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Re: Comments on Energy Transition Act Rulemaking

INTRODUCTION

Coalition for Clean Affordable Energy, Conservation Voters New Mexico, Diné C.A.R.E., Naeva, National Parks Conservation Association, San Juan Citizens Alliance, Sierra Club, Tó Nizhóní Ání, and Western Environmental Law Center submit these comments on the proposed rule to implement the carbon dioxide (“CO₂”) emission limit included in the Energy Transition Act (“ETA”). The Energy Transition Act provides that the Environmental Improvement Board (“EIB”) shall adopt:

standards of performance that limit carbon dioxide emissions to no more than one thousand one hundred pounds per megawatt-hour on and after January 1, 2023, for a new or existing source that is an electric generating facility with an original installed capacity exceeding three hundred megawatts and that uses coal as a fuel source.

N.M. Stat. Ann. § 74-2-5(B)(1)(b).

One of the primary goals of the ETA is to transition New Mexico away from reliance on uncontrolled coal plants as a source of electricity, benefiting public health, public lands and parks, and the climate. The CO₂ emission limit is a critical part of the ETA’s overall framework for transitioning away from the use of coal plants that lack systems for reducing their carbon dioxide emissions. The ETA requires that CO₂ emissions be limited from affected coal plants beginning on January 1, 2023. It is imperative that NMED and the Board finalize this rule as soon as possible, and prior to January 1, 2023, to fulfill the statutory mandate that the CO₂ emissions limits go into effect on January 1, 2023.

We appreciate the Division’s work in drafting the proposed rule. For the reasons explained below, we believe that the rule should be modified in several ways. Specifically, we recommend that the proposal be amended as follows:

- The averaging time should be shortened from a 12-operating-month to a 30-operating-day rolling average;
- The rule should define an “operating-month” or “operating-day”;
- The rule should state that all CO₂ emissions, including emissions during startup, shutdown, and malfunction events, must be included in calculating the CO₂ emission rate;
- The rule should state that all electricity output from an affected facility must be included in calculating the megawatt-hours for the CO₂ emission rate, regardless of whether or how the electricity output is used;
- The rule should state that idled or closed units at an affected facility cannot be used to offset or to average emissions with units that operate during the compliance period; and
- The rule should clarify whether the emission limit applies to each unit individually or the facility as a whole.

ARGUMENT

I. THE DIVISION SHOULD SHORTEN THE AVERAGING TIME FROM 12 MONTHS TO 30 DAYS, TO BE CONSISTENT WITH THE INTENT OF THE ENERGY TRANSITION ACT.

A shorter averaging time (i.e., a 30-operating-day rolling average) would better effectuate the legislative intent in the ETA than the 12-operating-month averaging time in the proposed rule. The ETA specifies that the standards must “limit” CO₂ emissions “on and after January 1, 2023.” N.M. Stat. Ann. § 74-2-5(B)(1)(b). This indicates that the legislature intended that CO₂ emissions be reduced starting on January 1, 2023, and thereafter.

The Division proposes that the CO₂ emission limit be expressed on a 12-operating-month rolling average basis. As a practical matter, that means a facility would not have to file its first compliance report until operating for 12 months after January 1, 2023. Thus, for a facility operating every day in 2023, the facility would not have to file a compliance report with the Division until 2024—at least a full year after the January 1, 2023 date in the ETA. Under the proposed rule, a facility could operate for all of 2023, emit CO₂ at a rate much higher than 1,100 lbs/MWh, and the Division might not be able to take enforcement action until 2024.

The proposed rule would constrain the Division’s options for enforcing the CO₂ limit until 2024 at the earliest, which would frustrate the statutory mandate that CO₂ emissions be limited to 1,100 lbs/MWh “on and after January 1, 2023.” To meet this statutory goal, it is important that facilities be required to demonstrate compliance as soon as possible after January 1, 2023, and that the Division be able to enforce the CO₂ limit as soon as possible after January 1, 2023. Shortening the averaging time to 30-operating-days would ensure that compliance reports are due in early 2023.

An averaging time shorter than 12 operating months would also be more consistent with the purpose of SB0489, which is to transition New Mexico away from reliance on coal plants that do not limit their CO₂ emissions by January 1, 2023. SB0489 contains various provisions indicating a legislative intent to transition New Mexico away from reliance on coal plants lacking control technologies for reducing carbon dioxide emissions. If a qualifying utility abandons its interest in a coal unit before 2023, the Act allows the utility to issue securitization bonds to recover its undepreciated costs in that coal unit. N.M. Stat. Ann. § 62-18-2(S)(3). The Act states that certain coal-fired generating units must meet the CO₂ emission limit that is the subject of this rulemaking beginning on January 1, 2023. N.M. Stat. Ann. § 74-2-5(B)(1)(b). Taken together, these provisions demonstrate a legislative intent that CO₂ emissions be limited to 1,100 lbs/MWh starting on January 1, 2023. The shortest possible averaging time is most consistent with the ETA because it would require compliance reporting as soon as possible after January 1, 2023 and enable the Division to evaluate compliance as soon as possible after January 1, 2023.

We recognize that the federal Environmental Protection Agency used a 12-operating-month rolling average in its new source performance standards for GHG emissions from new or modified power plants. We assume that NMED turned to these NSPS standards as the basis for proposing a twelve-operating-month rolling average for this rule. But EPA, in issuing new source performance standards, was implementing particular provisions of the federal Clean Air Act. Here, NMED is given a very different task: to implement a specific provision in a New Mexico law, the Energy Transition Act. For the reasons explained above, an averaging time shorter than the 12-operating-month rolling average in EPA's new source performance standards better reflects the intent of the New Mexico legislature in enacting the CO₂ limits in the ETA, and thus it is inappropriate to look to the averaging time in the federal NSPS for purposes of this rule.

Given the text and structure of the ETA, the averaging time should be as short as is feasible. Many, if not most, limits for pollutants emitted by power plants are expressed as a 30-day rolling average. Given the text of the ETA, and the fact that most emission limits for power plants are expressed as a 30-day rolling average, we ask that the proposed rule be revised to a 30-operating-day limit, rather than a 12-operating-month limit. Specifically, we ask that the Division revise 20.2.101.112 ("Emission Standard") to replace "12-operating-month" with "30-operating-day."

II. THE DIVISION SHOULD ADD DEFINITIONS OF KEY TERMS TO CLARIFY HOW THE RULE WOULD BE IMPLEMENTED AND ENFORCED.

A. The Division Should Define the Term “Operating Month” or “Operating Day.”

As mentioned above, we recommend that the proposal substitute the phrase “30-operating-day” for “12-operating-month.” If the Division makes that change, we suggest that proposed section 20.2.101.7 (“Definitions”) be revised to add a definition of “operating day” as “a calendar day during which any fuel is combusted in the affected EGU at any time,” or a similar phrasing that indicates that if any amount of fuel is burned at a unit during a calendar day, then that day qualifies as an operating day. This definition is analogous to EPA’s definition of an operating month in the new-source performance standards for greenhouse gas emissions from new or modified power plants. 80 Fed. Reg. 64,510, 64,657 (Oct. 23, 2015).

If the Division rejects our suggestion and retains 12 operating months as the averaging time for the rule, we suggest that the Division add a definition of “operating month.” We suggest that proposed section 20.2.101.7 (“Definitions”) be revised to add a definition of “operating month” as “a calendar month during which any fuel is combusted in the affected EGU at any time,” or a similar phrasing that indicates that if any amount of fuel is burned at a unit in a month, then that month qualifies as an operating month. This definition comes from EPA’s new-source performance standards for greenhouse gas emissions from new or modified power plants. 80 Fed. Reg. at 64,657.

B. The Division Should Specify that All CO₂ Emissions, Including from SSM Events, Count Toward Compliance with the Rule.

A recurring issue in regulation of power plant emissions is whether emissions from startup, shutdown, and malfunction (“SSM”) events are counted toward compliance with an emission limit. Here, the ETA does not exclude emissions from SSM events, but instead says that CO₂ emissions must be limited to no more than 1,100 lbs/MWh. Given that the statute does not contain an exception for SSM events, we believe that all emissions, including emissions from SSM events, should be counted toward compliance with the rule.

We urge the Division to add a sentence to the end of proposed 20.2.101.112 (Emission Standard) that: “The calculation of pounds of CO₂ emitted must include all CO₂ emitted during the compliance period, including but not limited to emissions during startup, shutdown, and/or malfunction events.”

C. The Division Should Specify that All Electrical Output, Regardless of what the Output is Used For, Counts Toward Compliance with the Rule.

The ETA includes an emission limit in which the numerator is pounds of CO₂ and the denominator is megawatt-hours of electricity. The proposed rule should make clear that all megawatt-hours must be included in compliance calculations, regardless of whether or how the electricity produced is used. This clarification can preempt disputes about whether electricity used to power pollution controls, or electricity used to create carbon dioxide as a product to be sold, is covered by the rule.

We urge the Division to add a sentence to the end of proposed 20.2.101.112 (Emission Standard) stating that: “The calculation of megawatt-hours generated during the compliance period must include all megawatt-hours generated by the affected EGF, regardless of whether or how the electricity is used.”

D. The Division Should Specify that an Idled or Closed Unit Does Not Affect the Emission Rate of an Operating Unit, and Clarify Whether The Emission Limit is Calculated at the Unit or Plant Level.

The proposed rule would apply to the San Juan Generating Station, as well as any new coal-fired units that might be constructed. As of the date these comments are being submitted, San Juan Units 1 and 4 are the only remaining units at San Juan that are still in operation (in prior years, the plant had four units). It is possible that Enchant and Farmington may attempt to operate only one unit in the future. This raises the issue of how idled or closed units should be treated for purposes of calculating the emission rate under this rule.

The Division should make clear that units that do not generate any megawatt hours during a compliance period cannot be counted for compliance purposes in any way, including to offset or average production between a closed and open unit. For example, if San Juan Unit 4 were to operate in 2023, but San Juan Unit 1 remained closed or idled for all of 2023, the owner/operator would calculate the pounds per megawatt hour of CO₂ emitted from only San Juan Unit 4 for purposes of compliance with this rule. While the Division may believe that this conclusion is implicit in the proposed rule, making it explicit in the rule can avoid confusion and future disputes.

In addition, the Division should clarify whether the emission limit applies at the unit or plant level. It is theoretically possible that an owner or operator of an affected facility with more than one unit could attempt to operate one unit above the CO₂ limit, another unit below the limit, and claim that the aggregate emission rate for the two units is at or below the CO₂ limit. We

suggest that the limit apply to each unit individually, but regardless of what the Division decides, it would be helpful to specify whether the limit should be calculated at the unit or facility level.

For these reasons, we recommend that the Division adds the following passage to the end of proposed 20.2.101.112 (Emission Standard) stating that: “The owner or operator shall calculate the pounds per megawatt-hour of CO2 emitted for each unit of an affected EGF. Compliance with this rule will be determined separately for each unit of an affected EGF.”

CONCLUSION

We appreciate the Division’s work on this rulemaking and the opportunity to submit comments. Please do not hesitate to contact the undersigned with any questions concerning these comments.

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