

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

**IN THE MATTER OF PROPOSED
AMENDMENT TO THE COMMISSION’S
RULES ON PRODUCED WATER,
19.15.34.20 NMAC**

CASE NO. _____

APPLICATION FOR RULEMAKING

Pursuant to 19.15.38(A) NMAC, Petitioner WildEarth Guardians (“Guardians”) hereby petitions the New Mexico Oil Conservation Commission (“OCC”) to amend 19.15.34.20 NMAC – *Disposition of Produced Water and Other Oil Field Waste* – a rule “to regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water ... in a manner that protects public health, the environment and fresh water resources.” NMSA 1978, § 70-2-12(B)(15). Currently, OCC/OCD rules do not prohibit spills or releases of produced water. The proposed rule would fill that glaring regulatory hole by specifically prohibiting the spilling or releasing of produced water.

Guardians states that:

- (1) The proposed rule change prohibits spills or releases of produced water and provides the Oil Conservation Division with enforcement authority to prevent unauthorized spills and releases. The rule is intended to protect public health, the environment, and fresh water resources, in accordance with the division’s regulatory authority under NMSA 1978 § 70-2-12(B)(15).

As the Commission is aware, produced water may contain numerous toxic contaminants, including “salts, metals, radioactive materials, dissolved organic compounds, and hydraulic fracturing [fracking] chemicals and their transformation products (the result of reactions of these chemicals in the subsurface).”¹ Yet despite evident risks to public health, the environment, and fresh water resources from produced water, the Commission’s rules do not actually prohibit spills and releases of this toxic waste. Guardians’ proposed rule is meant to fill this regulatory gap and provide the division with the enforcement authority needed to prevent such spills and release, which happen much

¹ EPA, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States, EPA-600-R-16-236Fa at 7-1 (Dec. 2016), available at: www.epa.gov/hfstudy.

too frequently within New Mexico's oil and gas industry. In fact, OCD records show more than 7,000 documented releases of produced water within New Mexico since July 2010, with more than 450 spills – including 225 *major* spills – so far this year.

In one incident from January, a produced water pipe burst across the street from a family home in Otis, New Mexico, drenching the family's house and yard for nearly an hour.² The family was forced to euthanize or give away their animals and has been advised by county officials not to eat anything grown on the property. While OCD has deemed the spill cleanup complete, independent analysis indicates that there are still unhealthy levels of contaminants in the soil, including benzene, chloride, and total petroleum hydrocarbons. Plainly, after-the-fact reporting and cleanup obligations standing alone are inadequate to protect public health, the environment, and fresh water resources. Spills of toxic produced water must be prevented from occurring in the first place.

Moreover, while OCD's regulatory jurisdiction over produced water is generally limited to oil and gas-related activities, there is no clear line on the ground between New Mexico's oil fields and its human communities. Accordingly, the impacts of spills and releases of produced water within the oil fields are not simply felt by the oil and gas industry, but broadly affect public health, the environment, and fresh water resources across New Mexico, as shown by the incident above. Accordingly, pursuant to NMSA 1978, § 70-2-12(B)(15), the proposed rule is intended to prevent spills and releases of produced water within the jurisdiction of the division to protect public health, the environment, and fresh water resources.

- (2) A draft of the proposed rule change is attached as Exhibit A to this Application.
- (3) The applicant's name is WildEarth Guardians.
- (4) The contact for the applicant shall be:

Daniel Timmons, Staff Attorney
301 N. Guadalupe Street, Suite 201
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dtimmons@wildearthguardians.org

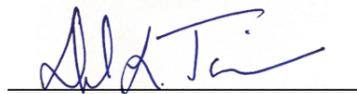
- (5) A proposed legal notice is attached as Exhibit B.

² K. Chamberlain, 'Dereliction of Duty': 1.6 Million Gallons of produced Water Spilled So Far in 2020, NM Political report, available at: <https://nmpoliticalreport.com/2020/08/19/dereliction-of-duty-1-6-million-gallons-of-produced-water-spilled-so-far-in-2020/>

Guardians requests that the Commission, at a meeting held no sooner than 15 days and no later than 60 days from the submittal of this Application, grant a hearing on the proposed rule changes and issue an order pursuant to 19.15.3.8(C) NMAC specifying procedures to conduct the rulemaking and hearing in a manner that provides a robust opportunity for public involvement while taking into consideration public health and safety in light of the current COVID-19 public health emergency.

Respectfully submitted this 2nd day of September 2020,

WILDEARTH GUARDIANS

A handwritten signature in blue ink, appearing to read "D. Timmons", is written over a horizontal line.

Daniel Timmons, Staff Attorney
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EXHIBIT A
PROPOSED RULE CHANGE FOR THE OIL CONSERVATION COMMISSION

19.15.34.20 DISPOSITION OF PRODUCED WATER AND OTHER OIL FIELD

WASTE: Except as authorized by 19.15.17 NMAC, 19.15.26.8 NMAC, 19.15.30 NMAC, 19.15.34 NMAC or 19.15.36 NMAC, persons, including transporters, shall not spill, release, apply, or dispose of produced water or other oil field waste:

A. on or below the surface of the ground, in a pit or in a pond, lake, depression or watercourse;

B. in another place or in a manner that may constitute a hazard to fresh water, public health, or the environment; or

C. in a permitted pit or registered or permitted surface waste management facility without permission of the owner or operator of the pit or facility.

D. Any unauthorized spills, releases, application, or disposal of produced water or other oil field waste shall be subject to the enforcement authority of the division, including but not limited to issuance of a notice of violation, commencement of a civil action, and/or assessment of civil penalties, in accordance with NMSA 1978, § 70-2-31.

EXHIBIT B
NOTICE OF PUBLIC MEETING AND PUBLIC HEARING

The New Mexico Oil Conservation Commission (Commission) hereby gives notice that the Commission will hold the following public meeting and public hearing commencing at 9:00 am on October 15, 2020 online and via telephone. Oral comments may be made either on-line or by telephone. The Commission shall make available to the public a preliminary agenda for the meeting no later than two weeks prior to the meeting, and a final agenda for the meeting no later than 72 hours before the meeting. The agenda shall specify the order of the proceedings and, to the extent feasible, identify the specific time(s) that public comments are to be heard. The agenda shall be posted online on the Commission's Hearings page under "OCC Dockets," accessible from the following web page: <http://www.emnrd.state.nm.us/OCD/hearings.html>.

Case No. _____: APPLICATION OF WILDEARTH GUARDIANS TO AMEND THE COMMISSION'S RULES FOR PRODUCED WATER IN 19.15.34.20 NMAC; STATEWIDE.

WildEarth Guardians proposes that the Commission amend 19.15.34.20 NMAC to prohibit unauthorized spills, releases, or application of produced water, and to provide the Oil Conservation Division with enforcement authority related to violations of the proposed prohibition on spills, release, or application of produced water.

Purpose of Proposed Rule. The proposed rule is intended to prevent spills and releases of produced water within the jurisdiction of the division to protect public health, the environment, and fresh water resources.

Legal Authority. The proposed rule is authorized by the Oil and Gas Act, NMSA 1978, Sections 70-2-1 through 70-2-38, and specifically, Section 70-2-6 (authorizing the Commission to exercise jurisdiction, authority, and control of and over all persons, matters, and things necessary or proper to enforce the statute), Sections 70-2-11 (authorizing the Commission to make rules to prevent waste, protect correlative rights, and to do whatever may be reasonably necessary to implement the statute), and Section 70-2-12 (enumerating the powers of the Commission and OCD). NMSA 1978, Section 70-2-12(B)(15) specifically provides the division with authority to regulate produced water to protect public health, the environment, and fresh water resources. The public hearing is governed by the Commission's rule on rulemaking proceedings, 19.15.3 NMAC.

Availability of Proposed Rule. The full text of the proposed rule may be obtained from the Commission Clerk, Florene Davidson at florene.davidson@state.nm.us or (505) 476-3458, or

can be viewed on the Rules page of the OCD's website at <http://www.emnrd.state.nm.us/OCD/rules.html>.

Public Hearing. The Commission will hold a public hearing on the proposed rule at the Commission meeting commencing at 9:00 am on October 15, 2020 online and via telephone. For information on how to participate in the hearing, please contact the Commission Clerk, Florene Davidson at florene.davidson@state.nm.us or (505) 476-3458, or visit the Hearings page on the OCD's website at <http://www.emnrd.state.nm.us/OCD/hearings.html>. The hearing may be continued to the following day(s) if not completed.

Proposed Modifications, Technical Testimony, and Cross Examination. Any person intending to propose a modification to the proposed rule, to present technical testimony at the hearing, or to cross-examine witnesses must file a Pre-Hearing Statement conforming to the requirements of Subsection B of 19.15.3.11 NMAC, no later than 5:00 pm on October 1, 2020. Filing may be accomplished by first class mail to the Commission Clerk, Florene Davidson, 3rd Floor, Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico 87505, or by electronic mail to OCD.Hearings@state.nm.us. Any person who presents technical testimony will be subject to cross-examination by the members of the Commission, the Commission's counsel, or another person who has filed a Pre-Hearing Statement on the subject matter of the person's direct testimony.

Oral Comments. Any person who has not submitted a Pre-Hearing statement may present non-technical testimony or make an unsworn statement at the hearing, and may offer exhibits at the hearing so long as the exhibits are relevant to the proposed rule and do not unduly repeat testimony. Any person who presents sworn, non-technical testimony will be subject to cross-examination by the Commission, the Commission's counsel, or another person who has filed a Pre-Hearing Statement on the subject matter of the person's direct testimony; however, any person who presents an unsworn position statement or general public comment shall not be subject to cross examination. To help facilitate this virtual hearing, persons wishing to present non-technical testimony or make an unsworn statement or public comment at the hearing are strongly encouraged to contact the Commission Clerk, Florene Davidson, at florene.davidson@state.nm.us or (505) 476-3458, prior to the hearing so that a list of commenters may be prepared in advance; however, at the close of oral public comment, the Commission shall open the virtual floor to any person who wishes to offer non-technical testimony or make an unsworn oral statement relevant to the proceedings.

Written or Electronic Comments. Any person may submit written or electronic comments on the proposed rule no later than 9:00 am on October 15, 2020, unless extended by the Commission or the Chair of the Commission, by first class or electronic mail to the Commission

Clerk, Florene Davidson, 3rd Floor, Wendell Chino Building, 1220 South St. Francis Drive, Santa Fe, New Mexico 87505, or florene.davidson@state.nm.us.

Persons with Disabilities. If you are an individual with a disability who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, including a summary or other accessible form of document, please contact the Commission Clerk, Florene Davidson, at florene.davidson@state.nm.us or (505) 476-3458, or through the New Mexico Relay Network at 1-800-659-1779, no later than July 2, 2020.

Technical Information. The U.S. Environmental Protection Agency's 2016 report entitled *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States* is available online at: www.epa.gov/hfstudy. Chapter 7 of the EPA report, Produced Water Handling, is particularly relevant to the proposed rulemaking. Additional technical information that may be provided through Pre-Hearing Statements and written technical testimony will be made publicly available on the OCD Imaging, Case File Search portal on the division's website at <http://ocdimage.emnrd.state.nm.us/imaging/CaseFileCriteria.aspx>, and may be accessed by searching for Case File No. _____.