

**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)**

**REPLY IN SUPPORT OF CLEAN AIR ADVOCATES AND EDF’S MOTION TO
STRIKE UNSUPPORTED “COMMENTS” FROM NMOGA’S AMENDMENTS TO
PROPOSED 20.2.50 NMAC**

Preliminary Statement

The New Mexico Oil and Gas Association (“NMOGA”) has offers no convincing response to Clean Air Advocates¹ and Environmental Defense Fund’s (“EDF”) motion to strike its unsupported “comments” from its redlines. NMOGA claims it has supported its comments in its redlined amendments with testimony, but then provides only **one** example where a witness allegedly adopts comments in one of NMOGA’s redlined sections – Section 20.2.5.223 NMAC. But even that example refers to **only one** of NMOGA’s **16 comments** in that section of its last redline, and NMOGA does not even begin to provide support for the rest of its **180 or so comments** laced throughout its redlines.

NMOGA is required to support its technical factual allegations and technical expert opinions with witness testimony. 20.1.1.302.A(4), (6), -B NMAC. NMOGA has failed to provide proper evidentiary support for its comments. NMOGA’s unsupported comments in its two redlines, in Appendix B and Exhibit 47, must be stricken from the record, and NMOGA must be required to immediately file a new redline without comments.

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.

Argument

I. NMOGA OFFERS NO CONVINCING EXPLANATION WHY ITS UNSUPPORTED COMMENTS SHOULD NOT BE STRICKEN

In its response, NMOGA first argues that its comments should be allowed because they provide justification for NMOGA's proposed amendments at the applicable sections and are therefore "helpful" to the Environmental Improvement Board ("EIB"). NMOGA Resp. at 1.

However, whether NMOGA's format is "helpful" is not at issue and is not relevant to whether NMOGA's comments are properly in the record before the EIB. The issue before the EIB is whether NMOGA's comments represent evidence that the EIB can properly consider. They are not. NMOGA's comments represent allegations of technical fact and expert opinion. The only way that the EIB may consider such allegations and proffered opinions is through witness testimony. NMOGA has failed to support its allegations and opinions with witness testimony, and they must be stricken from the record.

NMOGA next argues that 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." *Id.* at 2. NMOGA then offers one example in which a witness made reference to its redline. The entirety of that testimony is footnoted below.²

² **"V. STORAGE VESSELS, 20.2.50.123 NMAC**

Q. IN NMED EXHIBIT 32, PAGES 138 TO 148, NMED TECHNICAL WITNESSES MS. KUEHN AND MR. PALMER TESTIFY THAT THE STANDARDS FOR STORAGE VESSELS IN PROPOSED 20.2.50.123 NMAC SHOULD BE ADOPTED AS PROVIDED IN NMED EXHIBIT 41. DO YOU AGREE?

A. NO.

Q. WHAT ARE YOUR TECHNICAL CONCERNS WITH PROPOSED 20.2.50.123 NMAC AS PRESENTED IN NMED EXHIBIT 41 THAT NMED'S TECHNICAL TESTIMONY FAILS TO ADDRESS?

That testimony, however, provided by NMOGA witness Adam Meyer, refers only to the **first comment** of NMOGA's under Section 123.A of its redline in Exhibit 47. NMOGA offers 15 more comments under Section 123 of its redline. The entirety of the one comment is footnoted below.³ A comparison between Mr. Meyer's testimony and the one comment

A. One concern is that the TPY applicability threshold does not indicate whether averaging production across the tanks is permissible. From a technical perspective, the potential of one tank to cause emissions can be shown to be the same as its adjacent overflow tank by assessment or test of the vapor spaces in each. If they are found to be adequately communicating their vapor spaces, then the tanks have the same potential of emissions even if production is restricted to one of them. The NMOGA redlines intend to clarify that.

Another concern is if closed vent system analysis is adopted to mean what has become expected from recent consent decrees on the subject. More specifically, the expectation that closed vent system shall be designed for the simultaneous dump or flow of all "nonprecluded" inputs into the tank system. This practice often results in oversizing of control devices, which can lead to turndown issues, not to mention costs.

The other concern I have is the applicability of the rule for single tank batteries. Smaller tank batteries often have higher pressure spikes due to unavailable vapor space, as such can lead to a larger facility modification than was previously intended/estimated. I believe there is a point of diminishing return, and therefore believe that single tank batteries and other facility circumstances need a carveout of the applicability.

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

A. Yes."

NMOGA Ex. 42 at 10:37-11:33.

³ "Comment on 20.2.50.123(A): Redline required to align with proposed changes per the Valor Memo - Storage Vessels 20 20.2.50.123. Redline regarding averaging emissions across manifolded tank batteries is required to provide a reasonable methodology for determining potential emissions and rule applicability for such configurations. Where multiple manifolded storage vessels share headspace and are routed to a common end point, emissions from each respective tank are indistinguishable from one another. Where such configurations are routed to and controlled by a common control device, emissions from all tanks achieve the same destruction efficiency. Consequently, determining emissions for each respective tank by averaging the potential emissions rate across the number of units in the battery is an appropriate measure of each unit's potential emissions. Where the average VOC emissions across the number of storage vessels in the controlled battery is equal to or greater than the applicability threshold, all of the storage vessels in the controlled battery are subject to the standard. However, where the average emissions are less than the applicability threshold, none of the storage vessels in the controlled battery are subject to the standard. This is the approach EPA

demonstrates that Mr. Meyer did not even provide testimony in support of the full comment⁴, let alone the other 15 comments in that section or the 180 or so comments throughout the redline.

NMOGA next argues that as the “person” offering the “text of any recommended modifications to the proposed regulatory change” it is entitled to include “any proposed statement of reasons for adoption of the rules,” citing 20.1.302.A(5)-(6) NMAC, and therefore NMOGA is authorized to submit a “statement of reasons” unsupported by witness testimony. *Id.* at 3.

NMOGA completely misapprehends the EIB’s rules. There is nothing in the requirements for filing notices of intent that authorize a party to allege technical facts or offer technical expert opinion in a “statement of reasons” without those allegations being supported by witness testimony. The EIB’s rules require all technical testimony to be supported by witness testimony. 20.1.1.302.A(2), (4) NMAC; *cf. Gila Info. Res. Project. v. New Mexico Water Quality Control Comm’n*, 2005 NMCA 139, ¶ 7 (Commissioner relying on “matters outside the record” to support his vote supported court’s “view that the Commission’s [vote] was arbitrary and an abuse of discretion.”). For all practical purposes, NMOGA’s “comments” are “technical testimony of [a] witness for whom a notice of intent was not timely filed,” and must be excluded.

20.1.1.302.B NMAC. Indeed, every party in this proceeding has filed notices of intent with witness testimony who support the party’s proffered exhibits. No party has attempted to put

has taken for determining applicability under 40 C.F.R. Part 60, 30 Subpart OOOOa. See 85 Fed. Reg. 57398, 57411 (Sept. 15, 2020).”

NMOGA Ex. 47 at 53:7-17.

⁴ For example, nowhere in Mr. Meyer’s testimony does he support the following statement in the comment: “This is the approach EPA has taken for determining applicability under 40 C.F.R. Part 60, 30 Subpart OOOOa. See 85 Fed. Reg. 57398, 57411 (Sept. 15, 2020).”

dozens of unsupported allegations the record. NMOGA, like every other party, must rely only on witness testimony to support factual allegations and expert opinions, and may not rely on anonymously-authored “comments” to support its case.

Finally, NMOGA argues that it is Clean Air Advocates and EDF that bear the burden of identifying each and every comment that is not supported by witness testimony. NMOGA Resp. at 4.

First, Clean Air Advocates and EDF have alleged that, almost without exception, there is no citation to witness testimony in NMOGA’s 180 or so comments. We have met our burden. Second, and more to the point, it is NMOGA that in the first instance was required to cite to witness testimony in support each comment in order to demonstrate that each comment is proper evidence before the EIB. NMOGA did not do so and has not demonstrated in its response that the comments offered in its redlines have any evidentiary basis in the record. Its unsupported comments are therefore not properly before the EIB for consideration. 20.1.1.302.A(2), (4) NMCA; *cf. Gila Info. Res. Project. v. New Mexico Water Quality Control Comm’n*, 2005 NMCA 139, ¶ 7.

Conclusion

Based on the reasons set forth in this reply and on Clean Air Advocates and EDF’s motion to strike, Clean Air Advocates and EDF request the Hearing Officer to strike all comments from NMOGA’s proposed amendments filed in its notices of intent to file direct and rebuttal testimony in NMOGA Appendix B and Exhibit 47, and to order NMOGA to immediately file a redline without comments.

Respectfully submitted,

/s/ Tannis Fox

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

/s/ David R. Baake

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

Attorneys for 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

/s/ Elizabeth deLone Paranhos

Elizabeth deLone Paranhos
deLone Law Inc.
1555 Jennine Place
Boulder, Colorado 80304
303.442.0610
elizabeth@delonelaw.com

Attorney for Environmental Defense Fund

Certificate of Service

I certify that a copy of the foregoing pleading was emailed to the following on September 19, 2021:

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

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

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

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

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

Dalva L. Moellenberg
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta

Santa Fe, New Mexico 87501-2758
DLM@gknet.com

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

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

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

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

Louis W. Rose
Kari Olson
Ricardo S. Gonzales
P.O. Box 2307
Santa Fe, New Mexico 87504-2307
lrose@montand.com
kolson@montand.com
rgonzales@montand.com

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

Daniel Jaynes
Keifer Johnson
Gabriel Pacyniak
Natural Resources and Environmental Law
Clinic
University of New Mexico
1117 Stanford Drive NE
Albuquerque, New Mexico 87106
505.277.2146
jaynesda@law.unm.edu
johnsoke@law.unm.edu
pacyniak@law.unm.edu

List Devore
Air Quality Specialist
Intermountain Region
Lisa_devore@nps.gov
John Vimont
Branch Chief
Air Resources Division
John_vimont@nps.gov

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

Daniel L. Timmons

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

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

Stuart R. Butzier
Christina C. Sheehan
Modrall, Sperling, Roehl, Harris & Sisk,
P.A.
Post Office Box 2168
Albuquerque, New Mexico 87103-2162
srb@modrall.com
ccs@modrall.com [Jeffrey Holmstead](mailto:Jeffrey.Holmstead@modrall.com)

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

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

/s/ Tannis Fox
Tannis Fox