

**BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD
FOR THE STATE OF NEW MEXICO**



IN THE MATTER OF:

EIB No. 15-02(A)

**PETITION HEARING ON
TITLE V AIR QUALITY PERMIT NO. P100-R2
FOR LOS ALAMOS NATIONAL LABORATORY**

**Tewa Women United,
Dr. Maureen Merritt, and
Concerned Citizens for Nuclear Safety,**

Petitioners.

FINAL DECISION AND ORDER

THIS MATTER came before a quorum of the Environmental Improvement Board (“Board”) on December 17, 2015, for a hearing in the above referenced case. The Board reviewed the evidence, deliberated, and for the reasons set forth below, voted to deny the Petition for Hearing and sustain the action of the New Mexico Environment Department (“Department”) issuing Operating Permit No. P100-R2 (“Permit”).

FINDINGS OF FACT

Background

- 1) Pursuant to 20.2.70 NMAC, Los Alamos National Security, LLC (“LANS”) submitted an application to the Department to renew the Permit on July 9, 2013. Administrative Record (“AR”) No. 1.
- 2) Department released a draft permit on December 5, 2014, and the public comment period for the draft period was open from the publishing of public notice in *Los Alamos Monitor*

- on December 18, 2014, until January 18, 2015. AR No. 12; Department Statement of Intent to Present Technical Testimony (“Department SOI”), Exhibit 1, pg. 3.
- 3) Tewa Women United, Dr. Maureen Merritt, and Concerned Citizens for Nuclear Safety (collectively “Petitioners”) submitted comments on the draft permit to the Department on January 18, 2015. Petitioners stated that there is substantial public interested in the Permit and requested a public hearing in the event that certain terms of the Permit could not be negotiated among the parties. AR No. 52; Department SOI, Exhibit 1, pg. 3.
 - 4) The Department responded to Petitioners’ comments on January 26, 2015. AR No. 63.
 - 5) Petitioners renewed their request for a public hearing and submitted additional comments on February 2, 2015, requesting: a response to environmental justice questions; a cumulative effects analysis; concerns related to multiple small (Title V) insignificant sources not required to be listed in the permit, including the soil vapor extraction system, solar evaporative tanks (SET) at Technical Area 52, and the mechanical evaporator system (MES) at Technical Area 50; and a request for monitoring still potentially existing beryllium sources that may be subject to the Title V regulation which were not included in the permit, which included Permit Condition “A707.D Other-Beryllium Activities-Reporting Requirements-Beryllium Activities” and a request to require LANL to post reports to its electronic reading room mentioned in Section A109 of the final Permit. AR No. 67; AR No. 111; Hearing Transcript (TR) 84:1-10.
 - 6) The Department held a teleconference with Petitioners and LANS to discuss the issues raised in Petitioners’ second comments on February 24, 2015. AR No. 84. The Department responded to Petitioners’ second comments in writing on February 26, 2015. AR No. 95.

- 7) Following the teleconference, Petitioners submitted a third set of comments on February 27, 2015, the same day that the Department issued the Permit. AR No. 103; Department SOI, Exhibit 1, pg. 4.
- 8) Pursuant to NMSA 1978, Section 74-2-7(H) (2003) and 20.1.2.200 NMAC, Petitioners appealed the Permit and submitted a petition for hearing to the Board on March 31, 2015 (“Petition”).
- 9) Specifically, Petitioners requested:
 - a) An analysis of cumulative effects to minority and low-income populations from polluting facilities. Petition at 5.
 - b) Continuous monitoring of emissions from the soil vapor extraction system in Technical Area 54. *Id.*
 - c) Activated carbon filtration at the soil vapor extraction system in Technical Area 54. *Id.* at 6.
 - d) Continuous monitoring of previously permitted beryllium facilities and/or beryllium operations deemed “insignificant” sources. *Id.* at 6-7.
 - e) Continuous monitoring of emissions from the solar evaporative tanks at Technical Area 52 and the mechanical evaporative system at Technical Area 50 in order to verify the Department’s determination that these sources are insignificant. *Id.* at 11-12.
 - f) That LANS, the Permittee, be required to provide Petitioners with reports that are furnished to the Department. *Id.* at 12. Petitioners modified this request in pre-filed written testimony by requesting that these records be posted to the Permittee’s

Electronic Public Reading Room in the alternative. Petitioners' SOI, Exhibit 1, pg.

11.

- 10) At no point in the Petition did Petitioners challenge issuance of the Permit. Rather, all requests were for additional conditions to the Permit. *See* Petition and Petitioners' SOI, Exhibits 1 and 3; LANS' SOI.
- 11) The Department filed its answer to the Petition on April 29, 2015. *See* Department's Answer to Petition for Hearing on Title V Air Quality Permit No. P100-R2 for Los Alamos National Laboratory.
- 12) LANS filed its answer to the Petition on April 30, 2015. *See* LANS' Answer to Petition for Hearing.
- 13) The Department filed the administrative record and interested persons list with the Board's hearing clerk on April 29, 2015. *See* Notice of Completion and Transmission of the Administrative Record and Interested Persons List.
- 14) The Department filed its Motion to Dismiss the Petition for lack of standing on April 28, 2015. *See* Motion to Dismiss.
- 15) The Motion to Dismiss was considered by the Board at its properly noticed public meeting held on July 17, 2015, and after deliberation on the Motion a quorum of the Board voted to deny the Motion to Dismiss. *See* Order Denying Motion to Dismiss (July 20, 2015).
- 16) The Board granted a hearing on the Petition originally scheduled for May 29, 2015, but this hearing was vacated and rescheduled for October 16, 2015. *See* Order Granting Unopposed Motion to Re-Schedule Public Hearing. The Hearing was again vacated and

rescheduled for December 17, 2015, based on Board availability. *See* Amended Order to Vacate and Continue Hearing.

- 17) The Department and LANS filed statements of intent to present technical testimony, including pre-filed direct technical testimony, on October 1, 2015. *See* Department's SOI and LANS' SOI.
- 18) Pursuant to the Amended Order to Vacate and Continue Hearing, Petitioners filed a statement of intent to present technical testimony, including pre-filed direct testimony, on December 3, 2015. *See* Petitioners' SOI.
- 19) Public notice of the hearing was published in English and Spanish in the *Santa Fe New Mexican* and the *Los Alamos Monitor* on October 30, 2015. *See* Affidavit of Certification for Notice of Public Hearing and Affidavits of Publication.

Facts Received During Hearing

- 20) A properly noticed hearing was held on this matter on December 17, 2015, in Santa Fe, New Mexico. TR 8:10-9:2.
- 21) At the December 17 hearing, Kathleen Wanpovi Sanchez, representing Petitioner Tewa Women United, appeared in person and testified under oath regarding her community's history in the region and concerns regarding pollutants in the air, water, and soil. Ms. Sanchez read her written testimony into the record. *See* Petitioners' Exhibit 1.
- 22) At the December 17 hearing, Ms. Joni Arends, speaking on behalf of Concerned Citizens for Nuclear Safety and the Petitioners generally, testified telephonically and under oath regarding the Petitioner's concerns of beryllium and requested that the Department ensure verification of insignificant sources of beryllium around the site for the Permit

through additional monitoring. Ms. Arends read her written testimony into the record. *See* Petitioners' Exhibit 3.

- 23) Ms. Arends testified to the Petitioners' request for continuous monitoring at soil vapor extraction systems at LANL Technical Area 54, and continuous monitoring of emissions at the solar evaporative tanks and mechanical evaporative system at LANL Technical Areas 52 and 50, respectively.
- 24) Ms. Arends also testified to the Petitioners' request for LANL's provide copies of all reports submitted to the Department or post copies to LANL's electronic public reading room.
- 25) During its opening, the Department argued that pursuant to statute and rule, the Petitioners carried the burden of proof with their Petition to the Board and noted that the Petitioners did not provided any citations in their pleadings to any legal authority as to the Department or Board's obligation or ability to place additional stipulations on the Permit or the Permittee as suggested by the Petitioners.
- 26) During questioning Ms. Arends testified that the Petitioners were "asking for verification of what has been determined to be insignificant sources..." but did not provide evidence that the Department's original determination was incorrect or any substantive argument that provided significant doubt on the Department's analysis. *See* TR, 57: 2-16.
- 27) On cross examination Ms. Arends testified that she was an attorney, that she was not representing her organization the Petitioners in a legal capacity, but that she did understand the Petitioners' obligations regarding burden of proof and the Board's regulations and statutory authority.

- 28) Ms. Arends testified that she understands the need for legal citations to support the argument made in the Petition and admits that there was no citation to state or federal law to further support the Petition. She further testified that she did some research but could not find any persuasive authority on point to include in the Petition. *See* TR, 62:16-65:1.
- 29) When questioned whether the Petitioners were challenging the finding by the Department that the emissions were insignificant, Ms. Arends did not state that the findings were being challenged, but testified that the Petitioners were “asking for verification” regarding the monitoring because of concern that they “believe it should be continuous” monitoring to capture any “seasonal fluxes” that may occur. *See* TR, 71:1-18.
- 30) Petitioners did not provide evidence that the Department’s determination was reached in error or any evidence on “seasonal fluxes” or how much impact they could possibly have on the Department’s monitoring and determination on insignificant sources associated with the Permit.
- 31) The Department called Ms. Cember Hardison as a witness who testified in person and under oath at the hearing.
- 32) Ms. Hardison is a permit program manager in the Major Source Permit Section of the Department’s Air Quality Bureau and is responsible for staff who process Title V air permit applications. Ms. Hardison testified generally as to Title V permitting.
- 33) Ms. Hardison testified to the Department’s process for reviewing permit applications and that the Permit in this matter was issued according to state air permit regulations. *See* TR, 78:18-83:11.

- 34) Ms. Hardison testified that the Department is not required by state or federal Title V permit regulations to perform a cumulative impacts analysis for the Permit in question. TR, 87:3-7.
- 35) Ms. Hardison testified that the Department has no regulatory authority to required carbon filtration or continuous emissions monitoring on LANL's soil vapor extraction units or on emissions monitoring on either the solar evaporation tanks or the mechanical evaporation system. TR, 88:20-24.
- 36) Ms. Hardison testified that the Department does not have regulatory authority over OSHA safety regulations, oversight over cleanup of closed beryllium facilities, or authority to require the Permittee to submit notifications or reports to the Petitioners or anyone else other than the Department or the EPA. TR, Hardison Testimony 89:16-90:13.
- 37) Ms. Hardison testified that her Bureau and the Department has no regulatory authority to require the conditions requested by the Petitioners to be included in LANL's Title V permit. TR, 90:22-91:7.
- 38) The Department called Mr. Bill Blankenship as a technical witness who appeared in person and the hearing and testified under oath. TR, 108:12-134:22.
- 39) Mr. Blankenship testified to his thirty-plus years of educational and professional experience in the air quality regulatory field, which included industry, government, and private consulting positions. TR, 109:5-21.
- 40) Mr. Blankenship testified to his familiarity with the Board's air quality regulations, which included experience coming before the Board multiple times as a technical witness in support of the implementation of the regulations.

- 41) Mr. Blankenship prepared pre-filed written testimony and the Department introduced the written testimony without corrections, and the exhibit was entered into the record without objection. TR, 111:6-13.
- 42) Mr. Blankenship prepared and submitted the Permit in this matter to the Department. TR, 110:17-24.
- 43) It was noted by Mr. Blankenship that at no point in the Petition or in testimony at the hearing did Petitioners challenge issuance of the Permit. Rather, all requests were for additional conditions to the Permit. *See* Petition and Petitioners' SOI, Exhibits 1 and 3; LANS' SOI; TR, Written Testimony of Bill Blankenship 3:11-13.
- 44) Mr. Blankenship stated that he did not believe the Petition should be granted and that there are not relevant New Mexico regulations to support adopting any of Petitioners' recommendations for the Permit. TR, 112:2-6.
- 45) On cross examination Mr. Blankenship testified as to his position that Petitioner's request for continuous monitoring of certain sources is "technically impossible," and stated that soil evaporation ponds have no exhaust stack that would be needed to mount a continuous emission monitor. TR, 113:6-25.
- 46) When asked on cross examination questions regarding ambient air monitoring, Mr. Blankenship testified that such monitoring is "not a continuous emission monitor," and that such method is a "poor choice to try to determine an emission rate from a [single] source." TR, 114:16-21. Mr. Blankenship further testified that "it would be very hard to establish an emission rate from a source based on an ambient monitor" on a source without a SUMMA canister. TR, 116:7-9.

- 47) Mr. Blankenship testified that he has no information regarded whether a closed facility has been cleaned up because when a facility closes he would then notify agencies such as NMED and then the closed facility is removed from the permit. TR, 126:23-127:6. Mr. Blankenship further testified that once a beryllium activity ceases at a facility, even if it is not cleaned up, that facility no longer falls under the beryllium National Emission Standards for Hazardous Air Pollutants (NESHAP). TR, 133:4-12.

CONCLUSIONS OF LAW

- 1) Issuance of operating permits is governed by NMSA 1978, Section 74-2-7 (2003) and 20.2.70 NMAC, which includes the definitions of applicable requirements in 20.2.70.7(E) NMAC, the definition of insignificant activities in 20.2.70(Q) NMAC, and the imposition of additional permit conditions as specified in Section 74-2-7(D)(2) and 20.2.70.302 NMAC.
- 2) These proceedings are controlled by the Board's adjudicatory procedures. 20.1.2 NMAC.
- 3) The Board has jurisdiction and the authority to rule on this matter. Section 74-2-7.
- 4) Petitioners bear the burden of proof in these proceedings. Section 74-2-7(K) (2003); TR, 62:16-22.
- 5) A quorum of the Board attended the December 17, 2015, hearing and was familiar with the entire record of the proceeding at the time a decision was rendered at the December 18, 2015, board meeting.
- 6) By unanimous decision, the Board determined after deliberations on December 18, that:
 - a) The Department adequately considered and responded to Petitioners' comments and properly issued the Permit in accordance with 20.2.70 NMAC. Hearing Deliberations Transcript, 4:6-14.

- b) Petitioners failed to produce any evidence or citation to relevant law authorizing addition of the requested permit conditions or that the Department was incorrect in its determinations. TR, 63:24-65:1; *See* Petitioners' SOI.
- c) Petitioners failed to meet their burden pursuant to NMSA 1978, Section 74-2-7(K). Hearing Deliberations Transcript, 10:10.

ORDER

Based on the above findings and conclusions, a quorum of the Board at its public meeting on December 18, 2015, voted unanimously to issue the following decision.

IT IS THEREFORE ORDERED the Petition is hereby DENIED.

IT IS FURTHER ORDERED the Department's permitting action is UPHELD.

IT IS SO ORDERED.

8 February 2016
DATE

/s/ e-signed
JOHN VOLKERDING, CHAIR
On Behalf of the New Mexico
Environmental Improvement Board

*Executed electronic signature via email
authorization dated 02/08/2016*

JUDICIAL REVIEW

This Order constitutes a final decision for purposes of initiating any contemplated judicial review pursuant to the provisions of NMSA 1978, Section 74-2-9(A). An aggrieved party has the right to judicial review of this Order by filing an appeal within thirty (30) days following the date of filing of the final decision. Filing an appeal does not stay the Board's Order, unless otherwise ordered by the Board or a court of jurisdiction in the state pursuant to 20.1.2.101 NMAC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Final Decision and Order** was sent via the stated methods below to the following parties on February 9, 2016:

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