

**STATE OF NEW MEXICO  
NEW MEXICO OIL CONSERVATION COMMISSION**

**IN THE MATTER OF APPLICATION OF  
OIL CONSERVATION DIVISION TO  
ADOPT 19.15.41 NMAC, 19.15.42 NMAC,  
AND 19.15.43 NMAC; STATEWIDE**

**CASE NO. 25875**

**APPLICANT'S RESPONSE TO THE WESTERN ENVIRONMENTAL  
LAW CENTER, ET AL, MOTION TO DISMISS**

**Preliminary Statement**

The Energy, Minerals, and Natural Resources Department, Oil Conservation Division (“OCD” or “Division”) hereby submits this Response to the Motion to Dismiss Application to Adopt 19.15.41 NMAC, 19.15.42 NMAC, and 19.15.43 NMAC for Lack of Authority and Request for Stay (“Motion”) filed by the Center for Biological Diversity, Diné C.A.R.E., Earthworks, San Juan Citizens Alliance, Sierra Club Rio Grande Chapter, Tó Nizhóní Ání, Western Environmental Law Center, and WildEarth Guardians (collectively, “Movants”).

**I. INTRODUCTION**

1. The Motion is improper and premature because it fails to establish, as a matter of law, that the Proposed Rules, if adopted, would constitute an arbitrary and capricious agency action.<sup>1</sup> Applicant should be given the opportunity to explain the legal and factual basis for the proposed rule at a hearing for consideration by the Commission, and a dismissal at this stage would prevent consideration of factual and technical testimony and public participation. Thus, Movant’s Motion to Dismiss is improper and, if granted, would prevent public input on the proposed rules and the

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<sup>1</sup> Movants argue that “[a]ny Class VI rule promulgated by this Commission that goes beyond establishing a fee schedule for the Stewardship Fund exceeds the Commission’s statutory authority and will necessarily be arbitrary, an abuse of discretion, and not otherwise in accordance with the law.” Mot. Dismiss at 2.

Oil Conservation Commission's ("OCC" or "Commission") ability to consider all relevant evidence at the rulemaking hearing in this matter.

2. Additionally, both OCD and OCC have been authorized by the New Mexico Legislature to promulgate the proposed rules for underground injection of carbon dioxide for geologic sequestration, consistent with the Class VI Underground Injection Control ("UIC") program and rules under the federal Safe Drinking Water Act.

3. First, the Geologic Carbon Dioxide Storage Stewardship Act, NMSA 1978, Sections 74-14-1 through 74-14-7 ("Stewardship Act") expressly gives OCD the authority to issue rules and to adopt rules to implement its provisions and also grants OCD the jurisdiction and authority necessary to enforce its provisions. Several provisions of the Act expressly reference the Class VI injection well program and several of its provisions match specific elements of that program. Moreover, the definitions in the Stewardship Act expressly identify the federal UIC Class VI program and cover the same "sequestration facilities," including injection wells, that would be covered by the Class VI program.

4. Second, the proposed rules are authorized under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38 ("Act"). To carry out its duties, the Legislature empowered OCC and OCD<sup>2</sup> "to make and enforce rules, regulations, and orders, and to do whatever may be reasonably necessary to carry out the purpose of [the Act], whether or not indicated or specified in any section [of the Act]." NMSA 1978 Section 70-2-11(A). Moreover, the primary purpose of a UIC program to protect underground sources of drinking water fit with the regulation of oil and gas wells to protect fresh water, and it also may be appropriate to regulate Class VI injection wells to prevent waste, which directly relates to OCD's enumerated powers under the Act. NMSA 1978

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<sup>2</sup> OCC exercises concurrent jurisdiction and authority with OCD. NMSA 1978 Section 70-2-6(B).

Sections 70-2-12(B)(21), (22). These issues should be examined in more detail during the public hearing on the proposed rules.

5. As such, the Motion is based on an unduly narrow reading of the Act, a mischaracterization of the Stewardship Act, and a misunderstanding of the Safe Drinking Water Act's cooperative federalism framework, as discussed in more detail below. Because OCD plainly has statutory authority to propose the rules at issue, and because Movants cannot meet the legal standard for dismissal or a stay, the Motion should be denied in its entirety.

## II. ARGUMENT AND AUTHORITIES

### A. The Legislature has Granted OCC and OCD with Sufficient Authority to Propose, Adopt, and Promulgate the Proposed Rules.

6. It is well established that the Legislature can properly delegate rulemaking power to administrative agencies through an enabling statute. NMSA 1978 Section 70-2-11; *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (per curiam).

7. *Unite N.M. v. Oliver* does not stand for the proposition Movant asserts; it merely reiterates the uncontroversial principle that an agency may not create wholly new substantive policy in the absence of legislative direction, which is precisely why the New Mexico Supreme Court invalidated the Secretary of State's attempt to reinstate straight-ticket voting without any implementing statute. 2019-NMSC-009, ¶ 8; Mot. Dismiss at ¶ 18. By contrast, this is not a case where an agency is setting out on its own to adopt rules not referenced in legislation; rather, this case involves OCD's promulgation of regulations expressly contemplated and authorized by an enacted statute, the Stewardship Act, making *Unite N.M.* inapplicable both legally and factually.

8. Moreover, an agency's rulemaking authority is not limited to powers enumerated with technical precision. Rather, rules are valid if they are "in harmony with the agency's express

statutory authority or spring from those powers that may be fairly implied therefrom.” *N.M. Mining Ass’n v. N.M. Mining Comm’n*, 1996-NMCA-098, ¶ 15, 122 N.M. 93.

**B. The Stewardship Act Expressly Contemplates and Authorizes Regulation of Class VI Carbon Dioxide Injection Wells.**

9. As Movant acknowledges, the Stewardship Act, on its face, “gives both the Commission and the Division authority over distinct and discrete components of the Class VI UIC program.” Mot. Dismiss at ¶ 38. However, when considered together with the numerous references to Class VI injection wells and the potential for liability resulting therefrom, it is clear the Legislature intended to grant both OCD and, for the reasons explained below, OCC, with authority to propose, adopt and promulgate a class VI injection well permitting scheme, consistent with the federal UIC, in order to obtain primacy.

**i. The Act Regulates “Sequestration Facilities,” Which the Legislature Defined to Include Class VI Wells.**

10. Intervenors assert that “the Stewardship Act is limited to post closure stewardship and contains no authority to regulate injection operations or issue permits.” Mot. Dismiss at ¶¶ 6, 14-15, and 44-48. That assertion fails at the threshold because the Stewardship Act expressly defines the regulated subject matter as carbon dioxide injection infrastructure.

11. The Legislature expressly defined a “sequestration facility” to include “carbon dioxide injection wells, monitoring wells and devices . . . used for the purpose of geologic sequestration of carbon dioxide,” including facilities regulated under “federal environmental protection agency [EPA] class 6 underground injection control wells.” NMSA 1978 Section 74-14-2.F.

12. By expressly referencing EPA Class VI wells, the Legislature unambiguously legislated in that regulatory space. A statute that regulates facilities defined as Class VI wells cannot reasonably

be construed to deny the agency authority to regulate those wells. Moreover, some other elements of “sequestration facilities” may be regulated under a Class VI permit program.

**ii. Section 74-14-3.B of the Stewardship Act Confers Broad, Not Limited, Rulemaking Authority that Necessarily Includes Class VI Permitting and Operational Standards.**

13. The Stewardship Act contains a broad delegation of implementing authority. The Stewardship Act expressly gives OCD “the jurisdiction and authority necessary to enforce the provisions of the Geologic Carbon Dioxide Storage Stewardship Act” and provides that OCD “may adopt and promulgate rules and issue orders for the implementation of the provisions of that act.” NMSA 1978 Section 74-14-3.B.

14. Movant argues that the proposed rules “reach far past” the implementation of the Stewardship Act. Mot. Dismiss ¶ 43. However, that reading ignores settled New Mexico law, which holds that agency authority encompasses not only express powers, but also those which “spring from those [express] powers that may be fairly implied therefrom.” *N.M. Mining Ass’n v. N.M. Mining Comm’n*, 1996-NMCA-098, ¶ 15, 122 N.M. 93.

15. In other words, the language of Section 74-14-3.B. is intentionally expansive and authorizes all powers fairly implied and necessary to effectuate the purposes of the Stewardship Act. *Tri-State Generation & Transmission Ass’n, Inc. v. D’Antonio*, 2012-NMSC-039, ¶ 26, 289 P.3d 1232, 1239 (recognizing that broadly worded statutory authority delegated broad regulatory authority necessary to administer the statutory scheme).

16. Rules establishing permitting criteria, such as who may inject, under what conditions, with what safeguards, and subject to what oversight, in addition to well construction standards, monitoring and reporting obligations, corrective action requirements, and financial assurance mechanisms, are not ancillary to the statute; rather, they are indispensable to its implementation.

**iii. The Stewardship Act's Fee, Certification, and Liability Provisions Cannot Function Without Front-End Regulation of Injection Operations.**

17. Without front-end injection well standards and permitting requirements, OCD could not assess stewardship fees, evaluate closure eligibility, assume long-term liability, or ensure protection of groundwater and subsurface resources.

18. Movants contend that the Stewardship Act authorizes regulation only after injection has ceased. Mot. Dismiss at ¶ 48. That reading renders the statute internally inconsistent. The State cannot assume long-term liability for a facility unless the facility was designed, permitted, and operated under enforceable standards. Interpreting the Act to deny OCD any authority during injection would defeat the statute's purpose and is contrary to settled principles of statutory construction.

19. Accordingly, the rulemaking authority granted by the Stewardship Act is not confined to post-closure obligations. Rather, the Act establishes a comprehensive program, including fee assessment, closure certification, and long-term stewardship, that presupposes regulated injection during the operational life of a project.

20. As discussed above, several provisions of the Stewardship Act relate to the elements of a Class VI permit program, and its definitions expressly identify the federal UIC Class VI program and cover the same "sequestration facilities," including injection wells, that would be covered by the Class VI program. *See, e.g.*, NMSA 1978 Sections 74-14-2.A, F, 74-14-5.B(1), (2), (4), (7) and (8).

21. The Stewardship Act applies to "sequestration facilities that commence injection of carbon dioxide after the effective date that act," although it also provides that such facilities that

commence injection before the Act is effective can seek approval for continuing stewardship responsibilities to the State. NMSA 1978 Section 74-14-3.B.

22. A “sequestration facility” is defined to include carbon dioxide injection wells, monitoring wells and devices, certain assessment wells, and “other wells used for the injection of carbon dioxide in subsurface geologic formations, including the underground equipment, pipelines and surface equipment and buildings used for the purpose of geologic sequestration of carbon dioxide.” NMSA 1978 Section 74-14-2.F. “Sequestration facility” is further defined to include a facility that injects carbon dioxide pursuant to applicable federal laws. *Id.* § 74-14-2.F.

23. The specific provisions of the Act address elements that could be part of a permit program, including granting “certificates of closure” issued by the Division or other state agencies (*Id.* § 74-14-4), creating a long-term storage stewardship fund to be administered by the Division (*Id.* § 74-14-5), and providing for a certificate of completion of injection operations, which transfers long-term stewardship responsibilities for a sequestration facility and release of liability to an owner or operator, who presumably would be a permittee (*Id.* § 74-14-6).

24. Accordingly, the Stewardship Act regulates “geologic carbon dioxide storage facilities,” a term that necessarily encompasses Class VI injection wells, as those wells are the sole federally recognized mechanism for geologic carbon dioxide sequestration under the Safe Drinking Water Act (“SDWA”). NMSA 1978 Section 74-14-4.A.

### **C. The Oil and Gas Act Gives OCC and OCD Authority Over Class VI Wells.**

25. Applicants first argue the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, including Section 70-2-6 (authorizing Commission to exercise jurisdiction, authority, and control over all persons, matters, and things necessary or proper to enforce the statute), Section 70-2-11 (authorizing OCD to make and enforce rules, regulations and orders), and Section 70-2-12

(enumerating powers of Commission and Oil Conservation Division (OCD)). Section 70-2-6(A) NMSA 1978 grants the Commission jurisdiction over “all persons, matters or things necessary or proper to enforce effectively the provisions of this act, or any other law of this state relating to the conservation of oil or gas.”

26. Further, the Act empowers OCD and OCC to prevent waste and to protect correlative rights. NMSA 1978 Section 70-2-11. OCD is empowered to make and enforce rules to carry out this purpose, *whether or not indicated in any specific section of the Act. Id.* (emphasis added). The proposed rule implicates matters within the OCD’s traditional jurisdiction and technical expertise, including the prevention of waste and protection of oil and gas resources. Although the Act generally is limited to the regulation of the oil and gas industry, some sequestration facilities could be subject to the Act. The hearing process exists so that OCD and other witnesses may present evidence on these technical matters, including testimony regarding subsurface geology, well integrity, reservoir protection, and the prevention of waste.

27. The Legislature specifically empowered the Commission to regulate underground injection:

to regulate the disposition, handling, transport, storage, recycling or disposal of produced water...pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources.

28. § 70-2-12(B)(15) NMSA 1978 (emphasis added). Although this authority does not directly reference the Class VI program, it illustrates that the Commission and the Division are suitable agencies to receive permit authority. The agencies’ experience, suitability and capacity for the Class VI permit program should be examined during the hearing and will also be examined by EPA as part of an application for New Mexico primacy over the program.

29. Movants err by reading this provision as a limitation. To the contrary, the statute expressly incorporates the SDWA delegation framework, under which well classes, including Class VI, are defined by federal law. Nothing in the Act excludes Class VI wells from that delegated authority. Finally, as discussed *supra*, the proposed rule covers a subject matter within OCD's traditional jurisdiction and technical expertise, including the prevention of waste and protection of oil and gas resources. The hearing process will allow the OCD and other witnesses to present evidence on these matters, including why the OCD is best positioned to administer a Class VI program and protect recoverable oil and gas resources. Those issues should not be prematurely resolved through motion practice before the Commission has the benefit of a full evidentiary record.

#### **D. The Safe Drinking Water Act Confirms OCD's Authority and Legislative Intent**

30. The federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h–300h-8, establishes a cooperative federalism framework under which states may assume primary enforcement authority for underground injection control programs, including Class VI wells.

31. To obtain primacy, a state must adopt regulations at least as stringent as federal requirements and demonstrate adequate enforcement authority. The Legislature's enactment of the Stewardship Act, and its incorporation of SDWA-delegated authority in the Act, demonstrates clear intent that New Mexico position itself to regulate Class VI wells at the state level rather than leave exclusive authority with EPA.

32. The proposed rules at issue implement this legislatively authorized framework and provide additional public participation protections that are fully consistent with the cooperative federalism framework underlying the Class VI program.

#### **E. The Failure of Proposed Legislation Does Not Strip Existing Statutory Authority**

33. Movants rely heavily on the Legislature's failure to enact House Bill 457 (2025). New Mexico law squarely rejects reliance on failed legislation as evidence of legislative intent. *State v. Vest*, 2021-NMSC-020, ¶ 34 ("It is well settled that failed bills are a weak reed upon which to lean in divining legislative intent.").

34. The controlling expression of legislative intent is the law that was enacted, the Stewardship Act, not a bill that did not pass. Moreover, a close examination of the legislative history shows that several significant elements of House Bill 457 were incorporated as amendments to House Bill 458, which was enacted as the Stewardship Act.

#### **F. Dismissal Is Procedurally Improper In a Rulemaking Proceeding**

35. This matter is a rulemaking, not an adjudication of individual rights. The appropriate vehicle for resolving policy disagreements or factual disputes is the notice-and-comment process followed by judicial review, not dismissal at the outset. The Commission may, and should, permit the rulemaking to proceed to hearing and full public participation and provide OCD the opportunity to present technical evidence in support of the rule which relates to OCC's authority.

36. At the rulemaking stage, dismissal is appropriate only if the agency clearly and unambiguously lacks subject-matter jurisdiction. *See Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 47 (demonstrating that judicial intervention in pending administrative rulemaking is disfavored because it disrupts the rulemaking process, limits public participation, and prevents agencies from correcting issues during the proceeding). Any reasonable construction of the governing statutes that supports agency authority requires denial of the Motion. *Id.*

37. The Motion asks the Commission to take the extraordinary step of dismissing the Application without a hearing and without the opportunity for public participation and comment. The Motion is based on an unduly narrow reading of the Oil and Gas Act, a mischaracterization

of the Geologic Carbon Dioxide Storage Stewardship Act, and a misunderstanding of the Safe Drinking Water Act's cooperative federalism framework. Because OCD plainly has statutory authority to propose the rules at issue, and because Movants cannot meet the legal standard for dismissal or a stay, the Motion should be denied in its entirety.

#### **G. Movants Fail to Satisfy the Standard for a Stay**

38. A stay requires a showing of: (1) likelihood of success on the merits; (2) irreparable harm; and (3) that the balance of equities and public interest favor relief.

39. Movants meet none of these requirements. There is no likelihood of success for the reasons stated above; no irreparable harm because no permits are being issued; and the public interest strongly favors allowing New Mexico to develop a protective, state-run regulatory program rather than defaulting to federal oversight.

### **III. CONCLUSION**

The Motion to Dismiss rests on a legally erroneous and artificially narrow reading of New Mexico law. The Oil and Gas Act, the Geologic Carbon Dioxide Storage Stewardship Act, and the Safe Drinking Water Act, individually and collectively, provide ample authority for OCD to propose the rules at issue.

WHEREFORE, the Oil Conservation Division respectfully requests that the Commission:

1. Deny the Motion to Dismiss the Application;
2. Deny the Request for Stay; and
3. Allow the rulemaking to proceed to hearing and public comment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on May 18, 2026, I served this pleading by electronic mail only on:

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A handwritten signature in blue ink, appearing to read "Jesse K. Tremaine". The signature is fluid and cursive, with a long horizontal stroke at the end.

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Jesse K. Tremaine  
*Attorney for the New Mexico Oil Conservation Division*