

1 **BEFORE THE PIMA COUNTY AIR QUALITY HEARING BOARD**

2 In the matter of
3 Rosemont Copper Company

Docket No. 11.001

**[DRAFT] RULING ON APPEAL BY
ROSEMONT COPPER COMPANY,
INC., OF DENIAL OF AIR QUALITY
PERMIT**

7 **I. Background.**

8 This is an appeal by Rosemont Copper Company, Inc., of the denial of its air
9 quality permit application (No. 6112) by Control Officer Ursula Kramer and the Pima
10 County Air Quality Control District (“PCAQCD”). Rosemont had filed the application in
11 connection with its proposal to construct a copper mine and associated operations in Pima
12 County, Arizona. The Control Officer denied the permit on September 28, 2011 after
13 concluding, *inter alia*, that Rosemont would be a “major source” of air contaminants
14 because of its potential fugitive emissions of particulate matter and carbon monoxide, and
15 accordingly had failed to submit information necessary to support application for a new
16 major source. “Fugitive emissions” are emissions of air pollutants that escape from
17 industrial facilities and equipment, rather than being reasonably emitted through a vent or
18 a stack. 40 CFR 51.166 (b)(20); Pima County Code § 17.04.340(A)(96).

19 Rosemont argues that the Control Officer improperly concluded that the company’s
20 mine would be a major source of air emissions, and that the Control Officer acted
21 arbitrarily and capriciously and contrary to law in denying Rosemont’s permit application
22 on that basis. Rosemont requests that the Board reverse the Control Officer’s
23 determination that Rosemont must be treated as a potential major source and order its
24 application to be reinstated.

25 Although most of the underlying facts are not in dispute, the application of relevant
26 federal and state law to them is exceedingly complex. The ultimately controlling issue is
27 whether, under applicable law, Rosemont’s projected fugitive emissions of particulates
28 and carbon monoxide (“CO”) should be considered when determining whether the
 company is properly classified as a major source of air contaminants. If fugitive

1 emissions of particulates and CO are included, then there is no dispute that Rosemont is a
2 major source. That, in turn, would lead to the conclusion that the Control Officer properly
3 denied Rosemont's air quality permit application because the application failed to include
4 certain information required to be submitted by potential major sources. Conversely, if
5 federal, state, or local law requires that Rosemont's fugitive emissions be disregarded for
6 purposes of determining whether Rosemont is a potential major source, then there is no
7 dispute that Rosemont is a minor source. That, in turn, would lead to the conclusion that
8 the Control Officer's denial of the Rosemont permit application was contrary to law, if not
9 arbitrary and capricious.

10 Resolving this controlling issue is law requires some further exploration of the
11 regulatory regime under which Rosemont's application which submitted. We begin with
12 the federal Clean Air Act, 42 U.S.C. §§ 7401 et seq. The modern Clean Air Act was
13 passed in 1970 and substantially amended in 1990. The Act establishes "a comprehensive
14 national program that ma[kes] the States and the Federal Government partners in the
15 struggle against air pollution. *General Motors Corp. v. United States*, 496 U.S. 530, 532
16 (1990). The Act expressly states that "air pollution control at its source is the *primary*
17 responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added);
18 *see also id.* § 7407 ("Each State shall have the primary responsibility for assuring air
19 quality within the entire geographic area comprising such State").

20 Among other things, the Act required the United States Environmental Protection
21 Agency ("EPA") to establish primary and secondary national ambient air quality
22 standards for "criteria" pollutants, 42 U.S.C. § 7609.¹ Pursuant to 42 U.S.C. § 7609, EPA
23 subsequently established national ambient air quality standards ("NAAQS") for sulfur
24 oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. 40 CFR
25 Part 50.

26 The Act also established a process for those standards to be achieved and
27 maintained through the cooperative action of EPA, States, and other relevant jurisdictions.

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¹ Primary NAAQS are designed to protect the public health; secondary NAAQS are to protect the public welfare.

1 That process was set forth in 42 U.S.C. § 7610, which requires each State to submit for
2 EPA approval a “State Implementation Plan” (“SIP”), which establishes enforceable
3 emissions limitations and other control measures designed to ensure that the State attains
4 and/or maintains national ambient air quality standards. Each State’s SIP is required to
5 include emission limitations, schedules, compliance timetables, and other measures
6 insuring timely attainment and subsequent maintenance of the national ambient air quality
7 standards. Although the Act sets forth certain minimum requirements for SIPs, States are
8 granted discretion to adopt their own mix of regulatory requirements and control
9 measures. As long as the ultimate effect of a State's choice of emission limitations is
10 compliance with the national standards for ambient air, “the State is at liberty to adopt
11 whatever mix of emission limitations it deems best suited to its particular situation.”
12 *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

13 The State is also authorized to delegate certain enforcement responsibilities to
14 political subdivisions who demonstrate the capability to handle enforcement within their
15 jurisdiction. 42 U.S.C. § 7410(3)(3). Pima County is one such political subdivision.

16 Like all SIPs, the Arizona SIP is not a readily identifiable single document.
17 Rather, it is comprised of a diverse collection of state, county, local, and tribal laws and
18 regulations. 40 C.F.R. § 52.20. The original Arizona SIP was submitted to EPA on
19 January 28, 1972. It has been continuously amended and modified since. Merely listing
20 the titles of the diverse elements of the Arizona SIP now requires 25 pages of dense text in
21 the Code of Federal Regulations. *Id.* Some of the listed elements, such as later-adopted
22 codes, supersede or amend earlier-listed versions thereof.

23 The Clean Air Act also established a preconstruction review and permitting
24 program that applies to proposed new major sources of criteria pollutants or to major
25 modifications of existing sources. State SIPs are required to have a program that at least
26 meets the federally established minimum standards. The legal requirements vary based
27 upon the proposed source’s location and type. Obtaining preconstruction approval for a
28 new major source in an area with degraded air quality is considerably more difficult than
doing so in an area with clean air. In areas whose air quality achieves national ambient air

1 quality standards, the relevant program is generally referred to as the “Prevention of
2 Significant Deterioration” (“PSD”) program. The federal version of this program is found
3 in Part C of Subpart I of the Act, 42 U.S.C. §§ 7470 *et seq.* In areas whose air quality
4 does not comply with national ambient air quality standards, the relevant program is
5 generally referred to as “New Source Review” (“NSR”). The federal version of this
6 program, referred to as the “Part D” program, is found at 42 U.S.C. §§ 7501 *et seq.*²

7 A source generally is defined as “major” in an attainments area if it has the
8 potential to emit 250 tons per year of any regulated pollutant, although the threshold is
9 100 tons per year for certain source categories. 42 U.S.C. § 7479 (1); 40 CFR 52.21
10 (b)(1). In non-attainment areas, the threshold for “major” source definition is 100 tons per
11 year, or less in certain areas of more serious non-attainment. 40 CFR 51.165(a)(1)(iv)(A).
12 A source is defined as “major” or not based upon its “potential to emit” regulated air
13 pollutants. “Potential to emit” is the maximum capacity of a source to emit a pollutant,
14 given its physical and operational design, operating 24 hours a day for 365 days per year,
15 and discounting the effects of air pollution control technology that is not legally
16 enforceable. 40 CFR §§ 52.21 (b), 51.165 (a)(1)(iii), 51.166 (b)(4).³

18
19 ² Major new sources in non-attainment areas are obliged to obtain offsetting emissions
20 reductions from other sources and to apply air pollution control technology that achieves
21 the “lowest achievable emissions rate” (“LAER”). 42 U.S.C. §7503. LAER is typically
22 determined by evaluating the most stringent emissions limitation applied to a similar
23 source, without regard to the economic impact of requiring adoption of that technology by
24 the new proposed source. 40 CFR 51.165(a)(1)(xiii). New sources in attainment areas
25 need not obtain offsetting emissions reductions, and are obliged to apply air pollution
26 control technology constituting the “best available control technology.” (“BACT”). 42
27 U.S.C. § 7475. BACT is determined on a case-by-case basis, generally involving
28 selection of the maximum emissions reduction achievable, considering environmental and
economic factors. 40 CFR 166(b)(2). Essentially, the cost-effectiveness of control
technology is a consideration in determining BACT but not LAER.

³ A source's potential to emit is usually expressed in tons per year and is calculated by
multiplying the source’s maximum hourly emissions rate in pounds per hour times 8,760
hours (the number of hours in a year) and dividing by 2,000 (the number of pounds in a
ton). If a source is restricted by enforceable permit conditions (as defined in 40 CFR
49.152), the source’s potential to emit is calculated based on the restricted operating
conditions.

1 Under the federal program, fugitive emissions are not included for purposes of
2 determining a source's potential to emit unless the source belongs to one of the source
3 categories EPA has listed pursuant to § 302 (j). Those source categories are listed in 40
4 CFR Part 51, Appendix S, paragraph II.A.4 (iii) and in 40 CFR 52.21 (b)(1)(iii). EPA has
5 determined that these sources have the potential "significantly degrade air quality" and "it
6 has been demonstrated to be reasonable and cost effective" for these sources to quantify
7 and include their fugitive emissions in calculating their potential to emit. 77 Fed. Reg.
8 38748, 38755-76 (July 1, 2011).

9 Although primary copper smelters are included on the list of such sources, copper
10 mines are not. EPA states that it has thus far not expanded the list of § 302 (j) sources
11 because of the "unreasonable economic costs" of doing so. 77 Fed. Reg. at 38755-76.
12 The current Pima County Code is identical to the federal regime in all material respects.
13 *See, e.g.*, Pima County Code § 17.04.340.A (128) (adopting federal definition of "major
14 source," which disregards fugitive emissions except for certain listed sources not
15 including copper mines).

16 The Control Officer's position is that portions of the Arizona SIP submitted on
17 October 9, 1979 on behalf of Pima County ("Pima County SIP")⁴ require that Rosemont's
18 fugitive emissions be included in the potential to emit estimates of the facility. As noted
19 above, fugitive emissions are generally disregarded in emissions calculations prepared
20 under federal law and the current Pima County Code. However, the August 6, 1979 air
21 quality control regulations adopted by the Pima County Board of Supervisors, later
22 submitted as part of the Arizona SIP, arguably required fugitive emissions to be counted
23 for all sources.⁵ That 1979 provision has been superseded by newer County regulations
24 and is also inconsistent with current state law. Nevertheless, because of her uncertainty

25 _____
26 ⁴ In their briefs and during the hearing, the parties have consistently referred to relevant
27 portions of the 1979 Pima County Air Quality Control Regulations as the "Pima County
28 SIP." Portions of those regulations, were, indeed, indisputably part of the Arizona SIP at
one time. For purposes herein, the Board will employ that term, without presupposing
that those 1979 regulations (for instance, Rule 171) remain enforceable parts of the
Arizona SIP.

⁵ The parties disagree, as explored further below, whether the 1979 regulations were
intended to apply only in non-attainment areas of Pima County.

1 about whether the 1979 fugitive emissions provision remains part of the EPA-approved
2 Arizona SIP, the Control Officer decided to apply it to Rosemont. Rosemont itself had
3 previously invoked a different provision of the 1979 regulations, arguing that a deadline
4 for action by the Control Officer contained in those regulations was part of the current
5 Pima County SIP and hence provided a vehicle for suit. The Control Officer's position,
6 supported generally by the Clean Air Act and cases decided under it, is that the SIP
7 remains enforceable as a matter of both federal and state law unless and until EPA
8 approves a SIP revision.⁶

9 For the reasons set forth below, the Board finds that the Control Officer's action,
10 while not arbitrary and capricious, was contrary to law.

11 Before turning to the applicable legal analysis, this Ruling will set forth relevant
12 Findings of Fact, based on the parties' joint submittal of undisputed facts and other facts
13 established by the record or during testimony at the hearing herein on November 7, 2011.

14 II. Findings of Fact.

15 1. Rosemont is planning to construct a copper mine and associated operations
16 in Pima County, Arizona (the "Rosemont project"). Joint Statement of Stipulated Facts,
17 ¶ 1.

18 2. To construct and operate the Rosemont project, Rosemont must obtain an air
19 quality permit from the Pima County Air Quality Control Officer or other legally
20 authorized agency. Joint Statement of Stipulated Facts, ¶ 2.

21 3. On July 29, 2010, Rosemont submitted to the Pima County Department of
22 Environmental Quality ("PDEQ") an application for a Class II air quality permit ("Permit
23 Application"). Joint Statement of Stipulated Facts, ¶ 3.

24 4. On September 23, 2010 the Control Officer advised Rosemont that the
25 application was incomplete and requested Rosemont to provide additional information.
26

27
28 ⁶ Pima County Code § provides that "No rule adopted in this title shall preempt or nullify
any applicable requirement or emission standard in an applicable implementation plan
unless the control officer revises the applicable implementation plan in conformance with
the requirements of 40 CFR Part 51, subpart F, A.R.S 49-404, and the administrator
approves the revision."

1 Rosemont provided the requested additional information to the Control Officer on
2 October 8, 2010. Joint Statement of Stipulated Facts, ¶ 4.

3 5. On November 30, 2010, the Control Officer found Rosemont's Permit
4 Application "complete" under the requirements of the Pima County Code ("P.C.C.").
5 Joint Statement of Stipulated Facts, ¶ 5.

6 6. On May 12, 2010, the Control Officer requested additional information from
7 Rosemont concerning the technical aspects of the mine processes including control
8 efficiencies of the Pollution Control Equipment. On June 1, Rosemont provided the
9 additional information requested by the Control Officer. Joint Statement of Stipulated
10 Facts, ¶ 6.

11 7. On June 23, 2011, Rosemont notified the Control Officer and Pima County
12 Air Quality Control District ("District") of Rosemont's intent to sue them for alleged
13 failure to comply with the Pima County portion of the State Implementation Plan ("Pima
14 County SIP"). Specifically, Rosemont claimed that the 1979 version of the Pima County
15 air quality control regulations remained a part of the Arizona SIP, and that Rule 213(C)
16 therein required the Control Officer to "either grant or deny [the Permit Application]
17 within 30 days from the date of receipt of the complete application." Joint Statement of
18 Stipulated Facts, ¶ 7.

19 8. On August 29, 2011, the Control Officer and the District gave public notice
20 that a Proposed Air Quality Operating Permit for Rosemont had been prepared, and gave
21 notice of the commencement of a 90-day public comment period ending November 28,
22 2011. Also on August 29, 2011 the Control Officer posted the proposed Class II Air
23 Quality Permit for the Rosemont project on the Pima County Department of
24 Environmental Quality ("PDEQ"). A Class II permit is issued to facilities that are not
25 "major sources" under the Pima County Code. Joint Statement of Stipulated Facts, ¶ 8.

26 9. On September 2, 2011, Rosemont filed a lawsuit against the Control Officer
27 and the District in the United States District Court for the District of Arizona, alleging that
28 the Pima County SIP required the Control Officer to act on the Permit Application within
30 days of the application being complete. Rosemont asked the District Court to:

- 1 a. Issue a finding declaring that the Control Officer and District were in
2 violation of Rule 21-213(C) for failing to issue or deny the Permit
3 Application within thirty days of it being complete;
- 4 b. Issue a permanent injunction directing the Control Officer and District to
5 comply with Rule 21-213(C) and all applicable requirements of the
6 CAA; and
- 7 c. Order the Control Officer and District to either grant or deny the Permit
8 Application within forty-five days of the date of the injunction. Joint
9 Statement of Stipulated Facts, ¶ 9.
- 10 10. On September 28, 2011, the Control Officer denied Rosemont's Permit
11 Application. Joint Statement of Stipulated Facts, ¶ 10.
- 12 11. Specifically, the Control Officer's findings in her written notice of denial
13 included:
- 14 a. The Rosemont project is a major source under the PC SIP because the
15 potential to emit CO, including fugitive emissions, was 615.22 tons/year,
16 which is "greater than 100 tons per year";
- 17 b. The Rosemont project is a major source under the Pima County SIP
18 because the potential to emit PM₁₀, including fugitive emissions, was
19 909.62 tons/year, which is "greater than 100 tons per year";
- 20 c. Rosemont did not comply with Pima County SIP Rule 504 by failing to
21 provide necessary modeling;
- 22 d. Rosemont did not list all applicable requirements as mandated by
23 P.C.C. § 17.12.165; and
- 24 e. Rosemont did not demonstrate to the Control Officer that the "source is
25 designed, controlled, equipped, or capable of being operated" in such a
26 way that "compliance with all applicable provisions of the SIP rules
27 would be possible throughout the term of the permit." Joint Statement of
28 Stipulated Facts, ¶ 11.

1 12. On September 29, 2011, the Control Officer filed an answer in the District
2 Court litigation stating that since a permit decision had been made and the application had
3 been denied the case should be dismissed as moot. Joint Statement of Stipulated Facts, ¶
4 12.

5 13. Before the Control Officer denied Rosemont's Permit Application, she had
6 not applied the Pima County SIP permitting rules to any air quality permit applications
7 processed by the District. Joint Statement of Stipulated Facts, ¶ 13.

8 14. Rosemont did not identify any SIP rules as being applicable requirements in
9 its Permit Application or in any supplement to the application. Joint Statement of
10 Stipulated Facts, ¶ 14.

11 15. The Rosemont project is not a major source under the current Pima County
12 Code. Joint Statement of Stipulated Facts, ¶ 15.

13 16. The Rosemont project is not located in an area that has been designated as
14 non-attainment by the EPA. Joint Statement of Stipulated Facts, ¶ 16.

15 17. Before issuing the proposed Class II permit, the Control Officer and her
16 office were in contact with EPA Region IX. Joint Statement of Stipulated Facts, ¶ 17.

17 18. Before issuing the permit denial, the Control Officer and her office were
18 again in contact with EPA Region IX. Joint Statement of Stipulated Facts, ¶ 18.

19 19. Rosemont submitted a public records request to the Control Officer, the
20 District and PDEQ for a copy of the 1988 committal letter that was referenced in 40
21 C.F.R. § 52.120(c)(66)(i). The Control Officer has indicated that she is unable to locate a
22 copy of the 1988 committal letter. Joint Statement of Stipulated Facts, ¶ 19.

23 **III. Legal Discussion.**

24 The parties have raised a variety of legal arguments. The Board first turns to the
25 dispositive one. In denying Rosemont's permit application on the basis that the proposed
26 Rosemont facilities constituted a major source, the Control Officer relied upon the
27 definition of "major source" in the 1979 Pima County air quality control regulations, on
28 the basis that they remained part of the Pima County SIP despite subsequent amendment
of the Pima County Code. The Control Officer determined that the 1979 regulations

1 required fugitive emissions of a proposed source in an attainment area to be included
2 when determining that source's potential to emit, despite the fact that this 1979 provision
3 is inconsistent with current federal, state, and county law.

4 The parties agree that the Rosemont project is not a major source under the
5 current Pima County Code. The Control Officer testified that, once Rosemont argued that
6 the 1979 regulations remained a part of the Pima County SIP, she was obliged to enforce
7 all of the purported SIP provisions -- including the definition of major source that calls for
8 fugitive emissions to be included. That result, reasoned the Control Officer, was required
9 because upon approval the Pima County SIP became enforceable as a matter of both state
10 and federal law. Further, the Control Officer testified that EPA personnel urged her that
11 the SIP had to be enforced. This, she testified, put her in a dilemma: the current Pima
12 County Code does not call for fugitive emissions to be included in determining a source's
13 potential to emit, but an older version of the code that was at least once included within
14 the EPA-approved Pima County SIP did. Moreover, EPA regulations at 40 C.F.R. 121 do
15 not expressly state that the 1979 regulations have been deleted as Pima County SIP
16 requirements. Meanwhile, unofficial versions of the SIP posted at the EPA and Pima
17 County DEQ web sites include the 1979 regulations. Under those circumstances, the
18 Control Officer testified she felt obliged to enforce the older, more stringent provisions
19 arguably remaining in the SIP rather than the less stringent ones in the current Code
20 (which less stringent regulations are identical to federal requirements).

21 It is certainly correct, as a general proposition, that upon their approval by EPA,
22 state implementation plans become enforceable as a matter of both state and federal law.
23 But that is only the beginning of the analysis. The 1979 County Rules and Regulations
24 that were embodied in the approved Pima County SIP are not a model of clarity. At the
25 time they were prepared, much of Pima County was designated as non-attainment -- that
26 is, much of the County did not comply with the national ambient air quality standards.⁷

27 _____
28 ⁷ On March 3, 1978, EPA had designated Pima County as a nonattainment area for
carbon monoxide and total suspended particulates. 43 Fed. Reg. 8970 (March 3, 1978).
EPA later twice adjusted the boundaries of the carbon monoxide nonattainment area to
exclude suburban and rural areas, leaving only the urban Tucson Air Planning Area
("TAPA") as nonattainment for carbon monoxide. 44 Fed. Reg. 16392 (March 19, 1979);

1 That is no longer the case. The rules do not expressly state that they were intended to
2 apply solely to the County's then-non-attainment areas. *See, e.g.*, Rule 112. But the
3 substance of them reveals a heavy focus on issues relevant only to the construction of new
4 sources in non-attainment areas. For instance, the rules call for new sources to provide for
5 emissions off-sets and to install technology that allows them to achieve the lowest
6 achievable emission rate. Those requirements apply under federal and state law to new
7 sources in non-attainment areas, but not to those in attainment areas.

8 Entirely clear, however, is that -- regardless of the ambiguity of the original rules
9 submitted as part of the Pima County SIP -- EPA included these rules in the approved SIP
10 solely because of its demand that the County develop additional regulations, consistent
11 with the Clean Air Act, for the County's non-attainment areas. There was no EPA
12 mandate that the County promulgate these regulations for purposes of governing
13 regulations in attainment areas. The 1979 County rules were promulgated in response to
14 an EPA finding that the County's program at that time failed to comply with Clean Air
15 Act requirements applicable only to non-attainment areas. The rules were approved by
16 the County on August 6, 1979, during a time when the County was taking multiple steps
17 to address EPA's finding that the County had failed to adequately develop a plan for
18 addressing its non-attainment issues.

19 The rules were ultimately submitted to EPA on October 6, 1979. 40 CFR § 52.120
20 (c)(38). Submittal of the rules was preceded by a host of additional amendments to the
21 Pima County SIP. EPA's Notice of Proposed Rulemaking of July 6, 1979, 44 Fed. Reg.
22 39480 (July 6, 1979), is clear on this point, describing the first set of Pima County SIP
23 revisions as addressing the agency's concerns about air quality enforcement in non-
24 attainment areas of the County. The notice stated:

25
26
27 48 Fed. Reg. 51160 (March 4, 1983). EPA redesignated the TAPA area as attainment for
28 ozone effective July 10, 2000, noting that at that time the area had not suffered an ozone
exceedance since 1988. 65 Fed. Reg. 36353 (June 8, 2000). Pima County is also now in
attainment with NAAQS for particulate matter, now regulated as PM-10 (10 microns) and
PM-2.5 (the even smaller 2.5 microns).

1 Revisions to the Metropolitan Pima County portion of the Arizona State
2 Implementation Plan (SIP) have been submitted to the Environmental
3 Protection Agency (EPA) by the Governor's designee. The intended effect
4 of the revisions is to meet the requirements of Part D of the Clean Air Act,
as amended in 1977, "Plan Requirements for *Nonattainment* Areas."

5 44 Fed. Reg. at 39480 (emphasis added).

6 The first submittal to EPA by the Arizona designee, on behalf of the County, was
7 described as the "*Nonattainment Area* Plan for Metropolitan Pima County." *Id.* at 39481
8 (emphasis added). The plan had been submitted to EPA on March 27, 1979. 40 CFR
9 51.120 (c)(34). The CFR reference is to "Metropolitan Pima County Nonattainment Area
10 Plan for TSP." *Id.* That EPA viewed the Pima County SIP provisions as required only to
11 address Clean Air Act requirements applicable in non-attainment areas is further
12 illustrated by the Notice's discussion of ozone. At the time of its SIP amendment activity,
13 portions of the County were designated as non-attainment by EPA for, *inter alia*, ozone.
14 That was pursuant to a March 18, 1979 Notice at 44 Fed. Reg. 21261. However, on May
15 21, 1979, Arizona had asked EPA to redesignate Pima County as a whole to attainment
16 for ozone, based on updated air quality readings. At the time of the Notice of Proposed
17 Rulemaking on the SIP, EPA had yet to decide whether to grant the redesignation.

18 In the course of describing the regulatory background, EPA specifically
19 acknowledged that the purpose of the SIP submittal was to comply with EPA's mandates
20 regarding non-attainment areas. The Notice stated:

21
22 If EPA approves this redesignation in the subsequent final rulemaking
23 notice, the Clean Air Act, Part D requirements for ozone would not be
24 applicable to Metropolitan Pima County and those portions of the
nonattainment area plan concerning ozone would no longer be required.

25 44 Fed. Reg. at 39481.

26 EPA's description of the Pima County SIP submittal as necessary solely to address
27 non-attainment areas was consistent throughout the rulemaking process. On July 23,
28 1980, EPA issued another Notice of Proposed Rulemaking regarding the Metropolitan
Pima County Nonattainment Area Plan for carbon monoxide and total suspended

1 particulates. 45 Fed. Reg. 49112 (July 23, 1980). The Notice again confirmed that the
2 SIP submittal under review was requested by EPA because of recent Clean Air Act
3 requirements applicable solely to non-attainment areas. 45 Fed. Reg. at 49112. EPA took
4 final action on the full set of Pima County SIP submittals on July 7, 1982. 47 Fed. Reg.
5 29532. While conditionally approving the SIP submittal, the agency again left no doubt
6 that it viewed the provisions under review as required solely in order for the County to
7 satisfy its obligations with regard to non-attainment areas: "EPA is today conditionally
8 approving Pima County's NSR [New Source Review] rules." *Id.* at 29532. It is also
9 instructive that EPA used the term "New Source Review," as that term most commonly
10 refers to the stringent pre-construction review of proposed sources to be located in non-
11 attainment areas. In attainment areas, the term for the less onerous review process is
12 "Prevention of Significant Deterioration."

13 Accordingly, it is clear that EPA viewed the 1979 regulations as necessary
14 components of the Pima County SIP only to the extent they pertained to non-attainment
15 areas. Because Pima County is now an attainment area, the 1979 regulations are
16 irrelevant.

17 Furthermore, subsequent EPA regulatory approvals of Pima County's air quality
18 program confirm that, even with regard to non-attainment areas, the 1979 fugitive
19 emissions rule (Rule 171) no longer remained a part of the Pima County and Arizona SIP.
20 There is nothing in the record to suggest that EPA determined that Rule 171 would apply
21 as part of the SIP to areas that later achieved attainment. That result would have required
22 EPA to conclude that a superseded County ordinance that is more strict than today's
23 federal, state, and county law and which was driven by the need to regulate non-
24 attainment areas should nevertheless be enforced in attainment areas, rather than current
25 federal, state, and County law specifically developed for that purpose.

26 Subsequent to 1979, the County undertook a comprehensive reform of its air
27 quality regulations, which today are essentially identical to those set forth in the federal
28 Clean Air Act. Among other things, the County Code now provides that fugitive
emissions should not be included in determining a source's potential to emit, except as

1 required under federal law. Pima County Code § 17.04.340 (129). *Id.* The Pima County
2 Code has not included fugitive emissions in major source determinations since 1993. In
3 that year, the Pima County Board of Supervisors adopted Ordinance 1993-128, which
4 substantially amended the Air Quality Control regulations set forth in Chapter 17. Among
5 other things, Ordinance 1993-128 abandoned the 1979 provision that called for fugitive
6 emissions to be included in all source determinations. Instead, the County adopted the
7 federal definition set forth in Clean Air Act § 302 (j), pursuant to which fugitive emissions
8 are only included with regard to specifically listed facilities not including copper mines.
9 *See* Ordinance 1993-128, § 17.04.340 (133)(c), p. 27. Although the Code was thereafter
10 amended again, the County has never strayed in substance from faithfully adhering to the
11 federal definition. *See, e.g.*, Ordinance 1994-83, § 17.04.340.(A)(132) (defining “major
12 source” by reference to the definition of the same term in Ariz. Admin. Code R17-2-101,
13 which in term adopted the federal § 302 (j) definition); Ordinance 1994-83,
14 §17.04.340(A)(132)(same, but cross-referencing re-numbered Ariz. Admin. Code R18-7-
15 201).

16 In 1994, EPA delegated authority to Pima County to enforce the federal Prevention
17 of Significant Deterioration program – that is, the preconstruction review program that
18 applies to areas whose air quality has attained national ambient air quality standards. 49
19 Fed. Reg. 26129 (May 19, 1994). The administrative record makes it clear that EPA
20 understood during its consideration of the proposed delegation that the Pima County
21 regulations now duplicated federal law and no longer called for fugitive emissions to be
22 included in source calculations, as had been the case in 1979. For instance, on May 9,
23 1986, EPA published a proposed rule stating that it intended to approve Pima County’s
24 new source review rules, provided the County and State made some technical
25 amendments not relevant here. 51 Fed. Reg. 17210 (May 9, 1986). EPA’s discussion of
26 the technical deficiencies made no reference whatsoever to the County’s abandonment of
27 the fugitive emissions provision from the 1979 regulations.

28 The same is true of the final rulemaking on August 10, 1988, then EPA issued its
final rule approving Revisions to the Arizona SIP and the Pima County carbon monoxide

1 attainment plan. 53 Fed. Reg. 30220 (August 10, 1988). Among other things, the agency
2 stated that it was approving as meeting the requirements of federal law the County's new
3 source review ("NSR") regulations, adopted on July 16, 1985. The agency stated:

4 EPA has concluded that the NSR rules for Pima County and the State of
5 Arizona can now be fully approved based upon commitments by Pima
6 County and the State of Arizona to implement their NSR rules consistent
7 with EPA's requirements. EPA has determined that the rules as written are
8 adequate to meet the requirements of 40 CFR 51.165 (a) if certain
9 ambiguous provisions are always interpreted consistent with EPA's
10 requirements. The State submitted a letter for the State on June 1, 1988, and
11 a letter for Pima County on July 22, 1988, making all of the necessary
12 commitments. These commitment letters, which are appended to the TSD
13 for this notice, concern stack heights, temporary sources, growth
14 allowances, net emission decreases, reasonable further progress, volatile
15 organic compounds, stationary sources, allowable offsets, permittee
16 responsibility and visibility protection.

17 EPA thus has confirmed that the relevant version of the Pima County Code
18 embodied in the Pima County and Arizona SIP was no longer the superseded 1979
19 regulations.

20 In short, Rule 171 of the 1979 Pima County regulations is not enforceable against
21 Rosemont as a part of the Pima County and Arizona SIP, for two reasons. The first is that
22 the record is clear that EPA adopted it as part of the Pima County SIP only with regard to
23 non-attainment areas. The second is that, in any event, EPA later approved Pima
24 County's comprehensive regulatory overhaul, which included an abandonment of Rule
25 171. It is therefore inappropriate to conclude that EPA continues to view old Rule 171 as
26 a necessary component of the Pima County SIP.

27 The Control Officer is not bound by federal law or EPA's SIP approval to enforce
28 Rule 171 as promulgated in 1979 and contained in the 1979 Pima County SIP submittal to
EPA. Rather, she is free to apply instead the requirements of the current Pima County
Code, which do not call for inclusion of fugitive emissions in source potential to emit
calculations.

Having now decided that the Control Officer may, consistent with federal law and
the Pima County SIP, choose not to apply old Rule 171, the issues becomes whether she is
prohibited from doing so. Rosemont argues that the Control Officer is prohibited from

1 applying Rule 171 for a variety of reasons. First , Rosemont argues that including fugitive
2 emissions in the calculations of the Rosemont project’s potential to emit would violate
3 federal law, because (a) Clean Air Act § 302 (j), 42 U.S.C. § 7602 (j), provides that major
4 source status shall not be defined with regard to fugitive emissions unless the EPA
5 Administrator has promulgated a rule so providing, and the Administrator has
6 promulgated no such rule⁸; and (b) the Control Officer committed in 1988 to manage
7 “major sources” in Pima County in a manner consistent with the federal program.

8 In response, the Control Officer argues that, by approving the Pima County SIP
9 provisions that did call for including fugitive emissions in source definitions, the EPA
10 Administrator did effectively promulgate the regulation called for by Clear Air Act § 302
11 (j). The Control Officer’s argument is not well-taken. There is no suggestion in the
12 record that the EPA Administrator would choose to comply with a Congressional mandate
13 to promulgate a fugitive emissions regulation of nationwide applicability by approving
14 without comment a single jurisdiction’s State Implementation Plan. Nothing in the
15 Federal Register notices discussed above suggests that the Administrator intended, by
16 approving the Pima County SIP, to promulgate the sort of rulemaking envisioned by § 302
17 (j). Further, subsequent EPA rulemakings expressly confirm that, at least as of October
18 26, 1984, EPA itself acknowledged that it had yet to promulgate the type of fugitive
19 emissions rulemaking required under § 302 (j). On that date, EPA issued a final rule
20 announcing how it would henceforth regulate fugitive emissions in light of the ruling in
21 *Alabama Power Company v. Costle*, 636 F. 2d 325, 369 (D.C. Cir. 1979). In *Alabama*
22 *Power*, the Court held that EPA may require the inclusion of fugitive emissions in
23 threshold applicability determinations only if the agency has first satisfied the rulemaking
24 requirements of § 302 (j). 636 F.2d at 369. In its rulemaking, EPA explained on what
25 basis it would undertake future rulemakings, as appropriate, in compliance with § 302 (j)
26 and the holding in *Alabama Costle*. Had EPA intended that its 1982 approval of the Pima
27 County SIP act as a nationwide rule of general applicability, it would not have

28

⁸ The Control Officer has argued that, by approving the Pima County SIP, the EPA Administrator did in essence promulgate the requisite rule providing for inclusion of fugitive emissions

1 acknowledged two years later that it had yet to promulgate such a rule. *See also* 48 Fed.
2 Reg. 38742 (August 25, 1983) (EPA acknowledges that, because it had misinterpreted the
3 requirements of § 302 (j), it had failed to undertake the necessary rulemaking).

4 Rosemont is correct that EPA's approval of the Pima County SIP did not constitute
5 the sort of rule on fugitive emissions required under § 302 (j). Nevertheless, the Board is
6 not persuaded by Rosemont's argument that federal law, operating by itself, precludes the
7 Control Officer from applying Rule 171 and including fugitive emissions in calculating
8 potential to emit. Nothing in the Clean Air Act generally or § 302 (j) specifically
9 precludes state or local air quality authorities from adopting as a matter of their own law
10 more stringent regulation of fugitive emissions. Rather, the Act mandates merely that, in
11 order to comply with the federal program, state and local authorities maintain a program
12 that is at least as strict as the federal one. More stringent regulation of fugitive emissions
13 is not inconsistent with federal law. Indeed, § 116 of the Act, 42 U.S.C. § 7416, expressly
14 provides that States and political subdivisions are free to adopt emissions limitations for
15 stationary sources more stringent than those required under federal law.

16 Rosemont next argues that the Control Officer is precluded from newly interpreting
17 Rule 171 to include fugitive emissions in potential to emit calculations because Arizona
18 law restricts the ability of counties to adopt environmental rules and policies more strict
19 than federal and state law. A.R.S. § 49-104 (17) generally precludes the Arizona
20 Department of Environmental Quality from adopting environmental regulations more
21 strict than their federal counterparts.⁹ A.R.S. § 49-112, in turn, limits the circumstances
22 under which counties may adopt environmental laws more stringent than federal and state
23 law. The provision requires that the County demonstrate with credible evidence that the
24 rule or regulation is required to address peculiar local condition and is either required by
25 federal law or necessary to prevent a significant threat to public health or the environment.

26 _____
27 ⁹ Federal environmental law generally requires that, in order to obtain delegated authority
28 to be the primary enforcer of a federal environmental law, a state's program must be at
least as stringent as federal law. Taken together with the state mandate against adopting
environmental law more stringent than federal programs, these twin mandates have the
effect of requiring ADEQ to adopt laws and regulations identical to their federal
counterparts.

1 There is nothing in the record suggesting that the Control Officer undertook to comply
2 with A.R.S. § 49-112 prior to deciding to modify the County's historic practice and begin
3 applying Pima County SIP Rule 171.

4 In light of the foregoing, it was contrary to law for the Control Officer to apply
5 Pima County SIP Rule 171 to Rosemont and require that Rosemont's projected fugitive
6 emissions be included in determining its potential to emit. Nothing in federal law requires
7 the Control Officer to apply Pima County SIP Rule 171 in this fashion, and state law
8 prohibits it (even if Rule 171 retained viability as a County Ordinance).

9 **The Control Officer's Conduct Was Not Arbitrary and Capricious.**

10 Rosemont independently argues that the Control Officer's decision also was
11 arbitrary and capricious. Rosemont argues that the arbitrary and capricious nature of the
12 Control Officer's conduct is demonstrated, *inter alia*, by her decision to apply Pima
13 County SIP Rule 171 to Rosemont after failing to apply it to any other source for a period
14 of at least 11 years; by her refusal to allow Rosemont leave to amend its application; and
15 by her failure to fully review the implications of the Pima County SIP.

16 In response, the Control Officer testified that she failed constrained by federal law
17 regarding SIP enforcement and by general EPA statements that the SIP must be honored.

18 Given the complexity of the issues and the circumstances, the Board cannot find
19 that the Control Officer acted in an arbitrary and capricious manner. Although the Board
20 has concluded that the Control Officer erred in her interpretation of the implications of a
21 variety of federal, state, and local laws, the record does not support a finding that she was
22 arbitrary and capricious. Indeed, Rosemont itself has displayed no small measure of
23 confusion about this complex situation. Although Rosemont itself initially invoked the
24 jurisdiction of the Control Officer, its most recent legal position is that ADEQ, rather than
25 Pima County, has exclusive jurisdiction over its permit application. Similarly, although
26 Rosemont cited a provision of the Pima County SIP in its District Court claim demanding
27 that the Control Officer act on its permit, the company's current position is that the Pima
28 County SIP does not apply to Rosemont at all, since its proposed facility is located in an
attainment area. While the Board happens to agree with that current position, Rosemont's

1 own confusion over the issue illustrates the complexity of the legal issues relevant to this
2 proceeding. Under these circumstances, the Board declines to find that the Control
3 Officer acted in an arbitrary and capricious manner. The Control Officer's attempt to
4 apply a set of complex and arguably conflicting laws was no more flawed than
5 Rosemont's.

6 That leaves one major issue. Rosemont has most recently argued that the Control
7 Officer lacked authority to deny its permit application based on Pima County SIP Rule
8 171 because the Rosemont project will generate more than 75 tons per day of uncontrolled
9 emissions. On November 1, 2011, Rosemont asked ADEQ to assert sole jurisdiction over
10 air permitting for the Rosemont mine. Letter from Rosemont counsel Eric Hiser to Eric
11 Massey, ADEQ, dated November 1, 2011, Exhibit A to Control Officer's Proposed
12 Supplemental Statements of Fact and Conclusions of Law. Nothing in the record indicates
13 ADEQ has acted on this request.

14 As the Control Officer has noted, this position is inconsistent with the position
15 taken by Rosemont in its District Court litigation, in which it urged the Court to require
16 the Control Officer to timely grant its permit based upon a timing provision in the Pima
17 County SIP. That position is also, of course, inconsistent with Rosemont's initial decision
18 to seek a permit from Pima County. Rosemont has requested that ADEQ accept
19 jurisdiction over all aspects of its permit, to the exclusion of the County. It is unclear if
20 Rosemont believes that, in the absence of an ADEQ grant of that request, the County
21 would lack jurisdiction to any portion of the Rosemont facility, or merely jurisdiction to
22 enforce now-defunct County regulations regarding Rosemont's fugitive emissions.

23 Rosemont's prayer for relief asks the Board to order the Control Officer to take
24 further action with regard to its application, however. Additionally, had Rosemont
25 concluded that its decision to invoke the County's permitting authority was erroneous
26 from the outset, its appeal would seemingly be moot. Accordingly, the Board concludes
27 that further action by the Control Officer is appropriate, as set forth below.

28 On that issue, the parties disagree about whether and when the Rosemont permit
application was complete. The Control Officer's position is that the application has yet to

1 be completed, since Rosemont has failed to submit information the Control Officer
2 contends is required under old Rules 171 and 504. The Control Officer does not appear to
3 contend that the application was incomplete for reasons other than those pertaining to the
4 disputed provision of the 1979 Rules.

5 Rosemont contends that the permit application was complete as of November 30,
6 2010, when the Control Officer informed Rosemont that the application was
7 administratively complete. A third possible date of completion is June 1, 2011, when
8 Rosemont provided the Control Officer with additional information concerning issues
9 other than those pertaining to Rule 171.

10 The current Pima County Code provides a definition of “complete,” for purposes of
11 permit applications, in § 17.04.340(a)(52). It provides that an application shall be deemed
12 complete when it “contains all the information necessary for processing the application.”
13 Importantly, the definition further provides that an application remains “complete” even if
14 the Control Officer subsequently requests or accepts additional information. That
15 clarification confirms that June 1, 2011 cannot be deemed the date of completion.

16 Because the Board has found that Rule 171 is inapplicable to the Rosemont
17 application, the relevant completion date must be determined by reference to the date on
18 which the Control Officer received an application that adequately addressed the other
19 issues. The Board finds that November 30, 2011, was the date of completion.

20 In a separate proceeding in the United States District Court for the District of
21 Arizona, Rosemont has contended that the Control Officer was obliged to act on its permit
22 within 30 days of the date the company submitted its completed application. Plaintiff’s
23 Complaint, *Rosemont Copper Company v. Ursula Kramer, et al*, No. 4:11-CV-00552-
24 RCC, ¶ 3. Rosemont contends in that case that the 30-day time limit to act arises from
25 Rule 21-213 (C) of the 1979 County Regulations, later adopted as part of the Pima County
26 SIP. Rosemont urges that the 30-day time limit remains in effect because it was approved
27 by EPA as part of the Arizona SIP, and the County was without the power to amend it
28 without approval. Rosemont cites 42 U.S.C. § 7416, which prohibits States from

1 unilaterally “adopting or enforcing any emissions standard or limitation which is less
2 stringent” than a previously approved SIP.

3 As discussed above, the Board finds that EPA’s approval of the comprehensive
4 overhaul of the Pima County air quality regime effectively, if not expressly, removed the
5 1979 regulations from the SIP. Even were that not the case, however, Rosemont’s
6 argument would not be well-taken. Rosemont's District Court pleading cites § 7604 (f)
7 for the proposition that the 1979 Pima County regulation requiring the Control Officer to
8 act within 30 days remains today an enforceable part of the SIP, violation of which can
9 support a citizen suit. *Plaintiff Rosemont Copper Company's Motion for Summary*
10 *Judgment*, filed September 2, 2011, pp. 5-6. A proper reading of § 7604, however,
11 confirms that a citizen’s suit is authorized only when an event occurs that will have the
12 effect of relaxing emissions standards or compliance deadlines by sources or categories of
13 sources. The relevant stringency relates to the goal of achieving cleaner air. Relaxing the
14 deadline for the Control Officer to act on a permit application is not the sort of relaxed
15 progress toward achieving better air quality that can support a citizen suit. Accordingly,
16 nothing in federal law or the SIP precluded the County from modifying its regulations
17 regarding the deadlines for acting on permit approvals, as the County did. The applicable
18 deadline for acting upon Rosemont's application is found in Pima County Code §
19 17.12.165, which requires the Control Officer to take final action on the Rosemont
20 application within 18 months of receipt of the completed application, or by May 30, 2012.

21 **IV. Conclusions of Law.**

22 1. The 1979 version of the Pima County Air Quality Rules and Regulations,
23 including but not limited to Rules 171 and 504 therein, are not enforceable by the Control
24 Officer against Rosemont. Those rules have been superseded. Additionally, even had the
25 County not itself amended such rules, they would be unenforceable by the County and
26 Control Officer pursuant to A.R.S. § 49-112. Rosemont’s application shall be governed
27 by the current Pima County Code, Title 17, to the extent Title 17 is not more stringent
28 than federal or state law. Rule 171 provides no basis for treating Rosemont as a major
source of carbon monoxide or particulates.

1 3. Rule 171 of the 1979 version of the Pima County Air Quality Rules and
2 Regulations was intended to be enforceable as a part of the Pima County and Arizona
3 State Implementation Plan only with regard to proposed major sources in non-attainment
4 areas of Pima County. Further, Rule 171 is no longer an enforceable portion of the
5 Arizona State Implementation Plan.

6 4. Rule 21-213 (C) of the 1979 version of the Pima County Air Quality Rules
7 and Regulations has been superseded and is not enforceable by Rosemont against the
8 Control Officer. Pima County Code § 17.12.165 provides the deadlines for action by the
9 Control Officer with regard to the Rosemont permit. Pursuant to § 17.12.165, the Control
10 Officer is required to take final action on the Rosemont permit application within 18
11 months of receiving the completed permit application.

12 5. The Control Officer's decision to deny Rosemont's permit application based
13 upon the provisions of Rules 171 and 504 was contrary to law, but not arbitrary and
14 capricious.

15 6. November 30, 2010 is the date upon which the Control Officer received
16 Rosemont's completed permit application.

17 V. **Order.**

18 In light of the foregoing, it is hereby ORDERED:

19 1. The Control Officer's September 28, 2011 decision to deny Rosemont's
20 permit application is hereby reversed.

21 2. The permit application is remanded to the Control Officer for further
22 proceedings consistent with this ruling.

23 3. The Control Officer shall proceed expeditiously with public comment on the
24 draft Rosemont permit, as provided in Pima County Code § 172.12.165 (I)(7). Public
25 comment shall be conducted for no less than thirty days and may be conducted for a
26 longer period, provided it does not preclude the Control Officer from complying with the
27 deadline below.

28 4. The Control Officer shall take final action on the Rosemont permit
application no later than eighteen months after receipt of Rosemont's completed permit

1 application, as provided in Pima County Code § 172.12.165 (I)(6). November 30, 2010
2 shall be treated as the date of receipt by Control Officer of Rosemont's completed
3 application, meaning that the Control Officer shall take final action on the Rosemont
4 permit application no later than May 30, 2012.

5 5. Each party shall bear its own costs and attorney's fees.

6
7 Dated this ___ day of December, 2011.

8
9 PIMA COUNTY AIR QUALITY HEARING BOARD

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12 By: _____
13 Barry A. Friedman, Chairman

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1 Original filed with the
2 following on this ___ day of December, 2011:

3 Secretary
4 Air Quality Control Hearing Board
5 33 N. Stone Avenue, Suite 700
6 Tucson, AZ 85701-1451

7 Copy e-mailed and mailed this ___ day of December, 2011 to:

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9 Pima County Attorney's Office
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