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1 G. Van Velsor Wolf Jr. (#007530) Mark A. McGinnis (#013958) 2 Scott M. Deeny (#021049) Salmon, Lewis & Weldon, PLC 3 2850 East Camelback Road, Suite 200 Phoenix, Arizona 85016 Telephone: (602) 801-9060 4 Facsimile: (602) 801-9070 vvw@slwplc.com 5 mam@slwplc.com 6 smd@slwplc.com Attorneys for Save the Scenic Santa Ritas

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IN THE SUPERIOR COURT FOR MARICOPA COUNTY IN AND FOR THE STATE OF ARIZONA

10 SAVE THE SCENIC SANTA RITAS, 11 Appellant, 12 13 HENRY R. DARWIN, DIRECTOR OF THE 14 ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY. 15 Appellee, 16 v. 17 ROSEMONT COPPER COMPANY, 18 19 Intervenor-Appellee, 20

RE: Air Quality Permit No. 55223

Case No.: LC 2014-000262-001

NOTICE OF APPEAL FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION

Save the Scenic Santa Ritas ("SSSR") files this Notice of Appeal pursuant to A.R.S. §§ 49-443(A) and 12-904(A).

PARTIES, JURISDICTION, AND VENUE

1. Save the Scenic Santa Ritas is a non-profit 501(c)(3) organization incorporated under the laws of Arizona and doing business in Pima County, Arizona.

- 2. Henry R. Darwin ("Darwin") is the Director of the Arizona Department of Environmental Quality ("ADEQ") and is sued in his official capacity. The principal offices of ADEQ are located in Maricopa County.
- 3. ADEQ approved Rosemont Copper Company's air quality permit on January 31, 2013.
- 4. SSSR filed an administrative appeal of this action with the Office of Administrative Hearings ("OAH") on March 7, 2013.
- 5. After an evidentiary hearing that took place in Maricopa County, the Administrative Law Judge ("ALJ") of OAH recommended dismissal of SSSR's appeal on April 10, 2014.
- Darwin dismissed SSSR's appeal on April 25, 2014, Docket No. 13A-A007-DEQ ("ADEQ Decision"). The ADEQ Decision was sent by certified mail to SSSR on April 29, 2014.
- 7. This action seeks judicial review of the ADEQ Decision made by Darwin, as Director of ADEQ.
- 8. Rosemont Copper Company ("Rosemont") is an Intervenor in the original administrative appeal filed with OAH.
- 9. Venue in Maricopa County Superior Court is proper pursuant to A.R.S. §§ 12-401(6) and 12-905(B).

BACKGROUND

- 10. The director of ADEQ is required to deny an air pollution permit application "if the applicant does not show that every such source is so designed, controlled or equipped with such air pollution control equipment that it may be expected to operate without emitting or without causing to be emitted air contaminants in violation of this article and the rules adopted by the director." A.R.S. § 49-427(A).
- 11. The director of ADEQ adopted the National Ambient Air Quality Standards ("NAAQS") that apply to all permitted sources in the state. A.A.C. R18-2-201 et seq. The

NAAQS include specific limitations on emissions of concentrations of particulate matter of 10 microns ("PM10") and nitrogen dioxide ("NO2"), among others. The purpose of the NAAQS is to establish maximum concentrations of pollutant emissions from a source to be protective of the public health and the environment.

- 12. In order to determine whether a new source to be authorized by a permit will exceed the NAAQS, ADEQ usually relies upon an analysis that will add the modeled concentrations from the new source to the background concentration to determine the potential pollutant concentration, which is compared to the NAAQS. The analysis is usually submitted by the applicant. In the absence of a modeling analysis, ADEQ has no effective way to determine whether a new source has the potential to violate the NAAQS.
- 13. ADEQ and the Environmental Protection Agency ("EPA") guidance and regulations applicable to the modeling and analysis of potential pollutant concentrations require use of representative and conservative inputs, for comparing the resulting potential concentrations to the NAAQS, in order to account for uncertainties in the modeling process and to be most protective of the public health and the environment.
- 14. On or about November 15, 2011, Rosemont submitted an application for a Class II Synthetic Minor Air Quality Permit. Rosemont's application materials included a subsequently prepared July 2012 AERMOD Modeling Report to Assess Ambient Air Quality Impacts ("July 2012 Modeling Report"). On its face, the July 2012 Modeling Report purported to show that the Rosemont operations and sources did not have the potential to violate the NAAQS.
- 15. On August 6, 2012, ADEQ issued Rosemont's draft Class II Synthetic Minor Air Quality Permit ("Permit"), relying on the application materials submitted by Rosemont, including the July 2012 Modeling Report, and requested public comments.

- 16. On October 31, 2012, SSSR and others submitted comments on Rosemont's draft Permit, alleging, among other issues, that the July 2012 Modeling Report was flawed and that the Rosemont operations and sources had the potential to violate the NAAQS.
- 17. ADEQ failed to re-evaluate the July 2012 Modeling Report against the comments regarding its flaws submitted to ADEQ during the public comment period.
- 18. ADEQ issued Rosemont's Permit, No. 55223, in final form on January 31, 2013, in reliance on Rosemont's application materials, including the July 2012 Modeling Report. The Permit included additional conditions that ADEQ adopted as a result of some public comments.
- 19. On March 7, 2013, SSSR appealed Rosemont's Permit to OAH, pursuant to A.R.S. § 49-428(A), alleging, among other issues, that the July 2012 Modeling Report was flawed and that the Rosemont operations and sources had the potential to violate the NAAQS.
- 20. The evidentiary hearing on the appeal was conducted in Phoenix by the ALJ on July 24-31 and August 19-28, 2013.
- 21. At the evidentiary hearing, ADEQ testified that its practice with respect to an applicant for a permit for a new source is to work with a permit applicant to ensure that there would be no potential violation of the NAAQS and to assure the most protection for public health and the environment.
- 22. The ALJ issued his decision on April 10, 2014, recommending dismissal of the SSSR appeal.
- 23. On April 25, 2014 (mailed on April 29, 2014), Darwin ordered the dismissal of SSSR's appeal, stating that he had reviewed the ALJ decision and the record in the matter, presumably including the briefs filed by the parties, the exhibits, and the hearing transcripts.

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COUNT ONE

Judicial Review of Administrative Action

ADEQ Should Not Have Issued the Permit.

- 24. SSSR incorporates by reference all of the preceding paragraphs and allegations of this Notice of Appeal, as if set forth in full herein.
- 25. ADEQ acted arbitrarily and capriciously, abused its discretion, and acted contrary to law, as described in this Notice of Appeal.
- 26. The ADEQ Decision was in error, arbitrary, capricious, contrary to law, an abuse of discretion, and not supported by substantial evidence because, as set forth in SSSR's October 31, 2012, comments on the draft permit and in the administrative appeal, the sources authorized by the Permit may be expected to operate by emitting or causing to be emitted air contaminants in violation of Title 49, Chapter 3, Article 2, and rules adopted by the Director.
- 27. Based on an analysis that incorporates comments made by SSSR and others in the public comment period and in the administrative evidentiary hearing, the Rosemont operations and sources can be expected to violate the NAAQS.
- 28. ADEQ failed to properly exercise its discretion before issuing the final Permit by failing to consider the public comments regarding the impacts of the stated flaws in the July 2012 Modeling Report on the potential pollutant concentrations compared to the NAAQS and by failing to work with Rosemont to modify the Permit to avoid any potential NAAQS violation. ADEQ failed to require that the sources authorized by the Permit show that they may be operated without violating the NAAQS.

The Director Erred in Adopting the ALJ Recommended Decision.

29. The Director acted arbitrarily and capriciously by failing to apply his technical expertise in an independent evaluation of the ALJ's recommended decision and the record in this matter.

- 30. The Director failed to properly exercise his discretion in issuing the order dismissing the SSSR appeal by failing to consider the impacts of the stated flaws in the July 2012 Modeling Report on the potential pollutant concentrations compared to the NAAQS and by failing to work with Rosemont to modify the Permit to avoid any potential NAAQS violation. The Director failed to require that the sources authorized by the Permit show that they may be operated without violating the NAAQS. This was contrary to the law.
- 31. The Director should have denied the Permit because the sources authorized by the Permit may be expected to emit or cause to be emitted air contaminants in violation of the NAAQS. A.R.S. § 49-427(A). The appeal of SSSR was wrongly dismissed.

RELIEF

- 32. SSSR seeks the following relief:
- a. Reverse the ADEQ Decision dismissing SSSR's appeal and remand this matter to ADEQ for further consideration, including a re-evaluation of the July 2012 Modeling Report in light of the flaws identified during the public comment period and the evidentiary hearing.
- b. Award SSSR its attorneys' fees pursuant to A.R.S. § 12-348(A)(2) and costs pursuant to A.R.S. § 12-341, incurred and expended herein and in the administrative proceedings below.
- c. Grant SSSR such other and further relief as the Court may deem just and proper.

DATED this 4th day of June, 2014.

SALMON, LEWIS &	& WELDON	٧,	PL
			/

v. L

G. Van Velsor Wolf Jr.

Mark A. McGinnis Scott M. Deenv

2850 East Camelback Road, Suite 200

Phoenix, Arizona 85016

Attorneys for Save the Scenic Santa Ritas

1	ORIGINAL filed this 4 th day of June, 2014, with:
2	Maricopa County Superior Court
3	Clerk of the Lower Court's Office 201 West Jefferson
4	Phoenix, AZ 85003
5	COPIES of the foregoing served this 4th day of June, 2014 on:
6	Henry R. Darwin, Director
7	Arizona Department of Environmental Quality 1110 W. Washington Street
8	Phoenix, Arizona 85007
9	Eric C. Massey, Director Air Quality Division
10	Arizona Department of Environmental Quality 1110 W. Washington Street
11	Phoenix, Arizona 85007
12	Lorena Ayala, Hearing Administrator Office of Administrative Counsel
13	Arizona Department of Environmental Quality 1110 W. Washington Street
14	Phoenix, Arizona 85007
15	James Skardon, Assistant Attorney General Office of Attorney General General Environmental Enforcement Section
16	1275 W. Washington Street
17	Phoenix, Arizona 85007 Attorney for ADEQ
18	Eric L. Hiser
19	Jorden, Bischoff & Hiser, PLC 7272 East Indian School Road, Suite 360
20	Scottsdale, Arizona 85251 Attorneys for Rosemont Copper Company
21	COPY of the foregoing mailed
22	this 4 th day of June, 2014 to:
23	Thomas Shedden Administrative Law Judge
24	Office of Administrative Hearings 1400 W. Washington Street, Suite 101
25	Phoenix, Arizona 85007
26	(A) (A)
27	Dielo Jakaus
28	Denice C. Perrault