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,	)	
Petitioner/Appellants,	)	**AQCB Petition No. 2009-7**
vs.	)	
CITY OF ALBUQUERQUE AIR QUALITY DIVISION,	)	
Respondent/Appellee.	)	
AMERICAN CEMENT CORPORATION, Intervenor	)	

MOTION IN LIMINE AND MOTION TO DISMISS

Permittee American Cement Corporation, a New Mexico Corporation ("Permittee"), acting by and through its attorneys Brownstein Hyatt Farber Schreck, LLP, hereby moves the Albuquerque-Bernalillo County Air Quality Control Board (the "Air Board") for an order limiting the admission of facts, evidence and testimony in this matter, and an order dismissing Petitioners' fourth claim for relief, and in support thereof states as follows:

ARGUMENT

A. The Inclusion of Permit Conditions is a Decision Committed to the Discretion and Expertise of the Department, and Permit 0902-M3 Includes Conditions Necessary to Ensure Compliance with the Air Quality Control Act.

The only issue at this hearing is whether the Petitioners can prove that the permit issued by the Department failed to comply with the Air Quality Control Act (the "Air Act") the Joint Air Quality Control Board Ordinance and the Albuquerque/Bernalillo County Air Quality Control Board Regulations ("Air Regulations"). In making this showing, the Petitioners must show by a preponderance of the evidence that the permit terms imposed by the Division were inadequate to protect air quality. Evidence which does not demonstrate that the permit modification violates the Air Act and Air Regulations should be excluded. In conducting this review, the Air Board should defer to the Department's technical expertise, particularly on

matters involving air dispersion modeling, compliance with National Ambient Air Quality Standards (NAAQS), adequacy of technology to control emissions, and the effect of permit terms and conditions in meeting air quality standards.

Petitioners urge in their first claim for relief that the 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." In support, Petitioners recite evidence from the administrative record without identifying how or upon what basis such evidence should be incorporated into permit conditions that are permissible in accordance with NMAC § 20.11.41.18(B).

Under the Department's Authority to Construct regulations, the Department is afforded broad discretion in determining the appropriate combination of conditions necessary to ensure compliance with the Air Act. See NMAC 20.11.41.18(B) (the Department "may include any combination of the following conditions"). Permissible conditions include specification of emission limits necessary to comply with the state and federal acts; installation of control technologies; compliance with federal NSPS and NESHAP regulations; and emissions testing, monitoring, and measuring requirements. See *Id.* The permit modification for the American Cement facility included all of these various conditions and limitations.

The Petitioners in this matter have the burden of proof, which includes the burden of proving by a preponderance of the evidence the facts relied upon by the Petitioners to justify the relief sought in the petition. New Mexico Administrative Code provides:

> C. Burden of Persuasion: In a hearing on the merits, the petitioner has the burden of proof, the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence the facts relied upon by the petitioner to justify the relief sought in the petition.

NMAC 20.11.81.16(C.)

Part 81 provides that this matter is a hearing on the merits. 20.11.81 NMAC. Nevertheless, determinations made by an agency in the course of administrative hearings are extended "extreme deference" upon review, See *Archuleta v. Santa Fe Police Dept.*, 108 P.3d 1019 (N.M. 2005); *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 904 P.2d 28 (1995); *Stokes v. Morgan*, 680 P.2d 335, 342 (1984) (reviewing decision of the State Engineer following a hearing and noting that "[t]he special knowledge and experience of state agencies should be accorded deference"). Such deference is "especially" appropriate with respect to factual issues concerning matters in which the agency has specialized expertise. Morningstar, 904 P.2d at 32.

In conducting the review of technical testimony and determining whether the Department followed the statutory and regulatory standards for permit issuance, the Air Board should therefore defer to the Department's technical expertise, particularly on matters involving air dispersion modeling, compliance with National Ambient Air Quality Standards (NAAQS), adequacy of technology to control emissions, and the effect of permit terms and conditions in meeting air quality standards. The Petitioners will have an opportunity to demonstrate that the Department did not meet these standards, but the Air Board should not supplant the Department's

judgment on technical matters which are clearly within the specialized expertise of the Department. In that regard, the purpose of the hearing is not to provide conjectural, repetitive and cumulative evidence about what additional information beyond the statutory and regulatory standards the Petitioners may have liked the Department to consider, but to determine whether the Department did in fact meet its statutory and regulatory obligation in issuing the permit.

B. Petitioners' Environmental Justice Arguments

Any evidence, whether technical or public, that does not pertain to the Air Quality Act and Air Regulation should be excluded.

There is no legal authority for the Air Board to deny the permit or impose additional permit terms and conditions on the basis of environmental justice concerns. In order to impose environmental justice terms and conditions, there must be some regulatory standard for the Air Board and Department to reference, and for American Cement to address, when conducting a permit review. The New Mexico Supreme Court requires that the "authority to address such [environmental justice] concerns requires a nexus to a regulation." *Colonias Development Council v. Rhino Envt'l Services, Inc.*, 117 P.3d 939, 947 (N.M. 2005).

In *Rhino*, the New Mexico Supreme Court directed the New Mexico Environment Department (NMED) to apply specific aspects of the implementing regulations in the Solid Waste Act when considering public testimony regarding environmental justice concerns over the proposed location of a landfill in Chapparal, New Mexico. *Id.* Directing NMED to modify its review process and remanding the case for consideration of the environmental justice testimony, the New Mexico Supreme Court specifically relied on the nexus between the public comments and specific regulatory language under the Solid Waste Act and its implementing regulations which required NMED to consider: (1) whether the solid waste facility would be located or operated in a manner that would cause a public nuisance; (2) whether the solid waste facility would be located or operated in a manner that would create a potential hazard to public health, welfare, or the environment; and (3) whether the solid waste facility application poses an undue risk to property. *Id*, at 947.

Unlike the *Rhino* case, the Air Quality Control Act and Air Regulations contain no similar broad based language which would require the Air Board or Department to deny the permit or impose additional terms and conditions to address environmental justice concerns. The Air Quality Control Act and the Air Regulations do not require the Department or the Air Board consider: (1) whether location of a facility would cause a public nuisance, (2) whether the American Cement facility would be operated in manner to create a potential hazard to public health, welfare or the environment, or (3) whether the American Cement facility poses a risk to property. Instead, the Air Act and regulations require the Air Board and Department to impose permit terms and conditions which ensure that facilities "will not emit air pollution, which will cause violations of air pollution control regulations upon operation following construction." 20.11.41.6. NMAC.

Petitioners have so far failed to advance or identify any legal or factual basis for an "environmental justice" claim in this air permitting context which would require denial of the permit or the imposition of additional terms and conditions. The Albuquerque/Bernalillo County

regulations allow the Department to include nine different types of permit conditions. 20.11.14.18.B NMAC. These conditions include: (1) emission limits in accordance with the Air Act or regulation, (2) emission control technology, (3) compliance with NSPS and NESHAP regulations, (4) reasonable restrictions and limitations on operations, (5) a schedule of construction, (6) performance testing and monitoring, (7) repetitive testing, (8) recordkeeping and reporting, and (9) other reasonable conditions. *Id.*

Even the most general of these conditions – Condition (9) "other reasonable conditions as the Department may deem necessary" (20.11.14.18.B) – does not make any reference to public nuisance, potential hazard, or risk to property, as relied upon by the New Mexico Supreme Court in the Solid Waste context addressed in *Rhino*. The permit conditions which may be imposed tie back to the essential Department and Air Board function - issuing permits to prevent the emission of air pollution that would violate the Air Act or Air Regulations. Accordingly, the hearing of this matter and any testimony or evidence presented to the Air Board should go to the Petitioners burden to prove that the permit was inadequate to prevent air emissions that would violate the Air Act or the Air Regulations. While public testimony may be relevant on the issue of air emissions and appropriate terms and conditions as permitted by the Albuquerque/Bernalillo County regulations, irrelevant, repetitive and cumulative testimony should be excluded.

This matter differs from *Rhino* in other critical ways. The *Rhino* decision was about the appropriate siting of landfills in a community the New Mexico Supreme Court agreed was "an unincorporated community that lacks infrastructure, political representation, and medical facilities . . . consisting primarily of low income, minority residents, Chapparal has been called New Mexico's largest *colonia*." *Id*, at 941. In contrast, the American Cement facility is located in an incorporated area of Albuquerque, with infrastructure, active political representation and medical facilities. Moreover, American Cement is not seeking to locate a new facility in the neighborhood, but rather sought and obtained an amendment to a minor source permit for an existing facility. Accordingly, this case is not about the proliferation of cement transfer facilities or even industrial operations in the Greater Gardner neighborhood. It is also not about the siting of cement transfer facilities or industrial facilities in neighborhoods where environmental justice concerns dictate special protection from the Air Board. Instead, this is a simple permit modification action for a facility that is already located in the Greater Gardner neighborhood. Testimony, whether technical or public, which goes to the factors enumerated in *Rhino* but not embodied in the Air Quality Control Act or implementing regulations should be excluded. Even if the Air Board allows this testimony, it cannot result in denial of the American Cement permit modification or the imposition of additional permit terms and conditions if such terms and conditions do not tie directly to the terms and conditions which may be imposed under the air Regulations (20.11.41.18.B NMAC).

Petitioners also claim that the Department "failed to incorporate principles of environmental justice in its decision." Petition, at 5; see also Op. Att'y Gen. 08-03 (2008). Petitioners characterize these "principles" as consisting of notice and consideration of public testimony regarding impacts to minority or impoverished communities. Petition, at 5. Without consideration of these principles, Petitioners assert, "a concentration of pollution in a single area can continue to grow without meaningful regulation or planning." Id.

Petitioners have presented no evidence of deficiency in the form, substance, or timing of notice given in these proceedings. Furthermore, the administrative record is replete with testimony given by Petitioners in the course of public hearings, and evidence otherwise submitted for the record that relates to the specific impacts upon the local community. Presumably, Petitioners will be given adequate opportunity to present additional public testimony at the hearing before the Air Board starting February 22, 2010. Accordingly, the Air Board should dismiss the claim that Petitioners have not been given adequate notice and opportunity to comment.

C. Petitioners' Fourth Claim for Relief Should Be Dismissed.

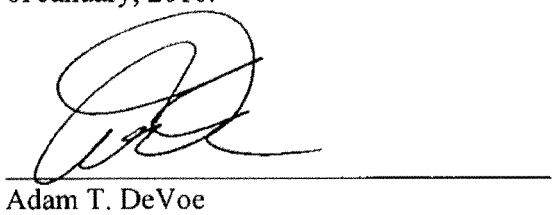
Petitioners' Fourth Claim for Relief, which includes "[a]ny other factual or legal issues identified by Petitioner prior to the hearing," appears intended to enable Petitioners to add any additional claims that they may in the future deem appropriate. This claim finds no support in the Air Board's Adjudicatory Procedures regulations or in the New Mexico Rules of Civil Procedure, and must be summarily dismissed. The Department and American Cement are entitled to be put on notice of any factual and legal claims the Petitioners may make. The Petitioners cannot now, or at anytime before the hearing, add factual or legal claims.

Likewise, the Petitioners may not now amend the Petition to add factual or legal claims. The Air Board's regulations governing the petition and review of Department decisions makes no provision allowing for an amended petition. Even if the Air Board were to rely on the New Mexico Rules of Civil Procedure, as the Air Board may, pursuant to Rule 1-015 a party is entitled to one amended pleading prior to service of a responsive pleading. In this case, both the Amended Petition and the responsive Answer of the City of Albuquerque were filed on November 17, 2009. In accordance with the Rules of Civil Procedure, therefore, Petitioners have already exercised whatever right they may have had to amend the Petition, and may not seek leave to add additional claims in the future.

Duty to Confer. Counsel for American Cement has conferred with all parties in this matter prior to the filing of this motion. Counsel for Petitioners indicated that they oppose the filing of this motion. Counsel for the Department indicated that they do not oppose the filing of this motion.

WHEREFORE, Permittee American Cement Corporation respectfully requests: (1) that the Air Board enter an Order dismissing Petitioners' Fourth Claims for Relief as set forth in the Amended Petition filed on November 17, 2009, and (2) exclude testimony and evidence as necessary to expedite the hearing of this matter, prevent repetitive and cumulative testimony, and exclude irrelevant testimony and evidence.

Respectfully submitted this 22nd day of January, 2010.



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Certificate of Service

I certify that one original and nine copies of the foregoing **Motion in Limine and Motion to Dismiss** were filed with the hearing clerk on the 22nd day of January, 2010, and by same date submitted by email and certified mail, return receipt requested, to the following:

Kyle Silfer, Petitioner
4465 Jupiter NW
Albuquerque, NM 87107

and by same date submitted by email to the following:

Jonathan Block
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Santa Fe, NM 87501

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and by same date submitted by hand delivery to Janice Wright for the following:

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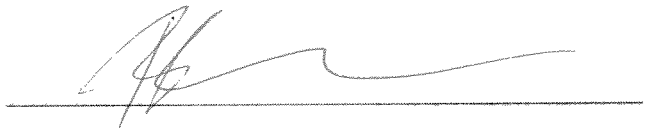
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