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

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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

ANSWER OF THE CITY OF ALBUQUERQUE TO PETITION FILED NOVEMBER 17, 2009

The City of Albuquerque (City) files this Answer in response to the *Appeal Petition for Hearing* that was filed on November 17, 2009 (hereafter the "November 17 Petition" or "Petition". The November 17 Petition was filed by the Petitioners/Appellants (hereafter "Petitioners") after Petitioners filed an identically-named *Appeal Petition for Hearing* on November 2 (hereafter "November 2 Petition"). The City Answers as follows.

Answer to Petitioners' November 17, 2009 *Appeal Petition for Hearing*

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

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

3. Petitioners' "Preliminary Statement", second para.: The City admits that the second paragraph of Petitioners' "Preliminary Statement" contains Petitioners' description

of Petitioners' arguments on appeal, and that the statements consist of legal arguments and legal conclusions, each of 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", third para.: 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-

5. Petitioners' "Statutory and Other Bases for Claims", first sentence: 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 (Air Act), NMSA 1978, §§ 74-2-1 to 17, 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 legal or factual allegations, the City denies all such allegations.

6. Petitioners' "Statutory and Other Bases for Claims", second sentence: 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 1978, §§ 74-1-1 to 74-1-16, specifically NMSA § 74-1-2, *Purpose of Environmental Improvement Act.* The EIA does not apply to the Air Board or political subdivisions of the State of New Mexico. 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", third sentence: 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", fourth sentence: 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 that 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 regarding unidentified "certain" populations, contains legal or factual allegations, the City denies all allegations.

9. Petitioners' "Jurisdiction" section, first sentence: 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 legal or factual allegations, the City denies.

10. Petitioners' "Jurisdiction" section, second sentence: 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, third sentence: 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 legal or 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, first para.: 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, second para., first sentence: The City admits the allegations contained in the first sentence of the second paragraph of Petitioners' "Parties" section.

15. Petitioners' "Parties" section, second para., second sentence: 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, second para., third sentence: The information asserted by Petitioners in third sentence of the second paragraph 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 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, second para., fourth sentence: 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, second para., fifth sentence: The Petitioners did not define the "area" referred to in the fifth sentence of the second paragraph 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, second para., sixth sentence: The information provided in the sixth sentence of the second paragraph of Petitioners' "Parties" section does not include a reference to a date. However, the City affirms that, as of November 17, 2009, within Bernalillo County there were 993 stationary sources with air quality permits and air quality registrations, that the stationary sources are permitted to emit a total of 2,550 tons per year of total suspended particulates (TSP), and that TSP includes 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, second para., seventh sentence: The information provided in the seventh sentence of the second paragraph does 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, second para., eighth sentence: The City admits the allegations contained in the eighth sentence of the second paragraph of Petitioners' "Parties" section.

22. Petitioners' "Parties" section, second para., ninth sentence: The information provided in the ninth sentence of the second paragraph appears to be nothing more than contact information for the President of the Greater Gardner Neighborhood Association. To the extent the ninth sentence of the second paragraph contains additional legal or factual allegations, the City denies all allegations.

23. Petitioners' "Parties" section, third para., first sentence: The City states that the North Valley Coalition of Neighborhood Associations documents and the North Valley Area Plan 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.

24. Petitioners' "Parties" section, third para., second sentence: 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.

25. Petitioners' "Parties" section, third para., third sentence: 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.

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

27. Petitioners' "Parties" section, third para., fifth sentence: The information provided in the fifth sentence of the third paragraph appears to be nothing more than contact information for the President of the North Valley Coalition of Neighborhood Associations. To the extent the fifth sentence of the third paragraph contains additional legal or factual allegations, the City denies all allegations.

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

29. Petitioners' "Parties" section, fourth para., second sentence: 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.

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

31. Petitioners' "Parties" section, fourth para., fourth sentence: 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.

32. Petitioners' "Parties" section, fourth para., fifth sentence: The information provided in the fifth sentence of the fourth paragraph appears to be nothing more than contact information for Petitioner Kyle Silfer. To the extent the fifth sentence of the fourth paragraph contains additional legal or factual allegations, the City denies all allegations.

33. Petitioners' "Parties" section, fifth para., first sentence: 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.

34. Petitioners' "Parties" section, fifth para., second sentence: 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.

35. Petitioners' "Parties" section, fifth para., third sentence: The information provided in the third sentence of the fifth paragraph appears to be nothing more than contact information for Petitioner David Wood. To the extent the third sentence of the fifth paragraph contains additional legal or factual allegations, the City denies all allegations.

36. Petitioners' "Parties" section, sixth para., first sentence: 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.

37. Petitioners' "Parties" section, sixth para., second sentence: The information provided in the second sentence of the sixth paragraph appears to be nothing more than contact information for Petitioner Marcia Finical. To the extent the second sentence of the sixth paragraph contains additional legal or factual allegations, the City denies all allegations.

38. Petitioners' "Parties" section, seventh para., first sentence: The City admits the Air Act and the City Ordinance authorize the City Environmental Health Department to be the local agency that administers and enforces 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.

39. Petitioners' "Parties" section, seventh para., second sentence: The Air Act at NMSA §74-2-2(J) defines "local authority" as a qualifying political subdivision, not a board. Therefore, the City denies the allegations in the second sentence of the seventh paragraph of Petitioners' "Parties" section.

40. Petitioners' "Parties" section, seventh para., third sentence: The City admits the Air Board assumed jurisdiction over air quality within Bernalillo County pursuant to the Air Act at NMSA § 74-2-4, the City Ordinance at 9-5-1-3 ROA 1994, and the Bernalillo County Ordinance at Section 3.

41. Petitioners' "Essential Facts" section, first para.: The City admits on September 15, 2009 the Air Quality Division of the City Environmental Health Department issued air quality Authority-to-Construct Permit No. 0902-M3 to American Cement Corporation. The City denies all other allegations in the first paragraph of Petitioners' "Essential Facts" section.

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

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

44. Petitioners' "Essential Facts" section, third para., first sentence: The City admits the allegations contained in the first sentence of the third paragraph of Petitioners' "Essential Facts" section.

45. Petitioners' "Essential Facts" section, third para., second sentence: The City admits the allegations contained in the second sentence of the third paragraph of Petitioners' "Essential Facts" section.

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

47. Petitioners' "Statement of Claims – First Claim", second sentence: The City admits neighborhood residents provided testimony as described in the second sentence of Petitioners' "First Claim".

48. Petitioners' "Statement of Claims – First Claim", third sentence: 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".

49. Petitioners' "Statement of Claims – First Claim", fourth sentence: 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 a major, stationary source. American Cement is subject to the minor source permitting regulation 20.11.41 NMAC, *Authority-to-Construct,* and is not subject to Part 61 PSD major source BACT requirements. The City denies all other allegations contained in the fourth sentence of Petitioners' "First Claim".

50. Petitioners' "Statement of Claims – First Claim", fifth sentence: The City admits BACT requirements were not included in Permit 902-M3 for the reasons stated in Answer 49 above. 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 then 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 recently-acquired facility, self-reported past and existing violations to the Air Quality Division, and was issued a Notice of Violation (NOV) by the Air Quality Division. The NOV ultimately was resolved consistent

with 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 described significant changes and improvements at the facility that were make by the new owner and were not required either by the air quality permit that was in effect at that 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".

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

52. Petitioners' "Statement of Claims – Second Claim", second sentence: 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.

53. Petitioners' "Statement of Claims – Second Claim", third sentence: The City admits the New Mexico Department of Health provided data derived from historical record, admits the Department of Health could not rule out causation, and affirmatively states the data did not establish causation. The City denies all other allegations contained in the third sentence of Petitioners' "Second Claim".

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

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

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

57. Petitioners' "Statement of Claims – Second Claim", seventh sentence: 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.

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

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

60. Petitioners' "Statement of Claims – Third Claim", third sentence: 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 affirmatively states air quality Authority-to-Construct Permit 0902-M3 is 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".

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

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

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

64. 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

65. 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' November 17, 2009 *Appeal Petition for Hearing* with prejudice, and sustain the issuance of air quality Authority-to-Construct Permit No. 902-M3.

Response to Request for Relief

66. In response to Petitioners' request for relief, and based on the foregoing Answer, the City respectfully asks the Air Board to deny the relief requested, dismiss Petitioners' November 17, 2009 *Appeal Petition for Hearing* with prejudice, sustain the issuance of air

quality Authority-to-Construct Permit No. 902-M3, and grant the City any additional relief deemed appropriate by the Air Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009: 1.) the original *Answer of the City of Albuquerque to Petition Filed November 17, 2009* was filed with the Hearing Clerk in the above-captioned matter, nine copies were hand delivered to the Hearing Clerk for delivery to the Air Board members as required by 20.11.81.12.G NMAC, and two copies were hand delivered to the Hearing Clerk forwarding to the current Hearing Officer, Jens Deichmann, Chair of the Air Board, and to Bill Granthan, Air Board counsel, as directed by the Hearing Clerk; and
2.) a copy was mailed and sent by electronic mail to:

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By: _____
Adelia W. Kearny, Deputy City Attorney