IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

DIAMOND VOGEL, INC.,

Appellant,

v. **Ct. App. No. A-1-CA-43483**

STATE OF NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,

Appellee.

DOCKETING STATEMENT

APPEAL FROM THE ENVIRONMENTAL IMPROVEMENT BOARD
No. EIB 25-61 (R)

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Pursuant to Rule 12-208 and Rule 12-601(B) NMRA, Appellant Diamond Vogel, Inc. ("Diamond Vogel") submits this Docketing Statement in its appeal of new regulations codified at 20.13.2 NMAC (the "Final Rule") adopted by the New Mexico Environmental Improvement Board ("EIB" or "Board") to implement the Per- and Poly-Fluoroalkyl Substances Protection Act ("HB 212" or "Act"), NMSA 1978, § 74-15-1 *et seq*. (2025). The Final Rule's consumer product labeling requirements violate the First Amendment protections of the United States and New Mexico constitutions, exceed the EIB's authority under HB 212, are arbitrary and capricious, and are unsupported by substantial evidence in the record. The Final Rule's provisions imposing fees are also in exceedance of the EIB's authority. Accordingly, the Final Rule's labeling requirements[1] and fee provisions[2] should be set aside.

NATURE OF THE PROCEEDING

This appeal arises from the EIB's proceeding to consider and act on the New Mexico Environment Department's ("NMED") petition to the EIB to adopt regulations to implement HB 212, which concerns the use of chemicals purportedly known as per- and polyfluoroalkyl substances ("PFAS") in consumer products.

[1] 20.13.2.13 NMAC.
[2] 20.13.2.13–22 NMAC and 20.13.2.12(A)(5) NMAC.

The Final Rule's PFAS labeling requirements are unlawful several times over. First, the broad scope of the requirements encompasses substances whose status as PFAS is subject to robust scientific debate, compelling businesses to make untrue and misleading claims on their products, which advances neither a compelling nor substantial state interest. Second, the EIB declined to apply HB 212's express exemptions to labeling, extending the reach of the Final Rule beyond that of the enabling statute. Third, the EIB adopted an impracticable labeling deadline that is arbitrary and capricious and unsupported by substantial evidence. Finally, because HB 212 does not grant the EIB the authority to impose fees, the Final Rule's fee provisions are also unlawful.

STATEMENT OF JURISDICTION

The Final Rule was filed with the State Records Center and Archives on April 22, 2026, and was published in the New Mexico Register on May 5, 2026. Pursuant to NMSA 1978, § 74-1-9(H) (1971), Diamond Vogel filed its timely Notice of Appeal of the EIB's final order adopting the Final Rule on May 22, 2026. This Docketing Statement is timely filed by June 22, 2026. Rules 12-601(B) and 12-308(A)(1) NMRA.[3]

[3] The 30-day deadline for the filing of this Docketing Statement falls on Sunday, June 21, 2026, but is extended to the next day that is not a Saturday, Sunday, or legal holiday under 12-308(A)(1) NMRA.

Any person who is or may be affected by a regulation adopted by the EIB may appeal to this Court for further relief. NMSA 1978, § 74-1-9(H). *See Kerr-McGee Nuclear Corp. v. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, ¶ 43, 97 N.M. 88.

STATEMENT OF THE CASE

I. PFAS

Per- and polyfluoroalkyl substances, or PFAS, are a diverse class of synthetic chemical substances. Substances in this class contain varying numbers of carbon and fluorine atoms, though the number, arrangement, and surrounding molecular structure may vary considerably. There is no single, agreed-upon definition of PFAS among governments, scientists, regulators, and other authoritative bodies. The multitude of definitions is indicative of an ongoing debate, which extends to the International Union of Pure and Applied Chemistry ("IUPAC"), the world authority on chemical nomenclature and terminology. Depending on which definition is applied, there may be hundreds or millions of PFAS.

Many of the substances that fall within one or more definitions of PFAS have useful properties—including chemical and thermal stability, and water and grease resistance—and are used in products such as medical devices, flame retardants, and refrigerants, sometimes without any available substitute. Some have been shown to present significant environmental or human health concerns because they persist in

the environment or accumulate in the body. Others lack such characteristics, and some have not been studied.

II. Statutory Framework

On April 8, 2025, New Mexico enacted the Per- and Poly-Fluoroalkyl Substances Protection Act, HB 212. Laws 2025, ch. 102. The Act took effect June 20, 2025.

HB 212 establishes two principal regulatory mechanisms. First, it imposes phased sales prohibitions on certain products containing intentionally added PFAS, culminating in a general ban on the sale of products containing intentionally added PFAS beginning January 1, 2032. 1978 NMSA, § 74-15-3(E). However, the EIB is authorized to adopt rules designating the use of PFAS in a product as a "currently unavoidable use," excluding that use from prohibition. *Id.*

Second, HB 212 requires manufacturers to report to NMED information on the amount and purpose of intentionally added PFAS used in the products they produce. 1978 NMSA, § 74-15-5. Initial reports are due January 1, 2027. *Id.* Manufacturers must provide a subsequent report if there is a significant change in the reported information. *Id.* NMED may extend the deadline for a manufacturer to report or waive all or part of the required information if substantially equivalent information is publicly available. *Id.*

Recognizing that certain uses of PFAS present acceptable risks to health or the environment, are adequately addressed through other regulatory frameworks, or are unavoidable, the Legislature expressly exempted sixteen types of products and materials from both prohibition and the reporting requirements. 1978 NMSA, §§ 74-15-3(A) and 74-15-5(K). Examples of exempt products and materials include used products offered for sale or resale, medical devices and drugs regulated by the United States Food and Drug Administration, and a family of substances known as fluoropolymers.

HB 212's core prohibition and reporting requirements are supported by provisions governing PFAS testing, 1978 NMSA, § 74-15-6, and enforcement, 1978 NMSA, § 74-15-7.

Importantly, HB 212 broadly defines PFAS as "a substance in a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom." 1978 NMSA, § 74-15-2(S). This is one of the most sweeping and controversial definitions of PFAS in use, encompassing a substantially larger array of chemically distinct substances with varying chemical structures, degrees of fluorination, and other properties. Some of the substances captured by this definition lack persistence in the environment and the tendency to accumulate in the body commonly associated with PFAS. Others are not well-studied or are otherwise the subject of ongoing scientific debate.

HB 212 grants the EIB rulemaking authority to implement various aspects of the Act. Most of these rules are nondiscretionary: the EIB must, for example, adopt rules to enumerate the information manufacturers must report, 1978 NMSA § 74-15-5(A), and identify currently unavoidable uses that should be excepted from prohibition, 1978 NMSA, § 74-15-4(A)(3).

HB 212 also grants the EIB certain discretionary rulemaking authorities. Most importantly for the purposes of this case, in a single sentence, HB 212 authorizes but does *not* require the EIB to adopt rules to require PFAS product labeling. 1978 NMSA, § 74-15-4(B)(1) ("The board may . . . adopt rules to carry out the provisions of the Per- and Poly-Fluoroalkyl Substances Protection Act, including requiring the labeling of products in English and Spanish.").

III. Proceedings Before the EIB and Related Developments

NMED commenced the rulemaking at issue in this case on October 8, 2025, by filing a Petition for Regulatory Change to Adopt 20.13.2 NMAC and Request for Hearing ("Petition") with the EIB. On October 24, 2025, the EIB granted the Petition. The EIB appointed a Hearing Officer on October 30, 2025. On December 3, 2025, the Hearing Officer issued a Pre-Hearing Order specifying that the public hearing would begin February 23, 2026. A public notice for the hearing was first published December 14, 2025.

On February 18, 2026, the Legislature passed House Joint Memorial 3 ("HJM 3"), directing the EIB to develop a report on the implementation of HB 212 and directing NMED to develop a report on the public health, environmental, and economic risks of HB 212's express exemptions and provide recommendations on whether they should be modified. HJM 3 also included an after-the-fact characterization of HB 212's labeling requirements, stating that the Act "requires" PFAS product labeling, "including [for] products exempted from the phaseout and prohibition," despite HB 212's clear use of discretionary language.

The public hearing occurred from February 23 through February 26, 2026. Public comments were accepted through March 5, 2026. Diamond Vogel's counsel submitted written comment on the rulemaking on March 3, 2026, on behalf of Diamond Vogel, whose identity was not disclosed in the submission.

The EIB reconvened March 6, 2026, for oral closing arguments and to deliberate on the rulemaking. Deliberations continued March 23, 2026. On the same date, the EIB voted to adopt the proposed 20.13.2 NMAC with minor alterations. On April 17, 2026, the EIB released its Final Order and Statement of Reasons. The Final Rule was filed with the State Records Center and Archives on April 22, 2026.

Over the course of the proceeding, NMED released four versions of the proposed regulatory text,[4] making substantial revisions to the required label language and imagery, the available labeling exemptions, and the scope of the labeling deadline.

IV. The Final Rule

The Final Rule was published in the New Mexico Register on May 5, 2026, and will take effect July 1, 2026.

Only the Final Rule's PFAS product labeling requirements and fee provisions are challenged in this case. The other provisions of the Final Rule, including those implementing PFAS prohibitions and manufacturer PFAS reporting requirements, are not at issue except insofar as they reference the fee provisions.

A. PFAS Product Labeling Requirements

Under the Final Rule, beginning January 1, 2027, a manufacturer may not manufacture for sale or distribution a product containing intentionally added PFAS unless it contains a PFAS label. 20.13.2.13(A) NMAC. The label must be an outline of an Erlenmeyer flask with the term "PFAS" within the flask. 20.13.2.13(C) NMAC. The label must be clearly visible and legible prior to sale, with text no

[4] *See* NMED Petition Exhibit A (Proposed New Rule) (Oct. 8, 2025); NMED Exhibit 1 (Revised Proposed Rule) (Jan. 26, 2026); NMED Exhibit 69 (Rebuttal Proposed New Rule) (Feb. 16, 2026); and NMED Statement of Reasons and Proposed Order Attachment A (Final Proposed New Rule) (Mar. 5, 2026).

smaller than the largest font used for other consumer information on the product. *Id.* If consumer packaging obscures the label on the product, then the consumer packaging must also be labeled. *Id.* In situations where a consumer is unable to view the product label at the time of purchase, such as online sales transactions, a manufacturer or retailer must provide a label or disclosure to the prospective consumer prior to purchase. *Id.*

Complex durable goods are subject to different labeling requirements. Instead of labeling the product or packaging directly, manufacturers must label the consumer-facing product specification sheet available to potential consumers prior to purchase, as well as the good's consumer-facing operation and maintenance manual. 20.13.2.13(D) NMAC.

Only four types of products are exempt from the labeling requirements: (1) used products offered for sale or resale; (2) products for which labeling requirements are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act; (3) veterinary products regulated by certain federal agencies; and (4) medical devices and drugs regulated by the United States Food and Drug Administration. 20.13.2.13(B) NMAC. Thus, the Final Rule denies applicability of the majority of HB 212's sixteen express exemptions to labeling, even though those products fall outside the scope of the Act.

The Final Rule allows manufacturers to comply with the labeling requirements by meeting corresponding requirements adopted by another state. 20.13.2.13(E) NMAC. This provides little relief, however, because the Final Rule's labeling requirements are far broader—encompassing many more products—than those imposed by any other state. Manufacturers may also apply for a waiver from the labeling requirements, but the criteria are narrow: the product must fall within one of HB 212's sixteen express exemptions and no material in the product that contains intentionally added PFAS may ever come into direct contact with a consumer while the product is being used as intended during its useful life. 20.13.2.13(F) NMAC.

i. First Amendment and Compelled Speech

Early versions of the proposed rule required manufacturers to label products using words and symbols approved by NMED and include a QR code or link to an NMED webpage asserting that PFAS present serious risks. Draft labels released by NMED used warning imagery and suggested that labeled products may be associated with cancer and other environmental and health harms. These elements were dropped in subsequent drafts. NMED argued that the revised label language provides explicit, non-controversial statements of facts, ignoring that the definition of PFAS is itself controversial because it sweeps so broadly that it encompasses substances that are not generally accepted by the scientific community as being PFAS. NMED

further sought to characterize the labeling requirement as an informational disclosure rather than a warning, testifying that its purpose is to raise awareness about PFAS in products rather than deter use or warn consumers. However, the comments submitted on behalf of Diamond Vogel alerted the EIB that significant First Amendment issues remained even after the label was revised.

The comments explained that the definition of PFAS employed by HB 212 is among the most expansive definitions of PFAS, encompassing a substantially larger array of chemicals than definitions used by authoritative bodies such as the United States Environmental Protection Agency. For substances not generally accepted by the scientific community as being PFAS or whose classification as PFAS is subject to robust debate, the comments argued that requiring a PFAS label would be neither purely factual nor uncontroversial and would not survive any level of judicial scrutiny. The comments discussed in detail a specific chemical as example of the definition's problematic breadth.

Other proceeding participants raised similar concerns. The American Chemistry Council ("ACC") contended that the labeling requirement continued to pose First Amendment issues even after NMED's revisions, and the Complex Products Manufacturing Coalition ("CPMC") and Alliance for Automotive Innovation ("Auto Innovators") argued that the final label design misleadingly implies that labeled products are hazardous in violation of the First Amendment.

During the EIB's deliberations, the EIB's counsel informed the Board that NMED had responded to participants' First Amendment concerns by revising the contents of the proposed label to the extent NMED felt necessary. The Board concluded that the label, as revised by NMED, acts as a statement of fact and does not address potential hazards. The Statement of Reasons does not make any mention of the First Amendment or compelled speech concerns.

ii. Labeling Exemptions

Initially, the proposed regulatory text exempted only used products offered for sale or resale from the labeling requirement. In a subsequent version of the rule, NMED added three exemptions for certain pesticides, veterinary products, and medical devices and drugs, stating that the change addressed participant concerns that labels may be preempted by federal requirements. All four of these labeling exemptions apply to products among those expressly exempted from HB 212, but most exempt products and materials are nonetheless subject to the labeling requirement. NMED cited HJM 3 as reason not to extend the rest of the exemptions to labeling.

The comments submitted on behalf of Diamond Vogel argued that all sixteen of HB212's express exemptions should apply to the labeling requirement. The comments observed that although the provision authorizing labeling rules was a minor, discretionary aspect of HB 212, denying the applicability of the exemptions

would cause the labeling requirement to overshadow the HB 212's core prohibitions and reporting requirements by greatly extending the reach of the Act. The comments cautioned that reworking HB 212's scheme in that manner would violate New Mexico law. Moreover, the comments warned that a labeling requirement that disregards HB 212's exemptions cannot be understood to "carry out the provisions" of HB 212, as the Act requires.

Other hearing participants raised similar arguments. The ACC argued that applying labeling requirements to products otherwise exempted would violate principles of statutory construction and undermine science- and policy-based distinctions made by the Legislature. Likewise, the CPMC and Auto Innovators contended that requiring labeling for exempt products would contradict legislative intent and fail to carry out the provisions of HB 212. The ACC, as well as the CPMC and Auto Innovators, proposed revisions to the regulatory text that would apply all of HB 212's express exemptions to the labeling requirement.

Both proposals were denied by the EIB. The Statement of Reasons suggests that the Board rejected these proposed revisions based on the four labeling exemptions already included in the regulations and its desire to make labeling requirements as broad as possible to inform the public, including to inform disposal of PFAS-containing products—effectively treating HB 212's express exemptions as if they did not exist. The Statement of Reasons also incorrectly asserts that HJM 3

clarified the EIB's authority to require labeling for exempt products. As a joint memorial, HJM 3 was not signed by the governor, does not carry the force of law, and cannot negate the express exemptions enacted by HB 212 or rework its regulatory scheme.

iii. Labeling Deadline

The proposed regulatory text included a January 1, 2027, labeling deadline from the outset. Originally, the deadline was a sell-by date: manufacturers would be prohibited from selling unlabeled products with intentionally added PFAS that did not fall under the narrow labeling exemptions beginning January 1. However, the second iteration of the proposal converted the deadline to a manufactured-by date: manufacturers are prohibited from selling unlabeled products manufactured on or after January 1 but can continue to sell unlabeled products manufactured before that date. NMED explained that the change reflects the complexities of global supply chains, ensures products sitting on shelves would not become noncompliant, and provides manufacturers with greater flexibility.

While changing the deadline from a sell-by to a manufactured-by date offers manufacturers a modicum of relief, the comments submitted on behalf of Diamond Vogel made clear that it would still be technically impracticable, economically unreasonable, and unnecessary to impose any labeling requirement with a deadline of less than 18 months after rule adoption. The comments explained that revising

hundreds of product labels takes substantial time and effort, including redesigning packaging, undergoing regulatory and legal review, coordinating with printers and suppliers, and aligning production schedules. For companies that manufacture products under tolling and private label requirements, the comments emphasized that the process requires additional coordination with customers and their designers, which often causes delays. The comments also observed that relabeling requirements typically grant manufacturers significantly more time to comply; for example, California granted manufacturers over three years to come into compliance with revised short-form "Proposition 65" label warnings.[5] Should the EIB impose a deadline less than 18 months after rule adoption, the comments stated that the affected company anticipated that it may have to suspend sale of certain products in New Mexico, resulting in economic losses and harm to business relationships, contractual commitments, and reputation.

Diamond Vogel was not alone in its concerns. In its written closing argument, the ACC listed numerous commenters who stated that the proposed deadline was impracticable and called for a January 1, 2028, labeling deadline. The CPMC and Auto Innovators also requested that the deadline be pushed back to January 1, 2028, explaining that a delay is necessary to allow manufacturers sufficient time to implement changes in their manufacturing cycles.

[5] Cal. Code Regs. Tit. 27, § 25603.

The EIB rejected these proposals. The Statement of Reasons indicates that an extension was deemed unnecessary because the required label language was simplified through revisions to the regulatory text, but this logic is faulty and ignores substantial evidence in the record. While a more complicated label may pose greater redesign challenges than a smaller one, the many other steps involved during product relabeling—described in the comments on behalf of Diamond Vogel and by other participants—are unaffected by the specifics of the label content. As it stands, Diamond Vogel will have approximately seven months to relabel following rule adoption, far less than the 18 months the comments said was the bare minimum to ensure technical practicability. Diamond Vogel will not be able to relabel all affected products in time.

B. Fee Provisions

The Final Rule requires product manufacturers to pay fees in connection with three types of mandatory and optional submissions under HB 212.

First, PFAS reporting: manufacturers must pay a $2,500 fee to submit the initial report, and $1,000 for each instance of subsequent reporting following a significant change. 20.13.2.15 and 20.13.2.16 NMAC. If a manufacturer fails to pay the fee, their report is not considered complete. 20.13.2.12(A)(5) NMAC.

Second, currently unavoidable use designations: manufacturers must pay a $5,000 fee to apply for a currently unavoidable use designation and $2,500 for triennial renewals. 20.13.2.17 and 20.13.2.18 NMAC.

Third, label waivers: manufacturers must pay $2,000 to apply for a waiver for a product and $5,000 to apply for a waiver for a product class, which also expire after three years. 20.13.2.19 and 20.13.2.20 NMAC.

Fees are paid into the recycling and illegal dumping fund. 20.13.2.6 NMAC. All fees are adjusted to reflect changes in the consumer price index beginning in 2028. If any fee is not paid in full when due, the manufacturer must pay a billing charge of $1,000 plus late charges every month or part of a month fees remain unpaid. 20.13.2.22 NMAC.

These fees are significant. NMED estimated that the fee structure for label waivers alone could generate approximately $15 million in the first year and over $7 million in the third year after adoption. Because only products that fall within HB 212's sixteen express exemptions may be eligible for a label waiver, the denial of most of the exemptions' applicability to labeling directly generates this substantial new revenue for NMED. NMED characterized the fee scheme as a fee-for-service approach that would cover the costs of reviewing submissions under HB 212.

The ACC moved to dismiss the rule provisions dealing with fees and reiterated in its closing argument that the provisions exceed the EIB's authority under HB 212

because the Act does not expressly authorize fees. In the Statement of Reasons, the EIB rejected this argument, asserting authority to adopt fees pursuant to the Environmental Improvement Act, NMSA 1978, §§ 74-1-8 and 74-1-9 (1971) (concerning the Board's duties and rulemaking procedures); the Department of Environment Act, NMSA 1978, § 9-7A-6(C) and (D) (1991) (providing that NMED may apply for and receive funds with the governor's approval and adopt procedural regulations); and HB 212 itself. Not one of these citations provides authority to impose fees.

Citing NMED testimony, the EIB also stated that the Legislature did not provide NMED with recurring general fund revenue to implement HB 212, that the approach reflects the "Legislature's direction towards self-funded regulatory programs," and that fees are necessary to avoid shifting the cost of regulation to taxpayers. But the need for funding does not create the authority to impose fees, and the EIB's policy justifications cannot substitute for a statutory grant of that authority.

STATEMENT OF ISSUES

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

I. Issue 1

Whether the EIB violated the First Amendment of the United States Constitution and Article II, § 17 of the New Mexico Constitution by mandating

PFAS labeling for substances whose status as PFAS is subject to robust scientific debate.

A. Statement of Preservation

Through counsel, Diamond Vogel submitted comments concerning this issue. This issue was also raised and preserved by several other participants in the rulemaking, including the ACC in its written closing argument and the CPMC and Auto Innovators in their Motion and Memorandum Brief in Support, opening statement, proposed statement of reasons, and oral closing argument. In addition, this issue falls under the exceptions under NMRA 12-321(B).

B. Authorities

NMSA 1978, §§ 74-1-9(H) and (J) (conferring authority on this Court to review validity of regulations adopted by the EIB and providing that such action shall be set aside "if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the transcript; or (3) otherwise not in accordance with law").

U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

N.M. Const. art. II, § 17 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

State v. Sanchez, 2015-NMSC-018, ¶ 9, 350 P.3d 1169 ("If a constitutional provision applies, claims arising under it are . . . reviewed de novo.").

State v. Rendleman, 2003-NMCA-150, ¶ 58, 134 N.M. 744 (noting that the protections of N.M. Const. art. II, § 17 and the First Amendment "are the same, at least with respect to content-neutral restrictions," and that "this Court has interpreted our state constitution more broadly than the federal constitution with respect to content-based restrictions" (internal quotation marks and citations omitted)).

Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and is therefore "a content-based regulation of speech").

Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) ("[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. 721, 734 (2011))).

Free Speech Coal., Inc. v. Paxton, 606 U.S. 461, 484 (2025) ("Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is 'the most demanding test known to constitutional law.'" (quoting *City of Boerne v. Flores*, 521 U. S. 507, 534 (1997))).

Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (holding that a lesser form of scrutiny applies to compelled disclosures conveying "purely factual and uncontroversial information," provided that the disclosure is "reasonably related" to preventing consumer deception and not "unjustified or unduly burdensome").

Nat'l Inst. of Family & Life Advocates v. Becerra, 585 U.S. 755, 776 (2018) (clarifying that *Zauderer* only applies to disclosures that "remedy a harm that is potentially real, not purely hypothetical" and "extend no broader than reasonably necessary" (internal quotation marks and citations omitted)).

Cal. Chamber of Commerce v. Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 478 (9th Cir. 2022) (holding that "robust disagreement by reputable scientific sources" supports a conclusion that a disclosure is controversial).

II. Issue 2

Whether the EIB exceeded its authority under HB 212 or abused its discretion by denying applicability of HB 212's express exemptions to the Final Rule's labeling provisions, thereby expanding the reach of the labeling provisions beyond that of the enabling statute.

A. Statement of Preservation

Through counsel, Diamond Vogel submitted comments concerning this issue. This issue was also raised and preserved by several other participants in the

rulemaking, including the ACC in its direct testimony, opening statement, proposed statement of reasons, written closing argument, and oral closing argument, and the CPMC and Auto Innovators in their direct testimony, opening statement, proposed statement of reasons, and oral closing argument. In addition, this issue falls under the exceptions of NMRA 12-321.

B. Authorities

N.M. Const. art. III, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.").

NMSA 1978, §§ 74-1-9(H) and (J) (this Court's review authority, per parenthetical above).

NMSA 1978, § 74-15-4(B)(1) ("The Board may. . . adopt rules to *carry out the provisions of* the Per- and Poly-Fluoroalkyl Substances Protection Act, including requiring the labeling of products in English and Spanish." (emphasis added)).

NMSA 1978, §§ 12-2A-18(A) and 19 (1997) (the Uniform Statute and Rule Construction Act instructs that the text of a statute is the primary, essential source of its meaning and a statute or rule is construed, if possible, to give effect to its objective

and purpose, to give effect to its entire text, and to avoid an unconstitutional, absurd or unachievable result).

Gonzales v. N.M. Educ. Ret. Bd., 1990-NMSC-024, ¶ 11, 109 N.M. 592 ("An agency may not create a regulation that exceeds its statutory authority.").

N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n, 2007-NMSC-053, ¶ 19, 142 N.M. 533 ("Statutory interpretation is an issue of law which we review de novo . . . . Because statutory construction itself is not a matter within the purview of the [agency's] expertise, [the court] affords little, if any deference to the [agency] on this matter." (internal quotation marks and citations omitted) (alterations added)).

Meridian Oil, Inc. v. New Mexico Taxation & Revenue Dep't, 1996-NMCA-079, ¶ 12, 122 N.M. 131 ("The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." (internal quotation marks and citation omitted)).

State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 22, 125 N.M. 343 ("The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature.").

New Mexico Pharmaceutical Ass'n v. State, 1987-NMSC-054, ¶ 8, 106 N.M. 73 ("In interpreting statutes, we should read the statute as a whole so that each provision may be considered in relation to every other part.").

III. Issue 3

Whether the EIB acted arbitrarily and capriciously or without support of substantial evidence when it set a January 1, 2027, deadline for PFAS labeling despite evidence as to the impracticability of labeling by that date, and when it erroneously dismissed concerns about inability to comply based on the incorrect assumption that revisions to the labeling contents would ease compliance burdens.

A. Statement of Preservation

Through counsel, Diamond Vogel submitted comments concerning this issue. This issue was also raised and preserved by several other participants in the rulemaking, including ACC in its proposed statement of reasons and written closing argument and the CPMC and Auto Innovators in their proposed statement of reasons and oral closing argument.

B. Authorities

NMSA 1978, §§ 74-1-9(H) and (J) (1985) (this Court's review authority, per parenthetical above).

Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 12, 133 N.M. 97 ("Normally an agency rule would be arbitrary or capricious if the agency . . . failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

In re Application of Rhino Envtl. Servs., 2005-NMSC-024, ¶ 13, 138 N.M. 133 ("A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." (quoting *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 17)).

N.M. Hum. Servs. Dep't v. Garcia, 1980-NMSC-025, ¶¶ 3–5, 94 N.M. 175 (describing how New Mexico courts are to apply substantial evidence review to the record as a whole, where the reviewing court may not "accept[] part of the evidence and totally disregard[] other convincing evidence in the record considered as a whole," and where "the reviewing court may act on other convincing evidence in the record and may make its own findings based thereon").

IV. Issue 4

Whether the EIB exceeded its authority under HB 212 by imposing fee and late charge provisions in the Final Rule when HB 212 does not grant that authority to the EIB.

A. Statement of Preservation

This issue was raised and preserved in the ACC's Motion to Dismiss the Rule Provisions Dealing with Fees and Labeling for Lack of Subject Matter Jurisdiction,

proposed statement of reasons, written closing argument, and oral closing argument. In addition, this issue falls under the exceptions under NMRA 12-321(B).

B. Authorities

N.M. Const. art. III, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.").

NMSA 1978, §§ 74-1-9(H) and (J) (this Court's review authority, per parenthetical above).

NMSA 1978, § 74-15-4 (granting specific mandatory and discretionary rulemaking authorities to the EIB under HB 212, without mention of fees).

NMSA 1978, § 74-15-7(E) (providing that penalties collected under HB 212 "shall be deposited in the recycling and illegal dumping fund," but making no reference to the use of that fund to collect fees).

Gonzales, 1990-NMSC-024, ¶ 11 ("An agency may not create a regulation that exceeds its statutory authority.").

N.M. Indus. Energy Consumers, 2007-NMSC-053, ¶ 19 ("Statutory interpretation is an issue of law which we review de novo . . . . Because statutory

construction itself is not a matter within the purview of the [agency's] expertise, [the court] affords little, if any deference to the [agency] on this matter." (internal quotation marks and citations omitted) (alterations added)).

Qwest Corp. v. N.M. Pub. Regulation Comm'n, 2006-NMSC-042, ¶ 20, 140 N.M. 440 ("Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.").

Marbob Energy Corp. v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶ 5, 146 N.M. 24 (to determine whether a rule exceeds statutory authority, courts look to the enabling statute to determine what authority the Legislature granted).

Unite N.M. v. Oliver, 2019-NMSC-009, ¶ 8 (the Legislature may not vest unbridled or arbitrary authority and must provide reasonable standards because the Legislature cannot confer on another actor the right to determine what the law shall be).

ENMR Tel. Coop. v. State Corp. Comm'n, 1994-NMSC-119, ¶¶ 9-14, 118 N.M. 654 (no statute or constitutional provision empowered the Commission to order a company to fund the Commission's regulatory audit of the company).

N.M. Att'y Gen. Op. No. 88-78 (1988) (concluding that where fee authority "is not necessary to effectuate any of [an agency's] express powers, we do not believe the [agency] has any implied authority to impose fees . . . .").

STATEMENT OF HOW PROCEEDINGS WERE RECORDED

The public hearing in this matter was held February 23, 2026, through February 26, 2026. Oral closing argument and EIB deliberations occurred March 6, 2026, and deliberations resumed March 23, 2026. These proceedings were audio and video recorded, as well as transcribed by a court reporter.

RELATED OR PRIOR APPEALS

Diamond Vogel is not aware of any other challenges to the Final Rule at this time.

CONCLUSION

This Court should set aside the labeling provisions of the Final Rule identified in this Docketing Statement because (1) the labeling requirement violates the United States and New Mexico constitutions, (2) the EIB violated statutory directives or acted outside of statutory authority, and (3) the EIB acted arbitrarily and capriciously or reached a decision not supported by substantial evidence. In addition, this Court should set aside the provisions of the Final Rule imposing fees and late charges because the EIB acted outside of statutory authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2026, a copy of the foregoing *Diamond Vogel, Inc.'s Docketing Statement* was served via electronic mail and via the Odyssey E-File and Serve System on the following:

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