

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

**IN THE MATTER OF THE PETITION FOR
HEARING ON DENIAL OF AIR QUALITY
PERMIT APPLICATION NO. 10487**

No. EIB _____

**El Rancho Escondido, LLC
Petitioner**

**APPLICANT EL RANCHO ESCONDIDO, LLC's
PETITION FOR HEARING BEFORE THE BOARD**

Pursuant to NMSA § 74-2-7(H) (2021), 20.1.2.202 NMAC, and 20.2.72.207(F) NMAC, permit applicant El Rancho Escondido, LLC (“El Rancho Escondido” or “Applicant”) submits this petition for hearing before the Environmental Improvement Board following the New Mexico Environment Department’s (“NMED” or “Department”) February 21, 2025, denial of El Rancho Escondido’s permit to construct a rock crushing plant in Cleveland, New Mexico (“Facility”). A copy of the Department’s denial letter is attached as Exhibit 1. This petition is timely filed with the Environmental Improvement Board within 30 days from the date notice was given of the permitting action under 20.2.1.202 NMAC. El Rancho Escondido, as the permit applicant, certifies that it has standing under the Air Quality Control Act, NMSA 1978, Section 74-2-7, to file this petition.

INTRODUCTION

Less than three weeks after its receipt of the Application, the Air Quality Bureau Chief issued a letter summarily denying El Rancho Escondido’s air permit application. The Letter asserts that the Department “completed a review of the application” and determined the permit “cannot be issued” for three related reasons: (1) Applicant had commenced construction prior to having a permit; (2) the statement in the Application that “construction has not occurred” knowingly

misrepresented a material fact; and (3) the Department “does not have confidence that the Applicant will conduct *operations* in accordance with the required regulations. *See* Exhibit 1. For these reasons, the letter concludes the application for permit is denied in accordance with 20.2.72.208(A) and 20.2.72.208(F).

Applicant appeals from the Department’s denial of Permit No. 10487 on the following grounds: First, the Department’s letter does not support denial of a permit under 20.2.72.208(A) and 20.2.72.208(F). Second, the Department has not established that Applicant *knowingly misrepresented a material* fact, required to support denial of the permit under Section 74-2-7(P). The Department gave no explanation and made no showing that Applicant *knowingly* misrepresented facts regarding construction of the site. Moreover, the Department made no showing that Applicant’s alleged statement that construction had not occurred is *material* to the Department’s determination of whether or not the construction of the site will meet applicable standards. The Department erred by making a decision without affording any opportunity to correct the statement, provide additional information, or present mitigating circumstances. Third, the Department has not demonstrated that “lack of confidence” in how the facility will be operated is a legal basis upon which it can deny a construction permit.

For these reasons, explained more fully below, the Board should reverse the Department’s denial of Permit Application No. 10487.

I. APPLICANT’S OBJECTIONS

A. THE PERMIT DENIAL IS NOT SUPPORTED BY 20.2.72.208 NMAC

Applicant first objects to the Department’s claim that denial of the permit is “in accordance with 20.2.72.208(A) and (F).” 20.2.72.208(A) and (F) provide for the Department to deny an application “if *considering emissions after controls*: (A) [i]t appears that the construction...will

not meet applicable regulations adopted pursuant to the Air Quality Control Act; or (F) Any provision of the Air Quality Control Act will be violated.” That regulation cannot provide a basis for the Department to deny the permit request here, because the Department has not considered proposed emissions at all. The Department’s denial was not based on proposed emissions. Rather, the Department denied the permit because Applicant allegedly commenced construction activities prior to obtaining a permit.

B. THE DEPARTMENT DID NOT SUPPORT SUMMARY DENIAL OF THE PERMIT UNDER SECTION 74-2-7(P)

Section 74-2-7(P) provides that the Department may deny a permit application “if, within ten years immediately preceding the submission of the permit application, the applicant (1) knowingly misrepresented a material fact in an application for a permit”. The Department’s letter suggests that a statement in the application that “construction has not occurred” violates this provision and thus supports denial of the Application. This conclusion should be reversed for the reasons that follow.

1. The Department Has Not Established that Applicant’s Statement Regarding Construction Was a Knowing Misrepresentation of Material Fact

The Department suggests that Applicant violated Section 74-2-7(P) by knowingly misrepresenting a material fact in the application. The Department asserts this is because the Application stated that “construction has not occurred” but a Department inspector found “the site is completely constructed and has been operating for testing purposes” during a site visit the week of February 10.

The Department’s denial should first be reversed because the Department has not actually identified commencement of any unallowable preconstruction activity at the site.

“Construction” is defined in Part 72 to mean “fabrication, erection, installation or relocation of a stationary source, including but not limited to temporary installations and portable stationary sources.” 20.2.72.7(I) NMAC. The Air Quality Bureau’s New Source Review Permit Program Guidance for Preconstruction Activities specifically lists “activities and that can and cannot be performed at the proposed construction site or within the plant perimeter before issuance of the new source construction permit. Exhibit 2, ¶ 5. The guidance identifies “Installation or construction of (A) footings, (B) foundations, (C) buildings, (D) plumbing, (E) electrical” as the preconstruction activities that are not allowed by the Department prior to issuance of the new source construction permit. Finally, “Commencement” is defined in Part 72 to mean “that an owner or operator has undertaken a *continuous program* of construction or modification. 20.2.72.7(G) NMAC.

The Department’s letter does not identify any unauthorized preconstruction activities at the site. In fact, the letter does not state what was constructed, what was tested, or when. The letter also does not claim, much less establish, that Applicant has undertaken a “continuous program” of the unidentified preconstruction activity. The Department’s vague conclusion that the site was “completely constructed and has been operating for testing purposes” does not reasonably identify or provide fair notice of the alleged activity that the Department contends is prohibited and thus cannot be the basis for its claim *C.f., Tri-State Generation and Transmission Ass’n, Inc., v. D’Antonio*, 2012-NMSC-039, ¶ 52, 289 P.3d 1232, 1244 (*quoting State v. Segotta*, 1983-NMSC-092, ¶ 5, 100 N.M. 498, 499, 672 P.2d 1129, 1130) (A regulation “will be held unconstitutional in violation of due process of law if [it]either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must guess at its meaning and differ as to its application.”).

The denial should also be reversed because the Department has not established the three elements of its claim – (1) that Applicant misrepresented a fact in the application, (2) that

Applicant's misrepresentation was intentional, or (3) that Applicant's misrepresentation is material to the Department's approval determination.

First, the letter does not establish that the Application *misrepresented* facts regarding pre-construction activities at the site at the time the Application was submitted. The letter takes issue with Applicant's statement that "construction has not occurred". Exhibit 1 at 1. In actuality, Applicant correctly indicated that the facility has not already been constructed based on its understanding of the terms "commencement" and "construction", defined above. *See* Application Section 1-B, p. 2; Exhibit 3, Decl. Olivas; 20.2.72.7(G), and (I); Exhibit 2.

Neither the equipment nor the site were ready to operate at the time the Application was submitted. Exhibit 3, Decl. Olivas. There were no footings, foundations, buildings, plumbing, or electrical on site. *Id.* The equipment observed by the Department inspector at the site visit was present on site because the rental company had communicated to Applicant that it was less expensive to leave the equipment on-site rather than have it removed and redelivered was the permit was issued. *Id.* The Department does not claim that Applicant knew at the time the Application was submitted that having equipment on site could be in conflict with its statement that the facility had not been constructed or could somehow be commencement of construction. Again, the definitions of the terms "commencement" and "construction", read together with the Air Quality Bureau's guidance, establishes that having equipment on site is not commencement of construction.

The alleged findings from the site visit more than a week after the Application was submitted, relied on by the Department, cannot show what Applicant knew at the time the Application was submitted. Moreover, the Department's assertion that "the site is completely constructed and has been operating for testing purposes" misunderstands what happened. At all

relevant times, Applicant did not believe that having equipment delivered onsite equated to commencing construction. As such, when given a binary choice on its Application, El Rancho Escondido honestly answered that the facility had not already been constructed. Section 1-B of the Application, on Current Facility Status, asks in Question 1.a: “Has this facility already been constructed?” Applicant checked “No” because Applicant understood the question to mean what it says. Applicant did not understand the question to ask whether equipment was present on site.

Second, the Department cannot show Applicant’s representation that construction had not occurred, even if deemed to be a misrepresentation, was intended to mislead the Department. Whether there was a knowing misrepresentation is a question of fact. *See Durham v. Sw. Developers Joint Venture*, 2000–NMCA–010, ¶ 39, 128 N.M. 648 (stating that issues involving intent or knowledge are generally questions of fact). The Department provides no evidence or discussion in the Permit Denial proving that this statement was a *knowing* misrepresentation. The Department’s allegation of intentionality, without any supporting facts, is not enough to satisfy the “knowing” requirement. *See Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶ 27, 146 N.M. 179 (reasoning that an allegation alone is insufficient to prove a knowing misrepresentation). At most, indicating that the facility had not already been constructed, when the facility was indeed not ready to operate, amounts to an *unintentional* misrepresentation.

Finally, the Department has not shown that Applicant’s statement that the facility had not already been constructed, was *material* to the permit determination. “A fact is material if such fact may affect the outcome of the case.” *Lopez v. Kline*, 1998–NMCA–016, ¶ 8, 124 N.M. 539. Applicant’s mistaken indication that the facility has not already been constructed is not material to whether an application can be approved because it does not relate to the criteria in Section 74-2-7(C). Section 74-2-7(C) prescribes evaluating a permit based on whether it can meet the

applicable air quality standards and cause or contribute to an emissions exceedance. The presence or absence of equipment is irrelevant to either of these determinations. Subsection C does not establish an Applicant's misstatement as a material violation. Particularly here, where the Facility was not even ready to operate, any inadvertent misrepresentation is not material.

In sum, Applicant did not knowingly misrepresent a material fact because it believed in good faith that given a binary choice on the form, the best answer was that the facility had not already been constructed. Because El Rancho Escondido attests that any error was unintentional, *See* Exhibit 3, Decl. Olivas, and an inadvertent error on the Application does not rise to the level of a material misrepresentation, the Environmental Improvement Board should disregard the Department's second reason for permit denial.

2. The Department Failed to Consider Mitigating Evidence

Section 74-2-7(Q) requires that the Department consider aggravating and mitigating factors in making a finding under Subsection P. The Department's denial decision failed to comply with that provision. The Department erred by issuing a permit decision denying the permit under Section 74-2-7(P) without affording opportunity to correct the application or provide additional information explaining why equipment was on site during the Department's site visit, prior to issuance of a permit. At a minimum, the Department's denial should be reversed and Applicant should be allowed to present these mitigating factors.

C. THE DEPARTMENT'S CONCERN OVER FUTURE NON-COMPLIANCE IS NOT A BASIS FOR DENIAL

The Department's third reason for denying El Rancho Escondido's permit is that the Department "does not have confidence that the applicant will conduct operations in accordance with the required regulations." Exhibit 1 at 2. The Department does not have authority to deny a

permit on this basis. *See* Section 74-2-7(C), (P); and 20.2.72.208 NMAC. Additionally, the alleged concern is not justified by the facts.

The Department has not even analyzed the Application to determine whether proposed activities will comply with actual standards under the New Mexico Air Quality Control Act or the Clean Air Act. And, the Department has not established any connection between the alleged misstatement on the application and Applicant's future compliance with a permit. Applicant has no history of violations, and the Department makes no allegations regarding prior violations. NMED has not even analyzed the Application to determine whether proposed activities will comply with actual standards under the New Mexico Air Quality Control Act or the Clean Air Act. Moreover, if NMED had concerns about El Rancho Escondido's emissions compliance, the available remedy is permit conditions, not denial. At a minimum, the Department should afford Applicant the opportunity to present mitigating factors and why this inadvertent mistake is not significant enough to warrant denial of a permit. There is no evidence to suggest that by misunderstanding that construction had occurred, the Facility would not comply with all state and federal regulations or that there would be an exceedance of NAAQS or NMAAQs increments.

CONCLUSION

For the reasons stated above, the Environmental Improvement Board should reverse NMED's denial of Air Quality Permit Application No. 10487. El Rancho Escondido requests that the Board hold a hearing on the Department's denial of the permit application, and based on the evidence presented, reverse the Department's denial and issue a permitting decision on the merits of the permit application.

Respectfully submitted,

SPENCER FANE LLP

By: /s/ Kari E. Olson

Kari E. Olson

Angela E. Harris

Post Office Box 2307

Santa Fe, New Mexico 87504-2307

(505) 982-3873

kaolson@spencerfane.com

aharris@spencerfane.com

cc: tpacheco@spencerfane.com

Attorneys for Applicant El Rancho Escondido, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2025, a true copy of the foregoing *El Rancho Escondido, LLC's Petition for Hearing Before the Board* was served via electronic mail to the following:

Chris Vigil
Assistant General Counsel
ChristopherJ.Vigil@state.nm.us

Zachary Ogaz
General Counsel
Zachary.ogaz@state.nm.us
Attorneys for New Mexico Environment Department

Eduardo Ugarte
New Mexico Office of the Attorney General
eugarte@nmdoj.gov
Counsel for the Environmental Improvement Board

Pamela Jones
Hearing Administrator
Environmental Improvement Board
Pamela.Jones@state.nm.us

By: /s/ Kari E. Olson



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

February 21, 2025

Sent by Certified Mail

Naomi Montoya
Administrative Assistant
El Rancho Escondido, LLC
PO Box 78
Mora, New Mexico 87732

Re: Denial of Air Quality Permit Application No. 10487 (Agency Interest No. 41232 - PRN20250001)
- El Rancho Escondido

Dear Naomi Montoya:

This letter is in response to your air quality permit application dated February 1, 2025, to construct the El Rancho Escondido facility located in Cleveland, New Mexico. The Department received the application on February 4, 2025.

The Department has completed a review of the application for the proposed project and has determined that the permit cannot be issued for several reasons.

First, the Department has determined that the applicant commenced construction prior to the Department's issuance of the permit in violation of 20.2.72.200(E) NMAC.

Specifically, 20.2.72.200(E) NMAC states that:

[A]pplications for permits shall be filed prior to the commencement of the construction, modification, or installation. Regardless of the anticipated commencement date, no construction, modification, or installation shall begin prior to issuance of the permit.

Second, the application stated that "construction has not occurred," however a Department inspector visited the site the week of February 10, 2025 and found that the site is completely constructed and has been operating for testing purposes.

NMSA 1978, Section 74-2-7(P) of the Air Quality Control Act states that:

The department or local agency may deny any permit application or revoke any permit issued pursuant to the Air Quality Control Act if, within ten years immediately preceding the date of submission of the permit application, the applicant or permittee has: (1) knowingly misrepresented a material fact in an application for a permit.

Under 20.2.72.208(F) NMAC, the Department may deny a permit if: "any provision of the Air Quality Control Act [is] violated."

SCIENCE | INNOVATION | COLLABORATION | COMPLIANCE

Air Quality Bureau | 525 Camino de los Marquez, Suite 1A, Santa Fe, New Mexico 87505-1816 | (505) 476-4300 | www.env.nm.gov

EXHIBIT 1

El Rancho Escondido, NSR 10487
February 21, 2025

Page 2 of 2

Third, based on the above, the Department does not have confidence that the applicant will conduct operations in accordance with the required regulations. Pursuant to 20.2.72(208)(A) NMAC, the Department may deny a permit if: *"it appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act."*

Therefore, for the reasons set forth above, and in accordance with 20.2.72.208(A) and 20.2.72.208(F) NMAC, the application for a permit is denied.

Appeal Procedures

20.2.72.207 NMAC provides that any person who participated in a permitting action before the Department and who is adversely affected by such permitting action, may file a petition for hearing before the Environmental Improvement Board. The petition shall be made in writing to the Environmental Improvement Board within thirty (30) days from the date notice is given of the Department's action and shall specify the portions of the permitting action to which the petitioner objects, certify that a copy of the petition has been mailed or hand-delivered and attach a copy of the permitting action for which review is sought. Unless a timely request for hearing is made, the decision of the Department shall be final. The petition shall be copied simultaneously to the Department upon receipt of the appeal notice. If the petitioner is not the applicant or permittee, the petitioner shall mail or hand-deliver a copy of the petition to the applicant or permittee. The Department shall certify the administrative record to the board. Petitions for a hearing shall be sent to:

Secretary, New Mexico Environmental Improvement Board
1190 St. Francis Drive, Runnels Bldg. Rm N2153
PO Box 5469, Santa Fe, New Mexico 87502

Sincerely,

DocuSigned by:

8CSB75B377A8482
Cindy Hollenberg
Air Quality Bureau Chief

cc via email: Paul Wade, Montrose Air Quality Services LLC



Version 07-11-18

New Mexico Environment Department
Air Quality Bureau
Compliance and Enforcement Section
525 Camino de Los Marquez
Santa Fe, NM 87505
Phone (505) 476-4300



POST INSPECTION NOTIFICATION FORM

This form shall constitute written notice, to the extent required by the Air Quality Control Act, Section 74-2-5.1.A, of the results of an investigation for which enforcement action is contemplated. The form identifies areas of concern identified during the investigation. Non-compliance with air quality requirements, including state and federal air quality laws, regulations, and permit conditions may result in the issuance of a compliance order, emergency order, civil or criminal complaint, Notice of Violation with associated civil penalty. The facility owner or operator is advised to initiate prompt corrective action for the areas of concern listed below.

Activity: FCE PCE Complaint Submittal - Type: _____ Other (explain) _____

GENERAL FACILITY INFORMATION

Company Name: El Rancho Escondido, LLC		Facility Name: El Rancho Escondido	
Physical Location: 35.986469, -105.367304		Inspection Date(s): 02/13/2025	
Facility Contact: Naomi Montoya 505-350-9749 morarockranch@gmail.com		Inspector: Robert Spillers 505-629-5668 Robert.spillers@env.nm.gov	
AI#	AIRS#	NSR#	Title V#
41232	35-033-0006	Not Issued	N/A
		Acid Rain #	
		N/A	

Potential Violation Number	Permit OR Regulation:	Description of Area(s) of Concern:
1.	20.2.72.200.A(1) NMAC	Failure to apply for a permit prior to constructing a source. On 02/13/2025, I, Robert Spillers, NMED/AQB Compliance Inspector, conducted an on-site investigation where I identified and documented aggregate processing equipment and generator engines that matched the equipment verified during the previous on-site investigation on 01/15/2025. The Department received the El Rancho Escondido, LLC, New Source Review application on 02/04/2025 approximately three weeks after the first on-site investigation.
2.	20.2.72.200.E NMAC	Failure to obtain a permit prior to constructing a source. On 02/13/2025, I conducted an on-site investigation where I identified and documented constructed aggregate processing equipment and generator engines at the location prior to obtaining a New Source Review Permit. Equipment documented at the site was listed in the permit application, however, the Department has not yet issued a permit.

Inspector Signature:
Robert Spillers Digitally signed by Robert Spillers
Date: 2025.02.19 16:47:38 -0700

Title:
NMED/AQB Compliance Inspector

Date:

Air Quality Bureau

Con



525 Camino de los Marquez, Suite 1A
Santa Fe, NM
87505

Robert Spillers
Compliance Inspector

Phone: (505) 629-5668
Fax: (505) 476-4375
robert.spillers@env.nm.gov

State of New Mexico Environment Dept.
www.env.nm.gov/air-quality

Facility Representative Signature:

Title:

Date:

Signing above acknowledges receipt of this post-inspection notification form and identified handouts and does not constitute agreement with the contents.

EL RANCHO ESCONDIDO, LLC

PO BOX 78, MORA NM 87732

2/20/2025

Naomi Montoya
El Rancho Escondido, LLC
PO Box 78, Mora NM 87732

Robert Spillers
NMED Air Quality Bureau – Compliance and Enforcement Section

Post Inspection Notification Form Inspection Date 2/13/2025 - Comment

Regarding Potential Violations 1 and 2:

El Rancho Escondido, LLC began working on the NSR permit in December 2024. To ensure that the equipment listed on the application matched the equipment to be used, we had to take possession of the equipment from the rental company. If we did not take possession, there was a chance that the equipment would not have been available if/when the permit is approved.

Due to the logistics of transport and delivery of specialized equipment of this size, it was determined that El Rancho Escondido was the most reasonable delivery site.

Completion and submission of the NSR permit application was done as timely as possible with most consideration made to assure accuracy on the application.



Naomi Montoya

El Rancho Escondido, LLC

EL RANCHO ESCONDIDO, LLC	
PO BOX 78, MORA NM 87732	

2/21/2025

Robert Spillers

NMED Air Quality Bureau – Compliance and Enforcement Section

Post Inspection Notification Form

Inspection Date 2/13/2025 - Comment

Regarding Potential Violations 1 and 2:

Please note that this is the same equipment submitted for substitution by PGE on their relocation permit for this site.

El Rancho Escondido, LLC began working on the NSR permit in December 2024. To ensure that the equipment listed on the application matched the equipment to be used, we had to take possession of the equipment from the rental company. If we did not take possession, there was a chance that the equipment would not have been available if/when the permit is approved.

Due to the logistics of transport and delivery of specialized equipment of this size, it was determined that El Rancho Escondido was the most reasonable delivery site.

Completion and submission of the NSR permit application was done as timely as possible with most consideration made to assure accuracy on the application.

Naomi Montoya

El Rancho Escondido, LLC

**AIR QUALITY BUREAU
NEW SOURCE REVIEW PERMIT PROGRAM GUIDANCE
GUIDANCE FOR PRECONSTRUCTION ACTIVITIES**

1.0 PROCEDURE NUMBER: AQB 02.006-01

2.0 DATE: December 17, 1998

3.0 REGULATORY REFERENCE: 20 NMAC 2.72, Subpart II,
Section 200.E.

4.0 PURPOSE: The purpose of this procedure is to explain what activities are allowed at a proposed construction site prior to the issuance of a new source construction permit by the Department.

5.0 PROCEDURE: The following are lists of activities that can and cannot be performed at the proposed construction site or within the plant perimeter before issuance of the new source construction permit.

5.1 ALLOWABLE PRECONSTRUCTION ACTIVITIES: The following activities are allowed by the Department at the proposed construction site or within the plant perimeter prior to the issuance of the new source construction permit:

- A. earth clearing,
- B. leveling ground,
- C. gravel base lay out,
- D. digging trenches,
- E. installing fences.

5.2 UNALLOWABLE PRECONSTRUCTION ACTIVITIES: The following activities are not allowed by the Department at the proposed construction site or within the plant perimeter prior to the issuance of the new source construction permit. Installation or construction of:

- A. footings,
- B. foundations,
- C. buildings,
- D. plumbing,
- E. electrical

Original signed by Cecilia Williams
Bureau Chief

December 21, 1998
Date

SLD ADDITION: The regulation states:

20.2.72.200(E). For all sources subject to this part, applications for permits shall be filed prior to the commencement of the construction, modification or installation. Regardless of the anticipated commencement date, no construction, modification or installation shall begin prior to issuance of the permit.

DECLARATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF MORA)

DECLARATION OF RAYMOND WILLIAM OLIVAS

Raymond W. Olivas, upon oath, states and deposes as follows:

1. I am over eighteen years of age and make this affidavit on my own personal knowledge.

2. I am the Owner of El Rancho Escondido, LLC.

3. I have read and verified the foregoing Permit Applicant El Rancho Escondido, LLC's Petition for Hearing before the Board and state that, to the best of my knowledge and belief, the information contained therein is true and correct.



Raymond William Olivas

Date: 3/22/25