STATE OF NEW MEXICO
NEW MEXICO OIL CONSERVATION COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS TO 19.15.2, 19.15.5, 19.15.8, 19.15.9, AND 19.15.25 NMAC

CASE NO. 24683

APPLICANTS' RESPONSE TO NMOGA AND IPANM'S JOINT MOTION TO STRIKE

Preliminary Statement

Applicants Western Environmental Law Center, Citizens Caring for the Future, Conservation Voters New Mexico Education Fund, Diné C.A.R.E., Earthworks, Naeva, New Mexico Interfaith Power and Light, San Juan Citizens Alliance, and Sierra Club (collectively "Applicants") oppose the New Mexico Oil and Gas Association and Independent Petroleum Association of New Mexico's ("IPANM") (collectively, "Oil and Gas Associations") Joint Motion to Strike. First, Applicants properly used a Notice of Errata to correct errors in their April 25, 2025 Revised Application for Rulemaking ("Revised Application"), amendments that do not materially change the Revised Application. Second, assuming *arguendo* the two challenged amendments are not properly errata, the proposed amendments fall within the scope of the notice of the rulemaking and therefore are properly before the Oil Conservation Commission ("Commission"). *See* 1.24.14.15.C NMAC; *Independent Petroleum Ass'n of N.M. v. N.M. Env't Improvement Bd.,* A-1-CA-40546, mem. op. ¶¶ 28-32 (N.M. Ct. App. Nov. 27, 2024) (nonprecedential) [found at 2024 WL 4905168] ("*IPANM").* The Motion to Strike of the Oil and Gas Associations -- who suffer no prejudice from the two amendments -- should be denied.

Argument

I. APPLICANTS' NOTICE OF ERRATA IS PROPER

The purpose of Applicants' Revised Application is to amend Commission rules to prevent oil and gas operators from failing to fulfill their responsibility to properly plug and

abandon their oil and gas wells, thereby obligating the State of New Mexico to finance the operator's liability through the Reclamation Fund and undertake the work to plug and abandon the wells. Applicants' proposed rules help prevent this scenario by providing the Oil Conservation Division ("OCD") a regulatory means to identify oil and gas operators that present a higher risk to the State at the point of operator registration and well transfer and by authorizing OCD to deny high risk registrations and transfers.

In both Applicants' initial June 24, 2024 Application for Rulemaking ("Initial Application") and Revised Application, Applicants' proposed the same regulatory framework in Sections 19.15.9.8 and 19.15.9.9 NMAC to achieve this goal by (1) requiring oil and gas operators to disclose and certify certain information that indicates a higher risk to the State (found at 19.15.9.8.B and 19.15.9.9.B NMAC) and (2) authorizing OCD to deny operator registration and well transfer applications when the information from an operator represents an unreasonable risk to the State (found at 19.15.9.8.C and 19.15.9.9.C NMAC).

The Oil and Gas Associations object to two errata in Applicants' notice that were mistakenly omitted from their Revised Application. Applicants omitted provisions that an operator registration under proposed 19.15.9.8.C NMAC and a well transfer under proposed 19.15.9.9.C NMAC may be denied if the applicant "is out of compliance with federal and state oil and gas laws and regulations in each state in which the applicant does business." Errata at 1-2. Both omissions were inadvertent, and their addition does not materially alter Applicants' Revised Application or prejudice the Oil and Gas Associations.

First, as to well transfers, in Applicants' Initial Application at 19.15.9.9.C(5) NMAC and Revised Application at 19.15.9.9.C(6) NMAC, Applicants propose a well transfer may be **denied** if:

> . . . **the certification or disclosure requirements set forth in Subsection B of this Section** disclose a substantial risk that the new operator would be unable to satisfy the plugging and abandonment requirements of 19.15.25 NMAC for the well or wells the new operator intends to take over.

(Emphasis added.) The certification and disclosure requirements in proposed 19.15.9.9.B NMAC **include** certification and disclosure of an operator's "compliance with federal and state oil and gas laws and regulations in each state" in which the operator does business. Therefore, under the amendments as proposed by Applicants **since June 2024**, a well transfer may be denied based on an operator's compliance with federal and state oil and gas laws in states where the operator operates. Expressly including compliance with federal and state oil and gas laws and regulations clarifies OCD's authority as already proposed by Applicants, **but does not change that authority**. The additional language is clerical and not substantive or material in any way. The amendment is properly noticed as an errata.

Second, since Applicants' submission of their Initial Application, Applicants' have proposed requiring a new operator applying for a well transfer to certify "compliance with federal and state oil and gas laws and regulations in each state" in which the operator does business, among other required information. Initial Application at Apps' Ex. 1-D at 19.15.9.9.B NMAC. Relatedly, in the following subsection, Applicants proposed a provision that would permit OCD to deny a well transfer application if the new operator's information disclosed a substantial risk that it would be unable to satisfy its plugging and abandonment requirements. *Id.* 19.15.9.9.C(6) NMAC. Applicants' Revised Application maintained these proposals in 19.15.9.9 NMAC but, importantly, added the same disclosure and certification requirements in the context of applications for operator registration at 19.15.9.8.B NMAC.[1] Revised Application at Apps'

[1] Most disclosure requirements for operator registration in proposed 19.15.9.8.B NMAC **already** provide the basis for OCD denial of a registration. *See* **existing** 19.15.9.8.B NMAC.

Ex. 1-D at 19.15.9.8.B NMAC.

In both the operator registration and well transfer contexts, Applicants' intention was not to create a mere paperwork exercise by requiring oil and gas operators to simply certify their compliance with federal and state oil and gas laws in other states: the whole point was to give OCD discretion to use this information to deny operator registration or transfer applications that posed too much risk to the State.

In fact, in Applicants' Initial and Revised Applications, Applicants provided summaries notifying the parties of their intent to propose amendments to Sections 19.15.9.8 and 19.15.9.9 NMAC, which would function as described above. The Initial Application states:

> *19.15.9 NMAC-Well Operator Provisions:* Applicants propose to amend 19.15.9.9 NMAC to add new operator certification and disclosure requirements to applications for change of operator and to add new criteria under which the OCD Director or designee **may deny change of operator applications based on compliance history** or risk that the transferred wells could be orphaned.

Initial Application at 2-3 (emphasis added). In their Revised Application, Applicants similarly notified the parties of the intent of their proposals at 19.15.9 NMAC, stating:

> **19.15.9 NMAC-Well Operator Provisions**
>
> - Applicants clarified in a new 19.15.9.8.B NMAC **that operators registering** with OCD must provide the information upon which OCD **may deny registration**, currently set forth in the existing 19.15.9.8.B NMAC.

Revised Application at 3 (emphasis added). Applicants' summaries represent not only Applicants' understanding of the effect their rule proposals would have, but also put the parties on notice of Applicants' intent that their proposals would authorize OCD to **deny** an application for operator registration and well transfer based on the information required, including an operator's "compliance with federal and state oil and gas laws and regulations in each state" the operator does business in.

Applicants' Notice of Errata corrects the Revised Application according to Applicants'

express effect with respect to well transfers and intended effect with respect to operator registration for which all parties have notice. Accordingly, Applicants' Notice of Errata does not materially amend the Revised Application, is clerical in nature, and is proper.

Errata (or errors) is a general legal term of art, and the particular context within which the term is employed informs how it should be understood and its proper use. For example, the Federal Rules of Civil Procedure permit deponents in civil matters to file an "errata sheet" or "errata page," to make corrections, "in form or substance," to a deposition transcript. Fed. R. Civ. P. 30(e)(1)(B); Errata Sheet, Black's Law Dictionary (12th ed. 2024).

In this case, the context is a state rulemaking before Commission. Regarding errors, the Oil and Gas Association points to a provision in the Oil and Gas Act which provides:

> An application for an administrative hearing, re-hearing or de novo hearing before the oil conservation division or commission will be considered to be materially amended if the amendment is made for a purpose other than to correct:
> (1) typographical errors; or
> (2) clerical errors.

NMSA 1978, § 70-2-39(B). While it appears that Section 70-2-39(B) does not apply to this Commission rulemaking,[2] this provision contrasts a typographical error (such as a misspelled word) with a clerical error. Applicants' omission in 19.15.9.8.C(2) and 19.15.9.9.C(2) NMAC in their Revised Application are properly understood as clerical errors, and do not materially amend the Revised Application because the omissions were inadvertent errors rather than errors of legal reasoning or determination. While the Oil and Gas Associations attempt to circumscribe the meaning of errata to "text corrections" (and not clerical error), the challenged amendments do

[2] Section 70-2-39(A) sets forth fees for six types of administration hearings, including a $500 fee "for an administrative hearing, re-hearing or de novo hearing before the division or commission." NMSA 1978, § 70-2-39(A)(5). This rulemaking is not "an administrative hearing, re-hearing or de novo hearing before the division or commission" to which the $500 fee applies and is the same type of hearing then referenced in Subsection B.

not materially change Applicants' proposals.[3]

II. APPLICANTS' PROPOSED CHANGES FALL WITHIN THE SCOPE OF THE NOTICE OF HEARING

Assuming *arguendo* the two challenged amendments are not properly errata, they nonetheless fall squarely within the scope of the public notice for this rulemaking and therefore are properly offered at this point in the rulemaking or, for that matter, at any other point in the rulemaking. Commission rulemaking is necessarily an iterative process based on the evidence that comes into the hearing, negotiations among the parties before and during the rulemaking, and other circumstances. Indeed, when the parties file their direct and rebuttal testimony in this matter, each party – including Applicants – may propose modifications to the proposed rule. 19.15.3.11.B(2) NMAC; Notice of Public Hearing for Proposed Rulemaking, NM Register, vol. XXXVI, issue 10, May 20, 2025 ("Notice of Hearing"); Prehearing Order ¶¶ 2(d), 4. Proposing **substantive** modifications to Applicants' Revised Application is part and parcel of this rulemaking proceeding.

As the New Mexico Court of Appeals recently explained in *Independent Petroleum Association of New Mexico v. New Mexico Environmental Improvement Board,* amendments to a proposed rule are authorized so long as they fall within the scope of the noticed rulemaking. *IPANM,* A-1-CA-40546, ¶¶ 29-32. In that appeal, IPANM challenged certain rule provisions adopted by the Environmental Improvement Board as outside the scope of the hearing notice.

[3] The Oil and Gas Associations point to a footnote in *Abernathy v. Wandes*, 713 F.3d 538, 544, n.5 (10th Cir. 2013), an inapposite criminal case in which the government filed an "errata sheet" seeking to substantively alter and withdraw certain legal positions the government had taken. Applicants' omission in 19.15.9.8.C(2) and 19.15.9.9.C(2) NMAC was inadvertent error, the correction of which does not substantively alter or materially amend the Revised Application.

The court disagreed, relying on 1.24.25.14.C NMAC.[4] That rule provides that an "agency may adopt, amend or reject [a] proposed rule" and clarifies that amendments to a proposed rule must fall within the scope of the noticed rulemaking and only amendments that exceed the scope may require a new rulemaking proceeding. *Id.* ¶ 30. Rule 1.24.25.14.C NMAC provides in part:

> . . . Amendments to a proposed rule may fall outside of the scope of the rulemaking based on the following factors:
>
> **(1)** any person affected by the adoption of the rule, if amended, could not have reasonably expected that the change from the published proposed rule would affect the person's interest;
>
> **(2)** subject matter of the amended rule or the issues determined by that rule are different from those in the published proposed rule; or
>
> **(3)** effect of the adopted rule differs from the effect of the published proposed rule.

The Notice of Hearing in this matter, which was reviewed and agreed to by all parties, provides that the proposed rules "set forth requirements for transfer of wells to better protect the state against transfer of wells that could become orphaned" and "modify well transfer requirements at 19.15.9 NMAC to better protect against risks to the state against wells becoming orphaned . . . ." Notice of Hearing at 1. The Notice of Hearing explains how a copy of the proposed rules, which include proposals relating to operator registration, can be obtained.

Applying the three factors above, all confirm that Applicants' two changes to proposed 19.15.9.8.C and 19.15.9.9.C NMAC fall well within the scope of the Notice of Hearing in this matter: (1) The Oil and Gas Associations could have reasonably expected the changes. In fact, there is no change to the provisions regarding well transfer and the Oil and Gas Associations were on notice of the changes to the provisions regarding operator registration, (2) the subject

[4] Rule 1.24.25 NMAC sets forth default procedural rules for rule hearings for agencies that have not adopted their own procedural rules. 1.24.25.6 NMAC. The *IPANM* court relied on these rules because neither the applicable statute nor rules governed the authorized scope of amendments to a proposed rule. *Id.* ¶ 30.

matter of the proposed rules is the same, and (3) there is no different effect on operators for the change to the well transfer provisions and the effect on operators for the change to the operator registration was noticed. In fact, the amendments challenged in the *IPANM* case, which the court allowed, were far more significant than those challenged here. *See IPANM,* A-1-CA-40546, ¶ 23.

Under the Oil and Gas Associations' formulation, no party would be allowed to offer any substantive amendments during this rulemaking. That is not how Commission rulemakings work. Nor should they. As long as parties' proposed amendments are within the scope of the hearing notice and there is substantial evidence in support, substantive amendments are proper.

III. APPLICANTS' ERRATA DOES NOT PREJUDICE THE OIL AND GAS ASSOCIATIONS

The Oil and Gas Associations claim Applicants' errata "disguise a material change" that "alter the fundamental nature of the proceeding." Mot. at ¶¶ 8, 12. This hyperbolic claim is belied by the history of the rule proposals. There is **no change** to the well transfer provisions: Applicants' proposal always authorized OCD to deny a well transfer based on the new operator's compliance with federal and state oil and gas laws and regulations. Similarly, it was always the intent that the proposal authorize OCD to deny an operator registration on the same basis, as Applicants indicated in their Initial and Revised Applications. The Notice of Errata was filed on June 2, 2025 – nearly two months before pre-filed written direst testimony is due, three months before pre-filed written rebuttal testimony is due, and over four months before the beginning of the hearing. The Oil and Gas Associations have more than sufficient time to mount an adequate defense against the operator registration proposal.[5] There is no prejudice.

[5] The Oil and Gas Associations reference *Eldorado at Santa Fe, Inc. v. Cook*, 1991-NMCA-117, ¶ 21, 113 N.M. 33, another inapposite case, in which a water user published public notice of an application to drill a replacement well, but the notice incorrectly stated the legal description of the well location. The error was not corrected via a subsequent public notice nor were the

Conclusion

Based on the foregoing, Applicants respectfully request the Hearing Officer deny the Oil and Gas Associations' Joint Motion to Strike.

Respectfully submitted,

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affected parties affected afforded the opportunity to evaluate and respond to the application. On these facts the court held that the omission prevented the State Engineer from granting the application to drill a replacement well. This individual well permit case has no application to the rulemaking here, where Applicants identified their omissions months before direct and rebuttal testimony are due and the hearing will be held.

Earthworks, Naeva, New Mexico Interfaith Power and Light, San Juan Citizens Alliance, and Sierra Club

Certificate of Service

I certify that on June 21, 2025, I served a copy of the foregoing pleading to the following via email:

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