

STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED AMENDMENTS TO
20.2.91 NMAC, NEW MOTOR VEHICLE EMISSION STANDARDS

EIB NO. 23-56(R)

NEW MEXICO ENVIRONMENT DEPARTMENT,

PETITIONER.

ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF PETITION TO AMEND EXISTING RULE 20.11.104 NMAC,
NEW MOTOR VEHICLE EMISSION STANDARDS

AQCB PETITION NO. 2023-01

CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT,

PETITIONER.

**NEW MEXICO ENVIRONMENT DEPARTMENT AND ENVIRONMENTAL HEALTH
DEPARTMENT'S JOINT RESPONSE IN OPPOSITION TO
MOTIONS TO POSTPONE HEARING**

Pursuant to 20.1.1.307(D) NMAC and 20.11.82.25(D) NMAC, the New Mexico Environment Department (“NMED”) and the City of Albuquerque Environmental Health Department (“EHD”) (collectively the “Agencies”) hereby respond in opposition¹ to the Motions to Postpone Hearing (collectively “Motions”) filed by New Mexico Auto Dealers Association and

¹ Movants’ Counsel stated in the Motions that EHD did not provide a response. Such statement is disingenuous when EHD’s Counsel in-fact promptly responded to the request, which was made after-hours on a Friday with a response deadline of Monday, October 10, 2023. EHD’s Counsel stated a position could not be timely obtained because Monday was a City Holiday. Movants’ Counsel agreed to wait until Tuesday to file the Motions, yet the Motions were filed a day early.

Automundo de Garcia, Ltd. (collectively “Movants”). The Agencies oppose Movants’ request to change the hearing date and ask the Environmental Improvement Board (“EIB”) and the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) (collectively the “Boards”) to deny the Motions because the request is not timely, moving the hearing would have a profound effect on the rulemaking proceeding, and a date change would detrimentally limit realization of air quality improvements in New Mexico.

First, Movants’ request was not timely. Movants had an opportunity to provide their position on whether a hearing should be granted and the scheduling of that hearing prior to and during the August 9, 2023 Meeting of the Air Board. *See* 20.1.1.300 NMAC (“Any person may respond to the petition either in writing prior to the public meeting or in person at the public meeting.”); 20.11.82.18(C) NMAC (substantially similar). Notably, Movant New Mexico Auto Dealers Association (“NMADA”) had actual notice of the matter. A NMADA representative was present at the August 9, 2023 Air Board meeting, where the Air Board heard the Petitions, allowed for public comment, granted the hearing, and set the dates. However, NMADA did not participate. All persons have been given and are being given ample opportunity to participate in the process and to have their positions heard in accordance with the legal requirements for rulemaking proceedings.

Additionally, Movant NMADA has no basis to assert it is not fully prepared to participate in this hearing when it has not fully availed itself of the stakeholder outreach opportunities. NMADA has been an active participant in stakeholder engagement opportunities provided by the Agencies, including meeting with the Governor’s Office and NMED Leadership; and has had at least one individualized stakeholder meeting with the Agencies, along with numerous email communications. However, NMADA declined an invitation by NMED to have further meetings

with the Agencies to discuss and potentially address concerns. The Agencies have advised representatives of NMADA on several occasions of relevant dates, opportunities for participation, and legal documents with detailed descriptions and dates relevant to the rulemaking (*e.g.*, the Pre-Hearing Order (Sept. 19, 2023)). Also, both NMED and EHD are still actively engaged in stakeholder engagement prior to filing testimony and participating in the hearing. The Agencies stand ready to engage with Movants and any other interested stakeholders about concerns, such as those listed in paragraphs 9 through 11 of the Motions. Regardless, Movants will have an opportunity during the hearing to present testimony on the concerns raised in paragraphs 9 through 11 of the Motions – the same as all other parties and persons.

Second, the public, the Agencies, and Climate Advocates would be prejudiced if they could no longer rely on the established hearing dates. The Boards already published their hearing notices in accordance with their procedural rules 20.1.1.301 NMAC and 20.11.82.19 NMAC, which include the exact hearing dates. The Boards should not prejudice the active participants relying on the hearing dates by making a change now. Moreover, the Agencies have already executed contracts and expended significant resources to prepare testimony and to facilitate the complex joint board hearing. Substantial waste would result if the Boards changed the hearing dates. Last minute date changes about a month from the hearing should be denied absent extenuating circumstances based on good cause or a justifiable reason. Movants do not identify any reason except their failure to participate in the process, so there is no basis to change the hearing dates.

Third, Movants' request is not simply an innocuous date change but if granted would be detrimental to the objectives of proposed amended rule 20.11.104 NMAC and proposed amended rule 20.2.91 NMAC, respectively (collectively the "Proposed Rules"). Postponing the hearing 60 days would push the effective date of any adopted rules past the deadline for Model Year 2027. If

the boards still considered the Proposed Rules, the earliest the rules could apply would be Model Year 2028. Section 177 of the Clean Air Act requires States give manufacturers at least two full model years to prepare their fleets to meet the standards. 42 U.S.C. § 7507. Model years for motor vehicles do not coincide with the calendar year. Model years are based on production periods, so manufacturers can introduce a next-model-year vehicle for public sale as early as January 2 of the preceding calendar year and as late as December 31 of the corresponding calendar year. *See* 42 U.S.C. § 7521(b)(3)(A). For example, a 2027-model-year vehicle can be sold starting on January 2, 2026, and up to and including December 31, 2027.

Movants' request would push the hearing to January 12, 2024 or later, making it impossible for the Proposed Rules to go into effect in time for Model Year 2027. The first day of Model Year 2027 is January 2, 2026, and two years before then is January 1, 2024. For the Proposed Rules to be effective by that date, the final orders from the Boards must be issued by November 31, 2023 for filing with the New Mexico Register on December 1, 2023 since it is the last filing date for the New Mexico Register that will allow thirty (30) days after filing before the effective date. *See* NMSA 1978, §§ 74-2-6(F); Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, § 9-5-1-6(F); Bernalillo County Code, art. II, § 30-35(f). The Boards must deny Movants' hearing date change request to preserve the opportunity to hear the Proposed Rules as written.

Fourth, Movants' request, if granted, would prevent manufacturers from earning credits/values to ease compliance with the motor vehicle delivery requirements. The opportunity to earn credits/values is critical for manufacturers who must have the credits/values to jump start as early as possible. Without credits/values, manufacturers lose the benefit of an extra year to ramp up deliveries to New Mexico and question whether they can achieve compliance. Delaying

the hearing would delay the Proposed Rules to begin Model Year 2028 and would destroy opportunities for manufacturers to earn any credits for their early delivery of compliant vehicles to New Mexico.

Lastly, the Agencies concur with the Hearing Officer's recommendation that the Motions be decided by the EIB and the Air Board, *see* 20.1.1.307 NMAC and 20.11.82.25(F) NMAC; the Agencies do not think a hearing is necessary; and the Agencies do not believe the Boards need to jointly meet to decide the Motions. However, any action taken by either board to change the hearing date needs concurrence by the other board to preserve the joint hearing process that ensures any final rules do not contain conflicting provisions. Without a joint hearing on the merits, the Proposed Rules may not uniformly create a statewide program for statewide compliance meeting the identity requirements of Section 177 of the Clean Air Act. *See* 42 U.S.C. § 7507. The Boards already agreed to hold a joint hearing to consider the Proposed Rules.

Movants waited two months to opine on the hearing date and have failed to provide any compelling reason for the Boards to change the date. In conclusion, the Agencies oppose any change to the hearing date already set by the Boards and the Motions should be denied.

Filed: October 17, 2023

Respectfully submitted,

**NEW MEXICO ENVIRONMENT
DEPARTMENT**

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CERTIFICATION

I hereby certify that on October 17, 2023, a copy of the foregoing document was served as follows with the mail to be sent to Mr. Nicholas R. Maxwell on October 18, 2023 due to mail drop-off deadlines at City Hall:

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