

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

3 **IN THE MATTER OF:**

4 **PROPOSED NEW REGULATION**

5 **20.2.50**

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

No. EIB 21-27 (R)

8 **NMOGA's MOTION TO STRIKE SECTION VI OF CCP AND NAVA EP**

9 **EXHIBIT 6 (REBUTTAL TESTIMONY OF TECHNICAL WITNESS**

10 **PROFESSOR CLIFFORD J. VILLA)**

11
12 **I. INTRODUCTION**

13 The New Mexico Oil and Gas Association ("NMOGA"), pursuant to 20.1.6.207 NMAC,
14 hereby moves to strike Section VI of the Rebuttal Testimony of Technical Witness Professor
15 Clifford J. Villa, responding to the question "Does the Environmental Improvement Board have
16 the legal authority to consider disparate impacts of pollution in promulgating regulations under
17 the Air Quality Control Act"? As explained further below, the grounds for this motion are that
18 (1) this part of the testimony is outside the allowable scope of technical testimony under the rules
19 governing this proceeding, 20.1.6 NMAC, (2) this testimony would not fall within the scope of
20 expert testimony under the New Mexico Rules of Evidence, Rule 11-702 and relevant case law,
21 and (3) this testimony is not proper rebuttal testimony.

1 **II. ARGUMENT**

2 **A. Section VI of Professor Villa’s Rebuttal Testimony Is Legal Argument, Not**
3 **Technical Testimony under the Board’s Rules.**

4
5 The rules governing this proceeding distinguish between technical testimony and legal
6 arguments, including testimony based on legal argument that reaches a legal conclusion. Legal
7 argument and legal opinions are not properly part of the technical testimony.

8 “Technical testimony” means “scientific, engineering, economic or other specialized
9 testimony, but does not include legal argument, general comments, or statements of policy or
10 position concerning matters at issue in the hearing.” 20.1.6.7.U NMAC. The clear language of
11 this rule excludes legal argument from the definition of “technical testimony.”

12 Professor Villa’s testimony clearly is being presented as “technical testimony,” as his
13 testimony is titled “Rebuttal Testimony of Technical Witness Professor Clifford J. Villa.”
14 Section VI of that testimony, beginning on page 11 of CCP and NAVA EP Exhibit 6, is
15 presented in response to a legal question and contains a response that amounts to a legal opinion
16 or conclusion. The question to which this part of Professor Villa’s testimony responds is: “Q.
17 Does the Environmental Improvement Board Have the Legal Authority to Consider Disparate
18 Impacts of Pollution in Promulgating Regulations under the Air Quality Control Act?” That
19 question clearly calls for a legal conclusion. Professor Villa’s answer to that question is in the
20 form of a legal opinion that draws a legal conclusion: “In my analysis, the EIB therefore must
21 consider such potential discriminatory impact as part of its mandatory duty to consider ‘facts and
22 circumstances’ related to the ‘character and degree’ of public health impacts and to the public
23 interest.” CCP and NAVA EP Exhibit 6, page 17.

1 There are sound reasons why legal opinions and legal arguments should not be part of the
2 technical testimony and why they are excluded from the definition of “technical testimony.”
3 First and foremost, allowing legal opinions and legal arguments as part of the testimony could
4 turn technical testimony into a battle of competing legal opinions. For example, if this testimony
5 stands, NMOGA would have to consider presenting surrebuttal testimony in response. Other
6 parties might see the need to introduce additional legal opinions and testimony into the
7 proceeding.

8 NMOGA acknowledges that legal arguments are an important part of this proceeding, but
9 they are not appropriate as part of the technical testimony. The rules provide for legal arguments
10 in particular as part of post-hearing submissions under 20.1.6.303 NMAC. That is traditionally
11 where legal arguments have been presented in EIB rulemaking proceedings, and that is the
12 proper place for arguments such as those presented by Professor Villa in Section VI of his
13 technical testimony.

14 **B. Section VI of Professor Villa’s Testimony Would Not Be Admissible under**
15 **the New Mexico Rules of Evidence.**
16

17 Although the New Mexico Rules of Evidence are not applicable to this proceeding, as
18 provided by 20.1.6.300.A NMAC, the Rules of Evidence provide useful guidance that supports
19 the application and intent of the exclusion of legal argument from the definition of “technical
20 testimony.” Under the Rules of Evidence, a judge should allow expert testimony if it “will help
21 the trier of fact to understand the evidence or to determine a fact in issue.” N.M.R.E 11-702.
22 This rule clearly limits expert testimony to topics that will either help the trier of fact—the Board
23 in this case—to understand the evidence or to determine a fact in issue. The legal argument
24 contained in Section VI of Professor Villa’s rebuttal technical testimony would not meet this

1 standard. Rather than being of help to the Board in understanding any particular evidence, this
2 part of Professor Villa's testimony is simply legal argument and opinion as to the Board's legal
3 authority to consider certain evidence. It is not helpful to understand any of that evidence.

4 Federal case law describes the reasons why courts do not accept legal opinions as expert
5 testimony. Though no New Mexico cases on this point were found, there are a number of cases
6 that discuss whether testimony consisting of legal opinions or drawing legal conclusions is
7 appropriate. For example, the Third Circuit Court of Appeals has stated the applicable rule as
8 follows:

9 The District Court has discretion to determine whether expert
10 testimony will help the trier of fact. [citations omitted] In utilizing
11 that discretion, however, the District Court must ensure that an
12 expert does not testify as to the governing law of the case.
13 Although Federal Rule of Evidence 704 permits an expert witness
14 to give expert testimony that 'embraces an ultimate issue to be
15 decided by the trier of fact,' an expert witness is prohibited from
16 rendering a legal opinion. [citation omitted] Such testimony is
17 prohibited because it would usurp the District Court's pivotal role
18 in explaining the law to the jury.

19
20 *Berkeley Investment Group, Lt. v. Colkitt*, 455 F.3d , 217 (3rd Cir. 2006). In sum, Rule 11-702
21 of the New Mexico Rules of Evidence and the case law support an interpretation of 20.1.6.7.U
22 NMAC to exclude this part of Professor Villa's testimony.

23 **C. Professor Villa's Legal Opinion Testimony Is Not Proper Rebuttal**
24 **Testimony.**

25 Proper rebuttal testimony is offered to rebut direct testimony of another party. Although
26 Professor Villa's testimony is offered generally to rebut changes to the rule proffered by
27 NMOGA (*see* CCP and NAVA EP Exhibit 6, page 1), Professor Villa's testimony does not
28 identify any particular witness testimony or exhibit that he seeks to rebut through Section VI of

1 his written rebuttal testimony. Importantly, neither NMOGA nor any other party presented
2 testimony by any expert legal witness or any testimony containing a legal opinion on whether the
3 Board has legal authority to consider the evidence and factors that Professor Villa advocates.
4 Indeed, as discussed above, such legal opinion testimony would have been improper as part of
5 the technical testimony.

6 **III. CONCLUSION**

7 For the reasons stated above, Section VI of Professor Villa's written rebuttal testimony
8 should be stricken, as it constitutes legal argument that is not appropriately part of the "technical
9 testimony" under the Board's rules. In addition, this part of Professor Villa's testimony is not
10

11 Respectfully submitted,

12 HISER & JOY, PLC

13 By: /s/ Eric L. Hiser

14 Eric L. Hiser
15 Brandon Curtis
16 5080 N. 40th St, Suite 245
17 Phoenix, AZ 85024
18 (480) 505-3900
19 ehiser@hiserjoy.com
20 bcurtis@hiserjoy.com
21

22 GALLAGHER & KENNEDY, P.A.

23 By: /s/ Dalva L. Moellenberg

24 Dalva L. Moellenberg
25 1239 Paseo de Peralta
26 Santa Fe, New Mexico 87501-2758
27 505-982-9523
28 DLM@gknet.com
29
30

1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that on September 18, 2021, a true and correct copy of the foregoing
4 ***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@bwenerylaw.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