

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

**IN THE MATTER OF PROPOSED AMENDMENTS TO THE  
COMMISSION’S RULES TO ADDRESS CHEMICAL DISCLOSURE  
AND THE USE OF PERFLUOROALKYL AND POLYFLUOROALKYL  
SUBSTANCES IN OIL AND GAS EXTRACTION,  
19.15.2, 19.15.7, 19.15.14, 19.15.16, AND 19.15.25 NMAC**

**WILDEARTH GUARDIANS,**

**PETITIONER.**

**CASE NO. 23580**

**HEARING OFFICER’S REPORT**

**I. INTRODUCTION**

This matter comes before the New Mexico Oil Conservation Commission (“Commission” or “OCC”) upon a Petition filed on May 25, 2023, and an Amended Petition (Petition) filed on August 23, 2024 by WildEarth Guardians (“Guardians” or “WEG”) to adopt amendments to several existing regulations in Title 19, Chapter 15 – *Oil and Gas*. On June 3, 2024, the Commission issued an Amended Procedural Order identifying the undersigned as Hearing Officer and setting the dates for hearing, among other things.

The Commission hearing was held in hybrid fashion, both in person in Pecos Hall in the Wendell Chino Building in Santa Fe, and on a virtual platform, Microsoft Teams, from November 12 through November 15, 2024. Commission Clerk Sheila Apodaca certified that the Notice of Public Meeting and Public Hearing had been timely provided in accordance with all applicable law and regulation: published in the Albuquerque Journal and the New Mexico Register; posted on the Commission’s website and the Sunshine Portal; emailed to the Legislative Council, the New Mexico Economic Development Department, and all

persons on the Commission’s mailing list for rulemakings; and posted on the front door of the Oil Conservation Division field offices in Santa Fe, Aztec, Artesia, and Hobbs, New Mexico. See Substitute Hearing Officer Exhibit 1.

The hearing was video-recorded on the Teams platform, and transcribed in four volumes by James Cogswell of Veritext Legal Solutions. The highest number of participants in the room was approximately 35, on the platform approximately 57, and the hearing proceeded without notable technological or other disruption. Sheila Apodaca served as Commission Administrator, and Dan Rubin from the New Mexico Department of Justice served as Commission Counsel.

At the hearing, all interested persons were given a reasonable opportunity to submit data, views or arguments orally and in writing and to examine witnesses testifying at the hearing. Following an extended post-hearing process, this report, with attachments, is respectfully submitted to the Commission for reference during its deliberations at the March 11-12, 2025 Commission meeting.

## **II. LEGAL AUTHORITY**

The Commission is authorized to adopt regulations pursuant to the New Mexico Oil and Gas Act, NMSA 1978, Sections 70-2-11 and -12. Section 70-2-11 of the Act provides that the Commission “is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.”

Section 70-2-12.B of the Act provides that the Commission may make rules and orders for the purposes and with respect to the subject matter stated in this subsection:

....

(15) to regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water during, or for reuse in, the exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources;

....

(21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment; and

(22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act [Chapter 74, Article 6 NMSA 1978] as provided in Subsection E of Section 74-6-4 NMSA 1978.

### **III. STANDARD OF REVIEW**

Following adoption or repeal of any rule or amendment, the Commission's decision can be appealed to the New Mexico Court of Appeals by a party of record or by any person adversely affected. The Commission's decision will be upheld unless it is found to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978, § 70-2-12.2(C).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rinker v. State Corporation Commission*, 1973-NMSC-021, ¶ 5, 506 P.2d. 783. An agency’s findings can be found to be supported by substantial evidence even if inconsistent conclusions can be drawn from the evidence in the record. See *Trujillo vv. Emp’t Sec. Dep’t*, 1987-NMCA-008, ¶ 18, 734 P.2d 245.

A reviewing court will also consider whether a rule adopted by the Commission is so broad as to be unconstitutionally vague. See *Bokum Resources Corp. v. NM Water Quality Control Comm’n*, 1979-NMSC-090 (“Bokum’s most serious complaint is that the definition of ‘toxic pollutants’ in the regulations is unconstitutionally vague. We agree.”)

The Commission is required to adopt a clear statement of reasons (SOR) supporting its decisions in this matter. See 19.15.3.13 (C) NMAC; see also *Earthworks’ Oil & Gas Accountability Project v. NM Oil Conservation Comm’n*, 2016-NMCA-055, cert. denied. The parties have proposed SOR in support of their respective positions; the Hearing Officer and Commission Counsel will finalize the SOR following deliberations for discussion and adoption at a subsequent meeting.

#### **IV. PARTIES PROVIDING TECHNICAL TESTIMONY OR ENTERING AN APPEARANCE**

1. Petitioner WildEarth Guardians was represented by counsel Tim Davis

Witnesses testifying for Guardians included technical witnesses Attorney Dusty Horwitt, Engineering Professor Dr. John Spear, Public Health Toxicologist Dr. David Brown, and a fact witness, Journalist Melissa Troutman.

2. New Energy Economy (NEE) was represented by counsel Mariel Nanasi. NEE presented technical witness Chemist and PFAS Researcher Dr. Kristin Hansen.
3. The Oil Conservation Division (OCD or the Division) was represented by counsel Jesse Tremaine and Chris Moander. OCD presented technical witnesses Division Deputy Director Brandon Powell, Toxicologist Dr. Erik J. Martin, and Senior Chemist Dr. Court Sandau.
4. The New Mexico Oil and Gas Association (NMOGA) was represented by counsel Cristina Mulcahy and Adam Rankin. Witnesses testifying for NMOGA included technical witnesses Principal Engineer Dr. Stephen Richardson and Principal Toxicologist Dr. Janet Anderson.
5. Nicholas Maxwell of Hobbs appeared *pro se*.
6. Several oil and gas companies entered appearances but did not present witnesses: EOG Resources was represented by Jordan Kessler, Apache Corporation was represented by Dalva Moellenberg, PBEX LLC/EGL Resources was represented by Michael Feldewert, Deana Bennett was represented by Avant Operating LLC, and COG Operating/Concho Oil and Gas LLC was represented by Jaclyn McLean.

**V. MOTIONS TO STRIKE TECHNICAL TESTIMONY**

Pursuant to the prehearing order, and following receipt of one another's pre-filed witness testimony, several motions to strike some of that testimony were filed: NMOGA moved to exclude the direct and rebuttal testimony and exhibits of Dr. Hansen; NMOGA moved to exclude the direct testimony and exhibits of Dr. Brown and Mr.

Horwitt; and both NMOGA and Mr. Maxwell moved to strike the testimony and exhibits of Ms. Troutman. Apart from concluding that Ms. Troutman was more properly offered as a fact witness, the motions were denied by the Hearing Officer.

During the hearing, NMOGA moved to strike portions of Mr. Horwitt's rebuttal testimony. The portions challenged are shown in pink highlighting on NMOGA's markup of WEG Exhibit 94. The Hearing Officer admitted the rebuttal testimony with the caveat that the challenged portions were accepted as part of an offer of proof, based on her perception that in some of his statements Mr. Horwitt went beyond the scope of his expertise in his discussion. Certainly, he is an attorney and journalist with 20 years' experience researching the health and environmental impacts in oil and gas drilling, fracking, the use of PFAS in extraction, and the laws around fracking chemical disclosure. The testimony he is rebutting, however, is primarily toxicological, and I would urge the Commissioners to consider testimony from toxicologists when making toxicological findings.

More appropriately, Mr. Horwitt's rebuttal testimony could be understood as urging caution around the limits of the toxicological testimony: is it necessary or helpful for the Commission to conclude that "PFAS are exceptionally toxic" when some types are not, and there are thousands without available toxicity data? His point is that those PFAS for which significant toxicological data exists "are exceptionally toxic," so the public has reason to be concerned about the others. Urging caution, and tying that point to a proposal to require chemical disclosure is one thing; exploring the details of toxicity levels, chemistry, and risk to public health as a non-toxicologist is another.

## **VI. PUBLIC COMMENT**

Opportunities for public comment were offered multiple times throughout the hearing, with the first day devoted entirely to public comment as long as necessary, and public comment invited twice each subsequent day, at 8:30 a.m. and 4:30 p.m. Although no requests for interpretive services or other accommodation were made prior to hearing, the morning session on November 15 included a professional interpreter, Ashley Ortiz, to provide translation between English and Spanish; a few persons who commented in earlier sessions had their statements interpreted from Spanish by a colleague.

Non-technical comment was offered on each of the hearing by:

(Day 1) Norman Gaume, Kathleen McCloud, Nancy Yuen, Amy Christian, Nodiah Brent, Savanna Woods, Paul Pino, Dr. Lauri Costello, Rev. Erica Lea-Simka, Stephen Schmidt, Caroline Knapp, Gail Robin Seycel, Elaine Cimino, Michael Sweringen, Evalyn Bemis, Sofia Jenkins-Nieto, Feleecia Guillen, Ennedith Lopez, Zephyr Jaramillo, Jonathan Juarez, Stephany Aguirre, Briana Reviere, Michael Dolce, Miriam Luebano, Megan Taros, Miguel Acosta, Mick Nickel, Stephen Meyer, Mykayla Trujillo, Pat Leahan, Robin Schuett-Hames, Nell Burrus, Rayellen Smith, Xavier Barraza, Bianca Sopoci-Belknap, Mary Martinez-White, Nancy Singham, Rachel Carson, Rev. Ryan Tate, Anna Rondon, Susan Schuurman, and Raife Juarez;

(Day 2) Ian Colburn, Kristen Gamboa, Ed Ashmead, Catana Lopez, Elizabeth Holland, Paula Claycomb, Dr. Robert Bernstein, Barbara Wisoff, Representative Patricia Roybal

Caballero, Byron McMillan, Ruth Striegel, Peggy Baker, Sam Hitt, Bobbe Besold, Glenn Wikle, Lara Adler, and Dianna Woods;

(Day 3) Sr. Joan Brown, Rev. Todd Wynward, Rev. Clara Sims, Penelope Mainz, Abby Shepard, Jeanette Iskat, Anita Amstutz, Alejandria Lyons, Giuliana Funkhouser, Sr. Marlene Perrotte, Avis Kerns, Dr. Christina Castro, Sarah Knopp, Dr. Stephen Conrad, Dr. David Munoz, Wendy Volkmann, Beth Enson, Eileen O'Shaughnessy, Chris Peskuski, Lauro Silva, and Stephanie Camfield;

(Day 4) Carlos Matutes, Shelley Mann-Lev, Kathleen Burke, Dr. Emma Mincks, Rebecca Sobel, Nika Beauchamp, Dr. William Athas, Laura Watchempino, José Villegas, Colin Cox, Senator Harold Pope, Jr., Mandy Sackett, Caitlyn Bizzell, Kayley Shoup, Krystal Curley, Deirdra Velasquez, Sandra Stulberg, Hazel James, Antoinette Reyes, Senator Jeff Steinborn, Aria Attoidom, Polly Bungum, Frankie Baca-Lucero, Randon Norine, and Seneca Johnson.

Written public comment was also received prior to and throughout the hearing, and is in the administrative record.

## **VII. MATTERS FOR DELIBERATION**

I have attached the parties' final rule proposals for ease of reference: Guardians', OCD's and NMOGA's. Guardians is joined by NEE in its final briefing and proposal.

The affected sections are 19.15.2.7, 19.15.7.16, 19.15.14.9, 19.15.14.10, 19.15.16.17, 19.15.16.19, and 19.15.25.14.

Counsel for the parties have provided extensive argument and substantial evidence for the Commission's consideration. I will attend the deliberations in the event there are

questions about the record, and I appreciate the Commission's attention and engagement in this rulemaking.

Respectfully submitted,

original signed by  
Felicia L. Orth, Hearing Officer