

1 **STATE OF NEW MEXICO**
2 **BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

3 **IN THE MATTER OF:**

4 **PROPOSED NEW REGULATION**

5 **20.2.50**

No. EIB 21-27 (R)

6 ***Oil and Gas Sector – Ozone Precursor Pollutants***
7

8 **RESPONSE TO CLEAN AIR ADVOCATES AND EDF’S MOTION TO STRIKE**

9 The New Mexico Oil and Gas Association (“NMOGA”) hereby responds to “Clean Air
10 Advocates and EDF’s Motion to Strike Unsupported ‘Comments’ from NMOGA’s Amendments
11 to Proposed 20.2.50 NMAC” (the “motion”). The motion requests striking redline justifications
12 contained in Appendix B of NMOGA’s Notice of Intent to Submit Technical Testimony and
13 NMOGA Exhibit 47 (the “redline exhibits”) on the basis that NMOGA’s submission violates
14 20.1.1.302 NMAC.

15 NMOGA’s filing does not violate 20.1.1.302 NMAC. NMOGA presented the redline
16 justifications within the redline exhibits to assist the Environmental Improvement Board (“EIB”)
17 with its review. This allows the EIB to review the redline changes and a summary of the reasons
18 for those changes in one place and streamlines what would otherwise be a cumbersome cross-
19 referencing effort.

20 In addition to being helpful, NMOGA’s approach is consistent with applicable rules of
21 procedure. Contrary to the movants’ claim that these justifications are unsupported by technical
22 witnesses, NMOGA’s technical witnesses have explicitly adopted the redline and associated
23 justifications in its direct and rebuttal testimony. Moreover, section 20.1.1.302.A(6) authorizes
24 NMOGA to provide “proposed statement of reasons for adoption of rules.” Thus, NMOGA’s

redline exhibits have been properly filed as incorporated technical testimony and “statements of reasons” to support the redline exhibits

Argument

NMOGA’s inclusion of redline justifications is consistent with section 20.1.1.302 NMAC. Section 20.1.1.302.A NMAC provides that “[a]ny *person*, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 20 days prior to the hearing, file a notice of intent to present technical testimony with the board administrator.” (emphasis added). The notice of intent must, among other things:

- (1) identify the *person* for whom the witness(es) will testify;
- (2) identify each technical witness the *person* intends to present and state the qualifications of that witness, including a description of their educational and work background;
- ...
- (4) include a copy of the direct testimony of each technical witness in narrative form;
- (5) include the text of any recommended modifications to the proposed regulatory change; and
- (6) list and attach all exhibits anticipated to be offered by that *person* at the hearing, including any proposed statement of reasons for adoption of rules.

20.1.1.302.A.4-6 NMAC (emphases added).

CAA and EDF’s principal argument is that the redline justifications provided are not adopted by any technical witness. This is simply not true. A cursory review of NMOGA’s direct and rebuttal testimony makes clear that the redlines and associated justifications have been consistently adopted, incorporated, and supported by NMOGA’s technical witnesses. As an

1 illustration, the following exchange from the rebuttal testimony of Adam Meyer regarding
2 storage vessels is representative:

3 Q. WOULD THE REDLINES AND ASSOCIATED JUSTIFICATIONS PROVIDED IN
4 20.2.50.123 OF APPENDIX B OF NMOGA’S NOTICE OF INTENT TO PRESENT
5 TECHNICAL TESTIMONY ADDRESS THESE TECHNICAL CONCERNS?

6 A. Yes.

7 NMOGA Exhibit 42, pg. 11, lines 26-29. This approach of incorporating the redline and associated
8 justifications is ubiquitous throughout NMOGA’s technical testimony.

9 CAA and EDF also argue that the redline justifications, if not adopted by a technical witness,
10 are not properly filed. Even assuming arguendo that not all redline justifications are adopted by a
11 technical witness, the movants’ argument ignores the plain language of 20.1.1.302 NMAC. Section
12 302 refers to two related but distinct entities: a “person,” who is responsible for filing the notice of
13 intent and providing other information, and a “witness,” who must be identified by the “person” as a
14 proponent of the party’s position. In this case, the “person” is NMOGA, the party who has submitted
15 the notice of intent. The witnesses are those persons NMOGA has presented as testifying on its
16 behalf. It is the *person*, NMOGA, not the witness, who is responsible for providing the “text of any
17 recommended modifications to the proposed regulatory change” and listing and attaching “all
18 exhibits anticipated to be offered *by that person* at the hearing, *including any proposed statement*
19 *of reasons for adoption of rules.*” 20.1.1.302.A(5)-(6) (emphases added). NMOGA, as the
20 “person” advocating for these redline changes, has done just that: it has submitted exhibits
21 detailing the text of recommended modifications and provided “statements of reasons for
22 adoption” of those recommendations. There is no requirement that exhibits, redline changes, or
23 additional “reasons for adoption” be supported by technical testimony to avoid a motion to
24 strike.

1 As such, NMOGA's redline justifications are properly filed both as incorporated
2 technical testimony and statement of reasons provided in support of the redline exhibits.

3 The movants' assertion that NMOGA will not be prejudiced by striking testimony is
4 disingenuous. NMOGA witnesses have incorporated the redline and associated justifications into
5 their testimony. Consequently, striking these statements would threaten to prohibit NMOGA
6 witnesses from testifying to the EIB on these important issues. For example, if movants' motion
7 to strike is granted, the EIB would have no idea what NMOGA's technical experts'
8 recommendations are, as shown in the example from Mr. Meyer's testimony above, which
9 adopts the NMOGA redline. Depriving the EIB of the opportunity to hear (and see) these issues
10 firsthand would deprive the EIB of an ability to effectively understand the experts' testimony and
11 also threaten the ability of the rule to meet the stated objectives to reduce ozone precursor
12 pollution. NMOGA, as a trade association representing oil and gas operators in New Mexico,
13 offers a unique perspective on several issues critical to the workability and success of NMED's
14 proposal.

15 Finally, CAA and EDF bear the burden of persuasion as the proponent of this motion to
16 demonstrate that the relief they seek is appropriate. The movants allege that the only cure is to
17 strike NMOGA's redline justifications in their entirety because the parties "cannot be expected"
18 to read NMOGA's testimony. But the motion itself demonstrates the impropriety of this request:
19 even CAA and EDF recognize that some redline justifications are attributed to technical
20 witnesses. Accordingly, CAA and EDF have failed to carry their burden by refusing to tailor
21 their request for relief to the problems they have allegedly identified.

22 For these reasons, NMOGA respectfully requests that the Hearing Officer deny this
23 motion.

1 Respectfully submitted,

2 HISER & JOY, PLC

3 By: /s/ Eric L. Hiser

4 Eric L. Hiser
5 Brandon Curtis
6 5080 N. 40th St, Suite 245
7 Phoenix, AZ 85024
8 (480) 505-3900
9 ehiser@hiserjoy.com
10 bcurtis@hiserjoy.com
11

12 GALLAGHER & KENNEDY, P.A.

13 By: /s/ Dalva L. Moellenberg

14 Dalva L. Moellenberg
15 1239 Paseo de Peralta
16 Santa Fe, New Mexico 87501-2758
17 505-982-9523
18 DLM@gknet.com
19
20

1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that on September 18, 2021, a true and correct copy of the foregoing

4 ***Response to Motion to Strike*** was served via electronic mail to the following:

5

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

Karla Soloria
New Mexico Office of the Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
ksoloria@nmag.gov
*Counsel for the Environmental Improvement
Board*

Felicia Orth
felicia.l.orth@gmail.com
*Environmental Improvement Board Hearing
Officer*

Lara Katz, 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

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

Andrew Knight, Assistant General Counsel
NMED Office of General Counsel
121 Tijeras Ave. NE, Suite 1000
Albuquerque, New Mexico 87102
andrew.knight@state.nm.us
*Counsel for the New Mexico Environmental
Department*

David R. Baake
Baake Law LLC
2131 North Main Street
Las Cruces, New Mexico 88001
david@baakelaw.com
*Counsel for Conservation Voters New
Mexico, Diné C.A.R.E., Earthworks, Natural
Resources Defense Council, San Juan
Citizens Alliance, Sierra Club, and 350 New
Mexico*

Elizabeth deLone Paranhos
Delone Law Inc.
1555 Jennine Place
Boulder, Colorado 80304
elizabeth@delonelaw.com
Counsel for Environmental Defense Fund

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

J. Scott Janoe
Baker Botts LLP
910 Louisiana Street

Houston, Texas 77002
Scott.janoe@bakerbotts.com
Counsel for Oxy USA Inc.

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

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

*Counsel for Kinder Morgan, Inc., El Paso
Natural Gas Company, L.L.C., TransColorado
Gas Transmission Co., LLC, and Natural Gas
Pipeline Company of America, LLC*

Charles de Saillan
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
cdesaillan@nmelc.org
*Legal Counsel for New Mexico Environmental
Law Center*

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, PA
PO Box 2168
Albuquerque, New Mexico 87103-2162
srb@modrall.com

shpallc@gtlaw.com
*Counsel for NGL Energy Partners LP, Solaris
Water Midstream, Owl Swd Operating LLC,
and Goodnight Midstream, LLC*

Matthias L. Sayer
NGL Energy Partners LP
125 Lincoln Ave, Suite 222
Santa Fe, NM 87501
Matthias.sayer@nglep.com
Legal Counsel for NGL Energy Partners, LP

Christopher L. Colclasure
Beatty & Wozniak, P.C.
216 16th Street, Suite 1100
Denver, CO 80202
ccolclasure@bwenergyllaw.com
*Counsel for 3 Bear Delaware Operating –
NM, LLC*

Leslie Witherspoon, Manager, Environmental
Programs
9330 Sky Park Court
MZ:SP3-Q
San Diego, CA 92123-5398
Witherspoon_leslie_h@solarturbines.com
Solar Turbines, Inc.

Louis W. Rose
Kari Olson
Ricardo S. Gonzales
Montgomery & Andrews, PA
P.O. Box 2307
Santa Fe, NM 87504
lrose@montand.com
kolson@montand.com
rgonzales@montand.com
*Legal Counsel for Independent Petroleum
Association of New Mexico*

Daniel Jaynes
Keifer Johnson
Gabriel Pacyniak
Natural Resources & Environmental Law
Clinic, University of New Mexico
1117 Stanford Dr NE

ccs@modrall.com
*Legal Counsel for The Gas Compressor
Association*

Matthew A. Nykiel
3798 Marshal St., Ste. 8
Wheat Ridge, CO 80033
mnykiel@wildearthguardians.org

Daniel L. Timmons
301 N. Guadalupe St, Ste. 201
Santa Fe, NM 87501
dtimmons@wildearthguardians.org
Legal Counsel for Wild Earth Guardians

Albuquerque, New Mexico 87106
jaynesda@law.unm.edu
johnsoke@law.unm.edu
pacyniak@law.unm.edu
*Legal Counsel for Center for Civic Policy and
NAVA Education Project*

Lisa Devore, Air Quality Specialist,
Intermountain Region
John Vimont, Branch Chief, Air Resources
Division
National Park Service

1
2
3
4
5
6
7

/s/ Eric L. Hiser _____
Eric L. Hiser