gardner Neighborhood Association,
North Valley Coalition of Neighborhood Associations,
David Wood individually, and
Marcia Finical individually

Date: 11/10/09