

**STATE OF NEW MEXICO  
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**

**NEW MEXICO OIL CONSERVATION DIVISION'S  
CLOSING ARGUMENT**

The New Mexico Oil Conservation Division (“OCD”) supports adoption of WildEarth Guardians’ application as amended in OCD’s Proposed Modifications. *See* OCD Exhibit 1. The Proposed Rules serve to protect public health, the environment, and fresh water resources by prohibiting the use of certain per- and polyfluoroalkyl substances (generally, “PFAS”) as additives in any downhole oil and gas operations. These substances are harmful to human health and are unnecessary for use as additives in oil and gas development or production. The Proposed Rules are proper expressions of the Commission’s enumerated authorities to regulate the use and treatment of produced water and nondomestic wastes and to protect public health and the environment.<sup>1</sup>

**I. STATUTORY AUTHORITY**

The Oil and Gas Act authorizes the Commission to “make and enforce rules, regulations and orders, and *to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.*”<sup>2</sup> Further, the Commission may make rules “to regulate the disposition, handling, [...] of produced water during [...] the exploration, drilling, production [...] of oil or gas[...] in a manner that protects public health, the environment and fresh water resources[.]”<sup>3</sup> The Commission may also “regulate the disposition of nondomestic wastes resulting from the exploration, development, production or

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<sup>1</sup> 1978 NMSA, §§ 70-2-11 and 70-2-12(B)(15), (21) & (22).

<sup>2</sup> 1978 NMSA, § 70-2-11 (*emphasis* added).

<sup>3</sup> 1978 NMSA § 70-2-12(B)(15)

storage of crude oil or natural gas to protect public health and the environment[.]”<sup>4</sup> Lastly, the Commission may “regulate the disposition of nondomestic wastes resulting from the oil field service industry [...] to protect public health and the environment[.]”<sup>5</sup> In this case, the Commission contemplates versions of a proposed rule that will prohibit the use of defined chemical compounds as additives in the drilling, development, and production of oil or natural gas. The additives have the potential to impact human health, the environment, and fresh water resources through the release of drilling or completions fluids or present as waste products in produced water.

## **II. THE PROPOSED RULES**

The Proposed Rules are rules of general applicability that reflect the state’s interest in the protection of public health, the environment, and fresh water resources. The Proposed Rules must be clear and detailed enough for operators to understand their obligations and the consequences of non-compliance while providing the necessary tools for OCD to respond to qualifying events without unnecessarily burdening the regulator with protected information. As the state agency charged with protection of human health, the environment, and fresh water resources, OCD must be able to implement and enforce the rules consistent with the Commission’s and constituent expectations.

## **III. FINDINGS OF FACT**

The parties generally agreed on the structure and substantial content of the Proposed Rules, and the following factual findings are supported by the record:

1. PFAS, as broadly defined, encompass tens of thousands of chemical compounds.<sup>6</sup>
2. A limited set of PFAS compounds are known to be harmful to human health.<sup>7</sup>

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<sup>4</sup> 1978 NMSA § 70-2-12(B)(21)

<sup>5</sup> 1978 NMSA § 70-2-12(B)(22)

<sup>6</sup> Testimony of Dr. Court Sandau, OCD Ex. 10 and transcript p. 141, November 13, 2024.

<sup>7</sup> Testimony of Dr. Erik Martin, transcript p. 212, November 13, 2024; Testimony of Dr. Janet Anderson, transcript p. 58, November 15, 2024.

3. The presence of PFAS as an additive in oil and gas downhole activities creates a potential pathway of exposure to humans.<sup>8</sup>
4. A very limited number of PFAS compounds are industrially relevant – less than 300 compounds as determined by the OECD.<sup>9</sup>
5. Different types of PFAS compounds are reasonably expected to behave differently in the environment and within the human body.<sup>10</sup>
6. All three proposed definitions of PFAS will result in the prohibition of the use of more compounds than are known to cause toxicological harm to humans.
7. OCD’s proposed definition will result in the prohibition of use for 40-70 compounds.<sup>11</sup>
8. OCD’s proposed definition will evolve and expand with the field of study, prohibiting the use of any compounds identifiable through the described sampling methods.<sup>12</sup>
9. OCD’s proposed definition is inherently precautionary because it will cover all PFAS compounds for which the scientific community develops a standardized testing method.
10. Prohibiting the use of defined PFAS compounds from use as downhole additives will not negatively affect the exploration, development, or production of oil and gas, because the industry has phased out the use of PFAS.<sup>13</sup>

**IV. THE COMMISSION SHOULD ADOPT OCD’S VERSION OF THE PROPOSED RULE AS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SOUND POLICY FOR THE STATE OF NEW MEXICO.**

*A. Aspects of Guardians’ petition are overly broad, not supported by the record, and conflict with statute.*

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<sup>8</sup> Testimony of Dr. Erik Martin, transcript p. 214, November 13, 2024.

<sup>9</sup> Testimony of Dr. Court Sandau, OCD Ex. 10 and transcript p. 144, November 13, 2024.

<sup>10</sup> Testimony of Dr. Court Sandau, OCD Ex. 10 and transcript pp. 145-146, November 13, 2024.

<sup>11</sup> Testimony of Dr. Court Sandau, transcript p. 144, November 13, 2024.

<sup>12</sup> Testimony of Dr. Court Sandau, OCD Ex. 10 and transcript p. 155, November 13, 2024.

<sup>13</sup> NMOGA Ex. D, Self-Affirmed statement of Dr. Stephen Richardson p. 3.

Guardians proposes to ban the use of all undisclosed compounds. OCD does not oppose the principle or policy of this proposal. However, it is beyond the authority of the Commission to promulgate rules which contravene state statute. OCC does not have authority over trade secret protections generally.<sup>14</sup> Commission authority extends only to acquiring and accessing such potentially protected information where necessary for the protection of public health and the environment.<sup>15</sup> Where the Commission or Division acquires protected information, it then becomes responsible for the appropriate handling and protection of this information. Not only is the protection of trade secret information stated in the Uniform Trade Secrets Act, the legislature also directed agencies to withhold such proprietary information from public inspection.<sup>16</sup> It is the clear intent of the legislature that trade secret protections are beneficial. The Commission does not have the requisite authority to either compel disclosure of protected information to the public or to ban use of such compounds simply because it is marked as trade secret. PFAS, or other compounds that could impact water quality, may be appropriate as an exception, but that exception must be crafted by the body that created the original protection. This aspect of Guardians' proposal is appropriate for consideration by the New Mexico Legislature.

Further, Guardians' proposed definition of PFAS and prohibition on use of trade secret protected compounds ("undisclosed") is overly broad. Guardians' PFAS definition includes myriad compounds for which there is no administrative record to support a ban. The consensus of technical testimony was that PFAS was now extensively studied, and that only PFAS of certain characteristics are connected to toxicological harm to humans. There are thousands of PFAS compounds that fall within Guardians' definition which are not extensively studied for toxicological affects, however these compounds have not been studied because they are not reasonably suspected by the scientific community as having characteristics that may cause detrimental human health impacts.<sup>17</sup> Petitioner did not establish any technical basis that the vast suite of PFAS compounds are harmful to human health. Rather, the record demonstrates that different types of PFAS compounds behave

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<sup>14</sup> See 1978 NMSA § 70-2-1, et seq.

<sup>15</sup> 1978 NMSA, §§ 70-2-11 and 70-2-12(B)(15), (21) & (22).

<sup>16</sup> See 1978 NMSA §§ 57-3A-1 et seq, & 1978 NMSA § 14-2-1(F).

<sup>17</sup> Testimony of Dr. Court Sandau, OCD Ex. 10 and transcript p. 154, November 13, 2024.

differently in the environment and do not share core characteristics with the subset of PFAS compounds linked to human health effects.

Similarly, petitioner's proposal to ban the use of all undisclosed chemicals is overly broad and not supported by the record. Whereas petitioner argues for an expansive definition of PFAS to the broadest class of compounds – thousands of chemical compounds which share at least some characteristics – the proposed ban of undisclosed chemicals will apply to numerous compounds which have little or no relationship to any substance demonstrated in the record to have harmful toxicological effects. For instance, there is no record that the use of proprietary sand mixtures in oil and gas production activities may cause harm to human health or the environment. These numerous other compounds with trade secret protections were never addressed at hearing as harmful to human health. There is no record to support a ban on the downhole use of any compound other than PFAS, as it is proposed to be defined by the OCD.

Disclosure of trade secret protected information to the OCD should be limited to specific circumstances where OCD may demand disclosure as necessary. Handling of proprietary information creates a significant administrative burden requiring review, technical and legal analysis of its content, segregation from other records kept by the Division, and ultimately the responsibility to withhold such protected information from public inspection. This administrative burden is entirely appropriate and necessary, but only when the disclosures provide information necessary to inform an agency action. Guardians' scope of disclosures is overly broad. In most oil and gas development and production, trade secret compound information is simply unnecessary for the Division's review. In instances where proprietary information is necessary in response to a release or event involving the loss of well integrity, OCD already has authority to require disclosure of the proprietary information to the OCD. That authority will be preserved under the Division's proposed rule. In the context of a qualifying event, the information is necessary and useful to the Division and the Division will take necessary actions to review and handle the information. Guardians' proposal, however, requires disclosures that will not benefit the Division in the fulfillment of its duties.

*B. OCD's modifications are appropriately tailored, transparent and enforceable, and supported by the administrative record.*

OCD proposes modifications which prohibit the use of PFAS, which is defined in the broadest possible enforceable terms. OCD's definition recognizes that additional study is likely in the area of PFAS. This definition relies on the scientific community, rather than the judgment of hearing participants, to identify and develop testing methodologies for the compounds that are harmful to human health. OCD's proposal seeks only to prohibit the use of PFAS as defined, rather than asking the Commission to make sweeping policy decisions. Further, OCD's proposed rule is supported by substantial evidence and does not ask this Commission to ban the use of an unknown number of "undisclosed" chemicals which have no chemical relationship to PFAS and were not established at hearing as having any adverse impact on human health.

## **V. CONCLUSION**

The Commission has the statutory authority to adopt the Proposed Rules as modified by the Division. The Proposed Rules fulfill the Division's and Commission's commitment to protect public health, the environment, and fresh water resources. Accordingly, OCD respectfully requests that the Commission adopt the Proposed Rules as presented in OCD Exhibit 1 and as modified above.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading was mailed electronically on February 19, 2025 to:

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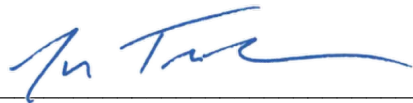
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