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TONI L. HELLON
CLERK, SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JOEL D. FISHER, Ph.D.,

Appellant,

v.

HENRY DARWIN, DIRECTOR OF THE ARIZONA DEPAREMNT OF ENVIRONMENTAL QUALITY,

Appellee,

ROSEMONT COPPER COMPANY,

Appellee.

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RV. ZEAGLER, JR.

Appellant,

v.

HENRY DARWIN, DIRECTOR OF THE ARIZONA DEPAREMNT OF ENVIRONMENTAL QUALITY,

Appellee,

ROSEMONT COPPER COMPANY,

Appellee.

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NO. C20143082
C20143163

**APPELLANT'S REPLY BRIEF TO ROSEMONT COPPER COMPANY'S RESPONSE BRIEF**

Hon. Stephen Villareal

Appellant, JOEL D. FISHER, Ph.D., through undersigned counsel, hereby submits his Reply Brief to the Response Brief submitted by the Rosemont Copper Company.

## INTRODUCTION

Rosemont Copper Company does not demonstrate that the permit was issued based on an explicitly lawful permit application process, but instead repeatedly refers to ADEQ acting in a "reasoned manner" based on evidence at the hearing. Rosemont Copper does not demonstrate that the issuance of the permit was not arbitrary, where evidence of improper political influence was excluded by the ALJ and the scientific evidence subject to more than one opinion was given an interpretation in favor of Rosemont Copper while no finding was made that this was not due to arbitrary improper political influence. Rosemont Copper did not disprove the evidence and science offered by the public and by the Appellant to show plausible risks to the public and environment. The agency acted arbitrarily and capriciously, unreasonably, and contrary to law.[1]

## STANDARD OF REVIEW

In Response, Appellee Rosemont Copper Company agrees that this Court has authority to grant relief where the agency's action is not supported by substantial evidence, is contrary to law, arbitrary, capricious, or an abuse of discretion. ARS 12-910(E). As set forth in Appellant's Brief, the permitting process and the issuance of the permit are contrary to law, arbitrary, and an abuse of discretion In Response, Appellee Rosemont Copper adds that, "Actions falling within these categories have been described as "unreasoned action, without consideration and in disregard for facts and circumstances." (*Emphasis added*). *Petras v. Ariz. State Liquor Bd.*, 129 Ariz. 449, 452

[1] Although the Maricopa County Superior Court in LC2014-000262-001 DT has concluded ADEQ acted arbitrarily and capriciously in issuing the instant air quality permit to Rosemont Copper Company (which is being appealed), that ruling does not moot the current appeal action to the extent that this appeal action is based on different issues.

(Ct. App. 1981). Appellee concedes the Agency must act with "honestly and due consideration" in order for its actions to be upheld. (Appellee Rosemont Copper's Brief at p. 33, ll. 24-25.)

In Response, Rosemont Copper notes this Court reviews questions of law *de novo*, citing *Gaveck*, 222 Ariz. at 436. However, Rosemont Copper argues that when an agency interprets a law, "... an agency's interpretation deserves considerable deference "and should not be overturned simply because judges find a greater 'sensibility quotient' . . . in an alternative interpretation of the statute", *citing Arizona Water Co. v. Arizona Dep't of Water Res.*, 208 Ariz.147, 154 (2004); *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 228 (2005). Appellant objects to this suggested standard, given the circumstances here. Government actions must be authorized by specific statutory or constitutional provisions. *E.g., Gershon v. Broomfield*, 131 Ariz. 507 (1982)(In Banc); *Arizona State Land Department v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960). This Court can and must interpret the law as explicitly authorizing the conduct of ADEQ or find ADEQ acted without lawful authority. *Id.*

## ARGUMENT

Appellant incorporates herein by reference his Reply Brief to the ADEQ Response Brief. To the extent Rosemont Copper raises additional arguments, Appellant Fisher replies as follows.

### I. Appellant has Standing to Challenge ADEQ Assertion of Jurisdiction.

In Response, Rosemont Copper argues Appellant lacks standing to challenge ADEQ's jurisdiction, *citing Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 118, ¶ 20 (App.1999). In that case, the court found Thompson had standing under the following facts:

> ¶ 23 She testified that the rezoning of the property would "adversely affect" her use and enjoyment of her property because of "[t]he greatly increased traffic load, the noise and pollution from the cars, possible increase in crime ... in addition to ... light pollution from the parking lot lights at the proposed WalMart Center." Significantly, her testimony was supported by appellants' expert witness, who was an "urban and land planner."

Id, at ¶ 23. As set forth in the record below, the environmental and health risks to Appellant himself are on par with the type of impact on Thompson. The reach of environmental impacts to air quality, for example, gives Appellant standing to object. If it were otherwise, then any agency action that measurably and uniformly harms an entire population would divest each individual of standing to challenge ADEQ assertion of jurisdiction. That would be an absurd result and contrary to the reasoning and holding in *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 118 (App.1999). Appellant also lives in an area to be impacted by the mine, and objected and commented below and he also timely appealed the permit before the OAH.

Furthermore, the standing argument fails because Rosemont claims ADEQ could act to take jurisdiction with impunity despite the fact that the Superior Court had the case because ADEQ was not a party to the Pima County Court litigation, yet they argue Appellant has no standing to complain because he was not a party. The irony of their position is not lost on Appellant. But, in any event, the question is not whether Appellant was a party to the litigation involving the Permit denied by Pima County, the question that Appellant has standing to raise is whether the Agency acted unlawfully and abused its discretion in relation to this Permit, and acted arbitrarily and unreasonably in asserting jurisdiction at that point, and even if it could assert jurisdiction under such circumstances, whether it was still unreasonable and contrary to law to have previously commenced an unlawful parallel permitting application process while Pima County had jurisdiction and to then jump midstream onto this unlawfully commenced process once the agency did exercise jurisdiction, and to then immediately issue a draft permit based on that "parallel" process. Once it did assert jurisdiction, PDEQ no longer had a permit pending before it, or any jurisdiction, and thus had no ability to file a notice of appeal. Appellant has standing to challenge the permit which is based on such arbitrary and capricious and

unlawful actions, which was arbitrary and capricious irrespective of whether PDEQ could have filed a motion for stay, or not. The draft -- and final -- air quality permit was founded on illegitimate, unlawful and unreasonably commenced agency actions. Under such circumstances, Dr. Fisher has standing because he has challenged the jurisdiction and has challenged the issuance of the air quality permit. ADEQ abused its power and violated state law.

Rosemont Copper claims ADEQ's jurisdiction was reasonable in light of purported confusion about the Pima County State Implementation Plan (SIP), and what was called an installation permit under the SIP (Rosemont Copper Brief at 7), versus an air quality permit, and thus confusion about two potential permits as suggested in the agency's jurisdiction letter. This argument holds no water. First, this argument either presumes the state did not believe there was confusion initially and somehow reached that decision 9 months later, or, the state believed there was confusion from the outset and intended to take jurisdiction when Rosemont Copper initially raised such concerns with the agency. Either way, why did the agency wait from late 2011 until August 3, 2012 – while accepting and working on a parallel application process -- and tell the public that it had not made any determination about taking jurisdiction? This delay all while Pima County DEQ -- the agency with jurisdiction –worked on and denied the air quality permit and had to go to court when Rosemont Copper appealed and litigated over the denial of the permit – suggests bad faith and an abuse of discretion and arbitrary action by the state agency.

Unreasonable delay may constitute bad faith. *City of Sedona v. Devol*, 993 P.2d 1142, 1146 (App. 1999), citing *State ex rel. Morrison v. Helm*, 86 Ariz. 275, 282, 345 P.2d 202, 207 (1959) (unreasonable delay in condemnation action may show bad faith). This Court may examine the record and the delay in determining whether an agency acted unreasonably. In contrast to *City of Sedona*, where a city's commencing and then abandoning a condemnation

action while scaling back the property needed, was determined not to be bad faith agency action, there was no evidence presented why the agency waited about 9 months to exercise jurisdiction if there were any valid permit confusion concerns. ADEQ told the public it had not decided to take jurisdiction, while processing a parallel air quality permit application behind the scenes.

If the state agency had any valid concern about confusion over potential issuance of two permits and processes, the state could have and should have invoked its statutory power to exercise jurisdiction immediately upon concluding that there was any validity to the allegation about potential confusion there might be a second permit required due to the Pima SIP.

In any event, alleged confusion was nothing more than a red herring designed to give the state cover if it agreed to take over. The Governor's office suggested an alleged policy of "regulatory certainty" in the press release drafted by the Governor's office (see Appellant's Appendix), and used in the letter in relation to the court finding in Pima County against the Pima County DEQ, which is not Arizona statutory or regulatory policy. (See also RoR 265 [public notice about ADEQ permit also suggesting that it was "uncertainty" from Pima's denial of the permit for arbitrary reasons was part of reason for taking jurisdiction].) Despite the assertion of confusion, Pima County's process involved issuance of an air quality permit, and no evidence was presented at the OAH hearing that Pima County was issuing anything other than an air quality permit – i.e., it was not some limited "installation" permit as implied by Rosemont Copper. The record shows the agency acted arbitrarily and unreasonably, and contrary to law.

## II. <u>There is Evidence of Improper Political Influence, the ALJ Excluded Evidence of Improper Political Influence, and the ALJ failed to Make Necessary Findings of Fact that Improper Political Influence Did Not Impact the Outcome</u>.

Appellee Rosemont Copper should be equally concerned to maximize transparency and to affirmatively dispel the reasonable inference that can be drawn from the evidence of improper

political influence. At a minimum, Appellant Rosemont Copper should take no position on this issue, given the implications adverse to public trust in the process.

Appellant has demonstrated ADEQ abused its discretion during the permit process in part by failing to receive evidence of political influence and by failing to make explicit findings of fact that the ADEQ and ALJ decisions are not based, in whole or in part, on improper political influence. Under such circumstances, the ALJ/Agency made no determinations, and such alleged bias and influence – given the timing and involvement of the Governor's office – serve to render suspect the agency's factual determinations. Under such circumstances, where the agency has agreed with excluding evidence of alleged improper influence on the entire process, no deference to any of the agency's factual or legal determinations should be afforded in this case.

The importance of this issue cannot be understated given the need for public trust in matters such as this that will have long term and permanent impacts on human life and the environment. Moreover, decisional involvement by the Governor was not statutorily permitted. The emails also showed the Governor's office stated in its draft press release the permit was being issued and ADEQ changed this language. (See Appellant's Appendix.) This supported Dr. Fisher's concern about the agency's subsequent actions and the permit issuance as *fait accompli*.

## III. THE PERMIT APPLICATION AND SUBSEQUENT GRANTING OF THE PERMIT DID IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE PUBLIC TO PROVE PLAUSIBLE VIOLATION OF ENVIRONMENTAL RULES AND STANDARDS, WHILE IGNORING POTENTIAL TO EMIT HAZARDOUS AIR POLLUTANTS & OTHER PROBLEMS WITH THE PERMIT.

In Response, Appellee Rosemont Copper concedes that there are rules and standards for the amount of particulate and emissions that are allowed by strict environmental laws. Rosemont Copper also concedes implicitly that it was the burden of Rosemont Copper to prove with modeling and projections that particulate and emissions standards would not be exceeded.

Appellant Fisher raised specific plausible problems with the estimates and projections employed by Appellee Rosemont Copper. At that point, Appellee Rosemont Copper, the ADEQ, and the ALJ should have focused the adjudication process on disproving, ruling out, the plausible risks articulate by Appellant Fisher. That did not happen.

Instead, the record and process below demonstrates that Appellee Rosemont Copper was relieved of any burden to come forward with evidence disproving the plausible risks set forth by Appellant Fisher. In each of his findings and objections, Appellant Fisher – a retired scientist with nearly 50 years of air pollution experience and commenting to the agency as a member of the public -- presented what are plausible risks. Appellee Rosemont Copper did not disprove these plausible risks. The ADEQ did not disprove these plausible risks. Instead, the Agency concluded that Dr. Fisher had not presented the agency with "evidence" which the agency deemed credible scientific evidence, thus applying requirements that were not advertised in the Notice soliciting Public Comment. See RoR 264. The ALJ did not make findings of fact that either the Applicant or the ADEQ disproved these plausible risks that Appellee Rosemont Copper's proposed mine will ultimately violate the rules and standards for the amount of particulate and emissions that are allowed by strict environmental laws.

Rosemont suggests the agency give little weight to Dr. Fisher's comments, but the citation actually reveals the agency imposed a standard of demanding evidence (rather than comments) and the agency concluded the "commenters provided no credible evidence to substantiate that any other form of emission could likely occur." (RT 589.) Dr. Fisher was unaware such evidentiary standards were demanded for the Comments. This demonstrates both the agency's after-the-fact evidence standard imposed on commenters, and that the agency was holding commenters to a standard of proving that this would "likely occur." That is not the standard.

The Clean Air Act demands evaluation of whether there is potential-to-emit – not *likely* to emit. Thus, ADEQ erroneously and arbitrarily applied an unreasonable standard contrary to law.[2]

Among other things, the agency disregarded the comments of Dr. Fisher in relation to the potential to emit HAPS based on the claims he had not presented evidence that the agency deemed credible scientific evidence, and where Dr. Fisher presented science and methodology used elsewhere to be able to calculate blasting emissions that included chemical composition. Appellant testified he was unaware that ADEQ wanted him to submit evidence along with his comments. (RT 1640, ln.20 to 1641, ln.1; 1643, ll.18-24.) The only standard given to public commenters was that they "clearly set forth reasons why the permit should or should not be issued. Grounds for comment are limited to whether the permit meets the criteria for issuance spelled out in the state air pollution control laws or rules." RoR 264.[3]

The air quality director Eric Massey testified that even if faced with scientific evidence that certain actions would be harmful to public health (including having evidence that an exceedance of NAAQs could occur), the Agency could not deny the permit if a modeling requirement was not stated in law. (RT 205, 411-412.) This was arbitrary and unreasonable agency action. It is one thing to follow law that one is expressly commanded to follow, but it is another to ignore science regarding public health when such evidence of potential to emit is suggested.

The difference between scientific knowledge and a law or regulation, is that law is static and where it commands a specific act, the law must be followed. But science and scientific

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[2] Pursuant to the Clean Air Act, ADEQ must determine whether the proposed mining activities emit or have "the potential to emit," considering controls, 10 tons per year or more of any one HAP or 25 tons or more of "any combination of [HAPs]." 42 U.S.C. §7412(a)(1) (emphasis added); see also A.R.S. § 49-422.2; § 49-426.04; Az. Admin. Code, sections R18-2-101.10 ("'Air pollution' means the presence in the outdoor atmosphere of one or more air contaminants *or combinations thereof* in sufficient quantities, *which either alone or in connection with other substances* by reason of their concentration and duration are or tend to be injurious to human, plant or animal life...."); R18-2-101.63 (Hazardous Air Pollutant); R18-2-101.75; R18-2-101.109; emphasis added.)

[3] A.R.S. 49-426(D), provides in pertinent part, that commenters must "clearly set forth reasons why the permit should or should not be issued. Grounds for comment are limited to whether the proposed permit meets the criteria for issuance prescribed in this section or in section 49-427."

knowledge are not static. "Science is not static, and methods must exist for reexamining the validity of scientific tests when new information is acquired." (*People v. Basler*, 740 N.Ed.1 (Ill. Sup. 2000) (recognizing principle, and that a party could challenge HGN test or science where appropriate, just not using a *Frye* hearing); *Upjohn Company v. Finch*, 422 F.2d 944, 951 (6th Cir. 1970) (noting certain FDA amendments recognized that medical "science is not static."), citing *Bell v. Goddard*, 366 F.2d 177, 181 (7th Cir. 1966) (Court held that in suspending a drug FDA can consider "clinical experience" occurring both prior and subsequent to the application because "An interpretation of the statute prohibiting such a new application of existing information would do violence to the paramount interest in protecting the public from unsafe drugs.".) The U.S. Supreme Court has "acknowledged that scientific knowledge is not static and fixed, but rather, that our understanding of certain scientific theories and techniques is constantly evolving, and that scientific knowledge is ever-expanding." *Johnson v. Commonwealth*, 12 S.W. Ed 3d 258, 268, (KY 1999), citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596-97, 113 S.Ct. 2786, 2798-99, 125 L.Ed.2d 469, 485 (1993).

Scientific understanding and methods to inquire or calculate whether certain physical reactions have to potential to emit pollutants via blasting has advanced as demonstrated by Dr. Fisher, but the agency closed its eyes by seeking to invoke AP 42 as a static standard that refuses to allow for consideration of advanced scientific knowledge or understanding or situational facts directly relevant and existing under the geological and geographic circumstances here.

There is no more clearer example than AP 42 which is a Guidance (whereas the Clean Air Act is the controlling law) and Dr. Fisher's unrebutted testimony detailed explaining that the AP 42 is based on a different type of mining in a different geographical region many years ago. Here, due to the Agency's disregarding of his Comments because they deemed that Dr. Fisher

had not presented "credible evidence" of the potential to emit hazardous air pollutants, Dr. Fisher presented testimony and scientific methods/studies addressing such emission calculations developed in more recent times, including the "Environment Canada 2005 Waste 5 and Pollution Pits and Quarries Guidance," and portions of the Mohave Desert Air Quality Management District Mineral Guidance 2000 (excluded by the ALJ on 8/19/2013). (RT 1856, 1867-1879.)

Dr. Fisher explained AP-42 is not regulation; it is guidance for a default position when other information is not available. AP-42 does *not* cover everything, and as Dr. Fisher testified, without rebuttal, AP-42 has its limits. (RT 1468, ll. 2-14.) Dr. Fisher also examined more current scientific data from emission factors used in a Canadian government guidance document titled "Environment Canada 2005 Waste 5 and Pollution Pits and Quarries Guidance," which provided more recent published scientific data related to HAPs from emissions from blasting. (See RoR 188 [JLF exhibit 3]; RT 1469-1474.) This provided Dr. Fisher with data to consider in relation to creation of HAPs from the projected blasting at the proposed Rosemont site. (RT 1474.) Such more recent data was not found in AP 42. (RT 1472.)

This was then ignored, with the Agency and Rosemont seeking to use the default usage of AP 42 etc., as a shield against looking elsewhere for scientific knowledge or understanding of potential to emit in blasting. The Agency/ALJ's refusal to admit such evidence was also an unreasonable and arbitrary under the circumstances. (RT 1877-1879.)

The Agency and Rosemont arbitrarily and unreasonably seek to imply that Dr. Fisher is demanding that the Agency follow law from Canada while ADEQ was bound by its regulatory defaults like AP 42. Dr. Fisher has merely presented scientific information and methods that are the most current that he could find as a retired air pollution scientist, yet the agency refused to consider what it did not know and would not look for. And, Dr. Fisher has explained that AP 42

is a guidance – not static law as implied by appellees. The question is whether there is a potential to emit in violation of the Clean Air Act. Once such potential to emit is presented, the Agency is obligated to rule out such plausible risk but here the agency clings to its regulation and AP 42 "guidance" and refuses to look outside for additional scientific knowledge and information.

Appellees claim Arizona regulation A.A.C R18-2-327 sets a standard "preferring AP-42 to mass-balance and other approaches for emissions inventories and confirming the Director's discretion as to whether to accept such other approaches." (Rosemont Brief at 16, ll. 2-4.)[4] The refusal to consider other methods was an arbitrary abuse of discretion.

ADEQ witnesses testified that they concluded state law and regulations precludes the Agency from imposing stricter standards than required by state or federal law, and they only utilized AP 42 for the HAPs calculations from blasting, despite conceding that AP was not the best for every calculation for various emissions calculations. (RT 539, 581, 2399.) In issuing the permit, the Agency used AP 42, considering only components in the explosive material itself to determine potential to emit chemical HAPS – not any chemistry from interaction on the ore on exploding. (RT 587-588, 591, 2399.) The agency cannot ignore chemistry and science this way.

Furthermore, carbonyl sulfide and carbon disulfide can be formed directly from the blast itself without any interaction with the ore. But the point is that because this occurring in a bore hole, the ore may act as a catalyst. Yet such reactions were never considered.

The agency claimed to have worked with data provided by Dr. Fisher to evaluate his Comments using Dr. Fisher's numbers (RT 598), but they misinterpreted his calculations and approach, and continued to cling to such erroneous conclusions even after he explained their

[4] Actually, the regulation says AP 42 shall be used when sufficient factual data from monitoring or actual emissions are not available, and when "sufficient data pursuant to" those subsections including the AP 42 "is not available, emissions estimates shall be calculated from material balance using engineering knowledge of process" and when "sufficient data pursuant to" those factors or actual data is not available, emissions estimates shall be calculated by equivalent methods approved by the Director that are demonstrated as accurate and reliable. A.A.C R18-2-327.

misinterpretation at the hearing. (RT 1752.) The agency admitted that it did not even have the geological survey reports (some 900 pages) as part of their initial issuance of the draft air quality permit, and were not aware of it until Dr. Fisher brought it to their attention. (RT 597.)

Appellant Fisher contends that the current state and federal law do require a stricter permit under the facts and scientific knowledge and potential to emit. Dr. Fisher is not seeking a new or stricter legal standard. He was simply using best available information and nearly 50 years of air pollution science experience to present the potential to emit such pollutants, but was ignored.

Despite the Agency's claim that AP-42 is "essentially derived by testing that is done by EPA extensively across the country for 24 different kinds of operations" (RT 583), suggesting all testing is ongoing, Dr. Fisher's testimony on mining went unrebutted in that "AP-42 basically reflected the research as of 1993 on emission factors, parts of it are subject to continuous upgrading and amendment, but Chapter 11, which dealt with mining, has had no changes that I can detect for nearly 15 years." (RT 1468.) So there have been no additions regarding mining and blasting. Moreover, AP 42 was exclusively based on western mineral surface coal mines regarding blasting emissions, and contained cautions about its use, and Dr. Fisher confirmed that such mines are entirely different than open pit copper mines at issue here. (RT 1479-81.)

Another example is that the agency unreasonably concluded the permit was not required to consider or measure radioactive material for particulate matter. (RT 656.) However, radon is a radioactive gas classified as a HAPS and there was evidence that someone for Rosemont Copper specifically directed that their consultant not look for Radon and scratching it off the list in an email from Kathy Arnold Rosemont Copper. (RT 1532-1534, 1560, 1575; RoR 282 [SSSR Exhibit 8] at p. 190.) The existence of Radon as a naturally occurring gaseous HAP categorically rebutted the Agency's assumptions during the Comments and responsiveness

summary assuming that no gaseous HAPS could be released from fracturing during blasting, and which was based on particulates only. (RT at 1529 [radon can be released during a blast & HAPS evaluation based on particulates only].) Radon is dangerous to public health. (RT 654.)

Similarly, with regard to particulate matter (and Appellee's incorrect claims that Dr. Fisher was confused about the PM standards), and the problems of PM10 and PM2.5, it cannot be overstated that the smaller particles are the most chemically, toxicologically, and physically active. They can penetrate deeper than PM 10. (RT 396.) That is the reason for the separate PM2.5 regulations. The Rosemont Copper's consultant's background measurements of the particle size distribution did not come from blast studies, but existing particulate matter blown around at the test site. As such, Rosemont Copper and ADEQ have no idea of how the particulate matter will be distributed following their blasting. They never did any test blast studies. The model equations used to estimate which fraction of the particulate matter generated are PM10 or PM2.5 may or may not apply, but they do not know. All of the analyses are dependent on the potential to emit, and that leaves considerable room for debate, and in such a context, the agency acted unreasonably in self-limiting their evaluation.[5]

Finally, all gaseous HAPs chemically formed in a blast are fugitive emissions. (RT 675, ll. 18-25.) Therefore, under the rules for evaluating HAPs under Clean Air Act, these must be counted for evaluations of potential to emit. (RT 1463, ll. 19-24.) The fact that ADEQ does not do this because it is not in AP-42 does not excuse their violation of the Clean Air Act.

Appellees continue to claim Dr. Fisher did not establish asbestos in quantities to be dangerous, but Rosemont did not conduct testing or evaluation of asbestos beforehand. Dr.

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[5] Likewise, with respect to lead and Appellee's claims that any lead emissions would be insignificant, since Rosemont Copper never measured lead following a blast study, the Agency and Rosemont Copper cannot make that statement about lead. It does not comport with the known chemistry of lead, which is an element whose compounds easily form aerosols or attach themselves to sulfur dioxide releases, thus escaping any attempt to quantify it with the models used. The same applies to arsenic and selenium.

Fisher discovered asbestos in asbestiform was identified elsewhere by the company. It was only at the hearing that a Rosemont witness came in – without corroboration -- and claimed he observed only "*de minimus*" amounts. Asbestos is one of the most toxic and dangerous materials known in relation to public health. (RT 1663.)[6] Because of the toxic nature of asbestos, a toxicity equivalent can be used as a surrogate. (RT 1664, ln.21 to 1665, ln. 2.) This toxicity equivalent provides an empirical way of calculating asbestos limits under HAPS rules; this shows a potential to emit can be evaluated. This was not done. Rosemont assumed the amount was *de minimis* and there was no evidence it tried to quantify in any permit documents.

Once the asbestos was identified, Rosemont was obligated to prove the amount of asbestos it had the potential to emit would not exceed limitations. A.R.S. §49-427(A). Instead, all we have is a paid Rosemont employee who has only ever worked for Rosemont in his career, who testified that only chrysotile was observed and in a *de minimis* quantity (RT 2320), with not one single piece of documentation or independent data to back up this claim. There was nothing in the Rosemont permit materials with any information by which Dr. Fisher could quantify the asbestos present. (RT 1717, 1886-87.) The existence of asbestos is critical because blasting will release it, and toxicity is not based on the amount of particulates (but instead fibers and length). Significantly, there is no such thing as a "safe level" of asbestos. (RT 1715, 1717-1719.)

Dr. Fisher disputes Rosemont Copper's other assertions. Appellant's Brief, and the record and evidence in this case, speak for itself. (See RT 1-3999.)

Appellant Fisher provided essential testimony on blast chemistry and gaseous HAPS. Appellant's testimony cannot be dismissed by administrative regulation simply because such

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[6] It is undisputed that Rosemont found asbestos in a core sample in the form of chrysotile. (RT 2320, ll. 8-23.) Rosemont's Tetratech Geochemical Baseline Report also identified two other types of asbestos – tremolite and serpentine. (RT 1518, 1662, 1665,1672;RoR 282 at bates 17 and 18, 55-56 [Summary of Whole Rock Testing Data].) While it is possible to quantify asbestos, it must be examined to do so. (RT 1663, ll..20 to 1664, ll.2.)

undisputed chemical processes were not mentioned under AP-42. The Clean Air Act supersedes and controls over any administrative regulation. If HAPs are chemically formed by mine processes, they must be counted under potential to emit evaluations. Dr. Fisher demonstrated at the hearing that these actions or failures to act on the part of ADEQ have not addressed problems which require specific attention according to the Clean Air Act Section 112, as well as Arizona law. As a result, ADEQ has issued a permit which does not protect human health.

## CONCLUSION

Rosemont Copper Company did not demonstrate that the permit was issued based on an explicitly lawful permit application process. Rosemont Copper did not demonstrate that the issuance of the permit was not arbitrarily based, in whole or in part, upon improper political influence. Rosemont Copper did not disprove the evidence and science offered by the public and by Appellant to show the plausible risks to the public and the environment, risks that rules and standards will be violated when and if the mine becomes operational. Based upon the record before this Court, there is not sufficient evidence in the record to draw factual conclusions in favor of Appellee Rosemont Copper having a permit to proceed with the planned mining operation that will have long term and permanent impact on human life and the environment.

The Court should reverse the agency decision in order to insure public trust in the process, public trust in the outcome, and to protect public health and safety.

RESPECTFULLY SUBMITTED this 6th day of April, 2015.

By: _____

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