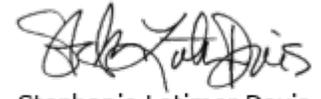


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 5/14/2025 12:04 PM

2 Opinion Number: _____

3 Filing Date: May 14, 2025



Stephanie Latimer Davis
Acting Chief Clerk

4 **No. A-1-CA-41197**

5 **ALTO COALITION FOR ENVIRONMENTAL**
6 **PRESERVATION,**

7 Appellant,

8 v.

9 **ROPER CONSTRUCTION, INC.,**

10 Petitioner-Appellee

11 and

12 **NEW MEXICO ENVIRONMENTAL IMPROVEMENT**
13 **BOARD,**

14 Appellee,

15 and

16 **NEW MEXICO ENVIRONMENT DEPARTMENT,**

17 Intervenor-Appellee.

18 **IN THE MATTER OF THE PETITION FOR**
19 **HEARING ON AIR QUALITY PERMIT NO. 9295.**

20 **APPEAL FROM THE ENVIRONMENT IMPROVEMENT BOARD**
21 **Phoebe Suina, Board Chair**

1 Hinkle Shanor LLP
2 Thomas M. Hnasko
3 Timothy B. Rode
4 David A. Lynn
5 Santa Fe, NM

6 for Appellant

7 Montgomery & Andrews, P.A.
8 Louis W. Rose
9 Kari E. Olson
10 Shelly L. Dalrymple
11 Daniel B. Goldberg
12 Santa Fe, NM

13 for Appellee Roper Construction, Inc.

14 Raúl Torrez, Attorney General
15 Kristin E. Hovie, Assistant Attorney General
16 Santa Fe, NM

17 for Appellee New Mexico Environmental Improvement Board

18 Chris Vigil, Assistant General Counsel
19 Albuquerque, NM

20 for Intervenor New Mexico Environment Department

1 **OPINION**

2 **BACA, Judge.**

3 {1} This is an appeal from the Environmental Improvement Board’s (EIB) final
4 order reversing the Deputy Secretary of the New Mexico Environment Department’s
5 (NMED) order denying Appellee Roper Construction, Inc.’s (Roper) Air Quality
6 Construction Permit (Permit 9295) for construction and operation of a concrete batch
7 plant. Appellant Alto Coalition for Environmental Preservation (Alto) contends that
8 (1) the EIB’s final order was arbitrary and capricious, an abuse of discretion, not
9 based upon substantial evidence, and otherwise not in accordance with law; (2) the
10 EIB failed to address other errors in Roper’s emissions modeling, thereby preventing
11 meaningful appellate review; (3) procedural irregularities during the EIB’s
12 proceedings on both Permit 9295 and Alto’s stay request violated Alto’s procedural
13 due process rights; and (4) the EIB erred in concluding that it lacked jurisdiction to
14 consider whether the Roper permit application’s use of the AP-42 emissions factor
15 for public paved roads reflected actual conditions at Roper’s concrete batch plant.
16 Because the parties submitted competing technical evidence to estimate emissions
17 and EIB had jurisdiction to review whether the permit demonstrated compliance
18 with all state and federal requirements and emissions standards, we reverse and
19 remand to the EIB for reconsideration.

1 **BACKGROUND**

2 {2} Roper applied to the NMED for Permit 9295, a minor source air quality
3 construction permit.¹ Thereafter, the Air Quality Bureau (the AQB) conducted its
4 administrative review to determine whether Roper’s application contained the
5 required components. *See* 20.2.72.207(A) NMAC. Finding all required components
6 present, the AQB ruled Roper’s application administratively complete.

7 {3} Subsequently, the AQB began its technical review, which requires it to verify
8 the applicant’s emissions calculations and to determine whether the application
9 meets applicable federal and state regulations and emission standards. During its
10 technical review, AQB staff determined that Roper’s application used the correct
11 AP-42 emissions factor and formulas in calculating emissions for all sources. Citing
12 federal sources, an AQB analyst testified that AP-42 emissions factors “are
13 representative values that relate the quantity of a pollutant released to the ambient
14 air with an activity associated with the release of that pollutant.” *See* Environment

¹ “[T]he Air Quality Control Act defines a major source of ozone as one, which emits 250 [tons per year (tpy)] or more of pollutant—which means that minor sources of ozone emit less than 250 tpy of pollutants. Per our regulations, [the] NMED shall deny any application for a permit, whether it be for a minor or major source, if the construction, modification, or permit revision will cause or contribute to air contaminant levels in excess of any [National Ambient Air Quality Standard] unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable.” *WildEarth Guardians v. N.M. Env’t Improvement Bd.*, 2024-NMCA-021, ¶ 20, 542 P.3d 820 (emphasis omitted) (alteration, internal quotation marks, and citations omitted).

1 Protection Agency (EPA), *AP-42, Compilation of Air Emissions Factors from*
2 *Stationary Sources, Introduction* at 1, (2024),
3 https://www.epa.gov/system/files/documents/2024-01/introduction_2024.pdf. AQB
4 staff also reviewed the modeling Roper submitted, and attested that Roper's
5 application followed appropriate modeling practices. Upon completing its technical
6 review, the AQB recommended that the NMED issue Permit 9295.

7 {4} In light of robust public opposition to Permit 9295, the NMED held a public
8 hearing to determine whether Roper's application complied with applicable air
9 quality standards. Following that public hearing, the hearing officer issued his report
10 recommending that Permit 9295 be denied. The NMED Deputy Secretary adopted
11 the Hearing Officer's Report and entered a final order denying Permit 9295. Roper
12 petitioned for an appeal before the EIB.

13 {5} The NMED filed an answer to Roper's appeal petition. In its answer, the
14 NMED in relevant part agreed with Roper that (1) Roper's air quality construction
15 permit application complied with all applicable state and federal requirements for
16 approval; (2) a person opposed to the relief sought in a petition cannot fulfill the
17 burden of production by raising doubt that the permit should be granted, but instead
18 must affirmatively demonstrate that the permit would violate state and/or federal
19 regulations, or that using different inputs in the modeling would result in an
20 exceedance of state or federal air quality standards; and (3) Roper's modeling used

1 an appropriate AP-42 emissions factor for haul roads based on Roper’s maximum
2 proposed usage. Following a three-day evidentiary hearing, the EIB convened to
3 deliberate. During its deliberations, the EIB engaged in a lengthy discussion in which
4 it evaluated the evidence and attempted to distinguish and apply the burdens of
5 production and persuasion. Ultimately, the EIB reversed NMED’s denial of Permit
6 9295 and in relevant part, determined that it lacked “jurisdiction over [Roper’s] use
7 of AP-42.” Alto appeals.

8 **DISCUSSION**

9 {6} One of the many issues before the EIB was the application of the AP-42
10 emissions factors, which the parties agree can be used to estimate emissions from
11 various sources of air pollution. NMED and Roper maintain that Roper’s use of the
12 AP-42 emissions factor for public paved roads reflected actual conditions at Roper’s
13 concrete batch plant. Alto contends that Roper’s use of the AP-42 emissions factor
14 for public paved roads, instead of the AP-42 emissions factor for industrial haul-
15 roads within concrete batch plants, resulted in an underestimation of emissions.
16 Thus, the parties dispute which AP-42 emissions factor applied to accurately
17 estimate emissions for the activity that Roper sought a permit to conduct.

18 {7} In New Mexico, air quality construction permits are required for “[a]ny person
19 constructing a stationary source which has a potential emission rate greater than 10
20 pounds per hour or 25 tpy of any regulated air contaminant for which there is a

1 [n]ational or New Mexico Ambient Air Quality Standard.” 20.2.72.200(A)(1)
2 NMAC; *see* NMSA 1978, § 74-2-7(A)(1) (2021). An applicant seeking an air quality
3 construction permit must demonstrate compliance with all state and federal
4 requirements and emission standards. 20.2.72.208 NMAC. At its heart, therefore,
5 one of Alto’s primary positions is that Roper’s permit application does not
6 demonstrate that the activity will comply with emissions standards because an
7 improper AP-42 emissions factor was used to estimate emissions, and that the EIB
8 improperly determined it had no jurisdiction to review which AP-42 factor was used
9 to estimate emissions. For the reasons expressed below, we agree with Alto that the
10 EIB has jurisdiction to review the propriety of the AP-42 factor used by a permit
11 applicant to estimate emissions.

12 **I. The EIB’s Final Order is Arbitrary, Capricious, and Otherwise not in**
13 **Accordance with Law**

14 **A. Standard of Review**

15 {8} On appeal, this Court may set aside a determination of the EIB only if it is
16 found to be “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by
17 substantial evidence in the record; or (3) otherwise not in accordance with law.”
18 NMSA 1978, § 74-2-9(C) (1992). “An agency action is arbitrary and capricious if it
19 is unreasonable, if it provides no rational connection between the facts found and the
20 choices made, or if it entirely omits consideration of important aspects or relevant
21 factors of the issue at hand.” *N.M. Mining Ass’n. v. N.M. Water Quality Control*

1 *Comm’n*, 2007-NMCA-010, ¶ 22, 141 N.M. 41, 150 P.3d 991. “A ruling that is not
2 in accordance with law should be reversed if the agency unreasonably or unlawfully
3 misinterprets or misapplies the law.” *Id.* ¶ 11 (internal quotation marks and citation
4 omitted).

5 **B. The EIB’s Jurisdiction**

6 {9} Alto argues the EIB erred in concluding that it lacked jurisdiction to consider
7 whether the AP-42 emissions factor for public paved roads reflected actual
8 conditions at Roper’s concrete batch plant. Because “[t]he question of jurisdiction
9 compels an answer” and “when a jurisdictional claim is raised, the issue must be
10 decided before a court can review the case,” *Smith v. City of Santa Fe*, 2007-NMSC-
11 055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (internal quotation marks and citation
12 omitted), we turn first to address this argument. “We determine de novo whether an
13 agency has jurisdiction over the parties or the subject matter of a case.” *Citizen*
14 *Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 12, 143 N.M. 620, 179 P.3d 1228.

15 {10} NMED and Roper argue that “the AQB’s discretionary use of the AP-42
16 [emissions] factors is internal [NMED] policy over which the EIB does not have
17 jurisdiction.” Specifically, NMED contends that Alto advocates “impermissible de
18 facto rulemaking that strips Roper, the [NMED], and the people of New Mexico of
19 due process rights to weigh in on the promulgation of new regulations that would
20 impose new air quality standards.” The NMED further contends that “[b]ecause the

1 EIB has not promulgated regulations regarding the use of AP-42 [emissions factors],
2 and because the EIB does not have authority over internal [NMED] policy, the EIB
3 cannot dictate which AP-42 emission factors the [NMED] accepts, provided that . . .
4 issuing the permit will not cause or contribute to any exceedances.” The NMED and
5 Roper misapprehend Alto’s argument on appeal.

6 {11} Alto does not contend that the EIB has jurisdiction to impose a universally
7 applicable rule or requirement that all applicants must use a specific AP-42
8 emissions factor. Rather, Alto argues that the EIB has the authority to evaluate
9 whether a construction permit will cause or contribute to air contaminant levels in
10 excess of a national or state standard, and that the EIB cannot make such a
11 determination without being able to consider whether the applicant used an AP-42
12 emissions factor that accurately estimates emission levels at the proposed facility.

13 We agree.

14 {12} “Administrative bodies are the creatures of statutes. As such they have no
15 common law or inherent powers and can act only as to those matters which are within
16 the scope of the authority delegated to them.” *Pub. Serv. Co. of N.M. v. N.M. Env’t*
17 *Improvement Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223, 549 P.2d 638. In other
18 words, “[t]he subject matter jurisdiction of an administrative agency is defined by
19 statute, and an agency is limited to exercising only the authority granted by statute.”
20 *Citizen Action*, 2008-NMCA-031, ¶ 12. Thus, in determining the issue of jurisdiction

1 in this instance, we must construe the Air Quality Control Act (the AQCA) and
2 accompanying regulations. “We are not bound by an agency’s interpretation of a
3 statute, since it is a matter of law that is reviewed de novo.” *N.M. Mining Ass’n*,
4 2007-NMCA-010, ¶ 11.

5 {13} When construing a statute, “[o]ur main goal is to give effect to the
6 [L]egislature’s intent.” *Id.* ¶ 12. “[T]he plain language of a statute is the primary
7 indicator of legislative intent” and we are to “give the words used in the statute their
8 ordinary meaning unless the [L]egislature indicates a different intent.” *High Ridge*
9 *Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413,
10 970 P.2d 599 (internal quotation marks and citation omitted). “Agency rules are
11 construed in the same manner as statutes.” *N.M. Mining Ass’n*, 2007-NMCA-010,
12 ¶ 12.

13 {14} Pursuant to Section 74-2-7(C)(1), the EIB may deny an application for a
14 construction permit if it appears that the construction “(a) will not meet applicable
15 standards, rules or requirements of the [AQCA] or the federal act; (b) will cause or
16 contribute to air contaminant levels in excess of a national or state standard . . . ; or
17 (c) will violate any other provision of the [AQCA] or the federal act.” Nothing in the
18 plain language of Section 74-2-7(C)(1)(b), or any other section of the AQCA or the
19 applicable rules and regulations, limits what the EIB may consider in determining
20 whether construction will cause or contribute to air contaminant levels in excess of

1 a national or state standard. Indeed, NMED acknowledges that EIB *can* consider the
2 evidence of different emission factors to the extent that “there was a dispositive
3 showing that exceedances of air quality standards would occur.” NMED cites no
4 authority for its inclusion of a “dispositive showing” requirement, and we adopt no
5 such standard. “However, to the extent that the language could be considered
6 ambiguous, we can consider principles of statutory construction that are employed
7 with statutes that are unclear. In doing so, we must attempt to construe a statute
8 according to its obvious spirit or reason.” *Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-
9 032, ¶ 29, 146 N.M. 453, 212 P.3d 341 (internal quotation marks and citation
10 omitted).

11 {15} As noted, the AQB expert, citing federal guidelines, testified that AP-42
12 emissions factors “facilitate estimation of emissions from various sources of air
13 pollution.” *See* EPA, AP-42, *Introduction* at 1. Where, as here, an applicant uses an
14 AP-42 emissions factor to estimate its emissions, we hold that the EIB has
15 jurisdiction to consider whether the applicant’s use of that AP-42 emissions factor
16 reflects that the proposed operation “will cause or contribute to air contaminant
17 levels in excess of a national or state standard.” *See* § 74-2-7(C)(1)(b). A contrary
18 holding would, in effect, render the EIB unable to meaningfully review permitting
19 decisions when parties present conflicting emissions estimates based on disputed
20 calculations or factual assumptions. *See Dewitt*, 2009-NMSC-032, ¶ 31 (“In

1 effectuating the intent of the Legislature, we must avoid any interpretations that
2 would lead to absurd or unreasonable results.”). We conclude that the EIB erred in
3 determining that it lacked jurisdiction to consider whether the choice of the AP-42
4 emissions factor to estimate emissions for the proposed permit would “cause or
5 contribute to air contaminant levels in excess of a national or state standard.” *See*
6 § 74-2-7(C)(1)(b).

7 {16} Having concluded that the EIB erred in concluding that it lacked jurisdiction
8 to consider whether the AP-42 emissions factor for public paved roads reflected
9 actual conditions at Roper’s concrete batch plant, we hold that the EIB’s decision is
10 arbitrary and capricious, and not in accordance with law. *See N.M. Mining Ass’n,*
11 *2007-NMCA-010*, ¶¶ 11, 22 (stating that “[a] ruling that is not in accordance with
12 law should be reversed if the agency unreasonably or unlawfully misinterprets or
13 misapplies the law” and that “[a]n agency action is arbitrary and capricious . . . if it
14 provides no rational connection between the facts found and the choices made”
15 (internal quotation marks and citation omitted)). Therefore, we need not reach many
16 of Alto’s remaining arguments on appeal. As we explain, however, we find it prudent
17 to address two additional issues because we perceive that they are likely to arise
18 again on remand.

1 **C. The Parties’ Respective Evidentiary Burdens and the EIB’s Order**

2 {17} Alto also contends that the EIB misunderstood and misapplied the parties’
3 respective evidentiary burdens and did not include sufficient factual findings in the
4 final order. Alto submits that as a result, the EIB erroneously concluded that Alto
5 failed to fulfill its burden of production and sided with Roper whenever there was
6 conflicting evidence. “Nowhere was this more evident,” Alto argues, “than with
7 respect to Roper’s use of the AP-42 emissions factor for ‘public paved roads.’”
8 Because we are remanding to the EIB, we endeavor to provide the EIB and the
9 parties with clarity as to the parties’ respective evidentiary burdens and the
10 requirements for the final order. *See State v. Carrasco*, 1997-NMCA-123, ¶ 7, 124
11 N.M. 320, 950 P.2d 923 (addressing issues briefed by the parties that are likely to
12 reoccur on remand “in the interest of judicial economy”).

13 {18} “[T]he term ‘burden of proof’ has been used to describe two distinct concepts:
14 (1) the burden of persuasion, i.e., the burden to persuade the fact[-]finder; and (2)
15 the burden of production, i.e., the burden to produce evidence.” *Strausberg v. Laurel*
16 *Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 24, 304 P.3d 409. The burden of
17 persuasion “never shifts from one party to the other, at any stage of the proceedings.”
18 *Duke City Lumber Co. v. N.M. Env’t Improvement Bd.*, 1980-NMCA-160, ¶ 6, 95
19 N.M. 401, 622 P.2d 709 (internal quotation marks and citation omitted). The burden
20 of production, on the other hand, “may shift back and forth between the parties as

1 the [proceeding] progresses.” *Id.* (internal quotation marks and citation omitted). “It
2 is said that although a [petitioner] always has the burden of persuasion, which never
3 shifts, [they] may produce sufficient evidence that [their] opponent’s failure to
4 adduce contradictory proof either may lead to a decision for [petitioner], or must
5 lead to such a ruling.” *Id.*

6 {19} In an appeal before the EIB, “[t]he burden of proof shall be upon the
7 petitioner.” Section 74-2-7(K). “In a petition hearing, the petitioner has the burden
8 of going forward with the evidence and of proving by a preponderance of the
9 evidence the facts relied upon to justify the relief sought in the petition. Following
10 the establishment of a prima facie case by the petitioner, any person opposed to the
11 relief sought in the petition has the burden of going forward with any adverse
12 evidence and showing why the relief should not be granted.” 20.1.2.302 NMAC.
13 Based on this language, all parties agree, as do we, that the burden of *production*
14 shifted from Roper to Alto upon Roper’s establishment of a prima facie case, and
15 that the burden of *persuasion* remained with Roper. *See Duke City Lumber Co.*,
16 1980-NMCA-160, ¶ 6.

17 {20} Alto first submits that “the EIB [f]inal [o]rder does not address whether Roper
18 established a prima facie case entitling it to an air quality permit.” We disagree. The
19 EIB concluded in relevant part that Roper’s application “established that the
20 construction of the [f]acility meets the applicable statutory and regulatory standards,

1 will not cause or contribute to air contaminant levels in excess of national or state
2 standards . . . , and will not violate any other provision of the [AQCA].” See § 74-2-
3 7(C). Therefore, the EIB expressly concluded that Roper established its prima facie
4 case that the permit should issue.

5 {21} However, Alto asserts, even if Roper established a prima facie case, the EIB
6 erred because it misunderstood that it was the burden of *production*, and not the
7 burden of *persuasion*, that shifted from Roper to Alto. Additionally, Alto contends,
8 the EIB misunderstood what was required of Alto to fulfill the burden of production.
9 Alto submits that contrary to the EIB’s understanding, the burden of production does
10 not require Alto to prove that Roper’s permit application should not be granted. In
11 other words, Alto contends that it need not “disprove the facts that would sustain the
12 petition.” Instead, Alto argues that to fulfill its burden of production it was only
13 required to “raise doubt” as to the correctness of Roper’s permit application.

14 {22} In determining what was required of Alto to fulfill the burden of production,
15 we look to our decision in *Gemini Las Colinas, LLC v. New Mexico Taxation &*
16 *Revenue Department*, 2023-NMCA-039, 531 P.3d 622, a tax protest case. Because
17 *Gemini Las Colinas, LLC* involves a substantially analogous burden-shifting scheme
18 to that of the AQCA, we find it instructive as to whether Alto may fulfill the burden
19 of production simply by raising doubt as to the correctness of Roper’s permit

1 application, or whether it must present evidence showing that Roper’s permit should
2 not be granted.

3 {23} In *Gemini Las Colinas, LLC*, we held that at the outset of a tax protest “a
4 protesting taxpayer bears both the burden to produce evidence (in order to overcome
5 the presumption of correctness) and the burden to ultimately prove its case by a
6 preponderance of evidence.” *Id.* ¶ 27. If a taxpayer successfully carries their burden
7 to produce evidence, thereby rebutting the presumption of correctness applied to
8 agency tax assessments, the burden of production shifts to the department—the party
9 supporting the initial assessment. *Id.* ¶ 29. There, we held that to carry its burden of
10 production,

11 the department must put forth evidence to show the *correctness of its*
12 *assessment*—that is, evidence sufficient to make the correctness of the
13 department’s assessment a question of fact. The imposition of this
14 burden is sensible and pragmatic; it ensures that when the hearing
15 officer decides the case on its merits and acts as a fact-finder, the
16 hearing officer can consider the evidence presented by both parties.
17 Likewise, the existence of this burden means that *the department*
18 *cannot simply rely on the unreliability or incredibility of the taxpayer’s*
19 *evidence. Instead, the department must produce evidence to justify its*
20 *assessment. If the department’s evidence creates a question of fact*
21 *about the correctness of the assessment, it has fulfilled its burden of*
22 *production, and the case is ripe for the hearing officer to resolve factual*
23 *disputes and decide the protest on the merits.* Ultimately, at the merits
24 stage, the burden of persuasion remains on the taxpayer—the party who
25 bore it at the outset. As a result, if the evidence is in equipoise, the
26 hearing officer should deny the taxpayer’s protest.

27 *Id.* (emphasis added).

1 {24} Following the guidance provided in *Gemini Las Colinas, LLC*, in this
2 instance, we hold that once a petitioner has made a prima facie case, a person
3 opposed to the relief sought in the petition cannot fulfill the burden of production
4 simply by raising doubt as to the correctness of the petition. Rather, the person
5 opposed to the relief sought must go forward with adverse evidence showing why
6 the relief should not be granted. In the present context, Alto must produce evidence
7 showing that the construction and operation of the facility “(a) will not meet
8 applicable standards, rules or requirements of the [AQCA] or the federal act; (b) will
9 cause or contribute to air contaminant levels in excess of a national or state standard
10 . . . ; or (c) will violate any other provision of the [AQCA] or the federal act.” *See* §
11 74-2-7(C). Contrary to Alto’s argument, this holding does not constitute improper
12 burden shifting. Instead, it ensures that if both parties fulfill their burdens of
13 production, the case is ripe for the EIB to resolve factual disputes; the EIB can
14 consider the evidence presented by both parties, and decide the case on its merits.
15 And since, at the merits stage, the burden of *persuasion* remains on the petitioner, if
16 the EIB finds the evidence is evenly balanced or in equipoise, the EIB should deny
17 the petition.

18 {25} We pause to clarify that the EIB need not deny an applicant’s permit
19 application simply because it concludes that the person opposed to the relief sought
20 has fulfilled their burden of production. The EIB, in resolving factual disputes, may

1 make credibility determinations about the evidence before it. *See Skowronski v. N.M.*
2 *Pub. Educ. Dep't*, 2013-NMCA-034, ¶ 47, 298 P.3d 469 (“[T]he possibility of
3 drawing two inconsistent conclusions from the evidence does not prevent an
4 administrative agency’s finding from being supported by substantial evidence.”
5 (internal quotation marks and citation omitted)). However, in such an instance, that
6 the EIB’s analysis ultimately results in relief for the petitioner does not mean that
7 the person opposed to the relief sought did not fulfill their burden of production. *See*
8 *Gemini Las Colinas, LLC*, 2023-NMCA-039, ¶ 29 (“If the department’s evidence
9 creates a question of fact about the correctness of the assessment, it has fulfilled its
10 burden of production, and the case is ripe for the hearing officer to resolve factual
11 disputes and decide the protest on the merits.”).

12 {26} Next, we address the requirements for the EIB to produce a reviewable final
13 order. Regulation 20.1.2.403(B)(1) of the New Mexico Administrative Code
14 explicitly requires that the EIB’s final order “contain findings of fact, conclusions of
15 law, [and] *an order based on the findings and conclusions.*” (Emphasis added.) This
16 is important “because our review is of an administrative, rather than a judicial,
17 decision, [and] we will take care not to inappropriately tread on the executive
18 branch’s functions by looking for a factual or legal basis to support an agency’s
19 decision that is not stated by the agency as the underlying reason for its decision.”
20 *Gila Res. Info. Project v. N.M. Water Quality Control Comm’n*, 2005-NMCA-139,

1 ¶ 34, 138 N.M. 625, 124 P.3d 1164. “The Legislature has recognized that
2 administrative agencies must provide written factual and legal bases for their
3 decisions.” *Id.* ¶ 37; *see, e.g.*, NMSA 1978, § 39-3-1.1(B)(1) (1999). “This
4 recognition undoubtedly stems from not only the concepts of fairness and
5 transparency in administrative proceedings, but also from the difficulty in our
6 conducting effective and meaningful statutorily prescribed review.” *Gila Res. Info.*
7 *Project*, 2005-NMCA-139, ¶ 37; *see also Atlixco Coal. v. Maggiore*, 1998-NMCA-
8 134, ¶ 19, 125 N.M. 786, 965 P.2d 370 (“[I]n a formal, adjudicatory proceeding the
9 decision[]maker must rule on the material issues in dispute in a manner that is
10 sufficient to permit meaningful appellate review.”). Thus, on remand, EIB’s order
11 must include findings that explain why the evidence does or does not meet the
12 burden of production to show that the permit should be granted or denied, *see* § 74-
13 2-7(C), or if both parties meet the burden of production, how EIB evaluated the
14 evidence presented and on what basis EIB made its decision for one party or the
15 other. In order to appropriately cabin our review of administrative proceedings, this
16 Court must be able to determine the basis for the EIB’s decision, and to ascertain
17 whether the EIB understood and applied the parties’ respective evidentiary burdens
18 as set forth in this opinion.

1 **CONCLUSION**

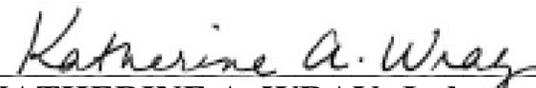
2 {27} We reverse the EIB’s final order and remand this case with instructions that
3 the EIB conclude that it has jurisdiction to consider whether the AP-42 emissions
4 factor for public paved roads reflected actual conditions at Roper’s concrete batch
5 plant, apply the evidentiary burdens as set forth herein, and articulate the basis for
6 its decision in its written final order in accordance with this opinion.

7 {28} **IT IS SO ORDERED.**

8 
9 _____
GERALD E. BACA, Judge

10 **WE CONCUR:**

11 
12 _____
SHAMMARA H. HENDERSON, Judge

13 
14 _____
KATHERINE A. WRAY, Judge