**BEFORE THE WATER QUALITY APPEALS BOARD**

**DEPARTMENT OF ADMINISTRATION**

**IN AND FOR THE STATE OF ARIZONA**

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| Arizona Mining Reform Coalition, Concerned Citizens and Retired Miners Coalition; Save Tonto National Forest,<br><br>Appellants,<br><br>vs.,<br><br>State of Arizona, Arizona Department of Environmental Quality<br><br>Respondent. | CASE NO. 17-001<br><br>CASE NO. 17-002<br><br>**WATER QUALITY APPEALS BOARD FINAL ADMINISTRATIVE DECISION** |
| San Carlos Apache Tribe,<br><br>Appellant,<br><br>vs.,<br><br>State of Arizona, Arizona Department of Environmental Quality<br><br>Respondent. | |

## BACKGROUND

These consolidated appeals involve the decision of the Arizona Department of Environmental Quality ("ADEQ") to issue to Resolution Copper Mining LLC ("RCM") a renewal of Permit No. AZ0020389, Authorization to Discharge Under the Arizona Pollutant Discharge Elimination System ("AZPDES"). Appellants are the Arizona Mining Reform Coalition, Concerned Citizens and Retired Miners Coalition, Save Tonto National Forest (collectively, "Coalition Appellants") and the San Carlos Apache Tribe. ADEQ is the Respondent and RCM the Intervenor.

On June 18, 2019, the Arizona Water Quality Appeals Board ("Board") met to consider the Administrative Law Judge's Decision and to resolve remaining outstanding issues in this matter. This Final Administrative Decision incorporates the Board's previous actions and orders taken in this matter, as follows:

> On October 15, 2018, the Office of Administrative Hearings, through Administrative Law Judge Thomas Shedden, issued an Administrative Law Judge Decision ("ALJ Decision") a copy of which is attached as Exhibit "A" and

incorporated by reference. On November 8, 2018, the Board first met to consider the ALJ Decision.

On November 19, 2018, the Board entered an Order remanding this matter to ADEQ for the purpose of conducting a new source analysis as required by 40 C.F.R. Section 122.29(b). The Board's November 19, 2018 Order ("November 2018 Order"), a copy of which is attached as Exhibit "B" and incorporated by reference, permitted ADEQ to disregard certain Findings of Fact and Conclusions of Law when conducting the new source analysis. The Board accepted the ALJ Decision as to all other issues, finding that Appellants did not establish that ADEQ's actions were arbitrary, unreasonable, unlawful, or based upon a technical judgment that is clearly invalid. The Board ratified its November 2018 Order in an Order dated January 4, 2019.

On February 1, 2019, the Coalition Appellants filed an Application for Costs and Fees Pursuant to A.R.S. § 41-1007. Response and reply briefs were filed.

On February 15, 2019, ADEQ submitted its New Source Analysis Pursuant to 40 CFR 122.29(b) As Ordered ("New Source Analysis"). The Appellants responded to the New Source Analysis and filed a Motion to Review and Reconsider the Board's November 19, 2018 Order. Response and reply briefs were filed.

The Board met to consider the various remaining issues in these appeals on March 11, 2019 and April 30, 2019. The Board permitted the parties to file Proposed Final Administrative Decisions which were considered at the Board's June 18, 2019 meeting.

After careful review and consideration of the ALJ Decision, the administrative record, the pleadings, as well as the written and oral arguments of the parties, the Board takes the following actions:

## FINDINGS OF FACT

1. The Board accepted Findings of Fact 1 through 97 and 121 through 192 in its November 2018 Order.

2. The Board accepts Findings of Fact 98 through 120.

## CONCLUSIONS OF LAW

3. The Board accepted Conclusions of Law 1 through 18, 35 through 67, and 69 through 71 in its November 2018 Order.

4. The Board rejects Conclusions of Law 19, 20, and 23 and adopts in their place the following:

> The former Magma mine site, the proposed RCM site, and any adjacent land are the "Site" as defined in 40 C.F.R. § 122.2.
>
> > Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.
> >
> > 40 C.F.R. § 122.2 (underscore added)



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The former Magma mine, the proposed RCM mine, Shaft 10 and the other mine features and infrastructure are the "Facilities" as defined in 40 C.F.R. §122.2.

> Facility or activity means any NPDES[1] "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.
>
> 40 C.F.R. §122.2 (underscore added)

The existing Outfalls 001 and 002 are "point sources" as defined in 40 C.F.R. §122.2

> Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.
>
> 40 C.F.R. §122.2 (underscore added)

Justification: The Board's adopted Conclusion of Law cites the relevant federal regulations.

5. The Board accepts Conclusion of Law 22.

6. The Board rejects Conclusion of Law 24 and adopts in its place the following:

> ADEQ's determination that Shaft 10 and the other features ("New Features") are not new sources as explained in its February 15, 2019 New Source Analysis is a correct application of the applicable rules.

Justification: The Board accepted the ALJ's recommendation to remand the matter to ADEQ for a New Source Analysis in its November 2018 Order. Now that the Board has received the New Source Analysis and has accepted it, Conclusion of Law 24 needs to be modified as it does not reflect the Board's ultimate determination of the issues raised in these appeals.

7. The Board finds that Conclusion of Law 25 is no longer applicable as it is addressed in the modified Conclusion of Law 24. *See* Justification regarding Conclusion of Law 24, above.

8. The Board finds that Conclusions of Law, 26, 28 through 30, and 32 are no longer applicable because the Board accepts ADEQ's New Source Analysis. *See* Justification regarding Conclusion of Law 24, above.

9. The Board rejects Conclusion of Law 27 because it conflates the features of a mine with the mine itself.

10. The Board rejects Conclusion of Law 31 as it misstates the applicable standard of review under A.R.S. § 49-324(C).

11. The Board rejects Conclusions of Law 33 and 68.

Justification: The ALJ's determination that ADEQ failed to properly apply the definitions and therefore acted "without adequate determining principle" incorporates a misunderstanding of the scope of the relevant defined terms. The Board finds that ADEQ

[1] "NPDES" means the National Pollutant Discharge Elimination System.



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did not act in an arbitrary way or without adequate determining principle in deciding that the New Features of the mine are not new sources as defined in 40 C.F.R. § 122.29(b). As the Arizona Supreme Court wrote in *Maricopa Co. Sheriff's Office v. Maricopa Co. Employee Merit System Comm'n*, 211 Ariz. 219, 223 ¶17(2005):

> "[W]e review the record to determine whether there has been 'unreasoning action without consideration and in disregard for the facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."

12. The Board accepted the ALJ Conclusion of Law 34 recommending remand and has since received and accepted the New Source Analysis required by 40 C.F.R. § 122.29(b).

## ORDERS

The Board hereby affirms ADEQ's decision to renew AZPDES Permit No. AZ0020389 issued by ADEQ to RCM on January 19, 2017, including the New Source Analysis.

The Board denies Appellants' Motion to Review and Reconsider the Board's November 19, 2018 Order.

The Board denies the Coalition Appellants' Application for Costs and Fees Pursuant to A.R.S. § 41-1007.

## NOTICE OF RIGHTS PURSUANT TO A.A.C. R2-17-125(C) AND A.R.S. § 41-1092.09

This is a final decision of the Water Quality Appeals Board, made according to A.R.S. § 49-323. You may file a motion with the Board for rehearing or review under A.A.C. R2-17-126. If you file a motion for rehearing or review, you shall file your motion within 30 days after service of this decision. You are not required to file a motion for rehearing or review before seeking judicial review. This decision may be reviewed by the Superior Court in accordance with A.R.S. § 49-323(B).

DATED this 25th day of June, 2019.

WATER QUALITY APPEALS BOARD

Fred E. Brinker, Chairman

A copy of the foregoing was mailed via U.S. Mail this 25th day of June, 2019, to:

WATER QUALITY APPEALS BOARD:



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