



MEMORANDUM

Date: July 19, 2012

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Rosemont Copper Company v. Pima County Air Quality Hearing Board, Pima County Air Quality Control District and Ursula Kramer**

Attached is a copy of the ruling of Superior Court Judge Kenneth Lee in this matter (Attachment 1). The ruling is substantially in favor of the County. Effectively, the ruling does nothing more than require Rosemont Copper Company to do what had been asked of them previously by our Department of Environmental Quality (PDEQ).

Rosemont initially submitted a permit application using Pima County Code requirements. When Rosemont discovered that PDEQ planned an extensive public participation process, they asserted their actions were subject only to the Pima County State Implementation Plan (PCSIP), which has a substantially shorter timeframe. However, the PCSIP also has more stringent rules, regulations and requirements regarding the submission of data and air quality modeling. Rosemont chose to invoke the PCSIP permitting process with its shorter timeframe but did not comply with the more stringent technical data and modeling requirements.

PDEQ Director Ursula Kramer had no choice but to deny Rosemont's permit, since it was inadequate and did not meet the technical requirements and information required by the PCSIP. This is effectively what Judge Lee ruled by requiring Rosemont to amend their permit application and provide the requested information. Rosemont was denied injunctive relief; denied declaratory relief; and denied attorneys' fees. They were simply allowed to amend their application within the next 30 days to meet all applicable requirements of the PCSIP.

Rosemont has now stated they will try a dual path of air quality permit processing: the local route through PDEQ, as well as through the Arizona Department of Environmental Quality, to determine which entity has the quickest and easiest process with the least stringent requirements.

The Honorable Chairman and Members, Pima County Board of Supervisors
Re: **Rosemont Copper Company v. Pima County Air Quality Hearing Board, Pima County
Air Quality Control District and Ursula Kramer**
July 19, 2012
Page 2

The most troubling component of this ruling is the finding that the County was arbitrary and capricious and abused its discretion. We completely disagree with Judge Lee's findings regarding our actions. Our actions were predicated on Rosemont's insistence their permit application be processed in accordance with PCSIP rules.

For a more technical analysis of the process that has been utilized, please refer to the attached memorandum from Ms. Kramer (Attachment 2).

CHH/dph

Attachments

c: John Bernal, Deputy County Administrator for Public Works
Ursula Kramer, Director, Environmental Quality

ATTACHMENT 1

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KENNETH LEE
JUDGE

CASE NO. C20120242

DATE: July 05, 2012

ROSEMONT COPPER COMPANY
Plaintiff

VS.

PIMA COUNTY AIR QUALITY HEARING BOARD,
PIMA COUNTY AIR QUALITY CONTROL DISTRICT,
and URSULA KRAMER
Defendants

R U L I N G

UNDER ADVISEMENT RULING

The Court has under advisement the Plaintiff/Appellant's [hereinafter "Rosemont Copper"] appeal from the decision of the Pima County Air Quality Hearing Board [hereinafter "Board"]. The Board upheld the denial of Rosemont Copper's Application for an air quality permit by the Pima County Air Quality District [hereinafter "District"] and the control officer, Ursula Kramer [hereinafter "Control Officer"]. In addition, Rosemont Copper has sought injunctive relief and a declaratory judgment. The Court has reviewed the record on appeal, the briefs, and the arguments made at the May 14, 2012 hearing. No additional evidence was presented at the hearing by any party with respect to the appeal or the separate claims for injunctive or declaratory relief.

Regulatory System

In 1970, the Federal Clean Air Act, 42 USC §7401 et. seq. was passed. The Act established a nationwide program that partnered the states and federal governments in the regulation and control of air pollution. The United States Environmental Protection Agency [hereinafter "EPA"] was charged with establishing air quality standards for a wide variety of air pollutants. The EPA was to work with the states to implement plans to regulate and control the discharge of air pollutants to meet the air quality standards established. Each state was to submit a state implementation plan to the EPA for approval.

Arizona submitted its original statewide implementation plan [hereinafter "AZ SIP"] on January 28, 1972. The AZ SIP, like all state plans, was comprised of a number of state, county, local, and tribal laws and

R U L I N G

regulations. The AZ SIP has been amended and modified many times since its original adoption and approval by the EPA. Areas of Arizona are categorized as attainment or non-attainment areas, which are those areas that meet the air quality standards versus those areas that do not meet the air quality standards. The regulations for attainment versus non-attainment areas differ.

In 1979, the AZ SIP was amended to include regulations for Pima County which have been referred to in this case by the parties as the PC SIP. In 1979 Pima County was designated by the EPA as a non-attainment area. The 1979 Pima County regulations addressed, in part, the non-attainment area requirements. The parties disagree on whether the PC SIP applies only to non-attainment areas of Pima County or all of Pima County. The EPA adopted the PC SIP. States and their political subdivisions cannot unilaterally amend an EPA approved state implementation plan. The EPA has never deleted the PC SIP from the AZ SIP.

Since 1979, Pima County has adopted newer regulations that are consistent with the current statewide AZ SIP. The EPA has also redesignated portions of Pima County. Suburban and rural portions of Pima County are no longer considered non-attainment areas. The location of Rosemont Copper's proposed mine is in a rural area of Pima County.

Factual Background

On July 29, 2012, Rosemont Copper submitted an Air Quality Permit Application to the Control Officer and the District. As part of an air quality permit application, the applicant is required to cite to all applicable requirements in the application. On September 23, 2010, Rosemont Copper was informed that its Application was incomplete and in need of additional information. This request for additional information did not mention the absence in the Application of the citation to all applicable requirements. Rosemont Copper submitted the additional information on October 8, 2010. The Control Officer and the District found Rosemont Copper's Application to be complete on November 30, 2010. The Application did not list any applicable requirements of law. Pima County has not required applicants to list all applicable requirements in their permit application for years preceding Rosemont Copper's Application, even though such listing is required by law.

Under the Pima County Code, P.C.C. §17.12, 165 (D) (6), the Control Officer and the District were required to make a final decision on the Application within 18 months of the completion date of November 30, 2010. On May 12, 2011, the Control Officer requested additional information from Rosemont Copper, which it provided on June 1, 2011. This request for additional information, again, made no mention of the absence of the listing of all applicable requirements.

R U L I N G

According to the Control Officer and the District, Rosemont Copper's Application was initially being reviewed and considered under the AZ SIP. On June 23, 2011, Rosemont Copper notified the Control Officer and the District that it intended to sue them for a failure to comply with the time limits found in the PC SIP. With the Application of the PC SIP, the Control Officer is required to either grant or deny the Permit Application within 30 days of the date of receipt of the completed application.

On August 29, 2011, the Control Officer and District gave public notice of Rosemont Copper's Application, which commenced a 90 day public comment period. The comment period was to end on November 28, 2011.

On September 2, 2011, Rosemont Copper filed a lawsuit in the United States District Court for the State of Arizona against the Control Officer and the District. In the lawsuit Rosemont Copper alleged that PC SIP applied to its Application and the Control Officer and the District were in violation of the time requirements contained in the PC SIP.

The Control Officer and the District consulted with the EPA regarding the applicability of the PC SIP. The Control Officer determined that the PC SIP applied to Rosemont Copper's Application. Rosemont Copper's Application was denied by the Control Officer and the District on September 28, 2011. The basis of the denial was the failure of Rosemont Copper to comply with the requirements of the PC SIP and the failure to list all applicable requirements in its Application. The Control Officer and the District found that they did not have sufficient information in the application that would show Rosemont Copper's operation would satisfy the PC SIP requirements as a major source of fugitive emissions for particulate matter and carbon monoxide.

On September 29, 2011, the Control Officer and the District filed a motion to dismiss the federal lawsuit on the basis that a ruling had been made on the Application, which rendered the lawsuit moot. By stipulation of the parties the federal lawsuit was dismissed.

Rosemont Copper filed an Appeal to the Board from the denial of its Application on October 7, 2011. The position Rosemont Copper initially took before the Board was that the PC SIP did not apply to its Application, rather, the AZ SIP applied. Under the AZ SIP, its proposed operation would be compliant as fugitive emissions would not be included in the determination of whether Rosemont Copper would be a major source under the AZ SIP. On November 11, 2011, Rosemont Copper took the position with the Arizona Department of Environmental Quality (ADEQ) that its permit should have been submitted to ADEQ and not the Control Officer and the District. However, ADEQ's exercise of jurisdiction is discretionary and, to date, ADEQ

RULING

has not exercised jurisdiction over Rosemont Copper's Application. Rosemont Copper has not requested the instant Appeal be dismissed in light of its request that ADEQ take jurisdiction over its Application.

After hearing and argument, the Board upheld the denial of the Application by the Control Officer and the District on December 19, 2011. In upholding the denial, the Board found that Rosemont Copper did not list all applicable requirements in its Application, as required by law. The Board did not address whether the PC SIP or the AZ SIP governed the evaluation of Rosemont Copper's Application. The Board determined, regardless of which SIP applied, Rosemont Copper failed to cite and list either set of regulations and requirements. Thus, the Board determined the Control Officer and the District did not act arbitrarily or capriciously or contrary to law in denying the Application.

Rosemont Copper appealed this decision to this Court by filing this action on January 13, 2012. In the Complaint, Rosemont Copper also seeks injunctive and declaratory relief.

Standard of Review

In reviewing the actions of the Board, the scope of the Court's review is governed by A.R.S. §12-901 et. seq., Judicial Review of Administrative Decisions. Decisions of the Board are subject to judicial review, pursuant to A.R.S. §49-497.01(B). The review by the Court is not a trial de novo, as the instant case is an appeal from an agency decision that is not exempt, pursuant to A.R.S. §41-1092.02. With an appeal governed by A.R.S. §12-901, a party is entitled to an evidentiary hearing, if requested. A.R.S. §12-901(A). At the hearing the parties may present exhibits and testimony that were not presented during the administrative hearing, subject to certain exceptions. A.R.S. §12-910(B). Upon review the Court may affirm, reverse, modify, or vacate and remand the agency's actions. A.R.S. §12-910(E). The Court shall affirm the agency's action if the action is supported by substantial evidence, is not contrary to law, is not arbitrary and capricious, or is not an abuse of discretion. A.R.S. §12-910(E).

In the instant case, the decisions of the Board are not exempt, pursuant to A.R.S. §41-1092.02. No party has requested an evidentiary hearing or submitted any additional evidence. The record before the Board is the same record before this Court.

The Court is not to reweigh the Board's findings of fact. Rather, the Court is to determine if there is substantial evidence to support the factual findings of the Board. Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prod., Inc., 167 Ariz. 383, 807 P.2d 1119 (App. 1990). However, the Court is not bound by the Board's conclusions of law. 3613 Ltd. v. Dept. of Liquor Licenses & Control, 194 Ariz.178, 978 P.2d 1282

RULING

(App. 1999). The Court is to give weight to the Board's factual determinations and interpretations of the laws it is charged with enforcing. See, Golob v. Arizona Med. Board, 217 Ariz. 505, 176 P.3d 703 (App. 2008).

Discussion

The decision of the Board was that there was substantial evidence to affirm the Control Officer and District's decision to deny Rosemont Copper's Application, due to Rosemont Copper's failure to cite all applicable requirements in its Application. The Board did not reach a decision on whether the AZ SIP or the PC SIP governed Rosemont Copper's Application.

The initial question is whether there was substantial evidence to support the Board's factual findings that Rosemont Copper failed to cite all applicable requirements in its Application. On this question the undisputed evidence is that Rosemont Copper did not cite to any applicable requirements.

Based upon that fact alone, the Defendants would have this Court affirm the Board's decision. However, this would ignore the other evidence that was undisputed and before the Board. It is uncontested that the Control Officer made two requests for additional information after Rosemont Copper submitted its Application. In neither request for additional information did the Control Officer mention the failure of Rosemont Copper to cite to all applicable requirements. The Control Officer's failure to raise the absence of citation to all applicable requirements as an issue is understandable given it was the policy of Pima County not to require applicants to cite to all applicable requirements. This explains the Control Officer's finding of a complete application, even though no citation to all applicable requirements existed in the Application. Then, when the Control Officer decided to deny the Application, she and the District did not afford Rosemont Copper the opportunity to amend the Application to include a citation to all applicable requirements. This is despite the unannounced change in policy to now enforce the citation requirement after Rosemont Copper had submitted its Application

In light of these facts, the Board still upheld the denial of the Application and did not allow Rosemont Copper to amend or supplement its Application to include the citation to the applicable requirements.

Under these undisputed facts, the Court finds the actions of the Defendants were arbitrary and capricious, and an abuse of discretion, under A.R.S. §12-910(E). The Defendants may not engage in a practice of failing to enforce the requirements for an application for a permit for years, certify that an application is complete even in the absence of the citation to all applicable requirements, make multiple requests for additional information from the applicant, fail to mention the absence of the citation to all applicable

Mary Ann Ritz

Judicial Administrative Assistant

RULING

requirements, and then decide to enforce the citation requirements and rely on the absence of the citation to deny the application without affording the applicant the opportunity to bring the application into compliance.

Having determined that the Defendants acted in an arbitrary and capricious manner and that the Defendants abused their discretion, the Court need not address the other issues raised by the parties in connection with the appeal from the decision of the Board. In addition, the Court need not speculate as to what the Defendants will or will not do once Rosemont Copper amends its Application with its citation to all applicable requirements.

IT IS ORDERED that the Ruling of the Board of December 19, 2011 is vacated and the matter is remanded with directions that the Defendants grant Rosemont Copper 30 days to amend its Application to include citations to all applicable requirements and for the Defendants to timely reconsider the Amended Application.

With respect to the Plaintiff's Request for Declaratory Judgment and Injunctive Relief, the Court finds, based on the record and applicable law, that the Plaintiff is not entitled to such relief.

IT IS ORDERED that the Plaintiff's Requests for Declaratory Relief and Injunctive Relief are denied. Finally, with respect to Plaintiff's Request for Attorney's Fees and Costs, the Court declines to award the same.

IT IS ORDERED that the Plaintiff's Request for Attorney's Fees and Costs is denied.


HON. KENNETH LEE /s/
(ID: 51350b09-9b69-4fd1-86dc-7f7b2a806484)

cc: Hon. Kenneth Lee
Christopher D Thomas, Esq.
Lesley M. Lukach, Esq.
Matthew L Rojas, Esq.
Meredith K Marder, Esq.
Phillip F. Fargotstein, Esq.
Scott D. McDonald, Esq.
Theresa Dwyer-Federhar, Esq.
Clerk of Court - Under Advisement Clerk

Mary Ann Ritz
Judicial Administrative Assistant

R U L I N G

Page 7

Date: July 05, 2012

Case No.: C20120242

Mary Ann Ritz
Judicial Administrative Assistant

ATTACHMENT 2



MEMORANDUM

Pima County Department of Environmental Quality

DATE: July 17, 2012

TO: C.H. Huckelberry
County Administrator

FROM: Ursula Kramer
Director

RE: Rosemont Copper Company's Air Quality Permit Application

On July 5, 2012, Judge Kenneth Lee issued his ruling on Rosemont Copper Company's appeal of the denial of its air quality permit application. The following is a summary of events leading to that Superior Court decision and a summary of the ruling.

Background

Rosemont applied for an air quality permit on July 29, 2010. Under Pima County Code (PCC), a determination of whether an application is complete must be made within 60 days of the filing of the application. A draft permit must be published within nine months, and a final permit action must be taken within 18 months after the application is deemed "complete." Rosemont's application was found to be complete on November 30, 2010. In June 2011, Rosemont sent a Notice of Intent to Sue, claiming a decision on the permit should have been made by December 30, 2010 under the PC State Implementation Plan Rules (PCSIP), which is a set of air quality rules submitted to the US Environmental Protection Agency (EPA) for approval. After Rosemont raised the issue of applicability of the PCSIP, the Control Officer and District staff began assessing Rosemont's claim about the PCSIP Rules and how they applied to Rosemont's application. A proposed permit was published on August 29, 2011, within the nine-month time period required by the PCC. Publication of the proposed permit began what was planned as a 90-day public comment period due to significant public interest in the proposed facility. On September 2, 2011, Rosemont filed a lawsuit in United States District Court alleging the PCSIP applied to its application and stating they were entitled to a permit decision within the shorter time requirements contained in the PCSIP.

When Rosemont applied for its application, it did not identify any SIP issues as applicable, nor did it identify any SIP requirements in later application amendments. Rosemont abandoned its position that there are no applicable SIP requirements when it filed its federal lawsuit. Rosemont claimed Pima County air quality control regulations from 1979 contained in the PCSIP governed the permit issuance, not the current PCC. The two processes are very different. PCC requirements, similar to State requirements, specify a detailed process including public participation and permitting timeframes. The PCSIP has no such detail and requirements.

C. H. Huckelberry

RE: Rosemont Copper Company's Air Quality Permit Application

July 17, 2012

Page 2

In my capacity as the Control Officer, I denied Rosemont's permit application on September 28, 2011, citing two reasons. First, Rosemont's application failed to list all applicable federal requirements as required by the PCC and SIP rules. Second, the application failed to comply with certain substantive requirements of the PCSIP Rules, specifically modeling to demonstrate compliance with federal health-based air quality standards. Rosemont appealed the denial to the Air Quality Hearing Board. The Board upheld the denial. Subsequently, Rosemont appealed the denial and the Hearing Board's decision in Superior Court. Rosemont continued to change its legal position during the hearing process by arguing the Arizona SIP, not the PCSIP, now applies.

Ruling Summary

In its appeal, Rosemont asked for the following:

1. The court vacate the Order;
2. Reverse the denial of the permit application;
3. Grant declaratory relief;
4. Instruct defendants to approve Rosemont's permit application.

The only item granted to Rosemont was relief from the denial of the permit. Rosemont was not granted any of its other requests. The judge ordered that Rosemont be given 30 days to amend its application to include citations to all applicable requirements and for timely reconsideration of the application.

Unfortunately, the judge ruled the decision to deny the permit application was arbitrary and capricious. Under Arizona Law administrative decisions, such as the Control Officer's decision to deny Rosemont's application and the Hearing Board's decision to uphold that denial, can be reversed if the decision is "arbitrary and capricious" or is an abuse of discretion. When determining whether a decision is arbitrary and capricious, a reviewing court should review the record to determine whether there has been "unreasonable action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." When testifying before the Air Quality Hearing Board, I explained my reasons for denying the permit application without asking Rosemont to supplement the application. Both I and the Hearing Board considered the facts and circumstances, including Rosemont's repeated changes in position. Based on the legal standard, the decision should not be characterized as arbitrary and capricious because neither the Control Officer's denial nor the Hearing Board's decision to uphold that denial can be fairly described as unreasonable or made without due consideration of the facts and circumstances.

C. H. Huckelberry

RE: Rosemont Copper Company's Air Quality Permit Application

July 17, 2012

Page 3

The Court decision is essentially a victory for the Air Quality District and the County. We have repeatedly suggested that Rosemont resubmit its application and include all applicable requirements. The judge's order to allow an amended application is, practically speaking, substantially similar to submitting a new application, since the amendment must include the initial application plus the additional applicable requirements from the PCSIP. Once the amended application is received, we will process it expeditiously and proceed to public comment with a draft provided Rosemont demonstrates compliance with all air quality requirements. Following the ruling, Rosemont requested a meeting with air quality permitting staff to discuss how best to proceed. The meeting was held on July 13, 2012. I provided Rosemont with the attached letter, which identifies the additional requirements.

We are available at your convenience to answer any questions you may have.

UK/mk

Attachment

c: John Bernal, Deputy County Administrator for Public Works



PIMA COUNTY DEPARTMENT OF ENVIRONMENTAL QUALITY

33 N. Stone Avenue, Suite 700
Tucson, Arizona 85701

Visit our website at: www.deq.pima.gov

Ursula Kramer, P.E.
Director

(520) 243-7400
Fax (520) 838-7432

July 13, 2012

Mr. Jamie Sturgess
Vice President, Sustainable Development
Rosemont Copper Company
P.O. Box 35130
Tucson, AZ 85740-5130

Re: Amended Rosemont Copper Air Quality Permit Application for an Air Quality Permit

Dear Mr. Sturgess:

As ordered by the Ruling from Judge Lee, dated July 5, 2012, the Pima County Air Quality Control District has granted Rosemont Copper Mine (RCM) 30 days to amend its air quality permit application to include all applicable requirements including any federal applicable requirement as defined by Pima County Code (PCC) 17.04.340 (A) (85). The additional applicable requirements include the Pima County State Implementation Plan (PC SIP) Rules identified in the Statement of Basis for Dental dated September 28, 2011. Specifically, the District will be reconsidering the application with respect to the requirements of PC SIP Rule 504 Pre-Installation Testing or Modeling Requirements. This Rule states:

“.....an estimate of the concentration of a pollutant in the ambient air near a proposed new major source shall be made in accordance with the reference Guideline on Air Quality Models (EXPOS 1.2-080) contained in Chapter IX, provided such document includes a method applicable to the proposed source. If this document does not contain an applicable model, the Control Officer shall refer to Workbook for the Comparison of Air Quality Models contained in Chapter IX herein, and other pertinent guidance furnished to the Control Officer in writing by the Administrator of the Environmental Protection Agency, in specifying to the permit applicant a suitable method for meeting these requirements.”

Letter to Mr. J. Sturgess

Re: Amended Rosemont Copper Air Quality Permit Application

July 13, 2012

Page Two

Please ensure that the information that is submitted is accompanied by a statement of truth, accuracy and completeness signed by the responsible official as required by PCC 17.12.165 (E) (1). If you would like to discuss this matter, please contact Richard Grimaldi, Deputy Director for EQ Division at (520) 243-7363.

Sincerely,



Ursula Kramer, P.E.

Control Officer, Pima County Air Quality Control District

UK/RG/vb

cc: Kathy Arnold, Rosemont Copper Company
Richard Grimaldi, PDEQ