

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

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

**CASE NO. 25875**

**REPLY IN SUPPORT OF 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**

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”) hereby submit this reply in support of their 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.

**INTRODUCTION**

The question before the Commission is whether it has the authority to promulgate the rules proposed by Applicant Oil Conservation Division (the “Division”). This question is properly before the Oil Conservation Commission (the “Commission”) because agency authority is a question of law that should be resolved as a threshold matter. *Concerned Citizens for Nuclear Safety v. N.M. Water Quality Control Comm'n*, 2026-NMCA-021, ¶ 22 (certiorari granted). The Division’s suggestion that the Commission undertake a full rulemaking to determine the bounds of its own authority risks wasting significant time and resources for the Commission and all parties involved. App’s Resp. ¶¶ 1, 35 – 37.

Resolution of this motion is straightforward because neither the Geologic Carbon Dioxide Storage Stewardship Act, NMSA 1978, §§ 74-14-1 – 74-14-7 (“Stewardship Act”), nor the New Mexico Oil and Gas Act, NMSA 1978, §§ 70-2-1 – 70-2-39 (“Oil and Gas Act”), grants the Commission authority to promulgate the proposed rules.

Under the Stewardship Act, the Commission’s authority is limited to establishing a fee schedule for the geologic carbon dioxide long-term storage stewardship fund (“Stewardship Fund”). NMSA 1978, § 74-14-5(A). And the purpose of the Oil and Gas Act is the conservation of oil and gas in the oil and gas industry – it does not grant authority for the broad regulation of Class VI carbon sequestration wells the Division now seeks.

Because the Division fails to identify any authority that would allow the Commission to promulgate this rule, this matter should be dismissed.

### **ARGUMENT**

**I. Dismissal is proper at this stage – the Commission need not undertake an entire rulemaking to determine whether it has the authority to undertake the rulemaking.**

The question of agency authority to undertake a rulemaking is a legal question that is properly before the Commission. The Division’s suggestion that the Commission must entertain every proposed rule the Division seeks to promulgate by holding a full rulemaking without critical examination of its authority to do so is untenable. *See* App’s Resp. ¶ 1. The question of authority is a threshold matter that the Commission must resolve before proceeding with any full rulemaking process. *Concerned Citizens for Nuclear Safety*, 2026-NMCA-021, ¶ 22 (“we conclude that, when an entity or person appropriately participating in a [Water Quality Act] administrative process challenges an agency’s subject matter jurisdiction, the agency must address and resolve the challenge on its merits. Put another way, the agency has a threshold duty to determine if it has the power to act in the manner in which it has been tasked.”). In *Concerned*

*Citizens for Nuclear Safety* state agencies, including the Water Quality Control Commission, continued with the administrative process and refused to substantively address motions to dismiss for a lack of statutory authority to issue a permit. *Id.* at ¶¶ 7 – 9. The court found the failure to resolve this serious issue of jurisdiction improper and that an agency cannot “delay, deflect, or defer” this question based on standing considerations but has a duty to address such questions as a threshold matter. *Id.* at ¶22.

In its Response, the Division has failed to identify a legal basis for this rule. And a rule that exceeds Commission authority will be overturned on appeal. NMSA 1978, § 70-2-12.2(C). Dismissal is proper and preferable at this stage in the rulemaking, before parties expend significant resources developing a rule that will not survive judicial review.

The Division erroneously argues that *New Energy Econ., Inc. v. Shoobridge*, requires the Commission to complete the entire rulemaking process before the question of Commission authority can be addressed. App’s Resp. ¶ 36. This is incorrect. In *Shoobridge*, the Environmental Improvement Board (“EIB”) found that it did have the authority to consider the proposed rule. Parties who disagreed with that finding attempted to stop the rulemaking by obtaining injunctive relief in the district court. The Court of Appeals overturned the injunction, finding that once the EIB determined it had the authority to consider the proposed rule, the rulemaking should proceed. The court in *Shoobridge* held that *judicial* intervention in a pending administrative rulemaking – *after* the agency had determined it had authority – is improper. 2010-NMSC-049, ¶ 1; 149 N.M. 42 (“We hold that a *court* may not intervene in administrative rule-making proceedings before the adoption of a rule or regulation for three reasons.” (emphasis added)). This holding does not apply here. Here, Movants ask the Commission to determine

whether it has the authority to proceed with this rulemaking. The Commission has a duty to make this determination now. *Concerned Citizens for Nuclear Safety*, 2026-NMCA-021, ¶ 22.

**II. The Commission must not ignore the unambiguous limits of authority found in the plain language of the Stewardship Act and Oil and Gas Act.**

As explained in Movants' Motion, neither the Stewardship Act nor the Oil and Gas Act is ambiguous. Accordingly, their plain language governs the scope of authority delegated to the Commission and Division. *E.g.*, *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9; 146 N.M. 24. The Division's arguments for broader implied authority are contrary to this plain language and must be denied. *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 34; 140 N.M. 77.

**A. The Stewardship Act only grants the Commission authority to establish a fee structure for the Stewardship Fund.**

The majority of the Division's response is dedicated to the provisions of the Stewardship Act, but the Stewardship Act only authorizes the Commission to establish a fee schedule for the Stewardship Fund. NMSA 1978, § 74-14-5(A).

The Stewardship Act does not grant the Commission concurrent authority with the Division. Thus, even if the Division's improperly broad vision of its own authority under that law were accepted, it would not resolve the issue of the Commission's lack of authority in the present rulemaking. The Legislature explicitly provided concurrent authority to the Agencies under the Oil and Gas Act. NMSA 1978, §§ 70-2-6(B); 70-2-11(B). If it had intended to do so under the Stewardship Act, it would have done so. The Division does not address this lack of concurrent authority nor explain how any of the authority granted to the Division under the Stewardship Act could reasonably be viewed as extending to the Commission.<sup>1</sup>

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<sup>1</sup> Applicant states that, "...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

The Commission need not—and indeed cannot—look further than the plain language of the statute in its search for authority and, upon doing so, will find that the authority it has been granted under the Stewardship Act is narrow, unambiguous, and insufficient for this rulemaking. NMSA 1978, § 74-14-5(A) (only identifying the Commission once to mandate that “[t]he oil conservation commission shall establish by rule a fee schedule sufficient to meet the projected needs of the [geologic carbon dioxide long-term storage stewardship] fund.”)

**B. The Stewardship Act does not support the Division’s arguments for sweeping implied authority.**

To be clear, because the Commission lacks the authority to promulgate this rule under the Stewardship Act and does not have concurrent authority with the Division under that Act, no authority granted to the Division by the statute can be relied upon by the Commission. However, it is important to briefly address the Division’s overreach in its broad assertions of implied authority under the Stewardship Act.

The Stewardship Act sets forth a regulatory scheme for the Division to assume oversight of certain aspects of Class VI well regulation *after carbon dioxide injection ceases*. The Division concedes that the express authority granted by the Stewardship Act is limited to administering the Stewardship Fund, issuing certificates of closure and completion, and regulating post-closure activities for Class VI projects, along with promulgating rules to effect these purposes. App’s Resp. ¶ 23; NMSA 1978, §§ 74-14-3 – 74-14-6.

To this express authority, the Division seeks to add expansive *implied authority* that is not supported by the plain language of the statute. The Division claims that “the [Stewardship] Act establishes a comprehensive program, including fee assessment, closure certification, and

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permitting scheme...” However, Applicant does not ever supply reasons supporting this conclusion nor why any authority given to the Division should implicitly extend to the Commission in the context of the Stewardship Act.

long-term stewardship, that presupposes regulated injection during the operational life of a project.” App’s Resp. ¶ 19. The statutory language simply does not support this interpretation, and the Division does not provide any justification for why these three provisions centered on post-injection regulation should instead be viewed as comprehensive grants of authority during the entire operational life of a project.

Because the Stewardship Act is unambiguous, its plain language controls and the Commission need not—and cannot—read into the statute language that is not present. *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 9 (“When statutory language is clear and unambiguous, [this Court] must give effect to that language and refrain from further statutory interpretation.”); *Cobb*, 2006-NMSC-034, ¶ 34 (“we will not read into a statute...language which is not there, particularly if it makes sense as written.”). Yet, this is what the Division now asks the Commission to do.

The Division argues, wrongly, that because the Legislature has granted the Division authority over *some* regulatory aspects of the Class VI program—those concerning post-injection operations—it must have intended to grant the Division authority over all other regulatory aspects of the program as well. *E.g.*, App’s Resp. ¶ 9. (“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... authority to propose, adopt and promulgate a class VI injection well permitting scheme”). The rules of statutory construction explicitly prohibit making this leap where, as here, the statute is unambiguous. *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 9.

The plain language of the Stewardship Act is clear and does not provide the Division or the Commission with the expansive regulatory authority that would be necessary to promulgate the proposed rules.

**C. The Oil and Gas Act does not grant express or implied authority over Class VI wells to the Commission or the Division.**

The Division also argues that the Oil and Gas Act provides the Commission with authority. However, the fundamental purpose of the Oil and Gas Act is to prevent waste and protect correlative rights in oil and gas operations. NMSA 1978, §§ 70-2-6; 70-2-1. It does not expressly or impliedly provide the requisite authority to regulate the legally distinct Class VI well program that has as its purpose the permanent storage of carbon dioxide.

The Division attempts to substitute the express authority granted under the Oil and Gas Act—limited to fulfilling the purposes of the act—with broad implied authority that reaches far enough to allow the regulatory action the Division proposes. Though the Division concedes that “the [Oil and Gas] Act generally is limited to the regulation of the oil and gas industry” it suggests that “*some* sequestration facilities *could* be subject to the Act” based upon their implication of matters within the Division’s traditional jurisdiction. App’s Resp. ¶ 28 (emphasis added). And from this, the Division argues that *all* sequestration facilities at all stages fall within its jurisdiction, as well as the Commission’s. The Division fails to offer any legal foundation for this argument.

The plain language of the Oil and Gas Act does not support this proposition. The law and courts’ interpretation of it have been clear that the fundamental purposes of the Oil and Gas Act are preventing waste and protecting correlative rights in the context of the oil and gas industry. NMSA 1978, § 70-2-6 (“The division shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas”); *Cont’l Oil Co. v. Oil Conservation*

*Comm'n*, 1962-NMSC-062, ¶¶ 11, 26. The Division admits that Class VI wells are not part of the oil and gas industry, and even if “some” wells “could” affect oil and gas operations, the Division fails to explain how that could grant the Commission rulemaking authority over *all* Class VI wells.

The question is not, as the Division suggests, whether the Commission and Division “are suitable agencies to receive permit authority” over Class VI projects. App’s Resp. ¶ 28. The question is whether the Commission has legal authority to promulgate the proposed rules. It does not.

**III. The Division is a New Mexico agency that must receive its authority from New Mexico law and neither the Safe Drinking Water Act nor “cooperative federalism” can provide the authority the Division currently lacks.**

The Division further relies on the Federal Safe Drinking Water Act and federal frameworks to support its assertion of authority to undertake this rulemaking. App’s Resp. at 9. This is simply wrong.

Whether the Commission has the authority to promulgate the proposed rules is a question of state law. No federal law or federal agency can grant or “confirm” the Division’s authority or the intent of the New Mexico Legislature in passing a state statute. App’s Resp. at 9 (“The Safe Drinking Water Act Confirms OCD’s Authority and Legislative Intent”). The “cooperative federalism framework” of the federal Safe Drinking Water Act, 42 U.S.C. §§ 300h–300h-8 (“SDWA”), cannot confer upon the Agencies authority that they do not otherwise hold under state law. Federal regulations provide guidelines and minimum requirements to pursue primacy, *see* 40 C.F.R. § 145, but cannot give state agencies *state authority* to administer any part of this program. SDWA regulations explicitly state that “[a]ll State programs under this part [concerning state primacy over UIC programs] must have legal authority to implement” all the detailed provisions it outlines before primacy can be granted. 40 C.F.R. § 145.11.

The only source that could grant the authority the Commission and Division currently lack concerning this rulemaking is the New Mexico Legislature.

**IV. If the Commission does not rule on this motion on June 11, a stay of proceedings pending its resolution is proper.**

The proper course of action is to stay any deadlines in the present case pending the resolution of this motion. Movants have provided extensive evidence of the likelihood of their success on the merits under the plain language of the Stewardship Act and Oil and Gas Act and the case law used to interpret them.

Additionally, no party—nor the Commission—will be able to recoup the time or resources currently being dedicated to this rulemaking. Should this rulemaking eventually be dismissed as a result of this motion, in the interim any expenditure that would ultimately be rendered unnecessary should be limited to the greatest extent practicable.

Finally, the public interest weighs in favor of staying the rulemaking during the pendency of this motion because the public has an interest in the Agencies judiciously using administrative resources in an efficient manner that is supported by law.

**CONCLUSION**

The question before the Commission is whether it has the authority to promulgate the proposed rules. Because neither the Stewardship Act nor Oil and Gas Act, by their plain language, provide that authority, Movants respectfully request the Commission dismiss Applicant's *Application of Oil Conservation Division to Adopt 19.15.41 NMAC, 19.15.42 NMAC, 19.15.43 NMAC*.

Movants further request stay of all deadlines in this matter until the present motion is resolved.

DATED: June 2, 2026.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify a copy of the forgoing filing was emailed to the following on June 2, 2026:

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