STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF:

PROPOSED NEW REGULATION
20.2.50 **No. EIB 21-27 (R)**
Oil and Gas Sector – Ozone Precursor Pollutants

NMOGA PROFFER OF EVIDENCE REGARDING PROPOSED 20.2.50.116 NMAC

Consistent with the Hearing Officer's November 19, 2021, Procedural Order on Post-Hearing Process, the New Mexico Oil and Gas Association ("NMOGA") hereby moves for the admission of certain evidence proffered regarding proposed 20.2.50.116.

I. BACKGROUND

On September 23, 2021, NMOGA served all parties with three documents that are the subject of this proffer. These include:

1. Exhibit 58, Surrebuttal testimony of John Smitherman regarding proposed 20.2.50.116 NMAC
2. Exhibit 59p, LDAR Gathering & Boosting Incremental Analysis Spreadsheet
3. Exhibit 60p, LDAR Well Site Incremental Analysis Spreadsheet

NMOGA submitted these materials consistent with the August 26, 2021 Procedural Order, which required submission of all demonstrative exhibits at least 24 hours prior to introduction at the hearing. *See* Procedural Order, August 26, 2021, at pg. 4. NMOGA intentionally provided these materials long before their introduction—approximately 6 days—to give all parties ample opportunity for review. Late in the evening on September 27, 2021, roughly 4 days after receiving notice of NMOGA's intent to offer these materials and approximately one day prior to the scheduled hearing day, Clean Air Advocates ("CAA"), the Environmental Defense Fund

("EDF"), and the New Mexico Environment Department ("NMED") filed a joint motion to exclude significant portions of Exhibit 58 and the entirety of Exhibits 59p and 60p. NMOGA filed an extensive response in opposition on September 28, 2021.

On September 29, 2021, the Hearing Officer heard argument on the motion. *See* Tr. 8:2354-2384, 2480-2487. After significant discussion between the parties, the Hearing Officer, and legal counsel for the EIB, movants withdrew all objections to Exhibit 58, except for pages 10-11, 29, and 52-56. For the disputed pages of Exhibit 58 and the entirety of Exhibits 59p and 60p, legal counsel for NMOGA was instructed to and did provide a proffer outlining the substance of Mr. Smitherman's testimony. NMOGA now urges the EIB to admit the proffered evidence for the reasons outlined below.

II. LEGAL ARGUMENT

Mr. Smitherman's surrebuttal testimony properly responds to rebuttal testimony submitted by various parties. In addition to being proper surrebuttal, much of the information contained in the proffered slides are already in the evidentiary record because they have been admitted through NMOGA and NMED's exhibits, or they are distillations or minor expansions of such materials.

Both the Air Quality Control Act and the Board's procedural rules governing this hearing favor the admission of relevant evidence that will assist the Board in reaching a decision. The Act provides that "[a]t the hearing, the environmental improvement board . . . shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing . . . ." NMSA 1978, § 74-2-6(D). As the Board's rules make clear, the objective of a rulemaking hearing is "to encourage public participation" and "the effective presentation of the evidence and points of view of the parties." 20.1.1.6.B&C. The Board's rules require "[t]he hearing officer

[to] conduct a fair and equitable proceeding, assure that the facts are fully elicited and avoid delay." 20.1.1.107.B NMAC. The Board and hearing officer are enjoined to construe the rules "liberally" to achieve these objectives. 20.1.1.108 NMAC.

Admission of the proffered NMOGA surrebuttal is consistent with the Act and the rules because it will assure that the facts helpful to the Board's decision are fully elicited. It also will be fair because, as explained below, the other parties have had notice of NMOGA's positions and technical support through the direct testimony of John Smitherman. The other parties responded in rebuttal to many of these statements and now seek to preclude any effective NMOGA response, frustrating the objectives of "public participation" and "effective presentation of the evidence and points of view of the parties."

The proffered material falls into one of three categories: NMOGA's model plants used to evaluate the cost effectiveness of the LDAR proposals (NMOGA Exhibit 58, pages 10, 11, and 29), NMOGA's surrebuttal to the LDAR proximity proposal (Exhibit 58, pages 52-56), and spreadsheets detailing the formulas underlying the above evaluations (NMOGA Exhibits 59p and 60p). We address each in turn.

A. NMOGA's Proffered Evidence Regarding Model Plants Should be Admitted Because It Is Proper Surrebuttal and Based on Data Already Admitted.

Movants object to the model plants presented on slides 10, 11 and 29 of Exhibit 58. As outlined in the proffer and admitted testimony, a model plant is a statistically average facility commonly used in rulemaking efforts to quantify costs and emissions reductions associated with a proposal. In the leak detection context, the goal of a model plant is to estimate the average population of potentially leaking components at a given facility type. Roughly speaking, constructing a model plant involves two steps:

1. **Step 1, Gather Data**. To construct a model plant, you need two variables: the average equipment count per facility type and the average component count per piece of equipment.
2. **Step 2, Calculate the Component Count**. To calculate the component count, one multiplies the average equipment count per facility type by the average component count per piece of equipment.

While gathering quality data at step 1 requires meaningful resources and expertise, once that data is available, constructing the model plant is basic arithmetic. As the record makes clear, both NMED and NMOGA relied on model plants constructed using this basic approach.

NMOGA first presented data regarding its model plants in Mr. Smitherman's direct testimony. On page 23, lines 20-21, of NMOGA Exhibit A1, Mr. Smitherman explains he reviewed the analysis NMED relied on to construct its model plants. He then incorporates NMOGA's technical response to this analysis as his own, which is contained in NMOGA Appendix B, pages 30-34. *See* NMOGA Exhibit A1, pg. 23, lines 21-22 ("you will find our analysis included in the comments in the NMOGA redline for your reference.").[1] Relying on the analysis presented in NMOGA Exhibit B, Mr. Smitherman testified that NMED's model plants are not based on the best data available. Her further testified that the model plants NMOGA has constructed rely on more representative data and demonstrate that NMED's approach underestimated the cost-per-ton of their proposal.

[1] To further clarify that the Appendix B commentary was incorporated in Mr. Smitherman's testimony, Mr. Smitherman responds to several questions along these lines: "What issues did ***you*** identify, if any, regarding ERG's assumptions about operations in New Mexico?" NMOGA Appendix Al, pg. 23, lines 24-25. All of Mr. Smitherman's responses to this line of questioning adopt and repeat what was captured in the analysis in NMOGA's Appendix B, and the framing of the questions makes clear that these are the observations and testimony of Mr. Smitherman. It's also telling that legal counsel for Clean Air Advocates refers specifically to NMOGA's LDAR testimony as the testimony of Mr. Smitherman in her questioning of Ms. Lee Ann Hill. CAA Rebuttal Exhibit 25, pg. 3, 17-19.

The movants object because the tables at Exhibit 58 pages 10-11 and 29 were not presented in tabular format in direct testimony. As to page 29, this is not accurate. NMOGA Exhibit 28 and NMOGA Exhibit 7 contain the model plant table on page 29, and these exhibits were submitted with direct testimony and admitted into evidence already without objection. As to pages 10-11, while it's true that the exact tables are not provided in direct testimony, the *data* underlying NMOGA's model plant was presented. In other words, while NMOGA did not show its basic arithmetic at step 2 of model plant construction, it presented all data gathered at step 1 necessary to conduct that basic arithmetic. NMOGA presented this data in tabular format in NMOGA Direct Exhibit 27, which was admitted into the evidentiary record without objection. Mr. Smitherman also testified at length in his direct testimony about the impact this data had on the cost-per-ton of NMED's LDAR proposal. *See* NMOGA Appendix B, pages 30-34.

On rebuttal, several parties dedicated significant testimony to refuting Mr. Smitherman's model plant analysis and its implications. For example, in NMED Rebuttal Exhibit 1, Ms. Bisbey-Kuehn and Mr. Palmer alleged they "cannot evaluate the validity or representativeness of the alternative model plants mentioned by NMOGA, because NMOGA does not document in its testimony or exhibits the actual model plants they created and on which they estimated new emission reductions and cost effectiveness numbers." NMED Rebuttal Exhibit 1:62-63. In the proffered materials, Mr. Smitherman has sought to surrebutt this statement by demonstrating that the admitted exhibits presented the underlying data (Exhibit 27) and that the so-called missing pieces were nothing more than "step 2"—a procedure common to any model plant constructed for evaluating a leak detection proposal. This is proper surrebuttal.[2]

[2] The model plant tables are also responsive to other rebuttal testimony. *See also, e.g.*, EDF Rebuttal Exhibit JJJ, Rebuttal Testimony of Hillary Hull (testifying that NMOGA's proposal will decrease emissions reductions and that its costs are inflated, among other things); CAA Rebuttal Exhibit 25, 3-21, Rebuttal Testimony of Lee Ann Hill

B. NMOGA's Proffered Evidence regarding the Proximity LDAR Proposal Should Be Admitted as Proper Surrebuttal because Oxy Represented for the First Time in Rebuttal that the Proximity LDAR Proposal Is Feasible for Industry, a Point that EDF's Witnesses Have Explicitly Pushed in their Rebuttal Testimony.

The second category of proffered material is Mr. Smitherman's testimony regarding the incremental cost of the proximity LDAR proposal. *See* Exhibit 58:52-56. The proximity LDAR proposal would require the owner or operator of a wellhead site within 1,000 feet of an occupied area to conduct a quarterly leak survey if PTE is less than 5 tpy VOC or a monthly leak survey if PTE is equal to or greater than 5 tpy VOC. CAA Exhibit 22, 20.2.50.116.C(3)(c). Clean Air Advocates and others presented this proposal in their direct testimony without industry support. When parties filed rebuttal, NMOGA learned for the first time that Oxy USA had joined and endorsed the proposal. In doing so, Oxy represented that this proposal is economically feasible for at least some of the oil and gas industry in New Mexico.

On rebuttal and throughout the hearing, movants overstated the significance of Oxy's endorsement and implied the agreement signaled the proposal would be feasible for the oil and gas industry generally. Movants did this in several ways. Movants repeatedly referred to the proposal as the "Oxy agreement." *See, e.g.,* CAA Rebuttal Exhibit 23, pg. 2. In CAA's opening statement, legal counsel characterized the proposal as garnering the support of "one of the top oil and gas producers in the state," which signaled the proposal deserved "serious consideration by the board." Vol. 1:55:1-2, 12-13. Legal counsel for EDF characterized the proposal as the "EDF, NGO, Oxy LDAR proximity proposal." On rebuttal, CAA witness, Dr. McCabe, asserted:

(responding specifically to John Smitherman and testifying that NMOGA's analysis fails to account for the emissions reductions that will be achieved); EDF Rebuttal Exhibit XX, Rebuttal Testimony of David Lyon (testifying that he disagrees with NMOGA's assertion that NMED has overestimated emissions reductions that can be achieved from LDAR).

> It is significant that a major oil and gas operator in New Mexico has agreed to these stronger provisions. Clearly, Oxy views them as technically and economically feasible. We hope the EIB will take note of this key development.

CAA Rebuttal Exhibit 23, pg. 2-3. In inviting the EIB to "take note of this key development," Dr. McCabe invites the board to conclude that if one industry member can do it, all can. NMOGA has not had an opportunity to respond to any of these assertions or implications as they were said for the first time on rebuttal or at the hearing. NMOGA has also not had an opportunity to surrebutt Oxy's testimony that this proposal should be adopted as sound policy. The proponents of this motion have clearly opened the door to surrebuttal on this issue.

The Hearing Officer found this argument unpersuasive. She excluded pages 52-56 because she believed them to be "based on surprising information that should have been provided earlier in this process" during rebuttal. The Hearing Officer's rational was that "NMOGA would have been motivated to offer whatever evidence it had on feasibility [of the LDAR proximity proposal] regardless of what Oxy was doing." Tr. 8:2355:4-6. This establishes a "one-shot" rule: a party must provide all responsive arguments on an issue at the first opportunity, even if the nature of the proposal shifts or new parties endorse that proposal. This is extremely problematic for several reasons.

This "one-shot" rule was not applied consistently throughout the hearing. For example, on September 30, 2021, CAA presented Mr. Orozco to present surrebuttal testimony on engines and turbines. CAA had not uttered a word in its direct or rebuttal testimony on engines and turbines. But when NMED filed its rebuttal redline, CAA learned that NMED had been persuaded by the direct testimony of industry witnesses to amend its engines and turbines proposal. This shift prompted CAA for the first time to offer a response in surrebuttal. All parties learned of Dr. Orozco's testimony for the first time on the day it was offered. Dr. Orozco's name

did not appear in any version of the excel witness list circulated to counsel to organize the hearing. When NMOGA learned of this testimony, it objected, citing this one-shot rule the Hearing Officer had established in her prior ruling:

> The changes that were made were advocated by NMOGA in its direct, and the appropriate time to respond to NMOGA's arguments that those changes should be made would have been in rebuttal, not in surrebuttal for the first time.

Tr. 9:2975:8-12. In response, legal counsel for CAA stated: "we are providing surrebuttal to changes that the Department . . . adopted. . . He didn't provide any testimony before because we agreed with the prior proposal." Tr. 9:2975:18-19. In other words, CAA did not respond to the direct testimony of NMOGA and other industry witnesses because it believed the department would remain aligned with the CAA. But when the department aligned with NMOGA's engines and turbines testimony, CAA argued, and the Hearing Officer agreed, that this opened the door to surrebuttal. The Hearing Officer overruled the objection and permitted Mr. Orozco to present extensive testimony.

These are the facts. The CAA was in full agreement with NMED's initial engines and turbines proposal. CAA said so. The "objectionable" changes made by NMED to the engines and turbines proposal were made on the basis of direct testimony provided by industry witnesses. NMED said so. It follows that everything CAA said in response to NMED could have been said in response to the direct testimony upon which NMED's changes were based. Put another way, "[CAA] would have been motivated to offer whatever evidence it had on [industry's engines and turbines testimony] regardless of what [the department] was doing." Tr. 8:2355:4-6.

Although NMOGA's effort to offer Mr. Smitherman's LDAR proximity testimony was no different, the Hearing Officer excluded the testimony. Just as CAA agreed with the department's initial engines and turbines proposal, NMOGA agreed with the department's initial

LDAR proposal to the extent that it did not incorporate a proximity LDAR concept. And just as CAA presumably did not agree with NMOGA's direct testimony on the subject, NMOGA did not agree with CAA's proximity LDAR proposal offered in direct.

Consequently, as Mr. Baake put it, NMOGA "didn't provide any testimony before [regarding LDAR proximity] because we agreed with the [department's] prior proposal." But just as the department's alignment on rebuttal with industry's position changed CAA's calculus, Oxy's alignment with the LDAR proximity proposal on rebuttal changed NMOGA's calculus. NMOGA should be given the same opportunity to respond to these changing circumstances.

It is inconsequential that the Orozco ruling involved a shift in department position, while the Smitherman ruling involved a shift in the position of another industry stakeholder. A shift in the department's position does not hold special weight over a shift by any other party for purposes of the admissibility of surrebuttal. In fact, although the department is authorized to participate in hearings before the board "on the same basis as any other person," the legislature has made clear that the department "shall not be given any special status over any other party." NMSA 1978, § 74-1-6.H-I.

The Hearing Officer's ruling is also problematic because it has no basis in the governing procedural rules. In fact, the rules that govern barely mention rebuttal and say nothing of surrebuttal. What the rules do say is that they should be construed liberally to provide ample opportunity for public participation. 20.1.1.6.B-C NMAC (stating the purpose of the rules is "to encourage public participation" and "the effective presentation of the evidence and points of view of the parties"); 20.1.1.107.B NMAC (stating that "[t]he hearing officer shall conduct a fair and equitable proceeding, assure that the facts are fully elicited and avoid delay"); 20.1.1.108

NMAC (requiring the board and hearing officer to construe the rules "liberally" to achieve these objectives).

Finally, the Hearing Officer's ruling was based on an interest in avoiding unfair surprise to other parties. However, the information on slides 52-56 is incremental, at most, to testimony already in the evidentiary record. Slides 52-56 present several tables that calculate the incremental cost per ton of the LDAR proximity proposal. NMOGA applied the identical procedure to NMED's proposal, and this analysis has been admitted into the evidentiary record. For example, on page 48 of Exhibit 55, Mr. Smitherman presents a summary of the incremental cost of transitioning from semiannual to quarterly LDAR monitoring consistent with NMED's proposal:

Incremental cost per ton of VOC reduction - ERG Costs & NMOGA Reductions			
Semiannual to Quarterly	Incremental VOC Reductions (tpy)	Incremental Annual Cost (2019)	Incremental Cost per Ton
NG Well Site	0.255	$ 2,011	$7,899
Oil Well Site (GOR < 300)	0.048	$ 2,011	$42,078
Oil Well Site (GOR > 300)	0.061	$ 2,011	$32,913

Exhibit 58, page 48. This is admitted into the evidentiary record and was not excluded on the basis of unfair surprise. On page 55 of Exhibit 58p, NMOGA proffered a similar incremental analysis estimating the costs of transitioning from semiannual to monthly LDAR monitoring consistent with the LDAR proximity proposal.

Incremental cost per ton of VOC reduction - ERG Costs & NMOGA Reductions			
Semiannual to Monthly	Incremental VOC Reductions (tpy)	Incremental Annual Cost (2019)	Incremental Cost per Ton
NG Well Site	0.382	$10,781	$28,234
Oil Well Site (GOR < 300)	0.072	$10,781	$150,407
Oil Well Site (GOR > 300)	0.092	$10,781	$117,648

NMOGA Exhibit 58p, page 55. These estimates rely on the same assumptions and formulas, with the only difference being a varying frequency transition to reflect the requirements of the differing proposals.

Movants complained that they would be prejudiced if this proffered surrebuttal testimony is admitted due to the lack of opportunity to respond. Although NMOGA had no obligation to do so, it provided the surrebuttal testimony in question to counsel for the other parties on September 23, allowing the parties ample time to digest and prepare responses to the testimony, which was not scheduled to be given until September 29. Instead, movants dedicated their time and resources to preparing a motion to strike, which likely required more time and resources than would have been required to review and prepare responses to the substance of the testimony. Movants would not be prejudiced by the admission of this testimony, and their gamesmanship should not be rewarded.

NMOGA, on the other hand, would be prejudiced if the proposed surrebuttal testimony is stricken. The surrebuttal testimony properly responds to rebuttal testimony submitted by the other parties, and prohibiting NMOGA from presenting the surrebuttal would deny NMOGA its only opportunity to respond and create reversible error in the event of an appeal. In short, by creating a "surprise" exception to the general rule of admissibility of relevant evidence, the Hearing Officer erred and violated the Air Quality Control Act's requirement and the admonition

that the rules should be applied "liberally," which is clearly meant to allow more information in for the Board's consideration rather than less.

C. Exhibits 59p and 60p Should also Be Admitted into Evidence As They Merely Contain the Information Described Above.

Exhibits 59p and 60p are spreadsheets presenting information already contained in the evidentiary record and information that should otherwise be admitted for the reasons discussed above.

Location in Exhibit	Information	Basis for Admission
NMOGA Exhibit 59p, tab "Base", cells B2-K11	The model plants relied on by NMED.	These tables are used in NMED's analysis, are contained in the 2016 CTG, and have already been admitted to the evidentiary record.
NMOGA Exhibit 59p, tab "Base", cells B17-M27.	Gathering and boosting model plants.	All information in this data table has already been admitted into the record. NMOGA Exhibit 28, Table-6; NMOGA Exhibit 7, pg. 43-45, 52.
Exhibit 59p, tab "Base", cells B29-J42	Emissions calculations based on component counts and emissions factors	This is the "step 2" basic arithmetic discussed above.
Exhibit 59p, tab "Base", cells B41-E52	Table of estimated emissions reductions from varying LDAR frequencies	This table is reproduced at page 31 of Exhibit 58, and this portion of Exhibit 58 has already been admitted into evidence.
Exhibit 59p, tab "Base", cells B54-E61	Estimated Cost of VOC Reductions for Gathering and Boosting Sites	This table is reproduced at page 38 of Exhibit 58, and this portion of Exhibit 58 has already been admitted into evidence.
Exhibit 59p, tab "Base", cells O18-Q26	Whole gas emissions factors	These are reproduced in Table 4 of NMOGA Exhibit 28 and have already been admitted into evidence.
Exhibit 59p, tab "Base", cells G44-I63	Gathering and boosting station annual cost per station of LDAR program	This is a table of costs, which are identical to the costs used by NMED.
Exhibit 59p, tab "Incremental", cells B2-E10	VOC tons per year reduced per gathering and boosting site	This table is reproduced at page 31 of Exhibit 58, and this portion of Exhibit 58 has already been admitted into evidence.
Exhibit 59p, tab "Incremental", cells B12-D31	Gathering and boosting station annual cost per station of LDAR program	This is a table of costs, which are identical to the costs used by NMED.

Exhibit 59p, tab "Incremental", cells B33-E41	Incremental cost per ton of VOC reduction table	This is reproduced on page 50 of NMOGA Exhibit 58, and this portion of Exhibit 58 has already been admitted into the record.
Exhibit 60 P, tab "Well Site Analysis", Cells A1-C11	Proposed rule provisions	This merely describes the proposed LDAR requirements in NMED's petition.
Exhibit 60, tab "Well Site Analysis", Cells A12-H26	Summary of the VOC Cost of Control for the Annual OGI Monitoring Option based on Model Plants	The data and conclusions from these tables are already admitted into the record. *See, e.g.,* Exhibit 58, pg. 15, 17.
Exhibit 60, tab "Well Site Analysis", Cells A28-I61	Summary of Costs of Control for Method 21 Monitoring at various frequencies	This is taken directly from NMED Exhibit 069, tab "Well Site Analysis", Cells A28-I61. This has already been admitted into evidence.
Exhibit 61, tab "Incremental Cost Analysis"	Incremental analysis for well sites, LDAR proximity and NMED proposal	This contains the incremental cost analysis for well site LDAR. The data for this analysis have already been admitted into the record either through NMED Exhibit 069 or NMOGA Exhibit 58. *See, e.g.,* NMOGA Exhibit 58, pg. 46-48, 50. The LDAR proximity incremental analysis is also included in this tab, which consists of the content on slides 52-56, discussed above.

Because these spreadsheets contain information largely already admitted into the record, there's nothing unfair about allowing their admission. To the extent these spreadsheets contain other information, it is additional explanatory material or formulas reflecting basic arithmetic movants were capable of readily discerning in the time allotted for review. NMOGA provided these to assist the Board with understanding NMOGA's approach, and EIB should allow their admission to ensure a complete record.

III. PROPOSED STATEMENT OF REASONS

In addition to the proposed statements of reason otherwise submitted, NMOGA urges the Board to adopt the following statements of reason as they relate to this proffer.

1. The Board finds that the proffered testimony from Mr. Smitherman is admitted into the evidentiary record. This includes all information and testimony encompassed in and related

to pages 10-11, 29, and 52-56 of NMOGA Exhibit 58, NMOGA Exhibit 59p and NMOGA Exhibit 60p.

2. The Board finds that the Hearing Officer's order to exclude this information in the first instance was in error, inconsistent with the Board's rules, and inconsistent with other evidentiary rulings made throughout the hearing.

3. Based on the information provided in Exhibits 58, 59p, and 60p, the Board finds that the incremental cost of moving from semiannual to quarterly surveys ranges from $7,899 per ton to $32,913 per ton, while the incremental cost of moving from semiannual to monthly surveys ranges from $28,234 per to $117,648 per ton.

4. The Board finds that these incremental costs of the proximity LDAR proximity proposal are excessive. The record does not provide substantial evidence that the proximity LDAR proposal is economically reasonable or that the proposal will demonstrably reduce ozone concentrations. The Board, therefore, lacks authority to adopt these standards as contained in proposed 20.2.50.116.C.3(e) NMAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2022, a true and correct copy of the foregoing ***Proffer*** was served via electronic mail to the following:

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