

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

**IN THE MATTER OF PROPOSED REPEAL
OF 20.2.85 NMAC, MERCURY EMISSION STANDARDS
AND COMPLIANCE SCHEDULES FOR
ELECTRIC GENERATING UNITS**

No. EIB 13-09 (R)

**ORDER AND STATEMENT OF REASONS
FOR REGULATORY CHANGES**

This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“NMED” or “Department”), proposing repeal of 20.2.85 NMAC. The Board heard testimony from the Department and admitted exhibits into the record. On March 21, 2014, the Board deliberated and voted to adopt the proposed repeal for the reasons that follow:

STATEMENT OF REASONS

1. On April 4, 2007, the Board adopted proposed 20.2.85 NMAC, *Mercury Emission Standards and Compliance Schedules for Electric Generating Units* (“Part 85”). See NMED Exhibit 5, Order and Statement of Reasons in EIB No. 06-15 (R), at p. 9.
2. Part 85 was proposed by the Department in response to requirements imposed by the U.S. Environmental Protection Agency’s (“EPA”) Clean Air Mercury Rule (“CAMR”), which, among other things, established a mercury emission budget for each state. *Id.* at ¶ 14. Part 85 reflected the Department’s decision to opt out of the optional CAMR trading program. *Id.* at ¶ 15. Instead, Part 85 provides for mercury emission limits for two

affected electric generating units in the State and provides a set-aside for new facilities.

See 20.2.85.101.B (1) – (2) NMAC.

3. On February 8, 2008, the U.S. Court of Appeals for the District of Columbia Circuit vacated CAMR. The court held that the EPA was required to follow the prescribed statutory procedure for removing mercury emissions from electric generating units (“EGUs”) from regulation under Clean Air Act (“CAA”) Section 112. Because CAMR was promulgated under the authority of CAA Section 111, which cannot be used to regulate sources subject to regulation under Section 112, EPA's failure to follow the proper delisting procedure under Section 112 rendered the CAMR provisions unlawful. See NMED Ex. 6, *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). See also Exhibit 4, Testimony of Robert Spillers, at pp. 3-4 (Vacatur of the Clean Air Mercury Rule).
4. Subsequent to the vacatur of CAMR, EPA promulgated the Mercury and Air Toxics Standards (“MATS”) under CAA Section 112. The MATS prescribes specific emission limits for various subcategories, on a mass emitted per energy input basis, for mercury and other toxic air pollutants. See NMED Exhibit 7, Excerpt from MATs at 77 Fed. Reg. 9466 – 9493. See also NMED Exhibit 4, Testimony of Robert Spillers, at p. 4 (Mercury Air Toxic Standards (MATS)).
5. In considering the proposed regulatory changes, the Board is required by the Air Quality Control Act, NMSA 1978, § 74-2-5.E to give the 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.

6. The federal Maximum Achievable Control Standards (MACT) standards, including the MATS, are established by the EPA for categories and subcategories of sources of emissions of hazardous air pollutants, based on the maximum degree of reduction of emissions achievable, taking into consideration the cost of achieving the reductions, any non-air quality health and environmental impacts and energy requirements. 42 U.S.C. § 7412(d)(2).
7. EPA's determination of the MATS therefore considers the character and degree of injury to or interference with health, and welfare; the public interest, including the social and economic value of the sources and subjects of air contaminants; and the technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved.
8. The MATS rule was among the revisions to federal MACT incorporated by reference when revisions to 20.2.77 NMAC and 20.2.82 NMAC were adopted by the Board in November, 2013. See 20.2.77.9 and 20.2.82.8 NMAC. See also NMED Exhibit 4, Testimony of Robert Spillers at p. 4 (Mercury Air Toxic Standards (MATS)).
9. The MATS are enforceable in New Mexico as a matter of federal law regardless of whether New Mexico has adopted them into state regulations. See CAA 112(l)(7) (providing that "Nothing in this subsection [state programs] shall prohibit the [EPA] Administrator from enforcing any applicable emission standard or requirement under this section.") .

10. The Air Quality Control Act allows the Board to adopt regulations requiring new coal-fired EGUs to achieve 90% control of mercury emissions, relative to the mercury content of the coal input, or best achievable control technology, whichever is greater. See NMSA 1978, § 74-2-5 (C)(4).
11. 20.2.86 NMAC - Best Available Control Technology for Mercury at New Power Plants, which was adopted by the Board in 2008, codifies the requirements of NMSA 1978, § 74-2-5 (C)(4). See NMED Exhibit 4, Testimony of Robert Spillers, at p. 5 (Future Mercury Reductions Mechanisms).
12. Mercury emissions from coal- and oil-fired EGUS are therefore currently subject to regulation under both 20.2.86 NMAC and the MATS as incorporated in 20.2.77 and 20.2.82 NMAC. These existing regulations address consideration number (1) of NMSA 1978, § 74-2-5.E (the character and degree of injury to or interference with health and welfare), and consideration number (3) (the technical practicability and economic reasonableness of reducing or eliminating air contaminants).
13. Mercury emissions from the two existing New Mexico facilities subject to Part 85 are currently lower than required by either Part 85 or the MATS. See NMED Exhibit 9, Table 1.
14. The repeal of 20.2.85 NMAC is in the public interest because it will increase regulatory certainty and clarity for the affected sources and the public and eliminate regulations that are administratively redundant and substantively ineffective, without allowing any increase in mercury emissions.

15. The proposed amendments therefore satisfy the statutory requirements of the Air Quality Control Act, NMSA 1978, § 74-2-5.E, and moreover eliminates any violation of the Act by Part 85 being more or less stringent than the federal standards.
16. Pursuant to 20.1.1.300.A NMAC, any person may petition the Board for amendment of regulations within the jurisdiction of the Board.
17. On September 18, 2013, NMED filed a petition with the Board for a public hearing in this matter. See petition in Record Proper.
18. On October 8, 2013, at a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Board granted the Department's request for a hearing.
19. On December 30, 2013, Notice of Hearing was published in the New Mexico Register. See NMED Exhibit 10.
20. On January 12, 2014, Notice of Hearing was published in the Albuquerque Journal (in English and Spanish). See NMED Exhibit 10.
21. NMED filed a Notice of Intent to Present Technical Testimony on February 27, 2014, in accordance with 20.1.1.302 NMAC.
22. A hearing was held in this matter on March 21, 2014 in Santa Fe, New Mexico.
23. The Board has the authority to approve these proposed amendments pursuant to NMSA 1978, § 74-2-5.C.
24. The notice and hearing requirements of NMSA 1978 Section 74-2-6 and 20.1.1 NMAC were satisfied in this rulemaking process.
25. The proposed amendments are adopted for any or all of the reasons stated above.

ORDER

By unanimous vote of a quorum of the Board members, the proposed repeal of 20.2.85 NMAC was approved by the Board on March 21, 2014. The Department is directed to file the appropriate documents with the New Mexico State Records Center in order effectuate the repeal.



Deborah A. Peacock, Chair
On Behalf of the Board

Dated: 4/4/13