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

IN THE MATTER OF PROPOSED AMENDMENT TO THE COMMISSION'S RULES TO ADDRESS CHEMICAL DISCLOSURE AND THE USE OF PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES AND 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**

WILDEARTH GUARDIANS' RESPONSE TO NMOGA'S MOTION TO EXCLUDE BROWN TESTIMONY AND EXHIBITS

This is a rulemaking proceeding before the New Mexico Oil Conservation Commission ("Commission" or "OCC"). The Commission has promulgated regulations applicable to rulemaking proceedings at 19.15.3 NMAC, and those provisions control the admission of evidence. *See Marker v. New Mexico Oil Conservation Commission* No. A-1-CA-37860, No. A-1-CA-38814 ¶21 4/19/2021) (nonprecedential) ("The Commission's rulemaking procedures are governed by the New Mexico Rules Act, *as well as the Commission's own procedural rules.*") (emphasis added).

In OCC rulemakings, "The commission *shall* admit relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious." 19.15.3.12(B)(2) (emphasis added). In New Mexico "shall" is a command. *See Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 53. ("The word 'shall' is ordinarily the language of command. And when a law uses 'shall', the normal inference is that it is used in its usual sense—that being mandatory.") (internal quotations and citations omitted); *see also* NMSA 1978, § 12-2A-4(A) (1997). ("'Shall' and 'must' express a duty, obligation, requirement or condition precedent.") Therefore, if testimony is relevant to the proposed rule, it must be admitted. The only other provision in the

OCC's rulemaking regulations that provides for the exclusion of testimony is for technical testimony that is not properly noticed. 19.15.3.12(B) NMAC. Because Dr. Brown's testimony is relevant and properly noticed, it must be admitted. Any arguments made by NMOGA under the New Mexico Rules of Evidence are not applicable to this motion, because the rules of evidence do not apply to OCC rulemaking hearings. 19.15.3.12(A).

Rulemaking proceedings have a more relaxed evidentiary standard than trial courts and administrative adjudications because rulemakings do not adjudicate individual rights. *See Earthworks Oil and Gas Accountability Project v. New Mexico Oil Conservation Commission* ("administrative action is "regulatory when it furthers the public interest under the state's police powers and adjudicatory when it is based on adjudicating a private right rather than implementing public policy). 2016-NMCA-055, ¶ 5. Rulemaking hearings are "intended to be inclusive, encouraging broad public participation." *New Energy Economy v. Vanzi* 2012-NMSC-005, ¶ 15. *See also Miles v. Bd. of Cnty. Comm'rs*, 1998-NMCA-118, ¶ 8, 125 N.M. 608. ("[T]he distinction between individualized fact-based deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication.")

Dr. Brown's testimony and exhibits are admissible in this proceeding because they are relevant to the proposed ban on PFAS and undisclosed chemicals in oil and gas downhole operations. Evidence is relevant if it "tends to establish a material proposition." *State v. Romero*, 1974-NMCA-015, ¶ 18, 86 N.M. 99. Dr. Brown's testimony and exhibits meet that standard, because his testimony establishes the need for chemical disclosure in order to protect the public

health and the environment, and the exhibits to his testimony extensively cite relevant, reliable sources like scientific studies and government reports.

Under the rules for OCC rulemakings and the Amended Prehearing Order, Guardians provided timely notice to the Commission of its intent to present testimony and exhibits. Because Guardians provided timely notice of Dr. Brown's testimony, and his testimony is relevant, it is admissible. NMOGA's motion must be denied.

1. Dr. Brown's testimony is relevant to this proceeding and is admissible.

Dr. Brown is a public health professional who spent years working on public health in the Pennsylvania oil and gas fields. His testimony describes the challenges of this public health work when there is a lack of chemical disclosure. Dr. Brown's professional work has included "analysis of the interactions between pathways of exposure and health." (WG Ex. 57 Bates 2196). He is one of the founders of the Southwest Pennsylvania Health Project ("Health Project") which has worked to protect the health of people living in areas of unconventional oil and gas development. *Id.* His testimony details the challenges posed by incomplete chemical disclosure to public health professionals who are giving guidance to those living near unconventional oil and gas development. *Id.* e.g. (Bates 2197, 2199).

Because there is not full chemical disclosure in New Mexico's downhole operations, it is not possible to know what PFAS may have been used in the state other than the ones that have been voluntarily disclosed on FracFocus. Therefore, NMOGA's argument that Dr. Brown's testimony lacks relevance because he discusses the health effects of only certain PFAS is not persuasive and misses the point of the need for full chemical disclosure. Dr. Brown encountered this same incomplete disclosure issue in Pennsylvania. *Id.* Bates 2199 ("It was not until 2011 that Pennsylvania required that hydraulic fracturing chemicals be reported to the state. Even then,

only partial information about chemicals in use was available to residents or their health providers.") This issue is at the heart of Guardians' proposed rule. In order to have a meaningful PFAS ban, full chemical disclosure is required. As long as gaps in reporting requirement prevent full chemical disclosure disclosure, regulators will not be able to enforce the ban, and the public and public health professionals will not know of potential exposures. *Id.* Bates 2201 ("Because industry was not required to disclose all chemicals used in the fracking process, the public health professionals working with the Health Project did not have the data needed to provide public health guidance to protect the communities in areas where fracking occurred.")

Dr. Brown does not need extensive knowledge of geology, climate, or the oil and gas industry to testify regarding his knowledge of the public health challenges posed by lack of chemical disclosure. His testimony regarding the public health challenges in situations where there is incomplete data is applicable to situations where chemical disclosure of oilfield chemicals is lacking, whether that is Pennsylvania or New Mexico. *Id.* Bates 2205 ("When there is no reliable information about chemicals used at an oil and gas site, you cannot characterize the risk.")

Guardians agrees that Pennsylvania's oil and gas regulations may differ from New Mexico's. However, NMOGA's argument about different regulations completely misses the point of why Dr. Brown's experience and testimony are relevant to this proposed rule. While Pennsylvania's regulations are not exactly the same as New Mexico's, one relevant trait the two states' laws share is that they do not require full disclosure of oilfield chemicals. Therefore, Dr. Brown's testimony about public health challenges posed by this lack of disclosure is relevant to the proposed rule.

Dr. Brown does not have to establish that the PFAS he references in his testimony have been used in New Mexico, because lack of chemical disclosure means no one knows which PFAS have been used in New Mexico. Gaps in chemical disclosure prevent regulators and the public from accessing this information. 19.15.16.19(B)(1) and (2) NMAC ("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 "the division does not require the reporting or disclosure of proprietary, trade secret or confidential business information[.]")

NMOGA's claim that the Commission will be prejudiced by considering Dr. Brown's testimony is also incorrect. First, his testimony is relevant and *shall* be admitted. 19.15.3.12(B)(2). Second, Oil Conservation Commissioners have specialized knowledge in the area in which they regulate. *See* NMSA 1978 § 70-2-4 ("The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue of education or training.") (OCD director is a member of the OCC) and § 70-2-5 (OCD director "shall" [] "by virtue of education and experience have expertise in the field of petroleum engineering.").[1] These experts will not be prejudiced by considering relevant testimony from an experienced public health professional that discusses the difficulties of risk assessment when there is incomplete data.

[1] In fact, on appeal "[s]pecial weight will be given to the experience, technical competence and specialized knowledge of the Commission." *Viking Petroleum, Inc. v. Oil Conservation Comm'n*, 1983-NMSC-091, ¶ 8, 100 N.M. 451. NMOGA's citation to *Proper v. Mowry*, 1977-NMCA-080, 90 N.M. 710, likewise misses the mark, because that case discusses motions in limine in the context of protecting a *jury* from prejudicial statements or questions. *Id.* ¶ 17

2. Conclusion

Dr. Brown's testimony and exhibits relevant to the proposed rule being considered by the Commission in this proceeding and therefore admissible. His testimony addresses the challenges faced by public health professionals in an environment of incomplete data caused by lack of chemical disclosure and contains extensive citations and exhibits. This testimony and the accompanying exhibits are relevant to the proposed rule that seeks to ban PFAS and require chemical disclosure. NMOGA's Motion to exclude Dr. Brown's testimony should be denied.

WHEREFORE, WildEarth Guardians respectfully requests that the motion be denied.

Respectfully submitted October 4, 2024 by:

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

Counsel for WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response was e-mailed to the following on October 4, 2024:

Hearing Examiner Felicia Orth
felicia.l.orth@gmail.com

NM Oil Conservation Commission Hearings:
occ.hearings@state.nm.us

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

Michael H. Feldewert
Adam G. Rankin
Julia Broggi
Paula M. Vance
Cristina Mulcahy
Holland & Hart, LLP
Post Office Box 2208
Santa Fe, New Mexico 87504
TEL: (505) 988-4421
FAX: (505) 983-6043
mfeldewert@hollandhart.com
agrankin@hollandhart.com
jbroggi@hollandhart.com
pmvance@hollandhart.com
camulcahy@hollandhart.com
Attorneys for NMOGA

Deana M. Bennett
Modrall, Sperling, Roehl, Harris, & Sisk P.A.
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800
deana.bennett@modrall.com
Attorney for EOG Resources, Inc.

Mariel Nanasi
New Energy Economy
300 East Marcy Street
Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com
Attorney for New Energy Economy