

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

**APPLICATION OF OIL CONSERVATION DIVISION
TO ADOPT 19.15.27 NMAC AND 19.15.28 NMAC,
AND TO AMEND 19.15.7 NMAC, 19.15.18 NMAC, AND
19.15.19 NMAC; STATEWIDE**

CASE NO. 21528

**CLIMATE ADVOCATES' OPPOSITION TO NMOGA'S MOTION TO EXCLUDE
EVIDENCE AND TESTIMONY**

Preliminary Statement

Center for Civic Policy, Conservation Voters New Mexico Education Fund, Diné C.A.R.E., Earthworks, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and 350 New Mexico ("Climate Advocates") oppose New Mexico Oil and Gas Association's ("NMOGA") Motion to Exclude Evidence and Testimony Pertaining to Additions to 19.15.27.8.C(1) Proposed by EDF and Climate Advodates [sic] ("Motion"). In its Motion, NMOGA asks the Oil Conservation Commission ("Commission") to exclude Climate Advocates and the Environmental Defense Fund ("EDF")'s proposal to modify the Oil Conservation Division's ("OCD") proposed rules on "Venting and Flaring on Completion and Recompletion Operations" in 19.15.27.8.C(1) NMAC, claiming our proposal is not a "logical outgrowth" of OCD's proposal.

This claim is absurd. The logical outgrowth test requires that "interested parties," like NMOGA, "should have anticipated" that our proposal was "possible." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (cited in Motion, pp. 2, 3). Climate Advocates propose, only, to modify OCD's already-proposed language governing completions and recompletions of oil and gas wells under 19.15.27.8.C(1) NMAC ("OCD Completion Proposal"), to prohibit venting during initial flowback. It is inconceivable that NMOGA would not have "anticipated" that Climate Advocates, EDF, or other like group would propose modifying OCD's Completion Proposal in this way.

Not only could NMOGA have “anticipated” with near certainty that Climate Advocates would propose modification of OCD’s Completion Proposal to prohibit venting initial flowback, NMOGA has *actual notice* that we are propose to modify OCD’s Completion Proposal to include this prohibition. Completions have been a point of discussion among the stakeholders in this rulemaking process, including NMOGA, since at least August 2019 when completions were the *first* substantive issue covered by the Methane Advisory Panel (“MAP”), convened by the New Mexico Energy, Minerals, and Natural Resources Department and the New Mexico Environment Department to discuss the agencies’ methane rules. Furthermore, NMOGA has been notice since December 17, 2020, when Climate Advocates and EDF filed their prehearing statements, that we would propose modifications to OCD’s completions provision. NMOGA, with all its resources, has had ample opportunity to (and no doubt will) mount a vigorous defense against our proposal. NMOGA has no basis to complain.

The Commission should summarily deny NMOGA’s Motion, allow Climate Advocates and EDF to make as to why venting during initial flowback should be banned, similarly allow NMOGA to put on rebuttal evidence, and fashion a final rule based on the merits.

Argument

I. CLIMATE ADVOCATES’ COMPLETIONS PROPOSAL MEETS THE LOGICAL OUTGROWTH TEST WITHOUT QUESTION

A. Legal Standard

According to the federal case cited by NMOGA, to satisfy the “notice requirement” of a rulemaking, a proposed rule and final rule “need not be identical.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009).

[A]n agency’s final rule need only be a logical outgrowth of its notice. A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the

notice-and-comment period. By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.

Id. at 1079-80 (internal citations and quotations omitted). Courts consider the entire rulemaking docket, including comments submitted by other parties, to determine whether interested parties could have anticipated a rule change. *See Ne. Maryland Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998) (no logical outgrowth problem where “[c]ommenters clearly understood that these technologies were under consideration, as the agency received comments on them from several sources”).

B. Interested Parties, Including NMOGA, Should Have Easily Anticipated Climate Advocates Would Propose A Prohibition on Venting During Initial Flowback

i. Climate Advocates’ completions proposal falls squarely within the scope of the Commission’s legal notice on completions

The Commission provided the required public notice for this rulemaking on November 24, 2020 in the *New Mexico Register* and *Albuquerque Journal*, which broadly provided that, “The new rules are 19.15.27 NMAC, which establishes requirements for operators of oil and gas production facilities to report and reduce the venting and flaring of natural gas”¹ The Commission’s legal notice linked to OCD’s proposed rules, rules that specifically and expressly address venting and flaring from completions. OCD’s publicly-noticed proposal included a provision entitled “Venting and flaring during completion and recompletion operations.” This provision stated: “During initial flowback, the operator shall route flowback fluids into a completion or storage tank and commence operation of a separator as soon as it is technically

¹ <http://www.emnrd.state.nm.us/OCD/documents/LegalNotice-Final-November122020.pdf>.

feasible for a separator to function.”² In addition, OCD proposed various definitions related to completions and recompletions. *See* definitions of “completion operations,” “initial flowback,” and “separation flowback” set forth in OCD’s proposed 19.15.27.7.D, K, and Q NMAC. Through its public notice, the Commission is on record that completion and recompletion operations, and reducing waste during those operations, fall within the scope of this rulemaking.

In response to the Commission’s public notice, and as part of its 200+ proposed modifications, NMOGA proposed changes to OCD’s Completions Proposal along with extensive amendments to OCD’s definitions relating to completions and recompletions. *See* NMOGA Pre-hearing Stmt., Ex. A, proposed 19.15.27.7.D, L, P, and S, and 19.15.27.8.C NMAC. Specifically, NMOGA proposed to expand the circumstances in which venting is allowed by modifying the definition of “completion operations” to eliminate the requirement that completions terminate within 30 days of initial flowback or when “permanent production equipment into service.”

² OCD’s Completion Proposal, at 19.15.27.8.C NMAC, provided:

C. Venting and flaring during completion and recompletions operations.

(1) During initial flowback, the operator shall route flowback fluids into a completion or storage tank and commence operation of a separator as soon as it is technically feasible for a separator to function.

(2) During separation flowback, the operator shall capture and route natural gas:

(a) to a gas flowline or collection system, reinject into the well, or use on-site as a fuel source or other purpose that a purchased fuel or raw material would serve; or

(b) to a flare if routing the natural gas to a gas flowline or collection system, reinjecting it into the well, or using it on-site as a fuel source or other purpose that a purchased fuel or raw material would serve would pose a risk to safe operation or personnel safety, provided that the flare is equipped with an automatic igniter or continuous pilot.

(3) If N₂ or H₂S concentrations in natural gas exceeds the gathering pipeline specifications, the operator may flare the natural gas for 60 days or until the N₂ or H₂S concentrations meet the pipeline specifications, whichever is sooner, provided that:

(a) the flare stack is equipped with an automatic igniter or continuous pilot;

(b) the operator analyzes natural gas samples twice per week;

(c) the operator routes the natural gas into a gathering pipeline as soon as the pipeline specifications are met; and

(d) the operator provides the pipeline specifications and natural gas analyses to the division upon request.

NMOGA has already provided testimony to the Commission on these amendments, to which Climate Advocates have not objected.

Climate Advocates also proposed revisions to proposed 19.15.27.8.C NMAC. These modifications provide that, instead of allowing an operator to vent the gases produced during flowback until it becomes “technically feasible for a separator to function,” operators should be required to route this gas to a flare or a vapor recovery unit at the outset of the completions. *See, e.g.,* Climate Advocates’ Prehearing Stmt., 19.15.27.7.A, L, and M, and 19.15.27.8.C NMAC.³

As well, since filing its original Completions Proposal, OCD itself has proposed modifications to the completions section and related definitions. *See* OCD Ex. 2A, proposed 19.15.27.7.O and Q, and 19.15.27.8.C NMAC.

Clearly, completion and recompletion operations, and how waste from those operations can be prevented, is a topic of some interest to OCD, NMOGA, Climate Advocates, and EDF, and each of these parties is advocating for that the Commission adopt its proposals.

NMOGA objects that Climate Advocates’ proposal would improperly “introduce new

³ We proposed the following changes to OCD’s Completions Proposal at 19.15.27.8.C NMAC:
C. Venting and flaring during completion and recompletions operations.

(1) During initial flowback, the operator must direct all fluids to flowback vessels and collect and control emissions from each flowback vessel on and after the date of initial flowback by routing emissions to an operating air pollution control equipment that achieves a hydrocarbon control efficiency of at least 95%. If a combustion device is used, it must have a design destruction efficiency of at least 98% for hydrocarbons.

a. Operators must use enclosed, vapor-tight flowback vessels with an appropriate pressure relief system to be used only as necessary to ensure safety.

b. Flowback vessels must be inspected, tested, and refurbished where necessary to ensure the flowback vessel is vapor-tight prior to receiving flowback.

c. Flares used to control emissions from flowback vessels and pressure relief systems must be equipped with an automatic ignitor. ~~shall route flowback fluids into a completion or storage tank and commence operation of a separator as soon as it is technically feasible for a separator to function.~~

equipment, concepts, and processes that were not contemplated by what the Division proposed.” Mot. at 4. That is incorrect. Under OCD’s proposal, operators must capture and route gas from a completion or storage tank to “a gas flowline or collection system,” to a device capable of combusting the gas for beneficial use, or to a flare, “as soon as it is technically feasible for a separator to function.” Similarly, Climate Advocates propose that flowback emissions be routed to a “flowback vessel” (such as a completion or storage tank), and that emissions from these vessels be routed to a “vapor recovery unit” (a type of gas “collection system”) or a “combustion device” (e.g., a flare). Thus, Climate Advocates’ proposed changes rely on the same general technologies in OCD’s proposal. Climate Advocates would simply require operators to begin using these technologies at an early stage in the completion process. This proposal is clearly a logical outgrowth of the proposal.

In any event, a proposal that would add new equipment is not automatically outside the scope of what parties could reasonably have anticipated in a rulemaking. *Cf. Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998) (no logical outgrowth problem where agency adopted rule that relied on technologies not specifically discussed in relevant section of proposal, because “[c]ommenters clearly understood that these technologies were under consideration, as the agency received comments on them from several sources”). Just as NMOGA’s proposal to add new equipment to the list of operations that that can be excluded from the prohibition on venting and flaring⁴ represents a logical outgrowth of OCD’s proposal, our proposed addition to OCD’s Completions Proposal does as well.

⁴ See NMOGA Pre-hearing Stmnt., Ex. A, proposed 19.15.27.8.D(5)(f)-(h) NMAC.

ii. NMOGA could have anticipated Climate Advocates' proposal based on the history of the rulemaking and public comments

Furthermore, it is beyond credulity that NMOGA or that the oil and gas industry in general could not have anticipated that environmental groups would propose additional regulation of completion emissions in this proceeding. Since the beginning of this process, stakeholders have been aware that this rulemaking would address whether and how to reduce waste from completion operations. Completions were the *first* substantive issue covered by the MAP. The MAP's August 30, 2019 meeting resulted in a 26-page paper on how to reduce waste from completions.⁵ Contributors to this paper sharply disagreed as to whether existing regulations were sufficient to control waste from these operations, but the viewpoint that Climate Advocates now advance -- that venting during completions should generally be disallowed -- was clearly expressed.⁶

Stakeholders were again put on notice that the rule would address completions when OCD published its draft rule on July 20, 2020. Section 19.15.27.8 NMAC of the draft included a subsection entitled "Venting and flaring during completion operations." Both the Western Environmental Law Center (on behalf of numerous environmental and civic groups) and NMOGA discussed this provision in their comments on the draft rule. Climate Advocates devoted more than three pages of their comments to call upon OCD to strengthen the draft provision by requiring operators to route flowback fluids through reduced emission completion equipment at the initiation of flowback.⁷ By contrast, NMOGA called upon OCD to delete the provision, arguing that the emissions from completion and recompletion operations were adequately addressed by federal

⁵ <https://www.env.nm.gov/new-mexico-methane-strategy/wp-content/uploads/sites/15/2019/08/MAP-Technical-Report-December-19-2019-FINAL.pdf> at 260-286.

⁶ *Id.* at 284.

⁷ Conservation & Community Group Comments on Draft OCD Methane Waste Rule at 6-10 (Sept. 16, 2020).

rules.⁸

Most recently, stakeholders were notified that this rulemaking would address waste from completion operations when OCD submitted its application for rulemaking to the Commission on October 15, 2020. Like the draft rule, this proposal included a provision entitled “Venting and flaring during completion and recompletion operations.” This provision stated, “During initial flowback, the operator shall route flowback fluids into a completion or storage tank and commence operation of a separator as soon as it is technically feasible for a separator to function.” *See OCD’s Application in No. 21528* (Oct. 15, 2020).

And, finally, NMOGA has had notice since December 17, 2020, when we filed our prehearing statements, that Climate Advocates and EDF intend to propose RECs, and has ample opportunity to rebut our evidence. NMOGA simply can’t be heard to complain it is surprised by this proposal.

Conclusion

Climate Advocates and EDF’s proposal to prohibit venting during initial flowback is plainly a logical outgrowth of the Commission’s legal notice and OCD’s Completions Proposal. NMOGA’s motion should be summarily denied.

Respectfully submitted,

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⁸ NMOGA Comments on Draft Waste Rule at 10 (Sept. 16, 2020).

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Certificate of Service

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