

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY
OF NEW MEXICO,

Appellant,

vs.

Case No. 31,020

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

100) at 4]. The purpose of Rule 100 is to mitigate New Mexico's contribution to global climate change by requiring certain large stationary sources to reduce their carbon dioxide emissions. See generally § 20.2.100; [Exhibit 1].

2. Under the standard of review in this appeal:

[The] court of appeals shall set aside the action only if found to be:

- (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, § 74-1-9(J) (1985); NMSA 1978, § 74-2-9(C) (1992). Based on PNM's arguments in the proceeding below, as well as in related proceedings before the New Mexico Supreme Court and in the Fifth Judicial District, PNM will likely advocate all three statutory grounds for reversal.

ARGUMENT

3. Although not controlling in this Court, Rule 1-024 NMRA provides useful guidance relating to intervention. Rule 1-024 allows for both "intervention as of right" and "permissive intervention" in district court cases, as follows:

A. Intervention as of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the ... transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

B. Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Rule 1-024 NMRA. "In general, [courts] construe Rule 24(a) liberally in favor of potential intervenors." Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. Cal. 2001).

4. **NEE should be allowed to intervene in this appeal "as of right," because it has a substantial interest in Rule 100, which it cannot protect unless the Court grants intervention.** NEE has a substantial stake in Rule 100. It was the petitioner in the proceeding below, as well as the drafter and chief advocate of Rule 100. It seeks to intervene in this appeal in order to defend the Board's legal authority to adopt Rule 100, the administrative procedures that the Board followed, and the evidentiary basis underlying the Board's decision to adopt Rule 100. Under the facts of this case, as set out in detail below, NEE should be allowed to intervene in this appeal "as of right." Cf. Rule 1-024(A) (2) NMRA (allowing intervention "as of right" in district court cases).

a. NEE drafted Rule 100, and, pursuant to its statutory rights under Section 74-1-9(A) and Section 74-2-6(A) of the EIA and AQCA, respectively, NEE petitioned the Board to adopt the Rule and was the petitioner throughout the Board's rulemaking process. See New Energy Economy v. Shoobridge et al., 2010 NMSC 49, ¶ 2, 243 P.3d 746 (outlining NEE's role in the

rulemaking); [Exhibit 1]. To meet its burden of persuasion, NEE presented multiple expert witnesses and technical exhibits to the Board. NEE also successfully defended against a series of motions filed by PNM and other opponents seeking at various times to dismiss or stay the rulemaking.

b. NEE not only advocated for Rule 100 in the administrative proceeding below, it has defended the Rule and the Board's right to consider and adopt the Rule in several court proceedings. After PNM *et al.* prematurely filed suit against the Board in the midst of Board's rulemaking and persuaded a Fifth Judicial District Judge to enjoin the rulemaking midstream, NEE successfully petitioned the New Mexico Supreme Court to issue a writ of superintending control against the District Court Judge. Shoobridge ¶ 1 (explaining the basis for issuance of the writ against the Honorable Judge Shoobridge and holding "that a court may not intervene in administrative rule-making proceedings before the adoption of a rule").

c. In response to Governor Martinez' improper attempt to halt publication of Rule 100 after its adoption by the Board, NEE again successfully petitioned the New Mexico Supreme Court to issue a writ of mandamus to compel the State Records Administrator to publish Rule 100 as required by the State Rules Act. New Energy Economy v. Martinez et al., 2011 NMSC 6 (explaining the Court's rationale for issuance of the writ against the State Records Administrator).

d. NEE also expended substantial time and money successfully defending Rule 100 in the last legislative session. NEE was able to persuade a sufficient number of legislators to vote against multiple bills that would have repealed or otherwise undermined Rule 100 and other greenhouse gas regulations. The current Governor is adamantly opposed to restricting greenhouse gas emissions, and no one from her administration spoke in favor of *any* environmental protection at the Legislature.

e. Thus, as set out above, NEE has demonstrated a substantial, sustained, and unique interest in Rule 100. PNM's appeal directly threatens this interest and the hard work NEE has done for the past three years to secure the Rule's adoption. Accordingly, NEE should be granted intervention. See Nellis v. Mid-Century Ins. Co., 2007 NMCA 90, ¶9, 142 N.M. 115 (intervention should be allowed where "a direct rather than contingent interest" is involved and intervenor's "interest will automatically be harmed should [opposing party] prevail"); cf. State ex rel. Sweet v. Village of Jemez Springs, 114 N.M. 297, 300, 837 P.2d 1380, 1383 (N.M. Ct. App. 1992) (recognizing a successful applicant for a zoning variance as a necessary party to an appeal of the planning commission's decision to ensure "the most vitally interested party's participation in the appellate process").

5. **NEE should be allowed to intervene in this appeal “as of right,” because no existing party adequately represents NEE’s interests.** As set out below, the Board will not adequately represent NEE’s interests in this appeal. Cf. Rule 1-024(A) (2) NMRA (providing for intervention “as of right ... unless the applicant's interest is adequately represented by existing parties”).

a. Although it was the Board that adopted Rule 100, it was NEE that drafted the Rule, petitioned the Board to adopt it, and defended the Rule—in the proceeding below, in the Fifth Judicial District, and in the New Mexico Supreme Court.

b. Governor Martinez has publically expressed hostility towards the Board’s regulation of greenhouse gas emissions as well as skepticism regarding the cause and reality of climate change. Immediately upon taking office, the Governor fired all of the Board members who adopted Rule 100 and the Board’s other greenhouse gas regulations, citing the adoption of these Rules as grounds for immediate dismissal. [**Exhibit 2** (New Mexico Governor Loses Bid to Overturn Greenhouse Gas Cap, *Environment News Service* (Jan. 26, 2011)]. Governor Martinez, moreover, attempted to stop Rule 100 from going into effect by preventing its publication in the state register, which prompted NEE to petition the Supreme Court for a writ of mandamus to compel publication as required by law. New Energy Economy v. Martinez et al., 2011 NMSC 6; [**Exhibit 3** (Felicity

Barringer, "2 Environment Rules Halted in New Mexico," *New York Times* (Jan. 6, 2011)]. The Governor has since appointed new Board members who share her hostility toward state regulation of greenhouse gases and general skepticism regarding climate science.

c. PNM summarizes Governor Martinez' and the Board's opposition to Rule 100 and other greenhouse gas regulations, as follows:

Governor Martinez has indicated that she does not support [Rule] 100 and is actively considering avenues to secure the repeal or otherwise prevent the implementation of that rule and other related rules, including the Board's adoption of [Rule 350], the "Greenhouse Gas Cap and Trade.

...

Second, the Governor is responsible for appointing members of the Board. On January 4, 2011, Governor Martinez announced her removal of the entire Board. She has subsequently appointed replacement Board members, whose nominations are subject to Senate confirmation. *PNM believes that a possible resolution of this matter may be achieved with the new Board.*

PNM's Motion for Extension of Time to File Docketing Statement at 2 ¶4 & 3 ¶ 7

(emphasis added).

d. In a related appeal, the Independent Petroleum Association of New Mexico ("IPANM") further describes the Governor's hostility towards Rule 100 and the Board's openness to negotiating a "resolution" through an "emergency rulemaking":

Governor Martinez has indicated that she does not support [Rule 100] and is actively working with IPANM to consider avenues to secure the repeal [or] otherwise prevent the implementation of this rule and other related rules.

As a first step, the new administration has issued Executive Order 2011-001, forming a “Small Business Friendly Task Force” and suspending pending regulations during a ninety-day review period. . . .

Our Independent Petroleum Association of New Mexico Executive Director and attorney, Karin Foster, has been appointed by the Secretary-designate of the Economic Development to serve on the Governor’s small business taskforce. As a member of that Taskforce, she is preparing a report for the Governor recommending the reversal or revision of several rules and regulations [T]he reversal of the GHG rules, specifically [Rule] 100 . . . and [Rule] 350, will be the top priority recommendation in the Taskforce report, due April 1, 2011. . . .

Moreover, the Governor recently terminated all members of the . . . Board and has appointed an entirely new Board. IPANM believes that a possible resolution of this matter could be negotiated with the new Board with an emergency rulemaking.

Motion for Extension of Time to File Docketing Statement ¶¶ 4-5, 7-9 (Feb. 22, 2011), filed in Indep. Petroleum Ass’n of N.M. v. N.M. Env’tl. Improvement Bd., No. 31016 (N.M. Ct. App.).

e. Although the Attorney General has represented the Board in some of the judicial and administrative proceedings referenced above, the Attorney General has never represented NEE nor duplicated NEE’s efforts to defend Rule 100 or any other greenhouse gas regulation. For example, unlike NEE, the

Attorney General in the Shoobridge case did not seek dismissal of the improper district court case or otherwise contest the jurisdiction of the district court, but instead merely sought dissolution of the preliminary injunction. The Supreme Court ultimately agreed with NEE that the district court case should be dismissed entirely. In the Martinez case, the Attorney General declined to take any position at all as to whether Rule 100 should be published as manifestly required by the State Rules Act. 2011 NMSC 6, ¶ 8. And finally, NEE maintains and has argued extensively that the Board can regulate greenhouse gas emissions independently of the AQCA pursuant to its authority to mitigate nuisances under the EIA. NMSA 1978, § 74-1-8(A)(7) (authorizing the Board to abate nuisances); cf. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. N.Y. 2009) (holding that plaintiffs' claims relating to climate change stated a public nuisance claim). The Board has never made this argument.

f. Finally, as the architect and longstanding advocate of Rule 100, NEE has demonstrated a substantial "personal interest" in Rule 100 and this appeal, and the Board will not adequately protect this interest. See Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995) ("Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public") (*quoting* 3B Moore's Federal Practice, Par. 24.07[4] at 24-78 (2d ed. 1995)). Indeed, the

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:

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CERTIFICATE OF SERVICE: I certify that I caused a copy of the foregoing paper to be mailed, first class, to the parties' attorneys (shown below) and also emailed to them and the other persons identified below on the 20th day of April, 2011:


R. Bruce Frederick

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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)
_____)

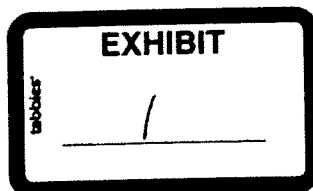
EIB No. 8-19 (R)

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

New Mexico Governor Loses Bid to Overturn Greenhouse Gas Cap

SANTA FE, New Mexico, January 26, 2011 (ENS) - The New Mexico Supreme Court handed environmental groups a victory today in their unanimous ruling that Governor Susana Martinez violated the state Constitution when she prevented a rule establishing a statewide cap on greenhouse gas emissions from being published as codified state law.

The environmental group New Energy Economy sued Martinez, claiming the newly elected governor improperly requested the state's records administrator to delay publishing the rule.

Chief Justice Charles Daniels said state law is clear - once regulations are filed, the records administrator "does not second guess" their intent.

The ruling orders the state records administrator to post the regulations in the next issue of rules publications. The court's ruling also applies to a separate but similar lawsuit on dairy regulations passed by the Water Quality Control Commission in December 2010.

"This is a tremendous and deserved victory for the administration of justice in New Mexico," said Bruce Frederick, staff attorney of the New Mexico Environmental Law Center, the nonprofit law firm that brought the two lawsuits against the governor for its clients, New Energy Economy and Amigos Bravos. "The ruling ensures that our regulations will continue to be developed in a public and open process, and be protected from revision through secret, backroom deals."

Governor Martinez, a Republican who took office on January 1, 2011, follows Governor Bill Richardson, a Democrat who was widely hailed as a champion of environmental protection.

On December 6, 2010, in the final days of the Richardson administration, the New Mexico Environment Improvement Board, adopted New Energy Economy's rules to reduce greenhouse gas emissions by three percent per year from 2010 levels, with a goal to reduce emissions 25 percent below 1990 levels by 2020.

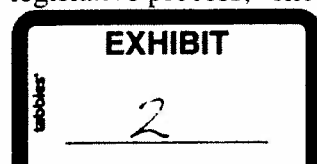
New Energy Economy said in a statement today, "This rule enables effective and efficient carbon pollution reduction that will foster clean energy job creation and prosperity for New Mexico's families and communities. This breakthrough achievement provides a practical model for national climate change policy and economic renewal."

Indicating her "bold" new direction for New Mexico, on January 4 Governor Martinez removed all the members of the Environmental Improvement Board for helping create an "anti-business environment."

"The EIB moved forward with the cap-and-trade regulatory program after state lawmakers rejected the proposal during the legislative process," she said then in a statement.



**New Mexico Governor
Susana Martinez** (Photo
courtesy Office of the Governor)



"Unfortunately, the majority of EIB members have made it clear that they are more interested in advancing political ideology than implementing common-sense policies that balance economic growth with responsible stewardship in New Mexico," Martinez said.

On her first day in office, Martinez had halted "all proposed and pending regulations," which includes the cap-and-trade regulation. To rescind those rules, the new members of the EIB, which will be appointed by Martinez, will have to hold new public hearings and allow for public comment.

Martinez' new direction for New Mexico is illustrated by her choice of Harrison "Jack" Schmitt to head the Energy, Minerals and Natural Resources Department, which oversees environmental issues.

A former U.S. Senator and Apollo 17 astronaut who walked on the Moon, Schmitt has said he believes that some leaders of the environmental movement are communists.

As reported by Matthew Reichbach today in the "New Mexico Independent," while appearing on "Infowars," the Alex Jones radio show, on July 31, 2009, Schmitt said, "I think that there are individuals, [Obama science advisor John] Holdren apparently among them, a very large number who have taken the - shall we say captured - the environmental movement and turned it into what was previously considered the communist movement."



Harrison Schmitt (Photo by Debbie McCallum courtesy NASA)

Holdren is director of the White House Office of Science and Technology Policy. He was previously Teresa and John Heinz Professor of Environmental Policy at the Kennedy School of Government at Harvard University, and director of the Woods Hole Research Center. Holdren was elected president of the American Association for the Advancement of Science, 2006-2007, and served as board chairman in 2007-2008.

Later in the interview, Schmitt expanded on the communist theme, saying, "I think the whole trend really began with the fall of the Soviet Union. Because the great champion of the opponents of liberty, namely communism, had to find some other place to go and they basically went into the environmental movement."

"That's not to say there aren't some major and significant environmental issues, particularly at the local level, but they converted environmental activism to a political movement and some would say a religious movement," Schmitt said on air.

Schmitt has stated repeatedly that he does not believe man-made global warming exists and says the government pressures scientists to support its existence.

Schmitt must be confirmed by the state Senate, where Democrats are in the majority.

Also up for Senate confirmation is Governor Martinez' choice of petroleum engineer F. David Martin for secretary of the environment.

Martin currently serves as an adjunct associate professor at the New Mexico Institute of Mining and Technology. After working for the Calgon Corp. for 15 years, Martin worked for 20 years at the Petroleum Recovery Research Center, serving as the director from 1987 to 1996.



F. David Martin (Photo courtesy NMIMT)

In 1990, Martin was appointed by Governor Garrey Carruthers to coordinate policy between the state of New Mexico and the United States Department of Energy.

Upon his nomination, Martin said, "Without question, our state's natural beauty must be kept intact for future generations. I look forward to working with Governor Martinez to implement common-sense policies that keep New Mexico beautiful and protect our environment while allowing for responsible development of our vast natural resources."

"My goals are the governor's goals," said Martin. "Our mission is to provide the highest quality life through a safe, clean and healthy environment. We want to have policies and procedures in place that will ensure that our children and grandchildren will have the same thing."

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2 Environment Rules Halted in New Mexico

By FELICITY BARRINGER
Published: January 6, 2011

Acting on a campaign promise, New Mexico's new Republican governor, Susana Martinez, has scuttled a state regulation requiring annual 3 percent cuts in greenhouse gas emissions.

A second environmental rule intended to control the discharge of waste from dairies in southern New Mexico was also dropped before publication. A different state rule that caps greenhouse gas emissions from stationary sources like power plants remains in effect for the time being.

During her campaign, Governor Martinez described the regulation of heat-trapping emissions as burdensome for industry and harmful to the state's economy. Her swift action upon taking office comes as the newly elected governors of two other southwestern states, Arizona and California, are setting a different tone, firmly advocating greater reliance on clean energy.

Governor Martinez, who received hundreds of thousands of dollars in campaign contributions from oil and gas interests, has also said that she does not believe that science has clearly established a link between climate change and human activity.

As if to emphasize that point, on Thursday she appointed the geologist and former astronaut Harrison Schmitt, another skeptic, as secretary of the state's Energy, Minerals and Natural Resources Department.

The measure on cutting emissions by 3 percent was struck on Tuesday, when the governor's office instructed a senior official at the state's records center not to publish it in the next state register, to be issued on Jan. 14.

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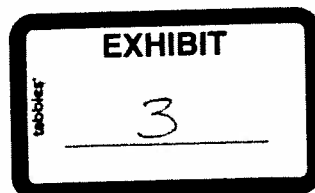
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Because state regulations become final on publication, that rule, which was adopted in December by the state's Environmental Improvement Board, now appears to have no force. Bruce Frederick, a lawyer for the New Mexico Environmental Law Center, called Governor Martinez's action "underhanded" and "illegal," adding: "It's beyond the power of the governor. What she's trying to do is change the result in a case after the judgment has been rendered."

Before scuttling the rule, the governor's office sent e-mails to members of the Environmental Improvement Board informing them that they had been dismissed. "Unfortunately, the majority of E.I.B. members have made it clear that they are more interested in advancing political ideology than implementing common-sense policies that balance economic growth with responsible stewardship," Governor Martinez said in a press release announcing the dismissals.

In an interview, Gay Dillingham, who had been the board's chairwoman, said that she would have preferred that the federal government acted to address climate change across the board in place of state regulators. In the absence of firm steps, she said, the board felt it had to act.

On Election Day, the board voted 4 to 3 to establish an emissions cap on stationary sources like power plants and a system permitting polluters to trade emission allowances that would take effect in 2012.

"I think we designed a very good regulation," Ms. Dillingham said. "Rate payers are not going to suffer; nobody's going to suffer."

Staff members in the state Environmental Department were instructed to refer calls to the governor's press secretary, Scott Darnell. He did not answer repeated phone calls and e-mails seeking comment.

A version of this article appeared in print on January 7, 2011, on page A14 of the New York edition.

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