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JAMES C. KENNEY
CABINET SECRETARY

September 20, 2021

Senator Gregory A. Baca
Senate Republican Leader

Senator Craig W. Brandt
Senate Republican Whip

Senator Mark Moores
Republican Caucus Chair

Additional Senators listed below
New Mexico State Senate
State Capitol
Santa Fe, New Mexico 87501

Re: September 17, 2021 Letter Regarding the New Mexico Environment Department's Proposed Ozone Precursor Rule

Dear Honorable Members of the New Mexico Senate,

Thank you for your letter dated September 17, 2021, expressing your concern about the New Mexico Environment Department's ("Department") proposed ozone precursor rule for the oil and natural gas industry and its potential fiscal impacts.

As you may know, the New Mexico Air Quality Control Act ("AQCA") requires the Environmental Improvement Board ("Board") to take action to address rising ozone levels in the State. *See* NMSA 1978, § 74-2-5(C). This is a non-discretionary duty. As the agency tasked with implementing ozone regulations for purposes of compliance with the health-based federal National Ambient Air Quality Standards pursuant to federal law, the Department has the role of proposing a plan, including regulations, for the Board's consideration to meet the statutory requirements. Due to severe general fund budget cuts, sweeping of special revenue funds, and the resulting loss of staff – the Department was unable to fulfill these responsibilities under the previous state administration. Further, the Department was unable to engage in any meaningful compliance assurance activities to deter emissions from the rapidly expanding oil and gas industry. As a result, ozone levels have risen to unhealthy levels in the oil and gas producing regions of New Mexico.

With the Governor's and Legislature's fiscal support, the Department began an extensive stakeholder process in 2019 to develop the proposed rules currently before the Board in furtherance of its mandatory duty to regulate ozone concentrations for the protection of public health and the environment. Further, regardless of the Board's actions, it is a fact that ozone levels are rising in New Mexico due in part due to oil and gas operations, and that several monitors, including in Eddy County, are registering concentrations far in excess of the federal standard. In addition, the U.S. Environmental Protection Agency ("EPA") and the Department continue to identify widespread non-compliance with air quality requirements across New Mexico's San Juan and Permian Basins which further aggravates our

rising ozone concentrations.¹ If the State does not take mandatory steps under the AQCA to address this situation, the U.S. EPA will ultimately force New Mexico to do so under the federal Clean Air Act.

Today, the Board begins hearing the proposed ozone precursor rule for the oil and natural gas industry. Parties to the hearing will present expert testimony to the Board on the costs and economic impact of the proposed draft rule. The Department provided detailed analysis and data on its cost estimates for the proposed rule in the written direct testimony that it filed with the Board on July 28, 2021. In addition, the Department provided rebuttal testimony on September 7, 2021 which includes expert testimony on the methods, data, and findings of the John Dunham & Associates (“JDA Analysis”). Of note, the New Mexico Tax Research Institute study, *Potential State and Local Revenue Impacts of Proposed Ozone Precursor Rule on the Oil and Gas Industry*, relies on the deeply flawed JDA Analysis economic analysis.

Regarding the Legislative Finance Committee (LFC) letter of August 25, 2021, the Department explained the administrative timeline in its September 1, 2021 response letter. After submitting rebuttal testimony, an exhibit is a matter of public record and posted to the Department’s website. Last week, the JDA Analysis was discussed with LFC staff on September 13, 2021 and specific exhibits were then shared with LFC staff on September 18, 2021.

The Department anticipates further discussion of the small business facility definition at the hearing based on direct and rebuttal testimony presented in this matter. Regarding the structure of the proposed rule, the requirements are scaled based on a source’s potential to emit pollution. The greater the emissions, the more significant the air pollution control practices. Conversely, a source with a small potential to emit air pollution has lesser requirements. A “small business facility” as currently defined in the draft proposed rule is subject to the fewest regulatory requirements.

Ultimately, the Board may decide to make changes to provisions of the draft proposed ozone precursor rule as a result of expert testimony presented at the hearing, which could impact the economics and/or applicability of the final rule. In addition, the draft proposed rule as submitted to the Board scales the compliance requirements based on potential to emit air pollution and offers oil and gas operators some flexibility on how to comply with these standards vs. prescribing a given technology. With such variables in play, the Department estimated the cost of compliance at approximately \$338M per year.

The Department’s collaborative engagement with stakeholders prior to drafting the draft proposed rule, solicitation of public comment on the draft proposed rule, and on-going engagement with those parties right up through the beginning of the hearing demonstrates our commitment to a positive outcome for all parties.

Sincerely,

James C. Kenney
Cabinet Secretary

¹ *Significant emission increases from oil and gas operations confirm need for stronger rules and enforcement, greater industry compliance* - <https://www.env.nm.gov/wp-content/uploads/2020/12/2020-12-21-Flyovers-reveal-high-leak-rates-in-Permian.pdf>

Additional recipients:

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