

SPECIAL MEETING  
MOTION HEARING  
STATE OF NEW MEXICO  
OIL CONSERVATION COMMISSION

June 4, 2021

9:00 a.m.

APPEARANCES:

Felicia Orth: Madam Hearing Officer

Andrienne Sandoval: Chairwoman

Gregory Bloom: Commissioner

Terry Warnell: Commissioner

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transcription.

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1           MADAM HEARING OFFICER ORTH: Okay. So we  
2 are here this morning. My name is Felicia Orth.  
3 I'm a hearing officer appointed by the Oil  
4 Conservation Commission to conduct a hearing in the  
5 matter of proposed amendments to New Mexico  
6 Administrative Code, in particular, 19.15.27,  
7 19.15.16, and 19.15.34 of the commission's rules,  
8 docketed by the hearing clerk as 21834.

9           I'm sorry. I think I -- I read the  
10 caption wrong, incorrectly, just there -- excuse me.  
11 I'm going to start again. I was reading from the  
12 wrong caption.

13           This is case 21834, the application by  
14 WildEarth Guardians of New Mexico Oil Conservation  
15 Division to consider proposed amendments to rules  
16 19.15.29.6, 29.8, and 29.15, sometimes called the  
17 release rule or the spill rule.

18           We're here this morning to consider a  
19 number of motions consistent with a procedural order  
20 entered by the commission chair at the beginning of  
21 this process. And in particular, we have a motion  
22 from the oil conservation division to exclude the  
23 additional proposed regulations proposed by  
24 intervenors.

25           And the intervenors are the Rio Grande

1 chapter of the Sierra Club, the Pueblo Action  
2 Alliance, Citizens Care for the Future, the Native  
3 American Voters Alliance Education Project, and  
4 Amigos Bravos. Again, we will collectively refer to  
5 them as the intervenors this morning.

6 So we have the division's motion to  
7 exclude some evidence related to additional  
8 regulatory proposals by the intervenors, the motion  
9 to exclude the intervenors' additional proposed  
10 regulatory requirements filed by the New Mexico Oil  
11 and Gas Association, a motion to exclude all of the  
12 intervenors' proposed evidence filed by the  
13 Independent Petroleum Association of New Mexico,  
14 IPANM.

15 We have a consolidated response from the  
16 intervenors to those motions, and a response filed  
17 by WildEarth Guardians to those motions.

18 We also have a motion filed by IPANM to  
19 exclude certain portions of the testimony of Kaley  
20 Shoup, who will be testifying for the intervenors, a  
21 response in opposition from the intervenors to that  
22 motion, and one distinct matter that was part of the  
23 motions to exclude, which related to the testimony  
24 of Mr. Zupan or Zupan [pronounced differently].  
25 Sorry if I mispronounce names here. Please correct

1 me as necessary.

2 Also a couple of notices of errata that  
3 are filed in connection with all of these motion  
4 documents.

5 So with us this morning we have the chair  
6 of the commission, Madam Chair, Adrienne Sandoval.

7 We also have Commissioner Terry Warnell  
8 and Commissioner Greg Bloom.

9 Counsel, I will ask for your appearances,  
10 just to make sure we have everyone on line and  
11 capable of being heard, at least via audio.

12 Mr. Ames, I see your -- your video is on  
13 right there. Would you kick us off, please?

14 MR. AMES: Good morning, Madam Hearing  
15 Officer, Madam Chair, and members of the commission.

16 My name is Eric Ames. I'm an attorney  
17 with the office of general counsel, Energy Minerals  
18 and Natural Resources Department, on behalf of the  
19 oil conservation division.

20 MADAM HEARING OFFICER ORTH: All right.  
21 Thank you, Mr. Ames.

22 Let's see. Do we have counsel for  
23 WildEarth Guardians here?

24 MR. TIMMONS: Yes, Madam Hearing Officer.  
25 Daniel Timmons on behalf of WildEarth Guardians.

1 MADAM HEARING OFFICER ORTH: Thank you.

2 Good morning.

3 Counsel for NMOGA?

4 MR. RANKIN: Good morning, Madam Hearing  
5 Officer. Adam Rankin, with the law firm of Holland  
6 & Hart, appearing on behalf of the New Mexico Oil  
7 and Gas Association.

8 MADAM HEARING OFFICER ORTH: Counsel for  
9 IPANM?

10 MR. CLOUTIER: Good morning, Madam Hearing  
11 Officer, and members of the commission. Andrew  
12 Cloutier of the Hinkle Shanor firm, on behalf of the  
13 Independent Petroleum Association of New Mexico.

14 MADAM HEARING OFFICER ORTH: Good morning.  
15 And, Mr. Meiklejohn?

16 MR. MEIKLEJOHN: Thank you, Madam Hearing  
17 Officer and members of the commission.

18 Douglas Meiklejohn. I'm an attorney with  
19 the New Mexico Environmental Law Center, and  
20 appearing here today on behalf of the intervenors.

21 MADAM HEARING OFFICER ORTH: Good morning.  
22 We also have Florene Davidson, the  
23 commission's administrator.

24 I know that we have other staff and  
25 counsel from EMNRD, and Mr. Moander, Chris Moander,

1 from the attorney general's office with us.

2 MR. MOANDER: Good morning, everybody.

3 MADAM HEARING OFFICER ORTH: All right.

4 If there is nothing else before we begin -- oh, and  
5 I'm sorry. This morning's session is being recorded  
6 and transcribed by Paul Baca, of Paul Baca Court  
7 Reporters, so there will be a transcript made of the  
8 session.

9 So let me begin by saying I have read the  
10 motions, the responses, and the case law that was  
11 cited in the motion and responses.

12 And we can take up the Zupan and Shoup  
13 testimony after we have addressed the much larger  
14 issue of whether the proposed additional regulatory  
15 changes by intervenors should be part of our hearing  
16 next Wednesday.

17 I'd like to shorten the argument by saying  
18 that in my mind, there's really no question that the  
19 intervenors should be allowed to present testimony  
20 in support of the division and Guardians' petition,  
21 regardless of whether their additional regulatory  
22 proposals are considered.

23 Fortunately the notice of intent to  
24 present technical testimony, in my opinion, was  
25 quite clear with respect to each of the witnesses,

1 that they had testimony to offer in support of the  
2 original petition by the division, of the Guardians,  
3 and also testimony in support of their additional  
4 proposals.

5 And I don't really need argument on  
6 whether they should be allowed to testify at all.  
7 In my mind, the notice of intent is perfectly  
8 suitable for allowing them to testify in support of  
9 the original petition.

10 I also saw that in their response,  
11 intervenors noted that they were withdrawing that  
12 third additional proposal, which would have codified  
13 a rebuttable presumption, so we really are focused  
14 on the two additional proposals that were offered  
15 there.

16 So having read the -- having read the  
17 motions, and really wanting to hear from folks just  
18 once this morning, what I'd like to do is start off  
19 with Mr. Meiklejohn and then go to the replies.

20 I will -- commissioners, I will invite  
21 your questions after we've heard arguments from each  
22 of the parties.

23 So, Mr. Meiklejohn, let me ask if you have  
24 anything to add or any particular points you would  
25 like to stress in your response to the motions.

1 MR. MEIKLEJOHN: Thank you, Madam Hearing  
2 Officer.

3 The point that we made throughout our  
4 written submission, and that is important, is that  
5 both the public notice and the application for rule  
6 making emphasize the interest of WildEarth Guardians  
7 and the division in making their proposals to  
8 protect public health and the environment.

9 And the two amendments that we have  
10 proposed are directly addressed to protection of  
11 public health and the environment.

12 The first proposal would require source  
13 characterization of a release. It's clear that  
14 without knowing what the release is and what  
15 constituents are in the release, there cannot be  
16 adequate measures taken to protect people who might  
17 be affected by the release or the environment that  
18 might be affected by the release.

19 The second point is that the -- when there  
20 is a release, people who are in the area surrounding  
21 the release and in the area that may be affected by  
22 the release need to be notified about that release.  
23 It's a fundamental fairness to those people that  
24 they be told that there has been a release so that  
25 they can take whatever measures they deem to be

1 appropriate to protect themselves and protect their  
2 property.

3 I would also point out that in our written  
4 submissions we addressed the logical outgrowth test  
5 for determining whether proposed amendment to rules  
6 that have been proposed should be allowed.

7 It is our position that the amendments  
8 that we have proposed are within the logical  
9 outgrowth, as that has been defined by federal  
10 courts.

11 In its response to the motions to strike  
12 or exclude evidence, WildEarth Guardians pointed out  
13 that while the logical outgrowth test has not been  
14 adopted by New Mexico courts and that, in fact,  
15 what's been adopted by the New Mexico courts is a  
16 test to determine whether the notice that was issued  
17 reasonably provided an opportunity for people to be  
18 heard on the matters that are in front of the  
19 agency.

20 Because our proposed amendments relate  
21 directly to protection of public health and the  
22 environment, which is a central theme of the rule  
23 making proceeding, as I said as announced in the  
24 public notice and in the application for rule  
25 making, our proposed amendments do meet that other

1 test. And we, therefore, urge that the commission  
2 rule that we may be able to present evidence,  
3 including testimony, on those proposed amendments.

4 You mentioned, Madam Hearing Officer, the  
5 objections to testimony by Joseph Zupan, who is the  
6 director of Amigos Bravos, and by Kaley Shoup.

7 In addition to taking up those points, I  
8 would like to address two other points. One has to  
9 do with the timing and length of the notice of  
10 intent that we filed. I would appreciate the  
11 opportunity to be able to address the objections to  
12 that, that were filed. And also, to address the  
13 objections that were filed to the hyperlinks in  
14 Norman Gaune's testimony, which I believe were  
15 raised both by the division and by the independent  
16 producers -- sorry -- Independent Petroleum  
17 Association.

18 So I would appreciate the opportunity to  
19 address those points as well.

20 Thank you, Madam Hearing Officer.

21 MADAM HEARING OFFICER ORTH: Mr.  
22 Meiklejohn, let me ask you a question about the  
23 hyperlinks in Mr. Gaune's testimony.

24 I tried to follow them as well, and came  
25 to the same, I believe, broken Dropbox message that

1 I think other folks did.

2 Are those essential to his testimony in  
3 support of the original petition or only in support  
4 of the additional proposed regulatory proposals?

5 MR. MEIKLEJOHN: Madam Hearing Officer, I  
6 believe that they are important for both points. I  
7 wouldn't say that they are essential, in the sense  
8 of making or breaking his testimony as to either. I  
9 believe that his testimony will be helpful as to the  
10 original proposals. And as to the proposed  
11 amendments, I think it would be more helpful with  
12 those working hyperlinks.

13 MADAM HEARING OFFICER ORTH: All right.  
14 Thank you for that.

15 Mr. Ames, would you like to make what is  
16 effectively a reply at this point?

17 MR. AMES: Yes. Thank you, Madam Hearing  
18 Officer. Thank you for the opportunity to reply.

19 The division's position is that the  
20 commission should decline to hear Sierra Club's  
21 proposed modifications to Part 29 at the June 9  
22 hearing, because it both violates the law and would  
23 set a bad precedent.

24 Instead, the Sierra Club should file its  
25 own petition, and the commission can then publish a

1 notice, a proper notice, and add a hearing at which  
2 interested persons have a full and fair opportunity  
3 to present testimony and evidence.

4 I'm not going to debate the merits of the  
5 Sierra Club's proposed modifications. That's  
6 appropriate in a hearing.

7 But I do want to emphasize that the law  
8 here is clear. The basic principle is procedural  
9 due process, which means that interested persons  
10 must get notice about a proposed government action  
11 and be given an opportunity to be heard before the  
12 government takes that action.

13 The legislature has codified this  
14 principle in the statute for the commission in the  
15 context of rule making in Section 23 of the Oil and  
16 Gas Act.

17 That statute requires the commission to  
18 give reasonable notice of a hearing so that persons  
19 having an interest in the subject matter can be  
20 heard.

21 The commission codified this requirement  
22 in its rules in Part 3. And I will not elaborate on  
23 what those requirements are, but they're quite  
24 detailed, and they're set forth in all of the briefs  
25 of the parties filing motions here.

1           It's fairly clear, obviously clear, that  
2 Sierra Club's proposed mods do not fall within the  
3 scope of the notice published for this hearing.

4           This hearing was noticed for two reasons:  
5 to prohibit major or minor releases; and, secondly,  
6 to conform Section 15 of Part 29 with Part 5, the  
7 enforcement rule.

8           Sierra Club's proposal goes well beyond  
9 these two -- these two rule changes.

10           It changes all the reporting requirements.

11           It requires operators to file forms for  
12 all releases.

13           It significantly increases reporting  
14 requirements and significantly shortens the  
15 deadlines.

16           It requires operators to give notice to  
17 all persons within certain distances and within  
18 certain times of the release.

19           And it requires OCD to post all of these  
20 forms, information, and so forth on its website.

21           None of that is contemplated by the  
22 notice.

23           As for -- as for the opportunity to be  
24 heard, no interested person reading the notice would  
25 know that the Sierra Club's proposed modifications

1 would be heard on June 9. And now it's too late for  
2 interested parties to enter their appearance, and  
3 it's too late for them to present testimony and  
4 evidence.

5 The parties are in exactly the same  
6 position now as well. We've already identified our  
7 witnesses. We've already filed our testimony and  
8 exhibits. There's no time to prepare.

9 Even if we had the time, there's a real  
10 question whether we could present that -- those  
11 witnesses and that testimony, because we didn't  
12 notice any of it in our prehearing statements.

13 Now, Mr. Meiklejohn makes a few arguments  
14 in -- with respect to the -- these changes.

15 He argues, first, that the proposed  
16 changes to 29 are okay as long as the change is  
17 intended to protect public health and the  
18 environment.

19 This argument is based on a reference in  
20 the notice to protecting public health and the  
21 environment.

22 But that reference is read completely out  
23 of context. That reference is not a rule change;  
24 it's a reference to the commission's legal authority  
25 to adopt a rule change for Part 29.

1           If the commission could use a reference to  
2     its legal authority to consider a proposed  
3     modification, there is no limit to what the  
4     commission could consider at a hearing, regardless  
5     of what the notice actually concerns with respect to  
6     proposed rule changes.

7           Second, Sierra Club argues that the  
8     commission can hear the proposed modifications  
9     because they fall within the scope of the original  
10    application for rule making, the petition itself.

11           This argument makes no sense. The  
12    petition doesn't establish the scope of the hearing.  
13    Under the law and the commission's rules, the public  
14    notice does. And it's to the public notice that we  
15    must refer for the scope of the hearing.

16           And then finally, Mr. Meiklejohn argues  
17    that even if the mods are not within the scope of  
18    the notice, the commission can consider them because  
19    they're a logical outgrowth of the OCD's very  
20    limited proposed changes to Part 29.

21           Now according to WildEarth Guardians,  
22    logical outgrowth isn't even a thing in New Mexico.  
23    So perhaps that's the end of the question.

24           But assuming that Sierra Club is right,  
25    that logical outgrowth is a valid doctrine in

1 New Mexico, it certainly doesn't help its position.

2           The proposed modifications fundamentally  
3 rewrite Part 29. These are -- there are huge  
4 changes to the scope of obligations and  
5 responsibilities under the rule for both the  
6 regulated community and the division.

7           These changes don't fit with any -- within  
8 any test of logical outgrowth applied by this  
9 commission, for instance, in the produced water rule  
10 and in the venting and flaring rule hearings, or in  
11 any federal court.

12           They don't fall within the range of  
13 reasonably foreseeable alternatives to the petition.  
14 No person reading the commission's notice could  
15 reasonably construe them to fall within the scope of  
16 the notice. And no person reading the commission's  
17 notice could reasonably contemplate that this  
18 commission would consider them at a hearing.

19           The division also believes that if the  
20 commission were to consider Sierra Club's proposed  
21 amendments on June 9, it would set a bad precedent.  
22 It essentially would mean that a petition by any  
23 party for any reason could serve as a basis for  
24 another party to enter an appearance at the last  
25 minute, when prehearing statements are due, and

1 propose a change to that part or any other part, no  
2 matter how extreme, as long as they can somehow cite  
3 to some words in the notice that they allege are  
4 broad enough to allow them to bring those proposals  
5 to the table.

6 The result would be that interested  
7 persons would have to enter an appearance in every  
8 hearing that even remotely touched on an issue that  
9 might affect them because of their fear of what  
10 might happen at the last minute.

11 And then the commission would have to  
12 provide, I would suggest, additional time for all  
13 the parties who file prehearing statements to  
14 prepare testimony on all of these new proposed  
15 modifications that are far outside the scope of the  
16 original notice.

17 That's not how it is supposed to work.  
18 That's why there's a statutory requirement for  
19 reasonable notice, so that the parties -- or so that  
20 interested persons can know what's going to be  
21 considered, so they can adequately prepare for the  
22 hearing.

23 If any party can come in at the last  
24 minute, one -- you know, one week before the hearing  
25 and put anything on the table that they can

1 conceivably argue is within the scope, then the  
2 notice has no meaning and the process loses its  
3 vitality.

4 Now you did reference a couple of issues,  
5 Madam Hearing Officer, with respect to Mr. Zupan's  
6 testimony and Mr. Gaune's testimony.

7 I will not present the division's position  
8 on those at the moment, but would like to reserve  
9 the right to address those as well.

10 Thank you.

11 MADAM HEARING OFFICER ORTH: So, Mr. Ames,  
12 around Mr. Zupan's testimony, I saw in the response  
13 Mr. Meiklejohn pointed to the procedural order.  
14 Certainly we've been together in some proceedings  
15 where verbatim or narrative testimony is required of  
16 technical witnesses.

17 From the portion of the procedural order  
18 that Mr. Meiklejohn cited to in his response, it  
19 doesn't appear that that requirement was entered in  
20 this proceeding.

21 Does that change your opposition?

22 MR. AMES: No, it does not, Madam Hearing  
23 Officer. It's -- it's true that both Sierra Club  
24 and WildEarth Guardians argue that Mr. Zupan is not  
25 required to provide verbatim testimony.

1           We never -- we never asked for that.  
2           We've never argued that Mr. Zupan has to provide  
3           verbatim testimony.

4           What we said is that he has to provide a  
5           concise statement in summary or outline form, which  
6           is the requirement in the procedural order.

7           Here, we don't even have that. Mr. Zupan  
8           is going to testify for an hour. He's going to have  
9           two topics: support for OCD's petition and support  
10          for Sierra Club's proposed modifications.

11          For the Sierra Club's proposed  
12          modifications, the entirety of his testimony, or his  
13          statement, is that the mods will -- the  
14          modifications will improve protection of water  
15          resources and for residents from impacts of waste  
16          from oil and gas activities.

17          It's essentially one sentence, and it's a  
18          conclusion.

19          If that's all he's going to say, he only  
20          needs a couple of minutes, or even a minute would be  
21          enough.

22          So the question is: What is he going to  
23          testify about for an hour?

24          Mr. Zupan is a professional registered  
25          engineer in New Mexico. His resume says he has

1 extensive experience with cleanup and remediation of  
2 oilfield waste. But we have no idea what he's going  
3 to say. His one brief conclusion tells us nothing.

4 We have no idea of how to prepare for  
5 cross-examination. That brief statement does not  
6 meet the requirements of the rule, of the  
7 commission's rule, and it doesn't meet the  
8 requirements of the procedural order.

9 We are not arguing for verbatim testimony,  
10 such as OCD itself has presented in this case.  
11 That's not the issue. That's a strawman.

12 Both Sierra Club and WildEarth Guardians  
13 refer to this verbatim testimony as an implication.  
14 That's an implication they draw and then attack.  
15 That's the nature of a strawman. We never said it.  
16 We're not saying it now.

17 We're saying that what has been filed for  
18 Mr. Zupan is clearly inadequate under the rule and  
19 under the order, and that's it.

20 MADAM HEARING OFFICER ORTH: All right. I  
21 will ask for more information from Mr. Meiklejohn  
22 after we've addressed the central issue this morning  
23 about the additional regulatory requirements.

24 All right. Let's see.

25 Mr. Timmons, if you would, please, what is

1 effectively a reply at this point to the responses  
2 by Mr. Meiklejohn.

3 MR. TIMMONS: Yes. Thank you,  
4 Madam Hearing Officer, Madam Chair, members of the  
5 commission.

6 Daniel Timmons, again on behalf of  
7 WildEarth Guardians.

8 I just kind of want to back up a little  
9 bit. Guardians filed this rule making application  
10 with OCD because we believe in that proposal, that  
11 prohibiting major and minor releases will help  
12 protect public health and the environment.

13 Frankly, Sierra Club's participation and  
14 these motions put us in a bit of an awkward spot.  
15 Our primary objective here is to get this rule  
16 passed, and we filed that joint petition.

17 And we've worked with industry intervenors  
18 and with the division in targeted testimony to make  
19 the hearing go smoothly, and because we recognized  
20 that working together gave us the best chance of  
21 getting this important rule passed.

22 So from that perspective, Sierra Club's  
23 intervention complicates things. It's inconvenient.

24 But on the other hand, we fundamentally  
25 believe in the value of public participation as a

1 matter of principle and as a matter of law. So we  
2 really appreciate the hearing officer's recognition  
3 that Sierra Club should be allowed to participate  
4 and to prevent -- provide testimony with respect to  
5 our petition, our joint proposal.

6 And that's our fundamental purpose for  
7 being here today and for filing our motion.

8 But with respect to Sierra Club's proposed  
9 modifications, our interests are really broader than  
10 this proceeding. And so we're really concerned  
11 about the unintended consequences of importing the  
12 logical outgrowth test from the federal notice and  
13 commented rule making proceedings -- procedures, to  
14 a very different type of formal rule making trial  
15 type process that we have here before the  
16 commission.

17 And so we think that as a matter of law,  
18 the statute, the Oil and Gas Act requires reasonable  
19 notice, and that has to meet due process  
20 requirements providing general notice of the issues  
21 to be presented.

22 In this particular case, that distinction  
23 might not matter. Applying the logical outgrowth  
24 test or a reasonable notice test might get us to the  
25 same place.

1           But we want to caution the commission  
2           against importing a legal term of art, logical  
3           outgrowth, and the giant body of federal case law  
4           that comes with that, because that case law has been  
5           developed in a very different context.

6           We recognize the concerns of the division  
7           and of the industry intervenors regarding the  
8           potential needs to develop new witnesses and new  
9           testimony to respond to these new modifications.

10           And that's probably a factor that weighs  
11           in favor of finding that that is outside the scope  
12           of what was presented.

13           But this is not a notice and common rule  
14           making proceeding, because this process does allow  
15           for at least some type of response to, and back and  
16           forth, with respect to those amendments, those  
17           modifications, through cross-examination or  
18           potentially rebuttal testimony.

19           At the end of the day, Guardians is simply  
20           not in a position to take a side with respect to  
21           these particular proposed rules and whether or not  
22           they should be considered by the commission.

23           I recognize that may sound like a copout.  
24           But we have an internal conflict between our  
25           immediate objective in this proceeding, of getting

1 our proposal passed, and our long-term interests and  
2 objectives in protecting the right of public  
3 participation. And here, that's a bit of a  
4 balancing act.

5 And so we ask that the commission, the  
6 hearing officer, apply the proper legal standard,  
7 and not unnecessarily raise the bar or tie the  
8 commission's hands to considering alternative  
9 proposals by adopting what we believe to be an  
10 inappropriate legal test that came from a different  
11 context.

12 Just as a final note, I think that some of  
13 the issues that have been raised in the motions, the  
14 timing concerns, and the ability to provide, you  
15 know, time to respond.

16 I like opportunities, let's say, to  
17 improve the OCC's rule making processes overall, and  
18 they probably were a consideration as to ways to  
19 make future process, future rule making proceedings,  
20 a little better, a little smoother, and ensure that  
21 those due process rights are protected, and that  
22 robust public participation can also be  
23 accomplished. And that those two values, those two  
24 goals, are not at odds, but that can both be  
25 protected and promoted in future proceedings.

1           So that is Guardians' position here, and  
2 I'm happy if you have any questions.

3           MADAM HEARING OFFICER ORTH: Thank you  
4 very much, Mr. Timmons.

5           Mr. Rankin, do you have anything to add by  
6 way of reply?

7           MR. RANKIN: Thank you very much, Hearing  
8 Officer.

9           In discussions with IPNM counsel,  
10 Mr. Cloutier, we had discussed allowing him to  
11 present first, so I'm happy to allow him to go  
12 first. But if you'd like me to present at this  
13 time, I'm happy to do that as well.

14           MADAM HEARING OFFICER ORTH: Well, I'm  
15 not -- I don't have feelings about that at all.

16           Mr. Cloutier?

17           MR. CLOUTIER: Thank you, Madam Hearing  
18 Officer.

19           First of all, I appreciate your desire for  
20 efficiency, Madam Hearing Officer, and I just want  
21 to make sure that I can adopt Mr. Ames' argument by  
22 this reference and not repeat his points, so that we  
23 can move along quickly.

24           MADAM HEARING OFFICER ORTH: Thank you  
25 very much.

1 MR. CLOUTIER: Okay. Thank you. We just  
2 want to make sure that the record is clear on that.

3 We definitely join in Mr. Ames' principal  
4 point, that the language that the intervenors are  
5 seeking to latch on to in the notice is an  
6 invocation -- or attempt to invoke -- what the  
7 commission's and division's powers are under  
8 72-2-12. And it is not a -- it is not the purpose  
9 of the rule. The purpose of the rule was set forth  
10 in one sentence. It is very narrow, as Mr. Ames  
11 argues.

12 I'd like to talk about the logical  
13 outgrowth test and the Earthworks case. You know,  
14 it's a little bit ironic that we are here.

15 Mr. Meiklejohn, in the Earthworks case,  
16 was taking the position that a reference in the  
17 public notice to multi well pits was ambiguous and  
18 didn't provide adequate notice.

19 The Court there said, Well, maybe  
20 ambiguous, but all you had to do was look at the  
21 proposed rule, and there's a definition of it.

22 If any member of industry looked at this  
23 proposed rule, after reading the notice, and was  
24 confused, they wouldn't have been.

25 There were -- the two purposes were

1 clearly addressed in the proposed rule making and  
2 nothing else.

3 First, clarifying what I say -- I would  
4 guess that while releases were totally discouraged  
5 under the formal rules that exist today, it does  
6 clarify that releases are illegal.

7 And secondly, the rule clarifies, as the  
8 notice states, that the division's powers to impose  
9 various forms of penalty apply to violations of the  
10 release rule. That's it.

11 In the Earthworks case, the Court said, Go  
12 look at the rule if you're confused about what the  
13 notice said.

14 Well, the notice and the proposed rule  
15 that the division and WildEarth Guardians put forth  
16 are the same.

17 Secondly, the Court of Appeals in the  
18 Earthworks case said, Well, if you're still  
19 confused, ask the division.

20 Well, I personally asked Mr. Timmons and  
21 Mr. Ames, Are there any other amendments  
22 contemplated other than what is here?

23 The answer was an unequivocal no from both  
24 of them.

25 So under the Earthworks case, the Sierra

1 Club, et al.'s proposal to amend should fail. The  
2 notice did not change -- the notice did not alert  
3 anyone that an operator's reporting responsibilities  
4 were going to be materially altered, that the  
5 operator was going to have to undertake new duties  
6 with respect to releases. All of these changes do  
7 not relate to what was in the purpose of the rule.

8 We think the logical outgrowth test,  
9 Madam Hearing Officer, is a practical test. Due  
10 process, as Mr. Timmons points out, underlines all  
11 of these notice concerns.

12 Logical outgrowth allows for robust rule  
13 making and back and forth and improving the rules as  
14 drafted. There is one proposal to amend the rules,  
15 as noticed.

16 And that I think all of the four  
17 participants support, which is to make sure that  
18 Part 29 is not in conflict with Parts 27 and 28 of  
19 the rules. That is a logical outgrowth of the  
20 proposed rules. Make sure that there's not an  
21 internal conflict among the rules.

22 However, the increased -- substantially  
23 increased reporting requirements, reducing the  
24 reporting period, requiring 24 hours' notice to  
25 nearby residents or occupants of buildings, none of

1 those things were in the notice.

2 I'd like to conclude. I -- I view this  
3 case, sort of put it on the other -- shoe on the  
4 other foot.

5 What would happen if one of the industry  
6 associations here today had worked with the division  
7 to propose a narrow rule and the other industry  
8 association came in with a slew of amendments at the  
9 last minute?

10 The press would be here. There would be  
11 outrage. There would be concern.

12 I don't accuse anyone of bad faith. But  
13 yeah, I can't help but think of what this would look  
14 like if the situation were reversed.

15 And with that, Madam Hearing Officer, I  
16 will stand for any questions and reserve my comments  
17 on the specific individual witnesses, as did other  
18 counsel.

19 MADAM HEARING OFFICER ORTH: Thank you  
20 very much, Mr. Cloutier.

21 Mr. Rankin?

22 MR. RANKIN: Thank you very much,  
23 Madam Hearing Officer, Madam Chair, may it please  
24 the commission.

25 I'll do my best here, as Mr. Cloutier has

1 done, to distill and avoid duplication of argument  
2 here.

3 But as Mr. Cloutier, I will endorse and  
4 incorporate and adopt the statements and arguments  
5 made today in opposition here to the proposed  
6 modifications by OCD counsel and IPNM counsel.

7 In short, the additional modifications  
8 here that have been proposed by the intervenors were  
9 not contemplated by the narrow and limited scope of  
10 the proposed rule or in the notice that was  
11 provided.

12 The intervenors themselves acknowledge  
13 that what they seek to inject into this rule making  
14 is -- are additional issues that were not proposed  
15 by the rule making application or in the notice that  
16 was provided.

17 As Mr. Ames has stated very eloquently and  
18 succinctly, this particular rule making has a very  
19 narrow scope. It's limited to only the two issues,  
20 essentially, that were discussed: the prohibition of  
21 major and minor releases. And that's essentially --  
22 essentially it.

23 The intervenors' additional proposed  
24 modifications would add entirely new requirements  
25 that were not contemplated or could not have been

1 contemplated by the proposed rule.

2 Now the intervenors say the proposed rule  
3 actually does contemplate these additional issues,  
4 because the broad purpose of Rule 29, and the  
5 proposed change, is to protect the environment and  
6 health and safety.

7 But if that were simply the test, then  
8 there would be no principal basis whatsoever for any  
9 party to add additional issues the week before a  
10 rule making, that the commission and other parties  
11 would then be forced to address and potentially  
12 contest, without having the required notice, due  
13 process, to review proposed language, the  
14 requirements, or the technical or legal bases for  
15 these proposed changes.

16 That's a bridge too far or door too wide.  
17 Because then, any modification would be deemed  
18 within the scope of a rule making. Any  
19 modification, for example to Rule 29 intended to  
20 prevent spills, would be allowed through the rule  
21 making door at the last minute simply because  
22 Rule 29 is also intended to prevent spills.

23 That's not the commission's test. The  
24 test is whether the modifications are a logical  
25 outgrowth and could be contemplated from the

1 language the applicants proposed and noticed to the  
2 public.

3           The commission, in its wisdom, understood  
4 the delicate balance between having the flexibility  
5 to consider additional modifications at the time of  
6 the rule making and due process requirements for  
7 giving the public and diverse stakeholders and the  
8 division and regulated entities reasonable notice of  
9 a proposed rule making.

10           When the division -- when the commission  
11 interpreted and implied a statutory mandate to  
12 require and provide reasonable notice, it enacted  
13 its updated rule making regulations on rule making  
14 back in 2017.

15           Those regulations require very specific  
16 disclosures and advance notice, all of which could  
17 easily be avoided for future rule makings going  
18 forward, if the commission adopts the intervenors'  
19 and WildEarth Guardians' conception of the test for  
20 reasonable notice.

21           This is important to understand, because  
22 their approach would allow parties, as Mr. Ames  
23 said, essentially, to ambush future rulings with  
24 additional issues that were not noticed or  
25 contemplated by the proposed rule and notification.

1           It would allow parties to totally sidestep  
2 the commission's regulations and specific  
3 requirements, including the initial determination on  
4 whether to proceed with the rule making on those  
5 issues.

6           It would allow them to avoid the  
7 commission's regulatory promise to provide proposed  
8 language well in advance of a hearing.

9           It would allow them to avoid the  
10 requirement to provide legal and technical basis for  
11 the changes in advance of the hearing.

12           And it would prevent the public, the  
13 division, and other parties, from having a  
14 reasonable opportunity and time to review, comment  
15 on, and prepare for the proposed -- and to address  
16 the proposed modifications, either with support,  
17 opposition, or with additional modifications to  
18 those proposed additions.

19           It would totally subvert the intent and  
20 purpose of the commission's own regulations, and  
21 that would not be a positive outcome for the rule  
22 making of the commission, and it would directly  
23 contravene the commission's updated and revised  
24 regulations governing rule making that have now been  
25 in place for more than four years.

1           So the commission's interpretation and  
2 application of its reasonable notice mandate under  
3 the statute is not new. It's been in place for  
4 years. It's the commission's own interpretation of  
5 its statutory mandate.

6           It's -- it's been applied effectively,  
7 even just within the last year, at the produced  
8 water rule making in 2020, in which the commission  
9 excluded a series of proposals and modifications  
10 from consideration at that rule making, because they  
11 were outside the scope of the proposed rule and  
12 notification.

13           And again earlier this year, at the  
14 venting and flaring rule, in which the commission  
15 considered a motion to exclude evidence and  
16 testimony, and then -- and denied that motion and  
17 allowed the testimony to go forward.

18           Now I just want to address separately some  
19 of the comments made, and make the point that the  
20 cases cited in the briefing, including the  
21 Earthworks case, were issued prior to the  
22 commission's updated rule making regulations.

23           So there's no case law addressing, you  
24 know, the scope of what's permitted under the scope  
25 of the commission's current regulations governing

1 rule making.

2 The commission has adopted -- incorporated  
3 its own guidance, its own outlook interpretation of  
4 what reasonable notice requires.

5 And here, you know, WildEarth Guardians'  
6 papers and the intervenors' papers, they are  
7 attempting to tell the commission how to interpret  
8 its own regulations and rules, which I think is  
9 inappropriate.

10 The commission has effectively applied and  
11 construed its authority and requirements under the  
12 statute and has used, as Mr. Cloutier has described,  
13 this -- this logical outgrowth test as a practical  
14 test.

15 And that test has effectively, you know,  
16 been able to strike a balance between preserving  
17 flexibility, to consider modifications during rule  
18 making, and ensuring that the public and all  
19 stakeholders, including the division, have actual  
20 and reasonable notice in advance.

21 And here, that balance can only be  
22 achieved by excluding the proposed additional  
23 modifications proposed here by the intervenors.

24 With only a week before the rule making,  
25 now that the parties have had a reasonable

1 opportunity to review the legal or technical bases  
2 for the proposed additional modifications, which has  
3 been compounded by the fact that we have not been  
4 provided the underlying data or technical analysis  
5 in support of their testimony.

6 So like the modifications that were  
7 presented during the 2020 produced water rule, the  
8 commission should -- the commission should exclude  
9 this testimony and proposed modifications, because  
10 they stray simply too far from the very limited and  
11 narrow modifications proposed by OCD and WildEarth  
12 Guardians in this case.

13 So with that, Madam Hearing Officer, I  
14 believe that I've addressed all the points that I  
15 wanted to emphasize in response to intervenors' and  
16 WildEarth Guardians' papers.

17 But if there are any specific questions,  
18 I'd be happy to answer them.

19 MADAM HEARING OFFICER ORTH: Thank you  
20 very much, Mr. Rankin.

21 So, Commissioners, Madam Chair, would you  
22 have questions of any of the counsel based on their  
23 arguments?

24 CHAIRWOMAN SANDOVAL: Commissioner Warnell  
25 or Bloom, do you have any questions for any of the

1 counselors?

2 COMMISSIONER BLOOM: I don't have any  
3 questions at this time, no. Thank you.

4 COMMISSIONER WARNELL: I don't have any  
5 questions either. Thank you.

6 CHAIRWOMAN SANDOVAL: I just have one.  
7 Okay. I'll ask each one of you, I guess  
8 starting with the OCD, so, Mr. Ames.

9 So within the intervenors' consolidated  
10 response to the motions to exclude or strike in  
11 Section 3B, bottom of page 7, it -- in the last  
12 paragraph it talks about, in Number 2:

13 "It's understood that amendments proposed  
14 by WildEarth Guardians and the division focus on  
15 releases, that interested party would probably  
16 expect that changes might be proposed to Sections  
17 19.15.29.10 of the commission's rules because it  
18 addresses notice to be given of releases."

19 And I guess my question, Mr. Ames: Yes or  
20 no, would you probably know that the changes  
21 proposed by Sierra Club were -- okay. Let me  
22 restate that.

23 Do you -- would you have probably been  
24 able to know or expect these changes that were  
25 proposed by Sierra Club, based off of the notice

1 that was given to the public? Yes or no?

2 MR. AMES: Absolutely not.

3 CHAIRWOMAN SANDOVAL: Thank you.

4 Mr. Timmons, would you probably have been  
5 able to expect the changes that Sierra Club proposed  
6 based on the legal notice? Yes or no?

7 MR. TIMMONS: You're not going to let me  
8 decline to answer this, are you?

9 CHAIRWOMAN SANDOVAL: You can refuse to  
10 answer if you would like.

11 MR. TIMMONS: Honestly, I don't know,  
12 Madam Chair.

13 CHAIRWOMAN SANDOVAL: Okay.

14 I'm sure I am going out of order here.  
15 Sorry.

16 Mr. Cloutier, the same question. Would  
17 you probably have been able to expect, based on the  
18 legal notice, that the changes from Sierra Club were  
19 in the -- the same question. I can't remember the  
20 question at this point.

21 MR. CLOUTIER: Absolutely not, Madam  
22 Chair. The Sierra Club necessitates technical  
23 testimony in favor of their amendments. There was  
24 no technical testimony proposed at any point, and  
25 nothing in the world suggested the need.

1 CHAIRWOMAN SANDOVAL: Right. A simple yes  
2 or no would have -- would have been fine.

3 Mr. Rankin, the same question. Yes or no?

4 MR. RANKIN: No, Madam Chair.

5 CHAIRWOMAN SANDOVAL: Thank you.

6 Okay. Mr. Meiklejohn, I think you're  
7 unmuted.

8 The same question to you. Would you  
9 probably have been able to expect these changes  
10 based on the legal notice? Yes or no?

11 MR. MEIKLEJOHN: Yes, Madam Chair.

12 CHAIRWOMAN SANDOVAL: All right. Thank  
13 you.

14 Those were my only questions.

15 MADAM HEARING OFFICER ORTH: All right.

16 Thank you, Madam Chair.

17 So again -- well, let me just make a few  
18 observations.

19 I appreciated Mr. Timmons' caution about  
20 not importing all of the logical outgrowth case law  
21 from the federal process onto the state process.  
22 That didn't appear to have been done intentionally  
23 in any of the New Mexico appellate case law.

24 Having said that, I guess I would just  
25 say, as someone who has been involved in rule making

1 proceedings for a variety of state agencies in  
2 New Mexico for about 35 years, that I've heard  
3 conversations among state agency lawyers, and  
4 certainly heard conversations among assistant  
5 attorney generals who represent those boards and  
6 commissions, that this is a phrase we use a lot.  
7 And I think, when it's used in New Mexico, it's  
8 referring to the same thing, if you will, what was  
9 referred to in one of the cases as a surprise  
10 switcheroo.

11 So whether we use the term logical  
12 outgrowth or the fancy legal term surprise  
13 switcheroo, that was in the EPA case, I, frankly,  
14 prefer Mr. Ames' language, "reasonably foreseeable."

15 And I think that's what Madam Chair was  
16 just getting to, is having looked at the public  
17 notice, would it be reasonable to foresee that these  
18 proposed additional regulatory requirements might be  
19 added. It's certainly reasonably foreseeable to  
20 draft some language or make minor adjustments.

21 I think I have to disagree with  
22 Mr. Meiklejohn, though. These were not minor  
23 adjustments.

24 Looking, for example at that EPA case,  
25 Environmental Integrity Project versus EPA, from the

1 DC circuit in 2005, where an agency's proposed rule  
2 was speaking about minimum air velocity to ventilate  
3 underground coal mines, the final rule provided,  
4 instead, a maximum air velocity to ventilate coal  
5 mines, and that was found to be out of line.

6 So I -- I'm not aware of case law in  
7 New Mexico or otherwise that would support the  
8 argument by intervenors that something as broad as  
9 any provision meant to protect public health and the  
10 environment would be reasonably foreseeable.

11 I think -- although it wasn't the subject  
12 of anyone's argument, I think there's another  
13 challenge here for intervenors which is, there are  
14 other sections in the commission's rule, this very  
15 same rule, that relate to release notification, that  
16 relate to source characterization.

17 And the fact that the commission would try  
18 to -- or allow a party to, if you will, add source  
19 characterization and release notification to a  
20 section, a different section altogether, I think  
21 again, is not consistent with what might be  
22 reasonably foreseeable.

23 Having said that, there's absolutely no  
24 prejudice here from -- prohibiting intervenors from  
25 bringing their own petition to, in fact, adopt these

1 changes, with a process of its own.

2 I was also put in mind of the one example  
3 I have in which proposed changes are by parties  
4 other than a -- the initial rule proposer are, if  
5 you will, incorporated into public notice which  
6 comes much later in the process, and whereby all  
7 kinds of changes can then be considered.

8 And that's the triennial review. If any  
9 of you -- I know Mr. Ames has joined me in that  
10 proceeding more than once.

11 That rule making process exceeds a year in  
12 length. The surface water bureau proposes changes,  
13 and then invites anyone else who's interested in  
14 surface water to make their own proposed changes,  
15 and then all of it is publicly noticed. Regardless  
16 of whether the initiating petitioner agrees with it  
17 or not, we hear all of it.

18 But that is a very different -- a very  
19 different process and not the commission's process.

20 So I think if we're going to proceed with  
21 a reasonable notice standard for commission rule  
22 making procedures and a reasonable notice procedure  
23 that allows us to -- allows anyone to discern the  
24 scope of what the commission will be hearing, that  
25 the additional proposals from the intervenors cannot

1 be considered as part of this rule making.

2 Now having said that, we have a few other  
3 things to consider.

4 As to the timing and length, let me just  
5 say -- and I'll go to Mr. Meiklejohn here, first.

6 As to the timing and length, so long as it  
7 is relevant to the original petition, I don't  
8 have -- I don't find someone's lengthy presentation  
9 to be inherently objectionable.

10 I know that point was made by some of the  
11 movants. But it doesn't trouble me, so long as it's  
12 relevant to the petition at hand.

13 Mr. Meiklejohn, can we go to Mr. Zupan?

14 And in particular, I had invited Mr. Ames  
15 to address Mr. Zupan's -- his objection, thinking  
16 maybe he would withdraw it, based on the  
17 understanding that verbatim testimony was not  
18 required.

19 But he made the point that what was  
20 offered in the intervenors' outline was not really a  
21 summary; it was one sentence.

22 I'm wondering if you can say more about  
23 Mr. Zupan's testimony.

24 MR. MEIKLEJOHN: Thank you, Madam Hearing  
25 Officer.

1           The summary we provided of Mr. Zupan's  
2 testimony certainly is not one sentence. It's a  
3 little over a page long. We pointed out that he  
4 will describe his background, to include extensive  
5 experience with cleanup and remediation of oilfield  
6 waste.

7           He has been a consultant to industry.

8           He's been a member of the Texas risk  
9 reduction program technical guidance committee.

10          He's a registered engineer in several  
11 states, or has been, and is currently a registered  
12 engineer in New Mexico and Colorado.

13          He also will explain what Amigos Bravos'  
14 mission is, and how the management of the oil and  
15 gas industry, and in particular releases of oil and  
16 gas and oil and gas waste, poses a serious threat to  
17 New Mexico waters.

18          He will explain why Amigos Bravos supports  
19 the petition that was filed by WildEarth Guardians  
20 and the division.

21          And it would -- he will point out it would  
22 be a major step towards the effective regulation of  
23 the industry and the protection of New Mexico's  
24 water resources from impacts of that industry.

25          We also said that he would support -- his

1 testimony would support the three amendments to the  
2 commission rule that were proposed by the  
3 intervenors. That, obviously, is irrelevant at this  
4 point, and he will not be testifying as to those  
5 matters.

6 That will shorten his testimony  
7 considerably. I would expect that, just off the top  
8 of my head, that his testimony at this point  
9 probably would be somewhere around half an hour or  
10 so, because a lot of it was to be taken up with the  
11 reasons for supporting those three amendments  
12 proposed by the intervenors.

13 And as I said, that's not relevant at this  
14 point.

15 MADAM HEARING OFFICER ORTH: Thank you for  
16 that.

17 As to the other counsel, I don't know that  
18 we need to go round robin.

19 I will ask you to speak up if you have  
20 anything to add. But my plan at this point would be  
21 to invite Mr. Zupan to give whatever testimony he  
22 would like to in support of the petition.

23 And in the event you find, or hear  
24 something you find particularly surprising, for you  
25 to make an objection at that time and we can address

1 it.

2 MR. AMES: Madam Hearing Officer, Eric  
3 Ames here.

4 OCD appreciates that resolution to the  
5 issue. We welcome the support of Sierra Club and  
6 its witnesses for OCD's petition.

7 And testimony in that light, I think it's  
8 incumbent on me to point out that even though we  
9 appreciate Sierra Club's support and testimony in  
10 support of our petition, Mr. Zupan -- it's our view  
11 that the presentation of Mr. Zupan's anticipated  
12 testimony still falls short of what the rule  
13 requires.

14 But given that his intent is to support  
15 the rule, and that -- in the belief that he will  
16 limit his comments to that point, we will not have  
17 any objection.

18 MADAM HEARING OFFICER ORTH: All right.  
19 Thank you.

20 Does anyone else need to speak to this  
21 point?

22 MR. CLOUTIER: Madam Hearing Officer,  
23 Andrew Cloutier, very briefly.

24 I just want to point out that our concern  
25 about Mr. Zupan is solely as a technical witness,

1 because there was no basis or -- there's no  
2 description of technical testimony. His support as  
3 a nontechnical witness IPNM has no objection to.

4 MADAM HEARING OFFICER ORTH: All right.  
5 Thank you.

6 Anyone else?

7 MR. RANKIN: Madam Chair, I just want to  
8 second Mr. Cloutier's statement.

9 If you look at the language provided in  
10 the summary of testimony, excluded support for  
11 proposed amendments that they offer, there really is  
12 no description of any technical -- summary of any  
13 technical testimony whatsoever.

14 So not knowing what he would say or what  
15 technical support he would provide, you know, I just  
16 want to point out that that is in conflict with what  
17 the procedural order provides, requires.

18 And intervenors understood very well what  
19 the procedural order required, because they provided  
20 a fully in-depth summary of their other technical  
21 witness, Mr. Gaune, in their subsequent exhibits.  
22 So they clearly understood the intent and the  
23 purpose of the procedural order requiring them to  
24 provide a summary of the technical testimony.

25 And in that summary, it's a very -- it's a

1 rather detailed analysis of his -- Mr. Gaune's  
2 testimony, along with charts and data supporting it.

3 So there's a disconnect, to some extent,  
4 between what they've offered here for Mr. Zupan and  
5 what they've offered for Mr. Gaune. And I just want  
6 to articulate that that's a concern under the  
7 procedural order.

8 MADAM HEARING OFFICER ORTH: All right.  
9 Thank you.

10 Anyone else on that point?

11 Again, I would propose to hear from  
12 Mr. Zupan. And in the event we hear,  
13 notwithstanding, perhaps, not full compliance with  
14 the procedural order, or even the rule, at this  
15 point what I'd like to do is invite Mr. Zupan to  
16 speak.

17 And again, if there's something in  
18 particular you object to, speak up at that time.

19 Let's move, then, to Mr. Gaune and the  
20 hyperlinks.

21 Mr. Meiklejohn, would you like to speak to  
22 how we're going to proceed there?

23 MR. MEIKLEJOHN: Thank you, Madam Hearing  
24 Officer.

25 Two points. One is that we did type the

1 hyperlink address into a browser. And although it  
2 took about five minutes to type the longest  
3 hyperlink into a browser, it did work. So we  
4 believe that the parties have had access to the  
5 information that is provided in that hyperlink.

6 In addition, yesterday, I sent to the  
7 other parties a working hyperlink that does not have  
8 to be typed into a browser. I am fortunate to have  
9 had the assistance of our very valuable paralegal,  
10 who has much more computer expertise and knowledge  
11 than I do, so she was able to make that working  
12 link.

13 And we would be glad to do the same thing,  
14 if people are having trouble with their hyperlinks,  
15 as well.

16 MADAM HEARING OFFICER ORTH: All right.  
17 Thank you.

18 Mr. Ames, do you have any particular  
19 proposals in connection with the hyperlinks?

20 MR. AMES: Thank you, Madam Hearing  
21 Examiner.

22 So as long as Mr. Gaune's testimony is  
23 limited to supporting OCD's proposal, we would not  
24 object to Mr. Gaune testifying.

25 It's a little confusing, though, as to

1 what he's actually going to say and what his  
2 exhibits support -- are intended to support.

3 Mr. Meiklejohn said that Mr. Gaune --  
4 Mr. Gaune's testimony and exhibits were in support  
5 of both OCD's proposal and Sierra Club's proposed  
6 mods, so it's kind of intermixed.

7 Mr. Gaune's testimony is about 11 pages  
8 long. It's based on this Excel workbook that's  
9 about 3.9 megs.

10 We didn't get that workbook until  
11 four days after it was due under the rules.

12 And just yesterday, as Mr. Meiklejohn  
13 acknowledged, Sierra Club sent it again, this time  
14 with working hyperlinks, which Mr. Meiklejohn says  
15 now actually it did work, even though he told -- he  
16 acknowledged that they hadn't.

17 So here we are, and from our perspective,  
18 we're one week out from this hearing, and we're just  
19 getting Mr. Gaune's actual testimony and exhibits.

20 And procedurally, this just isn't the  
21 right way to do it. A party shouldn't be dribbling  
22 out its evidence days before a hearing.

23 To the extent that Mr. Gaune's testimony  
24 goes to Sierra Club's proposed mods, that's not an  
25 issue anymore.

1           But to the extent he's going to testify,  
2           ostensibly on behalf of OCD's -- or in support of  
3           OCD's petition, based on this testimony, we still  
4           don't know what it is just days before the hearing.

5           And I think that the commission ought to  
6           seriously consider, a necessity to protect the  
7           integrity of its rules from this kind of practice,  
8           by excluding this testimony in whole.

9           MADAM HEARING OFFICER ORTH: Thank you.

10          Mr. Timmons?

11          MR. TIMMONS: I think Guardians is going  
12          to sit this one out, if that's okay with the Hearing  
13          Officer.

14          MADAM HEARING OFFICER ORTH: That's fine.  
15          Thank you.

16          Mr. Cloutier?

17          MR. CLOUTIER: Thank you, Madam Hearing  
18          Officer.

19          I join in Mr. Ames' comments. I think, at  
20          this point with the proceedings restricted, there  
21          may not be a whole lot of damage that can be done.  
22          But I think it's a very poor precedent for technical  
23          witnesses to be dribbling out their exhibits days --  
24          you know, almost -- with half of the scheduling  
25          period over -- the deadline was the 26th of May, and

1 we got it yes- -- we got the stuff yesterday.

2 MADAM HEARING OFFICER ORTH: All right.  
3 Thank you.

4 And, Mr. Rankin, anything to add?

5 MR. RANKIN: Nothing separate and apart  
6 from what Mr. Ames and Mr. Cloutier have discussed.

7 I just haven't had a chance to review the  
8 materials, and I don't know in what way it would  
9 support his testimony. And I just haven't had a  
10 chance to analyze it.

11 So my concern is exactly in how it would  
12 be used and in what manner and, of course, the  
13 precedent for such late submissions.

14 I think it's a concern that it would be  
15 permitted at this stage.

16 MADAM HEARING OFFICER ORTH: All right.  
17 Thank you, Mr. Rankin.

18 Mr. Meiklejohn, I trust completely that I  
19 can count on you to have a conversation with  
20 Mr. Gaune about the difference -- or to draw a line  
21 there between supporting the original petition and  
22 supporting the three additional proposals.

23 I'm wondering, though, if you have  
24 anything to add to the question of what role the  
25 workbook would play in that support and whether it's

1 necessary or whether Mr. Gaune can perhaps make his  
2 statements without going into the details of the  
3 workbook.

4 Do you have anything to add?

5 MR. MEIKLEJOHN: Thank you, Madam Hearing  
6 Officer.

7 Certainly Mr. Gaune can testify and limit  
8 his testimony to supporting the proposal by the  
9 division and by WildEarth Guardians.

10 My view, without having discussed this  
11 with him, is that he can provide compelling  
12 testimony in favor of that proposal with or without  
13 the workbook. I think the testimony would be more  
14 compelling with the workbook, but I believe that he  
15 can provide, as I said, compelling testimony in  
16 favor of that proposed amendment, even without the  
17 workbook.

18 And you can count on me to have a  
19 conversation with him. I believe that he may be  
20 watching this proceeding himself. So if he is,  
21 clearly he already understands that he needs to  
22 limit his testimony and his evidence to the proposal  
23 advanced by WildEarth Guardians and the division.

24 But we are planning to have a meeting with  
25 all of our witnesses on Monday of next week, so we

1 will talk with all of our witnesses about that  
2 distinction.

3 MADAM HEARING OFFICER ORTH: All right.  
4 Thank you.

5 Commissioners, do you have questions about  
6 this?

7 Let me just offer that I -- it is  
8 troubling that the rule and the procedural order  
9 weren't fully complied with.

10 Having said that, I'm loathe to exclude  
11 Mr. Gaune entirely as a result of that compliance,  
12 and more inclined to invite his testimony without  
13 delving into the details of a workbook that the  
14 other parties didn't have a sufficient time to  
15 study.

16 COMMISSIONER WARNELL: This is  
17 Mr. Warnell.

18 I'm certainly not in favor of seeing him  
19 testify to an Excel spreadsheet, a rather large  
20 Excel spreadsheet that apparently few of us have had  
21 any opportunity to look at.

22 I'm kind of wondering why we need more  
23 supportive testimony, but I have no other questions.

24 MADAM HEARING OFFICER ORTH: Thank you.

25 Commissioner Bloom, anything?

1                   COMMISSIONER BLOOM: Sure. Thank you,  
2                   Hearing Officer, Madam Chair.

3                   A couple of questions for Mr. Ames.

4                   Mr. Ames, I'm sorry, I might not have  
5                   fully understood you.

6                   Did you propose excluding Mr. Gaune  
7                   entirely from the proceedings?

8                   MR. AMES: No, sir. Only proposing to  
9                   limit his testimony to support for the OCD's  
10                  petition, and to the extent that he can do so  
11                  without referencing -- without making statements  
12                  that are based on the Excel spreadsheet.

13                  COMMISSIONER BLOOM: All right. Thank  
14                  you.

15                  Those are all my questions. Thank you.

16                  MADAM HEARING OFFICER ORTH: Madam Chair?

17                  CHAIRWOMAN SANDOVAL: I -- I don't have  
18                  any questions. I mean I think, you know, I do have  
19                  concerns about procedure. I mean, there is  
20                  procedure in place for a reason. So I feel like  
21                  that's a really important component.

22                  But if the testimony is limited to the  
23                  proposal and excluding the spreadsheet that, you  
24                  know, there hasn't been adequate time to review,  
25                  then I'm comfortable with Mr. Gaune testifying.

1 MADAM HEARING OFFICER ORTH: All right.

2 Thank you.

3 So let's plan, then, to invite Mr. Gaune's  
4 testimony and to -- I know that Mr. Meiklejohn  
5 already understands the difference between the  
6 original petition and the additional proposals.

7 And then if you would instruct Mr. Gaune,  
8 please, Mr. Meiklejohn, to avoid speaking to the --  
9 to the workbook.

10 MR. MEIKLEJOHN: I will do that,  
11 Madam Hearing Officer.

12 MADAM HEARING OFFICER ORTH: All right.  
13 Thank you.

14 I believe, then, we have, then, just  
15 Ms. Shoup's testimony, unless there's something I'm  
16 missing.

17 And in that case, Mr. Meiklejohn, I will  
18 invite -- I will invite a few comments from you.  
19 However, this is a much more common issue that we  
20 deal with in these hearings, which is a nontechnical  
21 witness wanting to draw connections that would  
22 require technical expertise or background.

23 In your response, you addressed one  
24 statement which went to her motivation, if you will,  
25 for getting involved. Mainly, the connection she

1 had drawn in her mind between produced water  
2 releases and cancer.

3 And I -- I understand your point, it goes  
4 to her motivation.

5 That wasn't the only place in her  
6 testimony, of course, where she is asserting that  
7 connection. So I'm going to -- I will ask you to  
8 say a few words.

9 However, I see a lot more of this than the  
10 other things we've been talking about this morning.  
11 And the instruction is always the same. We simply  
12 have to ask nontechnical witnesses not to offer  
13 technical testimony. And to the extent they manage  
14 to squeeze it in regardless, the commission will  
15 have to disregard it.

16 So my request of you would be to talk with  
17 Ms. Shoup about not making a connection she would  
18 have to be an oncologist or epidemiologist in order  
19 to make, going through her testimony with an eye to  
20 that. But if you would like to offer something now,  
21 please go ahead.

22 MR. MEIKLEJOHN: Thank you, Madam Hearing  
23 Officer.

24 I would point out two things.

25 One is that that is -- that was not her

1 intent when she made that statement. It was, as you  
2 point out, her motivation for getting involved with  
3 these issues.

4 The other point is that the motion that  
5 was filed by the Independent Petroleum Association  
6 neither alleged nor demonstrated that her testimony  
7 would in any way prejudice that association.

8 And under the Supreme Court's ruling in  
9 Martin v. Village of Hot Springs, it's showing that  
10 prejudice is necessary to exclude a witness from  
11 providing testimony.

12 And so unless there is some demonstration  
13 during or at the end of the hearing that her  
14 testimony has, in fact, prejudiced the association,  
15 our view is that she ought to be able to testify.

16 We understand that if she does testify on  
17 a matter that would require technical expertise,  
18 that the commission will disregard that because she  
19 is not a technical expert, and she's not offered as  
20 a technical expert.

21 MADAM HEARING OFFICER ORTH: All right.  
22 So I should offer here, Mr. Meiklejohn, I don't -- I  
23 don't actually agree. I think the case you cited is  
24 inept, the prejudice to IPANM is not necessary.

25 And I know it's not a reported case, but I

1 think the opinion in Louisiana Energy Services  
2 versus the Water Quality Control Commission includes  
3 a much more apt discussion of the role the hearing  
4 officer is supposed to play in a proceeding, in an  
5 administrative proceeding, to try to ensure the  
6 testimony that comes in, in fact, is based on  
7 experience and education.

8 Is there anything else that anyone would  
9 like to add there?

10 MR. CLOUTIER: Madam Hearing Officer, it  
11 sounds like you understand my motion. And it's very  
12 limited, not seeking to exclude Ms. Shoup in her  
13 entirety. Just -- just concerns about some of the  
14 statements and the description and her  
15 qualifications.

16 And so I have nothing further to add.

17 MADAM HEARING OFFICER ORTH: All right.  
18 Thank you, Mr. Cloutier.

19 Is there anything else that we need to  
20 talk about while we are together, presumably the  
21 last time before the hearing next Wednesday?

22 MR. RANKIN: Madam Hearing Officer, this  
23 is Adam Rankin, on behalf of NMOGA.

24 I think it's implied by the rulings to  
25 exclude the proposed modifications by intervenors.

1           But I just want to make clear for the  
2 record that we also raised the issue of the  
3 exclusion of nontechnical testimony that relates --  
4 relates to the intervenors' proposed modifications.

5           I just want to be clear that the -- as a  
6 consequence of the decision to exclude those  
7 modifications, that their nontechnical testimony  
8 relating to those issues would also be excluded.

9           MADAM HEARING OFFICER ORTH: All right.  
10 Thank you for that requested clarification.

11           I will write up an order, and I will make  
12 that clear, that this relates both to technical and  
13 nontechnical testimony.

14           And I think -- again, I'm not concerned.  
15 I think Mr. Meiklejohn understands.

16           MR. MEIKLEJOHN: Madam Hearing Officer,  
17 this is Douglas Meiklejohn.

18           We do understand that point, and we  
19 certainly do not object to that point being made in  
20 the order that you write up.

21           There is one other point that I would like  
22 to raise, and that is that both in their written  
23 submissions and orally today, the division and the  
24 two associations have complained about the length of  
25 our submission and the timing of our submission.

1           However, they have not cited anything in  
2 either the procedural order or the commission rules  
3 to indicate that it was inappropriate for us to  
4 submit a long notice of intent or that we submitted  
5 it at an inappropriate time.

6           And so use of the words like "ambush"  
7 seems to us to be completely out of line. We  
8 complied with the required procedures, and there's  
9 been no demonstration that we did not do that.

10           MADAM HEARING OFFICER ORTH: All right.  
11 Thank you, Mr. Meiklejohn.

12           Again, I am not troubled by the length of  
13 your witnesses' testimony, so long as you stay  
14 within the scope we've been talking about this  
15 morning.

16           MR. MEIKLEJOHN: Thank you, Madam Hearing  
17 Officer. We intend to do that.

18           MADAM HEARING OFFICER ORTH: Thank you.

19           Is there anything else we can talk about  
20 while we're together before next Wednesday?

21           CHAIRWOMAN SANDOVAL: Madam Hearing  
22 Officer, I just want to say -- offer all of the  
23 parties who are panelists right now, you should have  
24 received e-mails from -- I don't know if they come  
25 from me or if they come from Webex on, maybe,

1 Wednesday this week for the hearings next week.

2 So please use those links as you can.

3 There's a link in there for a panelist, which puts  
4 you in this little bucket. It will help smooth the  
5 process out for next time. So those should have  
6 come this week. They populate automatically on my  
7 calendar. They may populate on yours too, I'm not  
8 sure. But they should have come to your in box on  
9 Wednesday.

10 MR. MEIKLEJOHN: Madam Chair, do you know  
11 whether those links were sent to the people who will  
12 be appearing as witnesses?

13 CHAIRWOMAN SANDOVAL: No, they were not.  
14 The plan is to kind of, in a similar fashion as we  
15 did the waste rule. As the witness has sort of  
16 their turn, the host will unmute them.

17 MR. MEIKLEJOHN: Thank you.

18 MADAM HEARING OFFICER ORTH: And, Madam  
19 Chair, I think we found it helpful, as part of the  
20 methane rule in January, to get folks into the --  
21 onto the platform about 15 minutes early, just to  
22 check their audio and, for that matter, their video.

23 I trust the technical hosts for next week  
24 will, in fact, be on the platform at least  
25 15 minutes early.

1                   CHAIRWOMAN SANDOVAL: Yeah. The plan is  
2 to promptly start at, you know, 8:45, to make sure  
3 everybody has got time to get on. And also, just a  
4 reminder for anybody on the line who either knows of  
5 people who wish to make a public statement or wish  
6 to make a public statement, there is a signup for  
7 that through the commission clerk, Florene Davidson.  
8 Her information is in the procedural order. There  
9 was also a press release that was sent out with that  
10 information.

11                   As a reminder, if you sign up ahead of  
12 time, you get three minutes to speak. If you show  
13 up at the hearing, it is two minutes to speak, as  
14 was dictated in the procedural order.

15                   So I would encourage people to sign up  
16 with the commission clerk ahead of time.

17                   MADAM HEARING OFFICER ORTH: Thank you for  
18 that reminder.

19                   Anything else before we adjourn this  
20 morning?

21                   No? Thank you all very much.

22                   (Proceedings concluded at 10:45 a.m.)

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CERTIFICATE

I, Paul Baca, RPR, CCR in and for the State of New Mexico, do hereby certify that the above and foregoing contains a true and correct record, produced to the best of my ability via machine shorthand and computer-aided transcription, of the proceedings had in this matter.

/s/ Paul Baca  
\_\_\_\_\_  
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