BEFORE THE PIMA COUNTY AIR QUALITY HEARING BOARD

In the matter of Rosemont Copper Company	Docket No. 11.001 **RULING ON APPEAL BY ROSEMONT COPPER COMPANY, INC., OF DENIAL OF AIR QUALITY PERMIT**

I. Introduction.

This is an appeal by Rosemont Copper Company, Inc., of the denial of its air quality permit application (No. 6112) by Control Officer Ursula Kramer and the Pima County Air Quality Control District ("PCAQCD"). Rosemont originally filed the application on July 29, 2010 in connection with its proposal to construct a copper mine and associated operations in Pima County, Arizona. The Control Officer denied the permit on September 28, 2011 after concluding that Rosemont's application materials had failed to disclose all applicable federal requirements.

In light of that conclusion, the Control Officer found that Rosemont had failed to demonstrate to her satisfaction that the planned source would be able to comply with all applicable requirements throughout the term of the requested permit. In her denial letter, the Control Officer invited Rosemont to submit a new application that addressed all applicable requirements as required under the Pima County Code and the federally approved Arizona State Implementation Plan ("SIP").

Among other requirements, the Control Officer found that Rosemont had failed to disclose in its application certain requirements that apply to major sources of fugitive emissions of particulate matter and carbon monoxide.[1]

Rosemont argues that the Control Officer improperly concluded that the company's mine would be a major source of air emissions, and that its application accordingly did

[1] "Fugitive emissions" are emissions of air pollutants that escape from industrial facilities and equipment, rather than being reasonably emitted through a vent or a stack. 40 CFR 51.166 (b)(20); Pima County Code § 17.04.340(A)(96).

identify all applicable requirements. Rosemont requests that the Board reverse the Control Officer's denial of its permit and order its application to be reinstated.

The parties have devoted considerable attention to the exceedingly complex issue of whether certain regulations promulgated by Pima County in 1979 and later incorporated into the federally enforceable Arizona State Implementation Plan ("SIP") remain applicable federal requirements that should have been identified by Rosemont. There is no dispute that Rosemont failed to cite them.

The Board finds that resolution of this issue is not necessary to uphold the Control Officer's decision. If the Control Officer correctly determined that the 1979 regulations continue in effect as enforceable SIP provisions, then Rosemont's application was deficient for failure to cite them. If the 1979 regulations do not apply, then Rosemont's application was independently deficient for failure to cite other provisions of the Arizona SIP that would apply instead. In either event, the Control Officer did not act arbitrarily, capriciously, or contrary to law. Rosemont's appeal is accordingly denied. As the Control Officer summarized, "Starting the permitting process with a new application that addresses all outstanding issues will allow the Control Officer to propose a permit that complies with all applicable requirements and allow the public to engage in a meaningful public comment process." *Combined Supplemental Memorandum and Post-Hearing Memorandum*, p. 5.

II. Statutory Background.

A. The Clean Air Act and State Implementation Plans.

The modern Clean Air Act, 42 U.S.C. §§ 7401et seq., was passed in 1970 and substantially amended in 1990. The Act establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution. *General Motors Corp. v. United States,* 496 U.S. 530, 532 (1990). The Act expressly states that "air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State").

Among other things, the Act required the United States Environmental Protection Agency ("EPA") to establish primary and secondary national ambient air quality standards for "criteria" pollutants, 42 U.S.C. §7609.[2] The Act also established a process for those standards to be achieved and maintained through the cooperative action of EPA, States, and other relevant jurisdictions. That process was set forth in 42 U.S.C. § 7610, which requires each State to submit for EPA approval a "State Implementation Plan" ("SIP"), which establishes enforceable emissions limitations and other control measures designed to ensure that the State attains and/or maintains national ambient air quality standards. Each State's SIP is required to include emission limitations, schedules, compliance timetables, and other measures insuring timely attainment and subsequent maintenance of the national ambient air quality standards. Although the Act sets forth certain minimum requirements for SIPs, States are granted discretion to adopt their own mix of regulatory requirements and control measures. As long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

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

Like all SIPs, the Arizona SIP is not a readily identifiable single document. Rather, it is comprised of a diverse collection of state, county, local, and tribal laws and regulations. 40 C.F.R. § 52.20. The original Arizona SIP was submitted to EPA on January 28, 1972. It has been continuously amended and modified since. Merely listing the titles of the diverse elements of the Arizona SIP now requires 25 pages of dense text in the Code of Federal Regulations. *Id.*

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[2] Pursuant to 42 U.S.C. § 7609, EPA subsequently established national ambient air quality standards ("NAAQS") for sulfur oxides, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead. 40 CFR Part 50. Primary NAAQS are designed to protect the public health; secondary NAAQS are to protect the public welfare.

B. Preconstruction Review.

The Clean Air Act also established a preconstruction review and permitting program that applies to proposed new major sources of criteria pollutants or to major modifications of existing sources. State SIPs are required to have a program that at least meets the federally established minimum standards. The legal requirements vary based upon the proposed source's location and type. Obtaining preconstruction approval for a 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 quality standards, the relevant program is generally referred to as the "Prevention of Significant Deterioration" ("PSD") program. The federal version of this program is found in Part C of Subpart I of the Act, 42 U.S.C. §§ 7470 *et seq.* In areas whose air quality does not comply with national ambient air quality standards, the relevant program is generally referred to as "New Source Review" ("NSR"). The federal version of this program, referred to as the "Part D" program, is found at 42 U.S.C. §§ 7501 *et seq.*[3]

A source generally is defined as "major" in an attainment area if it has the potential to emit 250 tons per year of any regulated pollutant, although the threshold is 100 tons per year for certain source categories. 42 U.S.C. § 7479 (1); 40 CFR 52.21 (b)(1). In non-attainment areas, the threshold for "major" source definition is 100 tons per year, or less in certain areas of more serious non-attainment. 40 CFR 51.165(a)(1)(iv)(A). A source is defined as "major" or not based upon its "potential to emit" regulated air pollutants. "Potential to emit" is the maximum capacity of a source to emit a pollutant, given its physical and operational design, operating 24 hours a day for 365 days per year, and

[3] Major new sources in non-attainment areas are obliged to obtain offsetting emissions reductions from other sources and to apply air pollution control technology that achieves the "lowest achievable emissions rate" ("LAER"). 42 U.S.C. §7503. LAER is typically determined by evaluating the most stringent emissions limitation applied to a similar source, without regard to the economic impact of requiring adoption of that technology by the new proposed source. 40 CFR 51.165(a)(1)(xiii), New sources in attainment areas need not obtain offsetting emissions reductions, and are obliged to apply air pollution control technology constituting the "best available control technology." ("BACT"). 42 U.S.C. § 7475. BACT is determined on a case-by-case basis, generally involving 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.

discounting the effects of air pollution control technology that is not legally enforceable. 40 CFR §§ 52.21 (b), 51.165 (a)(1)(iii), 51.166 (b)(4).[4]

C. Regulation of Fugitive Emissions.

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

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

Portions of the Arizona SIP submitted on October 9, 1979 on behalf of Pima County ("Pima County SIP") required at the time that fugitive emissions be included in the potential to emit estimates of a facility. As noted above, fugitive emissions are generally disregarded in emissions calculations prepared under federal law and the current Pima County Code. However, the August 6, 1979 air quality control regulations adopted by the Pima County Board of Supervisors, later submitted as part of the Arizona SIP, by their terms required fugitive emissions to be counted for all sources.[5] As a matter of local

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[4] 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.

[5] At the time the 1979 regulations were adopted, Pima County was a non-attainment area,

law, the 1979 regulations unequivocally have been superseded by newer County regulations.[6] Less certain is whether those 1979 regulations, since they were embodied in the Arizona SIP, remain enforceable as a matter of federal law because EPA never expressly deleted them from the Arizona SIP. 40 C.F.R. § 52.120. Under the Clean Air Act, state and local provisions adopted into a SIP remain enforceable as a matter of federal law unless and until EPA approves deletion of them. States and their political subdivisions cannot unilaterally amend an EPA-approved SIP. 42 U.S.C. § 7410 (n); *Safe Air for Everyone v. EPA*, 488 F.3d 1088 (9th Cir. 2007); *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 366 F. 3d 692, 695 (9th Cir. 2004). The Board need not resolve this uncertainty to uphold the Control Officer's permit denial.

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

III. Findings of Fact.

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

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

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and Rosemont argues that they were never intended to apply to attainment areas.

[6] Subsequent to 1979, the County undertook a comprehensive reform of its air quality regulations, which today are essentially identical to those set forth in the federal 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 required under federal law. Pima County Code § 17.04.340 (129). *Id.* The Pima County Code has not included fugitive emissions in major source determinations since 1993. In that year, the Pima County Board of Supervisors adopted Ordinance 1993-128, which substantially amended the Air Quality Control regulations set forth in Chapter 17. Among other things, Ordinance 1993-128 abandoned the 1979 provision that called for fugitive emissions to be included in all source determinations. Instead, the County adopted the federal definition set forth in Clean Air Act § 302 (j), pursuant to which fugitive emissions are only included with regard to specifically listed facilities not including copper mines. *See* Ordinance 1993-128, § 17.04.340 (133)(c), p. 27.

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

4. On September 23, 2010 the Control Officer advised Rosemont that the application was incomplete and requested Rosemont to provide additional information. Rosemont provided the requested additional information to the Control Officer on October 8, 2010. Joint Statement of Stipulated Facts, ¶ 4.

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

6. On May 12, 2011, the Control Officer requested additional information from Rosemont concerning the technical aspects of the mine processes including control efficiencies of the Pollution Control Equipment. On June 1, Rosemont provided the additional information requested by the Control Officer. Joint Statement of Stipulated Facts, ¶ 6.

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

8. On August 29, 2011, the Control Officer and the District gave public notice that a Proposed Air Quality Operating Permit for Rosemont had been prepared, and gave notice of the commencement of a 90-day public comment period ending November 28, 2011. Also on August 29, 2011 the Control Officer posted the proposed Class II Air Quality Permit for the Rosemont project on the Pima County Department of Environmental Quality ("PDEQ") website. A Class II permit is issued to facilities that are

not "major sources" under the Pima County Code. Joint Statement of Stipulated Facts, ¶ 8.

9. On September 2, 2011, Rosemont filed a lawsuit against the Control Officer and the District in the United States District Court for the District of Arizona, alleging that the Pima County SIP required the Control Officer to act on the Permit Application within 30 days of the application being complete. *Rosemont Copper Company v. Ursula Kramer, et al,* No. 4:11-cv-0052-RCC (D. Ariz.). Rosemont asked the District Court to:

a. Issue a finding declaring that the Control Officer and District were in violation of Rule 21-213(C) for failing to issue or deny the Permit Application within thirty days of it being complete;

b. Issue a permanent injunction directing the Control Officer and District to comply with Rule 21-213(C) and all applicable requirements of the CAA; and

c. Order the Control Officer and District to either grant or deny the Permit Application within forty-five days of the date of the injunction. Joint Statement of Stipulated Facts, ¶ 9.

10. On September 28, 2011, the Control Officer denied Rosemont's Permit Application. Joint Statement of Stipulated Facts, ¶ 10.

11. Specifically, the Control Officer's findings in her written notice of denial included:

a. The Rosemont project is a major source under the PC SIP because the potential to emit CO, including fugitive emissions, was 615.22 tons/year, which is "greater than 100 tons per year";

b. The Rosemont project is a major source under the Pima County SIP because the potential to emit PM_{10}, including fugitive emissions, was 909.62 tons/year, which is "greater than 100 tons per year";

c. Rosemont did not comply with Pima County SIP Rule 504 by failing to provide necessary modeling;

d. Rosemont did not list all applicable requirements as mandated by P.C.C.§ 17.12.165; and

e. Rosemont did not demonstrate to the Control Officer that the "source is designed, controlled, equipped, or capable of being operated" in such a way that "compliance with all applicable provisions of the SIP rules would be possible throughout the term of the permit." Joint Statement of Stipulated Facts, ¶ 11.

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

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

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

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

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

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

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

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

20. On November 1, 2011 Rosemont submitted a letter to ADEQ stating that it had determined that its application should have been submitted to ADEQ rather than to Pima County, pursuant to the Arizona SIP and Pima County-specific provisions contained therein. Rosemont's letter cited portions of the 1979 Pima County regulations. Letter of November 1, 2011 from Eric Hiser to Eric Massey, ADEQ Air Quality Director, Exhibit A to *Control Officer's Combined Supplemental Memorandum and Post-Hearing Memorandum*, filed herein on November 22, 2011.

IV. Legal Discussion.

Rosemont did not identify *any* SIP rules as being applicable requirements in its Permit Application or in any supplement to the application. Findings of Fact, ¶ 14. Rosemont's Application cited neither the 1979 Pima County regulations, which the Control Officer argues remain part of the Arizona SIP, or the current Arizona SIP, which Rosemont has argued to ADEQ provides the applicable requirements. Findings of Fact, ¶ 20. Regardless of whether the disputed 1979 regulations remain part of the Pima County and Arizona SIP, then, the Control Officer's determination that Rosemont had failed to cite all applicable requirements was correct.

Because the Board finds that the Control Officer's denial of the Rosemont permit application was not arbitrary, capricious, or contrary to law on that basis, the Board need not determine whether the 1979 regulations remain part of the Pima County and Arizona SIP. Likewise, the Board need not address Rosemont's argument that the Control Officer is precluded from enforcing those regulations by A.R.S. § 49-112, which limits the circumstances under which counties can implement regulations more stringent than federal law. The Board does note that, if the 1979 regulations remain part of the approved SIP, then pursuant to the doctrine of federal supremacy those regulations will remain enforceable notwithstanding A.R.S. § 49-112 and similar state law provisions.

V. Conclusions of Law.

1. The Control Officer correctly determined that Rosemont's permit application failed to identify all applicable requirements.

2. The Control Officer's decision to deny Rosemont's permit application was not arbitrary, capricious, or contrary to law.

VI. Order.

In light of the foregoing, it is hereby ORDERED that the Control Officer's September 28, 2011 decision to deny Rosemont's permit application is affirmed. Each party shall bear its own costs and attorney's fees.

Dated this 19th day of December, 2011.

PIMA COUNTY AIR QUALITY HEARING BOARD

By: _____
Barry A. Friedman, Chairman

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