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

IN THE MATTER OF PROPOSED AMENDMENT TO THE COMMISSION'S RULES TO ADDRESS CHEMICAL DISCLOSURE AND THE USE OF PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES AND THEIR USE IN OIL AND GAS EXTRACTION, 19.15.2, 19.15.7, 19.15.14, 19.15.16 AND 19.15.25 NMAC **CASE NO. 23580**

NEW MEXICO OIL AND GAS ASSOCIATION'S PRE-HEARING STATEMENT

This Pre-Hearing Statement is submitted on behalf of the New Mexico Oil and Gas Association ("NMOGA"), through its counsel of record, in accordance with 19.15.3.11.B and Amended Procedural Order No. R-21540-A.

INTRODUCTION

NMOGA supports a clear, science-based prohibition on the use of hydraulic fracturing fluids that have intentionally added perfluoroalkyl and polyfluoroalkyl substances ("PFAS")—defined and discussed in more detail below—in the hydraulic fracturing of oil and gas wells in New Mexico. See 19.15.16.17 NMAC. NMOGA further supports requiring operators of oil and gas wells to provide a certification to the Oil Conservation Division ("OCD"), on a Form C-103, C-105, or both, as may be applicable, that no PFAS-containing fracturing fluids have been used in the fracturing of the well. *See, e.g.*, 19.15.16.19(B) NMAC (requiring disclosure, with enumerated exceptions, of hydraulic fracturing fluid constituents in the FracFocus chemical registry). Moreover, NMOGA supports the continued use of the FracFocus chemical disclosure registry for log, completion, and workover reports, as is currently required by 19.15.16.19(B) NMAC, and which expressly recognizes exceptions from full disclosure for those constituents or additives in fracturing fluid that are protected as trade-secrets under New Mexico law. *See*

19.15.16.19(B)(1)-(3) NMAC; *see also* NMSA 1978, §§ 57-3A-1 to 57-3A-7 (New Mexico Uniform Trade Secrets Act) (1989) ("Trade Secrets Act").

NMOGA, however, largely cannot support the amendments to 19.15.2, 19.15.7, 19.15.14, 19.15.16, and 19.15.25, as WildEarth Guardians ("WEG") proposes in its August 23, 2024, Amended Application for Rulemaking ("Application"). *See* Application, at pg. 1. As an initial issue, outlined in more detail below, WEG's Application and proposed amendment seek to have the OCD regulate the "generation"—as opposed to the "disposition"—of "nondomestic wastes," which is outside the statutory powers of the New Mexico Oil Conservation Commission ("OCC" or "Commission") and OCD. *See* NMSA 1978, §70-2-12(B)(21), (22) (1953) (emphasis added); *see also* § 70-2-12(B)(15) (authorizing OCC/OCD to regulate "disposition" and other activities applicable to produced water, but not the "generation" of produced water or non-domestic waste associated with it, and identifying produced water as a separately enumerated substance from "nondomestic waste"); *accord* NMSA 1978, § 70-13-1 to 70-13-5 (2019). Secondly, WEG's Application and proposed amendments utilize hyperbole, rather than science-based, technically feasible, technically correct modifications to existing regulations to first define PFAS and, correspondingly, prohibit the use of PFAS in completing, shooting, fracturing and treating of oil and gas wells. *See, e.g.*, **NMOGA Exhibit D** (Dr. Stephen Richardson testimony); *see also, e.g.*, **NMOGA Exhibit E** (Dr. Janet Anderson testimony). WEG proposes modifications to existing regulations to prohibit the use of any "undisclosed chemicals downhole," which in practice either mandates disclosure of trade-secreted information, in violation of New Mexico's Trade Secrets Act, or unreasonably forecloses the use of highly effective, hydraulic fracture chemicals—even if they are not PFAS substances—just because they are not disclosed due to trade secret protections. The OCD, however, has no regulatory authority to side-step trade secret protections

and mandate full disclosure of constituents in fracturing fluids that otherwise fall within the New Mexico trade secret protections. *See* Application at pg.1; *see also* NMSA 1978, § 57-3A-2. It also makes no sense, and would be contrary to public policy, to prohibit downhole use of effective hydraulic fracture chemicals just because they are not disclosed due to trade secret concerns.

Nevertheless, as analyzed in detail in the Pre-Hearing Statement below, NMOGA supports WEG's proposed regulatory amendments where the amendments are consistent with up-to-date scientific standards, data, and understandings of PFAS; technically feasible and correct; and consistent with the Commission's statutory authority. In the instances where NMOGA cannot support WEG's amendments, NMOGA offers its own modifications to the proposed amendments. NMOGA's condensed modifications and justifications for each modification appear in a redline/strikeout included as **NMOGA Exhibit A**. Additionally, in the Pre-Hearing Statement below, NMOGA addresses (1) the statutory authority of the OCC/OCD in relation to the modifications proposed in WEG's Application and (2) each enumerated, WEG-proposed modification to 19.15.2, 19.15.7, 19.15.14, 19.15.16, and 19.15.25, respectively.

NMOGA encourages the Commission to carefully and thoughtfully consider both the agency's enumerated powers in Sections 70-12-12 and Sections 70-13-1 to 70-13-5, and the practical effect of the proposed changes in WEG's Application to avoid jurisdictional overreach in this rulemaking. NMOGA appreciates the opportunity to participate in this rulemaking and recognizes the time and efforts of all Parties involved.

DISCUSSION

WEG's petition to the Commission included the following three parts: (1) the Application, totaling six (6) pages; (2) WEG Exhibit 1, comprising existing OCD regulations

with WEG's proposed changes in redline/strikeouts; and (3) a Public Notice for this rulemaking. Below, NMOGA first addresses claims and assertions in WEG's Application. Second, NMOGA analyzes WEG's various proposed amendments to the existing OCD regulations (WEG Exhibit 1), and suggests either further modifications or, where appropriate, wholesale rejection of WEG's proposed amendments. Third, NMOGA identifies its technical witnesses, briefly summarizes the scope of their testimony, and provides an estimate of the time needed for such testimony.

I. WEG's Application

A. The OCD has no statutory authority over the "*generation*" of "nondomestic waste," only the "*disposition*" of "nondomestic waste," as clearly enumerated in Section 70-2-12.

WEG's Application provides that " . . . the Commission [should] adopt a rule prohibiting the use of PFAS in oil and gas drilling, development, and production in order to prevent the *generation* of PFAS-contaminated produced water and nondomestic waste." Application at pg. 1 (emphasis added). The Commission's enumerated powers in Sections 70-2-12(B)(15), 70-2-12(B)(21), and 70-2-12(B)(22) serve as the basis for WEG's request to regulate such *generation* of non-domestic waste. *See* Application at pg. 3 (justifying request to Commission to adopt said prohibitions pursuant to enumerated powers in Sections 70-2-12(B)(15), (21), and (22)). But such assertion mistakenly conflates and equates "generation" and "disposition" as being one-in-the same, which they are not. The OCC/OCD have no regulatory authority over the "generation" of produced water or nondomestic waste.

Section 70-2-12(B)(15) provides the Commission with authority "to regulate the *disposition, handling, transport, storage, recycling, treatment, and disposal* of produced water . . ." § 70-2-12(B)(15) (emphasis added). Likewise, Section 70-2-12(B)(21) empowers the Commission "to regulate the *disposition* of nondomestic wastes resulting from the exploration,

development, or storage of crude oil or natural gas to protect public health and the environment." *Id.*; *see also* § 70-2-12(B)(22) (authorizing the OCD "to regulate *disposition* of nondomestic waste" under similar circumstances) (emphasis added).

Although not defined in Sections 70-2-12(B)(15), (21), or (22), the common understanding of "disposition" is "the disposal or discarding of something, the power to make decisions about . . . disposal." *See* Random House Unabridged Dictionary (2d Ed.)[1]; *see also Levario v. Ysidro Villareal Labor Agency*, 1995-NMCA-133, ¶ 11, 906 P.2d 266 (when a word in statute is left undefined, it must be read according to its common meaning); *accord Best v. Marino*, 2017-NMCA-073, ¶ 38, 404 P.3d 450 ("Appellate courts often refer to dictionary definitions to ascertain the ordinary meaning of statutory language"). On the other hand, the common understanding of "generation" is "the act or process of generating or bringing into being; production, manufacture, or procreation." *See* Random House Unabridged Dictionary (2d Ed.). Accordingly, the terms "disposition" and "generation" are neither inter-changeable, nor are they synonymous. *See id.* Furthermore, the Commission's regulatory authority in the context of produced water is limited to the "*disposition, handling, transport, storage, recycling, treatment, and disposal* of produced water," as expressly enumerated in the statute. *See id.*; *see also Leger v. Gerety*, 2019-NMCA-033, ¶17, 444 P.3d 1036 (where a statute is unambiguous, plain language governs).

Similarly, the plain language of Sections 70-2-12(B)(21), (22) limits the Commission's regulatory oversight to the "*disposition* of nondomestic waste." *See e.g.*, §§70-2-12(B)(21), (22) (providing authority to OCC to regulate "*disposition* of nondomestic wastes" in statutorily enumerated contexts) (emphasis added); *see also Leger*, 2019-NMCA-033, ¶17. Sections 70-2-

[1] Random House Unabridged Dictionary (2d Ed.), available at https://www.dictionary.com/ (last visited Oct. 14, 2024).

12(B)(15), (21), and (22) provide no statutory authority for the Commission to regulate the "*generation*" of "nondomestic waste" and any attempt by the Commission to do so is ultra vires. *See* §§ 70-2-12(B)(21), (22); *see also City of Santa Fe ex rel. Santa Fe Police Dep't v. One Black 2006 Jeep*, 2012-NMCA-027, ¶13, 286 P.3d 1223 (Cannot read language into a statute that does not appear in the statute).

It follows that to the extent WEG's Application and proposed rule, or portions thereof, rely upon Commission authority to regulate the "*generation*" of produced water or nondomestic waste, such proposed regulation is outside the Commission's statutory authority. *See* §§ 70-2-12(B)(15), (21), (22). The Commission, instead, may enact or amend its rules only in a manner consistent with its authority over the "*disposition, handling, transport, storage, recycling, treatment, and disposal* of produced water," and "disposition of nondomestic waste," as expressly and unambiguously provided for in Sections 70-2-12(B)(15), (21), (22), respectively. The Commission may not act to regulate the "*generation* of PFAS-contaminated produced water," as WEG proposes because doing so is clearly outside the express statutory authority of the agency. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm.*, 2009-NMSC-013, ¶ 5, 206 P.3d 135 ("[a]n agency may not create a regulation that exceeds its statutory authority").

B. Produced water is not a "nondomestic waste" and any attempt to redefine produced water as part of the current rulemaking is procedurally and legally improper.

Although unclear, it appears that WEG's Application melds and then, subsequently, uses the terms "produced water" and "nondomestic waste" interchangeably for purposes of its proposed amendments. *See* Application at pg. 3. To the extent that WEG is attempting to implicitly or explicitly re-define or re-frame produced water as either a waste or "nondomestic waste" through this rulemaking process, any such attempt is legally and procedurally improper. *See* 19.15.3.9(B) NMAC (requiring public notice for rulemaking and enumerating contents of

public notice, mandating amongst requirements citation to specific legal authority for rulemaking and any proposed changes/addition to rules). Both the Oil and Gas Act and the Produced Water Act define "produced water" as "a fluid that is an incidental byproduct from drilling for or the production of oil and gas." § 70-13-2(B); § 70-2-33. Meanwhile, New Mexico law defines "nondomestic waste" as "waste associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas . . . but does not include . . . produced waters." *See* NMSA 1978, § 74-9-43(A) (2001) (emphasis added); *accord* §§ 70-2-12(B)(21), (22).

The October 4, 2024, Notice of Public of Meeting and Public Hearing ("PFAS Public Notice"), issued pursuant to 19.15.3.9(B) NMAC, identified Case No. 23580 as "Rules to Address PFAS" in the following specific subparts of various existing OCD rules, including: 19.15.2, 19.15.7, 19.15.14, 19.15.16, and 19.15.25. *See* PFAS Public Notice at pg. 1. Nowhere in the Public Notice is there any reasonable notice to the public that this rulemaking addresses, redefines, or reframes the legal definition of "produced water." *See id*.; *see also* § 70-13-2(B). Thus, any attempt to redefine or reframe "produced water" under the Commission's regulations through this rulemaking has not been properly noticed.

Second, reframing or redefining "produced water" as a "nondomestic waste" also would conflict with the statutory definition under both the Oil and Gas Act and the Produced Water Act. In enacting the 2019 Produced Water Act, the legislature could have defined "produced water" as a waste but chose not to do so. *See* § 70-13-2(B) (retaining the Oil and Gas Act's definition of "produced water" as a "byproduct"). Likewise, at that time, the legislature could have amended the existing definition of "nondomestic waste" to no longer exclude produced water. *See* § 74-9-43(A). However, the legislature elected to define "produced water" as a "byproduct," not a

"waste" and opted to leave the existing definition of "nondomestic waste" in place, a definition that expressly excludes produced water. *See Williams v. Ashbaugh*, 1986-NMCA-073, ¶ 7, 906 P.2d 263 (It is assumed that legislature knows of existing laws and "what it is doing" when it enacts new laws, and the failure to change existing law is presumed to be intentional).

Thus, the legislature's decision not to redefine "produced water" as nondomestic waste and not to remove the exclusion for produced water from the definition of "nondomestic waste" was intentional and the Commission has no authority to rewrite the definition of produced water through this rulemaking. *See* § 70-2-12. It follows that WEG's proposed amendments to Commission rules 19.15.2, 19.15.7, 19.15.14, 19.15.16, and 19.15.25 cannot have the practical result or legal outcome whereby produced water is treated as a nondomestic waste by the Commission.

C. In its Application, WEG insinuates that the Commission should adopt its proposed amendments because Colorado recently adopted similar amendments but this fails to consider the correct scope of an agency rulemaking or recognize that Colorado's approach required substantial legislative action.

WEG's Application asserts that in 2022, "Colorado updated chemical disclosure and reporting requirements for the oil and gas industry . . . and adopted comprehensive PFAS safeguards." Application at pg. 4. However, Colorado's amendments occurred by legislative action—Colorado House Bills 22-1345 and 22-1348, repsectively—not agency rulemaking. *See* Colorado House Bill 22-1345 (Entitled, "Concerning measures to increase protections from [PFAS] Chemicals") (effective July 1, 2024), attached herein as **NMOGA Exhibit B**; *see also* Colorado House Bill 22-1348 (Entitled, "Concerning the enhanced oversight of the chemicals used in oil and gas production . . .") (effective July 1, 2024), attached herein as **NMOGA Exhibit C**.

Unlike legislative action, when an agency—such as the Commission—acts through rulemaking, the agency is constrained by the agency's rulemaking procedures, enabling act, and enumerated powers. *See Rivas v. Board of Cosmetologists*, 1984-NMSC-076, ¶3 ("The legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed"); *accord Family Dental Ctr. v. Board of Dentistry*, 1982-NMSC-020, ¶ 9, 97 N.M. 464, 641 P.2d 495 (When agency goes beyond its statutory authority in promulgating rules, the rules will be treated as a nullity); *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 5. Anything Colorado did or failed to do in its most recent legislative action is irrelevant to the present rulemaking, which cannot exceed the Commission or the OCD's powers, as enumerated in Section 70-2-12(A)-(B). Any regulatory modifications that the Commission seeks to adopt must fit squarely within the OCD/Commission's enumerated powers, lest these amendments "be treated as a nullity." *Family Dental Ctr.,* 1982-NMSC-020, ¶ 9.

II. WEG Exhibit 1, Proposed Amendments to Various Existing Commission Regulations

D. WEG proposes new definitional terms in 19.15.2 NMAC, many of which are confusing, technically inaccurate, or extraneous and, therefore, should either be rejected or revised before adoption by the Commission.

WEG's Application proposed amendments that would include the following new definitional terms: (1) "chemical"; (2) "chemical disclosure list"; (3) "downhole operations"; (4) "PFAS Chemicals"; (5) "Trade secret"; (6) "Undisclosed chemicals"; and (7) "Well site." To the extent the Commission amends 19.15.2, as WEG's Application requests, any amendments to regulatory definitions should be well-defined, technically accurate, circumscribed to the present rulemaking, and limited to terms necessary and used in the proposed amendments. Absent such parameters, the Commission risks introducing unnecessary ambiguities and technical impossibilities into the regulations through the proposed amendments.

- **"Chemical,"** WEG proposes adding a definition for "chemical" to 19.15.2 as follows: "any element, chemical compound, or mixture of elements or chemical compounds that has specific name or identified, including a Chemical Abstracts Service number." Application at Exhibit 1, pg. 1.

As further outlined in the written testimonies of Janet Anderson, PhD ("Dr. Anderson") and Stephen Richardson, PhD ("Dr. Richardson"), such a definition of "chemical" is circular and confusing, because it includes in the definition the very word it attempts to define—"chemical." Secondly, WEG's proposed changes to the term "chemical" are technically inaccurate, as WEG's definition is not the generally accepted scientific definition of "chemical." Moreover, the present rulemaking—consistent with the PFAS Public Notice—addresses PFAS *specifically*, not every indiscriminate "chemical" used in hydraulic fracturing fluids. Moreover, WEG does not utilize the term "chemical"—however defined—anywhere in context of its proposed amendments. Because the term "chemical" is not used in context in WEG's proposed amendments, the suggested definitional language standing by itself has little to no meaning and serves no purpose.

The Commission should not adopt WEG's confusing and technically inaccurate definitional term, which also lacks any contextual application in the proposed modifications to the regulations. Instead, the Commission should adopt the more precise definition of "PFAS"—discussed below in regard to WEG's proposed definition for "PFAS Chemicals"—for which this rulemaking was noticed and for which the definition has been applied in-context throughout the proposed rule modifications.

- **"PFAS Chemicals,"** WEG provided the following definition: "a perfluoroalkyl or polyfluoroalkyl substance with at least one fully fluorinated carbon atom."

As Dr. Anderson and Dr. Richardson testify, WEG's prosed definition is (1) technically incorrect for the purposes of this rulemaking because it captures and includes PFAS that are not known to be used in oil and gas operations, and is (2) overly broad and not a regulatory

definition that can reasonably be effectuated in the context of the proposed amendments. Likewise, WEG's proposed definition for PFAS is not the definition adopted in either federal regulations or those of multiple other states that regulate PFAS.

First, the use of "Chemicals" in "PFAS Chemicals" is redundant as PFAS are in and of themselves chemicals. Thus, the definitional term should simply be "PFAS" without more.

Second, perfluoroalkyl or polyfluoroalkyl substances encompass thousands of substances, many of which have nothing to do with oil and gas and instead are used in contexts far outside this rulemaking, such as in food packaging, household products, biomedical devices, personal care products, and pharmaceuticals. ("There are thousands of different PFAS, some of which have been more widely used and studied than others").[2] Compounds with single fully fluorinated carbons—as WEG suggests should be included in its definition of PFAS—are not known to be used in oil and gas. Accordingly, the Commission would be attempting to regulate substances not known to be used in oil and gas and, thus, outside of the agency's regulatory purview, *e.g.*, PFAS most commonly used in pharmaceuticals. This is unnecessarily over-inclusive and nonsensical.

Third, WEG's definition is inconsistent with the definition of PFAS that has been adopted in regulations under both federal law and in several other states. Specifically, the Toxic Substances Control Act ("TSCA"), which regulates the manufacture, production, and inventory of chemicals and chemical mixtures to protect human health and the environment, has defined PFAS as "substances with two or more sequential fully fluorinated carbons." *See* 15 U.S.C. §2601 *et seq.* (1976). The Commission should therefore align the definition of PFAS in the proposed rules with those already in existence and which align with scientific guidance on PFAS.

[2] *See* EPA, "Our Current Understanding of the Human Health and Environmental Risks of PFAS," available at, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last visited Oct. 8, 2024).

Such harmony will ensure regulatory consistency and reduce regulatory ambiguities and confusion. Moreover, defining PFAS to include only those substances "with two or more sequential fully fluorinated carbons" properly excludes compounds not relevant to oil and gas operations and that are not properly the subject of this rulemaking.

Fourth, and importantly, the Commission should include a definition of "intentionally added PFAs," to be defined as follows: "PFAS that are deliberately added during the manufacture of a chemical product to serve an intended function in the final product." The addition of "intentionally added" is needed to properly capture the intended scope of this rulemaking, which is a prohibition on the knowing or intentional use of PFAS-containing hydraulic fracturing fluids. As the EPA has acknowledged, PFAS have been and continue to be found in a variety of substances, materials, and products, including, but not limited to, public drinking water; biosolids, *i.e.*, fertilizer from wastewater treatment plants used in agriculture; biomedical devices; food packaging; household products, such as cleaning products, carpeting, and other fabrics; consumer goods, such as clothing; amongst others.[3] In fact, a 2023 United States Geological Survey ("USGS") study estimated that "at least 45% of tap water could [contain] one or more PFAS," including water from both private wells and public supplies.[4] Because the use of PFAS is ubiquitous, it is conceivable that PFAS could be detected in hydraulic fracturing operations, despite that given a hydraulic fracturing fluid additive did not contain PFAS simply because the source water used to conduct hydraulic fracturing unintentionally contained PFAS.

For example, if the water used in a hydraulic fracturing operation is from a water source that contains PFAS—i.e., it is among the estimated 45% of tap water supplies the USGS

[3] *See id.*
[4] *See* USGS, "Tap Water Study detects PFAS 'forever chemicals' across the US," available at https://www.usgs.gov/news/national-news-release/tap-water-study-detects-pfas-forever-chemicals-across-us (last visited Oct. 9, 2024).

estimates contains PFAS—then PFAS could end up downhole despite the fact that the hydraulic fracturing fluid did not contain any PFAS itself, and PFAS was not intentionally used as an additive to serve a purpose in hydraulic fracturing. As another example, if the hydraulic fracturing operation occurs near, next to, or on agricultural lands that have spread biosolids that contain PFAS, it is conceivable PFAS could be found downhole, again, despite the fact that hydraulic fracturing fluids did not contain any PFAS, and PFAS was not intentionally used as an additive to serve a purpose in hydraulic fracturing.

The proposed amendments must appropriately account for the pervasiveness of PFAS and avoid entangling the issue of background PFAS into this rulemaking, which only addresses a prohibition on the use of PFAS-containing hydraulic fracturing fluids for use in hydraulic fracturing operations. Including the definition of "intentionally added PFAS" properly adheres to the scope of this rulemaking and is also consistent with the Commission's regulatory authority under Sections 70-212(B)(21) and (22), which is limited to oil and gas operations.

- **"Chemical disclosure list,"** WEG includes this term in its proposed amendments and defines it as, "a list of all chemicals used in downhole operations at a well site."

Under existing 19.15.16.19(B), "the operator shall also complete and file with the FracFocus chemical disclosure registry a complete hydraulic fracturing disclosure within 45 days after completion, recompletion, or other hydraulic fracturing of the well." *Id.* It is unclear how, if at all, the "chemical disclosure list" WEG proposes in amended 19.15.16.19(B) is different from the "hydraulic fracturing disclosure" already required in the existing 19.15.16.19(B). Consequently, adding the new term, "chemical disclosure list" to 19.15.2.7 only creates regulatory ambiguity. The Commission should not include the amended 19.15.2 definition of "chemical disclosure list," as this term both creates regulatory ambiguity and is redundant of existing regulations mandating disclosure in the FracFocus chemical registry.

- **"Downhole operations"** is another proposed addition to the regulations for which WEG suggests the following definition: "oil and gas production operations that are conducted underground."

WEG's "downhole operations" definition is vague, unduly broad and, therefore, virtually meaningless as a result. As written, the definition of "downhole operations" captures activities far outside the scope of this rulemaking, which is concerned with PFAS-containing hydraulic fracturing fluids in hydraulic fracturing operations. For example, the definition as written could include running seismic or geophysical logs. Running seismic or geophysical logs are common activities "conducted underground" as part of "oil and gas production operations." Such activities, nevertheless, are obviously outside the scope of this rulemaking but would meet WEG's regulatory definition of "downhole operations." Removing the definition of "downhole operations" from 19.5.2.7 and simply replacing this term, in-context, in the applicable rules with "hydraulic fracturing" provides more precise regulatory language that captures only what is intended by the proposed amendments addressing PFAS.

- **"Trade secret"** is another term WEG proposes adding to 19.15.2.7.

The definition of "trade secret" is addressed below in relation to the discussion on WEG's amendments to 19.15.14.9 and 19.15.16.19. More generally, while WEG's proposed definition of "trade secret" is consistent with the definition under the New Mexico Uniform Trade Secrets Act (Sections 57-3A-1 to 57-3A-7), the Commission should reject the proposed addition of this definition to 19.15.2.7 because the Commission has no authority to enact regulations governing or defining trade secrets, the phrase is a legal term of art already defined under New Mexico law, and any changes to the Trade Secrets Act would necessitate a burdensome and unnecessary rulemaking amendment to update the Commission's definition.

- **"Undisclosed chemicals,"** WEG's amendments defined "undisclosed chemicals" as, "either chemicals that are listed without a Chemical Abstracts Service number in the FracFocus database pursuant to 19.15.16.19(B) NMAC, or if a safety data sheet lists ingredients that comprise less than one hundred percent of the whole chemical product, those chemicals that make up any unlisted portion of a chemical product on a safety data sheet."

NMOGA addresses the term "undisclosed chemicals" below in regard to 19.15.14.9 and 19.15.16.19 and recommends against including this term in amendments to 19.15.2.7 because the Commission has no authority to regulate additives in hydraulic fracturing fluid or to mandate disclosure—even indirectly—of trade secreted constituents in fracturing fluid. This proposal also unreasonably forecloses the use of highly effective, hydraulic fracture chemicals—even if they are not PFAS substances—just because they are not disclosed due to trade secret protections. This is unnecessarily over-inclusive and potentially runs afoul of the agency's mandate to prevent waste and protect correlative rights.

- "**Well site,"** is proposed to be defined as "the area that is disturbed by oil and gas operations within the boundary of the lease."

WEG utilizes the term "well site" only in its proposed amendments to 19.15.16.19(D) (requiring operators to provide a list of all chemicals used in hydraulic fracturing operations to a plethora of individuals and entities, separate and apart from any FracFocus disclosures). Because—as discussed below—NMOGA recommends rejecting *en toto* WEG's proposed amendments to 19.15.16.19(D), the only provision that utilizes the defined term "well site." Accordingly, NMOGA also recommends that the Commission reject amending 19.15.2 to include the proposed definition for "well site."

In summary, NMOGA recommends that the Commission reject WEG's proposed changes and the following definitional terms to 19.15.2.7 for the respective reasons articulated above: (1) "chemical"; (2) "chemical disclosure list"; (3) "downhole operations"; (4) "undisclosed

chemical"; and (5) "well site." On the other hand, NMOGA recommends that the Commission adopt its proposed definition for "PFAS," which is relevant to oil and gas operations; the generally accepted scientific term; and consistent with already existing regulations under federal law and in several states. Moreover, NMOGA also recommends the addition of the term, "intentionally added PFAS" to the regulations for clarity and to maintain the focus of this rulemaking, which is a prohibition on the use of PFAS-containing hydraulic fracturing fluids.

E. The Commission should reject WEG's proposed revisions that would unreasonably prohibit the use of "undisclosed chemicals," *aka* undisclosed additives, in hydraulic fracturing fluids because the OCC has no authority to regulate additives in hydraulic fracturing fluids and doing so would be unnecessarily over-inclusive and potentially runs afoul of the agency's mandate to prevent waste and protect correlative rights.

WEG's proposed revisions to 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 prohibit the use of hydraulic fracturing fluids in well completions, recompletions, or treatments that contain "undisclosed chemicals." *See, e.g.*, Proposed 19.15.7.16(A) (". . . the operator shall file a certification that no undisclosed chemicals or PFAS were used in the completion or recompletion of the well"). In support of its proposed amendment, WEG cites to Section 70-2-12(B)(15), which empowers the Commission "to regulate the disposition, handling, transport, storage, recycling, treatment, and disposal of produced water . . . ." *Id.* (emphasis added); *see also* Application at pg. 4 (". . . undisclosed chemicals [in hydraulic fracturing fluid] simply could not be used in New Mexico"). To be clear, Section 70-2-12(B)(15) empowers the Commission to regulate certain activities—"disposition, handling, transport, storage, recycling, treatment, and disposal, . . . during or for reuse in, the exploration, drilling, production, treatment or refinement of oil and gas"—related to "produced water." §70-2-12(B)(15) (emphasis added). Section 70-2-12(B)(15), however, makes no mention whatsoever of having authority to regulate additives, aka

the chemicals, in hydraulic fracturing fluid. *See id*. (emphasis added) (discussing only produced water as being within OCC purview).

A literal reading of Section 70-2-12(B)(15) provides no such authority for the Commission to regulate additives, aka chemicals—disclosed or undisclosed—in hydraulic fracturing fluid. *See id.; see Leger*, 2019-NMCA-033, ¶17 (plain language governs). Furthermore, WEG may not read into Section 70-2-12(B)(15) any language providing for the regulation of additives in hydraulic fracturing fluids. *See One Black 2006 Jeep*, 2012-NMCA-027, ¶13 (cannot read nonexistent language into statute). Instead, Section 70-2-12(B)(15) expressly limits the Commission's authority to "produced water." *See* §70-2-12(B)(15). Consequently, WEG's proposed regulatory amendments to 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 that seek to prohibit the use of "undisclosed chemicals" in hydraulic fracturing fluids regulates the additives in fracturing fluids, not produced water. Such regulation is wholly unsupported by the plain language in Section 70-2-12(B)(15). Because WEG's prohibition against "undisclosed chemicals" is unsupported by the clear-cut language circumscribing the Commission's powers, the Commission should reject WEG's invitation to amend 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 to prohibit the use of "undisclosed chemicals" in hydraulic fracturing fluid.

F. Likewise, the Commission should reject WEG's proposed amendments to 19.15.7.16, 19.15.14.9, and 19.15.16.19 to prohibit the use of "undisclosed chemicals" in hydraulic fracturing operations because such prohibition, as applied, nullifies the protections and purpose of the New Mexico Trade Secrets Act, which the OCC has no authority to nullify, and is otherwise contrary to public policy.

NMAC 19.15.16.19(B) currently mandates that "for a hydraulically fractured well, the operator shall . . . complete and file with the FracFocus chemical disclosure registry a completed hydraulic fracturing disclosure within 45 days after completion, recompletion, or other hydraulic

fracturing treatment on the well." *Id.* In other words, the existing regulations mandate the disclosure of hydraulic fracturing fluids—from completion, recompletion, or other hydraulic fracturing treatments—in the FracFocus chemical disclosure registry. *See id.* The FracFocus chemical disclosure registry is available to the public for free. The existing regulations at 19.15.16.19(B) further require that:

> the hydraulic fracturing disclosure shall be completed on a then current edition of the hydraulic fluid product component information form published by FracFocus and shall include complete and correct responses disclosing all information called for by the FracFocus form, provided that: (1) the division does not require the reporting of information beyond the material safety data sheet data as described in 29 C.F.R. 1910.1200; [and] (2) the division does not require the reporting or disclosure of proprietary, trade secret or confidential business information . . . *Id.* (emphasis added).

Accordingly, the FracFocus chemical disclosure mandate in 19.15.16.19(B) recognizes two narrow limitations on the scope of the disclosure: (1) any information beyond the safety data sheet at 29 C.F.R. 1910.1200, which is an extensive set of safety and occupational health disclosures, and (2) trade-secreted constituents in the hydraulic fracturing fluid. *See id*.

Relatedly, New Mexico law protects certain types of information as "trade secreted." *See* Trade Secrets Act (§§ 57-3A-1 to 57-3A-7). The New Mexico legislature has recognized the economic importance of trade secrets and under the Trade Secrets Act, a "trade secret" is protected from disclosure. *See* § 57-3A-2(B)(1)-(2). A "trade secret" can include all the following:

> information, including a formula, pattern, compilation, program, device, method, technique or process, that: derives independent economic value, actual or potential, from not being generally know to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. § 57-3A-2(D)(1)-(2).

Consequently, hydraulic fracturing fluids, composed of various additives, include a "formula, pattern, method, technique, [and/or] process," are maintained as secret, and are, therefore, trade secrets protected from disclosure under New Mexico law. *See id*. In practice, operators disclose nearly all constituents in a hydraulic fracturing treatment, in accordance with the 19.15.16.19(B), in the FracFocus chemical disclosure registry. Operators withhold only the name and/or concentration of a given constituent or additive in the hydraulic fracturing fluid used in each fracturing job if the constituent or concentration of it is trade-secreted and protected. *See* §57-3A-2(A)-(D). Nevertheless, an operator makes the required disclosure in FracFocus, redacting only the information that is trade secreted.

In this rulemaking, WEG initially proposes that the Commission mandate disclosure of all constituents—including trade secreted constituents—in FracFocus without exception:

> [i]n response to feedback from the [OCD], [WEG] has dropped the provision in its first application that required disclosure of all chemicals used downhole, including trade secret chemicals, in recognition that the [OCD] lacks authority to regulate [those] that hold trade secrets. Application at pg. 4 (emphasis added).

Because the Commission has no authority to waive claims or mandate disclosure of a trade secret, WEG was forced to amend its application. *See* August 23, 2024, Amended Application for Rulemaking (previously defined herein, as "Application"). *See also* §70-2-12 (B) (delineating authority of OCC and making no mention of trade secrets).

By comparison, in WEG's amended Application presently pending before the Commission:

> [WEG] includes [ ] provision[s] that prohibit[ ] the use of undisclosed chemicals in downhole operations. This provision does pose a jurisdictional problem for the [OCD] . . . Manufacturers and operators would not have to disclose any trade secrets . . . those

> undisclosed chemicals simply could not be used in New Mexico. *Id.* (emphasis added).

In other words, using slight-of-hand language in its amended Application, WEG no longer seeks to directly mandate disclosure of trade-secreted constituents in FracFocus. *See id.* ("Manufacturers and operators would not have to disclose trade secrets") (emphasis added). WEG, instead, indirectly mandates disclosure of all constituents in hydraulic fracturing fluid in FracFocus by proposing to prohibit the use of any "undisclosed chemicals" in hydraulic fracturing operations. *See id*. (". . . those undisclosed chemicals simply could not be used in New Mexico") (emphasis added).

Hydraulic fracturing fluids contain trade secreted information because the development of cutting-edge, next generation "formulas," such as "green fluids," takes both great time and expense. *See* §57-3A-2(D) (Trade Secret Act protects "formulas . . . method, technique, or process," *i.e.*, constituents in hydraulic fracturing formulas, as "trade secrets"). The legislature—by enacting the Trade Secrets Act—expressly recognized not only this time and effort, but also the "economic benefit" from the particularities of these fracturing "formulas" "not being generally known." § 57-3A-2(D). In accordance with this legislative directive, present day 19.15.16.19(D) exempts trade secreted constituents in fracturing fluids from disclosure in FracFocus. *See* 19.15.16.19(D) (". . . the division does not require the reporting or disclosure of proprietary, trade secret or confidential business information") (emphasis added); *see also* Commission Order No. R-13470-A.

Thus, to comply with WEG's proposed amendments to 19.15.7.16, 19.15.14.9, and 19.15.16.19, operators would need to disclose in FracFocus every confidential and proprietary constituent in their fracturing fluid without regard to legally applicable trade secret protections. *See* Application at pg. 4. Under WEG's proposal, failing to disclose every constituent would

prevent an operator from being able to obtain a permit to drill ("APD") in the future, even at unrelated well sites. *See* Proposed 19.315.14.10. Consequently, as applied, WEG's proposed revisions are a Hobson choice for operators, whereby operators must either (1) disclose trade secreted information in FracFocus because "undisclosed chemicals simply [cannot] be used in New Mexico," under its proposed amendments, as WEG concedes, or (2) be prevented from obtaining future permits to drill, deepen, or plug back wells. *See* Application at pg. 4; *see also* Proposed 19.315.14.10.

Such "choice" is no choice at all. WEG's proposed amendments to 19.15.7.16, 19.15.14.9, and 19.15.16.19, will require operators to either waive their trade-secret protections for their hydraulic fracturing formulas because no constituents can go undisclosed in FracFocus, or forego the use of highly effective, hydraulic fracture chemicals—even if they are not PFAS substances—just because they chose not to disclose them due to trade secret protections. *See* Application at pg. 4. WEG's proposal conflicts with the recognized protections afforded under the Trade Secrets Act, and, therefore, is contrary to public policy. *See Pincheira v. Allstate Ins*. *Co.,* 2007-NMCA-094, ¶ 34, 164 P.3d 982 (Noting there is a "strong public policy in New Mexico supporting the confidentiality of trade secrets").

Moreover, the most basic reading of Section 70-2-12(B)(1) to (22) evidences no Commission regulatory authority to require operators to waive trade secret protections for the constituents in their hydraulic fracturing formulas. *See* § 70-2-12(B)(1)-(22) (making not a single mention of trade secret). Likewise, the specifically enumerated Commission powers at Section 70-2-12(B)(21) and (22)—which WEG relies on for its proposed amendments to require full disclosure—are equally inapposite. *See* Application at pgs. 3-4 (WEG asserting OCC may

prohibit use of undisclosed chemicals under its enumerated powers in Section 70-2-12(B)(21), (22)).

Section 70-2-12(B)(21) provides the Commission with the power to "regulate the disposition of nondomestic wastes resulting from the exploration, development, or storage of crude oil or natural gas to protect public health." *Id.* (emphasis added). Similarly, Section 70-2-12(B)(22) empowers the Commission "to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment gas or the refinement of crude oil." *Id.* (emphasis added). As defined above, "disposition" means, "the disposal or discarding of something, the power to make decisions about . . . disposal." *See supra*, Part A.

However, WEG's proposed amendments at 19.315.14.10, 19.15.7.16, 19.15.14.9, and 19.15.16.19 have nothing to do with the "disposition of waste" and, instead, address operations relating to the production of oil and gas. Indeed, WEG's proposed definition of "hydraulic fracturing treatment," in 19.15.2.7 acknowledges that hydraulic fracturing is a production operation, not a disposal activity within the meaning of Section 70-2-12(B)(21), (22). *See* Proposed 19.15.2.7 (at definition for "hydraulic fracturing treatment"). WEG defined "hydraulic fracturing treatment" as ". . . a treatment expressly designed to initiate or propagate fractures in an underground formation [for] the production of oil and gas." *See* Proposed 19.5.2.7 (emphasis added). Sections 70-2-12(B)(21) and(22), both of which address disposal activities, provide no statutory authority to the Commission to regulate constituents in hydraulic fracturing fluids, especially with respect to production-related activities. *See* §§ 70-2-12(B)(21)-(22). The Commission cannot side-step its clearly enumerated statutory powers, which provide no basis to compel the waiver of trade secrets or face serious repercussions, including, OCC/OCD

compliance actions. A similar approach mandating full disclosure of hydraulic fracturing fluids, including trade secreted constituents, was previously proposed to the Commission and rejected. *See* Commission Order No. R-14753.

The Commission, therefore, should reject WEG's proposed amendments at 19.15.2.7 (defined the term "undisclosed chemical"), and 19.15.7.16, 19.15.14.9, and 19.15.16.19 (prohibiting use of "undisclosed chemicals in New Mexico").

G. The Commission should reject WEG's proposed amendments to 19.15.16.17, Completion Operations, Shooting, and Chemical Treatment of Wells, because they are imprecise, confusing, and contain terms that are generally not scientifically accepted.

WEG proposed a number of amendments to existing 19.15.16.17 NMAC, including the addition of four (4) subparts to Part A, each amendment is discussed in turn below.

1. WEG Proposed Rule at 19.15.16.17(A)(1)

WEG's proposed amended language at **19.15.16.17(A)(1)** provides:

> . . . diligence shall include but is not limited to verifying casing integrity and isolation of strata. This can include pressure testing in accordance with 19.15.25 NMAC, performing casing integrity logs, cement bond logs and other means determined necessary by the operator or required by the division.

Should a well integrity event occur, industry standard practice is to verify casing integrity. NMOGA takes no issue with this proposal. However, WEG's language stating, "isolation of strata" should be further refined to state, "isolation of target strata" to represent the geologic conditions more accurately and precisely during hydraulic fracturing operations on oil and gas wells. Thus, NMOGA recommends that the Commission adopt 19.15.16.17(A)(1), but replace the term "strata" with the further modified term "target strata."

2. WEG Proposed Rule at 19.15.16.17(A)(2)

In **19.15.16.17(A)(2)** WEG proposes the following language:

> (2) If damage from the shooting, fracturing or treating of a well has the potential to impact surface or groundwater, the operator will test for all chemicals disclosed in previous downhole operations and will use a third party, verified laboratory to conduct any in appropriate testing necessary to verify any potential impact. The testing shall include all chemicals used in the well and may also include but is not limited to PFAS, chemicals listed in 20.6.2. NMAC and chemicals listed in 19.15.29.11.A.(5)(e) NMAC. The division can elect to request more robust sampling than what is proposed by the operator if deemed necessary due to the nature of the potential chemicals. Proposed 19.15.16.17(A)(2).

There are several issues with the language WEG proposes in 19.15.16.17(A)(2). First, "potential to impact" is vague and ambiguous. "Potential" creates an amorphous standard for when action to address contamination or a release is triggered. Likewise, WEG does not define "impact" and no such definition is provided elsewhere in OCD regulations. Accordingly, it is unclear exactly what issues may or may not constitute an "impact" requiring further operator action, as opposed to an issue requiring no action.

Consequently, this language should be revised to read as follows, ". . . has the reasonable probability to contaminate surface water and groundwater." "Reasonable probability" provides a more definitive standard triggering when action to address contamination or a release should occur. Moreover, "reasonable probability" is the standard applied in Water Quality Control Commission ("WQCC") regulations governing groundwater contamination events. *See e.g.,* 20.6.2.1203 NMAC ("With respect to any discharge from any facility of oil or other water contaminant, in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property"); *see also* 20.6.2.3103 NMAC (Utilizing "reasonable probability" to require further sampling in some circumstances). Accordingly, modifying WEG's proposed language, to "reasonable probability" (1) utilizes a standard that is already enacted and has already been applied in various contexts by the WQCC and (2) aligns

and makes OCC regulations consistent with the WQCC regulations on groundwater contamination*, i.e.*, addressing the same concern.

Second, WEG's rule proposes that "the operator will test for all chemicals disclosed in previous downhole operations. *See* Proposed 19.15.16.17(A)(2). Such proposal is both ambiguous and impossible. WEG's proposed term to "test" does not specify what media—soil, groundwater, surface water, etc.—to test. As written, this "testing directive" is ambiguous. Similarly, it's very likely impossible that an operator could "test for *all* chemicals disclosed in previous downhole operations." If chemicals were used downhole before *mandatory* disclosures, information about the chemicals used is likely no longer available. Furthermore, in places like the Permian Basin where oil and gas has been developed over multiple decades, the same well may have been vertically developed, recompleted, and then horizontally developed. Thus, it's highly unlikely that any operator would be able to determine *all* chemicals used downhole, over the many decade-life of the well with any amount of certainty. Rather than speculate as to *all* chemicals used downhole, in the scenario of a well integrity event, the following requirements should apply:

(1) operators should sample ground water and surface water;

(2) sampling should occur in the immediate vicinity of the well integrity event; and

(3) the analytes sampled for should be (i) those constituents characteristic of oil and gas production, such as total petroleum hydrocarbons (TPH), benzene, toluene, ethylbenzene, and xylenes (BTEX), as outlined in Table I of 19.15.29.12 NMAC and (ii) those constituents disclosed in the FracFocus chemical registry disclosure that are also found in 20.6.2.3103 NMAC.

WEG's proposed amendments also specify the particular constituents that should be

tested if a well integrity event occurred: "[t]he testing shall include all chemicals used in the well and may also include but is not limited to PFAS, chemicals listed in 20.6.2. NMAC and chemicals listed in 19.15.29.11.A.(5)(e) NMAC." *See* Proposed 19.15.16.17(A)(2). NMOGA agrees that the OCD should look to 20.6.2 NMAC, the WQCC regulations, for the groundwater constituents to analyze. But NMOGA recommends that rather than test for *every* constituent listed in 20.6.2 NMAC—many constituents of which are unrelated to oil and gas operations, such as e. coli (bacteria from improperly treated domestic wastewater), trichloroethene (solvent used by dry cleaners), DDT (pesticide), amongst others—that the operator test for those constituents identified in 20.6.2 that *also* overlap with the FracFocus chemical disclosure that the operator filed for the hydraulic fracturing treatment that caused the event. *See* **NMOGA Exhibit A**.

Requiring the operator to test for the overlapping constituents makes both practical and technical sense. From a practical perspective, testing for *every* constituent in 20.6.2 will not assist the operator or the OCD in quickly analyzing which, if any, constituents from the *hydraulic fracturing operation*, which is the event in issue, may have been released. *See id.* (emphasis added). In such case, testing and analysis would be tied up in *every* regulated constituent under 20.6.2 regardless of whether it is a constituent generally associated with oil and gas operations. *See id.* However, synchronizing testing to the constituents listed in 20.6.2 that are *also* listed in the FracFocus disclosures allows for more targeted sampling and analysis, which is critical in determining whether the well integrity event in issue has a reasonable probability to contaminate ground or surface water, or endanger human health, thereby, making good technical sense.

Third, the Commission should not require sampling for those chemicals listed in

19.15.29.11.A(5)(E). 19.15.29.11.A(5)(E) which are irrelevant to the present rulemaking. 19.15.29.11.A(5)(E) is concerned with *remediation* requirements, not investigational sampling as is contemplated by 19.15.16.17(A)(2). Similarly, 19.15.29.11.A(5)(E) references additional sampling and remediation requirements *only "if* the constituent [in question] appears on 40 C.F.R. §261.24." *See* 19.15.29.11.A(5)(E) (emphasis added); *see also* 40 C.F.R. §261.24 (Resource Conservation and Recovery Act (RCRA) provisions governing characteristic hazardous waste). Meaning, further sampling is required only *if* the prescribed circumstances—"the constituents [in question] appear in 40 C.F.R. §261.24"—are *first* met. Section 40 C.F.R. § 261.24 constituents are potential "D-List" characteristic hazardous wastes largely associated with pesticides, not oil and gas operations. *See* 40 C.F.R. §261.24(a)-(b) (identifying p-Cresol and Lindane as potential waste characteristic for toxicity, if said constituents meet the concentrations for toxicity *after* conducting a Toxicity Characteristic Leaching Procedure ("TCLP") analysis). Operators should not be required to do investigational sampling and testing for RCRA D-list wastes in response to a well integrity event, whereby oil and gas *hydraulic fracturing chemicals*—not pesticide-related chemicals—were used and potentially released. *See* 40 C.F.R. § 261.24. If there is any concern about the release of D-List wastes, then any such concern will be and is properly addressed in remediation, which is already required by 19.15.29.11.A(5)(E). *See* 19.15.29.11.A(5)(E) (Delineating soil remediation requirements from oil and gas releases, requiring that "if the constituent appears on Table 1 of 40 C.F.R. 261.24(b), then that constituent shall be remediated according to 40 C.F.R. 261.24 ").

Fourth, the WEG amendments require the use of a "third party, verified laboratory to conduct the appropriate testing." *See* Proposed 19.15.16.17(A)(2). NMOGA recommends that the Commission reject the WEG-proposed language as written because it is not the generally

accepted language describing analytical capabilities and quality assurance/quality control ("QA/QC") procedures for a scientific laboratory. *See* **NMOGA Exhibit D** at pg. 20 (Dr. Richardson testimony on same). NMOGA supports the continued industry practice of using third-party, "certified"—not "verified"—laboratories for sample and analysis. Accordingly, NMOGA has proposed further revised, generally accepted language requiring the same below.

The Commission, therefore, should reject WEG's all-encompassing proposal to require indiscriminate sampling for *every* constituent in 20.6.2—regardless of whether it is a constituent regularly associated with oil and gas operations—and the chemicals listed in 19.15.29.11.A(5)(E), which are mostly pesticide-associated chemicals. *See* Proposed 19.15.16.17(A)(2)(emphasis added). Specifying (1) the media to be tested; (2) delineating the area to be tested; and (3) the constituents to be analyzed—tailoring sampling and analysis to those constituents associated with oil and gas and those regulated in 20.6.2—provides the level of specificity necessary for proper rulemaking and avoiding both regulatory overreach and ambiguity.

Given the discussion above and reasons therefor, NMOGA has revised WEG's proposed language at 19.15.16.17(A)(2). NMOGA recommends that the Commission reject WEG's proposed 19.15.16.17(A)(2) and, instead, adopt the following language that addresses sampling and testing:

> (b) the division may require the operator to test surface or groundwater within the immediate vicinity of the well integrity event and the division may require the operator to sample for the following contaminants:
>
> (i) all contaminants identified on Table I of 19.15.29.12, and as may be amended; and
>
> (ii) all chemicals disclosed in the FracFocus hydraulic fracturing disclosure in accordance with 19.15.16.19(B) NMAC and which are also identified as groundwater contaminants in 20.6.2.3103 NMAC, and as may be amended.

> (c) The operator must use an appropriately certified, third-party laboratory to conduct the commensurate sampling and analysis. **NMOGA Exhibit A** at Proposed 19.15.16.17(B)(b)-(c)).

3. WEG Proposed Rule at 19.15.16.17(A)(3)

WEG's proposed 19.15.16.17(A)(3) language states, "if it is deemed there is an impact to surface or groundwater the operator shall report the impact as a major release in accordance with 19.15.29 NMAC and respond according." Proposed 19.15.16.17(A)(3). As already discussed above, the term, "impact," is undefined in WEG's proposed amendments, imprecise, and not the generally accepted scientific terminology in such matters. Similarly, "deemed" is the incorrect language to use in this instance. *See* Proposed 19.15.16.17(A)(3).

Analytical sampling results—not specious supposing, *aka* "deeming"—should be the standard to determine both (1) if any further action is needed and (2) what that further action should be. Such sampling and analysis to determine next steps is also consistent with existing OCD regulations. *See* 19.16.29.7(A)(2)(d) (requiring sampling and analysis to determine whether given volume of release is "major" and next steps to remediate upon analysis demonstrating release is within definitional criteria of "major release").

The Commission should reject WEG's proposed language at 19.15.16.17(A)(3), which relies upon unscientific, unspecific standards to determine next steps. Instead, the Commission should adopt NMOGA's proposed language, discussed above in reference to 19.15.16.17(A)(2), which relies about scientific sampling and analysis to decipher and then dictate next steps.

4. WEG Proposed Rule at 19.15.16.17(A)(4)

At 19.15.16.17(A)(4), WEG proposes, "[i]f testing reveals the *presence* of PFAS or undisclosed chemicals, the Division may revoke authorization to operate upon consideration of whether the current operator or a previous well owners' operations contributed to the presence of

PFAS or undisclosed chemicals." *Id.* The multitude of issues related to WEG's various "undisclosed chemicals" proposals and the lack of Commission authority to directly or indirectly require disclosure of chemicals is previously addressed in NMOGA's Part E of this Pre-Hearing Statement and is not addressed again here but is incorporated by reference. *See supra*, Part E (discussing issues with WEG's proposals throughout amended rule aimed at prohibiting use of "undisclosed chemicals").

The *mere* "presence of PFAS or other chemicals" leading to follow-up regulatory action, that is revoking authorizations and other regulatory repercussions, is contrary to all established toxicology protocols. *See* **NMOGA Exhibit D** at pg. 13 (testimony of Dr. Janet Anderson, discussing central tenets of toxicology, including "the dose makes the poison," which requires an actual risk assessment). Adopting rules that are contrary to settled toxicology principles neither protects "public health and the environment" nor provides the necessary reasoned decision-making required of agencies, like the Commission. *See, e.g.*, §70-2-12(21) (providing Commission with delineated authority to protect "public health and the environment"). The Commission should <u>not</u> adopt arbitrary and capricious rules that are contrary to well-established principles of toxicology.

NMOGA instead proposes the following revised language to 19.15.16.17(A)(4) regarding both (1) how to determine if follow-on regulatory action is needed and (2) what action may be needed:

> If the division determines that the well integrity event caused a major release, as defined in 19.15.29 NMAC, then the operator shall report the release in accordance with 19.15.29 NMAC or has polluted, as defined in 19.15.30 NMAC, subsurface water then the operator shall abate the pollution in accordance with 19.15.30 NMAC as applicable. **NMOGA Exhibit A**, at Proposed 19.15.16.17(C).

NMOGA's proposed revisions to 19.15.16.17 are not only consistent with well-settled toxicology principles but also logically tie follow-on action to whether the well integrity event constituted a "major release" or created pollution of subsurface water under already enacted and enforced regulations in 19.15.29 and 19.15.30, respectively. *See id.* Likely, in the event of a well integrity incident, the *remedy* for such incident would be found in either 19.15.29 and/or 19.15.30. It follows then, the triggering action to require a remedy would also be found in 19.15.29 and/or 19.15.30. As such, NMOGA recommends that the Commission adopt its proposed revisions to 19.15.16.17(C) and reject WEG's.

5. WEG Proposed Rule at 19.15.16.17(D)

The final amendment to 19.15.16.17 that WEG proposes states, "[i]f completing, shooting, fracturing or chemical treating results in the well's irreparable injury the division may require the operator to properly plug and abandon the well and take any necessary actions to mitigate any resulting impacts." Proposed 19.15.16.17(D) (emphasis added). NMOGA recommends further revisions only to the last phrase in WEG's proposed 19.15.16.17(D).

As analyzed above, the Commission must act within its enumerated powers. *See generally*. §§70-2-12(A)-(B) (Commission/OCD powers). These powers are conferred on the Commission by grant of the legislature. *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 5, 206 P.3d 135 ("[a]n agency may not create a regulation that exceeds its statutory authority"). Any OCD follow-on action from a "well's irreparable injury" must, consequently, also be within the enumerated powers of the Commission/OCD. *See* §§ 70-2-12(A)-(B). Therefore, WEG's proposed language, "take *any necessary actions* to mitigate *any resulting impacts*" does not properly account for the Commission/OCD's enumerated powers. *See id.* Rather than be able to take "*any . . . actions"* the Commission/OCD is limited to taking only those actions within and

consistent with their enumeration of powers. *See* WEG Proposed 19.15.16.17(D) (emphasis added). As such, NMOGA suggests that the Commission/OCD not adopt WEG's language and, instead, adopt the following language: "[i]f the well integrity event from completing, shooting, fracturing or treating a well results in the well's irreparable injury the division may require the operator to properly plug and abandon the well and take any necessary actions to mitigate harm to human health, animal or plant life, or property." **NMOGA Exhibit A,** at Proposed 19.15.16.17(C) (emphasis added). NMOGA's language is properly limited to the legislatively granted powers outlined in Section 70-2-12, and should, thus, be the language adopted in a revised 19.15.16.17.

H. WEG's proposed amendment to 19.15.25.14 has not been properly noticed, introduces ambiguity, and should be rejected.

The PFAS Public Notice provides that "[WEG] proposes that the Commission amend its rule to prohibit the use of toxic [PFAS] and undisclosed chemicals in downhole operations." *See* PFAS Public Notice at pg. 1. The PFAS Public Notice then goes on to refer to 19.15.2 (definitional terms for oil and gas production); 19.15.7, 19.15.14, 19.15.16 (provisions for the hydraulic fracturing of oil and gas wells and disclosure of hydraulic fracturing fluids); and 19.15.25 (well plugging and abandonment). WEG's references to 19.15.2; 19.15.7; 19.15.14; and 19.15.16, all of which address hydraulic fracturing processes, certifications, and disclosures of fracturing fluids logically fit within a rulemaking "address[ing] PFAS." *See id.*; *see also e.g.*, 19.15.16.19(B) (requiring disclosure of chemical constituents used in hydraulic fracturing in FracFocus chemical registry). But WEG's after-thought inclusion of 19.15.25.14—which only covers the regulatory process for placing an oil or gas well into temporary abandonment—makes neither logical nor contextual sense in this rulemaking addressing fracturing fluid constituents and disclosure of those constituents. *See* PFAS Public Notice at pg. 1. Further, WEG provides no

further analysis in the body of its Application regarding its reasoning for including 19.15.25.14 as part of this scope-specific rulemaking, contrary to the rulemaking requirements. *See* 19.15.3.8 NMAC ("application to adopt, amend, or repeal any rule . . . shall include a brief summary of the proposed rule's effect"); *see also* NMSA 1978, § 12-8-4 (1969) (Petition for rulemaking must "adequately describe the substance of the proposed action . . . subjects and issues involved").

Secondly, WEG's proposed changes at 19.15.25.14 introduce ambiguity into the existing and explicit requirements in Part 25. Currently, 19.15.25.14(A) provides:

> [A]n operator may use the following methods of demonstrating internal casing integrity for wells to be placed in approved temporary abandonment. *Id.*

WEG proposes to amend 19.15.25.14(A), to add the underlined text, as follows:

> [A]n operator may use the following methods of demonstrating internal casing integrity, <u>for casing investigations, casing repairs and</u> for wells to be placed in approved temporary abandonment." Proposed 19.15.25.14(A).

As proposed, it is unclear what "casing investigation" means or constitutes. *See id.* WEG does not define "casing investigation" in its proposed 19.15.2.7 definitional terms section. *See* Proposed 19.15.2.7. "Casing investigation" is not used in context anywhere in the other Parts WEG proposes to amend. *See generally* Proposed 19.15.14,19.15.16. Similarly, "casing investigation" is not used in context in any existing regulations. Furthermore, WEG provides no analysis in its Application to explain the regulatory difference between a "casing integrity" test and a "casing investigation." as required in a rulemaking. *See* 19.15.3.8 NMAC; *see also* § 12-8-4. A plain language reading of the proposed, revised 19.15.25.14(A) is unclear as to all the following: (1) what constitutes a casing integrity test versus a casing investigation; (2) when, and under what circumstances, a casing integrity test versus a casing investigation would be required; and (3) how does the OCD determine which would be required.

Accordingly, WEG's proposed additional language to 19.15.25.14(A) creates ambiguous regulatory language where none previously existed. Because WEG's amendments to 19.15.25.14(A) were not properly noticed and create regulatory ambiguities, NMOGA, suggests that the Commission reject this change and avoid introducing ambiguities into an unambiguous regulation.

CONCLUSION

NMOGA supports a science-based prohibition on the use of PFAS—as defined in its Pre-Hearing Statement and in the testimonies of Drs. Anderson and Richardson—in the hydraulic fracturing of oil and gas wells in New Mexico. NMOGA additionally supports requiring operators of oil and gas wells to certify to the OCD that no PFAS-containing fracturing fluids have been used in the fracturing of the well. FracFocus, moreover, should continue to be the repository for chemical disclosures of hydraulic fracturing fluids, which currently provides and should continue to provide an express exemption from full disclosure for those constituents that are proprietary, business confidential, or trade secreted. NMOGA, however, to a large extent cannot support WEG's proposed amendments to the OCD regulations, as analyzed and discussed in NMOGA Pre-Hearing Statement. NMOGA, nevertheless, has proposed alternative revisions to WEG's Application to assist the Commission in addressing WEG's proposed amendments. NMOGA appreciates the opportunity to comment on this rulemaking.

NMOGA'S PRPOSED MODIFICATIONS, STATEMENT OF REASONS, AND PROPOSED EVIDENCE

As identified in its Introduction, NMOGA proposes various revisions to WEG's proposed amendments to 19.15.2, 19.15.7, 19.15.14, 19.15.16 AND 19.15.25 NMAC. Along with this Pre-Hearing Statement, NMOGA has submitted its proposed revisions in redline/strikeout format in NMOGA Exhibit ____. Each of these revisions in NMOGA Exhibit ____ is followed by a brief,

statement of some of the reasons for the proposed revisions. However, in further support of these necessary revisions, NMOGA intends to call the following witnesses:

NMOGA'S WITNESSES

Witness:	**Estimated Time:**
Stephen Richardson, PhD, PE, PEng Vice President Principal Engineer GSI Environmental	2.5 Hours

Stephen Richarson ("Dr. Richardson") is a Principal Engineer and Vice President at GSI Environmental and has twenty-two years of combined academic and consulting experience. His technical background and work experience is reflected in **NMOGA Exhibit D**. Dr. Richardson is familiar with the relevant portions of the existing rules that are the subject of this rulemaking and WEG's proposed revisions to the same. Dr. Richardson will provide the Commission with a review of WEG's proposed amendments, and will discuss, analyze, and elaborate on each of the proposed amendments; offer fact and other expert opinions supporting NMOGA's proposed modifications to WEG's amendments; address, and rebut any additional issues that may arise after the filing of this Pre-Hearing Statement or during a hearing on WEG's proposed amendments.

Witness:	**Estimated Time:**
Janet Anderson, PhD, DABT Vice President Principal Toxicologist GSI Environmental	2.0 Hours

Janet Anderson ("Dr. Anderson") is a Principal Toxicologist and Vice President at GSI Environmental, with fifteen (15) years of experience in toxicology, risk assessment, and risk

management. She is a recognized leader in unregulated and emerging chemicals, such as PFAS; 1,4 dioxane; and 1,2,3, trichloropropane. Her technical background and work experience is reflected in **NMOGA Exhibit E**. Dr. Anderson is familiar with the relevant portions of the existing rules that are the subject of this rulemaking and WEG's proposed revisions to the same. Dr. Anderson will provide the Commission with a review of some of WEG's proposed amendments, and will discuss, analyze, and elaborate on certain proposed amendments; offer fact and other expert opinions supporting NMOGA's proposed modifications to WEG's amendments; address, and rebut any additional issues that may arise after the filing of this Pre-Hearing Statement or during a hearing on WEG's proposed amendments.

NMOGA reserves the right to call rebuttal witness(es) upon a finding by the Commission that the testimony is solely offered for the purpose of rebuttal.

NMOGA'S HEARING EXHIBITS

NMOGA anticipates entering into evidence **NMOGA Exhibits A through E**, which contain numbered pages and have been provided with this Pre-Hearing Statement.

Respectfully submitted,

HOLLAND & HART LLP

By: 

Michael H. Feldewert
Adam G. Rankin
Cristina A. Mulcahy
Paula M. Vance
Julia Broggi
Post Office Box 2208
Santa Fe, NM 87504
505-998-4421
505-983-6043 Facsimile
mfeldewert@hollandhart.com
agrankin@hollandhart.com
camulcahy@hollandhart.com
pmvance@hollandhart.com
jbroggi@hollandhart.com

ATTORNEYS FOR THE NEW MEXICO OIL & GAS ASSOCIATION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Pre-Hearing Statement, as well as the referenced written direct testimony, was e-mailed to the following on October 21, 2024:

NM Oil Conservation Commission Hearings:
occ.hearings@emnrd.nm.gov

Oil Conservation Commission Clerk Sheila Apodaca:
Sheila.Apodaca@emnrd.nm.gov

Jesse Tremaine
Chris Moander
Assistant General Counsel
New Mexico Energy Minerals and
Natural Resources Department
1220 S. St. Francis Drive
Santa Fe, NM 87505
jessek.tremaine@emnrd.nm.gov
chris.moander@emnrd.nm.gov

Attorneys for New Mexico Oil Conservation Division

Daniel Rubin
Assistant Attorney General
NM Dept. of Justice
408 Galisteo St.
Santa Fe, NM 87501
505-537-4477
drubin@nmag.gov

Attorney for New Mexico Oil Conservation Commission

Tim Davis
Tim Davis
WildEarth Guardians
301 N. Guadalupe St., Ste. 201
Santa Fe, NM 87501
(205) 913-6425
tdavis@wildearthguardians.org

Attorney for WildEarth Guardians

Deana M. Bennett
Modrall Sperling
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800
deana.bennett@modrall.com

Jordan L. Kessler
125 Lincoln Avenue, Suite 213 Santa Fe, New Mexico 87501
(432) 488-6108
jordan_kessler@eogresources.com

Attorneys for EOG Resources, Inc.

Mariel Nanasi, Esq.
Executive Director
New Energy Economy
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com

Attorney for New Energy Economy

Mr. Nicholas R. Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
Telephone: (575) 441-3560
inspector@sunshineaudit.com

Individually

33269659_v2