IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO,

Appellant,

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

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellee.

BRIEF IN CHIEF

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

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-318(G) NMRA, undersigned counsel hereby certifies that this brief complies with Rule 12-318(F)(2) NMRA. The body of this brief is no more than 35 pages in length.

TABLE OF AUTHORITIES

New Mexico Case Law

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SUMMARY OF PROCEEDINGS

A. Nature of the Case

The Independent Petroleum Association of New Mexico ("IPANM") appeals pursuant to NMSA 1978, § 74-2-9 (1992), from the Statement of Reasons and Final Order ("Final Order") entered on June 27, 2022, by the New Mexico Environmental Improvement Board ("EIB" or "Board") in Case No. EIB 21-27 (R), *In the Matter of Proposed New Regulation, 20.2.50 NMAC – Oil and Gas Sector – Ozone Precursor Pollutants*. The Final Order adopts 20.2.50 NMAC ("Part 50"), which regulates the emission of ozone precursor pollutants (nitrogen oxides ("NOx") and volatile organic compounds ("VOC")) (together, "Ozone Precursors") from the oil and gas sector. This appeal challenges whether several of those regulations, and the rulemaking by which they were adopted, comply with the law.

B. Course of Proceedings and Disposition Below

On May 6, 2021, the New Mexico Environment Department ("NMED" or "Department") filed a Petition for Regulatory Change ("Petition") with EIB to initiate a rulemaking proceeding. **[1 RP 0001]** The Petition sought adoption of proposed Part 50 pursuant to EIB's authority under NMSA 1978, § 74-2-5(C) (2021). **[*Id.*]** On June 8, 2021, EIB scheduled the Petition for public hearing, set deadlines for technical testimony, and assigned a hearing officer. **[1 RP 0076]**

On June 22, 2021, the Board published a Notice of Rulemaking Hearing, attaching NMED's proposed Part 50 as the proposed rule. **[NMED Supplemental Exhibits 111–126]** Public hearing was held for ten days between September 20 and October 1, 2021. The Hearing Officer's Report was filed February 24, 2022 **[20 RP 4382-4746]**, and the Board entered its Final Order on June 27, 2022 **[20-21 RP 4747-5030]**.

C. Summary of Facts

Ozone is a molecule comprised of three oxygen atoms (O_3) and is found in both the upper atmosphere and at ground level, where it can be harmful to health and the environment. **[20 RP 4757]** Ozone is formed in the atmosphere through a complex set of photochemical reactions involving Ozone Precursors. **[20 RP 4758]** Ozone formation is also affected by ground-level trapping and low wind-speeds, which facilitate the accumulation of Ozone Precursors, and hot areas provide heat to fuel the reaction between Ozone Precursors that forms O_3 molecules. **[*Id.*]**

The federal Clean Air Act, 42 U.S.C §§ 7401 to -7438 (1963, as amended through 2022), requires the United States Environmental Protection Agency ("EPA") to set National Ambient Air Quality Standards ("NAAQS") for ozone (the "Ozone Standard" or "Standard") and five other criteria air pollutants. *See* § 7409. Each state is responsible for ensuring that its air quality conforms with the federal NAAQS. *See* § 7410. EPA collaborates with each state to designate the state's areas as either "in

attainment," "nonattainment," or "unclassifiable" for the Standard. *See* § 7407(d). An area is "in attainment" of the Standard if the ozone concentration meets or falls below the Standard. "Non-attainment" areas have concentrations that exceed the Standard. Areas without sufficient monitoring data are deemed "unclassifiable." *See* § 7407(d)(1)(A).

New Mexico's Air Quality Control Act ("AQCA"), NMSA 1978, §§ 74-2-1 to -22 (1967, as amended through 2022), requires EIB to adopt state-level rules and standards to attain and maintain the NAAQS. *See* § 74-2-5(B)(1). Specifically, EIB must adopt a plan, including rules, to control emissions of Ozone Precursors to provide for attainment and maintenance of the Ozone Standard. *See* § 74-2-5(C). Rules adopted pursuant to this authority "shall be limited to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the [Standard]." *Id.*

For purposes of ozone monitoring for compliance with the Ozone Standard, New Mexico is broken down into eight Air Quality Control Regions ("AQCRs"), located in 33 counties, and covering a total area of 120,000 square miles. **[20 RP 4762]** NMED operates ozone monitoring stations within these AQCRs and submits the data to EPA. **[20 RP 4763]** EPA then determines whether a given ACQR is in attainment of the Standard. **[*Id.*]** As of the time of the filing of the Petition in this matter, seven monitors located in the following counties under the Board's

jurisdiction were registering ozone design values exceeding 95% of the Standard: San Juan, Santa Fe, Sandoval, Valencia, Eddy, Lea, and Doña Ana. **[20 RP 4764]** NMED further determined that oil and gas sources in two other counties, Chaves County and Rio Arriba County, were "contributing to" the ozone levels at these monitors. **[*Id.*]**

To address the statutory requirement in Section 74-2-5(C) of the AQCA, the Department embarked upon the Ozone Attainment Initiative ("OAI") to develop a plan consisting of series of mandatory rules and voluntary measures to mitigate emissions of Ozone Precursors in those counties. **[20 RP 4765]** The Board subsequently adopted an "Ozone Path Forward" as the plan required to meet its statutory obligations. **[*Id.*]** Modeling done by NMED pursuant to this plan found that oil and gas sources in Chaves, Doña Ana, Eddy, Lea, Rio Arriba, Sandoval, San Juan, and Valencia counties were "causing or contributing to" ambient ozone concentrations that exceeded 95% of the Ozone Standard. **[20 RP 4773]** In response, the Department proposed Part 50.

IPANM is a 501(c)(6) non-profit that serves as the voice of the independent oil and gas producers in New Mexico, and advances and preserves the interests of independent oil and gas producers while educating the public to the importance of oil and gas to the state and all our lives. **[20 RP 4751]** IPANM members range from small, independent oil and gas producers to small, independent pipeline workers and

production site transportation employees, to independent marketers, consultants, and bankers. **[*Id.*]** As part of its mission, IPANM is an active member in the industry community that partakes in the public rulemaking process in New Mexico. **[16 RP 3834]** Members of IPANM participated in the stakeholder engagement process for this rulemaking and provided comments to NMED. **[*Id.*]** At the rulemaking hearing, IPANM submitted direct and rebuttal technical testimony and exhibits, arguments, and a proposed statement of reasons **[16 RP 3832-3922]** Throughout, IPANM members testified on behalf of IPANM. **[2 RP 0418-0424; 10 RP 2280-2284; Tr. Vol. 3, 899:13-912:4]**

ARGUMENT

I. PART 50 VIOLATES THE AQCA BECAUSE IT PURPORTS TO APPLY TO SOURCES LOCATED IN CHAVES COUNTY AND RIO ARRIBA COUNTY WITHOUT SATISFYING THE SECTION 74-2-5(C) REQUIREMENT THAT OZONE CONCENTRATIONS WITHIN THESE AREAS EXCEED NINETY-FIVE PERCENT OF THE STANDARD.

A. Standard of Review

This Court is authorized to review the validity of regulations adopted by EIB and shall set aside adopted regulations "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, § 74-2-9(C) (1992). Administrative decisions "based on issues of law" are reviewed de novo. *CAVU Co. v. Martinez*, 2014-NMSC-029, ¶ 12, 332 P.3d 287. It is unlawful for an agency to

adopt a regulation "that is not in harmony with its statutory authority." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902.

IPANM contends that EIB's promulgation of rules limiting emissions from oil and gas sources in Chavez and Rio Arriba Counties was unlawful because it did not comply with Section 74-2-5(C) of the AQCA. This issue poses a question of law involving statutory interpretation, which this Court reviews de novo. *Cates v. Mosher Enters., Inc.*, 2017-NMCA-063, ¶ 14, 403 P.3d 687. EIB's statutory interpretation is afforded no deference as to matters of law. *See Rayellen Res., Inc. v. N.M. Cultural Props. Rev. Comm.*, 2014-NMSC-006, ¶ 16, 319 P.3d 639. When reviewing a statute, the Court's "primary goal is to give effect to the intent of the legislature." *Draper v. Mountain States Mut. Cas. Co.*, 1994-NMSC-002, ¶ 4, 116 N.M. 775, 867 P.2d 1157. "The text of a statute . . . is the primary, essential sources of its meaning." NMSA 1978, § 12-2A-19 (1997); *see also N.M. Bd. of Veterinary Medicine v. Riegger*, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 248 (holding that the Court does "not depart from the plain language of a statute unless [it] must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statute provisions").

B. Preservation

IPANM raised and preserved this issue in IPANM's Closing Arguments and Proposed Statement of Reasons. **[16 RP 3832-3922; Tr. Vol. 2, 638:12-16]** The issue

was also addressed and preserved in the Hearing Officer's Report **[20 RP 4394-95]** and EIB's Statement of Reasons **[20 RP 4784-86]**.

C. EIB's rulemaking authority is limited to the regulation of "sources of emissions within the area of the state where ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard."

Administrative bodies such as EIB "are the creatures of statutes." *Pub. Serv. Co. of N.M. v. N.M. Env't Imp. Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223, 549 P.2d 638. "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.* "Administrative 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." *Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 31, 70 N.M. 310, 373 P.2d 809. EIB did not comply with the law, and the Court must set aside its attempt to regulate Ozone Precursor emissions from oil and gas sources in Chaves and Rio Arriba Counties.

The AQCA defines the scope of EIB's authority, including its authorization to promulgate rules and standards to "prevent or abate air pollution." NMSA 1978, § 74-2-5 (2021). The Board's rulemaking authority is not absolute; it is constrained by express limits identified by the Legislature. Specifically, with respect to control of VOCs and NOx to limit ozone, Section 74-2-5(C) unambiguously limits the scope of the Board's rulemaking authority to the regulation of sources of emissions located

"***within*** the area of the state ***where the ozone concentrations exceed ninety-five percent*** of the primary national ambient air quality standard":

> If the environmental improvement board or the local 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.**

NMSA 1978, § 74-2-5(C) (2021) (emphasis added).

When the Court engages in statutory interpretation, it "must give effect to all of the words used in a statutory provision." *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, ¶ 26, 417 P.3d 369. The word "shall" in statutes is mandatory. *City of Albuquerque v. Cauwels & Davis, Mgmt. Co., Inc.*, 1981-NMSC-077, ¶ 8, 96 N.M. 494, 32 P.2d 729; NMSA 1978, § 12-2A-4(A) (1997) (providing that use of the word "shall" expresses "a duty, obligation, requirement or condition precedent"). As such, the limitation on EIB's rulemaking authority as to Ozone Precursors must be given effect.

Further, even if the Legislature's grant of the Board's broad authority to "prevent and abate air pollution" in Section 74-2-5(A) could be read in conflict with the more limited rulemaking authority granted by Section 74-2-5(C) (which IPANM

does not agree is the case), the specific authority conferred by Section 74-2-5(C) prevails over the conferral of general rulemaking authority. *Matter of Est. of McElveny*, 2017-NMSC-024, ¶ 21, 399 P.3d 919 ("[a] conferral of specific authority trumps any previous conferral of general authority."); *State v. Cleve*, 1999-NMSC-017, ¶ 17, 127 N.M. 240, 980 P.2d 23 (discussing the canon of statutory construction known as the general/specific statute rule). Accordingly, EIB's rulemaking authority to control emission of Ozone Precursors is limited by statute to only the sources located "within the area of the state where the ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard." Section 74-2-5(C).

D. There was no evidence at hearing that sources in either Chaves County or Rio Arriba County are "within the area of the state" where the ozone concentrations exceed ninety-five percent of the Standard.

20.2.50.2 NMAC sets forth the scope of Part 50, and it specifically lists those areas of the state EIB has deemed subject to Part 50:

> This Part applies to sources located within areas of the state under the board's jurisdiction that, as of the effective date of this Part or anytime thereafter, are causing or contributing to ambient ozone concentrations that exceed ninety-five percent of the national ambient air quality standard for ozone, as measured by a design value calculated and based on data from one or more department monitors. **As of the effective date, sources located in the following counties of the state are subject to this Part: Chaves, Dona Ana, Eddy, Lea, Rio Arriba, Sandoval, San Juan, and Valencia**.

20.2.50.2 NMAC (emphasis added).

In support of Part 50, the Board states that "Eddy County and sites in southern Dona Ana County are monitoring ozone levels in violation of the NAAQS, while San Juan, Lea, Santa Fe, Sandoval and Valencia Counties are within 95% of the standard." **[20 RP 4761]** Notably, however, sources located in Chaves and Rio Arriba Counties are deemed to merely "*contribute to* elevated ozone concentrations in the San Juan and Permian Basins, respectively." **[*Id.*]** The Department concedes that Chaves and Rio Arriba Counties are not themselves "monitoring ozone levels in violation of the NAAQS." **[Id.]**

By its own admission, the Department lacks data demonstrating that Chaves and Rio Arriba Counties have sources located "within the area the area of the state" where ozone exceeds 95% of the Standard, and EIB lacks statutory authority to subject these sources to Part 50 under Section 74-2-5(C). A monitor located at Navajo Lake measures ozone concentrations for the AQCR that includes the part of Rio Arriba County encompassing the San Juan Basin. **[Tr. Vol. l, 297:16-309:16]** However, the Department's data showed that Rio Arriba County is currently below 95% of the Ozone Standard. **[NMED Amended Ex. 4 (Sept. 20, 2021), at 6]** Monitors in Hobbs (located in Lea County) and Carlsbad (located in Eddy County) measure ozone concentrations for the AQCR that encompasses Chaves County. **[Tr. Vol. 1, 297:16-309:16]** However, there is no ozone monitor in Chaves County, so

the Department and EIB cannot even know whether the Ozone Standard is exceeded by sources in Chaves County. **[NMED Amended Ex. 4 (Sept. 20, 2021), at 4]**

When prompted to explain why the Department included sources located in these two counties, the Department's witness explained:

> the stated purpose of the regulations adopted by the Board under the [Act] is to provide for the attainment and maintenance of the [ozone] standard. To achieve this, the purpose of the statute directs the Board to regulate sources **within areas of the state that cause or contribute to** ozone concentrations exceeding 95 percent of the NAAQS. The statute does not say that the regulations can only apply to counties with monitors showing concentrations exceeding 95 percent, so, logically, the boundaries of any designated nonattainment area would not be restricted to county lines or counties with monitors.

[Tr. Vol. 1, 299:20–300:6 (emphasis added)]

This interpretation is in direct conflict with the plain language of Section 74-2-5(C) and should be rejected. The statute does not authorize the Board to regulate sources within areas of the state "that cause or contribute to" ozone concentrations exceeding 95% of the Standard. Instead, Section 74-2-5(C) unambiguously and expressly limits the Board's rulemaking to sources "***within the area*** of the state ***where*** the ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard."

The Department contends that, so long as emissions from a source can reasonably be attributed to ozone concentrations in excess of 95% of the Ozone Standard *anywhere in the state of New Mexico*, that such source can be made to

comply with Part 50. This interpretation unlawfully expands the Board's authority and must be rejected. The Board states that it included Chaves and Rio Arriba counties because doing so "aligns with the language of the ACQA" by establishing "emissions standards for oil and gas production and processing sources located in areas of the State within the Board's jurisdiction that, as of the effective date of the rule or anytime thereafter, **are causing or contributing to** ambient ozone concentrations" exceeding 95% of the Standard. **[20 RP 4784 (emphasis added)]** The Board further contended that, although Chaves County and Rio Arriba County may not lie "within" that area of the state exceeding the Ozone Standard, sources in those counties nonetheless "contributed to" exceedances *in other areas of the state*:

> Modeling clearly demonstrated that oil and gas sources in [Chaves County and Rio Arriba County] contributed to ozone levels at the monitors that were registering concentrations exceeding ninety-five percent of the NAAQS. [O]zone monitors in the state are located according to EPA regulations under the CAA. These monitor locations are associated with Air Quality Control Regions (AQCR), not counties. The monitor located in Hobbs measures ozone concentrations for the AQCR that encompasses Chaves County, and the monitor located at Navajo Lake measures ozone concentrations for the AQCR that includes the part of Rio Arriba County encompassing the San Juan Basin.

[20 RP 4784-85]

The Department's technical witness testified that Section 74-2-5(C) does not establish any geographic limit on the "area" within which sources may be subject to Part 50. **[Tr. Vol. 1, 319:24–320:8]** Rather, he contended, that sentence

> just says it's limited to sources with emissions, within **any area** of the state where ozone concentrations exceed. So it could be any emissions anywhere in the state that – within the area of the state that the ozone concentrations exceed 95 percent, . . . So the rules are limited to the sources within the Department's jurisdiction that can – within areas of the state where ozone concentrations are monitored at 95 percent. So the rule can apply to **any part of any area of the state** where monitoring – and reasonably be attributed as exceeding 95 percent of the standard.

[*Id.* at 319:8–320:25]

This is not a proper construction of the ACQA's authorizing language. Much to the contrary, the Department's position—and the language adopted by the Board in 20.2.50.2 NMAC—constitutes an unlawful expansion of the Board's rulemaking authority by way of semantic sleight of hand. The Board has inserted the phrase "cause or contribute to," found in the first sentence of Section 74-2-5(C), into the unambiguous language of the second sentence of the section, thus improperly broadening EIB's limited statutory rulemaking authority by authorizing its regulation of *any* source located *anywhere* in the state that can be shown to be "causing or contributing to" the area of the state where ozone exceeds 95% of the NAAQS.

The Board cannot rationalize including sources located in Chaves County and Rio Arriba County through unlawful expansion of its rulemaking authority. *Pub. Serv. Co. of N.M.*, 1976-NMCA-039, ¶ 10 (holding that the Board cannot "amend or enlarge its authority under the guise of making rules and regulations"). The plain

language of the authorizing statute does not include areas deemed to be "causing" or "contributing" to exceedances elsewhere; it speaks only to sources located "within the area of the state" where ozone exceeds 95% of the Standard. Accordingly, regulation of sources in counties located outside this area are beyond the Board's limited rulemaking authority, were adopted contrary to law, and must be stricken from the scope of 20.2.50.2 NMAC. *See* Section 74-2-9(C).

E. If the "area of the state" subject to Part 50 is not based on counties, then 20.2.50.2 NMAC constitutes an arbitrary and capricious decision because the Board has not provided rational criteria for listing the counties subject to the rule to support the Board's determination that sources in those counties are within the area of the state where ozone exceeds 95% of the Standard.

The Board insists its statutory directive under the AQCA is not to regulate sources in "counties"; rather it must regulate sources in that "area" of the state where ozone exceeds 95% of the Standard. **[20 RP 4784]** EIB nonetheless adopted 20.2.50.2 NMAC, which purports to identify areas within the scope of Part 50 on a county-by-county basis. NMED explained at hearing that it did so "in order to facilitate compliance with the rule because counties have well-established and commonly understood boundaries." **[*Id.* (citing Tr. Vol. 1, 305:23-306:3)]** NMED suggested that 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 Air Quality Control Regions." **[*Id.* (citing Tr. Vol. 1, 309:15-16)]**

If the Board's position is that the "area of the state" subject to Part 50 is not based on counties, and is instead based on AQCRs—or something else—then the list of counties in 20.2.50.2 NMAC constitutes an arbitrary and capricious decision of the Board. EIB has not identified or provided any rational criteria for how it identified the counties in the rule sufficient to support its implicit determination that sources within each county are also "within the area of the state" where ozone concentrations exceed 95% of the Ozone Standard and are therefore subject to Part 50.

20.2.50.2 NMAC is first unlawful in that it violates the plain language of Section 74-2-5(C) expressly limiting the Board's rulemaking authority to regulation of "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." This regulation is also arbitrary and capricious, in that the decision to focus on counties is neither reasonable nor reasonably explained by the Board. 20.2.50.2 NMAC may be stricken on these grounds. *See* Section 74-2-9(C).

II. THE GROSS ANNUAL REVENUE PRONG OF THE PART 50 DEFINITION OF "SMALL BUSINESS FACILITY" IS ARBITRARY AND SHOULD BE SET ASIDE BECAUSE IT IS BASED ON THE CONSTANTLY FLUCTUATING MARKET PRICE OF OIL AND GAS.

A. Standard of Review

EIB rules may be set aside "if found to be . . . arbitrary, capricious or an abuse of discretion." NMSA 1978, § 74-2-9(C) (1992). "An agency's action is arbitrary

and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n,* 2016-NMCA-055, ¶ 10, 374 P.3d 710. "The party challenging a rule adopted by an administrative agency carries the burden of showing that the rule is arbitrary or capricious by demonstrating that the rule's requirements are not reasonably related to the legislative purpose." *Id.* ¶ 11; *see also The Counseling Center, Inc. v. N.M. Human Servs. Dept.*, 2018-NMCA-063, ¶ 32, 429 P.3d 326.

B. Preservation

IPANM objected at hearing to the gross annual revenue threshold in the Part 50 definition of small business facilities. **[IPANM Ex. 2 at 20:10-12; IPANM Ex. 10 at 4:2-3; Tr. Vol. 3, 901:8-17]** The issue was also addressed and preserved in the Hearing Officer's Report **[20 RP 4428-4429]** and EIB's Statement of Reasons. **[20 RP 4803-4810]**

C. The "gross annual revenue" prong of the Part 50 definition of "small business facility" is based on an arbitrary criterion—the fluctuating market price of oil and gas.

The Board adopted a small business facility exception intended to "provide regulatory relief to small, independent operators by requiring compliance with only a limited subset of requirements in Part 50." **[20 RP 4804]** This was done so that the cost of complying with Part 50 "would not put the majority of companies at risk of

becoming insolvent and therefore cause wells to be abandoned without remediation." **[*Id*.]** Accordingly, if an operator meets the definition of a small business facility set forth at 20.2.50.7(S)(1) NMAC, it is subject to a more limited set of requirements under Part 50. *See* 20.2.50.125 and 20.2.50.127 NMAC.

20.2.50.7(S)(1) NMAC defines a "small business facility" as a "source that is independently owned or operated by a company that is not a subsidiary or a division of another business, that employs no more than 10 employees at any time during the calendar year, and [that] has a gross annual revenue of less than $250,000." The Board's Statement of Reasons states how the gross annual revenue threshold was determined. Ultimately, a gross annual revenue of $250,000 was selected because only 54 out of 535 oil and gas companies operating in New Mexico would have annual revenues per well lower than the cost of compliance. **[20 RP 4807]**

The Part 50 definition of "small business facility" is arbitrary because the criterion of "gross annual revenue" has no connection to the actual size of the business, but rather, it is based on the fluctuating oil and gas market. For oil and gas producers, gross annual revenue "is tied to the price of oil and gas in the market. Increases or decreases in the price of oil or gas cannot be passed on by the producer nor can an increase in cost." **[IPANM Ex. 2 at 20]** This is no abstract threat. Appellant's witness testified at hearing that because this prong is directly tied to commodity prices, which are dependent on market conditions, the inevitable

variability of commodity pricing creates uncertainty for the regulated community—including his own family-owned oil and gas operation. **[Tr. Vol. 3, 910:23-912:2]**

For example, this witness's small operating business may currently qualify for small business facility relief. Yet, without changing its operations—including the amount of oil and gas it produces—when market commodity prices change, this operator's gross annual revenue also changes. If market prices rise high enough, this operator may exceed the "gross annual revenue" threshold, may no longer qualify as a small business facility, it may lose the regulatory relief afforded under 20.2.50.125 NMAC, and its compliance obligations—and costs—may greatly increase as it takes on the more expansive obligations of Part 50. As such, due to market prices beyond the operator's control, and with no change in its production levels, this operator then becomes subject to a different and more expensive regulatory framework under Part 50.

Such a regulatory scheme inherently creates ambiguity in the application of the regulation. The Board does not dispute that "[t]here will always be economic fluctuations, and both commodity prices and production can be variable." **[20 RP 4808]** EIB therefore concedes that Part 50 creates regulatory uncertainty due to the inherent volatility of both crude oil and natural gas prices. Yet, the Board rejected without explanation that inherent ambiguity in the gross annual revenue threshold serves as a basis for removing it. **[*Id.*]** The Board was mistaken. Given that this

criterion is both inherently and admittedly arbitrary, it must be stricken from Part 50. *See* Section 74-2-9(C).

III. THE BOARD EXCEEDED ITS AUTHORITY UNDER THE AQCA BY IMPROPERLY GRANTING TO NMED THE ENFORCEMENT AUTHORITY TO ELIMINATE A REGULATORY EXEMPTION FROM AN OTHERWISE QUALIFIED SMALL BUSINESS FACILITY.

A. Standard of Review

This Court may set aside EIB rules "if found to be . . . not in accordance with law." NMSA 1978, § 74-2-9 (1992). 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." *Nuclear Waste P'ship, LLC v. Nuclear Watch N.M.*, 2022-NMCA-014, ¶ 12, 505 P.3d 886.

B. Preservation

IPANM objected to this improper delegation of enforcement authority in its closing arguments. **[16 RP 3848-49]** EIB rejected IPANM's argument without reason, except to say that IPANM's proposal was "against the weight of the evidence." **[21 RP 5013]** Accordingly, this issue has been properly preserved for review by this Court.

C. 20.2.50.125(G) NMAC is not in accordance with law because only the Legislature—not the Board—has authority to grant enforcement powers to NMED.

The AQCA does not authorize EIB to grant enforcement powers to NMED. Rather, the Legislature has affirmatively granted rulemaking authority to EIB, *see* NMSA 1978, § 74-2-5 (2021), while it—and it alone—granted and can grant enforcement powers to NMED, s*ee* NMSA 1978, § 74-2-12(A) (2006). The Department's enforcement authority is wholly independent of the Board's rulemaking authority; it derives directly from the Legislature. *Id.* For instance, the Legislature has empowered the NMED Secretary to issue a compliance order or commence a civil action in district court upon a determination that a person has violated or is violating the AQCA or a regulation promulgated pursuant thereto, and "may include a suspension or revocation of the permit or portion thereof issued by the secretary . . . that is alleged to have been violated." Section 74-2-12(A)(1), (2) and (B).

The Legislature has not, however, granted to NMED the additional enforcement authority purportedly granted to it by the Board through 20.2.50.125(G) NMAC. This provision grants to NMED a new enforcement authority with respect to the small business exception. It empowers the Department to strip an otherwise qualified small business facility of the regulatory relief provided by 20.2.50.125 NMAC, if the Secretary finds that the 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." This represents an improper expansion of the enforcement authority otherwise granted to NMED by the Legislature through the AQCA. *See* § 74-2-12.

EIB "can only act as to those matters which are within the scope of authority delegated to [it]." *Pub. Serv. Co. of N.M.*, 1976-NMCA-039, ¶ 7. The Board cannot "amend or enlarge its authority under the guise of making rules and regulations." *Id.* ¶ 10. The Board's enabling statutes do not authorize EIB to grant additional enforcement authority to the Department. The Board, by adopting 20.2.50.125(G) NMAC, both stepped beyond the bounds of its own authority and, at the same time, usurped the role of the legislature from which it derives that authority. The Board's adoption of 20.2.50.125(G) NMAC in exceedance of its statutory authority is not in accordance with law. As such, 20.2.50.125(G) NMAC must be set aside.

IV. THE PROXIMITY MONITORING REQUIREMENTS INCLUDED IN 20.2.50.116(C)(3)(C) NMAC ARE OUTSIDE THE SCOPE OF THE NOTICED RULEMAKING HEARING AND VIOLATE STATUTORY RIGHTS TO NOTICE AND COMMENT.

A. Standard of Review

EIB regulations shall be 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, § 74-2-9(C) (1992). Administrative decisions "based on issues of law" are reviewed de novo. *CAVU Co.*, 2014-NMSC-029, ¶ 12.

B. Preservation

IPANM raised and preserved this issue for appeal at hearing and in IPANM's Closing Argument and Proposed Statement of Reasons. **[16 RP 3911-12]**

C. The Proximity Proposal is outside the noticed scope of the rulemaking proceeding.

The Board adopted the Proximity Proposal as an amendment to the leak detection and repair ("LDAR") monitoring requirements at 20.2.50.116 NMAC, which regulate "[e]missions from fugitive emission sources such as leaking valves, connectors, and flanges." The Proposal requires that operators more frequently conduct LDAR monitoring of regulated well sites located within 1,000 feet of an "occupied area." 20.2.50.116(C)(3)(e) NMAC. In connection with the Proposal, the Board adopted a new definition at 20.2.50.7(O)(1) NMAC, establishing the boundaries and other criteria for an "occupied area."

Although there is no express constitutional right to procedural due process in New Mexico rulemaking proceedings, *see Livingston v. Ewing*, 1982-NMSC-110, ¶ 14, 98 N.M. 685, 652 P.2d 235, Section 74-2-6 of the ACQA and Section 14-4-5.2 of the State Rules Act ***do*** establish a statutory right to notice and opportunity to be heard in such proceedings. NMSA 1978, § 74-2-6(C) (1992) ("Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views.") and § 14-4-5.2 (2017) ("the agency proposing the rule

shall provide to the public and publish in the New Mexico register a notice of proposed rulemaking."). The Board has promulgated its own regulations requiring the same. *See* 20.1.1.301 NMAC. Pursuant to these authorities, EIB "shall provide to the public notice of the proposed rulemaking" that states the "subject" and "purpose" of the purposed rule, including "a summary of the full text of the proposed rule"; includes "a citation to the specific legal authority authorizing the proposed rule" "*and the adoption of the rule*"—including "the statutes, regulations, and procedural rules governing the conduct of the hearing;" and provides "the location where persons may secure copies of the full text of the proposed regulatory change." Section 74-2-6(C); Section 14-4-5.2(A)(3) (emphasis added); 20.1.1.301 NMAC.

It is undisputed in this case that the Board's Notice of Rulemaking Hearing ("Notice") did not include either the Proximity Proposal or the new definition of "occupied area." These amendments were only first proposed by the Environmental Defense Fund ("EDF") in its notice of intent to present technical testimony, filed July 28, 2021. **[3 RP 564-1260]**

EIB may lawfully adopt amendments to a proposed rule so long as the amendments fall within the scope of the rulemaking proceeding as noticed. 1.24.25.14(C) NMAC ("Any amendments to the proposed rule must fall within the scope of the current rulemaking procedure."). However, "amendments that exceed the scope of the noticed rulemaking may require a new rulemaking proceeding." *Id.*

EIB regulation sets forth three factors for discerning whether amendments to the proposed rule fall outside of the rulemaking proceeding:

> (1) any person affected by the adoption of the rule, if amended, could not have reasonably expected that the change from the published proposed rule would affect the person's interest; (2) subject matter of the amended rule or the issues determined by that rule are different from those in the published proposed rule; or (3) effect of the adopted rule differs from the effect of the published proposed rule.

Id.

While a final rule "need not be an exact replica of the rule proposed in the notice," rule amendments that "deviate too sharply" from the proposed rule "deprive affected parties of notice and opportunity to be heard" on the final rule. *Nat'l Black Media Coal. v. F.C.C.*, 791 F.2d 1016, 1022 (2d Cir. 1986). As such, only those amendments that are a "logical outgrowth" of the proposed rule are allowable. *Id.* The logical outgrowth doctrine requires that a reasonable person be on notice of the changes in the final rule. *See LaMadrid v. Hegstrom*, 830 F.2d 1524, 1531 (9th Cir. 1987).

In *Groendyke Transp., Inc. v. N.M. State Corp. Comm'n*, 1969-NMSC-042, 80 N.M. 509, the New Mexico Supreme Court employed logical outgrowth analysis to vacate an administrative order. The order approved a permit for transporting "petroleum and petroleum products," whereas the notice of hearing was limited to the transport of "gasoline, oil, and water." *Id.* ¶¶ 3-4. The Court concluded that the order exceeded the scope of the proceeding as noticed because oil and petroleum

were not "synonymous"—"petroleum and petroleum products are much broader terms than gas or oil." *Id.* ¶ 4. The notice was legally insufficient because "an interested party might have no objection to a[] . . . permit [authorizing] transportation of gas, oil, and water . . . yet might . . . oppose [authorization of a similar permit for] petroleum and petroleum products." *Id.*[1]

In the instant matter, the Notice identified the Board's statutory authority for the proposed rule and adoption of the final rule, the purpose of the hearing, and the subject of the regulation. The Board's authority was cited as Section 74-2-5.3 of the AQCA (repealed and recompiled as Section 74-2-5(C)). The stated purpose of the hearing was to promulgate rules at 20.2.50 NMAC to "ensure attainment and maintenance of the . . . NAAQS for ozone within areas of the State that have monitoring ozone concentrations that exceed 95% of the NAAQS." **[NMED Supplemental Exhibits 111-126]** The subject matter of the proposed rule was described as "reduc[ing] emissions of ozone precursor pollutants [VOC and NOx] from sources in the oil and gas sector located in areas of the State within the Board's jurisdiction that are experiencing elevated levels." **[*Id.*]**

[1] Although *Groendyke* was an appeal from an administrative adjudication, the case is instructive for logical outgrowth analysis. *Groendyke* also highlights important policy concerns for any proceeding that affects the interests of non-attendees who may have objected upon receiving legally sufficient notice.

The Board adopted the Proximity Proposal because of several purported benefits—each of which shows that the Proximity Proposal was always ***outside*** the scope of the Notice. First, EIB recognized that the Proximity Proposal would purportedly reduce three types of emissions: (1) "greenhouse gases" (methane), (2) "hazardous air pollutants" (HAPs), and (3) "criteria air pollutants [(VOCs)]—emitted from upstream oil and gas development sites." **[20 RP 4916]** The latter emission would be reduced within 1,000 feet of occupied areas throughout the state. **[20 RP 4919-20]** By distinguishing these emissions, the Board knew that the reduction of methane and HAPs does not further the noticed subject of reducing Ozone Precursors.

Second, the Board adopted the Proximity Proposal for the purported reason that emissions reductions would result in health benefits for people residing, working, or simply located within 1,000 feet of occupied areas. **[20 RP 4919-20]** This benefit is not tied to the noticed statutory authority, purpose, or subject of the purposed rule and hearing. Social benefits that could be weighed when regulating ozone, *see* NMSA 1978, § 74-2-5(F) (2021), are ancillary considerations, rather than the central and noticed reason for the rulemaking in this case.

Even the Proximity Proposal's purported reduction of VOCs exceeds the scope of the noticed hearing. The Board found that the Proximity Proposal will reduce VOC emissions from the impacted well sites *throughout* New Mexico, which

"will help New Mexico reduce local formation of ozone and . . . stay in attainment of the NAAQS for ozone." **[20 RP 4917]** Yet the noticed purpose of this rulemaking was not to reduce VOC emissions from all well sites in New Mexico. The noticed purpose for rulemaking and EIB's cited authority under Section 74-2-5(C) was limited to "attainment and maintenance of the . . . NAAQS for ozone *within areas of the State that have monitoring ozone concentrations that exceed 95% of the NAAQS.*" **[NMED Supplemental Exhibits 111-126 (emphasis added)]**

There is neither record support nor any EIB findings that any or all the well sites impacted by the Proximity Proposal throughout New Mexico are "within that area of the state" where ozone concentrations exceed 95% of the Standard. Technical witness Dr. Tammy Thompson could point to no present exceedances of the Ozone Standard at the well sites impacted by the Proximity Proposal. **[Tr. Vol 8., 2730:20-2731:19]** Rather, Dr. Thompson thought that the Proximity Proposal was to prevent future exceedances and protect human health because, even if ozone concentrations are below the Standard, there is no safe level of ozone. **[*Id.*]** The Proximity Proposal therefore exceeds the noticed scope of the rulemaking, i.e., reducing Ozone Precursors "in areas of the State within the Board's jurisdiction that *are* experiencing elevated levels" of ozone.

Further, the Notice failed to appraise interested persons that the proposed rule may be amended to include the Proximity Proposal. Therefore, like in *Groendyke*,

affected persons could not have reasonably anticipated the regulation of methane and HAP emissions because they are not "synonymous" with VOCs or NOx. *Groendyke*, 1969-NMSC-042, ¶ 4. Nor could such persons have reasonably expected that the Proximity Proposal would have been decided on issues of human health as a core reason, rather than for controlling present exceedances of the Ozone Standard, especially in areas of the state that have ozone concentrations below 95% of the Standard. *See* 1.24.25.14(C)(2) NMAC (providing that a rule amendment exceeds the scope of the proposed rule when adopted upon decisions of unnoticed issues).

The Proximity Proposal is not a logical outgrowth of the proposed rule and therefore exceeds the scope of the rulemaking proceeding as noticed. *See* 1.24.25.14(C) NMAC. A reasonable person would not have anticipated the Board's adoption of the Proximity Proposal based on the Notice. Affected non-attendees might have participated in these proceedings to lodge their objections to the Proximity Proposal had they received legally sufficient notice. *See Groendyke*, 1969-NMSC-042, ¶ 4. However, because these amendments were first proposed as part of EDF's Notice of Intent **[3 RP 564-1260]**, affected persons were precluded from participating and presenting contrary testimony unless they were already a party.

By adopting the Proximity Proposal amendment to the proposed rule, EIB violated its procedural rulemaking obligations by depriving the public of reasonable notice and opportunity to be heard. The Board's actions contravened its statutory and

regulatory mandates and were not in accordance with law. The Proximity Proposal adopted at 20.2.50.116(C)(3)(e) and 20.2.50.7(O)(1) NMAC must be set aside.

D. The Board violated the statutory right to be heard of the parties who opposed the Proximity Proposal.

IPANM and other parties disputed the Board's authority to promulgate the Proximity Proposal because, as established above, doing so decides issues and adopts an amendment to the proposed rule that exceeds the scope of the noticed hearing. **[16 RP 3912; Tr. Vol. 8, 2733:8-22]** The Board rejected IPANM's contentions without explanation, other than to state that "based on substantial evidence . . . the Proximity Proposal . . . is more protective of public health and the environment." **[20 RP 4915]** The Board conducted no analysis, and made no finding, that the Proximity Proposal was within the scope of its notice. **[See *id.*]**

EIB was required to consider all parties' objections to the Proximity Proposal and concisely explain why such contentions are inapt. *See* NMSA 1978, §§ 14-4-5.3(A) and 14-4-5.8(C). But EIB did not give any reasonable explanation. By offering only a cursory justification to dismiss the issues raised by IPANM and other parties, the Board's actions were arbitrary and capricious. *See Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370 (holding that an agency's actions are arbitrary and capricious where it "disregard[s] those facts or issues that prove difficult or inconvenient or refuse to come to grips with the result

to which those facts or issues lead"). For the foregoing reasons, the Court should set aside the Proximity Proposal.

V. THE BOARD'S ADOPTION OF PART 50 WAS UNLAWFUL BECAUSE THE BOARD FAILED TO ACKNOWLEDGE AND WEIGH THE IMPACTS OF PROPOSED RULE CHANGES AND AMENDMENTS ON REDUCING OZONE CONCENTRATIONS.

A. Standard of Review

EIB rules may be set aside "if found to be . . . arbitrary, capricious or an abuse of discretion." NMSA 1978, § 74-2-9(C) (1992). "An agency's action is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Earthworks' Oil & Gas Accountability,* 2016-NMCA-055, ¶ 10. "The party challenging a rule adopted by an administrative agency carries the burden of showing that the rule is arbitrary or capricious by demonstrating that the rule's requirements are not reasonably related to the legislative purpose." *Id.* ¶ 11; *see also The Counseling Center, Inc.*, 2018-NMCA-063, ¶ 32.

B. Preservation

IPANM raised and preserved this issue for appeal in IPANM's Closing Argument and Proposed Statement of Reasons. **[16 RP 3878-80]**

C. The Board must ensure that its regulations are reasonable, by considering all relevant factors and determining that the benefits of the regulation outweigh the costs to society.

In New Mexico, "an agency's action is arbitrary and capricious if it . . . entirely omits consideration of relevant factors." *Atlixco Coal.*, 1998-NMCA-134, ¶ 24. This

standard of review "embod[ies] the principles of federal administrative law." *Id.* Under that federal principle, "agency action is lawful only if it rests on consideration of the relevant factors." *Id.* Such factors ordinarily include "the advantages *and* disadvantages of agency decisions." *Michigan v. E.P.A.*, 576 U.S. 743, 750, 753 (2015) (emphasis in original) (citation and internal quotations omitted).

The AQCA codifies the administrative-reasonableness requirement. When rulemaking to control emissions in areas where ozone exceeds 95% of the Standard, EIB "shall give weight it deems appropriate to all facts and circumstances, including . . . the public interest . . . the social and economic value . . . and reasonableness" of regulating air quality. Section 74-2-5(F). The Board must weigh the benefits and burdens of regulating ozone. This review ensures that the Board's regulations are reasonable.

The reasonableness requirement is also a constitutional mandate. Article XX, Section 21 of the New Mexico constitution requires "[t]he legislature [to] provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, *consistent with the use and development of these resources for the maximum benefit of the people*." N.M. Const. art. XX, § 21 (emphasis added). Further, substantive due process requires that all laws must be reasonable—they must at least bear a rational relationship to a legitimate governmental interest. *Matter*

of Held Ords. of U S W. Commc'ns, Inc., 1997-NMSC-031, ¶¶ 7-9, 123 N.M. 554, 943 P.2d 1007.

D. EIB did not assess in a reasonable manner whether the proposed rule changes would actually lead to beneficial reductions in ozone concentrations.

The Board did not accurately evaluate the effect of Part 50 on reducing ozone concentrations. Ozone is formed in the atmosphere where molecular precursors, including VOCs and NOx, react in the presence of sunlight. **[20 RP 4758]** Ozone formation is most prevalent during hot days in areas with ground-level trapping or low-wind speeds which enable VOCs and NOx to accumulate and react. **[*Id.*]** Decreasing VOCs and NOx has disparate effects on ozone concentrations, depending on whether the area has favorable environmental conditions for ozone formation—in other words, not all potential reductions of VOCs versus NOx are the same or have the same ability to reduce ozone concentrations. Moreover, although ozone can form from either VOCs or NOx, *in New Mexico*, ozone is primarily the product of reactions involving NOx in most areas. **[20 RP 4770]** The Board unreasonably disregarded this distinction.

NMED conducted PGM modeling to determine the effect of the proposed rule on reducing VOCs and NOx and the potential resulting impacts on ozone concentrations, **[20 RP 4766]** and relied on this modeling data to develop its proposed Part 50. **[1 RP 8]** IPANM opposed EIB relying on NMED's flawed

modeling data, which could not accurately evaluate the effect of the proposed rule in lowering ozone concentrations for areas where concentrations exceeded 95% of the Ozone Standard. **[20 RP 4771]**

Further, IPANM objected that the modeling data was flawed because it did not distinguish between VOC and NOx reductions. **[*Id.*]** The proposed rule was primarily directed at lowering VOCs, but any forecasted ozone reduction in most areas of the state would primarily be attributed to decreased NOx. **[20 RP 4770-71]** Additionally, proposed Part 50 would have little impact on lowering NOx in the regulated counties because most of the NOx in those areas is produced by biogenic and anthropogenic sources that are outside the jurisdiction of the Board. **[12 RP 2798]** Again, Part 50 focuses on VOC emissions, which are more common than NOx emissions for oil and gas sources, but NOx emissions from other sources are the drivers of ozone reductions in New Mexico. Thus, the effect of the proposed rule on reducing ozone concentrations could not be accurately evaluated. **[20 RP 4771]**

The Board rejected IPANM's concerns and unreasonably relied upon the flawed modeling data in support of adopting the final rule. **[16 RP 3825]** Consequently, EIB disregarded the impacts that the proposed rule changes had, if any, on reducing ozone. The modeling data was the only evidence that proposed Part 50 would reduce ozone in the regulated areas. Moreover, because of the complexities of ozone formation, updated modeling was necessary to evaluate ozone

concentrations and to predict final Part 50's effect on reducing ozone. **[*See* Tr. Vol 1, 169:15-19]**

NMED modeling was not updated to account for the changes to the proposed rule. The Board therefore could not have known whether the proposed rule changes impacted the ozone reductions predicted by the modeling data. Even if such changes were known to reduce VOCs, the impact on ozone concentrations might be negligible or substantial depending on the environmental conditions of the monitored area. This range of variable outcomes necessitates modeling ozone dynamics, yet EIB relied on non-updated modeling that did not account for the proposed rule changes. For that reason, the Board could not gauge the ozone-reduction benefits of such changes prior to adopting the final rule.

The Board's failure to consider the ozone-reduction implications of the proposed rule changes was unreasonable, which made it arbitrary and capricious. *See Atlixco Coal*, 1998-NMCA-134, ¶ 24. In sum, the Board relied on data that did not support its determination as the reason *for* its determination, failing to acknowledge this deficiency and the need for more data that would enable sufficient examination to make a fact-based determination relevant to its rulemaking. Such omission by EIB precluded the Board from conducting an appropriate evaluation of the proposed rule changes as required by Section 74-2-5(F). The Board therefore acted unlawfully by failing to regulate in harmony with its statutory authority. *See*

Wilcox, 2012-NMCA-106, ¶ 7 ("An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.").

In light of the foregoing, changes and amendments to the proposed rule unsupported by updated modeling were adopted unlawfully. However, severing only the amendments from the final rule would substantively alter the remaining provisions. This Court should therefore set aside Part 50 in its entirety.

CONCLUSION

EIB is a creature of statute, and as such, it was bound by its statutory mandates and procedural regulations when adopting Part 50. Even if the final rule has air quality benefits, that does not justify EIB rulemaking with unfettered discretion; in promulgating Part 50, EIB still had to comply with New Mexico law, which it failed to do. *See Cont'l Oil Co.*, 1962-NMSC-062, ¶ 31 ("Administrative bodies, however well intentioned, must comply with the law . . . to prevent any possible abuse [of their delegated authority]."). This Court should set aside Part 50 or, in the alternative, the provisions contested here, because the adoption of these rules by the Board was arbitrary, capricious, an abuse of discretion, not in accordance with law, or otherwise adopted in exceedance of the Board's statutory and regulatory authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023 a true and correct copy of the foregoing was filed and served via the court's electronic filing system.

/s/Kari E. Olson
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