

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION
OF ROPER CONSTRUCTION, INC. FOR
AN AIR QUALITY PERMIT NO. 9295,
ALTO CONCRETE BATCH PLANT

AQB 21-57(P)

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS NSR SOURCE PERMIT APPLICATION
AND CASE NO. AQB 21-57(P) BASED ON INSUFFICIENT NOTICE,
IMPROPER POSTING OF PUBLIC NOTICE, AND INCOMPLETENESS

The Ranches of Sonterra Property Owners Association (“Sonterra”), by and through the undersigned counsel, submits the following Memorandum of Law in Support of its Motion to Dismiss NSR Source Permit Application (“the Application”) and Case No. AQB 21-57(P) on grounds of Incompleteness, Insufficient Notice, and Improper Posting of Public Notice.

SUMMARY OF ARGUMENT

The Application fails to meet the New Mexico Environment Department’s (“NMED”) notice requirements, requiring dismissal and re-filing of the Application as a matter of law. At least one resident within one-half mile of the proposed source location did not receive direct notice of the Application from Roper, while the notice posted at the proposed source location does not appear posted at any “entrance” to the property and is certainly not visible from the highway. These deficiencies require dismissal of the case and re-filing of the application because, absent compliance with NMED’s notice requirements, all subsequent proceedings based on the Application are invalid as a matter of well-established New Mexico law.

NMED also cannot move forward with the Application because it is administratively incomplete. The Application fails to identify the nearest residence, school, or occupied structure as required by the applicable rules. The Application also fails to disclose the presence of the Mescalero Apache Indian Reservation, which is located within ten (10) miles of the proposed plant

location. NMED is thus prevented by its own regulations to act on the Application until Roper submits all the required information. Moreover, NMED should not allow the proceeding to move forward until the Application is complete as a matter of prudence, in order to avoid piecemeal permitting.

ARGUMENT

1. The Application Does Not Meet NMED’s Notice Requirements

A. Roper Failed to Provide Notice to Landowners within One Half Mile of the Proposed Source Location

The Application seeks a construction permit pursuant to 20.2.72.200.A(1) NMAC to construct a concrete batch plant along Highway 220 in Alto, New Mexico, approximately 0.35 miles east of the highway’s intersection with Highway 48. *See* Application (citation and facility street address). The area immediately surrounding the proposed site is residential, with dozens of residential homes located within a half mile. *See id.* at Section 9, 22-25 (list of property owners provided notice by certified mail). The Application recognizes Roper’s obligation, pursuant to 20.2.72.203.B(1)(b) NMAC, to provide notice by certified mail to all owners of property located “within one-half (1/2) mile of the property on which the facility is...proposed to be located.” The Application, however, does not comply with this requirement because at least two property owners who unquestionably are located within one-half mile of the proposed site did not receive the required notice.

As set forth in more detail in her attached affidavit, Kathleen Weems and her husband, Don R. Weems, are property owners residing less than one-half mile from the proposed site. *See* Exhibit A (Affidavit of Kathleen Weems). Attached to the affidavit is a distance measurement from Ms. Weems’ property to the location of Roper’s proposed batch plant, as shown by Google Earth, which demonstrates that the proposed concrete batch plant is 0.2 miles from the Weems’ residence.

The Application does not include proof of service on Mr. or Ms. Weems and, as a result, Roper's failure to meet the notice requirements in this respect cannot be reasonably disputed. *See* Application at 1 Section 9, 1-5.

In *Northeastern New Mexico Regional Landfill, LLC v. The New Mexico Environment Department and Martinez, et al.*, Ct. App. No. 28,236 consolidated with 28,229, the New Mexico Court of Appeals analyzed the NMED Secretary's denial of a permit application on the basis of notice violations and reiterated the importance of unconditional compliance with a notice requirement under a statute or its implementing regulations. *See* Exhibit B, relevant portions of *Northeastern New Mexico Regional Landfill*. In that case, the Court found that notice which did not meet the regulatory notice requirements was deficient as a matter of law, even where there was no due process violation because the interested parties not only had actual knowledge of the permit application, but also vigorously participated in the hearing and were represented by counsel throughout the entire process. *Id.* (actual knowledge of the hearing "would not render harmless the failure of [the applicant] to meet regulatory notice requirements."). The Court further noted that even if the Court found that "any determination on appeal by this Court that procedural due process was not violated would not overcome the Secretary's determination that [the applicant] failed to meet regulatory notice requirements." *Id.* As in *Northeastern New Mexico Regional Landfill*, Roper's failure to meet the regulatory notice requirements compels dismissal of the current case because all subsequent proceedings in this case will be void.

Because Roper's failure to provide Ms. Weems with the required notice is fatal to the Application, the Application must be dismissed to cure the deficiency and re-submitted for consideration in a new, separate proceeding. In *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, the New Mexico Court of Appeals considered whether an applicant's failure to comply

with the statutory notice requirements of the New Mexico Solid Waste Act, 1978 NMSA, § 74-9-22(C), invalidated the subsequent permitting proceedings such that the application required entirely *de novo* proceedings following proper notice. In *Martinez*, the applicant failed to comply with the Solid Waste Act's requirement that notice be published in both the classified/legal section of an appropriate newspaper, in addition to publishing the notice in a separate section of the same newspaper. *Id.*, ¶¶ 7-9. Relying on the Supreme Court's holding in *Nesbit v. City of Albuquerque*, 1977-NMSC-107, 91 N.M. 455, that failure to give the statutorily-mandated notice for a zoning hearing invalidates all later proceedings pursuant to the defective notice, the Court of Appeals held that NMED was required *to conduct entirely new proceedings after the applicant cured the defective notice*:

We once again follow *Nesbit* and hold that the administrative proceedings conducted subsequent to Landfill's defective notice are invalid. We vacate the order granting Landfill's application and remand to the Secretary for *de novo* review of Landfill's application after publication of notice substantially complying with Subsection 74-9-22(C).

Id., ¶ 13.

Martinez governs these proceedings; without dismissing the current case and requiring Roper to comply with the notice provisions of 20.2.72.203.B(1)(b) NMAC, NMED cannot lawfully proceed and will waste considerable resources on an invalid hearing. Just as the applicant in *Martinez*, Roper failed to comply with a clear notice requirement imposed by the controlling regulations. The Legislature properly delegated the authority to determine notice requirements to NMED in the Air Quality Act, giving the regulations the same force and effect as the statutory notice requirements at issue in *Martinez*. See NMSA 1978, § 74-2-7(B)(5) (delegation of authority to promulgate rules requiring notice); see also *State ex rel. Harkleroad v. New Mexico State Police Bd.*, 1985-NMSC-076, ¶ 17, 103 N.M. 270 ("Properly enacted rules and regulations have the force

and effect of law[.]”). Thus, this proceeding cannot result in the grant of a valid permit under *Nesbit* and *Martinez* and should therefore be dismissed.

B. The Public Notice Posted at the Source Location does not Meet the Notice Requirements

Roper’s Application also violates the requirement that “conspicuous” notice be posted at “the proposed...facility entrance on the property on which the facility is...proposed to be...located[.]” The attached affidavit of Mark Severance, a concerned property owner in Alto, provides an accurate description and photographs of the allegedly conspicuous notice. *See* Exhibit C. The photographs show that the notice does not appear to be located at the *entrance* of the proposed facility and is precisely 40 feet, one inch from the highway. The size of the print of the main text on the 11 x 17 notice, 10-point font, makes it impossible to read from more than a few feet away. For this independent reason, Roper has not met NMED’s notice requirements and the Application must be dismissed under the same analysis as above.

New Mexico law has long held that a requirement of “conspicuous” notice, at the “entrance” to a property, is not satisfied by posting notice that cannot be read by passersby. In *Baca v. Grisolano*, 1953-NMSC-028, 57 N.M. 176, our Supreme Court examined the effect of a licensee’s failure to comply with a remarkably similar provision of the New Mexico Liquor Control Act (1941 Compilation):

The first sentence using mandatory language and showing the character of the statute and intention of the legislature reads as follows: ‘Before any * * * license is issued * * * the chief of division *shall* cause a notice of the application therefor *to be posted conspicuously on the* outside of the front wall or *front entrance of the immediate premises* for which such liquor license or transfer is sought.

Id., ¶ 18 (emphasis in original).

The testimony in *Baca* established that the licensee posted the notice forty to fifty feet from the property line so that “it could not be read” from the adjoining highway. *Id.*, ¶ 12. The Supreme Court readily found that such notice did not comply with the statute and that issuance of the liquor license was *ultra vires*. *Id.*, ¶ 20. Similarly, Roper’s application and the current case must be dismissed until conspicuous public notice is appropriately posted at the proposed site. *See also Wright v. Zoning Bd. of Appeals of Town of Fairfield*, 391 A.2d 146 (Conn. 1978) (discussing requirements for on-site posted notice generally).

2. Roper’s NSR Source Permit Application Fails to Identify the Nearest Residence, School, Occupied Structure or Indian Tribe

In addition to not providing adequate notice to nearby landowners and the public, Roper’s Application is incomplete. Question 11 (Section 1-D) of the Application requires Roper to identify the distance from the perimeter of the area of operations “to the nearest residence, school or occupied structure.” *See* Application at Section 1, 3. Roper provided no answer to the question. *Id.* The property west of and immediately adjacent to the proposed site is occupied by a plant nursery, an RV park is located approximately one-quarter mile to the west of the proposed site, a religious camp is located approximately one-half mile east of the proposed site, and occupied residences surround the location on all sides. *See id.* at 106 (map of residences in surrounding area). Furthermore, Question 7 (Section 1-D) of the Application requires Roper to identify all municipalities, Indian Tribes, and counties within a ten (10) mile radius of the proposed site. Roper failed to identify the Mescalero Apache Indian Reservation approximately four (4) miles from the proposed site.

NMED’s regulations require submission of this information (in addition to the notice requirements discussed above) before the Application can be deemed administratively complete. *See* 20.2.72.203.A(11) NMAC (requiring applicant to provide all information NMED reasonably

requires). Without an administratively complete application, NMED cannot lawfully move forward with the proceeding under its regulations. See 20.2.72.207 (Permit Decisions and Appeals) (discussing NMED procedure; requiring determination of administrative completeness prior to granting permit).

CONCLUSION

For the reasons set forth above, the Application and current case should be dismissed. The Application fails to meet NMED's notice requirements and is incomplete, thereby requiring a new proceeding.

Respectfully submitted,

HINKLE SHANOR LLP

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*Attorneys for Ranches of Sonterra
Property Owners Association*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served via email on the following parties on this 12th day of November, 2021:

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/s/ Thomas M. Hnasko

Thomas M. Hnasko

FURTHER AFFIANT SAYETH NAUGHT.

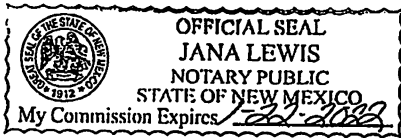
Kathleen A. Weems
KATHLEEN A. WEEMS

11/12/21
Date

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on this 12th day of November, 2021, by Kathleen A. Weems.

Jana Lewis
Notary Public

My Commission Expires: January 22, 2022



Property of K. Weems

Distance from the property of Kathleen Weems to the proposed Roper CBP site



EXHIBIT 1

Google Earth

800 ft


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11/08/2021 10:58:30 LINCOLN COUNTY ASSESSOR
1002481 Dist 280
WEEMS, DONNIE R
KATHLEEN A
PO BOX 563
RUIDOSO NM 88355
Year 2021 ASSR26A
0 Centr1 386841 Full
95220 Land 128947 Txbl
291621 Impr 0 Exmpt
0 P.P.
0 M.H. 128947 Net
0 Livstk
Print=Y
Property Description Code ValueDesc Quantity Rate Taxable
4 072 059 339 149 000000 101M HOMESITE 31740
FILE 2020 PG 760 202000760 02/10/20 201I NEW RES I 97207
CABINET-H SLIDE-685
LEGACY ESTATES
TRACT 4
CONT'G 2.116 ACS.
Bottom
F3=Cancel F4=Prompt () F6=Chg Yrs F12=Return
MA A MW 08/011

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EXHIBIT 2

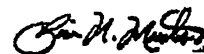
1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

2 **NORTHEASTERN NEW MEXICO**
3 **REGIONAL LANDFILL, L.L.C.,**

MAY 26 2011

4 Plaintiff-Appellant/Cross-Appellee,



5 v.

NO. 28,236 consolidated with 28,229

6 **THE NEW MEXICO ENVIRONMENT**
7 **DEPARTMENT,**

8 Defendant-Appellee/Cross-Appellee

9 and

10 **SOPHIA MARTINEZ, FELIPE GARCIA,**
11 **BETTY MEDINA, AND THE CONCERNED**
12 **CITIZENS OF WAGON MOUND AND**
13 **MORA COUNTY,**

14 Defendants-Appellees/Cross-Appellants

15 **APPEAL FROM THE SECRETARY OF THE NEW MEXICO**
16 **ENVIRONMENT DEPARTMENT**

17 **Ron Curry, Secretary of the New Mexico Environment**

18 Hinkle, Hensley, Shanor & Martin, LLP

19 Thomas M. Hnasko

20 Gary W. Larson

21 Dulcinea Z. Hanuschak

22 Santa Fe, NM

23 for Appellant/Cross-Appellee

24 Northeastern New Mexico Regional

25 Landfill, L.L.C.

1 “based on actual experience and projections within the solid waste industry.” Our
2 review of the record shows that NENMRL’s application did not provide any reason
3 at all for its use of a fifteen percent annual increase in its calculations. We cannot say
4 that the Secretary’s decision was arbitrary and capricious simply because he reached
5 a different conclusion than the one provided by NENMRL. *See N.M. Mining Ass’n*
6 *v. Water Quality Control Comm’n*, 2007-NMCA-084, ¶ 29, 142 N.M. 200, 164 P.3d
7 81 (“Even if a different conclusion might have been reached from the facts, the choice
8 made [by an administrative agency] is not arbitrary or capricious if exercised honestly
9 and upon due consideration.” (alteration omitted) (internal quotation marks and
10 citation omitted)).

11 **2. The Secretary’s Finding That NENMRL Failed to Provide Adequate**
12 **Individual Notice to Interested Parties**

13 NENMRL next challenges the Secretary’s finding that it failed to provide
14 adequate individual notice to adjacent landowners and other interested parties
15 regarding the “quantity, rate, type , as well as the origin of the [special] waste” it was
16 proposing to accept at the landfill, in violation of agency regulations in effect at the
17 time. As we understand NENMRL’s argument, it contends that in finding that
18 regulatory notice requirements were not met, the Secretary also made an “unstated
19 finding” that the interested parties’ procedural due process rights were violated.
20 Relying on this unstated finding, NENMRL appears to argue that even if there was

1 a purported deficiency in the individual notice letters, the procedural due process
2 rights of the interested parties were not violated and, therefore, the Secretary
3 erroneously denied the special waste permit on the basis of inadequate notice.

4 NENMRL's argument is premised on a contention that this Court differentiated
5 between statutory notice requirements and procedural due process in *Martinez*, 2003-
6 NMCA-043, ¶ 13. On the basis of this asserted difference, NENMRL argues only
7 that the interested parties' due process rights were protected without challenging the
8 Secretary's express finding that the individual notice letters failed to meet notice
9 requirements.

10 We are unpersuaded by NENMRL's argument for two reasons. First, we have
11 found no evidence in the record, nor has NENMRL pointed to any, showing that the
12 Secretary or the hearing officer made any findings regarding possible due process
13 violations on the basis of the notice provided by NENMRL during the permitting
14 process. Rather, the hearing officer's report concluded only that the notice failed to
15 meet regulatory requirements without referring to any possible due process issues.
16 Accordingly, we are hesitant to attribute an implicit finding to the Secretary regarding
17 due process in the absence of an express finding. *Cf. Atlixco*, 1998-NMCA-134, ¶¶
18 20, 21 (stating that "the reviewing court may not supply a reasoned basis for the
19 agency's action that the agency itself has not given" and that "the [s]ecretary's

1 decision stands or falls on its express findings and reasoning” (alteration omitted)
2 (internal quotation marks and citation omitted)).

3 Second, we disagree with NENMRL’s characterization of *Martinez* as
4 establishing that a due process analysis is required in cases where the sufficiency of
5 notice is at issue. In *Martinez*, we reversed the grant of a special waste permit to
6 NENMRL for the same facility at issue here on the basis of a failure to substantially
7 comply with statutory notice requirements. 2003-NMCA-043, ¶ 13. We determined
8 that NENMRL’s failure to publish notice of its permit application in two separate
9 locations within local newspapers was a violation of statutory notice requirements
10 under the Act. *Id.* ¶¶ 7-9. We then relied on *Nesbit v. City of Albuquerque*, 91 N.M.
11 455, 575 P.2d 1340 (1977), to hold that NENMRL’s failure to substantially comply
12 with statutory notice requirements rendered all subsequent administrative proceedings
13 invalid, thereby requiring reversal of the Secretary’s decision in those proceedings
14 to grant a special waste permit to the facility. *Martinez*, 2003-NMCA-043, ¶ 13. We
15 remanded the case for new proceedings to take place after proper notice was provided
16 regarding the requested special waste modification. *Id.*

17 Contrary to NENMRL’s position, *Martinez* never explicitly discussed due
18 process, and the opinion did not address the interplay between statutory notice
19 violations and due process. In fact, this Court declined to address a standing

1 argument raised in *Martinez* because it “confuse[d the a]ppellants’ due process right
2 to individual notice with . . . [the] statutory requirement of notice to the general public
3 [of a waste permit application].” 2003-NMCA-043, ¶ 15. We further stated that
4 NENMRL’s failure to meet statutory notice requirements in that case could not be
5 “rendered harmless as a matter of law by the fact that [the a]ppellants and a number
6 of other residents of the area attended the hearing and expressed their lay concerns.”
7 *Id.* ¶ 17. Thus, to the extent that NENMRL makes due process arguments on appeal
8 in this case—that the interested parties had actual knowledge of the hearing and that
9 individual notice letters were not misleading or prejudicial—we are not persuaded.
10 These actions, even if they were substantiated by the record, would not render
11 harmless the failure of NENMRL to meet regulatory notice requirements. This is
12 consistent with the underlying policy rationale behind *Martinez*—that the failure to
13 comply with statutory and/or regulatory notice requirements is a serious deficiency
14 in the permitting process requiring stark consequences because it effectively
15 precludes the right of interested parties to meaningfully participate in the hearing
16 process and to insure that their concerns regarding proposed permit modifications are
17 heard. *Id.* ¶¶ 15, 18-19; see *Colonias*, 2005-NMSC-024, ¶¶ 21-22 (discussing
18 *Martinez* and the legislative policy favoring the public’s right to participate
19 meaningfully in a landfill permitting process).

1 *Martinez* does not stand for the principle that meeting the interested parties'
2 due process rights under the circumstances presented in this case would act as a cure
3 for a statutory/regulatory notice violation. As an aside, we recognize that our reliance
4 on *Nesbit* in *Martinez* could have been construed as a signal to NENMRL in this case
5 that procedural due process is a consideration in cases where notice concerns are
6 raised in administrative proceedings. *See Nesbit*, 91 N.M. at 459, 575 P.2d at 1344
7 (stating that the failure to comply with statutory notice procedures in zoning
8 ordinance proceedings was a violation of “due process of law . . . and [that] no
9 subsequent act could correct the defect”); *see also Eldorado at Santa Fe, Inc. v. Cook*,
10 113 N.M. 33, 36, 822 P.2d 672, 675 (Ct. App. 1991) (relying on *Nesbit* to hold that
11 the failure to give proper statutory notice of an administrative permitting proceeding
12 was a due process violation), *abrogated on other grounds by Goodloe v. Bookout*,
13 1999-NMCA-061, 127 N.M. 327, 980 P.2d 652. However, these cases only serve to
14 establish the importance of meeting notice requirements under a statute or its
15 implementing regulations and the consequence for failing to do so. It stands to reason
16 that if this Court can reverse the grant of a special waste permit on the basis of
17 statutory notice violations, as we did in *Martinez*, there is no error on the part of the
18 Secretary in denying a special waste permit in this case on the same basis, irrespective
19 of any of the flexible procedural due process considerations NENMRL has asserted

1 in this case. *See also* II Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.1, at
2 736 (5th ed. 2010) (“Once an agency adopts a set of procedures by rule, the agency
3 must comply with its own procedural rules even if the procedures adopted by the
4 agency exceed those independently required by due process.”).

5 Accordingly, we decline to review the Secretary’s order for possible error as
6 to an “unstated” procedural due process violation, and we remain unconvinced that
7 any determination on appeal by this Court that procedural due process was not
8 violated would overcome the Secretary’s determination that NENMRL failed to meet
9 regulatory notice requirements. Because NENMRL has not argued that the Secretary
10 erred in determining that the individual notice letters failed to comply with regulatory
11 notice requirements regarding the special waste permit modification, we do not
12 disturb that finding on appeal.

13 **3. The Secretary’s Findings Regarding NENMRL’s History of**
14 **Noncompliance with Existing Permit Conditions and Applicable**
15 **Regulations**

16 NENMRL also challenges the Secretary’s denial of the special waste permit
17 modification on the basis of the following conclusions regarding its compliance
18 history: that (1) it “ha[d] a history of failing to submit reports and failing to comply
19 with conditions previously imposed by the [NMED] Solid Waste Bureau,” as required
20 by 20.9.1.200(L)(16) NMAC; (2) it had a “history of violations issued by the

EXHIBIT C

the Roper property;

to the adjoining lot. There is no marked path to the posted notice nor any gate in the wire fence of

6. The entire lot is enclosed with a wire fence, with the exception of the eastern border

40 feet, one inch from the property's boundary with the highway;

5. There is no marked entrance to the property and the 1 x 17 inch notice is posted

Roper's concrete batch plant on NM 220 in October 2021.

taken by me personally and accurately depict the public notice posted at the proposed site of

4. The photographs attached to this affidavit and marked as Exhibits 1 and 2 were

proposed site of Roper Construction, Inc.'s concrete batch plant at least several times a week;

3. As a result of my residence in Alto, I travel on NM 220 frequently, passing the

with my wife, Barbara Severance, since 2018.

2. I am the owner of 136 Santiago Circle, Alto, New Mexico where I reside full-time

matters set forth below are true based on my personal knowledge;

1. I over the age of 18 years and am otherwise competent to make this affidavit. The

Mark Severance deposes and states as follows:

AFFIDAVIT OF MARK SEVERANCE

COUNTY OF SANTA FE)

) ss.

STATE OF NEW MEXICO)

ALTO CONCRETE BATCH PLANT

AN AIR QUALITY PERMIT NO. 9295,

OF ROPER CONSTRUCTION, INC. FOR

IN THE MATTER OF THE APPLICATION

AQB 21-57(P)

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

7. The area of the property leading to the notice is overgrown with grass, as shown in the attached photographs, and the terrain is downward sloping and uneven making access to the notice difficult.

8. The main text of the notice is printed in 10-point font and is not legible unless one walks directly up to the placard.

9. The main text of the notice is not legible from the highway, either while driving or while stationary.

FURTHER AFFIANT SAYETH NAUGHT.

Mark T. Severance
Mark Severance

11/09/2021
Date

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on this 9th day of November, 2021, by Mark Severance.

Regina Shuster
Notary Public

My Commission Expires: 12/30/23

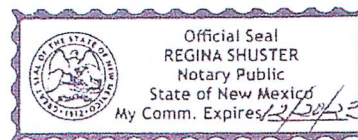




EXHIBIT 1



EXHIBIT 2