

1 There is no conflict and little overlap between the Tailoring Rule and the cap-and-
2 trade rule. The Tailoring Rule only requires permitting actions under PSD for the
3 construction or modification of the largest industrial facilities, which happens
4 infrequently. Many years the Department processes no PSD permit applications, and at
5 most receives one application in any given year. Given the thresholds, it is conceivable
6 that the Department will receive very few PSD applications for GHGs each year. For
7 Title V, the Tailoring Rule requires the Department to include GHG emission rates in the
8 permit, but at this time there are no new federal requirements for monitoring,
9 recordkeeping, and reporting for such emission rates. By contrast, the cap-and-trade
10 program requires all facilities emitting greater than 25,000 tons of carbon dioxide to
11 reduce their emissions each year. In terms of timing, scope, and effect, there simply is no
12 conflict between the federal regulation and the Department's cap-and-trade rule.

13 Mr. Wehrum also suggests that the Department's cap-and-trade rule is not
14 necessary because EPA is considering whether to adopt New Source Performance
15 Standards (NSPS) for GHG emissions from utility boilers and refineries. Even if these
16 standards were finalized in the near future - never a certainty - and assuming that the
17 standards are not stayed pending reconsideration by the agency or review by an appellate
18 court - always a possibility - the standards would only affect new and modified facilities.
19 Again, the difference in timing and scope does not conflict with the Department's rule.

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1 **II. REBUTTAL TO TESTIMONY OF BRUCE NICHOLSON**

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3 **Q: MR. NICHOLSON SUGGESTS THAT THE DEPARTMENT MUST HIRE**
4 **12-15 NEW STAFF TO MANAGE THE CAP-AND-TRADE PROGRAM.**
5 **DO YOU AGREE?**

6 **A:** No. Mr. Nicholson's analysis appears to be based on the erroneous assumption that
7 the cap-and-trade program will aggregate upstream oil and gas facilities - wells and
8 associated equipment - adding hundreds of additional sources to the program. The
9 Department has repeatedly stated, and states once again, that the cap-and-trade program
10 will not aggregate these facilities. As a result, the number of sources covered by the
11 program is closer to 63, as identified on the list attached to the direct testimony of Mike
12 Schneider. In the context of the Department's other work, and particularly its air
13 permitting programs, this is a small number of facilities, and the cap-and-trade rule does
14 not require the Department to make many decisions regarding them. For instance, the
15 decision most likely to generate a dispute - the baseline determination - will be made only
16 once per facility during each 3 year compliance period. The other potentially contentious
17 area involves enforcement, but the nature of cap-and-trade makes this a straightforward
18 process; a facility either has enough allowances or it does not. Unlike most air quality
19 enforcement cases, this issue does not require the Department to delve into the operations
20 of the affected facility.

21 Mr. Nicholson makes other unsupported assertions. For instance, he claims that
22 the rule will require 50 meetings per year, requiring an extra FTE, even though this
23 number amounts to only 4 meetings per month. Mr. Nicholson similarly asserts that the
24 Department will have to hire more staff to develop databases, write rules, track

1 compliance, and defend appeals, but his FTE calculations are speculative and inconsistent
2 with the Bureau's experience. For example, the Bureau has a history of working with the
3 regulated community to avoid protracted appeals before the Board. The Helena appeal
4 currently before the EIB is the first such hearing in many years; other permits have been
5 appealed, but the Bureau has been able to settle those appeals before reaching a hearing.
6 The Bureau processes approximately 500 permitting actions each year, but averages less
7 than one appeal to the Board, an appeal rate of 0.2 %. Should the Bureau continue this
8 practice in the cap-and-trade program, the Board could expect to hear less than 0.126
9 appeals per year, or roughly 1 appeal every 10 years.

10 Notwithstanding the foregoing discussion, the Bureau does not dispute that it will
11 need to allocate staff resources to implement the cap-and-trade program. However, the
12 program will be part of a regional trading system, so there will be efficiencies in working
13 with other states to develop implementation tools. This has been our experience with the
14 Section 309 program under the Regional Haze Rule, in which we worked with other
15 states through the Western Regional Air Partnership to develop a regional database for
16 tracking and reporting emissions for the SO₂ backstop cap-and-trade program. I envision
17 a similar collaboration for this rule.

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20 **Q: THE DEPARTMENT ORIGINALLY PROPOSED TO GIVE FREE**
21 **ALLOWANCES TO NEW SOURCES EQUIVALENT TO THE LEVEL OF**
22 **EMISSIONS FOR A HYPOTHETICAL FACILITY APPLYING BACT**
23 **FOR GHGS. MR. NICHOLSON COMPLAINED THAT THE**
24 **DEPARTMENT'S ANALYSIS OF THIS HYPOTHETICAL BACT**

1 **FACILITY WOULD REQUIRE SIGNIFICANT AGENCY RESOURCES.**

2 **HOW DO YOU RESPOND?**

3 **A:** The Department has revised this provision to eliminate the need for any BACT
4 analysis in the cap-and-trade program.

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6 **Q: HAS THE BUREAU "TOYED" WITH THE IDEA OF AGGREGATING**
7 **FACILITIES FOR THE PART 72 PERMITTING PROGRAM?**

8 **A:** I am not sure how this claim is relevant to the Department's cap-and-trade rule.
9 Perhaps Mr. Nicholson is suggesting that the Department's alleged "toying" with the idea
10 of aggregating facilities for PSD purposes reflects the Department's intent to aggregate
11 facilities, and particularly wells and associated equipment, for the cap-and-trade program.
12 Whatever his intent in making this suggestion, I can stated emphatically that the
13 Department does not intend to aggregate these facilities for the cap-and-trade program.

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16 **III. REBUTTAL TO TESTIMONY OF JEFFREY BURKS**

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18 **Q: MR. BURKS SUGGESTS THAT THE CAP-AND-TRADE RULE WILL**
19 **NOT HAVE A CO-BENEFIT IN REDUCING OTHER CRITERIA**
20 **POLLUTANT EMISSIONS BECAUSE THE NATIONAL AMBIENT AIR**
21 **QUALITY STANDARDS ALREADY PROTECT AIR QUALITY. DO YOU**
22 **AGREE?**

23 **A:** No. The suggestion makes no sense. The EPA establishes ambient air quality
24 standards to reflect the level of quality of air that protects public health and the
25 environment. The standards themselves do nothing to achieve that quality of air. Rather,

1 under the federal Clean Air Act, the states must adopt implementation plans specifying
2 the steps that they will take to attain and maintain those standards.

3 As I pointed out in my direct testimony, the cap-and-trade program can help New
4 Mexico to attain and maintain the national standard for ozone, which the EPA intends to
5 tighten this October. We expect some areas of the state to approach or exceed the new
6 standard, and the state will be required to demonstrate compliance as early as 2013.

7 To attain the new standard, New Mexico will develop implementation plans
8 specific to each area of the state not attaining the standard. The cap-and-trade program
9 can play a role in this regard. It is likely that areas of the state exceeding the standard
10 will only exceed by a slim margin. Thus, the state may be able to demonstrate
11 compliance within a few years by obtaining small reductions in ozone precursors from a
12 variety of pollutant sectors. Many pollution control measures that reduce ozone
13 precursors have a co-benefit of reducing GHG emissions. There will be a narrow window
14 of synergy between the state's obligation to achieve the new standard and the cap-and-
15 trade program, so it is possible that GHG reductions during the first compliance period
16 could be helpful in achieving the standard.