

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO.**

**Earthcare New Mexico, by Miguel Acosta Munoz
Linda Marianiello, as an individual
Petitioners,**

EIB 21-48

v.

NEW MEXICO ENVIRONMENT DEPARTMENT

v.

**ASSOCIATED ASPHALT AND MATERIALS, LLC
Applicant.**

PETITION FOR HEARING

Pursuant to 20.1.2.202 NMAC, Earth Care New Mexico, by Miguel Acosta Munoz, and Linda Marianiello, as an individual, (collectively "Petitioners"), through counsel, the New Mexico Environmental Law Center (Maslyn Locke and Eric Jantz), file this Petition for Hearing appealing the New Mexico Environment Department's ("the Department") issuance of Permit No. 8585 to Associated Asphalt and Materials, LLC ("AAM").

- A. Section 20.1.2.202(A)(1) provides that a Petition be filed within 30 consecutive days from the date notice is given of the permitting action.

This petition is filed within 30 consecutive days from the date notice was given of the permitting action. Notice of the issuance of Permit No. 8585 is dated July 30, 2021. This petition was filed with the Environmental Improvement Board and the Department on August 27, 2021 within 30 days of receiving notice of the permitting actions to which Petitioners object. Thus, this petition is timely filed.

- B. Section 20.1.2.202(A)(2) provides that a petition shall identify the petitioner and certify that the petitioner has standing under the act to file the petition.

Petitioners:

Earth Care New Mexico
Contact: Miguel Acosta Munoz
Co-Director
6600 Valentine Way, Building A
Santa Fe, New Mexico 87507
505-983-6896

Macosta.csf@gmail.com

Linda Marianiello
7038 Camino Rojo
Santa Fe, NM 87507
505-474-4513
beakspeak@comcast.net

Section 74-2-7(H) of the New Mexico Air Quality Act (“the Act”) provides:

A person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board. The petition shall be made in writing to the environmental improvement board or the local board within thirty days from the date notice is given of the department’s action.

Earth Care New Mexico participated as a named party in the March 22, 2021 hearing before the New Mexico Environment Department. Earth Care’s membership is made primarily of residents who live nearest the proposed AAM operation and includes residents who live in both the Cottonwood and Riverside mobile home parks and in the Airport Road Corridor. The pollution the proposed AAM operation will emit is of concern to Earth Care members. Petitioners Earth Care New Mexico and its individual representatives also provided their own public comments at the hearing on March 22, 2021. Members commented that permitting this operation ignores the health and social impacts of locating multiple polluting industries on Santa Fe’s South Side, that nearby residents could smell the fumes of already existing industry from their homes, and that the expected pollution will adversely impact students in the area. This consolidated facility will impact Petitioners’ quality of life and quiet enjoyment of their property because of increased fumes, air pollution, including fugitive dust, traffic, light pollution, exacerbate already existing impacts on health, quality of life and property values. Permitting this operation exacerbates existing air quality conditions already adversely impacting Petitioners’ health, quality of life and property values.

Petitioner Linda Marianiello participated as a named party in the March 22, 2021 hearing before the New Mexico Environment Department. Petitioner lives in Tierra Contenta, on the Southside of Santa Fe near and the pollution the proposed AAM operation will emit is of concern to Petitioner. Petitioner is adversely impacted by the permitting action because Petitioner lives nearby the proposed facility. Petitioner also provided written comments to Pam Jones related to the proposed permitting action and provided comments at the hearing before the New Mexico Environment Department on March 22, 2021. In written comments submitted January 18, 2021, Ms. Marianiello noted that she and other residents of Tierra Contenta would be affected by air pollution and are concerned about the health impacts of such pollution. Ms. Marianiello submitted additional comments on February 1, 2021, listing additional concerns about decreased property values in Tierra Contenta and the health impacts of asphalt fumes. The proposed facility will impact Petitioner’s quality of life by adversely impacting Petitioner’s health, quality of life and property values.

- C. Section 20.1.2.202(A)(3) provides that Petitioners must identify the permitting action appealed from, specify the portions of the permitting action to which Petitioner objects and generally state the objections.

1. This petition addresses the issuance of Construction Permit No. 8585, Associated Asphalt, LLC, consolidating AAM's existing facilities at 86 Paseo de River, Santa Fe, NM 87507. Issuance of the permit was approved by the New Mexico Environment Department and notice of issuance of the permit was sent on July 30, 2021.

2. Petitioners appeal the Department's decision to issue Permit No. 8585 on the following grounds:

- a. The Department's decision approves a definition of ambient air that is contrary to law.

Petitioners raised concerns about the Bureau's definition of ambient air because the Bureau was inappropriately expanding that definition to allow the Applicant to exclude National Ambient Air Quality Standards ("NAAQS") exceedances found at nearby properties. The United States Environmental Protection Agency ("EPA") defines ambient air in such a way that allows the Applicant to exclude emissions coming from within the property boundary of the Applicant's operation, within the Applicant's control, from the overall emissions expected to be released into the ambient air. The Department, in approving Permit No. 8585, has expanded that definition to allow for exclusions at sources not in the Applicant's control, in direct contradiction to EPA's longstanding definition.

- b. The air dispersion modeling is deficient, violating of the Bureau's Air Dispersion Modeling Guidelines, EPA Guidance, and applicable law.

Petitioners raised concerns about whether the proposed operation will comply with the NAAQS because the Applicant's air dispersion modeling relies on the use of AP-42 emissions factors to determine expected emissions from the proposed source instead of actual, source-specific and real time emissions data coming from AAM's already-existing operations. Petitioners are particularly concerned about the Department's approval of the use of these factors when it comes to emissions of fine particulate matter, PM 2.5. In using these emissions factors, the Applicant's air dispersion modeling demonstrates the proposed operation will operate within less than 1% of the PM 2.5 NAAQS and, even in using these emissions factors, the operation creates PM 2.5 NAAQS exceedances at *at least* 11 locations. AP-42 emissions factors are determined by taking the average of all acceptable data relating to an emissions source and, as such, are not likely to be accurate predictors of emissions from any one specific source because approximately half of the subject sources will have emissions rates greater than the emissions factor and the other half will have emissions rates less than the factor. Thus, EPA guidance provides that these emissions factors should only be used as a last resort.

Further, Petitioners presented evidence that AAM likely did not have an accurate expected emissions calculation because the background PM 2.5 emissions concentration data provided by the Department was based on an incomplete three-year average. In order to determine whether

expected emissions for any proposed operation will exceed the NAAQS, the Applicant must add an approved background emissions concentration amount for each criteria pollutant to the expected facility emissions of that pollutant in order to determine the total expected emissions amount. These background concentrations are determined by taking an average of three years of emissions readings from relevant air monitors. The EPA requires a valid three-year average be used to determine background concentrations for PM 2.5 and the Department arbitrarily allowed for the use of a PM 2.5 average concentration based on incomplete data that does not represent air quality conditions in the area.

- c. The Department's hearing process violated Title VI of the 1964 Civil Rights Act and the Department's own policy.

Petitioners presented evidence that the Department's hearing process violated limited English proficient ("LEP") community members' right to meaningfully participate in the hearing. The Department, though required to accommodate LEP members of the public who choose to speak during a public hearing in a language other than English, decided that members of the public could "speak English well enough," moving forward with the hearing and discouraging community members from commenting at the hearing. The Hearing Officer, however, does not have the authority to decide whether an LEP community member speaks English, or any other language, well enough to be denied an interpreter. As such, the Department ignored its obligations to accommodate LEP persons who participated in the hearing.

3. Petitioners request that the Board reverse the Department's decision to approve Permit No. 8585 because:
 - a. The Department's decision violates the Clean Air Act, the New Mexico Air Quality Control Act, EPA guidance and Department guidelines.
 - b. The Department's decision to issue Permit No. 8585 is arbitrary, capricious and contrary to applicable law.
- D. Section 20.1.2.202(A)(4) requires that petitioner attach a copy of the permitting action being addressed.

A copy of the permitting action at issue is attached to this petition as Exhibit A.

Petitioners and Counsel certify that the foregoing is true and correct to the best of our knowledge and belief.

/s/ Miguel Acosta Munoz

Miguel Acosta Munoz
On behalf of Earth Care, New Mexico
6600 Valentine Way, Building A
Santa Fe, New Mexico 87507
505-983-6896

/s/ Maslyn Locke

Maslyn Locke
Staff Attorney
New Mexico Environmental Law
Center
1405 Luisa St., Ste. 5

Macosta.csf@gmail.com

/s/ Linda Marianiello

Linda Marianiello

7038 Camino Rojo

Santa Fe, NM 87507

505-474-4513

beakspeak@comcast.net

Santa Fe, NM 87505

mlocke@nmelec.org

(505) 989-9022

/s/ Eric Jantz

Eric Jantz

Senior Staff Attorney

New Mexico Environmental Law
Center

1405 Luisa St., Ste. 5

Santa Fe, NM 87505

ejantz@nmelec.org

(505) 989-9022

CERTIFICATE OF SERVICE

On this 27th day of August, 2021, counsel for Petitioners caused to be served by electronic mail a copy of the foregoing Petition with Exhibit A to the following:

Gregory Chakalian
Administrative Law Judge, Office of Public Facilitation
New Mexico Environment Department
1190 St. Francis Drive, Santa Fe NM 87505
(505) 690-4549
Gregory.chakalian@state.nm.us
Hearing Officer

via

Madai Corral
Paralegal/Hearing Clerk
Office of Public Facilitation
New Mexico Environment Department
1190 St. Francis Drive, Santa Fe NM 87505
(505) 490-5803
Madai.Corral@state.nm.us

Pamela Jones
P.O. Box 5496
Santa Fe, NM 87502
(505) 827-2428
pamela.jones@state.nm.us
Hearing Clerk

Christopher J. Vigil
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave., NE Suite 1000
Albuquerque, NM 87102
(505) 827-2985
Christoperj.vigil@state.nm.us
Counsel for the New Mexico Environment Department

Travis G. Jackson
Megan D. Stanford
Jackson Loman Stanford Downey, P.C.
201 3rd St. SW #1500
Albuquerque, NM 87102
(505) 767-0577
travis@jacksonlomanlaw.com
meghan@jacksonlomanlaw.com
Counsel for Associated Asphalt and Materials, LLC

NEW MEXICO ENVIRONMENTAL LAW CENTER

/s/ Maslyn Locke

8/27/21

Maslyn Locke
Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
Tel.: (505) 989-9022
Fax: (505) 989-3769
Attorneys for Community

EXHIBIT A

RECEIVED

By Office of the Secretary at 11:12 am, Jul 30, 2021

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION
OF ASSOCIATED ASPHALT AND
MATERIALS, LLC FOR AN AIR QUALITY
CONSTRUCTION PERMIT FOR A FACILITY
IN SANTA FE, NEW MEXICO**

NO. AQB 20-12

FINAL ORDER

This matter comes before the Deputy Secretary of Environment following a hearing before the Hearing Officer on March 22-24, 2021, held via the Zoom virtual platform in response to the public health orders in place at that time.

Associated Asphalt and Materials, LLC ("AAM" or "Applicant") seeks an air quality construction permit to consolidate their hot mix asphalt plants into one amalgamated site ("Site"). AAM currently operates two hot mix asphalt plants under valid air quality permits in an area zoned for Heavy Industrial use in Santa Fe.

AAM proposes construction and operation of a 200 ton per hour (TPH) aggregate crushing and screening plant, 50 TPH aggregate scalping screen, a 150 TPH hot mix asphalt plant (HMA Plant #2) and a 300 TPH hot mix asphalt plant (HMA Plant #5), all to be located at the Site. AAM proposes moving HMA Plant #2 and the scalping screen plant, to the Consolidated Site. Consolidation under Draft Permit 8585 is modeled to produce the following benefits: reduced traffic turning onto Airport Road from Oliver Road; enhanced traffic flow with improved safety with truck traffic utilizing the NM 599 frontage road for delivery of raw materials and shipping of finished materials; reduction of dust and increased driver safety as a result of newly paved ingress and egress roads from the Consolidated Site; reduction of

particulate dust from fewer and better-managed stockpiles of raw materials at the Consolidated Site; movement of plants farther away from residential dwellings; and elimination of portable generators and associated diesel emissions in favor of line electric power. AAM's anticipated consolidation will not increase or expand its operations or footprint.

The New Mexico Environment Department Air Quality Bureau supports the approval of the permit allowing construction and operation of the plant with conditions necessary to protect human health and welfare and the environment.

Having considered the administrative record, including all post-hearing submittals and the Hearing Officer's Report, and the Comments; and being otherwise fully advised regarding this matter;

THE DEPUTY SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH THE FOLLOWING ADDITIONS:

- a. A preponderance of evidence supports the conclusion that Draft Permit 8585 will not cause or contribute to air contaminant levels in excess of any National Ambient Air Quality Standards (NAAQS), New Mexico Ambient Air Quality Standards (NMAAQs), or cause or contribute to ambient concentrations in excess of a Prevention of Significant Deterioration (PSD) increment.
- b. The Bureau's understanding of the term "Ambient Air" as testified to by Eric Peters and defined at 20.2.72.7.D NMAC is consistent with State and Federal law and does not render NAAQS almost obsolete.
- c. A preponderance of evidence supported AAM's use of the air dispersion

modeling grid receptor spacing of 50 meters, as appropriate and consistent with AERMOD and the State and Federal Acts.

- d. The Bureau's testimony regarding the reasons for the use of 1.5-years of Runnels background concentration data instead of 3-years was reasonable and not contrary to law.
- e. A thorough review of Mr. Eric Peter's testimony by the Hearing Officer concludes he was credible, consistent, and persuasive.
- f. A preponderance of evidence shows that AAM's ambient air quality modeling of concentrations of PM2.5, submitted and approved by the Bureau, was based on applicable air quality models as required by 20.2.74.305 NMAC.
- g. The Department and the Office of Public Facilitation provided a meaningful opportunity for all members of the public including those with limited English proficiency to comment and participate in the three-day public hearing.

IT IS THEREFORE ORDERED:

The application for an air quality permit is granted, and the permit shall be issued by the Air Quality Bureau in the form set forth in the Draft Permit, as shown in the Administrative Record.

Stephanie Stringer Digitally signed by Stephanie Stringer
Date: 2021.07.30 08:47:51 -06'00'

Stephanie Stringer,
Deputy Secretary of Environment

NOTICE OF RIGHT TO REVIEW

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

Certificate of Service

I hereby certify that on July 30, 2021, a copy of the **Final Order** was sent via electronic mail to the persons listed below:

Christopher J. Vigil
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave. NE,
Suite 1000
Albuquerque, New Mexico 87102
(505) 827-2985
Christopherj.vigil@state.nm.us
Counsel for the New Mexico Environment Department

Travis G. Jackson
Jackson Loman Stanford Downey, P.C.
201 3rd ST. SW#1500
Albuquerque, NM 87102
travis@jacksonlomanlaw.com

Meghan D. Stanford
Attorney for Associated Asphalt and Materials, LLC
201 Third Street NW, Suite 1500
Albuquerque, NM 87102
(505) 767-0577/ (505) 242-9944 fax
meghan@jacksonlomanlaw.com

Maslyn Locke
Eric Jantz
New Mexico Environmental Law Center
1405 Luisa Street Suite 5
Santa Fe, NM 87505
mlocke@nmelc.org
ejantz@nmelc.org

Lara Katz
Assistant General Counsel
New Mexico Environment Department
1190 St. Francis Dr., Suite N4050
Santa Fe, New Mexico 87501
Office: (505) 827-2985
Cell: (505) 577-6178
lara.katz@state.nm.us
<https://www.env.nm.gov/>

Madai Corral
Hearing Clerk
P.O. Box 5469
Santa Fe, NM 87502
Madai.corral@state.nm.us