STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF PROPOSED ADOPTION OF 20.13.2 NMAC
Per- and Poly-Fluoroalkyl Substances in Consumer Products

No. EIB 25-61(R)

New Mexico Environment Department, Office of Strategic Initiatives,

Petitioner.

AMERICAN CHEMISTRY COUNCIL'S WRITTEN CLOSING ARGUMENT AND LEGAL BRIEF

I. INTRODUCTION

The American Chemistry Council, or ACC, appreciates the opportunity to participate in this hearing before the Environmental Improvement Board ("Board") to address the New Mexico Environment Department's ("Department") proposed rule to regulate Per- and Poly-Fluoroalkyl ("PFAS") Substances in Consumer Products. ACC provided the Board with proposed changes to the proposed rule text at ACC Exhibit 6.

The technical hearing focused almost exclusively on a single topic: the scope of the proposed labeling requirements for consumer products containing intentionally added PFAS, as specified in the Department's proposed rule section 20.13.2.13 NMAC. Both ACC and the Complex Products Manufacturing Coalition ("CPMC") proposed substantive changes to section 20.13.2.13 NMAC, the labeling requirements, as well as changes to 20.13.2.10 NMAC. Those changes are addressed primarily to the Department's proposal to extend labeling requirements to consumer products that are exempt from the statutory mandates under Subsections A and F of Section 74-15-3, NMSA 1978.

The labeling requirements are not mandated by statute. Instead, the legislature stated that the Board ***may*** "adopt rules to carry out the provisions of the Per- and Poly-Fluoroalkyl Substances Protection Act, including requiring the labeling of products in English and Spanish . . . ." Under this plain language, the Board can decide not to adopt any rules requiring labeling. To the extent the Board decides that adopting rules requiring labeling is appropriate to carry out the provisions of the Act, the Board can decide the nature, scope and extent of any rules requiring labeling.

Importantly, no party has opposed those parts of the proposed rule that are mandated by statute, as specified in Subsection A of Section 74-15-4, NMSA 1978. These include (1) the prohibitions in proposed Section 20.13.2.9, (2) the exemptions in Section 20.13.2.10 (other than expanding the exemptions to cover labeling requirements and the prohibitions in Section 20.13.2.9), (3) the currently unavoidable use provisions of Section 20.13.2.11, (4) the reporting requirements in Section 20.13.2.12, and (5) the testing requirements in Section 20.13.2.14. The lack of any opposition to those provisions illustrates industry support for the Legislature's specification of reasonable prohibitions against and regulation of products containing intentionally added PFAS, subject to the exemptions and exceptions stated in the Act. Consequently, the Board can adopt most of the provisions of the Rebuttal Proposed Rule in the absence of opposition.

During the technical hearing and in public comments, additional issues were raised concerning (1) the definition of "consumer," as being inconsistent with the statutory definition of "consumer product," (2) concerns with the fee provisions, and (3) concerns with some of the enforcement provisions. With its closing argument, ACC proposes some additional changes to the Rebuttal Proposed Rule consistent with the hearing record. ACC's final proposed changes to the Rebuttal Proposed Rule are provided with ACC Exhibit 7 filed along with this document and ACC's proposed statement of reasons for its changes.

II. ARGUMENT

A. Background on the Department's Proposals on Labeling and ACC's Recommended Changes.

1. The Department's Proposal

During the course of this proceeding, the Department has offered three different labeling proposals. At the time the Department filed its Petition, it proposed labeling requirements that "a manufacturer may not sell, offer for sale, distribute, or distribute for sale a product containing intentionally added [PFAS] substances" without labeling the product in accordance with the standards in the proposed rule or in a manner consistent with the labeling requirements enacted by another state." Petition Ex. B, P. 8, Section 20.13.2.13.A; TR P. 154, LL. 10-22 (testimony of Dr. Chapman agreeing that the Department presented three different approaches to labeling). The only exceptions were for "used products offered for sale or resale," and for products for which the Department granted a waiver. *Id.* at pp. 8 and 10, section 20.13.2.13.A, .B and .F. The original rule proposal was modified as shown by NMED Exhibit 2. Those changes included a (1) prohibition on the manufacture for sale or distribution except in compliance with the labeling standards, (2) additional exemptions for (a) products for which labeling requirements are preempted pursuant to FIFRA, (b) veterinary products regulated by the FDA, USDA, or EPA, and (c) medical devices and drugs regulated by the FDA; (3) changes to the labeling standard specifying optional wording for the labels, rather than symbols or wording approved by the Department, and (4) additional language concerning waiver applications. NMED Ex. 2, pp. 8-10. At that time, NMED also added two new sections requiring payment of a label waiver application fee. NMED Ex. 2, p. 12, sections 20.13.2.19 and .20. The changes in NMED's third labeling proposal are shown in NMED Exhibit 70. That proposal did not change the exemptions but added

additional details in the labeling standards and removed the requirement for a label to include the Department's internet website address. NMED Ex. 70, pp. 8-10. NMED's final labeling proposal as contained in NMED's Rebuttal Rule was filed merely one week before the start of the public hearing and at the same time that all parties were required to file their rebuttal testimony responding to NMED's second labeling proposal.

2. ACC's Proposed Changes

ACC's proposed changes to the proposed rule, based upon NMED's second labeling proposal, are shown in ACC Exhibit 6. The first is a change to Section 20.13.2.10 to add a reference to section 20.13.2.9 in the list of rule sections to which the exemptions apply. ACC's change is necessary to conform the rule to the statute with regard to products exempted by the Act, as provided in Section 74-15-3 and Subsection A, Paragraph (1) of Section 74-15-4, NMSA 1978.

The second change offered by ACC is to Subsection B of Section 20.13.2.13 stating that the labeling requirements do not apply to the "products listed in Section 20.13.2.10 of this rule." This change is necessary to avoid a conflict between the Act and the Rule. Section 20.13.2.10 of the rule lists the statutory exemptions listed in Subsection A of Section 74-15-3, NMSA 1978. The statute applies those exemptions to the statutory prohibitions that are restated in Section 20.2.13.9 of the proposed rule. Consequently, the change proposed by ACC is to exempt those products that the Legislature chose to exempt from the substantive requirements of the Act listed in Subsections B through F of Section 74-15-3, NMSA 1978.

3. The Technical Testimony Supports the Exclusion of Fluoropolymers and Other Exempted Products from Labeling Requirements.

ACC presented two eminently qualified expert witnesses, Dr. Korzeniowski and Dr. Henry, who testified in support of ACC's proposed change to exclude from labeling requirements products

exempted by the Act. Both of ACC's technical witnesses have extensive knowledge and experience with various aspects of PFAS and have published peer-reviewed literature on the subject.

Dr. Korzeniowski presented written direct and rebuttal testimony and stood for questioning. He testified to his "extensive, first-hand knowledge of the regulatory, commercial, and scientific dimensions of fluorinated chemistries." ACC Ex. 2, p. 1, ll. 5-6. Dr. Korzeniowski has authored several peer-reviewed, published papers on PFAS-related topics. His testimony focused on the chemistry of PFAS compounds and the distinct chemical properties of various categories of PFAS, particularly perfluoroalkyl acids, or PFAAs, compared to fluoropolymers.

Dr. Korzeniowski explained how NMED's generalization of PFAS as a class of chemical compounds is not supported by science and runs contrary to a growing scientific consensus that all PFAS are not the same and should not be assumed to possess the same properties, citing numerous scientific studies and reports. *Id.* at P. 2, L.22 to P. 4, L. 17. Dr. Korzeniowski's direct testimony addressed two papers published in peer-reviewed scientific journals applying ten different criteria identified by the Organization for Economic Cooperation and Development (OECD) to identify polymers of low concern for human health or the environment. *Id.* P. 2, L. 31 to P.3, L. 13. He stated: "The authors of the two papers conclude that fluoropolymers are large, stable and insoluble substances that have properties fundamentally different from those of non-polymeric, water soluble PFAS. Because fluoropolymers are insoluble in water, concerns about environmental mobility do not apply to fluoropolymers. Fluoropolymers are neither bioavailable nor bioaccumulative and do not transform into non-polymeric PFAS in the environment." *Id*. Also see TR P. 1270, LL 1-3. As discussed below, the testimony of NMED's witnesses do not effectively rebut Dr. Korzeniowski's testimony regarding the solubility and mobility of

fluoropolymers and generally acknowledge the distinctions between fluoropolymers and other PFAS categories. His testimony supports both the statutory exemption for fluoropolymers found in Section 74-15-3.A(16), NMSA 1978 and the extension of that exemption to the labeling requirements.

Dr. Korzeniowski also presented written rebuttal testimony in ACC Exhibit 3. His rebuttal testimony made the following additional points:

- The Department's technical witnesses did not use scientifically precise terminology when referring to PFAS. In particular, the Department's testimony largely relied on data specific to PFAAs, yet framed conclusions as applying broadly to all PFAS. For example, conclusions regarding mobility do not apply to fluoropolymers and fluoroelastomers. ACC Ex. 3 at P.3, LL. 2-14.
- The scientific evidence does not support regulating or labeling all products identified as PFAS in the same manner. *Id.* P. 3, L. 16 to P. 4, L. 5.
- Some PFAS such as PFOA and PFOS have been voluntarily phased out and are treated differently under international agreements that do not cover broader categories of PFAS compounds. *Id.* P. 4, L. 6 to P. 5, L. 9.
- Labeling all PFAS-containing products in the same manner does not accurately reflect differences in hazard, exposure and potential risk. In particular, fluoropolymers have markedly different physical and toxicological characteristics compared to non-polymeric PFAS, and a uniform, one-size-fits-all warning could mislead consumers into believing that all of these materials pose similar risks. *Id.* P. 6, L. 9 to P. 7, L. 10.

- This same reasoning applies to the other product categories exempted by statute from the various requirements of the Act. *Id.* P. 7, L. 11 to P. 8, L. 8.

ACC's second expert witness, Dr. Barbara Henry, is a toxicologist with decades of experience who has authored numerous peer-reviewed publications relating to PFAS toxicology. ACC Ex. 5. She presented written rebuttal testimony through ACC Ex. 4 concerning the toxicology of various PFAS compounds. Dr. Henry's written testimony made the following points:

- She criticized the testimony of the Department's witnesses as framing health hazard, exposure, and bioaccumulation conclusions as applying to PFAS generally even though the cited studies primarily address PFAAs only. The extrapolation from PFAAs to all other PFAS substances is not supported by science. ACC Ex. 4, P.2, L. 21 to P. 3, L. 18.
- Emerging toxicological evidence applies to a limited subset of PFAS that are sufficiently bioavailable to reach target tissues at meaningful doses, primarily certain non-polymeric PFAS. Many PFAS, including fluoropolymers and high molecular weight perfluoropolyethers, or PFPEs are not bioavailable under typical exposure conditions. *Id.* at P. 3, L. 19 to P. 4, L. 4.
- Fluoropolymers and PFPEs, both polymeric PFAS, are not PFAA precursors according to OECD. Many PFAS are not precursors, and not all PFAS have demonstrated health effects. *Id.* P. 4, LL. 5-13.
- Toxicologists do not hold unform views about PFAS being a single group for hazard and risk assessment purposes, and not all PFAS share the same toxicological concerns. *Id.* P. 4, L. 14 to P. 5, L. 2. TR P. 1222, LL. 8-12.

- Polymeric PFAS such as fluoropolymers are not absorbed in the human body and are readily eliminated, and the scientific literature does not support the claim that all PFAS enter and persist in the body. *Id.* P. 5, LL. 9-12. Dr. Henry further testified that fluoropolymers and PFAAs are very different. Fluoropolymers are not toxic and do not bioaccumulate. TR P. 1221, LL. 20-23.
- The published literature does not indicate bioaccumulation for fluoropolymers or high molecular weight PFPEs, and without bioavailability, bioaccumulation cannot occur. *Id.* P. 5, LL. 14-18.
- The lack of solubility of many PFAS supports their lack of uptake or transfer into edible portions of plants. *Id.* P. 6, LL. 1-3.
- Fluoropolymers and PFPEs do not degrade or transform into PFAAs. They are not PFAA precursors and do not degrade and subsequently release toxic, bioaccumulative substances of concern, so reducing their use would not materially affect PFAA-related exposures. *Id.* P. 6, LL. 4-10.
- Requiring labeling of substances that do not contribute to hazard or exposures would not improve public health outcomes, and misleading warning labels could unwittingly drive consumers to avoid low risk products in favor of potentially more harmful products without such a warning. *Id.* P. 7, LL. 1-10.
- European PFAS restrictions exclude certain PFAS because they fully degrade under environmental conditions or do not present the same hazard or exposure profile. *Id.* P. 8, LL. 4-20.
- Fluoropolymers and perfluoropolyethers are chemically and toxicologically distinct from PFAAs due to their high-molecular weight and lack of bioavailability,

toxicity, bioaccumulation, mobility, solubility and volatility, they do not share the same hazard or exposure profiles. Treating fluoropolymers and perfluoropolyethers identically to PFAAs for labeling or regulatory purposes does not reflect their scientific characteristics or risk potential. *Id.* P 9. L. 17 to P. 10, l. 3.

- Dr. Henry testified that the term "PFAS" is not intended to communicate risk and does not inform a New Mexico consumer about bioavailable exposure, hazard, or risk. TR P. 1224, LL. 1-11.

The exemptions in 20.13.2.10 reflect a science-based, risk-informed approach and appropriately distinguish among products, uses and substances and are aligned with federal and international regulatory frameworks. Consequently, the exemptions listed in 20.13.2.10 of the proposed rule should apply to the labeling requirements of the proposed rule. *Id.* P. 10, L. 19 to P. 12, L. 2.With regard to the Department's technical testimony, as pointed out in ACC's Motion in Limine, many of the exhibits offered by the Department should be excluded from consideration by the Board because the Department did not comply with the State Rules Act requirement to cite and provide the technical information that served as the basis of the proposed rule. As stated in ACC's Motion, the Department offered many exhibits as part of its hearing presentation, and many of those exhibits covered technical topics and information that was not contained in the 19 publications cited by the Department and made available at the time of public notice. The Hearing Officer denied ACC's Motion in Limine and admitted the offending exhibits, although allowed ACC to cross-examine the Department's witnesses on this point. ACC preserved its objections to the admission of those exhibits, as acknowledged by the Hearing Officer.

During the hearing, Dr. Chapman for the Department testified that he was aware of the State Rules Act requirements regarding public notice. TR P. 137, LL. 15-23. He also conceded

that the Department identified only 19 publications as the technical information in support of the proposed rule with the public notice. TR P. 138, LL. 18-24. Dr. Chapman also conceded that none of the publications provided technical support for labeling requirements. TR P. 139, L. 15-25 through P. 140, L., 13.

To the extent that the Department relied on exhibits and other technical information not cited or provided with the public notice to support its positions on labeling, ACC contends that the Board should not consider those exhibits. Indeed, because none of the technical information supplied by the Department at the time of the public notice addressed or supported labeling requirements, the Board should now disregard technical information offered by the Department during the hearing and, in doing so, find that the Department did not present substantial evidence in support of its labeling proposal.

In support of its proposed broad labeling requirements and their application to statutorily exempt products, the Department presented generalized testimony on PFAS in general and argued to the Board that it is appropriate for the Board to treat all PFAS compounds as a single "class" for regulatory purposes, including the labeling requirements. As discussed above, the testimonies of both ACC's witness show that there are important distinctions among different types of PFAS compounds that compel different treatment for regulatory purposes, including the labeling requirements. The Department's own witnesses acknowledged most of those distinctions:

- The Department's overall testimony regarding the rule was presented through Dr. Chapman, who started work with the Department in August 2025, shortly before the publication of the proposed rule. Dr. Chapman did not cite to any peer-reviewed published works on his part relating the PFAS. NMED Ex. 3 and 4.

- Dr. Chapman conceded that not every PFAS is bioaccumulative, persistent and toxic in nature. TR P. 132, L. 15-19. He also agreed that the proposed labeling requirements would apply to products that are not bioaccumulative, persistent and toxic in nature. TR P. 135, L. 1-6.
- Dr. Chapman agreed that there are differences in mobility, persistence and bioaccumulative properties among various PFAS. TR P. 244, LL. 1-10 and P. 245, LL. 4-11.
- Dr. Chapman agreed that the Department's technical testimony was focused on PFAAs. TR P. 159, LL. 7-15.
- Dr. Chapman's written testimony acknowledged that within the PFAS category, there is a wide variation in chemical structure, which can ultimately influence biological, chemical and physical properties when released into the environment. TR P. 160 L. 17 to P. 161, L. 18.
- Dr. Chapman's testimony justifying the labeling requirements for fluoropolymers, despite the statutory exemption, relied upon potential releases of other PFAS during their manufacture. He was unaware, however, of any PFAS manufacturing in New Mexico. TR P. 167, LL. 15-19.
- Dr. Olson testified that the concerns with PFAS concentrations in groundwater ushered in the era of PFAS regulations, TR P. 282, LL. 9-13, but noted that there are differences in polymer versus non-polymer PFAS and that non-polymer PFAS are generally considered more mobile in the environment. TR P. 284, L. 11-019.
- Conversely, polymers are generally considered to be less mobile due to their relatively large molecular size. TR P. 295, L. 19 to P. 296, L. 1. He identified only

side-chain polymers, and not fluoropolymers, as potentially functioning as PFAA precursors. TR P. 297, LL. 8-12.

- Mr. Jochems stated that only certain PFAS chemicals have toxic properties. TR P. 319, LL. 17-18.
- Dr. DeWitt acknowledged that the vast majority of PFAS have not been studied, and that there is insufficient toxicological data to group all PFAS by their toxicological properties. TR P. 383, LL. 15-16; TR P. 391, LL. 10-12.
- Dr. DeWitt stated that the majority of toxicology and epidemiology knowledge is associated with PFAAs. TR P. 394, LL. 20-24 and P. 395, LL. 9-14
- Dr. Olson also acknowledged that PFAAs are of higher importance for three reasons, including that they are the drivers for remediation and water treatment. TR P. 289, LL. 1-15.

4. Construction of the Act in Accordance with Principles of Statutory Construction Compels Exclusion of Exempt Products from Labeling Requirements.

The Uniform Statute and Rule Construction Act (hereinafter, "USRCA") instructs that "[t]he text of a statute…is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19 (2025). The USRCA further states that "[a] statute or rule is construed, if possible, to: (1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result." NMSA 1978, § 12-2A-18(A) (2025).

New Mexico courts use statutory structure to ascertain legislative intent. *See Chisholm v. Chisholm (In re Conservatorship of estate of Chisholm*, 1999-NMCA-025, 126 N.M. 584, 587, 973 P.2d 261. "The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." *Meridian*

Oil, Inc. v. New Mexico Taxation & Revenue Dep't, 1996 NMCA 79, ¶ 12, 122 N.M. 131, 921 P.2d 327 (*quoting* 1A Norman J. Singer, *Statutes and Statutory Construction* § 47.01, at 136 (5th ed. 1992)) (footnote omitted).

Before discussing how the PFAS Protection Act operates, it is important to have a general idea of the primary statutory Sections. Other than the definitions identified in Section 74-15-2, these primary statutory Sections include: Section 74-15-3 (hereinafter, also referred to as "Exemptions and Prohibitions Section); Section 74-15-4 (hereinafter, also referred to as "Rules Section"; Section 74-15-5 (hereinafter, also referred to as "Reporting Requirements Section"); and Section 74-15-6 (hereinafter, also referred to as "Testing Section"). Also, throughout the PFAS Protection Act, the phrase "sell, offer to sell, distribute or distribute for sale in the state, directly or through intermediaries" is used in various tenses. For ease of referencing, this brief will use the word "deliver" in its various tenses instead of using the entire phrase.

The purpose and objectives of the PFAS Protection Act are clearly set forth in its text of the statutory framework. As previously noted, the USRCA instructs that "[a] statute should be construed to give effect to its objective and purpose…." NMSA 1978, § 12-2A-18(A)(1) (2025). Since the USRCA does not define what constitutes purpose or objective, the terms are generally interpreted according to their ordinary dictionary meanings. *See N.M. Att'y Gen. v. N.M. Pub. Regul. Comm'n*, 2013-NMSC-042, ¶ 26, 309 P.3d 89. Merriam-Webster's online dictionary defines "purpose" as "the reason something is done," while an "objective" is defined as "something toward which effort is directed." See www.meriam-webster.com.

In this case, the purpose of the PFAS Protection Act is unambiguous from the text of the statutory provision. As reflected in text of Section 74-15-3, the reason the New Mexico Legislature passed the PFAS Protection Act is to phase in prohibitions on a manufacturer from delivering

products containing an intentionally added per- and poly-fluoroalkyl substances, subject to exemptions. *See* NMSA 1978, § 74-15-3. The New Mexico Legislature then vested the Board rulemaking authority to accomplish objectives set forth in the Reporting Requirements Section and the Testing Section. *See* NMSA 1978, §§ 74-15-4 through -7.

Rulemaking authority can consist of either specific or general grants of rulemaking authority. A specific grant of rulemaking authority is limited to the precise purpose or provisions outlined in the statute, while a general grant provides broader discretion to address a wider range of issues within an agency's authority under the statute framework at issue. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, 146 N.M. 24, 30, 206 P.3d 135. The underlying principle is that general language in a statute is limited by specific language. *See id.*

With respect to the Board's rulemaking authority, the New Mexico Legislature decided that it needed to provide the Board with both mandatory and discretionary rulemaking authority. See § 75-15-4(A) ("The board shall adopt rules….) and (B)(1) ("The Board may adopt rules…."). The mandatory rulemaking authority consists of: (1) rules dealing with reporting requirements, and rules creating a series of ranges for the amount of PPS for reporting purposes; (2) rules exempting the exemptions in Section 74-15-3(A) from the reporting requirements; (3) rules identifying currently unavoidable uses of PPS; and (4) certain rules pertaining to firefighting foam. *See* NMSA 1978, §§ 74-15-4(A) and -5. The discretionary rulemaking authority consists of a statutory provision providing the Board with authority to adopt any other rules to ***carry out the provisions of the PFAS Protection Act***, including labeling of products. *See* NMSA 1978, § 74-15-4(B)(1) (emphasis added). In particular, ACC maintains plain language of Section 74-15-4(B)(1) gives the Board discretion to adopt rules—including labeling—as long as the discretionary rules carry out a different statutory provision of the PFAS Protection Act.

Here, the discretionary grant of rulemaking authority is a general grant of rulemaking conditioned upon the rule carrying out the other provisions of the PFAS Protection Act. Labeling products in no way gives effect to the statutory purpose of phasing in prohibitions on a manufacturer from delivering products containing an intentionally added PPS, subject to exemptions. Likewise, labeling products in no way gives effect to the statutory objectives of reporting and testing. An overall review of the PFAS Protection Act results in no statutory provision contemplating the labeling of a product other than the discretionary rulemaking provision.

In addition, the Petitioned Rule does not specifically exempt labeling of all products otherwise exempted from the PFAS Protection Act. *See* Petitioned Rule, Exhibit B at 8 (20.12.2.13), attached to the Petition. Instead, the Department chose one of the products in the exemptions—the exemption for "used products offered for sale or resale" set forth in Section 74-15-3(A)(2)—and decided that it had authority to exempt such products from the labeling requirement imposed by rule. *See id.* This exemption raises the issue as to whether the labeling requirements can apply to any product exempted by the PFAS Protection Act. For the reasons set forth below, ACC maintains that the Board does not have the statutory authority to label any product exempted from the PFAS Protection Act, and the only products that the Board can lawfully label under the PFAS Protection Act are products not exempted because they are waiting for an exemption to apply through a rule to be adopted by the Board and products otherwise subject to ban.

In State ex rel. Stapleton v. Skandera, 2015-NMCA-044, ¶8, 346 P3d 1191, the New Mexico Court of Appeals provided the necessary guidance to assess whether a rule extends beyond the reach of the law created by the Legislature. In particular, the Court stated:

> "Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 143 P.3d 478. "Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343, 961 P.2d 768. Through enabling statutes, the Legislature may "delegate both adjudicative and rule-making power to administrative agencies." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746. Thus, although courts have recognized the primacy of the Legislature's role, our Supreme Court "has acknowledged that elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the [L]egislature[.]" *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 12, 127 N.M. 272, 980 P.2d 55 (alteration, internal quotation marks, and citation omitted). However, "[t]he administrative agency's discretion may not justify altering, modifying[,] or extending the reach of a law created by the Legislature." *Taylor*, 1998-NMSC-015, ¶ 22.

Id.

The exemptions set forth in Section 74-15-3(A)(1)-(14) and (16) are immediate exemptions from the phased prohibitions in the PFAS Protection Act. In turn, Section 74-15-3(A)(1)-(14) and (16) are specifically exempted from the reporting and testing requirements. *See* § 74-15-4, -5, and-6. In other words, once a product is exempted, the legislative intent is that it is exempted from all of the PFAS Protection Act, including the discretionary rulemaking provision. Thus, any attempt to label products immediately exempted from the PFAS Protection Act does not give effect to any other statutory provision other than the discretionary provision itself.

Any other construction would lead to absurd result that extends the statutory reach of the PFAS Protection Act. For example, if labeling requirements can apply to exempt products, it would be the equivalent of saying that although the statutory provisions exempt the product from the PFAS Protection Act, the Board is still going to bring the product back under the jurisdiction of the PFAS Protection Act through a discretionary rule dealing with labeling. Without question,

the Board would be extending the reach of the PFAS Protection Act by rule, and such a maneuver is contrary to applicable law.

Thus, ACC maintains that the only conceivable product that could be lawfully subject to labeling requirements would be non-exempt products with intentionally added PPS. In terms of the statutory framework, if labeling does not apply to products exempted, then the only products that may be lawfully labeled are those waiting for a prospective exemption as set forth in Section 74-15-3(15). This construction of the statute is the only one that makes sense. A manufacturer seeking a prospective Exemption will be subject to reporting and testing requirements until some point in the future when the Board exempts the products by rule. This construction of the statutes makes sense because the manufacturer of such a product will be gathering evidence to eventually provide to the Board at some point in the future that the product is essential for health, safety, or the functioning of society and for which alternatives are not reasonable available, thereby qualifying the product for the prospective exemption. Therefore, while a manufacturer is waiting to qualify for the prospective exemption, it is conceivable that the Department may want to require labeling information on the product until such time as it is exempted or prohibited.

Simply put, the PFAS Protection Act does not directly or indirectly say, nor indicate, that any product containing intentionally added PPS, whether exempt or not exempt, can be subjected to labeling requirements. Likewise, the PFAS Protection Act does not say that the Board can label an exempt product in perpetuity. Instead, any attempt to label a product must fit into the purpose of the statute, and the purpose of the statute is to prohibit (not label) products containing intentionally added PPS, subject to certain exemptions. Any labeling of a product must advance this purpose, and labeling of an exempt product does not do so. If labeling a product outright exempts it, then that might work; however, that is not what the PFAS Protection Act says. Thus,

labeling of products waiting for a prospective exemption is the only lawful and appropriate construction of the PFAS Protection Act.

5. The Labeling Requirements as Proposed in the Rebuttal Proposed Rule Continue to Pose First Amendment Issues under the Federal and New Mexico Constitutions.

Several commenters, including ACC, raised First Amendment concerns in their written and oral comments. See ACC's written comments of October 22, 2025; American Coatings Association comments, TR P. 203, L. 5 to P. 206, L. 3; Los Alamos National Laboratory written comments dated February 23, 2026 (also raising other issues). CPMC also briefed this issue in their Motion. As stated in its written public comments, ACC joins these other parties raising First Amendment concerns with the labeling requirements.

6. The Board Should Consider Additional Public Comments from the Hearing and Written Public Comments on the Labeling Provisions and Should Extend the Compliance Date.

Numerous parties submitted written comments expressing concerns with the labeling requirements and urging the Board to exclude the statutorily exempt products from the labeling Rule.

- Sustainable PFAS Action Network, TR P. 174, L. 4 to P. 175, L. 20 (commenting that the application of the labeling requirements to exempt products undermines the intent of HB 212 and that the ability to apply for a waiver does not solve implementation issues); TR P. 176, LL. 11-17. See also written comments dated October 23, 2025.
- Cookware Sustainability Alliance, TR. P. 179, L. 12 to P. 182, L. 13 (also discussing studies and federal determinations on the safety of fluoropolymers) and written comments dated February 26, 2026.

- National Federation of Independent Business (NFIB) comments dated October 21, 2025.
- Animal Health Institute comments dated October 23, 2025.
- Pharmaceutical Working Group comments dated October 22, 2025.
- Beveridge & Diamond comments dated October 23, 2025.
- SEMI comments dated October 23, 2025.
- The Toy Association comments dated February 20, 2026.

Commenters also stated that the proposed January 1, 2027 date for compliance with the labeling requirements is not practicable.

- Sustainable PFAS Action Network, TR P. 176, LL. 5-10.
- Consumer Technology Association, TR P. 184, L. 22 to P. 185, L. 2 (at least two years is needed to make labeling changes).
- Consumer Healthcare Products Association, TR P. 201, LL. 4-17 (urging extension of the compliance deadline for labeling to January 2028).
- RV Industry Association, TR P. 207, L. 5 to P. 210, L. 8.
- Air Conditioning, Heating and Refrigeration Institute, TR P. 214, L. 17 to P. 216, L. 20 and written comments dated February 20, 2026.
- Ms. Solomon and Ms. Marapese, on behalf of CPMC, testified regarding the many changes required to various labels and other documentation that will take considerable time to gather the necessary information, develop appropriate labels consistent with other labeling requirements, and otherwise to implement labeling for products subject to labeling requirements under the Proposed Rule. TR PP. 1030 to 1049.

When asked by Board Chair Ely regarding the Department's response to those concerns, Dr. Chapman acknowledged the concerns with the timelines and stated that he did not have information regarding the Department's response. TR P. 262, L. 8 through P. 263, L. 1. As indicated in ACC Exhibit 7, ACC proposes that, if the Board adopts any labeling requirements, the compliance date should be extended to January 1, 2028.

Another important comment was made by the Plumbing Manufacturers International, noting that a New Mexico state specific label is not practicably workable in modern interstate commerce. TR P. 196, L. 3 to P. 197, L. 25 and written comments dated February 20, 2026 (also urging the Board not to adopt labeling requirements and to focus on clear product restrictions and reporting and offering numerous specific changes to the proposed rule language). Beveridge and Diamond submitted written comments requesting consideration of a number of changes to the labeling and other requirements dated February 18, 2026. ACC is unable to identify responses by the Department to all of these important comments in the record. This is not a complete list of all of the public comments made during the hearing process. It is up to the Board to review and consider the full record in this case, including all public comments, not just the technical record. The Board should give careful consideration to, and not ignore, the important written comments on the rule, including those by organizations who chose not to participate as parties to present technical evidence.

B. <u>The Board Lacks Statutory Authority under the Act to Impose Fees and Late Charges</u>.

ACC has filed its Motion to Dismiss the Rule Provisions Dealing with Fees and Labeling for Lack of Subject Matter Jurisdiction and incorporates the information and arguments in that motion in this Closing Argument. For the reasons stated therein, even if the Board does not grant

the Motion, it must recognize that it lacks the statutory authority to adopt rules imposing fees and late charges (collectively "fees") and, therefore, should not adopt those provisions in any version of the rule that it adopts.

There are some other important points that the Board should note regarding the fee proposal, particularly the sections dealing with fees related to the labeling requirements, Sections 20.13.2.19 and .20. First, those fee provisions were not in the version of the proposed rule filed with the Petition, which also was the version of the proposed rule available when public notice of the hearing was published. ACC contends that those fee provisions are not a "logical outgrowth" of the original proposed rule, that the Board cannot consider those provisions as they were not included in the version of the proposed rule when notice of the public hearing was given, as required by the State Rules Act, Section 14-4-5.2, NMAC 1978.

These are by no means trivial issues. Secretary Kenney testified that the fees related to labeling requirements alone are expected to generate $15 million in the first year. NMED Ex. 57, P. 10; TR P. 804 L. 9-10. Importantly, that figure is based upon the fees for filing an application for a label waiver and indicates that the Department contemplates thousands of waiver applications. *Id.* This is related to the Department's proposal to require labeling of products that are covered by the statutory exemption because requiring labeling for otherwise exempt products no doubt increases the number of products that may be the subject of waiver applications, thereby increasing the fees that the Department proposes to collect.

The lack of any statutory provisions relating to fees also means that the Legislature gave the Board no guidance relating to fees and provided no direction to either the Board or the Department on the allowable uses of fee revenue. The proposed rule fails to identify where fees

would be deposited and specifies no restrictions on the Department's use of or accounting for fees. These are fatal flaws in addition to the lack of statutory authority for any rules imposing fees.

C. The Board Should Not Adopt the Proposed Rule Definition of "Consumer"

The Act contains a definition of "consumer product" in section 74-15-2.E, NMSA 1978: "consumer product" means a tangible personal property that is distributed in commerce and normally used for personal, family or household use, including product categories that are normally used in households but designed for or sold to business, such as commercial carpet or floor waxes." This definition is a key to defining the scope of many of the requirements of the Act, and the Department's testimony repeatedly refers to "consumer products" with regard to labeling and other requirements of the rules. The Act also defines "product." These definitions are binding on the Board and the Department, which cannot change them by rule.

The Act does not define "consumer," but the proposed rule defines "consumer" as "an individual, partnership, corporation, state agency, or a subdivision of the state who seeks or acquires by purchase or lease, any goods or services." This definition does not comport with or refer to the statutory definition of "consumer product' and is a source of considerable confusion, as noted by several commenters. It is unclear why the definition would refer to "services," and it uses the term "goods" rather than "products" as defined in the Act. ACC is particularly concerned that the Department may seek to use this definition to broaden the scope of the rule requirements beyond "consumer products" and "products" as defined in the Act. That would make the rules inconsistent with the Act and create confusion within the regulated community as to the scope of the requirements of the rules where that term is used. For these reasons, the Board should not adopt the proposed definition of "consumer," instead deferring to the statutory definition of "consumer product."

III. CONCLUSION

In Conclusion, the Board can take a couple of different approaches regarding the labeling requirements. First, the Board could take the approaches as identified in ACC's recently filed motion in recognition that it may lack appropriate authority to adopt any labeling requirements. If the Board recognizes the serious legal and technical deficiencies with the labeling requirements as proposed, it could defer consideration of the adoption of any of the proposed rule and direct the Department to engage in further stakeholder discussions and research before presenting the whole rule for consideration and possible adoption. The Board could adopt those parts of the proposed rule that are not opposed, subject to addressing the changes proposed by other commenters, while reserving consideration of the labeling requirements until after the Legislature provides adequate guidance on any labeling requirements and the Department makes a revised proposal.

If the Board proceeds with adoption of some or all of the proposed rule, the Board should modify section 20.13.2.10 and 20.13.2.13 to incorporate the language proposed by ACC to exclude products exempted by statute from the labeling requirements. That is necessary for the rule to comport with the statute with regard to the exemptions. Also, the Board should delete the definition of "consumer."

Finally, the Board should exclude the fee provisions from any rule it may adopt. As discussed in ACC's Motion, the Board clearly lacks legal authority from the Legislature to adopt any rules imposing fees for this program.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail to the following on March 5, 2026:

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