

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

**APPLICATION OF WILDEARTH GUARDIANS AND THE NEW
MEXICO OIL CONSERVATION DIVISION TO CONSIDER
PROPOSED AMENDMENTS TO RULES 19.15.29.6, 19.15.29.8
AND 19.15.29.15 NMAC CONCERNING RELEASES.**

CASE NO. 21834

MOTION TO EXCLUDE EVIDENCE AND TESTIMONY

Pursuant to Section 70-2-23 and 19.15.3 NMAC, the New Mexico Oil & Gas Association (“NMOGA”) moves the Oil Conservation Commission to exclude evidence and testimony at the upcoming hearing in this matter regarding additional regulatory requirements for Subpart 29 proposed by The Rio Grande Chapter of the Sierra Club, The Pueblo Action Alliance, Citizens Care for the Future, The Native American Voters Alliance Education Project, and Amigos Bravos (collectively, the “Intervenors”). *See* Intervenors Exhibit 1, attached as **Exhibit A** (proposing additional regulatory requirements in 19.15.29.8.C(2), 19.15.29.10.A, 19.15.29.10.B, 19.15.29.15.B.).

For the reasons stated, proposed non-technical and technical evidence and testimony relating to Intervenors’ requested additional regulatory requirements in Subpart 29 should be excluded from this rulemaking.

I. Introduction

Petitioners and WildEarth Guardians (“WEG”) and the Oil Conservation Division (“Division”) initiated this rulemaking to modify 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC for the narrow purpose of prohibiting major and minor releases of oil, gas, produced water, oil field waste, and other contaminants that occur during oil and gas development and production. *See* Division Prehearing Statement at 1, filed May 21, 2021. This proposed modification has

been filed, advertised, and afforded the opportunity for public comment pursuant to the stringent provisions of the Commission's rulemaking requirements. *See generally*, Oil Conservation Division's Application and Notice of Public Meeting and Public Hearing in Case No. 21834, filed March 11, 2021, attached as **Exhibit B**.

Intervenors have recently submitted separate and additional proposed regulatory requirements and indicated an intent to present technical evidence on what they acknowledge are "additional issues" separate from the Division's proposed amendments to 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC. *See* Intervenors' Notice at 2. The noticed rulemaking clearly limits the purpose and intent of the proceeding to considering proposed changes that would prohibit major and minor releases. Intervenors, however, seek to inject additional technical issues into this rulemaking that have not been previously noticed that will require separate technical evidence and testimony. Specifically, Intervenors seek to make additional modifications to Subpart 29 that would require introducing technical testimony and exhibits on the following issues:

1. Additional requirements for responsible parties to "characterize" and "document" the source of releases, depending on the type of release, as part of the immediate response and to "inform remediation requirements." *See* Intervenors' Notice at 5; *see also* Intervenors' Exhibit 4 at p. 8; Exhibit A.
2. Additional requirements for responsible parties to provide notification of major and minor releases to various entities within different areas at different stages of the response, and for the Division to post Form C-141s and "all information about the release" on the Division website within seven days of receiving a Form C-141. *See* Intervenors' Notice at 5; *see also* Intervenors' Exhibit 4 at p. 8; Exhibit A.

3. Additional requirements creating a rebuttable presumption that all releases, regardless of location, depth to groundwater, or volume, present a risk to the health or safety of the public or a risk of causing significant environmental harm, thereby shifting the burden of proof to the responsible party to avoid potential liability for a civil penalty of \$10,000 per day instead of \$2,500 per day under NMSA 1978, 70-2-31(D). *See* Intervenors' Notice at 5-6; *see also* Intervenors' Exhibit 4 at p. 8; Exhibit A.

Intervenors' proposed additional issues are not a logical outgrowth of the noticed rulemaking because each addition would require separate technical testimony and exhibits beyond the limited scope of the noticed rulemaking. Including these additional issues with supporting testimony and exhibits would violate the Commission's requirements for rulemaking and the Commission's interpretation of what constitutes "reasonable notice" of a rulemaking under the Oil and Gas Act, as provided in the governing notice regulations. The proposed additions and supporting evidence must be excluded.

Intervenors also have not provided a copy of their analysis of the spill data upon which their proposed testimony and exhibits are based.¹ All testimony and exhibits that rely on that data and the analysis should be excluded because NMOGA, the public, and other parties to this rulemaking proceeding have had no opportunity to review or respond to Intervenors' analysis.

In addition, under Procedural Order No. R-21674, which governs this rulemaking, the parties were required to submit their anticipated technical testimony in writing no later than 5 p.m. on May 26, 2021. In their Notice, Intervenors state that Joseph Zupan will provide technical

¹ Mr. Gaume's proposed testimony refers to "downloaded data and our analyses of these data" in an Excel Workbook marked as Exhibit 1; however, that Excel Workbook was provided only to Division Director and Commission Chair Sandoval; it was not served on the parties to this rulemaking. A DropBox web link provided in footnote 1 to Mr. Gaume's testimony was not functioning at the time counsel for NMOGA attempted to access it.

testimony, but did not provide his anticipated technical testimony in writing, as required. Mr. Zupan's proposed technical testimony must be excluded, therefore, for failing to comply with the requirements of the Procedural Order.

Finally, Intervenors propose to offer non-technical testimony from several witnesses across a range of topics and issues that are not relevant to the narrow modifications proposed by the Division and WEG. Under the Procedural Order, non-technical testimony must be "relevant to the proposed rule" and must "not unduly repeat the testimony." Order No. R-21674. Intervenors' proposed non-technical testimony and exhibits that relate to Intervenors' proposed additional regulatory issues and requirements, and not the Division's and WEG's proposed prohibition on major and minor releases, must be excluded. This includes the non-technical testimony of Ms. Fiebelman described on pages 5 and 6 of Intervenors' Notice, Ms. Bernal's proposed testimony described on page 7 of the Notice, Ms. Shoup's proposed testimony described on pages 9 and 10 of the Notice, Mr. Hernandez's proposed testimony on pages 11 and 12 of the Notice, and Mr. Zupan's proposed testimony on page 13 of the Notice.

II. Argument

A. NMOGA and the Public Did Not Have Reasonable Notice of Intervenors' Proposed Additional Requirements.

Neither regulated entities represented by NMOGA nor the general public have been afforded the required notice of Intervenors' proposed additional requirements in advance of the hearing to begin on June 9, 2021. The proposed additions, which introduce new concepts and requirements, are not contemplated by the Division's and WEG's proposed rule language nor are they a logical outgrowth of the proposal. The required opportunity for NMOGA and the public to review, analyze, and evaluate the operational impact of the proposed additional requirements, and the technical basis for them, has not been provided. This lack of notice, which violates the

Commission's rulemaking regulations, requires that any evidence and testimony relating to the additional issues and requirements proposed by Intervenors be excluded and not considered by the Commission at this rulemaking.

1. Rule Additions Must be a Logical Outgrowth of the Division's Proposed Rule.

Modifications to a proposed rule must be a "logical outgrowth" of the noticed proposal to be considered at a Commission rulemaking. *See* July 31, 2020, Transcript from Case No. 2181, In the Matter of Proposed Amendments to the Commission's Rules on Produced Water, 19.15.2, 19.15.16 And 19.15.34 NMAC, attached as **Exhibit C** (relevant portions excerpted).

Modifications constitute a logical outgrowth if the public could have expected that the change would have been part of the rulemaking. *See* Exhibit C at Tr. 191:22-192:1; *see also* *CSX Transp., Inc.*, 584 F.3d 1076, 1081 (2009) (stating that a modification is a logical outgrowth "if interest parties 'should have anticipated' that the change was possible").

The Commission recently rejected a series of rule changes that would have deleted substantial portions of proposed rule language and substituted new language creating new provisions and requirements that had not been contemplated by the proposed rule. *See* Exhibit C at Tr. 188:16-22; 191:22-192:1; 195:5-8; 215:6-10. In each circumstance, the Commission rejected the proposed language because the additions were not a "logical outgrowth" of the original rule and, therefore, "cannot be considered at this rulemaking because the public was not provided adequate notice that this change would arise." *See* Exhibit C at Tr. 188:23-189:2; *see also id.* 191:25-192:7; 195:10-13; 215:15-19 (rejecting proposed additions because they were not a "logical outgrowth" and the public did not have notice of the change).

2. The Commission has Interpreted its “Reasonable Notice” Mandate to Require that Rule Changes be a “Logical Outgrowth” of the Original Proposal.

Section 70-2-23 of the Oil and Gas Act requires “‘reasonable notice’ as a condition precedent to a hearing.” *Johnson v. N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 28, 978 P.2d 327. The mandate for “reasonable notice” applies to “hearings regarding ‘any rule, regulation or order[.]’” *Id.* ¶ 28. The Commission has incorporated this “reasonable notice” mandate in its rules that govern rulemaking proceedings in 19.15.3 NMAC. By adopting such regulations, the Commission acted to ensure that the public, regulated entities, and the Division will have sufficient opportunity to scrutinize and evaluate the technical and legal bases for proposed regulations or rule amendments. The Commission has further interpreted these regulations to require rule modifications to be a logical outgrowth of the proposed rule. *See generally*, Exhibit C.

Because the additional regulations proposed by Intervenors introduce new requirements, concepts, and notifications that were not contemplated by what the Division and WEG proposed and noticed in this rulemaking, they are not a logical outgrowth of the original proposal. Consideration of evidence and testimony at this rulemaking supporting the additions would therefore violate key aspects of the Commission’s substantive procedural and notice requirements.

3. Rulemaking Initiation Requires Applicants to “Specifically Identify the Rule the Applicant Proposes to Adopt” and Provide a “Draft of the Proposed Rule.”

19.15.3.8 NMAC provides that any person may file an application for rulemaking, but the application must “specifically identify” the proposed rule and must include “a draft of the proposed rule” itself. The Division and WEG fulfilled these requirements when they filed the

application, summarizing the proposed rule's intended effect, and including a complete draft of the proposed rule's language. *See* Exhibits B.

However, nowhere in the Division's and WEG's application materials or notice, including the draft rule itself, is there any indication that the proposed regulation contemplated the "additional issues" raised now by Intervenors. *Compare* Exhibit A *with* Exhibit B. The Division's proposed language simply provides that "Except as provided in Parts 27 or 28, major releases and minor releases are prohibited." *See* Division Exhibit 6 at p. 1. Intervenors' proposed modifications introduce entirely new issues and requirements, adding at least six additional provisions and subparagraphs to account for their separate issues and modifications. *See* Exhibit A.

Because Intervenors' new regulation and requirements were not included in, or contemplated by, the rulemaking application materials required under 19.15.27.3.8, NMOGA and the public have had no opportunity to fairly assess or evaluate the technical or legal merits in advance of the hearing.

To avoid this problem, Intervenors could have, and should have, filed their own applications for rulemaking on the proposed additions to be heard concurrently with the Division's and WEG's proposed rule. That would have triggered the strict notice requirements under 19.15.3.9.B NMAC and would have given NMOGA and the public adequate opportunity to review and evaluate the additional requirements. Having failed to apply for its own rulemaking, Intervenors did not provide the required "reasonable notice."

B. 19.15.3.9.B NMAC Imposes Strict Notification Requirements for Rulemaking Proceedings that will be Subverted if Evidence and Testimony Relating to Intervenor’s Proposed Requirements are Permitted.

Had Intervenor’s filed rulemaking applications for the specific additions proposed, they would have been required to prepare a legal notice that meets the strict requirements of 19.15.3.9.B NMAC, which include:

- (1) a **summary of the full text** of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a **citation to the specific legal authority authorizing the proposed rule** and the adoption of the rule;
- ...
- (5) information on how a person may comment on the proposed rule, where comments will be received and when comments are due; [and]
- ...
- (7) a **citation to technical information**, if any, that served as a basis for the proposed rule, and **information on how the full text of the technical information may be obtained.**

By adopting these provisions as requirements for rulemaking, the Commission has incorporated them as elements necessary to provide “reasonable notice[,]” which is “a condition precedent to a hearing.” See *Johnson v.*, 1999-NMSC-021, ¶ 28.

NMOGA and the public have been deprived of the materials required under 19.15.3.9.B NMAC in advance of the rulemaking hearing. The Commission’s regulations also provide that public comments on the proposed requirements “shall be made part of the hearing record.” 19.15.3.10 NMAC. But here, the public also has been deprived of the opportunity to comment on Intervenor’s proposed additional issues and requirements.

If Intervenor’s are allowed to present evidence and testimony in support of their proposed additional regulations at the hearing, the regulatory procedure the Commission has carefully constructed to provide meaningful notice as a condition precedent to rulemaking will be unfairly subverted.

CONCLUSION

For the reasons stated, NMOGA's Motion should be granted and evidence and testimony supporting the additional regulatory provisions proposed by Intervenors under 19.15.29.8.C(2), 19.15.29.10.A, 19.15.29.10.B, 19.15.29.15.B should be excluded from this rulemaking, and the Commission should disregard any such evidence or testimony when considering adoption of any final rule.

In addition, testimony and exhibits that derive from or rely on Mr. Gaume's Exhibit 1 must be excluded because that analysis was not provided to the parties, as required. Similarly, the proposed technical testimony of Mr. Zupan must be excluded because it was not provided in writing as required by Procedural Order No. R-21674.

Finally, Intervenors' proposed non-technical testimony that relate to Intervenors' proposed additional regulatory requirements must be excluded pursuant to the Procedural Order because it is not relevant to the Division's and WEG's proposed modifications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2021, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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Adam G. Rankin

EXHIBIT A

Case No. 21834: Application of Wild Earth Guardians (WEG) and New Mexico Oil Conservation Division (OCD) to Amend the Oil Conservation Commission's Rules for Releases

Proposed Amendments of Intervenors: Rio Grande Chapter of the Sierra Club, the Pueblo Action Alliance, Citizens Caring for the Future, the Native American Voters Alliance Education Project, and Amigos Bravos to: New Mexico Oil Conservation Commission

Color code:

Black type is existing rule

Underline and strikethrough black type is WEG/OCD agreed petition changes to existing rule

Underline red type or strikethrough is Sierra Club et al change proposed in intervention

Blue type is unchanged language from existing rules not included in WEG/OCD petition

TITLE 19 NATURAL RESOURCES AND WILDLIFE CHAPTER 15 OIL AND GAS PART 29 RELEASES

19.15.29.6 OBJECTIVE: To prohibit releases and require persons who operate or control the release or the location of the release to report the unauthorized release of oil, gases, produced water, condensate or oil field waste including regulated NORM or other oil field related chemicals, contaminants or mixtures of those chemicals or contaminants that occur during drilling, producing, storing, disposing, injecting, transporting, servicing or processing; and to establish procedures for reporting, site assessment, remediation, closure, variance and enforcement [~~procedures~~].

19.15.29.8 RELEASES:

A. Prohibition. Major releases and minor releases are prohibited.

[A] B. Requirements. For all releases regardless of volume, the responsible party shall comply with 19.15.29.8 NMAC and shall remediate the release. For major and minor releases, the responsible party shall also comply with 19.15.29.9, 19.15.29.10, 19.15.29.11, 19.15.29.12 and 19.15.29.13 NMAC.

[B] C. Initial response. The responsible party must take the following immediate actions unless the actions could create a safety hazard that would result in injury.

(1) **Source elimination and site security.** The responsible party must take appropriate measures to stop the source of the release and limit access to the site as necessary to protect human health and the environment.

(2) Source Characterization. The responsible party shall collect samples of the source of the release for laboratory analysis based on the type of release for the constituents in Table I of 19.15.29.12 NMAC, total dissolved solids (TDS), and as required by Subsection A

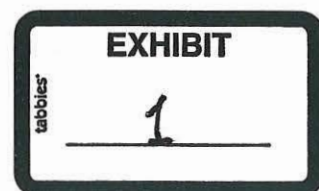


EXHIBIT A

of 19.15.29.11 NMAC, and document the release source and affected area with photographs for submittal to OCD with form C-141.

(3)(2) Containment. Once the site is secure, the responsible party must contain the materials released by construction of berms or dikes, the use of absorbent pads or other containment actions to limit the area affected by the release and prevent potential fresh water contaminants from migrating to watercourses or areas that could pose a threat to public health and environment. The responsible party must monitor the containment to ensure that it is effectively containing the material and not being degraded by weather or onsite activity.

(4)(3) Site Stabilization. After containment, the responsible party must recover any free liquids and recoverable materials that can be physically removed from the surface within the containment area. The responsible party must deliver material removed from the site to a division-approved facility.

(5)(4) Remediation. The responsible party may commence remediation immediately.

19.15.29.10 RELEASE NOTIFICATION REPORTING REQUIREMENTS: The responsible party must notify the division of releases in 19.15.29.9 NMAC as follows.

A. Reporting a major or minor release.

(1) The responsible party must notify the division's environmental bureau chief and the appropriate division district office verbally ~~or and in writing by email~~ within 24 hours of discovery of the release. The responsible party must provide notification within 24 hours of the release to any land owners, residences, institutions, and businesses within 1,000 feet distance of the point of release and area impacted by the release. These notifications must provide the information required on form C-141.

(2) The responsible party must also notify the appropriate division district office in writing within ~~five~~ 15 days of discovering the release by completing and filing form C-141. The written notification must verify the prior ~~verbal or e-mail~~ written notification and include additions or corrections to the information contained in the prior ~~verbal or e-mail~~ written notification.

(3) The responsible party must notify owners and occupants of any land, residence, institution, or business within one half mile (2640 feet) of the point of the release and the area impacted by the release by providing them a copy of the form C-141 within seven days of discovering the release. The responsible party shall provide written notification to the division listing all parties and their respective addresses that have been provided copies of the form C-141.

(4) Within 7 days of approval of completion of all compliance requirements, the responsible party must notify owners and occupants of any land, residence, institution, or business within one half mile (2640 feet) of the point of the release and the area impacted by the release by providing them a copy of the final form C-141. The responsible party shall provide

EXHIBIT A

written notification to the division listing all parties and their respective addresses that have been provided copies of the final form C-141.

(5) Within 7 days of receiving a form C-141, the division shall post the form including all information about the release on the division website. Any information, data, and reports produced and submitted pursuant to 19.15.29 shall be posted on the division website.

B. Reporting a minor release. The responsible party must notify the appropriate division district office in writing within 15 days of discovery of the release by completing and filing form C-141.

19.15.29.15 ENFORCEMENT

A. The responsible party must comply with all the requirements of 19.15.29 NMAC. The division may take enforcement action pursuant to 19.15.5.10 NMAC against any responsible party who does not comply with 19.15.29 NMAC [~~pursuant to 19.15.5.10 NMAC~~].

B. There shall be a rebuttable presumption that a violation of 19.15.29 NMAC presents either a risk to the health or safety of the public or a risk of causing significant environmental harm, pursuant to NMSA 70-2-31 (D).

~~{B}~~C. A responsible party may enter [~~an agreed compliance order~~] a stipulated final order with the division for any violation of 19.15.29 NMAC.

~~{C}~~D. The director or the director's designee may deny any application or permit, including but not limited to, a permit to drill, deepen or plug back a well if the responsible party is not in compliance with a court order [~~, agreed compliance order or administrative compliance order~~] or final order arising from a violation of 19.15.29 NMAC.

~~{D}~~E. — If the division or other party files an administrative enforcement application, the provisions of 19.15.4 NMAC apply to the enforcement proceeding, unless altered or amended by 19.15.5.10 NMAC or 19.15.29 NMAC.]

EXHIBIT B

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

IN THE MATTER OF PROPOSED
AMENDMENTS TO THE COMMISSION'S
RULES ON RELEASES,
19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC

CASE NO. _____

APPLICATION FOR RULEMAKING

Pursuant to 19.15.3.8(A) NMAC, Petitioners WildEarth Guardians (“Guardians”) and New Mexico Energy, Minerals and Natural Resources Department, Oil Conservation Division (“Division”) hereby apply to the New Mexico Oil Conservation Commission (“Commission”) to amend 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC. Currently, the Commission’s rules do not prohibit unauthorized releases of oil, gases, produced water, oil field waste, and other contaminants that occur during oil and gas development and production. The proposed rule would fill that regulatory gap by prohibiting major and minor releases as those terms are defined in the Commission’s rules.

Petitioners state that:

- (1) The proposed rule changes prohibit major and minor releases of oil, gases, produced water, oil field waste, and other contaminants that occur during oil and gas development and production and clarify the Division’s authority to enforce this prohibition.

Releases of oil, gas, produced water, oil field waste, and other contaminants from oil and gas development and production pose a threat to public health and the environment in New Mexico. The Division’s spills database contains more than 12,000 records for releases reported between January 1, 2010 and December 2020, including an estimated 7,000 releases of produced water and 4,000 releases of crude oil. For 2020, the Division’s records show 733 releases of produced water, of which 330 were major releases, and 398 releases of crude oil, of which 90 were major releases.

After-the-fact reporting and cleanup obligations standing alone are inadequate to protect public health and the environment. Operators should not release oil, gas, produced water, and other contaminants in the first place, and the Division should be given the tools necessary to prevent those releases.

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The proposed rule changes also conform 19.15.29.15 NMAC with the general enforcement provisions in 19.15.5.10 NMAC, which were adopted by the Commission in 2020.

A draft of the proposed rule changes is attached as Exhibit A to this Application.

- (2) The Applicants are WildEarth Guardians and the Oil Conservation Division.
- (3) The contacts for the Applicants shall be:

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- (4) A proposed legal notice is attached as Exhibit B.

Petitioners request that the Commission, as soon as possible after 15 days and no later than 60 days from the submittal of this Application, grant a hearing on the proposed rule changes and issue an order pursuant to 19.15.3.8(C) NMAC specifying the procedures to conduct the hearing in a manner that provides a robust opportunity for public involvement while taking into consideration the public health and safety in light of the COVID-19 emergency.

Respectfully submitted this 11th day of March 2021,

WILDEARTH GUARDIANS

/s/ Daniel L. Timmons

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EXHIBIT B

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EXHIBIT B

EXHIBIT A

PROPOSED RULE CHANGES

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 15 OIL AND GAS
PART 29 RELEASES

19.15.29.6 OBJECTIVE: To prohibit releases and require persons who operate or control the release or the location of the release to report the unauthorized release of oil, gases, produced water, condensate or oil field waste including regulated NORM or other oil field related chemicals, contaminants or mixtures of those chemicals or contaminants that occur during drilling, producing, storing, disposing, injecting, transporting, servicing or processing; and to establish procedures for reporting, site assessment, remediation, closure, variance and enforcement ~~procedures~~.

19.15.29.8 RELEASES:

A. Prohibition. Major releases and minor releases are prohibited.

BA. Requirements. For all releases regardless of volume, the responsible party shall comply with 19.15.29.8 NMAC and shall remediate the release. For major and minor releases, the responsible party shall also comply with 19.15.29.9, 19.15.29.10, 19.15.29.11, 19.15.29.12 and 19.15.29.13 NMAC.

CB. Initial response. The responsible party must take the following immediate actions unless the actions could create a safety hazard that would result in injury.

(1) Source elimination and site security. The responsible party must take appropriate measures to stop the source of the release and limit access to the site as necessary to protect human health and the environment.

(2) Containment. Once the site is secure, the responsible party must contain the materials released by construction of berms or dikes, the use of absorbent pads or other containment actions to limit the area affected by the release and prevent potential fresh water contaminants from migrating to watercourses or areas that could pose a threat to public health and environment. The responsible party must monitor the containment to ensure that it is effectively containing the material and not being degraded by weather or onsite activity.

(3) Site stabilization. After containment, the responsible party must recover any free liquids and recoverable materials that can be physically removed from the surface within the containment area. The responsible party must deliver material removed from the site to a division-approved facility.

(4) Remediation. The responsible party may commence remediation immediately.

19.15.29.15 ENFORCEMENT:

A. The responsible party must comply with all the requirements of 19.15.29 NMAC. The division may take enforcement action pursuant to 19.15.5.10 NMAC against any responsible party who does not comply with 19.15.29 NMAC ~~pursuant to 19.15.5.10 NMAC~~.

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B. A responsible party may enter ~~an agreed compliance order~~ a stipulated final order with the division for any violation of 19.15.29 NMAC

C. The director or the director's designee may deny any application or permit, including but not limited to, a permit to drill, deepen or plug back a well if the responsible party is not in compliance with a court order, ~~agreed compliance order or administrative compliance order~~ or final order arising from a violation of 19.15.29 NMAC.

~~**D.** If the division or other party files an administrative enforcement application, the provisions of 19.15.4 NMAC apply to the enforcement proceeding, unless altered or amended by 19.15.5.10 NMAC or 19.15.29 NMAC.~~

EXHIBIT B

EXHIBIT B

NOTICE OF PUBLIC MEETING AND PUBLIC HEARING

The New Mexico Oil Conservation Commission (Commission) hereby gives notice that the Commission will hold the following public meeting and public hearing commencing at 9:00 am on May __ 2021 (and subsequent days as may be necessary) online and via telephone. Oral comments may be made either online or by telephone. The Commission shall make available to the public a preliminary agenda for the meeting no later than two weeks prior to the meeting, and a final agenda for the meeting no later than 72 hours before the meeting. The agenda shall specify the order of the proceedings and, to the extent feasible, identify the specific time(s) that public comments are to be heard. The agenda shall be posted online on the Commission's Hearings page under "OCC Dockets," accessible from the following web page: <http://www.emnrd.state.nm.us/OCD/hearings.html>.

Case No. _____ : APPLICATION OF WILDEARTH GUARDIANS AND NEW MEXICO OIL CONSERVATION DIVISION TO AMEND THE COMMISSION'S RULES FOR RELEASES IN 19.15.29.6, 19.15.29.8, AND 19.15.29.15 NMAC; STATEWIDE.

WildEarth Guardians and the Oil Conservation Division propose that the Commission amend 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC to prohibit the unauthorized release of oil, gas, produced water, and other contaminants, and to clarify the Division's authority to enforce this prohibition on major and minor releases.

Purpose of Proposed Rule Changes. The proposed rule changes are intended to prohibit major and minor releases of oil, gas, produced water, oil field waste, and other contaminants that occur during oil and gas development and production to protect public health and the environment, and to conform 19.15.29.15 NMAC with the general enforcement provisions of 19.15.5.10 NMAC, which were adopted by the Commission in 2020.

Legal Authority. The proposed rule changes are authorized by the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, and specifically, Section 70-2-6 (authorizing the Commission to exercise jurisdiction, authority, and control of and over all persons, matters, and things necessary or proper to enforce the statute), Sections 70-2-11 (authorizing the Commission to make rules to prevent waste, protect correlative rights, and to do whatever may be reasonably necessary to implement the statute), Section 70-2-12 (enumerating the powers of the Commission and OCD), and Section 70-2-31 (authorizing the Division to bring administrative and judicial actions for violations of the Oil and Gas Act and Commission rules). The public hearing is governed by the Commission's rule on rulemaking proceedings, 19.15.3 NMAC.

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Availability of Proposed Rule. The full text of the proposed rule changes may be obtained from the Commission Clerk, Florene Davidson at florene.davidson@state.nm.us or (505) 476-3458, or can be viewed on the Rules page of the OCD's website at <http://www.emnrd.state.nm.us/OCD/rules.html>.

Public Hearing. The Commission will hold a public hearing on the proposed rule changes at the Commission meeting commencing at 9:00 am on May __, 2021 (and subsequent days as needed) online and via telephone. For information on how to participate in the hearing, please contact the Commission Clerk, Florene Davidson at florene.davidson@state.nm.us or (505) 476-3458, or visit the Hearings page on the OCD's website at <http://www.emnrd.state.nm.us/OCD/hearings.html>. The hearing may be continued to the following day(s) if not completed.

Proposed Modifications, Technical Testimony, and Cross Examination. Any person intending to propose a modification to the proposed rule changes, to present technical testimony at the hearing, or to cross-examine witnesses must file a Pre-Hearing Statement conforming to the requirements of Subsection B of 19.15.3.11 NMAC, no later than 5:00 pm on _____, 2021. Filing may be accomplished by first class mail to the Commission Clerk, Florene Davidson, 3rd Floor, Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico 87505, or by electronic mail to OCD.Hearings@state.nm.us. Any person who presents technical testimony will be subject to cross-examination on the subject matter of the person's direct testimony by the members of the Commission, the Commission's counsel, or another person who has filed a Pre-Hearing Statement.

Oral Comments. Any person who has not submitted a Pre-Hearing Statement may present non-technical testimony or make an unsworn statement or comment at the hearing, and may offer exhibits at the hearing so long as the exhibits are relevant to the proposed rule changes and do not unduly repeat testimony. Any person who presents non-technical testimony will be subject to cross-examination on the subject matter of the person's direct testimony by the Commission, the Commission's counsel, or another person who has filed a Pre-Hearing Statement. Any person who presents an unsworn statement or comment shall not be subject to cross-examination. To facilitate this virtual hearing, persons wishing to present non-technical testimony or make an unsworn statement or comment at the hearing should contact the Commission Clerk, Florene Davidson, at florene.davidson@state.nm.us or (505) 476-3458, prior to the hearing so that a list of persons may be prepared in advance. Notwithstanding this procedure, after the Commission has heard each person on the list, the Commission will open the virtual floor to any person who wishes to offer non-technical testimony or an unsworn statement or comment relevant to the proposed rule changes.

Public Comments. Any person may submit comments on the proposed rule changes no later than 9:00 am on May __, 2021, unless extended by the Commission or the Chair of the Commission,

EXHIBIT B

by first class or electronic mail to the Commission Clerk, Florene Davidson, 3rd Floor, Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico 87505, or florene.davidson@state.nm.us.

Persons with Disabilities. If you are an individual with a disability who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, including a summary or other accessible form of document, please contact the Commission Clerk, Florene Davidson, at florene.davidson@state.nm.us or (505) 476-3458, or through the New Mexico Relay Network at 1-800-659-1779, no later than July 2, 2020.

Technical Information. The following technical information served as the basis for the proposed rule changes:

EPA, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States, EPA-600-R-16-236Fa (Dec. 2016), available at: www.epa.gov/hfstudy.

Oil Conservation Division spill records may be accessed online at: <https://wwwapps.emnrd.state.nm.us/ocd/ocdpermitting/Data/Spills/Spills.aspx>,

using the following search parameters under “Spill Details”:

- Spill Material: All; Dates: 1/1/2010 – 12/31/2020
- Spill Material: All; Dates: 1/1/2020 – 12/31/2020
- Spill Material: Crude Oil; Dates: 1/1/2010 – 12/31/2020
- Spill Material: Crude Oil; Dates: 1/1/2020 – 12/31/2020
- Spill Material: Produced Water; Dates: 1/1/2010 – 12/31/2020
- Spill Material: Produced Water; Dates: 1/1/2020 – 12/31/2020

Pre-Hearing Statements, including technical testimony and exhibits, will be posted for public inspection on the Division’s website at

<http://ocdimage.emnrd.state.nm.us/imaging/CaseFileCriteria.aspx> or by searching for Case File No. _____.

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 21281

IN THE MATTER OF PROPOSED
AMENDMENTS TO THE COMMISSION'S
RULES ON PRODUCED WATER,
19.15.2, 19.15.16 AND 19.15.34 NMAC.

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS
COMMISSIONER HEARING, VOLUME 2
Agenda Item
July 31, 2020
Santa Fe, New Mexico

BEFORE: ADRIENNE SANDOVAL, CHAIRWOMAN
JORDAN KESSLER, COMMISSIONER
DR. THOMAS ENGLER, COMMISSIONER
MIGUEL LOZANO, ESQ.

This matter came on for virtual hearing before
the New Mexico Oil Conservation Commission on Thursday, July
31, 2020 through the New Mexico Energy, Minerals, and
Natural Resources Department, Webex Platform, Santa Fe, New
Mexico.

Reported by: Irene Delgado, NMCCR 253
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CLOSING ARGUMENT

By OCD
By NMOGA
By WildEarth Guardians
By Sierra Club
By New Energy Economy

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1 that it's not allowed to -- you're not allowed to use it for
2 any land use on pad, I don't think that goes under the
3 scope, it probably goes anywhere else.

4 COMMISSIONER ENGLER: Probably under procedures.

5 CHAIRWOMAN SANDOVAL: We will visit that in a
6 moment then.

7 Statutory authority, 19.15.34.3, we had two
8 proposals, one proposal from the Sierra Club, and one
9 proposal from WildEarth Guardians. It's just different
10 types of ways of adding language about protecting public
11 health, the environment and fresh water. I believe it was
12 the Division who afforded the WildEarth Guardian language.
13 Is that what you recall, Dr. Engler?

14 COMMISSIONER ENGLER: Yes, that's correct. It's
15 in a manner that protects public health, the environment and
16 fresh water resources, I think that's good to do that.

17 CHAIRWOMAN SANDOVAL: I agree. It again adds the
18 explicit statement in there. So we would propose to use
19 WildEarth Guardian's change to 19.15.34.3 as it was proposed
20 in their proposal.

21 MR. LOZANO: Okay. Yes, Madam Chair.

22 CHAIRWOMAN SANDOVAL: All right. The next
23 change, or next several changes are changes to the
24 objectives. I think it would be good maybe, Dr. Engler,
25 to -- I will just go through and list kind of the different,

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1 the different options here for changes to the objective.

2 So the original change to the objective is the
3 change that the Oil Conservation Division made, which also
4 explicitly states protects public health, environment, and
5 fresh water resources. I think it is good to state that in
6 as many places as possible, so I'm fine with their edition.

7 At the end of the Oil Conservation language they
8 use that kind of same language that I believe the WildEarth
9 Guardians use (inaudible) I think maybe we should change
10 that to within the jurisdiction of the Division to keep it
11 aligned. Okay. So that was the change from the Oil
12 Conservation Division.

13 We will get to New Mexico Oil and Gas Association
14 and see if they have any, they have any proposed changes to
15 the objective.

16 WildEarth Guardians had multiple changes to the
17 objectives. They added -- they deleted the entire section
18 which had been added by the Oil Conservation Division, and
19 they rewrote it to create four sections of equal importance
20 to prohibit hydraulic fracturing, to prohibit
21 hydraulic (inaudible) the use of surface or groundwater that
22 has less than a 1000 milligrams per liter of TDS.

23 On that statement specifically, I do not believe
24 that that change is a logical outgrowth of the original OCD
25 rule, and therefore cannot be considered at this rulemaking

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1 because the public was not provided adequate notice that
2 this change would arise.

3 COMMISSIONER ENGLER: I agree.

4 CHAIRWOMAN SANDOVAL: Okay.

5 COMMISSIONER ENGLER: (inaudible).

6 CHAIRWOMAN SANDOVAL: Excellent. B, to ensure
7 the protection of public health, the environment and fresh
8 water resources from any transportation, recycling, reuse
9 and disposition of produced water, I believe that -- or
10 other Division proposal, and then some of this language
11 about the -- the original statements of public health --
12 and protection of public health and environment and fresh
13 water resources, so I believe that section is adequately
14 covered in the proposal.

15 COMMISSIONER ENGLER: That's correct. B of
16 WildEarth Guardians is really a restatement of what we
17 already had.

18 CHAIRWOMAN SANDOVAL: C, that prohibits the use
19 of produced water and the use of recycled produced water in
20 any activities that are not directly related to oil -- to
21 drilling -- to exploration, drilling, production, treatment
22 or refinement of oil and gas.

23 I mean, I feel like we put that in here already,
24 so (inaudible).

25 COMMISSIONER ENGLER: Correct.

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1 COMMISSIONER ENGLER: Yes. Madam Chair, it's --
2 again, it's already explicitly in the Division objective.
3 So (inaudible) I'm fine with what the Division wrote.

4 CHAIRWOMAN SANDOVAL: I would agree. Okay. So
5 that -- I mean we walked through the four objectives
6 proposed by WildEarth Guardians. I do not propose to enter
7 any of those in this updated rule language, but look at
8 Sierra Club's objective section.

9 Okay. So again, similar to WildEarth Guardians,
10 they strike that whole paragraph predominantly that the Oil
11 Conservation Division proposed, and they have three
12 objectives.

13 In A, to provide protection of public health, the
14 environment and fresh water resources from produced water
15 production, storage, transportation and reuse of any oil and
16 gas industry. I --

17 COMMISSIONER ENGLER: That's, again, is very
18 good, but it's also already covered.

19 CHAIRWOMAN SANDOVAL: I agree. Okay. So we will
20 not include Section A of the Sierra Club's objective
21 section.

22 B, to prohibit the use of fresh water in major
23 well fracturing unless there is well permitted. Again this
24 is similar to WildEarth Guardian's proposal which we
25 discussed. I do not believe that this is a logical

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1 outgrowth of the proposed rule, and therefore it cannot be
2 considered during this rulemaking section.

3 It would have to be -- because this, you know,
4 the public could not have expected that this would have been
5 part of the rulemaking, and therefore were not given
6 adequate notice, so therefore it cannot be part of this
7 rulemaking.

8 COMMISSIONER ENGLER: I would concur, and just
9 add that they provided really no testimony whatsoever about
10 alternatives or how to go about this in terms of not just
11 the prohibition of the fresh water, but how you go about the
12 alternatives. So without any really strong evidence or
13 testimony, I would -- I just read that as (inaudible) and
14 agree with what you are saying.

15 CHAIRWOMAN SANDOVAL: Okay. So we will not be
16 including B.

17 C, to encourage recycling or reuse of produced
18 water it has to be related activities related to
19 exploration, drilling, production, treatment or refinement
20 of oil and gas that permanently and physically separate the
21 reuse of produced water from ground water or surface water
22 (inaudible) water.

23 Again I believe this is covered in the Oil
24 Conservation Division proposal in that first line, and so
25 that adequately covered what is being stated there.

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1 secondary recovery or enhanced recovery of oil and natural
2 gas or plugging of wells pursuant to 19.15.34 NMAC.

3 MR. LOZANO: Thank you.

4 CHAIRWOMAN SANDOVAL: Yes. Okay. Let's move
5 on to WildEarth Guardians' proposal. They require some
6 pretty large changes that require basically, for the reuse
7 of produced water, you have to get a permit, obtain a
8 permit.

9 So there's a couple of items here of concern.
10 Again, this was not a logical outgrowth of the proposed
11 rule, and therefore the public was not provided notice that
12 this could be part of the rulemaking, and so that's the
13 first reason.

14 The second reason which we heard testimony from
15 Mr. Brancard on is, we do not require a permit for any other
16 water type, and so this would actually make using recycled
17 produced water more onerous on operators and might have the
18 unintended consequence of not meeting the objectives of this
19 rule, which is to encourage recycling, and so I do not
20 believe that that should be included.

21 COMMISSIONER ENGLER: Yes, Madam Chair, whether
22 permit as one entity proposes or the registration of
23 another, I think the -- I agree with your statement, that
24 the objective is to promote the reuse. And that this is,
25 this is going to be more onerous and less of a promotion

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1 Dr. Engler, do you have any concerns with 1, 2 or
2 3?

3 COMMISSIONER ENGLER: Madam Chair, I think
4 (inaudible) spelled out (inaudible) and the third component
5 is necessary for this rule.

6 CHAIRWOMAN SANDOVAL: Okay. Okay. So now let's
7 move first to the WildEarth Guardians' edition of C. So
8 that would have been 19.15.34.8C, which basically says you
9 cannot use fresh water or drinking water in drilling and
10 completions operations.

11 You know, we had a proposal, I believe, from
12 Sierra Club in (inaudible). First of all, I think
13 Mr. Brancard testified that (inaudible) he is unsure if OCD
14 has the direct authorization to do this.

15 Second, it's -- again, I think (inaudible) it is
16 not a logical outgrowth of the initial proposal and
17 therefore cannot be considered in this rulemaking because
18 the public was not afforded reasonable public notice that
19 this may be a requirement going forward. Dr. Engler?

20 COMMISSIONER ENGLER: I concur, and I guess I
21 will add the statement that, again there was really no
22 evidence or testimony provided to say why this should be
23 prohibited.

24 CHAIRWOMAN SANDOVAL: And actually, that is
25 almost identical to Sierra Club's C, which says no fresh