



STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED REPEAL
OF REGULATIONS

No. EIB 11-15(R)

20.2.350 – GREENHOUSE GAS REDUCTION PROGRAM
20.2.300 – REPORTING OF GREENHOUSE GAS EMISSIONS
20.2.301 – GREENHOUSE GAS REPORTING VERIFICATION REQUIREMENTS

MOTION TO STRIKE OR OTHERWISE EXCLUDE
NMED'S PRE-FILED TESTIMONY

New Energy Economy, Inc. (NEE) requests the Hearing Officer to strike or otherwise exclude all of the testimony pre-filed by the New Mexico Environment Department (NMED). First, EIB lacks jurisdiction to resolve the issues that the testimony raises concerning the validity of Rule 350, because these same issues are pending before the Court of Appeals. Second, in accord with the doctrine of judicial estoppel, NMED should be precluded from advocating repeal of the Rule in this proceeding after it successfully advocated for adoption of the Rule last year in formal proceedings before the EIB. Third, the testimony of Butch Tongate regarding climate change, economics and other technical issues should be stricken for lack of competence and relevance.

ARGUMENT

- I. EIB cannot resolve the issues raised by NMED's witnesses while the same issues are pending on appeal before the Court of Appeals.

The New Mexico Environmental Improvement Board (EIB) issued final orders adopting Rules 100 and 350 in EIB Case Nos. 08-19(R) and 10-04(R), respectively, referred to herein as the "prior proceedings." *Order and Statement of Reasons for Adopting Regulations* (SOR), EIB Case No. 08-19(R) (Rule 100); *SOR*, EIB Case No. 10-04(R) (Rule 350). EIB's final orders are directly and exclusively appealable to the Court of Appeals. NMSA 1978, 74-1-9; NMSA 1978,

§ 74-2-9. Petitioners timely filed a total of fourteen separate appeals of EIB's final SORs in EIB Case Nos. 08-19(R) and 10-04(R).

The filing of petitioners' notices of appeal divested EIB of jurisdiction over the matters at issue in the prior proceedings, just as the filing of an appeal from the final order of a district court divests the district court of jurisdiction. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"); Gonzales v. Surgidev Corp., 120 N.M. 151, 156 (1995) ("The purpose of divesting a district court of jurisdiction while a judgment is on appeal is to 'avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time'") (internal citation omitted); Kelly Inn No. 102 v. Kapnison, 113 N.M. 231, 241-242 (N.M. 1992) ("The trial court loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed to the judgment pending at the time. ... Divestiture occurs by the taking of an appeal because the appeal removes the litigation from the district court") (internal citations omitted); Lorain Edn. Assn. v. Lorain City School Dist. Bd. of Edn. 46 Ohio St. 3d 12, 15, 544 N.E.2d 687 (1989) ("When a notice of appeal from a decision of an administrative agency has been filed, the agency is divested of its inherent jurisdiction to reconsider, modify, or vacate the decision.")

In the instant proceeding, petitioners raise multiple issues that purportedly call into question the validity of Rule 350. See, e.g., Petitioners' Joint Petition to Repeal Rule 350 (alleging that Rule 350 was not supported by substantial evidence, will harm New Mexico's economy, is technically infeasible, will not abate or prevent air pollution, is contrary to public

welfare, is beyond EIB's power to adopt, conflicts with state and federal law, will drive up costs, will drive out businesses, will harm power reliability, etc.). In their pre-filed testimony, petitioners present numerous witnesses, and NMED presents two witnesses, purporting to support petitioners' multi-pronged attack on the validity of Rule 350. Petitioners' witnesses are, by and large, the same witnesses who testified in the prior proceedings last year. Both petitioners and NMED advocate repealing Rule 350 for the same reasons that petitioners advocated not adopting Rule 350 in the prior proceedings, which EIB expressly rejected in its final SORs that are now on appeal in the Court of Appeals.¹ Accordingly, all of the testimony offered by NMED to repeal Rule 350 should be stricken or otherwise excluded, because EIB lacks power to reverse itself or resolve issues regarding the validity of Rule 350 while the same issues are pending before the Court of Appeals. Id.

II. NMED should be precluded from taking inconsistent positions

Last year NMED successfully argued that EIB should adopt Rules 300, 301, and 350. Among other things, NMED presented numerous witnesses and exhibits showing that these Rules were technically and administratively feasible; that these Rules would help mitigate climate change; that these Rules would help or at least not hurt New Mexico's economy; and that these Rules served the best interests of New Mexico and its citizens. See, generally, SOR Rule 100, SOR Rules 300 and 301 (Exhibit A); SOR Rule 350. EIB relied on NMED's testimony in adopting the Rules. Although NMED may be allowed to convey Governor Martinez' well-known disagreement with NMED's prior staunch advocacy of the Rules,² the agency itself

¹ Petitioners summarized all the appellate issues in their closing arguments in EIB 10-04(R), which are available at <http://www.nmenv.state.nm.us/eib/pastpleadingshtml.htm>, under the heading "EIB 10-04 (R) Proposed Greenhouse Gas Cap and Trade ~ Pleading Log and Documents" (open link "EIB 10-04 Pleading Documents 84-93").

² The Governor, however, has no control over EIB (New Energy Econ., Inc. v. Martinez, 2011 NMSC 6), and her opinions are no more relevant in this proceeding than other public comment.

should not be allowed to casually reverse itself from one formal administrative proceeding to the next:

The primary purpose of the judicial estoppel rule is to prevent parties from "playing fast and loose with the court" by successfully arguing one position and then later adopting a position inconsistent with the first. ... In Guzman v. Laguna Development Corp., 2009 NMCA 116, PP 13-14 ..., for example, we held that a defendant was judicially estopped from arguing to the district court that workers' compensation was the exclusive remedy for the plaintiff's injury because, at an earlier proceeding before the Workers' Compensation Administration, the defendant had successfully argued that the employee was not acting in the course and scope of employment and that workers' compensation was therefore inapplicable.

Keith v. ManorCare, Inc., 2009 NMCA 119, 39; see also Citizens Bank v. C & H Constr. & Paving Co., 89 N.M. 360, 366 (Ct. App. 1976) (holding that "judicial estoppel ... is not, however, strictly a question of estoppel" but "simply means that a party is not permitted to maintain inconsistent positions in judicial proceedings. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him"); Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 891 (9th Cir. Alaska 1992) (applying judicial estoppel against the Government). Accordingly, in the interest of sound public policy and the integrity of EIB proceedings, and in accordance with the doctrine of judicial estoppel, the Hearing Officer should strike all of NMED's testimony.

III. The testimony of Butch Tongate should be stricken for lack of competence.

In his testimony, NMED employee Butch Tongate takes issue with various alleged positions of the "proponents" of Rule 350 (Tongate at 3, 4, 7 and 8), citing out-of-context several statements made by these "proponents" in the prior proceedings and disregarding the fact that NMED was Rule 350's "proponent." Mr. Tongate claims that Rule 350 is merely "symbolic,"

that the Rule will produce no environmental benefits, that the Legislature failed to pass certain bills supported by NMED relating to cap and trade, that the Rule will hurt New Mexico's economy, and that the Rule imposes a "regressive tax." Nothing in Mr. Tongate's resume indicates that he is qualified to testify on these technical issues. Moreover, although Mr. Tongate may have knowledge about what the Legislature did or did not do, it is unclear why this information is relevant to the issues pending before EIB.³ Therefore, Mr. Tongate's testimony should be stricken for lack of competence and for lack of relevance.

WHEREFORE, for the reasons set out above, NEE requests the Hearing Officer to strike or otherwise exclude all of the testimony filed by NMED in this proceeding on or around September 15, 2011.

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CERTIFICATE OF SERVICE: I certify that I caused a copy of the foregoing paper to be emailed to Petitioners' attorneys and Stephen Vigil on 10/19, 2011.

RBFR
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³ Moreover, if this information were relevant, then Mr. Tongate should also have mentioned that the Legislature failed to pass several bills to repeal Rules 100, 300, 301, and 350 that were introduced during the last regular session.

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD



IN THE MATTER OF PROPOSED NEW REGULATIONS,
20.2.300 NMAC – *Reporting of Greenhouse Gas Emissions*
20.2.301 NMAC – *Greenhouse Gas Emissions – Verification Requirements*
AND PROPOSED REPEAL OF REGULATION,
20.2.87 NMAC – *Greenhouse Gas Emissions Reporting*

No. EIB 10 -09 (R)

ORDER & STATEMENT OF REASONS FOR ADOPTION OF REGULATIONS

This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“NMED” or “Petitioner”), proposing new regulations 20.2.300 NMAC – *Reporting of Greenhouse Gas Emissions* and 20.2.301 NMAC – *Greenhouse Gas Emissions Verification Requirements* and the repeal of 20.2.87 NMAC – *Greenhouse Gas Emissions Reporting*. A public hearing was convened in Santa Fe, New Mexico on November 8, 2010. The Board heard technical testimony from Petitioner and other interested parties and admitted exhibits into the record. On November 10, 2010, the Board having familiarized itself with the record and the audio transcript of the proceedings, deliberated and adopted the proposed new regulations with changes suggested by the Department and the New Mexico Oil and Gas Association (“NMOGA”) and repealed 20.2.87 NMAC by an affirmative vote of 5 to 1 for the reasons that follow:

PROCEDURAL HISTORY

1. The Department filed its Petition for Regulatory Change on July 30, 2010. PL 1.
2. On August 13, 2010, NMOGA filed a Response to the Department’s Petition for Regulatory Change. PL 4.
3. The Department filed its Notice of Intent on August 31, 2010. PL 5.



4. On October 15, 2010, NMOGA filed its Notice of Intent. PL 11.
5. On October 22, 2010, the Department filed a Motion for Procedural Order.
6. On October 25, 2010, the Department filed its Notice of Intent to Present Rebuttal Testimony.
7. On October 29, 2010, NMOGA filed its Response to the Departments Motion for Procedural Order.
8. On November 3, the Department filed a Reply in Support of its Motion for Procedural Order.
9. On November 4, 2010, the Hearing Officer issued Procedural Order.
10. On November 8, 2010, the Board convened a public hearing in Santa Fe, New Mexico and heard technical testimony from Petitioner and other interested parties and admitted exhibits into the record.
11. On November 10, 2010, the Department and NMOGA entered into a stipulation regarding changes to the proposed rules which the Board accepted.
12. On November 10, 2010, the Board deliberated and voted 5 to 1 to: (1) adopt NMED's proposed regulations with the changes suggested by the Department and NMOGA and (2) to repeal 20.2.87 NMAC.

STATEMENT OF REASONS

The reporting regulation establishes greenhouse gas (GHG) reporting requirements for the following emissions source categories:

- General Stationary Fuel Combustion Sources
- Electricity Generation
- Cement Production
- Hydrogen Production
- Lead Production
- Lime Manufacturing

- Nitric Acid Production
- Petrochemical Production
- Petroleum Refineries
- Zinc Production

The verification regulation establishes verification requirements for a portion of these emission reports, including requirements for verifiers.

The existing GHG reporting regulation, 20.2.87 NMAC - *Greenhouse Gas Reporting*, is repealed to prevent duplication.

I. STATUTORY AUTHORITY

1. The Board is authorized to adopt the proposed regulations. GHGs are "air contaminant[s]". The Air Quality Control Act (AQCA), §74-2-2(A), defines "air contaminant" as "a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof." This definition is broad enough to include GHGs, including carbon dioxide, methane, nitrous oxides, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride.

2. The Board may adopt regulations to prevent or abate air pollution, including reporting and verification. The AQCA, §74-2-5(B)(1), authorizes the Board to adopt regulations to "prevent or abate air pollution...within the geographic area of [its] jurisdiction." GHG emissions constitute air pollution which can be prevented or abated through implementation of 20.2.350 NMAC (Part 350) - *Greenhouse Gas Cap and Trade Provisions*.

3. The Board has the statutory authority to require GHG reporting and verification. The Act, §74-2-5(C)(5), authorizes the Board to "require any person emitting any air contaminant to ... (c) establish and maintain records of the nature and amount of emissions; (d) submit reports regarding the nature and amounts of emissions and the performance of emission

control devices; and (e) provide any other reasonable information relating to the emission of air contaminants." Additionally, the Board has the necessary and appropriate authority to adopt the verification regulation to ensure the accuracy of reporting for purposes of Part 350.

II. BASIS AND NEED

4. Since the Board adopted the reporting requirements in Parts 73 and 87, the U.S. Environmental Protection Agency (EPA) has adopted national rules for such reporting. Proposed Part 300 harmonizes the state and federal reporting requirements. In addition, Parts 300 and 301 establish comprehensive, uniform, and accurate mandatory reporting of GHG emissions to support Part 350.

5. Part 350 establishes requirements designed to reduce GHGs from affected facilities. GHGs endanger the public health, welfare, property, and environment by causing or contributing to global warming. This warming destabilizes the global climate, causing or contributing to a range of harms in New Mexico, including reduced snowpack, increased evaporation, earlier and more intense precipitation events, more severe flooding and drought, increased human morbidity and mortality, agricultural disruptions, and damaged ecosystems.

III. REGULATIONS

6. The regulations are technically practicable for the affected facilities. The reporting regulation is based on the reporting rules adopted by the U.S. Environmental Protection Agency (EPA). EPA has determined that the technology required to measure and report GHG emission is either currently used or readily available. The verification regulation is technically practicable because verification relies on record keeping by the affected facility.

7. The regulations are economically reasonable for the affected facilities. EPA already requires facilities emitting 25,000 metric tons CO₂e or more per year to measure and report GHG emissions. For most affected facilities emitting less than this, recordkeeping and reporting requirements are straightforward and do not require emission monitoring or the installation of new equipment. Therefore, the marginal cost of the proposed regulations is minor.

8. In developing the regulations, the Department consulted a wide range of sources, including the reporting rules proposed or adopted by EPA and the reporting and verification essential requirements proposed by the Western Climate Initiative, as well as stakeholders in the State of New Mexico.

9. The regulations establish a transparent, accurate, and consistent accounting system that measures and reports GHG emissions from affected facilities. These qualities are important to ensure equity among reporters who participate in a common allowance trading market, because each ton of emissions from those reporters translates directly into a financial obligation or benefit. Part 350 requires that another jurisdiction have reporting and verification requirements comparable to those in the proposed regulations as a condition of New Mexico accepting compliance instruments originating in that jurisdiction.

10. The regulations support Part 350. The first compliance period runs from 2012-2015. The regulation requires affected facilities to commence emission reporting with 2011 emissions. The reported emissions for 2011 will inform the Department's allocation of allowances, while reported emissions for subsequent years will be used to determine the facility's compliance obligations at the end of the compliance period.

11. The reporting regulation establishes requirements for facilities in industrial categories existing in New Mexico or which could be proposed in New Mexico in the next

several years. The Department will monitor the development of industrial facilities and propose additional reporting requirements as necessary.

12. The reporting regulation establishes basic requirements for all reporters, including reporting obligations, emissions quantification methodologies, report content, and recordkeeping. The regulation is structured as a modification of the EPA greenhouse gas reporting requirements. The modification is necessary to ensure the high accuracy of emissions quantification required to implement a cap-and-trade program.

13. The reporting regulation establishes the threshold of 10,000 metric tons CO₂e per year, as well as the mechanism for affected facilities to cease reporting if their emissions fall below the threshold in later years. Emissions for which the regulation specifies a quantification method are counted toward the threshold, unless otherwise provided. For instance, a petroleum refinery with a cogeneration unit must include emissions from that unit with those from the refining operation in order to determine whether the facility exceeds the threshold. Emissions from sources under common ownership or common control on non-adjacent or non-contiguous properties are not aggregated unless the properties are separated only by a public roadway or other public right-of-way, as specified by the U.S EPA definition of "facility" incorporated by reference in the proposed reporting regulation.

14. The Board adopted 20.2.300 NMAC as presented by the Department with the following amendments:

a. 20.2.300.100 is amended to include the date of publication of the Technical Corrections amendment and the Federal Register page number as follows:

20.2.300.100 ADOPTION OF 40 CFR PART 98. Except as otherwise provided, the following subparts of 40 CFR Part 98, as amended in the Federal Register through October 28, 2010 (75 FR 66434), are hereby incorporated by reference.

b. 20.2.300.103.C NMAC is amended as follows:

C. Section 98.34 [Monitoring and QA/QC requirements] is modified as follows.

(1) ~~A new sentence is added at the end of the introductory paragraph of 98.34(b)(3)(ii)(E): The equipment necessary to perform daily sampling and analysis of carbon content and molecular weight for refinery fuel gas shall be installed no later than January 1, 2012.~~ The following is added at the end of the introductory paragraph of 98.34(b)(3)(ii)(E): For any refinery not defined as a small refinery in 40 CFR 80.1101(g), equipment necessary to perform daily sampling and analysis of carbon content and molecular weight for refinery fuel gas shall be installed no later than January 1, 2012. For any small refinery, as defined in 40 CFR 80.1101(g), with refinery fuel gas accounting for greater than 10% of the heat input, sampling and analysis of carbon content and molecular weight for refinery fuel gas shall be performed a minimum of three days per week in calendar year 2012 and the equipment necessary to perform daily sampling and analysis shall be installed no later than January 1, 2013.

(2) [Reserved]

c. 20.2.300.106.B NMAC is deleted as it was duplicative of the language in 20.2.300.103.C NMAC.

15. 20.2.87 NMAC – *Reporting of Greenhouse Gas Emissions* must be repealed because it will be rendered duplicative by the EPA greenhouse gas reporting regulation and the reporting regulation.

16. The verification regulation requires affected facilities to obtain third-party verification of emission reports and establishes requirements for verifier accreditation and for determining conflicts of interest. Third-party verification ensures the integrity of allowances in a market system.

17. Verification is required for affected facilities reporting more than 25,000 metric tons CO₂e per year of emission, the threshold for inclusion in Part 350. Affected facilities may

discontinue verification if their emissions drop below this threshold upon a showing that the drop is real and that there is no outstanding compliance obligation.

18. Verification costs are expected to be reasonable, given that the intensity of the verification effort is based on risk of error, which will be lower for these reports than for voluntary GHG reports. These emissions reports will be subject to enforcement action by EPA as well as the State of New Mexico. EPA requires reporting of production and other process data and will employ data checking algorithms to determine if the reported emissions are consistent with the other reported data.

19. The Board adopted 20.2.301 NMAC as presented by the Department with the following amendment to subparagraph 101.E:

20.2.301.101

E. Owners and operators of any facility required to obtain, or voluntarily obtaining, verification of their emissions report in compliance with this Part shall complete the verification process and submit the verification report to the department no later than:
(1) ~~August 1, 2012, for reports of emissions in calendar year 2011;~~ and
(2) ~~April~~ September 1 of the year following the calendar year in which the emissions occurred, ~~for reports of emissions in calendar years after 2012.~~

ORDER

By an affirmative vote of 5 to 1, the proposed new regulations were approved by the Board on November 10, 2010 with the amendments as described in this Order and Statement and 20.2.87 NMAC was repealed. The proposed new regulations are to be set forth in Section 300 and 301 of 20.2 NMAC with any appropriate corrections of typographical errors, formatting, or other changes necessary to file these regulations with the New Mexico State Records Center.

The regulations described in this Order are hereby adopted, to be effective 30 days after filing with the State Records Center.

A handwritten signature in black ink, appearing to read "Gay Dillingham", written over a horizontal line.

Gay Dillingham, Chair
On Behalf of the Board

Dated: 11-12-10