

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

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

**CLEAN AIR ADVOCATES, EDF, AND NMED’S JOINT MOTION TO STRIKE PARTS
OF NMOGA’S PROPOSED SURREBUTTAL ON LDAR**

Preliminary Statement

Clean Air Advocates,¹ Environmental Defense Fund (“EDF”), and the New Mexico Environment Department (“NMED”) hereby move to strike parts of surrebuttal that the New Mexico Oil and Gas Association (“NMOGA”) intends to present on leak detection and repair requirements (“LDAR”) on the ground that the proffered surrebuttal should have been presented in NMOGA’s rebuttal case. Clean Air Advocates, EDF, and NMED specifically move to strike the following materials, filed by NMOGA on September 23, 2021, and any related testimony:

- Excel spreadsheets entitled “LDAR Gathering Boosting Station Incremental Analysis” and “LDAR Well Sites Incremental Analysis;”
- Slides 10-14, 16, 18, 29-32, 38-48, and 50 relating to LDAR estimated costs and emissions reductions in the PowerPoint setting forth “Surrebuttal Testimony of John R. Smitherman” (“LDAR Surrebuttal PowerPoint”); and
- Slides 52 to 56 relating to “occupied areas” in the LDAR Surrebuttal PowerPoint.

The two Excel spreadsheets and first set of slides from the LDAR Surrebuttal PowerPoint **directly rebut** testimony and exhibits filed by NMED in its notice of intent to present **direct** technical testimony to support its estimated costs and emissions reductions for its LDAR proposal. The second set of slides **directly rebuts** testimony and exhibits filed by EDF in its

¹ Conservation Voters New Mexico, Diné C.A.R.E., Earthworks, National Parks Conservation Association, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, 350 New Mexico, and 350 Santa Fe.

notice of intent to present **direct** technical testimony to support its proposal to increase LDAR inspection frequencies at well sites located within 1,000 feet of homes, businesses and schools, referred to as our “proximity proposal.”

NMOGA should have presented this technical evidence it calls “surrebuttal” in its notice of intent to present **rebuttal** technical testimony. It is too late in this proceeding to rebut parties’ direct case through surrebuttal. Allowing such evidence in would prejudice NMED, Clean Air Advocates, and EDF because we do not have an opportunity to respond to this late-filed, new evidence. These materials and all related testimony must be struck in order to comply with the procedural rules in this matter and as a matter of fairness.

Background

I. NMED AND EDF PRESENTED EVIDENCE IN THEIR DIRECT CASES THAT NMOGA SHOULD HAVE REBUTTED IN ITS REBUTTAL

A. NMED Made the Case for Its LDAR Proposal in Its Direct Case

NMED put forth detailed testimony and numerous exhibits in its direct case, filed July 28, 2021, in support of its LDAR proposal at proposed 20.2.50.116 NMAC.² See NMED Ex. 32 at 79-90 (Bisbey-Kuehn and Palmer direct testimony); NMED Exs. 67-74. NMED’s direct case in support of its LDAR proposed included:

- An estimate of and the basis for the number of wellhead and non-wellhead facilities;
- An estimate of and the basis for the VOC emissions from those facilities;
- An estimate of and the basis for reductions of emissions of volatile organic compounds (“VOCs”) from implementing its LDAR proposal; and
- Detailed cost estimates to implement its LDAR proposal and the cost per ton of VOCs reduced.

² This is the same proposal that NMED made public May 6, 2021, when it filed its Petition for Regulatory Change with the Environmental Improvement Board.

NMED Ex. 32 at 86-90; NMED Exs. 34, 68-71. Specifically, NMED provided a detailed Excel spreadsheet of the costs and emissions reductions anticipated from its LDAR proposal. See NMED Ex. 69.³ The basis for all these estimates has been transparent and available for other parties to analyze, scrutinize, and rebut.

B. EDF Made the Case for the Proximity Proposal in Its Direct Case

Clean Air Advocates, EDF, Center for Civic Policy (“CCP”), and NAVA Education Project (“NAVA EP”) proposed their proximity proposal in their direct notices of intent as part of their Joint Proposed Amendments, filed July 28, 2021. See, e.g., CAA Ex. 1. For sites located within 1,000 feet of an “occupied area”,⁴ this proposal would require facilities with a potential to emit (“PTE”) VOCs of less 5 tons per year (“tpy”) to conduct quarterly LDAR inspections and facilities with a PTE of 5 tpy or more to conduct monthly LDAR inspections. See CAA Ex. 1 at 16:47-49 (at proposed 20.2.50.116.C(3)(c) NMAC).

Our coalition supported this proposal through direct testimony and exhibits from EDF witnesses. Hillary Hull provided testimony on the proximity proposal including:

- EDF’s methodology for identifying wells located within 1,000 feet of occupied areas;
- EDF’s estimate of emissions reductions; and

³ This spreadsheet was made publicly available by early June 2021 on NMED’s website and was filed as Exhibit 69 with NMED’s notice of intent to submit direct technical testimony on July 28, 2021.

⁴ An “occupied area” is defined as “(1) a building or structure designed for use as a place of residency by a person, a family, or families. The term includes manufactured, mobile, and modular homes, except to the extent that any such manufactured, mobile, or modular home is intended for temporary occupancy or for business purposes; (2) indoor or outdoor spaces associated with a school that students use commonly as part of their curriculum or extracurricular activities; (3) five thousand (5,000) or more square feet of building floor area in commercial facilities that are operating and normally occupied during working hours; and (4) an outdoor venue or recreation area, such as a playground, permanent sports field, amphitheater, or other similar place of outdoor public assembly.” CAA Ex. 1 at 3:11-17 (at proposed 20.2.50.7.GG NMAC).

- EDF's estimate of the costs and cost effectiveness of the proposal, including a comparison of its estimates with those from other jurisdictions.

EDF Ex. SS at 2, 9-15 (Hull direct testimony). Ms. Hull also supplied numerous exhibits in support. See EDF Exs. E, W, Y, Z, AA, CC. Ms. Hull's testimony and exhibits provide a highly detailed and transparent explanation of EDF's estimates and methodologies that has been available for other parties to analyze, scrutinize, and rebut.

C. **NMOGA Failed to Rebut NMED's LDAR Cost Estimates and Emissions Reductions or EDF's Proximity Proposal Cost Estimates and Emissions Reductions in Its Rebuttal Case**

In its rebuttal case, filed September 7, 2021, NMOGA presented the testimony of six witnesses. See NMOGA Exs. 41-46. None of the six witnesses discussed NMED's LDAR proposal in any depth, let alone rebutted any of NMED's cost or emission reduction estimates. Likewise, none of NMOGA's witnesses discussed the proximity proposal put forth by Clean Air Advocates, EDF, CCP and NAVA EP, let alone rebutted the EDF estimates of costs or emissions reductions to implement the proximity proposal.

Instead of filing rebuttal (or direct) testimony on estimated costs and emissions reductions, NMOGA put "comments" in its redline strikeout proposed rules, but failed to support its comments with witness testimony. Clean Air Advocates and EDF moved to strike NMOGA's unsubstantiated comments in its redlines, a motion the Hearing Officer granted on the first day of hearing. Clean Air Advocates, EDF, and NMED now move to strike **new information** in NMOGA's September 23, 2021 "surrebuttal" filing that the parties have not seen and have had no opportunity to rebut.⁵

⁵ NMOGA also improperly re-submits information from its "comments" in its redlines that the Hearing Officer struck. This material is not proper surrebuttal either; however, we are not moving to strike it.

D. NMOGA Offers Evidence to Rebut the LDAR and Proximity Proposal Cost Estimates and Emissions Reductions in Surrebuttal

On September 23, 2021, nearly two months after NMED and EDF filed their direct testimony and exhibits on LDAR, NMOGA filed “LDAR demonstratives, surrebuttal, and related surrebuttal exhibits”⁶ that put forth estimates for costs and emissions reductions for NMED’s LDAR proposal and the joint proximity proposal. NMOGA’s 56-page surrebuttal PowerPoint and two Excel spreadsheets present detailed “base” and “incremental” costs, one for gathering and boosting stations and another for wellsites, and estimated emissions reductions. These cost and emissions reductions estimates **directly rebut** NMED and EDF’s evidence on cost and emissions reductions filed in their **direct** cases.

Argument

I. NMOGA’S “SURREBUTTAL” ON LDAR COST AND EMISSIONS REDUCTION ESTIMATES SHOULD HAVE BEEN PRESENTED IN ITS REBUTTAL CASE AND MUST BE STRUCK

NMED and EDF put on detailed estimates of the LDAR costs and emissions reductions in their direct cases. After those filings, if NMOGA disputed those estimates or the methodologies underlying the estimates, NMOGA was required to set forth its evidence for disagreement in its rebuttal case. “Rebuttal is evidence or arguments introduced to counter, disprove, or contradict the opposing party's evidence or argument”⁷ NMOGA failed to put on evidence rebutting these estimates.

After filing its rebuttal, NMOGA now attempts to introduce a 56-page “surrebuttal” PowerPoint and two surrebuttal exhibits -- detailed Excel spreadsheets with estimated costs and

⁶ Sept. 23, 2021 email from B. Curtis, Hiser Joy, to counsel.

⁷ Legal Information Institute, Cornell Law School at <https://www.law.cornell.edu/wex/rebuttal>. Accessed 9/26/21.

emissions reductions. “Surrebuttal is the response to a rebuttal that the responding party may be allowed to make in rare circumstances. Usually, a court will only allow the moving party to have a rebuttal to the evidence and arguments of the responding party. . . . A surrebuttal will be limited to discussing only the points made in the rebuttal.”⁸ In these environmental rulemakings before state administrative agencies, surrebuttal is virtually always extremely limited because the parties have already had full opportunity to put forth their evidence in their direct and rebuttal cases. The sheer amount of surrebuttal offered by NMOGA on one topic is highly unusual.

NMOGA’s “surrebuttal” on estimated costs and emissions reductions is not true surrebuttal. It responds directly to the estimated costs and emissions reductions put forth in NMED and EDF’s direct cases. Allowing this volume of highly detailed new technical testimony at this late stage violates the procedures in this proceeding and clearly prejudices NMED, EDF, and Clear Air Advocates who have had no opportunity to rebut. These materials and any related testimony must be struck.

Conclusion

For the reasons set forth herein, Clean Air Advocates, EDF, and NMED respectfully request the Hearing Officer to strike the following materials and any related testimony:

- NMOGA Excel spreadsheets entitled “LDAR Gathering Boosting Station Incremental Analysis” and “LDAR Well Sites Incremental Analysis;”
- Slides 10-14, 16, 18, 29-32, 38-48, and 50 relating to LDAR estimated costs and emissions reductions in the LDAR Surrebuttal PowerPoint; and
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⁸ Legal Information Institute, Cornell Law School at <https://www.law.cornell.edu/wex/surrebuttal>. Accessed 9/26/21/

Pursuant to 20.1.1.307.C NMAC, counsel for Clean Air Advocates sought concurrence in this motion from counsel for NMOGA, which was denied.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing pleading was emailed to the following on September 27, 2021:

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