

1 BEFORE THE WATER QUALITY APPEALS BOARD

2 DEPARTMENT OF ADMINISTRATION

3 IN AND FOR THE STATE OF ARIZONA

4
5 THE TOWN OF FLORENCE, a political
6 subdivision of the State of Arizona;
7 SWVP-GTIS MR, LLC, a Delaware limited
8 liability company; and PULTE HOME
9 CORPORATION, a Michigan corporation,

 NOTICE OF APPEAL

 Appellants,

vs.

10 ARIZONA DEPARTMENT OF
11 ENVIRONMENTAL QUALITY,

 Respondents.

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13 In November 2014, the Water Quality Appeals Board ("WQAB") issued an Order
14 ("Board Order") remanding this matter to the Arizona Department of Environmental
15 Quality ("ADEQ") with specific directions to amend the permit consistent with the
16 Order and Judge Mihalsky's findings of fact and conclusions of law. Now, with the
17 reissuance of this "amended" permit, ADEQ and Florence Copper have knowingly and
18 intentionally ignored the Board Order and applicable law. Among other things, the new
19 permit issued by ADEQ does not require Florence Copper to move a single Point of
20 Compliance ("POC") well, relying instead on the same arbitrary and unsupportable
21 justifications for POC locations that were unequivocally rejected by the Board Order.
22 There is still no meaningful vertical monitoring for escapes into the drinking water
23 aquifer. And the permit fails to require monitoring necessary to detect escapes of
24 mining contaminants during mine operations, instead establishing escape criteria that
25 can never be violated even with a massive and undiluted release.

26 It is becoming increasingly apparent that ADEQ does not understand the legal
27 and technical requirements of its own permitting program; has no respect for the
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1 public's right to be heard on this permit; is willfully ignoring the clear direction of the
2 Administrative Law Judge ("ALJ") and WQAB; and is deferring completely to the
3 wishes of Florence Copper in the permit process. ADEQ has not only showed no respect
4 or concern for the Board Order, it once again is shirking its obligation to objectively
5 review and investigate permit applications so as to protect the environment and human
6 health. As a result, Appellants are once again forced to expend public and private
7 resources with an appeal of a clearly unlawful, arbitrary, unreasonable, and technically
8 invalid permit decision.

9 1. The appellants file this Notice of Appeal with the Department of Environmental
10 Quality according to A.R.S. § 49-323.

11 2. Under A.R.S. § 49-323 and A.A.C. § R2-17-101 et seq., if you, a Respondent in this
12 case, have an interest in the final decision that may result from this Notice of
13 Appeal, you are required to file an Answer to this Notice of Appeal within 20
14 days from the date of service of this Notice of Appeal on you.

15 3. The names, addresses, and telephone numbers of the appellants are:

16 Name: Town of Florence

17 Address: c/o Christopher Kramer (AZ Bar No. 013289)
18 Barbara U. Rodriguez-Pashkowski (AZ Bar No. 006958)
19 Gust Rosenfeld P.L.C.
20 One E. Washington, Ste. 1600
21 Phoenix, AZ 85004

22 Telephone: (602) 257-7962

23 Name: SWVP-GTIS MR, LLC

24 Address: c/o Ronnie Hawks (AZ Bar No. 019122)
25 Russell Yurk (AZ Bar No. 019377)
26 Jennings, Haug & Cunningham, L.L.P.
27 2800 N. Central Ave., Ste. 1800
28 Phoenix, AZ 85004-1049

Telephone: (602) 234-7800

1 Name: Pulte Home Corporation

2 Address: c/o D. Christopher Ward (AZ Bar No. 007523)
3 16767 N. Perimeter Drive, Ste. 100
4 Scottsdale, AZ 85260

5 Telephone: (480) 391-6157

6 4. The following is a list of names, mailing addresses, and telephone numbers of all
7 of the following interested parties:

8 a. The permittee, if the permittee is not the appellant;

9 Name: Florence Copper Inc.

10 Address: c/o Daniel Johnson
11 Florence Copper Inc.
12 1575 W. Hunt Hwy.
13 Florence, AZ 85132

14 Telephone: (520) 374-3984, ext. 3710

15 b. All persons who filed a notice of appearance in the action before the
16 Department of Environmental Quality that the appellant is appealing:

17 ADEQ accepted written comments and held a public hearing regarding this
18 permit on May 19, 2016, at the Florence High School gymnasium. ADEQ did not ensure
19 the presence of a court reporter and did not record the public comments at the hearing.
20 A transcript that ADEQ prepared from a third-party recording includes 524 instances of
21 "unintelligible" statements, including portions or complete statements made by all but
22 two speakers at the hearing.

23 Based on the information available to appellants at this time, the persons
24 (although some names appear to be misspelled) who made an appearance before ADEQ
25 regarding this permit are reflected in ADEQ's Summary and Response to Public
26 Comments, dated August 4, 2016. Additionally, appellants believe that Karen Douglas
27 and Barbara Manning made an appearance and testified before ADEQ regarding this
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1 permit, but are not reflected in ADEQ's Summary and Response to Public Comments,
2 or in ADEQ's own transcript of the public hearing.

3 Because of ADEQ's failure to properly record and transcribe the public hearing,
4 Appellants reserve the right to supplement this statement of interested parties if they
5 become aware of additional persons who have made an appearance regarding this
6 permit.

7 c. The Department of Environmental Quality.

8 Name: Arizona Department of Environmental Quality

9 Address: ADEQ Water Quality Division, Groundwater Section
10 1110 W. Washington St.
Phoenix, AZ 85007

11 Telephone: (602) 771-2300

12 5. The specific action of the Department of Environmental Quality that is the basis
13 of this appeal is the following:

14 a. State of Arizona Temporary Aquifer Protection Permit No. P-106360, Place
15 ID 1579, LTF 61845, Significant Amendment

16 6. The date of the action complained of in the previous paragraph (5) is August 3,
2016.

17 7. The date the appellants received notice of the action complained of in the
18 previous paragraph (5) is August 3, 2016.

19 8. Appellants request the relief below for the following reasons:

20 WQAB already set aside one permit that ADEQ issued to Florence Copper Inc.
21 ("FCI") for FCI's planned in-situ mining operation, finding that the issued permit was
22 unlawful, arbitrary, unreasonable, and based on technical judgments that were clearly
23 invalid. A hearing regarding that permit was held from March 18, 2014 through May 7,
24 2014, before ALJ Diane Mihalsky (the "Hearing"). Judge Mihalsky issued her
25 Administrative Law Judge Decision on September 29, 2014, recommending that
26 Temporary APP No. P-106360 be rescinded. On November 14, 2014, WQAB issued an
27 Order adopting all of Judge Mihalsky's 419 findings of fact and all but one of her 73
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1 conclusions of law, but WQAB decided to remand the permit to ADEQ "for further
2 proceedings consistent with this Order." The WQAB allowed the permit to be
3 remanded because, based on statements made by FCI and ADEQ at the hearing, it
4 concluded that FCI had "the ability ... to implement the required amendments through
5 the process of a significant amendment"

6 On August 3, 2016, ADEQ issued a Significant Amendment to Temporary
7 Aquifer Protection Permit No. P-106360 ("Significant Amendment") that does not
8 "implement the required amendments" as set forth in the Administrative Law Decision
9 and Board Order.

10 As with the 2012 permit issued to FCI, the Significant Amendment allows FCI to
11 operate a Production Test Facility ("PTF") that plans to employ in-situ acid leach
12 mining to recover copper from oxide ore bodies. The PTF is located on State Land
13 within the Town of Florence, in close proximity to residential communities such as
14 Pulte's Anthem development, and up-gradient of drinking water supplies for current
15 and future residents. The groundwater in the aquifer where the copper is located flows
16 in a northwesterly direction, through and around the FCI site and toward Johnson
17 Utilities' twelve wells, the nearest of which is 1.2 miles away, and toward wells owned
18 by SWVP-GTIS MR, LLC ("SWVP") and others.

19 FCI's proposed in-situ copper recovery process involves the injection of sulfuric
20 acid into fractured bedrock in an area where the copper ore zone is in hydraulic
21 communication with the local drinking water aquifer. Absent constant and unerring
22 control of the injected solutions, contaminants - including arsenic, heavy metals,
23 radiochemicals, and numerous other contaminants - will contaminate the drinking
24 water supply in an area where such supplies are limited. Contamination emanating
25 from FCI's mine will flow onto private land within the Town of Florence owned by
26 Appellants and others and into drinking water aquifers used by Johnson Utilities and

1 others to serve current and future customers. Additionally, the permit sanctions
2 contamination of the drinking water aquifer with sulfate at three times the current
3 federal and state standards. Operation of the PTF is inconsistent with current and
4 planned future land uses approved by the Town of Florence and poses a real and
5 imminent threat to drinking water supplies that currently serve approximately 83,000
6 people.

7 Appellant Town of Florence is a political subdivision of the State of Arizona and
8 a municipal water provider holding a designation of assured water supply. Dating back
9 to 2002, the Town of Florence began the process of annexing approximately 8,000 acres,
10 including FCI's current site. The Town passed Ordinance No. 354-03 in 2003, formally
11 extending the Town's corporate limits to include the property later acquired by FCI.

12 Appellant SWVP is a Delaware company doing business in Arizona. SWVP is a
13 real estate development company that owns land in and around the Town of Florence,
14 in close proximity to the proposed in situ leach mine that is the subject of the permit at
15 issue. SWVP purchased this property in two separate transactions in December 2009
16 and March 2010 and currently owns 4,645 acres in this area. This land is zoned
17 "Planned Use Development" for the Merrill Ranch Master Planned Community, zoning
18 that provides for a mixture of residential and commercial uses. SWVP proposes to
19 develop a master-planned community composed of mixed residential and commercial
20 development. SWVP is appealing issuance of the Significant Amendment because it
21 does not adequately protect drinking water resources necessary to future development
22 of SWVP's land and does not adequately protect human health and the environment.

23 Appellant Pulte Home Corporation ("Pulte"), a Michigan corporation doing
24 business in Arizona, is a homebuilder that has invested over \$400 million in and around
25 the Town of Florence. Pulte is the developer of a mixed-use planned community known
26 as Anthem at Merrill Ranch, which is home to approximately 4,000 residents in the
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1 Town of Florence, immediately adjacent to the proposed mine site. Anthem has 1,700
2 developed residential lots and another 6,900 planned residential units; one school for
3 grades K-8 and plans for a second school; a site for a public facility; open spaces and
4 parks; over 50 acres of commercial mixed use development; and an area designated for
5 medical office use and a hospital. The commercial area includes a Safeway shopping
6 center, and the Florence Hospital at Anthem opened in 2012 in the office area. The
7 Town recently constructed and is operating Fire Station #2 on a public site transferred
8 to the Town by Appellant Pulte Home Corporation.

9 For the reasons that follow, Appellants assert that the Significant Amendment
10 does not cure the deficiencies found by the ALJ and WQAB following an appeal and
11 hearing of Temporary Aquifer Protection Permit No. P-106360, does not comply with
12 Arizona law, and remains inadequate to protect the groundwater resources, human
13 health and the environment in the vicinity of the proposed mine. ADEQ's decision to
14 grant this permit is unlawful, arbitrary, unreasonable, and based on clearly invalid
15 technical judgments. In issuing this permit, ADEQ has violated numerous legal
16 requirements, including but not limited to the requirements of A.R.S §§ 49-241 to 49-
17 252; A.A.C. §§ R18-9-101 to -110; A.A.C. §§ R18-9-A201 to -A214; and related agency
18 guidance and policies (collectively, "APP Legal Requirements").

19 To avoid repetition and specifically to avoid any waiver of Appellants'
20 arguments on appeal, Appellants incorporate the comments submitted by SWVP and
21 by the Town of Florence to ADEQ on May 19, 2016 ("SWVP Formal Comments" and
22 "Town of Florence Formal Comments"). The SWVP Formal Comments and Town of
23 Florence Formal Comments are in the ADEQ's file and ADEQ was legally required to
24 review, consider, and respond to those comments. A review of the draft permit and the
25 final permit issued by ADEQ shows that ADEQ made no substantive changes to the
26 permit in response to the formal comments submitted by SWVP and the Town.

1 Consequently, those comments remain applicable to the Significant Amendment and
2 they remain issues that Appellants raise in this appeal of ADEQ's issuance of the
3 Significant Amendment.¹

4 A. The Significant Amendment does not meet the requirements of the
5 November 14, 2014 Board Order, which adopted and incorporated the Administrative
6 Law Judge Decision dated September 29, 2014. The Board Order and ALJ Decision
7 found that the permit as issued was unlawful, arbitrary, unreasonable, and based on
8 clearly invalid technical judgments. As a matter of law, the Significant Amendment
9 must comply with all applicable law, and must cure all reasons for which the previous
10 iteration of the Temporary APP was found to be unlawful, arbitrary, unreasonable, and
11 based on clearly invalid technical judgments.

12 B. The Significant Amendment utilizes a Pollutant Management Area
13 ("PMA") that does not reflect the area on which pollutants are or will be placed. A.R.S.
14 § 49-244(1). The WQAB and ALJ concluded that "A.R.S. § 49-244(1) is not ambiguous:
15 the PMA 'is the limit projected in the horizontal plane of the area on which pollutants
16 are or will be placed' or for the PTF, where the lixiviant will be injected and recovered."
17 The WQAB and ALJ have already found that "lixiviant would be placed in the IRZ
18 [Injection and Recovery Zone] and was not expected to migrate more than one or two
19 well spacings to the northwest of the PTF well field." The Significant Amendment relies
20 on an arbitrary circular line with a 500-foot radius from the observation wells. The PMA
21 boundary not only is arbitrary, but also is unlawful because it does not comply with
22 A.R.S. § 49-244(1) or with the Board Order and ALJ Decision.

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26 ¹ Copies of both the SWVP Formal Comments and the Town of Florence Formal Comments (including exhibits) are
27 provided in electronic format on the attached disc.
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1 C. The Significant Amendment's PMA allows contaminants to be placed 500
2 feet downgradient from the observation wells in the Lower Basin Fill Unit ("LBFU"),
3 which other terms of the Significant Amendment prohibit.

4 D. The Significant Amendment utilizes the same POC wells that were
5 explicitly found to be unlawful in the Board Order and ALJ Decision. The POC well
6 locations continue to violate the requirements of A.R.S. § 49-244 and will not provide
7 meaningful monitoring of pollutants that may escape the PMA during the time of active
8 PTF operations.

9 E. The POC wells cannot be justified as "less costly" because the Significant
10 Amendment requires the installation of new monitoring wells near the PTF well field
11 that could be used as POC wells without any significant additional cost and because, for
12 new POC wells, the cost will be the same if they are placed in the legally-required
13 locations.

14 F. The Significant Amendment does not require meaningful monitoring of
15 possible vertical migration through electric conductivity sensors or HydraSleeve
16 sampling in the LBFU within the PTF well field during PTF operations. Instead of
17 complying with the Board Order requiring meaningful vertical monitoring in the well
18 field, ADEQ allowed FCI to rely exclusively on horizontal monitoring outside of the
19 well field. This attempt to avoid actual vertical monitoring is unchanged from permit
20 terms that were rejected by the ALJ and the WQAB. Additionally, although ADEQ
21 initially requested that FCI explain how its proposed monitoring would detect vertical
22 migration into the LBFU and demonstrate vertical containment, ADEQ never required
23 FCI to provide an answer.

24 G. The Significant Amendment does not ensure the maximum early warning
25 of permit violations.

1 H. The Significant Amendment relies on an arbitrary and clearly invalid
2 technical assumption that the aquifer system acts as equivalent porous media.

3 I. The Significant Amendment inappropriately relies on certain data from
4 the BHP pilot test that supports FCI's proposed permit terms, but ignores other data
5 that is unfavorable to the operational plans and permit terms endorsed by ADEQ.

6 J. ADEQ failed to properly review, analyze, and incorporate all information
7 regarding, and data generated in, the BHP pilot test before approving FCI's application.

8 K. ADEQ did not require FCI to investigate concerns raised by BHP's staff
9 and consultants regarding the geochemistry and hydrogeology of the aquifer system.

10 L. The Significant Amendment relies on a project design, operations plan,
11 and monitoring strategies that ignore the implications of heterogeneity in the aquifer
12 system, including short circuits and spatial bias in FCI's groundwater flow model.

13 M. ADEQ failed to require FCI to show that groundwater chemistry will be
14 properly restored after rinsing.

15 N. The Significant Amendment fails to properly account for all sulfuric acid
16 injected into the aquifer.

17 O. The Significant Amendment's requirement that FCI maintain only a
18 minimum one-foot inward gradient on a daily average basis is inadequate to ensure
19 hydraulic control. The inadequacy of this requirement was admitted by both ADEQ and
20 FCI at the Hearing.

21 P. The Significant Amendment contains an unreasonable and technically
22 erroneous alert level for fluid electrical conductivity, which is not triggered unless the
23 observation well conductivity is equal to or greater than the injection well conductivity.

24 Q. The Significant Amendment continues to rely on an inaccurate
25 groundwater flow model that contains significant spatial bias and is not properly
26 calibrated.

1 R. The Significant Amendment relies on geochemical model results
2 regarding arsenic that are inconsistent with FCI's previous fate and transport model
3 and with testimony at the Hearing based on FCI's own test results.


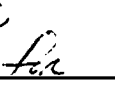
4 S. ADEQ failed to properly investigate potential physical impacts of FCI's
5 pumping to public water resources in the Florence area.

6 T. ADEQ violated A.R.S. § 49-241 and applicable law by failing to provide
7 proper and accurate information in the public notice of the Significant Amendment, by
8 failing to properly record, transcribe, and respond to public comments, and by
9 publishing a fact sheet that contained significant misleading statements.

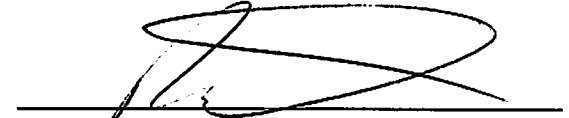
10 U. ADEQ's permit decision was predetermined long before the public
11 comment period was opened and ADEQ acted with a closed mind to public comment,
12 in violation of its due process obligation to provide a meaningful opportunity for the
13 public to comment before a decision is made.

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15 **Relief Requested:** Appellants respectfully request that the Water Quality Appeals
16 Board rescind the Amended Temporary Aquifer Protection Permit No. P-106360, dated
17 August 3, 2016. Appellants further request that the WQAB award Appellants their
18 attorneys' fees and costs under A.R.S. §§ 41-1001.01 and 41-1007.


19
20 DATED September 1, 2016

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23 Christopher Kramer
24 Barbara U. Rodriguez-Pashkowski
25 Gust Rosenfeld P.L.C.
26 One E. Washington, Ste. 1600
27 Phoenix, AZ 85004
28 Attorneys for the Town of Florence

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Attorney for Pulte Home Corporation

Certificate of Service

I verify that I have served or caused to be served a copy of this Notice of Appeal on the Department of Environmental Quality and all the persons listed in paragraph (4) above.

~~DATED September 1, 2016~~



Russell R. Yurk
Attorney for the Appellant

A copy was hand-delivered this 1st day of September, 2016, to:
Arizona Department of Environmental Quality
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1110 W. Washington St.
Phoenix, AZ 85007

Copies were mailed this 1st day of September, 2016, to:
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