

TWELFTH JUDICIAL DISTRICT COURT
COUNTY OF LINCOLN
STATE OF NEW MEXICO

DALE A. ANTILLA, et al.,

Plaintiffs,

v.

No. D-1226-CV-2021-00241

ROPER CONSTRUCTION, INC.,
and RYAN ROPER, individually,

Defendants,

and

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,

Plaintiffs/Counter-Defendants,

v.

No. D-1226-CV-2021-00261
(Consolidated into above case)

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,

Defendants/Counter-Plaintiffs.

**PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR A RESTRAINING ORDER
PENDING RESOLUTION OF MOTION FOR PRELIMINARY INJUNCTION**

COME NOW Plaintiffs/Counter-Defendants, James A. Miller, Sarah L., and Joshua C. Botkin ("Plaintiffs"), by and through their attorneys of record, pursuant to Rule 1-066(B) NMRA, and hereby move for a Temporary Restraining Order Pending resolution of their January 13, 2022 Motion for Preliminary Injunction.

SUMMARY OF ALLEGATIONS

1. Plaintiffs seek a restraining order preventing Defendants/Counter-Plaintiffs ("Roper") from engaging in further construction activities for the challenged concrete batch plant

located at NM 220 Tracts 4A-1 and 4B (the “Property”), in violation of the deed restrictions currently in effect.

2. On January 13, 2022, Plaintiffs filed a Motion for Preliminary Injunction and Memorandum in Support seeking to enjoin Roper from “constructing and operating, or taking any action seeking to construct or operate, the proposed concrete batch plant on Tracts 4A-1 and 4B and that such injunction remain effective until the merits are determined and a permanent injunction issued.”

3. Roper filed his Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, asserting that no irreparable harm could occur because “[n]o construction has begun or can it begin until Roper obtains the NMED Permit in addition to the necessary local building and construction permits.” Roper further represented to the Court that he would not take such action pending the Court’s resolution of the request for injunctive relief based on violations of deed restrictions preventing industrial activity and excessive noise.

4. On May 10, 17, 2022 and June 8, 10, 2022, this Court held a four-day hearing on Plaintiffs’ Motion for Preliminary Injunction, and accepted statements and expert testimony from the parties concerning noise impacts from the proposed batch plant

5. To date, this Court has not ruled on the Motion for Preliminary Injunction.

6. On June 22, 2022, the New Mexico Environmental Department (NMED) denied Roper’s application for an Air Quality Construction Permit for the proposed batch plant.

7. On February 28, 2023, the Environmental Improvement Board (EIB) indicated by oral ruling that it would reverse the NMED’s decision. The EIB’s actions are beyond arbitrary

and contrary to law; they are capricious and without legal or factual basis.¹ As a result, Plaintiffs intend to appeal the February 28, 2023 reversal.

8. To date, no air quality permit has been issued to Roper and Alto CEP intends to request that the Court of Appeals stay of the EIB's irregular action until resolution of the appeal.

9. On April 12, 2023, with the Motion for Preliminary Injunction still pending, Roper began construction activities on his property, including excavation for the concrete batch plant entrances for haul roads. *See* Affidavit of Mark Severance, attached as Exhibit A.

STANDARD FOR REHEARING ORDER

A temporary restraining order is an interim measure intended to preserve the status quo and prevent irreparable harm. *Grisham v. Romero*, 2021-NMSC-009, ¶ 19, 483 P.3d 545. The “status quo” has been defined as, “the last peaceable uncontested status between the parties.” *Id.* ¶ 21. In this case, preservation of the status quo is particularly important, given that the Court and parties have committed substantial resources to the presentation on the motion for a preliminary injunction. It is, at best, an affront to the processes of the Court for Roper to proceed while the motion for preliminary injunction is pending.

Moreover, plaintiffs will suffer irreparable injury unless the restraining order is granted; the threatened injury outweighs any damage the injunction might cause the defendant; the issuance of the injunction will not be adverse to the public's interest; and plaintiff has demonstrated there is a substantial likelihood of success on the merits at the preliminary injunction hearing. *LaBalbo*

¹ As an illustration, the most vocal member of the EIB advocating for Roper did not know that Alto CEP was the prevailing party at the NMED hearing and that Roper had the burden of proof at the EIB appeal. The Vice Chair did not bother to attend the hearing at all, but somehow found it appropriate to vote in favor of reversing the NMED's decision. The attached excerpts highlight the confusion exhibited by the EIB and the farcical irregularities of the proceedings. *See* Exhibit B.

v. Hymes, 1993-NMCA-010, ¶ 11, 115 N.M. 314 (applying the four factors to review the grant of a preliminary injunction); *see Grisham v. Romero*, 2021-NMSC-009, ¶ 20, 483 P.3d 545 (applying the same four factors to review the grant of a TRO). Most importantly, it is now apparent that Roper will not honor his previous representations to the Court, and a restraining order is necessary to protect the integrity of the Court’s deliberative process and assure that the Court’s subsequent order on the motion for preliminary injunction is meaningful.

ARGUMENT

I. Roper’s Actions Alter the Status Quo, and a TRO is Necessary to Preserve the Status Quo.

Roper’s intentional disregard for the pending Court action demonstrates that a restraining order is necessary to preserve the status quo. Throughout the underlying proceedings, Roper indicated to this Court that construction would not begin until he obtained the necessary permits and this matter has been resolved. Nonetheless, Roper is altering the status quo by beginning construction of the proposed concrete batch plant, including substantial excavation activities for the haul roads. Plaintiffs are entitled to the preservation of the status quo pending an outcome of the underlying Motion to ensure a full and fair opportunity to obtain the equitable relief sought. *RMCI, Gen. Contractors, Inc. v. Albuquerque Bernalillo Cnty. Water Util. Auth.*, Np. 31,058, 2014 WL 2451202 (N.M. Ct. App. Apr. 17, 2014) (“the purpose of an injunction is to protect the appellee against loss while maintaining the status quo.”) (internal quotation and citation omitted).

Additionally, a restraining order would prevent waste. *See Mannick v. Wakeland*, 2005-NMCA-098, ¶ 15, 138 N.M. 113 (noting that waste is “any concurrent non-possessory holders of an interest in land are enabled to prevent or retain harm to land committed by persons in possession.”); *see also Chosar Corp. v. Owens*, 235 Va. 660, 370 S.E.2d 305 (1988) (noting that equity will afford relief by injunction against a threatened waste). If Roper is not restrained from

this construction, and this Court grants the underlying Motion, then Roper will be compelled to reverse course and dismantle any improvements made up to that point. Accordingly, Roper should be restrained from further construction until this Court rules on Plaintiffs' Motion for Preliminary Injunction.

II. Plaintiffs are Entitled to the Restraining Order.

A. An Injunction is Necessary to Avoid Irreparable Harm.

Injuries are deemed irreparable if there is no adequate remedy at law; for instance, an injunction is warranted when the movant cannot be adequately compensated by damages, or damages cannot be measured within a certain pecuniary standard. New Mexico law recognizes that real property interests are unique as a matter of law, rendering damages an inadequate remedy. *See Cafeteria Operators, LP v. Coronado-Santa Fe Associates, LP, et al.*, 1998-NMCA-005, ¶ 19, 124 N.M. 440. As such, impairment of Plaintiffs' use and enjoyment of their property constitutes irreparable harm, and Roper's actions demonstrate the immediacy of harm. Additionally, Roper argued that no irreparable harm would occur because construction had not yet begun. That situation has now changed, Roper's statements are no longer correct, and irreparable harm is imminent.

B. The Balance of Equities Clearly Favors Plaintiffs, and the Requested Injunction is Not Adverse to the Public Interest.

The public's interest in enforcing Plaintiffs' property rights far outweighs Roper's unlawful activities in derogation of those rights, and the public interest favors cessation of all construction activities while the motion for preliminary injunction is pending before the Court. New Mexico courts have long recognized that property owners have a right to establish standards for their property and to rely on those standards. *See Aragon v. Brown*, 2003-NMCA-126, ¶ 12, 134 N.M. 459. New Mexico courts will enforce restrictive covenants when the language clearly indicates an

intent to restrict the use of land. *Appel v. Presley Companies*, 1991-NMSC-026, ¶ 4, 111 N.M. 464. Moreover, the public interest is served by enforcement of restrictive covenants because citizens have a right to rely on covenants when purchasing real property. The subject deed restrictions are clear and unambiguous. Roper's current use of the Property violates the plain language of the deed restrictions, contrary to Plaintiffs' rights conferred by those restrictions. Thus, the equities weigh in favor of Plaintiffs and in favor of protecting this Court's deliberative process while considering the motion for preliminary injunction.

C. There is a Substantial Likelihood of Success on the Merits.

New Mexico law favors Plaintiffs because there is a substantial likelihood that Plaintiffs will prevail on their claims seeking to enforce the deed restrictions. The language in the deed restrictions established that it runs with the land and binds all subsequent grantees, including Roper. *See Lexpro Corporation v. Snyder Enterprises, Inc.*, 1983-NMSC-073, ¶ 12, 100 N.M. 389. Moreover, the proposed concrete batch plant will create disruptive noise, which is precisely the type of activity the deed restriction seeks to prevent. *See Padilla v. Lawrence*, 1984-NMCA-064, ¶ 26, 101 N.M. 556. Plaintiff has established by expert assessments that the noise levels generated from Roper's proposed operations will exceed the U.S. EPA's recommended levels to preserve public health and will cause a more than doubling of the perceived levels from ambient background conditions. Moreover, as plaintiffs' pending motion to show cause establishes, Roper has now changed the configuration of the plant again, this time to an iteration that was never subjected to the analysis of a noise assessment, in order to achieve his objective of obtaining an air quality permit that is at odds with the proposal currently before the Court. Because the binding and unambiguous deed restriction precludes Roper's proposed use, Plaintiffs will likely succeed on the merits.

CONCLUSION

For these reasons, Plaintiffs move this Court to order Roper to cease any construction, including excavation activities, of the proposed concrete batch plant pending resolution of Plaintiffs’ Motion for Preliminary Injunction.

Respectfully submitted,

HINKLE SHANOR LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2023, I caused a copy of the foregoing to be electronically filed and served via the Court’s Odyssey File & Service System to all counsel of record as listed below:

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/s/ Thomas M. Hnasko

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AFFIDAVIT OF MARK SEVERANCE

Mark Severance deposes and states as follows:

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

The matters set for 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 – 7 were taken by me personally. The Exhibits 1-6 accurately depict the construction activity occurring at the proposed site of Roper's concrete batch plant on the following dates and times:

Exhibit 1: Tuesday, April 11, 2023 at approximately 10:28 a.m. MDT

Exhibit 2: Tuesday, April 11, 2023 at approximately 10:29 a.m. MDT

Exhibit 3: Thursday, April 13, 2023 at approximately 9:27 a.m. MDT

Exhibit 4: Thursday, April 13, 2023 at approximately 9:29 a.m. MDT

Exhibit 5: Friday, April 14, 2023 at approximately 12:55 p.m. MDT

Exhibit 6: Friday, April 14, 2023 at approximately 12:57 p.m. MDT

The photograph of Exhibit 7 was taken by me in October, 2021 and accurately depicts the condition of the proposed site of Roper's concrete batch plant prior to the start of construction on Tuesday, April 11, 2023.

FURTHER AFFIANT SAYETH NAUGHT.



Mark Severance

4/17/2023

Date

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on the 17 day of April, 2023, by Mark Severance.



Notary Public

My Commission Expires: May 5, 2024

STATE OF NEW MEXICO
NOTARY PUBLIC
ERICKA RAMOS
Commission No. 1103733
Expires: May 5, 2026

EXHIBIT 1

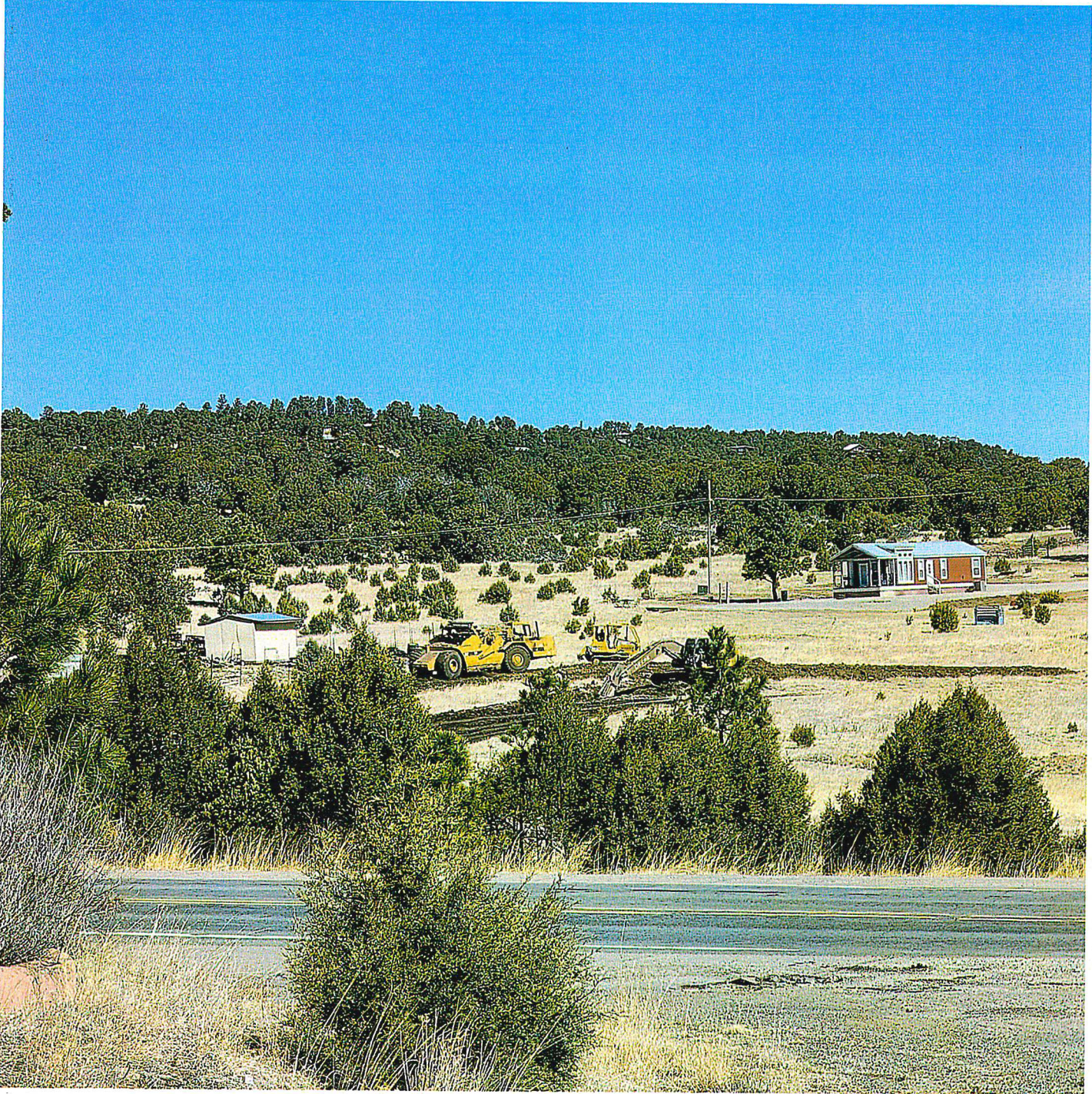


EXHIBIT 2

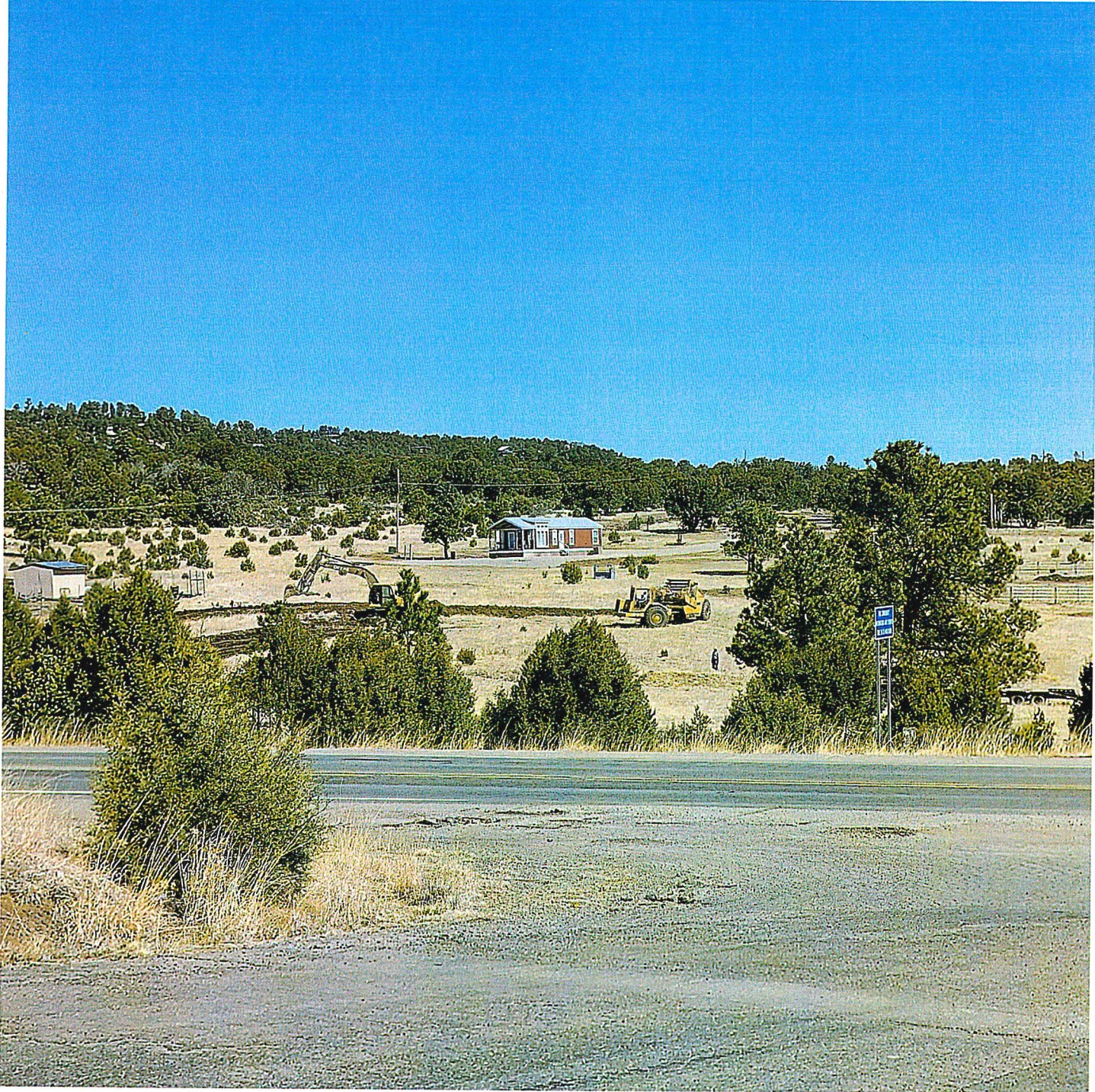


EXHIBIT 3

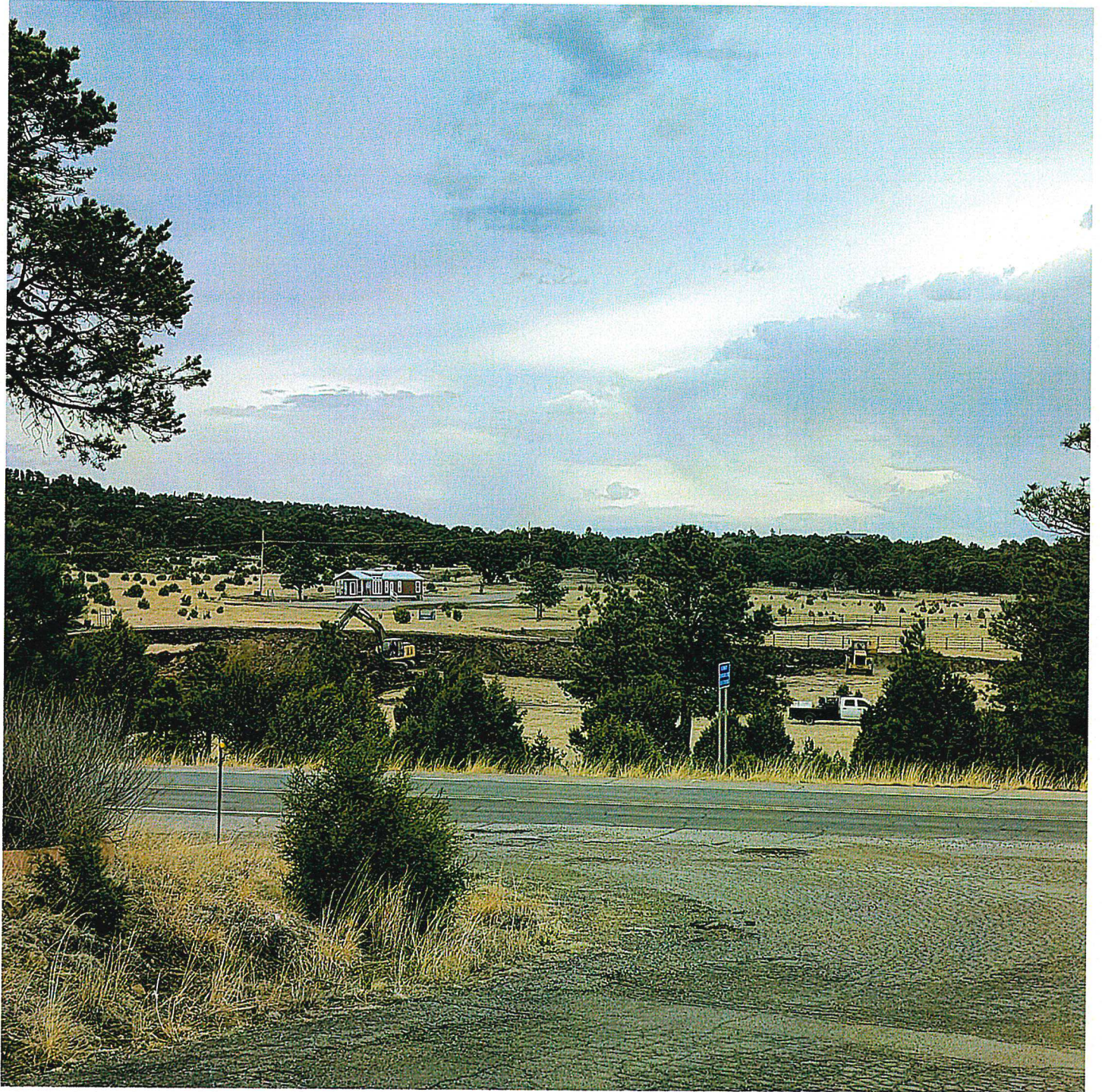


EXHIBIT 4



EXHIBIT 5



EXHIBIT 6

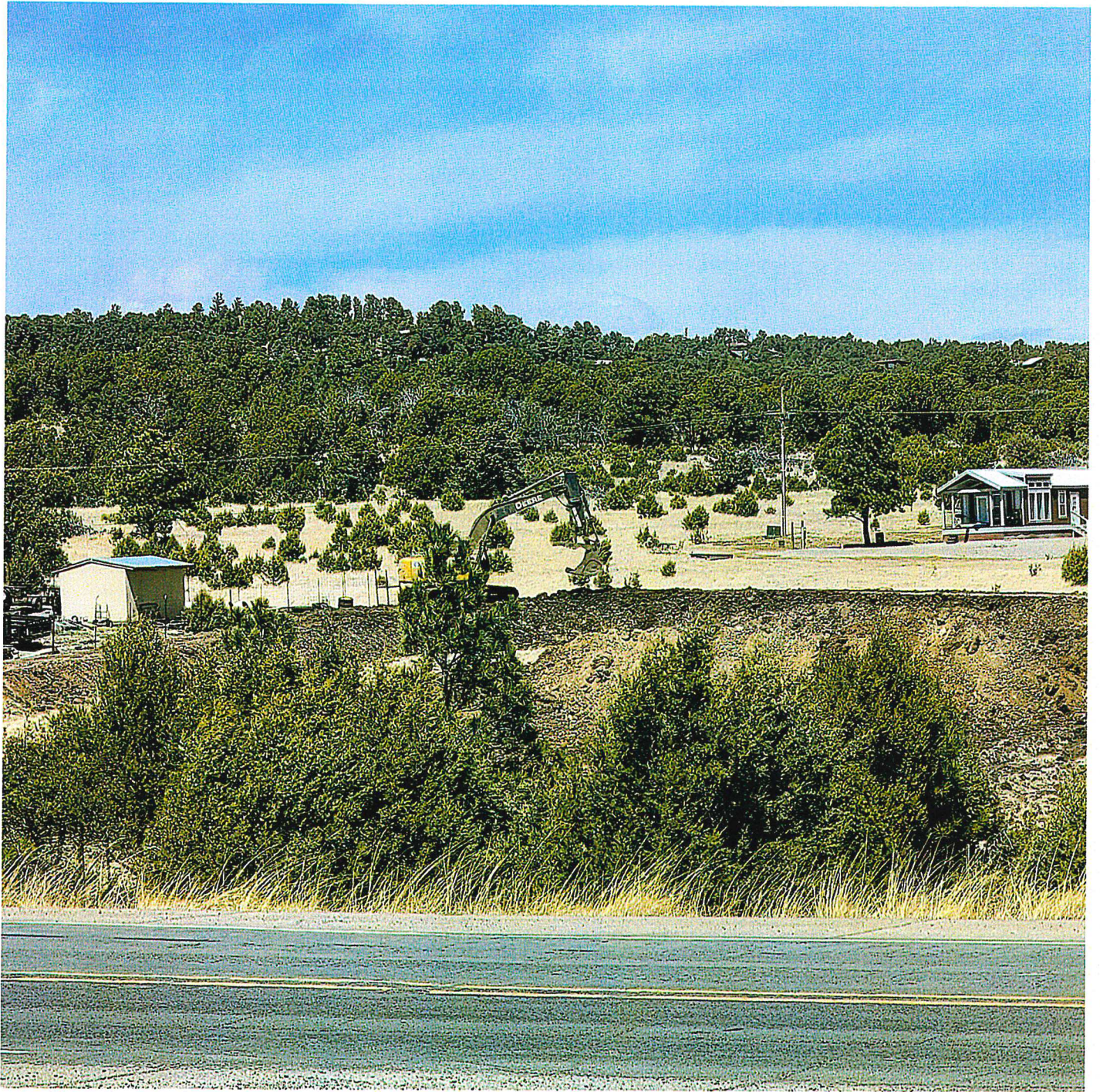


EXHIBIT 7



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STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO.
9295, ROPER CONSTRUCTION INC.'S
ALTO CONCRETE BATCH PLANT,

No. EIB 22-34

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 24th day of
March, 2023, the above-entitled matter came on for
deliberations before the New Mexico Environmental
Improvement Board, taken via WebEx Video Conference,
commencing at 9:00 a.m.

REPORTED BY: THERESA E. DUBOIS, RPR, CCR #29
ALBUQUERQUE COURT REPORTING SERVICE, LLC
3150 Carlisle Boulevard, Northeast
Suite 104
Albuquerque, New Mexico 87110



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1 area.

2 I do think we have to fall back on the law, the

3 rules and the historical practice of the Department.

4 There may be challenges to the adequacy of the rules, the

5 law, the Department's procedures, but I don't think --

6 unlike the Hearing Officer suggested, we may want to

7 address some policy issues, and I don't think that's

8 within our purview. I think we have to fall back on

9 what's required, what's been done in the past, and is this

10 consistent.

11 So, yeah, I think it's -- I'm not seeing that

12 what the Department did and accepted from the applicant is

13 out of line with the way they've handled other situations

14 like this, whether it be good or bad, that appears to be

15 what the regulatory structure is. And I think that's --

16 that's the boundaries we have to deal within.

17 CHAIRPERSON SUINA: Thank you for that, Member

18 Honker.

19 Yes, Member Garcia.

20 BOARD MEMBER GARCIA: Thank you, Madam Chair.

21 Yeah, I understand that this is a tough one because the

22 opposition, CEP, did spend a lot of time and I think their

23 witness Dr. Villarael has a lot of experience with air

24 modeling as well; probably not as much as the Department's

25 air modeler, but his testimony was compelling. So I

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1 understand they did raise some doubt and it's definitely

2 worth our while to look at it very carefully, but I do

3 realize also that CEP has a big burden to overcome.

4 Their burden is to prove, not just raise doubt,

5 but to prove that the application would not meet the

6 requirements of the Air Quality Bureau or would exceed the

7 air quality standards. They have to prove that. And so,

8 the question in my mind is, did they prove it?

9 And so, during the testimony when Dr. Ituarte

10 went through all of the information that he'd gathered, I

11 was very interested in hearing what did the Department

12 think of that. You know, is it that they brought up

13 something that the Department needs to relook at? And so,

14 when the modeler for the Department, Mr. Peters, was asked

15 what do you think of his modeling, I recall that

16 Mr. Peters -- because I was listening very carefully. I

17 recall that Mr. Peters said, well, gee, if I knew all of

18 the inputs and everything that was, you know, as you said,

19 input into -- into modeling is everything. That -- that

20 tells you what you're going to get out.

21 So if they had done an adequate job of providing

22 all of the calculations and all of the information, then

23 perhaps they could have changed the Department's mind

24 or -- but Mr. Peters didn't have that information to

25 evaluate. So I think that what that tells me is perhaps

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1 they did not meet their burden to prove.

2 They did -- they did cast doubt, but they didn't

3 meet the burden to prove that the application would not

4 meet standards. And so, the Department reviewed the

5 application, decided that it met requirements, with the

6 addition of conditions that were added. With those

7 conditions that the permittee would not exceed air quality

8 standards for the NAAQS and would meet all of the

9 Department requirements.

10 And they have done this a few times at other

11 concrete batch plants or asphalt batch plants that they've

12 permitted, so they've done this a few times, I think. So

13 that's what I'm looking at. Thank you.

14 CHAIRPERSON SUINA: Thank you, Member Garcia.

15 Any other comments from Board members?

16 I guess I had a question on burden. I think you

17 mentioned it. So is it Alto CEP's burden to prove that it

18 meets, or is it the petitioner's burden to prove that they

19 meet it? And I don't know if that's a nuance, but --

20 because isn't it the petitioner that needs to meet a

21 burden? Or are you talking about the burden of proof as

22 it related to the application process? I don't know if

23 we're talking about two different burdens.

24 BOARD MEMBER GARCIA: I think that's a very, very

25 good point you're bringing up, Madam Chair, and perhaps

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1 our counsel can weigh in on that. My understanding is the

2 petitioner, who is CEP, because they're the ones that are

3 appealing the denial, so...

4 CHAIRPERSON SUINA: So, would it be Roper,

5 though? I thought Roper was the petitioner. Am I wrong?

6 BOARD MEMBER GARCIA: I'm going to stop and let

7 our counsel -- that sounds like a legal question.

8 CHAIRPERSON SUINA: Yes, legal Counsel Rysted.

9 MR. RYSTED: Well, I don't know if I have a good

10 answer, but I can work through those issues. There's a

11 pretty complicated procedural history dealing with the

12 burden of proof and whether the correct one has been used

13 in the past. From my understanding, is that the -- in the

14 original hearing before the Department, there was a

15 Hearing Officer, which may have -- Gregory Chakalian, who

16 may or may not have used the right legal standard for

17 that. That may have been an error.

18 That is -- that's the Department's position. And

19 I believe in that respect, the Department is aligned with

20 the petitioner, Roper, on this appeal. So, as I say, it's

21 a very complicated and maybe unconventional situation, in

22 terms of the previous decision and -- hearing and decision

23 for the Department.

24 And I know Mr. Vigil's on the call, and if he

25 wants to address that, he may have been involved in that,

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1 break, but I know that Vice-Chair Trujillo-Davis, you had
 2 your hand up.
 3 VICE CHAIR TRUJILLO-DAVIS: Yes. I was hoping
 4 you'd give us ten minutes.
 5 CHAIRPERSON SUINA: Okay. We'll take ten minutes
 6 then. So in ten minutes we'll be back. And thank you,
 7 Mr. Rysted, for that.
 8 (Recess taken from 10:19 a.m. to 10:31 a.m.)
 9 CHAIRPERSON SUINA: I think we're back. All
 10 right. Thank you all for taking a minute. And with that,
 11 and we ended with Mr. Rysted's reading of the discussion
 12 item that we were having a few minutes ago regarding the
 13 burden of persuasion, I think it was referred to.
 14 MR. RYSTED: That's correct, Madam Chair. That's
 15 under the New Mexico Administrative Code for adjudicate --
 16 sorry -- adjudicatory procedures, given to this Board the
 17 authority -- the procedures to follow under the authority
 18 given to this Board for this type of adjudicatory
 19 procedure.
 20 CHAIRPERSON SUINA: Thank you so much.
 21 Appreciate that.
 22 Okay. So we're back and I think that burden of
 23 persuasion under 20.1.2.302, by -- that was provided,
 24 again going into our burden of persuasion and burden of
 25 proof discussion prior to the break.

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1 Member or Vice-Chair Trujillo-Davis, do you have
 2 any comments?
 3 VICE-CHAIR TRUJILLO-DAVIS: Well, I think just to
 4 kind of getting us back on track here, I believe Member
 5 Garcia's -- sorry. Member Garcia's point was that where
 6 the -- where the burden of proof lied in the first
 7 decision, is that correct, Member Garcia? That's what you
 8 were -- what you were asking?
 9 BOARD MEMBER GARCIA: Yes. Thank you,
 10 Vice-Chair. Yes, I think -- let me just correct myself, I
 11 did misspeak earlier. I said the petitioner was CEP. I
 12 was thinking Roper, and CEP came out of my mouth. It is
 13 Roper, and I understand that, so I just want to correct
 14 the record.
 15 But I see by this burden of persuasion in the
 16 rule, that whoever is trying to appeal to a body, they
 17 have the burden to show why their position is correct, I
 18 guess, to paraphrase and to take it out of legalese and
 19 put it into everyday language. So, originally, Roper had
 20 the burden to prove that their application was
 21 appropriate. They had that burden, and the Department
 22 decides whether or not they met it.
 23 The Department -- or the Deputy Secretary decided
 24 they didn't, so then the petitioner becomes Roper, who
 25 then has the burden -- wait a minute. I'm getting myself

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1 mixed up.
 2 But CEP -- to me, CEP still has the burden to
 3 prove that -- that their position -- that there's
 4 something wrong with the application and won't meet the
 5 NAAQS. I think somehow, to me, they still have to prove
 6 that, but I may be wrong on that point. So the counsel
 7 will correct me now. Thank you.
 8 VICE CHAIR TRUJILLO-DAVIS: Thank you.
 9 MR. RYSTED: Thank you, Madam Chair. No, I
 10 believe that's a correct statement of that rule or code,
 11 provision that we're discussing the burden of persuasion.
 12 Any person can be an organization, like Alto CEP. So they
 13 are the ones opposed to the relief sought in the petition,
 14 which would be granting the permit. They -- and so it's
 15 shifting the burden to them. They have the burden of
 16 going forward with any adverse evidence, and showing why
 17 the relief should not be granted.
 18 So that was the testimony of the modeling that
 19 you-all were discussing earlier. Did they meet that
 20 burden of persuasion? That's what you have to decide, I
 21 believe.
 22 CHAIRPERSON SUINA: Vice-Chair.
 23 Oh, Member Honker, sorry.
 24 BOARD MEMBER HONKER. Well, to phrase it another
 25 way, the way I'm seeing this is there was a decision made

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1 by the Deputy Secretary of NMED based on the hearing --
 2 the first Hearing Officer's report and recommendation,
 3 that the applicant had not met their burden of proof.
 4 The applicant is now saying, no, that decision
 5 was wrong and we did meet our burden of proof. And so
 6 we're basically having to relook at that same decision
 7 that was made in the initial permitting process, and make
 8 our own determination on those arguments. That's the way
 9 I'm seeing this.
 10 CHAIRPERSON SUINA: Thank you, Member Honker.
 11 Vice-Chair Trujillo-Davis.
 12 VICE-CHAIR TRUJILLO-DAVIS: If I understand
 13 correctly, the Environment Department submitted comments
 14 on the Hearing Officer's report, and in that document, if
 15 I'm reading this correctly, that they are asking us to
 16 reverse the Department's denial of the draft permit
 17 because it was wrongly decided and is contrary to law.
 18 And is everybody else kind of caught up on that
 19 as well? That that is -- if I'm understanding that
 20 correctly, they are also asking us to reverse that
 21 decision.
 22 CHAIRPERSON SUINA: Yes. So I just want to,
 23 like, maybe add to that point for clarity. So they -- I
 24 mean, the Deputy Secretary, I guess in some sense was --
 25 is the Department. Right? They're a Department

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1 representative, and they made the decision, so -- and so,
 2 it's -- this is a little bit more complicated because now
 3 we have their own Department saying they want to --
 4 through this process that we're going through, this
 5 hearing, to undo the decision of their own Department.
 6 Vice-Chair.
 7 VICE-CHAIR TRUJILLO-DAVIS: So, then, to keep
 8 going, then the burden of proof falls on to Alto CEP to
 9 prove that those -- that that modeling was not correct.
 10 Is that good? We're good?
 11 CHAIRPERSON SUINA: Well, that's where I'm still
 12 a little bit confused, because Alto CEP is not the
 13 petitioner.
 14 MR. HNASKO: Madam Chair, this is Tom Hnasko
 15 again. May I comment on that issue?
 16 CHAIRPERSON SUINA: Okay. Just please, again, be
 17 careful. I don't want to have a back and forth here.
 18 MR. HNASKO: Absolutely. I understand, but I
 19 think there's some fundamental confusion on the difference
 20 between the burden of proof and the burden of persuasion.
 21 They're two different things.
 22 The burden of proof is to establish that all air
 23 quality standards have been met. If it -- and only if
 24 this Board believes that Roper has made that showing, then
 25 Alto has to come back with the burden of persuasion to

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1 show why the burden of proof was not met. Alto does not
 2 have to come back and show definitively that the modeling
 3 is incorrect because of incorrect AP-42 haul road emission
 4 factors or otherwise. But Alto can point out the burden
 5 of persuasion, why the burden of proof has been met,
 6 because of, A, because the Board has not yet discussed,
 7 with the artificial --
 8 MR. VIGIL: I object. I apologize. I object.
 9 MR. HNASKO: I'm not finished. I've got to
 10 finish.
 11 (Inaudible due to two speaking at the same
 12 time.).
 13 MR. VIGIL: Mr. Hnasko is not counsel for the
 14 Board.
 15 CHAIRPERSON SUINA: Mr. Vigil, thank you for
 16 that. And again, Mr. Hnasko, I know -- again, let's make
 17 a reference that our legal counsel can refer to. I think
 18 we have all of the references. Is that correct?
 19 MR. HNASKO: I think that the legal counsel has
 20 transposed the idea of burden of proof and burden of
 21 persuasion. The burden of persuasion is not the burden of
 22 proof. The burden of persuasion is to come forward with
 23 facts and that the burden of proof has not been met.
 24 And the Hearing officer's report, there's
 25 specific discussion on the use of improper distances for

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1 haul roads, improper AP-42 emission factors and so forth.
 2 So that is sufficient for the burden of persuasion. It's
 3 not our burden of proof to go forward and show why the
 4 permit should not be -- why the air quality permit
 5 standards have not been met. It's our burden of
 6 persuasion to show --
 7 CHAIRPERSON SUINA: Thank you.
 8 MR. HNASKO: -- that the burden of proof has not
 9 been met.
 10 CHAIRPERSON SUINA: Thank you, Mr. Hnasko.
 11 MR. RYSTED: Madam Chair?
 12 CHAIRPERSON SUINA: Yes.
 13 MR. RYSTED: If I could address that? I'm going
 14 to object that that is a mischaracterization. The
 15 comments that I made, as your counsel, I simply read into
 16 the record the NMAC -- the administrative code rule
 17 20.1.2.302, burden of persuasion, and then some of the
 18 Board members discussed that rule.
 19 And, you know, again, I want to redirect your
 20 attention, as a Board, to the hearing that was held in
 21 October. That's when Mr. Hnasko had his opportunity to
 22 make his legal arguments and present Alto's position -- or
 23 Alto CEP's position. This is not the appropriate forum at
 24 this time for him to be interjecting his legal arguments,
 25 as Mr. Vigil pointed out. He had that opportunity. There

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1 was a lengthy hearing held in October, and we have all of
 2 that evidence. You have all of that before you. You have
 3 the Hearing Officer's report.
 4 The Board simply needs to determine whether those
 5 standards were met at that hearing. And it's simply a
 6 review of that hearing at this point.
 7 CHAIRPERSON SUINA: Thank you, Mr. Rysted.
 8 MS. DALRYMPLE: I need to lodge an objection,
 9 Madam Chairman. I'm sorry. I'm here on behalf of Roper
 10 Construction because Mr. Lou Rose is ill. He told me to
 11 just attend and watch, that there was no argument of
 12 counsel permitted at this meeting, so I'm a little
 13 surprised that I'm in a position of having to lodge an
 14 objection, just in case we end up on appeal, that counsel
 15 for Alto CEP has lodged argument and attempting to
 16 introduce evidence in what is the Board's review of
 17 procedure. Again, I apologize. I feel like I had to put
 18 that on the record in case there's an appeal. Thank you.
 19 CHAIRPERSON SUINA: Thank you. Okay. Our court
 20 reporter -- yes, Ms. DuBois.
 21 COURT REPORTER: I don't know who that was that
 22 just spoke. Can you help me out with that, please?
 23 CHAIRPERSON SUINA: Yes, ma'am, can you identify
 24 yourself for the record? I think you're legal counsel.
 25 MS. DALRYMPLE: Shelly Dalrymple, with Montgomery

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1 & Andrews. I do not represent Mr. Roper in this
 2 proceeding. I represent him in the other litigation
 3 brought against him, but I'm here on behalf of Lou Rose,
 4 who was too sick to appear and who is counsel of record in
 5 this matter. Thank you.

6 CHAIRPERSON SUINA: Thank you. Okay. Yes, all
 7 right. Member Honker.

8 BOARD MEMBER HONKER: Yeah, I would just suggest
 9 that since we're deliberating that this discussion be
 10 restricted to the Board members and our counsel, unless we
 11 specifically ask somebody else a question that's -- that's
 12 not in our group, but I think it's getting a little bit
 13 beyond the bounds of what we're supposed to be doing here.

14 CHAIRPERSON SUINA: Absolutely. Thank you,
 15 Member Honker, for that clarity. And so, yeah, thank you
 16 again, for legal counsel for being here on behalf of your
 17 clients. And I think at this point, I appreciate Member
 18 Honker's points of clarity here. And I see head shaking
 19 by our legal counsel, Mr. Rysted. So that's, as we go
 20 forward, I think that's what we'll be doing, is just
 21 maintaining our Board members and our legal counsel's
 22 discussion on the record here.

23 And again, I apologize. We should have just
 24 maintained the points of reference for our legal counsel.
 25 And I appreciate those call-outs for points of reference

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1 and those statutes and any other documentation. But going
 2 forward, we'll maintain that direction.

3 So, with that, members, do you have any other
 4 comments regarding this? Is there any -- still any more
 5 confusion on that? I mean, I think why we're here
 6 today -- again, just point of clarity, is, yes, we have
 7 the Roper appeal. And like I was sharing earlier, it did
 8 get more complicated because NMED issued the denial
 9 initially in this process -- in this administrative
 10 process, in the overall.

11 And then, we had, now, the Department and
 12 Mr. Roper on deciding, and then Alto CEP, but it's Roper's
 13 petition, to start off our hearing. Am I correct, legal
 14 counsel?

15 MR. RYSTED: That's correct, Madam Chair.

16 CHAIRPERSON SUINA: Okay. Does that help provide
 17 clarity to our Board, where we're at and how we got here?
 18 And I know you have like a follow-on there, Vice-Chair
 19 Trujillo-Davis. Does that help clarify? So we're here
 20 because Roper is the petitioner. And for where we are
 21 right now, NMED is supporting that petition, but Roper is
 22 the petitioner.

23 VICE CHAIR TRUJILLO-DAVIS: Yes, I think we're
 24 good. And I apologize, there was a lot of back and forth
 25 there, and I lost where I was going with that, but thank

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1 you for bringing us back around.

2 CHAIRPERSON SUINA: Okay. All right. Wonderful.
 3 Thank you. So, with that -- and I apologize, I'm not in
 4 person there in the room. I think it's -- you know, some
 5 of these issues then become harder virtually, to navigate.
 6 I appreciate everybody's patience in that.

7 I think if we could continue our deliberation and
 8 discussion. So, with that, does that provide any more
 9 clarity as to the points of this issue regarding the air
 10 quality? Yes, Member Garcia.

11 BOARD MEMBER GARCIA: Thank you, Madam Chair.
 12 Just to make sure we're all on the same page, so CEP has
 13 the burden of persuasion -- and correct me if I'm wrong
 14 please, counsel. CEP has the burden of persuasion to
 15 persuade us that the permit should not be issued, and that
 16 we should sustain the Department's denial; is that
 17 correct, counsel?

18 MR. RYSTED: That's correct. That was their
 19 burden at the hearing in October, was to show any adverse
 20 evidence why the permit should not be granted.

21 BOARD MEMBER GARCIA: Okay. Great. Thank you.
 22 So if CEP has the burden of persuasion to
 23 persuade us that there's something wrong with the issuance
 24 of the permit, then I guess going back to what I said
 25 earlier, I would maintain that while they did cast a lot

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1 of doubt, they didn't, to me, satisfy that burden of
 2 persuasion to convince me that the Department's modeler
 3 made a mistake in the analysis of the modeling in the
 4 application. So that's sort of where I sit. Thank you.

5 CHAIRPERSON SUINA: Thank you, Member Garcia.
 6 And I apologize, hitting on this, and legal counsel. So
 7 by the burden of persuasion, the petition hearing, the
 8 petitioner had the initial burden going forward with that,
 9 in this case, and that's Roper; is that correct?

10 MR. RYSTED: Yes, Roper was the petitioner,
 11 that's correct.

12 CHAIRPERSON SUINA: Okay. So we're -- now you're
 13 saying that following the establishment of a prima facie
 14 case by the petitioner, now, Alto is the person opposed to
 15 the relief, and now has the burden going forward; is that
 16 what your -- your point is?

17 MR. RYSTED: Let me reiterate. My point was that
 18 Alto CEP had to satisfy that burden of persuasion to go
 19 forward with any adverse evidence back at the hearing in
 20 October.

21 And this Board's role at this point is to review
 22 that evidence from that hearing, and determine, as you've
 23 been discussing on these issues, whether they were able to
 24 do that to the point that you feel like the permit should
 25 be denied.

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1 CHAIRPERSON SUINA: Okay. And that's because the
2 petitioner, Roper, established the prima facie?

3 MR. RYSTED: Well, the Department was aligned in
4 that position in the initial part of the procedure, is my
5 understanding. So they -- they are saying that going
6 forward, that that was established, there was a prima
7 facie case. And then Alto CEP was challenging that,
8 apparently, with their modeling expert, this point in
9 particular that you're discussing, at the hearing in
10 October.

11 CHAIRPERSON SUINA: Okay. I think I'm finally
12 there. Okay. So Alto is not the petitioner. I just want
13 to make sure that's clear. Right?

14 MR. RYSTED: That's correct. They would fall
15 under the language in this administrative code provision
16 that we're discussing: any person opposed to the relief
17 sought in the petition.

18 CHAIRPERSON SUINA: Got you.

19 MR. RYSTED: They're opposed to the permit.

20 CHAIRPERSON SUINA: Okay. Okay. I'm good.

21 All right. So, with that, is there any other
22 discussion on the air modeling? And thank you, Member
23 Garcia, for being patient with me. And so, we go back to,
24 now, therefore, it is Alto CEP's discussion, and burden to
25 demonstrate their model, or that the -- there are issues

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1 with the acceptance of Roper's modeling.
2 Is that correct? Member Garcia.

3 BOARD MEMBER GARCIA: Yes. Yes. Sorry. Yes,
4 that's correct.

5 CHAIRPERSON SUINA: Okay. And then, on that
6 point, you feel, Member Garcia -- I guess back to -- way
7 back to a couple -- a half an hour ago -- that the
8 modeling done by the Department and by Roper, as the
9 applicant. And, again, we talked about the modeling, but
10 that's where we are right now. And there's no -- does the
11 Board -- I guess not just you, Member Garcia, but do the
12 Board members feel good with the modeling that the -- I
13 would say that Alto CEP did not meet the burden of proof
14 to have to oppose to the modeling presented by Roper and
15 supported by NMED?

16 In other words, that the modeling is sufficient
17 by Roper and NMED, given the current inputs?

18 BOARD MEMBER GARCIA: Yes, if I could just add to
19 what I was saying --

20 CHAIRPERSON SUINA: Yes.

21 BOARD MEMBER GARCIA: -- previously, is that, you
22 know, as Member Honker pointed out before, we've kind of
23 been down this path in another case, as I recall, where a
24 Hearing Officer suggested that the folks who were opposed
25 to a permit, introduced enough doubt to make the Hearing

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1 Officer decide that maybe the permit shouldn't have been
2 issued.

3 That happened before, and in this case, I think
4 in the lower hearing, the Hearing Officer was persuaded to
5 some degree that there was enough doubt introduced, that
6 maybe the permit shouldn't have been issued. And I guess
7 my point in all of this is that, it's not enough to
8 introduce doubt. I think they have introduced doubt. You
9 know, that's their job. And they introduced enough doubt
10 that we all had to pay attention and look carefully at the
11 evidence. But doubt is not enough.

12 You have to prove -- in my mind, you have to
13 prove that the Department was wrong in issuing their draft
14 permit. And I guess I haven't been completely satisfied
15 with their case as of yet. So just another way of saying
16 the same thing, I guess. Thank you.

17 CHAIRPERSON SUINA: Wonderful, Member Garcia.
18 Thank you for that point of -- that discussion and those
19 points.

20 Yeah, members of the Board, do you have any other
21 comments on this? Do you feel comfortable where we're at
22 regarding the modeling? Yes? Okay. All right. So, I
23 mean, I think it's still to your point, Member Garcia, I
24 think there's still -- I mean, you know, much like the
25 previous issues that came before the Board is -- again,

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1 it's the inputs and kind of the technical side and having
2 to look at the existing models and the various approaches
3 to figure out, you know, to contradict a modeling -- a
4 model.

5 And I see now with the burden of persuasion
6 clause that was provided, that then it falls upon Alto CEP
7 to sufficiently provide that adverse evidence regarding
8 what Roper has provided in the application. All right.
9 So, it looks like we're -- I don't know if there's any
10 other discussion on that. If not?

11 I'm just trying to look at the members. Do you
12 feel comfortable with where we're at now on that? Thumbs
13 up? Yep? Okay. All right. And Vice-Chair
14 Trujillo-Davis and Member Bitzer, are you comfortable
15 where we're at?

16 (Board member Bitzer holding thumbs up.)

17 CHAIRPERSON SUINA: How about you, Vice-Chair?

18 VICE CHAIR TRUJILLO-DAVIS: (Nodding head.
19 Holding thumbs up.)

20 CHAIRPERSON SUINA: Okay. All right. And thank
21 you all for your patience of wading through that. I think
22 that was one of the major points of confusion that we had.
23 And legal counsel, I think we've covered some of
24 those points in the Hearing Officer's report that were
25 major items. Is there anything else that we haven't

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1 as far as what modeling they used, whether they need to
 2 use modeling or not. You can, but, you know, again, you
 3 don't have to.
 4 If they've taken the position that they don't
 5 have jurisdiction, these are just guidelines, as has been
 6 discussed. Then if you're -- for example, if you're
 7 sustaining that decision you don't have to go into great
 8 detail in that particular reference.
 9 BOARD MEMBER GARCIA: Thank you. That's very
 10 helpful.
 11 CHAIRPERSON SUINA: Thank you, Counsel Rysted,
 12 for that.
 13 Are there any comments or thoughts from members
 14 of the Board on legal Counsel Rysted's summary? I think
 15 that was helpful.
 16 So, with that -- and I apologize for kind of
 17 going back a little bit. So if there were doubts that
 18 were provided or that, you know, that Alto CEP had
 19 regarding to what Vice-Chair Trujillo-Davis, what you
 20 pointed out, maybe not the model itself, but what
 21 standards to utilize, or then, I guess, in a motion,
 22 though, we would just say that there may be -- I mean, and
 23 I'm just trying to get myself off the fence here. And
 24 maybe this is to legal counsel.
 25 There would be doubts, but not the maybe level of

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1 burden of persuasion to get us to the point where we would
 2 overturn the Department. Because now it's Alto's
 3 responsibility or burden to overturn the Department's
 4 stance; is that correct?
 5 MR. RYSTED: Right. In other words, you could
 6 say there was conflicting evidence on some modeling
 7 standards that were used at the hearing in October, and we
 8 take position X or Y on that issue. You know, so that's
 9 kind of how I would look at that.
 10 CHAIRPERSON SUINA: Thank you.
 11 Yes, Vice-Chair Trujillo-Davis?
 12 VICE-CHAIR TRUJILLO-DAVIS: I'm going to stir the
 13 pot a little bit. I was looking back through the evidence
 14 because I didn't know if anybody had remembered why the
 15 different standards were used. So I was looking back
 16 through the evidence to kind of remind myself, and I did
 17 not attend the hearing, I had to go through all of the
 18 documents on my own. So it wasn't something that stuck
 19 out to me when I was reviewing it.
 20 So, is there -- does anybody have anything to
 21 contribute on that topic of, you know, what was the
 22 difference and why did they choose to use a different
 23 standard? I'm just curious.
 24 CHAIRPERSON SUINA: Yeah, members of the Board,
 25 do you have any -- I've got to look at my notes, too, but

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1 on that point, please chime in. I'm going to look on my
 2 notes here, so if I don't see you, just jump in on
 3 Vice-Chair Trujillo-Davis's question. Let's see.
 4 So you're just asking, Vice-Chair?
 5 VICE CHAIR TRUJILLO-DAVIS: I just wanted to --
 6 and I was looking back at Mr. Wade's -- or I'm sorry. I
 7 was looking back at the testimony about -- from CEP about
 8 the use of the standard.
 9 And I think that Member Garcia brought up a
 10 really great point about the Department having -- I'm
 11 sorry, let me think about how I'm phrasing this so we
 12 don't get too muddled here.
 13 But Member Garcia brought up a point about being
 14 confident in the modeling that the Department had done,
 15 and if there was enough doubt raised to satisfy the burden
 16 of persuasion, which made me wonder, well, how much do you
 17 have to -- what do you have to do to show that there's
 18 doubt. And, obviously, it's through the evidence.
 19 And so, I just decided to review it real quick
 20 and make sure I had all of the -- I had all of the
 21 information. And so, I was trying to find the reason that
 22 they chose to use the paved road versus the -- I want to
 23 say unpaved roads, but that's not the correct term -- the
 24 concrete batch plant emission factors. So I was just
 25 looking for that citation. Does that help you out there,

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1 Madam Chair?
 2 CHAIRPERSON SUINA: Yes. Yes, thank you.
 3 Appreciate that. I know for those that were in attendance
 4 of the hearing, again, I'm just chiming through my notes
 5 here. Member Garcia -- or Member Honker, were you at the
 6 hearing as well?
 7 BOARD MEMBER HONKER: I was, and I looked through
 8 my notes and I couldn't find anything.
 9 BOARD MEMBER GARCIA: I'm reviewing the rebuttal
 10 testimony now. I'm just not remembering off the top of my
 11 head.
 12 CHAIRPERSON SUINA: All right. So, with that,
 13 Vice-Chair Trujillo-Davis, I mean, I'm looking through my
 14 notes here. Sorry for the delay here. I'm looking
 15 through my notes here.
 16 VICE CHAIR TRUJILLO-DAVIS: And I apologize for
 17 taking us down this -- kind of off into this path here,
 18 but I believe we had a lot of public interest in this
 19 issue, and so I just want to make sure that we do our due
 20 diligence and deliberate this issue because of how much
 21 public interest this issue did raise.
 22 CHAIRPERSON SUINA: Thank you for bringing this
 23 detail up. I want to make sure, too, that we address all
 24 of these details. So, again, I think this goes back to,
 25 you know, Member Garcia and Member Honker, our discussion