STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED NEW REGULATION,
20.2.351 NMAC – *Greenhouse Gas Reduction Program* **No. EIB 17-01 (R)**

THE NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE IN OPPOSITION TO PETITION FOR REGULATORY CHANGE

The Air Quality Bureau ("Bureau") of the Environmental Protection Division ("Division") of the New Mexico Environment Department ("Department") submits this response in opposition to the Petition for Regulatory Change filed by the Youth Petitioners and Wild Earth Guardians on June 27, 2017. The proposed rule, entitled "Greenhouse Gas Reduction Provisions," states that its purpose is to "establish regulations to reduce greenhouse gas emissions in New Mexico" in order to address global climate change. The provisions of the proposed rule, however, do not set forth a regulatory program, but instead contain a series of broad directives to the Department to establish a regulatory program. Many of the actions that the proposed rule directs the Department to take exceed the Department's authority under the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -17, and the Air Quality Control Act, (the "Act") NMSA 1978, §§ 74-2-1 to -17, while other provisions of the proposed rule are not within the Environmental Improvement Board's ("Board's") authority to promulgate.

Aside from these fundamental legal deficiencies, the Petition fails to account for the fact that several actions have already been taken, or will be taken in the near future, by the Department and other agencies in New Mexico that address, either directly or indirectly, greenhouse gas ("GHG") emissions in the State. Additionally, Petitioners developed their proposed rule and filed their Petition without any consultation with the Department – the agency that would have to implement the rule, including development of numerous additional regulations and plans to carry

out the proposed rule's directives. Nor did Petitioners conduct any public meetings or stakeholder outreach. For a rule of this magnitude and consequence, one that will require vast resources from the Department and the state as a whole, the failure of Petitioners to consult with the Department or involve the public in any way in developing their proposal renders that proposal fundamentally flawed on its face. As more fully elaborated below, the Board should exercise its discretion to decline to set a hearing on the Petition.

I. The Board Has Broad Discretion in Deciding Whether to Set a Hearing on a Petition

The Board has extensive discretion in deciding whether to conduct a rulemaking proceeding upon the filing of a petition to adopt a proposed rule. Neither the Air Quality Control Act nor the Board's rulemaking procedures specify any criteria guiding the Board's decision whether to hold a hearing on a rulemaking petition. *See* NMSA 1978, § 74-2-6(A) (stating that the Board "shall determine whether to hold a hearing within sixty days of submission of a proposed regulation"); 20.1.1.300.C NMAC (same). Thus, the Board's discretion is governed by the general standards set forth in Section 74-2-9 of the Air Quality Control Act, which provides that the Board's action can only be set aside if it is found to be "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the records; or (3) otherwise not in accordance with law." Federal courts applying this same standard have stated that an agency's discretion is at its broadest – and therefore court review at its narrowest – when it comes to the decision not to institute rulemaking proceedings. *See e.g.*, *WWHT Inc. v. Federal Communications Comm'n*, 656 F.2d 807, 818 (D.C. Cir. 1981). As the Tenth Circuit has explained:

> Substantial prudential concerns counsel particularly broad deference in the context of review of an agency refusal to initiate rulemaking. The D.C. Circuit has repeatedly observed that, within the range of deference embodied in the 'arbitrary and capricious' standard, refusals to initiate rulemaking are at the high end.

Maier v. U.S. E.P.A., 114 F.3d 1032 (10th Cir. 1997). As discussed below, the proposed rule is fundamentally and structurally flawed, and the Board is well within the ample contours of its discretion to decline to set a hearing on the Petition.

II. The Proposed Rule is Structurally Flawed and Would Require the Department and the Board to Act Beyond Their Statutory Authority

The proposed rule is not structured as a set of regulations that establishes a regulatory program, but rather as a series of directives to the Department to establish such a program, or to otherwise "ensure" that certain specified regulatory targets are met. These directives are largely not within the Department's powers under the Air Quality Control Act, which empowers the Department to do the following: develop facts and make investigations and studies in order to enforce the Act; institute legal proceedings to compel compliance with the Act or the Board's regulations promulgated thereunder; consult with owners and operators regarding sources of emissions; classify and record air contaminant sources that may cause or contribute to air pollution; and develop and present to the Board a plan for the regulation, control, prevention or abatement of air pollution. NMSA 1978, § 74-2-5.1. Essentially, the Board promulgates regulations to prevent and abate air pollution under the Act, and the Department implements and enforces those regulations. Likewise, a number of provisions in the proposed rule address issues that are not within the Board's authority to regulate under the Act.

As detailed below, the proposed rule as written does not properly reflect the statutory roles of the Board and the Department in regulating air pollution. The Board does not order the Department to develop and propose regulatory programs for the Board to adopt. If Petitioners desire to unilaterally bring proposed regulations before the Board, such proposed regulations need to contain the specific standards and regulatory programs Petitioners seek to accomplish, and must align with the statutory authority and functions of both the Board and the Department.

Section 20.2.351.9 of the proposed rule would require the Department to "[e]nsure that New Mexico's total in-boundary and embedded CO_2 emissions are reduced" by increasing percentages below 1990 levels from the years 2020 to 2050, and that total in-boundary and embedded CO_2 emissions are reduced by at least 8 percent per year beginning in 2018. The Department cannot simply "ensure" that specified reductions in GHG emissions occur over specified timeframes. If the Board promulgates regulations with requirements that are calculated to achieve such reductions, the Department will implement and enforce those regulations.

Section 20.2.351.10 of the proposed rule requires that the Department "adopt a statewide carbon budget using best climate science" to meet the targets set forth in the previous section, and to "[e]nsure the state is on track to meet the carbon budget on an annual basis." Pursuant to the powers and duties delineated in the Air Quality Control Act, it is the Board, not the Department, that would need to adopt a carbon budget via regulations (assuming it even has the authority to do so without additional legislative authorization), and the Department could attempt to carry out those regulations, assuming the necessary funding was provided for such an endeavor. But even in that case, the Department alone would not necessarily be able to "ensure" that the State was on track to meet specific GHG emission reduction targets. All that the Department can ensure is that the sources over which it has regulatory authority pursuant to the Air Quality Control Act are complying with the standards and regulations that the Board has properly adopted pursuant to its own statutory authority under the Act.

Section 20.2.351.14 of the proposed rule orders the Department to develop regulations mandating that sources emitting more than 10,000 metric tons of CO_2 equivalent report their baseline CO_2 emissions to the Department and that such sources reduce those emissions on an annual basis relative to their baseline emissions. Again, it is the Board that must promulgate

regulations. The Board does not issue regulations in the form of broad mandates to the Department to develop regulations.

Section 20.2.351.9.A of the proposed rule would require the Department to "develop and implement a low carbon fuel standard to measure and reduce the full-cycle, carbon intensity of the transportation fuel pool used in New Mexico to impact emissions reductions" consistent with achieving the state targets set forth in the proposed rule. First, as stated previously, the Board, not the Department, is the agency that promulgates standards via regulations. Second, the Board does not have authority to adopt its own fuel standards. Under the federal Clean Air Act, fuel standards can only be developed by the federal government or California.

Section 20.2.351.9.B of the proposed rule requires the Department to "develop and implement air emission limits and standards to measure, monitor, track and reduce greenhouse gas emissions" from agricultural sources. As is the case for the other provisions discussed above, the Board is the entity that promulgates emissions standards.

Section 20.2.351.15 of the proposed rule requires that the Department, within six months of adoption of regulations establishing emission reduction targets, to "adopt a new Climate Action Plan to meet the reduction goals. . . ." Again, it is the Board, not the Department, that is authorized adopt such a plan.

In sum, the proposed rule is not structured properly. The Petition, in its current form, does not include specific standards and regulatory programs for the Board's consideration, and thus would require the Department and Board to act in ways that exceed their respective legislative authority and mandates.

III. The Petition Disregards Numerous Existing and Future Actions that Address GHG Emissions in New Mexico

The Petition is premised on the general assumption that promulgation of this proposed rule, or a rule of this nature, is required in order for the Board to fulfill its public trust duty to protect and manage the natural resources of the State of New Mexico for the benefit of present and future generations. However, the Petition disregards the myriad actions that are already being taken in New Mexico, on the part of the Board, the Department, other state and federal agencies, and regulated entities, that directly or indirectly impact the State's GHG emissions.

For instance, the Board has already adopted regulations at 20.2.73 NMAC establishing emission inventory requirements, pursuant to which major sources with Title V operating permits are required to report their GHG emissions to the Department on an annual basis. Such reporting is also currently required by the U.S. Environmental Protection Agency ("EPA"), and the Department allows sources to report only to EPA to avoid duplicative reporting requirements. However, if EPA were to stop requiring those sources to report their GHG emissions, Part 73 would still be in place requiring New Mexico sources to report to the Department.

The Department also compiles its own top-down GHG inventory, estimating and analyzing historical New Mexico anthropogenic GHG emissions on a sector basis for the period beginning in 2000, with updates at three year intervals. This inventory, which is available on the Department's website, accounts for all GHG sources in New Mexico from 2000, including both stationary and mobile sources, as well as electric consumption. The latest Inventory document shows that the total (gross) direct emissions in New Mexico decreased by 6 million metric tons from 2000 to 2013, despite a 14.6% growth in New Mexico's population over that time period. *See* Inventory of New Mexico Greenhouse Gas Emissions: 2000-2013, at p. 2, *available at*, https://www.env.nm.gov/wp-content/uploads/2017/01/NM_GHGInventory_2013_Update.pdf.

Another critical action that will significantly reduce New Mexico's GHG emissions is the retirement of two of the four coal-fired units at the Public Service Company of New Mexico's ("PNM") San Juan Generating Station by the end of this year. This action is part of the State's regional haze State Implementation Plan, and it will have a marked effect on GHG emissions in the State. In fact, the retirement of the San Juan units would have rendered New Mexico in compliance with the federal Clean Power Plan, the regulatory program promulgated by EPA in 2015, which aimed to reduce carbon dioxide emissions from electrical power generation in the U.S. by 32 percent by 2030, relative to 2005 levels. While those regulations are currently stayed pending court review, it nonetheless bears noting that the effect of the retirement of the San Juan units will have a marked impact on GHG emissions in the State, enough to have satisfied reduction obligations under a federal rule that was specifically designed to curb GHG emissions in the U.S. to address global climate change. Further, PNM has recently indicated that it is considering shutting down all units at the San Juan Generating Station in 2022, which would result in additional GHG emissions reductions.

Another example of existing programs targeting GHG emissions are the federal regulations that directly regulate GHG emissions associated with oil and gas operations, which are a significant source of methane emissions in the U.S. In 2016, EPA promulgated updated new source performance standards for the oil and natural gas industry, setting technology-based GHG emissions limits for new, modified, and reconstructed sources in the upstream and midstream oil and gas sector. *See Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources*, 81 Fed. Reg. 35824 (June 3, 2016) ("NSPS OOOOa"). The Board adopted NSPS OOOOa on April 28, 2017. Similarly, in 2016 the Department of Interior, Bureau of Land Management, promulgated the Waste Prevention, Production Subject to Royalties, and Resource

Conservation rule, 81 Fed. Reg. 83008 (Nov. 18, 2016), which regulates GHG emissions from both existing and new, modified, or reconstructed oil and natural gas wells on federal lands. These rules target practices such as venting and flaring, which release methane and CO_2 into the atmosphere. Both rules are currently in place, and attempts to stay their effectiveness have thus far been rejected by the courts. *See Clean Air Council, et al., v. Pruitt*, Decision on Emergency Motion for a Stay, or, In the Alternative, Summary Vacatur, No. 17-1145 (D.C. Cir., July 3, 2017) (Vacating EPA's attempt to stay compliance dates for NSPS OOOOa); *State of Wyoming and State of Montana v. U.S. Department of Interior, et al.*, Order on Motions for Preliminary Injunction, No. 2:16-CV-0285-SWS (Jan. 16, 2017) (Denying motion for preliminary injunction to stay BLM Waste Prevention Rule).

In sum, the State's fulfillment of its obligation to protect the public trust does not stand or fall on this proposed rule, and therefore the Board is not compelled to act on this Petition.

IV. Petitioners Did Not Notify or Engage with the Public, the Department, or Other Stakeholders Prior to Filing Their Petition

The Board has traditionally placed great importance on a petitioner's engagement with the public and stakeholders, particularly those likely to be most affected by a proposed rule, prior to coming before the Board to request a hearing. Failure to involve or inform the public or the Department before a petition is filed has been the basis for denial of petitions in the past. See, for example, EIB 12-01 (R) (proposed amendments to liquid waste regulations), in which the Board denied a Petition for Rulemaking based on Petitioner's lack of public outreach prior to filing the petition.

In the present case, the petition was filed with absolutely no notice to the Department or to the public. The Department became aware of the petition more than two weeks after it was filed, only after being informed by a third party. The Board should require Petitioners to conduct both

meetings with the Department and extensive public meetings and other forms of public outreach prior to requesting a hearing on regulations that are this far-reaching, and that would affect so many New Mexico communities, regulated entities, and individuals.

As the agency responsible for implementing and enforcing air quality regulations, the Department is a major stakeholder in this proposed rulemaking. As such, the failure to engage with or even inform the Department about the Petition is troubling and problematic. Petitioners should be required to, at a minimum, consult with the Department prior to requesting a hearing.

V. Conclusion

For the reasons set forth above, the Board should exercise its discretion to decline to set a hearing and hold a rulemaking proceeding on the Petition at this time.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: 

Lara Katz
Andrew Knight
Assistant General Counsels
Post Office Box 5469
Santa Fe, New Mexico 87502
Telephone (505) 827-2885
Fax: (505) 827-1628
Email: Lara.Katz@state.nm.us
Andrew.Knight@state.nm.us

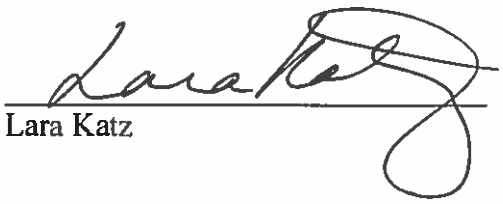
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *The New Mexico Environment Department's, Response in Opposition to Petition for Regulatory Change,* was served on the following via mail and hand delivery on August 18, 2017:

Ms. Pam Castaneda, Administrator
Water Quality Control Commission
Room N-2168, Runnels Building
1190 St. Francis Dr.
Santa Fe, New Mexico 87505

Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
sruscavagebarz@wildearthguardians.org

Andrea K. Rogers
Law Offices of Andrea K. Rogers
3026 NW Esplanade
Seattle, WA 98117
andrearogers42@gmail.com



Lara Katz