STATE OF NEW MEXICO
DEPARTMENT OF ENGERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION

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APPLICATION OF HILCORP ENERGY COMPANY TO AMEND THE WELL DENSITY AND LOCATION REQUIREMENTS AND ADMINISTRATIVE EXCEPTIONS OF THE SPECIAL RULES FOR THE BLANCO-MESAVERDE GAS POOL, RIO ARRIBA AND SAN JUAN COUNTIES, NEW MEXICO

Case No: 16403

RESPONSE TO MOTION TO STRIKE NOTICE OF INTERVENTION

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San Juan Citizens Alliance ("SJCA"), through its undersigned counsel, files this response to Hilcorp Energy Company's ("Hilcorp") Motion to Strike Notice of Intervention. Affirmatively, SJCA respectfully requests a grant of intervention by the Commission pursuant the NMAC 19.15.9.11(A) or (C).

During the 2005 hearing held by this Commission to consider the procedural standards for adjudicatory intervention, the OCD acknowledged its own struggles to define standing. **See generally**: Hearing Transcript, OCC Case No. 13482, Aug. 18, 2005. However, the Commission anchored its findings in the broad scope of standing jurisprudence, as Chairman Fesmire stated that standing is a "well-defined legal concept [...] broad enough to address the concerns of the New Mexico Citizens for Clean Air and Water." *Id.* at 195. Because the Commission intended standing to encompass groups like the New Mexico Citizens for Clean Air and Water, SJCA, as a similarly situated environmental advocate, should be granted standing and, accordingly, intervention, on the grounds presented below.

I. Hilcorp's Claim That the Powers Listed in Section 70-2-12 are not Relevant to the Subject Matter of This Application Improperly Limits the Authority of the Commission Under the Oil and Gas Act.

Despite Hilcorp's attempts to narrow the Commission's authority, Section 70-2-12 (B) of the Oil and Gas Act provides broad discretion for the Commission to make rules and orders "for the purposes and *with respect to* the subject matter stated in this subsection." NMSA 1978, § 70-2-12 (B) (emphasis added).

In its second Motion to Strike, Hilcorp states that its application only deals with "prevention of waste," and that no other issue is relevant. Second Motion to Strike at p. 1.

Hilcorp implies that the many enumerated powers of the Commission under the Oil and Gas Act do not apply to this request for amendment to the Blanco-Mesaverde special pool rules. Yet Hilcorp points to no authority that would limit the Commission's express authority to consider the issues enumerated in Section 70-2-12 (B) in this matter. Importantly, Section 70-2-12 (B) expressly allows the Commission to make rules and orders "with respect to" the enumerated subject matters, and does not constrain the Commission to artificially limit its considerations to one enumerated issue at a time.

Moreover, Hilcorp states that its application does not deal with drilling, operation, or production, but only "prevention of waste." Second Motion to Strike at p. 1. However, Hilcorp's stated objective for amending these rules is to produce more oil by allowing for four additional wells to be *drilled* per GPU. Hilcorp App. 16403, p. 6.

In the prior September 13 hearing, Hilcorp stated that it intended to drill new wells following an approval of this application. Sept. 13 2018, Hearing Transcript, Case No. 16403, at 5317-21 (Hereafter "HT") (Hilcorp stating that once it exhausted use of the Dakota wells in the area, it planned on drilling new wells). When asked by the Commission what Hilcorp is "looking at getting out of the Mesaverde spacing application," Hilcorp Reservoir Engineer Ms. Michelle Sivadon replied "about 10 trillion cubic feet" of oil. [HT 105:11-12]. In its Motion to Strike, Hilcorp explicitly states that it seeks this order because "increasing well density so operators can plan future drilling programs to efficiently and effectively drain this reservoir." Second Motion to Strike at p. 2.

Finally, the Oil and Gas Act is concerned with two types of waste prevention—underground waste and surface waste. NMSA § 70-2-3(B). Importantly, the Act expressly defines surface waste as encompassing actions that result in the loss of gas at the surface from

the "manner of spacing." Id. This demonstrates that contrary to Hilcorp's attempts to frame this application as only affecting downhole issues, the Act itself recognizes that well spacing raises issues of surface waste prevention.

Thus, Hilcorp acknowledges that it is asking the Commission to find that a doubling of well density is "necessary" throughout the pool for efficient drainage. Hilcorp App. 16403, p. 5. Yet Hilcorp has presented a blunt, not-well tailored rule that would allow for a dramatic by-right doubling of wells. Even OCD General Counsel Mr. Bill Branchard noted that Hilcorp's decision to increase three infill wells to seven infill wells was "pretty dramatic." [HT 132:2-4]. The Division itself recognizes the potential impact that Hilcorp's application carries beyond Hilcorp's semantic choice to describe its actions as simply "preventing waste."

SJCA's standing is related to the subject matter because the Oil and Gas Act empowers the Commission to issue order "with respect to" the property, public health, and environmental harms associated with the drilling operations and production. In considering whether Hilcorp's application is "necessary" for efficient drainage and production, the Commission is authorized to consider, and should consider, what the harms will be to surface property, public health, and the environment so as to recognize what is at stake if it grants an overly broad application.

II. New Mexico has Long Held That a "Real Risk of Future Injury" is Sufficient for Standing, and SJCA Demonstrates Reasonable Risk of Incremental Future Injuries That Would *Only* Result From an Increase in Well Density

SJCA has standing because its members identify a "real risk of incremental future injuries." Through SJCA's Notice of Intervention, SJCA adequately showed causation and redressability.

Hilcorp fails to address real risks of future injury arising from a grant of this application. The New Mexico Supreme Court made clear that in order to establish injury-in-fact, a claimant

need only establish that they are "faced with a real risk of future injury." *ACLU v. City of Albuqerque*, 144 N.M. 471, ¶ 11, 2008-NMSC-045 (putting the "imminent threat of injury" standard in "another way," internal citations omitted).

SJCA members' "fears" and "concerns" are more than speculative—they are well-founded concerns about risks that would result from an increase in well density. These incremental harms are sufficient to establish injury in fact under New Mexico doctrines of standing. **See** *De Vargas*, 1975-NMSC-026, ¶ 16 (the court found injury-in-fact in the plaintiff loan officers' claim that they *would* be harmed by undue competition if a new loan office opened when there was not sufficient demand in their town).

As indicated in the exhibits and SJCA's second Notice of Intervention, SJCA members reasonably believe that well density will result in incremental risks of future harm based on their prior experiences, including direct experience with oil leaks requiring removal of contaminated earth, emissions contributing to the growing San Juan county methane pollution, and destruction of land resulting from transporting produced oil and waste.

SJCA member Don Schreiber explains that an increase in well density will likely trigger additional well pads and recompletions of existing wells, all of which will decrease vegetation relied on for his ranching business and increase pollution that harms his health. [SJCA Ex. A 3]. Mike Eisenfeld similarly identifies that increasing well density will further decrease ability to use federal lands and increase air pollution that contributes to climate change and ozone. [SJCA Ex. B 3].

SJCA's injuries are also not "hypothetical." In *ACLU,* plaintiffs could not show that they would ever be harmed by the statute they challenge because none of the plaintiffs could show that they would ever get a DWI. *ACLU*, 2008-NMSC-045, ¶ 29. In that case, in order for a

plaintiff to be harmed by being charged with a DWI, it would require both speculative future actions from the ACLU plaintiffs and a DWI arrest. Here, Hilcorp states plainly that it is seeking this action because it intends to pursue a dramatic program of recompletions and some new drilling. [HT 53-54] (Engineer for Hilcorp stating that recompletions would "take place across the entire pool" and were not isolated). There will be substantial further harms to surface property, public health, and environment in the areas where these recompletions and drilling take place. Granting this application would mean expressly allowing such doubling of well density in the GPUs that affect SJCA members. It is true that SJCA members do not know when or if Hilcorp plans to recomplete or drill new wells in the specific GPUs that affect them, but that is precisely the result of changing the well density for the entire Special Pool as opposed to continuing with the current process of GPU-by-GPU variances.

Through their showing of incremental future injuries that would not result except for a doubling of well density, SJCA establishes a real risk of future injuries required for standing. There can be no questions that these risks would be caused by Hilcorp's application, because it is only through the grant of this application that well density can be increased in the Pool. Similarly, the Commission need only deny the application to prevent the injuries from occurring.

III. Contrary to Hilcorp's arguments, the Commission may always grant intervention on Public Health and Environmental Grounds and should do so here given the demonstrated Public Interests at stake.

Hilcorp fails to distinguish NMAC 19.15.4.11(A), which defines requirements of intervention, from NMAC 19.15.4.11(C), which provides an alternative for parties that do not have standing under (A). Under NMAC 19.15.4.11(C), SJCA only must show that its

participation "will contribute substantially to the prevention of waste, protection of correlative rights *or protection of public health or the environment.*"

As detailed in SJCA's Notice of Intervention, SJCA has experience and expertise addressing environmental issues concerning oil and gas at state and federal levels. This experience includes participation in BLM's development of its "Waste Prevention Rule" and being granted intervention status to defend that rule in the U.S. District Court of Wyoming—demonstrating expertise directly relevant to the prevention of surface waste issues highlighted in NMSA § 70-2-3. See State of Wyo. v. U.S. Dept. of Int., 16-CV-0285-SWS (D. Wyo.).

However, Hilcorp argues that NMAC 19.15.4.11(C) should not authorize granting standing to SJCA because its application is "highly technical" and "not related to surface issues." The language of 19.15.4.11(C) offers no support to Hilcorp's belief that the SJCA's substantial contribution in intervening must be related to what Hilcorp alleges the subject matter to be. On the contrary, the plain language of NMAC 19.15.4.11(C) states that the "Commission chairman may strike a notice of intervention ... *unless* the intervenor shows that intervenor's participation will contribute substantially to the ... *protection of public health or the environment.*" (emphasis added). There is no language in this provision that limits the Commission Chair's authority to grant invention on public health or environment grounds. The provision allows the Chair to grant intervention anytime she finds that an intervenor will "contribute substantially to the ... *protection of public health or the environment.*"

The extraordinary engagement by elected officials and members of the public, and their concern for the potential public health and environmental impacts that would result from granting this application, demonstrate that granting intervention on public health and environment grounds is clearly warranted.

Governor-elect Michelle Lujan-Grisham, Public Lands Commissioner-Elect Stephanie Garcia Richard, Senator Tom Udall, Senator Martin Heinrich, Congressman Ben Ray Lujan, Attorney Generally Hector Balderas, State Senator Michael Padilla, State Senator Cisco McSorley, State Senator Jerry Ortiz y Pino, and State Senator Matthew McQueen have all requested a delay of this hearing or registered concerns about this application in part because of concerns about environmental impacts. **See generally** SJCA Motion for Continuance Exhibits.

Accordingly, SJCA respectfully requests a grant of intervention by the Commission pursuant the NMAC 19.15.9.11(A) and (C).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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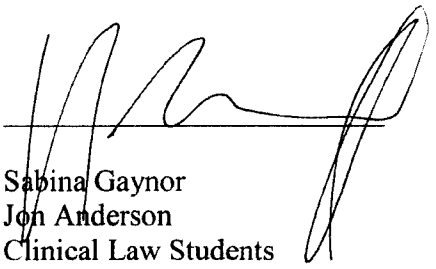

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