



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
ALL OF PETITIONERS' PRE-FILED TESTIMONY

New Energy Economy, Inc. (NEE) requests the Hearing Officer to strike or otherwise exclude all of the testimony pre-filed by petitioners. 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, pursuant to the public policy against multiplicity of suits, petitioners should not be allowed multiple bites at the apple.

ARGUMENT

I. EIB cannot resolve the issues raised by Petitioners' 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." Exhibit A—*Order and Statement of Reasons for Adopting Regulations* (SOR), EIB Case No. 08-19(R) (Rule 100); Exhibit B—*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 orders in EIB Case Nos. 08-19(R) and 10-04(R). Exhibit C at 10-11 (NEE's Motion to Intervene in PNM's appeal of Rule 100); Exhibit D at 11 (NEE's Motion to Intervene in PNM's appeal of Rule 350).

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 a district court's final order 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 purporting to support petitioners' multi-pronged attack on the validity of Rule 350. These witnesses are, by and large, the same witnesses who testified in the prior proceedings last year. They 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 Exhibit A; Exhibit B. Accordingly, all of the testimony offered by petitioners to repeal Rule 350 should be stricken or otherwise excluded, because EIB lacks power to reverse itself or resolve the issues regarding the validity of Rule 350 while the same issues are pending before the Court of Appeals. Id.

II. Petitioners cannot have multiple bites at the apple.

EIB's refusal so far to recognize the jurisdictional flaw in the instant proceeding² unjustly enables petitioners to have multiple bites at the apple, thus assisting petitioners in their quest to generate multiple administrative proceedings, lawsuits, and extraordinary writ proceedings on the same issues. In the prior proceedings, petitioners argued extensively and presented numerous witnesses and evidence against adoption of Rule 350 and Rule 100. During the course of the Rule 100 proceeding, they brought an unconstitutional lawsuit against EIB in Lea County District Court, forcing NEE to intervene in the suit and ultimately requiring it to obtain a writ of superintending control from the New Mexico Supreme Court. New Energy Econ., Inc. v. Shoobridge, 2010 NMSC 49. After EIB rejected petitioners' arguments and entered final SORs adopting Rules 100 and 350, petitioners filed fourteen separate appeals.

After the election of Governor Martinez, the newly-appointed EIB entered into an *ex parte*

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 In their Joint Motion for Remand and other pleadings, EIB and petitioners implicitly acknowledge the sticky jurisdictional problems created by having dual proceedings on the same matter (i.e., the validity of the Rules) pending at the same time before the Court of Appeals and EIB. See NEE's Reply in Support of Motion to Strike Portions of Petitioners' Statement of Reasons.

agreement with petitioners, pursuant to which petitioners filed joint petitions to repeal Rules 100 and 350, thus initiating the current proceedings in which petitioners raise the same issues and repeat the same arguments. The law abhors multiplicity of suits—it wastes limited resources, causes needless duplication, and leads to inconsistent results. State v. Manzanares, 100 N.M. 621 (1983); United Nuclear Corp. v. Fort, 102 N.M. 756, 761 (Ct. App. 1985). Accordingly, if EIB will not dismiss their petitions outright, the Hearing Officer should at least prevent petitioners from offering the same evidence and litigating the same issues in the current proceedings that they offered and fully litigated in the prior proceedings and that are currently on appeal. Cf. Shovelin v. Central N.M. Elec. Coop., 115 N.M. 293 (1993) (“The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ‘ultimate facts or issues actually and necessarily decided in a prior suit’”) (internal citations omitted).

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

NEW MEXICO ENVIRONMENTAL LAW
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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 10/14, 2011.

R37R

R. Bruce Frederick

STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD



IN THE MATTER OF THE PETITION TO ADOPT NEW)
REGULATIONS WITHIN 20.2 NMAC, STATEWIDE AIR)
QUALITY REGULATIONS, TO REQUIRE GREENHOUSE)
GAS EMISSIONS REDUCTIONS)
)
)
NEW ENERGY ECONOMY, INC. PETITIONER)
_____)

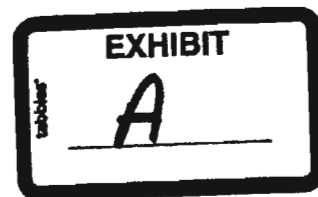
EIB No. 8-19 (R)

ORDER AND STATEMENT OF REASONS FOR ADOPTION OF REGULATION

This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by New Energy Economy (“NEE” or “Petitioner”), proposing new regulations within 20.2 NMAC. A public hearing was convened in Santa Fe, New Mexico on August 16 through 20, 2010 and October 5 through 6, 2010. The Board heard technical testimony from Petitioner and other interested parties and admitted exhibits into the record. On December 6, 2010, the Board having familiarized itself with the record and the transcript of the proceedings, deliberated and adopted the proposed new regulations with several amendments by an affirmative vote of 4 to 1 and 1 recusal for the reasons that follow:

PROCEDURAL HISTORY

1. December 19, 2008 and February 2, 2009, respectively, Petitioner filed an original and a corrected regulatory proposal to the Board.
2. On January 5, 2009, pursuant to Section 74-1-9(A) of the EIA and Section 74-2-6(A) AQCA, the Board held a public meeting to “determine whether or not to hold a hearing” on the Petitioner’s “proposed regulation.” Several opponents urged the Board to deny the Petition



for Hearing, alleging that the Board lacked the authority to consider Petitioner's regulatory proposal. In response to opponents' arguments, the Board instructed the parties to brief the issue of the Board's jurisdiction and authority, appointed a hearing officer, and informed the parties that it would take up the matter again at its April 6, 2009 meeting.

3. On April 6, 2009, after hearing extensive public comment, briefing and oral argument, the Board decided that it "had the authority to hear this case" and scheduled a hearing.

4. On October 14, 2009, the Hearing Officer (Gay Dillingham) issued her First Order for Hearing Procedures.

5. On December 31, 2009, public notice was published on the Petitioner's regulatory proposal.

6. On January 13, 2010, a group state legislators, corporations and industry associations filed a lawsuit against the Board in the Fifth Judicial District in Lea County.

7. On January 14, 2010, the Hearing Officer (Gay Dillingham) issued her Second Order for Hearing Procedures.

8. On February 17, 2010, the Hearing Officer (Gay Dillingham) issued a Third Order for Hearing Procedures and an Order on March 1, 2010 hearing procedures.

9. On March 1, 2010, the Board held a public hearing for the sole purpose of taking public comment on NEE's Petition.

10. On March 2, 2010, the Petitioner submitted its Notice of Intent to Present Technical Testimony ("NOI"), which included pre-filed technical testimony and, pursuant to 20.1.1.302 NMAC, recommended changes.

11. On March 12, 2010, several opponents filed a Motion to Strike Petitioner's Technical Testimony.

12. On April 1, 2010, the Hearing Officer (Felicia Orth) denied the Motion and ordered additional notice on Petitioner's recommended changes to be published. This additional notice was published On April 15, 2010.

13. On April 29, 2010, the District Court issued a temporary injunction effectively halting the Board's proceedings in this matter.

14. On May 4, the Hearing Officer issued an Order staying prehearing deadlines and hearing dates.

15. Petitioner and the Attorney General sought review of the injunction in the New Mexico Supreme Court.

16. The Supreme Court ordered the Lea County court to dismiss opponents' case and dissolve the injunction issued against the Board. *See New Energy Economy v. Shoobridge*, 2010-NMSC-049.

17. On June 16, 2010, the District Court dissolved the temporary injunction and dismissed the case.

18. On June 18, 2010, Petitioner filed an Emergency Motion to Lift Stay and Resume Hearing Pursuant to Modified Schedule. The Hearing Officer then issued an Order lifting the stay.

19. On July 16, 2010, all other interested parties filed their NOIs.

20. On August 6, 2010, all parties filed their NOIs to present rebuttal testimony.

21. On August 12, 2010, NMOGA, et al. filed a Motion for Summary Disposition. The Board refused to consider the motion as it was filed late according to the Board's rules.

22. On November 22, 2010, all parties filed closing arguments.

23. On November 22, 2010, NMOGA filed a Motion to Disqualify Board Member John Horning.

24. At the December 6, 2010 meeting, Board Member Horning announced on the record that he would recuse himself from voting and any further participation in the matter.

LEGAL AUTHORITY

1. The Board is authorized by the Air Quality Control Act ("AQCA") to adopt regulations "to prevent or abate air pollution...within the geographic area of [its] jurisdiction." NMSA 1978, § 74-2-5(B).

2. "In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to: (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved." NMSA 1978, § 74-2-5(E).

3. A court will not reverse the Board's decision to adopt Part 100 unless the Board's decision 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, § 74-2-9(C).

STATEMENT OF REASONS

I. Character and Degree of Injury & Public Interest.

1. Public interest in and support of the proposed regulation was demonstrated throughout the hearing. Tr. 1 at 276-292; Tr. 2 at 370-378, 381-391; Tr.4 at 52-71, 73-105; Tr. 6 at 18-21, 24-33; Tr. 7 at 297-300, 351-368; Tr. 8 at 344-41.

2. The United States Environmental Protection Agency (“EPA”) described the relationship between GHG emissions, climate change and injury to public health and welfare in its recent “Endangerment Finding”:

The specific issue here is whether an effect on human health that results from a change in climate should be considered when EPA determines whether the air pollution of well-mixed greenhouse gases is reasonably anticipated to endanger public health. In this case, the air pollution has an effect on climate. For example the air pollution raises surface, air, and water temperatures. Among the many effects that flow from this is the expectation that there will be an increase in the risk of mortality and morbidity associated with increased intensity of heat waves. In addition, there is an expectation that there will be an increase in levels of ambient ozone, leading to increased risk of morbidity and mortality from exposure to ozone. All of these are effects on human health, and all of them are associated with the effect on climate from elevated atmospheric concentrations of greenhouse gases. None of these human health effects are associated with direct exposure to greenhouse gases.

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496, 66527 (December 15, 2009). (Petitioner’s NOI, Exhibit P.10).

3. Dr. Gutzler, a well respected climate scientist, testified in support of proposed Part 100 all day on August 18. Tr. 3. Dr. Gutzler is a climate scientist and professor at the University of New Mexico. He has a PhD in Meteorology and has authored or co-authored numerous published reports and studies on the topic of climate variability and change. Since joining the faculty of UNM, much of his research has focused specifically on the climate of southwestern North America. (See Petitioner’s NOI, Exhibit P.13 (Gutzler CV)).

4. Dr. Gutzler's testimony, confirmed by his own research, presented the overwhelming scientific consensus that manmade greenhouse gas emissions are causing climate change, and that increasing emissions will increase the severity of climate change. (Tr. 3 at 27-30, 34-39, 57-58, 62-63, 167, 221-22, 225-226, 273-275).

5. Although past GHG emissions make it impossible to avoid climate change altogether, we can likely mitigate the most adverse effects of climate change by significantly reducing future GHG emissions. (Tr. 3 at 35). If not mitigated, the adverse effects of climate change could be catastrophic, particularly in New Mexico and the Southwest. (Tr. 3 at 14, 20-27, 29-33, 53, 84, 97, 255). Adverse effects include increased frequency and severity of drought, less snowpack and stream flow, more heat waves, and a substantial decrease in Gila Trout habitat. (Tr. 3 at 20-25, 29, 31-32, 49-50, 58, 220-21, 224, 275-277). Changes in climate induced by manmade greenhouse gas emissions could be abrupt and non-linear. (Tr. 3 at 49). The effects of climate change have already been observed. (Tr. 3 at 54-56).

6. Dr. Gutzler thoroughly explained why so-called "climategate" is merely a distraction without substance. Nothing in the stolen emails undermines the overwhelming evidence and body of scientific knowledge regarding climate change. (Tr. 3 at 43-46, 68-71). Dr. Gutzler discussed and debunked several popular myths regarding climate change. (Tr. 3 at 72-82).

7. Although he acknowledged that uncertainties exist, as they do in virtually all scientific endeavors, Dr. Gutzler believes that the evidence of human-caused climate change is compelling. (Tr. 3 at 63-64, 268, 272).

8. No climate scientist testified on behalf of opponents. Mr. Kappelman included a draft paper by a climate change skeptic, an economist, which Mr. Kappelman characterized as merely listing contrarian theories without judgment. Tr. 7 (Kappelman) at 336-338.

9. Compliance with Part 100 will reduce New Mexico's contribution to global warming at a rate consistent with the scientific consensus; and it will serve as an impetus for the United States Congress and other states to act. Pet. NOI, Tab C at 25; Pet. R-NOI, Tab B at 3, 30-31; Tr. 1 (Michel) at 109-110; Tr. 3 (Dr. Gutzler) at 265 (supporting the proposed rule); Tr. 5 (Michel) at 299; Tr. 6 (Michel) at 182-83, 210; Tr. 7 (Sprott) at 215-218, 268-69; Tr. 9 (Michel) at 324-25.

10. States acting together can have a substantial impact on climate change (Tr. 7 (Sprott) at 237).

II. Economic Reasonableness

11. The regulation is market-based and does not dictate how sources reduce CO₂ emissions, but allows them to achieve compliance at the lowest cost possible. Tr. 1 (Michel) at 38-39, 65, 102-103; Tr. 5 (Michel) at 249-251, 260-67; Tr. 6 (Michel) at 164-165; Tr. 7 (Sprott) at 266; Tr. 7 (Michel) at 41. The regulation will have a negligible impact on utility costs and will not cause gasoline prices to increase. Tr. 6 (Michel) at 172-176; Tr. 7 (Michel) at 84; Tr. 9 (Michel) at 324, 343-44.

12. The regulation includes a cost cap, such that once a source's expenditures on compliance reach the cap in a given year its reduction obligation is satisfied. § 20.2.100.12; Tr. 7 (Michel) at 91-92. Application of this cost cap to the regulated sources represents a scenario in which sources cannot reduce emissions through efficiency or technology measures or through credits, but are forced to comply solely through the purchase of offsets at a price greater or equal to \$50.00 per mton each and every year.¹ Tr. 5 (Michel) at 198-199, 222-224, 227-228; Tr. 7 (Michel) at 18-22. Under this scenario, the cost of the regulation will be minimal, representing in terms of revenues less than 1% per year for utilities, 0.08% for oil refining, and 0.25% for gas

¹ \$50.00 is the "carbon price," which increases by \$1.0 each year. Substantial evidence supports using \$50.0, as adjusted over time, as the carbon price. Pet. NOI, Tab C at 24-25; Tr. 1 (Michel) at 231-34; Tr. 7 (Michel) at 79-80.

processing. Pet. NOI, Tab C at 10 (Table 1), 11; Pet. R-NOI, Tab B at 42-43 (“Based upon Tri-State’s own numbers, the impact will be about a 0.33 percent increase to Tri-State’s member consumer electric bills in the first year, growing by that same fraction of a percent in each subsequent year”), 54; Tr. 1 (Michel) at 35-36, 100; Tr. 5 (Michel) at 225-226, 242; Tr. 6 (Michel) at 166-169, 172-176; Tr. 7 (Michel) at 84-86; Tr. 9 (Michel) at 243-44 (maximum cost of regulation would be 0.8% of Tri-State’s approximately \$1.3 billion in revenues, noting mathematical error of Tri-State witness Spiers); Tr. 9 (Michel) at 269; cf. City of Farmington NOI Tab B (Kappelman) at 12 (noting rule’s structure would result in “modest initial cost impacts”).

13. As a practical matter, the costs and revenues of regulated sources will not be affected by Part 100, but will continue to be dominated by the vagaries of global market forces and commodity prices. Pet. R-NOI, Tab B at 37; Tr. 1 (Michel) at 46, 101; Tr. 7 (Michel) at 85.

14. By placing a price on carbon and creating a market for offsets and businesses that specialize in reduction technologies and renewable resources, the regulation will likely induce economic activity in New Mexico and may have a net positive effect on the state’s economy. Pet. R-NOI, Tab B at 10-11, 38 (“greenhouse gas regulation will likely be a boom for the natural gas industry”); 41 (“rule more likely to drive development into New Mexico than out”); Tr. 1 (Michel) at 46, 172, 261; Tr. 2 (Collins) at 59-60 (regulations will provide extra “push” to incentivize methane reductions at upstream oil and gas sites); Tr. 7 (Michel) at 88, 93-96, 105-07, 113-14, ; Tr. 9 (Michel) at 256. Moreover, the emission baseline for new sources set by the regulation would create an incentive to locate sources here, because they can emit less than the baseline and thus establish valuable credits. Pet. R-NOI, Tab B at 5-6, 8-9, 25, 40; Tr. 1 (Michel) at 119, 223; Tr. 5 (Michel) at 300-302; Tr. 9 (Michel) at 245, 263-66, 294-295 (listing

energy sources that can “beat” the baseline), 342.

15. Wind and solar energy generate 40% more jobs per dollar invested than coal mining. The solar and wind industries create about 5.7 jobs per million dollars invested over a ten-year period, compared to the coal industry, which creates only 3.96 jobs per million dollars. Pet. R-NOI, Tab C (LaDuke) at 15.

16. As a general rule, the combustion of coal emits twice as much CO₂ as natural gas per MWh. Pet. R-NOI, Tab B at 15; Tr. 1 (Michel) at 212; Tr. 8 (Simms) at 95; Tr. 7 (Michel) at 40; Tr. 9 (Michel) at 345. The demand for natural gas, viewed as the transition fuel, will likely increase if the Board adopts the rule. Pet. R-NOI, Tab B at 38; Tr. 1 (Michel) at 224-225; cf. Tr. 8 (Richards) at 132 (increased natural gas demand would avoid perceived “death spiral”). The rule should not adversely affect investment in new coal-fired coal plants. The rule does not mandate the use of any particular resource or technology (Tr. 9 (Michel) at 345), and even without the rule, utilities are far more likely to invest in new gas-fired power plants than coal-fired plants. Tr. 9 (Michel) at 342, 357.

17. Because of the availability of offsets and cost-effective means of reducing CO₂ emissions through efficiency and other measures, it is highly unlikely that a source’s actual compliance costs will ever come close to the cost cap provided in the regulation. Pet. R-NOI, Tab B at 49; Tr. 1 (Michel) at 43, 45, 65, 95, 102-03, 201, 212, 214, 216-17, 243; Tr. 1 (Hausman, VP, Synapse Economics) at 259-261; Tr. 5 (Michel) at 241-244, 228, 252-55; Tr. 9 (Michel) at 267. In the unlikely event a source reaches the cost cap in a given year, it is excused from further compliance for that year. Tr. 5 (Michel) at 199, 241-242.

18. Although opponents speculated about the possibility of “leakage” under the regulation, none provided evidence that it would occur. No evidence in the record shows that any regulation

has ever induced leakage from New Mexico or any other jurisdiction, much less a regulation similar to the one under consideration. Utilities hoping to sell power to New Mexicans from out-of-state sources, moreover, would not have a “free ride” but would have to obtain approval from the New Mexico Public Regulation Commission. Tr. 5 (Michel) at 307.

19. No evidence shows that any covered source could operate more profitably in another state; nor did any party provide any economic or regulatory comparison of New Mexico to other states. In reality, covered sources are linked to New Mexico by the location of the resource (oil and gas) or the location of customers (utilities). Pet. R-NOI, Tab B at 32. Moreover, other states also impose various greenhouse gas reduction requirements and renewable portfolio standards and may impose additional requirements in the future. Tr. 9 (Michel) at 297. Finally, the modest costs imposed by this regulation are unlikely to justify moving facilities or purchasing power out-of-state. Pet. R-NOI, Tab B at 32-33.

20. There are multiple cost-effective opportunities and means by which CO₂ and other greenhouse gas emissions can be reduced in New Mexico, including improved efficiency, fuel-switching, employment of solar, wind and other renewable resources (either alone or in combination with fast-starting combustion and combined-cycle turbines), carbon capture and sequestration (or use in tertiary oil recovery), leak detection and cessation, de-pressuring gas pipelines, dairy biogas combustion, switching from combustion to electricity; vapor recovery units, vacuum release valves, use of co-generation (electricity and heat), methane recovery at landfills, rangeland management, refrigerator recycling, methane recover from underground coal mines, green completions of oil and gas wells, etc. Pet. NOI, Tab C at 18; Pet. R-NOI, Tab B at 5, 11, 13, 20-21, 23-25, 27, 34-35, 47; Tr. 1 (Michel) at 80-81, 95-96, 103, 212-215, 221; Tr. 2 (Peridas) at 30-43; (Randolph) at 43-53; (Collins) at 57-68; Tr. 5 (Michel) at 187-191, 257, 279;

Tr. 6 (Michel) at 152-158; Tr. 7 (Michel) at 44-47, 85-86; Tr. 8 (Simms) at 97.

21. There are 89 discrete practices or technologies for methane reduction in the oil and gas sector. These include reduction options for oil and gas production (e.g., at well sites, gathering lines), processing (e.g., natural gas plants) and transmission (e.g., larger pipelines). Pet. R-NOI, Tab G; Tr. 2 (Collins) at 58-63.

22. Eliminating methane from the rule alone creates millions of metric tons of potential offsets. Tr. 5 (Michel) at 43, 190, 214, 216-17; Tr. 7 (Sprott) at 233-34; cf. Tr. 8 (Simms) at 96; Tr. 9 (Michel) at 260-65, 319, 332-333 (BHP mine provides opportunities to reduce methane emissions on the order of hundreds of thousands of metric tons), 357-358.

23. Renewable energy sources, such as wind and solar, can be added to existing power generation without adversely affecting system reliability or fast-start capability. Tr. 5 (Michel) at 208; Tr. 9 (Michel) at 292-293. Indeed, as demonstrated by a PNM exhibit, this is key to California's strategy for reducing greenhouse gas emissions. PNM Surrebuttal (Bothwell), PNM Exhibit CDB-6S at 2-3 (December 24, 2009, letter from the California Energy Commission to EPA).

24. Even opponents admitted that an offset market will be stimulated by adoption of Part 100. Tr. 9 (Bothwell) at 82. And that Devon Energy Corporation has implemented profitable carbon reduction techniques and is banking credits from the anticipated price on carbon. Tr. 8(Smith) at 303.

25. The actions that are taken by specific companies, such as Devon and PNM, to reduce GHG emissions may qualify for early action credits under Part 100, and reductions required under Part 100 will also likely qualify for early action credits under a future federal GHG program. Pet. NOI, Tab B at 11-13, 15, 20, 31, 39, 55.

26. The incredible range of impacts estimated by one economist, who assumed no positive benefits from the rule, was an unbelievable \$0.0 to \$1.7 billion. Tr. 8 (Lillywhite) at 46-48, 56, 58 (“the net effect is going to be close to zero when you have -- you are exchanging money”), 60. Mr. Lillywhite provided no documentation of the output or assumptions of his simple Excel model. Tr. 8 (Lillywhite) at 42-44, 47.

III. Technical Practicability

27. NMED has sufficient staffing, funding and skill to implement Part 100. Tr. 6 (Michel) at 163; Tr. 7 (Sprott) at 165-174, 195-96, 201, 249-50 (one FTE required); Tr. 9 (Michel) at 374-75. The rule is appropriately flexible and provides appropriate discretion to NMED, enabling it to apply the rule to diverse sources and situations. Tr. 7 (Sprott) at 168-174, 186, 194. The flexibility provided in Part 100, as well as the many “off ramps,” will obviate the need for formal variances. Tr. 7 (Sprott) at 186, 194.

28. The definition of “source” in Part 100 is clear and workable and provides sufficient certainty to regulated sources. *Id.* at 196-99, 224; Tr. 6 (Michel) at 78. Reporting under Part 100 will track reporting to EPA and will not impose an undue burden on industry. *Id.* At 229-30.

AMENDMENTS

29. The Board amended Section 20.2.100.5 - EFFECTIVE DATE to read: "January 1, 2013, or six months after 20.2.350 NMAC is no longer in force, whichever date is later."

30. The Board amended Section 20.2.100.15 - SUNSET to read: "This part shall sunset if a regional or federal greenhouse gas reduction program is in place or ten years after the effective date."

31. Other sections of the proposed rule were amended to comport with these changes. These amendments are detailed in the deliberation transcript.

ORDER

By an affirmative vote of 4 to 1, the proposed new regulation was approved by the Board on December 6, 2010 with the amendments as detailed in this Order and the hearing transcript. The regulations described in this Order are hereby adopted, to be effective 30 days after filing with the State Records Center.


Gay Dillingham, Chair
On Behalf of the Board

Dated: 12-29-10

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

**IN THE MATTER OF PROPOSED NEW REGULATION,
20.2.350 NMAC – *Greenhouse Gas Cap and Trade Provisions***

No. EIB 10 -04 (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 regulation 20.2.350 NMAC – *Greenhouse Gas Cap and Trade Provisions*. A public hearing was convened in Santa Fe, New Mexico on September 20, 2010 and continuing through September 30, 2010. The Board heard technical testimony from Petitioner and other interested parties and admitted exhibits into the record. On November 2, 2010, the Board having familiarized itself with the record and the transcript of the proceedings, deliberated and adopted the proposed new regulations with one amendment by an affirmative vote of 4 to 3 for the reasons that follow:

PROCEDURAL HISTORY

1. The Department filed its petition for the proposed rule on June 4, 2010. PL 1.
2. On June 18, 2010, the New Mexico Oil and Gas Association (“NMOGA”), the City of Farmington and the Public Service Company of New Mexico (“PNM”)/Southwestern Public Service Company (“SPS”) filed responses in opposition to the Petition. PL 5, 7, & 8.
3. On June 21, 2010, El Paso Electric Company filed a response in opposition to the Petition. PL 10.



4. On June 21, the Department filed a Motion to Set Schedule and Assign Hearing Officer. PL 11.

5. On June 21, 2010, the Department filed a Notice of Rule Revisions. PL 9.

6. On June 21, 2010 a quorum of the Board voted to set the Department's Petition for hearing.

7. On June 22, 2010, the Board issued an Order scheduling the hearing for September 20, 2010, setting due dates for technical testimony and designating Ms. Felicia Orth as Hearing Officer. PL 12.

8. On July 16, 2010, the Department filed its direct testimony. PL 18.

9. On August 12, 2010, NMOGA filed a Motion to Stay Proceedings and an Expedited Motion to Amend Scheduling Order. PL 29a & 29b.

10. On August 16, 2010, other parties filed responsive testimony. PL 30-33, 35-40.

11. On August 27, 2010 the Department filed a Consolidated Response to NMOGA's Motions to Stay and Amend Scheduling Order. PL 43.

12. On August 30, 2010, the Department filed a Motion for Procedural Order. PL 52.

13. On August 30, 2010, the Department filed rebuttal testimony, as well as a revised rule reflecting changes made in response to the testimony of other parties. PL 51. Four other parties also filed rebuttal testimony. PL 47-50.

14. On September 7, 2010, NMOGA, El Paso Electric, PNM, SPS, Farmington, Farmington Electric Utility System ("FEUS"), the New Mexico Gas Company, Grupo Cementos de Chihuahua ("GCC") and Tri-State filed a joint response in opposition to the Department's Motion for Procedural Order. PL. 57

15. On September 7, 2010, the Department filed its Notice of Filing of Affidavits of Publication. PL 55.

16. On September 8, 2010, the Coalition of Arizona/New Mexico Counties (“Coalition”) filed a response to the Departments Motion for Procedural Order. PL 61.

17. On September 8, 2010 the Department filed a Motion to Consolidate Entries of Appearance filed by FEUS. PL 58.

18. On September 8, 2010, the Department filed a Motion to Strike Testimony of William Balgord. PL 59.

19. On September 10, 2010, the Department filed a Motion to Strike Testimony of Doug Roark and a Motion to Strike Testimony of James Taylor. PL 62 – 63.

20. On September 13, 2010, the Coalition filed a Response to Motion to Strike Testimony of William Balgord. PL 65.

21. On September 13, 2010, the Hearing Officer issued an Order on Motion for Procedural Order. PL 66.

22. On September 16, 2010, the Department filed a reply in support of its motion to strike testimony of Balgord and a Reply in Support of Motion to Consolidate Entries of Appearance filed by FEUS. PL. 73 – 74.

23. On September 16, 2010, NMOGA filed a Reply in Support of Motion to Stay Proceedings and Amend Scheduling Order. PL. 75 - 76.

24. On September 16, 2010, GCC filed a Response to Motion to Strike Testimony of Doug Roark. PL 77.

25. On September 17, 2010 NMED filed a Reply in support of its motion to strike testimony of Roark. PL 78.

26. At the start of the hearing on September 20, 2010, the Department submitted a revised rule reflecting nonsubstantive changes. NMED Hearing Exhibit 1.

27. At the start of the hearing on September 20, 2010, the Hearing Officer recommended denying NMOGA's Motion for Stay and Motion to Amend Procedural Order. The Board voted to affirm the Hearing Officer's recommendation denying the two Motions. Tr. 14:16 – 16:2.

28. At the start of the hearing on September 20, 2010 the Hearing Officer recommended denying NMED's Motion to Consolidate Entries of Appearance by FEUS. Tr. 17:21. The Chair agreed. Tr. 17:25.

29. At the start of the hearing on September 20, 2010, the Hearing Officer recommended denying NMED's Motion on Doug Roark. Tr. 19:14. There was no opposition from the Board.

30. At the start of the hearing on September 20, 2010, the Hearing Officer recommended granting NMED's Motion on Dr. Balgord Tr. 20:1 – 9. Board member Green expressed concern with the recommendation. Dr. Balgord's testimony was ultimately excluded. Tr. 24:12.

31. At the start of the hearing on September 20, 2010, the Hearing Officer recommended granting NMED's Motion on Taylor. Tr. 26:17. The Board expressed no opposition to this decision.

32. On September 21, 2010, Tri-State filed an Objection to NMED's Notices of Compliance with Small Business Regulatory Relief Act. PL 79.

33. On September 22, 2010, NMED submitted a Notice of Withdrawal of Portion of Rebuttal Testimony of Mark Fesmire. PL. 80

34. On September 22, 2010 IPANM Karin Foster raised objections to NMED witness Mark Fesmire's testimony. Various Board members expressed concerns as well. After a short recess the Department decided to withdraw Mr. Fesmire's testimony. Tr. 891:11 – 901:9

35. On September 27, 2010, the Department moved to enter Mr. Fesmire's testimony as public comment. The Hearing Officer recommended granting the motion and the Board agreed. Tr. 2176:19 – 2181:10.

36. On September 27, 2010, El Paso Electric filed an Unopposed Motion to Admit Testimony of William P. Patton. PL 81.

37. At the conclusion of the hearing, the Department submitted a revised rule containing responsive changes in legislative format and then presented surrebuttal testimony in support. NMED Hearing Exhibit 2. The changes reflected changes requested by Board members and other parties.

38. The Department presented a clean version of the revised rule, with one exception described below, identified as NMED Brief Exhibit 1 to its closing argument.

39. On October 6, 2010, the Hearing Officer issued an Order on Post Hearing Procedures. PL 82.

40. On October 12, 2010, the Board Administrator issues a Notice of Transcript Filing. PL 83.

41. On October 26, 2010, all parties filed closing arguments.

42. On November 2, 2010, the Board deliberated and voted 4 to 3 to adopt NMED's proposed regulation with one amendment.

STATUTORY AUTHORITY

1. The Board is authorized by the Air Quality Control Act ("AQCA") to adopt regulations "to prevent or abate air pollution...within the geographic area of [its] jurisdiction."

NMSA 1978, § 74-2-5(B). "Air pollution" is defined as:

the emission, except emission that occur in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life as may unreasonably interfere with the public welfare, visibility or the reasonable use of property.

"Air contaminant" is defined as "any substance, including but not limited to 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." NMSA 1978, § 74-2-2(A). This definition is broad enough to include GHGs, including carbon dioxide, methane, nitrous oxides, perfluorocarbons, hydrofluorocarbons, and sulfur hexafluoride. The Board relied on this section to adopt regulations restricting GHG emissions from motor vehicles, 20.2.88 NMAC - *Emission Standards for New Motor Vehicles*, and reporting rules for GHGs, 20.2.73 NMAC - *Notices of Intent and Emission Inventory Requirements*, and 20.2.87 NMAC - *Greenhouse Gas Emissions Reporting*, as well as a cap-and-trade program, 20.2.81 - *Western Backstop Sulfur Dioxide Training Program*. Tr. 1867, ll.1-17.

2. The U.S. Supreme Court has held, in the context of similar language in the federal Clean Air Act, that greenhouse gases are "air pollutants" that should be regulated. *Massachusetts v. EPA*, 127 S.Ct. 1438, 1460 (2007) ("The Clean Air Act's sweeping definition of 'air pollutant' includes 'any air pollution agent or combination of such agents, including any physical, chemical substance or matter which is emitted into or otherwise enters the ambient air....' §7602(g)(emphasis added). On its face, the definition embraces all airborne compounds

of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical substance[s] which [are] emitted into the ambient air.'").

3. The Department presented substantial evidence at the hearing that GHGs constitute "air pollution". The emission of these air contaminants are warming the planet and disrupting the climate, and their continued emission in any quantity and for any duration will prolong and exacerbate the harm.

4. Section 74-2-5(E) of the AQCA requires the Board to consider several factors before adopting a regulation. Specifically, the Board:

must give weight to all facts and circumstances deemed appropriate, including but not limited to:

- 1) character and degree of injury to or interference with health, welfare, visibility and property;
- 2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and
- 3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

5. Pursuant to section 74-2-9 of the AQCA, the Board's decision was supported by substantial evidence. Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder. *Wagner v. AGQ Consultants*, 2005-NMAC-016, ¶85, 137 N.M. 734, 114 P.3d 1050; *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶17, 125 N.M. 401, 962 P.2d 1236.

6. The Board is authorized by the AQCA to adopt the proposed rule, and this authority is not affected by the Department's previous efforts to clarify or expand that authority.

PL 51 - Norton at 11, 11.1-18, 12, 1.7 - 13, 1.10. The Board's inability to regulate some sources does not negate its authority to implement a cap-and-trade program for the large number of sources already regulated under the Act.

7. Administrative bodies are created by statute and must therefore find its authority and jurisdiction conferred upon it either expressly or by necessary implication from the same statutory authority. *New Mexico Elec. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 683, 684 (1970). The Board's authority to "prevent or abate air pollution" is broad enough to implement a statewide GHG emission cap and trade program as it is a necessary implication from that authority.

STATEMENT OF REASONS

The Board hereby adopts the Department's Statement of Reasons filed with its Petition (PL 1) and hereby makes the following additional findings:

A. CHARACTER AND DEGREE OF INJURY TO HEALTH, WELFARE, VISIBILITY AND PROPERTY.

1. There is compelling evidence that climate change is real and continuing, and that it is caused by anthropogenic emissions of GHGs. PL 18 - Gutzler at 1-9; Tr. 49 - 56.

2. Current levels of GHGs in the atmosphere, coupled with new emissions, will result in a rise in global temperatures between 3-7 degrees Celsius by the end of the century. PL 18 - Gutzler at 6, 11.3-15. These fundamental conclusions are supported by the vast majority of climate scientists and every major scientific society in the United States. PL 18 - Gutzler at 2, 1.17 - 3, 1.22; PL 51 - Overpeck at 4, 1.1 - 5, 1.30; PL 51 - Norton at 2, 11.5-9.

3. EPA recently confirmed these conclusions after a thorough review of the scientific evidence. Tr. 55, 11.18-24; PL 51 - Gutzler at Exhibit 2; PL 36 - Wehrum at 9, 11.12-17.

4. Climate change caused by anthropogenic emissions of GHGs will have a particularly severe impact of the American Southwest, including New Mexico. PL 51 - Overpeck at 7, l.1 - 11, l.6. The warming trends in this region are double the annual global average. PL 18 - Gutzler at 4, l.1 - 5, l.10. Already, water supply and snowpack have diminished; major reservoirs are drying out; soil moisture is dropping; vegetation death rates are increasing; and wildfires are becoming more frequent and severe. PL 18 - Gutzler at 6, l.17 - 9, l.5, 2, l.4, 14, l.11; PL 51 - Overpeck at 7, l.1 - 11, l.6. These changes are consistent with the climate models, Tr. 2258-2259, but are happening faster than predicted. Tr. 2265, ll.22 - 23, 2269, ll.12-16.

5. Climate change is causing adverse impacts to the public health, and these impacts are expected to intensify in the coming years. PL 18 - Patz at 2, ll.3-21. Climate change is unlike any other health threat because it affects multiple pathways. PL 18 - Patz at 1, l.30 - 2, l.2.

6. In the United States, climate change has caused an increase in deadly heatwaves, exacerbated air pollution such as ozone which is especially dangerous for children with asthma, caused an increase in pollen and allergies, and increased the rate of infectious diseases, particularly those resulting from flood-affected sewage systems. PL 18 - Patz at 3, l.7 - 5, l.23.

7. Contrary evidence was presented by the Independent Petroleum Association of New Mexico's witness, Howard Maccabee, who testified that climate change may have positive health benefits. PL. 37.

8. NMED witness, Jonathan Patz, a recognized public health expert and Nobel laureate, testified that Maccabee misconstrued data, ignored other data, relied heavily on unproven theories, and erroneously suggested that climate change and its impacts would be incremental and therefore manageable from a public health perspective. PL 51 - Patz at 1, l.14 - 5, l.14.

9. Climate change will have a serious adverse effect on other pollutants of concern in New Mexico such as ozone. Climate change will exacerbate ozone pollution. Pl 18 - Uhl at 1, 1.28 - 3, 1.21. Ozone, which is both a respiratory irritant and a factor in cardiopulmonary distress, will be a serious problem for the state if the EPA tightens the applicable standards as expected in the near future. The warming climate will exacerbate noncompliance in nonattainment areas and make it more difficult to attain the applicable standards. A similar situation is expected for particulate matter in southern New Mexico, as reduced soil moisture and more wildfires increase the number and severity of exceedances of the applicable standards. *Id.*

10. Tri-State witness Christy and Farmington witness Kappelmann suggested that "Climategate" - the publication of stolen emails written by a small number of climate scientists - and a few errors in published reports undermined the conclusions of the Intergovernmental Panel on Climate Change ("IPCC"). However, several scientific bodies, including the National Academy of Science and EPA, have thoroughly investigated the allegations and found no evidence of scientific misconduct. Moreover, the emails - which were taken out of context - had no meaningful impact on the fundamental conclusions regarding climate change. Tr. 2240, 1.12 - 2241, 1. 15; PL 51 - Gutzler at 15, 11.1-23, 27, 1.10 - 28, 1.12 & Exhibit 2; PL 51 - Overpeck at 2, 1.16 - 5, 1.7. In fact,

B. PUBLIC INTEREST

11. Climate change is expected to result in large economic costs, which for New Mexico are estimated at \$3.2 billion per year, or \$3,430 per household in 2020, rising to \$5,410 per household in 2040. PL 18 - Norton at 16, 11.5-11.

12. Sandia National Laboratory recently analyzed the data and concluded that between 2010 and 2050, climate change in New Mexico would result in the loss of \$12.7 to

\$26.1 billion in Gross State Product ("GSP"), 217,600 labor-years, and 8,300 residents who migrate to less impacted states. PL 51 - Norton at 14, ll.3-10.

13. Preventing or abating climate change will minimize harm to the state's water resources, PL 18 - Gutzler at 9, l.7 - 17, l.6, and the public health of its citizens, PL 18 - Patz at 6, l.14 - 8, l.20, and bring co-benefits for ozone and PM pollution. PL 18 - Norton at 16, ll.13-21; PL 18 - Uhl at 3, l.14-21. In fact, GHG reductions under the rule could contribute to demonstrating compliance with federal ozone standards, averting more stringent requirements for industrial sources in New Mexico. *Id.*

14. The Department's proposed rule would have a small but significant effect on climate change. PL 18 - Ely at 5, ll.13-21. The rule is limited to sources within the Board's jurisdiction in New Mexico, covering two-thirds of their emissions. PL 51 - Norton at 4, ll.4-19. The rule is anticipated to cover approximately 63 of the largest sources in the electrical generation and oil and gas sectors, which represent 97 percent of the total emissions from Title V sources in New Mexico. PL 18 - Schneider at 3-6; PL 18 - Norton at 9, ll.18-20.

C. TECHNICAL PRACTICABILITY

15. The Department's proposed rule provides sources with several compliance options. PL 18 - Sahu at 2, ll.9-13.

16. Aside from receiving free allowances for most emissions, sources can purchase allowances and transfer allowances from other facilities owned by the same company. PL 18 - Weaver at 6, l.11 - 7, l.14.

17. Sources also may use offsets to satisfy up to 49 percent of their total emission reduction obligation. PL 51 - Ely at 12, l.5 - 13, l.20; PL 51 - Weaver at 18, ll.11-23; NMED Hearing Exhibit 3. This limit balances the benefit of offsets as a cost containment strategy with

the encouragement of actual reductions at sources in New Mexico. Tr. 1894, II.12 - 1895, I.2. These offsets can be obtained from approved jurisdictions and external trading programs. PL 51 - Weaver at 17, I.13 - 19, I.18.

18. The Department's limit is more generous than RGGI, PL 51 -Litz at 3, II.7-19, and the failed federal legislation, which would have allowed offsets up to 30 percent of the total compliance obligation, but required a source to purchase all or a portion of its allowances at auction. PL 51 - Ely at 13, II.3-13, 15, II.13-15; TR 1790, II.9-25.

19. The Department in the proposed rule expressed the offset limit as 4 percent of the source's total compliance obligation between 2012 and 2020. NMED Hearing Exhibit 1; PL 51 - Weaver at 18, II.18-19 & Appendix A. The Department distributed this limit evenly over three compliance periods, which allows sources to use more offsets earlier in the program. PNM proposed to ramp up the offset limit in each compliance period, resulting in phased limits of 1, 4, and 7 percent of the reduction obligation, which allows sources to use more offsets later in the program. NMED Hearing Exhibit 2. At the hearing, the Department described its method, Tr. 1942, I.5 - 1946, I.15, and presented a side-by-side comparison with PNM's proposal. NMED Hearing Exhibit 3; Tr. 3057, I.21 - 3059, I.5. The Board prefers the single offset limit of 4 percent, as reflected in NMED Brief Exhibit 1, because it is consistent with the approach being taken by other WCI jurisdictions and therefore will help to assure New Mexico's ability to link with their programs.

20. A certification program is not necessary because offset certifiers will come to the project regardless where it is, rather than requiring the developer to go to the issuing state. Tr. 1681, I.22-1682, I.1, 1756, I.16 - 1757, I.6, 1961, II.19-25. Once the offsets have been approved

by another jurisdiction, they are available for any source - including a source in New Mexico - to satisfy its reduction obligation. Tr. 1962, ll.1-4.

21. In addition to obtaining allowances or offsets, a source may meet its obligation by reducing its emissions. In some cases, a source may prefer to reduce emissions because it would be less expensive than purchasing allowances or offsets, particularly in light of the ancillary benefits. PL 18 - Sahu at 3, ll.6-13.

22. Electric utilities can reduce GHG emissions by managing energy demand, reducing transmission and distribution losses, reducing electricity loss at generating stations, improving fuel conversion efficiency, using lower carbon intensity fuels, deploying optimization technologies, developing carbon capture and storage projects, and integrating renewable energy supplies to reduce system-wide carbon intensity. PL 18 - Sahu at 4, l.3 - 8, l.10.

23. Oil and gas facilities can reduce GHG emissions by improving energy efficiency, reducing flaring, and developing acid gas injection. PL 18 - Sahu at 8, l.12 - 9, l.12.

24. Many of these methods can be achieved at a minimal cost but a significant economic benefit to the facility. PL 51 - Sahu at 12, ll.4-18. Several industry witnesses acknowledged that their facilities have achieved significant reductions using these methods and plan to do more in the future. PL 18 - Sahu at Exhibits 1-3, 11; PL 31 - Patton at 8, ll.11-15, 9, ll.5-15; PL 39 - Darnell at 13, l.7 - 14, l.11; PL 39 - Ihle at 4, ll.7-13; PL 36 - Chicanowicz at 5, l.9 - 8, l. 4, 8, l.8 - 9, l.5, 9, l.12 - 10, l.23, 13, ll.11-14.

25. With respect to carbon capture and sequestration ("CCS"), Department witness Ron Sahu and Tri-State witness Ed Chicanowicz both testified that the technology takes several forms, including pre- and post-combustion processes and the related technology of oxycombustion. PL 18 - Sahu at 7, l.18 - 8, l.13; PL 36 - Chicanowicz at 9, ll.12-16. It is not

necessary to capture all exhaust gases from a facility for CCS to effectively reduce GHG emissions. Tr. 783, 11.1-3. CCS is being implemented in a number of locations in the United States and around the world. PL 51 - Sahu at 10, 1.14 - 11, 1.6.

26. The Department established a threshold of 100 million metric tons of allowances in the trading system before the proposed rule can take effect. This threshold reflects the Department's intent that New Mexico participate in a regional trading program; the Department never intended for New Mexico to establish a state-only program. PL 18 - Norton at 17, 1.24 - 18, 1.2. The threshold ensures that the trading system will have sufficient liquidity to control compliance costs for affected sources. Tr. 1274, 1.21 - 1275, 1.1. In this regard, liquidity is provided by the market size of the jurisdictions, not the number of jurisdictions. Tr. 1457, 11.7-20. The threshold, which is limited to North American jurisdictions, Tr. 1600, 1.21 - 1601, 1.16, would be satisfied if California adopted a trading program. *Id.* Notably, the 100 million metric ton threshold value is roughly equivalent to the metric tons in the RGGI system; which has operated successfully since January 2009. Tr. 1458, 1.12-17, 1459, 1.2 - 1460, 1.9.

27. The Department's proposed rule established an effective date of January 1, 2011, which allows the Department enough time to develop the administrative framework for allocations before the initial cap year of 2012, PL 18 - Weaver at 3, 11.2-5, and to create links with other trading programs, as well as allowing regulated sources to prepare for participation in the program. Tr. 1242, 1.12 - 1243, 1.8. PNM witness Dirk Forrister suggested that the program could not be developed within one year, Tr. 1438, 11.12-16. The Department and other WCI jurisdictions will work cooperatively to establish the trading system, using off-the-shelf computer programs developed by EPA and other trading systems such as RGGI. PL 51 - Ely at 11, 1.1 - 12, 1.3; PL 51 - Litz at 3, 1.21 - 4, 1.20; Tr. at 1438, 1.17 - 1439, 1.6. Even RGGI, the first

GHG cap-and-trade program in the United States, successfully established the allowance baseline for sources less than 4 months before trading was commenced, considerably less time than available in New Mexico. Tr. 1391, ll.10-13.

28. The Department proposed to "sunset" the proposed rule if the federal government adopts an equally effective cap-and-trade program. PL 18 - Weaver at 3, ll.7-12. The Department's sunset provision would require that a federal program obtain an emission reduction commensurate with the proposed rule.

29. The Department clarified that it had no intent to aggregate oil and gas wells and associated equipment for the purpose of designating a source that exceeds the 25 thousand metric ton threshold. PL 51 - Weaver at 6, ll.2-18. The Department added language to the August 30 version of the proposed rule and testified consistently with this position at the hearing. Tr. 1676, l.18 - 1677, l.8. The two parties representing oil and gas interests, NMOGA and Independent Producers Association of New Mexico ("IPANM"), acknowledged the Department's position. Tr. at 2925, ll.13-23, 1677, l.8.

D. ECONOMIC REASONABLENESS

30. The Department's analysis found that the rule will have a slight positive effect under the two most likely scenarios, and at worst, a small negative effect under the other scenarios.

31. The Department's economic analysis by Karl Hausker's found that a \$33 allowance price would achieve the WCI reduction objective. PL 18 - Hausker at 18.

32. Dr. Rose conducted seven policy runs using different combinations of allowance prices and complementary policies. PL 18 - Rose at 2, l.12 - 3, 14, 4 ll.1-10, 10, l.16-13, l.14. Two runs showed slightly positive results for the state economy by 2020, including an increase

in employment of 2,500 jobs (0.18%) and an increase in GSP of \$542 million (0.13%). The runs also predicted no impact on state tax revenues in 2020, no increase in electric rates, and a minimal increase (less than one percent) in the cost of transportation fuels. Rose considered these runs to be the most likely scenarios because they closely resembled the Department's proposed cap-and-trade program with free allowances and complementary policies. The remaining runs showed only a small negative impact on the state economy, including a maximum loss of 3,100 jobs and a fractional decrease in GSP. Given New Mexico's GSP of \$70 billion, this decrease would retard growth by a few months at most. Tr. 500, ll.14-23. These results were consistent with the findings for other cap-and-trade programs. Tr. 1284, ll.16 - 25.

33. The results represented the lower bound of potential economic outcomes because the model did not account for the avoided or reduced damages from climate change and emissions of other pollutants, the reduced use of natural resources, the reduced amount of traffic damage, and avoided impacts to water supply, tourism, ranching, and forestry, PL 18 - Rose at 3, ll.15-19; Tr. at 2321, ll.19-23, as well as the long-term impacts on the agricultural and industrial base and the exodus of population and jobs predicted by Sandia National Laboratory. PL 51 - Norton at 14, ll.3-10. The model also overestimated the negative impacts because it assumed that New Mexico would auction allowances, increasing the overall costs to industry. PL 18 - Rose at 13, ll.15-21.

34. The Department's analysis expressly addressed the impact on the oil and gas sector. Energy 2020 modeled the sector's economic activity to the extent possible with the available data. Tr. 708, l.7 - 712, l.4. Specifically, the REMI analysis included all capped facilities in the sector, the annualized process investment, and the sectors' projected revenue contribution to the General Fund. Tr. 1666, ll.3-7. The REMI model predicted that the sector

would experience a small negative effect of one-tenth to one percent by 2020. While this impact would fall more heavily on the petroleum refining industry, other parts of the sector - such as natural gas production and processing - should expect to benefit significantly from a cap-and-trade program. Tr. 489, 11.2-20, 504, 11.3-16. Natural gas is considered to be the transition fuel in a carbon-constrained economy, PL 51 - Norton at 14, 11.11-21, and will be especially favored when coal-fired power plants near large natural gas fields begin to switch fuels. Tr. 2980, 1.12 - 2981, 1.2.

35. Some parties conducted their own economic analyses. While they used different models with more negative assumptions, they predicted GSP and employment results slightly more negative but similar to the Department's. Tr. 500, 1.24 - 501, 1.6. From the long-term perspective, these results meant that for a given growth rate, there would be only a small temporal delay in reaching the same GSP. Tr. 501, 11.7-18.

36. Farmington witness Robert Kappelmann calculated Farmington's compliance costs using a worst case scenario, but did not contradict the Department's conclusion that a cap-and-trade program would have a minimal effect on the state economy. Tr. 2024, 1.25 - 2025, 1.5.

37. The Department's proposed rule contains provisions that minimize leakage, such as free allowances and delayed compliance obligations. PL 51 - Ely at 15, 11.10-16, Tr. 1315, 11.3-20. There is no evidence that RGGI's cap-and-trade program has caused any leakage in the electric generation industry, Tr. 1408, 11.11-16. Moreover, the risk of economic leakage due to regulation is not significant compared to other factors, such as commodity prices, fuel costs, and regulations in other states, which can be more onerous than those in New Mexico. PL 51 - Ely at 15, 1. 18 - 17, 1. 4; PL 51 - O'Hare at 10, 11.5-17; Tr. 1408, 11.4-6. The Department proposed to

monitor and reassess leakage in consultation with the stakeholders and report back to the Board. PL 51 - Ely at 15, ll.18-22.

38. The Board, in response to industry concerns that the rule would be too expensive and in order to address economic reasonableness, amended 20.2.350.17(H) NMAC to read: “additional cost containment provisions, and if for a period of six (6) continuous months the average price per metric ton of CO2 for offsets and allowances exceeds forty-five (45) dollars in 2010 dollars as adjusted annually by the consumer price index the department shall automatically return to the board with a cost containment proposal.”

E. PUBLIC NOTICE AND DUE PROCESS

39. The Department conducted an adequate and appropriate public process for the proposed rule. PL 18 - Ely at 2, l.18- 4, l.8. The WCI process, which developed the Design Document template, involved extensive stakeholder input, including regional events, telephone conferences, and a series of meetings in New Mexico. Tr. 1693, ll.3 - 1694, l.13, 1958, l.19 - 1959, l.5. The Department also conducted a second round of meetings and presentations across the state regarding New Mexico's climate change work in general, as well as a full stakeholder process for the proposed rule. Tr. 1959, l.6 - 1960, l.15. For each event, the Department sent electronic notification to more than 900 persons. Tr. 1966, l2 - 1967, l.18.

40. With respect to the proposed rule, the Department in March 2010 issued a draft white paper to solicit comments on the methods for allocating allowances, issued the draft rule for public comment, and hosted a series of meetings around the state, including Santa Fe, Farmington, Clovis, Roswell, Las Cruces, and Albuquerque. Unfortunately, with minor exceptions, the rule opponents refused to participate in the public process. PL 51 - Ely at 17, ll.7-16.

41. The Board's procedural rule promulgation requirements are provided by statute. First, a public hearing required pursuant to NMSA 1978, 74-2-6(B). This requirement meet was met as the Board conducted 9 days of hearing as well as taking public comment in various cities throughout the state. Second, notice is required 30 days prior to hearing date pursuant to NMSA 1978, 74-2-6(C). The public hearing was properly noticed as evidenced by the affidavits of publication. PL 55. Third, "At the hearing, the environmental improvement board or the local board shall allow all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978, 74-2-6(D). The Board exceeded its own requirements by requiring the Department to file direct testimony and exhibits more than 60 days before the hearing and allowed the other parties 30 days to submit responsive testimony and exhibits and an additional 14 days to submit rebuttal testimony, which two parties actually used to supplement their responsive testimony.

42. Tri-State objected to the notice provided to the Small Business Regulatory Committee. Tri-state's argument is highly technical argument and it is undisputed that the Department twice filed the proposed rule with the Commission (June 4, 2010 & July 16, 2010). This notice is evidence that the Committee received actual notice.

ORDER

By an affirmative vote of 4 to 3, the proposed new regulation was approved by the Board on November 2, 2010 with an amendment to 20.2.350.17NMAC that would require the Department to come back to the Board if the \$45.00 allocation or offset was reached. The proposed new regulation is to be set forth in Section 350 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.


Gay Dillingham, Chair
On Behalf of the Board

Dated: 11-10-10

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Appellant,

vs.

Case No. 30020

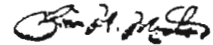
NEW MEXICO ENVIRONMENTAL
IMPROVEMENT BOARD,

Appellee.

COURT OF APPEALS OF NEW MEXICO

FILED

APR 20 2011



MOTION FOR LEAVE TO INTERVENE AS APPELLEE

New Energy Economy, Inc. ("NEE"), by and through its attorneys, New Mexico Environmental Law Center, respectfully requests leave to intervene in this appeal as a co-appellee. The grounds for this Motion are as follows:

INTRODUCTION

1. In this appeal, Public Service Company of New Mexico ("PNM") seeks to overturn the decision of the New Mexico Environmental Improvement Board ("the Board") to adopt regulations governing greenhouse gas emissions. The Board adopted the regulations ("Rule 100"), codified at § 20.2.100 NMAC, on December 6, 2010, pursuant to its authority under the New Mexico Environmental Improvement Act ("EIA") (NMSA 1978, §§ 74-1-1 *et seq.*) and the New Mexico Air Quality Control Act ("AQCA") (NMSA 1978, §§ 74-2-1 *et seq.*). See § 20.2.100.3 NMAC; see also [Exhibit 1 (Order and Statement of Reasons for Rule



statements of PNM, IPANM and the Governor make it more than merely possible that the Board will not adequately represent and protect NEE's interest in Rule 100—it is virtually certain that it will not. See WildEarth Guardians v. United States Forest Serv., 573 F.3d 992, 996 (10th Cir. Colo. 2009) (intervenor “need only show the *possibility* of inadequate representation”) (emphasis added). Accordingly, NEE should be allowed to intervene in this appeal “as of right.”

6. **NEE's intervention in this appeal is timely and will not cause delay or prejudice any party.** NEE's intervention at this early stage will not delay resolution of this appeal or prejudice any party. PNM has not yet filed a docketing statement and it seeks an extension of time in which to do so. Moreover, the Assistant Attorney General who represents the Board in this appeal asked that NEE delay filing this Motion until after the Board met on April 4th to, among other things, consider whether to oppose NEE's Motion.

7. **This motion is opposed:** PNM and the Board are aligned in their opposition to this Motion.


8. **Related Appeals:** Several parties to the rulemaking below filed separate appeals of the Board's decision to adopt Rule 100: City of Farmington and Farmington Electrical Utility System v. EIB (Case No. 31,015); Independent Petroleum Association of New Mexico (Case No. 31016); New Mexico Oil and Gas Association (Case No. 31,017); El Paso Electric Company (Case No. 31,018);

Tri-State Generation and Transmission (Case No. 31,019); Southwest Public Service Company (Case No. 31,021). Each of the foregoing appellants was served with this Motion; each has asked this Court in their respective appeals to extend the time in which to file docketing statements.

WHEREFORE, NEE respectfully requests the Court to permit it to intervene in this appeal.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL
LAW CENTER

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Inc.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

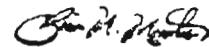
Appellant,

vs.

Case No. 31,902
COURT OF APPEALS OF NEW MEXICO
FILED

NEW MEXICO ENVIRONMENTAL
IMPROVEMENT BOARD,

APR 20 2011



Appellee.

MOTION FOR LEAVE TO INTERVENE AS APPELLEE

New Energy Economy, Inc. (“NEE”), by and through its attorneys, New Mexico Environmental Law Center, respectfully requests leave to intervene in this appeal as a co-appellee. The grounds for this Motion are as follows:

Introduction

1. In this appeal, Public Service Company of New Mexico (“PNM”) seeks to overturn the decision of the New Mexico Environmental Improvement Board (“the Board”) to adopt regulations governing greenhouse gas emissions. The Board adopted the regulation (“Rule 350”), codified at § 20.2.350 NMAC,” on November 2, 2010, pursuant to its authority under the New Mexico Environmental Improvement Act (“EIA”) (NMSA 1978, §§ 74-1-1 *et seq.*) and the New Mexico Air Quality Control Act (“AQCA”) (NMSA 1978, §§ 74-2-1 *et seq.*). § 20.2.350.3 NMAC; see also [Exhibit 1 at 6 (Board’s Order and Statement of Reasons for Rule



delay resolution of this appeal or prejudice any party. PNM has not yet filed a docketing statement and it seeks an extension of time in which to do so. Moreover, the Assistant Attorney General who represents the Board in this appeal asked that NEE delay filing this Motion until after the Board met on April 4th to, among other things, consider whether to oppose NEE's Motion.

7. **This motion is opposed:** PNM and the Board are aligned in their opposition to this Motion.

8. **Related Appeals:** PNM and several other parties have filed multiple separate appeals of both Rule 100 and Rule 350. *NEE Motion for Leave to Intervene in PNM v. Environmental Improvement Board, No. 31,020* (identifying six pending appeals of Rule 100) [**Exhibit 2** ¶ 8]; City of Farmington and Farmington Electrical Utility System v. EIB (Case No. 30,897) (appeal of Rule 350); Independent Petroleum Association of New Mexico (Case No. 30,907) (same); New Mexico Oil and Gas Association (Case No. 30,952) (same); El Paso Electric Company (Case No. 30, 908) (same); Tri-State Generation and Transmission (Case No. 30,899) (same); Southwest Public Service Company (Case No. 30,901) (same). Each of the foregoing appellants was served with this Motion; each has asked the Court in their respective appeals to extend the time in which to file docketing statements.

