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**STATE OF NEW MEXICO  
ENVIRONMENTAL IMPROVEMENT BOARD**

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

**No. EIB 22-34**

**ROPER CONSTRUCTION, INC.,  
Petitioner,**

**v.**

**NEW MEXICO ENVIRONMENT DEPARTMENT  
Respondent.**

**FINAL ORDER**

This matter comes before the New Mexico Environmental Improvement Board (“EIB”) upon the Petition for Hearing on Air Quality Permit No. 9295 (“Petition”) filed by applicant Roper Construction, Inc. (“Petitioner”).

Petitioner was represented by Louis W. Rose and Troy Lawton, Montgomery & Andrews, P.A. The New Mexico Environment Department (“Department”) was represented by counsel Christopher Vigil. The Alto Coalition for Environmental Preservation (“Alto CEP”) was represented by Thomas M. Hnasko and Julie A. Sakura, Hinkle Shanor, LLP.

On March 24, 2023, the EIB met pursuant to 20.1.2.403 NMAC to deliberate and consider the Hearing Officer’s Report and (Procedural) Recommended Findings of Fact and Conclusions of Law (“Recommended Decision”). By a vote of 4-1, the EIB decided to adopt the Recommended Decision and to issue Permit 9295. The EIB issues this Final Order pursuant to 20.1.2.403(B) NMAC.

## BACKGROUND

This matter has a complicated history with a resulting unusual posture before the EIB. Roper Construction, Inc. applied for an air quality construction permit. On November 16, 2021, due to public interest, the Department Secretary scheduled a hearing (“Department Hearing”) before its Hearing Officer, Gregory Chakalian. On February 9, 2022, the Department Hearing was held, with the result that Hearing Officer Chakalian recommended Petitioner’s permit application be denied. On June 22, 2022, the Secretary’s designee, Deputy Secretary Stringer, followed that recommendation and entered an Order denying the application. Petitioner appealed that decision to the EIB, arguing that the Secretary’s decision (and the Hearing Officer’s recommendation) was based on misapplication of the law and facts.

On August 22, 2022, the Department answered the Petition before the EIB, *agreeing* with the Petitioner that the permit application should be approved based on the Hearing Officer’s recommendations being in error, after the Department’s thorough administrative and technical review of the permit application and evidence presented. Alto Coalition for Environment Preservation (“CEP”, which has also referred to itself as the Property Owners of Sonterra), has argued that the Hearing Officer’s recommendations were correct and the EIB should uphold the denial of Petitioner’s permit application.

The EIB appointed Hearing Officer Richard Virtue to conduct the hearing before the EIB (“EIB Hearing”) for September 21, 22, and 23, 2022. On August 8, 2022, Alto CEP (calling themselves Sonterra) filed a Motion to Vacate and Reset the hearing. On August 24, 2022, Hearing Officer Virtue entered an Order granting the Motion and reset the hearing for October 18-20, 2022, as needed and until completed. *See* 20.1.2.109(B)(2) NMAC. Public Notice of the EIB Hearing was given as detailed in the Findings of Fact and Conclusions of Law below.

On October 17, 2022, EIB member Sandra Ely filed her Notice of Recusal. On October 18, 2022, prior to commencement of the hearing, the EIB held a special meeting to consider several dispositive motions which were filed by Alto CEP. The EIB denied these motions and the hearing proceeded for three days. The issues presented were:

1. Petitioner's Prima Facie Case in support of the Petition
2. Technical Testimony of the Department and Alto CEP on the controverted issues of Air Dispersion Modeling and Water Quantity and Water Rights.

After the EIB Hearing, on January 18, 2023 the Hearing Officer issued a Report and (Procedural) Recommended Findings of Fact and Conclusions of Law ("Recommended Decision"). At its public meeting on March 24, 2023, the EIB considered the Hearing Officer's Recommended Decision during deliberations. It is the decision of the EIB to adopt the Recommended Decision, and based on the evidence from the EIB hearing, to reverse the Secretary designee's decision to deny the permit application and therefore approve the issuance of Permit 9295, for reasons that follow.

### **REASONS FOR ADOPTION OF THE RECOMMENDED DECISION**

Pursuant to 20.1.2.403(B) NMAC, the EIB adopts the Hearing Officer's Recommended Decision. The EIB adopts the Hearing Officer's Recommended Findings of Fact and Conclusions of Law contained in Attachment 1 of the Recommended Decision as consistent with and supported by the evidence in the record. However, the Hearing Officer noted in the Recommended Decision that the Order appointing him did not direct him to prepare proposed Findings of Facts and Conclusions of Law, so he only entered those on uncontested procedural matters in Attachment 1 of the Recommended Decision. Therefore, at its public meeting on March 24, 2023, the EIB had to consider contested issues during deliberations based on the entire record. The following

Findings of Fact and Conclusions of Law are adopted as consistent with the EIB's determination on the Recommended Decision.

## **FINDINGS OF FACT**

### **A. THE APPLICANT AND THE PROPOSED FACILITY**

1. Roper Construction, Inc. ("Roper" or "Applicant") is a New Mexico-based domestic profit corporation and the owner/operator of the proposed Alto Concrete Batch Plant ("Facility"). AR No. 1, Bates No. 0003-0004.

2. The Facility is located at Section 27, Range 13E, Township 10S, Lincoln County, New Mexico. AR No. 1, Bates No. 0004.

3. The Applicant filed Application 9295 ("Application") for an air quality construction permit pursuant to 20.2.72 NMAC, for the proposed Facility to include an aggregate feed hopper (Unit 2), aggregate feed hopper conveyor (Unit 3), 4-bin aggregate bin (Unit 4), aggregate weigh batcher with conveyor (Units 5 and 6), cement/fly ash split silo (Units 9 and 10) with screw conveyors and dust collectors (Units 9b and 10b), cement/fly ash batcher (Unit 8) and concrete truck loading area (Unit 7) with central dust control system (Unit 7b) to control fugitive dust from the truck loading area and cement/fly ash batcher, aggregate and sand storage piles (Unit 11), and three heaters at .19 MMBtu/h each (units 12,13 and 14). AR No. 2, Bates No. 0191.

4. The Application proposed the Facility hours of operation of 7AM-6PM from November through February, 5AM-7PM March and October, 4AM-9PM April and September, and 3AM-9PM May through August. The Applicant certifies that the Facility will limit the hourly production rate to 125 cubic yards per hour and yearly production rate to 500,000 cubic yards per year. The annual emissions are controlled by limiting the

hours of operation and annual throughput of the Facility. NMED Exhibit 1 at 3.

5. During the proposed operations at the Facility, a front-end loader will load aggregate and sand into the aggregate feed hopper. The aggregate feed hopper conveyor transfers the material to the 4-bin aggregate bin. The aggregate and sand in the 4-bin aggregate bin is measured by the aggregate weigh batcher and transferred to the batcher conveyor. From the batcher conveyor, the aggregate and sand will be transferred to a truck loading area where they will be loaded into the concrete trucks. Fugitive dust created while loading concrete trucks will be controlled by the central dust control system as outlined in Section A502 of the Draft Permit. AR No. 119, Bates No. 2113-2114. Dust collected in the dust control system will be recycled back to the cement silo. AR No. 2, Bates No. 0191.

6. Measured amounts of fly ash and cement from the cement/fly ash split silo will be transferred by screw conveyors or gravity feed to the cement/fly ash batcher. From the cement/fly ash batcher, the measured material will be loaded into the concrete trucks at the same time as the aggregate, sand, and water. Fugitive dust created during transfer to the cement/fly ash batcher will be controlled by a central dust control system. During loading of the cement/fly ash split silo, fugitive dust will be controlled by a dust collector for each compartment of the split silo. Haul roads on site will be paved and maintained to reduce particulate emissions from truck traffic. AR No. 2, Bates No. 0192.

**B. THE AIR QUALITY BUREAU ("AQB" OR "BUREAU") OF THE NEW MEXICO ENVIRONMENT DEPARTMENT ("DEPARTMENT" OR "NMED") ADMINISTRATIVE AND TECHNICAL REVIEW OF THE APPLICATION**

**i. The Bureau's Administrative Review**

7. Application 9295 was received by the Bureau on June 22, 2021. NMED

Exhibit 1 at 5.

8. Upon receipt of the hard copy of the Application, on June 23, 2021, the Bureau requested that Applicant provide the electronic version of the documents due to the mandatory teleworking policy at the Department. The Applicant provided an electronic document to the Bureau's permitting section and the modeling files to the Bureau's Modeling Section. A copy of Application 9295 was posted on the Bureau's web page for permit applications with public interest on June 23, 2021. [AR No. 94, Bates No. 1741].

9. On June 28, 2021, Bureau technical staff received an email from the Bureau's Modeling Section manager, confirming that Application 9295 was complete from a modeling perspective. [AR No. 89, Bates No. 0965-0966].

10. On July 19, 2021, Bureau staff sent an email to the Applicant's representative requesting the property tax record, the certified mail receipt for Reynaldo Cervantes, and an example of the letter sent to the landowners. The Applicant's representative responded on July 19, 2021, providing the list provided by the Lincoln County Assessor's office, the certified mail receipt for Reynaldo Cervantes' Mexican address which was already present in the original application, and a statement that the letter sent to the government officials was also sent to the landowners. [AR Nos. 36 Bates 0481; 37 Bates 0482-0487].

11. On July 22, 2021, the Bureau ruled Application 9295 administratively complete. [NMED Exhibit 1 at 5; AR No. 38, Bates No. 0488-0493].

12. The Bureau sent the administrative completion determination letter, a copy

of the Department's Legal Notice, and an invoice for the permit fee to the Applicant on July 22, 2021. [NMED Exhibit 1 at 6; AR No. 38, Bates 0488-0493].

13. On July 22, 2021, the Bureau sent the Department's Legal Notice to Environmental Protection Agency ("EPA") Region 6. The Bureau also sent, by email, the Department's Legal Notice to the Lincoln National Forest and Smokey Bear Ranger District. The Department's Legal Notice was posted on the Bureau's website on the web page for permit applications with public interest. The Bureau's administrative staff sent the Department's Legal Notice to Ruidoso News for publication, and it was published in that newspaper on July 28, 2021. [NMED Exhibit 1 at 6-7; AR No. 97, Bates 1839-1841; AR No. 96, Bates 1835-1836; AR No. 97, Bates 1839-1841; AR No. 106, Bates 2020; AR No. 104, Bates 1980].

**ii. The Bureau's Technical Review**

14. The Bureau began the technical review of Application 9295 after it was deemed administratively complete. The technical review requires verification of emission calculations and a determination of applicable federal regulations and state regulations. [NMED Exhibit 1 at 7].

15. While performing the technical review, the Bureau determined that the emissions represented for Unit 12 were derived from 3 heaters combined, and because there were 3 units, an additional fee was calculated and an invoice for the additional two heaters was sent to the applicant on August 5, 2021. During the technical review, Bureau staff noticed that Section 1D, questions 7 and 11 were not reflective of the notification provided to the Mescalero Tribe in the original application (page 105 of the original application). The Bureau requested updates for those questions from the Applicant's representative on August 7,

2021, and the Bureau received the updates on August 10, 2021. [NMED Exhibit 1 at 7-8; AR No. 1, Bates 0001-0190; AR No. 43, Bates 0515-0516].

16. Bureau staff verified the emission calculations contained in the Application by confirming that the correct emission factors and formulas were used in calculating emission for all sources. The Bureau also verified the emission totals from the calculations matched the emissions total in Section 2 of the Application. [NMED Exhibit 1 at 8; AR No. 5, Bates 0208-0241].

17. Roper submitted several updates to the Application throughout the review process. [NMED Exhibit 1 at 8].

18. The Bureau reviewed the emission calculations submitted in the Application for all regulated equipment and the emission factors are based upon the EPA's AP-42 Compilation of Air Emission Factors ("AP-42"). AP-42 is the EPA's compilation of emission factors for various industries. Emission factors are representative values that relate to the quantity of a pollutant released to the ambient air with an activity associated with the release of that pollutant. These factors are usually expressed as the weight of pollutant divided by a unit weight, volume, distance, or duration of the activity emitting the pollutant. The factors are expressed in units such as pounds per ton of material processed and pounds per hour. Use of such factors facilitates estimation of emissions from various sources of air pollution. In most cases, these factors are averages of all available data of acceptable quality and are generally assumed to be representative of long-term averages. [NMED Exhibit 1 at 8-9; AR No. 1, Bates 0001-0190; AR No. 5, Bates 208-241].

19. The Department determined that the emission factors used in the



calculations are appropriate for this source type and were approved by the Department. The approved calculated emission rates were used as inputs into the Bureau's air dispersion modeling analysis. The air dispersion model conservatively predicts concentrations of the National Ambient Air Quality Standards ("NAAQS") based upon the approved emission rates. [NMED Exhibit 1 at 9].

20. During the technical review, Bureau staff began work on a Draft Permit and a Draft Statement of Basis. The Statement of Basis is a permitting record that includes a description and history of the facility, public response received by the Bureau, a regulatory compliance discussion, and outlines unique conditions in the permit. After completing the initial draft permit version 2021-09-13, Bureau staff sent it to the Applicant's representative for comments, and received comments on the Draft Permit from the Applicant's representative on September 15, 2021. [AR No. 68, Bates 0678-0693; AR No. 69, Bates 0694-0711].

21. The Applicant requested that the Bureau update Condition A108B (monitoring and record keeping), Condition A112 (haul roads), Condition A502 (process equipment); and Condition A503C. The Bureau sent Draft Permit version 2021-12-16 to the Applicant's representative for comments on December 22, 2021 and received a response on December 23, 2021. [AR No. 80, Bates No. 0826-0841; AR No. 81, Bates No. 0842-0860].

22. The Draft Permit versions dated December 8, 2021, and December 30, 2021, were provided to the Compliance and Enforcement section of the Bureau for comments. In addition, the Bureau did a further analysis to ensure enforceability of the permit condition. [NMED Exhibit 1 at 10; AR No. 8, Bates No. 0333-0337].

iii. **The Bureau's Review of the Air Dispersion Modeling**

23. The Bureau's modeling staff testified that, in order to be issued an air quality construction permit under 20.2.72 NMAC, the Applicant must demonstrate that construction of the proposed Facility will not cause or contribute to any violations of National or New Mexico Ambient Air Quality Standards, Prevention of Significant Deterioration (PSD) Increments, or State Air Toxic pollutant requirements. National Ambient Air Quality Standards are periodically reviewed by the Environmental Protection Agency and are designed to protect the most sensitive individuals. PSD increments are designed to maintain the air quality of pristine areas. Toxic permitting thresholds prevent persons from being exposed to more than one percent of the amount that has been deemed acceptable for workers to be exposed to throughout the day. [NMED Exhibit 3 at 2].

24. The Bureau's modeling staff reviewed the air dispersion modeling submitted by the Applicant, and verified that the Application followed appropriate modeling practices, as set out in the New Mexico Modeling Guidelines. [NMED Exhibit 7 (NMED Hearing)]. Details of the modeling are described in the Modeling Review Report, which is contained in the Administrative Record. [NMED Exhibit 3 at 1; NMED Exhibit 7; AR No. 6].

25. Bureau staff testified that, if the Facility operates in compliance with the terms and conditions of the draft permit, then operation of the Facility will not cause or contribute to any concentrations of pollutants above State or federal ambient air quality standards or PSD increments. Bureau modeling staff testified that, since the Facility has satisfied all modeling requirements, the permit may be issued. [NMED Exhibit 3 at 2].

**C. THE BUREAU'S PUBLIC OUTREACH**

26. The Application had significant public interest as documented by phone calls, emails and hard copy letters sent through U.S. Postal Service since June 3, 2021. Bureau staff reached out to several of the members of the public by telephone and email, and explained the permitting process. The Bureau also sent out emails to concerned citizens on June 24, 2021, indicating that the Application was received, outlining the permitting process, and indicating that their concerns were recorded. Initial citizen letters were sent to concerned citizens on record on June 30, 2021, July 1, 2021, July 22, 2021, and September 17, 2021. [NMED Exhibit 1 at 10; AR No. 95, Bates 1742-1835].

27. The Bureau sent an initial citizens letter by email to interested citizens with email addresses on record providing more clarity on the permitting process on July 22, 2021. On July 1, 2021, and July 23, 2021, the Bureau provided hard copy initial citizen letters to be mailed out to citizens who did not provide an email address. [NMED Exhibit 1 at 10-11; AR No. 103, Bates No. 1968-1979; AR No. 95, Bates No. 1742-1835].

28. The initial citizen letter is a template letter developed to comply with requirements in 20.2.72.206(B)(1) NMAC. The letter confirms citizens' written comments will be included as part of the permit application record. The letter also provides general information about the permit process, the pending availability of the Department's analysis, and the option to request a public hearing. [NMED Exhibit 1 at 11; AR No. 95, Bates No. 1749].

29. Interested persons were allowed thirty (30) days after publication of the public notice of filing of the Application to express an interest in writing in the Application per 20.2.72.206(A)(5) NMAC. The public notice was published in the

newspaper on July 28, 2021, and at the end of the 30-day comment period was August 27, 2021. [NMED Exhibit 1 at 11; AR No. 104, Bates No. 1980].

30. There were several requests for a public hearing to be held in this matter and the Bureau sent a Hearing Determination request to the office of the Secretary of the Department on August 3, 2021. The Secretary concurred with the Bureau's recommendation for a public hearing to be held based on the significant public interest and issued a Hearing Determination. The Bureau provided information concerning the Hearing Determination to concerned citizens with email addresses on record via email. Several more concerned citizens letters and emails were received after the result of the Hearing Determination and the Bureau sent initial Citizen letters on September 17, 2021, to citizens who had sent comments after July 23, 2021. [NMED Exhibit 1 at 11; AR No. 92, Bates No. 0982-1271; AR No. 93, Bates 1272-1667; AR No. 94, Bates No. 1712; AR No. 95, Bates No. 1742-1834].

31. The Bureau's analysis, including the Statement of Basis and modeling review report were posted on the Department webpage for public notices under Lincoln County. [NMED Exhibit 1 at 11; AR No. 106, Bates No. 2002-2023].

32. On September 21, 2021, the Bureau sent out second Citizen letters to all citizens who had expressed an interest in the application in writing up to date. The second Citizen letter is a template letter to notify citizens the Department's analysis is available for review. The letter included a link to the Department's analysis, including the Statement of Basis and modeling review report, which were posted on the new Department webpage for public notices under Lincoln County. [NMED Exhibit 1 at 11; AR No. 98, Bates No. 1851-1916].

**D. THE DRAFT PERMIT**

33. 20.2.72.210 NMAC provides that a permit must specify what equipment is authorized to be installed and operated, place limits on air pollutants, and place requirements on how equipment will be operated. A permit is an enforceable legal document, and includes emission limits, methods for determining compliance on a regular basis, and also includes monitoring, recordkeeping, and reporting requirements to ensure and verify compliance with the requirements of the permit. Conditions in Part A of the Draft Permit are Facility Specific Requirements, unique to the facility. They are site-specific and based on information provided in the Application. Conditions in Part B of the Draft Permit are General Conditions and standard language which generally apply to all sources. Part C is also standard language about supporting on-line documents, definitions, and acronyms which apply to all sources. [NMED Exhibit 1 at 13-14].

34. A draft permit is subject to updates throughout the review process. The Draft Permit began with standardized language in a Bureau permit template with standardized Bureau monitoring protocols added as necessary for the sources of emissions and control devices at the Proposed Facility. [NMED Exhibit 1 at 14].

35. Bureau staff included unique permitting conditions in the Draft Permit for site-specific operations and equipment, based on information provided in the Application. The Draft Permit was then sent to the Applicant and its representative to provide an opportunity to review and comment. The Applicant proposed changes to monitoring requirements for Facility throughput and visible emissions. [NMED Exhibit 1 at 14; AR No. 69, Bates No 0694-0711].

36. The Bureau reviewed the Applicant's proposed changes and confirmed

that the requests would be enforceable, then made edits to the conditions with which the Bureau agreed. The Bureau did not agree with all the requests the Applicant submitted. In the updated Draft Permit (Version 2021-12-30), monitoring and record keeping requirements for Condition A108B facility throughput and visible emissions were revised from hourly to daily after further review and explanation by the applicant regarding the maximum physical production limits. [NMED Exhibit 1 at 14; AR No. 74, Bates No. 0806-0810].

37. In the Draft Permit (Version 2021-12-30), for condition A503C monitoring the Bureau determined that the most reasonable requirement would be for the Applicant to do, at minimum, a weekly monitoring requirement as opposed to the monthly requirement requested by the Applicant and the daily requirement posted in the previous permit draft. In the Draft Permit (Version 2021-12-30), Condition A503D updated the recordkeeping requirement with respect to differential pressure was updated from daily to each time cement (unit 9) or fly ash (Unit 10) loading takes place. [NMED Exhibit 1 at 14-15; AR No. 81, Bates No. 0842-0860].

38. Pursuant to 20.2.72.206(B)(2) NMAC, a draft permit cannot be issued until at least 30 days after the Department's analysis is available for review. The Draft Permit was revised to incorporate all the calculation updates provided by the Applicant's representative. Updates related to typographic errors, address update for the Facility and incorrect unit number references provided by the Applicant and all of the updates were posted on the Department's webpage for public notices under Lincoln County. [NMED Exhibit 1 at 11-12; AR No. 106, Bates No. 2002-2023].

39. An updated version of the Draft Permit (Version 2021-12-30), an updated

version of the draft Statement of Basis (Version 2021-12-30), and the draft Database Summary (Version 2021-12-30), were posted on the Department's webpage for public notices under Lincoln County. [NMED Exhibit 1 at 12; AR No. 9, Bates No. 0338-0395; AR No. 2, Bates No. 0191-0198; AR No.3, Bates No. 0199-0203].

40. The Bureau created a document titled "Frequently Asked Questions" ("FAQs") in response to citizens' comments and questions regarding the Application and Draft Permit and posted it on the Department's webpage for public notices under Lincoln County on December 30, 2021. The FAQs were developed by grouping like-kind public comment questions into 19 FAQs with associated answers. [NMED Exhibit I at 12; AR No. 99-102, Bates No. 1917-1967; AR No. 106, Bates No. 2002 -2023. AR No. 103, Bates No. 1968-1979].

41. Bureau staff testified that the Applicant is required to operate the Facility as represented in the Application and any Application updates. The failure to operate the Facility as represented in the Application and the Application updates would be considered a violation of the permit and would be referred to the Enforcement Section at the Air Quality Bureau. In addition, the Draft Permit contains operating, monitoring, and recordkeeping conditions to ensure compliance with the emission rates in the permit. [2-9-22 Tr. 87:14-22].

#### **E. PUBLIC NOTICE AND THE NMED FEBRUARY 1, 2022 PUBLIC HEARING**

42. Because of significant interest by members of the public, the Secretary determined that a hearing would be held in this matter under 20.1.4 NMAC. On November 16, 2021, the Secretary entered an Order for a hearing and appointment of a hearing officer. [NMED Exhibit 1 at 11].

43. The NMED Hearing Officer scheduled a public hearing for February 9 through 11, 2022 ("NMED Hearing"). Bureau staff made arrangements for a Spanish interpreter to be present at the NMED Hearing and for a court reporter to be present at the NMED Hearing. [NMED Exhibit 1 at 12].

44. Due to the public health orders issued by the State related to the Coronavirus pandemic, the NMED Hearing Officer ordered that the public hearing would be a "hybrid" hearing, allowing for both virtual and in-person participation by members of the public.

45. The Bureau staff drafted the Notice of Hearing in accordance with the requirements in 20.1.4 NMAC. The Notice of Hearing was translated into Spanish and received by the Bureau on December 21, 2021. [NMED Exhibit 1 at 12].

46. On December 30, 2021, the Notices of Hearing in both English and Spanish were posted on the Department's webpage for public notices under Lincoln County and Roper Construction Inc. documents. The Bureau's Administrative staff e-mailed requests for publication of the Notice of Hearing in English and the Notice of Hearing in Spanish to *The Albuquerque Journal* and *Ruidoso News* on December 30, 2021. *Id.*

47. On January 3, 2022, the Bureau sent e-mails with the Notice of Hearing in English and Spanish attached to EPA Region 6, the Lincoln County Clerk, the Ruidoso Village Clerk, Ruidoso Downs City Clerk, Capitan Village Clerk, and to Christina Thompson, Travis Moseley, Camille Howes, Andres Bolanos, Laura Rabon and Sean Donaldson at the White Mountain Wilderness/Lincoln National



Forest and Smokey Bear Ranger District. [NMED Exhibit 1 at 13; AR No. 101, Bates No. 1949-1956].

48. Also, on January 3, 2022, the Bureau mailed hardcopies of a cover letter and the Notice of Hearing in English and Spanish in an envelope to interested citizens. These citizens had submitted written comments only by U.S. Postal Service and did not provide their email addresses in their comment letters. The Bureau delivered these envelopes to the Runnels Building on January 4, 2022, so they could reach the Department's Administrative Services Division (ASD) for postage and mailout on January 5, 2022. On January 3, 2022, and January 4, 2022, the Bureau emailed the cover letter and Notice of Hearing in English and Spanish to all the citizens who had provided written comment via email or provided their email address in their mailed letter as of January 3, 2022. [AR No. 99, Bates No. 1917-1937; AR No. 100, Bates No. 1938-1948].

49. The Notice of Hearing was published in English and in Spanish in *The Albuquerque Journal* and *Ruidoso News* on January 5, 2022. [NMED Exhibit 1 at 12; AR No. 104, Bates No. 1980-1997].

50. The NMED Hearing in this matter was held and concluded on February 9, 2022. The NMED Hearing Officer, the Parties, and many members of the public appeared virtually on the WebEx platform. For members of the public who wanted to participate in-person, the Bureau provided a venue at the Capitan Municipal Schools where members of the public could view and participate in the Hearing.

**F. PUBLIC NOTICE OF THE HEARING AND THE OCTOBER 2022 EIB PUBLIC HEARING**

51. For the EIB Hearing, Department staff prepared the Notice of Hearing in accordance with the requirements of 20.1.2 NMAC and arranged to have it translated into Spanish by Ana Maria MacDonald, Translation Program Manager for the Department. Department staff created the Notice of Hearing in English and the Notice of Hearing in Spanish on Board letterhead. [NMED EIB Exhibit 1 at 4; NMED EIB Exhibits 3 and 4].

52. Department administrative staff mailed out hard copies of the Notice of Hearing in English and the Notice of Hearing in Spanish on September 7, 2022. They prepared envelopes with labels to be mailed by the U.S. Postal Service to citizens who submitted written comments to Department by US Postal Service and did not provide an electronic mail address prior to the NMED Hearing. [NMED EIB Exhibit 1 at 4-5].

53. Department staff sent the Notices of Hearing in English and in Spanish to the Office of Public Facilitation ("OPF") via email on September 7, 2022. OPF posted the Notice of Hearing in English and in Spanish on the Department's Docketed Matters website under the Environmental Improvement Board dropdown, in the section for EIB 22-34 Appeal Petition - Permit No. 9295 Roper Construction Inc. on September 9, 2022. [NMED EIB Exhibit 1 at 5; NMED EIB Exhibit 7].

54. The Notice of Hearing for EIB 22-24 was published in English and in Spanish in *The Albuquerque Journal* on September 10, 2022. The Notice of Hearing was published in English and in Spanish in *Ruidoso News* on September 14, 2022. [NMED EIB Exhibits 5 and 6].

55. On September 9, 2022, the Department sent out emails with the Notices of

Hearing in English and in Spanish attached. The email messages announced the date for the public hearing before the Board and provided the link to the Department's Docketed Matters website under the Environmental Improvement Board dropdown, in the section for EIB 22-34 for more information. These emails with Notices in English and Spanish attached were sent to the same email lists used for sending out the Notices of Hearing for the February 2022 public hearing conducted by the Department. Emails with attached Notices in English and in Spanish were sent to EPA Region 6, Erica LeDoux, and Mary Layton at EPA. The Department's Notices in English and Spanish were also sent to Lincoln National Forest and Smokey Bear Ranger District; Christina Thompson, Camille Howes, Travis Moseley and Andres Bolanos. The Department also emailed the Notices in English and Spanish to the Village Clerk of Ruidoso, the Village of Capitan Clerk, the Lincoln County Clerk, the Mescalero Apache Tribe, and the Ruidoso Downs contact. [NMED EIB Exhibit 1 at 5-6; NMED EIB Exhibit 8].

56. The EIB hearing was held October 18, 20 and 21, 2022 by hybrid format ("EIB Hearing"). The EIB Hearing Officer, Board members, the parties and interested members of the public appeared virtually in the WebEx platform.

57. The Board held a special meeting on October 18, 2022 prior to presentation of testimony for the purpose of addressing two motions filed by Alto CEP requesting relief that would have been dispositive of the matter. Those motions were denied by the Board and the EIB Hearing proceeded as scheduled. The Board deliberation and decisions on the Alto CEP motions are set out in the transcript of the EIB Hearing. [Tr. 20-173].

## CONCLUSIONS OF LAW

### I. JURISDICTION

58. The EIB has jurisdiction in this proceeding over the subject matter of Permit 9295 and over the parties to this proceeding and is authorized by the Act to sustain, modify, or reverse the Department's action in this matter. NMSA 1978, §74-2-7(H)-(L) (1972 as amended through 2021); 20.2.72.207(F)-(G) NMAC.

59. The EIB does not have jurisdiction over internal Department policy or procedures. See NMSA 1978, § 74-1-5 (stating that “[t]he board shall promulgate all regulations applying to persons and entities *outside* of the department.”) (emphasis added).

60. The EIB does not have jurisdiction over the Applicant's use of AP-42.

61. The EIB does not possess the authority to *sua sponte* open up this proceeding to adjudicate matters not brought by the Petition. See *Public Serv. Co. v. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, ¶¶ 7, 19 (holding that the EIB has “no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.”) (internal citations omitted).

### II. STANDARD OF DECISION

62. In a permit proceeding hearing before the EIB “the petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the relief sought in the petition. Following the establishment of a prima facie case by the petitioner, 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 should

not be granted.” NMSA 1978, §74-2-7(K); 20.1.2.302 NMAC.

63. NMSA 1978, § 74-2 and 20.1.2.302 NMAC contain no limitations on the scope of the EIB’s review of the record, and, in effect, authorize *de novo* review of the record by the EIB.

### **III. THE ADEQUACY OF APPLICATION 9295**

64. The Applicant properly submitted Application 9295 pursuant to the Air Quality Control Act (“Act”), NMSA, 1978 74-2-1 to -17 (1967 as amended through 2019) and the Air Quality Rules, and all the required information was included in the application. 20.2.72.200(A); 20.2.72.402(A)(3); 20.2.72.203 and 20.2.72.403 NMAC.

65. Application 9295 established that the construction of the Facility meets the applicable statutory and regulatory standards, will not cause or contribute to air contaminant levels in excess of national or state standards or, and will not violate any other provision of the Air Quality Control Act or the CAA. NMSA 1978, § 74-2-7(C).

### **IV. THE DEPARTMENT’S ADMINISTRATIVE AND TECHNICAL REVIEW**

66. The Department’s administrative and technical reviews were thorough, complete, and sufficient to support the determination that Application 9295 was administratively and technically complete. 20.2.72.201(B); 20.2.72.207(A) NMAC.

### **V. THE DEPARTMENT’S PUBLIC NOTICE**

67. The Department has met all the elements of the statutory and regulatory standards with regard to public notice of the determination of administrative and technical completeness, and notice of Draft Permit 9295. NMSA 1978 Sections 14-11-2, 14-11-4, 14-11-6, 14-11-10.2; 20.2.72.206(A)(3) NMAC.

68. The Department met all the elements of the regulatory standard with regard to public notice of the February 2022 public hearing. NMSA 1978 Sections 14-11-2, 14-11-4, 14-11-6, 14-11-10.2; 20.1.4.200(C)(2)(a) NMAC.

69. The Department has met all the elements of the regulatory standard with regard to public notice for the October 2022 EIB Hearing. NMSA 1978 Sections 14-11-2, 14-11-4, 14-11-6, 14-11-10.2; 20.1.2.205 NMAC.

## **VI. THE DEPARTMENT'S PUBLIC OUTREACH**

70. The Department met all of the elements of the regulatory standards with regard to public outreach and receiving public comment on Application 9295 and Draft Permit 9295. 20.2.72.206(A)(1) and (2) NMAC; 20.2.72.206(B) NMAC.

## **VII. THE PUBLIC HEARINGS**

71. The February 2022 hearing in this matter was held in accordance with an Order for a public hearing entered by the Secretary of the Environment. 20.2.72.206(C) NMAC.

72. The October 2022 EIB Hearing was held in accordance with the law. NMSA

1978, § 47-2-7(I) (1972 as amended through 2003); 20.1.2.300 NMAC; Executive Order 2020-004; 3-24-20 Public Health Order.

### **VIII. CHALLENGES TO PERMIT 9295**

73. Alto CEP has failed to meet its burden of going forward with any adverse evidence and showing that the relief requested in the Petition should not be granted. 20.1.2.302 NMAC.

### **IX. THE ADEQUACY OF PERMIT 9295**

74. Permit 9295 meets all of the applicable standards, rules and requirements of the Air Quality Control Act and the CAA. NMSA 1978, § 74-2-7(C).

75. The conditions specified by the Department for Permit 9295 include emissions limitations that comply with State and federal air quality standards; include appropriate control technologies sufficient to meet the requirements of the State and federal standards; and include other conditions, all of which are reasonable. 20.2.72.210 NMAC.

76. The Department's definition of *ambient air* is reasonable and in accordance with the federal and EIB definitions.

77. The Applicant's use of AP-42 was reasonable and in accordance with the law.

78. The dispersion modeling performed by the Department was thorough and complete, and confirms that Draft Permit 9295 will not cause or contribute to air contaminant levels in excess of a national or state standard or prevention of significant deterioration increment.

79. The Department's use of a two-year average of background emissions data was reasonable and in accordance with the law and federal and state guidance.

80. The Department's Answer to Appeal Petition, filed August 22, 2022 regarding Permit 9295, stating that "[t]he Department agrees that the air quality permit application submitted by Roper complied with all applicable state and federal requirements for approval" was not arbitrary nor capricious, was not an abuse of the Department's discretion, was supported by substantial evidence, and was in accordance with law.

### **ORDER BASED ON FINDINGS AND CONCLUSIONS**

Based on the foregoing findings and conclusions it is ORDERED that the request for relief in the Petition be APPROVED. The EIB OVERTURNS the Secretary's Designee's decision to deny Permit 8585 without modification. The permit is approved.

### **STATEMENT AS TO AVAILABILITY OF JUDICIAL REVIEW**

Judicial review of this Final Order shall be as provided by law. 20.1.2.404 NMAC. The filing of an appeal does not stay the Final Order, unless otherwise ordered by the board or a court. *Id.* Any person adversely affected by an administrative action taken by the environmental improvement board, the local board, the secretary or the director may appeal to the court of appeals. NMSA 1978 § 74-2-9. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action. *Id.*



IT IS SO ORDERED.

Phoebe K.  
Suina

Digitally signed by  
Phoebe K. Suina  
Date: 2023.05.29  
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05/29/23

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Phoebe Suina, Board Chair  
New Mexico Environmental  
Improvement Board

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Date

Certificate of Service

I hereby certify that on May 30, 2023 a copy of the foregoing was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

Christopher Vigil  
Assistant General Counsel  
New Mexico Environment Department  
[christopherj.vigil@state.nm.us](mailto:christopherj.vigil@state.nm.us)  
*Counsel for the New Mexico Environment Department*

Louis W. Rose  
Troy S. Lawton  
Montgomery & Andrews  
Santa Fe, NM 87505  
[lrose@montand.com](mailto:lrose@montand.com)  
[tlawton@montand.com](mailto:tlawton@montand.com)  
*Counsel for Roper Construction Inc.*

Thomas Hnasko  
Timothy Rode  
Hinkle Law Firm  
[tnasko@hinklelawfirm.com](mailto:tnasko@hinklelawfirm.com)  
[trode@hinklelawfirm.com](mailto:trode@hinklelawfirm.com)  
*Counsel for Sonterra*

/s/ Pamela Jones  
Pamela Jones  
Board Administrator  
P.O. Box 5469  
Santa Fe, NM 87502  
Email: [pamela.jones@env.nm.gov](mailto:pamela.jones@env.nm.gov)