

OXY USA EXHIBIT 2

**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)

WRITTEN DIRECT TESTIMONY OF DANNY HOLDERMAN

ON BEHALF OF

OXY USA INC.

1 **I. Introduction**

2 My name is Danny Holderman. I am the Asset Director for the Onshore Resources and
3 Carbon Management Delaware Basin Business Unit with Oxy USA Inc. (“the Company” or “Oxy
4 USA”), and I am presenting this testimony on behalf of the Company. As an Asset Director, I am
5 responsible for oil and gas production operations and related activities carried out on the
6 Company’s assets in the Delaware Basin, and ensuring that those operations and related activities
7 prioritize the health and safety of our employees, contractors and the surrounding communities;
8 comply with all applicable local, state and federal regulations; and generate value for all
9 stakeholders. I received a Bachelor of Science degree with honors in Chemical Engineering from
10 Oklahoma State University in May 2004. My experience, duties, and responsibilities are outlined
11 in my resume, which is attached to my testimony as Oxy USA Exhibit 3. My testimony will
12 comment on the New Mexico Environment Department’s (“NMED’s”) proposed rulemaking.

13 Oxy USA is a subsidiary of Occidental Petroleum Corporation (collectively, “Oxy”), which
14 is an international energy company with assets in the United States, Middle East, Africa and Latin
15 America. Oxy is one of the largest oil producers in the United States and is a leading producer in
16 the Permian Basin. Oxy set a target to reach net-zero emissions associated with our operations
17 before 2040 and an ambition to achieve net-zero emissions associated with the use of our products
18 by 2050. Through the work of Oxy’s subsidiary formed in 2018, Oxy Low Carbon Ventures, Oxy
19 is advancing leading-edge technologies and innovative solutions to economically grow our
20 business while reducing emissions. Oxy is committed to using our global leadership in carbon
21 dioxide management to advance a low-carbon world.

22 Oxy has been an operator in New Mexico’s portion of the Permian Basin since the 1960s,
23 and our company is the second largest oil and gas producer in the state. Over a ten-year span, from
24 2010 to 2019, Oxy paid \$1.2 billion in state and federal royalties on production from its New

1 Mexico oil and gas properties and more than \$32 million in New Mexico state, local and payroll
2 taxes. Additionally, in that same span of time, Oxy paid approximately \$845 million in severance
3 taxes.

4 Oxy USA's comments focus on timing and implementation considerations to comply with
5 the requirements of the proposed rule, ensuring that operators are provided the flexibility to
6 implement alternative technologies and systems to reduce, prevent, monitor, record and report
7 emissions and related data, and concerns relating to the creation of a new presumption of
8 noncompliance based on third-party claims. Oxy USA appreciates the opportunity to submit the
9 following comments.

10 **II. Oxy USA Supports the New Mexico Environment Department's Overall Mission to**
11 **Further Reduce Emissions, and Requests a Phased-In Compliance Approach that**
12 **Targets Highest Emitting Sources First.**
13

14 Oxy USA is in agreement that reducing volatile organic compounds ("VOC") and nitrogen
15 oxide ("NOx") emissions must be a priority. Oxy USA's longstanding policy is to seek continuous
16 improvement in resource recovery, conservation, pollution prevention, and energy efficiency,
17 including ongoing efforts to manage and capture VOCs, NOx, methane and other greenhouse gas
18 ("GHG") emissions. Oxy USA takes a hands-on approach to improve the efficiency and reliability
19 of the equipment and facilities used in our oil and gas activities. To reduce our carbon and
20 emissions footprint while maximizing the efficient use of existing infrastructure, Oxy USA
21 employs multiple techniques to minimize and prevent flaring, improve energy efficiency and
22 deploy innovative technologies.

23 We support NMED's initiative to further reduce emissions from oil and gas activities. In
24 order to advance this initiative, Oxy USA suggests that the proposed rule provide operators with
25 the option to determine applicability thresholds based either on potential to emit ("PTE") or on

- 1 actual emissions. Further, Oxy USA proposes the following phased-in compliance schedule,
- 2 which will target highest-emitting facilities first and become more broadly applicable over time:

Source	Requested Retrofit Phase-in Time
Control Devices	Request five years from effective date of the rule for installing redundant control devices for facilities with existing vapor recovery units (“VRUs”).
Equipment Leaks and Fugitive Emissions	- VOC emissions > 2 and < 5 tons per year (“TPY”), inspect at least annually by January 2023; - VOC emissions > 2 and < 5 TPY, inspect at least semi-annually by January 2025; - VOC emissions > 5 TPY, inspect at least semi-annually by January 2023; - VOC emissions > 5 TPY, inspect at least quarterly by January 2025.
Storage Vessels	- Within one year of the effective date of the proposed rule, the owner or operator shall ensure that all of the company’s existing uncontrolled storage vessels that have a PTE or actual emissions of 10 TPY or greater are controlled; - By January 1, 2025, the owner or operator shall ensure at least 30% of the company’s existing uncontrolled storage vessels are controlled; - By January 1, 2027, the owner or operator shall ensure at least an additional 35% of the company’s existing storage vessels are controlled; and - By January 1, 2029, the owner or operator shall ensure at least an additional 35% of the company’s existing storage vessels are controlled.
Wellhead Sites, Tank Batteries, Gathering and Boosting Pneumatic Controllers	- Request that the retrofit requirements are based on production rather than controller counts. - No requested changes to the proposed retrofit schedule.
Hydrocarbon Liquid Transfers	- New operations subject to the requirements upon effective date of the rule. - Existing operations phased in over a two-year time frame from the effective date of the rule, with higher threshold locations controlled first.
Glycol Dehydrators	No requested changes to proposed retrofit schedule
Heaters	No requested changes to proposed retrofit schedule
Pig Launching and Receiving	No requested changes to proposed retrofit schedule
Natural Gas Compressor Stations and Gas Processing Plants Pneumatic Controllers	No requested changes to proposed retrofit schedule
Pneumatic Pumps	No requested changes to proposed retrofit schedule
Engines and Turbines	No requested changes to proposed retrofit schedule
Compressor Seals	No requested changes to proposed retrofit schedule

1 **A. Oxy USA is Proposing Phased-in Compliance Schedules to Prioritize Higher-**
2 **Emitting Facilities and Ensure Significant Emissions Reductions on Storage**
3 **Vessels.**

4 The core of NMED’s proposed rule is a series of technology-based standards imposing
5 requirements for retrofitting old equipment and installing new equipment by certain established
6 timeframes based on the equipment’s PTE. Oxy USA supports additional retrofit and installation
7 requirements to further reduce emissions, but proposes that operators have the option to determine
8 applicability based on actual emissions as an alternative to relying solely on PTE, and that NMED
9 incorporates a feasible phase-in schedule for compliance timelines.

10 Oxy USA already devotes significant resources to capturing emissions of VOCs, NO_x, and
11 methane by retrofitting existing facilities and optimizing the design and construction of new
12 facilities. Oxy USA currently has over 250 control devices installed on storage vessels at our
13 facilities in New Mexico, including primary and redundant controls. Given the anticipated demand
14 for control devices and significant supply chain concerns, as discussed in more detail below, Oxy
15 USA’s proposed revisions to the retrofit and installation schedule allow and encourage industry to
16 target and prioritize highest emitting storage vessels.

17 Section 20.2.50.123 of the proposed rule requires that, within three years of the effective
18 date of the proposed rule, operators retrofit existing storage vessels with a PTE greater than or
19 equal to 2 TPY and less than 10 TPY of VOCs to achieve a 95% combined capture and control
20 efficiency rate. Storage vessels with a PTE of greater than or equal to 10 TPY of VOC emissions
21 must be retrofitted within one year.

22 Federal regulations found at 40 CFR Part 60, Subparts OOOO (“Quad O”) and OOOOa
23 (“Quad Oa”) have required that if the PTE of a storage vessel that was constructed, modified, or
24 re-constructed since August 2011 is determined to be greater than or equal to 6 TPY of VOCs, the

1 associated VOC emissions must be reduced by 95%.¹ More than 85% of Oxy USA's production
2 in New Mexico comes from 19 facilities that were built after 2017 and have storage vessels that
3 are controlled pursuant to Quad Oa requirements. The remaining storage vessels affected by this
4 rule would account for only 15% of Oxy USA's production. The emissions impact of a phased-in
5 retrofit or installation schedule on these lower-emitting storage vessels would be minimal, but the
6 resource demand to comply with the proposed rule's timeframes would be significant: 178
7 facilities with up to four oil storage vessels and 128 facilities with up to four water storage vessels
8 would require retrofit or installation of controls.

9 In light of these concerns, Oxy USA proposes the following phase-in schedule that aligns
10 with the engine retrofit schedule and would allow operators to prioritize additional emissions
11 controls at higher producing facilities, while still accomplishing NMED's emissions reduction
12 goals:

- 13 **a.** Within one year of the effective date of the proposed rule, the owner or operator shall
14 ensure that all of the company's existing uncontrolled storage vessels that have a PTE
15 or actual emissions of 10 TPY or greater are controlled;
- 16 **b.** By January 1, 2025, the owner or operator shall ensure at least 30% of the company's
17 existing uncontrolled storage vessels are controlled;
- 18 **c.** By January 1, 2027, the owner or operator shall ensure at least an additional 35% of
19 the company's existing storage vessels are controlled; and

¹ Quad O applies to crude oil and natural gas facilities for which construction, modification or reconstruction commenced after August 23, 2011 and on or before September 18, 2015; Quad Oa applies to crude oil and natural gas facilities for which construction modification or reconstruction commenced after September 18, 2015.

1 d. By January 1, 2029, the owner or operator shall ensure at least an additional 35% of
2 the company's existing storage vessels are controlled.

3 Oxy USA is also suggesting that operators be allowed to utilize alternative methods to
4 control emissions and achieve 95% emissions reduction for lower-emitting storage vessels. VRUs
5 on storage vessels with low PTE or low actual emissions do not operate reliably. Oxy USA's
6 smallest VRU compressor operates at an average throughput of 100 MCFD. This compressor can
7 operate at a throughput as low as 40-50 MCFD. Operating below this throughput value increases
8 the temperatures on the unit, which in turn results in maintenance and reliability issues, increased
9 equipment downtime, and increased emissions.

10 Utilizing a combustion device would not provide an adequate solution either, because an
11 operator would have to add in assist gas, such as methane or propane, to ensure both reliability of
12 the pilot and efficient combustion of the gas. For these storage vessels with a low PTE or low
13 actual emissions, requiring a VRU or combustion device would effectively result in higher
14 emissions of CO and NOx. Therefore, Oxy USA suggests that the proposed rule provide operators
15 the flexibility to utilize alternative technology beyond a VRU or combustion device to control
16 emissions for storage vessels with low PTE or low actual emissions. Examples of such alternative
17 technologies include using biomass or carbon filters on the storage vessels.

18 **1. A More Phased-in Approach Will Also Account for Supply Chain**
19 **Concerns and Lessen Regulatory Burdens.**

20 The proposed rule's control device requirements will affect and/or require installation of
21 hundreds of pieces of equipment at Oxy USA facilities. Oxy USA is concerned that the anticipated
22 market demand for VRUs, vapor combustion units ("VCUs"), flares, and other control devices
23 cannot be met, which would affect Oxy USA's ability to comply with the proposed rule.

1 As an example, control device manufacturers have estimated during recent discussions that
2 the market as a whole can produce up to 500 VRUs of various sizes in any given year. Oxy USA
3 would not be the only operator affected by the proposed rules: every other operator impacted by
4 this rule would also need to begin obtaining VRUs, VCUs, flares, and other control devices shortly
5 after rule finalization in order to comply. Given the number of impacted operators and affected
6 facilities in New Mexico, and demand for equipment, the proposed timeline to retrofit and install
7 control devices is not realistic. Moreover, recent discussions with control device manufacturers
8 and suppliers have confirmed that there is already a shortage of qualified personnel who can build,
9 service and repair control devices. Simply put, the need under the proposed rule would greatly
10 exceed the maximum possible supply, making compliance through retrofitting equipment or
11 installing new equipment infeasible under the proposed regulatory timeline.

12 Moreover, control devices are made up of one key material: steel. The unprecedented
13 COVID-19 pandemic forced steel manufacturers to shut down production in Spring 2020. As the
14 country began to recover, steel mills have been slow to ramp up production, resulting in a massive
15 steel shortage and surging prices.² Operators in New Mexico would likely have difficulty
16 obtaining even 500 VRUs in the near future. At the time these comments were filed, there was a
17 16- to 24-week delay in obtaining parts and building a larger-sized VRU. See Oxy USA Exhibit
18 4. Once the VRU is built, it typically takes another four weeks for installation, although that time
19 may vary depending on safety considerations, availability of qualified contractors to install, and
20 complexity of the installation.³ This current delay means that even if operators begin phasing in

² See Rajesh Kumar Singh, “U.S. Manufacturers Grapple with Steel Shortages, Soaring Prices,” Reuters, Feb. 23, 2021, available at <https://www.reuters.com/article/us-usa-economy-steel-insight/u-s-manufacturers-grapple-with-steel-shortages-soaring-prices-idUSKBN2AN0YQ> (discussing effects of steel shortage on manufacturers across industries); Bob Tita, “Steelmakers Keep Old Plants Idle Despite Surging Prices,” The Wall Street Journal, June 10, 2021, available at <https://www.wsj.com/articles/steelmakers-keep-old-plants-idle-despite-surging-prices-11623322802> (discussing how steel mills remaining closed is exacerbating the ongoing shortage).

³ Smaller-sized VRUs can take up to 12 weeks to obtain parts and build, with up to an additional 4 weeks to install.

1 new equipment now, it will still be difficult – if not impossible – to install VRUs according to the
2 proposed rule’s timeline. Control device manufacturers have also confirmed that the same
3 considerations and delays apply to VCUs, flares, and other control devices. Should the proposed
4 rule be finalized as drafted, demand will increase greatly and exacerbate those long lead times.
5 Although Oxy USA anticipates that supply chain delays due to the COVID-19 pandemic will begin
6 to ease, the steel shortage remains ongoing and will continue to build the backlog.

7 The same concerns are relevant and applicable to redundant control requirements. Section
8 20.2.50.115(E)(1)(b) of the proposed rule requires that owners or operators control VOC emissions
9 during startup, shutdown, maintenance, or other VRU downtime with a backup control device or
10 redundant VRU. Currently, Oxy USA locations that have control devices installed are reducing
11 emissions during all normal operating conditions. In light of this fact, and the control device
12 supply chain difficulties discussed above, Oxy USA requests a five-year time frame to install
13 redundant controls at locations that already have VRUs.

14 The proposed rule mirrors rules from other states with one significant distinction: those
15 other states conducted a series of rulemakings that, over time, created more stringent standards
16 that are more broadly applicable. For example, in 2014, Colorado conducted a rulemaking that
17 entirely replaced its regulations regarding control of ozone precursors in oil and gas emissions.
18 Since then, Colorado has modified those regulations – including adjustments to retrofit timelines
19 – on an almost annual basis, giving operators time to begin phasing in compliant control devices.
20 Furthermore, the Colorado rules were not immediately applicable to all sources: over time, the
21 standards became more stringent and more broadly applicable.

22 On the federal level, EPA’s Quad Oa emission standards for new, reconstructed, and
23 modified sources in the oil and natural gas sector acknowledged equipment shortages and extended

1 the initial compliance period accordingly. *See* 81 Fed. Reg. 35,824, 35,855 (June 3, 2016) (noting
2 that because the Quad Oa standards “will more than double the number of wells requiring [reduced
3 emissions completion (“REC”)] equipment over [previous regulations],” EPA is providing an
4 additional 180 days for compliance). Even though REC equipment suppliers had ramped up
5 production in light of previous regulations, EPA acknowledged that additional time was still
6 needed to increase production to the level required by Quad Oa. *Id.* Compare those facts against
7 the backdrop of today’s market realities for control devices, and an additional 180 days would be
8 insufficient: there is an ongoing steel shortage, lingering supply chain effects from the COVID-19
9 pandemic, and no previous (or current) ramp-up in production. It is apparent that a substantial
10 additional phase-in time will be required in order for the proposed rule’s requirements to be
11 feasible.

12 **a. Re-routing Wells to Facilities with Control Devices Already**
13 **Retrofitted or Installed Presents Commingling and Royalties**
14 **Roadblocks.**

15 The proposed rule allows for operators that cannot timely obtain and install control devices
16 to comply by shutting in wells. *See* NMAC 20.2.50.123.B(6). In this scenario, rather than shutting
17 in wells, Oxy USA would prefer to achieve compliance with the proposed rule’s storage vessel
18 emission reduction requirements by re-routing wells to facilities that already have control devices
19 in place. However, the New Mexico Oil Conservation Division (“NMOCD”) and federal Bureau
20 of Land Management (“BLM”) have commingling requirements that mean wells cannot easily be
21 re-routed to share equipment in New Mexico.

22 For example, NMOCD requires operators that seek to commingle oil or gas from two or
23 more leases or pools to submit an application for surface commingling that may be approved or
24 denied by the department; to provide notice to interest owners; and, if any interest owner timely
25 files an objection, to complete a hearing process. *See* NMAC 19.15.12.10(C). BLM regulations,

1 meanwhile, provide that all measurement of oil and gas must be on the lease from which the oil or
2 gas originated and “must not be commingled with [oil or gas] originating from other sources”
3 unless approved by the BLM. 43 C.F.R. §§ 3162.7-2, -3. The approval and notice processes for
4 each agency can take several months, which, when combined with the time needed to negotiate
5 and obtain any new required rights-of-way and actually complete the rerouting process, would
6 significantly hamper Oxy USA’s attempts to timely comply with NMED’s proposed rule. Oxy
7 USA’s proposed phase-in timeline would account for these regulatory challenges.

8 **b. NMED’s Proposed Compliance Alternative to Control Device**
9 **Retrofitting or Installation Conflicts with Other State**
10 **Requirements.**

11 Shutting in wells to comply with the proposed rule when control devices cannot be timely
12 retrofitted or installed conflicts with other agencies’ rules regarding production timeframes for
13 active wells. If finalized as drafted, the proposed rule would require operators to shut in, regardless
14 of well-documented supply chain delays that are beyond an operator’s control, and run a significant
15 risk of noncompliance with NMOCD rules.

16 NMOCD rules require wells to be plugged within 90 days of a 60 day period following
17 suspension of drilling operations; a determination that the well is no longer usable for beneficial
18 purposes; or a period of one year in which a well has been continuously inactive. See NMAC
19 19.15.25.8(B). An operator that operates more than 1,000 wells is in compliance with NMOCD
20 rules if they have no more than ten wells that fail to comply with the plugging requirement. See
21 NMAC 19.15.5.9(A)(4). Operators with more than ten wells that fail to comply with the plugging
22 requirement are subject to NMOCD enforcement actions. See NMAC 19.15.5.10. The
23 infeasibility of obtaining control devices in a timely fashion due to supply chain concerns means
24 that operators would be required to shut in wells, which – due to the severe and likely worsening
25 state of the supply chain – would create conflicts with NMOCD plugging rules and potentially

1 lead to NMOCD enforcement actions. Furthermore, shutting in wells in order to comply with the
2 proposed rule is inconsistent with NMOCD requirements to minimize waste.⁴

3 **B. Oxy USA Suggests an Alternative Inspection Frequency Schedule that Aligns**
4 **with Other Significant Compliance Deadlines and Targets Higher-Emitting**
5 **Facilities to Ensure Significant Emissions Reductions.**

6 Oxy USA proposes that the proposed rule’s leak survey requirement for facilities
7 constructed prior to the proposed rule’s effective date also be phased in over time. Due to the
8 significant number of facilities that would be required to perform leak surveys, Oxy USA suggests
9 a phased-in schedule that ensures all facilities would be surveyed at least once by 2023 and all
10 facilities would be surveyed, according to their required schedule, by 2025. Per the proposed rule,
11 AVO inspections must be conducted on a weekly or monthly basis and any identified leaks must
12 be repaired within a set timeframe. These inspections and required repairs would serve to identify
13 any potential leaks, while operators phase-in and ramp up inspection frequencies under the leak
14 survey program. The compliance schedule Oxy USA proposes, including compliance dates and
15 inspection frequencies, is described below:

⁴ Section 70-2-11 of the New Mexico Statutes, on the New Mexico Oil Conservation Commission and NMOCD’s powers to prevent waste and protect correlative rights, states that “[t]he division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.” Section 70-2-3 of the New Mexico Statutes defines “waste” to include:

“[U]nderground waste” as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas.

VOC Emissions	Inspection Frequency	Compliance Dates
> 2 and < 5 TPY	All surveyed annually	January 2023
> 2 and < 5 TPY	All surveyed semi-annually	January 2025
VOC Emissions	Inspection Frequency	Compliance Dates
≥ 5 TPY	All surveyed semi-annually	January 2023
≥ 5 TPY	All surveyed quarterly	January 2025

Further, under the proposed rule there are no exemptions to the leak survey requirements for facilities that have little or no potential for leaks. Facilities such as satellite facilities, injection facilities, inactive facilities, and wellhead-only facilities either include very few pieces of equipment that could potentially cause an increase in emissions due to leaks or are inactive and therefore cannot increase emissions because they are not handling any material that could leak. The costs of conducting leak surveys at these facilities, which Oxy USA estimates at approximately \$2.5 million per year, far outweighs the minimal risk of leaks at these locations. Accordingly, Oxy USA requests that the proposed rule include a targeted exemption for locations where leak surveys are not expected to result in emissions reductions.

C. Oxy USA Proposes a Phased-In Implementation of Hydrocarbon Liquid Transfer Control Requirements, Which Would Provide a More Realistic Compliance Timeline.

Under Section 20.2.50.120(A) of the proposed rule, hydrocarbon liquid transfers at wellhead sites, tank batteries, gathering and boosting sites, natural gas processing plants, or transmission compressor stations are subject to the proposed rule's requirements one year after the effective date. There are 154 Oxy USA sites that will require installation of control devices under the proposed rule, and Oxy USA estimates that installation for all 154 sites would take approximately 770 days total. Oxy USA requests a phase-in of the control requirements: new

operations subject to the requirements upon effective date of the rule, and existing operations phased in over a two-year time frame, with higher threshold locations controlled first.

D. Oxy USA Requests that Requirements for Pneumatic Controllers at Wellhead Sites, Tank Batteries, and Gathering and Boosting Facilities Be Phased In Based on Historic Liquids Production.

As drafted, the proposed rule includes a compliance schedule that requires a certain percentage of pneumatic controllers and pumps be in compliance by a specific date. However, Oxy USA suggests that basing the compliance timeline for pneumatic controllers on historic liquids production as opposed to the number of pneumatic controllers at a site – *i.e.*, requiring that the pneumatic controllers with highest historic liquids production be addressed first – would better ensure that the pneumatic controllers that are actuated most frequently, and therefore have the potential to emit more often, are retrofitted first.⁵ These suggestions would have no effect on the current compliance timeframes in the proposed rule.

⁵ For example, Colorado’s Regulation 7 control requirements for on-site natural gas-actuated pneumatic controllers are based on the controller’s bleed rate and prioritizes controls for high-bleed pneumatic controllers (designed to have a continuous bleed rate above 6 SCFH). As noted in a pre-hearing statement given by the Joint Industry Workgroup at the Regulation 7 hearing, this approach better accounts for the fact that “(1) facilities with greater total liquids production typically have more pneumatic controllers; and (2) facilities with greater liquids production have pneumatic controllers that actuate more frequently.” Joint Industry Workgroup, “AQCC Regulation 7 Rulemaking Hearing,” Feb. 18, 2021, available at https://drive.google.com/drive/folders/17WCpy4JKXFXUmjZ_mK-OB76fO7_5w0JC.

Total Historic Non-Emitting Facility – Percent Liquids Production	Total Required Percentage of Pneumatic Controllers In Compliance by January 1, 2024	Total Required Percentage of Pneumatic Controllers In Compliance by January 1, 2027	Total Required Percentage of Pneumatic Controllers In Compliance by January 1, 2030
>75%	80%	85%	90%
>60-75%	80%	85%	90%
> 40-60%	65%	70%	80%
> 20-40%	45%	70%	80%
0-20%	25%	65%	80%

Additionally, Oxy USA requests exemptions for pneumatic controllers that are used as emergency shutdown devices (“ESDs”) located on a wellhead, as those pneumatic controllers are rarely used and provide a negligible contribution to emissions; each actuation of these safety valves emits less than 6 SCF of gas. An ESD is designed to minimize consequences of emergency situations, and will only emit in certain isolated circumstances, such as if a well must be shut in. Because these pneumatic controllers are rarely activated, their emissions impact is minimal.⁶

The requirement in the proposed rule to retrofit existing pneumatic controllers with access to commercial line electrical power is problematic for ESD and artificial lift controllers located on a wellhead. It is not always logistically feasible to electrify a location due to issues outside of Oxy USA’s control, which include right of way issues, distance from line power, and capacity to electrify a facility. Even without the foregoing concerns, the cost and timing can be prohibitive, with costs to run an electrical line to a facility around \$200,000 per mile and lead time up to a year.

⁶ As a point of reference, compare the EPA emission factor for intermittent controllers in the West, which is 17.1 SCF/hr/component, against that of Oxy USA’s pneumatic safety devices, at less than 6 SCF per actuation per component up to 12 times a year. Emissions from pneumatic safety devices such as Oxy USA’s are de minimis. As such, requiring them to be included would gain very little to no emissions benefit and divert resources better used to address higher-emitting sources.

Electrification of wellhead only facilities with artificial lift and ESD controllers would take significant resources to implement with minimal emissions reductions.⁷ Oxy USA requests that ESD and artificial lift requirements are exempt from the requirement to retrofit with access to commercial line electrical power, which allows operators to focus resources to retrofit larger producing locations and would result in the greatest emission reductions.

III. Oxy USA Suggests Removing Control Device Requirements for Thief Hatches Due to Safety Concerns.

Oxy USA also requests that NMED remove the requirements in Section 20.2.250.123 B(7) to install a control device on a thief hatch. The proposed rule defines a “control device” as “air pollution control equipment or emission reduction technologies that thermally combust, chemically convert, or otherwise destroy or recover air contaminants,” and provides that control devices include but are not limited to:

[O]pen flares, enclosed combustion devices (ECDs), thermal oxidizers (TOs), vapor recovery units (VRUs), fuel cells, condensers, air fuel ratio controllers (AFRs), catalytic converters (oxidative, selective, and non-selective), or other emission reduction equipment. A control device may also include any other air pollution control equipment or emission reduction technologies approved by the department to comply with emission standards in this Part.

Based on that definition, Oxy USA is not aware of control devices that may be installed on thief hatches. Thief hatches provide an operator access to the tank interior for inspection, gauging or sampling operations, and usually also provide pressure and vacuum relief of the tank's vapor space through integral, spring-loaded pressure and vacuum relief mechanisms. Any requirement that does not allow a thief hatch's pressure relief device to release pressure during a safety event would be of significant concern. There are no control devices specifically associated with thief hatches by design and for good reason: the risk of installing control devices would create additional

⁷ These wellhead only facilities with artificial lift and ESD controllers typically have fewer than 10 total controllers.

back pressure and limit and/or restrict the ability of the pressure relief device to relieve tank pressure. This would increase the risk of catastrophic events, including excess emissions and environmental concerns, as well as health and safety risks.

Oxy USA proposes that in lieu of requiring a control device on a thief hatch, NMED should consider that the proposed rule's AVO, LDAR and external tank gauging requirements would adequately serve to identify and mitigate leaks around the thief hatches and pressure relief devices.

IV. Oxy USA Supports Flexibility in the Types of Technology Permitted by the Proposed Rule so that Operators Can Continue to Drive Innovation and Reduce Emissions.

Many new emission detection technologies and methods have demonstrated that they can be as effective as hand-held Optical Gas Imaging ("OGI") surveys or Audio, Visual and Olfactory ("AVO") inspections. Continued innovation in emission detection technologies is an important tool for compliance assurance and emission reductions: better technology means better emission detection capabilities. The proposed rule requires leak surveys at a significant number of locations and allows operators to apply for alternative leak monitoring and detection methods, empowering operators to create an all-encompassing surveillance platform that can continue to evolve as newer technologies emerge.

Oxy USA supports NMED's proposal to allow for alternative equipment leak monitoring plans (*see* Proposed Rule at NMAC 20.2.50.116(D)), and also requests that NMED allow for alternative methods to be utilized instead of being wedded to the AVO inspection requirements and schedules. As an example, Oxy USA has been piloting small-sensors that can be placed in multiple positions on location, combined with image and sound recording, as an alternative compliance method to AVO inspections. This method allows for real-time monitoring and alarming of hydrocarbon levels with video and audio surveillance being captured several times per day. The sensors are wireless and can be placed in multiple locations for critical process

1 monitoring. In addition to the small-sensor technology, automation and measurement has the
2 potential to be an alternative compliance method for AVO and LDAR. These are examples of
3 alternative technologies that have the potential to result in more rapid response than AVO
4 inspections, and which can lead to greater emission reductions.

5 **V. There are Opportunities to Reduce the Administrative Burden Imposed by the**
6 **Proposed Rule’s Recordkeeping, Monitoring and Reporting Requirements While**
7 **Maintaining Compliance Assurance and Emissions Reduction.**
8

9 Oxy USA recognizes that recordkeeping and reporting requirements are an important
10 component of NMED’s ability to ensure compliance. However, Oxy USA is concerned that, as
11 drafted, the proposed rule would greatly increase the administrative burden on operators without
12 providing significant improvements in compliance assurance and emissions reductions.

13 **A. The Proposed Rule’s Requirement that Operators Install and Utilize EMT**
14 **Creates a Significant Administrative Burden Without Improving on Current**
15 **Compliance Databases or Reducing Emissions.**
16

17 If finalized as proposed, the rule would require operators to install and utilize Equipment
18 Monitoring Tags (“EMT”). All equipment subject to control device or monitoring requirements
19 under the proposed rule would be required to have monthly equipment scans, monitoring, and
20 recordkeeping. Oxy USA estimates that over 8,000 pieces of equipment, including storage vessels,
21 VRUs, VCUs, flares, pneumatic valves, and engines would fall under the purview of these
22 requirements. Furthermore, Oxy USA has estimated that the initial and reoccurring EMT scans
23 required under the proposed rule, which have equipment-specific inputs that must be adjusted for
24 each piece of tagged equipment, would require a staggering 16,892 hours of survey time and 3,370
25 hours of verification time to complete.

26 Notably, the proposed rule provides no flexibility with respect to how data may be collected
27 and maintained for compliance assurance. The proposed rule also requires operators conducting

1 monitoring activities to scan the EMT for each piece of equipment before and after each
2 monitoring event. Functionally, this requirement disincentivizes the use of flyovers and alternative
3 technologies for monitoring purposes. If finalized as proposed, the rule would require operators
4 to scan each piece of equipment implicated in the flyover before and after the flyover occurs,
5 thereby requiring far more time and manpower than is currently associated with flyover
6 monitoring. Disincentivizing this efficient, effective monitoring method cuts against the intent of
7 the proposed rule. Instead, Oxy USA suggests that the rule allow for alternative methods of
8 monitoring without requiring operators to scan in and scan out each piece of equipment surveyed
9 using an alternative monitoring method.

10 Oxy USA currently maintains databases that contain equipment information, emissions
11 data, and documentation of leak inspections. These databases are robust and have historically
12 proven adequate to ensure that Oxy USA is in material compliance with NMED air rules. While
13 EMT provides component-specific tracking, this approach provides little or no additional
14 compliance assurance beyond the facility-level approach already in place by Oxy USA. Any
15 benefits are heavily outweighed by the time and cost associated with development and
16 implementation of an EMT system, especially given that the functionality of an EMT system is
17 overwhelmingly duplicative of the databases that are already in use. Rather than imposing EMT
18 requirements on operators, like Oxy USA, that currently collect and retain the data and reports
19 necessary for compliance assurance, the proposed rule should be modified to allow for use of any
20 database that can produce a report that provides NMED with reasonable compliance assurance.

1 **B. The Proposed Rule’s Requirement That PTE Calculations be Certified by a**
2 **Qualified Professional Engineer Is Unduly Burdensome and Internally**
3 **Inconsistent.**
4

5 As drafted, the proposed rule requires operators to calculate the PTE for each emission
6 source and to have those PTE calculations certified by a qualified professional engineer (“PE”).
7 See Proposed Rule at 20.2.50.111(B). Certification of PTE calculations is a reasonable
8 requirement to confirm the validity of those calculations. However, the proposed rule’s
9 requirement that only a qualified PE may make that certification creates a significant burden in
10 terms of time required for a PE to complete and certify PTE calculations for each emission source.
11 In New Mexico, Oxy USA has approximately 645 facilities and 2,745 wells for which a PTE
12 calculation would be required. Assuming two hours per calculation for each source, this means
13 that PEs would be required to conduct 6,780 hours of work, or approximately 3.25 years of eight-
14 hour workdays, to complete this certification requirement. At standard rates, hiring a consultant
15 to assist with this effort would cost approximately \$800,000. Modifying the rule to allow a
16 qualified in-house engineer to certify PTE calculations as an accommodation for the number of
17 calculations that will need to be certified would significantly lighten this burden.

18 Modifying the proposed rule to allow certification by a qualified in-house engineer would
19 also make the proposed rule more internally consistent. Section 20.2.50.115(B)(6)(c) of the
20 proposed rule requires certification of closed vent systems for a centrifugal compressor wet seal
21 fluid degassing system, reciprocating compressor, pneumatic controller or pump, or storage vessel
22 using a control device or routing emissions to a process. However, in this instance, the proposed
23 rule explicitly provides that this certification may be made “by a qualified professional engineer
24 or an in-house engineer with expertise regarding the design and operation of the closed vent
25 system.” Updating Section 20.2.50.111(B) of the proposed rule to allow certification of PTE

1 calculations by an in-house engineer would create greater consistency within the rule. Oxy USA
2 also proposes that if an operator were to choose the option to determine applicability based on
3 actual emissions, an in-house engineer would be able to certify those calculations.

4 **C. The Leak Repair Requirements Included in the Proposed Rule Are Not**
5 **Always Feasible.**
6

7 Under the proposed rule, once a leaking component has been identified by using an OGI
8 camera, the operator must repair that component within seven days of detection. *See* Proposed
9 Rule at 20.2.50.116(E). If the leak is identified through another method, such as an AVO
10 inspection or Method 21, the operator must repair the component within 15 days of detection.
11 Although Oxy USA appreciates the need for timely leak repair and endeavors to complete all
12 repairs as efficiently as possible, it is not always technically feasible to complete repairs within a
13 calendar week.

14 Depending on the nature and location of the leak, an operator may need to order and obtain
15 new parts. Even if a new part is already on hand or readily available, operators may need to work
16 with qualified personnel or a third-party contractor to complete and verify the repair. Supply
17 timelines and personnel or contractor work schedules do not always allow for immediate leak
18 repair. Recent discussions with control device manufacturers and suppliers have confirmed that
19 there is already a shortage of qualified personnel who can build, service and repair control devices.
20 The market demand for control devices borne of operators' attempts to comply with the proposed
21 rule will create even more of a strain on trained and qualified personnel to service and repair
22 control devices. While Oxy USA believes the proposed seven-day timeline could be feasible if
23 recast as a deadline for an initial repair attempt, the repeated shutdowns that would be required to
24 attempt compliance with a seven-day full repair requirement would negatively affect facility
25 emissions. Modifying the proposed rule to allow for delay of repair in limited circumstances, or

1 allowing for 15 days to repair leaks identified through either OGI or AVO, would address this
2 issue.

3 In light of these considerations, Oxy USA respectfully requests that the proposed rule allow
4 for a delay of repair under limited situations, such as when required parts are unavailable; when
5 the repair requires a shutdown; when qualified personnel or contractors are not available within
6 the required repair timeframe; or for other documented good cause.

7 **D. The 24-Hour Reporting Requirement Does Not Provide Flexibility for**
8 **Information Requests That Require Time to Complete.**
9

10 Oxy USA understands that timely reporting plays a key role in NMED's ability to ensure
11 that New Mexico operators are complying with the department's emissions rules. However, the
12 proposed rule requires owners or operators to provide NMED with information within 24 hours of
13 a request from the department. See Proposed Rule at 20.2.50.112(D). This extremely short
14 timeframe provides little flexibility for situations where the requested information must be
15 collected from multiple sources or where the requested information will otherwise take time to
16 assemble. Because extending that timeline would have no effect on a facility's emissions, Oxy
17 USA suggests that the proposed rule require reporting within three to five business days of a
18 request from NMED. This would provide operators with enough time to assess the request;
19 determine which documentation is responsive; and assemble the full set of requested information,
20 thereby ensuring that the department receives its requested material efficiently.

21 **E. The Third-Party Data Verification Requirement Should Be Modified to**
22 **Include Reasonable Limitations.**
23

24 Oxy USA recognizes the utility in allowing for a third party to verify data or information
25 collected, reported, or recorded under the proposed rule. However, allowing NMED to require
26 that an operator retain a third party at the operator's expense with no limitations on frequency

creates an unfair burden. Oxy USA takes great pains to ensure that the data and information it collects and reports to the department is accurate. Oxy USA requests that the proposed rule be modified to limit the number of times NMED can require an operator to retain a third party to verify data to once a year.

VI. The Proposed Rule’s Approaches to Credible Information and the Presumption of Noncompliance Pose Significant Concerns and Effectively Restrain an Operator from Being Able to Defend Itself.

Oxy USA appreciates NMED’s efforts to establish meaningful opportunities for members of the public to engage with industry. In some instances, this includes the development and use of evidence collected by third parties in connection with compliance assessment. NMED has proposed a concept that all information collected by a third party be considered “credible information,” regardless of the methodology used to collect that information, and that such information creates a presumption of noncompliance unless rebutted. Oxy USA is concerned that the lack of a definition for the term “credible information” and the proposed rule’s unprecedented approach to information collected by third parties – especially the presumption of noncompliance – provides no boundaries on what information may be considered “credible,” creates a considerable burden on operators to constantly defend themselves against improper presumptions of noncompliance, misallocates NMED and operator resources, implicates constitutional due process rights, and poses a threat to public safety.

A. The Proposed Rule Provides No Parameters to Ensure Third-Party Information is Accurate.

Generally, credible evidence provisions work by allowing third parties to collect evidence and submit it to the relevant state agency for further screening and proceedings. The proposed rule takes this principle a step further by also creating a presumption of noncompliance based on third-party evidence. However, the proposed rule does not account for the fact that not all evidence is

1 equally valid or accurate. The proposed rule provides no guidance on what types of third-party
2 information would be considered “credible,” and automatically creates a presumption of
3 noncompliance if a member of the public provides NMED with information.

4 In contrast, the proposed rule contains specific monitoring and reporting requirements for
5 operators, such as allowable inspection methods and instrument calibration requirements, that are
6 designed to ensure NMED receives accurate information. See Proposed Rule at NMAC
7 20.2.50.116. If an operator wishes to use an alternative emissions monitoring method, they must
8 submit a plan to NMED and the agency has discretion to accept or reject that plan.⁸ See Proposed
9 Rule at 20.2.50.112(B). Industry employees who submit information to the agency have access to
10 calibrated instruments and accurate data, and agencies performing compliance investigations use
11 trained investigators and calibrated equipment. But the proposed rule contains no requirement that
12 members of the public use monitoring methods approved under the proposed rule, and there is no
13 guarantee that members of the public have the training, expertise, or equipment necessary to
14 investigate matters correctly. This means a presumption of noncompliance could be created based
15 on information that is misleading or simply inaccurate, either because it was gathered using
16 methods not approved by permit or regulation or because it was collected with poorly calibrated
17 instruments.

18 This approach is unprecedented, as other rules regarding third-party information require
19 that the third-party information be collected in accordance with permit or regulatory requirements
20 – a measure that, if incorporated into the proposed rule, could address some of the concerns
21 surrounding information submitted by members of the public. For example, Colorado’s rules
22 provide that “[w]hen compliance or non-compliance is demonstrated **by a test or procedure**

⁸ Oxy USA suggests that NMED develop formal guidance, standards and/or methodologies to be used for determining whether to accept an alternative emissions monitoring method plan.

1 **provided by permit or other applicable requirement**, the owner or operator shall be presumed
2 to be in compliance or non-compliance unless other relevant credible evidence overcomes that
3 presumption.” 5 Colo. Code Regs. § 1001-2:II.I (emphasis added).

4 Similarly, Texas rules authorize the executive director of the Texas Commission on
5 Environmental Quality (“TCEQ”) to initiate an enforcement action based on information provided
6 by private individuals, but require individuals to use agency protocols, procedures, or guidelines
7 when collecting and submitting information or evidence, as well as proper chain of custody
8 procedures for any samples collected. Tex. Water Code § 7.0025; 30 Tex. Admin. Code § 70.4;
9 *see also* TCEQ, “Title V Deviation Reporting and Permit Compliance Certification,” 2012, at
10 pages 11-12 (noting that credible evidence can include, among other things, “credible citizen-
11 collected evidence indicating noncompliance with a permit term or condition brought to the permit
12 holder’s attention”); TCEQ, “Gathering and Preserving Information and Evidence Showing a
13 Violation,” available at <https://www.tceq.texas.gov/compliance/complaints/protocols>.

14 Even in New Mexico’s own regulations, such as those applicable to construction permits,
15 the state creates no presumption of noncompliance and rather provides a list of information
16 gathering methods that are presumptively credible. *See* NMAC 20.2.72.218. In short, creating a
17 *per se* presumption of non-compliance, without any procedural safeguards in place to ensure the
18 validity of the collected information means operators face the unfair, unprecedented, and perhaps
19 impossible task of “proving the negative” to avoid substantial penalties, effectively hindering an
20 operator’s ability to adequately defend itself from state-mandated presumptions of non-
21 compliance.

1 **B. The Proposed Rule Puts Operators at a Disadvantage When Defending**
2 **Against Presumptions of Noncompliance.**

3 Under the proposed rule, AVO inspections must be conducted either weekly or monthly,
4 based on each facility's production amounts. If there is a time delay of days or weeks between
5 when a member of the public gathers information that allegedly demonstrates noncompliance and
6 when the operator learns of the presumptive noncompliance, or if the alleged noncompliance
7 occurred between scheduled inspections, the data required to rebut that presumption may be
8 difficult or impossible to obtain. Operators that are in compliance with monitoring and
9 recordkeeping requirements under the proposed rule would still be at a disadvantage when
10 defending against a presumption of noncompliance if information provided by a third party is stale.
11 This would effectively prevent operators from being adequately able to defend themselves against
12 presumptions of noncompliance, even if they have been in compliance with the rule all along.
13 When combined with the concerns surrounding accuracy of third-party information, this means
14 that operators could find themselves in a position where they are presumed to be noncompliant
15 based on inaccurate information and unable to adequately rebut that presumption.

16 **C. As Drafted, the Proposed Rule Creates the Risk of Constitutional Due Process**
17 **Violations and Associated Administrative Burdens.**

18 Presuming noncompliance based on any evidence submitted by third parties, without
19 additional screening, confirmation, or validation by NMED, creates the possibility of due process
20 violations under the U.S. Constitution. *See City of Las Cruces v. Rodriguez*, 2014 WL 5866773,
21 at *6 (Ct. App. N.M. Oct. 16, 2014) (noting that monetary fines are a property interest sufficient
22 to support a procedural due process claim under the 14th Amendment of the U.S. Constitution).
23 In New Mexico, courts have found that imposition of a monetary fine or penalty is a sufficient
24 property interest to support a procedural due process claim, and therefore the legal residuum rule
25 – which requires that administrative actions be supported by at least a residuum of competent

evidence which would support a verdict in a court of law – applies. *See Rodriguez*, 2014 WL 5866773, at *6; *Bransford v. State Taxation and Revenue Dep’t, Motor Vehicle Div.*, 960 P.2d 827, 832 (Ct. App. N.M. 1998).

Presuming non-compliance, pursuing enforcement, and assessing a fine or penalty based on third party information alone would create an actionable due process issue because, as noted above, the proposed rule neither establishes standards to ensure the accuracy of third-party information nor adequately accounts for concerns surrounding a compliant operator’s ability to adequately rebut presumed noncompliance. Establishing the accuracy of third-party information before utilizing that information to assess fines or penalties would create a significant regulatory burden for NMED. Modifying the proposed rule to require that third-party information follow methodologies included in relevant permits and regulations and removing the presumption of noncompliance could help reduce this administrative burden and alleviate the constitutional due process concerns.

D. The Proposed Rule Could Result in Potentially Unsafe Behavior by the Public.

Industry employees receive regular and extensive training, wear personal protective equipment, and are provided with gas monitors while on site to ensure their safety. There is no guarantee that members of the public will have the same training and experience at oil and gas facilities. Oxy USA’s Level 1 Operations and Maintenance Training requires 36 hours of training, while Oxy USA’s Level 2 Production Operations program totals 118 hours of training covering topics such as regulatory and compliance requirements, production facility operations, gas processing and compression, enhanced recovery operations, and measurement controls and treatment. Oxy USA also provides study materials for each class and an additional 268 hours of optional computer-based training, and requires additional HSE courses covering various safety

1 topics. These training courses and requirements are in place to ensure that Oxy USA employees
2 understand how to keep themselves and others safe. If a member of the public enters or approaches
3 a facility to obtain information without undergoing adequate training and without fully
4 understanding how to be safe in such a facility, members of the public could intentionally or
5 unintentionally put themselves or others in situations where there is a significant risk of harm for
6 themselves, operators and surrounding communities.

7 **VII. The Proposed Rule’s Burden Shifting from Buyer to Seller on Due Diligence**
8 **Responsibilities and Equipment Certification Significantly Impacts Transactions.**

9 As proposed, the rule itself provides robust compliance assurance requirements in the form
10 of monitoring, recordkeeping, and reporting obligations. As such, current operators (*i.e.*, sellers)
11 are already tasked with ensuring compliance with agency requirements. Adding an additional
12 certification requirement creates significant obstacles to transactions, conflicts with established
13 New Mexico principles concerning freedom of contract, and disincentivizes buyers from investing
14 in assets they could improve.

15 **A. The Proposed Rule Impedes Freedom of Contract.**

16 New Mexico case law establishes that “New Mexico has a strong public policy in favor of
17 freedom of contract.” *Midway Leasing, Inc. v. Wagner Equipment Co.*, 356 F.Supp.3d 1207, 1211
18 (D.N.M. 2018) (*citing Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶20, 134 N.M. 341).
19 In addition, “[P]ublic policy encourages freedom between competent parties of the right to
20 contract, and requires enforcement of contracts, unless they clearly contravene some positive law
21 or rule of public morals.” *General Elec. Credit Corp. v. Tidenberg*, 1967-NMSC-126, ¶ 14, 78
22 N.M. 59, 62. NMED has offered no explanation to override New Mexico’s strong public policy
23 in favor of freedom of contract, and there is no readily identifiable benefit to NMED in transferring
24 the due diligence requirement from the buyer to the seller. In fact, this provision of the proposed

1 rule could prevent investment in facility upgrades designed to ensure that facilities come into
2 compliance with the proposed rule. As such, this provision could thwart the overall purpose of
3 emission reduction.

4 **B. The Proposed Rule Significantly Impacts the Cost and Timing of Transactions**
5 **Between Private Parties.**

6 In typical transactions, the seller makes certain representations and warranties concerning
7 compliance with laws, but the buyer typically completes its own evaluation of facilities and
8 equipment as part of its due diligence. The proposed rule shifts the burden for due diligence to the
9 seller. This increases costs for the seller, and that cost increase may ultimately be passed along to
10 the buyer. This provision of the proposed rule arguably interferes with the risk allocation structure
11 that buyers and sellers agree to in their contractual relationship, which customarily includes
12 materiality qualifications and monetary thresholds, deductibles and caps, and other limitations.
13 The proposed rule may effectively add another basis of liability for the seller, *i.e.*, failure to identify
14 a potential instance of noncompliance to the buyer, or may result in a further limitation of the scope
15 of due diligence a seller permits a buyer to conduct. The proposed rule also disincentivizes the
16 buyer from conducting a thorough review of the subject assets, which increases the possibility that
17 the buyer could fail to identify other issues outside the proposed rule that need to be addressed.

18 In addition to concerns associated with risk allocation, the application of this rule may
19 impede the current owner's ability to make a sale within the time frame the seller and buyer have
20 agreed to, as the seller will now be required to complete a "full compliance evaluation" in a
21 specifically prescribed window before a sale. This could potentially delay the timing of sale
22 transactions and, in some cases, could entirely prevent a seller from completing a sale. Should the
23 timing of a sale be delayed for any commercial reason, the proposed rule would require the seller
24 to repeat the same full compliance evaluation – with the same timing risks – in order to abide by

1 the prescribed three month window, thereby doubling the costs of compliance for the transacting
2 parties. The proposed rule also contains no exceptions for material compliance. Taken to the
3 extreme, if one piece of equipment out of several thousands fails to meet one requirement of the
4 proposed rule, this provision could prevent the owner from selling the asset lest they risk
5 noncompliance.

6 This compliance evaluation is more consistent with a buyer's due diligence activities in a
7 transaction, as indicated by new owner audit programs enacted on both the state and federal level.
8 For example, the Texas Environmental, Health, and Safety Audit Privilege Act provides that
9 prospective purchasers may initiate a pre-acquisition audit to identify potential areas of
10 noncompliance and that new owners may qualify for immunity against enforcement so long as
11 certain notice and disclosure requirements are met. Tex. Health & Safety Code § 1101.154,
12 1101.155. On the federal level, EPA's audit policy provides incentives tailored to new owners
13 that conduct an audit of newly acquired assets, such as penalty mitigation beyond that offered by
14 EPA's standard audit policy and an expanded range of violations that may be eligible for audit
15 policy benefits. See EPA, "EPA's Interim Approach to Applying the Audit Policy to New
16 Owners," 2021, available at [https://www.epa.gov/compliance/epas-interim-approach-applying-](https://www.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners)
17 [audit-policy-new-owners](https://www.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners). As drafted, the proposed rule creates additional burdens for transacting
18 parties and chills transactions within the state with little to no benefit to NMED.

19 **C. If Implemented, the Proposed Rule Will Require Significant Clarifications.**

20 Section 20.2.50.112(C)(3) of the proposed rule provides that "[b]efore the transfer of
21 ownership of equipment subject to this Part, the current owner or operator shall conduct and
22 document a full compliance evaluation of such equipment. . . . [and] include a certification by a
23 responsible official as to whether the equipment is in compliance with the requirements of this
24 Part." The term "owner" is defined as "the person or persons who own a stationary source or part

1 of a stationary source.” There are several parties who own assets but do not operate them,
2 including joint working interest partners. If a joint working interest owner is selling its non-
3 operated interests, it may not have access to the equipment to conduct a “full compliance review,”
4 and it may not have the ability to cause the operator to conduct such a compliance review. In this
5 situation, the working interest owner would be precluded from selling its non-operated interests in
6 the equipment, amounting to a restriction on alienability of its real property interests.

7 The rule is also vague regarding what the term “compliance” means. The term
8 “compliance” is not quantified or qualified by any objective measure except for the “[compliance]
9 with the requirements of [the rule].” It is not clear how an owner would know whether its activities
10 amounted to a “full compliance evaluation” without specific guidance from NMED, nor is it clear
11 how an owner would be able to ascertain the costs and efforts required to comply with the rule.
12 For example, there is nothing to indicate whether a “full compliance evaluation” involves a review
13 of records and permits or an on-site inspection, or who must complete the record review or on-site
14 inspection. Nor is there clarification as to whether the compliance review includes each provision
15 of the proposed rule, or if it is meant to focus on recordkeeping and monitoring requirements,
16 reporting requirements, and/or installation and retrofitting requirements. Furthermore, the
17 proposed rule provides no clarity as to whether it requires full compliance or material compliance,
18 if a responsible official would be able to certify equipment is in compliance if a seller lacks certain
19 monitoring or reporting records, or even which parties NMED envisions enforcing the rule.

20 Oxy USA believes this certification requirement should be removed. In the alternative,
21 Oxy USA suggests modifying the proposed rule to require that the buyer of the assets conduct a
22 compliance audit within a certain number of months following the completion of a transaction, as
23 the compliance evaluation is more consistent with a buyer’s due diligence activities in a

1 transaction. An owner of equipment is required to comply with applicable law and regulatory
2 requirements, but this rule as proposed would add additional burdens to transacting parties with
3 little or no benefit to the environment.