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STATE OF NEW MEXICO
ENVIROMENTAL IMPROVEMENT BOARD

IN THE MATTER OF
PROPOSED NEW REGULATION
20.2.50 NMAC NO. EIB-21-27 (R)
Oil and Gas Sector – Ozone Precursor Pollutants

CCP AND NAVA EP'S RESPONSE TO NMOGA'S MOTION TO STRIKE SECTION VI OF CCP AND NAVA EP EXHIBIT 6 (REBUTTAL TESTIMONY OF TECHINCAL WITNESS PROFESSOR CLIFFORD J. VILLA)

The Center for Civic Policy ("CCP") and the NAVA Education Project ("NAVA EP"), submit this response to the New Mexico Oil and Gas Association's ("NMOGA") motion to strike Professor Clifford J. Villa's rebuttal testimony. Prof. Villa's rebuttal testimony is proper and allowed under 20.1.1.302 NMAC, consistent with the first Procedural Order in this matter, the New Mexico Rules of Evidence Rule 11-702, and applicable case law. Prof. Villa's testimony also indicates the exhibits and witnesses it is rebutting.

In its motion to strike, NMOGA argues that Section VI of Prof. Villa's rebuttal testimony "is outside the allowable scope of technical testimony under the rules governing this proceeding, 20.1.6 NMAC." Mot. 1-3. These regulations cited by NMOGA throughout its motion, however, govern rulemaking proceedings of the Water Quality Control Commission. *Id.* (citing 20.1.6; 20.1.6.207; 20.1.6.7; 20.1.6.303 NMAC, regulations governing rulemakings of the Water Quality Control Commission). In this response, CCP and NAVA EP assume NMOGA intended to cite to substantially similar provisions in 20.1.1 NMAC, which govern rulemaking procedures for the Environmental Improvement Board ("EIB"), and respond here accordingly.

I. Prof. Villa's testimony is allowable expert legal testimony under EIB rulemaking regulations, the first Procedural Order, and is consistent with the rules of evidence

A. Legal standard for allowing expert testimony in this rulemaking proceeding

Section 20.1.1.107.B NMAC directs the hearing officer to "conduct a fair and equitable proceeding" and "assure that the facts are fully elicited." In hearing witness testimony, the hearing officer is required to "*admit any relevant evidence*, unless the hearing officer determines that the evidence is incompetent or unduly repetitious." 20.1.1.401.B NMAC (emphasis added). The regulations further authorize the hearing officer to "take all measures necessary … for the efficient, fair and impartial consideration of issues arising in [rulemakings]," including "taking, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions." 20.1.1.107.B NMAC.

In keeping with the emphasis of the rules on public participation and the admission of relevant evidence, the rules do not require advance notice for non-technical testimony. Parties wishing to present "technical testimony," however, must satisfy an extra procedural step — providing advanced notice. 20.1.1.302 NMAC. The relevant provision also describes what this notice must contain and provides the hearing officer with the authority to enforce the requirement through "such action" as she deems appropriate, for example by "exclusion of the technical testimony [where] a notice of intent was not timely filed." *Id.*

The regulations define "technical testimony" to mean "scientific, engineering, economic or *other specialized testimony*, but [it] does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing." 20.1.1.7.S NMAC. Taken together, the effect of Sections 20.1.1.302 and 20.1.1.7.S NMAC is to define which types of testimony trigger the notice requirements for technical testimony.

Testimony that includes only "legal argument, general comments, or statement of policy or position" does not in and of itself trigger the notice requirements for technical testimony. It is left to the discretion of the hearing officer to determine when and how such testimony should be allowed, in keeping with her obligation to allow "any relevant testimony" by witnesses and broad authority to "take all measures necessary" to manage the hearing. *See* 20.1.1.401.B NMAC; 20.1.1.107.B NMAC.

In this case, the Hearing Officer has already identified the appropriate role of expert legal testimony in a related context. On the issue of "credible evidence provisions," the hearing officer set out a process in the first Procedural Order that allowed for pre-hearing legal briefing on those provisions. Procedural Order 2 (Aug. 25, 2021). The order further provides that "[a]ny legal argument on Section 20.2.50.127 provided in technical testimony through a *non-legal technical expert* shall be excluded." *Id.* (emphasis added). The order also "does not preclude any party from making the legal arguments it chooses as part of its post-hearing submittal." *Id.* By implication, any party is allowed to offer testimony from a legal expert on a relevant topic, and any party not offering a legal expert is able to make legal arguments in its post-hearing submittal.

The rules of evidence "shall not apply" in EIB rulemaking hearings. 20.1.1.400.A NMAC. That said, the procedure outlined above is also broadly consistent with federal 10th Circuit case law allowing expert testimony on legal issues so long as the testimony does not take a position on an "ultimate question of law." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000); *see also Gindes v. Gindes*, 864 F. Supp. 159, 162 (D. Colo. 1994) (Federal Rules of Evidence "allow an opinion by a legal expert in which the expert applies the principles of his expertise, the law, to the facts in evidence."); Expert Legal Testimony, 97 Harv. L. Rev. 797, 801 (1984) (expert testimony on issues of law "openly permitted in many cases" especially involving "complicated statutes that are difficult to understand or interpret."). An expert may be "called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms" and such testimony is "common." *Ingersoll-Rand Co.*, 214 F.3d at 1246

In sum, EIB rulemaking regulations require inclusion of relevant testimony, authorize the hearing officer to admit such testimony, and the first Procedural Order contemplates allowing expert legal testimony. Although not binding here, courts commonly allow testimony on legal issues "to aid the jury in understanding the facts in evidence."

B. Prof. Villa's expert legal testimony is proper under EIB rulemaking regulations and the first Procedural Order

1. *The EIB regulations allow "other specialized testimony" and do not prohibit expert legal testimony*

NMOGA asserts that "[l]egal argument and legal opinions are not properly part of the technical testimony" according to the "rules governing this proceeding," citing only to the definition of "technical testimony"[1] and the provision governing "post-hearing submissions."[2] Mot. 2-3.

Yet contrary to NMOGA's assertions, neither of the relevant EIB rulemaking provisions, nor any other section of the regulations, includes any language to exclude expert legal testimony.

First, the only substantive provision governing technical testimony, 20.1.1.302 NMAC, focuses exclusively on the notice requirements for technical testimony and the broad actions the hearing officer may use to enforce those requirements. There is no language related to excluding testimony on the grounds that it is not "technical." This is particularly notable given the clear

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[1] NMOGA cites to 20.1.6.7.U NMAC in the WQCC rulemaking regulations. CCP and NAVA EP assume NMOGA intended to cite to 20.1.1.7(S) NMAC.

[2] NMOGA cites to 20.1.6.303 NMAC in the WQCC rulemaking regulations. CCP and NAVA EP assume NMOGA intended to cite to 20.1.1.302 NMAC.

requirement in the provisions governing testimony that "the hearing officer shall admit *any relevant evidence*, unless … the evidence is incompetent or unduly repetitious." 20.1.1.401 NMAC (emphasis added).

Second, 20.1.1.7.S NMAC explicitly includes in the definition of "technical testimony" not just "scientific, engineering, [and] economic" testimony, but also "other specialized testimony." Prof. Villa's testimony as offered is "other specialized testimony" based on his expertise as a legal scholar of environmental justice. Rebuttal Testimony of Prof. Clifford J. Villa, CCP and NAVA EP Ex. 6 ("Villa, Ex. 6"). NMOGA has not challenged Prof. Villa's expertise in this area. *See* Mot.

Moreover, the part of Prof. Villa's testimony objected to by NMOGA, Section VI, provides expert legal opinion, not legal argument. Prof. Villa make clear he is providing an opinion by stating that "in [his] analysis" the board must consider and give weight to disparate impacts of pollution, Villa, Ex. 6 at 11, 17, and then provides his rationale for arriving at that opinion, *id.* at 12-17. This is consistent with N.M. Rules of Evidence that a "witness who is qualified as an expert … may testify in the form of an opinion." Rule 11-702 NMRA.

Nor can the second clause of the definition of technical testimony be plausibly interpreted to *bar* expert legal testimony. In providing that "technical testimony … does not include legal argument, general comments, or statements of policy or position," 20.1.1.7.S NMAC, the definition operates together with 20.1.1.302 NMAC to ensure that such elements of testimony do not in and of themselves trigger the notice requirement for technical testimony. It is clear that the definition does not by itself *bar* "legal argument, general comments, or statements of policy or position" in technical testimony from the practice of nearly all parties in this hearing. Parties have liberally presented expert witnesses whose testimony has included "statements of policy or position" and "general comments," *E.g.,* Direct Testimony of Ryan Davis, IPANM Ex. 2 at 4,6, 13, 18, 20 (responding to multiple questions, "What is your position" with respect to different elements of NMED's proposed regulation"); Direct Testimony of John Smitherman, NMOGA Ex. A1 at 4, 6 (responding to questions asking if witness has "any concerns … about aspects of the … rule that are counterproductive" and whether "there are aspects of the … rule that make sense."). If NMOGA's logic is allowed to hold, then 20.1.1.7.S NMAC would operate to bar not only any "legal argument" in technical testimony but also "statements of policy or position" and "general comments."

NMOGA further argues that "[t]he rules provide for legal arguments in particular as part of post-hearing submissions under 20.1.6.303 NMAC."[3] But the relevant EIB regulations do not limit legal argument to post-hearing briefing. The regulations only state that the hearing officer "*may allow* the record to remain open … for written submission of *additional* evidence, comments and *arguments*." 20.1.1.404 NMAC (emphasis added). This provision merely authorizes post-hearing briefing as one tool the hearing officer can use in managing the hearing to ensure "efficient, fair and impartial consideration of issues." *See* 20.1.1.10.(B NMAC.

That is not to say that CCP and NAVA EP suggest that any witness be allowed to provide legal argument at any time. Rather, CCP and NAVA EP respectfully submit that the process outlined in the first Procedural Order appropriately balances allowing "any relevant testimony" with the hearing officer's authority to manage the hearing. This process allows the EIB to hear opinion from qualified legal experts–taken under oath–while saving legal argument from parties for briefing, usually post-hearing briefing.

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[3] CCP and NAVA EP believe that NMOGA intended to cite to 20.1.1.404 NMAC in the EIB rulemaking regulations.

Finally, NMOGA argues that "if this testimony stands, NMOGA would have to consider presenting surrebuttal testimony in response" and that other parties might need to do the same. Mot. 3. CCP and NAVA EP agree that NMOGA and other parties should indeed be allowed to present surrebuttal on any issue it chooses, including surrebuttal that includes relevant legal opinion from a qualified expert. The threat of such surrebuttal is no reason to exclude Prof. Villa's testimony. And, as the first Procedural Order makes clear, parties also have the option of presenting legal argument rebutting any expert legal opinion presented in testimony in post-hearing briefing. Procedural Order 2, 5.

2. Prof. Villa's testimony is consistent with the rules of evidence and applicable case law

Although the "rules of evidence shall not apply," 20.1.1.400 NMAC, NMOGA argues that the New Mexico rules provide "useful guidance" that supports striking Prof. Villa's testimony, Mot. 3-4. In particular, NMOGA argues that Prof. Villa's testimony will not "help the Board in understanding any particular evidence" and is therefore not proper under the New Mexico Rules. *Id.*; *see also* 11-702 NMRA (expert witness may testify in the form of an opinion if the opinion "will help the trier of fact to understand the evidence or to determine a fact in issue.").

Yet Prof. Villa makes clear in his testimony that it is offered to help the EIB understand the import of evidence introduced on direct. Prof. Villa states that he is responding to both proposed changes by NMOGA to require less frequent leak detection inspections and to testimony by EDF witness Hillary Hull that identifies "how a significant number of people who are members of historically marginalized communities live in close proximity to low-producing oil and gas well and are at risk of health harms from oil and gas pollution due to this close proximity." Villa, Ex. 6 at 1-2. He further states that:

> The purpose of my testimony is to discuss the long history of how federal and state environmental regulations have failed to adequately protect communities of color and low-income people from disparate air pollution harms, including in New Mexico, and to state that based on my legal scholarship and analysis, the Environmental Improvement Board (EIB) has a mandatory duty to consider and protect against such disparate air pollution harms in this rulemaking.

Id. In other words, Prof. Villa is offering expert testimony to help the EIB "understand the evidence" that has already been offered in light of the history of environmental injustice and in light of his expert opinion relating to statutory factors the board must consider.

NMOGA further offers one federal 3rd Circuit Court of Appeals case to suggest that federal courts universally "do not accept legal opinions as expert testimony." But federal courts do accept such opinions in many cases, albeit with some limitations. The 10th Circuit held in *Smith v. Ingersoll-Rand Co* that there is no "per se bar on any expert testimony which happens to touch on the law; an expert may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." 214 F.3d at 1246. Indeed, Prof. Villa's testimony is similar to the testimony on legal factors at issue in *Ingersoll-Rand.* There, the court allowed expert testimony that "described in great detail the factors the jury could consider in calculating [Plaintiff's] lost future earnings," and found that "such testimony is common." *Id.* In the objected portion of Prof. Villa's testimony, he similarly describes how the EIB should consider as a factor "disparate impacts of pollution." Villa, Ex. 6 at 11-12. In both cases, the expert witnesses are using their specialized knowledge to explain how legal factors in a complicated area of law are applicable to the facts of the case. *See Gindes v. Gindes*, 864 F. Supp. 159, 162 (D. Colo. 1994) (Federal Rules of Evidence "allow an opinion by a legal expert in which the expert applies the principles of his expertise, the law, to the facts in evidence."); Expert Legal Testimony, 97 Harv. L. Rev. 797, 801 (1984) (noting courts often allow expert legal testimony on complicated statutes).

Nor is this the only example of courts allowing expert witnesses to provide opinions on legal issues. Courts have permitted testimony from, among others, a security law expert about "what qualifies as a security and why the contract at issue … was a security," *People v. Lawrence*, 2019 COA 84, ¶ 30 (subsequent history omitted); a law professor to explain the "principles behind [a] tax shelter," *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879, 883 (E.D. Pa. 1978) (subsequent history omitted); tax law experts "as to the proper tax consequences of a transaction," *United States v. Bedford, 536 F.3d 1148, 1158 (10th Cir. 2008)*; and intellectual property attorneys to discuss legal standards in trademark cases, *see HealthOne of Denver, Ind. v. UnitedHealth Grp. Inc.*, No. 10-CV-01633-WYD-BNB, 2012 WL 94678, at *7 (D. Colo. Jan. 12, 2012) ("Courts routinely admit" such testimony).

Finally, even if the rules of evidence were applicable, Prof. Villa's testimony would not cross the line into inadmissible testimony on legal issues. In general, courts prohibit expert testimony on "ultimate questions of law." *Ingersoll-Rand,* 214 F.3d at 1246. As the Second Circuit Court of Appeals has stated, the rationale behind this rule is to prohibit "the admission of opinions which would merely tell the jury what result to reach." *Fiataruolo v. United States*, 8 F.3d 930, 941 (2d Cir. 1993) (citing Fed. R. Evid. 704 (Advisory Committee Notes)).

Here, Prof. Villa does not "tell" the EIB "what conclusion to reach." While the thrust of Prof. Villa's testimony in Section VI is that in his opinion "disparate impacts of pollution" are a "critical" component of the "character and degree of injury to or interference with health, welfare" under NMSA 1978, § 74-2-5(F), Villa, Ex. 6 at 11-17, Prof. Villa explicitly acknowledges in his testimony in Section VI that the EIB has statutory discretion to take this factor into account "as it deems appropriate," *id*. at 12. Thus while Prof. Villa testifies that the

EIB must take disparate impacts into account and "recommends" ways that the EIB do that,[4] Villa, Ex. 6 at 17-18, nowhere in his testimony does he state that his legal opinion *mandates* adoption of particular regulatory provisions. In short, he offers no opinion on the "ultimate questions of law."

II. Prof. Villa's testimony appropriately rebuts prior testimony

NMOGA includes a final paragraph of argument stating that Prof. Villa's testimony is not proper because it "does not identify any particular witness testimony or exhibit that he seeks to rebut through Section VI of his written rebuttal testimony." Mot. 4-5. NMOGA offers no authority that supports striking Mr. Villa's testimony because of a lack of specificity relating to what testimony a particular section of pre-filed testimony is responding to.

Prof. Villa makes clear that he is offering his testimony in rebuttal to regulatory changes that "have been proposed by [NMOGA] that would require less frequent leak detection inspections," Villa, Ex. 6 at 1-2, and he notes the two relevant exhibits in a list of materials he reviewed: "Direct Testimony of John Smitherman, Appendix A1, The New Mexico Oil and Gas Association's (NMOGA's) Notice of Intent to Present Technical Testimony (July 28, 2021); Appendix B, Redlines, The New Mexico Oil and Gas Association's (NMOGA's) Notice of Intent to Present Technical Testimony (July 28, 2021)," *id.* at 5-6.

He similarly states that his testimony is also offered in rebuttal "to direct testimony offered in support of the "proximity" leak detection and repair proposals by Hillary Hull of the Environmental Defense Fund, which identifies how a significant number of people who are members of historically marginalized communities live in close proximity to low-producing oil

[4] NMOGA does not move to strike Sec. VII of Mr. Villa's testimony, which is the Section where he makes recommendations to the board. Mot.;

and gas wells and are at risk of health harms from oil and gas pollution due to this close proximity." *Id.* at 1-2. He then notes this exhibit in the list of materials he reviewed: "Direct Testimony of Hillary Hull, Ex. SS, Environmental Defense Fund's Notice of Intent to Present Direct Testimony (July 28, 2021)." *Id.* at 5-6.

Prof. Villa further makes clear that his testimony in Sec. VI is offered in response to both NMOGA's proposed regulatory changes and Ms. Hull's testimony in order to make the EIB aware of how the potential disparate impacts from NMOGA's proposal are a factor that in his analysis "the Environmental Improvement Board (EIB) has a mandatory duty to consider." *Id.* at 1-2. Prof. Villa's testimony falls firmly within the scope of rebuttal testimony.

III. CONCLUSION

For the foregoing reasons, CCP and NAVA EP respectfully request that the hearing officer deny NMOGA's motion to strike Sec. VI of Prof. Villa's testimony.

Respectfully submitted on Sept. 24, 2021,

*/s/ Gabriel Pacyniak*___________

Gabriel Pacyniak, Supervising Attorney
Travis Shimanek, Clinical Law Student
Daniel Jaynes, Clinical Law Student
Keifer Johnson, Clinical Law Student
Natural Resources & Environmental Law Clinic
University of New Mexico School of Law
1117 Stanford Dr., NE
Albuquerque, New Mexico 87106
Ph: 505-277-2146
pacyniak@law.unm.edu
Shimantr@law.unm.edu
Jaynesda@law.unm.edu
Johnsoke@law.unm.edu

Certificate of Service

I certify that a copy of the foregoing pleading was emailed to the following on September 7, 2021:

Pamela Jones
Hearing Administrator
Environmental Improvement Board
1190 Saint Francis Drive, Suite S2102
Santa Fe, New Mexico 87505
Pamela.jones@state.nm.us

Felicia Orth
Hearing Officer
Environmental Improvement Board
1190 Saint Francis Drive, Suite S2102
Santa Fe, New Mexico 87505
Felicia.l.orth@gmail.com

Karla Soloria
Assistant Attorney General
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
ksoloria@nmag.gov

Lara Katz
Andrew Knight
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87505
lara.katz@state.nm.us
Andrew.knight@state.nm.us

Elizabeth deLone Paranhos
deLone Law Inc.
1555 Jennine Place
Boulder, Colorado 80304
elizabeth@delonelaw.com

Eric L. Hiser
Brandon Curtis
Jorden Hiser & Joy, PLC
5080 North 40th Street, Suite 245
Phoenix, Arizona 85024
ehiser@jhjlawyers.com
bcurtis@jhjlawyers.com

Dalva L. Moellenberg
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta
Santa Fe, New Mexico 87501-2758
DLM@gknet.com

J. Scott Janoe
Baker Botts L.L.P.
910 Louisiana Street
Houston, Texas 77002
scott.janoe@bakerbotts.com

Ana Maria Gutiérrez
Hogan Lovells US LLP
1601 Wewatta Street, Suite 900
Denver, Colorado 80202
ana.gutierrez@hoganlovells.com

Sandra Milena McCarthy
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
sandra.mccarthy@hoganlovells.com

Christopher J. Neumann
Gregory R. Tan
Casey Shpall
Greenberg Traurig, LLP
1144 Fifteenth Street, Suite 3300
Denver, Colorado 80202
neumannc@gtlaw.com
tangr@gtlaw.com
shpallc@gtlaw.com

Louis W. Rose
Kari Olson
Ricardo S. Gonzales
P.O. Box 2307

Santa Fe, New Mexico 87504-2307
lrose@montand.com
kolson@montand.com
rgonzales@montand.com

Charles de Saillan
Staff Attorney
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505-4074
cdesaillan@nmelc.org

List Devore
Air Quality Specialist
Intermountain Region
Lisa_devore@nps.gov

John Vimont
Branch Chief
Air Resources Division
John_vimont@nps.gov

Matthew A. Nykiel
Wild Earth Guardians
3798 Marshal Street, Suite 8
Wheat Ridge, Colorado 80033
mnykiel@wildearthguardians.org

Daniel L. Timmons
Wild Earth Guardians
301 North Guadalupe Street, Suite 201
Santa Fe, New Mexico 87501
dtimmons@wildearthguardians.org

Jeffrey Holmstead
Tim Wilkins
Whit Swift
Bracewell LLP
111 Congress Avenue, Suite 2300
Austin, Texas 78701
jeff.holmstead@bracewell.com
tim.wilkins@bracewell.com
whit.swift@bracewell.com

Stuart R. Butzier
Christina C. Sheehan
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Post Office Box 2168
Albuquerque, New Mexico 87103-2162
srb@modrall.com
ccs@modrall.com

Tannis Fox
Western Environmental Law Center
409 East Palace Avenue, #2
Santa Fe, New Mexico 87501
505.629.0732
fox@westernlaw.org

David R. Baake
Baake Law LLC
2131 North Main Street
Las Cruces, New Mexico 88001
575.343.2782
david@baakelaw.com

Matthias L. Sayer
Additional Counsel for NGL Energy Partners LP
VP Legal – Regulatory Compliance
125 Lincoln Ave., Suyite 222
Santa Fe, New Mexico 87501
Matthias.Sayer@nglep.com

Christopher L. Colclasure
Counsel for 3 Bear Delaware Operating NM, LL.
Beatty & Wozniak, P.C.
216 16th Street, Suite 1100
Denver, Colorado 80202
ccolclasure@bwenergylaw.com

Leslie Witherspoon
Manager, Environmental Programs
9330 Sly Park Court
MZ:SP3-Q
San Diego, California 92123-5398
Witherspoon_leslie_H@solarturbines.com

/s/ Gabriel Pacyniak
Gabriel Pacyniak