IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ALTO COALITION FOR ENVIRONMENTAL PRESERVATION,

Appellant,

v.

No. A-1-CA-41197

ROPER CONSTRUCTION, INC., NEW MEXICO ENVIRONMENT DEPARTMENT, and NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellees.

APPELLANT'S DOCKETING STATEMENT

On Appeal from the Environmental Improvement Board
Richard Virtue, Hearing Officer
Case No. EIB 22-34

HINKLE SHANOR LLP

By */s/ Thomas M. Hnasko*
Thomas M. Hnasko
Timothy B. Rode
Lisa G. Zammiello
Post Office Box 2068
Santa Fe, NM 87504-2068
505.982.4554
Attorneys for Appellant Alto Coalition for Environmental Preservation

Pursuant to Rule 12-208 and Rule 12-601 NMRA, Appellant Alto Coalition for Environmental Preservation ("Alto") submits this Docketing Statement in support of Alto's appeal from the New Mexico Environmental Improvement Board's ("EIB") May 30, 2023, Final Order in EIB Case Number 22-34 (the "EIB Final Order"). The EIB Final Order overturned the May 6, 2022, Final Order of the Deputy Secretary of Appellee the New Mexico Environment Department's ("NMED Final Order"), in which the Deputy Secretary denied Appellee Roper Construction, Inc.'s ("Roper") application for an air quality construction permit for a proposed concrete batch plant near Alto, New Mexico (the "Alto Plant").

NATURE OF THE PROCEEDING

Alto brings this appeal pursuant to Section 74-2-9 of the New Mexico Air Quality Control Act (the "Act").[1] Alto submits that the EIB Final Order was arbitrary, capricious, an abuse of discretion, not based on substantial evidence, and otherwise not in accordance with law. Specifically, the EIB ignored and declined to make findings of fact on numerous, key factual issues that were critical to assessing whether Roper's permit application complied with the permitting criteria set forth in the Act, the Air Quality Control Regulations [20.2.72 NMAC] (the "Regulations"), and the New Mexico Environment Department's ("NMED") permitting guidelines [20.1.4 NMAC].

[1] NMSA 1978, §§ 74-2-1 through 74-2-17 (2023).

Additionally, during the EIB's post-evidentiary hearing deliberations on Roper's EIB appeal, the EIB committed a series of procedural and legal errors – including incorrectly assigning the burden of proof to Alto – that deprived Alto of its procedural due process rights. For these reasons, the EIB Final Order should be summarily reversed.[2]

STATEMENT OF TIMELY APPEAL

The EIB issued its Final Order on May 30, 2023. Pursuant to NMSA § 74-2-9(A), Alto timely filed its Notice of Appeal of the EIB Final Order on June 20, 2023, or twenty-one (21) days after the EIB Final Order.

STATEMENT OF THE CASE

A. Statutory Framework.

The Air Quality Control Act requires prospective operators of emissions-producing facilities – like concrete batch plants – to obtain air quality construction permits before building and operating the facilities. By requiring permit applicants to demonstrate their ability to operate within applicable air quality standards, the Act seeks to promote clean air and prevent and abate air pollution across the state. *See* NMSA 1978, § 74-2-5(B). The Act tasks the NMED with overseeing the permitting process for air quality construction permits. *See* 20.2.72.207 NMAC.

[2] The EIB Order is so legally infirm that Alto has filed a motion to stay the Order pending resolution of this appeal. *See* NMSA 1978, § 74-2-9(D) (authorizing stay of agency decision pending appeal). If the EIB denies Alto's stay motion, Alto will seek review of that denial before this Court.

Under the Act and the Regulations, the NMED must deny an application for an air quality construction permit if any of the following conditions exist:

- the proposed construction will not comply with regulations adopted pursuant to the Act;
- the proposed emissions source will emit hazardous air pollutants or air contaminants in excess of any (i) New Source Performance Standard or (ii) National Emission Standard for Hazardous Air Pollutants or (iii) regulation of the NMED; or
- the proposed construction will cause or contribute to air contaminant levels in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard; cause or contribute to ambient concentrations in excess of a prevention of significant (PSD) increment; or any provision of the Air Quality Act will be violated.

See 20.2.72.208 (A)-(F) NMAC.

Further, any person who participates in a permitting action before the NMED and is adversely affected by the NMED's decision may file a petition for review before the EIB. NMSA 1978, § 74-2-7(H). An EIB petition must "specify the portions of the [NMED] permitting action to which petitioner objects." *See* 20.1.2.202 NMAC (A)(3). The EIB will then review the underlying administrative record for error and consider any additional evidence presented on the petition to determine whether to sustain, modify, or reverse the NMED's permitting decision. *See* NMSA 1978, § 74-2-7(K); 20.1.2.206 NMAC.

Importantly, in an appeal to the EIB of an NMED permitting decision under the Act, the *petitioner* has the burden of "going forward with the evidence and

proving by a preponderance of the evidence the fact relied upon to justify the relief sought in the petition." 20.1.2.302 NMAC; *see also* NMSA § 74-2-7(K). If, and only if, the petitioner meets this burden, then "any person opposed to the relief sought in the petition has the burden of going forward with any adverse evidence and showing why the relief sought should not be granted." 20.1.2.302 NMAC; *see also* NMSA § 74-2-7(K).

Following the EIB proceeding, the Act affords any person adversely affected by the EIB's decision the right to a direct appeal to this Court. NMSA § 74-2-9(A). This Court must set aside the EIB's decision if it finds it was: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA § 74-2-9(C).

B. Proceedings before the NMED.

The administrative action that gave rise to this appeal began on June 14, 2021, when Roper applied to the NMED for an air quality construction permit under the Act. Roper sought to construct and operate a concrete batch plant in a predominantly residential neighborhood near Alto, New Mexico (the "Property"). The Air Quality Bureau ("AQB") of the NMED accepted and processed Roper's application. The AQB determined that due to the overwhelming public opposition to the application – including on the part of Alto's constituents, many of whom live and work around the Property – the application warranted a public hearing. Hearing Officer Gregory

Chakalian was appointed to oversee the public hearing, hear evidence, and make proposed findings of fact and conclusions of law.

On February 9, 2022, the NMED convened the public hearing on Roper's permit application. Alto presented voluminous technical evidence contesting Roper's emissions modeling and proposed emissions controls. The NMED Hearing Officer also heard public comment on the Alto Plant, the vast majority of which was negative.

After a fulsome hearing before the NMED, the NMED Hearing Officer recommended that the Deputy Secretary deny Roper's air quality permit. The NMED Hearing Officer based his decision to deny Roper's permit on numerous omissions and inaccuracies in the permit application, including the following:

1. In projecting Roper's total emissions at the Alto Plant, Roper was required to account for the emissions caused by truck traffic on the haul roads at the Alto Plant. "Silt loading," which occurs when vehicles traveling along a roadway "kick up" or redeposit loose contaminants on the road's surface, greatly impacts the extent of these haul road emissions. The NMED Hearing Officer found that Roper "arbitrarily and unjustifiably" used the "silt-loading factor"[3] – a representative value used in calculating silt loading at particular locations – for "paved public roads," instead of the correct, silt-loading factor for industrial haul-roads within a "concrete batching facility" that the United States Environmental Protection Agency ("U.S. EPA") specifically sanctioned and recommended for sites like the proposed Alto Plant.

2. The emissions factor for public paved roads is based on silt loading caused by light vehicles traveling at high speeds, like passenger cars on a highway. The NMED Hearing Officer found that this emissions factor

[3] The "silt loading" factor is used to calculate anticipated emissions from haul roads.

is wholly inapplicable to calculating the redeposition of particulate matter from the heavy construction vehicles that will travel the haul roads at the Alto Plant.

3. Roper failed to analyze how "downwash" structures, like aggregate bins and other site improvements, would contribute to and likely increase the emissions at the Alto Plant, further supporting the conclusion that Roper did not meet its burden of proving that its emissions would not exceed applicable air quality standards or the PSD increment.

4. Even without considering the significant errors in Roper's emissions analysis, Roper claimed that it could only comply with applicable air quality standards and the PSD increment by implementing an unidentified "wet dust suppression system," which supposedly would reduce emissions. According to Roper, using this wet dust suppression system would still result in emissions at or near the regulatory maximums, *i.e.*, 99.3% of the PSD increment and 83.1% of PM10 over a 24-hour period. The system would also require a staggering *3,030,414* gallons of water per year to operate. The NMED Hearing Officer noted that Roper failed to show the existence of an available water source to implement any wet dust suppression system, let alone one that would require 3,030,414 gallons of water per year.

On June 22, 2022, the Deputy Secretary of the NMED[4] issued a Final Order (i) adopting the NMED Hearing Officer's findings of fact and conclusions of law in their entirety; and (ii) denying Roper's permit application. The Deputy Secretary concluded that Roper failed to meet its burden of proving that the Alto Plant would meet applicable requirements of the Regulations, and not cause or contribute to air

[4] On February 8, 2022, the Secretary of the NMED delegated his decision-making authority over the permitting decision to the Deputy Secretary. *See* 20.1.4.100(E) NMAC.

contaminant concentrations more than applicable state and federal ambient air quality standards, or applicable PSD increments.

C. Proceedings before the EIB.

On July 22, 2022, Roper petitioned the EIB to overturn the NMED's denial of Roper's air quality permit. On August 15, 2022, the EIB appointed Richard Virtue to preside as the EIB hearing officer (the "EIB Hearing Officer"), and scheduled a public hearing for October 18 to October 20, 2022. The EIB's Order Appointing Hearing Officer, however, did not direct the EIB Hearing Officer to prepare proposed Findings of Fact or Conclusions of Law as to contested issues. *See* 20.1.2.109 NMAC ("The hearing officer shall exercise all powers and duties prescribed or delegated under the act or this part.").[5]

[5] Because the EIB did not direct the EIB Hearing Officer to make recommended findings and conclusions of law on contested issues, the EIB Hearing Officer left those issues to the EIB to decide. That is, the EIB Hearing Officer's Report offers comments on contested issues but contains Recommended Findings of Fact and Conclusions of Law only as to uncontested procedural matters. Had the EIB directed the EIB Hearing Officer to address contested issues, the EIB Hearing Officer likely would have accepted the uncontroversial proposition that Roper should have used the emissions factor specifically intended for concrete batch plant haul roads to calculate emissions from Roper's concrete batch plant haul roads.

1. Prehearing Motions.

Before the EIB hearing on October 10, 2022, Alto filed a motion to dismiss the petition or, in the alternative, to prevent Roper from presenting technical testimony that materially differed from its original application – in essence, to prevent Roper from presenting a new application for the first time on appeal to the EIB. The parties ultimately agreed that Roper would withdraw any proposed changes to its application and proceed with its original NMED application.

Notably, on appeal to the EIB, attorneys for the NMED performed a complete about-face, arguing *against* affirming the NMED Final Order. As EIB Member Honker recognized, the NMED's unprecedented "alignment" with Roper created a "very complicated and maybe unconventional situation," noting that "I've never seen a situation like this before…" Alto moved to exclude any argument or technical evidence from NMED counsel that directly contradicted the NMED Final Order, on the grounds that (1) the Deputy Secretary's Final Order represented the position of the NMED, and an agency cannot deviate from its established positions without a reasonable justification; (2) NMED attorneys identified no new facts, technical evidence, or law that explained their radical departure from the Deputy Secretary's decision; and (3) NMED attorneys owed an ethical duty of loyalty to their client, the NMED, to zealously advocate for the NMED's positions, not overtly argue against them. Alto's motion was denied.

2. Evidentiary Hearing.

After ruling on the prehearing motions, the EIB heard testimony and argument from the parties and received the parties' technical evidence. Alto once again presented technical evidence and testimony attacking Roper's emissions modeling; specifically, Alto argued that Roper's application was incomplete because Roper (1) relied on the incorrect emissions factor in calculating emissions from haul roads within a concrete batch plant, (2) artificially reduced haul road lengths to improperly reduce its emissions to an acceptable level, (3) omitted downwash emission sources from its calculations, which would likely have increased total emissions from the proposed plant, and (4) did not establish any water supply necessary to implement the emission controls represented in the application.

a. Application of the U.S. EPA AP-42 Protocol

The U.S. EPA's AP-42 protocol is commonly recognized in the construction industry as the gold standard for determining emissions. As the NMED has recognized, use of AP-42 emission factors for air dispersion modeling is standard practice by regulatory agencies across the United States. *See, e.g., In the Matter of the Petition for Hearing on Air Quality Permit No. 8585*, EIB No. 21-48, Final Order at ¶¶ 40-51 (August 26, 2022), available at https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/09/2022-08-26-EIB-21-48-Final-Order-signed-pj-2.pdf (noting that the AP-42 is "the best data that we have…")

Table 13.2.1-2 of the AP-42 sets forth different emissions factors that correspond to typical site conditions at particular types of facilities, including specifically setting forth emissions data for concrete batch plant haul roads. Use of the correct emissions factor will significantly impact a facility's total projected emissions. The U.S. EPA derives its specific emissions for roadways from data based on actual site conditions for different roadway types, including the "mean speed of vehicles, the average daily truck traffic, the number of lanes, and the fraction of heavy vehicles traveling on the road." During the EIB proceedings Alto argued that it was critical to use the correct emissions factor from the AP-42 because of the concept of silt-loading [*see supra* p. 5], which greatly influences the extent of emissions from trucks traveling on industrial haul roads. Thus, in determining whether the Alto Plant would exceed allowable emissions, it was fundamental to use the emissions factor that the U.S. EPA specifically designated to represent the actual conditions of the haul roads at proposed concrete batch plants.

As noted in the EIB Hearing Officer's Report, "silt-loading" refers to the resuspension of loose material on the road surface that contributes to the emission of particulate matter; *i.e.*, the "kicking up" of contaminants from the road surface into the air. The "silt-loading factor" is a variable that the U.S. EPA uses in calculating emissions from particular types of emission sources – *e.g.*, from concrete

batch plant haul roads or public paved roads – and the U.S. EPA includes those factors in its AP-42.

As to use of the correct the AP-42 emissions factor, Alto established that:

- the speed limits on freeways and other public paved roads generally far exceed the 15 MPH speed limit that Roper proposes for the Alto Plant, and the significantly higher speeds on public paved roads results in markedly less silt loading and redeposition of particulate on the roadway;

- vehicles traveling on freeways and other public roads are mainly light vehicles, which produce nowhere near the silt loading generated by the 8-ton construction vehicles that will populate the haul roads at the Alto Plant; and

- on a concrete batch plant haul road, pollutants are "constantly being replenished [on the roadway] by vehicles traversing from material handling areas or operating in other areas of the facility."

Alto also presented the EIB with uncontroverted evidence establishing that the emissions factor for haul roads within a concrete batch plant represents the actual conditions at the proposed Alto Plant. For example, the concrete batch plant haul roads emissions factor:

- accounts for the surface material contributing to silt loading at the Alto Plant, like aggregate, sand, concrete, cement; and

- incorporates the effect of emissions caused by the operation of heavy to medium-weighted vehicles, such as exhaust emissions, brake wear, and tire wear, all of which contribute to the loosening of material on roads near the plant;[6]

[6] The EPA itself has given the silt loading factor for concrete batch plants an A-rating. This means that the EPA considers the factor to be reliable and representative of site conditions and concrete

- is based on actual trips of 62 to 160 per day at similar concrete batch plants, which is highly representative of Roper's proposed operation.

Alto presented uncontroverted evidence demonstrating the impact that use of different emissions factors had on total haul road emissions at the Alto Plant. For instance, Alto showed that using the correct AP-42 emissions factor for concrete batch plant haul roads to calculate haul road emissions at the Alto Plant results in a cumulative concentration of PM10 for 24-hour NAAQS of 172.3 ug/m3. This would exceed the maximum allowable standards of 150 ug/m3 by 14.9% and mandate denial of the permit. Also, the standard for PM10 based on the 24-hour Class II PSD increment is 30 ug/m3. Alto presented undisputed evidence that the silt loading factor for concrete batch plants results in a cumulative concentration of 77.6 ug/m3, or 258.7% of the allowable standard. This exceedance would also mandate denial of Roper's permit.

NMED counsel – who, as noted above, opted to argue against the final decision of their client – defended Roper's decision to disregard the silt loading factor for concrete batch plants on the grounds that "the proposed haul road will be controlled, and [AP-42 for concrete batch facilities] did not take into consideration

batch plants like the Alto Plant. Further, because the A-rating is based on data from numerous, randomly selected, industrial facilities, the concrete batch plant silt-loading factor better accounts for the variability of site conditions across different concrete batch plants.

control measures applied to haul roads." Roper and the NMED, however, presented no evidence on what these haul road controls would be, or how they could possibly be enforced, nor did Roper provide any evidence of a water source needed to implement the purported haul road controls.

Moreover, Alto's emissions expert, Dr. Ituarte-Villareal, testified that the AP-42 silt loading factor for concrete batch plants does not differentiate between controlled and uncontrolled haul road emissions. This is, in part, because loose particulate on the surface of the roadway is constantly being redeposited. This necessarily reduces the effectiveness of any controls. In addition, the emissions factor for batch plant haul roads is based on data from both controlled and uncontrolled haul roads. As a result, even if the haul roads at Alto Plant could be "controlled" by some unspecified and enforceable mitigation measure, the silt loading factor for batch plants is based on data from other "controlled" haul roads and would still apply.

Although the AP-42 contains "control factors" for reducing emissions[7] – like sweeping or watering – for other types of facilities, Dr. Ituarte-Villareal explained that those control factors did not apply to haul roads within concrete batch plants. He further opined that even if the EIB were to superimpose the unenforceable

[7] *See* AP-42 § 13.2.1.4 ("Controls").

condition of "sweeping" the roads, it would still result in an "increase in silt loading of at least seven times what was presented on the application."[8] Roper, meanwhile, presented no evidence on what specific "controls" Roper would use to reduce particulate haul road emissions at the Alto Plant. As set forth below, the Final Permit itself is also silent on any specific haul road emission controls, or enforcement of those controls.

b. Incorrectly Reduced Haul Road Length

During the October 2022 EIB evidentiary hearing, Alto explained that haul road emissions at the Alto Plant will come from the numerous heavy construction vehicles, including fly ash, cement, and concrete trucks, that will travel along the haul roads at the Alto Plant. The longer the distance that these vehicles must travel, the greater their emissions. During the hearing, Alto offered testimony that permit applicants must use the entire proposed haul road length to calculate their haul road emissions. As emphasized by Brad Sohm, Alto's permitting expert, compressing the haul road length by 50%, as proposed by Roper, would require trucks to "back out" of the concrete batch plant and violate applicable Occupational Health and Safety Administration ("OSHA") requirements. Thus, Mr. Sohm testified that for modeling

[8] The AP-42 notes that sweeping which may actually increase in particulate emissions. *See* AP-42 § 13.2.1.4 ("It is particularly important to note that street sweeping of gutters and curb areas may actually increase the silt loading on the traveled portion of the road. Redistribution of loose material onto the travel lanes will actually produce a short-term increase in the emissions.").

purposes, "the entire haul road is required to be the basis for the emission estimates and in the modeling."

Alto further demonstrated that unlike at the NMED hearing, Roper's arbitrary and incorrect reduction of the length of the haul roads at the proposed batch plant by 50% significantly reduced actual emissions. Alto showed – and the EIB Hearing Officer agreed – that using the full haul road length would have caused Roper to exceed allowable emissions, mandating denial of its air quality permit. This is consistent with the principle that permit applicants must model their "maximum achievable emissions."

Roper attempted to respond to this evidence by claiming that its fly ash, cement, and concrete trucks would travel a separate, shorter loop at the Alto Plant, thereby justifying the compressed haul road length – as to those trucks – in Roper's emissions modeling. But Alto presented testimony that a site design with two separate haul roads would not comport with industry safety standards, because "as a matter of safety, trucks must follow a one-way round-about haul road and cannot back out of the proposed Facility in an effort to reduce the length of travel." Moreover, the draft permit did not contain any conditions requiring Roper's fly ash, cement, and concrete trucks to travel any prescribed loop. Roper's permit application

also does not account for water trucks or specify which "loop" the water trucks will travel.[9]

c. Omission of Downwash Structures

In addition, Alto presented ample evidence on building "downwash," which occurs as the wind flows over and around buildings and impacts the dispersion of pollution and emissions. Alto demonstrated that accurately modeling downwash structures when calculating emissions is essential to projecting both (i) the concentration of pollutants that a facility will produce, and (ii) their effect on the surrounding environment. As Mr. Sohm testified, "*all buildings and structures* must be identified and analyzed for potential downwash effects" and that "the downwash effect leads to higher ground level pollutant concentrations."

Alto elaborated on Mr. Sohm's testimony with uncontroverted evidence that Roper omitted key "downwash" structures – namely, aggregate bins and water storage tanks – from Roper's emissions model. Alto showed that, once again, this omission resulted in Roper underrepresenting the Alto Plant's total emissions to fall within allowable limits; *i.e.*, to not exceed applicable air quality standards or the PSD increment.

[9] Roper also omitted emissions from water trucks at the Alto Plant from Roper's emissions calculations. Although NMED argued that limiting the maximum allowable truck trips per day was sufficient to account for emissions from water trucks, Alto pointed out that water trucks uniquely impact haul road emissions due to the material carried and their weight. The EIB Final Order did not address the impact of water trucks on Roper's emissions calculations.

d. Lack of Available Water Source

Finally, Alto's evidentiary presentation before the EIB focused on the fact that the Alto Plant would require an enormous amount of water to safely operate. For instance, Alto's water expert, former State Engineer and Commissioner of the Bureau of Reclamation, Eluid Martinez, established that Roper's proposed wet dust suppression system alone – which Roper would need to comply with emissions standards – would consume approximately 82,000 gallons of water per day. Roper presented no evidence on the amount of water needed to control fugitive dust from the haul road or stockpiles, or Roper's ability to procure it. Further, Alto showed that of the three options for delivering water to the Alto Plant – *i.e.*, on site water, a water pipeline, or water trucks– only trucking the water in is feasible. Yet, Roper failed to include water trucks in its haul road emissions model, again underestimating the facility's actual emissions.

The NMED took the position that it could not require Roper to prove an available water source to implement required emission controls. However, Alto pointed out that NMED had imposed stringent requirements for other control technologies, requiring Roper to "install two particular types of baghouses, manufactured by a particular company, including the use of a different pressure gauge and special sensors, all of which are intended to ensure that the emission rates as stated in the Application satisfy the PSD increment and NAAQS for PM." Further,

an NMED witness testified that "nothing in the Air Quality Control Act or the regulations prevents the Bureau from requiring the Applicant to prove an available source of water to implement required emission controls". Ultimately, Roper provided no evidence he could obtain the vast amount of water needed to implement its wet dust suppression system or its other emissions controls.

3. EIB Hearing Officer Report.

On January 18, 2023, the EIB Hearing Officer issued his Report and Recommended Findings of Fact and Conclusions of Law. The EIB Hearing Officer reaffirmed many of the same concerns with Roper's application that the NMED Deputy Secretary had cited in her decision denying Roper's permit. [10] For instance, the EIB Hearing Officer found that "[t]he record does not appear to establish that the permit conditions are sufficient to meet the applicable air quality standards, if the omissions and discrepancies in the calculation of haul road truck emissions alleged by [Alto] are found to be credible by the Board." He further noted that, "Alto's [] evidence shows a major difference in modeling results when [the emissions factor for cement batch plant haul roads] is applied to the modeling done by Roper," and that "the record does not show any defects in the methodology and accuracy of

[10] The EIB Hearing Officer commented that "the central issue appears to be whether the use of AP-42 emissions factor for paved roads used by Roper and approved by the NMED is more reflective of actual conditions at the site of the proposed Facility than the AP-42 emission factor for cement batch plant haul roads."

[Alto's technical witnesses'] modeling results." The EIB Hearing Officer also found that Alto's evidence on silt loading was significant and worthy of discussion and resolution by the EIB. He noted that U.S. EPA guidance states that if site specific data is unavailable, then selecting AP-42 from the chart provided by the EPA is the best way to ensure accuracy in emissions calculations.

With respect to Roper's use of the compressed haul road length, the EIB Hearing Officer acknowledged that using the correct haul road length would have caused Roper to exceed allowable emissions, mandating denial of the air quality permit. Additionally, with respect to the proposed permit conditions relating to (i) use of a wet dust suppression system, and (ii) haul road emission "controls", the EIB Hearing Officer emphasized that "NMED's position regarding its authority [to regulate] water quan[t]ity [*sic*] appears inconsistent with its testimony." That is, the NMED testified that "there is no prohibition in the Air Quality Act or the regulations that would prevent the Bureau from requiring the applicant to prove an available source of water to implement required emission controls."

4. EIB Deliberations.

On March 24, 2023, the EIB held a public meeting to consider the Roper's petition, and to address any remaining fact issues that the EIB Hearing Officer left undecided. *See supra* note 5 and accompanying text.[11]

During the EIB's deliberations, the EIB repeatedly misstated the applicable burden of proof. For instance, Board Member Garcia announced that Alto "has the burden of persuasion to persuade us that the permit should not be issued, and that we should sustain the department's denial." Ms. Garcia went on to state, in no uncertain terms:

> …I do realize that [Alto] has a big burden to overcome. Their burden is to prove, not just to raise a doubt, but to prove that the application would not meet the requirements of the Air Quality Bureau or would exceed the air quality standards. They have to prove that. And so, the question in my mind is, did they prove it? [cite]

Other members of the EIB, as well as the EIB's new counsel, echoed this position.

Counsel for Alto attempted to clarify the difference between the burden of proof and the burden of persuasion, imploring the EIB: "I don't want to be argumentative here, but I think that the Board, with all due respect, is going down the wrong path."

[11] During the meeting, the EIB expressed surprise and confusion that the EIB Hearing Officer had not entered proposed findings of fact or conclusions of law on contested issues in the case, notwithstanding the EIB's own rule requiring the EIB to direct the hearing officer to do so. For instance, Board Member Garcia asked EIB Counsel: "I do have a little bit of a questions for our counsel…I think you said we need to make a decision about AP-42; is that correct?" Counsel responded, "you do enter findings of fact and conclusions of law on these contested issues because the [EIB] Hearing Officer did not take a stance on that."

Counsel's pleas fell on deaf ears, however, as one EIB Member mused:

> [T]his is a tough one because [Alto]… did raise some doubt and it's definitely worth our while to look at it carefully...their burden is to prove, not just raise doubt, but prove that the application would not meet the requirements of the Air Quality Bureau or would exceed the air quality standards.

As though to drive the point home even further, the EIB stated: "[Alto] did – [Alto] did cast doubt, but they didn't meet the burden to prove that the application would not meet standards." The EIB then concluded there was "conflicting evidence regarding modeling methodology and various other scientific inputs [and Alto] did not meet their burden of persuasion to persuade the Board that the permit should not be issued."

The EIB's confusion over the applicable burden of proof during the EIB's deliberations came after at least three other procedural irregularities occurred: (i) the new counsel for the EIB, Mr. Rysted, admitted that he had very little experience with environmental law, and that this inexperience would "limit [his] ability to give very detailed advice in this matter;" (ii) the EIB incorrectly identified Alto as the "petitioner;" and (iii) Vice-Chair Trujillo-Davis admitted that she did not even attend the EIB public hearing. In addition, at one point during the meeting, Member Honker simply threw in the towel and stated that he would defer to whatever NMED's counsel proposed.

As to the AP-42 issue, the EIB acknowledged that it had, in fact, disregarded Alto's emissions calculations, stating that Alto did not "do an adequate job of providing all of the calculations and all of the information" to verify Alto's calculations. EIB Member Garcia then speculated that "perhaps [Alto] could have changed the Department's mind" if Alto had provided complete modeling information. It is undisputed, however, that besides using the (correct) emissions factor for concrete batch plant haul roads, Alto used the precise emissions model that NMED and Roper did. Thus, NMED's experts could have easily verified Alto's modeling results simply by plugging in the correct emissions factor.

Additionally, Member Garcia maintained that the AP-42 protocol is just a guideline that the NMED is not required to use, and that use of the correct emissions factor therefore did not matter. She stated, in relevant part:

> But I think since the use of AP-42 emission factors is discretionary on the Department's part – in other words, the AP-42 emission factors are not regulations. If they were regulations under the Department's purview, then the Department has to use them. They have to. And then we could, as a Board then say, you didn't use them, you should have, you were wrong. In this case, AP-42 emission factors are a guideline, but in my understanding, the Department has discretion whether to use them or not, and *in some cases, they use them, in other cases, they don't*. They have that discretion. So – and we've dealt with these before in a previous case, whether or not they should be used – I do recall in a previous case. (emphasis added).

In other words, Member Garcia stated that because the AP-42 is not codified as an NMED regulation, the EIB was not required to use it. Ms. Garcia explained:

> So, since it's a guideline, it's not -- it's not a regulatory requirement, it's up to the Department whether a permittee uses them and which ones they use. So[,] in this case, *I guess I would defer to the Department as to whether AP-42 emission factors are appropriate*, which factor is appropriate to use. So, you know, it's different than a regulation, it's a guideline.

Based on this reasoning, the EIB declined to address which emissions factor was appropriate, and proceeded to ignore all of the other issues that Alto raised during the EIB hearing. The EIB then voted 4-1 to approve the petition.

5. The EIB Final Order.

Although the EIB Final Order purports to "adopt the [EIB Hearing Officer's] Recommended Decision]," [*see* EIB Final Order at 3], the Final Order does not meaningfully address Alto's evidence on numerous issues, including, *inter alia*: (1) use of the correct AP-42 silt loading factor;[12] (2) the impact of Roper compressing the haul road lengths in its emissions modeling; (3) the impact of Roper omitting downwash structures of its emissions modeling; (4) Roper's failure to quantify or identify an adequate water supply to implement essential emissions controls; or (5) the lack of any specific information about the emissions controls that Roper would be required to implement, or how NMED would monitor those controls and ensure that they were effective.

[12] The EIB Final Order concludes that "the EIB does not have jurisdiction over the Applicant's use of AP-42." EIB Final Order at ¶ 60.

On the selection of the correct AP-42 emissions factor, the Final Order merely states, without more, that "[t]he Department determined that the emission factor used in the calculations were appropriate for this source type and were approved by the Department…The Applicant's use of AP-42 was reasonable and in accordance with the law." [EIB Final Order ¶¶ 19, ¶ 77].[13] The EIB Final Order completely ignored Alto's evidence on: Roper's omission of downwash structures (*i.e.*, aggregate bins and water storage tanks) in its emission calculation, Roper's artificial reduction of haul road lengths,[14] and Roper's failure to show a reliable water source to obtain the vast quantities of water to implement required emission controls.

As to Roper's haul road emission controls, the Final Permit, issued on May 30, 2023, reads:

> Truck traffic areas and haul roads going in and out of the plant site shall be paved and maintained to minimize silt buildup to control particulate emissions. This condition demonstrates compliance with the AP-42, Section 13.2.1 (ver. 01/11) 'Paved Roads' emission equation used in the permit application.

[13] To reach this conclusion, however, the EIB had to find that Roper proved by a preponderance of the evidence that silt loading factor for public paved roads better represented site conditions at the Alto Plant than that of concrete batch facilities. *See* NMAC 21.1.2.302. This required the EIB to compare the conditions at the Alto Plant to those on which the different silt loading factors were based.

[14] The EIB Hearing Officer specifically found that "if the omissions alleged by Alto are found to be credible," then Roper's emissions calculation will exceed allowable emission standards.

Final Permit at A10. The Final Permit contains no information about how Roper is to "maintain" the haul roads, it does not specify the frequency with which Roper must implement the control measures, and it omits any mechanism whatsoever for testing control efficacies. The Final Permit also does not require Roper to monitor particulate emissions or identify any practical way that NMED or any other agency could enforce the ambiguous control conditions.

The EIB Final Order also contains no enforcement mechanism to ensure that Roper's fly ash, cement, and concrete trucks will actually travel any prescribed loop. The EIB Final Order has no permit condition that addresses haul road lengths or truck traffic, or their impact on emissions. This is true even though Roper's ability to comply with emissions standards depends on its fly ash, cement, and concrete trucks actually following the compressed haul road loop. Thus, it is not clear how any condition requiring Roper to direct the majority of its truck traffic to travel the compressed loop, or back out of the facility, would be federally enforceable (short of Roper himself directing the truck traffic every moment the plant is open).

Finally, the EIB Final Order fails to address the significant concerns that Alto raised regarding Roper's ability to comply with permit conditions, or even operate the Alto Plant, without an adequate water supply. Alto's evidence established that the Alto Plant would require an enormous amount of water to safely operate.

STATEMENT OF ISSUES

Alto states the following issues for purposes of this Docketing Statement only and reserves the right to raise additional issues.

ISSUE 1: Did the EIB commit a clear error of law by holding that, in Roper's appeal from the NMED's permit denial, Alto had the burden of proving that the NMED's decision should be affirmed, and Roper's construction permit denied?

Procedural Posture:

This issue first arose during the EIB's March 10, 2023, public meeting on Roper's petition when the EIB misstated and misapplied the burden of proof. *See* EIB Final Order, ¶ 73. Alto preserved the issue through its objections on the record during the March 10, 2023, meeting, as well as in its July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

NMSA 1978, § 74-1-4 (creating the "environmental improvement board").

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(K) (the burden of proof shall be on the petitioner; based on evidence presented at the hearing, EIB must sustain, modify, or reverse agency action).

20.1.2.302 NMAC (setting forth the applicable burden of proof in an EIB appeal).

20.1.2.106 NMAC (absent a specific EIB rule governing an issue, the EIB may look to the New Mexico Rules of Civil Procedure and Rules of Evidence for guidance).

20.1.2.202 NMAC (A)(3) (a petitioner before the EIB must "specify the portions of the permitting action to which petitioner objects.").

20.1.2.7(K)(2) NMAC (the Administrative Record of the NMED (including the record of the NMED Hearing) is part of the Record Proper of an EIB appeal).

Princeton Place v. NM Human Services Dept., 2022-NMSC-005, ¶ 35 ("The party challenging an administrative decision bears the burden on appeal of showing that the decision is unreasonable, or unlawful.").

Mortg. Inv. Co. of El Paso v. Griego, 1989-NMSC-014, ¶ 10, 108 N.M. 240 (the burden of persuasion never changes).

J. A. Silversmith, Inc. v. Marchiondo, 1965-NMSC-061, ¶ 10, 75 N.M. 290 (the burden of persuasion refers to the burden of establishing each element required for the requested relief).

Benavidez v. Bernalillo Cnty. Bd. of Cnty. Comm'rs, 2021-NMCA-029, ¶16, 493 P.3d 1024 (in an appeal from an agency decision, the Court of Appeals will review questions of law *de novo*).

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure").

Duke City Lumber Co. v. New Mexico Env't Imp. Bd., 1980-NMCA-160, ¶ 6, 95 N.M. 401 (distinguishing the burden of persuasion from the burden of production or of "going forward"; burden of production means nothing more than the obligation to present evidence during a hearing; burden of production can change).

Prima Facie Evidence Definition, *Black's Law Dictionary* (11th ed. 2019), available at Westlaw.

Preponderance of the Evidence Definition, *Black's Law Dictionary* (11th ed. 2019), available at Westlaw.

ISSUE 2:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law by refusing to use the emissions factor that the U.S. EPA has specifically designated for haul roads within concrete batch plant to calculate emissions from Roper's haul roads, where use of the correct emissions factor would

have caused Roper's emissions to significantly exceed applicable air quality standards?

(b) Did the EIB lack substantial evidence to support its decision to ignore the correct AP-42 silt loading factor for haul roads within concrete batch plants, where the record establishes that use of the correct emissions factor would have caused Roper's emissions to significantly exceed applicable air quality standards?

Procedural Posture:

This issue arose during the EIB hearing and in the EIB Final Order, when the EIB improperly abdicated its responsibilities and concluded that it lacked jurisdiction to consider which emissions factor Roper should have used in Roper's haul road emissions modeling, notwithstanding the published U.S. EPA protocol (and NMED's past practice) governing the issue. Alto preserved this issue in its hearing testimony and post-hearing briefing, as well as in Alto's July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(C) (setting out the standard for denying an application for a construction permit).

20.2.72.208 NMAC (setting out the regulatory standard for denying an application for a construction permit).

20.1.4, et seq. NMAC (setting forth NMED permitting criteria for minor source air quality construction permit).

40 C.F.R. § 63.2 (defining "federally enforceable" conditions).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, 101 N.M. 291 (holding that a court "may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole").

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses, reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency it is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

In Re Peabody Western Coal Co., 2005 WL 428833, at *8 (EAB) (holding that to be enforceable, permit condition had to be "practically enforceable" by specifying: (1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly,

and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting.").

In the Matter of the Petition for Hearing on Air Quality Permit No. 8585, EIB No. 21-48, Final Order at ¶¶ 40-51 (August 26, 2022), available at https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/09/2022-08-26-EIB-21-48-Final-Order-signed-pj-2.pdf (NMED recognizes that use of AP-42 emission factors for air dispersion modeling is standard practice by regulatory agencies across the United States and is "the best data that we have…").

Table 13.2.1-2 of the U.S. EPA AP-42: Compilation of Air Pollutant Emission Factors

AP-42 § 13.2.1.4 (discussing emission "controls").

ISSUE 3:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law by failing to require Roper to model its haul road emissions based on the actual length of the proposed concrete batch plant haul road, where use of the full haul road length would have caused Roper's emissions to exceed applicable air quality standards?

(b) Did the EIB lack substantial evidence for its determination to not require Roper to model emissions based on the entire length of the haul roads at the Alto

Plant, where use of the full haul road length would have caused Roper's emissions to exceed applicable air quality standards?

Procedural Posture:

This issue arose during the EIB hearing and in the EIB Final Order, when the EIB refused to consider the impact on emissions of Roper's improper reduction of its haul road length. Alto preserved this issue in its hearing testimony and post-hearing briefing, as well as in Alto's July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

40 C.F.R. § 63.2 (defining "federally enforceable" conditions).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, 101 N.M. 291 (holding that a court "may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole").

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses, reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency it is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

In Re Peabody Western Coal Co., 2005 WL 428833, at *8 (EAB) (holding that to be enforceable, permit condition had to be "practically enforceable" by specifying: (1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting.").

ISSUE 4:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law by failing to consider the enhanced emissions that would have resulted from including downwash structures in Roper's emissions calculations for the proposed Alto Plant, or the impact Roper's failure to account for these structures had on Roper's ability to meet its burden of proof?

(b) Did the EIB lack substantial evidence for its determination that downwash structures could be omitted from Roper's emissions modeling, where the EIB (i) ignored Alto's evidence that Roper's omission of these structures affected Roper's modeling results; and (ii) failed to make any specific findings of fact on this issue, despite the Hearing Officer's clear directive to do so?

Procedural Posture

This issue arose during the EIB hearing and in the EIB Final Order, when the EIB refused to consider the impact of Roper's omission of downwash structures from Roper's emissions calculations. Alto preserved this issue in its hearing testimony and post-hearing briefing, as well as in Alto's July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(C) (setting out the standard for denying an application for a construction permit).

20.2.72.208 NMAC (setting out the regulatory standard for denying an application for a construction permit).

20.1.4, et seq. NMAC (setting forth NMED permitting criteria for minor source air quality construction permit).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, 101 N.M. 291 (holding that a court "may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole").

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses, reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency it is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

ISSUE 5:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law in concluding that the NMED lacked the authority to require permit applicants to demonstrate their ability to implement required permit conditions, including identifying and quantifying an adequate water supply that would be necessary to achieve emission standards?

(b) Did the EIB Final Order lack a substantial evidentiary basis by ignoring Alto's evidence that Roper had failed to identify or quantify a water source needed

to operate the concrete batch plant and control emissions, and by making no specific findings of fact on this issue, despite the Hearing Officer's clear directive to do so?

Procedural Posture

The NMED denied Roper's permit based on its failure to demonstrate its ability to obtain a sufficient supply of water to implement necessary pollution controls and operate the proposed facility in compliance with the permit. Alto preserved this issue in its hearing testimony and post-hearing briefing, as well as in Alto's July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(C) (setting out the standard for denying an application for a construction permit).

20.2.72.208 NMAC (setting out the regulatory standard for denying an application for a construction permit).

20.1.4, et seq. NMAC (setting forth NMED permitting criteria for minor source air quality construction permit).

40 C.F.R. § 63.2 (defining "federally enforceable" conditions).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, 101 N.M. 291 (holding that a court "may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole").

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses,

reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency it is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

In Re Peabody Western Coal Co., 2005 WL 428833, at *8 (EAB) (holding that to be enforceable, permit condition had to be "practically enforceable" by specifying: (1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting.")

ISSUE 6: Whether the EIB's conduct during its review of Roper's petition, considering the totality of the circumstances, was so unreasonable that it violated Alto's procedural due process rights? Specifically, whether the EIB violated Alto's procedural due process rights by, *inter alia*:

(i) transposing the burden of proof and the burden of persuasion;

(ii) completely ignoring Alto's evidence on Issues 1-5, *supra*, in issuing the EIB Final Order;

(iii) failing to correctly distinguish the petitioner from the respondent during the EIB's decisive, March 10, 2023, public meeting, reflecting a complete lack of familiarity with the case;

(iv) relying on the advice of counsel who stated on the record that he limited knowledge of environmental law;

(v) allowing EIB Board Member Trujillo-Davis to vote to approve the EIB Final Order notwithstanding that she did not attend the public meeting at which the EIB considered Roper's petition;

Procedural Posture

This issue arose following the EIB's deliberations, when it became clear that the EIB was woefully unprepared to rule on the issues that, because of the EIB's Order Appointing Hearing Officer, the EIB Hearing Officer had left undecided. To the extent that Alto was required to preserve this issue, Alto preserved this issue in

Alto's July 10, 2023, Application for a Stay of Order Reversing the NMED Decision to Deny Air Quality Construction Permit.

Authorities:

N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law.").

U.S. Const. amend. XIV, § 1 (providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law").

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

TW Telecom of New Mexico, L.L.C. v. New Mexico Pub. Regulation Comm'n, 2011-NMSC-029, ¶ 17, 150 N.M. 12 (in an administrative proceeding, procedural due process rights extend to members of the public whose interests are affected by the outcome of the proceeding; these rights afford, at a minimum, the right to "reasonable notice and opportunity to be heard.").

N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 568 (To be "reasonable," an opportunity to be heard must be at a "meaningful time and in a meaningful manner").

Amkco, Ltd., Co. v. Welborn, 2001-NMSC-012, 130 N.M. 155 (party's interest in the use and enjoyment of property gave rise to procedural due process rights).

Los Chavez Cmty. Ass'n v. Valencia Cnty., 2012-NMCA-044, ¶ 12, 277 P.3d 475 (appellate courts "review questions of constitutional law and constitutional rights, such as due process protections, *de novo*.").

Joab, Inc. v. Espinosa, 1993-NMCA-113, ¶ 15, 116 N.M. 554 (where permit opponent had opportunity to present rebuttal evidence on proposed controls and cross-examine the applicant about controls, opponent was not denied procedural due process).

Id. at ¶ 18 (protected interest against private nuisance triggered procedural due process rights).

State ex rel. Battershell v. City of Albuquerque, 1989-NMCA-045, ¶ 15, 108 N.M. 658 (due process requires agency to apply its rules "equally and fairly to all persons properly before it.").

STATEMENT REGARDING RECORDING OF PROCEEDINGS

Upon information and belief, the EIB public hearings were both video and audio recorded through WebEx. These recordings are publicly available on the NMED website under Docketed Matters (EIB hearing) and Archived Docketed Matters (Air Quality Bureau hearing). EIB meeting recordings are available on the NMED YouTube channel.

RELATED OR PRIOR APPEALS

There are no related appeals, and no order appointing appellate counsel was issued.

CONCLUSION

The EIB Final order should be overturned as arbitrary and capricious, an abuse of discretion, not based upon substantial evidence, and otherwise not in accordance with law, and the matter should be remanded to the EIB for further proceedings.

Respectfully submitted,

HINKLE SHANOR LLP

By */s/ Thomas M. Hnasko*
Thomas M. Hnasko
Timothy B. Rode
Lisa G. Zammiello
Post Office Box 2068
Santa Fe, NM 87504-2068
505.982.4554
thnasko@hinklelawfirm.com
trode@hinklelawfirm.com
lzammiello@hinklelawfirm.com

Attorneys for Appellant Alto Coalition for Environmental Preservation

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Alto Coalition of Environmental Preservation's Docketing Statement* was electronically served via Odyssey and email, as indicated below, on each of the following on this 20th day of July, 2023:

Electronic Mail

Christopher Vigil, Assistant General Counsel
Lara Katz
New Mexico Environmental Department
chistopherj.vigil@env.nm.gov
lara.katz@env.nm.gov

Attorneys for the New Mexico Environmental Department

Louis W. Rose
Shelly Dalyrmple
Troy S. Lawton
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873
lrose@montand.com
sdalyrmple@montand.com
tlawton@montand.com

Attorneys for Roper Construction, Inc.

Karl Rysted
Assistant Attorneys General
New Mexico Office of the Attorney General
(505) 490-4054
krysted@nmag.gov

Attorney for the New Mexico Environmental Improvement Board

Pamela Jones
Madai Corral
Hearing Administrators
New Mexico Environmental Improvement Board
pamela.jones@env.nm.gov
madai.corral@env.nm.gov

Administrators for the New Mexico Environmental Improvement Board

Richard Virtue, Hearing Officer
Pam Ortiz
rvirtue@virtuelaw.com
portiz@virtuelaw.com

By: */s/ Thomas M. Hnasko*