

STATE OF NEW MEXICO

BEFORE THE OIL CONSERVATION COMMISSION

In the matter of the proposed amendments  
to NMAC §§19.15.29.6, 19.15.29.8 and  
19.15.29.15 of the New Mexico Oil  
Conservation Commission Rules

No. 21834

CONSOLIDATED RESPONSE  
IN OPPOSITION TO THE MOTIONS TO EXCLUDE OR STRIKE  
FILED BY THE NEW MEXICO OIL CONSERVATION DIVISION,  
THE NEW MEXICO OIL AND GAS ASSOCIATION, AND THE  
INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO

**Introduction**

This Consolidated Response is filed in Opposition to the Motions to Exclude or Strike submitted by the New Mexico Oil Conservation Division (“the Division”), the New Mexico Oil and Gas Association (“NMOGA”), and the Independent Petroleum Association of New Mexico (“IPANM”) (“the Motions to Strike”). This Consolidated Response is filed by the Rio Grande Chapter of the Sierra Club, the Pueblo Action Alliance, Citizens Caring for the Future, NAVA Education Project, and Amigos Bravos (collectively “the Intervenors”). The Intervenors are filing this Consolidated Response rather than responding to each individual Motion to Strike individually because the three Motions to Exclude or Strike present common allegations.

The Intervenors urge the Commission to deny the Motions to Exclude or Strike the Intervenors’ evidence and testimony because the Intervenors’ proposed amendments to sections 19.15.29.8 and 19.15.29.10 of the Commission’s Rules are within the scope of the Notice of Public Meeting and Public Hearing for this proceeding issued by the Commission (“the Public Notice”) and within the scope of the Application to Amend the Oil Conservation Commission’s

Rules for Releases filed by WildEarth Guardians and the Oil Conservation Division (“the Application for Rulemaking”) that initiated this proceeding.<sup>1</sup>

Alternatively, if the Commission grants one or more of the Motions to Exclude or Strike the Intervenors’ evidence or testimony, the Intervenors request that the Commission rule that the Intervenors may still present testimony and evidence in support of the amendments to the Commission rules proposed by WildEarth Guardians and the Division.

### **Argument**

#### **I. The Public Notice for this proceeding and the Application for Rulemaking indicate that this proceeding will address protection of public health and the environment.**

The Public Notice for this proceeding makes clear that the purposes of the proceeding include protection of public health and the environment. The Public Notice states:

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.

Public Notice, page 1, paragraphs 3, 4, emphasis added.

The scope of the Application for Rulemaking is similar. It asserts 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.

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<sup>1</sup> The Intervenors are no longer pursuing their proposed amendment to section 19.15.29.15 of the Commission’s Rules.

*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.*

Application for Rulemaking, page 1, paragraphs 2-4, emphasis added.

Thus the Public Notice and the Application for Rulemaking both indicate the purposes of the rulemaking proceeding include protection of public health and the environment from releases of oil, gas, produced water, oil field waste, and other contaminants from oil and gas development and production.

**II. The Intervenors' proposed changes to the amendments sought by WildEarth Guardians and the Division are within the scope of this proceeding because they address protection of public health and the environment.**

**A. The Intervenors' proposed amendment to section 19.15.29.8 addresses protection of public health and the environment and is within the scope of the rule changes proposed by WildEarth Guardians and the Division.**

The first numeric section of the Commission's Rules that the Intervenors seek to amend is section 19.15.29.8. This section is the principal section of the Commission's Rules that WildEarth Guardians and the Division seek to amend in this proceeding. WildEarth Guardians and the Division's proposed amendment would change section 19.15.29.8 by including a new subsection A that would prohibit major and minor releases of oil, gas, produced water, oil field waste, and other contaminants from oil and gas development and production. Application for Rulemaking, page 4, paragraph designated 19.15.29.8.A.

Section 19.15.29.8 also addresses the initial responses that parties responsible for releases of oil, gas, produced water, oil field waste, and other contaminants must take to “stop the source of the release and limit access to the site as necessary *to protect human health and the environment.*” Section 19.15.29.8.B (as relettered in the Application for Rulemaking), emphasis added. The Intervenors propose to add two additional protective measures to the measures that the section already indicates must be taken to protect human health and the environment. These two measures – titled Source Characterization – are the sampling of the release and documenting the release source and the affected area with photographs.

These two measures are both necessary and within the scope of section 19.15.29.8 of the Commission’s Rules. First, any effort to protect human health and the environment from the impacts of a release must include sampling and analysis of the material released as part of the initial response to provide information on appropriate corrective actions and remediation design in order to protect human health and the environment from the effects of the release. Second, WildEarth Guardians and the Division propose to amend section 19.15.29.8 to protect human health and the environment from the effects of releases, and the inclusion of these two measures – titled Source Characterization – is therefore within the scope of the amendments proposed by WildEarth Guardians and the Division.

It therefore was appropriate for the Intervenors to propose the amendment titled Source Characterization to section 19.15.29.8 of the Commission’s Rules.

**B. The Intervenors’ proposed amendments to section 19.15.29.10 are within the scope of this proceeding because they address protection of public health and the environment.**

The Intervenors also have proposed that section 19.15.29.10 of the Commission’s Rules be amended in order to increase protection of public health. Section 19.15.29.10 addresses the

notification and reporting that a responsible party must provide after a release occurs. The Intervenors' proposed amendments to section 19.15.29.10 provide that the responsible party must provide prompt notification of a release within a specified time after the release to neighboring land owners, residences, institutions, and businesses within a specified distance from the point of the release and the area affected by the release and later notification to occupants of land, residences, institutions, and businesses within a greater distance from the point of release and the area affected by the release. The Intervenors' proposed amendments also provide for further information being provided to individuals within the specified areas by means of the completed form C-141, and call for the Division to post completed forms C-141 on its web site.

These proposed measures are within the scope of this rulemaking proceeding as stated by the Public Notice and the Application for Rulemaking because these measures are directly addressed to protection of public health. Members of the public in the area immediately surrounding the point of a release cannot protect their health unless they are given prompt notice of the release. Similarly, members of the public who are farther away from the point of the release must also be given notice of the release, although the notice to those members of the public can be given later. In addition, members of the public in both categories must be provided with all of the information that is contained in the completed form C-141 pertaining to the release so that they can know that the release occurred and the potential impacts from the release.

**III. The efforts of the Division, NMOGA, and IPANM to exclude the Intervenor’s testimony and evidence as outside the scope of this proceeding are not persuasive.**

**A. There is no merit to the Division’s, NMOGA’s, and IPANM’s assertions that this proceeding’s notice was not broad enough to include the Intervenor’s proposed amendment requiring source characterization.**

The motions filed by the Division, NMOGA, and IPANM all allege that the notice of this proceeding was narrow and could not be construed to include the Intervenor’s proposed amendments. *See* Division’s Motion, pages 2-3; NMOGA’s Motion, pages 2-4; and IPANM’s Motion, pages 7-8. However, as was explained above, the inclusion of the Intervenor’s proposed amendment addressing Source Characterization is within the scope of the Public Notice and the Application for Rulemaking as well as the amendment to section 19.15.29.8 because of the need for the Commission Rules to address protection of public health and safety in the context of releases of oil, gas, produced water, and other contaminants.

Moreover, contrary to the assertions of NMOGA (NMOGA’s Motion pages 5-6) and IPANM (IPANM Motion, page 6), the Intervenor’s proposed amendment concerning Source Characterization is within the “logical outgrowth” test that courts have used to determine whether changes in a proposed rule may be adopted by an agency.

A change in a proposed rule can be said to be the “logical outgrowth” of the proposed rule if “interested parties should have anticipated that the change was possible”. *Market Synergy Group, Inc. v. United States Department of Labor*, 885 F.3d 676, 680. Here, an interested party who reviewed: 1) the scope of this proceeding in the Public Notice and the Application for Rulemaking as including the need to protect public health and the environment; and 2) the proposal put forth by WildEarth Guardians and the Division that includes an amendment to section 19.15.29.8 covering releases, certainly could have anticipated a proposed provision requiring characterization of the source of a release.

**B. There is no merit to the allegation by the Division, NMOGA, and IPANM that the Intervenor’s proposed amendment concerning notification is outside the scope of this proceeding.**

Similarly, the Intervenor’s proposed amendment requiring notification of releases is within the scope of this proceeding and within the “logical outgrowth” test. As was pointed out above, the scope of this proceeding as defined by the Application for Rulemaking and the Public Notice includes addressing protection of public health and safety in the context of releases of oil, gas, produced water, and other contaminants. People in the area where a release occurs, and people in the area that is affected by a release, can only take measures to protect themselves from the impacts of the release if they know about the release and are informed about what was released. For that reason, proposed amendments to the Rules that are designed to protect public health and safety – as WildEarth Guardians’ and the Division’s proposed amendments are according to the Public Notice and the Application for Rulemaking – must address notice to be given to members of the public in the event of a release.

Moreover, if an interested party: 1) reviewed the Public Notice and the Application for Rulemaking; and 2) understood that the amendments proposed by WildEarth Guardians and the Division focus on releases, that interested party would probably expect that changes might be proposed to section 19.15.29.10 of the Commission’s Rules because it addresses notice to be given of releases. For that reason, the Intervenor’s proposed changes to section 19.15.29.10 are within a “logical outgrowth” of the rule amendments proposed by WildEarth Guardians and the Division. See *Market Synergy Group, Inc. v. United States Department of Labor*, 885 F.3d 676, 680.

**IV. There is no merit to the assertion by the Division, NMOGA, and IPANM that the Intervenors were required to provide Joseph Zupan’s testimony verbatim.**

The Division and NMOGA have each asserted that Joseph Zupan, who is the Executive Director of Amigos Bravos, should not be permitted to testify because the Intervenors “did not provide his technical testimony as required by the procedural order.” Division Motion, page 5; *see also* NMOGA Motion, page 9. This assertion is without merit.

The Procedural Order issued by the Commission for this proceeding indicates that a party intending to present a technical witness must provide a “summary or outline” of the witness’s testimony. The Procedural Order’s specific language is:

**3. Technical testimony**

a) No later than 5:00 P.M. May 26, 2021 a person wishing to present technical testimony shall file a Pre-Hearing Statement with the Commission that includes a *concise statement in summary or outline form of each technical witness’s qualifications, anticipated testimony, exhibits, proposed modifications to the proposed rule change with reasons for adopting the modifications, and duration of testimony and attach the exhibits.*

Procedural Order, page 2, paragraph 3.a, emphasis added.

The Procedural Order’s requirement is that a party file a “concise statement in summary or outline form of each technical witness’s qualifications, anticipated testimony, exhibits” etc. There is no requirement in the Procedural Order that a party provide a technical witness’s testimony verbatim, and the Intervenors provided the appropriate summary of Mr. Zupan’s testimony at pages 12-13 of their Notice of Intent.

Moreover, the summary of Mr. Zupan’s testimony that the Intervenors provided also complied with the requirements of the Public Notice and section 19.15.3.11 of the Commission’s Rules. The Public Notice indicates that a party intending to present technical testimony shall comply with the requirements of “Subsection B of 19.15.3.11 NMAC”. That subsection explains

in relevant part that a pre-hearing statement filed by a party intending to present technical testimony must provide the following:

**B. Technical testimony**

(2) The pre-hearing statement shall include the person or entity's name and its attorney's name, the names of all witnesses the person or entity will call to testify at the hearing; *a concise statement of each witnesses' testimony*; all technical witnesses' qualifications including a description of the witnesses' education and experience; and the approximate time the person or entity will need to present its testimony; and any proposed modifications to the proposed rule change with reasons for adopting the modifications.

Commission Rule 19.15.3.11.B(2), emphasis added.

There is nothing in either the Procedural Order or Commission Rule 19.15.3.11.B to indicate that the Intervenors were required to provide Mr. Zupan's verbatim testimony. The Intervenors were required to provide "a concise statement" of his testimony, and they did so at pages 12-13 of their Notice of Intent.

**V. The Division's, NMOGA's, and IPANM's complaints about the timing and the length of the Intervenors' submittals are without merit.**

The Division has complained about the timing and the length of the Intervenors's Notice of Intent to Present Non-Technical and Technical Testimony. The Division asserted that the Intervenors filed their Notice of Intent "a mere 7 business days before the hearing" and that the Intervenors' Notice of Intent was "twice as long as all the prehearing statements of the other parties *combined*" (Division Motion, page 5, emphasis in original) implying that the Intervenors' conduct was somehow unfair. The Division's Motion also alleges that the Intervenors acted inappropriately by "waiting until the last possible day to disclose its proposed modifications" to the Commission Rules. Division Motion, page 6.

Similarly, IPANM has complained that IPANM first received notice of the Intervenors's proposals "just 15 minutes before the deadline" for IPANM to file its Prehearing Statement, that

the Intervenor's Notice of Intent is "double the length of the four other parties' Prehearing Statements combined" and that the length of time that the Intervenor's witnesses are projected to testify is significantly longer than the time that is projected for the four other parties. IPANM Motion, pages 6-7.

The complaints by the Division and IPANM are without merit. The Intervenor acted in accordance with the Commission's Public Notice and the Procedural Order entered by the Commission governing this matter. Neither the Public Notice nor the Procedural Order requires an intervening party to file its notice of intent to present testimony before the deadline set by the Public Notice, and neither the Public Notice nor the Procedural Order provides a limit on the length of a notice of intent to be filed by an intervenor or the amount of time that the intervenor's witnesses will spend testifying. The complaints by the Division and IPANM are nothing more than complaints. There is no legal basis for the Division's and IPANM's assertions that the Intervenor should have been required to follow the same procedures as the Division and IPANM. The Intervenor acted in accordance with the Public Notice and the Procedural Order, and neither the Division nor IPANM has provided any legal basis for asserting that the Intervenor were required to do otherwise.

### **Conclusion**

There is no merit to the Motions to strike or exclude the Intervenor's evidence and testimony filed by the Division, NMOGA, and IPANM. The Commission therefore should deny those Motions.

Alternatively, if the Commission grants one or more of the Motions to exclude or strike the Intervenor's evidence and testimony, the Commission should also rule that the Intervenor

may present testimony and evidence in support of the Commission Rule amendments proposed by WildEarth Guardians and the Division.

Dated: June 2, 2021.

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Certificate of Service

I certify that on June 2, 2021, copies of this Consolidated Response were sent by electronic mail to:

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