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STATE OF NEW MEXICO
BEFORE THE 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

PETITIONER ROPER CONSTRUCTION, INC.'S RESPONSE IN OPPOSITION TO ALTO CEP'S MOTION TO SUPPLEMENT THE RECORD AND/OR TO MODIFY THE HEARING OFFICER'S REPORT AND REQUEST FOR EXPEDITED RULING

Petitioner Roper Construction, Inc. ("Roper Construction"), pursuant to 20.1.2.113.D NMAC, opposes Alto CEP's Amended Motion to Supplement the Record and/or To Modify the Hearing Officer's Report (filed February 3, 2023) ("Motion") and requests that it be denied, for the reasons set forth below.

BACKGROUND

In its Motion, Alto CEP misstates many facts, and provides only a portion of the brief and evidence of Roper Construction's Response in Opposition to Plaintiffs' Motion for Order to Show Cause ("Roper Response," filed in Lincoln County District Court on 1-17-23), upon which it relies to make its claims of "new evidence." *See* Motion, Exhibits 1-2. Alto CEP fails to explain why Roper Construction filed that brief; the reason is important. The Roper Response opposes a Motion for Order to Show Cause ("Motion for Contempt"), filed by counsel for Alto CEP, attached hereto as **Attachment 1.**

The Environmental Improvement Board ("EIB" or "Board") may not be aware of the significance of such a motion. The Motion for Contempt accuses Roper Construction's litigation

counsel[1] of violating the duty of candor[2] to Judge Sugg by failing to notify him "of the changes to the plant submitted to the EIB and that those changes render invalid the proposed configuration of the plant presented to the Court in an effort to reduce noise." Att. 1 [Motion for Contempt], at 6-7. A finding of contempt carries civil and criminal penalties, as well as the potential for disbarment of the attorney. It is a very serious accusation, rarely filed by counsel, and must be based on serious misconduct.

The Motion for Contempt, however, is frivolous and intended only to delay matters and muddy the waters before the tribunal. The same is true of Alto CEP's Motion herein. Roper Construction has attached, as **Attachment 2**, the entirety of the Roper Response so that the Hearing Officer may read it and conclude for himself the recklessness of the Motion for Contempt, and compare it to the similarly meritless Motion to Supplement the Record before it now. The instant Motion is merely a continuation of Alto CEP's campaign to impugn the credibility of Mr. Roper. *See, e.g.,* Hrg. Tr. 351:21-352:17; 356:2-4. Roper Construction urges the Hearing Officer to compare Att. 1, Att. 2, and the Alto CEP Motion herein to determine which party is manipulating and misleading the tribunals.

ARGUMENT

There is no procedural vehicle allowing submission of evidence at this state in the proceeding. Further, Alto CEP does not provide "new" evidence, but evidence that has already been presented to the Board, and which Alto CEP prevented from being fully explored. For these

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[1] Shelly L. Dalrymple, of Montgomery & Andrews, represents Roper Construction, L.L.C. and Roper Investments, Inc., in the two (2) state court matters and does not represent Roper Construction in this proceeding.

[2] For a discussion of attorneys' duty of candor to the court, *see Matter of Dixon*, 2019-NMSC-006, 435 P.3d 80, 85-86, at ¶¶ 20, 23, 35, and *Rhinehart v. Nowlin*, 1990-NMCA-136, 804 P.2d 88, 94-95, at ¶¶ 27-28.

reasons, the Motion should be denied. Beyond that, the Motion should be denied because it does not, in fact, present evidence that should be before the Board.

I. THE MOTION IS PROCEDURALLY IMPROPER AND SHOULD BE SUMMARILY DENIED.

The Motion should be denied because it is procedurally unsupported and improper for three reasons: (1) the record for this matter is closed; (2) the proposed "new evidence" is not new at all, but rather has already been presented to the Board; and (3) the Motion is an improper "back door" attempt to present information that Alto CEP demanded be excluded from the EIB hearing.

1. The Record is Closed to Additional Evidence

The Hearing Officer allowed the record to remain open for one day after the close of the hearing on October 20, 2023. *See* Hrg. Tr. at 626:21-23. Thereafter, the record was closed to additional evidence, and the Hearing Officer set a schedule to finalize written materials for the Board's consideration. *See* Post Hearing Scheduling Order (filed 11-4-22, and as revised 1-18-23). After the conclusion of the hearing, "[n]o new evidence shall be presented unless specifically allowed by the hearing officer." 20.1.2.401 NMAC. There is no statutory or administrative provision allowing the record to be re-opened for evidence other than pursuant to the discretion of the Hearing Officer.

Alto CEP relies on Rule 1-060(B)(2) NMRA as authority for its position that the Hearing Officer may "relieve a party from an order or proceeding for 'newly discovered evidence,'" combined with Rule 1-059(E) relating to modification of a final judgment. Motion at 4. Neither these Rules nor the case law cited by Alto CEP apply to this situation. These Rules are lodged in Article 7, the "Judgment" section of the New Mexico Rules of Civil Procedure. Rule 1-059(E) is specifically limited to motions "to alter, amend, or reconsider a final judgment." Rule 1-060 is also

expressly limited to "Relief From Judgment Or Order." There is no judgment or order in this matter; therefore, these Rules are inapposite.

Alto CEP's case law is similarly inapplicable. Alto CEP itself concedes that *Matter of Estate of Keeney*, 1995-NMCA-102, 121 N.M. 58, *Couch v. Williams*, 2016-NMCA-014, 365 P.3d 45, and *State v. Miera*, 2018-NMCA-020, ¶ 25, 413 P.3d 491, all involve *post-judgment* motions. *See* Motion at 4. Their fourth case not only involves a post-judgment motion, but citation to *Godsey v. Brown*, 832 F.2d 443 (7th Cir. 1987) (Motion at footnote 2) is misleading for two additional reasons: the case was decided by the federal Seventh Circuit Court of Appeals, which is not an approved source of guidance for the Board,[3] and the case exclusively construes the standard for remand to take new evidence under 42 U.S.C. § 405(g), which governs procedures in federal social security disability benefit hearings.

After diligent research, Roper Construction has found no New Mexico case law supporting the use of either of these Rules in a situation like this, where a party seeks to open a *pre-judgment* record to add *evidence that could have been presented at trial*. *See* §§ I(2-3), below, for discussion on the prior availability of the evidence Alto CEP erroneously labels as "new."

Thus, there is no procedural mechanism, either in the administrative rules governing this procedure nor in the guidance supplied by the New Mexico Rules of Civil Procedure, allowing Alto CEP to submit additional evidence after the record has closed, except only at the discretion of the Hearing Officer. There is no reason or justification for the Hearing Officer to allow the record to be re-opened in this instance.

[3] "In the absence of a specific provision in this part governing an action, the board may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance." 20.1.2.106 NMAC.

2. The Allegedly "New" Evidence Was Already Presented to the Board

Alto CEP contends that Roper Construction's *possible* post-permit revisions to Roper Construction's Air Quality Permit No. 9295 (the "2021 Permit") is "newly discovered." Motion at 4. This is false. Roper Construction explained to the Board that Roper Construction might seek to modify his site plan and operations after the 2021 Permit is issued. Alto CEP confirmed that Roper Construction is entitled to make those changes. The Board acknowledged this potential course of action. This is thus *not* new evidence.

Roper Construction and its counsel explicitly advised the Board that it was probable that, after a permit is issued, Roper Construction would seek authorization to make the same or similar modifications to the Facility as those in the revised application submitted to and approved by NMED.[4] *See* Att. 2 [Roper Response], Exhibit B ["Revised Permit"]:

- If the permit is approved, "we would make modifications to less – to lessen throughput and hours of operation administratively, even after it was issued." *See* Hrg. Tr. 92:3-10 (also at Att. 2 [Roper Response], Exhibit C).

- "[I]f you agree that the permit should have been issued, we're going to make those changes as administrative revisions under your rules … at 20-2-71. … [T]he changes we're talking about, in terms of reduced throughput, hours of operation and truck traffic, to the extent they're limited by the permit can be done by administrative revision. The same thing is true about relocation and the site – the site specific information, in terms of the site plan." *See* Hrg. Tr. 105:8-19 (also at Att. 2 [Roper Response], Exhibit C).

- Alto CEP acknowledged, through its witness Brad Sohm, that Roper Construction may change its facility and may revise its permit to reflect these positive changes through the NMED revision process. *See* Hrg. Tr. 519:9-520:7; 522:18-25.

After hearing the above comments by counsel about the potential post-permit modifications, the Board understood the situation and implicitly approved:

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[4] The revised site plan, operational limitations, and supporting modeling were presented to the Board as part of Roper Construction's pre-filed exhibits and direct testimony (Statement of Intent to Present Technical Testimony, filed on 9-21-22).

> BOARD MEMBER HONKER: Well, one potential way to proceed here would be if there were an agreement between the parties that this hearing will just consider the information that was in the administrative record of NMED's denial, but in the event that we should decide in Roper's favor, then they would immediately request a permit modification to make the changes that they proposed, and that would go through a permit modification review by NMED.

Hrg. Tr. 118:17-25. Pursuant to the provisions of 20.2.72.219 NMAC, Roper Construction is explicitly allowed to revise his site plan, his throughput, his hours of operation – indeed, any aspect of his business that he chooses. In fact, in the district court, Alto CEP's counsel specifically recommended that Roper Construction "could always amend the permit application." *See* Att. 2 [Roper Response], at 5.

Thus, the Board is fully apprized of Roper Construction's possible post-permit modifications; Alto CEP presents no "new evidence."

3. Alto CEP's Motion Attempts to "Back-Door" Evidence it Precluded at the Hearing, and Therefore, the Motion is Improper

In the autumn of 2022, Roper Construction submitted to NMED the Revised Permit application, with lesser operations and throughput than the 2021 Permit application, for the reasons described in Att. 2 [Roper Response] at 2-6, 7-8, *and* Att. 2, Exhibit A [Roper Affidavit] at ¶¶ 3-10. After appropriate review, NMED approved the Revised Permit. *See* Att. 2 [Roper Response], Exhibit B; *see also* Hrg. Tr. 100:15-23 (NMED conducted a review of the revised application, including new modeling).[5] Roper Construction understood that the EIB hearing was a de novo hearing and that consideration of the Revised Permit was appropriate. *See* Att. 2 [Roper Response],

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[5] "The Department has reviewed the permit application for the proposed construction/ modification/revision and has determined that the provisions of the Act and ambient air quality standards will be met. Conditions have been imposed in this permit to assure continued compliance. 20.2.72.210.D NMAC, states that any term or condition imposed by the Department on a permit is enforceable to the same extent as a regulation of the Environmental Improvement Board." NSR Permit No. 9295 Version 2022-10-3, at Att. 2 [Roper Response], Exhibit B, Part B100A at page B2.

Exhibit A at ¶ 9. Accordingly, Roper Construction submitted its revised application and the revised draft permit to the EIB in its Statement of Intent to Present Technical Testimony (filed 9-21-22). Alto CEP vigorously contested introduction of the revised application and revised draft permit at the EIB hearing. *See* Alto CEP Motion to Dismiss or Preclude Roper Construction from Presenting New Evidence (filed 10-10-22); *see also* Att. 2 [Roper Response] at 6-7, 11. In response to Alto CEP's objections, the parties negotiated a resolution that resulted in Roper Construction's withdrawal of the revised application and the supporting testimony and exhibits, and revised the pre-filed direct and rebuttal testimony of Roper Construction, NMED, and Alto CEP. That is, Alto CEP's actions precluded evidence and explanation of the preferred site plan and operations, which is substantially similar to the evidence Roper Construction presented in the district court.

The modifications Roper Construction contemplates making, and is reflected in the revised draft permit (*see* Att. 2 [Roper Response], Exhibit B), include:

- Facility Throughput reduced from 500,000 to 50,000 cubic yards per year (A108(B) at page A7)
- Haul Road Permitted Capacity reduced from 305 to 127 trips per day (Table 104.A at page A4, and A112(A) at Page A9).
- Hours of Operation reduced (A108(A) at page A7).

Roper Construction explained the soundness of the proposed changes in Mr. Roper's testimony that the actual expected annual throughput, based on what the service area can actually support, is 25,000 cubic yards, which is five (5) percent of the theoretical maximum throughput in the 2021 Permit. *See* Hrg. Tr. 343:18-344:6; 345:6-18. As Mr. Roper testified, the site layout was modified, predominantly to lessen the visual impact from Highway 220 and to keep as many of the existing trees as possible. *See* Hrg. Tr. 347:18-22. Mr. Roper also testified that it was his intent to modify the site plan through the Revised Permit, although he was obstructed by Alto CEP "up to this point." Hrg. Tr. 349:12-20.

The Board will recall that the only reason the proposed modifications were not presented in detail to the Board is because Alto CEP refused to allow them to be presented. Alto CEP now claims that a few statements by Mr. Roper in another forum, relating to his possible future actions to effect the terms of the Revised Permit, are "significant and troubling admissions." Motion at 3. This is unfair gamesmanship and should not be countenanced.

Further, Alto CEP has misstated the record. Alto CEP alleges that in the Roper Response, Mr. Roper admitted

> that (1) Roper has no intention of implementing the permit applications that is currently before this Board and (2) if this Board approves Roper's permit application, Roper will seek to retroactively modify the application to incorporate material changes to the site plan…

Motion at 4. And also that "Roper conceded that Roper actually had no intention of building the proposed Alto CBP according to the site layout and location presented to this Board." Motion at 3. These statements by Alto CEP are false.[6] What Roper Construction ***actually*** stated in the Roper Response was:

- "I also understand that if the EIB approves the June 2021 application which it is considering, and issues an air quality permit, *I will later be able to make certain revisions to that approved permit, if I choose to do so*, that will result in a site plan the same as or very similar to that in Exhibit FFF. This administrative revision process does not include any public participation." Att. 2 [Roper Response], Exhibit B at ¶ 10 (emphasis added).

- "After EIB approves the 2021 Application, *Roper has the option* to pursue an administrative revision process with NMED to scale back its proposed operations to those submitted in the 2022 Revised Application (which Plaintiffs' counsel forced to be withdrawn from EIB consideration), or to any other site plan modification he deems appropriate and that meets NMED requirements." Att. 2 [Roper Response], at 12 (emphasis added).

- "Roper notified the EIB and all parties of its intentions to do so. *See* Ex. C at 92:3-10, 105:13-23; Ex. A at ¶ 10. Under 20.2.72.219.A(1)(b) NMAC, Roper may administratively revise its permit, including the throughput, hours of operation, and relocation of equipment *so long as the NMED identifies each revision as a minor administrative change at the*

[6] *See* the pattern of misstatements at Att. 2 [Roper Response], at 9-10.

source. NMED has traditionally approved similar revisions as those sought by Roper as an "administrative revision." Att. 2 [Roper Response], at 13 (emphasis added).

- "As of this moment, the Exhibit FFF site plan, or one very close to it, is what Roper intends to construct. However, when EIB approves the 2021 Application, *it may be more efficient for Roper to simply build according to that permit and the June 2021 site plan*." Att. 2 [Roper Response], at 13 (emphasis added).

Thus, Alto CEP's version of what Mr. Roper said regarding his intentions is radically different from what Mr. Roper actually said. Further, as Roper stated, due to the actions of Alto CEP, it may now be more efficient to forego such changes to the Facility, which NMED described as updated, "more protective," improved (*see* Hrg. Tr. at 86:22; 87:1-3; 89:1-9), and the Board members described as "better," "scaled back so it would be better for the citizens," "the scaled-back operations … is attractive from an environmental standpoint," (*see* Hrg. Tr. at 96:1; 113:25-114:1; 115:24-25; 141:11).[7]

Whatever modifications Roper Construction *may* ultimately make will be made in compliance with the EIB's construction permitting rules, whether through an administrative, technical, or significant permit revision. *See* 20.2.72.219 NMAC. But for Alto CEP's objections, these issues could have been presented and argued at the hearing, providing the Board with a full and complete record. They should not now be allowed to be "back doored" into record evidence.

If the Hearing Officer agrees that the Motion is procedurally improper and should be denied, the Hearing Officer need read no further.

[7] To the extent the Board determines that some or all of the modifications in the Revised Permit, as approved by NMED, are desirable, it has the authority to modify the 2021 Permit to make it more restrictive. *See* Hrg. Tr. 87:20-88:1; 102:14-17; 107:16-18; 127:1-3. It can only do this if the evidence of the Revised Permit is before it. Therefore, should the Hearing Officer grant Alto CEP's Motion and admit Mr. Roper's misconstrued statements, Roper Construction may file a motion to re-open the record to include the Revised Permit and thereby alleviate Alto CEP's concerns about potential post-permit modifications.

II. SUBSTANTIVELY, THE MOTION FAILS TO PRESENT "EVIDENCE" THAT SHOULD BE CONSIDERED BY THE BOARD.

Should the Hearing Officer decide to consider the merits of Alto CEP's Motion, he should deny the Motion because the "evidence" urged by Alto CEP is not relevant nor probative.

As counsel for Alto CEP stated: "***[T]he Board cannot look at the aspirations you might have for reduced production, but they need to look at the application*** …" Hrg. Tr. at 358:23-359:1. Now, however, Alto CEP takes the opposite position, claiming that Mr. Roper's "aspirational" statements in another forum about potential future changes to the Facility "are relevant and material to the EIB's determination on Roper Construction's permit application because they impact Roper Construction's stated plans and operating conditions for the proposed Alto CBP facility." *See* Motion at 5. This is not true; the statements are neither relevant nor material.

Pursuant to 20.1.2.303.A NMAC, evidence admitted for consideration in this matter must be relevant and probative. "Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department…" NMSA 1978, § 72-2-7(K). The Board may only deny Roper Construction's air quality permit application if it determines that emissions from the Facility

> (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act; (b) will cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or (c) will violate any other provision of the Air Quality Control Act or the federal act.

§ 74-2-7(C). There are no provisions for consideration of anything outside the application or evidence presented at the hearing. There is no administrative or statutory basis for the Board to consider the permit applicant's future plans for a facility after a permit is approved; it is simply not relevant to the Board's evaluation of the permit application before it. Indeed, Alto CEP did not

provide any authority supporting its position that potential future modifications are relevant to the question of whether the permit application meets the required parameters, because there is no such authority.

To the contrary, the Board's air permitting rules specifically contemplate that permits can and will be revised. *See* 20.2.72.219 NMAC. Alto CEP, through its witness Brad Sohm, expressly recognized this fact. *See* Hrg. Tr. 519:9-520:7. Should a permittee, in the future, violate any of the conditions of the permit, or be determined to have misrepresented material facts in his application, or operated a facility in violation of the terms of its permit, NMED has the authority to revoke the permit. *See* § 74-2-7(P).

Finally, the Board itself has acknowledged that post-permit modifications are the purview of NMED. Hrg. Tr. 118:17-25.

The "evidence" proposed by Alto CEP in its Motion is therefore neither relevant nor probative as required by 20.1.2.303.A NMAC, and should not be admitted into the record nor influence the Hearing Officer's Report.

III. REQUEST FOR EXPEDITED RULING

Roper Construction respectfully requests that the Hearing Officer expedite his ruling on the Motion to assure there is no impediment to a prompt decision by the Board on matter No. EIB 22-34. The NMED ruled Roper Construction's 2021 Permit was administratively complete on July 22, 2021. *See* Hearing Officer's Report (filed 1-18-23), at 1. Pursuant to § 74-2-7(B)(2)(a), NMED was required to have processed the 2021 Permit within 180 days of July 22, including accounting for a public hearing, or by January 18, 2022. The Deputy Secretary of NMED issued her denial on June 22, 2022; this was 155 days, or five (5) months, after the statutory deadline for

a decision on the 2021 Permit. Roper Construction did not receive any notifications of required extensions of time. *See* § 74-2-7(B)(3).

Roper Construction filed its Petition for Hearing with the EIB on July 22, 2022.[8] Pursuant to 20.1.2.204 NMAC, Roper Construction was entitled to a hearing "to begin no later than sixty (60) days after the date an appeal petition was received…"; that is, on or by September 20, 2022. Counsel for Alto CEP required an extension of time, delaying the EIB hearing by a month from its timely September setting to October 18, 2022. *See* Unopposed Motion to Vacate Hearing (filed 8-8-22). Alto CEP's current Motion potentially presents grounds for further delay.

Roper Construction has not objected to or made issue of the fact that the 2021 Permit process is at least six (6) months behind statutory deadlines. However, Roper Construction suffers prejudice by these delays. The delays hamper his ability to make important and time-sensitive business decisions. The delays also impact the district court litigations against Roper Construction in Lincoln County, New Mexico.

The Hearing Officer expressed, and Roper Construction urges, that the Board's consideration and ruling on the 2021 Permit be set for the next EIB meeting *(see* Hrg. Tr. 631:14-20), which Roper Construction understands to be in late February 2023. The Hearing Officer is charged with assuring the proceedings are not delayed, and may take "measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues …" 20.1.2.109(B)(2) NMAC. Roper Construction requests that the Hearing Officer promptly deny the Motion, and order that Alto CEP may not further burden the proceedings with a reply brief.

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[8] Hoping to avoid further proceedings, Roper filed a Motion to Reconsider Order Denying Permit Application on July 6, 2022; NMED did not rule on that motion.

CONCLUSION

For the reasons set forth above, Petitioner Roper Construction, Inc. respectfully requests that the Hearing Officer deny the Motion; and rule that Also CEP may not file a reply in support of its Motion, which will further delay these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2023, a true copy of the foregoing ***Petitioner Roper Construction, Inc.'s Response in Opposition to Alto CEP's Motion to Supplement the Record and/or to Modify the Hearing Officer's Report*** was served via electronic mail to the following:

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12th JUDICIAL DISTRICT COURT
Lincoln County
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AUDREY HUKARI
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TWELFTH JUDICIAL DISTRICT COURT
COUNTY OF LINCOLN
STATE OF NEW MEXICO

DALE A. ANTILLA, et al

Plaintiffs,

vs. **No. D-1226-CV-2021-00241**

ROPER CONSTRUCTION, INC.,
and RYAN ROPER, individually,

Defendants,

and

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,

Plaintiffs/Counter-Defendants

v. **No. D-1226-CV-2021-00261**
(Consolidated into above case)

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,

Defendants/Counter-Plaintiffs

PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE

Plaintiffs/Counter-Defendants James A. Miller and Sarah L. and Joshua C. Botkin (collectively "Plaintiffs") submit this motion for an order requiring Defendants Roper Investments, LLC and Roper Construction, Inc. (collectively "Roper") to show cause why the Court should not find Roper in contempt for failing to apprise the Court of the significant and material changes to the configuration of the proposed cement batch plant presented by Roper at the hearing on Plaintiffs' Motion for Preliminary Injunctive Relief ("Preliminary Injunction Motion").

INTRODUCTION

During the sworn testimony of Ryan Roper at the Environmental Improvement Board ("EIB") hearing in October 2022, Mr. Roper testified that he would instruct his counsel to present this Court with notice that the evidence Roper submitted at the Preliminary Injunction hearing was not accurate because of material and significant changes to the site layout and configuration of Roper's proposed concrete batch plant presented by Roper at the EIB hearing to obtain an air quality construction permit. Roper has yet to so inform the Court that the evidence Roper presented at the hearing on the Preliminary Injunction Motion is not accurate. Accordingly, this Court should enter an order directing Roper to show cause why Roper's failure to inform the Court of changes to the evidence Roper presented at the Preliminary Injunction hearing should not warrant the imposition of sanctions.

ARGUMENT

In June 2021, Roper filed its Application to the New Mexico Environment Department ("NMED") for an air quality construction permit to construct and operate a concrete batch plant on a lot adjacent to lots owned by Plaintiffs, despite knowing that the lots were burdened by deed restrictions that prohibited any use that would constitute a nuisance to adjoining landowners because of, *inter alia*, noise impacts. Roper attested that the information contained in the Application was true and correct. *See* Exhibit 1, Sworn Statement. The site diagram layout and configuration for the plant submitted with the Application is shown on Exhibit 2.

Prior to the Preliminary Injunction hearing, in order to minimize noise impacts at the lots adjacent to the proposed plant, Roper changed the proposed site layout and configuration of the concrete batch plant from that which was presented in the NMED Application. Specifically, at the Preliminary Injunction hearing, Roper introduced Respondent Exhibit FFF, which depicted the location of the plant farther north and west than the location of the plant as proposed by Roper in

its NMED Application. A copy of Respondent's Exhibit FFF is attached hereto as Exhibit 3 for reference. Roper also introduced at the Preliminary Injunction hearing Respondents' Exhibit AAAA, attached hereto as Exhibit 4, which included schematic drawings that purported to lower the height of the feed hopper from 19 feet 8 inches, as modeled in the NMED proceeding, to 3 feet 4 inches. Both the new location of the proposed plant as depicted on Respondent's Exhibit FFF, and the plant configuration as partly depicted on Respondent's Exhibit AAAA, were markedly different from the location and configuration that Roper swore under oath in the NMED Application were true and correct. The purpose of proposing these changes at the Preliminary Injunction hearing, was to mitigate noise impacts on the adjacent properties that were benefitted by the deed restriction.

Experts retained by Alto Coalition for Environmental Preservation ("Alto"), the party protesting Roper's Application for an NMED air quality construction permit, submitted exhibits (admitted without objection at the EIB hearing) that depicted the original layout of the concrete batch plant as presented to the NMED, and the site layout as depicted in Respondent Exhibit FFF presented to this Court at the Preliminary Injunction hearing. *See* Exhibit 5, proposed site layout and configuration as presented to the NMED; Exhibit 6, site layout presented at the Preliminary Injunction hearing. Exhibit 7, also attached hereto, shows the two markedly different site layouts and configurations by overlaying the original layout on top of the layout as proposed by Roper at the Preliminary Injunction hearing.

After the Preliminary Injunction hearing, the Deputy Secretary of the NMED denied Roper's application for an air quality construction permit. Thereafter, Roper appealed the Deputy Secretary's decision to the EIB and, immediately prior to the EIB hearing, in an effort to minimize air emissions as opposed to noise impacts, Roper again, for a third time, changed the site layout and configuration and disclosed yet another site layout and configuration that differed from both

the original NMED Application and the site layout and configuration presented at the Preliminary Injunction hearing. Exhibit 8 depicts Roper's third iteration of the plant location, layout and configuration disclosed on September 21, 2022. Recognizing that the sworn testimony provided at the Preliminary Injunction hearing was at odds with the NMED Application, Roper also sought to change the NMED Application and present a new application that reduced the hours of operation and throughput in an attempt to conform the NMED Application to the sworn testimony Roper provided on these subjects at the Preliminary Injunction hearing.

However, the statutes and administrative rules governing EIB review of the NMED Secretary's denial of Roper's Application for an air quality construction permit do not authorize an applicant to present a new application for the first time in an appeal to the EIB of an agency decision. Accordingly, Alto filed a motion to dismiss Roper's new application in the EIB proceeding, which the EIB considered at the beginning of the EIB hearing on October 18, 2022. During the EIB's deliberations, Roper withdrew the new application and, instead, agreed to limit the EIB review to the original NMED application, together with the original site plan, layout, configuration, hours of operation and throughput submitted to the NMED. These physical characteristics, however, differed considerably from the evidence presented to this Court to mitigate noise impacts from the proposed operation.

On October 19, 2022, during cross-examination at the EIB hearing, Mr. Roper acknowledged that the site layout and configuration, as presented at the Preliminary Injunction hearing to reduce noise, were no longer accurate. Specifically, Mr. Roper testified as follows:

> Q. This is not – you testified under oath, Mr. – Mr. Roper, did you not, that the plant configuration set forth in the green on Alto Exhibit 26 would be the plant configuration you would construct?

A. I testified that that's what our intentions were. That was prior to learning that I wasn't going to be able to make those adjustments in this permit process up to this point. So when I testified that – that was true, that's correct.

Q. And are you – do you intend to return to Judge Sugg to alert him that these measures you took to reduce noise will not be implemented?

* * *

Q. (BY MR. HNASKO) Do you have anything to add, Mr. Roper?

A. When this proceeding is done, I will consult with my litigation counsel and we will present whatever we need to present to Judge Sugg to bring him up-to-date on the process.

See Exhibit 9, Transcript of EIB hearing, p. 349:12-23; p. 350:12-17.

* * *

A. But now, going back to the original location of the plant, it's on a much leveler ground and it will not have to be reduced – or recessed into the ground.

Q. All right. So this particular modification will not be implemented; is that - - is that a fair statement?

A. That's correct.

Q. All right. And, again, I'm going to point out to you, I mean, Judge Sugg has no idea about this; does he?

A. I'm sorry. Can you repeat that?

Q. I said, Judge Sugg certainly has not been made aware that you're not going to reduce the height of the feed hopper to 3 feet, to 4 feet above grade, correct?

A. He is not.

Id. at p. 357:18-358:5.

To date, Roper has yet to fulfill his promise, made under oath, to notify the Court that the changes proposed to reduce noise, including modifications to the plant site layout, configuration,

and hours of operation, are not accurate and will not be considered by the EIB in Roper's appeal of the NMED's decision denying the air quality construction permit. This omission is particularly troubling given the December 23, 2022, filing in the EIB proceeding by Roper's administrative counsel attempting to prevent the EIB and the Hearing Officer from considering the non-conforming site layout and configuration evidence presented by Roper at the Preliminary Injunction hearing. Counsel's assertion that the EIB cannot consider Roper's presentation of evidence at the Preliminary Injunction hearing that contradicts the evidence presented to the EIB does not comport with the well-understood duty of candor to the Court applicable to all counsel. *See* Rule 16-303(A)(1) (a lawyer shall not knowingly fail to correct a false statement of material fact).

An order to show cause is necessary to correct Roper's failure to apprise the Court that the evidence Roper presented at the Preliminary Injunction hearing is no longer accurate. As one example, the affidavit of Roper's sound expert, Mike Dickerson, analyzed the new layout presented at the Preliminary Injunction hearing, but subsequently rejected at the EIB hearing. *See* Respondent Exhibit ZZZZ, pp. 7-11; 18. In accordance with the duty to correct knowingly incorrect statements, Roper must now apprise the Court that the evidence regarding the proposed plant's operations, location, configuration, and layout, as submitted at the Preliminary Injunction hearing in an effort to reduce noise impacts, is no longer valid and should be withdrawn. Roper should also be required to show cause why the portions of the record and its proposed Findings of Fact and Conclusions of Law that conflict with the proposed plant's operations, location, configuration, and layout, as submitted to the EIB, should not be stricken.

CONCLUSION

Based on the foregoing, the Court should enter an order requiring Roper to show good cause why Roper has not informed the Court of the changes to the plant submitted to the EIB and

that those changes render invalid the proposed configuration of the plant presented to the Court in an effort to reduce noise. The Court should direct Roper to strike those portions of the record and its Findings of Fact and Conclusions of Law in this proceeding that conflict with the proposed plant's operations, location, configuration, and layout as submitted to the EIB for issuance of the air quality construction permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2022, I caused a copy of the foregoing *Motion* to be electronically filed and served via the Court's Odyssey File & Service System to all counsel of record.

/s/ Thomas M. Hnasko
Thomas M. Hnasko

FILED
12th JUDICIAL DISTRICT COURT
Lincoln County
1/17/2023 5:32 PM
AUDREY HUKARI
CLERK OF THE COURT
Yazmin Helmick

STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT

DALE A. ANTILLA, et. al.,

Plaintiffs,

v. No. D-1226-CV-2021-00241
(consolidated with)

ROPER CONSTRUCTION, INC.

Defendant,

and

JAMES A. MILLER, SARAH L. MILLER and
JOSHUA C. BOTKIN,

Plaintiffs/Counter-Defendants,

v. No. D-1226-CV-2021-00261

ROPER CONSTRUCTION, INC. and ROPER INVESTMENTS, LLC,

Defendants/Counter-Plaintiffs.

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE

Defendants Roper Construction, Inc. and Roper Investments, LLC ("Roper") hereby respond in opposition to Plaintiffs' Motion for Order to Show Cause ("Motion"). Plaintiffs' counsel agreed that Roper may file this response on January 17, 2022. In support of its opposition, Roper states as follows.

BACKGROUND

The non-issue of which Plaintiffs complain in their Motion was engineered by Plaintiffs themselves. It is a non-issue because Plaintiffs' Motion complains that Roper's counsel did not do something she is not required to do – that is, inform this Court of *potential, abstract* changes to the Roper concrete batch plant layout that *may or may not* be put in place. The only reason Roper

was not able to present the same or substantially similar batch plant layout to the Environmental Improvement Board that he presented to this Court in the preliminary injunction hearing is that Plaintiffs' counsel prevented him from doing so, as described below.

This case came before the Court on a preliminary injunction hearing ("PI Hearing") in May and June of 2022 concerning the enforceability of a deed restriction and whether the operations of Roper's proposed Alto concrete batch plant ("Facility") would constitute a nuisance under the language of the purported deed restriction. Roper established that that the deed restriction does not burden the land in which Roper intends to construct the Facility, and/or that the deed restriction does not prohibit the operations of the Facility and other like businesses, and/or the deed restriction is too ambiguous to enforce.

At the PI Hearing, Roper also demonstrated that each of the three noise study versions created by Plaintiffs' experts were unreliable and inaccurate, and submitted undisputed evidence that noise mitigation efforts would reduce any noise levels the Plaintiffs might devise. *See* Defendants' Proposed Findings of Fact and Conclusions of Law Relating to Preliminary Injunction Hearing, filed July 5, 2022 ("FOF/COL") at § I(G), pages 34-66. Roper established that Plaintiffs failed to demonstrate that the noise created by the Facility would cause a nuisance, as nuisance is either generally understood or as mentioned in the deed restriction, to the neighboring Plaintiffs. *See id.* at page 66, *Conclusions of Law* ¶ 8.

Roper also presented and testified about a visual representation of the proposed Facility, which illustrates the Facility from the perspective of NM Highway 220 and has aerial views. *See* Defendants' PI Hearing Exhibit FFF (the "Concrete Batch Plant Visual", referred to herein as "Exhibit FFF"). Ryan Roper began working on a visual representation of his Facility layout in

December 2021 to counter the Sonterra Plaintiffs'[1] incorrect publicity campaign that the Facility would look the same as the Roper Carrizozo plant (including banners posted in public with a photo of the Carrizozo plant and falsely stating it reflected the proposed Facility). *See* Ex. A, Affidavit of Ryan Roper, ¶ 3. Separately, as a result of inputs from citizens that the primary objection to the Facility was its appearance, Ryan Roper considered whether the Facility could be made more visually appealing, apart from the trees he planned to plant. Ex. A, ¶ 4. Thus, to meet citizen concerns about aesthetics, he decided to modify his site plan to move the plant slightly further north, away from NM Highway 220, and somewhat more westerly (to place portions of Facility structures behind existing trees). Ex. A, ¶ 4. Starting in December 2021, Ryan Roper worked on creating a visual representation of the revised site plan, based on his own photographs of the Facility site taken from NM Highway 220, aerial views from Google Earth, and specs and models of the actual plant equipment he had purchased for the Facility. Ex. A, ¶ 5. The result is Exhibit FFF.

Ryan Roper's revisions to the site plan were entirely a result of this thought process and were completely unrelated to noise or air quality issues. Ex. A, ¶¶ 3-6. He did not consult his noise consultant – who he did not even engage until *after* publication of Exhibit FFF – nor his air quality consultant on any site plan revisions. Ex. A, ¶ 6. He published Exhibit FFF to the public, to counter

[1] Roper understands that members of the Ranches of Sonterra plaintiffs' group led the public campaign against the Facility, although other members of the public may have joined. Based on website statements, members of the Sonterra plaintiffs' group organized an opposition group known as Alto Coalition for Environmental Preservation ("Alto CEP"). In this brief, the actions undertaken by either of these groups and/or their members are referred to as actions by the Sonterra Plaintiffs unless otherwise designated. Sonterra Plaintiffs largely fund the litigation by Plaintiffs Miller and Botkin. *See* PI Hearing Exhibit RRR (Deposition Transcript of Josh Botkin) at 10:13 – 11:15. Mr. Thomas Hnasko represents all the relevant plaintiffs and complainants.

the misrepresentations being made by the Sonterra Plaintiffs, through flyers. It was first posted online on March 9, 2022. *See* facebook.com/ SupportSmallBusinessesinLincolnCounty.

Paralleling this litigation is the New Mexico Environment Department ("NMED") administrative proceeding for the approval of an air quality permit to construct the Facility. Although the NMED's Air Quality Bureau ("AQB") reviewed and recommended approval of Roper's June 2021 air quality permit application ("2021 Application"), the complaints led by the Sonterra Plaintiffs caused the NMED Secretary to determine that sufficient public interest existed to delay issuance of the permit and to hold a public hearing.[2] The NMED public hearing was held on February 9, 2021. At that hearing, the Sonterra Plaintiffs presented impermissible "technical" testimony upon which the Hearing Officer inappropriately based his recommendation that the permit be denied. The former Deputy Secretary of NMED denied the permit relying upon the Hearing Officer's erroneous recommendation and other misapplications of the law and facts.

Both the AQB and Roper felt the denial was unjustified and misapplied the applicable rules and law governing air permit applications. Accordingly, Roper filed a Petition for Hearing of the Deputy Secretary's denial with the Environmental Improvement Board ("EIB") on July 22, 2022 ("EIB Appeal"). NMED supported Roper's Petition and re-urged approval of the permit. The Sonterra Plaintiffs, through their counsel Mr. Hnasko, contested the Petition. The Sonterra Plaintiffs appear in the EIB Appeal as Alto CEP.[3]

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[2] Under the Air Quality Control Act, NMSA 1978, § 74-2-7(B)(2) 2021, and air quality regulations, 20.2.72.207.B NMAC, NMED must grant, grant subject to conditions, or deny a permit application within 90 days after determining the application complete. The Secretary may extend the deadline by 90 days to hold a public hearing. 20.2.72.207.C NMAC.

[3] All filings for the EIB Appeal are available online at: https://www.env.nm.gov/opf/docketed-matters/ as Matter No. EIB 22-34, under the Environmental Improvement Board tab.

Plaintiffs' counsel, and the Sonterra Plaintiffs, continue to publicize that the Facility will operate at the "theoretical maximum" levels of operation submitted in the 2021 Application. This is despite unrefuted evidence admitted at the PI Hearing and in associated court filings that Roper's actual operations will be approximately 5% of the theoretical maximums in the 2021 Application. *See* FOF/COL at § I(G)(i) ¶ 3 at page 38; Defendants' PI Hearing Exhibit III; Defendants' Motion for Partial Summary Judgment as to hours of operation, filed April 11, 2022 ("MPSJ"), and the MPSJ Reply, filed May 5, 2022. The Court recognized that the theoretical maximums do not reflect actual proposed operations when it granted Roper's MPSJ. *See* Order, filed May 24, 2022. Despite the unrefuted evidence that the 2021 Application does not reflect actual operations, Plaintiffs' counsel and Plaintiffs continue to demonize the Facility based on the theoretical maximum operations submitted to NMED for analysis purposes.[4] Roper's counsel went so far as to urge an oral summary judgment motion on the "theoretical maximums" issue to preclude further misrepresentations to the Court and the public, as reflected in the 6/8/2022 Log, time stamp 4:13:56-4:24:30 PM (Audio 13 of PI Hearing at 1:18:34 – 1:33:05). In response to the oral motion, ***Plaintiffs' counsel suggested that Roper "could always amend the permit application***." *See* 6/8/2022 Log, time stamp 4:27:20 PM.

Roper believed that an application reflecting more realistic potential operations might assuage concerns, and also eliminate the ability of Plaintiffs' counsel and the Sonterra Plaintiffs to misrepresent the impacts of the Facility. Ex. A, ¶¶ 8-9. Accordingly, Roper submitted revised

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[4] Plaintiffs not only did not offer contradictory evidence of Roper's potential actual operations, they did not offer any evidence contradicting that it is the normal practice, and is true of Roper's 2021 Application, to submit unrealizable "theoretical maximums" in air quality permit applications to test the "worst possible scenario." *Compare* MPSJ Ex. B (Paul Wade Affidavit) at ¶¶ 4-5, 7-8, 11-12 *to* Plaintiffs' Response to Defendants' MPSJ, filed May 2, 2022. The statements in the Wade affidavit were also submitted at the PI Hearing; Plaintiffs offered no contradictory evidence.

portions of the 2021 Application to NMED that reduced the "theoretical maximum" throughput by about 90% percent, and minimally altered the site plan from Exhibit FFF. This will be referred to as the "2022 Revised Application." Roper also commissioned new air quality modeling to account for the more northerly (and somewhat more westerly) position of the Facility as compared to the June 2021 site plan. The AQB approved the 2022 Revised Application at the much lesser operations levels. *See* Ex. B (Roper's 2022 Revised Application). This is the precise action suggested by Mr. Hnasko on June 8, 2022.

The rules for an EIB appeal permit the EIB to consider new evidence not on the record at the lower-level administrative proceeding in deciding whether to sustain, modify, or reverse the action of the Department. *See* NMSA 1978, § 74-2-7; *see also* 20.1.2.208 and 20.1.2.303 NMAC. Roper submitted the AQB-approved 2022 Revised Application for consideration by the EIB for an air quality permit that dramatically reduced the proposed theoretical maximum operations of the Facility. Roper and counsel naively believed the 2022 Revised Application would be more agreeable to the Sonterra Plaintiffs and/or Alto CEP.

However, despite his earlier suggestion that Roper submit an amended application, counsel for Alto CEP moved to dismiss consideration of Roper's 2022 Revised Application and required that it be withdrawn from consideration at the EIB Appeal.[5] That left the EIB to consider the 2021 Application, the NMED February 2022 hearing record, and any new evidence concerning the 2021 Application, to be presented at the EIB Appeal Hearing (October 18 through 20, 2022). That means that the June 2021 Facility site plan was presented at the EIB Appeal because complainant Alto

[5] Alto CEP's Motion to Dismiss Petition of Roper Construction, Inc., or in the Alternative, to Preclude Roper Construction, Inc. from Presenting New Evidence that was Not Presented in the Proceeding Before the New Mexico Department Of Environment, submitted October 10, 2022.

CEP refused to allow the EIB to consider the revised site plan as considered and approved by the AQB in the 2022 Revised Application, Ex. B.[6]

Plaintiffs now assert that Roper should be subject to sanctions because the site plan Mr. Hnasko forced Roper to submit for the EIB Appeal (the June 2021 site plan) differs from the Exhibit FFF site plan. *See* Motion at 2. Thus, Plaintiffs' counsel engineered the situation for which they now seek sanctions against Roper. Also, they misstate Roper's alleged "promise" to notify the Court. Further, Plaintiffs know that after the permit is approved, the site plan approved by the EIB may be administratively modified to reflect the Exhibit FFF site plan or something similar. For the reasons stated below, Plaintiffs' Motion is inaccurate, misleading, and premature, and should be denied.

ARGUMENT

I. Revisions to Roper's air quality permit application and site plan configuration have been performed as requested by NMED, for business purposes, and in direct response to public concern.

Plaintiffs falsely accuse Roper of preparing and submitting its 2022 Revised Application to, on the one hand, mitigate noise impacts for purposes of the PI Hearing, and on the other hand, to mitigate air pollution concentrations for the EIB Appeal. *See* Motion at 2-4. These accusations are completely unsupported by any evidence but rather are contradicted by sworn testimony. Since Roper first applied for an air quality permit in June of 2021, the NMED application has been a live document to reflect necessary adjustments. It has undergone several revisions both at the request of NMED and by Roper. This is common for an air quality permit application in New Mexico. *See*

[6] The EIB Hearing Officer's Report and Recommendation was intended to have been issued before this opposition brief was due, but has been slightly postponed due to a medical issue. Roper will advise the Court of the substance of that Report and Recommendation when it is issued. The EIB is anticipated to either accept, modify, or reject the Hearing Officer's Report and Recommendation by mid- to late-February, 2023.

Ex. F, 2-9-2022 NMED Hearing Transcript at 183:22-24 (NMED staff explaining that any air quality permit application has many updates).

In this case, Roper testified he modified the Facility site plan to the Exhibit FFF version prior to even engaging his noise consultant.[7] *See* Ex. D, 10-19-2022 EIB Appeal Hearing Transcript at 349:9-11; Ex. A, ¶ 6. Roper specifically testified that he revised the plant layout to lessen the visual impact of the Facility from NM Highway 220 and allow the property to retain the maximum number of existing trees and to use those trees to shield some of the plant equipment from sight. *See* Ex. D at 347:18-23; Ex. A, ¶ 4. Roper specifically denied that he revised the Site plan to minimize the noise impact. *See* Ex. D at 349:24-25 ("I didn't do it to reduce noise."). In fact, the Exhibit FFF revised site plan moved noise producing equipment *closer* to the property of the nearest Plaintiff, Botkin, meaning the noise for Botkin would be *greater* than in the June 2021 site plan. *Id* at 347:24-348: 12; *id.* at 349:9-10.[8]

The undisputed evidence is that Roper sought to revise its air quality permit application to scale back the "theoretical maximum" operations of the proposed Facility and to provide a more aesthetically pleasing plant and lesser operations in response to "issues raised by the public." *See* Ex. C, 10-18-2022 EIB Appeal Hearing Transcript at 86:20-23, 90:6-8, in which counsel for NMED argued in support of the 2022 Revised Application; Ex. A, ¶¶ 3-4, 8-9. Counsel for NMED argued that the 2022 Revised Application had "just been updated to improve it." Ex. C at 89:2-6. The 2022 Revised Application asks for "less operating hours, less maximum throughput … reducing the emissions from the facility." *See* Ex. C at 91:2-6; Ex. B. NMED noted that the EIB

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[7] Roper testified that he reconfigured the site plan "prior to the litigation suit." Ex. D at 347:18-23. By "prior to the litigation suit" Roper meant prior to preparing for the preliminary injunction hearing. Ex. A at ¶ 7.

[8] In fact, Roper's noise consultant was not engaged until after Ex. FFF was in circulation and posted online. Ex. A at ¶ 6.

is statutorily permitted to modify a permit under review, including making it more restrictive, because the EIB Appeal is a *de novo* hearing. Ex. C at 87:18-89:6. That is exactly what Roper requested the EIB do, but Alto CEP strenuously objected and argued to preclude its consideration.[9]

Although Roper attempted to address public concern and scale back allowable operations in the air quality permit application (coincidentally, exactly as Mr. Hnasko suggested he do in June 2022), as discussed below, Roper (and NMED) continue to understand that its original air quality permit application "is viable and approvable." *See* Ex. C at 92:3-10.

Plaintiffs' counsel inexplicably contradict themselves in this case, where in this Motion they assert that Roper attempted to revise its air permit application and site plan in the 2022 Revised Application to *reduce* air pollution emissions, yet during the EIB Hearing, counsel for Alto CEP argued that the revisions would *increase* air pollution concentrations. *Compare* Motion at 3 *to* Ex. C at 81:22 – 82:5. This is an example of Plaintiffs' counsel being willing to say anything, regardless of how unsubstantiated or absurd, to make "the point of the moment." Despite Plaintiffs' counsel's repeated unsupported declarations, Roper did not revise its air permit application and site plan to reduce air pollution emissions, but only to address the concerns expressed by the public in the community in which he plans to operate the Facility.

As he did at the PI Hearing, throughout the EIB Appeal (and in Plaintiffs' Motion) Plaintiffs' counsel inserts false statements as "facts" within his questions and declarations to the tribunal. False and/or misleading statements to this Court in the Motion are:

a. Plaintiffs misleadingly state that Roper's sound consultant, Mr. Dickerson, "analyzed the new layout presented at the Preliminary Injunction hearing." Motion at 6. This is incorrect: Mr. Dickerson analyzed the methodologies and protocols employed by Plaintiffs' experts, SWCA, as to each of the three noise studies they presented, and established that they were

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[9] Counsel for NMED noted: "Alto does not want a more restrictive or more protective permit." Ex. C at 126:17-18.

unreliable, violated established industry protocols, and produced incorrect results skewed to establish noise levels above an arbitrarily-chosen dBA level. *See* FOF/COL at § I(G).

b. Plaintiffs falsely state that "In order to minimize noise impacts at the lots adjacent to the proposed plant, Roper changed the proposed site layout and configuration of the concrete batch plant …" Motion at 2. *And also*: "The purpose of proposing these changes at the Preliminary Injunction hearing, was to mitigate noise impacts on the adjacent properties …" Motion at 3. These unsupported conjectures are false and directly contradicted by testimony. As stated *supra*, Roper's revised site plan, Exhibit FFF, was created for aesthetic and business purposes. Noise was not a consideration. Exhibit FFF was finalized and publicly available by March of 2022, prior to the PI Hearing. Further, this absurd statement completely ignores that by moving the Facility further west – closer to Plaintiff Botkin – Roper's Exhibit FFF site plan potentially *increases* the noise to Plaintiff Botkin.

c. And conversely, Plaintiffs untruthfully assert: "In an effort to minimize air emissions as opposed to noise impacts, Roper … changed the site layout …" Motion at 3. Roper had no reason to minimize air emissions because those levels of emission submitted in Roper's 2021 Application ***had been approved*** by AQB. *See supra.* Roper submitted its 2022 Revised Application in response to public concerns and to invalidate the misleading use of the "theoretical maximums."

d. "Recognizing that the sworn testimony provided at the Preliminary Injunction hearing was at odds with the NMED Application, Roper also sought to change the NMED Application … in an attempt to conform the NMED Application to the sworn testimony Roper provided on these subjects at the Preliminary Injunction hearing." Motion at 4. Again, these are false and unsupported statements. *See* ¶ c, above; and Roper's testimony herein, *generally*.

e. "Roper has yet to fulfill his promise, made under oath, to notify the Court that the changes proposed to reduce noise … are not accurate …" Motion at 5-6. This is ***not*** what Roper testified under oath he would do, as the testimony cited by Plaintiffs clearly shows; Plaintiffs invented this promise. Roper testified that he would "consult with my litigation counsel and we will present whatever we need to present to Judge Sugg…" Motion at 5. And that is exactly what Roper did.

These incorrect, misleading, prejudicial statements by Plaintiffs' counsel should be entirely disregarded to the extent the Court does not *sua sponte* determine they violate the duty of candor to the tribunal.

Thus, Plaintiffs' accusations that Roper revised its air quality permit application and site plan for the alternate (and, according to Plaintiffs, competing) purposes of mitigating noise or air pollution concentrations is completely unfounded and thoroughly disputed by the evidence.

II. Alto CEP prevented Roper from presenting its 2022 Revised Application to the EIB. The 2022 Revised Application demonstrated lesser operations, emissions, and air quality impacts.

Prior to the EIB hearing, Roper had submitted, and ABQ/NMED had approved, its 2022 Revised Application and site plan, which reduced the theoretical maximum operations of the proposed Facility. However, Alto CEP filed a motion in the EIB Appeal to exclude the 2022 Revised Application. *See* Motion at 4. At the Special Meeting of EIB held the day before the EIB Appeal hearing convened to hear motions in advance of the hearing itself, the options resulting from Alto CEP's motion were to either not go forward at all or that Roper go forward only with the 2021 Application (considered at the February 9, 2022, NMED Hearing).[10] As counsel for Roper noted: "We tried to be responsive to the public and to Alto CEP, but if they don't want to go forward with a reduced proposal, we're certainly willing to go forward with the [June 2021] proposal…" Ex. C at 153:2-6. NMED concurred. *Id*. at 153:17-21. Accordingly, Roper voluntarily withdrew the 2022 Revised Application and went forward with the 2021 Application. Ex. C at 152:21-153:9. The parties then reached a stipulation to withdraw those exhibits and testimony relating to the 2022 Revised Application. Ex. C at 163:19-164:5; Ex. D at 243:6-18. This did not stop Mr. Hnasko from attacking issues relating to the withdrawn 2022 Revised Application in the EIB Appeal.

Thus, Roper's original June 2021 permit application, with the June 2021 site plan, is currently before the EIB only because Alto CEP would not allow the EIB to consider the 2022 Revised Application, with its revised site plan and lesser emissions.

[10] The EIB seemed to be surprised by Alto CEP's refusal to go forward on the 2022 Revised Application, inasmuch as it was stricter than the 2021 Application. Discussion on the issue takes up 75 pages of transcript. *See* https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/11/Day_1-Condensed.pdf (75:17 – 150:16).

III. Roper's air quality permit application and site plan configuration have not been approved and finalized. Plaintiffs' Motion is premature, misleading, and not ripe for review.

In New Mexico, the "ripeness doctrine" exists to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *City of Sunland Park, Santa Teresa Services Co., Inc. v. Macias*, 2003-NMCA-098, ¶ 23, 134 N.M. 216 (internal quotation marks omitted). An issue is ripe where the threat of harm is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. *See id*. The basic purpose of ripeness law in New Mexico is to "conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems." *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-018, ¶ 25, 111 N.M. 622 (citing 4 K. Davis, *Administrative Law Treatise* § 25.1 (2d ed. 1983)).

Plaintiffs' Motion is premature and not ripe for review because Roper's air quality permit, which is required to construct the Facility, is pending approval before the EIB. In other words, Roper's counsel cannot advise the Court of changes, if any, to the Exhibit FFF site plan presented at the PI Hearing until NMED approves its permit application and Roper understands which site plan may actually be constructed. If Roper's counsel were to inform the Court of the "hypothetical" and "remote" changes to the site plan presently, it might burden the Court with a series of notifications of further "hypothetical" and "remote" proposed revisions as Roper works toward approval of the Exhibit FFF site plan.

After EIB approves the 2021 Application, Roper has the option to pursue an administrative revision process with NMED to scale back its proposed operations to those submitted in the 2022 Revised Application (which Plaintiffs' counsel forced to be withdrawn from EIB consideration), or to any other site plan modification he deems appropriate and that meets NMED requirements.

Roper notified the EIB and all parties of its intentions to do so. *See* Ex. C at 92:3-10, 105:13-23; Ex. A at ¶ 10. Under 20.2.72.219.A(1)(b) NMAC, Roper may administratively revise its permit, including the throughput, hours of operation, and relocation of equipment so long as the NMED identifies each revision as a minor administrative change at the source. NMED has traditionally approved similar revisions as those sought by Roper as an "administrative revision." Administrative revisions are effective upon receipt by NMED and do not require public notice. *See* 20.2.72.219.A(1)(b) NMAC.

As they did in the PI Hearing, at the EIB Appeal Sonterra Plaintiffs shored up Dr. Carlos Ituarte-Villareal's testimony with that of Brad Sohm. Mr. Sohm concurred that Roper could revise the Facility site plan any time before operations began at the Facility through a revision to the permit. Ex. E, 10-20-2022 EIB Appeal Hearing Transcript at 519:9-17. Mr. Sohm was aware of the 2022 Revised Application reflecting the revised site plan, which Alto CEP pressured to be withdrawn. *Id*. at 519:12-520:7.

Consequently, due to the actions of Plaintiffs' counsel, Roper is in a holding pattern concerning the final approved site plan for the Facility. However, once the site plan is finalized, Roper' counsel will advise the Court as appropriate. As of this moment, the Exhibit FFF site plan, or one very close to it, is what Roper intends to construct. However, when EIB approves the 2021 Application, it may be more efficient for Roper to simply build according to that permit and the June 2021 site plan. Plaintiffs have already conducted their noise studies for that site plan, and testified fully about it. *See* FOF/COL at § (I)G.

It is Plaintiffs' burden to prove Roper's Facility violates the purported deed restrictions. *See Nat'l Trust for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶¶ 18, 21, 117 N.M. 590 (internal quotation omitted); *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. When

the permit is approved based on the operations and site plan in the 2021 Application, Roper's counsel will notify the Court. Plaintiffs have already conducted noise studies relating to that site configuration and submitted that evidence to the Court. *See* FOF/COL at § (I)G. Roper will have been forced by Alto CEP into that less appealing site plan.

If, on the other hand, after the permit is approved Roper decides to make administrative revisions to the site plan to more closely accord with Exhibit FFF, Roper's counsel will notify the Court. In that event, should Plaintiffs deem a fourth noise study is necessary to attempt again to establish that Facility noise reaches a nuisance level at the Botkin and Miller businesses, it will be Plaintiffs' obligation to conduct the same. Roper will certainly cooperate with Plaintiffs in that regard.

New Mexico law, and logic, require that the Court deny Plaintiffs' Motion as premature with the understanding that Roper's counsel will apprise the Court of changes to the site plan of the Facility when such plan is approved by NMED through the air quality permit process. No changes to Roper's Findings of Fact and Conclusions of Law are warranted under the present circumstances.

CONCLUSION

Roper has not misled the Court concerning the site plan of the proposed Facility, nor violated any sworn testimony. Construction of the Facility is predicated on the approval of its air quality permit. Once the site plan is finalized and approved, Roper will determine the final site plan and Roper's counsel will then apprise the Court of any differences between Exhibit FFF and the final site plan, should there be any.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By: *<u>/s/ Shelly L. Dalrymple</u>*
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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on January 17, 2023, the foregoing was filed electronically with the Court's electronic filing system, with a copy electronically served on the following:

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STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT

DALE ANTILLA, et. al.,
Plaintiffs,

v.

ROPER CONSTRUCTION, INC.
Defendant

and

No. D-1226-CV-2021-00241

JAMES A. MILLER, AND SARAH L. AND
JOSHUA C. BOTKIN
Plaintiffs/Counter-Defendants

v.

ROPER CONSTRUCTION, INC. AND ROPER INVESTMENTS, LLC
Defendants/Counter-Plaintiffs

AFFIDAVIT OF RYAN ROPER

I, RYAN ROPER, being duly sworn, depose and state as follows:

1. I am over the age of 18 years and competent to make the following declaration. The matters set forth below are true based on my personal knowledge and information

2. I am the owner/operator of Roper Construction, Inc., and the principal of Roper Investments, LLC.

3. By December of 2021, I decided that a visual representation of the proposed concrete batch plant ("Facility") might help combat the incorrect public perception that the Facility would resemble the existing concrete batch plant in Carrizozo, New Mexico. This misinformation was being circulated by the Ranches of Sonterra plaintiffs and/or their contacts, including a banner

EXHIBIT A

that was being hung up in parts of town showing the Carrizozo plant and implying it was a representation of the proposed Alto plant.

4. Also, in my discussions with various people about the Facility, I was told that the primary concern was how the Facility looked. Therefore, even prior to the Ranches of Sonterra plaintiffs suing me, I decided to revise the site plan layout, moving it toward the northwest in order to make it farther from NM Highway 220, and to keep the existing trees and use them to shield some of the Facility components. This minor change in configuration of the Facility also met some business needs in that it allowed me to create a more compact layout, take better advantage of the site's topography, and reduce the cost to construct the facility.

5. Exhibit FFF, which was presented during the Preliminary Injunction Hearing, is the rendition of the site plan layout and visualization that I formulated beginning in December 2021. This visualization of the Facility is composed of photographs from NM Highway 220 that I took myself, aerial views from Google Earth, and specs and models of the actual plant equipment I purchased for the Facility.

6. The revisions I made to the site plan of the Facility in starting in December 2021 were not related to the mitigation of noise or air pollution. I did not discuss the revisions with my air quality consultant, Paul Wade. At the time I prepared and published the revised site plan, I had not even engaged, never mind consulted with, a noise consultant.

7. I believe my testimony at the EIB appeal hearing is somewhat confusing as to when I contemplated and revised the site plan. To clarify, when I stated that I had revised the site plan prior to litigation I meant prior to preparing for the preliminary injunction hearing held in May-June of 2022. See Day 2 Transcript (10-19-22) 347:18-23; 349:9-11. I revised the site plan, and

the visualization in Exhibit FFF was created, after the complaint was filed by the Sonterra Plaintiffs (November 2021), which initiated the litigation against the Facility.

8. Following the former NMED Deputy Secretary's denial of my June 2021air quality permit application, I decided to revise the air quality permit application to more reasonably reflect the anticipated operations of the Facility as opposed to the "theoretical maximums" in the June 2021 application. The initial "theoretical maximums" have been falsely stated to be future actual operations, despite my sworn testimony that the real potential operations would be about 5% of the "theoretical maximums". Accordingly, I reduced the proposed throughput of annual concrete production by about 90% percent and made other changes that more closely reflect proposed operations. I also revised the submitted site plan to be similar to Exhibit FFF, to best fit the topography of the site, to take advantage of the natural visual screening from the existing trees, and to comply with NMED air quality permitting requirements.

9. I submitted the 2022 revised application to NMED. The NMED AQB approved the revised permit application prior to the EIB appeals hearing, in which the EIB was tasked with upholding, modifying, or reversing the NMED's denial of the June 2021 permit application. I understood that the EIB would be allowed to consider and make decisions about the 2022 revised application. I also understood this procedure to ensure that the public participants in the hearing, namely Alto CEP members, would be aware of my efforts to ensure that the operations of the Facility would reasonably match the permit application. The 2022 revised application still asks for twice the amount of operations the area can sustain, and about 50% more operations hours than will be worked, in order to allow some amount of flexibility in operations on a daily basis. I stand firmly by my testimony at the Preliminary Injunction Hearing that I hope to average production and sales of 25,000 cubic yards of concrete per year, with the associated operations that requires.

10. I also understand that if the EIB approves the June 2021 application which it is considering, and issues an air quality permit, I will later be able to make certain revisions to that approved permit, if I choose to do so, that will result in a site plan the same as or very similar to that in Exhibit FFF. This administrative revision process does not include any public participation.

RYAN ROPER
Roper Construction, Inc.
Roper Investments, LLC

Date: 1.17.2023

Subscribed, sworn to and acknowledged before me on this 17 day of January 2023, by Ryan Roper.

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

STATE OF NEW MEXICO
NOTARY PUBLIC
BROOKE ROPER
COMMISSION NUMBER 1128924
EXPIRATION DATE 06-19-2024

Notary Public

My Commission Expires:

June 19, 2024

MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

AIR QUALITY BUREAU
NEW SOURCE REVIEW PERMIT
Issued under 20.2.72 NMAC

Note to Applicant for Draft Permit Reviews: **The AQB permit specialist provides this draft permit to the applicant as a courtesy to assist AQB with developing practically enforceable permit terms & conditions and correcting any technical errors. Please note that the draft permit may change following completion of the Department's internal reviews. If AQB makes additional changes, and as time allows, the applicant may be provided an opportunity for additional review before the permit is issued.**

Sent by Certified Mail
Return Receipt Requested

NSR Permit No:	9295
Facility Name:	Alto Concrete Batch Plant
Facility Owner/Operator:	Roper Construction Inc
Mailing Address:	P.O. Box 969 Alto, New Mexico 88312
TEMPO/IDEA ID No:	40076-PRN20210001
AIRS No:	35-027-0299
Permitting Action:	Regular New
Source Classification:	
Facility Location:	438240 m E by 3697950m N, Zone 13; Datum NAD83
County:	Lincoln County, NM
Air Quality Bureau Contact	Rhonda Romero
Main AQB Phone No.	(505) 476-4300

_______________________________ _______________________________

Liz Bisbey-Kuehn
Bureau Chief
Air Quality Bureau

Date

Template version: 06/30/2021

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PART A FACILITY SPECIFIC REQUIREMENTS

A100 Introduction

A. This is a new permit.

A101 Permit Duration (expiration)

A. The term of this permit is permanent unless withdrawn or cancelled by the Department.

A102 Facility: Description

A. The 125 cubic yard per hour concrete batch plant.

B. This facility is located approximately 8.2 miles north of Ruidoso, New Mexico in Lincoln County.

C. Tables 102.A and Table 102.B show the total potential emission rates (PER) from this facility for information only. This is not an enforceable condition and excludes emissions from Minor NSR exempt activities per 20.2.72.202 NMAC.

Table 102.A: Total Potential Emission Rate (PER) from Entire Facility

Pollutant	Emissions (tons per year)
Nitrogen Oxides (NOx)	0.3
Carbon Monoxide (CO)	0.2
Volatile Organic Compounds (VOC)	0.03
Sulfur Dioxide (SO_2)	0.003
Particulate Matter 10 microns or less (PM_{10})	0.2
Particulate Matter 2.5 microns or less ($PM_{2.5}$)	0.05

Table 102.B: Total Potential Emissions Rate (PER) for Hazardous Air Pollutants (HAPs) that exceed 1.0 ton per year

Pollutant	Emissions (tons per year)
Total HAPs	<1.0

A103 Facility: Applicable Regulations

A. The permittee shall comply with all applicable sections of the requirements listed in Table 103.A.

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Table 103.A: Applicable Requirements

Applicable Requirements	Federally Enforceable	Unit No.
20.2.1 NMAC General Provisions	X	Entire Facility
20.2.3 NMAC Ambient Air Quality Standards	X	Entire Facility
20.2.7 NMAC Excess Emissions	X	Entire Facility
20.2.61 NMAC Smoke and Visible Emissions	X	Units 12, 13, and 14
20.2.72 NMAC Construction Permit	X	Entire Facility
20.2.73 NMAC Notice of Intent and Emissions Inventory Requirements	X	Entire Facility
20.2.75 NMAC Construction Permit Fees	X	Entire Facility
40 CFR 50 National Ambient Air Quality Standards	X	Entire Facility

A104 Facility: Regulated Sources

A. Table 104.A lists the emission units authorized for this facility. Emission units identified as exempt activities (as defined in 20.2.72.202 NMAC) and/or equipment not regulated pursuant to the Act are not included.

Table 104.A: Regulated Sources List

Unit No.	Source Description	Make	Model	Serial No.	Construction/ Reconstruction Date	Manufacture Date	Permitted Capacity
1	Haul Road	NA	NA	NA	NA	NA	127 trips per day
2	Feeder Hopper	JEL Manufacturing	TBD	TBD	TBD	TBD	187.5 tph
3	Feeder Hopper Conveyor	JEL Manufacturing	TBD	TBD	TBD	TBD	187.5 tph
4	Overhead Aggregate Bins (4)	JEL Manufacturing	TBD	TBD	TBD	TBD	187.5 tph
5	Aggregate Weigh Batcher	JEL Manufacturing	TBD	TBD	TBD	TBD	187.5 tph
6	Aggregate Weigh Conveyor	JEL Manufacturing	TBD	TBD	TBD	TBD	187.5 tph
7	Truck Loading with Baghouse	JEL Manufacturing	TBD	TBD	TBD	TBD	125 yd^3 per hour
8	Cement/Fly Ash weigh Batcher	JEL Manufacturing	TBD	TBD	TBD	TBD	38.8 tph
9	Cement Split Silo	JEL Manufacturing	TBD	TBD	TBD	TBD	30.6 tph

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Table 104.A: Regulated Sources List

Unit No.	Source Description	Make	Model	Serial No.	Construction/ Reconstruction Date	Manufacture Date	Permitted Capacity
10	Fly Ash Split Silo	JEL Manufacturing	TBD	TBD	TBD	TBD	8.25 tph
11	Aggregate/Sand Storage Piles	NA	NA	NA	NA	NA	187.5 tph
12,13, 14	Concrete Batch Plant Heaters (3 in total)	TBD	TBD	TBD	TBD	TBD	0.6 MMBtu/hr (total)

1. All TBD (to be determined) units and like-kind engine replacements must be evaluated for applicability to NSPS and MACT requirements.

A105 Facility: Control Equipment

A. Table 105.A lists all the pollution control equipment required for this facility. Each emission point is identified by the same number that was assigned to it in the permit application.

Table 105.A: Control Equipment List:

Control Equipment Unit No.	Control Description	Pollutant being controlled	Control for Unit Number(s)[1]
3b	Wet Dust Suppression System	PM_{10}, $PM_{2.5}$	3
4b	Wet Dust Suppression System	PM_{10}, $PM_{2.5}$	4
5b	Wet Dust Suppression System	PM_{10}, $PM_{2.5}$	5
6b	Wet Dust Suppression System	PM_{10}, $PM_{2.5}$	6
7b	Baghouse	PM_{10}, $PM_{2.5}$	7, 8
9b	Baghouse	PM_{10}, $PM_{2.5}$	9
10b	Baghouse	PM_{10}, $PM_{2.5}$	10
1b	Paved and Swept	PM_{10}, $PM_{2.5}$	1

1. Control for unit number refers to a unit number from the Regulated Equipment List

A106 Facility: Allowable Emissions

A. The following Section lists the emission units and their allowable emission limits. (40 CFR 50, 20.2.72.210.A and B.1 NMAC).

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Table 106.A: Allowable Emissions

Unit No.	NO_x[1] pph	NO_x [1]tpy	CO pph	CO tpy	VOC pph	VOC tpy	SO_2 pph	SO_2 tpy	PM_{10} pph	PM_{10} tpy	$PM_{2.5}$ pph	$PM_{2.5}$ tpy
1	-	-	-	-	-	-	-	-	0.3	0.05	0.03	0.005
2	-	-	-	-	-	-	-	-	0.4	0.06	0.06	0.008
3	-	-	-	-	-	-	-	-	0.009	0.002	0.002	.0005
4	-	-	-	-	-	-	-	-	0.009	0.002	0.002	0.0005
5	-	-	-	-	-	-	-	-	0.009	0.002	0.002	0.0005
6												
7	-	-	-	-	-	-	-	-	0.02	0.004	0.003	0.0006
8												
9	-	-	-	-	-	-	-	-	0.01	0.003	0.003	0.0006
10	-	-	-	-	-	-	-	-	0.009	0.002	0.002	0.0004
11	-	-	-	-	-	-	-	-	0.5	0.07	0.08	0.01
12	0.06	0.3	0.05	0.2	0.007	0.03	0.0007	0.003	0.005	0.02	0.005	0.02
13												
14												

1 Nitrogen dioxide emissions include all oxides of nitrogen expressed as NO_2
"-" indicates the application represented emissions of this pollutant are not expected.

2 To report excess emissions for sources with no pound per hour and/or ton per year emission limits, see condition B110F.

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A107 Facility: Allowable Startup, Shutdown, & Maintenance (SSM)

A. Separate allowable SSM emission limits are not required for this facility since the SSM emissions are predicted to be less than the limits established in Table 106.A. The permittee shall maintain records in accordance with Condition B109.C.

A108 **Facility: Allowable Operations**

A. Allowable Hours of Operation (Facility)

Requirement: Compliance with the emission limiting in Table 106. shall be demonstrated by restricting this facility, including all permitted equipment and related activities such as truck traffic involving movement of product, to operate no more than the hours described in Condition 108.B below. Allowable Hours of Operation 7AM-5PM from November through February, 6AM-6PM March and October, 5AM-7PM April through September.
Monitoring: Daily, the permittee shall monitor the date, startup time, shutdown time, and the total hours of operation of the facility.
Recordkeeping: Daily, the permittee shall record the date, startup time, shutdown time, and the total hours of operation of the facility. The permittee shall maintain records in accordance with Section B109.
Reporting: The permittee shall report in accordance with Section B110.

B. Facility Throughput (Facility)

Requirement: Compliance with the allowable emission limits in table 106.A shall be demonstrated by limiting the facility production rates to 125 cubic yards per hour and 50000 cubic yards per year. 1) The concrete production rates shall not exceed 125 cubic yards per hour and 750 cubic yards per day from January through December. These production rates were specified in the permit application and are the basis for the Department's modeling analysis to determine compliance with the applicable ambient air quality standards.
Monitoring: The permittee shall monitor the hourly and daily total production, and, each calendar month, the monthly rolling 12-month total production.
Recordkeeping: The permittee shall: 1) Each day, record the date, start time, and end time of any production activity. 2) Each hour, during production, record the date, hour, and hourly production total. 3) Daily, record the daily production total by summing the hourly production totals for that day. 4) Each calendar month, calculate and record the total monthly production and the monthly rolling 12-month total production, and 5) Maintain on site all records necessary for the calculation of the required hourly, daily, and monthly rolling 12-month production totals.
Reporting: The permittee shall report in accordance with Section B110. This report shall be generated upon request.

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C. If the facility ceases operations for any reason for longer than 30 days, the owner or operator shall notify the Permit Program Manager within 45 days of ceasing operations, the reason for ceasing operations, and provide a restart date if the cessation is temporary.

A109 Facility: Reporting Schedules

A. The permittee shall report according to the Specific Conditions and General Conditions of this permit.

A110 Facility: Fuel and Fuel Sulfur Requirements

A. Fuel and Fuel Sulfur Requirements (units 12, 13 and 14)

Requirement: All combustion emission units shall combust only natural gas containing no more than 0.75 grains of total sulfur per 100 dry standard cubic feet.

Monitoring: No monitoring is required. Compliance is demonstrated through records.

Recordkeeping:

1) The permittee shall demonstrate compliance with the natural gas or fuel oil limit on total sulfur content by maintaining records of a current, valid purchase contract, tariff sheet or transportation contract for the gaseous or liquid fuel, or fuel gas analysis, specifying the allowable limit or less.
2) If fuel gas analysis is used, the analysis shall not be older than one year.
3) Alternatively, compliance shall be demonstrated by keeping a receipt or invoice from a commercial fuel supplier, with each fuel delivery, which shall include the delivery date, the fuel type delivered, the amount of fuel delivered, and the maximum sulfur content of the fuel.

Reporting: The permittee shall report in accordance with Section B110.

A111 Facility: 20.2.61 NMAC Opacity

A. 20.2.61 NMAC Opacity Limit (Units 12, 13 and 14)

Requirement: Visible emissions from all stationary combustion emission stacks shall not equal or exceed an opacity of 20 percent in accordance with the requirements at 20.2.61.109 NMAC.

Monitoring:

1) Use of natural gas fuel constitutes compliance with 20.2.61 NMAC unless opacity equals or exceeds 20% averaged over a 10-minute period. When any visible emissions are observed during operation other than during startup mode, opacity shall be measured over a 10-minute period, in accordance with the procedures at 40 CFR 60, Appendix A, Reference Method 9 (EPA Method 9) as required by 20.2.61.114 NMAC, or the operator

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will be allowed to shut down the equipment to perform maintenance/repair to eliminate the visible emissions. Following completion of equipment maintenance/repair, the operator shall conduct visible emission observations following startup in accordance with the following procedures: (a) Visible emissions observations shall be conducted over a 10-minute period during operation after completion of startup mode in accordance with the procedures at 40 CFR 60, Appendix A, Reference Method 22 (EPA Method 22). If no visible emissions are observed, no further action is required. (b) If any visible emissions are observed during completion of the EPA Method 22 observation, subsequent opacity observations shall be conducted over a 10-minute period, in accordance with the procedures at EPA Method 9 as required by 20.2.61.114 NMAC. For the purposes of this condition, *Startup mode* is defined as the startup period that is described in the facility's startup plan.
Recordkeeping: 1) If any visible emissions observations were conducted, the permittee shall keep records in accordance with the requirements of Section B109 and as follows: (a) For any visible emissions observations conducted in accordance with EPA Method 22, record the information on the form referenced in EPA Method 22, Section 11.2. (b) For any opacity observations conducted in accordance with the requirements of EPA Method 9, record the information on the form referenced in EPA Method 9, Sections 2.2 and 2.4.
Reporting: The permittee shall report in accordance with Section B110.

A112 Facility: Haul Roads

A. Truck Traffic

Requirement: Compliance with the allowable particulate emissions in Table 106.A shall be demonstrated by limiting the number of paved haul road round trips to 127 round trips per day.
Monitoring: The permittee shall monitor the total number of paved haul road round trips per day.
Recordkeeping: The permittee shall keep daily records of the total number of haul road trips per day.
Reporting: The permittee shall report in accordance with Section B110.

B. Haul Road Control

Requirement: Truck traffic areas and haul roads going in and out of the plant site shall be paved, swept, and maintained to control particulate emissions. Once each operational day the

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permittee shall inspect the haul roads to determine if the roads are paved and swept. This condition demonstrates compliance with the 95% control efficiency used in the permit application and modeling. This control measure shall be used on roads as far as the nearest public road.
Monitoring: The permittee shall monitor daily inspections, the frequency, quantity, and location(s) of maintenance and sweeping, or equivalent control measures.
Recordkeeping: The permittee shall keep daily records of the daily inspections, frequency, quantity, and location(s) of maintenance and sweeping or equivalent control measures.
Reporting: The permittee shall report in accordance with Section B110.

C. Nighttime Truck Traffic

Requirement: Nighttime operation of haul trucks is authorized providing the following requirements are met for the trafficked roads. Haul truck surfaces are paved and maintained to minimize silt buildup.
Monitoring: 1) The permittee shall monitor: (a) the date, time, and water truck odometer/hour meter reading at the commencement of watering activities or date and time of road sweeping; (b) the date, time, and water truck odometer/hour meter reading at the completion of watering activities or date and time of road sweeping; (c) the quantity of water applied; (d) the date and time of commencement and completion of night traffic operations. 2) For each hour of night operation in which the traffic areas were not maintained to minimize silt buildup, the permittee shall monitor the road and off-road surfaces to see if dust is rising higher than the headlights or taillights of a standard haul truck.
Recordkeeping: The permittee shall make a record of each hourly dust monitoring activity to see if additional maintenance is necessary. At a minimum the record shall include the date, the time of the observation, the roads and surfaces observed, the results of the observation, and the name of the person making the observation.
Reporting: Records shall be made available according to reporting requirements of this permit, if the Department requests them.

A113 Facility: Initial Location Requirements

A. Initial Setback Distance – Not required

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B. Co-location

This facility shall not co-locate with another facility without submitting air dispersion modeling and revising the permit.

A114 Facility: Relocation Requirements

A. This facility shall not be relocated.

A115 Governing Requirements During Source Construction, Source Removal, and/or Change in Emissions Control -Not Required

EQUIPMENT SPECIFIC REQUIREMENTS

OIL AND GAS INDUSTRY

A200 Oil and Gas Industry – Not Required

CONSTRUCTION INDUSTRY - AGGREGATE

A300 Construction Industry – Aggregate – Not Required

CONSTRUCTION INDUSTRY – ASPHALT

A400 Construction Industry – Asphalt -Not Required

CONSTRUCTION INDUSTRY - CONCRETE

A500 Construction Industry – Concrete

A. This section has common equipment related to most concrete operations.

A501 Equipment Substitutions

A. Substitution of aggregate handling equipment is authorized provided the replacement equipment is functionally equivalent and has the same or lower process capacity as the piece of equipment it is replacing in the most recent permit. The replacement equipment shall comply with the opacity requirements in this permit.

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B. The Department shall be notified within fifteen (15) days of equipment substitutions using the Equipment Substitution Form provided by the Department and available online.

A502 Process Equipment – Conveyors, Bins, Weigh Batchers and Storage Piles (Units 3, 4, 5, 6 and 11)

A. Wet Dust Suppression System (Units 3, 4, 5, 6 and 11)

Requirement: Compliance with allowable particulate emission limits in Table 106.A shall be demonstrated by: 1) Feeder Hopper Conveyor (Unit 3), Overhead Aggregate Bins (Unit 4), Aggregate Weigh Batcher (Unit 5), Aggregate Weigh Conveyor (Unit 6) shall have a Wet Dust Suppression System installed or additional moisture added at the aggregate/sand storage piles (Unit 11) to minimize fugitive emissions to the atmosphere from emission points and to meet the emission limitations contained in this permit. 2) At any time, if visible emissions at material transfer points are observed, additional water sprays shall be added or if already installed, turned on, or additional moisture will be added to the aggregate/sand storage piles (Unit 11) to minimize the visible emissions. 3) Each Wet Dust Suppression System shall be turned on and properly function at all times the facility is operating or additional moisture shall be added at the aggregate/sand storage piles (Unit 11), unless rain or snow precipitation achieves an equivalent level of dust control. Any problems with the control devices shall be corrected before commencement of operation.
Monitoring: 1) On each day of operation at the commencement of operation of the Wet Dust Suppression System, the permittee shall inspect the Wet Dust Suppression System. At a minimum, the visual inspection shall include checks for malfunctions and deficiencies in dust control effectiveness, such as breaches in the physical barriers controlling dust emissions; spray nozzle clogs; misdirected sprays; insufficient water pressure; and/or any other dust control equipment deficiencies or malfunctions, or 2) On each day of operation when additional moisture is added to the aggregate/sand storage piles, daily visible inspections will be made to determine the additional moisture is adequate to minimize visible emissions.
Recordkeeping: 1) A daily record shall be made of the Wet Dust Suppression System inspection and any maintenance activity that resulted from the inspection. The permittee shall record in accordance with Section B109 of this permit and shall also include a description of any malfunction and any corrective actions taken. The record shall be formatted with a description of what shall be inspected to ensure the inspector understands the inspection responsibilities. If the Wet Dust Suppression System is turned off due to rain or snow precipitation that achieve the equivalent level control as the Water Spray Units, it shall be so noted in the daily record.

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2) Daily visible observation logs will be maintained and at a minimum the record shall include the date, the time of the observation, the emission point observed, the results of the observation, and the name of the person making the observation.

Reporting: The permittee shall report in accordance with Section B110.

B. Fugitive Dust Control Plan (FDCP)

Requirement: The permittee shall develop a Fugitive Dust Control Plan (FDCP) for minimizing emissions from areas such as aggregate feeders, conveyors, bins, bin scales, storage piles, overburden removal, disturbed earth, buildings, truck loading/unloading, or active pits.

Sites of overburden removal and active pit areas shall be watered, dependent on existing wind speeds and soil moisture content, as necessary to minimize dust emissions.

Stockpiles must be kept adequately moist to control dust during storage and handling or covered at all times to minimize emissions.

Monitoring: Once each calendar month, the permittee shall inspect each area to ensure that fugitive dust is being minimized and determine if the FDCP plan needs updating.

Any observations of visible dust emissions from the above areas shall be considered an indication of the need to update the FDCP.

Recordkeeping: Monthly, the permittee shall make a record of each monthly inspection of each area and revise the plan to address past shortcomings as well as future activities. If no changes are needed, then the permittee shall make a record that the plan needs no changes. The permittee shall make a record of any action taken to minimize emissions as a result of the FDCP or monthly inspections. The permittee shall maintain records in accordance with Section B109.

Reporting: The permittee shall report in accordance with Section B110.

A503 Material Handling –Truck Loading from Batch Conveyor and Silos

A. Silos: (Units 9 and 10)

Requirement: Compliance with the allowable particulate emissions in Table 106.A shall be demonstrated by:

1) Ensuring Emissions from each silo (Units Cement Split Silo and Flyash Split Silo) shall at all times be routed to and controlled by the Silo Baghouses (Units 9b and 10b).
2) The Silo baghouse shall be equipped with a differential pressure gauge.
3) The gauge shall be maintained, replaced and calibrated per manufacturer's specifications so that it consistently provides correct and accurate readings.

Monitoring: Once, during each loading event, compliance with Table 106.A limits shall be demonstrated by ensuring the Silo Baghouse (Unit 9b and 10b) differential pressure meets the differential pressure requirement of this condition. If a deviation(s) from this requirement is noted, the permittee shall document actions taken to rectify the problem(s) and whether the repairs were successful.

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Recordkeeping: During each loading of Silo (Unit 9 or 10), the monitored differential pressure shall be recorded for each loading operation. The permittee shall maintain records of the maintenance checks on the silo baghouses , a record of the date and time of each check, the results of the check and if the check indicates whether the silo baghouse is operating as required by this condition and as represented in the application and in accordance with the manufacturer recommendations and the actions taken to repair the silo baghouse. The permittee shall maintain records of operational inspections, maintenance performed, and each gauge calibrations and in accordance with Section B109.
Reporting: The permittee shall report in accordance with Section B110.

B. Truck Loading -Loading of Aggregate, Sand, Cement and Flyash (Unit 7)

Requirement: Compliance with the particulate emission limits in Table 106.A shall be demonstrated by limiting the loading rate of the aggregate, sand, cement, flyash and water to 125 cubic yards per hour. The truck loading of materials shall be equipped with a central dust control system (Unit 7b) that captures fugitive emissions.
Monitoring: The permittee shall monitor the daily loading rates.
Recordkeeping: The permittee shall: 1) Measure and record the daily loading rate, 2) Date of concrete loading, 3) Determine or calculate the daily and hourly loading rate. Calculate the hourly load rate by dividing the daily loading rate by the total hours of operation per day. 4) Maintain the records necessary to support the calculation of the daily load rate.
Reporting: The permittee shall report in accordance with Section B110.

C. No Visible Emissions (Unit 7, 8, 9 and 10)

Requirement: Compliance with the emission limits in Table 106.A shall be demonstrated by each transfer point exhibiting no visible emissions except for ten (10) seconds during a six minute period as determined by EPA Reference Method 22. The Units (7, 8, 9, and 10) shall be controlled by the associated control devices identified in Table 105.A.
Monitoring: Daily during operation of each unit, the permittee shall perform a visible emissions check, if The observer sees visible emissions from a transfer point lasting longer than ten(10) seconds in a six(6) minute period as determined by EPA Reference Method 22 , the permittee shall perform a maintenance check on the control devices/methods and perform any necessary maintenance activities to ensure the controls are maintained per manufacturers specifications and to achieve no visible emissions.

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Recordkeeping: The permittee shall maintain the following information: records of visible emission observations and/or repairs and the date and time, occurring as a result of those observations.
Reporting: N/A

D. Requirements for Baghouses (Units 9b and 10b)

Requirement: Compliance with the emission limits in table 106.A shall be demonstrated by maintaining a differential pressure across each baghouse within the manufacturer recommended differential pressure range for that dust collector. Units 7, 8, 9, and 10 shall be controlled by the associated control devices as identified in table 105.A. Each baghouse shall be equipped with a differential pressure gauge. Gauges shall be maintained in good operating condition per manufacturer maintenance recommendations. Gauges shall be replaced and calibrated as needed to ensure accurate performance as needed to ensure accurate performance and per manufacturer maintenance recommendations. Operations shall cease immediately if the pressure drop is not within the manufacturer specified normal operating range. Operations shall not commence until the cause of the deviation is determined and rectified.
Monitoring: The differential pressure (inches of water) across each dust collector shall be continuously indicated using a differential pressure gauge and shall be monitored once each day.
Recordkeeping: The permittee shall maintain the following information: 1) The manufacturer specified normal differential pressure range for each bag house. 2) At least daily, a reading of the differential pressure during normal operations for each bag house and the name of the person making the record. 3) Any deviation in differential pressure from the manufacturers recommended range, the cause of deviation, the time operations ceased for repairs, the time operations commenced after repairs and the corrective actions taken. 4) Maintain a copy of the manufacturer specification sheet.
Reporting: The permittee shall report in accordance with Section B110.

PART B GENERAL CONDITIONS (Attached)

PART C MISCELLANEOUS: Supporting On-Line Documents; Definitions; Acronyms (Attached)

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AIR QUALITY BUREAU
NEW SOURCE REVIEW PERMIT
Issued under 20.2.72 NMAC

GENERAL CONDITIONS AND MISCELLANEOUS

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PART B GENERAL CONDITIONS

B100 Introduction

A. The Department has reviewed the permit application for the proposed construction/modification/revision and has determined that the provisions of the Act and ambient air quality standards will be met. Conditions have been imposed in this permit to assure continued compliance. 20.2.72.210.D NMAC, states that any term or condition imposed by the Department on a permit is enforceable to the same extent as a regulation of the Environmental Improvement Board.

B101 Legal

A. The contents of a permit application specifically identified by the Department shall become the terms and conditions of the permit or permit revision. Unless modified by conditions of this permit, the permittee shall construct or modify and operate the Facility in accordance with all representations of the application and supplemental submittals that the Department relied upon to determine compliance with applicable regulations and ambient air quality standards. If the Department relied on air quality modeling to issue this permit, any change in the parameters used for this modeling shall be submitted to the Department for review. Upon the Department's request, the permittee shall submit additional modeling for review by the Department. Results of that review may require a permit modification. (20.2.72.210.A NMAC)

B. Any future physical changes, changes in the method of operation or changes in restricted area may constitute a modification as defined by 20.2.72 NMAC, Construction Permits. Unless the source or activity is exempt under 20.2.72.202 NMAC, no modification shall begin prior to issuance of a permit. (20.2.72 NMAC Sections 200.A.2 and E, and 210.B.4)

C. Changes in plans, specifications, and other representations stated in the application documents shall not be made if they cause a change in the method of control of emissions or in the character of emissions, will increase the discharge of emissions or affect modeling results. Any such proposed changes shall be submitted as a revision or modification. (20.2.72 NMAC Sections 200.A.2 and E, and 210.B.4)

D. The permittee shall establish and maintain the property's Restricted Area as identified in plot plan submitted with the application. (20.2.72 NMAC Sections 200.A.2 and E, and 210.B.4)

E. Applications for permit revisions and modifications shall be submitted to:

Program Manager, Permits Section
New Mexico Environment Department

Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, NM 87505

F. The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollutant control practices for minimizing emissions. (20.2.7.109 NMAC). The establishment of allowable malfunction emission limits does not supersede this requirement.

B102 Authority

A. This permit is issued pursuant to the Air Quality Control Act (Act) and regulations adopted pursuant to the Act including Title 20, Chapter 2, Part 72 of the New Mexico Administrative Code (NMAC), (20.2.72 NMAC), Construction Permits and is enforceable pursuant to the Act and the air quality control regulations applicable to this source.

B. The Department is the Administrator for 40 CFR Parts 60, 61, and 63 pursuant to the delegation and exceptions of Section 10 of 20.2.77 NMAC (NSPS), 20.2.78 NMAC (NESHAP), and 20.2.82 NMAC (MACT).

B103 Annual Fee

A. The Department will assess an annual fee for this Facility. The regulation 20.2.75 NMAC set the fee amount at $1,500 through 2004 and requires it to be adjusted annually for the Consumer Price Index on January 1. The current fee amount is available by contacting the Department or can be found on the Department's website. The AQB will invoice the permittee for the annual fee amount at the beginning of each calendar year. This fee does not apply to sources which are assessed an annual fee in accordance with 20.2.71 NMAC. For sources that satisfy the definition of "small business" in 20.2.75.7.F NMAC, this annual fee will be divided by two. (20.2.75.11 NMAC)

B. All fees shall be remitted in the form of a corporate check, certified check, or money order made payable to the "NM Environment Department, AQB" mailed to the address shown on the invoice and shall be accompanied by the remittance slip attached to the invoice.

B104 Appeal Procedures

A. 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: (20.2.72.207.F NMAC)

For Mailing:
Administrator, New Mexico Environmental Improvement Board
P.O. Box 5469
Santa Fe, NM 87502-5469

For Hand Delivery:
Administrator, New Mexico Environmental Improvement Board
1190 St. Francis Drive, Harold Runnels Bldg.
Santa Fe, New Mexico 87505

B105 Submittal of Reports and Certifications

A. Stack Test Protocols and Stack Test Reports shall be submitted electronically to Stacktest.AQB@state.nm.us or as directed by the Department.

B. Excess Emission Reports shall be submitted as directed by the Department. (20.2.7.110 NMAC)

C. Routine reports shall be submitted to the mailing address below, or as directed by the Department:

Manager, Compliance and Enforcement Section
New Mexico Environment Department
Air Quality Bureau
525 Camino de los Marquez, Suite 1
Santa Fe, NM 87505

B106 NSPS and/or MACT Startup, Shutdown, and Malfunction Operations

A. If a facility is subject to a NSPS standard in 40 CFR 60, each owner or operator that installs and operates a continuous monitoring device required by a NSPS regulation shall comply with the excess emissions reporting requirements in accordance with 40 CFR 60.7(c), unless specifically exempted in the applicable subpart.

B. If a facility is subject to a NSPS standard in 40 CFR 60, then in accordance with 40 CFR 60.8(c), emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction shall not be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.

C. If a facility is subject to a MACT standard in 40 CFR 63, then the facility is subject to the requirement for a Startup, Shutdown and Malfunction Plan (SSM) under 40 CFR 63.6(e)(3), unless specifically exempted in the applicable subpart.

B107 Startup, Shutdown, and Maintenance Operations

A. The establishment of permitted startup, shutdown, and maintenance (SSM) emission limits does not supersede the requirements of 20.2.7.14.A NMAC. Except for operations or equipment subject to Condition B106, the permittee shall establish and implement a plan to minimize emissions during routine or predictable start up, shut down, and scheduled maintenance (SSM work practice plan) and shall operate in accordance with the procedures set forth in the plan. (SSM work practice plan) (20.2.7.14.A NMAC)

B108 General Monitoring Requirements

A. These requirements do not supersede or relax requirements of federal regulations.

B. The following monitoring requirements shall be used to determine compliance with applicable requirements and emission limits. Any sampling, whether by portable analyzer or EPA reference method, that measures an emission rate over the applicable averaging period greater than an emission limit in this permit constitutes noncompliance with this permit. The Department may require, at its discretion, additional tests pursuant to EPA Reference Methods at any time, including when sampling by portable analyzer measures an emission rate greater than an emission limit in this permit; but such requirement shall not be construed as a determination that the sampling by portable analyzer does not establish noncompliance with this permit and shall not stay enforcement of such noncompliance based on the sampling by portable analyzer.

C. If the emission unit is shutdown at the time when periodic monitoring is due to be completed, the permittee is not required to restart the unit for the sole purpose of conducting the monitoring. Using electronic or written mail, the permittee shall notify the Department's Compliance and Enforcement Section of a delay in emission tests prior to the deadline for completing the tests. Upon recommencing operation, the permittee shall submit pre-test notification(s) to the Department's Compliance and Enforcement Section and shall complete the monitoring.

D. The requirement for monitoring during any monitoring period is based on the percentage of time that the unit has operated. However, to invoke the monitoring period exemption at B108.D(2), hours of operation shall be monitored and recorded.

(1) If the emission unit has operated for more than 25% of a monitoring period, then the permittee shall conduct monitoring during that period.

(2) If the emission unit has operated for 25% or less of a monitoring period then the monitoring is not required. After two successive periods without monitoring, the permittee shall conduct monitoring during the next period regardless of the time operated during that period, except that for any monitoring period in which a unit has operated for less than 10% of the monitoring period, the period will not be considered as one of the two successive periods.

(3) If invoking the monitoring **period** exemption in B108.D(2), the actual operating time of a unit shall not exceed the monitoring period required by this permit before the required monitoring is performed. For example, if the monitoring period is annual, the operating hours of the unit shall not exceed 8760 hours before monitoring is conducted. Regardless of the time that a unit actually operates, a minimum of one of each type of monitoring activity shall be conducted during any five-year period.

E. For all periodic monitoring events, except when a federal or state regulation is more stringent, three test runs shall be conducted at 90% or greater of the unit's capacity as stated in this permit, or in the permit application if not in the permit, and at additional loads when requested by the Department. If the 90% capacity cannot be achieved, the monitoring will be conducted at the maximum achievable load under prevailing operating conditions except when a federal or state regulation requires more restrictive test conditions. The load and the parameters used to calculate it shall be recorded to document operating conditions and shall be included with the monitoring report.

F. When requested by the Department, the permittee shall provide schedules of testing and monitoring activities. Compliance tests from previous NSR and Title V permits may be re-imposed if it is deemed necessary by the Department to determine whether the source is in compliance with applicable regulations or permit conditions.

G. If monitoring is new or is in addition to monitoring imposed by an existing applicable requirement, it shall become effective 120 days after the date of permit issuance. For emission units that have not commenced operation, the associated new or additional monitoring shall not apply until 120 days after the units commence operation. All pre-existing monitoring requirements incorporated in this permit shall continue to apply from the date of permit issuance.

H. Unless otherwise indicated by Specific Conditions or regulatory requirements, all instrumentation used for monitoring in accordance with applicable requirements including emission limits, to measure parameters including but not limited to flow, temperature, pressure and chemical composition, or used to continuously monitor

emission rates and/or other process operating parameters, shall be subject to the following requirements:

(1) The owner or operator shall install, calibrate, operate and maintain monitoring instrumentation (monitor) according to the manufacturer's procedures and specifications and the following requirements.

(a) The monitor shall be located in a position that provides a representative measurement of the parameter that is being monitored.

(b) At a minimum, the monitor shall complete one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

(c) At a minimum, the monitor shall be spanned to measure the normal range +/- 5% of the parameter that is being monitored.

(d) At least semi-annually, perform a visual inspection of all components of the monitor for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion.

(e) Recalibrate the monitor in accordance with the manufacturer's procedures and specifications at the frequency specified by the manufacturer, or every two years, whichever is less.

(2) Except for malfunctions, associated repairs, and required quality assurance or control activities (including calibration checks and required zero and span adjustments), the permittee shall operate and maintain all monitoring equipment at all times that the emissions unit or the associated process is operating.

(3) The monitor shall measure data for a minimum of 90 percent of the time that the emissions unit or the associated process is in operation, based on a calendar monthly average.

(4) The owner or operator shall maintain records in accordance with Section B109 to demonstrate compliance with the requirements in B108H (1)-(3) above, as applicable.

B109 General Recordkeeping Requirements

A. The permittee shall maintain records to assure and verify compliance with the terms and conditions of this permit and any other applicable requirements that become effective after permit issuance. The minimum information to be included in these records is as follows:

(1) Records required for testing and sampling:

(a) equipment identification (include make, model and serial number for all tested equipment and emission controls)

(b) date(s) and time(s) of sampling or measurements

(c) date(s) analyses were performed

(d) the qualified entity that performed the analyses

(e) analytical or test methods used

(f) results of analyses or tests

(g) operating conditions existing at the time of sampling or measurement

(2) Records required for equipment inspections and/or maintenance required by this permit:

(a) equipment identification number (including make, model and serial number)

(b) date(s) and time(s) of inspection, maintenance, and/or repair

(c) date(s) any subsequent analyses were performed (if applicable)

(d) name of the person or qualified entity conducting the inspection, maintenance, and/or repair

(e) copy of the equipment manufacturer's or the owner or operator's maintenance or repair recommendations (if required to demonstrate compliance with a permit condition)

(f) description of maintenance or repair activities conducted

(g) all results of any required parameter readings

(h) a description of the physical condition of the equipment as found during any required inspection

(i) results of required equipment inspections including a description of any condition which required adjustment to bring the equipment back into compliance and a description of the required adjustments

B. Except as provided in the Specific Conditions, records shall be maintained on-site or at the permittee's local business office for a minimum of two (2) years from the time of recording and shall be made available to Department personnel upon request. Sources subject to 20.2.70 NMAC "Operating Permits" shall maintain records on-site for a minimum of five (5) years from the time of recording.

C. Unless otherwise indicated by Specific Conditions, the permittee shall keep the following records for malfunction emissions and routine or predictable emissions during startup, shutdown, and scheduled maintenance (SSM):

(1) The owner or operator of a source subject to a permit shall establish and implement a plan to minimize emissions during routine or predictable startup, shutdown, and scheduled maintenance through work practice standards and good air pollution control practices. This requirement shall not apply to any affected facility defined in and subject to an emissions standard and an equivalent plan under 40 CFR Part 60 (NSPS), 40 CFR Part 63 (MACT), or an equivalent plan under 20.2.72 NMAC - Construction Permits, 20.2.70 NMAC - Operating Permits, 20.2.74 NMAC -

Permits - Prevention of Significant Deterioration (PSD), or 20.2.79 NMAC - Permits - Nonattainment Areas. The permittee shall keep records of all sources subject to the plan to minimize emissions during routine or predictable SSM and shall record if the source is subject to an alternative plan and therefore, not subject to the plan requirements under 20.2.7.14.A NMAC.

(2) If the facility has allowable SSM emission limits in this permit, the permittee shall record all SSM events, including the date, the start time, the end time, a description of the event, and a description of the cause of the event. This record also shall include a copy of the manufacturer's, or equivalent, documentation showing that any maintenance qualified as scheduled. Scheduled maintenance is an activity that occurs at an established frequency pursuant to a written protocol published by the manufacturer or other reliable source. The authorization of allowable SSM emissions does not supersede any applicable federal or state standard. The most stringent requirement applies.

(3) If the facility has allowable malfunction emission limits in this permit, the permittee shall record all malfunction events to be applied against these limits. The permittee shall also include the date, the start time, the end time, and a description of the event. **Malfunction means** any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction. (20.2.7.7.E NMAC) The authorization of allowable malfunction emissions does not supersede any applicable federal or state standard. The most stringent requirement applies. This authorization only allows the permittee to avoid submitting reports under 20.2.7 NMAC for total annual emissions that are below the authorized malfunction emission limit.

(4) The owner or operator of a source shall meet the operational plan defining the measures to be taken to mitigate source emissions during malfunction, startup or shutdown. (20.2.72.203.A(5) NMAC)

B110 General Reporting Requirements
(20.2.72 NMAC Sections 210 and 212)

A. Records and reports shall be maintained on-site or at the permittee's local business office unless specifically required to be submitted to the Department or EPA by another condition of this permit or by a state or federal regulation. Records for unmanned sites may be kept at the nearest business office.

B. The permittee shall notify the Department's Compliance Reporting Section using the current Submittal Form posted to NMED's Air Quality web site under Compliance and Enforcement/Submittal Forms in writing of, or provide the Department with (20.2.72.212.A and B):

(1) the anticipated date of initial startup of each new or modified source not less than thirty (30) days prior to the date. Notification may occur prior to issuance of the permit, but actual startup shall not occur earlier than the permit issuance date;

(2) after receiving authority to construct, the equipment serial number as provided by the manufacturer or permanently affixed if shop-built and the actual date of initial startup of each new or modified source within fifteen (15) days after the startup date; and

(3) the date when each new or modified emission source reaches the maximum production rate at which it will operate within fifteen (15) days after that date.

C. The permittee shall notify the Department's Permitting Program Manager, in writing of, or provide the Department with (20.2.72.212.C and D):

(1) any change of operators or any equipment substitutions within fifteen (15) days of such change;

(2) any necessary update or correction no more than sixty (60) days after the operator knows or should have known of the condition necessitating the update or correction of the permit.

D. Results of emission tests and monitoring for each pollutant (except opacity) shall be reported in pounds per hour (unless otherwise specified) and tons per year. Opacity shall be reported in percent. The number of significant figures corresponding to the full accuracy inherent in the testing instrument or Method test used to obtain the data shall be used to calculate and report test results in accordance with 20.2.1.116.B and C NMAC. Upon request by the Department, CEMS and other tabular data shall be submitted in editable, MS Excel format.

E. The permittee shall submit reports of excess emissions in accordance with 20.2.7.110.A NMAC.

F. Allowable Emission Limits for Excess Emissions Reporting for Flares and Other Regulated Sources with No Pound per Hour (pph) and/or Ton per Year (tpy) Emission Limits.

(1) When a flare has no allowable pph and/or tpy emission limits in Sections A106 and/or A107, the authorized allowable emissions include only the combustion of pilot and/or purge gas. Compliance is demonstrated by limiting the gas stream to the flare to only pilot and/or purge gas.

(2) For excess emissions reporting as required by 20.2.7 NMAC, the allowable emission limits are 1.0 pph and 1.0 tpy for each regulated air pollutant (except for H2S) emitted by that source as follows:

(a) For flares, when there are no allowable emission limits in Sections A106 and/or A107.

(b) For regulated sources with emission limits in Sections A106 or A107 represented by the less than sign ("<").

(c) For regulated sources that normally would not emit any regulated air pollutants, including but not limited to vents, pressure relief devices, connectors, etc.

(3) For excess emissions reporting as required by 20.2.7 NMAC for H2S, the allowable limits are 0.1 pph and 0.44 tpy for each applicable scenario addressed in paragraph (2) above.

B111 General Testing Requirements

Unless otherwise indicated by Specific Conditions or regulatory requirements, the permittee shall conduct testing in accordance with the requirements in Sections B111A, B, C, D and E, as applicable.

A. Initial Compliance Tests

The permittee shall conduct initial compliance tests in accordance with the following requirements:

(1) Initial compliance test requirements from previous permits (if any) are still in effect, unless the tests have been satisfactorily completed. Compliance tests may be re-imposed if it is deemed necessary by the Department to determine whether the source is in compliance with applicable regulations or permit conditions. (20.2.72 NMAC Sections 210.C and 213)

(2) Initial compliance tests shall be conducted within sixty (60) days after the unit(s) achieve the maximum normal production rate. If the maximum normal production rate does not occur within one hundred twenty (120) days of source startup, then the tests must be conducted no later than one hundred eighty (180) days after initial startup of the source.

(3) The default time period for each test run shall be **at least** 60 minutes and each performance test shall consist of three separate runs using the applicable test method. For the purpose of determining compliance with an applicable emission limit, the arithmetic mean of results of the three runs shall apply. In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond the owner or operator's control, compliance may, upon the Department approval, be determined using the arithmetic mean of the results of the two other runs.

(4) Testing of emissions shall be conducted with the emissions unit operating at 90 to 100 percent of the maximum operating rate allowed by the permit. If it is not possible to test at that rate, the source may test at a lower operating rate

(5) Testing performed at less than 90 percent of permitted capacity will limit emission unit operation to 110 percent of the tested capacity until a new test is conducted.

(6) If conditions change such that unit operation above 110 percent of tested capacity is possible, the source must submit a protocol to the Department within 30 days of such change to conduct a new emissions test.

B. EPA Reference Method Tests

The test methods in Section B111.B(1) shall be used for all initial compliance tests and all Relative Accuracy Test Audits (RATAs), and shall be used if a permittee chooses to use EPA test methods for periodic monitoring. Test methods that are not listed in Section B111.B(1) may be used in accordance with the requirements at Section B111.B(2).

(1) All compliance tests required by this permit shall be conducted in accordance with the requirements of CFR Title 40, Part 60, Subpart A, General Provisions, and the following EPA Reference Methods as specified by CFR Title 40, Part 60, Appendix A:

(a) Methods 1 through 4 for stack gas flowrate

(b) Method 5 for particulate matter (PM)

(c) Method 6C SO_2

(d) Method 7E for NO_X (test results shall be expressed as nitrogen dioxide (NO_2) using a molecular weight of 46 lb/lb-mol in all calculations (each ppm of NO/NO_2 is equivalent to 1.194 x 10-7 lb/SCF)

(e) Method 9 for visual determination of opacity

(f) Method 10 for CO

(g) Method 19 for particulate, sulfur dioxide and nitrogen oxides emission rates. In addition, Method 19 may be used in lieu of Methods 1-4 for stack gas flowrate. The permittee shall provide a contemporaneous fuel gas analysis (preferably on the day of the test, but no earlier than three months prior to the test date) and a recent fuel flow meter calibration certificate (within the most recent quarter) with the final test report.

(h) Method 7E or 20 for Turbines per §60.335 or §60.4400

(i) Method 22 for visual determination of fugitive emissions from material sources and smoke emissions from flares

(j) Method 25A for VOC reduction efficiency

(k) Method 29 for Metals

(l) Method 30B for Mercury from Coal-Fired Combustion Sources Using Carbon Sorbent Traps

(m) Method 201A for filterable PM_{10} and $PM_{2.5}$

(n) Method 202 for condensable PM

(o) Method 320 for organic Hazardous Air Pollutants (HAPs)

(2) Permittees may propose test method(s) that are not listed in Section B111.B(1). These methods may be used if prior approval is received from the Department.

C. Periodic Monitoring and Portable Analyzer Requirements for the Determination of Nitrogen Oxides, Carbon Monoxide, and Oxygen Concentrations in Emissions from Reciprocating Engines, Combustion Turbines, Boilers, and Process Heaters

Periodic emissions tests (periodic monitoring) shall be conducted in accordance with the following requirements:

(1) Periodic emissions tests may be conducted in accordance with EPA Reference Methods or by utilizing a portable analyzer. Periodic monitoring utilizing a portable analyzer shall be conducted in accordance with the requirements of the current version of ASTM D 6522. However, if a facility has met a previously approved Department criterion for portable analyzers, the analyzer may be operated in accordance with that criterion until it is replaced.

(2) The default time period for each test run shall be **at least** 20 minutes.

Each performance test shall consist of three separate runs. The arithmetic mean of results of the three runs shall be used to determine compliance with the applicable emission limit.

(3) Testing of emissions shall be conducted in accordance with the requirements at Section B108.E.

(4) During emissions tests, pollutant and diluent concentration shall be monitored and recorded. Fuel flow rate shall be monitored and recorded if stack gas flow rate is determined utilizing Reference Method 19. This information shall be included with the test report furnished to the Department.

(5) Stack gas flow rate shall be calculated in accordance with Reference Method 19 utilizing fuel flow rate (scf) determined by a dedicated fuel flow meter and fuel heating value (Btu/scf). The permittee shall provide a contemporaneous fuel gas analysis (preferably on the day of the test, but no earlier than three months prior to the test date) and a recent fuel flow meter calibration certificate (within the most recent quarter) with the final test report. Alternatively, stack gas flow rate may be determined by using EPA Reference Methods 1-4.

(6) The permittee shall submit a notification and protocol for periodic emissions tests upon the request of the Department.

D. Initial Compliance Test and RATA Procedures

Permittees required to conduct initial compliance tests and/or RATAs shall comply with the following requirements:

(1) The permittee shall submit a notification and test protocol to the Department's Program Manager, Compliance and Enforcement Section, at least thirty (30) days before the test date and allow a representative of the Department to be present at the test. Proposals to use test method(s) that are not listed in Section B111.B(1) (if applicable) shall be included in this notification.

(2) Contents of test notifications, protocols and test reports shall conform to the format specified by the Department's Universal Test Notification, Protocol and Report Form and Instructions. Current forms and instructions are posted to NMED's Air Quality web site under Compliance and Enforcement Testing.

(3) The permittee shall provide (a) sampling ports adequate for the test methods applicable to the facility, (b) safe sampling platforms, (c) safe access to sampling platforms and (d) utilities for sampling and testing equipment.

(4) Where necessary to prevent cyclonic flow in the stack, flow straighteners shall be installed

E. General Compliance Test Procedures

The following requirements shall apply to all initial compliance and periodic emissions tests and all RATAs:

(1) Equipment shall be tested in the "as found" condition. Equipment may not be adjusted or tuned prior to any test for the purpose of lowering emissions, and then returned to previous settings or operating conditions after the test is complete.

(2) The stack shall be of sufficient height and diameter and the sample ports shall be located so that a representative test of the emissions can be performed in accordance with the requirements of EPA Reference Method 1 or the current version of ASTM D 6522, as applicable.

(3) Test reports shall be submitted to the Department no later than 30 days after completion of the test.

B112 Compliance

A. The Department shall be given the right to enter the facility at all reasonable times to verify the terms and conditions of this permit. Required records shall be organized by date and subject matter and shall at all times be readily available for inspection. The permittee, upon verbal or written request from an authorized representative of the Department who appears at the facility, shall immediately produce for inspection or copying any records required to be maintained at the facility. Upon written request at other times, the permittee shall deliver to the Department paper or electronic copies of any and all required records maintained on site or at an off-site location. Requested records shall be copied and delivered at the permittee's expense within three business days from receipt of request unless the Department allows additional time. Required records may include records required by permit and other information necessary to

demonstrate compliance with terms and conditions of this permit. (NMSA 1978, Section 74-2-13)

B. A copy of the most recent permit(s) issued by the Department shall be kept at the permitted facility or (for unmanned sites) at the nearest company office and shall be made available to Department personnel for inspection upon request. (20.2.72.210.B.4 NMAC)

C. Emissions limits associated with the energy input of a Unit, i.e. lb/MMBtu, shall apply at all times unless stated otherwise in a Specific Condition of this permit. The averaging time for each emissions limit, including those based on energy input of a Unit (i.e. lb/MMBtu) is one (1) hour unless stated otherwise in a Specific Condition of this permit or in the applicable requirement that establishes the limit.

B113 Permit Cancellation and Revocation

A. The Department may revoke this permit if the applicant or permittee has knowingly and willfully misrepresented a material fact in the application for the permit. Revocation will be made in writing, and an administrative appeal may be taken to the Secretary of the Department within thirty (30) days. Appeals will be handled in accordance with the Department's Rules Governing Appeals From Compliance Orders.

B. The Department shall automatically cancel any permit for any source which ceases operation for five (5) years or more, or permanently. Reactivation of any source after the five (5) year period shall require a new permit. (20.2.72 NMAC)

C. The Department may cancel a permit if the construction or modification is not commenced within two (2) years from the date of issuance or if, during the construction or modification, work is suspended for a total of one (1) year. (20.2.72 NMAC)

B114 Notification to Subsequent Owners

A. The permit and conditions apply in the event of any change in control or ownership of the Facility. No permit modification is required in such case. However, in the event of any such change in control or ownership, the permittee shall notify the succeeding owner of the permit and conditions and shall notify the Department’s Program Manager, Permits Section of the change in ownership within fifteen (15) days of that change. (20.2.72.212.C NMAC)

B. Any new owner or operator shall notify the Department’s Program Manager, Permits Section, within thirty (30) days of assuming ownership, of the new owner’s or operator’s name and address. (20.2.73.200.E.3 NMAC)

B115 Asbestos Demolition

A. Before any asbestos demolition or renovation work, the permittee shall determine whether 40 CFR 61 Subpart M, National Emissions Standards for Asbestos applies. If required, the permittee shall notify the Department's Program Manager, Compliance and Enforcement Section using forms furnished by the Department.

B116 Short Term Engine Replacement

A. The following Alternative Operating Scenario (AOS) addresses engine breakdown or periodic maintenance and repair, which requires the use of a short term replacement engine. The following requirements do not apply to engines that are exempt per 20.2.72.202.B(3) NMAC. Changes to exempt engines must be reported in accordance with 20.2.72.202.B NMAC. A short term replacement engine may be substituted for any engine allowed by this permit for no more than 120 days in any rolling twelve month period per permitted engine. The compliance demonstrations required as part of this AOS are in addition to any other compliance demonstrations required by this permit.

(1) The permittee may temporarily replace an existing engine that is subject to the emission limits set forth in this permit with another engine regardless of manufacturer, model, and horsepower without modifying this permit. The permittee shall submit written notification to the Department within 15 days of the date of engine substitution according to condition B110.C(1).

(a) The potential emission rates of the replacement engine shall be determined using the replacement engine's manufacturer specifications and shall comply with the existing engine's permitted emission limits.

(b) The direction of the exhaust stack for the replacement engine shall be either vertical or the same direction as for the existing engine. The replacement engine's stack height and flow parameters shall be at least as effective in the dispersion of air pollutants as the modeled stack height and flow parameters for the existing permitted engine. The following equation may be used to show that the replacement engine disperses pollutants as well as the existing engine. The value calculated for the replacement engine on the right side of the equation shall be equal to or greater than the value for the existing engine on the left side of the equation. The permitting page of the Air Quality Bureau website contains a spreadsheet that performs this calculation.

EXISTING ENGINE REPLACMENT ENGINE

$$\frac{[(g) \times (h1)] + [(v1)^2/2] + [(c) \times (T1)]}{q1} <= \frac{[(g) \times (h2)] + [(v2)^2/2] + [(c) \times (T2)]}{q2}$$

Where
g = gravitational constant = 32.2 ft/sec^2
h1 = existing stack height, feet
v1 = exhaust velocity, existing engine, feet per second
c = specific heat of exhaust, 0.28 BTU/lb-degree F
T1 = absolute temperature of exhaust, existing engine = degree F + 460
q1 = permitted allowable emission rate, existing engine, lbs/hour
h2 = replacement stack height, feet
v2 = exhaust velocity, replacement engine, feet per second
T2 = absolute temperature of exhaust, replacement engine = degree F + 460
q2 = manufacturer's potential emission rate, replacement engine, lbs/hour

The permittee shall keep records showing that the replacement engine is at least as effective in the dispersion of air pollutants as the existing engine.

(c) Test measurement of NOx and CO emissions from the temporary replacement engine shall be performed in accordance with Section B111 with the exception of Condition B111A(2) and B111B for EPA Reference Methods Tests or Section B111C for portable analyzer test measurements. Compliance test(s) shall be conducted within fifteen (15) days after the unit begins operation, and records of the results shall be kept according to section B109.B. This test shall be performed even if the engine is removed prior to 15 days on site.

i. These compliance tests are not required for an engine certified under 40CFR60, subparts IIII, or JJJJ, or 40CFR63, subpart ZZZZ if the permittee demonstrates that one of these requirements causes such engine to comply with all emission limits of this permit. The permittee shall submit this demonstration to the Department within 48 hours of placing the new unit into operation. This submittal shall include documentation that the engine is certified, that the engine is within its useful life, as defined and specified in the applicable requirement, and shall include calculations showing that the applicable emissions standards result in compliance with the permit limits.

ii. These compliance tests are not required if a test was conducted by portable analyzer or by EPA Method test (including any required by 40CFR60, subparts IIII and JJJJ and 40CFR63, subpart ZZZZ) within the last 12 months. These previous tests are valid only if conducted at the same or lower elevation as the existing engine location prior to commencing operation as a temporary replacement. A copy of the test results shall be kept according to section B109.B.

(d) Compliance tests for NOx and CO shall be conducted if requested by the Department in writing to determine whether the replacement engine is in compliance with applicable regulations or permit conditions.

(e) Upon determining that emissions data developed according to B116.A.1(c) fail to indicate compliance with either the NOx or CO emission limits, the permittee shall notify the Department within 48 hours. Also within that time, the permittee shall implement one of the following corrective actions:

i. The engine shall be adjusted to reduce NOx and CO emissions and tested per B116.A.1(c) to demonstrate compliance with permit limits.

ii. The engine shall discontinue operation or be replaced with a different unit.

(2) Short term replacement engines, whether of the same manufacturer, model, and horsepower, or of a different manufacturer, model, or horsepower, are subject to all federal and state applicable requirements, regardless of whether they are set forth in this permit (including monitoring and recordkeeping), and shall be subject to any shield afforded by this permit.

(3) The permittee shall maintain a contemporaneous record documenting the unit number, manufacturer, model number, horsepower, emission factors, emission test results, and serial number of any existing engine that is replaced, and the replacement engine. Additionally, the record shall document the replacement duration in days, and the beginning and end dates of the short term engine replacement.

(4) The permittee shall maintain records of a regulatory applicability determination for each replacement engine (including 40CFR60, subparts IIII and JJJJ and 40CFR63, subpart ZZZZ) and shall comply with all associated regulatory requirements.

B. Additional requirements for replacement of engines at sources that are major as defined in regulation 20.2.74 NMAC, Permits – Prevention of Significant Deterioration, section 7.AG. For sources that are major under PSD, the total cumulative operating hours of the replacement engine shall be limited using the following procedure:

(1) Daily, the actual emissions from the replacement engine(s) of each pollutant regulated by this permit for the existing engine shall be calculated and recorded.

(2) The sum of the total actual emissions since the commencement of operation of the replacement engine(s) shall not equal or exceed the significant emission rates in Table 2 of 20.2.74 NMAC, section 502 for the time that the replacement engine is located at the facility.

C. All records required by this section shall be kept according to section B109.

PART C MISCELLANEOUS

C100 Supporting On-Line Documents

A. Copies of the following documents can be downloaded from NMED's web site under Compliance and Enforcement or requested from the Bureau.

(1) Excess Emission Form (for reporting deviations and emergencies)

(2) Universal Stack Test Notification, Protocol and Report Form and Instructions

C101 Definitions

A. **"Daylight"** is defined as the time period between sunrise and sunset, as defined by the Astronomical Applications Department of the U.S. Naval Observatory. (Data for one day or a table of sunrise/sunset for an entire year can be obtained at http://aa.usno.navy.mil/. Alternatively, these times can be obtained from a Farmer's Almanac or from http://www.almanac.com/rise/).

B. **"Decommission"** and **"Decommissioning"** applies to units left on site (not removed) and is defined as the complete disconnecting of equipment, emission sources or activities from the process by disconnecting all connections necessary for operation (i.e. piping, electrical, controls, ductwork, etc.).

C. **"Exempt Sources"** and **"Exempt Activities"** is defined as those sources or activities that are exempted in accordance with 20.2.72.202 NMAC. Note; exemptions are only valid for most 20.2.72 NMAC permitting actions.

D. **"Fugitive Emission"** means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

E. **"Insignificant Activities"** means those activities which have been listed by the department and approved by the administrator as insignificant on the basis of size, emissions or production rate. Note; insignificant activities are only valid for 20.2.70 NMAC permitting actions.

F. **"Malfunction"** for the requirements under 20.2.7 NMAC, means any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction. (20.2.7.7.E NMAC)

G. **"Natural Gas"** is defined as a naturally occurring fluid mixture of hydrocarbons that contains 20.0 grains or less of total sulfur per 100 standard cubic feet (SCF) and is either composed of at least 70% methane by volume or has a gross calorific value of between 950 and 1100 Btu per standard cubic foot. (40 CFR 60.631)

H. **“Natural Gas Liquids”** means the hydrocarbons, such as ethane, propane, butane, and pentane, that are extracted from field gas. (40 CFR 60.631)

I. **“National Ambient air Quality Standards”** means, unless otherwise modified, the primary (health-related) and secondary (welfare-based) federal ambient air quality standards promulgated by the US EPA pursuant to Section 109 of the Federal Act.

J. **“Night”** is the time period between sunset and sunrise, as defined by the Astronomical Applications Department of the U.S. Naval Observatory. (Data for one day or a table of sunrise/sunset for an entire year can be obtained at http://aa.usno.navy.mil/. Alternatively, these times can be obtained from a Farmer’s Almanac or from http://www.almanac.com/rise/).

K. **“Night Operation** or **Operation at Night”** is operating a source of emissions at night.

L. **“NO2”** or "Nitrogen dioxide" means the chemical compound containing one atom of nitrogen and two atoms of oxygen, for the purposes of ambient determinations. The term **"nitrogen dioxide,"** for the purposes of stack emissions monitoring, shall include nitrogen dioxide (the chemical compound containing one atom of nitrogen and two atoms of oxygen), nitric oxide (the chemical compound containing one atom of nitrogen and one atom of oxygen), and other oxides of nitrogen which may test as nitrogen dioxide and is sometimes referred to as NOx or NO_2. (20.2.2 NMAC)

M. “**NOx**” see NO_2

N. “**Paved Road**” is a road with a permanent solid surface that can be swept essentially free of dust or other material to reduce air re-entrainment of particulate matter. To the extent these surfaces remain solid and contiguous they qualify as paved roads: concrete, asphalt, chip seal, recycled asphalt and other surfaces approved by the Department in writing.

O. **“Potential Emission Rate”** means the emission rate of a source at its maximum capacity to emit a regulated air contaminant under its physical and operational design, provided any physical or operational limitation on the capacity of the source to emit a regulated air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its physical and operational design only if the limitation or the effect it would have on emissions is enforceable by the department pursuant to the Air Quality Control Act or the federal Act.

P. “**Restricted Area**” is an area to which public entry is effectively precluded. Effective barriers include continuous fencing, continuous walls, or other continuous barriers approved by the Department, such as rugged physical terrain with a steep grade that would require special equipment to traverse. If a large property is completely enclosed by fencing, a restricted area within the property may be identified with signage only. Public roads cannot be part of a Restricted Area.

Q. **"Shutdown"** for requirements under 20.2.72 NMAC, means the cessation of operation of any air pollution control equipment, process equipment or process for any purpose, except routine phasing out of batch process units.

R. **"SSM"** for requirements under 20.2.7 NMAC, means routine or predictable startup, shutdown, or scheduled maintenance.

(1) **"Shutdown"** for requirements under 20.2.7 NMAC, means the cessation of operation of any air pollution control equipment or process equipment.

(2) **"Startup"** for requirements under 20.2.7 NMAC, means the setting into operation of any air pollution control equipment or process equipment.

S. **"Startup"** for requirements under 20.2.72 NMAC, means the setting into operation of any air pollution control equipment, process equipment or process for any purpose, except routine phasing in of batch process units.

C102 Acronyms

2SLB .... 2-stroke lean burn
4SLB .... 4-stroke lean burn
4SRB .... 4-stroke rich burn
acfm .... actual cubic feet per minute
AFR .... air fuel ratio
AP-42 .... EPA Air Pollutant Emission Factors
AQB .... Air Quality Bureau
AQCR .... Air Quality Control Region
ASTM .... American Society for Testing and Materials
Btu .... British thermal unit
CAA .... Clean Air Act of 1970 and 1990 Amendments
CEM .... continuous emissions monitoring
cfh .... cubic feet per hour
cfm .... cubic feet per minute
CFR .... Code of Federal Regulation
CI .... compression ignition
CO .... carbon monoxides
COMS .... continuous opacity monitoring system
EIB .... Environmental Improvement Board
EPA .... United States Environmental Protection Agency
gr/100 cf .... grains per one hundred cubic feet
gr/dscf .... grains per dry standard cubic foot
GRI .... Gas Research Institute
HAP .... hazardous air pollutant
hp .... horsepower
H_2S .... hydrogen sulfide
IC .... internal combustion
KW/hr .... kilowatts per hour

lb/hr .... pounds per hour
lb/MMBtu .... pounds per million British thermal unit
MACT .... Maximum Achievable Control Technology
MMcf/hr .... million cubic feet per hour
MMscf .... million standard cubic feet
N/A .... not applicable
NAAQS .... National Ambient Air Quality Standards
NESHAP .... National Emission Standards for Hazardous Air Pollutants
NG .... natural gas
NGL .... natural gas liquids
NMAAQS .... New Mexico Ambient Air Quality Standards
NMAC .... New Mexico Administrative Code
NMED .... New Mexico Environment Department
NMSA .... New Mexico Statues Annotated
NOx .... nitrogen oxides
NSCR .... non-selective catalytic reduction
NSPS .... New Source Performance Standard
NSR .... New Source Review
PEM .... parametric emissions monitoring
PM .... particulate matter (equivalent to TSP, total suspended particulate)
PM_{10} .... particulate matter 10 microns and less in diameter
$PM_{2.5}$ .... particulate matter 2.5 microns and less in diameter
pph .... pounds per hour
ppmv .... parts per million by volume
PSD .... Prevention of Significant Deterioration
RATA .... Relative Accuracy Test Assessment
RICE .... reciprocating internal combustion engine
rpm .... revolutions per minute
scfm .... standard cubic feet per minute
SI .... spark ignition
SO_2 .... sulfur dioxide
SSM .... Startup Shutdown Maintenance (see SSM definition)
TAP .... Toxic Air Pollutant
TBD .... to be determined
THC .... total hydrocarbons
TSP .... Total Suspended Particulates
tpy .... tons per year
ULSD .... ultra low sulfur diesel
USEPA .... United States Environmental Protection Agency
UTM .... Universal Transverse Mercator Coordinate system
UTMH .... Universal Transverse Mercator Horizontal
UTMV .... Universal Transverse Mercator Vertical
VHAP .... volatile hazardous air pollutant
VOC .... volatile organic compounds

1 STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD
2

3

4 IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO.
5 9295, ROPER CONSTRUCTION INC.'S No. EIB 22-34
ALTO CONCRETE BATCH PLANT,
6

7

8

9 TRANSCRIPT OF PROCEEDINGS

10

11 BE IT REMEMBERED that on the 18th day of

12 October, 2022, the above-entitled matter came on for

13 hearing before the New Mexico Environmental Improvement

14 Board, taken via WebEx Video Conference, commencing at

15 9:00 a.m.

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21

22 REPORTED BY: THERESA E. DUBOIS, RPR, CCR #29
ALBUQUERQUE COURT REPORTING SERVICE, LLC
23 3150 Carlisle Boulevard, Northeast
Suite 104
24 Albuquerque, New Mexico 87110

25

EXHIBIT C

1 to the throughput, to the modeling, so this is essentially
2 a new application.
3 We have a demonstrative exhibit that shows the
4 changes to the site plan. The original plan in the
5 original application is in red, while the blue shows this
6 new application iteration, which, by the way, is just the
7 latest. You know, this has gone through a couple of
8 iterations, but very clearly, from between the red and the
9 blue, you can see significant changes to the plant's
10 layout and the sources was emissions, and so we're dealing
11 with a brand-new application layout.
12 And that is also demonstrated by the new
13 materials that they submitted for the first time on
14 September 21st. Also, the changes in the application
15 with, we have summarized in a table. And this is -- this
16 comes directly from the rebuttal testimony of Brad Sohm,
17 which is Alto Exhibit 22. So that's something that we
18 submitted in our rebuttal as an exhibit.
19 So you can see here, there's significant changes
20 comparing the original site plan to the new site plan that
21 was just submitted for the first time on September 21st.
22 The location of the plant is significantly different.
23 It's further north and it's further west.
24 Now, all of these changes directly affect
25 modeling, as you can see on the right. Now the emission

1 sources are closer to the boundary, and that would
2 increase model concentrations. You can see the on-site
3 haul roads have been reconfigured, so that the road is
4 closer to the boundaries. Moving a haul road closer to
5 the boundaries results in higher model concentrations.
6 You can also -- you can also see from the
7 materials, the new application, that the on-site haul road
8 was significantly reduced. It went from 785 meters to 429
9 meters, for concrete and then fly ash. And significantly
10 reducing from 725 to 429, so as you can see, we're dealing
11 with a whole new layout, a whole new application.
12 In addition, there's been changes to the
13 configuration of the aggregate then.
14 If you could go back to the previous exhibit.
15 As you can see now, the aggregate bins are
16 significantly moved, which -- which changes the modeling
17 that needs to be done for these emission sources.
18 Let's go back to the other one.
19 So, as you can see, the haul road -- the haul
20 roads have changed, the location of the plant has changed,
21 the buildings have changed. And also, they now say --
22 they now say in their new materials, in this brand-new
23 application, that they are going to use water tanks to
24 store water. Those water tanks were not included as
25 downwash structures in the modeling. So what we have is a

1 So, under these circumstances, it's improper for
2 the -- for this appeal to go forward because Roper has
3 essentially changed his entire operation. There's new
4 modeling, there's a new site layout. There's new evidence
5 on water usage and there's a change in hours of operation
6 and truck traffic. There's change in the haul roads,
7 there's a change in the downwash structures.
8 So all of these things require them to go back
9 and file a new appeal, if this is how they want to go
10 forward. They are simply not permitted to at this stage
11 in the proceeding, act like this is the NMED proceeding,
12 and submit brand-new -- a brand-new application for the
13 first time for this Board to consider.
14 Thank you, Madam Chair.
15 CHAIRPERSON SUINA: Thank you, Ms. Sakura.
16 Appreciate your presentation.
17 And with that, I'll turn it over to Mr. Vigil.
18 ORAL ARGUMENT BY MR. VIGIL
19 MR. VIGIL: Thank you, Madam Chair, members of
20 the Board, Counsel Soloria. This is not a new
21 application. This is the same application. There have
22 been updates to the application made that are in direct
23 response to issues raised by members of the public.
24 And the Environmental Improvement Board's primary
25 role is to protect the environment and to protect public

1 health, and so these -- this -- the updates to the
2 application and the resulting new draft permit are more
3 protective and address issues that were raised by Alto and
4 by members of the public, not just Alto, but members of
5 the public as well, who were not represented by attorneys.
6 The -- in the Section 74-2-7 subsection (K) of
7 the Air Quality Control Act, make it clear that the EIB
8 can modify permits. In previous hearings, I don't -- I
9 want to make sure that I'm not contradicting myself. I
10 have made the argument that the EIB cannot remand back to
11 the Department and we -- we keep -- we -- we -- I'm sorry.
12 We -- we hold that position. In other words, EIB
13 doesn't have the ability to regulate internal Department
14 policy. And the EIB doesn't do that, it's not trying to
15 do that. I just, as a matter of law, I've raised this
16 argument before. Today what I'm seeing is something
17 different.
18 While the EIB can't necessarily remand a permit
19 back to the Department and require the Department to do
20 additional work, the statute, not the regulation, but the
21 statute enacted by duly-elected legislators, gives the EIB
22 the ability to modify this permit, to make this permit
23 more restrictive than it would have been even under the
24 previous proceeding. And it would make sense that the --
25 that the legislature put this provision in there, because

1 these proceedings are de-novo proceedings. And meaning
2 that new evidence can be brought before, and the only
3 limit that's on the type of evidence that can be brought
4 before the Board in this appeal is those -- those -- that
5 that evidence that's not relevant to the petition itself
6 and is not otherwise admissible.
7 And the -- every -- the -- all of the new
8 information that was brought by Roper and the new draft
9 permit that is being submitted by the Department today,
10 along with updates to the application relate directly to
11 the petition itself.
12 And I lay this all out in my motion, and I will
13 just point it out for you. Let's see here. On page 5 of
14 the motion that we filed -- or I'm sorry, in our response,
15 is that what we say is that updates to the modeling relate
16 to Roper's objection to the standards, which Roper argues
17 allowed Alto to quote, simply raise doubt without actually
18 demonstrating" that Roper will violate air quality control
19 standards -- and I'll just -- rather than read it all,
20 I'll paraphrase it.
21 And that goes to the page 4 of their petition.
22 And in response, we have submitted new modeling, updated
23 application, and a -- and a more restrictive permit that
24 is more protective of human health and the environment.
25 The application and the draft permit are -- have been

1 updated to improve them, and they respond to concerns
2 raised by members of the public. And the EIB is within
3 its full power under a de-novo proceeding, to take new
4 evidence on an already existing application, that retains
5 the same number, that's the same party, it's just been
6 updated to improve it.
7 And if the Board wants to issue a more
8 restrictive, more protective permit, which this draft
9 permit is, it's fully within the Board's power.
10 And that's all I have to say. Thank you very
11 much.
12 CHAIRPERSON SUINA: Thank you, Mr. Vigil, for
13 your presentation and discussion.
14 And so I will turn it over to Mr. Rose.
15 ORAL ARGUMENT BY MR. ROSE
16 MR. ROSE: Thank you, Madam Chair.
17 I agree with what Mr. Vigil said, and in our
18 response to the motion, I think we point out the statutory
19 section, what it says; the Board's regulations, what they
20 say. And it's pretty clear if you view it, that the
21 Board's regulations contemplate taking evidence --
22 additional evidence. In fact, allowing the public to
23 offer additional evidence. So it's not strictly an
24 administrative review.
25 We agree -- and now from Roper Construction's

1 standpoint, we stand by our position that the Department's
2 decision below is improper, and that the permit should
3 have been issued. And that -- and that we justified in
4 the modeling, and all of the testimony justified issuance
5 of the permit.
6 But as Mr. Vigil pointed out, in response to
7 comments, the applicant is willing to scale back his
8 proposal. And so we believe that it's certainly
9 contemplated by the process, that if the applicant isn't
10 looking for authorization to do something less than what
11 they had applied for, that the hearing process allows that
12 to happen.
13 And it's something the Department is willing to
14 accept, and has been done at Department proceedings, too.
15 Otherwise, if that -- if that weren't the case, and we
16 went forward on the -- on the permitting decision --
17 excuse me -- in front of the Department, if you were to
18 grant the permit, if we were to make these changes, as I
19 understand it, they would be subject to only an
20 administrative revision in front of the Department, with
21 no public comment, no public participation.
22 And so, we chose -- rather than going through
23 that process after the permit's issued, Roper Construction
24 has chosen to try to address what it's looking for in this
25 proceeding, and allow the public and Alto CEP to respond

1 as to the justification for those changes.
2 But I think as Mr. Vigil pointed out, the changes
3 that Roper Construction is asking for are basically less
4 operating hours, less maximum throughput, and so we're
5 looking at reducing the emissions from the facility and
6 what's contemplated.
7 Ms. Sakura alluded to water tanks and -- and --
8 and other equipment. There's no change to the equipment
9 that's being proposed in any of these iterations. They
10 remain the same. The control devices for the equipment
11 remain the same. As we pointed out, the inclusion of
12 water tanks was not on the site plan in front of the
13 Department because they're not emitting equipment.
14 And your rules only require that in the
15 application, you identify pollutant-emitting equipment.
16 And if we get to the substantive testimony about -- about
17 building downwash, we'll explain why we didn't consider
18 that, and the 10-foot walls that was alluded to, why
19 that's not appropriate and why it has no impact on
20 downwash, but that's a substantive issue, which, we
21 believe, will be addressed during the hearing.
22 But, again, we believe your rules are sufficient,
23 and that what we have proposed is consistent with the rule
24 on pairing back. By pairing back the application and
25 seeking something less than we think we're ultimately

1 authorized to do, that that's consistent with the Board's
2 rules and the Board's prior process.
3 As I pointed out, we still believe the initial
4 application that was the subject of the Department's
5 decision, is viable and approvable, but if they were
6 approved, we would make modifications to less -- to lessen
7 throughput and hours of operation administratively, even
8 after it was issued. And we thought it was appropriate to
9 address it in the context of this hearing, rather than
10 waiting.
11 So we believe the application and the changes
12 recommended here are within the scope of your proceeding,
13 and that the testimony adduced is appropriate, and that
14 your rules contemplate additional testimony and evidence
15 to be submitted for your consideration, and aren't just
16 limited to what was presented before the Department.
17 And I might also allude to the fact that Alto CEP
18 also submitted additional evidence that they didn't submit
19 below, concerning modeling and modeling results. So I
20 think it's somewhat disingenuous to argue that these kinds
21 of evidence should not be considered when they, in fact,
22 submitted evidence that was not submitted below, for the
23 Department's consideration.
24 So we believe the motion should be denied for the
25 reasons stated. Thank you, Madam Chair.

1 Department should have been approved. And we're willing
2 to go forward with it, but as a result of public comment,
3 including comments by Alta and their technical witnesses,
4 we're proposing to scale back the application and are
5 willing to accept something less, both in terms of truck
6 traffic, throughput, and hours of operation, than we were
7 willing to accept in the hearing below.
8 And what -- if you agree with Alto CEP and if you
9 agree that permit should have been issued, we're going to
10 make those changes as administrative revisions under your
11 rules, contrary to Ms. Sakura, they're actually the
12 Board's rules at 20-2-72.
13 If you look at -- I think it's 219, which is --
14 or 217, which is the revision section, the changes we're
15 talking about, in terms of reduced throughput, hours of
16 operation and truck traffic, to the extent they're limited
17 by the permit can be done by administrative revision. The
18 same thing is true about relocation and the site -- the
19 site specific information, in terms of the site plan.
20 All of that, it's my understanding, can be done
21 by administrative revision, which becomes effective upon
22 notice by the permittee. And there's no public process,
23 including no process for citizen review and comment.
24 By doing it the way we have chosen to do it, we
25 have provided, rather than set this up where the

1 CHAIRPERSON SUINA: Okay. Mr. Vigil.
2 MR. VIGIL: Excuse me. My comments are
3 tangentially related to it. I want to point out again,
4 it's not a new application. I'll leave my comments there.
5 Roper asked for an extension to reply, and so
6 they have -- they have had the opportunity to -- I mean,
7 and, again, I get that they're zealously, you know,
8 advocating for their client -- I'm sorry, I apologize;
9 Alto is zealously advocating for their clients, and I
10 appreciate that and respect that.
11 But the reality is that they did get information,
12 and they went to the Hearing Officer, asking for an
13 extension that was given to them in order to -- in order
14 to respond to certain changes. One of the things that I
15 want to point out, that it's not necessarily a legal
16 argument, but more of a commentary, but I think it's
17 relevant: Alto does not want a more restrictive or more
18 protective permit.
19 This, for them, is a zoning issue. They are
20 treating the EIB -- they're not -- they're not doing
21 anything improper or wrong or illegal, but the approach
22 that they're taking is they just don't want the plant
23 there, which is understandable, they have the right to
24 take that position. But this is not a zoning case. This
25 is an environmental protection case and a permitting case,

1 In response to Mr. Vigil, we're certainly not
2 adverse to having a discussion, but I would like to make a
3 suggestion if I may. And I certainly don't want to fringe
4 upon your autonomy.
5 But perhaps we would be in favor of deferring the
6 motion until the Vice-Chair is able to participate. And
7 secondly, perhaps the Board could consider the obverse
8 motion and maybe one of the two members would have a
9 change on heart on that.
10 In other words, a motion to call for dismissal of
11 the action, start this process over so the public does get
12 an opportunity to vet a new application. But we're not
13 adverse to discussing the matter with Mr. Vigil and
14 Mr. Rose.
15 CHAIRPERSON SUINA: Thank you, Mr. Hnasko.
16 Appreciate that.
17 And Mr. Rose, just so I can get everybody's
18 input, what are your thoughts?
19 MR. ROSE: Again, I mean it's a two-two vote, so
20 I'm not sure without -- without granting the motion to
21 dismiss, we're going to be moving forward with the
22 hearing.
23 Roper would have no objection to withdrawing its
24 proposed changes to the permit or the permit application,
25 and reduce hours of operation and whatnot and go forward

1 with the application as pending, for the Department, like
2 I said, if that makes things clearer. We tried to be
3 responsive to the public and to Alto CEP, but if they
4 don't want to go forward with a reduced proposal, we're
5 certainly willing to go forward with the proposal as
6 submitted to the Department, and withdraw the -- those
7 changes which are considered surrebuttal.
8 CHAIRPERSON SUINA: Thank you, Mr. Rose.
9 Appreciate that.
10 Yes, I saw you jump on, Counsel Katz. Did you
11 have something to add?
12 MS. KATZ: I'll let Mr. Vigil address it since he
13 jumped on here.
14 CHAIRPERSON SUINA: Okay. Mr. Vigil.
15 MR. VIGIL: The Department -- you know, maybe we
16 can just not have a recess, you know, since Mr. Rose has
17 indicated they're willing to go forward. The Department
18 is willing to withdraw the new draft application, the new
19 draft permit, to withdraw the case and go forward on the
20 original application and the original draft permit. So
21 we're perfectly willing to do that.
22 And that's getting to what I was discussing a few
23 minutes ago, as I'm sure you all know.
24 CHAIRPERSON SUINA: Thank you, Mr. Vigil.
25 MS. KATZ: And also, may I just add that --

1 decisions on how to move forward. So, with that, I think
2 I'll turn it over to maybe Mr. Vigil or Ms. Sakura. I
3 know there is some probably discussions between your
4 parties, as well as Mr. Rose. So whoever wants to go
5 first, please just raise your hand and jump in.
6 All right. Mr. Vigil.
7 MR. VIGIL: Thank you, Madam Chair, members of
8 the Board, Hearing Officer Soloria. The parties had a
9 productive discussion and we came to an agreement. And we
10 have a set of documents to present to you, so you have
11 some sort -- some sort of sense of what the parties agreed
12 to and what will be withdrawn.
13 So the Environment Department I need to --
14 because we had limited time, I'm going to have to check
15 some of the emails that were flying around to make sure
16 that I have all of the documents included that were agreed
17 upon. Okay. So these are the exhibits that the
18 Department will withdraw.
19 We will withdraw NMED EIB Rebuttal Exhibits 10
20 through 20, NMED EIB Surrebuttal Exhibits 1 through 8.
21 Alto agrees to withdraw Alto Exhibits 28, 29, 30,
22 31, 32, 33 and 34.
23 And Roper agrees to withdraw their Exhibit 4 and
24 their Exhibits 18 through 30.
25 So there's -- there's a set of documents that the

1 parties have agreed to withdraw. And the substance of the
2 agreement is that new information about a new application,
3 application updates, draft permits, new draft statements
4 of basis and new database summaries will be withdrawn and
5 for all of the parties.
6 And that the remaining issues -- because there,
7 you know, a lot of the testimony for all of the parties is
8 a mixed batch of newer testimony and older testimony, that
9 the Department is going to -- because it's very unlikely
10 the Department will put on its case tonight, the
11 Department will go through its rebuttal testimony of its
12 witnesses and redact any testimony that regards, you know,
13 any new application, new draft permits, so on and so
14 forth. And the remaining outstanding issues, the parties
15 agree to allow the Hearing Officer to resolve, because
16 they are -- you know, some of them are very, very close
17 questions of, you know, what is a response to public
18 comment at the hearing. And some of it, you know, may
19 appear to be new information, but in reality, it's an
20 actual evidentiary objection to something that the Hearing
21 Officer brought up in the hearing below.
22 So, because it would -- you know, we could have
23 an entire hearing, you know, just this group we have here,
24 on the remaining outstanding issues. The parties agree to
25 allow the Hearing Officer to -- to deal with any

1 STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD
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3
4 IN THE MATTER OF THE PETITION FOR
HEARING ON AIR QUALITY PERMIT NO.
5 9295, ROPER CONSTRUCTION INC.'S No. EIB 22-34
ALTO CONCRETE BATCH PLANT,
6
7
8
9 TRANSCRIPT OF PROCEEDINGS
10
BE IT REMEMBERED that on the 19th day of
11
October, 2022, the above-entitled matter came on for
12
hearing before the New Mexico Environmental Improvement
13
Board, taken via WebEx Video Conference, commencing at
14
9:00 a.m.
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21
22 REPORTED BY: THERESA E. DUBOIS, RPR, CCR #29
ALBUQUERQUE COURT REPORTING SERVICE, LLC
23 3150 Carlisle Boulevard, Northeast
Suite 104
24 Albuquerque, New Mexico 87110
25

EXHIBIT D

1 the parties, we took a recess and the parties had a
2 fruitful discussion, and what we came up with, and what we
3 offered to the Board was the stipulation and agreement
4 that was filed this morning with the -- with Ms. Jones and
5 Hearing Officer -- Hearing Officer Virtue.
6 And the summary of the -- it's a stipulation and
7 agreement for exhibits, is that there are a number of
8 exhibits that the parties are going to withdraw and not
9 offer at the proceeding. And all of those relate to new
10 information regarding the application updates, draft
11 permit and associated documents.
12 The other part of that stipulation and agreement
13 is that the parties will not offer testimony on any of the
14 withdrawn documents, they will not cross-examine or
15 impeach on the basis of any of these documents. And let
16 me look at the -- there's a couple other agreements here.
17 And the parties will not offer technical testimony on any
18 of the withdrawn documents.
19 And Mr. Hearing Officer, would you like me to
20 give the range of the exhibit numbers for each party, or
21 is the summary that I've given okay?
22 HEARING OFFICER VIRTUE: The summary -- I believe
23 the summaries that have been given are acceptable. They
24 set out the exhibit numbers. I think they're properly
25 identified. I don't believe you need to go through them

1 HEARING OFFICER VIRTUE: Mr. Hnasko or
2 Ms. Sakura.
3 MR. HNASKO: Thank you, Mr. Hearing Officer. We
4 do have questions.
5 CROSS-EXAMINATION OF RYAN ROPER
6 BY MR. HNASKO:
7 Q. Mr. Roper, just as a matter of clarification, you
8 did not testify at the air quality permit proceeding held
9 by the NMED; is that correct?
10 A. That's correct.
11 Q. But you did testify extensively in the nuisance
12 case brought before Judge Sugg; do you recall that?
13 A. I testified.
14 Q. All right. And during that case you changed
15 dramatically the configuration of the plant from that
16 configuration described by Mr. Wade in Exhibit 23; did you
17 not? Let's go back to Exhibit 23.
18 A. We revised the plant layout prior to the
19 litigation suit, trying to -- to lessen the impact -- the
20 visual impact from Highway 220 predominantly, to keep some
21 of the -- keep as many of the trees as we could, reduce
22 the visual impact from Highway 220. All of those
23 adjustments were done before the litigation suit.
24 Q. Yeah, and, in fact, you made adjustments through
25 your noise expert, Mr. Dickerson, so you would minimize

1 noise at that proceeding; is that a fair statement,
2 Mr. Roper?
3 A. That's incorrect. We moved the facility -- the
4 center of the facility, we moved it north and west. And
5 if you can see from that image you have up right there,
6 the only -- the predominant witness that you were
7 presenting, his noise receptor was north and east of the
8 site.
9 So moving the plant north and east, closer to
10 that -- to that plaintiff, trying to say that that was
11 going to reduce the noise to him, by moving the plant
12 closer to him, is erroneous.
13 Q. Well, let's look at Exhibit 25, Mr. Roper, which
14 is what you submitted at the preliminary injunction
15 hearing. This is the plant layout, correct?
16 A. Excuse me. It somewhat resembles it. I believe
17 there was a setback on our west border. It looks like
18 some of the stuff is out of position, but -- but more or
19 less, yes.
20 Q. All right. And -- and this -- this includes a
21 complete circulation of the -- of the haul road around the
22 facility; does it not?
23 A. It could. It just would depend on the operating
24 scenario. You could go directly to the plant or you could
25 go around in a circle. I don't think there's any -- any

1 regulations or stipulations that determine that.

2 Q. Yeah. Got you.

3 So let's superimpose, if we can, the two, with

4 the next exhibit, Alto Exhibit 26.

5 And this depicts a superimposition of the plant

6 layout as testified to by Mr. Wade today, and the plant

7 layout that you and your noise expert reconfigured in

8 front of Judge Sugg; do you see that?

9 A. As I just said, we reconfigured it prior to

10 talking to the noise expert and prior to the litigation

11 suit. I see this.

12 Q. This is not -- you testified under oath, Mr. --

13 Mr. Roper, did you not, that the plant configuration set

14 forth in the green on Alto Exhibit 26 would be the plant

15 configuration you would construct?

16 A. I testified that that's what our intentions were.

17 That was prior to learning that I wasn't going to be able

18 to make those adjustments in this permit process up to

19 this point. So when I testified that -- that was true,

20 that's correct.

21 Q. And are you -- do you intend to return to Judge

22 Sugg to alert him that these measures you took to reduce

23 noise will not be implemented?

24 A. Again, you keep implying things. I didn't do it

25 to reduce noise. I think this is an air permit process

1 STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD
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ALTO CONCRETE BATCH PLANT,
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9 TRANSCRIPT OF PROCEEDINGS
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BE IT REMEMBERED that on the 20th day of
11
October, 2022, the above-entitled matter came on for
12
hearing before the New Mexico Environmental Improvement
13
Board, taken via WebEx Video Conference, commencing at
14
9:00 a.m.
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22 REPORTED BY: THERESA E. DUBOIS, RPR, CCR #29
ALBUQUERQUE COURT REPORTING SERVICE, LLC
23 3150 Carlisle Boulevard, Northeast
Suite 104
24 Albuquerque, New Mexico 87110
25

EXHIBIT E

1 instance, but then, oh, wait, I'm going to change it for
2 this instance, it doesn't work that way.
3 And, you know, in the course of the air
4 permitting process, the applicant has a responsibility to
5 make sure they're providing correct, and certifies it's
6 accurate information. It's their duty to then update if
7 there has been a change or representation of the facility
8 or its emission sources.
9 Q. And are you aware of the permit revision process
10 in Part 72 of the Board's NSR regulations?
11 A. Yes.
12 Q. Isn't -- isn't it conceivable that if this permit
13 were issued before construction began or before operation,
14 that Roper Construction could, in fact, revise the permit
15 layout and include -- and the equipment through a revision
16 to the permit, before it's even constructed?
17 A. That is true, but I think it's disingenuous and
18 attempts to circumvent the process. In my opinion, if you
19 know fair well that you're going to change something, and
20 you wait until after a permit is issued, that's not the
21 way -- that's not the way it's intended to work. A
22 revision after the fact would be something unforeseen.
23 Q. Is there anything in the reg that says it
24 requires that it be unforeseen or that the applicant
25 couldn't, in fact, change its proposal prior to

1 construction and operation?
2 A. No, but --
3 Q. Were you -- were you aware of the proposed
4 exhibits that were offered by Roper Construction that were
5 withdrawn yet -- yesterday in this proceeding at the
6 request of Alto CEP?
7 A. I'm aware of them.
8 Q. And are you aware that those exhibits would have
9 conformed the proposed --
10 MS. SAKURA: Objection, Your Honor. Your
11 Honor -- I'm sorry. Mr. Hearing Officer, there is no
12 cross-examination on those exhibits. That's in the
13 stipulation. It's expressly stated.
14 MR. ROSE: If I might, Mr. Hearing Officer?
15 Mr. Sohm testified that, in fact, that the permit
16 application, as being considered here, is improper because
17 testimony in front of Judge Sugg said there would be a
18 different layout. And all I'm trying to do is clarify
19 that, in fact, the layout in front of the Board is what
20 was proposed in the application and, in fact, that Roper
21 Construction had proposed, and would now propose to
22 conform the permit and the permit layout in a subsequent
23 proceeding.
24 I want him to clarify, in fact, that Roper sought
25 to conform this application, and we ended up, as a result

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

NO: AQB 21-57

IN THE MATTER OF THE APPLICATION
OF ROPER CONSTRUCTION, INC., FOR
AN AIR QUALITY PERMIT,

TRANSCRIPT OF PROCEEDINGS

February 9, 2022
9:00 a.m.
All parties remote

PURSUANT TO THE NEW MEXICO RULES OF CIVIL PROCEDURE, this Hearing was:

HEARD BY: GREGORY A. CHAKALIAN
HEARING OFFICER

REPORTED BY: SHANON R. MYERS, RPR, CRR, RMR, CRC

1 Q. (BY MR. HNASKO) I'm curious, Dr. Saikrishnan, see
2 if you look at the yellow part, it looks as though, you
3 know, all the way up to January 22nd, 2022, you know, we had
4 this asphalt production mistake in the application. Is
5 that -- is that -- did I get that right in terms of timing?
6 A. Yes.
7 Q. So, you know, and I'm not going to take you
8 through each and everything here, but there were some
9 interesting public comments I thought over the noon hour. I
10 don't know if you had the opportunity to hear them, about
11 all the changes to this application. And I take it you're
12 the one who's responsible for incorporating changes to the
13 application or accepting the changes; is that right?
14 A. Yes.
15 Q. And I'm not going to take you through all these,
16 and I really don't want to do that, but I'm counting them up
17 all the way from November 18th, 2021, through just
18 January 28th, 2022, and I mean, I'm not going to say agree
19 with me or not agree with me, but there are dozens and
20 dozens of changes to this application. Has that been your
21 experience with this application?
22 A. Any application has many updates that are made to
23 the application. There have been several corrections in
24 this application, yes.
25 Q. Okay. I appreciate that very much. You also