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**

NEW MEXICO OIL CONSERVATION DIVISION'S MOTION TO STRIKE AND EXCLUDE TESTIMONY AND EVIDENCE ON PROPOSED MODIFICATIONS OF SIERRA CLUB, ET AL.

The New Mexico Oil Conservation Division ("OCD") moves to strike Sierra Club et al.'s proposed modifications to 19.15.29 NMAC – *Releases* ("Part 29") and exclude its supporting testimony and evidence. The petition filed by OCD and WildEarth Guardians ("WEG") has the narrow objective of prohibiting major and minor releases and subjecting them to OCD's enforcement authority under the Oil and Gas Act and implementing rules. The Oil Conservation Commission ("Commission") properly noticed the petition for hearing, and two additional parties, New Mexico Oil and Gas Association and Independent Petroleum Association of New Mexico, entered their appearances. Now just days before the hearing is scheduled to begin, Sierra Club proposes sweeping new changes to Part 29. None of these changes are related to the petition or disclosed in the public notice. Rather than using OCD and WEG's petition as a vehicle for these radically different changes to Part 29, Sierra Club should file its own petition which the Commission can properly notice so that interested persons can prepare to discuss them in a meaningful way in a public hearing.

I. THE COMMISSION DID NOT NOTICE SIERRA CLUB'S PROPOSED MODIFICATIONS FOR HEARING.

The Sierra Club's proposed modifications are not a logical outgrowth of the petition. OCD and WEG propose to make one substantive change to Part 29: to prohibit major and minor releases. The other changes are intended for the sole purpose of conforming Part 29 with the Commission's recent changes to 19.15.5.10 NMAC and the rule-writing requirements of the State Record Center. To consider the petition, the Commission published a notice which clearly reflects the narrow scope of the hearing:

> 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 confirm 19.15.29.15 NMAC with the general enforcement provisions of 19.15.5.10 NMAC, which were adopted by the Commission in 2020.

Exhibit 1.

Sierra Club's proposed modifications go far beyond the narrow scope of the Commission's public notice. Sierra Club begins by substantially expanding the reporting requirements for releases: Operators must file a Form C-141 for *all* releases. The form, which includes the characterization of an indeterminate number of samples for a laundry list of constituents, along with photographs, must be submitted within 24 hours of discovery and again within 5 days, in effect, both increasing the information required and reducing the time to prepare and submit it. Operators also must give multiple notices of *all* releases to persons within variable times and distances of the release dependent on the type of notice. OCD would be required to post all of these forms, notices, and information on its website. Finally, after proposing to change all of the reporting requirements in Part 29, Sierra Club then proposes to prescribe how OCD should exercise

its enforcement discretion by declaring that *all* releases are subject to the highest civil penalty threshold of the Oil and Gas Act.

OCD does not at this time express an opinion on the merits of Sierra Club's proposed modifications, but they certainly are not "minor", as characterized by its technical witness.[1] To the contrary, the modifications fundamentally rewrite Part 29. They are not a logical outgrowth of the petition nor fall within the range of reasonably foreseeable alternatives to the petition. No person reading the Commission's public notice could reasonably construe them to fall within the scope of the notice or contemplate that the Commission would be consider them at the hearing.

Because the Commission never noticed Sierra Club's proposed modifications, their consideration at the June 9 hearing would violate basic principles of fair notice as codified by law and rule. The New Mexico Supreme Court has declared that "Procedural due process is ultimately about fairness, ensuring that the public notice is notified about a proposed government action and afforded the opportunity to make its voice heard before that action takes effect." *Rayellen Resources, Inc. v. New Mexico Cultural Properties Review Committee*, 2014-NMSC-006 at ¶ 28. The Oil and Gas reflects this principle in Section 70-2-23, which requires the Commission to give "reasonable notice" of a hearing so that persons "having an interest in the subject matter of the hearing" can be heard. *Johnson v. New Mexico Oil Conservation Commission*, 1999-NMSC-021, ¶ 28. This requirement is codified in the Commission's rulemaking rule which requires the public notice to provide 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 for the proposed rule, information on

[1] *See* Notice of Intent to Present Non-Technical and Technical Testimony of the Rio Grande Chapter of the Sierra Club, et al., Testimony of Norman Gaume at 29.

how to obtain the full text of the proposed rule, and citations to the technical information that provides the basis for the proposed rule. 19.15.3.9(B) NMAC.

The New Mexico Court of Appeals' decision in *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Division*, 2016-NMCA-055, illustrates how the process is supposed to work. In *Earthworks*, the environmental group argued that the Commission could not adopt a provision related to multi-well pits because the public notice was misleading and unintelligible. *Id.* at ¶ 39. The court rejected the argument, observing that the public notice informed interested person how to obtain the proposed amendments, which explained at length the nature of multi-well pits and how they would be regulated. The court also noted that the public notice alerted the environmental group to the issue of multi-well pits, which should have prompted it to request additional information.

The Commission's public notice for the petition fully complies with the applicable requirements, ensuring that interested persons have a fair opportunity to review the technical basis for the proposed changes and prepare testimony and comments for the hearing. On the other hand, the Commission's public notice in this case says nothing about Sierra Club's proposed modifications. The public notice does not refer to any changes in the reporting requirements. It does not propose any changes to the characterization requirements. It does not suggest that the burden of proof in enforcement actions should be flipped or that OCD's enforcement authority under 19.15.5.10 NMAC should be constrained in any way. There is no link to Sierra Club's proposed modifications, no citations to technical information, and no place for the public to seek additional information about the modifications or their technical basis. *Earthworks* was about whether the public notice for OCD's proposed change was reasonable. Here, there is no public notice at all for Sierra Club's proposed modifications.

Allowing Sierra Club to present testimony and evidence for its proposed modifications would be an unfair "surprise switcheroo" on the public and other interested persons, and also would prejudice OCD and the other parties in this proceeding. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005). On April 19, 2021, the Commission published the notice advising the public of the proposed rule changes to be considered at the hearing. On April 22, 2021, the Chair of the Commission issued the procedural order. Based on that public notice and procedural order, on May 21, 2021, OCD filed its prehearing statement, and on May 26, 2021, WEG, NMOGA, and IPANM filed their prehearing statements supporting the petition.

On that same day – a mere 7 business days before the hearing - Sierra Club filed a prehearing statement which disclosed its proposed modifications to all of the parties. Sierra Club's prehearing statement is 34 pages long – twice as long as all the prehearing statements of the other parties *combined*. Sierra Club also proposes to present 4 1/2 hours of testimony - more than 10 times as long as all the testimony of the other parties *combined*. For technical witness Joseph Zupan, Sierra Club did not provide his technical testimony as required by the procedural order. For technical witness Norman Gaume, Sierra Club provided 11 pages of technical testimony containing extensive statistics regarding releases allegedly based on OCD data, but failed to provide the analysis itself.[2] Despite NMOGA's request for this information the day after Sierra Club filed its prehearing statement, as of today, Sierra Club still has not provided Zupan's testimony or Gaume's exhibit.

[2] *See* Gaume Testimony at 25 (Exhibit 1 is a 3.9 MB Excel workbook that is "the basis of the summaries and conclusions" of Gaume's technical testimony.) Gaume also refers to a report and another state's law that are not attached to Sierra Club's prehearing statement as required by the Commission's rules. *See* Gaume Testimony at 30-31.

By waiting until the last possible day to disclose its proposed modifications, Sierra Club effectively deprives the parties - as well as any other person who would have entered an appearance had it known - of the opportunity to present testimony on these extensive changes to Part 29. For OCD and the other parties in particular, Sierra Club's failure to comply with the public notice and procedural order is prejudicial because they have been denied the opportunity to review Zupan's testimony and Gaume's exhibit so that they can decide whether to file a motion in limine and whether and how to respond in the hearing.

II. SIERRA CLUB SHOULD FILE ITS OWN PETITION FOR WHICH THE COMMISSION CAN ISSUE A PUBLIC NOTICE THAT COMPLIES WITH DUE PROCESS AND THE RULES.

Refusing to allow Sierra Club to present its proposed modifications in this hearing protects the parties, the public, and the process, but does no harm to Sierra Club. OCD and WEG have presented a narrow petition supported by a single witness presenting 20 minutes of testimony, and which is not opposed by the state's two major trade associations representing the oil and gas industry. By contrast, Sierra Club proposes major changes to Part 29 which are supported by more than 4 hours of testimony and raise extensive legal and policy questions. Sierra Club should not be allowed to hijack this hearing. It can participate in the hearing to support OCD and WEG's petition, as it says it does, and then should file its own petition to amend Part 29, for which the Commission can publish a notice and hold a hearing that complies with the law and protects the due process rights of the public and interested persons.

For the reasons stated above, OCD opposes Sierra Club's attempt to inject its proposals into the public hearing on this petition, and to present testimony and evidence that has not been properly disclosed as required by the Commission's rules and procedural order in this case, and respectfully requests that the Commission strike the Sierra Club's proposed modifications and exclude testimony and evidence on them.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was mailed electronically on May 30, 2021 to:

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