

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

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**R U L I N G**

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**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

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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 (I) (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.

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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

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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

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(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

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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**

(ID: 51350bf9-9b69-4fdf-86dc-7f7b2a806484)

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