IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

INDEPENDENT PETROLEUM
ASSOCATION OF NEW MEXICO,

Appellant,

v. Ct. App. No. A-1-CA-40546

NEW MEXICO ENVIRONMENTAL
IMPROVEMENT BOARD,

Appellee.

DOCKETING STATEMENT

APPEAL FROM THE ENVIRONMENTAL IMPROVEMENT BOARD
No. EIB 21-27 (R)

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Pursuant to Rule 12-208 and Rule 12-601 NMRA, Appellant Independent Petroleum Association of New Mexico ("IPANM") submits this Docketing Statement in its appeal from the new regulations, codified at 20.2.50 NMAC, that were promulgated by the New Mexico Environmental Improvement Board's ("EIB" or the "Board") to regulate ozone precursor pollutants[1] from the oil and gas sector.

NATURE OF THE PROCEEDING

This appeal arises from EIB's proceeding to consider and take action on the New Mexico Environment Department's ("NMED") petition to the Board to adopt new regulations at 20.2.50 NMAC (Part 50) for emission limitations and work practices to control ozone precursor pollutant emissions from the oil and gas sector pursuant to the Board's authority under the New Mexico New Mexico Air Quality Control Act ("Air Act"), specifically, Section 74-2-5(C), which requires the Board to "adopt a plan, including rules, to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the [federal Ozone National Air Quality] standard" in areas of the state that exceed ninety-five percent (95%) of the standard. NMSA 1978, § 74-2-5(C) (2021).

[1] Ozone precursor pollutants are oxides of Nitrogen ("NO_x") and Volatile Organic Compounds ("VOCs").

IPANM submits that certain provisions of Part 50 are inconsistent with and exceeds the EIB's rulemaking authority conferred by the Air Act and should be declared null and void to the extent those provisions are contrary to law.

STATEMENT OF TIMELY APPEAL

The final Part 50 was circulated to participants in the rulemaking proceeding and filed with the State Records Center and Archives on July 6, 2022 and was published in the New Mexico Register on July 26, 2022. Pursuant to NMSA 1978, Section 74-2-9(B) (1971), IPANM filed its timely Notice of Appeal from the filed Part 50 on August 5, 2022.

STATEMENT OF THE CASE

A. Statutory Framework

The Air Act is both the source of and the limit on the Board's authority to adopt regulations to control ozone precursor pollutant emissions from the oil and gas sector in New Mexico. Under Section 74-2-5 of the Air Act, the Board is delegated responsibility for the prevention and abatement of air pollution and is delegated authority to "adopt, promulgate, publish, amend and repeal rules and standards *consistent* with the [Air Act] to attain and maintain national ambient air quality standards ["NAAQS"] and prevent or abate air pollution. . . ." NMSA 1978, § 74-2-5(A), (B) (emphasis added). In addition, Section 74-2-5(C) states that:

> If the [EIB] determines that emissions from sources within [its] jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of the primary [NAAQS] for ozone promulgated pursuant to the federal [Clean Air] act, the [EIB] shall adopt a plan including rules, to control emissions of [NO_x and VOCs] to provide for attainment and maintenance of the standard.

However, Section 74-2-5(C) also provides that "Rules adopted pursuant to this subsection *shall be limited* to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the primary [NAAQS]." (Emphasis added).

Under the Air Act, any person may recommend or propose regulations to the EIB for adoption. NMSA 1978, § 74-2-6(A) (1992). To adopt a regulation or emission control requirement, the Air Act requires the Board to hold a public hearing and allow interested persons the opportunity to submit data, views, or argument and permit the examination of witnesses who are testifying. Section 74-2-6(D). Before the Board adopts a rule that is to be more stringent than the federal act or regulations, the Board must "make a determination, based on substantial evidence and after notice and public hearing, that the proposed rule will be more protective of public health and the environment." Section 74-2-5(G). Because Part 50 is promulgated pursuant to the Board's authority under Section 74-2-5(C), the EIB must determine that the regulations are fulfilling the duty imposed under that provision and do not require performance far beyond what is necessary to assure compliance with the

ozone NAAQS consistent with this Court's Opinion in *Public Service Company of New Mexico ("PNM") v. New Mexico Environmental Improvement Bd.*, 1976-NMCA-039, ¶ 19, 89 N.M. 223, 549 P.2d 638. The Board's rulemaking procedures are governed by 20.1.1 NMAC.

B. Proceedings Before the EIB

On May 6, 2021, NMED commenced this matter by filing a Petition for Regulatory Change proposing new regulations for Oil and Gas Sector—Ozone Precursor Pollutants to be codified at 20.2.50 NMAC (i.e., Part 50) pursuant to the Board's rulemaking authority under the Air Act. NMED's Petition included a proposed draft Part 50 and NMED's statement of reasons for the proposed rule.

On June 8, 2021, the Board issued an order appointing a Hearing Officer, setting a public hearing on Part 50, and setting a procedural schedule for pre-filing direct and rebuttal technical testimony. On June 22, 2021, NMED published its Hearing Notice identifying the purpose of the public hearing as follows:

> The purpose of the public hearing is for the Board to consider and take possible action on a petition by the [NMED] requesting the Board to adopt a plan, including proposed new regulations at 20.2.50 NMAC. The requested action is currently authorized pursuant to the New Mexico Air Quality Control Act, NMSA 1978, Section 74-2-5.3, which requires that the Board adopt a plan, including regulations, to ensure attainment and maintenance of the National Ambient Air Quality Standard ("NAAQS") for ozone within areas of the State that have monitored ozone concentrations that exceed 95% of the NAAQS. . . . The proposed regulations at Part 50 would reduce emissions of ozone

> precursor pollutants (oxides of nitrogen and volatile organic compounds) from sources in the oil and gas sector located in areas of the State within the Board's jurisdiction that are experiencing elevated ozone levels.

Pursuant to the Hearing Determination and the Procedural Order, IPANM and several other parties pre-filed written direct and rebuttal technical testimonies on July 28, 2021, and September 7, 2021, proposing a number of revisions to Part 50. The Board held a virtual public hearing from September 20, 2021, to October 1, 2021, during which the Hearing Officer heard technical testimony, including direct and cross examination from the Parties, and comment from interested members of the public. Following that hearing, the parties submitted written closing arguments, proposed statements of reasons, and final proposed changes to Part 50. The Board then deliberated on Part 50 for several days and issued its Statement of Reasons and Final Order ("Statement of Reasons") adopting Part 50 on June 7, 2022. The final Part 50 was then circulated to participants in the rulemaking proceeding and filed with the State Records Center and Archives on July 6, 2022, was published in the New Mexico Register on July 26, 2022, and became effective on August 6, 2022.

Part 50 creates a complex regulatory framework, much of which IPANM agrees is appropriate. There are discrete areas, however, in which IPANM contends the rule is inconsistent with law, namely: (1) listing Chaves and Rio Arriba Counties in 20.2.50.2 NMAC as areas subject to the rule without record evidence that ozone

concentrations in these counties exceed ninety-five percent of the primary NAAQS; (2) including a gross annual revenue threshold tied to the constantly changing market price of oil and gas in the definition of "small business facility" at 20.2.50.7(S)(1) NMAC; (3) granting NMED enforcement authority to withdraw the regulatory exemption from certain requirements in 20.2.50.125(G) NMAC; (4) adopting Environmental Defense Fund's ("EDF") Leak Detection and Repair ("LDAR Proximity Proposal") which is unrelated to implementation of the federal ozone NAAQS, and therefore, outside the scope of the noticed rulemaking; and (5) adopting requirements that are more stringent than necessary to assure compliance with the ozone NAAQS.

1. <u>Scope (20.2.50.2)</u>

20.2.50.2 NMAC identifies the areas of the State that are subject to, or may be subject to, Part 50, and specifically identifies a total of eight counties, including Chaves and Rio Arriba, that as of the effective date, are subject to Part 50. 20.2.50.2 NMAC. IPANM and other parties objected to the inclusion of sources in Chaves and Rio Arriba counties because no evidence demonstrated that ozone concentrations in the politically and geographically circumscribed areas of these counties exceed 95% of the NAAQS.

The Board, in the Statement of Reasons, rejected IPANM and other parties' arguments and adopted NMED's proposal to include Chaves and Rio Arriba Counties adopting NMED's position that sources in those counties "contribute[]" to ozone levels in other counties. The Board reasoned that "its statutory directive under the [Air Act] is not to regulate sources in "counties;" rather it must regulate sources in any "area" of the state where ozone levels exceed ninety-five percent of standard." The Board further reasoned that "monitor locations are associated with Air Quality Control Regions (AQCR), not counties" but that "[NMED] delineated scope of Part 50 by county in order to facilitate compliance with the rule because counties have well-established and commonly understood boundaries." The Board stated, "it would be far more difficult for owners and operators of affected sources to determine applicability of the rule if the scope of the rule was based on [AQCRs]." Finally, the Board stated that counties listed in 20.2.50.2 NMAC "contain the majority of oil and gas sources in the major producing basins in the State [and] exclude[ing] sources located in Chaves and Rio Arriba County…would leave unregulated significant emissions of ozone precursors from oil and gas sources under its jurisdiction."

2. <u>Definition of Small Business Facility (20.2.50.7(S)(1) NMAC)</u>

Part 50 defines "small business facility" based on "three principal criteria" which EIB stated "delineate between small, independent businesses and large,

vertically integrated companies–- (1) ownership structure, (2) total number of staff employed by the company, and (3) annual revenue. The Board stated that the definition is "intended to provide regulatory relief to small independent operators by requiring compliance with only a limited subset of requirements in Part 50."

IPANM objected to the gross annual revenue threshold criteria included in NMED's proposed definition of Small Business Facility as creating regulatory uncertainty because, for oil and gas producers, gross annual revenue is tied to the constantly fluctuating market price of oil and natural gas. IPANM testified that increases or decreases in the price of oil or gas cannot be passed on by the producer nor can an increase in cost. IPANM provided the following as an example of uncertainty inherent in basing qualification for exemptions on a cost threshold:

> This year, an operator may qualify as a small business facility. Yet, without changing its operations—including the amount of oil and gas it produces—if market commodity prices rise in oil and gas, an operator's gross annual revenue also rises. If market prices rise high enough, the operator may no longer qualify as a small business facility. Due to market prices beyond an operator's control, and no change in its production levels, an operator becomes subject to a different regulatory framework in Part 50.

In the Statement of Reasons, the Board acknowledged that gross annual revenues are not a measure of a company's profitability and recognized the concern "that using a revenue threshold could result in operators moving in and out of qualifying as a small business from one year to the next due to uncertainties in

commodity pricing," but rejected that as a basis for removing the threshold from the adopted definition. The Board reasoned that "there will always be economic fluctuations, and both commodity prices and production can be variable [but] [i]n federal rulemakings similar to Part 50, it is standard practice to pick a snapshot of conditions in the regulated industry when estimating compliance costs and small business impacts."

3. Improper Delegation of Enforcement Authority

20.2.50.125.A NMAC provides that when an operator meets the definition of a "small business facility," it is "not subject to any other requirements" in Part 50 "unless specifically identified in Section 20.2.50.125." 20.2.50.125(B)- (F) NMAC outline the general requirements for small businesses, including monitoring, repair, recordkeeping, and reporting. Finally, 20.2.50.125(G) NMAC, grants NMED enforcement authority to withdraw the regulatory exemption from certain requirements if a source: "(1) presents an imminent and substantial endangerment to the public health or welfare or to the environment; (2) is not being operated or maintained in a manner that minimizes emissions of air contaminants; or (3) has violated any other requirement of 20.2.50.125."

IPANM argued 20.2.50.125(G) NMAC should be struck in its entirety because granting enforcement authority to NMED exceeds the authority delegated

to EIB under the Air Act. IPANM further argued that NMED's enforcement authority is independent of the Board's authority and derives directly from the Legislature, not EIB, and that authority does not include the ability to withdraw a regulatory exemption.

In the Statement of Reasons, the Board rejected IPANM's proposal to strike 20.2.50.125(G), supported by New Mexico Oil and Gas Association ("NMOGA"), as "against the weight of the evidence."

4. <u>LDAR Proximity Monitoring Requirements</u>

20.2.50.116 NMAC regulates "[e]missions from fugitive emission sources such as leaking valves, connectors, and flanges" by requiring LDAR monitoring. As part of rebuttal testimony, EDF proposed adding a new section, 20.2.50.116(C)(3)(c), to establish more frequent LDAR monitoring requirements when a regulated well site is located within 1,000 feet of an "occupied area." EDF's proposal also included a new definition to 20.2.50.7 for "occupied area" which generally provided boundaries and criteria for what would be considered an occupied area. At the hearing, EDF's witness, Dr. Lyons testified that the purpose of EDF's LDAR Proximity Proposal was to "protect frontline communities from excess emissions while also helping New Mexico avoid ozone nonattainment." On cross examination, in response to a question concerning the proximity proposal's

relationship with exceedances of federal ozone NAAQS, Ms. Hull—another EDF witness—testified that the proximity proposal is a "reference to all [pollutants] . . . that are associated with oil and gas that are creating negative health impacts." A third EDF witness, Dr. Thompson, testified that she believes the proximity proposal goes to both compliance with NAAQS and preventing unnecessary health risks.

IPANM and others opposed EDF's proposal as being outside the scope of the Board's Notice of Public Hearing because the purpose of the proposal was to address the toxic effect of exposure to emissions not to regulate ozone precursors to meet the ozone NAAQS. The Board adopted the Proximity Proposal over objections by IPANM and NMOGA. The Statement of Reasons summarily "rejects the argument from IPANM" without any discussion of the notice issue and finds "based on substantial evidence that the Proximity Proposal as amended is more protective of public health and the environment."

5. <u>Lack of Modeling of Final Rules to Support Part 50</u>

The "fundamentals of ozone modeling" section of EIB's Statement of Reasons explains that "ozone modeling is usually conducted using a photochemical grid model ('PGM')" and describes the inputs to the PGM. The Statement of Reasons then describes the PGM Modeling to support NMED's Ozone Attainment Initiative ("OIA"). The Statement of Reasons describes the OIA PGM study,

conducted from April 2020 to May 2021, which forecast that the requirements of Part 50 (as proposed by the Department in the Petition) are "estimated to reduce daily MDA8 ozone concentrations across wide areas in New Mexico, with the largest ozone reductions occurring within the San Juan and Permian Basin." The Statement of Reasons also states that:

> [T]he modeling study showed that ozone formation in the majority of New Mexico is more NO_x sensitive, with the San Juan Basin being an exception. However, both pollutants contribute to ozone formation, and NO_x sensitivity does not mean that there will be no ozone benefits from VOC emission reductions, particularly in the San Juan Basin.

IPANM criticized the validity of the OIA study on the basis that it did not separate values between oil and gas VOC and NO_x controls as would be necessary to identify ozone benefits from NO_x control compared to VOC controls. IPANM also criticized the applicability of the OIA PAG modeling, which was based on the proposed Part 50, and did not demonstrate the requirements set forth in the final rule, changed from NMED's proposed rule, are no more stringent than necessary to protect and maintain the ozone NAAQS.

Additionally, the Board's findings only state that Part 50 will result in decreased ozone design values and reductions of ozone concentrations. The Board presented no evidence demonstrating and made no determination that final Part 50 is no more stringent than necessary and is not far beyond what is necessary to meet

the NAAQS. *See PNM*, 1976-NMCA-039, ¶ 19; *Kennecott Copper Corp. v. N.M. Env't Improvement Bd.*, 1980-NMCA-007, ¶ 9, 94 N.M. 610, 614 P.2d 22.

STATEMENT OF ISSUES

IPANM states the following issues for purposes of this Docketing Statement only and reserves the right to raise additional issues.

ISSUE 1: Whether Part 50 violates the Air Act because it makes the new emissions standards and requirements applicable to sources located in Chaves and Rio Arriba Counties without satisfying the requirement under Section 74-2-5(C) that ozone concentrations in those politically and geographically defined areas "exceed 95% of the primary national ambient air quality standards."

Procedural Posture

IPANM raised and preserved this issue in pre-filed direct and rebuttal technical testimonies and IPANM's Closing Arguments and Proposed Statement of Reasons. The issue was also preserved in the Hearing Officer's Report and the EIB's Statement of Reasons.

Authorities

NMSA 1978, § 74-2-9(C) (1971) (conferring authority on the Court of Appeals to review validity of regulations adopted by the EIB and providing that such action shall set aside "if found to be: (1) arbitrary, capricious or an abuse of

discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.").

Princeton Place v. N.M. Human Servs. Dep't, Med. Assistance Div., 2022-NMSC-005, ¶ 35, 503 P.3d 319 ("The party challenging an administrative decision bears the burden on appeal of showing that the decision is unreasonable, or unlawful.") (alteration in original).

Elephant Butte Irrigation Dist. v. N.M. Water Quality Control Comm'n,__-NMCA-__, ¶ 9, __P.3d__, (A-1-CA-38474 and A-1-CA-38474, May 16, 2022) ("An agency decision is not in accordance with the law if the agency unreasonably or unlawfully misinterprets or misapplies the law.") (citing *Princeton Place v. N.M. Human Servs. Dep't, Med. Assistance Div.*, 2018-NMCA-036, ¶ 27, 419 P.3d 194), *rev'd on other grounds*, 2022-NMSC-005.

Hobbs Gas Co. v. N.M. Serv. Comm'n, 1993-NMSC-032, ¶ 6, 115 N.M. 678, 858 P.2d 54 (stating that burden on review of administrative decision under arbitrary and capricious standard is to show that the decision is "unreasonable or unlawful").

NMSA 1978, § 74-1-4 (2001) (creating the "environmental improvement board").

NMSA 1978, § 74-1-8(A) (2020) ("The board is responsible for environmental management and consumer protection. In that respect, the board shall

promulgate rules and standards in the following areas . . . (4) air quality management as provided in the Air Quality Control Act [NMSA 1978, Sections 74-2-1 to -17]").

Section 74-2-5(A), (B) (identifying duties and powers of EIB with respect to prevention and abatement of air pollution under the Air Act and authorizing the board to "adopt promulgate, publish, amend and repeal rules and standards consistent with the Air Quality Control Act to attain and maintain [NAAQS] and prevent or abate air pollution").

Section 74-2-5(C) ("If the environmental improvement board . . . determines that emissions from sources within the environmental improvement board's jurisdiction . . . cause or contribute to ozone concentrations in excess of ninety-five percent of the primary national ambient air quality standard for ozone promulgated pursuant to the federal act, the environmental improvement board . . . shall adopt a plan, including rules, to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard. Rules adopted pursuant to this subsection *shall be limited to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard*.") (emphasis added).

N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105 ("Statutory construction itself is not a matter

within the purview of the [agency's] expertise, [so the Court] 'afford[s] little, if any, deference to the [agency]'" on questions of law not involving this expertise or policy determination.) (quoting *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860).

PNM, 1976-NMCA-039, ¶ 7 ("Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.").

Id. ¶ 10 ("The authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. However, such an approach to construction does not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations.") (internal citations omitted).

La Jara Land Devs., Inc. v. Bernalillo Cnty Assessor, 1982-NMCA-006, ¶ 11, 97 N.M. 318, 639 P.2d 605 (holding that "[r]ulings by an administrative agency not in accord with the basic requirements of the statutes relating to the agency will render its decision void").

Cont'l Oil Co. v. Oil Conservation Comm'n, 1962-NMSC-062, ¶ 31, 70 N.M. 310, 373 P.2d 809 (providing that "[a]dministrative bodies, however well

intentioned, must comply with the law; and it is necessary that they be required to do so, to prevent any possible abuse").

ISSUE 2: If the Board's position is that the "areas" subject to Part 50 standards and requirements are not based on politically and geographically defined areas of a county, then whether the "Scope" section of Part 50 constitutes an arbitrary and capricious decision of the Board because the Board has not identified nor provided any rational criteria for how the "areas" identified as counties in the rule were defined to support its determination that those counties are "within the *area* of the state" where "ozone concentrations exceed 95% of the primary national ambient air quality standards" and are subject to the new regulations.

Procedural Posture

IPANM raised and preserved this issue in pre-filed technical testimony and IPANM's Closing Arguments and Proposed Statement of Reasons.

Authorities

Section 74-2-9(C) (conferring authority on the Court of Appeals to review the validity of regulations adopted by the EIB and providing that such action shall set aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law").

Princeton Place, 2022-NMSC-005, ¶ 35 ("The party challenging an administrative decision bears the burden on appeal of showing that the decision is unreasonable, or unlawful.") (alteration in original).

Section 74-2-5(C) (providing that "rules adopted pursuant to this subsection *shall be limited to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard*") (emphasis added).

NMSA 1978, § 74-2-5(F) (providing that "[i]n making its rules, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including: (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved").

Gila Res. Info. Project v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, ¶ 42, 417 P.3d 369 ("To the extent our inquiry of the lawfulness of the [rule] requires considerations of evidentiary matters, 'this Court reviews the whole record

to see if the agency decision is supported by substantial evidence. [The Court] will uphold the agency decision so long as the evidence in the record satisfies us that the agency decision is reasonable.") (internal citation omitted and quotation marks omitted).

Herman v Miners' Hosp., 1991-NMSC-021, ¶ 6, 111 N.M. 550, 807 P.2d 734 (When applying whole record review, the Court "views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence.")

Elephant Butte Irrigation Dist., __-NMCA-__, ¶ 9. ("'An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.'") (quoting *Albuquerque Cab Co. v. N.M. Pub. Regul. Comm'n*, 2017-NMSC-024, ¶ 8, 404 P.3d 1).

ISSUE 3: Whether the Part 50 definition of "small business facility" (and associated Part 50 exemptions) violates due process by tying qualification as a small business facility to revenue threshold criteria that is based on a constantly fluctuating market price of oil and gas.

Procedural Posture

This issue was raised and preserved in pre-filed direct and rebuttal technical testimonies, at hearing, and in IPANM's Closing Arguments and Proposed Statement of Reasons. The issue was also addressed in the Hearing Officer's Report.

Authorities

Section 74-2-9(C) (conferring authority on the Court of Appeals to review validity of regulations adopted by the EIB and providing that such action shall set aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.").

Nuclear Waste P'ship, LLC v. Nuclear Watch N.M., 2022-NMCA-014, ¶ 12, 505 P.3d 886 ("The term 'not in accordance with law' involves action taken by an agency or court which is based on an error of law, is arbitrary and unreasonable, or is based on conjecture, and is inconsistent with established facts.")

Princeton Place, 2022-NMSC-005, ¶ 35 ("'The party challenging [an administrative] decision bears the burden on appeal of showing that the decision is unreasonable, or unlawful.'") (alteration in original) (quoting *Morningstar Water Users Assoc.*, 1995-NMSC-062, ¶ 9).

Rayellen Res., Inc. v. N.M. Cultural Props. Rev. Comm., 2014-NMSC-006, ¶18, 319 P.3d 639 (the Court "review[s] de novo whether due process has been denied, a question of law").

N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law.").

U.S. Const. amend. XIV, § 1 (providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law").

N.M. Mining Ass'n v. Water Quality Control Comm'n, 2007-NMCA-084, ¶ 24, 142 N.M. 200, 164 P.3d 81 ("A law 'must provide fair and adequate warning to a person of ordinary intelligence of the conduct which is prohibited.").

Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, ¶ 52, 289 P. 3d 1232 ("A statute will be held unconstitutional in violation of due process of law, if the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application. A law must provide fair and adequate warning to a person of ordinary intelligence of the conduct which is prohibited. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis,

with the attendant dangers of arbitrary and discriminatory applications.") (Internal citations and quotation marks omitted).

Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 1979-NMSC-090, ¶¶ 13-14, 93 N.M. 546, 603 P.2d 285 ("The same strict rule of construction that is applied to statutes defining criminal action must be applied to rules enacted by an agency pursuant to statutory authority. It is well established that a penal statute or regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law.") (internal citations and quotation marks omitted).

ISSUE 4: Whether the Board exceeded its authority under the Air Act by granting authority to NMED under 20.2.50.125(G) NMAC, to eliminate a regulatory exemption.

Procedural Posture

IPANM raised and preserved this issue in IPANM's Closing Arguments and Proposed Statement of Reasons.

Authorities

Section 74-2-9(C) (conferring authority on the Court of Appeals to review validity of regulations adopted by the EIB and providing that such action shall set

aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law"). NMSA 1978, § 74-2-12(A) (2006) (conferring authority to Department Secretary or Director for enforcing regulations or conditions of a permit issued under the Air Act).

Section 74-2-5 (establishing EIB's duties and powers to prevent or abate air pollution, which do not include enforcement authority).

City of Albuquerque v. Am. Fed'n of State, Cnty. & Mun. Emps., 2015-NMCA-023, ¶¶ 8-9, 344 P.3d 1069 ("[Administrative bodies] can act only on matters that are within the scope of the authority that a statute has delegated to them either expressly or by necessary implication. Whether an administrative body has acted beyond the scope of its authority is a question of statutory construction that [the Court] reviews de novo") (internal quotations and citations omitted).

Wilcox v. N.M. Bd. Of Acupuncture & Oriental Med., 2012-NMCA-106, ¶ 7, 288 P.3d 902 ("An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority. The Legislature may delegate legislative duties to a board, but in so doing, boundaries of authority must be defined and followed.") (internal quotations and citations omitted).

ISSUE 5: Whether the proximity monitoring requirements included in 20.2.50.116.C(3)(c) NMAC, which seek to limit toxic emissions from oil and gas sources in proximity of occupied structures, violates administrative due process requirements because the proposal is outside the scope of the noticed rulemaking hearing and was adopted without reasonable notice and opportunity to be heard.

Procedural Posture

IPANM raised and preserved this issue at the hearing and in IPANM's Closing Arguments and Proposed Statement of Reasons.

Authorities

Section 74-2-9(C) (conferring authority on the Court of Appeals to review validity of regulations adopted by the EIB and providing that such action shall set aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law").

Rayellen Res., Inc., 2014-NMSC-006, ¶18 (the Court "review[s] de novo whether due process has been denied, a question of law").

Albuquerque Bernalillo Co. Water Util. Auth. ("ABCWUA") v. N.M. Pub. Regul. Comm'n, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 229 P.3d 494 ("It is well settled that the fundamental requirements of due process in an administrative context

are reasonable notice and opportunity to be heard and present any claim or defense.") (internal citations and quotation marks omitted).

20.1.1.301(B) NMAC (Requiring that the notice of a proposed EIB rulemaking include, among other requirements: "(1) [T]he subject of the proposed rule, including a summary of the full text of the proposed rule and a short explanation of the purpose of the proposed rule; [and] (2) a citation to the specific legal authority authorizing the proposed rule and short explanation of the proposed rule . . . .").

Jones v. N.M. State Racing Comm'n, 1983-NMSC-089, ¶ 9, 100 N.M. 434, 671 P.2d 1145 ("With respect to notice, in order to afford a party procedural due process, a reasonable identification of the issue to be considered in the administrative proceedings is required.").

ABCWUA, 2010-NMSC-013, ¶ 21 ("Notice should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case. General notice of the issues to be presented at a hearing is sufficient to comport with due process requirements.") (internal citations and quotation marks omitted).

N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 725 P.2d 244 (stating the "essence" of due process is the "right to be heard at a meaningful time and in a meaningful manner").

Rayellen Res., Inc., 2014-NMSC-006, ¶ 28 ("Procedural due process is ultimately about fairness, ensuring that the public is notified about a proposed government action and afforded the opportunity to make its voice heard before that action takes effect.").

PNM, 1976-NMCA-039, ¶¶ 7, 10 (providing that an agency "can act only as to those matters which are within the scope of authority delegated to them" and determining that EIB may not predicate a rule beyond the reasons expressed in its statutory mandate).

ISSUE 6: Whether the Board's adoption of Part 50 conflicts with this Court's opinion in *Public Service Company of New Mexico v. New Mexico Environmental Improvement Board*[2] because the EIB did not determine that the adopted Part 50 standards are no more stringent than necessary to assure attainment with the NAAQS.

[2] 1976-NMCA-039

Procedural Posture

IPANM raised and preserved this issue in pre-filed technical testimony, at the public hearing, and in IPANM's Closing Argument and Statement of Reasons.

Authorities

Section 74-2-9(C) (conferring authority on the Court of Appeals to review validity of regulations adopted by the EIB and providing that such action shall set aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law").

Section 74-2-5(C) (limiting the Board's rulemaking powers regarding NAAQS to regulations of "area[s] of the state where the ozone concentrations exceed ninety-five percent of the primary" NAAQS).

Section 74-2-5(F) (providing that "[i]n making its rules, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including: (1) character and degree of injury to or interference with health, welfare, visibility and property; (2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous

experience with equipment and methods available to control the air contaminants involved").

Gila Res. Info. Project, 2018-NMSC-025, ¶ 42 (providing that the Court "reviews the whole record to see if the agency decision is supported by substantial evidence [and] will uphold the agency decision so long as the evidence in the record satisfies us that the agency decision is reasonable") (internal citations and quotation marks omitted).

PNM, 1976-NMCA-039, ¶ 7, (holding that EIB may not promulgate a rule or regulation that is more stringent than necessary to maintain the ambient air quality standard).

Id. ¶¶ 7, 10 (providing that an agency "can act only as to those matters which are within the scope of authority delegated to them" and determining that EIB may not predicate a rule beyond the reasons expressed in its statutory mandate).

Kennecott, 1980-NMCA-007, ¶ 9 (determining that "although the Board has not expressly stated in its reasons that the regulation as amended was adopted to prevent or abate air pollution, that message is clear from a reading of the amended regulation itself, together with the reasons given for its adoption").

STATEMENT OF HOW PROCEEDINGS WERE RECORDED

The Public Hearing in this matter was held April 12, 2022, through April 14, 2022, and was transcribed by a court reporter.

RELATED OR PRIOR APPEALS

There are no related or prior appeals.

CONCLUSION

The Part 50 provisions identified in this Docketing Statement should be overturned as arbitrary and capricious and not in accordance with law, and the matter should be remanded to EIB for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, a copy of the foregoing ***Independent Petroleum Association of New Mexico's Docketing Statement*** was served via electronic mail on the following:

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