STATE OF NEW MEXICO
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. 21834**

WILDEARTH GUARDIANS' CONSOLIDATED RESPONSE TO MOTIONS

WildEarth Guardians provides this consolidated response to the following separately-filed motions regarding the Notice of Intent filed by Sierra Club Sierra Club, Pueblo Action Alliance, Citizens Caring for the Future, The Native American Voters Alliance Education Project, and Amigos Bravos (collectively, "Intervenors"): (1) New Mexico Oil Conservation Division's Motion to Strike and Exclude Testimony and Evidence on Proposed Modifications of Sierra Club et al. (May 30, 2021), and associated Notice of Errata (June 1, 2021); (2) New Mexico Oil and Gas Association's Motion to Exclude Evidence and Testimony (May 31, 2021); and (3) Independent Petroleum Association of New Mexico's Motion to Exclude All Proposed Evidence and Testimony of Sierra Club, Et Al. (May 31, 2021) (collectively, the "Motions").[1]

While Guardians takes no formal position at this time as to whether the Commission should consider, or ultimately adopt, Intervenors' proposed red-line modifications, Guardians provides this response to offer additional perspective on the appropriate standard for determining the applicable scope of a rulemaking proceeding such as this one, and to explain why – irrespective of any decision to potentially exclude evidence related to Intervenors' proposed modifications –

[1] Guardians takes no position on IPANM's separately-filed Motion to Exclude Certain Proposed Testimony of Kayley Shoup (May 28, 2021).

Intervenors' witness testimony regarding Guardians' and OCD's joint proposal in this matter should be admitted.

I. The Logical Outgrowth Test is Inapplicable to Formal OCC Rulemakings

Each of the Motions generally take the position that Intervenors' proposed modifications are not a logical outgrowth of Guardians' and OCD's joint rulemaking proposal, and therefore Intervenors' participation should be substantially restricted or denied completely. OCD Mot. 6; NMOGA Mot. 3-6; IPANM Mot. 6. While Guardians takes no formal position at this time on the substance of the Intervenors' proposed modifications or whether they are properly within the scope of the public notice for this rulemaking, the Motions misapply the "logical outgrowth" doctrine to formal rulemaking proceedings before the Commission.

Under the Oil and Gas Act, the Commission is required to provide "reasonable notice" of public rulemaking hearings. NMSA § 70-2-23. This "reasonable notice" standard, as applied to the particular rulemaking context at issue, should govern the Hearing Officer's decisions on the Motions. "Notice may be inadequate to fulfill its statutory purpose of notifying interested persons if it is insufficient, ambiguous, misleading, or unintelligible to the average citizen." *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 39, 374 P.3d 710, 723. But as the New Mexico Supreme Court has explained, "general notice of issues to be presented at the hearing [is] sufficient to comport with due process requirements." *Santa Fe Expl. Co. v. Oil Conservation Comm'n of State of N.M.*, 1992-NMSC-044, ¶ 21, 114 N.M. 103, 111, 835 P.2d 819, 827. While each of the Motions attempts to overlay the federal "logical outgrowth" test onto this general notice requirement, this federal standard is inapplicable in the context of the Commission's formal rulemaking procedures.

First, neither federal nor state case law support the blanket application of the "logical outgrowth" doctrine to rulemakings before the Commission, as New Mexico has never adopted the logical outgrowth doctrine as a test for determining whether a promulgated rule was properly noticed. Pointedly, the only reference in New Mexico case law to the "logical outgrowth" doctrine in a rulemaking is non-binding dicta in a district court decision that was subsequently reversed. *See Marbob Energy Corp. v. The New Mexico Oil Conservation Comm'n,* No. D-l01-CV-2006-00014, reversed by *Marbob Energy Corp v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, 206 P.3d 135.[2] The district court, in addressing whether Marbob was denied due process because it was not provided with proper notice of the rules that were actually considered by the Commission, characterized the promulgated rule as a "logical outgrowth" of the proposed rule and ruled that the changes made in the rule were ministerial and insubstantial, and therefore should not warrant further notice. Beyond this passing reference, however, there is no support in New Mexico case law for the assertion that the federal "logical outgrowth doctrine" applies generally to rulemakings before the Commission.[3]

Turning to federal authority, the Administrative Procedures Act ("APA") specifies two processes for rulemaking relevant here: (1) formal rulemaking, which consists of notice to affected parties, an on-the-record hearing with opportunity for direct and cross-examination of witnesses and a decision based only on the record; and (2) notice and comment rulemaking, referred to as "informal" rulemaking, which requires notice of a proposed rule in the federal Register and the

[2] The Supreme Court subsequently reversed the district court decision, upholding the rule without addressing the court's characterization of the rule as a "logical outgrowth."
[3] While the transcript for a 2020 Commission proceeding does appear to indicate the Commission has referred to the logical outgrowth test in its deliberations, *see NMOGA Mot. Ex. C*, the Motions identify no circumstance where the logical outgrowth doctrine has been used to preemptively exclude a party from presenting evidence regarding suggested modifications to a proposed rule.

opportunity for comment by interested parties. *See* Phillip M. Kannan, The Logical Outgrowth Doctrine in Rulemaking, 48 Admin. L. Rev. 213-214 (1996); 5 U.S.C. § 553(b), (c), and (U)(3). The "logical outgrowth doctrine" is a common law standard developed and applied by courts to resolve claims that a final rule was issued without the required notice in informal notice and comment rulemakings. *See* 48 Admin. L. Rev, at 214-216. There is no authority to support the assertion that application of the doctrine extends to formal rulemakings such as those before this Commission.

Rulemakings before the Commission are analogous to federal APA formal rulemakings in that they are on the record, with the opportunity to present direct and rebuttal evidence, and to conduct direct and cross-examination of witnesses. Additionally, the Commission bases its decision exclusively on the record at the conclusion of this process. OCD, NMOGA, and IPANM cite no legal authority for the proposition that the "logical outgrowth doctrine" should be applied to the Commission's formal rulemakings, particularly to exclude public participation before a / the hearing even begins.

As a policy matter, it makes sense to distinguish between formal trial-type rulemaking proceedings, like this one, and the informal notice-and-comment rulemaking process often used by federal agencies. The process before the Commission is a robust trial-type proceeding where interested parties are provided an opportunity to present and cross-examine technical and non-technical witnesses, offer exhibits into evidence, present legal arguments, and offer red-line edits to proposed rules. Necessarily, this process may, and indeed should, result in promulgation of a final rule somewhat different than what was originally proposed. Were that not the case, the extraordinarily resource intensive hearing process would risk being rendered a meaningless exercise. Guardians recognizes that the promulgated rule must have some reasonable relationship

to the subject matter described in the public notice of the hearing, such that the notice provides the "reasonable notice" required by the Oil and Gas Act, NMSA § 70-2-23, and "general notice of issues to be presented at the hearing" required by due process considerations. *Santa Fe Exploration Co.*, 114 N.M. 103 at 111, 835 P.2d at 827. However, to the extent the federal "logical outgrowth" doctrine may require notice beyond the applicable statutory and constitutional standard, the Commission should decline to adopt that doctrine in light of the significant procedural differences between federal notice-and-comment rulemaking and formal Commission rulemaking.

II. The OCC's Rulemaking Notice Provisions Are Inapplicable to Sierra Club's Proposed Modifications

Consistent with due process requirements, the Oil and Gas Act requires the Commission to provide "reasonable notice" of proposed rulemakings, and the Commission has adopted a series of formal procedures to implement this requirement. OCD, NMOGA, and IPANM, however, appear to imply that the specific formal procedures required for *initiating* a rulemaking proceeding are directly applicable to Intervenors' proposed *modifications*. They are not.

The Commission's rulemaking procedures clearly distinguish between the requirements for filing an initial application for rulemaking under NMAC § 19.315.3.8 and those for proposing modifications to an already-noticed rule proposal under NMAC § 19.15.3.11.B.(2). *See Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n*, 2016-NMCA-055, ¶ 38, 374 P.3d 710, 722 (distinguishing between OCC rules governing applications to initiate rulemaking and separate rules providing notice requirements). Notably, the rules require the Commission to provide public notice for rulemaking hearings, at least 30 days before the hearing, including "information on how a copy of the full text of the proposed rule may be obtained, including an internet link to the full text." NMAC § 19.15.3.9.B(4). Yet the rule also specifically requires pre-hearing statements to include "any proposed modifications

to the proposed rule," with such pre-hearing statements to be filed "no later than 10 business days before the scheduled hearing date." NMAC § 19.15.3.11.B.(2).[4] Read together, the rules plainly contemplate suggested modifications to proposed rules being provided *after* the required 30-day public notice has been posted. Hence, members of the public are permitted to offer suggested modifications to a proposed rulemaking without triggering additional public notice requirements, so long as the initial notice of the "general issues to be presented" provides "reasonable notice" that such modifications could be placed on the table during the rulemaking process.[5] The Hearing Officer should reject any attempt to overlay the initial rulemaking application procedures or public notice requirements onto the separate procedures for participating in the rulemaking, including through the submittal of proposed modifications and related testimony.

III. Pre-Filed Written Technical Testimony Was Not Required in This Matter

Neither the Commission's rules nor the procedural order in this case required pre-filed written testimony in this matter. To the contrary, pre-hearing statements generally must include "a concise statement of each witnesses' testimony," NMAC § 19.15.3.11.B.(2), which the procedural order defined as "a *concise statement in summary or outline form* of each technical witness's qualifications [and] anticipated testimony." Procedural Order No. R-21674, ¶ 3.a. The Motions filed by NMOGA, IPANM, and OCD incorrectly imply that Intervenors were obligated to pre-file the full technical testimony of their witness, Mr. Zupan. Here, Intervenors provided a brief summary of Mr. Zupan's background and anticipated testimony on pages 12-13 of its pre-

[4] Guardians notes that May 26, 2021 is ten business days before the June 9, 2021 hearing date, not seven business days as asserted by OCD. OCD Mot. 5.
[5] Guardians notes that OCD also proposed additional modifications to the joint proposal through its pre-hearing statement filed on May 21, 2021, which have also not been publicly noticed. OCD Pre-Hearing Statement, Ex. 6. All parties have concurred to OCD's proposed modifications.

hearing statement, and included Mr. Zupan's resume as Intervenors' Exhibit 2. While admittedly brief, the summary of Mr. Zupan's testimony provides a *concise summary* of the basic areas of his anticipated testimony, including describing the mission of Amigos Bravos, articulating the threat to waters of New Mexico from releases of oil and gas and oil and gas wastes, and supporting Guardians' and OCD's proposal as a "major step toward the effective regulation of the oil and gas industry and the protection of New Mexico's water resources from impacts of that industry." Intervenors' Notice of Intent 13. Finally, Mr. Zupan will discuss Intervenors' proposed amendments and describe how they will "improve protection for New Mexico's water resources and for its residents from impacts of the oil and gas industry and oil and gas wastes." *Id.*

The motions to exclude Mr. Zupan's testimony appear to be based on an incorrect assumption that Mr. Zupan was required to provide his full technical testimony in pre-filed written form. *See* OCD Mot. at 5; NMOGA Mot. at 3-4. As noted above, that is not the case in this proceeding. Moreover, IPANM's assertion that "even a summary" of Mr. Zupan's testimony remains "a complete mystery" is contradicted by the summary specifically provided in Sierra Club's pre-hearing statement. *Compare* IPANM Mot. at 7 *with* Sierra Club NOI at 12-13.

Accordingly, Intervenors timely provided the necessary summary of Mr. Zupan's anticipated testimony, and he should be allowed to testify at the hearing.

IV. Testimony Regarding Guardians' and OCD's Joint Proposal Should be Permitted

Guardians takes no formal position as to whether Intervenors' proposed modifications are properly considered within the scope of the proposed rulemaking under the appropriate "reasonable notice" standard. But even if Intervenors' proposed red-line edits are deemed outside

the scope of this proceeding, Intervenors' participation in this proceeding, including presentation of witness testimony, should nevertheless be permitted.[6]

First, Intervenors' Notice of Intent specifically explains that the Intervenors support the petition filed jointly by Guardians and OCD. Intervenors' NOI 1. Second, each of the Intervenors' witnesses will testify regarding their support of the rule changes proposed by Guardians and OCD. *Id.* at 4-14. So even if testimony regarding Intervenors' proposed modifications is excluded, there are no applicable grounds for excluding relevant testimony related to the joint Guardians-OCD proposal. Relevant testimony may only be excluded if it is "incompetent or unduly repetitious," NMAC § 19.15.3.12.B.2, and there is no reason to believe the testimony from Intervenors' witnesses will not meet this basic threshold. Each of the witnesses represent different organizations, covering a wide range of constituent interests and geographic areas, with varying perspectives on the different issues relevant to Guardians' and OCD's joint proposal.

Accordingly, irrespective of the Hearing Officer's determination regarding whether Intervenors' proposed modifications are within the scope of the "general notice of issues to be presented at the hearing," as required to meet due process requirements, *Santa Fe Expl. Co.*, 114 N.M. at 111, 835 P.2d at 827, Intervenors' witnesses should be permitted to testify regarding Guardians' and OCD's joint proposal pending before the Commission.

Guardians has worked in good faith with OCD, NMOGA, and IPANM to ensure a smooth and orderly hearing process for the Commission to consider Guardians' and OCD's joint proposal to prohibit major and minor releases. Additional public involvement, however, should not be viewed simply as an inconvenience, but as a welcome opportunity to gain additional perspective

[6] OCD's Motion to Strike also notes that Intervenors "can participate in the hearing to support OCD and WEG's petition…." OCD Mot. at 6.

on the proposed rule itself, as well as the broader issues implicated by the proposal. Recognizing the existence of broad public interest in the general issue of releases of oil, gas, and oil and gas waste addressed by Guardians' and OCD's joint proposal, the Commission set aside two full days for the public hearing in this matter. Robust public involvement, including participation by Intervenors, should not jeopardize that schedule, and should be welcomed in the interest of promoting public engagement and better-informed decision-making on issues of great concern to New Mexicans.

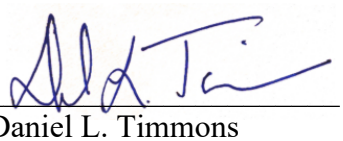
V. Conclusion

The Motions before the Hearing Officer raise important issues related to the proper balance between encouraging public participation in the Commission's rulemaking process while protecting the due process rights of affected parties. Accordingly, while Guardians takes no position on whether Intervenors' proposed red-line modifications are properly within the scope of the public notice for this public hearing, the Hearing Officer should not overlay the "logical outgrowth" test from the federal notice-and-comment rulemaking context upon this formal rulemaking proceeding. Nor should the Hearing Officer impose procedural requirements applicable to initial rulemaking applications to modifications proposed in accordance with NMAC § 19.15.3.11.B.(2). Instead, the questions before the Hearing Officer are whether the public notice provided "reasonable notice" of Intervenors' proposed modifications, as required by the Oil and Gas Act, NMSA § 70-2-23, and whether the modifications are encompassed within the "general notice of issues to be presented at the hearing" required by due process considerations. *Santa Fe Exploration Co.*, 114 N.M. 103 at 111, 835 P.2d at 827.

Irrespective of the issue of Intervenors' red-line modifications, however, Intervenors' participation in this proceeding should be permitted. Pre-filed written testimony was not required

in this proceeding, and Intervenors and their witnesses have indicated their intent to offer support for Guardians' and OCD's joint proposal pending before the Commission. At minimum, Intervenors should be allowed to participate to offer such support, including witness testimony related to Guardians' and OCD's joint proposal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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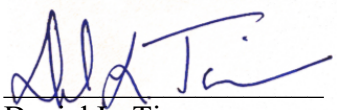

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