

**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 AND EDF’S MOTION TO STRIKE UNSUPPORTED
“COMMENTS” FROM NMOGA’S AMENDMENTS TO PROPOSED 20.2.50 NMAC**

Preliminary Statement

In its amendments to proposed 20.2.50 NMAC, the New Mexico Oil and Gas Association (“NMOGA”) adds “comments” to every section of the proposed rule. See NMOGA App. B and Ex. 47. The vast majority of NMOGA’s approximately 180 comments allege technical and scientific facts and/or offer technical and scientific expert opinion. See NMOGA App. B and Ex. 47. With few exceptions, NMOGA fails to cite to any testimony or exhibits to support its alleged facts or proffered opinions.

The Rulemaking Procedures of the New Mexico Environmental Improvement Board (“EIB”) and the EIB and Hearing Officer’s procedural orders in this matter authorize submission of testimony and exhibits in the parties’ notices of intent to present direct and rebuttal testimony. See 20.1.1.302.A(4), (6), -B; Order of Hearing Determination and Hearing Officer Appointment at ¶¶ 2, 3 (June 8, 2021) (“Order”); Procedural Order at 1 (Aug. 26, 2021).

Submission of volumes and volumes of alleged technical facts and anonymous expert technical opinion in a redline document is not authorized by the rules or orders in this proceeding and is wholly improper. NMOGA’s “comments” throughout its proposed amendments should be struck. To make its case, NMOGA, like the rest of the parties, must rely on the testimony and exhibits offered as part of that testimony, which must be submitted in its notices of intent to file direct and rebuttal testimony.

Argument

I. THE EIB’S PROCEDURAL RULES REQUIRE ALL TECHNICAL ALLEGATIONS OF FACT AND TECHNICAL OPINIONS IN NOTICES OF INTENT TO BE SUPPORTED BY TESTIMONY OR EXHIBITS

The EIB’s procedural rules require any person who intends to present “technical testimony”¹ at hearing to file a notice of intent to present technical testimony. 20.1.1.302.A NMAC. The notice “shall” include the “direct testimony” of each technical witness, the “text” of any recommended modifications to the proposed regulatory change, and all “exhibits anticipated to be offered by” the technical witness. 20.1.1.302.A(4)-(6) NMAC. The hearing officer may also require submission of “written rebuttal testimony.” 20.1.1.302.B NMAC. The Order and Procedural Order in this matter both require compliance with 20.1.1.302 NMAC and require parties to submit witness testimony and exhibits in the parties’ notices of intent. Order at ¶¶ 2, 3; Procedural Order at 1.

The only proper way to make technical argument in a notice of intent before the EIB is to file testimony of a technical expert. A technical expert can then offer exhibits as part of his or her testimony. The EIB’s rules do not allow parties to allege technical facts or offer expert technical opinion in their notices of intent (or at hearing) that is not supported by a witness. Furthermore, there is no accepted practice before the EIB that allows a party to provide unsupported “comments” to its proposed modifications without substantiating those comments with testimony or citing to the evidence in the record to support any such commentary.

The EIB’s procedural rules serve an important purpose. By requiring parties to make

¹ “Technical testimony” means “scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.” 20.1.1.7.S NMAC.

technical argument, and introduce technical exhibits, through the testimony of identified experts, the rules ensure that the parties and the EIB will have the opportunity to (1) consider the qualifications of the person making the technical argument and (2) question that person about the basis for his or her opinions at the hearing. It is impossible to evaluate or cross-examine anonymous technical comment in NMOGA's redlines, which is why the EIB's rules do not allow for it.

II. NMOGA HAS VIOLATED THE EIB'S RULES BY SUBMITTING COMMENTS WITHOUT PROVIDING OR CITING TO EVIDENTIARY SUPPORT AND ITS COMMENTS MUST BE STRUCK

Despite the EIB's clear requirement that all technical facts and opinion set forth in notices of intent be supported by testimony, NMOGA has submitted dozens and dozens of unsupported technical "comments" throughout in its proposed amendments to 20.2.50 NMAC in its notices to file direct and rebuttal testimony. *See* NMOGA App. B and Ex. 47. Most of NMOGA's comments are substantive, and allege technical and scientific facts and/or offer technical and scientific opinion without providing or citing to its evidentiary support for the alleged facts or proffered opinions.

Only infrequently does NMOGA support its allegations with citations to its testimony or exhibits. The extent to which various comments are supported by evidence that is not cited to, the parties cannot be expected to comb through the hundreds of pages of NMOGA's testimony and exhibits to try to find evidentiary support for each of NMOGA's 180 comments. The burden is on NMOGA to present its technical arguments through technical testimony by an identified expert.

The only cure for NMOGA's violation of the rules is to strike NMOGA's comments in its proposed amendments filed in both its notices of intent. *See* NMOGA App. B and Ex. 47.

Striking NMOGA's comments in no way prejudices NMOGA. All of NMOGA's testimony and exhibits remain in the record and may appropriately be considered by the EIB.

Notably, Clean Air Advocates raised this objection at the pre-hearing conference on August 19, 2021, before NMOGA's rebuttal testimony was due. Thus, NMOGA was on notice of the procedural requirements applicable to this proceeding. NMOGA had every opportunity to cure the defect by including its technical arguments in rebuttal testimony. The fact that NMOGA was on notice that its original submission was procedurally improper, and yet failed to fix this defect in its rebuttal testimony, precludes any suggestion that it would be prejudiced by excluding its improper testimony.

Conclusion

For the foregoing reasons, Clean Air Advocates and the Environmental Defense Fund move 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.

Respectfully submitted,

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Certificate of Service

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