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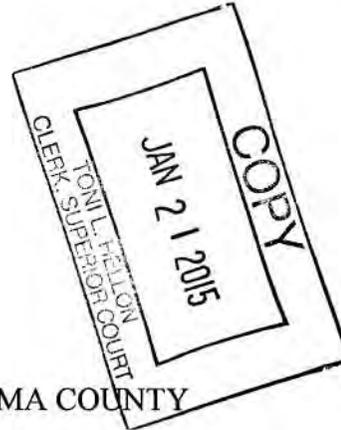
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9 IN THE SUPERIOR COURT FOR PIMA COUNTY

10 IN AND FOR THE STATE OF ARIZONA

11 **JOEL D. FISHER, Ph.D.,**

12 Appellant,

13 v.

14 **HENRY DARWIN, DIRECTOR OF THE**  
15 **ARIZONA DEPARTMENT OF**  
16 **ENVIRONMENTAL QUALITY,**

17 Appellee,

18 **ROSEMONT COPPER COMPANY,**

19 Appellee.

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**RV. ZEAGLER, JR.,**

21 Appellant,

22 v.

23 **HENRY DARWIN, DIRECTOR OF THE**  
24 **ARIZONA DEPARTMENT OF**  
25 **ENVIRONMENTAL QUALITY,**

26 Appellee,

**ROSEMONT COPPER COMPANY,**

Appellee.

**RE: Air Quality Permit No. 55223**

NO. C20143082

C20143163

**APPELLANT'S OPENING BRIEF**

**(ORAL ARGUMENT REQUESTED)**

HON. Stephen Villareal

**INTRODUCTION AND SUMMARY OF THE ARGUMENT**

1  
2 This Court should reverse the Arizona Department of Environmental Quality (ADEQ)  
3 final administrative decision after hearing in the Office of Administrative Hearings (“OAH”),  
4 upholding the issuance of an Air Quality Permit for the proposed Rosemont Copper mine,  
5 based on the record, testimony and evidence submitted at the administrative hearing.

6 First, ADEQ violated state law by issuing a proposed permit and eventual permit based  
7 on an application and agency process that unlawfully commenced when the state agency had  
8 no jurisdiction because the air permit application and mine was under Pima County  
9 jurisdiction at the time. When it did take jurisdiction, ADEQ wrongfully interrupted a court  
10 process prior to the allowed period to appeal, thus mooting any potential appeal.

11 Below, Dr. Fisher presented issues and testimony on four major areas: (1) ADEQ's  
12 permit was unreasonable or arbitrary because it does not protect human health as required by  
13 the Clean Air Act; (2) ADEQ arbitrarily or unreasonably issued the wrong kind of air quality  
14 permit; (3) ADEQ unreasonably, arbitrarily and/or capriciously issued the permit based on  
15 faulty modeling and calculations, data problems, and related matters and issuance of the permit  
16 is arbitrary because the scientific basis and support for the permit simply does not support  
17 issuance of the permit; and (4) belated information provided during the hearing , including  
18 evidence previously improperly withheld, evidenced proof of political involvement in the  
19 decision to take the permit from Pima County and issue it, which raises improper  
20 considerations having nothing to do with public health that also arguably impacted the agency  
21 in relation to its work on, and issuance of, the permit. This Court should conclude the permit  
22 was issued based on an unlawful permit application process, that the issuance of the permit was  
23 unreasonable, arbitrary or capricious and does not protect public health, and was based on  
24 invalid technical conclusions, and matters not legally permitted by Arizona or Federal law.  
25  
26

## STATEMENT OF THE CASE

1  
2 Prior to August 3, 2012, and dating as far back as 2006, Pima County had jurisdiction  
3 over the proposed Rosemont Copper mine project in Pima County. Record on Review  
4 (“RoR”), document 364; Reporters Transcript (“RT”) at 979.<sup>1</sup>

5 In July, 2010, Rosemont Copper Company submitted an Application to the Pima  
6 County Department of Environmental Quality seeking the issuance of a Class II Air Quality  
7 Permit related to the proposed Rosemont Copper Mine. RoR 364, p. 3, ¶ 4. Pima County DEQ  
8 had jurisdiction and eventually denied the Application for a Rosemont Copper Air Quality  
9 Permit on September 29, 2011. Pima County DEQ's denial of the Permit led to a contested  
10 administrative appeal before the Pima County Air Quality Hearing Board (PCAQHB), which  
11 resulted in a final administrative agency decision denying the permit on December 12, 2011.  
12

13 However, on or about November 15, 2011, while Pima County still had jurisdiction and  
14 during the pendency of a contested administrative appeal and prior to a final decision by the  
15 PCAQHB, Rosemont Copper then submitted an application for a Class II Synthetic Minor Air  
16 Quality Permit to the ADEQ. RoR 364, p. 3, ¶ 5-6.  
17

18 The ADEQ publicly disclaimed that they had taken over jurisdiction of the Rosemont  
19 Air Quality Permit in the media. However, despite Pima County having statutory jurisdiction  
20 over Rosemont's application for an Air Quality Permit, the ADEQ purported to allow the 60-  
21 day “administrative completeness” period to expire, which purported to establish that the state  
22 agency had a complete air quality permit application pending before it by operation of law.  
23

24 Meanwhile, Pima County's denial of the Air Quality Permit led to judicial review in  
25 superior court. On January 13, 2012, Rosemont Copper filed a judicial review appeal in Pima  
26 County Superior to challenged Pima County's final decision to deny the Air Quality Permit.

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<sup>1</sup>“RoR” refers to documents or items consisting of the Record on Review provided and certified by the OAH. “RT” or “HT” refers to the reporter's transcript of the hearing below in the OAH.

1 Days later, around mid-January 2012, the Arizona DEQ concluded that the Application  
2 submitted by Rosemont Copper to the ADEQ was deemed “complete.” As a result, the state  
3 agency ADEQ claimed that it had to begin work on the pending permit application.

4 Thereafter, from January 2012 through the end of July 2012, ADEQ conducted  
5 substantial work processing and reviewing this second Application for an Air Quality Permit  
6 submitted to the ADEQ, and the Agency even requested Rosemont Copper submit an Amended  
7 Application, and additional modeling report that was submitted in July 2012.

8  
9 Meanwhile, on July 5, 2012, the Pima County Superior Court issued a decision on the  
10 administrative appeal concerning the Pima County DEQ denial of Air Quality Permit, finding  
11 that Pima County had arbitrarily required certain documents in denying the Permit.

12 On August 3, 2012, less than 30 days after the July 5, 2012, Pima County Superior  
13 Court decision, ADEQ then purported to take “jurisdiction” of the Rosemont Copper permit  
14 away from Pima County with an official letter pursuant to A.R.S. § 49-402(B). At that time,  
15 the 30 day period to appeal the court decision had not expired under Arizona law.  
16

17 On August 6, 2012, just three (3) days later, the ADEQ issued Rosemont's draft Class II  
18 Synthetic Minor Air Quality Permit ("Permit") No. 55223, in relation to the application and  
19 materials submitted by Rosemont in 2011 through July 2012, and requested public comments.

20 In October 2012, Dr. Fisher submitted comments on the draft Permit and joined those  
21 by the Save the Scenic Santa Ritas Association (SSSR), raising, among many issues, a  
22 challenge to ADEQ jurisdiction and how it took jurisdiction, alleging the draft permit was not  
23 supported by scientific evidence and failed to consider significant air pollution public health  
24 dangers, including potential to emit Hazardous Air Pollutants (HAPs) in violation of federal  
25 and Arizona law, and the mine operations and sources would violate the Clean Air Act, other  
26 federal law, including National Ambient Air Quality Standards, and Arizona law.

1 On January 31, 2013, the ADEQ issued Rosemont's air quality Permit, after a public  
2 hearing held in Pima County, Arizona, in which Dr. Fisher participated.

3 On March 7, 2013, Dr. Fisher and others appealed the Permit to OAH under to A.R.S. §  
4 49-428(A), alleging, among other issues, that issuance of the Permit was flawed and that the  
5 mine would violate the Clean Air Act, Arizona law, and NAAQS, among other things.<sup>2</sup>

6 An Administrative Law Judge (“ALJ”) of OAH held an evidentiary hearing on July 24-  
7 31 and August 19-28, 2013, and issued a decision on April 10, 2014, recommending dismissal  
8 of Dr. Fisher's appeal, and the other appeals. On April 25, 2014, ADEQ Director Darwin  
9 dismissed Dr. Fisher's appeal and other appeals, mailing Dr. Fisher's order on April 29, 2014.

### 11 ISSUES PRESENTED ON APPEAL

12 1. ADEQ violated state law by issuing a proposed permit based on an application  
13 and agency process that unlawfully commenced when the agency had no jurisdiction. No  
14 Arizona law gives ADEQ the right to conduct a parallel permitting process when  
15 jurisdiction still lies with a county agency. ADEQ also abused discretion when it took  
16 jurisdiction by interrupting a court process in Pima County Superior Court prior to the  
17 period allowed for parties to appeal. In sum, jurisdiction was improperly and unlawfully  
18 asserted, and the permit based on an unlawfully commenced application process not  
19 authorized by Arizona law, resulting in an unlawful process that was void *ab initio*.

20 2. Political executive-branch influence was improperly imposed on agency actions,  
21 including but not limited to matters not authorized under Arizona law for ADEQ's  
22 mandate to protect public health, such as a purported “regulatory certainty” policy.

23 3. ADEQ's issuance of the permit was unreasonable, or arbitrary and capricious,  
24 contrary to law, or an abuse of discretion because: newly discovered information  
25 provided during this administrative appeal before the Office of Administrative Hearings,  
26 included evidence improperly withheld by ADEQ which provided proof of political  
executive involvement and pressure in decision to take the permit from Pima County for  
purported “regulatory certainty.” Thus, considerations having nothing to do with public  
health arguably impacted the agency. This newly discovered evidence was not provided  
to the public in the public comment process, and was withheld from prior public records  
requests from others on the basis of non-existent deliberative process privilege.

4. Dr. Fisher was wrongfully precluded from calling such witnesses at the hearing  
including staff from the Governor's office who engaged in the decision to remove the  
permit, and staff from ADEQ, to establish political involvement, and potential impact on  
the process even though such evidence and information was withheld from the public and  
not disclosed, and thus could not have been presented in his Comments in the process.

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<sup>2</sup> Save the Scenic Santa Ritas (SSSR), a Tucson-based non-profit Arizona corporation and Mr. Roy Zeagler were also parties. Other individuals also appealed but then withdrew.

1 5. The Agency decision wrongfully refused to consider the newly discovered issue  
2 of the Governor's office involvement in taking jurisdiction, and potential impact of such  
3 executive branch involvement in the decision, and potential impact or influence on the  
4 permit process even though such evidence and information was withheld from the public  
5 and not disclosed, and thus could not have been presented in Dr. Fisher's Comments.

6 6. The permit was wrongfully issued, and Dr. Fisher's appeal was dismissed, based  
7 on an arbitrary and capricious Public Comment and Public Comment evaluation process.  
8 ADEQ's process was fundamentally flawed because it did not adequately inform  
9 members of the public of the standards and evidence which it would require from Public  
10 Comments in order to consider such comments in evaluating the permit.

11 7. ADEQ failed to exercise its discretion before issuing the Permit by failing to  
12 adequately consider public comments about the flaws in the permit. ADEQ issued the  
13 permit after failing to require the requisite scientific proof by Applicant in light of public  
14 comments presented by Appellant and others to the Draft Permit.

15 8. ADEQ issued the final permit after wrongfully shifting the burden of proof to the  
16 public commenters on issues presented in their public comments instead of doing its job  
17 as the purported independent agency with a mandate to protect the public. ADEQ also  
18 wrongfully enforced a non-existent and unlawful regulatory requirement on the public to  
19 present "credible" scientific evidence in comments regarding the draft Permit, and used  
20 this standard against public commenters including Dr. Joel Fisher without any prior  
21 notice, and thus turned a blind eye to the scientific and technical comments of the public.

22 9. ADEQ's arbitrary and capricious permit and public comment participation process  
23 and decision violated Dr. Fisher's federal due process rights under the Fourteenth  
24 Amendment and due process rights under the Arizona Constitution.

25 10. ADEQ's Permit includes conditions in violation of Arizona law and federal law.  
26 ADEQ's issuance of the permit was based on faulty emission calculations which did not  
include the actual "potential to emit" Hazardous Air Pollutants, and thus ADEQ issued  
the wrong kind of air quality permit. Issuance of the permit was unreasonable or arbitrary  
because it does not protect human health as required by the Clean Air Act.

11. ADEQ issued the permit based on faulty modeling and calculations, data  
problems, significant statistical data imputation problems, and related matters, and the  
issuance of the permit is arbitrary, capricious, unreasonable, and not supported by  
substantial evidence, or contrary to law, because the scientific basis and support for the  
permit simply does not support issuance of the permit.

12. Based on analysis submitted by Dr. Fisher and others in the public comment  
period and hearing, the Rosemont mine can be expected to violate the Clean Air Act,  
other federal laws, and Arizona law.

13. ADEQ failed to exercise its discretion before issuing the final Permit by failing to  
adequately consider public comments. The Director failed to exercise his discretion in  
failing to consider impacts of flaws in the permit on the potential to emit pollutants.

14. Issuance of the permit and dismissal of the appeal does not protect public health,  
because the permit allows for exposure to exceed levels of Criteria pollutants (particulate  
matter, ozone, lead), and to Hazardous Air Pollutants (HAPS) in potential excess of  
federal and state law and regulatory thresholds.

15. The permit does not adequately address the presence of asbestos at the site. The  
permit and ADEQ decision failed to consider the existence of asbestos despite the toxicity  
and danger to human health because there is no safe level of asbestos, and despite the fact  
there is a way to measure the presence of the dangerous mineral. The permit and ADEQ

1 decision failed to consider asbestos and arbitrarily and capriciously relied on Rosemont's  
2 claim that the amount of any asbestos present was “de minimis”, an assertion which has  
no scientific basis or relevancy in light of the toxicity and deadliness of asbestos.

3 16. The permit and decision does not comport with ADEQ's legal duty to consider any  
4 combination of hazardous air pollutants under the Clean Air Act (42 U.S.C. 7412(a)(1))  
and related regulations and state law.

5 17. The permit and decision fails to comply with the applicable and required PM2.5  
6 particulate matter thresholds enacted in Dec. 2012 to protect public health, and instead is  
7 based on a prior PM10 standard, which no longer adequately protects public health.

8 18. The permit and decision failed to consider all sources of HAPS including those  
9 potentially generated by the mine processes themselves, such as (but not limited to) the  
10 blasting stage, and the creation or combination of HAPS created through such processes.

11 19. The permit and ADEQ defaulted to AP-42 in its evaluation of HAPS, but AP-42 is  
12 not a federal regulation, but merely a guidance, and such default by the agency does not  
13 excuse their violation of the federal Clean Air Act.

14 20. The permit and ADEQ failed to consider blast chemistry and likelihood of  
15 gaseous HAPS created in the blasting stage and other processes, thus resulting in an  
16 inadequate permit review and issuance process. The permit and ADEQ decision fail to  
17 consider that the blasting process has “potential to emit” significant amounts of HAPS  
18 due to chemically and/or gaseously created HAPS.

19 21. The permit and ADEQ decision fail to consider that the dry stack disposal system,  
20 including known possible operating conditions that produce air quality violations, have  
21 potential to release significant quantities of HAPS, including aerosols.

22 22. The permit and ADEQ decision wrongly did not consider monitoring of radon or  
23 radioactivity claiming the EPA has not set emissions standards, but such are HAPs even if  
24 the EPA has not issued standards.

25 23. The Director should have denied the Permit. A.R.S. § 49-427(A). The appeal of  
26 was wrongly dismissed. The decision was error, arbitrary, capricious, contrary to law, an  
abuse of discretion, and unreasonable and not supported by substantial evidence for the  
reasons stated above, including lack of jurisdiction, etc., pursuant to A.R.S. § 12-910(E),  
and as demonstrated by the evidence, 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, and in violation of the  
federal Clean Air Act and other pertinent Arizona and federal law and regulations.

### STANDARD OF REVIEW

A.R.S. § 12-910(E) provides that the Court:

may affirm, reverse, modify or vacate and remand the agency action. The court  
shall affirm the agency action unless after reviewing the administrative record  
and supplementing evidence presented at the evidentiary hearing the court  
concludes that the action is not supported by substantial evidence, is contrary  
to law, is arbitrary and capricious or is an abuse of discretion.

ADEQ's decision to issue an air quality permit cannot be affirmed when the decision  
to issue a permit is illegal, arbitrary, or capricious, or an abuse of discretion, and essentially,

1 inconsistent with facts in the record. Generally, the standard of review is as follows:

2 In reviewing an administrative agency's decision, the superior court  
3 examines whether the administrative action was illegal, arbitrary, or  
4 capricious, and whether it involved an abuse of discretion. A.R.S. §§ 12-901  
5 to 913 (1992); *Ethridge v. Arizona State Bd. of Nursing*, 165 Ariz. 97, 100,  
6 796 P.2d 899, 902 (App.1989). In our review of the superior court's ruling  
7 upholding the administrative decision, we independently examine the record  
8 to determine whether the evidence supports the judgment. *Carley v. Arizona*  
9 *Bd. of Regents*, 153 Ariz. 461, 463, 737 P.2d 1099, 1101 (App.1987). Neither  
10 this court nor the superior court may substitute its judgment for that of the  
11 agency on factual questions or matters of agency expertise. *DeGroot v.*  
12 *Arizona Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App.  
13 1984). We apply our independent judgment, however, to questions of law,  
14 including questions of statutory interpretation and constitutional claims.  
15 *Hansson v. State Bd. of Dental Exam'rs*, 195 Ariz. 66, 68, ¶ 6, 985 P.2d 551,  
16 553 (App.1998).

17 *Webb v. State ex rel. Arizona Bd. of Medical Examiners*, 202 Ariz. 555, 48 P.3d 505,  
18 507-08, ¶ 7 (App. 2002).

19 “Interpretation of rules and statutes is a legal matter, which [this Court  
20 reviews] *de novo*. *Pima County v. Pima County Law Enforcement*, 119 P. 3D 1027,  
21 1030, ¶ 13 (Ariz. Supreme Court, 2005). “Because administrative agencies derive their  
22 powers from their enabling legislation, their authority cannot exceed that granted by  
23 the legislature.” *Pima County, supra*, citing *Kendall v. Malcolm*, 98 Ariz. 329, 334,  
24 404 P.2d 414, 417 (1965).

25 This Court should not give deference to purported ADEQ expertise in relation to the  
26 testimony by Dr. Fisher, particularly with respect to the blast processes and simultaneous  
potential creation of HAPs as a result of the blast in connection with gases and particulates  
released upon blasting, or statistics. None of the agency's witnesses testified to substantial  
experience with blast chemistry or chemical reactions that could potentially emit HAPs.

ARGUMENT

**I. THE ADEQ UNLAWFULLY ACCEPTED AND COMMENCED WORK ON THE AIR PERMIT APPLICATION PROCESS WITHOUT INVOKING STATUTORY JURISDICTION AS REQUIRED – WHILE PIMA COUNTY ALREADY HAD JURISIDICION – AND THUS THE ENTIRE ADEQ PERMITTING PROCESS AND PERMIT ISSUED AFTER THE ADEQ EVENTUALLY INVOKED JURISDICTION WAS VOID *AB INITIO*.**

The record indisputably shows ADEQ violated state law. ADEQ issued a proposed air quality permit for the Rosemont Copper mine based on an application and agency process that commenced when the state agency had no jurisdiction, when the air permit application for the copper mine was under the jurisdiction of Pima County. As a conclusion of law, the ALJ rejected these arguments based on the following interpretation of Arizona law:

9. ARIZ. REV. STAT. Section 49-402 describes the process by which ADEQ may assert jurisdiction over a source of air pollution. That statute does not require ADEQ to assert jurisdiction before it begins processing an application, nor did that statute require ADEQ to delay taking jurisdiction on the basis that the parties to the Pima County Superior Court action may have had appeal rights. ADEQ did not abuse its discretion in asserting jurisdiction over the Rosemont facility.

RoR 364, p. 48. This decision mis-apprehends and incorrectly interprets Arizona law.

**A. ARIZONA LAW DOES NOT ALLOW FOR DUAL PERMITTING PROCESSES TO OCCUR IN DIFFERENT JURISDICTIONS (STATE AND COUNTY) FOR THE SAME PERMIT/PROJECT; HENCE, THE ENTIRE APPLICATION PROCESS BEFORE ADEQ WAS INVALID SINCE IT WAS COMMENCED IN VIOLATION OF ARIZONA LAW**

Pima County, not ADEQ, was the proper permitting agency under the Clean Air Act and the Arizona State Implementation Plan. See A.R.S. § 49-402(B). In July 2010, Rosemont Copper applied for an air quality permit from Pima County in July 2010 for its proposed copper mine facility. RoR 364, page 3 (ALJ decision.)

In September 2011, after issuing a draft permit for comment, Pima County denied the application. RoR 364, p. 3. This led to administrative judicial review litigation in Pima County Superior Court. On January 13, 2012, Rosemont Copper filed a legal challenge to

1 Pima County's final decision to deny the Air Quality Permit in Pima County Superior Court.<sup>3</sup>

2       However, on November 15, 2011, while Pima County still had jurisdiction and during  
3 the pendency of the contested administrative appeal (prior to a final agency decision),  
4 Rosemont Copper submitted an application for a Class II Synthetic Minor Air Quality Permit  
5 to the ADEQ) for the same proposed copper mine facility. RoR 364, page 3 (ALJ decision).

6       The ADEQ publicly disclaimed that they had taken over jurisdiction of the Rosemont  
7 Air Quality Permit in the media. However, despite Pima County having and exercising  
8 statutory jurisdiction over Rosemont's application for an Air Quality Permit, the ADEQ took  
9 actions that would only be relevant if it had jurisdiction over the facility -- the agency claimed  
10 that after accepting the air permit application that the 60-day "administrative completeness"  
11 period had expired, which ostensibly purported to establish by operation of law that the state  
12 agency now had a complete air quality permit application pending before it.

13  
14       On July 5, 2012, Pima County Superior Court overturned Pima County's denial of the  
15 permit. RoR 364, page 3 (ALJ decision).

16  
17       The Agency's action of allowing Rosemont's permit application to ADEQ to become  
18 complete and to commence work behind the scenes on the permit -- while there was an  
19 ongoing permit for the same project pending before Pima County DEQ's jurisdiction -- prior to  
20 the state officially "taking" jurisdiction was unlawful. Because all subsequent actions flowed  
21 from the improper acceptance of the state of Rosemont's application and amended application  
22 while Rosemont's air quality permit application was pending before Pima County DEQ and  
23 thereafter pending in Pima County Superior Court, the state's exercise of jurisdiction based on  
24 an improperly and unlawfully commenced application process was a nullity from the outset.  
25

26  

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<sup>3</sup>See ROSEMONT COPPER COMPANY VS. PIMA COUNTY AIR QUALITY HEARING BOARD ET AL.,  
C20120242 (Pima County Superior Court). This Court may take judicial notice of the filing date of the  
administrative judicial review action in that case. See also, <http://www.deq.pima.gov/pdf/Rosemont/11-09-28PermitApplicationDeniedLetter.pdf>

1 A.R.S. § 49-402, by its own terms, contemplates that only one entity (state or county)  
2 can have jurisdiction to issue or deny a permit. There is no other plausible interpretation. That  
3 is why the statute allows ADEQ to take jurisdiction by using the process set forth in the statute.

4 Indeed, A.R.S. 49-402B provides that the permit would be under the jurisdiction of the  
5 County.<sup>4</sup> The same section provides a mechanism for the state ADEQ to lawfully divest the  
6 county of its jurisdiction. ADEQ did not invoke jurisdiction until August 3, 2012.

7 The inescapable problem for ADEQ is that while the agency denied it had taken  
8 jurisdiction before then and only purported to invoke jurisdiction over the facility on August 3,  
9 2012, its entire permitting process for the instant air quality permit is based on the ADEQ  
10 working on a permit application that was accepted by ADEQ back in November 2011, deemed  
11 “administratively complete” by ADEQ in January 2012, and even amended by Rosemont in a  
12 submission to the Agency in March of 2012. Yet, there was no jurisdiction over the facility  
13 during this process and time period. The entire purpose of A.R.S. § 49-402B is to authorize the  
14 state to invoke jurisdiction over a project over which it currently does not have jurisdiction.  
15

16  
17 Significantly, however, at the time Rosemont Copper submitted an application to  
18 ADEQ in November 2011 (RT at 131), Pima County already had jurisdiction of the permit  
19 pending since 2010 (and Rosemont had been working with Pima County since at least 2006  
20 with the submission of a data Quality Assurance Plan to the county - RT at 979). Despite  
21 Pima County having jurisdiction over Rosemont's application for an air quality permit, the  
22 ADEQ then allowed for the 60-day “administrative completeness” period to expire, which  
23

24 <sup>4</sup>A.R.S. 49-402B provides: Except as specified in subsection A of this section, the review, issuance, administration  
25 and enforcement of permits issued pursuant to this chapter shall be by the county or multi-county air quality control  
26 region pursuant to the provisions of article 3 of this chapter. After the director has provided prior written notice to  
the control officer describing the reason for asserting jurisdiction and has provided an opportunity to confer, the  
county or multi-county air quality control region shall relinquish jurisdiction, control and enforcement over such  
permits as the director designates and at such times as the director asserts jurisdiction at the state level. The order of  
the director which asserts state jurisdiction shall specify the matters, geographical area, or sources over which the  
department shall exercise jurisdiction and control. Such state authority shall then be the sole and exclusive  
jurisdiction and control to the extent asserted, and the provisions of this chapter shall govern, except as provided in  
this chapter, until jurisdiction is surrendered by the department to such county or region.

1 ostensibly would determine that the agency had a complete air quality permit application  
2 pending before it by operation of law. (RT at 132.) ADEQ concluded the application was  
3 deemed “complete” in January 2012. (RT at 136.) As such, the agency claimed that it “had”  
4 to begin working on the permit application. (RT, at 1800.)

5 On March 23, 2012, Rosemont submitted an amended application, to address issues that  
6 had been raised by the agency. (RT at 560, 1778.) Work was undeniably being done by the  
7 state agency ADEQ related to the Rosemont application prior to the agency taking jurisdiction  
8 from Pima County. (RT at 560, 1800, 2153.) In July of 2012, Rosemont submitted a final  
9 modeling report to ADEQ -- to resolve issues raised by ADEQ. (RT at 532; RoR 166.)  
10

11 Meanwhile, as explained, Pima County DEQ had jurisdiction and denied the permit on  
12 September 29, 2011, which led to a contested administrative appeal, and resulted in a final  
13 ruling from Pima County denying the permit on December 12, 2011, which led to a judicial  
14 review case in Pima County Superior Court filed by Rosemont Copper on January 13, 2012,  
15 challenging the county's final decision to deny the permit.<sup>5</sup> Eventually, Pima County Superior  
16 Court issued a decision on July 5, 2012, finding that Pima County arbitrarily required certain  
17 documents of the applicant in denying the permit. RoR, 353, and 364 at 3. On August 3,  
18 2012, less than 30 days after the July 5, 2012, Superior Court decision, ADEQ invoked  
19 jurisdiction, taking away the permit away from Pima County. RoR 353.  
20

21 However, the final decision at that point was in the jurisdiction of the Pima County  
22 Superior Court, which had the case (and therefore the validity of the agency's permit denial)  
23 pending before it, and the Court only issued its decision against Pima County on July 5, 2012.  
24

25 In sum, ADEQ acceptance of the application, the administrative completeness process,  
26

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<sup>5</sup>See Exhibit RJZ 11; see ROSEMONT COPPER COMPANY VS. PIMA COUNTY AIR QUALITY HEARING BOARD ET AL., C20120242 (Pima County Superior Court) (this Court may take judicial notice). See also, <http://www.deq.pima.gov/pdf/Rosemont/11-09-28PermitApplicationDeniedLetter.pdf>

1 allowing an amended application, and additional work done by the agency, and the proposed  
2 issuance of the permit and subsequent permit as started with ADEQ back in November 2011 –  
3 all presume the existence of jurisdiction with the ADEQ Agency, yet the ADEQ denied that it  
4 was taking jurisdiction and the Agency only claimed to take jurisdiction of the Permit from  
5 Pima County on August 3, 2012. Prior to that, the ADEQ had actually publicly disclaimed  
6 taking over jurisdiction of the Rosemont Air Quality Permit in the media. (RT at 1800.)

7  
8 The Agency did not present any testimony that it had lawful jurisdiction when it  
9 accepted the dual (and amended) application from Rosemont and has never presented any  
10 Arizona law authorizing such a two pronged process for the same air quality permit in two  
11 separate jurisdictions. That is because Arizona law, A.R.S. § 49-402, contemplates that either  
12 the state or the county can have jurisdiction, but not both. That is why the state agency was  
13 required to send the official notice invoking jurisdiction, and to consult with the county agency,  
14 which it did not do until August 3, 2012. RoR 353. In short, there was no jurisdiction for the  
15 Rosemont Copper application and process that occurred when it occurred (commencing in  
16 November 2011 - August 2, 2012), and the state's subsequent invocation of jurisdiction on  
17 August 3, 2012 after the fact does not cure the violation of state law occurring from the outset.

18  
19 **B. ADEQ IMPROPERLY TOOK JURISDICTION PRIOR TO THE**  
20 **CONCLUSION OF JUDICIAL PROCEEDINGS IN PIMA COUNTY**

21 Furthermore, the agency wrongfully asserted and took jurisdiction from Pima County  
22 by interrupting a judicial review process in Pima County days after the superior court's decision  
23 but prior to the allowed time period for the parties to appeal. The administrative decision is  
24 legally and factually erroneous. Below, the ALJ factually concluded ADEQ “asserted its  
25 jurisdiction over the facility on August 3, 2012, which was the last day to appeal the Pima  
26 County Superior Court ruling.” RoR 364, p. 17, ll. 24-25. The ALJ concluded A.R.S. § 49-402  
“does not require ADEQ to assert jurisdiction before it begins processing an application, nor

1 did that statute require ADEQ to delay taking jurisdiction on the basis that the parties to the  
2 Pima County Superior Court action may have had appeal rights. ADEQ did not abuse its  
3 discretion in asserting jurisdiction over the Rosemont facility.” RoR 364, p. 48.

4 Under Arizona law, the parties to the case filed by Rosemont Copper in Pima County  
5 Superior Court had 30 days in which to decide whether to file a Notice of Appeal after the  
6 Superior Court's final entry of judgment. Arizona Rules of Civil Appellate Procedure  
7 (ARCAP), Rule 9(a), provides parties with 30 days in which to file a Notice of Appeal.  
8

9 Moreover, the Arizona law related to court appeals of final agency decisions  
10 specifically provides the following:

11 A.R.S. 49-443. Court appeals; procedures

12 A. Except as provided in section 41-1092.08, subsection H, all final  
13 administrative decisions relating to permit actions, permit transfers or orders of  
14 abatement are subject to judicial review pursuant to title 12, chapter 7, article 6.

15 B. When an appeal is taken from a final administrative decision pursuant to title  
16 41, chapter 6, article 10, the order or decision shall remain in effect pending final  
17 determination of the matter, unless stayed by the court, on a hearing after notice  
18 to the director and upon a finding by the court that there is probable cause for  
19 appeal and that great or irreparable damage may result to the petitioner  
warranting the stay.

20 C. An appeal may be taken to the court of appeals from the order of the superior  
21 court as in other civil cases. Proceedings under this section shall be given  
22 precedence and brought to trial ahead of other litigation concerning private  
23 interests and other matters that do not affect public health and welfare.  
24

25 Under A.R.S. 49-443(C), an appeal may be taken to the court of appeals from the order  
26 of the superior court as in other civil cases. Moreover, not only does state law generally  
authorize appeals to the court of appeals in civil cases, A.R.S. 12-2101, but Arizona law also  
provides a 30 day period in which to appeal a civil case – improperly cut short here by the  
ADEQ purporting to take jurisdiction immediately on August 3, 2012.

The factual conclusion that the agency took jurisdiction on the last day the parties could  
appeal the Pima County Superior Court decision is erroneous. The Superior Court decision

1 overturning Pima County's denial of the Rosemont air permit issued on July 5, 2012. RoR 364,  
2 p. 3. Thus, the last day to appeal was August 6, 2012 (the 30th day was Saturday, Aug. 4th,  
3 which kicked over by operation of law to Monday, August 6th, 2012).

4 Even if ADEQ could assert jurisdiction while the court process was not final, the other  
5 problem is that ADEQ took jurisdiction of the permit as it stood before the Pima County DEQ.

6 Since state law does not otherwise authorize for the improper dual permitting process  
7 which the state allowed to commence and continue, the ADEQ at best was relegated to taking  
8 over the jurisdiction of the permit in the state of affairs and at the point of process which it did.  
9

10 If it was able to take jurisdiction at that point despite the obvious effect of mootness of  
11 any potential appeal, it could have commenced the process from the beginning to start the  
12 state's permit application process, or take over the permit application as it stood from Pima  
13 DEQ but subject to the process developed thus far. But it could not lawfully commence the  
14 instant air quality permit process under state jurisdiction already midstream, based on an  
15 application submitted back when the state did not have jurisdiction.  
16

17 Because the permit and the final decision was under the jurisdiction of the Pima County  
18 Superior Court, ADEQ had no statutory authority to usurp Pima County's jurisdiction. The  
19 Agency's actions in taking over jurisdiction in the way it did as a court process was in play, and  
20 in processing an application when it had no jurisdiction, and thereafter issuing a permit based  
21 on such unauthorized application process and substantial work on the permit done without  
22 jurisdiction, were both an abuse of discretion and not authorized under Arizona law.  
23

24 **II. ADEQ UNREASONABLY TOOK JURISDICTION TO ISSUE THE PERMIT**  
25 **WITH POLITICAL INVOLVEMENT BY THE GOVERNOR'S OFFICE AND**  
26 **BASED ON FACTORS NOT RELATED TO – OR RELEVANT TO -**  
**PROTECTING PUBLIC HEALTH: THE AGENCY THEN ABUSED ITS**  
**DISCRETION BY REJECTING CONSIDERATION OF SUCH EVIDENCE**

In this case, political executive-branch interference or influence was improperly

1 imposed on agency actions and independent agency fact finding and decision making,  
2 including but not limited to matters not legally authorized under Arizona law for the Agency to  
3 consider in its mandate to protect public health, such as purported “regulatory certainty”.

4 The ADEQ's issuance of the permit was unreasonable, or arbitrary and capricious,  
5 contrary to law, or an abuse of discretion. The newly discovered information provided during  
6 this administrative appeal included evidence improperly withheld by ADEQ that provided  
7 proof of the Governor's Office involvement in the decision to take the permit away from Pima  
8 County and to issue the permit for the purpose of purported “regulatory certainty.” The belated  
9 evidence provided on the first day of the hearing shows that considerations having nothing to  
10 do with public health arguably impacted the agency in relation to issuance of the permit.  
11

12 The newly discovered evidence shows the Governor's office played a role in taking  
13 away the permit from Pima County, suggesting that considerations having nothing to do with  
14 “public health” arguably impacted the agency in relation to its removal of the jurisdiction over  
15 the permit before Pima County, and in relation the Agency's subsequent work and issuance of  
16 the application presented to the Agency and the issuance of their ADEQ draft and final permit.  
17

18 This was newly discovered evidence not provided to the public in the public comment  
19 process, and withheld from a public records request by SSSR on the basis of non-existent  
20 deliberative process privilege and other reasons. (RoR 55, 63, 71, 74, 79, 82, 85, 94, 95, 96,  
21 150.) At the hearing, Dr. Fisher was wrongfully precluded from introducing such emails or  
22 calling such witnesses including staff from the Governor's office, and staff from ADEQ, to  
23 establish political involvement in the decision to take jurisdiction, and potential impact on the  
24 permit process even though such evidence and information was withheld from the public and  
25 not disclosed, and thus could not have been presented in his Comments in the process because  
26 it was newly discovered. (RoR 151, 262.)

1 The decision wrongfully failed to consider the newly discovered issue of the Governor's  
2 office involvement in the decision to take jurisdiction, and potential impact impact or influence  
3 on the permit process even though such evidence and information was withheld from the public  
4 and not disclosed, and thus could not have been presented in Dr. Fisher's public Comments.

5 Appellant Fisher testified about the emails, and proffered the emails establishing the  
6 involvement of the Governor's Office in the jurisdiction decision, but the ALJ sustained  
7 relevance objections. RoR 262; RT 1774-1798. This evidence was wrongfully precluded.  
8 This evidence was newly discovered, and the Agency/ALJ wrongfully abused discretion by  
9 refusing to consider the political executive branch issues by claiming that such issues could  
10 have been raised in Dr. Fisher's public comments back in October 2012 or February 2013.  
11 RoR 158; RoR 150, p.4; RoR 261; RT 187 (ADEQ air director had not ever in his experience  
12 seen emails with Governor and ADEQ in a permit file open to public). The ALJ abused  
13 discretion by concluding A.R.S. 41-1092.03(B), which limits administrative appeals to issues  
14 in the Comments, which such issues were newly discovered to Dr. Fisher, and by citing to the  
15 lack of subpoenas from Dr. Fisher when Dr. Fisher had filed Motions with the OAH directly  
16 asking the ALJ to order the Agency to release the emails. See RoR 158, compare RoR 94.

17  
18  
19 When newly discovered evidence is found, and it bears on the credibility of other  
20 evidence or the substantive issues at hand, it is an abuse of discretion for the ALJ to refuse to  
21 consider it. *Southwest Nurseries v. Industrial Com'n*, 133 Ariz. 171, 174, 650 P.2d 473 (1982).

22  
23 Nonetheless, Dr. Fisher testified about his after-the-fact review of the emails which had  
24 been withheld from the public until after the hearing started, and that the privilege log was first  
25 provided to him May 23, 2013, and he testified about viewing various emails which  
26 collectively established the involvement of the Governor's office's involvement and apparent  
control over the agency decision to take jurisdiction, and potential impact on the subsequent

1 work and issuance of the permit. RT 1774-1798. The ALJ arbitrarily abused discretion by  
2 refusing to consider this testimony as evidence. RT 1787-88, 1794.

3 Nonetheless, the Governor's office played a role, and the evidence provided by ADEQ  
4 shows that considerations of alleged “regulatory certainty” for the applicant (RoR 353), which  
5 has nothing to do with public health -- impacted the agency in relation to taking jurisdiction  
6 and arguably impacted the agency's subsequent work and issuance of the proposed permit.

7 ADEQ previously improperly withheld numerous email communications between  
8 Agency employees and the Governor's employee on the basis, among other things, that such  
9 material was subject to concealment from the public as a “deliberative process.” But there is no  
10 deliberative process public records exemption in Arizona. *Rigel Corp. v. State of Arizona*, 234  
11 P.3d 633, 640, at ¶ 40-41 (App. 2010). Such withholding of public records itself may be  
12 deemed arbitrary and capricious. *Star Publishing Co. v. Pima County Attorney's Office*, 181  
13 Ariz. 432, 434 (1994). Arbitrarily withholding the records until the first hearing day supports  
14 an inference of undue regulatory interference in agency work, not authorized by Arizona law.<sup>6</sup>  
15

16  
17 This involvement by the Governor's office was not revealed to the public and was  
18 information that Dr. Fisher would have wanted to know as a member of the public providing  
19 comments, prior to submitting his comments. During the hearing, Dr. Fisher reviewed emails  
20 from the Governor's office and ADEQ about taking jurisdiction, some right before the action  
21 doing so, and a media release with a draft version from the Governor's press secretary stating  
22 ADEQ had “issued” the air permit. (RT 1774-1797.) The timing and substance of the emails  
23 suggested to Dr. Fisher that issuance of the permit may have been a *fait accompli* insofar as  
24 final issuance of the permit was concerned. (RT at 1778, 1784-1785, 1788-1789.) This also  
25 led Dr. Fisher to conclude the taking of jurisdiction was improper. (RT at 1789-1790.)  
26

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<sup>6</sup>ADEQ withheld some records claiming it was in “the best interest of the state.” Appellant likewise disputes this.

1 Arizona's air pollution policy and ADEQ's mandate is in A.R.S. § 49-401. The fact that  
2 the ADEQ's decisions must be based on the law, public health, and such policy, is clear:

3 Section 49-401. Declaration of policy.

4 A. The legislature finds and declares that air pollution exists with varying degrees of  
5 severity within the state, such air pollution is potentially and in some cases actually  
6 dangerous to the health of the citizenry, often causes physical discomfort, injury to  
7 property and property values, discourages recreational and other uses of the state's  
8 resources and is esthetically unappealing. The legislature by this act intends to exercise  
9 the police power of this state in a coordinated state-wide program to control present and  
10 future sources of emission of air contaminants to the end that air polluting activities of  
11 every type shall be regulated in a manner that insures the health, safety and general  
12 welfare of all the citizens of the state; protects property values and protects plant and  
13 animal life. The legislature further intends to place primary responsibility for air  
14 pollution control and abatement in the department of environmental quality and the  
15 hearing board created thereunder. However, counties shall have the right to control  
16 local air pollution problems as specifically provided herein.

17 B. It is further declared to be the policy of this state that no further degradation of the  
18 air in the state of Arizona by any industrial polluters shall be tolerated. Those industries  
19 emitting pollutants in the excess of the emission standard set by the director of  
20 environmental quality shall bring their operations into conformity with the standards  
21 with all due speed. A new industry hereinafter established shall not begin normal  
22 operation until it has secured a permit attesting that its operation will not cause  
23 pollution in excess of the standards set by the director of environmental quality.

24 Furthermore, although the Director of ADEQ serves at the pleasure of the Governor, it  
25 is actually the Director, not the Governor, who is empowered with the statutory directive to  
26 “administer the Department” in carrying out its overall mission to protect public health. See  
A.R.S. 49-102(B) (“The Director shall administer the Department ....”)

27 As demonstrated in the related motions filed with the ALJ, ADEQ itself claimed the  
28 Governor's Office was involved in deliberative process with ADEQ on the Permit by having  
29 citing a “deliberative process” public records exemption and refusing to release numerous  
30 emails between staff and the governor's apparent public relations representative. The  
31 Governor's involvement in the deliberative process of agency decision-making is *ipso facto*  
32 illegal since the Agency head is tasked with this decision, not the Governor. This diminishes  
33 the expected impartiality of a government agency issuing a permit and its quasi-judicial duties.

1 Finally, insofar as the records suggest ADEQ was concerned with issues not applicable  
2 to the legal and environmental standards, such as concern with “regulatory certainty” for an  
3 applicant, as opposed to public health, such considerations are similarly impermissible.

4 The evidence disclosed by ADEQ arguably support the view that such improper matters  
5 impacted both the context and deliberative decisional process in an unreasonably and arbitrary  
6 manner, resulting in a permit that is unsupported for all of the factual reasons stated herein.

7 Ultimately, the fact that ADEQ deliberated with, relied on, and deferred to the  
8 Governor's office for the agency taking jurisdiction of a permit – when the agency was already  
9 unlawfully working on such a permit without statutory authority –was arbitrary and capricious.

### 11 **III. THE AGENCY UTILIZED AN ARBITRARY AND CAPRICIOUS PUBLIC** 12 **COMMENT AND EVALUATION PROCESS**

13 The permit was wrongfully issued, and Dr. Fisher's appeal was dismissed, based on an  
14 arbitrary and capricious Public Comment and Public Comment evaluation process.

15 The ALJ, in discussing emission estimates, and apparently addressing Dr. Fisher's  
16 arguments regarding the public comment process and his argument that the agency had  
17 effectively foisted their job onto public commenter such as Dr. Fisher without advance notice  
18 of what standards would be applied to public comments, the final decision concluded that the  
19 “ADEQ holds a member of the public to the same standards as the applicant and will not act on  
20 speculation or hypothesis. When the public provides sufficient new information, ADEQ will  
21 evaluate that information as was the case in this matter for public comments about lead and  
22 arsenic.” RoR 364, page 27, ¶ 183 (ALJ decision). Yet, the record shows that the agency did  
23 not give notice of such standard or that a public commenter would be held to such standards.

24 ADEQ's process was fundamentally flawed because it did not adequately inform  
25 members of the public of the standards and evidence which it would require from Public  
26 Comments in order to consider such comments in evaluating the permit. ADEQ failed to

1 exercise its discretion before issuing the final Permit by failing to consider the public  
2 comments regarding the flaws in the permit and working with Rosemont to modify the Permit  
3 to avoid any Clear Air Act violations and any NAAQS violations.

4 ADEQ failed to require the requisite scientific proof from the Applicant in light of  
5 public comments presented by Appellant and others. ADEQ issued the final permit after  
6 wrongfully shifting the burden of proof to the public commenters on the issues presented in  
7 their comments instead of doing its job as an agency with a mandate to protect the public.  
8

9 The actions of ADEQ were arbitrary and capricious. Their standard of evaluating  
10 evidence from citizens in public hearings were and are unknown (RT, Vol. 3, p. 711), yet  
11 agency witnesses kept attempting to explain away their failure to examine various potentials to  
12 emit hazardous air pollutants by repeatedly alleging Dr. Fisher had not provided certain  
13 evidence or technical information or methodologies. (E.g., RT 593-594, and at 2232-2233.)

14 For example, Mr. Balaji Vaidyanathan claimed there was a “credible evidence”  
15 standard being applied to public commenters to suggest “these emissions truly occurred”  
16 (despite the fact the analysis is entirely based on a “potential” to emit), and claimed he used the  
17 standard that Dr. Fisher “brought us no evidence.” (RT 593-594.) Ironically, this is the same  
18 sort of arbitrary activity the State took Pima County DEQ to task for when it took jurisdiction,  
19 claiming Pima County's requiring documents or material without previously informing the  
20 applicant was arbitrary and capricious. The agency's after-the-fact demand for such evidence  
21 and actions can only be viewed as arbitrary and capricious, especially given the scientific detail  
22 and potential to emit calculations provided in Dr. Fisher's extensive Comments. See RoR 261.  
23  
24

25 ADEQ witness Mr. Massey admitted emissions can be calculated in a variety of  
26 different ways, and one reason ADEQ hires engineers is to develop estimates of emissions  
where information might not be available. (RT, at 146-147.) He further confirmed that such

1 analysis is often done on a case by case basis (RT at 150-151.) So the Agency's claim that it  
2 was up to Dr. Fisher to bring them evidence – without ever previously explaining what would  
3 be required for public commenters to participate and be taken seriously – ring hollow.

4 ADEQ wrongfully enforced a non-existent and unlawful regulatory requirement on the  
5 public to present “credible” scientific evidence in public comments regarding the draft Permit,  
6 and used this standard against the public including Dr. Fisher without any prior notice to the  
7 public, and thereafter turned a blind eye to the scientific and technical comments of the public.  
8

9 After Appellant presented evidence of the potential to emit gaseous and aerosol HAPs  
10 created during blasting, ADEQ’s duty was to require Rosemont to prove such emissions do not  
11 exceed applicable limits. A.R.S. §49-427(A). Ironically, ADEQ incorrectly informed the  
12 public that zero HAPS from fugitive emissions would occur, incorrectly stating fugitive  
13 emissions are not considered (RoR 265 at page 2), which is legally incorrect in relation to  
14 HAPS. Thus, ADEQ also misinformed the public in the comment process. Further, the  
15 Agency arbitrarily did not give notice to the public of its evidentiary standards that it intended  
16 to impose on members of the public. (See RoR 264, and RoR 265; RT at 1497.)  
17

18 ADEQ's permit and public comment process and decision violated Arizona and federal  
19 due process requirements under the Fourteenth Amendment, and the Arizona Constitution.

20 **IV. ADEQ's ISSUANCE OF THE PERMIT UNREASONABLY & ARBITRARILY**  
21 **FAILS TO PROTECT THE PUBLIC HEATH AND SAFTEY OF ARIZONA**

22 Dr. Fisher contends the permit does not protect human health because it allows for  
23 exposure to possible exceedance levels of criteria pollutants (particulate matter, ozone, & lead)  
24 as well as exposure to hazardous and toxic air pollutants (HAPs) in potential excess of  
25 regulatory thresholds. Also, the permit does not adequately address the presence of asbestos.  
26

**1. Criteria Pollutants:** Under the federal Clean Air Act, ADEQ must determine  
whether the proposed mining activities emit or have “the potential to emit considering controls,

1 in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or  
2 more of any combination of hazardous air pollutants.” 42 U.S.C. 7412(a)(1) (emphasis added);  
3 see also A.R.S. § 49-422.2; § 49-426.04; Az. Admin. Code, sections R18-2-101.10 (“‘Air  
4 pollution’ means the presence in the outdoor atmosphere of one or more air contaminants or  
5 combinations thereof in sufficient quantities, which either alone or in connection with other  
6 substances by reason of their concentration and duration are or tend to be injurious to human,  
7 plant or animal life....”); R18-2-101.63 (Hazardous Air Pollutant); R18-2-101.75; R18-2-  
8 101.109; emphasis added.)”. This regulatory requirement expressly addresses the possibilities  
9 that HAPs will be emitted above levels regulators currently believe to be associated with low  
10 risk exposure, and mandates evaluation of the potential to emit any combination of HAPs.

12 The Environmental Protection Agency (EPA) changed the particulate matter standard in  
13 December 2012 from PM10 to PM2.5 during the period of review for the Rosemont Mine, and  
14 appeal of the current permit. The permit is keyed to the PM10 levels. Because the amount of  
15 particulate matter was estimated under a standard allowing for higher levels, the current permit  
16 cannot be said to comply with the new standards which are necessary to protect public health.

18 Appellant Fisher testified that particulate matter exceedances are possible since recent  
19 climate conditions in the Green Valley/Sahuarita area of his residence have included severe  
20 dust storms of several hours duration which caused air criteria exceedances or approached the  
21 limits of same for particulate matter on several occasions. (RT, Vol. VI, p.1456, lines 12-24.)

22 The Clean Air Act therefore calls for a reasonable evaluation and analysis whether  
23 these substances have the potential to be emitted in excess of the new threshold standard. To  
24 try to evaluate a potential to emit HAPs, the analysis requires a complete examination of how  
25 and where HAPs are generated and their subsequent fate and transport.

26 All estimates for particulate matter are based on modeling equations because the mine

1 is not yet in operation. Appellant Dr. Fisher testified below that the error margins on such  
2 estimates are often of an order of magnitude in size (10 times). (RT Vol. VII, p.1819, lines 7-  
3 14.) Therefore a strong probability of an exceedance of the annual emissions limits exists.

4 The third criterion pollutant is lead. ADEQ claims that its analysis shows that lead was  
5 not a pollutant problem because the estimated levels do not approach the NAAQS standard of  
6 5tpy. Appellant challenged this because the background information provided by ADEQ was  
7 unclear as to how they determined lead was not a problem. (RT - Vol. VI, p.1457, lines 4-13  
8 (Fisher). ADEQ's calculations seem to assume that all of the lead appears as particulate matter  
9 and has used the PM<sub>10</sub> calculations as a basis for its lead estimates. The Appellant has testified  
10 that to the extent lead can exist in a gas form, the use of the PM10 particulate standard would  
11 not account for that form, which is a HAP that these calculations ignore fundamental aspects of  
12 the chemistry of lead: that lead compounds can be absorbed by sulfuric acid mist or sulfur  
13 dioxide aerosols, that it can form methyl lead as a gaseous HAP, and these mechanisms will  
14 release lead to the atmosphere that are not accounted for by estimates of particulate matter  
15 based lead. (RT, Vol. VI, pp.1458, line 8 - p.1460, line 5.) ADEQ's estimates are dangerously  
16 flawed and the resulting analysis does not support the permit's requirement to protect health.

17  
18  
19 **2. Generation Of Hazardous Air Pollutants (HAPs):** Dr. Fisher testified HAPs  
20 could be produced at several stages, including the initial blasting to release ore material for  
21 further processing; intermediate processing stages; and the final dry stack disposal process.

22 The permit fails to consider all sources of HAPs, including those generated by the mine  
23 processes themselves. At the hearings, ADEQ witnesses claimed that their review of the  
24 permit did not require them to address many of these things because the permit was for a minor  
25 source, and copper mines are not a categorical source or a source subject to prevention of  
26 significant deterioration rules (PSD). (RT Vol. I, p.57, line 22 - p.58, line 9.)

1           Significantly, ADEQ witnesses claimed that because the AP-42 guidance document  
2 does not specifically discuss chemical creation of HAPS as part of the blast due to synergistic  
3 reactions of HAPS with gases created during blasting, therefore they are only required to use  
4 the evaluation provided by AP-42 and go no further. (RT - Vol. II, p.599, lines 1-6.)  
5 However, AP-42 is NOT regulation; it is guidance for a default position when other  
6 information is not available. AP-42 does NOT cover everything. Indeed, as Dr. Fisher  
7 testified, without rebuttal, AP-42 has its limits. (RT - Vol. VI, p.1468, Lines 2-14.) Dr. Fisher  
8 examined more current scientific data from emission factors used in a Canadian guidance titled  
9 "Environment Canada 2005 Waste 5 and Pollution Pits and Quarries Guidance," which  
10 provided more recent published scientific data related to HAPs from emissions from blasting.  
11 (See RoR 188; RT - Vol. VI, pp.1469-1474.) This provided Dr. Fisher with data to consider in  
12 relation to creation of HAPs from the projected blasting. (RT - Vol. VI, p.1474.)

14           All gaseous HAPs chemically formed in a blast are fugitive emissions. (RT, Vol. III,  
15 p.675, ll.18-25.) Under Clean Air Act, such HAPs must be counted for evaluations of potential  
16 to emit. (RT, Vol. VI, p.1463, ll. 19-24.) That ADEQ does not do this because it is not in AP-  
17 42 does not excuse their violation of the Clean Air Act by failing to consider potential to emit.

19           The administrative decision erroneously concluded that because AP-42 calculations are  
20 based on the amount of ANFO (only the chemicals in the explosive), Dr. Fisher's contention  
21 was not material to the calculations and the evidence thus did not show that ADEQ erred  
22 regarding the number of blasts. RoR 364, page 27, ¶¶ 186 – 187. In short, the agency refused  
23 to consider the potential to emit arising from the chemical creation of HAPS via chemical  
24 explosive processes during blasting. It only considered chemicals released that were in the  
25 explosive, i.e., ANFO. Refusing to consider chemistry was unreasonable and arbitrary error.  
26

1 Dr. Fisher provided substantial testimony on blast chemistry and gaseous HAPS.<sup>7</sup> This  
2 scientific testimony cannot be dismissed simply because such undisputed chemical processes  
3 are not mentioned in the AP-42. Simply put, the Clean Air Act supersedes any regulation. If  
4 HAPs are chemically formed, they must be counted under “potential to emit” evaluations. Dr.  
5 Fisher's testimony based on his chemistry background and nearly 50 years experience was that  
6 such HAPS could be formed; there is a potential to emit such HAPS.

7  
8 The Agency similarly refused to consider Radon which is a HAPs, based on the lack of  
9 any rule or guidance from EPA, or that the blasting could release other radioactive HAPs into  
10 the atmosphere, such as radioactive Thorium particulates. RT, Vol. I, p.252, ll. 5-23; RT- Vol.  
11 III, p.656, ll. 4-20; RT Vol. I, p.242, l.19 - p.243, l.11. ADEQ has unreasonably neglected to  
12 measure if PM10 contains any radioactivity. RT, Vol. III, p.656, lines 4-20.

13 Appellant demonstrated at the hearing that the actions or failures to act by ADEQ have  
14 not addressed problems requiring attention under the Clean Air Act Sec. 112, and Arizona law.  
15 ADEQ turned a blind eye to public health even when faced with evidence science supporting  
16 the findings or a danger to public health, if there was no applicable rule or law. E.g., RT 205,  
17 208-211, 411. Indeed, although the director of the Air Quality Division testified that permits  
18 were to be “designed to protect public health,” (RT 447), he also testified “Our mission doesn't  
19 imply any kind of a broad mandate for us to do what we need to do to protect health. We are  
20 governed by rules and regulations and that's what we're going by. That's the bottom line.” RT  
21

22  
23 <sup>7</sup>RT - Vol. VI, p.1469, line 14 - p.1478, line 14. (concerns re documentation of chemicals which could react during  
24 blasting.); RT - Vol. VI, p.1487, line 12 - p.1488, line 22. (re did not find that Rosemont considered the possibility  
25 of a chemical formation of gaseous HAPs); RT - Vol. VI, p.1496, line 22 - p.1497, line 2. (re possibility of aerosol  
26 HAPs formed from blasting); RT - Vol. VI, p.1523, line 14 - p.1529, line 11. (re how to find possible chemical  
reactions in blasting in general, lack of data from Rosemont, possible release of radon during blasting); RT - Vol.  
VI, p.1533, line 18 - p.1534, line 21. (re possible release of radon during blasting); RT - Vol. VI, p.1576, lines 11-  
20. (re potential for radioactive particulate emissions in blasting); RT - Vol. VII, p.1717, lines 1 - p.1718, line 23.  
(re permit does not address examination for asbestos when blasting ores, and presumption of no HAPs from blasting  
is inaccurate because ore composition report showed asbestos); RT - Vol. VII, p.1732, line 16 - p.1737, line 15. (re  
potential for nickel carbonyl emissions during blasting)RT - Vol. VII, p.1753, line 15 - p.1756, line 18. (re  
photochemical reactions & explosive component interactions in blasting); RT - Vol. VII, p.1805, line 21 - p.1808,  
line 22. (re blasting creating airborne particles)

1 662. ADEQ issued a permit that does not protect human health.

2 **3. There is Potential to Emit Significant Amounts of Chemically and/or Gaseously**  
3 **Created HAPs during blasting.**

4 The blasting stage to release ore for processing is the first major HAPs generation step,  
5 depending on the chemical composition of the material subject to the blast. Appellant  
6 established below that HAPs can exist in forms that **are not found** in particulate fractions, e.g.,  
7 HAPs can occur both in aerosol mists and gaseous form, including lead for example or liquid  
8 droplets in suspension. (RT - Vol. VI, p.1458, line 8 - p.1459, line 9 (gaseous); RT - Vol. VI,  
9 p.1492, line 2 - p.1494, line 5 (aerosol); RT - Vol. III, p.756, line 23 - p.757, line 8.)

10 Nothing in the permit addresses production of HAPs through chemical reactions between  
11 NAAQS products of the explosive and constituents of the ore material. RT - Vol. II, p.597, lines  
12 12-22. Dr. Fisher testified that a blast process simultaneously (“at the same time”) can create  
13 gases in a separate process that is strictly chemical, not physical, and the product of such  
14 reactions can be gaseous HAPs. (RT - Vol. VI, p.1475, line 10 - p.1476, line 1.) But the AP-42  
15 only addresses particulates from the ores, and only considers chemicals to the extent that  
16 chemicals exist and react in the explosive itself. (RT Vol. VII, p.1755, line 12 - p.1756, line 18.)

17 As examples, the Appellant testified regarding the likelihood of the following gaseous  
18 HAPs that are generated in the blasting stage and other processes:

- 19 carbon disulfide (RT - Vol. VI, p.1477, lines 6-7;  
20 RT Vol. VII, p.1758, lines 18-20 )
- 21 carbonyl sulfide (RT - Vol. VI , p.1477, lines 6-7)
- 22 nickel carbonyl (Exhibit 78)
- 23 arsine and arseneous acid (RT Vol. VII, p.1847, lines 7-8)
- 24 hydrogen selenide and seleneous acid (RT Vol. VII, p.1849, lines 7-9)
- 25 methyl lead (RT Vol. VII, p.1843, lines 11-17)

26 The issue of blast chemistry and its relationship to HAPs has been entirely omitted from  
the permit evaluation as evidenced by the absence in the emissions information (Exhibits: RoR  
161-163) of any notations, references, calculations or information on blast chemistry or blast  
chemistry products in considering HAPs. ADEQ claimed that no naturally gaseous HAPs occur  
in the source material. (RT - Vol. II, p.519, line 1 - p.520, line 13.) The confirmed presence of

1 radon shows this is erroneous. (RT - Vol. VI(2), p.1560, lines 3-12; Exhibit RoR 283 [SSSR  
2 Exh. 9].) The failure to consider this chemistry has resulted in an inadequate review process and  
3 a flawed and inappropriate permit. Further, failure to consider this material because of agency  
4 lack of chemistry expertise demonstrates capricious and arbitrary actions by ADEQ.

5 **The Blasting Has the Potential to Emit Significant Amounts of HAPs Due to  
6 Chemically and/or Gaseously Created HAPs**

7 The Mine Plan of Operations calls for 80 bore holes, one blast per bore hole per day, or  
8 29,200 blasts/yr, and processing of 75,000 lb/hr of ore. Appellant has shown that the large  
9 number of blasts combined with the high production of the Rosemont Mine create the potential  
10 to emit significant amounts of gaseous HAPs:

<u>Grams of gaseous HAPs emitted/per bore hole/blast</u>	<u>TPY of HAPs</u>
500 grams/blast	exceeds 25tpy
250 grams/blast	12.5+tpy
100 grams/blast	5+tpy

14 (RT Vol. VII, p.1829, line 22 - p.1830, line 21.)

15 Thus, the release of unmonitored and unmeasured gaseous HAPs following the initial  
16 blast stages can occur in amounts coming close to or even exceeding thresholds in Section 112.

17 The possible HAPs that could be formed in the blast stage come in multiple forms. Thus,  
18 to look at the potential to emit HAPs under Section 112(b), both Rosemont and ADEQ must  
19 account for all forms of HAPs that can be emitted. That means a total material balance for each  
20 known or possible HAP related to the ore source material.

21 Significantly, ADEQ witness Latha Toopal wrongly claimed that no consideration of  
22 such HAPs created chemically through a blasting process is permitted by the EPA. The Clean  
23 Air Act requires consideration of the mine's potential to emit any HAPS, regardless whether it  
24 occurs through chemistry as suggested, or from the direct emission of particulates from blasting.

25 Toopal wrongly conflated what Dr. Fisher was testifying about in relation to creation of  
26 HAPs in the blasting process (creation of HAPs by the source when blasting) – versus what she  
tried to describe as being “secondary emissions” that could not counted at all under the Clean Air

1 Act. (See RT at 2231-2232.) In considering Dr. Fisher's testimony, Dr. Toopal claimed there is  
2 absolutely no accounting for “secondary emissions” under the Clean Air Act, and that  
3 “secondary emissions ... [don't count at all.]” (RT at 2232.)

4 But Dr. Fisher never testified about “secondary emissions” not created by the source,  
5 which is a unique, specific term defined by both the EPA and ADEQ. See generally See Ariz.  
6 Admin. Code., R18-2-101.127; See 40 CFR 52.21(b)(18).<sup>8</sup> Instead, Dr. Fisher testified about  
7 secondary chemical processes occurring as part of the blast and its effect that create HAPs as part  
8 of the overall blast. (RT at 1535.) That is entirely different than a secondary emission, which is  
9 a secondary, specific, well-defined quantifiable emission not from the source.

10 Thus, the testimony by ADEQ permit engineer Toopal was entirely erroneous and either  
11 starkly demonstrates the agency's failure to consider valid chemistry or it speaks to a willful  
12 attempt to mislead this Court by manipulating Dr. Fisher's testimony into an entirely unrelated  
13 subject area of “secondary emissions” not from the source, which the EPA and ADEQ does not  
14 consider for purposes of calculating emissions.<sup>9</sup> These misdescriptions cement the arbitrary and  
15 capricious nature of the agency's blind refusal to consider the potential to emit chemically  
16 created HAPs. In short, the Agency has refused to consider fundamental chemistry, and the  
17 testimony provided by a chemist with nearly 50 years of air pollution related experience.

---

21 <sup>8</sup>Both the EPA and the Agency's regulation define secondary emissions, and this type of well defined and specific  
22 emission is one that does not come from the source. This is not at all what Dr. Fisher was testifying to or about. See  
23 Ariz. Admin. Code., R18-2-101.127. “Secondary emissions' means emissions which are specific, well defined,  
24 quantifiable, occur as a result of the construction or operation of a major source or major modification, but do not  
25 come from the major source or major modification itself, and impact the same general area as the stationary source  
26 or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite  
support facility which would not otherwise be constructed or increase its emissions as a result of the construction or  
operation of the major source or major modification. Secondary emissions do not include any emissions which come  
directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.”  
EPA has the same or similar definition, which is likewise not applicable here. See 40 CFR 52.21(b)(18).

<sup>9</sup>Likewise, Mr. Balaji Vaidyanathan erroneously claimed – without any technical or legal EPA document to support  
him – that “secondary HAPs” was “the result of chemical reaction that happen on a *cumulative basis*” and that the  
Clean Air Act “do not regulate secondary atmospheric formation.” (RT at 747-748; italics added.) Again, Dr. Fisher  
did not comment about “cumulative bases” or regulation of “secondary atmospheric formation” of HAPS in ambient  
air. Dr. Fisher's position is – and his testimony was --focused on chemistry with the blast process itself.

1 To the extent that the chemical reaction may be a process secondary to the physical blast  
2 itself, it is the HAPs emissions created by the source as part of the blasting and can occur at the  
3 same time. (See RT at 1842-1843; see RT at 1475-1476 [“And this is happening at the same  
4 time?” “... [T]hat's correct.”].) This potential to emit could exceed the thresholds. (RT at 1861.)

5 **4. The Dry Stack Disposal System:** The final agency/ALJ decision erroneously  
6 concluded Dr. Fisher had to show such emissions would actually occur by concluding that Dr.  
7 Fisher – without access to the Rosemont property – had to establish “the conditions described in  
8 [Fisher's scientific] articles actually exist at the Rosemont Facility.” RoR 364, page 31, ¶¶ 210.  
9 Dr. Fisher presented these articles at the hearing since ADEQ rejected his public comments on  
10 the basis he provided “no proof” to show that aerosols could form as suggested. RoR 364, page  
11 31, ¶¶ 209. (ALJ decision). This ignores the very nature of calculating a potential to emit.

12  
13 The bottom line on HAPs in the dry stack stage is that while various mechanisms and  
14 calculations individually may produce very low emitted quantities of HAPs, totals can still  
15 exceed the thresholds of Section 112 of the Clean Air Act. Federal law does not require one to  
16 prove that the emissions will actually exceed, only that under a set of reasonable conditions, this  
17 is very likely. In this case, the potential to emit has been established.

18 The dry stack disposal stage is the other major stage of the mine process that can release  
19 significant quantities of HAPs. Appellant established that the dry stack disposal process creates  
20 an enormous open waste disposal pit and erosion of materials off the dry stack and its  
21 entrainment and transport by air currents will release and transport HAPs. (RT - Vol. VI(2),  
22 p.1625, lines 15-20; RT Vol. VII, p.1811, lines 2-6.) The most vulnerable stage of the dry stack  
23 system for HAPs release is freshly deposited slurry and the top layer before it has crusted. (RT  
24 Vol. VII, p.1872, lines 2-11.) Appellant also established cause for concern about HAPs from  
25 secondary aerosols, and HAPs from photochemically activated aerosols. (RT - Vol. VI(2),  
26 p.1632, ll.1-9; RT Vol. VII, p.1754, ll. 10-20 (hosing); RT - Vol. VI(2), p.1637, ll. 4-17.)

1 Dr. Fisher, during cross-examination about dry stack lead emissions, noted that under the  
2 conditions listed, gaseous HAP, "methyl lead" can form. (RT Vol. VII, p.1842, ll. 17-24.)  
3 Appellant's submissions indicate lead can concentrate in sulfur acid mist and sulfur dioxide  
4 based aerosols. (RoR 261, Bates #JLF001378; RT, Vol. VI(2), p.1629, l.12 - p.1630, l.8.) Such  
5 emission mechanisms would not be estimated using AP-42 formulas. Thus, Rosemont and  
6 ADEQ did not provide sufficient review and analysis of the dry stack disposal, and erred by  
7 assuming that only particulate-based HAPs occur here. Most of the HAPs will be particulate  
8 based, but some will be aerosol based. (RT - Vol. VI(2), p.1629, line 12 - p.1630, line 8.)

9 The modeling of emission dispersion and transport from the Rosemont site relies on data  
10 at ground level. (RT Vol. VII, p.1938, line 24 - p.1939, line 7.) If Rosemont continues to model  
11 dry stack data this way, it seriously ignores that the emissions will likely occur at altitudes of 200  
12 to 500 feet above the ground. (RT Vol. VIII, p.1958, lines 4-21.) The permit for the dry stack  
13 disposal system contains a provision to suspend particulate hosing operations for dust control of  
14 particulate emissions when wind velocities exceed 25mph. (RT Vol. VII, p.1851, ll. 4-7.) Data  
15 from nearby federal lands showed winds at altitudes associated with the dry stack disposal  
16 process were often high enough to suspend possible dust control procedures for enough days to  
17 cause an exceedance. (RT - Vol. VI(2), p.1612, l. 17 - p.1614, line 11.)

18 Various references, including AP-42, the Environment Canada guidelines, etc., indicate  
19 that winds above 12mph permit the erosion off the dry stack of materials with subsequent  
20 entrainment and dispersion. (RT Vol. VII, p.1811, lines 23-25; RT - Vol. VI(2), p.1623, lines 5-  
21 16; RT Vol. VII, p.1867, line 12 - p.1868, line 17.) The rates of erosion have a scaling exponent  
22 of 1.3 with higher wind velocities. In order to suppress the erosion, one must provide some kind  
23 of dust control, and here it will be through a hosing operation. If this hosing operation is  
24 suspended then, the release of HAPs through particulate matter can occur basically unimpeded.  
25 The releases of HAPs for potential to emit conditions therefore depend on wind gusting and wind  
26 velocities, their duration and frequency. ADEQ comments that because the AERMOD modeling

1 platform does not accommodate wind gusting data, they do not address the issue. (RT Vol. VII,  
2 p.1831, lines 13-17.) This is negligent regulatory oversight because it deliberately ignores  
3 conditions that produce air quality violations and are known to be possible under the proposed  
4 operating conditions of the dry stack disposal system.

5 Dr. Fisher raised concerns about the accuracy and performance of Rosemont's equipment  
6 to obtain background meteorological data because of where and how it was positioned, and the  
7 design of the background meteorological measurement plan because of altitude and terrain  
8 variability. Such factors require more than a single station to measure climate parameters: a  
9 single site cannot provide representative data to be used in the analysis of the dry stack disposal  
10 processes, nor provide coverage for the extent of the area of the mine processing. (RT - Vol.  
11 VI(2), p.1595, lines 7-16; RT Vol. X, p.2518, line 6 - p.2520, line 15.)

12 Appellant Dr. Fisher has shown that it is possible to quantify the potential to emit under  
13 conditions of suspended dust control. RoR 261 (Fisher public comments). Dr. Fisher's  
14 calculations show a potential to emit HAPs from the dry stack pile that clearly depends on  
15 climate conditions but allows for realistic scenarios situations that will breach exceedance  
16 thresholds. (See RoR 261 (Dr. Fisher public comments) and related testimony.)

17 **5. Asbestos:** The agency decision arbitrarily and erroneously rejected Dr. Fisher's evidence  
18 and position that ADEQ did not account for potential to emit Asbestos. It concluded ADEQ had  
19 not found enough information in the TetraTech reports to act on, and that Dr. Fisher had not  
20 presented credible information on which ADEQ could conclude there would be more than a  
21 minimal asbestos potential to emit. The Agency found its permit engineer Latha Toopal was not  
22 aware of any legal authority to calculate asbestos using what the ALJ described as toxicity  
23 equivalents, and Dr. Fisher had not cited any authority. RoR 364, p. 31, ¶¶ 212-216.

24 Rosemont's Background Geochemistry Report (RoR 283) affirms the presence of  
25 asbestos in two forms: tremolite and serpentine. The permit only addresses asbestos and  
26 asbestiform minerals as they relate to the demolition of buildings and structures. RT Vol. VII,

1 p.1716, lines 13-25. The permit totally ignores any asbestos release to the environment from  
2 disturbing the landscape and ore processing. Rosemont claimed the amount, if present, was so  
3 negligible it does not require monitoring or measurement. But Rosemont never measured or  
4 quantified the asbestos and asbestiform materials in their material. RT Vol. VII, p.1717, ll.12-17.  
5 The record does not support their assumption: asbestos was not mentioned as a sought mineral  
6 analyte, and no evaluation done as to where asbestos would be found or how much. RoR 283.

7 Dr. Fisher testified about the asbestos problem: there is no safe level of asbestos and  
8 there is danger to health. Weight or gravimetric measures are irrelevant due to its nature, and  
9 why it was essential for ADEQ and Rosemont to address such issues in the permit regarding  
10 asbestos release by mine processes. (RT at 1712-1726; see RoR 193-195 (JLF Exhibits 8-10).)

11 First, all open pit mines release asbestos, as indicated in RoR 195. Next, not all asbestos  
12 comes as mineral fibers, but all forms of asbestos are listed collectively under Section 112(b).  
13 Thus the question of mineral fibers with respect to asbestos is irrelevant. Insofar as Rosemont  
14 witness Cornoyer claimed to have seen what was described as a *de minimis* amount of one type  
15 of asbestos, this is meaningless given that ADEQ issued the permit without any such data.

16 None of the notes associated with chemical analyses presented in the background  
17 geochemistry materials contained any notations as to observations of mineral fibers, no evidence  
18 they were sought, no analyses of mineral content beyond what had been indicated as source of a  
19 given sample for elemental analysis, no quality control information to suggest any asbestos  
20 related studies. (RT Vol. VII, p.1717, lines 12-17.) Thus it is not possible to corroborate or dis-  
21 prove the after-the-fact claim by Rosemont's witness about alleged observations. RT 2330.

22 Third, asbestos can be measured, but nothing in the geochemical background materials  
23 indicate this. The usual method for measuring asbestos in air and water sample is in the number  
24 of fibers if present, the length of such fibers, and the number of particles that can arise from  
25 breaking of fibers. No mention of this was in the permit. (RT Vol. VII, p.1717, lines 1-4.)  
26

The toxicity of asbestos is so great that several countries have banned it. (RT Vol. VII,

1 p.1717, lines 9-10.) The emphasis of all EPA regulations under 40 CFR 61 is asbestos removal  
2 and disposal, not to “permit” or control asbestos based on alleged *de minimus* sighting. The  
3 existing regulations seek to prevent release of any asbestos to the environment and subsequent  
4 human exposure. Ultimately, the claim of “de minimus” asbestos simply has no legal or  
5 scientific value or status, in light of the very nature of asbestos and its toxicity. The refusal of  
6 the agency to consider asbestos in issuing the permit was arbitrary and erroneous.

7 **V. GIVEN THE HAPs PROBLEM, ADEQ HAS ISSUED THE WRONG PERMIT**

8 Because Dr. Fisher established the potential to emit exceeded the thresholds concerning  
9 HAPs, a different permit was required. The final decision, by erroneously rejecting this potential  
10 to emit, arbitrarily and erroneously concluded appellants had not established a potential to emit  
11 more than 10 tons per year of any HAP, or more than 25 tons per year of all HAPS, or 100 tons  
12 per year of criteria pollutants. RoR 364, p. 48, ¶ 11. Moreover, ADEQ's negotiating conditions  
13 for a synthetic Class II permit to avoid a Class I permit, and the issuance of the permit, raises the  
14 issues of arbitrary and capricious administrative procedures and legality because of unauthorized  
15 actions relative to requirements set by the Legislature. RT 382-290; e.g., A.R.S. § 49-104.A.17.

16  
17 Ultimately, the emissions information does not consider blast chemistry, and the emission  
18 of gaseous HAPs, and impact of aerosols on HAPs emissions. RoR 161-163. In the case of blast  
19 chemistry, Appellant testified the potential to emit HAPs exceeds the threshold values of 10tpy  
20 of a single HAP material and 25tpy of combined HAPs. Failure to consider blast chemistry and  
21 the potential to emit calculation render the permit in violation of Arizona and federal law.

22 **VI. MODELING FAILURES: THE UNREASONABLE AND ARBITRARY**  
23 **ISSUANCE OF A PERMIT BASED ON FLAWED TECHNICAL DATA**

24 Because Rosemont chose an incorrect and sheltered sampling site, data collection was  
25 faulty and unreliable since it could not collect properly, and thus any modeling based on such  
26 data was unreliable. Rosemont then experienced instrument error which lost data, and then

1 imputed more faulty data in a manner that did not comport with accepted statistical practices.<sup>10</sup>

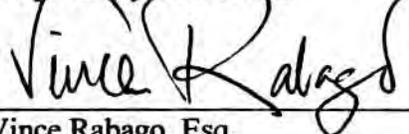
2 The final decision erroneously and arbitrarily rejected Dr. Fisher's testimony (RoR 364,  
3 ¶¶ 264-270), although he was the only witness with substantial statistical or data imputation  
4 expertise. RT 982, 1592-1609. The agency had no peer review of the statistical analysis that  
5 was done. RT 988. Dr. Fisher had expertise, training and specific knowledge in statistics and  
6 data imputation including generally accepted techniques, and had also worked with recognized  
7 experts in the field. RT 1450-1451, 1605-1606. The decision was arbitrary and unreasonable.  
8

9 **CONCLUSION**

10 Appellant Fisher respectfully urges this Court to reverse the ADEQ decision because  
11 ADEQ abused its discretion and unlawfully accepted and commenced a statutory application  
12 process for an Air Quality Permit without jurisdiction, when Pima County had jurisdiction, and  
13 the Court should require the ADEQ to commence the application and permitting process from  
14 the start to remedy the unlawful conduct and flaws identified herein.<sup>11</sup> The Court should  
15 conclude ADEQ abused its discretion and acted contrary to law by issuing the permit and  
16 dismissing the appeal as described, as it does not protect public health. Finally, the Court  
17 should award Appellant's attorneys' fees and costs under A.R.S. § 12-348(A)(2), and § 12-341.  
18

19 DATED: Jan. 21, 2015

Respectfully submitted:

20 

21 \_\_\_\_\_  
22 Vince Rabago, Esq.  
23 Attorney for Appellant Dr. Fisher

24 <sup>10</sup>In summary, Dr. Fisher presented testimony that: (1) the experimental design of the meteorological data  
25 collection was inadequate and flawed; (2) failure to measure background data for lead was unreasonable in  
26 potential violation of federal law; (3) fundamental modeling parameters were not measured, (4) modeling did not  
utilize proper data from appropriate meteorological sites; (5) Rosemont's data collection had a faulty quality  
assurance plan that failed; (6) Rosemont incorrectly handled fundamental climatological parameters of albedo and  
cloud cover; (5) Rosemont committed egregious statistical data data imputation procedures.

<sup>11</sup>If proper, this Court should return the Permit to Pima County to provide the opportunity to appeal the original  
permit decision before Pima County Superior Court before the State divested jurisdiction before the time to appeal  
had expired, which effectively mooted any appeal because the county no longer had jurisdiction over the permit.

CERTIFICATE OF SERVICE

**Original** filed this 21st of January 2015 with:

Pima County Superior Court  
Clerk of the Pima County Superior Court  
110 W. Congress, Tucson, AZ 85701

**Copies** of the foregoing mailed 21st of January 2015 to:

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s/   
\_\_\_\_\_  
Vince Rabago

## APPENDIX

RoR Document 262 (Exhibit JLF 77)

**JLF - 77**

Privilege Log - Rosemont Copper Company

DATE	SUBJECT	FROM	TO	Copy To	Reason for Withholding	Description
12/2/2011	Rosemont goes to ADEQ	Henry Darwin	Eric C. Massey; Trevor Baggione		Deliberative process privilege in best interest of State	Relates to discussions with the Governor's office regarding Superior Court decision & asserting jurisdiction
12/9/2011	Rosemont, phone call	Joseph Mikitish	Eric C. Massey; Trevor Baggione		Was accidently listed in the log previously. Has been made available with other emails sent previously	
7/13/2012	Attorney-client privilege:Rosemont	Joseph Mikitish	Trevor Baggione	Eric C. Massey, Henry Darwin	Attorney-client privilege	Discussions with the Attorney General's Office regarding Superior Court decision & asserting jurisdiction
8/1/2012	Rosemont	Kevin Kinsall	Eric C. Massey		Deliberative process privilege in best interest of State	Discussion with the Governor's Office regarding potential considerations for asserting jurisdiction
8/1/2012	Rosemont	Kevin Kinsall	Eric C. Massey			
8/1/2012	RE: Rosemont	Henry Darwin	Eric C. Massey			
8/1/2012	RE: Rosemont	Henry Darwin	Eric C. Massey			
8/2/2012	RE: For your review, revised ROSEMONT release	Eric C Massey	Mark Shaffer; Trevor Baggione	Michael A. Fulton; Linda C. Taunt; Henry Darwin	Deliberative process privilege in best interest of State	Relates to discussions with the Governor's Office regarding drafting of press release
8/3/2012	RE:Are you in agreement with what Benson wants to do in the headline and first paragraph of getting away from our asserting jurisdiction?..	Eric C Massey	Mark Shaffer, Henry Darwin	Trevor Baggione		
8/3/2012	RE: For your review, revised ROSEMONT release	Eric C Massey	Mark Shaffer; Henry Darwin; Mathew Benson	Trevor Baggione		
8/8/2012	RE: Rosemont Newspaper Ads	Kevin Kinsall	Eric C. Massey		Deliberative process privilege in best interest of State	Discussion with the Governor's Office regarding newspaper articles and commencement of public notice process



**From:** Henry Darwin  
**To:** Eric C. Massey; Trevor Baggione  
**Subject:** FW: Rosemont goes to ADEQ  
**Date:** Friday, December 02, 2011 4:43:38 PM

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FYI. Looks like we're going to need to make a decision sooner than later. I resent Huckelberry's assertion and would love an opportunity to present the facts – but unlike him I'm not about to do it in the papers.

Henry

---

**From:** Britann O'Brien [mailto:bobrien@az.gov]  
**Sent:** Friday, December 02, 2011 4:37 PM  
**To:** Henry Darwin  
**Cc:** Kevin Kinsall; Eileen Klein; Scott Smith  
**Subject:** Rosemont goes to ADEQ

Henry,

I just wanted you to be aware of an issue headed your way.

Thanks,

Britann

## Rosemont, rejected by Pima County, seeks air-quality permit from state

- [Story](#)
- [\(142\) Comments](#)

[Rosemont, rejected by Pima County, seeks air-quality permit from state](#)

[Tony Davis Arizona Daily Star](#) | [Arizona Daily Star](#) | Posted: Wednesday, November 30, 2011 12:00 am | [Comments](#)

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Since Rosemont's mine would emit that much pollution if it weren't using controls, the state needs to take over permitting, Hiser wrote Eric Massey, Arizona DEQ's air-quality division director. ADEQ should assert its authority and consolidate permitting processes into one, Hiser wrote, to avoid the possibility of inconsistent permit decisions.

But ADEQ's Baggio said that 75-ton figure "muddies the water" because it is not mentioned as a threshold in either the state or county air-quality regulations - only in the separate, state-approved air-quality plan for Pima County.

"We could delegate jurisdiction to Pima County or assert jurisdiction. The issues are such that we don't want Pima County and us to (both) issue permits," Baggio said.

"We're not shopping," said Arnold, Rosemont Copper's vice president for environmental and regulatory affairs. "It's one of those things that should have been caught by the county. I don't think they would ignore this maliciously - their staff is very professional and easy to work with. I think everyone just looked at the document and nobody realized (this provision) was there."

She added that either way, the company expects to be regulated - "we're just making sure the process works."

But Huckelberry, while he has no evidence backing his concern about the company's motive, said Rosemont's behavior matches how other county-regulated companies have acted.

"If people think they can get a more lenient answer from another agency, they seek it," he said.

He said the company has been citing the state-approved air-quality plan for Pima County when it backs Rosemont's position, but then says that plan doesn't apply when it doesn't favor Rosemont's position.

"They want to ignore other sections of the state plan that don't side with their position," Huckelberry said.

Rosemont Copper officials have made similar comments about Pima County, saying that its DEQ director, Ursula Kramer, has "cherry-picked" certain sections of that air-quality plan to suit her denial of the permit.

Now, however, Kramer says she's not fighting Rosemont's efforts to get the permit transferred to the state. "The state air-quality permitting program is essentially similar to the county's," Kramer said.

On StarNet: Find stories on nature, wildlife and the environment in Southern Arizona at [azstarnet.com/environment](http://azstarnet.com/environment)

Read more: [http://azstarnet.com/news/local/rosemont-rejected-by-pima-county-seeks-air-quality-permit-from/article\\_54f85e38-d5f7-5e60-8cd9-93d6181c7ce0.html#ixzz1fQldIGI8](http://azstarnet.com/news/local/rosemont-rejected-by-pima-county-seeks-air-quality-permit-from/article_54f85e38-d5f7-5e60-8cd9-93d6181c7ce0.html#ixzz1fQldIGI8)



**From:** [Mikitish, Joseph](#)  
**To:** [Eric C. Massey](#); [Trevor Baggione](#)  
**Subject:** FW: Rosemont, phone call  
**Date:** Friday, December 09, 2011 8:48:27 AM

---

**From:** Eric Hiser [mailto:[EHiser@jordenbischoff.com](mailto:EHiser@jordenbischoff.com)]  
**Sent:** Thursday, December 08, 2011 3:25 PM  
**To:** Mikitish, Joseph  
**Subject:** RE: Rosemont, phone call

Joe:

Thanks for the update. Please feel free to call me with any questions or concerns.

Eric Hiser

**From:** Mikitish, Joseph [mailto:[Joseph.Mikitish@azag.gov](mailto:Joseph.Mikitish@azag.gov)]  
**Sent:** Thursday, December 08, 2011 10:26 AM  
**To:** Eric Hiser  
**Subject:** RE: Rosemont, phone call

Eric,

Thanks for forwarding these. It is turning out to be a hectic week, so I likely will have my assessment finished early next week. I will be back in touch with any thoughts or questions. If you have any questions in the interim, please let me know.

Best regards,

Joe



**From:** [Kevin Kinsall](#)  
**To:** [Eric C. Massey](#)  
**Subject:** FW: Rosemont  
**Date:** Wednesday, August 01, 2012 8:38:36 AM  
**Attachments:** [Rosemont.doc](#)

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Eric, can you call me about this – thanks krk

**From:** Henry Darwin [mailto:[Darwin.Henry@azdeq.gov](mailto:Darwin.Henry@azdeq.gov)]  
**Sent:** Wednesday, August 01, 2012 8:36 AM  
**To:** Kevin Kinsall  
**Subject:** Fw: Rosemont

Background, but no recommendation.

H

**From:** Eric C. Massey  
**Sent:** Tuesday, July 24, 2012 06:25 PM  
**To:** Henry Darwin  
**Subject:** Rosemont

Henry:

Attached is a 2-page briefing memorandum regarding 6-items for consideration in relation to Rosemont's request for an air quality permit from the Arizona Department of Environmental Quality. This includes the most recent information my staff and I have regarding the permit application and some of the deadlines associated with our review of the application provided to us. If you would like to discuss, please let me know.

Eric



# Memorandum

**Confidential Document – Executive Privileged Information**

**Date:** July 24, 2012

**To:** Henry R. Darwin

**From:** Eric C. Massey

**Subject:** Rosemont Air Quality Permit Information for Consideration

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The purpose of this memorandum is to provide information for consideration regarding actions requested of the Arizona Department of Environmental Quality (ADEQ) in relation to the air quality permit application for the Rosemont Copper mine in Pima County, Arizona. The items for consideration are as follows:

**Consideration #1 – Has ADEQ Asserted Jurisdiction Over Other Facilities in the Past?**

Yes, while it is uncommon, such an action is not unprecedented.

To reduce confusion related to jurisdiction, ADEQ asserted jurisdiction over a Soil Vapor Extraction Unit owned and operated by BE&K/Terranext on December 4, 2003. According to the file the company had received several Notices of Violation regarding operation of the facility, and ADEQ was pursuing formal enforcement action, including penalties for the violations. During this process the company applied for an air quality permit for the emissions unit in question from the Pinal County Air Quality Control District.

**Consideration #2 – Rosemont's Request for Assertion of Jurisdiction**

Rosemont has provided a number of reasons for its request that ADEQ assert jurisdiction over the facility including the argument that Rosemont could be required to obtain air quality permits from both the State and the Pima County Department of Environmental Quality (PDEQ) prior to constructing and operating the facility.

According to Rosemont, the applicable federally approved State Implementation Plan for Pima County states that sources with the uncontrolled potential to emit more than 75 tons per day of a pollutant must obtain an air quality permit from the State. The current Arizona Revised Statutes do not include this same requirement and clearly provide PDEQ with original jurisdiction over the facility's operations. Rosemont argues that in order to comply with both state and federal law, the facility must obtain air quality permits from both PDEQ and ADEQ before it can commence construction. On November 23, 2011, the company filed an air quality permit application with ADEQ and has requested that ADEQ eliminate the perceived need for duplicative air quality permits.

**Consideration #3 – ADEQ Analyses of November 23, 2011 Permit Application**

ADEQ's analyses of the air quality permit application has resulted in numerous improvements to the emissions. On March 23, 2012, Rosemont filed an amended permit application

October 17, 2012

demonstrating a total emissions savings of 27 tons per year of PM<sub>10</sub> and 43 tons per year of PM<sub>2.5</sub>. Fugitive PM<sub>10</sub> emissions are also expected to be reduced by 20 tons per year. These emissions reductions were not included in the PDEQ permit application and would be accomplished by the following improvements:

- Paving of 3.1 miles of road used within the proposed property;
- Increased use of new, less polluting engines in on-site vehicles;
- Replacement of older wet scrubber and baghouse emissions controls with state-of-the-art, high-efficiency cartridge filters to reduce PM<sub>10</sub> from process equipment; and
- Redesigning the primary crushing and lime systems for process optimization and fewer emissions.

Rosemont is also pursuing authority to pave a 10-mile stretch of unpaved County road within the region to improve visibility (Regional Haze) in a nearby Class I area.

#### **Consideration #4 – ADEQ Permitting Decision Required by Law Before January 3, 2013**

ADEQ is required by Arizona Revised Statutes Title 41, Chapter 6, Article 7.1 to issue permits in response to permit applications within a time period specified in Arizona Administrative Code, Title 18, Chapter 1, Article 5. According to these provisions and ADEQ's database, a decision to grant or deny an air quality permit application is required on or before January 3, 2013. As of the date of this memorandum the Air Quality Division has invested 129 billable hours developing documents in response to Rosemont's application to ensure compliance with these requirements.

#### **Consideration #5 – Status of Rosemont's Appeal of PDEQ Decision to Deny Application**

On July 5, 2012, the Pima County Superior Court remanded PDEQ's decision to deny Rosemont's air quality permit application, explaining that PDEQ acted in an arbitrary and capricious manner and abused its discretion during the review of the application. The Court provided Rosemont 30 day to amend its application to cure the deficiencies identified by PDEQ in its decision to deny the application, and then required PDEQ to "timely reconsider the Amended Application".

Rosemont has determined that an amended application must be submitted to PDEQ on or before August 6, 2012. The amended application is likely to include the improved emissions controls achieved as a result of ADEQ's review of the permit application.

#### **Consideration #6 – Other Permits Required Prior to Construction**

Prior to construction and operation of the facility, Rosemont must complete the Federal Environmental Impact Statement (EIS) process and receive a 404 Water Quality Permit. According to Rosemont, the EIS process is scheduled to be complete on or around December 2012. Rosemont has also reported that there is progress on the 404 Water Quality Permit but did not provide an anticipated timetable for completion of that process.



**From:** [Kevin Kinsall](#)  
**To:** [Eric C. Massey](#)  
**Subject:** FW: Rosemont  
**Date:** Wednesday, August 01, 2012 9:21:48 AM  
**Attachments:** [Rosemont.doc](#)

---

Eric, FYI. We have a 1:30 conference call with HD to discuss this. Thanks krk

**From:** Henry Darwin [mailto:Darwin.Henry@azdeq.gov]  
**Sent:** Wednesday, August 01, 2012 8:36 AM  
**To:** Kevin Kinsall  
**Subject:** Fw: Rosemont

Background, but no recommendation.

H

**From:** Eric C. Massey  
**Sent:** Tuesday, July 24, 2012 06:25 PM  
**To:** Henry Darwin  
**Subject:** Rosemont

Henry:

Attached is a 2-page briefing memorandum regarding 6-items for consideration in relation to Rosemont's request for an air quality permit from the Arizona Department of Environmental Quality. This includes the most recent information my staff and I have regarding the permit application and some of the deadlines associated with our review of the application provided to us. If you would like to discuss, please let me know.

Eric



**From:** [Henry Darwin](#)  
**To:** [Eric C. Massey](#)  
**Subject:** Re: Rosemont  
**Date:** Wednesday, August 01, 2012 8:45:05 AM

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Can you please work with KK to add a recommendation. We propose to assert jurisdiction and issue the permit within hours thereafter. We would offer to delegate oversight of the permit to Pima County - letting them know verbally of our plans to do so when we formally assert jurisdiction (i.e., via a phone call from you to Ursula before sending the letter asserting jurisdiction). If Pima County is interested, we would work with them on timing of the announcement of delegation. If they are not interested, we would post our intent to offer delegation in the permit public notice. We would let the County know this too during your call.

Thanks

Henry

**From:** Eric C. Massey  
**Sent:** Tuesday, July 24, 2012 06:25 PM  
**To:** Henry Darwin  
**Subject:** Rosemont

Henry:

Attached is a 2-page briefing memorandum regarding 6-items for consideration in relation to Rosemont's request for an air quality permit from the Arizona Department of Environmental Quality. This includes the most recent information my staff and I have regarding the permit application and some of the deadlines associated with our review of the application provided to us. If you would like to discuss, please let me know.

Eric



**From:** Henry Darwin  
**To:** Eric C. Massey  
**Subject:** Re: Rosemont  
**Date:** Wednesday, August 01, 2012 12:28:22 PM

---

If we get the OK, we will want to talk to Rosemont about what they will need and when for them not to reapply to the County.

H

Sent from my iPad

On Aug 1, 2012, at 12:15 PM, "Eric C. Massey" <[Massey.Eric@azdeq.gov](mailto:Massey.Eric@azdeq.gov)> wrote:

Agreed. We are going to need at least 3 days for the public notice from the time we assert jurisdiction. The newspapers need it at a minimum.

Also - Rosemont has not yet seen a draft of the permit, they may want to. Just thought to factor that in to your thinking. We're just finishing the TSD, I am told the permit is otherwise ready.

If you'd like to talk I'm on the BB while at lunch. Thanks!

**From:** Henry Darwin  
**Sent:** Wednesday, August 01, 2012 12:11 PM  
**To:** Eric C. Massey  
**Subject:** Re: Rosemont

Thanks Eric. It might be a good idea to get Mark started on a press release.

Henry

**From:** Eric C. Massey  
**Sent:** Wednesday, August 01, 2012 10:48 AM  
**To:** Kevin Kinsall <[kkinsall@az.gov](mailto:kkinsall@az.gov)>  
**Cc:** Henry Darwin  
**Subject:** RE: Rosemont

Hi Kevin:

Per our discussion, and consistent with Henry direction, I have included a recommendation portion to the end of the memorandum. If you have any questions, or if I can be of any further assistance, please let me know.

Office: 602-771-2288  
Blackberry: 602-799-2367

Eric

---

**From:** Kevin Kinsall [<mailto:kkinsall@az.gov>]

**Sent:** Wednesday, August 01, 2012 9:22 AM  
**To:** Eric C. Massey  
**Subject:** FW: Rosemont

Eric, FYI. We have a 1:30 conference call with HD to discuss this. Thanks krk

**From:** Henry Darwin [mailto:Darwin.Henry@azdeq.gov]  
**Sent:** Wednesday, August 01, 2012 8:36 AM  
**To:** Kevin Kinsall  
**Subject:** Fw: Rosemont

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**Sent:** Tuesday, July 24, 2012 06:25 PM  
**To:** Henry Darwin  
**Subject:** Rosemont

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Eric



**From:** [Eric C. Massey](#)  
**To:** [Mark Shaffer](#); [Trevor Baggione](#)  
**Cc:** [Michael A. Fulton](#); [Linda C. Taunt](#); [Henry Darwin](#)  
**Subject:** RE: For your review, Rosemont press release  
**Date:** Thursday, August 02, 2012 5:28:00 PM  
**Attachments:** [Rosemont \(3\).doc](#)

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Hi Mark:

Thanks for the e-mail. My thoughts are in track changes. I wanted to be sure we clarified for the public that we are going through a public comment period before actually issuing the permit, so I changed it from issues to proposes issuance. Also, I wanted to be clear that we didn't assert jurisdiction over all of Pima County. Our statutes require us to state with specificity that we're asserting jurisdiction over a specific geographical area or permit so I thought I'd change it to say we're asserting jurisdiction over Rosemont in Pima County. Finally, I just did a little editing with the proposed quote for Henry.

Since I added the public notice piece, here are some facts about which we're likely to get questions.

- The public comment period will start August 6, 2012, end on October 8, 2012 (just a little longer than 60 days)
- We will host a public hearing in the vicinity of the proposed project on October 8, 2012 (verbal comments)
- We will host a public meeting in the vicinity of the proposed project on September 12, 2012 (questions/answers, Rosemont will set up a booth)

I will send you a copy of the final letter as soon as I've shared it with PDEQ. Anticipate having everything done on our end before 10 AM tomorrow. Thanks for putting this together on such short notice! If you have questions, please let me know!

Eric

---

**From:** Mark Shaffer  
**Sent:** Thursday, August 02, 2012 4:48 PM  
**To:** Eric C. Massey; Trevor Baggione  
**Cc:** Michael A. Fulton; Linda C. Taunt  
**Subject:** For your review, Rosemont press release

Mark Shaffer  
Communications Director  
Arizona Department of Environmental Quality  
1110 W. Washington St.  
Phoenix, Az. 85007  
(602) 771-2215 (o)  
(480) 433-9551 (cell)



DATE: Aug. 3, 2012 **DRAFT**  
CONTACT: Mark Shaffer, Director of Communications, (602) 771-2215 (o);  
(480) 433-9551 (cell)

## **ADEQ Asserts Jurisdiction Over Rosemont Copper Company Mine in Pima County, Proposes Issuance of Air Quality Permit**

PHOENIX (Aug. 3, 2012) – Arizona Department of Environmental Quality officials announced Friday that they are asserting jurisdiction over the Rosemont Copper Project in Pima County. A comprehensive air quality permit for operation of Rosemont Copper Company's proposed open pit copper mine 30 miles southeast of Tucson will be made available for public comment beginning on August 6, 2012.

"Pima County Superior Court ruled last month that the Pima County Department of Environmental Quality acted in an arbitrary and capricious manner in denying Rosemont's application for an air quality permit, highlighting the regulatory uncertainty that the company faced." ADEQ Director Henry Darwin said. "Our action will ensure regulatory certainty at the same time enhancing the environmental protection while the facility operates."

ADEQ's proposed air quality permit will ensure that Rosemont meets all federal, state and local requirements by operating with enhanced emissions controls at the mine site. The ADEQ permit also has more enhanced environmental protection than PDEQ's proposed permit in August 2011.

Among those emissions controls are state of the art cartridge filters which will reduce dust emissions from mine processing equipment, redesign of the primary crushing and lime systems to reduce dust emissions, requiring the use of new, less-polluting engines in on-site vehicles and requiring the paving of 3.1 miles of roadway within the property.

ADEQ issued an aquifer protection permit to Rosemont in April 2012 for the proposed mine's water discharges. But the mining company still needs several other permits before it can begin operations, including an ADEQ multi-sector general permit for stormwater control before construction can begin.

The U.S. Forest Service earlier issued a draft Environmental Impact Statement (EIS) and public comment on that document ended in January 2011. Issuance of a final EIS is expected by the end of this year. The U.S. Army Corps of Engineers also is currently reviewing Rosemont's application for a Clean Water Act 404 (dredge and fill) permit. ADEQ must review the 404 permit application to ensure that the proposed actions with comply with State water quality standards.

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Follow ADEQ on Twitter: <http://twitter.com/ArizonaDEQ>



**From:** Eric C. Massey  
**To:** Mark Shaffer; Henry Darwin  
**Cc:** Trevor Baggione  
**Subject:** RE: Are you in agreement with what Benson wants to do in the headline and first paragraph of getting away from our asserting jurisdiction?....  
**Date:** Friday, August 03, 2012 9:22:00 AM  
**Attachments:** Rosemont (4).doc

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Hi Mark:

You probably already made most of the changes that were requested. I went ahead and added my thoughts to the version that Benson sent over, adding in those same changes. I did so in an effort to better understand what the final might look like (see attached). I also added the information about the total number of tons of emissions reduced by the ADEQ permit. This was all I had at my fingertips this morning. I will see if I can find percentages for you.

I'm fine with it. While Henry's quote comes off a little bit stronger than the rest of the piece, it's completely factual, and not an opinion. It was the court's finding. So with that in mind, I think it works.

Eric

---

**From:** Mark Shaffer  
**Sent:** Friday, August 03, 2012 7:59 AM  
**To:** Henry Darwin; Eric C. Massey  
**Cc:** Trevor Baggione  
**Subject:** Are you in agreement with what Benson wants to do in the headline and first paragraph of getting away from our asserting jurisdiction?....

This certainly will come off a bit strange, leading the story this way followed by Henry's rather strong quote about asserting jurisdiction and why...

## **ADEQ Issues Air Quality Permit for Rosemont Copper Mine**

*State Permit to Hold Mine Operator to Rigorous Environmental Standards*

PHOENIX (Aug. 3, 2012) – The Arizona Department of Environmental Quality announced Friday it will issue a comprehensive air quality permit to Rosemont Copper Company for operation of its proposed open pit copper mine 30 miles southeast of Tucson.



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Follow ADEQ on Twitter: <http://twitter.com/ArizonaDEQ>

DATE: Aug. 3, 2012 **DRAFT**  
CONTACT: Mark Shaffer, Director of Communications, (602) 771-2215 (o);  
(480) 433-9551 (cell)

## **ADEQ Issues Air Quality Permit for Rosemont Copper Mine** *State Permit to Hold Mine Operator to Rigorous Environmental Standards*

PHOENIX (Aug. 3, 2012) – The Arizona Department of Environmental Quality announced Friday it will issue a comprehensive air quality permit to Rosemont Copper Company for operation of its proposed open pit copper mine 30 miles southeast of Tucson.

“Pima County Superior Court ruled last month that the Pima County Department of Environmental Quality acted in an arbitrary and capricious manner and abused its discretion in denying Rosemont’s application for an air quality permit,” ADEQ Director Henry Darwin said. “Our action will ensure regulatory certainty and enhanced environmental protection for individuals living in the vicinity of the mine.”

ADEQ’s air quality permit will ensure that Rosemont meets all federal, state and local requirements by operating with enhanced emissions controls at the mine site. The ADEQ permit also has more enhanced environmental protection than the PDEQ permit proposed in August 2011, reducing emissions of fine particles and dust by 43 and 27 tons respectively. Fugitive dust emissions will also be reduced by 20 tons.

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Among the emissions controls required by the State permit are: state-of-the-art cartridge filters to reduce dust emissions from mine processing equipment; and redesign of the primary crushing and lime systems to reduce dust emissions. Additionally, ADEQ will mandate the use of new, lower-polluting engines in on-site vehicles, as well as require that roadways within 3.1 miles of the property be paved.

In April 2012, ADEQ issued an aquifer-protection permit to Rosemont for the proposed mine’s water discharges. The mining company still needs several other permits before it can begin operations, including an ADEQ multi-sector general permit for stormwater control.

The U.S. Forest Service has already issued a draft Environmental Impact Statement (EIS) for Rosemont. Public comment on that document ended in January 2011. Issuance of a final EIS is expected by the end of this year. The U.S. Army Corps of Engineers is currently reviewing Rosemont’s application for a Clean Water Act 404 (dredge and fill) permit. ADEQ must review the 404 permit application in order to ensure that the proposed actions will comply with State water quality standards.

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Follow ADEQ on Facebook: <http://www.facebook.com/azdeq>  
Follow ADEQ on Twitter: <http://twitter.com/ArizonaDEQ>



**From:** [Eric C. Massey](#)  
**To:** [Mark Shaffer](#); [Henry Darwin](#); [Matthew Benson](#)  
**Subject:** RE: For your review, revised ROSEMONT release  
**Date:** Friday, August 03, 2012 11:24:00 AM  
**Attachments:** [Rosemont \(7\).doc](#)

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All -

Here is the track changes version that makes the edits from both Matthew Benson and Henry Darwin of which I was made aware. I've updated the quote, made sure that we included the factual information about PDEQ's denial of the permit it proposed in August of 2011, and input the location and time of the public hearing. If you have questions, please let me know.

Eric

---

**From:** Mark Shaffer  
**Sent:** Friday, August 03, 2012 10:38 AM  
**To:** Henry Darwin; Eric C. Massey; Matthew Benson  
**Subject:** For your review, revised ROSEMONT release

Mark Shaffer  
Communications Director  
Arizona Department of Environmental Quality  
1110 W. Washington St.  
Phoenix, Az. 85007  
(602) 771-2215 (o)  
(480) 433-9551 (cell)



1110 West Washington Street • Phoenix, Arizona 85007 • azdeq.gov

DATE: Aug. 3, 2012 **DRAFT**  
CONTACT: Mark Shaffer, Director of Communications, (602) 771-2215 (o);  
(480) 433-9551 (cell)

## ADEQ Proposes to Issue Air Quality Permit for Rosemont Copper Mine in Pima County

*State Permit Would Hold Mine Operator to Rigorous Environmental Standards*

PHOENIX (Aug. 3, 2012) – The Arizona Department of Environmental Quality announced Friday that it is proposing to issue a comprehensive air quality permit to Rosemont Copper Company for operation of its planned open pit copper mine 30 miles southeast of Tucson.

“Pima County Superior Court ruled last month that the Pima County Department of Environmental Quality acted in an arbitrary and capricious manner and abused its discretion in denying Rosemont’s application for an air quality permit,” ADEQ Director Henry Darwin said. “Our assertion of jurisdiction will ensure regulatory certainty and enhanced environmental protection.”

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ADEQ’s air quality permit will ensure that Rosemont meets all federal, state and local requirements by operating with enhanced emissions controls at the mine site. The ADEQ permit also has more environmental protection than the permit that PDEQ proposed in August, but ultimately denied on September 29, 2011, reducing emissions of course dust particles by 47 tons and fine dust particles by 43 tons.

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Among the controls required by the proposed State permit are state-of-the-art cartridge filters to reduce dust emissions from mine processing equipment and redesign of the primary crushing and lime systems to reduce dust emissions. Additionally, ADEQ will mandate the use of new, lower-polluting engines in on-site vehicles as well as require that 3.1 miles of roadway within the property be paved.

The public comment period will start Monday, Aug. 6 and end on Oct. 9. A public meetings will be held in mid-September at a time and location to be posted on ADEQ’s web site. A public hearing will be held starting at 6 p.m. on Oct. 9 at Sycamore Elementary School, located at 16701 S. Houghton Road in Vail, Arizona. ADEQ also proposes to offer oversight of the mine’s day-to-day operations to Pima County Department of Environmental Quality.

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In April 2012, ADEQ issued an aquifer protection permit to Rosemont for the proposed mine’s discharging facilities. But the mining company still needs several other permits before it can begin operations, including a multi-sector general permit for stormwater control.

-more-

The U.S. Forest Service has already issued a draft Environmental Impact Statement (EIS) for Rosemont. Public comment on that document ended in January 2011. Issuance of a final EIS is expected by the end of this year. The U.S. Army Corps of Engineers is currently reviewing Rosemont's application for a Clean Water Act 404 (dredge and fill) permit. ADEQ must review the 404 permit application to ensure that the proposed actions will comply with State water quality standards.

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Follow ADEQ on Twitter: [twitter.com/ArizonaDEQ](http://twitter.com/ArizonaDEQ)



**From:** [Kevin Kinsall](mailto:Kevin.Kinsall)  
**To:** [Eric C. Massey](mailto:Eric.C.Massey)  
**Subject:** RE: Rosemont Newspaper Ads  
**Date:** Wednesday, August 08, 2012 10:03:29 AM

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E, thank you. krk

**From:** Eric C. Massey [<mailto:Massey.Eric@azdeq.gov>]  
**Sent:** Wednesday, August 08, 2012 9:52 AM  
**To:** Kevin Kinsall  
**Subject:** RE: Rosemont Newspaper Ads

Not very much at all. There was an article by Tony Davis in the Daily Star this past weekend, some posts by Mr. Davis on Twitter, and a note sent out through the "Save the Scenic Santa Ritas" organization, but beyond that, I've not seen too much. Here are some links to the articles and attached is information posted to twitter and a newsletter sent out through the Save the Scenic Santa Ritas organization. I also included some of the thoughts that Chuck Huckleberry sent to Tony as a basis for part of his stories. Just about everything I saw came out on Friday.

Saturday, August 4: [http://azstarnet.com/business/local/state-takes-charge-of-rosemont-air-permit/article\\_17ce4e03-6bdd-59a4-9bcf-544ec28cbbfd.html](http://azstarnet.com/business/local/state-takes-charge-of-rosemont-air-permit/article_17ce4e03-6bdd-59a4-9bcf-544ec28cbbfd.html)

Friday, August 3: [http://azstarnet.com/news/local/ariz-proposes-issuing-air-permit-for-rosemont-mine/article\\_cf532af4-dda7-11e1-868f-0019bb2963f4.html](http://azstarnet.com/news/local/ariz-proposes-issuing-air-permit-for-rosemont-mine/article_cf532af4-dda7-11e1-868f-0019bb2963f4.html)

We've had a little follow-up with one individual asking us about the process and to confirm that we were not issuing a permit, but proposing a permit for public comment. The most common misunderstandings (perhaps misinformation) that I see right now is that ADEQ "fast tracked" a permit, that there is a foregone conclusion that the permit will be issued so the public comment period is a sham, that we used PDEQ's permit as a base for our own permit, and that ADEQ shouldn't do to the county the very thing EPA is doing to the State:

We have more than valid responses to all of those issues. It really comes down to how Pima County interprets and sells the judge's decision in the case that remanded its bad decision back to PDEQ. They are selling it as an administrative issue, something that wasn't a very big deal. Unfortunately no one seems to understand how bad an arbitrary and capricious ruling really is for a regulatory agency.

If there is more I can provide, please let me know!

Eric

---

**From:** Kevin Kinsall [<mailto:kkinsall@az.gov>]  
**Sent:** Wednesday, August 08, 2012 9:36 AM  
**To:** Eric C. Massey  
**Subject:** RE: Rosemont Newspaper Ads

E, I haven't seen much coverage - have you?

**From:** Eric C. Massey [<mailto:Massey.Eric@azdeq.gov>]  
**Sent:** Tuesday, August 07, 2012 1:19 PM  
**To:** Kevin Kinsall  
**Subject:** Rosemont Newspaper Ads

Hi Kevin:

I'm sorry for the delayed e-mail. I was out sick yesterday and didn't have a chance to interface with staff. My Permits Section manager has confirmed that the public notices for Rosemont appeared in the legal advertisement sections of both the Arizona Republic and Arizona Daily Star yesterday morning. These advertisements started the public comment period on our draft permit, identified the fact that we will be hosting a public hearing in October and notified the public that we would be announcing a date, time and location for a public meeting in September. If there is anything more that you need, please let me know!

Eric



The purpose of this memorandum is to provide information for consideration regarding actions requested of the Arizona Department of Environmental Quality (ADEQ) in relation to the air quality permit application for the Rosemont Copper mine in Pima County, Arizona.

## **Has ADEQ Asserted Jurisdiction Over Other Facilities in the Past?**

Yes, while it is uncommon, such an action is not unprecedented. (Pinal County)

## **Rosemont's Request for Assertion of Jurisdiction**

According to Rosemont, the applicable federally approved State Implementation Plan for Pima County states that sources with the uncontrolled potential to emit more than 75 tons per day of a pollutant must obtain an air quality permit from the State. The current Arizona Revised Statutes do not include this same requirement and clearly provide PDEQ with original jurisdiction over the facility's operations. On November 23, 2011, the company filed an air quality permit application with ADEQ and has requested that ADEQ eliminate the perceived need for duplicative air quality permits.

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- Paving of 3.1 miles of road used within the proposed property;
- Increased use of new, less polluting engines in on-site vehicles;
- Replacement of older wet scrubber and baghouse emissions controls with state-of-the-art, high-efficiency cartridge filters to reduce PM<sub>10</sub> from process equipment; and
- Redesigning the primary crushing and lime systems for process optimization and fewer emissions.

Rosemont is also pursuing authority to pave a 10-mile stretch of unpaved County road within the region to improve visibility (Regional Haze) in a nearby Class I area.

## **ADEQ Permitting Decision Required by Law Before January 3, 2013**

ADEQ is required by Arizona Revised Statutes Title 41, Chapter 6, Article 7.1 to issue permits in response to permit applications within a time period specified in Arizona Administrative Code, Title 18, Chapter 1, Article 5. A decision to grant or deny an air quality permit application is required on or before January 3, 2013.

## **Status of Rosemont's Appeal of PDEQ Decision to Deny Application**

October 17, 2012

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On July 5, 2012, the Pima County Superior Court remanded PDEQ's decision to deny Rosemont's air quality permit application, explaining that PDEQ acted in an arbitrary and capricious manner and abused its discretion during the review of the application. The Court provided Rosemont 30 days to amend its application to cure the deficiencies identified by PDEQ, and then required PDEQ to "timely reconsider the Amended Application".

Rosemont has determined that an amended application must be submitted to PDEQ on or before August 6, 2012. The amended application is likely to include the improved emissions controls achieved as a result of ADEQ's review of the permit application.

#### **Other Permits Required Prior to Construction**

Rosemont must complete the Federal Environmental Impact Statement (EIS) process and receive a 404 Water Quality Permit. The EIS process is scheduled to be complete on or around December 2012. There is progress on the 404 Water Quality Permit but did not provide an anticipated timetable for completion of that process.