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	)	

INTERVENOR'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY MEMBER BRINKMAN

Intervenor GCC, d/b/a American Cement Corporation ("GCC") through undersigned counsel, hereby replies to the Petitioner's Response, the Hearing Officer's Recommendation, and Member Brinkman's Response. For the reasons set forth below, the Motion to Disqualify Member Brinkman should be granted.

Prejudgment of the Issues

The Appellants and Mr. Brinkman make too much of the fact that Mr. Brinkman's testimony to the Air Division was phrased in the form of questions. As noted by the Hearing Officer, the questions from Member Brinkman were repeated and pressed in a way to indicate an opinion, not merely to seek information. Moreover, in response to his questions about modeling, trace metals, and acute exposure, Mr. Brinkman did in fact get answers from the Division and

from the American Cement representative at the hearing. Nevertheless, he pressed the questions again, belying the fact that his questions were statements intended to influence the outcome of the proceeding. As indicated by the Hearing Officer, Mr. Brinkman must therefore be disqualified because he presented testimony that shows he has already formed an opinion on the issues in dispute.

Investigative or Prosecutorial Function

The Hearing Officer suggests that disqualification is only appropriate where a member has acted in an official capacity as a prosecutor or investigator in a case. While this more stringent standard may be appropriate in criminal proceedings, a lesser standard should inform a disqualification decision in administrative adjudicatory proceedings. Where, as here, a member took on investigation of the permit in order to provide testimony in opposition to the permit, that "investigative" function should be weighed in determining whether disqualification is appropriate.

At the time of filing the Motion to Disqualify Member Brinkman, GCC did not have any specific information regarding the investigation of the permitting action performed by Member Brinkman. Without any specific information, GCC therefore made a general allegation that Member Brinkman apparently investigated the facts of the matter.

Since filing the motion, GCC has obtained information that Member Brinkman did in fact request additional information from the Division prior to providing testimony. On March 18, 2008, Mr. Brinkman faxed an IPRA form to the City of Albuquerque Air Quality Division. Mr. Brinkman's information request sought the following information: (1) Permit Application #0902-M2 for the American Cement Facility at 4702 Carlton, NW; (2) Air Dispersion Model Summary and Report; (3) Original Permit Application and supporting documents; and (4) Other

pertinent information in the facility's file. Items 3 and 4 were deemed to be overboard by the Air Division, so Mr. Brinkman, in an e-mail dated March 20, 2008, replaced those items by requesting: (3) all previous permits applications; and (4) all city inspection reports.

Mr. Brinkman states that he did not read the permit application, but he must have reviewed the Air Dispersion Model Summary and Report in order to provide the specific and detailed testimony presented at the March 18, 2008 hearing. And whether he obtained and reviewed the information or not, he was specifically seeking information on city inspections. His request for and review of such information is perhaps not the equivalent of a prosecutorial investigation, but neither is it a completely unbiased quest for information. While this investigation alone does not provide grounds for disqualification, viewed as a whole with the testimony presented at the March 18, 2008 hearing, there is at least the clear appearance that Mr. Brinkman was not testifying at the hearing merely to seek additional information. Mr. Brinkman's independent review of materials and information, and the clear direction of his testimony at the March 18, 2008 hearing, gives the appearance that he was opposed to the permit modification and that he should therefore be disqualified.

Conference with the Hearing Officer

Mr. Brinkman states that approximately six months ago he sought the counsel of Mr. Grantham, in his capacity as counsel to the Air Board, as to whether Mr. Brinkman should recuse himself from this hearing. At that time, Mr. Grantham advised him that recusal was unnecessary.

Hearing Officer Grantham informed the parties at a status conference conducted Friday, February 5, 2010, that his initial discussion with Mr. Brinkman was brief and without the benefit of all the facts. Mr. Grantham has since been appointed the hearing officer in this matter,

reviewed the facts, arguments, and written statement of Mr. Brinkman, and recommended that the Board disqualify Member Brinkman. In short, it appears that Mr. Grantham's earlier advice to Mr. Brinkman was based on limited information under time constraints, while on further reflection and with the benefit of additional facts Mr. Grantham has concluded that disqualification is appropriate.

Same Company and Permit

Appellants make much of the allegation that this permit modification is not the same company or the same permit. On the contrary, GCC purchased the American Cement Corporation, and is doing business at this facility as American Cement. Though this appeal involves permit modification Number 0902-M3, as opposed to the hearing where Mr. Brinkman provided testimony on Number 0902-M2, the permits are fundamentally the same. The facility is the same, the modeling exercise is nearly is identical, the permit terms and conditions (with the exception of operating hours) are nearly identical, and the parties on all sides are the same. Perhaps most importantly, the modeling that Mr. Brinkman objected to at the hearing has not fundamentally changed with the exception of updates to reflect the slightly different operating conditions in permit versions 2 and 3. Accordingly, the Board should draw no conclusions from Appellant's arguments that this proceeding does not involve the same permit or the same company.

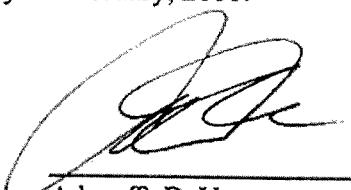
Conclusion

The applicable standard in New Mexico is that the appearance of complete fairness must be present at all times. *Reid v. New Mexico Board of Examiners,* 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). The appearance of fairness cannot be maintained where a member of the air board sought information about a permit and testified at the hearing in a manner that displayed

clear opposition to the permit.

WHEREFORE, the undersigned Counsel respectfully request that the Board enter an order disqualifying member James Brinkman from the above captioned proceedings.

Respectfully submitted this 8th day of February, 2010.



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Certificate of Service

I certify that one original and nine copies of the foregoing **Intervenor's Reply in Support of Motion to Disqualify Member Brinkman** were filed with the hearing clerk on the 8th day of February, 2010, and by same date submitted by email and certified mail, return receipt requested, to the following:

Kyle Silfer, Petitioner
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Albuquerque, NM 87107

and by same date submitted by email to the following:

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

Jens Deichman, Hearing Officer and Board Chair
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