

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 21834

APPLICATION OF WILDEARTH GUARDIANS
AND THE NEW MEXICO OIL CONSERVATION DIVISION
TO AMEND RULES 19.15.29.6, 19.15.29.8, and
19.15.29.15 NMAC.

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS
Agenda Item 4
April 15, 2021
Via Webex Platform
Santa Fe, New Mexico

BEFORE: ADRIENNE SANDOVAL, CHAIRWOMAN
GREG BLOOM, COMMISSIONER
CHRIS MOANDER, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on April 15, 2021, via Webex Virtual Platform, hosted by New Mexico Energy, Minerals, and Natural Resources Department.

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1 CHAIRWOMAN SANDOVAL: Thank you. And on to
2 Agenda Item Number 4, Case Number 21834, application of
3 WildEarth Guardians and New Mexico Oil Conservation Division
4 to amend Rules 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC.

5 Pursuant to 19.15.3.8(A) NMAC, petitioners
6 WildEarth Guardians and New Mexico Minerals and Natural
7 Resources Department Oil Conservation Division applied to
8 the Commission to amend the three rules as stated earlier.

9 Currently the Commission's rules do not prohibit
10 unauthorized releases of oil, gases, produced water, oil
11 field waste and other contaminants that occur during the oil
12 and gas production. The proposed rule will fill that
13 regulatory gap by preventing major and minor releases as
14 those terms are defined in the Commission's rules.

15 And today we are here to determine setting a date
16 for the hearing as well as defining the procedural order and
17 how that hearing, if granted, will take place. Do we
18 have -- let's do a sound check. Mr. Ames?

19 MR. AMES: Good morning, Madam Chair.

20 CHAIRWOMAN SANDOVAL: Good morning. I can hear
21 you.

22 Mr. Timmons?

23 MR. TIMMONS: Yes, Madam Chair, I'm here as well.

24 CHAIRWOMAN SANDOVAL: Great. And then
25 Mr. Feldewert?

1 MR. FELDEWERT: Good morning, Madam Chair,
2 Commissioner Bloom.

3 CHAIRWOMAN SANDOVAL: I believe that's all the
4 parties. Okay. First I will give Mr. Timmons and Mr. Ames
5 an opportunity to make a brief statement on sort of the --
6 on the petition, and then any sort of proposal that you
7 might have associated with the time frame or the procedural
8 order, and then we can go to Mr. Feldewert following that.

9 MR. TIMMONS: Thank you, Madam Chair. Daniel
10 Timmons on behalf of WildEarth Guardians, and as you're
11 aware this is sort of a -- we're coming back to the
12 Commission with a proposal for this prohibition on releases
13 that started actually back in September with the Guardians'
14 proposal for prohibition on produced water releases. And
15 then we adapted that into a prohibition filed in October for
16 all releases.

17 We ran into some procedural hiccups with the
18 public notice and some other issues there, and so we sort of
19 went back to the drawing boards and had conversations with
20 both the Division and with NMOGA and have come together with
21 this joint proposal from the Division and WildEarth
22 Guardians and have had conversations again with the Industry
23 and don't expect any opposition to the substance of the
24 rule.

25 So this is a pretty simple straightforward

1 proposal that essentially prohibits major releases and minor
2 releases as those are specifically defined already in the
3 Commission's regulation and makes those sort of enforceable
4 violations under the Division's authority.

5 We had worked through a proposed procedural order
6 with the Division and Commission counsel and NMOGA, and so
7 we would request a hearing essentially as soon as possible
8 under the rules and given the public notice requirements.

9 We think, given the straightforward and sort
10 of -- straightforward nature of this proposal, as well as
11 the fact it sort of has been, the general sense of it has
12 been out in the public already, that we think a 30-day
13 public comment period is appropriate at this point.

14 And our understanding from the timing with New
15 Mexico Register publication is that around June 3 would be
16 the earliest that this could be heard as a public hearing.
17 So we would request that, you know, shortly thereafter,
18 according to the dates that work for the Commissioners'
19 schedules that we schedule the hearing for early to mid
20 June. Thank you.

21 CHAIRWOMAN SANDOVAL: Thank you. Mr. Ames, do
22 you have anything to add?

23 MR. AMES: Yes, briefly, Madam Chair,
24 Commissioner Bloom. OCD concurs in Mr. Timmons' proposal
25 for a hearing in 30 days. I would like to add that there

1 does appear to be another party in the matter now. Shortly
2 before this meeting convened, Mr. Andrew Cloutier of Hinkle
3 Shanor entered an appearance for the Independent Petroleum
4 Association, so they just joined the case. I don't see Drew
5 on the line, though, so --

6 CHAIRWOMAN SANDOVAL: Drew was an attendee. I
7 just moved him over to a panelist. My apologies. Can we
8 hear you, Mr. Cloutier?

9 MR. CLOUTIER: (Inaudible.)

10 CHAIRWOMAN SANDOVAL: You should be able to
11 unmute yourself now. Maybe.

12 MR. CLOUTIER: There I am, yes. Thank you, Madam
13 Chair and Mr. Ames. I apologize, Madam Chair, it was our
14 fault. I was hired yesterday afternoon and I just entered
15 an appearance this morning, so I appreciate the courtesy.

16 CHAIRWOMAN SANDOVAL: Thank you, Mr. Ames.

17 MR. AMES: If I may conclude, Madam Chair, we
18 support the proposal to have a hearing in 30 days. As
19 Mr. Timmons pointed out, NMOGA -- or Mr. Feldewert for
20 NMOGA, myself and Mr. Timmons provided comments to
21 Commission counsel regarding the draft procedural order, and
22 we are hopeful that those changes would be accepted in the
23 main part prior to adoption of the order itself by the
24 Commission. Thank you.

25 MR. MOANDER: Madam Chair, can I address that

1 briefly? Mr. Ames, almost all the changes were acceptable.
2 There is a few drafting things I have to -- some of the
3 comments I need to address yet, but the parties -- I want
4 everyone to know I would say probably 95 percent of those
5 were accepted and work.

6 CHAIRWOMAN SANDOVAL: Thank you. All right,
7 Mr. Feldewert, would you like to say anything?

8 MR. FELDEWERT: Thank you, Madam Chair,
9 Commissioner Bloom, Michael Feldewert of the Santa Fe office
10 of Holland & Hart on behalf of the New Mexico Oil & Gas
11 Association, and I concur that this is really a
12 straightforward proposal that's been put forth here.

13 It almost really clarifies the existing rule. I
14 think they are correct that the general sense of what the
15 rule accomplished has been out there for quite some time.
16 So one could also view this as really kind of clarifying,
17 cleaning up the existing rule.

18 It seems to me that this is a case, given the
19 very limited nature of the events where you really -- I
20 doubt that you need witnesses. It seems to me that the
21 parties could get together and come up with a short
22 statement of undisputed facts that would support the
23 Commission's decision, you know, following perhaps the
24 allegations, basically that releases occur and that they can
25 pose a threat.

1 Beyond that, I don't see what you would need in
2 terms of the record. So to me this is a very
3 straightforward proceeding that, in my mind, could be
4 accomplished by the parties getting together with a short
5 set of undisputed facts.

6 CHAIRWOMAN SANDOVAL: Thank you, Mr. Feldewert.
7 Mr. Cloutier, do you have anything to add?

8 MR. CLOUTIER: No, Madam Chair. I have just
9 gotten involved, but I don't want to be attempting to throw
10 a monkey wrench into what the parties have started right
11 now. We are here to participate.

12 With respect to Mr. Feldewert's comments, I'm not
13 sure if IPA would want a witness. I haven't spoken to them,
14 but I would imagine that a witness would be brief, if at
15 all.

16 CHAIRWOMAN SANDOVAL: Okay. I guess, just sort
17 of a brief question for Mr. Ames and Mr. Timmons. What do
18 you anticipate the time frame needed for this? Previously
19 the changes in the produced water took two days, and it was
20 every minute of two days. Do you expect it to be similar to
21 that, less than that, more than that, so that the Commission
22 can try to make sure we allot the appropriate time?

23 MR. TIMMONS: Thank you, Madam Chair. I think
24 that sort of the case in chief that I would anticipate sort
25 of in support of this rule, I think, could be very

1 straightforward, and I'm certainly open to considering Mr.
2 Feldewert's suggestion of even sort of a written sort of
3 case in chief.

4 I'm not fully sure how that would comport with
5 the public rulemaking requirements, and so I do think that
6 the Commission's rules require that there be, you know, a
7 public hearing with opportunity for public comment and
8 testimony from nonparties as well as the opportunity for
9 other parties to intervene.

10 As we have just had one intervenor, I think that
11 there probably is the potential for additional parties to
12 intervene sort of given the high profile of this sort of
13 issue in general, notwithstanding the very straightforward
14 nature of what's actually on the table.

15 So I would, I would suggest or request that the
16 Commission schedule a full day for the hearing. I don't
17 anticipate that it would take that long, but just given the,
18 again, sort of the unforeseen potential of, you know, for
19 other parties and substantial public comment given what we
20 saw in the produced water hearing, I think that that would
21 be appropriate.

22 CHAIRWOMAN SANDOVAL: Thank you. Mr. Ames, do
23 you concur with that?

24 MR. AMES: I do generally, Madam Chair,
25 Commissioner Bloom. I would not anticipate a hearing nearly

1 as long as the produced water rule. I think the case in
2 chief could be done in 30 minutes, maybe an hour. The open
3 question will be cross-examination, if any, and questions
4 from the Commission and then public comment and
5 non-technical testimony. And it's difficult to predict the
6 latter two categories at this juncture, but I can't imagine
7 it will take more than a day, and probably substantially
8 less.

9 CHAIRWOMAN SANDOVAL: Okay. Commissioner Bloom,
10 do you have any questions for the parties?

11 COMMISSIONER BLOOM: Madam Chair, no questions at
12 this time. Thank you.

13 CHAIRWOMAN SANDOVAL: Well, I think we need to
14 decide on sort of the ground rules and the timing. My
15 initial -- and then maybe if -- maybe if we talk through it
16 and we can make motions on the back end.

17 My initial thought is right now we do not have
18 anything on our regularly-scheduled June agenda, which is
19 June 10, so my inclination would be to use that
20 regularly-scheduled hearing date so that we're not packing
21 the month.

22 And I know they are saying one day, but I would
23 feel more comfortable probably blocking off two days because
24 I would rather free up time than have to go the other way.

25 MR. MOANDER: Madam Chair, I think as much as I

1 love the optimism of the parties, I'm going to suggest two
2 days just because the, the mix of cases in chief,
3 cross-examination, Commission questions and then the public
4 comments, I agree with you it's better to have excess time
5 than to not have enough, so I'm going to suggest two days
6 with the anticipation it could be done at the end of the
7 first day.

8 CHAIRWOMAN SANDOVAL: Yeah, I agree.
9 Commissioner Bloom, do you have a preference if it's
10 Wednesday-Thursday, or Thursday-Friday, the 9th and 10th or
11 10th and 11th?

12 COMMISSIONER BLOOM: I think reserving two days
13 would be a good idea. I'm fine on both ends of that, so I
14 can do Wednesday-Thursday or Thursday-Friday, whatever works
15 best for you and someone will need to check with
16 Commissioner Engler as well.

17 CHAIRWOMAN SANDOVAL: Commissioner Engler is
18 unfortunately no longer with us. He has resigned from the
19 Commission, and so the Commission has appointed -- will be
20 looking for a third commissioner before this date. My
21 thought is to do the 9th and the 10th just, just in case it
22 goes over two days then we have the 11th to play with. So
23 that would be my thought would be to schedule it for the 9th
24 and 10th and, you know, worst case scenario we can work into
25 the 11th.

1 I appreciate the optimism, as Mr. Moander says.
2 Maybe I'm a little more pessimistic on timing, so I think
3 that makes sense then. I think there are a handful of
4 items. Do you think it would be beneficial to appoint a
5 hearing officer similar to how we did with the waste rule?
6 I think it helped everything go much smoother. I think it's
7 the first time -- it's been maybe a long time since the
8 Commission has done a hearing officer for rulemaking, but
9 particularly with a virtual session it allowed me to be able
10 to fully focus on the testimony and the evidence as seen, so
11 I would also prefer to have a hearing officer for this.

12 And since we don't, at this point, know who that
13 might be, maybe -- what is it, designate or allow for me to
14 choose -- I don't know what the technical term is -- allow
15 for me to choose a hearing officer at a later date and
16 appoint them outside of the normal Commission hearing or
17 meeting. I think that's how we did it last time, wasn't it,
18 Mr. Moander?

19 MR. MOANDER: That is correct. So we would need
20 a motion, a second and then a vote to grant you that, that
21 authority.

22 CHAIRWOMAN SANDOVAL: Okay. We can do -- is that
23 something you are comfortable with, Commissioner Bloom?

24 COMMISSIONER BLOOM: Yes, Madam Chair,
25 absolutely. And just one question on the dates, if we begin

1 on a Wednesday, finish on Wednesday, do we still have our
2 regular OCC hearing on Thursday?

3 CHAIRWOMAN SANDOVAL: I don't believe so because
4 this should be the only thing that's on the docket. I don't
5 think we are going to schedule any extra cases, unless you
6 clearly want to.

7 Okay. All right. So that's the hearing
8 officer -- I'm sorry, I'm missing something -- so it looks
9 like we need to set the date for motions to be filed and
10 responses. And Mr. Ames suggested that all motions be due
11 ten business days before the hearing. Not sure what date
12 that would make it. Let's see.

13 CHAIRWOMAN SANDOVAL: Would that be the 26th,
14 maybe?

15 MR. MOANDER: I think that's the 27th. Ten
16 business days is usually two calendar weeks. Wait, no,
17 you're right, it would be the 26th. That's right, Madam
18 Chair.

19 CHAIRWOMAN SANDOVAL: Does that make sense to
20 you, Commissioner Bloom?

21 COMMISSIONER BLOOM: Madam Chair, yes, it does.

22 CHAIRWOMAN SANDOVAL: And then Mr. Ames'
23 suggested responses set five days before, business days
24 before the hearing, so that would be the 2nd.

25 MR. MOANDER: The 2nd, that's correct, Madam

1 Chair. So here it looks like -- I mean the suggestion is to
2 have a separate motions hearing. I'm wondering if we need
3 to have a separate motions hearing, or can we hear -- can we
4 hear motions at the actual hearing itself?

5 Any thoughts on that? I know we did a separate
6 hearing for the waste rule, but I think it was because we
7 were concerned about the timing or about the amount of time.

8 MR. MOANDER: So my question is, Madam Chair, if
9 there is going to be an appointment of a hearing officer, it
10 seems that one of the key roles for the hearing officer is
11 to handle motion hearings. And so if the Commission wants
12 to hear motions on the first day of the rulemaking hearing,
13 I'm not clear what role the hearing officer might otherwise
14 have, I mean, other than maybe running the hearing. So it's
15 just a thought on utilizing that.

16 CHAIRWOMAN SANDOVAL: Okay. I mean, I don't have
17 a strong opinion either way. Three business -- well, three
18 days would then make that Monday, right, the 7th. So having
19 a motions hearing on the 7th? Is that what we are thinking?

20 COMMISSIONER BLOOM: Madam Chair, I recall during
21 previous motions hearings being done on the first day of the
22 rulemaking itself, I would be comfortable with that, but if
23 there is some entanglement here with the hearing officer, I
24 would be fine doing it a few days previous.

25 MR. MOANDER: Madam Chair, another question, and

1 I'm just sort of asking this generally to the parties.
2 Given what I'm hearing about the positions of the parties,
3 what are the anticipated motions just to get -- and
4 recognizing this will change over time, but I'm just curious
5 what the parties might anticipate filing because it sounds
6 like a motion to dismiss may not necessarily be forthcoming
7 from any particular party which tends to be a significant
8 motion in rulemaking.

9 So can I get a sense or can the Commission get a
10 sense of what the parties think they might be filing?

11 MR. AMES: Mr. Moander, Madam Chair, Commissioner
12 Bloom, at this point the OCD doesn't anticipate filing any
13 motions, and I am not aware that Mr. Feldewert or
14 Mr. Timmons anticipate doing so, either.

15 But it's entirely possible that another party may
16 enter an appearance in this case, and Mr. Cloutier is still
17 evaluating his position, so it's -- it's impossible for us
18 to say what might be filed.

19 One reason for having a hearing on motions prior
20 to the initiation of the hearing itself on the rule is to
21 resolve potentially dispositive issues before we get to the
22 hearing so we don't get bogged down. And it also would give
23 the parties a better idea of what they are facing when they
24 go to hearing itself and to make any adjustments they might
25 need to in their case to the extent it's consistent with

1 their prehearing statements.

2 So I would suggest that a hearing on dispositive
3 motions be scheduled prior to the hearing itself with the
4 caveat that parties might take exception to other parties'
5 prehearing statements and those kinds of issues would have
6 to be addressed at the hearing itself.

7 MR. FELDEWERT: Madam Chair, Commissioner Bloom,
8 Michael Feldewert. A couple of things; number one -- and I
9 will start with what Mr. Ames said at the end -- by rule the
10 prehearing statements which is a disclosure of witnesses and
11 evidence is filed ten business days before the hearing.

12 So it seems to me you've got to start there and
13 then work backwards or work from that point. And the reason
14 I say that that's -- it's not required, but it's important
15 because at this point NMOGA does not, and New Mexico does
16 not know exactly what the applicants intend to present, and
17 what witnesses they intend to present, and, more
18 importantly, what issues they are going to want to try to
19 raise and address in this hearing.

20 I would think, and that's why I suggested it
21 might be worthwhile to have some understanding of that if we
22 can't reach resolution of disputed or undisputed facts,
23 because part of the problem is being put in a position where
24 we are required to potentially address issues that should
25 not arise in this kind of rulemaking and should not be

1 addressed in this rulemaking.

2 I'm hopeful that doesn't happen, but we are not
3 going to know that until we see a disclosure of witnesses or
4 have some sense of what the applicants intend to present,
5 which we do not at this point.

6 CHAIRWOMAN SANDOVAL: Okay. At this point if we
7 do separate motions hearing, then I guess three days -- I
8 couldn't count earlier -- would be the 4th. So, what,
9 responses would be due on the 2nd and then motions hearing
10 on the 4th? Unless we did it on the 7th, which is two days.
11 The 4th would probably give people more time to react if
12 needed.

13 How about the 4th?

14 COMMISSIONER BLOOM: I'm sure the 4th works for
15 me.

16 CHAIRWOMAN SANDOVAL: Maybe start it at 9 on the
17 4th? We are just -- so that I think sets the deadlines.
18 Technical testimony, I did like sort of what we required in
19 the waste rule where for each witness you didn't have to
20 have written technical testimony in its entirety, but at
21 least a summary of what each witness was supposed to present
22 on as well as anticipated timing, so I would like to see
23 that again.

24 I think that made it easier. And then on
25 non-technical testimony -- maybe, Mr. Moander, could you do

1 me a favor and help me understand the distinction between
2 non-technical testimony and oral public comment?

3 MR. MOANDER: So are you referring to the rule,
4 or are you referring to the draft scheduling or procedural?

5 CHAIRWOMAN SANDOVAL: The draft procedural order.

6 MR. MOANDER: So that -- so I think Mr. Ames
7 is -- he has proposed some of that, if I'm looking at that.
8 And I'm sitting here looking at -- and I have to do the
9 formatting, but it should be the first indented paragraph
10 under non-technical testimony, any person that wishes to
11 present non-technical testimony, the way I understand it --
12 and I'm always happy to hear the parties' comment -- is that
13 even if you are going to give some sort of comment like a
14 public comment, or, in other words, really, if you are going
15 to speak about technical aspects of this rule, you are going
16 to need to file a prehearing statement, and it's not going
17 to be permitted if you show up to make comment without
18 having filed a prehearing statement to give, give public
19 comment that is technical testimony.

20 That's one of the things I want to talk with Mr.
21 Ames a little bit about so maybe I can parse the language a
22 little bit further, but if it's non-technical testimony, and
23 they get one opportunity to speak, and that's it, and that's
24 the public comment. So maybe I'm not clear what we were
25 wanting to do, so I thought the order was fairly clear, but

1 I will happily listen to Mr. Ames.

2 MR. AMES: Madam Chair, if I might?

3 CHAIRWOMAN SANDOVAL: Go ahead.

4 MR. AMES: Thank you. Mr. Moander, first, I
5 don't deserve credit for the edits to the procedural order,
6 but I need to share that with Mr. Timmons and Mr. Feldewert.
7 But with respect to your question about the -- about
8 non-technical testimony, my understanding is that, as you
9 said, if a party -- if a person wants to present technical
10 testimony, they have to enter an appearance and file a
11 prehearing statement.

12 Anyone else can speak to the Commission, and they
13 have two paths they can go, one is public comment, the other
14 is non-technical testimony. The only difference is a person
15 wanting to present non-technical testimony will be sworn and
16 subject to cross.

17 CHAIRWOMAN SANDOVAL: Okay.

18 MR. AMES: Full stop. As far as I'm aware there
19 is no other distinction.

20 CHAIRWOMAN SANDOVAL: All right. I mean, I guess
21 I'm fine with keeping the distinction in there then, but I
22 do want to, I mean, let's see, I think -- well, I think the
23 formatting needs to be updated, but that's easy.

24 The second, I guess, subpart of non-technical
25 testimony is a person wishes to present non-technical

1 testimony to notify the Commission by signing up on the date
2 on which the person wishes to be heard, I distinctly have
3 set some time parameters, and same thing with the oral
4 public comment.

5 Again, I think that was a successful way to do it
6 during the waste rule. I think we had confusion with the
7 previous rule back in the summer, and so like setting time
8 parameters, like comment is going to be from X time to X
9 time, and you signed up during this hour or 30-minute block,
10 so I sort of want to put that in here.

11 I know it's a little bit different with a shorter
12 hearing, but the way it's written right now it sort of
13 sounds like if I want to -- if I decide that talking on
14 Tuesday at 2:30 and that's best for me, then I'm going to
15 sign up for that time, that's what I'm going to get.

16 I don't think that's how it's going to work, so
17 we need to set a time parameter that works for the structure
18 of the hearing. And not know how many days it's going to go
19 makes it a little more challenging.

20 I sort of think we start off with public comment.
21 And so if we are doing, I don't know, two hours, three
22 hours, we can say two hours specifically, but if it's -- if
23 we don't have enough people signed up, you know, two hours
24 for what we -- with the waste rule it was like two-minute
25 slots, so if we don't have enough people signed up right

1 then, I want it to be structured so that we can go ahead and
2 start the hearing.

3 I think it was a little -- we had issues with
4 that under the waste rule hearing. It wasn't structured
5 that way, even though we didn't have people signed up in the
6 time slots, we had to wait. So I want it structured that
7 once public comment is done, we can move right into the
8 hearing or the testimony part of the hearing. Or vice
9 versa, if it takes more than two hours, it takes more than
10 two hours. But we need to have them sign up ahead of time
11 so we can have it structured and coordinated, and that
12 worked so much better in the waste rule. That was a lesson
13 learned from last summer.

14 MR. MOANDER: The order can be modified to
15 include these particulars, I don't think that's a problem,
16 including something to the effect that all individuals that
17 timely signed up upon completion of comment, saying the
18 hearing may begin, or something approximating that.

19 The other thing, too, that comes into play is if
20 we do comments, any time we are going to have commenters at
21 the hearing, the parties obviously need to be present. So
22 if -- if we run into a large volume of commenters, that may
23 be where we got -- we have to look at the second day to
24 incorporate that.

25 And then I would recommend we do that before a

1 party closing, preferably. I suspect the parties would
2 agree with that, that any comment on say the second day or
3 even the first day would need to be done ahead of closing.
4 There is cross-examination needs done or anything like that
5 that permits the parties to address those comments if
6 necessary.

7 CHAIRWOMAN SANDOVAL: Well, it sounds like we are
8 going to have a day two. So, okay, my initial thought,
9 Commissioner Bloom -- my initial thought would be to set
10 aside two hours on the morning of the 9th and then set
11 aside -- you know, go ahead and commit that we are having a
12 second day and, you know, even if, even if the testimony and
13 all of those pieces conclude the day before, and say it's 3
14 o'clock, right, we will just break until the next morning
15 and closing argument can be after the public comment
16 concludes the next morning.

17 And then we also, you know, need to, we can
18 decide at the hearing whether or not we want to go directly
19 into deliberations or do -- do it another way.

20 Okay. So my thought would be two hours on the
21 morning of the -- oh, God, I wonder if two hours is going
22 to be enough. Let's say three, three hours, but, Chris, I
23 want to make sure it's structured that like if we have
24 people that fill that entire time, that we can go ahead and
25 start.

1 MR. MOANDER: That can absolutely be placed in
2 the order, and I will draft language to that effect.

3 CHAIR SANDOVAL; And then, what, 30 minutes or an
4 hour the next day? I don't know, Commissioner Bloom, what
5 do you think? I'm sort of throwing out times.

6 COMMISSIONER BLOOM: Madam Chair, begin with one
7 hour reserved for public comment and then again immediately
8 upon public comment should then move to closing statements.

9 CHAIRWOMAN SANDOVAL: Okay. That sounds good.
10 So that would be, what, 9 to 11 -- no -- 9 to 11 on day one,
11 and day two that would be 9 to 10 will be reserved for
12 public comment. Individuals need to sign up prior to that
13 time frame to, to comment. So they need to sign up prior to
14 the morning of the 10th. Or I would say the night before.
15 They need to sign up by the night before so that we are not
16 trying to manage a bunch of people that morning and maybe
17 miss somebody.

18 So I think sign up before, what is it, the 9th,
19 you know, evening of the 8th, something like that.

20 MR. MOANDER: That can also be addressed. That's
21 doable.

22 CHAIRWOMAN SANDOVAL: All right.

23 MR. TIMMONS: Madam Chair, Mr. Moander, this is
24 Daniel Timmons with WildEarth Guardians.

25 I want to point out, according to the rules

1 19.15.3.11, Section (A)(1) states, "A person does not need
2 to file prior notification with the Commission clerk to
3 present non-technical testimony at the hearing."

4 I would think that that -- I would recommend that
5 you request prior notification when folks sign up, but then
6 open up the floor at the close to ensure that we comply with
7 the regulations.

8 CHAIRWOMAN SANDOVAL: Mr. Moander, do you have
9 any thoughts on that?

10 MR. MOANDER: I'm having some technical
11 difficulties here. I'm trying to pull up the rules, so I
12 will need just a minute.

13 MR. FELDEWERT: Madam Chair and Commission, while
14 we are waiting on that, as I alluded to earlier, the one
15 problem I see with the motion being due ten business days
16 before the hearing is that that is the same date the
17 prehearing statements are due.

18 It seems to me that you would want to have the
19 prehearing statements filed first and then have the motions
20 the day after that, because I would suspect the prehearing
21 statements are going to be what may foster some type of
22 motion.

23 MR. CLOUTIER: Madam Chair and Commissioner
24 Bloom. Drew Cloutier here. I concur with Mr. Feldewert.

25 CHAIRWOMAN SANDOVAL: What would your timing

1 proposal be, Mr. Feldewert?

2 MR. FELDEWERT: If we could file motions on the
3 31st, if the prehearing statements came in Wednesday the
4 26th, that would give you two business days plus the weekend
5 to file a motion on the 31st.

6 MR. AMES: Madam Chair, OCD doesn't have any
7 objection to structuring the process in that way, although I
8 would point out that in the venting and flaring rule we had
9 a motion hearings prior to the hearing itself, and the
10 parties all understood that they could file additional
11 motions based on prehearing statements and that those would
12 be heard at the hearing, at the rulemaking hearing itself.

13 So in the venting and flaring rule we had a
14 two-phase process. Mr. Feldewert is correct and
15 Mr. Cloutier had proposed simply consolidating all the
16 motions into one hearing, and I don't have an objection to
17 that. I think that may actually be a better practice
18 overall.

19 CHAIRWOMAN SANDOVAL: Okay. So Mr. Feldewert,
20 your proposal is prehearing statements due the 26th.
21 Motions due the 31st, and then we would have responses due
22 the 2nd, then motions hearings the 4th.

23 MR. FELDEWERT: That's tight, but that's fine
24 with me, Madam Chair. I think -- we don't have an option
25 on the prehearing statement. That has to be filed on ten

1 business days, so that's where we don't have an option.

2 Everything else we have some flexibility.

3 CHAIRWOMAN SANDOVAL: We just like to keep it
4 interesting here at the OCC. We don't want anybody bored.
5 I'm fine with those revised dates. Commissioner Bloom,
6 Mr. Moander, do you have any preference on that?

7 COMMISSIONER BLOOM: I have no problem with those
8 dates. I would just note that May 31 is Memorial Day. That
9 shouldn't stop anyone from submitting their motions.

10 CHAIRWOMAN SANDOVAL: Happy holidays.

11 MR. MOANDER: So as a general rule, we have a
12 whole lot of stuff on the floor. Can I catch the dates
13 because I was parsing the rule based on Mr. Timmons'
14 statement earlier. So what was the proposed motion
15 deadline?

16 CHAIRWOMAN SANDOVAL: The proposed deadlines from
17 Mr. Feldewert are prehearing statements due on Wednesday the
18 26th, motions due end of business or end of day, whatever,
19 the 31st, which is Monday, which is Memorial Day. The
20 response is due the 2nd, which is the Tuesday that week, and
21 then the hearing on the 4th.

22 MR. MOANDER: So a few comments on that. Mr.
23 Feldewert's right about the prehearing statement, that
24 works. And these motion deadlines work. One thing I will
25 address, realizing this is not court, is customarily filing

1 deadlines that fall on the state holiday roll over to the
2 next business day.

3 And the Commission can have some latitude there,
4 but I always put that out there sort of as a matter of
5 course as something to consider. If the parties are fine
6 with having the 31st as the deadline, I'm fine with that as
7 well. Taking it -- stepping back briefly and looking at
8 the non-technical testimony, I will -- I'm still pretty
9 vague on the difference between a public comment and
10 non-technical testimony. It seems to me that essentially
11 all public comment is non-technical testimony because there
12 is nothing that distinguishes the two in the rule.

13 And so Mr. Timmons, Mr. Timmons is right, it says
14 they do not need to file prior notification. I'm also not
15 clear whether that means they are signing up for a slot
16 versus notifying the Commission that they are going to
17 comment on a particular topic.

18 This is always a problem with regulations is that
19 some of this stuff isn't necessarily outlined or defined, so
20 I would like to hear from the parties on that because when I
21 think of notification, I tend to think along the lines of,
22 "Here is my name and here is what I plan on talking about
23 when I get my opportunity," rather than signing in.

24 But as a corollary to that under 11(A)(3), it
25 says that sign-in would need to be sign-in sheet at the

1 hearing, I'm not convinced that's the same thing as a
2 sign-up, so I would like to hear that discussed a bit
3 because I do have some concerns about those distinctions.

4 CHAIRWOMAN SANDOVAL: Mr. Timmons, you want to
5 give it a go first?

6 MR. TIMMONS: Thank you, Madam Chair.

7 Mr. Moander, I certainly concur with the general
8 sense of it, that the distinction between public comment or
9 which I interpret to align with what is referred to as an
10 unsworn position statement in the rule, and so I have been
11 using the term -- I think Mr. Ames in our comments was using
12 essentially the term public comment as analogous to unsworn
13 position statement.

14 Because the distinction that we identified or
15 that -- I should just speak for myself -- that I have
16 identified is, yes, that the swearing in and opportunity for
17 cross-examination is the distinction between public comment
18 or unsworn position statement and non-technical testimony.

19 There may also be -- or a distinction could be
20 made in terms of the time that would be allowed for a public
21 comment versus a sworn non-technical testimony. Obviously
22 if the opportunity for cross-examination is taken, then that
23 certainly could go longer than two minutes, so that would be
24 sort of the other distinction there.

25 Again, I -- again, I think that that sign-in

1 sheet at the hearing language, as well as not needing to
2 file prior notification, for me I interpret that to mean it
3 would be improper for the Commission to require sign in
4 prior to the hearing.

5 I think it would be entirely appropriate for
6 logistical purposes to request that and to highly encourage
7 folks to do that so that we can sort of manage our time most
8 efficiently, but I would encourage the Commission to make,
9 make available an opportunity for folks that had not signed
10 up prior to the hearing to be allowed to speak.

11 CHAIRWOMAN SANDOVAL: Any other parties have
12 comments on that?

13 MR. AMES: This is Eric Ames for OCD. I
14 completely concur with what Daniel said. He framed it quite
15 well.

16 MR. TIMMONS: Madam Chair, if I could add one
17 additional thought. Just thinking in terms of ways to
18 encourage people to sign up beforehand, maybe you could give
19 them three minutes if they sign up beforehand and limit them
20 to two if they sign up at the hearing just in terms of a,
21 providing the opportunity, but yet also trying to give folks
22 incentive to sign up ahead of time.

23 MR. FELDEWERT: Commissioner Bloom, Mr. Moander,
24 I think the distinction we are dealing with here, if you
25 look at the rules, 19.15.3.10 deals what we term public

1 comment, which is written comment to the proposed rule
2 that's sent in to the Division. That certainly is dealt
3 with, and you can deal with the time frames for that.

4 We then have a second category which is person
5 who may testify or make an unsworn testimony at the
6 rulemaking hearing. That is what Mr. Moander referenced in
7 19.15.3.11 that does have a sign-up sheet at the hearing
8 requirement to it.

9 I know we are all on a virtual format which makes
10 it more difficult, but that's essentially the distinction.
11 Those that want to provide public comment in written format
12 before or during the hearing, or, if you allow, after, and
13 those that actually want to say something at the hearing.

14 And those that want to say something at the
15 hearing are either sworn or they are not sworn and that is
16 the sign up requirement.

17 CHAIRWOMAN SANDOVAL: Mr. Cloutier, do you have
18 anything to round up the discussion?

19 MR. CLOUTIER: I agree with Mr. Feldewert. This
20 is a weird day.

21 CHAIRWOMAN SANDOVAL: We will mark it down in
22 history. Okay. I actually want to make sure that we can
23 give everybody, you know, the opportunity to comment as they
24 like. I think we want to strongly encourage people to sign
25 up just because it's it kind of makes the process better.

1 I am fine with doing the, you sign-up before and
2 you get three minutes, if you want to go that way. You, you
3 know, you show up and then you get two minutes.

4 The other thing, and this is what we did in the
5 waste rule hearing is we -- what was it, 20 people per
6 block. It was two minutes at that point, 20 people per
7 block of an hour time frame, and so you were able to know,
8 okay, well, I know I am going to be from 9 to 10 on this
9 day, which was a benefit to people because a complaint we
10 heard in the past is when is it going to be my time.

11 So maybe we can try to do -- I would like to try
12 to do that where they sign up for, you know, like maybe we
13 could have a shorter time frame, do 30 minute blocks, 30
14 minute blocks with ten people in them to allow for two or
15 three minutes or two minutes and have a little bit of extra
16 time. So maybe they sign up for 30 minute increments with
17 the Commission clerk and the know what 30-minute blocks they
18 are going to be in. And at the point where if it's someone
19 that shows up at the hearing wants to speak, they get an
20 opportunity when they get an opportunity, you know, whenever
21 sort of the comment ends, at that point. Or it might have
22 to be -- so that might be the best to have a set amount of
23 time so they're not just -- I don't know. Mr. Bloom, do you
24 have thoughts?

25 COMMISSIONER BLOOM: Madam Chair, you have done

1 this much more recently than I have particularly on the
2 waste venting and flaring rule. I think you're headed down
3 the right track with suggestions. Sounds good, so I'm fine
4 with any of those things. Thank you.

5 CHAIRWOMAN SANDOVAL: Okay. All right. So to
6 summarize that, Mr. Moander, three hours on the first day
7 from 9 to 11, encouraging people to sign up with the
8 Commission clerk. Prior to that date, anybody signing up
9 prior to that date will get three minutes, and they will be
10 signed up in sort of 30-minute blocks with a maximum of ten
11 people in a 30-minute block.

12 And if you show up at the hearing, you know, we
13 can't guarantee what time it will be, but everybody will
14 have their opportunity and they will get two-minute blocks
15 to make their statement.

16 And then an hour scheduled for the next day, but
17 in both situations make it clear that if we finish prior to
18 the time block, we will move straight into the technical
19 testimony or closing arguments or whatever it may be sort of
20 at that point at the hearing.

21 My only question is, how are we supposed to
22 distinguish the technical versus non-technical -- I'm sorry,
23 the oral public comments and the non-technical testimony,
24 i.e., who gets sworn in and who can be crossed. I don't --
25 how do we distinguish that? I mean, is it like a --

1 MR. AMES: Madam Chair, I think the way you
2 distinguish is to ask the commenter or ask the person who
3 wishes to speak to the Commission whether they would like to
4 be sworn and present non-technical testimony in which case
5 they would be subject to cross or not. And at that point,
6 if they want to be sworn, they get sworn and are subject to
7 cross. If not, they proceed with their public comment.

8 MR. MOANDER: I'm inclined to agree with that
9 because I do not, based on my admittedly limited experience
10 with these rulemakings, I don't know that most commenters
11 are going to necessarily understand or even frankly care
12 about the distinction all that much. So I think that that
13 shot goes on the table, and I can certainly -- the
14 procedural order is mostly for the benefit of the parties,
15 but at the same time we can put that in there, that the
16 parties will be offered that opportunity to be sworn.

17 CHAIRWOMAN SANDOVAL: And I think make it clear,
18 "and crossed." I think that's the -- I think that's the
19 thing to understand, but I think, "and crossed," is a big
20 distinguishing factor.

21 MR. MOANDER: I think that's the primary one,
22 but, yes, and that puts them on notice, the parties also now
23 aware as well. So this is one of those things where we have
24 to make sure both from a Commission, as well as a party
25 standpoint, that this is what we are going to do so that

1 anyone that may be offered up for comment hopefully might be
2 aware of that even before they speak.

3 CHAIRWOMAN SANDOVAL: Okay. Great. I think we
4 have nailed that piece down now. I think that's sort of my
5 last -- I think that's really kind of the last item -- oh,
6 written public comment, can't forget that.

7 So what is the date that this technically gets
8 published? Isn't that technically when the written public
9 comment starts?

10 MR. MOANDER: Yes, Madam Chair, and I'm assuming
11 since we worked so hard on this cumulatively, this is -- the
12 next publication deadline is the 22nd for May 4, so we would
13 open, I would think, public comment starting on May 4, if we
14 we wanted.

15 CHAIRWOMAN SANDOVAL: May 4 and it would run
16 through the 8th?

17 MR. MOANDER: I believe that should work because
18 30 days is, from -- in May would get us to like June 3rd or
19 something like that. Yeah, I think it's June 3rd. So with
20 that in mind, you can have it run up to the 8th. There is
21 no issue there because, I mean, the real question is, how do
22 the comments get handled, collated and disseminated, but I
23 think we have that under control.

24 CHAIRWOMAN SANDOVAL: My inclination would be to
25 have it run as long as feasible, which would be the 8th, the

1 day before, by the end of business on the 8th. Commissioner
2 Bloom, what do you think?

3 COMMISSIONER BLOOM: (Inaudible response.)

4 CHAIRWOMAN SANDOVAL: I can't hear. I think you
5 are muted.

6 COMMISSIONER BLOOM: Can you hear me now?

7 CHAIRWOMAN SANDOVAL: Yes.

8 COMMISSIONER BLOOM: That date, that sounds fine
9 to me, May 4 to June 8 provided we are giving staff enough
10 time to get everything collated and submitted. Perhaps
11 the -- let me look at the dates one more time here.
12 Perhaps we would want to say beginning right on the 9th --
13 if we say close of business on the 7th, then that gives
14 staff time to fully gather comment and us time to review
15 them.

16 CHAIRWOMAN SANDOVAL: That's fine with me.

17 And we did this in the waste rule, and I would be
18 inclined to do it again, like technically write the public
19 comment period starts on May 4, but we accepted public
20 comments before that date, written public comments, and I
21 don't see any reason not to do that again.

22 MR. MOANDER: I don't think it hurts because
23 we've got the formal comment period. I know, unless the
24 parties have a particular objection to that, I don't see any
25 negatives from it, other than more paperwork, but that's

1 part of the process.

2 CHAIRWOMAN SANDOVAL: Commissioner Bloom?

3 COMMISSIONER BLOOM: Madam Chair, I would be fine
4 with that.

5 CHAIRWOMAN SANDOVAL: Okay. Okay. I think
6 that's the last piece. Which parts of this do we need to
7 make motions on, Mr. Moander?

8 MR. MOANDER: So I think the first thing we want
9 to address is the granting of power to you, Madam Chair, to
10 appoint a hearing officer, and so that's the start. And
11 then assuming we're -- maybe what I should do is kind of go
12 through my notes and editions so that way the key components
13 of the scheduling order are addressed.

14 And I think -- could I could have a couple of
15 minutes to go through the draft that I have circulated and
16 make sure there is nothing that's missing before we address
17 that, but we can do the -- do the vote on the appointment
18 right now and just get that out of the way?

19 CHAIRWOMAN SANDOVAL: Okay.

20 COMMISSIONER BLOOM: All right. Madam Chair, I
21 move to empower you to name a -- appoint a -- what's the
22 word I'm looking for here -- a manager for the purposes of
23 the oral --

24 CHAIRWOMAN SANDOVAL: I second that.

25 Mr. Moander, do we need to be more specific, or is that

1 okay?

2 MR. MOANDER: No, that's fine, just granting you
3 the power to appoint a hearing officer. Short and sweet.

4 CHAIRWOMAN SANDOVAL: Would you do a roll call,
5 please?

6 MR. MOANDER: Okay. I absolutely will.
7 Commissioner Bloom?

8 COMMISSIONER BLOOM: Approve.

9 MR. MOANDER: Madam Chair?

10 CHAIRWOMAN SANDOVAL: Approved.

11 MR. MOANDER: The motion carries. I just need
12 one second to take a look at this order.

13 CHAIRWOMAN SANDOVAL: You want to go on a
14 five-minute minute break? Would that help?

15 MR. MOANDER: That would be wonderful, if you
16 would so indulge.

17 CHAIRWOMAN SANDOVAL: Why don't we come back at
18 10:12.

19 MR. MOANDER: Excellent.

20 (Recess taken.)

21 CHAIRWOMAN SANDOVAL: All right. I think we have
22 Commissioner Bloom. Go ahead, Mr. Moander.

23 MR. MOANDER: In reviewing the proposed
24 scheduling order, it looks like we have all dates and times
25 that are necessary for entry into the procedural order. So

1 unless any particular party needs to or wants to have those
2 recited, I think we are good to go.

3 MR. TIMMONS: Mr. Moander, Madam Chair, Daniel
4 Timmons with WildEarth Guardians. Actually just going back
5 through the rules, I do have one other comment with respect
6 to the close of the written public comment period, reading
7 the rule with respect to that, 19.15.3.10, "a person shall
8 provide written comment on the proposed rule change to the
9 Commission clerk not later than the date of the scheduled
10 hearing unless extended," my interpretation of that rule --
11 and I just had a quick conversation with Mr. Ames -- I
12 believe it's not clear that the Commission has the
13 discretion to shorten that public comment period.

14 And so I would suggest that -- I realize it's an
15 inconvenience and somewhat unfortunate the way the rules are
16 written, but we would request that the written public
17 comment be allowed to continue through the first day of the
18 public hearing.

19 CHAIRWOMAN SANDOVAL: I don't have any strong
20 opposition to that if that's how the rule reads.
21 Commissioner Bloom?

22 COMMISSIONER BLOOM: Madam Chair, thanks for -- I
23 guess it's the unfortunate reality. I prefer to have things
24 in front of me so I can have time to review them and study
25 them and give the public comment the attention it's due, but

1 yeah, we'll be reading them as they come in during the
2 hearing. Thank you.

3 CHAIRWOMAN SANDOVAL: (Inaudible.)

4 COMMISSIONER BLOOM: Madam Chair, you are muted.
5 Sorry.

6 CHAIRWOMAN SANDOVAL: Well, I will try again. Do
7 we need to make motions on any of the other items like the
8 date of the hearing or any of the other items, or is that
9 wrapped up in the procedural order?

10 MR. MOANDER: With the procedural order as it's
11 written, I would suggest, just for the sake of completeness,
12 that the Commission -- essentially one of the commissioners
13 move to adopt the dates and times discussed to be reflected
14 in the procedural order.

15 CHAIRWOMAN SANDOVAL: I have them written down --
16 I move that the rule hearing in Case 21834 be scheduled for
17 June 9 and 10, and that the prehearing statements are due on
18 May 25. The motion, any motions are due on May 31,
19 responses are due on June 2nd, and that a motion hearing be
20 set on June 4th for 9 a.m.

21 COMMISSIONER BLOOM: I second that motion, Madam
22 Chair.

23 CHAIRWOMAN SANDOVAL: Mr. Moander, will you do us
24 the honor?

25 MR. MOANDER: Yes, Madam Chair. Commissioner

1 Bloom?

2 COMMISSIONER BLOOM: Approved.

3 MR. MOANDER: Madam Chair?

4 CHAIRWOMAN SANDOVAL: Approved.

5 MR. MOANDER: Motion passes.

6 CHAIRWOMAN SANDOVAL: Great. All right. Well, I
7 think that concludes case Number 21834.

8 (Concluded.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

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