

SPECIAL MEETING
MOTION HEARING
STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

June 4, 2021

9:00 a.m.

APPEARANCES:

Felicia Orth: Madam Hearing Officer

Andrienne Sandoval: Chairwoman

Gregory Bloom: Commissioner

Terry Warnell: Commissioner

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1 A P P E A R A N C E S:

2 FOR EMNRD and OCD:

3 Eric Ames
eames@santafecountynm.gov
4 Santa Fe County Attorney's Office
102 Grant Avenue
5 Santa Fe, New Mexico 87501-2061
505-986-6279

6
7 For the Attorney General's Office

8 Christopher L. Moander
chris@marrslegal.com
Marrs, Griebel Law, Ltd.
9 1000 Gold Avenue, Southwest
Albuquerque, New Mexico 87102-2933
10 505-433-3926

11 For WildEarth Guardians:

12 Daniel Timmons
Staff Attorney

13
14 For NMOGA:

15 Adam Rankin
agrarkin@hollandhart.com
Holland & Hart LLP
16 110 North Guadalupe Street #1
P.O. Box 2208
17 Santa Fe, New Mexico 87504-2208
505-988-4421

18
19 FOR IPANM:

20 Andrew L. Cloutier
acloutier@hinklelawfirm.com
Hinkle Shanor LLP
21 400 North Pennsylvania Avenue #640
P.O. Box 10
22 Roswell, New Mexico 88202-0010

23
24
25

1 For the Intervenors:

2 Douglas Meiklejohn
dmeiklejohn@nmelc.org
3 NM Environmental Law Center
1405 Luisa Street #5
4 Santa Fe, New Mexico 82505-4074
505-989-9022

6 Also in Attendance:

7 Jesse Tremaine
Bill Brancard
8 Florene Davidson

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1 MADAM HEARING OFFICER ORTH: Okay. So we
2 are here this morning. My name is Felicia Orth.
3 I'm a hearing officer appointed by the Oil
4 Conservation Commission to conduct a hearing in the
5 matter of proposed amendments to New Mexico
6 Administrative Code, in particular, 19.15.27,
7 19.15.16, and 19.15.34 of the commission's rules,
8 docketed by the hearing clerk as 21834.

9 I'm sorry. I think I -- I read the
10 caption wrong, incorrectly, just there -- excuse me.
11 I'm going to start again. I was reading from the
12 wrong caption.

13 This is case 21834, the application by
14 WildEarth Guardians of New Mexico Oil Conservation
15 Division to consider proposed amendments to rules
16 19.15.29.6, 29.8, and 29.15, sometimes called the
17 release rule or the spill rule.

18 We're here this morning to consider a
19 number of motions consistent with a procedural order
20 entered by the commission chair at the beginning of
21 this process. And in particular, we have a motion
22 from the oil conservation division to exclude the
23 additional proposed regulations proposed by
24 intervenors.

25 And the intervenors are the Rio Grande

1 chapter of the Sierra Club, the Pueblo Action
2 Alliance, Citizens Care for the Future, the Native
3 American Voters Alliance Education Project, and
4 Amigos Bravos. Again, we will collectively refer to
5 them as the intervenors this morning.

6 So we have the division's motion to
7 exclude some evidence related to additional
8 regulatory proposals by the intervenors, the motion
9 to exclude the intervenors' additional proposed
10 regulatory requirements filed by the New Mexico Oil
11 and Gas Association, a motion to exclude all of the
12 intervenors' proposed evidence filed by the
13 Independent Petroleum Association of New Mexico,
14 IPANM.

15 We have a consolidated response from the
16 intervenors to those motions, and a response filed
17 by WildEarth Guardians to those motions.

18 We also have a motion filed by IPANM to
19 exclude certain portions of the testimony of Kaley
20 Shoup, who will be testifying for the intervenors, a
21 response in opposition from the intervenors to that
22 motion, and one distinct matter that was part of the
23 motions to exclude, which related to the testimony
24 of Mr. Zupan or Zupan [pronounced differently].
25 Sorry if I mispronounce names here. Please correct

1 me as necessary.

2 Also a couple of notices of errata that
3 are filed in connection with all of these motion
4 documents.

5 So with us this morning we have the chair
6 of the commission, Madam Chair, Adrienne Sandoval.

7 We also have Commissioner Terry Warnell
8 and Commissioner Greg Bloom.

9 Counsel, I will ask for your appearances,
10 just to make sure we have everyone on line and
11 capable of being heard, at least via audio.

12 Mr. Ames, I see your -- your video is on
13 right there. Would you kick us off, please?

14 MR. AMES: Good morning, Madam Hearing
15 Officer, Madam Chair, and members of the commission.

16 My name is Eric Ames. I'm an attorney
17 with the office of general counsel, Energy Minerals
18 and Natural Resources Department, on behalf of the
19 oil conservation division.

20 MADAM HEARING OFFICER ORTH: All right.
21 Thank you, Mr. Ames.

22 Let's see. Do we have counsel for
23 WildEarth Guardians here?

24 MR. TIMMONS: Yes, Madam Hearing Officer.
25 Daniel Timmons on behalf of WildEarth Guardians.

1 MADAM HEARING OFFICER ORTH: Thank you.

2 Good morning.

3 Counsel for NMOGA?

4 MR. RANKIN: Good morning, Madam Hearing
5 Officer. Adam Rankin, with the law firm of Holland
6 & Hart, appearing on behalf of the New Mexico Oil
7 and Gas Association.

8 MADAM HEARING OFFICER ORTH: Counsel for
9 IPANM?

10 MR. CLOUTIER: Good morning, Madam Hearing
11 Officer, and members of the commission. Andrew
12 Cloutier of the Hinkle Shanor firm, on behalf of the
13 Independent Petroleum Association of New Mexico.

14 MADAM HEARING OFFICER ORTH: Good morning.
15 And, Mr. Meiklejohn?

16 MR. MEIKLEJOHN: Thank you, Madam Hearing
17 Officer and members of the commission.

18 Douglas Meiklejohn. I'm an attorney with
19 the New Mexico Environmental Law Center, and
20 appearing here today on behalf of the intervenors.

21 MADAM HEARING OFFICER ORTH: Good morning.
22 We also have Florene Davidson, the
23 commission's administrator.

24 I know that we have other staff and
25 counsel from EMNRD, and Mr. Moander, Chris Moander,

1 from the attorney general's office with us.

2 MR. MOANDER: Good morning, everybody.

3 MADAM HEARING OFFICER ORTH: All right.

4 If there is nothing else before we begin -- oh, and
5 I'm sorry. This morning's session is being recorded
6 and transcribed by Paul Baca, of Paul Baca Court
7 Reporters, so there will be a transcript made of the
8 session.

9 So let me begin by saying I have read the
10 motions, the responses, and the case law that was
11 cited in the motion and responses.

12 And we can take up the Zupan and Shoup
13 testimony after we have addressed the much larger
14 issue of whether the proposed additional regulatory
15 changes by intervenors should be part of our hearing
16 next Wednesday.

17 I'd like to shorten the argument by saying
18 that in my mind, there's really no question that the
19 intervenors should be allowed to present testimony
20 in support of the division and Guardians' petition,
21 regardless of whether their additional regulatory
22 proposals are considered.

23 Fortunately the notice of intent to
24 present technical testimony, in my opinion, was
25 quite clear with respect to each of the witnesses,

1 that they had testimony to offer in support of the
2 original petition by the division, of the Guardians,
3 and also testimony in support of their additional
4 proposals.

5 And I don't really need argument on
6 whether they should be allowed to testify at all.
7 In my mind, the notice of intent is perfectly
8 suitable for allowing them to testify in support of
9 the original petition.

10 I also saw that in their response,
11 intervenors noted that they were withdrawing that
12 third additional proposal, which would have codified
13 a rebuttable presumption, so we really are focused
14 on the two additional proposals that were offered
15 there.

16 So having read the -- having read the
17 motions, and really wanting to hear from folks just
18 once this morning, what I'd like to do is start off
19 with Mr. Meiklejohn and then go to the replies.

20 I will -- commissioners, I will invite
21 your questions after we've heard arguments from each
22 of the parties.

23 So, Mr. Meiklejohn, let me ask if you have
24 anything to add or any particular points you would
25 like to stress in your response to the motions.

1 MR. MEIKLEJOHN: Thank you, Madam Hearing
2 Officer.

3 The point that we made throughout our
4 written submission, and that is important, is that
5 both the public notice and the application for rule
6 making emphasize the interest of WildEarth Guardians
7 and the division in making their proposals to
8 protect public health and the environment.

9 And the two amendments that we have
10 proposed are directly addressed to protection of
11 public health and the environment.

12 The first proposal would require source
13 characterization of a release. It's clear that
14 without knowing what the release is and what
15 constituents are in the release, there cannot be
16 adequate measures taken to protect people who might
17 be affected by the release or the environment that
18 might be affected by the release.

19 The second point is that the -- when there
20 is a release, people who are in the area surrounding
21 the release and in the area that may be affected by
22 the release need to be notified about that release.
23 It's a fundamental fairness to those people that
24 they be told that there has been a release so that
25 they can take whatever measures they deem to be

1 appropriate to protect themselves and protect their
2 property.

3 I would also point out that in our written
4 submissions we addressed the logical outgrowth test
5 for determining whether proposed amendment to rules
6 that have been proposed should be allowed.

7 It is our position that the amendments
8 that we have proposed are within the logical
9 outgrowth, as that has been defined by federal
10 courts.

11 In its response to the motions to strike
12 or exclude evidence, WildEarth Guardians pointed out
13 that while the logical outgrowth test has not been
14 adopted by New Mexico courts and that, in fact,
15 what's been adopted by the New Mexico courts is a
16 test to determine whether the notice that was issued
17 reasonably provided an opportunity for people to be
18 heard on the matters that are in front of the
19 agency.

20 Because our proposed amendments relate
21 directly to protection of public health and the
22 environment, which is a central theme of the rule
23 making proceeding, as I said as announced in the
24 public notice and in the application for rule
25 making, our proposed amendments do meet that other

1 test. And we, therefore, urge that the commission
2 rule that we may be able to present evidence,
3 including testimony, on those proposed amendments.

4 You mentioned, Madam Hearing Officer, the
5 objections to testimony by Joseph Zupan, who is the
6 director of Amigos Bravos, and by Kaley Shoup.

7 In addition to taking up those points, I
8 would like to address two other points. One has to
9 do with the timing and length of the notice of
10 intent that we filed. I would appreciate the
11 opportunity to be able to address the objections to
12 that, that were filed. And also, to address the
13 objections that were filed to the hyperlinks in
14 Norman Gaune's testimony, which I believe were
15 raised both by the division and by the independent
16 producers -- sorry -- Independent Petroleum
17 Association.

18 So I would appreciate the opportunity to
19 address those points as well.

20 Thank you, Madam Hearing Officer.

21 MADAM HEARING OFFICER ORTH: Mr.
22 Meiklejohn, let me ask you a question about the
23 hyperlinks in Mr. Gaune's testimony.

24 I tried to follow them as well, and came
25 to the same, I believe, broken Dropbox message that

1 I think other folks did.

2 Are those essential to his testimony in
3 support of the original petition or only in support
4 of the additional proposed regulatory proposals?

5 MR. MEIKLEJOHN: Madam Hearing Officer, I
6 believe that they are important for both points. I
7 wouldn't say that they are essential, in the sense
8 of making or breaking his testimony as to either. I
9 believe that his testimony will be helpful as to the
10 original proposals. And as to the proposed
11 amendments, I think it would be more helpful with
12 those working hyperlinks.

13 MADAM HEARING OFFICER ORTH: All right.
14 Thank you for that.

15 Mr. Ames, would you like to make what is
16 effectively a reply at this point?

17 MR. AMES: Yes. Thank you, Madam Hearing
18 Officer. Thank you for the opportunity to reply.

19 The division's position is that the
20 commission should decline to hear Sierra Club's
21 proposed modifications to Part 29 at the June 9
22 hearing, because it both violates the law and would
23 set a bad precedent.

24 Instead, the Sierra Club should file its
25 own petition, and the commission can then publish a

1 notice, a proper notice, and add a hearing at which
2 interested persons have a full and fair opportunity
3 to present testimony and evidence.

4 I'm not going to debate the merits of the
5 Sierra Club's proposed modifications. That's
6 appropriate in a hearing.

7 But I do want to emphasize that the law
8 here is clear. The basic principle is procedural
9 due process, which means that interested persons
10 must get notice about a proposed government action
11 and be given an opportunity to be heard before the
12 government takes that action.

13 The legislature has codified this
14 principle in the statute for the commission in the
15 context of rule making in Section 23 of the Oil and
16 Gas Act.

17 That statute requires the commission to
18 give reasonable notice of a hearing so that persons
19 having an interest in the subject matter can be
20 heard.

21 The commission codified this requirement
22 in its rules in Part 3. And I will not elaborate on
23 what those requirements are, but they're quite
24 detailed, and they're set forth in all of the briefs
25 of the parties filing motions here.

1 It's fairly clear, obviously clear, that
2 Sierra Club's proposed mods do not fall within the
3 scope of the notice published for this hearing.

4 This hearing was noticed for two reasons:
5 to prohibit major or minor releases; and, secondly,
6 to conform Section 15 of Part 29 with Part 5, the
7 enforcement rule.

8 Sierra Club's proposal goes well beyond
9 these two -- these two rule changes.

10 It changes all the reporting requirements.

11 It requires operators to file forms for
12 all releases.

13 It significantly increases reporting
14 requirements and significantly shortens the
15 deadlines.

16 It requires operators to give notice to
17 all persons within certain distances and within
18 certain times of the release.

19 And it requires OCD to post all of these
20 forms, information, and so forth on its website.

21 None of that is contemplated by the
22 notice.

23 As for -- as for the opportunity to be
24 heard, no interested person reading the notice would
25 know that the Sierra Club's proposed modifications

1 would be heard on June 9. And now it's too late for
2 interested parties to enter their appearance, and
3 it's too late for them to present testimony and
4 evidence.

5 The parties are in exactly the same
6 position now as well. We've already identified our
7 witnesses. We've already filed our testimony and
8 exhibits. There's no time to prepare.

9 Even if we had the time, there's a real
10 question whether we could present that -- those
11 witnesses and that testimony, because we didn't
12 notice any of it in our prehearing statements.

13 Now, Mr. Meiklejohn makes a few arguments
14 in -- with respect to the -- these changes.

15 He argues, first, that the proposed
16 changes to 29 are okay as long as the change is
17 intended to protect public health and the
18 environment.

19 This argument is based on a reference in
20 the notice to protecting public health and the
21 environment.

22 But that reference is read completely out
23 of context. That reference is not a rule change;
24 it's a reference to the commission's legal authority
25 to adopt a rule change for Part 29.

1 If the commission could use a reference to
2 its legal authority to consider a proposed
3 modification, there is no limit to what the
4 commission could consider at a hearing, regardless
5 of what the notice actually concerns with respect to
6 proposed rule changes.

7 Second, Sierra Club argues that the
8 commission can hear the proposed modifications
9 because they fall within the scope of the original
10 application for rule making, the petition itself.

11 This argument makes no sense. The
12 petition doesn't establish the scope of the hearing.
13 Under the law and the commission's rules, the public
14 notice does. And it's to the public notice that we
15 must refer for the scope of the hearing.

16 And then finally, Mr. Meiklejohn argues
17 that even if the mods are not within the scope of
18 the notice, the commission can consider them because
19 they're a logical outgrowth of the OCD's very
20 limited proposed changes to Part 29.

21 Now according to WildEarth Guardians,
22 logical outgrowth isn't even a thing in New Mexico.
23 So perhaps that's the end of the question.

24 But assuming that Sierra Club is right,
25 that logical outgrowth is a valid doctrine in

1 New Mexico, it certainly doesn't help its position.

2 The proposed modifications fundamentally
3 rewrite Part 29. These are -- there are huge
4 changes to the scope of obligations and
5 responsibilities under the rule for both the
6 regulated community and the division.

7 These changes don't fit with any -- within
8 any test of logical outgrowth applied by this
9 commission, for instance, in the produced water rule
10 and in the venting and flaring rule hearings, or in
11 any federal court.

12 They don't fall within the range of
13 reasonably foreseeable alternatives to the petition.
14 No person reading the commission's notice could
15 reasonably construe them to fall within the scope of
16 the notice. And no person reading the commission's
17 notice could reasonably contemplate that this
18 commission would consider them at a hearing.

19 The division also believes that if the
20 commission were to consider Sierra Club's proposed
21 amendments on June 9, it would set a bad precedent.
22 It essentially would mean that a petition by any
23 party for any reason could serve as a basis for
24 another party to enter an appearance at the last
25 minute, when prehearing statements are due, and

1 propose a change to that part or any other part, no
2 matter how extreme, as long as they can somehow cite
3 to some words in the notice that they allege are
4 broad enough to allow them to bring those proposals
5 to the table.

6 The result would be that interested
7 persons would have to enter an appearance in every
8 hearing that even remotely touched on an issue that
9 might affect them because of their fear of what
10 might happen at the last minute.

11 And then the commission would have to
12 provide, I would suggest, additional time for all
13 the parties who file prehearing statements to
14 prepare testimony on all of these new proposed
15 modifications that are far outside the scope of the
16 original notice.

17 That's not how it is supposed to work.
18 That's why there's a statutory requirement for
19 reasonable notice, so that the parties -- or so that
20 interested persons can know what's going to be
21 considered, so they can adequately prepare for the
22 hearing.

23 If any party can come in at the last
24 minute, one -- you know, one week before the hearing
25 and put anything on the table that they can

1 conceivably argue is within the scope, then the
2 notice has no meaning and the process loses its
3 vitality.

4 Now you did reference a couple of issues,
5 Madam Hearing Officer, with respect to Mr. Zupan's
6 testimony and Mr. Gaune's testimony.

7 I will not present the division's position
8 on those at the moment, but would like to reserve
9 the right to address those as well.

10 Thank you.

11 MADAM HEARING OFFICER ORTH: So, Mr. Ames,
12 around Mr. Zupan's testimony, I saw in the response
13 Mr. Meiklejohn pointed to the procedural order.
14 Certainly we've been together in some proceedings
15 where verbatim or narrative testimony is required of
16 technical witnesses.

17 From the portion of the procedural order
18 that Mr. Meiklejohn cited to in his response, it
19 doesn't appear that that requirement was entered in
20 this proceeding.

21 Does that change your opposition?

22 MR. AMES: No, it does not, Madam Hearing
23 Officer. It's -- it's true that both Sierra Club
24 and WildEarth Guardians argue that Mr. Zupan is not
25 required to provide verbatim testimony.

1 We never -- we never asked for that.

2 We've never argued that Mr. Zupan has to provide
3 verbatim testimony.

4 What we said is that he has to provide a
5 concise statement in summary or outline form, which
6 is the requirement in the procedural order.

7 Here, we don't even have that. Mr. Zupan
8 is going to testify for an hour. He's going to have
9 two topics: support for OCD's petition and support
10 for Sierra Club's proposed modifications.

11 For the Sierra Club's proposed
12 modifications, the entirety of his testimony, or his
13 statement, is that the mods will -- the
14 modifications will improve protection of water
15 resources and for residents from impacts of waste
16 from oil and gas activities.

17 It's essentially one sentence, and it's a
18 conclusion.

19 If that's all he's going to say, he only
20 needs a couple of minutes, or even a minute would be
21 enough.

22 So the question is: What is he going to
23 testify about for an hour?

24 Mr. Zupan is a professional registered
25 engineer in New Mexico. His resume says he has

1 extensive experience with cleanup and remediation of
2 oilfield waste. But we have no idea what he's going
3 to say. His one brief conclusion tells us nothing.

4 We have no idea of how to prepare for
5 cross-examination. That brief statement does not
6 meet the requirements of the rule, of the
7 commission's rule, and it doesn't meet the
8 requirements of the procedural order.

9 We are not arguing for verbatim testimony,
10 such as OCD itself has presented in this case.
11 That's not the issue. That's a strawman.

12 Both Sierra Club and WildEarth Guardians
13 refer to this verbatim testimony as an implication.
14 That's an implication they draw and then attack.
15 That's the nature of a strawman. We never said it.
16 We're not saying it now.

17 We're saying that what has been filed for
18 Mr. Zupan is clearly inadequate under the rule and
19 under the order, and that's it.

20 MADAM HEARING OFFICER ORTH: All right. I
21 will ask for more information from Mr. Meiklejohn
22 after we've addressed the central issue this morning
23 about the additional regulatory requirements.

24 All right. Let's see.

25 Mr. Timmons, if you would, please, what is

1 effectively a reply at this point to the responses
2 by Mr. Meiklejohn.

3 MR. TIMMONS: Yes. Thank you,
4 Madam Hearing Officer, Madam Chair, members of the
5 commission.

6 Daniel Timmons, again on behalf of
7 WildEarth Guardians.

8 I just kind of want to back up a little
9 bit. Guardians filed this rule making application
10 with OCD because we believe in that proposal, that
11 prohibiting major and minor releases will help
12 protect public health and the environment.

13 Frankly, Sierra Club's participation and
14 these motions put us in a bit of an awkward spot.
15 Our primary objective here is to get this rule
16 passed, and we filed that joint petition.

17 And we've worked with industry intervenors
18 and with the division in targeted testimony to make
19 the hearing go smoothly, and because we recognized
20 that working together gave us the best chance of
21 getting this important rule passed.

22 So from that perspective, Sierra Club's
23 intervention complicates things. It's inconvenient.

24 But on the other hand, we fundamentally
25 believe in the value of public participation as a

1 matter of principle and as a matter of law. So we
2 really appreciate the hearing officer's recognition
3 that Sierra Club should be allowed to participate
4 and to prevent -- provide testimony with respect to
5 our petition, our joint proposal.

6 And that's our fundamental purpose for
7 being here today and for filing our motion.

8 But with respect to Sierra Club's proposed
9 modifications, our interests are really broader than
10 this proceeding. And so we're really concerned
11 about the unintended consequences of importing the
12 logical outgrowth test from the federal notice and
13 commented rule making proceedings -- procedures, to
14 a very different type of formal rule making trial
15 type process that we have here before the
16 commission.

17 And so we think that as a matter of law,
18 the statute, the Oil and Gas Act requires reasonable
19 notice, and that has to meet due process
20 requirements providing general notice of the issues
21 to be presented.

22 In this particular case, that distinction
23 might not matter. Applying the logical outgrowth
24 test or a reasonable notice test might get us to the
25 same place.

1 But we want to caution the commission
2 against importing a legal term of art, logical
3 outgrowth, and the giant body of federal case law
4 that comes with that, because that case law has been
5 developed in a very different context.

6 We recognize the concerns of the division
7 and of the industry intervenors regarding the
8 potential needs to develop new witnesses and new
9 testimony to respond to these new modifications.

10 And that's probably a factor that weighs
11 in favor of finding that that is outside the scope
12 of what was presented.

13 But this is not a notice and common rule
14 making proceeding, because this process does allow
15 for at least some type of response to, and back and
16 forth, with respect to those amendments, those
17 modifications, through cross-examination or
18 potentially rebuttal testimony.

19 At the end of the day, Guardians is simply
20 not in a position to take a side with respect to
21 these particular proposed rules and whether or not
22 they should be considered by the commission.

23 I recognize that may sound like a copout.
24 But we have an internal conflict between our
25 immediate objective in this proceeding, of getting

1 our proposal passed, and our long-term interests and
2 objectives in protecting the right of public
3 participation. And here, that's a bit of a
4 balancing act.

5 And so we ask that the commission, the
6 hearing officer, apply the proper legal standard,
7 and not unnecessarily raise the bar or tie the
8 commission's hands to considering alternative
9 proposals by adopting what we believe to be an
10 inappropriate legal test that came from a different
11 context.

12 Just as a final note, I think that some of
13 the issues that have been raised in the motions, the
14 timing concerns, and the ability to provide, you
15 know, time to respond.

16 I like opportunities, let's say, to
17 improve the OCC's rule making processes overall, and
18 they probably were a consideration as to ways to
19 make future process, future rule making proceedings,
20 a little better, a little smoother, and ensure that
21 those due process rights are protected, and that
22 robust public participation can also be
23 accomplished. And that those two values, those two
24 goals, are not at odds, but that can both be
25 protected and promoted in future proceedings.

1 So that is Guardians' position here, and
2 I'm happy if you have any questions.

3 MADAM HEARING OFFICER ORTH: Thank you
4 very much, Mr. Timmons.

5 Mr. Rankin, do you have anything to add by
6 way of reply?

7 MR. RANKIN: Thank you very much, Hearing
8 Officer.

9 In discussions with IPNM counsel,
10 Mr. Cloutier, we had discussed allowing him to
11 present first, so I'm happy to allow him to go
12 first. But if you'd like me to present at this
13 time, I'm happy to do that as well.

14 MADAM HEARING OFFICER ORTH: Well, I'm
15 not -- I don't have feelings about that at all.

16 Mr. Cloutier?

17 MR. CLOUTIER: Thank you, Madam Hearing
18 Officer.

19 First of all, I appreciate your desire for
20 efficiency, Madam Hearing Officer, and I just want
21 to make sure that I can adopt Mr. Ames' argument by
22 this reference and not repeat his points, so that we
23 can move along quickly.

24 MADAM HEARING OFFICER ORTH: Thank you
25 very much.

1 MR. CLOUTIER: Okay. Thank you. We just
2 want to make sure that the record is clear on that.

3 We definitely join in Mr. Ames' principal
4 point, that the language that the intervenors are
5 seeking to latch on to in the notice is an
6 invocation -- or attempt to invoke -- what the
7 commission's and division's powers are under
8 72-2-12. And it is not a -- it is not the purpose
9 of the rule. The purpose of the rule was set forth
10 in one sentence. It is very narrow, as Mr. Ames
11 argues.

12 I'd like to talk about the logical
13 outgrowth test and the Earthworks case. You know,
14 it's a little bit ironic that we are here.

15 Mr. Meiklejohn, in the Earthworks case,
16 was taking the position that a reference in the
17 public notice to multi well pits was ambiguous and
18 didn't provide adequate notice.

19 The Court there said, Well, maybe
20 ambiguous, but all you had to do was look at the
21 proposed rule, and there's a definition of it.

22 If any member of industry looked at this
23 proposed rule, after reading the notice, and was
24 confused, they wouldn't have been.

25 There were -- the two purposes were

1 clearly addressed in the proposed rule making and
2 nothing else.

3 First, clarifying what I say -- I would
4 guess that while releases were totally discouraged
5 under the formal rules that exist today, it does
6 clarify that releases are illegal.

7 And secondly, the rule clarifies, as the
8 notice states, that the division's powers to impose
9 various forms of penalty apply to violations of the
10 release rule. That's it.

11 In the Earthworks case, the Court said, Go
12 look at the rule if you're confused about what the
13 notice said.

14 Well, the notice and the proposed rule
15 that the division and WildEarth Guardians put forth
16 are the same.

17 Secondly, the Court of Appeals in the
18 Earthworks case said, Well, if you're still
19 confused, ask the division.

20 Well, I personally asked Mr. Timmons and
21 Mr. Ames, Are there any other amendments
22 contemplated other than what is here?

23 The answer was an unequivocal no from both
24 of them.

25 So under the Earthworks case, the Sierra

1 Club, et al.'s proposal to amend should fail. The
2 notice did not change -- the notice did not alert
3 anyone that an operator's reporting responsibilities
4 were going to be materially altered, that the
5 operator was going to have to undertake new duties
6 with respect to releases. All of these changes do
7 not relate to what was in the purpose of the rule.

8 We think the logical outgrowth test,
9 Madam Hearing Officer, is a practical test. Due
10 process, as Mr. Timmons points out, underlines all
11 of these notice concerns.

12 Logical outgrowth allows for robust rule
13 making and back and forth and improving the rules as
14 drafted. There is one proposal to amend the rules,
15 as noticed.

16 And that I think all of the four
17 participants support, which is to make sure that
18 Part 29 is not in conflict with Parts 27 and 28 of
19 the rules. That is a logical outgrowth of the
20 proposed rules. Make sure that there's not an
21 internal conflict among the rules.

22 However, the increased -- substantially
23 increased reporting requirements, reducing the
24 reporting period, requiring 24 hours' notice to
25 nearby residents or occupants of buildings, none of

1 those things were in the notice.

2 I'd like to conclude. I -- I view this
3 case, sort of put it on the other -- shoe on the
4 other foot.

5 What would happen if one of the industry
6 associations here today had worked with the division
7 to propose a narrow rule and the other industry
8 association came in with a slew of amendments at the
9 last minute?

10 The press would be here. There would be
11 outrage. There would be concern.

12 I don't accuse anyone of bad faith. But
13 yeah, I can't help but think of what this would look
14 like if the situation were reversed.

15 And with that, Madam Hearing Officer, I
16 will stand for any questions and reserve my comments
17 on the specific individual witnesses, as did other
18 counsel.

19 MADAM HEARING OFFICER ORTH: Thank you
20 very much, Mr. Cloutier.

21 Mr. Rankin?

22 MR. RANKIN: Thank you very much,
23 Madam Hearing Officer, Madam Chair, may it please
24 the commission.

25 I'll do my best here, as Mr. Cloutier has

1 done, to distill and avoid duplication of argument
2 here.

3 But as Mr. Cloutier, I will endorse and
4 incorporate and adopt the statements and arguments
5 made today in opposition here to the proposed
6 modifications by OCD counsel and IPNM counsel.

7 In short, the additional modifications
8 here that have been proposed by the intervenors were
9 not contemplated by the narrow and limited scope of
10 the proposed rule or in the notice that was
11 provided.

12 The intervenors themselves acknowledge
13 that what they seek to inject into this rule making
14 is -- are additional issues that were not proposed
15 by the rule making application or in the notice that
16 was provided.

17 As Mr. Ames has stated very eloquently and
18 succinctly, this particular rule making has a very
19 narrow scope. It's limited to only the two issues,
20 essentially, that were discussed: the prohibition of
21 major and minor releases. And that's essentially --
22 essentially it.

23 The intervenors' additional proposed
24 modifications would add entirely new requirements
25 that were not contemplated or could not have been

1 contemplated by the proposed rule.

2 Now the intervenors say the proposed rule
3 actually does contemplate these additional issues,
4 because the broad purpose of Rule 29, and the
5 proposed change, is to protect the environment and
6 health and safety.

7 But if that were simply the test, then
8 there would be no principal basis whatsoever for any
9 party to add additional issues the week before a
10 rule making, that the commission and other parties
11 would then be forced to address and potentially
12 contest, without having the required notice, due
13 process, to review proposed language, the
14 requirements, or the technical or legal bases for
15 these proposed changes.

16 That's a bridge too far or door too wide.
17 Because then, any modification would be deemed
18 within the scope of a rule making. Any
19 modification, for example to Rule 29 intended to
20 prevent spills, would be allowed through the rule
21 making door at the last minute simply because
22 Rule 29 is also intended to prevent spills.

23 That's not the commission's test. The
24 test is whether the modifications are a logical
25 outgrowth and could be contemplated from the

1 language the applicants proposed and noticed to the
2 public.

3 The commission, in its wisdom, understood
4 the delicate balance between having the flexibility
5 to consider additional modifications at the time of
6 the rule making and due process requirements for
7 giving the public and diverse stakeholders and the
8 division and regulated entities reasonable notice of
9 a proposed rule making.

10 When the division -- when the commission
11 interpreted and implied a statutory mandate to
12 require and provide reasonable notice, it enacted
13 its updated rule making regulations on rule making
14 back in 2017.

15 Those regulations require very specific
16 disclosures and advance notice, all of which could
17 easily be avoided for future rule makings going
18 forward, if the commission adopts the intervenors'
19 and WildEarth Guardians' conception of the test for
20 reasonable notice.

21 This is important to understand, because
22 their approach would allow parties, as Mr. Ames
23 said, essentially, to ambush future rulings with
24 additional issues that were not noticed or
25 contemplated by the proposed rule and notification.

1 It would allow parties to totally sidestep
2 the commission's regulations and specific
3 requirements, including the initial determination on
4 whether to proceed with the rule making on those
5 issues.

6 It would allow them to avoid the
7 commission's regulatory promise to provide proposed
8 language well in advance of a hearing.

9 It would allow them to avoid the
10 requirement to provide legal and technical basis for
11 the changes in advance of the hearing.

12 And it would prevent the public, the
13 division, and other parties, from having a
14 reasonable opportunity and time to review, comment
15 on, and prepare for the proposed -- and to address
16 the proposed modifications, either with support,
17 opposition, or with additional modifications to
18 those proposed additions.

19 It would totally subvert the intent and
20 purpose of the commission's own regulations, and
21 that would not be a positive outcome for the rule
22 making of the commission, and it would directly
23 contravene the commission's updated and revised
24 regulations governing rule making that have now been
25 in place for more than four years.

1 So the commission's interpretation and
2 application of its reasonable notice mandate under
3 the statute is not new. It's been in place for
4 years. It's the commission's own interpretation of
5 its statutory mandate.

6 It's -- it's been applied effectively,
7 even just within the last year, at the produced
8 water rule making in 2020, in which the commission
9 excluded a series of proposals and modifications
10 from consideration at that rule making, because they
11 were outside the scope of the proposed rule and
12 notification.

13 And again earlier this year, at the
14 venting and flaring rule, in which the commission
15 considered a motion to exclude evidence and
16 testimony, and then -- and denied that motion and
17 allowed the testimony to go forward.

18 Now I just want to address separately some
19 of the comments made, and make the point that the
20 cases cited in the briefing, including the
21 Earthworks case, were issued prior to the
22 commission's updated rule making regulations.

23 So there's no case law addressing, you
24 know, the scope of what's permitted under the scope
25 of the commission's current regulations governing

1 rule making.

2 The commission has adopted -- incorporated
3 its own guidance, its own outlook interpretation of
4 what reasonable notice requires.

5 And here, you know, WildEarth Guardians'
6 papers and the intervenors' papers, they are
7 attempting to tell the commission how to interpret
8 its own regulations and rules, which I think is
9 inappropriate.

10 The commission has effectively applied and
11 construed its authority and requirements under the
12 statute and has used, as Mr. Cloutier has described,
13 this -- this logical outgrowth test as a practical
14 test.

15 And that test has effectively, you know,
16 been able to strike a balance between preserving
17 flexibility, to consider modifications during rule
18 making, and ensuring that the public and all
19 stakeholders, including the division, have actual
20 and reasonable notice in advance.

21 And here, that balance can only be
22 achieved by excluding the proposed additional
23 modifications proposed here by the intervenors.

24 With only a week before the rule making,
25 now that the parties have had a reasonable

1 opportunity to review the legal or technical bases
2 for the proposed additional modifications, which has
3 been compounded by the fact that we have not been
4 provided the underlying data or technical analysis
5 in support of their testimony.

6 So like the modifications that were
7 presented during the 2020 produced water rule, the
8 commission should -- the commission should exclude
9 this testimony and proposed modifications, because
10 they stray simply too far from the very limited and
11 narrow modifications proposed by OCD and WildEarth
12 Guardians in this case.

13 So with that, Madam Hearing Officer, I
14 believe that I've addressed all the points that I
15 wanted to emphasize in response to intervenors' and
16 WildEarth Guardians' papers.

17 But if there are any specific questions,
18 I'd be happy to answer them.

19 MADAM HEARING OFFICER ORTH: Thank you
20 very much, Mr. Rankin.

21 So, Commissioners, Madam Chair, would you
22 have questions of any of the counsel based on their
23 arguments?

24 CHAIRWOMAN SANDOVAL: Commissioner Warnell
25 or Bloom, do you have any questions for any of the

1 counselors?

2 COMMISSIONER BLOOM: I don't have any
3 questions at this time, no. Thank you.

4 COMMISSIONER WARNELL: I don't have any
5 questions either. Thank you.

6 CHAIRWOMAN SANDOVAL: I just have one.
7 Okay. I'll ask each one of you, I guess
8 starting with the OCD, so, Mr. Ames.

9 So within the intervenors' consolidated
10 response to the motions to exclude or strike in
11 Section 3B, bottom of page 7, it -- in the last
12 paragraph it talks about, in Number 2:

13 "It's understood that amendments proposed
14 by WildEarth Guardians and the division focus on
15 releases, that interested party would probably
16 expect that changes might be proposed to Sections
17 19.15.29.10 of the commission's rules because it
18 addresses notice to be given of releases."

19 And I guess my question, Mr. Ames: Yes or
20 no, would you probably know that the changes
21 proposed by Sierra Club were -- okay. Let me
22 restate that.

23 Do you -- would you have probably been
24 able to know or expect these changes that were
25 proposed by Sierra Club, based off of the notice

1 that was given to the public? Yes or no?

2 MR. AMES: Absolutely not.

3 CHAIRWOMAN SANDOVAL: Thank you.

4 Mr. Timmons, would you probably have been
5 able to expect the changes that Sierra Club proposed
6 based on the legal notice? Yes or no?

7 MR. TIMMONS: You're not going to let me
8 decline to answer this, are you?

9 CHAIRWOMAN SANDOVAL: You can refuse to
10 answer if you would like.

11 MR. TIMMONS: Honestly, I don't know,
12 Madam Chair.

13 CHAIRWOMAN SANDOVAL: Okay.

14 I'm sure I am going out of order here.
15 Sorry.

16 Mr. Cloutier, the same question. Would
17 you probably have been able to expect, based on the
18 legal notice, that the changes from Sierra Club were
19 in the -- the same question. I can't remember the
20 question at this point.

21 MR. CLOUTIER: Absolutely not, Madam
22 Chair. The Sierra Club necessitates technical
23 testimony in favor of their amendments. There was
24 no technical testimony proposed at any point, and
25 nothing in the world suggested the need.

1 CHAIRWOMAN SANDOVAL: Right. A simple yes
2 or no would have -- would have been fine.

3 Mr. Rankin, the same question. Yes or no?

4 MR. RANKIN: No, Madam Chair.

5 CHAIRWOMAN SANDOVAL: Thank you.

6 Okay. Mr. Meiklejohn, I think you're
7 unmuted.

8 The same question to you. Would you
9 probably have been able to expect these changes
10 based on the legal notice? Yes or no?

11 MR. MEIKLEJOHN: Yes, Madam Chair.

12 CHAIRWOMAN SANDOVAL: All right. Thank
13 you.

14 Those were my only questions.

15 MADAM HEARING OFFICER ORTH: All right.

16 Thank you, Madam Chair.

17 So again -- well, let me just make a few
18 observations.

19 I appreciated Mr. Timmons' caution about
20 not importing all of the logical outgrowth case law
21 from the federal process onto the state process.
22 That didn't appear to have been done intentionally
23 in any of the New Mexico appellate case law.

24 Having said that, I guess I would just
25 say, as someone who has been involved in rule making

1 proceedings for a variety of state agencies in
2 New Mexico for about 35 years, that I've heard
3 conversations among state agency lawyers, and
4 certainly heard conversations among assistant
5 attorney generals who represent those boards and
6 commissions, that this is a phrase we use a lot.
7 And I think, when it's used in New Mexico, it's
8 referring to the same thing, if you will, what was
9 referred to in one of the cases as a surprise
10 switcheroo.

11 So whether we use the term logical
12 outgrowth or the fancy legal term surprise
13 switcheroo, that was in the EPA case, I, frankly,
14 prefer Mr. Ames' language, "reasonably foreseeable."

15 And I think that's what Madam Chair was
16 just getting to, is having looked at the public
17 notice, would it be reasonable to foresee that these
18 proposed additional regulatory requirements might be
19 added. It's certainly reasonably foreseeable to
20 draft some language or make minor adjustments.

21 I think I have to disagree with
22 Mr. Meiklejohn, though. These were not minor
23 adjustments.

24 Looking, for example at that EPA case,
25 Environmental Integrity Project versus EPA, from the

1 DC circuit in 2005, where an agency's proposed rule
2 was speaking about minimum air velocity to ventilate
3 underground coal mines, the final rule provided,
4 instead, a maximum air velocity to ventilate coal
5 mines, and that was found to be out of line.

6 So I -- I'm not aware of case law in
7 New Mexico or otherwise that would support the
8 argument by intervenors that something as broad as
9 any provision meant to protect public health and the
10 environment would be reasonably foreseeable.

11 I think -- although it wasn't the subject
12 of anyone's argument, I think there's another
13 challenge here for intervenors which is, there are
14 other sections in the commission's rule, this very
15 same rule, that relate to release notification, that
16 relate to source characterization.

17 And the fact that the commission would try
18 to -- or allow a party to, if you will, add source
19 characterization and release notification to a
20 section, a different section altogether, I think
21 again, is not consistent with what might be
22 reasonably foreseeable.

23 Having said that, there's absolutely no
24 prejudice here from -- prohibiting intervenors from
25 bringing their own petition to, in fact, adopt these

1 changes, with a process of its own.

2 I was also put in mind of the one example
3 I have in which proposed changes are by parties
4 other than a -- the initial rule proposer are, if
5 you will, incorporated into public notice which
6 comes much later in the process, and whereby all
7 kinds of changes can then be considered.

8 And that's the triennial review. If any
9 of you -- I know Mr. Ames has joined me in that
10 proceeding more than once.

11 That rule making process exceeds a year in
12 length. The surface water bureau proposes changes,
13 and then invites anyone else who's interested in
14 surface water to make their own proposed changes,
15 and then all of it is publicly noticed. Regardless
16 of whether the initiating petitioner agrees with it
17 or not, we hear all of it.

18 But that is a very different -- a very
19 different process and not the commission's process.

20 So I think if we're going to proceed with
21 a reasonable notice standard for commission rule
22 making procedures and a reasonable notice procedure
23 that allows us to -- allows anyone to discern the
24 scope of what the commission will be hearing, that
25 the additional proposals from the intervenors cannot

1 be considered as part of this rule making.

2 Now having said that, we have a few other
3 things to consider.

4 As to the timing and length, let me just
5 say -- and I'll go to Mr. Meiklejohn here, first.

6 As to the timing and length, so long as it
7 is relevant to the original petition, I don't
8 have -- I don't find someone's lengthy presentation
9 to be inherently objectionable.

10 I know that point was made by some of the
11 movants. But it doesn't trouble me, so long as it's
12 relevant to the petition at hand.

13 Mr. Meiklejohn, can we go to Mr. Zupan?

14 And in particular, I had invited Mr. Ames
15 to address Mr. Zupan's -- his objection, thinking
16 maybe he would withdraw it, based on the
17 understanding that verbatim testimony was not
18 required.

19 But he made the point that what was
20 offered in the intervenors' outline was not really a
21 summary; it was one sentence.

22 I'm wondering if you can say more about
23 Mr. Zupan's testimony.

24 MR. MEIKLEJOHN: Thank you, Madam Hearing
25 Officer.

1 The summary we provided of Mr. Zupan's
2 testimony certainly is not one sentence. It's a
3 little over a page long. We pointed out that he
4 will describe his background, to include extensive
5 experience with cleanup and remediation of oilfield
6 waste.

7 He has been a consultant to industry.

8 He's been a member of the Texas risk
9 reduction program technical guidance committee.

10 He's a registered engineer in several
11 states, or has been, and is currently a registered
12 engineer in New Mexico and Colorado.

13 He also will explain what Amigos Bravos'
14 mission is, and how the management of the oil and
15 gas industry, and in particular releases of oil and
16 gas and oil and gas waste, poses a serious threat to
17 New Mexico waters.

18 He will explain why Amigos Bravos supports
19 the petition that was filed by WildEarth Guardians
20 and the division.

21 And it would -- he will point out it would
22 be a major step towards the effective regulation of
23 the industry and the protection of New Mexico's
24 water resources from impacts of that industry.

25 We also said that he would support -- his

1 testimony would support the three amendments to the
2 commission rule that were proposed by the
3 intervenors. That, obviously, is irrelevant at this
4 point, and he will not be testifying as to those
5 matters.

6 That will shorten his testimony
7 considerably. I would expect that, just off the top
8 of my head, that his testimony at this point
9 probably would be somewhere around half an hour or
10 so, because a lot of it was to be taken up with the
11 reasons for supporting those three amendments
12 proposed by the intervenors.

13 And as I said, that's not relevant at this
14 point.

15 MADAM HEARING OFFICER ORTH: Thank you for
16 that.

17 As to the other counsel, I don't know that
18 we need to go round robin.

19 I will ask you to speak up if you have
20 anything to add. But my plan at this point would be
21 to invite Mr. Zupan to give whatever testimony he
22 would like to in support of the petition.

23 And in the event you find, or hear
24 something you find particularly surprising, for you
25 to make an objection at that time and we can address

1 it.

2 MR. AMES: Madam Hearing Officer, Eric
3 Ames here.

4 OCD appreciates that resolution to the
5 issue. We welcome the support of Sierra Club and
6 its witnesses for OCD's petition.

7 And testimony in that light, I think it's
8 incumbent on me to point out that even though we
9 appreciate Sierra Club's support and testimony in
10 support of our petition, Mr. Zupan -- it's our view
11 that the presentation of Mr. Zupan's anticipated
12 testimony still falls short of what the rule
13 requires.

14 But given that his intent is to support
15 the rule, and that -- in the belief that he will
16 limit his comments to that point, we will not have
17 any objection.

18 MADAM HEARING OFFICER ORTH: All right.
19 Thank you.

20 Does anyone else need to speak to this
21 point?

22 MR. CLOUTIER: Madam Hearing Officer,
23 Andrew Cloutier, very briefly.

24 I just want to point out that our concern
25 about Mr. Zupan is solely as a technical witness,

1 because there was no basis or -- there's no
2 description of technical testimony. His support as
3 a nontechnical witness IPNM has no objection to.

4 MADAM HEARING OFFICER ORTH: All right.
5 Thank you.

6 Anyone else?

7 MR. RANKIN: Madam Chair, I just want to
8 second Mr. Cloutier's statement.

9 If you look at the language provided in
10 the summary of testimony, excluded support for
11 proposed amendments that they offer, there really is
12 no description of any technical -- summary of any
13 technical testimony whatsoever.

14 So not knowing what he would say or what
15 technical support he would provide, you know, I just
16 want to point out that that is in conflict with what
17 the procedural order provides, requires.

18 And intervenors understood very well what
19 the procedural order required, because they provided
20 a fully in-depth summary of their other technical
21 witness, Mr. Gaune, in their subsequent exhibits.
22 So they clearly understood the intent and the
23 purpose of the procedural order requiring them to
24 provide a summary of the technical testimony.

25 And in that summary, it's a very -- it's a

1 rather detailed analysis of his -- Mr. Gaune's
2 testimony, along with charts and data supporting it.

3 So there's a disconnect, to some extent,
4 between what they've offered here for Mr. Zupan and
5 what they've offered for Mr. Gaune. And I just want
6 to articulate that that's a concern under the
7 procedural order.

8 MADAM HEARING OFFICER ORTH: All right.
9 Thank you.

10 Anyone else on that point?

11 Again, I would propose to hear from
12 Mr. Zupan. And in the event we hear,
13 notwithstanding, perhaps, not full compliance with
14 the procedural order, or even the rule, at this
15 point what I'd like to do is invite Mr. Zupan to
16 speak.

17 And again, if there's something in
18 particular you object to, speak up at that time.

19 Let's move, then, to Mr. Gaune and the
20 hyperlinks.

21 Mr. Meiklejohn, would you like to speak to
22 how we're going to proceed there?

23 MR. MEIKLEJOHN: Thank you, Madam Hearing
24 Officer.

25 Two points. One is that we did type the

1 hyperlink address into a browser. And although it
2 took about five minutes to type the longest
3 hyperlink into a browser, it did work. So we
4 believe that the parties have had access to the
5 information that is provided in that hyperlink.

6 In addition, yesterday, I sent to the
7 other parties a working hyperlink that does not have
8 to be typed into a browser. I am fortunate to have
9 had the assistance of our very valuable paralegal,
10 who has much more computer expertise and knowledge
11 than I do, so she was able to make that working
12 link.

13 And we would be glad to do the same thing,
14 if people are having trouble with their hyperlinks,
15 as well.

16 MADAM HEARING OFFICER ORTH: All right.
17 Thank you.

18 Mr. Ames, do you have any particular
19 proposals in connection with the hyperlinks?

20 MR. AMES: Thank you, Madam Hearing
21 Examiner.

22 So as long as Mr. Gaune's testimony is
23 limited to supporting OCD's proposal, we would not
24 object to Mr. Gaune testifying.

25 It's a little confusing, though, as to

1 what he's actually going to say and what his
2 exhibits support -- are intended to support.

3 Mr. Meiklejohn said that Mr. Gaune --
4 Mr. Gaune's testimony and exhibits were in support
5 of both OCD's proposal and Sierra Club's proposed
6 mods, so it's kind of intermixed.

7 Mr. Gaune's testimony is about 11 pages
8 long. It's based on this Excel workbook that's
9 about 3.9 megs.

10 We didn't get that workbook until
11 four days after it was due under the rules.

12 And just yesterday, as Mr. Meiklejohn
13 acknowledged, Sierra Club sent it again, this time
14 with working hyperlinks, which Mr. Meiklejohn says
15 now actually it did work, even though he told -- he
16 acknowledged that they hadn't.

17 So here we are, and from our perspective,
18 we're one week out from this hearing, and we're just
19 getting Mr. Gaune's actual testimony and exhibits.

20 And procedurally, this just isn't the
21 right way to do it. A party shouldn't be dribbling
22 out its evidence days before a hearing.

23 To the extent that Mr. Gaune's testimony
24 goes to Sierra Club's proposed mods, that's not an
25 issue anymore.

1 But to the extent he's going to testify,
2 ostensibly on behalf of OCD's -- or in support of
3 OCD's petition, based on this testimony, we still
4 don't know what it is just days before the hearing.

5 And I think that the commission ought to
6 seriously consider, a necessity to protect the
7 integrity of its rules from this kind of practice,
8 by excluding this testimony in whole.

9 MADAM HEARING OFFICER ORTH: Thank you.

10 Mr. Timmons?

11 MR. TIMMONS: I think Guardians is going
12 to sit this one out, if that's okay with the Hearing
13 Officer.

14 MADAM HEARING OFFICER ORTH: That's fine.
15 Thank you.

16 Mr. Cloutier?

17 MR. CLOUTIER: Thank you, Madam Hearing
18 Officer.

19 I join in Mr. Ames' comments. I think, at
20 this point with the proceedings restricted, there
21 may not be a whole lot of damage that can be done.
22 But I think it's a very poor precedent for technical
23 witnesses to be dribbling out their exhibits days --
24 you know, almost -- with half of the scheduling
25 period over -- the deadline was the 26th of May, and

1 we got it yes- -- we got the stuff yesterday.

2 MADAM HEARING OFFICER ORTH: All right.

3 Thank you.

4 And, Mr. Rankin, anything to add?

5 MR. RANKIN: Nothing separate and apart
6 from what Mr. Ames and Mr. Cloutier have discussed.

7 I just haven't had a chance to review the
8 materials, and I don't know in what way it would
9 support his testimony. And I just haven't had a
10 chance to analyze it.

11 So my concern is exactly in how it would
12 be used and in what manner and, of course, the
13 precedent for such late submissions.

14 I think it's a concern that it would be
15 permitted at this stage.

16 MADAM HEARING OFFICER ORTH: All right.
17 Thank you, Mr. Rankin.

18 Mr. Meiklejohn, I trust completely that I
19 can count on you to have a conversation with
20 Mr. Gaune about the difference -- or to draw a line
21 there between supporting the original petition and
22 supporting the three additional proposals.

23 I'm wondering, though, if you have
24 anything to add to the question of what role the
25 workbook would play in that support and whether it's

1 necessary or whether Mr. Gaune can perhaps make his
2 statements without going into the details of the
3 workbook.

4 Do you have anything to add?

5 MR. MEIKLEJOHN: Thank you, Madam Hearing
6 Officer.

7 Certainly Mr. Gaune can testify and limit
8 his testimony to supporting the proposal by the
9 division and by WildEarth Guardians.

10 My view, without having discussed this
11 with him, is that he can provide compelling
12 testimony in favor of that proposal with or without
13 the workbook. I think the testimony would be more
14 compelling with the workbook, but I believe that he
15 can provide, as I said, compelling testimony in
16 favor of that proposed amendment, even without the
17 workbook.

18 And you can count on me to have a
19 conversation with him. I believe that he may be
20 watching this proceeding himself. So if he is,
21 clearly he already understands that he needs to
22 limit his testimony and his evidence to the proposal
23 advanced by WildEarth Guardians and the division.

24 But we are planning to have a meeting with
25 all of our witnesses on Monday of next week, so we

1 will talk with all of our witnesses about that
2 distinction.

3 MADAM HEARING OFFICER ORTH: All right.
4 Thank you.

5 Commissioners, do you have questions about
6 this?

7 Let me just offer that I -- it is
8 troubling that the rule and the procedural order
9 weren't fully complied with.

10 Having said that, I'm loathe to exclude
11 Mr. Gaune entirely as a result of that compliance,
12 and more inclined to invite his testimony without
13 delving into the details of a workbook that the
14 other parties didn't have a sufficient time to
15 study.

16 COMMISSIONER WARNELL: This is
17 Mr. Warnell.

18 I'm certainly not in favor of seeing him
19 testify to an Excel spreadsheet, a rather large
20 Excel spreadsheet that apparently few of us have had
21 any opportunity to look at.

22 I'm kind of wondering why we need more
23 supportive testimony, but I have no other questions.

24 MADAM HEARING OFFICER ORTH: Thank you.

25 Commissioner Bloom, anything?

1 COMMISSIONER BLOOM: Sure. Thank you,
2 Hearing Officer, Madam Chair.

3 A couple of questions for Mr. Ames.

4 Mr. Ames, I'm sorry, I might not have
5 fully understood you.

6 Did you propose excluding Mr. Gaune
7 entirely from the proceedings?

8 MR. AMES: No, sir. Only proposing to
9 limit his testimony to support for the OCD's
10 petition, and to the extent that he can do so
11 without referencing -- without making statements
12 that are based on the Excel spreadsheet.

13 COMMISSIONER BLOOM: All right. Thank
14 you.

15 Those are all my questions. Thank you.

16 MADAM HEARING OFFICER ORTH: Madam Chair?

17 CHAIRWOMAN SANDOVAL: I -- I don't have
18 any questions. I mean I think, you know, I do have
19 concerns about procedure. I mean, there is
20 procedure in place for a reason. So I feel like
21 that's a really important component.

22 But if the testimony is limited to the
23 proposal and excluding the spreadsheet that, you
24 know, there hasn't been adequate time to review,
25 then I'm comfortable with Mr. Gaune testifying.

1 MADAM HEARING OFFICER ORTH: All right.

2 Thank you.

3 So let's plan, then, to invite Mr. Gaune's
4 testimony and to -- I know that Mr. Meiklejohn
5 already understands the difference between the
6 original petition and the additional proposals.

7 And then if you would instruct Mr. Gaune,
8 please, Mr. Meiklejohn, to avoid speaking to the --
9 to the workbook.

10 MR. MEIKLEJOHN: I will do that,
11 Madam Hearing Officer.

12 MADAM HEARING OFFICER ORTH: All right.
13 Thank you.

14 I believe, then, we have, then, just
15 Ms. Shoup's testimony, unless there's something I'm
16 missing.

17 And in that case, Mr. Meiklejohn, I will
18 invite -- I will invite a few comments from you.
19 However, this is a much more common issue that we
20 deal with in these hearings, which is a nontechnical
21 witness wanting to draw connections that would
22 require technical expertise or background.

23 In your response, you addressed one
24 statement which went to her motivation, if you will,
25 for getting involved. Mainly, the connection she

1 had drawn in her mind between produced water
2 releases and cancer.

3 And I -- I understand your point, it goes
4 to her motivation.

5 That wasn't the only place in her
6 testimony, of course, where she is asserting that
7 connection. So I'm going to -- I will ask you to
8 say a few words.

9 However, I see a lot more of this than the
10 other things we've been talking about this morning.
11 And the instruction is always the same. We simply
12 have to ask nontechnical witnesses not to offer
13 technical testimony. And to the extent they manage
14 to squeeze it in regardless, the commission will
15 have to disregard it.

16 So my request of you would be to talk with
17 Ms. Shoup about not making a connection she would
18 have to be an oncologist or epidemiologist in order
19 to make, going through her testimony with an eye to
20 that. But if you would like to offer something now,
21 please go ahead.

22 MR. MEIKLEJOHN: Thank you, Madam Hearing
23 Officer.

24 I would point out two things.

25 One is that that is -- that was not her

1 intent when she made that statement. It was, as you
2 point out, her motivation for getting involved with
3 these issues.

4 The other point is that the motion that
5 was filed by the Independent Petroleum Association
6 neither alleged nor demonstrated that her testimony
7 would in any way prejudice that association.

8 And under the Supreme Court's ruling in
9 Martin v. Village of Hot Springs, it's showing that
10 prejudice is necessary to exclude a witness from
11 providing testimony.

12 And so unless there is some demonstration
13 during or at the end of the hearing that her
14 testimony has, in fact, prejudiced the association,
15 our view is that she ought to be able to testify.

16 We understand that if she does testify on
17 a matter that would require technical expertise,
18 that the commission will disregard that because she
19 is not a technical expert, and she's not offered as
20 a technical expert.

21 MADAM HEARING OFFICER ORTH: All right.
22 So I should offer here, Mr. Meiklejohn, I don't -- I
23 don't actually agree. I think the case you cited is
24 inept, the prejudice to IPANM is not necessary.

25 And I know it's not a reported case, but I

1 think the opinion in Louisiana Energy Services
2 versus the Water Quality Control Commission includes
3 a much more apt discussion of the role the hearing
4 officer is supposed to play in a proceeding, in an
5 administrative proceeding, to try to ensure the
6 testimony that comes in, in fact, is based on
7 experience and education.

8 Is there anything else that anyone would
9 like to add there?

10 MR. CLOUTIER: Madam Hearing Officer, it
11 sounds like you understand my motion. And it's very
12 limited, not seeking to exclude Ms. Shoup in her
13 entirety. Just -- just concerns about some of the
14 statements and the description and her
15 qualifications.

16 And so I have nothing further to add.

17 MADAM HEARING OFFICER ORTH: All right.
18 Thank you, Mr. Cloutier.

19 Is there anything else that we need to
20 talk about while we are together, presumably the
21 last time before the hearing next Wednesday?

22 MR. RANKIN: Madam Hearing Officer, this
23 is Adam Rankin, on behalf of NMOGA.

24 I think it's implied by the rulings to
25 exclude the proposed modifications by intervenors.

1 But I just want to make clear for the
2 record that we also raised the issue of the
3 exclusion of nontechnical testimony that relates --
4 relates to the intervenors' proposed modifications.

5 I just want to be clear that the -- as a
6 consequence of the decision to exclude those
7 modifications, that their nontechnical testimony
8 relating to those issues would also be excluded.

9 MADAM HEARING OFFICER ORTH: All right.
10 Thank you for that requested clarification.

11 I will write up an order, and I will make
12 that clear, that this relates both to technical and
13 nontechnical testimony.

14 And I think -- again, I'm not concerned.
15 I think Mr. Meiklejohn understands.

16 MR. MEIKLEJOHN: Madam Hearing Officer,
17 this is Douglas Meiklejohn.

18 We do understand that point, and we
19 certainly do not object to that point being made in
20 the order that you write up.

21 There is one other point that I would like
22 to raise, and that is that both in their written
23 submissions and orally today, the division and the
24 two associations have complained about the length of
25 our submission and the timing of our submission.

1 However, they have not cited anything in
2 either the procedural order or the commission rules
3 to indicate that it was inappropriate for us to
4 submit a long notice of intent or that we submitted
5 it at an inappropriate time.

6 And so use of the words like "ambush"
7 seems to us to be completely out of line. We
8 complied with the required procedures, and there's
9 been no demonstration that we did not do that.

10 MADAM HEARING OFFICER ORTH: All right.
11 Thank you, Mr. Meiklejohn.

12 Again, I am not troubled by the length of
13 your witnesses' testimony, so long as you stay
14 within the scope we've been talking about this
15 morning.

16 MR. MEIKLEJOHN: Thank you, Madam Hearing
17 Officer. We intend to do that.

18 MADAM HEARING OFFICER ORTH: Thank you.

19 Is there anything else we can talk about
20 while we're together before next Wednesday?

21 CHAIRWOMAN SANDOVAL: Madam Hearing
22 Officer, I just want to say -- offer all of the
23 parties who are panelists right now, you should have
24 received e-mails from -- I don't know if they come
25 from me or if they come from Webex on, maybe,

1 Wednesday this week for the hearings next week.

2 So please use those links as you can.

3 There's a link in there for a panelist, which puts
4 you in this little bucket. It will help smooth the
5 process out for next time. So those should have
6 come this week. They populate automatically on my
7 calendar. They may populate on yours too, I'm not
8 sure. But they should have come to your in box on
9 Wednesday.

10 MR. MEIKLEJOHN: Madam Chair, do you know
11 whether those links were sent to the people who will
12 be appearing as witnesses?

13 CHAIRWOMAN SANDOVAL: No, they were not.
14 The plan is to kind of, in a similar fashion as we
15 did the waste rule. As the witness has sort of
16 their turn, the host will unmute them.

17 MR. MEIKLEJOHN: Thank you.

18 MADAM HEARING OFFICER ORTH: And, Madam
19 Chair, I think we found it helpful, as part of the
20 methane rule in January, to get folks into the --
21 onto the platform about 15 minutes early, just to
22 check their audio and, for that matter, their video.

23 I trust the technical hosts for next week
24 will, in fact, be on the platform at least
25 15 minutes early.

1 CHAIRWOMAN SANDOVAL: Yeah. The plan is
2 to promptly start at, you know, 8:45, to make sure
3 everybody has got time to get on. And also, just a
4 reminder for anybody on the line who either knows of
5 people who wish to make a public statement or wish
6 to make a public statement, there is a signup for
7 that through the commission clerk, Florene Davidson.
8 Her information is in the procedural order. There
9 was also a press release that was sent out with that
10 information.

11 As a reminder, if you sign up ahead of
12 time, you get three minutes to speak. If you show
13 up at the hearing, it is two minutes to speak, as
14 was dictated in the procedural order.

15 So I would encourage people to sign up
16 with the commission clerk ahead of time.

17 MADAM HEARING OFFICER ORTH: Thank you for
18 that reminder.

19 Anything else before we adjourn this
20 morning?

21 No? Thank you all very much.

22 (Proceedings concluded at 10:45 a.m.)

23

24

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CERTIFICATE

I, Paul Baca, RPR, CCR in and for the
State of New Mexico, do hereby certify that the
above and foregoing contains a true and correct
record, produced to the best of my ability via
machine shorthand and computer-aided transcription,
of the proceedings had in this matter.

/s/ Paul Baca

PAUL BACA, RPR, CCR
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