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

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

INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO'S MOTION TO EXCLUDE ALL PROPOSED EVIDENCE AND TESTIMONY OF SIERRA CLUB, ET AL.

Pursuant to Section 70-2-23 and 19.15.3 NMAC, the Independent Petroleum Association of New Mexico ("IPANM") moves for an order of the Oil Conservation Commission ("Commission") excluding evidence and testimony at the upcoming hearing in this matter regarding additional regulatory requirements for Subpart 29 that were first proposed on May 26, 2021 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, "Sierra Club, et al.").

I. HISTORY OF THIS CASE

On March 11, 2021, the Wild Earth Guardians ("WEG") and the Oil Conservation Division (the "OCD") proposed narrow amendments to subpart 29 of the Commission's rules. *See* Application for Rulemaking filed in this case March 11, 2021 (the "Application").[1] Those proposals seek to prohibit major and minor releases of oil, gas, produced water, oil field waste, and other contaminants that sometimes occur during oil and gas development, production, and associated activities and to "clarify the Division's

[1] IPANM does not attach copies of matters filed of record in this Case to which it makes reference or cites herein.

authority to enforce this prohibition." Id. at ¶ 1. No other purpose was identified in that Application nor was any other change sought in the proposed rulemaking.

Prior to May 26, the only other parties to enter their appearances in this case were the two state-wide associations representing the industry regulated by the Commission. The New Mexico Oil and Gas Association entered its appearance on March 17, 2021 and IPANM entered its appearance on April 15, 2021.

The Commission entered its Procedural Order on April 23, 2021. Order No. R-21674. Among other things, that Order provided that "[n]o later than 5:00 P.M. May 26, 2021 a person wishing to present technical testimony shall file a Pre-Hearing Statement ... that includes a concise statement...of each technical witness's qualifications, anticipated testimony, exhibits, proposed modifications to the proposed rule changes ...and attach the exhibits." Order No. R-21674 at ¶3(a).

Consistent with the Commission's rules and the due process rights of the citizens of New Mexico and others regulated by the Commission's rules, notice of this proposed rulemaking was made no later than May 4, 2021, to the public in at least six (6) different ways and via email "to all persons on the Commission mailing list for rulemakings. *See* "Certificate of Compliance with Notice Requirements" filed in this case on May 4, 2021.

Prior to May 26, 2021, two additional parties entered their appearance in these proceedings—IPANM and the New Mexico Oil and Gas Association who are the two trade associations representing oil and gas producers in the State of New Mexico. Consistent with the narrow purpose of the proposed rulemaking, the four parties worked to agree upon written testimony of a single witness to support the proposed rulemaking and to

fashion a single clarifying amendment to the proposed rulemaking that clarified that the amendments to Part 29 of the rules did not extend to matters covered by Parts 27 or 28.

On May 26, 2021, Sierra Club et al. filed a 34-page "Notice of Intent to Present Non-Technical and Technical Testimony" ("Sierra Club et al.'s Statement"). Without prior notice to the public or IPANM and its members, Sierra Club et al. proposed testimony of three non-technical witnesses and two technical witnesses to support extensive additional changes to Part 29, including:

1. Adding new requirements for responsible parties "document" and "characterize" the source of any release (Sierra Club et al.'s Statement at Ex. 1, their proposed Rule 19.15.29.13(C)(2));

2. Materially alters the notification requirements for major releases by including minor releases, by adding requirements to make written reports to the Division in 24 hours, and by adding new notification requirements to basically all owners and occupiers of land within 1,000 feet of the spill (id., their proposed Rule 19.15.29.10(A)(1);

3. Shortening by two-thirds the length of time in which the responsible party must file a form C-141 (id., their proposed Rule 19.15.29.10(A)(2));

4. Adding new requirements for notifying owners and occupiers of land with-in one-half mile of the spill and the remediation efforts completion (id., their proposed Rule 19.15.29.10(A)(3) & (4));

5. Adding a new requirement that the Division post information on its website concerning the C-141 and any other reports in a short amount of time (id., their proposed Rule 19.15.29.10(A)(5)); and,

6. Creates a new "rebuttable presumption that a violation of [Part 29] 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)." (Id., their proposed Rule 19.15.29.15(B)).

Prior to receiving the Sierra Club et al.'s Statement, IPANM and its members had no notice that this rulemaking proceeding would involve any of those six changes.[2]

Sierra Club et al. state that they will call two witnesses to provide technical testimony.[3] First, they list Joseph Zupan as a non-technical and technical witness. Sierra Club et al.'s Statement at 12-13, § F. As to Mr. Zupan's technical testimony, the entirety of Sierra Club et al.'s disclosure consists of his two-page resume (id. at Exhibit 2) and that he will testify in support of WEG and Division's proposed amendments to Part 29 as those amendments "will improve protection for New Mexico's water resources and for its residents" (id. at 13). They also propose to call Norm Gaume as a technical witness and attach his resume and a statement concerning his proposed testimony. Id. at 13-14, § F and at Exs. 3-4. However, Mr. Gaume's proposed Exhibit 1 is an Excel Workbook that was not attached to Sierra Club et al.'s Statement but rather there was supposedly available at a DropBox link. Id. at Ex. 4, p. 10. That Workbook was unavailable to IPANM

[2] Sierra Club et al.'s Statement does not include IPANM's or NMOGA's counsel in the Certificate of Service. However, Mr. Mieklejohn corrected that error by providing the undersigned a copy of that Statement in an email sent on May 26, 2021 at 4:45 p.m.

[3] As described in IPAN's Motion to Exclude Certain Proposed Testimony of Kayley Shoup filed May 28, 2021, Sierra Club et al. improperly propose to offer technical testimony through a third witness. As to Ms. Shoup, none of the requirements for technical witnesses in the Procedural Order were observed.

and, to IPANM's knowledge, the other parties until a May 31, 2021 at 3:23 p.m. e-mail from Sierra Club et al.'s counsel. See Exhibit 1.

II. THERE ARE CONSITUTIONAL, STATUTORY, AND REGULATORY NOTICE REQUIREMENTS THAT MUST BE SATISFIED.

Fundamental notions of due process are applicable to proceedings before the Commission:

> Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty.

Uhden v. N.M. Oil Conservation Comm'n, 1991-NMSC-089, ¶ 10, 817 P.2d 721 (citations omitted). While Uhden was an adjudicatory case, not a rulemaking, that is not a relevant distinction for purposes of adequate advance notice. *Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶¶ 26-27, 978 P.2d 327. Consistent with the constitutional requirements, Section 70-2-23 of the Oil and Gas Act requires "'reasonable notice' as a condition precedent to a hearing." *Id.* at ¶ 28 (declining to reach the constitutional issues as the interpretation of the statue was dispositive). The "reasonable notice" requirements of Section 70-2-23 applies to "hearings regarding 'any rule, regulation or order[.]'" *Id.*

The Commission has enacted rule recognizing and incorporating this "reasonable notice" mandate in its rules that govern rulemaking proceedings. 19.15.3 NMAC. Those rules require various disclosures in the notice of rulemaking including "a summary of the full text of the proposed rule;" "a short explanation of the purpose of the proposed rule;" "a citation to the specific legal authority authorizing the proposed rule" and its adoption; and, "a citation to technical information…that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained."

19.15.3.9.B(1)-(3) & (7) NMAC. These regulations ensure that the public, regulated entities, and the Division will have sufficient opportunity to scrutinize the proposed rules for efficacy, consistency, necessity, and burden and evaluate the technical and legal bases for proposed regulations rules.

Notice in a rulemaking does not require that a regulatory body only adopt the rule initially proposed. Indeed, notice of the rulemaking would be highly inefficient if the agency could only adopt the proposed rule or reject it rather than incorporate changes that the agency. Nevertheless, notice requirements (whether constitutional, statutory, or regulatory) require that the public notices of the rulemaking give the public and regulated entities fair notice of the substance of the changes that are proposed. Courts considering these issues have adopted a "logical outgrowth" test for considering the rule adopted versus the notice of rulemaking under which the adopted rule is only upheld "`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.'" *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009); quoting, *Ne. Md. Waste Disposal Auth. v. EPA,* 358 F.3d 936, 952 (D.C.Cir.2004).[4]

III. THERE HAS NOT BEEN ANYTHING APPROACHING ADEQUATE NOTICE OF SIERRA CLUB ET AL.'S PROPOSED AMENDMENTS.

Just 15 minutes before the deadline to submit its Prehearing Statement and identify technical witnesses, IPANM first received notice of Sierra Club et al.'s intent to materially alter this proceeding to suggest at least six additional major changes to Part 29 of the oil and gas rules. See discussion at 3-4, supra. As the Division points out in its

[4] As NMOGA points out in its Motion addressed to striking Sierra Club et al.'s proposed testimony, the Commission has recognized and applied the logical outgrowth test in other rulemaking proceedings.

Motion, Sierra Club et al.'s Statement is double the length of the other four parties' Prehearing Statements combined. Between them, the four other parties proposed a single witness to testify for approximately 20 minutes (assuming that his written testimony is not accepted), whereas Sierra Club et al. propose to call six witnesses for four and one-half hours of testimony.

Perhaps recognizing the need to satisfy the applicability of logical outgrowth standard, Sierra Club et al. state that Mr. Gaume's testimony "will support additional proposed amendments to [Part 29] that are within the scope of this rulemaking" and, more honestly, acknowledge that he will also be sponsoring "additional rulemaking topics." Sierra Club et al.'s Statement at 14.

As to the adequacy of the notice of Sierra Club et al.'s proposed additions to the rulemaking, there can be no dispute that the text of their proposed amendments were not included in the notice of this rulemaking. 19.15.3.9.B(1) NMAC. Likewise, there was no "a citation to the specific legal authority authorizing the proposed rule" changes in that original notice unless they are relying on only the Division's and WEG's citations in that notice. Id. at B(2). Finally, Sierra Club et al. seek to present technical testimony and evidence to support their proposed additional rulemakings, the notice of rulemaking does not contains neither "a citation to [that] technical information" nor "information on how the full text of the technical information may be obtained." Id. at B(7). Indeed, despite an absolute deadline in the Procedural Order in this case of May 26, 2021 at 5 p.m. to file and serve exhibits in support of technical testimony, the "Excel Workbook" that is apparently crucial to Mr. Gaume's proposed testimony was not available to IPANM mid-afternoon May 31, 2021, and certainly was not part of the earlier notice of this proceeding.

To the extent that Mr. Zupan is supposed to present technical testimony, as of the afternoon of May 31, even a summary of that testimony let alone any data or information underlying that testimony, remain a complete mystery to IPANM.

Finally, any argument that Sierra Club et al.'s suggested amendments to Part 29 are "within the scope of this rulemaking" is unsupportable. The narrow, disclosed purposes of this rulemaking were twofold: to "prohibit major and minor releases" of certain substances produced or used in oil and gas operations; and, to "clarify the Division's authority to enforce this prohibition." Application for Rulemaking filed March 11, 2021 at ¶ 1. There is nothing in the Notice of Public Meeting and Public Hearing contains identical language as to the first purpose and provides a more technical but substantively similar explanation of the second purpose, namely "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." OCD Motion to Strike at Ex. 1 (the "Spill Rule Notice").

--There is nothing in the Spill Rule Notice that suggests that responsible parties will be subject to new requirements to "characterize" and "document" the spill and its source. Nevertheless, Sierra Club et al.'s May 26 proposals seek to impose such requirements.

--Currently the Commission's rules impose certain additional reporting requirements for major releases only. See 19.15.29.7A (defining a "major release" as a release of 25 barrels or more with certain other possibilities that a smaller volume may, under specified circumstances, also constitute a major release) and 19.15.29.10 NMAC (discussing different reporting requirements for major and minor releases). The Spill Rule Notice contains no suggestion that there will be similar reporting requirements for minor

releases. Id. at B (defining a "minor release" as a release that is greater than five barrels, less than 25 barrels, and does not otherwise constitute a major release). Even if their other suggested amendments about responsible party notice are rejected, Sierra Club et al. propose to expand major release notice requirements to minor releases.

--The Spill Rule Notice contains no suggestion that responsible parties will be required to notify anyone but the Division of any minor or major release, but Sierra Club et al.'s recent suggestions would require notice to all owners and residents of property in a specified vicinity of a spill of the fact of the spill.

--The Spill Rule Notice does not suggest any additional reporting requirements for responsible parties to the Division or an alteration of the timing provisions for those notices. The Sierra Club et al. seek to impose additional reporting requirements on responsible parties and to materially shorten the time for filing the Form C-141.

--The Spill Rule Notice does not suggest any changes to the Division's responsibilities for publicly disclosing information about releases, but the Sierra Club et al. seek to mandate certain actions by the Division.

--While, again, the Spill Rule Notice contains no suggestion that responsible parties will be required to report to anyone but the Division, Sierra Club et al. seek to impose reporting requirements about remediation planned and completed to owners and occupiers of land within one-half mile of the site of the release.

--Finally, although nothing in the Spill Rule Notice discusses proof issues or presumptions, Sierra Club et al. seek to amend the rules to create a "rebuttable presumption that a violation of [Part 29] 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)."

The Commission should not countenance this type of Trojan Horse rulemaking where a few changes are proposed to a Rule that are principally clarifying in nature and, at the 11th hour, a party comes in and suggests huge changes to the scope and reach of the Rules. Sierra Club et al. should be required to initiate their own rulemaking proceeding to advance these changes so that members of the public, regulated entities and associations such as IPANM have actual notice as required by the United States and New Mexico constitutions, the Oil and Gas Act, and this Commission's regulations. IPANM would have presented one or more witnesses and submitted one or more exhibits in support had it known the scope of the rulemaking that Sierra Club et al. now propose.

Sierra Club et al.'s belated proposals to amend Part 29 also demonstrate the reason for robust advance notice of rulemaking as those proposals evidence either unintended inconsistencies or are an invidious attempt to create traps for regulated entities. Suppose:

> --Operator X has a producing oil well 900 feet west of the western boundary of Rancher Martinez's pasture which also has trailer that is generally unoccupied.
>
> --On May 1, Rancher Martinez leases his pasture to Rancher Smith to pasture for 90 days and gives permission for Rancher Smith's hand, Cowboy Johnson, to live in the trailer during the 90 days. Rancher Smith moves his cattle on and Cowboy Johnson moves in on May 2. Operator X,

who does not conduct any activities on Rancher Martinez's lands, has not knowledge of these arrangements.

--On June 1, the gasket around the manway cover of one of Operator X's produced water tanks causing six barrels of produced water to leak into the containment around Operator X's tanks. Operator X's pumper discovers the leak on June 2 and shuts off the valve so that no further fluids flow to that tank. On June 3, a vacuum truck empties the produced water tank and vacuums up the standing liquid in containment; and a roustabout crew then replaces the failed gasket. An environmental firm conducts other appropriate remediation activities on June 4.

Under the regulations, with amendments suggested by WEG and the Division, Operator X would be required to file a Form C-141 within 15 days of June 2. Also, potentially, the Division has the option to pursue some form of administrative sanction against Operator X (although IPANM would strongly urge none is warranted).

However, under the Sierra Club et al.'s proposals, Operator X must: provide oral and written notice to the Division by June 2; notify Martinez, Smith and Johnson within 24 hours (it is not clear if this notice must also be verbal and/or in writing) even though Operator X may have no basis to know anything about any of the three except being on record notice that Martinez owns the surface according to the County records; provide all those parties notice of the Form C-141 information; and, provide all those parties of completion of remediation. Under the Sierra's Club et al.'s rebuttable presumption suggestion if Operator X failed to say,

notify Cowboy Johnson of any these matters, the presumption is that and Operator X's minor release at the time is transformed into a major release because it endangers public health and welfare. Operator X is then subject to sanctions for a major release unless it can rebut any conceivable theory as to why the release did not create "a risk to the health or safety of the public or a risk of causing significant environmental harm."

IV. CONCLUSION

Sierra Club et al. seek to evade the notice and other requirements of a rulemaking by suggesting massive changes to the Division's and WEG's narrow rule amendments. Whatever their motivation, the transformation of these proceedings that they seek is to substantially rewrite Part 29—a rewrite of the public, regulated entities, and IPANM had no notice of this transformation. The proposed amendments, testimony and other evidence of Sierra Club et al. should be struck for failure to give adequate notice of their proposals that differ materially from any change proposed by the Division and WEG

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion* was e-mailed to the following on this 28th day of May, 2021:

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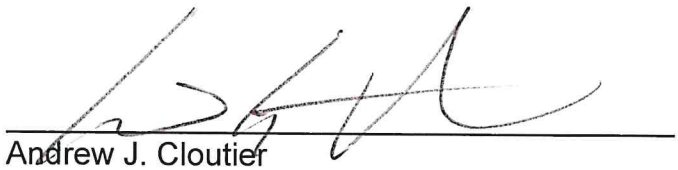

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