STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION COMISSION

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

NMOGA'S CLOSING STATEMENT

This Closing Statement is submitted on behalf of the New Mexico Oil and Gas Association ("NMOGA"), through its undersigned counsel, pursuant to Commission Order R-21540-F.

I. EMISSIONS FROM LOW-PRESSURE SOURCES SHOULD NOT BE INCLUDED IN THE GAS CAPTURE CALCULATIONS

The Commission has authority to prevent "surface waste" defined as the prevention of "unnecessary or excessive surface loss or destruction without beneficial use." NMSA § 70-2-3.B. Yet Sections 27.8.G(2) and 27.9.B, as well as 28.8.F(2) and 28.10.B, of the Proposed Rules impose the same measurement, reporting and gas capture obligations for low-pressure emissions that do not constitute surface waste as it does for high-pressure venting and flaring that does constitute surface waste. These sources should not be treated the same and inclusion of low-pressure sources that do not constitute "surface waste" in the calculation of the gas capture requirement exceeds the Commission's authority to regulate surface waste.

A. Natural Gas Emissions from Low-Pressure Sources Is Not Surface Waste

The Proposed Rules state: "Venting or flaring of natural gas during drilling, completion, or production operations that constitutes waste as defined in 19.15.2 NMAC is prohibited." *See* 19.15.27.8(A); *see also* 19.15.28.8(A). Parts 27.8(D) and 28.8(B) identify operating activities that do not constitute surface waste. The testimony further establishes that emissions from certain low-pressure sources identified in 27.8.D and 28.8.D are not feasible to capture for sale

and establish that the volumes are too small to measure or estimate with the precision required for monthly production volume accounting. *See* NMOGA Exs. I9, M4-M10.[1] Yet, the Division has proposed that these emissions be reported and counted against operators in the determination of the numerical gas capture obligation. *See* Parts 27.8.G(2) and 27.9.B, and Parts 28.8.F(2) and 28.10.B (excluding only a few low-pressure sources).

The Division has not demonstrated that emissions from these low-pressure sources are unnecessary or excessive. The fact that some emissions from these low-pressure sources could be excessive when operated improperly in limited circumstances does not make them surface waste across the board. The Division presented no evidence that these low-pressure sources were in fact

[1] *See* [1] *See also* Day 3 Tr. 34 (Lepore) ("Even when they are operating properly there is some low volume/low pressure loss from that equipment. Low pressure/low volume loss is not considered waste."); Tr. 47 – 48 (Lepore) ("[V]enting at low volume and low pressure does happen in the normal course of events, and is considered infeasible to -- or infeasible or impractical or uneconomic to capture and attempt to put into a sales line. And for that reason it's not considered waste."); Tr. 205 (Lepore) ("[T]here are circumstances when lost gas is unavoidable and that should not be counted against operations."); Tr. at 198 (Lepore, question from Commissioner Kessler)("So maybe I will try to say that in the affirmative, that in some sense those [low-pressure, low-volume] losses are necessary and not excessive" and "[w]ould not be considered waste."); Day 5 Tr. 23-27, 137-150, 152-153, 157-161 (Smitherman); Day 6 Tr. 68-73 (Smitherman); Day 7 Tr. 71-86, 100 (Davis); Day 7 Tr. 160-176, 181-183, 231-32 (Greaves); Day 7 Tr. 249-256, 258-270 (Smith); Day 10. Tr. 60 (Bolander) (emissions during manual liquids unloading is necessary and provides a beneficial use); Tr. 71-78 (Bolander) (division's gas capture accounting includes releases that are necessary and unavoidable).

See also OCD Ex. 4a, Slides 16 and 49 ("accurate data is critical to establishing meaningful baselines and enforceable goals to reduce natural gas waste" and monthly production volume reporting categories must be capable of providing "reliable, accurate data,"); Day 2 Tr. 125 (Polak) (noting same); Day 3 Tr. 72 (Lepore) ("we want the operators to provide accurate, detailed reports to the division on a monthly basis about their venting and flaring"); Day 8 Tr. 102-105 (Martinez) (noting a high standard of accuracy is required for reporting the monthly volumes of vented or flared natural gas); Day 8 Tr. 27 (Perez) (noting same); Day 10 Tr. 79-82 (Bolander) (gas capture calculations should be based on "accurate data" and "consistent data" "on a monthly volume basis."); Tr. 98 (discrepancies in emission estimation methodologies vary by as much as a factor of 14); Tr. 105-106 (noting lack of knowledge on capability of estimation methods and software to account for various operation approaches and equipment design); Day 10 Tr. 201-204 (Greaves) (equation of state software programs do not account for the operational history of tanks when calculating standing and working losses and can provide very different calculations and, while used to design systems, the calculations are not well suited for monthly production accounting because they do not take into account the range of operating conditions); Tr. 204 (software programs are programmed for design and permitting which account for "worst case" or "peak" levels but not what happens in reality); Tr. 205-207 (software calculations can be verified by a third party but the calculation may not be accurate for short-range periods).

generally being operated in a fashion constituting surface waste. Since these activities are not surface waste, they should not be mandated for reporting or inclusion in the gas capture obligations proposed by the Division.

The U.S. District Court for the District of Wyoming recently confirmed that departures from the governing concept of "waste" are impermissible, leading to the vacatur of the BLM's Methane and Waste Prevention Rule ("2016 BLM Rule"):

> [P]ursuant to [Department of Interior's] longstanding interpretation and implementation of [the MLAs] authority, whether a loss is deemed "avoidable" (**and therefore constitutes impermissible "waste**") has turned on whether it would have been economic for the lessee to market the gas from the well at issue. In contrast, the 2016 Rule deems losses of gas "avoidable" (virtually all venting and flaring unless falling within one of twelve categories considered "unavoidable" losses) without determining whether a reasonable and prudent operator would, given the circumstances, **capture and market the gas**. (Internal citations omitted).

Wyoming v. U.S. Dept. of Interior., Case No. 2:16-CV-0285-SWS, Order On Petitions for Review of Final Agency Action, 35 (D. Wyo., Oct. 8, 2020) (hereinafter "Wyoming Vacatur Decision") (emphases added).[2] Just as BLM could not ignore whether it is technically and economically feasible for an operator to capture and market gas, neither can the Commission. The low-pressure sources identified in NMOGA Exs. I9, M4-M10 are sources that occur even under prudent operations and inclusion of these sources in the gas capture requirements impermissibly subverts the basic principles of surface waste prevention.

[2] Administrative case law further demonstrates that the concept of surface waste is inextricably tied to the ability to economically capture and market natural gas. *See,* e.g., Rife Oil Properties, Inc., 131 IBLA 357, 376 (1994) (whether a loss is "avoidable" turns on "whether it would have been economic to market the gas from the well at issue"); Maxus Expl. Co., 122 IBLA 190, 195 (1992) (economic feasibility "is always relevant to a question [of] whether gas was avoidably lost"); Ladd Petroleum Corp., 107 IBLA 5 (1989) (remanding the "avoidable" determination "further consideration of whether it was uneconomic to capture that gas at that time").

B. Inclusion of Low-Pressure Sources That Do Not Constitute Surface Waste Unlawfully Turns the Gas Capture Requirement into an Arbitrary Emissions Limit That Conflicts with the NMED Jurisdiction

The Division's failure to exclude from the gas capture requirement low-pressure sources that do not constitute "surface waste" turns the gas capture requirement into an arbitrary emissions cap. Such an extensive and onerous emissions cap is outside the Commission's jurisdiction and overreaches into the air pollution control authority of NMED. As such, the Division's Proposed Rules present jurisdictional issues similar to the 2016 BLM Rule vacated after the U.S. District Court of Wyoming found the "BLM exceeded its waste prevention authority in promulgating regulations primarily intended to benefit the environment and improve air quality, without regard for its longstanding interpretation of "waste" and in a manner that is inconsistent with the administrative structure Congress enacted into law." Wyoming Vacatur Decision at 36–37. The MLA grants the BLM authority to issue regulations "for the prevention of undue waste" whereas regulations for the protection of air quality are "expressly within the 'substantive field' of the EPA and States pursuant to the Clean Air Act." *Id*. at 19 (quoting 30 U.S.C. § 187), 20. Similarly, the Commission is granted authority to prevent surface waste, whereas the authority to regulate emissions for air pollution purposes rests with NMED. *See* NMSA §§ 70-2-6, 74-2-5.

Governor Lujan's Executive Order instructed that the agencies are to work together (within each of their respective jurisdictions) to develop a comprehensive scheme – not overlap in their regulation of the oil and gas industry. *See* New Mexico Interagency Climate Change Task Force, *New Mexico Climate Change Strategy*, 18 (2020) ("NMED regulates air pollution under the state Air Quality Control Act, while EMNRD regulates the [surface] waste of a resource under the state Oil and Gas Act."). The Proposed Rules go beyond the prevention of surface waste by including in the gas capture obligation emissions that indisputably do not constitute surface waste. NMED

has the authority to regulate low-pressure sources and has drafted proposed rules to reduce emissions from these low-pressure sources. The Division has essentially asked the Commission to step into NMED's authority to regulate air emissions from these sources under the guise of the prevention of surface waste. While regulations may certainly have ancillary benefits, "it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." Wyoming Vacatur Decision at 25 (internal citations omitted).

C. The Reporting and Calculation of the Natural Gas Capture Requirements Are Inconsistent with Other Federal and State Regulation of Surface Waste

Although the 2016 BLM Rule was vacated due to the BLM exceeding its statutory authority, it is instructive that even in adopting a rule that exceeded its authority, the BLM only proposed to apply its gas capture requirements to high-pressure flaring. The 2016 BLM Rule required "operators to reduce wasteful flaring of gas by capturing for sale or using on the lease a percentage of their gas production." 81 Fed. Reg. 83008, 83011 (Nov. 18, 2016). Operators were required to capture a certain percentage of their adjusted total volume of gas produced each month, with the required capture percentage increasing over time. *Id*. In calculating the gas capture percentage, the BLM allowed a certain amount of flaring (to decline over time) which did not count against the gas capture percentage. The "total volume of gas captured" was defined as the: "total volume of gas captured" over the "relevant area" divided by the "adjusted total volume of gas produced" over the "relevant area." *Id*. at provision 40 C.F.R. § 3179.7(c). The "adjusted total volume of gas produced is calculated based on the quantity of **high pressure gas produced** from the operator's development oil wells that are in production, adjusted to exempt a specified volume of gas per well, which declines over time." 81 Fed. Reg. at 83011 (emphasis added). The BLM confirmed that it explicitly excluded gas from low-pressure flares from the gas capture requirements, stating: "gas from low pressure flares is not included in the requirements in 3179.7

[(gas capture requirements)] because capturing the gas from these flares would require additional compression which may not be cost-effective given the volume of gas being flared." *See* BLM, *Responses to Public Comment on Final Rule, Waste Prevention, Production Subject to Royalties and Resource Conservation* (Nov. 2016) at 110. Given that BLM's gas capture requirement (which applied only to high-pressure sources) was vacated for lack of jurisdiction, any inclusion of low-pressure sources that do not constitute surface waste in the gas capture requirement strays even further from the Commission's jurisdictional limits.

Exclusion of low-pressure sources in the gas capture requirement is consistent with new regulations related to venting and flaring adopted by the Colorado Oil and Gas Conservation Commission ("COGCC").[3] The COGCC "intentionally used the term 'natural gas' in the definitions of Flaring and Venting to clarify that the requirements for Flaring and Venting apply to produced gas, and **do not apply to hydrocarbons that normally evaporate or vaporize from liquid hydrocarbons, including flash gas**." COGCC, *Statement of Basis, Specific Statutory Authority, and Purpose for 800/900/1200 Mission Change Rulemaking,* 71 (Nov. 23, 2020) (emphasis added); *see also id*. at 78 ("The Commission's intent in regulating Venting is to address the natural gas coming out of the well that should be, or would be sent to a gathering line or otherwise put to beneficial use (or, in limited circumstances, flared), absent the Venting."). The COGCC further ensured that the definition of flaring was distinguishable from different forms of oil and gas combustion because it did "not intend to regulate **all** combustion at an oil and gas location as flaring." *Id*. While the COGCC "intends for operators where possible, to capture low-pressure natural gas for beneficial use," "[t]hese beneficial onsite processes would not clearly meet the definition of waste." *Id*. at 72. Therefore, consistent with the 2016 BLM Rule, the COGCC

[3] *See* Day 10, Tr 50-53 (J. Bolander) (acknowledging that the COGCC removed sources of low-volume and low-pressure emissions from the definition of venting and does not regulate them as "waste").

only "considers the combustion of high-pressure natural gas to be flaring." *Id*. *See also* NMOGA Ex. C9 (COGCC definition of venting).

II. THE NATURAL GAS GATHERING OPERATIONS PLAN IN 28.8.C (1) UNNECESSARILY PRESENTS JURISDICTIONAL AND PREEMPTION ISSUES

NMOGA appreciates and supports the Division's revisions to the July 2020 draft based upon acknowledgment of the potential for federal preemption of the various and prescriptive pipeline integrity and safety standards. *See*, OCD Ex. 4a, Slides 19, 78. However, the Proposed Rules still improperly require certain pipeline integrity and safety standards as part of the operations plan required of operators of natural gas gathering systems, including requirements related to routine maintenance, cathodic protection, corrosion control, liquids management, and integrity management. *See* Proposed Rules, 19.15.28.8.C(1). By requiring operators to incorporate some combination of these federal standards in order to comply with a vague and subjective "all reasonable actions" standard, the rule as drafted continues to present jurisdictional and preemption limitations as outlined in NMOGA's prehearing statement. *Id.*

The Division acknowledged at the outset of the hearing that it intended to remove language preempted by federal law. S*ee,* OCD Ex 4a at Slide 19 ("PIPELINES: Removed regulating language that would have been preempted by federal law."). Changing course, the Division argued in rebuttal that the operations plan requirements are related to waste prevention – not safety-related – and are thus not preempted by federal law. However, this ignores the fact that each of the procedures recited in the proposed rule are governed and established by PHMSA pipeline safety standards. *See* 49 CFR Part 192, Subpart M (maintenance); *id*. Subpart M, § 192.463 (external corrosion control: Cathodic protection); *id*. Subpart I (requirements for corrosion control); *id*. § 192.620(d) (controlling internal corrosion (liquids)); *id*. Subpart O

(integrity management). The Commission cannot avoid preemption simply by framing the same standards under a different name.

NMOGA has submitted an alternate proposal that avoids these pitfalls by requiring operators that are not in compliance with gas capture requirements to submit a plan that identifies and addresses mitigative actions to improve the operator's gas capture percentage. This approach focuses both the operator and the Division on achieving compliance, which in NMOGA's view should be the ultimate objective of this rulemaking. This approach is supported by testimony from the hearing and avoids potential conflicts with other federal and state agencies. *See* Day 6 Tr. 212-217, 258-262 308-310 (Reinermann); NMOGA Exs. F19-F20.

III. A THIRD EMERGENCY EXPERIENCED BY AN OPERATOR WITHIN A 60-DAY PERIOD SHOULD NOT BE ARBITRARILY CONSIDERED AN UNAUTHORIZED VENTING OR FLARING EVENT

NMOGA presented substantial evidence regarding the importance of adding the phrase "at one site for similar cause" in Part 27.7.G(6) and Part 28.7.D(6). *See* Day 4 Tr. 228-230, 234-35 (Smitherman); Day 6 Tr. 195-200 (Reinermann); NMOGA Ex. F8-F9; Day 7 Tr. 12-16 (Leonard); NMOGA Exs. G2-G3. In the event the Commission is not persuaded that it is prudent and appropriate to include the limitation "for similar causes," NMOGA recommends that the Commission at least include "at one site" so that the final rule does not unfairly and unduly impact operators that have numerous sites in a single reporting area.

The Division's definition requires a venting or flaring event caused by a third emergency to be reported against an operator's monthly gas capture requirements if it occurs within a 60-day period. *See* Day 3 Tr. 164 (Lepore); Day 10 Tr. 45-46 (Bolander); Day 6 Tr. 195 (Reinermann). The Division further acknowledged that the process and timing for Division action under the last clause in Parts 27.7.G(6) and 28.7.D(6) is unknown and may not occur before the monthly reporting obligation. *See* Day 3 Tr. 164-65 (Lepore). As such, a single

weather event or a power outage impacting multiple sites managed by the same operator in a reporting area will impact that operator's monthly gas capture reporting and compliance obligations.

Accordingly, the BLM's definition allows three emergencies in a 30-day period and is limited to a single lease, unit or communitized area. *See* 43 C.F.R §3179.103 (Referenced in OCD Ex. 37); Day 10 Tr. 47-49 (Bolander); Day 10 Tr. 177-78 (Powell/Bolander, questions from Commissioner Sandoval). Even well-maintained operations where operators have anticipated likely causes of failure, for example weather events, and have taken measures to reduce or minimize the impacts (i.e., lightning protection), can still experience not only directly impacted equipment but also a loss of electrical power coming into a facility. There are no steps that an operator can take to completely mitigate the impact of some failure causes. This is not the "same thing happening over and over again" or a "pattern" that is of concern to the Division. *See* Day 3 Tr. 32 (Lepore). If the definition of emergency is applied site by site, this will still allow the Division to detect patterns of failure that may indicate poor operations without arbitrarily and unduly impacting operators with numerous sites in a single reporting area.

IV. MONTHLY REPORTING TO ROYALTY OWNERS SHOULD APPLY ONLY TO THE STATE LAND OFFICE

The Division acknowledges the monthly reporting burden on "operators" imposed by Part 27.8.G(4) should not extend to overriding royalty owners because they "do not have correlative rights in the oil and gas being produced by a well or facility." *See* Notice of Filing of Final Proposed Rules at p. 2. Royalty owners likewise do not have operating or correlative rights. *See* NMAC 19.15.2.7.R(7) (definition of "royalty owner"). While the Division has struck the word "royalty" before the phrase "owners in the mineral estate," it is unclear if this change dispenses with the requirement for "operators" to report monthly to all royalty owners in an affected spacing

unit. *See* OCD Exhibit 2C at p. 8; NMAC 19.15.2.7.R(O)(7) and R(M)(8), (9) (definition of "owner," "mineral estate," and "mineral interest owner').

Division testimony reflects a lack of understanding on the contractual arrangements with royalty owners and a failure to examine the ability of an operator to implement this monthly obligation. *See* Day 4 Tr. 98 (Bolander, questions from Commissioner Kessler); Day 4 Tr. 178-80 (Powell) ("witness has already said he has no idea about any of these contractual relationships"); Day 10 Tr. 88 (Powell)("I'm not a royalty interest owner expert."). Accordingly, the Division presented no evidence on the ability of an operator to provide monthly reports to all royalty owners or to support the notion that this added monthly burden will prevent waste. Division witnesses noted instead that this provision rests on what the testimony demonstrates is an erroneous assumption: "An underlying assumption here is that operators have an going business relationship with their royalty owners and that adding this nugget of information to those ongoing reports would not be unduly burdensome." *See* Day 3 Tr. 168 (Lepore) Day 4 Tr. 177-78 (Powell) (noting same). NMOGA presented undisputed evidence that this assumption is not correct and that an operator does not have a contractual relationship with all royalty owners in a spacing unit, does not send monthly statements to all royalty owners in a spacing unit, and does not have contact information for all royalty owners in a spacing unit. *See* Day 5 Tr 172-182 (Smitherman); Day 5 Tr. 298-301 (Smitherman, questions from Commissioner Engler).

However, NMOGA acknowledges that an operator can likely provide C-115B reports to the New Mexico State Land Office when it has an interest in the natural gas vented or flared from a well or facility. *See* Day 5 Tr. 321-324 (Smitherman, questions from Commissioner Kessler). NMOGA has therefore modified Part 27.8.G(3) to impose this requirement. *See* NMOGA Ex. A-1 at p. 11.

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CERTIFICATE OF SERVICE

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