BEFORE THE ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

GREATER GARDNER NEIGHBORHOOD ASSOCIATION, NORTH VALLEY COALITION OF NEIGHBORHOOD ASSOCIATIONS, AND KYLE SILFER, DAVID WOOD, AND MARCIA FINICAL AS INDIVIDUALS,	)	
Petitioners/Appellants,	)	AQCB Petition No. 2009-7
Versus	)	
CITY OF ALBUQUERQUE AIR QUALITY DIVISION,	)	
Respondent/Appellee,	)	
AMERICAN CEMENT CORPORATION, Intervenor.	)	

RESPONSE TO MOTION TO DISQUALIFY MEMBER BRINKMAN

Chairperson man Deichmann, Vice Chairperson Menache and Members Grace, Sharpe, Sullivan, and Upson:

The testimony referenced in the motion is in the administrative record on the compact disk (CD) entitled, American Cement Public Hearing Audio, 3/18/2008, AR090. The testimony is from 2:20 to 2:30 on this audio MP3 file.

My participation in this hearing occurred before I was a member of Albuquerque-Bernalillo County Air Quality Control Board (Board). I received a telephone call from a friend at about 3:00 pm on 3/18/2008. He told me of the public information hearing that evening and asked if I would attend and potentially speak as a resident of the North Valley and an environmental professional. I told him that my knowledge of the facility was limited to driving past it. I had seen the silos on the property and had seen trucks entering and exiting the facility onto Griegos Road. After significant coaxing, I agreed to attend. My friend sent me the flier for the hearing. I searched the Web for information on the facility and found limited information that included a brief description of the facility, that it was transferring cement and fly ash. The time I spent on this search was between 15 and 30 minutes. The rest of information I have regarding this permit modification came from testimony provided at the March 2008 hearing and a partial review of the administrative record recently provided by the Air Quality Division (Division).

At the time of the March 2008 hearing, my exposure to and understanding of air permitting requirements was very limited and I had not read the American Cement permit modification application. Prior to the hearing, I had attended only one meeting of the Board. The agenda included an action item regarding a facility on North Second Street for which some neighbors and I had concerns. I had not read the Albuquerque-Bernalillo County Air Quality Regulations.

My testimony was primarily questions seeking information on the requirements of an air quality permit. I was and am concerned about the protection provided by modeling compared to sampling and analysis, protections from acute exposures, what a facility must know and report regarding the chemical constitution of handled materials, cumulative impacts from a facility and other nearby sources, and the nature and level of involvement of the public in the permitting and regulatory process. These are general concerns regarding prevention and abatement of air pollution. I have no personal bias for or against American Cement. I have not formed an opinion regarding the American Cement permit modification. I can and will act in a fair and impartial manner in the hearing.

I had considered recusing myself from this hearing based on the said testimony. I first sought counsel on this matter more than six months ago. Before a board meeting I spoke with Mr. Grantham about the testimony relative to the possible permit approval and petition. I explained to Mr. Grantham that my testimony was before I was a board member and mainly questions regarding what was required in a permit relative to concerns I have regarding air pollution and public exposure and health. Based on my description of the testimony, he did not think the regulations required that I recuse myself.

I again considered recusal earlier this year. I asked myself if I could be an impartial evaluator of the facts in these proceedings. I thought of the time that I have served as a trier of fact as a juror and foreperson in an armed bank robbery trial. In the prosecution's case, a few witnesses' statements did not make sense; in particular the FBI agent's reason for video observation of the defendant's storage shed. Before the jury started deliberations, as foreperson, I took a straw poll on the verdict. It was split evenly. The inconsistencies in the prosecution witnesses' testimony bothered me to the degree that I was one that thought that the defendant was guilty but not proven beyond a reasonable doubt. Through deliberation, piecing the events together, we reached a unanimous guilty verdict. I was able to put aside concerns regarding the prosecution's case because they did not affect the facts in this case. After the trial, the judge and lawyers debriefed the jury. They explained the inconsistencies that concerned me resulted from rulings by the judge limiting testimony regarding other ongoing bank robbery investigations and trials. Recalling this experience, I am confident that I can and will do the same in these proceedings, that is, evaluate and deliberate on the facts impartially.

Regarding No.7 in the motion, I did not testify in opposition to the permit modifications. Framed by testimony provided by American Cement's consultant, Division staff, legislators and facility neighbors, I asked questions seeking information regarding my concerns. I hoped that the facility and the division would consider these concerns. However, given my lack of familiarity with the governing regulations, the permit application and other information about the facility and its neighbors, I was not sure of the applicability and appropriateness of my concerns to the specific permit application.

I did not advocate the positions as stated in No. 8. Rather, I questioned if the modeling, monitoring, and consideration of acute exposure could and should be in a permit. I asked questions because I did not know. The facility representative and Division staff responded with useful information.

Regarding No. 9, the first statement is false. I did not investigate the permit modification and I have no personal knowledge of additional facts of this matter. Although stated as fact, the second statement is a presumption apparently based on an interpretation of the 10-minute

question and answer exchange at the March 2008 hearing. This statement is false; I have formed no opinion as to the outcome of the upcoming hearing. The final sentence is based on two false statements and also is false. If qualified to serve, I can and will act in a fair and impartial manner in the hearing.

I do not have access to the judicial review cited in No. 11 of the motion. I presume that the point is that grounds for appeal by the intervenor may be if the board's ruling is to deny the permit modification with my participation in the process. I would then also presume that grounds for appeal by the petitioner may be if the board's ruling is to accept the permit modification without my participation in the process. In my opinion the question is: Will the fairness and impartiality of the proceeding by better served with my participation or without my participation?

In my earlier consultation with Mr. Grantham, he did not think that recusal was required. The Division staff knew of my testimony at the March 2008 because they answered most of my questions. Furthermore, in a lunch meeting early last year with Mr. Soladay, Mr. Tavarez, and Ms. Nieto, I discussed some of these same concerns and referenced my testimony at the March 2008 hearing. The respondent in this case, the Division, knew of my testimony and had the opportunity to file a motion to disqualify. The Division did not file a motion and do not support the intervenor's motion; rather, the Division takes no position.

The statements in the motion regarding my thoughts and experiences are apparently based on presumptions and interpretation of a 10-minute question and answer session. My response is based on careful and thorough introspection concluding with a finding that I can and will act fairly and impartially in this hearing. It is my opinion that I should be included for the board to provide in actuality and appearance a fair and impartial hearing.

WHEREFORE the undersigned Board Member respectfully requests that the Board vote to qualify Member Brinkman for participation in the captioned proceedings.

Respectfully submitted on January 26, 2010,

James Brinkman
Board Member