

**Background - New Energy Economy's Efforts to Create and Preserve
New Mexico's Carbon Pollution Reduction Law**

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Creating New Mexico's Carbon Pollution Reduction Law:

On December 19, 2008, New Energy Economy petitioned the New Mexico Environmental Improvement Board (EIB) to set a science-based cap on global warming emissions: EIB – 08-19(R). New Energy Economy's Petition sought to require certain industrial facilities, primarily fossil fuel-based power generators and petroleum refineries, to reduce greenhouse gas (GHG) air pollution that threatens the health of people and natural resources, under the Air Quality Control Act. Further, the Petition requested that the EIB reduce GHG emissions pursuant to its authority to abate and prevent nuisances under the Environmental Improvement Act.

More than fifteen organizations committed to health, job growth, education, and the environment – including League of Women Voters, Center Advancing Sustainable Architecture, Center for Southwest Culture, Amigos Bravos, VAWT Wind Power, and Physicians for Social Responsibility – joined as co-petitioners.

In April 2009, PNM et al., challenged the EIB's authority to hear the case. There was briefing, and a hearing, that included testimony from the public, and argument from counsel. EIB found that it indeed have the requisite authority to hold a hearing on New Energy Economy's Petition.

In March 2010 the public testified at its first hearing on the merits of New Energy Economy's Petition. Over 100 people from across the state talked about the effects of local pollution and the harm it is causing in New Mexico. Giving testimony were doctors, ranchers, youth, small business owners, solar installers, wind manufacturers, and Native American leaders.

PNM, other groups, and four state legislators filed a lawsuit to stop the EIB from even hearing the Petition, arguing that the EIB had no authority to even consider the Petition. On April 13, 2010, Lea County District Judge William Shoobridge adopted all of PNM's arguments and ordered the EIB to halt consideration of the Petition.

New Energy Economy filed an appeal to the New Mexico Supreme Court and on June 7, 2010, in a unanimous and unprecedented decision, the Justices overruled Judge Shoobridge (from the bench) and reinstated the Petition before the Environmental Improvement Board. The Supreme Court dismissed PNM's frivolous lawsuit. Basing their decision on a "separation of powers issue" the Justices ruled that a Judge cannot interfere with an "ongoing, uncompleted agency process." New Energy Economy v. Shoobridge et al., 2010 NMSC 49

On August 16, 2010 the hearing finally began on NEE's Petition. The Petition before the Environmental Improvement Board went in strong with hundreds of hours of stellar expert testimony about the urgency of climate change and the impact on New Mexico, the feasibility of implementing the 5-page regulation, and the economic, health and social benefits of acting now to reduce carbon pollution. On December 6, 2010 after a two-year public process, which included over two hundred hours of scientific, economic and public testimony the EIB adopted New Energy Economy's Regulation.

Features of New Mexico's Carbon Pollution Reduction Law:

- 1) Stationary sources in New Mexico with CO₂ emissions exceeding 25,000 metric tons would reduce their emissions of greenhouse gases by 3% per year from 2010 levels. Regulation would commence in 2013. Electricity or oil & gas facilities emitting less than 25,000 metric tons per year can opt in to the regulation, and a baseline other than 2010 can be used if more representative of a facility's usual operation.
- 2) An owner or operator of more than one source emitting greenhouse gases may use excess reductions at one source to comply at a source that it also owns, operates or controls. In addition, sources can petition NMED for early action credit for voluntary emission reductions achieved by the emitter during or after 2005.
- 3) Sources may propose the use of New Mexico offsets approved by NMED, or certified by the Climate Action Reserve, to meet their GHG reduction requirements. These offsets could be based on reductions to any greenhouse gas emissions, not just CO₂.
- 4) Full compliance would be excused in any year that the source demonstrates it has expended, over its prior year's expenditure, \$50 times 3% of its 2010, or baseline, CO₂ emissions on reasonable and effective CO₂ mitigation measures. Sources may also seek variances from the regulations.

The most detailed economic analysis available conservatively indicates that the carbon pollution reduction rules will create more than 17,500 family-supporting jobs in New Mexico's electric sector alone through 2020. These new jobs will deliver more than \$1 billion in household income and more than \$2 billion in total added economic value to New Mexico's families, businesses and communities. <http://newenergyeconomy.org/wp-content/uploads/2011/02/Synapse-Report-2-9-11.pdf>

A report by nationally recognized energy security expert, Dan Klein, asserts that New Mexico's carbon pollution reduction law has multiple well-designed elements that contribute to energy security, including predictability, market-based mechanisms and extensive compliance flexibility. Klein asserts that New Energy Economy's regulation takes advantage of the state's energy resources and research and development capacity to foster innovation for future job creation and economic growth.

Challenges to the Carbon Pollution Reduction Law:

On January 1, 2011, immediately upon taking office, Governor Susana Martinez summarily removed all of the EIB members. Governor Martinez campaigned against carbon pollution reduction. The Governor attempted to illegally stop the carbon pollution reduction rule from being published in the state register, which is the vehicle in which the public receives notice of the laws of the state. New Energy Economy filed a Writ of Mandamus in the New Mexico Supreme Court and again in a unanimous decision, on January 11, 2011, the Court held that the

Martinez administration could not prevent the lawful publication of a final administrative rule as codified state law. New Energy Economy v. Martinez et al., 2011 NMSC 6.

On January 6, 2011, PNM and six other entities regulated by EIB appealed EIB's decision to adopt the greenhouse gas regulation with the NM Court of Appeals, Case No. 31020.

On February 14, 2011, PNM filed a Motion for Extension of Time in the Court of Appeals and stated: "Governor Martinez has indicated that she does not support [the greenhouse gas regulation] and is actively considering avenues to secure the repeal or otherwise prevent the implementation of that rule and other related rules." PNM also argued that the regulation might be repealed during the 2011 legislative session. The Court of Appeals granted PNM's motion.

During the 2011 NM legislative session, Governor Martinez, major polluters' and their lobbyists' made repeated attempts to repeal or undermine New Mexico's hard-won carbon pollution reduction law. New Energy Economy defeated all these attacks.

On April 20, 2011 New Energy Economy filed a Motion to Intervene in PNM's appeal of the EIB decision and argued that New Energy Economy's intervention was critical because it was the only entity that would defend the greenhouse gas reduction law. PNM and the EIB opposed New Energy Economy's Motion to Intervene.

PNM made a motion in the Court of Appeals for PNM and the EIB to engage in mediation and, on May 5, 2011, the Court of Appeals granted the Motion for Mediation.

The Court of Appeals denied New Energy Economy's Motion to Intervene on May 24, 2011. Unbeknownst to New Energy Economy or the public, the mediation directed by the Court of Appeals took place on June 17, 2011 between PNM and the EIB.

On June 20, 2011, New Energy Economy filed its Petition for Writ for Superintending Control in the New Mexico Supreme Court. In its Petition for Writ, New Energy Economy requested the Supreme Court to reverse a ruling by the Court of Appeals that barred New Energy Economy from intervening in PNM's appeal. On June 29, 2011, the Supreme Court asserted jurisdiction over New Energy Economy's Writ and ordered responses to be filed.

On July 11, 2011, without notice to either the Supreme Court or New Energy Economy, "the [EIB] ... consider[ed] a proposed settlement that arose out of the Court of Appeals mediation." On July 13, 2011, while jurisdiction over the Petition for Writ was pending in the Supreme Court, PNM and EIB filed a **Joint Motion** for a 180-Day Remand to the EIB. This Joint Motion was not served on New Energy Economy or the Supreme Court. **The Joint Motion provides that PNM and EIB "agree that further proceedings before the Board may resolve [PNM's] appeal."** The Court of Appeals granted PNM and EIB's Joint Motion and remanded PNM's appeal back to the Board and staying the appeal.

On July 19th, PNM filed a new Petition with the EIB (EIB 11-16(R)) and PNM attached a Statement of Reasons to its petition to repeal the regulation. In its Statement of Reasons, PNM makes the same arguments to EIB that it does to the Court of Appeals, including: (a) that the economic costs of the regulation outweigh its environmental benefits; (b) that the regulation is not economically reasonable; (c) that cost effective control technologies are not available; (d) that the regulation will not abate or prevent air pollution; (e) that EIB should let the federal government deal with climate change; and that (f) the EIB lacks statutory authority to adopt the regulation.

On remand, EIB did not re-commence the EIB 08-19(R) original proceeding, but simply allowed PNM to start an entirely new proceeding. In this way, PNM was not required to give notice to New Energy Economy or the Supreme Court.

A regulatory agency and a corporation it regulates cannot legitimately mediate in private and decide how to “resolve” a case. *Ex parte* communications with the EIB members and the hearing officer is strictly forbidden, and EIB members whose “impartiality or fairness may reasonably be questioned” must recuse themselves. § 20.1.1.112 NMAC and § 20.1.1.111 NMAC. Also, see, NMSA 1978 § 10-15-1 (1999) (Open Meetings Act)

The “remand” that PNM and EIB orchestrated is diametrically opposed to New Energy Economy’s interests, because it effectively delegates the judicial review function of the Court of Appeal - raising the same legal, factual and procedural issues – to an agency that has colluded with PNM and other to defeat the regulation.

July 25, 2011: The Supreme Court (unanimously) Orders A Stay (of the Appellate Court Remand) that sanctioned the agreement between PNM and EIB.

July 26, 2011: The State Supreme Court will make further rulings on the Remand and New Energy Economy’s right to intervene in an appeal filed by PNM.