Environmental Improvement Board
RECEIVED
December 22, 2025
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STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED ADOPTION
OF 20.2.92 NMAC –
Clean Transportation Fuel Program **No. EIB 25-23 (R)**

FOOD & WATER WATCH'S CLOSING ARGUMENT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to 20.1.2.401 NMAC and the Hearing Officer's Post-Hearing Order, Food & Water Watch ("FWW") files its Closing Argument and Proposed Statement of Reasons. This Post-Hearing Brief attempts to provide the Environmental Improvement Board ("Board") with a concise presentation on the focus of FWW's engagement in these proceedings: avoided methane crediting for manure biomethane.

I. Closing Argument

The New Mexico Environment Department ("NMED") proposes new rule 20.2.92 to create the Clean Transportation Fuel Program ("CTFP") and decrease the carbon intensity of transportation fuels in New Mexico. Addressing the climate crisis and reducing the transportation sector's climate footprint are indisputably critical objectives. But NMED and the Board must be careful to implement a CTFP that does not cause unintended consequences and harm communities, whether in New Mexico or in other states. Allowing fuels derived from factory farm manure, or "factory farm biogas," to include avoided methane emissions in their carbon intensity values risks such unintended consequences that could negatively impact the integrity of the CTFP as well as communities living near large factory farms. As stated by Senator Pope on day one of the public hearings in this proceeding:

[The CTFP] could actually incentivize large-scale factory farm biogas projects

> that replicate the failures of California's Low-Carbon Fuel Standard. California's program … ended up producing more manure, more methane, and placing severe burdens on local communities through water pollution, air pollution, and environmental strain. Instead of cutting emissions and protecting community health, those credits were rewarded to polluters turning environmental harm into a profitable enterprise.

9/22/25 Tr. 158:21–161:1. New Mexico can do better. Therefore, FWW requests the Board reject avoided methane crediting entirely, as argued and supported by the Coalition for Clean Affordable Energy. Alternatively, if the Board decides to allow avoided methane crediting, it should at least retain the critical safeguards added by NMED during these proceedings and ensure they are applied to all fuel pathways, including those approved under a similar program in another jurisdiction. Each of the safeguards included at Proposed 20.2.92.202(E), NMAC are allowed by HB 41, supported by the record here, and essential to mitigate perverse incentives and unintended outcomes associated with factory farm biogas in programs like the CTFP.

A. Legal Background

House Bill 41 requires the Board to promulgate rules to implement the CTFP. The CTFP must establish an annually decreasing carbon intensity standard for transportation fuels used in New Mexico to achieve a 20 percent reduction from the state's 2018 emissions levels by 2030 and 30 percent by 2040. NMSA 1978, § 74-1-18(C). The standard must be technology neutral and must establish a credit market where transportation fuel producers can trade and sell credits. Credits are generated by fuels with a carbon intensity below the standard and from "activities and projects that support the reduction or removal of greenhouse gas emissions associated with transportation in the state." NMSA 1978, § 74-1-18(C)(3). Nothing in HB 41 mandates any particular carbon intensity accounting methodologies.

The Board must "consider similar programs in other jurisdictions [and] allow for coordination with other jurisdictions to promote regional reductions or removal of greenhouse gas emissions." NMSA 1978, § 74-1-18(C)(6). There is no requirement that the CTFP incorporate specific provisions from another jurisdiction's program, especially if such a provision would be at odds with what the Board determines is best for New Mexico's program. Therefore, the Board's required consideration of other programs must include consideration of problems that have arisen in other programs, not only opportunities for coordination.

The Board has full authority to create a CTFP without avoided methane crediting, or if it is allowed, with restrictions. The RNG Coalition's assertion that the Board would "overstep its authority" were it to adopt FWW's recommendation to prohibit avoided methane crediting is patently wrong. RNG Coalition Exhibit 1, 2. The RNG Coalition argues that because SB 99, which would have disallowed carbon intensity values of less than zero in the CTFP, was introduced and did not become law, that indicates "clear legislative intent" that the CTFP must include avoided methane crediting. Mere failure of a bill to become law by no means renders the policies expresses in such a bill off limits to the Board. *See Giddings v. SRT-Mountain Vista, LLC*, 2019-NMCA-025, ¶ 23 n.1 ("Under our system of government, law is not made by defeating bills or proposed constitutional amendments." (quoting *State ex re. Udall v. Pub. Emps. Ret. Bd.*, 1994-NMCA-094, ¶ 20)). Furthermore, Senator Pope, a member of the Senate Conservation Committee, is the only Senator to provide public comment during these proceedings regarding avoided methane crediting in the CTFP and commented in opposition to such incentives. 9/22/25 Tr. 158:21–159:16. The RNG Coalition's position is clearly incorrect and the Board should give it no weight.

B. The Board Should Reject Avoided Methane Crediting Entirely

FWW requests that the Board reject avoided methane crediting entirely as the most effective and administrable way of addressing the issue and learning from the mistakes of similar programs in other jurisdictions. FWW supports the position taken by the Coalition for Clean Affordable Energy that avoided methane crediting is simply unnecessary. As explained by Dr. Laskowski, NMED "did not include avoided methane crediting in their modeling and they still meet their benchmarks." 11/18/25 Tr. 3770:12–14. NMED's Benefit Cost Analysis confirms this. NMED Exhibit 78, 40.

FWW additionally supports the legal arguments presented by the Coalition for Clean Affordable Energy in these proceedings explaining why avoided methane crediting is impermissible under HB 41 and existing New Mexico law. In sum, the Board should reject avoided methane crediting because doing otherwise puts the Proposed Rules on dubious legal footing and risks undermining the integrity of the CTFP when New Mexico can achieve the HB 41 targets without it.

C. If Allowed, Avoided Methane Crediting for Factory Farm Biogas Is a Risky Policy That Requires Safeguard

If the Board allows avoided methane crediting for factory farm biogas in the CTFP, it is a major problem from another jurisdiction that New Mexico must learn from. Under California's Low Carbon Fuel Standard ("LCFS"), avoided methane crediting for factory farm biogas has become increasingly controversial and the evidence of its perverse outcomes increasingly robust. As the public comments from these proceedings show, this is a controversial policy that many see as detrimental and oppose allowing in the CTFP.[1]

Were the Board to allow avoided methane crediting over these protests, it must adopt

[1] *E.g.*, 9/22/25 Tr. 149:5–157:10; Public Comment, Carol A Sassaman (July 21, 2025); Public Comment, Clean Air Task Force (Sept. 2, 2025); Public Comment, New Mexico Interfaith Power and Light (Sept. 22, 2025); Public Comment, Gary Anderson (Sept. 25, 2025); Public Comment, Chad Young (Sept. 30, 2025); Public Comment, Animal Protection New Mexico (Oct. 10, 2025); Public Comment, Margaret Bell (Nov. 18, 2025).

rules that minimize the degree to which the CTFP can perversely incentivize large factory farms to pollute even more to generate CTFP credits. Experience with the LCFS shows that the policy of avoided methane crediting risks bringing those problems to New Mexico, where NMED's own analysis demonstrates it is particularly out of place and unnecessary.

At the beginning of these proceedings, Board Member Garcia asked NMED what "the Environment Department could do that would help mitigate potential problems with [the incentivization of biogas producers such as CAFOs]." 09/22/25 Tr. 236:3–16. FWW greatly appreciates Board Member Garcia's inquiry and NMED's efforts to include critical mitigation provisions in its rule revisions. *See* Proposed 20.2.92.202(E), NMAC. Experience with California's LCFS shows that effective guardrails are essential. This Section briefly outlines the potential problems, and Section D below explains why each of the guardrails NMED has added to the Proposed Rule are necessary to address these problems.

1. Perverse Incentives to Increase Manure Methane Production

Allowing avoided methane crediting in the CTFP risks perversely incentivizing factory farms to get bigger and pollute more. The reason is that avoided methane crediting results in factory farm biogas being the most aggressively incentivized alternative fuel, even more than zero-emission electric vehicle options. CCAE Exhibit 9, 53. As recognized by the U.S. Department of Energy and Department of Treasury, such a strong financial signal raises serious perverse incentive concerns. CCAE Rebuttal Exhibit 17, 20; 11/18/25 Tr. 3708:7–3709:8. This problem is twofold. First, the CTFP could incentivize factory farms to increase their herds, thereby increasing facilities' climate emissions and local pollution. Second, the CTFP could incentivize factory farms to manage their manure to maximize pollution emissions, thereby creating more opportunity to generate credits.

On the first, the question of herd size increases came up in several ways during these proceedings. Many public commenters raised concerns about the CTFP and avoided methane crediting encouraging factory farms to get bigger.[2] Of particular note is a public comment that includes a recently published research paper by Stanford University's Regulation, Evaluation, and Governance Lab and Johns Hopkins University's Center for a Livable Future. Public Comment, Varun Magesh Iyer (Nov. 18, 2025). The commenter presented the researchers' findings of a "significant and meaningful relationship between digester incentives and facility expansion." *Id.* That research indicates that the increased emissions from that expansion "undercuts a third of the emissions reductions claimed by the crediting program." *Id.*

NMED's rebuttal witness on this issue, Dr. Colin Murphy, readily acknowledges that this concern is based on a "valid premise," in part due to "known economies of scale in the production of Renewable Natural Gas and digesters [for] livestock." NMED Rebuttal Exhibit 115, 7; 11/17/25 Tr. 3232:5–7. But Dr. Murhpy believes that "[e]conomic analysis cannot identify a significant deviation from broad, industry-wide trends that can be attributed to clean fuel programs' incentives for renewable natural gas." NMED Rebuttal Exhibit 115, 7–8. Dr. Murphy's opinion is based on two claims: a) that herd sizes expand because of industry-wide trends that cannot be specifically attributed to biogas incentives; and b) that economic analyses do not show a significant effect on herd sizes attributable to clean fuel program incentives. Neither of these claims stand up to scrutiny.

Dr. Murphy points to "industry-wide" trends in his written testimony to downplay the concerns around incentivizing expansions. But this is a red herring; the existence of other trends driving a negative outcome does not justify creating new ones that will exacerbate the problem.

[2] *Id.*

Dr. Murphy's testimony ultimately supports that assessment. The same trends he identified as diminishing the significance of biogas incentives would have their own influence in the specific context of incentivizing factory farm biogas production. For example, Dr. Murphy identifies "consolidated processing infrastructure" as a trend driving factory farm herd expansions and then acknowledges that this same pressure to consolidate would accompany biogas incentives but in new and unique ways, such as being close to necessary pipeline interconnection points and biogas upgrading facilities. 11/17/25 Tr. 3238:6–3239:7. In other words, incentivizing factory farm biogas production will add to the trends already driving larger herd sizes. Dr. Murphy opines that the effect of this addition would be "significantly smaller," but he did not attempt to quantify significance other than to make clear that his testimony should not be taken as suggesting the effects from biogas incentives are insignificant. 11/17/25 Tr. 3233:2–21.

Further complicating Dr. Murphy's testimony is his reliance on a single citation – a blog post – to support his economic analysis. As Dr. Murphy acknowledged, the blog post cited in his rebuttal testimony contained a significant data limitation. The source itself highlighted this critical data set from the U.S. Department of Agriculture that was unavailable at the time of the author's analysis. 11/17/25 Tr. 3242:15–23; NMED Rebuttal Exhibit 116. By its own admission, Dr. Murphy's source for this opinion is of limited value.

Finally, Dr. Murphy's opinion that "[f]urther research into this topic is likely" was prophetic. NMED Rebuttal Exhibit 115, 8. The same day as Dr. Murphy's oral rebuttal testimony, Mr. Iyer with Stanford University's Regulation, Evaluation, and Governance Lab entered the Lab's public comment and working paper into the record. See Public Comment, Varun Magesh Iyer (Nov. 18, 2025). The Board should give significant weight to this public comment, and FWW submits that it significantly undermines the value of Dr. Murphy's opinion and the credibility of his reliance on an analysis based on admittedly insufficient data.

Second, regarding the perverse incentive for factory farm operators to intentionally produce methane so it can then be captured for credits, Dr. Laskowski provided a concrete example of this concerning dynamic in her written testimony. Dr. Laskowski's rebuttal testimony quotes an interview of a dairy operator in New York State conducted by researchers and published in the Journal of Carbon Management: "we are being paid to create methane gas and destroy it. Now wrap your head around that one. If we just did what we normally did it would not produce methane … the absurdity of this idea, it makes no sense…." CCAE Rebuttal Exhibit 17, 18. When asked whether this points to a more prevalent dynamic in the livestock industry, with operators purposely increasing methane emissions, Dr. Laskowski testified that "there is certainly the perverse incentive to chang[e] management practices for this exact purpose." 11/18/25 Tr. 3703:10–3704:21.

New Mexico should not reward practices like this. These emissions are almost entirely mitigatable with different manure management practices, as evidenced by New Mexico's in-state dairy industry. NMED explained to Board Member Garcia that the state's industry "mitigates itself because we don't have wet dairy management." 9/22/25 Tr. 237:4–238:9. Essentially, because New Mexico dairy operations do not utilize wet manure management systems, they do not have significant manure methane emissions that could be captured for CTFP credit generation. *See* CCAE Exhibit 9, 50–52. Avoided methane crediting would incentivize the opposite and risks rewarding emissions that do not and need not exist in the first place in New Mexico, incentivizing methane-intensive practices over more responsible manure management.

2. *Book and Claim Could Allow Out-of-State Factory Farms to Take Advantage of the CTFP*

While New Mexico's in-state dairy industry is not poised to take advantage of the CTFP if the Board allows avoided methane crediting, the Proposed Rule's book-and-claim provisions mean that out-of-state factory farms could bring the problem to New Mexico. 11/18/25 Tr. 3704:25–3705:7. Experience with California's LCFS illustrates this, where almost 80% of biomethane volume participating in the program in 2024 was from outside California. CCAE Exhibit 9, 50 n. 72. Therefore, the Board cannot be reassured by the circumstances of New Mexico's in-state dairy industry because the CTFP will allow factory farms in other states to participate as alternative fuel producers. The RNG Coalition's participation in these proceedings and their "strong[] support" for book-and-claim accounting so as not to "disincentivize participation from out-of-state producers" makes this clear. RNG Coalition Exhibit 1, 4.

D. The Proposed Guardrails Are Necessary and Should Be Applied to All Fuel Pathways

Each of NMED's guardrails are necessary if the Board allows avoided methane crediting in the CTFP. But these safeguards must be applied to all pathways, including those that have been approved under other jurisdictions' programs. Therefore, FWW requests that the Board apply NMED's more conservative approach as outlined in the Proposed Temporary Fuel Pathways to all pathways using avoided methane crediting. *See* Proposed 20.2.92.701(E) (Table 5). This approach utilizes the "generic counterfactual" approach used by the U.S. Department of Treasury to address the perverse incentive problem. NMED Exhibit 67, 33; NMED Exhibit 72 (U.S. Department of Energy's "Generic Counterfactual Greenhouse Gas Emission Factor for Life-Cycle Assessment of Manure-Derived Biogas and Renewable Natural Gas"); CCAE Exhibit 17, 20; 11/18/25 Tr. 3707:24–3710:20. As Senator Pope implored the Board, "[a]llowing out-of-state farms approved under California's [LCFS] to participate here would bypass our Environmental Experts and import perverse incentives we are trying to avoid." The Board should not allow this to happen via 20.2.92.204 as alternative fuel pathways from another jurisdiction.

The specific additions NMED made during these proceedings at Proposed 20.2.92.202(E) address, at least in part, the problems discussed above as follows:

- (1)(c) & (d): These lookback provisions are necessary to rein in factory farms deliberately generating more emissions for credit generation.
- (1)(e): Inclusion of downstream emissions from factory farm gas production waste is essential to reach accurate carbon intensity values.
- (1)(f): New Mexico should not award credits to an operation that is already required to mitigate its emissions; this additionality requirement is a critical program integrity safeguard.
- (1)(g): Requiring applicants to provide a carbon intensity with and without using avoided methane crediting is a wise decision that will enable more administrative efficiency as the timelines laid out in (g) take effect.
- (1)(g): Phasing out avoided methane crediting is essential to ensure that the CTFP does not perpetually reward factory farms for causing emissions when different manure management would avoid the problem in the first instance.

But as with NMED's more conservative approach to New Mexico's temporary pathways that include avoided emissions, these guardrails need to be applied to all pathways, including those coming in under Proposed 20.2.92.204 as an alternative fuel pathway approved under a similar program in another jurisdiction. To correct this, FWW requests the Board adopt the redlines presented in FWW's Proposed Redlines to the Rules, filed concurrently with this Closing Argument.

II. Proposed Findings of Fact

A. Avoided Methane Crediting

1. Avoided methane crediting risks incentivizing livestock operations to increase their climate emissions to produce biogas through increased herd size and/or changes in how manure is managed. Public Comment, Varun Magesh Iyer (Nov. 18, 2025); CCAE Rebuttal Exhibit 17, 18.
2. The United States Department of Treasury has acknowledged that incentivizing the production of biogas from livestock manure through avoided methane crediting could lead to perverse and counterproductive outcomes. CCAE Rebuttal Exhibit 17, 20; 11/18/25 Tr. 3708:7–3709:8.
3. The United Stated Department of Treasury, in collaboration with the United States Department of Energy, addressed this concern by applying a "generic counterfactual" to establish an applicable carbon intensity for manure biomethane. NMED Exhibit 67, 33; NMED Exhibit 72; CCAE Exhibit 17, 20; 11/18/25 Tr. 3707:24–3710:20.
4. Avoided methane crediting causes factory farm biogas to receive a larger incentive than zero-emission electric vehicle options. CCAE Exhibit 9, 53.
5. Avoided methane crediting is not necessary to achieve the reduction targets of HB 41. 11/18/25 Tr. 3770:12–14; NMED Exhibit 78, 40.
6. Avoided methane crediting for factory farm biogas is a controversial policy opposed by many public commenters.

III. Proposed Conclusion of Law

a. The Board has the authority under HB 41 to prohibit or restrict the use of avoided methane crediting when calculating a fuel's carbon intensity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December 2025, the foregoing was served via electronic mail to all counsel and parties listed below:

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