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 18, 2010

PETITIONERS/APPEALLANTS RESPONSE OPPOSING INTERVENER MOTIONS IN LIMINE AND TO DISMISS

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 granting the Intervener CGG, Inc. (Grupo Cementos de Chihuahua), d/b/a American Cement Corporation (henceforth "Grupo Cementos"), Motion in Limine and Motion to Dismiss (henceforth "Motions") for the reasons of fact and law set forth below.

ARGUMENT IN OPPOSITION TO MOTIONS

A. The Decision on the Petition at Issue Is Vested Within The Jurisdiction of the Albuquerque-Bernalillo Air Quality Control Board, Not The Air Quality Division; The Board Has Authority Over The Division And May, On Appeal, Revoke, Suspend, Modify or Deny A Permit That The Air Quality Division Has Issued.

Grupo Cementos misinterprets the jurisdictional basis for the current proceeding, alleging that the Air Quality Director's Decision is the controlling basis for the Board's jurisdiction over the appeal. Motions at 1-3. The rules governing the filing and adjudication of the instant petition state, in pertinent part:

> 20.11.81 NMAC governs the following adjudicatory proceedings of the board, which are proceedings in which the board makes final, binding determinations that directly affect legal rights:
>
> (1) petitions for hearings on the merits before the board made by permit applicants, permittees or other persons who participated in a permitting action before the department and who are adversely affected by the permitting action.

20.11.81.2.A and A(1) NMAC (emphasis added). The Board jurisdiction is also described as follows:

> If a timely request for public hearing is made; the Board shall hold such hearing within thirty (30) days of receipt of the request. The Department shall notify the applicant by certified mail of the date, time and place of the hearing. In the hearing, the burden of proof shall be upon the applicant. The Board may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the Board shall sustain, modify or reverse the action of the Department within thirty (30) days.

20.11.41.15.F.[1] The Director's hearing, at the Director's discretion in the event of sufficient public interest, is provided for under 20.11.41.14.B. Significantly absent

[1] Under the New Mexico Air Quality Act, the burden of proof is s on the petitioner and the Board's

anywhere in 20.11.81 or 20.11.41 is a directive that the Board will take the Director's decision as conclusive or binding upon the Board's adjudication on the merits, nor is there any statement similar, like or parallel to that made in the Grupo Cementos Motions requiring that "[e]vidence which does not demonstrate that the permit modification violates the Air Act and Air Regulations should be excluded." Motion at 1.

Further, the is no language in the regulations indicating that the subject matter of the hearing is properly confined to the sole issue of "whether the Petitioners can prove that the permit issued by the Department failed to comply with the Air Quality Act[,] the Join Air Quality Control Board Ordinance and the Albuquerque/Bernalillo County Air Quality Control Board Regulations[.]" *Id.* (abbreviated names omitted). Nor is there any requirement that the Board defer to the Department's technical expertise--although some deference would be expected, as long as the Board considers and gives proper weight to the opinions and conclusions of Petitioners' experts provide in the same areas of expertise as that of the Division. (As Grupo Cementos notes, "dispersion modeling, compliance with National Ambient Air Quality Standards, adequacy of technology to control

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jurisdiction is also made plain:

> The burden of proof shall be upon the petitioner. Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.

NMSA 74-2-7.K (emphasis added). Significantly, there is no requirement in the Air Quality Act that the Board defer to the Director's decision that is the subject of the appeal, nor any evidentiary requirements that such deference be given to the technical basis for its decision.

emissions, the effect of permit terms and conditions"--i.e. the adequacy and enforceability of the permit.)

In its Motions, Grupo Cementos proceeds to extract from the petition a statement that the Permit was issued "without adequate conditions to protect the health, safety and welfare of the public and without proper review of all relevant evidence." Motions at 2. This is a red herring that Grupo Cementos then uses to alleged that Petitioners have failed to meet a nonexistent burden: "identifying how or upon what basis such evidence should be incorporated into the permit". *Id.* Although Grupo Cementos cites NMAC §20.11.41.18(B) as requiring this of the Petitioners, the cited section only deals with specific conditions that the Division *may* include in a permit, *not* any requirement of the adjudicatory rules that require Petitioners' allegations of defects in the Division's process and decision-making to conform to NMAC §20.11.41.18(B).

Moreover, even if such pleading by regulation were required for a proper petition, "catch-all" provisions in the regulations that allow the Division to expand conditions outside the narrow confines Grupo Cementos advocates as being required. *See* NMAC §20.11.41.18 at (B)(4) ("imposition of reasonable restrictions and limitations other than those relating specifically to emission limits or emission rates"), (B)(6)(e) ("any other reasonable sampling, testing or ambient monitoring and meteorological facilities and protocol") and (B)(9) ("other reasonable conditions as the Department may deem necessary").

Grupo Cementos argument proceeds to partially state the requirements of the "burden of persuasion" by omitting the portion of the rule that requires it to respond to the case the Petitioners present. Motions at 2. The complete rule states that the burden shifts back to the opponent of the petition once the petitioner makes a prima facie case. NMAC 20.11.18.16(C).

Following upon this partial statement of the burden of persuasion, Grupo Cementos states correctly that the rules require the proceeding before the Board be a "hearing on the merits." NMAC §20.11.81; Motions at 2. However, Grupo Cementos then offers three inapposite cases allegedly supporting the proposition that "determinations made by an agency in the course of administrative hearings" are extended "extreme deference" upon review. Motions 2. While there is half-a truth in this assertion, the other half is that the decision to extend deference depends upon the body conducting the review (another agency, a court, etc.). The cases Cementos cites are distinguishable on applicability of the facts and the law to the instant case.

Beginning with Grupo Cementos's last cited case, *Stokes* is a New Mexico Supreme Court reversal of a District Court trial *de novo* of an Officer of the State Engineer groundwater rights decision following an administrative hearing. *Stokes v. Morgan*, 101 N.M. 195, 680 P2d 335 at 336-337 (1984). While the quotation in the Motions is correct, the State Engineer's proceeding has the formality of a "hearing on the merits" which is completely lacking in the "Public Information Hearing" that the Division conducts, at its discretion, under 20.11.41.14.B. So,

while the quotation is correct, applying it a requirement for Board deference to the Division Director's decision-making would not be appropriate where the Director's proceeding is one in which there is no way of knowing what weigh any evidence collected may have been given, no findings of fact, conclusions of law and adequate record of decision. To defer to the Division's expertise, one must at least know how an opinion was formed, whether other expert opinions and the public opinion counted for anything at all in the process--and none of this can be known from the "Public Information Hearing" that the Director, at his discretion, conducted.

Grupo Cementos next cites generally to *Morningstar Water Users Ass'n v. N.M. Public Utility Comm'n* for the same proposition. In *Morningstar*, the issue was whether the Public Utility Commission was correct in finding that it lacked jurisdiction to issue an order restraining the City of Farmington from encroaching on the Morningstar Water Users service territory. 120 N.M. 579, 579, 904 P.2d 28 (1995). Here, although the principles of deference to the agency's expertise are discussed, the Court found exceptions to such deference where the agency interprets law (such as the jurisdictional issue), and facts (where a reviewing court may employ a "whole record review"). *Id.* at 582-583. After closely examining the *law* involved, the Court affirmed the Public Utility Commission's position that it lacked jurisdiction to take up the dispute without any congratulations to the PUC for its legal scholarship. This rather arcane situation does not provide support for Grupo Cementos' contention that the Board should defer the Division's expertise

in the permitting decision under appeal in this case, where no legal interpretation was involved in that decision.

Finally, Grupo Cementos holds up, again citing generally, *Archuleta v. Santa Fe Dep't ex rel. City of Santa Fe*, 137 N.M. 161, 108 P3d 1019 (2005), to support its contention that a hearing on the merits should be something far narrower than a hearing on the merits--yet *Archuleta* is also inapplicable. *Archuleta* was an appeal by the City of Santa Fe on behalf of the Santa Fe Police Department from a Court of Appeals decision reversing the City Grievance Review Board demotion of Lieutenant Archuleta. The sole issue on appeal was "whether is was error [on the part of the Hearing Officer] to deny Archuleta access to the disciplinary records of fellow police officers in his post-demotion hearing before the City's Grievance Review Board." *Id.* at 164. This is pretty far afield from whether the Board should defer to the Division's permit issuing expertise--and in fact, once again, there is no direct analogy to the situation in the instant case where the Board has jurisdiction and must conduct a "hearing on the merits."

Again, a reviewing court, not Board with jurisdiction over a Division (as is this case), will defer to agency expertise, taking into account the "nature of the agency and the scope of its power to determine fundamental policy." *Id.* at168. Yet, this case, too, is not "on point" as it involved deference to the Hearing Officer's decision (off the record) to deny an overly broad discovery request for access to other officers' disciplinary records. *Id.* at 169-171,174-175.

Reviewing courts "recognize agency expertise" because they (the Judicial branch of government), unlike the Board (the Executive branch of government) lack the expertise that informed the decision making process "below." In the case before this Board (and its appointed Hearing Officer), the Board does possess that expertise--it is required to have that expertise--and it makes regulations and ordinances and oversees the administration of the New Mexico Air Quality Act for the city and county. The Joint Air Quality Control Board Ordinance describes the Board's composition, in pertinent part:

> At least a majority of the membership of the Board shall be individuals who represent the public interest and meet the requirements of the state and federal guidelines set forth in the New Mexico Air Quality Control Act, as amended, and the federal Clean Air Act, 42 U.S.C.A. Section 7401, et seq., as amended. Further, to the extent that the requirement does not conflict with this division (a), Board members will be selected for their concerns about, and commitment to, the local ambient air quality. Therefore, selections may be made from a broad range of persons representing the public interest and who are experienced or trained in disciplines including natural sciences, humanities, social studies, finance, medicine and health, engineering or physics, law, law enforcement, education, business and industry.

§9-5-1-3(B)(4)(a).[2] Thus, unlike most reviewing courts, the Board is uniquely staffed by persons of interest and experience who are charged with administering the relevant statues, hearing appeals of decision by the Division, conducting rulemakings, and passing resolutions as needed to conduct their business. NMSA §§74-2-4, -5. They need not defer to the Division and, in fact, oversee it.

Finally, looking at the well-settled definition of a "hearing on the merits" as

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[2] City Ordinance 9-5-1.1, downloadable PDF is available on-line at: http://www.cabq.gov/airquality/aqcb/regulations-and-ordinances

required for this Petition under NMAC §20.11.81, settles the issue that such a hearing requirement means that the Petitioners are entitled to present their case to the Board without limitation, other than the basic evidentiary rules, i.e., that the testimony must be relevant and probative to making a prima facie case on the issues raised in the Petition and not be repetitive, or cumulative.[3] A hearing on the merits means that the adjudicator will decide the matters

> on a consideration of their substance and the legal rights involved in opposition to a decision based upon mere defects of procedure or the technicalities thereof. It means the court shall do justice irrespective of informal, technical or dilatory objections or contentions.

Seward v. The Denver & Rio Grande Railroad Company, 17 N.M. 557, 580; 131 P. 980 (1913) (citations omitted) (emphasis added). Petitioners contend that the Grupo Cementos Motions before the Hearing Officer and Board are, in essence, dilatory objections that in no way justify or warrant "limiting the admission of facts, evidence and testimony in this matter". Motions at 1.

B. Petitioners' Environmental Justice Arguments Are Proper Issues For This Hearing.

The *Colonias* case, cited by Grupo Cementos as *Rhino*, arguably requires a nexus between the statutorily required considerations and environmental justice concerns before an agency is required to employ such considerations in its adjudicatory functions. *Colonias Development Council v. Rhino Environmental Services, Inc,*, 138 N.M. 133, at 141,117 P.3d 939 (2005). However, the Court went on to find that

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[3] *See generally on conduct of hearing, evidence, burden of persuasion, objections and offers of proof,* NMAC §§20.11.81.12.B(2)(b), 20.11.81.16.B(1),(2), C, D and E.

> [W]e do find that quality of life concerns expressed during the hearing bear a relationship to environmental regulations the Secretary is charged with administering. Although both parties refer to the issues on appeal in a wide variety of ways, including "social impact," "sociological concerns," "social well-being," and "environmental justice," we believe there are legitimate concerns at the core of CDC's claim that are within the purview of the Secretary's oversight role. Contrary to the Department's position, the impact on the community from a specific environmental act, the proliferation of landfills, appears highly relevant to the permit process.

Id. (emphasis added). The Court went on to state

> As we have discussed, the regulations implementing the Solid Waste Act demand more from the Department than mere technical oversight. The regulations regarding permit issuance direct the Secretary to issue a permit if the applicant fulfills the technical requirements *and* "the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result."
>
> . . . .
>
> The regulations do not limit the Secretary's review to technical regulations, but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit.

Id. (citations omitted). This language is nearly identical to that used by the New Mexico Legislature to define an "air contaminant" under the Air Quality Act.

Compare 20.9.1.200(L)(10) NMAC *and* NMSA 1978 74-2-2.A, B. (2009).

Petitioners contend that there is a nexus here between the requirements of the applicable New Mexico and federal law on air quality and environmental justice concerns, a nexus nearly identical to that which the Court identified in *Colonias*. This nexus has had some effect upon the Board's decision-making, to the extent that the Board resolved to include such considerations within its decision-making processes and obtained a commitment that the Air Quality Division would do the same.

The Air Quality Board adopted an Environmental Justice resolution, recognizing that the Air Board is committed to the concept of environmental justice. Resolution #2008-11 (attachment #1 hereto). This commitment is defined as "fair treatment of all residents (in the City of Albuquerque and Bernalillo County), including communities of color and low income, and their meaningful involvement in the development, implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level." *Id.*

Moreover, the Board specifically recognized that the Air Quality Division is a recipient of assistance from the EPA and is subject to applicable EPA implementing regulations that the EPA adopted in response to Title VI of the Civil Rights Act of 1964. *Id.* It is, therefore, a reasonable contention that the Air Quality Division and the Air Quality Board may be subject to §1983 actions in the event that a community protected by Title VI is the subject of disparate impact due to permitting decisions. Hence, environmental justice considerations *should* inform the permitting process and be fully vetted at both the Director decision level and at the appeal level in this case.

EPA's guidelines, in regard to implementing environmental justice considerations in the permitting process, recommend initial and continuing opportunities for meaningful public participation in the entire permitting process. *See, e.g.*, U.S. EPA, "Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs." 71 Fed. Reg. 14207 (March 21, 2006).

Absent such a resolution, the Board and Division also have duties in their administration, execution and enforcement of the New Mexico Air Quality Act, NMSE

1978, §74-2 et seq. (2009), that spring from consideration of matters at the heart of environmental justice concerns, which considerations underlie all regulations and are the basis for interpreting air contamination in the context of permitting and regulating under the Air Quality Act and the federal Clean Air Act.

The New Mexico Air Quality Control Act defines "air contaminant" as "a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof." It defines "air pollution" as "the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property." *Compare* NMSA §74-2-2.A, B. (emphasis added) *and* NMAC §20.11.1.7 (" 'Air pollution' means the emission, except as such emission occurs in nature, into the outdoor atmosphere of one or more air contaminants in such quantities and duration as may with reasonable probability injure human health, animal or plant life, or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property") (emphasis added).

The Albuquerque-Bernalillo Air Quality Control Board regulations also provide that a permit may be denied if "any provision of the Air Quality Control Act will be violated." NMAC 20.11.41.16(A)(5). This indicates that the general consideration of the kind embracing environmental justice issues are well within the scope of air quality regulation and that, unlike the interpretation Grupo Cementos urges upon the Board

(and its Hearing Officer) in this case, air pollution control and permitting are about *more* than merely ascertaining whether a permit (or permittee) will meet technical. The Board and Division are executing a public trust that they make certain permits the Division issues are not slowly killing the people and the destroying property they are supposed to protect. This "trust" is particularly acute where, in addition to the state and federal air quality laws, the affected community, as in this case, is one that Title VI of the Civil Rights Act protects.

Plainly, under the New Mexico Air Quality Act, the Board and Division are tasked with interpreting air contaminant "events" in relation to human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property. Where such contamination takes place with a disparate impact upon citizens who are within the class described by Title VI of the Civil Rights Act, there is an environmental justice issue. Petitioners contend, and the Board and Division have acknowledged in the Resolution cited above, that the Division receives Title VI funding. Petitioners also contend that, under the Civil Rights Act, more than mere lip service to environmental justice is required when the Division examines the impacts upon communities and persons such as those who have petitioned in this case. See generally, 42 U.S.C. §1983; 42 U.S.C §200d *et seq*.

Moreover, pursuant to the Air Quality Act, the Board must, at a minimum, include the following considerations when enacting regulations:

> (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3)

> technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

74-2-5.E (emphasis added). The Board, however, has the discretion to "give weight" it deems appropriate to these factors under a totality of facts and circumstances. *Id.*

Petitioners contend that it would be irrational to read the act as requiring such considerations in the *drafting* of regulations and yet *not* expect that the identical considerations would be there, at a minimum, in the appeal of an Air Quality Division permit--particularly as similar considerations underlie the definition of air contaminants in the Air Quality Act cited above. After all, as the substance of the regulations and the definition of the substances regulated involve consideration of these factors, how would it be possible to conduct a meaningful review of the practical application of the regulations to permitting without asking whether a permit issued was consistent with the considerations underlying the regulations applied in granting it?

It is gratuitous for the permittee in this case to argue for a narrow basis of review. It is difficult to imagine Grupo Cementos demanding that its appeal of, e.g., the denial of a permit or granting a permit with conditions the company found onerous, would be on narrow grounds that excluded "the social and economic value of the source of the air contaminants" and the "economic reasonableness of reducing or eliminating air contaminants".

The substantive considerations that the New Mexico Air Quality Act requires within the rulemaking process (and at the heart of the definition of an air contaminant)

are not a mere recitation of "police power" inserted by the Legislative drafters to assure constitutional compliance. They are, rather, a direction from the legislature as to what kinds of questions, at a minimum, should form the basis of the Board's intellectual process when drafting regulations.

What are the primary concerns? Not the concrete, narrow reading--i.e., "does it violate the regulation?"--that the Grupo Cementos asks this Board (and its appointed Hearing Officer) to adopt. Rather, it is social-economic considerations that are at the very heart of environmental justice concerns: a community's health, welfare, property, aesthetics (visibility), and the "economic value of the subjects" (i.e. those persons subjected to) "air contaminants" when that community falls within the Title VI definition and is subject to disparate impact from regulated air contaminants adversely affecting those values. *Id.*

Were these considerations insufficient to warrant keeping environmental justice considerations before the Board in this appeal, there is also the issue of the Division's claim, "stamped" at the bottom of an interoffice memo, that it was implementing the Board's environmental justice resolution in the permitting process. *See* copy of the first page of an interoffice memo on the permit (attachment #2 hereto). Given that there is no way to know how the Division conducted this act of compliance with the Resolution, as it made no findings of fact, conclusions of law, nor a record of decision setting forth the use, weight and credibility of the evidence relied upon in the decision, one cannot ascertain more than "rubber stamp" compliance with the Resolution (or Title VI). This allegation

of compliance also opens the door to raising environmental justice considerations in this appeal.

Absent the crucial information missing from the Director's decision, a "hearing on the merits" of petitioners' appeal is, of necessity, a *de novo* hearing before the Board. For this reason, granting Grupo Cementos's Motions to "limi[t] the admission of facts, evidence and testimony" will deny Petitioners the right to a meaningful hearing.

Under Section 74-2-4 NMSA 1978 (2009) authorizing a local board and director to administer the provisions of the New Mexico Air Quality Act, the statute states in pertinent part that:

> Prior to adopting any ordinance regulating air pollution, public hearings and consultations shall be held as directed by the local authority adopting the ordinance. The provisions of any ordinance shall be consistent with the substantive provisions of the Air Quality Control Act <u>and shall provide for standards and regulations not lower than those required by regulations adopted by the environmental improvement board</u>.

Id. at 74-2-4.C (emphasis added), *compare id.* and 74.2.7.G *with* 20.1.4.7.A(1)(b) *and* NMAC 20.1.4.100.B *and* 20.2.1.109 ("Any Part under Chapter 2 of Title 20 shall be *liberally construed* to effectuate the purpose of the Environmental Improvement Act, NMSA 1978, 74-1-1 et seq. and the Air Quality Control Act, NMSA 1978, 74-2-1 et seq.).[4] This means that regulations governing hearings that EIB adopted also pertain, by definition, to Albuquerque-Bernalillo Air Quality Control Board hearings under the Air Quality Act.

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[4] Petitioners contend that it is also significant, in the context of the nexus of concerns that require the Board and Division to consider environmental justice issues in regulations and permitting (and this appeal), that the New Mexico Air Quality Act and applicable federal law require that air quality regulations in New Mexico mirror federal law, including Title VI. See, e.g., NMSA 1978, §74-2-5(C)(1)(a).

It cannot be the case that an Air Quality Division proceeding within the Department and before the Secretary is required by regulation to have its purposes "liberally construed" and, specifically be liberally construed to "facilitate participation by members of the public, including those who are not represented by counsel" while those of the local air boards and divisions, such as the Air Quality Division and Board, without such language in its regulations, do not. That would mean unequal treatment for persons living in areas administered by a local board. Rather, §74-2-4 requires that the regulations and ordinances which the local divisions and boards adopt--including, petitioners contend, their procedures dealing with the public, public participation at hearing, hearing opportunities, and consideration of environmental justice issues-- "shall provide for standards and regulations not lower than those required by regulations adopted by the environmental improvement board". *Id.* (emphasis added).

The New Mexico Supreme Court has held that it "must construe [p]ermit procedures to facilitate meaningful participation by members of the public." *Colonias Development Council v. Rhino Environmental Services, Inc.*, 138 N.M. 133, 117 P.3d 939, 949-950 (2005) (citing *Martinez v. Maggiore,* 2003-NMCA-043, PP 14-19, 133 N.M. 472, 64 P3d 499 (Ct.App.2003) (emphasis added), and referencing 20.1.4.100(B) NMAC. Although *Colonias* deals with the provisions of the Solid Waste Act, this reference to 20.1.4.110(B), in the light of the plain language of NMSA 74-2-4.C, requires that such "meaningful participation" also apply to the hearing processes of the Division and Board.

What constitutes meaningful participation? In the context of the "Public Information Hearing" conducted by the Air Quality Division, there is no way of knowing

how the information Petitioners and others presented to the Director was utilized in his decision making process. There were no findings of fact, conclusions of law or record of decision from which one could glean which evidence was used, which discarded, what weight was given to evidence, and how the Director arrived at his conclusions. Certainly, "meaningful participation" includes having the substance of such participation factored into the decision-making process and having the process open and transparent--which is not the case for the Division's process in this matter.

The letters sent to participants in that Public Information Hearing merely present a laundry list of evidence allegedly considered, do not even acknowledge the enormous public response and presence at the two hearings that were required. Nor is the public comment and testimony--including videos of fugitive emissions from the Grupo Cementos facility--acknowledged. In short, the Director's decision is without adequate explanation and arrives at what Petitioners contend are unsupported conclusions. *Compare* Administrative Record #251, the form letter send to residents (attachment #3 hereto) *and* the Petition filed in this case.

The missing portion of the Director's decision is precisely the type of excluded evidence that the New Mexico Supreme Court found to be troubling in the *Colonias* case. *Colonias, supra* at 139-140, 143-144. That is why, in this case, with a "hearing on the merits" there must also be a hearing process which avoids that type of problem. There must be an opportunity for the Petitioners and the public to present testimony pursuant to the evidentiary rules--and, at the end of the hearing, a decision based upon findings of fact, conclusions of law and a reviewable record of decision that reveals how evidence was

weighed, and on what rational basis a final decision was made. "[L]imiting the admission of facts, evidence and testimony in this matter" to any degree beyond requirements in the adjudicatory procedural rules will make that result impossible.

C. Petitioners' Fourth Claim For Relief Should Be Maintained

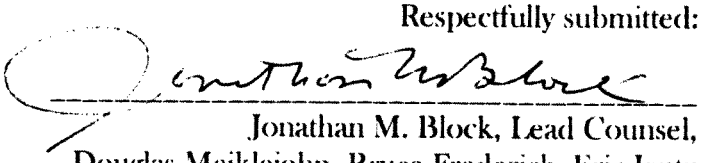
Petitioner's Fourth Claim For Relief is no more or less than a reservation of the right to amend pleadings in conformity with the evidence. Had an attorney drawn it, it would have said that with specificity. However, it is comprehensible as submitted. Petitioners want to be able to raise issues that may be uncovered in the course of presenting and hearing the evidence in this case. Therefore, Petitioners ask that the Fourth Claim be understood as asking no more or less than that, and that it be allowed.

CONCLUSION

The Petitioner herein above provided facts, law and argument to warrant dismissal of Grupo Cementos Motions In Limine and Motion To Dismiss.

WHERFORE, the Board (and Hearing Officer) should deny the Motions.

Respectfully submitted:



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Certification of Service on following page

CERTIFICATION OF SERVICE

I, Jonathan M. Block, hereby certify that on this 18th day of February, 2010, I caused the foregoing Response to Motion to Disqualify to be served upon the below listed persons by email or by email and U.S.P.S. First Class Mail, postage prepaid to the Hearing Clerk:

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Attachment # 1
to Petitioners' Response to Motions for Limine and to Strike

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

RESOLUTION # 2008-11

INCORPORATING ENVIRONMENTAL JUSTICE PRINCIPLES, INCLUDING MEANINGFUL PUBLIC PARTICIPATION, INTO THE AIR BOARD'S PROCESS FOR ADOPTING AIR BOARD REGULATIONS AND IN THE AIR QUALITY DIVISION'S POLICIES AND PROCEDURES

Whereas, the Environmental Justice (EJ) Task Force was created by the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) on May 9, 2007, to "provide recommendations to the Air ... Board to address EJ concerns in Albuquerque and Bernalillo County"; and

Whereas, on July 11, 2007, the EJ Task Force was tasked with seven objectives, then met with Task Force members and produced a Final Report dated March 12, 2008; and

Whereas, at the March 12, 2008 Air Board meeting, the Air Board acknowledged receipt of the Final Report and thanked the EJ Task Force for its work; and

Whereas, at an April 23, 2008 workshop held at Los Griegos Health and Social Service Center, Air Board members discussed the EJ Final Report and recommendations, clarified some of the information included in the Report, and heard statements from members of the Task Force, the Air Quality Division (AQD), the Bernalillo County Office of Environmental Health, the New Mexico Environment Department and others; members of the public attended the workshop; and

Whereas, at the May 14, 2008 Air Board meeting, the Air Board heard and considered public comments regarding the EJ Task Force Report Workshop, and the Air Board Chair asked Board members to submit individual proposals regarding the EJ Task Force Final Report and related issues to the Board Clerk by May 30, 2008; and

Whereas, thereafter the Air Board discussed written proposals by four Air Board members regarding the Final Report, and the Board took comments from the public, AQD and the Bernalillo County Office of Environmental Health; Board Member Campen offered to summarize the Board Members' proposals and incorporate them into one written document; and

Whereas, Member Campen's first summary was discussed at the August 13, 2008 Air Board meeting, as were AQD's initial written response, statements by AQD, the Board attorney and others, which resulted in Member Campen offering to rework and reissue the EJ summary; and

Whereas, at the Air Board's September 10, 2008 meeting, Member Campen's second synthesis, entitled *Recommendations for Incorporation of Environmental Justice Principles into the Albuquerque-Bernalillo County Air Quality Division Policies and Procedures: A summary of Prioritized Objectives Submitted to the Division Staff for Feasibility Analysis* (EJ Summary #2), was distributed, Board members discussed the merits of and concerns regarding EJ Summary #2, additional statements were heard, and the Board asked AQD for a written response regarding the feasibility of implementing the proposals, costs, a comparison of the difficulty of implementing the proposals, and a written proposed Resolution; and

Whereas, the Air Board has reviewed and considered the Final Report submitted by the EJ Task Force; the proposals submitted by the four Board Members; Member Campen's EJ Summary #2; statements, members of the EJ Task Force, AQD , the Bernalillo County Office of Environmental Health, the public and others; the September 10, 2008 response of the Bernalillo County Office of Environmental

Health, and the *Air Quality Division 11/12/08 Response to Member Campen's Second Summary of Air Board Recommendations for Incorporating Environmental Justice Principles* (AQD 11/12/08 Response) and the Air Board has agreed upon approaches to continue incorporating environmental justice principles in AQD's policies and procedures; and

Whereas, the New Mexico Attorney General rendered opinion number 08-03, "Albuquerque-Bernalillo County Air Quality Control Board" on Wednesday, March 12, 2008, regarding the Board's authority to address environmental justice issues.

NOW, THEREFORE, BE IT RESOLVED BY THE AIR BOARD THAT:

1. The Air Board is committed to the concept of environmental justice, which is defined in the Final Report as "The fair treatment of all residents (in the City of Albuquerque and Bernalillo County), including communities of color and low income communities, and their meaningful involvement in the development, implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level."

2. The Air Board accepts the Air Quality Division's commitment to the concept of environmental justice as defined in Section #1 of this Resolution. AQD's 11/12/08 Response demonstrated that: the New Mexico Air Quality Control Act (Air Act) and relevant New Mexico case law establish that the general purpose of the Air Board is to "prevent or abate air pollution" (NMSA 74-2-5(A)); the types of regulations the Air Board has authority to adopt are described at NMSA 74-2-5(B) through (D); and the Air Act establishes the basis AQD can use to deny applications for air quality permits.

3. The Air Board acknowledges that AQD is a recipient of assistance from the EPA and is subject to applicable EPA implementing regulations that the EPA adopted in response to Title VI of the Civil Rights Act of 1964. AQD has reviewed and implemented recommendations from the March 21, 2006 *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Recipient Guidance), which is based on the EPA's commitment to early and meaningful public involvement throughout the entire permitting process and offers suggestions to EPA assistance recipients regarding how to enhance public involvement processes in environmental permitting and to address potential Title VI issues.

4. The Air Board strongly suggests that AQD's internal regulatory development group will continue to:

A. seek opportunities to incorporate appropriate environmental justice principles in the regulations; and

B. incorporate early and meaningful public involvement throughout the air quality permitting process, which shall include public education and outreach, public notice and opportunities for public participation during the permitting process.

5. The Air Board will continue to consider opportunities to incorporate environmental justice principles in its regulations, as is consistent with the limited authority granted to the Air Board and the local air agency by the Air Act.

6. The Air Board will consider AQD's proposed amendments to the minor source air permitting regulation, which significantly increase public notification; shift the responsibility for notice prior to application submittal to the applicant, at the applicant's expense; and limit the permit applicant to three permit application submittals (an initial submittal and two additional submittals following written rejection of the application by AQD), at which point, if AQD determines the application is still incomplete, AQD will deny the permit application.

7. The Air Board encourages AQD to increase information available on AQD's web site and, as appropriate for the level of funding and staffing available, to increase public outreach, education and training sessions for the public regarding air quality, air dispersion modeling, the permitting process, and enforcement activities.

8. The Air Board encourages AQD to continue to work with the City's Office of Management and Budget and with the EPA to maintain and optimize the existing air monitoring network. The Air Board encourages AQD to work to create additional transparency between neighborhoods and AQD through ongoing public education and training activities that will include neighborhood associations, and will continue developing the Public Involvement Plan.

9. The Air Board encourages AQD to continue to assess air quality program costs in order to determine whether funds are available for outside contracts or expenditures related to Environmental Justice proposals.

10. The Air Board encourages AQD to give high priority to enforcement actions and to its compliance assistance program to further ensure compliance with air quality regulations and air quality permit terms.

11. The Air Board encourages AQD, during the state legislative session, to continue to work with interested participants, track and review proposed legislation involving the Air Quality Control Act and environmental justice principles. The Air Board acknowledges that AQD staff cannot act as lobbyists during the process.

12. The Air Board encourages AQD to continue to work with the Air Board, stakeholders and other governmental entities to preserve and improve Bernalillo County's air quality resource and enhance public involvement in air quality programs.

13. A member of the Air Board will be appointed to attend meetings and/or monitor the Governor's Environmental Justice Task Force with the primary purpose being to identify appropriate environmental justice (as defined in the EJ Task Force Final Report) elements that can be incorporated in comprehensive reviews of air permit applications. The appointed Air Board member shall report to the Air Board as necessary.

14. The Air Quality Control Board will work with the City of Albuquerque, Bernalillo County, and the public to implement key recommendations of the Environmental Justice Task Force, as appropriate.

PASSED AND ADOPTED THIS 10th DAY OF DECEMBER 2008
BY A VOTE OF 4 FOR AND ____ AGAINST.
Absent: 3
Abstain: _____

Mike Minturn, Chair
Albuquerque-Bernalillo County
Air Quality Control Board

Attest:

Isreal Tavarez
Board Secretary

Martin J. Chávez, Mayor

Environmental Health Department
Air Quality Division
Interoffice Memorandum

Attachment #2 to Petitioners' Response to Motions for Limine and to Discuss

John W. Soladay, Director

To: Permit File, Enforcement File

From: Regan Eyerman, Environmental Health Scientist

Date: September 15, 2009

Subject: American Cement
Permit application #0902-M3, AIRS #NM/001/00012

Project: American Cement Facility
Cement and Cement Additive Transfer Station
4702 Carlton NW
Albuquerque, New Mexico 87107

Mail Address: American Cement Corporation
P.O. Box 2273
Espanola, NM 87532
UTMN: 3888364 UTME: 350955

History: **0902**

On December 29, 1997 an application was received by the Division from American Cement Corporation for their existing Portland cement/flyash transfer facility. Process equipment consisted of one (1) cement silo, one (1) fly ash silo and a backup generator. Permitted TSP emissions were 2.69 tons/yr. The permit was issued April 24, 1998.

0902-M1 (Active Permit)

On September 22, 2005 an application was received by the Division from American Cement Corporation to modify Authority to Construct Permit No. 0902. The modification consisted of increasing cement throughput from 100,000 to 190,000 tons per year, and fly ash throughput from 15,000 to 60,000 tons per year. The modification also allowed the installation of three cement silos, bringing the total amount of equipment to four (4) cement silos, one (1) fly ash silo and three (3) truck loading points. The original cement and fly ash silos each had their own baghouse with controlled emission rates at 99.5% control efficiency. The three new silos were each ducted to a single baghouse with controlled emission rates at 99.5% control efficiency. The applicant had provided manufacturer data verifying the bags had a control efficiency greater than 99.5% for PM2.5, PM10, and TSP. At the loading points and unloading points for the silos, captured emissions were drawn back to the baghouse. The applicant had requested a 64.75% control efficiency on uncontrolled emission rates emanating from haul roads. To achieve this level of control efficiency, the applicant wet swept the haul road every other week. Requested operating hours were 11 hours/day, 6 days/week, 51 weeks/year for a total of 3,366 hours/yr. The permit was issued November 15, 2006.

AR
246.1

Note: The Division's review of the permit application and the Division's issuance of the permit modification followed applicable provisions of Albuquerque-Bernalillo County Air Quality Control Board Resolution #2008-11 regarding incorporation of environmental justice principles and including meaningful public participation in the process.

9/15/09

CITY OF ALBUQUERQUE

Environmental Health Department
John W. Soladay, Director

Attachment #3 to Petitioners' Response to Motions in Limine & to Dismiss

September 30, 2009

Re: Air Quality Permit No. 0902-M3 ~ American Cement Corporation (American Cement) - Permit Modification

Dear Resident(s):

You either submitted written comments or evidence regarding the American Cement air quality permit application or, on Tuesday, June 23, 2009, you participated in a public information hearing (PIH) at the Albuquerque Convention Center and/or, on Wednesday, August 5, 2009, you participated in the continued PIH at the Indian Pueblo Cultural Center concerning the American Cement air quality permit application that had been received by the Air Quality Division (Division) of the Albuquerque Environmental Health Department (Department). The application requested a permit modification that would authorize American Cement to upgrade the baghouses to higher-efficiency dust cartridges and to operate at any time at the American Cement cement and cement supplement transfer terminal located at 4702 Carlton St. NW (Facility).

The decision of the Division regarding the permit application is based on the requirements of the New Mexico Air Quality Control Act, Chapter 74, Article 2 NMSA (Act); the City of Albuquerque and Bernalillo County Joint Air Quality Control Board Ordinances (Ordinances); 20.11.41 NMAC, which is the Albuquerque-Bernalillo County Air Quality Control Board (Board) "Authority to Construct" permit regulation, also known as "Part 41"; and other applicable Board Regulations. I attended both PIHs, along with staff and supervisory/management personnel from the City of Albuquerque, which included the permit writer assigned to primary review of the American Cement permit application, and Division, Department and Legal employees. Before the Division made a decision regarding the application, the Division considered all written comments and evidence, testimony, exhibits and questions supporting and opposing the permit application. The Division considered whether the application complied with the technical requirements of the Act, the Ordinances and Part 41, and also considered public opinion regarding air quality issues, wider public health and environmental issues, and additional public safety and welfare issues, within the context of the requirements of the Act, the Ordinances and Part 41.

Environmental Health Department

PO Box 1293

Albuquerque

NM 87103

www.cabq.gov

As a part of the application review process, the Division established an "administrative record" regarding the permit modification application. The administrative record includes the application, evidence submitted by the applicant, all written comments and evidence received by the Division, and all written and oral questions, testimony and exhibits submitted at the PIHs (the hearing record). As stated by the hearing officer at the PIHs, and as authorized by Subsection C of 20.11.41.15 NMAC, the Division can make three different decisions regarding an application for an Authority-to-Construct air quality permit or modification, if the Division has legal justification for making the decision. The choices are:

1. granting the permit as requested by the applicant, or
2. granting the permit subject to additional conditions, or
3. denying the permit.

Before the Division made a decision, the Division reviewed the administrative record; reports prepared by New Mexico Department of Health epidemiologist Thomas Scharmen entitled "Permitted Stationary Sources of Pollution", "Asthma and Mortality Rates Tables for No. Valley Coalition of Neighborhood Associations.xls" and "Hospitalization and Mortality in Albuquerque Zip Codes" http://www.nmpha.org/documents/social%20determinants/Hospitalization%20and%20Mortality%20in%20ABQ%20MSA%20T%20Scharmen.pdf; and a report prepared by the Centers for Disease Control and Prevention and the National Institutes of Health entitled "Healthy People 2010", Volume 2, Focus Area 24, Respiratory Diseases, Section 24-1 http://www.healthypeople.gov/Document/HTML/Volume2/24Respiratory.htm.

In response to testimony at the PIHs regarding increased noise and traffic concerns in the community, the Division contacted the City of Albuquerque Municipal Development and Planning Departments, which have jurisdiction over traffic, noise and lighting issues in the area surrounding the Facility. The Planning Department informed the Division that the arterial roads surrounding the Facility are designed to handle the increased traffic capacity that may result from the permit modification. The Facility is in a M-1 Light Manufacturing Zone, and there is no ordinance in the City Zoning Code (Code) that regulates noise issues for that zoning. Regulations in the Code do state that light may not shine directly onto a residentially zoned property. There is also a city noise ordinance which you can review at http://www.cabq.gov/envhealth/pdf/chapter9noiseordinance.pdf. Any issues with lighting or noise issues can be reported by contacting the city's 311 help line.

The Division determined the permit applicant has met all requirements of the Act, the Ordinances and Part 41. In addition, the Division determined that if the Facility is operated as required by Permit 0902-M3, there is no basis for the Division to deny the permit application for the reasons listed in NMSA 1978 § 74-2-7(C)(1) and 20.11.41.16 NMAC, "Basis for Permit Denial". Therefore, the Division has issued a modification to American Cement's authority-to-construct permit. The Division decided to grant Permit No. 0902-M3 subject to additional conditions that were not included in the application. The additional conditions were imposed to meet comments and concerns expressed in letters and testimony at the PIHs by

representatives of the Albuquerque Museum Foundation, the North Valley Coalition and Senator Dede Feldman's office. The following list summarizes the conditions that have been incorporated into the permit modification. The conditions **in bold** are the additional operational requirements for the cement and cement supplement transfer terminal that were added by the Division:

1. The nine (9) dust collectors which serve Units 1 through 8 shall be operated and maintained in accordance with the manufacturer's specifications in order to ensure a control efficiency greater than or equal to 99.95% is achieved. The pressure drop across the dust collectors shall remain within the range required by the manufacturer to achieve this level of control efficiency. If any of the dust collectors are not operating in compliance with the respective conditions in this permit or the manufacturer's specifications, the effected silo shall be **immediately** shut down until the dust collection control equipment is repaired and functioning in accordance with the manufacturer's specifications. Compliance with this condition shall be shown through meeting the requirements of Permit Conditions I.1.d), I.1.i)ix, I.2.c), and I.3.b),d),e),f). This condition has been placed in the permit based on air dispersion modeling of the Facility at this location to demonstrate compliance with the National Ambient Air Quality Standards and New Mexico Ambient Air Quality Standards for $PM_{2.5}$, PM_{10}, and TSP. [NOTE: The Division independently verified the accuracy of the modeling results submitted by the applicant.]
2. Units 1 through 5 shall be equipped with a functioning and well maintained overflow alarm. Alarm activation shall either be visual in the form of a lamp, or audible in the form of a buzzer. The Permittee shall stop filling the silo whenever the overflow alarm has been activated. This device shall be installed within **fifteen (15) days** of permit issuance.
3. **All haul roads at the Facility shall be paved by the owner/operator. The permittee shall perform daily vacuum street cleaning or wet sweeping with a sweeper certified by the manufacturer to be efficient at removing particulate matter having an aerodynamic diameter of less than 10 microns (i.e. PM10) to prevent visible emissions of fugitive dust from being generated as specified by 20.11.20.23.A and B NMAC. Vacuum street cleaning or wet sweeping shall be conducted more frequently than daily as necessary to prevent fugitive dust from being generated from all haul roads.**
4. Emission Units 1 through 9 shall not cause or allow visible emissions that exceed 10 percent opacity. Percent opacity shall be determined using **a 15-minute Method 22 test** - "Visual determination of fugitive emissions from material sources and smoke emissions from flares", pursuant to CFR Title 40 Part 60 Appendix A. If visible emissions are observed during any Method 22 test, the Facility will perform on the Unit(s) in question a 30-minute Method 9 test - "Visual Determination of the opacity of emissions from stationary sources", pursuant to CFR Title 40 Part 60 Appendix A.
5. **Maintain records of monthly purchases and installation of cartridges.**
6. **Biannual compliance tests for the overflow alarms for each silo shall be conducted.**

7. Compliance tests for Units 1 through 9 shall be conducted **once every quarter-year** in order to demonstrate continual compliance of the opacity standards stated in Condition I.2.b). The compliance tests shall be conducted in accordance with EPA Method 9 found in Appendix A of CFR Title 40 Part 60, and the procedures found in Subpart A of CFR Title 40 Part 60.11. If any Method 9 reading shows non-compliance, EPA Methods 1 through 5 shall be conducted within 30 days of the non-compliant Method 9 testing. The permittee may submit to the Department for review a written request to waive any compliance test requirement. Compliance testing shall not be waived unless it is approved in writing by the Department.

The Division issued Air Quality Permit No. 0902-M3 effective September 15, 2009. If you have any questions concerning this permit issuance, or the permitting process, please contact me at (505)768-1965. As provided by the New Mexico Air Quality Control Act, NMSA 1978, 74-2-7.H, as a participant in the permitting action, you may file a petition for a hearing on the merits before the Board as provided by Board regulation 20.11.81 NMAC, "Adjudicatory Procedures-AQCB". The petition must be submitted in writing to the Board in care of John W. Soladay, Director of the Environmental Health Department, to the address as shown on page 1 of this letter, within thirty (30) days from the date you receive this letter. Subsection K of 20.11.2.18 NMAC, "Board hearing filing fees", establishes: "Any person who requests a hearing before the board to challenge the issuance of a permit, the terms of a permit or permit modification, (or) the department's refusal to issue a permit ... shall be charged a filing fee of $125.00."

Sincerely,

Isreal J Tavarez

Isreal Tavarez, Environmental Engineering Manager
Air Quality Programs
Air Quality Division
City of Albuquerque Environmental Health Department

cc: File