

**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)**

REBUTTAL TESTIMONY OF MICHAEL BACA

1 In this rebuttal testimony I will address issues raised in the direct testimony of Jeremy
2 Nichols (“Nichols Direct”) submitted on behalf of WildEarth Guardians.

3 Mr. Nichols asserts that proposed Part 50 requires additional language to ensure proper
4 regulatory control, provide transparency in implementing and enforcing the rule, and maintain
5 consistency with state statutes. Mr. Nichols provides proposed language in Sections 20.2.50.7
6 NMAC and 20.2.50.112 NMAC to address his concerns with the proposed rule. Below I provide
7 responses to the specific points raised by Mr. Nichols and the changes he proposes to Part 50.

8 **MR. NICHOLS’ STATEMENT ON PAGE 8:**

9 In particular, I am concerned that pre-production stationary source emissions at
10 well head facilities, including, but not limited to, non-mobile source emissions
11 related to drilling, hydraulic fracturing, and well completion, often may not be
12 accounted for in the assessment of a facility’s potential to emit.

13 This concern is bolstered by assessments that...oil and gas wellhead sites may
14 be commencing construction of facilities prior to obtaining permits in
15 accordance with 20.2.72 NMAC.

16 In 2020, WildEarth Guardians collaborated with the UCLA Institute of the
17 Environment and Sustainability to assess whether and to what extent owners or
18 operators may have begun construction of wellhead facilities in the San Juan
19 Basin prior to being permitted to construct by NMED. The final report revealed
20 that 35% or more of assessed wellhead facilities were constructed prior to being
21 permitted by NMED.

22 **MR. NICHOLS’ PROPOSED AMENDMENTS:**

23 **20.2.50.7 DEFINITIONS:** In addition to the terms defined in 20.2.2 NMAC - Definitions,
24 as used in this Part, the following definitions apply.

25 ****

1 **GG. “Potential to emit (PTE)”** means the maximum capacity of a stationary source to
2 emit an air contaminant under its physical and operational design. The physical or operational
3 limitation on the capacity of a source to emit an air pollutant, including air pollution control
4 equipment and a restriction on the hours of operation or on the type or amount of material
5 combusted, stored or processed, shall be treated as part of its design if the limitation is federally
6 enforceable. The PTE for nitrogen dioxide shall be based on total oxides of nitrogen. For
7 wellhead sites, calculation of PTE shall include non-mobile source emissions that may occur
8 prior to commencement of operation.

9 **NMED’S RESPONSE:**

10 NMED opposes inclusion of additional language to the definition of PTE as proposed by
11 WildEarth Guardians. The definition as proposed by NMED is consistent with the definition
12 used in the Department’s permitting programs, which are based on federal regulations at 40 CFR
13 Sections 52.21(B)(4), 51.165(a)(1)(iii), and 51.166(b)(4). Contrary to Mr. Nichols testimony,
14 NMED does not issue “drilling” permits for wellhead sites; that is the jurisdiction of the New
15 Mexico Oil Conservation Division. In addition, the activities and emissions (waste) associated
16 with the drilling of wells are also within the jurisdiction of the OCD. After the well is drilled,
17 NMED is responsible for regulating the equipment located at the well site associated with the
18 production of oil and gas. In effect, Mr. Nichol’s is requesting the department to expand its
19 jurisdiction to include activities regulated by OCD but offers no emissions information indicating
20 the impact of such a change. It is unclear from the testimony what equipment should be included
21 in this calculation. The term “non-mobile” is vague and undefined in the Clean Air Act. Thus,
22 the department cannot speculate as to what equipment would be included. The testimony did not
23 provide any equipment specific information, nor any data regarding emissions from these
24 undefined source types. Thus, the department has no way of determining what emissions may
25 occur from such equipment or if they are regulated ozone precursors.

26 The report cited in Mr. Nichol’s testimony has not undergone peer review and has not
27 been published in any scientific journal such that it could be relied upon as being credible. The

1 methods by which the data collection and analysis were conducted are not detailed in any way,
2 nor has a reasoned conclusion been presented how the data supports their conclusion that “35%
3 or more of assessed wellhead facilities were constructed prior to being permitted by NMED”. Thus,
4 the claims are entirely unsubstantiated, and should not be relied upon by the Board as a basis for
5 the requested addition to Part 50.

6 **MR. NICHOLS’ STATEMENT ON PAGE 9:**

7 It is essential for the Environmental Improvement Board to ensure NMED’s
8 permitting authorities are brought into alignment with New Mexico’s
9 statute...I would propose that the Board adopt an additional provision...to
10 ensure the Department has authority to deny permits for new or modified
11 sources that would cause or contribute to ozone concentrations in excess of
12 95% of the NAAQS.

13 **MR. NICHOLS’ PROPOSED AMENDMENTS:**

14 **20.2.50.112 GENERAL PROVISIONS:**

15 **A. General requirements:**

16 ****

17 (11) In permitting a stationary source subject to this Part pursuant to 20.2.72,
18 20.2.74, or 20.2.79 NMAC, the department shall deny any application for a permit or permit
19 revision, including any general permit registration, where construction or modification will cause
20 or contribute to air contaminant levels in excess of ninety-five percent of any primary National
21 Ambient Air Quality Standard for ozone. Compliance with this Part does not demonstrate that a
22 source will not cause or contribute to exceedances of any National Ambient Air Quality Standard
23 or New Mexico ambient air quality standard.

24 **NMED’S RESPONSE:**

25 The Department opposes WildEarth Guardians’ proposed revision pertaining to
26 permitting as it is not within the scope of this rulemaking and it is not technically feasible, nor
27 practical to implement. First, the purpose of the proposed rule is to set emission standards for oil
28 and gas sector equipment and processes, regardless of the permitting status for such equipment
29 and processes. Adopting permitting provisions into this rule is not appropriate at this time, as the
30 consequences of such a revision to New Mexico’s permitting program require a full evaluation,
31 including a public comment period for the regulated community and interested stakeholders, as

1 well as discussions with the U.S. Environmental Protection Agency to identify the implications
2 for New Mexico’s SIP if such revisions were adopted. The breadth of such a change would best
3 be addressed through a separate rulemaking process and public notice since it is outside of the
4 original scope of the proposed rule.

5 Second, the Environmental Improvement Board and the Department derive their
6 authority to carry out their duties from the enabling statutes that are passed into law by the
7 Legislature. Most notably, these statutes include the Environmental Improvement Act, 74-1-1
8 NMSA 1978, and the Air Quality Control Act, 74-2-1 NMSA 1978. As the designated air
9 pollution control agency for the state, the Department must ensure that its SIP, and by extension,
10 its regulatory programs are operated consistent with the federal Clean Air Act and its
11 implementing regulations. This includes the Department’s air quality permitting program and its
12 governing regulations including the following: 20.2.72 NMAC – Construction Permits; , 20.2.74
13 NMAC – Permits – Prevention of Significant Deterioration; and 20.2.79 NMAC – Permits –
14 Nonattainment Areas. Additionally, Subsection 74-2-7(C) of the AQCA specifies that
15 circumstances under which the Department may deny a permit. There is no authority provided in
16 the AQCA for the Board to specify by regulation additional bases for denial of permits.
17 While the statute allows the Department to deny a permit where it will “cause or contribute to air
18 contaminant levels in excess of a [NAAQS],” NMSA 1978, § 74-2-7(C)(1)(a) and (C)(2), it does
19 not provide authority to the Department to deny a permit where it will cause or contribute to air
20 contaminant levels in excess *of ninety-five percent* of a NAAQS. The Board’s regulations
21 relating to air quality permit must be in line with the statute, otherwise they are vulnerable to
22 legal challenges.

1 Furthermore, these state statutes and permitting rules are fully approved by EPA as part
2 of New Mexico’s SIP, and give the Department the ability to implement the Clean Air Act in
3 New Mexico on behalf of the federal government. Denying permits contrary to the AQCA and
4 the State’s approved SIP endangers the ability of New Mexico to run its own air quality program
5 and issue permits. The Department has not been notified by EPA that any part of its permitting
6 program is inconsistent with the approved SIP or federal law.

7 **MR. NICHOLS’ STATEMENT ON PAGE 6:**

8 It is very concerning that NMED’s proposed regulations...simply authorizes
9 NMED to request and obtain information...but does not otherwise
10 affirmatively require any reporting.

11 Reporting of monitoring data to NMED is critical for ensuring the public has
12 access to air quality information that is relevant to their health and the health of
13 their communities.

14 **MR. NICHOLS’ PROPOSED AMENDMENTS:**

15 **20.2.50.112 GENERAL PROVISIONS:**

16 ****

17 **D. Reporting requirements:**

18 (1) The owner or operator shall submit records of all monitoring events
19 documenting deviations of this Part to the department. For excess emissions, reports shall be
20 submitted in accordance with 20.2.7 NMAC. For all other deviations, reports shall be submitted
21 semi-annually beginning January 1, 2022 and shall be submitted by the 30th day of the month
22 following the end of each semi-annual period.

23 (2) Within 24 hours of a request by the department, the owner or operator
24 shall for each unit subject to the request, provide the requested information either by
25 electronically submitting a CDR to the department’s Secure Extranet Portal (SEP), or by other
26 means and formats specified by the department in its request.

27 (3) The owner or operator shall comply with all applicable reporting
28 requirements at 20.2.7 NMAC.

29 **NMED’S RESPONSE:**

30 NMED opposes WEG’s proposed language regarding excess emissions and self-reporting
31 of “deviations” from the proposed rule. This language creates significant administrative burdens
32 on the Department and introduces ambiguous concepts into the rules. Use of the term

1 “deviations” without additional context and details creates unclear expectations and poses
2 implementation challenges. As written, a company would have to report simple and
3 inconsequential deviations from the rule’s requirements. Additionally, specific requirements for
4 reporting and correcting deviations from each section would have to be developed.

5 The proposed language would create additional administrative burdens on the
6 Department and the regulated community without commensurate public health protections.
7 Reporting of a deviation does not ensure that it is corrected, nor do all deviations result in
8 emissions to the atmosphere. The resources expended by industry to comply with the rule and the
9 Department to enforce it are better spent identifying and addressing problems to ensure
10 compliance with the emission standards and that emissions to the atmosphere are minimized.

11 Additionally, the proposed changes would require the Department to set up a new system
12 for reporting deviations and processing those reports to determine if a violation has occurred and
13 whether corrective action and enforcement are necessary. The Department simply does not have
14 the resources to design, deploy, and administer such a system. Instead, the rule sets deadlines for
15 completing repairs for faulty equipment or when leaks are detected, and required regulated
16 entities to keep records which can be provided to the Department upon request.

17 Sources subject to 20.2.7 NMAC - Excess Emissions, are already required to comply
18 with the provisions of that rule independent of any other rule or requirement. Cross referencing
19 this rule in the proposed rule does not provide enhanced compliance incentives for industry, nor
20 does it provide the Department additional tools for increased compliance and enforcement of
21 either rule.

22 Finally, reporting of violations of the rule does not provide pertinent health information
23 to the public. The Department provides pertinent data to the public through our ozone monitoring

1 network and emissions reporting requirements. This information is readily available on the
2 Department's website and staff routinely respond to more complex external data inquires and
3 requests for other information through the Inspection of Public Records Act, 14-2-1 NMSA,
4 1978. Additionally, the Department is proposing to require companies to keep extensive records,
5 including date stamped records of monitoring and repair events, and produce a Compliance Data
6 Report at any time upon the Department's request. The request for a CDR may be made for any
7 reason, including in response to public inquiries, complaints, or concerns. Limiting these
8 submittals allows the Department to focus its limited resources on ensuring compliance, instead
9 of administrative record keeping. The Rebuttal Testimony of Cindy Hollenberg included at
10 NMED Rebuttal Exhibit 14, discusses the Department's recent compliance and enforcement
11 activities, including those related to the Oil and Gas sector.