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8 **IN THE SUPERIOR COURT FOR MARICOPA COUNTY**
9 **IN AND FOR THE STATE OF ARIZONA**

10 SAVE THE SCENIC SANTA RITAS,

11 Appellant,

12 v.

13 HENRY R. DARWIN, DIRECTOR OF THE
14 ARIZONA DEPARTMENT OF
15 ENVIRONMENTAL QUALITY,

16 Appellee,

17 v.

18 ROSEMONT COPPER COMPANY,

19 Intervenor-Appellee,

20 RE: Air Quality Permit No. 55223
21

Case No.: LC 2014-000262-001

**NOTICE OF APPEAL FOR
JUDICIAL REVIEW OF
ADMINISTRATIVE DECISION**

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

25 **PARTIES, JURISDICTION, AND VENUE**

26 1. Save the Scenic Santa Ritas is a non-profit 501(c)(3) organization
27 incorporated under the laws of Arizona and doing business in Pima County, Arizona.
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1 NAAQS include specific limitations on emissions of concentrations of particulate matter
2 of 10 microns ("PM10") and nitrogen dioxide ("NO2"), among others. The purpose of the
3 NAAQS is to establish maximum concentrations of pollutant emissions from a source to
4 be protective of the public health and the environment.

5 12. In order to determine whether a new source to be authorized by a permit
6 will exceed the NAAQS, ADEQ usually relies upon an analysis that will add the modeled
7 concentrations from the new source to the background concentration to determine the
8 potential pollutant concentration, which is compared to the NAAQS. The analysis is
9 usually submitted by the applicant. In the absence of a modeling analysis,
10 ADEQ has no effective way to determine whether a new source has the potential to
11 violate the NAAQS.

12 13. ADEQ and the Environmental Protection Agency ("EPA") guidance and
13 regulations applicable to the modeling and analysis of potential pollutant concentrations
14 require use of representative and conservative inputs, for comparing the resulting potential
15 concentrations to the NAAQS, in order to account for uncertainties in the modeling
16 process and to be most protective of the public health and the environment.

17 14. On or about November 15, 2011, Rosemont submitted an application for a
18 Class II Synthetic Minor Air Quality Permit. Rosemont's application materials included a
19 subsequently prepared July 2012 AERMOD Modeling Report to Assess Ambient Air
20 Quality Impacts ("July 2012 Modeling Report"). On its face, the July 2012 Modeling
21 Report purported to show that the Rosemont operations and sources did not have the
22 potential to violate the NAAQS.

23 15. On August 6, 2012, ADEQ issued Rosemont's draft Class II Synthetic
24 Minor Air Quality Permit ("Permit"), relying on the application materials submitted by
25 Rosemont, including the July 2012 Modeling Report, and requested public comments.

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1 16. On October 31, 2012, SSSR and others submitted comments on Rosemont's
2 draft Permit, alleging, among other issues, that the July 2012 Modeling Report was flawed
3 and that the Rosemont operations and sources had the potential to violate the NAAQS.

4 17. ADEQ failed to re-evaluate the July 2012 Modeling Report against the
5 comments regarding its flaws submitted to ADEQ during the public comment period.

6 18. ADEQ issued Rosemont's Permit, No. 55223, in final form on January 31,
7 2013, in reliance on Rosemont's application materials, including the July 2012 Modeling
8 Report. The Permit included additional conditions that ADEQ adopted as a result of some
9 public comments.

10 19. On March 7, 2013, SSSR appealed Rosemont's Permit to OAH, pursuant to
11 A.R.S. § 49-428(A), alleging, among other issues, that the July 2012 Modeling Report
12 was flawed and that the Rosemont operations and sources had the potential to violate the
13 NAAQS.

14 20. The evidentiary hearing on the appeal was conducted in Phoenix by the ALJ
15 on July 24-31 and August 19-28, 2013.

16 21. At the evidentiary hearing, ADEQ testified that its practice with respect to
17 an applicant for a permit for a new source is to work with a permit applicant to ensure that
18 there would be no potential violation of the NAAQS and to assure the most protection for
19 public health and the environment.

20 22. The ALJ issued his decision on April 10, 2014, recommending dismissal of
21 the SSSR appeal.

22 23. On April 25, 2014 (mailed on April 29, 2014), Darwin ordered the dismissal
23 of SSSR's appeal, stating that he had reviewed the ALJ decision and the record in the
24 matter, presumably including the briefs filed by the parties, the exhibits, and the hearing
25 transcripts.

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1 COUNT ONE

2 Judicial Review of Administrative Action

3 ADEQ Should Not Have Issued the Permit.

4 24. SSSR incorporates by reference all of the preceding paragraphs and
5 allegations of this Notice of Appeal, as if set forth in full herein.

6 25. ADEQ acted arbitrarily and capriciously, abused its discretion, and acted
7 contrary to law, as described in this Notice of Appeal.

8 26. The ADEQ Decision was in error, arbitrary, capricious, contrary to law, an
9 abuse of discretion, and not supported by substantial evidence because, as set forth in
10 SSSR's October 31, 2012, comments on the draft permit and in the administrative appeal,
11 the sources authorized by the Permit may be expected to operate by emitting or causing to
12 be emitted air contaminants in violation of Title 49, Chapter 3, Article 2, and rules
13 adopted by the Director.

14 27. Based on an analysis that incorporates comments made by SSSR and others
15 in the public comment period and in the administrative evidentiary hearing, the Rosemont
16 operations and sources can be expected to violate the NAAQS.

17 28. ADEQ failed to properly exercise its discretion before issuing the final
18 Permit by failing to consider the public comments regarding the impacts of the stated
19 flaws in the July 2012 Modeling Report on the potential pollutant concentrations
20 compared to the NAAQS and by failing to work with Rosemont to modify the Permit to
21 avoid any potential NAAQS violation. ADEQ failed to require that the sources authorized
22 by the Permit show that they may be operated without violating the NAAQS.

23 The Director Erred in Adopting the ALJ Recommended Decision.

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

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1 ORIGINAL filed this 4th day of June, 2014, with:

2 Maricopa County Superior Court
3 Clerk of the Lower Court's Office
4 201 West Jefferson
5 Phoenix, AZ 85003

6 COPIES of the foregoing served
7 this 4th day of June, 2014 on:

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9 Arizona Department of Environmental Quality
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COPY of the foregoing mailed
this 4th day of June, 2014 to:

Thomas Shedden
Administrative Law Judge
Office of Administrative Hearings
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Denice C. Perrault