

**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

No. AQB 21-57(P)

FINAL ORDER

This matter is before the Deputy Secretary of Environment¹ on Roper Construction, Inc.'s application for an air quality construction permit, the Notice of Public Hearing Determination filed in the Office of Public Facilitation on November 2, 2021, and the Notice of Hearing and Appointment of Hearing Officer filed on November 17, 2021.

Applicant seeks approval of Draft Permit No. 9295 pursuant to 20.2.72 NMAC for a concrete batch plant located less than one mile east of the Lincoln National Forest in Alto, New Mexico. The proposed industrial site is located in a narrow mountain valley 7200 feet above sea level and three miles east of the Class-1 White Mountain Wilderness.

The Environment Department's permit procedures provide in relevant part:

Burden of Persuasion: The Applicant ... has the burden of proof that a permit ... should be issued and not denied. This burden does not shift. The Division has the burden of proof for a challenged condition of a permit or license which the Department has proposed. Any person who contends that a permit condition is inadequate, improper, or invalid, or who proposes to include a permit condition shall have the burden of going forward to present an affirmative case on the challenged condition

20.1.4.400.A(1) NMAC.

¹ See Delegation of Authority filed February 8, 2022.

After a thorough review of the application, the New Mexico Air Quality Bureau added conditions to the Draft Permit and recommends its approval. Applicant did not challenge any of the conditions in the Draft Permit.

From the outset, the Air Quality Bureau received overwhelming opposition to the Application from residents who live within a two (2) mile radius from the proposed industrial site. New Mexico law does not provide a setback between a concrete batch plant and residences.

On February 9, 2022, the Office of Public Facilitation conducted a hybrid public hearing on the Draft Permit, using the virtual WebEx platform in conjunction with two physical meeting rooms in Alto, New Mexico. where members of the public appeared and testified under oath.²

Since 2005, it has been the express policy of all New Mexico cabinet level executive agencies that are involved in “decisions that may affect environmental quality and public health shall provide meaningful opportunities for involvement to all people regardless of race, color, ethnicity, religion, income, or education level.” Executive Order 2005-056, at p. 1. While technical evidence must be filed in advance of a public hearing, “any person may provide a general written statement concerning the Draft Permit ... at or before the hearing, ... and may provide a general oral statement or non-technical testimony concerning the Draft Permit ... at the hearing.” 20.1.4.300.B(2) NMAC. “Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this Part or by the Hearing Officer.” 20.1.4.400.B(2) NMAC. Finally, the rule also provides that “the Hearing Officer shall admit all

² See Scheduling Order filed December 2, 2021.

relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value.” 20.1.4.400.B(1) NMAC.

At the public hearing, many residents of Alto, New Mexico credibly testified under oath to relevant issues that had not been addressed by the parties’ cases-in-chief. No party timely objected to the admission of this general comment on the grounds that it was technical in nature. No party cross-examined any member of the public and no party recalled their technical witnesses to rebut any of the evidence offered. The Office of Public Facilitation’s public comment portal received hundreds of written comments which were considered by the Hearing Officer after the evidentiary record closed. In sum, written and verbal general comment that the Hearing Officer deemed credible and relevant was given evidentiary weight to resolve matters in controversy by a preponderance of evidence. 20.1.4.400.A(3) NMAC.

Under New Mexico caselaw “‘Burden of Proof’ is a term which describes two different concepts, (1) the burden of persuasion, which under the traditional view never shifts from one party to the other, at any stage of the proceedings, and (2) the burden of going forward with the evidence, which may shift back and forth between the parties as the trial progresses.” *Duke City Lumber Co. v. N.M. Env’tl. Improvement Bd.*, 1980-NMCA-160, ¶ 6, 95 N.M. 401, 622 P.2d 709. Here, Applicant failed to meet its burden of persuasion-that the permit should be issued and not be denied.

Therefore, having considered the Hearing Record as defined by 20.1.4.7 NMAC, including all post-hearing submittals and the Hearing

Officer's Report; and being otherwise fully advised regarding the Draft Permit,

THE DEPUTY SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IT IS THEREFORE ORDERED:

The Application for an air quality construction permit is hereby denied, and the corresponding permit shall not be issued by the Air Quality Bureau.

Stephanie
Stringer

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Stringer
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Stephanie Stringer
Deputy Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Pursuant to Section 74-2-7.H, NMSA 1978, any person who participated in this permitting action and who is adversely affected by the action may file a petition for hearing by the Environmental Improvement Board, c/o Office of Public Facilitation, Pamela Jones, 1190 St. Francis Drive, Santa Fe, New Mexico 87502. The petition shall be made in writing to the Board within thirty days from the date notice is given of this action.

Certificate of Service

I hereby certify that on June 22, 2022, a copy of the attached Final Order was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

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