STATE OF NEW MEXICO
Before the
ALBUQUERQUE BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF PETITION FOR A HEARING ON THE MERITS
REGARDING AMERICAN CEMENT CORPORATION
AIR QUALITY PERMIT No. 0902-M3

Greater Gardner Neighborhood Association, North Valley Coalition of Neighborhood Associations, Kyle Silfer, David Wood and Marcia Finical, as individuals, *Petitioners/Appellants* **v.** City of Albuquerque Environmental Health Department Air Quality Division, *Respondent/Appellee,* *and* GCC, Inc. (Grupo Cementos de Chihuahua), d/b/a American Cement Corporation, *Intervener*	AQCB Petition 2009-7 February 3, 2010

APPEALLANT'S RESPONSE IN OPPOSITION TO INTERVENER'S MOTION TO DISQUALITY, MEMBER BRINKMAN'S RESPONSE, AND HEARING OFFICER'S RECOMMENDATION ON THE MOTION

Petitioners/Appellants, Greater Gardner Neighborhood Association, North Valley Coalition of Neighborhood Associations, and Kyle Silfer, David Wood and Marcia Finical as individuals ("Petitioners"), through counsel Jonathan M. Block, New Mexico Environmental Law Center, hereby respond in opposition to the Intervener CGG, Inc. (Gruppo Cementos de Chihuahua), d/b/a American

Cement Corporation, Motion to Disqualify Air Quality Board Member Brinkman and the Hearing Officer's Recommendation on the Motion to Disqualify, and Member Brinkman's Response. For the reasons of fact and law set forth below, Petitioners contend the Motion to Disqualify should be overruled.

BACKGROUND FACTS AND LEGAL ISSUES

To the extent they are not inconsistent with the facts set forth below, Petitioners incorporate the facts set forth in the Member Brinkman's response of January 26, 2010, and Hearing Officer Grantham's Recommendation on the Motion to Disqualify of February 1, 2010, and further set forth:

1. Mr. Brinkman was not a member of the Air Quality Board at the time he participated in the public information hearing at issue.

2. The permit at issue is not the same permit as in the instant proceeding, as a previous owner of the cement transfer station applied for the permit, and the new owners withdrew that permit.

3. The permit at issue is a new permit for a new company, Intervener in this case, and the issues involved in this permit cannot and should not be considered identical, given that it is a new permit and a new company.

5. In the *Las Cruces Professional Fire Fighters v. City of Las Cruces*, 123 N.M. 239 (1997), analyzing the recusal behavior of the United States Supreme Court, our New Mexico Supreme Court stated:

> These actions by members of the [U.S.] Supreme Court reflect recognition that members of courts (and administrative agencies) are human beings. They cannot avoid having histories or opinions; indeed, they may well have been selected for their offices in part on that basis. Recognition of this reality counsels us against requiring that every decisionmaker start with a clean slate.

Id. at 246.

ARGUMENT

Petitioners agree with Hearing Officer Grantham's analysis of the applicable law and discussion of the issues except as to "point 1", "Prejudgment of the issues", on which the following is focused.

Although Hearing Officer Grantham states that the Intervener American Cement "overstated" the facts in alleging that Member Brinkman cannot act in a fair and impartial manner" in the proceeding, and, significantly, that "nowhere in his testimony did Mr. Brinkman express an opinion on the ultimate question" as to whether the permit should be approved, Hearing Officer Grantham concludes that Mr. Brinkman's statements and questions in the 2008 Public Information Hearing warrant disqualification. Hearing Officer's Recommendations on the Motion to Disqualify Member Brinkman at 5-6 (emphasis added).

Two important items are noticeably absent from absent in the Hearing Officer's analysis. First, there is no discussion of the significance of the fact that, unlike the *Reid* issue, this is not the same company (person), nor the same permit as when Mr. Brinkman participated in a "Public Information Hearing". Mr. Brinkman

was *neither* a Board member or adjudicator at the time, and only asked questions in the context of the answers to those questions and information he had heard at the hearing prior to his questions--none of which, under the Hearing Officer description, actually show *any* bias or prejudice in this case. Not only a different permit and a different company, but no actual bias or prejudice is shown--merely a subjective judgment by an individual (the Hearing Officer) as to the meaning of the "tone" and "form" of questions and a negative characterization of that based upon that subjective judgment.

Second, and significantly, in the Hearing Officer's reference to the *Las Cruces Fire Fighters* case he fails to discuss the significance of the distinctions the New Mexico Supreme Court made between the *Reid* case analysis and that deemed applicable following Kenneth Culp Davis's "five point" list of reasons to disqualify. It is significant that in *Las Cruces Fire Fighters,* a partisan union representative was on the Board at issue, conducted extensive cross-examination of witnesses based upon the union's interest in getting certain information on the record, and yet the Court of Appeals found that disqualification of the Board member was not required. See *Las Cruces Professional Fire Fighters v. City of Las Cruces*, 123 N.M. 239, 244-248 (1997) (Court analyzes a situation in which, unlike the instant case, the partisanship of a member already sitting on a Board in the same matter at issue, is blatant, yet finds disqualification not required).

Petitioners contend that requiring Brinkman disqualification imposes a higher standard as called for in *Reid*, the principal case upon which the Hearing Officer relies, which case is distinguishable on its facts from the instant matter. The Hearing Officer does not confront two very significant issues that distinguish this case from *Reid*: (1) this permit does not have the same property interest and privilege as a professional license, and, (2), unlike the adjudicator in Reid, Mr. Brinkman was just an ordinary citizen exercising his right of free speech and democratic participation in a public process when he raised the questions at issue--at the time he was not a Board member bound to act in a fair and impartial manner.[1]

Hearing Officer Grantham's analysis turns entirely on an interpretation of the questions Mr. Brinkman raised at a public information hearing on a subsequently withdrawn permit application by a previous owner of the facility at issue here. Mr. Brinkman asked whether monitoring included certain trace materials known to be present in cement dust, was told that it did not, asked further whether that meant that there was no guarantee that people in the area were not being exposed to those trace materials know to be in cement dust, observed further that this is a facility that emits 12 tons of dust per year, has neighbors adjacent to the source, with "fallout in

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[1] The Hearing Officer also fails to confront a side issue of disqualification--his own--in that Mr. Brinkman's Response states that the Hearing Officer counseled him on this very issue six months ago, and the Hearing Officer told him, "he did not think the regulations required that I recuse myself", yet the Hearing Officer provided the entire Board with legal advice on this matter by recommending that Member Brinkman disqualify himself. *Compare* Member Brinkman's Response at 2 *and* Hearing Officer's Recommendation at 6-7.

their trees" and "in their breathing zones as well." Hearing Officer's Recommendation at 4, quoting AR090, American Cement Public Hearing 3/18/2008 Audio file at hour 2:20-2:30).

What is significantly absent in the Hearing Officer's account of this brief period of questioning is how Mr. Brinkman acquired the information he used in his questions. Petitioners contend that if the information was presented during the public hearing prior to the time that Mr. Brinkman spoke, he was merely restating in his questions the information other citizens had provided during the course of the hearing. Is the mere fact that he raised additional questions based upon what he had heard during the proceeding evidence of anything more than a concerned citizen who was able to reason and question the information being presented to him and all attendees at the public hearing? Hearing Officer's Grantham's "Q.E.D." of alleged "prior commitment" to the fact at issue here is not only based upon a hearing for a withdrawn permit sought by a different company at a time Mr. Brinkman was merely an interested citizen attending and asking questions at a public hearing, it really rests solely upon the final question/statement Mr. Brinkman made: "when the wind comes up you know those levels on the average are being broken considerably -- people can get sick from breathing that really thick air for a short amount of time." Again--this is no more than a "Q.E.D." that Mr. Brinkman was exercising some intelligence and deductive reasoning and does not show any

prejudgment of the issues in the instant case, as the testimony in this case is not identical nor does it concern the identical permit or company.

Were the Hearing Officer correct that Mr. Brinkman's statements "reflect a bias in favor of a policy of requiring certain permit conditions" there might be a reasonable argument that there was a "prior commitment"--but there is none. Reading such a "prior commitment" into questions Mr. Brinkman says were raised not "in opposition to the permit modifications" but "seeking information regarding [his] concerns", Brinkman Response to Motion to Disqualify at 2. Hearing Officer Grantham goes too far when he opines that Mr. Brinkman's "statement indicate that he believed it was a fact that dust emitted from the facility contained certain heavy metals, was deposited on neighbors, and could result in sickness from short term exposure, <u>and therefore necessitated certain permit requirements</u>." Hearing Officer's Recommendation at 5-6 (emphasis added).

The Hearing Officer added the underlined portion--nowhere has he provided a quotation from Mr. Brinkman that any permit requirements was necessary. In fact, responding to Intervener American Cement's allegations of Mr. Brinkman's statements, Hearing Officer Grantham states that "Mr. Brinkman did not explicitly state that he believed that the modeling and monitoring requirements should have been required"--rather, Hearing Officer Grantham relies on divination

as support, stating that "the tone and form of his questions reasonably indicate such a belief." Hearing Officer's Recommendation at 4. P

Petitioners contend that in so serious a matter as a Motion to Disqualify, more than mere opinion concerning the import of "tone and form" should be necessary before the harsh remedy of disqualification in invoked on the basis of inferred "prior commitment" on an issue. This is doubly true when Mr. Brinkman denies having testified in opposition to the permit modification and states that he has not prejudged the issues, formed an opinion on this new permit for a different company, and that he can act fairly and impartially. Brinkman Response at 2. As the Hearing Officer rightly notes, New Mexico law provides that Mr. Brinkman is entitled to a "presumption of honest and integrity." Hearing Officer's Recommendation at 5 (citing *Jones v. New Mexico State Racing Commission*, 100 N.M. 434, 437 (1983) (citing *Withrow v. Larkin*, 421 U.S. 35 (1975)).

The bottom line is that despite Intervener American Cement's allegation of testimony showing prejudgment on the need for specific permit conditions, finding no such statements in the record, the Hearing Officer rests his entire recommendation on his personal interpretation of the "tone and form" of questions as indicating such a belief and predicated on irrelevant facts. If such a standard were adopted, not only would professional diviners be required to interpret each case of alleged bias, but many Boards and Commissions would fail of have a quorum--

unless they were composed of people who had never raised questions during pervious permit hearings. In the *Las Cruces Professional Fire Fighters* the New Mexico Supreme Court stated, in pertinent part:

> One should not infer from Reid that a member of a tribunal is necessarily disqualified whenever prior conduct of the member indicates a view that would favor one party or the other. If that were the law, no judge could sit on a case after rendering a decision in a similar case.

Id. at 245. Board member Brinkman, at the time of his raising questions at a public hearing, was a private citizen. The hearing where is raised questions was on a different permit application by a different company. Thus, his questions in that matter have nothing to do with the instant case and are not a proper basis for the Intervener's motion or the Hearing Officer's recommendation to the Board that the motion be sustained. The alleged evidence offered here of Mr. Brinkman's "prior commitment" type of bias is so attenuated, so entirely inappropriate and questionable as to fail to meet the stringent tests of *Reid* and *Las Cruces Fire Fighters* on which the Hearing Officer relies to support his recommendation. Hearing Officer's Recommendation at 4-5.

CONCLUSION

The reasons of fact and law stated above weigh heavily in favor of overruling the motion to disqualify.

WHERFORE, the Board should overrule the Motion for Disqualification and deny the motion.

Respectfully submitted:

BY PERMISSION JONATHAN BLOCK

Jonathan M. Block, Lead Counsel,
Douglas Meiklejohn, Bruce Frederick, Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87501
(505) 989-9022, Ext. 22
jblock@nmelc.org

CERTIFICATION OF SERVICE

I, Jonathan M. Block, hereby certify that on this 3d day of February, 2010, I caused the foregoing Response to Motion to Disqualify to be served upon the below listed persons by hand or by email* where mail service has been waived:

Janice C. Wright, Hearing Clerk
Air Quality Div., Env. Health Dept.
City of Albuquerque
One Civic Plaza, Rm. 3023
Albuquerque, NM 87103
jcwright@cabq.gov

For City of Albuquerque
Adelia W. Kearny, Esq.
City Attorney's Office
City of Albuquerque
One Civic Plaza, Rm. 4015
Albuquerque, NM 87102
akearny@cabq.gov

Bill Grantham, Esq., Hearing Officer
N.M. Environmental Department
P.O. Box 5469
Santa Fe, NM 87502-5469
By service upon the Hearing Clerk

For Intervener
Adam T. DeVoe*
Brownstein, Hyatt, Farber, Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
adevoe@bhfs.com

Tim Van Valen, Esq. (Local counsel)*
Brownstein, Hyatt, Farber, Schreck, LLP
201 Third Street NM, #1700
Albuquerque, NM 87102
tvanvalen@bhfs.com

BY PERMISSION JONATHAN BLOCK

Jonathan M. Block