Court of Appeals of New Mexico
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Mark Reynolds

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ALTO COALITION FOR ENVIRONMENTAL PRESERVATION,

Appellant,

v. **No. A-1-CA-43795**

ROPER CONSTRUCTION, INC., NEW MEXICO ENVIRONMENT DEPARTMENT, and NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellees.

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**

APPELLANT'S DOCKETING STATEMENT

On Appeal from the Environmental Improvement Board
Case No. EIB 22-34

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Pursuant to Rule 12-208 and Rule 12-601 NMRA, Appellant Alto Coalition for Environmental Preservation ("Alto") submits this Docketing Statement in support of Alto's appeal from the New Mexico Environmental Improvement Board's ("EIB") September 8, 2026, Final Order in EIB Case Number 22-34 (the "EIB Final Order"). The EIB Final Order reversed the May 6, 2022, Final Order of the Deputy Secretary of Appellee the New Mexico Environment Department ("NMED Final Order"), in which the Deputy Secretary denied Appellee Roper Construction, Inc.'s ("Roper") application for an air quality construction permit for a proposed concrete batch plant near Alto, New Mexico (the "Alto Plant").

NATURE OF THE PROCEEDING

Alto brings this appeal pursuant to Section 74-2-9 of the New Mexico Air Quality Control Act (the "Act").[1] Alto submits that the EIB Final Order was arbitrary, capricious, an abuse of discretion, not based on substantial evidence, and otherwise not in accordance with law. In *Alto Coal. for Envt'l Preservation v. Roper Constr., Inc.*, 2025-NMCA-018, ¶¶ 16, 19-27, 572 P.3d 268, this Court concluded that the EIB had improperly failed to consider whether the AP-42 Compilation of Air Pollutant Emissions Factors for Stationary Sources ("AP-42") emissions factor specifically addressing haul roads at a concrete batch plant should have been applied to Roper's concrete batch plant, clarified the evidentiary burdens, and remanded the

[1] NMSA 1978, §§ 74-2-1 through 74-2-17 (1967, as amended through 2021).

case back to the EIB with instructions to enter an order with findings of fact and conclusions of law explaining why Alto's evidence does or does not meet the burden of production.

On remand, the EIB once again failed to make findings of fact on numerous, key factual issues that were critical to assessing whether Roper's permit application complied with the permitting criteria set forth in the Act, the Air Quality Control Regulations [20.2.72 NMAC] (the "Regulations"), and the New Mexico Environment Department's ("NMED") permitting guidelines [20.1.4 NMAC], including whether the AP-42 emissions factor for concrete batch plant haul roads should apply to Roper's emissions modeling for the Alto Plant.[2]

The Court issued its mandate on June 30, 2025, but the EIB did not address the remand until fourteen (14) months later, on August 28, 2026. While it is clear the EIB should have applied the concrete batch plant haul road emissions factor to Roper's emissions modeling, the EIB wholly ignored the evidence regarding that factor. The emissions factor, based specifically on "silt loading" on haul roads within a "concrete batching" facility, is specifically sanctioned and recommended by the

[2] Because this is the second appeal related to EIB Case Number 22-34, Alto will limit the discussion in this Docketing Statement to include only those facts related to the following issues: (1) the appropriate AP-42 factor to be applied to Roper's emissions modeling; (2) Roper's proposal to sweep and apply water to roads at the Alto Plant; (3) the EIB's failure to conduct a meaningful review; and (4) the EIB's failure to provide any notice to Alto of the EIB's second deliberations.

United States Environmental Protection Agency ("U.S. EPA") for sites like the proposed Alto Plant. This silt loading factor accurately depicts concrete batch plant haul roads because pollutants are constantly replenished on the roadway and 8-ton construction vehicles typically traverse the haul roads and generate heavy silt loading. Rather than consider this appropriate factor, the EIB simply accepted Roper's use of the inapplicable "paved public roads" emissions factor, which is based on silt loading caused by light vehicles traveling at high speeds on highways and other public roads. The EIB's decision conflicts with the Deputy Secretary of the NMED's determination that Roper's use of the silt loading factor for "paved public roads," as opposed to the correct silt loading factor for a "concrete batching" facility, was incorrect and unjustifiable.

The EIB Final Order states in conclusory terms without explanation that Roper's use of the public paved roads emission factor was appropriate.[3] The EIB Final Order also states without support that Alto did not present adverse evidence showing why Roper's permit application should be denied. The EIB Final Order did not include findings to support the EIB's determinations, and its conclusions are contrary to the record. In fact, Alto presented significant adverse evidence, i.e., proof that the AP-42 emissions factor for haul roads at "concrete batching" facilities

[3] The Commission never actually referred to the AP-42 factor by name and only referenced this factor as the "one used in the permit application."

applied to Roper's application and resulted in emissions that exceeded the applicable air quality standards by nearly 260%. Alto also produced adverse evidence demonstrating that the "concrete batching" emissions factor represents actual conditions of the haul roads at the Alto Plant. Nowhere within the Final Order is this evidentiary material discussed. Instead, the EIB failed to consider the record and ignored the AP-42 emissions factor for haul roads at concrete batch plants even though this Court had instructed the EIB to do so.

In failing to consider the evidence, the EIB Final Order also does not address Alto's evidence that Roper's proposed used of "controls," such as sweeping and applying water to roads, is not relevant to the U.S. EPA's determination that the emissions factor for haul roads within a concrete batching facility should be used to model emissions for that facility. Alto's evidence demonstrated that the AP-42 emissions factor for haul roads does not consider whether "controls" would be implemented, because those controls are deemed ineffective. Moreover, Alto submitted evidence that sweeping would actually increase the silt-loading on the haul roads at the Alto Plant. Alto also underscored that Roper had produced no evidence showing the existence of an available water source to implement the wet dust suppression system and that a condition to water the road was federally unenforceable. The EIB Final Order included no findings of fact or conclusions of law regarding these issues.

Additionally, the EIB did not provide notice to Alto in advance of the EIB's deliberations following remand. Although the EIB knew Alto's contact information, Alto received no notice that the EIB intended to deliberate on EIB 22-34 at the EIB's August 28, 2026, meeting. Alto did not learn of this meeting until after it had occurred. As a result, the EIB deprived Alto of any meaningful opportunity to participate in the proceeding and to advocate its position, depriving it of procedural due process.

STATEMENT OF TIMELY APPEAL

The EIB issued its Final Order on September 8, 2026. Pursuant to NMSA 1978, Section 74-2-9(A), Alto timely filed its Notice of Appeal of the EIB Final Order on September 28, 2026, or twenty (20) days after the EIB Final Order.

STATEMENT OF THE CASE

I. The Secretary of the NMED Denied Roper's Air Quality Permit Application.

On June 14, 2021, Roper applied to the NMED for an air quality construction permit under the Act. Roper sought to construct and operate a concrete batch plant in a predominantly residential neighborhood near Alto, New Mexico (the "Property"). The Air Quality Bureau ("AQB") of the NMED accepted and processed Roper's application. The AQB determined that due to the overwhelming public opposition to the application – including on the part of Alto's constituents, many of whom live and work around the Property – the application warranted a public

hearing. Hearing Officer Gregory Chakalian was appointed to oversee the public hearing, hear evidence, and make proposed findings of fact and conclusions of law.

On February 9, 2022, the NMED convened the public hearing on Roper's permit application. Alto presented voluminous technical evidence contesting Roper's emissions modeling and proposed emissions controls. The NMED Hearing Officer also heard public comment on the Alto Plant, the vast majority of which was negative.

After a fulsome hearing before the NMED, the NMED Hearing Officer recommended that the Deputy Secretary deny Roper's air quality permit. The NMED Hearing Officer based his decision to deny Roper's permit on numerous omissions and inaccuracies in the permit application, including the following:

1. In projecting Roper's total emissions at the Alto Plant, Roper was required to account for the emissions caused by truck traffic on the haul roads at the Alto Plant. "Silt loading," which occurs when vehicles traveling along a roadway "kick up" or redeposit loose contaminants on the road's surface, greatly impacts the extent of these haul road emissions. The NMED Hearing Officer found that Roper "arbitrarily and unjustifiably" used the "silt-loading factor" – a representative value used in calculating silt loading at particular locations – for "paved public roads," instead of the correct silt-loading factor for industrial haul-roads within a "concrete batching" facility that the U.S. EPA specifically sanctioned and recommended for sites like the proposed Alto Plant.

2. The emissions factor for public paved roads is based on silt loading caused by light vehicles traveling at high speeds, like passenger cars on a highway. The NMED Hearing Officer found that this emissions factor is wholly inapplicable to calculating the redeposition of particulate matter from the heavy construction vehicles that will travel the haul roads at the Alto Plant.

3. Even without considering the significant errors in Roper's emissions analysis, Roper claimed that it could only comply with applicable air quality standards and the prevention of significant determination ("PSD") increment by implementing an unidentified "wet dust suppression system," which supposedly would reduce emissions. According to Roper, using this wet dust suppression system would still result in emissions at or near the regulatory maximums, i.e., 99.3% of the PSD increment and 83.1% of PM10 over a 24-hour period. The system would also require a staggering 3,030,414 gallons of water per year to operate. The NMED Hearing Officer noted that Roper failed to show the existence of an available water source to implement any wet dust suppression system, let alone one that would require 3,030,414 gallons of water per year.

On June 22, 2022, the Deputy Secretary of the NMED issued a Final Order (i) adopting the NMED Hearing Officer's findings of fact and conclusions of law in their entirety; and (ii) denying Roper's permit application. The Deputy Secretary concluded that Roper failed to meet its burden of proving that the Alto Plant would meet applicable requirements of the Regulations and not cause or contribute to air contaminant concentrations more than applicable state and federal ambient air quality standards, or applicable PSD increments.

II. Proceedings before the EIB.

On July 22, 2022, Roper petitioned the EIB to overturn the NMED's denial of Roper's air quality permit. On August 15, 2022, the EIB appointed Richard Virtue to preside as the EIB hearing officer (the "EIB Hearing Officer"), and scheduled a public hearing for October 18 to October 20, 2022. The EIB's Order Appointing Hearing Officer, however, did not direct the EIB Hearing Officer to prepare proposed Findings of Fact or Conclusions of Law as to contested issues. *See*

20.1.2.109 NMAC ("The hearing officer shall exercise all powers and duties prescribed or delegated under the act or this part.").

a. The U.S. EPA AP-42 Protocol

The U.S. EPA's AP-42 protocol is commonly recognized in the construction industry as the gold standard for determining emissions. As the NMED has recognized, use of AP-42 emissions factors for air dispersion modeling is standard practice by regulatory agencies across the United States. *See, e.g., In the Matter of the Petition for Hearing on Air Quality Permit No. 8585*, EIB No. 21-48, Final Order at ¶¶ 40-51 (August 26, 2022), available at https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/09/2022-08-26-EIB-21-48-Final-Order-signed-pj-2.pdf (noting that the AP-42 is "the best data that we have . . . .")

The AP-42 protocol sets forth different emissions factors that correspond to typical site conditions at particular types of facilities. Use of the correct emissions factor will significantly impact a facility's total projected emissions. Section 13.2.1 of the AP-42 derives its specific emissions for roadways from data based on actual site conditions for different roadway types, including the "mean speed of vehicles, the average daily truck traffic, the number of lanes, and the fraction of heavy vehicles traveling on the road."

During the EIB proceedings, Alto argued that it was critical to use the correct emissions factor from the AP-42 because of the concept of silt-loading, which

greatly influences the extent of emissions from trucks traveling on industrial haul roads. As noted in the EIB Hearing Officer's Report, "silt-loading" refers to the resuspension of loose material on the road surface that contributes to the emission of particulate matter, *i.e.*, the "kicking up" of contaminants from the road surface into the air. The "silt-loading factor" is a variable that the U.S. EPA uses in calculating emissions from particular types of emission sources – *e.g.*, from concrete batch plant haul roads or public paved roads – and the U.S. EPA includes those factors in its AP-42. In determining proper emissions from the Alto Plant, it was fundamental to use the emissions factor that the U.S. EPA specifically designated to represent the actual conditions of the haul roads at the Alto Plant.

Confirming that the "concrete batching facility" factor should be applied instead of the "paved public road" factor, Alto established that:

- the speed limits on freeways and other public paved roads generally far exceed the 15 MPH speed limit that Roper proposes for the Alto Plant, and the significantly higher speeds on public paved roads results in markedly less silt loading and redeposition of particulate on the roadway;

- vehicles traveling on freeways and other public roads are mainly light vehicles, which produce nowhere near the silt loading generated by the 8-ton construction vehicles that will populate the haul roads at the Alto Plant; and

- on a concrete batch plant haul road, pollutants are "constantly being replenished [on the roadway] by vehicles traversing from material handling areas or operating in other areas of the facility."

Alto also presented the EIB with uncontroverted evidence establishing that the emissions factor for haul roads within a concrete batch plant represents the actual conditions at the proposed Alto Plant. For example, the concrete batch plant haul roads emissions factor:

- accounts for the surface material contributing to silt loading at the Alto Plant, like aggregate, sand, concrete, and cement;
- incorporates the effect of emissions caused by the operation of heavy to medium-weighted vehicles, such as exhaust emissions, brake wear, and tire wear, all of which contribute to the loosening of material on roads near the plant;[4] and
- is based on actual trips of 62 to 160 per day at similar concrete batch plants, which is highly representative of Roper's proposed operation.

Alto presented uncontroverted evidence demonstrating the impact that use of different emissions factors had on total haul road emissions at the Alto Plant. For instance, Alto showed that using the correct AP-42 emissions factor for concrete batch plant haul roads to calculate haul road emissions at the Alto Plant results in a cumulative concentration of PM10 for 24-hour NAAQS of 172.3 ug/m3. This would exceed the maximum allowable standards of 150 ug/m3 by 14.9% and mandate denial of the permit. Also, the standard for PM10 based on the 24-hour Class II PSD

[4] The EPA itself has given the silt loading factor for concrete batch plants an A-rating. This means that the EPA considers the factor to be reliable and representative of site conditions and concrete batch plants like the Alto Plant. Further, because the A-rating is based on data from numerous, randomly selected, industrial facilities, the concrete batch plant silt-loading factor better accounts for the variability of site conditions across different concrete batch plants.

increment is 30 ug/m3. Alto presented undisputed evidence that the silt loading factor for concrete batch plants results in a cumulative concentration of 77.6 ug/m3, or 258.7% of the allowable standard. This exceedance would also mandate denial of Roper's permit.

Attorneys for the NMED, who argued against the final decision of their client, defended Roper's decision to disregard the silt loading factor for concrete batch plants on the grounds that "the proposed haul road will be controlled, and [AP-42 for concrete batch facilities] did not take into consideration control measures applied to haul roads." Roper and the NMED, however, presented no evidence on what these haul road controls would be, or how they could possibly be enforced, nor did Roper provide any evidence of a water source needed to implement the purported haul road controls.

Moreover, Alto's emissions expert, Dr. Ituarte-Villareal, testified that the AP-42 silt loading factor for concrete batch plants does not differentiate between controlled and uncontrolled haul road emissions. This is, in part, because loose particulate on the surface of the roadway is constantly being redeposited. This necessarily reduces or entirely eliminates the effectiveness of any controls. In addition, the emissions factor for batch plant haul roads is based on data from both controlled and uncontrolled haul roads. As a result, even if the haul roads at the Alto Plant could be "controlled" by some unspecified and enforceable mitigation

measure, the silt loading factor for batch plants is based on data from other "controlled" haul roads and would still apply.

Although the AP-42 contains "control factors" for reducing emissions[5] – like sweeping or watering – for other types of facilities, Dr. Ituarte-Villareal explained that those control factors did not apply to haul roads within concrete batch plants. He further opined that even if the EIB were to superimpose the unenforceable condition of "sweeping" the roads, it would still result in an "increase in silt loading of at least seven times what was presented on the application."[6] Roper, meanwhile, presented no evidence on what specific "controls" Roper would use to reduce particulate haul road emissions at the Alto Plant. The Final Permit itself is also silent on any specific haul road emission controls, or enforcement of those controls.

b. Lack of Available Water Source

Finally, Alto's evidentiary presentation before the EIB focused on the fact that the Alto Plant would require an enormous amount of water to safely operate. For instance, Alto's water expert, former State Engineer and Commissioner of the Bureau of Reclamation, Eluid Martinez, established that Roper's proposed wet dust

[5] *See* AP-42 § 13.2.1.4 ("Controls").

[6] The AP-42 notes that sweeping may actually result in an increase of particulate emissions. *See* AP-42 § 13.2.1.4 ("It is particularly important to note that street sweeping of gutters and curb areas may actually increase the silt loading on the traveled portion of the road. Redistribution of loose material onto the travel lanes will actually produce a short-term increase in the emissions.").

suppression system alone – which Roper would need to comply with emissions standards – would consume approximately 82,000 gallons of water per day. Roper presented no evidence on the amount of water needed to control fugitive dust from the haul road or stockpiles, or Roper's ability to procure it. Further, Alto showed that of the three options for delivering water to the Alto Plant – *i.e.*, on site water, a water pipeline, or water trucks– only trucking the water in is feasible. Yet, Roper failed to include water trucks in its haul road emissions model, again underestimating the facility's actual emissions.

The NMED took the position that it could not require Roper to prove an available water source to implement required emission controls. However, Alto established that NMED had imposed stringent requirements for other control technologies, requiring Roper to "install two particular types of baghouses, manufactured by a particular company, including the use of a different pressure gauge and special sensors, all of which are intended to ensure that the emission rates as stated in the Application satisfy the PSD increment and NAAQS for PM." Further, an NMED witness testified that "nothing in the Air Quality Control Act or the regulations prevents the Bureau from requiring the Applicant to prove an available source of water to implement required emission controls." Ultimately, Roper provided no evidence it could obtain the vast amount of water needed to implement the wet dust suppression system or its other emissions controls.

III. The EIB's Hearing Officer Did Not Take a Position of Which AP-42 Factor to Apply or Other Contested Issues.

The EIB Hearing Officer did not enter findings of fact or conclusions of law on contested issues in this case, including which AP-42 silt-loading factor applied to the Alto Plant, even though the EIB's rule allowed the EIB to direct the hearing officer to do so. (*See supra* at 8). Because the EIB did not direct the EIB Hearing Officer to make recommended findings and conclusions of law on contested issues, the EIB Hearing Officer left those issues to the EIB to decide. That is, the EIB Hearing Officer's Report offered comments on contested issues but contained Recommended Findings of Fact and Conclusions of Law only as to uncontested procedural matters.[7]

The EIB Hearing Officer reaffirmed many of the same concerns with Roper's application that the NMED Deputy Secretary had cited in the decision denying Roper's permit. The EIB Hearing Officer found that "[t]he record does not appear to establish that the permit conditions are sufficient to meet the applicable air quality standards, if the omissions and discrepancies in the calculation of haul road truck emissions alleged by [Alto] are found to be credible by the Board."

The EIB Hearing Officer commented that "the central issue appears to be

[7] Had the EIB directed the EIB Hearing Officer to address contested issues, the EIB Hearing Officer likely would have accepted the uncontroversial proposition that Roper should have used the emissions factor specifically intended for concrete batch plant haul roads to calculate emissions from Roper's concrete batch plant haul roads.

whether the use of AP-42 emissions factor for paved roads used by Roper and approved by the NMED is more reflective of actual conditions at the site of the proposed Facility than the AP-42 emission factor for cement batch plant haul roads." On this topic, he noted that, "Alto's [] evidence shows a major difference in modeling results when [the emissions factor for cement batch plant haul roads] is applied to the modeling done by Roper," and that "the record does not show any defects in the methodology and accuracy of [Alto's technical witnesses'] modeling results." He noted that U.S. EPA guidance states that if site specific data is unavailable, then selecting AP-42 from the chart provided by the EPA is the best way to ensure accuracy in emissions calculations. The EIB Hearing Officer found that Alto's evidence on silt loading was significant and worthy of discussion and resolution by the EIB.

With respect to the proposed permit conditions relating to (i) use of a wet dust suppression system, and (ii) haul road emission "controls," the EIB Hearing Officer emphasized that "NMED's position regarding its authority [to regulate] water quan[t]ity [*sic*] appears inconsistent with its testimony." That is, the NMED testified that "there is no prohibition in the Air Quality Act or the regulations that would prevent the Bureau from requiring the applicant to prove an available source of water to implement required emission controls."

IV. In its First Deliberations, the EIB Incorrectly Concluded that it Did Not Have Jurisdiction to Consider Which Emissions Factor Roper Should Have Used in Emissions Modeling and it Misunderstood the Applicable Burden of Proof.

On March 24, 2023, the EIB held a public meeting to consider Roper's petition, and to address any remaining fact issues that the EIB Hearing Officer left undecided. Aside from misstating the applicable burden of proof, the EIB acknowledged that it had, in fact, disregarded Alto's emissions calculations, stating that Alto did not "do an adequate job of providing all of the calculations and all of the information" to verify Alto's calculations. EIB Member Garcia then speculated that "perhaps [Alto] could have changed the Department's mind" if Alto had provided complete modeling information. It is undisputed, however, that besides using the (correct) emissions factor for concrete batch plant haul roads, Alto used the precise emissions model that NMED and Roper did. Thus, NMED's experts could have easily verified Alto's modeling results simply by plugging in the correct emissions factor.

Additionally, Member Garcia maintained that the AP-42 protocol is just a guideline that the NMED is not required to use, and that use of the correct emissions factor therefore did not matter. She stated, in relevant part:

> But I think since the use of AP-42 emission factors is discretionary on the Department's part – in other words, the AP-42 emission factors are not regulations. If they were regulations under the Department's purview, then the Department has to use them. They have to. And then we could, as a Board then say, you didn't use them, you should have,

> you were wrong. In this case, AP-42 emission factors are a guideline, but in my understanding, the Department has discretion whether to use them or not, and *in some cases, they use them, in other cases, they don't*. They have that discretion. So – and we've dealt with these before in a previous case, whether or not they should be used – I do recall in a previous case. (emphasis added).

In other words, Member Garcia stated that because the AP-42 is not codified as an NMED regulation, the EIB was not required to use it. Ms. Garcia explained:

> So, since it's a guideline, it's not -- it's not a regulatory requirement, it's up to the Department whether a permittee uses them and which ones they use. So[,] in this case, *I guess I would defer to the Department as to whether AP-42 emission factors are appropriate*, which factor is appropriate to use. So, you know, it's different than a regulation, it's a guideline.

Based on this reasoning, the EIB declined to address which emissions factor was appropriate and proceeded to ignore all of the other issues that Alto raised during the EIB hearing, deferring to NMED staff. The EIB then voted 4-1 to approve the petition.

On May 30, 2024, following the hearing, the EIB entered its initial final order ("Initial Final Order"). The Initial Final Order did not meaningfully address Alto's evidence on numerous issues, including, *inter alia*: (1) use of the correct AP-42 silt loading factor;[8] (2) Roper's failure to quantify or identify an adequate water supply to implement essential emissions controls; or (3) the lack of any specific information

[8] The EIB Final Order concludes that "the EIB does not have jurisdiction over the Applicant's use of AP-42." EIB Final Order at ¶ 60.

about the emissions controls that Roper would be required to implement, or how NMED would monitor those controls and ensure that they were effective.

Addressing the correct AP-42 emissions factor, the Initial Final Order merely states, without more, that "[t]he Department determined that the emission factor used in the calculations were appropriate for this source type and were approved by the Department…The Applicant's use of AP-42 was reasonable and in accordance with the law." [EIB Initial Final Order ¶¶ 19, ¶ 77]. To reach this conclusion, however, the EIB had to find that Roper proved by a preponderance of the evidence that silt loading factor for public paved roads better represented site conditions at the Alto Plant than the silt loading factor specific to concrete batch facilities. *See* NMAC 21.1.2.302. This required the EIB to compare the conditions at the Alto Plant to those at which the different silt loading factors were based. The EIB did not do so.

V. Appeal of the Initial Final Order.

On June 20, 2023, Alto appealed the EIB's Initial Final Order reversing the denial of Roper's application for an air quality construction permit for the Alto Plant. Alto asserted, *inter alia*, that the EIB acted arbitrarily or capaciously, abused its discretion, and did not act in accordance with law by concluding that it lacked jurisdiction to consider which AP-42 emissions factor Roper should have used in Roper's haul road emission modeling. In doing so, Alto underscored that the EIB had ignored Alto's evidence that: (1) distinguished site conditions for public paved

roads (on which the silt loading factor for public paved roads is based) from actual site conditions at the Alto Plant; and (2) established that the silt loading factor for concrete batch plants represents actual conditions at the Alto Plant. Alto emphasized that the EIB improperly deferred to the NMED staff on the AP-42 issue and that this deference was also arbitrary and capricious given the EIB's abdication of its fact-finding function and failure to provide any explanation or analysis.

Alto also asserted that the EIB's failure to consider Alto's evidence on the use of the correct silt loading factor caused the EIB to misapply regulatory permitting criteria and draw incorrect conclusions concerning Roper's actual emissions. Counsel for the NMED defended Roper's decision to disregard the silt loading factor for concrete batch plants on the grounds that the proposed haul road would allegedly be controlled by unspecified sweeping or watering. Alto stated that there was no evidence supporting this statement.

Alto's technical expert explained that even if the EIB were to superimpose the inapplicable AP-42 control factors for sweeping, it would still result in an impermissible increase of silt loading.

VI. The Court of Appeals Opinion

On May 14, 2025, the Court entered its opinion captioned, *Alto Coal. for Envt'l Preservation v. Roper Constr., Inc.*, 2025-NMCA-018, 572 P.3d 268. The Court addressed whether the Initial Final Order was arbitrary, capricious, and not in

accordance with law. The Court specifically addressed whether the EIB had jurisdiction to consider the AP-42 emissions factor and the respective evidentiary burden for Roper and Alto.

The Court reversed the Initial Final Order and remanded the case to the EIB. The Court concluded that the EIB's determination that it lacked jurisdiction to consider the AP-42 emissions factor was arbitrary and capricious and not in accordance with law. *Alto Coal. for Envt'l Preservation*, 2025-NMCA-018, ¶ 15. The Court also clarified the evidentiary burdens for Roper and Alto. The Court held that the burden of establishing a prima facie case rested with Roper and that Roper carried the burden of persuasion, which never shifts. *Id*. ¶¶ 19, 24. The Court explained that Alto carried the burden of production, which required evidence showing that the construction and operation of the Alto Plant "(a) will not meet applicable standards, rules or requirements of the [AQCA] or the federal act; (b) will cause or contribute to air contaminant levels in excess of a national or state standard . . . ; or (c) will violate any other provision of the [AQCA] or the federal act.". *Id*. ¶ 24 (citing NMSA 1978, § 74-2-7(C)). The Court explained that because the burden of persuasion remains on the petitioner, i.e., Roper, "if the EIB finds the evidence is evenly balanced or in equipoise, the EIB should deny the petition." *Id*.

Finally, the Court addressed the EIB's requirement to produce a reviewable final order. *Id*. ¶ 26. The Court emphasized that the EIB's final order must "*contain*

findings of fact, conclusions of law, [and] *an order based on the findings and conclusions*." *Id*. (emphasis in original) (citing 20.1.2.403(B)(1) NMAC). Consequently, the Court unequivocally instructed that the EIB's final order must "include findings that explain why the evidence does or does not meet the burden of production to show that the permit should be granted or denied, . . . or if both parties meet the burden of production, how EIB evaluated the evidence presented and on what basis EIB made its decision for one party or the other." *Id*. (citing NMSA 1978, § 74-2-7(C)). The Court issued its mandate on June 30, 2025.

VII. The EIB's Second Deliberations

On August 28, 2026, – approximately one year and two months after the Court issued its mandate – the EIB held a public meeting to purportedly deliberate on Roper's petition following remand from the Court. At the beginning of its deliberations, the EIB went into a closed, executive session to receive a litigation update from its counsel. After a brief period back on the record, the EIB then went back into another closed session to deliberate on this matter. Because Alto was not notified of this meeting, it was not present and it is uncertain how long the EIB deliberated in the closed session. The EIB also did not disclose what was discussed during its secret session.

During the open session of the meeting, the EIB first determined whether the "original AP-42 emissions factor," which the EIB did not refer to by name but simply

referenced as the one "used in the permit application," was the correct emissions factor. The EIB summarily concluded that the "paved public roads" factor was appropriate. In explaining the basis for this determination, Member Holbert mischaracterized site conditions. She incorrectly stated that the AP-42 factor for a "concrete batching" facility, again which was not referenced by name and instead referred to as "the factor that Alto used," was for an "*unpaved*, *uncontrolled*" surface. (emphasis added). She based her opinion on the mistaken belief that the concrete batch haul roads emission factor does not contemplate mitigation efforts. The other Members of the Board agreed with Member Holbert's explanation.

The EIB's reliance on Member Holbert's comments demonstrates that the EIB did not actually consider the evidence, much less meaningfully deliberate on these issues. Table 13.2.1-3 of the AP-42, which provides for the silt-loading factor of a "concrete batching" facility, plainly states that the loading values are "FOR PAVED ROADS AT INDUSTRIAL FACILITIES." (all caps in original). Alto's expert also explained that the AP-42 emissions factor for "concrete batching" facilities does not differentiate between controlled and uncontrolled haul roads and is based on data from both. Further demonstrating that the EIB did not consider the record, Member Holbert stated that her opinion came only from one exhibit filed by NMED Counsel, not from any testimony about the issue, again exhibiting the improper deference the EIB accorded to the NMED.

The EIB then analyzed whether each party had met their respective burden. Relying on the same incorrect explanation that Member Holbert provided, the EIB determined that Roper met its burden to establish a prima facie case and that Alto did not meet its burden of production. The EIB reached this unsupportable conclusion by ignoring the critical technical evidence that Alto presented, which unequivocally demonstrated that Roper could not meet applicable air quality standards, including that: (1) the AP-42 emissions factor for "concrete batching" facilities represented the actual conditions at the proposed Alto Plant; (2) the application of the "concrete batching" factor to Roper's emissions modeling demonstrated an exceedance of air quality standards by up to 260% of the permitted emissions; (3) Roper had failed to show the existence of an available water source to implement any wet dust suppression system even though Roper claimed it could only comply with applicable air quality standards and the PSD increment by implementing this system; and (4) the technical evidence proved that Roper's proposal to sweep roads at the Alto Plant would actually result in an "increase in silt loading of at least seven times what was presented on the application."

The EIB's illusory deliberations demonstrated that the EIB did not engage in the appropriate burden shifting framework established by this Court. Rather than considering the entire record, the EIB again deferred to NMED staff, simply citing one filing submitted by counsel for the NMED, and deciding to reverse the Deputy

Secretary of the NMED's denial of Roper's application for an air quality construction permit. The EIB failed to explain how Alto did not meet its burden of production and failed to consider all of the technical evidence that demonstrated Roper's operation of the Alto Plant would exceed applicable air quality standards.

VIII. The EIB Final Order.

On September 8, 2026, the EIB issued the EIB Final Order. Despite the Court's instructions on the appropriate way to conduct the proceedings on remand, the EIB Final Order does not include any findings of fact or conclusions of law or explain how the EIB reached its determinations. Specifically, the EIB Final Order includes no findings of fact or conclusions of law with respect to any of the technical evidence, including the evidence that Alto presented. Instead, the EIB's determinations are limited to just three paragraphs, which are only two to five sentences in length.

On the issue of whether the "paved public roads" factor that Roper used in its modeling was appropriate, the EIB Final Order cited one exhibit submitted by counsel for NMED, which in turn concluded without analysis that the AP-42 emissions factor used in Roper's application was the correct emissions factor. Contrary to the record, the EIB Final Order also concluded that "Alto did not go forward with adverse evidence showing why the relief should not be granted." The EIB Final Order based this determination not upon an evaluation of any testimony

or record evidence, but on the same, single exhibit submitted by NMED counsel.

The EIB Final Order departs significantly from the Court's decision that required the EIB to meaningfully review the record and apply the evidentiary burdens between the parties. Even with clear instructions from this Court, the EIB has shown that it cannot or will not properly conduct a hearing and deliberate on this important air quality issue.

STATEMENT OF ISSUES

Alto states the following issues for purposes of this Docketing Statement and reserves the right to raise additional issues.

ISSUE 1:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law by failing to consider the emissions factor that the U.S. EPA has specifically designated for haul roads within concrete batch plants to calculate emissions from Roper's haul roads, where use of the correct emissions factor would have caused Roper's emissions to significantly exceed applicable air quality standards?

(b) Did the EIB lack substantial evidence to support its decision to ignore the correct AP-42 silt loading factor for haul roads within concrete batch plants, where the record supports the application of that factor and establishes that use of

the correct emissions factor would have caused Roper's emissions to significantly exceed applicable air quality standards?

Procedural Posture:

This issue arose during the EIB Hearing, the EIB Initial Final Order, and in the EIB Final Order, when the EIB failed to consider whether the AP-42 emissions factor for paved roads at a "concrete batching" facility should have been applied to Roper's haul road emissions modeling for Roper's concrete batch plant. Alto preserved this issue in its hearing testimony and post-hearing briefing, as well as by timely filing its Notice of Appeal on September 28, 2026.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(C) (setting out the standard for denying an application for a construction permit).

20.2.72.208 NMAC (setting out the regulatory standard for denying an application for a construction permit).

20.1.4 *et seq.* NMAC (setting forth NMED permitting criteria for minor source air quality construction permit).

40 C.F.R. § 63.2 (defining "federally enforceable" conditions).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, ¶ 14 101 N.M. 291 (holding that a court "may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole").

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses, reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Gila Res. Info. Project V. New Mexico Water Control Comm'n, 2005-NMCA-139, ¶¶ 34-37, 138 N.M. 625, 124 P.3d 1164 (holding that the New Mexico Water Quality Commission's unexplained conclusions prevented meaningful appellate review and warranted summary reversal).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

In Re Peabody Western Coal Co., 2005 WL 428833, at *8 (EAB) (holding that to be enforceable, permit condition had to be "practically enforceable" by specifying: (1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily,

monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting.").

In the Matter of the Petition for Hearing on Air Quality Permit No. 8585, EIB No. 21-48, Final Order at ¶¶ 40-51 (August 26, 2022), available at https://www.env.nm.gov/opf/wp-content/uploads/sites/13/2022/09/2022-08-26-EIB-21-48-Final-Order-signed-pj-2.pdf (NMED recognizes that use of AP-42 emission factors for air dispersion modeling is standard practice by regulatory agencies across the United States and is "the best data that we have . . . .").

Table 13.2.1-2 of the U.S. EPA AP-42: Compilation of Air Pollutant Emission Factors.

Table 13.2.1-3 of the U.S. EPA AP-42: Compilation of Air Pollutant Emission Factors.

AP-42 § 13.2.1.4 (discussing emission "controls").

ISSUE 2:

(a) Did the EIB act arbitrarily or capriciously, abuse its discretion, or not act in accordance with law by failing to consider the evidence that Alto presented, including the technical evidence, where that evidence demonstrated that Roper's emissions significantly exceeded applicable air quality standards?

(b) Did the EIB lack substantial evidence to support its decision where that decision ignored the technical evidence submitted by Alto, and where that evidence demonstrated that Roper's emissions significantly exceeded applicable air quality standards?

Procedural Posture:

This issue arose during the EIB's Second Deliberations and in the EIB Final Order, when the EIB failed to consider all of the evidence in the record, including the evidence that Alto presented. Alto preserved this issue by filing its Notice of Appeal, which was filed on September 28, 2026.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

NMSA 1978, § 74-2-7(C) (setting out the standard for denying an application for a construction permit).

20.2.72.208 NMAC (setting out the regulatory standard for denying an application for a construction permit).

20.1.4, *et seq*. NMAC (setting forth NMED permitting criteria for minor source air quality construction permit).

40 C.F.R. § 63.2 (defining "federally enforceable" conditions).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 19, 125 N.M. 786 (an agency must rule on the material issues in dispute in a manner that is sufficient to permit meaningful appellate review).

Id. at ¶ 21 ("[T]he final order cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.").

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

Duke City Lumber Co. v. New Mexico Env't Improvement Bd, 1984-NMSC-042, ¶ 14, 101 N.M. 291 (holding that a court may not accept part of the evidence and totally disregard other convincing evidence in the record considered as a whole).

Matter of Termination of Boespflug, 1992-NMCA-138, ¶ 8, 114 N.M. 771 (it is the duty of the ALJ to weigh testimony and determine credibility of witnesses, reconcile inconsistent or contradictory statements, and determine where the truth lies).

Trujillo v. Employment Sec. Dept., 1987-NMCA-008, ¶ 17, 105 N.M. 467 (an agency is required to review and consider all of the evidence, not just supporting evidence, to determine whether the agency decision is supported by the evidence).

In re Two Petitions for a Hearing on Merits Regarding Air Quality Permit, No. 2037-MI, 2014 WL 7187148, at *3 (N.M. Ct. of App.) (holding that the absence of findings of fact supporting a conclusion is arbitrary and capricious) (unpublished opinion).

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.1984) (it was error for an ALJ to ignore or misstate competent evidence in the record to justify his conclusion).

Gila Res. Info. Project V. New Mexico Water Control Comm'n, 2005-NMCA-139, ¶¶ 34-37, 138 N.M. 625, 124 P.3d 1164 (holding that the New Mexico Water Quality Commission's unexplained conclusions prevented meaningful appellate review and warranted summary reversal).

Wilson v. Employment Sec. Comm'n, 1963-NMSC-085, ¶ 34, 74 N.M. 3 (holding that it is the fact finder's duty to resolve conflicts over disputed factual issues).

ISSUE 3: Did the EIB commit a clear error of law by failing to include any findings or explanation to support the EIB's decision to reverse the Deputy Secretary's denial of Roper's application for an air quality construction permit?

Procedural Posture:

This issue arose during the EIB's Second Deliberations and in the EIB Final Order. Alto preserved the issue by timely filing its Notice of Appeal on September 28, 2026.

Authorities:

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

20.1.2.403(B)(1) NMAC ("The final order shall contain findings of fact, conclusions of law, an order based on the findings and conclusions . . . .").

Alto Coal. for Envt'l Preservation v. Roper Constr., Inc., 2025-NMCA-018, ¶¶ 26-27, 572 P.3d 268 (holding that a final order from the EIB must "contain findings of fact, conclusions of law, [and] *an order based on the findings and conclusions*." (emphasis in original)).

Atlixco Coalition v. Maggiore, 1998-NMSC-134, ¶ 27, 125 N.M. 786 (an agency must provide findings and conclusions of law to support the agency's decision).

Fasken v. Oil Conservation Comm'n, 1975-NMSC-009, ¶ 8, 87 N.M. 292, 532 P.2d 588 (holding that an agency must make findings sufficient to disclose its

reasoning in reaching its ultimate findings (setting aside agency orders where that reasoning was absent).

Gila Res. Info. Project V. New Mexico Water Control Comm'n, 2005-NMCA-139, ¶¶ 34-37, 138 N.M. 625, 124 P.3d 1164 (holding that the New Mexico Water Quality Commission's unexplained conclusions prevented meaningful appellate review and warranted summary reversal).

ISSUE 4: Whether the EIB's failure to provide notice to Alto that the EIB would be deliberating on Roper's application for an air quality permit was so unreasonable such that it violated Alto's right to procedural due process?

Procedural Posture:

This issue arose before the EIB's Second Deliberations when the EIB failed to provide any notice to Alto that the EIB anticipated secretly deliberating on Roper's application for an air quality construction permit. Alto preserved the issue by timely filing its Notice of Appeal on September 28, 2026.

Authorities:

N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law.").

U.S. Const. amend. XIV, § 1 (providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law").

NMSA 1978, § 74-2-9(C) (authorizing the Court of Appeals to set aside an EIB decision if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regul. Comm'n, 2014-NMSC-008, ¶ 9, 319 P.3d 1284 (holding that an agency may abuse its discretion if it acts "not in accordance with legal procedure" by failing to consider evidence in a meaningful way).

TW Telecom of New Mexico, L.L.C. v. New Mexico Pub. Regulation Comm'n, 2011-NMSC-029, ¶ 17, 150 N.M. 12 (in an administrative proceeding, procedural due process rights extend to members of the public whose interests are affected by the outcome of the proceeding; these rights afford, at a minimum, the right to "reasonable notice and opportunity to be heard.").

N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 568 (To be "reasonable," an opportunity to be heard must be at a "meaningful time and in a meaningful manner").

Amkco, Ltd., Co. v. Welborn, 2001-NMSC-012, 130 N.M. 155 (party's interest in the use and enjoyment of property gave rise to procedural due process rights).

Los Chavez Cmty. Ass'n v. Valencia Cnty., 2012-NMCA-044, ¶ 12, 277 P.3d 475 (appellate courts "review questions of constitutional law and constitutional rights, such as due process protections, *de novo*.").

Joab, Inc. v. Espinosa, 1993-NMCA-113, ¶ 15, 116 N.M. 554 (where permit opponent had opportunity to present rebuttal evidence on proposed controls and cross-examine the applicant about controls, opponent was not denied procedural due process).

Id. at ¶ 18 (protected interest against private nuisance triggered procedural due process rights).

State ex rel. Battershell v. City of Albuquerque, 1989-NMCA-045, ¶ 15, 108 N.M. 658 (due process requires agency to apply its rules "equally and fairly to all persons properly before it.").

STATEMENT REGARDING RECORDING OF PROCEEDINGS

Upon information and belief, the EIB public hearings were both video and audio recorded through WebEx. These recordings are publicly available on the NMED website under Docketed Matters (EIB hearing) and Archived Docketed Matters (Air Quality Bureau hearing). EIB meeting recordings are available on the NMED YouTube channel.

RELATED OR PRIOR APPEALS

Alto appealed the EIB's Initial Final Order on June 20, 2023. The Court of Appeals issued its Opinion in that appeal on May 14, 2025, reversing the Initial Final Order for the reasons described above.

CONCLUSION

The EIB Final Order is arbitrary and capricious, an abuse of discretion, not based upon substantial evidence, and otherwise not in accordance with law, and the Court should reverse the EIB Final Order and affirm the Deputy Secretary of the NMED's decision to deny Roper's application for an air quality construction permit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Alto Coalition of Environmental Preservation's Docketing Statement* was electronically served and sent via U.S. mail, postage prepaid, as indicated below, to each of the following on this 28th day of October 2026:

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