STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
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

NEW MEXICO OIL CONSERVATION DIVISION'S RESPONSE TO NEW MEXICO OIL AND GAS ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO'S MOTION TO DISMISS

NOW COMES The New Mexico Oil and Conservation Division ("OCD") filing this Response to The New Mexico Oil and Gas Association ("NMOGA") and Independent Petroleum Association of New Mexico's ("IPANM") Motion to Dismiss, and in support thereof would show that 1) the proposed amendment to 19.15.8.9(A) NMAC is within the sound purview of OCD's regulation of operators in the State of New Mexico, and 2) the proposed amendments to 19.15.8.9(D), (E), and (F) NMAC and the proposed addition of 19.15.2.7(M)(2) NMAC are in accordance with the enabling provisions of the New Mexico Oil and Gas Act, N.M. Stat. Ann. 1978 ("NMSA 1978") Sections 70-2-1 through -44 (also referred to herein from time to time as "the Act").

I. INTRODUCTION

1. The Motion to Dismiss is improper because it fails to establish as a matter of law that the proposed rule, if adopted, would constitute an arbitrary and capricious agency action. The relationship between the agency's purpose and the proposed rule must be presented and tested at hearing, and a dismissal would prevent consideration of factual and technical testimony and public participation. The rulemaking hearing provisions allow for any person or member of the public to provide sworn or unsworn testimony before the Commission. 19.15.3.12 NMAC.

Thus, the Movants' Motion to Dismiss is improper and, if granted, would prevent public input on the proposed rules and the OCC's ability to consider all relevant evidence at the rulemaking hearing in this matter.

2. Additionally, the OCD is authorized to regulate operators' acquisitions of operations under the Act, and, in fact, has so regulated operators under the Rules. The proposed rules do not attempt to regulate the acquisition of real property interests, as stated by Movants, but, rather, the acquisition and/or transfer of operatorship for wells unless certain preconditions are met, as the OCD already does and as provided for by the Legislature and enabling statutes.

3. Finally, the proposed rules are authorized under the Oil and Gas Act, and the Legislature has specifically allowed OCD to require single well financial assurance in an amount determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance. N.M. Stat. Ann. § 70-2-14(A). These amounts are in addition to blanket bonding provisions and are in accordance with the provisions of the Oil and Gas Act. *Id.* To carry out its duties, the Legislature empowered OCC and OCD "to make and enforce rules, regulations, and orders, and to do whatever may be reasonably necessary to carry out the purpose of [the Act], whether or not indicated or specified in any section [of the Act]." N.M. Stat. Ann. § 70-2-11(A).

4. Further, as the record of hearing will show, abandoned wells present substantial risk of releases which potentially impact public health, the environment, and water, which directly relates to the Division's enumerated powers. N.M. Stat. Ann. § 70-2-12(B)(21 & 22).

II. ARGUMENT AND AUTHORITIES

A. Legal Standard and Burden of Proof

5. According to the Oil and Gas Act, the Oil Conservation Division has "jurisdiction and authority over all matters relating to the conservation of oil and gas," and it has "jurisdiction,

authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas." N.M. Stat. Ann. § 70-2-6. It is well established that the Legislature can properly delegate rulemaking power to administrative agencies through an enabling statute, and the Legislature has delegated concurrent rulemaking authority under the Oil and Gas Act to OCD and OCC. Section 70-2-11; *New Energy Econ., Inc. v. Shoobridge,* 2010–NMSC–049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (per curiam).

6. Movants incorrectly claim that the proposed rules are arbitrary and capricious. *See* NMOGA Motion to Dismiss at p.7. An agency's action is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe,* 2005–NMSC–006, ¶ 17, 137 N.M. 161, 108 P.3d 1019 (internal quotation marks and citation omitted); *McDaniel v. N.M. Bd. of Med. Exam'rs,* 1974–NMSC–062, ¶ 11, 86 N.M. 447, 525 P.2d 374 (describing agency action as arbitrary and capricious when it is "willful and unreasonable ..., without consideration and in disregard of facts or circumstances." The party challenging a rule adopted by an administrative agency carries the burden of showing that the rule is arbitrary or capricious by demonstrating that " 'the rule's requirements are not reasonably related to the legislative purpose[.]' " *Old Abe Co. v. N.M. Mining Comm'n,* 1995–NMCA–134, ¶ 10, 121 N.M. 83, 908 P.2d 776. "When reviewing an agency's rulemaking decision [the reviewing court] uses a deferential standard: 'An agency's rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement.'" *Earthworks' Oil & Gas*

Accountability Project v. New Mexico Oil Conservation Comm'n, 2016-NMCA-055, ¶ 11 (quoting *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.,* 2012–NMCA–106, ¶ 7, 288 P.3d 902).

7. Further, reviewing courts "will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Starko, Inc. v. N.M. Human Servs. Dep't, 333P.3d 947 (N.M. 2014) citing Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 1995–NMSC–062, ¶ 11, 120 N.M. 579, 904 P.2d 28. Thus, Movants must show, with the requisite deference to OCD, that the proposed rules are not reasonably consistent with the Oil and Gas Act, are not fundamental policies within OCD's statutory function, and are without a rational basis. As set out further below, Movants fail to overcome that strong burden, since the proposed rules regarding the regulation of operators and financial assurance are fundamental policies within OCD's statutory function that have a rational basis and are reasonably consistent with the Oil and Gas Act.

B. The OCC and OCD May Regulate Transfers and Acquisitions of Operations

8. The OCC and OCD already regulate the transfer of operations from one operator to another. 19.15.9.8-9 NMAC. The existing rule holds in part that OCD may deny registration of an operator if certain conditions are not met by an operator, including compliance with other rules, certain involvement or ownership of non-compliant entities, and registration to do business in New Mexico. *Id.* Thus, OCD already regulates and may deny the acquisition of operatorships for non-compliant entities. Movants incorrectly attempt to conflate operating wells with ownership of real property interests. NMOGA Motion to Dismiss at p. 7-8. The proposed rules do not attempt to regulate ownership interests of oil and gas properties, but, rather, who may operate the properties,

as OCD already does. In short, use of the term "acquisition" in the proposed rule refers to the registration of a well to a particular operator or the transfer of registration of a well between operators.

9. An operator is defined as "a person who duly authorized, manages a lease's development or a producing property's operation, or who manages a facility's operation." 19.15.2(O) NMAC. Notably, this definition does not require an ownership interest in real property to be considered an operator in New Mexico. This is because a person need not own any property to be an operator in New Mexico, and the regulation of acquisition of operatorship for an oil and gas property does not equate to regulation of acquisition of real property interests, as Movants incorrectly state.

10. The transfer of operatorship or the registration as a new operator in New Mexico necessarily involves the acquisition of operatorship and is already regulated by OCD. 19.15.9.8-9 NMAC. Such regulation is soundly within the purview of OCD, and its "authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas." N.M. Stat. Ann. § 70-2-6. While an operator might incidentally own real property interests in a well, those ownership interests would not be affected by a denial of a person's acquisition of operator status in New Mexico.

11. Movants are simply mistaken in their statement that the proposed rule would condition ownership of oil and gas leases or wells on OCD's preclearance. Rather, the proposed rule would continue to regulate who may operate wells in New Mexico based upon that person's record of compliance with the Oil and Gas Act and OCD's regulations.

C. The Proposed Rules Are In Accordance with the Requirements for Regulation of Financial Assurance for Wells.

12. The Legislature has specifically allowed OCD to require single well financial assurance in an amount determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance. N.M. Stat. Ann. § 70-2-14(A). The same statute also allows OCD to "establish categories of financial assurance after notice and hearing." *Id.* Notably, the Oil and Gas Act also states that in "establishing categories of financial assurance, the oil conservation division shall consider…the cost of plugging similar wells and *such other factors as the oil conservation division deems relevant*." *Id.* (emphasis added).

13. While the statute requires the establishment of certain categories of financial assurance, including blanket plugging financial assurance, no part of the statute mandates that every well shall be eligible for blanket plugging financial assurance. "[…] Such categories shall include a blanket plugging financial assurance, which shall be set by rule in an amount not to exceed two hundred fifty thousand dollars ($250,000), a blanket plugging financial assurance for temporarily abandoned status wells, which shall be set by rule at amounts greater than fifty thousand dollars ($50,000), and one-well plugging financial assurance in amounts determined sufficient to reasonably pay the cost of plugging the wells covered by the financial assurance. […]" N.M. Stat. Ann. 70-2-14(A). The proposed rule establishes categories of financial assurance consistent with the categories required in statute and is supported by the consideration of factors consistent with the statute. Movant's objection to the proposed rule is based on reading in to this provision a guarantee that all wells must be eligible for blanket plugging financial assurance. This does not comport with the plain language of the statute. Further, even to the extent this section of statute were considered ambiguous as to whether every well was eligible for blanket plugging financial assurance, the structure and categories of financial assurance

defined in statute indicates a clear intent to require single well financial assurance for certain wells, and delegates the establishment of such categories to the OCD and OCC.

14. Thus, the Legislature has provided great deference and breadth to OCD in enabling it to set categories of financial assurance by utilizing factors that OCD deems relevant. *Id.* As evidenced by the direct testimony and rebuttal testimony of Brandon Powell that has previously been filed in this matter, and is hereby incorporated by reference, the financial assurance required by the proposed rule for marginal wells is directly tied to the costs for OCD to plug such wells. Testimony of Brandon Powell. Mr. Powell's testimony also makes clear that marginal wells are those that are likely to become inactive or abandoned sooner than other, higher-producing wells, and, thus, will likely require plugging by industry or the State in the near future. *Id.*

15. Relatedly, the Motion to Dismiss is improper at this juncture, since evidence will be presented to the OCC, and the public will be given an opportunity to provide input, that will inform the multitude of factors that establish the need for financial assurance relating to marginal wells and the mandate from the Legislature that OCD set categories of financial assurance by utilizing factors that OCD deems relevant. N.M. Stat. Ann. § 70-2-14(A). If the proposed rules were dismissed prior to hearing all the evidence relating to the proposed rules, OCD would be deprived of its opportunity to present evidence of the factors and data that underly its support for the proposed marginal well rules. Further, the OCC would be deprived of hearing that evidence and the associated cross-examination and counter-evidence before deciding whether to implement the proposed rules. This would limit the OCC's ability to make its decision based upon the totality of the relevant evidence.

16. Granting Movants' Motion to Dismiss, in whole or in part, would run counter to the Legislature's enablement of OCD to set categories of financial assurance relating to the cost of plugging wells, as well as any other factors OCD deems relevant to setting categories and amounts of financial assurance. It would also deprive the parties from presenting all of the relevant evidence at the rulemaking hearing, and, thus, would deprive the OCC from hearing all the evidence necessary to make the most informed decision in this matter.

III. CONCLUSION

17. For the reasons described above, OCD respectfully requests that Movants' Motion to Dismiss be denied in all respects, as Movants have failed to meet the requisite burdenof demonstrating that the proposed rule would constitute an arbitrary and capricious agency action, if adopted.

18. Further, the Motion to Dismiss as a dispositive motion is premature and inappropriate as the relationship between the agency's legislative purpose and the proposed rule must be established by the factual and technical record of the hearing, which also allows for public participation.

19. The proposed rules are necessary for OCD to properly regulate responsible operation and financial assurance for oil and gas wells, which includes operator registration and transfer of wells and the establishment of distinct categories of financial assurance. Irresponsible management, transfer, and abandonment of oil and gas infrastructure may cause waste, impact correlative rights, and result in contamination from nondomestic wastes which affect public health and the environment. The proposed rules directly relate to the agency's legislative purpose, and constitute a reasonable exercise of the authority delegated to the agency.

20. The OCC and OCD have already regulated whether proposed operators may be operators in New Mexico, and the proposed rules continue with that obligation under the Oil and Gas Act. The proposed rules do not infringe on the acquisition or transfer of real property rights.

21. The OCD may establish categories of wells that require financial assurance, and the Legislature has empowered OCD to utilize factors in doing so that OCD deems relevant. Further, OCD may set categories of wells requiring financial assurance based upon the cost of plugging similar wells. The OCC should hear all of the relevant evidence relating to these factors and the designation of marginal wells as a category requiring financial assurance that is based upon the costs of plugging similar wells.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 30, 2025, I served this pleading by electronic mail only on:

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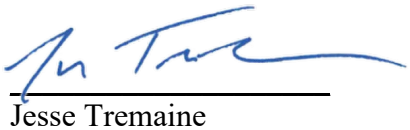

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