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12 **BEFORE THE WATER QUALITY APPEALS BOARD**

13  
14 THE TOWN OF FLORENCE, a political  
15 subdivision of the State of Arizona; SWVP-GTIS  
16 MR, LLC, a Delaware limited liability company;  
17 and PULTE HOME CORPORATION, a Michigan  
corporation,

18 Appellants,

19 vs.

20 ARIZONA DEPARTMENT OF  
21 ENVIRONMENTAL QUALITY, an agency of the  
22 State of Arizona; and MISAEL CABRERA, in his  
23 official capacity as Director of the Arizona  
Department of Environmental Quality,

24 Respondents.

25 FLORENCE COPPER INC., a  
Nevada Corporation,

26 Intervenor.

Case No. 16-002

**APPELLANTS' RESPONSE BRIEF RE  
ISSUES ON APPEAL**

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28

1 This response brief is not intended as a response to arguments on the merits by  
2 Respondents. This briefing is intended only to identify the issues that the Board should  
3 consider on appeal of the Significant Amendment. The lack of a response on any specific  
4 merits-related issue should not be construed as an admission or agreement with positions  
5 taken by ADEQ or FCI in their initial briefs.

6 It appears undisputed that this Board has jurisdiction to determine whether the  
7 Significant Amendment complies with the Board's November 14, 2014 Order regarding the  
8 following issues:

- 9 • a PMA that complies with A.R.S. § 49-244(1);
- 10 • POC wells that comply with A.R.S. § 49-244(2);
- 11 • meaningful monitoring to verify hydraulic control horizontally within the PTF  
12 well field;
- 13 • meaningful monitoring to verify hydraulic control vertically within the oxide  
14 zone; and
- 15 • whether ADEQ properly reviewed and considered the BHP reports and data in  
16 determining the appropriate terms of the permit.

17 ADEQ and FCI argue that the Board should narrowly construe the issues on remand  
18 when determining whether the Significant Amendment complies with Arizona law.  
19 ADEQ's and FCI's argument misses the mark for three related reasons:<sup>1</sup>

- 20 (1) the newly-provided BHP pilot test information creates a new and expanded  
21 administrative record not available in the last appeal, requiring a thorough review of  
22 all terms of the Significant Amendment;
- 23 (2) the issues raised by Appellants are inextricably intertwined with the reasons for  
24 remand and, consequently, are relevant to the Board's review regardless of whether  
25 they are considered as independent issues or as arguments on the undisputed  
26 issues; and
- 27 (3) even if not expressly found to be deficient following the prior hearing, the Board

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28 <sup>1</sup> These are in addition to the reasons provided in Appellants' opening brief.

1 expressed concern regarding several permit terms and assumptions that should be  
2 reviewed in this appeal.

3  
4 **I. The administrative record relevant to the Significant Amendment contains new  
and relevant information that requires independent review of this permit.**

5 The Board's requirement that ADEQ obtain and review reports and data from the  
6 BHP pilot test cannot be considered in a vacuum. ADEQ was required to review the BHP  
7 data to determine how it impacted permit terms found unlawful and unreasonable in the  
8 last appeal. But the additional BHP reports and data also are highly relevant to whether  
9 ADEQ should have modified or added terms that were not expressly found deficient in the  
10 last hearing.

11 For example, the Board can properly consider whether reasonable scrutiny of the  
12 newly-provided BHP reports and data should have caused ADEQ to reject FCI's EPM  
13 assumptions. Appellants have long argued that the BHP pilot test showed strong evidence  
14 of anisotropy and that the aquifer did not act as an EPM. The newly-provided reports  
15 provide additional support for and confirm Appellants' arguments on this issue. They also  
16 support Appellants' identification of other flaws in FCI's models. Whether ADEQ's  
17 acceptance of and reliance on FCI's modeling assumptions was reasonable *based on the*  
18 *newly-provided BHP reports and data* is ripe for review. By definition, that issue could not  
19 have been considered and decided in the previous appeal because ADEQ did not have  
20 access to the newly-provided BHP reports and data when drafting the original Temporary  
21 APP in 2013.

22 And there are additional documents disclosed by FCI to the Town in pending  
23 litigation regarding FCI's illegal mining within Town boundaries that represent new  
24 information available to both Appellants and the Board that was not available at the last  
25 hearing. This means that the findings in the last hearing were based on a narrower record  
26 than the record currently before the Board in this appeal.<sup>2</sup> Appellants did not have access  
27

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28 <sup>2</sup> Appellants provided to ADEQ copies of relevant new documents disclosed by FCI after the last appeal.

1 to the newly-provided FCI documents for purposes of its arguments on appeal in the last  
2 hearing, and the ALJ and the Board did not have access to them for purposes of rendering a  
3 decision. The Board's Order expressly recognized the significant relevance of the  
4 previously-withheld BHP reports and data. Consequently, Appellants should have the  
5 opportunity to utilize the newly-produced reports and data on these issues, and the Board  
6 should have the opportunity to consider them in deciding these issues.

7  
8 **II. The issues raised by Appellants are intertwined and are relevant regardless of**  
9 **whether they are considered as separate issues on appeal or as evidence on other**  
10 **undisputed issues.**

11 The issues to which ADEQ and FCI object are relevant to the issues on which this  
12 Board remanded the previous permit. For example, if FCI's groundwater model is flawed  
13 (*e.g.*, contains significant spatial bias and assumes that the aquifer acts as an EPM), then the  
14 permit's monitoring scheme is called into question. For a monitoring scheme to be  
15 meaningful, it must be based on a realistic estimate of the movement of potential  
16 pollutants, which in turn requires a model based on reasonable assumptions.  
17 Consequently, a review of the permit's monitoring scheme necessarily incorporates a  
18 review of the underlying models on which the monitoring scheme is based.

19 There is a similar interrelationship between hydraulic control alert levels and the  
20 reasonableness of the permit's monitoring scheme. The Board's Order clearly expressed  
21 concern about the permit's assumption that a minimum one-foot inward hydraulic  
22 gradient was sufficient to prevent horizontal and vertical migration of pollutants.<sup>3</sup>  
23 However, rather than finding the minimum one-foot inward gradient to be unreasonable  
24 for ensuring hydraulic control (a fact that even FCI and ADEQ witnesses admitted at the  
25 hearing), the Board instead focused on a requirement for meaningful monitoring ostensibly

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26 ADEQ indicated in its response to public comments that it intended to review the documents, thereby  
27 indicating that these documents were not reviewed by ADEQ as part of the decision at issue here. *See* ADEQ,  
28 *Summary and Response to Public Comments*, at 20 (Aug. 4, 2016).

<sup>3</sup> The same reasoning applies to ADEQ's refusal to require FCI to properly account for all sulfuric acid injected into the aquifer.

1 intended to identify any hydraulic control failures. The unreasonably low hydraulic control  
2 alert levels remain relevant to understanding the risk of hydraulic control failures. Because  
3 the permit continues to require unreasonably low minimum hydraulic control measures,  
4 the risk of hydraulic control failures remains unreasonably high, which in turn necessitates  
5 a more stringent review of the monitoring that ostensibly is intended to detect all hydraulic  
6 control failures.

7 Another example is the interrelationship between FCI's fate and transport models  
8 and its groundwater and geochemical models. Both models assume that the aquifer acts as  
9 an EPM. If FCI's groundwater model is flawed, then the reasonableness of the permit's  
10 monitoring requirements are called into question, as are the alert levels and restoration  
11 plans. And if FCI's geochemical model is flawed (as the Board previously found), then the  
12 permit's reliance on FCI predictions about impacts to, and restoration of, groundwater  
13 chemistry remains flawed.

14 In other words, each of the issues to which ADEQ and FCI object will be part of this  
15 appeal regardless of whether the Board considers them as separate issues or as evidence on  
16 other undisputed issues. In reality, that is a distinction without a difference.

17  
18 **III. Even if they did not form the basis for remand, the Board expressed concern  
19 regarding many of these issues following the previous hearing.**


20 The Board expressed concern about numerous issues during the last appeal that  
21 were not remanded to ADEQ for reconsideration.<sup>4</sup> But that does not preclude the Board's  
22 consideration of those issues in this appeal. These issues are so intertwined with the issues  
23 on remand that it is impossible to consider them separately. New information provided by  
24 FCI since the last appeal impacts issues of concern to the Board. And changes—or the lack  
25 of necessary changes—to the Significant Amendment may impact whether the Board's  
26 concerns have been addressed. Protection of public drinking water supplies warrants

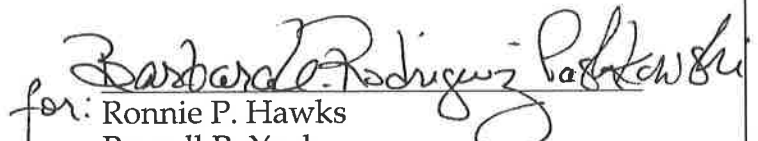
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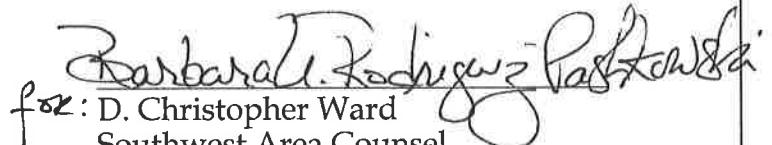
27 <sup>4</sup> See, e.g., ALJ Decision, at 128, Conclusions of Law 26-27 (EPM assumption); *id.* at 133, Conclusions of Law 42-  
28 44 (acid balance); *id.*, at 134, Conclusions of Law 45-46 (exclusion zone); *id.*, at 140, Conclusions of Law 58-59  
(POC cost exception).

1 review of all relevant issues arising from ADEQ's most recent permit decision.

2 Dated this 21<sup>st</sup> day of November, 2016.

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19 ORIGINAL of the foregoing filed  
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