

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)

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”), through the undersigned counsel, hereby moves to dismiss the NSR Minor Source Application (the “Alto CBP Application”) submitted by Roper Construction, Inc. (“Roper”) and to dismiss the current proceedings. As grounds for this motion, Sonterra states:

1. Pursuant to 20.1.4.200.D NMAC, any party may file a motion requesting pre-hearing relief. The New Mexico Environment Department (“NMED”) Secretary may specify such pre-trial procedures in order to “expedite the efficient resolution of the action or to avoid obvious injustices.”

2. Although the Secretary has not made a “completeness determination” concerning the Alto CBP Application under 20.1.4.200.A(1) NMAC, the Secretary has made a “hearing determination” based on the significant public opposition to the Alto CBP Application.

3. Notwithstanding the issuance of a “hearing determination,” the Air Quality Bureau of the New Mexico Environment Department (“AQB”) must also determine whether the Alto CBP Application is “administratively complete when all information required by all applicable parts has been submitted.” *See* 20.2.72.201.B NMAC. In this regard, a determination by AQB that the Application is administratively complete would be improvidently entered where the matters on the

application form have not been answered accurately or have been omitted entirely. *See* 20.2.72.203.A NMAC.

4. In the current circumstances, the applicant is required, in question 11 of Section 1-D of the application, to provide the distance from the perimeter of the area of operations “to the nearest residence, school or occupied structure.” *See* Application, Section 1-D, question 11. The Alto CBP Application failed to provide any of this information and left the question entirely unanswered despite the fact that the property west of and adjacent to the proposed location is occupied by a plant nursery, a Bible school is located approximately one-half mile directly east of the proposed location on Highway 220, and an RV park is located approximately one-quarter mile directly west of the proposed location on Highway 220.

5. Furthermore, in question 7 of Section 1-D of the application, the applicant is required to “List all municipalities, Indian tribes and counties within a ten (10) mile radius (20.2.72.203.B.2 NMAC) of the property on which the facility is being proposed to be constructed and operated.” The Alto CBP Application failed to mention the Mescalero Apache Indian Reservation located approximately 4 miles southwest of the proposed location on Highway 220.

5. Additionally, under 20.2.72.203.D(1)(b) NMAC, the public notice for the permit must be provided by certified mail to property owners of record within one-half mile of the proposed facility location. The public notice must also be posted in at least four “publicly accessible and conspicuous places,” including on the “proposed or existing facility entrance.” *See* 20.2.72.203.D(4) NMAC.

6. As established in the affidavit attached as Exhibit “A,” at least two (2) property owners located within one-half mile of the proposed location have not received notice of the Application. Additionally, as established in the affidavit attached as Exhibit “B,” the public notice

does not appear to be posted at the proposed entrance to the facility, nor is it “conspicuous” because it does not alert any person traveling on Highway 220 about the proposed permit application. In fact, the notice is posted along the fence line in the middle of the property, over 40 feet from the highway, and the main text is of insufficient size (10-point font) to be legible from Highway 220.

7. As our appellate courts have repeatedly observed, the failure to comply with statutory or regulatory notice requirements “is a serious deficiency in the permitting process requiring stark consequences because it effectively precludes the right of interested parties to meaningfully participate in the hearing process and to ensure that their concerns are heard.” *See 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; *see also Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499. Those consequences include rendering invalid all subsequent administrative proceedings and requiring entirely new proceedings to be initiated after proper notice is provided. *See Martinez*, 2003-NMCA-043, ¶ 13.

8. Pursuant to 20.1.4.200.D(3), Sonterra has sought the concurrence of counsel for Roper, and concurrence has been denied.

9. This motion is supported by a memorandum of law filed concurrently with this motion.

WHEREFORE, Sonterra respectfully requests that the Secretary enter an order:

- A. Dismissing the Alto CBP Application and the current case; and
- B. Requiring Roper to initiate an entirely new proceeding, including the filing of a new application with notice provided as required by the applicable rules of procedure.

Respectfully submitted,

HINKLE SHANOR LLP

/s/ Thomas M. Hnasko _____

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*Attorneys for The Ranches of Sonterra
Homeowners 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.

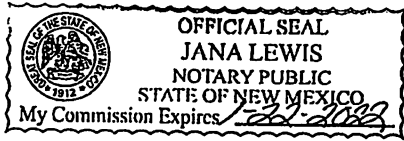
Kathleen A. Weems
KATHLEEN A. WEEMS

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

600 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 ASSR28A
0 Centrl 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

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)

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

AFFIDAVIT OF MARK SEVERANCE

Mark Severance deposes and states as follows:

1. I over the age of 18 years and am otherwise competent to make this affidavit. The matters set forth below are true based on my personal knowledge.
2. I am the owner of 136 Santiago Circle, Alto, New Mexico where I reside full-time with my wife, Barbara Severance, since 2018.
3. As a result of my residence in Alto, I travel on NM 220 frequently, passing the proposed site of Roper Construction, Inc.'s concrete batch plant at least several times a week.
4. The photographs attached to this affidavit and marked as Exhibits 1 and 2 were taken by me personally and accurately depict the public notice posted at the proposed site of Roper's concrete batch plant on NM 220 in October 2021.
5. There is no marked entrance to the property and the 11 x 17 inch notice is posted 40 feet, one inch from the property's boundary with the highway.
6. The entire lot is enclosed with a wire fence, with the exception of the eastern border to the adjoining lot. There is no marked path to the posted notice nor any gate in the wire fence of the Roper property.

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