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 TO DISQUALIFY MEMBER BRINKMAN

Pursuant to Paragraph 3 of Subsection B of 20.11.81.12 NMAC, by and through undersigned counsel, American Cement Corporation requests an order of the Board disqualifying Member James Brinkman from participating in the above captioned adjudicatory proceeding. In support of this Motion, Counsel states the following:

1. In summary, New Mexico law requires a trier of fact to recuse himself or herself where impartiality may be in question or there is any appearance of unfairness in the proceeding. In the early stages of the Albuquerque Environmental Health Department's ("Department") review of the American Cement Corporation permit modification, Mr. Brinkman personally provided testimony in opposition to the permit modification, and attempted to call into question the adequacy of the modeling conducted by American Cement and reviewed and approved by the Department.

2. The New Mexico Administrative Code provides:

(3) Board member and hearing officer disqualification-recusal-withdrawal:

(a) A board member or hearing officer **shall not perform** any function authorized by 20.11.81 NMAC [adjudicatory functions] regarding any matter in which a board member or a hearing officer:

(i) has a personal bias or prejudice concerning a party or the outcome of a proceeding;

(ii) has personal knowledge of disputed facts concerning the proceeding;

[(iii) (v) excluded]; or

(vi) has performed prosecutorial or investigative functions in connection with a permitting action at issue in the proceeding.

20.11.18.12(3) NMAC

3. The New Mexico Administrative Code also provides that the hearing officer and board may rely on applicable legal authority. "In making its decision regarding whether a board member or hearing officer should be disqualified or recuse himself or herself, the board and hearing officer may rely on applicable legal authority." 20.11.81.12.B(3)(b) NMAC.

4. In this adjudicatory proceeding, the Air Quality Control Board Members are essentially acting as judges. According to the New Mexico Code of Judicial Conduct, a judge must recuse himself "in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 21-400(A) NMRA.

5. The principles behind disqualification requirements apply to adjudicatory procedures of an administrative tribunal as well as to a court. *Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.), *aff'd mem.*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974); 1 Am.Jur.2d *Administrative Law* § 63 (1962). New Mexico applies disqualification and recusal principles to administrative proceedings. *Reid v. New Mexico Board of Examiners*, 92 N.M. 414, 589 P.2d 198 (1979). The basis for the standard for disqualification of an administrative hearing officer which is set forth in *Reid* is that "our system of justice requires that the appearance of complete fairness be present." *Reid*, 92 N.M. at 416, 589 P.2d at 200.

6. A fair trial in a fair tribunal is an essential requirement of due process, and this concept applies to administrative agencies as well as to courts. *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Safeguarding this requirement is especially essential in administrative proceedings where certain basic rights are overlooked in the interest of administrative efficiency and expedition. *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir.1943).

7. On March 18, 2008, Member Brinkman testified at a public hearing before the Department on a previous version of the permit modification (permit modification version M2). Though a transcript of Mr. Brinkman's testimony has not been produced, in a tape recording from that hearing Mr. Brinkman testified in opposition to the permit modification for the American Cement facility.

8. Specifically, Mr. Brinkman testified that modeling for trace metals should have been conducted at the American Cement facility. There is no federal, state or local requirement to conduct modeling for trace metals, and there is no National Ambient Air Quality Standard (NAAQS) for trace metals. As such, Mr. Brinkman's requested modeling would have exceeded the applicable federal, state and local requirements, and the Department could not have required

such modeling to be conducted in order to approve the requested permit modification. Mr. Brinkman also testified that American Cement should be required to conduct fence line monitoring, even though the American Cement facility falls far below federal, state and local thresholds to conduct fence line monitoring. Finally, Mr. Brinkman testified that some consideration should have been given, and the permit modification should address, acute exposure, despite the fact that there is no federal, state or local requirement for any such consideration in approving a permit modification.

9. Member Brinkman has apparently investigated the proposed permit modification and has personal knowledge of the facts of this matter outside the context of the facts and evidence to be presented to the board at the hearing set to commence February 22, 2010. Member Brinkman has already formed an opinion that the permit modification should have been denied prior to the commencement of this hearing. As such, Member Brinkman cannot act in a fair and impartial manner in the adjudicatory hearing of this matter.

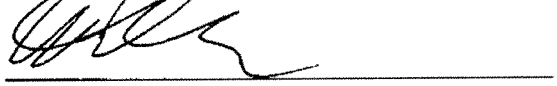
10. Where a board member has "personal bias" concerning a party and has personal knowledge through his or her own investigations of the permitting action, the New Mexico Administrative Code **requires** disqualification or voluntary recusal of that board member.

11. Judicial review is available for recusal issues and may result in remand for a new hearing of the matter. *See City of Albuquerque v. Chavez*, 941 P.2d 509 (N.M.App. 1997).

12. 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 take no position on the filing of this motion.

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

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 to Disqualify Member Brinkman** 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
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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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