

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

**IN THE MATTER OF PROPOSED REPEAL AND REPLACEMENT OF
20.2.71 NMAC – *OPERATING PERMIT EMISSIONS FEES* AND
20.2.75 NMAC – *CONSTRUCTION PERMIT FEES***

No. EIB 25-___ (R)

New Mexico Environment Department,

Petitioner.

**STATEMENT OF REASONS IN SUPPORT OF NEW MEXICO ENVIRONMENT
DEPARTMENT’S PETITION FOR REGULATORY CHANGE TO REPEAL AND
REPLACE 20.2.71 NMAC, *OPERATING PERMIT EMISSIONS FEES*, AND 20.2.75
NMAC, *CONSTRUCTION PERMIT FEES***

The New Mexico Environment Department (“Department”) respectfully submits to the Environmental Improvement Board (“Board”) this Statement of Reasons as **Exhibit A** to the Department’s Petition for Regulatory Change to Repeal and Replace 20.2.71 NMAC, *Operating Permit Emissions Fees*, and 20.2.75 NMAC, *Construction Permit Fees* (“Petition”), in support of the regulatory changes proposed in the Petition for adoption of proposed replacement of rules 20.2.71 NMAC and 20.2.75 NMAC. See Petition, **Exhibits B and C**. The Department proposes to repeal and replace 20.2.71 NMAC, *Operating Permit Emissions Fees* (“Part 71”) and 20.2.75 NMAC, *Construction Permit Fees* (“Part 75”) to ensure the fees are sufficient to cover the reasonable costs of the Department’s Title V Permit Program and Construction Permit Program (collectively the “Air Programs”), as required by the New Mexico Air Quality Control Act (“AQCA”), Sections 74-2-1 through 74-2-17, and the federal Clean Air Act (“CAA”), 42 U.S.C. § 7401 *et seq.*

AUTHORITY AND BACKGROUND

1. The current fee schedules previously established by the Board at Part 71 and Part 75 no longer generate sufficient revenue to cover the costs of fully implementing the Department's Air Programs.

2. The fees obtained by the Department support the required Title V and Construction Permit Programs under state and federal law, including the Department's Air Quality Bureau (Environmental Protection Division); and the Department's Environmental Protection Compliance and Enforcement Bureau (Compliance and Enforcement Division).

3. The New Mexico Legislature, in Section 74-2-7(B)(7) of the Air Quality Control Act ("AQCA"), directed the Board to establish a schedule of emissions fees that satisfy the federal requirements of CAA, Section 502(b)(3) and 40 C.F.R. Section 70.9, including supporting direct and indirect operating permit program costs.¹ This is separate from the agency budgeting processes the Department conducts annually per fiscal year.

4. Part 71 establishes the schedule of emissions fees for sources required to obtain a Title V permit under 20.2.70 NMAC, *Operating Permits*, to meet the aforementioned state and federal requirements.

¹ Direct operating permit program costs include labor costs (*i.e.*, salary and benefits) and program-related expenses such as materials, equipment, professional services, travel, public notices, public hearings, and contracted services. Indirect operating permit program costs are "general administration" costs not directly attributed to the program but needed to operate it and include, but are not limited to, costs for utilities, rent, general administrative support, training, budget and accounting support, supplies, and postage. ENVIRONMENTAL PROTECTION AGENCY, *Updated Guidance on EPA Review of Fee Schedules for Operating Permit Programs Under Title V* (March 27, 2018), at 4, available at https://www.epa.gov/sites/default/files/2018-03/documents/fee_schedule_2018.pdf.

5. The Part 71 Title V permit fee schedule specifies the annual emissions fee for each fee pollutant expressed in dollars per ton of allowable emissions. Annual emissions fees increase each year by the percentage increase, if any, in the Consumer Price Index (“CPI”).

6. The Board last amended the Part 71 Title V permit fee schedule in 2009.

7. The lack of amendment to Part 71 since 2009 has precluded the Department from updating the definition of “fee pollutant” to reflect current pollutant categories and precluded the Department from fully supporting costs of the Title V Permit Program.

8. The New Mexico Legislature, in Section 74-2-7(B)(6) of the AQCA, directed the Board to establish a schedule of fees sufficient to cover the reasonable costs of the Department’s Construction Permit Program, including reviewing and acting upon construction permit applications and implementing and enforcing the terms and conditions of such permits.² This is separate from the agency budgeting processes the Department conducts annually per fiscal year.

9. Part 75 establishes a schedule of fees for notices of intent, permits to construct or modify a source, permit revisions, and technical reviews of existing permits to meet the aforementioned state requirements.

10. The Part 75 construction permit fee schedule includes a complexity-based points schedule for various actions and a cost per point, which is multiplied by the sum of all the points applicable to a given permitting action to determine the required permit fee. It also includes an annual fee for sources that have already been issued a construction permit.

11. The Board last amended the Part 75 construction permit fee schedule in 2003.

² Like operating permit program costs, construction permit program costs include labor costs, program-related expenses, and indirect “general administration” costs.

12. The lack of amendment to Part 75 since 2003 has precluded the Department from fully supporting costs of the Construction Permit Program.

13. The volume of Construction Permit Program operations has increased over the last 10-15 years. By way of specific example, permitting actions associated with general construction permits for oil and gas operations have increased around 2100% over the last 13 years, while the overall number of permitted facilities has increased at least 160%. In addition, the number of facilities holding a notice of intent has increased, the Department has increased regulatory responsibilities under 20.2.50 NMAC (Ozone Precursor Rule), and federal air quality rules have increased in complexity and scope. These factors have caused significant increases in air quality permit modeling review complexity, as well as corresponding increases to inspection, planning, and monitoring needs.

14. In 2024, the Board declined to increase the Part 71 Title V permit fee schedule and the Part 75 construction permit fee schedule after the Board determined the Department did not provide sufficient evidence; however, the Department has now compiled the additional financial evidence needed to present the Board with details regarding the expanded needs of the Department's Air Programs.

15. In the Department's current fiscal year, Fiscal Year 2026, the Title V Permit Program costs are projected to exceed revenue from emissions fees by at least \$3 million, while Construction Permit Program costs are projected to exceed revenue from permit fees by at least \$4 million.

16. Absent any changes to the current fee schedules and without considering increased costs associated with needed expansion to the Air Programs, both the Title V and Construction Permit Programs are projected to run comparable deficits in each of the next four fiscal years. The

Title V Special Revenue Fund (holding Part 71 Title V permit fees) is projected to be exhausted in Fiscal Year 2028, while the New Source Review Special Revenue Fund (holding Part 75 construction permit fees) is projected to be exhausted sometime in Fiscal Year 2030.

17. The resulting fiscal cliff will have significant consequences for the Department's Air Programs, and in addition to the Air Programs' employees and projects, will negatively impact the public and the regulated community.

18. The Department has engaged the New Mexico Department of Finance and Administration ("DFA") on the solvency of the Title V Special Revenue Fund and New Source Review Special Revenue Fund for the Department's Air Programs, and DFA concurred that the Funds could be at risk.

19. Since the 2024 petition, the Department's Air Quality Bureau, using available funds, has created and filled 20 new positions, began a gap analysis for its technology database upgrades, initiated a photochemical ground-level ozone modeling analysis to better understand how to decrease this pollutant in impacted areas at risk for non-attainment, and deployed additional air monitors in response to requests from the public.

20. At the same time, counties in New Mexico remain above the National Ambient Air Quality Standard for ground-level ozone; the Department is unable to respond to local community pollution detection concerns; and the Department has been forced to delay permit responses to the regulated community based on its inability to absorb the application volume, amongst other issues.

21. New Mexico is now the second highest oil producing state in the nation and the third largest natural gas producer in the nation, increasing demands on the Air Programs. As such, the Department needs to add approximately 80 full-time positions over the next five years, and invest in compliance assistance and assurance efforts such as optical gas imaging and remote

satellite sensing. The Department also needs to continue its technology upgrades to ensure integrated, transparent, and reliable services to both the regulated community and the public.

22. Given the projected fiscal cliff of the Title V Special Revenue Fund and New Source Review Special Revenue Fund, the Department will be unable to continue its work in these and other mission critical program areas without the Board revising Part 71 and Part 75, as requested by the Department.

SUMMARY OF THE REPLACEMENT RULES

23. The Department requests the Board repeal and replace Part 71 and Part 75 to adopt the Department's proposed changes. The proposed replacement rules include the higher emissions and construction permit fees the Department has calculated are necessary to cover the reasonable costs of its Air Programs, and other changes intended to clarify and modernize the rules.

24. The proposed replacement rules also adopt the State Records Center and Archives' current style and formatting requirements, as required by 1.24.11.9(C) NMAC.

25. The full text of replacement rules 20.2.71 NMAC and 20.2.75 NMAC are attached to the Petition as **Exhibits B and C**, respectively. For ease of review, the current rules 20.2.71 NMAC and 20.2.75 NMAC with the proposed changes shown in redline fashion are attached to the Petition as **Exhibits D and E**, respectively.

26. The substantive changes the Department is proposing to Part 71 and Part 75 are briefly described below:

PART 71 OPERATING PERMIT EMISSIONS FEES

20.2.71.7 NMAC, *Definitions*, defines certain terms used in the rule. The Department proposes removing mercury and total suspended particulate matter ("TSP") from the definition of "fee pollutant" provided in 20.2.71.7(C)(1) NMAC, and adding particulate matter 10 microns or

less in diameter (PM₁₀) and particulate matter 2.5 microns or less in diameter (PM_{2.5}) to the definition. These changes are necessary because there are no longer any major sources with mercury emissions in New Mexico following the closure of the San Juan Generating Station in 2022, and because TSP is no longer regulated given that the health risks posed by particulate matter are more accurately measured by analyzing smaller particles. Even though regulation has shifted from TSP to PM₁₀ and PM_{2.5} the Department has been unable to assess fees for particulate matter since 2018 because the existing definition only addresses TSP.

20.2.71.10 NMAC, *Severability*, specifies that if any provision of the rule – or its application to any person or circumstance – is held invalid, the remainder of the rule shall not be affected. The Department proposes adding this new section to the rule to prevent the entire rule from being voided should a court strike down one or more specific provisions of the rule. This provision is standard in and consistent with other Department rules.

20.2.71.109 NMAC, *Applicability*, identifies to whom the rule applies and whom it affects. The Department proposes repealing this section in its entirety because it is duplicative of 20.2.71.2 NMAC, *Scope*.

20.2.71.111 NMAC, *Fee Determination*, describes the calculation of fees, the effect of source shutdowns on fees, and how fees for excess emissions are determined. The Department proposes reducing the maximum tons used in the fee calculation for any one fee pollutant from 6,000 to 3,000 tons and adding provisions specifying that fees will be assessed for either PM₁₀ or PM_{2.5}, not both, based on whichever has the higher allowable emission rate, or, in the case of fees for excess emissions, whichever has higher emissions above annual allowable emission limits. Reducing the maximum tons used in the fee calculation for any one fee pollutant will increase equity by ensuring that no single source pays more than five percent of the total fees collected, and

the provisions regarding fees for PM₁₀ or PM_{2.5} will prevent double billing for the same pollutant since PM_{2.5} is a component of PM₁₀.

20.2.71.112 NMAC, *Emissions Fee*, establishes the baseline emissions fee for each fee pollutant, currently \$165 per ton for hazardous air pollutants (“HAPs”) and \$20 per ton for all other fee pollutants except mercury, which has its own fee schedule, and provides that these fees shall be adjusted annually using the CPI beginning in 2009. The Department proposes resetting the baseline fee for HAPs to \$258 per ton (equal to the current, inflation-adjusted amount after the next adjustment on January 1, 2026) and increasing the baseline fee for all other fee pollutants to \$85 per ton; deleting the fee schedule for mercury, which the Department proposes removing from the definition of fee pollutant; and adding language to the provision regarding annual fee adjustments clarifying that fees shall remain the same in the event there is a decrease or absence of change in the CPI. An increase in baseline emission fees is necessary to ensure the Department’s fees are sufficient to cover the reasonable costs of its Title V Permit Program, as required by the CAA and AQCA, and safeguard its Title V Special Revenue Fund against impending insolvency.

20.2.71.113 NMAC, *Notification, Payment, Late Fee and Enforcement*, states when the Department shall assess annual emissions fees and when payment is due, describes how fees shall be remitted, and stipulates that nonpayment of fees may result in penalties and possible enforcement action. The Department proposes expanding payment options to allow for payment of fees electronically or by other methods allowed by the State, adding a provision imposing a late fee if emissions fees are not remitted by the due date, and adding a provision regarding administrative compliance costs for enforcement of the State’s air quality regulations. These changes are necessary to allow for the use of modern payment methods, incentivize the timely payment of fees, and confirm administrative compliance costs.

PART 75 CONSTRUCTION PERMIT FEES

20.2.75.11 NMAC, *Application Review Fee and Annual Fee*, provides the point schedule for calculating application review fees (previously “permit fees”) for new permits, permit revisions, and technical reviews of existing permits; establishes the baseline cost per point used to calculate application review fees; provides that sources that have been issued a construction permit shall be assessed an annual fee; and provides that the cost per point and annual fee shall be adjusted annually using the CPI. The Department proposes increasing the points for modeling reviews from 15 to 30; increasing the points for oil and gas General Construction Permit registrations from 10 to 30; adding 10 points for notices of intent; increasing the cost per point from \$539 (the current, inflation-adjusted amount after the next adjustment on January 1, 2026) to \$585; increasing the annual fee for sources that have been issued a construction permit from \$2,564 (the current, inflation-adjusted amount after the next adjustment on January 1, 2026) to \$2,800; adding an annual fee of \$700 for sources that have filed a notice of intent; and adding language to the provision regarding annual fee adjustments clarifying that fees shall remain the same in the event there is a decrease or absence of change in the CPI. An increase in the points assessed for modeling reviews is necessary because the average complexity and review time of modeling projects has increased significantly in recent years due to the issuance of various general construction permits, which have eliminated the requirement to perform modeling for simpler sources. An increase in the points assessed for oil and gas general construction permits is necessary because applications for oil and gas general construction permits are more complex than for other general construction permits. Assessing points for notices of intent is necessary because the current \$500 filing fee is insufficient to cover the cost of reviewing a notice of intent to determine whether a construction permit is required before construction may commence. Finally, increasing the cost per point and

annual fee for sources that have been issued a construction permit and adding an annual fee for sources that have filed a notice of intent are necessary to ensure the Department's fees are sufficient to cover the reasonable costs of its construction permit program, as required by the AQCA, and safeguard its permit fee fund against impending insolvency. Adding an annual fee for sources that have filed a notice of intent is also justified because these sources, like sources that have been issued a construction permit, impose ongoing compliance obligations on the Department, the costs of which are not covered by application review fees, which are one-time fees intended only to cover the cost of reviewing an application.

20.2.75.12 NMAC, *Invoicing, Payment, Late Fee and Enforcement*, describes the process for invoicing and paying construction permit fees. The Department proposes adding language allowing for invoicing and payment of fees electronically or by other methods allowed by the State; adding a provision imposing a late fee if annual fees are not remitted by the due date; adding a provision stipulating that nonpayment of construction permit fees may result in penalties and possible enforcement action; and adding a provision regarding administrative compliance costs for enforcement of the State's air quality regulations. These changes are necessary to allow for the use of modern billing and payment methods, incentivize timely payment of fees, and confirm administrative compliance costs.

20.2.75.13 NMAC, *Periodic Review*, as currently written in law, requires the Department to prepare a review of permit fees and program costs annually and present it to the Board within six months following the end of the fiscal year. However, the Department proposes removing the provision requiring that the annual review be presented to the Board. The purpose of the annual review is to help the Department determine whether it is necessary to initiate rulemaking proceedings to increase fees. When it does so, it must provide information regarding budgets and

expenditures to the Board in the course of those proceedings. In years when the Department determines it is not necessary to seek an increase in permit fees, there is no purpose in providing this information to the Board, and the Board historically has not received or reviewed this information.

20.2.75.14 NMAC, *Severability*, specifies that if any provision of the rule – or its application to any person or circumstance – is held invalid, the remainder of the rule shall not be affected thereby. The Department proposes adding this new section to the rule to prevent the entire rule from being voided should a court strike down one or more specific provisions of the rule. This provision standard in and consistent with other Department rules.

PUBLIC ENGAGEMENT

27. The Department plans to hold at least one virtual public engagement meeting on the proposed regulatory changes in January 2026. The Department will formally announce this meeting after filing the Petition and provide more information, including instructions for how to join online or by phone, via the Department’s website at <https://www.env.nm.gov/air-quality/proposed-regs/>, the Department’s public events calendar at <https://www.env.nm.gov/events-calendar/>, and its various listservs. The Department will also continue to meet one-on-one with individual stakeholders, upon request.

28. In addition to accepting feedback on the proposed regulatory changes during the aforementioned public engagement meetings, the Department will accept comments in writing via its online public comment portal at <https://nmed.commentinput.com?id=dM4UeKV73>. The Department will make the public comment form available after filing the Petition.

29. Interested individuals can sign up to receive email updates from the Department on the rulemaking at <https://public.govdelivery.com/accounts/NMED/subscriber/new>. After

subscribing, users should check the “Air Quality” box to receive updates about all air quality topics, or the “Air Quality Bureau Regulatory and SIP Announcements” box to only receive updates about the Department’s rulemaking activities.

COMPLIANCE WITH STATUTORY RULEMAKING REQUIREMENTS

30. Adoption of replacement rules 20.2.71 NMAC and 20.2.75 NMAC is justified given the character and degree of injury to or interference with health, welfare, visibility, and property. See NMSA 1978, § 74-2-5(F)(1).

31. Adoption of replacement rules 20.2.71 NMAC and 20.2.75 NMAC is in the public interest, including the social and economic value of the sources and subjects of air contaminants. See NMSA 1978, § 74-2-5(F)(2).

32. Replacement rules 20.2.71 NMAC and 20.2.75 NMAC are technically practicable and economically reasonable in the methods the rule employs to reduce or eliminate air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved. See NMSA 1978, § 74-2-5(F)(3).

33. Replacement rules 20.2.71 NMAC and 20.2.75 NMAC are drafted to comply with 1.24.0010 NMAC, the uniform drafting rules for regulations in the New Mexico Administrative Code.

34. Therefore, replacement rules 20.2.71 NMAC and 20.2.75 NMAC comply with the statutory rulemaking requirements.