

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

**IN THE MATTER OF PROPOSED
REPEAL AND REPLACEMENT OF
20.2.71 NMAC – *OPERATING PERMIT EMISSIONS FEES*
and 20.2.75 NMAC – *CONSTRUCTION PERMIT FEES***

No. EIB 24-12 (R).

**Air Quality Bureau
Environmental Protection Division
New Mexico Environment Department,**

Petitioner.

**PETITION TO REPEAL AND REPLACE 20.2.71 NMAC AND 20.2.75 NMAC OF THE
AIR QUALITY PERMITTING REGULATIONS
AND REQUEST FOR HEARING**

The Air Quality Bureau (“Bureau”) within the Environmental Protection Division of the New Mexico Environment Department, pursuant to 20.1.1 NMAC – *Rulemaking Procedures*, respectfully submits this Petition (“Petition”) to the Environmental Improvement Board (“Board”) in the matter of the proposed repeal and replacement of 20.2.71 NMAC – *Operating Permit Emissions Fees* and 20.2.75 NMAC – *Construction Permit Fees*.

As support for this Petition, a Statement of Reasons is attached hereto as Attachment 1.

A copy of 20.2.71 NMAC with the proposed regulatory changes is attached as Exhibit 1.

A copy of 20.2.75 NMAC with the proposed regulatory changes is attached as Exhibit 2.

JURISDICTION

The Board has the authority to amend 20.2.71 and 20.2.75 NMAC pursuant to the Air Quality Control Act, NMSA 1978, Sections 74-2-5 and 74-2-6 (1967, as amended through 2021).

WHEREFORE, the Bureau requests that the Board schedule a hearing and appoint a Hearing Officer in this matter during its regular March 2024 meeting. The Bureau estimates that the hearing will take two days and requests the dates of June 10 and 11, 2024 for the hearing.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
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ATTACHMENT 1

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**Air Quality Bureau
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STATEMENT OF REASONS

The Air Quality Bureau (“Bureau”) in the Environmental Protection Division of the New Mexico Environment Department (“Department”) proposes to repeal and replace the Operating Permit Emissions Fees and Construction Permit Fees rules to ensure the Bureau’s ability to administer and implement state and federal air quality regulations and requirements in accordance with the New Mexico Air Quality Control Act and the federal Clean Air Act (CAA).

First, the Department proposes to repeal and replace 20.2.71 NMAC – *Operating Permit Emissions Fees* (“Part 71”) so that the Bureau can properly administer and implement the requirements of the federal Clean Air Act Section 502(b)(3) and 40 CFR § 70.9. These federal provisions require the Bureau to collect fees from major sources of air pollution sufficient to cover the costs of the Bureau’s Title V permitting program needs. The Operating Permit Emissions Fees schedule consists of a dollar value set per ton of each fee pollutant emitted annually for major sources of air pollution. The Bureau is proposing to increase the dollar

amount charged per ton of fee pollutant and to continue to adjust that dollar per ton value annually. The U.S. Environmental Protection Agency (U.S. EPA) sets a presumptive minimum dollar amount per ton of chargeable pollutant emitted per year by major sources of air pollution as a benchmark to determine if a state's program has sufficient fees to administer and implement the Title V permitting program. If the state is charging the presumptive minimum, the state is presumed to be sufficiently funded. Currently, the fees the Bureau charges pursuant to Part 71 are below the EPA's presumptive minimum and, therefore, must be increased.

Second, the Department proposes to repeal and replace 20.2.75 NMAC – *Construction Permit Fees* (“Part 75”) to update the costs of sufficiently sustaining the administration and implementation of the construction permit program and meet the Board's statutory obligation under NMSA 1978, Section 74-2-7(B)(6) to establish a fee schedule that collects enough revenue to cover the entire reasonable cost of the construction permit program. The Construction Permit Fees schedule consists of a complexity-based schedule and an annual fee for non-Title V sources. Permitting activities, such as modeling and technology analyses, are assessed points based on their complexity, and each point is valued at a fixed amount. As a result, complicated permitting actions, which involve more activities, and therefore more points, cost more than less complicated ones. The Bureau is proposing changes to the fee point value, filing fee, accelerated review fee, and annual fee, but not to the schedule itself, except for the addition of increased points for modeling reviews and oil and gas general construction permits.

Finally, the Bureau is providing for the collection of administrative compliance costs to ensure the Department is made whole under instances in which NMED must take resource-intensive compliance actions beyond simply permit or license compliance verification.

I. UPDATED FEES WILL MODERNIZE THE AIR QUALITY BUREAU

The Bureau has not updated fees in Part 71 and Part 75 in the last two decades. The current regulations at Part 71 were promulgated on December 15, 2004, with limited updates on June 15, 2007, and January 9, 2009. The current regulations at Part 75 were promulgated on December 1, 2003, with no fee updates since that time. Although Part 71 and 75 allow for annual adjustments using the consumer price index, there have been significant changes to oil and gas production industry technologies during this time that have increased permitting volumes beyond the Department's original projections.

Oil and gas production has substantially increased in New Mexico and is by far the largest permitting industry section at approximately 80 percent of all permits by the Bureau. New Mexico has now become the second largest oil producer in the country. From 2012 to 2023, the number of oil and gas general construction permits issued by the Bureau increased by over 2235 percent (from 34 permits to 794 permits), and on average, the Bureau annually receives 84 new oil and gas general construction permit applications under Part 75.

Technological advances in the oil and gas industry have increased the complexity of permitting applications for the Bureau as well. The rise in complexity contributes to increased workload for the Bureau due to the additional equipment, higher production, and increased emissions from the regulated facilities, and specifically require additional analysis by the Bureau's permitting and planning sections. Although the Bureau generally meets its minimum regulatory deadlines for permitting applications, the Bureau projects the proposed fee update will lead to more transparency and accountability during the permitting process from submission to completion. The Bureau has begun developing an e-permitting system and modernizing its technology system for such purposes.

Over the past twenty years, state and federal air regulations have also changed significantly and affected the Bureau. U.S. EPA has promulgated over seven significant federal air quality regulations since 2004 that require emissions reductions from equipment operated at oil and gas production, processing, transmission and storage segments. These rules have significantly increased the scope and number of regulated equipment under the Bureau’s jurisdiction, and each regulatory update does not automatically come with a commensurate increase in staffing resources to administer the new requirements.

In addition to the change in federal regulations over time, the Board passed a new state air quality regulation in 2022 (*20.2.50 NMAC – Oil and Gas Sector—Ozone Precursor Pollutants*) (“Part 50”) that targets emissions reductions from the oil and gas sector, covering over fifteen types of process and control equipment as well as other activities and processes commonly used in oil and gas production, transmission, processing, and storage. Part 50 also established requirements for monitoring fugitive emissions from all active wells in the state, which adds over 50,000 sources to the Bureau’s regulatory oversight with increasing requirements for regulated entities over time.

U.S. EPA is also finalizing multiple actions to reduce air pollution emissions from the Crude Oil and Natural Gas source category (NSPS OOOOb and NSPS OOOOc, Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review). The impact of these actions on the workload of the Bureau is predicted to be significant, as they are in addition to previous federal rules and the requirements of Part 50, the costs of which the Bureau is already absorbing.

As far as its mission to ensure healthy air quality, the Bureau has been closely monitoring levels of ground-level ozone pollution in several counties in New Mexico that are exceeding

federal thresholds. The main pollutants that form ozone are oxides of nitrogen and volatile organic compounds (VOC). They are considered “precursor” pollutants because they fuel the chemical reactions that form ozone. This pollutant is a public health concern, as ozone can harm the respiratory system by inflaming cells that line the upper airways and the lungs, much like a sunburn damages skin. Ozone can inflame airways, causing symptoms such as chest pain, coughing, wheezing and shortness of breath, even in healthy people. The Bureau’s ozone design values, i.e. statistics that describe the air quality status of a given location relative to the National Ambient Air Quality Standards (“NAAQS”) set by U.S. EPA, identify, for example, that Doña Ana County and Eddy County have exceeded the federal threshold for several years. There are other counties, such as San Juan County and Lea County, that have been at or close to that federal threshold as well.

This data informs much of the Bureau’s current workload and projected workload, as one of the objectives of the Bureau is (1) to prevent areas of New Mexico from being designated as non-attainment by U.S. EPA, and (2) to bring New Mexico’s non-attainment area, Sunland Park, into attainment status. Under the federal Clean Air Act, nonattainment areas require air quality permits to include lowest achievable emission rate technology and permit emission offsets for any new or modified operations. Offsets are emission reductions, generally obtained from existing sources located in the vicinity of a proposed source, that must (1) offset the emissions increase from a new source or modification and (2) provide a net air quality benefit. Although some growth can still occur under a non-attainment designation, such designation brings with it additional federal oversight.

With the increase in permitted facilities, largely due to oil and gas production, the Bureau’s compliance effort to ensure all of the permitted facilities are meeting state and federal

air quality requirements to prevent non-attainment status designations are inadequate. For approximately 1975 facilities, the Bureau only has seven inspectors and three employees in its compliance reporting section. Although there have been advances in compliance technologies over time in the oil and gas industry, the sheer volume of permitted facilities prevents the Bureau from swiftly identifying out-of-compliance facilities compared to compliant facilities. Without the proper staff levels to conduct this work, all permitted facilities – whether compliant or not – face further regulatory oversight if a non-attainment designation occurs.

The proposed increases are consistent with the fees previously authorized by the Board to meet the Air Quality Control Act, NMSA 1978, Sections 74-2-7 and 74-2-15. The sections of Parts 71 and 75 affected by the proposed changes are shown below. The entirety of Parts 71 and 75 with the proposed changes are included and attached here as Exhibits 1 and 2, respectively.

Since Part 71 and Part 75 fee regulations do not currently meet the style and formatting requirements established by the State Records Center and Archives, they must be repealed and replaced with the proposed Operating Permit Emissions Fees and Construction Permit Fees regulations for adoption by the Board. *See* 1.24.11.9(C) NMAC.

II. PART 71 - OPERATING PERMIT EMISSIONS FEES

The proposed Operating Permit Emissions Fees regulation would repeal and replace Title 20, Chapter 2, Part 71 of the New Mexico Administrative Code (“NMAC”):

- 20.2.71.1 NMAC (“Issuing Agency”);
- 20.2.71.2 NMAC (“Scope”);
- 20.2.71.3 NMAC (“Statutory Authority”);
- 20.2.71.4 NMAC (“Duration”);
- 20.2.71.5 NMAC (“Effective Date”);
- 20.2.71.6 NMAC (“Objective”);
- 20.2.71.7 NMAC (“Definitions”);
- 20.2.71.8 NMAC (“Amendment and Supersession of Prior Regulations”);
- 20.2.71.9 NMAC (“Documents”);
- 20.2.71.10 NMAC to 20.2.71.108 NMAC (“Reserved”);

- 20.2.71.109 NMAC (“Applicability”);
- 20.2.71.110 NMAC (“Fee Requirements”);
- 20.2.71.111 NMAC (“Fee Determination”);
- 20.2.71.112 NMAC (“Emission Fee”); and,
- 20.2.71.113 NMAC (“Fee Payment”).

The proposed 20.2.71.1 NMAC (“Issuing Agency”) identifies the Board as the issuing agency. This section is unchanged.

The proposed 20.2.71.2 NMAC (“Scope”) identifies the scope of Part 71. This section is unchanged.

The proposed 20.2.71.3 NMAC (“Statutory Authority”) cites the statutes that provide authority for the regulations. Amendments include meeting the State Records and Archives style and format requirements.

The proposed 20.2.71.4 NMAC (“Duration”) indicates that the regulations would be permanent (until the next time the Board amends the regulations). This section is unchanged.

The proposed 20.2.71.5 NMAC (“Effective Date”) states that the effective date of the amendments would be July 15, 2024. (The prior effective date was November 30, 1995.)

The proposed 20.2.71.6 NMAC (“Objective”) clarifies that the regulations are for the establishment of a fee schedule for Title V operating permits and emissions fees. This section is unchanged.

The proposed 20.2.71.7 NMAC (“Definitions”) deletes the requirements for mercury emissions and replaces total suspended particulate matter with particulate matter less than 10 microns (PM10) and particulate matter less than 2.5 microns (PM2.5) from the “Fee pollutant” definition.

The proposed 20.2.71.8 NMAC (“Amendment and Supersession of Prior Regulations”) references the prior regulations that were in effect before Part 71 became effective. This section is unchanged.

The proposed 20.2.71.9 NMAC (“Documents”) cites the physical address and the Bureau to contact to view Part 71 in person. This section was amended to reflect the current physical address of the Bureau’s main office.

The proposed 20.2.71.10 NMAC to 20.2.71.108 NMAC (“Reserved”) sections are reserved for future rule expansion. These sections remain unchanged.

The proposed 20.2.71.109 NMAC (“Applicability”) describes the owner or operator of a major source as the applicable parties who are covered under Part 71. This section remains unchanged.

The proposed 20.2.71.110 NMAC (“Fee Requirement”) describes the owner or operator as the responsible party to pay the annual operating permit emissions fee along with how the fee is assessed for the major source. This section remains unchanged.

The proposed 20.2.71.111 NMAC (“Fee Determination”) describes how the fee calculation is based on the allowable emission rate, including excess emissions, in tons per year for each fee pollutant. The rule proposes to remove the limitation on charging a maximum of six thousand tons per year of any one fee pollutant and adds language that for permits that establish emission limits for both PM10 and PM2.5, the Department will invoice only for the higher amount of tons of either PM10 and PM2.5, and permittees will not be double charged for those pollutants.

The proposed 20.2.71.112 NMAC (“Emission Fee”) establishes the cost per ton for each fee pollutant and uses the Consumer Price Index (CPI) as the mechanism for raising fees

annually due to inflation. The Department proposed the CPI language to be clarified to keep the fee point amount constant for years with no increase in inflation. The Department proposes to increase the dollar per ton for each fee pollutant, including hazardous air pollutants, and to remove the mercury emissions fees due to mercury emissions no longer being a source of revenue since the closure of the San Juan Generating Station (SJGS) in 2022. The SJGS was previously the only source of mercury emissions in the state. The rule proposes to amend the methods of invoicing and payment to be transmitted electronically or as allowed by the state of New Mexico.

The proposed 20.2.71.113 NMAC (“Fee Payment”) sets the schedule when annual fees are assessed and due, along with the penalties associated for nonpayment. The proposed rule removes unnecessary language referring to old, out of date requirements, updates payment methods, and establishes administrative compliance cost provisions.

III. PART 75 -- CONSTRUCTION PERMIT FEES

The proposed Construction Permit Fees regulation would repeal and replace Title 20, Chapter 2, Part 75 of the New Mexico Administrative Code (“NMAC”):

- 20.2.75.1 NMAC (“Issuing Agency”);
- 20.2.75.2 NMAC (“Scope”);
- 20.2.75.3 NMAC (“Statutory Authority”);
- 20.2.75.4 NMAC (“Duration”);
- 20.2.75.5 NMAC (“Effective Date”);
- 20.2.75.6 NMAC (“Objective”);
- 20.2.75.7 NMAC (“Definitions”);
- 20.2.75.8 NMAC (“Amendment and Supersession of Prior Regulations”);
- 20.2.75.9 NMAC (“Documents”);
- 20.2.75.10 NMAC (“Filing Fee”);
- 20.2.75.11 NMAC (“Permit Fee”);
- 20.2.75.12 NMAC (“Payment of Fees”); and,
- 20.2.75.13 NMAC (“Periodic Review”).

The proposed 20.2.75.1 NMAC (“Issuing Agency”) identifies the Board as the issuing agency. This section is unchanged.

The proposed 20.2.75.2 NMAC (“Scope”) identifies the scope of Part 75 and removes the annual permit fee requirement redundancy, cited in section 11.

The proposed 20.2.75.3 NMAC (“Statutory Authority”) cites the statutes that provide authority for the regulations. This section remains unchanged.

The proposed 20.2.75.4 NMAC (“Duration”) indicates that the regulations would be permanent (until the next time the Board amends the regulations). This section is unchanged.

The proposed 20.2.75.5 NMAC (“Effective Date”) states that the effective date of the amendments would be July 15, 2024. (The prior effective date was March 2, 2001.)

The proposed 20.2.75.6 NMAC (“Objective”) establishes the objective of the rule and the fee schedule for the construction permit program. This section remains unchanged.

The proposed 20.2.75.7 NMAC (“Definitions”) clarifies the terminology used in the regulations. This section remains unchanged.

The proposed 20.2.75.8 NMAC (“Amendment and Supersession of Prior Regulations”) references the prior regulations that were in effect before Part 75 became effective. This section is unchanged.

The proposed 20.2.75.9 NMAC (“Documents”) provides a physical address for the Bureau so anyone may view Part 75 in person. The proposed rule amends the current physical address of the Bureau’s main office.

The proposed 20.2.75.10 NMAC (“Filing Fee”) describes the filing fee for each notice of intent, application for a permit to construct, modify a source, or revise a permit. In addition, the rule identifies the accelerated review criterion, including for the use of qualified outside firms.

The proposed rule increases the filing fees and the accelerated review filing fees and proposes to include annual CPI adjustments to both fees.

The proposed 20.2.75.11 NMAC (“Permit Fee”) describes the point-based fee schedule for a new construction permit and the technical review of an existing permit, including the dollar value per fee point. The proposed rule proposes to increase the annual fee, increase the dollar value per point, increase the points for modeling reviews, and add a separate increased point system for oil and gas general construction permits. The proposed rule retains the current fee for non-oil and gas general construction permits. The proposed rule continues to include adjustments annually based on the CPI. The Department proposes the CPI language to be clarified to keep the fee point amount constant for years with no increase in inflation.

The proposed 20.2.75.12 NMAC (“Fee Payment, Collection and Costs”) describes the process for invoicing and paying construction permit fees. The rule proposes to amend the methods of invoicing and payment to be transmitted electronically or as allowed by the state of New Mexico and to allow for the recuperation of administrative compliance costs.

The proposed 20.2.75.13 NMAC (“Periodic Review”) describes the procedure for the Bureau to annually present to the Board the financial status of the revenue fund account along with projections for the construction permit program. The rule proposes amending the requirement to present the annual fees report to the EIB and proposes to simply develop the report.

IV. CONCLUSION

In sum, the proposed changes to the fee structure will correct the permitting fees deficiencies and properly fund the Bureau so that it may fully and effectively implement the requirements of the state Air Quality Control Act and federal CAA.