STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

APPLICATION OF OIL CONSERVATION DIVISION TO ADOPT 19.15.41 NMAC, 19.15.42 NMAC, AND 19.15.43 NMAC, STATEWIDE **CASE NO. 25875**

NEW MEXICO OIL CONSERVATION DIVISION'S CLOSING ARGUMENT

The New Mexico Oil Conservation Division ("OCD" or "Division") respectfully submits to the Oil Conservation Commission ("OCC" or "Commission") the Division's Closing Argument in support of the Division's proposed regulatory change to adopt 19.15.41 NMAC, 19.15.42 NMAC, and 19.15.43 NMAC, filed on September 11, 2026 ("Final Proposed Rules"). The Final Proposed Rules would allow the OCD to assume primacy over the federal Class VI Underground Injection Control ("UIC") Program. The Final Proposed Rules properly reflect the Commission's duties to conserve oil and gas through judicious supervision, prevent waste, and protect correlative rights.[1]

CLOSING ARGUMENT

I. STANDARD OF REVIEW AND STATUTORY REQUIREMENTS

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

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.

[1] NMSA 1978, §§ 70-2-6 and 70-2-22(A).

It is well established that the Legislature can properly delegate rulemaking power to administrative agencies through an enabling statute.[2] Here, the Geologic Carbon Dioxide Storage Stewardship Act, NMSA 1978, Sections 74-14-1 through 74-14-7 ("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."[3] Several provisions of the Stewardship Act expressly reference the Class VI injection well program and several of its provisions match specific elements of that program.[4] 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.[5]

Additionally, 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[6] "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]."[7] Further, the Oil and Gas Act empowers OCD and OCC to prevent waste and to protect correlative rights.[8] 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 is also appropriate to regulate Class VI injection wells to prevent waste.[9] The Final Proposed

[2] NMSA 1978 § 70-2-11; *New Energy Econ., Inc. v. Shoobridge*, 2010–NMSC–049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (per curiam).
[3] NMSA 1978 § 74-14-3.B
[4] *See* NMSA 1978 § 74-14-2(A)
[5] *Id*.
[6] OCC exercises concurrent jurisdiction and authority with OCD. NMSA 1978 Section 70-2-6(B).
[7] NMSA 1978 § 70-2-11(A)
[8] NMSA 1978 § 70-2-11
[9] NMSA 1978 § 70-2-12(B)(21), (22).

Rules implicate matters within the OCD's traditional jurisdiction and technical expertise, including the prevention of waste and protection of oil and gas resources.

The Legislature also 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.[10]

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.

In exercising that delegated rulemaking authority, the Commission must ensure that its decision satisfies the standards governing judicial review of Commission rules. The Commission's decision to adopt a regulation will be upheld unless it is "found to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law."[11] Under the first standard, "[a]n agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand."[12] "'Normally an agency rule would be arbitrary or capricious if the agency . . . failed to consider an important aspect of the problem, offered an explanation for its decision that runs

[10] NMSA 1978 § 70-2-12(B)(15)
[11] NMSA 1978, § 70-2-12.2 (C)
[12] *N.M. Mining Ass'n. v. N.M. Water Quality Control Comm*., 2007-NMCA-010, ¶ 22, 141 N.M. 41, 49, 150 P.3d 991, 999 (*citing Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806; *Atlixco Coal. v. Maggiore*, 1998- NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370).

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[13]

The second standard requires the regulatory change be supported by "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] The Court may find that substantial evidence supports an agency's findings even when the record could support two inconsistent conclusions.[15] The Commission's decision must be based on the evidence contained in the administrative record developed through this rulemaking proceeding. While the Commission members bring valuable professional experience to their service, the Commission may not substitute its own personal knowledge, professional background, or policy preferences for record evidence, nor may it rely on extra-record assumptions to support factual determinations necessary for rule adoption. In this proceeding, the evidentiary record consists of sworn testimony, admitted exhibits, and materials properly subject to official notice. To the extent the Commission seeks to rely on general technical or policy considerations beyond that record, such matters must either be supported by evidence admitted during the hearing or identified through a process of official notice that affords parties an opportunity to contest or rebut the noticed material.

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[13] *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 12, 133 N.M. 97, 102, 61 P.3d 806, 811 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856 (1983)).

[14] *Rinker v. State Corporation Commission*, 1973-NMSC-021, ¶ 5, 506 P.2d. 783; *see DeWitt v. Rent-A-Center, Inc*., 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341 ("Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own.") (internal citation omitted).

[15] *See Trujillo v. Emp't Sec. Dep't*, 1987-NMCA-008, ¶ 18, 734 P.2d 245; *Herman v. Miners' Hosp.*, 111 N.M. 550, 552, 807 P.2d 734, 736 (1991); *see also Duke City Lumber Co. v. N.M. Envtl. Improvement Bd*., 101 N.M. 291, 294, 681 P.2d 717, 720 (1984).

Lastly, for the third standard, a ruling that is not in accordance with law is one where "the agency unreasonably or unlawfully misinterprets or misapplies the law."[16] To that end, "[r]ules, regulations, and standards that have been enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes."[17]

In sum, the Stewardship Act and the Oil and Gas Act provide ample statutory authority for OCD to propose, and the Commission to adopt, a comprehensive Class VI regulatory program. The Stewardship Act expressly assigns OCD jurisdiction over geologic sequestration facilities and authorizes the rules and orders necessary to implement that statutory scheme. The Oil and Gas Act supplies complementary authority over underground injection, protection of fresh water, prevention of waste, and protection of correlative rights. Read together, these statutes demonstrate the Legislature's intent that OCD and the Commission regulate the construction, operation, monitoring, closure, and long-term stewardship of Class VI wells in New Mexico.

B. The Safe Drinking Water Act Confirms the Regulatory Authority Contemplated by the Legislature

The federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300f et seq. (1974), establishes a cooperative-federalism framework for regulating underground injection. Under that framework, the Environmental Protection Agency ("EPA") administers the Underground Injection Control ("UIC") program unless a state obtains primary enforcement responsibility, commonly referred to as "primacy." A state may seek primacy specifically for Class VI wells, independently

[16] *N.M. Mining Ass'n. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶ 11 (quoting *Archuleta v. Santa Fe Police Dep't*, 2005-NMSC-006, ¶ 18, 137 N.M. 161, 108 P.3d 1019).
[17] *N.M. Mining Assn. v. N.M. Water Quality Control Comm.*, 2007-NMCA-010, ¶ 11 (citing *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 107 N.M. 469, 473, 760 P.2d 161, 165 (Ct.App.1987)).

of the other classes of injection wells.[18] Once EPA approves the state program, the state administers that program in lieu of the federal permitting program, subject to EPA's continuing oversight and enforcement authority.[19]

To obtain EPA approval, a state must establish a complete regulatory program encompassing permitting, compliance evaluation, enforcement, public participation, and information sharing.[20] The state must demonstrate legal authority to implement the applicable federal requirements[21]; maintain procedures for inspections, surveillance, record review, and investigation of potential violations[22]; and possess adequate authority to restrain unauthorized activities, enjoin violations, and obtain civil and criminal remedies.[23] The state's primacy application must therefore include its governing statutes and regulations, a description of the proposed program, an attorney general's statement establishing adequate legal authority, and a memorandum of agreement with EPA.[24]

These requirements demonstrate that an effective Class VI program necessarily extends across the entire regulatory life cycle of a sequestration facility. It must govern permit applications, site characterization, well construction, operation, testing and monitoring, corrective action, emergency response, plugging, post-injection site care, site closure, financial responsibility, reporting, and enforcement.[25] The Commission therefore is not being asked to regulate matters merely incidental to long-term stewardship. The proposed rules establish the integrated regulatory

[18] 40 C.F.R. Section 145.1(i)
[19] *See* 40 C.F.R. Sections 145.1(e)–(f), 145.21(f).
[20] 40 C.F.R. Section 145.1(c).
[21] 40 C.F.R. Section 145.11
[22] *Id.* Section 145.12
[23] *Id.* Section 145.13
[24] *Id.* Sections 145.22–145.25.
[25] *See generally* 40 C.F.R. Parts 144–146

program that federal law requires before New Mexico may assume responsibility for Class VI wells.

Although New Mexico is not required to reproduce EPA's rules word for word, each state requirement must be at least as stringent as its federal counterpart.[26] States also remain free to adopt requirements that are more stringent or more extensive than the federal minimum.[27] Federal consistency thus requires preservation of each mandatory federal protection but it does not prevent New Mexico from tailoring its program to state-specific geology, administrative procedures, and regulatory needs.

Accordingly, the relevant question is not whether each provision of OCD's proposal appears verbatim in EPA's regulations. The question is whether the proposed rules, considered together with the Commission's statutory authority, establish an enforceable Class VI program that preserves every mandatory federal protection and enables OCD to perform the responsibilities the Legislature assigned to it. The SDWA framework confirms that they do. Adoption of the proposed rules would implement the regulatory authority contemplated by the Legislature and would position New Mexico to seek primacy of the Class VI program.

C. The State Rules Act Limits the Commission to Revisions Within the Noticed Scope of the Rulemaking

The State Rules Act provides the statutory requirements for every state agency to promulgate a proposed rule, regulation, or standard.[28] This includes provisions relating to the format of rules, notice of proposed rulemaking, public participation, and agency record in a

[26] 40 C.F.R. Section 145.11(b)(1)
[27] *Id.* Section 145.1(g)
[28] *See* NMSA 1978 § 14-4-1 et seq.

rulemaking proceeding.[29] The State Rules Act requires notice containing the proposed rule's purpose, the specific legal authority, access to the complete proposed text, participation procedures, and citations to technical information serving as a basis for the proposal.[30] The Commission's own rulemaking procedures likewise require an application that specifically identifies the proposed rule and includes draft language.[31] These requirements allow affected persons to determine whether their interests are implicated, retain appropriate experts, submit evidence, and test the proposal through cross-examination and rebuttal.

Accordingly, the Commission may adopt revisions that reasonably refine the noticed Class VI framework and are supported by the rulemaking record. It should not, however, adopt proposals that introduce materially different obligations, regulate interests beyond those identified in the notice, or rest on technical and policy considerations that affect people who lacked a meaningful opportunity to address them through entering the rulemaking proceeding.

II. THE DIVISION'S PROPOSED RULES FULFILL THE LEGISLATURE'S DIRECTIVES AND FEDERAL REQUIREMENTS FOR CLASS VI PRIMACY

The proposed Class VI rules implement the regulatory responsibilities the Legislature assigned to OCD under the Geologic Carbon Dioxide Storage Stewardship Act and the Oil and Gas Act, as discussed above. The record demonstrates that the proposed program carries out those statutory responsibilities throughout the entire lifecycle of a sequestration facility. The proposed rules require technical review of site characterization, well construction, operational parameters, plugging plans, post-injection site care, monitoring, and financial responsibility before a permit

[29] *Id*.
[30] NMSA 1978 § 14-4-5.2
[31] 19.15.3.8 NMAC

may be issued.[32] They also require financial assurance sufficient to cover corrective action, well plugging, emergency response, site closure, and post-injection site care, with annual updates to ensure that the available financial instruments remain adequate.[33] These provisions provide the technical and financial foundation necessary for OCD ultimately to determine whether injection operations have been completed, whether the facility has been properly closed, and whether the conditions for transfer of long-term stewardship responsibilities have been satisfied.

The proposed rules also carry out the Legislature's complementary directives under the Oil and Gas Act to regulate underground injection, protect fresh water, prevent waste, and exercise the technical and enforcement powers reasonably necessary to administer those responsibilities.[34] The record establishes that OCD already administers an EPA-approved underground injection control program and possesses established systems for permitting, technical review, field inspection, mechanical-integrity evaluation, corrective action, compliance monitoring, enforcement, and data management.[35] OCD has supplemented those existing capabilities with permanent Class VI staff, specialized technical expertise, training, information-management resources, and access to outside contractors when necessary.[36]

The proposed rules likewise satisfy the central purpose of the federal Safe Drinking Water Act's Class VI program: protection of underground sources of drinking water from injected carbon dioxide, displaced formation fluids, and associated pressure effects. The federal program establishes minimum requirements for siting, permitting, construction, operation, mechanical integrity, monitoring, reporting, emergency response, post-injection site care, closure, and

[32] OCD Exhibit 4 at 7–9. *See also* OCD Exhibit 3 at 19.15.43.9(E)-(H), (P), and (N)
[33] OCD Exhibit 4 at 11; OCD Exhibit 6 at 40–41; OCD Exhibit 3 at 19.15.43.9(F), (N), and (O)
[34] *See* NMSA 1978, §§70-2-11(A) and 70-2-12(B)
[35] OCD Exhibit 4 at 4, 6
[36] *Id.* at 4–7, 10

financial responsibility.[37] To obtain primacy, New Mexico must demonstrate adequate legal authority, regulations, procedures, staffing, technical capability, and enforcement mechanisms to administer a program that is at least as stringent as the federal program.[38] OCD's proposed rules incorporate the substantive federal permit-information requirements and authorize OCD to require additional information, revisions, or permit conditions when necessary to protect underground sources of drinking water.[39] Further, the proposed siting and characterization requirements are consistent with the federal Class VI framework and adequately protective of underground sources of drinking water.[40]

The technical provisions of the proposed rules supply the protections contemplated by the federal framework. Applicants must characterize the injection and confining zones, identify faults and fractures that may serve as pathways for fluid movement, delineate the Area of Review through computational modeling, identify artificial penetrations, and perform necessary corrective action.[41] The proposed rules require well logs and preoperational testing to confirm site conditions, well construction, and mechanical integrity, and they establish plugging requirements intended to isolate the injection zone permanently from underground sources of drinking water.[42] They further impose construction, casing, cementing, pressure-control, continuous-monitoring, mechanical-integrity, automatic-shutoff, emergency-response, and site-specific seismic-monitoring

[37] OCD Exhibit 6 at 6
[38] *Id.*
[39] *Id.* at 8–14
[40] *Id.* at 24. *See also* OCD Exhibit 3 at 19.15.43.9(D) and (I)
[41] OCD Exhibit 6 at 9–11; OCD Exhibit 8 at 3–5; OCD Exhibit 1 at 19.15.41.8.(A)(2); OCD Exhibit 3 at 19.15.43.9(B)-(C), (E)
[42] OCD Exhibit 10 at 3–8; *See* OCD Exhibit 3 at 19.15.43.9.(C)(1)(c)(iii), (C)(3)(a)-(b), (H)(1)-(2), (M); 19.15.43.7.(Q)

requirements.[43] Collectively, these provisions address the principal pathways through which injection could endanger an underground source of drinking water and authorize the Director to modify operations, require additional monitoring or corrective action, or stop injection when site conditions warrant.[44]

The proposed Class VI program also satisfies the federal requirements for transparent permitting and meaningful public participation. OCD conducted stakeholder outreach during development of the rules, published draft regulations and a federal crosswalk, solicited public comment, and engaged potentially affected communities and Tribal Nations.[45] For individual permits, the proposed rules require a pre-application public meeting, advance notice, publicly available fact sheets, a public-comment period, procedures for requesting a hearing, notice of the final decision, and a publicly available response to significant comments.[46] These procedures are consistent with 40 C.F.R. Part 124 and ensure that affected persons have access to relevant information and a meaningful opportunity to participate before OCD issues a final Class VI permit.[47]

The record therefore establishes that the proposed rules accomplish the intersecting purposes of state and federal law. They provide the permitting, technical, financial, monitoring, closure, and enforcement mechanisms necessary for OCD to administer the sequestration facilities entrusted to it by the Legislature, while meeting or exceeding the federal safeguards necessary for Class VI primacy. The Commission may therefore find that OCD's proposed rules fulfill the

[43] OCD Exhibit 12 at 4–18; OCD Exhibit 2 at 19.15.42.7.(B)-(C); OCD Exhibit 3 at 19.15.43.9.(F)--(L), (O)(1)-(5)
[44] OCD Exhibit 12 at 9–10, 16–18
[45] OCD Exhibit 14 at 4–7
[46] *Id.* at 8–11; *see also* OCD Exhibit 1 at 19.15.41.8.(D)-(E), (H)-(I)
[47] OCD Exhibit 14 at 8-11

Legislature's directives, satisfy the Safe Drinking Water Act's requirements for state administration of the Class VI program, and are supported by substantial evidence in the rulemaking record.

III. NOTABLE RULE LANGUAGE FOR THE COMMISSION'S CONSIDERATION

On September 11, 2026, the Division submitted Final Proposed Rules 19.15.41 NMAC, 19.15.42 NMAC, and 19.15.43 NMAC ("Final Proposed Rules") for the Commission's consideration. As discussed further below, the proposed changes respond directly to voiced concerns during the rulemaking hearing, as well as other parties' technical proposals. The Final Proposed Rules are drafted to comply with 1.24.10 NMAC, the uniform drafting rules for regulations in the New Mexico Administrative Code. The Final Proposed Rules also comply with the State Rules Act because each substantive revision concerns a subject placed at issue by the noticed proposal and is supported by testimony or exhibits admitted into the rulemaking record.

OCD's Final Proposed Rules

Following the hearing, OCD revised limited provisions of its proposed rules in response to testimony, party proposals, and Commissioner questions. Each revision concerns a subject expressly placed at issue by OCD's amended application and proposed rule text, is supported by the rulemaking record, and either conforms the state program more closely to the federal Class VI requirements or clarifies how the proposed program will be administered. None of the revisions discussed below establish a materially different regulatory program, regulate a new category of persons or activities, or impose an obligation that interested persons lacked a meaningful opportunity to address.

- After reviewing and considering the Conservation Groups proposal regarding the definition of "Area of Review", the definition was revised to align with the federal language of "Area of Review".[48]
- The definition of "Permit" was revised to strike references that are outside the scope of the proposed Class VI program.[49] Similarly, the definition of "Point of Injection" was struck, as this definition references permitting programs that are outside the scope of the proposed Class VI program.[50] These deletions are non-substantive, as they remove references associated with permitting programs that are not governed by Parts 41 through 43 and do not alter the requirements applicable to a Class VI permit, injection well, or sequestration facility. Because "Point of Injection" is not used elsewhere in the proposed rules, deleting the unused definition neither changes an operator's obligations nor eliminates a protection required by the federal Class VI regulations.
- The definition of "State" was revised to clarify that the state is the state of New Mexico.[51] This revision is a technical clarification that eliminates potential ambiguity concerning the geographic and governmental jurisdiction addressed by the rules. It does not alter the regulated activity, expand OCD's jurisdiction, or impose any new regulatory obligation.

[48] OCD Final Proposed Rule at 19.15.41.7(A)(4); 19.15.42.7(A)(4); 19.15.43.9(B)(1); Conservation Groups Direct Testimony of Dr. Harvey at 48-49
[49] OCD Final Proposed Rule at 19.15.41.7(P)(1) NMAC and 19.15.42.7(P)(1)
[50] OCD Final Proposed Rule at 19.15.41.7(P)(4) NMAC and 19.15.42.7(P)(4)
[51] OCD Final Proposed Rule at 19.15.41.7(S)(5) NMAC and 19.15.42.7(S)(5)

- A section was added that clarifies and addresses the appeals process, consistent with Oxy's request and Commissioner recommendations.[52] This section outlines that appeals of final permitting decisions relating to Parts 41, 42, and 43 of Title 19, Chapter 15 shall be conducted pursuant to the process and standards described in Part 19.15.4 NMAC.[53]
- Consistent with Commissioner questioning during the rulemaking hearing, a clarification was added that exempted aquifers are subject to EPA approval.[54] This revision expressly preserves EPA's role in approving aquifer exemptions and prevents the state rule from being read to authorize OCD to make an exemption effective without federal approval.
- Consistent with Commissioner questioning and other parties' recommendations, a clarification was added that information that is already available for public inspection will not be considered confidential.[55] Importantly, the clarification does not expand public disclosure beyond what governing law already requires or eliminate protection for information that qualifies as confidential under applicable law. It simply provides that information already lawfully available to the public cannot acquire confidential status merely because it is submitted with a Class VI application.
- "Integrity of the confining zone" was added to the list of director considerations when determining whether there is an increased risk to underground sources of

[52] Oxy Direct Testimony at 5; Tr. Day 2-3 at 451:5-13; 319:15-25; 320:1-20
[53] OCD Final Proposed Rule at 19.15.41.8.J
[54] OCD Final Proposed Rule at 19.15.42.8.A; Tr. Day 3 at 579:1-17; 634:6-11; 688:17-21
[55] OCD Final Proposed Rule at 19.15.42.8.A; Conservation Groups Direct Testimony of Dr. Harvey at 34; Tr. Day 3 at 553:8-25; Day 6 at 1210:1-20

drinking water when transitioning from Class II to Class VI wells.[56] This change was incorporated after reviewing the Conservation Groups proposed edits.[57]

- As it relates to requirements for enforcement authority, the Division's final proposed rule contains two clarifying edits. The first is to remove any reference of Class II wells, as that is outside the scope of these proceedings. The second is to add a cross reference to the statutory authority for criminal fines.[58] Note that the cross reference contains the same language and does not change the intent of this subsection.
- The proposed rules and federal requirements require an owner or operator to develop and submit an emergency remedial response plan. After reviewing Oxy's proposal to require that the plan be reviewed and amended at least every five years, consistent with the federal regulations at 40 C.F.R. Section 146.94(d), OCD incorporated this change into its final proposed rules.[59]

Taken together, these revisions reflect reasoned consideration of the hearing record. They either conform the proposed program more closely to federal Class VI requirements, remove language unrelated to that program, or clarify the procedures and authorities through which the program will be administered. Each revision concerns a subject disclosed in the proposed text and examined during the hearing, and none creates the type of materially different obligation that would require supplemental notice. The Commission may therefore adopt OCD's Final Proposed

[56] OCD Final Proposed Rule at 19.15.42.9.F(2)(i)
[57] Conservation Groups Direct Testimony of Dr. Harvey at 35; Tr. Day 6 1211:11-21
[58] OCD Final Proposed Rule at 19.15.42.13.A(1)(c)(i)-(ii)
[59] OCD Final Proposed Rules at 19.15.43.9.O(5); Oxy Direct Testimony of Tiffany Wallace at 15-16

Rules as supported by substantial evidence, consistent with the State Rules Act, and within the authority delegated to OCD and the Commission.

Commissioner Recommendation's During the Hearing

During the hearing, the Commissioners identified provisions that may warrant clarification and technical issues that will require close review during permitting. Consistent with the standards discussed above, the Commission should ask whether each suggested change is within the noticed scope, supported by testimony and admitted evidence, and consistent with federal primacy requirements. Applying those standards, OCD recommends that the Commission adopt a limited group of clarifying edits identified in the Final Proposed Rules, retain site-specific Director discretion for technical matters that cannot be reduced to a defensible statewide standard, and reserve property-rights and land-use proposals for a separately noticed proceeding.

OCD Director Discretion Addresses Many of the Technical Concerns Raised at Hearing

Many of the Commission's technical recommendations concern matters already addressed by the proposed rules' performance standards and site-specific permit review. For example, the Commission suggested whether pre-modeling consultation, written identification of deficiencies, open and sealing fault scenarios, alternative conceptual models, and consideration of pressure or operating data from neighboring projects should be incorporated into the final rule language.[60] OCD witness testimony supports early consultation and thorough Director review but does not recommend prescribing one modeling protocol for every project.[61]

The same is true of recommendations concerning seismic and legacy-well information. The Commission proposed searches for existing two- and three-dimensional seismic data and identified

[60] Tr. Day 2 at 279:12-280:10, 297:10-21, 471:17-472:15.
[61] *Id*. at 279:21-280:10, 297:14-21. *See also id*., 471:17-472:15.

multiple potential sources for locating artificial penetrations.[62] OCD supports a reasonable, documented search using sources relevant and available to the project, coupled with authority for the Director to require additional information when the initial search is inadequate.[63] However, the final rule should not impose a duty to acquire third-party proprietary information.

Other proposed clarifications depend heavily on project conditions for a single statewide definition. For example, the Commission asked what constitutes a material change in injection rate, volume, pressure, or carbon-dioxide composition.[64] The Commission also requested more specific meanings for adequate funding, staffing, training, laboratory controls, and quality assurance, as well as a fixed frequency for carbon-dioxide-stream analysis.[65] While the Division can appreciate the basis for these clarifying questions, it is the Division's recommendation that these matters be addressed through guidance and permit conditions as opposed to adding additional technical rule requirements that are unsupported by the current rulemaking record.

Commission Recommendations Must Be Supported by Substantial Evidence and Remain Within the Noticed Scope of the Rulemaking

As explained above, the Commission may modify OCD's proposed rules based on the evidence developed during the hearing. That authority, however, is not unlimited. Any substantive addition to the final rules must be supported by substantial evidence in the rulemaking record and must remain within the scope of the notice required by the State Rules Act.[66] Questions, concerns, and potential revisions raised during the hearing appropriately informed the Commission's consideration of OCD's proposal, but the fact that a recommendation was discussed does not itself

[62] Tr. Day 2 at 465:21-466:16, 494:1-495:8.
[63] *Id*. at 465:1-10.
[64] Tr. Day 2 at 480:1-25.
[65] Tr. Day 3 at 629:1-630:12, 673:1-25.
[66] *See* NMSA 1978, Sections 14-4-5.2, 70-2-12.2(C).

establish either the technical basis for adopting it or that affected persons received adequate notice that the Commission might impose it as a statewide requirement.

Several Commission recommendations illustrate this distinction. The Commissioners explored whether the final rules should require particular characterization methods, fixed Area of Review investigation areas, specified testing procedures, mandatory monitoring configurations, inactivity limits, siting setbacks, and other prescriptive requirements.[67] These recommendations identify subjects that may warrant close examination during permit review. But the record does not establish that any single method, distance, frequency, or configuration would be appropriate for *every* Class VI project. To the contrary, the testimony demonstrates that the appropriate requirements depend on site geology, available data, model uncertainty, project design, operating conditions, and the particular risks presented.[68]

The Commission therefore should not convert a technical measure into a universal regulatory mandate unless the record contains substantial evidence supporting its statewide application. For example, three-dimensional seismic may provide valuable information at a geologically complex or poorly characterized site, but the record does not demonstrate that it is necessary where other reliable data adequately characterize the injection and confining zones. Likewise, a fixed Area of Review buffer or seismic-investigation radius could be unnecessarily broad for one project and insufficiently protective for another. The same concern applies to mandatory interference testing, prescribed monitoring networks, maximum inactivity periods, universal setbacks, and other fixed criteria for which the record supplies no generally applicable

[67] *See, e.g.*, Tr. Day 2 at 269-275, 292:11-24, 303:7-311:12; Tr. Day 3 at 633:1-20, 671:1-25, 682:1-683:20, 698:19-703:10.
[68] *See, e.g.*, Tr. Day 2 at 275:18-25, 292:19-25, 303:18-304:4, 464:19-465:20; Tr. Day 3 at 682:1-683:20, 698:3-699:20.

technical standard. The proposed rules address these concerns more effectively by establishing enforceable performance standards and authorizing the Director to impose project-specific conditions supported by the permit record.

The required legal notice also provides an independent limitation. OCD's application, proposed rules, and public notice placed the creation of a Class VI permitting, compliance, and enforcement program before the Commission.[69] Importantly, this does not necessarily provide notice of materially different requirements that introduce new regulatory mechanisms, expand the persons or property interests subject to regulation, or impose substantive obligations that affected parties could not reasonably have anticipated from the proposed text.[70] The opportunity to answer questions during the hearing does not substitute for the notice necessary to retain experts, present affirmative evidence, conduct cross-examination, and offer rebuttal concerning a newly proposed statewide mandate.[71] These concerns are particularly significant where a recommendation would expand the rules beyond protection of USDWs and regulation of Class VI injection operations. For example, proposals concerning setbacks from schools or population centers, comprehensive review of mineral and geothermal resources, land or pore-space agreements, lease rights, or the adjudication of surface and mineral interests may implicate important policy questions.[72] But those proposals may reach land-use and property-rights matters not identified as independent regulatory subjects in OCD's application or the published notice. They also may affect persons who had no reason to understand that those interests would be regulated in this proceeding. If the Commission believes such requirements should be considered, the appropriate course is a separately noticed

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[69] *See* https://www.emnrd.nm.gov/ocd/wp-content/uploads/sites/6/Class-VI-Public-Notice-Public-Comment-1.pdf

[70] *See* NMSA 1978, Section 14-4-5.2; 19.15.3.8 NMAC

[71] See NMSA 1978, Sections 14-4-5.2(A), 14-4-5.3, and 14-4-5.7(C); 1.24.25.14(C) NMAC

[72] *See* Tr. Day 3 at 660:1-671:25, 702:1-703:10, 716:6-24, 724:8-726:24, 746:11-754:22.

proceeding in which affected persons receive a meaningful opportunity to present evidence and respond.

Accordingly, the Commission should adopt only those clarifications that remain within the noticed Class VI framework and are supported by the evidentiary record. Where the record establishes a legitimate concern but not a defensible statewide requirement, the Commission should retain the proposed standard and allow the matter to be addressed through guidance, application instructions, or permit-specific conditions. Where a recommendation introduces a materially different regulatory subject, the Commission should decline to adopt it in this proceeding and, if further consideration is warranted, address it through additional notice and an opportunity for meaningful participation.

Property-Rights and Land-Use Recommendations Exceed the Proper Scope of This Rulemaking

As explained above, the Commission may adopt revisions that are supported by substantial evidence and remain within the noticed scope of the proceeding. It should not, however, use this Class VI primacy rulemaking to establish a new system for determining property ownership, compelling access, resolving competing mineral interests, or regulating land use. Those subjects present distinct legal and policy questions, may implicate statutory authority beyond the Class VI program, and affect persons who may not have received notice that their property rights could be determined in this proceeding.

Several Commission recommendations implicate these concerns. The Commission explored whether an applicant should be required to establish land or pore-space rights before permit issuance, possess a lease or other legal right before applying or injecting, and submit tribal

and landowner agreements with its application.[73] An applicant must, as a practical matter, possess sufficient authority to construct and operate its project, perform corrective action, install monitoring wells, and satisfy the conditions of its permit. OCD may require an applicant to submit agreements or other information on which its application relies and may deny a permit if the applicant cannot demonstrate that it is capable of performing the activities required by the proposed rules.[74] However, broader notice or property-rights requirements would raise concerns under the State Rules Act. OCD's application and the published notice proposed a regulatory program governing the permitting, construction, operation, monitoring, closure, and enforcement of Class VI injection wells.[75] They did not provide notice that the Commission might establish a comprehensive pore-space ownership, leasing, compulsory-access, or mineral-title program. Persons holding surface, mineral, pore-space, tribal, or other property interests may have participated differently, and presented different legal and factual evidence, had those subjects been identified as proposed areas of regulation. Discussion of those issues during the hearing does not substitute for the notice and meaningful opportunity to participate required by NMSA 1978, Section 14-4-5.2.

The same limitations apply to recommendations that the Class VI rules more broadly address correlative and mineral rights.[76] The Oil and Gas Act independently requires protection of correlative rights where applicable, while the federal Class VI program principally protects USDWs from endangerment associated with underground injection. The Commission may

[73] Tr. Day 3 at 716:6-24, 746:11-747:18, 754:9-22.
[74] *Id*
[75] *See* https://www.emnrd.nm.gov/ocd/wp-content/uploads/sites/6/Class-VI-Public-Notice-Public-Comment-1.pdf *and* https://www.emnrd.nm.gov/ocd/wp-content/uploads/sites/6/Crosswalk_NM-Class-VI-Primacy_EPA-Submittal_with-NM-Amendments.pdf
[76] Tr. Day 3 at 660:1-25.

recognize that these duties operate concurrently. It should not, however, transform a Class VI primacy proceeding into a mineral-allocation or unitization regime without adequate notice, and an evidentiary record addressing how those requirements would operate.

Accordingly, the proposals concerning pore-space ownership, compulsory access, landowner or tribal agreements, title adjudication, unitization, and allocation of mineral interests should be reserved for a separately noticed rulemaking in which all affected persons receive a meaningful opportunity to participate.

Other Parties' Proposed Revisions

The proposals submitted by the Center for Biological Diversity ("CBD"), the Conservation Groups, and Oxy must be evaluated under the same legal standards governing the Commission's consideration of its own recommendations. A proposed revision may be adopted only if it remains within the noticed scope of this rulemaking, is supported by substantial evidence in the record, falls within the Commission's statutory authority, and preserves each mandatory federal Class VI protection.

The Commission May Adopt Narrow Revisions Supported by the Record

A limited number of party proposals clarify the existing Class VI framework without changing its substantive reach. The Conservation Groups proposed conforming the Area of Review definitions in Parts 41 and 42 to the risk-based definition in proposed Paragraph 19.15.43.9.B(1).[77] That revision promotes internal consistency by defining the Area of Review as the modeled region in which USDWs may be endangered. OCD incorporated this suggestion in its Final Proposed Rules at 19.15.41.7(A)(4); 19.15.42.7(A)(4); and 19.15.43.9(B)(1). The record also supports

[77] Conservation Groups Direct Testimony of Dr. Harvey at 48-49

clarifying that monitoring wells must be constructed and maintained to prevent movement of fluids into or between USDWs, while limiting injection-well construction features to monitoring wells whose function and depth warrant those requirements.[78]

Other proposals may be accepted only in qualified form. Sonic and porosity measurements before installation of surface casing may provide useful characterization data, but the undefined phrase "best available technology" should not be incorporated because it could compel experimental or unproven methods. Long-term caprock integrity is likewise relevant to Class II-to-Class VI transition decisions, but that concern is already addressed by the proposed requirements for an adequate confining system, site characterization, modeling, construction, testing, operation, and monitoring. Any final clarification should reinforce, not duplicate or expand, those existing requirements.[79]

Oxy's proposal to review the Emergency and Remedial Response Plan every five years instead of every three years is also supported by the record. The change does not eliminate the Director's authority to require an earlier revision when monitoring, operating conditions, or an emergency demonstrates that the approved plan is inadequate.[80] OCD incorporated this suggestion in its Final Rule Proposal submission at 19.15.43.9.O(5). Oxy further proposed to incorporate an appeals provision. The Division incorporated this suggestion at Final Proposed Rules at 19.15.41.8.J.

These limited revisions are consistent with the State Rules Act because they refine subjects expressly presented in the proposed text and do not establish materially different regulatory

[78] OCD Ex. 22, Rebuttal Testimony of Dr. Gregory Schnaar at 11-12, 20-24.
[79] OCD Ex. 22, Rebuttal Testimony of Dr. Gregory Schnaar at 13-14; OCD Ex. 25, Rebuttal Testimony of Matt Eales at 4, 6-7.
[80] OCD Ex. 25, Rebuttal Testimony of Matt Eales at 13-14.

programs. They are also supported by the rebuttal evidence and preserve the protections required for primacy.

Proposals That Would Reduce Federal Stringency or Displace the Federal Framework Must Be Rejected

The Commission may adopt state requirements that are more stringent than the federal minimum, but it may not omit a mandatory federal protection or offset a less-stringent provision with a more protective requirement elsewhere. For example, Oxy's proposal to remove spontaneous-potential logging from the surface-casing requirements fails that standard because the log is included in the federal Class VI requirements.[81] The Conservation Groups' proposed categorical transition from Class II to Class VI likewise should be rejected. The federal framework asks whether carbon-dioxide injection presents an increased risk to USDWs compared with Class II operations. Removing that determination could require Class VI permitting for enhanced-recovery operations whose risks remain adequately managed under the Class II program and would displace the project-specific inquiry established by 40 C.F.R. Section 144.19.[82]

The Commission should also reject any undefined incorporation of future EPA material-compatibility standards. EPA issues regulations, guidance, technical recommendations, policy memoranda, and permit-specific determinations of differing effect. A reference to future standards does not identify which materials would become binding and would bypass the State Rules Act process necessary to evaluate their applicability to New Mexico. If EPA later changes the federal Class VI regulations, OCD may determine through primacy oversight whether a properly noticed state rule amendment is required.[83]

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[81] OCD Ex. 25, Rebuttal Testimony of Matt Eales at 12-13; *see* 40 C.F.R. Section 145.11(b)(1).
[82] OCD Ex. 22, Rebuttal Testimony of Dr. Gregory Schnaar at 13-14.
[83] OCD Ex. 22, Rebuttal Testimony of Dr. Gregory Schnaar at 28-29.

Vague or Redundant Proposals Should Not Be Added to the Final Rules

Several proposals would add language without creating a clearer or more protective regulatory requirement. For example, the Conservation Groups' proposed terms "intensive corrective action area", "plume stabilization", and "qualified professional expert" do not supply defined regulatory thresholds or qualifications and could create uncertainty concerning their relationship to existing AoR, corrective-action, and PISC requirements.[84] Oxy's proposed minor-modification category for non-material, non-substantive changes that do not increase risk to USDWs poses similar issues.[85] OCD recommends that the Commission does not adopt proposals that blur the line between minor modifications and changes requiring full public review.[86]

Conclusion

The proposed new rules in Parts 41, 42, and 43 give force and effect to the legislative intent of the Stewardship Act, are grounded in the authority delegated to OCD and the Commission in the Oil and Gas Act and Stewardship Act, conform to the requirements of the Safe Drinking Water Act and federal regulation, and are supported by substantial evidence in the record of this hearing. For the reasons stated above and those in the Division's Proposed Statement of Reasons, Findings of Fact, and Conclusions of Law, Applicants respectfully request that the Commission adopt the Division's Final Proposed Changes to OCD Exhibits 1, 2, and 3, as revised herein.

[84] Conservation Groups Direct Testimony of Dr. Harvey at 37, 42 and 54
[85] Oxy Direct Testimony Tiffany Wallace at 6-8
[86] OCD Ex. 22, Rebuttal Testimony of Dr. Gregory Schnaar at 15-18, 32-33; OCD Ex. 25, Rebuttal Testimony of Matt Eales at 11-12.

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2026, a copy of the foregoing was served via electronic mail to the following parties:

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